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# NOTE

# PLEADING GUILTY TO DEATH: PROTECTING THE CAPITAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY SENTENCING AFTER ENTERING A GUILTY PLEA

*Sarah Breslow*†



## INTRODUCTION

On September 23, 2010, Teresa Lewis became the first woman to be executed in Virginia in nearly a century.[1] As individuals at Greensville Correctional Center inserted intravenous lines into Lewis's arms, she sang hymns.[2] She offered her last words to her stepdaughter: "I

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1 Editorial, *A Woman Dies*, AMERICA, Nov. 1, 2010, at 5.

2 Catie Beck, *"I Watched a Woman Die": Eye-Witness Reveals Haunting First-Hand Account of the Execution of Teresa Lewis*, DAILY MAIL ONLINE (Sept. 25, 2010, 7:58 AM), http://www.dailymail.co.uk/news/article-1314993/Teresa-Lewis-execution-I-watched-woman-die-One-witness-hand-account.html.

love you and I'm very sorry."[3] Eighteen minutes later, she fell unconscious and died from the chemicals lethally injected into her body.[4]

Eight years earlier, Teresa Lewis conspired with Matthew Shallenberger and Rodney Fuller to kill her husband, Julian Lewis, in a plot to share the insurance benefits that Teresa would receive upon her husband's death.[5] Although the Lewis family was of modest means, Julian had recently come into about $200,000 as the beneficiary of a life insurance policy after one of his sons died in an automobile accident.[6] Teresa met Shallenberger and Fuller in a retail store, and they became friends.[7] Shallenberger, looking for money to begin an illegal drug operation, found a willing accomplice in Teresa.[8] Soon, the three prepared to kill Julian; Teresa withdrew cash and gave it to Shallenberger and Fuller to purchase firearms and ammunition.[9] Early on October 30, 2002, Shallenberger and Fuller entered the Lewis home and shot and killed Julian and his son, Charles.[10] Teresa waited forty-five minutes before calling emergency responders to report that an intruder had killed her husband and stepson.[11] Authorities suspected Teresa's involvement, and about one week later she confessed to police that she had offered Shallenberger money to kill her husband.[12] Law enforcement arrested Teresa, Shallenberger, and Fuller and charged them with capital murder and other criminal offenses.[13]

Each of the defendants pled guilty to the charged crimes.[14] Fuller immediately accepted a sentence of life without parole to testify against Teresa and Shallenberger.[15] Shallenberger initially went to trial, but midtrial he entered a guilty plea.[16] The trial judge also sentenced Shallenberger to life, reasoning that his sentence should be proportionate to that of Fuller, the other triggerman.[17] After learning that the prosecutor intended to seek the death penalty for Teresa

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3 *Id.*

4 *Id.*

5 *See* Petition for Writ of Certiorari at 7–8, Lewis v. Hobbs, 131 S. Ct. 59 (2010) (No. 10-5692), 2010 WL 3740551, at *7–8. This description of the events is per the prosecution's presentation of evidence and is taken as true given Lewis's guilty plea. *See id.* at 7–9, 2010 WL 3740551, at *7–9.

6 *See* Lewis v. Virginia, 593 S.E.2d 220, 222 (Va. 2004); *cf.* Editorial, *supra* note 1 (suggesting that Lewis was unable to afford her own attorney).

7 *Lewis*, 593 S.E.2d at 222.

8 *See* John Grisham, *Why Is Teresa Lewis on Death Row?*, WASH. POST, Sept. 12, 2010, at B5.

9 *See Lewis*, 593 S.E.2d at 223.

10 *See id.* at 223–24.

11 *Id.* at 223.

12 *Id.* at 224.

13 *See* Grisham, *supra* note 8.

14 *See id.*

15 *See id.*

16 *See id.*

17 *See* Petition for Writ of Certiorari, *supra* note 5, at 10, 2010 WL 3740551, at *10.

under a theory that Teresa was the "mastermind" of the murders, her trial counsel encouraged her to accept responsibility and plead guilty.[18] Teresa's counsel most likely calculated that the trial judge would not sentence her to death. Fuller had recently received a sentence of life without parole after pleading guilty before the same judge, Teresa had accepted full responsibility and cooperated with authorities, and Teresa's gender seemed to work in her favor (Virginia had not executed a woman since 1912).[19]

At sentencing, however, the judge found that Lewis's conduct displayed "vileness . . . because her acts reflected a depravity of mind."[20] This factual finding established an aggravator, making Teresa death eligible under Virginia law.[21] Following this finding, the judge sentenced Lewis to death, explaining that "as the 'head of this serpent,'" Teresa's culpability outweighed that of her accomplices.[22] After eight years of appeals and a denied stay from Virginia Governor Robert McDonnell and the Supreme Court, the State of Virginia executed Teresa.[23] During this time, Shallenberger committed suicide in prison, while Fuller continued to serve his life sentence.[24]

The Lewis case illustrates a problem inherent in Virginia's capital punishment scheme and a question that arises in capital sentencing in general: Should guilty pleas automatically lead to judge sentencing, and does such automatic judge sentencing violate the defendant's Sixth Amendment jury right? Historically, the American criminal justice system has encouraged guilty pleas. Plea deals allow for quick disposition of criminal cases and in exchange provide defendants with more favorable sentences for acknowledging and taking responsibility

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18 *Id.* at 8–10, 2010 WL 3740551, at *8–10. Virginia is one of the few states to have a "triggerman" rule associated with its death penalty scheme. The triggerman rule requires that a capital defendant actually be the person who killed the victim; codefendants in felony murders are not eligible for capital murder. The Virginia statute prescribing this triggerman rule contains an exception, however, for defendants charged as masterminds in murders for hire. *See* VA. CODE ANN. § 18.2-31(2) (2009); *Wrong Direction for Death Penalty*, VIRGINIAN PILOT, Feb. 1, 2011, at B8 (citing Lewis's case as a notable exception to the triggerman rule).

19 *See* Grisham, *supra* note 8.

20 *See* Lewis v. Virginia, 593 S.E.2d 220, 222 (Va. 2004). The trial court made these findings in a postsentencing hearing to clarify the original sentence imposing death. *See id.*

21 *See* Petition for Writ of Certiorari, *supra* note 5, at 13, 2010 WL 3740551, at *13.

22 *Id.*

23 *See* Editorial, *supra* note 1 (describing the efforts Lewis's attorney and supporters undertook from 2002 to 2010 to overturn the death sentence). In the Supreme Court order, Justices Ruth Bader Ginsburg and Sonia Sotomayor excepted that they would have granted Lewis a stay but provided no insight as to why. Lewis v. Hobbs, 131 S. Ct. 59 (2010) (order denying certiorari).

24 *See* Grisham, *supra* note 8.

for their guilt.[25] The Supreme Court recently affirmed the importance of the plea bargain when it held that a criminal defendant is entitled to effective assistance of counsel in plea negotiations.[26]

Although the stakes of plea bargaining are weighty in all criminal cases, they are particularly high in capital murder cases. Pleading guilty in multidefendant cases can create a "race" to the prosecutor's office to cooperate and ensure the best sentence possible for the individual defendant at the expense of the other defendants.[27] While taking responsibility for one's actions should serve as a mitigating factor, it can be used to pit defendants against one another.

Defendants who plead guilty to murder in Virginia place their sentences at the trial judge's discretion; the default procedure after a guilty plea requires the trial judge to determine death eligibility and selection.[28] Recent Supreme Court decisions in *Apprendi v. New Jersey*[29] and *Ring v. Arizona*[30] affirmed the capital defendant's right to a jury determination of death eligibility. Yet defendants who plead guilty in Virginia often unknowingly waive this right.[31] Teresa Lewis's trial counsel advised her: "[I]f you plead guilty the Judge and not a jury will sentence you," and neither her counsel nor the court mentioned her right to a jury determination of death eligibility at any time.[32]

Virginia's capital sentencing scheme deprives defendants of their fundamental right to a jury determination of death eligibility. Capital defendants should be able to plead guilty and accept responsibility for their actions and also take full advantage of the Sixth Amendment right to a jury determination of death eligibility—or at least knowingly waive that right. This Note explores the rights of capital defendants at sentencing in the United States and Virginia, ultimately concluding that a defendant who pleads guilty should be afforded a jury to deter-

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25 *See* Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the . . . plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.").

