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Note

Death by Peers: The Extension of the Sixth Amendment to Capital Sentencing in *Ring v. Arizona*

Thomas Aumann*

I. INTRODUCTION

On a blazing Arizona afternoon in July 2002, two defendants charged with first-degree murder did the unthinkable: they pled guilty.¹ This move shocked state prosecutors, yet proved ingenious in a state that recently lost its ability to impose the death penalty upon convicted first-degree murderers.² One month earlier, in *Ring v. Arizona*,³ the United States Supreme Court invalidated Arizona's death penalty statute, a statute that authorized judges to make the final determination of whether to sentence a capital defendant to death.⁴ In *Ring*, the Court held that the Sixth Amendment requires that a jury determine whether certain facts exist in order to constitutionally impose the death penalty.⁵

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1. Adam Liptak, *A Supreme Court Ruling Roils Death Penalty Cases*, N.Y. TIMES, Sept. 16, 2002, at A14, available at LEXIS, News Library, New York Times File. The State of Arizona charged the defendants, Nicholas S. Sizemore and Scott B. Brian, with first-degree murder after they stabbed a fellow inmate in November of 2000. *Id.* Both men committed the killing while serving sentences for previous murder convictions. *Id.* The State of Arizona sought the death penalty for both men in connection with the stabbing. *Id.*

2. *Id.*

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

4. *Id.* at 2443; see also *infra* notes 136–43 and accompanying text (explaining the components and application of Arizona's death penalty statute).

5. *Ring*, 122 S. Ct. at 2443. The Sixth Amendment states:

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

Although the State of Arizona eventually enacted new legislation in response to the Court's decision,⁶ *Ring* announced that death penalty proceedings must provide heightened safeguards in accordance with the Sixth Amendment.⁷

Despite the rapidity with which the *Ring* decision jostled capital sentencing in Arizona and other states with similar death penalty statutes,⁸ the holding resulted from a long and complex history of death penalty jurisprudence in the United States.⁹ For most of the nation's history, judges and juries handed down death sentences with little to no guidance.¹⁰ Following a sequence of cases that required death penalty statutes to offer guidance to sentencing bodies,¹¹ state legislatures developed a balancing test that required sentencing bodies to find certain facts before imposing the death penalty.¹² States, however, differed as to whom should determine the existence of those facts—judges or juries—and the Court offered few opportunities for resolution

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

6. Liptak, *supra* note 1 (referring to the state's enactment of emergency legislation in order to resurrect the death penalty); *see also* Act of Aug. 1, 2002, ch. 1, 2002 Ariz. Sess. Laws 5th Spec. Sess. (codified as amended at ARIZ. REV. STAT. § 13-703 (2002)) (providing for a jury hearing to determine whether a capital defendant should be sentenced to die).

7. *See Ring*, 122 S. Ct. at 2443. The Court found that the meaning of the Sixth Amendment would be "senselessly diminished" if the Court did not apply the Sixth Amendment to death penalty determinations. *Id.*

8. *See* Press Release, Capital Defense Weekly, *Moratorium Needed Now in All Death Penalty Cases* (June 24, 2002), available at <http://www.ccadp.org/ring-pressreleases.htm> (last visited May 7, 2003). A Capital Defense Weekly press release from June 2002 indicates that the *Ring* decision would immediately affect death row inmates in Arizona, Idaho, Colorado, and Nebraska, where judges alone decide whether to impose the death penalty in a given case. *Id.* The press release expressed uncertainty over the effects felt by Montana, Florida, Alabama, Indiana, and Delaware, where judges consider advisory sentences by the jury but make the ultimate sentencing determination. *Id.*

9. *See infra* Part II.B (discussing the development of capital sentencing legislation in the United States).

10. *See* John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 643, 652–53 (1990) [hereinafter Poulos, *A Preliminary Inquiry*]. John Poulos indicates that most state death penalty statutes lacked sentencing guidance until 1972. *Id.* at 652.

11. *See, e.g.,* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (invalidating North Carolina's scheme of mandatory death sentences for certain crimes because it lacked a balancing test for sentencing bodies); Gregg v. Georgia, 428 U.S. 153, 207 (1976) (plurality opinion) (upholding Georgia's death penalty statute that required a sentencing body to conduct a balancing test of aggravating and mitigating factors); Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) (striking down all death penalty statutes that lacked guidance for sentencing bodies).

12. *See infra* notes 90–95 and accompanying text (describing state legislative schemes that created a balancing test of aggravating and mitigating factors).

of the issue.¹³ The Court's decision in *Ring* established that the Sixth Amendment right to a jury trial extends to the finding of facts necessary to impose the death penalty upon a capital defendant.¹⁴

Part II of this Note begins with an overview of the Sixth Amendment and the reasonable doubt standard.¹⁵ Part II then explains the expansion of the Sixth Amendment to sentencing considerations, setting the stage for application of jury protection to the death penalty determination.¹⁶ Part III discusses the majority, concurring, and dissenting opinions from the United States Supreme Court's decision in *Ring*.¹⁷ Part IV argues that the majority correctly held that the Sixth Amendment requires a jury determination of all aggravating factors in determining whether to sentence a defendant to death and criticizes the dissent's rejection of the majority analysis.¹⁸ Part V examines the effects that *Ring* creates for current death row inmates and the consequences that result from the Court's failure to address jury trial waiver and judicial override scenarios.¹⁹ This Note concludes by asserting that *Ring* serves as an example of the growing concern over the continued existence of the death penalty.²⁰

II. BACKGROUND

In order to understand the Court's decision in *Ring*, it is necessary to understand the evolution of Sixth Amendment jurisprudence and the parallel creation of modern capital sentencing safeguards. The Sixth Amendment, combined with the Due Process Clause in the Fifth and Fourteenth Amendments, guarantees a criminal defendant the right to a jury determination of all essential elements of an alleged crime beyond a reasonable doubt.²¹ This right seemed to necessitate the creation of

13. See *infra* Part II.D (outlining the Court's approach to challenges to state death penalty statutes based upon the Sixth Amendment).

14. *Ring v. Arizona*, 122 S. Ct. 2428, 2443 (2002).

15. See *infra* Part II.A–C (discussing the development of the reasonable doubt standard and the parallel creation of an aggravating factors balancing test).

16. See *infra* Part II.D–E (discussing the development of the Court's analysis of sentencing since 1984 and the development of the maximum penalty test).

17. See *infra* Part III.C.1 (discussing the majority opinion); *infra* Part III.C.2 (discussing the concurring opinion); *infra* Part III.C.3 (discussing the dissenting opinion).

18. See *infra* Part IV.A–C (analyzing the majority and dissenting opinions).

19. See *infra* Part V.A–B (discussing the effects of *Ring* upon the current death row population and the remaining questions of jury waiver and judicial override).

20. See *infra* Part V.C (explaining the connection between *Ring* and the future of the death penalty in the United States).

21. See *infra* Part II.A (discussing the meaning of the reasonable doubt standard and its relation to the Sixth Amendment).

procedural safeguards for defendants in capital sentencing cases, yet did not definitively guarantee a defendant a jury determination of the predicate factors those safeguards required.²² Furthermore, limitations on the definition of an element of a crime left capital sentencing decisions at the mercy of state legislatures.²³ Recent Court decisions, however, have opened the door to a re-examination of judicially imposed death sentences through a shift in the Court's Sixth Amendment analysis.²⁴ By extending the Sixth Amendment jury trial guarantee to sentencing, the Court raised the possibility that the Constitution could require a jury determination to impose death sentences.²⁵

A. *The Sixth Amendment Right to a Jury Trial*

The Sixth Amendment guarantees that all individuals receive a jury trial when charged with a criminal offense.²⁶ Although the right to have a jury decide one's fate in a criminal prosecution champions individual freedom in the face of government oppression,²⁷ it extends only to serious offenses.²⁸ In order to determine whether a crime achieves the

22. See *infra* Part II.C (outlining the creation of guided sentencing discretion through the development of an aggravating and mitigating factor balancing test).

23. See *infra* Part II.D (discussing the distinction between sentencing factors and elements of a crime and the Court's corresponding deference to state legislatures).

24. See *infra* Part II.E (discussing the Court's creation of the "maximum penalty test").

25. See Leading Cases, *Sixth Amendment—Scope of Apprendi—Mandatory Minimum Sentences*, 116 HARV. L. REV. 230, 238 (2002) [hereinafter Leading Cases] ("*Ring* may best be viewed as unfinished business from *Apprendi* . . .").

26. U.S. CONST. amend. VI; see also *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the right to a jury trial applies to the states to protect a fundamental liberty under the Fourteenth Amendment). Conversely, a defendant possesses no constitutional right to a bench trial. See *United States v. Parker*, 742 F.2d 127, 127 n.1 (4th Cir. 1984) (holding that a trial judge's decision to conduct a jury trial after alleged perjury occurred during a bench trial did not violate the Sixth Amendment); *United States ex rel. Williams v. DeRobertis*, 715 F.2d 1174, 1178 (7th Cir. 1983) (dictum) (noting that the court or a prosecutor has the authority to veto a request for a bench trial).

27. 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, 3 (1989). The framers of the Constitution sought to create "an independent judiciary but insisted upon further protection against arbitrary action." *Duncan*, 391 U.S. at 156.

28. *Duncan*, 391 U.S. at 159–61; Brian W. Bolster, *Right to Jury Trial*, 86 GEO. L.J. 1618, 1619–20 (1998). The Court recognized that petty offenses may be tried without a jury present. *Duncan*, 391 U.S. at 159–61; see also *United States v. Sain*, 795 F.2d 888, 891 (10th Cir. 1986) (holding that a defendant charged with a federal petty offense was not entitled to a jury trial, even though state law guaranteed a jury trial for the determination of petty offenses).

level of seriousness necessary to trigger the right to a jury trial, one must look to the severity of the maximum penalty for that crime.²⁹

Implicit in the ability of the jury to determine a defendant's guilt for serious offenses is the jury's sole power to determine the facts necessary to find guilt.³⁰ Such facts fall under the province of the Due Process Clause, embodied in the Fifth and Fourteenth Amendments of the Constitution.³¹ The Due Process Clause protects individuals within the criminal law system, preventing the government from depriving an individual of life, liberty, or property without due process of law.³² The Due Process Clause requires that the prosecution prove a defendant's guilt beyond a reasonable doubt in order to convict that defendant.³³ The reasonable doubt standard provides well-established protection to the accused,³⁴ shielding the innocent from erroneous convictions.³⁵

29. Bolster, *supra* note 28, at 1619. Brian Bolster notes several examples of the Court's Sixth Amendment analysis examined according to the severity of a potential penalty. *Id.* at 1619–20. The Sixth Amendment guarantees the right to a jury trial to any defendant who faces the possibility of a prison sentence greater than six months. *See Baldwin v. New York*, 399 U.S. 66, 69 (1970) (plurality opinion) (holding that a misdemeanor that results in a one-year sentence is considered a serious crime that necessitates a jury determination of a crime); *Frank v. United States*, 395 U.S. 147, 149 (1969) (dictum) (indicating that legislatures promote value judgments about the seriousness of a crime by creating varied penalty levels); *Duncan*, 391 U.S. at 159 (holding that the right to a jury trial applied where the defendant faced a two year prison term for a misdemeanor battery conviction). Furthermore, the right to a jury trial may apply to sentences of six months or less when the severity of the sentence indicates a legislative intent to deem the offense serious. *See Richter v. Fairbanks*, 903 F.2d 1202, 1205 (8th Cir. 1990) (holding that the Sixth Amendment preserved the right to a jury trial for a drunk driver who, upon conviction for a third drunk driving offense, faced a six month jail term and the revocation of his driver's license for fifteen years). *But see Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989) (ruling that the right to a jury trial did not apply to a drunk driver who faced six months in prison, a \$1000 fine, and the loss of his driver's license for ninety days).

30. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 670. “[O]nce the jury finds the facts that invoke the law that, in turn, holds the defendant liable for punishment, the purpose of the sixth amendment is fulfilled.” *Id.*

31. U.S. CONST. amend. V (“No person . . . shall be . . . deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV (“No State . . . shall deprive any person of life, liberty, or property, without due process of law.”).

32. *See* Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 395 (2002).

33. *In re Winship*, 397 U.S. 358, 364 (1970) (holding that all elements of a crime must be proven beyond a reasonable doubt). In *Winship*, the Court found that a defendant's stake in liberty required that the prosecution take on a heightened burden in order to justifiably deprive the defendant of such a fundamental value. *Id.* The Court, however, limited its decision strictly to the statutorily defined elements of the crime, and thus did not address the finding of facts that would serve to enhance the level of the defendant's crime. *Id.*; *see* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665, 1671 (1987). The Court, thus, left open the specific scope of reasonable doubt protection. *Id.*

34. Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 112–18 (1999). The phrase “beyond a reasonable doubt” first appeared in the late eighteenth century, yet did not culminate as the highest level of proof in trials until the end of the nineteenth century. *Id.*; *see In re Winship*, 397

Furthermore, the reasonable doubt standard promotes a heightened degree of certainty,³⁶ ensuring that an individual loses his or her liberty only upon the most exacting of proof.³⁷

When combined with the right to a jury trial, the Constitution entitles an individual to receive a jury determination of all essential elements of the crime with which the individual is charged beyond a reasonable doubt.³⁸ Although it is undisputed that a jury must determine all essential elements of a defendant's crime, the Court has struggled to define precisely what constitutes an essential element.³⁹ Legislatures often attempt to label a determinative fact as a sentencing factor in order to avoid having it treated as an element of the crime and thus having to prove that factor beyond a reasonable doubt.⁴⁰ Furthermore, although

U.S. at 360 (explaining that the reasonable doubt standard dated back to ancient times); *see also* Analisa Swan, Note, *Apprendi v. New Jersey, The Scaling Back of the Sentencing Factor Revolution and the Resurrection of Criminal Defendant Rights, How Far Is Too Far?*, 29 PEPP. L. REV. 729, 733 (2002) (describing the reasonable doubt standard as a "fundamental principle of common law").

35. Swan, *supra* note 34, at 734 (noting the effect that the reasonable doubt standard has on reducing erroneous convictions based upon factual errors). The reasonable doubt standard is a cornerstone of constitutional criminal procedural protection, along with the right to notice, the right to confront witnesses, the right to counsel, and the right to refrain from self-incrimination. *In re Winship*, 397 U.S. at 368.

36. Norman Dorsen & Daniel A. Reznick, *In re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 26 (1967). Norman Dorsen and Daniel Reznick connect the reasonable doubt standard to the esteem of the greater community, asserting that the reasonable doubt standard ensures that law's moral influence is "not diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*; *see also* Swan, *supra* note 34, at 734 (labeling the reasonable doubt standard the "highest level of proof").

37. *See In re Winship*, 397 U.S. at 363 (citing the fundamental unfairness involved in depriving an individual of his liberty based upon a lesser standard). Social stigmatization, which accompanies the loss of one's liberty, necessitates the highest standard of proof before subjecting a defendant to such treatment. Swan, *supra* note 34, at 734; *see also* Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (asserting that when one party deprives another of liberty, the depriving party necessarily bears the highest burden of proof).

38. *See In re Winship*, 397 U.S. at 364 (holding that all elements of a crime must be proven beyond a reasonable doubt in order to convict a defendant); Andrew M. Levine, *The Confounding Boundaries of "Apprendi-Land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 390 (2002).

39. Levine, *supra* note 38, at 390. Andrew Levine acknowledges the difficulty that accompanies defining an "essential" element. *Id.* In *Patterson v. New York*, the Supreme Court held that requiring defendants to prove an affirmative defense beyond a reasonable doubt did not violate the Constitution. *Patterson v. New York*, 432 U.S. 197, 216 (1977). Yet, two years earlier the Court found that the prosecution carries the burden of proving the non-existence of an affirmative defense. *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975).

40. *See* Huigens, *supra* note 32, at 393. A complementary issue arises when a state labels what appears to be an element of the crime as an affirmative defense. *Id.* When a state labels a fact as an affirmative defense, the burden of proof appropriately shifts to the defendant. *Id.* Use of a "sentencing factors" label deprives the defendant of rights inherent in a jury trial, such as notice of an indictment and the right to confront witnesses. *Id.* Justice Powell frowned upon

the guarantee of the right to a jury trial encompasses any fact of a crime that serves to increase a defendant's sentence beyond the statutory maximum,⁴¹ such protection did not extend to the imposition of the death penalty upon an individual defendant.⁴²

B. *Death and the Forgotten Jury*

Although the Constitution ensures a defendant a jury determination of all elements of his or her crime, such a safeguard does not necessarily extend to protect the rights of defendants faced with the death penalty.⁴³ During the drafting of the Constitution, the United States sought to protect capital defendants by developing death penalty schemes that conformed to the English common law, which requires jury participation to determine the sentence.⁴⁴ Continued evolution of statutory death schemes, however, resulted in statutes that provided little guidance to sentencing bodies and removed sentencing authority from juries.⁴⁵ Within the last thirty years, the Court has overturned a substantial amount of law that historically afforded unfettered discretion to those judges and juries making capital sentencing decisions and has established guidelines to aid sentencing bodies in making the difficult

such a practice, finding it an invitation to undermine the "axiomatic and elementary" principle of the presumption of innocence, which "lies at the foundation of the administration of our criminal law." *Patterson*, 432 U.S. at 227 (Powell, J., dissenting) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)); see also *Ivan V. v. City of New York*, 407 U.S. 203, 204–05 (1972) (per curiam) (requiring retroactive application of the reasonable doubt standard in pre-*Winship* juvenile cases); *Lego v. Twomey*, 404 U.S. 477, 486–87 (1972) (stating that "[a] high standard of proof is necessary . . . to ensure against unjust convictions"); *Morissette v. United States*, 342 U.S. 246, 275 (1952) (noting the "overriding presumption of innocence" that extends to all elements of a crime); *Coffin*, 156 U.S. at 453 (explaining that defendants are entitled to the "benefit of the doubt").

41. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (holding that any fact that serves to increase a defendant's sentence beyond the statutory maximum must receive a jury determination).

42. *Ring v. Arizona*, 122 S. Ct. 2428, 2436 (2002); see also *infra* Part III (discussing the Supreme Court's decision in *Ring*).

43. See Joshua N. Sondheim, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 413 (1989). Joshua Sondheim references the creation of the requirements of a constitutional death sentencing procedure, as framed by the Court in the following five decisions: *Roberts v. Louisiana*, 428 U.S. 325 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion), *Jurek v. Texas*, 428 U.S. 262 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). *Id.*

44. See *infra* notes 47–54 (discussing the origin of capital sentencing in the United States).

45. See *infra* notes 55–62 (discussing the evolution of capital sentencing schemes, including the introduction of unfettered sentencing discretion).

decision to sentence a defendant to death.⁴⁶ Yet, such guidelines failed to consider whether juries should determine capital sentences.⁴⁷

The role of the jury in American death penalty decisions stems in large part from the jury system created under the common law in England.⁴⁸ Jury trials originated in England in the thirteenth century.⁴⁹ Juries not only ruled on the facts involved in the alleged crime but also determined the existence of mitigating circumstances that would reduce a defendant's eligibility for the death penalty in homicide cases.⁵⁰ In the seventeenth century, the law of homicide changed, allowing

46. See Daniel Ross Harris, Note, *Capital Sentencing After Walton v. Arizona: A Retreat from the "Death Is Different" Doctrine*, 40 AM. U. L. REV. 1389, 1390-91 (1991) (discussing the Supreme Court's decision to overturn unfettered discretionary sentencing schemes in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam)). Daniel Ross Harris asserts that the Supreme Court's holding in *Furman* created two requirements for death penalty statutes. *Id.* at 1390. First, no statute may provide for "unguided discretion" in the sentencing phase. *Id.* at 1390-91. Second, the sentencing body must consider all mitigating evidence relevant to the crime under the principle of individualized sentencing, which takes a defendant's individual situation into account prior to sentencing that defendant. *Id.* at 1391; see also Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 U. KAN. L. REV. 1039, 1040 (1995) (explaining the principle of individualized sentencing). For a more in-depth discussion of the Court's requirement that a sentencing body consider all relevant mitigating evidence, see *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion).

