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Ring v. Arizona: The Sixth and Eighth Amendments Collide: Out of the Wreckage Emerges a Constitutional Safeguard for Capital Defendants

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Ring v. Arizona: The Sixth and Eighth Amendments Collide: Out of the Wreckage Emerges a Constitutional Safeguard for Capital Defendants

TABLE OF CONTENTS

- I. INTRODUCTION
- II. QUALIFIED TO DIE? THE MODERN HISTORY OF EIGHTH AMENDMENT CAPITAL PUNISHMENT JURISPRUDENCE
- III. AT THE CROSSROADS OF DEATH: THE MODERN DEVELOPMENT OF SIXTH AMENDMENT SENTENCING JURISPRUDENCE
 - A. *Mullaney v. Wilbur*
 - B. *Patterson v. New York*
 - C. *McMillan v. Pennsylvania*
 - D. *The Sixth Amendment in Motion: Almendarez-Torres v. United States*
 - E. *A Head of Steam: Jones v. United States*
 - F. *Collision Course: Apprendi v. New Jersey*
 - 1. The Majority Sets the Stage for *Ring*
 - 2. The Dissent: Justice O'Connor's Foresees the Impact
- IV. BACKDROP: THE HISTORY OF *RING V. ARIZONA*
 - A. *The Factual History*
 - B. *The Procedural History*
- V. COLLISION: THE SUPREME COURT'S DECISION IN *RING*
- VI. OUT OF THE WRECKAGE: THE IMPACT OF *RING V. ARIZONA*
 - A. *The Initial Damage Report: Capital Punishment in States Providing for Judicial Findings of Fact*
 - 1. Overview of the Schemes Identical to That of Arizona
 - 2. The Consequences of *Ring* in Arizona, Colorado, Idaho, Montana, and Nebraska,
 - a. *Arizona*

- b. *Colorado*
 - c. *Idaho*
 - d. *Montana*
 - e. *Nebraska*
 - B. *Ring's Influence on States Employing "Hybrid Schemes"*
 - 1. Alabama
 - 2. Delaware
 - 3. Indiana
 - 4. Florida
 - C. *Ring's Effect on States Employing Judicial Fact-Finding in Cases of Jury Deadlock*
 - 1. Nevada
 - 2. Missouri
 - D. *The Immediate Future of Capital Punishment Under Ring*
- VI. CONCLUSION: PUTTING THE PIECES TOGETHER

I. INTRODUCTION

A convicted man's life hangs in the balance. The State seeks death, the most irrevocable and severe penalty that the American criminal justice system permits. The defendant's fate hinges on the answer to one question: does an aggravating factor exist sufficient to permit the State to deprive that man of his life? Who within the community, at that most decisive moment in a man's life, answers that critical question? That was precisely the problem posed to the United States Supreme Court in *Ring v. Arizona*.¹ For many, the Court's decision meant the difference between life and death at the hands of the State.²

When the Supreme Court decided *Ring*, two such men languished on Colorado's death row.³ In the cases of George William Woldt and Francisco Martinez, Jr., three-judge panels answered the question posed above and sentenced each man to die.⁴ Due to the Supreme Court's decision in *Ring*, both men are currently serving life sentences without the possibility of parole, their very lives spared by the Sixth Amendment protections announced in *Ring*.⁵

The United States Constitution provides that the State may not deprive an individual of his life without due process⁶ nor inflict cruel and unusual punishments.⁷ The Constitution further provides that each individual

1. 536 U.S. 584 (2002).

2. As of January 1, 2002, there were 3,581 inmates on death row in the United States. U.S. Department of Justice Bureau of Justice Statistics, *Capital Punishment 2001* (Dec. 2002), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf>.

3. *Woldt v. People*, 64 P.3d 256, 259-61 (Colo. 2003).

4. *Id.* at 260-61.

5. *Id.* at 266-72.

6. U.S. CONST. amend. V.

7. U.S. CONST. amend. VIII.

accused of a crime has the right to a trial by an impartial jury.⁸ Courts nationwide have long struggled with the meaning of these portions of our nation's most cherished document in the context of the death penalty.⁹

In 1972, the Supreme Court began the modern line of death penalty case law in *Furman v. Georgia*,¹⁰ virtually foreclosing capital punishment in the United States.¹¹ In that decision, the Court mandated that while the Constitution did not outlaw the death penalty *per se*, states could not impose capital sentences without certain procedural controls to guide the sentencer's discretion and ensure that states did not administer capital punishment in an arbitrary manner.¹²

In response to *Furman*, states implemented certain statutorily mandated "aggravating factors," without which a capital defendant could not receive a death sentence.¹³ States designed these "aggravating factors" to guide the sentencer's discretion and ensure that they did not dispense capital sentences in an arbitrary or capricious manner.¹⁴ In 2002, thirty years after *Furman*, the Court's decision in *Ring v. Arizona* finally provided the states with guidance as to who must determine the existence of those aggravating factors.¹⁵

At approximately 6:30 PM on November 28, 1994, a Sheriff's deputy from Maricopa County, Arizona discovered a missing armored van in a

8. U.S. CONST. amend. VI.

9. See, e.g., *Walton v. Arizona*, 497 U.S. 639 (1990) (holding that the Eighth Amendment does not require jury determination of aggravating factors in capital sentencing); *Gregg v. Georgia*, 428 U.S. 153 (1976) (finding Georgia's capital sentencing scheme consistent with the Eighth Amendment); *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion) (finding that the Eighth Amendment requires guided discretion in capital sentencing).

10. 408 U.S. 238 (1972) (plurality opinion).

11. See *Furman*, 408 U.S. at 239-240; Joseph L. Hoffman, Apprendi v. New Jersey: *Back to the Future?*, 38 AM. CRIM. L. REV. 255, 259-60 (2001) ("[I]n *Furman v. Georgia*, the Court struck down all then-existing state capital punishment statutes on the ground that they violated the Eighth Amendment's Cruel and Unusual Punishment Clause because the death penalty was being imposed under such statutes in an arbitrary and unpredictable manner"); Daniel Ross Harris, Note, *Capital Sentencing After Walton v. Arizona: A Retreat from the "Death is Different" Doctrine*, 40 AM. U. L. REV. 1389, 1390 (1991) ("*Furman* declared all existing death penalty statutes unconstitutional as a violation of the eighth amendment bar against cruel and unusual punishment").

12. *Furman*, 408 U.S. 238; Jeffrey Alan Wellek, *Eighth Amendment—Trial Court May Impose Death Sentence Despite Jury's Recommendation of Life Imprisonment: Spaziano v. Florida*, 104 S. Ct. 3154 (1984), 75 J. CRIM. L. & CRIMINOLOGY 813, 814 (1984).

13. Gary Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 788 (1983); Richard E. Wirick, Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After Zant, Barclay, and Harris*, 17 U.C. DAVIS L. REV. 689, 689-90 (1984); see, e.g., FLA. STAT. ANN. § 921.141 (West 1973 & Supp. 1983); GA. CODE ANN. §§ 26-3102, 27-2503 (1973 & Supp. 1983).

14. Goodpaster, *supra* note 13, at 788.

15. See *Ring*, 536 U.S. at 609. *Ring* stands for the proposition that if the death penalty is unavailable without the finding of aggravating factors, a jury must find those factors unless the defendant waives the jury trial right. See *id.*

church parking lot.¹⁶ The van's engine was running and the driver was dead, the victim of a single gunshot wound to the head.¹⁷ After a lengthy investigation, the State of Arizona indicted Timothy Stuart Ring, along with two other men, for the robbery and murder.¹⁸ A jury found Ring guilty of felony murder, basing the decision largely on circumstantial evidence.¹⁹

After a sentencing hearing, the trial judge found that Timothy Ring killed the van's driver and that Ring was a major participant in the robbery.²⁰ The judge, identifying two aggravating factors and insufficient mitigating factors to warrant leniency, sentenced Ring to death.²¹ The Arizona Supreme Court affirmed both the conviction and the sentence.²² The United States Supreme Court granted certiorari.²³ The Supreme Court overruled Ring's death sentence based upon its recent decision in *Apprendi v. New Jersey*.²⁴ In *Ring* the Court held the Arizona capital sentencing statute unconstitutional because it allowed a judge rather than a jury to determine the existence of facts necessary to expose a defendant to a death sentence.²⁵ Thus, *Ring* stands for the proposition that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."²⁶

The Court's decision in *Ring* produced a profound effect on capital sentencing in the United States.²⁷ *Ring* effectively struck down the schemes of seven states, and cast considerable doubt on the schemes of at least four others.²⁸ The Court's decision immediately resulted in numerous challenges

16. *State v. Ring*, 25 P.3d 1139, 1142 (Ariz. 2001) (en banc).

17. *Id.* at 1142.

18. *Id.* at 1142-44.

19. *Id.* at 1144.

20. *Id.*

21. *Id.* at 1144-45. The aggravating factors present were that Ring committed the offense "in expectation of the receipt of anything of pecuniary value" and "in an especially heinous, cruel or depraved manner." *Id.* (quoting the transcript of Ring's sentencing hearing).

22. *State v. Ring*, 25 P.3d at 1156.

23. *Ring v. Arizona*, 534 U.S. 1103 (2002).

24. *Ring*, 536 U.S. at 608-09.

25. *See id.*

26. *Id.* at 589.

27. As a result of *Ring*, Arizona, Colorado, Delaware, Idaho, Indiana, Missouri, Montana, Nebraska, and Nevada changed their capital sentencing procedures. *See* ARIZ. REV. STAT. ANN. § 13-703.01 (West 2002); COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2002); DEL. CODE ANN. tit 11, § 4209 (2002); IDAHO CODE § 19-2515 (Michie 2003); IND. CODE ANN. § 35-50-2-9 (Michie 2002); MO. REV. STAT. § 565.030.4 (2003); MONT. CODE ANN. § 46-1-401 (2002); 2003 Mont. Laws 154 § 1; NEB. REV. STAT. § 29-2522 (2002); NEV. REV. STAT. 175.554 & 175.556 (2003); *see also* *State v. Jones*, 49 P.3d 273 (Ariz. 2002) (recognizing that *Ring* declared Arizona's capital sentencing scheme unconstitutional); *Woldt v. People*, 64 P.3d 256 (Colo. 2003) (acknowledging that *Ring* rendered Colorado's capital sentencing statute unconstitutional); *State v. Fetterly*, 52 P.3d 874, 875 (Idaho 2002) (conceding that *Ring* rendered Idaho's capital sentencing procedure unconstitutional); *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (confirming that *Ring* rendered part of Missouri's capital sentencing scheme unconstitutional); *State v. Gales*, 658 N.W.2d 604 (Neb. 2003) (declaring that *Ring* rendered Nebraska's capital sentencing scheme unconstitutional); *Johnson v. State*, 59 P.3d 450 (Nev. 2002) (finding that *Ring* declared multiple aspects of Nevada's capital sentencing procedure unconstitutional).

28. *Ring*, 536 U.S. at 620-21 (O'Connor, J., dissenting) (noting that *Ring* likely invalidated the

to death sentences nationwide.²⁹ Within fourteen months of the *Ring* decision, eight states altered their capital sentencing procedures in order to conform to the newly mandated Constitutional protections.³⁰

The purpose of this note is to examine the Supreme Court's decision in *Ring v. Arizona* in the context of late twentieth century Supreme Court capital punishment jurisprudence. First, Part II will examine the history of American Eighth Amendment capital punishment jurisprudence beginning with *Furman v. Georgia*, the Court's 1972 decision that shaped the Eighth Amendment constitutional limitations on capital punishment to the present day.³¹ Second, Part III will examine the recent history of Supreme Court Sixth Amendment sentencing decisions to the extent that they pertain to the Court's decision in *Ring*. Third, Parts IV and V will scrutinize the *Ring* decision itself. Finally, Part VI will address the impact of the *Ring* decision on states that currently dispense capital punishment in a manner similar to that previously employed by Arizona.

II. QUALIFIED TO DIE? THE MODERN HISTORY OF EIGHTH AMENDMENT CAPITAL PUNISHMENT JURISPRUDENCE

The modern history of the American death penalty begins in 1972 with the Supreme Court's decision in *Furman v. Georgia*, which drastically altered the constitutional landscape for capital punishment.³² In *Furman*, the Court refused to find capital punishment *per se* unconstitutional under the Eighth Amendment.³³ The Court, in a brief but cryptic five-to-four opinion in which each justice wrote separately with none of the justices joining each

schemes in Arizona, Colorado, Idaho, Montana, and Nebraska while also casting doubt upon those in Alabama, Delaware, Florida, and Indiana). In addition, the Nevada Supreme Court subsequently recognized *Ring's* effect on Nevada's death penalty eligibility procedure. See *Johnson*, 59 P.3d at 460-63 (striking down portions of Nevada's scheme in light of *Ring*); *accord Whitfield*, 107 S.W.3d at 253 (confirming that *Ring* rendered part of Missouri's capital sentencing scheme unconstitutional). For a more comprehensive discussion of states affected by *Ring*, see *supra* note 27 and *infra* Part VI.

29. As of August 1, 2003, courts had decided more than 300 cases involving *Ring*-based issues both in state and federal courts. See, e.g., *United States v. Regan*, 221 F. Supp. 2d 672 (E.D. Va. 2002) (finding the Federal Death Penalty Act consistent with *Ring*); *Jones*, 49 P.3d 273 (Ariz. 2002) (recognizing *Ring's* impact on Arizona's capital sentencing procedure); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (upholding Florida's scheme); *Jones v. State*, 780 N.E.2d 373 (Ind. 2002) (finding *Ring* requirements fulfilled); *Johnson*, 59 P.3d at 450 (striking down portions of Nevada's scheme in light of *Ring*).

30. See *supra* notes 28-29.

31. See *Furman v. Georgia*, 408 U.S. 238 (1972); Captain Michael E. Pfau & Captain Eugene R. Milhizer, *The Military Death Penalty and the Constitution: There is Life After Furman*, 97 MIL. L. REV. 35 (1982).

32. See *Furman*, 408 U.S. 238. The Court's *Furman* decision invalidated nearly every capital sentencing scheme in the United States. John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 643, 645 (1990).

33. See *Furman*, 408 U.S. 238; Poulos, *supra* note 32, at 645.

other's opinion, ruled that capital punishment was unconstitutional as applied in the cases before it.³⁴ The *Furman* Court sent the message to states wishing to continue dispensation of capital punishment that "unfettered capital sentencing discretion violates the cruel and unusual punishment clause of the [E]ighth [A]mendment."³⁵ This message sent a shockwave through the legal community because it meant that most states' capital sentencing statutes applied death in an unconstitutional manner,³⁶ and that in the eyes of the Supreme Court, death is different than other forms of punishment.³⁷

The "death is different" doctrine arose out of *Furman* when Justice Stewart, in one of the nine separate opinions, wrote:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.³⁸

The philosophy that "death is different" has proved an omnipresent theme in capital punishment jurisprudence in the thirty years following *Furman*.³⁹ Because capital punishment is unlike any other in the American criminal justice system, the Eighth Amendment entitles a capital defendant to certain procedural safeguards.⁴⁰ However, *Furman* failed to specifically outline the

34. *Furman*, 408 U.S. at 239-40; David Dolinko, *Foreword: How to Criticize the Death Penalty*, 77 J. CRIM. L. & CRIMINOLOGY 546, 548 n.9 (1986).

35. Poulos, *supra* note 32, at 645. See *Furman*, 408 U.S. 238.

36. See Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1056 (1991) (stating that in the years immediately following *Furman*, thirty-five of the thirty-nine death penalty states enacted new capital sentencing statutes in reaction to *Furman*).

37. *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

38. *Id.* (Stewart, J., concurring).

39. Numerous decisions and commentators have reiterated that "death is different" in sustaining that philosophy. See, e.g., *Sattazahn v. Pennsylvania*, 537 U.S. 101, 127 (2003) (Ginsburg, J., dissenting) ("[D]eath is indeed a penalty 'different' from all others."); *Streetman v. Lynaugh*, 484 U.S. 992, 996 (1988) (Brennan, Marshall, JJ., dissenting) ("Death is certainly different . . ."); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) ("[D]eath is a punishment different from all other sanctions in kind rather than degree."); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (noting that *Furman* recognized death is different); American Bar Association Criminal Justice Section, *Report to the House of Delegates*, 40 AM. U. L. REV. 9, 28 (1990) ("[D]eath is different from all other criminal penalties."); Daniel Ross Harris, *Capital Sentencing After Walton v. Arizona: A Retreat From the "Death is Different" Doctrine*, 40 AM. U. L. REV. 1389 (1991); David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735, 783-86, 790-92 (1994) (recognizing the "death is different" philosophy in *Furman* and numerous subsequent decisions).

40. William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat From its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737, 738 (1985) (stating that the Court required "super due process" in death penalty cases because death "is qualitatively different"); see *Furman*, 408 U.S. at 283-91 (Brennan, J., concurring) (discussing the heightened due process requirements for capital punishment implicit in the Bill of Rights).

exact safeguards necessary to rectify the constitutional failings announced in that decision.⁴¹

The *Furman* Court seemed to hold that in order for the death penalty to pass constitutional muster, it must not be “so wantonly and so freakishly imposed” as it had been in the past.⁴² Rather, the defendant is entitled to freedom from arbitrary or discriminatory application of a punishment so unique that when imposed without the proper safeguards,⁴³ it becomes “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”⁴⁴

States responded to *Furman* with newly drafted death penalty statutes.⁴⁵ These new statutes then faced the scrutiny of the Supreme Court.⁴⁶ In those challenges the Court upheld certain schemes and struck down others, providing the states with both a model of how they may proceed and an example of the manner in which the Constitution prohibits them from meting out capital punishment.⁴⁷ *Gregg v. Georgia* clarified *Furman* with the mandate that “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”⁴⁸ The *Gregg* Court found Georgia’s new capital sentencing scheme constitutional.⁴⁹

The *Gregg* Court characterized the Georgia scheme as a bifurcated trial, with the first phase conducted to determine guilt and the second devoted to sentencing.⁵⁰ In the penalty phase, the Georgia scheme provided for sentencing discretion in the form of certain statutory “aggravating circumstances,” which served to guide the sentencing authority by

41. The Court’s *Furman* decision focused primarily on the infirmities of the statutes challenged in that case rather than on the probable remedies necessitated by the decision. See, e.g., *Furman*, 408 U.S. at 257 (Douglas, J., concurring); William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1067-68 (1983).

42. *Furman*, 408 U.S. at 310 (White, J., concurring).

43. *Id.* at 242-43 (Douglas, J., concurring)

44. *Id.* at 309 (Stewart, J., concurring).

45. Higginbotham, *supra* note 36, at 1056.

46. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia’s bifurcated proceeding providing for guided discretion and automatic judicial review); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding mandatory death statutes unconstitutional).

47. See *Gregg*, 428 U.S. at 153-54 (upholding Georgia’s bifurcated proceeding providing for guided discretion and automatic judicial review); *Woodson*, 428 U.S. at 280 (finding that statutes providing for mandatory imposition of the death penalty for certain crimes are unconstitutional).

48. *Gregg*, 428 U.S. at 189.

49. *Id.* at 207; see also Catherine Hancock, *The Perils of Calibrating the Death Penalty Through Special Definitions of Murder*, 53 TUL. L. REV. 828, 829-30 (1979) (noting that while the Supreme Court struck down mandatory death penalty statutes, “the same plurality . . . found the ‘guided discretion’ schemes of Georgia, Florida, and Texas to possess sufficient guidance and individualization to avoid the constitutional failing of arbitrariness”).

