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## THE ULTIMATE AUTHORITY ON THE ULTIMATE PUNISHMENT: THE REQUISITE ROLE OF THE JURY IN CAPITAL SENTENCING

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On July 2, 1976, the Supreme Court issued five death penalty decisions,<sup>1</sup> which shaped the modern era of capital punishment jurisprudence—and also planted the seeds for a quarter-century of confusion about the role of the jury in capital sentencing. Each of the five cases involved a death penalty statute that a state enacted in an attempt to cure the constitutional infirmities that led to the Court's invalidation of the death penalty in *Furman v. Georgia*<sup>2</sup> in 1972. Because a terse per curiam opinion announced *Furman*'s holding, with each of the five Justices in the majority articulating somewhat different rationales in separate concurring opinions,<sup>3</sup> state legislators who desired the death penalty<sup>4</sup> had little guidance on how to craft a statute that would avoid the constitutional vices which *Furman* identified.<sup>5</sup>

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1. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

2. 408 U.S. 238 (1972).

3. All five of the Justices in the majority agreed that capital punishment, as then administered, was plagued by arbitrariness, unpredictability, and capriciousness, but there was no clear consensus on the precise basis for deeming the death penalty unconstitutional. *See Furman*, 408 U.S. at 240-57 (Douglas, J., concurring) (discretionary sentencing procedures allow discrimination); *id.* at 291-300 (Brennan, J., concurring) (statutes can produce capricious sentencing); *id.* at 309-10 (Stewart, J., concurring) (statutes can lead to random and capricious administration of death penalty); *id.* at 311-14 (White, J., concurring) (infrequency of imposition of death penalty renders punishment "unusual" and pointless); *id.* at 364-66 (Marshall, J., concurring) (death penalty discriminates against members of minority groups). Justices Brennan and Marshall addressed not only the constitutionality of the statutes before the Court but also the broader issue of the constitutionality of the death penalty, concluding that the death penalty is per se unconstitutional. *Furman*, 408 U.S. at 305-06 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring).

4. In the wake of *Furman*, thirty-five states revised their preexisting death penalty statutes or enacted new ones. In understanding state legislators' unwillingness to give up on the death penalty despite *Furman*'s invalidation of all existing death penalty statutes, it is useful to consider that this was a

With five very different statutes before the Court in 1976, the resulting decisions employed a welter of rationales that were difficult to piece together coherently.<sup>6</sup> What was clear, in the aftermath of these decisions, was that death penalty statutes were not per se unconstitutional;<sup>7</sup> that any such statute must guard against arbitrariness by establishing standards to guide the sentencer's discretion;<sup>8</sup> and that such a statute also must permit the sen-

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period in which anti-crime politics were beginning to reshape the political identity of American policymakers. See, e.g., MARC MAUER, RACE TO INCARCERATE 42-55 (1999).

5. The only statutes before the Court in *Furman* were those of Georgia and Texas. See *Furman*, 408 U.S. at 238-42. But, because the statutory attribute that resulted in the Court's invalidation of those statutes—absolute jury discretion—characterized all death penalty statutes in existence at the time, see *Lockett v. Ohio*, 438 U.S. 586, 598 (1978), it was readily apparent that all of the existing statutes were unconstitutional. Following the issuance of *Furman*, the state supreme courts in the other states implemented the obvious lesson of *Furman* by invalidating their respective death penalty statutes. See, e.g., *Hubbard v. State*, 274 So. 2d 298, 301 (Ala. 1973).

6. The rulings in the five cases were the product of a shifting majority. A plurality composed of Justices Stewart, Powell, and Stevens formed the core of that majority in all five cases. In the three cases in which the Court upheld a death penalty statute—*Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas*—the plurality was joined by four Justices (White, Blackmun, Rehnquist, and Chief Justice Burger) who took the position that all five of the death penalty statutes before the Court were constitutional. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). In the two cases in which the Court struck down a death penalty statute—*Woodson v. North Carolina* and *Roberts v. Louisiana*—the plurality was joined by Justices Brennan and Marshall, who took the position that capital punishment is per se unconstitutional. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

7. *Gregg*, 428 U.S. at 176-87.

8. See *Jurek*, 428 U.S. at 270-74; *Proffitt*, 428 U.S. at 251-53; *Gregg*, 428 U.S. at 196-98. The Stewart-Powell-Stevens plurality's detailed discussion of the various features of the Georgia, Florida, and Texas statutes that enabled them to pass constitutional muster appeared to provide an inventory of criteria for gauging the constitutionality of a death penalty statute. However, many of the guidelines applauded by the Court were subsequently declared as constitutionally unnecessary. For example, the Stewart-Powell-Stevens plurality emphasized that Georgia had provided for appellate review of the proportionality of death sentences, a statutory feature that guarded "against a situation comparable to that presented in *Furman*" and "serve[d] as a check against the random or arbitrary imposition of the death penalty," *Gregg*, 428 U.S. at 198, 206 (plurality opinion), but the Court later declared that such proportionality review is not required by the Eighth Amendment. *Pulley v. Harris*, 465 U.S. 37, 44 (1984). The Stewart-Powell-Stevens plurality emphasized that the Georgia statute required that the jury "narrow the class of murderers subject to capital punishment" by finding an aggravating circumstance beyond a reasonable doubt, *Gregg*, 428 U.S. at 196, but the Court subsequently declared that a death penalty statute can satisfy the Eighth Amendment even if the same aggravating circumstance serves both to elevate a crime to murder at the charging and guilt-innocence stages and to provide the basis for a death sentence at the capital sentencing hearing. *Lowenfield v. Phelps*, 484 U.S. 231, 233 (1988). The Stewart-Powell-Stevens plurality emphasized that Georgia's statute provided for the jury's attention to be directed not only to aggravating circumstances but also whether there were "any special facts about this defendant that mitigate against imposing capital punishment," *Gregg*, 428 U.S. at 197, but the Court has declared in recent years that a death sentence is valid even if the jury instructions omit all reference to the mitigating circumstances in the case and furthermore omit all explanation of the concept of mitigation. *Weeks v. Angelone*, 528 U.S. 225, 227 (2000); *Buchanan v. Angelone*, 522 U.S. 269, 270 (1998). Just as statutory features that seemed to be constitutionally indispensable were later disavowed, features that appeared to survive constitutional scrutiny in the 1976 cases were later struck down, with the explanation that the 1976 cases had merely upheld these statutory features on their face. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 315-16, 328 (1989) (although *Jurek v. Texas* upheld "the facial validity of the Texas death penalty statute," the Court invalidates death sentence because statute prevented jury from adequately considering and giving effect to mitigating evidence). Justice Scalia states in his concurring and dissenting opinion that "[w]hile rejection of a facial challenge to a statute does not preclude all as-applied attacks, surely it precludes one resting upon the same asserted principle of law. And that is the situation here." *Penry*, 492 U.S. at 354 (Scalia, J., concurring in part and dissenting in part); see also *Godfrey v. Georgia*, 446 U.S. 420, 422-23, 433 (1980) (striking down Georgia aggravating circumstance

tencer to consider mitigating circumstances as part of an individualized sentencing determination.<sup>9</sup>

What was left *unclear* was whether the Constitution imposes any constraints upon a legislature's resolution of the question of whether the capital sentencing determination should be allocated to a jury or to a judge. The death penalty statutes before the Court in *Furman* had assigned the sentencing decision to a jury, as did four of the five statutes before the Court in the 1976 cases.<sup>10</sup> But one of the 1976 cases involved a statute that created a hybrid sentencing system in which the jury issued a sentencing "recommendation" but a judge rendered the ultimate sentencing verdict.<sup>11</sup> The Court sustained the constitutionality of that statute on its face, rejecting constitutional challenges to various aspects of the Florida law.<sup>12</sup> The plurality opinion of Justices Stewart, Powell, and Stevens—which appeared to articulate the authoritative rationale for the Court's holding<sup>13</sup>—commented that, notwithstanding the "important societal function" of "jury sentencing in a capital case," the Court "has never suggested that jury sentencing is constitutionally required."<sup>14</sup>

In the ensuing years, a majority of the Court reiterated and amplified that view, rejecting other constitutional challenges to Florida's jury override system<sup>15</sup> and to a somewhat differently structured jury override provision in Alabama's death penalty statute.<sup>16</sup> The apparent definitiveness of these rulings was underscored by the degree of support they found on the Court. The Court's upholding of Florida's jury override provision in *Spaziano v. Florida*<sup>17</sup> in 1984 was a 6-3 decision; two of the three Justices in the dissent were Brennan and Marshall, whose position on the constitutionality of the jury override provision could be viewed as an application of these two Justices' broader assessment that the death penalty is *per se* unconstitutional.<sup>18</sup> When the Court in 1989 rejected a new, differently-framed challenge to Florida's provisions for allocating the capital sentencing determination to

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as unconstitutionally vague even though the same statutory provision had previously been upheld "on its face" against the same challenge in *Gregg v. Georgia*).

9. This principle was at the core of the Court's rulings striking down the two mandatory death penalty statutes before the Court. *See Roberts*, 428 U.S. at 333-34; *Woodson*, 428 U.S. at 304.

10. *Furman*, 408 U.S. at 245.

11. *See Proffitt*, 428 U.S. at 248-49.

12. *Id.* at 253 ("On its face, the Florida system . . . satisfies the constitutional deficiencies identified in *Furman*.").

13. For an explanation of the central role that this plurality played in the five death penalty decisions of July 2, 1976, *see supra* note 6. *But see supra* note 8 (describing subsequent Supreme Court decisions that repudiated the apparent import of various aspects of the Stewart-Powell-Stevens plurality opinions of July 2, 1976).

14. *Proffitt*, 428 U.S. at 252 (plurality opinion).

15. *See Hildwin v. Florida*, 490 U.S. 638, 640 (1989) (*per curiam*); *Spaziano v. Florida*, 468 U.S. 447, 449 (1984); *see also Dobbert v. Florida*, 432 U.S. 282, 292-97 (1977).

16. *Harris v. Alabama*, 513 U.S. 504 (1995).

17. 468 U.S. 447 (1984).

18. *See Spaziano*, 468 U.S. at 467 (Stevens, J., concurring in part and dissenting in part, joined by Brennan and Marshall, JJ.). Justice White issued a brief concurring opinion, joined by Chief Justice Rehnquist, explaining that he did not join a certain part of the majority's opinion. *Id.* at 467 (White, J., concurring in part and concurring in the judgment, joined by Rehnquist, C.J.).

judge and jury, the Court spoke in a per curiam decision, joined by all but Justices Brennan and Marshall.<sup>19</sup> By the time the challenge to Alabama's jury override provision reached the Court, Justices Brennan and Marshall were no longer on the bench, and eight members of the Court joined in the decision upholding the statute; only Justice Stevens dissented.<sup>20</sup>

The jury override decisions appeared to leave open the question whether a capital sentencing statute that eliminates the jury altogether from the capital sentencing process—and allocates the capital sentencing determination entirely to a judge—could pass constitutional muster. In 1990, in *Walton v. Arizona*,<sup>21</sup> a majority of the Court demonstrated that it regarded this distinction as immaterial to the constitutional analysis. With only a very brief discussion, the majority applied the jury override cases directly to Arizona's judicial sentencing statute, categorically rejecting the argument that there is a constitutionally mandated role for the jury in capital sentencing.<sup>22</sup>

The *Walton* decision stood as the Court's definitive pronouncement on the subject until June 24, 2002, when the Court in *Ring v. Arizona*<sup>23</sup> overruled *Walton*<sup>24</sup> and declared that the Constitution requires that at least some aspects of the capital sentencing determination be allocated to a jury rather than a judge.<sup>25</sup> The *Ring* decision does not resolve how broad a role the jury must play in the capital sentencing process. That issue is currently the subject of heated litigation<sup>26</sup> in the lower courts in the five states with judge-

19. *Hildwin*, 490 U.S. at 638.

20. *See Harris*, 513 U.S. at 515.

21. 497 U.S. 639 (1990).

22. *See Walton*, 497 U.S. at 647-49. The *Walton* majority decision, which Justice White authored, was joined in relevant part by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. *Id.* at 642. Justice Blackmun filed a dissenting opinion, joined by Justices Brennan, Marshall and Stevens, concluding that other aspects of Arizona's death penalty statute were unconstitutional. *Id.* at 677 (Blackmun, J., dissenting). Justice Stevens dissented separately to express his view that a capital defendant is entitled to a jury determination of the facts underlying the imposition of a death sentence. *Id.* at 709. Justice Brennan issued a dissenting opinion, joined by Justice Marshall, to reiterate their previously expressed view that the death penalty is per se unconstitutional and to express concern about trends in the Court's capital punishment jurisprudence. *Id.* at 674-75.

23. 122 S. Ct. 2428 (2002).

24. *See Ring*, 122 S. Ct. at 2432, 2443 (“[T]oday we overrule *Walton* in relevant part . . . 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.”).

25. *Id.* at 2443. The Court stated:

Because 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 . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it [did not] encompass[] . . . the factfinding necessary to put [a defendant] . . . to death.

*Id.* For further discussion of *Ring*'s holding and rationale, see *infra* notes 117-31 and accompanying text.

26. Much of the first wave of post-*Ring* litigation is focusing on the issue of whether defendants whose cases were already at the state or federal post-conviction stages at the time that *Ring* was decided are entitled to the benefits of *Ring*'s rule (for an overview of the direct appeal and postconviction stages of a criminal case, see Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 717 n.85 (2002)). Under well-established rules of retroactivity, defendants whose cases are pending on direct appeal at the time a Supreme Court decision is issued are entitled to the benefits of the new ruling. *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). Defendants whose cases have already passed the direct review stage may be subject to limitations on retroactive application of new rules to cases in state postconviction or federal

only capital sentencing statutes (Arizona, Colorado, Idaho, Montana, and Nebraska), the three states that currently have hybrid systems in which a jury makes a capital sentencing recommendation but the judge can override the jury's advisory verdict (Alabama,<sup>27</sup> Florida,<sup>28</sup> and Indiana), and one state (Delaware) which recently amended its jury advisory system to comport with *Ring* but still has several cases on appeal or in postconviction in which the sentence was determined under the prior system.<sup>29</sup> At the very least, *Ring*'s express overruling of *Walton* calls into question—and justifies a revisiting of—a quarter-century of jurisprudence on the role of the jury in capital sentencing.

Part I of this Article describes the evolution of the Court's modern thinking on the constitutional status of the capital sentencing jury, beginning with the Stewart-Powell-Stevens plurality's sanctioning of a jury override

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habeas corpus proceedings. In state postconviction proceedings, this issue is generally governed by state law rules of retroactivity. *See, e.g.,* *Bottoson v. Moore*, 833 So. 2d 693, 717 (Fla. 2002) (per curiam) (Shaw, J., concurring in result only) (concluding that *Ring* is retroactively applicable under "Florida's criteria for determining whether a change in the decisional law must be applied retroactively in [state] postconviction proceedings"); *Cannon v. State*, No. PCD-2002-877, slip op. at 4 n.14 (Okla. Ct. Crim. App. July 18, 2002) ("*Ring* applies retroactively to this case on collateral review."). At the federal habeas corpus stage, the federal courts will employ the *Teague* rule of nonretroactivity to determine first whether *Ring* holding is a "new rule" and, if so, whether it applies—notwithstanding the general prohibition against retroactive application of new rules to habeas corpus proceedings—because it falls within either or both of the two exceptions to the *Teague* bar. *See generally* RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* §§ 25.1, 25.5, 25.7 (4th ed. 2001). If deemed to be a "new rule" that is subject to the *Teague* bar, *Ring* may nonetheless qualify for retroactive application on the ground that it falls within *Teague*'s exception for "fundamental" or "watershed" rules of criminal procedure. *See Ring*, 122 S. Ct. at 2444 (Scalia, J., concurring) (emphasizing "fundamental" nature of "the jury-trial guarantee of the Sixth Amendment . . . that all facts essential to imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt"); *Apprendi v. New Jersey*, 530 U.S. 466, 524 (2000) (O'Connor, J., dissenting) (characterizing majority's ruling as "a watershed change in constitutional law"). Moreover, *Ring* and its predecessor, *Apprendi*, can be viewed as applications of a new rule of substantive criminal law, in which event the *Teague* bar for new rules of criminal procedure would be wholly inapplicable. *See McCoy v. United States*, 266 F.3d 1245, 1271-72 (11th Cir. 2001) (Barkett, J., concurring in result) (stating that "New substantive rules of law are to be retroactively applied on collateral review" and "As long as a petitioner's claim relies on *Apprendi*'s effect on substantive law, . . . the claim is not analyzed under *Teague*."), *cert. denied*, 122 S. Ct. 2362 (2002); *United States v. Clark*, 260 F.3d 382, 388 (5th Cir. 2001) (Parker, J., dissenting from panel's decision to forbear determining applicability of *Apprendi*, and to remand case to district court for reconsideration in light of *Apprendi* and stating "Because I conclude that *Apprendi* announces a new substantive rule, *Teague*'s prohibition against retroactivity does not apply and *Apprendi* must be applied retroactively. . . . For that reason, I do not reach the question of whether *Apprendi* falls within one of *Teague*'s exceptions."). Some federal courts have concluded that *Ring* is not retroactively applicable. *See, e.g., Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002). However, most federal circuits have yet to resolve the issue.

27. In the first case to address the issue, the Alabama Supreme Court has recently held that Alabama's sentencing scheme did not run afoul of *Ring* in a case where the jury had recommended a sentence of life imprisonment without parole that was overridden by the judge who imposed death. *Ex parte Waldrop*, No. 1001194, 2002 WL 31630710, at \*6 (Ala. Nov. 22, 2002).

28. The Florida Supreme Court recently rejected a *Ring* challenge to Florida's provision for judicial override of an advisory jury recommendation. *See infra* notes 139-40 (discussing *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (per curiam); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (per curiam)).

29. *See* Adam Liptak, *A Supreme Court Ruling Roils Death Penalty Cases*, N.Y. TIMES, Sept. 16, 2002, at A14; Mary Allen, *All Del. Capital Cases Put on Hold: Questions Remain About the Death Penalty*, THE NEWS J., Sept. 13, 2002, at 9, available at 2002 WL 22881187. *See infra* note 304 for quotation of the Delaware statute, as amended by recent revisions. For further discussion of the new Delaware provision, *see infra* notes 299-304 and accompanying text.

scheme in *Proffitt* in 1976<sup>30</sup> and culminating with the recent decision in *Ring*. Part II explores the scope of the Sixth Amendment analysis that the Court employed in *Ring* by examining the implications of this analysis for the various pre-*Ring* capital jury decisions other than *Walton*. This discussion will address, among other things, certain issues that the Court expressly left open in *Ring*. Part III addresses the capital jury issues from a different jurisprudential direction, reexamining the role of the capital jury through the lens of the Eighth Amendment's Cruel and Unusual Punishments Clause rather than the Sixth Amendment's jury guarantee.

## I. THE COURT'S EVOLVING VIEW OF THE JURY'S ROLE IN CAPITAL SENTENCING: THE CIRCUITOUS PATH FROM *PROFFITT* TO *RING*

### A. Pre-*Ring* Jurisprudence on the Jury's Role in Capital Sentencing

When the claim of a right to jury sentencing in capital cases first came before the Court in 1976 in *Proffitt v. Florida*,<sup>31</sup> the argument was framed in Eighth Amendment terms. The Court had granted certiorari in *Proffitt* and its four companion cases<sup>32</sup> to determine whether the death penalty statutes challenged in these cases violated the Eighth Amendment protections that the Court had previously recognized in *Furman v. Georgia*<sup>33</sup> in 1972. Among the many statutory features that the petitioners challenged was a Florida provision that limited the jury's role in capital sentencing to issuing a sentencing recommendation and that authorized the sentencing judge to override that recommendation (although Florida Supreme Court caselaw construing the statute limited judicial overrides of life recommendations to situations in which “the facts suggesting a sentence of death . . . [are] so clear and convincing that virtually no reasonable person could differ”).<sup>34</sup> The Court rejected the challenge, speaking through two sets of plurality opinions (one by Justices Stewart, Powell, and Stevens,<sup>35</sup> who joined to-

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30. See *supra* notes 6, 8, 11 and accompanying text; *infra* notes 34-40 and accompanying text.

31. 428 U.S. 242 (1976).

32. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). The Court had also granted certiorari in an Oklahoma case that involved a mandatory death penalty statute like the ones considered in *Woodson* and *Roberts*, but the Court resolved the Oklahoma case with a memorandum opinion issued four days after the decisions of July 2, 1976, granting the writ of certiorari, vacating the lower court opinion “as [i]t leave[s] undisturbed the death penalty imposed” and remanding to the Oklahoma Court of Criminal Appeals for further proceedings in light of *Woodson* and *Roberts*. See *Green v. Oklahoma*, 428 U.S. 907 (1976) (mem.).

33. 408 U.S. 238 (1972). As explained *supra* notes 3-5 and accompanying text, the fractured form of the Court's pronouncement in *Furman*—issued in the form of a brief per curiam opinion joined by five Justices who explained their differing rationales in individual opinions—created a state of confusion about not only what statutory requirements were necessary to satisfy the Eighth Amendment but even about the very nature of the constitutional rules that governed the issue.

34. See *Proffitt*, 428 U.S. at 249 (plurality opinion) (describing FLA. STAT. ANN. § 921.141 (Supp. 1976-77) and quoting from *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)).

35. See *id.* at 244-60 (opinion of Justices Stewart, Powell, and Stevens, “announced by” Justice Powell).

gether in all five of the July 2, 1976 cases to articulate a series of principles to govern the administration of the death penalty,<sup>36</sup> and one by Chief Justice Burger and Justices White and Rehnquist, who rejected Proffitt's claims in summary fashion<sup>37</sup>) and Justice Blackmun, who concurred in the judgment upholding the Florida statute.<sup>38</sup>

The Stewart-Powell-Stevens plurality opinion, the only opinion that specifically addressed the jury claim, explained its rejection of the claim as follows:

[I]n Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial 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>39</sup>

The plurality's focus on "consistency" as the touchstone of its constitutional analysis reflects the Eighth Amendment framing of the claim and the plurality's attention in all five of the July 2, 1976 cases to statutory features that served to eliminate the arbitrariness and capriciousness which the Court condemned in *Furman*.<sup>40</sup>

At the core of the plurality opinion is an approach to the jury trial right that is reminiscent of the Court's treatment of a jury claim in a very different context in *McKeiver v. Pennsylvania*<sup>41</sup> in 1971. In *McKeiver*, the Court rejected the argument that alleged juvenile delinquents prosecuted for crimes in juvenile court have a constitutional right to a jury trial at the "fact-finding" (guilt-innocence) stage of a delinquency proceeding.<sup>42</sup> In a plural-

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36. For further explanation of the Stewart-Powell-Stevens plurality's role in the five death penalty cases of July 2, 1976, see *supra* notes 6-8 and accompanying text.

37. See *Proffitt*, 428 U.S. at 260-61 (White, J., concurring, joined by Chief Justice Burger and Justice Rehnquist). As explained *supra* note 6, Chief Justice Burger and Justices White, Rehnquist, and Blackmun provided the votes to create a majority for the Stewart-Powell-Stevens view of the constitutionality of the statutes at issue in *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas*, while Justices Brennan and Marshall provided the votes to create a majority for the Stewart-Powell-Stevens view of the unconstitutionality of the statutes at issue in *Woodson v. North Carolina* and *Roberts v. Louisiana*.

38. See *id.* at 261 (Blackmun, J., concurring in the judgment).

39. *Id.* at 252 (plurality opinion of Justices Stewart, Powell, and Stevens) (citation omitted).

40. The plurality's overarching Eighth Amendment analysis is set out at greatest length in *Gregg v. Georgia*, 428 U.S. 153, 168-207 (1976) (plurality opinion of Justices Stewart, Powell, and Stevens), where the plurality explained its view of the meaning of *Furman v. Georgia*, rejected the argument that the death penalty per se violates the Eighth Amendment, and presented a set of principles to govern the assessment of the constitutionality of an individual state's death penalty statute. *Gregg*, 428 U.S. at 168-207.

41. 403 U.S. 528 (1971).

42. *McKeiver*, 403 U.S. at 528.

ity opinion joined by three other Justices,<sup>43</sup> Justice Blackmun framed the question before the Court as whether a juvenile's due process right to "fundamental fairness" in a delinquency trial<sup>44</sup> compels the use of juries to ensure "accurate factfinding."<sup>45</sup> Expressing an unshakeable confidence in judges' inherent capacity to engage in fair and reliable factfinding,<sup>46</sup> the plurality concluded that "the imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function"<sup>47</sup> and would erode the juvenile court's valuable feature of informal-

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43. Chief Justice Burger and Justices Stewart and White joined Justice Blackmun's plurality opinion. *See id.* at 530. Justice Harlan concurred in the judgment on a different rationale, *id.* at 557 (Harlan, J., concurring), and Justice Brennan concurred in the judgment in one of the cases before the Court and dissented in the other. *Id.* at 553-57.

