

March 3, 2010

# The Facts about Ring v. Arizona and the Jury's Role in Capital Sentencing

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# THE FACTS ABOUT *RING V. ARIZONA* AND THE JURY'S ROLE IN CAPITAL SENTENCING\*

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## I. Introduction: *Ring v. Arizona* Eight Years Later

When it was decided in 2002, *Ring v. Arizona*<sup>1</sup> appeared to be a watershed in the way capital sentences are handed out in the United States. *Ring* announced that the rule of *Apprendi v. New Jersey*<sup>2</sup> applied to capital sentencing and required that any fact necessary to the imposition of the death penalty be proven to a jury and beyond a reasonable doubt. No longer could states remove capital decision-making entirely from juries (as many states had done prior to *Ring*); rather *Ring* appeared to signal that the jury has an important role to play in determining who lives and who dies.

*Ring* was initially seen, both by its proponents and its detractors, as a sea change in the way states could structure their capital decisionmaking; it overturned several states' death penalty statutes and appeared to imperil many more. Yet eight years after the case was decided, it is not clear what, if anything, *Ring* demands of the states. As Justice Scalia made clear in his *Ring* concurrence, the case does not grant the right to have a jury determine a capital sentence. Rather it only precludes a judge from finding the *facts* that make the defendant eligible for a sentence of death;<sup>3</sup> the ultimate sentence may still be imposed by a judge sitting without a jury. However, determining exactly what decision-making constitutes fact-finding, and therefore which tasks must be carried out by the capital jury rather than a judge, remains a challenging task.<sup>4</sup>

In this article we investigate the impact of *Ring* by analyzing four typical capital statutes against both the language of the *Ring* opinion and the broader context of the Court's Sixth and Eighth Amendment jurisprudence. What we find is that in all but the most obvious cases, *Ring*'s mandate is an extraordinarily weak one. Beyond these easiest

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\* The authors would like to thank the organizers and participants of the Southwestern Criminal Law Teachers Workshop held at the University of Arizona as well as our colleagues at the University of Denver Sturm College of Law who attended and commented at our works in progress workshop. All errors and omissions are ours alone.

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<sup>1</sup> *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>2</sup> 530 U.S. 466 (2000)

<sup>3</sup> *Id.* at 612-13 (Scalia, J., concurring).

<sup>4</sup> In other contexts, the Supreme Court has repeatedly emphasized that the task of establishing a "methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller v. Fenton*, 474 U.S. 104, 113 (1985) (compiling cases on this point); *see also Williams v. Taylor*, 529 U.S. 362, 408, (2000) (acknowledging that it is "difficult to distinguish a mixed question of law and fact from a question of fact").

cases, fact-finding is a difficult concept to define<sup>5</sup> and, as a result, state courts have consistently minimized *Ring*'s impact on their capital systems. In the absence of firm guidance from the Supreme Court, the states have largely been left free to read *Ring* as they wish and the states have generally used this freedom to read *Ring*'s mandate very narrowly.

To the extent that states are unwilling to hand complete control of capital cases over to juries (and, for various reasons many seem unwilling to do so)<sup>6</sup> *Ring* creates perverse incentives: Juries can be removed from the equation simply by making capital decisionmaking open-ended rather than fact-based, by making the decision to impose death a moral judgment rather than a legal conclusion.<sup>7</sup> Such standardless decision-making, while it currently passes constitutional muster under the Court's Eighth Amendment jurisprudence,<sup>8</sup> remains constitutionally dubious. We demonstrate that the malleability of the capital sentencing process leaves the decision whether to impose death nearly unregulated by *Ring* and in need of a protective Eighth Amendment overlay.<sup>9</sup> Stated another way, the role of the jury in capital sentencing is best realized not through the Sixth Amendment, but through the Eighth Amendment.

By examining the capital sentencing systems in four of the nation's most active death penalty states – Florida, Texas, California, and Georgia – we argue that the Sixth Amendment jury right, with its narrow focus on fact-finding, though of great importance in the non-capital context,<sup>10</sup> tends to generate more confusion than protection in capital sentencing. Nonetheless, the possibility of a meaningful jury right in the capital sentencing context need not be abandoned entirely. In view of the shortcomings of the Sixth Amendment in this realm and in light of the retributive purpose underlying modern

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<sup>5</sup> See, e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 237 (1985) ("it seems misguided to assume, as many courts apparently do, that all law application judgments can be dissolved into either law declaration or fact identification").

<sup>6</sup> See Part IV, *infra*.

<sup>7</sup> This reflects a peculiarly perverse incentive system because studies show that juries exercise much more ownership and care over capital sentencing when it is open-ended or unconstrained, as opposed to highly technical and legalized. See, e.g., Robert Weisberg, Symposium, *How Sentencing Commissions Turned Out to be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 191, 200-02 (2007). Because the strength of *Ring*'s jury mandate is inversely proportional to the amount of jury discretion, the jury right has the least force when it would be most effective.

<sup>8</sup> See *Zant v. Stephens*, 462 U.S. 862 (1983).

<sup>9</sup> Of course, the role of the Eighth Amendment as a procedural stop-gap in capital sentencing issues is not a novel proposition. For the last forty years, the Court has recognized the role of the "cruel and unusual punishment clause" as providing a unique or additional protective procedural gloss to death penalty adjudications. See, e.g., *Zant*, 462 U.S. 862, 884-85 (noting that "because there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976))).

<sup>10</sup> See e.g., Joseph L. Hoffman, *Apprendi v. New Jersey: Back to the Future?*, 38 Am. Crim. L. Rev. 255 (2001) (noting the importance of *Apprendi* in reigniting the debate from the 1970s and 1980s regarding the extent to which a "legislature, consistent with constitutional requirements, shift the burden of persuasion in a criminal case" by simply redefining an element as a defense); R. Craig Green, *Apprendi's Limits*, 39 U. RICH. L. REV. 1155, 1157 (2005) (describing *Apprendi* as the "landmark in modern sentencing law").

capital punishment,<sup>11</sup> the wisdom of Justices Stevens<sup>12</sup> and Breyer<sup>13</sup> in locating a jury right for capital sentencing in the Eighth Amendment has been dramatically underappreciated. Under their view of the Eighth Amendment, the role of the jury is crucial in capital sentencing not because of the jury's fact-finding prowess but because the jury plays an indispensable role in expressing the conscience of the community.<sup>14</sup> Recognizing an Eighth Amendment jury right is consistent with the Court's general approach to capital sentencing and better effectuates the jury-right promise of the Sixth Amendment than does the Sixth Amendment itself.

Part II of this Article provides an overview of the relevant constraints on capital sentencing imposed by the Sixth and Eighth Amendments. Part III applies these limits to four key death penalty jurisdictions and reveals the failure of *Ring*'s promised jury right. In Part IV we conclude that the Eighth Amendment – rather than the Sixth – dictates that the uniquely democratic and retributive process of deciding who lives and who dies ought to be carried out not by a judge but by a jury.

## II. The Constitutional Regulation of the Death Penalty

For our purposes, capital punishment in the United States is regulated by two discrete but related Constitutional provisions: The Eighth Amendment's prohibition on cruel and unusual punishment and the Sixth Amendment's jury trial guarantee. As this section makes clear, these two provisions exert competing pressures on states seeking to implement capital sentencing systems.

### A. Capital Punishment Post-*Gregg*: The Eighth Amendment Framework

In 1972 the United States Supreme Court held in *Furman v. Georgia*<sup>15</sup> that the death penalty, as it was then being carried out across the country<sup>16</sup> was wanton and arbitrary, thereby violating the Eighth and Fourteenth Amendments' prohibition on Cruel

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<sup>11</sup> We believe that the Court's capital sentencing jurisprudence rests a strongly, if not exclusively retributive rationale. Efforts to prove a statistically meaningful deterrent have been inconclusive, and if there is any ambiguity as to the purposes of sentencing, there is good reason to default in favor of jury sentencing. Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 313 (2003) ("In the absence of wide consensus on sentencing goals, it is best to leave the sentencing decision with a deliberative democratic institution--the jury."); *id.* at 328 (quoting the Federal Sentencing Commission's admitted inability to settle on a goal for punishment: "Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor.").

<sup>12</sup> See *Harris v. Alabama*, 513 U.S. 504, 515-26 (1995) (Stevens, J., dissenting).

<sup>13</sup> *Ring v. Arizona*, 536 U.S. 584, 613-19 (2002) (Breyer, J., concurring).

<sup>14</sup> *Id.* at 615-16. See also Iontcheva, *supra* note 11, at 323 (tracing the history of the jury right and recounting the notion that it embodies "the ideal of a decentralized democracy" insofar as juries are the "vehicle through which community concerns could be made to bear on important political decisions.").

<sup>15</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>16</sup> Commentators have observed that "Furman had the effect of invalidating capital statutes passed by thirty-nine states, the District of Columbia and the federal government." Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362 (1996); see also *id.* at n. 22 (noting that only Rhode Island's automatic, non-discretionary death penalty survived after *Furman*).

and Unusual Punishments.<sup>17</sup> Each of the Court's nine justices wrote an opinion in *Furman*, making the decision long on pages but short on discernible rationales.<sup>18</sup> Two of the justices asserted that the death penalty is never constitutional and four found no constitutional fault with the Georgia statute directly at issue in the case. Thus the import of the decision derives primarily from the opinions of the three justices, Potter Stewart, Byron White and William O. Douglas, who did not state categorical objections to the death penalty but rather found fault with the specifics of the Georgia statute.<sup>19</sup>

These three justices focused on the broad discretion permitted capital sentencers by the Georgia statute.<sup>20</sup> Justice Stewart stated that death sentences imposed under the statute were cruel and unusual in the same way that being struck by lightning was cruel and unusual;<sup>21</sup> the statutes provide no guidance to the jury in terms of how to decide a defendant's sentence and thus result in random, unpredictable, unprincipled death sentences. The other justices in this group were concerned about the possibility of racial discrimination that discretion permitted and by the relatively small number of death sentences actually imposed compared to the much larger number of murders occurring in Georgia.<sup>22</sup> For these justices, a Constitutional death penalty statute would require more rigorous, defined, and fixed criteria for determining those cases for which death is the appropriate punishment.

The states were sent back to the drawing board by *Furman*, forced to parse the opinions of Justices Stewart, White and Douglas in order to determine what the Eighth Amendment required of them. But it was not long before a majority of the Court was satisfied that the problems of arbitrariness found repugnant to the Eighth Amendment in *Furman* had been remedied – to be sure, *Furman* represents, not the end, but the beginning of the Supreme Court's regulation of state capital sentencing regimes. Less than four years after *Furman* had been handed down, the Court, in *Gregg v. Georgia*

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<sup>17</sup> *Furman v. Georgia*, 408 U.S. 238, 238-39 (1972). Identifying the sentencing systems under review as arbitrarily assigning death, Justice Stewart memorably wrote, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309 (Stewart, J., concurring).

<sup>18</sup> Because the opinion of the Court was per curiam, the nine justices in *Furman* actually managed to produce ten separate opinions. See *Furman*, 408 U.S. at 239. See also Steiker & Steiker, *supra* note 9, at 362 (identifying *Furman* as the "longest decision ever to appear in the U.S. Reports").

<sup>19</sup> See *Pulley v. Harris*, 465 U.S. 37, 44 (1984) (summarizing these three justices' rationales underlying their three separate opinions in *Furman*). See also James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 8 (2007) (noting that Justices Douglas, Stewart, and White "controlled the outcome" of *Furman*).

<sup>20</sup> See *Furman*, 408 U.S. at 253 (Douglas, J. concurring) ("Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); *id.* at 309-10 (Stewart, J., concurring) ("the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."); *id.* at 314 (White, J., concurring) (stating that the legislature delegated sentencing authority to juries and judges who exercised independent discretion).

<sup>21</sup> *Id.* at 309 (Stewart J., concurring).

<sup>22</sup> *Id.* at 311 (White, J., concurring) ("[J]udges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist."). Justice Douglas' concurring opinion focused on racial disparities in capital sentencing. *Id.* at 253-57 (Douglas, J., concurring).

upheld the new statute the Georgia legislature had passed in response to *Furman*.<sup>23</sup> Although no definitive capital sentencing algorithm was mandated by the Court, the decision in *Gregg* combined with separate opinions upholding the capital systems in Florida,<sup>24</sup> Louisiana,<sup>25</sup> and Texas,<sup>26</sup> provided a set of guideposts for the states. Read together these decisions sketch a rough outline of the type of procedures that would, for Eighth Amendment purposes, sufficiently guide the sentencer's discretion in assessing whether a defendant should live or die.

On the same day that the Court expressly approved Georgia's revised capital sentencing system, however, the Court declared North Carolina's capital system unconstitutional in *Woodson v. North Carolina*.<sup>27</sup> The relevant North Carolina statute mandated capital punishment for *all* first degree murderers, and the Court held that this automatic death penalty statute was unconstitutional insofar as it denied the defendant the opportunity to have his individual characteristics considered by the sentencer. The Court explained, "North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.'"<sup>28</sup>

Consequently, by the end of 1976, the Court had, through cases like *Gregg* and *Woodson*, essentially mandated that capital sentencing include two layers of inquiry – there must be a narrowing or eligibility phase at which the pool of all killers was narrowed to a smaller, death-eligible pool, and there must be an individualizing or culpability phase at which the actual sentence is determined.<sup>29</sup> States seeking to impose the death penalty, then, must navigate between these two Constitutional requirements. They cannot, under *Furman*, leave the sentencer the unfettered discretion whether to impose the death penalty or not and they cannot, under *Woodson*, require that the death penalty be imposed under certain circumstances. This task of complying with the dual procedural requirements of the Eighth Amendment has resulted in an ongoing dialogue

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<sup>23</sup> *Gregg v. Georgia*, 428 U.S. 153, 207 (1976). Only the two absolutists, Brennan and Marshall, dissented. *Gregg*, 428 U.S. at 227 (Brennan, J., dissenting); *id.* at 230 (Marshall, J., dissenting).

<sup>24</sup> *Proffitt v. Florida*, 428 U.S. 242 (1976).

<sup>25</sup> *Roberts v. Louisiana*, 428 U.S. 325 (1976).

<sup>26</sup> *Jurek v. Texas*, 428 U.S. 262 (1976).

<sup>27</sup> *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

<sup>28</sup> *Woodson*, 428 U.S. at 301 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). It is notable that the Court imported the evolving standards of decency framework for proportionality review under the Eighth Amendment into the realm of pure proceduralism under the Eighth Amendment. The *Woodson* rule addresses only the adequacy of the capital sentencing proceedings, and yet the Court expressly invokes "contemporary standards" as a gauge for the constitutionality of the procedure in question. *Id.*

<sup>29</sup> See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (stating that when considering sentencing a person to death, "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."); *Woodson*, 428 U.S. at 304 (mandating individualized consideration before sentencing defendants in capital cases).

between the states and the Supreme Court regarding the propriety of various sentencing systems.<sup>30</sup>

Justice Scalia has declared the task of complying with these twin goals to be impossible.<sup>31</sup> Forced to choose between what he saw as contradictory commands to the states – make the death penalty difficult to impose and easy not to impose – Justice Scalia decided that he could follow only one. Reviewing the history of the two lines of cases, he could find Constitutional support only for the *Furman* line, and announced that he would no longer follow the rule created in *Woodson* and elaborate in *Lockett v. Ohio*.<sup>32</sup>

[Our] jurisprudence contain[s] the contradictory commands that discretion to impose the death penalty must be limited but discretion not to impose the death penalty must be virtually unconstrained . . . I would not know how to apply [*Woodson*] – or, more precisely, how to apply both [*Woodson*] and *Furman* – if I wanted to. I cannot continue to say, in case after case, what degree of “narrowing” is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett*. And I cannot continue to say, in case after case, what sort of restraints upon sentencer discretion are unconstitutional under *Woodson-Lockett* when I know that the Constitution positively favors constraints under *Furman*. *Stare decisis* cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.<sup>33</sup>

For Scalia, the two sets of requirements – that sentencing discretion be suitably narrowed through rules and that all available evidence relevant to mitigation be admitted for consideration by the sentencer – were irreconcilable.<sup>34</sup>

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<sup>30</sup> Since 1976, the Court has been “involved in the ongoing business of determining which state systems pass constitutional muster,” a process that has been described by some commentators as the Supreme Court’s “regulatory role” in the field of capital punishment. Steiker & Steiker, *supra* note 9, at 363.

