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Criminal Law - The Sixth Amendment Clash: Judge vs. Juries. Ring v. Arizona, 122 S. Ct. 2428 (2002)

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CRIMINAL LAW – The Sixth Amendment Clash: Judges vs. Juries. *Ring v. Arizona*, 122 S. Ct. 2428 (2002).

INTRODUCTION

On November 28, 1994, a Wells Fargo armored van pulled up to the Dillard's department store at the Arrowhead Mall in Glendale, Arizona.[1] Dave Moss, the van's "hopper," left the armored vehicle and entered the department store to pick up its daily deposit.[2] After making his rounds, Moss left the store to return to the vehicle.[3] Upon exiting the store, he found the armored vehicle missing.[4] About five hours later, the missing van was discovered by a Maricopa County Sheriff's deputy in the parking lot of the Sun City Church.[5] The van's doors were locked and the engine was running.[6] Inside the vehicle, police discovered the body of the driver, John Magoch, dead from a single gunshot to the head.[7]

Through information provided by an informant, the Glendale Police Department contacted Judy Espinoza, the girlfriend of James Greenham.[8] The police suspected Greenham had taken part in the robbery.[9] Espinoza told police she had seen Greenham acting suspiciously the week of the robbery and did not know of his whereabouts on the afternoon of the robbery.[10] Police believed that two of Greenham's friends, Timothy Ring and William Ferguson, were also involved in the robbery.[11] While conducting surveillance of Greenham and Ring, police observed both making large cash purchases.[12] Subsequent wiretaps revealed suspicious information being passed between the three men.[13] On February 16, 1995, the police obtained a war-

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1. State v. Ring, 25 P.3d 1139, 1142 (Ariz. 2001).
2. *Id.* "Hopper" is the slang term for the van's courier who enters the business while the driver stays inside the armored vehicle to guard the money. *Id.*
3. Ring v. Arizona, 122 S. Ct. 2428, 2432 (2002).
4. *Id.* at 2432-33.
5. *Ring*, 25 P.3d at 1142.
6. *Id.*
7. *Id.* Wells Fargo officials determined that $833,798.12 had been stolen from their armored van. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 1143.
11. *Id.* at 1142. Espinoza also told police that Ring owned a red pick-up truck. *Id.* While there were no eyewitnesses to the crime, two individuals had told police that on the day of the robbery, they had seen a white van being followed by a red pickup truck. *Id.* at 1143.
12. *Id.* at 1143.
13. *Id.* Police successfully generated more incriminating conversations between the men by releasing false statements about the robbery on local news broadcasts. *Id.* One recorded conversation between Ring and Ferguson revealed that Ring had "laughed [his] ass off" about the information being released and that he was "not real worried at all now." *Id.* Ring went

rant to search Ring's house.[14] Police found a homemade sound suppressor attached to a Ruger 10-22 rifle hidden behind a water heater.[15] Police also found large sums of cash and a notebook that apparently showed the amount of money each man was to get for his part in the robbery.[16]

Ring was arrested and charged with the murder of the vehicle driver, John Magoch.[17] At trial, Ring claimed the money was obtained from his work as a gunsmith, a bounty hunter, and as a confidential informant for the FBI.[18] Evidence was introduced that Ring only made around $5000 from his work in these endeavors.[19] Based on the circumstantial evidence presented by the state, a jury convicted Ring of first-degree felony murder.[20] According to Arizona's first-degree murder statute, this offense is punishable by either life imprisonment or death.[21] Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for felony murder, unless further findings of fact were made by the trial judge.[22] As required by statute, Judge Gregory Martin conducted a special sentencing hearing without a jury to determine whether Ring would receive a life sentence or the death penalty.[23] Between Ring's trial and sentencing hearing, Greenham pled

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on to say "there's only one thing that slightly concerns me . . . [if] they ask for hair and fiber [samples]." *Id.* at 1144.

14. *Id.* at 1143.

15. *Id.* At trial, the state was unable to connect this gun to the murder because the round that entered Magoch's body was not recovered, the pathologist who performed the autopsy could not conclude what type of weapon was used, nor could the caliber of weapon used be determined. *Id.*

16. *Id.* at 1144. At trial, an expert testified that the handwriting in the notebook was that of Timothy Ring. *Id.* A search warrant for William Ferguson's residence also turned up $62,601. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The trial judge instructed the jury on alternative charges of premeditated murder and felony murder. The jury deadlocked on premeditated murder, with six of the twelve jurors voting to acquit Ring. The jury did convict Ring of felony murder, because the murder occurred in the course of an armed robbery. *Id.* *See* ARIZ. REV. STAT. ANN. §13-1105(A), (B) (West 2001). As later summed up by the Arizona Supreme Court:

> The evidence admitted at trial failed to prove, beyond a reasonable doubt, that [Ring] was a major participant in the armed robbery or that he actually murdered Magoch. [F]or all we know from the trial evidence, [Ring] did not participate in, plan, or even expect the killing. This lack of evidence no doubt explains why the jury found [Ring] guilty of felony, but not premeditated, murder.

Ring, 25 P.3d at 1152.

21. *Ring*, 122 S. Ct. at 2434. *See* ARIZ. REV. STAT. ANN. §13-1105(C) (West 2001).

22. *Ring*, 122 S. Ct. at 2434. ARIZ. REV. STAT. ANN. §13-703 (West 2001). *Id.* This statute directs the trial judge to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain] enumerated circumstances . . . for the purpose of determining the sentence to be imposed." *Id.*

23. *Ring*, 25 P.3d at 1144. *See* ARIZ. REV. STAT. ANN. § 13-703(B) (West 2001).

guilty to second-degree murder and armed robbery and agreed to testify against Ring and Ferguson.[24] At Ring's sentencing hearing, Greenham testified that Ring had been the "leader because he laid out all the tactics."[25] Greenham also stated that Ring had shot Magoch with the Ruger rifle found during the police search, and that later Ring asked the men to congratulate him on his accurate shot.[26]

After the sentencing hearing, Judge Martin issued his special verdict to determine whether Ring would receive a sentence of life in prison or death.[27] In his verdict, Judge Martin determined that Ring was the person who killed Magoch, a fact not proved during trial.[28] Judge Martin also determined that Ring was a major participant in the armed robbery and that his behavior exhibited a reckless disregard for human life.[29] This made him eligible for the death penalty under the felony murder statute.[30] Judge Martin then looked at any aggravating and mitigating circumstances and determined that two aggravating circumstances were present.[31] First, he determined that Ring committed the offense in expectation of receiving something of pecuniary value.[32] Second, Judge Martin found that the offense was committed "in an especially heinous, cruel, or depraved manner" because of Ring's comment about his excellent marksmanship when shooting Magoch.[33] Judge Martin then found one nonstatutory mitigating factor, Ring's minimal criminal record.[34] In Judge Martin's opinion, this mitigating circumstance did not "call for leniency."[35] Based solely on the jury verdict, the maximum punishment Ring could have received was life in prison.[36] Nevertheless, under Arizona law a death sentence could now be imposed because

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24. *Ring*, 122 S. Ct. at 2435.
25. *Ring*, 25 P.3d at 1144.
26. *Id.* Greenham previously had told Ring's counsel that Ring had nothing to do with the planning or execution of the robbery, but stated at the sentencing hearing that he was now testifying as "payback" for threats Ring had made on his life and Ring's interference in his personal relationship with Greenham's ex-wife. *Ring*, 122 S. Ct. at 2435.
27. *Ring*, 25 P.3d at 1144.
28. *Id.*
29. *Id.* Judge Martin determined that Ring's behavior had shown a "reckless disregard for human life" because he had asked to be "congratulated" after shooting Magoch. *Id.*
30. *Id.* at 114-45. In *Tison v. Arizona*, the U.S. Supreme Court found that the Eighth Amendment permits execution of a felony murder defendant who did not kill or attempt to kill, *if* that individual was a major participant in the felony committed and demonstrated reckless indifference to human life. 481 U.S. 137, 158 (1987).
31. Ring v. Arizona, 122 S. Ct. 2428, 2435 (2002). *See* ARIZ. STAT. ANN. § 13-703 (West 2001).
32. *Ring*, 122 S. Ct. at 2435. Judge Martin found that the "taking the cash from the armored car was the motive and reason for Mr. Magoch's murder and not just the result." *Id.*
33. *Id.*
34. *Id.* No mention of Ring's minimal criminal record is found in any brief or court opinion.
35. *Id.* at 2436.
36. *Id.* at 2437.

