

“FINDING” A WAY TO COMPLETE THE *RING* OF CAPITAL JURY SENTENCING

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ABSTRACT

In the modern death penalty era in America, two findings have emerged as generally required before a murderer can be sentenced to death. First, the decisionmaker must find that the murder was especially egregious, due to specific, statutorily-defined characteristics of the murder or the murderer—typically referred to as “aggravating circumstances.” Second, the decisionmaker must find that any aggravating circumstances in the case “outweigh” any “mitigating circumstances,” i.e., anything that makes the crime or the defendant seem less deserving of death. Remarkably, regarding the second finding (the weighing finding) it remains unclear *who* “the decisionmaker” must be and *how convinced* the decisionmaker must be—even though the Supreme Court held back in 2002, in *Ring v. Arizona*, that the Sixth Amendment mandates that the decisionmaker for the aggravating circumstance finding must be a jury and that the jury must be convinced “beyond a reasonable doubt.”

This Article asserts that *Ring*’s use of the word “fact” to describe the kind of determination that must be made by a jury has completely undermined the functional and elements-based approach of *Ring*. This approach, properly understood, mandates that the Sixth Amendment jury requirement applies to any *finding* (not just “fact”) that is required for a death sentence. This Article traces the Court’s use of the term “finding” in this context—from the beginning of the modern death penalty era in 1976, through *Apprendi v. New Jersey* in 2000, *Ring* in 2002, and *Hurst v. Florida* in 2016—and asserts that the *Apprendi* Court’s use of the broader term “finding” in this arena is more faithful to the Sixth Amendment and to substantive state law. This Article catalogs how state supreme courts and federal circuit courts overwhelmingly concluded (post-*Ring*) that the capital weighing finding is *not* subject to the Sixth Amendment, because it is not a “fact” under *Ring*—aided by the Court’s Eighth Amendment “death eligibility” doctrine, which misleadingly suggests that defendants become

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“eligible” for a death sentence based solely on the finding of an aggravating circumstance.

The Court’s broader approach in *Hurst* does provide some hope in this realm and has led to momentous changes in Delaware, Florida, and Alabama. And all but two states now insist that a jury make all the findings that are required for a death sentence under state law. Nevertheless, while nearly 75% of the current thirty-one death penalty states require a weighing-type finding for a valid death sentence, almost 75% of these states still fail to require that this finding be made beyond a reasonable doubt, as the Sixth Amendment mandates. There is still much work to be done.

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INTRODUCTION

On June 24, 2002, in *Ring v. Arizona*,¹ the United States Supreme Court announced, in a 7–2 decision and with six Justices on the majority opinion, that the jury had a critical and required role to play in deciding which convicted murderers could be sentenced to death.² In particular, the Court held that the Sixth Amendment right to trial by jury includes the right to have a jury, and not merely a judge, make the first finding that is

1. 536 U.S. 584 (2002).

2. *Id.* at 587–89.

required in every capital case before a defendant can potentially be sentenced to death—namely, the finding that at least one statutorily-established “aggravating circumstance” exists in the case.³

Thus, beginning in 2002, states no longer had the option of entirely removing the jury from the capital sentencing process, and capital defendants in the United States have had the right to insist that a jury play a key role in any death sentence. Furthermore, *Ring* established that this *first* required jury finding, that at least one aggravating circumstance exists in the case, must be made “beyond a reasonable doubt.”⁴ Consequently, after *Ring*, no American defendant could be sent to death row without a jury being thoroughly convinced that at least one aggravating circumstance (or its functional equivalent) exists in the case, which makes that particular murder or that particular murderer significantly “worse” than others.

Unfortunately, however, the *Ring* Court explicitly declined to decide whether its holding applied to the *second* required finding of most capital sentencing proceedings, i.e., the finding that any aggravating circumstances in a case “outweigh” the mitigating circumstances in the case.⁵ In other words, *Ring* did not decide *who* the decisionmaker must be for this weighing finding or *how convinced* the decisionmaker must be regarding this second finding. Does the Sixth Amendment require that a jury make this weighing finding or can it be made by a judge? And does the Sixth Amendment require that the weighing finding (like the finding of an aggravating circumstance) be made beyond a reasonable doubt? These issues remain unresolved even today and are the focus of this Article.

The *Ring* decision was unusual and surprising in a number of important ways. First, even though it was a death penalty decision, it was based upon the Sixth Amendment rather than the Eighth Amendment, which had been the undisputed foundation of the Supreme Court’s modern death penalty jurisprudence.⁶ Second, the *Ring* pronouncement regarding

3. *Id.* at 609. In essence, “aggravating circumstances” are the facts about a particular murder that make it especially egregious due to the manner in which it was committed, the criminal history of the murderer, the vulnerability of the victim, the risk caused to others, the motivation for the killing, etc. See, e.g., OKLA. STAT. tit. 21, § 701.12 (2016) (listing Oklahoma’s “aggravating circumstances”).

4. See *Ring*, 536 U.S. at 602, 607–09 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)); see also *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (describing *Ring* as holding “that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt”) (citing *Ring*, 536 U.S. at 608–09)).

5. See *Ring*, 536 U.S. at 597 n.4. “Mitigating circumstances” can include *anything* about the murder itself or the defendant’s life, family history, limitations, positive qualities, etc., that could potentially cause the decisionmaker to choose a sentence other than death. Mitigating evidence includes evidence suggesting a lesser degree of culpability for the murder, but also *anything* that could cause the decisionmaker to view the defendant more sympathetically or to give a sentence other than death. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 113, 115 (1982) (discussing mitigating factors).

6. See discussion *infra* Part I. In Part I, this Article briefly summarizes *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the 1972 Eighth Amendment decision that struck down the death penalty as it then existed in America and set the stage for a new and entirely different “modern era” of capital sentencing.

the central role of the jury in capital sentencing was directly contrary to a string of earlier cases in the modern era, which had repeatedly denied that the jury had any necessary constitutional role in the capital sentencing process.⁷

The *Ring* decision was also surprising because in the very cases that were its immediate predecessors and progenitors—the Supreme Court’s 1999 decision in *Jones v. United States*⁸ and its 2000 decision in *Apprendi v. New Jersey*⁹—the Court had insisted that these groundbreaking decisions about the role of the jury in noncapital cases did *not* conflict with its prior rulings that the jury did not have any required role to play in death-penalty sentencing.¹⁰

On the other hand, the underlying legal logic and rationale of both *Jones* and *Apprendi*, when extended to the capital sentencing context, seemed to compel the conclusion that the Sixth Amendment does give capital defendants the right to insist that a jury make any findings that are required for a sentence of death.¹¹ And in 2002, the *Ring* Court agreed that at least the *first* such finding in a capital case (the finding of at least one statutorily-established aggravating circumstance) does indeed have to be found by a jury, and it has to be found beyond a reasonable doubt.¹² This was a revolutionary result, and *Ring* seemed to portend a great expansion in the concept of the constitutionally-required role of the jury in capital sentencing.¹³

Nevertheless, sixteen years later, the Court has gone no further, at least in terms of its holdings, not even in 2016, when it struck down Florida’s death penalty system for violating *Ring*, in *Hurst v. Florida*.¹⁴

7. See discussion *infra* Part II. In Part II, this Article briefly reviews the “*Gregg* cases,” the five 1976 Eighth Amendment cases that launched the modern era and established the key features that have defined Eighth Amendment capital jurisprudence ever since: the need to narrow the class of murders subject to the death penalty and the need to allow consideration of the individual characteristics of both the crime and the defendant within the capital sentencing process. Part II then focuses upon the capital jury cases from the first twenty years of the modern era, during which the Court recognized that a death sentence requires that multiple “findings” be made, but denied that the Constitution mandated any role for the jury in this regard.

