Ring v. Arizona: How Did This Happen, and Where Do We Go

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I. Introduction

Charles Andrew Bates, the Defendant in State v. Bates,\(^1\) listened to his friends and former neighbors give testimony about his character, as he sat at

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1. Fictional case. Bates' story is designed to give the reader an understanding of how a sentencing hearing progresses.
a table in a hot Florida courtroom. Bates' defense attorney called these character witnesses in a final effort to save his client's life. The jury has already returned a guilty verdict on one count of first-degree murder; therefore, Bates is facing either life imprisonment or death. The Defendant is in danger of the jury recommending death to the judge if his attorney is unable to present mitigating circumstances that equalize or outweigh the several aggravating circumstances presented by the prosecutor.

Prior to the defense attorney's attempt at presenting mitigating circumstances, the prosecutor presented evidence to demonstrate aggravating circumstances. During the prosecutor's argument, she presented several pieces of evidence, which could have been classified as aggravating factors. The prosecutor demonstrated, as she had done to establish guilt at trial, that the Defendant stabbed his seventy-two year-old victim twenty-six times. After killing the victim, the Defendant looted the victim's apartment, stealing precious family heirlooms and a modest savings of cash. The prosecutor also demonstrated that the Defendant kept the victim bound and gagged in a dark bathroom for two days, providing limited food and water before killing her. The prosecutor closed her argument by stating that according to the state statute, three aggravating factors were present. First, the Defendant killed the victim in an especially heinous and cruel manner. Second, the victim was an elderly woman, whom he physically and mentally abused, and killed. Finally, the Defendant committed this murder for pecuniary gain.

2. This sentencing hearing is similar to a sentencing hearing in Alabama, Delaware, or Florida. Ala. Code § 13A-5-45 (1994); Del. Code Ann. tit. 11, § 4209 (1995); Fla. Stat. § 921.141 (2001). In any of these three states, the following will occur. After a guilty verdict has been rendered in a capital case, the jury listens to all of the evidence presented by both sides in a separate sentencing hearing. Upon completion of the arguments by both attorneys, the jurors weigh the aggravating and mitigating circumstances. However, if the aggravating circumstances outweigh the mitigating circumstances, then the jury may recommend death. If the mitigating circumstances outweigh or equal the aggravating circumstances, then the jury must recommend life imprisonment. Regardless of the jury's recommendation, the judge makes the final decision. The judge weighs the evidence as the jury did, and he or she can impose death or life imprisonment as a penalty. Ala. Code § 13A-5-45 (1994); Del. Code Ann. tit. 11, § 4209 (1995); Fla. Stat. § 921.141 (2001).

3. In Florida, committing a capital felony in an "especially heinous, atrocious, or cruel" manner is considered an aggravating factor. Fla. Stat. § 921.141(5)(h) (2001).

4. In Florida, committing a capital felony against an "elderly person . . . resulting in great bodily harm" is considered an aggravating factor. § 921.141(5)(d).

5. In Florida, committing a capital felony for "pecuniary gain" can be considered an aggravating factor. § 921.141(5)(f).
Bates’ attorney focused on the Defendant’s age, mental state at the time of the crime, and limited criminal history to mitigate the aggravating factors presented by the prosecutor. First, the defense attorney explained to the jury that while the defendant is currently nineteen, he was only eighteen at the time of the murder. Thus, while the law sees the Defendant as an adult, his young age should be considered when analyzing his decisions. Second, the defense attorney attempted to reason the Defendant’s actions based upon his mental state at the time of the murder. To do this, the Defendant’s friends testified that they had taken illegal drugs with the Defendant only one day prior to the Defendant’s felonious act, causing the Defendant to react aggressively. Finally, the defense attorney presented the Defendant’s limited criminal history. Bates had only been arrested one time prior, for a misdemeanor.

Upon completion of the arguments, the judge gave the jury brief instructions, and allowed them to deliberate so they might form a recommendation of either life imprisonment or death. The jury returned after two short hours. The jury informed the judge that they had reached a decision. By a vote of twelve to zero, they found that the Defendant’s age, limited criminal history, and mental state at the time of the murder were sufficient mitigating circumstances to offset the aggravating factors presented by the prosecution. Thus, the jury recommended that the judge impose a sentence of life imprisonment.

One week later, the court reconvened for the judge’s decision. The judge explained that while he gives great weight to the jury’s recommendation, he is not bound by it, and he must rule appropriately. Moreover, the judge explained that while the jury is often swayed by the emotion of witnesses at a sentencing trial, his experience and understanding of the procedure allows him to see things more objectively than juries might. Therefore, the judge explained that he was ready to make his ruling. As all ears in the courtroom listened attentively, the judge sentenced Charles Andrew Bates to death by the electric chair. The judge stated that he was

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6. In Florida, the “age of the defendant at the time of the crime” can be considered a mitigating factor. § 921.141(6)(g).
7. In Florida, the aggravating factors may be mitigated if “[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.” § 921.141(6)(b).
8. In Florida, lack of a significant criminal history can be a mitigating factor. § 921.141(6)(a).
not persuaded by the argument that the Defendant's age was a mitigating circumstance. When the judge weighed the three aggravating circumstances against the two remaining mitigating circumstances, he felt death was the appropriate punishment.

Although the sentencing hearing previously described is fictional, the possibility of its likeness becoming a reality is true, due to the current process required by death penalty statutes in eight states. In those eight states, either: 1) a judge makes the decision alone; 2) a panel of judges makes the decision together; or 3) a judge makes the decision with a recommendation from the jury, as was the case in the Bates' trial. As of April 1, 2001, a total of 3701 inmates resided on death row. Of those 3701 inmates, 758 were sentenced to death by one of the three previously mentioned processes.