50. *Gregg*, 428 U.S. at 193-98.

characterizing certain circumstances of either the crime or the defendant's character as particularly worthy of a death sentence.⁵¹ Once the Court reached this decision, the Georgia scheme, as endorsed by *Gregg*, became the model for the statutory schemes of other states.⁵²

The Court further clarified *Gregg* in *Proffitt v. Florida*.⁵³ There, the Court found the Florida capital sentencing scheme, which was similar to Georgia's system, constitutional in how it dispensed capital punishment.⁵⁴ The Florida scheme used the same type of bifurcated proceeding as in *Gregg*, where the jury considered whether certain aggravating circumstances existed, and then weighed those against any mitigating factors to determine whether to sentence the defendant to life in prison or to death.⁵⁵ The primary difference between the Georgia and Florida statutes was the allocation of authority to actually impose a sentence of death.⁵⁶ The Georgia scheme allotted sentencing authority to the jury, whereas in Florida, the jury's verdict as to life or death was merely advisory.⁵⁷ Once the Florida jury reached its verdict by a majority vote, the judge was then free to follow the jury's recommendation or to override it and sentence the defendant as he or she saw fit.⁵⁸ The Court upheld this system, stating that while "jury sentencing in a capital case can perform an important societal function . . . [this Court] has never suggested that jury sentencing is constitutionally required."⁵⁹

The Court elaborated on the *Proffitt* holding in *Spaziano v. Florida*,⁶⁰ another challenge to the Florida capital sentencing statute.⁶¹ *Spaziano* dealt with an Eighth Amendment challenge to a death sentence imposed over the jury's recommendation of life imprisonment based on the claim that the Constitution entitled a defendant to jury sentencing in capital cases.⁶² Because neither the Eighth nor the Sixth Amendment requires jury sentencing, and because neither fairness nor reliability in capital cases necessitates it, the *Spaziano* Court refused to conclude "that placing

51. *Id.* at 196-98.

52. Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE* 81, 81-113 (Austin Sarat ed., 1999). Following Georgia's lead, all of the thirty-eight death penalty states now employ aggravating factors in some form in order to guide the discretion of the sentencing authority. See *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002).

53. 428 U.S. 242 (1976).

54. *Id.* at 242; see also Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 40 n.56 (1985).

55. *Proffitt*, 428 U.S. at 248-50.

56. Compare the Florida scheme described in *Proffitt*, 428 U.S. at 249-53, to that of Georgia as depicted in *Gregg*, 428 U.S. at 193-98.

57. *Proffitt*, 428 U.S. at 252.

58. *Id.* at 249.

59. *Id.* at 252 (citation omitted).

60. 468 U.S. 447 (1984).

61. *Id.* at 449.

62. *Id.* at 449-54.

responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.”⁶³

In his dissent, Justice Stevens challenged the notion that capital sentencing does not require jury sentencing.⁶⁴ Justice Stevens pointed out that Florida’s scheme turned a death penalty trial into a “trifurcated” proceeding, in which the jury first decided guilt, then rendered an advisory verdict, but the judge then imposed the actual sentence.⁶⁵ Justice Stevens then stated that the Court left the constitutionality of Florida’s “trifurcated” sentencing procedure an open question.⁶⁶ Justice Stevens further argued that the link between community standards and the imposition of the death penalty is ingrained in the history of capital punishment, and that the jury’s function accordingly legitimizes capital punishment.⁶⁷

The issue of the capital jury’s role faced yet another challenge in 1989 when a defendant attacked Florida’s capital sentencing scheme in *Hildwin v. Florida*.⁶⁸ In *Hildwin*, a jury found the defendant guilty of first-degree murder and returned a unanimous advisory verdict in support of the death penalty.⁶⁹ The judge then sentenced the defendant to death providing written findings of four statutory aggravating factors.⁷⁰ In a per curiam opinion, the Supreme Court held that the Sixth Amendment allows the judge to make the “written findings [of aggravating factors] that authorize imposition of a death sentence when the jury unanimously recommends a death sentence.”⁷¹

In 1990, the focus shifted to Arizona when the Supreme Court addressed that state’s capital sentencing scheme, a system in which the jury rendered a verdict of guilt, and the judge made the findings of aggravating factors and mitigating circumstances leading to imposition of either a sentence of life

63. *Id.* at 464; Cynthia M. McKnight, *Right to Jury Trial*, 82 GEO. L.J. 1033, 1035-36 (1994) (arguing that *Spaziano* stood for the proposition that “the right to a jury trial does not extend to sentencing determinations”); Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 1-2 (1989) (noting that according to *Spaziano*, a judge may constitutionally “make the sentencing decision in capital cases”).

64. *Spaziano*, 468 U.S. at 467 (Stevens, J., dissenting).

65. *Id.* at 470-71.

66. *Id.* at 470 n.4.

67. *Id.* at 483-85.

68. 490 U.S. 638 (1989) (per curiam).

69. *Id.* at 638-39.

70. *Id.*

71. *Id.* at 640; see also White, *supra* note 63, at 1-2 (noting that *Hildwin* affirmed *Spaziano*’s holding that the Constitution permits a judge to make sentencing determinations in capital cases); Jodi L. Short & Mark D. Spoto, *Capital Punishment*, 82 GEO. L.J. 1199, 1206 (1994) (“Some states require that the sentencer ‘weigh’ the aggravating circumstances against the mitigating circumstances. Others merely require that the sentencer find a proper aggravating circumstance and then, in determining whether the death penalty should be applied, consider all circumstances before it.”).

imprisonment or death.⁷² In that case, *Walton v. Arizona*, the Court tackled precisely the same issue that it would address in *Ring v. Arizona* in 2002.⁷³ The Court granted certiorari in *Walton* to resolve the issue of judicial fact-finding in capital sentencing addressed by the Ninth Circuit's decision in *Adamson v. Ricketts*,⁷⁴ in which that court found the Arizona death penalty statute unconstitutional.⁷⁵ The Arizona statute in question directed the judge to conduct a separate sentencing hearing at which he or she determined the existence of any aggravating or mitigating circumstances and weighed those found in order to determine whether the crime warranted a sentence of life imprisonment or death.⁷⁶

The Supreme Court's majority opinion in *Walton* recognized the similarities between the Florida and Arizona schemes, relying heavily on their earlier decisions in *Spaziano*, *Proffitt*, and *Hildwin*.⁷⁷ The Court rejected the contention that in the Arizona scheme, the aggravating factors acted as "elements of the offense" rather than sentencing factors, calling the factors "standards" meant to guide the decision between life and death.⁷⁸ The Court reasoned that "the judge's finding of any particular aggravating circumstance does not in and of itself 'convict' a defendant (*i.e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (*i.e.*, preclude the death penalty)."⁷⁹ Finally, the Court concluded that a State is not "required to denominate aggravating circumstances 'elements' of the offense or permit

72. See *Walton v. Arizona*, 497 U.S. 639 (1990).

73. Compare *Walton*, 497 U.S. at 639 (dealing specifically with the constitutionality of the Arizona scheme under which a trial judge made all findings of aggravation in order to make the sentencing decisions), with *Ring*, 536 U.S. at 609 (overturning *Walton*'s holding that such a scheme was constitutional stating, "[w]e overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty").

74. 865 F.2d 1011 (9th Cir. 1988). The court in *Adamson* concluded that under the Arizona scheme aggravating factors operated as elements of capital murder rather than simply as sentencing factors and therefore the Sixth Amendment entitled the defendant to a jury determination of their existence. *Id.* at 1029-31. At least one commentator recognized the Ninth Circuit's rationale in *Adamson* as a valid constitutional doctrine because it defended the accused's Sixth Amendment right to a jury trial. See Poulos, *supra* note 32, at 669. Poulos recognized that:

The sixth amendment would fail to cabin legislative choices if a legislature could control the jury trial right by simply designating that the court rather than a jury try a particular issue. There is no reason to permit a legislature to achieve this same result by allocating the litigation of an issue to a portion of the capital trial in which a jury is not required. A rule permitting such a result would wholly fail to serve the purpose for including the right to trial by jury in the sixth amendment.

Id.

75. *Walton*, 497 U.S. at 647; *Adamson v. Ricketts*, 865 F.2d 1011, 1043-45 (9th Cir. 1988).

76. ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 2002) (instructing the court on the matter of judicial fact-finding and sentencing in subsection (B) and defining aggravating and mitigating circumstances in subsections (F) and (G) respectively). The statute further provided that the prosecution shouldered the burden of proof for aggravating circumstances while the burden of proving mitigating factors was borne by the defendant. *Id.*

77. See *Walton*, 497 U.S. at 647-49.

78. *Id.* at 648.

79. *Id.* (quoting *Poland v. Arizona*, 476 U.S. 147, 156 (1986) (citation omitted)).

only a jury to determine the existence of such circumstances.”⁸⁰ Thus, *Walton* stood for the proposition that it is constitutionally permissible to allow a judge alone to hear evidence and make the life or death decision.⁸¹

Justice Stevens remained convinced that the Sixth Amendment required otherwise.⁸² In dissent, Justice Stevens maintained that both of the aggravating factors found in *Walton* concerned the offense and not the offender, casting a specter of elements rather than sentencing factors.⁸³ Further, the aggravating factors acted as elements because in their absence the defendant could not be subject to a death sentence.⁸⁴ Only through a finding of one or more aggravating factors could a defendant become eligible for a death sentence; the penalty was unavailable without them.⁸⁵

Justice Stevens expressed a belief that where factors exposed a criminal defendant to a punishment that he could not have faced in their absence, the Sixth Amendment requires that a jury determine the existence of those factors.⁸⁶ Justice Stevens’ language would reappear frequently throughout the next decade in the Court’s Sixth Amendment jurisprudence in the context of criminal sentencing procedure, finally coming to a crest in *Apprendi* and *Ring*.⁸⁷

III. AT THE CROSSROADS OF DEATH: THE MODERN DEVELOPMENT OF SIXTH AMENDMENT SENTENCING JURISPRUDENCE

At the same time that the Court addressed the role of the jury in capital sentencing, it also considered that role in the context of lesser felonious offenses.⁸⁸ Many of these cases, decided from the 1980s to the 1990s, provided guidance for the Court’s decision to overturn *Walton*.⁸⁹

80. *Id.* at 649.

81. Earl Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 84 n.1 (1997).

82. *Walton*, 497 U.S. at 709 (Stevens, J., dissenting).

83. *Id.* at 710 n.2.

84. *Id.* at 709-10.

85. *Id.* at 709.

86. *Id.* at 709-10.

87. *See, e.g., Ring*, 536 U.S. at 609 (2002) (“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.”) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2002)); *Apprendi*, 530 U.S. at 490 (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”); *Jones v. United States*, 526 U.S. 227, 253 (1999) (Scalia, J., concurring) (“I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.”); *Almendarez-Torres v. United States*, 523 U.S. 224, 241 (1998) (suggesting that the Constitution *may* require that most sentencing factors be treated as elements).

88. *See, e.g., Apprendi*, 530 U.S. at 490 (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”); *Jones*, 526 U.S. at 252 (stating that any factor that

A. *Mullaney v. Wilbur*⁹⁰

In 1975, the Court addressed due process in the context of sentencing in a challenge to Maine's homicide statute.⁹¹ The Court recognized a hierarchy in homicide cases based upon the "degree of criminal culpability[.]" which inevitably leads to a stratified sentencing scheme where those who are less blameworthy receive less severe penalties.⁹² The Court also recognized that the state statutory definitions of "[sentencing] factors" and "elements of the crime" necessary to reach particular sentencing levels were not necessarily dispositive in determining how each actually functioned.⁹³ The majority noted that if the statutory construction were dispositive, a State might circumvent due process by defining elements that constitute different crimes as factors that bore only on the "extent of punishment[.]" thus removing the reasonable doubt standard.⁹⁴

B. *Patterson v. New York*⁹⁵

In 1977, the Court once again addressed the issue of due process in criminal sentencing in *Patterson v. New York*, a case that served as an integral part of the Court's decisions in *Apprendi* and *Ring*.⁹⁶ *Patterson* seemed to limit *Mullaney* when the Court refused to allocate the burden of disproving any affirmative defenses to the State, rather providing that once the State proved the basic elements of the crime beyond a reasonable doubt, the burden shifted to the defendant to prove any affirmative defenses.⁹⁷ The

subjects the defendant to a more serious level of sentencing must be found by a jury beyond a reasonable doubt); *Almendarez-Torres*, 523 U.S. at 247 (holding that recidivism, a classic sentencing enhancement, need not be found by a jury); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (addressing factors that triggered imposition of a mandatory minimum *within the prescribed sentencing range* allowed by the *jury's* finding); *Patterson v. New York*, 432 U.S. 197 (1977) (allocating the burden of proof for affirmative defenses to the defendant once the State had proven the requisite elements of the offense); *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (addressing the functional operation of 'elements' versus 'sentencing factors' in Maine's murder statute in determining that the definition of each was not necessarily dispositive).

89. See, e.g., *Apprendi*, 530 U.S. at 466; *Jones*, 526 U.S. at 227. *Ring* extended the general rule from *Jones* and *Apprendi* to capital cases when the Court stated that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Ring*, 536 U.S. at 609.

90. 421 U.S. 684 (1975).

91. See *Mullaney*, 421 U.S. at 684-85.

92. *Id.* at 697-98.

93. *Id.* at 698-99. See generally Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983) (providing definitional analysis with respect to the Model Penal Code).

94. *Mullaney*, 421 U.S. at 698.

95. 432 U.S. 197 (1977).

96. See *Patterson*, 432 U.S. at 197. The Court's decision in *Apprendi* stated that "*Patterson* made clear that the state law still required the State to prove every element of that State's offense of murder and its accompanying punishment." *Apprendi v. New Jersey*, 530 U.S. 466, 485 n.12 (2000).

97. See *Patterson*, 432 U.S. at 207-210; see also Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY, 421, 423 n.18 (1982).

Patterson Court further limited *Mullaney* by instructing that the *Mullaney* holding did not require that the prosecution “prove beyond a reasonable doubt any fact affecting ‘the degree of criminal culpability.’”⁹⁸ The Court acknowledged certain constitutional limitations to the doctrine announced in *Patterson*, noting that States were still bound to their constitutional burden to prove guilt in order to overcome a presumption of evidence.⁹⁹

C. *McMillan v. Pennsylvania*¹⁰⁰

In 1986, the Court directly addressed the issue of sentencing as it pertained to the Sixth Amendment in *McMillan v. Pennsylvania*.¹⁰¹ In *McMillan*, the Court addressed a statute mandating that a defendant convicted of certain felonies was subject to “a mandatory minimum sentence of five years’ imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person ‘visibly possessed a firearm’ during the commission of the offense.”¹⁰² The Court relied on *Patterson* rather than *Mullaney* in deciding that the express definition of visible possession of a firearm as a sentencing factor rather than an element, was dispositive and within the constitutional limits of *Patterson*.¹⁰³ The Court in *McMillan* did recognize that the Pennsylvania statute raised the ante on a criminal defendant, but stated that it did so in an acceptable manner, by imposing a minimum sentence allowable by the trial court.¹⁰⁴ The Court cited *Spaziano*, and in two brief sentences tersely disregarded the defendant’s contention that he was entitled to have a jury determine any

98. *Patterson*, 432 U.S. at 214 n.15.

99. *Id.* at 210; *see also* *Speiser v. Randall*, 357 U.S. 513, 523-25 (1958) (“It is of course within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, ‘unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))); *Tot v. United States*, 319 U.S. 463, 469 (1943) (“[T]he legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.”); *McFarland v. Am. Sugar Ref. Co.*, 241 U.S. 79, 86 (1916) (stating that “it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime”).

100. 477 U.S. 79 (1986).

101. *McMillan*, 477 U.S. at 79.

102. *Id.* at 81 (citing 42 PA. CONS. STAT. § 9712 (1982)). The statute in question was the Pennsylvania Mandatory Minimum Sentencing Act of 1982 requiring consideration of the defendant’s visible possession of a firearm after conviction for third degree murder, voluntary manslaughter, rape, involuntary deviate sexual intercourse, certain types of robbery, aggravated assault, or kidnapping or the attempt to commit any of the above offenses. *See* 42 PA. CONS. STAT. § 9712 (1982). The statute specifically stated in subsection (b) that the provisions of the law should not be treated as elements of the crimes themselves, but rather as sentencing factors. *Id.*

103. *McMillan*, 477 U.S. at 85-86; *see also* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 77 n.70 (1993) (recognizing the Court’s finding that the Pennsylvania statute was constitutional).

104. *McMillan*, 477 U.S. at 89.

facts bearing on the offense committed and on the possible sentencing range “even where the sentence turns on specific findings of fact.”¹⁰⁵

Justice Stevens continued his pattern of unyielding dissent in this line of Sixth Amendment cases.¹⁰⁶ Justice Stevens’ primary argument was that no matter how Pennsylvania chose to define the act of visibly possessing a firearm during the commission of an enumerated felony, the penal consequences of that possession acted like an element of the crime and should be treated as such, subject to the requirements of the Sixth Amendment.¹⁰⁷ Justice Stevens astutely pointed out that the finding of visible possession of a firearm subjected a convicted defendant to an automatic increase in his sentence to a penalty “twice as severe as . . . the trial judge considered appropriate.”¹⁰⁸

D. *The Sixth Amendment in Motion: Almendarez-Torres v. United States*¹⁰⁹

In 1998, the Court once again confronted the issue of sentencing factors as opposed to elements of the offense subject to Sixth Amendment protection.¹¹⁰ *Almendarez-Torres v. United States* began a line of Sixth Amendment sentencing cases, which would culminate two years later in the *Apprendi* ruling.¹¹¹ Each of the following three cases, *Almendarez-Torres*, *Jones*, and *Apprendi*, would prove instrumental in the Court’s decision in *Ring*.¹¹² *Almendarez-Torres* dealt with a challenge to a federal statute, which prohibited an alien who was once deported from returning to the United States and provided that such an offender would be subject to a prison term of up to two years.¹¹³ The subsequent section of 8 U.S.C. § 1326 further provided for a prison term of up to 20 years for “any alien described” by subsection (a) if the initial “removal was subsequent to a conviction for

105. *Id.* at 93 (citing *Spaziano v. Florida*, 468 U.S. 447, 459 (1984)).

106. *Id.* at 95 (Stevens, J., dissenting).

107. *Id.*

108. *Id.* at 103.

109. 523 U.S. 224 (1998).

110. *Almendarez-Torres*, 523 U.S. at 224.

111. *See id.*; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (stating that any fact, other than that of a prior conviction, “that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”); *Jones v. United States*, 526 U.S. 227, 232 (1999) (“Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.”); *see also* Laurence A. Benner, et al., *Criminal Justice in the Supreme Court: A Review of United States Supreme Court Criminal and Habeas Corpus Decisions (October 4, 1999 - October 1, 2000)*, 37 CAL. W. L. REV. 239 (2001).

112. The *Ring* Court distinguished its holding in *Almendarez-Torres* and maintained the exception that prior convictions may still enhance a defendant’s sentence. *Ring v. Arizona*, 536 U.S. 584, 597 (2002). The *Ring* Court specifically employed the rule from *Jones* and *Apprendi* in deciding that a jury must find aggravating factors necessary to subject the defendant to a capital sentence. *Id.* at 600-09.