8. 526 U.S. 227 (1999).

9. 530 U.S. 466 (2000).

10. See, e.g., *id.* at 496–97 (reaffirming prior capital-case decisions).

11. See discussion *infra* Section III.A. In Section III.A., this Article analyzes the Court’s non-capital decisions in *Jones* and *Apprendi* and how their functional approach to the “elements” required for a particular sentence logically led to the revolutionary capital sentencing holding of *Ring*. This Article emphasizes, in particular, the broad language and approach of *Apprendi*, especially its use of the generic term “finding” interchangeably with the term “fact” (and “finding of fact”) when referring to the determinations that must be made in order to sentence a defendant to death.

12. *Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002) (quoting *Apprendi*, 530 U.S. at 477).

13. See discussion *infra* Section III.B. In Section III.B., this Article analyzes *Ring*, emphasizing both its revolutionary result and impact, as well its potential limitations, especially its seemingly narrower focus (compared to *Apprendi*) on “facts” and “factfinding.”

14. 136 S. Ct. 616 (2016).

This Article asserts that the legal logic of *Apprendi/Ring* compels the conclusion that the Sixth and Fourteenth Amendments together mandate that the “weighing” finding that is required by most death penalty jurisdictions—about whether the aggravating circumstances in a case “outweigh” the mitigating circumstances in the case—must also be made by a jury *and* that a jury must make this finding beyond a reasonable doubt. In other words, this Article maintains that the Sixth Amendment rule of *Apprendi/Ring* applies to the weighing finding.

Of the numerous state and federal jurisdictions that have addressed this issue, however, precious few have reached this same conclusion. As will be explained in detail, the “rule of *Apprendi/Ring*” is based upon a functional analysis of a particular jurisdiction’s requirements for a death sentence, i.e., the “elements” of a death sentence. Under this functional approach, if a particular finding is a required element for a death sentence, it must be found by a jury and be found beyond a reasonable doubt. This approach would seem to compel the conclusion that, at least for jurisdictions that do require a weighing finding, this finding must also be made by a jury and beyond a reasonable doubt. Nevertheless, this has been a distinctly minority conclusion in this realm.¹⁵

The “failure” of the *Ring* revolution in this regard has been so pronounced and disappointing (at least for some) that some scholars have argued that the Sixth Amendment itself has been a failure and that the Eighth Amendment may provide a more viable avenue for appropriately recognizing the jury as the primary decisionmaker in the capital context.¹⁶ Upon reviewing the minimal impact of *Ring*, which they blame mainly on its applicability only to “findings of fact,”¹⁷ Sam Kamin and Justin Marceau propose that “the role of the jury in capital sentencing is best realized not through the Sixth Amendment, but through the Eighth Amendment.”¹⁸

15. See discussion *infra* Section III.C. In Section III.C., this Article reviews and analyzes how the *Ring* revolution stalled and faltered during the years between *Ring* and *Hurst* regarding both its impact on “hybrid” judge-jury capital sentencing schemes, see discussion *infra* Section III.C.1., and its applicability to the weighing finding, see discussion *infra* Section III.C.3. In Section III.C.2., this Article suggests that the Court’s Eighth Amendment concept of “death eligibility” is a misnomer, at least when taken too literally, which has contributed to an overly narrow interpretation of the proper scope of *Ring* in the Sixth Amendment realm. See discussion *infra* Section III.C.2.

16. See, e.g., Sam Kamin & Justin Marceau, *The Facts About Ring v. Arizona and the Jury’s Role in Capital Sentencing*, 13 U. PA. J. CONST. L. 529, 529–31 (2011). Kamin and Marceau argue that although “*Ring* was initially seen, both by its proponents and its detractors, as a sea change in the way states could structure their capital decision making[,]” this “apparent watershed decision has not forced much change[] [because] [s]tate and federal courts continue to take a crabbed reading of exactly what constitutes fact finding” under *Ring*. *Id.* at 529, 581. Kamin and Marceau maintain that the basic problem is that *Ring*, by its terms, is limited to findings of “fact”; and they blame this limitation for the ease with which the force of *Ring*’s functional analysis has been avoided by courts seeking to limit its impact. See *id.* at 582–83 (“Unless a sentencing decision can be described as fact finding, it simply falls outside the *Apprendi-Ring* purview.”).

17. See *id.* at 580 (“*Ring* requires a jury only when the decision at issue hinges on a finding of fact . . .”).

18. *Id.* at 531.

They maintain that the Eighth Amendment (at least as understood by Justices Stevens and Breyer) can “better effectuate[] the jury-right promise of the Sixth Amendment than does the Sixth Amendment itself.”¹⁹

This Article rejects the suggestion that the Sixth Amendment *Ring* approach to capital jury sentencing is doomed or inadequate (though it certainly has been slow). This Article asserts that the main culprit for the shortfalls of the *Ring* revolution is the *Ring* Court’s use of the word “fact” in its opinion (along with “factfinding” and “findings of fact”). While the word “fact” and a decidedly narrow, nonfunctional approach to this word have indeed been the main cause of *Ring*’s minimal impact—with some help from the Supreme Court’s Eighth Amendment concept of being “death eligible” (which is also troubling and potentially misleading in this realm)—this Article maintains that there is another word that can potentially “save the day” or at least help bring the *Ring* revolution to its logical and constitutionally appropriate conclusion. And the word is “finding.”

This Article undertakes a careful, textual analysis of the *Apprendi* decision, upon which *Ring* is explicitly based, and asserts that the *Apprendi* Court used the broader term “finding” interchangeably with the seemingly more narrow terms “fact” and “finding of fact” to describe the type of determination that is covered by its functional rule.²⁰ This Article emphasizes that although the *Ring* opinion and holding focus upon the terms “fact” and “factfinding,” a narrow understanding of these terms is entirely inconsistent with *Ring*’s roots in *Apprendi* and, more importantly, with the explicitly *functional* nature of the analysis mandated by both.

This Article recognizes that although the Court’s 2016 decision in *Hurst* did strike down Florida’s death penalty system for violating *Ring*, it did not explicitly change or expand the rule of *Ring*.²¹ On the other hand, Justice Sotomayor’s *Hurst* opinion returned to a much broader “finding”-based Sixth Amendment approach (like that of *Apprendi*), which may herald a future fulfillment of the *Ring* revolution by applying its elements-based rule to *all* required capital findings, including the weighing finding.²² Decisions by the Supreme Courts of Florida and Delaware have already recognized *Hurst*’s broader vision and approach and have applied

19. *Id.* at 531–32; see also Jeffrey Wermer, Comment, *The Jury Requirement in Death Sentencing After Hurst v. Florida*, 94 DENV. L. REV. 385, 410, 411 (2017) (proposing that due to the “fact-finding” limitations of the Sixth Amendment’s *Ring* approach, even post-*Hurst*, “Eighth Amendment capital jurisprudence should . . . be brought to bear to protect a criminal defendant from being sentenced to death by a judge’s determination”); *id.* at 400 (lamenting that “[t]he effects of *Ring* and *Hurst* depend on what exactly a ‘fact’ is with regard to capital sentencing”).

20. And in *Apprendi*’s application of its new rule to the facts of that case, it consistently described its analysis as applying to “the required ‘motive’ finding” and the finding of biased purpose without ever concluding that such “findings” constituted “facts” or “factfinding.” *Apprendi v. New Jersey*, 530 U.S. 466, 494–95 (2000) (quoting *State v. Apprendi*, 731 A.2d 485, 492 (1999), *rev’d*, 530 U.S. 466).

