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I'm Sorry Your Honor, You Will Not Decide My Fate Today: The Role of Judges in the Imposition of the Death Penalty: A Note on Ring v. Arizona

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**I'M SORRY YOUR HONOR, YOU WILL NOT DECIDE MY FATE
TODAY: THE ROLE OF JUDGES IN THE IMPOSITION OF THE
DEATH PENALTY: A NOTE ON *RING v. ARIZONA***

I. INTRODUCTION

The Sixth Amendment to the Constitution of the United States guarantees every criminal defendant the right to a trial by jury.¹ Since this is one of the most important rights that all American criminal defendants enjoy, the extension of the Sixth Amendment's right to a trial by jury beyond core court proceedings has been an oft-litigated issue. In 1990, the U.S. Supreme Court deemed the Sixth Amendment inapplicable to Arizona's death penalty sentencing statute because the aggravating circumstances found by the judge were not elements of the crime, and therefore these factors did not have to be decided by a jury.²

Twelve years later, it seemed certain that Timothy Stuart Ring's petition for a writ of certiorari from the Supreme Court would be denied because it was based on the exact point of law the Court in *Walton* had refused to recognize. However, recent decisions of the Supreme Court had begun to call into question the *Walton* decision without expressly overruling precedent.³ The Supreme Court decided to take Case Number 01-488, because of the unintelligible and convoluted rule it had judicially created with its own precedent⁴ *Timothy Stuart Ring v. Arizona*.⁵ In taking this case, the Court seemingly made a commitment to cure this ambiguity and its their rule. After this case, many issues are seemingly still open. The following questions must then be asked: Is this rule any better than the previous rule?; What parties may

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

2. *Walton v. Ariz.*, 497 U.S. 639, 649 (1990).

3. *Id.* (holding this same Arizona sentencing statute constitutional under the Sixth Amendment); *Apprendi v. N.J.*, 530 U.S. 466, 497 (2000) (holding unconstitutional New Jersey's sentencing guidelines which allowed for a larger sentence to be imposed by the judge than was imposed by the jury); *Jones v. United States*, 529 U.S. 229, 252 (1999) (suggesting that any fact, other than prior conviction, that increases the maximum penalty for a crime must be submitted to a jury).

4. *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting) ("The distinction of *Walton* offered by the [*Apprendi*] Court today is baffling, to say the least.").

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

partake in what roles in sentencing?; What formula of judge and jury fact-finding is constitutional and what sort of system will be unconstitutional after this decision?

II. THE SUPREME COURT'S JURISPRUDENCE PRIOR TO *RING*

A. *Walton v. Arizona*

In the Supreme Court's first attempt to decide whether or not the sentencing scheme of Arizona comported with the Sixth Amendment's trial by jury clause, the Court decided *Walton v. Arizona*. In March 1986, Jeffrey Walton and two co-defendants went to a bar in Tucson, Arizona, intending to rob a bar patron, steal his car and leave him tied up while they fled the state in the victim's car.⁶ Walton and his two co-defendants encountered Thomas Powell in the parking lot of this bar and robbed him as planned. After driving Powell to the desert and having a conversation with his 2 cohorts, Walton instructed his co-defendants to wait in the car while he marched Powell off into the desert. Walton then shot Powell once in the head with a .22 caliber Derringer. Walton was tried by a jury and sentenced in front of the trial judge alone. The sentencing was carried out pursuant to Arizona revised statute 13-703, the very same way in which the defendant in the later *Ring* case, Timothy Ring, was sentenced.⁷ The trial judge, after finding facts and weighing all of the aggravating and mitigating factors, sentenced Walton to death.⁸

The Supreme Court, in an opinion written by Justice White and joined by four other justices,⁹ found that the aggravating circumstances laid out by the trial court in this case were not elements of the crime, and thus there was no need for the jury to find the facts associated with them. The Supreme Court distinguished between *aggravating factors* and *elements* of the crime and found the factors in this case to be aggravating factors and not elements of the crime.¹⁰ The Supreme Court thus affirmed the judgment of the trial court and

6. *See Walton*, 497 U.S. at 644-45 (all facts in this paragraph are taken from the Supreme Court's recitation of the facts).

7. *Id.* at 645 (finding the same two aggravating factors found by the trial court in *Ring* of pecuniary gain and heinousness).

8. *Id.* Arizona law required that the sentencing hearing be conducted in front of the judge alone.

9. *Id.* at 639 (Justice White's opinion was signed by Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy).

10. *Id.* at 649 ("we cannot conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances.").

the Arizona Supreme Court¹¹ and found the Sixth Amendment inapplicable to the Arizona death penalty sentencing scheme under section 13-703.

If *Walton* was the only case in the Court's jurisprudence regarding the applicability of the Sixth Amendment to sentencing schemes such as section 13-703, then would have been decided purely on *stare decisis* grounds. A petition for a writ of certiorari probably would never have been granted. However, more recent cases began to question the Court's jurisprudence on this issue, while specifically not overruling *Walton*.¹²

B. *Jones v. United States*

In the Supreme Court's next attempt to resolve exactly what type of sentencing scheme would and would not violate the Sixth Amendment's guarantee of a trial by jury, the Court decided *Jones v. United States*.¹³ Nathaniel Jones and two others held up two men, resulting in Jones forcing one of the men back into the car after robbing both men and driving off in the car.¹⁴ Jones then let the victim out of the car and was pursued by the police until he crashed the vehicle into a telephone pole.

Jones was charged with one count of violating the federal carjacking statute¹⁵ and was told by the magistrate judge that he would be sentenced to no more than fifteen years in jail. The judge submitted instructions to the jury, which defined the elements solely as in paragraph one of section 2219,¹⁶ and the jury returned a verdict of guilty. The pre-sentence investigation report, which was submitted to the trial court before the imposition of sentence, suggested that Jones should be sentenced to twenty-five years because one of the victims subsequently suffered serious ear damage from the assault

11. *State v. Walton*, 769 P.2d 1017, 1032 (Ariz. 1989) *aff'd*, *Walton*, 497 U.S. at 656.

12. *Apprendi*, 530 U.S. at 496 (differentiating the Arizona sentencing scheme in *Walton* from the New Jersey sentencing scheme in that case); *see also* *Jones*, 526 U.S. at 251 (also differentiating *Walton*).

13. *Jones*, 526 U.S. at 227.

14. *Id.* at 229-30 (all facts in this paragraph are taken from the Supreme Court's recitation of the facts).

15. The 1994 version of 18 U.S.C. § 2119 then stated that:

Whoever, possessing a firearm as defined in section 921 of this title takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall (1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both.

16. The elements of the crime submitted to the jury *did not* include the aggravating factors later determined at sentencing.

preceding the carjacking.¹⁷ The magistrate judge then sentenced Jones to twenty-five years for the carjacking count.

The Supreme Court granted certiorari to resolve the issue of whether the Sixth Amendment is violated if a judge sentences a defendant to a term greater than the jury can sentence the defendant on its factual findings.¹⁸ The Supreme Court, in an opinion by Justice Souter, held that the three paragraphs of section 2119 must be held as separate offenses, with separate elements, that must be found by the jury beyond a reasonable doubt and not by the judge.¹⁹

The Court in *Jones* sidestepped the issue of the applicability of *Walton* by simply distinguishing the two statutes and saying that “[w]e are frank to say that we emphasize this careful reading of *Walton*’s rationale because the question implicated by the Government’s position on the meaning of section 2119(2) is too significant to be decided without being squarely faced.”²⁰ In fact, the dissent believed that there was absolutely no need to address the *Walton* case or to cast doubt on it as it believed that the majority had done.²¹ In looking at the rule that the majority laid down in this case, the dissent seemed to foreshadow the exact question and result in *Ring*, saying:

If 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. In fact, *Walton* would appear to have been a better candidate for the Court’s new approach than is the instant case. In *Walton*, the question was the aggravated character of the defendant’s conduct, not, as here, a result that followed after the criminal conduct had been completed. In distinguishing this line of precedent, the Court suggests *Walton* did not “squarely fac[e]” the key constitutional question “implicated by the Government’s position on the meaning of § 2119(2).” The implication is clear. Reexamination of this area of our capital jurisprudence can be expected.²²

C. *Apprendi v. New Jersey*

The final case in this line of jurisprudence prior to *Ring* was *Apprendi v. New Jersey*. In an opinion written by Justice Stevens for five justices, the

17. The injury to the victim which was sustained during the carjacking did not become serious until after the initial crime, but was a direct result of the assault.

18. *Id.* at 232.

19. *Jones*, 526 U.S. at 252 (in effect the aggravating factors should be treated as the functional equivalent of elements of the crime).

20. *Id.* at 251.

21. *Id.* at 271-72 (Kennedy, J., dissenting) Justice Kennedy was confused as to why aggravating factors were viewed in one way in *Walton* and in another way here. If the Court was correct in *Walton*, why should the result be different here?

22. *Id.* at 272 (Kennedy, J., dissenting) (internal citations omitted).

Supreme Court held unconstitutional a New Jersey sentencing scheme which allowed a judge to find, by a preponderance of the evidence, that a charged crime was a hate crime.²³ This finding then allowed a judge to increase the maximum sentence imposed for a second degree offense from between five and ten years to between ten and twenty years.²⁴

The Petitioner, Charles Apprendi, fired several .22 caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood in New Jersey.²⁵ After being arrested, Apprendi made a statement that he did not know the family personally, but that because the family was black, he did not want them to live in the neighborhood.²⁶ Apprendi was indicted, and later plead guilty to the two counts on the indictment, for second-degree possession of a firearm for an unlawful purpose. The State reserved the right to ask for a sentencing enhancement on the count related to the facts described above so long as Apprendi could reserve the right to challenge the constitutionality of the sentencing enhancement scheme. If the judge was to find that the crime on December 22nd was not a hate crime, the maximum sentence for this crime would have been between ten and twenty years total for the two counts. If, however, the judge was to find the hate crime sentencing enhancement to be present, the maximum sentence for one of the counts could be twenty years, for a total of thirty years possible incarceration between the two counts.²⁷

The judge found, by a preponderance of the evidence, that the crime was a “hate crime” within the meaning of the sentencing enhancement guidelines and sentenced Apprendi to twelve years for this one count, two years greater than he could have been sentenced if he was found guilty by a jury without the sentencing enhancement. This sentence was, however, well within the range allowed by the sentencing enhancement guidelines of New Jersey’s hate crime statute.²⁸ This statute allowed for a sentence of between ten and twenty years on each count.²⁹ In an unsuccessful appeal,³⁰ the New Jersey Supreme Court

23.

24. *Apprendi*, 530 U.S. at 468-69.

25. *Id.* at 469 (all facts in this paragraph are taken from the Supreme Court’s recitation of the facts).

26. This statement was later recanted by Apprendi.

27. 5-10 years for each count if this is not a hate crime for 10-20 years total. If count one was found to be a hate crime, that count would carry a 10-20 year sentence, or a total of 15-30 years for the two counts.

28. N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999) provided that: (e) The 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 (repealed 2001).

29. *Apprendi*, 530 U.S. at 471.