26 *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.").

27 *Cf.* Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 410–11 (1994) ("[A]n examination of the system as it actually operates suggests that . . . the most important function of the death penalty may be to facilitate prosecutors' efforts to induce guilty pleas." (quoting WELSH S. WHITE, THE DEATH PENALTY IN THE EIGHTIES 46–47 (1987))).

28 *See* Petition for Writ of Certiorari, *supra* note 5, at 24–26, 2010 WL 3740551, at *24–26.

29 530 U.S. 466, 496–97 (2000).

30 536 U.S. 584, 607–09 (2002).

31 *See* Petition for Writ of Certiorari, *supra* note 5, at 14, 2010 WL 3740551, at *14.

32 *Id.* at 11, 2010 WL 3740551, at *11.

mine death eligibility and selection. This Note uniquely advances recent scholarship by confronting the particular issue of defendants unknowingly waiving their right to a jury. A severe procedural penalty is embedded in statutes that do not outright deny a defendant a right but rather allow a judge to shuffle a defendant through the system without knowledge of the right to a penalty-phase jury. Part I explores the development and current state of constitutional requirements for capital sentencing in the United States and the modern approach to jury sentencing. Part II describes problems facing defendants who plead guilty to murder in death penalty jurisdictions. Part III particularizes this problem to Virginia's death penalty scheme and offers potential solutions to the issue presented.

## I
## THE DEVELOPMENT OF THE SIXTH AMENDMENT JURY RIGHT AT SENTENCING[33]

### A. The Historical Right to Jury Sentencing

Death penalty sentencing often departs from traditional criminal sentencing because of the foundational notion in American death penalty jurisprudence that "death is different."[34] The Sixth Amendment guarantees all criminal defendants the right to a trial "by an impartial jury."[35] More specifically, the Sixth Amendment entitles all criminal defendants to a jury for the fact-finding, guilt-determination stage of their trial, and judges retain final discretion for sentencing determinations.[36] A jury conviction at the fact-finding stage is constitutionally sufficient; juries are considered "unnecessary or untrustwor-

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33 Throughout this Part, I will provide an overview of jury sentencing. For purposes of simplicity, where background information discusses death penalty sentencing, I have collapsed death eligibility and death selection into one sentencing determination. The factors are equally relevant to death eligibility, which is the thrust of the analysis in Part III.

34 *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (noting that "the penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind."); James R. Acker & Charles S. Lanier, *Beyond Human Ability? The Rise and Fall of Death Penalty Legislation*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 85, 105 (James R. Acker et al. eds., 2d ed. 2003).

35 U.S. CONST. amend. VI. The Sixth Amendment right to a jury trial has been incorporated against the states, although the specific characteristics of the jury have not been defined. *See* Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968).

36 *See* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953–54 (2003) (highlighting the paradox of the American justice system that a jury determines civil damages but not criminal sentences for noncapital cases); *cf.* United States v. Booker, 543 U.S. 220, 226–27 (2005) (holding that judges may not impose sentences greater than those justified by facts found beyond a reasonable doubt by a jury or admitted by the defendant). A few states do still use juries for noncapital sentencing, but many commentators in these states urge change. *See* Hoffman, *supra*, at 955 & n.8.

thy" in noncapital sentencing.[37] The Supreme Court has held that criminal defendants have no constitutional right to a jury sentencing.[38] Theoretically, this holding allows for individual determinations of an offender's unique circumstances, maximizing the deterrent and retributive values of punishment.[39]

Most capital sentencing schemes nevertheless require a jury to determine the sentence where a defendant potentially faces the death penalty.[40] Although the Supreme Court rejected the notion that the penalty of death is so serious that it is inherently different and thus should be vested in a jury, many states still entrust juries with sentencing for this very reason.[41] Before *Ring v. Arizona*,[42] juries determined sentences in twenty-nine states and the federal system, while five states vested sole sentencing discretion in judges, and the remaining four states used a hybrid system of jury recommendations to a judge with ultimate sentencing authority.[43] Overwhelmingly, states rely on juries for this important decision.

Historically, juries have been vital to capital sentencing. The jury right at capital sentencing has its roots in the common law. From the early thirteenth century to the colonial era, juries played an important role in England's capital trials, with jurors serving as representatives of the community as a whole.[44] Professor Welsh White noted that "[t]hroughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations."[45] Although tensions sometimes developed between the judge's and jury's respective powers to determine sentences at a homicide trial, the defendant's right to a jury usually trumped the judge's power.[46]

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37 Hoffman, *supra* note 36, at 954.

38 *See id.* at 973–74 & nn.83–84 (citing Spaziano v. Florida, 468 U.S. 447, 451–52, 459 (1984)).

39 *See* Irving R. Kaufman, *Sentencing: The Judge's Problem*, ATLANTIC MONTHLY, Jan. 1960, at 40, *available at* http://www.theatlantic.com/past/docs/unbound/flashbks/death/kaufman.htm (discussing the values one judge believes to be important when sentencing felons).

40 *See* Acker & Lanier, *supra* note 34, at 105–06.

41 *See Spaziano*, 468 U.S. at 461–63 (rejecting petitioner's argument that differences in the death penalty require a jury sentencing); William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 34, at 413.

42 536 U.S. 584 (2002).

43 *See* Acker & Lanier, *supra* note 34, at 105–06.

44 *See* 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, 5–11 (1989).

45 *Id.* at 10–11.

46 *See id.* at 8–10 (tracing the balance of power between judges and juries and citing *Bushell's Case*, which had "become a landmark in expanding the province of the jury." (quoting John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 298 (1978))).

Juries carry historical importance because the jury traditionally represented the community's values and thus mitigated the harshness of a punishment. William Blackstone argued in his *Commentaries on the Laws of England* that the jury should maintain an important role in fact-finding because "more is to be apprehended from the violence and partiality of judges."[47] As such, "the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours," despite any inconveniences a jury might entail.[48] The Framers relied heavily on Blackstone's writings, and at the time Congress adopted the Bill of Rights, the jury's right to make factual determinations regarding which defendants to punish with the death penalty was "unquestioned."[49]

The jury provides a benefit in representing the community's values because it shields the defendant from the potential harms of judge sentencing. In the eighteenth century, the danger of entrusting a judge with sentencing arose from the "voice of higher authority"—the king.[50] Today, judges still present a danger, but they answer to a different "higher authority"—the voters.[51] In most states, judges are popularly elected.[52] Even though voters understand that judges preside over a variety of criminal and civil matters, voters pay disproportionate attention to a judge's record on criminal cases.[53] Criminal cases, and especially capital cases, have the most visibility and seem to have the most direct impact on a voter's life.[54] As could be expected, the visibility of capital cases is even greater in smaller communities. Popular support for the death penalty creates an incentive for popularly elected judges to pander to the electorate's political positions; a judge can cite number of death sentences in campaign advertisements as evidence of the judge's so-called tough-on-crime record.[55]

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47 *Id.* at 10 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343).

48 Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (second alteration in original) (emphasis omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343). Inconveniences could include the cost or time of a jury trial. *See id.*

49 *See* White, *supra* note 44, at 10–11. For more detail on the English cases that impacted the colonial Framers of the Bill of Rights, see *id.* at 5–14.

50 *See* Walton v. Arizona, 497 U.S. 639, 713 & n.4 (1990) (Stevens, J., dissenting) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

51 *See id.* at 713 n.4.

52 *See* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 328 (2008).

53 *See id.* at 328–29 (discussing the political incentives for judges in "death states" to support the death penalty). Note, however, that this effect may be exaggerated; voters may hold judges less politically accountable for imposing the death penalty than legislators and prosecutors in the same jurisdiction. *See id.*

54 *See id.* at 328–30.