21. See discussion *infra* Section IV.A.

22. See discussion *infra* Section IV.A. In Section IV.A., this Article analyzes *Hurst* and its broader “finding”-based vision of the jury’s necessary Sixth Amendment role in capital sentencing.

Hurst expansively within their jurisdictions (at least prospectively). On the other hand, it remains to be seen whether the numerous capital jurisdictions that already require a weighing-type finding will likewise recognize that under the Sixth Amendment rule of *Apprendi/Ring/Hurst*, such findings must be made by a jury *and* beyond a reasonable doubt.²³

I. *FURMAN V. GEORGIA* AND THE END OF ABSOLUTE JURY DISCRETION

In 1972, in *Furman v. Georgia*,²⁴ the U.S. Supreme Court, in a 5–4 decision, struck down the death penalty as it existed at the time for violating the Eighth Amendment’s prohibition on “cruel and unusual punishment[.]”²⁵ In the years leading up to *Furman*, death penalty sentencing in America was entirely jury determined, with the decision about whether to sentence a particular defendant (who had been convicted of a capital offense) to death or to some term of imprisonment left entirely to the unguided discretion of the jury.²⁶ Interestingly, such discretionary jury sentencing had previously been seen as a significant and progressive sentencing reform in America, since it was preceded—from colonial times until late in the nineteenth century—by a protracted age of mandatory capital sentencing, in which a death sentence followed automatically from a conviction for a remarkably wide range of crimes.²⁷ This positive understanding of discretionary capital sentencing had begun to come under sharp attack, however, in the years leading up to *Furman*, based upon a growing perception that the death penalty was being imposed not for the worst crimes or upon the worst criminals, but arbitrarily and often due to racial animus.²⁸

Nevertheless, the Supreme Court’s 1972 landmark decision in *Furman*, striking down the death penalty as it was then being used, came as a huge shock.²⁹ In addition, the basis for the Supreme Court’s decision was not easy to discern because the *Furman* decision resulted in a very brief per curiam holding, followed by nine separate opinions, one for every Justice on the Court, and with no Justices in the majority joining the opinion of anyone else, i.e., no plurality opinion, let alone a majority opinion.³⁰

23. See discussion *infra* Section IV.B. In Section IV.B., this Article summarizes the impact of *Hurst* among the states that had judge-jury capital sentencing at the time of *Hurst* (especially Delaware, Florida, and Alabama) and analyzes the death penalty statutes of all thirty-one current death penalty states regarding the potential applicability of *Ring/Hurst* to the weighing-type findings that are required by the vast majority of these states.

24. 408 U.S. 238 (1972) (per curiam).

25. *Id.* at 239–40; see also U.S. CONST. amend. VIII.

26. CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 43 (2016) (“By the 1960s, every capital jurisdiction afforded absolute discretion to jurors to impose or withhold the death penalty.”).

27. *Id.* at 9–12.

28. *Id.* at 44.

29. *Id.* at 60 (“National and state leaders greeted *Furman* with vehement objection.”).

30. *Furman*, 408 U.S. at 239–40 (per curiam); *id.* at 240–57 (Douglas, J., concurring); *id.* at 257–306 (Brennan, J., concurring); *id.* at 306–10 (Stewart, J., concurring); *id.* at 310–14 (White, J., concurring); *id.* at 314–74 (Marshall, J., concurring); *id.* at 375–405 (Burger, C.J., dissenting); *id.* at

Yet among the opinions of the *Furman* majority Justices, the completely discretionary nature of capital sentencing as of 1972 appeared to be its main downfall. Whereas Justices Brennan and Marshall concluded that the death penalty itself violated the Eighth Amendment,³¹ Justices Stewart and White focused upon the unpredictable and seemingly capricious nature of capital sentencing decisions at the time, in which death sentences were quite rare overall, but also seemingly random.³² Justice Douglas emphasized, in particular, the profound potential for (and apparent reality of) vast racial discrimination within this entirely discretionary process.³³

After *Furman*, it was not entirely clear whether the death penalty in America was gone for good or just needed to be reformulated. Jurisdictions that wanted to continue to use the death penalty scrambled to come up with a system that would pass constitutional muster, i.e., be upheld by the Supreme Court, and the main focus of these efforts was to come up with a system of “guided discretion.”³⁴ During the four short years after *Furman*, a remarkable thirty-five states and the U.S. Congress passed new death penalty statutes.³⁵ The death penalty in America was not going down without a fight.

II. THE CAPITAL JURY IN THE FIRST TWENTY YEARS OF THE MODERN ERA: COMMON, BUT NOT REQUIRED

On July 2, 1976, on the brink of the 200th anniversary of the signing of the Declaration of Independence, the Supreme Court issued its decisions in five separate cases regarding the constitutionality of the capital punishment systems adopted in Georgia, Florida, Texas, North Carolina, and Louisiana.³⁶ The Supreme Court’s “modern” death penalty jurisprudence can be described as beginning on this day when the Court affirmed the constitutionality of the capital sentencing schemes of Georgia, Florida,

405–14 (Blackmun, J., dissenting); *id.* at 414–65 (Powell, J., dissenting); *id.* at 465–70 (Rehnquist, J., dissenting).

31. *See id.* at 305 (Brennan, J., concurring); *id.* at 370–71 (Marshall, J., concurring).

32. *See, e.g., id.* at 309–10 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); *id.* at 310 (describing the American death penalty as “wantonly and . . . freakishly imposed”); *id.* at 313 (White, J., concurring) (concluding that “the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not”).

33. *Id.* at 256–57 (Douglas, J., concurring) (“Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”).

34. *See STEIKER & STEIKER, supra* note 26, at 61 (“The distinctive feature of all the new statutes was an effort to limit the discretion characteristic of death penalty schemes before *Furman*.”).

35. *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (plurality opinion).

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

and Texas (and struck down the systems of North Carolina and Louisiana).³⁷ For present purposes, two key themes came out of these cases. First, capital systems must specifically narrow the class of offenses for which the death penalty can be given in order to limit discretion. This theme came out of the cases affirming the death penalty schemes of Georgia, Florida, and Texas, especially *Gregg v. Georgia*.³⁸ Second, capital systems must allow for individual consideration of the specific crime and criminal at issue, including the character and record of that defendant. This theme emerged in the cases striking down the mandatory death penalty schemes of North Carolina and Louisiana, particularly the decision in *Woodson v. North Carolina*.³⁹

By and large, the “narrowing” requirement has been implemented through the use of either guilt-stage “aggravated murder” crimes or sentencing-stage “aggravating circumstances,” both of which specifically limit the murders to which the death penalty can be applied.⁴⁰ And the “individualized consideration” requirement has been implemented by insisting that death penalty jurisdictions allow consideration of any mitigating evidence or “mitigating circumstances” that the defendant chooses to offer as a basis for a sentence less than death.⁴¹

While the 1976 “*Gregg* cases” focused on *how* the death penalty decision must be made, they mostly paid little attention to *who* was actually making this decision and whether the jury was required. In fact, during the first twenty years of the modern era, the Court consistently declined to find that the jury had any central or constitutionally-required role in capital sentencing, often with quite limited and conclusory analysis of the issue. Instead, the Court repeatedly chose to allow the states great freedom in their decisions about how to use the jury in the realm of capital sentencing, including not at all.

37. While *Furman* could also be described as the beginning of this “modern era,” the return of the death penalty to the United States in 1976, in significantly changed form, is also a plausible place to mark the start of this new era.

38. *Gregg*, 428 U.S. at 171–72, 189 (“*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.”).

39. *Woodson*, 428 U.S. at 304 (“[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (citation omitted)).

40. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (“[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”); see also *Lowenfield v. Phelps*, 484 U.S. 231, 244–45 (1988) (“We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase.”).

41. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (“[A] death penalty statute must not preclude consideration of relevant mitigating factors.”); see also *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (“[T]he sentencer in [a] capital case[] must be permitted to consider any relevant mitigating factor . . .”).

*Proffitt v. Florida*⁴² was one of the five *Gregg* cases that marked the beginning of the modern era and was the Court's first post-*Furman* consideration of a capital system in which a jury was not the key death penalty decisionmaker.⁴³ Although Florida had not entirely removed the jury from the capital sentencing process, it subjugated the jury to the trial judge, who served as the actual decisionmaker regarding both the required findings and the ultimate sentencing decision.⁴⁴ Although the challenges to Florida's capital system were not Sixth Amendment challenges,⁴⁵ the *Proffitt* Court's statements about the role of the jury set the stage for the Court's resolution of jury-focused claims in later cases.

The Florida system provided that, after a defendant was convicted by a jury of first-degree murder, a separate evidentiary hearing would be held before the same judge and jury to determine whether the defendant would be sentenced to life imprisonment or to the death penalty.⁴⁶ Evidence could be presented by both the prosecution and the defense regarding "aggravating circumstances" and "mitigating circumstances," as defined by Florida law, and about whether the defendant should be sentenced to death.⁴⁷ The jury was not asked to make any specific findings, but was directed to consider "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist," and then make a sentencing recommendation, life or death, which was based on a majority vote and was only advisory.⁴⁸

In order to actually sentence a defendant to death, the trial judge was required to set forth in writing: (1) which of Florida's statutory aggravating circumstances existed in the case, and (2) whether the mitigating circumstances in the case were "insufficient . . . to outweigh the aggravating circumstances."⁴⁹ The trial court could only sentence a defendant to death if it made both of these two findings.⁵⁰

42. 428 U.S. 242 (1976) (plurality opinion).

43. See *id.* at 246. The *Proffitt* decision, upholding Florida's new capital sentencing scheme, was decided by a vote of 7–2 with only Justices Brennan and Marshall dissenting. See *Gregg*, 428 U.S. at 227 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting); *Proffitt*, 428 U.S. at 244, 260–61. The plurality opinion of Justices Stewart, Powell, and Stevens, *Proffitt*, 428 U.S. at 244–60, is generally regarded as articulating the "authoritative rationale" for the Court's holding. Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1093 (2003).

44. *Proffitt*, 428 U.S. at 251.

45. *Id.* at 244 ("The issue presented by this case is whether the imposition of the sentence of death for the crime of murder under the law of Florida violates the Eighth and Fourteenth Amendments.").

46. *Id.* at 247–48.

47. *Id.* at 248 (quoting FLA. STAT. § 921.141(2)(b)–(c) (1976) (amended 2017)).

48. *Id.* at 248–49 (quoting § 921.141(2)(b)–(c)).

49. *Id.* at 250 (quoting § 921.141(3)(a)–(b)).

50. *Id.* The Florida capital sentencing procedure upheld in *Proffitt* in 1976 was fundamentally and structurally the same as the Florida procedure struck down almost forty years later in *Hurst*, based upon the Court's 2016 conclusion that the Sixth Amendment "require[s] Florida to base . . . [a] death sentence on a jury's verdict, not a judge's factfinding." *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

The *Proffitt* Court recognized that in Florida “the actual [death] sentence is determined by the trial judge,”⁵¹ while the jury’s role “is only advisory.”⁵² The *Proffitt* Court’s analysis of the potential constitutional significance of Florida’s subjugation of the jury’s role, however, was remarkably brief: “*This Court has pointed out that jury sentencing in a capital case can perform an important societal function, v. Illinois, 391 U.S. 510, 519 n.15 (1968), but it has never suggested that jury sentencing is constitutionally required.*”⁵³ And that was the entirety of *Proffitt*’s analysis regarding whether a jury is constitutionally required for sentencing a defendant to death, i.e., a notation that the Court has “never suggested” that a jury is “constitutionally required,” which, in turn, served as a strong suggestion that it is not.

Exactly eight years later, on July 2, 1984, in *Spaziano v. Florida*,⁵⁴ the Supreme Court took up this issue directly and made its big “wrong turn” on the issue of capital jury sentencing—a turn that the Court majority would not seriously question or attempt to right until *Ring* in 2002. The Court made this wrong turn by allowing the states unconstrained flexibility to choose *who* would be the death penalty decisionmaker, even while imposing many other limitations on how the death penalty decision could be made, as well as the evidence that must be admitted regarding this decision.⁵⁵

The *Spaziano* case involved a challenge to the same Florida capital sentencing scheme addressed in *Proffitt*.⁵⁶ In *Spaziano*, after convicting the defendant of murder, the jury recommended a sentence of imprisonment for life.⁵⁷ The trial judge, however, reached a different conclusion, finding, “notwithstanding the recommendation of the jury,” (1) that two specific statutory aggravating circumstances existed in the case, (2) that “the mitigating circumstances were insufficient to outweigh such aggravating circumstances,” and (3) that “a sentence of death should be imposed in this case.”⁵⁸

51. *Proffitt*, 428 U.S. at 249.

52. *Id.*

53. *Id.* at 252 (citation omitted) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)). The *Proffitt* Court’s citation to its pre-*Furman* (i.e., pre-“modern era”) capital decision in *Witherspoon* is quite striking here because the *Witherspoon* Court *did* envision a critical and important role for the jury in the capital sentencing process. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (“[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.”).

54. 468 U.S. 447 (1984), *overruled by Hurst*, 136 S. Ct. 616.

55. *Id.* at 462, 464.

56. *See id.* at 449.

57. *Id.* at 451.

58. *Id.* at 451–52 (quoting the trial court).

This “judge trumps jury” result is often described as a “judicial override,”⁵⁹ and defendant Spaziano challenged the judicial override in his case.⁶⁰ In particular, he challenged it under the Fifth, Sixth, Eighth, and Fourteenth Amendments.⁶¹ The Court noted that it could have limited its decision to whether Florida’s judicial-override system was constitutional, but it ultimately chose to speak more broadly about whether the jury had *any* necessary constitutional role in the choice about whether to sentence a defendant to death.⁶² And the *Spaziano* Court spoke very broadly indeed:

In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.⁶³

Regarding the Sixth Amendment, the *Spaziano* Court defaulted to the same (weak) conclusion it had invoked in *Proffitt*, namely, that “[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination” regarding “the appropriate punishment to be imposed on an individual.”⁶⁴ And regarding the Eighth Amendment, the Court quickly dispatched the “because death is different” argument for requiring a jury to sentence a defendant to death.⁶⁵

When Florida’s capital sentencing scheme was yet again challenged five years later in *Hildwin v. Florida*,⁶⁶ the focus was on the Sixth Amendment right to jury sentencing.⁶⁷ The *Hildwin* petitioner asserted that Florida’s system violated the Sixth Amendment because it allowed a defendant

59. See *id.* at 463 (referring to states that “allow[] a judge to override a jury’s recommendation of life”); see also Ryan Lovelace, *Alabama Knocks Down Judicial Override in Death Penalty Cases*, WASH. EXAMINER (Apr. 12, 2017, 11:44 AM), <https://www.washingtonexaminer.com/alabama-knocks-down-judicial-override-in-death-penalty-cases>; Richard Wolf, *Supreme Court Lets Alabama Judges Impose Death Penalty*, USA TODAY (Jan. 23, 2017), <https://www.usatoday.com/story/news/politics/2017/01/23/supreme-court-alabama-florida-death-penalty-judge-jury/96947280>.

60. *Spaziano*, 468 U.S. at 457.

61. *Id.* at 457–58.

