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THE EVOLVING MEANING OF THE FIFTH AND SIXTH AMENDMENTS: SENTENCING EFFECTS OF AGGRAVATING FACTORS AS ELEMENTS OF THE CRIME

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INTRODUCTION

The American legal system's understanding of constitutional principles is ever evolving. On June 24, 2002, in the case of *Ring v. Arizona*,[1] new insight was given into Sixth Amendment jurisprudence. In overturning its own precedent, the United States Supreme Court held that the Sixth Amendment right to a jury trial includes the right to have a jury find aggravating factors where those factors are functional elements of the crime.[2] This decision combined with our historical understanding of the Sixth Amendment fundamentally alters the constitutional guarantees that govern America's criminal sentencing scheme. For nearly two years scholars and lower courts alike have tried to determine and apply the Fifth and Sixth Amendments in light of *Ring*'s new constitutional sentencing requirement. However, these varying interpretations have only led to a legal limbo resulting in baffling inconsistencies.[3]

The implications of this new legal premise—that sentencing factors can equate to elements of the crime, thereby triggering a defendant's Fifth and Sixth Amendment rights—are inescapable. Given the current inconsistencies within the judicial process, sooner or later the Supreme Court will have to return to the issues it failed to answer when it announced a new application of the Sixth Amendment in *Ring*. Until then, the courts are left to individually decipher the meaning, scope and application of *Ring*'s new legal premise.

This Note examines the meaning, scope, and effect of our current understanding of the Fifth and Sixth Amendments, highlights the inconsistent applications of those amendments, and endeavors to fill the gaps left unanswered in *Ring* by applying the Fifth and Sixth Amendments as they should be understood today. Part I will set the stage by examining the necessary historical context for both the Sixth Amendment and the cases leading up to the modern understanding of the Sixth Amendment. Implicit in the current understanding of the Fifth and Sixth Amendments is the United States Supreme Court's most recent decision on the issue—*Ring v. Arizona*. That decision itself will be elucidated in Part II. Part III will then explore the incon-

1 536 U.S. 584 (2002).
2 *Id.* at 609.
3 *See, e.g.*, *infra* Part III.

sistent applications of the post-*Ring* Fifth and Sixth Amendments and endeavor to provide a way to reconcile the issues posed by such inconsistent applications. These issues include: whether aggravating factors must be proven beyond a reasonable doubt, whether *Ring*'s new-found understanding of the Fifth and Sixth Amendments should be applied retroactively, whether aggravating factors now need to be included in the indictment, whether the new understanding of the Fifth and Sixth Amendments affects hybrid states such as Delaware and Indiana, and how to properly weigh aggravating and mitigating factors in light of our current understanding of the Sixth Amendment. By implementing the changes proposed in this Note, the legal system can achieve a constitutionally sound and consistent application of the Fifth and Sixth Amendments.

I. BACKGROUND

The Court's decision in *Ring* was based upon the evolution of the Sixth Amendment and the jurisprudential conflict that existed prior to the Court's ruling in *Ring*. In order to understand *Ring*, its implications, and the questions left unanswered by the Court, it is necessary to first review both the Sixth Amendment and the cases that paved the way for *Ring*.

A. The Sixth Amendment Right to a Jury Trial

An individual's right to a trial by a jury of his peers is codified in the Sixth Amendment of the United States Constitution.[4] This right extends only to serious criminal offenses—i.e., a right to have a jury decide one's fate attaches only when the criminal charges achieve the necessary level of severity.[5] Thus, the pivotal question in determining whether an individual is entitled to a jury trial is: what is the maximum penalty for the alleged crime?[6] Supreme Court decisions dictate that any crime punishable by more than six months triggers the Sixth

4 U.S. CONST. amend. VI.

> 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

5 *See* Duncan v. Louisiana, 391 U.S. 145, 159–61 (1968); Brian W. Bolster, *Right to a Jury Trial*, 86 GEO. L.J. 1618, 1618–19 (1998).

6 *Id.*

Amendment right to a trial by a jury, regardless of the actual sentence imposed.[7] Crimes punishable by six months or less are referred to as "petty" offenses. Petty offenses do not trigger the Sixth Amendment, even where the aggregation of multiple petty offenses would exceed the six-month marker.[8] The Sixth Amendment right applies to any federal prosecutions and, via the Fourteenth Amendment, to any state prosecutions as well.[9]

Once the Sixth Amendment right to a jury trial has been triggered, the jury's primary function is to make a determination of guilt or innocence based on a finding of the facts. In making this determination, the Due Process Clause mandates that the jury must find that all elements of the crime have been proven beyond a reasonable doubt.[10] As will become evident in the next section, discussing the line of cases preceding *Ring*, the Court has continuously struggled to define what constitutes an element of the crime.

B. Ring*'s Antecedent Caselaw*

Aggravating factors are most often an issue in death penalty cases. The death penalty, as understood today, has its roots in *Furman v.*

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7 *See* Frank v. United States, 395 U.S. 147, 149 (1969) ("In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion."); *see also* Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (holding that a one-year confinement as punishment for a misdemeanor triggers right to a jury trial); *Duncan*, 391 U.S. at 161–62 (holding that a defendant sentenced to sixty days imprisonment for simple battery, which carried a maximum penalty of two years, was entitled to a jury trial).

8 Lewis v. United States, 518 U.S. 322, 327 (1996) ("The fact that the petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury trial right would apply."). The only time a petty offense may entitle an individual to a jury trial is when the statutory penalties "are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989). *Compare* United States v. Unterburger, 97 F.3d 1413, 1415–16 (11th Cir. 1996) (holding that there is no right to a jury trial when the maximum penalty for violating the Freedom of Access to Clinic Entrance Act is six months imprisonment or five years of probation and a $10,000 fine), *and* United States v. Musser, 873 F.2d 1513, 1516 (D.C. Cir. 1989) (holding that there is no right to a jury trial when the maximum penalty for displaying an unattended sign in a park is six months imprisonment and a $5000 fine), *with* Richter v. Fairbanks, 903 F.2d 1202, 1205–06 (8th Cir. 1990) (holding that there is a right to jury trial where an individual is charged with his third driving while intoxicated offense and the maximum penalty is a six-month sentence accompanied by a fifteen-year revocation of one's driver's license).

9 Ring v. Arizona, 536 U.S. 584, 595 (2002).

10 *In re* Winship, 397 U.S. 358, 362 (1970).

Georgia,[11] a 1972 Supreme Court case which held that giving a jury complete and uninhibited discretion to determine whether to sentence a guilty defendant to death violated the Eighth Amendment's prohibition of cruel and unusual punishment. In effect, *Furman* invalidated every death penalty statute in effect at that time.[12] In response to the invalidation, states took one of two possible approaches to bring their death penalty statutes into compliance with the Eighth Amendment. Under the first approach, most states passed statutes that listed crimes for which the death penalty was mandatory.[13] However, these statutes were struck down four years later in *Woodson v. North Carolina*.[14] *Woodson* held that the Eighth Amendment's prohibition on cruel and unusual punishment required an evaluation of individual circumstances wherever the death penalty may be imposed.[15]

Meanwhile, other states adopted a second method of using a bifurcated jury trial.[16] In the first stage, the jury made a determination of guilt or innocence. In the second stage, the sentencing stage, the jury would decide whether to impose the death penalty by considering aggravating and mitigating factors. On the same day the Court struck down the mandatory statutes in *Woodson*, the Court approved the bifurcated system in *Gregg v. Georgia*.[17] The Court held that the use of aggravating and mitigating factors passed constitutional muster because the determination of those factors protected a defendant from receiving an arbitrary sentence.[18]

Furman, *Woodson*, and *Gregg* established that the use of aggravating and mitigating factors provided sufficient procedural safeguards. However, whether a jury needed to be the one to weigh the existence of aggravating and mitigating factors remained an open question. Eight years later, the Supreme Court answered that question in the negative. In *Spaziano v. Florida*,[19] the Court rejected the argument that the Constitution required a jury to make the final decision of imposing the death penalty on a defendant.[20] In doing so, the Court upheld the Florida death-sentencing scheme wherein the jury, based

11 408 U.S. 238 (1972).

12 Robert C. Stacy II, State v. McCarver*: The Role of Jury Unanimity in Capital Sentencing*, 74 N.C. L. REV. 2061, 2067 (1996).

13 Gregg v. Georgia, 428 U.S. 153, 179 n.23 (1976).

14 428 U.S. 280 (1976) (plurality opinion).

15 *Id.* at 303.

16 *Gregg*, 428 U.S. at 179 n.23.

17 428 U.S. 153 (1976) (plurality opinion).

18 *Id.* at 206.

19 468 U.S. 447 (1984).

20 *Id.* at 465.

on its findings of aggravating and mitigating factors, recommended to the judge whether to sentence the defendant to death.[21] The judge, however, was given the right to conduct his own analysis of aggravating and mitigating factors, and to override the jury's decision—even where that meant imposing death when the jury recommended only a life sentence.[22] The Court concluded by stating that although the Sixth Amendment clearly guarantees the right to a jury trial at the conviction stage, "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of [appropriate punishment]."[23]

Since *Spaziano*, the Court has continuously struggled to distinguish elements of a crime, which must be decided by a jury, from sentencing factors, which do not have to be decided by a jury. First faced with the issue in 1986 in *McMillan v. Pennsylvania*,[24] the Supreme Court agreed to defer to state legislatures to determine when a fact was an element of the crime and when it was a sentencing factor. At issue was Pennsylvania's Mandatory Minimum Sentencing Act, which required "that anyone convicted of certain enumerated felonies [be] subject to a mandatory minimum sentence of five years imprisonment if the sentencing judge f[ound], by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offense."[25] The Court held that because "[t]he Act operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony [and] . . . does not authorize a sentence in excess of that otherwise allowed for that offense," the finding that a person "visibly possessed a firearm" was in fact a sentencing factor and therefore only had to be proven by a preponderance of the evidence.[26] Moreover, the Court stated, "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[27] The Court did note, however, that its decision would not bar any additional challenges to state sentencing schemes under the Due Process Clause.[28]

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21 *Id.* at 451 (citing FLA. STAT. § 921.141(3) (1983) (stating that a judge must conduct a balancing test regarding aggravating and mitigating factors regardless of a jury's recommendation)).

