CASE NOTE:

WHEN IT COMES TO CAPITAL SENTENCING, YOU BE THE JUDGE: *RING V. ARIZONA*

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I. INTRODUCTION

The role of the jury as the arbiter of facts and the judge as the interpreter of law has been an established legal principle since the 17th century.[1] The constitutional right to a trial by jury is understood to "guard against a spirit of oppression and tyranny on the part of rulers . . . [and] as the great bulwark of civil and political liberties."[2] This Sixth Amendment right requires that "the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors."[3] Though this broad principle has long been established, its practical implications became the subject of the landmark United States Supreme Court decision in *Ring v. Arizona.*[4]

Following a conviction of first-degree murder, Arizona's questioned capital-sentencing statute required a judge to conduct a sentencing hearing to make the factual determinations required to impose a sentence of death.[5] A judge determined the existence of "aggravating" and "mitigating" circumstances based on evidence offered by the prosecution and defense.[6] The judge alone was charged with making "all factual determinations required by this section."[7] If one or more

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1. Jones v. United States, 526 U.S. 227, 248 (1999) (citing 1 E. Coke, Institutes of the Laws of England 155b (1628) ("*ad questionem facti non respondent judices; ad questionem juris non respondent juratores*")).

2. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (citing 2 J. Story, Commentaries on the Constitution of the United States 540–41 (4th Ed. 1873)).

3. *Id.* (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

4. Ring v. Arizona, 122 S. Ct. 2428 (2002).

5. ARIZ. REV. STAT. § 13-703(B) (2001), *amended by* ARIZ. REV. STAT. § 13-703 (Supp. 2002).

6. *Id.* § 13-703 (C).

7. *Id.* § 13-703 (D).

aggravating circumstances were present, the judge must then consider whether any mitigating circumstances were sufficient to merit leniency. If not, a sentence of death should be imposed.[8]

II. AMBIGUITY IN SUPREME COURT RULINGS BEFORE *RING*

The United States Supreme Court declared Arizona's capital-sentencing statute constitutional in *Walton v. Arizona*.[9] Among other objections, Walton claimed that the sentencing scheme violated his Sixth Amendment right to a trial by jury.[10] He argued that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge."[11] Under this interpretation, the Arizona scheme must empower the jury to assess aggravating and mitigating circumstances in order to make the statute constitutional.[12] The court drew a distinction, however, between "elements of the offense" that require a jury finding and "sentencing factors" that are within the discretion of the judge.[13]

The *Walton* Court held that aggravating circumstances do not have to be denominated as "elements" of an offense requiring jury consideration.[14] The judge was not seen to raise the ceiling of the potential sentences. Instead, the Court characterized the judge's role as deciding between two penalties already authorized by the jury verdict on first-degree murder. If the judge's sentencing considerations neither require nor preclude a death penalty verdict, the Court reasoned, the defendant is in no sense convicted or acquitted by the finding of those circumstances.[15] Therefore, the defendant's Sixth Amendment rights are not violated.

Though Arizona's sentencing procedure was specifically upheld by the United States Supreme Court in *Walton*, later rulings cast serious doubt on the constitutionality of the statute. In *Jones v. United States*, the Court expressed Sixth Amendment concerns when a jury's significance is diminished "by removing control over facts determining a statutory sentencing range."[16] Under Arizona law, the lack of jury participation in capital sentencing appears to illustrate this concern. However, the court noted that only elements of an offense "must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."[17] The Court stood by their judgment in *Walton* that classified aggravating circumstances as sentencing considerations.

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8. *Id.* § 13-703 (F).
9. Walton v. Arizona, 497 U.S. 639 (1990).
10. *Id.* at 647–48; *see also* U.S. CONST. amend. VI.
11. *Walton*, 497 U.S. at 647.
12. *Id.*
13. *Id.* at 639. The Supreme Court first coined the term "sentencing factor" in reference to any fact affecting a judge-imposed sentence that was not determined by a jury in McMillan v. Pennsylvania, 477 U.S. 79 (1986).
14. *Id.* at 648.
15. *Id.*
16. *Jones*, 526 U.S. at 248.
17. *Id.* at 232.