62. See *id.* at 458, 464. The Court noted that it “need not decide whether jury sentencing in all capital cases is required,” because the case presented “only the question whether, given a jury verdict of life, the judge may override that verdict and impose death.” *Id.* at 458. The Court further noted, however, that defense counsel had “acknowledged at oral argument . . . [that] his fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury.” *Id.* Hence the Court concluded: “We therefore address that fundamental premise.” *Id.*

63. *Id.* at 464.

64. *Id.* at 459.

65. See *id.* at 460 (“[T]here certainly is nothing in the safeguards necessitated by the Court’s recognition of the qualitative difference of the death penalty that *requires* that the sentence be imposed by a jury.”).

66. 490 U.S. 638 (1989) (per curiam), *overruled by* *Hurst v. Florida*, 136 S. Ct. 616 (2016).

67. *Id.* at 638. There was no judicial override issue in *Hildwin* because the jury had unanimously recommended a death sentence, and the trial court agreed. *Id.* at 639.

to be sentenced to death “without a specific finding by [a] jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment.”⁶⁸ This argument was unlike any that had been made or addressed in *Spaziano*.⁶⁹ Nevertheless, the *Hildwin* Court rejected it in a per curiam opinion, noting that in *Spaziano* it had “upheld against Sixth Amendment challenge the trial judge’s imposition of a sentence of death notwithstanding that the jury had recommended a sentence of life imprisonment.”⁷⁰ The Court added: “If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, . . . it follows that it does not forbid the judge to make the written *findings* that authorize imposition of a death sentence when the jury unambiguously recommends [death].”⁷¹

The *Hildwin* Court maintained that “the existence of an aggravating factor here is not an element of the offense but instead is ‘a sentencing factor that comes into play only after the defendant has been found guilty.’”⁷² This assertion is, in a nutshell, precisely the same argument that would be made by the State of Arizona (and rejected by the Court) thirteen years later in *Ring*.⁷³ Nevertheless, the above conclusory sentence was all that was offered to justify the *Hildwin* Court’s rejection of this Sixth Amendment challenge. The *Hildwin* Court declared, “Accordingly, the Sixth Amendment does not require that the specific *findings* authorizing the imposition of the sentence of death be made by the jury.”⁷⁴

When this same issue came before the Court again just one year later in *Walton v. Arizona*,⁷⁵ the Court again quickly disposed of it.⁷⁶ The Arizona capital system considered in *Walton*, unlike the Florida system, was *entirely* judge based.⁷⁷ The death penalty sentencing hearing was conducted “before the court alone,”⁷⁸ and the judge would determine whether any of Arizona’s statutory aggravating circumstances existed, whether any mitigating circumstances existed, and whether any “mitigating circumstances [were] sufficiently substantial to call for leniency.”⁷⁹ As in

68. *Id.*

69. It was also the argument that later prevailed in *Ring*. See *Ring v. Arizona*, 536 U.S. 584, 607, 609 (2002).

70. *Hildwin*, 490 U.S. at 639–40.

71. *Id.* at 640 (emphasis added).

72. *Id.* at 641 (quoting *McMillian v. Pennsylvania*, 477 U.S. 79, 86 (1986)).

73. See *Ring*, 536 U.S. at 609.

74. *Hildwin*, 490 U.S. at 640–41 (emphasis added). It should be noted that the *Hildwin* Court here and otherwise (including *supra*) referred to the determinations that must be made before a defendant could be sentenced to death as “findings,” though the Court emphatically declined to require that these findings be made by a jury. See *id.*

75. 497 U.S. 639 (1990), *overruled by Ring*, 536 U.S. 584.

76. *Id.* at 647–49, 655.

77. See ARIZ. REV. STAT. ANN. § 13-703(B) (1989) (current version at §§ 13-751 to -752 (2017)).

78. *Walton*, 497 U.S. at 643 (quoting § 13-703(B)).

79. *Id.* at 643–44 (quoting § 13-703(E)).

Hildwin, the petitioner challenged this system under the Sixth Amendment, arguing that “every finding of fact underlying the sentencing decision must be made by a jury, not by a judge.”⁸⁰

The *Walton* Court’s response was both summary and unflinching: “Any argument that the Constitution requires that a jury impose the sentence of death or make the *findings* prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.”⁸¹ And the Court quoted *Hildwin*’s conclusion that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.”⁸²

The *Walton* opinion reveals that the Court clearly understood the overall import of the defendant’s claims in that case, namely, that if *either* the Sixth Amendment or the Eighth Amendment mandate that the “findings” that are required for a death sentence be made by a jury, this jury mandate would apply to *all* required capital “findings.”⁸³ And the *Walton* Court, like the *Hildwin* Court, repeatedly referred to the “findings”—in the plural—that were required for a death sentence, under the laws of the jurisdictions at issue.⁸⁴ These decisions recognized that *if* the Constitution mandates that any required capital findings (such as the existence of an aggravator) have to be made by a jury, then it would logically follow that *all* death-sentence-required “findings” have to be made by a jury (including, for example, any finding regarding the weighing of aggravating and mitigating circumstances or whether mitigating circumstances are “sufficiently substantial to call for leniency”). Although *Walton* and *Hildwin* rejected the claim that aggravating circumstances are required “elements” of a capital offense, they recognized what was at stake and the profound significance of starting down this path.

And by 1995, the Court seemed to have reached overwhelming consensus in its resolution *not* to go down this path. In *Harris v. Alabama*,⁸⁵ in an opinion that garnered the assent of eight of the nine Justices on the Court, the Court rejected a claim that Alabama’s hybrid “judge-jury” capital sentencing statute was unconstitutional because it did not specify the weight that the trial judge had to give to the jury’s sentencing recommendation.⁸⁶ Considering that in *Walton* the Court had upheld a capital sentencing scheme with *no* jury involvement at all, this result seems unsurprising. It is worth noting, however, that this time there was only one dissenter, Justice Stevens, who articulated a powerful argument for the role of the jury in *all* capital sentencing proceedings.⁸⁷ Yet because both Justice

80. *Id.* at 647.

81. *Id.* (emphasis added) (quoting *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)).

82. *Id.* (quoting *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989) (per curiam)).

83. *See id.* at 647–49.

84. *See id.* at 647–48.

85. 513 U.S. 504 (1995).

86. *Id.* at 504, 512.

87. *See id.* at 515–26 (Stevens, J., dissenting).

Brennan and Justice Marshall had left the Court since *Walton*—and no other Justice had joined the Stevens camp—he dissented alone.

The near-unanimity of the *Harris* opinion, as well as the unblinking nature of the final paragraph, are both rather striking. The opinion concludes, with nary a citation to authority nor a caveat, as follows: “The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is not offended when a State further requires the sentencing judge to consider a jury’s recommendation and trusts the judge to give it the proper weight.”⁸⁸

As of 1995, any argument that the American jury had *any* required constitutional role—beyond finding the defendant guilty of murder—in a decision about whether a convicted murderer could be or should be sentenced to death seemed to be effectively over. It appeared that the Court would allow death penalty states complete freedom to choose who would be the decisionmaker regarding *any* required “findings” in a capital sentencing proceeding, including findings about aggravating circumstances, findings about whether aggravating circumstances outweigh mitigating circumstances, and the ultimate finding about whether the defendant should be sentenced to prison or to death. It appeared that the Court was quite comfortable that the Constitution permitted a trial judge, a jury, or any combination of the two to make any and all of these decisions. Neither the Sixth Amendment, nor the Eighth Amendment, nor the Fourteenth Amendment appeared to provide any restrictions on state discretion in this regard; and the Supreme Court appeared quite content with this result.

But revolutions are often hard to predict. And the Supreme Court’s capital jury sentencing revolution was actually not far off.