Judge Martin found at least one aggravating circumstance present during the sentencing hearing.[37] Accordingly, Judge Martin sentenced Ring to death.[38]

Ring appealed to the Arizona Supreme Court, arguing that Arizona's capital punishment scheme violated the Sixth Amendment to the United States Constitution.[39] Ring asserted that Arizona's law allowed a judge to independently make findings of fact after a jury trial that could increase a defendant's maximum jail sentence beyond that to which the defendant could have been sentenced based on the findings of the jury trial alone.[40] The Arizona Supreme Court agreed that there was insufficient evidence to support the aggravating circumstance of depravity.[41] Regardless, the court upheld the aggravating factor concerning pecuniary gain.[42] The court then weighed the one remaining aggravating factor against the sole mitigating factor (Ring's minimal criminal record) and affirmed the death sentence.[43] Subsequently, the United States Supreme Court granted certiorari to determine:

> [W]hether Arizona's capital sentencing statutory scheme, under which, according to the Arizona Supreme Court, the maximum "punishment allowed by law on the basis of the verdict alone is life imprisonment" and "[i]t is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death" contravenes the right to jury trial guaranteed by the Sixth Amendment.[44]

This case note will look at the recent inconsistency in case law regarding post-trial judicial enhancement of a defendant's sentence. It will also explore why the Supreme Court's decision in *Ring* was correct, as Arizona's sentencing scheme violated the Sixth Amendment and displaced the jury from its proper place as factfinder in a criminal trial.[45] Finally, this case note will further examine what precedent was overruled by *Ring*, and how capital punishment will be affected across the country.

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37. *Id.*
38. *Id.* at 2436.
39. *Id.*
40. *Id.* at 2437.
41. *Id.* at 2436.
42. *Id.*
43. *Id.* The Arizona Supreme Court also looked at the significant inconsistency in the current case law regarding a judge's ability to solely determine aggravating and mitigating circumstances after a jury decision. State v. Ring, 25 P.3d 1139, 1150 (Ariz. 2001).
44. Ring v. Arizona, 122 S. Ct. 2428, 2437 (2002); Brief for Petitioner at 2, Ring v. Arizona, 122 S. Ct. 2428 (2002) (No. 01-488) [hereinafter Petitioner's Brief].
45. State v. Ring, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 122 S. Ct. 865 (2002).

BACKGROUND

Constitutionality of the Death Penalty

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[46] For years, controversy had existed because many thought the death penalty was a cruel and unusual form of punishment, and thus a violation of the Eighth Amendment.[47] In 1972, the United States Supreme Court decided *Furman v. Georgia*, which declared the death penalty unconstitutional.[48] In *Furman*, three cases where the death penalty was imposed were consolidated.[49] In two cases, the defendants were convicted of rape, and in the other the defendant was convicted of murder.[50] The *Furman* Court held that the death penalty was faulty in its justification and uneven application.[51] In cases throughout America's history, the Court had held that the death penalty was a traditional form of punishment in the United States.[52] In *Furman*, however, the Court reasoned that since the death penalty had been imposed upon minorities in such a disproportionate way, it violated the Eighth Amendment's ban on "cruel and unusual punishment."[53] The effect of *Furman* was that it invalidated every existing state death penalty law in the country.[54]

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46. U.S. CONST. amend. VIII.
47. Furman v. Georgia, 408 U.S. 238, 241-42 (1972).
48. 408 U.S. 238 (1972) (per curium).
49. *Id.* at 240.
50. *Id.*
51. *Id.* at 251-52 (Douglas, J., concurring). Justice Douglas argued that the death penalty was "cruel and unusual" punishment, and that those who were sentenced to death were usually racial minorities and the poor. *Id.* (Douglas, J., concurring). Justice Douglas also quoted former Attorney General Ramsey Clark, writing, "It is the poor, the sick, the ignorant, the powerless and the hated who are executed." *Id.* at 251 (Douglas, J., concurring).
52. Trop v. Dulles, 356 U.S. 86 (1957). Trop was a soldier in the United States Army who lost his United States citizenship and became stateless because of his conviction by court-martial for wartime desertion. *Id.* at 87. In 1952, Trop applied for an American passport, but was denied because he had lost his citizenship. *Id.* at 88. Chief Justice Warren, writing for the majority, ruled that this denial was beyond the war powers of Congress. *Id.* at 104. Since wartime desertion is punishable by death, there was a comparison between the punishments of death and denationalization. *Id.* at 99-100. Chief Justice Warren wrote that "the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." *Id.* at 99.
53. *Furman*, 408 U.S. at 240 (Douglas, J., concurring). The *Furman* Court struck down Georgia' death penalty statute because it had not been imposed in an "evenhanded, nonselective, and nonarbitrary way." *Id.* at 256. *Furman* was a five to four decision, with Justices Douglas, Brennan, White, Marshall and Stewart in the majority. Each justice filed a separate concurring opinion. The dissenters were Justice Blackmun, Powell, Rehnquist, and Chief Justice Burger. *Id.* at 239 (per curiam).
54. Bob Egelko, *Death Penalty Dealt Another Blow*, S.F. CHRON., Jun. 25, 2002, at A1.

The Court revisited the death penalty four years later in *Gregg v. Georgia*.[55] After *Furman* in 1972, the Georgia legislature had revised the death penalty statute provisions that were deemed unconstitutional in *Furman*.[56] Troy Gregg was convicted of armed robbery and murder and was sentenced to death under Georgia's newly amended death penalty statute.[57] *Gregg* held that capital punishment for the crime of murder does not always violate the Eighth Amendment.[58] The majority determined that while a state legislature may not impose excessive punishment, it is not restricted to the least severe punishment possible.[59] The Court held that the Eighth Amendment was not static, but was "flexible and dynamic" and evolved along with society's interpretation of decency and notions of justice.[60] The Court also reasoned that the deficiencies described in *Furman* had been cured with the newly revised Georgia death penalty statute.[61] Finally, the majority looked

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55. 428 U.S. 153 (1976).

56. *Id.* at 156. The Georgia Legislature had revised their death penalty statute that had previously left juries "with untrammeled discretion to impose or withhold the death penalty." *Id.* at 153. After significant revision, the Georgia death penalty statute stated:

> [This statute] retains the death penalty for murder and five other crimes. Guilt or innocence is determined in the first stage of a bifurcated trial; and if the trial is by jury, the trial judge must charge lesser included offenses when supported by any view of the evidence. Upon a guilty verdict or plea a presentence hearing is held where the judge or jury hears additional extenuating or mitigating evidence and evidence in aggravation of punishment if made known to the defendant before trial. At least one of 10 specified aggravating circumstances must be found to exist beyond a reasonable doubt and designated in writing before a death sentence can be imposed. In jury cases, the trial judge is bound by the recommended sentence. In its review of a death sentence (which is automatic), the State Supreme Court must consider whether the sentence was influenced by passion, prejudice, or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." If the court affirms the death sentence it must include in its decision reference to similar cases that it has considered.

Id. at 153-54. The Georgia statutory system under which Gregg was sentenced to death was found to be constitutional because the new procedures on their face satisfied the concerns of the Court expressed in *Furman*. *Id.* at 155-56. The death penalty could now only be imposed if there were specific jury findings as to the circumstances of the crime or the character of the defendant. *Id.* The Georgia Supreme Court then reviewed the comparability of each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. *Id.* at 156.

57. *Id.* at 153.

58. *Id.* at 154.

59. *Id.*

60. *Id.*

61. *Id.* at 155. The *Gregg* Court held:

> Georgia's new statutory scheme, enacted to overcome the constitutional deficiencies found in *Furman*, to exist under the old system, not only guides the jury in its exercise of discretion as to whether or not it will im-

at American history and found that the Framers of the Constitution had accepted capital punishment, and that for nearly two centuries the Court had recognized that capital punishment for the crime of murder was acceptable.[62] *Gregg* firmly established that the United States Supreme Court felt that capital punishment was constitutional if done under a proper and fair statutory scheme.[63]

Cases Under the Sixth Amendment

The death penalty has also been challenged under the Sixth Amendment to the United States Constitution. 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."[64] Cases challenging the death penalty under the Sixth Amendment arose because of a judge's independent reexamination of a jury verdict, which often resulted in the defendant's sentence being increased from the maximum punishment allowed by the jury decision. The defendants in these cases claimed this violated their Sixth Amendment right to trial by jury.

