ELEMENTAL FACTS: DID *RING v. ARIZONA* REDEFINE CAPITAL SENTENCING?

I. INTRODUCTION

Capital punishment has been criticized from virtually every angle imaginable. Economists argue that while capital punishment is a viable deterrent of crime, the current appellate process surrounding capital punishment is intolerably inefficient.[1] Other commentators suggest that the death penalty, as administered, is sexist because vastly more men than women have been executed throughout history.[2] Still others use numerous studies to prove that racial discrimination is linked to the application of the death penalty.[3] Other theorists argue that the implementation of capital punishment oversteps the bounds of governmental authority; the killing of any person, guilty or not, is an act of murder and, as such, immoral.[4] Some individuals fear the possibility (some would say certainty) that an innocent man or woman might be executed following a faulty trial.[5] Death is so irrevocable, they argue, that it should not be meted out by fallible humanity.

This debate has permeated the Christian community as well. While many Christians have traditionally favored the death penalty,[6] people of faith are questioning the wisdom of that position.[7] Notably, the Roman

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[1] *See, e.g.*, Allan D. Johnson, Note, *The Illusory Death Penalty: Why America's Death Penalty Process Fails to Support the Economic Theories of Criminal Sanctions and Deterrence*, 52 HASTINGS L.J. 1101 (2001).

[2] *See, e.g.*, Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433 (2002).

[3] *See, e.g.*, Ronald J. Tabak, *Racial Discrimination in Implementing the Death Penalty*, HUMAN RIGHTS, Summer 1999, at 5; *see also* RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 115-60 (1991).

[4] *See, e.g.*, Louis P. Pojman, *For the Death Penalty, in* THE DEATH PENALTY: FOR AND AGAINST 1, 52 (Louis P. Pojman & Jeffrey Reiman eds., 1997).

[5] *See, e.g.*, Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 223 (James R. Acker et al. eds., 1998); *see also* United States v. Quinones, 205 F. Supp. 2d 256 (S.D.N.Y. 2002) (holding that the death penalty is unconstitutional based on due process guarantees, because it cuts off time for continued appeals and the possibility of exculpatory evidence—such as DNA—being produced), *rev'd*, 313 F.3d 49 (2d Cir. 2002) (holding that the death penalty itself is clearly constitutional based on Gregg v. Georgia, 428 U.S. 153 (1976), and that the Federal Death Penalty Act (FDPA) violates neither the Eighth nor Fifth Amendments based on Herrera v. Collins, 506 U.S. 390 (1993)).

[6] *See, e.g.*, Jill Jones, Note, *The Christian Executioner: Reconciling "An Eye for an Eye" with "Turn the Other Cheek,"* 27 PEPP. L. REV. 127, 129 (1999).

[7] *See, e.g.*, Thomas C. Berg, Symposium, *Religion's Role in the Administration of the Death Penalty: Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL OF RTS. J. 31 (2000).

Catholic Church has recently backed away from its traditional, somewhat favorable view of capital punishment[8] to a view that favors the protection of all human life in the interest of providing an opportunity for rehabilitation.[9]

Yet, despite legitimate concerns and criticisms, imposing the death penalty remains an option throughout the United States. Most Americans still believe that the death penalty is necessary; in a recent Gallup poll, for example, 70% of Americans questioned favored sentencing convicted murderers to death.[10] Those individuals who support capital punishment most often do so with the belief that the death penalty is a legitimate punishment earned by heinous behavior or that the death penalty will improve society because of its deterrent effect.[11]

For decades, the Supreme Court has grappled with the constitutionality of the death penalty.[12] It has concluded that the death penalty is constitutional, but only under certain circumstances and only if rigorous procedural standards are maintained.[13]

This note will examine the changing constitutional standard for imposing a capital sentence. Part II discusses the framework that the Court has developed to balance the rights of the individual under the Constitution against states' interests in imposing capital punishment. Part III examines the Supreme Court's recent decisions in *Jones v. United States*,[14] *Apprendi v. New Jersey*,[15] and *Ring v. Arizona*.[16] Specifically, this part discusses the effect of these decisions on what constitutes an element of a crime. It also discusses the emphasis that the Court placed on the Sixth Amendment's guarantee that those elements be proven to a jury beyond a reasonable doubt. Part IV details *United States v. Fell*[17] and *United States v. Regan*,[18] recent district court decisions that applied the principles of *Jones*, *Apprendi*, and *Ring* to the

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8 *Id.* at 39-41.

9 Pope John Paul II, *Evangelium Vitae*, *in* THE ENCYCLICALS OF JOHN PAUL II 844, at § 56.1 (Michael Miller ed., 1995), *available at* http://www.usccb.org/sdwp/national/criminal/golpars.htm (last visited Aug. 30, 2003).

10 Marc Fisher, *Executing Children is the Case Now Before Virginia*, WASH. POST, Jan. 14, 2003, at B01, *available at* http://www.pollingreport.com/crime.htm#Death (last visited Aug. 30, 2003).

11 Pojman, *supra* note 4, at 28.

12 Gregg v. Georgia, 428 U.S. 153 (1976).

13 *Id.*; Furman v. Georgia, 408 U.S. 238 (1972).

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

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

16 Ring v. Arizona, 536 U.S. 584 (2002).

17 United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002).

18 United States v. Regan, 221 F. Supp. 2d 469 (E.D. Va. 2002).

Federal Death Penalty Act of 1994.[19] Part V discusses recent decisions in the United States Courts of Appeals dealing with *Ring*'s retroactive application on collateral appeal for habeas corpus petitioners challenging their death sentences. Finally, Part VI reveals the possible ramifications of these cases and illuminates the need for clarification of the Supreme Court's holdings in this area of the law.

II. REQUIREMENTS FOR A CONSTITUTIONAL DEATH PENALTY

A. Early History

The first recorded execution in what would become the United States occurred in 1608 at Jamestown.[20] Captain George Kendall's offense was "sowing discord" among his fellow settlers.[21] Such executions were familiar to the Englishmen who settled at Jamestown. Even during the more tolerant reign of Charles I (1625-1649), less than a generation after Jamestown was settled, "2,160 persons were executed [in England] (90 per year)."[22] Criminals fared no better under King Charles's successor; Cromwell's government executed 990 of its citizens during the Republican Interregnum (1649-1658).[23]

During America's colonial period, capital punishment remained common; following Independence, however, many early American leaders advocated death penalty reform. Thomas Jefferson, for example, urged more proportional punishments for crimes that were traditionally punished by death (such as rape), while still supporting capital punishment for murder and treason.[24] Benjamin Rush, one of the signers of the Declaration of Independence, proposed the abolition of the death penalty, writing that he considered death "an improper punishment for *any* crime."[25]

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[19] 18 U.S.C. §§ 3591-98 (1994).

[20] PATERNOSTER, *supra* note 3, at 3.

[21] The Thomas Jefferson Papers: Virginia Records Timeline, 1600-1609 *at* http://memory.loc.gov/ammem/mtjhtml/mtjvatm2.html (listed under Aug. 28, 1607, the date of his conviction) (last visited Oct. 29, 2003).

[22] PATERNOSTER, *supra* note 3, at 5.

[23] *Id.*

[24] THOMAS JEFFERSON, A BILL FOR PROPORTIONING CRIMES AND PUNISHMENTS IN CASES HERETOFORE CAPITAL (1779), *reprinted in* CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 16 (Bryan Vila & Cynthia Morris eds., 1997).

[25] BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS AND UPON SOCIETY (1787), *reprinted in* CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 24, at 21. Instead, Rush advanced the development of a penitentiary system as an alternative to the widespread use of the death penalty, which led to the creation of the first penitentiary in 1790 in Philadelphia. *Id.* at 22.

Partly because of Rush's efforts,[26] beginning in the late eighteenth century and throughout the nineteenth century, there was a fairly successful movement to abolish capital punishment in many states.[27] This movement also led to the development and adoption of various means to limit the imposition of the death penalty. These safeguards included discretionary (as opposed to mandatory) capital punishment, reduction of the number of capital offenses, and the development of degrees of murder, with only first-degree murder and treason being punishable by death[28] (degree-fixing changed the common law rule of mandatory capital punishment for the crime of murder[29]). From about 1850 until the end of World War I, several states abolished or strictly narrowed the application of their death penalty statutes; by 1930, however, most of these states had returned to using the death penalty.[30]

The Supreme Court was not silent on the issue of the death penalty during this era: it granted certiorari on the issue of whether the given methods of imposing the death penalty withstood the Eighth Amendment's proscription of cruel and unusual punishment.[31] In *Wilkerson v. Utah*,[32] the Court found execution by shooting did not violate the Eighth Amendment, stating that, at the time of its adoption, "cruel and unusual" carried the idea of "torture" or "unnecessary cruelty."[33] In *In re Kemmler*,[34] the Court reaffirmed that electrocution was neither cruel nor unusual.[35] The Court held that "cruel and unusual" indicated "torture or a lingering death . . . something inhuman and barbarous, something more than the mere extinguishment of life."[36] In *Louisiana ex rel. Francis v. Resweber*,[37] the Court again heard an Eighth Amendment challenge to the death penalty, this time involving repeated attempts to execute the same defendant after Louisiana's electric chair malfunctioned.[38] The Court held the failed electrocution was "an unforeseeable accident" and not an attempt on the part of the state to

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26 DONALD D. HOOK & LOTHAR KAHN, DEATH IN THE BALANCE: THE DEBATE OVER CAPITAL PUNISHMENT 24 (1989).

27 PATERNOSTER, *supra* note 3, at 4-9.

28 HOOK & KAHN, *supra* note 26, at 24.

29 McGautha v. California, 402 U.S. 183, 197-98 (1971).

30 PATERNOSTER, *supra* note 3, at 9. These states included: Arizona, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Washington, and Wisconsin. *Id.*

31 U.S. CONST. amend. VIII.

32 Wilkerson v. Utah, 99 U.S. 130 (1878).

33 *Id.* at 135-36.

34 *In re* Kemmler, 136 U.S. 436 (1890).

35 *Id.* at 447.

36 *Id.*

37 Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

38 *Id.* at 464.

"inflict unnecessary pain."[39] While the Court did not specifically decide whether the death penalty itself was constitutional in these cases, the "assumption" that the death penalty was constitutional "provided a necessary foundation for the decision[s]."[40]

Executions for capital crimes took place somewhat regularly under both state and federal law throughout the first half of the twentieth century.[41] Beginning in the 1960s, however, the legal and academic communities began to attack the death penalty with renewed vigor.[42] By 1967, so many death penalty opponents had challenged the death penalty that the Supreme Court ordered all executions to cease, pending its decision on the constitutionality of the death penalty.[43]

B. Toward Guided Discretion

1. *Furman v. Georgia*:[44] The Meaning of the Sixth Amendment Changes in Keeping with Contemporary Moral Standards

In 1972, the Supreme Court heard *Furman v. Georgia* and for the first time squarely confronted whether capital punishment itself was cruel and unusual. The Court issued a short *per curiam* decision holding that the imposition of the death penalty in the cases at question would violate the Eighth and Fourteenth Amendments.[45] The five justices supporting the judgment, however, did so for different reasons, and each filed a separate concurring opinion explaining his rationale.[46] The concurring justices largely relied on the Court's holdings in *Weems v.*

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[39] *Id.*

[40] Gregg v. Georgia, 428 U.S. 153, 168 (1976).