<sup>31</sup> Notably, Justice Scalia’s pronouncement that he will now only apply one of the Eighth Amendment’s two procedural requirements arose in a case that represents the Court’s last decision affirming the principle that the Sixth Amendment does not require jury involvement in any stage of capital sentencing. *Walton v. Arizona*, 497 U.S. 639, 656-57 (1990), *overruled by* *Ring v. Arizona*, 536 U.S. 584 (2002). Not long after *Walton* was decided, the Court revisited the Sixth Amendment issue and reversed itself. *See Ring v. Arizona*, 536 U.S. 584, 589 (2002). Justice Scalia, however, has not revised his position as to the Eighth Amendment protections during sentencing. *Ring*, 536 U.S. at 610 (Scalia, J. concurring).

<sup>32</sup> *Walton*, 497 U.S. at 673. In *Lockett*, the Court elaborated on the protections announced in *Woodson*. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

<sup>33</sup> *Walton*, 497 U.S. at 668, 673.

<sup>34</sup> Given Scalia’s generally robust notion of the Sixth Amendment jury right, perhaps his explicit rejection of the need for broad individualizing or mitigation review, as a matter of Eighth Amendment doctrine, has tainted his view as to whether such review warrants the Sixth Amendment jury protections. Given that he does not recognize a right to have one’s sentence individualized under *Woodson*, it is not terribly surprising that he has grouched that the jury right does not attach to this right. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring).

In short, the Eighth Amendment is sufficiently complicated on its own to make determining the constitutionality of any state's capital sentencing provision unclear. There is substantial disagreement about the role of *Woodson's* mandate that individual characteristics of the accused – mitigation – be considered as part of the capital sentencing proceeding and disagreement over what it means for a state to meaningfully narrow the pool of murderers to those who are ultimately eligible for death. These difficulties are exponentially compounded, however, by the fact that capital sentencing proceedings are also regulated by the Sixth Amendment jury right. Although the Court has squarely addressed, in *Ring*, the relationship between *Furman's* Eighth Amendment requirements and the Sixth Amendment, it has not yet untangled the relationship between *Woodson's* additional requirements and the Sixth Amendment.<sup>35</sup>

## B. Capital Punishment and the Sixth Amendment

### 1. The Tension Builds: Developing a Coherent Sixth Amendment Theory for Capital Sentencing.

In *Jones v. United States*<sup>36</sup> the Supreme Court was asked to determine whether a provision of the federal carjacking statute, 18 USC § 2119(2), dealing with serious bodily injury was an element of the offense or merely a sentencing factor.<sup>37</sup> Under this provision, a successful demonstration that the defendant had caused serious bodily injury during the course of his crime raised the potential punishment for carjacking from 15 years to 25 years in prison. The Court reasoned – citing the due process cases *In Re Winship*<sup>38</sup> and *Patterson v. New York*<sup>39</sup> – that the government must allege all the elements of an offense in the charging document<sup>40</sup> and must prove them to a jury beyond a

<sup>35</sup> At least for now, it seems clear that Justice Scalia has not prevailed in his quest to de-constitutionalize the *Woodson* rule. In recent years the Court has repeatedly applied the requirement of broad, nearly unlimited admissibility principles regarding mitigation evidence in capital sentencing proceedings. See e.g., *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007) (reiterating that the Court has long held that before imposing a death sentence the jury must, “be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense.”).

<sup>36</sup> *Jones v. U.S.*, 526 U.S. 227 (1999). The relationship between sentencing factors and the Sixth Amendment jury right was first raised in a dissenting opinion by Justice Scalia one year before *Jones*. See *Monge v. California*, 524 U.S. 721, 738-40 (1998) (Scalia, J., dissenting).

<sup>37</sup> The section read, in its entirety, as follows.

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

- (1) be fined under this title or imprisoned not more than 16 years, or both,
- (2) if serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both, and
- (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C.A. Sec. 2119 (West 2010).

<sup>38</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>39</sup> *Patterson v. New York*, 432 U.S. 197 (1977).

<sup>40</sup> Although beyond the scope of this Article, the Fifth Amendment Grand Jury Right, which produces the relevant *charging document* discussed in *Jones*, serves as yet another constitutional protection that is implicated by the Eighth Amendment's rules governing capital sentencing. Capital sentencing implicates



reasonable doubt. Mere sentencing provisions, by contrast, need generally be proven only to a judge and only by a preponderance of the evidence.

Reviewing the carjacking provisions at issue in *Jones*, the Court concluded that serious constitutional questions would be raised by accepting the government's reading of the statute as containing one offense with several sentencing factors. Were the allegation of serious bodily injury viewed merely as a sentencing factor, the Court reasoned, the jury's role in the adjudication of a criminal defendant would be greatly eroded:

The terms of the carjacking statute illustrate very well what is at stake. If serious bodily injury were merely a sentencing factor under § 2119(2) (increasing the authorized penalty by two thirds, to 25 years), then death would presumably be nothing more than a sentencing factor under subsection (3) (increasing the penalty range to life). If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment. It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn.<sup>41</sup>

To avoid these serious constitutional concerns, the Court concluded that the statute was more accurately read as containing three separate offenses<sup>42</sup> – carjacking, carjacking with serious bodily harm resulting, and carjacking with death resulting –

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at least four distinct constitutional provisions: (1) The Eighth Amendment requirements of *Furman* and *Woodson*; (2) The Sixth Amendment right to have a jury make findings of fact that increase one's maximum sentencing range; (3) the Fourteenth Amendment's requirement that elements be found by a jury beyond a reasonable doubt; and (4) the Fifth Amendment grand jury right requires that all elements be submitted to a jury. Of these four, only the grand jury right to an indictment as to all elements has not been incorporated so as to apply to the states. See *U.S. v. Allen* 406 F.3d 940, 943 (8<sup>th</sup> Cir. 2005) (en banc)

The indictment must include at least one statutory aggravating factor to satisfy the Fifth Amendment because that is what is required to elevate the available statutory maximum sentence from life imprisonment to death. In turn, at least one of the statutory aggravating factors found by the petit jury in imposing the death sentence must have been one of the statutory aggravating factors charged by the grand jury in the indictment.

*Id.* (compiling federal court opinions reaching the same conclusion).

<sup>41</sup> *Jones*, 526 U.S. 243-44.

<sup>42</sup> *Id.* at 251-52 (“Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions. This is done by construing § 2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.”) (footnote omitted).

rather than one. Because the government had not alleged in the indictment<sup>43</sup> or proven beyond a reasonable doubt to a jury the fact that Jones caused serious bodily injury in the commission of a carjacking, his maximum sentence was properly determined by what was in fact proven to the jury, namely a violation of the baseline offense of carjacking.<sup>44</sup>

In coming to the conclusion that the allegation of serious bodily injury was an element of the offense and not a mere sentencing factor, the Court was forced to distinguish three capital sentencing cases – *Spaziano v. Florida*,<sup>45</sup> *Hildwin v. Florida*,<sup>46</sup> and *Walton v. Arizona*<sup>47</sup> – which had all upheld the judge’s traditional role as a factfinder in sentencing. *Spaziano* and *Hildwin* had both challenged Florida’s death penalty scheme that allows a judge, as the ultimate sentencer under Florida law, to disregard a jury’s recommendation of a life sentence and impose the death penalty. In *Spaziano* the Court ruled that capital sentencing, like non-capital sentencing, is merely the process of choosing one alternative sentence over another, a task that has traditionally been one for the judge and not the jury.<sup>48</sup> In the Court’s brief, per curiam decision in *Hildwin*, it rejected the idea that the findings that lead to death must be made by a jury; the finding of such sentencing factors, the Court argued, is a task traditionally left to the judge and not the jury.<sup>49</sup> Finally, in *Walton*, the Court rejected the petitioner’s assertion that the findings that would make him death eligible under Arizona law must be made by a jury; relying on *Hildwin*, *Spaziano*, and other cases, the Supreme Court once again asserted that neither the Sixth Amendment nor the history of criminal sentencing in the United States mandate a role for the jury in the fact-finding that leads to an increased sentence.<sup>50</sup>

The Court’s attempt to distinguish these three capital cases from its *Jones* holding is, at least in retrospect, difficult to comprehend. If there is no constitutional infirmity in allowing a judge rather than a jury to find the facts that lead to death, why does allowing

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<sup>43</sup> Cf. Jane Eggers, Note, *McKaney v. Foreman: An Odd Departure from the Apprendi Line*, 48 ARIZ. L. REV. 403, 411-12 (2006) (explaining the implications of the Supreme Court’s Sixth Amendment cases discussing the indictment rule on states, which are not obligated to charge by indictment).

<sup>44</sup> *Jones*, 526 U.S. at 253 (Scalia, J., concurring) (noting that the result in *Jones* is governed by his “considered view” of the Sixth Amendment as announced in his *Monge* dissent).

<sup>45</sup> *Spaziano v. Florida*, 468 U.S. 447 (1984).

<sup>46</sup> *Hildwin v. Florida*, 490 U.S. 638 (1989).

<sup>47</sup> *Walton v. Arizona*, 497 U.S. 639 (1999).

<sup>48</sup> *Spaziano*, 468 U.S. at 458 (“Petitioner does not urge that capital sentencing is so much like a trial on guilt or innocence that it is controlled by the Court’s decision in *Duncan v. Louisiana*.”) (citations omitted).

<sup>49</sup> *Hildwin*, 490 U.S. at 640-41

Like the visible possession of a firearm in *McMillan*, the existence of an aggravating factor here is not an element of the offense but instead is “a sentencing factor that comes into play only after the defendant has been found guilty.” Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.

*Id.* (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986)) (citations omitted). Notably, in *McMillan*, the Court was not addressing a factual finding that increased the statutory maximum sentence. See *McMillan*, 477 U.S. 79.

<sup>50</sup> See *Walton*, 497 U.S. at 647 (“Contrary to Walton’s assertion . . . : ‘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.’”) (quoting *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)).

a judge to find that serious bodily harm resulted from a carjacking raise serious constitutional questions? If the *Jones* Court was so concerned that a defendant might be sentenced to *life* without specific jury findings, why did they seem willing to allow a defendant to be sentenced to *death* based upon the findings of a trial judge sitting without a jury?

Perhaps the answer lies in the Court's concern that the carjacking statute, as read by the government in *Jones*, would allow the jury only a gate-keeping function; a jury verdict would merely make the defendant guilty of a felony, but the ultimate seriousness of that felony would depend entirely on a judge's determination of additional facts not heard – or even rejected – by the jury. By contrast, in Florida the jury determines whether or not the defendant is guilty of capital murder and the judge's factfinding and conclusion as to the ultimate punishment is limited to the narrow, but important, choice between life and death.<sup>51</sup>

Notwithstanding the obvious tension between the holding in *Jones* and the Court's extensive capital sentencing jurisprudence, the Supreme Court famously reaffirmed and generalized the holding of *Jones* in *Apprendi v. New Jersey*,<sup>52</sup> holding that the Constitutional concerns that the Court raised in *Jones* were in fact quite substantial.<sup>53</sup> *Apprendi* involved a hate crime allegation that doubled the maximum permissible prison term for the weapons violation to which the defendant had pleaded guilty. A judge sitting without a jury found the allegation of racial animus to be true to a preponderance of the evidence and sentenced the defendant to a longer term of incarceration than he could have received based solely on the facts he admitted in his plea. *Apprendi*, who had reserved his right to appeal the animus finding, did so, arguing that the fact that the hate crime allegation was found to be true by a judge rather than a jury deprived him of the rights guaranteed him by the Sixth and Fourteenth Amendments.<sup>54</sup>

Justice Stevens, writing for five of the Justices, reaffirmed the holding of *Jones*. He quoted his own concurring opinion in that case for the proposition that: “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is

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<sup>51</sup> FLA. STAT. ANN. § 921.141(1) (2010) (“Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment”). Under the federal statute, by contrast, to be eligible for the death penalty, an aggravating (eligibility) factor must exist above and beyond the capital murder itself.

<sup>52</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

<sup>53</sup> Given the Court's odd assertion in *Jones* that no one “today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution,” *Jones v. United States*, 526 U.S. 227, 248 (1999), *Apprendi* is perhaps no more than merely a consolidation of the holding in *Jones*.

<sup>54</sup> As a defendant in State court, *Apprendi*'s jury rights derive from the Fourteenth Amendment. See *Barron v. Baltimore*, 32 U.S. 243 (1833). See also Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 317 (1982); Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns That Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231 (2008).

equally clear that such facts must be established by proof beyond a reasonable doubt.”<sup>55</sup> The Court left intact its decision in *United States v. Almendarez-Torres*<sup>56</sup> that an allegation of a prior conviction was a sentencing provision and not an element of the crime (and thus, presumably did not need to be proved to a jury and beyond a reasonable doubt), but its opinion was otherwise categorical.<sup>57</sup> Other than the fact of a prior conviction, any fact that increases the maximum possible penalty for a crime must be submitted to a jury and proved by the prosecution beyond a reasonable doubt.<sup>58</sup>

In clarifying and expanding its *Jones* holding, the *Apprendi* Court was again obligated to distinguish apparently contradictory capital precedents. Citing *Walton v. Arizona* – where the Court had upheld Arizona’s capital sentencing scheme by which the judge determined whether or not the facts that make the defendant eligible for death are true – Justice Stevens argued that the reasoning of *Jones* and *Apprendi* did not prohibit a state from permitting a judge to find facts necessary to impose the penalty of death:

This 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.<sup>59</sup>

Why, exactly, the reasoning of *Jones* and *Apprendi* did not apply to capital sentencing was far from clear, however, as Justice O’Connor pointed out in her *Apprendi* dissent. She argued that the distinction that the Court drew between *Apprendi* and *Jones* on the one hand and *Spaziano*, *Hilbin*, and *Walton* on the other, could not be maintained: “The distinction of *Walton* offered by the Court today is baffling, to say the least.”<sup>60</sup> As

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<sup>55</sup> *Apprendi*, 530 U.S. at 490. He also quoted Justice Scalia’s concurring opinion in *Jones*. *Id.*

<sup>56</sup> *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998).

<sup>57</sup> The Court’s defense of *Almendarez-Torres* was hardly full-throated:

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision’s validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

*Apprendi*, 530 U.S. at 489-90.

<sup>58</sup> *Id.* at 490.

<sup>59</sup> *Id.* at 496 (citing *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990)).

<sup>60</sup> *Id.* at 538 (O’Connor, J., dissenting). As Justice Kennedy quite rightly pointed out dissenting in *Jones*, the standard that the Supreme Court has adopted for determining what questions must go to a jury seems custom-suited to overturning a case like *Walton*:

If 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. In fact, *Walton* would appear to have been a better candidate for the Court’s new approach than is the instant case.

*Jones v. United States*, 526 U.S. 227, 272 (Kennedy, J., dissenting). Of course, Kennedy and O’Connor were arguing that *Jones* and *Apprendi* were wrongly decided as inconsistent with the line of capital cases.