Greater uncertainty surfaced a year later in *Apprendi v. New Jersey*.[18] *Apprendi* involved a charge of unlawful firearm possession and raised the issue of whether proof of a hate-crime motive was properly labeled a sentencing factor or an element of the crime.[19] The Court held that the Sixth Amendment does not permit a defendant to be exposed "to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[20] Except for a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[21] This rule applies even if a statute characterizes the additional findings by the judge as "sentencing factors."[22]

Legislatures previously had broad discretion to differentiate elements of an offense from sentencing factors.[23] After *Apprendi*, the emphasis in constitutional analysis shifted from one of "form" to one of "effect."[24] If a death sentence cannot be imposed based on "facts reflected in the jury verdict alone," then, presumably, a judicial finding of "aggravating circumstances" that increases the sentence to the death penalty is in violation of a defendant's Sixth Amendment rights.

The *Apprendi* Court recognized the tension between its holding and that of *Walton* but expressly chose to stand by the earlier decision. The Court asserted that no judge can determine "the existence of a factor which makes a crime a capital offense."[25] When a jury convicts a defendant of an offense subject to a maximum penalty of death, "it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed."[26] In her dissent, Justice O'Connor described this characterization of Arizona's procedure as "demonstrably untrue."[27] She argued that "of all the decisions that refute the Court's 'increase in the maximum penalty' rule, perhaps none is as important as *Walton v. Arizona*."[28] Only a judge can make a factual finding of an aggravating circumstance and "without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty."[29] Despite O'Connor's characterization of the Arizona system, the majority refrained from overruling *Walton*, and the apparent contradictions remained unresolved for the time.

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18. 530 U.S. 466 (2000).
19. *Id.*
20. *Id.* at 483.
21. *Id.* at 490 (citing *Jones*, 526 U.S. at 252–53).
22. *Id.*
23. Stephanos Bibas, *Back from the Brink*, LEGAL TIMES, August 5, 2002, at 59.
24. *Apprendi*, 530 U.S. at 494.
25. *Id.* at 497.
26. *Id.* (citing Almendarez-Torres v. United States, 523 U.S. 224 (1998)).
27. *Id.* at 538.
28. *Id.* at 536.
29. *Id.* at 538.

III. THE CASE OF TIMOTHY STUART RING TESTS THE CONSTITUTIONALITY OF THE ARIZONA DEATH PENALTY STATUTE

Timothy Stuart Ring was charged with armed robbery of a Wells Fargo armored van and the murder of its driver, John Magoch. On December 6, 1996, a jury found Ring guilty of first-degree murder, conspiracy to commit armed robbery, armed robbery, burglary, and theft.[30] At a subsequent sentencing hearing, the judge found that the offense was committed for "pecuniary" gain and in an "especially heinous, cruel or depraved" manner. Though finding no enumerated mitigating factors, the judge acknowledged Ring's minimal criminal record.[31] Upon weighing the competing considerations, the judge found the evidence insufficient to justify leniency. Ring was then sentenced to death.[32]

A. The Arizona Supreme Court

When Ring's case reached the Arizona Supreme Court, the Justices were faced with seemingly contradictory opinions from the United States Supreme Court. The Arizona court noted that "in Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings . . . [but rather] only after a subsequent adversarial hearing, at which the judge alone acts as the finder of the necessary statutory elements."[33] This process violates a defendant's Sixth Amendment right under *Apprendi* not to be subject "to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[34] In Ring's case, the judge made findings based on testimony presented at the sentencing hearing alone, outside the presence of a jury. But for the finding of aggravating circumstances at the sentencing hearing, Ring would not have been subject to the death penalty. As the court stressed, a death sentence "may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt."[35]

Despite the inherent contradictions in *Walton*, *Jones* and *Apprendi*, the Arizona court was bound by the Supremacy Clause to follow the United States Supreme Court precedent.[36] Justice Feldman noted that the Supreme Court explicitly refrained from overruling the earlier decisions, raising a legitimate question about whether the two later cases should be read as broadly as their