[41] PATERNOSTER, *supra* note 3, at 9. While executions continued to take place, the number of executions declined overall from 1930-1967. *Id.*

[42] HOOK & KAHN, *supra* note 26, at 25; see PATERNOSTER, *supra* note 3, at 41 (discussing how the American Law Institute's Model Penal Code (MPC), issued at approximately the same time as the *Gregg* decision, also called for reform of death penalty procedure). The MPC called for a bifurcated trial process consisting of a preliminary hearing on the issue of guilt, followed by a penalty phase, during which the sentencing determination would be made based on the existence of aggravating and mitigating factors. PATERNOSTER, *supra* note 3, at 41.

[43] HOOK & KAHN, *supra* note 26, at 25.

[44] Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

[45] *Id.* at 240.

[46] *Id.* at 257-306 (Brennan, J., concurring); *id.* at 314-74 (Marshall, J., concurring). Two justices believed that the death penalty was unconstitutional as cruel and unusual punishment in and of itself. Three justices did not believe that the death penalty itself was unconstitutional but believed that the statutory schemes for imposing the death penalty that were at issue in *Furman* were unconstitutional. *Id.* at 240-57 (Douglas, J. concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring). Four justices believed that the death penalty was not unconstitutional and did not see a problem with the statutes. *Id.* at 375-405 (Burger, C.J., dissenting); *id.* at 405-14 (Blackmun, J., dissenting); *id.* at 414-65 (Powell, J., dissenting); *id.* at 465-70 (Rehnquist, J., dissenting).

United States[47] and *Trop v. Dulles*[48] to distinguish the view of cruel and unusual punishment that prevailed in *Wilkerson*, *Kemmler* and *Resweber*.[49] Based on *Weems* and *Trop*, the concurring justices argued that instead of a fixed historical view of cruel and unusual punishment as something involving torture or excessive pain, the meaning of the words changed with society's expectations and moral standards.[50] Although the Court had recently affirmed the constitutionality of full jury discretion in capital sentencing,[51] the *Furman* Court found that the results of such "untrammeled discretion"[52] were unconstitutional because of the "abitrar[y],"[53] "totally capricious,"[54] "wanton[], and . . . freak[ish]"[55] imposition of the death penalty.

The majority of the Court plainly revealed its disapproval of the then-prevailing death penalty system in the separate concurring opinions. Less apparent, however, was exactly how the lengthy and convoluted *Furman* opinions affected the procedure for imposing capital punishment. The Court stopped short of ruling that the death penalty in and of itself violated the Eighth Amendment,[56] but it did leave "the future of capital punishment . . . in an uncertain limbo."[57] *Furman* invalidated thirty-nine state capital punishment statutes, as well as

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[47] Weems v. United States, 217 U.S. 349 (1910). The definition of cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378.

[48] Trop v. Dulles, 356 U.S. 86 (1958). The words cruel and unusual "must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

[49] *See supra* notes 33-40 and accompanying text.

[50] *Furman*, 408 U.S. at 241-42 (Douglas, J., concurring); *id.* at 265-70 (Brennan, J., concurring); *id.* at 309 (Stewart, J., concurring); *id.* at 325 (Marshall, J., concurring); *id.* at 327 (Marshall, J., concurring).

> The Cruel and Unusual Punishments Clause . . . is not susceptible of precise definition. Yet we know that the values and ideals it embodies are basic to our scheme of government. And we know also that the Clause imposes upon the Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, "[t]hat issue confronts us, and the task of resolving it is inescapably ours."

Id. at 258 (Brennan, J., concurring) (quoting *Trop*, 356 U.S. at 103).

[51] McGautha v. California, 402 U.S. 183, 207 (1971) ("In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.").

[52] *Furman*, 408 U.S. at 248 (Douglas, J., concurring).

[53] *Id.* at 249 (Douglas, J., concurring).

[54] *Id.* at 295 (Brennan, J., concurring).

[55] *Id.* at 310 (Stewart, J., concurring).

[56] *Id.* at 398 (Burger, C.J., dissenting).

[57] *Id.* at 403 (Burger, C.J., dissenting).

federal death penalty laws.[58] Six hundred death row inmates had their death sentences commuted by *Furman*.[59]

In the wake of *Furman*, thirty-five states and the federal government enacted new capital punishment statutes.[60] "Keeping in mind the requirements that seemed to have been established by the Court's decision in *Furman*, the new state laws included mandatory and guided discretion statutes" that were "designed to lead to less arbitrary, more consistent sentencing by giving juries less discretion in choosing a defendant's sentence, or none at all."[61] In *Woodson v. North Carolina*,[62] the Supreme Court disallowed mandatory sentencing, holding that "consideration of the character and record of the individual offender" is "constitutionally indispensable" to any system of imposing capital punishment.[63]

2. *Gregg v. Georgia*:[64] The Court Approves of Sentencing Methods Designed to Minimize Arbitrary and Capricious Sentencing

In 1976, the Court further clarified what sort of capital sentencing scheme would be acceptable under the Constitution. Georgia's death penalty procedure called for a bifurcated trial proceeding, followed (in the case of "a guilty verdict, plea, or finding") by a separate pre-sentence hearing at which the finder of fact heard evidence "in extenuation, mitigation, and aggravation"[65] to help determine an appropriate sentence.[66] Under the Georgia statute, the death penalty could be imposed only if the jury (or in cases of a bench trial, the judge) found one of ten possible statutory aggravating factors.[67] The Georgia scheme also provided for expedited direct review by the Supreme Court of Georgia of every death sentence.[68]

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58 *Id.* at 411-12 (Blackmun, J., dissenting).

59 CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 24, at 141.

60 Gregg v. Georgia, 428 U.S. 153, 179-80 (1976).

61 CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 24, at 148.

62 Woodson v. North Carolina, 428 U.S. 280 (1976).

63 *Id.* at 304.

64 *Gregg*, 428 U.S. 153.

65 *Id.* at 163 (citing GA. CODE ANN. § 27-2503 (1972)).

66 *Id.* at 163-64.

67 *Id.* at 164-66 (citing GA. CODE ANN. §§ 26-3102, 27-2534.1(c) (1972)).

68 *Id.* at 166 (citing GA. CODE ANN. § 27-2537 (Supp. 1975)). The Georgia Supreme Court was statutorily required to determine whether there was prejudice or passion on the part of the jury, whether one or more of the statutory aggravating factors was found, and whether the death penalty was an excessive punishment in comparison with the sentences imposed in similar cases. *Id.* at 166-67.

In *Gregg v. Georgia*, the Court construed *Furman* to hold, "Because of the uniqueness of the death penalty . . . it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[69] The *Gregg* Court also specifically affirmed that "the punishment of death does not invariably violate the Constitution."[70] The Court made it clear, however, that there was a rigorous constitutional standard to be met in the imposition of the death penalty: "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[71]

The Court examined the Georgia statute and found that it met *Furman*'s mandate since it was "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."[72] The Court went on to state that Georgia's statutory scheme provided ample protection against arbitrary and capricious actions on the part of the sentencing body: "As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of information relevant to the imposition of sentence and provided with standards to guide its use of the information."[73]

When the dust settled after the Court's holdings in *Furman* and its progeny, the framework for a constitutional capital sentencing scheme had been established: the discretion of the sentencing body—be it judge or jury—had to be guided and somewhat constrained, and the sentencing body had to be able to make a determination based on the circumstances of the individual criminal and the particular crime.[74]

C. The Federal Death Penalty Act of 1994: Congress Seeks to Design a Death Penalty Statute Consistent with Furman *and* Gregg

Until *Furman*, "[f]ederal juries retained unlimited and unguided discretion over the imposition of the death penalty . . . ."[75] *Furman*,

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[69] *Id.* at 188 (referring to the holding in *Furman*, 408 U.S. at 313). "Since five Justices wrote separately in support of the judgments in Furman, the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." *Id.* at 169 n.15.

[70] *Id.* at 169.

[71] *Id.* at 189.

[72] *Id.* at 195.

[73] *Id.*

[74] United States v. Fell, 217 F. Supp. 2d 469, 476 (D. Vt. 2002) (citing Jones v. United States, 527 U.S. 373, 381 (1999)).

[75] *Id.* at 475.

however, invalidated federal death penalty procedures, making it impossible for the federal government to impose the death penalty despite the existence of federal capital crimes.[76] In 1993, Senators Thurmond and DeConcini introduced a bill that provided for death penalty procedures that were constitutional under *Furman* and its progeny.[77]

The Federal Death Penalty Act (FDPA or the Act)[78] was passed in 1994. Under the Act, the government must provide notice to the accused that the death penalty is being sought; this notice must be given a reasonable amount of time before the trial.[79] Following a guilty verdict or plea, a separate hearing is held to determine the sentence, preferably before the same jury that tried the issue of guilt.[80] The fact-finder must first find the existence of threshold requirements dealing with criminal intent.[81] If there is no finding of these threshold factors, the death penalty may not be imposed.[82] If the factors *are* found, the sentencing phase progresses to the consideration of statutory and non-statutory aggravating factors.[83] The aggravating factors must be found unanimously and beyond a reasonable doubt.[84] If, however, only one juror finds a mitigating factor, it may still be considered, and mitigating factors need only be proven by a preponderance of the evidence.[85] During the penalty phase, information the court believes relevant to a just sentence is admissible. While the government must give notice of the aggravating factors it intends to prove, neither side is required to abide by the rules of evidence.[86] The sentencing body must then weigh the mitigating and aggravating factors to determine whether the imposition of the death penalty is warranted in a particular case and for a particular offender.[87] If the jury does not return with a unanimous recommendation for the death penalty, or if aggravating or threshold factors are not found, the death sentence may not be imposed.[88]

Clearly, this statute fulfills its purpose: it follows the guidelines set forth in *Gregg* by guiding the discretion of the sentencing body and

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76 139 CONG. REC. S459 (daily ed. Jan. 21, 1993) (statement of Sen. Thurmond).

77 *Id.*

78 18 U.S.C. §§ 3591-98 (1994).

79 18 U.S.C. § 3593(a).

80 18 U.S.C. § 3593(b).

81 18 U.S.C. § 3591(a)(2)(A-D).

82 *Id.* (except for treason).

83 18 U.S.C. § 3592(c)(1-16).

84 18 U.S.C. § 3593(c-d).

85 *Id.*

86 18 U.S.C. § 3592(c).

87 18 U.S.C. § 3593(e).

88 18 U.S.C. § 3594.

providing for individual determination of whether death is an appropriate sentence for that offender and that crime.

III. ELEMENTS VERSUS SENTENCING FACTORS: THE SIXTH AMENDMENT ATTACK ON CAPITAL SENTENCING PROCEDURES

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.[89]
>
> – Justice Antonin Scalia

The practice of allowing increased sentences based on factual findings made by a judge, based only on a preponderance of the evidence, has gained in popularity and practice over the last several years.[90] As discussed below, these findings include factors such as the possession of a firearm during the commission of the crime[91] and the existence of racial animus as a motive for the crime.[92] In a death penalty case, these sentencing factors would be exactly what the Court approved in *Gregg v. Georgia*. These factors merely help determine an appropriate sentence; rather than being found during the guilt phase of a trial, their role emerges only after a finding of guilt. Therefore, they are not subject to the same rigorous procedural safeguards as elements of the crime (such as proof beyond a reasonable doubt to a jury). The Supreme Court has issued a series of holdings based on the view that increasing a sentence based on judge-determined factors flouts the Anglo-American tradition of trial by jury.

A. Jones v. United States: *The Supreme Court's Historical Analysis of the Link Between Elements Proved and Sentence Imposed*

1. Factual and Procedural Background

Nathan Jones was indicted "on two counts: using or aiding and abetting the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), and carjacking or aiding and abetting carjacking, in violation of 18 U.S.C. § 2119."[93]

At the time, 18 U.S.C. § 2119 provided for a fifteen-year sentence for carjacking by a person "possessing a firearm."[94] The statute further

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89 Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

90 *Id.* at 611-12 (Scalia, J., concurring).