This article will deal directly with the 758 inmates who were sentenced to death by a judge or panel of judges. Initially, this article will briefly analyze the effects of *Furman v. Georgia*. In the analysis of *Furman*, the article will discuss the Court's holding, as well as *Furman's* effects on the death penalty in 1972. Finally, this section will discuss the implementation of aggravating and mitigating factors into state death penalty statutes, as a direct result of *Furman*.

In Part III, this article will survey the various ways states have formed their death penalty statutes. In this section, the article will first discuss those state statutes where a judge, or panel of judges makes the sentencing determination, independent of a jury. Next, the article will discuss state

14. DEATH PENALTY INFO. CTR., DEATH ROW INMATES BY STATE, at http://www.deathpenaltyinfo.org/DRowInfo.html (Apr. 1, 2001). At the time of the writing of this article, this was the most current information.
15. See id.
16. 408 U.S. 238 (1972) (per curiam).
statutes that require a judge to determine the sentence, after receiving a recommendation from the jury. Finally, this section will analyze a state statute that requires the jury to make the final sentencing determination, and does not allow the judge to overrule the jury’s decision, as he can in other states. 17

In Part IV, this article will begin to look at landmark United States Supreme Court cases that set the stage for Ring v. Arizona. 18 In this section, it becomes apparent that the Court is conflicted over the appropriate level of involvement by the judge in the sentencing process. The first case analyzed to demonstrate this point is Walton v. Arizona. 19 In Walton, a 1990 case, the Court upheld the Arizona death penalty statute, finding that it did not violate the Sixth Amendment. 20 The article then shifts forward to the year 2000 and discusses Apprendi v. New Jersey, 21 another significant United States Supreme Court case. In the discussion of Apprendi, the paper will show how a conflict between Apprendi and Walton existed, even though the Court stated in Apprendi that Walton remained good law. 22 Also at this juncture, the article will discuss Justice O’Connor’s dissenting opinion in Apprendi, which predicted that appeals, such as Ring, would be quickly forthcoming. 23

In Part V, this article will analyze Ring. In the analysis of Ring, the paper will show that Apprendi and Walton could not coexist, and how the Court chose not to tip-toe the line any longer. Also in this section, the article will revisit Justice O’Connor in another dissenting opinion, as she opines that the majority sided with the wrong case, Apprendi, and instead should have chosen Walton. 24

Finally, in Part VI, this article will discuss the legal ramifications of the Ring decision. There are both long and short-term effects of Ring, and in this section, the article will examine both. In the short-term, will those currently on death row, who were sentenced by a judge, have their sentences commuted, as was done after Furman; or will they only receive new sentencing trials? In the long-term, what will this mean for current death penalty statutes, or for the administration of the death penalty? Will Ring

20. Id. at 639.
22. Id. at 496.
23. Id. at 551 (O’Connor, J., dissenting).
only be a speed bump, slowing down executions until state legislatures can cleverly create new death penalty statutes that comply with the "Ring" ruling, or will this decision result in a permanent slowing of executions in this country?

II. FURMAN V. GEORGIA

The United States Supreme Court's decision in *Furman v. Georgia* is the most significant reason death penalty statutes exist in their current form. Prior to *Furman*, the Court did not interpret punishment by death as cruel, "unless the manner of execution [could] be said to be inhuman and barbarous." However, as Justice Douglas pointed out in his concurring opinion, "the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" Thus, the *Furman* Court sought to measure the death penalty against the existing "standards of decency."

A. The Court's Opinion

In *Furman*, three convicted felons, two from Georgia and one from Texas, were sentenced to death by juries in their respective states. Furman, from Georgia, was sentenced to death for murder, while Jackson, the other petitioner from Georgia, and Branch, the petitioner from Texas, were sentenced to death for rape. All three petitioners were black, and none had an education exceeding high school, as was the case for a large number of defendants sentenced to death at that time. As a result, the petitioners' attorney argued that the death penalty was imposed arbitrarily because a

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26. *Id.* at 241 (citing *In re Kemmler*, 136 U.S. 436, 447 (1890)). The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).
28. *See id.*
29. *Id.* at 239.
30. *Id.* at 252.
31. *Id.* at 252–53.
33. *Id.* at 249–50.
large majority of deathrow inmates were minorities with limited education,\(^\text{34}\) thus, the capital punishment statutes were a violation of the Eighth and Fourteenth Amendments.\(^\text{35}\)

The sole issue addressed in *Furman* was whether the "imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"\(^\text{36}\) The decision of the Court in *Furman* was five to four, with the five justices making up the majority filing separate opinions.\(^\text{37}\) The majority held that "the imposition and carrying out of the death penalty in these cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments,"\(^\text{38}\) and thus, was unconstitutional. All five concurring Justices rationalized their decision based on inequality.\(^\text{39}\) "Justices Brennan and Marshall concluded that the death penalty was per se unconstitutional, in part based on its inevitably unequal application."\(^\text{40}\) The other three concurring Justices, Justices Douglas, Stewart, and White, found fault with the inequality rooted in the sentencing procedure, as opposed to the punishment itself.\(^\text{41}\) Justice White wrote in his concurring opinion that "the Due Process Clause of the Fourteenth Amendment would render unconstitutional ‘capital sentencing procedures that are purposely constructed to allow maximum possible variation from one case to the next, and [that] provide no mechanism to prevent that consciously maximized


\(^{35}\) *Id.*

\(^{36}\) *Furman,* 408 U.S. at 239.