47. See Poulos, *A Preliminary Inquiry*, *supra* note 10, at 652; see also *infra* notes 75-81 (discussing state adoptions of the Model Penal Code formulation of a death sentencing scheme, which provides no mandate for juries to make the sentencing determination).

48. See Poulos, *A Preliminary Inquiry*, *supra* note 10, at 650; see also 4 WILLIAM BLACKSTONE, COMMENTARIES *349. See generally TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800 (J.S. Cockburn & Thomas A. Green eds., 1988) (discussing the evolution of the jury trial in England).

49. See White, *supra* note 27, at 5-6 (noting that jury trials replaced the long-standing practice of trial by ordeal in criminal prosecutions); see also Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 421-22 (1976) (noting that the abolition of trials by ordeal opened the door to trials in which the accused offered to "put himself on the country," or in front of lay jurors). Courts selected jury members who possessed first-hand knowledge of the events surrounding a crime, thus creating a role for the jury as a fact-finding body. White, *supra* note 27, at 6. "The early English jury was self-informing and composed of persons supposed to have first-hand knowledge of the events and persons in question." Green, *supra*, at 414. By the seventeenth century, however, courts refrained from selecting jury members with direct knowledge of the case. White, *supra* note 27, at 7. Evolutions in trial procedure in the sixteenth and seventeenth centuries produced trials in which witnesses testified in front of the jury and the judge. *Id.* Because the jury could only render a verdict based upon the evidence presented, self-informed jurors became unnecessary. See *id.*

50. White, *supra* note 27, at 7. At common law, all defendants convicted of homicide received the death penalty unless they committed the killing in self-defense. 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 358-59 (4th ed. 1927). The law also provided life sentences to individuals who commit homicide involuntarily or while of unsound mind. *Id.* Yet, the vast majority of jury members believed that homicide was justified when committed through provocation in the heat of passion. See White, *supra* note 27, at 6. Many juries sentenced individuals who had committed murder to life in prison even though the law required otherwise. Green, *supra* note 49, at 432.

defendants to escape capital punishment if a killing lacked premeditation.⁵¹ As a result of this change in the law, the jury possessed the power to determine the defendant's guilt and resulting sentence by determining the defendant's state of mind at the time of the killing.⁵²

By the end of the eighteenth century, the framers of the United States Constitution possessed ample knowledge of the English jury system, recognizing jury trials as an opportunity to promote community representation in the courtroom.⁵³ Prior to the American Revolution, the jury stood as the focal point of colonial government.⁵⁴ After the revolution, when the time came for states to create criminal codes, many states retained not only the English jury system but also the English distinction between murder and manslaughter when determining death penalty eligibility.⁵⁵

As the new nation grew, however, a trend emerged that eliminated this simple eligibility distinction.⁵⁶ In 1838, the Tennessee legislature abolished mandatory death sentences in its state and enacted a scheme of capital sentencing discretion.⁵⁷ Under such a scheme, the jury or judge, depending upon who was the fact finder in a particular case,

51. See White, *supra* note 27, at 7–8. At that time, killings made in the heat of passion were among those crimes eligible for “benefit of the clergy.” Green, *supra* note 49, at 426. The concept of “benefit of the clergy” dated back to the twelfth century when a clergyman who committed a felony did not receive punishment unless an ecclesiastical court subsequently found him guilty of the felony. 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 441–42 (2d ed. 1959).

52. White, *supra* note 27, at 10. “As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense.” *Id.*

53. Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 421 (1996). Douglas Smith asserts that juries created opportunities for colonists to exercise political power. *Id.* at 422; see also 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282 (Phillips Bradley ed., New Am. Library 7th ed. 1956) (1834).

54. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 20–23 (1994); see also Smith, *supra* note 53, at 422 (referring to the jury as the “central instrument of governance”). The jury determined the validity of legal claims and enforced legal rights in the colonies. Smith, *supra* note 53, at 422.

55. See Poulos, *A Preliminary Inquiry*, *supra* note 10, at 649–50. For example, Pennsylvania's criminal code mandated the death penalty for murder, yet spared those convicted of manslaughter. *Id.* Pennsylvania later served as a model for other states in the late eighteenth century by distinguishing between first- and second-degree murders when considering the death penalty. *Id.*; see also *THE EARLIEST PRINTED LAWS OF PENNSYLVANIA 1681–1713*, at 36–37 (John D. Cushing ed., 1978).

56. See Poulos, *A Preliminary Inquiry*, *supra* note 10, at 651–52 (commenting on the creation of discretionary capital sentencing schemes in the United States).

57. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 651; see also Act of Jan. 10, 1838, ch. 29, 1837–38 TENN. PUB. ACTS 55 (enacting a scheme of absolute sentencing discretion for capital cases in Tennessee).

possessed unfettered discretion in determining whether to impose the death penalty upon a convicted murderer.⁵⁸ Discretionary sentencing provided no rules or guidelines to direct the decision making process.⁵⁹ Though discretionary sentencing created uncertainty regarding the propriety of sentencing a defendant to death, many states adopted unfettered discretionary sentencing systems.⁶⁰ By 1972, the year of the Supreme Court's landmark death penalty decision in *Furman v. Georgia*,⁶¹ discretionary sentencing prevailed as the dominant capital sentencing scheme in the United States.⁶²

C. *The Modern Death Penalty: Guided Sentencing Body Discretion*

Unlike death sentencing schemes of the past, the modern death penalty statute must possess safeguards that prevent arbitrary imposition of the death penalty.⁶³ In order to achieve that goal, death penalty statutes must recognize a sentencing body's discretion, while

58. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 651–52; *see also* John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 148 (1986) (discussing Tennessee's adoption of unfettered sentencing discretion) [hereinafter Poulos, *The Rise and Fall of Mandatory Capital Punishment*].

59. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 652; *see* WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 4 (1991) (discussing the discretion afforded to sentencing bodies before the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 283 (1972) (per curiam)); Sondheimer, *supra* note 43, at 413 (commenting on the role of prejudice in capital sentencing pre-*Furman*).

60. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 652. By the end of the nineteenth century, twenty-three states used discretionary capital sentencing. *Id.*; *see also* Woodson v. North Carolina, 428 U.S. 280, 291 (1976) (plurality opinion) (commenting that fourteen states created discretionary capital sentencing schemes during the early twentieth century). In *Woodson*, the Court invalidated all state statutes that provided for mandatory sentencing by holding that the severity of the death penalty requires a determination that death is appropriate on a case-by-case basis. *Woodson*, 428 U.S. at 304–05 (plurality opinion).

61. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (holding as unconstitutional all state death penalty statutes that lacked guidance for sentencing bodies). Nearly all death penalty statutes at the time in the United States provided no guidance to sentencing bodies; thus, the Court's decision in *Furman* represented a “de facto invalidation of the death penalty across the United States.” *Id.* (per curiam); *see also infra* Part II.C.1 (discussing the Court's holding in *Furman*).

62. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 652. All forty-one states that permitted capital punishment granted discretionary sentencing authority to its judges and juries, with the exception of Delaware. *See* Poulos, *The Rise and Fall of Mandatory Capital Punishment*, *supra* note 58, at 152–53. In Delaware, all convicted murderers received mandatory death sentences. Act of Mar. 29, 1974, ch. 284, § 4209, 59 DEL. LAWS (1973).

63. *See infra* Part II.C.1 (discussing the Court's holding in *Furman v. Georgia*, which held unconstitutional death penalty statutes that allowed for unfettered discretion by sentencing bodies).

simultaneously placing reasonable restraints upon that discretion.⁶⁴ A guaranteed right for capital defendants to have a jury determine whether to sentence a defendant to death did not accompany these heightened safeguards.⁶⁵

1. *Furman v. Georgia*: The Reduction of a Sentencing Body's Discretion

For much of United States history, judges and juries handed down death sentences with few impediments.⁶⁶ The Court's decision in *Furman v. Georgia*, however, led states to scramble to implement procedures that would comply with the Court's mandate of guided discretion in the death sentencing process.⁶⁷

In 1972, the Court established a guiding principle to determine the validity of a given death penalty statute.⁶⁸ In *Furman v. Georgia*,⁶⁹ a sharply divided Court⁷⁰ ruled that any capital punishment statute that lacked judicial guidance violated the Eighth Amendment prohibition of cruel and unusual punishment.⁷¹ The Georgia death penalty statute at issue gave the jury complete and uninhibited discretion to determine whether to sentence a defendant to death.⁷² The Court noted that

64. See *infra* Part II.C.2 (connecting the Constitutional requirements of individualized sentencing and guided discretion).

65. See *infra* Part II.C.3 (discussing the Court's refusal in *Spaziano v. Florida*, 468 U.S. 447 (1984), to extend the Sixth Amendment right to a jury trial to determination of the death penalty).

66. See Harris, *supra* note 46, at 1394; see also Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 S.C. L. REV. 245, 260–62 (1988) (referring to a link between unjust death sentences and racial prejudice before *Furman*).

67. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (ruling that mandatory death sentencing schemes violate the Constitution); *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (plurality opinion) (upholding the validity of guided discretionary sentencing); *Furman*, 408 U.S. at 239–40 (per curiam) (holding unfettered discretionary death sentencing schemes unconstitutional); Robert Stacy II, *State v. McCarver: The Role of Jury Unanimity in Capital Sentencing*, 74 N.C. L. REV. 2061, 2067 (1996).

68. Stacy, *supra* note 67, at 2066 (referring to the Court's decision in *Furman* as establishing a "core principle" of death penalty jurisprudence).

69. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

70. See *id.* at 240 (per curiam). The Court obtained a 5-4 majority, yet four separate dissenting opinions attached to the per curiam majority opinion. *Id.* (per curiam). The per curiam majority opinion itself consisted of five separate concurrences. *Id.* (per curiam).

71. *Id.* at 239–40 (per curiam); see also U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

72. *Furman*, 408 U.S. at 240 (Douglas, J., concurring); see also GA. CODE ANN. § 26-1302 (Supp. 1971), amended by GA. CODE ANN. § 26-1302 (Supp. 1975) (outlining the various sentencing options available to a jury). In *Furman v. Georgia*, the three separate defendants received death sentences under section 26-1302 of the Georgia Criminal Code upon their individual convictions for the crimes of murder and rape. *Furman*, 408 U.S. at 240 (Douglas, J., concurring). The Georgia criminal code, however, provided only three options to the jury for

application of death penalty statutes resulted in discrimination toward disadvantaged groups nationwide.⁷³ The Court ultimately concluded that because of the uniqueness and finality of the death penalty, any death penalty statute that allowed for its arbitrary application violated the Eighth Amendment and must be struck down.⁷⁴

By invalidating all death penalty statutes that lacked sentencing guidelines, the Court's decision in *Furman* effectively rendered all death penalty statutes in existence at the time inoperable.⁷⁵ In response to the invalidation of these statutes, states adopted two main approaches toward remedying the situation.⁷⁶ The majority of states created statutes that mandated imposition of the death penalty upon conviction for certain crimes, thus eliminating sentencing discretion altogether.⁷⁷

sentencing upon a defendant's conviction for murder or rape: a prison term of one to twenty years, life imprisonment, or death. Harris, *supra* note 46, at 1395 n.33 (discussing the options available under GA. CODE ANN. § 26-1302).

73. *Furman*, 408 U.S. at 249 (Douglas, J., concurring) (citing THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 143 (1967) (noting the disproportionate application of the death penalty upon the poor, African Americans, and other disadvantaged groups)). In the State of Texas, numerous instances occurred in which black defendants received the death penalty, while white co-defendants received a life sentence. Rupert Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 *CRIME & DELINQ.* 132, 141 (1969). Furthermore, nearly twice as many whites received commutation of their death sentence to life imprisonment compared to blacks. See HUGO BEDAU, *THE DEATH PENALTY IN AMERICA* 474 (rev. ed. 1982).

74. See, e.g., *Furman*, 408 U.S. at 313 (White, J., concurring). Justice White articulated the view that the Georgia death penalty statute provided no method for deciding who should and should not receive the death penalty. *Id.* (White, J., concurring); see also Franklin Zimring & Gordon Hawkins, *Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect*, 18 *U.C. DAVIS L. REV.* 927, 929-44 (1985) (analyzing the five concurrences in *Furman*).

75. Stacy, *supra* note 67, at 2067. In Justice Blackmun's dissent, he noted that the majority's decision served to invalidate the death penalty statutes of thirty-nine states and the District of Columbia. *Furman*, 408 U.S. at 411 (Blackmun, J., dissenting). Furthermore, he acknowledged that, although he would vote to abolish the death penalty were he sitting on a state legislature, his participation in *Furman* was not as one. *Id.* at 410-11 (Blackmun, J., dissenting). "We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great." *Id.* at 411 (Blackmun, J., dissenting).

76. See Harris, *supra* note 46, at 1396-97 (discussing the two approaches adopted by states in order to avoid arbitrary imposition of the death penalty); see also Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 *HARV. L. REV.* 1690, 1699-1712 (1974) [hereinafter *New Death Penalty Statutes*] (analyzing various approaches attempted by the states immediately following *Furman*).

77. Stacy, *supra* note 67, at 2069; *New Death Penalty Statutes*, *supra* note 76, at 1710-12. Among those crimes that tended to trigger a mandatory death sentence upon conviction were felony murder, murder while serving life in prison, and murder of a peace officer. Harris, *supra* note 46, at 1397-98. Those states that enacted mandatory death sentence provisions include California, Delaware, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nevada, New

By contrast, a few states created statutes that mandated a bifurcated capital trial in which a defendant's guilt and his resultant punishment were separately decided.⁷⁸ During the sentencing stage of a bifurcated trial, a jury would determine whether to impose the death penalty based upon the consideration of aggravating and mitigating factors.⁷⁹ Such a sentencing scheme offered an alternative procedure in which a judge alone would determine the existence of the aggravating and mitigating factors at the sentencing stage.⁸⁰ Although the bifurcated trial system sought to promote individualized sentencing, little concern arose over the implications of the alternative judicial determination procedure upon a defendant's Sixth Amendment right to a jury trial.⁸¹

Hampshire, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, and Wyoming. *New Death Penalty Statutes*, *supra* note 76, at 1710.

78. Stacy, *supra* note 67, at 2067–68. Four states created bifurcated trial proceedings: Arizona, Florida, Nebraska, and Tennessee. *New Death Penalty Statutes*, *supra* note 76, at 1704 n.92. At the time the Court decided *Furman*, six states already utilized a bifurcated trial scheme: California, Connecticut, Georgia, New York, Pennsylvania, and Texas. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 655 n.72 (citing Act of Sept. 11, 1957, ch. 1968, 1957 CAL. STAT. 3509 (codified at CAL. PENAL CODE ANN. § 190.1 (West 1999)); Act of Apr. 22, 1972, ch. 56, 1972 CONN. ACTS 50 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 53a-46a (2001)); Act of Mar. 27, 1970, ch. 1333, 1970 GA. LAWS 949 (codified as amended at GA. CODE ANN. § 17-2-3 (1996)); Act of July 6, 1971, ch. 1205, 1971 N.Y. LAWS 2257 (codified as amended at N.Y. PENAL LAW § 125.30 (repealed 1974)); Act of Dec. 1, 1959, No. 594, § 1, 1959 PA. LAWS 621 (codified as amended at 42 PA. CONS. STAT. § 9711 (2001)); Act of May 1, 1967, ch. 659, § 22, 1967 TEX. GEN. LAWS 1739 (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon Supp. 2001))).

79. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 653 n.63 (citing MODEL PENAL CODE § 210.6(2) cmt. 8, at 108 (1980)). The Model Penal Code mandates that a sentencing body cannot impose the death penalty upon an individual if mitigating factors exist such as are “sufficiently substantial to call for leniency.” MODEL PENAL CODE § 210.6(2) cmt. 8, at 148 (1980). Use of the aggravating circumstances creates a finding of “liability” for the death penalty in the guilt phase and “imposition” of the death penalty in the sentencing stage. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 654.

80. See MODEL PENAL CODE § 210.6 cmt. 7, at 142–44 (1980). The judge might serve as the sole sentencing authority under the bifurcated trial and sentencing scheme. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 653. The Model Penal Code, however, does not mention whether a judicial determination of those factors interferes with a defendant's right to a jury trial. *Id.* Specifically, Poulos notes the lack of concern for the infringement upon the jury trial right when a defendant has not waived his or her right to a jury trial during the guilt phase. *Id.* Poulos explains the existence of two alternatives regarding aggravating factors and the right to a jury determination. *Id.* at 655. First, if aggravating factors were determined in the guilt phase, then a defendant was entitled to have a jury determine those factors as elements of a capital offense. *Id.* Second, if the right to a jury trial extends to the finding of aggravating factors, then a judicial determination of those factor in the sentencing phase infringes upon that right. *Id.*

81. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 655–56. Poulos argues that the drafters of the Model Penal Code focused their efforts solely upon the eradication of the Tennessee model of unfettered discretionary capital sentencing, leaving little room to consider Sixth Amendment complications. *Id.* Furthermore, the Sixth Amendment did not apply to the states when the Model Penal Code was created. *Id.* at 656. The American Law Institute officially adopted the Model Penal Code on May 24, 1962. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 656 n.74.

2. Putting the New Death Penalty Statutes to the Test

Lacking a resolution to the jury trial issue, two cases came before the Supreme Court that ended mandatory capital sentencing and solidified the constitutionality of the aggravating and mitigating factors balancing test.⁸² In *Woodson v. North Carolina*,⁸³ the Court declared unconstitutional North Carolina's statutory scheme of mandatory sentencing for capital offenses.⁸⁴ The Court insisted that the Eighth Amendment's prohibition against cruel and unusual punishment required the imposition of a death sentence according to the individual circumstances of a particular case.⁸⁵ The Court found that individualized sentencing determinations properly adhered to longstanding notions of just sentencing.⁸⁶ Furthermore, the Court reaffirmed the central tenet stated by *Furman* that death is different from any other punishment,⁸⁷ and determined that mandatory sentencing provisions do not provide adequate protection under the Eighth Amendment but actually encourage juries to act contrary to the

The Sixth Amendment did not apply to the states until six years later in *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

82. See *infra* notes 84–100 and accompanying text (discussing *Woodson v. North Carolina* and *Gregg v. Georgia*).

83. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

84. *Id.* at 305 (plurality opinion). In *Woodson*, four defendants were convicted of first-degree murder after a robbery attempt resulted in the shooting death of a woman in a convenience store. *Id.* at 283–84 (plurality opinion). North Carolina law required that all individuals convicted of first-degree murder “shall receive the death penalty.” N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975) (repealed by N.C. GEN. STAT. § 15A-2000 (1977)). Included among crimes classified as first-degree murder were “murder[s] which shall be . . . committed in the perpetration or attempt to perpetrate any . . . burglary or other felony.” *Id.* All four defendants were sentenced to death under North Carolina's death sentence provision. *Woodson*, 428 U.S. at 284 (plurality opinion).

85. *Woodson*, 428 U.S. at 304 (plurality opinion). The Court announced that the Eighth Amendment “requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Id.* (plurality opinion). As such, the Court found that individualized sentencing determinations properly adhered to longstanding notions of just sentencing. *Id.* at 304 (plurality opinion); see also *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) (asserting that sentencing bodies properly may consider the circumstances of charged crimes when they decide upon defendants' sentences). “For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.” *Sullivan*, 302 U.S. at 55; see also *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (commenting on the heightened respect for humanity inherent in the Eighth Amendment).

86. *Woodson*, 428 U.S. at 304 (plurality opinion).

