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Unraveling Ring v. Arizona: Balancing Judicial Sentencing Enhancements with the Sixth Amendment in Capital Punishment Schemes

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UNRAVELING RING v. ARIZONA: BALANCING JUDICIAL SENTENCING ENHANCEMENTS WITH THE SIXTH AMENDMENT IN CAPITAL PUNISHMENT SCHEMES

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I. INTRODUCTION: PUTTING CAPITAL PUNISHMENT IN PERSPECTIVE

Deciding upon the appropriate sentence for a person who has been convicted of a crime is the routine work of judges. By reason of this experience, as well as their training, judges presumably perform this function well. But, precisely because the death penalty is unique, the normal presumption that a judge is the appropriate sentencing authority does not apply in the capital context. The decision whether or not an individual must die is not one that has traditionally been entrusted to judges . . . .

. . . .

Juries – comprised as they are of a fair cross section of the community – are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench. . . . [T]he belief that juries more accurately reflect the conscience of the community than can a single judge is the central reason that the jury right has been recognized at the guilt stage in our jurisprudence. This same belief firmly supports the use of juries in capital sentencing, in order to address the Eighth Amendment’s concern that capital punishment be administered consistently with community values. . . . [Since] evidence indicates that judges and juries do make sentencing decisions in capital cases in significantly different ways . . . entrusting the capital decision to a single judge creates an unacceptable risk that the decision will not be consistent with community values.¹

The debate over the issue of capital punishment is probably as old as history itself. Indeed, it is an issue that goes to the very core of fundamental human values. Some foreign countries have banned the practice for decades; others have continued to endorse the procedure through political or religious oppression. Similarly, the United States continues to struggle with this issue. Even in the post-September 11th era, where the war on terrorism continually affects our culture, the moral issue of capital punishment continues to be a

highly controversial and debated issue. The problem with capital punishment is that it is one of the few core issues in society on which almost every individual has a moral, philosophical, or religious viewpoint. In the midst of these pre-conceived and usually sensitive opinions, it seems as if the reasons upon which an individual should make an informed decision about the status of the death penalty in our country fall on deaf ears.

In order to undertake an intellectual discussion of the procedural and theoretical questions raised following a landmark capital punishment case such as *Ring v. Arizona*, it is important to consider the context of the death penalty in our society. There are currently thirty-eight states that allow for the death penalty. Since 1976, 906 prisoners have been executed. Recently, a 2003 year-end survey of the death penalty showed that the punishment is in significant decline. This conclusion is based on the facts that (1) there were only sixty-five prisoners executed in 2003; (2) the total population of death row has declined five percent to 3,504 since 2002; (3) the imposition of new death sentences has decreased to approximately 139 in 2003; and (4) public support for capital punishment has dropped to its lowest level since 1978. Additionally in 2003, ten death-row inmates were exonerated and 174 death sentences were commuted.

In considering what has caused these recent declines, strong consideration must be given to two landmark United States Supreme Court decisions of 2002. First, in *Atkins v. Virginia*, the Court held that the imposition of the death penalty upon mentally retarded inmates violated the Eighth Amendment’s

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2 For a detailed discussion of the specific issues created by capital punishment in the post-September 11th era, see Symposium, *Capital Punishment in the Age of Terrorism*, 41 CATH. L. 187 (2001).

3 536 U.S. 584 (2002).


5 Id. at 4. The overwhelming majority of these executions have been by lethal injection. Id.


7 Id. This represents an 8% decline from 2002 and a 34% decline from 1999. Id.

8 See id.

9 Id. at 1-2 (signifying almost a 50% drop from the late 1990s).

10 Id. at 2. “Support dropped from 70% . . . in October [of 2002] to 64% in October of [2003], despite the media focus on the trials of two men accused of serial killings in Virginia and Maryland and continuing concern about terrorism.” Id.

11 Id. at 1. It should be noted that 171 of these commutations came as a result of former Illinois Governor George Ryan’s decision in January of 2003 to clear death row in Illinois. Illinois has since continued its moratorium on capital punishment. Id. at 2-3.

Cruel and Unusual Punishment Clause. The second case the Court decided was *Ring v. Arizona*. In *Ring*, the Court held that a capital punishment sentencing scheme that allowed a judge to balance aggravating and mitigating circumstances unconstitutionally violated a criminal defendant’s Sixth Amendment right to a jury trial. This decision, which will serve as the focal point of this Comment, has widespread ramifications which include the possibility of affecting the status of over eight hundred death sentences in eleven states.

Prior to discussing the specifics of *Ring v. Arizona*, it is important to consider the foundation of Arizona’s capital punishment law. The Territory of Arizona enacted its initial capital punishment statute in 1901. This statute delegated the sentencing decision to a jury except in cases where the defendant had pleaded guilty. Abolished in 1916, the statute was subsequently resurrected in 1918. Thereafter, the 1901 sentencing scheme remained in effect until 1972. In 1972, the United States Supreme Court invalidated these complete discretion capital punishment schemes as unconstitutional in *Furman v. Georgia*.

As a result of *Furman*, the Arizona Legislature approved a new capital punishment sentencing scheme in 1973, which entrusted the sentencing decision to a judge. The statute outlined six aggravating circumstances and four

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13 *Id.* at 321.


15 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).


18 *Id.*

19 *Id.*

20 *Id.* (citing Hernandez v. State, 32 P.2d 18, 20-21 (Ariz. 1934)).

21 408 U.S. 238 (1972).


23 *Summerlin*, 341 F.3d at 1103. The 1973 scheme fundamentally changed the 1901 statute. The 1901 scheme required the jury to make sentencing decisions in capital cases; the 1973 legislation entrusted the sentencing decision to a judge. *See id.* at 1102-03.
mitigating circumstances for judicial consideration.\textsuperscript{24} The death sentence was permitted only when the judge found the presence of at least one aggravating factor and no mitigating factors.\textsuperscript{25} Six years later, another reform to the statute was required following the case of Lockett v. Ohio,\textsuperscript{26} in which the United States Supreme Court invalidated exclusive statutory lists of mitigating circumstances in capital cases.\textsuperscript{27} In response to Lockett, the Arizona Supreme Court found the 1973 statute unconstitutional because it prohibited a defendant from proving mitigating circumstances not in the statute.\textsuperscript{28}

To address this problem, the Arizona State Legislature amended the capital sentencing process in 1979 to permit a judge to consider any relevant mitigating circumstances in the determination of whether to impose the death penalty.\textsuperscript{29} This is the sentencing scheme that eventually became the center of controversy in Ring v. Arizona.\textsuperscript{30} The Ring decision raises two broad concerns. The first issue left unanswered by Ring is the practical implications associated with a landmark case that strikes down capital punishment schemes in five states.\textsuperscript{31} Second, and more importantly, the Ring majority did not address whether the decision should be applied retroactively to prisoners awaiting execution.

Part II of this Comment will examine the three major United States Supreme Court cases that played a role in determining the constitutionality of the sentence enhancement scheme at issue in Ring. Part III provides a factual and procedural background of the Ring decision. In addition, this Part outlines the conflicting opinions rendered by the Ring Court. Part IV assesses the impact of Ring, specifically analyzing whether Ring should be retroactively applied. Finally, this Part also argues that the United States Supreme Court should apply Ring retroactively based on Supreme Court precedents.

\textsuperscript{24} Id. at 1103.
\textsuperscript{26} 438 U.S. 586 (1978).
\textsuperscript{27} Id. at 608-09. The Arizona Supreme Court had found the 1973 statutory list of mitigating circumstances to be exclusive. See State v. Bishop, 576 P.2d 122 (Ariz. 1978), vacated, 439 U.S. 810 (1978).
\textsuperscript{29} Summerlin, 341 F.3d at 1103. Various aggravating and mitigating circumstances were added to supplement the statute from 1977 to 1985. Id. (noting changes in 1977, 1978, 1984, and 1985).
\textsuperscript{30} 536 U.S. 584 (2002).
\textsuperscript{31} The Ring decision has the potential to affect a total of eleven states capital punishment sentencing schemes. See infra Part. IV.
II. WALTON, JONES, AND APPRENDI: A PARADOX OF APPLICATION

A. Walton v. Arizona — Allowing Judges to Balance the Circumstances

In Walton v. Arizona, the defendant was convicted of first-degree murder for robbing, kidnapping, and killing a victim with a firearm. Under the applicable state statute, the trial judge held a sentencing hearing in order to balance the “aggravating circumstances” presented by the State with the “mitigating circumstances” presented for leniency by the defendant. The trial judge found “that [because] the two aggravating circumstances pressed by the State were present, . . . [and because] there were ‘no mitigating circumstances sufficiently substantial to call for leniency’” the defendant should be sentenced to death. After his conviction was affirmed by the Arizona Supreme Court, Walton petitioned the United States Supreme Court for a writ of certiorari. Walton claimed that the Arizona capital punishment statute violated the Sixth Amendment by allowing a judge, rather than a jury, to balance the aggravating and mitigating circumstances and make the final sentencing hearing decision.

A majority of the Court disagreed and upheld the statute, stating that “the Arizona capital punishment sentencing scheme does not violate the Sixth Amendment.” The Court, citing Clemons v. Mississippi and Hildwin v. Florida, compared the Arizona scheme to the Florida framework, which had previ-

33 See id. at 644-45.
34 See ARIZ. REV. STAT. § 13-703(B) (1989) (current version as amended at ARIZ. REV. STAT. ANN. § 13-703.01(A) (West Supp. 2003)).
35 See Walton, 497 U.S. at 645.
36 Id.
39 See Walton, 497 U.S. at 647. It should be noted that Walton also claimed on appeal that the statute violated the Eighth and Fourteenth Amendments by imposing an unconstitutional burden of production, a preponderance of evidence, that the defendant show mitigating circumstances to obtain leniency, id. at 649; that the effect of the statute was to “create an unconstitutional presumption that death is the proper sentence”, id. at 651; and that one of the aggravating circumstances, for which he was attributed to have possessed, failed to attribute appropriate discretion to the sentencer and its imposition was thereby applied unproportionally. Id. at 652-55. The Court dismissed each of these arguments, finding that the statute did not violate the corresponding constitutional provisions. See id. at 649-56.
40 Id. at 649.
41 494 U.S. 738 (1990) (citing the proposition that no prior Supreme Court decision had articulated a requirement that the jury impose a death sentence).
ously been upheld by the Court, and found that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by a jury." 43 The Court dismissed Walton's efforts to distinguish the Arizona scheme from the Florida system. 44 Specifically, the Court refuted Walton's contention that the Arizona format applied the "aggravating circumstances" as "'elements of the offense'" and explained that the circumstances acted as a mere guide to the trial judge. 45 Furthermore, the Court relied on its decision in *Cabana v. Bullock* 46 and reasoned:

If the Constitution does not require that the *Enmund* finding ["that the defendant killed, attempted to kill, or intended to kill" 47] be proved as an element of the offense of capital murder, and does not require a jury to make that finding, 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. 48

In his dissent, Justice Stevens questioned the majority's interpretation of the Arizona capital punishment scheme. 49 First, Stevens theorized that because the Arizona statute did not permit the application of the death penalty without the finding of an aggravating circumstance, the aggravating circumstances did in fact serve as elements of capital sentencing. 50 Second, Stevens relied on English common-law theory and the Supreme Court's early applications of the Sixth Amendment for the principle that it was a jury's responsibility to assess the factual elements that decided the imposition of a capital punishment sentence. 51 For these two reasons, the Arizona scheme in question was, in his opinion, unconstitutional.