III. THE CAPITAL JURY IN THE NEXT TWENTY YEARS: REQUIRED, BUT TO WHAT EXTENT?

A. The Unlikely Beginning of the Capital Jury Revolution

Death penalty cases are overwhelmingly state court cases, and (in the modern era) they are always murder cases.⁸⁹ Nevertheless, the case that began the capital jury sentencing revolution was not a capital case, nor was it a murder case or a state court case. The revolution began with *Jones v.*

88. *Id.* at 515 (majority opinion).

89. See *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding that the Eighth Amendment prohibits the death penalty as punishment for rape of child where crime does not result in death of victim), *modified*, 554 U.S. 945 (2008); see also *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion) (holding that the Eighth Amendment prohibits the death penalty as punishment for crime of rape of an adult woman). These cases are generally understood to mean that the death penalty is only allowed for murder. See *Kennedy*, 554 U.S. at 437 (concluding that for “crimes against individual persons,” the death penalty can only be given in cases where a life has been taken).

United States, which was nominally a case about the statutory interpretation of the federal carjacking statute.⁹⁰ Although *Jones* seemed to potentially herald a sentencing revolution in general, it did not appear to be one that would affect capital sentencing.⁹¹

The federal carjacking statute established three different punishment ranges for carjacking: up to fifteen years for the basic carjacking offense, up to twenty-five years if the carjacking resulted in “serious bodily injury,” and up to life imprisonment if the carjacking resulted in a death.⁹² The *Jones* petitioner was indicted and convicted at a jury trial of carjacking based simply upon the elements of the basic offense.⁹³ At his later sentencing before the district court, however, the state presented evidence that the offense involved “serious bodily injury.”⁹⁴ The district court found by a preponderance of the evidence that this was true (over defense objection that this had not been charged or proven to the jury) and then sentenced the petitioner to imprisonment for twenty-five years on the carjacking count.⁹⁵

The *Jones* majority described the case as turning on “whether the federal carjacking statute . . . defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict.”⁹⁶ The Court concluded that “the better reading is of three distinct offenses, particularly in light of the rule that any interpretive uncertainty should be resolved to avoid serious questions about the statute’s constitutionality.”⁹⁷ The 5–4 *Jones* decision revealed a deeply divided Court, and the real fight was not nearly so much about the best interpretation of the federal carjacking statute, but rather about whether the case raised “serious constitutional questions.”⁹⁸

The Court emphasized that the key question was whether the “serious bodily injury” provision was “an element of an offense rather than a sentencing consideration, given that *elements* must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.”⁹⁹ And even the dissenters agreed that the issue at stake was whether the provisions establishing higher penalties for a carjacking

90. *Jones v. United States*, 526 U.S. 227, 229 (1999). The *Jones* decision was about 18 U.S.C. § 2119 (1988), as of the time the petitioner was charged. *Jones*, 526 U.S. at 229–30; see 18 U.S.C. § 2119 (1988) (amended 1996).

91. See *Jones*, 526 U.S. at 254 (Kennedy, J., dissenting) (“Departing from this recent authority, the Court’s sweeping constitutional discussion casts doubt on sentencing practices and assumptions followed not only in the federal system but also in many States.”).

92. *Id.* at 230 (majority opinion) (quoting 18 U.S.C. § 2119).

93. *Id.* at 230–31.

94. *Id.* at 231.

95. *Id.*

96. *Id.* at 229.

97. *Id.*

98. *Id.* at 251.

99. *Id.* at 232 (emphasis added).

that resulted in “serious bodily injury” or “death” created new and separate offenses (for which these provisions were required “elements”) or merely “sentencing considerations” of a single carjacking offense.¹⁰⁰

The *Jones* majority and the dissenters disagreed vehemently over the proper test for determining whether something is an “element.” The majority’s test—which proposed a bold new rule—was as follows:

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, *any fact* (other than prior conviction) *that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.*¹⁰¹

The majority conceded that “our prior cases suggest rather than establish this principle” and thus that the government’s proposed interpretation of the carjacking statute raised an issue of constitutional “doubt,” rather than a clear violation.¹⁰²

While the majority recognized the plausibility of the dissent’s single-offense interpretation of the carjacking statute,¹⁰³ it maintained that its reading of the statute should be preferred because it *avoided* the “grave and doubtful constitutional questions” that would be raised by the dissent’s approach.¹⁰⁴ The majority maintained that allowing an increase in the defendant’s maximum possible sentence—from fifteen years to twenty-five years to life—based upon a “preponderance of the evidence” finding by the court at sentencing (about the results of the carjacking), rather than a “beyond a reasonable doubt” finding by the jury at trial, raised troubling constitutional issues regarding the appropriate role of the jury.¹⁰⁵

The *Jones* dissenters warned, however, that the majority’s proposed approach actually *caused* constitutional doubt regarding the Court’s capital sentencing cases, asserting, “If it is constitutionally impermissible to allow a judge’s *finding* to increase the maximum punishment for carjacking by [ten] years, it is not clear why a judge’s *finding* may increase the maximum punishment for murder from imprisonment to death.”¹⁰⁶ The dissent warned: “Reexamination of this area of our capital jurisprudence

100. See *id.* at 254–55, 269 (Kennedy, J., dissenting) (arguing that if something qualifies as an “element” of an offense, this implies the constitutional requirements of being included in an indictment and proved to a jury beyond a reasonable doubt).

101. *Id.* at 243 n.6 (majority opinion) (emphasis added).

102. *Id.*

103. *Id.* at 238–39.

104. *Id.* at 239–40 (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

105. *Id.* at 242–44.

106. *Id.* at 271–72 (Kennedy, J., dissenting) (emphasis added). Justice Kennedy’s dissent added that “*Walton [v. Arizona]* would appear to have been a better candidate for the Court’s new approach than is the instant case.” *Id.* at 272. It should also be noted here that Kennedy’s dissent used the term “finding” to refer to the kind of required capital sentencing determination that was at issue. See *id.*

can be expected.”¹⁰⁷ Thus the *Jones* dissenters predicted the Court’s eventual conclusion in *Ring*, even while the *Jones* majority denied that its new approach raised any such conflict and even before the majority’s new approach had been actually adopted as the law of the land.¹⁰⁸

Just one year later in 2000, in *Apprendi v. New Jersey*, the Court’s new approach became the law of the land, launching a broad and general sentencing revolution in earnest.¹⁰⁹ Once again, the vote was 5–4, with the same Justices in the majority and dissenting as in *Jones* (though the Court was even more deeply divided),¹¹⁰ and with the majority continuing to deny that its bold, new approach to sentencing in general had any implications for capital sentencing.¹¹¹

The question before the Court was the constitutionality of a New Jersey “hate crime” statute, which provided for an increased maximum term of imprisonment if a trial judge found at sentencing (by a “preponderance of the evidence”) that the crime at issue was committed “with a purpose to intimidate an individual or group . . . because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.”¹¹² In *Apprendi*, the relevant underlying offense (to which the defendant pleaded guilty) was for second-degree possession of a firearm for an unlawful purpose, which had a sentencing range of five to ten years.¹¹³ Even though the defendant’s indictment did not mention the hate crime statute or allege that he had acted with a biased purpose, after the defendant pleaded guilty, the prosecutor requested that his punishment on a particular second-degree possession of a firearm count be “enhanced” based on the hate crime statute.¹¹⁴ After an evidentiary hearing, the trial judge ruled that the New Jersey hate crime enhancement applied because the offense at issue was “motivated by racial bias,” which increased the potential sentence on that particular count to a range of ten to twenty years.¹¹⁵

107. *Id.*

108. *See id.* at 250–51 (majority opinion) (denying the relevance of *Spaziano*, *Hildwin*, and *Walton* to the Sixth Amendment analysis and approach relied upon in *Jones*).