87. *Harris*, *supra* note 46, at 1400. The Court asserted that because of its finality, death inherently is different than a life sentence. *Woodson*, 428 U.S. at 305 (plurality opinion). Such a difference in the severity of the punishment exceeds the disparity existing between prison terms of one year and one hundred years. *Id.* (plurality opinion).

law.⁸⁸ As such, the Court rendered invalid all statutes that provided mandatory sentencing for certain offenses.⁸⁹

In contrast to the disapproval incurred by mandatory sentencing schemes, statutes that employed a balancing test of aggravating and mitigating factors achieved constitutional approval.⁹⁰ On the same day the Court decided *Woodson*, the Court decided *Gregg v. Georgia*⁹¹ and upheld a sentencing scheme comprised of aggravating and mitigating factors.⁹² The circumstances surrounding *Gregg* concerned a death sentence imposed upon a defendant convicted of two counts of each armed robbery and murder.⁹³ Georgia law required the trial judge to instruct the jury that, before sentencing the defendant to death, it must determine the existence of at least one statutorily enumerated aggravating factor beyond a reasonable doubt.⁹⁴ The jury found that two aggravating factors existed and sentenced the defendant to death.⁹⁵

88. *Woodson*, 428 U.S. at 302–03 (plurality opinion). The Court referenced a study conducted by a special commission of the State of North Carolina that revealed that juries were often unwilling to convict a defendant of first-degree murder knowing the severity of the resultant punishment of death. *Id.* at 302 (plurality opinion) (citing Report of the Special Commission For the Improvement of the Administration of Justice, North Carolina, Popular Government 13 (Jan. 1949)). Furthermore, the Court noted that juries in North Carolina imposed death sentences in only a small number of first-degree murder cases. *Id.* (plurality opinion).

89. Harris, *supra* note 46, at 1400. *Woodson* invalidated only those statutes that dictated mandatory sentencing for certain capital offenses. *Id.*

90. *Id.* at 1401. Harris refers to the Court's decision to uphold the constitutionality of Georgia's use of aggravating and mitigating factors to determine whether to impose the death penalty in *Gregg v. Georgia* to support his assertion that the Court's decision approved death penalty statutes that balanced aggravating and mitigating factors. *Id.*

91. *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). The Court decided both cases on July 2, 1976. Carrie A. Dannenfelser, Note, *Burch v. State: Maintaining the Jury's Traditional Role as the Voice of the Community in Capital Punishment Cases*, 60 MD. L. REV. 417, 423 (2001).

92. *Gregg*, 428 U.S. at 207 (plurality opinion). The same day that the Court decided *Gregg*, it rendered approval for similar death statutes in two companion cases. See *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (ruling that Texas's capital sentencing statute, requiring juries to answer specific questions before sentencing a defendant to death, satisfied the Eighth Amendment); *Proffitt v. Florida*, 428 U.S. 242, 259 (1976) (holding as constitutional a Florida death penalty statute that required both an advisory jury verdict and an ultimate sentence by a trial judge to be determined based upon the finding of aggravating and mitigating factors).

93. *Gregg*, 428 U.S. at 161–62 (plurality opinion). In a particularly heinous crime, defendant Tony Gregg shot and killed two traveling companions, Fred Simmons and Bob Moore, and then robbed the victims of their valuables. *Id.* at 159 (plurality opinion).

94. *Id.* at 161–62 (plurality opinion) (citing GA. CODE ANN. § 26-2401 (1975)). The trial judge instructed the jury that it must determine the existence of one of three aggravating factors in order to sentence Gregg to death. *Id.* at 160–61 (plurality opinion). The judge announced the three factors:

“One—That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore].

In a plurality decision, the Court upheld the constitutionality of Georgia's death penalty statute.⁹⁶ The Court reaffirmed the principle of the unique nature of the death penalty originally discussed in *Furman*.⁹⁷ The Court found that Georgia's provision for sentencing bodies to consider aggravating and mitigating factors protected a defendant from receiving an arbitrary sentence and thereby ensured due process.⁹⁸ In so doing, the Court rejected the petitioner's argument that the Georgia statute was overly broad and allowed for arbitrary and capricious decisions on the part of juries.⁹⁹ Ultimately, the Court decided that the procedural safeguards implemented in the Georgia statute distinguished it from the mandatory sentencing statute at issue in *Woodson*.¹⁰⁰

3. The Constitutional Allowance for Jury Override

Although *Furman* and *Woodson* established the requirement that a sentencing body weigh aggravating and mitigating factors to determine the imposition of the death penalty, the right to a jury determination of

Two—That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.

Three—The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [sic] involved the depravity of [the] mind of the defendant.”

Id. at 161 (plurality opinion) (quoting the trial judge). The judge also instructed the jury that it could consider any facts or evidence offered in mitigation. *Id.* (plurality opinion).

95. *Id.* at 161 (plurality opinion). The jury found that the defendant committed the murders in the midst of an armed robbery. *Id.* (plurality opinion). The jury also found that the defendant committed the murders with the goal of pecuniary gain. *Id.* (plurality opinion).

96. *Id.* at 207 (plurality opinion).

97. *Id.* at 188 (plurality opinion); see *supra* note 74 and accompanying text (discussing the Court's recognition in *Furman* that death is different from all other punishments allowed under the American criminal justice system).

98. *Gregg*, 428 U.S. at 206 (plurality opinion). The Court distinguished Georgia's present death penalty statute from the statute in question in *Furman*, which, in the absence of guided discretion, allowed for juries to impose the death penalty in a “freakish” manner. *Id.* (plurality opinion).

99. *Id.* at 200 (plurality opinion). Although the petitioner did not claim that the aggravating circumstances put forth in his case were overly broad, he claimed as vague the seventh factor listed in Georgia's death penalty statute. *Id.* at 200–01 (plurality opinion). Georgia's seventh aggravating factor referred to a murder that was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.” *Id.* at 201 (plurality opinion) (citing GA. CODE ANN. § 26-2401 (1975)). The petitioner argued that any murder necessarily involved depravity of mind and aggravated battery. *Id.* (plurality opinion). The Court exercised deference toward the Supreme Court of Georgia, asserting that the mere possibility of such a statutory interpretation did not render the statute invalid. *See id.* (plurality opinion).

100. Harris, *supra* note 46, at 1401; see also *supra* notes 82–89 and accompanying text (discussing the Court's decision to strike down mandatory sentencing schemes in *Woodson*).

such factors remained uncertain.¹⁰¹ The Court did not address the proper identity of the sentencing body until eight years later in *Spaziano v. Florida*.¹⁰² The Court in *Spaziano* rejected the argument that the Sixth Amendment jury trial guarantee extended to a determination of the facts leading to the imposition of the death penalty.¹⁰³

In *Spaziano*, the Court held that the Sixth Amendment did not require that a jury to determine whether or not to impose a death sentence upon a defendant.¹⁰⁴ Under Florida's death penalty scheme, a jury determination regarding the existence of aggravating factors only provided an advisory sentence to the trial judge, in whom the state vested the final punishment determination.¹⁰⁵ After convicting the defendant in *Spaziano* of two counts of first-degree murder,¹⁰⁶ the jury weighed aggravating and mitigating factors offered by the state and the defendant and recommended that the defendant receive a life sentence.¹⁰⁷ The trial judge then conducted his own analysis of the aggravating and mitigating factors and found that the defendant's crime warranted the death penalty.¹⁰⁸ The Court affirmed Spaziano's death

101. Poulos, *A Preliminary Inquiry*, *supra* note 10, at 655. Poulos explains that those states that adopted statutes containing the aggravating and mitigating factors balancing test in response to *Furman* did so based upon the Model Penal Code's death penalty statute. *See id.* (discussing MODEL PENAL CODE § 210.6 (1980)). Although the Model Penal Code served as the model for guided discretion statutes, the commentary to the Code gave no indication regarding the Code's impact upon a defendant's right to a jury trial. *Id.*

102. *See Spaziano v. Florida*, 468 U.S. 447, 465 (1984) (holding that judicial override of a jury's life sentence determination did not violate the Sixth Amendment).

103. *Spaziano*, 468 U.S. at 459; *see also* Poulos, *A Preliminary Inquiry*, *supra* note 10, at 664 (discussing *Spaziano*).

104. *Spaziano*, 468 U.S. at 465. The majority opinion was divided into two parts. *Id.* In part one, the Court voted unanimously that the trial court judge did not violate the Sixth Amendment by refusing to instruct the jury that it may convict the defendant of a lesser offense if it could not convict him of a capital offense. *Id.* at 457. In part two, the Court refuted Spaziano's contention that Florida's allowance for judicial override violated the Sixth Amendment. *Id.* at 465.

105. *Id.* at 451. After receiving the jury's sentence recommendation, Florida required judges to conduct their own examination of the aggravating and mitigating circumstances, after which the judge had the authority to override the jury's determination if he or she reached a contrary conclusion. *Id.* (citing FLA. STAT. § 921.141(3) (1983)) (stating that a judge must conduct a balancing test regarding aggravating and mitigating factors regardless of a jury's recommendation).

106. *Spaziano*, 468 U.S. at 451. During Joseph Spaziano's trial, a witness testified that Spaziano told the witness that he had tortured and killed two women. *Id.* at 450. Spaziano showed the witness the remains of the two women, left in a garbage dump in Seminole County, Florida. *Id.* The jury was deadlocked for six hours over whether to convict Spaziano on two first-degree murder counts before the trial judge pleaded with the jury to reach a consensus. *Id.* at 450-51.

107. *Id.* at 451-52.

108. *Id.* at 452. The trial judge found that two aggravating circumstances existed: the heinous nature of the defendant's murders and the defendant's prior violent felony convictions. *Id.* The

sentence,¹⁰⁹ rejecting the argument that the Constitution requires a jury to make the ultimate decision to impose the death penalty.¹¹⁰ Although the Court recognized that a sentencing hearing resembles a trial, it concluded that the Sixth Amendment had never been extended to the determination of a convicted defendant's punishment.¹¹¹

D. The Sentencing Factors Distinction

Following *Spaziano*, the Court struggled with the question of distinguishing between elements of a crime and sentencing factors.¹¹² In *McMillan v. Pennsylvania*,¹¹³ the Court deferred to state legislatures, allowing them to determine for themselves the elements of a crime and the corresponding burden of proof.¹¹⁴ Similarly, in *Walton v. Arizona*,¹¹⁵ the Court recognized aggravating factors as mere sentencing factors that did not constitutionally require a jury determination.¹¹⁶

trial judge found the mitigating circumstances insufficient to overcome the aggravating circumstances. *See id.*

109. *Id.* at 467.

110. *Id.* at 460. The Court reasoned that a judicial override did not prove inconsistent with the dual objectives of death penalty precedent of "measured, consistent application" of the death penalty and "fairness to the accused." *Id.* at 459–60 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110–11 (1982)). Five years later, the Court reaffirmed its decision in *Spaziano*, holding that the right to a jury trial does not attach to a capital sentencing hearing. *See Hildwin v. Florida*, 490 U.S. 638, 640 (1989) (per curiam). In *Hildwin v. Florida*, the Court explained that sentencing factors arise only after adjudication of a defendant's guilt, and thus do not necessitate a jury determination in order to comply with the Sixth Amendment. *Id.* (per curiam). For a further discussion of sentencing factors, see *infra* notes 121–30 and accompanying text, which discusses the evaluation of sentencing factors in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

111. *Spaziano*, 468 U.S. at 459. The Court stated that past decisions related to death penalty legislation demonstrated a court's role in limiting both jury and judge discretion in sentencing. *Id.* at 462. In addition, the Court asserted that the mere fact that the majority of states did not allow jury override to occur did not render Florida's statute in violation of the Eighth Amendment. *Id.* at 464. In 1984, only seven out of the thirty-seven states that allowed capital sentencing delegated the sentencing authority to judges. *Id.* Of those seven states, only three allowed judges to override a jury's recommendation in making the final sentencing determination. *Id.* at 463. "Whether or not 'reasonable people' could differ over the result here, we see nothing irrational or arbitrary about the imposition of the death penalty in this case." *Id.* at 467 (quoting *Barclay v. Florida*, 463 U.S. 939, 968 (1983) (Stevens, J., concurring)).

112. *See* Huigens, *supra* note 32, at 405.

113. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

114. *Id.* at 93; *see also* Stephanie B. Stewart, Note, *Apprendi v. New Jersey: Protecting the Constitutional Rights of Criminals at Sentencing*, 49 U. KAN. L. REV. 1193, 1200 (2001) (referring to the discussion of sentencing factors in *McMillan*).

115. *Walton v. Arizona*, 497 U.S. 639, 647–48 (1990).

116. *Id.* at 647–48; *see also infra* notes 144–47 and accompanying text (discussing the Court's holding in *Walton*).

Prior to *McMillan* and *Walton*, the concept of the “sentencing factor” had received limited scrutiny.¹¹⁷ In *Williams v. New York*,¹¹⁸ for example, the Court held that a judge’s examination of factors to determine the appropriate sentence for a defendant did not violate that defendant’s right to due process.¹¹⁹ In its decision, the Court affirmed judicial sentencing discretion as a valid feature of the modern trend of indeterminate sentencing.¹²⁰ Furthermore, the Court stated that its decision would not bar any additional challenges to state sentencing procedures under the Due Process Clause.¹²¹ Yet, in *McMillan*, the Court seemed to grant unfettered discretion to the states and Congress to identify elements of crimes and establish punishments in the manner that best suited their needs.¹²²

1. Sentencing Factors and Reasonable Doubt: *McMillan v. Pennsylvania*

In *McMillan*,¹²³ the Supreme Court deferred to state legislatures and allowed them to determine the elements of a crime and the

117. See, e.g., *Specht v. Patterson*, 386 U.S. 605 (1967).

118. *Williams v. New York*, 337 U.S. 241 (1949).

119. *Id.* at 252. In determining whether to sentence a defendant to death for a murder committed during a burglary, the *Williams* trial judge relied upon a probation report that detailed the defendant’s involvement in roughly thirty burglaries. *Id.* at 244; Huigens, *supra* note 32, at 394–95. The Court upheld the judge’s discretion to use the probation report, saying that “no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant’s trial manner impressed the judge that the appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all.” *Williams*, 337 U.S. at 252.

120. *Williams*, 337 U.S. at 248–49.

121. *Id.* at 252 n.18; see also *Townsend v. Burke*, 334 U.S. 736, 741 (1949) (reversing a denial of habeas corpus as violative of the due process clause when based upon misinformation used at a defendant’s sentencing hearing).

122. Huigens, *supra* note 32, at 403; see also Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1305 (1998).

123. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). In *McMillan*, four defendants contested the five-year sentences that they received under Pennsylvania’s Mandatory Minimum Sentencing Act, 42 PA. CONS. STAT. ANN. § 9712 (West 1982). *Id.* at 82. Petitioner *McMillan* shot his victim during an argument over a debt, and a jury convicted him of aggravated assault. *Id.* Petitioner *Peterson* shot and killed her husband, and a jury found her guilty of voluntary manslaughter. *Id.* Petitioner *Dennison* shot an acquaintance, and a jury convicted him of aggravated assault. *Id.* Petitioner *Smalls* robbed a store at gunpoint, and a jury convicted him of robbery. *Id.*

At the sentencing hearing, the trial judge sentenced the defendants to terms shorter than five years, declaring the Mandatory Minimum Sentencing Act unconstitutional. *Id.* The trial judge found that using a preponderance standard to determine whether the defendant visibly possessed a firearm violated the defendant’s due process rights. *Commonwealth v. Wright*, 494 A.2d 354, 357 (Pa. 1985). The judge reasoned that visible possession of a firearm constituted an element of the crime that must be determined beyond a reasonable doubt. *Id.* The Pennsylvania Supreme

corresponding burden of proof.¹²⁴ The statute at issue in *McMillan* was Pennsylvania's Mandatory Minimum Sentencing Act,¹²⁵ which required a mandatory minimum sentence of five years upon a defendant's conviction for certain enumerated felonies if the prosecution proved that the defendant "visibly possessed a firearm" during commission of the crime.¹²⁶ At the post-trial sentencing hearing, the State possessed the burden of proving visible possession of a firearm by a mere preponderance of the evidence.¹²⁷

Court overruled the trial judge's decisions, holding that the Act conformed with due process guarantees. *Id.* at 362-63. The Pennsylvania Supreme Court observed that the Mandatory Minimum Sentencing Act expressly provided that visible possession is not an element of the crime with which the state charges the defendant. *Id.* at 359. Furthermore, the Court explained that the reasonable doubt standard must be applied only when the State defines a certain factor as an element of the offense. *McMillan*, 477 U.S. at 84; *see also* *Patterson v. New York*, 432 U.S. 197, 211 (1977) ("The applicability of the reasonable doubt standard, however, has been dependent on how a State defines the offense that is charged in any given case.").

124. *McMillan*, 477 U.S. at 82-84; *see also* Stewart, *supra* note 114, at 1200 (referring to the discussion of sentencing factors in *McMillan*). Justice Marshall and Justice Stevens dissented from the Court's decision in *McMillan*. *McMillan*, 477 U.S. at 93 (Marshall, J., dissenting); *id.* at 95 (Stevens, J., dissenting). Justice Brennan and Justice Blackmun joined Justice Marshall in his dissent. *Id.* at 93-94 (Marshall, J., dissenting). In their respective dissents, Justice Marshall and Justice Stevens contended that the majority created a precedent in contravention of *Winship* in which a state could merely designate certain facts as sentencing factors in order to avoid the reasonable doubt standard. *Id.* at 93-94 (Marshall, J., dissenting); *id.* at 102 (Stevens, J., dissenting). Although Justice Marshall believed that democratic processes would keep state legislatures in check, he stated:

[T]his Court nonetheless must remain ready to enforce [the guarantee that all elements of a defendant's crime receive adjudication beyond a reasonable doubt] should the State, by placing upon the defendant the burden of proving certain mitigating facts, effectively lighten the burden of the prosecution with respect to the elements of the crime.

Id. at 94 (Marshall, J., dissenting). Similarly, Justice Stevens worried that the majority's decision, if abused by the states, threatened to "demean the Constitution." *Id.* at 102 (Stevens, J., dissenting). Both dissents acknowledged the fact that *Winship* previously rejected the formalism now advocated by the majority. Huigens, *supra* note 32, at 397; *see also* *McMillan*, 477 U.S. at 94 (Marshall, J., dissenting) ("I would not, however, rely in this case on the formalistic distinction between aggravating facts."); *id.* at 102 (Stevens, J., dissenting) ("It would demean the importance of the reasonable-doubt standard . . . if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an 'element' of a crime."). The *McMillan* dissenters asserted the simple argument that any fact used to determine a punishment must be shown beyond a reasonable doubt. *See* *McMillan*, 477 U.S. at 93 (Marshall, J., dissenting) (asserting that the determination of whether a fact requires proof beyond a reasonable doubt "cannot be abdicated to the States," and is a question for the Court alone to decide); *id.* at 99 (Stevens, J., dissenting) (invoking the Due Process Clause protection for "conduct which exposes a criminal defendant to greater stigma or punishment").

125. 42 PA. CONS. STAT. ANN. § 9712 (West 1982).

126. *McMillan*, 477 U.S. at 81 (citing section 9712 of the Mandatory Sentencing Act).

127. *Id.* (citing section 9712 of the Mandatory Sentencing Act).

The *McMillan* Court rejected the argument that the state must prove visible possession of a firearm beyond a reasonable doubt.¹²⁸ The Court found that the Pennsylvania statute limited a sentencing body's discretion in imposing a sentence within the statutory range by increasing the minimum term of imprisonment in the event of a particular finding.¹²⁹ The Court determined that the Pennsylvania statute did not create any separate offense that would require a finding of visible possession of a firearm beyond a reasonable doubt.¹³⁰ In addition, the Court determined that the statute did not increase the maximum penalty for the crimes committed by a defendant.¹³¹ The Court, however, left the door open to reverse that determination when it concluded that the constitutionality of future statutes would depend upon the specifics of the particular statute at issue.¹³²

2. Sentencing Factors and the Death Penalty: *Walton v. Arizona*

The Court's decision in *McMillan* seemed to leave questions unanswered regarding the factors of a crime that would lead to a sentence enhancement.¹³³ *Walton v. Arizona* firmly answered those

128. *Id.* at 84–91. The majority stressed that when the state connects the “severity of the punishment” to “the presence or absence of an identified fact,” it is not necessary to employ the reasonable doubt standard. *Id.* at 84 (quoting *Patterson*, 432 U.S. at 214).