30. *State v. Apprendi*, 731 A.2d at 497.

found the Supreme Court decision in *Jones* inapplicable and affirmed the decision.³¹

After granting a petition for certiorari, the Supreme Court addressed the issue of whether a judge alone, by a preponderance of the evidence, could impose a sentence longer than could have possibly been imposed if the jury had found the defendant guilty beyond a reasonable doubt. The Court suggested that there is a distinction between an *element* of a crime and a *sentencing factor* because the Constitution requires the former be found beyond a reasonable doubt by the jury, and allows the judge to find the latter by the same or a lesser standard.³² The Court further found that “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.”³³ In attempting to distinguish the sentencing scheme in *Walton*, the Court specifically stated that the sentencing scheme in this case was different from that in *Walton*: “[f]inally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.”³⁴

The dissent took issue with the distinction offered by the majority and suggested that it was “baffling.”³⁵ The dissent further suggested the jurisprudence of the Court, and the *Walton* case specifically, dictated that Apprendi’s sentence should be affirmed.³⁶

III. THE *RING* CASE IN STATE COURT

A. *Facts leading to the Sentencing of Timothy Stuart Ring*

On November 28, 1994, a Wells Fargo armored van arrived at the Arrowhead Mall in Glendale, Arizona.³⁷ The Wells Fargo courier went into the Dillard’s department store to pick up a money drop, only to return to the

31. *Id.* at 493 (“[b]ecause the language in *Jones* was not essential to its holding, and because the Court did not expressly overrule the *Almendarez-Torres* formulation, we believe that case still states the rationale that we must apply here”).

32. *Apprendi*, 530 U.S. at 478.

33. *Id.* at 490.

34. *Id.* at 496.

35. *Id.* at 538 (O’Connor, J., dissenting) (“[t]he distinction of *Walton* offered by the [*Apprendi*] Court today is baffling, to say the least”).

36. *Id.* at 554 (O’Connor, J., dissenting). It should be noted that Justice O’Connor wrote the majority opinion in the *Walton* case and also signed the dissent in *Jones*.

37. *Ring*, 122 S.Ct. at 2432-33. All of the facts in this paragraph are taken from the Supreme Court’s recitation of the facts.

parking lot to find the van and driver missing. The truck was located later that day, with the doors locked and the engine running. The driver was found dead from a single shot to the head. Over \$730,000 in cash and checks were missing from the van. The police conducted a thorough investigation and eventually arrested Timothy Ring, after executing a search warrant on his house and finding in excess of \$271,000 in cash.

At the trial of Timothy Ring, the State proffered voluminous evidence of the crime and conspiracy.³⁸ The judge submitted instructions to the jury on the alternative charges of premeditated murder and felony murder.³⁹ The jury was unable to return a verdict on the premeditated murder charge,⁴⁰ but they were able to unanimously convict on the lesser instructed charge of felony murder.⁴¹ Ring was found guilty of felony murder committed in the commission of an armed robbery. The verdict of felony murder returned by the jury is what precipitated the controversy in this case, since only when aggravating factors are found can the death penalty be imposed upon those guilty of felony murder.

B. *The Sentencing Phase of Timothy Ring's Trial*

Ring was convicted of first-degree murder pursuant to Arizona rev. stat. section 13-1105(A)(2), which allows for a first-degree conviction not only in cases of premeditated murder, but also in cases where the accused:

Acting either alone or with one or more other persons the person commits or attempts to commit . . . robbery under § 13-1902, 13-1903 or 13-1904 . . . and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.⁴²

The pre-*Ring* version of Arizona's sentencing statute, 13-703(A), provided in pertinent part that:

When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial . . . shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections G and H of this section, for the purpose of determining the sentence to be imposed. *The hearing shall be conducted*

38. The State of Arizona offered evidence of the money found at Ring's house and taped phone conversations between Ring and his accomplices in which they commented about the ineptitude of the police investigation.

39. *Id.* at 2433.

40. *Id.* Six of the jurors voted to acquit Ring of the charge of premeditated murder.

41. *Id.*

42. ARIZ. REV. STAT. § 13-1105(A)(2) (2001).

*before the court alone. The court alone shall make all factual determinations required by this section or the Constitution of the United States or this state.*⁴³

Under the common law, the judge was required first to find whether Timothy Ring was the actual killer of the victim⁴⁴ or at least a “major participant” in the felony committed.⁴⁵ The judge must then determine that the defendant demonstrated “reckless indifference to human life” in order to allow a sentence of death for felony murder.⁴⁶ During the sentencing phases a convicted co-conspirator implicated Ring as the leader of the group and stated that he witnessed Ring take the shot at the driver of the armored van.⁴⁷ This was in spite of the fact that this same witness, James Greenham,⁴⁸ testified that he had previously stated that Ring had nothing to do with the planning and was only testifying to “pay back” Ring for threats made by Ring to interfere with the relationship between Greenham and his ex-wife.⁴⁹ The judge then found that Ring was eligible for death under *Enmund* and *Tison*.

Under subsection G of section 13-703, the judge was next required to find the presence or absence of aggravating and mitigating circumstances.⁵⁰ The trial judge found that two aggravating circumstances under subsection G were present in this case. Both the fact that “the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value”⁵¹ and “the defendant committed the offense in an especially heinous, cruel or depraved manner.”⁵² The judge also found the existence of one mitigating circumstance, under subsection H of 13-703,⁵³ in that the

43. ARIZ. REV. STAT. § 13-703(C) (2001) (emphasis added).

44. *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (requiring that in order for a charge of felony murder to carry the death penalty, the accused must be the actual killer).

45.

46. *Tison v. Arizona*, 481 U.S. 137, 158 n.12 (qualifying *Enmund*) (stating: [a]lthough we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.).

47. *Ring*, 122 S.Ct. at 2435.

48. *State v. Ring*, 25 P.3d 1139, 1144 (Ariz. 2001), *rev'd*, 122 S.Ct. at 2443 (stating Greenham’s alleged nickname is “Yoda”).

49. *Ring*, 122 S.Ct. at 2435.

50. ARIZ. REV. STAT. § 13-703(G) (2001).

51. ARIZ. REV. STAT. § 13-703(G)(5) (2001). The judge concluded that this factor was present because of the over \$700,000 stolen and the \$271,000 found at Ring’s house.

52. ARIZ. REV. STAT. § 13-703(G)(6) (2001). The judge concluded that this factor was present solely because of the testimony of Ring’s co-conspirator, James Greenham.

53. ARIZ. REV. STAT. § 13-703(H) (2001) (“The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining

defendant had a minimal criminal record, which is not specifically enumerated in subsection G, but allowable under the section.

After making these findings of fact, the trial judge sentenced Timothy Stuart Ring to death under section 13-703. Timothy Ring was incarcerated pending the outcome of his appeals.

C. *The Arizona Supreme Court*

After Timothy Ring was convicted, he appealed directly to the Arizona Supreme Court, asserting as one ground for reversible error that the trial court failed to follow the Supreme Court's decisions in *Jones* and *Apprendi* in considering whether Arizona's sentencing scheme was indeed constitutional.⁵⁴ The State, in response, pointed to the fact that the *Walton* case had specifically addressed Arizona's sentencing statute and *Jones* and *Apprendi* had specifically distinguished *Walton*.⁵⁵

The Arizona Supreme Court engaged in a full Fifth and Sixth Amendment analysis regarding Ring's claims. The court seemed to be confused as how to reconcile *Walton* with the Supreme Court's subsequent jurisprudence in *Jones* and *Apprendi*.⁵⁶ The Arizona court felt that the instant case was exactly what Justice O'Connor feared in her dissenting opinion in *Apprendi*. They stated that "the present case is precisely as described in Justice O'Connor's dissent – Defendant's death sentence required the judge's factual findings."⁵⁷ Although the Arizona Supreme Court found the arguments of Timothy Ring persuasive, they were "bound by the Supremacy Clause in such matters."⁵⁸ Therefore the Arizona Supreme Court found they "must conclude that *Walton* [wa]s still the controlling authority and that the Arizona death penalty scheme ha[d] not been held unconstitutional under either *Apprendi* or *Jones*."⁵⁹ The Arizona court thus, albeit reluctantly, accepted the arguments of the State regarding the applicability of *Walton* after *Apprendi* and *Jones*.

whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense.").

54. *State v. Ring*, 25 P.3d at 1150.

55. *Id.*

56. *Id.* at 1151-52.

57. *Id.* at 1151. Justice O'Connor opined:

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.) (citing *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting).

58. *Id.* at 1152.

59. *State v. Ring*, 35 P.3d at 1152.

The Arizona Supreme Court then turned to the other issues allowing for the death sentence. The court found that *if* the evidence of Ring's actual commission of the homicide or major participation in the crime was limited to the evidence admitted at trial, then there would not have been sufficient evidence for the finding of a death sentence under the *Enmund-Tison* standard.⁶⁰ However, because the court found that the judge may take into account evidence offered at sentencing,⁶¹ the trial judge was proper in his *Enmund-Tison* determination.

Next, turning to the aggravating factors, the Arizona Supreme Court found that there was not evidence, beyond a reasonable doubt, to support the trial court's determination of depravity or heinousness under section 13-703(G)(6).⁶² The court did, however, find that there was evidence beyond a reasonable doubt that the defendant did have pecuniary gains from this crime and allowed this aggravating factor under section 13-703(G)(5).⁶³ The court finally suggested that the one mitigating factor found by the trial court, the lack of criminal history, was valid, but was entitled to little weight.⁶⁴

After reviewing all of the evidence, the court found that the lack of the heinousness itself was not reversible error. The court concluded that it had previously, and would in this case, support pecuniary gain as the sole aggravating factor to allow a death penalty conviction for felony murder.⁶⁵ The Arizona Supreme Court affirmed the conviction and death penalty sentence of Timothy Ring.⁶⁶

The concurrence argued that the reliance by the majority on mere Supremacy Clause arguments for its decision, and that its fear that this case may not be correctly decided, was misplaced.⁶⁷ The concurrence argued that this case was clearly correct since the maximum statutory penalty for first degree murder is death, and without a finding by a jury of first-degree murder,

60. *Id.*

61. *Id.* (discussing ARIZ. REV. STAT. § 13-703(E)). This evidence could include the testimony of co-conspirator James Greenham.

62. *Id.* at 1154 (ARIZ. REV. STAT. § 13-703(G)(6) is now ARIZ. REV. STAT. § 13-703(F)(6) after the 2002 legislative amendments).

63. *Id.* (ARIZ. REV. STAT. § 13-703(G)(5) is now ARIZ. REV. STAT. § 13-703(F)(5) after the 2002 legislative amendments).

64. *State v. Ring*, 35 P.3d at 1155.

65. *Id.* at 1156 ("After our independent review, we conclude that even crediting Defendant's minimal criminal record, the mitigating evidence is not sufficient to call for leniency in light of the facts of this case. This murder was not the result of sudden impulse or loss of control nor a robbery gone bad, but a planned, ruthless robbery and killing.").

66. *Id.*

67. *Id.* at 1157 (Martone, J., concurring). Since the *Apprendi* case specifically distinguished *Walton*, the issue of *Apprendi* calling *Walton* into doubt is moot.

the death penalty could not be imposed. Finally, the concurrence suggested that it should matter not who sentences the convicted defendant.⁶⁸

IV. THE SUPREME COURT'S DECISION IN *RING V. ARIZONA*

A. *Making it to the Supreme Court*

After losing his appeal to the Arizona Supreme Court, Timothy Ring then petitioned for a writ of certiorari, to the U.S. Supreme Court which was granted.⁶⁹ The Court accepted the Petitioner's Brief,⁷⁰ the Respondent's brief,⁷¹ a Reply Brief from the Petitioner,⁷² as well as Amicus Curiae Briefs from the Attorneys General of multiple states,⁷³ the Criminal Justice Law Center⁷⁴ and the National Crime Victims Law Institute.⁷⁵ The case was argued on April 22, 2002.