O'Connor read the Arizona statute at issue in *Walton*, it did exactly the thing that the Court rejected in the New Jersey hate crime statute:

Under Arizona law, the fact that a statutory aggravating circumstance exists in the defendant's case “‘increases the maximum penalty for [the] crime’ ” of first-degree murder to death (quoting *Jones, supra*, at 243, n. 6, 119 S.Ct. 1215). If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury's guilty verdict is life imprisonment.<sup>61</sup>

Justice O'Connor's critique, of course, was not of the Arizona sentencing scheme but of the Court's Sixth Amendment jurisprudence.<sup>62</sup> For her, the traditional role of the judge in determining a defendant's appropriate sentence was badly undercut by the Court's blind adherence to a perceived Sixth Amendment principle.

## 2. The Sixth Amendment Cannot Be Home to Both

The continuing tension between these two lines of Sixth Amendment cases – capital cases upholding the power of a judge to make the findings of fact that make one eligible for death and non-capital cases requiring that every fact that leads to greater possible punishment must be found by a jury and beyond a reasonable doubt – came to a head in 2002 in *Ring v. Arizona*.<sup>63</sup> In *Ring*, the petitioner challenged the very Arizona capital statute that the Court had upheld in *Walton* and reaffirmed in *Apprendi*. The Arizona Supreme Court, in passing on Ring's challenge of the state's death penalty law, explicitly endorsed Justice O'Connor's reading of the Arizona capital statute.<sup>64</sup> Under

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Their arguments, however, would lead to the overturning of the capital precedents as inconsistent with the Sixth Amendment cases.

<sup>61</sup> *Apprendi*, 530 U.S. at 537 (O'Connor, J., dissenting) (quoting *Jones*, 526 U.S. at 243 n. 6) (internal citations omitted). Ironically, the Court retorts by quoting Justice Scalia's opinion dissenting in *Almendarez-Torres* for the proposition 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 penalty, rather than a lesser one, ought to be imposed....” *Apprendi*, 530 U.S. at 497 (quoting *Almendarez-Torres*, 523 U.S. at 257, n.2 (Scalia, J., dissenting)).

<sup>62</sup> The Arizona capital sentencing scheme described by Justice O'Connor is consistent with the Model Penal Code provision addressing capital punishment, § 210.6. Compare *id.* at 536-37 (O'Connor, J., dissenting) with MODEL PENAL CODE § 210.6 (2001). Following *Gregg v. Georgia*, which upheld a capital sentencing system based loosely on that endorsed by the Model Penal Code, *Gregg v. Georgia*, 428 U.S. 153, 207, most states embraced a similar approach.

<sup>63</sup> *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>64</sup> See e.g., *State v. Ring*, 25 P.3d 1139, 1151 (2001) (en banc), *overruled by* *Ring v. Arizona*, 536 U.S. 548 (2002):

In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for “natural life” without the possibility of release. It 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. . . .

Therefore, the present case is precisely as described in Justice O'Connor's dissent-Defendant's death sentence required the judge's factual findings.  
*Id.* (citing ARIZ. REV. STAT. § 13-703(B) (2000)).

Arizona law, the state high court found, a defendant cannot be sentenced to death unless a judge, sitting without a jury, determines that at least one aggravating circumstance has been proven true beyond a reasonable doubt.<sup>65</sup> Although the Arizona Court appeared to believe that the statute, properly interpreted, ran afoul of *Apprendi*, it rejected *Ring*'s Sixth Amendment challenge in light of the Supreme Court's explicit reaffirmance of *Walton* in that very case.<sup>66</sup>

On appeal the United States Supreme Court reversed, finding that the Arizona statute, as interpreted by the state high court, ran afoul of the Sixth Amendment as read by the *Jones* and *Apprendi* Courts.<sup>67</sup> Echoing the opinion of the Arizona Supreme Court, the Supreme Court rightly noted that once a capital defendant had been convicted of capital murder in Arizona, the greatest punishment he can receive is life without parole. A defendant does not become eligible for death until at least one aggravating factor is found. Because Arizona law calls for this finding to be made by a judge sitting without a jury, the Arizona statute ran afoul of the Court's opinion in *Apprendi*. In a memorable phrase, Justice Ginsburg wrote for the Court that:

[W]e hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."<sup>68</sup>

As he would again in *Booker v. United States*,<sup>69</sup> Justice Breyer attempted in his concurrence to soften *Ring*'s blow. Breyer, who did not join Justice Ginsburg's majority

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<sup>65</sup> *Id.* *Apprendi* recognizes that the jury right is a "companion" to the beyond a reasonable doubt standard of proof under *Winship*. *Apprendi*, 530 U.S. at 478. Accordingly, after *Ring*, the prosecutorial burden of proof as to an aggravator is beyond a reasonable doubt. Compare *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972) ("[T]he Sixth Amendment itself has never been held to require proof beyond a reasonable doubt"), with *Apprendi*, 530 U.S. at 478 (describing the Sixth Amendment jury protection as "*the companion right to have the jury verdict based on proof beyond a reasonable doubt*") (emphasis added), and Priya Nath, Note, *Sattazahn v. Pennsylvania* 123 S. Ct. 732 (2003), 15 CAP. DEF. J. 419, 422 (2003) ("[T]he *Ring* Court held that the Sixth Amendment requires a jury to find the existence of aggravating factors beyond a reasonable doubt.").

<sup>66</sup> *State v. Ring*, 25 P.3d at 1152.

<sup>67</sup> *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

<sup>68</sup> *Id.*

<sup>69</sup> *United States v. Booker*, 543 U.S. 220 (2005). Although Justice Breyer dissented from the Court's holding that the federal sentencing guidelines were unconstitutional, he managed to exert substantial influence over what is now considered the *Booker* rule because his opinion regarding the proper remedy commanded a five Justice majority. See *Booker*, 543 U.S. at 258; see also Doug Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 346 (2005) (examining "Justice Breyer's remedial opinion"). The softening that occurred at the hands of Justice Breyer's remedial opinion is somewhat hard to grasp; the remedy for a sentencing under an unconstitutional system of federal sentencing guidelines was to declare the entire guideline system advisory. Doug Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 410 (describing the *Booker* remedy as greatly enhancing judges' discretion at sentencing). Of course the sort of far-reaching discretion permitted (and mandated) after *Booker*, is not permissible in the Eighth Amendment capital sentencing context. See *Furman v. Georgia*, 408 U.S. 238 (1972). Thus, a faithful application of the *Ring* jury-right to capital sentencing might provide capital

opinion, began by expressing his continued disapproval of the Court's decision in *Apprendi*. He concurred in the result, however, because he believed that the jury's role in capital cases is mandated by the Eighth Amendment rather than the Sixth: "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death."<sup>70</sup> For Justice Breyer, therefore, the heightened due process required in capital cases necessarily includes a determination by the jury of whether retribution requires the imposition of a sentence of death against the defendant; only retribution, Breyer argued, could justify the imposition of a sentence of death rather than some lesser punishment and only a jury was properly situated to determine whether society's ultimate punishment is justified in a particular case.<sup>71</sup>

Justice Scalia, who did join the majority opinion, also concurred separately largely to make clear his disagreement with Justice Breyer's understanding of the basis for the Court's opinion.

While I am, as always, pleased to travel in Justice Breyer's company, the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so – by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. There is really no way in which Justice Breyer can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.<sup>72</sup>

The disagreement between Justices Scalia and Breyer in *Ring*, therefore, comes down to nothing less than a determination of what the jury right entails in capital cases, and from where in the Constitution this right derives. Is the jury right merely about a defendant's right to have the facts that condemn him to possible execution found by a

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defendants with the benefits of the *Apprendi* line of cases, without the oft complained arbitrariness of the *Booker*-remedy.

<sup>70</sup> *Id.* at 619 (Breyer, J., concurring). Notably, the argument that the Eighth Amendment requires jury sentencing in capital cases was not even advanced by counsel for the defendant in cases like *Spaziano*. See *Spaziano v. Florida*, 468 U.S. 447, 458 (1984) ("Petitioner points out that we need not decide whether jury sentencing in all capital cases is required; this case presents only the question whether, given a jury verdict of life, the judge may override that verdict and impose death.")

<sup>71</sup> *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring):

[Jurors] are more 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), and 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." *Gregg v. Georgia*, 428 U.S. 153, 184 (1976).

<sup>72</sup> *Ring*, 536 U.S. at 612-13 (Scalia, J., concurring). See also Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

jury, or is it a more robust “death is different” rule regarding the jury’s role as moral conscience of the community? Is *Ring*’s promise of a jury right like the procedural requirements of the Eighth Amendment that are unique to capital punishment,<sup>73</sup> or is it exclusively a product of the Sixth Amendment non-capital decisions? As the following sections reveal, Justice Scalia’s view – that *Ring* is merely about fact-finding – has largely carried the day. We demonstrate the negative consequences of the triumph of the Justice Scalia’s reading and encourage the Court to give more credence to Justice Breyer’s reading in order to realize the promise of the jury’s role in capital sentencing.

### **III. Understanding the Eighth Amendment’s Capital Sentencing Requirements in Light of the Sixth Amendment Jury Right.**

#### **A. The Capital Sentencing Landscape Today**

The buildup to *Ring* is one of the Supreme Court ironing out the tensions between its non-capital Sixth Amendment decisions – which trumpeted the role of the jury – and its Eighth Amendment capital decisions – which largely minimized the role of the jury in sentencing.<sup>74</sup> Whereas *Jones* and *Apprendi* were content to allow questions of capital sentencing to be governed exclusively by the Eighth Amendment’s prohibition on cruel and unusual punishment, *Ring* made clear that the Court’s capital punishment jurisprudence must accommodate its Sixth Amendment jurisprudence (rather than vice versa). However, this recognition that capital sentencing had to comport with the dictates of the Sixth Amendment was only half the battle; clarifying what, exactly, the Sixth Amendment means in the capital punishment context remains no easy feat.

Here’s what we do know: The Supreme Court currently reads the Eighth Amendment as imposing two distinct procedural protections designed to ensure that meaningful distinctions are made between those defendants who live and those who will be executed: (1) the states must have a process (“narrowing”) calculated to measure the relative aggravation of the offence; and 2) the trier of fact in a capital case must consider any factor relevant to the particular defendant’s culpability so as to limit the class of persons eligible for the ultimate penalty.<sup>75</sup> These are the twin requirements of the *Gregg*

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<sup>73</sup> For example, unlike in a non-capital case, during the sentencing phase of a capital trial, a defendant may put into evidence any evidence that he believes mitigates of his culpability.

<sup>74</sup> Indeed, on several occasions in the Eighth Amendment context the Court has affirmatively celebrated the role of the judge over the jury in sentencing. Compare *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980) with *Walton v. Arizona*, 497 U.S. 639, 653 (1990):

When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. . . . But the logic of those cases [*Godfrey* and *Maynard*] has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions.

*Walton*, 497 U.S. at 653.

<sup>75</sup> The Court has never held that these two requirements alone are sufficient to comply with the Eighth Amendment requirement of procedural regularity and fairness. Indeed, in upholding the capital sentencing systems of various states in *Gregg v. Georgia* and the accompanying cases, the Court seemed to recognize that each state’s “peculiar mix of procedural protections,” considered in the aggregate, was sufficient to comply with the Eighth Amendment. Steiker & Steiker, *supra* note 9, at 363. (explaining that among other procedural requirements that seemed essential to the Eighth Amendment in the wake of *Gregg*, the Court



and *Woodson* lines of cases, the requirements that Justice Scalia argued could not be reconciled with one and other. And the states, in attempting to comply with these twin requirements, have constructed similar, but subtly varied death penalty statutes.

With regard to the first of these requirements – the making of meaningful distinctions – states generally ask juries to determine whether one or more aggravating factors are present: whether the crime was committed for pecuniary gain, whether it involved the intentional infliction of great pain, whether it involved multiple or vulnerable victims, etc.<sup>76</sup> Knowing that they may neither impose the death penalty on all murderers nor leave the question of which murderers are most deserving of death to the unfettered discretion of a trier of fact, the states followed the lead of the Model Penal Code's capital provisions, using aggravating circumstances to determine death eligibility.<sup>77</sup> There is little unanimity regarding exactly what factors make a defendant death-eligible, however, and the Supreme Court has spent a good part of the last 35 years determining the constitutionality of the various aggravating factors used by the nation's death penalty states.<sup>78</sup>

With regard to the second of the Supreme Court's Eighth Amendment requirements – that triers of fact consider any factor that the defendant believes to be mitigating of his culpability – the states also follow similar if slightly divergent paths. They generally ask triers of fact to consider any proffered mitigating evidence against the government's case in aggravation and to determine whether, on balance, the evidence supports a punishment of life imprisonment or death.<sup>79</sup> While the states can be roughly

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has “emphatically disclaimed any separate requirement to channel discretion.”). *Id.* at 379. Likewise, the Court admitted that it no longer requires proportionality review in all cases. *See Pulley v. Harris*, 465 U.S. 37 (1984).

<sup>76</sup> See, e.g., Tenn. Code Ann. § 39-13-204(i)(1)-(15) (West 2010) (“No death penalty or sentence of imprisonment for life without possibility of parole shall be imposed, except upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances, which are limited to the following: . . .”).

<sup>77</sup> *See* MODEL PENAL CODE § 210.6 (2001). As one commentator has observed, “The MPC approach did not initially attract much political support, but in the wake of . . . *Furman v. Georgia*, . . . the MPC's approach has essentially become the law of the land in jurisdictions that continue to use the death penalty.” Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 232 (2003). In 2009, the American Law Institute (ALI) withdrew its support of the Model Penal Code death penalty provision and Michael Traynor, President Emeritus of the ALI has called this “a striking repudiation from the very organization that provided the blueprint for death penalty laws in this country.” Michael Traynor, Opinion, *The death penalty -- it's unworkable*, L.A. TIMES, Feb. 4, 2010, available at <http://articles.latimes.com/2010/feb/04/opinion/la-oe-traynor4-2010feb04>

<sup>78</sup> *See Godfrey v. Georgia*, 446 U.S. 420, 432 (1980); *see also Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988).

<sup>79</sup> The cumulative breadth of the available aggravating (eligibility) factors in many states has led commentators to conclude that the narrowing function of aggravating factors, as required by *Furman*, has been effectively negated. *See, e.g.,* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345 (1998) (arguing that the aggregate effect of so many aggravating factors is to eliminate any meaningful narrowing function and concluding that only a mandatory death penalty system would actually eliminate the arbitrariness concerns raised in *Furman*); *id.* at 356-57 (suggesting that the Court no longer takes seriously the requirement that death sentences not be arbitrary); Steiker & Steiker, *supra* note 9 at 374 (identifying a key failure of the use of aggravators for narrowing as the Court's failure to place any “outer

categorized into weighing states – which limit the factors that may be considered in aggravation – and non-weighing states – which do not place limits on the factors considered in aggravation – there is a fair amount of variation in how the states ask triers of fact to engage in this balancing.<sup>80</sup> The Supreme Court has considered a variety of state selection schemes and held that the Eighth Amendment does not require any particular means of balancing aggravating and mitigating factors against one and other.<sup>81</sup>

## B. The Sixth Amendment Jury Right in Four Representative States

While the Supreme Court has held that many state sentencing regimes pass Eighth Amendment scrutiny, this section is concerned with whether the Sixth Amendment jury right is implicated in lesser or greater ways by the states' varied approaches to determining the ultimate sentence in a capital case.<sup>82</sup> The Supreme Court has been largely silent on this point since *Ring* and the lower courts are generally divided as to the scope of *Ring*'s protections, if any, during the sentencing phase of capital trials.<sup>83</sup> We examine the Sixth Amendment implications in four states – Florida, Texas,

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limit on the number of aggravating factors that a state may adopt. Thus, even if a state adopts aggravating factors that, taken individually, meaningfully narrow the class of the death-eligible, the factors collectively might render virtually all murderers death-eligible.”).