30. State v. Ring, 25 P.3d 1139 (Ariz. 2001), *rev'd*, 122 S. Ct. 2428 (2002).
31. *Id.* at 1145.
32. *Id.*
33. *Id.* at 1151.
34. *Apprendi*, 530 U.S. at 483.
35. *Ring*, 25 P.3d at 1151 (referring to the rule in State v. Gretzler, 659 P.2d 1, 13 (Ariz. 1983)).
36. *Id.* at 1152 ; U.S. CONST. art. VI.

language suggested.[37] With clear reluctance, the Arizona high court upheld Ring's conviction.[38]

B. The United States Supreme Court

The Supreme Court took the opportunity to consider whether the *Apprendi* Court was correct to leave the holding in *Walton* undisturbed. The Court noted the established rule that a state court's construction of its own law is authoritative.[39] The *Apprendi* Court had reconciled *Walton* with its holding by suggesting "that a conviction of first-degree murder in Arizona carried a maximum sentence of death."[40] If the jury convicted the defendant of an offense potentially subject to the maximum penalty of death, the argument followed, then the judge's sole decision was "whether that maximum penalty, rather than a lesser one, ought to be imposed."[41] However, the Arizona Supreme Court expressly disagreed with the *Apprendi* Court's characterization of the sentencing statute. Rather, the Arizona court supported Justice O'Connor's conclusion that "defendant's death sentence required the judge's factual findings."[42] The Court, therefore, was bound to follow Arizona's construction of its own law.

The State of Arizona nevertheless urged the Court to affirm the *Walton* Court's distinction between "sentencing factors" and "elements of an offense."[43] The Court responded by pointing to *Apprendi*'s repeated instruction that a mere choice of label can not empower a judge, rather than a jury, to make a decision.[44] The proper inquiry is into effect, not form: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury."[45] Though recognizing the importance of *stare decisis* to the rule of law, the Court acknowledged its duty to overrule "where the necessity and propriety of doing so has been established" and concluded that "this is such a case."[46]

IV. *RING* AND ITS AFTERMATH

The *Ring* decision brought a needed sense of clarity to unresolved constitutional questions. A new host of issues has emerged, however, as states struggle to mend unconstitutional statutes and death row inmates rush to the courts

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37. *Ring*, 25 P.3d at 1145.

38. *Id.* at 1152–56. The court overruled the finding of "heinousness and depravity" as an aggravating factor but found that the "pecuniary" motive outweighed the mitigating factor of a minimal criminal record. *Id.*

39. Ring v. Arizona, 122 S. Ct. 2428, 2440 (2002) (citing Mullaney v. Wilbur, 421 U.S. 684, 691 (1975)).

40. *Id.*

41. *Id.* (citing *Apprendi*, 530 U.S. at 497).

42. *Id.* (quoting *Ring*, 25 P.3d. at 1151 (O'Connor, J., dissenting)).

43. *Id.* at 2441.

44. *Id.*

45. *Id.* at 2443 (citing *Apprendi*, 530 U.S. at 494).

46. *Id.* (citing Patterson v. MacLean Credit Union, 491 U.S. 164, 172 (1989)).

for reconsideration of their sentences. Perhaps most importantly, *Ring*'s silence on the issue of retroactivity creates a new problem of constitutional uncertainty.

A. Bringing Unconstitutional Statutes into Compliance with Ring

The decision in *Ring* has the potential to destabilize the criminal justice system in numerous states as once-settled murder convictions resurface in the courts. Prior to *Ring*, five states, including Arizona, had a capital-sentencing system in which the jury plays no role.[47] In four other so-called "hybrid" states, juries make sentencing recommendations, but judges have the power to overrule the advisory verdict.[48] Justice O'Connor, writing for the dissent in *Ring*, recalled her prediction in *Apprendi* that "the decision 'would unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of [*Apprendi*]'. . . . The decision today is only going to add to these already serious effects."[49] One count puts the number of affected death row inmates at 794.[50]