55 *See id.* at 294–95, 330. Political pandering may also affect federal judges; although they do not have to run for state or local office, the Senate selects for pro-death-penalty

Certain states allow judges to override a jury's sentencing recommendation and impose the death penalty.[56] Death penalty statistics from Alabama provide one example of how judges are likely to adopt a stance favoring death.[57] In Alabama, capital overrides are common. Over twenty percent of Alabama's death row population arrived on death row after a judge overrode a jury sentence for life imprisonment.[58] This situation suggests that judges in Alabama are generally comfortable sentencing a defendant to death despite a jury's recommendation that the death penalty should not be imposed. One possible explanation for this discrepancy between the judge and jury is that although jurors are hesitant to sentence a defendant to death when they have a lingering doubt about the defendant's guilt and find it "preferable to err on the side of mercy," judges may be hardened to these doubts and therefore less likely to respond to them.[59]

The unique structure of capital sentencing procedure causes these differences to have more impact. Sentencing, whether by jury or judge, operates differently than the guilt decision phase. In the guilt phase, the prosecutor seeks to establish facts for each element of the charged crime to prove to the fact finder beyond a reasonable doubt that the defendant committed the crime.[60] The sentencing phase, on the other hand, requires moral judgment.[61] In the death eligibility stage of sentencing, the sentencer must first find an aggravating factor beyond a reasonable doubt, but the presence of an aggravating factor alone cannot justify capital punishment.[62] Rather, in the death selection stage, the sentencer also considers the defendant's background and any mitigating factors, making an individualized assessment of culpability based on the circumstances of the crime and

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judges in the confirmation process, where Senators may question judicial appointees for being "soft" on the death penalty. *See id.* at 329–30.

56 *See* EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 6–7 (2011), *available at* http://www.eji.org/files/Override_Report.pdf (citing Alabama, Delaware, and Florida as states with judicial override).

57 *See id.* at 11–13.

58 *See id.* at 10.

59 *See* Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1428 (1985) (explaining why judges might be more likely than juries to sentence defendants to death). *But see* Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. ST. L. REV. 793, 796–804, 812–15 (citing data demonstrating that only Alabama judges commonly impose death where juries have recommended life and where judges can override the jury's recommendation of life).

60 *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970) (holding that due process requires that each element of a charged crime be proven beyond a reasonable doubt).

61 *See* Bowers et al., *supra* note 41, at 416.

62 *See* Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976) (holding a mandatory death penalty unconstitutional).

other factors that could prescribe mercy.[63] When a judge conducts sentencing, only one person undertakes this moral balancing. A jury sentencing, by contrast, requires that each of twelve individual jurors make a moral determination about the defendant's personal culpability and need for punishment, in line with the community's values.[64] In theory, a jury provides a fairer determination of moral culpability because it relies on several individuals instead of just one.[65]

The Supreme Court affirmed the importance of allowing twelve individuals to determine a capital defendant's sentence in *Wiggins v. Smith*.[66] *Wiggins* held counsel ineffective where counsel did not present compelling mitigating evidence in a penalty-phase hearing, noting that even though all twelve jurors might not have been swayed, "there is a reasonable probability that *at least one juror* would have struck a different balance."[67] A jury's decision to impose the death penalty must be unanimous, and this requirement safeguards against misapplication.[68] The "at least one juror" theory imparts the importance of the jury's wisdom and intuitions, especially when compared to theories vesting sole authority in one judge.

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63 *See* Bowers et al., *supra* note 41, at 416–17. This calculation has some variation depending on whether the state is a weighing or nonweighing state. In weighing states, jurors are limited to a specific, itemized list of aggravating circumstances in both the eligibility and selection phases, and in nonweighing states, jurors are not limited by a specific set of factors and may consider all relevant mitigating and aggravating circumstances. *See* Brown v. Sanders, 546 U.S. 212, 216–17 (2006).

64 *See* Bowers et al., *supra* note 41, at 417.

65 Note, however, that some elements of capital jury selection may make the jury unrepresentative of the community's views on the death penalty. *See* Acker & Lanier, *supra* note 34, at 106–07 ("Ironically, statutes that provide for jury sentencing in death[ ]penalty cases . . . are significantly undercut by other laws that operate to selectively exclude certain community members from participating."); *see, e.g.*, Lockhart v. McCree, 476 U.S. 162, 173, 177–78 (1986) (holding that "death-qualified" or "conviction-prone" juries do not violate a capital defendant's constitutional right to a fair cross-section jury). *But cf.* Turner v. Murray, 476 U.S. 28, 36–37 (1986) (holding that a capital defendant has the right to cross-examine prospective jurors in voir dire about the jurors' racial biases).

66 539 U.S. 510 (2003).

67 *Id.* at 537–38 (emphasis added) (citations omitted); *see also* Piper v. Weber, 771 N.W.2d 352, 359 (S.D. 2009) ("The fact that one juror has the potential to save a defendant's life cannot be underplayed."); *cf.* AM. CIVIL LIBERTIES UNION OF VA., UNEQUAL, UNFAIR AND IRREVERSIBLE: THE DEATH PENALTY IN VIRGINIA 17 (2000), *available at* http://www.acluva.org/publications/deathpenaltystudy.pdf (discussing the Virginia case of Dwayne Allen Wright, in which three jurors would have voted for life had they been presented with mitigating evidence, and noting that if "one juror voted for a life sentence . . . Wright would not have been sentenced to death").

68 *See, e.g.*, Borchardt v. State, 786 A.2d 631, 660 (Md. 2001) (noting that the death penalty cannot be imposed as long as a single juror concludes that mitigating evidence outweighs aggravating evidence).

### B. The Supreme Court's Sixth Amendment Jury Sentencing Jurisprudence

Although several states require that a jury make the ultimate sentencing determination of life or death, the Supreme Court has not held that the Constitution mandates jury sentencing. In the foundational modern American death penalty cases, *Furman v. Georgia*[69] and *Gregg v. Georgia*,[70] the Court made no clear pronouncement about who the sentencer should be in a capital case, even though it directed state legislatures to provide sufficient channeling and guidance to whichever body ultimately made findings of fact.[71] After *Gregg*, the Court implicitly condoned the constitutionality of judge sentencing and then officially ratified it in cases that followed.

The first approval came in 1984 when the Court decided *Spaziano v. Florida*.[72] Florida's capital punishment scheme used the jury in an advisory capacity; the judge determined death eligibility and selection.[73] Despite a holding in *Bullington v. Missouri*[74] that seemed to suggest that capital sentencing should guarantee the same procedural protections as those afforded in other criminal guilt phase proceedings (such as protection against double jeopardy, which was at issue in *Bullington*),[75] the Court in *Spaziano* declined to extend this protection to the Sixth Amendment's jury trial guarantee.[76] The Court reasoned that, although a capital sentencing has many unique features separating it from other criminal sentencings, "despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the

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69 408 U.S. 238 (1972).

70 428 U.S. 153 (1976).

71 *See id.* at 206–07; Acker & Lanier, *supra* note 34, at 105. Setting the tone for modern death penalty jurisprudence, *Furman* and *Gregg* and their associated cases established that a death penalty scheme satisfies Eighth Amendment constitutional concerns if the scheme reduces the risk of arbitrariness by limiting discretion while still ensuring that a capital defendant has an individualized sentencing by taking into account the defendant's character and record. *See Gregg*, 428 U.S. at 195. Theoretically, these guarantees ensure that a defendant who receives a death sentence deserves that sentence and that a rational jury has imposed the sentence without prejudice. At the same time, courts will afford a state legislature deference in developing a death penalty scheme. So long as a statute fulfills the minimal requirements of guided discretion and individualized consideration of the circumstances of the offense and the defendant's character, the statute will likely be constitutional under the Eighth Amendment. *See id.* at 188 (citing Justice Potter Stewart's concurrence in *Furman*, which underscored the importance of reducing arbitrariness); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (emphasizing the importance of individualized sentencing in striking down North Carolina's mandatory death sentence); Acker & Lanier, *supra* note 34, at 96.

72 468 U.S. 447 (1984), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

73 *See id.* at 451–52.

74 451 U.S. 430 (1981).

75 *See id.* at 446–47.

