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RING V. ARIZONA: UNNECESSARILY ABANDONING JUDGES ALONG THE WINDING ROAD OF THE DEATH PENALTY

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I. INTRODUCTION

In ancient Rome, emperors inflicted the death penalty by forcing capital offenders to fight a wild animal in an open arena.[1] Shortly before the French Revolution, Robespierre's word alone was enough to subject a man to the torture of the guillotine.[2] Today, however, capital punishment in America is drastically different.

In *Ring v. Arizona*, the United States Supreme Court held that a trial judge, sitting alone, cannot determine the presence or absence of the aggravating factors required to impose the death penalty.[3] Justice Ginsberg, writing for the Court, declared that the Sixth Amendment right to a jury trial requires a jury determination of any aggravating factors that lead to the imposition of the death penalty.[4] After the Court's decision in *Ring v. Arizona*, only a jury can impose a capital sentence.

Ring v. Arizona mistakenly applied precedent relating to the Sixth Amendment right to a jury trial by overlooking Supreme Court opinions dealing precisely with capital sentencing that have consistently held that the Sixth Amendment does not extend to the death penalty.[5] Furthermore, forcing juries to find any or all aggravating factors leading to the imposition of the death penalty does not further protect a capital defendant's Sixth Amendment rights because, under Arizona's death penalty statute, any aggravating factor established in the sentencing phase must also have been presented to the jury during the guilt phase of the trial.[6] Ultimately, states should adopt a rule of criminal procedure granting judges some authority

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[1] Brooklyn College Classics Department, *Capital Punishment* <http://depthome.brooklyn.cuny. edu/classics/gladiatr/cappunsh.htm> (accessed Mar. 5, 2003).

[2] Jennifer Brainard, *The Guillotine* <http://www.histroywiz.com/guillotine.htm> (accessed Oct. 15, 2002).

[3] 536 U.S. 584, 122 S. Ct. 2428, 2432 (2002).

[4] *Id.*

[5] For cases holding that jury sentencing is not required in the death penalty, *see e.g. Spaziano v. Fla.*, 468 U.S. 447 (1984); *Proffitt v. Fla.*, 428 U.S. 242 (1976); *Harris v. Ala.*, 513 U.S. 504 (1995) (holding that state statutes employing only jury's recommendation of sentencing in a capital case are constitutionally valid).

[6] *See* Ariz. Rev. Stat. Ann. § 13-703 (West 2001).

during the sentencing phase of a death penalty case, while still ensuring a capital defendant's right to a jury trial.

In examining the Court's opinion in *Ring v. Arizona*, Section II of this Note will first trace the Supreme Court's consistent holding that jury sentencing is not required for imposition of the death penalty. Next, this Note will scrutinize Arizona's death penalty statute. Section II will also examine the majority and dissenting opinions of *Ring v. Arizona*. Section III of this Note will conclude that the Supreme Court's decision in *Ring v. Arizona* does not further protect the Sixth Amendment rights of capital defendants. Finally, this Note will suggest a possible procedural safeguard to ensure that judges play some role in capital sentencing, while still advancing the Court's ruling in *Ring v. Arizona*.

II. BACKGROUND

A. The Death Penalty in the Supreme Court

In the United States, capital punishment as the penalty for murder "is as old as the nation itself."[7] Indeed, the First Congress enacted a comprehensive law establishing death as the punishment for certain crimes such as treason, murder, piracy, and forgery.[8]

Essentially, modern death penalty jurisprudence in the United States began with *Furman v. Georgia*.[9] In *Furman*, the Supreme Court held that the death penalty violated the Eighth and Fourteenth Amendments to the Constitution.[10] *Furman*'s directive has compelled the Supreme Court justices to ensure that the death penalty is not imposed "in a random and capricious fashion."[11] Inherent in this initiative was the Court's apparent desire to create a body of case law that was separate and distinct from decisions affecting other criminal sanctions.[12]

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[7] *U.S. v. Fell*, 217 F. Supp. 2d 469, 473 (D. Vt. 2002) (holding the Federal Death Penalty Act, 18 U.S.C. § 3591 (2000), unconstitutional based on the reasoning set forth in *Ring v. Arizona*, 536 U.S. 584).

[8] *Id.* at 474-75; *see Furman v. Ga.*, 408 U.S. 238, 304 (1972) (Brennan, J., concurring).

[9] 408 U.S. 238.

[10] *Id.* at 239-40.

[11] *Walton v. Ariz.*, 497 U.S. 639, 657 (1990) (Scalia, J., concurring) (citing *Furman*, 408 U.S. 238).

[12] *See generally* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1045 (1995). Since the Court's decision in *Furman*, states have enacted procedures and statutory schemes to ensure that an imposition of the death penalty was subject to far greater scrutiny. Some of those statutes compelled judges to

Since that time, states have labored to produce a statutory scheme that satisfied the directive articulated by the Supreme Court in *Furman*.[13] Some states enacted statutes compelling mandatory death sentences;[14] others attempted to accomplish this task by enacting systems whereby judges or juries would weigh the aggravating factors[15] against the mitigating factors[16] of the crime. Consistently though, the Supreme Court has ruled that there is no constitutional requirement that the "specific findings authorizing the imposition of the sentence of death be made by the jury."[17]

B. The Death Penalty in Arizona

Prior to the decision in *Ring v. Arizona*, a judge or judges made the ultimate decision to impose the death penalty. In Arizona, a defendant convicted of first-degree murder "shall suffer" death or life imprisonment.[18] As with all criminal charges, the defendant stands trial. In the death penalty context, this is often referred to as the "guilt phase." Following a conviction, or a guilty plea, the case then moves on to the "sentencing phase" of the trial.