The Court decided the matter, with six members⁷⁶ voting to reverse the Arizona Supreme Court decision and invalidate *Walton* in favor of *Apprendi* and *Jones*. Justice Scalia delivered a concurring opinion, joined by Justice Thomas. Justice Kennedy also filed a concurring opinion. Justice Breyer filed an opinion concurring only in the judgment. Justice O'Connor filed a dissenting opinion, joined by Chief Justice Rehnquist. Each of these opinions will be handled separately below.

B. *The Majority Opinion*

After a recitation of the facts and procedural history which brought this case to the Supreme Court, Justice Ginsburg, writing for the majority,

68. *Id.* at 1158 (Martone, J., concurring).

69. *State v. Ring*, 35 P.3d 1139, *cert. granted*, 122 S.Ct. 865 (U.S. Jan. 11, 2002) (No. 01-488).

70. Brief for Petitioner, *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (No. 01-488) (2002 WL 432399).

71. Brief for Respondent, *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (No. 01-488) (2002 WL 481144).

72. Reply Brief for Petitioner, *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (No. 01-488) (2002 WL 649366).

73. Amicus Curiae Brief for Respondent, Filed by Attorneys General of Ala., Colo., Del., Fla., Idaho, Ind., Miss., Mont., Neb., Nev., N.Y., Pa., S.C., Utah, Va., *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (No. 01-488) (2002 WL 481140).

74. Amicus Curiae Brief for Respondent, Filed by Ariz. Voice for Crime Victims and Nat'l Crime Victim Law Inst., *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (No. 01-488) (2002 WL 730737).

75. Amicus Curiae Brief for Respondent, Filed by Criminal Justice Legal Found., *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (No. 01-488) (2002 WL 730734).

76. *Ring*, 122 S.Ct. at 2432 (Justice Ginsburg delivered the opinion of the court in which Justices Stevens, Scalia, Kennedy, Souter and Thomas joined).

immediately recognized that the statute called into question by Petitioner Timothy Ring had been squarely addressed before.⁷⁷ The previous case⁷⁸ had directly addressed the issue of the constitutionality of the Arizona death penalty sentencing scheme and found that scheme constitutional under the Sixth Amendment.⁷⁹ The Court granted certiorari to decide the impact of its more recent cases which seemed to cast doubt on the *Walton* decision without explicitly overturning it. For this reason, the Court was prompted into its most recent venture into this area of constitutional law.

The Court recognized that based solely on the findings of the jury, the maximum sentence that Timothy Ring could have been given was life in prison, and only after the intervention of the judge alone could Ring be sentenced to death.⁸⁰ The Court wanted to answer the question of whether this aggravating factor could be found by a judge or was required by the Sixth Amendment of the Constitution⁸¹ to be found by a jury beyond a reasonable doubt.⁸² One of the main questions raised by the Court in this case was the differentiation between *elements* of a crime and *aggravating circumstances* of a crime, and what procedural differences should exist between the two at the trial level. The Court concluded that the differences should not be one of form, but rather of effect.⁸³ In foreshadowing to Justice Scalia's concurrence, the Court did not believe that the mere naming of a factual finding as one or the other should allow it to be found constitutionally by the judge and not the jury.⁸⁴ The answer, the Court concluded, was that if a factual finding has the ability to increase the sentence to a level greater than it can be found without this finding, then that fact must be considered the functional equivalent of an element of the crime, and thus cannot be found solely by the judge, no matter what it may be called.⁸⁵

The Court rejected Arizona's argument that since the Arizona statute⁸⁶ specifically allowed for the sentence of life or a sentence imposing the death penalty; that these are mere sentencing options to which the judge has

77. *Id.* at 2437.

78. *Walton*, 497 U.S. at 649.

79. *Id.*

80. *Ring*, 122 S.Ct. at 2437. In Arizona, a defendant cannot be sentenced to death without the finding of an aggravating factor, which can only be found by a judge.

81. *In re Oliver*, 333 U.S. 257, 273-74 (1948) (making the Sixth Amendment applicable to the states through the Fourteenth Amendment).

82. *Ring*, 122 S.Ct. at 2437.

83. *Id.* at 2439-40.

84. *Id.* at 2439.

85. *Id.* at 2443.

86. ARIZ. REV. STAT. § 13-1105(C) (2001).

discretion to sentence within the range authorized by the jury verdict.⁸⁷ The Court noted again, that *in effect*, the verdict of the jury cannot impose a sentence of death, but only a sentence of life imprisonment, unless a further factual finding is made by the judge. Because this further finding by the judge increases the sentence above the maximum penalty that could be imposed by the jury, this scheme is unconstitutional.⁸⁸ The Court also found unpersuasive the distinction between sentencing factors and elements proffered by Arizona.⁸⁹ Finally, the Court rejected Arizona's argument that decision on the death penalty are unique from the Court's other jurisprudence on the Sixth Amendment and therefore the Court should allow the aggravating factors for the death penalty to be found by the judge alone.⁹⁰ The Court found no reason to except capital defendants from the Sixth Amendment guarantees laid out in *Jones* and *Apprendi*⁹¹ and rejected this argument as well.

The Court concluded by stating the importance of *stare decisis*,⁹² and suggested that a decision of the Supreme Court should never be overruled lightly, but can be overruled in cases where the "necessity and propriety of doing so has been established[;] . . . this is such a case."⁹³ The Court found that "*Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both."⁹⁴ The Court then overruled *Walton*⁹⁵ "to the extent that it allows a sentencing judge, sitting without a jury to find an aggravating circumstance necessary for the imposition of the death penalty."⁹⁶ The Court finally held that the "aggravating factors" in the Arizona scheme were nothing more than "the functional equivalent of an element of a greater offense"⁹⁷ and "the Sixth Amendment requires that they be found by a jury."⁹⁸ In conclusion, Justice Ginsburg stated that it would make no sense to leave the

87. *Ring*, 122 S.Ct. at 2440. Our country has a significant history of discretionary sentencing by judges, a fact not lost on the dissenting Justices.

88. *Id.* at 2440-41.

89. *Id.* at 2441 (in large part reciting the differentiation found by the majority in *Walton* based on the fact that the aggravating factors were called aggravating factors and not elements of the crime).

90. *Id.* (stating "[d]eath is different").

91. *Id.* at 2442 ("Arizona presents 'no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent.'" (quoting *Apprendi*, 530 U.S. at 539 (O'Connor, J., dissenting))).

92. *Ring*, 122 S.Ct. at 2442-43 (although "the doctrine of *stare decisis* is of fundamental importance to the rule of law[.] . . . [o]ur precedents are not sacrosanct" (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989))).

93. *Id.* at 2443.

94. *Id.*

95. *Id.* ("accordingly, we overrule *Walton*").

96. *Id.*

97. *Ring*, 122 S.Ct. at 2443 (quoting *Apprendi*, 530 U.S. at 494, n. 19).

98. *Id.* at 2443.

Court's jurisprudence the way it was before this decision; to say that an increase in sentence by two years must be found by a jury, but that the finding of death over life could be found by a judge. The Supreme Court thus reversed the decision of the Arizona Supreme Court and remanded the case for further proceedings.⁹⁹

C. *Justice Scalia's Concurrence*

Justice Scalia, joined by Justice Thomas, was torn by two conflicting interests in attempting to resolve this case. On the one hand, Justice Scalia did not agree with fact the Constitution necessarily places procedural sentencing requirements on the states, and therefore did not understand how any sentencing, whether conducted by the judge or the jury, can rise to the level of a constitutional issue.¹⁰⁰ On the other hand, Justice Scalia recognized that his decisions in previous cases, such as *Apprendi*, required him to find that "all facts essential to the 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."¹⁰¹

Justice Scalia further recognized a possible manipulation of the Constitution after *Walton* in that states could call certain factors relevant to sentencing an aggravating factor for the judge to decide, and make an end-run around the constitutional guarantee of a trial by jury.¹⁰² For these reasons, Justice Scalia decided to join the opinion of the Court.¹⁰³

D. *Justice Kennedy's Concurrence*

While Justice Kennedy still believed that *Apprendi* was incorrectly decided, he stated that *Apprendi* is now the law and must be followed. In applying the law of *Apprendi* to the facts of this case, Justice Kennedy concluded that "[i]t is beyond question that during the penalty phase of a first-degree murder prosecution in Arizona, the finding of an aggravating circumstance exposes 'the defendant to a greater punishment than that authorized by the jury's guilty verdict.'"¹⁰⁴ Based on this application of the facts of this case to the law of *Apprendi*, Justice Kennedy stated that he

99. *Id.*

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

101. *Id.* (Scalia, J., concurring).

102. *Ring*, 122 S.Ct. at 2445. (Scalia, J., concurring). Justice Scalia is not making any particular accusations, but rather stating the possibility of abuse.

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

104. *Id.* (Kennedy, J., concurring) (quoting *Apprendi*, 530 U.S. at 494).

“agree[d] with the Court . . . that *Apprendi* and *Walton* cannot stand together as the law.”¹⁰⁵

E. Justice Breyer's Concurrence in the Judgment

Justice Breyer did not sign on to the majority opinion of the Court in this case, but nonetheless concurred in the judgment because he believed that death penalty sentencing by the jury is mandated by the Eighth Amendment of the United States Constitution.¹⁰⁶ Justice Breyer reached this conclusion because, in his opinion, without special procedural safeguards when the death penalty is involved, the punishment will be considered cruel and unusual.¹⁰⁷ Because the focus of this case note is not the cruel and unusual punishment clause of the Eighth Amendment, this opinion will not be addressed further.¹⁰⁸

F. The Dissent

Justice O'Connor, joined by Chief Justice Rehnquist, dissented from the majority opinion. The dissenters agreed with the majority that there is no room for both *Walton* and *Apprendi* to stand in concert.¹⁰⁹ The main difference between the dissent and the majority, however, is that the dissent would have overruled *Apprendi*, not *Walton*.¹¹⁰ Justice O'Connor believed that *Apprendi* was wrongly decided because the rule in *Apprendi* was “not required by the Constitution, by history, or by our prior cases . . . [a]nd it ignores the significant history in this country of . . . discretionary sentencing by judges.”¹¹¹

Justice O'Connor then discussed the effects of *Apprendi* on the U.S. legal system and her belief that the number of *habeas corpus* petitions has risen sharply, a phenomenon she attributed to the *Apprendi* decision.¹¹² Since Justice O'Connor simply saw *Ring* as an extension of *Apprendi*, she believed that this phenomenon would just increase the number of claims of

105. *Id.* (Kennedy, J., concurring).

106. *Id.* at 2446 (Breyer, J., concurring in the judgment).

107. *Ring*, 122 S.Ct. at 2446 (Breyer, J., concurring in the judgment).

108. *Id.* at 2445 (Scalia, J., concurring). It is worth noting that Justice Scalia scolds Justice Breyer for this approach, saying, “today’s judgment has nothing to do with jury sentencing” and “there is really no way in which Justice Breyer can travel with the happy band that reaches today’s result unless he says yes to *Apprendi*. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.”