76 *See Spaziano*, 468 U.S. at 458–59.

appropriate punishment to be imposed on an individual."[77] The dissent argued that contemporary standards of decency fell against judge sentencing.[78] In particular, the dissent emphasized the importance of the jury as the voice of the community, using historical and current evidence of the prevalence of jury sentencing in the United States.[79] Without jury sentencing, the dissenters argued, a capital punishment scheme violates the Eighth Amendment because it "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[80]

In 1989, the Court upheld the *Spaziano* decision against a challenge in *Hildwin v. Florida*.[81] The majority noted that traditionally a judge determines the sentence in a criminal case and ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."[82]

One year later, in *Walton v. Arizona*, the Court again affirmed the sufficiency of a judge's finding of fact in capital sentencing.[83] Arizona's death penalty statute entrusted death eligibility determinations to the judge alone.[84] After the trial jury returned a guilty verdict, the prosecution and defense presented evidence of aggravating and mitigating factors directly to the judge, who made the ultimate weighing calculation to determine death eligibility.[85] Unlike the Florida death penalty statute, which paid lip service to a jury determination by allowing the jury an "advisory" function, the Arizona scheme never included a jury in the sentencing determination.[86] The Court rejected the petitioner's argument that a jury must find every fact necessary to render a sentencing decision.[87] Instead, the Court relied on precedent from other cases, ultimately concluding that the Constitution did not require that a jury find the existence of aggravating circumstances that would elevate a defendant to death eligibility.[88] The Court maintained its position that neither the Sixth Amendment nor the history of criminal sentencing established a need for jury fact finding at sen-

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77 *Id.* at 459.

78 *See id.* at 476–77, 484 (Stevens, J., dissenting).

79 *See id.*

80 *Id.* at 489 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion)).

81 490 U.S. 638, 639–41 (1989) (per curiam), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

82 *Id.* at 640–41.

83 497 U.S. 639, 647–48 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

84 *See id.* at 643–44.

85 *See id.* at 645–47.

86 *See id.* at 648.

87 *See id.* at 647–49.

88 *See id.*

tencing.[89] Justice John Paul Stevens's dissent traced the Sixth Amendment jury right to the Founding, when the jury was crucial to factual determinations of life and death.[90] Justice Stevens urged the Court to stop "distorting" the function of jury fact finding in sentencing and change course from the "unfortunate decision[ ]" in *Spaziano*.[91]

A decade later, the Court's holding in *Apprendi v. New Jersey* called the *Spaziano/ Walton* line of cases into question. In *Apprendi*, the Court held that "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."[92] Specifically, the Court held that New Jersey's hate-crimes statute violated the Sixth and Fourteenth Amendments because it permitted the judge to make additional findings at sentencing—after the jury made findings at the guilt phase of the trial—using a preponderance-of-the-evidence standard that would increase the defendant's penalty beyond the maximum that the jury could impose.[93] *Apprendi* marked a new era in sentencing, shifting power away from judges.[94]

However, the *Apprendi* majority specifically insulated capital cases from the announced rule, holding that *Walton* and the cases approving judge discretion in capital sentencing still controlled.[95] Thus, the Sixth Amendment guaranteed a right to have a jury determine all facts relevant to an increased sentence but did not extend the definition of facts that are relevant as elements of a crime to a judge's ruling on the presence of aggravating factors. The contrary holdings of *Walton* and *Apprendi* could not stand unreconciled for long. In his *Apprendi* concurrence, Justice Clarence Thomas acknowledged that the Court would need to address the issue in the future: "Whether this

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89 *See id.*; Sam Kamin & Justin Marceau, *The Facts About* Ring v. Arizona *and the Jury's Role in Capital Sentencing*, 13 U. PA. J. CONST. L. 529, 540 (2011).

90 *See Walton*, 497 U.S. at 712–13 (Stevens, J., dissenting).

91 *See id.* at 713–14.

92 *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

93 *See id.* at 492–97.

94 *See* Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775, 800 (2002) (noting that *Apprendi* marked a shift in the sentencing landscape, but also arguing that power actually shifted from judges to prosecutors, who could include sentencing enhancements in plea agreements).

95 *See Apprendi*, 530 U.S. at 522–23 (Thomas, J., concurring) ("*Walton* did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. . . . But that scheme exists in a unique context, for . . . [w]e have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment."). In contrast, the *Apprendi* dissenters cited *Walton* as clearly controlling given the higher life-or-death stakes of the death penalty versus a term of imprisonment. *See id.* at 537 (O'Connor, J., dissenting) ("If a State can remove from the jury a factual determination that makes the difference between life and death . . . , it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence . . . .").

distinction between capital crimes and all others . . . is sufficient to put the former outside the rule," he wrote, "is a question for another day."[96]

That day came just two years later, when the Court resolved the conflicting holdings of *Apprendi* and *Walton* in *Ring v. Arizona*.[97] The Court overruled *Walton*, holding that "*Apprendi*'s reasoning is irreconcilable with *Walton*'s holding" because the additional facts found by a judge as aggravating factors were actually elements of the crime.[98] As such, "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[99]

Although death selection could remain within the judge's discretion, *Ring* required that a jury determine death eligibility. After his guilt-phase jury trial, defendant Timothy Ring could not have received a death sentence without additional factual findings; life imprisonment was the maximum sentence legally possible based on the evidence presented at trial.[100] The Supreme Court defined any factual findings necessary for death eligibility as elements of the greater offense and thus subject to the Sixth Amendment jury right established in *Apprendi*.[101] The Court also held that the Sixth Amendment required that the jury determine these additional facts beyond a reasonable doubt and not by a lower burden.[102] *Ring* established the capital defendant's right to a jury determination of aggravating factors at the death eligibility stage.[103] However, the judge could still conduct death selection after the jury found the defendant death eligible.

Some difficulty in interpreting *Ring* remains, mostly because state legislatures have broad discretion in drafting their capital sentencing statutes.[104] In their evaluation of state compliance with *Ring*, Sam Kamin and Justin Marceau discovered that many states take advantage of a fluid definition of what constitutes "fact finding" to maintain judge determinations of death eligibility and sentencing. In examples

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96 *Id.* at 523 (Thomas, J., concurring).

97 536 U.S. 584, 588–89 (2002).

98 *Id.* at 588–89, 602, 605.

99 *Id.* at 589.

100 *See id.* at 591–92, 597. In Ring's case, the trial judge found that Ring had "committed the offense in expectation of receiving something of 'pecuniary value'" and that "the offense was committed 'in an especially heinous, cruel or depraved manner.'" *Id.* at 594–95 (citations omitted).

101 *See id.* at 609.

102 *See* Acker & Lanier, *supra* note 34, at 106.

103 *See* Bowers et al., *supra* note 41, at 416 n.6 ("*Ring* . . . holds that statutory aggravating factors in capital sentencing are . . . factual elements of the crime that must be determined by jury rather than judge in accord with the Sixth Amendment. As such, they are presumably subject to the requirement that they be found beyond a reasonable doubt in capital cases.").

104 *See supra* discussion at note 71.

from four death penalty states, Kamin and Marceau isolated ways in which states avoid jury determinations of what should be facts under *Ring*.[105] For example, the Florida State Supreme Court held that mitigating evidence is not a fact-finding endeavor within the jury's province.[106] The Tenth Circuit agreed, holding:

> [T]he jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. Instead, it is a highly subjective, largely moral judgment regarding the punishment that a particular person deserves . . . . The *Apprendi/Ring* rule applies by its terms only to findings of fact, not to moral judgments.[107]

Kamin and Marceau argue that "this position is largely indefensible" given the body of scholarship on what constitutes a finding of law versus a finding of fact.[108] Limiting fact finding to "the who, when, what, and where" is unrealistic; a jury must often make determinations about concepts that are not normally considered to be "facts" but that are clearly within the jury's fact-finding duty, including questions of causation, culpability, and reasonableness.[109] Analogously, aggravating factors, while not "facts" in the traditional sense, nonetheless fall within the jury's fact-finding domain.[110]

As a result, *Ring* has not prompted much change in state capital sentencing statutes.[111] *Ring*'s limited holding means that states can easily work within its minimal requirements. However, a more difficult question arises when defendants waive their Sixth Amendment rights. Some defendants may procedurally waive their Sixth Amendment *Ring* right to have a jury determine death eligibility.[112] Others may believe that they have a guaranteed right to a jury sentencing though they actually do not because of *Ring*'s limitations. Pleading guilty is one means by which defendants waive their right to a jury sentencing. In the next Part, I will explore why pleading guilty creates a tension for the defendant's Sixth Amendment right as established in *Ring*.