During the sentencing phase, a hearing is held before the trial judge.[19] This judge is charged with concluding whether the death sentence shall be imposed.[20] This "hearing shall be conducted before the court alone. The

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weigh "aggravating factors" against "mitigating factors." Others compelled juries to conduct the same analysis. *See infra* nn. 15-16 and accompanying text.

[13] Bowers, *supra* n. 12, at 1045.

[14] *Gregg v. Ga.*, 428 U.S. 153 (1976) (holding that mandatory death penalty statutes were unconstitutional against the Eighth Amendment because they aided in the arbitrary or capricious imposition of the death penalty).

[15] Ariz. Rev. Stat. Ann.§ 13-703(F)(1)-(10). *See infra* n. 23 (listing Ariz. aggravating factors).

[16] Ariz. Rev. Stat. Ann. § 13-703(G)(1)-(4). Under Arizona's death penalty statute, "any aspect of the defendant's character" can be used as a mitigating factor. *Id.* at § 13-703(G). *See infra* n. 25 (listing Ariz. mitigating factors).

[17] *See Walton*, 497 U.S. at 648 (quoting *Hildwin v. Fla.*, 490 U.S. 638 (1989) (per curiam)); *Spaziano*, 468 U.S. 447; *Proffitt*, 428 U.S. 242.

[18] Ariz. Rev. Stat. Ann. § 13-703. First-degree murder in Arizona is defined in Ariz. Rev. Stat. Ann. § 13-1105. *See Enmund v. Fla.*, 458 U.S. 782, 797 (1982) (holding that the Eighth Amendment forbids imposition of the death penalty against a defendant who simply aids or contributes to the murder, but does not commit the murder himself). Unless otherwise noted, all references to Arizona's death penalty statute refer to the statute that existed at the time of Timothy Ring's trial. After the Court's decision in *Ring*, the Arizona legislature revised its death penalty statute in accordance with the Court's decision. *See* Ariz. Rev. Stat. Ann. § 13-703.

[19] Ariz. Rev. Stat. Ann. § 13-703(B)-(C). In the event that the trial judge is unable to sit for the sentencing hearing, any other judge can be appointed for the hearing. *Id.*

[20] *Id.* at (B).

court alone shall make all factual determinations required by this section or the constitution of the United States or this state."[21] In order to make this conclusion, the trial judge must make all factual conclusions relative to the existence of any aggravating and mitigating circumstances of the offense.[22]

Like many other states, Arizona's death penalty statute sets forth an extensive list of aggravating circumstances necessary to impose the death penalty.[23] For example, if "[t]he defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value," such an aggravating circumstance would warrant the

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[21] *Id.* In *Ring v. Arizona*, the Court called the constitutional validity of several death penalty statutes into question. 122 S. Ct. at 2441 n. 5. States such as Colorado, Idaho, Montana, and Nebraska enacted death penalty statutes where the judge determined the existence of all aggravating and mitigating factors. *Id.* at 2449 (O'Connor, J., dissenting). For example, in Colorado, "[u]pon conviction of guilt . . . a panel of three judges, as soon as practicable, shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death. . . ." Colo. Rev. Stat. § 16-11-103 (2001). In Idaho, "[a]fter a plea or verdict of guilty the court shall convene a hearing to receive evidence and argument in aggravation and mitigation of the punishment." Idaho Code § 19-2515 (2001).

[22] Ariz. Rev. Stat. Ann. § 13-703(E).

[23] *Id.* at (F). Listing all aggravating factors, the statute reads:

F. The trier of fact shall consider the following aggravating circumstances:

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

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

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

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

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

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

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

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, 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.

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.

imposition of the death penalty.[24] At the same time, the trial judge is to determine what, if any, mitigating factors are present and are "relevant in determining whether to impose a sentence less than death."[25] For example, "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law"[26] would constitute a mitigating factor. Most important though is the umbrella provision that allows "any aspect of the defendant's character" to serve as a mitigating factor.[27] Under this statutory scheme, after the defendant and prosecution have presented all evidence, the trial judge shall issue a special verdict "setting forth its findings as to the existence or nonexistence" of each of the aggravating and mitigating factors.[28]

C. *Facts of the Case*—State v. Ring

On November 28, 1994, a Wells Fargo armored car was robbed and reported missing.[29] When the car was discovered, the driver, John Magoch,

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Id. These factors are very similar to those that exist in other states. *See e.g.* Ohio. Rev. Code Ann. § 2929.04 (West 2002).

[24] Ariz. Rev. Stat. Ann. § 13-703(F)(5).

[25] *Id.* at (G). Listing all mitigating factors, the statute reads:

> G. The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:
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> 1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
>
> 2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
>
> 3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
>
> 5. The defendant's age.

Id. In both Arizona statues listing aggravating and mitigating factors, the statute makes a vague reference to the trier of fact. *Id.* at (F)-(G). Prior to the Court's decision in *Ring*, the "trier of fact" was the trial judge.