22 *Id.* at 451–52.

23 *Id.* at 459.

24 477 U.S. 79 (1986).

25 *Id.* at 81.

26 *Id.* at 81–83.

27 *Id.* at 93 (citing *Spaziano*, 468 U.S. at 459).

28 *Id.* at 91.

McMillan left unanswered the question of what happens when a sentencing factor is used to enhance the maximum sentence for a certain crime. In *Walton v. Arizona*,[29] the Supreme Court answered precisely that question. The Sixth Amendment question posed in *Walton* revolved around an Arizona statute which said that any defendant convicted by a jury of first-degree murder was eligible for the death penalty only if the judge, in the sentencing phase, found at least one aggravating factor.[30] The Court held that the statute was constitutional. In holding such, the Court reasoned that "'[a]ny argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.'"[31] The court extended that line of reasoning in asserting that "Arizona's aggravating factors [were] standards to guide the making of the choice between verdicts of death and life imprisonment rather than 'elements of the offense.'"[32] Given that the sentencing factors were construed as being sentencing guidelines, as opposed to elements of the offense, the determination of guilt by the jury on the elements of the offense and a separate finding of sentencing factors by the judge, even where such factors could trigger the death penalty, remained constitutional.[33]

The Court revisited this issue in *Jones v. United States*.[34]

> This case turn[ed] on whether the federal carjacking statute, 18 U.S.C. § 2119, as it was when petitioner was charged, defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict.[35]

Under the federal carjacking statute, anyone convicted of carjacking could receive up to fifteen years in prison. If, however, as a sentencing factor, the defendant was found to have caused serious bodily harm to the victim, the maximum sentence increased to twenty-five years.[36] Additionally, if the victim died as a result of the carjacking, then that finding, as a sentencing factor, increased the penalty to life imprisonment.[37]

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29 497 U.S. 639 (1990).
30 *Id.* at 643.
31 *Id.* at 647 (quoting Clemons v. Mississippi, 494 U.S. 738, 745 (1990)).
32 *Id.* at 648–49 (citing Poland v. Arizona, 476 U.S. 147 (1986)).
33 *Id.* at 648.
34 526 U.S. 227 (1999).
35 *Id.* at 229.
36 *Id.* at 230.
37 *Id.* at 230.

Writing for the majority, Justice Souter retreated from the Court's position in *McMillan*. In fact, the majority went so far as to state that

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.[38]

The Court concluded that although the provisions for serious bodily harm or death of the victim appeared at first glance to be sentencing factors, in effect they were elements of the crime since they increased the maximum penalty the convicted could receive.[39] *Jones* thus set forth the "maximum penalty test," which provides that the decision of whether a fact is a sentencing factor or an element of the crime turns on whether the finding of such a fact would increase the maximum penalty available for that crime.[40]

A year later, the Court extended the "maximum penalty test" to the states in *Apprendi v. New Jersey*.[41] In *Apprendi*, the defendant pled guilty to three counts of weapons possession, a second-degree crime carrying a sentence of five to ten years.[42] The sentence for second-degree crimes, however, was increased to ten to twenty years if the convicted defendant was found to have committed the crime based upon hatred of a particular group.[43] The defendant argued that the "Due Process Clause of the Fourteenth Amendment require[d] that a factual determination authorizing an increase in the maximum prison sentence for an offense . . . be made by a jury on the basis of proof beyond a reasonable doubt."[44] The appeals court below relied on *McMillan* and thus held that "the state legislature decided to make the hate crime enhancement a 'sentencing factor,' rather than an element of an underlying offense—and that decision was within the State's established power to define the elements of its crimes."[45] Applying *Jones*, the Supreme Court reversed the court of appeals's decision, reasoning that

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38 *Id.* at 243 n.6.

39 *Id.* at 238–39.

40 *See* Stephanie B. Stewart, Note, Apprendi v. New Jersey*: Protecting the Constitutional Rights of Criminals in Sentencing*, 49 U. KAN. L. REV. 1193, 1200 (2001) (referring to the Court's approach as the "maximum penalty test").

41 530 U.S. 466 (2000).

42 *Id.* at 469–70.

43 *Id.* at 470.

44 *Id.* at 469.

45 *Id.* at 471.

> if 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. 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."[46]

The *Apprendi* Court made clear that the dispositive question was "not one of form, but of effect."[47] Where the legislature effectively took a penalty-increasing factor out of the hands of the jury and placed it in the hands of a judge, the legislature had violated the defendant's right to a trial by a jury in which all elements of the crime must be proven, in the mind of the jury, beyond a reasonable doubt.[48] The Court, however, overtly noted that its decision in *Apprendi* was not at odds with *Walton* because *Walton* simply allowed a judge to decide whether or not to impose the maximum penalty rather than, as in *Apprendi*, giving the judge the ability to increase the maximum penalty.[49]

II. *RING V. ARIZONA*

The conflicts posed by *Walton* and *Apprendi* regarding Sixth Amendment jurisprudence—despite the Court's attempt to pretend no conflict existed—culminated in *Ring v. Arizona*.[50] The petitioner, Timothy Ring, had been charged with murder, armed robbery, and related charges.[51] Ring and two accomplices had hijacked an armored van and kidnapped its driver.[52] Sheriff's officers found the van abandoned in the parking lot of a church with the dead driver inside. More than $562,000 in cash and $271,000 in checks were missing from the van.[53] A lawful search of Ring's house revealed a duffle bag containing more than $271,000 in cash, along with other incriminating evidence.[54] Instructions on both premeditated murder and felony

46 Ring v. Arizona, 536 U.S. 584, 602 (2002) (quoting *Apprendi*, 530 U.S. at 482–83).

47 *Apprendi*, 530 U.S. at 494.

48 *Id.* at 495–97.

49 *Id.* at 496. Dissenters in *Apprendi* found the majority opinion puzzling in light of the case background, specifically *Walton*. Dissenters criticized the majority for not overruling *Walton* and for pretending that their decision in *Apprendi* could be reconciled with past cases. *Id.* at 536–39 (O'Connor, J., dissenting).

50 536 U.S. 584 (2002).

51 *Id.* at 589.

52 *Id.*

53 *Id.*

54 *Id.* at 590.

murder were given to the jury. Since there was no direct evidence putting Ring at the scene of the robbery, the jury split on the question of premeditated murder, but convicted Ring of felony murder.[55]

Under Arizona law, a conviction for felony murder constituted first-degree murder, for which the maximum penalty was life imprisonment. However, Arizona law directed a judge to conduct a '"separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed.'"[56] Based on the judge's findings, the judge could increase the penalty to death if he found that there was at least one aggravating factor and that there were no, or not enough, mitigating factors to call for leniency.[57] Between Ring's trial and sentencing hearing, one of his accomplices pled guilty and agreed to cooperate with the prosecution in the cases against Ring and the other accomplice. At Ring's sentencing hearing, the accomplice who pled guilty testified that Ring had planned the entire crime and that Ring had shot the driver.[58] At the conclusion of the sentencing hearing, the trial judge stated that although Ring's jury conviction for felony murder did not make him eligible for the death penalty, the finding of certain aggravating factors could bring the death penalty into play. Citing the accomplice's testimony, the judge concluded that Ring was the actual shooter and was also a major participant in the crime leading to the driver's death. The judge also found the crime to be especially heinous.[59] Both findings by the judge constituted aggravating factors. Despite finding a mitigating factor as well, the judge sentenced Ring to death.[60]

On appeal, citing *Jones* and *Apprendi*, "Ring argued that Arizona's capital sentencing scheme violate[d] the Sixth and Fourteenth Amendments to the U.S. Constitution because it entrust[ed] to a judge the finding of a fact raising the defendant's maximum penalty."[61] The Arizona Supreme Court found merit in Ring's argument. The Arizona Supreme Court admitted that the judge's finding did in

55 *Id.* at 591.

56 *Id.* at 592 (quoting ARIZ. REV. STAT. ANN. §13-703(C) (West Supp. 2001)).

57 *Id.* at 592–93.

58 *Id.* at 593. On cross-examination the accomplice acknowledged that his testimony was inconsistent with the information he had previously supplied to Ring's counsel. The accomplice accounted for the discrepancy by stating that Ring had threatened his life. The accomplice also testified that his testimony was "pay back" for Ring's interference in the accomplice's personal life. *Id.* at 593–94.

59 *Id.* at 594–95.

60 *Id.* at 595. The judge found that Ring's minimal criminal history constituted a mitigating factor. *Id.*

61 *Id.*

fact increase the maximum penalty. In characterizing the system, it noted that without the finding of an aggravating factor, a defendant was not eligible for the death penalty, but with the finding of an aggravating factor (a determination made only by a judge in the sentencing phase) a defendant became eligible for the death penalty.[62] Moreover, the Arizona Supreme Court noted that *Apprendi* and *Jones* "raise[d] some question about the continued viability of *Walton*."[63] Even though it apparently agreed with Ring's position and questioned *Walton*'s validity, the high court of the state recognized that it was bound by the Supremacy Clause to follow the Supreme Court's precedent. Thus, since the Supreme Court had upheld Arizona's death sentencing scheme in *Walton*, the Arizona Supreme Court "rejected Ring's constitutional attack" on the State's sentencing scheme.[64] Ring then was granted certiorari by the Supreme Court of the United States.