91 Jones v. United States, 526 U.S. 227, 230 (1999).

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

93 *Jones*, 526 U.S. at 230.

94 *Id.* (citing 18 U.S.C. § 2119(1) (Supp. 1988) (amended 1994)).

provided for a twenty-five-year maximum sentence "if serious bodily injury . . . results,"[95] or a life sentence "if death results."[96]

Jones's indictment referred only to the fifteen year sentence; at his arraignment, he was told that he could expect a sentence of no more than fifteen years for the carjacking. At his trial, the "jury instructions defined the elements subject to the Government's burden of proof by reference solely to the [fifteen year sentence]."[97]

After Jones's conviction, however, a twenty-five-year sentence was imposed for the carjacking; the sentence was based on serious bodily injury (a perforated eardrum) occurring when Jones struck the victim on the head with a gun during the carjacking.[98] In reply, the defense maintained that "serious bodily injury was an element of the offense defined in part by § 2119(2), which had been neither pleaded in the indictment nor proven before the jury."[99] Both the district court and the appellate court disagreed with Jones. They held that Congress clearly intended to define one crime (carjacking) with the numbered subparagraphs merely indicating sentencing enhancements. The courts based this result on the grammatical structure of the statute as well as congressional debates referring to "enhanced penalties for an apparently single carjacking offense."[100]

The Supreme Court granted certiorari to decide whether § 2119 set forth the elements of one offense (followed by factors that could be used to increase sentencing) or of three separate offenses.[101]

2. Legal Analysis

The Supreme Court held that the statute set forth the elements of three separate offenses.[102] The Court based its holding on both statutory and constitutional grounds.

a. Statutory analysis

Addressing the statutory grounds first, the Court looked at the "traditional treatment of certain categories of important facts, such as the degree of injury to victims of crime, in relation to particular crimes."[103] The Court reasoned that, given Congress's murky drafting of

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95 *Id.* (citing 18 U.S.C. § 2119(2) (Supp. 1988) (amended 1994)).

96 *Id.* (citing 18 U.S.C. § 2119 (Supp. 1988) (amended 1994)).

97 *Id.* at 231.

98 *Id.*

99 *Id.*

100 *Id.* at 231-32.

101 *Id.* at 232.

102 *Id.* at 229.

103 *Id.* at 234.

the statute, "it makes sense to look at what other statutes have done, on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so."[104]

Based on an extensive list of recently enacted statutes, the Court found that "Congress had separate and aggravated offenses in mind when it employed the scheme of numbered subsections in § 2119."[105] The Court particularly looked at the use of "serious bodily injury" in other robbery statutes, which served as models for the carjacking statute.

> The likelihood that Congress understood injury to be an offense element here follows all the more from the fact that carjacking is a type of robbery, and serious bodily injury has traditionally been treated, both by Congress and by the state legislatures, as defining an element of the offense of aggravated robbery.[106]

b. Constitutional concerns

The Court also examined the statute from a constitutional standpoint, relying on a settled principle of law: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[107] The Court was concerned that interpreting the subsections of § 2119 as sentencing factors (and not elements) was of dubious constitutionality because of a line of cases suggesting that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt."[108]

The Court based its concern on a series of three cases beginning with *Mullaney v. Wilbur*.[109] In that case, the Court examined the constitutionality of a statute requiring a defendant to prove the existence of provocation on a manslaughter charge.[110] Mullaney based his argument on the Court's holding in *In re Winship*,[111] namely, that the government had "the burden to prove every element of the crime beyond a reasonable doubt,"[112] a burden that was undercut by the Maine law. The Court held the statute unconstitutional because it was a change from the longstanding common law view of malice as the fact

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[104] *Id.*

[105] *Id.* at 235.

[106] *Id.*

[107] *Id.* at 239 (quoting United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

[108] *Id.* at 243 n.6.

[109] Mullaney v. Wilbur, 421 U.S. 684 (1975).

[110] *Id.* at 686 nn.3-4 (citing ME. REV. STAT. ANN. tit. 17, §§ 2551, 2651 (West 1975)).

[111] *In re* Winship, 397 U.S. 358 (1970).

[112] *Jones*, 526 U.S. at 240 (citing *In re* Winship, 397 U.S. at 358 (1970)).

distinguishing murder from manslaughter. The Court also acted to close a potential loophole from *In re Winship* giving "an unlimited choice over characterizing a stated fact as an element" thus allowing prosecutors to escape the burden of proving the elements of an offense beyond a reasonable doubt to a jury.[113]

In *Patterson v. New York*,[114] the Court examined the constitutionality of a homicide law requiring the defendant to prove the affirmative defense of extreme emotional disturbance. The Court upheld the statute, stating that it "declined to adopt as a constitutional imperative . . . that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused."[115] The New York law passed constitutional muster because it comported with the historical view of a defendant proving the elements of an affirmative defense.[116]

The third case was *McMillan v. Pennsylvania*.[117] The issue was the constitutionality of a law allowing a judge to find "visible possession of a firearm" by a preponderance of the evidence, thereby triggering a five-year mandatory minimum sentence.[118] Petitioners argued that visible possession of a firearm was actually an element of an aggravated offense that, based on the holding in *In re Winship*, had to be proven beyond a reasonable doubt.[119] The *McMillan* Court held that the visible possession of a firearm was not, in fact, an element of the offense, but was a sentencing factor.[120] Since the government's proof of the elements of a crime are dispositive of guilt, while sentencing factors merely guide a court's discretion in handing down an appropriate sentence, the Court felt no need to apply the same rigorous standard to the latter.[121] The Court indicated a sentencing factor that "exposed [defendants] to greater or additional punishment" (i.e., an increased *maximum* sentence) might be unconstitutional,[122] the very question at issue in *Jones*.

The *Jones* Court's final concern was the protection of the Sixth Amendment's guarantee of trial by jury in criminal cases:

> If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative

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[113] *Id.* at 240-41 (citing *Mullaney*, 421 U.S. at 692-96, 698 (citations omitted)).

[114] Patterson v. New York, 432 U.S. 197 (1977).

[115] *Id.* at 210.

[116] *Id.* at 202.

[117] McMillan v. Pennsylvania, 477 U.S. 79 (1986).

[118] *Id.* at 81 (citing 42 PA. CONS. STAT. § 9712(b) (1982)).

[119] *Id.* at 83.

[120] *Id.* at 85-86.

[121] *Id.* at 84-87.

[122] *Id.* at 88.

> importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment. It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must be drawn.[123]

The Court proceeded to examine the role of juries in the late eighteenth century to see if "the Framers' understanding of the Sixth Amendment principle demonstrated an accepted tolerance for exclusively judicial fact-finding to peg penalty limits."[124] While the Court did not point to a time when there was tension regarding elements and sentencing factors, it did examine the struggle between the jury and the judiciary existing around the time of America's founding.[125] Although English judges had broad discretion over sentencing in misdemeanor cases, juries made their wishes known when it came to sentencing in felony cases.[126] "The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences."[127]

In response, the English government tried to limit the jury's role. First, Parliament eliminated the jury right when promulgating new statutory offenses, including violations of the Stamp Act.[128] These provisions limiting the jury right raised the ire of William Blackstone, who wrote that the jury right, "'the Grand bulwark' of English liberties"[129] had to be protected "not only from all open attacks . . . but also from all secret machinations, which may sap and undermine it; by

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[123] Jones v. United States, 526 U.S. 227, 243-44 (1999).

[124] *Id.* at 244.

[125] *Id.*

[126] *Id.* at 244-45. The Court referred to the following materials: JOHN BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 584 (3d ed. 1990); 4 WILLIAM BLACKSTONE, COMMENTARIES *238-*39, *372; John A. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY, 1700-1900, at 36-37 (Antonio Padoa Schioppa ed., 1987); ARTHUR SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 27-28, 103-106 (1930); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 350 (1982). *Jones*, 526 U.S. at 244-45.

[127] *Jones*, 526 U.S. at 245 (citing BLACKSTONE, *supra* note 126, at *238-*39).

[128] *Id.* at 245 (citing BLACKSTONE, *supra* note 126, at *244-*79); CARL UBBELOHDE, VICE ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 16-21, 74-80 (1960); LAWRENCE WROTH, THE MASSACHUSETTS VICE ADMIRALTY COURT IN LAW AND AUTHORITY IN COLONIAL AMERICA 32, 50 (G. Billias ed., 1965); Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 925-30 (1926)).

[129] *Jones*, 526 U.S. at 246 (quoting BLACKSTONE, *supra* note 126, at *278).

introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience."[130] Apparently, the Founding Fathers agreed with Blackstone's contentions: the denial of the jury trial under the Stamp Act was one of the grievances mentioned in the Declaration of Independence.[131]

This history, the Court explained, was undoubtedly familiar to the Founders, as was the principle that the jury right could easily be lost and therefore needed vigilant protection.[132] "The point is simply that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled."[133]

The Court determined the Fifth Amendment's Due Process Clause as well as the Sixth Amendment's jury trial guarantee combined to require that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[134]

B. Apprendi v. New Jersey: *The Relationship Between Increased Penalty and the Elements of a Crime*

In *Apprendi v. New Jersey*, the Court confronted a hate crime statute increasing maximum sentences based on a judicial finding by a preponderance of the evidence that the defendant "acted with a purpose to intimidate because of . . . race."[135]

1. Factual and Procedural Background

Apprendi fired a gun into the home of an African-American family. After being arrested, Apprendi confessed and stated that he did not want the family in the neighborhood because of their race—a statement he later retracted.[136]

Apprendi was indicted by a New Jersey grand jury on a variety of weapons-related charges.[137] None of the counts, however, included

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[130] *Id.* (quoting BLACKSTONE, *supra* note 126, at *342-*44).

[131] THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

[132] *Jones*, 526 U.S. at 247-48.

[133] *Id.* at 248.

[134] *Id.* at 243 n.6; *see* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (holding that recidivism is a sentencing factor and does not have to be charged in an indictment nor proven to a jury beyond a reasonable doubt).

[135] Apprendi v. New Jersey, 530 U.S. 466, 469 (2000) (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000)).

[136] *Id.* at 469.

[137] *Id.*

anything about "a racially biased purpose."[138] Subsequently, Apprendi pleaded guilty to several charges that typically carried a sentence of five to ten years.[139] After the trial judge accepted the guilty plea, the prosecution "filed a formal motion for an extended term."[140]

Following an evidentiary hearing on Apprendi's purpose in shooting into the home, the trial court found that he had acted out of racial hatred and "with a purpose to intimidate."[141] Apprendi was sentenced to a twelve-year term.[142] The state appellate courts affirmed his conviction and sentence.[143]

2. The Court's Analysis

The Supreme Court, basing its decision on *Jones*, reversed the New Jersey courts. The Court held the Fourteenth Amendment's Due Process Clause incorporates the Sixth Amendment's guarantee of a jury trial; "together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"[144]

Again, the Court justified its holding with historical analysis, or to be more precise, the lack thereof, of the difference between an element and a sentencing factor. By the time of the founding of the United States, it was well accepted that if a jury found the facts that constituted the offense (or the elements of the crime) beyond a reasonable doubt the defendant would be found guilty and would be given the sentence prescribed by law.[145] There was, barring an extraordinary circumstance, very little sentencing discretion left to an English common law judge because "[t]he substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence."[146] Thus, the ultimate outcome of the case, including sentencing, was largely in the hands of the jury. Furthermore, "the defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the

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[138] *Id.*

[139] *Id.* at 470.

[140] *Id.*

[141] *Id.* at 471.

