

## RE-EVALUATING THE ROLE OF THE JURY IN CAPITAL CASES AFTER *RING v. ARIZONA*

MARC R. SHAPIRO\*

### I. INTRODUCTION

On June 24, 2002, the Supreme Court decided *Ring v. Arizona*, holding that “[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”<sup>1</sup> Consequently, Arizona, Colorado, Idaho, Montana, and Nebraska, states that have historically provided for judicial, rather than jury, imposition of a death sentence, learned that their capital sentencing schemes were unconstitutional and were left with little choice but to revise their statutes.<sup>2</sup> While *Ring*’s impact on these states was clear the moment the decision came down, commentators, scholars, and journalists have been speculating on what effect, if any, the ruling would have on states with “hybrid” sentencing schemes, such as Alabama, Delaware, Indiana, and Florida.<sup>3</sup> Initially, it appeared as if each of these states would be forced to reform its use of the jury in capital cases; however, after *Ring* Alabama and Florida have, at least for the moment, avoided the seemingly far-reaching impact of this decision.

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\* New York University School of Law Fellow at the Equal Justice Initiative of Alabama; J.D., New York University School of Law, May 2003; B.A., Binghamton University, May 2000. This article is dedicated to the memory of my mother, Mona Shapiro, whose undying love, support, and encouragement contributed in countless ways to its development and, more importantly, to my personal and academic growth. In addition, many thanks are owed to my loving family, Professors Randy Susskind and Bryan Stevenson, Daniel Pancotti, Jay Mirostaw, and a very special thanks to Lori Raphan without whose everlasting support and love this article would not have been possible.

1. 536 U.S. 584, 589 (2002).

2. *Id.* at 620 (O’Connor, J., dissenting).

3. See Joan M. Cheever, Editorial, *A Chance Reprieve, and Another Chance at Life*, N.Y. TIMES, June 29, 2002, at A15 (stating that the Supreme Court may have invalidated the death sentences of some of the “800 killers now housed on death rows in the nine states that allow judges, not juries, to impose a sentence of death, a procedure that the Supreme Court found violates a defendant’s right to a trial by jury”).

This article traces the evolving role of the jury in capital cases, analyzing the impact of the Rehnquist Court's interpretation of the Sixth Amendment on the nine states implicated by the Court's decision in *Ring*. Part II begins by tracing the significance of the jury in criminal cases prior to the Supreme Court's ruling in *Apprendi v. New Jersey*.<sup>4</sup> This section then analyzes the importance of *Apprendi* as an expression of the Supreme Court's renewed emphasis on the role of the jury in criminal cases and its foreshadowing of the Court's decision in *Ring*. Part III examines the capital sentencing statutes that existed at the time of *Apprendi* in those states that would later be affected by the Court's decision in *Ring*. This section continues by noting the differences and similarities between the pre-*Apprendi* capital sentencing provisions in Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska. Part IV discusses the Supreme Court's ruling in *Ring* and, in turn, considers its impact on jury sentencing states, judicial sentencing states, and hybrid states. Part V analyzes more specifically the impact of this ruling on the nine states whose statutes came under scrutiny as a result of *Ring*. This section also outlines the post-*Ring* steps that each of these states has taken since *Ring* to either revise or justify its capital sentencing statutes. Even though only seven of the nine states implicated by the decision have revised their capital sentencing statutes,<sup>5</sup> the state court decisions that purportedly justify the constitutionality of Alabama's and Florida's capital sentencing statutes are suspect, and therefore the possibility remains that these two states will also fall prey to the sweeping impact of *Ring*.

## II.

### PRE-RING CASES EMPHASIZING THE IMPORTANCE OF THE JURY IN CRIMINAL TRIALS

The importance of the jury's role in criminal trials has been consistently reaffirmed throughout the centuries. At the time the United States was founded, colonists frequently complained to the

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4. 530 U.S. 466 (2000).

5. By revising their statutes, these states have effectively conceded that at least some capital defendants in their states were tried and sentenced under unconstitutional capital sentencing procedures. At this juncture, the precise number of death row prisoners who may be re-tried is indeterminable. However, "[c]lose to 800 death sentences in [Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska] could be in question, depending on the breadth and retroactivity of [Ring]." Linda Greenhouse, *Major Death Penalty Appeal Accepted*, N.Y. TIMES, Jan. 12, 2002, at A10.

King of England of the deprivation of juries at criminal trials.<sup>6</sup> Outraged by this deprivation, the Framers of the Constitution sought to ensure its permanence by codifying the right to trial by jury in the Constitution on no less than three occasions.<sup>7</sup> Furthermore, each state legislature entering the Union provided for the right to trial by jury in criminal cases in its constitution.<sup>8</sup>

Since that time, the Supreme Court has continued the trend of expanding the right to trial by jury in criminal cases. Noting the institution's historic role in protecting against judicial and prosecutorial unfairness, in 1968 the Supreme Court held that the practice of affording a jury trial to defendants in serious criminal cases, as embodied by the Fifth and Sixth Amendments, applies to the states.<sup>9</sup> Despite making such a strong statement as to the proper role of the jury at criminal trials in *Duncan v. Louisiana*, the Supreme Court waited almost three decades before issuing an opinion the significance of which would parallel that of *Duncan*.

In the 2000 case of *Apprendi v. New Jersey*, the Supreme Court further expounded upon the significance of the right to jury trials in criminal cases by finding that New Jersey violated the Sixth Amendment by removing "from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."<sup>10</sup> At issue in *Apprendi* was New Jersey's hate crime statute, which authorized an increase in a defendant's maximum prison sentence based on a judge's finding of racial bias.<sup>11</sup> In *Apprendi*, the Supreme Court noted that the New Jersey legislature intended a finding of "racial bias" to be a sentencing factor, and not an element of the offense. However, the Court emphasized the

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6. In explaining the importance of the practice, Blackstone stated, "[o]ur law has . . . wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown." 4 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 349 (Wayne Morrison ed., 2001).

7. Article III provides, "The [t]rial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ." U.S. CONST. art. III, § 2. In addition, the Due Process Clause of the Fifth Amendment states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." U.S. CONST. amend. V. Likewise, the Sixth Amendment of the Bill of Rights declares, "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 . . ." U.S. CONST. amend. VI.

8. *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968).

9. *Id.* at 154.

10. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring)).

11. *Id.* at 468–69.

effect of the sentencing factor and not its form.<sup>12</sup> Finding that the racial bias sentencing enhancer “expose[d] the defendant to a greater punishment than that authorized by the jury’s guilty verdict,”<sup>13</sup> the Court celebrated the role of the jury in stating that “New Jersey procedure . . . is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.”<sup>14</sup> The Court then held, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>15</sup>

The *Apprendi* decision necessarily called into question the Court’s ruling in *Walton v. Arizona*,<sup>16</sup> a case that had been decided only a decade earlier, thus rekindling arguments about the constitutionality of state procedures used in capital sentencing.<sup>17</sup> Under then existing Arizona law, capital sentencing was left solely to the trial judge’s discretion.<sup>18</sup> Arizona’s capital sentencing statute provided a defendant with a jury trial at the guilt phase of his or her case;<sup>19</sup> however, once the jury entered a guilty verdict, the jurors

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12. *Id.* at 494.

13. *Id.*

14. *Id.* at 497.

15. *Id.* at 490.

16. 497 U.S. 639 (1990).

17. *See infra*, text accompanying note 25.

18. *See* 2002 Ariz. Sess. Laws 1 (revising Arizona’s capital sentencing statute so that the trier of fact determines whether to impose the death penalty).

19. *Walton*, 497 U.S. at 645 (1990) (describing Arizona’s pre-*Ring* capital sentencing procedures where the jury made a guilt phase determination and the judge then sat alone in determining the defendant’s sentence). Because the Supreme Court upheld Georgia’s death penalty statute in *Gregg v. Georgia*, 428 U.S. 153 (1976), and struck down North Carolina’s mandatory death penalty scheme in *Woodson v. North Carolina*, 428 U.S. 280 (1976), many state legislatures ultimately adopted death penalty statutes that are similar to Georgia’s, which provides a bifurcated capital trial where a sentencing phase follows a guilt phase conviction. In an effort to avoid arbitrary or wanton infliction of the death penalty, state legislatures drafted a list of aggravating circumstances necessary to implement a sentence of death. GA. CODE ANN. § 17-10-30(b) (2003). If the jury does not find an aggravating circumstance, a death sentence may not be imposed. GA. CODE ANN. § 17-10-30(c) (2003). If the jury does find an aggravating circumstance, the jury must then consider any statutory or non-statutory mitigating circumstances. GA. CODE ANN. § 17-10-30(b) (1997). At this point the states diverge with respect to the sentencing procedure. In “non-weighting” states, such as Georgia, the “jury receives no instructions to give special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance the aggravating and mitigating circumstances pursuant to any special standard.” *Simpkins v. State*, 486 S.E.2d 833, 836 (1997). However, in “weighting” states, the jury must weigh the aggravating circumstances against the

were dismissed and the judge, sitting alone, considered the aggravating and mitigating factors in the case and then determined whether the defendant was to receive a sentence of life imprisonment or death.<sup>20</sup> In *Walton*, the Court held that “[a]ggravating circumstances are not separate penalties or offenses,”<sup>21</sup> and therefore the justices refused to “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.”<sup>22</sup>

The *Apprendi* Court recognized the apparent conflict its decision might have with the ruling in *Walton*, and in an effort to reconcile the opinions, the majority attempted to distinguish *Walton*, a capital case, from *Apprendi*, a non-capital case involving only criminal possession of a firearm for an unlawful purpose. The Court did so by contending that Walton’s conviction, first-degree murder, carried a maximum sentence of death and, as a result, he was sentenced within the prescribed range permitted by the jury’s guilt phase finding.<sup>23</sup> In *Apprendi*, unlike *Walton*, the defendant was convicted of only second degree possession of a firearm for an unlawful purpose, which carries a maximum sentence of ten years; however, with the hate crime enhancement found by the judge by a preponderance of the evidence, the defendant was sentenced to twelve years in jail—a sentence that exceeded the statutory maximum for the punishment found by the jury. The majority in *Walton* characterized a death sentence as itself being the statutory maximum for a guilt phase finding of first-degree murder. In other words, unlike the hate-crime enhancement that elevated the defendant’s punishment in *Apprendi* beyond the ten year maximum permitted by the jury’s guilt phase finding, the *Walton* majority asserted that there effectively could be no sentencing enhancement by the trial judge that could elevate the sentence beyond the statutory maximum for the crime found by the jury. According to the *Walton* majority, this is because a sentence of death, the ultimate sentence, is itself permissibly within the statutory scope of a guilt phase finding of first degree murder. Over a vigorous dissent,<sup>24</sup> the Court concluded

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mitigating circumstances before deciding whether to impose the death penalty. See *Zant v. Stephens*, 462 U.S. 862, 873 n.12 (1983).