<sup>80</sup> There is significant confusion regarding the proper meaning of these categories; however, for our purposes the distinction is not material. For what it is worth, the Court has identified Mississippi as a paradigmatic example of a weighing state, because it is a state where the aggravators or eligibility factors, and only these factors, are weighed against the applicable mitigating evidence to assess whether a death sentence is permissible. *Brown*, 546 U.S. at 217-18. The two pans of the scale, then, are weighted with discrete and limited categories of evidence – on the mitigation side is whatever evidence was admitted in mitigation during the penalty phase and on the aggravation side are only the factor or factors found in aggravation at the eligibility stage of the proceeding. By contrast, the Court has explained that a non-weighing state is a state that permits the sentencer to balance against the applicable mitigation evidence any relevant evidence in aggravation, not just the proven eligibility or aggravating factors. *Brown*, 546 U.S. at 217-18. *See also* John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing “Life Qualification” Through Expanded Voir Dire*, 29 *HOFSTRA L. REV.* 1209, 1264 n.68 (2001). Accordingly, the distinction between weighing and non-weighing “lies not in whether weighing occurs, but in what is weighed.” Fromherz, *supra* note 79, at 405 n.17 “limited” balancing system – only eligibility and mitigation facts are considered in aggravation – while non-weighing is a more “holistic” form of balancing.

<sup>81</sup> *See, e.g., Kansas v. Marsh*, 548 U.S. 163, 175 (2006) (“We have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required. Rather, this Court has held that the States enjoy a constitutionally permissible range of discretion in imposing the death penalty.”).

<sup>82</sup> The balancing phase, as the term is used in this Article, refers to that portion of the sentencing proceeding where a defendant has already been deemed “eligible” for a death sentence based on the finding of one or more aggravating factors and the question is whether the evidence in mitigation outweighs the evidence in aggravation.

<sup>83</sup> *Compare* *United States v. Barrett*, 496 F.3d 1079, 1107 (10th Cir. 2007) (“the *Apprendi/Ring* rule should not apply here because the jury’s decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. Instead, it is a “highly subjective,” “largely moral judgment” “regarding the punishment that a particular person deserves ... .”) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985)); *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004); *State v. Barker*, 809 N.E.2d 312 (Ind. 2004); *Oken v. State*, 835 A.2d 1105 (Md. 2003); *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007); *State v. McLaughlin*, 265 S.W.3d 257 (Mo. 2008) (en banc), *with* *Johnson v. Nevada*, 59 P.3d 450 (Nev. 2002); William J. Bowers, Wanda D. Foglia, Jean E. Giles & Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the*

California and Georgia – that are notable both as very active death penalty states,<sup>84</sup> and as states with sentencing systems that illustrate the unanswered constitutional questions that remain so many years after *Ring*.

## 1. Florida

Consider, first, the capital statute of Florida, a statute that the Supreme Court, prior to *Ring*, found on multiple occasions complies with the dictates of the Eighth Amendment.<sup>85</sup> The Florida statute begins with a straightforward weighing procedure, but adds a twist that has serious Constitutional implications.

Florida Statute Section 775.082 states that “(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.”<sup>86</sup> Section 921.141, in turn provides for a sentencing hearing to be held before the trial judge. At the end of the sentencing hearing, the jury is to determine: whether sufficient aggravating circumstances exist,<sup>87</sup>

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*Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 940 (“The rationale of *Ring* would seem [] to require that jurors decided the relative weight or sufficiency of aggravating and mitigating factors”).

<sup>84</sup> See Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765, 818, (2008) (calling Texas the “buckle of the death belt”); *Id.* at 784 (noting that both Georgia and Florida are “active capital punishment states”); *Id.* at 784 (asserting that California has the “largest death row... in the western hemisphere”).

<sup>85</sup> See *Spaziano v. Florida*, 468 U.S. 447, 462-63 (1984); *Barclay v. Florida*, 463 U.S. 939, 958 (1983); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976).

<sup>86</sup> FLA. STAT. ANN. § 775.082 (West 2010).

<sup>87</sup> The statute lists the following aggravating factors:

- (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (f) The capital felony was committed for pecuniary gain.
- (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (h) The capital felony was especially heinous, atrocious, or cruel.
- (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

whether sufficient mitigating circumstances exist to outweigh the aggravating factors, and based on these considerations, whether the defendant shall be sentenced to life or death.<sup>88</sup>

Up to this point, the statute resembles a classic, post-*Gregg* capital sentencing provision. The state has enumerated certain aggravating factors and has made a finding of one of those circumstances a prerequisite to the imposition of the penalty of death. This is also clearly a weighing statute – the aggravating factors found, and only those factors, are to be balanced against whatever mitigating evidence a defendant has placed before the jury for its consideration.

After requiring the jury to balance the eligibility factors against the mitigating factors, the Florida statute next commands a step that is a deviation from the procedures of most other weighing statutes and that brings the question of *Ring*'s applicability into sharp relief. For in Florida, the judge, rather than the jury, ultimately determines the defendant's sentence: "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts."<sup>89</sup> In other words, regardless of the decisions of the jury regarding the presence of aggravating factors and the extent to which they outweigh the case in mitigation, the trial judge is to re-balance these factors and determine anew whether death or life is merited.

a. Death Eligibility under Florida Law

Because of the role afforded to the judge in determining whether the defendant ultimately lives or dies, in Florida the *Ring* question is more than merely rhetorical. Recall that *Ring* requires that any fact that is necessary for the imposition of a sentence of death be made by a jury; if the second part of the Florida statute allows a criminal defendant to be sentenced to death based upon judicial fact-finding then it runs afoul of *Ring*'s mandate. In order to understand the applicability of the Sixth Amendment to Florida's capital statute, therefore, it is necessary to determine what facts must be determined before an individual can be sentenced to death.

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- (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
  - (l) The victim of the capital felony was a person less than 12 years of age.
  - (m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim,
  - (n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.
  - (o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

FLA. STAT. ANN. § 921.141 (West 2010).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

Let us begin with the first question for the trier of fact: whether a sufficient aggravating factor exists. The determination is unquestionably a factual conclusion that makes a defendant eligible for the death penalty. In the absence of such a finding, the highest penalty that can permissibly be imposed upon a capital defendant is 25 years to life in prison. In this way the Florida statute is operationally identical to the Arizona statute described in both *Walton* and in *Ring*. Thus, the plain language of *Ring* makes clear that the determination of an aggravating factor must be made by a jury and beyond a reasonable doubt.<sup>90</sup>

Despite *Ring*'s unambiguous, black-letter mandate that a jury make the factual finding with regard the initial aggravating (eligibility) factors, the Florida Supreme Court's reading of its own statute appears to come to a different conclusion. For example, in *State v. Steele*<sup>91</sup> the Florida high court rejected the use by a trial court of special verdict forms in a capital sentencing hearing. The trial court had ordered the advisory jury to fill out verdict forms in order to ensure that a majority of the jury agreed on the presence of at least one aggravating factor. The prosecution appealed this ruling and the Florida Supreme Court held that a majority vote with regard to any single aggravating factor was not required by Florida Law; in fact it held that the use of special verdict forms would be error under the statute:

Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on *which* aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, while three others believe that only the "committed for pecuniary gain" aggravator applies, because seven jurors believe that at least one aggravator applies. . . . Unless and until a majority of this Court concludes that *Ring* applies in Florida, *and* that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute . . . the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required.<sup>92</sup>

This understanding of the jury right is irreconcilable with the Sixth Amendment for at least two independent reasons.

First, the passage quoted above demonstrates that, although a finding of an aggravating factor is clearly a prerequisite to the imposition of the death penalty in

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<sup>90</sup> What is interesting about the Florida statute, however, is that it is not clear whether the jury's finding of aggravating factors may be disturbed by the trial judge. While the jury must determine whether sufficient aggravating factors exist and whether those factors outweigh the case in mitigation, the trial judge is given a more limited task; her role is limited to weighing the aggravating and mitigating factors against one another. See FLA. STAT. ANN. § 912.141(3). Of course, not even this part of the statute is clear. For the same section states that a judge determining that the defendant should be sentenced to death must "set forth in writing its findings upon which the sentence of death is based as to the facts ... [t]hat sufficient aggravating circumstances exist..." *Id.*

<sup>91</sup> 921 So.2d 538 (2005).

<sup>92</sup> *Id.* at 545-46

Florida, the state's high court has refused to hold that *Ring* applies to such a finding. In fact, the Court explained that *Ring*'s application, if any, to Florida's capital sentencing scheme "remains unclear."<sup>93</sup>

Imagine the implications of this rejection of special verdicts in a case in which the jury recommends a sentence of death, but the judge rejects this recommendation and imposes a death sentence.<sup>94</sup> And this is no idle possibility; "[b]etween 1972 and early 1992, Florida trial judges imposed death sentences over 134 juries' recommendations of life imprisonment."<sup>95</sup> A jury's rejection of the death penalty in such a case could mean one of two things: Either the jury found no aggravators to be present or it found an aggravator to be present but concluded that the case in mitigation outweighed the case in aggravation. A judge's rejection of the jury's life verdict in the first alternative clearly violates *Ring*; aggravating factors are a prerequisite to the imposition of the death penalty and those factors must be found by a jury and not a judge. If, however, the jury imposed life because it believes that aggravators were present but outweighed by the case in mitigation, the applicability of *Ring* is less clear.<sup>96</sup> The problem, of course, is that without a special verdict, a sentencing judge can never know for sure if the jury found an aggravating factor.<sup>97</sup> Consequently, although Florida's advisory verdict sentencing system is not facially unconstitutional, if a judge ignores a life sentence returned by the jury and replaces it with a sentence of death, *Ring* is violated.<sup>98</sup>

We believe that that Florida's approach to eligibility facts is inconsistent with the Supreme Court's Sixth Amendment jurisprudence for a second reason. A number of States have concluded that the Sixth Amendment applies to findings of aggravators but *not* to the findings of mitigators. There are various explanations for this disparate

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<sup>93</sup> 921 So.2d 538. *Id.* ("Since *Ring*, this Court has not yet forged a majority view about whether *Ring* applies in Florida.").

<sup>94</sup> *Proffitt v. Florida*, 428 U.S. 242, 249-50, (1976) (noting that the Florida Supreme Court has expressly approved the practice of imposing a sentence of death "following a jury recommendation of life") (citing *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975)); *see Harris v. Alabama*, 513 U.S. 504, 522 (1995) ("[J]udges are far more likely than juries to impose the death penalty. This has long been the case, and the recent experience of judicial overrides confirms it. Alabama judges have vetoed only five jury recommendations of death, but they have condemned 47 defendants whom juries would have spared."); *see also Thompson v. State*, 328 So.2d 1 (Fla. 1976) (judge-imposed death sentence despite jury recommendation of life); *Douglas v. State*, 328 So.2d 18 (Fla. 1976) (jury had refused death sentence after "finding that sufficient aggravating circumstances did not exist").

<sup>95</sup> *Harris v. Alabama*, 513 U.S. 504, 522 n. 8(1995) (Stevens, J., dissenting). It does not appear that there are any reported cases in Florida that reflect this factual scenario post-*Ring*. *See* Florida Commission on Capital Cases, Inmate Legal Status, available at <http://www.floridacapitalcases.state.fl.us/c-inmate-status.cfm#W> (last visited February 25, 2010). In this regard, Florida's system is, as applied, not violating the core requirement of *Ring*, by stripping from the jury the very sort of fact-finding at issue in *Ring*.

<sup>96</sup> We discuss the applicability of *Ring* to Florida's selection process in the next section.

<sup>97</sup> Under Florida law, when the trial judge imposes a sentence of death, the judge must issue a written statement describing the circumstance, presumably including aggravating facts, that justify a sentence of death. § 921.141(3).

<sup>98</sup> *Cf. Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) (holding that because a trial judge must give "great weight" to a jury's advisory sentence, when the jury is instructed on an invalid eligibility factor, even though it is impossible to know whether the jury relied on that particular invalid aggravator, the death sentence imposed by the judge is invalid).

treatment, but one persuasive basis upon which state courts have distinguished aggravator findings from mitigator determinations is that findings as to mitigators do not require the sort unanimity required of other substantive criminal law elements.<sup>99</sup> Explaining this distinction, the Arizona Supreme Court has emphasized that “each juror may vote for a sentence of death—or against it—as each sees fit in light of the aggravating factors *found by the jury* and the mitigating evidence *found by each juror*.<sup>100</sup> Whereas elements and their functional equivalent, including eligibility factors, must be found by the jury as whole, facts in mitigation do not require any consensus as to a particular mitigator, but rather, require each individual juror to determine for herself whether a mitigator or set of mitigators was sufficiently substantial to justify a life sentence.<sup>101</sup> The Florida sentencing system turns this logic of the Arizona high court’s approach on its head.

Under Florida’s system, the facts in aggravation – which serve the role of an element by rendering one eligible for greater punishment<sup>102</sup> – need not be found unanimously. Indeed, the Florida high court has held that a special verdict form specifying which, if any, eligibility factors were unanimously found is impermissible as a matter of Florida law.<sup>103</sup> But if aggravators are functionally equivalent to elements, then the Court’s conclusion in this regard – that a death sentence is permissible so long as a majority of the jury believes that *some* aggravating factor is present, even if a majority of the jury rejects each of the factors – is valid only if it would apply to the elements of an offense. However, the United States Supreme Court has held just the opposite with regard to elements of an offense; a jury must be sufficiently unanimous<sup>104</sup> as to each element. Thus, because eligibility factors are elements of a death sentence, they must be found unanimously.<sup>105</sup>

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<sup>99</sup> See, e.g., *Waldrop*, 859 So.2d at 1190 (distinguishing finding of mitigator from finding of element); *Commonwealth v. Chambers*, 807 A.2d 872, 883 (Pa. 2002) (holding that Pennsylvania law does not require jury to find mitigators unanimously and holding jury instruction requiring jurors to all find the same mitigator prejudicial error)

<sup>100</sup> *State ex rel. Thomas v. Granville*, 123 P.3d 662, 666 n.3 (Ariz. 2005) (emphasis added).

<sup>101</sup> *Id.*

<sup>102</sup> *Blakely v. Washington*, 542 U.S. 296, 303 (“[T]he maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”). As Professor John Douglass has observed, under the “language of *Blakely*, no judge – or jury for that matter – may impose death ‘solely on the basis of the facts reflected’ in the finding of death eligibility.” John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2003-06 (2005).

<sup>103</sup> The Court also explained that such a system would be an “unnecessary expansion of *Ring*.” *State v. Steele*, 921 So.2d 538, 540 (Fla. 2005).

<sup>104</sup> Although most jurisdictions, including the federal system, require unanimous jury verdicts, FED. R. CRIM. P. 31, the Constitution does not require unanimous verdicts in state criminal trials. See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality) (reviewing a 10-2 conviction and concluding that the Sixth Amendment jury right does not require unanimity in state criminal trials); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (reviewing a 9-3 conviction and concluding that because a “substantial majority” of the jury voted to convict, due process was not violated).