44. The Court had previously held in *In re Gault*, 387 U.S. 1, 30, 31 n.48 (1967), that "the procedural requirements at the adjudicatory stage" of a delinquency proceeding "must measure up to the essentials of due process and fair treatment." In his plurality opinion in *McKeiver v. Pennsylvania*, Justice Blackmun characterized this ruling as requiring "fundamental fairness" in delinquency proceeding. *McKeiver*, 403 U.S. at 543.

45. *See McKeiver*, 403 U.S. at 543. (explaining that "[a]ll the litigants here agree that the applicable due process standard in juvenile proceedings, as developed by *Gault* and [*In re*] *Winship* [397 U.S. 358 (1970)], is fundamental fairness" and then stating: "But one cannot say that in our legal system the jury is a necessary component of accurate factfinding.").

46. *See id.* at 543, 547-48, 550. Justice Blackmun acknowledged that there may be "[c]oncern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers," *id.* at 550, all of which could "create the likelihood of pre-judgment," *id.*, but Justice Blackmun dismissed any such concern as "ignor[ing] . . . every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." *Id.* at 550. Yet even the cases before the Court furnished reason to doubt the reliability and fairness of judicial factfinders. With regard to Joseph McKeiver's case, Justice Blackmun stated that the details of the case are set forth in the Pennsylvania Supreme Court's opinion and that "[i]t suffices to say that McKeiver's offense was his participating with 20 or 30 youths who pursued three young teenagers and took 25 cents from them." *McKeiver*, 403 U.S. at 536. But a review of the lower court opinion reveals that the version of the facts presented by Justice Blackmun came from one of two prosecution witnesses and that the other witness presented a completely contradictory account in which "the thief acted alone"; the prosecution's evidence at trial also left significant questions about the reliability of the identification of Joseph McKeiver as the perpetrator. *See In re Terry*, 265 A.2d 350, 351 n.1 (Pa. 1970), *aff'd sub nom.* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (describing facts at *McKeiver* trial and acknowledging that "[t]he testimony given by the two alleged victims at the hearing was weak"). The evidence might have been weaker still if defense counsel had been given an adequate opportunity to prepare: When defense counsel informed the judge on the day of trial that he was unable to proceed because he had not yet had an opportunity to consult with his client, the judge "gave counsel five minutes to talk with his client and then proceeded to hear the case." *Id.* The *Burrus* case out of North Carolina, which was joined with the *McKeiver* case on appeal, was a prosecution of thirteen-year-old Barbara Burrus "and approximately 45 other black children, ranging in age from 11 to 15 . . . [on] charges [of wilfully impeding traffic] [that] arose out of a series of demonstrations . . . in late 1968 by black adults and children protesting school assignments and a school consolidation plan." *McKeiver*, 403 U.S. at 536. The opinion of the North Carolina Court of Appeals affirming Burrus's delinquency adjudication characterized the peaceful protest as:

[A] concerted demonstration by Negroes of Hyde County to assert their defiance of law and order and to disrupt the normal economic and social life of Hyde County by a wilful, intentional and flagrant disregard and violation of laws duly enacted by the governing bodies of the State for the public welfare and orderly conduct of human affairs for all citizens of the State.

*In re Burrus*, 167 S.E.2d 454, 457 (N.C. App. 1969), *aff'd sub nom.* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

47. *McKeiver*, 403 U.S. at 547.



ity.<sup>48</sup> Justice Blackmun's plurality opinion in *McKeiver* set the stage for the *Proffitt* plurality opinion by reducing the jury trial entitlement to an analysis of whether a judge can find facts in a fair, reliable, and consistent manner—a question that the Court inevitably would answer in the affirmative.

The Court again addressed the constitutionality of Florida's jury override provision in 1984<sup>49</sup> in *Spaziano v. Florida*,<sup>50</sup> this time speaking through a majority opinion and analyzing the issues at greater length. On this occasion, the petitioner framed the claim in Sixth, Eighth, and Fourteenth Amendment terms, arguing that the limited role afforded the jury under the Florida statute violated the Sixth Amendment's jury trial guarantee and the Due Process Clause of the Fourteenth Amendment, and that the judicial override provision violated the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>51</sup> In an opinion authored by Justice Blackmun and joined in pertinent part by five other Justices,<sup>52</sup> the Court rejected all of these challenges. Acknowledging that "the majority view [in this country is] that capital sentencing, unlike other sentencing, should be performed by a jury" (and that, specifically, "30 out of 37 jurisdictions with a capital sentencing statute give the life-or-death decision to the jury, with only 3 of the remaining 7 allowing a judge to override a jury's recommendation of life")<sup>53</sup> and commenting that "[w]e do not denigrate the significance of the jury's role as a link between the community and the penal system and as a bulwark between the accused and the State,"<sup>54</sup> the Court nonetheless declared that "the Sixth Amendment does not require jury sentencing, . . . the

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48. Justice Blackmun's plurality opinion assigned a high priority to preserving the traditional juvenile court model. *See id.* at 547, 551. Viewing the jury trial guarantee as threatening to "remake the juvenile proceeding into a fully adversary process and . . . put[ting] an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding," the plurality treated the jury guarantee as something to be avoided in juvenile court unless required by the due process guarantee of "fundamental fairness." *Id.* at 545. Upon concluding that the Due Process Clause did not compel that result, the plurality stated that it would not "give impetus" to the "ultimate disillusionment" of hastening the end of the juvenile court by superimposing "the formalities of the criminal adjudicative process." *Id.* at 551.

49. The Florida statutory provision also came before the Court in the interim in *Dobbert v. Florida*, 432 U.S. 282, 282 (1977), in which the petitioner argued that the Ex Post Facto Clause prohibited application of the jury override provision to determine the sentence for a crime that predated the enactment of the jury override statute and that was committed at a time when a jury recommendation of life was binding. The Court rejected that argument, holding that the change was merely "procedural" and was not necessarily "more onerous than the prior law" in that "it certainly cannot be said with assurance that, had [Dobbert's] trial been conducted under the old statute, the jury would have returned a verdict of life." *Dobbert*, 432 U.S. at 293-97.

50. 468 U.S. 447 (1984).

51. *Spaziano*, 468 U.S. at 457-58. The petitioner also argued that a judicial override of a jury verdict of life violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment. *See id.*

52. Three Justices joined Justice Blackmun's opinion. Justice White, joined by Justice Rehnquist, filed an opinion concurring in the judgment and concurring in Justice Blackmun's opinion with the exception of a passage concerning the rule of *Beck v. Alabama*, 447 U.S. 625 (1980), governing a defendant's right to a jury instruction on a lesser included offense. *Beck*, 447 U.S. at 467. Justices Brennan, Marshall, and Stevens dissented. *See id.* at 467-90.

53. *Id.* at 463; *see also Spaziano*, 468 U.S. at 463 n.9 (listing statutes).

54. *Beck*, 447 U.S. at 462 (citing, inter alia, *Gregg v. Georgia*, the lead decision in the five death penalty cases issued on July 2, 1976, which is discussed *supra* note 8 and accompanying text).

demands of fairness and reliability in capital cases do not require it, and . . . neither the nature of, nor the purpose behind, the death penalty requires jury sentencing.”<sup>55</sup> With regard to the separate Eighth Amendment challenge to the jury override provision, the Court embraced the *Proffitt* plurality’s analysis that the provision does not produce the arbitrariness and capriciousness condemned by *Furman*.<sup>56</sup>

Not surprisingly, Justice Blackmun’s opinion for the Court in *Spaziano* bears the stamp of the same general conceptual approach to the judge-jury division that he employed in his plurality opinion in *McKeiver*, although neither Justice Blackmun nor any other member of the Court made a connection to that earlier opinion. In analyzing the Sixth and Eighth Amendment issues, Justice Blackmun’s opinion in *Spaziano* essentially boiled down these issues to the question of whether a judge is capable of rendering a capital sentencing judgment in a fair and constitutionally acceptable way.<sup>57</sup> The Court stated that a judge, no less than a jury, is able to fulfill the previously recognized “twin objectives” of “measured, consistent application and fairness to the accused,”<sup>58</sup> in that a judge can “rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not”<sup>59</sup> and can give appropriate “consider[ation] [to] the individual circumstances of the defendant, his background, and his crime.”<sup>60</sup> Although acknowledging that there is “some appeal” to the argument that “the jury serves as the voice of the community . . . [and] is in the best position to decide whether a particular crime is so heinous that the community’s response must be death,” Justice Blackmun again framed the issue in terms of a judge’s capabilities.<sup>61</sup> “While retribution clearly plays a more prominent role in a capital case [than in the non-capital sentencing judgments ordinarily allocated to judges],” Justice Blackmun stated, “retribution is an element of all punishments society imposes, and there is no suggestion as to any of these that the sentence may not be imposed by a judge.”<sup>62</sup>

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55. *Id.* at 464.

56. *See id.* at 465 (stating that “[t]his Court already has recognized the significant safeguard the [Florida Supreme Court’s construction of the jury override provision] . . . affords a capital defendant in Florida” and citing, *inter alia*, the plurality opinion in *Proffitt v. Florida*). As explained *supra* note 47, the *Spaziano* case also involved a Fifth Amendment double jeopardy challenge to a judicial redetermination of the appropriateness of a death sentence after a jury has issued a recommendation of life imprisonment. The Court rejected this claim in summary fashion. *See id.* (“If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge’s exercising that responsibility after receiving the advice of the jury.”).

57. *See Spaziano*, 468 U.S. at 463-67.

58. *Id.* at 460 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110-11 (1982)).

59. *Id.* (citing *Zant v. Stephens*, 462 U.S. 862, 873-80 (1983); *Furman v. Georgia*, 408 U.S. 238, 294 (1972) (Brennan, J., concurring)).

60. *Id.* (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)).

61. *Id.* at 461.

62. *Spaziano*, 468 U.S. at 462. Justice Blackmun also stated that, in a judicial sentencing scheme, the “community’s voice [nonetheless] can be expressed” in the form of legislative determinations of “when the death penalty is authorized and the particular circumstances in which death is appropriate.” *Id.*

A jury-related challenge to Florida's death penalty statute came before the Court yet again five years later in *Hildwin v. Florida*.<sup>63</sup> On this occasion, the petitioner made a Sixth Amendment claim that a jury, not a judge, must "specify the aggravating factors that permit the imposition of capital punishment" and must make the statutorily-required "finding . . . that sufficient aggravating circumstances exist to qualify the defendant for capital punishment."<sup>64</sup> A majority of the Court, treating this issue as definitively resolved by the earlier decision in *Spaziano*, summarily rejected the claim without briefing and oral argument.<sup>65</sup>

Because the Florida death penalty statute provided for at least some jury involvement in capital sentencing in the form of an advisory recommendation to the sentencing judge, the *Proffitt*, *Spaziano*, and *Hildwin* decisions did not necessarily mean that a judge-only capital sentencing scheme was immune from constitutional challenge. To be sure, such a distinction was admittedly tenuous, for the *Spaziano* decision rejected the petitioner's characterization of the case as limited to the constitutionality of a jury override system and the Court expressly declared that it was reaching the "fundamental" question of whether "jury sentencing . . . is required" in capital cases.<sup>66</sup> The Court eliminated whatever doubts remained in *Walton v. Arizona*<sup>67</sup> in 1990, issued one year after the summary per curiam decision in *Hildwin*. The petitioner in *Walton* challenged several aspects of Arizona's death penalty statute, including its allocation of the sentencing decision to a judge. As the Court explained:

Walton's . . . argument is that every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in

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63. 490 U.S. 638 (1989) (per curiam).

64. *Hildwin*, 490 U.S. at 638-39.

65. See *id.* at 639-40 (granting petition for writ of certiorari and summarily affirming Florida Supreme Court's rejection of jury challenge, and explaining that "[i]n *Spaziano v. Florida* . . . we rejected the claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death"). Justices Brennan and Marshall dissented on the basis of their view that the death penalty is per se unconstitutional. See *id.* at 641 (Brennan & Marshall, JJ., dissenting). Justice Marshall added that "[e]ven if [he] did not hold this view, [he] would dissent from the Court's decision today to affirm summarily the decision below" because of his belief that "summary dispositions deprive litigants of a fair opportunity to be heard on the merits and create a significant risk that the Court is rendering an erroneous or ill-advised decision that may confuse the lower courts," a risk which "is particularly unacceptable in capital cases where a man's life is at stake." *Id.* at 641 (Marshall, J., dissenting).

66. See *Spaziano*, 468 U.S. at 458 ("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. As counsel acknowledged at oral argument, however, his fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury. . . . We therefore address that fundamental premise.").

67. 497 U.S. 639 (1990).

a given case and the trial judge then imposes sentence based on those findings.<sup>68</sup>

The Court treated the claim as foreclosed by the earlier decisions in *Proffitt*, *Spaziano*, and *Hildwin*, rejecting the petitioner's attempt to distinguish those cases as involving a capital sentencing scheme that afforded some role for a jury.<sup>69</sup> The Court pointed out that the Florida statute treated the jury's recommendation as merely advisory and "not binding on the trial judge," and that a Florida jury "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances."<sup>70</sup> Thus, with regard to the central issue of whether the Sixth Amendment requires a jury to make findings of aggravating and mitigating circumstances, the Court deemed the earlier decisions as having already upheld a statute's allocation of those factfinding determinations to a judge.<sup>71</sup>

In 1995, the Court took up a jury right challenge to a capital sentencing scheme on one more occasion prior to the recent decision in *Ring*. In *Harris v. Alabama*,<sup>72</sup> the Court considered Eighth Amendment and Due Process challenges to the Alabama death penalty statute's structure for jury and judge decision-making at the capital sentencing stage. Alabama's statute resembled Florida's in that it provided for a jury recommendation that a judge could override, but the two statutes differed in one potentially significant respect: Whereas Florida caselaw required that the judge accord "great weight" to a jury's sentencing recommendation, particularly a recommendation of life,<sup>73</sup> the Alabama statute imposed no constraints whatsoever on the judge's ability to reject the jury's recommendation.<sup>74</sup> Thus, as Justice Stevens observed in his dissenting opinion,

In Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death—even though a jury has determined that death is an inappropriate penalty, and even though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence.<sup>75</sup>

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68. *Walton*, 497 U.S. at 647.

69. *Id.* at 648 ("The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive.").

70. *Id.*

71. *See id.* ("A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.").

72. 513 U.S. 504 (1995).

73. *See Harris*, 513 U.S. at 509 (describing Florida's capital sentencing structure, including the requirement that a judge defer to a jury's life recommendation "unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ'" (quoting *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975))).

74. *Id.* ("Alabama capital sentencing statute . . . requires only that the judge 'consider' the jury's recommendation.").

75. *Id.* at 515 (Stevens, J., dissenting).

The Court was not swayed by the uniqueness of the statute or by what the majority called the “ostensibly surprising statistics” on the frequency with which Alabama judges override life recommendations<sup>76</sup> or by the petitioner’s attempt to distinguish Alabama’s statute from the Florida statute previously upheld in *Proffitt*, *Spaziano*, and *Hildwin*.<sup>77</sup> Invoking the earlier decisions, the Court majority (in an opinion authored by Justice O’Connor and joined by all members of the Court except Justice Stevens) rejected the challenge to the Alabama statute, stating, “The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury’s recommendation and trusts the judge to give it the proper weight.”<sup>78</sup>

Looking back on the entire line of pre-*Ring* cases on the right to jury sentencing in capital cases, it is apparent that the die was indelibly cast in *Proffitt* and *Spaziano*. In the subsequent decisions in *Hildwin*, *Walton*, and *Harris*, the Court merely applied the *Proffitt-Spaziano* reasoning, dismissing attempts to distinguish the earlier cases on the basis of statutory variations or structural differences.

During this period, the Court also applied the *Proffitt-Spaziano* reasoning in a somewhat different context in two cases that are worth mentioning before moving on to *Ring v. Arizona*. Both of these cases concerned the ability of a state appellate court<sup>79</sup> to make factfindings relating to a capital sentence instead of remanding the case to a jury. The first was *Cabana v. Bullock*,<sup>80</sup> in which the Court concluded that a death sentence imposed without a constitutionally necessary finding that the defendant “kill[ed], attempt[ed] to kill, or intend[ed] that a killing take place or that lethal force will be employed”<sup>81</sup> need not be reversed for resentencing because an appel-

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76. See *id.* at 513. (“In practice, . . . Alabama’s sentencing scheme has yielded some ostensibly surprising statistics. According to the Alabama Prison Project, there have been only 5 cases in which the judge rejected an advisory verdict of death, compared to 47 instances where the judge imposed a death sentence over a jury recommendation of life.”). The Court dismissed the import of the statistics, declaring that “these numbers do not tell the whole story” because “[w]e do not know . . . how many cases in which a jury recommendation of life imprisonment is adopted would have ended differently had the judge not been required to consider the jury’s advice” and “[e]ven assuming that these statistics reflect a true view of capital sentencing in Alabama, they say little about whether the scheme is constitutional.” *Id.* at 513-14. For further discussion of this aspect of *Harris*, see *infra* notes 273-75 and accompanying text.

77. *Harris*, 513 U.S. at 509-13.

78. *Id.* at 515.

79. In situations such as those described in the text, in which an essential sentencing-related factfinding in a state capital case is absent from the record and a new weighing of aggravating and mitigating circumstances is needed, *Cabana* and subsequent Supreme Court decisions require that the requisite factfinding be made by a *state* sentencing authority, whether at the trial or appellate levels, and not by a federal court. See, e.g., *Richmond v. Lewis*, 506 U.S. 40, 49 (1992) (“Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the *state* appellate court or some other *state* sentencer must actually perform a new sentencing calculus.”) (emphasis added). Under other decisions applying these principles to *federal* prosecutions, the Court has sanctioned a federal appellate court’s engaging in the requisite factfindings. See *Jones v. United States*, 527 U.S. 373, 402-05 (1999). As explained later in this Article, however, *Ring* throws all of these lines of authority into question. See *infra* notes 216-52 and accompanying text.

80. 474 U.S. 376 (1986).

81. The sentencing in *Cabana v. Bullock* had taken place prior to the Supreme Court’s announce-

late court can remedy the omission by making the requisite factfinding on culpability.<sup>82</sup> Even if the jurisdiction is one that employs jury sentencing (as was true in *Cabana*), the Court concluded that an appellate court can substitute for the jury in making the factual determination<sup>83</sup> because the additional factfinding does not involve “a new element of the crime of capital murder”<sup>84</sup> and *Spaziano* teaches that neither “the Sixth Amendment [n]or any other constitutional provision provides a defendant with the right to have a jury consider the appropriateness of a capital sentence.”<sup>85</sup>

In the second of the cases, *Clemons v. Mississippi*,<sup>86</sup> the Court held that an appellate court’s invalidation of an aggravating circumstance does not necessarily require a remand for jury resentencing, even in a jurisdiction in which the capital sentencing determination involves a weighing of aggravating and mitigating circumstances,<sup>87</sup> because the appellate court can reweigh the remaining valid aggravating circumstances against the mitigating factors.<sup>88</sup> Invoking *Cabana*, *Spaziano*, and *Hildwin*, the Court dismissed the argument that a jury determination is constitutionally required.<sup>89</sup> Echoing the prior decisions’ approach to the question of a jury entitlement in terms of a judge’s capacity to make the necessary findings, the Court declared in *Clemons*: “We see no reason to believe that careful appellate weighing of aggravating against mitigating circumstances in cases such as this would not

ment in *Enmund v. Florida*, 458 U.S. 782, 797 (1982), that the Eighth Amendment prohibits the execution of an individual “who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.” Although the lack of the requisite *Enmund* finding clearly rendered Bullock’s death sentence unconstitutional, *Cabana v. Bullock* presented the Court with the question whether that omission could be rectified by an appellate court or necessitated a new sentencing hearing. See *Cabana*, 474 U.S. at 378 (“This case requires us to determine in whose hands the [*Enmund*] decision that a defendant possesses the requisite degree of culpability properly lies.”). The Court subsequently modified the *Enmund* rule by holding in *Tison v. Arizona*, 481 U.S. 137, 158 (1987), that the Eighth Amendment permits execution for a capital felony murder even of an individual who was not the trigger-person and who did not intend the death of the victim if the defendant was a “major participa[nt]” in the felony and had a “reckless indifference to human life.”

82. *Cabana*, 474 U.S. at 392.

83. *Id.* (“The proceeding that the state courts must provide Bullock [to make the missing factfinding determination] need not take the form of a new sentencing hearing before a jury . . . [T]he Eighth Amendment does not require that a jury make the findings required by *Enmund* . . . [T]he sentence currently in force may stand provided only that the requisite findings are made in an adequate proceeding before some appropriate tribunal—be it an appellate court, a trial judge, or a jury.”).

84. *Id.* at 385 n.3.

85. *Id.* at 385-86 (citing *Spaziano*).

86. 494 U.S. 738 (1990).

87. The Court had previously held in *Zant v. Stephens*, 462 U.S. 862, 891 (1983), that the invalidation of one out of a group of aggravating circumstances does not require a remand for jury resentencing in a jurisdiction like Georgia, where the finding of a single aggravating circumstance is sufficient to render a defendant eligible for the death penalty and “no suggestion is made that the presence of more than one aggravating circumstance should be given special weight.” The *Zant* decision expressly reserved the question of the effect of “a holding that a particular aggravating circumstance is ‘invalid’ under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.” *Zant*, 462 U.S. at 890.

88. See *id.*

89. *Clemons*, 494 U.S. at 745-46.

produce ‘measured consistent application’ of the death penalty or in any way be unfair to the defendant.”<sup>90</sup>

As the foregoing review demonstrates, the Court in *Proffitt* and *Spaziano* developed a certain approach to the issue of jury involvement in capital sentencing, and thereafter applied that conception to all subsequent permutations of the issue. The next Subpart shows that the Court embarked on a radically different approach upon confronting similar issues in a *non-capital* context. The new approach created a tension in the Court’s jurisprudence on juries in criminal cases that eventually culminated in the Court’s reconsideration of the capital jury issue in *Ring*.

*B. The Genesis of Ring: The Emergence of Fracture Lines in the Court’s Applications of the Jury Right to Capital and Non-Capital Cases*

Questions about the continuing viability of the Court’s capital jury jurisprudence first surfaced in a 1999 case, *Jones v. United States*,<sup>91</sup> a federal criminal case that concerned the construction and constitutionality of the federal carjacking statute.<sup>92</sup> The statute established a certain sentence for the crime of armed carjacking by means of “force and violence or by intimidation,” and then specified a higher sentence if “serious bodily injury” results and an even higher sentence if death results.<sup>93</sup> The question for the Court was whether the statute should be viewed as establishing two fact-specific bases for a judge to enhance sentencing, or as creating three distinct crimes with statutory elements that a jury must find.<sup>94</sup> The Court construed the statute as creating separate crimes because the alternative construction, which the government sought, would give rise to “grave and doubtful constitutional questions”<sup>95</sup> in 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

90. *Id.* at 748; *see also id.* at 749-50.

91. 526 U.S. 227 (1999).

92. 18 U.S.C. § 2119 (1994 & Supp. V).

93. *See id.* The statute provides:

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

- (1) be fined under this title or imprisoned not more than 15 years, or both,
- (2) if serious bodily injury . . . 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.

*Id.*

94. *See Jones*, 526 U.S. at 229 (“This case turns on whether the federal carjacking statute, 18 U.S.C. § 2119, as it was when petitioner was charged, defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict.”).

95. *Id.* at 239.

for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.<sup>96</sup>

This analysis seemed so fundamentally at odds with the earlier capital decision in *Walton*, which authorized a judge to make the findings of aggravating circumstances that result in the ultimate increase of a sentence from a term of incarceration to death,<sup>97</sup> that the majority in *Jones* took pains to harmonize its new rule with *Walton*. A “careful reading of *Walton*’s rationale,” the Court stated, reveals that the statute at issue in *Walton* allowed a sentencing judge to use findings of aggravating factors to choose “between a greater and a lesser penalty,” but did not permit the judicial findings to “rais[e] the ceiling of the sentencing range available.”<sup>98</sup> In a dissenting opinion, Justice Kennedy disputed this characterization of *Walton*,<sup>99</sup> criticizing the majority for issuing a ruling that “needless[ly] . . . casts [doubt] upon our cases involving capital sentencing.”<sup>100</sup>

The fault lines in the Court’s jury jurisprudence became even more pronounced one year later in *Apprendi v. New Jersey*.<sup>101</sup> The statute at issue on this occasion was a New Jersey “hate crime” law that authorized an increase in the maximum prison sentence if the sentencing judge finds by a preponderance of the evidence that the defendant acted with “a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.”<sup>102</sup> A majority of the Court struck down the statute, concluding that it violated the defendant’s Sixth and Fourteenth Amendment right to a jury verdict on all elements of the charged crime(s).<sup>103</sup> This right attached notwithstanding the New Jersey legislature’s apparent intention to treat the “biased purpose” finding as a sentencing factor and not an element of the offense.<sup>104</sup> The dispositive ques-

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96. *Id.* at 243 n.6; *see also id.* at 242-43.