20. 2002 Ariz. Sess. Laws 1.

21. *Walton*, 497 U.S. at 648 (quoting *Poland v. Arizona*, 476 U.S. 147, 156 (1986)).

22. *Id.* at 649.

23. *Apprendi*, 530 U.S. at 496–97.

24. Justice Stevens foreshadowed the conflict that would later result with respect to the constitutionality of judicial sentencing at capital trials. In his *Walton* dissent, he stated that aggravating circumstances are in fact elements of the of-

that “once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide [the penalty.]”<sup>25</sup>

Other members of the Court, including Justice O'Connor, were not persuaded by the Court's valiant attempt to reconcile the cases.<sup>26</sup> Rather, she asserted that the majority's contention that under Arizona law the jury makes all findings necessary to make a defendant death eligible is “demonstrably untrue.”<sup>27</sup> Quoting Justice Stevens' opinion in *Walton*, Justice O'Connor stated what would later be the holding in *Ring v. Arizona*, namely that first-degree murder is not punishable by death in Arizona unless at least one statutory aggravating circumstance is found. She contended that without this “critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.”<sup>28</sup> Therefore, she concluded that, under *Apprendi*, the task of determining the existence or non-existence of aggravating circumstances is one that should lawfully be left to the jury.<sup>29</sup>

### III.

#### PRE-RING CAPITAL SENTENCING SCHEMES

While specifically castigating Arizona, Justice O'Connor's *Apprendi* opinion also implicitly called into question the capital sentencing schemes of Colorado, Idaho, Montana, and Nebraska.<sup>30</sup> As

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fense under Arizona law because without them a death sentence may not be imposed. In making his case, Justice Stevens noted the historic role of the jury, stating that at the time the Sixth Amendment was drafted “the English jury's role in determining critical facts in homicide cases was entrenched . . . . [T]he jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well-established. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment . . . .” *Walton*, 497 U.S. at 710–11 (quoting Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10–11 (1989)).

25. *Apprendi*, 530 U.S. at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)).

26. *Id.* at 538 (O'Connor, J., dissenting) (“If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.”). A number of lower court judges were just as “baffled” by the Court's inability to reconcile adequately the two cases. See *United States v. Promise*, 255 F.3d 150, 158–60 (4th Cir. 2001) (en banc); *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001); *People v. Kaczmarek*, 741 N.E.2d 1131, 1142 (Ill. App. 2000).

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

28. *Id.*

29. *Id.* at 543–44.

30. See *Ring v. Arizona*, 536 U.S. 584, 620 (2002).

with Arizona, Montana afforded the trial judge sole discretion in sentencing a capital defendant to death.<sup>31</sup> Without the aid of a jury, a trial judge, sitting in a case where a defendant was found guilty, considered the aggravating and mitigating circumstances,<sup>32</sup> and, following the applicable law of her state, the judge imposed a sentence. Similarly, in Nebraska, when a capital defendant was found guilty, he could be sentenced by: (1) the trial judge presiding at the trial, (2) upon request by the presiding judge to the Chief Justice of the Nebraska Supreme Court, a panel of three judges including the judge who presided over the trial, or (3) a panel of three district judges named by the Chief Justice in those situations when the Chief Justice determines that the presiding judge is disabled or disqualified.<sup>33</sup> Lastly, in Colorado, upon conviction, a three-judge panel sat to determine whether the defendant would receive a sentence of death or life-imprisonment.<sup>34</sup>

State rationales for excluding juries at the sentencing phase varied. Prosecutors in Colorado argued that the implementation of a three-judge system would help increase the number of death sentences handed down in the state by “tak[ing] sentencing in death penalty cases away from jurors . . . [because they] were ‘too soft’ to vote for death sentences in even the most heinous cases.”<sup>35</sup> Other states justified judicial sentencing by claiming instead that it would have the opposite effect and would limit the number of death sentences imposed by a state. Along these lines, Arizona and Florida argued that judges are better equipped to handle such grave determinations. Because juries may be susceptible to decisions based on emotion rather than reason,<sup>36</sup> Arizona and Florida asserted that judicial sentencing prevents arbitrary imposition of the death penalty.<sup>37</sup> In effect, they contended, quite ironically, that because “death is different,” capital trials require non-capricious decisions, and, as a result, sentencing determinations should be im-

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

32. *Id.*

33. 2002 Neb. Laws 3rd Special Sess. L.B. 1 (revising Nebraska’s capital sentencing statute).

34. 2002 Colo. Sess. Laws 025-1005 (revising Colorado’s capital sentencing statute).

35. Scott Robinson, *Death Penalty No Longer in Hands of Politicians*, ROCKY MOUNTAIN NEWS (Denver), June 25, 2002, at 15A.

36. See Terri Somers, *Final Judgment; The U.S. Supreme Court is Expected to Decide Who is Better Qualified to Sentence Convicted Killers: The Judge or Jury*, SOUTH FLORIDA SUN-SENTINEL, April 21, 2002, at 1F.

37. *Id.*; Statement of Janet Napolitano, Attorney General of Arizona, Oral Argument in *Ring v. Arizona*, at 32, available at 2002 WL 859054 (April 22, 2002).

posed by an informed judge rather than a lay jury.<sup>38</sup> Notably, however, empirical evidence contradicts the misinformed perception that judicial determinations offer capital defendants *more procedure* than jury determinations.<sup>39</sup> For instance, despite Florida's contention that strict judicial sentencing reduces the number of defendants who are sentenced to death, since the mid-1970s Florida judges have disregarded a jury's recommendation of life imprisonment 166 times and instead placed these defendants on death row.<sup>40</sup> Thus, it appears that rather than narrowing, trial judges are instead expanding the class of defendants sentenced to death.

Alabama, Delaware, Florida, and Indiana adopted somewhat different capital sentencing schemes than Arizona, Colorado, Idaho, Montana, and Nebraska. While the latter states completely deprived the jury of its sentencing role, the former states allowed jurors to participate at sentencing, but in a limited fashion. These states have commonly been referred to as "hybrid" states because a jury makes a recommendation, but the trial judge is actually responsible for imposing the sentence.<sup>41</sup> In Alabama and Florida, the jury that presides over the capital trial is left to make an advisory verdict.<sup>42</sup> Three possible scenarios may result under these states' capital sentencing schemes: (1) if the jury does not find at least one aggravating circumstance beyond a reasonable doubt, then it shall recommend to the court a sentence of life imprisonment without the possibility of parole; (2) if the jury finds an aggravating circumstance, but finds that the mitigating factors outweigh the aggravating factors, then the jury shall return a recommendation of life imprisonment without the possibility of parole; and (3) if the jury finds an aggravating circumstance and determines that the aggravating circumstance outweighs the mitigating circumstance(s), then the jury shall return a recommendation for death.<sup>43</sup> While a jury recommendation of death in Alabama requires a vote of at least ten jurors, such a verdict requires only a simple majority in Florida.<sup>44</sup>

38. Theoretically, fewer capital defendants would be sentenced to death where judges are "reining [sic] in runaway, emotional juries;" however, the opposite has proven true. *Final Judgment*, *supra* note 36.

39. *See id.*

40. *See id.*

41. *See* Ira Mickenberg, *Death Penalty Focus*, NAT'L L. J., Aug. 5, 2002, at C8.

42. ALA. CODE § 13A-5-46(e) (1975); FLA. STAT. ANN. § 921.141(2) (West 2001).

43. ALA. CODE § 13A-5-46(e) (1975); *Bottoson v. Moore*, 833 So.2d 693, 702-03 (Fla. 2002).

44. ALA. CODE § 13A-5-46(f) (1975); FLA. STAT. ANN. § 921.141(3) (West 2001).



In both states, a jury recommendation for a life sentence may be supported by a majority vote.<sup>45</sup> Although the jury participates in this sentencing hearing, their recommendation is simply that—a recommendation. The decision is not binding on the court.<sup>46</sup> Rather, in Alabama, the trial judge conducts another sentencing hearing outside the presence of the jury where more evidence may be introduced, following which the judge is left to impose the actual sentence.<sup>47</sup> The court's findings with respect to the existence of aggravating circumstances, mitigating circumstances, and its weighing of these factors must be set forth in writing.<sup>48</sup>

Delaware and Indiana provided for similar sentencing procedures. Under then-existing Delaware law, the jury, having found the defendant guilty of first-degree murder, was instructed to consider evidence of aggravating circumstances and "recommend" whether at least one such circumstance existed.<sup>49</sup> The jury was then asked to weigh the aggravating and mitigating circumstances and report the vote to the court.<sup>50</sup> Taking into consideration the jury's recommendation, the judge was left to impose a sentence.<sup>51</sup> Likewise, under Indiana's former capital sentencing laws, the jury that found the defendant guilty of capital murder reconvened and the defendant was permitted to introduce evidence relating to the aggravating circumstances alleged and any mitigating circumstances.<sup>52</sup> The jury was then left to make a sentencing recommendation, which the court need not impose.<sup>53</sup>

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45. ALA. CODE § 13A-5-46(f) (1975); FLA. STAT. ANN § 921.141(3) (West 2001).

46. ALA. CODE § 13A-5-47(e) (1975); FLA. STAT. ANN § 921.141(3) (West 2001).

47. ALA. CODE § 13A-5-47(c) (1975). The court is instructed to consider the jury's recommendation in its advisory verdict when deciding which sentence to impose. ALA. CODE § 13A-5-47(e) (1975).