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105 *See* Kamin & Marceau, *supra* note 89, at 530, 551–52.

106 *See id.* at 558–59 (citing Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) (per curiam)).

107 *Id.* at 559–60 (quoting United States v. Barrett, 496 F.3d 1079, 1107 (10th Cir. 2007)) (internal quotation marks omitted).

108 *Id.* at 561 & nn.119–20.

109 *Id.* at 561–63 (quoting Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985)) (internal quotations marks omitted). For an example of this reasoning from tort law, see *id.* at 562–63.

110 *See id.* at 563–64.

111 *See id.* at 560–61 & n.118.

112 *See* Maurita Elaine Horn, Comment, *Confessional Stipulations: Protecting Waiver of Constitutional Rights*, 61 U. CHI. L. REV. 225, 225 (1994).

## II
## A PROCEDURAL CHALLENGE: DEATH ELIGIBILITY FOR PLEA BARGAINS

The plea bargain is a "striking" feature of the American criminal courts and a "[d]istinctively American [p]ractice."[113] Ninety-four percent of those sentenced as felony offenders in state court plead guilty to the crimes with which they are charged.[114] The criminal justice system relies on guilty pleas to function efficiently and effectively. Ideally, the guilty plea benefits all involved.

At its core, a plea bargain is a contract between the state and the defendant that the defendant will plead guilty in exchange for a lesser sentence.[115] Theoretically, the parties bargain in the "shadows of trials," with an eye toward the expected outcome if the case went through a full trial before a jury.[116] The plea bargain reduces the large caseload facing judges, prosecutors, and defense attorneys, thus conserving judicial resources and saving taxpayers' money.[117] Moreover, some believe that having fewer plea bargains would result in a lower standard of justice because resources would necessarily be spread thinner.[118] In exchange, defendants who acknowledge their guilt receive lesser sentences, may relieve their consciences, and can begin serving their sentences sooner.[119] In most criminal trials, judges will sentence the defendant to the agreed term. However, the judge is not required to do so, and the sentence ultimately imposed on a defendant might diverge from that agreed upon by the defense attorney and the prosecutor.[120]

Capital defendants face special challenges when pleading guilty. Prosecutors have been criticized for using the threat of the death pen-

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113 MARY E. VOGEL, COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS AND THE MAKING OF POLITICAL AUTHORITY 3 (2007).

114 SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

115 *See* Timothy Sandefur, *In Defense of Plea Bargaining*, REGULATION, Fall 2003, at 28, 28.

116 *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464–68 (2004) (explaining the theory behind the "shadow-of-trial" model but arguing that parties sometimes diverge from this model in practice).

117 *See* Blackledge v. Allison, 431 U.S. 63, 71 (1977); Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 765–67 (1998); Timothy Lynch, *The Case Against Plea Bargaining*, REGULATION, Fall 2003, at 24, 24 (discussing the cost of jury trials to taxpayers and the ways in which plea bargaining decreases the workload of judges, prosecutors, and defense attorneys).

118 *See Blackledge*, 431 U.S. at 71; Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 440 (1971).

119 *See Blackledge*, 431 U.S. at 71; Lynch, *supra* note 117, at 24; White, *supra* note 118, at 440.

120 *See* White, *supra* note 118, at 443–46, 448 (detailing judges' practices for accepting guilty pleas in New York and Philadelphia).

alty as a bargaining chip in plea negotiations.[121] "[P]lea bargaining in the shadow of death" allows prosecutors to use the threat of the death penalty to incentivize defendants to waive their right to trial by pleading guilty.[122] Defendants may also face coercion from judges who might abandon their positions as impartial moderators of the criminal trial and instead inject their preference for a plea bargain in order to preserve judicial economy.[123] Judges can also disrupt the efficiency of the plea bargain system if they sentence defendants to harsher penalties than requested by prosecutors.[124]

Despite the procedural difficulties facing capital defendants, pleading guilty remains present in, and often a crucial part of, capital murder prosecution. In *Brady v. United States*, the Supreme Court held that guilty pleas are not invalid simply because defendants entered them with an eye toward avoiding the death penalty.[125] The Court acknowledged that guilty pleas should be scrutinized because defendants waive their constitutional rights but concluded that so long as a guilty plea is voluntary, knowing, and made with "sufficient awareness of the relevant circumstances and likely consequences," the use of a plea bargain is acceptable and in fact should be encouraged for reasons of judicial economy.[126] Essentially, the Court believed that the threat of the death penalty did not restrict the voluntariness of a capital defendant's plea bargaining to an unconstitutional degree.[127]

Unable to challenge the voluntariness of guilty pleas in capital cases, many defense attorneys have embraced them as a strategy to avoid death sentences for their clients, making their use even more prevalent.[128] The American Bar Association Guidelines require defense attorneys for capital defendants to consider seeking negotiated pleas for their clients.[129] Those attorneys who pursue plea bargains as a way to avoid the death penalty express confidence that the negoti-

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121 *See id.* at 439.

122 *See* Joseph L. Hoffmann et al., *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313, 2313, 2350 (2001). In response to these concerns, New York appellate courts effectively banned all plea bargaining in capital cases, rationalizing that all capital defendants should have their day in court. *See id.* at 2313. However, the New York Court of Appeals rendered this ban moot when it held New York's death penalty statute unconstitutional in 2004. *See* People v. LaValle, 817 N.E.2d 341, 367 (N.Y. 2004).

123 *See* White, *supra* note 118, at 452–53.

124 *See id.* at 462–63 (noting that defendants become less likely to plead guilty when judges impose harsher sentences than those initially agreed upon with the prosecution).

125 397 U.S. 742, 755 (1970).

126 *See id.* at 748, 752–53.

127 *See id.* at 750–52, 755.

128 *See generally* WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 145–71 (2006) (discussing the plea-bargaining tactics of several experienced defense attorneys). This strategy assumes that avoiding a death sentence is the ultimate goal and is in the client's best interests. *See id.* at 170–71.

129 *See id.* at 145 (citing AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.9.I, at 91 (2003)).

ated settlement of the charges increases their chances of saving their client's lives.[130] Many prosecutors, even those who consistently seek the death penalty for almost all capital crimes, will cut a deal for efficiency reasons and because they recognize that a sentence of life without parole protects the community and satisfies the state's interest in finality.[131] Even in jurisdictions with high execution rates, a defense attorney can usually convince a prosecutor to work out a plea bargain if the defense attorney can persuade the prosecutor that it will be advantageous to the government to avoid litigation.[132] Unfortunately, however, a defendant who enters a plea intelligently and with the advice of counsel waives future challenges (so long as the state does not make a misrepresentation or engage in other impermissible conduct in the plea negotiations), which raises broader issues about ineffective assistance of counsel in this context.[133]

Capital defendants face unique consequences because of the structure of capital sentencing. Although no clear constitutional right requires that a jury conduct capital sentencing, many states provide juries at this stage because of the uniquely harsh and final nature of the death penalty.[134] However, the question of who should make the eligibility determination in the penalty proceedings arises after a defendant pleads guilty in front of a judge without a jury verdict at the guilt phase. Often, states that normally allow for jury sentencing will provide the defendant with the option to have a jury sentencing, but with default judge sentencing and no notice of an alternative, defendants will often unknowingly waive their jury right.[135]

Capital defendants can lose another important right, however, if they cannot enter a guilty plea. The use of a guilty plea to show acceptance of responsibility can have a great impact on a defendant's jury sentence. Studies of capital juries have found that lack of remorse plays an enormous part in sentencing a defendant to death.[136] Acceptance of responsibility can strongly influence a jury to sentence a defendant to life without parole rather than death. Notably, however, acceptance of responsibility is only likely to affect jurors if the

130 *See id.* at 146 (citing interviews with experienced capital defense attorneys).