97. *See supra* notes 67-71 and accompanying text (discussing *Walton v. Arizona*).

98. *Jones*, 526 U.S. at 251. The Court also employed various other distinctions to harmonize its holding with the earlier decisions in *Spaziano* and *Hildwin*. *See id.* at 250-51.

99. *See id.* at 272 (Kennedy, J., dissenting) (“Under the relevant Arizona statute, *Walton* could not have been sentenced to death unless the trial judge found at least one of the enumerated aggravating factors. . . . Absent such a finding, the maximum potential punishment provided by law was a term of imprisonment.”) (citing ARIZ. REV. STAT. ANN. § 13-703 (1989)).

100. *Id.* at 271-72 (Kennedy, J., dissenting) (“A further disconcerting result of today’s decision is the needless doubt the Court’s analysis casts upon our cases involving capital sentencing . . . 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.”).

101. 530 U.S. 466 (2000).

102. *Apprendi*, 530 U.S. at 469 (describing N.J. STAT. ANN. § 2C:33-3(e) (West Supp. 1999-2000)).

103. *Id.* at 477 (finding that New Jersey’s sentencing scheme violates a defendant’s right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)); *see also id.* at 490 (“Other 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.”).

104. *See id.* at 495 (noting that the New Jersey legislature “plac[ed] the required biased purpose finding in a sentencing enhancement provision” and did not designate it as “a ‘separate offense calling



tion, the Court found, was whether the requisite finding subjects the defendant to the possibility of a higher punishment than that which could be imposed for the criminal conviction that the jury returned.<sup>105</sup> Because a “biased purpose” finding operated in this manner under the New Jersey statutory scheme, the Court ruled that the issue fell within the Sixth Amendment’s jury trial guarantee.<sup>106</sup>

As in *Jones*, the majority in *Apprendi* attempted to reconcile its ruling with the earlier decision in *Walton*, despite the readily apparent inconsistency between *Apprendi*’s insistence upon the jury’s role in a sentencing-stage finding that increases the maximum possible punishment and *Walton*’s sanctioning of Arizona’s judge-based capital sentencing scheme. The *Apprendi* Court declared that *Walton* was distinguishable because the Arizona statute provided for the jury at the trial stage of a capital case to make all of the factual determinations necessary to subject a defendant to the possibility of a death sentence.<sup>107</sup>

The ostensible distinction drawn by the *Apprendi* majority was, at best, a slim reed. In a dissenting opinion, Justice O’Connor labeled the distinction “baffling”<sup>108</sup> and denounced the majority’s characterization of the Arizona statute at issue in *Walton* as “demonstrably untrue.”<sup>109</sup> In the wake of *Apprendi*, the lower courts floundered as they attempted to implement the elusive distinction between *Apprendi* and *Walton*.<sup>110</sup> Thus, the scene was set for the Court’s revisiting of *Walton*’s holding—which the Court did, two years later, in *Ring*.

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for a separate penalty’ . . . New Jersey would also point to the fact that the State . . . plac[ed] the required biased purpose finding in a sentencing enhancement provision”).

105. *Id.* at 494 (“[T]he 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?”).

106. *Apprendi*, 530 U.S. at 466.

107. *Id.* at 496-97 (finding that *Walton* and “the capital cases are not controlling” on the issue before the Court because “What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.”) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)).

108. *Id.* at 538 (O’Connor, J., dissenting).

109. *Id.* (O’Connor, J., dissenting) (“The key to th[e] distinction [of *Walton* by the Court majority] is the Court’s claim that, in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence. . . . [T]hat claim is demonstrably untrue. A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.”).

110. *See, e.g.*, *United States v. Promise*, 255 F.3d 150, 159-60 (4th Cir. 2001) (en banc) (characterizing *Walton*’s apparently continuing vitality notwithstanding *Apprendi* as “perplexing”); *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001) (“*Apprendi* may raise some doubt about *Walton*.”); *People v. Kaczmarek*, 741 N.E.2d 1131, 1142 (Ill. App. 2000) (“[W]hile it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital, defendants, the Court has endorsed this precise principle, and we are in no position to second guess that decision here.”); *see also infra* notes 111-16 and accompanying text (describing Arizona Supreme Court’s opinion in *State v. Ring*).

*C. The Conceptual Shift in Ring*

The lower court proceedings in *Ring* perfectly paved the way for a grant of certiorari on the inconsistencies between *Apprendi* and *Walton*. In appealing his death sentence to the Arizona Supreme Court, Ring argued that Arizona's judge-only capital sentencing scheme violated *Apprendi* and *Jones*; the state responded that the statute had been upheld in *Walton* and that the Court had made clear in *Apprendi* that *Walton* was still good law.<sup>111</sup> The Arizona Supreme Court rejected the appellant's attack upon the statute and his death sentence but, in doing so, observed that *Apprendi* and *Jones* "raise some question about the continued viability of *Walton*."<sup>112</sup> The Arizona court waded into the dispute between the *Apprendi* majority and Justice O'Connor regarding the operation of Arizona's capital sentencing mechanism and squarely aligned itself with Justice O'Connor's dissenting view. Rejecting the *Apprendi* majority's characterization of the Arizona capital sentencing scheme as one in which the judge merely makes specific findings of aggravating factors after the jury has convicted the defendant of a capital crime,<sup>113</sup> the Arizona Supreme Court declared that its system operates "precisely as described in Justice O'Connor's dissent—Defendant's [final] death sentence required the judge's factual findings."<sup>114</sup> Although this construction necessarily led to the conclusion that the statute suffered from the same vice that led to the New Jersey statute's downfall in *Apprendi*, the Arizona Supreme Court nonetheless upheld its death penalty statute and Ring's death sentence because, as the court explained, it was bound by the Supremacy Clause to follow *Walton*.<sup>115</sup>

The Arizona Supreme Court's opinion presented a compelling case for a grant of certiorari to resolve the confusion that had been engendered by the earlier decisions, and the United States Supreme Court accepted the invitation. As the Court explained in its opinion in *Ring*, "We granted Ring's petition for a writ of certiorari . . . to allay uncertainty in the lower courts caused by the manifest tension between *Walton* and the reasoning of *Apprendi*."<sup>116</sup>

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111. See *Ring v. Arizona*, 122 S. Ct. 2428, 2436 (2002) (describing parties' arguments in the Arizona Supreme Court).

112. *State v. Ring*, 25 P.3d 1139, 1150 (Ariz. 2001), *rev'd sub nom.* *Ring v. Arizona*, 122 S. Ct. 2428 (2002).

113. See *State v. Ring*, 25 P.3d at 1151 (describing, and rejecting, *Apprendi* majority's characterization of Arizona's capital sentencing scheme as one that "requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death," and not as a system that "permits a judge to determine the existence of a factor which makes a crime a capital offense.") (quoting *Apprendi*, 530 U.S. at 496-97).

114. *Id.* (quoting the description of Arizona's system in Justice O'Connor's *Apprendi* dissent: "A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.") (quoting *Apprendi*, 530 U.S. at 496-97 (O'Connor, J., dissenting)).

115. *Id.* at 1152.

116. *Ring*, 122 S. Ct. at 2436.

From beginning to end, Justice Ginsburg's opinion for the Court<sup>117</sup> in *Ring* is framed as simply a straightforward application of the rule of *Apprendi* to the Arizona death penalty statute. After briefly describing the workings of the Arizona statute and the earlier opinions in *Walton* and *Apprendi*,<sup>118</sup> the *Ring* opinion declares "*Apprendi*'s reasoning is irreconcilable with *Walton*'s holding . . . and today we overrule *Walton* in relevant part. Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."<sup>119</sup>

The ensuing analysis reviews the jurisprudential genesis of the issue before the Court in *Ring*, describing the Court's pre-*Apprendi* pronouncements on the role of a jury at capital sentencing (*Hildwin* and *Walton*), and an appellate court's ability to make findings that are ordinarily consigned to a jury (*Cabana*).<sup>120</sup> The Court then presents the conflicting strain of non-capital jury decisions in *Jones* and *Apprendi*, noting the attempts to "distinguish certain capital sentencing decisions, including *Walton*,"<sup>121</sup> and observing that "[t]he *Apprendi* dissenters called the Court's distinction of *Walton* 'baffling.'"<sup>122</sup> The Court ultimately declares at the end of the opinion, as it did at the beginning, that "*Walton* and *Apprendi* are irreconcilable" and that "our Sixth Amendment jurisprudence cannot be home to both."<sup>123</sup> Acknowledging that a different rule cannot be applied in capital and non-capital cases (let alone one that provides lesser protection to capital defendants), the Court states that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."<sup>124</sup> "Accordingly," the Court declares, "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>125</sup> In accordance with *Apprendi*'s rule and reasoning, the Court holds in *Ring* that the Arizona death penalty statute violates the Sixth Amendment by allocating to a judge the determination of

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117. Justice Ginsburg's majority opinion was joined by Justices Stevens, Scalia, Kennedy, Souter, and Thomas. *Id.* at 2432. Justice Scalia filed a separate concurring opinion, which Justice Thomas joined. *Id.* at 2443. Justice Kennedy also filed a separate concurring opinion and Justice Breyer filed an opinion concurring in the judgment. *Id.* at 2445-46. Justice O'Connor dissented in an opinion that was joined by Chief Justice Rehnquist. *Id.* at 2448.

118. See *Ring*, 122 S. Ct. at 2432.

119. *Id.*

120. See *id.* at 2437-38. For a discussion of *Hildwin*, see *supra* notes 63-65 and accompanying text. For a discussion of *Cabana*, see *supra* notes 80-85 and accompanying text.

121. *Id.* at 2439.

122. *Id.* at 2440 (quoting *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)).

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

124. *Id.*

125. *Id.* ("Because 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.") (citations omitted).

aggravating circumstances that are necessary predicates for a death sentence.<sup>126</sup>

The apparent storyline of the *Ring* opinion is that the Court is dealing with the ineluctable ramifications of the analytic road it chose to go down in *Jones* and *Apprendi*. But there is another storyline that is equally important to understanding the jury's constitutionally mandated role in capital sentencing. The first sentence of the opinion hints at this auxiliary narrative. Justice Ginsburg states there that "[t]his case concerns the Sixth Amendment right to a jury trial in capital prosecutions."<sup>127</sup> This broad characterization of the case cuts through any technical distinctions between the trial and sentencing stages of a capital case. It locates the right at issue to be the "right to a jury trial," and not merely the right to a fundamentally fair or reliable or consistent sentencing determination (which, as previously discussed, are the entryways to a conceptual path that leads to validating judges as inherently capable of evenhanded sentencing).

At one point in the opinion, the Court directly confronts the analytic consequences of its earlier framing of the capital jury issue in terms of a judge's and jury's comparative abilities to engage in fair, rational sentencing. As the Court explains, the State of Arizona had made the argument that "judicial authority over the finding of aggravating factors 'may . . . be a better way to guarantee against the arbitrary imposition of the death penalty.'"<sup>128</sup> The Court rejects this contention in a passage that is worth quoting at length:

The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be

"an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. . . . The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free."

In any event, the superiority of judicial factfinding in capital cases is far from evident. Unlike Arizona, the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.

Of the 38 States with capital punishment, 29 generally commit sentencing decisions to juries. [citing statutes] . . .

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126. *Id.* at 2432.

127. *Id.*

128. *Ring*, 122 S. Ct. at 2442 (quoting Tr. of Oral Arg. 32).

Other than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges. [citing statutes] . . .

Four States have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.<sup>129</sup>

The above language can be viewed as signifying an important paradigm shift in the way in which the Court approaches the issue of jury involvement in capital sentencing. It is, in essence, a repudiation of *Walton's* (and *Proffitt's* and *Spaziano's*) conceptual framing of the subject in terms of the relative capabilities of judge and jury.

The Court in *Ring* did not further explain its new conception of the jury's role. Moreover, notwithstanding the breadth and apparently sweeping implications of the above language, the Court stopped short of announcing a broadly framed right to jury sentencing in capital cases. The issue, as framed in *Ring*, was the narrower question of whether the Sixth Amendment creates a right to a jury determination of aggravating circumstances that are "necessary for imposition of the death penalty" and that therefore "operate as 'the functional equivalent of an element of a greater offense.'"<sup>130</sup> As framed in that manner, the issue was easily resolved because, as Justice Ginsburg emphasized, the case fell squarely within the rule announced in *Apprendi*. The Court noted that the petitioner did not raise various other, broader claims, including whether the "Sixth Amendment require[s] the jury to make the ultimate determination whether to impose the death penalty" and whether an appellate court has the "authority to reweigh the aggravating and mitigating circumstances after that court [has] struck one aggravator."<sup>131</sup> These and other related issues will be addressed in the next Part of this Article, in an exploration of the implications of the Court's ruling and reasoning in *Ring*.

## II. POST-RING SIXTH AMENDMENT ANALYSIS OF THE JURY'S ROLE IN CAPITAL SENTENCING

The overruling of *Walton* inevitably raises questions about the series of capital jury cases discussed in Subpart I.A, which progressively led up to *Walton* and which established the principles that controlled the *Walton* decision: *Proffitt*, *Spaziano*, *Harris*, and *Hildwin*. It also casts at least some doubt on *Cabana* and *Clemons*, the two cases in which the Court employed the reasoning of the earlier capital jury decisions to hold that an appellate court can make certain findings on appeal that a jury ordinarily makes at the capital sentencing stage. The Court had no reason to revisit these decisions

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129. *Id.* at 2442 & n.6 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

130. *Id.* at 2443 (quoting *Apprendi*, 530 U.S. at 494 n.19).

131. *Id.* at 2437 n.4.

in *Ring* itself because the narrow framing of the claim in that case required only that the Court revisit *Walton*, the last case in the progression of capital jury decisions.

This Part will use the decisions that preceded and produced *Walton* as an organizing tool to explore the scope and implications of the *Ring* decision. Subpart A will begin this discussion by examining *Hildwin*, which concerned the very same issue as *Walton* and *Ring*, and is different from these later cases only in that the statutory sentencing mechanism at issue in *Hildwin* was a judge-jury hybrid system rather than a judge-only sentencing process. The examination of *Hildwin* will explore whether the involvement of an advisory jury creates a different constitutional context for resolving the *Ring* issue. Subpart B will test the scope and sweep of *Ring* by examining, in both the context of judge-only and judge-jury sentencing schemes, whether *Ring*'s rationale extends to other factfindings that are ordinarily predicates for a death sentence: determinations of the existence of mitigating circumstances and the weighing of mitigating against aggravating circumstances. Finally, Subpart C will examine the effects of *Ring* on the appellate court prerogatives that the Court established in *Cabana* and *Clemons*.

*A. Revisiting Hildwin: The Applicability of Ring's Ruling to  
Hybrid Judge-Jury Capital Sentencing Schemes*

Of the pre-*Walton* cases on the right to a jury in capital sentencing, the one that comes closest to *Walton* in holding and reasoning is the 1989 per curiam decision in *Hildwin v. Florida*,<sup>132</sup> a summary ruling issued without the benefit of briefing or oral argument.<sup>133</sup> In *Hildwin*, the petitioner challenged the Florida death penalty statute on the very ground that the Court rejected in *Walton* and ultimately accepted in *Ring* and argued that "the Florida capital sentencing scheme violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment."<sup>134</sup> The Court rejected this challenge, stating:

[T]he 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.<sup>135</sup>

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132. 490 U.S. 638 (1989). For a detailed description of *Hildwin*, see *supra* notes 63-65 and accompanying text.

133. See *supra* note 65.

134. *Hildwin*, 490 U.S. at 639.

135. *Id.* at 640-41 (citation omitted).

This is the very reasoning that produced the Court's subsequent decision in *Walton* (where the Court approvingly quoted the foregoing language from *Hildwin*)<sup>136</sup> and that the Court unequivocally rejected in *Ring*. *Ring* stands for the proposition that when a finding of aggravating circumstances renders a defendant subject to the death penalty, it operates as a de facto element of the offense of capital murder and must be allocated to the jury, not a judge.<sup>137</sup>

In overruling *Walton*, the Court in *Ring* did not comment on the continuing vitality of *Hildwin*.<sup>138</sup> While it is certainly true that *Hildwin* did not speak as directly to the *Ring* issue as did *Walton*—in that *Walton* had upheld the constitutionality of the Arizona death penalty statute, the very same statute before the Court in *Ring*, whereas *Hildwin* concerned the Florida statute—one would reasonably have expected the *Ring* Court to comment on *Hildwin*'s status, especially given the *Ring* Court's quotation of a passage of the *Walton* opinion that had quoted *Hildwin*.<sup>139</sup>

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136. See *Walton v. Arizona*, 497 U.S. 639, 648 (1990).

137. See *supra* notes 118-31 and accompanying text.

138. *Ring*, 122 S. Ct. at 2430-37.

139. See *id.* at 2437 (quoting *Walton*, 497 U.S. at 648; *Hildwin*, 490 U.S. at 640-41). While *Ring* was pending, the Supreme Court of the United States granted stays of execution pending the disposition of the petitions for certiorari in two Florida cases in which the petitions raised *Ring/Apprendi* challenges to the Florida statute. See *Bottoson v. Florida*, 122 S. Ct. 981 (2002) (mem.); *King v. Florida*, 122 S. Ct. 932 (2002) (mem.); see also Alisa Ulferts & Mary Jacoby, *Ruling Muddies Florida Death Sentences*, ST. PETERSBURG TIMES, June 25, 2002, at 1A (reporting, on day after *Ring*'s issuance, that "Florida officials and defense attorneys said they hope to get guidance on Thursday, when the [Supreme] [C]ourt is expected to rule on two Florida death sentences it delayed pending this decision [in *Ring*]"). But four days after *Ring*'s issuance, the Supreme Court denied the certiorari petitions in these two cases without comment. See *Bottoson*, 122 S. Ct. at 2670; *King*, 122 S. Ct. at 2670. The Florida Supreme Court has treated these certiorari denials as signifying that the Court is distinguishing Florida's statute from the Arizona statute struck down in *Ring*. See *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) (per curiam) (rejecting Bottoson's claim "that he is entitled to relief under *Ring*" and explaining that the United States Supreme Court "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" and "did not direct the Florida Supreme Court to reconsider *Bottoson* in light of *Ring*"); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same as *Bottoson*). But, as the United States Supreme Court has made clear in other cases, neither a denial of certiorari nor a denial of a stay can be taken as a comment on the substantive claim. See, e.g., *Bridgers v. Texas*, 121 S. Ct. 1995, 1996 (2001) (statement of Breyer, J., joined by Stevens and Souter, JJ., respecting denial of certiorari) ("Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim . . . I write to make this point explicit. That is to say, if the problem purportedly present here proves to be a recurring one, I believe that it may well warrant this Court's attention."); *Knight v. Florida*, 528 U.S. 990, 990 (1999) (opinion of Stevens, J., respecting denial of certiorari, that "It seems appropriate to emphasize that the denial of these petitions for certiorari does not constitute a ruling on the merits."); *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of stay and stating, "The denial of the present application [for a stay] should not . . . be construed as having been predicated on a determination that there is no merit in the claims asserted in the state collateral review process"). The Supreme Court has on several occasions granted relief on a claim even though that same claim in another case did not result in a grant of certiorari. See Anthony G. Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, 14 HUMAN RIGHTS 14, 16 & n.8, 54-56 (1987); see also *In re McDonald*, 489 U.S. 180, 187-88 (1989) (Brennan, J., dissenting) ("It is rare, but it does happen on occasion that we grant review and even decide in favor of a [habeas corpus] litigant who previously had presented multiple unsuccessful petitions on the same issue.") (citing *Chessman v. Teets*, 354 U.S. 156 (1957)).

In answering the unresolved question of *Hildwin*'s current validity and the implications for the Alabama and Florida statutes,<sup>140</sup> the central issue is whether some aspect of the Florida or Alabama statutes serve as a basis for distinguishing the reasoning and result in *Ring*. One possible distinction is the grant of a limited role for the jury in the sentencing process: Whereas the Arizona statute struck down in *Ring* allocated the sentencing process entirely to a judge, eliminating the jury from the determination of aggravating circumstances as well as all other aspects of the decision whether to impose death,<sup>141</sup> the Florida and Alabama statutes provide for a jury to hear the evidence at sentencing and to render an "advisory verdict."<sup>142</sup>

A passage of the *Walton* decision actually comments on this very issue, although the *Walton* Court approached the issue from a different direction. The petitioner in *Walton* had argued—in an attempt to distinguish the earlier Supreme Court decisions upholding the Florida statute—that the Arizona statute presents a distinct Sixth Amendment issue in that it completely eliminates the jury from the capital sentencing process, whereas the Florida statute provided for the jury to play at least a limited role.<sup>143</sup> The Court in *Walton* rejected this argument, stating:

The distinctions *Walton* attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of

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140. In the wake of *Apprendi*, capital defendants in Florida challenged the death penalty statute on the same grounds that were eventually heard by the Supreme Court in *Ring*. The Florida Supreme Court, in pre-*Ring* decisions, rejected these arguments on the ground that the Supreme Court of the United States had rejected equivalent arguments in *Walton v. Arizona* and *Proffitt v. Florida* and "[t]he *Apprendi* majority clearly did not revisit these rulings." *Mills v. Moore*, 786 So. 2d 532, 538 (Fla.), cert. denied, 532 U.S. 1015 (2001); *Bottoson v. State*, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, 122 S. Ct. 2670 (2002); *King v. State*, 808 So. 2d 1237, 1245 (Fla. 2002), cert. denied, 122 S. Ct. 932 (2002); *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001). After certiorari was granted in *Ring*, and while the case was pending decision, the Florida Supreme Court announced that it would "continue to rely on our precedents on this [*Apprendi*] issue until the United States Supreme Court rules to the contrary." *Sweet v. Moore*, 822 So. 2d 1269, 1275 n.14 (Fla. 2002). In the wake of *Ring*'s issuance, the Florida Supreme Court has rejected *Ring* claims on the ground that the United States Supreme Court "repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century . . . [citing, inter alia, *Hildwin v. Florida*, *Spaziano v. Florida*, and *Proffitt v. Florida*]," and because the Court in *Ring* did not specifically address the continuing validity of the earlier decisions, state courts now must "leav[e] to th[e] [United States Supreme Court] the prerogative of overruling its own decisions." *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) (quoting *Rodriguez De Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989)); *King v. Moore*, 831 So. 2d 143, 144 (Fla. 2002) (same as *Bottoson*). Similar challenges have been turned down by the Alabama Supreme Court in Alabama cases. See *Ex parte Waldrop*, No. 1001194, 2002 WL 31630710, at \*6 (Ala. Nov. 22, 2002) (rejecting a challenge to Alabama's sentencing scheme under *Ring v. Arizona*).

141. See *Ring*, 122 S. Ct. at 2434-35, 2437-43; *Walton*, 497 U.S. at 643-44, 647-49.

142. See *Hildwin*, 490 U.S. at 639 (describing FLA. STAT. § 782.04(1)(a) (1987)); *Spaziano v. Florida*, 468 U.S. 447, 451-52 (1984); *Proffitt v. Florida*, 428 U.S. 242, 248-49, 252 (1976).

143. *Walton*, 497 U.S. at 647.



a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.<sup>144</sup>

Both of the systemic features identified in the above quotation—the lack of a “specific factual finding[] [by a jury] with regard to the existence of . . . aggravating circumstances” and the lack of a “binding” verdict by the jury on this issue<sup>145</sup>—must be regarded, in the wake of *Ring*, as independent, fatal flaws of Florida and Alabama's system. First, the Florida and Alabama statutes permit a judge to impose a death sentence without a jury's specific finding of an aggravating circumstance even though *Ring* places the determination of aggravating circumstances within the exclusive province of the jury.<sup>146</sup> Indeed, the nature of the sentencing process in Florida and Alabama makes it impossible, in the vast majority of cases, to even glean what aggravating factors the jurors found.<sup>147</sup> All that can be said in most

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144. *Id.* at 648; *see also* *Combs v. State*, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring) (“As a matter of law, as we hold here, the jury's recommendation is merely advisory; the trial judge is the sentencer and must base the sentence on an independent weighing of the aggravating and mitigating factors, notwithstanding the jury recommendation.”).