A. The Majority Opinion

Writing for the majority, Justice Ginsburg began by declaring that the Court "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*."[65] Recognizing that the construction given to Arizona law by the Arizona Supreme Court was inconsistent with the Supreme Court's construction of Arizona law in *Walton*, the Court held that the State's own interpretation of its law was authoritative.[66] Under the State's controlling construction of Arizona law, the Court recognized that *Walton* could not survive the reasoning of *Apprendi*.[67] Under *Apprendi*'s reasoning, Arizona's capital

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62 State v. Ring, 25 P.3d 1139, 1151 (Ariz. 2001).

63 *Id.* at 1150.

64 *Ring*, 536 U.S. at 596 (citing *Ring*, 25 P.3d at 1151).

65 *Id.* at 596. *Ring* was not the first case to recognize the tension between *Walton* and *Apprendi*. Justice Ginsburg included the following footnote:

> *See, e.g.*, United States v. Promise, 255 F.3d 150, 159–60 (4th Cir. 2001) (en banc) (calling the continued authority of *Walton* in light of *Apprendi* "perplexing"); Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001) ("*Apprendi* may raise some doubt about *Walton*."); People v. Kaczmarek, 741 N.E.2d 1131, 1142 (Ill. App. Ct. 2000) ("[W]hile it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital, defendants, the Court has endorsed this precise principle, and we are in no position to second-guess that decision here.").

Id. at 596–97.

66 *Id.* at 603 (citing Mullaney v. Wilbur, 421 U.S. 684, 691 (1975)).

67 *Id.*

sentencing scheme was irreconcilable with the guarantees of the Sixth Amendment.

The Court rejected each argument Arizona offered to justify its system. First, Arizona argued that the majority's construction of the statute in *Apprendi* was correct and thus Ring's conviction fell within the sentencing range. The Court quickly dismissed this argument based on the above-mentioned principle that a state's construction of its own law is controlling.[68] Arizona also tried to justify its system by noting that, according to *Walton*, the aggravating factors were "sentencing factors" and thus were properly presented to a judge. The Court shot down this argument as well, noting that *Apprendi*'s reasoning clearly rendered *Walton*'s test of who decides (judge or jury) based on the label (element or sentencing factor) invalid.[69] Finally, Arizona argued that "[e]ven if facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone ordinarily must be found by a jury . . . aggravating circumstances necessary to trigger a death sentence may nonetheless be reserved for judicial determination."[70] Arizona reasoned that a judicial decision on such facts was designed to avoid the arbitrariness that often brought death-sentencing schemes into question. The Court found this argument unpersuasive and noted that the Sixth Amendment could not give way to the admirable goal of fairness. Moreover, the Court concluded that there was no proof that a judge would be any less arbitrary than a jury.[71]

Reiterating that "the relevant inquiry is one not of form, but effect," the Court stated that because the judicial finding of an aggravating factor exposed Ring to greater punishment than was authorized by the jury's verdict, Arizona's death-sentencing scheme violated Ring's Sixth Amendment right to a jury trial.[72] The majority concluded that its Sixth Amendment jurisprudence could not be home to both *Walton* and *Apprendi*, and thus overruled *Walton*.[73] The Court extended *Apprendi*'s reasoning, stating that if the Sixth Amendment "encompassed the factfinding necessary to increase a defendant's sentence by two years," it must also encompass the "factfinding necessary to put him to death."[74]

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68 *Id.* at 603–04.

69 *Id.* at 604–05.

70 *Id.* at 605.

71 *Id.* at 607–08.

72 *Id.* at 604.

73 *Id.* at 609.

74 *Id.*

B. *The Concurring Opinions*

Writing one of the concurring opinions,[75] Justice Scalia expanded upon the majority's position. Although the majority never mentioned whether the aggravating factors put to the jury had to be found beyond a reasonable doubt, Justice Scalia repeatedly stated that any factors put to the jury must in fact be proven beyond a reasonable doubt.[76] "[T]he jury-trial guarantee of the Sixth Amendment [means] that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."[77] Notably, Justice Scalia concluded his opinion by laying out the idea that a judicial override of a jury's advisory verdict of death may be constitutional as long as the jury first considered the aggravating factors.[78]

In a separate concurring opinion, Justice Breyer concluded that he stood by his dissenting position in *Apprendi* and therefore could not join the majority's opinion.[79] Justice Breyer, however, concurred in the judgment, basing his reasoning upon the Eighth Amendment's Cruel and Unusual Punishment Clause. Justice Breyer's position was founded upon the premise that juries are better equipped than judges to gauge the community conscience in determining whether a crime is serious enough to warrant death as punishment.[80] A jury, Justice Breyer concluded, is therefore part of the procedural safeguards required by the Eighth Amendment.[81]

C. *The Dissent*

Writing for herself and Chief Justice Rehnquist, Justice O'Connor authored the dissent. Justice O'Connor immediately admitted that *Walton* and *Apprendi* were incompatible, but dissented on the basis

75 Justice Scalia, Justice Kennedy, and Justice Breyer each wrote separate concurring opinions. *Id.* at 610, 613.

76 *Id.* at 610 (Scalia, J., concurring).

77 *Id.* (Scalia, J., concurring); *see also id.* at 612 (Scalia, J., concurring) (stating that our Constitution has enshrined the requirement that any facts, including aggravating factors, must be found by a jury beyond a reasonable doubt in criminal cases).

78 *Id.* at 612–13 (Scalia, J., concurring).

79 *Id.* at 613–14 (Breyer, J., concurring). Justice Scalia criticized Justice Breyer's position stating that "[t]here is really no way in which Justice Breyer can travel with the happy band that reaches today's result unless he says yes to *Apprendi.* Concisely put, Justice Breyer is on the wrong flight; he should get off before the doors close, or buy a ticket to *Apprendi*-land." *Id.* at 612 (Scalia, J., concurring).

80 *Id.* at 614–15 (Breyer, J., concurring).

81 *Id.* at 614 (Breyer, J., concurring).

that it was *Apprendi* that should have been overruled. Justice O'Connor's dissent echoed her dissent in *Apprendi.* According to Justice O'Connor there is no basis—in the past cases, the Constitution, nor in our nation's history—for *Apprendi*'s reasoning.[82] Justice O'Connor noted that her fear that *Apprendi* would "unleash a flood of petitions" by convicted felons looking to overturn their convictions had proven true in the two years between *Apprendi* and *Ring.*[83] Even though Justice O'Connor's reasoning in her dissent is arguably unsound, her conclusion rings true—"[t]he decision today is only going to add to these already serious effects."[84]

III. ANSWERS TO THE FIFTH AND SIXTH AMENDMENT QUESTIONS *RING* LEFT UNANSWERED

The Court's decision in *Ring* is problematic. Although it may have allayed some of the uncertainty in the lower courts, it did so in such a narrow fashion that the lower courts now face even greater uncertainty on related issues.[85] The majority opinion in *Ring* explicitly declined to address a number of issues directly related to the issue at hand.[86] The Court's unwillingness to address those issues or to even give direction to the broader implications of *Ring* has generated a number of conundrums within the lower courts. This Part explores the inconsistencies and attempts to resolve them in a manner consistent with the current understanding of the Fifth and Sixth Amendments in light of *Ring.*

A. Do Aggravating Factors Have to Be Proven Beyond a Reasonable Doubt?

At first glance, *Apprendi* and *Ring* imply that any aggravating factors must be proven beyond a reasonable doubt. In fact, some commentators have taken that position.[87] To accept, however, that *Ring* stood for such a blanket proposition conflates what the Court actually said. What the Court said was "[b]ecause Arizona's enumerated ag-

82 *Id.* at 619 (O'Connor, J., dissenting).

83 *Id.* at 619–20 (O'Connor, J., dissenting) (noting that eighteen percent of petitions for certiorari received by the Supreme Court in the year prior to *Ring* were for *Apprendi*-related issues).

84 *Id.* at 620 (O'Connor, J., dissenting).

85 *See infra* Parts III.A–E.

86 *Ring*, 536 U.S. at 597 n.4.

87 *See, e.g.*, Priya Nath, Case Note, Sattazahn v. Pennsylvania, *123 S. Ct. 732 (2003)*, 15 CAP. DEF. J. 419, 422 (2003) ("[T]he *Ring* Court held that the Sixth Amendment requires a jury to find the existence of aggravating factors beyond a reasonable doubt.").

gravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury."[88] Nowhere in the majority opinion does it state that aggravating factors per se have to be proven beyond a reasonable doubt.

In fact, the reasonable-doubt standard of proof is not a Sixth Amendment guarantee;[89] nor is the reasonable-doubt requirement embodied in the text of the Constitution. Rather it was a concept that most common law jurisdictions began adopting around 1798. After being in common use for over a century, the Supreme Court adopted the reasonable-doubt requirement as a constitutional guarantee in 1970.[90] Constitutionalizing the traditionally used standard, the Supreme Court stated:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[91]

Thus, only the facts that make up the elements of the crime must be proven beyond a reasonable doubt. However, even after *Ring*, this does not lead to the conclusion that *all* aggravating factors must be proven beyond a reasonable doubt. Only when aggravating factors can be functionally equated with being an element of the crime does the Due Process standard of proof—beyond a reasonable doubt—come into play.[92]

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88 *Ring*, 536 U.S. at 609 (citing Apprendi v. New Jersey, 530 U.S. 466, 494, n.19 (2000)).