113. The statute challenged in *Almendarez-Torres* was 8 U.S.C. § 1326 (1997). *Almendarez-Torres*, 523 U.S. at 226-27.

commission of an aggravated felony.”¹¹⁴ A defendant to whom a court had applied this section after his guilty plea to subsection (a) specifically challenged the statute.¹¹⁵

The Court conceded that the language of *Mullaney* suggested that a judge may not increase a convicted defendant’s sentence “in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt.”¹¹⁶ However, the majority used *Patterson* to enervate *Mullaney*’s holding as it pertained to the issue in *Almendarez-Torres*.¹¹⁷ The Court specifically stated that *Patterson* suggested that the “Constitution requires scarcely any sentencing factors to be treated [as elements of the crime].”¹¹⁸ The Court then reiterated its holding from *Patterson* that “the state legislature’s definition of the elements of the offense is usually dispositive[,]” thereby suggesting that the legislature’s definition of sentencing factors was also dispositive.¹¹⁹

The *Almendarez-Torres* majority recognized the distinction between *McMillan* and the instant case; that here the statute did “alter the maximum penalty for the crime[,]” whereas in *McMillan* the statute merely prescribed a mandatory minimum.¹²⁰ The majority pointed out that the imposition of a mandatory minimum sentence “is no less, and may well be greater . . . than a permissive maximum . . .”¹²¹ Further relying on *McMillan*, the Court concluded that Congress possessed the power to treat a prior conviction for an aggravated felony as a sentencing factor in the framework of illegal entry after deportation.¹²² The Court also noted that a contrary rule would undermine its decisions in *Hildwin*, *Spaziano*, and *Walton*, thereby recognizing the link between the Court’s rule that a capital defendant lacked the right to jury determination of factors making that defendant eligible for the death penalty and the current line of Sixth Amendment sentencing cases for non-capital offenses.¹²³

114. 8 U.S.C. § 1326(b)(2) (1997).

115. *Almendarez-Torres*, 523 U.S. at 226-27.

116. *Id.* at 240.

117. *Id.* at 240-41; see Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 400-02 (2002); Andrew M. Levine, *The Confounding Boundaries of “Apprendi-land”: Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 393-96 (2002).

118. *Almendarez-Torres*, 523 U.S. at 241.

119. *Id.* at 242 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (citing *Patterson v. New York*, 432 U.S. 197, 210 (1977))).

120. *Id.* at 243 (quoting *McMillan*, 477 U.S. at 87).

121. *Id.* at 245.

122. *Id.* at 246. The Court discussed the historical background of criminal law in concluding that prior convictions operate as sentencing factors because “recidivism . . . is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence[,]” adding that a prior criminal history is not part of the offense itself but rather the product of previous judicial proceedings that provided the requisite procedural protections of the Constitution. Huigens, *supra* note 117, at 403-04 (quoting *Almendarez-Torres*, 523 U.S. at 243).

123. See *Almendarez-Torres*, 523 U.S. at 247.

The majority's decision and rationale in *Almendarez-Torres* provoked a caustic dissent from Justice Scalia.¹²⁴ The dissent first framed the issue facing the Court as a question of "whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as an element of that crime—to be charged in the indictment, and found beyond a reasonable doubt by a jury."¹²⁵ Justice Scalia then based his analysis on the Court's rule that, "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'"¹²⁶

Justice Scalia vigorously argued that the issue at hand was indeed a muddy one and that the above proposition should control.¹²⁷ His dissent drew support from the Court's holdings in *Mullaney*, and to some extent *McMillan*.¹²⁸ Justice Scalia argued that the majority in *McMillan*, of which he was a part, specifically limited that decision to situations in which only a mandatory minimum sentence was at issue, while it emphasized repeatedly that no increase in the maximum sentence was at issue.¹²⁹ The dissent then harshly criticized the majority for its position that an increase in the permissible maximum was more advantageous to the defendant than the imposition of an increased mandatory minimum, on the basis that *McMillan* soundly rejected such an argument.¹³⁰ In addition, Justice Scalia's dissent characterized the majority's holding as repeatedly stressing its limitation to the particular sentencing factor of recidivism, rather than applying that rule to sentencing factors in general.¹³¹

E. *A Head of Steam*: *Jones v. United States*¹³²

The tide turned for the Court's Sixth Amendment sentencing jurisprudence one year after *Almendarez-Torres*, when the Court addressed a challenge to a federal carjacking statute in *Jones v. United States*.¹³³ In *Jones*, the defendant was indicted under 18 U.S.C. § 2119, which provided in essence that any person possessing a firearm who takes or attempts to take a motor vehicle from an individual "by force and violence or by

124. *Id.* at 248 (Scalia, J., dissenting).

125. *Id.* at 248.

126. *Id.* at 250 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

127. *Almendarez-Torres*, 523 U.S. at 250 (Scalia, J., dissenting).

128. *Id.* at 252, 257-58 (recognizing that *Mullaney's* limitations exist on legislatures' ability to label elements of crimes and stating that *McMillan* rejected the argument that an increase in the allowable maximum was more advantageous to an accused than a mandatory minimum).

129. *Id.* at 253 ("Pennsylvania's law did not transgress [the constitutional limitations of *Patterson*] primarily because it 'neither alter[ed] the maximum penalty for the crime committed nor create[d] a separate offense . . .'" (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986)).

130. *Almendarez-Torres*, 523 U.S. at 254 (Scalia, J., dissenting).

131. *Id.* at 257-58.

132. 526 U.S. 227 (1999).

133. *See Jones*, 526 U.S. at 227.

intimidation,” shall be fined or imprisoned not more than fifteen years.¹³⁴ Subsection (2) of the statute provided that the possible maximum penalty increased to twenty-five years if serious bodily injury resulted, and subsection (3) further increased the possible maximum to life in the case that death resulted.¹³⁵ The indictment failed to mention any of the subsections, nor did it charge any facts that would prove application thereof.¹³⁶

In addition, the trial judge informed the defendant that the maximum penalty was fifteen years, and the jury instructions contained only reference to the first paragraph, omitting any mention of serious bodily injury or death.¹³⁷ After the jury found the defendant guilty of the charged offense, the court held a sentencing hearing at which the pre-sentence report recommended a twenty-five-year sentence under subsection (2) because serious bodily injury resulted to the victim.¹³⁸ Over the defendant’s objections, the trial judge imposed a twenty-five-year sentence, and the Court of Appeals affirmed based on its reading of the statute as not setting out elements of separate crimes, but rather sentencing guidelines.¹³⁹

Because “[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt,” *Jones* necessitated a determination of whether the second two subsections of 18 U.S.C. § 2119 served as elements or sentencing factors, despite the fact that they appeared to operate as the latter.¹⁴⁰ The Court struggled with two possible interpretations of the statute: first, that Congress intended serious bodily injury as an element of an aggravated offense punishable by up to twenty-five years imprisonment; and second, that Congress intended serious bodily injury simply as a sentencing enhancement.¹⁴¹ The majority opinion relied on the very language utilized by the dissent in *Almendarez-Torres*, that ““where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.””¹⁴²

The Court then issued a paragraph that would open the door for its future Sixth Amendment jurisprudence, predictive of its decisions in

134. *Id.* at 230 (quoting 18 U.S.C. § 2119 (1998)).

135. 18 U.S.C. § 2119 (1998).

136. *Jones*, 526 U.S. at 230-31.

137. *Id.* at 231.

138. *Id.*

139. *Id.* at 231-32.

140. *Id.* at 232.

141. *See Jones*, 526 U.S. at 239.

142. *Id.* at 239 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)); *see also Almendarez-Torres*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting).

Apprendi and *Ring*.¹⁴³ The Court recognized the “grave and doubtful constitutional question”¹⁴⁴ raised by 18 U.S.C. § 2119 in stating:

[i]f serious bodily injury were merely a sentencing factor under § 2119(2) (increasing the authorized penalty by two thirds, to 25 years), then death would presumably be nothing more than a sentencing factor under subsection (3) (increasing the penalty range to life). If a potential penalty might rise from 15 years to life on a nonjury determination, the jury’s role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment. It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury’s function to a point against which a line must necessarily be drawn.¹⁴⁵

Jones announced the rule that under the Fifth and Sixth Amendments “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.”¹⁴⁶ In announcing that rule, the Court expressly distinguished, and thereby limited, its holding in *Almendarez-Torres* by pointing out that recidivism need not be charged and proved to a jury in order for the prior offense to operate as a sentencing enhancement.¹⁴⁷ In fact, the Court explicitly stated:

The Court’s repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.¹⁴⁸

143. See Benjamin J. Priester, *Constitutional Formalism and the Meaning of Apprendi v. New Jersey*, 38 AM. CRIM. L. REV. 281, 281-84 (2001) (asserting that *Apprendi* would likely “have a significant impact on the administration of criminal justice in federal and state courts”).

144. *Delaware & Hudson Co.*, 213 U.S. at 408.

145. *Jones*, 526 U.S. at 239, 243-44.

146. *Id.* at 243 n.6.

147. See *id.* at 248-49 (stating that “a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees”).

148. *Id.* at 249 (citations omitted).

The implications of the *Jones* holding, specifically the above statement, would prove wide reaching in the next three years of Sixth Amendment jurisprudence as these words opened the door through which *Apprendi* and *Ring* entered, a fact astutely recognized by the dissent written by Justice Kennedy and joined by Justices O'Connor, Rehnquist, and Breyer.¹⁴⁹ At the conclusion of the majority's opinion, the Court recognized and distinguished its previous decisions in *Spaziano*, *Hildwin*, and *Walton*.¹⁵⁰ In fact, the concurrence of Justice Stevens unequivocally acknowledged that the *Jones* decision placed *Walton* in jeopardy.¹⁵¹

F. Collision Course: *Apprendi v. New Jersey*¹⁵²

1. The Majority Sets the Stage for *Ring*

In 2000, the seminal case in establishing the necessary precedent for overturning Arizona's capital sentencing scheme strode through that door opened by *Jones* in the form of *Apprendi v. New Jersey*.¹⁵³ In *Apprendi*, the defendant challenged a New Jersey sentencing enhancement scheme on Sixth Amendment grounds.¹⁵⁴ The statute allowed for between five and ten years imprisonment for possessing a firearm for an unlawful purpose.¹⁵⁵ A separate statute (dealing with hate crimes) provided for an extended term of ten to twenty years in the case that a judge finds, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."¹⁵⁶

149. See *id.* at 254 (Kennedy, J., dissenting) ("[T]he Court's sweeping constitutional discussion casts doubt on sentencing practices and assumptions followed not only in the federal system but also in many States."); Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania*, 22 SEATTLE U. L. REV. 1057, 1112-18 (1999) (recognizing that *Jones* simply created an environment for further debate).

150. *Jones*, 526 U.S. at 250-51. The Court stated that *Spaziano* did not address the issue presented in *Jones* because *Spaziano* dealt with jury sentencing in capital cases, not the specific fact-finding necessary for imposition of a particular sentencing range. *Id.* at 250. The Court added that one could not construe *Hildwin* to control the issue because the jury in *Hildwin* recommended death, thus demonstrating the jury's engagement in the "factfinding required for imposition of a higher sentence." *Id.* at 250-51.

151. *Id.* at 253 (Stevens, J., concurring) (stating that *Walton* should be reconsidered "in due course").

152. 530 U.S. 466 (2000).

153. See *Apprendi*, 530 U.S. 466. The Court expressly based *Ring* on the rule of *Apprendi* that defendants are entitled to "a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

154. See generally *Apprendi*, 530 U.S. at 466.

155. *Id.* at 468-69 (citing N.J. STAT. ANN. §§ 2C: 39-4(a) and 43-6(a)(2) (West 1995)).

156. *Apprendi*, 530 U.S. at 468-69 (quoting N.J. STAT. ANN. § 2C: 44-3(e) and 43-7(a)(3) (West Supp. 1999-2000)).

The defendant pled guilty pursuant to a plea-agreement and faced a maximum of twenty years increased to a maximum of thirty years should the judge apply the enhancement.¹⁵⁷ The judge applied the enhancement based on the hate crime statute and sentenced the defendant to twelve years, a sentence that the defendant challenged, claiming that the enhancement was an element of the offense, thus requiring proof to a jury beyond a reasonable doubt.¹⁵⁸ Relying on *McMillan* and *Almendarez-Torres*, The New Jersey Supreme Court affirmed.¹⁵⁹ The Supreme Court decision that would follow “will surely be remembered as a watershed change in constitutional law,” as it imposed “as a constitutional rule the principle it first identified in *Jones*.”¹⁶⁰ The Court’s decision less than two years later in *Ring* would confirm Justice O’Connor’s statement.¹⁶¹

The *Apprendi* Court first relied on *Jones*, in which it had considered a federal statute, and that decision’s proposition that the Sixth Amendment required that any fact which increased the maximum penalty allowable for a crime be “‘charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.’”¹⁶² Next, the Court turned to Blackstone for support.¹⁶³ It noted that “trial by jury has been understood to require that ‘*the truth of every accusation*, whether preferred in the shape of the indictment . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours”¹⁶⁴

In analyzing the history of criminal sentencing in America, the Court pointed out that judges have always exercised discretion, but that their discretion in considering sentencing factors has always been limited to imposing a sentence within a particular range.¹⁶⁵ The key to the analysis of Sixth Amendment protection is that due process requirements protect a criminal defendant from loss of liberty by requiring that a jury render a verdict subjecting that defendant to a range of possible penalties.¹⁶⁶ If the defendant faces a punishment greater than the maximum possible sentence according to the facts reflected in that jury’s verdict, the defendant loses his Sixth Amendment protections against loss of liberty.¹⁶⁷

The Court addressed the State’s argument that the facts in question operated as “sentencing factors” by using *Mullaney*, and by distinguishing

157. *Apprendi*, 530 U.S. at 470.

158. *Id.* at 471.

159. See generally *State v. Apprendi*, 731 A.2d 485 (N.J. 1999), *rev’d*, 530 U.S. 466 (2000).

160. *Apprendi*, 530 U.S. at 524 (O’Connor, J., dissenting).

161. See *Ring v. Arizona*, 536 U.S. 584 (2002) (overturning *Walton*).

162. *Apprendi*, 530 U.S. at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

163. *Id.* at 477 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

164. *Id.* at 477 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)); see also *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968) (holding that the Sixth Amendment secures a right to a jury trial for serious offenses).

165. *Apprendi*, 530 U.S. at 481.

166. *Id.* at 482-84.

167. *Id.*

its decisions from *McMillan* and *Almendarez-Torres*.¹⁶⁸ The Court first pointed out that in *Mullaney*, it had determined that the due process requirements of the Sixth Amendment and *In re Winship*, in which the court determined that every criminal defendant was entitled to a determination of guilt by a jury and beyond a reasonable doubt, may extend not simply to the determination of guilt, but to the length of the sentence as well.¹⁶⁹

Next, the Court addressed the ramifications of its decision in *McMillan*, in which the Supreme Court first coined the term “sentencing factor” to mean “a fact that was not found by a jury but that could affect the sentence imposed by the judge.”¹⁷⁰ In analyzing the State’s *McMillan* claim in *Apprendi*, the Court began by restating its position from *Winship* that “(1) constitutional limits exist to states’ authority to define away facts necessary to constitute a criminal offense, and (2) that a state scheme that keeps from the jury facts that ‘expos[e] [defendants] to greater or additional punishment’ may raise serious constitutional concern.”¹⁷¹ The Court then distinguished *McMillan* because there, the statute in question only worked to limit the sentencer’s discretion within the acceptable range, whereas the statute in *Apprendi* exposed the defendant to a greater penalty than that possible based upon the jury’s verdict.¹⁷²

Finally, *Apprendi* limited *Almendarez-Torres* to cases involving sentencing enhancements based on prior convictions.¹⁷³ This distinguishing factor is significant because, as the Court stated, earlier convictions carry “substantial procedural safeguards of their own,” such as the right to a jury trial and a standard of proof beyond a reasonable doubt.¹⁷⁴ Therefore, the standard for enhancing a sentence based on facts not found by a jury is different than the standard for an enhancement based on facts which a jury has already found.¹⁷⁵

Thus, the *Apprendi* Court announced its decision, one which paved the way for *Ring*, that any fact, other than a prior conviction, “that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁷⁶ The Court further endorsed the rule set forth in the *Jones* concurring opinions of Justices Stevens and Scalia that “it is unconstitutional for a legislature to

168. *Id.* at 484-90, 496.

169. *Id.* at 484; see *In re Winship*, 397 U.S. 358 (1970).

170. *Apprendi*, 530 U.S. at 485.

171. *Id.* at 486 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)) (citations omitted).

172. *Id.* at 486. The statute addressed in *McMillan* involved a mandatory minimum sentence rather than an increase in the allowable maximum. *McMillan*, 477 U.S. at 80-83.

173. *Apprendi*, 530 U.S. at 487-88, 496.

174. *Id.* at 488.

175. *Id.*

176. See *id.* at 490.

remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.”¹⁷⁷

Interestingly, the majority opinion in *Apprendi* distinguished *Walton* on the basis that it dealt with capital sentencing.¹⁷⁸ Justice Thomas elaborated on this position in his concurring opinion.¹⁷⁹ Justice Thomas characterized the Court’s capital punishment jurisprudence as a unique situation, one in which the Court has imposed “special constraints on a legislature’s ability to determine what facts shall lead to what punishment”¹⁸⁰ Justice Thomas recognized that the Court has “restricted the legislature’s ability to define crimes.”¹⁸¹ This distinguishing point is particularly puzzling considering the *Ring* Court’s reliance on *Apprendi* in overturning *Walton*, a point not lost in the *Apprendi* dissent.¹⁸²

2. The Dissent: Justice O’Connor Foresees the Impact

Because Justice O’Connor’s dissent from *Ring* is, for the most part, a restatement of her dissent in *Apprendi*, the *Apprendi* dissent necessitates some attention.¹⁸³ Initially, the dissent focused on the Court’s decision in *McMillan*, which stated that not every fact with impact upon a defendant’s punishment need be proven to a jury beyond a reasonable doubt, and further, that a state legislature’s definition of a crime’s elements is usually dispositive in determining what facts need be submitted to the jury.¹⁸⁴ The dissent then argued that the majority erred when it dispensed with the Court’s longstanding precedent in cases such as *McMillan*, *Patterson*, and *Almendarez-Torres*, relying instead upon a supposed history of common law sentencing discretion and Blackstone’s nineteenth century treatise on criminal procedure.¹⁸⁵

177. *Id.* at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252 (1999) (Stevens, J., concurring)).

178. *Apprendi*, 530 U.S. at 496-97.

179. *Id.* at 499 (Thomas, J., concurring).

180. *Id.* at 522-23 (Thomas, J., concurring).

181. *Id.* at 523 (Thomas, J., concurring). Justice Thomas referred to the Court’s jurisprudence beginning with *Furman*, where the Supreme Court mandated limited discretion for capital sentencing, which led to the modern schemes involving the necessity of a finding of certain “aggravating factors” in order to authorize a death sentence. *Id.* For a brief overview of *Furman* and its progeny, see *supra* Part II of this note. For a more detailed discussion of the *Furman* doctrine, see Lawrence A. Darby III, Comment, *Constitutional Law—Eighth Amendment—Death Penalty as Currently Administered Constitutes Cruel and Unusual Punishment*, 47 TUL. L. REV. 1167 (1973); David R. Shieferstein, Note, *The Death Penalty Cases: Shaping Substantive Criminal Law*, 58 IND. L.J. 187 (1982).

182. Compare *Ring v. Arizona*, 536 U.S. 584 (2002) (relying heavily on *Apprendi* to find the Arizona method of death qualification unconstitutional), with *Apprendi*, 530 U.S. 466, 496-97 (2000) (distinguishing *Walton* from the issue in *Almendarez-Torres*), and *id.* at 523-55 (O’Connor, J., dissenting) (recognizing the majority’s mischaracterization of *Walton*).