109. *Id.* at 2448 (O'Connor, J., dissenting).

110. *Id.* (O'Connor, J., dissenting). It is of note that Justice O'Connor authored the majority opinion in *Walton* and authored the dissent in *Apprendi*.

111. *Id.* at 2449 (O'Connor, J., dissenting) (quoting *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting)).

112. *Ring*, 122 S.Ct. at 2449 (O'Connor, J., dissenting) (discussing the belief of the Office of the United States Courts for the increase in habeas corpus petitions).

unconstitutionality of sentences based on *Apprendi* and *Ring*.¹¹³ Because the dissenters believed that the sentencing in this case was in accordance with the Sixth Amendment, they would have affirmed the conviction of Timothy Ring.¹¹⁴

V. *RING* AND BEYOND, THE IMPLICATIONS OF THE *RING* HOLDING

This section will deal with the implications of the *Ring* decision. The focus will be not only on the applicability of this decision on statutes that are very similar to it, but also its more general applicability to other state death penalty statutes, which may now be called into doubt. This section will also address sentencing schemes which seem to move elements of the crime, to be decided by a jury beyond a reasonable doubt, to sentencing considerations which can be found by the judge by the same or a lesser standard. These schemes may also face constitutional scrutiny in the near future.

This section will accomplish this by first looking at the holding in *Ring*, as well as *Apprendi* and *Jones*, and determining exactly what these cases hold and what they require of lawmakers in order to guarantee compliance with the Sixth Amendment. Second, the implications of the *Ring* decision will be discussed, both constitutionally and practically, how these cases will affect the cases already on the books, and how they will affect cases in the future. Third, other state statutes which may be implicated by this decision will be addressed. Finally, the subsequent case law will be examined, to determine how the lower courts are indeed distinguishing or following *Ring* in evaluating their own state statutes.

A. *What are the Requirements Now?*

One of the principal issues raised is what exactly the *Ring* case requires after its adjudication. Does this case say that *juries alone must* find facts which could lead to a greater period of sentencing, or does the decision say that *judges alone must not* find these facts? The facts of the *Ring* case were of a sentencing scheme which allowed a judge, sitting without a jury, to find the facts relevant to the aggravating factors listed in the Arizona first-degree murder statute.¹¹⁵ So, the obvious holding is that *judges alone must not* find the relevant factors that may lead to a death-penalty sentence; but is the obvious extension of this that these facts must be found by *juries alone*? The

113. *Id.* at 2449-50 (O'Connor, J., dissenting) ("The number of second or successive habeas corpus petitions filed in the federal courts also increased by 77% in 2001.").

114. *Id.* at 2450 (O'Connor, J., dissenting).

115. ARIZ. REV. STAT. § 13-703 (2001).

question is important because of the volume of statutes which employ some sort of hybrid system for determining these factors.¹¹⁶

The exact holding of the case is this:

We hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we 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.* 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.¹¹⁷

It seems plain that a scheme by which the judge may increase the maximum sentence of a convicted defendant outside of the presence of the jury is unconstitutional both in death-penalty cases,¹¹⁸ as well as any non-capital case.¹¹⁹ As stated above, one question that remains open is whether or not a system can survive Sixth Amendment scrutiny if it uses some combination of the judge and the jury to make the decision relevant to aggravating factors, or if a jury alone must decide those issues beyond a reasonable doubt. The crux of the issue will most likely lie in the nature of the involvement of the two parties, the judge and the jury. If the fact-finding is truly left to the jury, and the judge has little or no discretion once the jury renders its opinion, then this system should be acceptable. These different variations will be addressed specifically below.

B. *Author's Comments on the Ring decision*

In looking at the Supreme Court's jurisprudence leading up to the *Ring* case, it seemed plain that the Court needed to directly answer the question of the applicability of *Walton* after *Jones* and *Apprendi*. After the Court's decisions in *Jones* and *Apprendi*, it was painfully obvious that the Court was simply attempting to distinguish its cases in an effort to preserve *stare decisis*. These distinctions became rather arbitrary; a point even noticed by some members of the Court themselves.¹²⁰ *Stare decisis* is very important, but what became much more important and obvious to the Court was that its decisions, read in concert with each other, made absolutely no sense.

116. Hybrid and other varied sentencing schemes which may be implicated by the *Ring* decision will be more fully discussed herein.

117. *Ring*, 122 S.Ct. at 2443 (internal citations omitted) (emphasis added).

118. *Id.*

119. *Apprendi*, 530 U.S. at 470; see also *Jones*, 526 U.S. at 252.

120. *Id.* at 538 (O'Connor, J., dissenting) ("[t]he distinction of *Walton* offered by the [*Apprendi*] Court today is baffling, to say the least").

The Court needed to take this case; not only if it wanted to reverse *Walton*, but also if it wanted to re-affirm *Walton*. The Court needed to provide a better answer than was given after *Jones* and *Apprendi*. In doing what the Court did, it did make its jurisprudence much more consistent, but was it the right choice?

In deciding, through this line of cases, that any factor which may lead to the increase in sentence must not be found by a judge, sitting without a jury, the Court relied on the Sixth Amendment.¹²¹ Does the right to a trial by jury equate to a right to sentencing by a jury and factual determinations that a crime was committed heinously,¹²² or that a crime was a hate crime,¹²³ or that a crime caused serious bodily injury?¹²⁴ Some of the members of the Court did not believe that these proceedings are equivalent; they believed that a trial by jury and sentencing are two different things.¹²⁵ But besides the view of these dissenting Justices, did the other Justices get it right?

As a practical matter, Justice Scalia suggests in his concurring opinion in *Ring* that this rule must be promulgated, because if it does not, the danger for abuse is very high.¹²⁶ Justice Scalia artfully points out that if we are to focus on form, rather than effect, then state legislatures could simply make an end-run around the trial by jury requirement of the Sixth Amendment to the Constitution.¹²⁷ By simply characterizing an enhancing guideline as a sentencing guideline, rather than as an element, the trial by jury would be usurped by allowing this fact to be found by the judge alone.¹²⁸ Justice Scalia is not accusing the state legislatures of such an unconstitutional practice, but correctly recognizes the danger which is inherent in any finding of fact by the judge solely which could increase a defendant's sentence.¹²⁹

As an initial matter, it seems much safer to have a jury decide these facts, simply to avoid any appearance of impropriety and to guarantee compliance with the Sixth Amendment. Whereas it is true that practical considerations are important, the chief concern is whether the practice of the states, Arizona specifically, was in violation of the Sixth Amendment of the Constitution. Therefore, is Justice O'Connor correct in suggesting that this line of cases is

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

122. *Ring*, 122 S.Ct. at 2443.

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

124. *Jones*, 526 U.S. at 252.

125. *Ring*, 122 S.Ct. at 2449 (O'Connor, J., dissenting) (suggesting that the rule derived in *Apprendi* and extended in *Ring* is not required by the Constitution, or history, or by our prior cases and in fact may cut against some of our prior cases).

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

127. *Id.* (Scalia, J., concurring).

128. *Id.* (Scalia, J., concurring).

129. *Id.* (Scalia, J., concurring).

not required by the Sixth Amendment? To decide this, the exact requirements of the Sixth Amendment must be determined.

The requirement of a trial by jury is one of the oldest and most respected legal concepts. The history of the right to a trial by jury dates back to the Magna Carta.¹³⁰ Jury trials then transpired through English legal history. Jury trials came to America and flourished because of the deep resentment of royal interference. The right to a trial by jury was added as the Sixth Amendment to the Constitution, guaranteeing the right to trial by jury in criminal cases to all accused in Federal court. All of the original states of the union included a right to trial by jury in their respective state constitutions and every state entering the Union has included the same protection.

The right to a trial by jury *could* be something completely different than the right to sentencing by jury (as dealt with by the *Ring* case as the *Ring* case dealt with) and the Supreme Court's jurisprudential history has been less than clear on this issue. Initially, the Court had found that there was no Sixth Amendment right to be sentenced by a jury, even in a capital case.¹³¹ This holding was elaborated in *McMillan*, where the judge increased the sentence of a convicted defendant.¹³² The Supreme Court then limited the holding of *McMillan* in *Apprendi*. The Court held in *Apprendi* that a judge may not increase the sentence of a convicted defendant to a term greater than what the jury could have sentenced the defendant.¹³³ This limitation of *McMillan* allowed the Court to say that the fact-finding jury of the Sixth Amendment should do the fact-finding.¹³⁴ There was an exception carved out of *Apprendi* for prior convictions as a sentencing factor, since this requires no fact-finding.¹³⁵ Because the sentencing factors in *Ring* would allow for a sentence of death, when the jury would only sentence life imprisonment, this statute seems squarely unconstitutional under *Apprendi*.

After *Apprendi*, it seems only logical that the Arizona statute allows judicial fact-finding and must not be allowed. The *Ring* decision itself is not that surprising as applied to the Arizona statute. The reasoning offered in *Apprendi* to distinguish *Walton* was indeed "baffling"¹³⁶ and it was only a

130. *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968) (providing a history of the Sixth Amendment's guarantee of a trial by jury).

131. *Spaziono v. Florida*, 468 U.S. 447, 459 (1984) ("The fact that a capital sentencing is like a trial in some respects . . . does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial.").

132. *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986) (there is no Sixth Amendment right to jury sentencing).

133. *Apprendi*, 530 U.S. at 487, n. 13.

134. *Id.* at 497.

135. *Id.* at 488.

136. *Id.* at 538 (O'Connor, J., dissenting).

matter of time before the Court considered the issue and ultimately found that *Walton* could not stand with *Apprendi*. The logical extension of *Apprendi* to capital defendants makes perfect sense, since capital defendants should have more, not less, protection than non-capital defendants. The truly interesting portion of this opinion is not what it does to the Arizona statute, but rather what happens to other statutes that may still involve some judicial fact-finding. Those statutes are more fully discussed below.

C. *Statutes Affected by the Ring Decision*

Thirty-eight states and the federal government allow for the death penalty by as the ultimate form of punishment for the most heinous crimes.¹³⁷ The form of sentencing procedures which allow for the imposition of the death penalty vary greatly from state to state. With something this important, it is essential to ensure that the convicted defendant's constitutional rights are absolutely protected.

It has been shown that the Arizona statute is unconstitutional. What about statutes that have the exact same scheme for sentencing as *Ring*? What about states that have a system where the jury makes recommendations to the judge, but he is not bound by those recommendations? What about states which allow a judge to sentence if the jury is unable to reach a decision? What is the best sentencing system to ensure constitutional compliance?

1. The Arizona Statute

One thing is sure after the Court's decision in *Ring v. Arizona*; Arizona's death penalty sentencing scheme, section 13-703, is now unconstitutional.¹³⁸ The Arizona legislature wasted no time in amending 13-703 to comport with *Ring v. Arizona* and the Sixth Amendment of the Constitution. Even before the *Ring* decision was handed down by the Supreme Court, on February 11th, 2002, the Forty-Fifth Legislature was hard at work in their second regular session of 2002. The House of Representatives proposed legislation¹³⁹ to completely strike section C and amend sections G and H to change all references from "the court" to "trier of fact." These subtle changes seem to make section 13-703 constitutional. The passage of this bill was conditioned

137. See *Ring*, 122 S.Ct. at 2447 (Breyer, J., concurring in the judgment) (saying that currently there are states that have moratoriums on the death penalty).