89 Apodaca v. Oregon, 406 U.S. 404, 411 (1972) ("[T]he Sixth Amendment itself has never been held to require proof beyond a reasonable doubt . . . .").

90 *In re* Winship, 397 U.S. 358, 363 (1970).

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

Id. (quoting Coffin v. United States, 156 U.S. 432, 453 (1895) ('[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.'") (citing W. v. Family Court, 247 N.E.2d 253, 259 (N.Y. 1969))).

91 *Id.* at 364.

92 This contention is supported by the fact that some state statutes explicitly require aggravating factors to be found beyond a reasonable doubt. *See, e.g.*, N.C. GEN. STAT. § 15A-2000(c) (2003).

Although the above stated conclusion is the only logical conclusion that follows from the constitutional guarantees of the Due Process Clause and the Sixth Amendment, as well as the Court's line of cases up through *Ring*, it is not a conclusion to which all courts have come. In fact, Justice Scalia, in writing for the Supreme Court, has circumvented the narrow application of the reasonable-doubt standard in favor of the blanket application mentioned at the beginning of this subsection. In *Sattazahn v. Pennsylvania*, Justice Scalia, writing for the majority, wrote: "[In *Ring*], we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of *any* aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt."[93]

Justice Scalia's characterization of the *Ring* holding is not only inaccurate, but it is the beginning of a slippery slope that could be used to overturn lower courts that have correctly held that the reasonable doubt standard applies only to aggravating factors when those factors act as the equivalent of an element of the crime. Clarity on this issue is needed so as to avoid inconsistent application and incorrect results. The Supreme Court must explicitly recognize that *Ring*'s holding affects the burden of proof for aggravating factors only when those factors act as functional elements of a greater offense.

B. Does Ring *Apply Retroactively?*

Whether *Ring* applies retroactively could perhaps have the greatest impact of all the issues surrounding the case. The Supreme Court never mentioned the issue of retroactivity, thereby leaving it to the lower courts to decide.[94] Decisions of the lower courts on the issue, however, have resulted in a circuit split.[95] By leaving the issue un-

93 537 U.S. 101, 111 (2003) (emphasis added). Although Justice Scalia's statement is troubling, it is uncertain whether he intended the statement to apply as broadly as it plainly does. In portions of his concurring opinion in *Ring*, as well as in an earlier portion of *Sattazahn*, he seems to understand that both *Ring* and *Apprendi* focus on the fact that a fact must increase the maximum penalty in order to be the functional equivalent of a crime. *See id.* at 111; *Ring*, 536 U.S. at 612. Nonetheless, the plain language he uses seems to muddle that understanding and could be used as detrimental precedent.

94 Some state officials have taken the Supreme Court's silence as a cue for not allowing *Ring* to be retroactively applied. Paul Duggan, *New Rulings Don't Fling Open Death Row Doors*, WASH. POST, June 27, 2002, at A2.

95 The Ninth Circuit favors retroactive application of *Ring*, while the Tenth and Eleventh Circuits have declined to apply *Ring* retroactively. *Compare* Summerlin v. Stewart, 341 F.3d 1082, 1108–09 (9th Cir. 2003) (holding the *Ring* decision was not "merely procedural"; rather, it was also a substantive change that fell under the *Teague* exceptions), *with* Turner v. Crosby, 223 F.3d 1247, 1280 (11th Cir. 2003) (holding

resolved the Supreme Court has created an inequitable situation, which it has previously warned against, by allowing lower courts to treat similarly situated defendants differently.[96] This situation should provide the needed impetus for the Supreme Court to address the issue of retroactivity.

Grounded on precedent aided by equitable interest and statistical findings, *Ring* should be applied retroactively.[97] In order to understand this conclusion one must understand the rules of retroactive application as well as each of the circuits' respective positions.

1. Rules of Retroactivity as Promulgated by the Supreme Court

When analyzing a retroactivity claim, the court must first determine if the case the defendant seeks to have retroactively applied declares a new rule. "In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."[98] That is, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[99] If the rule is found to be a new rule the inquiry proceeds; if not, the retroactive claim is denied.

Once it is evident that a new rule has in fact been established, the analysis turns on whether the new rule is deemed to be one of substance or one of procedure. If the rule is declared to be one of substance, then it is presumptively retroactive.[100] The Supreme Court has

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that *Ring* did not apply retroactively to 2254 petitioners), *and* Cannon v. Mullin, 297 F.3d 989, 992–94 (10th Cir. 2002) (holding that *Ring* was not retroactive because it did not announce a new substantive rule or fall under the *Teague* exceptions). In addition, the Eighth Circuit has declined to address the issue until the Supreme Court indicates whether *Ring* should apply retroactively. Whitefield v. Bowersox, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003).

96 In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court acknowledged that the disparity in treatment caused by inconsistent retroactive application was problematic in both direct and collateral appeals. *Id.* at 304–05. The Court illustrated its concern by pointing to *Edwards v. Arizona*, 451 U.S. 477, 484–87 (1981), in which the Court held that "once a person invokes his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be inferred from the fact that the person responded to police-initiated questioning." *Teague*, 489 U.S. at 305. After the *Edwards* decision, lower courts split on the issue of whether it was to be applied retroactively. "Thus some defendants . . . received the benefit of *Edwards*, while [others] did not." *Id.* The Court recognized that such disparate treatment of similarly situated individuals was inequitable and intolerable. *Id.* at 304.

97 Granted, the retroactivity would only be applicable to those states whose systems were declared unconstitutional by *Ring*, and perhaps to the hybrid states as well.

98 *Teague*, 489 U.S. at 301.

99 *Id.*

100 *See, e.g.*, United States v. Mandanici, 205 F.3d 519, 525 (2d Cir. 2000).

instructed that new rules are substantive when they alter the meaning of a substantive criminal statute.[101] "Decisions of 'substantive criminal law' . . . are those that reach beyond issues of procedural function and address the meaning, scope, and application of substantive criminal statutes."[102] Thus, only substantive rules are eligible for retroactive application.

Conversely, if a new rule is procedural, and not one of substance, it is presumed not to be retroactive.[103] Named after the case codifying this rule, *Teague v. Lane*, the rule is often referred to as the *Teague* retroactivity bar.[104] A new rule is procedural when it impacts *only* "the operation of the criminal trial process" and not the substance.[105] According to the *Teague* analysis, procedural rules on direct appeal should be retroactively applied, but on collateral review "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," unless the rule meets one of two narrow exceptions.[106] The first exception looks at whether the conduct has been decriminalized or whether a certain class of persons has been granted immunity from punishment for that conduct.[107] The second exception requires that a new rule both enhance the accuracy of the proceeding *and* "alter our understanding of the *bedrock procedural elements*" essential to the fairness of the proceeding.[108]

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101 Bousley v. United States, 523 U.S. 614, 620 (1998).

102 Summerlin v. Stewart, 341 F.3d 1082, 1100 (9th Cir. 2003) (citing *Bousley*, 523 U.S. at 620).

103 This rule is relatively new as it was established in *Teague* in 1989. *Teague*, 489 U.S. at 310 (1989). For a historical recount of the retroactive application of criminal procedure guarantees, see 2 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW 292–94 (5th ed. 1999).

104 *See, e.g.*, United States v. Sanders, 247 F.3d 139, 140 (4th Cir. 2001).

105 *Summerlin*, 341 F.3d at 1100.

106 *Teague*, 489 U.S. at 310.

107 Saffle v. Parks, 494 U.S. 484, 494 (1990).

108 *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 693–94 (1971)). Therefore, for clarification purposes, once the court determines that a new rule has been announced, the *Teague* analysis goes as follows:

> The rule is substantive and is therefore presumed to apply retroactively; *or*
>
> The rule is procedural and is therefore presumed not to apply retroactively *unless*:
>
> The conduct at issue has been decriminalized as a result of the new case or a certain class of persons has been granted immunity; *or*
>
> The new rule enhances the accuracy of the proceeding and alters the understanding of bedrock procedural elements essential to the fairness of the proceeding.

2. The Circuit Split on Whether *Ring* Is Retroactive

Circuits have taken conflicting positions on how the retroactive standard applies to *Ring*.[109] In the first step of the analysis, the circuits all agree that *Ring* iterates a new rule. However, the circuits then divide at each subsequent step in the analysis.

The Ninth Circuit has held that *Ring* stands for a substantive rule that, depending on the state at issue, may have procedural implications as well.[110] Its conclusion securely rests upon the reasoning that *Ring* altered the substantive law of Arizona by declaring its substantive law unconstitutional and then redefining the elements needed for a defendant to be sentenced to death by adding an aggravating factor to the list of elements.[111] Since *Ring* altered the meaning and scope of Arizona law, the Ninth Circuit contends that *Ring* should be retroactively applied.[112]

Alternatively, the Tenth and Eleventh Circuits assert that *Ring* is not a substantive rule. "It is clear," says the Tenth Circuit, "that *Ring* is simply an extension of *Apprendi* to the death penalty context" and "[a]ccordingly, this court's recent conclusion . . . that *Apprendi* announced a rule of criminal procedure forecloses [the] argument that *Ring* announced a substantive rule."[113] As will be discussed in the next subsection,[114] such a quick answer is superficial and lacks any effort to seriously analyze whether *Ring* in and of itself is a substantive rule.