\(^{37}\) *Id.* at 240.

\(^{38}\) *Id.* at 239–40.

\(^{39}\) Howe, supra note 34, at 404 (citing Stephen P. Garvey, "As the Gentle Rain From Heaven": *Mercy In Capital Sentencing,* 81 CORNELL L. REV. 989, 997 (1996)).

\(^{40}\) Howe, supra note 34, at 405.

\(^{41}\) *Id.*
variation from reflecting merely random or arbitrary choice." Thus, the Court left the door open for state legislatures to devise a system, whereby a defendant could be sentenced to death, if procedurally the sentencing state could avoid random or arbitrary choice of those defendants selected for death.

B. After Furman v. Georgia

During the three years following Furman, thirty-five states passed new death penalty statutes. Most states elected to implement statutes that mandated execution upon conviction. Conversely, a small number of states created statutes mandating a separate post-conviction sentencing hearing, combined with guidelines designed to funnel the judge’s or jury’s decision in a certain direction, based upon the circumstances surrounding the criminal act. In 1976, the Court was asked to determine the constitutionality of the revised capital punishment statutes. Therefore, the Supreme Court granted certiorari in five cases, originating in North Carolina, Louisiana, Georgia, Florida, and Texas. Of the five state statutes analyzed by the Court, North Carolina and Louisiana mandated capital punishment upon conviction for murder, whereas Georgia, Florida, and Texas mandated a separate post-conviction sentencing hearing. Ultimately, the Court found North Carolina’s and Louisiana’s capital punishment statutes unconstitutional, on the same grounds as Furman. However, the Court held that the death penalty statutes of Georgia, Florida, and Texas were constitutional, because the guidelines put into place by those state legislatures reduced the "substantial

43. Howe, supra note 34, at 405 n.241 (citing John W. Poulos, The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment, 28 Ariz. L. Rev. 143, 226 (1986)).
44. Id. at 405–06.
45. Id. at 406.
46. Id.
47. Id.
48. Howe, supra note 34, at 406.
49. Id. at 406–07 (citing Woodson v. North Carolina, 428 U.S. 280 (1976) (rejecting the North Carolina system); Roberts v. Louisiana, 428 U.S. 325 (1976) (rejecting the Louisiana statute)).
risk' that the capital sanction would be imposed 'in an arbitrary and capricious manner.'”

Hence, the Court effectively gave notice to state legislatures that it was necessary for any sentencing scheme to somehow narrow the number of defendants eligible for the death penalty.

III. SURVEY OF STATE DEATH PENALTY STATUTES

States have created three different procedural ways to impose capital punishment. The first procedural design mandates that a single judge, or panel of judges, independently make a finding and weighing of aggravating or mitigating circumstances, before imposing a sentence. The second procedural scheme requires a judge to make a finding and weighing of any aggravating or mitigating circumstances after the jury has made a sentencing recommendation to the judge based upon their finding of aggravating or mitigating circumstances. The third procedural style calls for a jury to determine the sentence based upon their finding and weighing of aggravating and mitigating circumstances. In the third procedural style, the judge does not make the final decision as he or she would in the first two procedural styles.

A. State Statutes That Require the Judge to Impose a Sentence, Independent of a Jury

Five states require a judge, without any recommendation from the jury, to impose a sentence in capital cases. Of these five states, Arizona, Arizona, 57

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51. Id. at 406 (quoting Gregg, 428 U.S. at 188 (plurality opinion)).
54. See ARK. CODE ANN. § 5-4-603 (Michie 1997).
55. See Liptak, supra note 11.

The Arizona statute states in relevant part:
A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life . . . .

C. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections G and H of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state.

D. Any information relevant to any mitigating circumstances included in subsection H of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection G of this section shall be governed by the rules of evidence at criminal trials. . . .

E. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection G of this section and as to the existence of any of the circumstances included in subsection H of this section. In evaluating the mitigating circumstances, the courts shall consider any information presented by the victim regarding the murdered person and the impact of the murder on the victim and other family members. The court shall not consider any recommendation made by the victim regarding the sentence to be imposed.

F. In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections G and H of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection G of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

G. The court shall consider the following aggravating circumstances:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a serious offense, whether preparatory or completed.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
Idaho, and Montana call for a single judge to impose the penalty, while the two others, Nebraska and Colorado, require a panel of judges to impose the sentence. For all five states, the judge is burdened with the task of determining if any aggravating or mitigating circumstances were present.

7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.
8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.
9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.
10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

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

Id.

58. IDAHO CODE ANN. § 19-2515 (Michie 1997 & Supp. 2002). This section of the Idaho statute is similar to the process provided in section 13-703 of the Arizona statute, including a listing of aggravating and mitigating factors. Id.
59. MONT. CODE ANN. § 46-18-301, -303, -304 (2001). These three Montana statute sections combine to form a process similar to section 13-703 of the Arizona statute, including a listing of aggravating and mitigating factors. Id.
60. NEB. REV. STAT. § 29-2520 (1995). The Nebraska statute is similar to section 13-703 of the Arizona statute, except Nebraska uses a panel of judges to determine the appropriate sentence in a capital case. Id.
61. COLO. REV. STAT. ANN. § 16-11-103 (West 2001). The Colorado statute is very similar to section 13-703 of the Arizona statute, except that Colorado mandates that a “panel of three judges” conduct the sentencing hearing. Id.
during the crime. If the judge determines that such circumstances existed, then the judge must weigh those circumstances to determine if the aggravating circumstances outweigh the mitigating. If they do, then the judge can impose death; however, if the mitigating circumstances outweigh the aggravating circumstances, then the judge cannot impose death.