The first case to use the term "sentencing factor" to refer to a fact not found by the jury at trial, which could result in sentence enhancement, was *McMillan v. Pennsylvania*, decided in 1986.[65] At issue in *McMillan* was Pennsylvania's Mandatory Minimum Sentencing Act, which called for a sentence enhancement after conviction if the defendant "visibly possessed a firearm" during the commission of the offense.[66] *McMillan* consolidated three cases where individuals had been given enhanced sentences because a

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> pose the death penalty for first-degree murder, but also gives the Georgia Supreme Court the power and imposes the obligation to decide whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion. If that court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish that the Georgia Supreme Court failed properly to perform its task in the instant case or that it is incapable of performing its task adequately in all cases. Thus the death penalty may be carried out under the Georgia legislative scheme consistently with the *Furman* decision.

Id. at 156.

62. *Id.* at 154.

63. Egelko, *supra* note 54, at A1. *Gregg* also held that states must apply special procedural safeguards when they seek the death penalty, which were accomplished by the revised Georgia death penalty statute. *Gregg*, 428 U.S. at 153-54. These safeguards then will ensure no violation of the Eighth Amendment's ban on "cruel or unusual" punishment. Furman v. Georgia, 408 U.S. 238, 240 (1972).

64. U.S. CONST. amend. VI.

65. 477 U.S. 79 (1986).

66. *Id.* at 79.

firearm had been visible during the commission of a crime.[67] Justice Rehnquist, writing for the majority, held that the statute did not violate the Sixth Amendment because a state may treat visible possession of a firearm as a sentencing consideration rather than a particular offense.[68] Moreover, the Court held that the Act did not violate the Sixth Amendment because a defendant has a right to a trial by jury, not "jury sentencing."[69]

In 1989, the Court decided *Hildwin v. Florida*.[70] This case reaffirmed that a judge may decide aggravating factors after a jury trial and impose a death sentence.[71] Paul Hildwin had been convicted of first-degree murder and under Florida law could be sentenced to either life imprisonment or death.[72] Under the Florida sentencing scheme, following a defendant's conviction of a capital felony, the trial court conducts a separate sentencing proceeding and the jury renders an advisory verdict.[73] The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance.[74] If the court imposed a sentence of death, it must "set forth in writing its findings upon which the sentence of death is based."[75] After Hildwin's trial, the jury returned a unanimous advisory verdict of death and the trial judge then imposed the death sentence.[76]

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67. *Id.* at 79-80. 42 PA. CONS. STAT. § 9712 (1982) provides:

> Any person who is convicted in any court of this Commonwealth of a crime of violence as defined in section 9714(g) (relating to sentences for second and subsequent offenses), shall, if the person visibly possessed a firearm or a replica of a firearm, whether or not the firearm or replica was loaded or functional, that placed the victim in reasonable fear of death or serious bodily injury, during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary. Such persons shall not be eligible for parole, probation, work release or furlough.

Id.

68. *McMillan*, 477 U.S. at 79.

69. *Id.* at 79-80. Justice Rehnquist concluded:

> Petitioners again argue that the jury must determine all ultimate facts concerning the offense committed. Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.

Id. at 93.

70. 490 U.S. 638 (1989).

71. *Id.* at 638.

72. *Id.*

73. *Id.*

74. *Id.* A trial judge in Florida may also sentence a defendant to death regardless of a jury's advisory verdict to not impose the death penalty. *Id.*

75. *Id.* at 639.

76. *Id.*

The trial judge found four aggravating circumstances, but no mitigating circumstances.[77] In front of the United States Supreme Court, Hildwin argued that the Florida capital sentencing scheme violated the Sixth Amendment because it permitted the imposition of death without a specific finding by the jury that an aggravating circumstance existed to make the defendant eligible for the death penalty.[78] The Court affirmed the death penalty because "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."[79] The Court held "[I]f the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, however, it follows that it does not forbid the judge to make the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence."[80]

The *Hildwin* Court, in rendering its judgement, relied heavily on its decision in *Spaziano v. Florida*.[81] There, the Court upheld a Florida law that allowed a judge to impose a death sentence even after the jury recommended life in prison.[82] The Court admitted that while capital sentencing conducted by a judge after a jury trial may be important to a Double Jeopardy violation under the Fifth Amendment, it did not violate a defendant's Sixth Amendment right to trial by jury.[83] This was because the *Spaziano* Court held that independent judicial sentencing after a jury decision was not a "trial" and therefore not governed by the Sixth Amendment.[84]

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77. *Id.* The trial judge found four aggravating circumstances in order to impose the death penalty: defendant had previous convictions for violent felonies, he was under a sentence of imprisonment at the time of the murder, the killing was committed for pecuniary gain, and the killing was especially heinous, atrocious, and cruel. The trial judge found nothing in mitigation. *Id.*

78. *Id.* at 639-40.

79. *Id.* at 640-41.

80. *Id.* at 640.

81. 468 U.S. 447 (1984).

82. Hildwin v. Florida, 490 U.S. 638, 639-40 (1989).

83. *Id.* The *Spazianio* Court held that "[t]he sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant . . . ." Spaziano v. Florida, 468 U.S. 447, 459 (1984). The majority wrote:

> [T]here is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed [that] also disposes of petitioner's double jeopardy challenge to the jury-override procedure. If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the advice of the jury. The advice does not become a judgment simply because it comes from the jury.

Id. at 465.

84. *Id.* at 465-66.

The first case to challenge Arizona's sentencing scheme as unconstitutional under the Sixth Amendment was *Walton v. Arizona* in 1990.[85] Jeffery Walton was convicted of robbing and murdering an off-duty Marine outside of Tucson, Arizona, in 1986.[86] A jury convicted Walton of first-degree murder after being given instructions on both premeditated and felony murder.[87] The trial judge then conducted a separate sentencing hearing as required by statute to determine if any aggravating or mitigating circumstances were present.[88] First, the judge found that Walton committed that act for pecuniary gain.[89] Second, the act was committed "in an especially cruel, heinous, or depraved manner."[90] The judge considered the mitigating circumstances of Walton's youth and his history of substance abuse, which may have impaired his judgment.[91] The judge felt that there were no mitigating circumstances sufficiently substantial to call for leniency and sentenced Walton to death.[92]

The United States Supreme Court affirmed Walton's death sentence and held that Arizona's sentencing scheme did not violate the Sixth Amendment.[93] The Court held that the United States Constitution does not require that every finding of fact underlying a sentencing decision be made by a jury.[94] The Court held that Arizona's separate judicial sentencing scheme did not determine elements of a crime, but merely the sentence which was to be imposed.[95] With respect to the presence of aggravating and mitigating circumstances, the Court stated:

> Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice" between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant (*i.e.*,

85. 497 U.S. 639 (1990).
86. *Id.* at 644.
87. *Id.* at 645.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* Walton was 20 at the time of the killing. *Id.* Evidence was presented at trial that Walton was also sexually abused as a child. *Id.*
92. *Id. Walton* was very similar procedurally to *Ring* in that both men were charged with the same crimes and raised the same arguments against Arizona's sentencing scheme that allows a judge to make findings of fact to increase a jury sentence. However, Ring prevailed whereas Walton's death sentence was affirmed.
93. *Id.* at 647.
94. *Id.* Justice White wrote, "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Id.* (quoting Clemons v. Mississippi, 494 U.S. 738, 745 (1990)).
95. *Walton*, 497 U.S. at 648.