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44 *Id.* at 648.
45 *Id.* (citing *Poland v. Arizona*, 476 U.S. 147 (1986)) (explaining that the presence of an aggravating circumstance or lack thereof, does not establish a per se standard for the imposition or preclusion of a death sentence).
46 474 U.S. 376 (1986) (holding that an appellate court may constitutionally decide a defendant's culpability and finding that this action does not impact the State's classification of a particular crime, nor in the instance of a capital crime, does it require additional elements to be recognized by a jury prior to a sentencing determination).
47 *Walton*, 497 U.S. at 648-49.
48 *Id.* at 649.
49 *Id.* at 709 (Stevens, J., dissenting).
50 *Id.* (Stevens, J., dissenting).
51 See *id.* at 710-14 (Stevens, J., dissenting).
B. Jones v. United States – The Foundation for Change

In Jones v. United States, the defendant and two accomplices were arrested and indicted under federal law on two counts: using a firearm in relation to a crime of violence and carjacking. Under the terms of the carjacking statute, the maximum sentence could be increased from fifteen to twenty-five years ""if serious bodily injury . . . results." This provision was not included in the indictment, and the district court instructed the jury on the fifteen-year maximum sentence available. After the jury returned guilty verdicts on both charges, the Government presented a "presentence report," and it recommended a twenty-five-year maximum for the carjacking charge (due to evidence that one of the victims suffered significant injuries to his ear) in accordance with the bodily injury provision of the carjacking statute. Despite Jones' objection on the ground that the provision had never been pleaded at trial as an element of the offense, the district court agreed with the Government's recommendation and granted the twenty-five-year maximum sentence on the carjacking charge in addition to a five-year sentence for the use of the firearm. On appeal to the Ninth Circuit, Jones claimed that the sentencing process allowed the trial judge to determine an element of the carjacking offense under the terms of the statute. The Ninth Circuit rejected this argument, stating that the framework and legislative history of the statute intended for the subsections to serve as "sentencing factors" that could lead to increased penalties and not separate offenses.

The United States Supreme Court subsequently granted certiorari and reversed. Justice Souter, writing for the majority, explained that the issue was "whether the federal carjacking statute . . . defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury ver-

53 See id. at 229-30.
56 Id. at 230-31.
57 Id. at 231.
58 Id.
59 Id.
60 Id. at 231-32. The Ninth Circuit agreed with the Eleventh Circuit Court Appeals' decision in United States v. Williams, 51 F.3d 1004, 1009-10 (11th Cir. 1995). Id. It should be noted that the Ninth Circuit vacated that portion of the district court decision that reduced Jones' total sentence to twenty-five years. Id. at 232 n.2 (citing United States v. Oliver, 116 F.3d 1487 (9th Cir. 1997); United States v. Oliver, 60 F.3d 547, 555-56 (9th Cir. 1995)).
61 Jones, 526 U.S. at 232.
dict."

The Court explained that while it appeared from the face of the statute that the subsections might be sentencing provisions, the increased penalty provisions in subsections (2) and (3) were conditioned upon certain facts ("serious bodily injury" and "death").

Thus, the conditional provisions seemed to produce an effect similar to elements of the crime. Finding the statutory construction to be facially ambiguous, the Court focused upon other state and congressional statutes for reference to guide its interpretation.

After extensive consideration, the Court found that while the subsections of the statute could potentially be construed as either elements or sentencing factors, "the fairest reading [of the statute] ... treats the fact of serious bodily harm as an element." To find otherwise would result in serious constitutional ramifications.

The Court stressed that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact ... that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."

After stressing the significance of allowing a jury to assess the facts that are associated with specific elements of a crime, the Court addressed the dif-

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62 Id. at 229 (citation omitted). At the time the petitioner was charged, the carjacking statute specifically stated:

Whoever, possessing a firearm ... 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 ... results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.


63 Id. at 232-33.

64 Id.

65 See id. at 234-37. The Court articulated that Congress had previously made serious bodily injury an element of an offense of other statutes and that numerous states utilize it as an element of aggravated robbery. Id. Furthermore, the Court specifically explained: "We thus think it is fair to say that ... Congress probably intended serious bodily injury to be an element defining an aggravated form of the crime." Id. at 236.

66 Id. at 239.

67 See id. at 239-44. The Court opined, "If serious bodily injury were merely a sentencing factor ..., then death would presumably be nothing more than a sentencing factor ... [which could cause] a jury finding of fact necessary for a maximum 15-year sentence ... [to] open the door to a judicial finding sufficient for life imprisonment." Id. at 243-44 (citations omitted).

68 Id. at 243 n.6.

69 See id. at 243-48.
ferences in its prior decisions permitting judicial factfinding in capital punishment cases. The Court distinguished Spaziano v. Florida on the ground that it did not involve a true factfinding assessment but rather a theoretical choice in sentencing application. The Court also distinguished Hildwin v. Florida on the ground that the judge was only permitted to determine the existence of aggravating circumstances after the jury had engaged in the factfinding process and made a recommendation about the sentence. Finally, the Court briefly distinguished its decision in Walton, finding its application inapplicably narrow since the Walton Court had not labeled the assessment of aggravating circumstances as "raising the ceiling of the sentencing range." By distinguishing these cases, the Jones Court circumvented potential constitutional problems and held that the challenged statute "establish[ed] three separate offenses by specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict."

C. Apprendi v. New Jersey – The Jury Must Make Sentence Enhancement Determinations

In Apprendi v. New Jersey, the United States Supreme Court took its reasoning one step further. In late December of 1994, Charles Apprendi fired shots into an African-American household located in a predominantly white neighborhood in Vineland, New Jersey. After his arrest, Apprendi stated that even though he did not know the occupants of the house, he did not want them in the neighborhood because they were black; Apprendi later retracted this statement. Apprendi was subsequently indicted on twenty-three offenses. He agreed to a plea arrangement whereby he entered a guilty plea for two counts

70 Id. at 248-51.
72 Jones, 526 U.S. at 250.
74 Jones, 526 U.S. at 250-51.
75 See id. at 251. This view has been criticized by several justices. See, e.g., Apprendi v. New Jersey, 530 U.S. 466, 538 (2000) (O'Connor, J., dissenting).
76 Jones, 526 U.S. at 252.
78 Apprendi, 530 U.S. at 469.
79 Id. (quoting State v. Apprendi, 731 A.2d 485, 486 (N.J. 1999)).
80 Id.
of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful possession of an antipersonnel bomb in exchange for dismissal of the remaining twenty counts.\textsuperscript{81} Under New Jersey law, the combined maximum sentence for these three offenses was twenty-five years.\textsuperscript{82} Although not referenced in the indictment, New Jersey also had a hate crime law which allowed a trial judge to enhance the prison sentence if it was determined "by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.'\textsuperscript{83} The enhancement in this case, requested by the State for one of the possession counts, had the potential to increase the prison term by ten to twenty years.\textsuperscript{84}

According to the stipulations of the plea arrangement, the State maintained the privilege to demand that Apprendi’s sentence be increased in accordance with the hate crime statute.\textsuperscript{85} Concurrently, Apprendi preserved the right to challenge the constitutionality of the statute.\textsuperscript{86} Following the plea agreement hearing, the trial court accepted the guilty plea and proceeded to conduct an evidentiary hearing to determine the factual applicability of the hate crime law.\textsuperscript{87} Testimony was introduced by both sides, and Apprendi denied that his actions were motivated by racial bias.\textsuperscript{88} However, the trial judge ruled "'that the crime was motivated by racial bias.'\textsuperscript{89} "Having found 'by a preponderance of the evidence' that Apprendi’s actions were taken 'with a purpose to intimidate' . . . the trial judge held the hate crime enhancement applied . . . [and] sentenced him to a 12-year term of imprisonment on [the possession] count . . .\textsuperscript{90} Apprendi appealed the decision on the grounds that it violated his Fourteenth Amendment Due Process right to have the factual determination behind the issue of bias decided by a jury, rather than a judge.\textsuperscript{91} The sentence was upheld by

\textsuperscript{81} Id. at 469-70.
\textsuperscript{82} See id. at 470.
\textsuperscript{83} Id. at 468-69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000)).
\textsuperscript{84} See id. at 469.
\textsuperscript{85} Id. at 470.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 471.
\textsuperscript{89} Id. (citation omitted).
\textsuperscript{90} Id.
\textsuperscript{91} Id.
the New Jersey appellate courts,\textsuperscript{92} but reversed on appeal to the United States Supreme Court.\textsuperscript{93}

Justice Stevens, writing for the Court, determined that the primary issue was "whether the Due Process Clause . . . requires that a factual determination authorizing an increase in the maximum prison sentence . . . be made by a jury on the basis of proof beyond a reasonable doubt."\textsuperscript{94} At the outset, the Court noted the significance of its opinion in \textit{Jones},\textsuperscript{95} and reiterated the fundamental principle that the Constitution implicitly requires a jury to find every element of a criminal charge beyond a reasonable doubt in order to convict a criminal defendant.\textsuperscript{96} Stevens articulated his distaste for an interpretation that would provide procedural safeguards for some acts and deny those same procedural safeguards for other acts merely because the latter acts were labeled sentence enhancements.\textsuperscript{97} The Court acknowledged its prior recognition of the historical role of judicial discretion in implementing a particular sentence within the limits of each statute and elaborated on the association between this discretion and the jury's determination.\textsuperscript{98} Despite this judicial discretion, the Court relied largely on the inherent dangers of depriving a defendant the procedural safeguards of a jury trial, noting that "[i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attached to the offense are heightened."\textsuperscript{99}

Stevens also restated the importance of the Court's expression in \textit{Jones}, declaring that the majority now endorsed his previous interpretation of the rule that "[i]t is unconstitutional for a legislature to remove from the jury the assess-

\textsuperscript{93} Apprendi, 530 U.S. at 474.
\textsuperscript{94} Id. at 469.
\textsuperscript{95} Id. at 476; see supra notes 61-68 and accompanying text.
\textsuperscript{96} Apprendi, 530 U.S. at 477 (citing United States v. Gaudin, 515 U.S. 506, 510 (1995)).
\textsuperscript{97} Id. at 476 ("In his 1881 lecture on the criminal law, Oliver Wendell Holmes, Jr., observed: 'The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed.' New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently.").
\textsuperscript{98} See id. at 481-83.
\textsuperscript{99} Id. at 484 (citing \textit{In re} Winship, 397 U.S. 358, 363 (1970)).
ment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.” 100 The Court explained more generally that the key question was “one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” 101 In Apprindi’s case, the majority of the Court found this issue clearly answered in the affirmative because the result of the sentencing scheme of the New Jersey Supreme Court had the practical effect of allowing a judge to transform a second-degree offense into a first-degree offense. 102 Therefore, the Court reversed Apprindi’s conviction and held that a defendant could not be subject to a judicially imposed sentence penalty that is in excess of the statutory maximum that could be imposed by the factual assessments of a jury. 103 Finally, the Court attempted to distinguish Walton, albeit abstractly, on the grounds that the judicial sentencing discretion in Walton was only applicable in capital punishment situations when the jury had previously found the defendant guilty of all the elements of the death sentence; thus, the Court explained, this allowed the judge to apply either the maximum or a more lenient sentence. 104

Justice O’Connor’s dissent articulated that “[o]ur Court has long recognized that not every fact that bears on a defendant’s punishment need be charged in an indictment, submitted to a jury, and proved by the government beyond a reasonable doubt.” 105 O’Connor criticized the majority for applying such a broad holding with a vague and unsubstantiated historical foundation. 106 In her opinion, she found it “remarkable that the Court cannot identify a single instance [in which] our Court has applied, as a constitutional requirement, the rule it announces today.” 107 O’Connor also focused on the fact that the majority essentially overlooked the Court’s prior decision in Patterson v. New York. 108 Finally, O’Connor firmly rejected the majority’s assessment that Walton was inapplicable and questioned how the Court was able to find that the case did not