48. While in Alabama written findings must be made regardless of the sentence actually imposed, ALA. CODE § 13A-5-47(d) (1975), in Florida, written findings are only required if a death sentence is imposed, FLA. STAT. ANN § 921.141(3) (West 2001).

49. 68 Del. Laws 189, § 1 (1998).

50. 68 Del. Laws 189, § 1 (1998).

51. 68 Del. Laws, c. 189 §§ 1–4 (1991) (revising Delaware's capital sentencing statute, 11 Del. C. § 4209, from a hybrid system where the jury's finding of an aggravating circumstance was merely a recommendation to one where the jury's finding is now determinative); *Brice v. State*, 815 A.2d 314, 320 (Del. 2003) (noting that "the 2002 Statute transformed the jury's role, at the so-called narrowing phase, from one that was advisory under the 1991 version of Section 4209 into one that is now determinative as to the existence of any statutory aggravating circumstances").

52. *See* 2002 Ind. Acts 117.

53. 2002 Ind. Acts 117.

#### IV. THE *RING* DECISION

With these statutory frameworks in place, the Supreme Court announced its ruling in *Ring v. Arizona*.<sup>54</sup> At issue in *Ring* was the constitutionality of Arizona's capital sentencing statute.<sup>55</sup> Again, the Court was asked to reconcile *Apprendi* and *Walton*. This time, however, the Court held that the two cases were irreconcilable, and concluded that the Sixth Amendment could not "be home to both."<sup>56</sup> At petitioner Timothy Ring's trial, the jury remained deadlocked with respect to the question of premeditated murder, but found Ring guilty of first-degree felony-murder.<sup>57</sup> Under Arizona law, Ring could not be sentenced to death unless the judge who presided over the trial, sitting without a jury, considered the aggravating and mitigating circumstances, found at least one statutory aggravating circumstance, and determined that "there [were] no mitigating circumstances sufficiently substantial to call for leniency."<sup>58</sup> The trial judge found two aggravating factors in Ring's case: (1) Ring committed the offense in expectation of receiving something of pecuniary value; and (2) the offense was especially "heinous, atrocious, or depraved."<sup>59</sup> The judge found that these two aggravating circumstances offset Ring's lone mitigating circumstance, his "minimal" criminal record.<sup>60</sup> As a result, he sentenced Ring to death.<sup>61</sup>

Ring argued on appeal that "Arizona's capital sentencing scheme violates the Sixth and Fourteenth Amendments to the U.S. Constitution because it entrusts to a judge the finding of a fact raising the defendant's maximum penalty."<sup>62</sup> The State of Arizona asserted, to the contrary, that because the Arizona Statute designates life imprisonment or death as the only possible sentences for first-

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54. Justices Stevens, Scalia, Kennedy, Souter, and Thomas joined in Justice Ginsburg's majority opinion. 536 U.S. 584, 587.

55. See 2002 Ariz. Sess. Laws 1 (revising Ariz. Rev. Stat. § 13-703(C), which in its earlier version required the judge to determine the existence of aggravating or mitigating factors and determine the sentence to be imposed).

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

57. *Id.* at 591.

58. 2002 Ariz. Sess. Laws 1 (revising Ariz. Rev. Stat. § 13-703).

59. *Ring*, 536 U.S. at 594-95.

60. *Id.* at 595.

61. *Id.* The Arizona Supreme Court later found insufficient evidence to support the depravity aggravating circumstance, but reweighed the mitigating circumstances against the lone aggravating circumstance (expectation of pecuniary gain) and affirmed the trial court's determination of a death sentence. *Id.* at 596.

62. *Id.* at 595

degree murder,<sup>63</sup> Ring was sentenced within a permissible range since the jury convicted him of felony-murder. Noting that the “relevant inquiry is . . . not [one] of form, but of effect,”<sup>64</sup> Justice Ginsburg, writing for the majority, stated that “if Arizona prevailed [in this argument], *Apprendi* would be reduced to a ‘meaningless and formalistic’ rule of statutory drafting.”<sup>65</sup> Consequently, the Court held that the trial judge’s finding of an aggravated circumstance exposed Ring “to a greater punishment than that authorized by the jury’s guilty verdict.”<sup>66</sup>

Similarly, the Court rejected Arizona’s contention that *Walton* correctly distinguished between elements of an offense and sentencing factors. In accordance with *Apprendi*, Justice Ginsburg stated that simply labeling a fact or circumstance a “sentencing factor” is not dispositive of the question as to who should make the relevant determination. Rather, the Court cited to *Apprendi* as finding that any time “the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.”<sup>67</sup>

In turn, the Court found that statutory aggravating circumstances are equivalent to an element of a greater offense, and therefore “overrule[d] *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.”<sup>68</sup> In making these determinations, the Court highlighted the critical role of the jury in criminal trials. Quoting *Duncan v. Louisiana*, Justice Ginsburg stated, “The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered.”<sup>69</sup> Thus, the Court concluded that the jury must, at the very least, make a fact finding with respect to the existence of one aggravating circumstance for a capital defendant to become eligible for the death penalty.<sup>70</sup>

Though the majority opinion called for only jury fact findings relating to aggravating circumstances, at least one justice was of the

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63. Ariz. Rev. Stat. Ann. § 13-1105(C).

64. *Id.* at 604 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494, (2000) (internal citations omitted)).

65. *Id.* (quoting *Apprendi*, 530 U.S. at 541 (O’Connor, J. dissenting)).

66. *Id.* (quoting *Apprendi*, 530 U.S. at 494) (internal citations omitted).

67. *Id.* at 605 (quoting *Apprendi*, 530 U.S. at 495).

68. *Id.* at 609.

69. *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968)).

70. *Id.* at 609.

opinion that the Eighth Amendment's "death is different" jurisprudence mandates complete jury imposition of any death sentence. Denying the legitimacy of capital punishment on deterrence and incapacitation grounds, Justice Breyer concluded that retribution is the only plausible justification for capital punishment.<sup>71</sup> With regard to retribution, he contended, the jury is a more appropriate medium for imposing the death penalty because the jurors, as the voice of the community, are better suited for determining the need for retribution in a given case.<sup>72</sup> Thus, he concluded that the Eighth Amendment requires that "the decision to impose the death penalty is made by a jury rather than by a single government official."<sup>73</sup>

Controverting Justice Breyer's assertion that strict jury sentencing is constitutionally required, Justice Scalia in his concurring opinion recapitulated the majority's position that the Constitution only requires the jury make a finding of aggravation. In refuting Justice Breyer's position, Justice Scalia argued that the decision has nothing to do with jury sentencing *per se* because the ultimate decision may still be left to the judge provided the jury finds an aggravating circumstance at either the verdict or sentencing phase.<sup>74</sup> Instead, he concluded, the Court's opinion does not mandate jury imposition of a death sentence, but rather calls only for a jury determination with respect to those facts that will increase a sentence above a statutory maximum, which in capital cases are the aggravating circumstances.<sup>75</sup>

Justice Scalia sided with the reasoning of the majority with respect to the need for jury fact-finding relating to aggravating circumstances, but articulated his own precise reasoning. He began by noting that this jurisprudential mess is a result of the Court's decision in *Furman v. Georgia*.<sup>76</sup> The *Furman* Court prompted state legislatures to define aggravating circumstances, yet it did not determine whether the judge or the jury is constitutionally required to

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71. *Id.* at 614–15 (Breyer, J., concurring) (citing numerous sources that examine the effectiveness of the death penalty as a means of deterring and incapacitating offenders, and concluding that the deterrent effects of capital punishment are inconclusive and that 98% of defendants sentenced for life never commit another crime).

72. *Id.* at 615 (quoting *Spaziano v. Florida*, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part)).

73. *Id.* at 619 (quoting *Spaziano*, 468 U.S. at 469 (Stevens, J., concurring in part and dissenting in part)).

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

75. *See id.*

76. 408 U.S. 238 (1972).

find these aggravating factors.<sup>77</sup> Since the time the Supreme Court validated Georgia's death penalty statute in *Gregg v. Georgia*,<sup>78</sup> there has been a marked increase in legislative adoption of sentencing factors, which are found by judges, and, in turn, may elevate a defendant's punishment above the statutory maximum proscribed by jury verdicts.<sup>79</sup> In light of these developments, Justice Scalia contended that "our people's traditional belief in the right of trial by jury is in perilous decline."<sup>80</sup> Because state legislatures have usurped this power from the jury and handed it to judges, Justice Scalia stated, "[w]e cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty . . . ."<sup>81</sup>

Lastly, the majority disputed Arizona's position that "[e]ven if facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone ordinarily must be found by a jury, . . . aggravating circumstances necessary to trigger a death sentence may nonetheless be reserved for judicial determination."<sup>82</sup> In support of its argument, Arizona contended that judicial, rather than jury, inquiry into aggravating circumstances aids in eliminating the arbitrary imposition of a death sentence.<sup>83</sup> In dismissing the State's argument, the majority not only noted the historical importance of jury factfinding,<sup>84</sup> but also questioned the superiority of judicial factfinding.<sup>85</sup>

In dissent, Justice O'Connor re-asserted her position that *Apprendi* was wrongly decided and therefore she contended that *Ring*,

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77. See *supra*, text accompanying note 20.

78. 428 U.S. 153 (1976).

79. *Ring*, 536 U.S. at 611–12 (Scalia, J., concurring).

80. *Id.* at 612.

81. *Id.*

82. *Id.* at 605.

83. *Id.* at 607.

84. After conceding that judge imposed sentencing may be more fair and efficient, Justice Scalia, in his *Apprendi* concurrence, noted the historical respect for jury trials in criminal cases by stating, "The founders of the American Republic were not prepared to [entrust a judge with the findings of fact necessary to support a death sentence], which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring)).