> require the death penalty), and the failure to find any particular aggravating circumstance does not "acquit" a defendant (*i.e.*, preclude the death penalty).[96]

Walton stood for broad judicial discretion in sentencing, as the Court held that a judge was constitutionally permitted to make findings of fact after a jury decision because "the Sixth Amendment does not require that the specific finding authorizing the imposition of the sentence of death be made by the jury."[97]

Jones v. United States, decided in 1999, addressed a federal carjacking statute that allowed a sentence enhancement for causing bodily harm during the commission of a crime.[98] Nathan Jones was convicted of stealing a Cadillac at gunpoint in December 1992.[99] His sentence was enhanced under the federal statute after the jury conviction because he had pistol-whipped the vehicle's owner, causing him to suffer a perforated eardrum.[100] However, the "bodily harm" sentence enhancement had not been contained in Jones' indictment, Jones had not been informed of the charge by the Magistrate Judge, and the charge had not been submitted to the jury.[101] On a writ of certiorari to the United States Supreme Court, Jones contended that this enhancement was actually a separate charge for which the elements had not been proven.[102] The United States Government argued that the enhancement was merely a sentencing factor that contained no elements and need not be proven at trial.[103] The Court held that the government's position would raise serious constitutional concerns and was not supported by precedent.[104] The majority construed the sentence enhancement as a separate offense for which elements must be proven and not as a sentencing guideline.[105] This meant that the bodily harm offense had to be contained in the indictment, proven beyond a reasonable doubt at trial, and submitted to a jury for a decision.[106]

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96. *Id.*

97. *Id.* *Walton* also drew support from *Cabana v. Bullock*, 474 U.S. 376 (1986), where the Court held that there was no constitutional bar to an appellate court's findings that a defendant killed, attempted to kill, or intended to kill, in order to impose the death penalty in a death penalty case. Ring v. Arizona, 122 S. Ct. 2428, 2437-38 (2002).

98. 526 U.S. 227 (1999); *see* 18 U.S.C. § 2119 (1992).

99. *Jones*, 526 U.S. at 231.

100. *Id.*

101. *Id.* at 230-31.

102. *Id.* at 231-32.

103. *Id.* at 232-33.

104. *Id.* at 251.

105. *Id.* at 252.

106. *Id.* Another case of note came a year earlier in Almendarez-Torres v. United States, 523 U.S. 224 (1998). Hugo Almendarez-Torres had been deported from the United States because of three aggravated felonies, but was arrested after he entered the United States illegally. *Id.* at 224. His indictment had not contained his previous felony convictions, but Almendarez-Torres received a sentence enhancement for his prior record anyway. *Id.* Almendarez-Torres claimed that since his indictment had not mentioned his prior aggravated felony

The *Jones* Court sought to distinguish itself from *Walton* because *Walton* "characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available."[107] Justice Kennedy, in his dissent in *Jones*, wrote that the Court's decision had needlessly cast doubt on capital sentencing.[108] He compared the results in *Jones* and *Walton* and concluded that "[i]f it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death."[109]

The issue in *Jones* was revisited in 2000 with *Apprendi v. New Jersey*.[110] In December, 1994, Charles Apprendi fired several gunshots into the home of an African-American family who had moved into an all-white neighborhood in Vineland, New Jersey.[111] Apprendi pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose, and one count of third-degree unlawful possession of an antipersonnel bomb.[112] The prison sentence for these convictions imposed a term of five to ten years.[113] New Jersey had a separate statute, described by the State Supreme Court as a hate crime law, which provided for an "extended term" of imprisonment if the trial judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose to intimidate an individual or groups because of race, religion, sexual orientation, or ethnicity.[114] The prosecutor then filed for an extended term because of evidence presented that Apprendi's shooting at the residence was racially motivated.[115] At a separate evidentiary hearing after Apprendi's trial, the judge determined that Apprendi's purpose for shooting into the residence was indeed racially motivated and gave him an enhanced sentence of 12 years under New Jersey's sentencing scheme.[116] Before the United States Supreme Court, Apprendi argued that the Due Process Clause of the Fourteenth

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convictions, his sentence could not be longer than two years. *Id.* This would be the maximum penalty for an individual without an offense convicted of being in the county illegally. *Id.* Almendarez-Torres received a prison sentence of 77-96 months. *Id.* The Court held that the sentence enhancement was a "penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the Government to charge the factor that it mentions, an earlier conviction, in the indictment." *Id.* at 226-27.

107. *Jones*, 526 U.S. at 251.
108. *Id.* at 271 (Kennedy, J., dissenting).
109. *Id.* at 272 (Kennedy, J., dissenting).
110. 530 U.S. 466 (2000).
111. *Id.* at 469.
112. *Id.* at 469-70.
113. *Id.* at 470.
114. *Id.* at 471.
115. *Id.* at 470.
116. *Id.* at 471.

Amendment to the United States Constitution required that the finding of bias upon which this hate crime sentence rested must be proved to a jury at trial beyond a reasonable doubt.[117] The Court held that "the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt."[118] The Court also found that historically, a defendant is entitled to a jury determination to determine if he is guilty of every element of a crime beyond a reasonable doubt under the Sixth Amendment.[119] The majority did not view the enhancement merely as a sentencing factor because it exposed the defendant to a greater punishment than that authorized by the jury verdict.[120]

The majority also addressed the dissent's criticism that *Apprendi* conflicted with *Walton* regarding the sentencing of defendants through an independent judicial proceeding after a jury trial.[121] The majority reconciled the two by announcing that the ruling in *Apprendi* would not affect any capital cases, and that *Walton* remained the standard by which defendants convicted of murder would be sentenced.[122]

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117. *Id.*

118. *Id.* at 466. The *Apprendi* Court held:

> The answer to the narrow constitutional question presented – whether Apprendi's sentence was permissible – given that it exceeds the 10-year maximum for the offense charged-was foreshadowed by the holding in *Jones*, that, with regard to federal law, the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that 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 proved beyond a reasonable doubt. The Fourteenth Amendment commands the same answer when a state statute is involved.

Id.

119. *Id.* 466-67.

120. *Id.* at 467. The Court distinguished *Apprendi* from *Almendarez-Torres* because "allowing a judge to impose an enhanced sentence based on prior convictions not alleged in the indictment – represents at best an exceptional departure from the historic practice." *Id.*

121. *Id.* at 496.

122. *Id.* at 496-97. *Apprendi* held:

> [T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. For reasons we have explained, the capital cases are not controlling. Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed . . . . The person who is charged with actions that expose

The continued viability of *Walton* in light of recent decisions in *Jones* and *Apprendi* was questioned numerous times by the federal judiciary. In *United States v. Promise*, a panel of the United States Court of Appeals for the Fourth Circuit called the continued authority of *Walton* in light of *Apprendi* "perplexing, if not baffling."[123] *Hoffman v. Arave*, decided in the United States Court of Appeals for the Ninth Circuit, stated: "*Apprendi* may raise some doubt about *Walton*."[124] More confusion abounded because *Apprendi* held that a jury must make all factual determination regarding the sentencing of non-capital punishment defendants, but that *Walton* still applied to the sentencing of capital defendants.[125] These rulings appeared to indicate that the United States Supreme Court extended greater constitutional protection to noncapital, rather than capital, defendants.[126]

PRINCIPAL CASE

In *Ring*, the question presented was whether a judge might determine an aggravating factor which exposed a defendant to the death penalty, or whether the Sixth Amendment jury trial guarantee required that such a determination be entrusted to the jury.[127] Justice Ginsburg, writing for the majority, first addressed the "manifest tension" between *Walton* and *Apprendi*.[128] The *Walton* Court held that the Sixth Amendment did not require

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> him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.

Id. (citations omitted) (quoting Almendarez-Torres v. United States, 523 U.S. 224, 257, n.2 (Scalia, J., dissenting) (emphasis deleted)).

123. 255 F.3d 150, 159 (4th Cir. 2001).

124. 236 F.3d 523, 542 (9th Cir. 2000).

125. Ring v. Arizona, 122 S. Ct. 2428, 2436-37 (2002).

126. *Id.* at 2437.

127. *Id.* at 2437. Ring' s argument was very narrow and focused as it only contended only that the Sixth Amendment required jury findings, rather than independent judicial findings, on the aggravating circumstances asserted against him. *Id.*

128. *Id.* When Ring appealed to the Arizona Supreme Court, he argued that:

> [I]n light of the United States Supreme Court's decisions in *Jones* and *Apprendi*, Arizona's capital sentencing scheme violates the Sixth and Fourteenth Amendments to the United States Constitution. In response to defendant's claims, the state counters that , which approved Arizona's present judge-sentencing procedure for capital cases, is still the controlling authority on point. While the state is correct in noting that neither *Jones* nor *Apprendi* overruled *Walton*, we must acknowledge that both cases raise some question about the continued viability of *Walton*. Of course, it could also be said that because a majority of the Court refused to expressly overrule *Walton*, the apparent scope of *Apprendi* and *Jones* is not as broad as some of the language of the two opinions suggests.