129. *Id.* at 88 (citing section 9712 of the Mandatory Sentencing Act). The majority, in a famous analogy, asserted: “The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.” *Id.* at 88; see also *United States v. Murray*, 67 F.3d 687, 690 (8th Cir. 1995) (noting the dangers inherent in using a preponderance standard when determining sentencing enhancement factors); *United States v. Mobley*, 956 F.2d 450, 456 (3d Cir. 1992) (stating that sentencing enhancers that have a “disproportionate impact on the sentence” constitute elements of an offense in reality).

130. *McMillan*, 477 U.S. at 88.

131. *Id.* at 87–88. The Court stressed that sentencing courts have traditionally been allowed the discretion to decide the existence of sentencing factors without regard to a standard of proof. *Id.* at 91; see also *Williams v. New York*, 337 U.S. 241, 247–48 (1949) (noting that, in New York, judges determined “the type and extent of punishment”).

132. *McMillan*, 477 U.S. at 91. The majority noted that it had failed to create a “bright line” test that would guide future court decisions. *Id.* Furthermore, the majority insisted that, despite its decision, “there are constitutional limits to the State’s power in this regard.” *Id.* at 86. Some commentators recognized that the Court left the unresolved issue of whether a defendant’s right to a jury trial included the determination of facts leading to an enhanced sentence. See, e.g., White, *supra* note 27, at 26.

133. White, *supra* note 27, at 26. In the wake of *McMillan*, Welsh White sought to remedy the problem through a variety of approaches. *Id.* at 25. One approach advocated labeling any facts that led to the enhancement of a defendant’s sentence as elements of a new and separate offense. *Id.* A similar approach emerged in the majority decision in *Apprendi v. United States* fourteen years later. See *infra* notes 170–94 and accompanying text (discussing the majority opinion in *Apprendi v. United States*, 530 U.S. 466 (2000)).

questions.¹³⁴ In *Walton*, a defendant who had been sentenced to death under Arizona law challenged Arizona's death penalty statute on the basis of a constitutional right to a jury determination of his sentence.¹³⁵ In 1973, the State of Arizona enacted the sentencing scheme¹³⁶ at issue in *Walton* in response to the Court's invalidation of state death penalties in *Furman*.¹³⁷ Under Arizona law, any first-degree murder¹³⁸

134. See *infra* notes 135–51 and accompanying text (discussing the Court's holding in *Walton*).

135. *Walton v. Arizona*, 497 U.S. 639, 647 (1990). During an attempted robbery, Jeffrey Walton and two other men forced an off-duty Marine into his car, drove him out into the middle of the desert, and shot him. *Id.* at 644. According to the Court, Walton and the two co-defendants, Robert Hoover and Sharold Ramsey, intended to find an individual at a Tucson bar, rob him, drive him out into the middle of the desert, and leave him there while they took his car. *Id.* The three men selected Thomas Powell, an off-duty marine, and robbed him at gunpoint. *Id.* After robbing Powell, the men drove to a desert area outside of Tucson. *Id.* Walton motioned Powell out of the car, led him away from the highway, forced him to lie down on the ground, and shot him in the head. *Id.* Powell lived, but died nearly a week later from dehydration, starvation, and pneumonia incurred while trying to remain alive in the desert. *Id.* at 644–45.

A jury convicted Walton of first-degree murder, triggering a separate sentencing hearing. *Id.* at 645. The trial judge found the existence of two aggravating circumstances, yet did not find sufficient mitigating circumstances and, therefore, sentenced Walton to death. *Id.* The judge determined that Walton had acted “in an especially heinous, cruel or depraved manner” and that Walton committed the murder in search of pecuniary gain. *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-703(F)(5) to (6) (1989)).

Walton offered mitigating evidence of a long history of substance abuse that impaired his judgment the night of the murder, and the judge considered the fact that Walton was only twenty-years-old. *Id.* The judge, however, ultimately decided that these factors did not outweigh the aggravating factors to the extent that he could not impose the death penalty. *Id.*

136. Mark Vilaboy, *Playing the Apprendi Card: Revisiting Judicial Fact-Finding in Arizona's Death Penalty Scheme*, 33 ARIZ. ST. L.J. 363, 366 (2001); see also Act of May 14, 1973, ch. 138, § 5, 1973 Ariz. Sess. Laws 966 (codified at ARIZ. REV. STAT. § 13-703 (2002)) (containing Arizona's sentencing procedure for defendant convicted of first-degree murder).

137. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (holding unfettered discretionary death sentencing schemes as unconstitutional); see also *supra* notes 66–80 and accompanying text (discussing the Supreme Court's decision in *Furman*).

138. In Arizona, first-degree murder is defined as:

1. Intending or knowing that the person's conduct will cause death, the person causes the death of another with premeditation.

2. Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under section 13-1405, sexual assault under section 13-1406, molestation of a child under section 13-1410, terrorism under section 13-2308.01, marijuana offenses under section 13-3405, subsection A, paragraph 4, dangerous drug offenses under section 13-3407, subsection A, paragraphs 4 and 7, narcotics offenses under section 13-3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under section 13-3409, kidnapping under section 13-1304, burglary under section 13-1506, 13-1507 or 13-1508, arson under section 13-1703 or 13-1704, robbery under section 13-1902, 13-1903 or 13-1904, escape under section 13-2503 or 13-2504, child abuse under section 13-3623, subsection A, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under section 28-622.01 and in the course of and in furtherance of the offense or

conviction exposes a defendant to the possibility of receiving the death penalty.¹³⁹ Although the jury determined the guilt or innocence of a defendant with respect to a first-degree murder charge, the judge determined the sentence upon conviction during a separate sentencing hearing.¹⁴⁰ During that separate hearing, Arizona law requires the judge alone to determine the existence of aggravating and mitigating circumstances offered by both parties.¹⁴¹ Although the statute limits

immediate flight from the offense, the person or another person causes the death of any person.

3. Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

ARIZ. REV. STAT. § 13-1105(A)(1)-(3) (1989).

139. See Vilaboy, *supra* note 136, at 366. See section 13-703(A) of the Arizona code, which states:

A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life or natural life as determined and in accordance with the procedures provided in § 13-703.01. A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis. If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age.

ARIZ. REV. STAT. § 13-703(A).

140. ARIZ. REV. STAT. § 13-703(B), *amended by* ARIZ. REV. STAT. § 13-703.91 (2002). The statute demanded that a "separate sentencing hearing" occur "before the court alone." *Id.* Furthermore, the statute requires the trial judge to "make all factual determinations" regarding a convicted defendant's sentence. *Id.*

141. *Id.* § 13-703(G). The statute listed ten circumstances that constituted aggravating factors:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a serious offense, whether preparatory or completed.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, that were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.

judicial consideration of aggravating factors to those enumerated in the statute, the trial judge can consider any mitigating factors offered by the defense during the hearing.¹⁴² In order to sentence the defendant to death, the judge had to find that at least one aggravating circumstance existed and that any mitigating circumstances did not sufficiently justify reduction of the sentence to life in prison.¹⁴³

In considering Arizona's death scheme, the Court held that the Sixth Amendment did not require a jury determination regarding whether or not to impose the death penalty.¹⁴⁴ The Court stated that aggravating factors did not constitute elements of an offense and that, therefore, a jury need not determine their existence beyond a reasonable doubt.¹⁴⁵ Instead, the Court asserted that aggravating circumstances act as sentencing guides as opposed to separate offenses.¹⁴⁶ A determination that certain aggravating factors existed does not themselves convict defendants, thus permitting a judge to properly make that determination.¹⁴⁷

In a vehement dissent, Justice Stevens asserted that capital defendants have the right to a jury determination of their sentences that proved predictive of future decisions.¹⁴⁸ Justice Stevens argued that, based upon the original intentions of the jury system, the Sixth Amendment protected defendants at the sentencing stage.¹⁴⁹ Additionally, Justice

10. The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

Id.

142. See Vilaboy, *supra* note 136, at 377 (referring to ARIZ. REV. STAT. § 13-703(G)). The statute provides that mitigating factors are "any factors" that would serve to reduce the defendant's sentence to "less than death." ARIZ. REV. STAT. § 13-703(H).

143. ARIZ. REV. STAT. § 13-703(E). The court may not impose the death penalty if there exist an mitigating factors "sufficiently substantial to call for leniency." *Id.*

144. *Walton v. Arizona*, 497 U.S. 639, 647 (1990). Four years earlier, the Court struck down a similar challenge to Arizona's death penalty statute. See *Poland v. Arizona*, 476 U.S. 147, 156-57 (1986).

145. *Walton*, 497 U.S. at 648.

146. *Id.* (quoting *Poland*, 476 U.S. at 156). In *Poland v. Arizona*, the Court referred to aggravating circumstances as "standards to guide" the decision to impose a death sentence. *Poland*, 476 U.S. at 156.

147. *Walton*, 497 U.S. at 648.

148. *Id.* at 708-19 (Stevens, J., dissenting). No other justice joined Justice Stevens in his dissent. *Id.* at 708 (Stevens, J., dissenting); see also *infra* Part II.E (discussing the Court's requirement of a jury determination of sentencing factors in its holdings in *Jones* and *Apprendi*, whose arguments mirror those made by Justice Stevens's dissent in *Walton*).

149. *Walton*, 497 U.S. at 710-11 (Stevens, J., dissenting). Justice Stevens referred to the jury system in place in England at the time the framers enacted the Bill of Rights. *Id.* (Stevens, J., dissenting). Justice Stevens asserted that "the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established." *Id.* at

Stevens recognized the necessity of jury determinations to shield defendants from uncertainties embodied by single-minded prosecutors and unpredictable judges.¹⁵⁰ Despite Justice Stevens's concerns, *Walton* seemed to represent a continued application of the Court's objective to prevent the imposition of arbitrary sentences by juries.¹⁵¹ A later change in the Court's Sixth Amendment analysis, however, placed the *Walton* decision in a precarious position.¹⁵²

E. *The Maximum Punishment Test and Jury Determination*

After *Walton*, the Court issued decisions regarding statutory interpretation that effectively ended the sentencing factors distinction in non-capital cases.¹⁵³ Through its opinions in *Jones v. United States*¹⁵⁴ and *Apprendi v. New Jersey*,¹⁵⁵ the Court established the constitutional requirement of a jury determination for any fact that increases the maximum penalty for a defendant's crime.¹⁵⁶

1. *Jones v. United States* and the Creation of the Maximum Punishment Test

In *Jones v. United States*, the Court created a maximum punishment test¹⁵⁷ under which future federal statutes that serve as sentence

711 (Stevens, J., dissenting) (emphasis omitted). Justice Stevens insisted that the framers knew of this role played by the jury when they adopted the Bill of Rights. *Id.* at 711 (Stevens, J., dissenting).

150. *See id.* at 712–13 (Stevens, J., dissenting). “Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” *Id.* (Stevens, J., dissenting).

151. Susie Cho, Comment, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 538 (1994); *see also* Booth v. Maryland, 482 U.S. 496 (1987) (holding that victim impact statements may not be introduced in the sentencing phase of capital cases because of their inflammatory impact upon juries); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (overturning a capital defendant's death sentence that resulted from “caprice and emotion” on the part of the jury); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (invalidating all death penalty statutes that granted unfettered discretion to sentencing bodies). Due to the finality of death, the allowance for arbitrary decisions by juries would deny a defendant “super due process” rights necessary when faced with a capital proceeding. Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1148–50 (1980).

152. *See infra* Part II.E (discussing the Court's decisions in *Jones* and *Apprendi*).

153. *See* Huigens, *supra* note 32, at 400. Huigens comments that the “tide turned” from the *McMillan* decision when the Court conducted statutory interpretations in *Jones* and *Apprendi*. *Id.*

154. *Jones v. United States*, 526 U.S. 227 (1999).

155. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

156. Huigens, *supra* note 32, at 400.

157. Stewart, *supra* note 114, at 1200 (referring to the Court's approach as the “maximum penalty test”); *see also Jones*, 526 U.S. at 252 (announcing that sentencing enhancers constituted separate and distinct elements of a defendant's crime).

enhancers would be viewed as containing separate offenses.¹⁵⁸ The Court interpreted the federal carjacking statute,¹⁵⁹ under which anyone found guilty of carjacking could receive a term of up to fifteen years in prison.¹⁶⁰ Serious bodily injury to a victim in the midst of the crime, however, subjects a carjacker to a maximum of twenty-five years.¹⁶¹ A victim's death exposes the carjacker to a life sentence or death.¹⁶²

158. *Jones*, 526 U.S. at 252; *see also* Stewart, *supra* note 114, at 1200 (explaining that the Court divided the three separate scenarios in New Jersey's hate crime statute into three separate offenses); *see also infra* note 161 (presenting the three levels of culpability contained in New Jersey's Hate Crime Statute).

159. 18 U.S.C. § 2119 (1988), *amended by* Act of Sept. 13, 1994, Pub. L. No. 103-322, 108 Stat. 1970.

160. *Jones*, 526 U.S. at 230–52 (discussing the various components and application of the federal carjacking statute); *see also* 18 U.S.C. § 2119 (providing for a prison term of up to fifteen years for carjacking). According to the statute, a carjacking occurs when “whoever, possessing a firearm as defined in section 921 of [Title 18], takes a motor vehicle that has been transported . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so.” *Id.*

161. *See* 18 U.S.C. § 2119. The statute reads:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

(1) be fined under this title or imprisoned not more than 15 years, or both

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

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

18 U.S.C. § 2119 (2000).

162. 18 U.S.C. § 2119 (2000). In *Jones*, the defendant's carjacking attempt resulted in the victim sustaining serious injuries to his ear. *Jones*, 526 U.S. at 231. While carjacking the vehicle that belonged to the victim Mutanna, the defendant, Nathaniel Jones, stuck his gun in Mutanna's left ear, and also struck him in the head. *Id.* The defendant was charged under the federal carjacking statute, was informed that he faced a fifteen-year prison sentence, and subsequently was convicted by a jury. *Id.* at 230–31. During the arraignment, a New Jersey magistrate judge informed Jones that he would receive a maximum of fifteen years in prison. *Id.* at 231. At the defendant's sentencing hearing, a pre-sentencing report emerged that detailed the extent of the victim's injuries, and recommended that the defendant receive a twenty-five year sentence for causing serious bodily injury. *Id.* at 231. Jones's pre-sentencing report later revealed that Mutanna had sustained a perforated eardrum, numbness in the ear, and permanent hearing loss. *Id.* Despite the defendant's objection that serious bodily injury comprised an element of the carjacking offense, and as such required a jury determination, the district court imposed a twenty-five year sentence upon the defendant. *Id.* at 231. Jones also received a five-year sentence for his violation of federal firearms law, 18 U.S.C. § 924(c) (1988), *amended by* 18 U.S.C. 924(c) (2000). *Id.*

Writing for the majority,¹⁶³ Justice Souter stressed that a difference existed between sentencing factors and elements of a crime.¹⁶⁴ The majority questioned its earlier holding in *McMillan*,¹⁶⁵ stating that the Sixth Amendment right to a jury trial and the Fifth Amendment right to due process required that any fact that increased the maximum penalty for a crime must be submitted to a jury.¹⁶⁶ The Court stated that although the provisions of the carjacking statute related to serious bodily harm and death appeared at first glance to be mere sentencing provisions, the severity of the enhanced penalties rendered that conclusion questionable.¹⁶⁷ In order to avoid such a questionable conclusion, the Court created a “maximum punishment test” to gauge whether a sentence enhancer should be treated as an element of a crime.¹⁶⁸ The Court held that all sentence enhancers, or factors that raise the maximum punishment available for a crime, constitute separate offenses whose elements must receive a jury determination beyond a reasonable doubt.¹⁶⁹

2. *Apprendi v. New Jersey*: Extension of the Maximum Punishment Test to State Legislation

One year after its decision in *Jones*, the Court applied this maximum punishment test to state legislation in *Apprendi v. New Jersey*.¹⁷⁰ In a

163. In a 5-4 decision, Justice Stevens, Justice Scalia, Justice Thomas, and Justice Ginsburg joined Justice Souter’s majority opinion. *Jones*, 526 U.S. at 229–52. Justice Rehnquist, Justice O’Connor, and Justice Breyer joined in Justice Kennedy’s dissent. *Id.* at 254–72 (Kennedy, J., dissenting).

164. *Id.* at 232. The Court stressed the importance of the distinction between sentencing factors and elements of a crime because elements of a crime must be charged in an indictment, proven beyond a reasonable doubt, and ultimately submitted to a jury. *Id.*; see, e.g., *United States v. Gaudin*, 515 U.S. 506, 509–10 (1995); *Hamling v. United States*, 418 U.S. 87, 117 (1974).

165. See *supra* notes 125–33 and accompanying text (discussing the Court’s ruling in *McMillan* that the Sixth Amendment did not require a jury determination of sentencing factors).

166. *Jones*, 526 U.S. at 243 n.6. The majority further required that such a fact must be charged in the indictment and proved beyond a reasonable doubt by the government. *Id.* The Court indicated that prior decisions did not establish this principle, but did allude to it. *Id.*

167. *Id.* at 232–33. By contrast, Justice Kennedy’s dissent expressed concern over the majority raising an issue of constitutional doubt in the face of stare decisis. *Id.* at 254 (Kennedy, J., dissenting). Justice Kennedy argued that reasonable doubt jurisprudence established clear guidelines regarding those factors that must be found by a jury beyond a reasonable doubt. See *id.* at 264–65 (Kennedy, J., dissenting); see also *supra* notes 30–42 and accompanying text (discussing the reasonable doubt standard in relation to the Sixth Amendment right to a jury trial).

168. *Jones*, U.S. at 251–52.

169. *Id.*

170. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see also Stewart, *supra* note 114, at 1200 (discussing the sentencing enhancements at issue in *Apprendi*).

divided opinion,¹⁷¹ the Court held, in accordance with *Jones*, that any factor that increases a defendant's penalty beyond the statutory maximum, other than a record of a prior conviction, must be determined by a jury and proven beyond a reasonable doubt.¹⁷² Writing for the majority, Justice Stevens indicated an intent to preserve the traditional structure of criminal law.¹⁷³ In its analysis, the majority emphasized that judges have always retained the discretion to sentence a defendant within a statutorily prescribed range of sentences.¹⁷⁴

In *Apprendi*, the defendant pled guilty to three counts of weapons possession, a second-degree offense, after he was arrested for firing several shots into the home of an African American family.¹⁷⁵ Under New Jersey's "hate crime" statute,¹⁷⁶ evidence demonstrating that a

171. Justices Stevens, Scalia, Souter, Thomas, and Ginsburg comprised the majority. *Apprendi*, 530 U.S. at 468. Justice Scalia wrote a concurring opinion responding to a dissent raised by Justice Breyer. *Id.* at 498–99 (Scalia, J., concurring). Justice Thomas also wrote a concurrence, which Justice Scalia joined in part. *Id.* at 499–523 (Thomas, J., concurring). Justice O'Connor wrote a dissent, which Chief Justice Rehnquist and Justices Kennedy and Breyer joined. *Id.* at 523–54 (O'Connor, J., dissenting). Finally, Justice Breyer included a dissent, which Chief Justice Rehnquist joined. *Id.* at 55–56 (Breyer, J., dissenting). This split is identical to the vote break down in *Jones*. *Levine, supra* note 38, at 403 n.165.