B. State Statutes That Require the Jury to Make a Sentencing Recommendation, but Mandate the Judge Make the Final Sentence Determination

Three states require a judge to impose a sentence in capital cases after first receiving a sentencing recommendation by a jury in a separate sentencing hearing. Those states include Florida, Alabama, and Delaware. In these three states, after a jury renders a guilty verdict, the trial moves on to a separate sentencing hearing. In the sentencing hearing, the jury determines if any aggravating circumstances existed during the crime. If the answer is no, the jury then advises that life imprisonment should be imposed. However, if an aggravating circumstance is found, then the jury determines if any mitigating circumstances are present to offset the aggravating circumstances. The jury weighs all possible factors and

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67. DEL. CODE ANN. tit. 11, § 4209(b) (1995).


renders a recommendation to the judge.\textsuperscript{72} Once the recommendation has been made, the judge completes the same process as the jury, and renders his or her decision.\textsuperscript{73} Even though the judge often times sides with the jury, he or she is not required to do so.\textsuperscript{74} Thus, while the jury has input, the judge makes the ultimate decision, as is done in Arizona, Colorado, Idaho, Montana, and Nebraska.

C. State Statutes that Require the Jury to Determine a Sentence

The remaining twenty-eight states that allow capital punishment require the jury to impose the sentence, and not the judge.\textsuperscript{75} The statutes in these states are similar to those in states where the judge makes the decision after the jury rendered their sentencing recommendation. However, in these states, the jury renders a final decision, and not only a recommendation.\textsuperscript{76} For example, section 5-4-604 of the Arkansas Code provides a list of aggravating factors,\textsuperscript{77} and section 5-4-605 of the Arkansas Code provides a list of possible mitigating factors.\textsuperscript{78} Both lists are very similar to those factors found in the Florida Statutes discussed above. In states such as Arkansas, even though relatively the same aggravating and mitigating factors are weighed, the jury does this service exclusively.

IV. CASES THAT CREATED THE CONFLICT LEADING TO RING V. ARIZONA

A. Walton v. Arizona

In the case of Walton v. Arizona,\textsuperscript{79} Walton was convicted of first-degree murder in Arizona for the shooting death of one Thomas Powell.\textsuperscript{80} During
the separate sentencing hearing, as was mandated by Arizona law, the judge found two aggravating factors. The first aggravating factor was that the murder was committed "in an especially heinous, and cruel or depraved manner," because Walton shot Thomas as Walton held Thomas to the ground with his foot on Thomas' neck. This act was done after Walton and his two accomplices spoke in front of Thomas about their plan for disposing of him. The second aggravating factor was that the murder was "committed for pecuniary gain." This finding was made because Walton and his accomplices murdered Powell in an effort to steal his car.

In his defense, Walton argued several potential mitigating factors. However, the judge found that the aggravating factors outweighed the mitigating; therefore, the judge sentenced Walton to death.

The issue before the United States Supreme Court was whether the Arizona law, which allowed a judge to determine the existence of aggravating and mitigating circumstances in a separate sentencing hearing, was constitutional, or did it violate the defendant's Sixth Amendment right to a jury trial? The Court held that the Arizona capital punishment statute was constitutional, because the aggravating circumstances were not elements of the crime, which the jury was required to find. Rather, the aggravating circumstances were merely "sentencing considerations."

In justification of its holding, the Court stated that the rule governing a fact finder in a criminal trial is that the jury must decide questions of fact, as it pertains to the elements of the crime. This means that a jury must make the factual findings to determine guilt or acquittal. The Court went on to say that this rule did not affect the Arizona statute, because the Arizona statute allowed the jury to make the findings of fact regarding the elements,

81. ARIZ. REV. STAT. ANN. § 13-703(c) (West 1989).
82. Walton, 497 U.S. at 645.
83. ARIZ. REV. STAT. ANN. § 13-703(g)(6) (West 1989).
84. Walton, 497 U.S. at 644.
85. Id.
86. Id. at 645; see ARIZ. REV. STAT. ANN. § 13-703(g)(5) (West 2001 & Supp. 2001).
87. Walton, 497 U.S. at 644.
88. Id at 645.
89. Id.
90. Id. at 642.
91. Id. at 649.
92. Walton, 497 U.S. at 648.
93. Id.
94. Id.
and thus, the jury determined guilt or acquittal.\textsuperscript{95} Moreover, during the sentencing portion of the trial, after the jury judged the elements, the judge was able to examine factors as "considerations," not elements, and choose between death or life imprisonment.\textsuperscript{96} In making this determination, the Court relied on \textit{Hildwin v. Florida} as precedent.\textsuperscript{97} Walton attempted to distinguish the Florida statute by claiming that it used aggravating factors as considerations, and the Arizona statute used them as elements.\textsuperscript{98} The Court addressed Walton’s argument by citing \textit{Poland v. Arizona},\textsuperscript{99} where the Court stated that "[a]ggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment."\textsuperscript{100} Thus, under the Arizona statute, the judge’s findings did not result in a conviction or acquittal, and therefore, were not findings of elements; rather, they were sentencing considerations.\textsuperscript{101}