In addition to denying substantive retroactive application, the Eleventh Circuit also denies that *Ring* should be applied retroactively based on procedure. Again dismissing *Ring* as though it is identical to *Apprendi*, the Eleventh Circuit held that *Ring* met neither exception and thus, as a rule of procedure, fell victim to the *Teague* retroactivity bar.[115]

Instead of dismissing it as the equivalent of *Apprendi*, the Ninth Circuit conducted a more careful analysis that focused on the reasoning, holding, and effect of *Ring*. It concluded that even if *Ring* announced a procedural rule, it falls within the second *Teague* exception and therefore should retroactively be applied.[116] After examining sta-

109 *See supra* note 92.

110 *Summerlin*, 341 F.3d at 1101–02.

111 *Id.*

112 *Id.*

113 Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002).

114 *See infra* Part III.B.3.

115 Turner v. Crosby, 339 F.3d 1247, 1285 (11th Cir. 2003).

116 *Summerlin*, 341 F.3d at 1121.

tistics and scholarly work on the topic, the Ninth Circuit found that "the *Ring* rule enhances the accuracy of the determination of capital murder . . . ."[117] Additionally, the court found that *Ring* "fundamentally altered the procedural structure of capital sentencing applicable to all states" by "establish[ing] the bedrock principle that, under the Sixth Amendment, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty."[118] Therefore, *Ring* passed both prongs of the second exception and as such was applied retroactively in the Ninth Circuit.

3. The Retroactivity Test as It Should Be Applied to *Ring*

As the courts agree, *Ring* sets forth a new constitutional rule. It is undisputed that a rule must be new "if it expressly overrules a prior decision,"[119] and *Ring* explicitly did that by overruling *Walton*.[120] The new rule avers that where an aggravating factor can be used to increase the maximum penalty, the elements of the crime consist of murder plus an aggravating factor, thereby making it a separate and distinct offense from murder itself. As such, the distinguishing element, i.e., the aggravating factor, must be decided by a jury in order for the conviction to comply with the Sixth Amendment right to a jury trial.[121]

Unquestionably *Ring* has had procedural effects. However, whether *Ring* has a procedural effect upon a state's procedure depends on the substance of that state's statute, i.e., whether the aggravating factor increases the maximum penalty available for the crime.

Thus, while *Ring* has certainly had procedural effects, the rule iterated in *Ring* is primarily substantive. In finding that aggravating factors act as functional equivalents of the offense, the Supreme Court redefined the elements of the murder statute at issue. The rule in *Ring* therefore addressed the meaning and application of a substantive criminal statute. As previously mentioned, precedent dictates that

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117 *Id.* at 1110.

118 *Id.* at 1116.

119 Graham v. Collins, 506 U.S. 461, 467 (1993).

120 Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that *Ring* overturned *Walton*).

121 *Id.* ("Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury.") (citing Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2001)).

when a rule addresses "the meaning, scope, and application" of a substantive criminal statute, the rule is substantive in nature.[122]

To put it another way, the Supreme Court did not simply find that aggravating factors had to be presented to the jury as part of the Sixth Amendment right to a jury trial. Had that been the holding, the rule would have been purely procedural. The pivotal point in *Ring* is that the Sixth Amendment right affects only those statutes in which aggravating factors are functionally part of the substantive offense.

Ring, therefore, is distinct from *Apprendi*. In *Apprendi*, the Court expressly stated that "[t]he substantive basis for [the state's] enhancement is thus not at issue."[123] In stark contrast, the state's statutorily mandated capital sentencing scheme was precisely the issue in *Ring*. *Ring* both redefined the statute at issue and identified a new substantive offense—capital murder is now a separate offense from murder and the distinguishing element is the presence of an aggravating factor. This change alters the substantive qualities of the crime. As a new substantive rule, *Ring* should be retroactively applied.

Even if it could logically be argued that *Ring* is a rule only of procedure, it would fall within the second *Teague* exception thereby allowing it to be applied retroactively. Supposing the rule was only one of procedure, the presumption would be against retroactive application. The first exception to this presumption, whether the conduct has been decriminalized or whether a certain class of persons has been granted immunity from punishment for that conduct, is not applicable to *Ring*. However, *Ring* does fall within the purview of the second exception, which applies when a new rule both enhances the accuracy of the proceeding and alters the "understanding of the *bedrock procedural elements*" essential to the fairness of the proceeding.[124]

When considering *Ring*'s effect on the accuracy of the proceeding, it is important to note that accuracy may be understood as precision in determining innocence or guilt,[125] both at the conviction and at the penalty phase. The Eighth Amendment requires the accuracy

122 *Summerlin*, 341 F.3d at 1100 (citing Bousley v. United States, 523 U.S. 614 (1998)); *see also* Collins v. Youngblood, 497 U.S. 37, 51 (1990) (noting that a rule is substantive where it affects "the definition of crimes, defenses, or punishments"); United States v. Montalvo, 331 F.3d 1052, 1055–56 (9th Cir. 2003) (holding that explaining or redefining elements of an offense is a decision of substantive law); State v. Correll, 715 P.2d 721, 735 (Ariz. 1986) (stating that changes involving aggravating circumstances in the ex post facto context were substantive changes to the offense of capital murder).

123 Apprendi v. New Jersey, 530 U.S. 466, 475 (2000).

124 Teague v. Lane, 489 U.S. 288, 311 (1989).

125 Graham v. Collins, 506 U.S. 461, 478 (1993).

in capital cases to be of a greater degree than would be necessary in a non-capital case.[126] Today's death-penalty system teems with errors.[127] The procedural effect of *Ring*, in putting aggravating facts before a jury instead of before a judge, is bound to increase accuracy for a number of reasons.[128]

For example, because aggravating factors that act as elements of the offense now have to be presented to a jury, the aggravating factors must now be proven beyond a reasonable doubt. Previously, the same factors went before a judge where the prosecution's burden of proof consisted of a relatively low threshold of a preponderance of the evidence. Thus, *Ring* has the effect of raising the standard of proof from "likely" to "almost certainly." This change means that the prosecution will have to show more proof to satisfy its burden. In turn, this will likely ensure greater certainty in the finding of aggravating factors.

Additionally, a number of reasons suggest juries are less susceptible to outside influences than are judges. The elimination of such outside considerations will increase accuracy as well. First, judges are often aware of inadmissible evidence to which the jury is not privileged. Although a judge should ignore this evidence, even a judge committed to fairness cannot erase inadmissible evidence after she or he hears it.[129] Thus, the safer alternative is to allow a jury that has no knowledge of such evidence to determine whether aggravating factors exist. In addition, judges are privy to pre-sentencing reports, which have been found to be problematic as they have the "potential for introducing inaccurate or misleading information into the sentencing decision."[130] "The net result, prior to *Ring*, was a capital sentencing system that allowed a large amount of inadmissible evidence to be submitted to capital sentencing judges that could not be considered by a penalty-phase jury."[131] By requiring the aggravating factors to be

126 Gilmore v. Taylor, 508 U.S. 333, 342 (1993).

127 For a statistical analysis of errors in death penalty cases, see JAMES S. LIEBMAN ET AL., BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1975 (2000), *available at* http://justice.policy.net/jpreport; *see also* Peter Neufeld, *Preventing the Execution of the Innocent: Testimony Before the House Judiciary Committee*, 29 HOFSTRA L. REV. 1155 (2001) (detailing the impediments of the current death penalty system).

128 *Contra* Robert Robb, *Arizona's Death Penalty Law More Prone to Error, Bias*, TUCSON CITIZEN, Aug. 8, 2002, at 6B.

129 *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 127 (1966) (noting that "a judge is exposed to prejudicial information" and that it may be too idealistic to assume a judge can make an accurate decision with that information in mind).

130 Stephen A. Fennel & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615, 1628 (1980).

131 Summerlin v. Stewart, 341 F.3d 1082, 1112 (9th Cir. 2003).

presented to a jury, inadmissible evidence will be screened out, thereby necessarily increasing the quality of evidence presented to the jury and implicitly increasing accuracy.

"A second primary accuracy-enhancing role of a jury in capital cases is to make the important moral decisions inherent in rendering a capital verdict."[132] Since many of the aggravating factors are subjective determinations that will be based upon the morals and norms of the community, juries are better suited to make those decisions. As the Supreme Court has previously recognized, "the Government has 'a strong interest in having the jury express the conscience of the community.'"[133] For example, one of the aggravating factors found in *Ring* was that the crime was especially heinous. It is easy to see that a judge who presides over case after case may become too numb to the facts of a particular case and may lose touch with the community's understanding of what constitutes an especially heinous crime.[134] A jury, however, consists of people pulled directly from the community whose interpretation of what constitutes an especially heinous crime resembles, most likely, the opinion of the community more than that of a well-seasoned judge.[135]

Finally, judges pose a greater risk of inaccuracy than juries because judges in many states are elected and thus fall prey to outside influences that have no place for consideration in the trial process. In fact, judges are more likely than juries to impose the death penalty.[136] Studies have found that some election campaigns in large part are based on a judge's capital-sentencing record.[137] Although this may

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132 *Id.* at 1113.

133 *Id.* (citing Jones v. United States, 527 U.S. 373, 382 (1999) (quoting Lowenfield v. Phelps, 484 U.S. 231, 238 (1988))).

134 *See, e.g.*, Adam Liptak, *Judge's Drug Use at Issue in 2 Death Sentences*, N.Y. TIMES, May 16, 2002, at A1 (showing an example of a judge who seems to be numb to realistic consequences of imposing the death penalty).

135 This concern directly echoes the apprehensions of Justice Breyer in his concurrence in *Ring*. Justice Breyer stated that jury members "are more attuned to 'the community's moral sensibility' and act to 'express the conscience of the community on the ultimate question of life or death.'" Ring v. Arizona, 536 U.S. 584, 615–16 (2002) (Breyer, J., concurring) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

136 Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793–94 (1995); *see* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 62 (2002); Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1039–44.