[26] *Id.* at (G)(1).

[27] *Id.* at (G).

[28] *Id.* at (D).

[29] *State v. Ring*, 25 P.3d 1139, 1142 (Ariz. 2001).

was found dead in the driver's seat, killed by a gunshot wound to the head.[30] Wells Fargo reported that $833,798.12 had been stolen from the armored car.[31]

Following an extensive police investigation,[32] Timothy Ring was arrested on February 16, 1995.[33] He was convicted of the crime of felony murder.[34] As required by statute, the trial judge conducted a special sentencing hearing to determine if, in fact, the death penalty was an appropriate sentence.[35] After this hearing, the judge ruled that the felony murder was committed for pecuniary value and was committed in an especially heinous, cruel, and depraved manner.[36] Accordingly, the trial judge sentenced Timothy Ring to the death penalty.[37]

Ring appealed to the Arizona Supreme Court, which affirmed the conviction and sentence.[38] The United States Supreme Court granted certiorari to answer the question whether "aggravating factor[s] may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee . . . requires that the aggravating factor determination be entrusted to the jury."[39]

D. Justice Ginsberg's Majority Opinion

In *Ring v. Arizona*, Justice Ginsberg set out to reconcile the reasoning of *Walton v. Arizona* and *Apprendi v. New Jersey*.[40] In the opinion, Justice Ginsberg characterized *Walton* as representing the rule that Arizona's death penalty statute does not violate the Sixth Amendment.[41] Next, the opinion

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[30] *Id.*

[31] *Id.*

[32] *Id.* at 1143. Through information gathered from an informant, police were able to name Ring and two other men as suspects. Police later engineered two television news reports about the crime that included several factual misstatements. These reports generated discussion among the conspirators that eventually led to their arrest. *Id.*

[33] *Id.* at 1144. Police were executing a search warrant on the defendant's house where they discovered $271,681 hidden in a green duffel bag.

[34] *Id.*

[35] *Id.*; Ariz. Rev. Stat. Ann. § 13-703.

[36] *Ring*, 25 P.3d at 1144; Ariz. Rev. Stat. Ann. § 13-703(F)(5) and (6).

[37] *Ring*, 25 P.3d at 1144.

[38] *Id.* at 1156.

[39] *Ring*, 122 S. Ct. at 2437.

[40] *Id.* at 2436; *Walton*, 497 U.S. 639 (upholding the constitutionality of Arizona's death penalty statute); *Apprendi v. N.J.*, 530 U.S. 466 (2000) (holding that any fact that increases the sentence beyond the statutory minimum must be submitted to a jury and proven beyond a reasonable doubt).

[41] *Ring*, 122 S. Ct. at 2437.

traced the reasoning of *Apprendi*, and ultimately settled that *Apprendi* established that the Sixth Amendment requires "a jury determination . . . of every element of the crime with which he is charged, beyond a reasonable doubt."[42]

Apprendi, the Court wrote, eliminates the distinction between sentencing factors and elements of the crime.[43] *Apprendi* revolved around a New Jersey "hate crime statute" which allowed judges to increase the sentence if the offense was racially motivated.[44] In *Apprendi*, the defendant fired several shots into the home of an African-American family that had moved into a previously all-white neighborhood.[45] When the defendant confessed to the shooting he also made a statement to the effect that the occupants of the house were "black in color" and he did not want them in the neighborhood.[46] After the defendant pled guilty to the charges, the prosecution moved for an enhanced sentence based on New Jersey's hate crime statute.[47] The court then conducted an evidentiary hearing to ascertain the defendant's purpose for committing the crime.[48] At the hearing, it was determined that the shooting was racially motivated and thus punishable under New Jersey's hate crime statute.[49] As a result, the defendant's sentence was increased.[50]

In *Ring*, the State of Arizona argued that aggravating factors are not elements of the crime, and thus are not subject to jury determination.[51] More specifically, the state argued, aggravating factors are different than the sentencing factors discussed in *Apprendi*.[52] Based on the reasoning set forth in *Apprendi*, the Court disagreed. In the Court's view, *Apprendi* demanded that Arizona's claim that aggravating factors are not elements of the crime fail. Therefore, the Court held that aggravating factors are subject to the Sixth Amendment requirement of jury determination.[53] When any "enumerated aggravating factors operate as 'the functional equivalent of an

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[42] *Id.* at 2439 (quoting *U.S. v. Gaudin*, 515 U.S. 506, 510 (1995)).

[43] *Id.* at 2441.

[44] *Ring*, 122 S. Ct. at 2441; *see* N.J. Stat. Ann. § 2C:44-3(e) (West 1995) "The defendant in committing the crime acted, . . . with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity." *Id.*

[45] *Apprendi*, 530 U.S. at 469.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *See* Trans. of Oral Arg., 2002 U.S. Trans. Lexis 41, *Ring v. Arizona*, 536 U.S. 584.