<sup>105</sup> This aspect of Florida’s sentencing scheme could be salvaged if capital eligibility facts were regarded as “means” of establishing eligibility as opposed to elements of capital murder. See *Schad v. Arizona*, 501 U.S. 624 (1991) (plurality). In a plurality with no clear narrowest grounds, the Court upheld a murder conviction that did not require the jury to be unanimous as to the “means” – i.e., premeditated or felony murder – of the commission of the crime. *Id.* Setting aside the potential impact of changes of Court personal on this badly fractured decision, there are at least three reasons that non-unanimity as to an aggravating factor is not easily understood as a natural extension of *Schad*: (1) The *Apprendi* line of cases

b. The Selection Decision under Florida Law

What, then, of the next question posed to the trier of fact under the Florida statute: whether sufficient mitigating factors exist to justify the imposition of an indeterminate life sentence rather than a death sentence? Is the absence of sufficient mitigation a “fact” that needs to be found by a jury or is it something else? As to this question as well, Florida has held that *Ring* does not apply. A per curiam opinion with concurrences from all seven Justices, *Bottoson v. Moore*<sup>106</sup> points out the struggles that the states have in coming to terms with *Ring*’s mandate. The part of the per curiam opinion discussing *Ring*, reads, almost in its entirety, as follows:

Although Bottoson contends that he is entitled to relief under *Ring*, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson’s execution and placed the present case in abeyance while it decided *Ring*. That Court then in June 2002 issued its decision in *Ring*, summarily denied Bottoson’s petition for certiorari, and lifted the stay without mentioning *Ring* in the *Bottoson* order. The Court did not direct the Florida Supreme Court to reconsider *Bottoson* in light of *Ring*.

Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida’s capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are

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sought to end the sort of formalism that permits an element to be characterizes as a mere sentencing factor, Appendi v. New Jersey, 530 U.S. 466, 485 (2000), and relabeling what *Ring* has called the functional equivalent of an element as a mere “means” of establishing capital eligibility seems to similarly exalt form over substance; (2) the *Schad* plurality expressly noted that due process imposes limits on the ability of a crime to be defined in terms of wildly divergent “means”; that is to say, a crime cannot be so generic as to include as to permit such disparate means as burglary or tax evasion, *Schad*, 501 U.S. at 625. If the Court is unwilling to accept a single crime with such generic means, the diversity of aggravating factors – pecuniary gain or future dangerousness, for example – strongly suggests that an aggravating factor must be regarded as an element that must be found beyond a reasonable doubt by a unanimous jury, *Richardson v. United States*, 526 U.S. 813, 820 (1999); and (3) Some lower courts have suggested that double jeopardy does not prohibit one from being re-prosecuted for capital murder after a finding of insufficient evidence in the first trial when the second capital murder charge is supported by a new aggravator. *Powell v. Kelly*, 562 F.3d 656 (4th Cir. 2009) (conducting federal habeas review under 28 U.S.C. §2254). In *Powell*, a defendant’s first capital murder conviction was overturned based on a finding of insufficient evidence regarding the aggravating factor supporting the death sentence. *Id.* When additional evidence was discovered that justified charging a separate aggravating factor, the defendant was re-prosecuted for capital murder based on this new aggravator. *Id.* This result strongly suggests that lower courts regard distinct capital aggravating facts as individual elements. *Id.* at 666 (accepting as reasonable the conclusion that “where there is a single murder victim accompanied by multiple” eligibility factors, double jeopardy does not bar a re-prosecution for capital murder based on a new eligibility factor). See also *Blockburger vs. United States*, 284 U.S. 299, 304 (1932).

<sup>106</sup> 833 So.2d 693 (Fla. 2002).



areas of “irreconcilable conflict” in that precedent, the Court in *Ring* did not address this issue. . . .<sup>107</sup>

The Florida Court thus reasons that the United States Supreme Court had Bottoson’s claim before it at the time that it decided *Ring v. Arizona* and that the High Court’s refusal to grant certiorari in Bottoson’s case – even if just to vacate and remand to the Florida Court for reconsideration in light of the *Ring* decision – indicates the Supreme Court’s belief that Florida’s statute comports with the rule the Court created in *Ring*.

Procedural issues to one side,<sup>108</sup> this decision raises at least as many questions as it answers. For example, the fact that the United States Supreme Court has repeatedly upheld the constitutionality of the Florida statute does not do the analytic work that the Florida Supreme Court seems to think that it does. Each of the decisions it cites for that proposition were decided *before* 2002’s *Ring* decision when capital punishment was governed exclusively by the Eighth Amendment.<sup>109</sup> To cite a number of decisions, all invoking the *Eighth* Amendment’s prohibition on cruel and unusual punishment, for the proposition that the statute complies with the *Sixth* Amendment is nothing short of perverse. Similarly, the Court’s brief, per curiam does not actually engage the merits of whether a finding of sufficient mitigating evidence is a finding of fact giving rise to Sixth Amendment rights.<sup>110</sup>

Nonetheless, despite the dearth of analysis in the Florida Court’s opinion, it appears to be in line with most of the recent Circuit court decisions on this issue. For example, the Tenth Circuit has concluded:

“[T]he *Apprendi/Ring* rule should not apply here because the jury’s decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. Instead, it is a highly subjective, largely moral judgment regarding the punishment that a particular person deserves. In death cases, “the sentence imposed at the penalty stage ... reflect[s] a reasoned moral response to the defendant’s background, character, and crime.” The *Apprendi/ Ring* rule applies by its terms only to findings of fact, not to moral judgments.<sup>111</sup>

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<sup>107</sup> *Id.* at 695 (notes and citations omitted).

<sup>108</sup> The Florida Supreme Court fails to recognize that a denial of certiorari is not a judgment on the merits and is not entitled to precedential effect. See, e.g., *Teague v. Lane*, 489 U.S. 288, 296 (1989) (citing *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)). The fact that the Supreme Court had stayed the case during the pendency of the *Ring* case only to deny certiorari after deciding it strengthens the Florida Court’s reasoning, but only slightly.

<sup>109</sup> See, e.g., *Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983); *Proffitt v. Florida*, 428 U.S. 242 (1976).

<sup>110</sup> *Bottoson*, 833 So.2d at 693.

<sup>111</sup> *United States v. Barrett*, 496 F.3d 1079, 1107-08 (10th Cir. 2007) (quoting *United States v. Fields*, 483 F.3d 313, 346 (5th Cir.2007)) (internal citations and quotations omitted). See also *People v. Prieto*, 66 P.3d 1123, 1147 (Cal. 2003) (describing the sentencing process as “inherently moral and normative, not factual”) (internal quotations omitted).

Similar reasoning also characterizes the forceful rejection of *Ring*'s application to balancing by the First Circuit:

This [*Ring*] argument founders . . . because it assumes, without the slightest support, that the weighing of aggravating and mitigating factors is a fact. This assumption is incorrect. As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found. The outcome of the weighing process is not an objective truth that is susceptible to (further) proof by either party. Hence, the weighing of aggravators and mitigators does not need to be "found."<sup>112</sup>

Not all of the data points in that direction, however. For example, the Nevada capital statute calls, in the event of a deadlocked jury, for a three-judge panel to make the determinations that would otherwise fall to the jury: "The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."<sup>113</sup> The Nevada Supreme Court held that it would violate *Ring* for a three-judge panel to make *either* of these finding in the absence of a jury.

This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing. So even though *Ring* expressly abstained from ruling on any "Sixth Amendment claim with respect to mitigating circumstances," we conclude that *Ring* requires a jury to make this finding as well: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt."<sup>114</sup>

In this regard, however, Nevada remains a significant outlier.

Despite the fact that most courts that have considered the question have determined that balancing is not a fact-finding subject to *Ring*'s limitations,<sup>115</sup> we believe that this position is largely indefensible in view of the substantive criminal law decisions

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<sup>112</sup> U.S. v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) (citations and quotations omitted).

<sup>113</sup> NEV. REV. STAT. § 175.554(3) (2009).

<sup>114</sup> Johnson v. State, 59 P.3d 450, 460-61 (Nev. 2002) (quoting *Ring*, 536 U.S. at 597 n. 4, 600-01).

<sup>115</sup> Oken v. State, 835 A.2d 1105, 1144-47 (Md. 2003) (explaining that "the weighing process is not a fact-finding [process]"). Courts have variously expressed this stunted view of Apprendi by concluding that weighing is "moral" rather than factual, *Ex parte Waldrop*, 859 So.2d 1181, 1189-90 (Ala. 2002), "normative, not factual", *People v. Prieto*, 66 P.3d 1123, 1147 (Cal. 2003), and by referring to the weighing process as merely a forum "for the jury to give its subjective opinion as to whether the death penalty is appropriate.", *State v. Whitfield*, 107 S.W.3d 253, 259 (Mo. 2003) (summarizing the prosecution's argument, but ultimately rejecting this position). The common thread seems to be that weighing cannot be regarded as a finding of fact because it is not sufficiently rigorous or delineated.

and scholarly literature regarding what is question of fact.<sup>116</sup> Although the longstanding debate regarding what type of determinations are truly factual is beyond the scope of this paper,<sup>117</sup> substantive criminal law's applied definition of elements – those issues that must be left to a jury and proven beyond a reasonable doubt<sup>118</sup> – is sufficiently capacious to include the balancing process as it is administered in most jurisdictions. Particularly in a weighing state – where the jury is told what factors to place on both sides of the sentencing balance – the courts' unwillingness to consider balancing to be a fact-finding giving rise to *Ring*'s jury requirement seems deliberately short-sighted.

To be sure, it is possible to define fact-finding, or factual identification in terms of a purely descriptive account of what has already happened – the “who, when, what, and where.”<sup>119</sup> Viewed in this light, the process of determining whether the facts in aggravation outweigh the facts in mitigation so as to justify a sentence of death in a particular case is an inherently non-factual assessment. However, such an approach to the fact/law dichotomy is needlessly formalistic and correspondingly irreconcilable with the way fact finding is generally viewed in the context of criminal cases.<sup>120</sup> Take, for example, the crime of negligent homicide. The crime generally requires: (1) that a person died; (2) that the defendant acted negligently; and (3) that the defendant's negligent actions caused the victim's death. The first fact, that the victim died, is obviously an historical fact; it is either true or it is not. However, the second two requirements – which unquestionably constitute the sort of ‘facts’ that must be found by the jury beyond a reasonable doubt – necessarily require the jury to make some very non-factual, subjective, even moral assessments about the defendant.

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<sup>116</sup> To be sure, there is considerable debate about what constitutes a finding of fact as to some sort of mixed question of fact and law. But it is anything but clear that a finding as to whether aggravators outweigh mitigators is patently classifiable under one category or the other. For a discussion regarding the complexity of determining whether a particular question is one of fact. See generally Louis L. Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020 (1956).

<sup>117</sup> There is a long line of commentary addressing this question. See, e.g., *id.*; Ronald R. Hofner, *Standards of Review — Looking beyond the Labels*, 74 MARQ. L. REV. 231 (1991); George C. Christie, *Judicial Review and Findings of Facts*, 87 NW. U. L. REV. 14, 26-31 (1992).

<sup>118</sup> The Court has repeatedly recognized that due process requires that “every fact necessary” for a conviction must be proven by the prosecution beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970). In *Apprendi*, the court explicitly linked the Sixth Amendment jury right to the due process beyond a reasonable doubt right. *Apprendi v. New Jersey*, 530 U.S. 466, 476-78 (2000). Thus, *Winship*'s holding regarding the burden of proof for facts necessary for conviction is imported into *Apprendi*'s jury-right protections. As commentators have observed, the *Apprendi* “controversy is almost an exact reflection of [an] earlier one, with the primary differences being that the Court has replaced as its foci the proof requirement with the requirement of jury decisionmaking.” Ronald J. Allen & Etha A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 Stan. L. Rev. 195, 199 (2005).

<sup>119</sup> Monaghan, *supra* note 5, at 236.

<sup>120</sup> It is fair to consider all “elements” of an offense as “factual.” The Court requires “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship* 397 U.S. 358, 364 (1970). Commentators have observed that the practical effect of *Winship* is that “the prosecution must prove all of the ‘elements of the offense’ beyond a reasonable doubt.” Note, *Winship on Rough Waters: The Erosion of the Reasonable Doubt Standard* 106 Harv. L. Rev. 1093, 1096 (1993) (distinguishing between elements and affirmative defenses).

Consider, first, the question of whether an individual acted negligently. Although there is no question that the negligence determination is the sort of fact that must be determined beyond a reasonable doubt by the trier of fact, an assessment of negligence is inherently amorphous, normative, and moralistic. For example, in evaluating whether a defendant had sufficient culpability to warrant criminal punishment, the law will instruct the jury to consider, for example, whether he “should [have been] aware of a substantial and unjustifiable risk” that the prohibited harm would occur.<sup>121</sup> Moreover, in assessing whether the defendant’s failure to perceive the risk was sufficiently culpable, the jury must assess whether the conduct was a “gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”<sup>122</sup> Obviously, this inquiry into whether a deviation from the ordinary standard of care is sufficiently “gross” and the “reasonableness” of the defendant’s actions are not classic, or even readily identifiable, factual questions. Nonetheless, such determinations are reserved for the jury alone.<sup>123</sup>

The question of whether the individual’s harm was the legal cause of another’s death similarly defies tidy, factual categorization.<sup>124</sup> Indeed, the concept of causation has been characterized as a “purely normative question” masked with the legalistic label of “proximate cause.”<sup>125</sup> Reviewing the Model Penal Code’s classic formulation of causation is illustrative: A defendant is said to have caused a result if the harm is not “too remote or accidental in its occurrence to have a just bearing on the actor’s liability.”<sup>126</sup> While this conclusion is explicitly moral and judgmental, no court would consider taking it from a jury; it is an element of the offense and must be found by a jury and beyond a reasonable doubt.

It seems obvious and wholly unremarkable that if a Court were to take either of these findings – negligence or causation – away from the jury and determine them as a matter of law, it would run afoul of the Due Process Clause of the Constitution. Examples like negligence – and other nebulous legal conclusions like obscenity<sup>127</sup> –

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<sup>121</sup> Model Penal Code §2.02(2)(d) (defining negligence).

<sup>122</sup> *Id.*

<sup>123</sup> *In re Winship*, 397 U.S. 358, 361(1970). *See also* Monaghan, *supra* note 5, at 235 n.33 (“though the question of negligence may involve considerable norm elaboration, a function ordinarily performed by judges, the question has long been viewed as one for the jury.”). Some have noted the confusion in treating negligence as ‘factual’ and argued that in reality “this task is neither factfinding nor law declaration,” and thus that clarity of in the law would be best served by recognizing that “the allocation of negligence questions to the jury rests on grounds of policy, not on abstract conceptions of the intrinsic nature of the question itself.” *Id.* at 232 n. 22.

<sup>124</sup> Cf. Patrick J. Kelley, Symposium, *Restating Duty Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L.REV. 1039 (2001) (describing tort negligence).

<sup>125</sup> *Id.* at 1053.

<sup>126</sup> MODEL PENAL CODE, §§ 2.03(2)(b), (3)(b) (1981).

<sup>127</sup> Well beyond the simple negligence hypothetical, other examples of normative or moral judgments that are consistently and rightly regarded as sufficiently “factual” to trigger the jury protection abound. Other examples include damage calculations, such as loss of future earnings, see *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300-01 (1995); *Shepard v. General Motors*, 423 F.2d 406, 410 (1st Cir. 1970), questions as to whether one was reasonably provoked into the proverbial “heat of passion,” based on “adequate” provocation and, of course, questions regarding obscenity within a particular community,

explode the notion of factual purity espoused by the lower courts that have rejected the applicability of the jury rights to capital sentencing balancing. There is no litmus test that recognizes all normative assessments as non-factual; quite the contrary. And given that *Ring* abolished the “line between the fact finding in the guilt phase and the fact finding in the sentencing phase,”<sup>128</sup> the confidence with which many lower courts have asserted that balancing does not implicate *Ring* is unsettling as a matter of doctrine, even if understandable as an administrative matter.<sup>129</sup>

In short, careful definition of “fact-finding” has always proven illusory.<sup>130</sup> Commentators and courts have repeatedly lamented the absence of a meaningful method for distinguishing a normative or legal question from a question of historical fact,<sup>131</sup> and thus to the extent the jury right remains linked to this concept of “fact finding” it is misleading for courts to assert confidently that the jury right does or does not apply to a particular finding – i.e., balancing – because such a finding is, or is not, a factual determination.