109. *See Apprendi v. New Jersey*, 530 U.S. 466, 524 (2000) (O’Connor, J., dissenting) (“Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*.”).

110. Justice Stevens wrote the majority opinion in *Apprendi*, which was joined by Justices Scalia, Souter, Thomas, and Ginsburg. *Id.* at 468 (majority opinion). Justice O’Connor filed a dissenting opinion, which was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. *Id.* at 523 (O’Connor, J., dissenting). In addition, Justice Scalia filed a concurring opinion, *id.* at 498 (Scalia, J., concurring), and Justice Thomas filed a concurring opinion, which was joined in part by Scalia, *id.* at 499 (Thomas, J., concurring). And Justice Breyer filed a dissenting opinion, which was joined by Chief Justice Rehnquist. *Id.* at 555 (Breyer, J., dissenting).

111. *Id.* at 496–97.

112. *Id.* at 468–69 (majority opinion) (quoting N.J. STAT. ANN. § 2C:44-3(e) (West 1997) (amended 2001)).

113. *Id.* at 469–70.

114. *Id.*

115. *Id.* at 470–71. The trial judge found, by a preponderance of the evidence, that the sentencing enhancement applied—and that it was constitutional—and then sentenced the defendant to imprisonment for twelve years on the enhanced count. *Id.* at 471.

The *Apprendi* majority framed the issue before the Court as follows: “The question presented is whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from [ten] to [twenty] years be made by a jury on the basis of proof beyond a reasonable doubt.”¹¹⁶ The Court noted that it had “foreshadowed” its answer to this question in *Jones* and that “[t]he Fourteenth Amendment commands the same answer in this case involving a state statute.”¹¹⁷

The *Apprendi* Court emphasized the “surpassing importance” of the Fourteenth Amendment right to due process and the Sixth Amendment right to jury trial and concluded that “[t]aken 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.’”¹¹⁸ After discussing the common law tradition regarding the rights to jury trial and due process, the early American understanding of these rights, and the Court’s own case law regarding these rights,¹¹⁹ the *Apprendi* majority formally adopted the rule it had foretold in *Jones*: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹²⁰ The *Apprendi* majority described this principle as “the constitutional rule that emerges from our history and our case law.”¹²¹

The Court’s approach in *Apprendi* was an adamantly functional one, rather than a formalistic one, regarding how its new rule should be applied. The *Apprendi* Court emphasized that in determining whether a particular “required finding” is an “element” that must be proven to a jury or a “sentencing factor” that could be found by a judge, “[l]abels do not afford an acceptable answer.”¹²² The Court also noted that the location of a particular statute within a jurisdiction’s statutory scheme was likewise not decisive and, in particular, that “the mere presence of this ‘enhancement’ in a sentencing statute does not define its character.”¹²³

Instead, the Court emphasized that the determinative issue was the effect of the finding at issue: “[T]he relevant inquiry is one not of form, but of effect—does the required *finding* expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”¹²⁴ And the Court found constitutional significance in the change in the defendant’s

116. *Id.* at 469.

117. *Id.* at 476.

118. *Id.* at 476–77 (second alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

119. *See id.* at 476–90.

120. *Id.* at 490.

121. *Id.* at 492.

122. *Id.* at 494 (quoting *State v. Apprendi*, 731 A.2d 485, 492 (N.J. 1999)).

123. *Id.* at 495–96.

124. *Id.* at 494 (emphasis added).

maximum sentence (from ten years to twenty years): “Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance.”¹²⁵ The Court declared: “When a judge’s *finding* based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as ‘a tail which wags the dog of the substantive offense.’”¹²⁶

It should be noted that the *Apprendi* Court here repeatedly used the word “finding” to refer to a determination that, under the Court’s new rule, must be made by a jury and beyond a reasonable doubt, regardless of its label or characterization by the jurisdiction at issue, *if* the effect of the determination is to increase the maximum possible sentence on the underlying count.¹²⁷ Although the *Apprendi* opinion also used the term “fact” to refer to such determinations,¹²⁸ which is arguably narrower and more limited than the term “finding,” a careful reading of the opinion reveals that the Court did *not* intend its use of the term “fact” in its various assertions of this new rule to be read narrowly or to have any different meaning than the term “finding,” which it used repeatedly and interchangeably with the term “fact” in this context.

For example, the *Apprendi* Court noted that the defendant’s argument on appeal was that due process “requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt.”¹²⁹ And the Court noted that in *Jones* it had “expressed serious doubt concerning the constitutionality of allowing penalty-enhancing findings to be determined by a judge by a preponderance of the evidence.”¹³⁰

Furthermore, the *Apprendi* Court *consistently* used the term “finding,” rather than “fact” or even “factual finding,” when referring to the specific determination that was at issue in the case before the Court: whether the defendant had acted with a “purpose to intimidate” based upon race.¹³¹ This is understandable because it sounds somewhat strange to call this type of purpose or mental state a “fact.”¹³² The *Apprendi* Court noted that the challenged New Jersey scheme allowed a defendant to be convicted at trial based upon a jury’s “finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon” (a second-degree offense), but then allowed a judge to impose a sentence identical to that of a greater

125. *Id.* at 495.

126. *Id.* (emphasis added) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

127. *See id.* at 474, 494–95.

128. *See supra* text accompanying note 120.

129. *Apprendi*, 530 U.S. at 471.

130. *Id.* at 472 (citing *Jones v. United States*, 526 U.S. 227, 251–52 (1999)).

131. *See id.* at 471–74, 491–95.

132. Indeed, the New Jersey Supreme Court dissent in the case below, which the *Apprendi* majority quoted from, likewise used the word “finding” to refer to the determination at issue. *See id.* at 473–74 (quoting *State v. Apprendi*, 731 A.2d 485, 498 (N.J. 1999) (Stein, J., dissenting)).

(first-degree) offense “based upon the judge’s finding, by a preponderance of the evidence, that the defendant’s ‘purpose’ for unlawfully possessing the weapon was ‘to intimidate’ his victim on the basis of a particular characteristic the victim possessed.”¹³³ The Court also noted that in the current case, “it does not matter whether the required finding is characterized as one of intent or of motive,”¹³⁴ still referring to this determination as involving a “finding” (rather than a “fact” or a “finding of fact”).¹³⁵

Yet despite the *Apprendi* opinion’s emphasis on the broad and functional nature of its new rule—that any “finding” that, by law, effectively increases a defendant’s maximum sentence is actually an “element” of a greater offense that must be found by a jury beyond a reasonable doubt—the majority maintained that its new rule did not undermine its capital cases, such as *Walton*, allowing judges (rather than juries) “to find specific aggravating factors before imposing a sentence of death.”¹³⁶ The *Apprendi* majority suggested (briefly and unconvincingly) that the capital sentencing context was different and that its new rule would not apply there anyway because “once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.”¹³⁷ This proffered distinction was both inaccurate (because a jury conviction of murder does not, without further findings, actually expose a defendant to a death sentence) and contrary to the Court’s own consistent recognition of the nature of capital sentencing in America in the modern era.¹³⁸

Justice O’Connor’s dissent in *Apprendi*, which was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, was extensive, vigorous, and quite hard hitting.¹³⁹ The four dissenting Justices disagreed vigorously with the majority on numerous issues and predicted extensive

133. *Id.* at 491 (quoting N.J. STAT. ANN. § 2C:43-6(a)(1) (West 1999) (amended 2013)). The Court concluded, “In light of the constitutional rule explained above, and all of the cases supporting it, this practice cannot stand.” *Id.* at 491–92.