[52] *Id.*

[53] *Ring*, 122 S. Ct. at 2443.

element of a greater offense,' the Sixth Amendment requires that they be [proven beyond a reasonable doubt to] a jury."[54] Based on this logic, the Supreme Court ruled Arizona's death penalty statute unconstitutional in violation of the jury trial right expressed in the Sixth Amendment.[55]

Next, the Court sought to reconcile the extension of *Apprendi* to the death penalty with its previous decision in *Walton*.[56] *Walton* stood as the Court's affirmance of the very same Arizona death penalty statute as was at issue in *Ring*.[57] In *Walton*, the Court determined that Arizona's death penalty statute was constitutionally valid even if it did not require jury determination of aggravating factors.[58] Nevertheless, Justice Ginsberg in *Ring v. Arizona* extended the rule of *Apprendi* to the death penalty.[59] "We have overruled prior decisions where the necessity and propriety of doing so has been established"[60]—clearly, the Court saw the necessity and propriety in overruling *Walton*.[61] Accordingly, the U.S. Supreme Court reversed Timothy Ring's conviction and sentence.[62]

III. ANALYSIS

In *Ring v. Arizona*, the justices sought to answer whether the Sixth Amendment required that aggravating factors be subject to jury determination.[63] This section will seek to provide answers to those questions that the Court seemingly avoided. Would capital defendants be better served if the justices had addressed the following questions: Does any capital punishment jurisprudence suggest that jury sentencing is constitutionally required? Does jury determination of aggravating and mitigating factors advance the Sixth Amendment rights of capital defendants? Are aggravating factors different than other sentencing factors? Will a jury's weighing of aggravating and mitigating factors lead to arbitrary and capricious impositions of the death penalty?

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[54] *Id.* at 2443 (quoting *Apprendi*, 530 U.S. at 494 n. 9).

[55] *Ring*, 122 S. Ct. at 2443.

[56] *Id.*

[57] *See Walton*, 497 U.S. at 649.

[58] *Id.*

[59] *Ring*, 122 S. Ct. at 2443.

[60] *Id.*

[61] *Id.* Justice Ginsberg cited *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), as representing the ability of the Court to ignore *stare decisis*. *Ring*, 536 U.S. at 2443. The Court stated that its "precedents are not sacrosanct," and as a result *Walton* was overruled. *Id.* (quoting *Patterson*, 491 U.S. at 172).

[62] *Ring*, 536 U.S. at 2443.

[63] *Id.* at 2437.

A. The Death Penalty Does Not Require Jury Sentencing

At the outset of the Supreme Court's death penalty jurisprudence, the Court explained the unique nature of the death penalty.[64] The Court's landmark death penalty decision, *Furman v. Georgia*, stated this principle most succinctly: "[t]he penalty of death . . . is unique in its total irrevocability. It is unique in its rejection of rehabilitation . . . . And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."[65] As the Supreme Court continued to develop an acceptable procedure for imposing the death penalty, the Court stated that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."[66]

By this rationale, both scholars and the Court itself have articulated a different and more exacting standard for the death penalty.[67] In states where the judge was compelled to order the death sentence, the Supreme Court has consistently held that capital defendants have no constitutional right to jury sentencing. While the Court has never suggested that juries are constitutionally required to have any involvement in capital sentencing, the *Ring* Court failed to even acknowledge this rule. Numerous cases support the conclusion that a capital sentence does not need to be imposed by a jury.[68]

First, in *Proffitt v. Florida*, the Court examined the Florida death penalty where sentences were determined by the trial judge rather than by the jury.[69] In *Proffitt*, the Court pointed out that "jury sentencing in a capital

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[64] *Furman*, 408 U.S. at 286-291 (Brennan, J., concurring); *see supra* nn. 10-11 and accompanying text.

[65] *Id.* at 306 (Stewart, J., concurring) (quoting *Cal. v. Ramos*, 463 U.S. 992, 998-99 (1983)). Because the death penalty is "manifested most clearly in its finality and enormity," it is axiomatic that the death penalty is different than any other sentence. *Id.* at 289 (Brennan, J., concurring).

[66] *Caldwell v. Miss.*, 472 U.S. 320, 329 (1985). During oral argument, counsel for the petitioner, Ring, admitted that the Court might "simply say in the end, we're going to have a different rule for capital punishment." Trans. of Oral Arg., *supra* n. 51, at *48.

[67] *See e.g.* Margaret J. Radin, *Super Due Process for Death*, 53 S. Cal. L. Rev. 1143 (1980). In this article, the author asserts that, if for no other reason, the death penalty should be subject to "super due process" because the punishment is final and severe. *Id.* at 1162; *see Caldwell*, 472 U.S. at 323.

[68] *See supra* n. 17 and accompanying text. Cases like *Proffitt*, 428 U.S. 242; *Spaziano*, 468 U.S. 447; and *Walton*, 497 U.S. 639, agree that jury sentencing is not required in a death penalty case.

[69] 428 U.S. 252.

case can perform an important societal function."[70] The Court, however, "never suggested that jury sentencing is constitutionally required." Indeed, the Court was convinced that judicial sentencing would lead to "even greater consistency" in the imposition of the death penalty.[71] Ultimately, the Supreme Court decided that the Florida death penalty statute, which was substantially similar to the Arizona statute at issue in *Ring*, satisfied the constitutional requirements articulated in *Furman*.[72] Evidently, this prior reasoning was not compelling enough to even warrant mention in the Court's opinion in *Ring v. Arizona*.