172. *Apprendi*, 530 U.S. at 490. The holding exempted records of a prior conviction due to the Court's decision two years earlier in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In *Almendarez-Torres*, the Court conducted a statutory interpretation of 8 U.S.C. § 1326, which imposed a twenty-year sentence upon any alien deported subsequent to an aggravated felony who later returned to the country. *Almendarez-Torres*, 523 U.S. at 226 (citing 8 U.S.C. § 1326(b)(2) (1988), amended by 8 U.S.C. § 1326(b)(2) (West Supp. 2002)). In lieu of an aggravated felony conviction, a deported alien receives a two-year sentence for returning to American soil. 8 U.S.C. § 1326(b)(2) (1988). The Court asserted that no precedent called for the treatment of the fact of recidivism as an element of the crime. *Almendarez-Torres*, 523 U.S. at 239.

173. *Apprendi*, 530 U.S. at 477; see also Huigens, *supra* note 32, at 402 (noting the Court's goal to "preserve the traditional normative architecture of the criminal law").

174. See *Apprendi*, 530 U.S. at 481; see also *Williams v. New York*, 337 U.S. 241, 246 (1949) ("Both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."); Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L. REV. 715 (1942) (discussing the evolution of sentencing ranges in the United States).

175. *Apprendi*, 530 U.S. at 469–70. Apprendi fired shots into the home of an African American family at two in the morning on December 22, 1994. *Id.* at 469. One hour later, police arrested Apprendi, at which time he admitted to shooting at the house. *Id.* During further questioning, Apprendi admitted that he shot at the house because he knew the occupants were African American, and he expressed his displeasure with the family living in the predominantly white neighborhood. *Id.*

176. N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000). According to the statute, a hate crime is committed when "the defendant in committing the crime acted . . . with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.*

defendant committed a crime based upon animus toward a particular group resulted in a ten to twenty year prison term upon conviction for a second-degree offense.¹⁷⁷ Without the hate crime enhancement, second-degree weapons possession carried a sentence of five to ten years.¹⁷⁸ After Apprendi pled guilty to the weapons possession charge, the trial judge held an evidentiary hearing to determine the purpose behind Apprendi's shooting.¹⁷⁹ The trial judge found by a preponderance of the evidence that Apprendi shot into the house to intimidate the African American family and sentenced Apprendi to twelve years in prison on the weapons possession charge.¹⁸⁰

On Apprendi's appeal to the United States Supreme Court, the State of New Jersey defended its hate crime enhancement statute by arguing that it required the finding of a sentencing factor as opposed to an element of the crime.¹⁸¹ The Court rejected this argument, asserting that the proper inquiry would examine the effect, instead of the form, of an affirmative finding of the sentencing factor at issue.¹⁸² The Court stated that the effect of the sentencing enhancement in this case turned a second-degree offense into a first-degree offense under New Jersey law.¹⁸³ The majority also distinguished *McMillan*,¹⁸⁴ finding that Apprendi's potential sentence with the judicial finding of a biased justification differed substantially from a sentence lacking the finding of bias.¹⁸⁵ Thus, the majority determined New Jersey's procedure of

177. See N.J. STAT. ANN. § 2C:43-7(a)(2) (West Supp. 2000). After a defendant is convicted of one of the enumerated crimes in N.J. Stat. Ann. § 2C:44-3, that defendant is sentenced, "[e]xcept for the crime of murder and except as provided in paragraph (1) of this subsection, in the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 20 years and life imprisonment." *Id.*

178. N.J. STAT. ANN. § 2C:39-4(a) (West 1995). "Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree." *Id.*

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

180. *Id.* at 471.

181. *Id.* at 492.

182. *Id.* at 494. The Court recognized that the labels placed upon facts themselves do not answer the question regarding the appropriate procedural safeguards. *Id.*; see also *State v. Apprendi*, 731 A.2d 485, 492 (N.J. 1999) ("[L]abels do not afford an acceptable answer."), *rev'd*, 530 U.S. 466 (2000).

183. *Apprendi*, 530 U.S. at 494. The New Jersey Supreme Court earlier noted that proof of a motive did not normally "increase the penal consequences to an actor." *Apprendi*, 731 A.2d at 492.

184. *Apprendi*, 530 U.S. at 494; *McMillan v. Pennsylvania*, 477 U.S. 79, 96-98 (1986) (Stevens, J., dissenting); see also *supra* notes 123-33 and accompanying text (discussing the Court's holding in *McMillan*).

185. *Apprendi*, 530 U.S. at 495. The Court acknowledged that the penalty differential did not reach the discrepancy of a small fine versus mandatory life imprisonment. *Id.* (referring to the difference in potential sentences noted in *Mullaney v. Wilbur*, 421 U.S. 684, 700 (1975)).

applying its hate crime statute to be an unconstitutional departure from a defendant's right to a jury trial.¹⁸⁶

Two dissenting justices in *Apprendi* disagreed that the Constitution required a jury determination of sentence enhancing facts.¹⁸⁷ Justice O'Connor's dissent pointed to the Court's past holdings that deferred to states in defining the elements of criminal offenses.¹⁸⁸ Justice O'Connor criticized the majority's use of the maximum punishment test because it contradicted the Court's decision in *Walton*.¹⁸⁹ Similarly, Justice Breyer argued that classifying certain factors as sentencing factors instead of elements of the crime served a practical purpose.¹⁹⁰ He asserted that the distinction between sentencing factors and elements made an otherwise unworkable criminal system workable.¹⁹¹

Notably, the Court declined to overrule *Walton*, differentiating between "hate crime" sentence enhancers and the determination of

Nevertheless, the increased term of years behind bars, coupled with the accompanying social stigma, created far more than a "nominal effect." *Id.*

186. *See id.* at 497. The Court criticized the New Jersey statute as "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Id.*

187. *See id.* at 523-54 (O'Connor, J., dissenting); *id.* at 555-66 (Breyer, J., dissenting).

188. *Id.* at 524 (O'Connor, J., dissenting); *see McMillan*, 477 U.S. at 85 (stating that the "legislature's definition of the elements of the offense is usually dispositive"); *see also* *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) (examining "the statute's language, structure, subject matter, context and history" in order to determine a state's intent in enacting legislation); *Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977) ("The applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case.").

189. *Apprendi*, 530 U.S. at 536 (O'Connor, J., dissenting). Justice O'Connor questioned the Court's logic of permitting states to remove the factual determination of whether to impose the death penalty from the jury yet requiring juries to determine a ten-year sentence increase. *Id.* at 537 (O'Connor, J., dissenting). Justice O'Connor further insisted that "a defendant in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." *Id.* at 538 (O'Connor, J., dissenting).

190. *Apprendi*, 530 U.S. at 556-57 (Breyer, J., dissenting); Huigens, *supra* note 32, at 409 (arguing against a categorical approach to reconciling the difference between sentencing factors and elements based upon Justice Breyer's dissent in *Apprendi*). Justice Breyer argued that requiring juries to determine all factors that would relate to sentencing would put defendants in the unenviable position of denying that he committed a crime yet proving how he committed the same crime. *Apprendi*, 530 U.S. at 557 (Breyer, J., dissenting). Justice Breyer offered the example of a defendant denying that he sold drugs but then affirming that he sold less than five hundred grams. *Id.* (Breyer, J., dissenting).

191. *Apprendi*, 530 U.S. at 557 (Breyer, J., dissenting). Justice Breyer noted that the United States Sentencing Commission itself concluded that "a sentencing system tailored to fit every conceivable wrinkle . . . can become unworkable and seriously compromise the certainty of punishment and its deterrent effect." *Id.* (Breyer, J., dissenting) (quoting U.S. SENTENCING GUIDELINES MANUAL, Part A, at 1.2 (1987)).

death penalty aggravating factors by a judge.¹⁹² Nevertheless, *Apprendi* established the principle that any fact of fault necessitates a jury determination.¹⁹³ The next logical step, according to commentators, requires the Court to strike down any statute that allowed for a judicial determination to increase a defendant's sentence from life in prison to death.¹⁹⁴

III. DISCUSSION

In its decision in *Ring v. Arizona*, the Supreme Court affirmatively extended the Sixth Amendment guarantee of a jury determination of sentence enhancing factors to the death penalty realm.¹⁹⁵ The Court's decision in *Ring* extended the affirmation of a defendant's Sixth Amendment right to a jury determination of sentence enhancements commenced in *Apprendi*.¹⁹⁶ Although the Arizona Supreme Court upheld *Walton*'s validation of Arizona's judge-decided death sentencing scheme,¹⁹⁷ a 7-2 United States Supreme Court majority reversed *Walton*.¹⁹⁸ In addition to the majority opinion, Justice Scalia wrote a concurring opinion passionately defending a defendant's right to a jury trial.¹⁹⁹ Justice Breyer wrote a concurring opinion advocating an alternative analysis based on the Eighth Amendment.²⁰⁰ Finally, Justice

192. *Id.* at 496–97. The Court explained that death penalty jurisprudence created the rule that once a jury has found all elements of a crime that carries a maximum penalty of death, the judge may decide whether to impose death or a lesser penalty. *Id.* at 497 (citing *Almendarez-Torres*, 523 U.S. at 257 (Scalia, J., dissenting)).

193. *Huigens*, *supra* note 32, at 444. *Huigens* explains that if fault justifies punishment, and commission of a crime justifies punishment, then fault falls within the realm of an element of a crime. *Id.* So, if the commission of a crime requires a jury determination, then fault necessitates the same determination. *Id.*

194. *See, e.g.*, *Swan*, *supra* note 34, at 763–64. Because the majority in *Apprendi* found a two-year sentence enhancement to require a jury determination, the magnitude of a death sentence demanded the same constitutional protection. *See id.* Furthermore, Justice O'Connor's dissent argued that the majority improperly distinguished *Walton* when "the magnitude of the punishment" of death far exceeded the two-year enhancement at stake in *Apprendi*. *Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting).

195. *Ring v. Arizona*, 122 S. Ct. 2428, 2443 (2002).

196. *Leading Cases*, *supra* note 25, at 238.

197. *State v. Ring*, 25 P.3d 1139, 1143 (Ariz. 2001), *rev'd*, 536 U.S. 584 (2002).

198. *Ring*, 122 S. Ct. at 2443; *see also infra* Part III.C.1 (discussing the majority opinion in *Ring v. Arizona*).

199. *Ring*, 122 S. Ct. at 2443–45 (Scalia, J., concurring); *see also infra* Part III.C.2.a (discussing Justice Scalia's concurring opinion).

200. *Ring*, 122 S. Ct. at 2446–48 (Breyer, J., concurring); *see also infra* Part III.C.2.b (discussing Justice Breyer's concurring opinion).

O'Connor's dissent insisted that the Court should have overruled *Apprendi* instead of *Walton*.²⁰¹

A. Facts

On November 28, 1994, a Wells Fargo armored vehicle pulled up to a Glendale, Arizona, department store to pick up the day's receipts.²⁰² David Moss, a Wells Fargo courier, exited the vehicle to make the pick-up while his partner, John Magoch, remained in the vehicle.²⁰³ As he waited for Moss, Magoch opened the driver's side door to have a cigarette.²⁰⁴ When Magoch opened the door, Timothy Ring fired a bullet into his head.²⁰⁵ Hours later, police found the Wells Fargo vehicle in the parking lot of a church in Sun City, Arizona, with its doors locked and the engine running.²⁰⁶ Police also found Magoch dead in the vehicle with a gunshot wound to the head.²⁰⁷ A total of \$833,000 was missing from the vehicle.²⁰⁸

The State of Arizona charged Timothy Ring with murder, armed robbery, and other related offenses.²⁰⁹ At trial, the State produced evidence of an informant's tip that led police to suspect Ring of involvement in the robbery and murder.²¹⁰ Over wiretapped conversations, Ring made several statements that connected him to the

201. *Ring*, 122 S. Ct. at 2448–50 (O'Connor, J., dissenting); see also *infra* Part III.C.3 (discussing the dissenting opinion).

202. *Ring*, 122 S. Ct. at 2432.

203. *Id.*

204. *Id.* at 2435.

205. Larry Lipman, *Court Reviews Judge-Imposed Death Penalties*, ATLANTA J.-CONST., Apr. 22, 2002, at B2. As a former New Hampshire policeman, Ring possessed "championship caliber" aim with a rifle. *Id.* The Court, however, noted that nothing submitted at Ring's trial placed him at the scene of the robbery. *Ring*, 122 S. Ct. at 2434.

206. *Ring*, 122 S. Ct. at 2432–33.

207. *Id.* at 2433.

208. *Id.* Wells Fargo officials specified that \$562,000 in cash and \$271,000 in checks were missing. *Id.*

209. *Id.* at 2432. Specifically, the State of Arizona charged Ring with alternative offenses of premeditated murder and felony murder. *Id.* at 2433. Under Arizona law, an individual commits first-degree murder "if . . . acting either alone or with one or more other persons the person commits or attempts to commit . . . robbery under . . . § 13-1904 . . . and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person." ARIZ. REV. STAT. § 13-1105(A) to (B) (West 2001); see also *supra* note 138 (quoting the language of section 13-1105). Section 13-1904 pertains to robbery coupled with possession or use of a deadly weapon. ARIZ. REV. STAT. § 13-1904. The State of Arizona also charged Ring with conspiracy to commit an armed robbery, armed robbery, burglary, and theft. *State v. Ring*, 25 P.3d 1139, 1142 (Ariz. 2001), *rev'd*, 536 U.S. 584 (2002).

210. *Ring*, 122 S. Ct. at 2433. This tip also implicated Ring's accomplice, James Greenham, in the robbery. *Id.* An investigation by Glendale police revealed that Ring and Greenham made expensive purchases between December 1994 and early 1995. *Id.*

crime.²¹¹ Additionally, a search of Ring's home uncovered a duffel bag containing over \$271,000.²¹² With that evidence, a jury convicted Timothy Ring of felony murder.²¹³

Under the Arizona death penalty statute, an individual cannot be sentenced to death unless certain aggravating factors are found to exist.²¹⁴ If statutorily enumerated mitigating circumstances outweighed such factors, then the death penalty cannot be imposed.²¹⁵ Arizona grants the trial judge the sole authority to determine both aggravating and mitigating factors.²¹⁶

B. *The Lower Courts' Decisions*

At Ring's sentencing hearing, the trial judge found the existence of two aggravating factors.²¹⁷ The judge also found the existence of a non-statutorily enumerated mitigating factor but decided that it was not substantial enough to overcome the aggravating circumstances.²¹⁸

211. *Id.* at 2433. During one conversation, Ring told William Ferguson, a third man involved in the crimes, that Greenham indiscreetly flaunted a new truck to his ex-wife and had thus become "too much of a risk." *Id.* In another instance, Glendale police staged a news broadcast purportedly reporting on the robbery. *Id.* Ring phoned Ferguson to critique the many inaccuracies contained in the fake broadcast. *Id.*

212. *Id.* In addition to the cash, the police found a note with the number "575,995" written on it. *Id.* The note further contained the word "splits" and the letters "F," "Y," and "T." *Id.* During the trial, the prosecution argued that "F" stood for Ferguson, "Y" for Yoda, which was Greenham's nickname, and "T" for Timothy Ring. *Id.*

213. *Id.* The trial judge instructed the jury to determine whether Ring had committed the alternative crimes of premeditated murder and felony murder. *Id.* The jury deadlocked on the premeditated murder conviction. *Id.* The jury also convicted Ring on the related charges of armed robbery, burglary, theft, and conspiracy to commit an armed robbery. *Ring*, 25 P.3d at 1142.

214. *Ring*, 122 S. Ct. at 2434 (citing ARIZ. REV. STAT. ANN. § 13-703(F) (West 2001)). The Arizona death penalty statute at issue in *Ring* was the same statute at issue in *Walton*. See *supra* notes 136-43 and accompanying text (discussing Arizona's death penalty statute).

215. See *Ring*, 122 S. Ct. at 2434 (citing ARIZ. REV. STAT. ANN. § 13-703(F)); see also *supra* notes 136-43 and accompanying text (discussing Arizona's death penalty statute).

216. *Ring*, 122 S. Ct. at 2434 (citing ARIZ. REV. STAT. ANN. § 13-703(C), amended by ARIZ. REV. STAT. § 13-703.01 (2002)). "The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." ARIZ. REV. STAT. ANN. § 13-703(C), quoted in *Ring*, 122 S. Ct. at 2434.

217. *Ring*, 122 S. Ct. at 2435. The judge determined that Ring committed the crime under the expectation of receiving a pecuniary gain. *Id.* Additionally, the judge found that Ring committed the offense in a cruel and depraved manner. *Id.* Greenham's testimony during the sentencing hearing supported this finding because Greenham testified that Ring verbally took pride in his marksmanship ability. *Id.*

218. *Id.* at 2435-36. The trial judge cited Ring's minimal criminal record as a mitigating factor. *Id.*

Based upon these findings, the trial judge found that aggravated factors existed sufficient to warrant sentencing Ring to death.²¹⁹

Ring directly appealed his death sentence to the Arizona Supreme Court, arguing that Arizona's capital sentencing law violated the Sixth Amendment by giving judges the authority to enhance a life sentence to death.²²⁰ The Arizona Supreme Court affirmed Ring's sentence, saying that it was bound by the Supremacy Clause to uphold the United States Supreme Court's affirmation of judicially determined death sentences in *Walton*.²²¹

Although upholding the constitutionality of Arizona's death sentencing scheme,²²² the Arizona Supreme Court acknowledged that both *Jones* and *Apprendi* raised questions about the continued vitality of *Walton*.²²³ In order to reconcile the decisions, the court conducted a detailed examination of Arizona's death sentencing scheme.²²⁴ The court explained that a guilty jury verdict alone is not sufficient to expose a defendant to the death penalty.²²⁵ When the State demands the imposition of the death penalty, a separate evidentiary hearing must be held in order to determine the existence of at least one aggravating factor.²²⁶ Although the evidentiary hearing is conducted based upon evidence proffered at trial, the sentencing hearing is not heard by the jury and involves the issuance of a post-trial decision.²²⁷

Based upon all of these safeguards, the Arizona Supreme Court concluded that a first-degree murder conviction did not expose an individual to death and, therefore, did not require a jury

219. *Id.* at 2436.

220. *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001), *rev'd*, 536 U.S. 584 (2002). The State of Arizona grants an automatic appeal to the Arizona Supreme Court to any individual who receives a death sentence. ARIZ. REV. STAT. § 13-703.01 (2000).

221. *Ring*, 25 P.3d at 1152 (citing *Walton v. Arizona*, 497 U.S. 639 (1990)). The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

222. *Ring*, 25 P.3d at 1152.

223. *Id.* at 1150. Justice Feldman asserted that the broad language proffered in *Apprendi* and *Jones* invited a divergent interpretation that the two cases are limited in scope. *Id.*

224. *Id.* at 1150-51.

225. *Id.* at 1151.

226. ARIZ. REV. STAT. § 11-703(E) (2001); *Ring*, 25 P.3d at 1150; *see also* *State v. Gretzler*, 659 P.2d 1 (Ariz. 1983) (holding that Arizona's death penalty statute provided adequate constitutional protection).