138. ARIZ. REV. STAT. § 13-703 (2001).

139. H.B. 2671, 45th Leg., 2d. Reg. Sess. (Ariz. 2002).

by the House of Representatives in section 6 of the bill on the exact holding of *Ring*.¹⁴⁰

After the *Ring v. Arizona* decision was handed down by the Supreme Court on June 24, 2002, the Arizona Legislature amended its statute in order to meet the requirements of the Supreme Court. The house bill, formerly introduced conditionally as H.B. 2671, was formally introduced to the House of Representatives¹⁴¹ and to the Senate¹⁴² simultaneously on July 30th, 2002. No debate was had, and the bill was engrossed by both houses of the Legislature on August 1st of 2002 and passed by both houses of the Legislature on the same day.¹⁴³

The Arizona statute did exactly what the Supreme Court asked the Legislature to do, remove the judge from the fact-finding role after the conviction has been handed down. The old scheme, discussed at length previously, required the judge to engage in fact-finding in order to determine the presence or absence of aggravating factors.¹⁴⁴ This was done by the judge alone outside of the presence of the jury. The revised statute removes this role from the province of the judge and places it squarely in the hands of the trier of fact.¹⁴⁵ This is seemingly what the *Ring* decision requires¹⁴⁶ and what now seems to make this statute constitutional. This statute now comports with the *Ring* decision, but what about states that have the same or similar statutes? Those statutes will be discussed in the next section.

2. States with Similar Statutes

Four states other than Arizona had a very similar system by which the judge conducted the sentencing hearing by herself, outside of the presence of the jury. The judge then makes factual findings regarding the aggravating and/or mitigating factors. If the judge is able to outweigh the mitigating factors with aggravating factors, he alone then, may sentence the convicted defendant to death.

140. *Id.* at § 6 (“This act does not become effective unless the United States Supreme Court holds in *Ring v. Arizona*, United States Supreme Court case #01-488, that, in death penalty cases it is unconstitutional for a judge and not a jury to impose a sentence of death.”).

141. H.B. 2001, 45th Leg., 5th. Special Sess. (Ariz. 2002).

142. S.B. 1001, 45th Leg., 5th. Special Sess. (Ariz. 2002).

143. *Id.* (enacted version).

144. ARIZ. REV. STAT. § 13-703 (2001) (the judge is to conduct a second phase of the trial after the guilt phase to determine sentencing).

145. ARIZ. REV. STAT. § 13-703 (Supp. 2002) (now the judge may only find the facts of sentencing if the defendant agrees to waive her right to a trial by jury).

146. *Ring*, 122 S.Ct. at 2443 (holding that the judge alone may not make the finding of aggravating factors).

One such state, Colorado, has already amended its statute¹⁴⁷ in accordance with the *Ring* decision. Colorado's previous statute¹⁴⁸ allowed the sentencing procedures, including the fact-finding, to be conducted in front of a panel of three judges. This was changed by Colorado's Sixty-Third General Assembly on July 12th, 2002.¹⁴⁹ The Colorado Legislature removed all references to the three-judge panel and replaced it with a trial judge sitting in front of the trial jury. The procedure now mandates the trial judge to allow factual arguments to be made by the parties and then instruct the jury that they must find unanimously at least one aggravating factor beyond a reasonable doubt.¹⁵⁰ The judge will be bound by this decision of the jury and if the jury is unable to reach a decision to all of the above specifications, the sentence automatically reverts to life imprisonment.¹⁵¹ In addition to the amendments by the legislature, the Colorado Supreme Court has also opined as to the constitutionality of their death penalty sentencing scheme¹⁵² and concluded that its system of capital sentencing is unconstitutional under *Ring*.¹⁵³ Because of these recent developments, Colorado's amended statutory scheme should now be constitutional.

Montana also had a very similar statute¹⁵⁴ which required that "the hearing must be conducted before the court alone."¹⁵⁵ However, even before the *Ring* decision was handed down, the Montana Legislature introduced and passed House Bill 521,¹⁵⁶ which made subtle yet drastic changes to the Montana code. This bill codified section 46-1-401 of the Montana Code, which now requires that the jury find the enhancement actions in a separate proceeding unanimously and beyond a reasonable doubt.¹⁵⁷ This seems to make the Montana statute comport with *Ring* and remove Montana from the unconstitutional realm of death penalty sentencing by a judge alone.

147. COLO. REV. STAT. § 18-1.3-1201 (Supp. 2002).

148. COLO. REV. STAT. § 18-1.3-1201 (2001) (formerly COLO. REV. STAT. ANN. § 16-11-103 (2001)).

149. H.B. 1005, 63rd Gen. Assem., 3d Extraord. Sess., (Colo. 2002).

150. COLO. REV. STAT. § 18-1.3-1201 (Supp. 2002) (the three judge panel will only engage in fact-finding during sentencing if the defendant knowingly waives his or her right to a trial by jury).

151. COLO. REV. STAT. § 18-1.3-1201(2)(c) (Supp. 2002).

152. *Woldt v. State*, Nos. 97SA193, 97SA392, 2003 WL 459419, at *2 (Colo. 2003).

153. Press Release, Office of the Colorado State Attorney General, Attorney General Salazar to Seek U.S. Supreme Court Review of Colorado Court Rulings Striking Death Penalty Sentences (March 12, 2003) (stating that in the view of the Colorado Attorney General, the *Ring* decision needs to be clarified because of conflicting applications) (on file with author).

154. MONT. CODE ANN. § 46-18-301 (2001).

155. MONT. CODE ANN. § 46-18-301(1) (2001).

156. H.B. 521, 57th Leg., Reg. Sess., (Mont. 2001).

157. MONT. CODE ANN. § 46-1-401 (Supp. 2002).

Nebraska was another state which allowed sentencing to be done by judges, including the factual finding of aggravating factors. Nebraska's statute¹⁵⁸ required that a panel of three judges find the facts necessary for aggravation or mitigation and accordingly sentence the accused to life or death. This statute was amended following the *Ring* decision to remove the fact-finding associated with aggravating and mitigating factors from the hands of the three judge panel and require that this be done by the jury alone.¹⁵⁹ The only way that the panel of three judges may now hear the facts relating to the aggravating factors is if the defendant knowingly waives his right to have these facts heard by a jury. The Governor of Nebraska called the State's Legislature into a special session to decide on the constitutionality of the state statute in November. The statute was amended by the Legislature and signed by the Governor on November 22nd, 2002.¹⁶⁰ In addition to these amendments, the Nebraska Supreme Court recently decided that its statute was also unconstitutional under *Ring*.¹⁶¹ With these timely changes, Nebraska also seems to have a system that comports with the *Ring* decision.¹⁶²

Idaho is the final state which requires the trial judge make these factual findings and sentence a defendant without the benefit of a jury. The Idaho statute¹⁶³ is very similar to Colorado and Arizona's statutes before they were amended. This statute was not directly ruled unconstitutional by the *Ring* decision, since the only issue before the Court was the Arizona statute, but this statute seems to be squarely unconstitutional and will need to be amended. The Idaho Legislature has taken no action as of yet, but the Idaho Supreme Court has remanded death-row inmates who were sentenced under this scheme for re-sentencing in light of the *Ring* decision.¹⁶⁴ The Idaho legislature is now in the process of amending its statute to comport with the Supreme Court's

158. NEB. REV. STAT. § 29-2520 (2001).

159. NEB. REV. STAT. § 29-2520 (Supp. 2003).

160. NEB. LEGIS. 3SS 1 (2002).

161.

162. *State v. Gales*, No. S-01-1231, 2003 WL 1571588, at *18 (Neb. 2003) (stating that in light of the *Ring* decision, the Nebraska statute, before amended, was unconstitutional).

163. IDAHO CODE § 19-2515 (Michie 2000).

164. *State v. Fetterly*, 52 P.2d 874, 875 (Idaho 2002) (stating:

[s]ubsequent to the decision in the district court and the appeal to this Court the United States Supreme Court decided *Ring v. Arizona* which appears 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. *Ring* requires those factual findings to be made by a jury. In light of that decision it is necessary to remand this case for further consideration by the district court.).

ruling in *Ring*, but the Idaho code has yet to be revised to reflect those changes.¹⁶⁵

3. Hybrid Statutes

The first of the statutes which were not directly addressed by the Court's opinion in *Ring*, but are definitely indirectly implicated are the so-called "hybrid" statutes.¹⁶⁶ Whereas these statutes differ slightly from state-to-state, they share the common thread that both the judge and the jury are involved in fact-finding to determine whether or not to sentence a convicted defendant to death.

The first of these statutes is found in the Alabama code.¹⁶⁷ This code provision mandates that the judge initially is to instruct the trial jury as to aggravating and mitigating factors.¹⁶⁸ The jury then deliberates and attempts to determine if one of the statutory aggravating factors exists in the minds of at least ten of the twelve jurors and that it outweighs any mitigating factors.¹⁶⁹ The jury then issues a sentence recommendation to the judge presiding over sentencing.¹⁷⁰ The trial judge then enters another phase of sentencing in which he may hear further arguments from the parties and then makes written findings of fact about aggravating and mitigating circumstances.¹⁷¹ The judge then sentences the convicted defendant by himself. The judge may take the jury's findings into account, but he is in no way bound by that recommendation.¹⁷² The Alabama system has been tested by court cases, but at this point, the courts have been able to distinguish *Ring* because of the facts of those particular cases.¹⁷³

Three other states had similar statutes at the time of the *Ring* opinion: Delaware,¹⁷⁴ Florida,¹⁷⁵ and Indiana.¹⁷⁶ These statutes are all very similar in

165. See Gregory Hahn, *Death Penalty Bill Clears House, Kempthorne has Already Promised to Sign the Measure*, THE IDAHO STATESMAN, Feb. 5, 2003, at 04, available at 2003 WL 4775490.

166. Hybrid statutes were employed by Alabama, Delaware, Florida and Indiana.

167. See ALA. CODE §§ 13A-5-45 – 13A-5-47 (1999).

168. ALA. CODE § 13A-5-45(a) (1999).

169. ALA. CODE § 13A-5-46(e) (1999).

170. ALA. CODE § 13A-5-47(a) (1999).

171. ALA. CODE §§ 13A-5-47(b) – 13A-5-47(e) (1999).

172. ALA. CODE § 13A-5-47(e) (1999).

173. See e.g., *Ex Parte Waldrop*, No. 1001194, 2002 WL 31630710 (Ala. Nov. 22, 2002) at *5 (*Ring* not implicated where the aggravating factor of "committed during the commission of a robbery" is part of the offense which was proven beyond a reasonable doubt through the jury's verdict of guilt).

174. DEL. CODE ANN. tit. 11 § 4209 (2001).

175. FLA. STAT. ch. § 921.141 (2001).

176. IND. CODE ANN. § 35-50-2-9 (1998).

the crucial fact that all of these statutes involve a jury making an advisory verdict to a judge who is not bound by that determination, who then solely issues a verdict.