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

146. If a statute were to provide for a specific jury finding on an issue at the guilt-innocence stage of the trial that precisely mirrors the factfinding necessary for the determination of an aggravating circumstance at the capital sentencing stage, an issue would arise as to whether the jury's finding at a pre-sentencing stage of the case is sufficient to satisfy *Ring*'s mandate notwithstanding the absence of an explicit jury finding at the sentencing stage. *See, e.g., Cole v. State*, 701 So. 2d 845, 852 (Fla. 1997), *cert. denied*, 523 U.S. 1051 (1998) (concluding that aggravating circumstances found by the trial court, namely “murder committed during the course of a kidnapping . . . and . . . murder committed for pecuniary gain [were] . . . established beyond a reasonable doubt in view of the jury's verdict in the guilt phase that Cole was guilty of the kidnapping and robbery of John Edwards”). This issue is discussed *infra* note 149. Such an analysis, even if arguably applicable to some of the Florida aggravating circumstances, would not legitimate judicial findings on the statutory aggravating circumstances that do not even arguably replicate findings that are made by the jury at trial. *See, e.g., FLA. STAT. ANN. § 921.141(5)(h)* (West 2001) (“The capital felony was especially heinous, atrocious, or cruel.”); *id.* § 921.141(5)(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.”); *id.* § 921.141(5)(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.”).

147. *See Combs*, 525 So. 2d at 859 (Shaw, J., specially concurring) (“[B]oth this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation . . . Florida's statute is unlike those in states where the jury is the sentencer and is required to render special verdicts with specific findings of fact.”). In some capital cases in Florida, the jury is given a “special verdict form” that calls for the jury to identify the specific aggravating circumstances it found. *See, e.g., Vining v. State*, 637 So. 2d 921, 924 (Fla. 1994), *cert. denied*, 513 U.S. 1022 (1994) (“[U]sing a special verdict form, the jury found four statutory aggravating factors proven beyond a reasonable doubt.”). The Florida Supreme Court, however, has held that “no constitutional or statutory requirement . . . mandates the use of a special verdict form in death penalty cases.” *Patten v. State*, 598 So. 2d 60, 62 (Fla. 1992), *cert. denied*, 507 U.S. 1019 (1993); *accord Jones v. State*, 569 So. 2d 1234, 1237 (Fla. 1990). As a result, it is common for the record to be silent on the issue of what specific aggravating circumstances the jury found; in such cases, the only specific findings on aggravating circumstances are those made by the sentencing judge pursuant to the statutory requirement that “if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based.” *See FLA. STAT. ANN. § 921.141(3)* (West 2001); *see also Sweet v. Moore*, 822 So. 2d 1269, 1271 (Fla. 2002) (“The jury recommended a death sentence by a vote of ten to two, and after concluding that the aggravating circumstances of the crime outweighed the mitigating circumstances, the trial court followed the jury's recommendation.”). Accompanying footnotes two and three regarding the aggravating and mitigating circumstances found in the case explain that “[t]he trial court found the following aggravating circumstances

cases is that whatever aggravating circumstances may have been found were deemed by the jury to be sufficient (or, in cases in which the jury recommends life imprisonment, insufficient) to outweigh whatever mitigating circumstances the jury found.<sup>148</sup> Moreover, although Florida and Alabama law limits the jury's consideration of aggravation to those factors that it has found beyond a reasonable doubt,<sup>149</sup> the jurors need not unanimously agree that any particular aggravating circumstance has been established beyond a reasonable doubt.<sup>150</sup> In a state like Florida, which requires unanimous jury findings on all elements of the offense,<sup>151</sup> *Ring's* reclassification of aggravating circumstances as tantamount to elements of the offense calls for extension of the unanimity requirement to jury findings on aggravation.<sup>152</sup>

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[listing factors]" and that "[t]he trial court found no statutory mitigating circumstances, but found . . . nonstatutory mitigation." *Id.* at 1271 nn.2-3 (emphasis added).

148. "At the conclusion of the [capital sentencing] hearing the jury is directed to consider '[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.'" *Proffitt v. Florida*, 428 U.S. 242, 248 (1976) (plurality opinion) (quoting FLA. STAT. ANN. §§ 921.141(2)(b), (c) (Supp. 1976-77)).

149. The Florida statute does not expressly require that findings of aggravating circumstances be made beyond a reasonable doubt. *See* FLA. STAT. ANN. §§ 921.141(2)(a), (3)(a), (5) (West 2001). However, in some of the earliest cases construing the post-*Furman* death penalty statute, the Florida Supreme Court held that the state must prove every aggravating circumstance beyond a reasonable doubt. *See* *Alford v. State*, 307 So. 2d 433, 443 (Fla. 1975), *cert. denied*, 428 U.S. 912 (1976); *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). As a result, "the standard [Florida] sentencing phase jury instruction . . . states: Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision." *Archer v. State*, 673 So. 2d 17, 20 (Fla. 1996), *cert. denied*, 519 U.S. 876 (1996). *See also, e.g.*, *Fitzpatrick v. State*, 437 So. 2d 1072, 1077 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984) ("[T]he judge instructed the jury that an aggravating circumstance had to be established beyond a reasonable doubt."). The existence of a standard jury instruction to this effect makes it likely, but certainly not inevitable, that the jury will always receive this instruction. Indeed, even when, as in Alabama, the statute expressly requires that aggravating circumstances be proven beyond a reasonable doubt, juries sometimes are not instructed that aggravation must be established beyond a reasonable doubt. *See* ALA. CODE § 13A-5-45(e) (2003) (providing that "[a]t the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances."); *see also* *Harris v. Alabama*, 513 U.S. 504, 506 (1995) (describing Alabama statute). In such cases, the absence of such an instruction provides an additional ground for finding a death sentence to be unconstitutional. In *In re Winship*, 397 U.S. 358, 361 (1970), the Supreme Court held that the Due Process Clause requires that elements of the crime be proven by the prosecution beyond a reasonable doubt. In *Ring*, the Court recognized that its classification of aggravating circumstances as tantamount to elements of the offense requires that these facts be found beyond a reasonable doubt. *See* *Ring v. Arizona*, 122 S. Ct. 2428, 2439 (2002) ("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.*") (emphasis added); *accord* *Apprendi*, 530 U.S. at 482-83, 490.

150. *See* *Jones v. State*, 569 So. 2d 1234, 1238 (Fla. 1990) (rejecting argument that Florida's death penalty statute "and the federal constitution require jurors to . . . unanimously agree upon the existence of the specific aggravating factors applicable in each case"); *see also* *Franqui v. State*, 804 So. 2d 1185, 1201 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part) (comparing Florida statute with other states' death penalty laws and observing, *inter alia*, that "the New Hampshire statutory scheme requires the unanimous vote of the jury for a death recommendation, a safeguard not present in Florida where a death recommendation can be made by a bare majority vote").

151. *See* FLA. R. CRIM. P. 3.440 (providing that "[n]o verdict may be rendered unless all of the trial jurors concur in it"); *see also* *Jones v. State*, 92 So. 2d 261, 261 (Fla. 1956) ("In this state, the verdict of the jury must be unanimous.").

152. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), the Supreme Court held that the Constitution does not require jury unanimity in criminal trials. *See* *Kim*

Unanimity is the prevailing rule for jury findings on aggravating circumstances in those jurisdictions that allocate the sentencing judgment to a jury rather than a judge or a hybrid judge-jury procedure.<sup>153</sup>

The “non-binding” nature of a Florida jury’s sentencing recommendation is yet another impediment to the Florida statute’s satisfaction of *Ring*’s mandate. The crux of *Ring*’s ruling is that the accused is entitled, under the Sixth Amendment, to a jury finding on all elements of the offense, and this

Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1264-65 (2000). Only three states (Idaho, Oklahoma, and Texas) have followed the examples of Oregon and Louisiana in adopting a majority rule approach to jury verdicts in criminal trials. *See id.* at 1265 n.16. The Supreme Court has often recognized that the higher need for reliability in capital cases calls for enhanced procedural protections when a defendant’s life is at stake. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 422 (1995); *Herrera v. Collins*, 506 U.S. 390, 405 (1993). So the Court may, if confronted with the question, deem unanimity to be required in capital trials—in which event, *Ring* would call for the same approach to be applied to jury findings on aggravating circumstances. *See Ring*, 122 S. Ct. at 2444 (Scalia, J., concurring) (characterizing *Apprendi* requirement as one in which “a unanimous jury must find beyond a reasonable doubt”) (emphasis added).

In gauging the need for a particular procedural protection in capital sentencing processes, the Court has, on occasion, considered the prevailing trends in state legislatures’ treatment of the issue. *See, e.g., id.* at 2442 (observing that “the great majority of States responded to this Court’s Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury”).

In any event, the Court’s invitation to states to experiment with non-unanimous jury verdicts cannot be viewed as permitting state legislatures and courts to pick and choose among elements of the crime and designate some as requiring unanimity and others to be adequately established with a majority vote. And even if such a selective approach to unanimity could be squared with the Constitution, the requirement of heightened reliability in capital cases would foreclose the application of a lesser standard to capital cases. *See id.* at 2443 (“The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death.”); *see also In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 69 (Fla. 1972) (per curiam) (Roberts, J., concurring in part and dissenting in part). Justice Roberts dissented from the Florida Supreme Court’s adoption of a rule of criminal procedure that requires unanimity in criminal cases, and stated:

In my opinion, certainly in misdemeanor cases where the punishment is light, a jury should be able to reach a verdict with an affirmative vote of five out of six jurors. Therefore, I would adopt a rule that in misdemeanors providing for punishment of six months or less or a fine of \$500 or less, five out of six jurors could reach a verdict.

*Florida Rules*, 272 So. 2d at 69 (Roberts, J., concurring in part and dissenting in part).

153. *See, e.g.*, *Bell v. Cone*, 122 S. Ct. 1843, 1848 (2002) (describing TENN. CODE ANN. § 39-2-203 as requiring that death sentence rest upon unanimous jury finding of at least one statutory aggravating circumstance beyond a reasonable doubt); *Kelly v. South Carolina*, 122 S. Ct. 726, 730 n.2 (2002) (describing S.C. CODE ANN. § 16-3-20(B), (C) as requiring jury findings of existence of statutory aggravating circumstances to be unanimous and beyond a reasonable doubt); *Romano v. Oklahoma*, 512 U.S. 1, 4 (1994) (describing OKLA. STAT., tit. 21, § 701.10 as predicating death sentence upon unanimous jury finding of at least one statutory aggravating circumstance beyond a reasonable doubt); *Blystone v. Pennsylvania*, 494 U.S. 299, 302 (1990) (holding PA. CONS. STAT. ANN. § 9711(c)(1)(iv) requires unanimous jury finding of at least one statutory aggravating circumstance beyond a reasonable doubt as basis for death sentence). *Cf. ALA. CODE* § 13A-5-46(f) (2003) (under Alabama’s hybrid judge-jury system, an advisory verdict recommending a death sentence requires a vote of ten jurors, and a verdict recommending life imprisonment without parole requires a vote of seven jurors). *But cf. NEV. REV. STAT. ANN.* § 175.556 (2002) (although jury’s sentencing verdict must be unanimous, and a unanimous decision is binding upon the trial court, a jury’s inability to reach a unanimous verdict results in Nevada Supreme Court’s appointment of two district judges to sit alongside the trial judge and conduct a penalty hearing, in which “[a] sentence of death may be given only by unanimous vote of the three judges, but any other sentence may be given by the vote of a majority”); S.D. CODIFIED LAWS § 23A-27A-4 (2002) (statute fails to specify whether the jury’s recommendation must be unanimous, and the courts have not had occasion to decide this question, but statutory reference to the jury’s “verdict” may be construed as signifying a legislative intent to require a single, unanimous verdict).

right extends to aggravating circumstance findings that render a capital defendant subject to the death penalty.<sup>154</sup>

In assessing whether an advisory jury recommendation can satisfy this rule, it is useful to consider the Supreme Court's endorsement of the advisory jury option in *McKeiver v. Pennsylvania*,<sup>155</sup> the previously discussed opinion concluding that alleged juvenile delinquents do not have a constitutional right to a jury trial.<sup>156</sup> Justice Blackmun's plurality opinion noted: "There is, of course, nothing to prevent a juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury."<sup>157</sup> As explained earlier,<sup>158</sup> Justice Blackmun's opinion analyzed the jury trial issue solely in terms of a due process right to a fundamentally fair and reliable factfinder at trial. In concluding that judges are capable of providing the fairness and reliability required by the Due Process Clause,<sup>159</sup> Justice Blackmun offered the advisory jury option as, essentially, an additional feature that would allow individual judges to enhance the quality of their decision-making.<sup>160</sup> But when the right at issue shifts from a due process guarantee of fundamental fairness to a straightforward Sixth Amendment jury trial guarantee, the constitutional analysis is very different. As the Supreme Court recognized in *Ring*, the "Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders."<sup>161</sup> When applicable, the Sixth Amendment confers a right to a jury determination, regardless of the relative efficiency of this form of decision-making.<sup>162</sup> Indeed, the three Justices in *McKeiver* who employed a Sixth Amendment framework to analyze an alleged delinquent's right to a jury trial—Justices Douglas, Black, and Marshall, in dissent—concluded that considerations of relative fairness and reli-

154. See *supra* notes 118-31 and accompanying text.

155. 403 U.S. 528 (1971).

156. See *supra* notes 41-48 and accompanying text.

157. *McKeiver*, 403 U.S. at 548 (plurality opinion). The option of an advisory jury has received only very limited acceptance in delinquency proceedings in the years since *McKeiver*. Compare *Ex parte State ex rel. Simpson*, 263 So. 2d 137, 139 (Ala. 1972) (holding Family Relations Division of Circuit Court "has the power to provide for a jury trial in a juvenile delinquency proceeding and to consider the verdict as being only advisory"), *People v. Superior Court ex rel. Carl W.*, 539 P.2d 807, 815, (Cal. 1975) (holding applicable statute "permits the empanelment of a purely advisory jury in appropriate cases to assist the juvenile court to discharge its capacity as the ultimate factfinder in juvenile court proceedings"), and *In re Estate of Fanelli v. Fanelli*, 336 So. 2d 631, 632 (Fla. App. 1976) (stating that "in revocation of probation proceedings and juvenile delinquency proceedings," and also in probate proceedings, judge has "authority to use an advisory jury to determine a disputed issue of fact, although not required to do so"), with *People ex rel. Carey v. White*, 357 N.E.2d 512, 516 (Ill. 1976) (holding juvenile division of circuit court lacks power to empanel advisory jury in delinquency proceeding because "the legislature has manifested its intent that the circuit judge alone shall make factual findings under the [Juvenile Court] Act"), and *Upham v. McElligott*, 956 P.2d 179, 183 (Or. 1998) (holding juvenile court erred in granting alleged delinquent's motion for advisory jury: "The juvenile court lacks authority to empanel any jury to hear a delinquency case.").

158. See *supra* notes 41-48 and accompanying text.

159. See *McKeiver*, 403 U.S. at 547; see also *supra* notes 41-48 and accompanying text.

160. *McKeiver*, 403 U.S. at 547.

161. *Ring v. Arizona*, 122 S. Ct. 2428, 2442 (2002).

162. See *Ring*, 122 S. Ct. at 2442 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (quoted in text accompanying *supra* note 129)).

ability must give way before the straightforward jury trial right enshrined in the Sixth Amendment.<sup>163</sup>

Moreover, even if an advisory jury system could somehow be squared with the Sixth Amendment, and even if a death penalty statute provided for an explicit jury recommendation with regard to findings of aggravating circumstances (a feature that, as explained above, is missing from the Florida statute),<sup>164</sup> the relegation of the jury to an advisory status fatally taints the reliability of the jury's factfinding processes and therefore would run afoul of the Eighth Amendment. In *Caldwell v. Mississippi*,<sup>165</sup> the Supreme Court held, with regard to a somewhat different issue, that "it is constitutionally impermissible [under the Eighth Amendment] to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."<sup>166</sup> In jury override jurisdictions, it is a common practice for prosecutors to inform jurors that their capital sentencing verdict is "merely advisory," and the standard jury instructions routinely inform the jurors of their advisory role.<sup>167</sup> In the past, this practice has been upheld by the Supreme Court, the lower federal courts, and the state courts on the ground that such comments do not "mislead the jury as to its role in the sen-

163. See *McKeiver*, 403 U.S. at 557-63 (Douglas, J., dissenting, joined by Black and Marshall, JJ.) ("[T]he child, the same as the adult, is in the category of those described in the Magna Carta: 'No freeman may be . . . imprisoned . . . except by the lawful judgment of his peers, or by the law of the land.'"). The other Justices analyzed the issue solely in due process terms. See *id.* at 530 (plurality opinion of Blackmun, J., joined by Burger, C.J., and Stewart and White, JJ.) ("These cases present the narrow but precise issue whether the Due Process Clause of the Fourteenth Amendment assures the right to trial by jury in the adjudicative phase of a state juvenile court delinquency proceeding."); *id.* at 553 (Brennan, J., concurring and dissenting) ("I agree with the plurality opinion's conclusion that the proceedings below in these cases were not 'criminal prosecutions' within the meaning of the Sixth Amendment. For me, therefore, the question in these cases is whether jury trial is among the 'essentials of due process and fair treatment.'").

164. See *supra* notes 146-51 and accompanying text.

165. 472 U.S. 320 (1985).

166. *Caldwell*, 472 U.S. at 328-29. The issue in *Caldwell* was an Eighth Amendment challenge on the ground that the prosecutor had argued at trial, and the judge had instructed the jury, that its decision was not final but was automatically reviewable by the state supreme court. *Id.* The Court reversed the conviction and sentence, explaining that the

[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case."

*Id.* at 330 (citations omitted).

167. See, e.g., *Combs v. State*, 525 So. 2d 853, 855-56 (Fla. 1988) (rejecting *Caldwell* argument that "the prosecutor minimized the jury's role . . . by advising the jurors during *voir dire* and in final argument that their decision would be advisory, and that the ultimate decision rested with the trial judge," and that "the trial judge erred in instructing the jury from our standard jury instructions that the 'final decision as to what punishment should be imposed rests solely with the judge of this court'"); *Grossman v. State*, 525 So. 2d 833, 838 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989) (rejecting *Caldwell* challenge to prosecutor's informing "several potential jurors [who] indicated misgivings about their ability to impose the death penalty" that "the jury role was to make an advisory recommendation to the judge and that the judge had the ultimate responsibility for sentencing to death"); see also *Johnson v. State*, 660 So. 2d 637, 647 (Fla. 1995), *cert. denied*, 517 U.S. 1159 (1996) (rejecting *Caldwell* challenge to "Florida's jury instructions" and commenting that "[w]e repeatedly have rejected similar claims").

tencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.”<sup>168</sup> After *Ring*—in which the Court has declared that the jury *must* play a determinative role as to the finding of facts at the penalty phase of a capital trial—instructions to the jury that its verdict is “advisory” or merely a “recommendation” run afoul of *Caldwell*, as they are “inaccurate and misleading in a manner that diminishe[s] the jury’s sense of responsibility.”<sup>169</sup>

The foregoing reasoning strongly suggests that *Ring*’s holding—that the jury must make the factfinding determination of the existence of aggravating circumstances—applies, unabated, to advisory jury schemes like the one employed in Florida and Alabama. Accordingly, the analysis that caused the *Ring* Court to overrule *Walton* (which had upheld Arizona’s judge-only capital sentencing scheme) also should lead to the overruling of *Hildwin* (which had approved Florida’s advisory jury system) and *Harris v. Alabama*<sup>170</sup> (which had approved an equivalent advisory jury scheme in Alabama).

Until now, the discussion has focused exclusively on the dimension of Arizona’s capital sentencing scheme that the Court explicitly addressed in *Ring*: the determination of the existence of aggravating circumstances. The next Subpart will consider whether the Court’s reasoning in *Ring* has implications for other aspects of the capital sentencing process under a judge-only sentencing system and/or a hybrid judge-jury approach.

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168. *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986); *Duren v. Hopper*, 161 F.3d 655, 664 (11th Cir. 1998), *cert. denied*, 528 U.S. 940 (1999) (noting attorney was not ineffective for failing to object to court’s instruction that jury’s verdict was “advisory”; instruction was not erroneous because “the court did not mislead the jury, diminish its importance, or absolve it of responsibility for its decision”); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997), *cert. denied*, 523 U.S. 1141 (1998) (holding *Caldwell* is not violated as long as references to and descriptions of jury’s sentencing verdict as advisory recommendation to judge, who is final sentencing authority, “accurately characterize the jury’s and judge’s sentencing roles” under state law); *see also Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (“[T]o establish a *Caldwell* violation, a defendant must necessarily show that the remarks to the jury improperly described the role assigned to the jury by local law.”) (quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989)).

For Florida Supreme Court decisions rejecting *Caldwell* challenges to prosecutorial arguments and/or jury instructions advising the jury that its role is “merely advisory,” *see supra* note 167. Similar caselaw can be found in other jurisdictions that employ a hybrid judge-jury mechanism for capital sentencing. For example, there is extensive caselaw of this sort in Alabama, which also employs an “advisory jury” at the capital sentencing stage. *See, e.g., Ex parte Taylor*, 666 So. 2d 73 (Ala. 1995), *disagreed with on other grounds, Ex parte Borden*, 769 So. 2d 950 (Ala. 2000) (holding no error in trial court’s instructions to jury that verdict was advisory); *Ex parte Hays*, 518 So. 2d 768, 777 (Ala. 1986) (holding trial court’s instruction that jury’s verdict was merely “recommendation” was correct); *Smith v. State*, 2000 WL 1868419, at \*39 (Ala. Crim. App. Dec. 22, 2000) (holding instruction that verdict is “recommendation” or “advisory” is proper); *Thomas v. State*, 766 So. 2d 860, 964-65 (Ala. Crim. App. 1998) (holding prosecutor’s statements that verdict was advisory, combined with court’s instruction that it was merely “recommendation,” not improper); *Brown v. State*, 686 So. 2d 385, 398 (Ala. Crim. App. 1995), *aff’d*, 686 So. 2d 409 (1996) (holding prosecutor’s statements that verdict was advisory not erroneous); *Hallford v. State*, 629 So. 2d 6, 10-11 (Ala. Crim. App. 1992) (holding prosecutorial argument that jury verdict is “recommendation” not erroneous).

169. *Caldwell*, 472 U.S. at 342 (O’Connor, J., concurring in part and concurring in the judgment).

170. 513 U.S. 504 (1995). For discussion of *Harris*, *see supra* notes 72-78 and accompanying text.

*B. Revisiting Spaziano: The Applicability of Ring's Ruling to Other Factfindings in the Capital Sentencing Process*

Although there are many variations among the capital sentencing statutes currently in existence, most of these statutes employ a common, tripartite factfinding process that involves the sentencer's making factual findings on three different issues: the existence of aggravating circumstances; the existence of mitigating aspects of the defendant's character, record, or offense; and whether the aggravating circumstances outweigh the mitigating circumstances.<sup>171</sup> The portion of this tripartite structure that has been the central focus of Sixth Amendment scrutiny up to this point has been the first prong: factfinding on the existence of aggravating circumstances. This was the factfinding determination that the now-overruled *Walton* decision and its jurisprudentially linked predecessor, *Hildwin*, deemed suitable for a judge. And it is the factfinding determination that *Ring*, in overruling *Walton*, reserved for the jury. In the wake of *Ring*, the inevitable next questions for resolution are whether the *Ring* rationale requires a jury also to make the second and third factfinding determinations—the determination of the existence of mitigating circumstances and the assessment whether aggravating circumstances outweigh mitigating circumstances.

The *Ring* decision does not address these issues. Indeed, the Court explicitly noted that the petitioner's "claim is tightly delineated"<sup>172</sup> and does not encompass either a "Sixth Amendment claim with respect to mitigating circumstances"<sup>173</sup> or an argument "that the Sixth Amendment required the

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171. The prevalence of this procedural framework is hardly coincidental. When *Furman* struck down all capital punishment statutes in this country in 1972, see *supra* notes 3-5 and accompanying text, the states that sought to adopt new death penalty laws that might withstand judicial scrutiny could turn to the Model Penal Code, which set forth a capital sentencing process involving the weighing of aggravating against mitigating circumstances. See *Gregg v. Georgia*, 428 U.S. 153, 193-95 & n.4 (1976) (plurality opinion) (quoting extensively from MODEL PENAL CODE § 201.6 cmt. 3 at 71 (Proposed Official Draft 1959)). Those states that engaged in statutory drafting in the wake of the Court's 1976 decisions (because, for example, they had previously adopted mandatory death penalty statutes of the sort condemned by the Court in 1976, see *supra* notes 6-13 and accompanying text (discussing *Woodson v. North Carolina*, *Roberts v. Louisiana*, and *Green v. Oklahoma*)), quite naturally adopted the statutory framework that won the Court's favor in the 1976 decisions, one involving the identification of and weighing of aggravating and mitigating circumstances. Of the three statutes upheld in 1976, two of them—Georgia's and Florida's—employed this capital sentencing procedure. See *Gregg*, 428 U.S. at 166-67, 196-98 (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 247-52 (1976). The third statute approved in 1976, the Texas death penalty law, appeared to employ a different structure, in that it did "not explicitly speak of mitigating circumstances" and "direct[ed] only that the jury answer three questions," *Jurek v. Texas*, 428 U.S. 262, 272 (1976) (plurality opinion), but the plurality opinion in *Jurek* emphasized that the second of the statutory questions had been construed by the state courts to permit jury consideration of mitigating circumstances. See *Jurek*, 428 U.S. at 272-74. Much later, the Court had reason to revisit and reconsider the extent to which the Texas statutory question actually permitted jury consideration of mitigating circumstances. See *Penry v. Lynaugh*, 492 U.S. 302, 315-16, 328 (1989) (holding Texas statute prevented jury from adequately considering and giving effect to mitigating evidence).