227. *Ring*, 25 P.3d at 1151. Justice Feldman referred to the aggravating factors determination as a "special verdict." *Id.*; *see also* ARIZ. REV. STAT. § 11-703(D) to (E).

determination.²²⁸ As the United States Supreme Court had explicitly refused to overrule *Walton*,²²⁹ the Arizona Supreme Court concluded that the Supremacy Clause required it to follow *Walton* and uphold Ring's death sentence.²³⁰

Ring petitioned for a writ of certiorari with the United States Supreme Court, which the Court granted on January 11, 2002.²³¹ On June 25, 2002, the Court decided whether Arizona's statutory grant of complete authority to judges to determine the existence of aggravating and mitigating factors violated Ring's right to a jury trial under the Sixth Amendment.²³²

C. *The Supreme Court Decision*

In a 7-2 decision, the United States Supreme Court reversed the Arizona Supreme Court's affirmation of the constitutionality of Arizona's death penalty statute.²³³ Writing for the majority, Justice Ginsburg concluded that Arizona's use of judges to determine the existence of aggravating factors necessary to trigger the death penalty was unconstitutional and, subsequently, overruled the Court's decision in *Walton*.²³⁴ Justice Scalia concurred, affirming the vital importance of jury determinations of the death penalty in light of the fundamental nature of the Sixth Amendment right to a jury trial.²³⁵ Justice Breyer's concurrence argued that defendants facing the death penalty must have a jury determine whether death should be imposed upon the defendant under the Eighth Amendment, as opposed to the Sixth Amendment, as

228. See *Ring*, 25 P.3d at 1152; see also *Apprendi v. New Jersey*, 530 U.S. 466, 538 (2000) (O'Connor, J., dissenting) (asserting that capital defendants do not receive the death penalty until a determination of aggravating factors is made). According to the Arizona Supreme Court, a first-degree murder conviction exposes a defendant only to the aggravating and mitigating factors balancing test. *Ring*, 25 P.3d at 1152. Only upon a finding that the aggravating factors outweighed the mitigating factors is a defendant exposed to the death penalty. *Id.*

229. *Ring*, 25 P.3d at 1152; see also *Apprendi*, 530 U.S. at 496 (noting that the *Apprendi* majority refused to overrule *Walton*, despite an inability to reconcile the two decisions); *supra* note 192 and accompanying text (noting the Court's express refusal to overrule *Walton* in *Apprendi*).

230. See *Ring*, 25 P.3d at 1152. "[W]e must conclude that *Walton* is still the controlling authority and that the Arizona death-penalty scheme has not been held unconstitutional under either *Apprendi* or *Jones*." *Id.*

231. *Ring v. Arizona*, 122 S. Ct. 865 (2002) (mem.) (granting writ of certiorari).

232. *Ring v. Arizona*, 122 S. Ct. 2428, 2437 (2002).

233. *Id.* at 2443.

234. *Id.* at 2432-43; see also *infra* Part III.C.1 (discussing the majority opinion).

235. *Ring*, 122 S. Ct. at 2443-45 (Scalia, J., concurring); see also *infra* Part III.C.2.a (discussing Justice Scalia's concurring opinion).

held in *Apprendi*.²³⁶ Finally, Justice O'Connor's dissent argued to overrule *Apprendi*, instead of *Walton*, and predicted that the Court's decision would place tremendous strains upon state and federal courts as a result of prisoners seeking a re-examination of their death sentences.²³⁷

1. The Majority Opinion

In the *Ring* decision, the Supreme Court established that the Sixth Amendment requires a jury determination of all factors that lead to the imposition of the death penalty.²³⁸ As a result, the Court determined that Arizona's death penalty statute violated the Sixth Amendment and struck it down.²³⁹ Furthermore, by extending the right to a jury trial to the capital sentencing phase of the trial, the majority extended the sentence enhancement rule of *Apprendi* and overruled *Walton*.²⁴⁰

To begin its analysis, the majority presented the recent history of Supreme Court decisions relating to the determination of aggravating factors.²⁴¹ The majority noted that in *Walton*, the Court stated that the Sixth Amendment did not specifically require that a jury make the findings that lead to the imposition of the death penalty.²⁴² Additionally, the majority asserted that the factors at issue in *Walton* constituted "sentencing considerations" as opposed to elements of the offense that would guarantee a defendant a right to a jury determination.²⁴³ Yet, the majority indicated that an historical evaluation of the jury's role in determining whether to impose a death sentence upon a convicted murderer must be considered.²⁴⁴

236. *Ring*, 122 S. Ct. at 2446–48 (Scalia, J., concurring); see also *infra* Part III.C.2.b (discussing Justice Breyer's concurring opinion).

237. *Ring*, 122 S. Ct. at 2448–50 (O'Connor, J., dissenting); see also *infra* Part III.C.3 (discussing the dissenting opinion).

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

239. *Id.*

240. *Id.* at 2440. The majority, however, acknowledged that a state court interpretation of its own law is authoritative. *Id.*; see also *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (noting that the Supreme Court "repeatedly has held that state courts are the ultimate expositors of state law").

241. *Ring*, 122 S. Ct. at 2437–39.

242. *Id.* at 2437 (citing *Walton v. Arizona*, 497 U.S. 639 (1990)). In *Hildwin v. Florida*, the Court stated that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin v. Florida*, 490 U.S. 638, 640 (1989) (per curiam).

243. *Ring*, 122 S. Ct. at 2437 (citing *Walton*, 497 U.S. at 648).

244. See *Ring*, 122 S. Ct. at 2438 (citing Justice Stevens's dissent in *Walton*: "[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 by making factual determinations . . ." *Walton*, 497 U.S. at 709 (Stevens, J., dissenting)).

Next, the majority examined the Court's central holding in *Jones* that any fact that increased a defendant's sentence beyond the maximum penalty allowed for the crime itself must be found by a jury beyond a reasonable doubt.²⁴⁵ The majority acknowledged a distinction between *Jones* and *Walton* in that Arizona's death penalty statute required the finding of aggravating factors to trigger the maximum penalty within a sentencing range, not extending beyond that range.²⁴⁶ The majority, however, also noted that the *Jones* Court remained divided over the continued vitality of *Walton* in light of the *Jones* decision.²⁴⁷

Finally, the majority relied on the holding in *Apprendi*, in which the Court held that a jury must find, beyond a reasonable doubt, that a defendant is guilty of all elements of the crime with which he is charged.²⁴⁸ The majority asserted that, like in *Apprendi*, the key question in *Ring* was whether a defendant's exposure to an increase in punishment, if contingent on a finding of fact, must be found beyond a reasonable doubt.²⁴⁹ That is, the Court should examine the effect, as opposed to the form, of the sentence.²⁵⁰ The majority acknowledged that the *Apprendi* Court found *Walton* to be reconcilable with its decision in *Apprendi* precisely because Arizona law provided a maximum sentence of death when an individual is convicted of first-degree murder.²⁵¹ Yet, the majority again acknowledged the discord within the Court in retaining *Walton* in light of the disparate sentences handed down to the defendants in *Walton* and *Apprendi*.²⁵² Under such

245. *Ring*, 122 S. Ct. at 2439 (citing *Jones v. United States*, 526 U.S. 227, 243 (1999)). In *Jones*, the Court stated:

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Jones, 526 U.S. at 243 n.6.

246. *Ring*, 122 S. Ct. at 2439 (citing *Jones*, 526 U.S. at 251).

247. *Id.* (citing *Jones*, 526 U.S. at 272 (Kennedy, J., dissenting)).

248. *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); see also *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (stating that the Court requires criminal convictions to rest upon a jury determination that the defendant was guilty of every element of the crime with which he was charged beyond a reasonable doubt).

249. *Ring*, 122 S. Ct. at 2439–40 (citing *Apprendi*, 530 U.S. at 482–83).

250. See *id.* (citing *Apprendi*, 530 U.S. at 494).

251. *Id.* at 2440 (citing *Apprendi*, 530 U.S. at 497). In *Almendarez-Torres v. United States* Justice Scalia stated: “[O]nce 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 whether that maximum penalty, rather than a lesser one, ought to be imposed.” *Almendarez-Torres v. United States*, 523 U.S. 244, 257 n.2 (1998) (Scalia, J., dissenting).

252. *Ring*, 122 S. Ct. at 2440 (citing *Apprendi*, 530 U.S. at 537 (O'Connor, J., concurring)); see also Eric C. Hallstrom, *Recent Decisions of the Minnesota Supreme Court: State v.*

considerations of precedent, the majority commenced a re-evaluation of Arizona's death penalty statute.²⁵³

The majority's interpretation of Arizona's death penalty statute rejects the State of Arizona's argument that Ring's sentence fell within the statutory range of penalties available for a first-degree murder conviction and, thus, did not serve as an increased penalty.²⁵⁴ The majority relied on *Apprendi*, stating that the Court should inquire into the effect, not the form, of the sentence.²⁵⁵ In *Ring*, the majority found that the effect of the defendant's sentence exposed him to a punishment above and beyond the punishment allowed for a jury conviction on a first-degree murder charge alone.²⁵⁶ Such an effect was evident, according to the majority, because Arizona's first-degree murder statute references the finding of aggravating factors before a defendant can be sentenced to death.²⁵⁷

The majority next addressed an argument made by the State of Arizona that *Walton* distinguished between elements of the offense and sentencing factors.²⁵⁸ The majority quickly refuted this contention, citing *Apprendi* for the rule that the classification of a fact as either an element or a sentencing factor does not determine the question of the appropriate sentencing body.²⁵⁹

Grossman: *The Minnesota Supreme Court Applies Apprendi to Minnesota's Patterned Sex Offender Statute, But What Lies Ahead?*, 29 WM. MITCHELL L. REV. 411, 429 (2002) (arguing that it was impossible for the Court to continue to reconcile *Walton* and *Apprendi* after granting certiorari in *Ring*). Justice O'Connor's dissent in *Apprendi* pointed out the troubling result of providing a defendant with a jury determination of aggravating factors when the defendant was faced with a ten-year sentence enhancement, as in *Apprendi*, yet failing to provide such a guarantee to a defendant who was exposed to the death penalty. *Apprendi*, 530 U.S. at 537 (O'Connor, J., dissenting); see also *supra* notes 187-89 and accompanying text (discussing Justice O'Connor's dissent in *Apprendi*).

253. *Ring*, 122 S. Ct. at 2440-43.

254. *Id.* at 2440; see also Br. for Resp't at 4, *Ring* (No. 01-488) (arguing that a finding of aggravating factors does not increase the penalty for first-degree murder beyond the statutory maximum in Arizona).

255. *Ring*, 122 S. Ct. at 2439-40 (citing *Apprendi*, 530 U.S. at 494).

256. *Id.*

257. *Id.* (discussing ARIZ. REV. STAT. ANN. § 13-1105(C) (West 2001)).

258. *Id.* at 2441.

259. *Id.* (citing *Apprendi*, 530 U.S. at 492). "[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, . . . the core crime and the aggravating fact together constitute an aggravated crime The aggravating fact is an element of the aggravated crime." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). "[W]hen 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." *Id.* at 494 n.19.

After confirming the similarity between sentencing factors and elements of the crime, the majority rejected any distinctions that could be made between capital and non-capital convictions.²⁶⁰ The majority acknowledged that death is different,²⁶¹ and that such a recognition led the Court to place constraints upon the ability of the states to sentence convicted criminals to death.²⁶² Yet, the majority stated that Eighth Amendment restrictions on the ability of states to define capital crimes did not result in a corresponding leniency as to the manner in which a state must prove an aggravating factor.²⁶³ The majority concluded that adding aggravating factors as elements necessary to trigger the death penalty logically should receive similar protection under the Sixth Amendment.²⁶⁴

Finally, the majority rejected the State of Arizona's argument that the determination of aggravating factors in the hands of a judge produced more fair and efficient results.²⁶⁵ The State argued that judges stood in a better position to avoid dispensing arbitrary sentences.²⁶⁶ The majority asserted that there was no conclusive evidence establishing that judges are better suited to make death penalty determinations.²⁶⁷ The majority noted that, in fact, consensus among the states indicated that juries are in a better position to make such a determination.²⁶⁸

260. *Ring*, 122 S. Ct. at 2442.

261. *See supra* Part II.C.1 (discussing the Court's exploration of the "death is different" doctrine in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam)).

262. *Ring*, 122 S. Ct. at 2442; *see also Apprendi*, 530 U.S. at 522–23 (Thomas, J., concurring) ("[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes."); *see also Furman*, 408 U.S. at 313 (White, J., concurring) (asserting that the present administration of the death penalty in the United States required Court intervention).

263. *Ring*, 122 S. Ct. at 2442. The majority supported this claim by citing instances in which the Court has required legislation to add an element in order to narrow the scope of the punishable offense, based upon Constitutional interpretation. *Id.*

264. *Id.*

265. *See id.* (stating that the superiority of a judge's fact-finding ability was not clearly evident).

266. *Id.*

267. *Id.*

268. *Id.* At the time the opinion was written, thirty-eight states allowed for the death penalty for certain crimes. *Id.* at 2442 n.6. Twenty-nine of those states entrusted the determination of whether to impose a death sentence to juries. *See* ARK. CODE ANN. § 5-4-602 (Michie 1993); CAL. PENAL CODE ANN. § 190.3 (West 1999); CONN. GEN. STAT. § 53a-46a (2001); GA. CODE ANN. § 17-10-31.1 (1996); 720 ILL. COMP. STAT. ANN. 5/9-1(d) (West 1993); KAN. STAT. ANN. § 21-4624(b) (1995); KY. REV. STAT. ANN. § 532.025(1)(b) (Michie 1993); LA. CODE CRIM. PROC. ANN., Art. § 905.1 (West 1997); MD. ANN. CODE, art. 27, § 413(b) (1996); MISS. CODE ANN. § 99-19-101 (2000); MO. REV. STAT. §§ 565.030, 565.032 (1999 & Supp. 2002); NEV. REV. STAT. § 175.552 (2001); N.H. REV. STAT. ANN. § 630:5(II) (1996); N.J. STAT. ANN.

Furthermore, the majority asserted that considerations such as efficiency and fairness did not trump the Sixth Amendment guarantee of a jury trial.²⁶⁹ The majority confirmed that the framers did not leave states with the option of providing jury trials for their citizens precisely for fear that the states would deny to their citizens such a fundamental right.²⁷⁰

In conclusion, the majority held that a proper interpretation of the Sixth Amendment rendered *Walton* and *Apprendi* irreconcilable and determined that *Walton* must be overruled.²⁷¹ Because the finding of aggravated factors created a greater offense in Ring's case, the majority held that a jury must determine whether these factors exist in both capital and non-capital cases.²⁷² The majority reversed the judgment of the Arizona Supreme Court and remanded Ring's sentence to the trial court.²⁷³

2. The Concurring Opinions

Although the concurring opinions agreed that Arizona's death sentencing scheme violated the Constitution, the reasons for the agreement varied.²⁷⁴ Justice Scalia stressed the crucial importance of preserving a defendant's right to a jury trial, particularly when the

§ 2C:11-3(c) (West Supp. 2001); N.M. STAT. ANN. § 31-20A-1 (Michie 2000); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2001-2002); N.C. GEN. STAT. § 15A-2000 (1999); OHIO REV. CODE ANN. § 2929.03 (West 1997); OKLA. STAT. tit. 21, § 701.10(A) (Supp. 2001); OR. REV. STAT. § 163.150 (1997); 42 PA. CONS. STAT. § 9711 (2001); S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. 1985); S.D. CODIFIED LAWS § 23A-27A-2 (Michie 1998); TENN. CODE ANN. § 39-13-204 (2000); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 2001); UTAH CODE ANN. § 76-3-207 (2001); VA. CODE ANN. § 19.2-264.3 (Michie 2000); WASH. REV. CODE § 10.95.050 (1990); WYO. STAT. ANN. § 6-2-102 (Michie 2001).

269. *Ring*, 122 S. Ct. at 2442.

270. *See id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring)).

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

272. *Id.* (citing *Apprendi*, 530 U.S. at 494 n.19). Justice Ginsburg cited Arizona's setting of death as the maximum penalty for first-degree murder as a mere formality. *Id.* at 2440 (citing *Apprendi*, 530 U.S. at 541). The majority indicated that Arizona's statute relating to first-degree murder specifically cross-references its aggravating factors determination, thus providing the tenuous link between the crime of first-degree murder and the death penalty. *Id.*; *see also* ARIZ. REV. STAT. § 13-1105(C) (2001) (stating that "[f]irst-degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703" (emphasis added)).

273. *Ring*, 122 S. Ct. at 2443. The majority refused to address the State of Arizona's contention that the trial judge's finding of pecuniary gain as a motive for the murder fell implicitly within the jury verdict. *Id.* at 2443 n.7; *see also* *Neder v. United States*, 527 U.S. 1, 25 (1999) (stating that the Court usually leaves issues of harmless error, such as pecuniary gain determination, to the lower courts).

274. *See infra* Part III.C.2.a-c (discussing the concurring opinions).

defendant faces the death penalty.²⁷⁵ By contrast, Justice Breyer found jury determinations a necessary safeguard to prevent the imposition of a cruel and unusual punishment.²⁷⁶ Finally, Justice Kennedy agreed with an extension of *Apprendi* to a capital sentencing context, yet cautioned against trampling state expectations of valid sentencing schemes.²⁷⁷

a. Justice Scalia's Concurrence

Justice Scalia's concurrence asserted a strong belief in the fundamental importance of the jury trial guarantee in a punishment context.²⁷⁸ Justice Scalia began his concurrence by admitting to his conflicting viewpoints on the continued vitality of *Walton* after *Apprendi*.²⁷⁹ He disagreed with the Court's advocacy of aggravating factors as a necessary determination in advance of the death penalty, stating that the line of decisions beginning with *Furman* possessed no constitutional foundation.²⁸⁰ Yet, Justice Scalia emphasized his belief that the right to a jury trial encompassed all facts necessary to impose a punishment upon a defendant.²⁸¹

In order to justify his conclusion that the jury trial right should extend to the determination of aggravating factors, Justice Scalia articulated two considerations.²⁸² First, Justice Scalia insisted that it would be impossible to determine which states had adopted aggravating factors merely in response to what he believed to be an erroneous holding in *Furman*.²⁸³ Additionally, Justice Scalia believed that the nation's

275. See *infra* Part III.C.2.a (discussing Justice Scalia's concurrence).

276. See *infra* Part III.C.2.b (discussing Justice Breyer's concurrence).

277. See *infra* Part III.C.2.c (discussing Justice Kennedy's concurrence).

278. *Ring*, 122 S. Ct. at 2444 (Scalia, J., concurring). Justice Thomas joined in the concurring opinion. *Id.*

279. *Id.* at 2444–45 (Scalia, J., concurring).

280. *Id.* at 2444 (Scalia, J., concurring). Justice Scalia previously raised constitutional concerns over mandating that states create aggravating factors in his concurrence in *Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring).

281. *Ring*, 122 S. Ct. at 2444 (Scalia, J., concurring) (citing *United States v. Almendarez-Torres*, 523 U.S. 224, 248 (1998) (Scalia, J., dissenting)). Justice Scalia asserted that such facts must be found to exist beyond a reasonable doubt by the jury. *Id.* (Scalia, J., concurring). Furthermore, Justice Scalia stated that the reasonable doubt standard must be used, regardless whether the state refers to pertinent facts as “elements of the offense, sentencing factors, or *Mary Jane*.” *Id.* (Scalia, J., concurring).

282. See *id.* (Scalia, J., concurring) (stating that he had “acquired new wisdom” in two areas critical to this discussion).

283. *Id.* (Scalia, J., concurring). Justice Scalia noted that some states had already possessed aggravating factor standards for certain capital crimes. *Id.* (Scalia, J., concurring). For example, prior to *Furman*, New York provided that murder of a peace officer served as an aggravating factor that triggered the death penalty. See 1969 N.Y. LAWS 1022. Furthermore, Justice Scalia argued that any state that added aggravating factors to their capital statutes post-*Furman* may

commitment to the right of its citizens to a jury trial was in jeopardy.²⁸⁴ In particular, Justice Scalia lamented the fact that many of his fellow justices had, in recent decisions, endorsed the practice of judge-determined death sentences.²⁸⁵ Justice Scalia criticized the notion that concern for the right to a jury trial in criminal cases could be reconciled with the lack of a jury when a defendant is faced with the death penalty.²⁸⁶ Based upon these dual considerations, Justice Scalia concluded that aggravating factors must be subject to a jury determination.²⁸⁷ Justice Scalia, however, left open the possibility for judicial override of a jury's advisory verdict.²⁸⁸

b. Justice Breyer's Concurrence

Justice Breyer's concurrence, based upon an Eighth Amendment analysis, urged the majority to strike down Arizona's death penalty.²⁸⁹ Justice Breyer argued that the Eighth Amendment contains a right to a jury determination regarding the imposition of the death penalty for two reasons.²⁹⁰ First, he indicated that most death penalty sentences are handed down as a measure of retribution.²⁹¹ Justice Breyer cited this reason because of the inability of states to justify the death penalty in furthering penological goals of deterrence, incapacitation, or

have simply acted out of a changed view regarding proper imposition of the death penalty rather than reliance upon *Furman*. *Ring*, 122 S. Ct. at 2444 (Scalia, J., concurring).