183. See *Apprendi*, 530 U.S. at 523-44 (O’Connor, J., dissenting); *Ring*, 536 U.S. at 619 (O’Connor, J., dissenting).

184. *Apprendi*, 530 U.S. at 524 (O’Connor, J., dissenting).

185. *Id.* at 525-36.

The dissent accused the majority of categorizing *Mullaney*'s holding to mean that "the due process proof-beyond-a-reasonable-doubt requirement applies to those fact[s] . . . that . . . make a difference in the degree of punishment" but ignoring the Court's rejection of that broad interpretation of *Mullaney* in the Court's *Patterson* decision.¹⁸⁶ Third, the dissent cited the Court's precedent in *Monge v. California*,¹⁸⁷ which stated that "the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed."¹⁸⁸ Finally, the dissent recognized what the majority rule in *Apprendi* meant for capital sentencing jurisprudence.¹⁸⁹ Justice O'Connor's dissent harshly questioned the Court's reasoning in distinguishing *Walton*, an argument that would gain force when the *Ring* Court would later use *Apprendi* to overrule *Walton*.¹⁹⁰

IV. BACKDROP: THE HISTORY OF *RING V. ARIZONA*

In 2002, the Supreme Court faced a challenge to the Arizona statute it had addressed twelve years earlier in *Walton v. Arizona*.¹⁹¹ The Court granted certiorari to resolve the inconsistencies between its *Walton* decision and its more recent Sixth Amendment jurisprudence exemplified by *Jones* and *Apprendi*.¹⁹² The challenge came in the form of Timothy Stuart Ring, perhaps the worst-case scenario for the State's abuse of the Arizona capital sentencing scheme.¹⁹³

186. *Id.* at 529-30 (O'Connor, J., dissenting); see also *Patterson v. New York*, 432 U.S. 197 (1977). *Patterson* explicitly limited *Mullaney*'s holding:

Mullaney's holding, it is argued, is that the State may not permit the *blameworthiness* of an act or the *severity of punishment* authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read.

Id. at 214-15 (emphasis added).

187. 524 U.S. 721 (1998) (stating that a sentencing enhancement does not necessarily constitute an element of an offense simply because it raises the permissible maximum).

188. *Apprendi*, 530 U.S. at 536 (O'Connor, J., dissenting) (quoting *Monge*, 524 U.S. at 729).

189. Justice O'Connor correctly recognized that the rules announced in *Jones* and *Apprendi* could overturn *Walton*. See *Apprendi*, 530 U.S. at 538-45 (O'Connor, J., dissenting).

190. *Id.* at 536-42 (O'Connor, J., dissenting). Justice O'Connor characterized the majority's distinction of *Walton* as "baffling," as she discussed the fact that in Arizona, a defendant may not face a capital sentence without a finding of at least one aggravating factor. *Id.* at 538-39. This aptly demonstrated that in the Arizona capital scheme, aggravating factors operated as sentencing enhancements, and thus *Walton* should have controlled *Apprendi*. *Id.* at 538-39.

191. *Ring*, 536 U.S. at 588.

192. *Id.* at 588-89.

193. See *id.* at 584.

A. *The Factual History*

On November 28, 1994, Maricopa County, Arizona authorities found a missing Wells Fargo armored delivery van in a church parking lot.¹⁹⁴ The van's engine was running and inside the police found the driver dead, apparently from a gunshot wound to the head.¹⁹⁵ Over \$500,000 in cash was missing from the van.¹⁹⁶ After a prolonged investigation, the State of Arizona indicted Timothy Stuart Ring, along with two co-conspirators, for the robbery of the van and the murder of the driver.¹⁹⁷ The jury deadlocked on the charge of premeditated murder, but found Ring guilty of felony murder, a crime punishable by death under the Arizona sentencing scheme.¹⁹⁸

On appeal, the Arizona Supreme Court summarized the findings at trial as to defendant Ring.¹⁹⁹ That court noted that evidence clearly connected Ring to the proceeds of the robbery, but failed to show beyond a reasonable doubt that Ring "was a major participant in the armed robbery or that he actually murdered [the driver]."²⁰⁰ In fact, evidence adduced at trial failed to prove that Ring had planned, participated in, or been present at the scene of the crime.²⁰¹

According to the Arizona sentencing scheme, Ring was not eligible for the death penalty unless certain aggravating factors existed and those factors outweighed any mitigating factors.²⁰² The Arizona death penalty statute directed the trial judge to conduct a separate sentencing hearing to determine the existence of certain enumerated circumstances in order to determine the appropriate sentence.²⁰³ The statute was very specific in its instructions that "[t]he hearing shall be conducted before the court alone[.]" and "[t]he court alone shall make all factual determinations required"²⁰⁴ The judge must make the factual determinations necessary in order to find the presence of the enumerated aggravating circumstances and is authorized to sentence the defendant to death only if he or she finds the existence of at least one aggravating circumstance.²⁰⁵

194. *Id.* at 589.

195. *Id.*

196. *Id.*

197. *Id.* at 589-91.

198. *Id.* at 591; *see* ARIZ. REV. STAT. ANN. § 13-703 (West 2001) (amended 2002) (current version at ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 2002)).

199. *State v. Ring*, 25 P.3d 1139, 1142-45 (Ariz. 2001).

200. *Id.* at 1152.

201. *Id.* at 1152.

202. *Ring*, 536 U.S. at 592. The pertinent statute here provided that first-degree murder was punishable by death under ARIZ. STAT. REV. ANN. § 13-703. ARIZ. STAT. REV. ANN. § 13-1105(C) (West 2001) (amended 2002) (current version at ARIZ. STAT. REV. ANN. § 13-1105(C) (West Supp. 2002)).

203. ARIZ. REV. STAT. ANN. § 13-703(C) (West 2001) (amended 2002) (current version at ARIZ. REV. STAT. ANN. § 13-703(C) (West Supp. 2002)).

204. *Id.*

205. *Id.*; *State v. White*, 815 P.2d 869 (Ariz. 1991) (stating that one and only one aggravating factor is necessary to impose a death sentence).

After the jury found Ring guilty and before his sentencing hearing, one of his co-conspirators pleaded guilty to second-degree murder and, in exchange for a twenty-seven-and-one-half-year sentence, agreed to cooperate in the State's case against Ring.²⁰⁶ The State called Ring's co-conspirator at the sentencing hearing and elicited testimony that Ring and a third man had planned the robbery for months before it occurred and that, in his opinion, Ring had been the leader and primary planner of the crime.²⁰⁷ He further testified that Ring was the gunman, shooting the driver from a distance with a rifle equipped with a silencer.²⁰⁸

The judge made numerous findings at the conclusion of the sentencing hearing.²⁰⁹ First, according to the United States Supreme Court's jurisprudence in *Enmund v. Florida*²¹⁰ and *Tison v. Arizona*,²¹¹ a defendant may not be subjected to a death sentence without a finding that he was either a major participant in the crime that led to the killing²¹² or that he exhibited "a reckless disregard for human life."²¹³ "Citing Greenham's testimony at the sentencing hearing, the judge concluded that Ring 'is the one who shot and killed [the driver].'"²¹⁴ Due to the presence of the mandatory *Enmund-Tison* findings, coupled with the presence of two aggravating factors and the absence of mitigating circumstances sufficient to call for leniency, the judge sentenced Ring to death.²¹⁵

B. The Procedural History

In reviewing Ring's sentence, the Arizona Supreme Court immediately recognized that, in light of recent United States Supreme Court rulings in *Jones* and *Apprendi*, the viability of *Walton v. Arizona*, the controlling case on Arizona's death penalty scheme, was in serious doubt.²¹⁶ However, the Arizona Supreme Court also acknowledged that a majority of the Court had refused to expressly overrule *Walton* in their *Apprendi* decision.²¹⁷ The

206. *Ring*, 536 U.S. at 593-94.

207. *Id.*

208. *Id.*

209. *State v. Ring*, 25 P.3d 1139, 1144-45 (Ariz. 2001).

210. 458 U.S. 782 (1982) (holding that a defendant could not receive the death penalty because he did not kill, attempt to kill, or contemplate that death would occur in the commission of a robbery during which an accomplice committed the actual killing).

211. 481 U.S. 137 (1987). *Tison* held that major participation in a crime leading to a felony murder conviction coupled "with reckless indifference to human life is sufficient to satisfy the *Enmund* culpability requirement [and impose the death penalty]." *Id.* at 158.

212. *See generally Enmund*, 458 U.S. at 782.

213. *Tison*, 481 U.S. at 157.

214. *Ring v. Arizona*, 536 U.S. 584, 594 (2002).

215. *Id.* at 594-96.

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

217. *Id.* at 1150.

Arizona court then explained Arizona's capital sentencing scheme from the State's point of view.²¹⁸ The court explicitly stated that in Arizona, a jury does not make all of the findings necessary to expose the defendant to the death penalty.²¹⁹ Rather, the Arizona Supreme Court agreed wholeheartedly with the *Apprendi* dissent and Justice O'Connor's characterization of Arizona's capital sentencing scheme.²²⁰ The court specified that:

In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of release. It is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death And even then a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt.²²¹

Clearly, the Arizona Supreme Court's characterization of the State's capital sentencing scheme comported with Justice O'Connor's *Apprendi* dissent: a finding, by a judge, of at least one aggravating factor is necessary to expose the defendant to a possible maximum sentence of death.²²² Recognizing that the United States Supreme Court did not overrule *Walton* in its *Apprendi* opinion, and acknowledging that the Supremacy Clause bound them to the Supreme Court's precedent, the Arizona Supreme Court affirmed Ring's death sentence.²²³

V. COLLISION: THE SUPREME COURT'S DECISION IN *RING*

Recognizing that the Court's opinion in *Apprendi* was irreconcilable

218. *Id.* at 1150-53.

219. *Id.* at 1152.

220. *Id.* at 1151. Justice O'Connor had characterized the Arizona scheme and the impact of the Court's *Apprendi* decision as follows:

A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.

Apprendi v. New Jersey, 530 U.S. 466, 538 (2000) (O'Connor, J., dissenting).

221. *State v. Ring*, 25 P.3d at 1151.

222. *Compare* *Ring v. Arizona*, 536 U.S. 584, 619-21 (2002) (O'Connor, J., dissenting) (reiterating her dissent from *Apprendi*, Justice O'Connor argued largely that *Apprendi* was decided incorrectly), *with Apprendi*, 530 U.S. at 523-55 (O'Connor, J., dissenting) (arguing vehemently with the majority's characterization of the Arizona scheme), *and State v. Ring*, 25 P.3d at 1152 (characterizing Arizona's death qualification process exactly as Justice O'Connor had in her *Apprendi* dissent).

223. *State v. Ring*, 25 P.3d at 1152.

with *Walton*, the United States Supreme Court granted certiorari.²²⁴ In doing so, the Court found itself faced with contradictory precedents.²²⁵ On the one hand, it had upheld the Arizona capital punishment scheme only twelve years earlier in *Walton*.²²⁶ On the other hand, *Apprendi* dictated that a defendant could not face an increase in the maximum allowable penalty without a jury determination of the facts necessary to invoke the increased penalty.²²⁷

The *Ring* Court first noted that the Arizona Supreme Court's characterization of its state's law is authoritative.²²⁸ This principal, first announced in *Mullaney*,²²⁹ meant that the Court, in deciding *Ring*'s appeal, would construe the Arizona sentencing system as the Arizona Supreme Court had in *State v. Ring*.²³⁰ Thus, the majority abandoned its own characterization of the Arizona scheme from *Apprendi* and adopted that of the *Apprendi* dissent and the Arizona Supreme Court.²³¹ The Arizona court stated, as Justice O'Connor had in her *Apprendi* dissent, that a capital defendant was not eligible for death unless the court found at least one aggravating factor.²³² This interpretation meant that without such a finding made by a judge, the Arizona trial court could not sentence *Ring* to death, only life imprisonment.²³³

The aggravating factors found by the judge subjected *Ring* to an increased potential sentence, exactly the situation that *Apprendi* precluded.²³⁴ Faced with the inevitability of overturning one of the two precedents, the Court chose to extend *Apprendi* and overrule *Walton*.²³⁵ In doing so, the majority relied almost exclusively on the reasoning of its previous decisions in *Jones* and *Apprendi*.²³⁶

The Court turned to *Apprendi*'s instruction that the legislature's classification of a fact or circumstance as either an element or a sentencing factor is not dispositive.²³⁷ Rather, the *function* of the fact at issue, whether

224. *Ring*, 536 U.S. at 608-09 (stating that "*Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both"); *Ring v. Arizona*, 534 U.S. 1103 (2002) (granting certiorari).

225. *See Ring*, 536 U.S. at 588.

226. *See generally* *Walton v. Arizona*, 497 U.S. 639 (1990).

227. *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2000).

228. *Ring*, 536 U.S. at 603 (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

229. *Mullaney*, 421 U.S. at 691.

230. *See Ring*, 536 U.S. at 603-04; 25 P.3d 1139 (2001).

231. *See Ring*, 536 U.S. at 603-04; *Apprendi*, 530 U.S. at 536-40 (O'Connor, J., dissenting); *State v. Ring*, 25 P.3d at 1139.

232. *Apprendi*, 530 U.S. at 538-39 (O'Connor, J., dissenting); *State v. Ring*, 25 P.3d at 1150.

233. *See Ring*, 536 U.S. at 591-93.

234. *Id.* at 602-05.

235. *Id.* at 608-09.

236. *Id.* at 600-09.

237. *Id.* at 604-05; *Apprendi*, 530 U.S. at 470-71.

it raises the range of penalties facing the defendant, is the proper inquiry.²³⁸ As Arizona's highest court properly characterized, the scheme provided that a defendant was subject to death only after a finding of at least one aggravating factor.²³⁹ Therefore, under *Apprendi*, Arizona's aggravating factors functioned as elements of the offense, "raising the ceiling" on the defendant and subjecting him to increased peril, in this case death, thereby requiring the State to submit those facts to a jury and prove their existence beyond a reasonable doubt.²⁴⁰

Using *Apprendi* as primary support, the Supreme Court found Arizona's capital sentencing statute unconstitutional because it violated the Sixth Amendment.²⁴¹ The Court overruled its holding in *Walton* "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."²⁴² *Ring* thereby extended *Apprendi* to apply to capital sentencing cases, mandating that the Sixth Amendment applies to any determination, other than a prior conviction, necessary to increase a defendant's maximum sentence.²⁴³

The Court's reasoning and use of *Apprendi* and *Jones* was sound.²⁴⁴ The inherent weakness of the majority's position in using *Apprendi* and *Jones* to overrule *Walton* rested in the closing paragraph of the *Apprendi* majority opinion.²⁴⁵ New Jersey had based one of its arguments in *Apprendi* on the Court's precedents in the area of capital sentencing jurisprudence, namely the *Hildwin*, *Spaziano*, and *Walton* line of case law.²⁴⁶ New Jersey argued that because *Walton* upheld a sentencing scheme, that of Arizona, which allowed a judge to determine facts necessary to subject a defendant to the increased penalty of death rather than life imprisonment, the New Jersey statute should pass constitutional muster because it allowed a judge to make the factual determinations necessary to increase a defendant's potential sentence by a few years.²⁴⁷

The *Apprendi* Court had expressly distinguished *Walton* and the other capital sentencing cases based on an erroneous characterization of capital sentencing procedures in Arizona.²⁴⁸ Without that distinction, the *Apprendi* majority would have faced a dilemma; either overturn *Walton* or refuse to decide *Apprendi* in the manner it did.²⁴⁹ Justice O'Connor fervently

238. *Ring*, 536 U.S. at 602-05 (citing *Apprendi*, 530 U.S. at 495).

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

240. *Ring*, 536 U.S. at 600-09; see *Apprendi*, 530 U.S. at 478-84.

241. *Ring*, 536 U.S. at 609.

242. *Id.*

243. *Id.* at 588.

244. See *id.* at 600-08.

245. See *Apprendi*, 530 U.S. at 496-97 (distinguishing *Walton* along with the Court's recent line of Eighth Amendment capital cases, including *Hildwin* and *Spaziano*).

246. *Id.*

247. See *id.*

248. See *id.* (rejecting the argument that *Apprendi* invalidated some death penalty schemes); *State v. Ring*, 25 P.3d 1139, 1150-52 (Ariz. 2001) (validating the *Apprendi* dissent's portrayal of Arizona's procedure).

249. See *Apprendi*, 530 U.S. at 495-97; *id.* at 536-42 (O'Connor, J., dissenting).

highlighted this error in the *Apprendi* dissent, which astutely argued that by its erroneous distinction, the majority was simply sidestepping precedent to arrive at their predetermined destination: an increase in Sixth Amendment protections at great expense and trouble to the court system.²⁵⁰

The *Apprendi* dissent argued that the majority should either face the inconsistency directly and overrule *Walton*, or stick to precedent and decide in favor of New Jersey.²⁵¹ In the end, the *Apprendi* dissent was ostensibly correct, a fact proven when the Court backtracked on its distinction of *Walton* only two years later when faced with *Ring*.²⁵² When confronted with that inconsistency, the majority adopted the *Apprendi* dissent's reasoning in order to overrule *Walton*, using *Apprendi* as chief authority, a case which they had explicitly distinguished only two terms earlier.²⁵³

Despite this apparent logical failing, *Ring's* rationale remains defensible.²⁵⁴ First, significant differences existed between the Sixth Amendment ideology during the *Walton* period and contemporary thought on Sixth Amendment protections for sentencing proceedings.²⁵⁵ As Justice Scalia pointed out in his *Ring* concurrence, the issue in *Walton* was not as tightly delineated as it was in *Ring*.²⁵⁶ *Walton* had addressed the issue from an Eighth Amendment perspective, while *Ring* clarified the issue as one of Sixth Amendment import.²⁵⁷

Justice Scalia emphasized this point when he expressed his conviction that the American people's "traditional belief in the right of trial by jury is in perilous decline," and that the decline would only accelerate should they witness "the repeated spectacle of a man's going to his death because a judge found that an aggravating factor existed."²⁵⁸ Justice Scalia reasoned that, "[w]e cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it."²⁵⁹ That statement alone marked a substantial change not only in Justice Scalia's constitutional awareness, but of the contemporary climate as well.²⁶⁰

250. *Id.* at 536-54.

251. *Id.*

252. *See Ring v. Arizona*, 536 U.S. 584, 602-09 (2002).

253. *Id.*

254. *See id.* at 588-609.

255. *See id.* at 611-12 (Scalia, J., concurring). In his concurring opinion, Justice Scalia pointed out the "accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase punishment beyond what is authorized by the jury's verdict" in the 12 years leading up to *Ring*. *Id.*

256. *Id.* at 610-11.

257. *Compare Ring*, 536 U.S. 584, with *Walton v. Arizona*, 497 U.S. 639 (1990).

258. *Ring*, 536 U.S. at 612 (Scalia, J., concurring).