172. *Ring v. Arizona*, 122 S. Ct. 2428, 2437 n.4 (2002).

173. *Ring*, 122 S. Ct. at 2437 n.4 (quoting passage in *Apprendi* "noting 'the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation'" (citation omitted)).

jury to make the ultimate determination whether to impose the death penalty.”<sup>174</sup>

A central difficulty in resolving these second-stage issues is that the jurisprudential tools that one would naturally use to analyze the questions—the Supreme Court’s prior decisions on the jury’s role in capital sentencing—are now inherently suspect in light of *Ring*. As Part I explained, the line of decisions that led up to the Supreme Court’s upholding of judge-only capital sentencing in *Walton* were bound by a common rationale. Indeed, in handing down its ruling in *Walton*, the Court emphasized that the prior decisions essentially compelled a ruling upholding the Arizona statute.<sup>175</sup> Although the Court has not yet revisited these earlier decisions in light of *Ring*’s overruling of *Walton*, the previous discussion in Subpart II.A shows that at least some portions of the earlier rulings cannot survive such scrutiny.

Heavy reliance on the Court’s pre-*Ring* decisions in *Apprendi* and *Jones* also is perilous. Although *Ring* reaffirmed these rulings,<sup>176</sup> it nevertheless refuted a significant facet of these earlier decisions’ reasoning: their harmonizing of *Walton* by distinguishing away the capital punishment context.<sup>177</sup> Indeed, the core of *Ring*’s ruling is that the “key distinction” that these earlier decisions sought to draw between the capital and non-capital contexts is jurisprudentially unsound.<sup>178</sup> Thus, although the *Jones* and *Apprendi* decisions’ analyses of the non-capital statutes at issue in those cases emerge unscathed from *Ring*’s revisiting of the issues, one must regard *Apprendi*’s and *Jones*’s comments on the capital context as discredited dicta. Moreover, caution is required, even in applying other passages of *Apprendi* and *Jones* to the capital context, given the difficulties of discerning the degree to

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174. *Id.* (quoting earlier statement by *Proffitt* plurality that “[i]t has never [been] suggested that jury sentencing is constitutionally required.”) (citation omitted).

175. *See Walton*, 497 U.S. at 647-49 (describing petitioner’s attack upon Arizona’s judge-only sentencing scheme, then stating that “[w]e repeatedly have rejected constitutional challenges to Florida’s death sentencing scheme, which provides for sentencing by the judge, not the jury,” then rejecting “[t]he distinctions *Walton* attempts to draw between the Florida and Arizona statutory schemes,” then explaining that *Cabana v. Bullock* “provides further support for our conclusion,” and then declaring, at the end of what is an abbreviated discussion, that “the Arizona capital sentencing scheme does not violate the Sixth Amendment”).

176. The reaffirmation of *Apprendi* did not command universal agreement. Justice O’Connor and Chief Justice Rehnquist announced that they would have resolved the “irreconcilable” conflict between *Apprendi* and *Walton* by “choosing . . . to overrule . . . *Apprendi*, not *Walton*.” *Ring*, 122 S. Ct. at 2448 (O’Connor, J., dissenting, joined by Rehnquist, C.J.).

177. *See Apprendi v. New Jersey*, 530 U.S. 466, 496-97 (2000) (stating *Walton* and “the capital cases are not controlling” on the issue before the Court in *Apprendi* because “[w]hat the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed”) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)); *Jones*, 526 U.S. at 251 (distinguishing *Walton* on the ground that it concerned a statute that allowed a sentencing judge to use findings of aggravating factors to choose “between a greater and a lesser penalty” but did not permit the judicial findings to “rais[e] the ceiling of the sentencing range available”). *See supra* notes 98-109 and accompanying text (discussing this dimension of *Apprendi* and *Jones*).

178. *See Ring*, 122 S. Ct. at 2440, 2443. For discussion of this facet of *Ring*, see *supra* notes 119-25 and accompanying text.



which these earlier decisions' misjudgment about *Walton* may have colored the Court's comments.

Where, then, other than *Ring* itself, is one to look for Supreme Court guidance on the post-*Ring* issues? An important resource is a non-capital decision announced on the same day as *Ring*: *Harris v. United States*.<sup>179</sup> *Harris* concerned another of the jurisprudential tensions created by *Apprendi*. The Court had held in *McMillan v. Pennsylvania*<sup>180</sup> in 1986 that the Sixth Amendment does not require that the jury, rather than a judge, make a factfinding determination that triggers a statutorily defined mandatory minimum sentence.<sup>181</sup> The apparent conflict between this rule and the new one announced in *Jones* and *Apprendi* was openly proclaimed by the *Jones* and *Apprendi* dissenters, who stated that the majority decisions squarely conflicted with *McMillan*.<sup>182</sup> Thus, just as with the capital punishment issue eventually resolved in *Ring*, the stage was set for a revisiting—and what seemed likely to be an overruling—of the earlier Supreme Court decision. Yet, the ending of the “*Apprendi* versus *McMillan*” story was the opposite of the “*Apprendi* versus *Walton*” conflict. In a 5-4 decision, a majority of the Court in *Harris* declined to overrule the earlier decision in *McMillan* and rejected the petitioner's *Apprendi*-based challenge to a statute that allocated to a judge the factual findings that trigger a statutory mandatory minimum.<sup>183</sup>

Given the divergent outcomes of the simultaneously announced decisions in *Ring* and *Harris*, one might think that the jurisprudential key for analyzing Sixth Amendment issues in the post-*Ring* era is found at the dividing line between *Ring* and *Harris*: the analytic step that allowed the Court, in treading the path that began in *Jones* and *Apprendi*, to turn in one direction in *Ring* while turning in the opposite direction in *Harris*. However, in this murky area of the law, beset by repeated reversals, the story is not nearly so simple. It is, indeed, the case that four of the Justices in the *Harris* majority embraced a rationale that allowed them to place *McMillan* and *Harris* on one side of a divide while placing *Apprendi* and *Ring* on the other. In a plurality opinion announcing the judgment of the Court, which was joined by three other Justices, Justice Kennedy stated that *Apprendi* and *McMillan* can be reconciled as standing for the proposition that the Sixth Amendment reserves for the jury any factfindings that “set[] the outer limits of a sentence, and of the judicial power to impose it” (which would include

179. 122 S. Ct. 2406 (2002).

180. 477 U.S. 79 (1986).

181. See *McMillan*, 477 U.S. at 81.

182. See *Apprendi*, 530 U.S. at 533 (O'Connor, J., dissenting) (“The essential holding of *McMillan* conflicts with at least two of the several formulations the Court gives to the rule it announces today. . . . Accordingly, it is incumbent on the Court not only to admit that it is overruling *McMillan*, but also to explain why such a course of action is appropriate under normal principles of *stare decisis*.”); *Jones*, 526 U.S. at 268 (Kennedy, J., dissenting) (“[B]y its terms, JUSTICE SCALIA’S view . . . would call into question the validity of judge-administered mandatory minimum sentencing provisions, contrary to our holding in *McMillan*.”).

183. *Harris*, 122 S. Ct. at 2419-20.

the aggravating circumstance finding at issue in *Ring*, although Justice Kennedy did not mention this in *Harris*), but that factfindings that set a “minimum term” for a jury-authorized sentence may be assigned to a judge.<sup>184</sup> But Justice Breyer, who provided the fifth vote in *Harris* by concurring in the judgment, did not embrace this reasoning. Indeed, he expressly rejected it. Explaining that he “cannot easily distinguish *Apprendi v. New Jersey* . . . from this case in terms of logic” and therefore “cannot agree with the plurality’s opinion insofar as it finds such a distinction,”<sup>185</sup> Justice Breyer joined the plurality in declining to apply *Apprendi* to the case before the Court because, as he had said in his dissenting opinion in *Apprendi*, he disagrees with the holding and reasoning of *Apprendi*.<sup>186</sup> Given the breadth of the divergence in rationales between Justice Kennedy’s plurality opinion and Justice Breyer’s concurrence, this is not a situation that lends itself neatly to the Supreme Court’s rule that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”<sup>187</sup> All that can comfortably be said about the “narrowest grounds” for the decision in *Harris* is that five Justices agreed, for starkly incompatible reasons, that factfindings that increase a minimum sentence may be allotted to a judge.<sup>188</sup> As the four dissenters in *Harris* commented,

184. *Id.* at 2419 (plurality opinion) (“Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury’s verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.”).

185. *Id.* at 2420 (Breyer, J., concurring in part and concurring in the judgment).

186. *See id.* at 2422 (“For the reasons set forth” in “my *Apprendi* dissent . . . and in other opinions, . . . I would not apply *Apprendi* in this case.”); *id.* at 2420 (“I continue to believe that the Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here).”).

187. *Marks v. United States*, 430 U.S. 188, 192 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion of Justices Stewart, Powell, and Stevens)).

188. In a footnote in *Ring*, Justice Ginsburg provides a different description of the point of convergence between the opinions of Justices Kennedy and Breyer in *Harris*. Justice Ginsburg writes in *Ring*:

In *Harris v. United States*, --- U.S. ---, 122 S.Ct. 2406, 153 L.Ed.2d 524, a majority of the Court concludes that the distinction between elements and sentencing factors continues to be meaningful as to facts increasing the minimum sentence. *See ante*, at 2419 (plurality opinion) (“The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. [A] finding [that triggers a mandatory minimum sentence] restrain[s] the judge’s power, limiting his or her choices within the authorized range. It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be.”); *ante*, at 2420 (BREYER, J., concurring in part and concurring in judgment) (“[T]he Sixth Amendment permits judges to apply sentencing factors – whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here).”).

*Ring v. Arizona*, 122 S. Ct. 2428, 2441 n.5 (2002). Although it is certainly accurate to say, as Justice Ginsburg does at the beginning of this passage, that all five Justices who joined the judgment in *Harris* agreed that there is a “meaningful” “distinction between elements and sentencing factors . . . as to facts increasing the minimum sentence,” *Ring*, 122 S. Ct. at 2441 n.5, this characterization glosses over a wide gulf between the constitutional theories that underlay the two opinions. Justice Kennedy and the three Justices who joined his plurality opinion viewed the distinction as a basis for reaching diametrically opposed results regarding the need for a jury finding in the *Apprendi* and *Harris* contexts. *See id.* at

“This leaves only a minority of the Court embracing the distinction between *McMillan* and *Apprendi* that forms the basis of today’s holding.”<sup>189</sup>

What is most significant about *Harris* is that it helps to elucidate the meaning of *Ring* in various ways that are relevant to the current inquiry and that bypass the issues that divided Justice Kennedy’s plurality opinion in *Harris*, Justice Breyer’s opinion, and the dissenting opinion. Before discussing these dimensions of *Harris*, it is useful to return to *Ring* itself and to consider what can be gleaned from *Ring*.

Although *Ring* focuses specifically on findings of aggravating circumstances—and, as explained earlier, disavows any commentary on other findings involved in the determination of whether to impose a death sentence<sup>190</sup>—*Ring*’s explanation of the reasons for assigning aggravation findings to a jury helps to shed light on other types of sentencing-related fact-finders that similarly must be reserved for the jury. What caused the Court to classify the aggravation finding as necessarily a jury determination is that Arizona law makes this finding an essential predicate for imposing a death sentence upon a defendant who has been convicted of first-degree murder.<sup>191</sup> As the Court explained, a first-degree murder conviction renders an Arizona defendant eligible for a death sentence but such a sentence cannot actually be imposed “unless further findings [are] made.”<sup>192</sup> These additional findings are the ones involved in the previously identified, commonly employed, tripartite framework for capital sentencing. The Court described Arizona’s judge-only version of this framework as follows:

At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the [statutorily] enumerated “aggravating circumstances” and any “mitigating circumstances.” The State’s law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance and “there are no mitigating circumstances sufficiently substantial to call for leniency.”<sup>193</sup>

Focusing on the aggravation finding—the one that was the subject of the grant of certiorari in *Ring*—the Court rejected the state’s effort to char-

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2441. Justice Breyer, on the other hand, deemed a jury finding to be unnecessary in both situations, and drew a distinction between them merely for the purpose of showing that application of *Apprendi* to *Harris* would further exacerbate the problems he described in his *Apprendi* dissent. See *Harris*, 122 S. Ct. at 2422 (Breyer, J., concurring in part and concurring in the judgment).

189. *Harris*, 122 S. Ct. at 2428 (Thomas, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

190. See *supra* notes 117-19 and accompanying text.

191. See *Ring*, 122 S. Ct. at 2443.

192. See *id.* at 2434 (explaining that “[t]he State’s first-degree murder statute prescribes that the offense ‘is punishable by death or life imprisonment,’” but that *Ring*’s conviction of first-degree murder did not authorize a death sentence because “[u]nder Arizona law, *Ring* could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made”); see also *id.* at 2437 (“Based solely on the jury’s verdict finding *Ring* guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.”).

193. *Id.* (footnotes omitted) (quoting ARIZ. REV. STAT. § 13-703(E) (Supp. 2002)).

acterize the conviction of first-degree murder, “for which Arizona law specifies ‘death or life imprisonment’ as the only sentencing options,” as authorizing a range of punishments that includes death as the maximum possible punishment.<sup>194</sup> Acknowledging that this was precisely the conception of the Arizona statute on which the *Apprendi* majority had relied in order to distinguish *Walton*’s upholding of that statute,<sup>195</sup> the Court in *Ring* declared:

This argument overlooks *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.” The Arizona first-degree murder statute “authorizes a maximum penalty of death only in a formal sense,” for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty.”<sup>196</sup>

The touchstone of *Apprendi*’s analysis, the *Ring* Court explained, is to examine whether the finding exposes the defendant to a higher sentence than can be imposed solely on the basis of the conviction itself: “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>197</sup> Because, under Arizona law, the finding of “an aggravating circumstance [is] necessary for imposition of the death penalty,” *Apprendi* required that this finding be allocated to a jury, not a judge.<sup>198</sup>

All of the features of the aggravation finding that the *Ring* Court regarded as significant are equally true of the two other components of the tripartite sentencing determination. Arizona law conditions a death sentence upon not just a finding of an aggravating circumstance, but also a determination—after identification of any mitigating circumstances in the case—of whether the “‘mitigating circumstances [are] sufficiently substantial to call for leniency.’”<sup>199</sup> Thus, as the *Ring* Court itself remarked, a defendant cannot “be sentenced to death [under Arizona law] . . . unless [these] further findings [are] made.”<sup>200</sup> Indeed, the statutory feature that the *Ring* Court deemed essential to rejecting the state’s characterization of Arizona law as

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194. *Id.* at 2440.

195. *Ring*, 122 S. Ct. at 2440. For further discussion of *Walton*, *Apprendi*’s discussion of *Walton*, and *Ring*’s overruling of *Walton*, see, respectively, *supra* notes 67-71 and accompanying text, *supra* notes 107-10 and accompanying text, and *supra* notes 116-25 and accompanying text.

196. *Id.* at 2440 (citations omitted).

197. *Id.* at 2439 (describing and citing *Apprendi*).

198. *Id.* at 2443.

199. *Id.* at 2434-35 (quoting ARIZ. STAT. § 13-703(E) (Supp. 2002)).

200. *Ring*, 122 S. Ct. at 2434.

treating a conviction of first-degree murder as sufficient authorization for a death sentence—that the first-degree murder statute itself cross-referenced the aggravation finding as a necessary additional predicate for a sentence of death<sup>201</sup>—applies equally to the other two findings. The statutory cross-reference is not merely to the provision governing the finding of aggravating circumstances: It references the entire tripartite structure for determining the existence of aggravating and mitigating circumstances and gauging their relative weight.<sup>202</sup>

Thus, the central reasoning of *Ring* appears to require the application of the Sixth Amendment jury entitlement to all three sets of findings that Arizona law treats as essential predicates for imposition of a death sentence upon a defendant convicted of first-degree murder. This conclusion finds further support in *Harris*—in both Justice Kennedy’s plurality opinion and in the opinion of the four dissenting Justices. In rejecting the petitioner’s attempt to extend *Apprendi* to findings that trigger a mandatory minimum, Justice Kennedy took great pains to emphasize the very same dimension of *Apprendi* that drove the foregoing analysis: that *Apprendi* requires that “facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis” and therefore must be allocated to the jury.<sup>203</sup> Justice Thomas’s opinion for the dissenters frames the *Apprendi* mandate in even broader

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201. See *id.* at 2440 (“The Arizona first-degree murder statute ‘authorizes a maximum penalty of death only in a formal sense,’ . . . for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty . . . ‘First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703.’”) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 541 (2000) (O’Connor, J., dissenting), and ARIZ. STAT. § 13-1105(C) (Supp. 2002)).

202. As explained *supra* note 201, the cross-reference is to ARIZ. STAT. § 13-703 (Supp. 2002). Although the narrow framing of the certiorari question in *Ring* caused the Court to refer to this statute as a “provision requiring the finding of an aggravating circumstance before imposition of the death penalty,” *Ring*, 122 S. Ct. at 2440, the referenced statute also requires the other findings. See ARIZ. STAT. § 13-703 (1956) (directing judge who presided at trial to “conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances . . . for the purpose of determining the sentence to be imposed,” *id.* § 13-703(B), specifying that a sentence of death can be imposed only if there is at least one aggravating circumstance and “there are no mitigating circumstances sufficiently substantial to call for leniency,” *id.* § 13-703(E), enumerating aggravating circumstances, *id.* § 13-703(F), and setting forth a non-exclusive list of mitigating circumstances, *id.* § 13-703(G)). Thus, when the Arizona first-degree murder statute states that “[f]irst degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703,” *Ring*, 122 S. Ct. at 2441 (quoting ARIZ. STAT. § 13-1105(C) (Supp. 2002)), the cross-reference necessarily encompasses all aspects of the capital sentencing procedure set forth in section 13-703.

203. *Harris v. United States*, 122 S. Ct. 2406, 2419 (2002) (plurality opinion) (“Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis.”); see also *Harris*, 122 S. Ct. at 2414 (“*Apprendi* said that any fact extending the defendant’s sentence beyond the maximum authorized by the jury’s verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights.”); *id.* at 2417 (“At issue in *Apprendi* . . . was a sentencing factor that did ‘swell the penalty above what the law has provided,’ . . . and thus functioned more like a ‘traditional elemen[t].’”) (quoting *Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977)); *id.* at 2419 (“The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury.”); 1 BISHOP, LAW OF CRIMINAL PROCEDURE § 85, at 54 (2d ed. 1872).

terms, stating that a jury determination is needed for any “fact [that] exposes a defendant to greater punishment.”<sup>204</sup> Although these competing formulations led to a divergence of views between the Justices in *Harris*, they necessarily meld when it comes to applying *Ring* to the additional findings that the Arizona statute sets as prerequisites for the imposition of a death sentence.

Justice Kennedy’s *Harris* opinion injects a new analytic element that is equally pertinent to the present discussion. Reaffirming the analysis in the Court’s *McMillan* decision in 1986, Justice Kennedy stated that the calculus of whether a certain finding is to be allocated to the judge or jury should be informed by a “historical” analysis of the traditional roles of judges and jurors.<sup>205</sup> Justice Kennedy’s classification of findings underlying a mandatory minimum as factors for a judge to determine at sentencing rests in part upon the conclusion that “[t]hese facts, though stigmatizing and punitive, have been the traditional domain of judges.”<sup>206</sup> Assuming that such a historical analysis is appropriate (a view the *Harris* dissenters challenged<sup>207</sup>), the analysis cuts in the opposite direction when it comes to the factfindings encompassed within a capital sentencing decision. As Justice Stevens observed, in dissenting in *Walton*, “the jury’s role in finding facts that would determine a homicide defendant’s eligibility for capital punishment was particularly well established” in “1791, when the Sixth Amendment became law” and “in 1968, when this Court held the guarantee of trial by jury in criminal prosecutions binding on the States.”<sup>208</sup> Moreover, as the Court

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204. *Harris*, 122 S. Ct. at 2425-26 (Thomas, J., dissenting) (“It is true that *Apprendi* concerned a fact that increased the penalty for a crime beyond the prescribed statutory maximum, but the principles upon which it relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum: When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is ‘by definition [an] “elemen[t]” of a separate legal offense.’ Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.”) (citation omitted); see also *id.* at 2423-24 (“As I discussed at great length in *Apprendi*, the original understanding of what facts are elements of a crime was expansive: ‘[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact—of whatever sort, including the fact of a prior conviction—the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact . . . that fact is also an element.”); *id.* at 2424 (“But when the legislature provides that a particular fact shall give rise ‘both to a special stigma and to a special punishment,’ the constitutional consequences are clear.”) (citations omitted).

205. See *id.* at 2414-17 (plurality opinion); see also *McMillan v. Pennsylvania*, 477 U.S. 79, 90-92 (1986).

206. *Harris*, 122 S. Ct. at 2416 (plurality opinion).

207. See *id.* at 2426 (Thomas, J., dissenting) (stating unconstitutionality of statutory scheme before the Court is “no less true because mandatory minimum sentences are a 20th-century phenomena. As the Government acknowledged at oral argument, this fact means only that historical practice is not directly dispositive of the question whether facts triggering mandatory minimums must be treated like elements. The Court has not previously suggested that constitutional protection ends where legislative innovation or ingenuity begins. Looking to the principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested (rather than to the historical pedigree of mandatory minimums), there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum.”) (citation omitted).

208. *Walton v. Arizona*, 497 U.S. 639, 710-11 (1990) (italics omitted) (quoting Welsh S. White,

noted in *Ring*, the practice in “the great majority of States” in this country even now is to treat the capital sentencing determination as lying within the province of the jury.<sup>209</sup>

Thus, under the approaches employed in *Harris* in both Justice Kennedy’s opinion announcing the judgment of the Court and Justice Thomas’s dissent, the *Apprendi/Ring* principle calls for jury determination of not just aggravating circumstances but also mitigating circumstances and the assessment of whether aggravation outweighs mitigation. Although Justice Breyer presumably would disagree with such an application of *Apprendi*, given his position in *Harris* that *Apprendi* was wrongly decided, Justice Breyer nonetheless would likely reach the same ultimate result with regard to jury involvement in capital sentencing. In *Ring*, Justice Breyer declined to join the majority opinion because of the views he expressed in *Apprendi* and *Harris*, but joined the Court’s judgment on the alternative rationale that “the Eighth Amendment requires [individual jurors to make, and to take responsibility for, a] decision to sentence a defendant to death.”<sup>210</sup> Of the views expressed in *Harris*, the only one that apparently leads to a different end point is that of Justice O’Connor, who reiterated her previously expressed position that *Jones* and *Apprendi* were “wrongly decided” but did not join Justice Breyer’s Eighth Amendment analysis.<sup>211</sup>

If the foregoing application of *Ring* and *Apprendi* to Arizona’s judge-only death penalty statute is correct, it remains to be determined whether a different result should ensue under a hybrid judge-jury framework like the Florida statute approved in *Spaziano*. As in Subpart II.A’s review of *Hildwin*’s post-*Ring* status, this question is easily resolved because the matter was already the subject of discussion in *Walton*. As explained earlier, the *Walton* Court rejected the petitioner’s attempt to draw distinctions between the Arizona and Florida statutes.<sup>212</sup> The Court declared that a Florida advisory jury “does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances,” and thus “[a] Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.”<sup>213</sup> The same is true of advisory juries under the Alabama statute upheld in *Harris v. Alabama*.<sup>214</sup>

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*Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10-11 (1989)).

209. See *Ring v. Arizona*, 122 S. Ct. 2428, 2442 (2002) (quoted in text accompanying note 129 *supra*).

210. *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring in the judgment). For further discussion of Justice Breyer’s concurring opinion in *Ring*, see *infra* notes 318-23 and accompanying text.

211. See *Harris*, 122 S. Ct. at 2420 (O’Connor, J., concurring); see also *Ring*, 122 S. Ct. at 2448-50 (O’Connor, J., dissenting).