85. *Id.* at 607–08 (stating that the superiority of judicial factfinding in capital cases is far from evident).

as an expansion of *Apprendi*, is also a flawed decision.<sup>86</sup> According to Justice O'Connor, *Apprendi* is not required by the Constitution or by this nation's history, nor does it follow prior Supreme Court precedent.<sup>87</sup> In addition, she asserted that such reliance upon the jury "ignores the 'significant history in this country of . . . discretionary sentencing by judges.'"<sup>88</sup> She noted the manifest burden that *Apprendi* has had on the judiciary by opening courthouses to a floodgate of litigation; likewise, she posited that the ruling would prompt death row prisoners in Alabama, Delaware, Florida, and Indiana—"hybrid" states that provide for advisory jury sentencing—to articulate claims that the sentencing schemes under which their sentences were imposed are also unconstitutional.

## V.

### THE IMMEDIATE AND DIRECT IMPACT OF *RING*

*Ring* sent vibrations throughout the legal community. Scholars, practitioners, inmates, and legal commentators immediately understood the import of this seminal decision. These individuals knew that, upon release, *Ring* would "have [a] widespread impact, both doctrinally and atmospherically, in ways that reach far beyond the particular issues at stake" in the case.<sup>89</sup> State legislatures, prompted not only by *Ring* itself, but also by a flood of renewed habeas petitions and a flurry of media coverage, began revising their capital sentencing statutes.<sup>90</sup>

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86. Justice O'Connor's dissenting opinion was joined by Chief Justice Rehnquist. *Id.* at 619. Justice Kennedy also wrote a concurring opinion in which he reasserted his view that *Apprendi* was wrongly decided. With that said, he then continued by accepting *Apprendi*'s status as law and stated his agreement with the majority that *Apprendi* cannot be reconciled with *Walton*. *Id.* at 613.

87. Specifically, Justice O'Connor stated that the *Ring* Court is faced with deciding between *Apprendi* and *Walton*. In accordance with her position that *Apprendi* was wrongly decided, she would let *Walton* stand. Furthermore, Justice O'Connor pointed out that *Apprendi* also conflicts with the Court's opinions in *Patterson v. New York*, 432 U.S. 197 (1977), and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Id.* at 619.

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

89. Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1477 (2002).

90. See *Brice v. State*, 815 A.2d 314, 320 (Del. 2003) (citing 73 Del. Laws c. 423, S.B. 449); J. 1001, 57th Leg., 1st Sess. (Id. 2003) (amending IDAHO CODE § 19-2515(7)(b) (2003) effective Feb. 13, 2003); 2002 Ariz. Sess. Laws 1; 2002 Colo. Legis. Serv. (H.B. 02S-1005) (revising Colorado's capital sentencing statute effective July 12, 2002); IND. CODE ANN. § 35-50-2-9(e)(2) (2003) (withdrawing those provisions from its capital sentencing statute that directed the court to consider the jury's recommendation before determining the sentence, and stated that the

A. *Ring's Impact on  
States that Formerly Employed Strict Judicial Sentencing*

Unlike the other four states which allowed judicial imposition of the death penalty, Montana, perhaps anticipating the Court's holding in *Ring*, opted to change its capital sentencing scheme in 2001.<sup>91</sup> Prior to May 1, 2001, Montana had permitted trial judges, sitting alone, to engage in capital sentencing factfinding and to implement the sentence of death on their own.<sup>92</sup> Since 1977, Montana had continuously upheld this practice.<sup>93</sup> Indeed, in *State v. Smith*, the Montana Supreme Court explicitly stated its approval of judicial sentencing, holding that jury participation at the sentencing phase of a capital trial was not constitutionally required.<sup>94</sup> However, in passing Mont. Code § 46-1-401 in 2001, the state legislature overruled *Smith*. Under Section (1)(b) of this provision, a judge is prohibited from enhancing a sentence in criminal cases tried before a jury unless the jury unanimously finds that "the enhancing act, omission, or fact occurred beyond a reasonable doubt . . . ."<sup>95</sup> This language seems to equate an enhancing factor with an aggravating circumstance and, in this regard, Montana's capital sentencing regime has now shifted to a "hybrid" approach, similar to the pre-*Ring* schemes of Alabama, Delaware, Florida, and Indiana.

While Montana perhaps astutely anticipated the *Ring* decision, Arizona, Colorado, Idaho, and Nebraska retained strict judicial sentencing regimes up until the moment *Ring* was decided in June 2002. Arizona, the original jurisdiction of the *Ring* case,<sup>96</sup> witnessed serious debate on the issue of jury sentencing in capital cases.<sup>97</sup> In response to the Court's decision in *Ring*, the Arizona legislature met in a special session to reform its capital sentencing

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court was not bound by the jury's recommendation); 2002 Neb. Laws, 3rd Special Sess., LB 1; 2001 Mont. Laws 524 (approving H.B. 521, enacted as MONT. CODE ANN. § 46-1-401).

91. 2001 Mont. Laws 524 (approving H.B. 521, enacted as MONT. CODE ANN. § 46-1-401).

92. MONT. CODE ANN. § 46-18-301 (2001). Prior to MONT. CODE ANN. § 46-1-401 (2001), MONT. CODE ANN. § 46-18-301 stood on its own, and under its terms, judges were equipped to make all sentencing determinations in capital cases once the jury returned a verdict of guilty.

93. In 1977, the Montana Legislature enacted MONT. CODE ANN. § 46-18-301 (1977).

94. *State v. Smith*, 705 P.2d 1087, 1106 (Mont. 1985).

95. MONT. CODE ANN. § 46-1-401(1)(b) (2001).

96. *See State v. Ring*, 25 P.3d 1139 (2001).

97. *See, e.g.*, David J. Cieslak, *Ruling Could Let Juries Set Death Penalties*, TUCSON CITIZEN, June 4, 2002, at 1A; Joseph Barrios, *Should It Be Up to the Judge?*, ARIZ. DAILY STAR, March 5, 2002, at A1.

statute.<sup>98</sup> Distancing itself from its previously unconstitutional scheme,<sup>99</sup> the Arizona legislature adopted a new capital sentencing statute which requires complete jury participation with respect to the imposition of the death sentence.<sup>100</sup> The jury must first decide whether aggravating circumstances exist in the so-called aggravation phase.<sup>101</sup> If at least one aggravator is found, the jury then enters the sentencing phase, where they determine whether a death sentence shall be imposed.<sup>102</sup> Notably, the statute also prohibits retroactive application of jury sentencing, thereby expressly limiting *Ring*'s application to only those cases that were pending on direct appeal at the time *Ring* was decided.<sup>103</sup>

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98. See 2002 Ariz. Sess. Laws 1.

99. Ironically, claims have been made that Arizona's newly reformed capital sentencing scheme is also unconstitutional. An editorial in the Tucson Citizen stated the following:

The [new] law allows survivors of murder victims to tell the jury whether they want the defendant sentenced to death. Attorney General Janet Napolitano told lawmakers that is unconstitutional and cited a U.S. Supreme Court ruling supporting her. The law also bars review of the jury's sentence by the trial judge and limits review by the state Supreme Court. Both provisions are likely to be challenged.

Editorial, *Death Penalty: A Botched Fix by Legislature*, TUCSON CITIZEN, Aug. 6, 2002, at 4B.

100. ARIZ. REV. STAT. § 13-703.01 (2003).

101. ARIZ. REV. STAT. § 13-703.01(C) (2003). The statute actually states that the "trier of fact" shall determine whether aggravating circumstances exist; however, "trier of fact" is presumed to be the jury unless the defendant and the state waive a jury, in which case the trier of fact is the judge. 2003 Ariz. Sess. Laws 225 (relabeling ARIZ. REV. STAT. § 13-703.01(R)(1) as §13-703.01(S)(1) (2003)).

102. ARIZ. REV. STAT. § 13-703.01(D) (2003).

103. 2002 Ariz. Sess. Laws 1. Under *Teague v. Lane*, 489 U.S. 288, 310-11 (1989), prisoners whose appeals became final prior to a Supreme Court declaration of new law will not gain its benefit unless the rule falls within one of *Teague*'s two exceptions:

The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe . . . or addresses a "substantive categorical guarante[e] accorded by the Constitution," such as the rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense."

*Saffle v. Parks*, 494 U.S. 484, 494 (1990) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989)). For example, the federal circuits have since agreed that the Supreme Court's ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), falls within this exception. See, e.g., *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002) (citing *Penry*, 492 U.S. at 330); *Hill v. Anderson*, 300 F.3d 679, 681-82 (6th Cir. 2002). *Teague*'s second exception applies when a Supreme Court decision announces a "watershed rule[ ] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495 (quoting *Teague*, 489 U.S. at 311).



Similarly, Colorado and Idaho were compelled to revise their capital sentencing statutes by *Ring*. In July 2002, Colorado Governor Bill Owens called a special legislative session to address the constitutionality of Colorado's capital sentencing system.<sup>104</sup> The Idaho legislature took a bit more time, but eventually met to accomplish the same task.<sup>105</sup> Each of these states revised their statutes to provide for jury imposition of the death penalty.<sup>106</sup> Thus, judges are no longer given discretion to decide the sentence imposed; rather, in Arizona, Colorado, and Idaho, a jury's determination is dispositive in answering the sentencing question.

Although these states may now have constitutional sentencing statutes, many death row prisoners in these states whose cases were tried before their unconstitutional statutes were revised will have viable Sixth Amendment claims under *Ring*. Due to the doctrine of retroactivity, the number of cases affected by *Ring* will likely be limited to those cases pending on direct appeal at the time *Ring* was decided.<sup>107</sup> Nonetheless, Arizona, Colorado, and Idaho have death row inmates whose sentences were imposed while *Ring* was under

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While *Ring*'s retroactivity has not yet been decided by the Supreme Court, the likelihood of such application does not appear promising. Insofar as *Ring* is perceived as an extension of *Apprendi*, the possibility of its retroactivity is severely diminished given the consensus among the circuit courts in finding *Apprendi* non-retroactive. See *United States v. Sanders*, 247 F.3d 139, 146 (4th Cir. 2001); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1236 (9th Cir. 2000). In addition, the Tenth Circuit has specifically stated that *Ring* itself does not apply retroactively. *Cannon v. Mullin*, 297 F.3d 989, 992–93 (10th Cir. 2002). However, the Ninth Circuit recently concluded that *Ring* applies retroactively to cases on collateral review. *Summerlin v. Stewart*, 341 F.3d 1082, 1121 (9th Cir. 2003) (“The rule announced in *Ring* defines structural safeguards implicit in our concept of ordered liberty that are necessary to protect the fundamental fairness of capital murder trials. *Ring* satisfies the criteria of *Teague* and must be given retroactive effect on habeas review.”).