131 *See id.* at 147–48.

132 *See id.* at 148.

133 *See* Brady v. United States, 397 U.S. 742, 756 (1970); WHITE, *supra* note 128, at 171.

134 *See supra* Part I.B.

135 *See, e.g.*, Petition for Writ of Certiorari, *supra* note 5, at 11, 2010 WL 3740551, at *11 (noting that the trial judge made no mention of the jury right at sentencing).

136 *See* Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1557–59 (1998); *cf.* State v. Louviere, 833 So. 2d 885, 894 (La. 2002) ("[D]enying a defendant the choice to plead guilty arguably would impermissibly deprive the defendant, per the federal Constitution, of his strategic choice to acknowledge his crime and thereby appear remorseful before his jury.").

defendant expresses it before the penalty proceedings.[137] Jurors' attitudes, therefore, seem to evidence that accepting responsibility early in a trial will likely change the defendant's sentence, even though strategically it might be to the defendant's disadvantage. Furthermore, many capital defendants do not wish to put their families or the family of the victim through the "spectacle and expense" of a lengthy, public trial.[138] For these reasons, the right to plead guilty is an essential protection for criminal defendants.

If defendants do not receive a jury sentencing after the guilt phase, a costly alternative called the "slow guilty plea" might become more prevalent. With a slow guilty plea, the defendant pleads not guilty, and a full trial follows. However, the defense chooses not to present any evidence or to contest the prosecution's evidence.[139] In effect, the defendant pleads guilty, but going through a trial preserves the defendant's rights that would otherwise be waived after a guilty plea.[140] Prosecutors and defendants alike will suffer undesirable costs if slow guilty pleas become standard. The state will not save any resources because it still must prove the defendant's guilt beyond a reasonable doubt in a trial.[141] The defendant will not have the opportunity to accept responsibility and must instead go through the motions of a trial, although he or she has essentially conceded guilt. This least favorable option will likely find increasing favor among defendants if they are stripped of basic constitutional rights like the jury determination of death eligibility at sentencing.[142]

Under *Ring*, the Sixth Amendment guarantees a defendant the right to a jury for any fact finding that increases the maximum sentence.[143] When defendants plead guilty, they essentially concede the factual elements of their crimes. After this point, a judge elevates the

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137 *See* Sundby, *supra* note 136, at 1586–87 (quoting jurors who did not believe a defendant's acceptance of responsibility was genuine when the defense presented the jurors with the evidence at the penalty phase but not at the guilt phase of the trial, including, "[He] testified and said he was sorry, but he didn't *show* it by his actions," and arguing that this trial strategy leaves room for jurors to have a reasonable doubt (alteration in original)).

138 *See* Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 ALB. L. REV. 181, 200–01 (2001) (quoting United States v. Jackson, 390 U.S. 570, 584 (1968)); *see also* People v. Montour, 157 P.3d 489, 500 (Colo. 2007) (en banc) ("[B]ecause trials of capital cases can be especially traumatic, some defendants are compelled to enter guilty pleas so as to avoid the pain that the process inevitably will cause to themselves, their families, or the victim's families." (citing *Brady*, 397 U.S. at 750)).

139 *See* Arthur John Keeffe & Linda L. Castle, *Browser*, A.B.A. J., Sept. 1984, at 163, 165.

140 *See id.* For an example of case involving a slow guilty plea, see Florida v. Nixon, 543 U.S. 175, 180–84 (2004).

141 *See supra* notes 139–40 and accompanying text.

142 *Cf.* Michelle Alexander, Op-Ed., *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 11, 2012, at SR5 (arguing that the criminal justice system will only be improved and criminal defendants will be better able to preserve their rights if they forego plea deals and effectively stall the justice system).

143 *See* Ring v. Arizona, 536 U.S. 584, 609 (2002).

possible maximum sentence if the judge determines death eligibility. Pleading guilty provides procedural and moral benefits to defendants, but these benefits will not be realized if by entering a guilty plea a defendant also forfeits certain constitutional rights. In the next Part of this Note, I will examine Virginia's death penalty scheme and provide a specific example of how pleading guilty deprives defendants of their constitutional rights. I will then discuss potential solutions to this problem and explore the procedures by which defendants could challenge a guilty plea at trial to establish their constitutional right.

## III
## CHALLENGING THE CAPITAL PLEA AND SENTENCING SCHEME

### A. Pleading Guilty in Virginia

Virginia stands out as a leader among death penalty jurisdictions in the United States. Since *Gregg* (decided in 1976),[144] Virginia has executed 109 death row inmates, second only to Texas.[145] Virginia quickly moves defendants from trial to execution; although states take, on average, nine years to bring a defendant from sentencing to execution, Virginia has completed this process in as few as five years in some cases.[146] Moreover, the murder statute in Virginia lists no fewer than fifteen offenses that the legislature defines as capital murder.[147]

Prosecutorial discretion determines if the state will seek the death penalty in an individual case.[148] Officially, Virginia reserves the death penalty for "a very small number of extreme cases."[149] Virginia Attorney General Ken Cuccinelli has said that Virginia prosecutors "rarely seek a death sentence unless the case involves overwhelming guilt and is truly one of the worst of the worst."[150] Significant narrowing occurs in the Virginia scheme: in the late 1990s, 215 murder arrests were for capital offenses; 170 resulted in a capital murder indictment, 64 were prosecuted as death eligible cases, 46 of these resulted in convictions,

144 Gregg v. Georgia, 428 U.S. 153, 153 (1976).

145 *See* Simon Rogers, *Death Penalty Statistics from the US: Which State Executes the Most People?*, GUARDIAN DATABLOG (Sept. 21, 2011, 8:30 AM), http://www.guardian.co.uk/news/datablog/2011/sep/21/death-penalty-statistics-us.

146 *See* AM. CIVIL LIBERTIES UNION OF VA., *supra* note 67, at 4; *see also* Frank Green, *Path to Execution Swifter, More Certain in Va.*, RICHMOND TIMES-DISPATCH, Dec. 4, 2011, http://www2.timesdispatch.com/news/2011/dec/04/tdmain01-path-to-execution-swifter-more-certain-in-ar-1512219 (citing arguments that the swift pace at which Virginia's death penalty system moves may sacrifice certainty for efficiency).

147 *See* VA. CODE ANN. § 18.2-31 (2009).

148 *See* AM. CIVIL LIBERTIES UNION OF VA., *supra* note 67, at 8 ("The decision to seek death in any given capital murder case is made by an individual prosecutor elected in the jurisdiction where the murder took place.").

149 *Id.* at 8 (quoting Clark v. Commonwealth, 257 S.E.2d 784, 791 (4th Cir. 1979)).

150 Green, *supra* note 146.

and 24 were sentenced to death.[151] This data suggests that a great degree of discretion must enter the sentencing process.[152] Anecdotal evidence supports discrepancies in the exercise of this discretion. One former Virginia prosecutor, William H. Fuller, sought the death penalty in almost all death-eligible cases—"not just the worst cases"—but other prosecutors did not deem many "egregious killers" death eligible.[153]

Virginia's statutory scheme intends to effect *Furman* and *Gregg* individualization and guided discretion. To enter death penalty consideration, a defendant must first be convicted at the guilt phase of an offense for which the death penalty can be imposed under the state's capital murder statute.[154] Next, at the eligibility phase, Virginia law requires that the fact finder determine whether the prosecution has proven the existence of an aggravating factor beyond a reasonable doubt.[155] After being found death eligible, the defendant enters the selection phase.[156] Virginia's death penalty scheme is nonweighing.[157] This means that in the final selection phase, Virginia requires that either the judge or a jury consider all aggravating and mitigating factors and recommend a sentence of death or life imprisonment.[158]

When a defendant pleads guilty, he or she loses access to many of these procedural safeguards. Virginia law requires that a judge conduct all sentencing proceedings after a defendant pleads guilty.[159] Thus, after pleading guilty to a crime that could qualify a defendant for capital punishment, Virginia's default rule grants discretion to the judge to rule on both death eligibility and selection. This procedure runs afoul of the Sixth Amendment. *Ring v. Arizona* requires that a jury find any fact that can increase the maximum sentence, most notably in the death eligibility phase.[160] Often, defendants unknowingly waive their right to a jury determination of death eligibility when they plead guilty.[161] Advocates of Virginia's death penalty scheme argue

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151 JOINT LEGISLATIVE AUDIT & REVIEW COMM'N OF THE VA. GEN. ASSEMBLY, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT, at ii (2002), *available at* http://jlarc.virginia.gov/reports/Rpt274.pdf.