212. See *supra* notes 69-71 and accompanying text.

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

214. 513 U.S. 504 (1995). In Alabama, as in Arizona and Florida, defendants are not eligible for the death penalty unless a factfinding is made that aggravating circumstances outweigh mitigating circumstances. ALA. CODE § 13A-5-46(e)(2) (2003) (providing that if jury determines that aggravating circumstances do not outweigh mitigating circumstances, jury “shall” return advisory verdict recommending life imprisonment without parole); see also *Ex parte Woodard*, 631 So. 2d 1065, 1071 (Ala. Crim. App.

Accordingly, *Ring* would appear to require overruling not just *Hildwin*'s opinion rejecting a Sixth Amendment challenge to Florida's procedure for determining aggravating circumstances,<sup>215</sup> but also *Spaziano*'s opinion rejecting a broader Sixth Amendment challenge to the assignment of the full range of capital sentencing factfindings to a judge. The next Subpart will take up the last of the three lines of pre-*Ring* Sixth Amendment rulings on the jury's role in capital sentencing: the rulings in *Cabana* and *Clemons* regarding the ability of an appellate court to issue factfindings on issues ordinarily allotted to a jury.

*C. Revisiting Cabana and Clemons:  
The Prerogatives of an Appellate Court*

As explained earlier, the Supreme Court's decisions in *Cabana v. Bullock*<sup>216</sup> and *Clemons v. Mississippi*<sup>217</sup> established the power of state appellate courts in certain circumstances to make findings on factual issues relating to a capital sentence that ordinarily a jury makes.<sup>218</sup> The Court ruled in *Cabana* that, in cases in which a death sentence was imposed upon a non-trigger-person without a constitutionally necessary finding that the defendant intended that a killing take place or that lethal force be used, a state appellate court may rectify this omission by making the necessary factual finding regarding the defendant's mental state.<sup>219</sup> In *Clemons*, the Court held that, in cases in which an invalid aggravating circumstance has tainted the jury's weighing of aggravating and mitigating circumstances, a state appellate court may forego a remand for a new sentencing hearing by weighing the remaining, valid aggravating circumstance(s) against the mitigating circumstances in the record.<sup>220</sup>

As Part I demonstrated, *Cabana* and *Clemons*, although not explicitly concerned with the issue of a capital defendant's right to a jury, were inextricably intertwined with the Court's capital jury decisions. An essential link in the Court's reasoning in these decisions was that the factfindings in question need not be reserved for a jury because the findings relate solely to the determination of sentence, not guilt or innocence, and the Court's prior decisions had already established that there is no constitutional right to a jury at the capital sentencing stage.<sup>221</sup> In both of these cases, the Court expressly

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1993) ("A greater punishment—death—*may* be imposed on a defendant convicted of a capital offense, but *only* if one or more of the aggravating circumstances enumerated in § 13A-5-49 is found to exist and that aggravating circumstance(s) . . . outweighs any mitigating circumstance(s) that may exist."). In Alabama, judges make the weighing decision based on aggravating circumstances, mitigation evidence, and facts not found by the jury.

215. See *supra* notes 63-65 and accompanying text.

216. 474 U.S. 376 (1986).

217. 494 U.S. 738 (1990).

218. See *supra* notes 79-90 and accompanying text.

219. See *supra* notes 80-85 and accompanying text.

220. See *supra* notes 86-90 and accompanying text.

221. See *supra* notes 83-89 and accompanying text.



invoked the authority of its earlier capital jury decisions.<sup>222</sup> And, in a further linking of the lines of authority, the Court relied on *Cabana* in ruling in *Walton* (the decision later overruled in *Ring*) that a judge may make the determination of the existence of aggravating circumstances at the trial level.<sup>223</sup>

In *Ring*, the state attempted to dissuade the Court from overruling *Walton* by invoking the link between *Walton* and *Cabana*,<sup>224</sup> thereby implicitly signaling that an overruling of *Walton* would jeopardize the continuing validity of *Cabana*. The petitioner responded by arguing that the continuing validity of *Cabana* is essentially a second-stage issue that would be reached only if the Court deems the determination of aggravating circumstances to be a jury prerogative and the State of Arizona thereafter restructures its capital sentencing process in a manner that nonetheless places state appellate courts in the position of making *Cabana*-type findings.<sup>225</sup> The latter view apparently persuaded the Court, for its list of the issues that were not on review included the following statement: “[Petitioner] does not question the Arizona Supreme Court’s authority to reweigh the aggravating and mitigating circumstances after that court struck one [aggravating circumstance.]”<sup>226</sup>

Although the *Ring* opinion accordingly does not speak directly to the powers of an appellate court, its reasoning is highly pertinent to this issue. *Ring* altered a paradigm that was critical to the results in both *Cabana* and *Clemons*. The latter two decisions depended upon the sharp division between the “elements of the crime” determined at the guilt-innocence phase and sentencing-related factors. The Sixth Amendment guarantees the accused a jury finding on each and every element of the crime,<sup>227</sup> and that right is violated if a judge adjudicates an element of the offense rather than submitting it to a jury.<sup>228</sup> Accordingly, if an element was withheld from the jury or erroneously described in the jury instructions, an appellate court must reverse the conviction, except in those instances in which the error can be deemed harmless,<sup>229</sup> or waived.<sup>230</sup> In *Cabana* and *Clemons*, these princi-

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222. See *supra* notes 79-90 and accompanying text.

223. See *supra* notes 67-71 and accompanying text.

224. See Brief for Respondent at 32, *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (No. 01-488), available at 2002 WL 481144 (“*Cabana* . . . is of particular significance . . . As *Walton* noted, arguments regarding ‘eligibility’ for the death penalty apply equally to an *Enmund/Tison* finding [the type of finding at issue in *Cabana*] made by a judge, rather than by a jury.”).

225. See Reply Brief of Petitioner at 12 n.7, *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (No. 01-488).

226. *Ring*, 122 S. Ct. at 2437 n.4 (citing *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)).

227. See, e.g., *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995) (“The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.”); see also *Neder v. United States*, 527 U.S. 1, 12 (1999) (“an improper instruction on an element of the offense violates the Sixth Amendment’s jury trial guarantee”).

228. *Gaudin*, 515 U.S. at 510-12, 514, 520 (holding Sixth Amendment’s jury trial guarantee is violated when trial court refuses to submit an element to the jury and decides the element itself, even if the element presents mixed question of law and fact or requires jury “not merely to determine the facts, but to apply the law to those facts”); accord *Johnson v. United States*, 520 U.S. 461, 463-64, 467 (1997).

229. See *Neder*, 527 U.S. at 15 (“[T]he omission of an element is an error that is subject to harmless-

ples did not bar the assignment of a factfinding to a state appellate court (or state trial court, for that matter) because the factfindings in question related exclusively to sentencing and not (as the Court viewed it at the time) an “element of the crime.”<sup>231</sup>

*Ring* abolished the neat distinction that *Cabana* and *Clemons* drew between “elements of the crime” found at the guilt-innocence stage and findings made at the capital sentencing hearing. Reiterating *Apprendi*’s declaration that “the relevant inquiry is not one of form, but of effect,”<sup>232</sup> the Court in *Ring* deemed an aggravating circumstance finding to be tantamount to an element of the crime, and therefore encompassed within the Sixth Amendment jury guarantee just as are traditional elements of the crime.<sup>233</sup>

Under *Ring*’s reconceptualization of an aggravation finding as an element of the crime, an appellate court is no more capable of making the necessary finding than is a trial court judge. Indeed, the Court in *Cabana* recognized that when it comes to elements of the crime, “[f]indings made by a judge cannot cure deficiencies in the jury’s finding.”<sup>234</sup> Accordingly, if the earlier discussion in Subpart II.B correctly concluded that a factfinding on the relative weight of aggravating and mitigating circumstances is an element of the offense,<sup>235</sup> then *Clemons*—which sanctioned an appellate court’s reweighing of aggravating and mitigating circumstances when the jury’s weighing was tainted by its reliance on an invalid aggravating factor—can no longer stand.

The assessment of the continuing validity of *Cabana* requires additional analysis. Aggravation findings and determinations of the relative weight of aggravating and mitigating circumstances are explicit components of the statutory scheme for capital sentencing in Arizona, Florida, and several other states. In contrast, the factfinding at issue in *Cabana*—the culpability

error analysis.”).

230. See *Johnson*, 520 U.S. at 470 (holding failure to object to trial judge’s resolution of an element instead of submitting it to the jury resulted in waiver of claim because the case did not fall within FED. R. CRIM. P. 52(b)’s standard for plain error review of unreserved claims).

231. See *Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986) (“Findings made by a judge cannot cure deficiencies in the jury’s finding as to the guilt or innocence of a defendant resulting from the court’s failure to instruct it to find an element of the crime . . . . But our ruling in *Enmund* [v. Florida, 458 U.S. 782 (1982)], requiring that the imposition of a death sentence upon a non-trigger-person rest upon a finding that the defendant intended that a killing take place or that lethal force be employed] does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury . . . . The decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury.”); accord *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990) (“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. *Cabana v. Bullock* . . . held that an appellate court can make the findings required by *Enmund v. Florida*.”).

232. *Ring v. Arizona*, 122 S. Ct. 2428, 2440 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

233. See *Ring*, 122 S. Ct. at 2443 (“Because 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.”) (quoting *Apprendi*, 530 U.S. at 494 n.19).

234. *Cabana*, 474 U.S. at 384-85.

235. See *supra* notes 171-215 and accompanying text.

assessment of the mental state of an accomplice who was not a trigger-person—is not, at least in these states, a statutory component of the capital sentencing judgment.<sup>236</sup> Thus, the question arises: Should *Ring*'s Sixth Amendment analysis vary if the sentencing-related factfinding is one imposed by a court decision construing the Constitution rather than by statute? This question has already been answered, albeit in a somewhat different form, by the *Ring* opinion itself. In *Ring*, the state had attempted to avert an overruling of *Walton* by arguing that legislatively defined elements of the crime are fundamentally different from aggravation findings because the latter are the product of legislative responses to Supreme Court declarations regarding the “constraints . . . the Eighth Amendment places on capital sentencing.”<sup>237</sup> The Court in *Ring* rejected this purported distinction, stating:

In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope. If a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. We see no reason to differentiate capital crimes from all others in this regard.<sup>238</sup>

From the foregoing analysis, it is a simple additional step to the *Cabana* context. The factfinding at issue in *Cabana*, even if not reduced to a statutory element, is one that a constitutional ruling of the Supreme Court has added as “an element or elements to the definition of a criminal offense [of capital murder] in order to narrow its scope” and thereby satisfy the Eighth Amendment’s proportionality principle.<sup>239</sup> Whether or not a state legislature codifies this constitutionally driven element of the crime, it functions as an element. Heeding *Ring*'s critical admonition that “the relevant inquiry is not one of form, but of effect,”<sup>240</sup> one must conclude that the finding is subject to the Sixth Amendment’s jury trial guarantee.<sup>241</sup>

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236. This is not invariably the case. For example, in Mississippi, the capital sentencing statute requires the jury to make the culpability finding which is required by *Enmund v. Florida* and that was at issue in *Cabana*. See MISS. CODE ANN. § 99-19-101(7) (1994).

237. *Ring*, 122 S. Ct. at 2441 (citing Brief for Respondent at 21-25).

238. *Id.* at 2442 (citations omitted).

239. *Id.*

240. *Id.* at 2440 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

241. In *Walton*, the decision that *Ring* overruled, the Court recognized the fundamental similarity between aggravation findings and the type of factfinding at issue in *Cabana*, although the Court used this relationship to conclude that neither type of factfinding is an element of the offense that triggers the Sixth Amendment’s jury trial guarantee. See *Walton v. Arizona*, 497 U.S. 639, 648-49 (1990) (quoting earlier language from *Cabana* that categorized the culpability finding as merely a sentencing-related factor and not an element of the offense, and then stating: “If the Constitution does not require that the *Enmund* [*Cabana*] finding be proved as an element of the offense of capital murder, and does not require the jury to make that finding, we cannot conclude that a State is required to denominate aggravating circumstances ‘elements’ of the offense or permit only a jury to determine the existence of such circumstances.”).

While the foregoing discussion resolves the issue with which this Subpart began—the validity of *Cabana* and *Clemons* in the wake of *Ring*—an examination of an appellate court’s powers regarding findings ordinarily allocated to a jury is incomplete without a discussion of the harmless error doctrine. Indeed, in *Ring* itself, the state argued that even if the Court were to find that the Arizona statute unconstitutionally assigned aggravating circumstances to a judge, the Court should find that error to be harmless in *Ring*’s own case because “a pecuniary gain finding was implicit in the jury’s guilty verdict” at the trial stage of the case.<sup>242</sup> The *Ring* Court declined to reach this issue, explaining that “this Court ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance.”<sup>243</sup>

Under the harmless error standard that applies to findings of constitutional error on direct appeal in criminal cases, the prosecution can avert reversal of an error-tainted conviction or sentence by proving that the error was harmless beyond a reasonable doubt.<sup>244</sup> The harmless error rule does not apply to certain types of errors, which are deemed “prejudicial *per se*” because they involve “defects in the constitution of the trial mechanism” which affect “the framework within which the trial proceeds,” so severely impairing the trial’s ultimate function of adjudicating guilt or innocence that “no criminal punishment may be regarded as fundamentally fair.”<sup>245</sup>

Although the denial of the right to a “jury verdict within the meaning of the Sixth Amendment” is deemed to be a “structural error” and therefore prejudicial *per se*,<sup>246</sup> the Supreme Court has held that the harmless error doctrine applies to an improper omission of a jury instruction on an element of the crime, at least where no more than a single element was omitted.<sup>247</sup> In such instances, the harmless error inquiry is framed as whether it is “clear

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242. *Ring*, 122 S. Ct. at 2443 n.7.

243. *Id.* (citing *Neder v. United States*, 527 U.S. 1, 25 (1999)).

244. *See Chapman v. California*, 386 U.S. 18 (1967). A different, less rigorous standard of harmless error applies if the error was not of constitutional dimension or if the constitutional error finding is made at the federal habeas corpus stage rather than on direct appeal. In both instances, the applicable standard is “whether the . . . error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (announcing standard for federal habeas corpus cases by adopting—and quoting—rule adopted in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), for nonconstitutional errors on direct appeal). Shortly after the Supreme Court adopted the less protective standard for federal habeas corpus proceedings in *Brecht* in 1993, the Eighth Circuit declared that it will apply the more rigorous *Chapman* standard even at the federal habeas corpus stage if there was never a *Chapman* review by the state courts at an earlier stage in the case, *see Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993), *cert. denied*, 511 U.S. 1060 (1994), and some other circuits have reserved the question whether to follow the Eighth Circuit’s lead in this regard. *See Tapia v. Roe*, 189 F.3d 1052, 1056-57 & n.2 (9th Cir. 1999); *Lyons v. Johnson*, 99 F.3d 499, 503 (2d Cir. 1996).

245. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). In *Fulminante*, the Court denominated such errors “structural defects,” distinguishing them from “trial errors” which occur “during the presentation of the case to the jury” and are generally subject to the harmless error rule. *Fulminante*, 499 U.S. at 307, 309.

246. *Sullivan v. Louisiana*, 508 U.S. 275, 278-80 (1993). *Sullivan* applied this principle to apply the “prejudicial *per se*” category to a defect in the reasonable doubt instruction which denies the accused of “a jury verdict of guilt beyond a reasonable doubt.” *Sullivan*, 508 U.S. at 278-80.

247. *Neder*, 527 U.S. at 7-20; *see also id.* at 9 (issue before Court “involv[es] improper instructions on a single element of the offense”); *id.* at 33 (Scalia, J., dissenting) (“[W]e do not know, when the Court’s opinion is done, *how many* elements can be taken away from the jury with impunity.”).

beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.”<sup>248</sup> The applicability of these principles to a *Ring* error is uncertain. Although the Supreme Court has previously sanctioned an appellate court’s use of the harmless error rule to uphold a death sentence notwithstanding the invalidity of an aggravating circumstance, the rulings authorizing this practice took place in *Clemons v. Mississippi*<sup>249</sup> and a subsequent decision that applied *Clemons* to a federal prosecution for a capital offense.<sup>250</sup> As we have already seen, the validity of *Clemons*’s holding and reasoning are highly suspect in light of *Ring*.

It would appear that the denial of the right to jury findings on the presence of aggravating and mitigating circumstances and on the ultimate balance of aggravating and mitigating circumstances (in a judge-only sentencing scheme or an advisory jury system) is a structural error that must be deemed prejudicial per se. In the trial context, the Supreme Court has deemed a defective instruction on the prosecution’s burden of proof beyond a reasonable doubt to be prejudicial per se because it “vitiat[e] all of the jury’s findings . . . [and] one could only speculate what a properly charged jury might have done.”<sup>251</sup> When the jury has been utterly removed from the capital sentencing process, an attempt to divine what a jury would have done will amount to an even more egregious exercise in speculation. In an advisory jury system such as the one considered in Subparts II.A and B, where the jury’s findings are indecipherable, there is at least a jury in the picture, but its views on the relevant issues usually are not subject to reconstruction.<sup>252</sup>

In *Ring*, the state did not seek to argue that a reviewing court could find harmless error by speculating about how the jury would have ruled on the aggravating circumstance found by the sentencing judge.<sup>253</sup> Instead, the state argued that the jury actually *did* make a finding on the factual issue, albeit at the trial stage.<sup>254</sup> According to the state, the aggravating circumstance which the judge found at the penalty stage—that the murder was

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248. *Id.* at 18-19 (majority opinion).

249. *See Clemons*, 494 U.S. at 752-54.

250. *Jones v. United States*, 527 U.S. 373, 402-05 (1999) (“Harmless-error review of a death sentence may be performed in at least two different ways. An appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict or it may choose instead to consider whether the result would have been the same had the invalid aggravating factor been precisely defined.”) (citing *Clemons*, 494 U.S. at 753-54).

251. *Johnson v. United States*, 520 U.S. 461, 469 (1997); *accord Sullivan*, 508 U.S. at 278.

252. This point was made by the dissenting Justices in *Jones*, the above-mentioned case in which a majority of the Court applied *Clemons v. Mississippi* to the federal context. Justice Ginsburg, in a dissenting opinion joined in pertinent part by Justices Stevens, Souter, and Breyer, stated that “[i]f the jury’s weighing process is infected by the trial court’s misperceptions of the law, the legitimacy of an ensuing death sentence should not hinge on . . . the reviewing court’s speculation about the decision the jury would have made absent the infection.” *Jones*, 527 U.S. at 421. The dissenters’ view on this issue was affected by their application of the Court’s oft-stated principle that particularly stringent protections must be applied in the capital context. *See id.* (stating “‘death is qualitatively different’”) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)).

253. *See* Brief of Respondent at 4-6, *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (No. 01-488).

254. *See id.*

committed “in expectation of the receipt, of anything of pecuniary value”<sup>255</sup>—was “indirectly, but conclusively” found by the jury at the trial stage when the jury convicted Ring of first-degree felony murder in the course of a robbery and the lesser included crime of armed robbery.<sup>256</sup> As the Reply Brief in *Ring* pointed out, however, in arguing to the Court that it should refrain from reaching the harmless issue until the lower courts had passed on it (an argument that proved persuasive to the Court),<sup>257</sup> the claimed relationship between the elements of the crime and the aggravating circumstance was far less clear than the state maintained: Arizona Supreme Court decisions hold that the “state must prove additional facts to prove the aggravating circumstance of pecuniary gain once it has proved the robbery.”<sup>258</sup>

Even if one were to assume the validity of the state’s *Ring* argument about the complete overlap of the guilt-stage and sentencing-stage versions of the factual issue, there would still be a constitutional problem with transposing the jury’s guilt-phase finding to a judge-determined capital sentencing judgment. As the Supreme Court has observed, a failure to submit an element of the crime to the jury cannot be deemed harmless if “the defendant contested the omitted element and raised evidence sufficient to support a contrary finding.”<sup>259</sup> But it cannot be assumed that a capital defendant would have the same interest in contesting a particular factual issue at both the guilt and sentencing stages. Indeed, capital defense counsel often use significantly different strategies—and theories of the case—at the guilt and capital sentencing stages.<sup>260</sup> Thus, a system that employs the same factual finding at the guilt and sentencing phases but only affords a jury determination of that finding at the guilt phase forces the capital defendant to choose between the Sixth Amendment right to present a defense at the guilt phase (a defense that may not entail contesting the factual element at the guilt stage even though it could be contested and later will be at the sentencing stage) and the Sixth Amendment right to a jury factfinding on the issue. As the Supreme Court has recognized in other contexts, criminal defendants cannot be placed in the posture of having to make a “Hobson’s Choice” of

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255. ARIZ. REV. STAT. ANN. § 13-703(F)(5) (Supp. 2002); see *Ring*, 122 S. Ct. at 2435 (recounting that sentencing judge “determined that Ring committed the offense in expectation of receiving something of ‘pecuniary value,’ as described in § 13-703”).

256. Brief of Respondent at 35, *Ring v. Arizona* (No. 01-488).

257. See *Ring*, 122 S. Ct. at 2443 n.7.

258. *State v. Carriger*, 692 P.2d 991, 1010 (Ariz. 1984), cited in Reply Brief of Petitioner at 14-15, *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (No. 01-488). For additional Arizona Supreme Court caselaw to the same effect, see Reply Brief at 14-15, *Ring v. Arizona* (No. 01-488). The Reply Brief also observed that the Arizona Supreme Court’s opinion in *Ring*’s own case “pointedly noted that the trial record in this case ‘provided almost nothing about why [the victim] was killed.’” *Id.* at 15 (citation omitted).

259. *Neder v. United States*, 527 U.S. 1, 19 (1999).

260. See James M. Doyle, *The Lawyers’ Art: “Representation” in Capital Cases*, 8 YALE J. L. & HUMAN. 417, 417-27 (1996); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 328-34 (1983); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 356-58.

foregoing one constitutional right in order to receive the benefit of another.<sup>261</sup>

Finally, it is important to recall that, as the Supreme Court observed in *Ring*, the petitioner's "claim [was] tightly delineated" as a Sixth Amendment claim of a right to "jury findings on the aggravating circumstances asserted against him."<sup>262</sup> On this narrow issue, the state could advance a harmless error argument that the jury had made the requisite factfinding at the guilt stage. As Subpart II.B showed, however, *Ring*'s reasoning calls for extending the jury right to other facets of the capital sentence decision-making process: the determination of the existence of mitigating circumstances and the ultimate judgment of whether aggravating circumstances outweigh mitigating circumstances. On these issues, there is no colorable argument that the jury has made the requisite factfindings at the guilt stage.

Thus, in the context of appellate review, as in the trial court context considered in the preceding two Subparts of the Article, *Ring* sends a single, uniform message: that the jury is an indispensable player in the capital sentencing process. The next Part will look further at this issue, examining it from the different perspective of Eighth Amendment doctrines that govern the capital sentencing process.

### III. THE ROAD NOT TAKEN: RE-VIEWING *RING* THROUGH AN EIGHTH AMENDMENT LENS

#### *A. The Central Division Between the Sixth and Eighth Amendment Approaches*

As Part I showed,<sup>263</sup> the Supreme Court's pre-*Ring* decisions rejecting the need for a jury at capital sentencing were activated, at their core, by a view about the relative capabilities of judges and juries as factfinders. In analyzing both Sixth and Eighth Amendment claims of a right to a jury determination at the capital sentencing stage, the Court conceptualized the claims as entailing a core attack upon a judge's ability to find facts as reasonably and reliably as a jury.<sup>264</sup> This view is perhaps justified—and, at the very least, is understandable—when it comes to the Eighth Amendment claim. Because such a claim is founded (or, at least in the pre-*Ring* cases, was founded) upon the Eighth Amendment's requirement of "reliability" in the imposition of the ultimate punishment of death,<sup>265</sup> the claim appears to

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261. See *Simmons v. United States*, 390 U.S. 377, 394 (1968) (criminal defendant cannot be put to "Hobson's Choice" of "either . . . giv[ing] up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, . . . waiv[ing] his Fifth Amendment privilege against self-incrimination . . . we find it intolerable that one constitutional right should have to be surrendered in order to assert another.").

262. *Ring*, 122 S. Ct. at 2437 n.4.

263. See *supra* notes 31-131 and accompanying text.

264. See *supra* notes 31-131 and accompanying text.

265. See *Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976) (plurality opinion) (analyzing whether Florida's capital sentencing procedure, in which sentence is ultimately determined by "the trial judge

turn upon the capacity of a judge-only decision-making mechanism to function as reliably as a jury system. And as Part I suggested, the framing of the claim in these terms virtually guaranteed its failure. Even if there were some basis for viewing judges as inferior decision-makers, the Justices of the Supreme Court were unwilling to entertain that view of the members of their own profession.