100 Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).
101 Id. at 494.
102 Id.
103 See id. at 483, 497.
104 Id. at 496-97.
105 Id. at 524 (O’Connor, J., dissenting). Justice O’Connor’s dissent was also joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer. Id. at 523.
106 Id. at 525 (O’Connor, J., dissenting).
107 Id. (O’Connor, J., dissenting).
108 Id. at 531-32 (O’Connor, J., dissenting) (citing Patterson v. New York, 432 U.S. 197 (1977)). In Patterson, the Court rejected an expansive application of the Due Process Clause that would have required proof of every fact beyond a reasonable doubt. See Patterson, 432 U.S. at 215-16.
apply without overruling Walton's holding. She rationalized that "[i]f a State can remove from the jury a factual determination between life and death [under Walton] . . . it is inconceivable why a State cannot do the same with respect to a . . . 10 year increase in the maximum sentence to which a defendant is exposed."110

III. RING v. ARIZONA

A. Background

1. Arizona’s Capital Punishment Sentencing Scheme

Under Arizona law at the time of Ring’s sentencing, an individual convicted of murder in the first-degree as classified by Title Thirteen, Chapter Eleven, Section Five of the Arizona Revised Statutes111 was subject to the terms of the Arizona homicide sentencing scheme which allowed a punishment of death or life imprisonment.112 The sentencing scheme instructed that following a finding of guilt on the part of the defendant, the judge shall conduct a “separate sentencing hearing to determine the existence or non-existence of the [aggravating and mitigating] circumstances in subsections F and G . . . [and that] [t]he court alone shall make all factual determinations required by this section.”113 In balancing these circumstances, the court “shall impose a sentence of

109 See Apprendi, 430 U.S. at 536-38 (O’Connor, J., dissenting).
110 Id. at 537 (O’Connor, J., dissenting).
112 Id. § 13-703(A) (current version as amended at ARIZ. REV. STAT. ANN. § 13-703(A) (West Supp. 2003)).
113 Id. § 13-703(B) (current version as amended at ARIZ. REV. STAT. ANN. § 13-703.01(C)-(D) (West Supp. 2003). The statute provided for the consideration of the subsequent ten aggravating circumstances:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a serious offense, whether preparatory or completed.
3. In the commission of the offense[,] the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency.”

2. Facts

On November 28, 1994, an armored van arrived for a collection outside a department store at a local mall in Glendale, Arizona.\textsuperscript{115} When the courier

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency[, or a county or city jail.
8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.
9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.
10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

\textit{Id.} § 13-703(F) (current version as amended at ARIZ. REV. STAT. ANN. § 13-703(F) (West Supp. 2003). These aggravating circumstances are essentially to be balanced in the sentencing hearing against any mitigating circumstances, in the context that:

Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining 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, including but not limited to the following:

1. The defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of [the] law was significantly impaired, but no so impaired as to constitute a defense to prosecution.
2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
4. The defendant could not reasonably have foreseen that his conduct would in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
5. The defendant’s age.

\textit{Id.} § 13-703(G) (current version as amended at ARIZ. REV. STAT. ANN. §. 13-703(G) (West Supp. 2003)).

\textsuperscript{114} \textit{Id.} § 13-703(E) (current version as amended at ARIZ. REV. STAT. ANN. § 13-703(E) (West Supp. 2003)).
returned with the deposit, he discovered both the van and its driver were missing. Subsequently, the van was located in a church parking lot; however, by the time the van was located, the driver had been murdered and over $800,000 in cash and checks had been stolen. During the investigation, the local police utilized a tip from an informant to establish probable cause in order to tap the phones of suspects Timothy Ring, James Greenham, and William Ferguson. Following some creative police work designed to elicit communication between the suspects, Ring mentioned a "'very large bag'" in a phone conversation with Ferguson. Consequently, a search of Ring's house revealed "a duffel bag in his garage containing more than $271,000 in cash." Accompanying the money was a note, which seemed to signify how the money was to be split among the suspects. This note was later shown to have been written by Ring.

3. Procedural History

a. Maricopa County Superior Court

At Ring's trial, complications did not allow the prosecution to prove that the weapon found was the one used in the crime. Therefore, the State relied primarily on circumstantial evidence regarding the money to prove its case. In his defense, Ring argued that the money which had been seized was earned through employment as a bail bondsman and as an FBI informant, and was earmarked for starting a new corporation in the construction industry. However, the State introduced subsequent testimony that Ring could not have

116 Id.
117 See id.
118 See id. at 589-90.
119 See id. at 590.
120 Id.
122 Id.
123 Id. at 1144 n.2. The search revealed a rifle that had been concealed in the garage, which incidentally matched the description of the weapon Ring's co-defendant later admitted at the sentencing hearing that Ring had used to murder the driver. Id. at 1144. However, the prosecution did not have sufficient evidence at Ring's trial to prove the gun caused the driver's death. See id.
124 See id.
125 Id.
made more than $9,000 in these employment positions.\textsuperscript{126} Although the jury was divided on the issue of premeditated murder,\textsuperscript{127} "[o]n December 6, 1996, a jury found Defendant, Timothy Stuart Ring, guilty of first-degree [felony] murder, conspiracy to commit armed robbery, armed robbery, burglary and theft."\textsuperscript{128} Following the verdict and prior to the sentencing hearing, Ring's accomplice Greenham negotiated with the prosecution and agreed to a reduced sentence in exchange for his testimony against Ring.\textsuperscript{129} At the sentencing hearing, Greenham testified that Ring had "'taken the role as leader'" and had not only killed the driver of the van but also complained that his accomplices had not applauded him for his actions.\textsuperscript{130}

The trial judge used this testimony to find that the circumstances of the case required that Ring receive the sentence of death for the murder of the armored van driver.\textsuperscript{131} In applying the Arizona capital punishment scheme, the trial judge was required to balance a finding of aggravating circumstances with offsetting mitigating circumstances.\textsuperscript{132} The court's analysis revealed two potential aggravating circumstances: (1) "Ring committed the offense in expectation of receiving something of 'pecuniary value'" and (2) "the offense was committed 'in an especially heinous, cruel, or depraved manner.'"\textsuperscript{133} These factors were considered to be present because the jury found that Ring had stolen the money from the van, and Greenham testified that Ring seemed to gain a sense of satisfaction from the killing.\textsuperscript{134} Conversely, the judge did recognize "Ring's 'minimal' criminal record" as a mitigating factor.\textsuperscript{135} However, the trial judge determined that this mitigating factor was not sufficient "'to call for leniency.'"\textsuperscript{136} As a result, the trial judge imposed the death sentence.\textsuperscript{137}

\begin{itemize}
\item \textsuperscript{126}See Ring v. Arizona 536 U.S. 584, 591 (2002).
\item \textsuperscript{127}Id.
\item \textsuperscript{128}Ring, 25 P.3d at 1142.
\item \textsuperscript{129}Ring, 536 U.S. at 593.
\item \textsuperscript{130}Id. at 593-94.
\item \textsuperscript{131}Id. at 594.
\item \textsuperscript{132}See supra note 112-14 and accompanying text.
\item \textsuperscript{133}Ring, 536 U.S. at 594-95 (citations omitted).
\item \textsuperscript{134}See id. at 595.
\item \textsuperscript{135}Id. (citation omitted).
\item \textsuperscript{136}Id. (citation omitted).
\item \textsuperscript{137}Id.
\end{itemize}
b. Arizona Supreme Court – State v. Ring

Under the terms of Arizona law, Ring was automatically granted a direct appeal to the Arizona Supreme Court.\(^{138}\) Ring’s primary argument focused on the constitutionality of the Arizona scheme in light of the United States Supreme Court decisions in Jones and Apprendi.\(^{139}\) Considering the conflict between Walton and Apprendi, the Arizona Supreme Court reviewed how the Apprendi majority attempted to distinguish Walton.\(^{140}\) The court found this analysis unpersuasive and explained that it believed Justice O’Connor’s dissent in Apprendi more accurately reflected the Arizona sentencing proceeding.\(^{141}\) The court noted that a defendant cannot receive the death sentence as a result of a jury verdict alone.\(^{142}\) The death penalty could only be applied through the use of a sentencing hearing held by the judge, without a jury.\(^{143}\) Even then, it could only be imposed when an aggravating circumstance was found that essentially outweighed any potential mitigating circumstance.\(^{144}\) Thus, the court concluded that neither Apprendi nor Jones had overruled the Arizona death penalty scheme and rejected Ring’s constitutional challenge.\(^{145}\)

Ring also challenged the sufficiency of the evidence the Superior Court relied upon to find the aggravating factors.\(^{146}\) In evaluating the first aggravating circumstance, the court stated, “Although [Ring’s] statements reflect a calculated plan to kill, satisfaction over the apparent success of his plan, and an extreme callousness or lack of remorse after the murder, the evidence does not support a finding” that Ring acted in a heinous or depraved manner or relished the act of murder.\(^{147}\) Despite this finding, the court reached a vastly different

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139 Id. at 1150. Ring also appealed the trial court’s refusal to suppress the wiretap evidence, the denial of his motion for a new trial, the denial of the introduction of evidence that a third-party may have committed the crime, the trial judge’s reliance on his accomplice’s testimony as the sole determination of the sentence, the factual basis behind the trial judge’s application of the two aggravating factors, and the trial judge’s lack of sufficient weight to his mitigating circumstance that he had no prior criminal history. See id. at 1145-55.

140 See id. at 1150-52.

141 See id. at 1151-52 (“Therefore, the present case is precisely as described in Justice O’Connor’s dissent – Defendant’s death sentence required the judge’s factual findings. Specifically, the trial judge in this case made the necessary factual finding to support the aggravating circumstance that the killing was heinous and depraved.”); see also Ring, 536 U.S. at 596.

142 Ring, 25 P.3d at 1152.

143 See id. (emphasis added).

144 See id.

145 See id. at 1152.

146 See id. at 1153-54.

147 Id. at 1153.
conclusion when assessing the aggravating factor of "pecuniary gain." The
court approved the trial judge’s conclusion that the driver of the armored van
was clearly murdered in order for Ring to obtain the large sum of money. Therefore, the court found that Ring’s argument that the murder was a result of
the “common sin of greed” was without merit and upheld the death penalty.