Next, in *Spaziano v. Florida*, Justice Blackmun held that nothing in the Supreme Court's death penalty jurisprudence "suggests that the sentence must or should be imposed by a jury."[73] The Court stated more precisely: "The point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge."[74] Again, the justices failed to mention *Spaziano* in the majority opinion in *Ring v. Arizona*.

This reasoning was reaffirmed in 1989 when the Court again ruled that a "capital sentencing scheme [does not violate] the Sixth Amendment because it permits the imposition of death without a specific finding *by the jury* that sufficient aggravating circumstances exist to qualify the defendant for capital punishment."[75] The Court followed this line of reasoning during its first examination of Arizona's death penalty statute, yet failed to do so the second time around.

Most relevant to the present case, the Supreme Court deemed Arizona's death penalty statute constitutional in *Walton v. Arizona*.[76] At issue in *Walton* was whether the death sentence imposed by an Arizona trial court judge after a jury found the defendant guilty of first-degree murder was constitutionally valid.[77] Justice White, writing for the majority, stated that the Court had often rejected Sixth Amendment challenges to state death penalty statutes "which provide[] for the sentencing by the judge, not the jury."[78] The Court was persuaded that trial judges were more

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[70] *Id.*
[71] *Id.*
[72] *Id.* at 253.
[73] 468 U.S. at 460.
[74] *Id.* at 462-63.
[75] *Hildwin*, 490 U.S. at 639 (per curiam) (emphasis added).
[76] 497 U.S. 639.
[77] *Id.* at 642.
[78] *Id.* at 647.

knowledgeable about the law, and were better apt to "apply it in making their decisions."[79]

Ultimately, *Walton* stood as the Supreme Court's affirmance of not only Arizona's death penalty statute, but also of a judicial finding of aggravating factors in a death penalty case. Prior to *Ring*, no other death penalty case had ever brought this notion into serious question. As can be seen from this long line of death penalty cases, the Court has never held that jury sentencing in a capital case is constitutionally required. In fact, the cases seem to suggest the exact opposite.[80]

This constitutional background seemed to be of little relevance to the Court when deciding *Ring v. Arizona*. What seems even more troubling about the Court's decision is the complete lack of discussion concerning this existing case law.[81] *Ring v. Arizona* contains no such language. Perhaps if the justices would have examined the history of the death penalty, as it relates to jury sentencing, they may have reached a different conclusion.

B. In a Death Penalty Case, Juries Are Not Constitutionally Required to Impose Sentence

Against this constitutional backdrop of death penalty jurisprudence,[82] the Arizona death penalty statute at issue in *Ring* requiring judges to impose the death sentence satisfied the Sixth Amendment requirements for two reasons. First, any aggravating factor that would be used to impose the death penalty would already have been presented to the jury in the guilt phase of the trial. Second, the aggravating factors necessary to impose the death penalty are inherently different from any other sentencing factors.

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[79] *Id.* at 653.

[80] Consistent Supreme Court opinions have held that the Sixth Amendment does not require a jury finding of aggravating factors in a death penalty case. *See e.g. Proffitt*, 428 U.S. 242; *Spaziano*, 468 U.S. 447; *Walton*, 497 U.S. 639.

[81] Even more, the Court failed to discuss the severity of the death penalty. Other capital cases decided by the Supreme Court are replete with statements concerning the utter finality and unique nature of the death penalty. *See e.g. Spaziano*, 468 U.S. 447; *Proffitt*, 428 U.S. 242. At oral argument, the justices were interested in the precedent that did not require jury sentencing in a death penalty case, but this apparent curiosity was not compelling enough to demand attention in the Court's opinion. *See* Trans. of Oral Arg., *supra* n. 51, at *41; *supra* n. 66 and accompanying text.

[82] Indeed, the "constitutional backdrop" can be a very persuasive tool when reviewing a constitutional question. *See e.g. Cohen v. Cal.*, 403 U.S. 15, 24 (1971) (stating that, even among all others, the constitutional backdrop was "[e]qually important to our conclusion").

1. Juries in Arizona Have Already Been Presented with the Aggravating Factors

In *State v. Ring*, the Court's opinion expended few words discussing the specific aggravating factors that demanded the death sentence for Timothy Ring.[83] During the trial, the prosecution proved Ring's guilt beyond a reasonable doubt.[84] Indeed, Arizona used this same evidence to ensure a sentence of death. For example, in the trial court, one of the key facts linking Ring to the murder was the existence of large amounts of U.S. currency in Ring's presence.[85] When the Wells Fargo van had been robbed, the bank reported $833,798.12 missing.[86] Then, when police searched Ring's home, they discovered a green duffel bag containing $271,681.[87] This circumstantial evidence was presented to the jury and was integral to the jury finding Ring guilty of felony murder.[88]

The trial judge was presented these same facts during the sentencing phase of the trial, which ultimately ended in a death sentence for Timothy Ring. The trial judge found that the defendant had committed the murder "in expectation of the receipt of anything of pecuniary value."[89] What can be observed from this is that the sentencing judge made no factual conclusion. Rather, the trial judge simply adjudicated the facts that had already been presented to the jury. More importantly, the judge evaluated the facts that had already been submitted to the jury and were proven beyond a reasonable doubt.[90] Indeed, Arizona's death penalty statute does not even require the reintroduction of evidence during the sentencing phase of a capital trial.[91] At the time of Ring's trial, the Arizona statute did not require that evidence used during the guilt phase be reintroduced during the sentencing phase.[92] Under this language, the trial court could impose the death penalty based simply on the evidence presented during the guilt phase

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[83] *See supra* nn. 29-37 and accompanying text.