Most states acted quickly to bring their statutes into compliance with the new constitutional guidelines. Arizona Attorney General Janet Napolitano swiftly advised judges to halt all capital cases until a new statute could be written.[51] Governor Jane Hull then called a special session to redraft the statute and bring it in compliance with *Ring*.[52] Most of the other four states with clearly unconstitutional statutes revised their laws quickly.[53] Of the "hybrid" states, some amended their law while others deferred to their high courts for rulings on the issue of *Ring* compliance.[54]

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47. Julia Vitullo-Martin, *The Jury's Still Out*, COMMONWEALTH, Aug. 16, 2002, at 11. Arizona, Colorado, Idaho, Montana, and Nebraska have thirty-nine condemned prisoners. *Id.*

48. *Id.* Alabama, Florida, Delaware, and Indiana have 626 people on death row. *Id.*

49. *Ring*, 122 S. Ct. at 2449 (citing *Apprendi*, 530 U.S. at 551). O'Connor noted that in the two years following *Apprendi*, over 1800 criminal appeals had been entertained by United States Courts of Appeals based on the ruling. *Id.*

50. Vitullo-Martin, *supra* note 47. Of the 794, 626 cases involve inmates in "hybrid" jurisdictions; 129 of those on death row are in Arizona. *Id.*

51. Rhonda Bodfield & Joseph Barrios, *Court Voids Arizona Death Sentences in a Bombshell*, ARIZ. DAILY STAR, June 25, 2002, at A1.

52. S.B. 1001, 45th Leg., 5th Sp. Sess. (Ariz. 2002)..

53. Betsy Z. Russell, *State's Death Penalty Law in Limbo*, SPOKESMAN-REV., July 21, 2002, at B1. Montana brought their law into compliance with *Ring*, though all six death row inmates had already exhausted appeals. *Id.* Colorado approved a provision requiring unanimous jury decision on the death penalty in a four-day special session. *Id.* Nebraska awaits its state's Supreme Court ruling on a pending capital case for guidance. *Id.* Idaho, on the other hand, refused to call a special session, arguing that *Ring* should not be retroactive. *Id.* Hence, those on death row who have not exhausted appeals have no recourse.

54. Indiana passed a law requiring judges to accept the jury's recommendation on capital sentences before *Ring*. Bodfield & Barrios, *supra* note 51. In Delaware, at least three capital murder trials have been put on hold to await the Delaware Supreme Court's ruling on the constitutionality of the revised law. Sean O'Sullivan, *Third Murder Trial*

B. Analyzing the Issue of Retroactivity

The extent of *Ring*'s impact turns largely on whether courts construe its holding as having retroactive effect.[55] The Supreme Court expressly refrained from addressing the issue, leaving the affected states discretion to arrive at their own interpretations. Arizona's Attorney General argued that Supreme Court decisions should not be retroactive unless clearly specified, as do state officials in the four other states unambiguously affected by the ruling.[56] Current constitutional doctrine casts serious doubt on this position, though the answer on retroactivity may depend on whether or not a sentenced inmate has received a final judgment.

1. Cases with Unexhausted Appeals[57]

The existing federal framework for analyzing the potential retroactivity of constitutional decisions begins with a consideration of whether the court announced a "new" rule. The applicable federal test defines a new rule as one that "breaks new ground or imposes a new obligation on the States or the Federal Government."[58] A Supreme Court decision breaking from the doctrine of *stare decisis* and requiring jury participation in all capital-sentencing schemes will almost certainly be classified as a "new" rule for purposes of constitutional analysis.

New constitutional rules must be applied to "all similar cases pending on direct review."[59] Therefore, inmates with unexhausted appeals in affected states will likely be entitled to the Sixth Amendment protections outlined in *Ring*. Though burdensome on the criminal justice system, equity requires this result in

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Delayed, NEWS JOURNAL (Del.), Aug. 14, 2002, at B6. Florida awaits a state Supreme Court decision on whether the limited jury advisory role is consistent with *Ring*, noting "difficulty in trying to read constitutional tea leaves." *State Court Hears Challenge of Death Sentence Law*, MIAMI HERALD, Aug. 22, 2002, at B1. Under Missouri law, a judge makes a sentencing decision only when the jury deadlocks. Since the jury engages in fact-finding on aggravating circumstances, Missouri believes that their statute is in compliance with *Ring*. Bill Bell, Jr., *Lawyers Hope Arizona Case Helps Get Sentence Overturned*, ST. LOUIS POST-DISPATCH, Sept. 1, 2002, at B4.