## 2. Texas

The second example we use to illustrate the confusion surrounding *Ring*’s application is the Texas capital sentencing system.<sup>132</sup> In the rush to adopt a capital sentencing regime that would comply with the mandates of the Eighth Amendment as announced in *Furman*, the Texas legislature adopted a provision conditioning death on a finding of future dangerousness.<sup>133</sup> In the run-of-the-mill Texas capital case, two questions are generally put to the jury in the capital sentencing process: “[W]hether there

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Smith v. United States, 431 U.S. 291 (1977) (discussing at length the obscenity standard), and even questions of future dangerousness for purposes of pretrial or civil confinement.

<sup>128</sup> Michael Antonio Brockland, Comment, *See No Evil, Hear No Evil, Speak No Evil: An Argument for a Jury Determination of the Emmud/Tison Culpability Factors in Capital Felony Murder Cases*, 27 ST. LOUIS U. PUB. L. REV. 235, 236 (2007).

<sup>129</sup> Some studies suggest that juror involvement in capital sentencing is more, *not less* likely to result in sentences of death. See Susan D. Rozelle, *The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L. J. 769, 777-94 (2006); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Changes in Capital Sentencing*, 77 TEX. L. REV. 605, 716-17 (1999). Consequently, some have proffered that lower courts will want to fortify the option of states to employ judges as the final arbiters of capital sentences. See Jill M. Cochran, Note, *Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. U. L. REV. 1399, 1449-50 (2004); Benjamin Cook, Note, *Ring v. Arizona, Unnecessarily Abandoning Judges on the Winding Road of the Death Penalty*, 28 U. DAYTON L. REV. 383, 383-84 (2003).

<sup>130</sup> Note that in SVPA litigation “future dangerousness” is also a factual issue. See, e.g., WASH REV. CODE § 71.09.020(18) (2009).

<sup>131</sup> Nancy J. King, *Beyond Blakely*, FED. LAW., Nov.-Dec. 2004, at 53, 53-54. See also Baumgartner v. United States, 322 U.S. 665, 671 (1944); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232-33 (1985).

<sup>132</sup> Between 2000 and 2009, the state of Texas has executed between 17 and 40 persons every year. <http://www.tdcj.state.tx.us/stat/annual.htm> (last visited February 28, 2010).

<sup>133</sup> TEX. CRIM. P. CODE ANN. § 37.071(2)(b)(1) (Vernon 2009). In *Jurek v. Texas*, 428 U.S. 262 (1976), the Court upheld Texas’ system as compliant with the requirements of the Eighth Amendment.

is a probability that the defendant would commit criminal acts of violence that would constitute a *continuing threat to society*?”<sup>134</sup> And then, if yes:

[W]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, *there is a sufficient mitigating circumstance* or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.<sup>135</sup>

Texas, unlike most capital states, limits death eligibility to a single aggravating factor; the only finding that can make a defendant eligible for the death penalty is his future dangerousness.

a. Eligibility for the Death Penalty under Texas Law

While Texas is alone in its singular focus on future dangerousness, prediction of a defendant's continuing threat to the community is a very important factor in capital sentencing nationwide. Future dangerousness is used as an eligibility or aggravating factor “in nearly every capital jurisdiction in the United States.”<sup>136</sup> Even more striking, it is estimated as “underlying” more than half of all modern executions, and as “playing some role in the rest”; indeed, federal prosecutors have been found to raise a future dangerousness claim in “77% of federal capital prosecutions.”<sup>137</sup>

Although the Texas statute requires that the aggravating factor be proven beyond a reasonable doubt, the Texas Court of Criminal Appeals – in a series of unpublished opinions – has repeatedly held that the future dangerousness allegation need not comply with *Ring*'s mandates.<sup>138</sup> For example, condemned murderer Jesus Flores argued that his indictment failed to comply with *Ring* because an element of his death eligibility – that he poses a continuing threat to society – was not included in the charging document.<sup>139</sup> The Court dismissed this argument summarily:

The statutory maximum punishment in a capital murder case is death. Including the issue of future dangerousness in the indictment would not

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<sup>134</sup> TEX. CRIM. P. CODE ANN. § 37.071(2)(b)(1) (emphasis added).

<sup>135</sup> *Id.* § 37.071(e)(1) (emphasis added).

<sup>136</sup> Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions it Supports*, 35 AM. J. CRIM. L. 145, 146 n.2 (2008) (“Future dangerousness is a requisite sentencing factor in two states, . . . an optional statutory aggravating factor in four states, and an articulated non-statutory aggravating factor in at least two dozen states and the federal system.”).

<sup>137</sup> *Id.*; see also *id.* at Appendix B (listing the twenty-four people that the state of Virginia has executed “based on future dangerousness alone”).

<sup>138</sup> See, e.g., *Garza v. State*, 2008 WL 1914673, at \*8 (Tex. Crim. App. April 30, 2008); *Cubas v. State*, 2005 WL 3956312, at \*7 (Tex. Crim. App. April 12, 2006); *Flores v. State*, 2004 WL 3098822, at \*6 (Tex. Crim. App. October 20, 2004).

<sup>139</sup> *Flores*, 2004 WL 3098822, at \*6.

allow the State to seek a more severe punishment. Accordingly, *Apprendi* and *Ring* do not apply.<sup>140</sup>

Whether or not the Constitution requires the defendant's future dangerousness to be specifically alleged in the indictment,<sup>141</sup> the Texas Court's interpretation of the capital statute is demonstrably wrong under *Ring*. While it is technically true that the maximum penalty for capital murder is death, it was equally true that the maximum penalty for first degree murder was death in Arizona prior to *Ring*.<sup>142</sup> It does not follow, however, that the penalty of death may be imposed based solely upon a conviction of murder; rather, the Texas capital statute makes a finding of future dangerousness a prerequisite to the imposition of death. Therefore, future dangerousness appears to us unquestionably to be a finding that must be made before death may be imposed. If this finding is a factual one, it must be found beyond a reasonable doubt by a jury.

The future dangerousness determination turns on a jury's assessment of whether facts such as the nature of the crime, lack of remorse, mental illness, and criminal history, on balance, suggest a propensity for future violence.<sup>143</sup> This is obviously not a finding of historical fact – it is in many ways, the opposite, a prediction of the future. However, future dangerousness is no less factual than the examples discussed in the previous section<sup>144</sup> and in other contexts state and federal courts have routinely regarded the question of future dangerousness as a question of fact.<sup>145</sup> But it is important to realize that it is not on this basis that the Texas Court has held *Ring* to be inapplicable to the finding of future dangerousness.<sup>146</sup> The Court did not hold that this determination – like balancing mitigation and aggravation – is a moral judgment and not a finding of fact. Rather, the Court simply and inexplicably expressed its view that future dangerousness is not a threshold question to the imposition of death.<sup>147</sup>

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<sup>140</sup> *Id.* ; see also *Cubas*, 2005 WL 3956312, at \*7 (finding that *Apprendi* and *Ring* are inapplicable to Texas's capital scheme). The reasoning in *Cubas* is particularly troubling. In *Cubas*, the Court cites exclusively to cases finding *Ring* inapplicable to the finding of mitigating evidence. For the reasons set forth below, this is likely correct; but it carries no weight with regard to the determination of whether Texas's lone aggravating factor is present.

<sup>141</sup> The indictment requirement of the Fifth Amendment has never been incorporated into the Due Process Clause of the Fourteenth Amendment. See, e.g., *Hurtado v. California*, 110 U.S. 516, 538 (1884). All that is required is that the charging documents satisfy the notice requirements of due process.

<sup>142</sup> See *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990) *overruled by Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>143</sup> Shapiro, *supra* note 137, at 145.

<sup>144</sup> See Part III.B.1.b., *supra*

<sup>145</sup> See 18 U.S.C. § 3142(i)(1) (requiring that a pretrial detention order “include written findings of fact” as to whether release conditions “will not reasonably assure the appearance of the person” or will “*endanger the safety of any other person or the community*”) (emphasis added); *U.S. v. Salerno* 481 U.S. 739, 742, (1987) noting that (denial of bail based on fear of future dangerousness must be justified by writing “findings of fact”). *People v. Buerge* 2009 WL 3764078, 1 (Colo.App.) (Colo.App.,2009) (describing the determination as to whether one is likely to commit another sexually violent crime as a “specific finding[ ]of fact” and thus such findings must be deferred to by an appellate court).

<sup>146</sup> *Garza v. State*, 2008 WL 1914673 at \*8 (Tex. Crim. App. April 30, 2008) (“*Apprendi* and *Ring* have no applicability to Article 37.071 in its current form”).

<sup>147</sup> It is important not to make too much of this point. Texas assigns the task of finding future dangerousness to the jury. Thus, the *Ring* question is more theoretical with regard to the Texas statute than

b. The Selection Decision under Texas Law

The second part of the Texas statute – dealing with balancing the mitigating evidence against the case in aggravation – is much more open-ended than in Florida. Texas is an example of a non-weighting state; the jury is not limited to balancing the found aggravating factors – or factor in this case – against the evidence in mitigation.<sup>148</sup> Rather, the jury is to consider *all* of the evidence in the case in determining whether the defendant should live or die.

The Texas Court of Criminal Appeals has concluded that this second inquiry – what it calls the mitigation special issue – is also not a fact finding that must be made by a jury under *Ring*. In *Perry v. State*<sup>149</sup> the Court held that the death penalty becomes a permissible punishment once the aggravating factor has been found. The absence of factors sufficient to mitigate death, therefore, is not a fact that increases the permissible punishment; rather the presence of facts in mitigation can only lower the possible punishment.<sup>150</sup>

It is, therefore, clear that what a jury is asked to decide in the mitigation special issue is not a “[fact] legally essential to the punishment.” By the time the jury reaches the mitigation special issue, the prosecution has proven all aggravating “facts legally essential to the punishment.”<sup>151</sup>

The Fifth Circuit is in accord.<sup>152</sup>

Thus, the Texas Court’s rejection of the application of *Ring* to the balancing task is on a very different basis than the Florida Court’s rejection of the application of *Ring* to its statute. The *Perry* Court rejected *Ring*’s applicability not because the presence of sufficient mitigation is not a factual finding, but because it is not the *kind* of factual finding that *Ring* requires a jury to make. This argument makes sense so far as it goes, but it also proves too much. *Apprendi* was an explicit rejection of this sort of formalism, of the idea that the state, by terming a fact a sentencing factor rather than an element of the offense could remove that fact from the jury. The Texas Court’s analysis – that the presence of sufficient mitigating factors is a condition that can *lower* the possible penalty – constitutes exactly the kind of formalism that *Apprendi* rejected.

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it was with regard to the Florida statute, which purports to give such authority to a judge rather than the jury.

<sup>148</sup> See Part III.A., *supra* (distinguishing between weighing and non-weighting sentencing systems).

<sup>149</sup> 158 S.W.3d 438 (Tex. Crim. App. 2004).

<sup>150</sup> See *id.* at 446-48.

<sup>151</sup> *Id.* (quoting *Blakely v. Washington*, 542 U.S. 296, 303 (2004)).

<sup>152</sup> See *Granados v. Quarterman*, 455 F.3d 529, 536-37 (5th Cir. 2006).

We are not persuaded that Texas violated any principle of *Apprendi* or *Ring* in the trial of this case. Specifically, it did not do so by not asking the jury to find an absence of mitigating circumstances beyond a reasonable doubt in addition to questions it required the jury to answer. Put another way, a finding of mitigating circumstances reduces a sentence from death, rather than increasing it to death. (citations omitted).



For as long as there has been an *Apprendi* right to jury adjudication, there has been concern about the ease with which a legislature could manipulate *Apprendi*'s protections. In her *Apprendi* dissent, Justice O'Connor explained that the rule mandating jury fact-finding was hollow insofar as a state legislature could simply restructure the statute so as to evade the new jury right.

Thus, apparently New Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one who commits that criminal offense. Second, New Jersey could provide that only those defendants convicted under the statute who are found by a judge, by a preponderance of the evidence, to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence greater than 10 years' imprisonment.<sup>153</sup>

O'Connor argued, in essence, that all of the Court's work could be undone by making facts relevant to aggravating a sentence into facts relevant to mitigating a sentence. Such facts, unlike facts in aggravation, need not be proved to a jury under any fair reading of *Ring*.

However, in oft-overlooked language from the *Apprendi* majority, the Court responded to Justice O'Connor's concern: "if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not . . .), we would be required to question whether the revision was constitutional under this court's prior [due process] decisions."<sup>154</sup> This language has been construed as forging a marriage between the Court's longstanding due process jurisprudence – the *Winship* line of cases – and the newly minted *Apprendi*-jury rights.<sup>155</sup> In other words, the jury rights established by *Apprendi* and its progeny are not mere lessons in statutory drafting for legislatures; the Court made clear its view that any efforts to evade the jury requirement announced in *Apprendi* are subject to the limitations of due process.<sup>156</sup>

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<sup>153</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 549 (2000) (O'Connor, J., dissenting).

<sup>154</sup> *Id.* at 490 n.16 (majority opinion) (citing *Patterson v. New York*, 432 U.S. 197, 228-229 n. 13(1977) (Powell, J., dissenting) and *Mullaney v. Wilbur*, 421 U.S. 684, 698-702 (1975)). See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467,1471 (2001) (summarizing the dissenters fear that by "simply raising the maximum sentence for a crime. . . a legislature could ensure that the very same sentence enhancements that were deemed elements by the Court's opinion would continue to be adjudicated without a jury finding beyond a reasonable doubt.").

<sup>155</sup> Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder*, 58 STAN. L. REV. 195, 207 (2005) ("*Apprendi* and its progeny have married the beyond a reasonable doubt standard with the Sixth Amendment right to trial by jury.")

<sup>156</sup> It should be noted upfront that in the same breath that the court acknowledged the due process limits, it also invoked a historical distinction "between facts in aggravation of punishment and facts in mitigation." *Apprendi*, 530 U.S. at 490 n. 16. The Court was referring to the distinction between affirmative defenses and facts required to prove guilt, yet the context of the comment suggests broader applicability.

While the precise nature of the “constitutional limits” on a legislature’s ability to redefine a particular finding as a non-element has remained uncertain,<sup>157</sup> the impact of *Apprendi* on criminal statutes has clearly been profound. State courts have recognized that legislatures cannot merely shift the burdens of the “essential elements” of a crime onto criminal defendants to avoid the jury right. In practical terms, this has resulted in victories for defendants when legislatures have attempted to make facts such as sexual motivations, serious bodily injury, proximity to a school, use of a firearm, and racial animus, to name but a few, as non-elements.<sup>158</sup> There is now broad recognition that if a crime requires a fact that serves as an essential element for the conviction, it must be tried to a jury and found beyond a reasonable doubt.<sup>159</sup> In a nutshell, the “formalism of the *Apprendi* rule is not pointless,”<sup>160</sup> and it suggests that due process imposes limitations on the ability of a state to prescribe a sentencing default in favor of death.

However, the Court’s warnings about the due process limits of burden shifting have not always been heeded in the capital context. Consider, for example, a capital statute that provides that that all killings are punishable by death but that a defendant will be spared if no aggravating factors are present or if the aggravating factors that are present are outweighed by the mitigating factors that are also present. The effect of such a statutes would be to impose upon the defendant an obligation to disqualify himself from death. Such a result that would appear to comply with both the Eighth Amendment – it makes meaningful distinctions between who lives and who dies – and the Sixth Amendment – the facts necessary to support a finding of death are all found by a jury rather than a judge. There are significant Constitutional concerns with such an approach, however, based in the due process right, a right that has, through *Apprendi*, been “married” to the Sixth Amendment jury right.<sup>161</sup>

The Supreme Court, in one of its few post-*Ring* opinions confronting this issue, appears to have endorsed such burden shifting in the capital context. In *Kansas v. Marsh*<sup>162</sup> the Court endorsed a sentencing provision that provided for the death penalty if the state proved beyond a reasonable doubt that the case in aggravation was at least as strong as the case in mitigation. Marsh argued that this standard enabled the jury to impose the death penalty in the event of “equipoise” between the factors in aggravation and mitigation; the Court agreed with this description of the Kansas statute, but found no constitutional violation with such a statute.