104. See 2002 Colo. Sess. Laws 025-1005 (revising Colorado's capital sentencing statute).

105. See Dan Gallagher, *Resentencing Ordered in Eden Killing*, Assoc. Press Newswires, Feb. 14, 2003.

106. In its current incarnation, Colorado law states that “in the event that the jury's verdict is to sentence to death, such verdict *shall be* unanimous and *shall be binding* upon the court unless the court determines . . . that the verdict of the jury is clearly erroneous . . . .” COLO. REV. STAT. §16-11-103(2)(c) (2002) (emphasis added). Similarly, Idaho law requires that “[i]f the jury finds that a statutory aggravating circumstance exists and no mitigating circumstances exist which would make the imposition of the death penalty unjust, the defendant *will be* sentenced to death by the court.” 2003 Idaho Sess. Laws Ch. 19 (S.B. 1001) (amending IDAHO CODE § 19-2515(7)(a) (2003) (emphasis added)).

107. See text accompanying note 111.

review. Indeed, the Colorado and Idaho Supreme Courts have each reconsidered the death sentences of one death row inmate sentenced under each state's former scheme.<sup>108</sup>

*B. Ring's Impact on  
States that Formerly Employed Hybrid Sentencing Schemes*

With respect to those states that previously employed hybrid systems, only Indiana has revised its statute to provide for complete jury control in imposing death sentences. Less than one week after *Ring*, the Indiana legislature convened to amend the state's capital sentencing statute.<sup>109</sup> In its current incarnation, the statute provides: "[i]f the jury reaches a sentencing recommendation, the court *shall* sentence the defendant accordingly."<sup>110</sup> By requiring the jury, on its own, to impose a sentence of death, Indiana, along with Arizona, Colorado, and Idaho, has clearly complied with the constitutional mandate of *Ring*.<sup>111</sup> Similarly, Indiana is now faced with at least six cases that are likely to receive great scrutiny as a result of the *Ring* decision and may result in the reversal of these capital defendants' convictions.<sup>112</sup>

Alabama, Delaware, Florida, Montana, and Nebraska have each taken less drastic steps in either revising or retaining their capital sentencing statutes. Delaware, Montana, and Nebraska have revised their statutes to provide for express jury imposition of an aggravating circumstance at the penalty phase. Alabama and Florida, on the other hand, have refused to revise their capital sentencing statutes, which have traditionally characterized all jury determinations, including jury findings of aggravating circumstances, as advisory.

As previously noted, Montana currently requires the jury to find an enhancing factor beyond a reasonable doubt at the penalty

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108. See *Woldt v. Colorado*, 64 P.3d 256, 272 (Colo. 2003); *Idaho v. Fetterly*, 52 P.3d 874 (Idaho 2002) (remanding for further consideration by district court).

109. See 2002 Ind. Acts 117.

110. IND. CODE ANN. § 35-50-2-9(e)(2) (2003) (emphasis added).

111. These states have satisfied even Justice Breyer's interpretation of the Sixth Amendment, which would require complete jury imposition of a death sentence with absolutely no judicial intervention in making the sentencing decision. *Ring v. Arizona*, 536 U.S. 584, 618. Though Arizona may have complied with the constitutional mandate of *Ring* itself, there is still speculation that the statute drafted by the Arizona legislature is unconstitutional on non-*Ring* grounds.

112. See Denise G. Callahan, *State's Death Penalty Cases to Be Debated Again*, THE IND. LAWYER, July 3, 2002, at 8 ("Indiana Attorney General Steve Carter issued a statement identifying only six cases that might be impacted by the high court decision.").

phase.<sup>113</sup> After receiving this determination by the jury, the judge, acting alone, decides whether to impose a sentence of death.<sup>114</sup> Similarly, Delaware has made only slight changes to its statute, transforming the jury's role at the penalty phase from an advisory one with respect to determining aggravating circumstances to "one that is now determinative as to the existence of any statutory aggravating circumstances."<sup>115</sup> Nebraska shifted from a three-judge sentencing panel to a system that requires the jury to find at least one aggravating circumstance beyond a reasonable doubt at the penalty phase.<sup>116</sup>

These three states have interpreted *Ring* to require that state courts need only submit to and assume as determinative a jury finding with respect to the aggravating circumstances. In other words, the jury need not impose the sentence itself; rather, the jury is constitutionally required only to find at least one aggravating circumstance.<sup>117</sup> According to this rationale, a defendant is not eligible for a death sentence simply because she is found guilty of a capital offense and the statutory maximum for finding a capital defendant guilty is life imprisonment without the possibility of parole. As the Arizona Supreme Court stated, under *Apprendi*, because a defendant can be sentenced to death only once an aggravating circumstance is found, it is considered an element of the offense, and must therefore be found by the jury.<sup>118</sup> Thus, these states assert that a judge need only accept the jury's factual determination with respect to an aggravating circumstance; then, with that fact as determinative, she is left on her own, guided by only federal and state law, to determine the proper sentence.<sup>119</sup> In other words, Dela-

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113. MONT. CODE ANN. § 46-1-401 (2001).

114. MONT. CODE ANN. §§ 46-1-401, 46-18-301 (2001). Section 46-1-401 did nothing more to enhance a jury's role than require the jury to find enhancing factors beyond a reasonable doubt.

115. *Brice* v. State, 815 A.2d 314, 320 (Del. 2003) (citing 73 Del. Laws c. 423 (2002), S.B. 449).

116. 2002 Neb. Laws 3rd Special Sess., LB 1.

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

118. *Id.* at 595.

119. *Brice*, 815 A.2d at 320 (indicating that Delaware's new capital sentencing statute requires jury finding only as to aggravating circumstance, not sentence itself); MONT. CODE ANN. § 46-1-401(1)(a) (requiring only jury finding of an aggravating circumstance); 2002 Neb. Laws, 3rd Special Sess., LB 1 (requiring only jury finding of an aggravating circumstance). By amending their statutes to require only a jury finding as to an aggravating circumstance, as opposed to imposition of the sentence itself, these states have by implication adopted Justice Scalia's narrow interpretation in *Ring* rather than Justice Breyer's broad interpretation. *Ring*, 536 U.S. 584.

ware, Montana, and Nebraska (*i.e.*, states that require only jury determination of an aggravating circumstance) contend that their capital sentencing statutes now precisely overlap with *Ring*'s requirement of jury determination of an aggravating circumstance; consequently, they contend that Indiana, Arizona, Colorado, and Idaho (*i.e.*, states that now require complete jury imposition of a death sentence) have elected to go beyond the constitutional boundaries set forth in *Ring* with additional safeguards.

Since *Ring*, only Alabama and Florida have decided to retain their capital sentencing statutes, asserting in effect that the Court's decision in *Ring* had no impact on their sentencing schemes. Alabama and Florida have historically characterized the jury's determination of the existence or non-existence of an aggravating circumstance as a mere *recommendation*. Traditionally then, this recommendation has not been binding on the court in making its determination. Under Alabama law, whether the jury finds an aggravating circumstance or not, its advisory verdict is nonetheless statutorily defined as a recommendation.<sup>120</sup> Similarly, Florida law states that a jury's decision is "an advisory sentence to the court" and "[n]otwithstanding the *recommendation* of a majority of the jury, the court . . . shall enter a sentence . . . ."<sup>121</sup> These approaches are similar to Delaware's and Indiana's former capital sentencing regimes where the jury's determination of the existence of an aggravating circumstance was simply an advisory decision.<sup>122</sup>

Consequently, in these states, judges have traditionally determined whether any aggravating circumstances exist, whether any mitigating circumstances exist, and whether the aggravating circumstances outweigh the mitigating circumstances. Therefore, on the surface, state judges in Alabama, Delaware, Florida, and Indiana were not bound to follow the jury's finding of an aggravating cir-

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120. ALA. CODE §§ 13A-5-46(e), 13A-5-47(e) (1975). Sections (e)(1)-(3) of 13A-5-46 outline all possible scenarios with respect to a jury determination at the sentencing phase. Under any scenario, the jury's decision is characterized as an "advisory verdict" that shall be "recommended" to the court. Section (e) of 13A-5-47 states:

In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning the sentence shall be given consideration, it is not binding upon the court.

121. FLA. STAT. ANN § 921.141(2), (3) (West 2001) (emphasis added).

122. 68 Del. Laws 189, §§ 1-2 (1991); 2002 Ind. Acts 117.

cumstance and therefore the manner in which they have historically sentenced death row inmates is apparently unconstitutional under *Ring*. However, because Delaware and Indiana have adopted the jury imposition of aggravating circumstances at the penalty phase approach, the impact of *Ring* on their current statutes is of little concern insofar as they now seemingly satisfy the mandate of *Ring*; however, as the only two states that did not at the very least expressly provide for jury imposition of aggravating circumstances at the penalty phase, it initially seemed impossible for Alabama and Florida to justify and legitimize their traditionally advisory approach to capital sentencing in light of the *Ring* decision.

At first, it appeared as if the two states—Alabama and Florida—were caught in a double bind. Assuming *Ring* required jury imposition of an aggravating circumstance at the penalty phase, these states would be forced to take one of two approaches. On the one hand, they could concede that in making a mere recommendation, the sentencing judge never seriously considered the jury's finding of aggravation and therefore their statutory frameworks violated *Ring* insofar as the jury's finding of aggravation was not imposed on the sentencing court. On the other hand, Alabama and Florida could contend that in cases where a jury brought back a recommendation of death, it is fairly obvious that the jury had found aggravating circumstances. Such an argument would continue by asserting that logically we must assume the jury followed the trial court's instructions, which require the jury to make a determination as to whether aggravating circumstances exist. Only after the jury has found the existence of an aggravating circumstance may it consider mitigating circumstances and then weigh the two against each other. In turn, this argument would contend that where the jury brought back a sentence of death, one must assume the jurors followed the court's instructions during deliberations and their subsequent recommendation of death reflected a belief in the existence of at least one aggravating circumstance.