As Part I also explained, the breakthrough in *Ring* did not come about by means of a dramatic shift in the Justices' conceptions of the relative abilities of judges and juries. The transformation was in the paradigm used to gauge the need for a jury at capital sentencing. By considering the claim in Sixth Amendment terms, the Court came to view jury findings at capital sentencing (at least with respect to aggravating circumstances) as constitutionally compelled by the choice the Framers of the Sixth Amendment had made in conferring a right to jury factfinding on elements of the crime. Thus, the Court in *Ring* was able to say that the "relative rationality, fairness, or efficiency of potential factfinders" is irrelevant to the Sixth Amendment issue before the Court.<sup>266</sup> Indeed, the Court even was able to give a nod to a view of judicial sentencing as "“admirably fair and efficient.”"<sup>267</sup>

It is interesting to observe that the Court was unable to appreciate this dimension of the Sixth Amendment analysis in its pre-*Ring* decisions (in cases like *Walton* and *Hildwin*)<sup>268</sup> and that the Court was able to attain this view of the matter only by reapproaching the issue in the non-capital context.<sup>269</sup> Perhaps the early juxtaposition of the Sixth and Eighth Amendment claims left the Court locked in the "comparative reliability" paradigm, especially since the capital context is so inextricably associated with Eighth Amendment reasoning. If so, then the non-capital context was crucial in freeing the Court from the cognitive blinders caused by the Eighth Amendment overtones, thereby allowing the Court to finally see the claim in quintessentially Sixth Amendment terms. Or perhaps the non-capital context was a more conducive medium for measured analysis because the claim could come before the Court without the negative baggage of appearing (to those Justices who were inclined to view things in this manner) as part of a multi-faceted attack upon the continuing use of the death penalty.<sup>270</sup>

Whatever the reasons for the paradigm shift, *Ring* represents a major transition to a new direction in the evaluation of claims of the right to a jury at capital sentencing. As Part II demonstrated, the implications of *Ring* are

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rather than by the jury," adequately "assure[s] that the death penalty will not be imposed in an arbitrary or capricious manner"). For further discussion of *Proffitt*, see *supra* notes 51-62 and accompanying text.

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

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

268. See *supra* notes 63-71 and accompanying text.

269. See *supra* notes 91-110 and accompanying text.

270. For elaboration of this point, see *Stevenson*, *supra* note 26, at 711-31 (describing the myths of defendant and defender manipulation that appear to have colored some Justices' perceptions and treatment of challenges to capital convictions and sentences, especially in the federal habeas corpus context).



profound, for the Sixth Amendment construct the Court adopted in *Ring* should lead to the overruling of several of the Court's pre-*Ring* rulings on the right to a capital sentencing jury. Because Part II focused specifically on the Sixth Amendment approach the Court itself employed in *Ring*, the discussion up to this point has not addressed the validity of the Court's Eighth Amendment analysis in the pre-*Ring* cases or the Court's underlying view of the relative abilities of judges and juries as capital sentencing decision-makers. These will be the subjects of the next Subparts.

*B. Glimmers of a New Receptivity to an Eighth Amendment  
Right to a Jury at Capital Sentencing*

In explaining in 1976 why the death penalty is not per se unconstitutional, the plurality opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*<sup>271</sup> identified two essential touchstones for defining the evolving standards of decency that are at the core of the Eighth Amendment's prohibition against cruel and unusual punishments: (1) "objective ind[ices] of contemporary values," which the plurality found in the death penalty statutes adopted by legislators and the verdicts returned by juries;<sup>272</sup> and (2) the plurality's own assessment of whether the death penalty "comports with the basic concept of human dignity at the core of the Amendment," which the plurality gauged in part by considering whether the death penalty adequately furthers legitimate penological purposes.<sup>273</sup> In ascertaining how to apply these Eighth Amendment principles to the question of a defendant's entitlement to a jury in capital sentencing, Justice Ginsburg's majority opinion in *Ring* provides a useful starting point for a discussion of legislative judgments and Justice Breyer's concurring opinion in *Ring* provides a useful vehicle for discussing the relationship of penological purposes to the jury entitlement issue.

*1. The Majority Opinion in Ring*

In the passage of *Ring* quoted earlier in this Article,<sup>274</sup> Justice Ginsburg's majority opinion made the point that "the great majority of States responded to th[e] Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury."<sup>275</sup> In an accompanying footnote, she listed all of the statutes, demonstrating that twenty-nine of the thirty-eight capital punishment states "generally commit sentencing decisions to juries" while five states (including Arizona) "commit both capital sentencing factfinding and

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271. 428 U.S. 153 (1976). For further discussion of *Gregg* and its companion cases of July 2, 1976, see *supra* notes 6-13 and accompanying text.

272. *Gregg*, 428 U.S. at 180-81 (plurality opinion).

273. *Id.* at 183-87.

274. See *supra* notes 127-28 and accompanying text.

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

the ultimate sentencing decision entirely to judges” and “[f]our states have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.”<sup>276</sup>

Justice Ginsburg presented this information to support what appeared to be a side point that, notwithstanding the irrelevance of the comparative efficacy of judges and juries to a Sixth Amendment analysis, “the superiority of judicial factfinding in capital cases is far from evident.”<sup>277</sup> But, as is implicit in Justice Ginsburg’s reference to the prevailing practice, the existence of a consistent pattern in legislative choices about the death penalty has often been treated by the Court as a means of gauging whether a certain practice offends “evolving standards of decency.”<sup>278</sup> Although Justice Ginsburg did not go further down this path, there is much more that can be said about legislative judgments regarding the jury’s role in capital sentencing.

Because Justice Ginsburg focused solely on the legislative choices that the states made in response to “th[e] Court’s Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases,” her survey did not include the historical practice in this country.<sup>279</sup> Had she chosen to look further back, the degree of imbalance would have been even greater. As the Court remarked in a decision in *McGautha v. California*<sup>280</sup> in 1971, the year before *Furman v. Georgia*<sup>281</sup> ended the use of capital punishment for a period of time, “every American jurisdiction,” wrote the court, “[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, . . . has at some time authorized jury sentencing in capital cases.”<sup>282</sup> In the years leading up to *Furman*, all but two states allocated to juries the judgment whether to impose a sentence of death.<sup>283</sup>

The decision of a handful of states in the wake of *Furman* to empower judges to make the capital sentencing decision is probably attributable to a perception that such a practice would help preserve the statutes from constitutional infirmities that spelled the downfall of the jury-sentencing statutes before the Court in *Furman*. Thus, although Florida created a jury override system in response to *Furman*,<sup>284</sup> it is difficult to attach much significance

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276. *Id.* at 2442-43 n.6 (citing statutes).

277. *Id.* at 2442.

278. *Atkins v. Virginia*, 122 S. Ct. 2242, 2247-48 (2002); *see* *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977); *Gregg*, 428 U.S. at 183-84 (plurality opinion).

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

280. 402 U.S. 183 (1971).

281. 408 U.S. 238 (1972).

282. *McGuatha*, 402 U.S. at 200 n.11.

283. *Witherspoon v. Illinois*, 391 U.S. 510, 525-27 & nn.2-8 (1968) (opinion of Douglas, J.) (surveying and citing statutes); *see also* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 301 n.20, 435 & n.5 (1971).

284. *Proffitt v. Florida*, 428 U.S. 242, 247 (1976) (plurality opinion) (“In response to *Furman v. Georgia*, 408 U.S. 238 (1972), the Florida Legislature adopted new statutes that authorize the imposition of the death penalty on those convicted of first-degree murder.”); *see also Witherspoon*, 391 U.S. at 525 & n.4 (opinion of Douglas, J.) (pre-*Furman* opinion listing Florida in the group of states in which “death is imposed upon a conviction of first degree murder unless the jury recommends mercy or life imprisonment”).

to such legislative responses because, as the Supreme Court itself has remarked, “[T]he variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment.”<sup>285</sup>

What is of far greater significance, and adds a useful dimension to the picture that Justice Ginsburg painted of legislative choices regarding the jury’s role in capital sentencing, is the behavior of those state legislatures that chose to adopt a judge-only or jury override system for capital sentencing in the years *after* the Court’s 1976 decisions clarified the meaning of *Furman*<sup>286</sup> and after decisions like *Spaziano* and *Walton* declared that state legislatures have the option of choosing a jury override or judge-only system.

In 1995, Colorado enacted a death penalty statute that assigns the sentencing judgment to a three-judge panel.<sup>287</sup> Some have conjectured that the switch from jury to judge sentencing was encouraged by prosecutors frustrated with juries that would not impose capital punishment. As of 1995, the date of Colorado’s switch to judge sentencing, prosecutors (and legislators) certainly had good reason to think that judges are generally more likely than juries to return death sentences. In his dissenting opinion in *Harris v. Alabama*<sup>288</sup> in 1995, Justice Stevens described the empirical data at that time regarding the comparison of judges’ and juries’ capital sentencing judgments in jury override states: “[J]udges are far more likely than juries to impose the death penalty . . . Alabama judges have vetoed only five jury recommendations of death, but they have condemned 47 defendants whom juries would have spared.”<sup>289</sup> Furthermore, Justice Stevens wrote,

285. *Lockett v. Ohio*, 438 U.S. 586, 599 (1978).

286. For discussion of the relationship between *Furman* and the Court’s decisions of July 2, 1976, see *supra* notes 3-5 and accompanying text.

287. See *People v. Martinez*, 22 P.3d 915, 919 (Colo. 2001) (“The three-judge sentencing panel is a creature of statute that replaces the sentencing jury in a capital case. Specifically, effective July 1, 1995, the Colorado legislature amended the statute governing the imposition of the death penalty for those convicted of class one felonies. The new law provided for judicial sentencing by a three-judge panel in capital cases instead of sentencing by a jury.”) (citations omitted). Under the statute, COLO. REV. STAT. § 16-11-103 (2000), the jury is dismissed after issuing a verdict of guilty in the first degree. The trial judge, along with two other district court judges from the judicial district in which the case was filed or from adjoining districts and selected by the Chief Justice, presides over the sentencing phase of the trial and determines whether the defendant will be sentenced to death or life without parole. *Id.* § 16-11-103(1)(a)(5)(1). The three-judge panel considers evidence from both parties, which includes presentation of aggravating and mitigating factors and the certified transcripts of the trial. *Id.* § 16-11-103(1)(a)(7). A death sentence may be imposed only upon a unanimous finding. *Id.* § 16-11-103(2)(b)(II). The panel is required to issue specific written findings of fact if the members of the panel agree on the appropriate sentence; if they disagree, each judge must separately record his or her position, and the defendant is sentenced to life without parole. *Id.* §§ 16-11-103(2)(c), (d).

288. 513 U.S. 5094 (1995).

289. *Harris*, 513 U.S. at 521 (Stevens, J., dissenting). The majority in *Harris* acknowledged that the Alabama statistics are “ostensibly surprising,” *id.* at 513 (majority opinion), but then dismissed the statistics on the ground that these numbers do not tell the whole story. “We do not know . . . how many cases in which a jury recommendation of life imprisonment is adopted would have ended differently had the judge not been required to consider the jury’s advice.” *Id.* Justice Stevens responded:

This attempt to shrug off the reality of Alabama capital sentencing misses the point. Perhaps Alabama judges would be even more severe, and their sentences even more frequently incon-

Statistics from Florida and Indiana confirm that judges tend to override juries' life recommendations far more often than their death recommendations. Between 1972 and early 1992, Florida trial judges imposed death sentences over 134 juries' recommendations of life imprisonment. During the same period, Florida judges overrode only about 51 death recommendations. In Indiana, between 1980 and early 1994, judges had used overrides to impose eight death sentences and only four life sentences.<sup>290</sup>

The Florida and Indiana statistics are even more extreme than they appear, for many of these overrides occurred after each state had adopted a rule calling for judicial deference to a jury's decision to spare the life of a capital defendant: In 1975, the Florida Supreme Court adopted a common law rule limiting the power of a judge to override a life recommendation to those cases in which "virtually no reasonable person could differ" with a conclusion that death is the appropriate sentence;<sup>291</sup> the Indiana Supreme Court adopted an equivalent rule in 1989.<sup>292</sup>

By 1995, the point when Colorado switched to judge-only sentencing, it had also become apparent *why* judges are more likely than juries to opt in favor of death. As Justice Stevens stated, again in his dissent in *Harris*:

The Framers of our Constitution "knew from history and experience that it was necessary to protect . . . against judges too responsive to the voice of higher authority." The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.<sup>293</sup>

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sistent with the community's sense of justice, if Alabama provided for no jury verdicts at all. But the proper frame of reference is not a sentencing scheme with no jury; rather, it is a sentencing scheme with no judge—the scheme maintained by 29 of 37 States with capital punishment. In that comparison, the fact that Alabama trial judges have overridden more than nine juries' life recommendations for every vetoed death recommendation is conclusive indeed.

*Id.* at 522 (Stevens, J., dissenting).

290. *Id.* at 521 n.8 (Stevens, J., dissenting) (citations omitted).

291. *Proffitt v. Florida*, 428 U.S. 242, 249 (1976) (plurality opinion) (quoting *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)).

292. *Martinez Chavez v. State*, 534 N.E.2d 731, 734-35 (Ind. 1989).

293. *Harris*, 513 U.S. at 519-20 (Stevens, J., dissenting) (citations omitted); see also John Paul Stevens, *Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida, August 3, 1996*, 12 ST. JOHN'S J. LEGAL COMMENT. 21, 31 (1996) (observing that "making the retention of judicial office dependent on the popularity of the judge inevitably affects the decisional process in high visibility cases, no matter how competent and how conscientious the judge may be"); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges*

Since the time of Justice Stevens's dissent, data has emerged that provides a statistical foundation for the relationship that he drew between judges' susceptibility to public pressure and their behavior in capital cases: 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.<sup>294</sup>

Even with what was known in 1995, Colorado legislators had good reason to assume that judges are more likely than juries to bow to public pressure to be "tough on crime" by erring on the side of death. Moreover, Colorado legislators had specific reason to assume that judges in their state would behave in this manner. In Colorado, judges are appointed and they must stand election to retain their seats on the bench.<sup>295</sup> In 1994, Colorado Governor Richard Lamm expressed regret at having appointed two state supreme court judges with whose rulings in a capital case the governor disagreed.<sup>296</sup> The governor vowed to "publicly push to remove [Judge] Kirshbaum from the bench" and "suggested that the second judge had four years before the next retention election to 'change his mind.'"<sup>297</sup> Thus, when Colorado legislators switched to judge sentencing in the following year, they had reason to think that (1) future consideration of candidates for the bench would pay greater attention to the candidate's willingness to impose the death penalty, (2) judges already on the bench or appointed in the future would learn from the governor's remarks to toe the line, and (3) judges who failed to heed that message could be removed by the public in a retention election. In the aftermath of *Ring*, Colorado has abandoned the judge-only sentencing statute and enacted a jury sentencing scheme that essentially replicates the system that existed in Colorado before 1995.<sup>298</sup>

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from *Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 312-26 (1997); Stephen B. Bright & Patrick J. Keenan, *Judging and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776-813 (1995).

294. See Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1039-44; Scott William Faulkner, Comment, *Still on the Backburner: Reforming the Judicial Selection Process in Alabama*, 52 ALA. L. REV. 1269 (2001).

295. Robin Lutz, Comment, *Experimenting with Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing*, 73 U. COLO. L. REV. 227, 237 (2002).

296. *Id.* at 237-38.

297. *Id.* at 238 (footnotes omitted).

298. The statute adopted in 1995, COLO. REV. STAT. § 16-11-103 (2000), was repealed, effective October 1, 2002, and replaced by section 18-1.3-1201. The new statute provides for a sentencing hearing to be conducted by the trial court before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment (unless the defendant was under eighteen at the time of the offense or has been determined to be mentally retarded). COLO. REV. STAT. § 18-1.3-1201 (2002). The state is required to prove aggravating factors beyond a reasonable doubt; there is no burden of proof as to disproving or proving mitigating factors. *Id.* The jury is directed to render a verdict based upon (1) whether at least one aggravating factor has been proved; and (2) whether sufficient mitigating factors exist which outweigh any aggravation. *Id.* The jury's death verdict must be unanimous and specify in writing that at least one aggravating factor has been proved and that there are insufficient mitigating factors to outweigh the aggravation. *Id.* The court may sentence the defendant to life imprisonment only if it finds that the jury's death verdict is clearly erroneous as contrary to the weight of the evidence. *Id.* This new statute recreates section 16-11-103 as it existed on June 30, 1995, before the change to judge-panel sentencing.

A similar history can be found in Delaware, which switched from jury sentencing to a jury override system. The bill altering the jury's role to a purely advisory capacity was signed into law by the governor on November 4, 1991.<sup>299</sup> As the Delaware Supreme Court related,

The new law was enacted under a suspension of legislative rules on the day it was introduced. There was little debate in either house of the General Assembly. The catalyst for these rapid developments was the imposition of life sentences on defendants by a New Castle County jury in a much publicized capital murder case involving the execution style murders of two armored car guards.<sup>300</sup>

During the ensuing years, Delaware judges (who are appointed to the bench<sup>301</sup> and, therefore, potentially captive to the views of the appointing officials, albeit not the general public) overrode juries' capital sentencing verdicts in seven cases, all of which involved a life recommendation by the jury that the judge overrode in order to impose a sentence of death.<sup>302</sup> On July 22, 2002, in direct response to the Supreme Court's issuance of the *Ring* decision,<sup>303</sup> the Delaware legislature amended its statute to reassign to the jury the determination of the existence of aggravating circumstances.<sup>304</sup>

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299. State v. Cohen, 604 A.2d 846, 849 (Del. 1992).

300. Cohen, 604 A.2d at 849.

301. DEL. CONST. art. IV, § 3.

302. Stephen Bright, *Analysis: Supreme Court Ruling that a Jury, Not a Judge, Must Impose the Death Penalty on a Defendant*, NPR: Morning Edition radio broadcast, June 25, 2002, available at <http://discover.npr.org/features/feature.jhtml?wflid=1145570>.

303. See Mary Allen, *All Del. Capital Cases Put on Hold: Questions Remain About the Death Penalty*, THE NEWS J. (Wilmington, Del.), Sept. 13, 2002, at 1A.

304. As amended on July 22, 2002, DEL. CODE ANN. tit. 11, § 4209(d)(1) (Determination of Sentence) reads:

(1) If a jury is impaneled, the Court shall discharge that jury after it has reported its findings and recommendation to the Court. *A sentence of death shall not be imposed unless the jury, if a jury is impaneled, first finds unanimously and beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section.* If a jury is not impaneled, a sentence of death shall not be imposed unless the Court finds beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section. If a jury has been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the jury, *the Court, after considering the findings and recommendation of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist.* If a jury has not been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the Court, it shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist.

2002 Del. Laws Ch. 423 (S.B. 449) (emphasis added).

The experiences in Colorado and Delaware supplement Justice Ginsburg's survey of current death penalty statutes and the earlier-described historical evidence on the use of juries in capital sentencing in this country. They demonstrate that at least some states' decisions to move to judge-only or jury override systems of capital sentencing (or in those states that adopted them in the wake of *Furman*, to retain such a system) are motivated by legislators' desire to skew the capital sentencing system in favor of death. Of course, it could be argued that such a legislative motivation is itself an expression of public will and therefore bears upon the Eighth Amendment calculus. But given the Court's recognition that "[t]he jury . . . is a significant and reliable objective index of contemporary values,"<sup>305</sup> it seems questionable to assign much, if any, Eighth Amendment weight to actions of legislators that are consciously designed to strip the jury of its ability to represent the voice of the community.<sup>306</sup>

As the Court repeatedly has emphasized, the judgments of legislatures (and juries) are only a reference point for the Court's definition of Eighth Amendment requirements, and the Court also must apply its "own judgment . . . by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."<sup>307</sup> It is this secondary stage of analysis that led the plurality in *Gregg* to examine the penological objectives of the death penalty, and this is also the direction that the inquiry naturally leads when it comes to assessing whether the Eighth Amendment requires a jury at capital sentencing.

## 2. Justice Breyer's Concurring Opinion in Ring

Although Justice Stevens was one of the signatories of the 1976 plurality opinion in *Proffitt v. Florida*<sup>308</sup> that expressed approval for Florida's jury override system,<sup>309</sup> he later came to a radically different view of the issue. In *Spaziano v. Florida*<sup>310</sup> and *Harris v. Alabama*,<sup>311</sup> he dissented from the Court's sustaining of the constitutionality of jury override schemes.<sup>312</sup> In *Walton v. Arizona*,<sup>313</sup> he dissented from the Court's upholding of a judge-

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305. *Gregg v. Georgia*, 428 U.S. 153, 181 (1976).

306. With regard to Colorado, the legislators' decision to return to jury sentencing is a factor that also weighs on the scale in favor of the majority view of jury sentencing. The Delaware legislature's amendment of its statute to restore aggravation findings to the jury is a far more ambiguous event since it was taken in direct response to *Ring*'s announcement of the need for such a change. Yet, the Delaware legislature could have taken a view of *Ring* as applying exclusively to judge-only capital sentencing and thereby retained its pre-*Ring* jury advisory system in its entirety.

307. *Atkins v. Virginia*, 122 S. Ct. 2242, 2247-48 (2002); see also, e.g., *Coker v. Georgia*, 433 U.S. 584, 597 (1977); *Gregg*, 428 U.S. at 182 (plurality opinion).

308. 428 U.S. 242 (1976).

309. For discussion of *Proffitt*, see *supra* notes 31-40 and accompanying text.

310. 468 U.S. 447 (1984). For discussion of *Spaziano*, see *supra* notes 49-62 and accompanying text.

311. 513 U.S. 504 (1995). For discussion of *Harris*, see *supra* notes 72-78 and accompanying text.

312. See *Harris*, 513 U.S. at 515-26 (Stevens, J., dissenting); *Spaziano*, 468 U.S. at 467-90 (Stevens, J., dissenting).

313. 497 U.S. 639 (1990).

only capital sentencing scheme.<sup>314</sup> In each of these opinions, he strongly asserted an Eighth Amendment rationale for a right to a jury determination of a capital sentence.

Justice Breyer, who had joined the majority opinion in *Harris v. Alabama*,<sup>315</sup> underwent a similar transformation in *Ring*. Quoting Justice Frankfurter's observation that "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late,"<sup>316</sup> Justice Breyer declared in *Ring* that he has "come to agree with the dissenting view [of Justice Stevens in *Harris v. Alabama*], and with the related views of others upon which it in part relies."<sup>317</sup> Embracing Justice Stevens's view that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death,"<sup>318</sup> Justice Breyer concurred on this ground in the *Ring* majority's declaration of the unconstitutionality of the Arizona statute even though he has consistently rejected the Sixth Amendment rule of *Apprendi*.<sup>319</sup>

The preceding Subpart of this Article highlighted two aspects of Justice Stevens's dissenting opinion in *Harris*: his use of empirical data to show the tendency of judges to be more likely than juries to return a sentence of death and his attribution of this pattern to judges' susceptibility to political pressure.<sup>320</sup> Justice Breyer revived and adopted a different portion of Justice Stevens's *Harris* dissent: the analysis of the jury entitlement claim in light of the Eighth Amendment's requirement that a punishment serve legitimate penological purposes.<sup>321</sup>

Justice Breyer began by identifying retribution as the "main justification for capital punishment"<sup>322</sup> and then zeroed in on the question of the com-

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314. See *Walton*, 497 U.S. at 708-19 (Stevens, J., dissenting).

315. See *Harris*, 513 U.S. at 505.

316. *Ring v. Arizona*, 122 S. Ct. 2428, 2446 (2002) (Breyer, J., concurring in the judgment) (quoting *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)).

317. *Ring*, 122 S. Ct. at 2446.

318. *Id.*

319. Justice Breyer dissented in *Apprendi*, taking the position that there is no Sixth Amendment impediment to a judge's application of sentencing factors even when that process entails factfindings that can produce a sentence beyond the statutory maximum. See *Apprendi v. New Jersey*, 530 U.S. 466, 555-66 (2000) (Breyer, J., dissenting). Accordingly, as Justice Breyer explained in his separate opinion in *Ring*, he was unable to join the majority's opinion applying the *Apprendi* rule. *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring in the judgment). See also *Harris v. United States*, 122 S. Ct. 2406, 2420 (2002) (Breyer, J., concurring in part and concurring in the judgment) (reiterating disagreement with *Apprendi* but joining four-Justice plurality in adopting a rule that the plurality reached by distinguishing *Apprendi*) (discussed *supra* notes 110-13 and accompanying text).

320. See *supra* notes 288-94 and accompanying text.

321. For an explanation of the role of penological theories in Eighth Amendment analysis, see *supra* notes 271-85 and accompanying text (discussing *Gregg v. Georgia*, 428 U.S. 153, 182-87 (1976) (plurality opinion)).