259. *Id.*

260. *See id.* at 610-14 (Scalia, J., concurring). In his *Ring* concurrence, Justice Scalia noted that since *Walton* he has "acquired new wisdom" or, more precisely, has "discarded old ignorance"

The Court's decision in *Ring* found added support in the fact that the Court lacked adequate precedent in the area of Sixth Amendment capital sentencing decisions at the time the Court decided *Walton*.²⁶¹ The Court based *Walton* largely on *Proffitt*, *Hildwin*, and *Spaziano*, cases decided primarily based upon the Eighth Amendment, each of which is easily distinguishable from the fundamental issue of *Ring*.²⁶²

Proffitt dealt specifically with jury sentencing, not jury adjudication of facts necessary to engage in sentencing, as was the issue in *Ring*.²⁶³ The *Spaziano* Court tackled the issue of *judicial override* in capital sentencing.²⁶⁴ However, the *Spaziano* Court stuck to the issue of jury sentencing, never resolving the issue of whether a judge could override a jury's advisory sentence where the jury had failed to find an aggravating factor.²⁶⁵ *Hildwin* also addressed Florida's method of allowing judicial override of an advisory sentence.²⁶⁶ However, in *Hildwin* the jury recommended death, indicating that they did in fact find at least one aggravating factor.²⁶⁷

In addition to the distinctions mentioned above regarding Eighth Amendment precedent available to the *Walton* Court, the Sixth Amendment cases available at the time of *Walton* were decidedly different from the issue confronted in *Apprendi* and *Ring*.²⁶⁸ By the time the Court heard *Apprendi*,

involving the impact of the Court's Eighth Amendment jurisprudence as it pertains to the aggravating factors involved in capital sentencing. *Id.*

261. In 1990, the *Walton* Court faced a challenge to the Arizona statute based primarily on Eighth Amendment grounds. *See Walton v. Arizona*, 497 U.S. 639 (1990). At that time the Court lacked the reasoning present in *Jones* and *Apprendi* that placed the Arizona statute in a Sixth Amendment context, thus making the *Ring* decision possible. *Compare id.* at 639 (placing the issue in an Eighth Amendment rather than a Sixth Amendment context), with *Ring*, 536 U.S. 584 (extending *Apprendi* and *Jones* to capital sentencing), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (extending the *Jones* rule to state laws), and *Jones v. United States*, 526 U.S. 227 (1999) (holding that the prosecution must submit factors which raise the potential maximum sentence to a jury).

262. *See generally Walton*, 497 U.S. at 639 (relying on *Hildwin*, *Spaziano*, and *Proffitt* in upholding Arizona's scheme); *Hildwin v. Florida*, 490 U.S. 638 (1989) (dealing with a situation where the jury's advisory verdict called for death, thus implying a finding of at least one aggravating factor); *Spaziano v. Florida*, 468 U.S. 447 (1984) (failing to resolve the issue of whether a judge may override a jury's recommendation of life imprisonment where the jury failed to find the existence of at least one death-qualifying factor); *Proffitt v. Florida*, 428 U.S. 242 (1976) (finding that jury sentencing was not necessary, but failing to directly address the issue of jury fact-finding in order to qualify a defendant for death).

263. *Compare Proffitt*, 428 U.S. at 248-254, with *Ring*, 536 U.S. 584.

264. *Spaziano*, 468 U.S. at 449-67.

265. *See id.*

266. *See Hildwin*, 490 U.S. at 638.

267. *Hildwin*, 490 U.S. at 638-40; *see Jones v. United States*, 526 U.S. 227, 250-51 (1999) (discussing *Hildwin*, 490 U.S. at 638-40). The *Jones* Court stated that "*Hildwin* could not drive the answer to the Sixth Amendment question" because there, "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Jones*, 526 U.S. at 250-51.

268. *See generally McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (confronting mandatory minimum sentences rather than an increase in the *maximum* penalty allowed by the jury's verdict); *Patterson v. New York*, 432 U.S. 197 (1977) (focusing on the burden of proving *affirmative defenses*); *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (discussing elements of an offense versus sentencing factors).

Sixth Amendment jurisprudence had developed substantially, especially with respect to the particular issue in that case and the capital sentencing issue faced in *Ring*.²⁶⁹ The primary precedents available at the time of *Walton*, principally *Patterson* and *McMillan*, focused on distinctly disparate issues than those in *Apprendi*.²⁷⁰ *Patterson* focused on affirmative defenses, holding that the burden to prove them rested with the defendant once the State met its burden of proof on guilt.²⁷¹ In contrast, *Apprendi* and *Ring* concentrated on the State's burden to prove basic facts necessary to impose a particular sentence.²⁷²

The issue in *McMillan*, while more analogous to *Apprendi* and *Ring* than was *Patterson*, remains easily distinguishable.²⁷³ The *McMillan* Court confronted the subject of mandatory minimum sentences, not an increased maximum as in *Ring* and *Apprendi*.²⁷⁴ The difference becomes more relevant when one considers that the augmentation in the potential maximum addressed in *Ring* was an increase from life imprisonment to the irrevocable deprivation of a person's life.²⁷⁵ Certainly, the difference between enhancing a sentence to a mandatory minimum term of years within the statutorily prescribed range and an enhancement that deprives an individual of his or her most valuable asset, life, is obvious.²⁷⁶ The *Ring* Court

269. See *Jones v. United States*, 526 U.S. 227 (1999) (specifically discussing the constitutionality of increased maximum sentences without a jury's verdict authorizing the increased sentence); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (distinguishing recidivism from other types of enhancements).

270. Compare *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (contemplating the necessity of jury determination of facts necessary to expose a defendant to a particular sentencing range), with *McMillan*, 477 U.S. at 79 (focusing on the issue of mandatory minimum sentences), and *Patterson*, 432 U.S. at 197 (concentrating on the burden to prove an affirmative defense).

271. *Patterson*, 432 U.S. at 210-15.

272. See *Ring v. Arizona*, 536 U.S. 584, 597-99 (2002) (deciding that when the presence of certain factors are necessary to impose a death sentence, the defendant possesses the right to have a jury determine whether those factors exist); *Apprendi*, 530 U.S. at 476 (requiring that any fact which increased the maximum penalty allowable for a crime be "charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt") (quoting *Jones*, 526 U.S. at 243 n.6).

273. *McMillan* dealt with mandatory minimum sentences triggered by certain factors while both *Ring* and *Apprendi* addressed factors that prompted an increase in the maximum possible penalty. Compare *McMillan*, 477 U.S. at 79, with *Ring*, 536 U.S. at 584, and *Apprendi*, 530 U.S. at 466.

274. Compare *McMillan*, 477 U.S. at 79, with *Ring*, 536 U.S. at 597-98, and *Apprendi*, 530 U.S. at 468-69.

275. See *Ring*, 536 U.S. at 588-89.

276. Justice Kennedy recognized the difference between a deprivation of liberty and a deprivation of life: "[i]f it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death." *Jones*, 526 U.S. at 272 (Kennedy, J., dissenting). The majority in *Apprendi* distinguished between factors that required the imposition of a mandatory minimum within the statutory range and factors that raised the possible maximum sentence. *Apprendi*, 530 U.S. at 491-95. The *Ring* Court then recognized that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Ring*, 536 U.S. at 609.

recognized this distinction while acknowledging that because “death is different,” a capital defendant deserves the utmost constitutional protection.²⁷⁷

The particular case of Timothy Stuart Ring aptly demonstrated the rationale for providing the most stringent safeguards.²⁷⁸ In fact, Timothy Stuart Ring displayed the worst-case scenario for sentencing regimes such as that employed by Arizona because his case illustrated the manner in which those regimes denied defendants their fundamental constitutional protections.²⁷⁹ The jury failed to find Ring guilty of premeditated murder, instead finding him guilty of felony murder.²⁸⁰ The Arizona Supreme Court specified that the evidence admitted during the trial phase “failed to prove, beyond a reasonable doubt, that [Ring] was a major participant in the armed robbery or that he actually murdered [the victim].”²⁸¹ The Arizona court noted that the trial evidence failed to adequately demonstrate Ring’s participation in the crime or its planning.²⁸²

According to the Eighth Amendment protections iterated in *Enmond* and *Tison*, the court could not sentence Ring to death without finding that he actively participated in the crime.²⁸³ The trial judge, acting alone and at the sentencing phase, made the requisite findings and did so based on evidence that the jury never heard, the testimony of a co-conspirator.²⁸⁴ Even then, the court could not impose a death sentence on Timothy Ring until the judge made further findings.²⁸⁵

Again acting on evidence never introduced at trial, and based upon the testimony of a witness neither seen nor heard by the jury, the judge determined that two aggravating factors existed.²⁸⁶ In doing so, the court clearly denied Ring the right to a jury determination of facts necessary to execute him.²⁸⁷ This case may have been different had the judge used only facts presented at trial because in Ring’s case the jury’s findings and the facts on which they were based were insufficient to permit a death

277. *Ring*, 536 U.S. at 605-06.

278. *See id.* at 588-97.

279. *See id.* at 588-97, 606-09.

280. *Id.* at 591-92.

281. *Id.* at 591 (quoting *State v. Ring*, 25 P.3d 1139, 1152 (2001)).

282. *Ring*, 536 U.S. at 591-92.

283. *Tison v. Arizona*, 481 U.S. 137, 145, 158 (1987) (holding that major participation in a crime leading to a felony murder conviction, coupled “with reckless indifference to human life is sufficient to satisfy the *Enmond* culpability requirement” and impose the death penalty); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (holding that a defendant could not receive the death penalty because he did not kill, attempt to kill, or contemplate that death would occur in the commission of a robbery during which an accomplice committed the actual killing).

284. *Ring*, 536 U.S. at 592-95.

285. In Arizona, a judge could not impose a death sentence without a finding of at least one aggravating factor. ARIZ. REV. STAT. ANN. § 13-703 (West 2001) (amended 2002) (current version at ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 2002)); *Ring*, 536 U.S. at 591-95.

286. *Ring*, 536 U.S. at 593-95. The judge found that Timothy Ring had committed the murder in “expectation of the receipt of anything of pecuniary value” and “in an especially heinous, cruel or depraved manner.” *Id.* (quoting the transcript of Ring’s sentencing hearing).

287. *See id.* at 595-97, 609.

sentence.²⁸⁸ Scenarios such as this are feasible in a scheme such as Arizona's, where a state may execute a person based on facts never heard or seen by his or her peers but rather adjudicated entirely by a judge.²⁸⁹ The Sixth Amendment appears designed to safeguard against precisely such a situation.²⁹⁰

As part of its decision, the Court addressed the relationship between its requirements of aggravating factors, per the Court's *Furman* and *Gregg* decisions, and the rule decided in *Ring* compelling the State to submit those constitutionally necessary facts to a jury.²⁹¹ The State of Arizona argued that, "[s]tates have constructed elaborate sentencing procedures in death cases . . . because of constraints [the Supreme Court has] said the Eighth Amendment places on capital sentencing."²⁹² The Court dismissed the argument that because the Supreme Court had interpreted the Eighth Amendment to require certain procedural protections for capital defendants, the states were somehow entitled to increased flexibility under the Sixth Amendment as compensation by stating:

In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope If a legislature responded to one of [those] decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. We see no reason to differentiate capital crimes from all others in this regard.²⁹³

288. *Id.* at 588-93.

289. *See id.* at 602-08.

290. *See* U.S. CONST. amend. VI; *Ring*, 536 U.S. at 610 (Scalia, J., concurring):

[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is 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.

Id.

291. *Ring*, 536 U.S. at 604-08; *see also* *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

292. *Id.* at 606; *see also* Brief for Respondent at 21-25, *Ring v. Arizona*, 536 U.S. 584 (2002) (No. 01-488), available at 2002 WL 481144 (citing *Furman v. Georgia*, 408 U.S. 238 (1972)).

293. *Ring*, 536 U.S. at 606-07; *see also* *Apprendi v. New Jersey*, 530 U.S. 466, 539 (2000) (O'Connor, J., dissenting) (stating that the notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence"). For examples of decisions in which the Court has found Constitutionally required elements, *see* *United States v. Lopez*, 514 U.S. 549, 561-62 (1995) (suggesting that the addition to the federal gun possession statute of an "express jurisdictional element" requiring a connection between the weapon and interstate commerce would render the statute constitutional under the Commerce Clause); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (prohibiting states from proscribing "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing

This argument makes particular sense in the context of capital sentencing.²⁹⁴ The Constitution provides numerous protections for criminal defendants within the first eight amendments.²⁹⁵ Among them are the right to remain silent,²⁹⁶ the right to counsel,²⁹⁷ the freedom from cruel and unusual punishment,²⁹⁸ and the right to a jury trial.²⁹⁹ The criminal defendant is not restricted to exercising these rights one at a time; rather, as the *Ring* majority aptly pointed out, he or she may exercise many of them simultaneously.³⁰⁰ Therefore, the Court properly stated that simply because *Furman* and *Gregg* dictated that the Eighth Amendment requires certain procedural safeguards in guiding a capital sentencer's discretion, that protection does not preclude the defendant from also exercising his Sixth Amendment right to a jury trial in applying those protections.³⁰¹

In his concurring opinion, Justice Scalia addressed the interplay between *Furman*'s Eighth Amendment mandate and the Sixth Amendment protections announced by the *Ring* majority.³⁰² Justice Scalia voiced his opinion that the Court erred in the *Furman* line by mandating aggravating factors.³⁰³ However, Justice Scalia nevertheless supported the rationale of the *Ring* majority because:

imminent lawless action and is likely to incite or produce such action"); *Lambert v. California*, 355 U.S. 225, 229 (1957) (requiring actual knowledge or the probability of knowledge of a duty to register on the part of a felon before the defendant can be convicted of failing to register in a municipality).

294. The Court's decisions in *Furman* and *Gregg* interpreted the Eighth Amendment as requiring that jurisdictions wishing to implement capital punishment include factors to guide the discretion of the sentencing authority. See *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976); *Furman*, 408 U.S. at 255-57 (Douglas, J. concurring); WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 4-5 (1991). The *Ring* Court indicated that if the Eighth Amendment required the presence of a specific element in order to impose a particular punishment, the defendant would nonetheless maintain his full Sixth Amendment rights with regard to that element. *Ring*, 536 U.S. at 604-08.

295. See U.S. CONST. amend. I-VIII.

296. U.S. CONST. amend. V.

297. U.S. CONST. amend. VI.

298. U.S. CONST. amend. VIII.

299. U.S. CONST. amend. VI.

300. *Ring v. Arizona*, 536 U.S. 584, 604-08 (2002). The majority cited numerous occasions on which they interpreted the Constitution to provide certain procedural safeguards, all of which are subject to Sixth Amendment protection. *Ring*, 536 U.S. at 606-07 (citing *United States v. Lopez*, 514 U.S. 549, 561-562 (1995) (suggesting that the addition to a federal gun possession statute of an "express jurisdictional element" requiring a connection between the weapon and interstate commerce would render the statute constitutional under the Commerce Clause)); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (First Amendment prohibits states from "proscribing advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Lambert v. California*, 355 U.S. 225, 229 (1957) (Due Process Clause of Fourteenth Amendment requires "actual knowledge of the duty to register or proof of the probability of such knowledge" before ex-felon may be convicted of failing to register presence in municipality)).

301. See *Ring*, 536 U.S. at 609.

302. *Id.* at 610-13 (Scalia, J., concurring).

303. *Id.* at 610-11 (Scalia, J., concurring).

[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is 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.³⁰⁴

Justice Scalia further supported the Court's decision, despite his sentiment that the Constitution does not require aggravating factors in capital sentencing, based on the fact that:

We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it. Accordingly, *whether or not* the States have been erroneously coerced into the adoption of "aggravating factors," wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.³⁰⁵

On a note of great importance in interpreting *Ring's* impact on states allowing capital punishment, Justice Scalia added:

What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so – by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.³⁰⁶

Justice Scalia's characterization of the significance of *Ring* indicated that states need not require jury sentencing.³⁰⁷ Justice Scalia also announced that those states allowing a judge to override a jury's advisory verdict "may continue to do so," as long as the jury makes the initial finding required to impose a death sentence.³⁰⁸

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

305. *Id.* at 610-12 (Scalia, J., concurring).

306. *Id.* at 612-13 (Scalia, J., concurring).

307. *Id.* at 611-12. This portion of Justice Scalia's concurrence addressed the argument that the Constitution required jury sentencing, an argument advanced by Justice Breyer in his concurring opinion. *Id.* at 611-12, 614-19 (Breyer, J., concurring).

308. *Id.* at 612-13 (Scalia, J., concurring).

Justice O'Connor kept her dissent in *Ring* short, deferring primarily to her dissent in *Apprendi*.³⁰⁹ This was largely appropriate considering that Justice O'Connor possessed the foresight to properly characterize the Arizona capital sentencing scheme in her *Apprendi* dissent and likely anticipated the Court's decision to overrule *Walton* based on the logic and precedent of *Apprendi*.³¹⁰ As discussed earlier, the Arizona Supreme Court, the highest court from the state in which Justice O'Connor once served as an appellate justice, vindicated the dissent's portrayal of the Arizona capital sentencing scheme.³¹¹

The dissent reiterated its stance that the Court's decision in *Apprendi*, and now the Court's decision in *Ring*, contradicted the precedent of *Patterson* and *Almendarez-Torres*.³¹² This argument certainly holds some merit as all three cases dealt with sentencing issues in the context of aggravating factors.³¹³ However, *Almendarez-Torres* dealt with recidivism as an aggravating factor, while the issue presented in *Ring* was that of findings of fact not protected by previous due process safeguards.³¹⁴ As the majority in both *Jones* and *Apprendi* pointed out, prior convictions, by their very nature, already contain the essential requisite constitutional protections.³¹⁵ As discussed earlier, the issue in *Patterson* regarded on whom the burden of proof rested for affirmative defenses.³¹⁶ *Ring* is clearly distinguishable because there the issue was the burden of proving affirmative facts necessary to subject a defendant to a particular sentence, in *Ring*'s case, the ultimate sentence of death.³¹⁷

The dissent then demonstrated the destabilizing effect of *Apprendi* on the criminal justice system since its pronouncement.³¹⁸ The dissent argued that the Court's decision in *Ring* would continue that destabilization by rendering five sentencing schemes unconstitutional and casting doubt on the schemes of four others.³¹⁹ The appeals generated, and the ensuing costs, would envelop the courts.³²⁰ While the dissent's argument in this regard is

309. *See id.* at 619-21 (O'Connor, J., dissenting).

310. *See Apprendi v. New Jersey*, 530 U.S. 466, 523-54 (2000) (O'Connor, J., dissenting).

311. *State v. Ring*, 25 P.3d 1139, 1150-52 (Ariz. 2001). Justice O'Connor served in the Arizona State Senate; as a Superior Court Judge in Maricopa County, Arizona, the same county in which the original *Ring* trial took place, and later as a judge on the Arizona Court of Appeals. ROBERT W. VAN SICKEL, NOT A PARTICULARLY DIFFERENT VOICE: THE JURISPRUDENCE OF SANDRA DAY O'CONNOR 28-32 (1998).

312. *Ring*, 536 U.S. at 619-21 (O'Connor, J., dissenting).

313. *Id.* at 584, 588-609 (dealing with sentencing in capital cases); *Almendarez-Torres v. United States*, 523 U.S. 227 (1999) (focusing on recidivism as a sentencing enhancement); *Patterson v. New York*, 432 U.S. 466 (1977) (addressing placement of the burden of proof in criminal cases).

314. *See Ring*, 536 U.S. 584; *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

315. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999).

316. *Patterson v. New York*, 432 U.S. 197 (1977).

317. *See Ring*, 536 U.S. at 602-04.

318. *Id.* at 619-21 (O'Connor, J., dissenting). Justice O'Connor quoted statistics that showed 1802 criminal appeals under the *Apprendi* doctrine in just two years. *Id.* at 620. Justice O'Connor also noted a rise of 77% in second or successive habeas corpus petitions filed in federal court. *Id.*

319. *Id.* at 619-21.