[84] *Ring*, 25 P.3d at 1144.

[85] *Id.*

[86] *Id.* at 1142 (finding that Ring's crime was committed for financial gain).

[87] *Id.* at 1144. In fact, Ring argued that he obtained the money as a bounty hunter, gunsmith, and confidential informant. *Id.* According to police reports, however, Ring had made only $458 as a confidential informant, and never more than $3,500 working for Don's Bail Bonds. *Id.*

[88] *Id.*

[89] *Id.*; Ariz. Rev. Stat. Ann. § 13-703(F)(4).

[90] *Ring*, 25 P.3d at 1144.

[91] Ariz. Rev. Stat. Ann. § 13-703.

[92] *Id.* at (C).

of the trial. The trial judge would merely apply the facts from the guilt phase of the trial to determine whether the death sentence was warranted.[93]

As the facts would already have been proven beyond a reasonable doubt, this action would satisfy the Sixth Amendment as stated in *Apprendi.* Furthermore, as can be seen from the procedure of Arizona's death penalty statute, forbiddance of such judicial action in the sentencing phase does not increase or advance the Sixth Amendment rights of capital defendants. By allowing the imposition of the death penalty to occur based on evidence presented and proven beyond a reasonable doubt in the guilt phase of the trial,[94] the Arizona statute did not deny any jury trial right from the capital defendant. The Court, on the other hand, extended the *Apprendi* rule to the death penalty without investigating whether the Arizona statute actually served to deny the Sixth Amendment rights of a capital defendant.

2. Aggravating Factors in *Ring* Are Different Than Sentencing Factors in *Apprendi*

Justice Ginsberg and the majority felt that the decision rendered in *Apprendi v. New Jersey* demanded jury determination of all aggravating factors.[95] In the Court's view, aggravating factors are substantially similar to sentencing factors.[96] As a result, the two should both be subject to jury determination.[97] This assertion fails to recognize the inherent difference between aggravating factors in a death penalty case and other types of sentencing factors. As will be presented, the action undertaken by a trial judge in the death penalty context differs greatly from that employed in *Apprendi.* Therefore, the rule set forth in *Apprendi* should never have been extended to the death penalty.

In *Apprendi,* the existence of a hate crime permitted the trial judge to enhance the defendant's sentence without submitting the specific facts to the jury.[98] The Supreme Court determined that this act on the part of the New Jersey judiciary was unconstitutional in violation of the Sixth

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[93] *Id.* This provision of the statute provided that: "Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding." *Id.*

[94] *Id.*

[95] *Ring*, 122 S. Ct. at 2439-40 (7-2 decision, with Justices Rehnquist and O'Connor dissenting).

[96] *Id.* at 2443.

[97] *Id.*

[98] 530 U.S. at 469; *see supra* nn. 44-50 and accompanying text.

Amendment.[99] "[A]ny fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[100] Consistent with this holding, Justice Stevens, writing for the Court, felt that any factor that can be seen as an element of the crime must be proven by a jury beyond a reasonable doubt.[101] In *Apprendi*, the trial judge had made an ultimate factual conclusion that ran contrary to the jury trial requirement expressed in the Sixth Amendment.[102]

Ring v. Arizona is clearly distinguishable from *Apprendi.* Sitting alone, the trial judge in *Ring* did not make a factual conclusion. Rather, the judge simply applied facts that were presented during the guilt phase of the trial. Provisions of the Arizona death penalty statute illustrate this point. Any evidence presented to the jury during the guilt phase of the trial need not be reintroduced to the court during the sentencing phase of the trial.[103] Certainly, any evidence that was proven beyond a reasonable doubt in the guilt phase would prove essential to imposing a death sentence. Again, a trial judge could impose the death penalty without hearing any evidence as to the aggravating factors of the murder. Under Arizona's death penalty statute, the trial judge is not required to make any factual conclusion that might violate the Sixth Amendment.

Ring involved a defendant charged with murder and presented a potential death sentence;[104] *Apprendi*, on the other hand, involved a defendant charged with illegal possession of a firearm.[105] Nowhere in the indictment was the hate crime aspect of the offense set forth.[106] More importantly, nowhere in a trial for the weapons charge could any evidence of the hate crime be presented to the jury. Instead, as a sentencing factor, the hate crime statute increased the sentence without any possibility of jury determination.[107] In fact, any evidence surrounding the hate crime would never be introduced during a trial on a weapons violation. Thus, the hate crime evidence first would be introduced to the judge; it would never be introduced to the jury.

In *Ring*, on the other hand, the possibility of increased judicial discretion when imposing a death sentence was limited by the very terms of the death penalty statute. Indeed, there is no aggravating factor that could not be

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[99] *Apprendi*, 530 U.S. at 476.
[100] *Id.*
[101] *Id.* at 477.
[102] *Id.* at 469.
[103] Ariz. Rev. Stat. Ann. § 13-703.
[104] 122 S. Ct. at 2432-33.
[105] 530 U.S. at 468.
[106] *Id.* at 469.
[107] *Id.* at 471.

presented at trial, yet still be introduced to the judge during the sentencing hearing.[108] Only a moment's reflection will settle this point. Imagine any murder that was committed during an armed robbery. Clearly, evidence of the robbery would be presented at trial. Again, evidence that the crime was committed for pecuniary value would be presented at the sentencing hearing. This distinction illustrates the inherent difference between the sentencing factor judged in *Apprendi* and the aggravating factors at issue in *Ring*.