B. United States Supreme Court Decision

Following the Arizona Supreme Court decision, Ring petitioned the
United States Supreme Court, which granted certiorari to resolve the apparent
conflict lower courts had encountered in trying to reconcile Walton with Apprendi. Due to the potential impact of the issues, the case was “fast tracked’
with an expedited briefing and argument schedule” and came before the Su-
preme Court on April 22, 2002. At oral argument, Ring was represented by
Andrew Hurwitz and the State of Arizona was represented by former State At-
torney General and current Governor Janet Napolitano. During the course
of the oral argument, the Justices aggressively questioned both sides about the
impact that Apprendi would have in the event it was applied to capital punish-
ment schemes. The primary inquiries directed to Mr. Hurwitz focused upon the
practical repercussions of striking down capital punishment schemes in a sig-
nificant number of states and the potential effect upon the U.S. Sentencing
Guidelines. Mr. Hurwitz replied, “The basic constitutional principle that under-
lies the Sixth Amendment . . . is the notion that . . . before the State is al-
lowed to exact the maximum punishment . . . a jury of your peers is allowed to
you to find those facts to put the State in that position.” On the other hand,
the Court’s questioning for Ms. Napolitano focused primarily on the Sixth

148 Id. at 1154.
149 See id.
150 See id. at 1154, 1156.
152 Ring v. Arizona, 536 U.S. 584, 596 (2002); see, e.g., United States v. Promise, 255 F.3d
150, 159-60 (4th. Cir. 2001) (en banc).
153 Joan Huls, Ring Cycle Continues: Arizona Capital Sentencing at U.S. Supreme Court, ARIZ.
supremeppg24-29.pdf.
154 For a review of the oral argument, see generally Oral Argument Transcript, Ring v. Ar-
izona, 536 U.S. 584 (2002) (No. 01-488), http://a257.g.akamaitech.net/7/257/2422/
06may20020730/www.supremecourtus.gov/oral_arguments/argument_transcripts/01-488.pdf.
155 See Ring, 536 U.S. at 587; see also Huls, supra note 154, at 26.
156 See Huls, supra note 154, at 26.
157 Id.
158 Id. at 28.
Amendment.\textsuperscript{159} Napolitano articulated that "[t]here are some facts that the legislature is entitled to find which don't go to the definition of the crime but go to the punishment. And this Court has never held there's a Sixth Amendment right to jury [trial] sentencing."\textsuperscript{160} Approximately two months after oral arguments, the Court issued its decision in \textit{Ring v. Arizona} on June 24, 2002.\textsuperscript{161}

1. Justice Ginsburg's Majority Opinion

Justice Ginsburg, writing for the majority of the Court, explained that the issue would focus upon "whether that aggravating factors may be found by the judge, as Arizona law specify[ed] or whether the Sixth Amendment's jury trial guarantee . . . require[d] that the aggravating factor determination be entrusted to the jury."\textsuperscript{162} In evaluating this issue, Justice Ginsburg thoroughly discussed how the Court's approach has changed from \textit{Walton}, to \textit{Jones}, and finally to \textit{Apprendi}.\textsuperscript{163} By considering the context of Ring's claim, the Court noted the significance that Ring could only have received a maximum sentence of life in prison under the jury verdict itself as opposed to the death sentence he received through judicial determination.\textsuperscript{164}

Turning to the specific conflicts from prior case law, the Court began its analysis with brief summaries of \textit{Walton}, \textit{Jones}, and \textit{Apprendi}.\textsuperscript{165} In evaluating the latter two cases, the Court recognized how it had previously distinguished \textit{Walton} on inconsistent grounds.\textsuperscript{166} On one hand, \textit{Jones} only seemed to distinguish \textit{Walton} on the ground that capital sentencing enhancements play a different role in the criminal justice system.\textsuperscript{167} On the other hand, \textit{Apprendi} seemed to explain \textit{Walton}'s acceptance of capital sentencing enhancements on the premise that since death was the maximum possible sentence for first-degree murder, the jury's declaration of total guilt was sufficient to allow the judge to choose the sentence.\textsuperscript{168} Although the Arizona Supreme Court rejected this distinction by choosing to follow Justice O'Connor's dissent in \textit{Apprendi}, the State at-

\begin{footnotesize}
\begin{enumerate}
\item See id. at 26.
\item Id.
\item Id. at 597. The Court further noted that Ring's claim is specifically narrow, such that he "only contends that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." Id. at 597 n.4.
\item Id. at 598-603.
\item See id. at 597.
\item See id. at 598-603.
\item See id. at 600-03.
\item See id. at 600-01.
\item Id. at 602-03.
\end{enumerate}
\end{footnotesize}
tempted to utilize the distinction by arguing that "Ring was convicted of first-degree murder, for which Arizona law specifies 'death or life imprisonment' as the only sentencing options . . . Ring was therefore sentenced within the range of punishment authorized by the jury verdict." The Court clearly rejected this argument, stating that a death sentence could only be achieved after an aggravating circumstance was established in the post-verdict sentencing hearing thereby subjecting Ring to an increased punishment.

In addition, the State claimed that, under Walton, the present case could be protected as involving a sentencing "factor" rather than an element of an offense. The Court, yet again citing Apprendi, rationalized that this distinction in language was no longer significant when the focus was the maximum punishment. Finally, Arizona claimed that capital punishment, through the use of judicial conclusion of aggravating circumstances, is distinct because limitations are already provided through the Eighth Amendment, and judges are better suited to ensure capital punishment is not capriciously applied. The Court clarified that this argument has no real merit because there is no precedent for allowing more freedom in capital cases under the guise of the Eighth Amendment. Furthermore, the Court stated that the claim that a judge may be able to more efficiently restrain capital punishment is not clearly accepted, and that the Sixth Amendment is not grounded in efficiency but rather the freedom of the jury trial system.

As a result of its heavy reliance on Apprendi and the inability to adequately balance Apprendi with Walton, the Court partially struck down 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." Therefore, the Court held that "[b]ecause 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," and it consequently reversed Ring's conviction.

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169 Id. at 603-04 (citation omitted).
170 See id. at 604-05.
171 See id. at 604.
172 See id. (citing Apprendi v. New Jersey, 530 U.S. 466, 492 (2000)).
173 See id. at 605-06.
174 Id. at 606 (citing Apprendi, 530 U.S. at 539 (O'Connor, J., dissenting)).
175 See id. at 607-08. The Court noted that twenty-nine of the thirty-eight states delegate the sentencing decision for capital punishment to juries. Id. at 608 n.6.
176 See id. at 607.
177 Id. at 609.
178 Id. (citation omitted).
2. The Concurring Opinions

a. Justice Scalia's Concurring Opinion

Justice Scalia’s concurring opinion\(^\text{179}\) arguably plays a very significant role because Scalia reconciles the two apparently conflicting Supreme Court principles enunciated in Walton\(^\text{180}\) and Apprendi.\(^\text{181}\) Scalia focused his analysis on the constitutionality of the different principles under the Sixth Amendment.\(^\text{182}\) Scalia first reiterated his more recent belief from Apprendi that “the fundamental meaning of the jury-trial guarantee . . . is that all facts essential to imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt.”\(^\text{183}\) Scalia then explained how, in Walton, the appellant’s argument seemed too broad considering the State’s inherent ability to structure its capital punishment scheme.\(^\text{184}\) Even if Walton’s challenge had been narrower, Scalia stated that he would have upheld the Arizona sentencing scheme over the Apprendi principle.\(^\text{185}\)

In reflecting upon these conflicting positions, Scalia noted that two significant “realizations” had changed his viewpoint as to the application of the Apprendi principle to “aggravating factors” in capital punishments schemes.\(^\text{186}\) First, Scalia explained the difficulties of determining the impact of Furman v. Georgia\(^\text{187}\) upon “aggravating factors” added to capital punishment schemes after Furman.\(^\text{188}\) Subsequently, and more critically, he explained that recent statutory trends have granted the power of sentence enhancements to judges “beyond what is authorized by the jury’s verdict” and that these enhancements had essentially depreciated the fundamental right of trial by jury embodied in the Sixth Amendment.\(^\text{189}\) In addition, Scalia stated his opinion that in criminal cases such as Ring, the basic principles of common law require that any so-

\(^{179}\) Id. at 610 (Scalia, J., concurring).


\(^{182}\) See Ring, 536 U.S. at 610 (Scalia, J., concurring).

\(^{183}\) Id. at 610 (Scalia, J., concurring).

\(^{184}\) Id. at 611 (Scalia, J., concurring). Walton had argued that “every finding of fact underlying the sentencing decision,” including the aggravating factors and the mitigating factors, must be found by the jury. Id. (citing Walton, 497 U.S. at 647).

\(^{185}\) Id. (Scalia, J., concurring).

\(^{186}\) Id. (Scalia, J., concurring).

\(^{187}\) 408 U.S. 238 (1972) (per curiam).

\(^{188}\) See Ring, 536 U.S. at 611 (Scalia, J., concurring).

\(^{189}\) Id. at 611-12 (Scalia, J., concurring).
called "aggravating factors... must be found by the jury beyond a reasonable doubt." In his conclusion, Scalia commented that the effect of the Court's decision was not to eliminate schemes that leave the final "life or death decision" to the judge, but rather to compel state legislatures to modify such sentencing schemes to require the jury to find the facts which support these "aggravating factors" prior to the sentencing stage.

b. Justice Kennedy's Concurring Opinion

In a brief yet clear concurrence, Justice Kennedy commented on his enduring displeasure with the Court's decision in Apprendi. As a member of the majority in Walton, Kennedy had strictly opposed the Apprendi Court's view on sentencing enhancements as evidenced by his dissent in Jones and his endorsement of Justice O'Connor's dissent in Apprendi. Nevertheless, Kennedy agreed that Apprendi was applicable law and that "no principled reading of Apprendi would allow Walton... to stand." Despite this acceptance, he noted his view that Apprendi should not be extended to the point that it stifles the states' ability to adequately address the problems imposed by the criminal justice system.

c. Justice Breyer's Concurring Opinion

Justice Breyer wrote separately in Ring, despite the fact that he concurred in the majority's ultimate ruling, because he did not agree with Justice Ginsberg's rationale. In Breyer's view, the Eighth Amendment requires capital punishment sentencing to be performed by a jury instead of a judge. Additionally, Breyer took the opportunity to examine the theoretical justifications that support capital punishment. In this analysis, Breyer relied primarily on sociological studies which showed: (1) no significant evidence of criminal deterrence in capital punishment jurisdictions; and (2) a decrease of further crimi-

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190 Id. at 612 (Scalia, J., concurring).
191 See id. at 611-12 (Scalia, J., concurring).
192 Id. at 613 (Kennedy, J., concurring).
196 See Ring, 536 U.S. at 613 (Kennedy, J., concurring).
197 Id. (Kennedy, J., concurring).
198 Id. (Breyer J., concurring).
nal activity for individuals that were sentenced to life without parole.199 Breyer continued his criticism of capital punishment schemes that allow a judge to make sentencing decisions by explaining that juries hold a "comparative advantage" over judges since the people themselves are more likely to represent the values of the community.200 Consequently, juries are better equipped to determine when capital punishment may be socially appropriate.201 Furthermore, Breyer cited sociological and governmental reports finding that the "race of the victim and socio-economic factors" have contributed to the imposition of the death penalty in many states and other potential constitutional problems in the process such as inadequate representation and unnecessary delays following the imposition of death sentences.202 Finally, Breyer commented on the contemporary trend of modern nations to prohibit capital punishment and concluded that these factors, in combination with the Eighth Amendment, dictate that a death sentence should only be imposed by a jury.203

3. Justice O'Connor's Dissenting Opinion

In her dissent, Justice O'Connor articulated her preference for the Court to overrule Apprendi rather than Walton.204 O'Connor largely relied on her dissent from Apprendi where she criticized the majority for unjustly seizing the established system of sentencing power, which had traditionally been delegated to judges.205 In addition, O'Connor reiterated her disagreement with the principle from Apprendi, which required bound elements of a crime and facts that enhance a maximum sentence be viewed on the same constitutional level.206 Furthermore, she commented on the practical problems created post-Apprendi, specifically citing a distinct rise in criminal appeals, which have "caused an enormous increase in the workload of an already overburdened judiciary."207 In conclusion, O'Connor articulated the most critical problem with the majority's analysis – the practical implications associated with striking down capital pun-

199 Id. at 614-15 (Breyer, J., concurring).
200 See id. at 615-16 (Breyer, J. concurring) (citation omitted).
201 Id. (Breyer, J., concurring); see also Spaziano v. Florida, 468 U.S. 447, 486-89 (1984) (Stevens, J., concurring in part, dissenting in part).
202 Ring, 536 U.S. at 617 (Breyer, J., concurring).
203 Id. at 618-19 (Breyer, J., concurring).
204 Id. at 619 (O'Connor, J., dissenting). Justice O'Connor's dissent was joined only by Chief Justice Rehnquist. Id.
205 Id. (O'Connor, J., dissenting).
206 Id. (O'Connor, J., dissenting).
207 Id. at 620 (O'Connor, J., dissenting).
ishment in five states with little guidance as to the breadth of the decision or the retrospective consequences to current death row inmates in those jurisdictions.  