\textbf{B. Apprendi v. New Jersey}

Only ten years after Walton, the United States Supreme Court was, again, faced with the issue of whether a judge could make a finding of fact that increased the defendant’s sentence. That issue was raised in \textit{Apprendi v. New Jersey}.\textsuperscript{102} In Apprendi, the defendant was charged with "fir[ing] several .22- caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood."\textsuperscript{103} At the hearing, the "grand jury returned a 23-count indictment."\textsuperscript{104} The defendant took "a plea agreement, pursuant to which [the defendant] pleaded guilty to two counts of second-degree possession of a firearm," and one count of third-

\begin{itemize}
\item \textsuperscript{95} \textit{Id.}
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} 490 U.S. 638, 639–40 (1989). In \textit{Hildwin}, the Court upheld the decision of \textit{Spaziano v. Florida}, 468 U.S. 447 (1984), and found the Florida statute at issue was constitutional because "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." \textit{Hildwin}, 490 U.S. at 640–41.
\item \textsuperscript{98} \textit{Walton}, 497 U.S. at 648.
\item \textsuperscript{99} 476 U.S. 147 (1986).
\item \textsuperscript{100} \textit{Id.} at 156.
\item \textsuperscript{101} \textit{Walton}, 497 U.S. at 648.
\item \textsuperscript{102} 530 U.S. 466 (2000).
\item \textsuperscript{103} \textit{Id.} at 469.
\item \textsuperscript{104} \textit{Id.}
\end{itemize}
degree unlawful possession of an antipersonnel bomb. As of the plea agreement . . . the State reserved the right to request the court to impose a higher ‘enhanced sentence’ on one of the counts, on the basis that it was racially motivated. Also, as part of the agreement, the defendant reserved the right to challenge the constitutionality of the hate crime sentencing enhancement.

The trial judge accepted the guilty pleas, and upon the prosecutor’s motion for an extended sentence, held an evidentiary hearing. The judge “concluded that the evidence supported a finding ‘that the crime was motivated by racial bias.’” Having made this finding “by a preponderance of the evidence,” the judge sentenced the defendant to twelve years imprisonment. The statutory maximum for this crime was ten years. Therefore, the sentence imposed by the trial judge exceeded the statutory maximum by two years.

The defendant appealed, stating the Due Process Clause of the Fourteenth Amendment required that the finding of bias be “proved to a jury beyond a reasonable doubt.” The appellate court affirmed the decision because the “‘hate crime enhancement’ [was] a ‘sentencing factor,’ rather than an element of an underlying offense, and that decision was within the State’s established power to define the elements of its crimes.” Moreover, the appellate court stated that the factor in dispute was “motive,” which is a “traditional ‘sentencing factor,’ one not considered an ‘essential element.’”

Upon reaching the United States Supreme Court, the issue was whether the defendant “had a constitutional right to have a jury find such [racial] bias on the basis of proof beyond a reasonable doubt.” The Court held that a
defendant does have that right. The Court referenced to Jones v. United States, and said that:

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

Moreover, the Court said the Fourteenth Amendment deserved the same treatment, and thus, extended the rule to include state courts.

In the Court's analysis of the issue, it stated that nothing throughout history indicates that it is "impermissible for judges to exercise discretion;" however, that discretion must be made "within the range prescribed by statute." To support this proposition, the Court looked at McMillan v. Pennsylvania, where it decided that mandatory minimum sentences were constitutional because the mandatory minimum was within the range prescribed by the statute. The Court also stated in regard to McMillan, that as long as the judge "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty," then the judge may change the sentence.

The Court then examined the sole exception to the rule from McMillan. The exception, according to Almendarez-Torres v. United States, is a defendant's prior felony conviction. This exception was restated in Jones as follows: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Thus, the exception would have applied in Apprendi if the defendant had a prior felony conviction. However, a prior felony conviction was never

118. Id. at 476.
120. Apprendi, 530 U.S. at 476 (quoting Jones, 526 U.S. at 243).
121. Id. at 476.
122. Id. at 481 (emphasis in original).
125. Id. at 486 (citing McMillan, 477 U.S. at 86–88).
128. Id. at 490 (quoting Jones, 526 U.S. at 243).
introduced; and therefore, the rule from McMillan applied in Apprendi, leaving the judge without the ability to increase the defendant’s sentence beyond the statutory maximum.

The State presented two arguments in opposition to the Court’s application of the McMillan rule in this case. The Court began with the State’s argument that the “finding of biased purpose is not an ‘element’” of the crime; rather, it is a “sentencing factor.” The Court disagreed with New Jersey on this point. The Court stated that the statute required the judge to make a determination of “whether the defendant possessed, at the time he committed the subject act, a ‘purpose to intimidate’ on account of . . . race.” Thus, the statute required the determination “of the defendant’s state of mind,” which is commonly known as mens rea. The Court went on to say that “[t]he defendant’s intent in committing the crime is perhaps as close as one might hope to come to a core criminal offense ‘element.’” The Court concluded their analysis of this argument by saying the “relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”

The State’s second argument was that the exception created by Almendarez-Torres allowed the judge to impose a sentence beyond the maximum provided by the substantive statute under which a defendant is charged.” This meant that a sentence could be increased above the maximum if a statute allowed a judge to do so. The Court distinguished Almendarez-Torres from Apprendi by stating that recidivism had nothing to do with the New Jersey statute. Instead, “New Jersey’s biased purpose inquiry goes precisely to what happened in the ‘commission of the offense.’” Thus, the Court was allowing the objective exception of a prior felony conviction to remain, but eliminating the allowance of any subjective exceptions found by a judge.