State v. Ring, 25 P.3d 1139, 1150 (2001) (citations omitted). The Arizona Supreme Court found that "[a]lthough Defendant argues that *Walton* cannot stand after *Apprendi*, we are bound by the Supremacy Clause in such matters. Thus, we must conclude that *Walton* is still

the jury to make specific findings authorizing the imposition of the death penalty.[129] The majority thought this was due to the fact that the Court in *Walton* looked at aggravating circumstances as sentencing considerations rather than elements of an offense.[130] On the other hand, the *Ring* Court interpreted *Apprendi* to mean that the enhanced sentence violated the defendant's right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[131] The *Ring* Court unequivocally felt its ruling in *Apprendi* directly conflicted with *Walton.*[132] In *Apprendi,* the majority tried to reconcile both cases by noting a conviction of first-degree murder in Arizona carried a maximum sentence of death. The *Apprendi* Court held, "[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."[133] The majority in *Ring* cited the dissent in *Walton,* which called the Court's distinction and rationale "baffling" and "demonstrably untrue."[134] This is because life in prison was the statutory maximum Ring could receive due to his conviction.[135] Therefore, the majority held the Arizona sentencing scheme allowed for the imposition of the death penalty only in a "formal" sense.[136] This is because a judge had to make independent determinations of aggravating circumstances after trial for a defendant to become eligible for the death penalty.[137]

The Court was not persuaded by Arizona's claim that judicial authority over the determination of aggravating factors was a better way to guard against the "arbitrary imposition of the death penalty."[138] The majority held that the Sixth Amendment's right to a jury trial does not depend on

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the controlling authority and that the Arizona death-penalty scheme has not been held unconstitutional under either *Apprendi* or *Jones*." *Id.* at 1152.

129. *Ring*, 122 S. Ct at 2437. Justice Stevens, in his dissent in *Walton*, wrote that the Sixth Amendment required that "a jury determination of facts must be established before the death penalty may be imposed." Walton v. Arizona, 497 U.S. 639, 709 (1990) (Stevens, J., dissenting). Aggravators "operate as statutory 'elements' of capital murder under Arizona law because in their absence, [the death] sentence is unavailable." *Id.* at 709 n.1.

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

131. *Id.* at 2439. The *Apprendi* Court held that "[m]erely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 476 (2000)).

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

133. *Id.* at 2440.

134. *Id.*

135. *Id* at 2440. The *Ring* Court stated that the dispositive question here "is one not of form, but of effect." *Id.* at 2439. This is because the Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense." *Id.* at 2440.

136. *Id.*

137. *Id.*

138. *Id.* at 2442.

the "relative rationality, fairness, or efficiency of potential factfinders."[139] The majority also agreed that the "judicial factfinding in capital cases is far from evident."[140] The Court noted that of the 38 states that utilize capital punishment, 29 of them require juries, not judges, to make sentencing decisions regarding the imposition of the death penalty.[141]

The Court ultimately held that *Walton* and *Apprendi* were irreconcilable.[142] The Court acknowledged that though the doctrine of stare decisis is of fundamental importance, "[its] precedents are not sacrosanct."[143] Because the Court's Sixth Amendment jurisprudence could not accommodate both cases, *Ring* overruled *Walton*.[144] Justice Ginsburg announced the new rule regarding the sentencing of defendants would be that the Sixth Amendment requires a jury, rather than a judge, to determine all factors that are necessary to impose the death penalty.[145] The Court extended this jury trial right not only to capital punishment cases, but also to all criminal cases where a defendant's sentence might be enhanced because of aggravating circumstances.[146] The majority concluded by stating that this new rule "reflect[s] a profound judgment about the way in which [the] law should be enforced and justice administered."[147]

The dissent, written by Justice O'Connor and joined by Chief Justice Rehnquist, thought that *Walton*, rather than *Apprendi*, should have been the rule concerning post-trial sentencing by judges.[148] The dissent wrote that *Apprendi* was a serious mistake because it ignored the United States Consti-

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139. *Id.* Justice Scalia's concurrence in *Apprendi* noted that while entrusting to a judge the finding of facts necessary to support a death sentence might be:

> [A]n admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State . . . . The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights.

Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

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

141. *Id.* at 2443. Wyoming is one of the 29 states that requires the jury to make the sentencing decision in a death penalty case. WYO. STAT. ANN. § 6-2-102 (Lexis 2001).

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

143. *Id.* at 2442-43. Justice Ginsburg wrote: "[W]e have overruled prior decisions where the necessity and propriety of doing so has been established. We are satisfied that this is such a case." *Id.* at 2443.

144. *Id.*

145. *Id.*

146. *Id.* The Court held that the "trial by jury guaranteed by the Sixth Amendment would be senselessly diminished" if not extended to all cases where a defendant might be given an enhanced sentence because of an independent judicial determination of aggravating factors after a jury trial. *Id.*

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

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

tution, American history, and Supreme Court precedent.[149] The dissent felt that there was no justification for deviating from years of tradition where a judge maintained discretion in the sentencing of defendants.[150] Justice O'Connor predicted that a wave of appeals would hit an already overburdened judiciary system because of the ruling in *Ring*.[151] Yet, the dissent thought most of these appeals would be meaningless.[152] Justice O'Connor wrote that "prisoners will be unable to satisfy the standards of harmless error or plain error review, or because, having completed their direct appeals, they will be barred from taking advantage of today's holding on federal collateral review."[153]

ANALYSIS

The decision in *Ring* was significant for three reasons. First, it correctly ruled that juries, rather than judges, should make all factual decisions regarding the commission of a crime, guilt of a defendant, and imposition of a sentence. Consequently, jurors now have retained their appropriate role and constitutionally conferred right as fact finders. Second, it cleaned up significant inconsistency and confusion in existing caselaw concerning the methods by which defendants are sentenced. Third, *Ring's* impact on the death penalty and the prison system was immediate, and may shed light on the ultimate future of capital punishment.

Why Ring Was Decided Correctly

The statute in *Ring* was correctly struck down for two reasons. First, to remove the jury from its proper place as the trier of fact is unconstitutional under the Sixth Amendment.[154] The Sixth Amendment entitles a criminal defendant to a jury determination that he is guilty beyond a reasonable doubt of every element of the crime with which he is charged.[155] The *Ring* deci-

149. *Id.* at 2449 (O'Connor, J., dissenting). Although a dissenter in *Ring*, Justice O'Connor has expressed her displeasure with the death penalty in the past. At a conference with the Minnesota Women Lawyers in the summer of 2002, she told the audience that she was concerned by the number of innocent people sentence to death by a system which has proved it can't produce accurate results in every case. Andrew Cohen, *The Death Penalty's Cloudy Future*, *available at* www.cbsnews.com/stories/2004/04/26/news/opinion/courtwatch (Apr. 26, 2002).

150. *Ring*, 122 S. Ct. at 2449 (2002) (O'Connor, J., dissenting).

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

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

153. *Id.* at 2449-50 (O'Connor, J., dissenting).

154. Jones v. United States, 526 U.S. 227, 253 (1999) (Scalia, J., concurring).

155. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Justice Breyer wrote in his concurrence in *Ring* that jurors are better suited to make decisions regarding the death penalty.

> In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to "the community's moral sensibility," because they "reflect more accurately the composition and experiences of the community as a whole." Hence, they are more

sion ended the disturbing practice of allowing independent judicial review after a jury trial, a practice that denies capital defendants their constitutional right to an impartial jury drawn from a fair cross-section of the community.[156] Ring also may have had a claim under the Eighth Amendment that Arizona's sentencing statute violated the ban on "cruel and unusual punishment" because it allowed judges to increase a defendant's sentence from life imprisonment to death.[157]

The Sixth Amendment's right to a jury trial ensures that justice will be administered and enforced, and guards against Government oppression.[158] For over 200 years, a defendant has been given the choice between a judge or jury in criminal proceedings.[159] It is constitutionally impermissible not to allow a choice between a common sense, and perhaps more sympathetic judgment of a jury, rather than that of a "more tutored" or less sympathetic judge.[160] Furthermore, the Sixth Amendment right to a jury trial guards

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> likely to "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). [Juries are also] better able to determine in the particular case the need for retribution, namely, "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."