IV. ASSESSING THE IMPACT OF RING v. ARIZONA

The United States Supreme Court’s decision in Ring clearly changed the future landscape of capital punishment in our country. The decision directly voided capital punishment schemes in five states: Arizona, Idaho, Montana, and Nebraska, which all divested the ultimate sentencing decision in the sole discretion of a single judge, and Colorado, which delegated the sentencing authority to a judicial panel. Therefore, as a result of the impact on these five states alone, 168 prisoners on death row could potentially challenge their sentences under Ring. Furthermore, the decision is thought to seriously question the so-called “hybrid-system” process. This process, which allows a judge to impose a sentence following a jury’s recommendation, was utilized in four states – Alabama, Delaware, Florida, and Indiana – at the time

208 See id. at 620-21 (O’Connor, J., dissenting).


210 Ring, 536 U.S. 584, 620 (O’Connor, J., dissenting) (recognizing this effect); see also id. at 608 n.6.


218 Id. at 621 (O’Connor, J., dissenting).


of *Ring*. Finally, *Ring* also impacted schemes in Missouri\(^{223}\) and Nevada,\(^{224}\) which permitted judicial sentencing determinations in the event that the jury could not reach a unanimous verdict. As a result, *Ring* undoubtedly affected capital punishment systems in at least eleven, or almost thirty percent, of the thirty-eight states that permit the death penalty.\(^{225}\) Such application could potentially create new appeals for over five hundred more death row inmates in some of those jurisdictions.\(^{226}\)

Despite the apparent response that *Ring* signaled a victory for capital punishment opponents, the brevity of the Court’s analysis has clearly limited and hampered the impact of the decision. As one commentator noted, the decision “answered one question and created half a dozen others, including how the new rule affects defendants at various stages in the cases against them; whether the decision requires actions in states where juries render advisory verdicts; [and] what new laws are required to fix the problem the court identified.”\(^{227}\) As a result of the Court’s failure to address these potential problems, the road to assessing how *Ring* truly impacts capital punishment reform has yet to be decided.

A. The Legislative Response – Emergency Statutory Reforms

Following the Supreme Court’s decision in *Ring*, former Arizona Governor Jane Hull summoned the Arizona Legislature for a Fifth Special Session. In this Special Session, the Arizona Legislature’s Senate Judiciary Committee took up three proposed bills addressing the state’s newly unconstitutional capital punishment scheme.\(^{228}\) The primary piece of reform legislation was Senate Bill 1001,\(^{229}\) which retained the dual adjudication balancing process, yet included

\(^{221}\) FLA. STAT. ANN. § 921.141(3) (West 2001).


\(^{224}\) NEV. REV. STAT. 175.554, .556 (2002) (current version as amended at NEV. REV. STAT. 175.554, .556 (LEXIS through 2003 legislation)).

\(^{225}\) See DEATH PENALTY INFO. CTR., *supra* note 4, at 1.


significant modifications that shifted capital punishment sentencing to the hands of the jury. Specifically, the proposed legislation amended section 13-703 and added section 13-703.01 to delineate the new sentencing scheme. Under the terms of the new scheme, once the trier of fact has found the defendant guilty of first-degree murder, a sentencing hearing must be held. The first step of the sentencing hearing is called the "aggravation phase." Under this step, "the trier of fact . . . [shall] immediately determine whether one or more alleged aggravating circumstances have been proven." The burden remains on the prosecution to "prove the existence of the aggravating circumstances beyond a reasonable doubt." If the trier of fact is a jury then each aggravating circumstance must be found unanimously in order to be proven.

Subsequently, if at least one aggravating circumstance has been found by the trier of fact, the process advances to the "penalty phase" of the proceeding where the trier of fact "determine[s] whether the death penalty shall be imposed." At this stage, the trier of fact shall consider any evidence provided by the prosecution or the defendant relating to mitigating circumstances. The burden of proof is on the defendant who must "prove the existence of the mitigating circumstances by a preponderance of the evidence." It should be noted that in the determination of this phase, the recognition of a mitigating circumstance is not subject to unanimous jury consent; rather, each juror can individually determine any potential claim and its weight. However, the new scheme

state.az.us/legtext/45leg/5s/bills/sb1001s.pdf. In addition, for a summary of the debate of the bill as discussed, see generally Judiciary Committee Hearing, supra note 228.

230 See generally Ariz. S.B. 1001.
231 See generally id. § 3 (codified at ARIZ. REV. STAT. ANN. § 13-703.01 (West Supp. 2003)).
232 See id. (codified at ARIZ. REV. STAT. ANN. § 13-703.01 (West Supp. 2003)).
233 Id. (codified at ARIZ. REV. STAT. ANN. § 13-703.01(C) (West. Supp. 2003)).
234 For a list of the aggravating circumstances to be considered, see ARIZ. REV. STAT. ANN. § 13-703(F) (West Supp. 2003).
235 Ariz. S.B. 1001, § 3 (codified at ARIZ. REV. STAT. ANN. § 13-703.01(C) (West Supp. 2003)). It is important to recognize that the statute defines "trier of fact" as "a jury unless the defendant and the State waive a jury, in which case the trier of fact shall be the court." Id. (codified at ARIZ. REV. STAT. ANN. § 13-703.01(R)(1) (West Supp. 2003)).
236 Id. § 1 (codified at ARIZ. REV. STAT. ANN. § 13-703(B) (West Supp. 2003)).
237 Id. § 3 (codified at ARIZ. REV. STAT. ANN. § 13-703.01(E) (West Supp. 2003)).
238 Id. (codified at ARIZ. REV. STAT. ANN. § 13-703.01(D) (West Supp. 2003)).
239 See id. § 3 (codified at ARIZ. REV. STAT. ANN. § 13-703.01(G) (West Supp. 2003)). For a list of the mitigating circumstances to be considered, see ARIZ. REV. STAT. ANN. § 13-703(G) (West Supp. 2003).
240 Ariz. S.B. 1001, § 1 (codified at ARIZ. REV. STAT. ANN. § 13-703(C) (West Supp. 2003)).
241 See id.
does require unanimous consent by the trier of fact that "death is the appropriate sentence." In the event a jury "unanimously determines that the death penalty is not appropriate, the court shall determine whether to impose a sentence of life or natural life." 

Due to the tentative constitutionality of the proposed new scheme, Senate Bill 1001 also included provisions addressing judicial review, applicability of the new and amended sections, and a summary of the legislative intent behind the law. In regard to the judicial review provision, the proposed legislation requires the Arizona Supreme Court to review all cases resulting in death sentences for an abuse of discretion by the trier of fact. In the event that an abuse of discretion is discovered, the court must analyze the magnitude of such fault under a harmless error standard. This review provision, under the terms of Senate Bill 1001, is to apply "to any sentencing or resentencing proceeding on any first degree murder case that is held after the effective date of this act and in which the offense was committed on or after the effective date of this act." In addition, the legislation specified that amended section 13-703 and its supplement section 13-703.01 would only apply to first-degree murder sentencing or resentencing hearings after the law goes into effect. Finally, the legislation included the following statement of the Legislature's intent:

1. There be no hiatus in the imposition of the death penalty in this state as a result of . . . Ring v. Arizona . . .

2. Those persons . . . previously sentenced to death in this state not be entitled to a new sentencing proceeding pursuant to this act if they have already exhausted direct appeals of their sentences.

3. The adoption of the new capital jury sentencing procedures . . . shall not be construed . . . [in a manner] that the former
judge sentencing procedures are [labeled] unconstitutional or that any death sentence imposed pursuant to the former procedure is invalid.

4. Cases under supreme court review that are found to need resentencing be remanded to the superior court for resentencing . . . .

B. It is not the intent of the Legislature to provide any right of or basis for appeal or commutation that did not exist before the effective date of this act. 251

Prior to approval, Senate Bill 1001 was thoroughly discussed in the Senate Judiciary Committee. Extensive testimony was provided, including that of the State Attorney General (and current Governor) Janet Napolitano and several other noted attorneys, professors, and advocates. Following a lengthy debate, the Committee passed the legislation. 252 As result of the Committee’s actions, Senate Bill 1001 was sent to the entire legislature, which subsequently approved the legislation, and was signed into law by former Governor Jane Hull. 253

1. A Potential Constitutional Flaw in Arizona’s Revised Sentencing Scheme

Some commentators have suggested that Arizona’s new legislation may still be constitutionally defective. As discussed above, the new sentencing scheme provides that “[a]t the penalty phase, . . . the defendant and the State may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency . . . . [T]he State may present any evidence that demonstrates that the defendant should not be shown leniency.” 254 Furthermore the law explains that “[t]he trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or

251 Id. § 9 (italics and emphasis added). The section of the bill cited supra notes 248-50 and accompanying text seem to indicate that the Arizona Legislature did not intend the new scheme to be applied retroactively.

252 See Judiciary Committee Hearing, supra note 228. The Committee also briefly addressed the two other related pieces of proposed legislation. First, Senate Bill 1004, which proposed a moratorium on the death penalty, was withheld by the bill sponsor likely due to the failure of a similar amendment to Senate Bill 1001. Finally, the Committee addressed Senate Bill 1005, which proposed the abolition of the death penalty in Arizona and obviously failed to obtain a committee recommendation due to the passage of Senate Bill 1001. Id.


254 ARIZ. REV. STAT. ANN. § 13-703.01(G) (West Supp. 2003) (emphasis added); see also id. § 13-703(C).
the state that are relevant in determining" the sentence. The primary problem with such provisions, as expressed by current Governor and former Attorney General Janet Napolitano, is that these sections permit the State to introduce victim-impact statements reflecting the victims' sentencing preference. Governor Napolitano explained that this process is likely unconstitutional under current doctrine from the United States Supreme Court. One can speculate that Governor Napolitano was referring to the Court's decision in Booth v. Maryland where the Court found that victim-impact statements including "family members' opinions and characterizations of the crimes and the defendant" were unconstitutional. However, three years later Booth was overruled in part by Payne v. Tennessee. Payne held that "if the State chooses to permit the admission of victim impact evidence . . . the Eighth Amendment erects no per se bar." Despite this holding, the Court specifically noted that lack of evidence prohibited it from addressing Booth's finding that family opinions were unconstitutional. As a result, there is a significant argument that Booth prohibits opinion evidence by a victim's family introduced under the revised Arizona sentencing scheme.