152 *See* Green, *supra* note 146 (alluding to research suggesting that factors such as whether a community is rural or suburban plays a role in whether prosecutors seek the death penalty).

153 *Id.*

154 *See* VA. CODE. ANN. § 18.2-31 (2009).

155 *See id.* § 19.2-264.4(C) (2008).

156 *See id.* § 19.2-264.2; Buchanan v. Angelone, 522 U.S. 269, 275 (1998) (defining "eligibility" and "selection").

157 *See* VA. CODE. ANN. § 19.2-264.2.

158 *See id.*

159 *See id.* § 19.2-257 ("Upon a plea of guilty in a felony case . . . the court shall hear and determine the case without the intervention of a jury . . . .").

160 *See supra* notes 97–103 and accompanying text.

161 *See supra* text accompanying notes 134–35.

that the stringent procedures for death sentences encourage prosecutors to seek guilty pleas;[162] as applied, however, the scheme seems to have the opposite effect.

Teresa Lewis's sentencing provides one example of how Virginia's death penalty scheme may cause defendants to unknowingly waive their constitutional right to a jury determination of death eligibility. Teresa entered a guilty plea for several reasons. First, she accepted responsibility[163] and avoided a long, costly, and painful trial. Her actions before and after the murders strongly implicated her in the charged crimes.[164] Her coconspirator, Fuller, won the "race" to the prosecutor's office, making a deal to cooperate in exchange for a life sentence.[165] In pleading guilty, Teresa certainly hoped to avoid a death sentence, both because her coconspirator had done the same and because it seemed unlikely that a judge would sentence a woman with an IQ of just above seventy to death.[166] When she entered her guilty plea, Teresa did not know that a jury could determine her death eligibility and perhaps consider mitigating evidence that could fall against finding any aggravating factors. Teresa's counsel informed her that if she pled guilty, "the [j]udge and not a jury" would sentence her.[167] During the plea proceedings, the court also failed to notify Teresa that she had a constitutional right to a jury determination of death eligibility.[168] At Teresa's sentencing, the judge found that she had acted with "depravity of mind."[169] This factual finding established the aggravating factor necessary for death eligibility.[170] After making this finding, the judge sentenced Teresa to death.[171]

Teresa unknowingly waived her right to a jury determination of death eligibility. Pleading guilty to her crime and accepting responsibility, she did not knowingly accept death eligibility or a death sentence. The case record does not mention any details of the deals

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162 *See* JOINT LEGISISLATIVE AUDIT & REVIEW COMM'N OF THE VA. GEN. ASSEMBLY, *supra* note 151, at 3, 56–57, 107 (noting that supporters of the death penalty argue that "[w]ithout unequivocal convincing evidence . . . prosecutors will be more likely to seek a plea agreement even if the nature of the crime supports the pursuit of the death penalty" and defining "non-death" cases as including those in which the defendant pleads guilty).

163 *See* Grisham, *supra* note 8 ("[Lewis] confessed to the police, pled guilty to the judge and for almost eight years has expressed profound remorse for her role in two murders.").

164 *See* Petition for Writ of Certiorari, *supra* note 5, at 7–8, 2010 WL 3740551, at *7–8.

165 *See* Grisham, *supra* note 8; *supra* note 27 and accompanying text.

166 *See* Grisham, *supra* note 8; *cf.* Atkins v. Virginia, 536 U.S. 304, 309 n.5, 321 (2002) (barring capital punishment for the mentally retarded and citing 2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (Benjamin J. Sadock & Virginia A. Sadock eds., 7th ed. 2000) to define mental retardation as "between 70 and 75 or lower").

167 *See* Petition for Writ of Certiorari, *supra* note 5, at 11, 2010 WL 3740551, at *11.

168 *See id.*

169 *See id.* at 13, 2010 WL 3740551, at *13.

170 *See id.*

171 *See id.*

between the prosecution, defense counsel, and the judge. One can imagine a case, however, in which the record indicates that a defendant pled guilty to a crime on the condition that she receive life imprisonment, only to have the judge later change his mind without giving the defendant an opportunity to object. Virginia's death penalty statutory scheme would not prevent this scenario. In both Teresa Lewis's case and this hypothetical scenario, the defendant provides the state a benefit—efficiency and the conservation of resources—and accepts moral and criminal responsibility. In return, the defendant receives a death sentence.

Capital defendants often benefit when a jury, rather than a judge, conducts fact finding and makes the ultimate moral judgments in their cases because defendants are more likely to receive death sentences from a judge than from a jury.[172] As the Virginia system stands, to preserve the jury right, a defendant must engage in a slow guilty plea.[173] In a slow guilty plea situation, the historical benefits provided by a jury as the best outlet for the community's interest would apply.[174] Additionally, the prosecution would hold a much heavier burden; rather than convincing just one judge, the prosecutor would have the burden of convincing each member of a twelve-person jury.[175] In Teresa Lewis's case, for example, a jury might have found differently on the question of death eligibility given the mitigating evidence in her favor. Teresa's guilty plea and acceptance of responsibility, her borderline mental illness, and the culpability of her triggermen coconspirators would all have played a part in this determination.

If a state wishes to encourage guilty pleas as institutional policy, it must guarantee that defendants can have a jury for death eligibility—or at least inform defendants of this right before they effectively waive it.

### B. Resolving Guilty Pleas and the Sixth Amendment

Virginia's capital scheme effectively waives defendants' jury rights when they plead guilty to murder.[176] Recent scholarship has focused on unconstitutional denials of defendants' jury rights. For example, South Carolina Code section 16-3-20 denies a defendant who pleads guilty to capital murder the right to a jury sentencing.[177] But Virginia's statute and similar statutes in other states reside in a greyer

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172 *See supra* notes 58–64 and accompanying text.

173 *See supra* notes 138–42 and accompanying text.

174 *See supra* notes 49–55 and accompanying text.

175 *See supra* notes 63–68 and accompanying text.

176 *See supra* notes 154–72 and accompanying text.

177 *See* Thomas W. Traxler, Jr., Comment, *Reconciling the South Carolina Death Penalty Statute with the Sixth Amendment*, 60 S.C. L. REV. 1031, 1031–32 (2009).

area. Under these schemes, defendants are not outright denied a jury sentencing; instead, the statute makes it substantially more likely that defendants will unknowingly waive their jury right. This is especially true where the practice, like that in Virginia, allows the judge to proceed to the sentencing without any additional notification to the defendant.[178]

Some basic changes to the plea procedure would prevent unknowing waiver and ensure that Virginia follows *Ring*, thus preserving the defendant's Sixth Amendment rights, the utility of the guilty plea, and fundamental fairness. A jury determination of death eligibility should be the default after a plea to an offense that could qualify a defendant for death. This measure would honor the defendant's Sixth Amendment guarantee to a jury fact finding of any element that increases the possible maximum sentence while still encouraging efficiency by foregoing the trial and moving straight to sentencing. At that point, both parties could present evidence of aggravating and mitigating factors to a twelve-person jury. The jury would then conduct any fact finding necessary to ensure it has found the presence of an aggravating factor beyond a reasonable doubt. The defendant could still waive this requirement at any time and allow for complete judicial discretion for both eligibility and selection. Judge determination as the default sentencing procedure lends itself to abuse of the defendant's constitutional rights either through ineffective assistance of counsel or a hurried plea bargain. A waiver of constitutional rights, however, is permissible so long as the judge notifies the defendant of the consequences of waiving the right to a jury.[179] Judge notification thus becomes essential to ensuring that death sentencing proceeds constitutionally.[180]

Although not constitutionally mandated, allowing the death-eligibility jury to sit for the selection phase as well would strengthen the individualization dimension of Virginia's death penalty scheme. A jury determination at sentencing would ensure that the death penalty only applies to the most egregious crimes, a goal that is important to Virginia's death penalty system.[181] If the state kept the death-eligibility jury to sit for the selection stage, it would incur no extra cost. The

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178 *See* discussion *supra* Part III.A.