In anticipation of possible constitutional challenge to their state statutes, some of the states which used this sentencing system have already taken steps after *Ring* to ensure that their sentencing schemes comport with the Supreme Court's decision.¹⁷⁷ Delaware has already amended its death penalty sentencing statute¹⁷⁸ in order to make the jury's recommendation a report and require that the jury alone make the factual findings.¹⁷⁹ Indiana has amended its statute¹⁸⁰ to say that if the jury has made a determination, then the judge *must* sentence the convicted defendant accordingly, leaving no room for judicial interpretation of the jury's recommendation.¹⁸¹ Alabama¹⁸² and Florida¹⁸³ also use a system of advisory verdicts which have yet to be revised after *Ring*. These states have had a few challenges to their statutes that have distinguished *Ring* on the grounds that the jury is still doing the actual fact-finding.¹⁸⁴ This of course does not mean that a court of these states could not preempt the legislature and rule the statute unconstitutional based on *Ring*, if the facts of a particular case are identical to *Ring*.¹⁸⁵

The reason that these statutes are under constitutional scrutiny after the *Ring* decision is not based on the direct holding of *Ring*,¹⁸⁶ but rather the proposition that *Ring* suggests any judicial fact-finding in relation to an increase in sentencing is unconstitutional under the Sixth Amendment. These statutes do require fact-finding by the jury, but the possible constitutional defect is that judges are not required to follow these recommendations and may engage in their own fact-finding resulting in a sentence of death despite the jury's inability to sentence the defendant to death. The main issue is whether a non-binding recommendation of the jury is enough to remove these statutes

177. Press Release, Office of the Del. Atty. Gen'l, New Death Penalty Bills Signed Into Law (July 23, 2002) (on file with author).

178. DEL. CODE ANN. tit. 11 § 4209 (Supp. 2002).

179. 2002 DEL. LAWS 423 (2002) (mandating that the judge adopt the jury's recommendation).

180. IND. CODE ANN. § 35-50-2-9 (Supp. 2002).

181. 2002 IND. LEGIS. SERV. 117 (Supp. 2002).

182. ALA. CODE §§ 13A-5-45 – 13A-5-47 (1999).

183. FLA. STAT. ch. § 921.141 (2001).

184. These cases will be discussed at length herein.

185. *Bottoson v. Moore*, 833 So.2d 693, 695 (Fla. 2002), *cert. denied* 123 S.Ct. 662 (U.S. Dec. 6, 2002) (the Florida Supreme Court has already addressed this issue, holding for now that their statute is constitutional, but three members of the court are not convinced).

186. *Ring*, 122 S.Ct. at 2443 (the direct holding is that the judge alone may not make the factual determinations which can increase a convicted defendant's sentence to a level greater than the sentence that a jury could give to the defendant).

from constitutional scrutiny. This recommendation is the only thing that separates these hybrid statutes from the statute held unconstitutional in *Ring*. This non-binding nuance will likely be insufficient to save these statutes from the constitutional scrutiny. It was a wise choice for the legislatures of Delaware, Florida, Indiana and Alabama to revise their statutes with an eye not towards the letter of *Ring*, but rather the spirit of *Ring*.

4. States Which Still Allow Some Judicial Fact-Finding

There is yet another category of state statutes which have sentencing schemes implicated by the *Ring* decision. These statutes advise that the jury should make the factual determinations, but have a provision which may still allow for some judicial fact-finding of the type prohibited by *Ring*. These statutes do not seem facially unconstitutional after the *Ring* decision, but may still have fatal errors.

Missouri¹⁸⁷ and Nevada¹⁸⁸ each employ a system by which the jury hears testimony from both of the parties as to statutory aggravating and mitigating factors.¹⁸⁹ The jury is then instructed as to the requisite burden of proof and procedures and they then retire for deliberation. The jury reports its verdict to the judge who is to sentence the defendant accordingly.¹⁹⁰ Up to this point, these statutes seem squarely constitutional and indeed ideal.¹⁹¹ The possibly fatal flaw now comes into play. If the jury decides that aggravating factors exist and those aggravating factors outweigh any mitigating factors, they then proceed to decide whether or not the defendant should be sentenced to life or death.¹⁹² If the jury cannot come to a decision as to whether the defendant should receive life imprisonment or the death penalty (as both require unanimous decisions), this determination then returns to the judge¹⁹³ or to a three judge panel¹⁹⁴ for determination.

At first this would seem to violate the rule proffered in *Ring*, but further discussion is needed. Under this system, the jury truly decides unanimously and beyond a reasonable doubt whether or not aggravating factors exist, and only after the jury decides that these aggravating factors exist does the jury even move to the question of life or death. If the jury does not find aggravating factors, a verdict of life imprisonment must be returned. Since the

187. MO. REV. STAT. § 565.030 (2000).

188. NEV. REV. STAT. §§ 175.552 – 175.556 (2001).

189. *See, e.g.*, MO. REV. STAT. § 565.030 (2000).

190. *See, e.g., id.*

191. Ideal statutes will be discussed more fully herein.

192. *See, e.g.*, MO. REV. STAT. § 565.030 (2000).

193. MO. REV. STAT. § 565.030 (2000).

194. NEV. REV. STAT. § 175.556 (2001).

jury is truly making the initial factual determination, does this system violate *Ring*?

A strong argument, based mainly on the spirit of the majority holding in *Ring*, can be made that this system does not violate *Ring*. The statute in Arizona,¹⁹⁵ which was specifically held unconstitutional, is markedly different from this variety of state statutes. The Arizona statute had *no* jury involvement and left the determination of the sentence *solely* to the judge.¹⁹⁶ In Missouri and Nevada, the question of the judicial sentencing of the convicted defendant can never be reached unless the jury first unanimously finds beyond a reasonable doubt that the statutory aggravating factors exist beyond a reasonable doubt.

There are two main differences between these statutes and the ideal state statutes. First is the automatic reversion to life imprisonment or a term of years if the jury is unable to decide on sentencing. Second is the exact detailing of which aggravating and mitigating factors were found by the jury. The two-tier schemes employed by Missouri and Nevada seem to offer similar constitutional protection to other state statutes with the only difference being that if the jury is unable to decide on the sentence *after* it has decided that the aggravating factors exist, the decision will then return to the judge for the ultimate determination.

Courts interpreting the Missouri statute have largely sidestepped the issue of constitutionality of the Missouri sentencing scheme and pattern jury instructions in sentencing a defendant under *Ring*,¹⁹⁷ theory being that in order to get to the life and death determination in Missouri courts, one must assume that the jury has reached a unanimous decision to at least one aggravating factor. This assumption has operated for a long time and is a sound legal inference. There are two main problems with this theory after *Ring*. First, the jury is not required to enumerate which aggravating factors it found in deliberations. The problem with non-enumeration is that the judge, in considering which sentence to choose in the case of a deadlock, knows not what the jury was considering in its deliberations. This then forces the judge to

195. ARIZ. REV. STAT. § 13-703 (2001).

196. *Id.*

197. *Smith v. Bowersox*, 311 F.3d 915, 918 n.2 (8th Cir. 2002) (stating Missouri's pattern jury instructions, which were given at Smith's trial, direct the jury to return a sentence of life imprisonment if it cannot unanimously agree on at least one aggravating factor. In the past, where the jury did not impose a sentence of life imprisonment, we have presumed that the jury did find at least one such aggravating factor. However, we note that the Supreme Court's recent decision in *Ring v. Arizona*, now requires the jury to find an aggravating factor before the judge may impose a sentence of death. We express no opinion as to whether Missouri's pattern instructions and procedures are constitutional under *Ring*. (internal citations omitted)).

go through a second fact-finding in sentencing the defendant, which may run this system afoul of *Ring*. The second problem is the issue of weighing all of the aggravating factors against mitigating factors. If the jury deadlocks, the judge then has to weigh aggravating and mitigating factors. This raises the question of whether this weighing of factors is fact-finding in itself. Many courts have taken the position that this process is a mere weighing of interests and not fact-finding.¹⁹⁸ However, some courts have seen this as fact-finding in itself.¹⁹⁹ If this process is indeed determined to be fact-finding, this system could also be unconstitutional under the *Ring* decision.

The Nevada Supreme Court has recently addressed the issue of the applicability of *Ring* to the Nevada statute. It found that both the initial determination by the three-judge panel after a deadlock by the jury that aggravating and mitigating factors exist as well as the weighing of the aggravating and mitigating factors against each other are both inherently fact-finding endeavors and therefore must be done by the jury alone after *Ring*.²⁰⁰ This decision renders the Nevada statute unconstitutional under *Ring*. This court's interpretation of *Ring* is interesting in that two of the aggravating circumstances did not truly entail fact-finding because those factors were that (1) the murders were committed while engaged in a robbery, where the defendant was also convicted of robbery; and (2) that the defendant committed more than one murder when he was indeed convicted of four murders by the jury. It is interesting that these aggravating factors that some courts have found not to entail fact-finding²⁰¹ have here been determined to be fact-finding. Whereas the Nevada Supreme Court believes this to be an unconstitutional practice, a strong argument can be made that this practice may indeed be constitutional, albeit unconventional and imperfect.²⁰²

The key difference between the judicial involvement between Arizona-type and Missouri-type statutes is that in Missouri, the judge is not the sole official making factual determinations as to whether the aggravating factors indeed exist. The only judicial involvement is that the judge may, if the jury

198. *Ex Parte Waldrup*, 2002 WL 31630710 at *6 (“the weighing process is not a factual determination . . . in fact, the relative weight of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof”).

199. *Johnson v. Nevada*, 59 P.3d 450, 460 (Nev. 2002).

200. *Id.*

201. *See e.g., Bottoson*, 833 So.2d at 705 (Anstead, C.J., concurring).

202. Another issue still to be determined (outside of the scope of this paper) is whether or not the Supreme Court will expand its list of sentencing enhancement guidelines that can constitutionally be found by the judge alone. Currently, only prior convictions can be found on this way because this requires no fact-finding. However, other factors such as multiple killings or commission of another felony, if the defendant is also convicted of those crimes may be permissibly found in the future, but this is beyond the scope of this paper.

deadlocks, decide on the basis of the facts which sentence the convicted defendant should receive.²⁰³ Arizona used a system where the judge was the sole fact finder, completely leaving the jury out of the picture. These differences are more than simple semantics and are true substantive differences that should make the difference between passing constitutional muster and being ruled unconstitutional by the Supreme Court. While it would still be advisable to amend these statutes to comport with the ideal statutes, it does not seem that these statutes should be ruled unconstitutional based on the direct holding or rationale of *Ring*.

5. Optimal Statutes

Despite all of the apparent problems with the above-mentioned statutes, an overwhelming majority of the jurisdictions that impose the death penalty do indeed conduct their sentencing in exactly the manner in which the Supreme Court suggests that they should. The advantage of these state statutes is the number of safeguards which are in place to ensure that aggravating factors, if they are to be found, are found in a constitutional manner. These safeguards include (1) having the jury alone make these factual determinations; (2) making sure that the findings are made unanimously and beyond a reasonable doubt; and finally (3) if the jury is unable to do each of these things, the sentence will automatically revert to a lesser term of prison time. The judge has no fact-finding role in the entire process.

The states which followed this regiment before the *Ring* decision included: Arkansas,²⁰⁴ California,²⁰⁵ Connecticut,²⁰⁶ Georgia,²⁰⁷ Illinois,²⁰⁸ Kansas,²⁰⁹ Kentucky,²¹⁰ Louisiana,²¹¹ Maryland,²¹² Mississippi,²¹³ New Hampshire,²¹⁴ New Jersey,²¹⁵ New Mexico,²¹⁶ New York,²¹⁷ North Carolina,²¹⁸ Ohio,²¹⁹

203. MO. REV. STAT. § 565.030 (2000).

204. ARK. CODE ANN. § 5-4-603 (1987).

205. CAL. CODE §§ 190.3 – 190.4 (1999).

206. CONN. GEN. STAT. § 53a-46a (2001).

207. GA. CODE ANN. §§ 17-10-30 – 17-10-30.1 (2000).

208. 720 ILL. COMP. STAT. § 5/9-1 (Supp. 2002).