[142] *Id.*

[143] *Id.* at 473 (citing New Jersey v. Apprendi, 698 A.2d 1265 (N.J. Super. Ct. App. Div. 1997), *aff'd*, 731 A.2d 485 (N.J. Sup. Ct. 1999)).

[144] *Id.* at 477 (alteration in original) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995) (citations omitted)).

[145] *Id.* at 478; *see also* JOHN JERVIS, ARCHBOLD'S PLEADING AND EVIDENCE IN CRIMINAL CASES 60-61 (21st ed. 1893).

[146] *Apprendi*, 530 U.S. at 479 (quoting Langbein, *supra* note 126, at 36-37).

invariable linkage of punishment with crime."[147] In other words, neither England nor America in the late 1700s would have allowed Apprendi to be sentenced to a higher term based on facts not alleged in his indictment and not proven to a jury beyond a reasonable doubt.

The Court also discussed what facts constituted elements of a crime both at common law and under English statutes and concluded that "circumstances mandating a particular punishment" were viewed as elements in the common law.[148] When an offense was given a higher penalty under a statute, the facts making the statute applicable to the crime had to be alleged in the indictment. If the prosecution failed to prove those facts, the defendant could be convicted of the common law crime, but was not subject to the higher penalty under the statute.[149] Thus, history supported the view that circumstances and facts that increase the maximum penalty for an offense are elements of that crime.

The Court hastened to clarify one point: it is perfectly permissible for judges to exercise sentencing discretion as long as they do so "*within the range* prescribed by statute."[150] The constitutional problem arises when the sentencing factor extends the sentence beyond the maximum otherwise allowed by law, therein creating a new aggravated offense, which has not been proven to a jury beyond a reasonable doubt.[151] The Court further stated that the important question was "one not of form, but of effect."[152] If a defendant is "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" the facts exposing the defendant to the higher sentence must be found by a jury beyond a reasonable doubt.[153]

C. Ring v. Arizona: *The Supreme Court Applies* Ring *and* Apprendi *to Capital Sentencing Procedures*

In *Ring v. Arizona*, the Court examined Arizona's death penalty law. Under the statute, the death penalty could be imposed following a conviction for first-degree murder only if a judge found the existence of

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147 *Id.* at 478.

148 *Id.* at 480; *see also* JERVIS, *supra* note 145, at 72-73.

149 *Apprendi*, 530 U.S. at 480-81; *see also* JERVIS, *supra* note 145, at 188.

150 *Apprendi*, 530 U.S. at 481.

151 *Id.* at 483-84; *see also* Harris v. United States, 536 U.S. 545 (2002) (reaffirming *McMillan* by holding that a fact that increases a mandatory minimum sentence is not an element of a separate offense). "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." *Harris*, 536 U.S. at 567.

152 *Apprendi*, 530 U.S. at 494.

153 *Id.* at 483.

at least one statutory aggravating factor and no statutory mitigating factors.[154]

1. Factual and Procedural History

The defendant, Timothy Stuart Ring, was convicted of felony murder following the robbery of an armored van.[155] After his conviction, Greenham, one of Ring's co-felons, pleaded guilty to second-degree murder and armed robbery; he also agreed to testify against Ring. At Ring's sentencing hearing, Greenham testified that Ring had been the gunman who shot the van's driver—testimony that had not been presented at Ring's trial.[156] Following this hearing, the judge entered a special verdict that sentenced Ring to death, having found that he committed the murder in the pursuit of something of "pecuniary value" and that the crime was committed "in an especially heinous, cruel or depraved manner."[157] Although the judge found one nonstatutory mitigating factor, Ring's "minimal" criminal record, he did not find that this factor warranted a more lenient sentence.[158] Consequently, Ring was sentenced to death.

Ring based his appeal on the Court's decisions in *Jones* and *Apprendi*. The Arizona court noted that a prior Supreme Court decision upholding the state's death penalty procedure, *Walton v. Arizona*,[159] had been specifically reaffirmed in *Apprendi*.[160] The Arizona Supreme Court, however, pointed out that *Apprendi* had mischaracterized the Arizona system as one in which the judge does not "determine the existence of a factor which makes a crime a capital offense."[161] As both the Arizona Supreme Court and Justice O'Connor in her *Apprendi* dissent posited, this is exactly what the Arizona statute *does* call on a judge to do.[162] The Arizona Supreme Court upheld Ring's death sentence.[163]

The Supreme Court granted certiorari to *Ring* in order to resolve the confusion caused by *Apprendi*'s treatment of *Walton*.[164] The Court drew the issue narrowly: "The question presented is whether [the]

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154 ARIZ. REV. STAT. ANN. § 13-703(G) (West Supp. 2001).

155 Ring v. Arizona, 536 U.S. 584, 589 (2002).

156 *Id.* at 593.

157 *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-703(G)) (These are two of Arizona's statutory aggravating factors, and are typical of aggravating factors for murder); *cf.* 18 U.S.C. § 3592(c)(1)-(16) (1994).

158 *Ring*, 536 U.S. at 595.

159 Walton v. Arizona, 497 U.S. 639 (1990).

160 Apprendi v. New Jersey, 530 U.S. 466, 496-97 (2000).

161 State v. Ring, 25 P.3d 1139, 1151 (Ariz. 2001) (quoting *Apprendi*, 530 U.S. at 496-97), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

162 *Id.*; *see also Apprendi*, 530 U.S. at 537 (2000) (O'Connor, J., dissenting).

163 *Ring*, 25 P.3d at 1154-56.

164 Ring v. Arizona, 536 U.S. 584, 596 (2002).

aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury."[165]

2. Legal Analysis

The Court held, "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'"[166] The Court also "overrule[d] *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."[167]

The Court began by discussing its decision to overrule *Walton*. In *Walton*, the Court had found the Arizona death penalty law constitutional under the Sixth Amendment because the aggravating factors were not elements of the offense, but were "sentencing considerations guiding the choice between life and death."[168] The *Ring* Court, however, rejected this view in light of its decisions in *Jones* and *Apprendi*.[169] Joining the *Apprendi* dissenters' characterization of *Apprendi*'s treatment of *Walton* as "baffling," the Court stated that since a defendant convicted of first-degree murder in Arizona can be sentenced only to life imprisonment in the absence of a finding of aggravating factors, the aggravating factors raise the maximum sentence. Therefore, the aggravating factors are essentially elements of another greater offense—capital murder.[170] A jury must find the elements of this offense beyond a reasonable doubt.

Again, the Court used the historical role of the jury to support its decision. In the late eighteenth century, when the Sixth Amendment was adopted, juries had discretion over the imposition of the death sentence:

> Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual

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[165] *Id.* at 597.

[166] *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

[167] *Id.*

[168] *Id.* at 598 (quoting Walton v. Arizona, 497 U.S. 639, 648 (1990)).

[169] *Id.* at 599-609.

[170] *Id.* at 603 (citing *Apprendi*, 530 U.S. at 494 n.19 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.")); *see also Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

> [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[,] . . . 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.

Apprendi, 530 U.S. at 501 (Thomas, J., concurring).

> determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.[171]

The Court concluded that the jury right "would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."[172] The Court also expanded the rule announced in *Apprendi*: a fact that increases the maximum sentence for murder from life in prison to death is "the functional equivalent of an element of a greater offense,"[173] which a jury must find.

IV. DISTRICT COURT APPLICATIONS OF *JONES*, *APPRENDI*, AND *RING* TO THE FEDERAL DEATH PENALTY ACT

After the Supreme Court decided *Ring v. Arizona* in July 2002, criminal defense attorneys wasted no time using it to challenge capital sentencing procedures. In the two cases discussed in this part, each defendant moved to have the government's Notice of Intent to Seek the Death Penalty dismissed on constitutional grounds, claiming, *inter alia*, that the FDPA's relaxed evidentiary standard was impermissible under the rule announced in *Ring*.[174] As discussed below, federal district courts hearing these cases came to very different conclusions based on the Supreme Court's ruling in *Ring*.

A. United States v. Fell: *The FDPA Violates the Sixth Amendment*

In *United States v. Fell*, the district court applied the *Ring* trilogy of cases in what was essentially a simple syllogism: sentencing factors increasing the maximum sentence of an offense are elements, or their functional equivalent. Elements of a crime must be proven in accordance with the rules of evidence.[175] Therefore, the court in *Fell* held that since the aggravating factors used to determine death penalty eligibility under the FDPA are functionally equivalent to elements, they must be proven in accordance with the rules of evidence.[176]

Obviously, this is an extension of the Supreme Court's holding in *Ring*, where the Court held only that fact-finding determinative of death

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[171] *Ring*, 536 U.S. at 599 (quoting Welsh White, *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)) (internal quotation marks and citations omitted).

[172] *Id.* at 609.

[173] *Id.* (quoting *Apprendi*, 530 U.S. at 494 n.19).

[174] United States v. Fell, 217 F. Supp. 2d 469, 473 (D. Vt. 2002); United States v. Regan, 221 F. Supp. 2d 672, 674 (E.D. Va. 2002).

[175] *Fell*, 217 F. Supp. 2d at 488-89 (citing Tot v. United States, 319 U.S. 463, 467 (1943) and Brinegar v. United States, 338 U.S. 160, 174 (1949)).

[176] *Id.* at 489.

penalty eligibility must be made by a jury.[177] Recognizing that the FDPA meets this requirement,[178] the *Fell* court maintained that "the Supreme Court's line of cases that distinguish between elements and sentencing factors, culminating in *Ring*, has implications beyond the 'tightly delineated' claim decided there."[179]

1. Elements or Sentencing Factors?

The district court first determined that the FDPA's statutory aggravating factors and mental culpability factors were essentially elements.[180] The Act was written to comply with the Supreme Court's requirements for a constitutional death sentence: "limited sentencing discretion" and "individualized determination."[181] "The FDPA," according to the district court, "in its concern for punishment, looks like a sentencing statute that sets forth sentencing factors."[182] Upon further examination, however, these factors look suspiciously similar to "elements of a separate capital offense."[183] For instance, the prosecution must prove the existence of the aggravating factors beyond a reasonable doubt.[184] Furthermore, "the jury's finding with respect to any aggravating factor must be unanimous."[185] Most convincingly, the Act's provisions expose the defendant to a greater maximum punishment than that otherwise available.[186] The court concluded that the Act's requirements were "indistinguishable" from the aggravating factors at question in *Ring*.[187]

2. Evidentiary Standard

The district court then discussed whether the FDPA, read in light of the decisions in *Jones*, *Apprendi*, and *Ring*, violated the Due Process Clause and the Sixth Amendment's Confrontation Clause, asking whether "other fair trial guarantees" were implicated by the *Ring* view that "the death-eligibility factors are the functional equivalents of

177 Ring v. Arizona, 536 U.S. at 609 (2002).

178 *Fell*, 217 F. Supp. 2d at 482 (citing United States v. Allen, 247 F.3d 741, 762 (2001), *vacated by* 536 U.S. 953 (2002)).

179 *Id.* (quoting *Ring*, 536 U.S. at 597 n.4).

180 *Id.* at 483.

181 *Id.* at 482.

182 *Id.*

183 *Id.*

184 *Id.* (citing 18 U.S.C. § 3593(c) (1994)).

185 *Id.* (citing 18 U.S.C. § 3593(d)).

186 *Id.* at 483 (citing 18 U.S.C. § 3593(d) ("if no aggravating factor set forth in § 3592 is found to exist, court shall impose sentence other than death")).