55. Marcia Coyle, A Tale of Two Justices, Legal Intelligencer, Aug. 12, 2002, at 9.

56. Paul Duggan, New Rulings Don't Fling Open Death Row Doors, Wash. Post, June 27, 2002, at A2. Former Arizona Attorney General Janet Napolitano posited: "the court's opinion doesn't say it's retroactive, so in our view it isn't. . . . Unless the court specifically says in a decision that it's retroactive, then normally it isn't. But I'm sure we're going to be litigating this for quite a while." *Id.*

57. In Arizona, defendants convicted of first degree murder whose sentencing hearings had not taken place at the time of the Ring decision will be sentenced according to the new statute. ARIZ. REV. STAT. § 13-703 (West 2002). Cases where sentencing took place under the old statutory regime but that have not reached the Arizona high court on direct appeal are the subject of this section. The Arizona Supreme Court heard arguments from these death row inmates in November 2002. *See* ARIZ. SUPREME COURT, ARIZONA SUPREME COURT OPINION FILED IN 2002, http://www.supreme.state.az.us/opin/filed2002.htm (last visited Feb. 5, 2002).

58. Teague v. Lane, 489 U.S. 288, 301 (1989).

59. Griffith v. Kentucky, 479 U.S. 314, 323 (1987).

order to preserve the "integrity of judicial review" and to ensure that all defendants are treated equally.[60]

2. Cases with Final Judgments

For those cases that have reached a final disposition, the only available legal avenue is collateral attack of the judgment. In other words, an inmate must argue that a conviction based on an unconstitutional statute should not be upheld. Unless new decisions fall within a narrow exception to the general rule, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[61] The extent of *Ring*'s impact will turn on whether the new constitutional rule is construed to fall within one of two exceptions to the presumptive rule of non-retroactivity. Though one exception is clearly inapplicable, *Ring* could arguably fall within the exception covering new procedures that are "implicit in the concept of ordered liberty."[62] This opaque exception has been clarified as a test of "accuracy" and "fundamental fairness."[63] In the habeas corpus context, the Court has expressed a desire to "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[64] With that ideal in mind, Justice Harlan proposed that "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures . . . be retroactively applied on habeas."[65]

The central issue, therefore, is whether *Ring* "significantly improve[s] the pre-existing fact-finding procedures" by requiring jury participation in capital-sentencing hearings. In a sense, the finding of aggravating circumstances requires a value judgment as much as it does a determination of facts. For example, the aggravating factor of pecuniary motive involves a factual judgment, but a determination of whether a crime was committed in an "especially heinous, cruel or depraved manner" is really more of a value judgment. Also, because a judge can

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60. *Teague*, 489 U.S. at 304.

61. *Id.* at 310.

62. Mackey v. United States, 401 U.S. 667, 693 (1971) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.)). The other exception is clearly inapplicable in this case: "a new rule should be applied retroactively if it places 'certain kinds of primary, private conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S. at 311 (citing *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in judgment in part and dissenting in part)).

63. *Teague*, 489 U.S. at 312–13 (citing Desist v. United States, 394 U.S. 244 (1969) ("We believe it desirable to combine the accuracy element of the *Desist* version of the second exception with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial . . . our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review.").

64. *Desist*, 394 U.S. at 262 (Harlan, J., dissenting).

65. *Id.* (Harlan, J., dissenting). Since the Court in *Teague* specifically adopted Justice Harlan's retroactivity framework for collateral review as expressed in *Desist* and *Mackey*, the issue of "accuracy" may be resolved by a court's determination of whether *Ring* substantially improves the fact-finding procedures in capital-sentencing schemes. *Teague*, 489 U.S. at 310–12.

not direct a verdict no matter how clear the evidence, some judgment in terms of ultimate result is left to the jury. To the extent that the finding of aggravating circumstances involves such value judgment, *Ring*'s requirement of a panel of jurors in capital-sentencing hearings significantly alters the prior fact-finding procedures.