284. *See Ring*, 122 S. Ct. at 2445 (Scalia, J., concurring). Justice Scalia noted the increase in the number of states enacting legislation providing judges the authority to determine the existence of sentencing factors. *Id.*

285. *Id.* (Scalia, J., concurring) (citing *Apprendi*, 530 U.S. at 523 (O'Connor, J., dissenting)).

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

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

288. *Id.* (Scalia, J., concurring). Justice Scalia distinguished a jury's determination regarding the existence of an aggravating circumstance from jury sentencing. *Id.* (Scalia, J., concurring). Addressing concerns raised in Justice Breyer's concurring opinion, Justice Scalia added that a state could still allow for judicial input into sentencing by placing the aggravating factor determination into the guilt phase of a trial. *Id.* (Scalia, J., concurring). Justice Scalia emphasized that placing the determination of aggravating factors in the trial phase was a logical location for such a determination. *Id.* (Scalia, J., concurring). Justice Scalia went on to further prod Justice Breyer:

There is really no way in which Justice Breyer can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.

Id. (Scalia, J., concurring).

289. *Id.* at 2446 (Breyer, J., concurring).

290. *See id.* (Breyer, J., concurring) (agreeing with Justice Stevens's concurring opinion in *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (Stevens, J., concurring)).

291. *Id.* (Breyer, J., concurring).

retribution.²⁹² Second, because retribution provides the driving force behind continued use of the death penalty, Justice Breyer determined that juries possess an advantage over judges in determining whether to impose the death penalty upon a defendant.²⁹³ He asserted that juries maintain a grasp upon the moral sense of the community, which better equips juries to express the community conscience²⁹⁴ and gauge whether a crime is serious enough to warrant death as punishment.²⁹⁵ Furthermore, Justice Breyer refuted the notion that elected judges lessened the advantage held by the jury, emphasizing the unique position that juries hold in determining the appropriateness of handing down a death sentence.²⁹⁶

After describing the importance of the jury as a reflection of the morality of the community, Justice Breyer connected its importance to the ongoing division over the continued viability of the death penalty in

292. *See id.* (Breyer, J., concurring). Justice Breyer asserted that studies connecting the death penalty to deterrence remain inconclusive. *Id.* (Breyer, J., concurring). Additionally, he cited that defendants who receive sentences of life in prison without parole in lieu of the death penalty rarely commit additional crimes. *Id.* (Breyer, J., concurring). Justice Breyer listed a number of studies that have failed to find a substantial link between the imposition of the death penalty and deterrence. *Id.* (Breyer, J., concurring); *see, e.g.*, Jonathan R. Sorenson et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481 (1999); Raymond Bonner & Foid Fessenden, *States with No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1 (revealing that, since 1980, homicide rates have been roughly fifty to one hundred percent higher in states that maintain the death penalty), available at LEXIS, News Library, New York Times File. Finally, Justice Breyer noted that the death penalty renders rehabilitation impossible. *Ring*, 122 S. Ct. at 2446–47 (Breyer, J., concurring). Justice Breyer provided a number of studies relating to incapacitation and life sentences. *See, e.g.*, James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 26 (1989); Jonathan R. Sorensen & Rocky L. Pilgrim, *Criminology: An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1256 (2000).

293. *Ring*, 122 S. Ct. at 2447 (Breyer, J., concurring).

294. *Id.* (Breyer, J., concurring) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

295. *Id.* (Breyer, J., concurring). A jury determination that the death penalty is appropriate in a particular case represents “an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.” *Gregg*, 428 U.S. at 184 (plurality opinion).

296. *Ring*, 122 S. Ct. at 2447 (Breyer, J., concurring); *see also* *Harris v. Alabama*, 513 U.S. 504, 518–19 (1995) (Stevens, J., dissenting) (asserting that a juror answers only to his or her own conscience, and thus a collective jury verdict accurately represents the collective community conscience); JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT* 405–06 (2002) (finding that judges who override jury decisions to refrain from imposing the death penalty have often done so erroneously).

the United States.²⁹⁷ He noted the irreversibility of the death penalty and the consequences that result when a state wrongly puts an individual to death.²⁹⁸ In addition, Justice Breyer acknowledged many studies that indicate a disproportionate imposition of the death penalty based upon race and socio-economic background.²⁹⁹ Furthermore, Justice Breyer argued that the many delays that encompass a death penalty appeal furthered the suffering of a death row inmate, and thus raised a question of cruel and unusual punishment.³⁰⁰ Finally, Justice Breyer noted the fact that the United States finds itself in a worldwide minority by retaining the death penalty.³⁰¹ Because of that fact and the fact that the vast majority of the country does not carry out the death penalty,³⁰² Justice Breyer concluded that the Eighth Amendment

297. *Ring*, 122 S. Ct. at 2447 (Breyer, J., concurring). Specifically, Justice Breyer referred to the debate over whether the death penalty violates the Eighth Amendment's prohibition of cruel and unusual punishment. *Id.* (Breyer, J., concurring).

298. *Id.* (Breyer, J., concurring); *see, e.g.*, GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 7-10 (2002) (finding errors in the imposition of the death penalty in Illinois), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf (last visited May 7, 2003); Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 27 (1987) (discussing the horror of executing a person wrongly convicted of a capital crime).

299. *Ring*, 122 S. Ct. at 2447-48 (Breyer, J., concurring); *see, e.g.*, U.S. GEN. ACCOUNTING OFFICE, REPORT TO SENATE AND HOUSE COMMITTEES ON THE JUDICIARY: DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (Report No. GAO/GGD-90-57, Feb. 1990) (summarizing twenty-eight studies indicating a link between race and imposition of the death penalty); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1661 (1998) (demonstrating a correlation between the race of the defendant, the race of the victim, and whether the death penalty is given).

300. *Ring*, 122 S. Ct. at 2448 (Breyer, J., concurring); *see also* *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting) (referring to "the suffering inherent in a prolonged wait for execution"); *Lackey v. Texas*, 514 U.S. 1045 (1995) (stating that the wait for execution was "one of the most horrible feelings to which [an inmate] can be subjected"); TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2000, at 12, 14 (Dec. 2001) (noting that the average delay to exhaust death penalty appeals is twelve years), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp00.pdf> (last modified Feb. 21, 2002).

301. *Ring*, 122 S. Ct. at 2448 (Breyer, J., concurring); *see, e.g.*, Karen DeYoung, *Group Criticizes U.S. on Detainee Policy; Amnesty Warns of Human Rights Fallout*, WASH. POST, May 28, 2002, at A4 (noting that seventy-four countries had abolished the death penalty by the end of 2001), *available at* 2002 WL 21747520; Sam Martin, *U.S. Taken to Task Over Death Penalty*, MIAMI HERALD, May 31, 2001, at A1 (noting that the United States is the only industrialized nation in the Western Hemisphere that continues to allow the imposition of the death penalty).

302. *Ring*, 122 S. Ct. at 2448 (Breyer, J., concurring). Justice Breyer indicated that a mere three percent of United States counties account for fifty percent of the death sentences handed down historically throughout the nation. *Id.* (Breyer, J., concurring).

requires juries to make the determination of whether a defendant should receive the death penalty.³⁰³

c. Justice Kennedy's Concurrence

Justice Kennedy believes that *Walton* and *Apprendi* were irreconcilable and that *Walton* could no longer stand.³⁰⁴ He determined that because Arizona's death penalty scheme exposed defendants to a greater punishment than a first-degree murder conviction alone, a jury must find the aggravating factors that would subject the defendant to the death penalty.³⁰⁵ Justice Kennedy concluded with a word of caution, stating that the Court should implement the *Apprendi* holding while keeping in mind the expectations of the states.³⁰⁶

3. Justice O'Connor's Dissenting Opinion

Justice O'Connor's dissent³⁰⁷ argued that the Court overruled the wrong precedent.³⁰⁸ Justice O'Connor urged the Court to overrule *Apprendi* instead of *Walton*.³⁰⁹ In so doing, Justice O'Connor reiterated her dissent in *Apprendi*, arguing that the Constitution and the totality of American history made no showing that an aggravating factor must be treated as an element of a crime.³¹⁰ She asserted that past Court decisions refused to treat aggravating factors as elements of a crime.³¹¹ Justice O'Connor criticized the majority's lack of a sufficient justification for adhering to *Apprendi* when weighed against Court precedent.³¹²

Furthermore, Justice O'Connor determined that the *Apprendi* decision created a substantial burden for courts already inundated with

303. *Id.* (Breyer, J., concurring).

304. *Id.* at 2445 (Kennedy, J., concurring).

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

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

307. *Id.* at 2448–50 (O'Connor, J., dissenting). Chief Justice Rehnquist joined Justice O'Connor in the dissent.

308. *Id.* at 2448, 2450 (O'Connor, J., dissenting).

309. *Id.* (O'Connor, J., dissenting).

310. *Id.* at 2449 (O'Connor, J., dissenting); *see also supra* Part II.E.2 (discussing Justice O'Connor's dissent in *Apprendi*).

311. *Ring*, 122 S. Ct. at 2449 (O'Connor, J., dissenting); *see, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Walton v. Arizona*, 497 U.S. 639 (1990); *Patterson v. New York*, 432 U.S. 197 (1977).

312. *Ring*, 122 S. Ct. at 2449 (O'Connor, J., dissenting). "The Court has failed, both in *Apprendi* and in the decision announced today, to 'offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the 'increase in the maximum penalty' rule is not required by the Constitution.'" *Id.* (O'Connor, J., dissenting) (quoting *Apprendi*, 530 U.S. at 539 (O'Connor, J., dissenting)).

countless other claims.³¹³ She noted that since the announcement of the Court's decision in *Apprendi*, over 1800 defendants had challenged their death sentences on the federal level alone.³¹⁴ Furthermore, she noted that the federal courts had been inundated with a substantial increase in the number of habeas corpus challenges filed since *Apprendi*.³¹⁵ Finally, Justice O'Connor acknowledged that writs of certiorari filed with the Supreme Court related to the determination of aggravating factors increased eighteen percent in the wake of *Apprendi*.³¹⁶ Justice O'Connor concluded that the *Apprendi* decision caused the already overwhelmed courts to take on another substantial burden.³¹⁷

When combined with the effects of *Apprendi*, the majority's decision in *Ring*, Justice O'Connor predicted, would place an even greater burden upon the judicial branch.³¹⁸ Justice O'Connor noted that the Court's decision invalidated the sentencing statutes of the five states that gave judges the authority to determine the existence of aggravating factors.³¹⁹ She indicated that 168 prisoners resided on death row in those states,³²⁰ creating the potential for 168 separate death sentence appeals in state courts.³²¹ Although Justice O'Connor predicted that

313. *Id.* (O'Connor, J., dissenting).

314. *See id.* (O'Connor, J., dissenting). Justice O'Connor further noted that federal criminal prosecutions are a small percentage, roughly 0.4%, of the total number of criminal prosecutions nationwide. *Id.* (O'Connor, J., dissenting) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 551 (2000) (O'Connor, J., dissenting)).

315. *Id.* (O'Connor, J., dissenting). Federal writs of habeas corpus jumped seventy-seven percent between the years 2000 and 2001. *Id.* (O'Connor, J., dissenting) (citing Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 2001 Report of the Director 17).

316. *Id.* (O'Connor, J., dissenting).

317. *Id.* (O'Connor, J., dissenting).

318. *Id.* (O'Connor, J., dissenting).

319. *Id.* (O'Connor, J., dissenting). In addition to Arizona, the four other states that utilized judge-decided death sentences at the time of *Ring* were Colorado, Idaho, Montana, and Nebraska. *Ring*, 122 S. Ct. at 2442; *see also* COL. REV. STAT. § 16-11-103 (2001); IDAHO CODE § 19-2515 (Michie 2001); MONT. CODE ANN. § 46-18-301 (1997); NEB. REV. STAT. § 29-2520 (1995).

320. *Ring*, 122 S. Ct. at 2449 (O'Connor, J., dissenting); *see also* CRIM. J. PROJECT OF THE NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 25 (Spring 2002) (counting 168 death row inmates in Arizona, Colorado, Idaho, Montana, and Nebraska), available at <http://www.naacpldf.org/pdfdocs/deathrow-2002sp.pdf> (last modified Apr. 1, 2002) [hereinafter NAACP PROJECT].

321. *See Ring*, 122 S. Ct. at 2449 (O'Connor, J., dissenting) (arguing that each of the prisoners on death row will likely challenge his or her death sentence).

many such challenges would fail,³²² she recognized the strain that even unsuccessful challenges would place upon those states.³²³

In addition, Justice O'Connor believes that many challenges would arise in the four states that possessed a "hybrid" sentencing system.³²⁴ She explained that in a hybrid sentencing system, the jury's determination of aggravating factors produces an advisory verdict, but the judge makes the final determination as to whether to impose the death penalty upon a defendant.³²⁵ She noted that over 500 inmates resided on death row in the hybrid states, many of whom might bring forth a sentencing appeal.³²⁶ In light of the present and future burdens that would be placed upon the state and federal court systems, Justice O'Connor concluded that the majority should have overruled *Apprendi* instead of *Walton*.³²⁷

IV. ANALYSIS

The majority correctly decided that Arizona's death sentencing scheme, requiring a judicial determination of aggravating factors necessary to impose the death penalty, violated the Sixth Amendment guarantee of a jury determination of all elements of a defendant's charged crime beyond a reasonable doubt.³²⁸ First, this Part explains that the majority adhered to the maximum punishment test set forth in *Apprendi* to make its determination and addresses Justice O'Connor's mistaken belief that aggravating factors do not constitute elements of a crime.³²⁹ Then, the analysis considers the Eighth Amendment argument raised by Justice Breyer and the majority's proper restraint in restricting

322. *Id.* (O'Connor, J., dissenting). Justice O'Connor indicated that difficulty awaits defendants in overcoming the standards of harmless error or plain error review in order to have their sentences overturned. *Id.* (O'Connor, J., dissenting).

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

324. *Id.* (O'Connor, J., dissenting). The four states with hybrid sentencing for the death penalty are Alabama, Delaware, Florida, and Indiana. *Id.* (O'Connor, J., dissenting); see also ALA. CODE §§ 13A-5-46, 13A-5-47 (1994); DEL. CODE ANN. tit. 11, § 4209 (1995); FLA. STAT. ANN. § 921.141 (West 2001); IND. CODE ANN. § 35-50-2-9 (West 2001).

325. *Ring*, 122 S. Ct. at 2450 (O'Connor, J., dissenting).

326. *Id.* (O'Connor, J., dissenting); see also NAACP PROJECT, *supra* note 320, at 25 (counting five hundred twenty-nine death row inmates in the hybrid sentencing states).

327. *Ring*, 122 S. Ct. at 2450 (O'Connor, J., dissenting).

328. See *supra* Part III.C.1 (discussing the majority ruling that the death penalty may not be imposed without the determination of aggravating factors by a jury).

329. See *Ring*, 122 S. Ct. at 2448-50 (O'Connor, J., dissenting); see also *infra* Part IV.A (discussing the reasoning behind the majority's decision to extend Sixth Amendment protection to the determination of aggravating factors).

its decision to a Sixth Amendment analysis.³³⁰ Finally, this Part suggests that Justice Scalia's proposed alternative to jury sentencing might find acceptance within the guarantee of a right to a jury trial.³³¹

A. *Aggravating Factors Properly Qualify as Sentence Enhancing Factors Requiring a Jury Determination*

The majority correctly decided that a defendant's right to a jury trial extends to the determination of aggravating factors used to impose the death penalty upon that defendant.³³² Although the Court previously had not applied the maximum punishment test in a death penalty context,³³³ Arizona's death penalty scheme created a situation in which the finding of aggravating factors exposed Timothy Ring to a greater punishment than a first-degree murder conviction by itself.³³⁴ Without the finding of aggravating factors, Ring's first-degree murder conviction subjected him to only a life sentence.³³⁵ Thus, Ring faced a similar fate to the defendant in *Apprendi*, as both became vulnerable to an enhanced sentence through additional findings.³³⁶ The majority properly looked to the effect of the sentence according to past precedent,³³⁷ using a direct and accurate application of the *Apprendi* maximum punishment test.³³⁸

330. See *Ring*, 122 S. Ct. at 2446–48 (Breyer, J., concurring); see also *infra* Part IV.B (contrasting the majority's use of legal precedent to Justice Breyer's reliance upon public policy in arguing that the Eighth Amendment required a jury examination of aggravating factors).

331. See *Ring*, 122 S. Ct. at 2443–45 (Scalia, J., concurring); see also *infra* Part IV.C (discussing Justice Scalia's belief that the majority decision allowed states to retain a judicial determination of whether to impose the death penalty).

332. Leading Cases, *supra* note 25, at 238; see also *supra* Part III.C.1 (discussing the majority's holding that the finding of aggravating factors prior to imposition of the death penalty requires a jury determination). *Ring* represented a "straightforward application" of the Court's holding in *Apprendi*. Leading Cases, *supra* note 25, at 238.

333. See *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (explaining that New Jersey's hate crime enhancer effectively turned a second-degree weapons offense into a first-degree offense); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (applying the maximum punishment test to a sentence enhancer contained in the federal carjacking statute); see also *supra* notes 153–94 and accompanying text (discussing the Court's application of the maximum punishment test in *Jones* and *Apprendi*).

334. *Ring*, 122 S. Ct. at 2440.

335. See *id.* at 2437; see also *supra* notes 139–43 and accompanying text (discussing Arizona's application of its death penalty statute to first-degree murder convictions).

336. See *Ring*, 122 S. Ct. at 2443; *Apprendi*, 530 U.S. at 494; see also *supra* notes 170–80 and accompanying text (discussing the effect of New Jersey's hate crime statute upon the defendant's second-degree weapons conviction in *Apprendi*).

337. See *Ring*, 122 S. Ct. at 2443 (citing *Apprendi*, 530 U.S. at 494); see also *Apprendi*, 530 U.S. at 494 (finding that New Jersey's "hate crime" statute exposed defendants to punishments greater than those to which they would be exposed in lieu of the statute).

338. Leading Cases, *supra* note 25, at 238.

Moreover, the majority appropriately rejected the argument that the Sixth Amendment should acquiesce to the effectiveness of judicial determinations.³³⁹ The majority asserted that qualitative judgments regarding who constitutes the more effective sentencing body are irrelevant when discussing the fundamental importance of the right to a jury determination.³⁴⁰ Such a conclusion receives reinforcement through the fact that the overwhelming majority of states that maintain the death penalty leave its imposition to juries.³⁴¹ Although states have traditionally acted as laboratories of experiment, the majority decision reflected an adherence to an historical reverence for the jury trial right in light of evolving constitutional standards.³⁴²

By contrast, Justice O'Connor's dissent improperly attempted to distinguish aggravating factors from elements of a crime.³⁴³ Justice O'Connor insisted that the majority overrule *Apprendi* instead of *Walton*,³⁴⁴ predicating her assertion upon past precedent.³⁴⁵ Justice O'Connor cited *Patterson v. New York* as one such precedent, though the *Patterson* Court merely held that requiring defendants to prove an affirmative defense did not violate the reasonable doubt standard.³⁴⁶ Furthermore, Justice O'Connor argued that the *Apprendi* rule, as applied by the majority in *Ring*, ignored a history of discretionary sentencing by judges in the United States.³⁴⁷ Justice O'Connor, however, neglected the fact that states, in response to *Furman*, created capital sentencing

339. See *Ring*, 122 S. Ct. at 2442; see also *supra* Part III.C.1 (discussing the majority opinion).

340. *Ring*, 122 S. Ct. at 2442 (“The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders.”); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (“If the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.”).