Ring v. Arizona, 122 S. Ct. 2428, 2447 (2002) (Breyer, J., concurring) (quoting Gregg v. Georgia, 428 U.S. 153, 184 (1976)). It is also interesting to note that the United States is the only western industrialized nation that utilizes the death penalty. Amnesty International Website Against the Death Penalty, Facts and Figures on the Death Penalty, *available at* http://www.web.amnesty.org/rmp/dplibrary.nsf (last visited Jan. 6, 2003).

156. Susan D. Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 677-78 (2002). Rozelle continues:

> To safeguard against the potential for injustice that comes with placing this potentially deadly sentencing duty in the hands of a few individuals, the Fourteenth Amendment requires that juries include an impartial, fair cross-section of the community. Such an impartial cross-section is vital to the integrity of the justice system, since without it, certain "qualities of human nature" and "perspective[s] on human events" would be missing from the deliberations. Society relies on the wisdom of the collective, and the idea that a group of impartial people who have diverse backgrounds, experiences, and standards will be representative of the "conscience of the community," as such a group must be in order to answer "the ultimate question of life or death."

Id. at 691.

157. *Ring*, 122 S. Ct. at 2446. Justice Breyer wrote in his concurrence in *Ring* that jury sentencing in capital cases is mandated by the Eight Amendment. *Id.* (Breyer, J., concurring). Justice Ginsburg also wrote in the majority opinion in *Ring* that "the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury." *Id.* at 2442.

158. Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

159. *Id.* at 156.

160. *Id.*

against the unfettered exercise of discretion over the life and liberty of a citizen by a judge or group of judges.[161]

The second reason why the Arizona statute was properly struck down stems from the fact that the traditional role of the jury as a factfinder is deeply rooted in American history.[162] The framers of the United States Constitution knew that it was vital to guarantee the right to a jury trial.[163] By the time the Constitution had been written in 1791, the right to a jury trial in England had been closely guarded for several centuries, and even could be traced back to the Magna Carta.[164] The Framers believed:

> [T]he English jury's role in determining critical facts in homicide cases was entrenched. 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. Moreover, *the 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, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was

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161. *Id.*

162. Walton v. Arizona, 497 U.S. 637, 710-11 (Stevens, J., dissenting). *Apprendi* held:

> The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. The historical foundation for these principles extends down centuries into the common law. While judges in this country have long exercised discretion in sentencing, such discretion is bound by the range of sentencing options prescribed by the legislature. The historic inseparability of verdict and judgment and the consistent limitation on judges' discretion highlight the novelty of a scheme that removes the jury from the determination of a fact that exposes the defendant to a penalty exceeding the maximum he could receive if punished according to the facts reflected in the jury verdict alone.

Apprendi v. New Jersey, 530 U.S 466, 466-67 (2000).

163. *Walton*, 497 U.S. at 711. Justice Breyer wrote in *Jones*:

> [T]he Framers' understanding of the Sixth Amendment principle demonstrated an accepted tolerance for exclusively judicial factfinding to peg penalty limits. But such is not the history. To be sure, the scholarship of which we are aware does not show that a question exactly like this one was ever raised and resolved in the period before the framing. On the other hand, several studies demonstrate that on a general level the tension between jury powers and powers exclusively judicial would likely have been very much to the fore in the Framers' conception of the jury right.

Jones v. United States, 526 U.S. 231, 244 (1999).

164. *Walton*, 497 U.S. at 711-12.

> adopted, the jury's right to make these determinations was unquestioned.[165]

Juries in Arizona still were able to decide an individual's guilt, but they were left out of critical fact-finding procedures that could increase a defendant's sentence.[166] Whether called sentence enhancements or elements of the crime, the indisputable fact was that these post-trial judicially decided factors determined the length or severity of a defendant's sentence.[167] Historically, trial judges have enjoyed wide latitude when sentencing defendants.[168] But when a judge is allowed to independently ascertain facts not proved at trial (even though they are not elements of a crime) that result in an increase of the defendant's maximum sentence under the jury verdict, it is unconstitutional under the Sixth Amendment.[169] This procedural safeguard protects against unfounded accusations and criminal charges against individuals, and insulates defendants from judicial corruption or "judges too responsive to a higher authority."[170] Accordingly, diminishing the jury's role in determining facts regarding sentencing senselessly violates the Sixth Amendment.[171]

Inconsistent Caselaw Resolved

In the American legal system, conflict had arisen between judges and juries and their respective roles at trial.[172] Tension had been mounting for some time over whether a judge may independently reexamine a jury verdict and increase a jury sentence after the conclusion of a trial.[173] The

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165. Joseph White, *Fact-Finding and the Death Penalty: The Scope of A Capital Defendant's Right To A Jury Trial,* 65 NOTRE DAME L. REV. 1, 10-11 (1989) (emphasis added).

166. Petitioner's Brief, *supra* note 44, at 5-6.

167. Ring v. Arizona, 122 S. Ct. 2428, 2441-42 (2002).

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

169. Petitioner's Brief, *supra* note 44, at 8-9. Every member of the Court had authored or joined in opinions that state or suggest that the holding in *Walton* has been undermined by subsequent decisions by the Court, suggested that *Walton* should be reconsidered in light of principles articulated in these recent decisions, or noted that Arizona's sentencing statute does not allow a trial judge to make findings of fact that may increase a defendant's maximum sentence. *Id.* at 9-10.

170. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

171. Jones v. United States, 526 U.S. 227, 248 (1999). Justice Scalia wrote in his concurrence in *Ring* that:

> [M]y observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt "sentencing factors" determined by judges that increase punishment beyond what is authorized by the jury's verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK, cause me to believe that our people's traditional belief in the right of trial by jury is in perilous decline.

Ring, 122 S. Ct. at 2445 (Scalia, J., concurring).

172. *Jones*, 526 U.S. at 248.

173. Ring v. Arizona, 122 S Ct. 2428, 2436 (2002).

Court wisely used *Ring* as an opportunity to correct uncertainty and confusion in the judiciary.[174] The *Ring* Court clearly announced that juries must make all factual determinations regarding a defendant's potential sentence.[175]

Ring was the last in a series of cases that firmly reestablished the role of the jury as a factfinder at trial.[176] The first case that foreshadowed things to come was *Jones v. United States* in 1999.[177] Here, the Court declared that judicial fact-finding after a jury verdict that increases the defendant's sentence was unconstitutional.[178] The United States Government argued that "bodily harm" occurring during the commission of a crime amounted to a sentence enhancement and not an element of the crime.[179] The Court thought this raised serious constitutional concerns and determined that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter."[180]

Apprendi v. New Jersey, decided in 2000, continued this trend and cast serious doubt on the viability of a significant amount of Supreme Court

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174. Petitioner's Brief, *supra* note 44, at 13.

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

176. Interestingly, another case decided by the Court in 2002, which related to *Ring*, was *Harris v. United States*, 122 S. Ct. 2406 (2002). Harris was found guilty of carrying a firearm in relation to drug trafficking offense. *Id.* at 2407. The trial court found that he had "brandished" a gun and consequently sentenced defendant to mandatory *minimum* sentence of seven years' imprisonment. *Id. Harris* had argued that *Apprendi* and *McMillian* were irreconcilable. *Id.* The Court held that a fundamental distinction existed between the factual findings at issue in those two cases.

> *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime by the Framers of the Bill of Rights. That cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding. This sort of fact is more like the facts judges have traditionally considered when exercising their discretion to choose a sentence within the range authorized by the jury's verdict – facts that the Constitution does not require to be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. Read together, *McMillian* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion – and rely upon judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings.

Id. at 2409.