Therefore, the Arizona death penalty statute did not permit, nor did it encourage, what the Supreme Court outlawed in *Apprendi*. All evidence paramount in producing the jury's guilty verdict would ultimately support a finding of aggravating factors. The Arizona trial judge served only to moderate the sentencing hearing, rather than act as a fact-finder. In the end, the actions taken by the trial judge in Arizona did not run contrary to what the jury trial expressed by sentencing Ring to death. This indicates why the rule set forth in *Apprendi* should never have been made applicable to Arizona's, or any other states', death penalty statute.

C. *What to do with* Ring v. Arizona*?*

Arguably, the Supreme Court settled the fate of the Arizona death penalty statute when it announced its holding in *Apprendi v. New Jersey*.[109] Whether or not the decision is correct is immaterial; *Ring v. Arizona* stands as law in American death penalty jurisprudence. What can be done about the decision? Is there any way to reconcile the jury's role in the death penalty without stripping the trial judge of all authority? In a word, yes.

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[108] Ariz. Rev. Stat. Ann. § 13-703.

[109] 530 U.S. at 496-97. Another interesting argument can be made concerning the members of the Court that made up the majority in both *Apprendi* and *Ring*. In a group that can only be described as "strange bedfellows," Justices Stevens, Scalia, Thomas, Ginsberg, and Souter made up the majority in *Apprendi*. These five justices, joined by Justices Kennedy and Breyer, made up the majority in *Ring*. In the concurring opinions in *Apprendi*, Justices Thomas and Scalia donned their novice historian caps and set out to explain why sentencing factors have historically been treated as elements of the crime. *Apprendi*, 530 U.S. at 499. In fact, Justice Thomas wanted to prove that discretion in judicial sentencing was not as prevalent as most thought. *Apprendi*, 530 U.S. at 499-530 (Thomas, J., concurring). When this majority announced its opinion in *Apprendi*, any case, death penalty or not, that related to sentencing factors or aggravating factors would be governed by the majority in *Apprendi*. *Id.* at 496-97. This so-called intellectual journey undertaken by Justices Scalia and Thomas illustrates the preemptive demise of Arizona's death penalty statute. *See* David G. Savage, *Sentence Structure*, 88 ABA J. 32 (2002).

Under Federal Rule of Criminal Procedure 29, a defendant is able to make a motion to the court for a judgment of acquittal.[110] Defendants can make a motion to the court after the evidence of either side has been closed, and can also renew the motion following the discharge of the jury.[111] As guided by the language of the Rule, courts should grant acquittal if "the evidence is insufficient to sustain a conviction of such offense . . ."[112] Indeed, the Supreme Court elaborated that acquittal should be granted where "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[113] Granting criminal defendants such an avenue of relief ensures that jury determinations are not completely devoid of merit.[114] Moreover, this rule allows judges discretion without infringing on the Sixth Amendment rights of the defendant.

Arizona has adopted a similar rule for the death penalty.[115] Under new Rule 20 of the Arizona Rules of Criminal Procedure: "In an aggravation hearing in a capital case, after the evidence on either side is closed, on a motion of a defendant or on its own initiative, the court shall enter a judgment that an aggravating circumstance was not proven if there is no substantial evidence to warrant the allegation."[116] In a direct response to *Ring v. Arizona*, the Arizona legislature has taken action to ensure that judges retain some authority over the imposition of the death penalty in that state.[117]

All states should adopt a similar procedure. During the sentencing phase, after the prosecution has presented all evidence relative to the statutory aggravating factors, the capital defendant should be able to move the court for a judgment of leniency.[118] Again, after the defense has

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[110] States have a similar procedure. For example, Ohio Rule of Criminal Procedure 29 permits the defendant to make a motion for a judgment of acquittal. Ohio R. Crim. P. 29 (West 2002). Such a motion should be granted "if the evidence is insufficient to sustain a conviction of such offense or offenses." *Id.* Similarly, Arizona Rule of Criminal Procedure 20 states that acquittal shall be granted "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20 (West 2002). Arizona has amended its judgment of acquittal following the Court's decision in *Ring*.

[111] Fed. R. Crim. P. 29(a) (West 2002).

[112] *Id.*

[113] *Jackson v. Va.*, 443 U.S. 307, 319 (1979).

[114] *See U.S. v. Cox*, 593 F.2d 46, 48 (1979) (stating that "a motion for acquittal 'is a challenge to the government in the presence of the court that the government has failed in its proof.'") (citing *U.S. v. Jones*, 174 F.2d 746, 748 (7th Cir. 1949)).

[115] *See* Ariz. R. Crim. P. 20.