2. The Effects of Ring in Other Jurisdictions

As previously noted, the United States Supreme Court's decision in Ring potentially affects capital punishment schemes in as many as eleven states. Many of these states have already taken significant steps to remedy the situation. In addition to Arizona, all four of the remaining states directly impacted have taken legislative action. In Montana, the state legislature elected to amend its statute to conform to Ring. Conversely, legislative reform in the

255 Id. § 13-703(G) (emphasis added).
256 See Ring Developments, supra note 253 (quoting Tucson Citizen Editorial, August 6, 2002). For additional analysis on this problem, see generally Douglas E. Beloof, Constitutional Implications of Crime Victims as Participants, 88 CORNELL L. REV. 282 (2003).
257 Ring Developments, supra note 253.
259 See id. at 502, 508-09.
261 Id. at 827.
263 See supra Part IV.
264 MONT. CODE ANN. § 46-1-305 (2003). The legislature took action before the Montana Supreme Court was able to address the issue. As of April 19, 2004, a LEXIS search of Ring v. Arizona in the Montana Supreme Court yielded no citations.
three other states directly affected by *Ring* was prompted by judicial challenges to state sentencing schemes. The Idaho Supreme Court vacated the death sentence of an inmate under the principles of *Ring*.\(^{265}\) Subsequently, the Idaho Legislature amended the capital punishment statute to comply with the decision.\(^{266}\) State supreme court decisions and statutory reforms have also occurred in Nebraska\(^{267}\) and Colorado.\(^{268}\)

Whereas reform in those states directly impacted has been quickly implemented, the "hybrid system" jurisdictions have been in less agreement. On one hand, prior to *Ring*, both Indiana and Delaware employed similar sentencing systems generally marked by three characteristics: (1) a sentencing hearing was held before a jury which rendered an advisory verdict; (2) in order to impose a death sentence, at least one aggravating factor was required to be found; and (3) the judge could override the jury's verdict.\(^{269}\) In 2002, Indiana elected to amend this process by eliminating the judicial override and explicitly requiring a jury to make the aggravating circumstances determination.\(^{270}\) In Delaware, the response was more moderately tempered as the legislature only amended the statute by adding the requirement that a unanimous jury find at least one aggravating circumstance as a pre-condition to the judicial imposition of the death sentence.\(^{271}\) Conversely, there has been resistance in other "hybrid" states such as Alabama and Florida. These two states also utilize a similar advisory verdict process requiring the jury to find at least one aggravating factor to recommend a death sentence but allowing the trial judge to override the jury's decision.\(^{272}\) Despite the similarities of the systems, both the Alabama Supreme Court and the Florida Supreme Court have expressly refused to read *Ring* as striking down their sentencing processes.\(^{273}\)

\(^{265}\) See State v. Fetterly, 52 P.3d 874 (Idaho 2002).

\(^{266}\) **IDAHO CODE** § 19-2515 (Michie Supp. 2003).

\(^{267}\) **NEB. REV. STAT.** § 29-2519, 29-2520 (Supp. 2003). The pre-*Ring* Nebraska scheme was found to be unconstitutional in *State v. Gales*, 658 N.W.2d 604 (Neb. 2003).

\(^{268}\) **COLO. REV. STAT. ANN.** § 18-1.3-1201 (West 2003). The pre-*Ring* Colorado scheme, which employed the judicial-panel sentencing format, was found to be unconstitutional in *Woldt v. People*, 64 P.3d 256 (Colo. 2003).


\(^{271}\) **DEL. CODE ANN.** tit. 11, § 4209(d)(1) (Supp. 2003). Delaware maintained the judicial override provision, provided the jury found at least one aggravating circumstance. *Id.* § 4209 (2001 & Supp. 2002).

\(^{272}\) See **ALA. CODE** § 13A-5-46(e) (1994); *id.* § 13A-5-47(e); **FLA. STAT. ANN.** § 921.141 (West 2001).

\(^{273}\) See **Ex Parte** Waldrop, 859 So. 2d 1181, 1190 ( Ala. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) (relying largely on prior approval of the Florida system by the United States Su-
Finally, there have also been developments in Nevada and Missouri, the two states that permitted judicial sentencing when the jury was deadlocked. Under the original terms of the Nevada statute, if the jury was unable to reach a unanimous sentencing decision, the Nevada Supreme Court appointed a three-judge panel to determine the sentence. However, in 2002, the Nevada Supreme Court ruled that this process was unconstitutional in light of Ring and that a jury was required to make both the aggravating and mitigating circumstances determinations. The Nevada Legislature responded in 2003 by requiring, in the case of a deadlocked jury, that the trial judge either impanel a new jury or impose a sentence of life without parole. Additionally, almost one year ago, the Missouri Supreme Court broadly held that Ring rendered the Missouri judicial capital sentencing scheme unconstitutional. Moreover, the Missouri court ruled that Ring should apply retroactively and that prisoners sentenced under the statute should be resentenced to life without parole. When considering all of these changes in context, Ring has already mandated reforms in nine of the eleven states thought to be affected by the decision.

B. The Retroactivity Problem

Despite these significant post-Ring reforms, the practical problem of retroactivity — how the case affects those already on death row — remains. This issue is even more challenging because Justice Ginsburg’s majority opinion failed to address the retroactivity issue at all. Fortunately for those defendants that have not exhausted all their appeals, retroactive application of Ring seems clearly available under common-law precedent. Conversely, those potential petitioners that have previously exhausted all appeals are left with the difficult task of federal habeas corpus relief. Therefore, under current Supreme Court jurisprudence, the potential petitioners are essentially required to overcome the


274 NEV. REV. STAT. 175.556 (2002) (current version as amended at NEV. REV. STAT. 175.556 (LEXIS through 2003 legislation)).


276 NEV. REV. STAT. 175.556 (LEXIS through 2003 legislation).

277 See State v. Whitfield, 107 S.W.3d 253 (Mo. 2003). The former Missouri statute allowed a judge to sentence a defendant in the event that the jury failed to reach a unanimous verdict. Id. at 256.

278 See id. at 264-72.


presumption against retroactivity by showing that: (1) *Ring* created a new, clearly established substantive rule; or (2) *Ring* established a new procedural rule that meets one of the two exceptions permitting retroactive application.\(^{282}\) The first procedural exception for a new rule under *Teague* provides that "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe[.]"\(^{283}\) The second exception applies if the new rule "'presents a watershed rule of criminal procedure'" that enhances accuracy and alters our understanding of bedrock procedural elements essential to the fairness of a particular conviction.\(^{284}\) To make matters worse for potential petitioners, the distinctions between what "rules" qualify as substantive, procedural, or procedural retroactive exceptions are widely variant depending on the jurisdiction.\(^{285}\)

As a result, there has been widely differing interpretations of *Ring*’s retroactivity. In Arizona, the Arizona Supreme Court held that while *Ring* did create a new rule, it was procedural and not substantive.\(^{286}\) The court also found that *Ring* did not meet either of the *Teague* procedural exceptions.\(^{287}\) The Eleventh Circuit agreed with the Arizona Supreme Court’s analysis and found that *Ring* did not apply retroactively, stating:

Ring’s new rule, at most, would shift the fact-finding duties during . . . [the] penalty phase from (a) an impartial judge after an advisory verdict by a jury to (b) an impartial jury alone. Ring is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context. Ring simply does not fall within the ambit of the second *Teague* exception.\(^{288}\)


\(^{283}\) *Teague*, 489 U.S. at 311 (quoting *Mackey* v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part, dissenting in part)).


\(^{286}\) See *Towery*, 64 P.3d at 832-33.

\(^{287}\) See id. at 833-35.

\(^{288}\) *Turner* v. *Crosby*, 339 F. 3d. 1247, 1286 (11th Cir. 2003). A separate issue is whether *Ring* applies to habeas petitions filed after the effective date of the Antiterroism and Effective Death Penalty Act of 1986 (AEDPA). 28 U.S.C. § 2255 (2000). Under the Act, a prisoner may petition for a writ of habeas corpus by claiming "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise sub-
Conversely, the Ninth Circuit held that *Ring* applied retroactively under two separate theories. First, the court found that *Ring* was exempt from *Teague* because the rule actually did qualify as substantive; alternatively, *Ring* qualified for the second *Teague* exception as a "watershed procedural" rule. Due to the United States Supreme Court’s grant of certiorari to hear the retroactivity issue from this case, a more specific analysis of *Summerlin* should be provided.

1. *Summerlin v. Stewart*

In this case, Warren Summerlin was arrested for the murder of Brenda Bailey. After Bailey did not return to work the following day, her boyfriend became worried and retraced her whereabouts only to discover that she did not arrive at her appointment following her visit to Summerlin’s home.

Habeas petitions filed before the enactment of the AEDPA are governed by pre-AEDPA common-law retroactivity principles. See Lindh v. Murphy, 521 U.S. 320, 327 (1997). Courts that have examined whether *Ring* applies retroactively to habeas petitions filed after the enactment date of the AEDPA law have found that *Ring* is not retroactive because the *Ring* Court did not expressly state that the new rule was retroactive to cases on collateral review. See Moore v. Kinney, 320 F.3d 767, 771 n. 3 (8th Cir.), cert. denied, 123 S. Ct. 2580 (2003) (citing Tyler v. Cain, 533 U.S. 656, 663 (2001)); see also Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir.), cert. denied sub nom. Cannon v. Oklahoma, 536 U.S. 974 (2002). However, as Justice O’Connor states in *Tyler*, the Court can “logically dictate” the retroactivity of the new rule. See *Tyler*, 533 U.S. at 668-69 (O’Connor, J., concurring). The Tenth Circuit rejected a claim that the Supreme Court had made *Ring* impliedly retroactive through a combination of *Teague*, *Ring*, and the *Appendix* line of cases. See *Cannon*, 297 F.3d at 992-94. It remains to be seen if the Supreme Court has, or will, make *Ring* retroactive to habeas petitions filed after the enactment of the AEDPA.

See generally id. at 1108.

See generally id. at 1120-21.

See infra notes 302, 306.

*Summerlin*, 341 F.3d at 1084-85. Bailey was a delinquent account manager that went to Summerlin’s home in reference to a debt. See id. at 1084.
house.\textsuperscript{295} Subsequently, the police received a tip from Summerlin’s mother-in-law that Bailey had been murdered by Summerlin.\textsuperscript{296} Upon investigation, the police located Bailey’s deceased body in the trunk of her car only blocks from Summerlin’s house.\textsuperscript{297} As a result, the police executed a search warrant upon Summerlin’s home, which revealed significant evidence linking Summerlin to the crime.\textsuperscript{298} “After the search warrant was read to Summerlin, he stated, ‘I didn’t kill nobody.’ When the detective did not respond, Summerlin asked: ‘Is this in reference to the girl that was at my house?’”\textsuperscript{299} The detective asked a follow-up question, and Summerlin proceeded to describe Bailey.\textsuperscript{300} At this point, Summerlin was arrested for murder and appointed a public defender.\textsuperscript{301}

Following extensive psychological examinations of Summerlin’s mental fitness, the court concluded he had a mental impairment but was competent to stand trial.\textsuperscript{302} Later at trial, Summerlin’s new counsel focused his defense almost entirely on a lack of premeditation yet presented no evidence and only called one witness.\textsuperscript{303} The jury found Summerlin guilty of both first-degree murder and sexual assault.\textsuperscript{304} Prior to the sentencing hearing, Summerlin’s counsel did not meet with Summerlin, failed to interview witnesses, and failed