However, this latter argument would create an unavoidable problem because Alabama and Florida have persistently characterized the jury's sentencing role as non-binding.<sup>123</sup> Consequently, given an interpretation that assumes the jury's determination of an aggravating circumstance is, and always has been, binding on the trial judge, Alabama and Florida would be forced to concede that statements that characterize the jury's role as non-binding are, and have always been, unconstitutionally inaccurate. As a result, death

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123. See text accompanying note 134.

row inmates in Alabama and Florida who would be unable to assert viable *Ring* claims would have compelling *Caldwell* claims, which may result in new trials.

Addressing the importance of the jury in capital cases in *Caldwell v. Mississippi*,<sup>124</sup> the United States Supreme Court held that “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”<sup>125</sup> In *Caldwell*, the Supreme Court reversed the conviction of a death row inmate at whose trial the prosecutor had informed the jury that its sentencing decision was not a final determination because the Mississippi Supreme Court would review the jury’s decision.<sup>126</sup> The Court noted that the jury’s determination is so crucial to the capital sentencing process that a miscarriage of justice occurs where the prosecutor “mislead[s] the jury as to its [proper] role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.”<sup>127</sup> Indeed, because the jury plays such a pivotal role in the criminal process, the Supreme Court has consistently required that “jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision . . . .”<sup>128</sup> Consequently, when a prosecutor disrespects the jury and its role by misleading the jurors as to their proper function in the sentencing process, their decision can no longer be considered reliable.<sup>129</sup>

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124. 472 U.S. 320 (1985).

125. *Id.* at 328–29.

126. *Id.* at 325–26.

127. *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986).

128. *Caldwell*, 472 U.S. at 329–30 (1985) (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)).

129. *Id.* at 330. The court presented several reasons to fear the unreliability and bias of a death sentence where the state relays to the jury a message that leads members to believe that the responsibility for the decision rests elsewhere. First, the defendant may be deprived of the right to a fair determination of her sentence because the sentencing decision will be shifted to the appellate court, which is ill-suited to make such sentencing determinations. *Id.* at 330–31. Second, the jury, being misled by a prosecutor’s comments, may not believe the defendant deserves the death penalty, but being under the false impression that its determination will be corrected, might attempt to “send a message” and thereby bring back a sentence of death. *Id.* at 331–32. Third, where a jury is informed that only a death sentence, and not a life sentence, will be reviewed, it may believe that it is erring on the side of caution by returning a sentence of death insofar as the jury is under the impression that its decision will be appropriately reviewed and revised if it came to the wrong conclusion. *Id.* at 332–33. Such a justification for returning a death sentence “create[s] the danger of a defendant’s being executed in the ab-

In the capital sentencing context, the relevant inquiry for assessing the constitutionality of prosecutorial statements focuses on the extent to which the prosecutor has mischaracterized the jury's role as promulgated by state law. In *Romano v. Oklahoma*, the Supreme Court reiterated this proposition where it stated, "'To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.'" <sup>130</sup> Likewise, the Eleventh Circuit has stated that "references to and descriptions of the jury's sentencing verdict [must] . . . accurately characterize the jury's and judge's sentencing roles under [state] law." <sup>131</sup>

In both Alabama and Florida, prosecutors have repeatedly informed juries that their verdicts are only advisory opinions. <sup>132</sup> Furthermore, trial judges presiding over capital trials have continually instructed juries that their decisions are mere recommendations. <sup>133</sup> In fact, Florida's Standard Penalty Phase Jury Instructions itself refers on numerous occasions to the jury's decision as being "advisory." <sup>134</sup>

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sence of any determination that death was the appropriate punishment." *Id.* at 332–333. Fourth, where the prosecutor successfully, but unfortunately, leads the jury to believe that the ultimate responsibility rests elsewhere, members of the jury may "in fact choose to minimize the importance of its role." *Id.* at 333. For instance, a deadlocked jury may be swayed toward a sentence of death due to the presence of appellate review. *Id.*

130. 512 U.S. 1, 9 (1994) (quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989)).

131. *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997).

132. *See, e.g., Waterhouse v. State*, 792 So.2d 1176, 1189 n.13 (Fla. 2001) (prosecutor repeatedly told jury that their role was advisory); *Reed v. State*, 560 So.2d 203, 206 (Fla. 1990) (same); *Thomas v. State*, 766 So.2d 860, 964–65 (Ala. Crim. App. 1998) (prosecution informed the jury that their verdict was only advisory and the trial judge was not bound by their recommendation); *Hallford v. State*, 629 So.2d 6, 10 (Ala. Crim. App. 1992) (prosecutor stated that jury's decision was only a recommendation); *Kuenzel v. State*, 577 So.2d 474, 501 (Ala. Crim. App. 1990) (statements by prosecutor characterizing the jury's decision as to whether the aggravation outweighs the mitigation as a recommendation).

133. *See, e.g., Ex parte Taylor*, 666 So.2d 73, 87–88 (Ala. 1995) (trial court instructed jury that its verdict was advisory); *Reed v. State*, 560 So.2d 203, 206 (Fla. 1990) (same); *Hart v. State*, 612 So.2d 520, 532 (Ala. Crim. App. 1992) (same); *Martin v. State*, 548 So.2d 488, 494 (Ala. Crim. App. 1988) (same); *Hooks v. State*, 534 So.2d 329, 360 (Ala. Crim. App. 1987) (same).

134. Fla. Std. Jury Instr. (Crim.) 7.11. *Caldwell* challenges have been launched against Florida's standard jury instructions relating to capital sentencing. *See, e.g., Cook v. State*, 792 So.2d 1197, 1200–01 (Fla. 2001); *Card v. State*, 803 So.2d 613, 627–28 (Fla. 2001). However, the Florida Supreme Court has routinely upheld the state's standard jury instructions. *See, e.g., Brown v. State*, 721 So.2d 274, 283 (Fla. 1998) (holding that standard jury instructions fully advise the jury of

Because Alabama and Florida have statutorily defined the jury's sentencing verdict as a recommendation, state court decisions prior to *Ring* have historically upheld prosecutorial comments referring to the jury's determination as non-binding.<sup>135</sup> Moreover, in accordance with Alabama and Florida law, appellate courts have continually upheld statements and instructions that refer to the jury's decision as advisory or a recommendation.<sup>136</sup> Similarly, the United States Supreme Court and the Eleventh Circuit have repeatedly held that Alabama and Florida capital sentencing instructions, which refer to the jury's determination as non-binding, are constitutional because such instructions accurately characterize each state's sentencing laws and therefore do not mislead the jury as to its proper role.<sup>137</sup>

By attempting to comply with the mandate of *Ring*, Alabama and Florida would then have to admit that the jury's role was never advisory in their states. And, if in fact the jury's role was never advisory, *Caldwell* was pervasively violated on every occasion in which the jury was informed that its decision was non-binding. Such comments would undoubtedly mischaracterize the jury's proper sentencing role if judges are actually required under Alabama and Florida law to accept jury findings of aggravating circumstances at the penalty phase. Indeed, Judge Lewis of the Florida Supreme Court immediately recognized the dilemma that would result if state courts were forced to assume that only a jury finding of aggravation at the penalty phase would satisfactorily fulfill the mandate

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the importance of its role, correctly state the law, and do not denigrate the role of the jury); *Combs v. State*, 525 So.2d 853, 855-58 (Fla. 1988).

135. See *Turner v. Dugger*, 614 So.2d 1075, 1079 (Fla. 1992); *Provenzano v. Dugger*, 561 So.2d 541, 545 (Fla. 1990) (rejecting claim that counsel's failure to object to prosecutor's statements referring to the jury's role as advisory constituted ineffective assistance); *Reed*, 560 So.2d at 206 (attacking "statements by the judge and prosecutor to the effect that the jury's decision would be advisory and that the ultimate sentencing decision would be made by the judge"); *Ex Parte Taylor*, 666 So.2d at 87-88 (holding that prosecutorial statements referring to advisory role of the jury do not violate *Caldwell* because they aptly state Alabama law, which characterize the jury's decision as non-binding).

136. See *Sochor v. State*, 619 So.2d 291 (Fla. 1992); *Combs*, 525 So.2d at 855-58; *Ex Parte Hays*, 518 So.2d 768, 777 (Ala. 1986) (holding that trial court's reference to jury's determination as a recommendation was a correct statement of the law); *Hart*, 612 So.2d at 532 (finding reversible error did not exist where trial judge instructed jury that its decision was advisory); *White v. State*, 587 So.2d 1218, 1231 (Ala. Crim. App. 1990) (same); *Martin v. State*, 548 So.2d 488, 494 (Ala. Crim. App. 1988).

137. See *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986); *Davis v. Singleary*, 119 F.3d 1471, 1482 (11th Cir. 1997).



of *Ring*.<sup>138</sup> When the Florida Supreme Court first addressed *Ring*'s impact on Florida's capital sentencing scheme, Judge Lewis stated, "By highlighting the jury's advisory role, and minimizing its duty under *Ring* to find the aggravating factors, Florida's standard penalty phase jury instructions must certainly be reevaluated under the Supreme Court's *Caldwell v. Mississippi* decision."<sup>139</sup>

Therefore, after *Ring*, if Alabama and Florida agreed that a jury's finding of the existence of an aggravating circumstance at the penalty phase was binding on the court, any instruction or prosecutorial statements that referred to the jury's decision as being merely advisory or a recommendation would have unmistakably "minimize[d] the jury's sense of responsibility for determining the appropriateness of death."<sup>140</sup> In this regard, it initially appeared as if Alabama and Florida would be unable to escape the wrath of *Ring* insofar as death row inmates in those states would either have an opportunity to assert challenges under *Ring* or would have the opportunity to resurrect claims cognizable under *Caldwell* where the states opted to interpret their statutes in a manner that seemingly complied with the mandate of *Ring*. In this regard, it seemed as if *Ring* would still have a profound impact on the death row population of these states.

However, the Alabama Supreme Court, and by implication the State of Florida,<sup>141</sup> recently avoided this dilemma by affording its

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138. *Bottoson v. Moore*, 833 So.2d 693, 732–33 (Fla. 2002) (Lewis, J., concurring).

139. *Id.* at 733.