137 *See* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 470–75 (1999); *see also* Stephen B. Bright et al., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial*

not influence all judges, it is still a factor which may contribute to inaccuracy in some cases. Giving the decision to the jury removes this concern, thereby reducing the chance of inaccuracy and heightening accuracy overall. In sum, the risk of error is reduced by relying on a jury of "twelve individuals who must agree as to the presence of aggravating factors beyond a reasonable doubt, whose continued job security is not threatened by their decision, and whose consideration is based solely on admissible evidence subject to the rigors of cross-examination."[138]

With the first prong of the *Teague* analysis satisfied we move to the second prong of the *Teague* analysis which requires that the new rule must "alter our understanding of bedrock procedural elements" essential to the fairness of the proceeding.[139] In redefining the elements of the substantive offense at issue, the Supreme Court necessarily altered our understanding of the bedrock procedural elements essential to the fairness of the death penalty proceeding. *Ring* requires that all procedures conform to its mandate that aggravating factors necessary for the imposition of the death penalty be decided by the jury. *Ring* recognized a longstanding structural defect within our system and corrected that defect. Prior to *Ring*, death-penalty proceedings in multiple states violated constitutional protections. Functionally, defendants in those states were being denied their Sixth Amendment right to a jury trial, for it was not the jury's verdict that exposed the defendant to the possibility of death, but rather the opinion of a single judge. Since *Ring* it is clear that states must adjust their capital-sentencing schemes to fit within the Sixth Amendment framework identified in *Ring*. Therefore, "*Ring* . . . fundamentally altered the procedural structure of capital sentencing applicable to all states."[140]

The finding of an alteration of bedrock procedural elements is supported by statistics as well. *Ring* established minimal standards for all states, and these standards meant that one fourth of all death pen-

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Independence Preclude Due Process in Capital Cases?, 31 COLUM. HUM. RTS. L. REV. 123 (1999) (discussing how politics have interfered with judicial independence in capital cases).

138 *Summerlin*, 341 F.3d at 1116.

139 Teague v. Lane, 489 U.S. 288, 311 (1989).

140 *Summerlin*, 341 F.3d at 1116. Note also that the Ninth Circuit analogized the decision in *Ring* to that of *Furman* since both declared death sentencing schemes unconstitutional. Thus, like *Furman*, the Ninth Circuit argues, *Ring* too should be applied retroactively. *Id.* at 1102–03, 1119–20.

alty statutes were immediately brought into question.[141] Tellingly, *Ring* declared the procedures used in five percent of all death-row inmates' cases unconstitutional and brought the procedures of almost another eighteen percent of death row inmates' cases into question.[142] "When viewed in both theoretical and practical terms, *Ring* redefined the structural safeguards implicit in our concept of ordered liberty."[143]

If one remains unconvinced that *Ring* should apply retroactively both because it is substantive in nature and because even if it was not it fits within the second *Teague* exception one should turn to policy as another means of justifying the retroactive application. There are three main reasons the Supreme Court has identified as justifications of the presumption that retroactivity should not apply in the procedural context. First, the Court has stated that blocking retroactivity serves a deterrent purpose as it holds defendants responsible under the law at the time the crime was committed.[144] In the situation at hand, however, it would be implausible to think that more crimes will be committed simply because aggravating factors now have to go to the jury. Thus, applying *Ring* retroactively in no way disturbs the first purpose served by the general rule that new procedural rules are not applied retroactively.

The second policy concern identified by the Court as justifying the retroactive bar is that "retroactive application of new rules frustrates the judicial need for comity and finality."[145] While this is a legitimate concern, finality in the *Ring* sense is very different from finality in other types of cases. Finality here means the taking of a person's life even if the procedures which put him on death row were later

141 Thirty-eight states have death penalty statutes and of those nine were immediately affected by *Ring*. Five of those nine were automatically unconstitutional and four others deemed questionable. Brief for Amici Curiae Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Mississippi, Montana, Nebraska, Nevada, New York District Attorneys Association, Pennsylvania, South Carolina, Utah, Virginia, In Support of Respondent at 4–5, Ring v. Arizona, 536 U.S. 584 (2002) (No. 01-488), *available at* 2002 WL 481140.

142 These figures are based on the following numbers. At the time *Ring* went to trial 3517 people sat on death row. DEBORAH FINS, DEATH ROW U.S.A. 1 (2003), *available at* http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf. Of those, 169 were from states whose death penalty statues were declared unconstitutional by *Ring* and another 629 were from states whose death penalty statutes were brought into question. *Ring*, 536 U.S. at 620 (O'Connor, J., dissenting).

143 *Summerlin*, 341 F.3d at 1121.

144 *Teague*, 489 U.S. at 306.

145 Eric J. Beane, Case Note, *When It Comes To Capital Sentencing, You Be the Judge:* Ring v. Arizona, 45 ARIZ. L. REV. 225, 233 (2003) (citing *Teague*, 489 U.S. at 308).

found to be unconstitutional. Can we really ignore new constitutional standards and simply continue to execute people for the sake of judicial efficiency and finality?

Finally, the *Teague* Court stated that retroactive application should generally not be allowed because the "'costs imposed upon the State[s] . . . generally far outweigh the benefits.'"[146] It is true that great costs will be imposed upon states both as they revamp their systems to comply with *Ring* and as they hear retroactive claims. In the capital context it seems morally repugnant to think that any amount of costs to the States can outweigh the value of the human life that is put at risk by not hearing the claim. In conclusion, the life or death context of *Ring*'s retroactivity debate overrides the policy concerns behind denying retroactive application. Therefore, based both on legal analysis and policy considerations, *Ring* should be retroactively applied.

C. *Do Aggravating Factors Need to Be Included in the Indictment?*

Also unaddressed by the Supreme Court is the issue of whether *Ring*'s holding requires aggravating factors to be presented to the grand jury as part of the indictment. Again, the lower courts have split on this issue. Federal courts have generally held that at least one aggravating factor must be alleged in the indictment.[147] State courts, on the other hand, have gone both ways.[148]

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146 *Teague*, 489 U.S. at 310 (quoting Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., dissenting)) (alteration in original).

147 *See* United States v. Jackson, 327 F.3d 273, 287 (4th Cir. 2003) (holding that at the federal level the indictment must include at least one aggravating factor); *see also* United States v. Mikos, No. 02 CR 139-1, 2003 WL 22110948, at *2 (N.D. Ill. Sept. 11, 2003) (finding that "the [aggravating] facts used to justify the imposition of the death penalty are functional equivalents of elements of the capital offense and must therefore be charged in the indictment") (citations omitted); United States v. Regan, 221 F. Supp. 2d 672, 679 (E.D. Va. 2002) (stating that in light of *Ring* and *Jones*, "it appears to be a foregone conclusion that aggravating factors that are essential to the imposition of the death penalty must appear in the indictment"); United States v. Fell, 217 F. Supp. 2d 469, 483 (D. Vt. 2002).

> Although the *Ring* decision explicitly did not discuss whether a defendant was entitled to grand jury indictment on the facts that, if proven, would justify a sentence of death, the clear implication of the decision, resting as squarely as it does on *Jones*, is that in a federal capital case the Fifth Amendment right to a grand jury indictment will apply.

Id.

148 *Compare* Drew v. Warden, No. CR 03-87-10, 2003 WL 21228572, at *3 (D.N.H. May 28, 2003) (noting that any fact that increases the maximum penalty must be charged in the indictment), *with* State v. Berry, No. M2001-02023-CCA-R3-001, 2003 WL 185509, at *5 (Tenn. Crim. App. April 10, 2003) (holding that despite the fact

The Fifth Amendment to the United States Constitution states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[149] As a result, prosecutors at the federal level must obtain an indictment before bringing a defendant to trial. The states, however, are not bound by the Fifth Amendment grand jury requirement.[150] Nevertheless, about half the states, through their respective state constitutions, guarantee the right to a grand jury in most criminal trials. It is the split within these states that is problematic.[151]

Ring should be applied to both federal cases and state cases (where the respective state constitution has grand-jury indictment requirements) so as to require that an aggravating factor be included in the indictment.[152] *Ring* held that the aggravating factor was an additional element to the core crime, thereby creating a new substantive offense, i.e., the aggravated crime.[153] Because the holding stated that the aggravating factor constituted the functional equivalent of an element of the offense, it is axiomatic that the aggravating factor, as an element, deserves the same constitutional protections as every other element of the crime.[154] Where the federal or state constitution guarantees that an indictment be handed down by a grand jury before a person is put on trial, each element of that crime must be contained in the indictment so as to properly put the defendant on notice.[155]

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that Tennessee's constitution has a provision identical to the Fifth Amendment of the United States Constitution, *Ring* does not necessitate the inclusion of aggravating factors in the indictment).

149 U.S. CONST. amend. V.

150 In *Hurtado v. California*, 110 U.S. 516 (1884), the Supreme Court held that states are not bound by the Fourteenth Amendment to abide by the grand jury requirement of the Fifth Amendment. *Id.* at 538.

151 For the discussion in this section the term "states" shall mean only those states whose constitutions give defendants the right to a grand jury indictment.

152 Although the Supreme Court has not directly considered the indictment implications of *Ring*, just after deciding *Ring*, the Supreme Court vacated *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), instructing the appeals court to reconsider the indictment claim in light of *Ring*. Allen v. United States, 536 U.S. 953 (2002); *see* Linda Greenhouse, *Supreme Court Roundup: Court to Review Mandatory Detention of Immigrant Felons*, N.Y. TIMES, June 29, 2002, at A10.

153 Ring v. Arizona, 536 U.S. 584, 605 (2002) (quoting Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J., concurring)).