\textsuperscript{295} \textit{Id.}
\textsuperscript{296} \textit{See id. at 1084-85.}
\textsuperscript{297} \textit{Id. at 1085.}
\textsuperscript{298} \textit{Id.}
\textsuperscript{299} \textit{Id.}
\textsuperscript{300} \textit{Id.}
\textsuperscript{301} \textit{Id.}
\textsuperscript{302} \textit{Id.} There were also extensive procedural and substantive issues created involving an \textit{Alford} plea procured by Summerlin’s court appointed counsel and, subsequently, a conflict of interest which occurred between Summerlin’s attorney and the prosecutor. \textit{See id. at 1086-88.} As for the proposed \textit{Alford} plea agreement, Summerlin would have agreed to plead guilty, without admitting guilt, to second-murder and aggravated assault and, additionally, admit a probation violation. In exchange, Summerlin would only be required to serve fourteen years for the murder charge and a maximum of fifteen years for the assault. \textit{Id. at 1086.} The court subsequently rejected these stipulated sentences and, under the terms of the agreement, Summerlin elected to withdraw and proceed to trial. \textit{See id. at 1086-87.} This decision to withdraw the plea made Summerlin eligible for a first degree murder conviction and a death sentence. \textit{Id. at 1087.} As for the conflict of interest during her representation of Summerlin, Summerlin’s attorney and the prosecutor handling the case were involved in an intimate encounter over Christmas. \textit{Id. at 1086-87.} Despite this encounter, Summerlin’s attorney continued to represent him at the plea agreement hearing, and it was not until six days later that this conflict resulted in the disqualification of the entire public defender’s office. \textit{Id. at 1087-88.} As a result of these issues, the case was essentially reallocated on all levels: a private practitioner was appointed to represent Summerlin and the Arizona Attorney General’s Office took over the prosecution. \textit{Id. at 1088.}
\textsuperscript{303} \textit{Id. at 1088.}
\textsuperscript{304} \textit{Id.}
to present any significant factual mitigating evidence to the judge.305 After a brief sentencing hearing, Judge Marquardt506 ruled that Summerlin was to be sentenced to death as a result of two aggravating factors: (1) a prior felony conviction involving threatened violence; and (2) the fact that the offense was committed “in an especially heinous, cruel, or depraved manner.”307

The Arizona Supreme Court, in State v. Summerlin,308 affirmed the convictions and corresponding death sentence.309 After four post-conviction attempts for appeal in state court were denied and an initial petition for habeas corpus relief in federal district court was also denied, Summerlin filed an amended petition for habeas corpus in 1995.310 Although this petition was denied in 1997, Summerlin was permitted to appeal under a certificate of appealability under Federal Rule of Appellate Procedure 22(b)(1).311 At this point, a three-judge panel of the Ninth Circuit Court of Appeals remanded the case to determine whether the trial judge was competent to make the death penalty determination.312 This decision was later vacated to await the United States Supreme Court decision in Ring.313 Following the United States Supreme Court’s decision in Ring, Summerlin requested that the Arizona Supreme Court reconsider his direct appeal as a result of the Ring decision. Although a stay was granted, the Arizona Supreme Court refused to recall its decision denying Summerlin’s state court appeal.314 Subsequently, the Ninth Circuit agreed to rehear the case en banc.315 In his appeal, Summerlin raised multiple issues regarding effective assistance of counsel, conflict of interest, due process, and the constitutionality of the Arizona death penalty statute as applied to him.316

At the outset, the Ninth Circuit noted, “The [United States] Supreme Court did not decide whether the holding in Ring applied to petitioners, such as

305 Id. at 1088-89.
306 The factual and legal issues in this case are further complicated by the fact that Judge Marquardt, unknown to Summerlin, was later discovered to have been a frequent marijuana user. This fact was conceded by the State at the District Court habeas proceeding. Id. at 1089.
307 Id. at 1090. In addition, the judge found that there were no mitigating circumstances. Id.
309 Summerlin, 341 F.3d at 1091.
310 Id.
311 Id.
312 Id. (citing Summerlin v. Stewart, 267 F.3d 926, 957 (9th Cir. 2001)).
313 Id. (citing Summerlin v. Stewart, 281 F.3d 836, 837 (9th Cir. 2002)).
314 Id. at 1091. This decision exhausted Ring’s state court remedies. Id.
315 See Summerlin v. Stewart, 310 F.3d 1221 (9th Cir. 2002).
316 See Summerlin, 341 F.3d at 1092. For purposes of this Comment, the focus is concentrated upon only the constitutionality of the Arizona death penalty claim and the retroactivity element thereby discussed.
Summerlin, who raised the constitutional challenge in collateral post-conviction proceedings rather than on direct appeal.\textsuperscript{317} Therefore, the court specifically delineated the issue as “whether others who received the same constitutionally infirm sentence, including those who previously raised the identical issue, are eligible for the same relief or whether they should remain subject to execution.”\textsuperscript{318} Following a historical analysis of the role of retroactivity in the criminal procedure context,\textsuperscript{319} the court focused on the application of the United States Supreme Court’s decision in \textit{Teague v. Lane}.\textsuperscript{320} The threshold issue in \textit{Teague} focuses on whether the petitioner is attempting to apply a substantive rule or procedural rule because \textit{Teague} only serves as a retroactive bar to procedural claims.\textsuperscript{321}

Although the Ninth Circuit did recognize Ring’s procedural nature,\textsuperscript{322} the court explained that Ring’s effect was more substantively broad.\textsuperscript{323} The court articulated:

More than a procedural holding, Ring effected a redefinition of Arizona capital murder law, restoring, as a matter of substantive law, an earlier Arizona legal paradigm in which murder and capital murder are separate substantive offenses with different essential elements and different forms of potential punishment. That is, as applied . . . Ring’s holding was “substantive” for \textit{Teague} purposes.\textsuperscript{324}

In explaining the substantive aspect, the court evaluated the historical development of Arizona’s capital punishment jurisprudence noting that, in essence, by overruling Walton, Ring restored the state of Arizona law to the pre-Walton stage by redefining the crime of capital murder as a separate offense.\textsuperscript{325} The

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\begin{itemize}
  \item \textsuperscript{317} Id. at 1096.
  \item \textsuperscript{318} Id. at 1097.
  \item \textsuperscript{319} See id. at 1096-99.
  \item \textsuperscript{320} 489 U.S. 288 (1989). \textit{Teague} bars retroactive application of new constitutional rules of criminal procedure unless they meet one of two exceptions. Id. at 310. For a discussion of how Ring’s retroactivity is analyzed under \textit{Teague}, see infra notes 350-353, 363-75 and accompanying text.
  \item \textsuperscript{321} Summerlin, 341 F.3d at 1099. Summerlin’s analysis of the \textit{Teague} exceptions are discussed infra notes 327-37 and accompanying text.
  \item \textsuperscript{322} Id. at 1101 (explaining the procedural aspect is Ring’s requirement that a jury find aggravating circumstances).
  \item \textsuperscript{323} Id. at 1101-02.
  \item \textsuperscript{324} Id. at 1102.
  \item \textsuperscript{325} See id. at 1104-06.
\end{itemize}
court noted that "Ring announced a 'substantive' rule . . . for it 'altered the meaning of [Arizona's] substantive criminal law.'"\textsuperscript{326}

Notwithstanding its position on the substantive effect of \textit{Ring} to Arizona law, the court then analyzed the application of the \textit{Teague} procedural exceptions.\textsuperscript{327} The second exception exempts a new procedural rule from the \textit{Teague} presumption against retroactivity if the new rule: "(1) seriously enhance[s] the accuracy of the proceeding and (2) alter[s] our understanding of bedrock procedural elements essential to the fairness of the proceeding."\textsuperscript{328} Focusing upon the accuracy enhancement factor, the court criticized the practical problems of the pre-\textit{Ring} penalty phase for three reasons.\textsuperscript{329} First, the proceeding was regularly condensed with limited evidentiary analysis.\textsuperscript{330} Second, judges making capital sentence determinations were allowed to receive inadmissible evidence, such as letters from the victim's family.\textsuperscript{331} Finally, the court found that the accuracy of the sentencing proceeding could only be enhanced by vesting the determinative role in sentencing in the jury as society's moral representative of the people.\textsuperscript{332} Thus, according to the court, applying \textit{Ring} retroactively would enhance the accuracy of the sentencing proceeding.\textsuperscript{333}

Turning to the second element of the \textit{Teague} exception, the court recognized that \textit{Ring} clearly established a "bedrock procedural element" by establishing that "under the Sixth Amendment, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty."\textsuperscript{334} In analyzing the fairness of the proceeding, the court rejected the applicability of harmless-error analysis because the wrong entity found Summerlin guilty of a capital crime.\textsuperscript{335} "This type of error cannot be cured . . . because, as Justice Scalia observed: 'The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action . . . ; it requires an actual jury finding of

\textsuperscript{326} Id. at 1106 (quotations and citations omitted). It is important to note that the Arizona Supreme Court has recently found that \textit{Ring} was not substantive in nature and therefore denied retroactive application under \textit{Teague}. \textit{See} State v. Towery, 64 P.3d 828 (Ariz.), cert. dismissed, 124 S. Ct. 44 (2003) (emphasis added).

\textsuperscript{327} \textit{See} \textit{Summerlin}, 341 F.3d at 1108-09. It should be noted that the court did recognize that the first \textit{Teague} exception did not apply to \textit{Ring}. \textit{Id.} at 1109.

\textsuperscript{328} \textit{Id.} at 1109 (citing Sawyer v. Smith, 497 U.S. 227, 242 (1990)).

\textsuperscript{329} \textit{See id.} at 1110-15.

\textsuperscript{330} \textit{See id.} at 1110.

\textsuperscript{331} \textit{Id.} at 1111-12.

\textsuperscript{332} \textit{See id.} at 1113-15.

\textsuperscript{333} \textit{See id.} at 1115.

\textsuperscript{334} \textit{Id.} at 1116 (citing \textit{Ring} v. Arizona, 536 U.S. 584, 609 (2002)).

\textsuperscript{335} \textit{Id.} at 1117.
As a result, the court found that this case involved an ultimate decision, which was inappropriately rendered by a judge, and that the decision suffered from a "plain defect." Consequently, the decision had to be vacated. Because the court found Ring to be substantive in nature or, at the very least, within the second Teague procedural exception, the court held that "the Supreme Court’s decision in Ring had retroactive application to cases on federal habeas review."

The direct immediate effect of the Ninth Circuit’s decision in Summerlin seems to commute the death sentences of over one hundred condemned inmates in Arizona, Idaho, and Montana. Although Colorado and Nebraska had similar sentencing systems, they are not subject to the jurisdiction of the Ninth Circuit and are thereby unaffected by the decision. Recently, in December, the United States Supreme Court granted certiorari to hear the Ring retroactivity issues raised in Summerlin. More specifically, the Court will hear the following two issues:

1. Did the Ninth Circuit err by holding that the new rule announced in Ring is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion)?

2. Did the Ninth Circuit err by alternatively holding that the new rule announced in Ring applies retroactively to cases on collateral review under Teague’s exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings?

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337 See id. at 1117-18 (citation omitted).
338 Id.
339 Id. at 1121. Summerlin was an 8-3 decision of the court. Circuit Judge Thomas authored the majority opinion for the court, while Circuit Judge Reinhardt authored a concurring opinion. Circuit Judge Rawlinson, joined by Circuit Judges O’Scannlain and Tallman, authored a dissent.
341 Id.
The Court heard oral arguments in this case, renamed *Schriro v. Summerlin*, on April 19, 2004. One legal commentator has asserted his belief that "[t]he Justices were fairly clear [in *Ring*] in deciding that juries and not judges ought to have the power to make life or death decisions in criminal cases, and for that rule to make a lot of sense it almost has to apply retroactively." The retroactivity issue will be put to rest very soon.

2. *Ring* Should Be Applied Retroactively

When oral arguments are complete, the Supreme Court should find that *Ring* applies retroactively on collateral review. Whether a rule will apply retroactively is a relatively new inquiry. The common law presumes retroactivity for constitutional decisions of the Supreme Court. Only after the "criminal procedure revolution" of the 1960s did the Court adopt doctrines limiting the common-law presumption of retroactivity. After a series of cases that attempted to determine the proper retroactivity doctrine, the Court adopted two theories on retroactivity depending on the nature of the rule enunciated. Intervening changes in substantive law are applied retroactively on collateral review. Procedural rules are governed by completely different principles.