140. *Caldwell*, 472 U.S. at 341.

141. In *Bottoson*, 833 So.2d at 694, the Florida Supreme Court first examined the constitutionality of the state's capital sentencing statute in light of *Ring*. In its *per curiam* opinion, the court summarily justified Florida's scheme by pointing out that the United States Supreme Court granted stays of execution in two cases prior to *Ring* that raised *Ring*-related issues. Because the Supreme Court then refused to grant certiorari in those cases after *Ring* was decided, the Florida Supreme Court concluded that the United States Supreme Court did not believe Florida's capital sentencing scheme was unconstitutional. *Id.* at 695. Relying on this inference without presenting a more detailed, substantive explanation as to why its capital sentencing scheme was not affected by the *Ring* decision, the Florida Supreme Court held that its capital sentencing system is constitutionally permissible. *Id.*

Conversely, the Alabama Supreme Court has provided a more thorough explanation relating to the constitutionality of its sentencing statute. See *Ex Parte Waldrop*, 2002 WL 31630710 (2002). Given the similarities between Alabama's and Florida's sentencing schemes, one must assume that Florida's substantive rationale for declaring its sentencing statute constitutional parallels Alabama's. Therefore, this article presumes that the Alabama Supreme Court's opinion in *Waldrop* also reflects the view of Florida's judiciary with respect to the constitutionality of its capital sentencing statute.

statute a unique and novel interpretation. Despite the express statutory language permitting judges to disregard the jury's determination,<sup>142</sup> both states have relied on the concept of "double-counting" as a means of legitimating their sentencing schemes after *Ring*.

"Double-counting" refers to the overlap between capital offenses and aggravating circumstances. Though at times in this country's history, the list of capital offenses has been quite expansive,<sup>143</sup> the Supreme Court's rulings in *Furman v. Georgia* and its progeny significantly narrowed the previously broad scope of offenses for which one could be sentenced to death.<sup>144</sup> In response to the *Furman* and *Gregg* opinions, those states retaining capital punishment were forced to narrow the number of offenses for which a defendant could be capitally charged. Consequently, capital charges may only be brought in Alabama if the defendant's actions fall within one of eighteen designated categories.<sup>145</sup> These

142. As previously noted, Alabama's and Florida's capital sentencing statutes characterize the jury's finding as a recommendation and define their verdict as advisory. ALA. CODE § 13A-5-46(e) (1975); FLA. STAT. ANN § 921.141(2), (3) (West 2001).

143. RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 5 (2001) (stating that rape, idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, manstealing, perjury in a capital trial, and rebellion were all capital crimes in early America). Moreover, in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Supreme Court invalidated state laws that previously permitted capital punishment for the crime of rape.

144. In *Furman v. Georgia*, 408 U.S. 238 (1972), a plurality opinion declared the death penalty unconstitutional because it was being applied in an arbitrary and capricious manner. In *Gregg*, 428 U.S. 153, 189 (1976), the Supreme Court found that Georgia's capital sentencing statute satisfied the constitutionally required narrowing function mandated by *Furman* in order to limit the number and types of murderers who were sentenced to death. "Since *Gregg*, [the Supreme Court's] jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

145. ALA. CODE § 13A-5-40(a) (1975) specifically provides:

The following are capital offenses: (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant. (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant. (3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant. (4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant. (5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty, regardless of whether the defendant knew or should have known the victim was an officer or guard on duty, or because of

include, but are not limited to, intentional murder during the course of a kidnapping, intentional murder during the course of a robbery, intentional murder during the course of a rape, or intentional murder during the course of a burglary.<sup>146</sup>

Under the logic of *Ring*,<sup>147</sup> once a defendant is found guilty of a capital offense, she is not yet eligible for the death penalty.

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some official or job-related act or performance of such officer or guard. (6) Murder committed while the defendant is under sentence of life imprisonment. (7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire. (8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant. (9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion. (10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct. (11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity. (12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft. (13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction. (14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness. (15) Murder when the victim is less than fourteen years of age. (16) Murder committed by or through the use of a deadly weapon fired or otherwise used from outside a dwelling while the victim is in a dwelling. (17) Murder committed by or through the use of a deadly weapon while the victim is in a vehicle. (18) Murder committed by or through the use of a deadly weapon fired or otherwise used within or from a vehicle.

146. *Id.*

147. The logic of *Ring* was at least partially dictated by the Burger Court's emphasis on narrowing the class of defendants for whom the death penalty is deemed an appropriate punishment. *Furman*, 408 U.S. at 400 (Burger, C.J., dissenting). In *Gregg*, the Court stated that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). The Court noted that such a risk could be minimized with the identification of aggravating circumstances, which could direct a jury as to whether

Rather, the jury must find the existence of at least one statutory aggravating circumstance.<sup>148</sup> As with more recent definitions of capital offenses, most state lists of statutory aggravating circumstances are attributable to the Supreme Court's rulings in *Furman* and *Gregg*. Following the Burger Court's interpretation of the Eighth Amendment, most death penalty states adopted the use of statutory aggravators in an effort to narrow the class of offenses for which defendants could be sentenced to death.<sup>149</sup> Perhaps unsurprisingly, many of these statutory aggravating circumstances paralleled conduct included in the list of capital offenses. For instance, amongst the ten aggravating circumstances in Alabama are murder during the course of a kidnapping, murder during the course of a robbery, murder during the course of a rape, and murder during the course of a burglary.<sup>150</sup> This overlap is referred to as "double-counting" because the capital defendant may have certain facts counted against her twice: once as an element in the charged offense and again as an aggravating circumstance.<sup>151</sup>

Looking to the practical effect of double-counting, Alabama and Florida assert that their sentencing schemes comply with *Ring* in cases where an aggravating circumstance overlaps with an element of the charged offense for which the defendant has been found guilty. In making this argument, Alabama notes that under its capital sentencing laws, "when a defendant is found guilty of a capital offense, 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable

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a defendant at trial is the type of exceptional defendant for whom the death penalty would be an appropriate punishment. *Id.* at 193–95. In this regard, the *Ring* Court's emphasis on jury factfinding with respect to aggravating circumstances dates back to the Court's ruling in *Gregg*.

148. Thus, in order to be eligible for the death penalty, one must not only have committed a capital offense for which he or she can be charged, but even after he or she has been capitally charged, there must be a finding of an aggravating circumstance.

149. In *Lowenfeld v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)) the Supreme Court stated "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'"

150. ALA. CODE § 13A-5-49 (1975).

151. In *Lowenfeld*, 484 U.S. at 241–46, the Supreme Court determined that overlap between an element of the charged offense and an aggravating circumstance is constitutionally permissible.

doubt for purposes of the sentencing hearing.’”<sup>152</sup> As a result, the Alabama Supreme Court, as articulated in *Ex Parte Waldrop*,<sup>153</sup> has determined that in cases where the jury found the defendant guilty of a capital crime, it has also effectively found the existence of any corresponding aggravating circumstances. Thus, the Alabama Supreme Court has given Alabama’s death penalty statute a new meaning where, for the first time, a sentence of death may be imposed at the end of the first phase with no further findings. In this regard, the sentencing phase is no longer of any consequence because the jury’s finding of guilt beyond a reasonable doubt may it-

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152. *Ex Parte Waldrop*, 2002 WL 31630710, at \*5 (Ala. 2002) (quoting ALA. CODE § 13A-5-45(e) (1975)).

153. In *Waldrop*, 2002 WL 31630710, the Alabama Supreme Court considered three questions presented by petitioner Waldrop. The court first addressed the argument that a defendant cannot be sentenced to death in Alabama unless a jury finds both that a defendant is guilty of a capital offense and that at least one statutory aggravating circumstance exists. The court concluded:

Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala. Code 1975, § 13A-5-40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was “proven beyond a reasonable doubt.” Only one aggravating circumstance must exist in order to impose a sentence of death. Thus, in Waldrop’s case, the jury, and not the trial judge, determined the existence of the “aggravating circumstance necessary for imposition of the death penalty.” Therefore, the findings reflected in the jury’s verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all *Ring* and *Apprendi* require.

*Id.* at \*5 (citations omitted). The court then answered the question as to whether the process of deciding whether the aggravating circumstances outweigh the mitigating circumstances is a factual finding that must be made by the jury and not the trial court. The court rejected this argument, concluding that the weighing process is not an element of the offense nor a factual determination. Therefore, the court determined that *Ring* does not require that a jury engage in the weighing process. *Id.* at \*6.

Lastly, the court addressed Waldrop’s argument that the existence of the aggravating circumstance that a murder is “especially heinous, atrocious or cruel compared to other capital offenses,” an aggravating circumstance that has no corresponding element in any capital offense, is a factual finding that must be made by the jury, not the trial court. *Id.* at \*7. The court rejected this argument, holding that a jury need not find every factual determination. *Id.* Rather, the jury need not only make factual determinations that increase the defendant’s authorized punishment, and because the jury had already found one aggravating circumstance—murder during the course of a first-degree robbery—“[a]t that point Waldrop became ‘exposed’ to, or eligible for, the death penalty.” *Id.* In turn, the Alabama Supreme Court held that “[t]he trial court’s subsequent determination that the murders were especially heinous, atrocious, or cruel is a factor that has application only in weighing the mitigating circumstances and the aggravating circumstances.” *Id.*

self qualify as a finding of aggravation. In other words, Alabama contends that the manner by which it has statutorily defined capital murder on its own satisfies the constitutional requirements of *Ring* and *Apprendi* by incorporating many aggravating circumstances.<sup>154</sup>

In this regard, Alabama and Florida would agree with the more narrow interpretation of *Ring* espoused to by Delaware, Montana, and Nebraska, which requires only jury imposition of an aggravating circumstance rather than jury imposition of the actual sentence.<sup>155</sup> However, Alabama and Florida differ from Delaware, Montana, and Nebraska insofar as Alabama and Florida do not require jury findings of aggravation separate from the jury's verdict of conviction in double counting cases.