In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the

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<sup>157</sup> *Patterson*, 432 U.S. at 210.

<sup>158</sup> Nancy J. King & Susan R. Klein, *Apprendi and Plea Bargaining*, 54 STAN. L. REV. 295, 296 (noting that “*Apprendi* is making a big difference, in ways favorable to defendants in cases such as these).

<sup>159</sup> See, e.g., *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *Commonwealth v. Hoffman*, 266 A.2d 726, 731 (Pa. 1970) (stating it is an “unquestioned requirement that the Commonwealth establish every element of any crime beyond a reasonable doubt”).

<sup>160</sup> King, *supra* note 158, at 1486.

<sup>161</sup> Allen & Hastert, *supra* note 119, at 207.

<sup>162</sup> 548 U.S. 163 (2006).

appropriate sentence. The thrust of our mitigation jurisprudence ends here. We have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required. Rather, this Court has held that the States enjoy a constitutionally permissible range of discretion in imposing the death penalty.<sup>163</sup>

The Court even cited favorably its earlier opinion in *Walton v. Arizona*<sup>164</sup> in which it had upheld against an Eighth Amendment challenge an Arizona statute that placed the burden upon the defendant to show that there were sufficient facts in mitigation to justify sparing his life.<sup>165</sup>

These cases demonstrate that, at least as it is currently understood, *Ring* provides very little in the way of restraint on the way states structure their capital statutes. The Court seems in *Marsh* to endorse, at least implicitly, statutes that would excuse the state from having to prove that the case in aggravation is stronger than the case in mitigation. Even if, as we argue, balancing is a finding of fact, *Ring* only applies to that finding if it increases the defendant's potential penalty. If a state can take such balancing outside of *Ring*'s protections by fiat – by changing balancing from a hurdle for the prosecution to clear to an opportunity for the defendant to spare his life – then *Ring*'s promise is a hollow one indeed. In sum, although the Court has married the *Apprendi* and *Winship* rights, it appears willing to ignore a key aspect of this relationship; while the Court has policed burden-shifting to the defendant in the non-capital context it has not done so with regard to capital sentencing.

As the next two statutes make clear, however, burden shifting is not the only way for a state to avoid *Ring*'s mandate. We show that states can also remove *Ring* from the equation by dispensing with any legalistic limits on the process of balancing, by making it look more like a moral judgment and less like a legal one.

### 3. California

California occupies an odd place in America's capital punishment regime. California has a death row population of nearly 700 people, by far the largest in the country.<sup>166</sup> However, the state has executed only thirteen people since *Gregg v. Georgia*

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<sup>163</sup> *Id.* at 175 (citations and quotations omitted).

<sup>164</sup> *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>165</sup> The Court intimates in *Marsh* that if it believed that the Kansas statute made the death penalty the "default" penalty for homicide, this would have constitutional implications. But it is not entirely clear why this should be true.

<sup>166</sup> The Criminal Justice Project, *Death Row USA*, available at <http://www.deathpenaltyinfo.org/documents/DRUSASummer2009.pdf> (July 1, 2009); California Department of Corrections and Rehabilitation Division of Adult Operations, Death Row Tracking System Condemned Inmate Summary List, available at [http://www.cdcr.ca.gov/Reports\\_Research/docs/-CondemnedInmateSummary.pdf](http://www.cdcr.ca.gov/Reports_Research/docs/-CondemnedInmateSummary.pdf) (Feb. 3, 2010).

was decided in 1976,<sup>167</sup> a rate of less than one every two years. At this rate, it would take California more than 1,400 years to execute all of its condemned inmates, even if it were to stop imposing death sentences tomorrow.

California's capital statute has caused appellate courts a fair amount of confusion over the last thirty years.<sup>168</sup> Unlike most states, California uses special circumstances, proved at the trial stage, to determine a defendant's death eligibility. If a defendant is convicted of first degree murder and at least one special circumstance is proven to the jury, the defendant is eligible for death and the case proceeds to a separate sentencing trial.<sup>169</sup> At this sentencing phase, a list of factors is set forth by statute for the jury's consideration in determining whether the defendant lives or dies. The jury is not told which of these factors are aggravating and which are mitigating, nor told specifically how to balance them against one another.<sup>170</sup> In contrast to the special circumstances which require a yes or no answer,<sup>171</sup> the sentencing factors set forth in the California capital

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<sup>167</sup> California Department of Corrections and Rehabilitation Office of Public and Employee Communications, *Condemned Inmates Who Have Died Since 1978*, available at [http://www.cdcr.ca.gov/-Reports\\_Research/docs/CIWHD.pdf](http://www.cdcr.ca.gov/-Reports_Research/docs/CIWHD.pdf) (Feb. 3, 2010).

<sup>168</sup> See, e.g., *Brown v. Sanders*, 546 U.S. 212, 222-23 (2006) (disagreeing with the Court of Appeals conclusion that California is a weighing state and concluding the opposite).

<sup>169</sup> The Supreme Court has endorsed this approach to death qualification against Eight Amendment challenge. See, e.g., *Tuilaepa v. California*, 512 U.S. 967 (1994) ("To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase.") citing *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988) and *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

<sup>170</sup> See CAL. PENAL CODE § 190.3 (West 2009):

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

- (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
- (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
- (c) The presence or absence of any prior felony conviction.
- (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
- (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
- (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.
- (i) The age of the defendant at the time of the crime.
- (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
- (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

<sup>171</sup> California Penal Code Section 190.2 sets forth 22 special circumstances including several with multiple subparts. Examples include: (1) the murder was intentional and carried out for financial gain; (3) multiple

statute are open-ended and at least potentially ambiguous. However, the United States Supreme Court has repeatedly rejected Eighth Amendment challenges to the statute; in fact the Court has reasoned that California's open-ended sentencing has advantages over the use of so called propositional or true/false factors:

In our decisions holding a death sentence unconstitutional because of a vague sentencing factor, the State had presented a specific proposition that the sentencer had to find true or false (*e.g.*, whether the crime was especially heinous, atrocious, or cruel). We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by *Furman v. Georgia*, 408 U.S. 238 (1972). Those concerns are mitigated when a factor does not require a yes or a no answer to a specific question, but instead only points the sentencer to a subject matter.<sup>172</sup>

Although the United States Supreme Court has not ruled on the Sixth Amendment implications of California's statute, the California Supreme Court has consistently held that *Ring* does not apply at all in the sentencing phase of a capital trial.<sup>173</sup> The Court has stated explicitly that the jury's decision that the case in aggravation outweighs the case in mitigation is a moral one, not a factual one.<sup>174</sup> "Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' and, hence, not susceptible to a burden-of-proof quantification." The United States Supreme Court decisions rendered in *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) do not compel a different conclusion."<sup>175</sup>

The California Court is thus quite clear about how its capital statute operate. The trial stage requires findings of fact that invoke the jury right. A defendant is not death eligible unless the jury finds the elements of first degree murder and the special circumstance allegations to have been proven beyond a reasonable doubt. By contrast, at the sentencing phase, there is simply no fact-finding to be done. According to the state high court, the jury's role in capital sentencing is "moral and normative" rather than factual. While *Ring* obviously applies at the trial stage,<sup>176</sup> the California Court has consistently held that it does not apply at the sentencing stage.

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murder; (7) the victim was a peace officer; (15) the defendant killed intentionally by means of lying in wait. CAL. PENAL CODE § 190.2 (West 2009)

<sup>172</sup> *Tuilaepa v. California*, 512 U.S. 967, 974-75 (1994) (citations omitted). See also, *California v. Ramos*, 463 U.S. 992, 1008 n. 22 (1983) ("the fact that the jury is given no specific guidance on how the commutation factor is to figure into its determination presents no constitutional problem.").

<sup>173</sup> *People v. Prieto*, 66 P.3d 1123, 1155 (2003).

<sup>174</sup> Because it is the special circumstance finding, and not the finding of any aggravating factor that makes a defendant eligible for death, no aggravating factor need be found beyond a reasonable doubt.

<sup>175</sup> *People v. Manriquez*, 123 P.3d 614, 644 (Cal. 2005) (quoting *People v. Hawthorne*, 841 P.2d 118, 142 (Cal. 1992)).

<sup>176</sup> The California Court has held that *Ring* applies to the special circumstance findings, which must be proven to a jury and beyond a reasonable doubt. See, *e.g.*, *People v. Lewis*, 181 P.3d 947, 1022-23 (Cal. 2008).

Although the California Courts have not explained this position with great care,<sup>177</sup> it is a difficult proposition with which to disagree. California's capital statute may contain the language of balancing the case in aggravation against the case in mitigation, but, unlike in a weighing state like Florida, it does not require *any* specific findings regarding either aggravating evidence or mitigating evidence. Each juror may consider different factors; different jurors may give different weight to different factors. In fact, many of the factors set forth by the statute defy the very notion of fact finding. For example, under sentencing factor (i) the jury is instructed to consider the defendant's age at the time of the offense. It is not clear whether the jury is to consider the defendant's relatively young (or old) age at the time of the offense as a factor in aggravation or in mitigation. In fact, the California Court has been clear that the legislature did not mean to assign either aggravating or mitigating significance to the defendant's age, but rather to merely alert the jury to the factor for its discretionary consideration. The jury is to make of that factor, and all of the others, what it will. This kind of subjective, open-ended, unbounded decision-making is different in kind and not just in degree from the decisions juries make during the guilt phase of a criminal trial.

California, thus, demonstrates the ease with which the ultimate question of life and death can be removed from the jury after *Ring*. Because the selection question is described by the California courts as a moral rather than a factual one, it simply falls outside of *Ring*'s coverage. On its own terms this logic seems to us unimpeachable; the selection process in California, as described by the California courts, does not call for the finding of any facts and thus does not implicate *Ring* at all. While there may be Eighth Amendment problems with a sentencing regime that leaves to the sentencer's discretion the question of whether a particular fact is aggravating or mitigating of guilt,<sup>178</sup> it would be a stretch to argue that *Ring* applies to such a regime.

The logical conclusion of this approach – of making the sentencing decision less legalistic and more open-ended – is Georgia's capital statute.

#### 4. Georgia

Georgia's statute, which was the subject of both the *Furman* and *Gregg* decisions, is a paradigmatic example of a non-weighing state, a state in which the material that can form the basis of the case in aggravation is not limited to the statutory aggravating factors.<sup>179</sup> But more than this, Georgia's statute is remarkable for the fact that it leaves the selection decision – whether the defendant is to live or die – to the unfettered discretion of the trier of fact. While California merely provides some guideposts for the jury in making what is ultimately a moral decision regarding whether the defendant's sentence,

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<sup>177</sup> The position was stated first in the pre-*Ring* case *People v. Hawthorne*, 4 Cal. 4<sup>th</sup> 43 (1992) and has been repeated, as a mantra, in numerous decisions since then.

<sup>178</sup> And, of course, the Supreme Court has rejected those claims with regard to this statute.

<sup>179</sup> After *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Lockett v. Ohio*, 438 U.S. 586 (1978), a state cannot impose limits on what evidence may be considered in mitigation.

in Georgia the state has consistently refused to provide the trier of fact with any guidance whatsoever.<sup>180</sup>

*Zant v. Stephens*<sup>181</sup> remains the Supreme Court's definitive ruling on the constitutionality of Georgia's open-ended selection procedures. Stephens brought an Eighth Amendment challenge to the statute, claiming that its amorphous nature failed to comply with *Furman*'s requirement that a state make meaningful distinctions between who lives and who dies. Before it could evaluate this claim, however, the United States Supreme Court found it necessary to certify a question to the Georgia Supreme Court asking them to characterize the role played by aggravating factors during the selection stage of the state capital punishment statute.<sup>182</sup> The Georgia Court answered that aggravating factors served no official role in sentence selection; once the state had cleared the qualification hurdle – once it had proven at least one aggravating circumstance beyond a reasonable doubt – the aggravating circumstance was afforded no statutory significance in determining the ultimate punishment.<sup>183</sup> Rather, the question of life or death under the Georgia statute was left to the unfettered discretion of the jury.<sup>184</sup> The Georgia Court famously invoked the metaphor of a pyramid pierced by planes; each plane narrows the pool of murders until only the very top of the pyramid, those sentenced to death, remains. The Georgia Court described the top of the pyramid as follows:

[A] plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. There is an absolute discretion in the factfinder to place any given case below the plane and not impose death. The plane itself is established by the factfinder. In establishing the plane, the factfinder considers all evidence in extenuation, mitigation and aggravation of punishment.<sup>185</sup>

This sort of unbridled sentencing discretion appears to be precisely the sort of lightning-strike model of justice that was held unconstitutional in *Furman*.<sup>186</sup> For the last fifty years, unchecked discretion has been equated with a level of capriciousness that is prohibited by the Eighth Amendment's bar on cruel and unusual punishment.<sup>187</sup> Although this statute might appear to be a clear violation of *Furman*'s mandate of meaningful

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<sup>180</sup> See GA. CODE ANN § 17-10-31 (2006).

<sup>181</sup> 462 U.S. 862 (1983).

<sup>182</sup> *Zant v. Stephens*, 456 U.S. 410, 416-17 (1982).

<sup>183</sup> *Zant v. Stephens*, 297 S.E.2d 1, 3-4 (Ga. 1982).

<sup>184</sup> The Supreme Court upheld the Georgia statute at issue in *Zant* on the ground that the guiding of the jury's discretion, required by the Eighth Amendment, occurs earlier in the process of adjudicating death. *Zant*, 462 U.S. at 880. In other words, the Supreme Court determines that so long as the pool of murderers is meaningfully narrowed by a death penalty scheme, the ultimate decision may be made in an unguided way. *Id.*

<sup>185</sup> *Id.* at 871.

<sup>186</sup> *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

<sup>187</sup> The Court's decision to uphold Georgia's sentencing scheme in *Gregg* effectively constitutionalized the Model Penal Code's approach to capital punishment. See *supra*, note 57. Interestingly, the drafters of the Code have now rejected as no less arbitrary than the pre-*Furman* systems the very provision relied on by states like Georgia and endorsed by the Court. See MODEL PENAL CODE: SENTENCING § 6.06 and comments (2009) (Tentative Draft).

distinctions, the *Zant* Court held otherwise. Because rules govern the finding of aggravating factors during the earlier eligibility determination, the Court reasoned, *Furman*'s requirement is satisfied and Georgia is free to structure the ultimate selection decision as it wishes.<sup>188</sup>

Stephens' challenge to the Georgia statute was an Eighth Amendment claim; at that time *Zant* was decided, the Supreme Court clearly believed that the Sixth Amendment did not apply in the capital sentencing context.<sup>189</sup> However, the *Ring* analysis of this reading of the Georgia statute appears relatively straightforward.<sup>190</sup> While we, in contrast to most appellate courts that have considered the issue, tend to view weighing as a factual finding subject to *Ring*, we have trouble doing so with regard to Georgia's non-weighing sentencing scheme. As the United States Supreme Court described the statute: "In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard."<sup>191</sup> The question posed to the Georgia jury at the selection stage is a purely moral one – the jury is merely asked to determine in its discretion whether the defendant should live or die.<sup>192</sup> In this process there is not even the pretense of factual evaluation – the jury is told neither what factors are relevant nor how to balance them against one and other. Rather, the jury is instructed, in essence, to use its moral sense to determine the

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<sup>188</sup> In this way, the Court's opinion echoes the discredited language of *McGautha v. California*, 402 U.S. 183 (1971). Decided the year before *Furman*, the Court endorsed the grant of limitless discretion to the jury under California's then-applicable statute:

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit, rather than expand, the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.