[116] *Id.*

[117] *Id.*

[118] If the trial judge were to grant a judgment of leniency, such a judgment would automatically compel a life sentence.

presented all evidence of the mitigating factors, the defendant could renew his motion for a judgment of leniency. At that time, if the trial judge were to conclude that there is insufficient evidence to prove that the aggravating factors outweigh the mitigating factors, then a judgment of leniency would be required. Even after the jury returned a decision imposing the death sentence, the capital defendant would still be entitled to move the court for leniency.

This judgment of leniency would fall under the same test that was articulated by the Supreme Court in *Jackson v. Virginia*: could any rational juror conclude that the evidence supports a conclusion of the existence of aggravating factors beyond a reasonable doubt.[119] A proposed rule would read:

> During the sentencing phase of a capital trial, at the close of evidence from either side, either the defendant or the court itself may make a motion for a judgment of leniency. Such a motion shall be granted if, based on the evidence presented, no rational juror could possibly conclude that any aggravating factor exists beyond a reasonable doubt. If such a judgment is warranted, the court shall immediately grant leniency, and impose a sentence of life imprisonment without possibility of parole.

Aside from complying with the constitutional initiative set forth in *Ring v. Arizona*, this procedural rule would achieve many of the goals necessary for the constitutional imposition of the death penalty. First, this device would allow the trial judge to retain some authority over the imposition of the death sentence without infringing on the defendant's Sixth Amendment rights. Detached and disinterested trial judges would be able to remove themselves from the emotion so often inherent in a murder trial that results in a capital sentence. Moreover, the trial judge, having absorbed all the evidence from the guilt phase and sentencing phase, would be able to impose an objective sentence consistent with that evidence. In a death penalty case, jurors may, and often do, confuse objectivity with a disregard for the consistent imposition of capital sentences.[120] Capital defendants should be entitled to some constitutional protection during the sentencing phase of their trial.

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[119] *Jackson*, 443 U.S. at 319.

[120] *See* Bowers, *supra* n. 12, at 1074. In fact, this study illustrates that jurors are generally persuaded by the emotion of a capital case, rather than by the statutory safeguards. *Id.* Of 54 capital jurors questioned, a significant majority (37) stated that the "aggravating and mitigating guidelines had 'little or no influence' on their sentencing decisions." *Id.* Furthermore, this study found that only 27.2% of jurors felt that the responsibility of sentence fell only with the jury. *Id.*

Permitting the trial judge to entertain and even grant a judgment of leniency ensures such protection.

Second, this procedure would advance judicial economy. In a judicial system where death penalty appeals average 22 years between conviction and execution of sentence,[121] allowing a trial judge to immediately review the evidence presented at the sentencing hearing will cut down, albeit minimally, on the appeal process. Immediate review would permit an additional judicial screening of the sentence of death.[122] Whenever a judge is able to review a jury's finding or even the evidence itself, it stands to reason that such action would inherently reduce the arbitrary imposition of the death sentence.

As the consistent and non-arbitrary imposition of a capital sentence is the ultimate goal of death penalty jurisprudence, allowing the defendant to move for a judgment of leniency would advance that goal while at the same time advancing the ideals set forth by the Supreme Court in *Ring v. Arizona*.

IV. CONCLUSION

What seems most troubling about the Supreme Court's decision in *Ring v. Arizona* is the complete lack of discussion concerning the history of the death penalty. Nowhere in the opinion did any of the justices refer to the enormity or severity of the imposition of the death sentence. Although conducting a relevant inquiry, the justices appeared preoccupied with whether under the Sixth Amendment a jury must find the existence of all aggravating factors necessary to compel the death sentence. Would capital defendants be better served if the justices answered this question: Does a requirement of jury sentencing in a capital case result in an arbitrary or capricious imposition of the death penalty? Throughout the history of death penalty jurisprudence in the Supreme Court, the Court has overturned any law even suggesting an arbitrary death penalty. Indeed, the Court has insisted on imposing a higher standard of review in death penalty cases. The justices ultimately failed to follow this well-established rule when deciding *Ring v. Arizona*.

What are the implications of *Ring*? Without an additional procedural device to protect capital defendants, death sentences are more likely to be

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[121] *See* Joseph E. Wilhelm and Kelly L. Culshaw, *Ohio's Death Penalty Statute: The Good, the Bad, and the Ugly*, 63 Ohio St. L.J. 549, 597-98 (2002).

[122] In states such as Ohio, where the legislature has removed the intermediate appellate level review of capital cases, allowing the trial judge some discretion on sentencing can further ensure that the death penalty is not imposed in an arbitrary or capricious fashion. *See* Ohio Rev. Code Ann. § 2929.03.

arbitrary and capricious. Allowing trial judges to review the aggravating factors upon motion of the defendant provides the capital defendant with a necessary avenue of review. More importantly, the review does not intrude on the Sixth Amendment rights that the Court articulated in *Ring* and *Apprendi.*

While it would seem misplaced to assert that the Supreme Court has placed the capital jury in the place of a Roman emperor or Robespierre, it does seem safe to conclude that the Supreme Court failed in its decision in *Ring v. Arizona*. If for no other reason than the death penalty is final, the Supreme Court should have articulated another standard relative to jury sentencing in capital cases. Perhaps immediate judicial review of a jury's factual conclusion as to the aggravating factors of the crime will ensure that the death penalty is not imposed in an arbitrary or capricious fashion. Without this standard, the Supreme Court may just have allowed precisely what it seeks to avoid.