An examination of the underlying justifications for a presumption of non-retroactivity may help in predicting whether *Ring* will be construed as retroactive. The Supreme Court has offered several explanations for this restrictive doctrine. First, retroactivity does not advance the deterrent purpose of habeas corpus. Habeas corpus ensures that constitutional standards are honored.[66] For this function to be fulfilled, "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[67] Second, retroactive application of new rules frustrates the judicial need for comity and finality.[68] Though *Teague* did not involve capital sentencing, the Court did make note of its finality concerns in the death penalty context but expressly chose to refrain from addressing the issue.[69] Finally, an assessment of the relative costs and benefits of retroactivity generally shows that "costs imposed upon the State[s] . . . generally far outweigh the benefits."[70]

3. Applying the Retroactivity Framework in Arizona

Arizona adopted the *Teague* retroactivity analysis in *State v. Slemmer*.[71] The Arizona Supreme Court, therefore, will start with a presumption that the *Ring* rule is "almost automatically nonretroactive" to cases with final judgments that reach the court on collateral attack.[72] The ultimate success of appeals will turn on whether the lack of jury participation in sentencing "substantially impairs . . . [the court's] truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials."[73] The Arizona court previously applied a three-factor approach to retroactivity analysis: "the purpose served by the new rule, the extent of reliance by law enforcement officials on the old rule, and the effect on the administration of justice."[74] The ultimate outcome is difficult to predict. The court may be swayed to trust the accuracy of judge-made determinations on aggravating circumstances. Law enforcement officials certainly relied on the pre-existing sentencing system, and the destabilizing impact on the administration of justice would likely be substantial. On the other hand, the *Ring* doctrine was specifically designed to protect a defendant's fundamental right to a trial by jury. An execution based on a law found to be unconstitutional may raise concerns of "fundamental fairness." If the Arizona Supreme Court wants the newly established

66. *Id.* at 306 (citing *Desist*, 394 U.S. at 262–63 (Harlan, J., dissenting)).
67. *Id.* (citing *Desist*, 394 U.S. at 262–63 (Harlan, J., dissenting)).
68. *Id.* at 308.
69. *Id.* at 314 n.2.
70. Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring).
71. State v. Slemmer, 823 P.2d 41, 49 (Ariz. 1991).
72. *Id.* at 47 (citing *Solem*, 465 U.S. at 646).
73. *Id.* at 48 (citing United States v. Johnson, 457 U.S. 537, 544 (1982)).
74. *Id.* at 47–48.

Sixth Amendment protections to be fully realized, the decision must be given retroactive effect and collateral attack of final judgments permitted.

V. CONCLUSION

Even if the courts decide to apply *Ring* expansively and allow collateral attack of final judgments, another obstacle may prevent successful appeals. In many cases, a jury will reach the same finding the judge did on aggravating circumstances.[75] Ring's case may provide the perfect example of such a case. A jury is reasonably likely to agree with the judge's finding of "pecuniary" motive as an aggravating factor. Moreover, the Arizona Supreme Court previously found that aggravating factor to be sufficient to merit the death penalty.[76]

Under a restrictive interpretation on the issue of retroactivity, *Ring* will impact only twenty-nine recently sentenced inmates in Arizona whose initial appeals have not been heard.[77] Though this limited effect may sound minor in the grander scheme of things, the impact on any of those twenty-nine death row inmates could be dramatic. As Timothy Stuart Ring notes, "The prosecutor would have . . . to convince 12 people instead of just one friendly judge."[78]

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75. Bibas, *supra* note 23.

76. State v. Ring, 25 P.3d 1139, 1156 (Ariz. 2001), *rev'd*, 122 S. Ct. 2428 (2002).

77. Duggan, *supra* note 56.

78. Bodfield & Barrios, *supra* note 51.