*Id.* at 207-08.

<sup>189</sup> See part II.A., *supra*.

<sup>190</sup> Perhaps for this reason, there is very little decisional law in the Georgia state courts about how *Ring* applies to its statute.

<sup>191</sup> *Zant*, 462 U.S. at 873-74.

<sup>192</sup> There is a paradox regarding the scope of the *Ring* protections. As Judge Morris Hoffman and Professor Robert Weisberg have both independently concluded, the jury-right is most meaningful when the jury's discretion is least constrained. Robert Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 391; Robert Weisberg, Symposium, *How Sentencing Commissions Turned Out to be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 191, 200-02 (2007); Morris B. Hoffman, *Booker, Pragmatism and the Moral Jury*, 13 Geo. Mason L. Rev. 455, 456, 465-77 (2005). See also Joseph L. Hoffman, *Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137 (1995) (relying on Weisberg's research to conclude that the "mystifying language of legal formality" may allow a juror to believe that he or she is not morally responsible for a capital sentencing decision).



appropriate sentence. Rules do not govern this process; each juror must decide for herself what punishment is appropriate using her own factors and metrics.<sup>193</sup>

This sort of moral judgment – looking at the defendant, his act, his past and determining without guidance whether he should live or die – simply cannot colorably be deemed a fact-finding. As Professor Monaghan explained, fact-finding is an inquiry into “what happened” such that factual findings “respond to inquiries about who, when, what, and where.”<sup>194</sup> Obviously, the jury’s unfettered decision as to life or death bears none of these hallmarks of fact-finding. There is no sense that the jury’s task is to arrive at a “correct” judgment; if the trial court cannot explain to the jury what its task is, it is hard to see how an appellate court could find the result incorrect.<sup>195</sup> While we have great concerns about the kind of decisions produced by such discretion – we believe, in short, that *Zant* was wrongly decided and that the Georgia statute violates the Eighth Amendment – it is difficult to arrive at that result under the language of *Ring*. *Ring* implicates the jury protections only when the decision at issue hinges on a finding of fact that is functionally equivalent to an element.<sup>196</sup> And the Georgia statute is quite explicit that any fact finding, any rule-boundedness occurs at the eligibility stage and not at the selection stage.

If the unfettered judgment of the trier of fact whether the defendant lives or dies were treated as an *Apprendi* fact, then essentially all sentencing decisions would be subject to *Apprendi*’s requirements as well. For example, the unfettered discretion that judges have to sentence within the range permitted by statute is at least as much a factual conclusion as the decision whether a defendant should live or die under a sentencing scheme like Georgia’s. And Justice Scalia – in many ways the chief architect of the *Apprendi* revolution<sup>197</sup> – made quite clear his view that *Ring* is about fact-finding, not

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<sup>193</sup> In this way, the Georgia statute closely parallels the California statute approved by the Supreme Court in *McGautha v. California*, 402 U.S. 183 (1971) *overruled by* *Furman v. Georgia*, 408 U.S. 238 (1972). In *McGautha*, overturned only a year later in *Furman*, the Supreme Court approved California’s standardless discretion statute on the basis that rules are inappropriate to govern the kind of life and death decision being made by a capital jury. The Court stated: “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.” *Id.* at 204.

<sup>194</sup> Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM.L.REV. 229, 235 (1985). *See also* Clarence Morris, *Law and Fact*, 55 HARV.L.REV. 1303, 1304-06 (1942).

<sup>195</sup> However, the Supreme Court was influenced, in upholding the Georgia capital scheme, by the fact that jurors’ decisions were reviewed by the Georgia high court to ensure proportionality. *See, e.g., Georgia v. Gregg*, 428 U.S. 153, 207 (1976); *Zant*, 462 U.S. at 879. However, a decision that a jury’s sentencing decision is disproportionate cannot necessarily be seen as a rejection of the decision that a particular jury came to. A single jury simply cannot ensure the proportionality of the sentence it imposes; such a task, of necessity, must be conducted by a legal actor with access to the facts of more than one case.

<sup>196</sup> *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (“Because Arizona’s enumerated aggravating factors operate as the functional equivalent of an element of the greater offense, the Sixth Amendment requires that they be found by a jury.”).

<sup>197</sup> Commentators tend to substantially credit (or blame) Justice Scalia for the *Apprendi*-revolution. Professor Frank O. Bowman has argued summarized Justice Scalia’s role as one of seducing four other Justices to his approach of “confounding simplicities.” *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How it Might Yet Be Mended*, 77 UNIV. CHI. L. REV. 1 (2009).

about the right to be sentenced by a jury.<sup>198</sup> If his views express those of the majority in *Ring*, if *Ring* is truly limited to findings of fact,<sup>199</sup> then the Sixth Amendment right simply cannot be stretched to include decisions – even capital decisions – based on standardless discretion.

#### IV. Conclusion

All of this brings us back to the start, to the question of how the Sixth and Eighth Amendments interact in the capital context. We have attempted to show, through the application of *Ring* to a number of representative capital statutes, that the Court's apparent watershed decision has not forced much change. State and federal courts continue to take a crabbed reading of exactly what constitutes fact finding and as a result, appellate judges are permitted to reweigh aggravating and mitigating factors and, at least in the case of Florida, a judge is implicitly permitted to reject a jury's conclusion that the case in aggravation is outweighed by the case in mitigation.<sup>200</sup>

But more than that, what this trip through the states demonstrates is that, paradoxically, the easiest way for a state to avoid complying with *Ring* is to move toward Georgia-like unfettered discretion or toward a California-like system that explicitly states that the selection decision is a moral rather than a factual one. As we move along a continuum from Florida's weighing statute to Georgia's completely discretionary non-weighing statute we move from a statute that to us obviously raises *Ring* concerns to one that we must admit does not. Given the apparent desire of the states to take capital decision-making out of the hands of juries whenever possible,<sup>201</sup> this development creates a genuine concern that *Ring* will inevitably push the states to adopt the kind of unprincipled, discretionary capital system adopted in Georgia. The Court's Sixth

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<sup>198</sup> *Supra*, note 194.

<sup>199</sup> As the history set forth in Section II.B., *supra*, indicates, Justice Scalia is on firm ground; since its decisions in *Jones* and *Apprendi* the Court has consistently framed the Sixth Amendment right in terms of factual findings.

<sup>200</sup> The abrogation of the jury's role is certainly not limited to Florida, however. A number of states have held that judicial reweighing on appeal – in the event, say that an aggravating factor found by the jury is invalidated – is permitted. *See, e.g.*, *Neff v. State*, 849 N.E.2d 556, 561-62 (Ind. 2006); *Leslie v. Warden*, 59 P.3d 440, 446-47 (Nev. 2002).

<sup>201</sup> Their desire to do so is based, in no small part, on the fact that judges, particularly politically accountable judges, are more likely to impose the death penalty than are juries. *See, e.g.*, *Harris v. Alabama*, 513 U.S. 504, 521 (1995) (Stevens, J., dissenting) (citing HANS ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARD CAPITAL PUNISHMENT, 37-50 (1968)) (“Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty. This has long been the case, and the recent experience of judicial overrides confirms it. Alabama judges have vetoed only five jury recommendations of death, but they have condemned 47 defendants whom juries would have spared”). *See also* Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1141 (2003) (noting that some states switched from jury to judge sentencing based on a “with juries that would not impose capital punishment.”); *id.* at 1143 (“Empirical analyses of judges' behavior in the override states reveals a correlation between judges' use of the override power and the dates of judicial elections.”); Carrie A. Dannenfelser, *Burch v. State: Maintaining the Jury's Traditional Role as the Voice of the Community in Capital Punishment Cases*, 60 MD. L. REV. 417, 438 (2001) (suggesting the susceptibility of judges to political pressure in support of executions).

Amendment jurisprudence, in other words, pushes the states to write statutes that push at the very edges of the Eighth Amendment's edicts.

In part, these criticisms of *Ring* as a force of change in American capital punishment are attributable to the Court's narrow focus on fact-finding.<sup>202</sup> Unless a sentencing decision can be described as a fact-finding, it simply falls outside the *Apprendi-Ring* purview. We are not the first, obviously, to note the narrowness of the Court's *Ring* mandate;<sup>203</sup> but our investigation of how that mandate plays out in practice demonstrates just how little force it exerts on the states today. Because states are free to cast the ultimate sentencing decision as a moral choice rather than a factual finding, they are essentially free to avoid *Ring*'s requirements altogether.

For those of us who believe that the jury has an important role to play in capital sentencing, then, perhaps a more robust solution lies in Justice Breyer's concurrence in *Ring*. For Breyer, it was the Eighth Amendment, not the Sixth that required the presence of juries in the capital process.<sup>204</sup> Citing two decades of the Court's cruel and unusual punishment jurisprudence, Breyer explained that only the jury could reasonably be expected to express the conscience of the community necessary for a just and equitable death sentence.

In this sense, Breyer is merely echoing opinions expressed earlier, before *Ring*, by one of the chief *Apprendi-Ring* architects, Justice Stevens. Dissenting in 1995's *Harris v. Alabama*,<sup>205</sup> Stevens expressed his displeasure with a system that allowed a judge sitting without a jury to reject the jury's recommendation of leniency and to impose death instead of a life sentence. For Stevens, many of the traditional justifications for the death penalty disappear when it is contrasted with a true life sentence. The only explanation that remains viable today is retribution:

An expression of community outrage carries the legitimacy of law only if it rests on fair and careful consideration, as free as possible from passion or prejudice. . . . Jurors' responsibilities terminate when their case ends; they answer only to their own consciences; they rarely have any concern about possible reprisals after their work is done. More importantly, they focus their attention on a particular case involving the fate of one fellow citizen, rather than on a generalized remedy for a global category of faceless violent criminals who, in the abstract, may appear unworthy of

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<sup>202</sup> Philip English Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. REV. 32, 32-34 (1974).

<sup>203</sup> See, e.g., Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OH. ST. J. CRIM. L. 117, 154 (2004) ("*Ring*'s reliance on the Sixth Amendment entitlement to jury fact-finding has a tired, museum-like quality to it").

<sup>204</sup> Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing Proceedings*, 54 ALA. L. REV. 1091, 1148 (2003) (describing Justice Breyer's opinion as "a striking expansion of the Eighth Amendment analysis" that was necessary to "give full meaning to the concept of the jury as a representative of the moral values and sensibilities of the community").

<sup>205</sup> 513 U.S. 504 (1995)

life. A jury verdict expresses a collective judgment that we may fairly presume to reflect the considered view of the community.<sup>206</sup>

There is an irony at work here. As part of its Eighth Amendment jurisprudence – a jurisprudence requiring the states to make meaningful decisions between who lives and who dies – the Supreme Court has fairly consistently trumpeted the fact-finding powers of the judge over those of the jury, not just before *Ring*, but since. In *Proffitt v. Florida*, a case still cited by the Florida Supreme Court as evidence of the continued constitutionality of the advisory jury, the Court concluded that decision-making by judges was more likely to lead to consistent results than would similar decision-making by juries: “[J]udicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.”<sup>207</sup> The Court has expressed a similar ambivalence about the fact-finding capacities of juries elsewhere. For example, in *Schiro v. Summerlin*<sup>208</sup> the Supreme Court refused to give *Ring* retroactive effect, refused, in other words to find that jury fact-finding was so necessary to the fairness of a death penalty trial that due process required its retroactive application.<sup>209</sup> In doing so, the Court disparaged the role of juror as fact-finder: The Court found that juries were likely to be confused by trial courts’ instructions, did not have the benefit of seeing multiple cases, and are not used extensively outside of the United States.<sup>210</sup>

Why then is the Court trumpeting the role of juries on the one hand – in the Sixth Amendment context – while disparaging it on the other – the Eighth Amendment context? The answer seems to be, in part, the Court’s narrow reading of the text of the Sixth Amendment. The *Apprendi* majority believe that the Amendment compels jury fact-finding *whether it’s a good idea or not*. In rejecting Justice O’Connor’s repeated protests that the *Apprendi* majority was leading the criminal justice system to ruin, Justice Scalia remarked that it was the Sixth Amendment, not the views of the Justices, that required fact-finding. To paraphrase the Court’s opinion in *Mapp v. Ohio*,<sup>211</sup> refuting Justice Cardozo’s famous phrase about a blundering constable: the defendant gets a jury, but it is the law (not common sense) that gives it to him.

And that is true as far as it goes, but it is only goes so far. The Sixth Amendment may require just that juries make the factual findings that lead to death, but it does not follow from that conclusion that that is all that the Constitution requires. The criticisms

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<sup>206</sup> *Id.* at 518-19; *State v. Dixon*, 283 So.2d 1, 8 (1973) (“[A] trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants.”).

<sup>207</sup> *Proffitt v. Florida*, 428 U.S. 242, 252 (1976)

<sup>208</sup> 524 U.S. 348 (2004).

<sup>209</sup> *See, e.g., Teague v. Lane*, 489 U.S. 288, 310 (1989) (holding that “[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced”).

<sup>210</sup> *Id.* at 356.

<sup>211</sup> 368 U.S. 871(1961).

of the jury that the Court made in *Summerlin* are valid;<sup>212</sup> if what we care about is accurate fact-finding, making sense of complicated legal doctrines, consistency across cases, the jury has trouble competing with the judge.<sup>213</sup> The power of the jury, the comparative advantage that it has over the judge, however, is expressive.<sup>214</sup> As one commentator has observed:

The near disappearance of jury sentencing over the last few decades has not been healthy for American democracy. Strictly speaking, the regimes that have replaced jury sentencing are not anti-democratic – they were approved and to some extent designed by legislatures. Yet an examination from the perspective of deliberative democracy shows that citizens have lost something important by abolishing sentencing juries. First, as the role of the jury has receded, in Justice Souter's words, to “low-level gatekeeping,” the criminal justice system has become ever more opaque to the average citizen, citizens have lost sense of the day-to-day workings of the criminal justice system. Second, the professionalization of sentencing has not lived up to its promise to make sentencing outcomes more just and publicly acceptable.<sup>215</sup>

In sum, the jury, representative as it is of the people, was designed to and still today stands as an effective bulwark against official tyranny.<sup>216</sup> Just as jury nullification in capital cases led to modernization of the death penalty in the nineteenth century<sup>217</sup> so the relative unwillingness of juries today to impose a death sentence is viewed by some as an indication of the death penalty's inevitable demise. While the Court is not wrong to require the jury to find the facts that lead to death, this article demonstrates that that protection is insufficient to allow the jury its proper role. The Court should take up the call of Justices Breyer and Stevens and hold that the Eighth Amendment requires that juries determine the ultimate sentence in a capital case.

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<sup>212</sup> *Schriro v. Summerlin*, 542 U.S. 348, 356-58 (2004).

<sup>213</sup> As one commentator has observed, “[p]erhaps the main criticism of sentencing juries is that their lack of experience and expertise leads them to make decisions based on a fragmented understanding of the sentencing process. Unable to situate the case before them within the larger sentencing framework, juries are said to render disparate judgments in similar cases in violation of the basic principle of equality before the law.” Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 356 (2003)

<sup>214</sup> *Id.* at 322 (“As the nullification cases demonstrate, the jury--whether at trial or at sentencing--operated as a deeply political institution in the early republic. It played a central part in the American system of checks and balances.”).

<sup>215</sup> *Id.* at 339.

<sup>216</sup> *Id.* at 327-330 (describing the rise of determinate sentencing systems through, for example, mandatory guidelines as rendering jury sentencing largely “archaic”).

<sup>217</sup> *Woodson v. North Carolina*, 428 U.S. 280, 289-301 (1976).