320. *Id.*

somewhat persuasive, the gravity of the situation unmistakably outweighs the potential cost in terms of money and time to the criminal justice system.³²¹ Capital punishment deals not only with death, but also with life, or more accurately, with many lives.³²² One must closely contemplate the logic of an argument that would weigh the cost of many lives, or even a single life, against the potential burden upon the court system of providing safeguards against arbitrary, vindictive, or erroneous decisions in sentencing a person to die.

VI. OUT OF THE WRECKAGE: THE IMPACT OF *RING V. ARIZONA*

Thirty-eight states currently employ capital punishment as part of their criminal justice systems, housing more than 3500 inmates on death row as of January of 2002.³²³ In addition, both the federal government and the United States military utilize capital punishment.³²⁴ Before *Ring*, of the thirty-eight capital punishment states, eleven employed a sentencing procedure providing, to some degree, for judicial findings of fact in capital sentencing.³²⁵ Five states, including Arizona, vested sole authority in the judge to determine the existence of aggravating factors necessary to expose a defendant to a death sentence.³²⁶ Four states utilized a hybrid system in

321. The majority confirmed its holding in *Jones* that the Sixth Amendment protects defendants from an increase in years without a jury determination of facts. *Id.* at 600-01. Because capital punishment involves the deprivation of life, the stakes are considerably higher in capital sentencing than in any other type of punishment, and the capital defendant must be afforded at least the same protection as those charged with lesser offenses. *See id.* at 606-10.

322. The Department of Justice reported that the United States death row population at the end of 2001 was 3,581 inmates from thirty-seven states and federal prisons. U.S. Department of Justice, *Bureau of Justice Statistics 2001*, at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf> (last visited October 20, 2003).

323. *Id.* Of these states, 36 currently house death row inmates. *Id.* New Hampshire does not have anyone on death row. *Id.* In January of 2003, Illinois Governor George Ryan commuted the sentences of every inmate on Illinois' death row to lesser sentences. Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears out Death Row in Illinois*, N.Y. TIMES, January 12, 2003, at A1.

324. U.S. Department of Justice, *Bureau of Justice Statistics 2001*, at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf> (last visited October 20, 2003).

325. *See* Brief for Amici Curiae Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Mississippi, Montana, Nebraska, Nevada, New York District Attorney's Association, Pennsylvania, South Carolina, Utah, Virginia, in support of Respondent, at 9-10, *Ring v. Arizona*, 536 U.S. 584 (2002) (No. 01-488), available at 2002 WL 481140 (indicating that nine states, Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska, employ schemes put in peril by the Court's *Ring* decision due to their use of judicial fact-finding). In addition to the aforementioned nine states, *Ring* called into question the capital sentencing procedures of Nevada and Missouri due to those states' use of judicial fact-finding in cases of jury deadlock. *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (en banc); *Johnson v. State*, 59 P.3d 450 (Nev. 2002).

326. *Ring*, 536 U.S. at 608 n.6; *see also* ARIZ. REV. STAT. ANN. §§ 13-703(C)-(F) (West 2001) (amended 2002) (current version at ARIZ. REV. STAT. ANN. §§ 13-703(C)-(F)) (West Supp. 2002); COLO. REV. STAT. ANN. § 16-11-103 (West 2001) (amended 2002) (current version at COLO. REV. STAT. ANN. § 18-1.3-1201 (West Supp. 2002); IDAHO CODE §§ 19-2515(a)-(c) (Michie 1997) (amended 2003) (current version at IDAHO CODE §§ 19-2515(a)-(c) (2003)); MONT. CODE ANN. §§

which the jury rendered an advisory sentence and the sentencing judge possessed the authority to override the jury's recommendation.³²⁷ Two other states provided for judicial fact-finding in cases where the jury deadlocked as to the existence of aggravating factors.³²⁸ At the very least, *Ring* impacted these eleven states, more than one-fourth of the capital punishment states.³²⁹

A. *The Initial Damage Report: Capital Punishment in States Providing for Judicial Findings of Fact*

1. Overview of the Schemes Identical to That of Arizona

In Arizona once a jury found the capital defendant guilty, a judge presided alone at a sentencing hearing "to determine the existence or nonexistence" of aggravating factors.³³⁰ The statute dictated that the court "shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection G . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency."³³¹

46-18-301(1), 46-18-305 (2001); NEB. REV. STAT. ANN. §§ 29-2520, 2521, 2522 (Michie 1995) (amended 2002) (current version at NEB. REV. STAT. ANN. §§ 29-2520, 2521, 2522) (2003)).

327. *Ring*, 536 at 621 (O'Connor, J., dissenting); see ALA. CODE §§ 13A-5-46(a)-(f), 13A-5-47 (1994) (amended 2002) (current version at ALA. CODE §§ 13A-5-46(a)-(f), 13A-5-47 (2002)); DEL. CODE ANN. tit. 11 § 4209 (2001) (amended 2002) (current version at 2003 Delaware Laws Ch. 174 (H.B. 287)); FLA. STAT. ANN. § 921.141(1)-(3) (West 2001); IND. CODE ANN. § 35-50-2-9 (West 2001) (amended 2002) (current version at IND. CODE ANN. § 35-50-2-9) (West Supp. 2002)).

328. MO. REV. STAT. § 565.030(4) (2002) (amended 2003); NEV. REV. STAT. 175.554, 556 (2002) (amended 2003) (current version at 2003 Nevada Laws Ch. 336 (A.B. 13)).

329. *Ring*, 536 U.S. at 584; see ALA. CODE §§ 13A-5-46, 47 (2001); ARIZ. REV. STAT. ANN. § 13-703 (West 2001) (amended 2002) (current version at ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 2002)); COLO. REV. STAT. ANN. § 16-11-103 (West 2001) (amended 2002) (current version at COLO. REV. STAT. ANN. § 18-1.3-1201 (West Supp. 2002)); DEL. CODE ANN. tit 11, § 4209 (2001) (amended 2002) (current version at 2003 Delaware Laws Ch. 174 (H.B. 287)); FLA. STAT. ANN. § 921.141 (West 2002); IDAHO CODE § 19-2515 (Michie 1997) (amended 2003) (current version at IDAHO CODE §§ 19-2515(a)-(c) (2003)); IND. CODE ANN. § 35-50-2-9 (West 2001) (amended 2002) (current version at IND. CODE ANN. § 35-50-2-9) (West Supp. 2002)); MO. REV. STAT. § 565.030.4 (2002) (amended 2003); MONT. CODE ANN. §§ 46-18-301, 305 (2001); NEB. REV. STAT. §§ 29-2520, 2521, 2522 (2001) (amended 2002) (current version at NEB. REV. STAT. ANN. §§ 29-2520, 2521, 2522) (West Supp. 2002)); NEV. REV. STAT. 175.554, 556 (2002) (amended 2003) (current version at 2003 Nevada Laws Ch. 336 (A.B. 13)); see also *State v. Jones*, 49 P.3d 273 (Ariz. 2002) (recognizing *Ring*'s effect on Arizona's sentencing procedure); *Woldt v. People*, 64 P.3d 256 (Colo. 2003) (recognizing that *Ring* rendered Colorado's method of allowing a three-judge panel to determine the presence of aggravating factors unconstitutional); *State v. Fetterly*, 52 P.3d 874, 875 (Idaho 2002) (stating that *Ring* appeared to "invalidate the death penalty scheme in Idaho which to this time has allowed the sentencing judge to make factual findings of the aggravating factors necessary to the imposition of a death sentence."); *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (en banc) (finding the portion of Missouri's capital sentencing procedure allowing a judge to determine the existence of aggravating factors in the instance of jury deadlock unconstitutional); *Johnson v. State*, 59 P.3d 450 (Nev. 2002) (finding the portion of Nevada's capital sentencing procedure allowing a judge to determine the existence of aggravating factors in the instance of jury deadlock unconstitutional).

330. ARIZ. REV. STAT. ANN. § 13-703(C) (West 2001) (amended 2002) (current version at ARIZ. REV. STAT. ANN. § 13-703(C) (West Supp. 2002)).

331. *Id.* § 13-703(F).

Thus, under the Arizona scheme before *Ring*, a capital defendant could not face a sentence of death unless the trial judge made a factual finding of at least one aggravating factor.³³²

The capital punishment systems of Nebraska, Idaho, and Montana were effectively identical to that of Arizona.³³³ Each state required that, after a finding of guilt, a judge preside over a separate sentencing hearing.³³⁴ At that hearing the judge alone made the determination of whether any aggravating factors existed.³³⁵ Each of these schemes required the presence of at least one aggravating factor in order for the state to impose a death sentence.³³⁶

The Colorado capital punishment system was different only in that it provided for a three-judge panel to determine the presence of the aggravating factors.³³⁷ Colorado also required the presence of at least one aggravating factor before the panel of judges could impose a death sentence.³³⁸

332. *Id.*

333. See *Ring*, 536 U.S. at 608 n.6 (stating that Idaho, Montana, and Nebraska “commit capital sentencing factfinding . . . entirely to judges”). Compare ARIZ. REV. STAT. ANN. § 13-703 (West 2001) (amended 2002) (current version at ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 2002)), with IDAHO CODE § 19-2515 (Michie 1997) (amended 2003) (current version at IDAHO CODE §§ 19-2515 (2003)), and MONT. CODE ANN. §§ 46-18-301, 305 (2001), and NEB. REV. STAT. §§ 29-2520, 2522 (2001) (amended 2002) (current version at NEB. REV. STAT. ANN. §§ 29-2520, 2522) (2002)).

334. IDAHO CODE § 19-2515 (Michie 1997) (amended 2003) (current version at IDAHO CODE § 19-2525 (2003)); MONT. CODE ANN. §§ 46-18-301, 305 (2001); NEB. REV. STAT. §§ 29-2520, 2522 (2001) (amended 2002) (current version at NEB. REV. STAT. ANN. §§ 29-2520, 2522) (2002)..

335. IDAHO CODE § 19-2515 (Michie 1997) (amended 2003) (current version at IDAHO CODE § 19-2515 (2003)); MONT. CODE ANN. §§ 46-18-301, 305 (2001); NEB. REV. STAT. §§ 29-2520, 2522 (2001) (amended 2002) (current version at NEB. REV. STAT. ANN. §§ 29-2520, 2522) (2002)).

336. IDAHO CODE § 19-2515(c) (Michie 1997) (amended 2003) (current version at IDAHO CODE § 19-2515(c) (2003)); *State v. Charboneau*, 774 P.2d 299 (Idaho 1989); MONT. CODE ANN. § 46-18-305 (2001); *State v. McKenzie*, 581 P.2d 1205 (Mont. 1978) (recognizing that the United States Supreme Court has required states to prove at least one aggravating factor before imposing a death sentence); NEB. REV. STAT. §§ 29-2520, 2522 (2001) (amended 2002) (current version at NEB. REV. STAT. ANN. §§ 29-2520, 2522) (2002)..

337. Compare ARIZ. REV. STAT. ANN. § 13-703 (West 2001) (amended 2002) (current version at ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 2002)), with COLO. REV. STAT. ANN. § 16-11-103 (West 2001) (amended 2002) (current version at COLO. REV. STAT. ANN. § 18-1.3-1201 (West Supp. 2002)).

338. COLO. REV. STAT. ANN. § 16-11-103(1)(d)(2)(b)(II)(A) (West 2001) (amended 2002) (current version at COLO. REV. STAT. ANN. § 18-1.3-1201 (West Supp. 2002)).

2. The Consequences of *Ring* in Arizona, Colorado, Idaho, Montana, and Nebraska

a. Arizona

Ring declared Arizona's scheme unconstitutional to the extent that it allowed a judge to engage in the fact-finding required to determine the existence of aggravating factors necessary to sentence a defendant to death.³³⁹ In response to the United States Supreme Court's decision in *Ring*, the Arizona legislature revised section 703 of the criminal code to reflect the constitutional limitations imposed by that decision.³⁴⁰ Arizona's scheme now mandates that the trier of fact engage in the fact-finding necessary to impose a capital sentence on a defendant.³⁴¹ If the trier of fact in the guilt phase is a jury, that same jury must determine the existence of one or more aggravating factors unanimously and beyond a reasonable doubt and, if they find at least one, the jury must decide the proper penalty.³⁴²

Because Arizona now requires a jury determination of those facts necessary to the imposition of a capital sentence, its capital sentencing scheme comports with *Ring*.³⁴³ However, *Ring's* effect on defendants sentenced under the old scheme is not yet settled.³⁴⁴ The Arizona Supreme Court has decided numerous *Ring*-based appeals, refusing to find that application of the old system constituted harmless error, and remanding cases for re-sentencing consistent with *Ring*.³⁴⁵ This ruling applies only to cases with remaining available appeals, however.³⁴⁶ The Arizona court has refused to apply *Ring* retroactively to defendants who have exhausted their appeals.³⁴⁷

b. Colorado

Because the Colorado system expressly required that an aggravating factor exist prior to exposing the defendant to a death sentence, and because the system provided that a panel of judges rather than a jury make that finding, *Ring* rendered the Colorado system unconstitutional.³⁴⁸ In response,

339. *Ring*, 536 U.S. at 595. The Arizona Supreme Court recognized this fact in July of 2002. *State v. Smith*, 50 P.3d 825, 830-31 (Ariz. 2002); *State v. Jones*, 49 P.3d 273, 284 (Ariz. 2002).

340. ARIZ. REV. STAT. ANN. § 13-703.01 (West 2002).

341. *Id.*

342. *Id.*

343. See ARIZ. REV. STAT. ANN. § 13-703.01 (West 2002); *Ring*, 536 U.S. at 584.

344. *E.g.*, *State v. Hoskins*, 65 P.3d 953, 954-55 (Ariz. 2003) (remanding for re-sentencing due to *Ring*); *State v. Jones*, 49 P.3d 273, 284 (Ariz. 2002) (remanding for re-sentencing due to *Ring*).

345. *E.g.*, *State v. Pandelli*, 65 P.3d 950, 953 (Ariz. 2003); *State v. Hoskins*, 65 P.3d 953, 955 (Ariz. 2003); *State v. Phillips*, 67 P.3d 1228, 1232 (Ariz. 2003); *State v. Finch*, 68 P.3d 123, 126 (Ariz. 2003); *State v. Lehr*, 67 P.3d 703, 706 (Ariz. 2003); *State v. Jones*, 72 P.3d 1264 (Ariz. 2003).

346. See *State v. Towery*, 64 P.3d 828, 830 (Ariz. 2003) ("We conclude that [*Ring*] does not apply retroactively to final cases").

347. *Id.*

348. *Woldt v. People*, 64 P.3d 256, 259 (Colo. 2003). The *Ring* dissent confirmed that *Ring*

the Governor signed a bill enacted by the Colorado legislature designed to bring the Colorado capital sentencing scheme into accordance with the Sixth Amendment's requirements of trial by jury.³⁴⁹ The new sentencing procedure provides for a sentencing hearing at which a jury determines the existence of aggravating factors before a court may sentence a defendant to death.³⁵⁰

In February of 2003, the Colorado Supreme Court decided the direct appeals of two men, William Woldt and Francisco Martinez, both condemned to death under the old sentencing regime.³⁵¹ The Colorado court recognized that *Ring* rendered the previous capital sentencing system unconstitutional.³⁵² The court then reversed each man's sentence and imposed terms of life without the possibility of parole upon both Martinez and Woldt.³⁵³ This marked the first instance in which *Ring's* Sixth Amendment mandate spared the life of a condemned individual.³⁵⁴

c. Idaho

In August of 2002, the Idaho Supreme Court recognized the implications of *Ring* to the Idaho capital sentencing scheme.³⁵⁵ Idaho's highest court acknowledged that *Ring* appeared to "invalidate the death penalty scheme in Idaho which to this time has allowed the sentencing judge to make factual findings of the aggravating factors necessary to the imposition of a death sentence."³⁵⁶ In that case, the Idaho Supreme Court vacated the death sentences and remanded the cases consolidated before it to the lower courts for re-sentencing in accordance with *Ring*.³⁵⁷ In response, the Idaho Legislature passed a bill revising the state's capital sentencing procedure.³⁵⁸ The change requires the court to hold a sentencing hearing before a jury, which must find at least one aggravating factor before the court may impose death upon the accused.³⁵⁹

declared the Colorado scheme unconstitutional. *Ring*, 536 U.S. at 620 (O'Connor, J., dissenting); see COLO. REV. STAT. ANN. § 16-11-103 (2001) (amended 2002) (current version at COLO. REV. STAT. ANN. § 18-1.3-1201 (2002)).

349. See COLO. REV. STAT. ANN. § 18-1.3-1201 (2002).

350. *Id.*

351. *Woldt*, 64 P.3d at 258.

352. *Id.* at 259.

353. *Id.* at 272.

354. See *id.* at 259.

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

356. *Id.*

357. *Id.*

358. IDAHO CODE § 19-2515 (Michie 2003).

359. *Id.*

d. *Montana*

At the time Timothy Stewart Ring received his death sentence in the state of Arizona, the language of Montana's capital sentencing scheme seemed to state that no defendant may receive a sentence of death without a finding of at least one statutory aggravating factor,³⁶⁰ and that a judge must make such a finding.³⁶¹ Montana has since amended its capital scheme to comport with the *Ring* requirements that aggravating factors necessary for imposition of a death sentence must be found by a jury.³⁶² As of yet, Montana's courts have released no ruling regarding *Ring's* impact on the six inmates awaiting execution on that state's death row.³⁶³

e. *Nebraska*

In late 2002, Nebraska Governor Mike Johanns called a special session of the state legislature to deal with the issues raised by *Ring*.³⁶⁴ A revision to Nebraska Statute 29-2520 passed through the Nebraska legislature and Governor Johanns signed the change into law in November of 2002.³⁶⁵ The new scheme provides that after resolution of a defendant's guilt, unless the defendant waives the right to a jury, the same jury that presided at trial must determine whether one or more aggravating factors exist.³⁶⁶ Because the new scheme provides for a jury's fact-finding on the matter of the aggravating factors, Nebraska's capital sentencing system appears to comport with *Ring*.³⁶⁷

In March of 2003, the Nebraska Supreme Court reacted to *Ring* when it decided the appeal of Arthur L. Gales, a man found guilty of two counts of first-degree murder and sentenced under the pre-*Ring* scheme.³⁶⁸ The Court found that *Ring* had in fact rendered Nebraska's capital punishment scheme unconstitutional and that application of the pre-*Ring* system did not constitute harmless error.³⁶⁹ The Nebraska court vacated Gales' death

360. MONT. CODE ANN. § 46-18-305 (2001); *State v. McKenzie*, 581 P.2d 1205, 1228 (Mont. 1978) (recognizing that the United States Supreme Court has required states to prove at least one aggravating factor before imposing a death sentence).

361. MONT. CODE ANN. § 46-18-301(1), 305 (2001); *State v. Dawson*, 761 P.2d 352, 360 (Mont. 1988) (holding that a defendant is not entitled to jury determination of aggravating factors because they relate only to sentencing and were not elements of the crime).

362. MONT. CODE ANN. § 46-1-401 (2002); 2003 Mont. Laws 154 § 1; *Ring v. Arizona*, 536 U.S. 584, 620-21 (2002) (O'Connor, J., dissenting). The dissent stated, "The Court effectively declares five States' capital sentencing schemes unconstitutional," identifying Montana as one of those five states. *Id.*

363. As of June 2003, searches on Westlaw and LexisNexis returned no results for cases pending or decided in Montana on *Ring* issues.