129. Id. at 466.
130. Id. at 492.
131. Id.
132. Apprendi, 530 U.S. at 492.
133. Id.
134. Id. (citing BLACK’S LAW DICTIONARY 1137 (rev. 4th ed. 1968)).
135. Id. at 493.
136. Id. at 494.
137. Apprendi, 530 U.S. at 492.
138. Id. at 496.
139. Id. (quoting Almendarez-Torres, 523 U.S. at 244).
In the final section of the majority opinion it stated that Walton remained good law, and furthermore, Apprendi did not overrule Walton. However, as Justice O'Connor pointed out in her dissent, Walton and Apprendi could not coexist. Also in Justice O'Connor's dissent, she wrote, regarding the conflict between Apprendi and Walton, that "the most significant impact of the Court's decision will be a practical one—its unsettling effect on sentencing conducted under current federal and state determinate—sentencing schemes." Justice O'Connor felt that "the Court's decision threaten[s] to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision [in Apprendi]." Thus, Justice O'Connor predicted the procedural problems that were certain to ensue because of the majority's decision.

V. RING V. ARIZONA

As Justice O'Connor predicted, within two years of its decision, the Supreme Court was faced with an appeal based on Apprendi. In 2002, the Court granted certiorari in the case of Ring v. Arizona. In Ring, the defendant, Timothy Stuart Ring, was charged with murder during the robbery of an armored van with two other accomplices. At trial, "[t]he jury deadlocked on premeditated murder" because "the evidence admitted at trial failed to prove, beyond a reasonable doubt, that [Ring] was a major participant in the armed robbery or that he actually murdered Magoch, [the victim]." However, the jury did return a verdict of first-degree felony murder for Ring's participation in the act.

Between the guilt phase of the trial and the sentencing hearing, James Greenham, Ring's accomplice, came forward after accepting a plea agreement, and testified that Ring planned "the robbery for several weeks before it occurred," and "[took] the role as leader because he laid out all the

140. Id. at 496–97.
141. See id. at 538 (O'Connor, J., dissenting).
143. Id. at 551 (O'Connor, J., dissenting).
144. See id. (O'Connor, J., dissenting).
146. Id. at 2432–33.
147. Id. at 2433.
148. Id. at 2434 (quoting State v. Ring, 25 P.3d 1139, 1152 (Ariz. 2001)).
149. Id. at 2433.
150. Ring, 122 S. Ct. at 2435.
Ring's accomplice went on to say that "Ring shot [Magoch] with a rifle equipped with a homemade silencer." Lastly, Greenham stated that while the three were dividing up the money, Ring upbraided him and Ferguson for 'forgetting to congratulate [Ring] on [his] shot.'

At the sentencing hearing, the judge cited Greenham's testimony before concluding "that Ring [was] the one who shot and killed Mr. Magoch." Based on this conclusion, the judge "turned to the determination of aggravating and mitigating circumstances." The judge "found two aggravating factors." First, "that Ring committed the offense in expectation of receiving something of 'pecuniary value,' as described in § 13-703; '[t]aking the cash from the armored car was the motive and reason for Mr. Magoch's murder and not just the result." "Second, the judge found that the offense was committed 'in an especially heinous, cruel or depraved manner.' To mitigate the crime, the judge found only one "factor[,] Ring's 'minimal' criminal record.'

On appeal, Ring challenged the constitutionality of the Arizona statute under Apprendi, but the Supreme Court of Arizona upheld the sentence because the majority in Apprendi stated "that Walton remained good law." However, the Supreme Court of Arizona went on to confirm that Justice O'Connor's dissent in Apprendi was correct when she stated that "'[w]ithout that critical finding [of an aggravating factor], the maximum sentence to which the defendant [was] exposed is life imprisonment, and not the death penalty.' Therefore, the Supreme Court of Arizona agreed with Justice O'Connor's interpretation of the Arizona statute. However, "the Arizona court understood that it was bound by the Supremacy Clause to apply Walton, which [the] Court had not overruled. It therefore rejected Ring's constitutional attack on the State's capital murder judicial sentencing system.'

151. Id. at 2435 (quoting testimony of Greenham at sentencing hearing).
152. Id.
153. Id.
154. Id (quoting App. to Pet. for Cert. 47a, State v. Ring, 25 P.3d 1139 (Ariz. 2001)).
155. Ring, 122 S. Ct. at 2435.
156. Id.
157. Id.
158. Id.
159. Id.
160. Ring, 122 S. Ct. at 2436.
161. Id. (quoting State v. Ring, 25 P.3d 1139, 1151 (Ariz. 2001)).
162. See id.
163. Id. (quoting Ring, 25 P.3d at 1152).
On appeal to the United States Supreme Court, the issue was “whether an aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment’s jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury[?]” The Court found “that Walton and Apprendi [were] irreconcilable.” Therefore, the Court overruled Walton, and held that a jury must make such a determination.

The Court began its analysis of this issue by discussing the cases which led to this point, Walton and Apprendi. The Court stated that in the Walton holding, the aggravating and mitigating factors were seen “as ‘sentencing considerations.’” However, in Apprendi, the Court stated that a judge could not increase “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.” Furthermore, the Court restated its reconciliation of the two cases in Apprendi by finding that “[t]he key distinction... was that a conviction of first-degree murder in Arizona carried a maximum sentence of death.” However, based upon the Supreme Court of Arizona’s opinion confirming Justice O’Connor’s observation regarding the Arizona statute, it appeared that the maximum sentence was life imprisonment before the judge made a determination of aggravating or mitigating factors.