187 *Id.* (citing Ring v. Arizona, 536 U.S. 584, 605-06 (2002)).

elements, which must be proven to a jury beyond a reasonable doubt."[188] The district court pointed to the provision of the Act "permit[ting] the jury to consider any information relevant to the sentence, subject only to exclusion if the danger of creating unfair prejudice, confusing the issues, or misleading the jury outweighs its probative value."[189] It then concluded that this evidentiary standard does not "withstand due process and Sixth Amendment scrutiny, given the Supreme Court's concern for heightened reliability and procedural safeguards in capital cases."[190]

In Fell's case, the prosecution intended to submit information in the sentencing phase that would have been inadmissible hearsay in the trial.[191] A statement made by a "deceased co-defendant . . . is potentially critical to the establishment of the death-eligibility factors under the statute."[192] Even though the Supreme Court has not yet specifically decided whether the Sixth Amendment's Confrontation Clause applies to sentencing proceedings, the court believed that allowing this statement to be used to make Fell death penalty eligible would violate his Sixth Amendment rights.[193] The court came to this determination using the same form-versus-function analysis used by the Supreme Court in *Apprendi*.[194] The court asked, "[W]hat rights are required at a proceeding at which facts are found that equate to offense elements?"[195] The court relied heavily on *Specht v. Patterson*[196] to answer that question.

In *Specht*, the defendant was convicted of indecent liberties, which carried a maximum statutory sentence of ten years.[197] Under Colorado's Sex Offenders Act, however, he was subject to an indeterminate prison term of one day to life.[198] The Supreme Court held that, under the Due Process Clause, Specht had "a right to be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, cross-examine the witnesses and offer evidence of his own."[199] The Supreme Court based its decision on the Sex Offenders Act's provision for "another

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188 *Id.* at 485.

189 *Id.* (citing 18 U.S.C. § 3593(c)).

190 *Id.* (citing *Ring*, 536 U.S. at 614 (Breyer, J., concurring in the judgment) (arguing that there are special procedural safeguards in death penalty cases) and Woodson v. North Carolina, 428 U.S. 280, 323 (1976) (Rehnquist, J., dissenting) (stating that since death penalty is irrevocable there must be heightened procedural standards)).

191 *Id.* (citing FED. R. EVID. 804(3)(b)).

192 *Id.*

193 *Id.* at 486 (citing Mempa v. Rhay, 389 U.S. 128, 134, 137 (1967)).

194 *Id.* at 488 (citing Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).

195 *Id.* at 486 (quoting *Apprendi*, 530 U.S. at 494).

196 Specht v. Patterson, 386 U.S. 605 (1967).

197 *Id.* at 607.

198 *Id.*

199 *Fell*, 217 F. Supp. 2d at 487 (citing *Specht*, 386 U.S. at 610).

proceeding under [the statute] to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. *That is a new finding of fact that was not an ingredient of the offense charged.*"[200]

The *Fell* court also examined *Bullington v. Missouri*.[201] There, the Supreme Court held that Missouri's bifurcated capital sentencing proceeding was so similar to a trial on the issue of guilt or innocence that the Fifth Amendment's Double Jeopardy Clause precluded rehearing the death penalty issue once the jury recommend that the defendant be sentenced to life in prison.[202] In *Bullington*, the Court also discussed *Specht*, indicating that the sentencing hearing at issue in *Bullington* was analogous to that in *Specht* and that, therefore, the due process protections applicable in *Specht* would apply to Missouri's capital sentencing scheme as well.[203] Emphasizing that the Missouri statute was "virtually identical to the FDPA," the *Fell* Court concluded, "If Missouri's capital sentencing scheme is sufficiently different from the indeterminate sentencing hearing to warrant the due process protections outlined in *Specht*, then the FDPA, indistinguishable from Missouri's statute in any meaningful way, warrants the same due process protections."[204]

Fell further examined the results of *Apprendi*:

> After *Apprendi* was decided, federal courts concluded that if drug type and quantity is used in a 21 U.S.C. § 841 prosecution to impose a sentence beyond the statutory maximum for an indeterminate quantity of drugs, then it is an element of the offense that must be charged in an indictment and submitted to a jury. . . . [I]ndictments now routinely allege drug quantity. . . . *The evidentiary standards of course are the same for these judicially-recognized elements as for any other element of an offense.*[205]

Finally, the district court examined Congress's intent in enacting the Act with a relaxed evidentiary standard. The court concluded that the Act's evidentiary standard, at the time of its passage, "provide[d] more procedural protection than the usual sentencing proceeding."[206] Even so, Congress could not predict the Court's decisions in *Jones*, *Apprendi*, and *Ring* that would treat aggravating factors as elements

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[200] *Specht*, 386 U.S. at 608 (emphasis added) (citations omitted).

[201] Bullington v. Missouri, 451 U.S. 430 (1981).

[202] *Id.* at 446.

[203] *Id.*

[204] *Fell*, 217 F. Supp. 2d at 487.

[205] *Id.* at 488 (emphasis added) (citing United States v. Thomas, 247 F.3d 655, 660 (2d Cir. 2001) (en banc); *see also* United States v. Outen, 286 F.3d 622, 634 (2d Cir. 2002).

[206] *Fell*, 217 F. Supp. 2d at 488 (citing United States v. Allen, 247 F.3d 741, 759-60 (8th Cir. 2001) ("[A] relaxed evidentiary standard works to defendant's advantage in helping to prove mitigating factors and to disprove aggravating factors.").

when they resulted in a higher maximum sentence; following those decisions, the "relaxed evidentiary standard requirement is inconsistent with treating the death-eligibility factors as elements."[207] In addition, the court declined to "approve death eligibility as the federal criminal justice system's sole exception to the practice of requiring that offense elements be proven by admissible evidence comporting with due process and fair trial guarantees."[208] While Congress makes determinations of what evidence is and is not admissible in court, there are limits to that power.[209] The court explicated:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard [persons] from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.[210]

The court found that the Act is not severable[211] or capable of being "saved by judicial reconstruction."[212] As such, the court held that the Act is unconstitutional because "recognition that the death-eligibility factors are the functional equivalents of elements of the capital offense necessitates recognition that the fundamental rights of confrontation and cross-examination and an evidentiary standard consistent with the adversarial nature of the proceeding must be afforded in the death-eligibility determination."[213]

While the *Fell* court did expand upon the Supreme Court's holdings in *Jones*, *Apprendi*, and *Ring*, the extension is reasonable. If a sentencing factor is actually an element of an aggravated offense, it should be proven just like any other element—to a jury, beyond a reasonable doubt, and in compliance with the rules of evidence.

B. United States v. Regan: *The FDPA Withstands a* Ring*-based Attack*

In *United States v. Regan*,[214] the defendant was indicted on attempted espionage charges and the government, pursuant to the FDPA, filed a Notice of Intent to Seek the Death Penalty.[215] The defendant argued that the Act was unconstitutional in light of *Jones*,

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[207] *Id.*

[208] *Id.*

[209] *Id.* at 488-89 (citing Tot v. United States, 319 U.S. 463, 467 (1943)).

[210] *Id.* at 489 (quoting Brinegar v. United States, 338 U.S. 160, 174 (1949) (alterations in original)).

[211] *Id.* at 489 n.10 (citing Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987)).

[212] *Id.* at 489 (quoting United States v. Jackson, 390 U.S. 570, 585 (1968)).

[213] *Id.*

[214] United States v. Regan, 221 F. Supp. 2d 672 (E.D. Va. 2002).

[215] *Id.* at 674-75.

Ring, and *Apprendi*, but the court disagreed. In sharp contrast to the *Fell* court, the court held that the Act was constitutional,[216] and that the relaxed evidentiary standard of 18 U.S.C. § 3593(c) meets the requirements of the Fifth, Sixth, and Eighth Amendments.[217]

1. Elements or Sentencing Factors?

The court based its decision on a narrow reading of the holdings in *Jones*, *Apprendi*, and *Ring*. Rejecting the defense's argument that any fact leading to an increased maximum punishment must be proven as an element, the court concluded that the rule in *Ring* is a procedural rule that merely requires such findings of fact be made by a jury.[218]

The court justified its holding by drawing a bright line between the phrase "functional equivalent of an element of a greater offense"[219] on the one hand, and an "actual element[] of a new substantive offense" on the other.[220] Finding that *Jones* and *Apprendi* dealt with procedural, not substantive, issues[221] the court decided only that "the narrow holding of

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[216] *Id.* at 673-74.

[217] *Id.* at 674, 682-83.

[218] *Id.* at 674.

[219] *Id.* at 678 (quoting Ring v. Arizona, 536 U.S. 584, 609 (2002)).

[220] *Id.*

[221] *Id.* (citing Jones v. United States, 526 U.S. 227, 243 n.6 (1999). "The constitutional safeguards that figure in our analysis concern not the identity of the elements of defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment." *Id.*; *see also* Apprendi v. New Jersey, 530 U.S. 466, 475 (2000) ("The 'substantive basis for . . . [the] enhancement is thus not an issue; the adequacy of . . . [the] procedure is.'" *Id.* (alteration in original) (emphasis omitted)). *But see Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

> [A] "crime" includes every fact that is by law a basis for imposing or increasing punishment . . . . Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact . . . 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.

Apprendi, 530 U.S. at 501 (Thomas, J., concurring).

While Justice Thomas's concurring opinion does not constitute the rule from *Apprendi*, it is sufficiently persuasive that many courts will be inclined to read *Apprendi* and *Ring* broadly. Refer to the discussions of *Fell* in *supra* notes 176-88 and *Regan*, 221 F. Supp. 2d at 678 n.1. *See also* B. Patrick Costello, Jr., Comment, Apprendi v. New Jersey: *"Who Decides What Constitutes a Crime?" An Analysis of Whether a Legislature is Constitutionally Free to "Allocate" an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205, 1251-69 (2002) (discussing possible ramifications of the *Apprendi* decision on federal sentencing schemes, including several examples and also providing an excellent overview and explanation of the *Apprendi* decision).

Ring did not mandate that aggravating factors must become elements of a new greater substantive offense."[222]

2. Evidentiary Standard

Since the *Regan* court determined that the FDPA's sentencing factors did not constitute elements of an offense, the court easily upheld the Act's relaxed evidentiary standard.[223] The court noted that, even if the "statutory aggravating factors are substantive elements, . . . the Federal Rules of Evidence are not constitutionally mandated."[224] The court found that the Act's relaxed evidentiary standard is consistent with Eighth Amendment precedent allowing a broad range of information to be presented to the sentencing body in making the capital sentencing decision.[225] "The relevancy standard enunciated in § 3593(c) actually excludes a greater amount of prejudicial information than the Federal Rules of Evidence because it permits the judge to exclude information where the 'probative value is outweighed by the danger of creating unfair prejudice' rather than 'substantially outweighed.'"[226]

The court addressed Regan's Sixth Amendment concerns by finding that the Confrontation Clause's "purpose . . . is 'the promotion of the integrity of the fact-finding process.'"[227] This purpose is arguably protected by the Act's provision that evidence "may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues or misleading the jury."[228]

Thus, the *Regan* court upheld the federal death penalty based on a narrow reading of *Jones*, *Apprendi*, and *Ring*.

V. SHOULD *RING* BE APPLIED RETROACTIVELY ON COLLATERAL REVIEW IN CASES INVOLVING HABEAS CORPUS PETITIONS CHALLENGING CAPITAL SENTENCING PROCEDURES?

A. Setting up the Conundrum

While district courts have reached contrary decisions on the question of evidentiary standards under *Ring*, its effect on the habeas

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[222] *Regan*, 221 F. Supp. 2d at 679.

[223] *Id.* at 679. If *Jones*, *Apprendi*, and *Ring* did require that aggravating factors constitute an element of a greater offense, "many of the concerns raised by Defendant would present significant hurdles to a constitutionally permissible reading of the Act." *Id.* at 678.