179 *Cf.* Horn, *supra* note 112, at 225–26 (noting that the Supreme Court has mandated that trial courts inform defendants of their rights before they plead guilty, in addition to requiring that the trial court determine whether the defendant is knowingly pleading guilty to the charged crimes).

180 The judge is in the best position to notify the defendant of his or her rights, as there is no particularized unconstitutional statute in Virginia.

181 *See* JOINT LEGISLATIVE AUDIT & REVIEW COMM'N OF THE VA. GEN. ASSEMBLY, *supra* note 151, at 9–10 (reserving the death penalty for "the most atrocious or egregious crimes, consistent with the intent of the legislature").

parties would not need to go through voir dire again. Nor would the jury need to look at additional evidence or even take more time for deliberation. After finding an aggravating circumstance that would make the defendant death eligible, the jury could determine the presence of aggravating and mitigating factors and make a selection decision. The jury plays an important role at sentencing, representing the community's morals and values, and sentencing by jury would allow the capital defendant to have an unbiased hearing on aggravating and mitigating evidence. Requiring the prosecution to convince all twelve jurors to vote for death will ensure a procedural safeguard against sentencing to death those defendants who do not truly represent the worst, most heinous cases in the opinion of the community.

Virginia would not be alone in separating a guilty plea in the guilt phase from a jury sentencing in the penalty phase in order to preserve the defendant's Sixth Amendment rights. Although Virginia's courts continue to affirm that their capital murder statute complies with *Ring*,[182] other state courts have held that a state statute that allows a judge to conduct sentencing in a plea proceeding does not comply with the Sixth Amendment.[183] In 2007, the Colorado Supreme Court held that the state's death penalty statute unconstitutionally "link[ed] the waiver of a defendant's jury sentencing right to his guilty plea."[184] In particular, the court noted that when defendants plead guilty, they do not waive all of their rights; rather, a guilty plea "only waives those rights that are incompatible with a guilty plea."[185] The court concluded that a defendant's right to a jury at sentencing was not incompatible with entering a guilty plea because the plea would not make the jury sentencing impossible.[186] In 2009, the South Dakota Supreme Court affirmed the importance of a capital defendant's opportunity to have a jury sentencing.[187] The court held that where a defendant did not understand the judge's instruction that the jury would have to be unanimous in choosing death, the defendant did not knowingly and voluntarily waive the right to a jury trial.[188] Vir-

182 *See, e.g.*, Powell v. Commonwealth, 590 S.E.2d 537, 555 (Va. 2004) ("[T]he procedures for . . . the penalty determination phase . . . continue to be fully in accord with the Sixth Amendment due process concerns underpinning the decision in *Ring*."); *see also* VA. CODE ANN. §§ 19.2-264.2–19.2-264.5 (2008) (prescribing the procedures for capital cases in Virginia state courts); VA. SUP. CT. R. 3A:1, 3A:13(a), 3A:18 (setting forth the Virginia Supreme Court rules of criminal practice and procedure).

183 *See* People v. Montour, 157 P.3d 489, 491 (Colo. 2007) (en banc); Piper v. Weber, 771 N.W.2d 352, 359–60 (S.D. 2009). *But see* Missouri v. Nunley, 341 S.W.3d 611, 623 (Mo. 2011) (en banc) (holding that *Ring* does not preserve a right to jury determination of death eligibility where a defendant entered a guilty plea).

184 *See Montour*, 157 P.3d at 491.

185 *Id.* at 499.

186 *See id.*

187 *See Piper*, 771 N.W.2d at 359–60.

188 *See id.* at 358–60.

ginia and other states with invalid sentencing schemes would be following a growing trend in ensuring that their sentencing statutes prevent unknowing waiver of the jury right.

### C. Establishing a Constitutional Challenge

*Ring* established a defendant's Sixth Amendment right to a jury determination of death eligibility at the sentencing phase.[189] Many state legislatures, including Virginia's, have not recognized this right in their statutory schemes and case law. Rather, these state legislatures have determined that a judge who makes factual findings regarding death eligibility of a capital defendant does not elevate the level of the crime or that the defendant waived the right to a jury determination when the defendant pled guilty.[190] Establishing a constitutional challenge to this fundamental deprivation presents unique difficulties. First, it requires defendants to plead guilty and admit the factual elements of their crimes. This admission presents a danger for sentencing, as it limits the availability of defenses to present to a jury later on. And, perhaps even more problematic, it does not prevent a judge from denying the request for a jury sentencing, leaving defendants with an admission to the facts of the crime but without the ability to appeal to a jury to explain the acceptance of responsibility.[191]

Defendants would more effectively challenge the existing sentencing provisions and seek to have the court affirm their jury right by limiting the scope of their guilty pleas. To successfully set up a constitutional challenge, defendants would stand before trial and enter a limited plea. The limited plea would only admit the facts necessary to find the defendant guilty of murder. The defendant would not, however, admit any facts necessary to establish an aggravating circumstance and elevate the crime from murder to death-eligible murder. The defendant's admissions would mirror the language in the statute to ensure the limited scope of the plea. This strategy would leave the question of death eligibility open and thus clearly establish an *Apprendi/Ring* conflict. Should a judge unilaterally determine death eligibility, that determination would elevate the crime beyond any of the facts established for the defendant to that point, at which time the court is constitutionally obligated to provide the defendant with a jury to conduct any further fact finding.

Criminal defendants often use this strategy in other contexts. For example, defendants frequently enter conditional or limited pleas to preserve a claim for use in later motions.[192] Limiting the scope of the

189 *See supra* notes 97–103 and accompanying text.
190 *See supra* discussion Part III.A–B.
191 *See supra* discussion Part III.A–B.
192 *See Guilty Pleas*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 381, 381–83 (2006).

guilty plea could easily extend to the capital sentencing context. It would not impose any additional requirements beyond the current plea procedure.

Although a court and prosecutor might resist allowing a defendant to enter a limited plea, this procedure would uniquely preserve a limited set of facts—thus ensuring that a defendant does not plead to the elements necessary for death-eligible murder. If a defendant did not limit the facts admitted, a court could reason that the defendant did not preserve the issue for jury determination, and the judge could take control of the final penalty decision. The limited plea is worth the challenges initial resistance might pose in the courtroom because after entering a limited plea, a defendant will have a much higher chance of succeeding on an *Apprendi/Ring* claim on appeal.

## CONCLUSION

Cases like Teresa Lewis's illuminate the potential for procedural unfairness where defendants plead guilty to death. The process implicates two important rights. First, defendants risk unknowing waiver of their right to have a jury determine death eligibility. This right has strong historical roots and an empirical effect on defendants' receiving fair sentences.[193] Second, the process may erode the guilty plea. Replacing guilty pleas with slow guilty pleas in order to preserve constitutional rights removes any benefits the state may gain from a guilty plea.[194] Virginia's statutory scheme does not properly account for defendants' right to have a jury determine death eligibility after pleading guilty, but simple changes to this scheme would ensure preservation of the right while also benefitting the state by encouraging guilty pleas. Perhaps the outcome of Teresa Lewis's case would not have been different had a jury determined her death eligibility, but, per the Sixth Amendment, she deserved a chance to convince at least one juror that her crimes were not sufficiently aggravated to trigger the death penalty. Future capital defendants should mount constitutional challenges to Virginia's scheme during their own trials to take advantage of their right to a jury determination before a death sentencing.

193 *See supra* notes 45–65 and accompanying text.

194 *See supra* notes 139–42 and accompanying text.