154 *See* Bottoson v. Moore, 833 So. 2d 693, 715–17 (Fla. 2002) (Shaw, J., concurring) (stating that an "aggravating circumstance necessary for imposition of the death sentence must be subjected to the same rigors of proof as every other element of the charged offense").

155 Hamling v. United States, 418 U.S. 87, 117 (1974) ("[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a

Thus, where the substantive offense includes an aggravating factor as an element of the offense—a new phenomenon since *Ring*—that factor/element must also be alleged in the indictment. Concisely put, "[i]t is no doubt true . . . that the Fifth Amendment right to be charged by an indictment containing every element of the offense [or the state equivalent thereof] is no less demanding than the Sixth Amendment right to have every element of the offense found by the jury."[156]

Misguided state courts that have held that *Ring* does not extend to the indictment phase miss the true holding of *Ring* since they often skim over the issue, dismissing it as identical to issues *Apprendi* already decided. For example, an Illinois appellate court held that the defendant's "*Ring* argument" was simply a cloak for an *Apprendi* argument that had already been rejected by the Illinois Supreme Court.[157]

In this blatant circumvention of the issue, the Illinois appellate court failed to examine the facts of the case in light of *Ring*. Had the court not dismissed the *Ring* claim as a dressed up version of *Apprendi*, it would have realized that the defendant had a valid claim. The Illinois State Constitution provides that "[n]o person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless the initial charge has been brought by indictment of a grand jury."[158] Based on the previously mentioned provision of the Illinois Constitution and in light of *Ring*, the defendant challenged an Illinois law stating that aggravating factors could be introduced after the indictment. In the defendant's case, the aggravating factor had been introduced after the indictment and that same aggravating factor had increased the maximum penalty for which the defendant was eligible.[159] As was the case in *Ring*, the aggravating factor brought against the defendant here acted as the functional equivalent of an element since the addition of that factor effectively created a new aggravated offense for which the maximum penalty increased. Being a functional equivalent of an element, the qualifying aggravator was entitled to be included in the indictment as guaranteed by the Illinois Constitution.

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defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.").

156 United States v. Jackson, 327 F.3d 273, 285 (4th Cir. 2003).

157 People v. McClain, 799 N.E.2d 322 (Ill. App. Ct. 2003).

158 ILL. CONST. art I., § 7.

159 *McClain*, 799 N.E.2d at 335.

D. Does Ring *Affect the Hybrid States?*

The question of how *Ring* affects the hybrid states, i.e., states in which juries make a recommendation of life or death but still leave the ultimate decision to the judge, has probably received the most attention.[160] Hybrid states include Alabama, Delaware, Florida, and Indiana.[161] "Although *Ring* . . . did not directly address judicial overrides, the Court's . . . holding suggests that the use of overrides may be unconstitutional."[162] Even though statutes in each of these states provide for juries to make recommendations based in part on aggravating factors, that alone does not save them from constitutional scrutiny. After all, the dispositive question is "one not of form, but of effect."[163] Thus, each hybrid state must examine the effects of its death-sentencing scheme to determine if it is in compliance with the constitutional mandates set out in *Ring*.

In evaluating their respective statutes, the high courts of the hybrid states have split on the issue of whether *Ring* requires a revamping of the judicial override systems. Delaware and Indiana, as a result of judicial cues, both chose to revise their statutes.[164] Meanwhile, Florida and Alabama have both held that their statutes remain constitutional despite the holding in *Ring*.[165] Since the positions taken by Delaware and Indiana are strikingly similar to one another, as are the

160 *See, e.g.*, Benjamin F. Diamond, *The Sixth Amendment: Where Did the Jury Go? Florida's Flawed Sentencing in Death Penalty Cases*, 55 FLA. L. REV. 905 (2003); Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime After* Ring v. Arizona, 54 ALA. L. REV. 1157 (2003); Mike Limrick, *Overlooked Consequences of* Apprendi*: The Unconstitutionality of Indiana's Non-Capital Sentencing*, RES GESTAE, Apr. 2003, at 19.

161 *See* sources cited *supra* note 156.

162 Ingrid A. Holewinski, *"Inherently Arbitrary And Capricious": An Empirical Analysis of Variations Among State Death Penalty Statues*, 12 CORNELL J.L. & PUB. POL'Y 231, 236 (2002) (discussing Ring v. Arizona, 536 U.S. 584, 606–09 (2002)).

163 Ring v. Arizona, 536 U.S. 584, 585, 586, 602, 604 (2002).

164 *See* DEL. CODE ANN. tit. XI, § 4209 (as amended by 2003 Del. Laws 174); IND. CODE § 35-50-2-9 (2003); *see also* Brice v. State, 815 A.2d 314, 320 (Del. 2003) (recognizing that an amendment was needed in order to bring Delaware's sentencing scheme into compliance with *Ring*); Bostick v. State, 773 N.E.2d 266, 273 (Ind. 2002) ("Contrary to *Apprendi* and *Ring*, the defendant's sentences . . . pursuant to Ind[iana law], were based on facts extending the sentence beyond the maximum authorized by the jury's verdict finding her guilty of murder.").

165 *See* ALA. CODE § 13A-5-46 (2003); FLA. STAT. ANN. § 775.082(1) (West 2003) (cross-referencing FLA. STAT. ANN. § 921.141(3) (West 2003)); Lee v. State, CR-00-0084, 2001 WL 1299241 (Ala. Crim. App. Oct. 26, 2001) (holding that a judge's judicial override imposing death when the jury only recommended life imprisonment did not violate *Ring*); Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002) ("Although Bottoson contends that he is entitled to relief under *Ring*, we decline to so hold.").

opposing positions taken by Florida and Alabama, it is necessary to critique only one state on each side of the divide. Therefore the subsections below will evaluate Florida's position as well as Indiana's.

1. Florida

Florida's Supreme Court has repeatedly held that its death penalty scheme survives *Ring*. Whenever the issue has arisen, the Supreme Court refers to its initial decision on the issue—*Bottoson v. Moore*.[166] *Bottoson* was decided by the Florida Supreme Court only months after the decision in *Ring*. In contending that Florida's sentencing scheme remained unscathed by *Ring*, Florida's high court emphasized the fact that the Supreme Court failed to mention overruling any of its prior decisions involving the capital-sentencing scheme in Florida.[167] As evidenced by *Apprendi*, however, the Supreme Court's failure to specifically state that a decision overturns a prior decision is not a reliable indicator of the functional implications that that decision will actually have.[168] As the concurring justices in *Bottoson* observed, it is not enough to rely on cases that predated *Ring*; rather, Florida's Supreme Court "has an obligation to evaluate the validity of Florida's capital sentencing statute in light of *Ring*."[169]

Evaluating the validity of Florida's capital sentencing scheme in light of *Ring* reveals a number of flaws. In order to identify "*Ring* flaws" within Florida's capital sentencing scheme, it is essential to understand how Florida's statute operates in effect, not form. Under the Florida statute, the jury first makes a determination of guilt or innocence.[170] That decision, if guilty, exposes the defendant to a maximum sentence of only life imprisonment.[171] Then, at the sentencing, the jury considers aggravating and mitigating factors and makes a *rec-*

166 833 So. 2d 693 (Fla. 2002).

167 *Id.* at 695 n.4 (citing Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Barclay v. Florida, 463 U.S. 939 (1983); Proffitt v. Florida, 428 U.S. 242 (1976)).

168 In *Apprendi*, the Supreme Court contended that *Walton* remained good law. Apprendi v. New Jersey, 530 U.S. 466, 497 (2000). However, the facts in *Ring* showed the Court that *Apprendi* and *Walton* could not coexist under the umbrella of the Sixth Amendment. *Ring*, 536 U.S. at 609.

169 *Bottoson*, 833 So. 2d at 711 (Shaw, J., concurring).

170 *Id.* at 715 (Shaw, J., concurring).

171 *See* FLA. STAT. ANN. § 775.082(1) (West 2003) (cross-referencing FLA. STAT. ANN. § 921.141(3) (West 2003) (noting that a sentence of death may only be imposed if sufficient aggravating factors are found to exist at the sentencing stage)).

ommendation of either life imprisonment or death.[172] Keep in mind that the jury is not required to find specific aggravating factors.[173]

At this point in the procedure there are already two problems. First, because "a first-degree murder verdict without additional findings pursuant to section 921.141 subjects a defendant to no more than a life sentence,"[174] the aggravating factor, as it did in *Ring*, acts as the functional equivalent of an element. Hence, to comply with the Sixth Amendment, it must be found by a jury. However, as already mentioned, even though the jury does consider aggravating factors, the jury does not make a direct finding of the existence of specific aggravating factors. As an element equivalent, at least one death qualifying aggravating factor must be found by the jury in order to comply with *Ring*. Since this is not the case as Florida's statute now stands, the statute conflicts with *Ring*.

Even more problematic is the fact that the judge is not bound by the jury's recommendation. A judge is allowed, under Florida's statute, to find aggravating facts which have never been presented to the jury.[175] In turn, the judge can, and in twenty percent of capital cases does, override a jury's recommendation of life imprisonment and instead hands out a sentence of death.[176] This clearly violates *Ring* since it makes it possible for a judge to impose death on a defendant where the jury's verdict only made the defendant eligible for life imprisonment.

The final flaw in Florida's system is that under Florida law a jury must unanimously return a verdict of guilt,[177] but a jury need only have a majority vote for finding aggravating factors.[178] However, as noted above, "[j]ust like the Arizona sentencing scheme at issue in *Ring*, Florida's sentencing scheme requires additional findings by a judge before the death penalty can be imposed," and thus aggravating factors are functionally elements of the crime.[179] As a functional ele-

172 *Bottoson*, 833 So. 2d at 705 (Anstead, C.J., concurring).