Current Supreme Court doctrine states that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." There are two recognized exceptions to the bar on retroactive application of new constitutional rules of criminal procedure. A new rule should be retroactively applied if the rule: (1) "place[s] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or (2) "require[s] the observance of those procedures that . . . are implicit in the concept of ordered liberty." The second exception has been limited to those rules that present "a new 'watershed rule of criminal procedure' that

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344 SUPREME COURT OF THE UNITED STATES, ARGUMENT CALENDAR, 1
http://a257.g.akamaitech.net/7/257/2422/02mar20041745/www.supremecourts.gov/oral_argume
nts/argument_calendars/monthlyargumentcalapril2004.pdf

345 Associated Press, supra note 340 (quote by CBSNews.com Legal Analyst Andrew Cohen).

346 Summerlin, 341 F.3d at 1097.

347 Id. (citing Harper v. Va. Dep't of Taxation, 509 U.S. 86, 94 (1993)).


351 Id. at 311. This exception to the *Teague* rule is rarely employed.

352 Id.
enhances the accuracy and alters our understanding of bedrock procedural elements essential to the fairness of a particular conviction.\textsuperscript{353}

Applying these doctrines, the Court should apply \textit{Ring} retroactively using one of two separate retroactivity theories. First, there is a compelling argument that \textit{Ring} announced a substantive rule.\textsuperscript{354} Although the distinction between procedural and substantive rules is sometimes hard to define,\textsuperscript{355} a substantive rule change is one that alters the scope or modifies the applicability of a substantive criminal statute.\textsuperscript{356} The rule in \textit{Ring} should meet this standard;\textsuperscript{357} thus, the rule should be retroactively applied on collateral review under the rule enunciated in \textit{Davis v. United States}.\textsuperscript{358}

\textit{Ring} is similar to other cases that have received retroactive application.\textsuperscript{359} Similarly, the rule announced in \textit{Ring} effectuated a "wholesale invalidation of Arizona's capital sentencing scheme."\textsuperscript{360} By requiring a jury to determine sentencing enhancements in capital cases, \textit{Ring} returned Arizona law to its pre-\textit{Furman} status.\textsuperscript{361} Most importantly, in invalidating the Arizona statute, the Court decided the meaning of a criminal statute in a manner that separated the offense of murder from capital murder.\textsuperscript{362}

The second theory that would allow the Court to apply \textit{Ring} retroac-


\textsuperscript{354} See \textit{id.} at 1099-1108; \textit{see also} Jacobs, \textit{supra} note 348, at 1818.

\textsuperscript{355} See \textit{United States v. Woods}, 986 F.2d 669, 677 (3d Cir. 1993).

\textsuperscript{356} \textit{Summerlin}, 341 F.3d at 1100.

\textsuperscript{357} See \textit{id.} at 1105-08; \textit{see also} Jacobs, \textit{supra} note 348, at 1835-37.

\textsuperscript{358} 417 U.S. 333 (1974).

\textsuperscript{359} See Richardson v. United States, 526 U.S. 813, 815 (1999) (finding that a new rule requiring jury unanimity on individual violations alleged as part of a criminal enterprise is a substantive change).

\textsuperscript{360} \textit{Summerlin}, 341 F.3d at 1102.

\textsuperscript{361} \textit{Id.} The \textit{Summerlin} court placed great emphasis on the effect \textit{Furman v. Georgia}, 408 U.S. 238 (1972), had on Arizona law. \textit{Summerlin}, 341 F.3d at 1102. \textit{Furman} held that death penalty statutes that vest complete sentencing discretion to judges were unconstitutional. \textit{Furman}, 408 U.S. at 256-57. Subsequently, the Supreme Court applied \textit{Furman} retroactively. \textit{Summerlin}, 341 F.3d at 1102 (citing Moore v. Illinois, 408 U.S. 786 (1972); United States v. Johnson, 457 U.S. 537 (1982)). Since \textit{Ring} effectuated a change to the elements of the Arizona death penalty statute akin to \textit{Furman}, the Ninth Circuit reasoned that the \textit{Ring} decision was also a substantive change. \textit{Id.} at 1119-20 ("The Supreme Court's decision in \textit{Ring} affects the structure of every capital trial and has rendered unconstitutional every substantive statute in conflict with its dictates. It involves the structure of penalty-phase trials which, unlike non-capital sentencing proceedings, are subject to the constraints of the Double Jeopardy Clause. Thus, \textit{Ring}'s effect on capital murder cases is akin to that of \textit{Furman}, which declared that death penalty statutes vesting complete discretion in the judge or in the jury, like Arizona's, were unconstitutional. \textit{Furman}, as already noted, was given full retroactive effect for the purposes of federal habeas review.") (citations omitted).

\textsuperscript{362} \textit{Id.} at 1108.
tively is under one of the *Teague* exceptions. If the Court fails to find that *Ring* is a substantive rule, the Court should find that *Ring* is a "'watershed rule of criminal procedure' that enhances the accuracy and alters our understanding of bedrock procedural elements essential to the fairness of a particular conviction." If the Court finds that a rule is procedural, the Court undertakes a three-step analysis to determine if *Teague* bars the rule's application. The first step is to determine the date the defendant's conviction became final for *Teague* purposes. The second step requires the Court to survey "the legal landscape as it then existed to determine whether existing precedent compelled a finding that the rule at issue was required by the Constitution." If existing precedent requires application of the rule, the *Teague* bar does not apply. "If, by contrast, the procedure at issue is considered a new rule for *Teague* purposes, the court must proceed to the third step and determine whether either of the two announced exceptions applies." Because *Ring* can be shown to seriously enhance the accuracy of the sentencing proceeding and because it alters our understanding of bedrock procedural elements affecting the basic fairness of the proceeding, the Court should rule that *Ring* is a watershed rule of criminal procedure and apply the rule retroactively.

The Eleventh Circuit declined to apply *Ring* retroactively because "*Ring*, like *Apprendi*, 'is not sufficiently fundamental to fall within *Teague*'s second exception.'" The court barely addressed whether *Ring* would enhance the accuracy of the proceeding; rather, the court relied on two principles to find that *Ring* should not be applied retroactively. First, the court cited Supreme Court precedent that stated that the second *Teague* exception should be narrowly applied. Second, the court found that "*Ring*'s new rule, at most, would shift the fact-finding duties during . . . [the] penalty phase from (a) an impartial judge after an advisory verdict by a jury to (b) an impartial jury alone."

The Court should reject *Turner*'s reasoning as flawed and adopt the reasoning employed by the Ninth Circuit in *Summerlin v. Stewart*. First,

363 Id. at 1099 (quoting Teague v. Lane, 489 U.S. 288, 310 (1989)).
364 Id.
365 Id.
366 Id. (citations and quotations omitted).
367 Id.
368 Id.
369 For a full *Teague* analysis that the Court should adopt, see id. at 1109-21.
370 Turner v. Crosby, 339 F.3d 1247, 1285 (11th Cir. 2003).
371 See id. at 1286.
372 *Summerlin*, 341 F.3d at 1082. In *Summerlin*, the Ninth Circuit found that *Ring* was a wa-

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the *Turner* analysis is conclusory. Contrary to *Turner’s* assertions,\(^3\) the accuracy of the penalty phase of the preceding would be increased because inadmissible evidence would be restricted and the moral guilt of the defendant would be assessed by the jury instead of a judge.\(^4\) Similarly, *Ring* affects the basic fairness of the proceeding because the case corrects a trial that “proceeded under a completely incorrect, and constitutionally deficient, frame-work.”\(^5\)

In sum, there are adequate avenues to allow the Court to apply *Ring* retroactively; in addition, the law supports a ruling that applies *Ring* in this manner. The Court has already found that the Sixth Amendment requires a jury to make factual determinations “on which the legislature conditions an increase in their maximum punishment.”\(^6\) By finding that “Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’” the Court expressed a fairly clear principle that juries should make life and death determinations. It makes sense to apply these same Sixth Amendment principles to those unfortunate prisoners who happened to exhaust their appeals before the *Ring* decision.

V. CONCLUSION

The difficulty with capital punishment is that, by its nature, it is one of the few issues that is inherently burdened by an individual’s sense of morality. The effect of this moral burden is that the death penalty issue tends to create a lack of objectivity and increased polarization of opinions. As best-selling author Scott Turow has commented, “For most Americans, the death penalty debate goes no further than asking whether they ‘believe’ in capital punishment. . . . The death penalty . . . maintains its hold on the American conscience because of its intensely symbolic nature. Values count enormously in our lives.”\(^7\) This “belief” pervades the unique complexity of how the death penalty is treated such that even former United States Supreme Court Justice Potter Stewart explained, “[D]eath is a punishment different from all other sanctions in kind rather than

shed rule of criminal procedure. See *id.* at 1121.

\(^3\) See *Turner*, 339 F.3d at 1286.

\(^4\) See *Summerlin*, 341 F.3d at 1113-15. The Ninth Circuit stated that the jury would act as a better judge of moral guilt than a judge. See *id.* at 1113-14. One of the reasons supporting this statement is that jury members would probably only sit on one death penalty case. *Id.* at 1114. Thus, representatives of the community would better reflect societal values. See *id.* at 1113-14. Conversely, judges are subjected to countless capital cases that may cause the judge to be acclimated to matters of a heinous nature. See *id.* at 1114.

\(^5\) *Id.* at 1116.


\(^7\) SCOTT TUROW, ULTIMATE PUNISHMENT: A LAWYER’S REFLECTIONS ON DEALING WITH THE DEATH PENALTY 23, 64 (2003).
degree.” As a result of these variant social norms and changes in the Court’s composition and views, the death penalty has understandably had a turbulent jurisprudential history in this country.

Nevertheless, in 2002, the landscape of capital punishment significantly changed with the Court’s decisions in Atkins v. Virginia and Ring v. Arizona. By holding that the Sixth Amendment requires a jury, rather than a judge, to make the factual decision upon required aggravating factors as a prerequisite to applying the death penalty, the Court has thrust capital punishment reform upon the states. Even aside from the nine states previously mentioned that have taken some action to conform to Ring, the case has also prompted an increased critique by several states regarding the effectiveness of capital punishment. The most notable of these critical assessments came in January of 2003 when a previously “lifelong supporter of the death penalty,” former Illinois Governor Republican George Ryan, found the Illinois system to be “fraught with error” and decided to pardon four inmates and commute the remaining 167 death sentences in Illinois. In addition to Illinois, subsequent moratorium considerations have arisen in other prominent states such as Pennsylvania and Maryland. As a clear result, capital punishment reform is unmistakably at the current forefront of our culture. Although the brevity of the Court’s analysis in Ring has admittedly created considerable uncertainties, the decision has undoubtedly reasserted the spirit of the Sixth Amendment into the reformation of capital punishment schemes. If the United States continues to tolerate an increasingly criticized capital punishment system, the Court should require that a jury decide the factual requisites necessary to impose man’s most severe punishment in all cases. The Court has the opportunity to apply Ring to those sentenced without adequate Sixth Amendment protections. By applying Ring retroactively, the Court provides a remedy to defendants sentenced by a judge’s

381 See id. at 609.
382 See Turow, supra note 377, at 10, 96, 98. Governor Ryan had declared a moratorium in 2000. Id. at 10. He issued the pardons and commutations right before leaving office in January of 2003. See supra note 11.
conscience and continues the dialogue on capital punishment’s proper role in America’s criminal justice system. Society should accept nothing less.

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