Under Alabama's and Florida's approach, it need not matter whether *all* of the aggravating circumstances overlap with elements of a charged offense provided that at least one does. As the Alabama Supreme Court stated, "*Ring* and *Apprendi* do not require that the jury make *every* factual determination; instead, those cases require the jury to find beyond a reasonable doubt only those facts that result in 'an increase in a defendant's authorized punishment . . . ' or 'expose [ ] [a defendant] to a greater punishment . . . ' "<sup>156</sup> Accordingly, once the jury finds the existence of the elements of an

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154. *Id.* at \*5.

155. A number of states have adopted Justice Scalia's narrow interpretation of *Ring*, requiring only jury imposition of an aggravating circumstance. See *Ring*, 536 U.S. at 612–13. Drawing upon this interpretation, Florida has noted that in its state the trial judge does not make the sentencing decision alone; rather, "the jury hears the evidence presented by the prosecutor, is instructed on the aggravating circumstances, and renders an advisory sentence based on the evidence and the instructions." *Bottoson v. Moore*, 833 So.2d 396, 700 (2002) (Quince, J., concurring). In this regard, they conclude that *Ring*'s "finite holding . . . does not affect [their] capital sentencing provisions." *Id.*

However, as noted by several of the Florida justices in the *Bottoson* opinion, there is language in the *Ring* opinion to support a broader holding. For instance, under *Ring*, juries may be constitutionally required to complete special interrogatories indicating which aggravating circumstances were found at the sentencing phase. *Id.* at 702 (Quince, J., concurring). Second, there is also a plausible argument that *Ring* requires that the "determination of the existence of aggravating sentencing factors, just like elements of the crime, must be found by a *unanimous* jury vote." *Id.* at 709 (Anstead, J., concurring) (emphasis added). Of course, some may argue that only complete jury imposition of the death sentence is permitted after *Ring*. Proponents of this broader interpretation would contend that one is death eligible only if the jury conclusively determines the existence of aggravators and mitigators, and balances them—as is the current approach in Arizona. *Id.* at 722 (Shaw, J., concurring).

156. *Waldrop*, 2002 WL 31630710, at \*7 (quoting *Ring*, 536 U.S. at 602–04 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000))).

offense and one of those elements overlaps with at least one aggravating circumstance, then it need not matter if any other aggravating circumstances are found by the judge because the jury, in finding the existence of the elements of the offense and by implication an aggravating circumstance, has itself exposed the defendant to an increased sentence, thereby complying with *Ring*.<sup>157</sup> This rationale has also been used to expel arguments that juries must actually determine the relative weight afforded to aggravating and mitigating circumstances.

Consequently, Alabama and Florida would argue that the only cases that could potentially fall outside the scope of *Ex Parte Waldrop* are those in which there is no overlap between the charged offense and the statutory aggravating circumstances. In these cases, the underlying offense does not have a corresponding statutory aggravating circumstance and therefore, the finding of guilt cannot be said to have satisfied the aggravation requirement. Although such cases are rare, those defendants who were convicted of non-overlapping capital offenses, then given a life recommendation by the jury (commonly referred to as judicial override), but nonetheless sentenced to death by the trial judge, should fall outside the scope of *Ex Parte Waldrop* and would therefore have viable *Ring* claims.<sup>158</sup>

Despite Alabama's and Florida's efforts to redefine their capital sentencing statutes to comply with the Rehnquist Court's interpretation of the Sixth Amendment, the faulty foundation upon which Alabama's arguments stand will likely crumble and, in turn,

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157. *Id.* at \*5-\*7.

158. This might occur if, for instance, a defendant was charged with the capital offense of murder of a police officer under Ala. Code § 13A-5-40(a)(5), given a life recommendation by the jury at the penalty phase, and the jury's recommendation was then ignored by the trial judge who rendered a judgment in favor of death. Because there is no corresponding aggravating circumstance for this offense and the jury in such a case did not come back with a specific finding of an aggravating circumstance (evidenced by the fact that it returned a recommendation for life), the trial judge then must have found the existence of an aggravating circumstance on her own. Thus, the argument set forth in *Ex Parte Waldrop* would not qualify in such a situation. The same argument would apply in cases involving capital offenses under Ala. Code § 13A-5-40(a)(11), (12), (14), (15), (16), (17), and (18).

In most other death penalty states, there are numerous aggravating circumstances that do not overlap with elements of the offense. For example, in Florida such aggravators include murder that was "especially heinous, atrocious, or cruel" and murder "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." FLA. STAT. ANN. § 921.141(5) (West 2001).

the double bind mentioned above will again face the states of Alabama and Florida. The reasoning of *Ex Parte Waldrop* is highly questionable because it renders meaningless the Burger Court's emphasis on the need for bifurcated capital trials in order to alleviate the arbitrariness of the death penalty's application. The Supreme Court reinstated the death penalty four years after *Furman*, but only after dutifully noting the array of newly adopted state procedures afforded capital defendants under revised state statutes.<sup>159</sup> One such procedure lauded by the Court was that of a bifurcated trial.<sup>160</sup> Indeed, in *Gregg*, the Court stated that "a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*."<sup>161</sup>

Despite the Supreme Court's heavy reliance on the use of bifurcated trials as a cure for the evils surrounding pre-*Furman* capital convictions, under the logic of *Ex Parte Waldrop*, the type of jury-run penalty phase envisioned by the *Gregg* Court would no longer be required. According to the Alabama Supreme Court, a jury determination at the penalty phase in a double counting case would be irrelevant because, under *Ex Parte Waldrop*, a death sentence could be given based solely on the facts used as the basis for conviction.<sup>162</sup> This interpretation of *Ring* and Alabama's capital sentencing statute renders meaningless the Burger Court's strong emphasis on bifurcated capital jury trials. In addition, if no jury penalty phase is in fact constitutionally required in overlap cases, it would fly in the face of Supreme Court precedent that has found attorneys ineffective under the Sixth Amendment for failing to engage an adequate sentencing phase presentation.<sup>163</sup>

Moreover, by permitting the trial judge to impose a death sentence based solely on the jury's guilt phase determination, *Ex Parte Waldrop* effectively eases the State's burden of proving the appropriateness of the death penalty because the jury is never told and thus is unaware that its guilt phase determination permits the court to

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159. *Gregg v. Georgia*, 428 U.S. 153, 162–169 (1976).

160. *Id.* at 190–92.

161. *Id.* at 191–92.

162. *Waldrop*, 2002 WL 31630710, at \*5 (stating that "when a defendant is found guilty of a capital offense, 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing'" (citing ALA. CODE, § 13A-5-45(e) (1975))).

163. See *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002) (holding that petitioner was denied effective assistance of counsel at the penalty phase, as required by the Sixth Amendment, where his attorney presented no mitigating evidence to the jury).



impose a sentence of death, conflicting with the requirements of *Caldwell*. For these reasons, it is unlikely that the Alabama Supreme Court's interpretation of *Ring*, as expressed in *Ex Parte Waldrop*, will be the final and conclusive interpretation of the Sixth Amendment.

In the event that *Waldrop* is struck down, Alabama and Florida will once again be left with some difficult choices. Alabama and Florida will be forced to grapple with the same pre-*Waldrop* concerns addressed above, namely the bind of complying with *Ring* and violating *Caldwell* or complying with *Caldwell* and violating *Ring*. If such a scenario unfolds, Alabama and Florida will be forced to revise their capital sentencing statutes just as the other seven states implicated by the Court's decision in *Ring*. Consequently, Alabama and Florida would either have to provide for complete jury imposition of a death sentence or, at the very least, jury imposition of aggravating circumstances found at the penalty phase.

Regardless of whether *Waldrop* is upheld, Alabama and Florida will still have a host of constitutional concerns to grapple with. First, belying the logic of *Ex Parte Waldrop* are the seemingly unreliable outcomes of a small class of double counting cases where the jury found the defendant guilty, but returned a life sentence, which was then overridden by the court. In these cases, it is difficult to argue that the jury clearly found the existence of the overlapping aggravating circumstance. Indeed, the jury's recommendation for a life sentence seriously calls such an assumption into question. Attorneys for the states of Alabama and Florida will undoubtedly argue that in such cases we should assume the jury found the existence of an overlapping aggravating circumstance because by convicting the capital defendant, the jury must have found the overlapping circumstance's existence at the guilt phase. Thus, Alabama and Florida will "reasonably" infer that these juries had trouble at the weighing stage and in each situation the juries must have concluded that the aggravating circumstances did not outweigh the mitigating circumstances. However, such a sweeping generalization is hardly a sound basis for affirming these death sentences. Indeed, it is difficult for Alabama to back its position in a case such as *Hodges v. State*.<sup>164</sup> In *Hodges*, the trial court overrode the jury's life sentence recommendation and found that no mitigating circumstances existed.<sup>165</sup> In such a case, it is difficult for the State to assert, with a straight face, that the jury must have found the

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164. *Hodges v. State*, 2001 WL 306937 (Ala. Crim. App. 2001).

165. *Id.*

mitigating circumstances outweighed the aggravating circumstances despite the fact that the trial court itself found that no mitigating circumstances existed.

Moreover, Alabama and Florida will also be faced with another class of cases not covered by the *Waldrop* opinion. Just as *Ring* itself was not a case involving an overlapping circumstance, *Waldrop* does not cover cases in Alabama, and by inference in Florida, where there is no overlap between the charged offense and an aggravating circumstance. Consequently, those capital defendants in Alabama and Florida whose cases did not involve aggravating circumstances that overlap with elements of the offense of conviction will have compelling *Ring* claims. Thus, regardless of *Waldrop*'s vitality, Alabama and Florida will be forced to wrestle with at least these two subsets of cases.

## VI. CONCLUSION

As an expression of the jury's proper role in our criminal justice system, *Ring*'s message is perhaps long overdue. However, what the Supreme Court has lacked in consistency, it may have made up for in quality. Given the effects of *Ring* outlined above, it is clear that the decision has sent tremors throughout Alabama, Arizona, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska. Though seven of these nine states have succumbed to the far-reaching impact of the decision by revising their capital sentencing statutes, it is yet to be seen what impact *Ring* will have on Alabama's and Florida's capital sentencing statutes. However, one thing is certain: in one form or another, all of these states will be forced to grapple with the ramifications of the Supreme Court's most recent affirmation of the jury's role in criminal trials.