341. *Ring*, 122 S. Ct. at 2442 n.6. The majority indicated that twenty-nine of the thirty-eight states that impose capital punishment require a jury determination of aggravating factors. *Id.*

342. See *supra* Part III.C.1 (discussing the majority opinion). The majority recognized the right to a jury trial as one of the most valued amendments to the Bill of Rights. *Ring*, 122 S. Ct. at 2442. Additionally, Justice Scalia has referred to the Sixth Amendment as “one of the least controversial provisions of the Bill of Rights.” *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

343. See *Ring*, 122 S. Ct. at 2449 (O'Connor, J., dissenting); see also *supra* Part III.C.3 (discussing the dissenting opinion).

344. *Ring*, 122 S. Ct. at 2448, 2450 (O'Connor, J., dissenting).

345. *Id.* at 2449 (O'Connor, J., dissenting).

346. *Patterson v. New York*, 432 U.S. 197, 216 (1977) (holding that states may require a defendant to prove an affirmative defense beyond a reasonable doubt); see also *supra* notes 30–42 and accompanying text (discussing the reasonable doubt standard in connection with the Sixth Amendment jury trial right).

347. *Ring*, 122 S. Ct. at 2449 (O'Connor, J., dissenting); see also *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting) (asserting the “significant history” of discretionary sentencing by judges).

statutes to reduce judge and jury sentencing discretion.³⁴⁸ Thus, Justice O'Connor incorrectly relied upon history and precedent to denounce the majority decision to require a jury determination of aggravating factors.

B. Arizona's Use of Judicial Determinations of Aggravating Factors Did Not Violate the Eighth Amendment

Not only did the majority properly hold that aggravating factors require a jury determination, it also properly de-emphasized the Eighth Amendment protections at stake. The majority refuted the State of Arizona's argument that the protection afforded by aggravating factors under the Eighth Amendment created a compensatory flexibility regarding state adherence to the Sixth Amendment.³⁴⁹ Yet, the majority ruled that a judicial determination of aggravating factors violated Ring's right to a jury trial under the Sixth Amendment, foregoing an Eighth Amendment analysis.³⁵⁰ Although the majority acknowledged that death constitutes a truly unique punishment,³⁵¹ it limited its application of the Eighth Amendment to the restrictions placed upon states to define offenses that are death penalty eligible.³⁵² Previous Eighth Amendment jurisprudence created aggravating factors with the express objective of preventing arbitrary and capricious impositions of the death penalty.³⁵³ Because the State of Arizona incorporated a scheme of aggravating factors into its death penalty statute, the majority showed appropriate restraint in refraining from finding a right to a jury determination under the Eighth Amendment.³⁵⁴

Although Justice Breyer's concurrence made a strong case that the majority should have applied an Eighth Amendment analysis, his

348. Stacy, *supra* note 67, at 2067; *see also supra* Part II.C.1 (discussing the Court's decision in *Furman*, and the subsequent response by state legislatures to create compliant statutes).

349. *Ring*, 122 S. Ct. at 2442. The majority deemed the State's argument to be "without precedent in our constitutional jurisprudence." *Id.*

350. *Id.* at 2443.

351. *Id.* at 2441. The notion that "death is different" has emerged in a number of past cases. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972) (Douglas, J., concurring); *see also supra* notes 82-89 and accompanying text (discussing the Court's decision to invalidate mandatory capital sentencing schemes in *Woodson*); *supra* notes 63-74 and accompanying text (discussing the Court's invoking of the principle of individualized sentencing in *Furman*).

352. *See Ring*, 122 S. Ct. at 2442. The majority acknowledged the role of the Constitution in requiring states to add elements to an offense in order to narrow the scope of the offense. *Id.*

353. *See Harris*, *supra* note 46, at 1401; *see also Furman*, 408 U.S. at 313 (White, J., concurring) (requiring states to create sufficient criteria to determine whether to impose the death penalty).

354. *See Leading Cases*, *supra* note 25, at 239. *Ring*, however, resides in a slightly different category from *Apprendi* and *Jones* because of its capital context. *Id.*

argument amounted to a public policy debate.³⁵⁵ Justice Breyer correctly asserted that the Eighth Amendment requires heightened procedural safeguards when a state seeks to impose the death penalty.³⁵⁶ Furthermore, he described the advantage that juries bring to a death penalty decision through their ability to reflect the pulse of the community.³⁵⁷ Justice Breyer's concurrence, however, seemed to be more of an indictment of the death penalty itself rather than Arizona's scheme of judicial determination as a violation of the Eighth Amendment.³⁵⁸ By asserting the value of requiring juries to decide whether to sentence a defendant to die, in light of the ongoing debate over the continued vitality of the death penalty, Justice Breyer assumed that courtroom activities alone could promote the public conscience.³⁵⁹ Thus, Justice Breyer's concurrence effectively advocated state legislatures and Congress to do something the Court has refused to do: declare the death penalty itself unconstitutional.³⁶⁰

355. See Robert L. Wiener, *Death Penalty Research in Nebraska: How do Judges and Juries Reach Penalty Decisions?*, 81 NEB. L. REV. 757, 763–64 (2002) (discussing Justice Breyer's use of empirical evidence and penological theory in crafting his dissent in *Ring*).

356. *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring); see, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion) (holding that the State of Georgia's creation of a death sentencing scheme based upon the finding of aggravating and mitigating factors complied with the Eighth Amendment).

357. *Ring*, 122 S. Ct. at 2447 (Breyer, J., concurring). Justice Breyer believed that juries reflect the "composition and experiences of the community as a whole." *Id.* (Breyer, J., concurring). As such, they reflect more accurately the community consensus regarding whether a crime is serious enough to warrant the death penalty. *Id.* (Breyer, J., concurring).

358. Justice Breyer argued that the fact that the death penalty is irreversible made critical the proper imposition of the death penalty. *Ring*, 122 S. Ct. at 2447 (Breyer, J., concurring). Moreover, Justice Breyer offered that the world consensus disfavors use of the death penalty. *Id.* at 2448 (Breyer, J., concurring). In the United States, a small percentage of locations account for the vast majority of the nation's death sentences. *Id.* (Breyer, J., concurring). For instance, of the seventy-one executions carried out last year, nearly fifty percent occurred in the State of Texas. Robert E. Pierre, *Effects of Death Penalty Ruling Debated: Illinois Decision Is Seen by Some as Precedent, by Others as Mistake*, WASH. POST, Jan. 13, 2003, at A02, available at 2003 WL 2368011.

359. See *Ring*, 122 S. Ct. at 2447 (Breyer, J., concurring). Cf. Carol S. Steiker, *Things Fall Apart, but the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1483 (2002) (citing that public support for the death penalty decreased to sixty-five percent in 2001, the lowest support level in nineteen years).

360. In *Furman v. Georgia*, the Court held that any death penalty statute that permitted unlimited sentencing discretion violated the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam). In addition, the Court limited its holding to the Georgia death sentencing scheme at issue. See, e.g., *id.* at 314 (White, J., concurring) ("In my judgment what was done in these cases violated the Eighth Amendment.") (emphasis added).

C. A Possible Alternative to Jury Determinations?

In his concurrence, Justice Scalia seemed to leave the door open for judges to make the ultimate determination regarding imposition of the death penalty.³⁶¹ Justice Scalia stated that imposition of the death penalty without a jury determination conflicted with a proper respect for the right to a jury trial.³⁶² Furthermore, Justice Scalia interpreted the majority decision as requiring a jury determination of aggravating facts but not a defendant's sentence.³⁶³ Because the majority did not address the constitutionality of judges making the final sentencing determination,³⁶⁴ Justice Scalia correctly noted a possible alternative to jury determinations of a capital defendant's sentence.³⁶⁵

V. IMPACT

The Supreme Court's decision in *Ring* ensured tougher standards for the imposition of the death penalty.³⁶⁶ The Court's decision, however, produces a logistical nightmare regarding sentences imposed under a judicial determination of aggravating factors.³⁶⁷ Furthermore, the Court left unanswered two questions that could affect future Sixth Amendment jurisprudence.³⁶⁸ First, the Court failed to decide whether a defendant's waiver of his or her right to a jury trial nevertheless required a jury determination of aggravating factors upon a guilty verdict.³⁶⁹ Second, the Court neglected to fully answer whether its

361. See *supra* Part III.C.2.a (discussing Justice Scalia's concurring opinion). Justice Scalia advocated placing the determination of aggravating factors in the guilt phase of a trial, but allowing the judge to make the final sentencing decision. *Ring*, 122 S. Ct. at 2445 (Scalia, J., concurring). Cf. Steiker, *supra* note 359, at 1475 (asserting that the Court's decision in *Ring* would likely affect sentencing schemes in which judges and juries share in the determination of a capital defendant's sentence).

362. *Ring*, 122 S. Ct. at 2445 (Scalia, J., concurring). Justice Scalia lamented that veneration for the death penalty would suffer "perilous decline" with the "repeated spectacle of a man's going to his death because a judge found that an aggravating factor existed." *Id.* (Scalia, J., concurring).

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

364. Liptak, *supra* note 1. "In its ruling, the Supreme Court answered one question and created half a dozen others, including . . . whether the decision requires actions in states where juries render advisory verdicts." *Id.*

365. See *supra* Part III.C.2.a (discussing Justice Scalia's concurring opinion).

366. See *Ring*, 122 S. Ct. at 2443 (explaining that aggravating factors create an essentially new offense that must receive a jury determination); see also *supra* Part III.C.1 (discussing the majority opinion).

367. See *infra* Part V.A (discussing the effects of the Court's decision in *Ring* upon the death sentences of inmates sentenced in states where judges made the final sentencing determination).

368. See *infra* Part V.B (discussing the uncertainty of the scope of the *Ring* decision).

369. See *infra* Part V.B (questioning the effects of the *Ring* decision upon the waiver of a defendant's right to a jury trial).

decision applied to final sentencing determinations, or merely to the finding of aggravating factors.³⁷⁰ Finally, the Court's ruling in *Ring* falls in line with a growing national concern over the continued vitality of the death penalty.³⁷¹

A. *Placing a Burden upon the Nation's Courts*

By ruling that the Sixth Amendment right to a jury trial required that a jury find the existence of aggravating factors used to sentence an individual to death, the Court invalidated death sentencing schemes in five states.³⁷² As such, the decision presents questions as to the validity of roughly eight hundred death row sentences in those states.³⁷³

Although many of these defendants received death sentences under now unconstitutional judicial death sentence schemes, it is unlikely that many of the challenges will prove successful.³⁷⁴ Nevertheless, the nation's courts have already felt the effects of a number of death sentence challenges based upon the *Ring* decision.³⁷⁵

370. See *infra* Part V.B (discussing the future for states that utilize a judicial override scheme in light of the *Ring* decision).

371. See Steiker, *supra* note 359, at 1477. The Court's decision in *Ring* "reflects a recent and more widespread cultural and political shift in popular attitudes and concerns about the death penalty." *Id.*

372. Press Release, Coloradans Against the Death Penalty, CADP Hails Court Ruling Which Renders Colorado Death Penalty Law Unconstitutional (June 24, 2002), at http://www.coadp.org/thepublications/pub-2002-6-CADP_RingPR.html (last visited May 6, 2003). In addition to Arizona, the Court's decision invalidated death penalty statutes in Colorado, Idaho, Montana, and Nebraska. *Id.*; see also *Ring*, 122 S. Ct. at 2449 (O'Connor, J., dissenting) (noting the state death penalty statutes invalidated by the majority decision in *Ring*).

373. Br. for Amici Curiae Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Mississippi, Montana, Nebraska, Nevada, New York District Att'ys Association, Pennsylvania, South Carolina, Utah, Virginia, in Supp. of Resp't at 10, *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (No. 01-488), available at LEXIS, 2001 U.S. Briefs 488. An amici curiae brief submitted by several states in the *Ring* case indicates that Alabama, Arizona, and Florida have the greatest number of sentences that would be affected, totaling approximately five hundred combined. *Id.* at 10 n.7; see also CRIM. J. PROJECT OF THE NAACP LEGAL DEF. AND EDUC. FUND, INC., DEATH ROW U.S.A. 21-22 (Fall 2001), available at <http://www.naacpldf.org/pdfdocs/DRUSA-Fall01.pdf> (last modified Oct. 1, 2001).

374. *Ring*, 122 S. Ct. at 2449 (O'Connor, J., dissenting). Justice O'Connor explained that many inmates faced an uphill climb proving that their sentences did not result from harmless error. *Id.* (O'Connor, J., dissenting).

375. See *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (holding that a defendant's writ of habeas corpus was improperly denied due to Nevada's scheme of judicial determination of aggravating factors); *Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002) (holding that the defendant failed to show prima facie evidence that *Ring* applied retroactively to collateral review cases); *United States v. Lentz*, 225 F. Supp. 2d 672 (E.D. Va. 2002) (upholding the federal death penalty statute, which provided for a judicial finding of aggravating factors in order to raise a defendant's minimum sentence).

B. Requirement of Judicial Determinations Produces Uncertainty

In the wake of *Ring*, confusion abounded regarding exactly what the Court held.³⁷⁶ By limiting its explicit holding to a jury determination of aggravating factors, yet not addressing the jury's role in determining the final sentence, the Court left a substantial question unanswered.³⁷⁷ In response to the Court's invalidation, the Arizona state legislature quickly held a special session and enacted new legislation to recognize jury participation in the aggravating factors determination.³⁷⁸ Arizona's new death penalty scheme placed the aggravating factors determination in the hands of the trier of fact, yet did not explicitly require that a jury make the determination.³⁷⁹ Thus, questions arise as to what will happen when a defendant waives his or her right to a jury trial in the guilt phase.³⁸⁰

Furthermore, the Court failed to address the continued vitality of states that use judicial override.³⁸¹ In four states, a jury determination of the existence of aggravating factors serves as an advisory verdict to the judge, who then conducts his own balancing test in order to

376. See, e.g., Press Release, Floridians for Alternatives to the Death Penalty, *Ring* Decision Impacts Florida (June 24, 2002) [hereinafter FADP] ("A defendant is entitled to a jury determination of aggravating factors that must be found before death may be imposed"), at <http://www.ccadp.org/ring-pressreleases.htm> (last visited May 6, 2003). Cf. Debra Rosenberg, *Web Exclusive: 'People on Death Row Are Thrilled,'* NEWSWEEK, June 26, 2002, Nat'l Affairs ("Ring v. Arizona said juries, not judges must sentence inmates to death."), available at 2002 WL 9211380.

377. See, e.g., FADP, *supra* note 376. "For example, what will happen in cases where a defendant waived his or her right to a trial by jury?" *Id.*

378. See Act of Aug. 1, 2002, ch. 1, 2002 Ariz. Sess. Laws 5th Spec. Sess. (codified at ARIZ. REV. STAT. § 13-703 (2002)). The new death penalty legislation applies to all first-degree murder trial held after August 1, 2002. *Id.*

379. Act of Aug. 1, 2002, ch. 1, 2002 Ariz. Sess. Laws 5th Spec. Sess. (codified at ARIZ. REV. STAT. § 13-703(C) (2002)). The statute reads in pertinent part:

In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

Id.; see also ARIZ. REV. STAT. § 13-703(C) (2002) ("At the penalty phase . . . [i]f the trier of fact is a jury, the jurors do not have to agree unanimously that a mitigating circumstance has been proven to exist.").

380. See Liptak, *supra* note 1 (referring to the numerous questions that the *Ring* decision raises concerning implementation).

381. Adam Liptak, *A Florida Judge Upholds State Death-Sentence Law*, N.Y. TIMES, July 3, 2002, at A18, available at LEXIS, News File, New York Times Library.

determine whether to impose the death penalty.³⁸² Although Delaware and Indiana amended their capital laws following the *Ring* decision,³⁸³ other states continued to uphold the constitutionality of judicial override schemes.³⁸⁴ Even though *Ring*'s impact upon judicial override systems remains unclear, the majority opinion certainly indicated a heightened protection of the jury trial right.³⁸⁵ The majority asserted a distaste for any argument that judicial efficiency and accuracy in decision making should trump an all-encompassing right to a jury trial.³⁸⁶ This firm conviction that the right to a jury trial must receive heightened protection could prompt the Court to reexamine judicial override sentencing schemes.

C. Jury Determinations Question Continued Existence of the Death Penalty

Finally, the Court's decision fuels a growing national debate over the continued imposition of the death penalty.³⁸⁷ Justice Breyer theorized that juries serve an invaluable purpose in voicing the community consensus on the death penalty through their votes in capital cases.³⁸⁸ Recent actions in states that retain the death penalty reflect growing concern over its potential for erroneous results.³⁸⁹ Furthermore, surveys

382. *Ring v. Arizona*, 122 S. Ct. 2428, 2442 n.6 (2002). The four states that use these hybrid systems are Alabama, Delaware, Florida, and Indiana. *Id.*

383. *See* Liptak, *supra* note 1; *see also* DEL. CODE ANN. tit. 11, 4209 (2001); IND. CODE ANN. 35-50-2-9(d) to (e) (Michie 1998 & Supp. 2002).

384. *See* *King v. Moore*, 831 So. 2d 143, 145 (Fla. 2002) (denying habeas corpus relief to a defendant who claimed that Florida's system of judicial override did not comply with the Sixth Amendment). The Florida Supreme Court acknowledged that although the Court's decision in *Ring* placed Florida's capital sentencing scheme in jeopardy, the *Ring* Court failed to explicitly overrule *Spaziano v. Florida*, 468 U.S. 447 (1984). *See id.* at 155 (Pariente, J., concurring in result only).

385. *See* *Ring*, 122 S. Ct. at 2443. The Court asserted that the jury trial guarantee reflected critical judgments about the proper administration of justice and law enforcement in the United States. *Id.*

386. *See id.* at 2442.

387. *See* Barbara Bader Aldave, *The Future of Capital Punishment in the United States*, 81 OR. L. REV. 1, 9 (2002). Barbara Bader Aldave advocates a nationwide discussion over the value of the death penalty in light of growing litigation costs and disparate impositions of capital punishment. *Id.*

388. *See* *Ring*, 122 S. Ct. at 2447 (Breyer, J., concurring). "Leaving questions of arbitrariness aside," Justice Breyer believes that jury determinations of aggravating factors "will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not 'cruel,' 'unusual,' or otherwise unwarranted." *Id.* at 2448 (Breyer, J., concurring).

389. *See* Steve Mills & Maurice Possley, *Clemency Adds Fuel to Death Penalty Debate: Mixed Response to Ryan's Actions*, CHI. TRIB., Jan. 13, 2003, § 1, at 1, available at 2003 WL

indicate an overall decline in the imposition of the death penalty in the United States.³⁹⁰ Although juries must now make the findings that determine whether to impose the ultimate punishment, the question remains as to how long they will continue to make that determination.

VI. CONCLUSION

The majority correctly decided that the death-sentencing scheme in the State of Arizona violated the Sixth Amendment by authorizing judges to determine the existence of aggravating factors used to sentence first-degree murder defendants to death. Although the majority left questions unanswered regarding the scope of its decision, the Court properly interpreted that an increase in a defendant's punishment, from life to death, increased the punishment beyond the maximum allowed by the laws of Arizona. Although the State of Arizona attempted to craft capital sentencing legislation to conform with the death penalty jurisprudence of the 1970s, that attempt neglected the fundamental importance of the right to a jury trial, particularly when a state imposes the ultimate punishment of death. As such, *Ring v. Arizona* serves not only as a champion of the Sixth Amendment but also as an argument against the continued vitality of the death penalty in the United States.

3743362. Recently, in Illinois, Governor George Ryan pardoned four death row inmates and commuted the death sentences of 164 others to life in prison without parole. *Id.*

390. Mills & Possley, *supra* note 389, at 1. For example, Richard Dieter of the Death Penalty Information Center indicates that over the five years prior to 2001, juries imposed an average of 300 death sentences per year. *Id.* Yet, in 2001, that number decreased to 165 nationwide. *Id.*