364. Robyn Tysver, *Execution Bill Gets Final OK Lawmakers Go Home After an 11-day Special Session and Receive "Thank-yous" From the Governor*, OMAHA WORLD-HERALD, Nov. 22, 2002, at 1a.

365. *Id.*

366. NEB. REV. STAT. §§ 29-2519, 29-2520 (2002).

367. See NEB. REV. STAT. §§ 29-2519, 29-2520 (2002); *Ring*, 536 U.S. 584.

368. *State v. Gales*, 658 N.W.2d 604, 631-32 (Neb. 2003).

369. *Id.*

sentences and remanded to the lower court with instructions to conduct a new sentencing hearing in accord with Nebraska's new capital punishment statute.³⁷⁰ However, the Nebraska Supreme Court refused to apply *Ring* retroactively to defendants whose final appeals had been exhausted, suggesting that its ruling in *Gales* applies only to defendants with pending cases.³⁷¹

B. Ring's Influence on States Employing "Hybrid Schemes"

1. Alabama

The Alabama system mandates that the court hold a sentencing hearing before a jury, which returns an advisory verdict based on a majority vote in the case of recommending life imprisonment, and must include the votes of at least ten jurors if the verdict is for death.³⁷² The jury may not return a verdict recommending death without a finding that at least one aggravating circumstance exists.³⁷³ The court then conducts a sentencing investigation.³⁷⁴ "[I]n deciding upon the sentence, the trial court shall determine whether the aggravating circumstances *it finds* to exist outweigh . . . the mitigating circumstances."³⁷⁵ The statute directs the court to consider the jury's recommendation, but instructs that the recommendation is not binding.³⁷⁶

The Alabama scheme requires the presence of at least one aggravating factor before sentencing a defendant to death.³⁷⁷ The fact that the jury recommendation is only advisory and a judge may override that recommendation is not *per se* unconstitutional under *Ring*.³⁷⁸ However, the statute suggests, and the case law supports, the proposition that the trial court is the final arbiter of whether at least one aggravating factor exists.³⁷⁹

370. *Id.*

371. *State v. Lotter*, 664 N.W.2d 892, 903-08 (Neb. 2003).

372. ALA. CODE § 13A-5-46(a)-(f) (2002).

373. *Id.* § 13A-5-46(e)(1).

374. *Id.* § 13A-5-47(e).

375. *Id.* (emphasis added).

376. *Id.*; *Ex Parte Hays*, 518 So. 2d 768, 777 (Ala. 1986) (finding that the trial judge is the final sentencing authority and may override the jury's advisory sentence and impose a death sentence), *cert. denied*, 485 U.S. 929 (1988).

377. ALA. CODE § 13A-5-46(e)(1) (2002); *Ex Parte Waldrop*, No.1001194, 2002 Ala. Lexis 336, at *12-13 (Ala. Nov. 22, 2002) ("It is true that under Alabama law at least one statutory aggravating circumstance under Ala. Code 1975, § 13A-5-49, must exist in order for a defendant convicted of a capital offense to be sentenced to death."); *see also Coral v. State*, 585 So. 2d 248, 248-249 (Ala. Crim. App. 1991) (holding that the trial court must make specific written findings in order for the court to uphold a death sentence).

378. *See Ring v. Arizona*, 536 U.S. 584 (2002); ALA. CODE § 13A-5-47 (2002).

379. ALA. CODE § 13A-5-47(e) (2002); *Scott v. State*, 728 So. 2d 164, 171-72 (Ala. Crim. App.

Ring invalidates any system in which a jury need not make the requisite findings necessary to impose a death sentence, casting doubt upon the portion of Alabama's code that allows a judge to override a jury's recommendation of a life sentence in the instance that the jury failed to find at least one aggravating factor.³⁸⁰

The Alabama courts have issued several decisions since *Ring*.³⁸¹ Overall, Alabama has shown hesitance to read *Ring* as overruling the state's sentencing system.³⁸² Likewise, the state legislature is standing by the Alabama court's interpretation of the state's scheme and the effect of *Ring*.³⁸³ No doubt, in the future the Alabama scheme will face constitutional challenges based on *Ring*.³⁸⁴

2. Delaware

Prior to *Ring*, the trial court conducted a sentencing hearing before a jury, which then returned an advisory verdict.³⁸⁵ The law required a finding of at least one aggravating factor in order to expose a capital defendant to a death sentence.³⁸⁶ The court polled the jury regarding its verdict, and asked whether it found the existence of at least one aggravating factor.³⁸⁷ The system allowed a judge to override the jury's verdict.³⁸⁸ It is unclear from the statutory language whether the judge could do so in a case where the jury failed to find at least one aggravating factor.³⁸⁹

Ring cast significant doubt on the validity of Delaware's scheme, at least to the extent that it allowed a court to sentence a defendant to death without a unanimous jury determination that at least one aggravating factor

1997) (permitting a judge to override a jury's recommendation for mercy is not cruel and unusual punishment); *Hays*, 518 So. 2d at 777 (finding that the trial judge is the final sentencing authority and may override the jury's advisory sentence and impose a death sentence).

380. See *Ring*, 536 U.S. at 620-21 (O'Connor, J., dissenting) (casting doubt on Alabama's scheme).

381. See, e.g., *Ex Parte Waldrop*, No. 1001194, 2002 Ala. Lexis 336 (Ala. Nov. 22, 2002); *Hale v. State*, 848 So. 2d 224 (Ala. 2002); *Ex Parte Carroll*, No. 1010546, 2002 Ala. Lexis 285 (Ala. Sept 20, 2002).

382. *Waldrop*, 2002 Ala. Lexis 336.

383. As of March, 2003, a search of Alabama's legislative sessions since *Ring*'s release returns no results for any pending legislation involving *Ring*-based alterations to the state's sentencing procedures.

384. See Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1479 (2002) (stating that numerous questions raised by *Ring* regarding the hybrid-scheme states, one of which is Alabama, "will be decided preliminarily in the state courts and legislatures" as well as in federal courts).

385. DEL. CODE ANN. tit 11, § 4209(b) (2001) (amended 2003) (current version at 2003 Delaware Laws Ch. 174 (H.B. 287)).

386. *Id.* § 4209(d); *State v. Rodriguez*, 656 A.2d 262, 274 (Del. Super. Ct. 1993) (specifying that if the court fails to find at least one aggravating factor, the court may not impose a death sentence, but must impose a sentence of natural life).

387. DEL. CODE ANN. tit 11, § 4209(c)(3) (2001).

388. See *id.* § 4209(d); *Shelton v. State*, 652 A.2d 1, 15 (Del. Super. Ct. 1995) (recognizing that in Delaware a defendant is not entitled to a jury trial with regard to sentencing); *Wright v. State*, 633 A.2d 329, 335 (Del. Super. Ct. 1993) (the jury's role is advisory).

389. See § 4209(d).

existed.³⁹⁰ Justice O'Connor, in her dissent, expressed doubt as to *Ring*'s effect on Delaware's scheme.³⁹¹ In July of 2002, a Delaware trial court put a capital trial on hold pending a review of the Delaware capital statute.³⁹² Delaware State Prosecutor Steven P. Wood expressed concern that it may take months or years to determine whether *Ring* applies to Delaware, voicing his concern that "[i]f Justice O'Connor doesn't know if *Ring* applies to Delaware, it's very difficult for the rest of us to answer that question."³⁹³

Recognizing that months or years of doubt cast upon their criminal justice system might produce a severely destabilizing effect, the Delaware legislature passed a bill intended to amend Delaware's code to reflect the Sixth Amendment mandate of *Ring*.³⁹⁴ The new law requires that a unanimous jury find at least one aggravating factor before a judge could sentence a defendant to death.³⁹⁵ The law leaves the remainder of Delaware's scheme unchanged.³⁹⁶ Delaware continues to allow a jury to enter an advisory sentence and allow the judge to override that recommendation, but only in the case that the jury entered a finding on the existence of one or more aggravating factors.³⁹⁷

3. Indiana

Prior to *Ring*, Indiana employed a system very similar to that of Delaware.³⁹⁸ Indiana's was a hybrid system in which the sentencing hearing was held before a jury that rendered an advisory verdict.³⁹⁹ The defendant could not receive a death sentence without a finding of at least one aggravating factor.⁴⁰⁰ The judge could override the jury's recommendation,

390. *See id.*; *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

391. *Ring*, 536 U.S. at 620-21 (O'Connor, J., dissenting) ("I fear that the prisoners on death row in Alabama, Delaware, Florida, and Indiana, which the Court identifies as having hybrid sentencing schemes in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination, may also seize on today's decision to challenge their sentences.") (citation omitted).

392. Celia Cohen, *Supreme Court Death Penalty Ruling Muddles Capano Murder Sentence*, 5 DEL. L. WKLY. No. 29 (July 3, 2002).

393. *Id.* (quoting Steven P. Wood).

394. *See* DEL. CODE ANN. tit 11, § 4209(d)(1) (2003).

395. *Id.*

396. *Id.*

397. *Id.*

398. *Compare* IND. CODE ANN. § 35-50-2-9 (West 2001) (amended 2002) (current version at IND. CODE ANN. § 35-50-2-9) (West Supp. 2002), *with* DEL. CODE ANN. tit 11, § 4209 (2001) (amended 2003) (current version at 2003 Delaware Laws Ch. 174 (H.B. 287)).

399. IND. CODE ANN. §§ 35-50-2-9(d)-(e) (West 2001) (amended 2002) (current version at IND. CODE ANN. § 35-50-2-9) (West Supp. 2002)).

400. *Id.* § 35-50-2-9(k); *Wrinkles v. State*, 690 N.E.2d 1156, 1171 (Ind. 1998) (finding that the state is required to prove at least one aggravating factor prior to sentencing defendant to death).

and in the case that a jury was unable to reach a verdict, the court could conduct the hearing on its own.⁴⁰¹

In anticipation of the Supreme Court's decision in *Ring*, the Indiana legislature amended the state's pertinent code sections to reflect the Sixth Amendment limitations imposed by the Court's decision.⁴⁰² The current Indiana sentencing scheme provides for a jury determination of aggravating circumstances and removes the potential for judicial override in the case that the jury fails to so find.⁴⁰³

4. Florida

Before the Court's decision in *Ring*, a convicted capital defendant faced a separate sentencing hearing in front of the same jury that heard the case.⁴⁰⁴ That jury rendered an advisory sentence based in part upon "[w]hether sufficient aggravating circumstances exist[ed] . . ."⁴⁰⁵ The jury was not required to arrive at this advisory verdict unanimously.⁴⁰⁶ The court then, "after weighing the aggravating and mitigating circumstances," entered a sentence of either life imprisonment or death.⁴⁰⁷ It bears repeating that the jury's sentence was only advisory and the trial court could override the jury's verdict and impose the sentence of its choosing.⁴⁰⁸

The key to *Ring*'s impact on the Florida scheme is the jury's role.⁴⁰⁹ It would seem that the advisory sentencing procedure passes constitutional muster in the instances that the jury finds at least one aggravating

401. IND. CODE ANN. § 35-50-2-9(f) (West 2001) (amended 2002) (current version at IND. CODE ANN. § 35-50-2-9) (West Supp. 2002)); *Schiro v. State*, 451 N.E.2d 1047, 1054 (Ind. 1983) (specifying that the jury's recommendation is not binding on the trial court), *cert. denied*, 464 U.S. 1003 (1983).

402. IND. CODE ANN. § 35-50-2-9 (West 2002) (current version at IND. CODE ANN. § 35-50-2-9) (West Supp. 2002)).

403. *Id.*

404. FLA. STAT. ANN. § 921.141(1) (West 2002).

405. FLA. STAT. ANN. § 921.141(2)(a) (West 2002).

406. *See James v. State*, 453 So. 2d 786, 792 (Fla. 1984) (finding that jury unanimity is not required by due process), *cert. denied*, 469 U.S. 1098 (1984).

407. FLA. STAT. ANN. § 921.141(3) (West 2002).

408. *See, e.g., Washington v. State*, 653 So. 2d 362, 366 (Fla. 1994) (finding that the judge's imposition of a death sentence over the jury's advisory verdict of life imprisonment was proper); *Christmas v. State*, 632 So. 2d 1368, 1371 (Fla. 1994) (stating that only when facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ, may a judge overrule the jury's recommendation of life imprisonment and impose the death penalty); *Thomas v. State*, 465 So. 2d 456, 460 (Fla. 1984) (stating that a sentence of death imposed by a judge after the jury has recommended sentence of life imprisonment will be upheld if the facts supporting sentence of death are clear and convincing).

409. The issue addressed by *Ring* involved a jury determination of facts necessary to permit a death sentence. *Ring v. Arizona*, 536 U.S. 584, 588-610 (2002). In Florida, imposition of a death sentence necessitates the existence of at least one aggravating factor. FLA. STAT. ANN. § 921.141 (West 2002). The Florida scheme allows a judge to override a jury's recommendation of life imprisonment regardless of whether that jury found a single aggravating factor during either the guilt or sentencing phases. *Id.*; *Washington v. State*, 653 So. 2d 362, 366 (Fla. 1994) (finding that the judge's imposition of a death sentence over the jury's advisory verdict of life imprisonment was proper).

circumstance, regardless of that jury's recommendation.⁴¹⁰ Because the Florida scheme requires at least one aggravating factor to be found before a defendant may receive the death penalty, and because *Ring* requires that any fact that exposes the defendant to increased peril must be found by a jury, the Florida scheme must require that the jury find at least one aggravating factor unanimously.⁴¹¹ After such a finding, the judge may sentence the defendant as he or she sees fit, even if that sentence overrides the jury's advisory sentence.⁴¹²

The Florida Supreme Court has since issued numerous decisions regarding the Court's *Ring* holding, two of which are particularly pertinent.⁴¹³ In *King v. Moore*⁴¹⁴ and *Bottoson v. Moore*,⁴¹⁵ released as companion cases, the Florida high court upheld the Florida system stating that the United States Supreme Court has repeatedly sustained Florida's capital sentencing scheme in cases such as *Hildwin* and *Spaziano*.⁴¹⁶ Therefore, the Florida court left the issue to the United States Supreme Court to render a decision directly referring to Florida before the state court would mandate alterations in Florida's procedure.⁴¹⁷ However, one member of the Florida court, Justice Pariente, expressed doubt regarding the viability of Florida's system.⁴¹⁸ In his concurrence Justice Pariente stated:

[T]he *Ring* decision creates uncertainty as to its effect—more so because we now know that a majority of the United States Supreme Court is seriously concerned about the implications for the Sixth Amendment trial by jury when a judge and not a jury makes the factual determinations that are prerequisites for an increased penalty. In the context of a capital case, the stakes are the ultimate because the increased penalty is death.⁴¹⁹

Justice Pariente further recognized that Florida's system does not provide for specific jury findings of aggravating factors; rather, it "requires

410. *Ring* merely requires that a jury make a determination of the existence of aggravating factors rather than requiring jury sentencing. See *Ring v. Arizona*, 536 U.S. 584 (2002).

411. See FLA. STAT. ANN. § 921.141 (West 2002); *Ring*, 536 U.S. 584.

412. See *Ring*, 536 U.S. 584. *Ring* does not require jury sentencing in capital cases, only a determination of each factor necessary for imposition of the sentence with the exception of prior convictions. *Id.* at 612 (Scalia, J., concurring).

413. *King v. Moore*, 824 So. 2d 127 (Fla. 2002); *Bottoson v. Moore*, 824 So. 2d 115 (Fla. 2002) (granting a stay of execution for filing of briefs and oral arguments), *cert. denied*, 530 U.S. 1070 (2002).

414. 824 So. 2d 127 (Fla. 2002).

415. 824 So. 2d 115 (Fla. 2002).

416. See *King*, 824 So. 2d at 130-32 (Wells, J., dissenting); *Bottoson*, 824 So. 2d at 124-26 (Wells, J., dissenting).

417. *King*, 824 So. 2d at 127; *Bottoson*, 824 So. 2d at 115.

418. *Bottoson*, 824 So. 2d at 116-17 (Pariente, J., concurring).

419. *Id.* at 117 (Pariente, J., concurring).

the jury to render an ‘advisory sentence’ based on a balancing of aggravating . . . and mitigating factors.’⁴²⁰ He added, “The jury, however, is not required to specify what, if any, aggravators it found.”⁴²¹

Justice Pariente recognized the constitutional problem this system raises, “because Florida law does not require that any number of jurors agree that the State has proven the existence of an aggravator before that aggravator may be deemed to be found, it is questionable whether the jury has actually found proof beyond a reasonable doubt of a particular aggravator.”⁴²² Justice Pariente’s concurring opinion noted that the United States Supreme Court had previously failed to find a distinction between Florida’s and Arizona’s sentencing schemes:

As the United States Supreme Court recognized in *Walton v. Arizona*, in concluding that Arizona’s sentencing scheme was not dissimilar to Florida’s scheme: “The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but *it does not make factual findings with regard to the existence of mitigating and aggravating circumstances and its recommendation is not binding on the trial judge.*”⁴²³

Justice Pariente astutely realized the implications of this fact, stating, “[t]hus, a substantial question is raised as to whether Florida’s capital scheme violates the holding in *Ring*.”⁴²⁴ Pariente also cast doubt upon the Florida system because of the state’s failure to require unanimity in jury findings at capital sentencing hearings.⁴²⁵

In dissent, however, Justice Wells argued that the United States Supreme Court’s previous decisions regarding Florida’s capital sentencing system validated the constitutionality of that system, and that the Court’s denial of Bottonson’s *Ring*-based appeal for certiorari confirmed that contention.⁴²⁶ Due to the issues raised by the Florida Supreme Court and due to the obvious split within that court itself, the constitutionality of Florida’s procedure remains in doubt.⁴²⁷

420. *Id.* at 120-21 (Pariente, J., concurring).

421. *Id.* at 120 (Pariente, J., concurring).

422. *Id.*

423. *Id.* (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)).

424. *Bottonson*, 824 So. 2d at 120 (Pariente, J., concurring).

425. *Id.* at 120-21 (Pariente, J., concurring).

426. *Id.* at 123-25 (Wells, J., dissenting). Justice Wells relied heavily on the Court’s decisions in *Hildwin* and *Spaziano*, both of which vindicated the Florida sentencing scheme prior to *Walton*, and on which the United States Supreme Court relied in deciding *Walton*, for support for his proposition that the Court’s jurisprudence vindicated Florida’s sentencing scheme. *Id.*

427. *See id.* at 120-21 (Pariente, J., concurring); *id.* at 123-25 (Wells, J., dissenting).

C. Ring's Effect on States Employing Judicial Fact-Finding in Cases of Jury Deadlock

1. Nevada

Before the Court's decision in *Ring*, Nevada required the existence of at least one aggravating factor before a court could impose a death sentence.⁴²⁸ Nevada's procedure conferred the authority to determine both the existence of aggravating factors and the appropriate sentence to the jury at a separate sentencing phase.⁴²⁹ However, in the case that the jury failed to reach a unanimous verdict regarding the sentence, the statute directed the Nevada Supreme Court to appoint a three-judge panel to make that determination.⁴³⁰

In December of 2002, the Nevada Supreme Court recognized that the procedure of allowing a judicial panel to resolve the issue of aggravating factors was a constitutional infirmity under *Ring*.⁴³¹ The Nevada court vacated the death sentences of a convicted defendant because at the sentencing phase, the jury was unable to reach a unanimous verdict, and a three-judge panel determined the existence of aggravating factors before sentencing the defendant to death.⁴³² However, the Nevada court took *Ring* a step further.⁴³³ The court noted that in order to impose a death sentence, the Nevada statute required that the "jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."⁴³⁴ The Nevada Supreme Court interpreted the Nevada capital sentencing statute as requiring both a finding that an aggravating factor existed *and* that no mitigating factors outweighed those aggravators found before a defendant

428. NEV. REV. STAT. 175.554 (2002) (amended 2003) (current version at 2003 Nevada Law Ch. 366 (A.B. 13)).

429. *Id.*; *Hardison v. State*, 763 P.2d 52 (Nev. 1988) (holding that once a jury has assessed a penalty of death, the judge holds no discretion and must enter a judgment according to the verdict of the jury).