173 *Id.* at 708.

174 *Id.* at 721 (Pariente, J., concurring) (citing FLA. STAT. ANN. § 775.082(1) (West 2002)).

175 *Id.* at 707–08 (Anstead, C.J., concurring) (citing Morton v. State, 789 So. 2d 324, 333 (Fla. 2001)).

176 An empirical study found that between December 1972 and March 1988, 526 Florida defendants were sentenced to die. Of those, 113 involved cases in which the judge overrode the jury's life imprisonment recommendation and sentenced the defendant to death instead. Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 924, 926 (1991).

177 FLA. R. CRIM. P. 3.440.

178 *Bottoson*, 833 So. 2d at 710 (Anstead, C.J., concurring).

179 *Id.* at 721 (Pariente, J., concurring).

ment, the aggravating factor must be subject to the "same rigors of proof as other elements, including Florida's requirement of a unanimous jury finding."[180]

Florida's resistance to complying with *Ring* will become even more difficult in the months to come. In its most recent term, in *Blakely v. Washington*,[181] the United States Supreme Court reaffirmed that under the Sixth Amendment "'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.'"[182] What is more, the Court stated that for Sixth Amendment purposes the statutory maximum means "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"[183]—i.e., "'the maximum [a defendant] would receive if punished according to the facts reflected in the jury verdict alone.'"[184] Thus, "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow,"[185] as do the judges in Florida, "the judge exceeds his proper authority"[186] and violates the defendant's Sixth Amendment rights.

Of Florida's three major "*Ring* flaws," the unanimity flaw can easily be solved by rewriting the Florida statute to mandate that the finding of aggravating factors must be unanimous. However, the other

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180 *Id.* at 717 (Shaw, J., concurring).

181 124 S. Ct. 2531 (2004).

182 *Id.* at 2536 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

183 *Id.* at 2539.

184 *Id.* (quoting Ring v. Arizona, 536 U.S. 584, 602 (2002)).

185 *Id.* at 2537. In describing the role of the jury, Justice Scalia, writing for the majority noted, "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 2539. Moreover, Justice Scalia noted that the Founders created the jury as a "fundamental reservation of power in our constitutional structure," and went on to cite the following in support of the Founders' intent: Letter XV by Federal Farmer (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (H. Storing ed., 1981) (describing the jury as "secure[ing] to the people at large, their just and rightful control in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), *reprinted in* 2 WORKS OF JOHN ADAMS 252, 253 (C. Adams ed., 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature as in the legislature."); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), *reprinted in* 15 PAPERS OF THOMAS JEFFERSON 282, 283 (J. Boyd ed., 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary depart, I would say it is better to leave them out of the Legislative."). *Blakely*, 124 S. Ct. at 2538–39.

186 *Blakely*, 124 S. Ct. at 2537. As Justice Scalia noted, "the very reason the Framers put a jury-trial into the Constitution, is that they were unwilling to trust government to mark out the role of the jury." *Id.* at 2540.

two problems require Florida to essentially revamp its sentencing system in order to comply with the new understanding of the Sixth Amendment announced in *Ring*. In making such a change, it should look to the amended statutes of Indiana and Delaware for guidance.[187]

2. Indiana

Only two months after the Supreme Court issued its decision in *Ring*, the Indiana Supreme Court found that Indiana's sentencing scheme, as it then functioned, could not survive the mandate of *Ring*.[188] In *Bostick v. State*, the defendant had been sentenced to life without parole. Under Indiana's statute at that time, life without parole could only be imposed where at least one aggravating factor was found in addition to the elements of the core offense.[189] In *Bostick*, the jury was unable to unanimously agree on the existence of an aggravating factor.[190] However, after the judge independently found the existence of aggravating factors, the defendant was sentenced by the judge to life without parole.[191]

In reviewing the case, the Indiana Supreme Court noted that, in light of *Ring*, the qualifying aggravating factor was the functional equivalent of an element and thus could only be found by the jury.[192] The defendant's sentence was, like Timothy Ring's, "based on facts extending the sentence beyond the maximum authorized by the jury's verdict."[193] To remedy the situation, the state's high court vacated the sentence and remanded the case to the lower court for resentencing in accordance with *Ring*.[194]

In response to *Ring*, and by extension *Bostick*, the Indiana legislature amended its statutory sentencing scheme. Today, Indiana's statute complies with *Ring*.[195] The first pertinent change provides that "if

187 *See* sources cited *supra* note 156.

188 Bostick v. State, 773 N.E.2d 266, 273 (Ind. 2002) ("Contrary to *Apprendi* and *Ring*, the defendant's sentences . . . pursuant to Ind[iana law], were based on facts extending the sentence beyond the maximum authorized by the jury's verdict finding her guilty of murder.").

189 *Id.* at 273.

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.* at 273–74.

195 Note that Indiana's statute remedies each of the flaws that exist in Florida's statute, *supra* Part III.D.1. *Compare* IND. CODE § 35-50-2-9 (2003), *with* FLA. STAT. ANN. § 775.082(1) (West 2003), *and* FLA. STAT. ANN. § 921.141(3) (West 2003).

the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed . . . . If a jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly."[196] Given that a judge can no longer override the jury's sentencing recommendation, it is impossible for the defendant to be sentenced beyond the maximum penalty available based on the jury's verdict. Thus, in accordance with *Ring*, all elements upon which the sentence is based, including qualifying aggravators, are found by the jury. Additionally, a later section of the same statute provides that a jury must find that at least one aggravating factor exists beyond a reasonable doubt before it can impose a sentence of either life imprisonment without parole or death.[197] Thus, Indiana's new statute not only conforms to *Ring*'s direct holding, but it also acknowledges[198] that by necessary implication, qualifying aggravating factors must be found by the jury to exist beyond a reasonable doubt.

E. How Are Aggravating Factors and Mitigating Factors to Be Weighed in Light of Ring?

With the foregoing issues resolved, one question remains—does *Ring* affect the way aggravating and mitigating factors must be weighed? The answer to this question lies in the structure and effect of the statute. There are two basic statutory structures that must be taken into consideration. First, in several states the sentencing phase requires the fact finder to conclude that the aggravating circumstances outweigh the mitigating in order to impose a death sentence.[199] Alternatively, some states require the finding of only one aggravating factor to trigger the imposition of the death penalty.[200] In the first instance, assuming that the weighing determination is what qualifies the defendant for the death sentence, *Ring* would require that the overall determination be made by a jury beyond a reasonable doubt. To illustrate, think about the following example. In State *A* the statute for first degree murder exposes a defendant to a maximum penalty of life imprisonment. However, under the same statute a defendant becomes eligible for death if at the sentencing phase the fact finder determines that the aggravating factors outweigh the mitigating factors. Because the weighing determination acts as the functional

196 IND. CODE § 35-50-2-9(e) (2003).
197 *Id.* § 35-50-2-9(l).
198 *See supra* Part III.A.
199 Holewinski, *supra* note 162, at 253–55 app. A.
200 *Id.*

equivalent of an element, under *Ring*, it must go before a jury. Thus, the jury must make the determination of both aggravating and mitigating factors. The remaining issue is how must the jury actually weigh the aggravating factors? Under these types of statutes it is not the individual aggravating and mitigating factors that act as the functional elements, rather it is the overall determination of how they balance out that is the qualifying aggravator. Therefore, it seems that a jury would not have to agree to the existence of individual facts. Rather, each jury would only have to agree, beyond a reasonable doubt, that the totality of the aggravating circumstances outweighs the totality of the mitigating circumstances.[201]

Under the second type of statute, where only one aggravating factor is needed to expose a defendant to the death penalty, *Ring* would require only the aggravating factor to go before the jury. Mitigating factors could still be assessed by a judge at the sentencing phase. An example is again helpful. State *B*'s statute for first degree murder provides for a maximum sentence of life imprisonment. However, the statute also provides that the finding of an aggravating factor increases the maximum penalty to death. Based on this type of statute, it is simply the aggravating factor itself that acts as the qualifying element. Thus, only this factor would need to go before the jury. Alternatively, if the statute in State *B* says only that the aggravating factor can increase the maximum penalty, but does not mandate an enhancement in the sentence, it would be constitutional for the judge to consider mitigating factors once the jury has made a determination on the aggravating factor. Regardless of whether the judge chose to impose life imprisonment or death after considering the mitigating factors, the maximum penalty range was still set by the jury upon the finding of the aggravating factor.

CONCLUSION

As illustrated in Part III and its subsections, a consistent application of the Fifth and Sixth Amendments is possible. State splits and circuit splits are brewing. Soon the Supreme Court will have to face the music and call for conformity in the application of the Fifth and Sixth Amendments as understood in light of its holding in *Ring*.

201 It is interesting to note that, under this construction, half the jurors could find that aggravating factor *X* outweighs mitigating factor *Z*, while the other half could find that aggravating factor *X* is questionable, but that aggravating factor *Y* outweighs mitigating factor *Z*. Despite this reliance on different aggravating factors, the result would still be that the jury as a whole found that the aggravating facts outweighed the mitigating facts.

The rights embodied in the United States Constitution are guaranteed to all citizens. Our current and evolving understanding of the Fifth and Sixth Amendments as embodied in *Ring* must be applied to each citizen. However, as the legal system currently exists, defendants in different states receive varying protections depending on whether the state in which they are charged is correctly applying the new understanding of the Fifth and Sixth Amendments. Such an inconsistent application of the same national Constitution must end. This is especially true in the context of the death penalty since the system already suffers from errors—errors which can never be undone once the final sentence is imposed.