322. *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring in the judgment); see also *Gregg*, 428 U.S. at 183 (plurality opinion) (explaining capital punishment's grounding in retribution rationale and observing that "[i]n part, capital punishment is an expression of society's moral outrage at particularly offensive conduct"). Justice Breyer noted "the continued difficulty of justifying capital punishment in terms of its ability to deter crime, to incapacitate offenders or to rehabilitate criminals. Studies of deterrence, are at most, inconclusive. As to incapacitation, few offenders sentenced to life without parole (as an alternative



parative abilities of judges and jurors as capital sentencers. "In respect to retribution," he said,

[J]urors possess an important comparative advantage over judges. In principle, they are more attuned to the "community's moral sensibility," because they "reflect more accurately the composition and experiences of the community as a whole." Hence they are more likely to "express the conscience of the community on the ultimate question of life or death," 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."<sup>323</sup>

Justice Breyer, like Justice Stevens before him, thus eschewed a formulation that would compare the relative "reliability" of judges' and juries' decisions, and focused instead on the decision-makers' ability to embody and apply society's sense of morality. As this juxtaposition of analytic approaches helps to illustrate, the traditional casting of the comparison in terms of "reliability" was a cognitive trap. A comparison of reliability presupposes that there is some normative reality of what the correct judgment in each case should be, and then asks whether the decision-makers are equally likely to reach the "correct" judgment. While such a construct may be meaningful at the guilt-innocence stage when it comes to the determination of what acts the defendant committed and what *mens rea* the defendant possessed at the time—and may even apply to the determination of some aggravating and mitigating circumstances—the ultimate weighing of aggravating and mitigating circumstances is not a judgment that can be viewed as normatively "correct" or "incorrect." It is rather, as the Court has said, an application of "contemporary community values" to the exercise of discretion to "choose 'between life imprisonment and capital punishment.'"<sup>324</sup>

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to death) commit further crimes. And rehabilitation, obviously, is beside the point." *Ring*, 122 S. Ct. at 2447 (citations omitted); see also *Harris v. Alabama*, 513 U.S. 504, 517-18 (1995) (Stevens, J., dissenting).

323. *Ring*, 122 S. Ct. at 2447 (Breyer, J., concurring in the judgment) (citations omitted).

324. *Witherspoon v. Illinois*, 391 U.S. 510, 519 & n.15 (1968) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). A similar but somewhat distinct conceptual path to this result was suggested by Professor Stephen Gillers in 1980 in an article that provided a blueprint for analysis of the capital jury issue that would have averted the series of Supreme Court decisions that led to *Walton v. Arizona* and the need for the Court to overrule *Walton v. Arizona*. See Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 60 (1980). Gillers writes:

'Reliability' . . . refer[s] in this context to the accuracy of the decision to be retributive. Because retribution is an expression of the community will, reliability in the decision to be retributive is achieved if the body deciding penalty expresses the community will. Conventionally, when we speak of the 'reliability' of an assertion, we mean its accuracy as a reflection of reality. A reliable assertion is one you can depend on, that you can accept as true. An assertion's reliability is a function of its relationship to that which it purports to reflect or construe. Reliability in the death cases is an expression of a degree of relationship between the penalty verdict and the conscience of the community. Since the death decision is a retributive one and

When it comes to that task, the jury is—as Justices Stevens and Breyer have recognized—uniquely better suited than a judge to perform the requisite functions.

Justice Breyer's opinion adds an entirely new dimension to Justice Stevens's earlier analysis by drawing on empirical and anecdotal data about the death penalty that has emerged in recent years and that has fueled criticisms of the validity of capital punishment as currently administered. A jury, Justice Breyer maintains, is uniquely able to gauge whether a death sentence is "unwarranted" in a particular case, given the backdrop of current knowledge about: (1) the unreliability of convictions and sentencing judgments in cases in which DNA evidence has led to exonerations of convicted individuals; (2) the degree to which the "race of the victim and socio-economic factors" may affect the death penalty and render it "arbitrary"; (3) the lengthy "delays that increasingly accompany sentences of death" and thereby impose the additional "suffering inherent in a prolonged wait for execution"; (4) the inadequacy of representation in capital cases; and (5) the increasing abandonment of the use of the death penalty in other nations.<sup>325</sup>

Justice Breyer's opinion is a striking expansion of the Eighth Amendment analysis to give full meaning to the concept of the jury as a representative of the moral values and sensibilities of the community from which the jury is drawn.<sup>326</sup> Yet, it is a natural application of the principles the Court has adopted in prior cases to define the functions of the sentencer in capital cases.<sup>327</sup>

Finally, Justice Breyer obliquely—and intriguingly—floats the possibility that judges' capital sentencing decisions may be less reliable than those of juries even in the normative sense of reliability as accuracy of judgment. Again drawing on empirical data that has emerged in recent years, Justice Breyer supports his view of the intrinsic superiority of jury sentencing in capital cases by referring to an empirical finding that "judges who override jury verdicts for life are especially likely to commit serious errors."<sup>328</sup> The data underlying this observation is the high frequency of appellate reversals

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since retribution is an expression of the will of the 'public,' or the 'community,' or 'society,' a 'greater degree of reliability' is achieved if the will of that body is expressed in the sentence with a 'greater degree of' accuracy.

*Id.* (citations omitted).

325. *Ring*, 122 S. Ct. at 2447-48 (Breyer, J., concurring in the judgment).

326. Drawing on empirical data that shows that "more than two-thirds of American counties have never imposed the death penalty since *Gregg* . . . and [that] only 3% of the Nation's counties account for 50% of the Nation's death sentences," *id.* at 2448 (citing J. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It*, App. B, Table 11A, at <http://www.law.columbia.edu/brokensystem2/appendixb.html>) (last updated May 13, 2002)). Justice Breyer makes the point that "[l]eaving questions of arbitrariness aside," the "diversity" of community mores in this country makes it especially important that the sentencer in a capital case reflect the views of the particular community in which the case is tried. *Id.*

327. See text accompanying *supra* notes 322-25 (quoting Justice Breyer's *Ring* opinion's quotations from *Witherspoon v. Illinois* and *Gregg v. Georgia*).

328. *Ring*, 122 S. Ct. at 2447 (Breyer, J., concurring) (citing Liebman, *supra* note 309, at 405-06).

of Florida judges' overrides of jury life recommendations.<sup>329</sup> This data would appear to suggest that judges who feel driven by political pressures or other factors to return a sentence of death despite a jury recommendation of life are prone to misconstrue facts or law in an effort to produce a predetermined outcome. Assuming that this phenomenon does indeed take place (and the explanation certainly fits the behavior of judges in a significant number of capital cases), judges' sentences can be viewed as "unreliable" and "inaccurate" in the sense that they are premised on erroneous judgments and findings.

### C. An Additional Route to an Eighth Amendment Right to Jury Sentencing in Capital Cases

The immediately preceding Subparts identified an Eighth Amendment right to capital jury sentencing by returning to the reasoning of the Court's decisions of July 2, 1976, which reinstated the use of capital punishment after the temporary abolition by *Furman*. There is yet another possible route to an Eighth Amendment right to a capital jury, one not discussed or implied in any of the decisions in *Ring*, but one that also finds its genesis in the 1976 decisions.

An overarching theme in the plurality opinion in *Gregg v. Georgia*<sup>330</sup> was the need for an assessment that a death sentence is proportionate. The plurality identified three different levels or forms of proportionality review; first, with regard to the constitutionality of the death penalty in general, the plurality explained that the Court's task was to determine whether this penalty is, in the abstract, "excessive."<sup>331</sup> Second, with regard to the categories

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329. See Liebman et al., *supra* note 326, at 405-06 & n.917 (stating on page 406 of the report that "In some states, there is evidence that death verdicts imposed by judges in cases where the jury votes for life are especially likely to be overturned on appeal" and supporting that statement with the following information in note 917: "The Florida experience documents the risk of error in override cases and the burden excessive overrides place on appellate courts. See Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 99-100 (1993) (finding that jury recommendations of life constitute the vast majority of override cases, and that the Florida Supreme Court usually reverses death sentences imposed by judges contrary to the life recommendation of a jury, either based on a conclusion that the override was improper or due to other errors in the case; also reporting that in 1991, the reversal rate for Florida capital verdicts imposed following overrides of life verdicts was ninety-one percent, and concluding that based on these high reversal rates, eliminating override cases would reduce the death penalty workload of the Florida Supreme Court by twenty-one percent and the Court's overall workload by six to eight percent). See also Gary Caldwell, *Capital Crime Decisions: 1992 Survey of Florida Law*, 17 NOVA L. REV. 31, 64 n. 261 (1992) (reporting that from 1986 through 1992, the Florida Supreme Court upheld death sentences in only seven cases where judges overrode life verdicts).").

330. 428 U.S. 153 (1976).

331. *Gregg*, 428 U.S. at 173 ("A penalty . . . must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' . . . This means, at least, that the punishment not be 'excessive.'"); see also *id.* at 171 (describing earlier Eighth Amendment ruling in *Weems v. United States*, 217 U.S. 349 (1910), as "focused on the lack of proportion between the crime and the offense"). As explained *supra* notes 3-10 and accompanying text, the plurality ultimately answered the question of whether the death penalty is "excessive" in the abstract by examining its possible penological underpinnings so as to ensure that the penalty is not "so totally without penological justification that it results in the gratuitous infliction of suffering." *Id.* at 183.

or types of crimes for which the death penalty can be imposed, the plurality declared that the punishment “must not be grossly out of proportion to the severity of the crime.”<sup>332</sup> Third, the plurality suggested that the “propriety of death as a penalty to be applied to a specific defendant for a specific crime” may present an Eighth Amendment issue.<sup>333</sup>

The first of these judgments was one that the plurality viewed as self-evidently a judgment for the Court itself,<sup>334</sup> the third, which was the least defined, seemed just as obviously intended for a jury. In analyzing the degree to which the death penalty furthers the objective of retribution, the plurality made note of the relative infrequency with which juries imposed the death penalty, a pattern which the plurality characterized as apparently “reflect[ing] the humane feeling that this most irrevocable of sanctions should be reserved for a small number of cases.”<sup>335</sup>

With regard to the second-level inquiry into proportionality, the *Gregg* plurality indicated that this issue is, at least in some instances, a determination for the Court itself. The plurality explained that the case before the Court required that “[w]e . . . consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed,”<sup>336</sup> and the plurality concluded that “[w]hen a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime.”<sup>337</sup> The plurality reserved the question “whether the taking of a criminal’s life is a proportionate sanction where no victim has been deprived of life—for example, when capital punishment is imposed for rape, kidnaping, or armed robbery that does not result in the death of any human being.”<sup>338</sup>

In the very next term, in *Coker v. Georgia*,<sup>339</sup> the Court took up the issue of the constitutionality of the death penalty for rape. In concluding that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment,”<sup>340</sup> the Court relied on, among other factors, the infrequency with which juries impose the death penalty for rape in Georgia and Florida, the two states that permitted such a punishment in such cases.<sup>341</sup> The Court explained:

It was also observed in *Gregg* that “[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved,” and that it is thus important to look to the

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332. *Id.* at 173.

333. *Id.*

334. *See Gregg*, 428 U.S. at 174-76.

335. *Id.* at 182.

336. *Id.* at 187.

337. *Id.*

338. *Id.* at 187 n.35.

339. 433 U.S. 584 (1977).

340. *Coker*, 433 U.S. at 592.

341. *See id.* at 596-97.

sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried.<sup>342</sup>

When the Court, some years later, held in *Enmund v. Florida*<sup>343</sup> that the death penalty is disproportionate for a defendant who “aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed,” the Court once again relied heavily on the behavior of juries.<sup>344</sup> The Court stated:

Society’s rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made. As we have previously observed, “[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.” The evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner’s.<sup>345</sup>

The jury’s role as assessor of the proportionality of the imposition of the death penalty resurfaced in a different way in the Court’s recent decision in *Atkins v. Virginia*,<sup>346</sup> in which the Court held the death penalty to be a disproportionate punishment for mentally retarded offenders.<sup>347</sup> The dissenters in *Atkins* chided the majority for considering gauges of contemporary values *other than* “the work product of legislatures and sentencing jury determinations” and for striking down the death penalty for retarded offenders even though “neither petitioner nor his *amici* have adduced any comprehensive statistics that would prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner.”<sup>348</sup> In the course of leveling these criticisms, Chief Justice Rehnquist (in an opinion joined by Justices Scalia and Thomas) reaffirmed the function of capital sentencing jury verdicts as one of the “objective indicia of contemporary values” and an “indicator[] by which courts ascertain the contemporary American conceptions of decency for purposes of the

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342. *Id.* at 596 (citation omitted).

343. 458 U.S. 782 (1982).

344. *Enmund*, 458 U.S. at 797. The rule was at issue in the earlier-discussed decision of the Court in *Cabana v. Bullock*, 474 U.S. 376 (1986). See *supra* notes 80-85 and accompanying text. As explained *supra* note 81, the Court later modified the rule in *Tison v. Arizona*, 481 U.S. 1079 (1986).

345. *Enmund*, 458 U.S. at 794 (quoting *Coker*, 433 U.S. at 596 (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976))) (citations omitted).

346. 122 S. Ct. 2242 (2002).

347. *Atkins*, 122 S. Ct. at 2252.

348. *Id.* at 2253-54 (Rehnquist, C.J., joined by Scalia and Thomas, JJ.); see also *id.* at 2266 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J.) (“The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society’s moral outrage sometimes demands execution of retarded offenders.”).

Eighth Amendment.”<sup>349</sup> “Individual sentencing juries are,” he said, “by design, better suited than courts to evaluat[e] and giv[e] effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.”<sup>350</sup>

Against this backdrop, it is apparent that the capital jury plays an essential role in the Court’s Eighth Amendment rubric for assessing the proportionality of the death penalty for categories of crimes and offenders. Capital jury determinations constitute one of the essential “workings of normal democratic processes in the laboratories of the States” that provide the basis for an “across-the-board consensus” to inform the Supreme Court’s judgments in applying the proportionality principle of the Eighth Amendment.<sup>351</sup> Thus, although the Court has never had to face the possibility of wholesale extinction of capital juries—because so few states have ever even considered abolition of juries at capital sentencing—such a result would drastically undermine the processes by which the Court identifies and enforces Eighth Amendment rules of proportionality. In this regard, it can be said that the Court’s already-existing Eighth Amendment framework assigns a crucial role to the capital jury that must be preserved by safeguarding the continuing use of juries in capital sentencing.<sup>352</sup>

Moreover, the Court’s practice of waiting *until* a consensus has been reached requires the use of capital juries to administer the proportionality principle until the Supreme Court is ready to intervene and declare the death penalty categorically disproportionate. The Eighth Amendment principle announced in *Enmund* in 1982—the prohibition of the death penalty for aiders and abettors who neither took life nor attempted or intended to take life—was identified by Justice White in a concurring and dissenting opinion in *Lockett v. Ohio*<sup>353</sup> in 1978.<sup>354</sup> During the four years between *Lockett* and *Enmund* (and, for that matter, in the years prior to *Lockett*), the mechanism by which defendants who fit the *Enmund* category were spared the death penalty (a punishment that, as *Enmund* eventually recognized, was categorically disproportionate for them) was through the sentencing determinations of juries in individual cases (the determinations that later proved decisive in the Court’s analysis in *Enmund*). In much the same way, juries served as the instrument for deeming the death penalty disproportionate for individual mentally retarded offenders during the years between *Penry v. Lynaugh*<sup>355</sup>

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349. *Id.* at 2253 (Rehnquist, C.J., joined by Scalia and Thomas, JJ.).

350. *Id.* at 2253-54.

351. *Id.* at 2255.

352. The Sixth Circuit has recently recognized that the Court’s earliest consideration of modern death penalty cases under the Eighth Amendment has application to the role of the jury in consideration of aggravating circumstances and the narrowing function that juries are required to play in capital sentencing. *See* *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002) (reversing a death sentence from Ohio where jury did not make requisite findings relating to aggravation as required by the Eighth Amendment).

353. 438 U.S. 586 (1978).

354. *See Lockett*, 438 U.S. at 621-28 (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court).

355. 492 U.S. 302 (1989).

in 1989 (when the Court concluded that a national consensus had not yet emerged for prohibiting the death penalty for retarded offenders) and *Atkins* in 2002 (when the Court was satisfied that such a consensus existed). Without juries to serve this function in these and other as-yet-to-be-determined categories of disproportionality, a state's death penalty system lacks an essential mechanism for guarding against unconstitutionally excessive punishments.

#### CONCLUSION

On the surface, there appears to be a considerable gulf between Justice Ginsburg's majority opinion in *Ring* and Justice Breyer's concurring opinion in the case. The former is a very narrowly framed holding on a Sixth Amendment issue concerning a single facet of the capital sentencing process, resolved with an explicit declaration that the opinion does not reach issues other than the "tightly delineated" Sixth Amendment claim before the Court<sup>356</sup> and declining to rely in any way on the Eighth Amendment.<sup>357</sup> In sharp contrast, Justice Breyer's opinion explicitly rejects the majority's Sixth Amendment analysis<sup>358</sup> and instead employs an Eighth Amendment analysis that reaches issues far beyond the specific one before the Court in *Ring*.<sup>359</sup>

Yet, as this Article has shown, both of these *Ring* opinions lead eventually to the same end point: that the capital sentencing judgment must be entrusted to a jury, not a judge. As Part III showed, Justice Breyer's opinion reaches that conclusion in a straightforward and definitive manner. Justice Ginsburg's opinion leads there in a more circuitous fashion: It starts the Court down a path that, as Part II explained, will eventually and ineluctably require that all of the key factfinding judgments embodied in a capital sentencing determination be assigned to the jury.

Moreover, below the surface, the apparently unrelated rationales of the two opinions are united by certain common core understandings of the essential attributes and functions of a jury. As Justice Stevens wrote in a dissenting opinion in *Spaziano v. Florida*,<sup>360</sup> the opinion that marked his disavowal of his earlier approval of Florida's jury override system:<sup>361</sup>

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356. *Ring v. Arizona*, 122 S. Ct. 2428, 2437 n.4 (2002). For further discussion of the Court's holding in *Ring*, see *supra* notes 111-31 and accompanying text.

357. The majority's only references to the Eighth Amendment are in a passage of the decision that explains the state's attempt to distinguish *Apprendi* on the ground that the death penalty statute at issue in *Ring* was enacted by the state legislature in response to the Court's Eighth Amendment jurisprudence, and in a passage that inventories the approaches the states have employed in integrating a jury into the capital sentencing procedures adopted to implement Eighth Amendment requirements. See *Ring*, 122 S. Ct. at 2442.

358. *Id.* at 2446 (Breyer, J., concurring in the judgment). For further explanation of Justice Breyer's disagreement with the majority's Sixth Amendment ruling, see *supra* notes 316-19 and accompanying text.

359. See *supra* notes 320-29 and accompanying text.

360. 468 U.S. 447 (1984).

361. The earlier approval took place in *Proffitt v. Florida*, 428 U.S. 242 (1976), in a plurality opinion

[T]he belief that juries more accurately reflect the conscience of the community than can a single judge is the central reason that the jury has been recognized at the guilt stage in our jurisprudence [in decisions that provided the jurisprudential foundations for the majority's Sixth Amendment analysis in *Ring*]. This same belief firmly supports the use of juries in capital sentencing, in order to address the Eighth Amendment's concern that capital punishment be administered consistently with community values [which was at the core of Justice Breyer's concurring opinion in *Ring*].<sup>362</sup>

At an even deeper level, Justice Ginsburg's majority opinion in *Ring*, Justice Breyer's concurring opinion in *Ring*, and Justice Stevens's opinion in *Spaziano*, are linked by a common narrative. It is a storyline that Justice Breyer explicitly embraced when he acknowledged that his position in *Ring* was a direct reversal of his earlier view in *Harris v. Alabama*,<sup>363</sup> and quoted Justice Frankfurter's words about the need to remain open to "[w]isdom . . . [even when] it comes late."<sup>364</sup> Justice Breyer in *Ring*, like Justice Stevens in *Spaziano*, shifted from an earlier position of accepting judicial overrides of jury sentencing verdicts to a new view of the capital jury's role as constitutionally sacrosanct. Justice Ginsburg's majority opinion similarly, if implicitly, embraces wisdom even though it comes late by overruling *Walton v. Arizona*<sup>365</sup> insofar as that decision permitted aggravation findings at the capital sentencing stage to be made by a judge rather than a jury.<sup>366</sup>

It would be comforting to believe that the legislatures and courts in the states with judge-only and jury override systems of capital sentencing will embrace the wisdom offered by *Ring*, but unfortunately the earliest indications are to the contrary. When the Delaware legislature responded to the issuance of *Ring* by revising its provisions for jury override, the legislature interpreted *Ring* in the narrowest possible fashion and reassigned only the

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authored by Justices Stewart, Powell, and Stevens. See *supra* notes 34-40 and accompanying text.

362. *Spaziano v. Florida*, 468 U.S. 447, 487-88 (1984) (Stevens, J., concurring in part and dissenting in part).

363. See *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring in the judgment) (citing *Harris v. Alabama*, 513 U.S. 504 (1995) and explaining that "[a]lthough I joined the majority in *Harris v. Alabama*, I have come to agree with the dissenting view").

364. *Id.* (quoting *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)). For the full quotation, see text accompanying *supra* note 316.

365. 497 U.S. 639 (1990). For discussion of *Walton*, see *supra* notes 67-71 and accompanying text. For discussion of *Ring*'s overruling of *Walton*, see *supra* notes 111-26 and accompanying text.

366. The storyline of "wisdom . . . com[ing] late" with regard to Supreme Court oversight of the death penalty inevitably evokes Justice Blackmun's declaration, after two decades of upholding the constitutionality of the death penalty and "tinker[ing] with the machinery of death" that he felt "morally and intellectually obligated simply to concede that the death penalty experiment has failed" and that it was "virtually self-evident to [him] now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies." *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of certiorari). The series of capital jury cases examined in this Article, which began with *Proffitt v. Florida* in 1976 and has, to date, led to *Ring* but will surely continue with post-*Ring* decisions, is one of many examples of Justice Blackmun's central point that the death penalty defies any attempt to devise a set of coherent, fair, and reliable criteria for its application.



aggravation findings to the jury while leaving the other factfindings in the capital sentencing judgment to a judge.<sup>367</sup> The Alabama Supreme Court has rejected challenges to the state's capital sentencing scheme under *Ring* by concluding that the guilt-innocence phase of Alabama capital trials has a different legal consequence than has been previously recognized, thereby satisfying the dictates of *Ring*.<sup>368</sup> When the Florida Supreme Court recently took up the issue of *Ring*'s application to Florida's jury override system, the court declined to extend *Ring* in the manner recommended in Subpart II.A, *supra*, because the United States Supreme Court has not yet done so and the Florida court declared itself bound by the prior United States Supreme Court decisions upholding the Florida statute.<sup>369</sup> This action is strikingly reminiscent of the Arizona Supreme Court's ruling in *Ring*, declining to apply the obvious lesson of *Apprendi* to strike down the Arizona statute because the statute had previously been upheld by the United States Supreme Court in *Walton*.<sup>370</sup> Just as the action of the Arizona Supreme Court set the stage for the Supreme Court's ruling in *Ring*, the action of the Delaware legislature and the rulings of the Florida and Alabama Supreme Courts are paving the way for the next chapters in the long saga of the United States Supreme Court's attempt to define the constitutional rules governing the role of the jury in capital sentencing hearings.

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367. See *supra* note 304 (quoting DEL. CODE ANN. tit. 11, § 4209(d)(1), as amended on July 22, 2002).

368. In *Ex parte Waldrop*, No. 1001194, 2002 WL 31630710, at \*2 (Ala. Nov. 22, 2002), the trial judge overrode the jury's sentencing recommendation of life imprisonment without parole. The Alabama Supreme Court declared that this death sentence did not violate the requirements of *Ring* because at the first phase of the trial "the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala. Code 1975, § 13A-5-40(a)(2), [and thus] the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was 'proven beyond a reasonable doubt.' Ala. Code 1975, §13A-5-45(e); Ala. Code 1975, §13A-5-50." *Waldrop*, 2002 WL 31630710, at \*5. The Court concluded that only one valid aggravating circumstance was needed to meet the *Ring* requirement under Alabama's statute. *Id.*; see also *Ex parte Hodges*, No. 1010619, 2003 WL 1145451, at \*7 (Ala. Mar. 14, 2003) (finding the requirements of *Ring* satisfied where defendant was convicted of robbery-murder during first phase of trial).

369. See *Bottoson v. Moore*, 443 So. 2d 962 (Fla. 2002) (per curiam); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (per curiam). These decisions are described in greater detail *supra* notes 139-40.

370. See *State v. Ring*, 25 P.3d 1139, 1150 (Ariz. 2001), *rev'd sub nom. Ring v. Arizona*, 122 S. Ct. 2428 (2002). These decisions are described *supra* notes 111-19 and accompanying text.