Arizona’s first argument was the same argument it made in Walton, that Ring was sentenced within the range of the law. However, unlike in Walton, the Court stated that the state’s argument “overlook[ed] Apprendi’s instruction that ‘the relevant inquiry is one not of form, but of effect.’ In effect ‘the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury’s guilty verdict.’”

Arizona’s second argument was also based on Walton, which was the distinction “between elements of an offense and sentencing factors.” The Court rejected that argument as well, stating that “[a]s to elevation of the

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164. Id. at 2437.
165. Ring, 122 S. Ct. at 2443.
166. Id.
167. Id. at 2437–40.
168. Id. at 2437 (quoting Walton v. Arizona, 497 U.S. 639, 648 (1990)).
169. Id. at 2439 (quoting Apprendi v. New Jersey, 530 U.S. 466, 482–83 (1990)).
170. Ring, 122 S. Ct. at 2440.
171. Id.
172. Id. (quoting Apprendi, 530 U.S. at 494).
173. Id. at 2441.
maximum punishment... *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an ‘element’ or a ‘sentencing factor’ is not determinative of the question ‘who decides,’ judge or jury.” 174 Thus, the Court appeared to see no difference between an “element” and a “sentencing factor” if the judge’s decision increased the defendant’s sentence beyond the maximum allowed under the statute.

Arizona’s third argument was that “‘[d]eath [was] different,’” and hence, a judge should make the decision to impose death, rather than a jury. 175 Arizona based this theory on *Furman*, which required states to impose factors to minimize the risk of arbitrary rulings of death sentences. 176 Aside from the Eighth Amendment argument, which the *Furman* Court relied upon, “Arizona present[ed] ‘no specific reason for excepting capital defendants from the constitutional protections... extend[ed] to defendants generally, and none is readily apparent.’” 177 Moreover, the Court went on to say that a state legislature could not create laws that restrict one’s constitutional protection in order to preserve another. 178 However, Arizona continued that argument by stating “that judicial authority over the finding of aggravating factors may... be a better way to guarantee against the arbitrary imposition of the death penalty.” 179 The Court responded to this version of the argument by stating that “[t]he Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders.” 180 The Court concluded its analysis of this argument by stating that the majority of states that impose the death penalty do so without compromising the Eighth Amendment. 181

In closing, Justice Ginsburg clarified the ruling in this case by stating “[b]ecause Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment requires that they be found by a jury.” 182

Justice O’Connor, again dissenting as she did in *Apprendi*, stated that she would have chosen to overrule *Apprendi*, not *Walton*. 183 Justice O’Connor went on to say that “*Apprendi was a serious mistake,” and that
"[t]he Court ha[d] failed, both in Apprendi and in the [Ring] decision... to offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the increase in the 'maximum penalty rule' is not required by the Constitution." Furthermore, Justice O'Connor stated that the "destabilizing effect" that Apprendi had on the criminal justice system is disastrous. She went on to opine that "[it is simply beyond dispute that Apprendi threw countless criminal sentences into doubt and thereby caused an enormous increase in the workload of an already overburdened judiciary." Justice O'Connor concluded by identifying the four state capital sentencing schemes, other than Arizona's, that Ring effectively declared unconstitutional: Colorado's, Idaho's, Montana's, and Nebraska's; and further identified four other states whose capital sentencing schemes are now in doubt: Alabama's, Delaware's, Florida's, and Indiana's.

VI. LEGAL RAMIFICATIONS OF RING

A. Short-Term

Due to the Court's decision in Ring, states will be required to decide three very important issues. First, the states must decide whether their state's death penalty statute was affected by the ruling. Second, if their statute was affected, whether death row inmates in their state will receive new sentencing trials or have their sentences commuted to life imprisonment, as all death penalty sentences were after the landmark decision of Furman? Indiana's new capital sentencing scheme, which requires a unanimous jury to render the final sentencing decision, went into effect on July 1, 2002. DEATH PENALTY INFO. CTR.; INDIANA, at http://www.deathpenaltyinfo.org/indiana.html (last visited Mar. 22, 2003). Thus, while Indiana's new capital sentencing scheme appears to be safe from constitutional challenges, current death row inmates sentenced under the old scheme may have a constitutional claim. See Death Sentence Laws in Five States Overturned, (June 24, 2002), at http://www.msnbc.com/news/771488.asp?pne=msn.

185. Id. at 2449 (O'Connor, J., dissenting).
186. Id.
187. Id. at 2449-50 (O'Connor, J., dissenting). Indiana's new capital sentencing scheme, which requires a unanimous jury to render the final sentencing decision, went into effect on July 1, 2002. DEATH PENALTY INFO. CTR.; INDIANA, at http://www.deathpenaltyinfo.org/indiana.html (last visited Mar. 22, 2003). Thus, while Indiana's new capital sentencing scheme appears to be safe from constitutional challenges, current death row inmates sentenced under the old scheme may have a constitutional claim. See Death Sentence Laws in Five States Overturned, (June 24, 2002), at http://www.msnbc.com/news/771488.asp?pne=msn.
The *Ring* decision makes the death penalty statutes in Arizona, Idaho, Montana, Colorado, and Nebraska unconstitutional, because a judge makes the sole determination in those states of aggravating or mitigating factors. Thus, the judge is essentially making factual findings to increase the sentence beyond what the jury finding of guilt deemed appropriate. Therefore, those state statutes are in direct violation of *Ring*, and thus, unconstitutional.