177. Apprendi v. New Jersey, 530 U.S. 466, 467 (2000).

178. Jones v. United States, 526 U. S. 227, 251 (1999).

179. *Id.*

180. *Id.* at 228 (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

caselaw. The *Apprendi* Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[181] *Apprendi* therefore seemed to reject Supreme Court precedent like *McMillian*.[182] The *Apprendi* Court stopped short of overruling any precedent, holding that "we reserve for another day the question whether *stare decisis* considerations preclude reconsideration."[183]

Just two years later, and without any change in the membership on the Court, *Ring* finally succeeded where *Jones* and *Apprendi* had failed. This success resulted in *Ring* announcing with clarity and certainty that the Sixth Amendment requires any fact that increases a defendant's potential sentence to be proved beyond a reasonable doubt and submitted to the jury for a determination.[184] Furthermore, *Ring* held that all criminal defendants would be entitled to this constitutional right.[185] The Court had refrained from announcing this rule in previous cases like *Jones* and *Apprendi* because to do so would have been improper, as neither were death penalty cases. In *Ring*, the Court finally had found an appropriate case and opportunity to announce its new jurisprudence regarding the sentencing of criminal defendants.[186] Therefore, *Ring* directly overruled *Walton*, a decision handed down by the Court in 1990.[187]

Walton stood for the proposition that judges sitting alone could make factual determinations affecting a defendant's sentence after a jury trial.[188] *Walton* was in direct conflict with recent decisions made by the Court in *Jones* and *Apprendi*.[189] Due to these inconsistencies, the Court overruled *Walton* and announced that the *Apprendi* rule would govern a judge's ability to make factual determinations on a defendant's sentence.[190] The precedent set forth in *Walton* was wrong because any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

181. *Apprendi*, 530 U.S. at 490.
182. *Id.* at 487.
183. Apprendi v. New Jersey, 530 U.S. 466, 487 n.13 (2000).
184. Ring v. Arizona, 122 S. Ct. 2428, 2443 (2002).
185. *Id.*
186. Of interest, *Jones* was a 5-4 decision with the Chief Justice and Justices O'Connor, Kennedy and Breyer in dissent. *Jones*, 526 U.S. at 229. *Apprendi* was also a 5-4 decision, with the same dissenters. *Apprendi*, 530 U.S. at 468. *Ring*, however, was a 7-2 decision with Justices Breyer and Kennedy switching positions and joining the majority. *Ring*, 122 S. Ct. at 2432.
187. *Id.* at 2443.
[187] *Id.* at 2443.
188. *Id.* at 2437.
189. *Id.* at 2443, 2449. *Walton* also seemed to conflict with *In Re Winship*, where the Court determined that "[t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." 397 U.S. 358, 361 (1970).
190. *Ring*, 122 S. Ct. at 2443.

submitted to the jury.[191] Additionally, the burden falls on the state to prove a charge against a defendant beyond a reasonable doubt.[192] Had *Ring* been decided in favor of the State of Arizona, it would have rendered *Apprendi* meaningless and caused even more confusion in the court system.[193]

Post-Ring Developments

Ring was the biggest death penalty reversal since *Furman*, where the Court invalidated every state's death penalty.[194] By holding that juries must now make all factual determinations concerning a defendant's sentence, *Ring* narrowed the scope of capital punishment as never before in the thirty years since *Furman*.[195] While the impact of *Ring* has been immediate, its long-term effect will not be realized for years to come.

1. Impact on State Sentencing Schemes

Ring had a tremendous effect on state death penalty sentencing schemes. *Ring* finally will bring uniformity to a sentencing system that previously allowed judges in nine states to make post-trial factual determina-

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191. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Although *Apprendi* expressly preserved *Walton* for sentencing defendants in capital cases and implemented *Apprendi* as the rule regarding the sentencing of all other defendants, the Court realized this dichotomy would not work in *Ring* and announced "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." *Ring*, 122 S. Ct. at 2443.

192. *Apprendi*, 530 U.S. at 490.

193. *Ring*, 122 S. Ct. at 2441. Justice Kennedy wrote in his concurrence in *Ring*:

> Though it is still my view that *Apprendi* was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way. As the Court suggests, no principled reading of *Apprendi* would allow *Walton* to stand. It is beyond question that during the penalty phase of a first-degree murder prosecution in Arizona, the finding of an aggravating circumstance exposes "the defendant to a greater punishment than that authorized by the jury's guilty verdict." When a finding has this effect, *Apprendi* makes clear, it cannot be reserved for the judge.

Id. (Kennedy, J., concurring) (citations omitted). Justice Ginsburg wrote in *Ring*: "If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting." *Ring*, 122 S. Ct at 2441. *See also Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting).

194. Egelko, *supra* note 54, at A1.

195. *Id.* The new rule announced by the Court in *Ring* may have occurred because the justices now to want to get involved a make repairs on a system that seems to have faltered in recent times. The Supreme Court "appears interested in tinkering with it. More and more law schools and outside scholars are researching its effects. And now those on the front line of the system are challenging it. It may survive, strengthened, or it may fall, but it won't likely stay the same for long." Andrew Cohen, *The Death Penalty's Cloudy Future*, *available at* www.cbsnews.com/stories/2002/04/26/news/opinion/courtwatch (Apr. 26, 2002).

tions regarding the imposition of a death sentence.[196] This is in contrast to 29 states where juries are required to make all factual determinations in capital cases.[197] The ruling in *Ring* expressly declared Arizona's capital punishment sentencing unconstitutional, and also affected schemes in Idaho, Montana, Colorado, and Nebraska.[198] All of these states had laws that permitted judges to make factual determinations after trial allowing a death sentence to be imposed.[199] In Arizona, Montana, and Idaho, a single judge was allowed by statute to make post-trial sentencing decisions.[200] In Nebraska and Colorado, a panel of judges made the decision.[201] Arizona, Montana, Nebraska, Idaho and Colorado currently have 168 prisoners awaiting death sentences.[202] Additionally, the ruling possibly could affect death sentences in Florida, Alabama, Indiana, and Delaware, where 629 prisoners currently sit on death row.[203] These states allow a judge to impose a death sentence despite a jury's recommendation of life in prison.[204] In total, *Ring* could potentially have implications for 797 prisoners in eight states.[205]

States immediately affected by *Ring* took swift action to correct constitutional deficiencies in their death penalty sentencing statutes. In August 2002, the Arizona legislature called a special session to amend the state's death penalty statute, which now requires juries to impose death sentences.[206]

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196. *Ring*, 122 S. Ct. at 2442-43.
197. *Id.*
198. Egelko, *supra* note 54, at A1.
199. *Id.*
200. *U.S. Supreme Court Overturns 150 Death Sentences*, *available at* http://cbc.ca/cgi-bin/templates/2002/06/24/death_penalty_us (Jun. 24, 2002).
201. *Id.*
202. Egelko, *supra* note 54, at A1.
203. *Id.*
204. *Id.* Another effect of *Ring* is that it prevents judges, democratically elected officials, from delivering verdicts in capital cases, with reelection in mind. Abe Bonowitz, *Ring Decision Impacts Florida*, *available at* http://www.fadp.org/pressrel36.html (Jun. 24, 2002). There may be problems when elected judges deliver death sentences if a judge is concerned about appearing tough on crime for reelection purposes. *Id.*
205. Prisoners already on death row who have exhausted all of their direct appellate remedies may face the problem of being sentenced to death under an unconstitutional capital punishment statute. Justice O'Connor raised this concern in her dissent of *Ring*, and felt this fact would greatly injure the American criminal justice system. *Ring*, 122 S. Ct. 2428, 2449-50 (2002) (O'Connor, J., dissenting).
206. Death Penalty Information Center, *Developments Related to Ring*, *available at* http://www.deathpenaltyinfo.org/Ring.html (last visited Apr. 6, 2003). An editorial in the *Tucson Citizen* has suggested that Arizona's new death penalty legislation is possibly flawed.

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

Id.

Moreover, both the Colorado and Nebraska state legislatures called special sessions to amend their death penalty statutes in light of *Ring*.[207] In February, 2003, Idaho felt *Ring*'s effect as Governor Dirk Kempthorne signed into law a bill that requires jury sentencing in capital cases.[208] Additionally, the Montana House Judiciary Committee has approved legislation to abolish the state's death penalty.[209] *Ring* also may have serious effects in Florida, where 383 prisoners sit on death row.[210] The United States Supreme Court did not rule directly on whether death sentences in Florida would be affected. In Florida, there have been 166 individuals who have received a death sentence after a jury recommended life in prison.[211] The Florida Supreme Court recently has stayed two executions in order to determine the effect of *Ring* on Florida's capital punishment laws.[212] Other states not directly affected by *Ring* nonetheless have taken action in anticipation of future problems with their sentencing statutes. Delaware has halted all capital murder trials in the state until the Delaware Supreme Court can consider how *Ring* effects the state's sentencing scheme.[213] The Attorney General of New Jersey also has considered freezing all pending capital murder cases in the state for the same reason.[214]

2. Impact on Prisoners and the Prison System

Prisoners already incarcerated also have felt the effect of *Ring*. The Arizona Supreme Court has turned down 31 subsequent appeals from death row inmates who claim they should be resentenced due to the *Ring* decision.[215] On September 24, 2002, a federal judge in Vermont declared the

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207. *Id.* The Colorado Supreme Court overturned the death sentences of two men on death row in February, 2003 because of the rule announced in *Ring*. Howard Pankratz, *Justices Take Two off Death Row*, THE DENVER POST, Feb. 25, 2003, at A1. Both men were given death sentences by three-judge panels. *Id.* The court could have sent the two cases back to a trial court where new juries could have imposed the death penalty if found guilty, but instead commuted the sentences to life in prison. *Id.*

208. Death Penalty Information Center, *Developments Related to Ring*, *available at* http://www.deathpenaltyinfo.org/Ring.html (last visited Apr. 6, 2003).