430. NEV. REV. STAT. 175.556 (2002) (amended 2003) (current version at 2003 Nevada Laws Ch. 366 (A.B. 13)).

431. *Johnson v. State*, 59 P.3d 450 (Nev. 2002).

432. *Id.* at 460-61.

433. *Id.* (noting that *Ring* abstained from ruling on "any Sixth Amendment claim with respect to mitigating circumstances").

434. *Id.* at 460 (quoting NEV. REV. STAT. 175.554(3) (2002)). The court also referred to *Holloway v. State*, 6 P.3d 987 (Nev. 2000) for the proposition that

Under Nevada's capital sentencing scheme, two things are necessary before a defendant is eligible for death: the jury must find unanimously and beyond a reasonable doubt that at least one enumerated aggravating circumstance exists, and each juror must individually consider the mitigating evidence and determine that any mitigating circumstances do not outweigh the aggravating.

Johnson, 59 P.3d at 460 n.34 (quoting *Holloway*, 6 P.3d at 996).

could receive a death sentence.⁴³⁵ The court then interpreted Nevada's procedure, in light of *Ring*, to indicate that because the statute necessitated both findings in order to authorize an increase in the defendant's punishment, a jury must make both findings.⁴³⁶ Therefore, according to the Nevada Supreme Court's ruling in *Johnson*, *Ring* indicates that Nevada may neither empanel three judges to make the determination of the existence of aggravating factors, nor allow a three-judge panel to weigh the mitigating factors against any aggravators found in order to determine the appropriate sentence.⁴³⁷

2. Missouri

Prior to *Ring*, Missouri required that a jury find the presence of at least one aggravating factor before a court could impose a death sentence.⁴³⁸ However, in a case where the jury failed to reach a unanimous verdict on whether at least one aggravating factor existed, the Missouri statute allowed the trial judge to make that determination.⁴³⁹ In June of 2003, the Missouri Supreme Court recognized that *Ring* rendered that procedure unconstitutional.⁴⁴⁰

In hearing the appeal of convicted murderer Joseph Whitfield, the Missouri court recognized the similarity between the Missouri and Nevada capital schemes.⁴⁴¹ The *Whitfield* court recognized that in Missouri, a capital defendant could not receive a death sentence without a finding that at least one aggravating factor existed.⁴⁴² The court then observed that because *Ring* requires that a jury make that determination, judges are precluded from making the requisite findings necessary to impose a capital sentence.⁴⁴³ Accordingly, the Missouri court vacated Whitfield's death sentence and, consistent with the Colorado Supreme Court's decision in *Woldt v. People*,⁴⁴⁴ and pursuant to Missouri statutory law,⁴⁴⁵ re-sentenced Whitfield to life imprisonment without the possibility of parole.⁴⁴⁶

435. *Johnson*, 59 P.3d at 460-61.

436. *Id.*

437. *Id.* at 460-63.

438. MO. REV. STAT. § 565.030 (2002) (amended 2003).

439. MO. REV. STAT. § 565.030.4 (2002) (amended 2003).

440. *State v. Whitfield*, 107 S.W.3d 253, 261-62 (Mo. 2003).

441. *Id.* at 260-61.

442. *Id.* at 256-61.

443. *Id.* at 261-62.

444. *Id.* at 259-60 (recognizing the Colorado Supreme Court's decision in *Woldt v. People*, 64 P.3d 256 (Colo. 2003) and the fact that the Colorado court chose to re-sentence the defendants to life in prison without the possibility of parole).

445. *Id.* at 271-72. The Missouri Supreme Court claimed the authority to vacate Whitfield's sentence under MO. REV. STAT. § 565.040.2 (2002) and the authority to re-sentence the defendant under MO. REV. STAT. § 565.035.5(2) (2002).

446. *Whitfield*, 107 S.W.3d at 272.

The Missouri court also addressed the issue of retroactivity as it applied to Whitfield and the State of Missouri in general.⁴⁴⁷ The court determined that according to Missouri law:

*In the event that any death sentence imposed pursuant to [MO. REV. STAT. 565.040] is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor*⁴⁴⁸

Thus, the Missouri court concluded that Missouri Law entitled capital defendants to protection even in the event that they had exhausted their final appeals.⁴⁴⁹

D. The Immediate Future of Capital Punishment Under Ring

The Court's decision is one indication of the evolving cultural and social attitudes concerning capital punishment.⁴⁵⁰ Blanket clemency in one state and a public moratorium in another represent additional indications of that shift, brought on in part by numerous cases of death-row exonerations, instances of prosecutors suppressing evidence, and reduced availability of habeas corpus relief for death row inmates as a result of the Anti-Terrorism and Effective Death Penalty Act of 1996.⁴⁵¹ The Court's decision in *Ring* reflected the growing social cynicism regarding capital punishment and will likely bolster death penalty foes to redouble their efforts to defeat capital punishment.⁴⁵² In addition to the potential social questions, *Ring* left several legal questions in its wake.⁴⁵³

447. *Id.* at 264-71.

448. *Id.* at 271 (quoting MO. REV. STAT. § 565.040.2 (2002)).

449. *Id.*

450. Steiker, *supra* note 384, at 1482-83.

451. *Id.* at 1482-83.

452. *Id.* at 1483-84. The court stated:

The Court's decisions in *Atkins* and *Ring* do not merely reflect this trend in public attitudes toward skepticism about the administration of capital punishment; to some degree, of course, the Court's decisions reinforce this skepticism. While the Court's decisions create new headaches and costs for states that wish to continue to administer capital punishment, they also embolden abolitionist litigators to push further and encourage federal court judges to consider challenges they might otherwise dismiss out of hand).

453. *See id.* at 1481-82 (stating that litigation is needed to resolve the questions of whether sentences imposed under pre-*Ring* schemes constitute harmless error and what effect *Ring* had on judicial fact-finding in cases of jury deadlock). To some extent these questions have found answers in post-*Ring* appeals. *See State v. Pandelli*, 65 P.3d 950, 953 (Ariz. 2003) (failing to find harmless error in a *Ring*-based appeal); *Woldt v. People*, 64 P.3d 256 (Colo. 2003) (finding reversible error based on a *Ring* appeal and re-sentencing to life imprisonment without the possibility of parole);

The Court's ruling in *Ring* raised numerous issues for future legislation and litigation.⁴⁵⁴ Because *Ring* amplified the procedural standards constitutionally required in capital sentencing procedures, many states will likely face challenges based on *Ring*'s possible effect upon evidentiary rules in those same procedures.⁴⁵⁵ Also, one or more courts may choose to follow Nevada's example in interpreting *Ring* to require a jury to render a finding that the aggravating factors outweigh mitigating circumstances before allowing imposition of a death sentence.⁴⁵⁶

The battle over *Ring*'s scope is only beginning.⁴⁵⁷ In February of 2003, Maryland's highest court granted a stay of execution in order to consider *Ring*'s impact on that state's capital sentencing procedure.⁴⁵⁸ Maryland law requires that in order to permit a death sentence, a jury must find that the aggravating factors outweigh any mitigating circumstances by a preponderance of the evidence.⁴⁵⁹ The appeal argues that *Ring* requires a heightened standard, that of beyond a reasonable doubt.⁴⁶⁰

Furthermore, any State affected by *Ring* will no doubt endure numerous challenges on *Ring* grounds.⁴⁶¹ The most important and perhaps the most vague issue in these appeals may be retroactivity.⁴⁶² Although argued in the State's brief, *Ring*'s majority failed to address retroactivity, and the dissent mentioned it only briefly.⁴⁶³ Thus, that question remains unresolved.⁴⁶⁴ Prospective appellants will broach retroactivity from one of many approaches, depending on the status of their particular case.⁴⁶⁵

State v. Whitfield, 107 S.W.3d 253 (Mo. 2003) (finding that judicial fact-finding in cases of jury deadlock violates the Sixth Amendment); Johnson v. State, 59 P.3d 450, 460-63 (Nev. 2002) (finding that judicial fact-finding in cases of jury deadlock violates the Sixth Amendment).

454. Steiker, *supra* note 384, at 1477-82.

455. See *id.* at 1481-82. Fourteen states do not apply their usual rules of evidence to capital sentencing proceedings. See ALA. CODE § 13A-5-45(d) (2002); FLA. STAT. ANN. § 921.141 (West 2001); MISS. CODE ANN. § 99-19-101(1) (1999); MONT. CODE ANN. § 46-18-302 (2002) (amended 2003); NEB. REV. STAT. ANN. § 27-1101(4)(b) (Michie 2002); NEV. REV. STAT. § 175.552.1 (2002); N.H. REV. STAT. ANN. § 630:5(III) (1996); OHIO REV. CODE ANN. § 2929.03(D)(1) (West 2001); ORE. REV. STAT. § 163.150(a)(1) (2001); S.D. CODIFIED LAWS § 19-9-14(4) (Michie 2002); TENN. CODE ANN. § 39-13-204(c) (2002); UTAH CODE ANN. § 76-3-207(2)(b) (2002); WASH. REV. CODE ANN. § 10.95.060(3) (West 2002); WYO. STAT. ANN. § 6-2-102(c) (Michie 2002).

456. See Johnson v. State, 59 P.3d 450, 459 (Nev. 2002).

457. See Steiker, *supra* note 384, at 1480-82.

458. Stephanie Hanes, *Maryland Court Delays Execution of Oken; White Marsh Killer's Case Was First Under Ehrlich; A Postponement Until May*, BALT. SUN, Feb. 12, 2003, at 1A.

459. MD. CODE ANN., CRIMINAL § 2-302(h)(2) (2002).

460. Hanes, *supra* note 458.

461. See Steiker, *supra* note 384, at 1476-84.

462. See *id.* at 1478-81 (noting that the number of inmates that will be entitled to new hearings is in question, and that every inmate in the five states that provided for judicial determination of aggravating factors was sentenced to death in violation of *Ring*).

463. Brief for Respondent at 6, *Ring v. Arizona*, 536 U.S. 584 (2002) (No. 01-488), available at 2002 WL 481144; see *Ring v. Arizona*, 536 U.S. 584, 621 (2002) (O'Connor, J., dissenting) ("I believe many of these challenges will ultimately be unsuccessful . . . because . . . having completed their direct appeals, they will be barred from taking advantage of today's holding on federal collateral review.").

464. See generally *Ring*, 536 U.S. 584.

465. See Steiker, *supra* note 384, at 1478-79.

Prospective appellants separate into two categories: those that have exhausted their direct appeals, and those with remaining potential for state remedy.⁴⁶⁶ *Ring* should operate retroactively for those with pending appeals before their respective state courts.⁴⁶⁷ Defendants who have exhausted their direct appeals must wage a collateral attack upon their sentences by seeking federal habeas corpus relief.⁴⁶⁸ These defendants must overcome significant hurdles in an attempt to apply *Ring* retroactively.⁴⁶⁹

Current federal law and the corresponding Supreme Court jurisprudence in the area of retroactivity, while somewhat ambiguous, dictates that defendants whose decisions were contrary to established federal procedural law may seek to apply a decision retroactively.⁴⁷⁰ As for those decisions establishing “new rules,” the Supreme Court has distinguished between rules of procedural law as opposed to substantive law for purposes of retroactivity.⁴⁷¹ New substantive rules may apply retroactively, while new procedural rules do not unless they fit into an exception.⁴⁷²

Appellants basing arguments on *Ring* may contend that *Ring* produced a new rule of substantive law, and accordingly should apply retroactively.⁴⁷³ However, at least one federal court has already ruled that *Ring* announced a procedural rule rather than a substantive one.⁴⁷⁴ In addition, while several states have applied *Ring* to cases with pending appeals, at least two have

466. According to the Supreme Court, “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.” *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). Therefore, inmates with remaining direct appeals will utilize this rule on appeal to apply *Ring* retroactively. *Id.* Inmates that have exhausted their direct appeals must attempt to overcome *Teague’s* presumption against retroactivity by arguing either that *Ring* simply extended a clearly established rule or, in the alternative, that *Ring* fits an exception to the general rule of retroactivity announced in *Teague*. See *Teague v. Lane*, 489 U.S. 288 (1989); Steiker, *supra* note 384, at 1478-79.

467. *Griffith*, 479 U.S. at 322 (“failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.”). Two such condemned men brought *Ring*-based appeals in Colorado. *Woldt v. People*, 64 P.3d 256 (Colo. 2003). The Colorado Supreme Court recognized *Ring’s* applicability, vacating both men’s death sentences and imposing terms of life imprisonment without the possibility of parole. *Id.*

468. Under 28 U.S.C. § 2254 (2000), a person in custody pursuant to the judgment of a state court may apply for to a federal court for relief based on the theory that he is in custody “in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a) (2000).

469. See A. Christopher Bryant, *Retroactive Application of “New Rules” and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 10-18 (2002).

470. 28 U.S.C. § 2254(d)(1) (2000); see *Teague v. Lane*, 489 U.S. 288 (1989).

471. *Bousley v. United States*, 523 U.S. 614, 618-20 (1998) (holding that *Teague* does not apply to new rules of substantive criminal law).

472. *Teague*, 489 U.S. at 288; *Bousley*, 523 U.S. at 619.

473. An Alabama death-row inmate, George Everette Sibley, Jr., brought such an appeal in a federal habeas corpus petition. *Sibley v. Culliver*, 243 F. Supp. 2d 1278 (M.D. Ala. 2003).

474. *Id.* at 1293. The court relied on the Eleventh Circuit’s interpretation that *Apprendi* had stated a new rule of procedural rather than substantive law in deciding that the rule announced in *Ring* was procedural as well. *Id.* at 1289 (citing *McCoy v. United States*, 266 F.3d 1245, 1257-58 (11th Cir. 2001)).

refused to apply *Ring* retroactively to appellants who have exhausted their appeals.⁴⁷⁵

As for decisions that provide for “new rules” of procedural law, the Court defined “new rule” as one that “breaks new ground or imposes a new obligation on the States or the Federal Government.”⁴⁷⁶ Appellants wishing to argue that *Ring* simply extended the clearly established premise of *Apprendi*, will face the obstacle that *Apprendi* specifically exempted capital cases from its holding and distinguished the Court’s *Walton* rule.⁴⁷⁷ Should condemned appellants fail in arguing that *Ring* represents a firmly established rule, they will argue that *Ring* fits one of the *Teague* exceptions.⁴⁷⁸

The first *Teague* exception insists that “a new rule should be applied retroactively if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.’”⁴⁷⁹ The second exception applies solely to “those new procedures without which the likelihood of an accurate conviction is seriously diminished.”⁴⁸⁰ Current Supreme Court jurisprudence in this area dictates that a decision should not apply retroactively unless the Supreme Court so rules.⁴⁸¹ One federal circuit recognized this fact in early 2003, dismissing an argument for *Ring*’s retroactive application in the death penalty appeal of Carey D. Moore, a man condemned to death in Nebraska.⁴⁸² However, in September of 2003, the Ninth Circuit Court of Appeals applied *Ring* retroactively.⁴⁸³ In response to that decision, the United States Supreme Court will soon decide the retroactivity issue in the context of *Ring*-based appeals.⁴⁸⁴

475. See *State v. Towery*, 64 P.3d 828, 830 (Ariz. 2003); *State v. Lotter*, 664 N.W.2d 892, 902-08 (Neb. 2003). *Contra State v. Whitfield*, 107 S.W.3d 253, 271 (Mo. 2003) (applying *Ring* to an appellant whose appeals had been exhausted).

476. *Teague*, 489 U.S. at 301. Supreme Court jurisprudence has been somewhat convoluted in defining precisely what constitutes a “new rule.” See Bryant, *supra* note 469, at 10-23.

477. See *Apprendi v. New Jersey*, 530 U.S. 466, 496-97 (1999).

478. See *Teague*, 489 U.S. at 310. (“Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”).

479. *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)).

480. *Teague*, 489 U.S. at 313; see Benjamin P. Cooper, *Truth in Sentencing: The Prospective and Retroactive Application of Simmons v. South Carolina*, 63 U. CHI. L. REV. 1573 (1996).

481. *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (holding that “a new rule is not ‘made retroactive to cases on collateral review’ unless the Supreme Court holds it to be retroactive”) (quoting 28 U.S.C. § 2244(b)(2)(A) (2000)).

482. *Moore v. Kinney*, 320 F.3d 767, 771 n.3 (8th Cir. 2003) (noting that “[t]he Supreme Court did not, and has not, expressly made the ruling in *Ring* retroactive”). *Moore* also recognized the dissent’s mention of retroactivity. *Id.* In *Ring*, the dissent cited *Teague* as confirmation that current death row inmates “will be barred from taking advantage of today’s holding on federal collateral review.” *Ring v. Arizona*, 536 U.S. 584, 621 (O’Connor, J., dissenting).

483. *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *cert. granted in part*, *Schiro v. Summerlin*, No. 03-526, 2003 U.S. LEXIS 8574 (Dec. 1, 2003).

484. *Schiro v. Summerlin*, No. 03-526, 2003 U.S. LEXIS 8574 (Dec. 1, 2003) (granting certiorari in part).

VI. CONCLUSION: PUTTING THE PIECES TOGETHER

It may take years before the ramifications of *Ring* become fully clear. What is apparent is that *Ring* has significantly influenced the sphere of American capital punishment. In just fourteen months, *Ring* has altered the sentencing procedures of more than one-fourth of the death penalty states.⁴⁸⁵ Portions of the sentencing schemes of at least two other states remain in question.⁴⁸⁶ Men and women living under capital sentences in affected states will doubtlessly challenge their sentences based on *Ring*, forcing federal and state courts to consider whether their sentences should be reconsidered and whether *Ring* should apply retroactively.

The Supreme Court's decision in *Ring v. Arizona* marks the culmination of a thirty-year foray into constitutional law encompassing both the Sixth and Eighth Amendments. Three decades after *Furman*, the states that choose capital punishment as a component of their penal systems possess crucial guidance as to the constitutional requirements necessary to the imposition of that most severe punishment.⁴⁸⁷ More importantly, *Ring* granted capital defendants a vital Sixth Amendment protection: the right to a jury determination of facts necessary to deprive them of their lives.⁴⁸⁸

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485. See *supra* notes 324-29 and accompanying text.

486. See *supra* notes 373-84, 404-27 and accompanying text.

487. See *Ring v. Arizona*, 536 U.S. 584 (2002).

488. *Id.* at 595-607.

489. J.D. candidate (Spring 2004), Pepperdine University School of Law. I would like to thank my parents, John and Joanne, both of whom have always believed in me and supported me, even when I hardly believed in myself. Without their patience and encouragement I would not be where I am today. I would also like to thank my Aunt, Carole Walthers, not only for her care packages and cookies (which are fantastic) but also for her undying and selfless love. Additionally, I would like to express my gratitude to Professor Harry M. Caldwell for his kindness, his knowledge, and most of all for his time. Also, I would like to extend thanks to the membership of the Pepperdine Law Review for all of their hard work on this article. Finally, I would like to express my thanks to John Casey, Assistant Dupage County Public Defender, for his help, his guidance, and the opportunity to experience the practice of law.