The fate of Alabama, Delaware, and Florida’s death penalty statutes are not so easily determined. In those states, the judge renders a final order after the jury makes a sentencing recommendation to the judge. This process is misleading because one might think that the jury’s extended role makes the statute constitutional. This procedure, however, is unconstitutional. First, since the judge is not required to sentence the defendant in accordance with the jury’s verdict, the judge, in essence, possesses the same power in these three states as the judge possessed in Arizona. Second, as Justice Ginsburg said in *Ring*, the test is in effect, not form. Therefore, if you look at the effect of these three state statutes on a defendant’s sentencing hearing, instead of the form, it becomes clearer that the jury’s recommendation means little or nothing, and the judge makes the necessary factual finding of any aggravating or mitigating circumstances. Thus, when *Apprendi* is applied to the state death penalty statutes of Alabama, Delaware, and Florida, it appears they will be declared unconstitutional, even though they have been declared constitutional in the past, as was *Walton*.

All other states possessing the death penalty currently require the jury to sentence the defendant in capital cases. Meaning, the judge plays no role in determining whether aggravating or mitigating circumstances are present. Therefore, those statutes should be unaffected by *Ring*.

For the eight states mentioned as having unconstitutional death penalty statutes, their legislatures must decide what procedure to put into place for the death row inmates who were sentenced under those unconstitutional

190. The Supreme Court of Florida has already stayed the executions of two death row inmates until it can decide how *Ring* effects, if at all, Florida’s death penalty statute. Phil Long, *Florida Supreme Court Halts Two Executions*, MIAMI HERALD, July 9, 2002, at A2. The Supreme Court of Florida’s decision is expected in the Fall of 2002. *Id.*
sentencing procedures. For example, after *Furman* was decided, all inmates on death row had their sentences commuted to life.\textsuperscript{196} The states at that time did not have the aggravating or mitigating circumstances in place to offer as sentencing guidelines for juries and judges. Therefore, commuting the sentences appears to have been the only viable choice. However, at this moment, other state death penalty statutes can work as a model for a constitutional statute, and new sentencing hearings are more possible. Thus, it is just a matter of whether the states are willing to spend the money and time to provide new sentencing hearings.

Regardless of whether the affected states create a new death penalty statute for new sentencing hearings, or the states choose to commute the death sentences to life imprisonment, they must still decide how to create a new capital punishment statute for future offenders. Three obvious options exist. First, the affected states can model their statutes after a state statute that has not been declared unconstitutional, and thus, require a jury to make the final sentencing decision. Second, an affected state can attempt to cleverly structure a statute where the judge still has some input in the process, in hopes that the Supreme Court will find the new statute constitutional. One thing is certain, a state cannot get around *Ring* by making death the mandatory sentence, and allowing the judge to lower the sentence to life in prison, because this idea was struck down in *Furman*.\textsuperscript{197} Finally, the state can abolish the death penalty. While this may be possible in some of the affected states, those such as Florida may find this option politically impossible since it executes such a high number of prisoners,\textsuperscript{198} and a large majority of the public supports its use.\textsuperscript{199}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{197} Howe, supra note 34, at 406 (citing Woodson v. North Carolina, 428 U.S. 280 (1976) (rejecting the North Carolina system)); Roberts v. Louisiana, 428 U.S. 325 (1976) (rejecting the Louisiana statute)).
\item \textsuperscript{198} Florida has ranked fourth on the list for most executions since 1976. *Death Penalty Info. Ctr., Number of Executions by State Since 1976*, at http://www.deathpenaltyinfo.org/dpicreg.html (last visited Apr. 10, 2003).
\item \textsuperscript{199} Staff, Opinion Editorial, *The News-Press* (Ft. Myers, Fla.), Jan. 18, 2003, at 8B. "Support for the death penalty remains high [in Florida] at about 70 percent . . . ." *Id.*
\end{itemize}
\end{footnotesize}
B. **Long-Term**

The long-term effects of *Ring* are fewer in number, but possibly greater in value.\(^{200}\) *Ring* might not bring an end to the death penalty, but it could decrease the number of defendants sentenced to death. According to Ronald J. Tabak, the co-chairman of an American Bar Association committee on the death penalty, “[f]ar, far, far more often when the judges override the jury, it is in order to impose the death penalty when the jury has recommended life.”\(^{201}\) Mr. Tabak stated that this is evident in those states, such as Florida and Alabama,\(^{202}\) where the jury only provides a sentencing recommendation, but the judge still has the final say.\(^{203}\) Thus, if all eight states where death penalty statutes have been called into question are forced to change their death sentencing procedure, then there might be a reduction in the number of death sentences rendered in the future.

**VII. CONCLUSION**

In conclusion, the Court succeeded in providing some clarity of *Apprendi* in *Ring*, but left an unsettling question for some states as to *Ring*’s range. The Court has experienced difficulty in determining how to allow states to apply the death penalty. This difficulty apparently began in 1972 with *Furman*, extended through 1990 with *Walton*, and apparently has continued through 2002 with *Ring*. It is possible that inevitable appeals from states such as Alabama, Florida, and Delaware will clarify *Ring*’s impact even more, but unfortunately, death row inmates in those states will have to wait patiently until the Supreme Court decides to revisit the issue—once again.

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200. If you value life over questionable deterrence and retribution, then less executions might provide a greater value.

201. Liptak, *supra* note 11.

202. “James S. Liebman, [a law professor at Columbia University], said that: ‘about a quarter of the death row in Alabama is made up of people whom juries sentenced to life in prison but judges sentenced to death.’” Liptak, *supra* note 11.

203. *Id.*