209. *Montana House Committee Approves Bill to Abolish Death Penalty*, *available at* http://www.deathpenaltyinfo.org/whatsnew.html (last visited Apr. 6, 2003).

210. Abe Bonowitz, *Ring Decision Impacts Florida*, *available at* http://www.fadp.org/pressrel36.html (June 24, 2002). In Florida, judges may override a jury's sentence of life in prison with a death sentence. *Id.* In addition, a jury sentence for death does not have to be unanimous, and juries need not state reasons for a death sentence. Bob Egelko, *Death Penalty Dealt Another Blow*, S. F. CHRON., Jun. 25, 2002, at A1.

211. Bonowitz, *supra* note 210.

212. Death Penalty Information Center, *Developments Related to Ring*, *available at* http://www.deathpenaltyinfo.org/Ring.html (last visited Apr. 6, 2003).

213. *Id.* Prior to *Ring*, jurors served in an advisory role in Delaware capital cases while the judge retained the ultimate authority to impose a sentence. *Id.*

214. *Id.*

215. *Id.* Without comment, the Arizona Supreme Court denied the prisoner's motions. The inmates had exhausted all of their direct appeals. *Id.* The court will decide later this year if the new resentencing applies to those inmates that have not exhausted their direct appeals.

federal death penalty unconstitutional based on *Ring*.[216] United States District Court Judge William Sessions, the former director of the Federal Bureau of Investigation, held that certain types of federal death penalty sentencings processes conducted by judges are the same as a determination of guilt by a jury, violating the jury trial right under the Sixth Amendment.[217] Judge Sessions wrote:

> If the death penalty is to be part of our system of justice, due process of law and the fair trial guarantees of the Sixth Amendment require that standards and safeguards governing the kinds of evidence juries may consider must be rigorous, and constitutional rights and liberties scrupulously protected.[218]

The United States Supreme Court also has vacated the death sentence of federal death row inmate Billie Allen and remanded the case back to the United States Court of Appeals for the Eighth Circuit in light of the rule announced in *Ring*.[219] While the *Ring* Court answered one question, many more may have been created.[220] The United States Court of Appeals for the Ninth Circuit Court soon will decide whether *Ring* applies retroactively to prisoners sitting on death row.[221] Another question is how *Ring* applies to

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Id. These appeals might be illustrative of Justice O'Connor's dissent in both *Apprendi* and *Ring* that predicted "a flood of petitions by convicted defendants seeking to invalidate their sentences." Ring v. Arizona, 122 S. Ct. 2428, 2449 (2002) (quoting Apprendi v. New Jersey, 530 U.S. 466, 551 (2000)). Justice O'Conner further predicted that these appeals would have a "severe[ly] destabilizing effect on our criminal justice system." *Id.*

216. Death Penalty Information Center, *Developments Related to Ring*, *available at* http://www.deathpenaltyinfo.org/Ring.html (last visited Apr. 6, 2003).

217. *Id.*

218. *Id.* The U.S. Supreme Court granted an indefinite stay to Delma Banks in March 2003 minutes before he was supposed to be executed for murder because of claims of unfair jury selection and coaxed testimony. David Stout, *By Minutes, Supreme Court Halts Execution in Texas*, N. Y. TIMES, Mar. 12, 2003, at A1. There, Judge Sessions personally asked the Court to intervene in the Banks case. *Id.*

219. Death Penalty Information Center, *Developments Related to Ring*, *available at* http://www.deathpenaltyinfo.org/Ring.html (last visited Apr. 6, 2003).

[219] *Id.*

220. Adam Liptak, *A Supreme Court Ruling Roils Death Penalty Cases*, N. Y. TIMES, Sept. 16, 2002, at A1.

221. Death Penalty Information Center, *Developments Related to Ring*, *available at* http://www.deathpenaltyinfo.org/Ring.html (last visited Apr. 6, 2003). *Ring* was also cited in Brief of United States at 22, United States v. Moussaoui, No. 01-455-A (D. Va. filed July 25, 2002). Zacarias Moussaoui is the alleged 20th hijacker of September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon. The United States cited *Ring* and argued:

> As made clear by the Court in *Ring*, the characterization of a fact or circumstance as an element or a sentencing fact is not determinative. The *Jones/Apprendi/Ring* trilogy instead speak to substance; namely, ensuring the existence of safeguards as to the formality of notice, the identity of the fact finder, and the burden of proof.

those inmates who are currently in various stages of their trials or appellate procedures.[222] In February 2003, the Court ordered a new hearing for Texas death row inmate Thomas Miller-El because of evidence of strong racial bias in selecting an all-white jury.[223] The majority opinion also warned that federal courts of appeals may not prematurely preclude state prisoners from presenting constitutional challenges to their convictions.[224] This may allow appeals to be brought under *Ring* by inmates challenging the constitutionality of their convictions.

CONCLUSION

In *Ring*, the United States Supreme Court finally announced with clarity that juries must make all factual determination affecting a defendant's potential sentence. But it will be years before the full impact of the decision is understood. Nevertheless, *Ring* was the most significant decision regarding capital punishment in 30 years. It rightly placed the jury in its appropriate position as a factfinder, narrowing the death penalty in a quarter of the states that utilize capital punishment. Maybe the most important aspect of *Ring* is its potential effect on the future of the death penalty.[225] The Court may have decided the way it did because of recent developments in the area of capital punishment, as *Ring* was yet another illustration of the intrinsic problems associated with the death penalty in the United States.[226] *Ring*'s overall impact on the future of the death penalty, however, remains to be seen. Perhaps the death penalty will be revised to accommodate the growing

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Id.

222. Liptak, *supra* note 220, at A1.

223. Linda Greenhouse, *U.S. Justices Reopen Door a Bit for State Inmates' Appeals*, N. Y. TIMES, Feb. 25, 2003, at A1.

224. *Id.*

225. Andrew Cohen, *The Death Penalty's Cloudy Future, available at* www.cbsnews .com/stories/2002/04/26/news/opinion/courtwatch (Apr. 26, 2002). Missy Longshore, the program director of the Death Penalty Focus, a San Francisco based group that works on death-penalty issues, thinks a moratorium on capital punishment may be near after the decision in *Ring*. "I think the court is expressing reservations about the way the death penalty is being implemented. I think it's evidence of some broader questions that citizens are starting to have. I hope it will assist the push towards a moratorium" said Longshore. Bob Egelko, *Death Penalty Dealt Another Blow*, S. F. CHRON., June 25, 2002, at A1. Dianna Wentz, executive director of the Moratorium Campaign, said that the decision in *Ring* "shows how critical it is that we review the entire capital punishment system in the United States. It is time for the federal government to take the lead in implementing a moratorium in all executions." Dianna Wentz, *Strike Two: Supreme Court Says Again Death Penalty Unconstitutional, available at* http://www.moratorium2000.org/news/domestic_archive.lasso (Jun. 23, 2002). On the other hand, Kent Scheidegger, the legal director for the Criminal Justice Legal Foundation in Sacramento, California, who filed an amicus brief in support of the State of Arizona, felt that *Ring* was "a betrayal of the American people to overturn these clear, well-established precedents decades of reliance on them." Bob Egelko, *Death Penalty Dealt Another Blow*, S. F. CHRON., Jun. 25, 2002, at A1.

226. Sue Gunawardena-Vaughn, *Statement on U.S. Supreme Court Decision Ring v. Arizona, available at* www.aiusa.org/news/2002/usa06242002.html (Jun. 24, 2002).

concern with its deficiencies, or perhaps it again will be declared unconstitutional. The one thing that can be predicted is that the American system of capital punishment is unlikely to remain static in the coming years.

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