[224] *Id.* at 681 (citing United States v. Brainer, 691 F.2d 691, 695 n.7 (4th Cir. 1982)).

[225] *Id.* at 682 (citing Gregg v. Georgia, 428 U.S. 153, 204 (1976) and Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

[226] *Id.* (quoting United States v. Jones, 132 F.3d 232, 241 n.7 (5th Cir. 1998), *aff'd sub nom.* Jones v. United States, 527 U.S. 373 (1999)).

[227] *Id.* at 683 (quoting White v. Illinois, 502 U.S. 346, 356 (1992)).

[228] 18 U.S.C. § 3592(c) (1994).

process promises to have an even greater impact on the American justice system. In September 2003, the Ninth Circuit Court of Appeals made headline news by holding that *Ring* applies retroactively to petitions by prisoners whose death sentences were imposed and affirmed on direct appeal before *Ring* was decided.[229] The decision affected death sentences in Arizona, Idaho, Montana, and Nevada, the four states in the Ninth Circuit whose capital sentencing systems prior to *Ring* allowed judges to make the sentencing determination.[230] Over 100 death sentences were commuted to life imprisonment as a result of the Ninth Circuit's holding.[231]

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs all habeas petitions filed since it went into effect.[232] A prisoner may initially petition for a writ claiming that the "sentence was imposed in violation . . . [of the law], or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."[233] In contrast, second or successive habeas corpus applications are governed by 28 U.S.C. § 2244(b)(2),[234] which allows a subsequent habeas petition in only two circumstances. The petitioner must either show there is new evidence that "could not have been discovered previously through the exercise of due diligence"[235] or "that a claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[236] In *Tyler v. Cain*,[237] the Supreme Court held that § 2244(b)(2)(A) should be interpreted quite literally: "Based on the plain meaning of the text read as a whole, we conclude that 'made' means 'held' and, thus, the requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review."[238]

To satisfy the statute the Court must have specifically held that the rule was retroactive on collateral review either at the time of the establishment of the rule or in a subsequent case.[239] Therefore, for

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229 Summerlin v. Stewart, No. 98-99002, 2003 U.S. App. LEXIS 18111 (9th Cir. Sept. 2, 2003).

230 Jason Hoppin, *9th Circuit Overturns Death Sentences*, LEGAL TIMES, Sept. 8, 2003, at 14.

231 *Id.*

232 Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2255 (2000).

233 *Id.*

234 28 U.S.C. § 2244(b)(2) (2000).

235 28 U.S.C. § 2244(b)(2)(B)(i) (2000).

236 28 U.S.C. § 2244(b)(2)(A) (2000).

237 Tyler v. Cain, 533 U.S. 656 (2001).

238 *Id.* at 662.

239 *Id.* at 662-63.

second and successive applications brought under AEDPA, the petitioner may not rely on a new rule unless the Supreme Court explicitly stated the rule is applicable on collateral review. While AEDPA and *Tyler* create a very clear, bright line standard, this standard is inapplicable to habeas petitions filed before AEDPA's effective date[240] and initial habeas petitions. In these instances, common law developed by the Supreme Court determines whether *Ring* applies retroactively.

This part briefly discusses that common law standard and the Ninth Circuit's holding in *Summerlin* that *Ring* applies retroactively.

B. Playing by the Rules: The Supreme Court's Standards for the Retroactive Application of a New Procedural Rule on Collateral Review Under Teague v. Lane[241]

1. The Threshold Determination: Did *Ring v. Arizona* Announce a New Substantive or Procedural Rule of Law?

Under the Supreme Court's retroactivity jurisprudence, courts must engage in several levels of analysis before applying a rule retroactively on collateral review.[242] First, courts must determine whether the rule upon which the petitioner is relying is new. If it is, the courts must then decide whether that rule is substantive or procedural.[243] Whether the rule is substantive or procedural determines if it is applied retroactively.

For the purpose of collateral review, a rule is "new" when it "breaks new ground or imposes a new obligation on the States or Federal Government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[244] The rule announced in *Ring v. Arizona* and its predecessors meets that requirement. In *Ring*, the Court held that the death penalty determination must be made by a jury, not by a judge.[245] Prior to that holding, the rule had been the exact opposite.[246] Consequently, *Ring*'s holding was clearly not "dictated by precedent existing," but was a new rule.

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[240] *See* Lindh v. Murphy, 521 U.S. 320, 327 (1997).

[241] Teague v. Lane, 489 U.S. 288 (1989).

[242] Bousley v. United States, 523 U.S. 614 (1998); *Teague*, 489 U.S. at 310; *see also* Christopher S. Strauss, Comment, *Collateral Damage: How the Supreme Court's Retroactivity Doctrine Affects Federal Drug Prisoners'* Apprendi *Claims on Collateral Review*, 81 N.C. L. REV. 1220 (2003).

[243] *Teague*, 489 U.S. at 299-307.

[244] *Id.* at 301.

[245] Ring v. Arizona, 536 U.S. 584, 609 (2002); *see also id.* at 610-12 (Scalia, J., concurring).

[246] The Supreme Court's decision in *Walton v. Arizona* expressly upheld the constitutionality of Arizona's capital sentencing scheme. Walton v. Arizona, 497 U.S. 639, 655-56 (1990).

Prisoners seeking to base their habeas petitions on the *Ring* rule have several more significant hurdles to clear. First, the petitioner must determine whether the new *Ring* rule is substantive or procedural. If substantive, it is presumptively retroactive on collateral review.[247] If, on the other hand, the rule is merely a procedural rule, then under *Teague v. Lane*, it will most likely not be retroactive on collateral review. There are, however, two narrowly tailored exceptions to the *Teague* presumption.[248]

While at first glance the *Teague* analysis seems straightforward, applying it to *Ring* proves problematic. The *Ring* holding defies categorization as either a substantive or a procedural rule, for it includes characteristics of both.

a. Determining whether a rule is substantive

According to *Bousley v. United States*,[249] a "situation in which [the Supreme] Court decides the meaning of a criminal statute" is substantive.[250] In *Bousley*, the petitioner challenged his conviction under 18 U.S.C. § 924(c)(1) (use of a firearm during a drug transaction) based on the Court's intervening decision in *Bailey v. United States*,[251] which held the government had to prove the defendant actively employed the firearm during the transaction, and did not merely possess firearms in the same general area as the drug transaction.[252]

Bousley was sentenced under 18 U.S.C. § 924(c)(1) based on a finding that he had firearms in the same house in which he was conducting his drug business.[253] In his habeas petition, he argued that his guilty plea was "unintelligent because . . . . the record reveal[ed] that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged."[254] The Court denied Bousley's petition because his claim did not meet the procedural standard for challenging a guilty plea.[255]

Arguably, the holding in *Ring*, like *Bailey*, was the announcement of a substantive rule of law because "[the Supreme] Court decide[d] the

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[247] *See Bousley*, 523 U.S. at 620-21; Santana-Madera v. United States, 260 F.3d 133, 138 (2d Cir. 2001); United States v. Mandanici, 205 F.3d 519, 525 (2d Cir. 2000).

[248] *Teague*, 489 U.S. at 356-57.

[249] *Bousley*, 523 U.S. at 614.

[250] *Id.* at 620.

[251] Bailey v. United States, 516 U.S. 137 (1995).

[252] *Bousley*, 523 U.S. at 617-18 (citing *Bailey*, 516 U.S. at 150).

[253] *Id.* at 617.

[254] *Id.* at 618.

[255] *Id.* at 621 (finding a failure to "challenge the validity of [a guilty] plea bars collateral attack on appeal.").

meaning of a criminal statute."[256] If the Court's holding in *Ring*[257] created a separate offense of capital murder with more elements than simply "murder *simpliciter*,"[258] then the Court announced a new substantive rule of law that redefined the elements of capital murder in states using statutory sentencing factors.

For example, in *Bousley*, a principle clarifying an element of 18 U.S.C. § 924(c) was available on collateral review because it was a substantive rule of law.[259] The writ of habeas corpus exists "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[260] Obviously, as the *Bousley* Court explained, substantive decisions that place "conduct 'beyond the power of the criminal law-making authority to proscribe' necessarily carry a significant risk that a defendant stands convicted" of an act that is simply no longer against the law.[261] Since the legislature, not the judiciary, has the power to define crimes, "it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner[s] from relying on" substantive rules of law announced after their convictions became final.[262] The Court's decision in *Ring* can plausibly be characterized as a substantive rule of law. Under this view, it redefined the elements of murder by viewing what were once seen as mere aggravating factors as elements of a new, substantively distinct crime of capital murder.[263]

b. Determining whether a rule is procedural

Ring, however, does not address the issue of guilt or innocence—nothing in *Ring* places conduct outside the realm of criminal law. Since a rule is procedural when it merely orders the way in which a criminal trial is conducted, an argument that *Ring* is merely procedural is also persuasive. For instance, the Second Circuit held the rule in *United States v. Gaudin*[264] was procedural for *Teague* purposes. If materiality is considered an element of mail fraud, *Gaudin* requires it to be found by a jury, not a judge. The Second Circuit held this rule is procedural because

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[256] *Id.* at 620.

[257] The Court held that "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Ring v. Arizona, 536 U.S. 584, 609 (2002) (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

[258] *Id.* at 611 (Scalia, J., concurring).

[259] *Bousley*, 523 U.S. at 621.

[260] *Id.* at 620 (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

[261] *Id.* (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

[262] *Id.* at 621.

[263] *See supra* Part III.

[264] United States v. Gaudin, 515 U.S. 506, 522-23 (1995).

it determines who must find a fact, not the nature of that fact.[265] Similarly, the Court's holding in *Apprendi v. New Jersey* analyzed a procedural rule of law.[266] And since *Ring* extends *Apprendi*,[267] it follows that the rule announced in *Ring* can be classified as procedural. Like *Gaudin*, *Apprendi* (and therefore *Ring*) arguably determines only the identity of the fact-finder.

The *Jones*, *Apprendi*, and *Ring* line of cases announces rules that are in reality hybrids of substance and procedure. Because of this mixed character, the rules do not fit neatly within the rubric established by the Supreme Court in *Teague*.[268] The Court has not yet decided whether *Ring* announced a substantive or procedural rule of law, but two out of the three circuits that have considered the question held that *Ring* announced a procedural rule for *Teague* purposes.[269]

2. If *Ring* is procedural, should it be applied retroactively?

a. The Ring *rule does not meet either of* Teague's *exceptions to presumed non-retroactivity*

Even if *Ring*'s holding is found to be a new procedural rule, habeas petitioners are not automatically precluded from *Ring*-based relief. Generally, new procedural rules are not available on collateral review; however, *Teague* does provide two narrow exceptions.[270] First, a new constitutional rule of criminal procedure will apply retroactively if it provides that "certain kinds of primary, private individual conduct" are "beyond the power of the criminal law-making authority to proscribe."[271] The second exception allows for retroactivity if the rule is a "watershed rule of criminal procedure"[272] that "implicat[es] fundamental fairness and accuracy of the criminal proceeding."[273] Since the *Ring* rule obviously does not place any primary activity outside the scope of

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[265] United States v. Mandacini, 205 F.3d 519, 531 (2d Cir. 2000); *see infra* note 267 and accompanying text.

[266] *See* Apprendi v. New Jersey, 530 U.S. 466, 475 (2000) ("The substantive basis for New Jersey's enhancement is . . . not at issue; the adequacy of New Jersey's procedure is."). *But see* United States v. Clark, 260 F.3d 382, 384-88 (2001) (Parker, J., dissenting).

[267] *See* Ring v. Arizona, 536 U.S. 584, 602-10 (2002).