209. KAN. STAT. ANN. § 21-4624 (2000).

210. KY. REV. STAT. § 532.025 (2001).

211. LA. CODE CRIM. PROC. ANN. art. 905 – 905.8 (1997).

212. MD. CODE ANN. CRIMINAL LAW § 2-303 (2002).

213. MISS. CODE ANN. § 99-19-101 (1999).

214. N.H. REV. STAT. ANN. § 630:5 (1996).

215. N.J. STAT. ANN. § 2C:11-3 (West Supp. 2002).

216. N.M. STAT. ANN. §§ 31-20A-1 – 31-20A-3 (Michie 2000).

217. N.Y. CRIM. PROC. LAW § 400.27 (Supp. 2002).

218. N.C. GEN. STAT. § 15A-2000 (Supp. 2002).

219. OHIO REV. CODE ANN. § 2929.03 (West 2002).

Oklahoma,²²⁰ Oregon,²²¹ Pennsylvania,²²² South Carolina,²²³ South Dakota,²²⁴ Tennessee,²²⁵ Texas,²²⁶ Utah,²²⁷ Virginia,²²⁸ Washington,²²⁹ and Wyoming,²³⁰ as well as the general federal death penalty statute²³¹ and a specialized federal procedure for cases involving drugs.²³² Although the statutes vary slightly, they all include these basic safeguards mentioned above. Because of the safeguards that are present in these state statutes, there seems to be little question that these statutes are constitutional after *Ring*.

D. Retroactivity: The Future of Current Cases

Whenever the Supreme Court issues a landmark opinion of criminal procedure such as this, one of the main questions left open by the opinion itself is the applicability of the basis and rationale of the opinion to those already incarcerated. There are a few well-settled principles which should be addressed initially.

First, it is a well settled matter that this case may now be used as precedent for all cases which are yet to happen.²³³ Second, it is also well settled that if a case has been adjudicated at the trial level, that this case may be used on direct appeal in an attempt to invalidate the statute upon which they were sentenced.²³⁴ Third, as a matter of policy, all of the states that allow for capital punishment have clemency procedures through the executive branch of the controlling authority.²³⁵ The questions left open involve post-conviction relief and collateral attacks. These are often handled through federal *habeas corpus* motions²³⁶ and similar state proceedings.²³⁷ Thus the question must be answered as to the applicability of this decision to persons who have already

220. OKLA. STAT. tit. 21 §§ 701.10 - 701.11 (1999).

221. OR. REV. STAT. § 163.150 (1999).

222. 42 PA. CONS. STAT. § 9711 (Supp. 2002).

223. S.C. CODE ANN. § 16-3-20 (Law. Co-op. 2001).

224. S.D. CODIFIED LAWS §§ 23A-27A-2 - 23A-27A-5 (Michie 2001).

225. TENN. CODE ANN. § 39-13-204 (Supp. 2000).

226. TEX. CRIM. PROC. CODE ANN. § 37-071 (Vernon Supp. 2003).

227. UTAH CODE ANN. § 76.3-207 (2002).

228. VA. CODE ANN. § 19.2-264.4 (Michie 2002).

229. WASH. REV. CODE §§ 10.95.030 - 10.95.080 (2001).

230. WYO. STAT ANN. § 6-2-102 (Michie 2001).

231. 18 U.S.C. §§ 3591 - 3593 (2000).

232. 21 U.S.C. § 848 (2000).

233. *Ring*, 122 S.Ct. at 2442 (“*stare decisis* is of fundamental importance to the rule of law”).

234. *See Standard Industries, Inc. v. Tigrett Industries, Inc.*, 397 U.S. 586, 587 (1970).

235. *See, e.g., MO. CONST. art. IV, § 7* (“[t]he governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason”).

236. 28 U.S.C. §§2254-2255 (2000).

237. *See, e.g., Mo. R. Crim. P. 29.15* (West 2000).

exhausted all of their appeals, but still wish to escape a death sentence which may have been unconstitutionally imposed.

This area of jurisprudence is also fairly well settled. Generally, rules that are promulgated after direct appeal and in time for a post-conviction relief motion cannot be used to upset a verdict on collateral attack or post-conviction relief.²³⁸ There are, however, two narrow exceptions to this general rule.²³⁹

First, there is an exception for rulings that place “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority.”²⁴⁰ Put more simply, a movant in a collateral attack case may be granted a new hearing if a certain conduct is decriminalized.²⁴¹ This exception is obviously not applicable to *Ring*, because felony murder has not been decriminalized.

The second exception under *Teague* is for cases that are “central to an accurate determination of innocence or guilt.”²⁴² Again, more simply, this exception provides for retroactive application of “watershed rule[s] of criminal procedure.”²⁴³ It may at first seem that the rule in *Ring* would be a watershed rule of criminal procedure, but it must be realized how narrow this watershed exception truly is. In fact, only one reported case has held its promulgated rule of criminal procedure so central to be considered “watershed.”²⁴⁴ In realizing how narrow this exception is and comparing this rule to the other rules examined, it can be seen that this rule is not so central to be considered watershed.

Of the courts that have addressed this issue, many of them have failed to reach the issue, but the ones that have squarely addressed the retroactivity of *Ring* expressed that “[petitioner] is simply incorrect in asserting that the combination of *Teague*, *Ring* and the cases in the *Apprendi* line render the rule announced in *Ring* retroactively applicable to cases on collateral review.”²⁴⁵ For the above-stated reasons, the rule adopted in *Ring* cannot be considered a watershed rule. Because neither of the *Teague* exceptions applies; the *Ring* decision simply cannot be applied retroactively to collateral attack cases.

238. *Teague v. Lane*, 489 U.S. 288, 306-07 (1989).

239. *Id.* at 307.

240. *Id.*

241. *Graham v. Collins*, 506 U.S. 461, 477 (1993).

242. *Teague*, 489 U.S. at 307.

243. *Id.* at 311.

244. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

245. *Cannon v. Mullin*, 297 F.3d 989, 992-93 (10th Cir. 2002); *see also* *Sibley v. Culliver*, No. CIV.A.02-A-1217-N, 2003 WL 256907, at *11 (M.D. Ala. Feb. 3, 2003); *State v. Towery*, Nos. CR-02-0031-PC, CR-02-0022-PC, CR-02-0038-PC, CR-02-0146-PC, 2003 WL 548386 at *6 (Ariz. Feb. 26, 2003).

*E. Subsequent Cases*²⁴⁶

Despite the relative short amount of time that the *Ring* decision has been law, the number of court challenges based on this landmark case has been remarkable. Many cases have discussed this case and that number continues to grow daily, but the number of cases to directly address the content of this case note is still relatively small. There are cases which distinguish the challenged statutes from the Arizona statute invalidated in *Ring*, and cases which follow lock-step behind the Supreme Court and invalidate state statutes based on *Ring*. Those two types of cases will be discussed below.

1. Distinguishing Cases

The number of cases which have distinguished the *Ring* opinion is relatively small. This is most likely a result of the fact that courts are hesitant to not follow the reasoning of the highest court in the land, even if the statute is clearly distinguishable. In addition to this, statutes which are clearly not implicated are likely not to be challenged and therefore no cases reported.

Of the cases which distinguish the *Ring* opinion, one of the most interesting²⁴⁷ is the Florida Supreme Court case of *Bottoson v. Moore*.²⁴⁸ In this post-conviction relief case, Petitioner Linroy Bottoson attempted to have the Florida death penalty statute²⁴⁹ invalidated on the basis of the Court's decision in *Ring*. The Florida Supreme Court, in a per curiam opinion, denied his post-conviction relief on the basis that (1) Petitioner's execution was stayed by the Supreme Court prior to the *Ring* decision and the Court released the stay after the decision was released without discussing the implication of *Ring* on the Florida statute; and (2) the Supreme Court specifically did not overturn any precedent in *Ring* upon which the Florida statute relied for its constitutional basis.²⁵⁰ With these considerations, The Florida court determined that Bottoson was not entitled to relief.²⁵¹

Other than the *Bottoson* case, the Indiana Supreme Court refused to squarely address the applicability of *Ring* to the Indiana death penalty statute.²⁵² In *Wrinkles v. State*, the court found that there was no reason to address the issues because of the complete implausibility of the Petitioner's

246. Subsequent cases published to Westlaw as of Apr. 1, 2003.

247. Interesting not for the differentiation of the statute, but because of the opinions of the concurring Justices suggesting why Florida's statute should be unconstitutional in light of the *Ring* decision.

248. *Bottoson*, 833 So.2d at 695.

249. FLA. STAT. ch. § 921.141 (2001).

250. *Bottoson*, 833 So.2d at 695.

251. *Id.* (three Justices do discuss serious problems, in their opinions, with the Florida statute in light of *Ring*, those concurrences will be discussed at length herein).

252. IND. CODE ANN. § 35-50-2-9 (Supp. 2002).

arguments.²⁵³ The aggravating factor that was used to sentence the Petitioner in this case was the fact that multiple murders had been committed and the court found that the jury did establish this fact when it returned its verdict in the guilt phase because it found him guilty of three counts of murder.²⁵⁴ Since the jury found these facts unanimously and beyond a reasonable doubt, the *Ring* issue is not properly addressed.²⁵⁵ A similar issue was raised in Alabama in *Ex Parte Waldrup*; the aggravating factor was the fact that the defendant killed the victims in the course of a robbery.²⁵⁶ Since the defendant was found guilty of homicide committed in the commission of a robbery, the court determined that the jury did indeed make the factual determinations necessary for the aggravating factor.²⁵⁷

Other than these major cases, the Court of Criminal Appeals of Oklahoma refused to extend *Ring* to the Oklahoma death penalty statute²⁵⁸ without giving much guidance.²⁵⁹ However, in concurrence, Justice Johnson more fully explained that *Ring* is inapplicable to the Oklahoma statute because the requisite aggravating factors are all determined by the jury in accordance with *Ring*.²⁶⁰

There have also been two federal cases to address the constitutionality of the federal death penalty statute²⁶¹ and the fact that it does not require the government to indict the aggravating factors as part of the substantive charge. In effect, this would change the offense charged to the initial offense plus the aggravating factors so that all of the facts necessary will be found by the jury as if they were all elements of the crime.²⁶² The court rejected this argument and suggested that the aggravating factors were required to be found by the jury beyond a reasonable doubt, but that there was no requirement that the offense itself should be changed to incorporate the aggravating factors.²⁶³

2. Cases which Follow Ring

All across the country, direct appeals and post-conviction relief cases are being filed on the basis of the *Ring* decision. Many courts that have considered

253. *Wrinkles v. State*, 776 N.E.2d 905, 907-08 (Ind. 2002).

254. *Id.* at 908.

255. *Id.*

256. *Ex Parte Waldrup*, 2002 WL 31630710 at *5.

257. *Id.*

258. OKLA. STAT. tit. 21 §§ 701.10 - 701.11 (1999).

259. *Murphy v. State*, 54 P.3d 556, 566 (Okla. 2002).