[268] *See* Strauss, *supra* note 242, at 1220, 1239-45; *see also* Summerlin v. Stewart, 341 F.3d 1082, 1106-09 (9th Cir. 2003).

[269] *See* Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002). *But see Summerlin*, 341 F.3d at 1116.

[270] Teague v. Lane, 489 U.S. 288, 292 (1989).

[271] *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

[272] *Id.*

[273] O'Dell v. Netherland, 521 U.S. 151, 167 (1997).

criminal law, *Ring* must be analyzed in light of the second *Teague* exception.

The Supreme Court has narrowly tailored the second *Teague* exception.[274] In *O'Dell v. Netherland*,[275] the Supreme Court held that a petitioner relying on an interim decision[276] did not meet the second *Teague* exception.[277] The intervening decision, *Simmons v. South Carolina*, provided that when determining the defendant's future dangerousness, the jury should be told that the prisoner would be ineligible for parole under a life sentence.[278] The Court denied O'Dell's petition for review, even though his death sentence was based on his potential dangerousness and the jury was precluded from hearing that he would not be eligible for parole under a life sentence.[279] The Court held that "unlike the sweeping rule of *Gideon v. Wainwright*,[280] which established an affirmative right to counsel in all felony cases, the narrow right . . . that *Simmons* affords to defendants in a limited class of capital cases has hardly 'altered our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding."[281]

In *Graham v. Collins*,[282] the Supreme Court once again denied habeas relief in a capital case based on the petitioner's inability to meet the second *Teague* exception.[283] Here, the petitioner relied on the interim holding announced in *Penry v. Lynaugh*.[284] *Penry* had been decided while Graham's petition for certiorari on other grounds was pending. It held that the Texas capital murder statute did not provide for sufficient jury consideration of the mitigating effects of mental retardation and an abusive childhood.[285] Responding to Graham's petition for reconsideration under the *Penry* rule, the Court held that Graham's petition did not rise to the level necessary to meet the second *Teague* exception. The Court stated that while it is difficult to define "the precise scope" of the *Teague* exception, "it is clearly meant to apply only to a

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[274] *See generally* United States v. Mandanici, 205 F.3d 519, 528-29 (2000) (case collection).

[275] *O'Dell*, 521 U.S. at 151.

[276] Simmons v. South Carolina, 512 U.S. 154 (1994).

[277] *O'Dell*, 521 U.S. at 155.

[278] *Simmons*, 512 U.S. at 163-64.

[279] *O'Dell*, 521 U.S. at 167.

[280] Gideon v. Wainwright, 372 U.S. 335 (1963).

[281] *O'Dell*, 521 U.S. at 167.

[282] Graham v. Collins, 506 U.S. 461, 478 (1993).

[283] *Id.*

[284] Penry v. Lynaugh, 492 U.S. 302, 340 (1989).

[285] *Id.*

small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty."[286]

Clearly, then, the second *Teague* exception applies only to those cases that announce new, fundamental rules of criminal procedure. *Ring* does not announce this kind of rule. Rather, *Ring* arguably mandates only the manner in which the facts at issue must be found. This view of *Ring* makes the case similar to *United States v. Gaudin*.[287] In *Gaudin*, the Supreme Court held that if materiality is viewed as an element of mail fraud under 18 U.S.C. § 1001 (an issue resolved differently by the circuits), then it must be found by a jury, not a judge.[288] The Second Circuit, in *United States v. Mandanici*,[289] held that *Gaudin* did not provide adequate grounds for collateral review under the second *Teague* exception.[290] According to the Second Circuit, a holding that a jury is to find a fact does not "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding."[291] Since, like *Gaudin*, *Ring* determined who in a proceeding is responsible for a finding of fact, it does not constitute an essential procedural element. And given the Supreme Court's longstanding history of applying the second *Teague* exception only in very limited circumstances,[292] it seems unlikely that *Ring* meets its standard.[293]

b. Summerlin v. Stewart:[294] *The Ninth Circuit's reading of the second* Teague *exception*

In *Summerlin,* the Ninth Circuit held that *Ring* met the second *Teague* exception.[295] The court found that *Ring*'s instruction that a jury,

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[286] *Graham*, 506 U.S. at 478 (internal quotation marks omitted) (alteration in original).

[287] United States v. Gaudin, 515 U.S. 506 (1995).

[288] *Id.* at 522-23.

[289] United States v. Mandanici, 205 F.3d 519 (2d Cir. 2000).

[290] *Id.* While this part focuses on *Ring*'s applicability to cases that involve writs of habeas corpus, the petitioner in *Mandanici* was proceeding under *coram nobis*, a collateral remedy that, when granted, vacates and expunges the petitioner's record. *Id.* at 524. The Second Circuit used the *Teague* analysis to determine that retroactivity was inappropriate, so the decision is included in this discussion. *Id.* at 527-31.

[291] *Id.* at 530 (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)) (internal quotation marks omitted).

[292] *See generally Mandanici*, 205 F.3d at 529-31 (case collection).

[293] On the other hand, the fact that *Ring* has characteristics of both a substantive rule and a procedural rule may essentially tip the scales in favor of retroactivity under the *Teague* exception. A better solution, however, would be for the Supreme Court to announce a definitive standard regarding the retroactivity of hybrid rules of procedure and substance—something the Court has yet to address.

[294] Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003).

[295] *Id.* at 1121.

not a judge, must find sentencing factors warranted application on collateral review.

The *Summerlin* case, in the Ninth's Circuit's words, "is the raw material from which legal fiction is forged."[296] Warren Summerlin, a troubled man who experienced an abusive childhood and had an "explosive personality disorder with impaired impulse control"[297] was convicted for killing Brenna Bailey—a woman who worked for one of his creditors.[298] At trial, Summerlin was represented by a public defender who attempted to negotiate a plea bargain to avoid her client being sentenced to death.[299] While the plea was still pending, the public defender began a romantic relationship with the prosecutor on the case.[300] Despite the fact that both she and her supervisor agreed that she and, by imputation, the whole public defender's office had a conflict of interest and should not have been representing Summerlin at that time, she remained on the case.[301] Only after Summerlin insisted on withdrawing his guilty plea did the public defender's office finally withdraw from representation; the Arizona Attorney General's Office took over the prosecution of the case also because of the romantic relationship between the attorneys.[302]

The trial court appointed private counsel for Summerlin.[303] At trial, Summerlin's new attorney presented no evidence supporting his theory that Summerlin did not premeditate Bailey's murder.[304] Furthermore, the attorney only called one witness at trial, Summerlin's former attorney from the public defender's office.[305]

Following his conviction, Summerlin was sentenced to death based on findings made under pre-*Ring* Arizona death penalty procedure.[306] During sentencing, Judge Marquardt presided; subsequently, the judge was disbarred because of a serious addiction to marijuana.[307] While there is no direct evidence that Judge Marquardt was using marijuana during the actual Summerlin sentencing, he was a heavy user of marijuana at that time.[308]

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296 *Id.* at 1084.
297 *Id.*
298 *Id.*
299 *Id.* at 1085.
300 *Id.* at 1086-87.
301 *Id.* at 1087.
302 *Id.* at 1087-88.
303 *Id.* at 1088.
304 *Id.*
305 *Id.*
306 *Id.* at 1089.
307 *Id.* at 1089 n.1.
308 *Id.* at 1090.

The Ninth Circuit, after denying Summerlin's ineffective assistance of counsel claim,[309] granted his *Ring* claim, finding that *Ring* was retroactive on collateral review.[310] In reaching this conclusion, the court examined the history of the death penalty in Arizona and decided that *Ring*, when applied to Arizona law, was a substantive decision.[311] "When *Ring* displaced *Walton*," the court explicated:

> the effect was to declare Arizona's understanding and treatment of the separate crime of capital murder, as Arizona defined it, unconstitutional. And when *Ring* overruled *Walton*, repositioning Arizona's aggravating factors as elements of the separate offense of capital murder and reshaping the structure of Arizona murder law, it necessarily altered both the substance of the offense of capital murder in Arizona and the substance of Arizona murder law more generally.[312]

The Ninth Circuit's holding runs counter to the Arizona Supreme Court's decision in *Arizona v. Towery*.[313] There, the Arizona Supreme Court concluded that *Ring* was a procedural rule that changed only "who decides" death penalty eligibility under Arizona law.[314] The Ninth Circuit faulted the Arizona Supreme Court for analogizing *Apprendi*'s procedural rule to *Ring*.[315] The circuit court distinguished *Apprendi* from *Ring* arguing that while the United States Supreme Court clearly stated that *Apprendi* was only concerned with procedure,[316] the *Ring* Court made no such distinction and effectively "restored as a matter of substantive law the pre-*Walton* capital murder paradigm in Arizona . . . [which] had defined capital murder as a substantive offense separate from non-capital murder."[317] Concluding the *Ring* rule "altered the meaning of [Arizona's] substantive criminal law,"[318] the Ninth Circuit held that *Ring* was a substantive rule of law as to Arizona and was, therefore, not *Teague*-barred.[319]

Even so, the Ninth Circuit still proceeded to analyze *Ring* under the second *Teague* exception, stating, "a full *Teague* analysis of the unique procedural aspects of *Ring* provides an independent basis upon which to apply *Ring* retroactively to cases on collateral review."[320] The Ninth

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309 *Id.* at 1092-96 (discussing Strickland v. Washington, 466 U.S. 668 (1984)).

310 *Id.* at 1121.

311 *Id.* at 1102-05.

312 *Id.* at 1105.

313 *Id.* at 1107-08 (discussing Arizona v. Towery, 64 P.3d 828 (Ariz. 2003)).

314 *Towery*, 64 P.3d at 833.

315 Apprendi v. New Jersey, 530 U.S. 466, 475 (2000).

316 *Id.*

317 *Summerlin*, 341 F.3d at 1107.

318 *Id.* at 1106 (quoting Santana-Madera v. United States, 260 F.3d 133, 139 (2001)) (internal quotation marks omitted) (alteration in original).

319 *Id.* at 1108.

320 *Id.*

Circuit focused heavily on one component of the second exception: does the new rule "seriously enhance the accuracy of the proceeding"?[321] The court emphasized, "[T]he Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a non-capital case,"[322] and found that in Summerlin's sentencing phase, the fact that the judge—a heavy marijuana user—was solely responsible for finding facts necessary for the imposition of the death penalty, jeopardized the accuracy of Summerlin's sentencing proceeding.[323] The court then broadened this finding to include *all* judge-imposed death sentences by highlighting that the following factors lessened the accuracy of death penalty proceedings in these jurisdictions: pre-sentence reports (which contain many levels of hearsay), letters from the victim's family and the community, victim impact statements that would be inadmissible under most evidentiary rules, the routine nature of death penalty determinations to a judge that handles them regularly, and the fact that some judges in these states run for election.[324]

While the Ninth Circuit did raise valid concerns under the first prong of the second *Teague* exception, the court's analysis failed under the second: the rule must be a "watershed rule that alters our understanding of bedrock procedural elements essential to the fairness of the proceeding."[325] As discussed, this prong is very narrowly tailored. The Ninth Circuit stated, "*Ring* established the bedrock principle that, under the Sixth Amendment, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty."[326] As the Supreme Court ably indicated in its opinions in *Jones*, *Apprendi*, and *Ring*, however, this is not a watershed rule of procedure; rather, requiring the jury to find the facts upon which the defendant's sentence is predicated is a return to pre-*Furman* procedure.[327] Again, *Ring*, viewed as a procedural rule, mandates only the manner in which the facts at issue must be found; it does not define what those facts need to be.[328]

The Ninth Circuit's argument that *Ring* announces a substantive rule of law, at least as to states that allowed judges to make the death penalty determination, is persuasive. Read broadly, *Ring* does "decide

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[321] *Id.* at 1109 (citing Sawyer v. Smith, 497 U.S. 227, 242 (1990)).

[322] *Id.* at 1110 (quoting Gilmore v. Taylor, 508 U.S. 333, 342 (1993)).

[323] *Id.* at 1114-15.

[324] *Id.* at 1110-16.

[325] *Id.* at 1116 (internal quotation marks omitted).

[326] *Id.*

[327] *See* discussion *supra* Part II.B.

[328] *See* United States v. Gaudin, 515 U.S. 506 (1995); *see also* discussion *supra* note 286 and accompanying text.

the meaning of a criminal statute."[329] Alternately, *Ring*'s procedural aspects, combined with its undeniable linkage with *Apprendi*, give credence to the theory that *Ring* is a procedural rule—at its root, *Ring* changes who decides death penalty eligibility, not what the decision-maker must find. Rather than forcing lower courts to fit *Ring* into a *Bousley* or *Teague* analysis, the Supreme Court should clarify its retroactivity rules to provide guidance to courts attempting to determine the retroactivity of hybrid rules. The Court has provided such clarification as was evidenced by *Tyler v. Cain*, which analyzed AEDPA.[330] A failure to do so will lead only to the arbitrary imposition of the death penalty, the very concern that the Court's death penalty decisions have attempted to eliminate over the last thirty years.

VI. IMPLICATIONS

A. Perspective: How the Fell *Decision Affects the FDPA*

Obviously, the decision in *United States v. Fell* does not require Congress to change the FDPA; absent a ruling from the Supreme Court declaring the Act unconstitutional, the Act may continue to be used in federal courts. In fact, unless the Second Circuit affirmed the decision in *Fell*, federal courts in the Second Circuit may even continue using the FDPA. Nevertheless, the *Fell* decision is an interesting example of the plethora of ways in which lower courts may interpret the Court's recent pronouncements on sentencing procedure and the confusion that has already ensued.

B. The Need for Clarification

Clearly, the Court's decisions have led to widely divergent views in the lower courts. If the confusion persists (*Ring, Fell,* and *Regan* were all decided in the latter half of 2002), the Court will have to clarify its position. Does the rule developed in *Jones*, *Apprendi*, and *Ring* require each fact leading to an increased maximum sentence be proven just like an element of a greater offense, including compliance with the Federal Rules of Evidence, or does the rule merely call for an increased procedural safeguard for those facts that must be found by a jury?

One persuasive guide to answering this question is Justice Scalia's concurring opinion in *Ring*.[331] He identified the root of the confusion in the *Ring* line of cases: the Court's holdings in the *Furman* line of cases.[332] "In my view," Justice Scalia wrote, "that line of decisions had no

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[329] Bousley v. United States, 523 U.S. 614, 620 (1998).

[330] *See supra* notes 232-40 and accompanying text.

[331] Ring v. Arizona, 536 U.S. 584, 610-14 (2002) (Scalia, J., concurring).

[332] *Id.* at 610.

proper foundation in the Constitution."[333] He goes on to point out that it is impossible to know whether states would have enacted statutes including aggravating sentencing factors in the absence of *Furman*.[334] Justice Scalia also expressed his concern for the right of trial by jury:

> [M]y observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt "sentencing factors" determined by judges that increase punishment beyond what is authorized by the jury's verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK, . . . cause me to believe that our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of man's going to his death because a judge found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.[335]

While Justice Scalia recognized that states may have been "coerced into the adoption of 'aggravating factors,'"[336] he also emphasized that "wherever those factors exist they must be subject to *the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.*"[337] Justice Scalia reemphasized the importance of protecting the right of trial by jury:

> What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of an aggravating factor in the sentencing phase or . . . simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.[338]

Interestingly, in *Ring*, the Court specifically and approvingly discussed twenty-nine state statutory schemes that allow the submission of aggravating factors to juries.[339] Of those twenty-nine, the vast majority follow a relaxed evidentiary standard much like that in the

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[333] *Id.*; *see also* Gardner v. Florida, 430 U.S. 349, 371 (1977) ("The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed.").

[334] *Ring*, 536 U.S. at 611 (Scalia, J., concurring) (pointing out some states already had such requirements in their capital murder statutes prior to the *Furman* decision).

[335] *Id.* at 611-12 (Scalia, J., concurring).

[336] *Id.* at 612 (Scalia, J., concurring).

[337] *Id.* (Scalia, J., concurring) (emphasis added).

[338] *Id.* at 612-13 (Scalia, J., concurring).

[339] *Id.* at 608 n.6; *see also* the discussion of FDPA, *supra* text accompanying notes 79-89.

FDPA.[340] Since the evidentiary question was not at issue in *Ring*, the Court made no mention of the evidentiary standard. But Justice Scalia's suggestion that the aggravating factor determination be made during the trial on the question of guilt[341] seems to indicate that evidence as to those facts would have to be admitted in accordance with the rules of evidence.

Furthermore, evidentiary rules developed along with the institution of the jury to insulate juries from information that could be misleading or prejudicial. These rules protect the jury's role as a disinterested, independent participant in the proceeding—an important distinction in the American adversarial legal system.[342] The *Fell* court's position that capital sentencing proceedings before a jury are sufficiently adversarial to warrant fair trial guarantees, including the use or application of the rules of evidence, seems persuasive.[343]

As the law stands, whether the FDPA is unconstitutional because of its relaxed evidentiary standard is a difficult question. In light of the *Furman-Gregg* line of cases, the FDPA's evidentiary standard appears to be appropriate. In *Gregg*, the Supreme Court discussed the Model Penal Code's provisions for capital sentencing, which were very similar to the Georgia law in question in that case and to the current FDPA.[344] According to the drafters of the Model Penal Code, the rules of evidence should be relaxed following a determination of guilt so that all "information that is relevant to the sentence" may be considered.[345] The *Gregg* court did not specifically address concerns presented by a relaxed evidentiary standard.[346] In addressing the Georgia statute, the Court noted that the statute had been revised since Gregg's trial. The revision called for admission of "only such evidence in aggravation as the state has made known to the defendant prior to his trial."[347] The Court commented that the statute was unclear as to whether this language relaxed the evidentiary standard, but gave no indication that this interpretation could be problematic.[348] On the other hand, the *Ring* trilogy of cases appears to invalidate just the sort of statutory scheme

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[340] *See Ring*, 536 U.S. at 608 n.6. Interestingly, Arizona's statute allows for the admission of evidence of aggravating factors only in accordance with the rules of evidence. ARIZ. REV. STAT. § 13-703(b) (2001).

[341] *Ring*, 536 U.S. at 612-13 (Scalia, J., concurring).

[342] Stephan Lansman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 716, 726-27 (1983).

[343] *See supra* notes 175-214 and accompanying text.

[344] Gregg v. Georgia, 428 U.S. 153, 191 (1976).

[345] MODEL PENAL CODE § 201.6 cmt. 5 at 74-75 (Tentative Draft, No. 9, 1959).

[346] *Gregg*, 428 U.S. at 191-92.

[347] *Id.* at 164 n.7 (comparing GA. CODE ANN. § 27-2503(a) (Supp. 1975) to GA. CODE ANN. § 27-2534 (1972)).

[348] *Id.*

that was so strongly approved of in *Gregg*. These decisions very easily could have far-reaching implications for the admission of evidence during the penalty phase of a capital trial. Clearly, criminal sentencing procedures—including capital sentencing—are undergoing major changes.

The murkiness of the Court's retroactivity jurisprudence will not aid lower courts in determining whether to allow petitioners, whose convictions became final before *Ring*, to rely on that decision in their habeas applications. Since the circuits are split on this issue,[349] it is likely that the Court will at some point grant certiorari to clarify its position on the retroactive application of *Ring*.

In the absence of a clear holding from the Supreme Court regarding *Ring*'s retroactive application, courts may be inclined to refuse to grant habeas petitions that rely on *Ring* for prisoners whose convictions became final before September 2002. The rule of law, as this note demonstrates, is anything but clear when used to analyze *Ring* and courts will likely be swayed by good policy reasons for holding that *Teague* bars the retroactive application of *Ring* even though *Ring* tends to have the substantive effect of redefining the elements of capital crimes.[350]

VII. CONCLUSION

Under Old Testament law, a person could not be convicted of a capital crime by the word of only one witness; two or three witnesses were required to testify to the defendant's conduct before the death sentence could be imposed.[351] This provision limited the number of executions actually carried out under Old Testament law, since most capital crimes were unlikely to have been committed in the presence of

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[349] *See* Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003) (holding *Ring* announced a substantive rule of law for *Teague* purposes and alternatively, that *Ring* meets the second *Teague* exception); Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) (holding that even if the petitioner were not procedurally barred from bringing his *Ring* claim, *Ring* would not apply retroactively under *Teague*); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002) (holding petitioner's claim was governed by AEDPA and, therefore, barred by Tyler v. Cain, 533 U.S. 656 (2001)).

[350] In 2002, motions requesting second or successive habeas corpus relief constituted 72% of all original pleadings filed in the U.S. Courts of Appeals. Judicial Caseload Indicators, at 4, *available at* http://www.uscourts.gov/caseload2002/front/mar02txt.pdf (last visited Oct. 29, 2003). Combined with the fact that following the Court's decision in *Apprendi*, motions by prisoners to vacate their sentences increased by 30%, any retroactive applications of *Ring* or *Apprendi* will seriously burden the federal judicial system. *See supra* Judicial Caseload.

[351] *Deuteronomy* 17:6 ("At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death.").

more than one witness.[352] Those witnesses bore a heavy burden: if their testimony resulted in a conviction, they were literally to cast the first stone—thereby taking an active part in the execution itself.[353] Furthermore, if the witnesses perjured themselves and were discovered, they were to be executed in the defendant's stead; thus, the integrity of the judicial process was upheld.[354]

Enhanced evidentiary and procedural standards in capital crimes are nothing new. The death penalty is often deserved; if it is to be a part of America's penal system, its administration should be quick and certain, and its imposition must be just.[355] Requiring aggravating factors to be proven beyond a reasonable doubt to a jury, in accordance with the rules of evidence might make the death penalty more difficult to impose in some cases, but expediency alone should never be the test for capital sentencing procedure.

The Supreme Court's decisions in *Jones*, *Apprendi*, and *Ring* do one positive thing—return more power to the jury. It is too early to tell whether the *Ring* ruling will eventually make the death penalty simpler or more difficult to obtain; nor can one tell if *Ring* will effectively return capital sentencing to pre-*Furman* jury discretion. But one thing is certain: courts, perhaps including the Supreme Court, will be attempting to determine for years to come just what constitutes "the functional equivalent of an element of a greater offense."[356]

Victoria Johnson

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[352] Jones, *supra* note 6, at 144.

[353] *Deuteronomy* 17:7; *John* 8:7; *Acts* 7:58; *see also* JOHN M'CLINTOCK & JAMES STRONG, 8 CYCLOPAEDIA OF BIBLICAL, THEOLOGICAL, AND ECCLESIASTICAL LITERATURE 787-91 (Franklin Square, Harper & Bros. 1894). Typically, the first stone cast was thrown on the condemned person's chest, and usually resulted in death. If it did not, on-lookers completed the execution. This was the most common form of execution in ancient Israel, and was far more humane than many of their contemporaries's methods, which included hanging alive, burning, and breaking on the wheel. M'CLINTOCK & STRONG, *supra*, at 787-91.

[354] *Deuteronomy* 19:15-20.

[355] For more information on this related issue, see, for example Jones, *supra* note 6, and Pojman, *supra* note 4.

[356] Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000).