260. *Id.* at 578.

261. 18 U.S.C. §§ 3591 – 3593 (2000).

262. *United States v. Reagan*, 221 F. Supp. 2d 672, 677-78 (E.D.Va. 2002); *United States v. Lentz*, 225 F. Supp. 2d 672, 679 (E.D.Va. 2002).

263. *Reagan*, 221 F. Supp. 2d at 679; *Lentz*, 225 F. Supp. 2d at 680.

this issue have suggested that the sentencing schemes in their respective jurisdictions do indeed follow *Ring* or are unconstitutional under *Ring*. On June 28th, 2002, the Supreme Court vacated and remanded four Arizona cases for reconsideration in light of the *Ring* decision.²⁶⁴

After *Ring*, a number of jurisdictions are reviewing their death penalty statutes. One such jurisdiction is the federal government, where the Federal Death Penalty Act was recently held unconstitutional.²⁶⁵ Judge Sessions reviewed the Federal Death Penalty Act and found that because the aggravating factors are to be treated like elements after *Ring*, the relaxed evidentiary standard available at sentencing is unacceptable because it allows for the evidence introduced at sentencing to be treated differently than the evidence at trial, and therefore must be unconstitutional.²⁶⁶

In addition to this federal court, the Supreme Court of Idaho has also suggested that the decision of the Supreme Court in *Ring* “appears to invalidate the death penalty scheme in Idaho.”²⁶⁷ Arizona has also realized after *Ring* that its death penalty statute is unconstitutional and has ordered that all of the defendants sentenced under the old scheme be re-sentenced or have their sentences reduced to life with or without parole.²⁶⁸

Finally, the Nevada Supreme Court has recently held its death penalty sentencing scheme unconstitutional. In a case where the jury was unable to reach a verdict as to a life sentence or the death penalty after determining the existence of aggravating factors and this determination was then turned over to a panel of three judges,²⁶⁹ those judges imposed the death penalty. The Supreme Court of Nevada then reversed that verdict as being contrary to the holding in *Ring*.²⁷⁰ The court determined that because both the initial determination of aggravating and mitigating factors as well as the weighing of those factors against each other required some factual determination, this statute was unconstitutional after *Ring*.²⁷¹ This ruling is unique because the Nevada statute was the closest statute to ideal to be struck down to date, and may show the true far-reaching impact of the Supreme Court’s ruling in *Ring*.

264. *Allen v. United States*, 122 S.Ct. 2653 (2002) (mem.); *Harrod v. Arizona*, 122 S.Ct. 2653 (2002) (mem.); *Pandeli v. Arizona*, 122 S.Ct. 2654 (2002) (mem.); *Sansing v. Arizona*, 122 S.Ct. 2654 (2002) (mem.).

265. *United States v. Fell*, 217 F.Supp.2d 469, 483 (D.Vt. 2002).

266. *Id.*

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

268. *See e.g.*, *State v. Smith*, 50 P.3d 825, 831 (Ariz. 2002).

269. *Johnson*, 59 P.3d 450 at 458-59.

270. *Id.* at 454. The aggravating factors were that the killings were committed in the commission of a robbery, to which the defendant was also sentenced and that there were more than two killings in one incident, where the defendant was convicted of four murders.

271. *Id.* at 459.

Besides the jurisdictions to rule their death penalty sentencing schemes unconstitutional, one of the most interesting debates about the application of *Ring* to a state statute is occurring in Florida. The *Bottoson* case²⁷² sidestepped the issue of the applicability to *Ring* to the hybrid sentencing structure of Florida, but the concurring justices in *Bottoson* signaled that this was not the last to be heard from that court on this issue.²⁷³ Three of the justices suggested that the Florida statute was indeed unconstitutional under *Ring* and were mystified as to why the majority did not address this issue.²⁷⁴

Chief Justice Anstead suggested that the Florida statute has serious problems because (1) the nature of the advisory opinion system violates *Ring*; and (2) that advisory opinion is not even required to be unanimous, again violating *Ring*.²⁷⁵ Chief Justice Anstead nonetheless concluded that since the *Ring* opinion did not overrule Florida's statute or the Supreme Court precedent for it, that the result reached by the majority was indeed correct.²⁷⁶

Justice Shaw argued that the Florida statute violates *Ring* because the aggravating factors are the functional equivalent of elements which should be proven unanimously and Florida does not require such a unanimous finding.²⁷⁷ Justice Shaw also concluded that this Petitioner was not entitled to relief, because one of the aggravating factors found was prior convictions, the one aggravating factor which can still be found by a judge after *Ring*.²⁷⁸

Justice Pariente believed that the Florida statute was functionally similar to *Ring* and should be found unconstitutional,²⁷⁹ but believed that because of the Supreme Court precedent, that this was an issue for the Supreme Court to address and thus concurred in the result.²⁸⁰ Despite the fact that the

272. *Bottoson*, 833 So.2d at 704 (Anstead, C.J., concurring in the judgment).

273. *Id.* at 725 (Pariente, J., concurring in the judgment).

274. *Id.* (Pariente, J., concurring in the judgment).

275. *Id.* at 705 (Anstead, C.J., concurring in the judgment).

276. *Id.* at 704 (Anstead, C.J., concurring in the judgment).

277. *Bottoson*, 833 So.2d at 716 (Shaw, J., concurring in the judgment).

278. *Id.* at 718-19 (Shaw, J., concurring in the judgment).

279. *Id.* at 725 (Pariente, J., concurring in the judgment) (stating:

In effect, the maximum penalty of death can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors. *In effect*, Florida juries in capital cases *do not do* what *Ring* mandates—that is, make specific findings of fact regarding the aggravators necessary for imposition of the death penalty. *In effect*, Florida juries *advise* the judge on the sentence and the judge *finds* the specific aggravators that support the sentence imposed. Indeed, under both the Florida and Arizona schemes, it is the judge who *independently* finds the aggravators necessary to impose the death sentence. Whether the non-unanimous advisory role of Florida's penalty phase juries is of sufficient constitutional significance under the Sixth Amendment to distinguish Florida's sentencing statute from the Arizona statute invalidated in *Ring* is a question for the United States Supreme Court to decide.).

280. *Id.* (Pariente, J., concurring in the judgment).

circumstances of this particular case were not correct for the ruling of the Florida statute unconstitutional under *Ring*, it seems to forecast that the day Florida overrules this statute is not too far away after the Florida Supreme Court's ruling in *Bottoson*. The Florida court has subsequently held up the *Bottoson* case in other post-conviction relief as well as direct appeal cases in Florida.²⁸¹ This fate could reach many other state statutes as this decision has more of an opportunity to work its way through the courts.

VI. CONCLUSION

Because of the considerations mentioned above, the case of *Ring v. Arizona* was indeed correctly decided. It must be understood that *Ring* was not a watershed decision; it was merely the logical extension of *Apprendi* to the death penalty. Prior to this decision, it was odd to see the Supreme Court attempt to distinguish its prior precedent while creating an unintelligible rule. As previously mentioned, *stare decisis* is important to U.S. legal history. It is important not only to preserve the finality of decisions made and rules promulgated, but also to provide some measure of predictability to our legal system. This latter goal is what allows our common law system to survive and is truly a cornerstone of American jurisprudence.

While these considerations are no doubt important, what measure of predictability is furthered by a rule of conflicting cases that even the Supreme Court has a difficult time interpreting and applying to fact situations? In this situation, the Supreme Court and the American public are better off creating a new rule, one which not only provides a certain amount of guidance to the public, but also to legislatures so that they can create statutes which will comport with the Constitution. When we have a rule that allows a judge to increase a sentence from life to death, but disallow as unconstitutional a sentencing scheme which adds two years to the jury sentence, how can this comport with the constitutional and practical concerns of fairness to the convicted defendant? Why should a capital defendant actually enjoy less protection under the Constitution than an ordinary criminal defendant?

These were the questions that needed to be answered in the *Ring* case, but were these questions answered? Did the *Ring* Court answer these questions and create a more user-friendly rule? The Court attempted to standardize the system and create a rule which would allow for predictability. What the Court failed to do was provide much guidance as to a threshold for what will amount to constitutional sentencing and what will violate the Sixth Amendment. The rule promulgated is that any fact which, if found, could lead to the sentencing of a defendant to a term greater than she could have been sentenced following an adverse verdict from a jury, must not be found by the judge alone. While

281. See e.g., *Anderson v. State*, No. SC95773, 2003 WL 124468 at *16 (Fla., Jan. 16, 2003).

this is not the clearest rule of criminal procedure, it is certainly a clearer rule than what existed before *Ring*. The old rule was similar but had to be qualified by the Court's jurisprudence, which made it much more complicated. The rule, as it now exists, does provide some minimal guidance to legislatures, as well as some measure of predictability to potential defendants and fair and even application under the Sixth Amendment to the Constitution of the United States.

But there are still questions remaining under this rule. Statutes, like Arizona's, that leave the process of fact-finding solely to the judge are unconstitutional. Statutes which leave fact-finding entirely to the jury seem to be constitutional so long as the facts are found unanimously and beyond a reasonable doubt. The issue that still remains relates to hybrid systems. Hopefully, this case note has addressed some of those questions. By looking at the letter and the spirit of the *Ring* holding as well as subsequent case law; it can be seen that it is the effect and not the form of the system which should determine its constitutionality. Some judicial fact-finding may still be acceptable under *Ring*, but states must be careful in allowing any significant judicial fact-finding after *Ring*.

The issue of what requires fact-finding and what does not may also arise. Some aggravating factors clearly do not require fact-finding, such as prior convictions. Other aggravating factors also seemingly do not require any fact-finding. Aggravating factors such as multiple killings or multiple crimes, if the defendant is convicted of all of the elements of the aggravating factor do not seem to require fact-finding, but it remains to be seen if the Court will expand its list of aggravating factors which may be constitutionally found by a judge alone.

In addition to the roles issue and defining what requires fact-finding, the issue of retroactivity must be answered. This case may indeed increase the number of petitions for post-conviction relief, but this begs the question to Justice O'Connor that if the defendants were sentenced in an unconstitutional manner in the first place, shouldn't we want them to challenge their sentences; isn't that why we have post-conviction relief? Also, if it is judicially determined that this rule is not retroactive, none of these post-conviction cases will prevail and eventually will tail off and cease to be a drain on the resources of the judicial system, a small price to pay.

The remaining questions are much more of clarity than of substance. The exact holding of the Court needs to be clarified to determine if what was meant is that *judges alone must not* serve as fact finders or if what was meant is that *juries alone must* find these facts. This leaves open for attack those systems which use both the judge and the jury or the judge alone after a deadlock by a jury to determine the facts for aggravation and mitigation. Some of these systems may indeed be constitutional, but it would be wise for legislatures to

take note of the Court's position and carefully review their statutes in light of *Ring*.

The intent of this case note was to answer some of the remaining questions left open under *Ring* and hopefully it has accomplished this goal by identifying those states which may have problem statutes and making a judgment as to whether or not those statutes may still constitutionally stand after *Ring*. One thing is sure, we have finally received clear guidance from the Supreme Court about how to reconcile *Walton* with *Apprendi* and *Jones*; we cannot.

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I'M SORRY YOUR HONOR, YOU WILL NOT DECIDE MY FATE TODAY

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