134. *Id.* at 494.

135. *See id.* (referring to “the required ‘motive’ finding” (quoting *State v. Apprendi*, 731 A.2d 485, 492 (N.J. 1999)); *id.* at 495 (referring to “the finding of biased purpose”); *id.* (referring to “the required biased purpose finding”); *id.* at 474 (noting the significance of the purpose “finding . . . because it increased—indeed, it doubled—the maximum” sentence at issue).

136. *Id.* at 496 (citing *Walton v. Arizona*, 497 U.S. 639, 647–49 (1990)).

137. *Id.* at 496–97 (Scalia, J., dissenting) (emphasis omitted) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998)).

138. Justice Thomas candidly recognized that “*Walton* did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment”—in clear conflict with the rule of *Apprendi*. *See id.* at 522 (Thomas, J., concurring). Thomas was in no hurry, however, to actually reach this issue in *Apprendi* and seemed relieved to conclude that it was “a question for another day.” *See id.* at 523.

139. *See id.* at 523–54 (O’Connor, J., dissenting). O’Connor quipped that the majority opinion “marshals virtually no authority to support its extraordinary rule. Indeed, it is remarkable that the Court cannot identify a *single instance*, in the over 200 years since the ratification of the Bill of Rights, that our Court has applied, as a constitutional requirement, the rule it announces today.” *Id.* at 525. Justice

damage as a result of the *Apprendi* decision, including the demise of the federal Sentencing Guidelines and similar state sentencing schemes,¹⁴⁰ as well as great disruption and confusion within American criminal courts generally.¹⁴¹ Nevertheless, for present purposes, it is enough to note that the dissenters did *not* buy the majority's claim that *Apprendi* would not impact the Court's capital sentencing jurisprudence. In particular, Justice O'Connor argued that *Walton* "plainly reject[ed]" the "increase in the maximum penalty" rule adopted in *Apprendi*.¹⁴² And regarding the *Apprendi* majority's claim that *Walton* could be distinguished because it was based on a system where "the jury makes all of the findings necessary to expose the defendant to a death sentence," O'Connor described this proffered "distinction" as both "baffling" and "demonstrably untrue."¹⁴³ The dissenters in *Apprendi* had no doubt that this "watershed change in constitutional law" portended a monumental reconsideration of the Court's decisions in the capital sentencing context in terms of the jury's role.¹⁴⁴ And they were right.

B. *Ring v. Arizona: The Capital Jury Revolution Begins*

Two years later, in *Ring v. Arizona*, the Supreme Court took up the issue of *Apprendi*'s impact in the death penalty sentencing context.¹⁴⁵ The Arizona capital sentencing scheme at issue in *Ring* was essentially the same one that the Court had considered and upheld in 1990 in *Walton*.¹⁴⁶ Under this system, after a jury convicted a defendant of first-degree murder, the sentencing phase was conducted entirely by the trial judge, without any jury involvement at all.¹⁴⁷ And to sentence a defendant to death,

Breyer also dissented, in an opinion joined by Chief Justice Rehnquist. *Id.* at 555 (Breyer, J., dissenting). Breyer focused on the argument that *Apprendi* is impractical. *See id.* at 555 (asserting that the *Apprendi* rule "would seem to promote a procedural ideal," but that "the real world of criminal justice cannot hope to meet any such ideal" and "can function only with the help of procedural compromises, particularly in respect to sentencing").

140. *See, e.g., id.* at 544 (O'Connor, J., dissenting) (warning of potentially "severe" consequences from *Apprendi*, including "invalidation of the [federal] Sentencing Guidelines," along with the "determinate-sentencing schemes [of] many States"); *id.* at 550 (describing *Apprendi* as "invalidat[ing] with the stroke of a pen three decades' worth of nationwide [sentencing] reform").

141. *See id.* (forecasting that "perhaps the most significant impact of the Court's decision . . . [is] its unsettling effect on sentencing conducted under current federal and state determinate-sentencing schemes"); *id.* at 551–52 (arguing that *Apprendi* "threatens to cast sentencing in the United States into what will likely prove to be a lengthy period of considerable confusion" and that its impact "could be colossal").

142. *Id.* at 536–37.

143. *Id.* at 538; *see also id.* (noting that in *Walton* the Court "upheld the Arizona scheme specifically on the ground that the Constitution does not require the jury to make the factual findings that serve as the 'prerequisite to imposition of [a death] sentence'" (quoting *Walton v. Arizona*, 497 U.S. 639, 647 (1990))).

144. *Id.* at 524; *see also id.* at 539 (criticizing the *Apprendi* majority's "unprincipled and inexplicable distinctions between its decision and previous cases addressing the same subject in the capital sentencing context"); *id.* at 538 ("If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today").

145. *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002).

146. *Compare Walton*, 497 U.S. at 642–44, with *Ring*, 536 U.S. at 588 (noting that Court upheld Arizona's capital sentencing scheme in *Walton*).

147. *Compare Walton*, 497 U.S. at 643, with *Ring*, 536 U.S. at 592.

the trial judge was required to make two findings: (1) that at least one statutory aggravating circumstance exists in the case, and (2) that any mitigating circumstances in the case are not “sufficiently substantial to call for leniency.”¹⁴⁸

The *Walton* Court had concluded that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.”¹⁴⁹ Yet *Apprendi* held that “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.”¹⁵⁰ Although the *Apprendi* majority had asserted that Arizona’s system was compatible with this new *Apprendi* rule,¹⁵¹ the Arizona Supreme Court had since rejected that claim in Timothy Ring’s case.¹⁵² In particular, that court clarified that the maximum sentence an Arizona defendant could receive for a first-degree murder conviction by a jury was imprisonment for life (with or without parole), and thus that the findings made as part of Arizona’s capital sentencing process (entirely by the trial judge) were necessary to increase a convicted murderer’s maximum potential sentence to death.¹⁵³ In fact, the Arizona Supreme Court specifically rejected the *Apprendi* majority’s characterization of Arizona’s capital sentencing system and endorsed the description of Justice O’Connor (in her *Apprendi* dissent): “Therefore, the present case is precisely as described in Justice O’Connor’s dissent—Defendant’s death sentence required the judge’s factual findings.”¹⁵⁴

The *Ring* Court acknowledged this clarification of Arizona law by Arizona’s highest court and the (now undeniable) “manifest tension between *Walton* and the reasoning of *Apprendi*.”¹⁵⁵ The *Ring* Court emphasized that *Apprendi* “held that the Sixth Amendment does not permit a

148. *Walton*, 479 U.S. at 644 (quoting ARIZ. REV. STAT. ANN. § 13-703(E) (1989) (current version at §§ 13-751 to -752 (2017))). Compare *id.* at 643–44, with *Ring*, 536 U.S. at 593 (“The State’s law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance and there are no mitigating circumstances sufficiently substantial to call for leniency.”) (emphasis added) (quoting ARIZ. REV. STAT. ANN. § 13-703(F) (2001) (current version at §§ 13-751 to -752 (2017))).

149. *Walton*, 497 U.S. at 648 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989) (per curiam)).

150. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 252 (1999) (Stevens, J., concurring)).

151. *See id.* at 496–97.

152. *See State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001) (en banc), *rev’d*, 536 U.S. 584.

153. *See id.* (“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. . . . It is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death.”)

154. *Ring*, 25 P.3d at 1151. The Arizona Supreme Court was in the strange position of having a Supreme Court case upholding its system (*Walton*) being challenged on the basis of a new Supreme Court case, which included a clear misstatement of Arizona law (*Apprendi*). *See id.* at 151–52. After recognizing the conflict between *Walton* and *Apprendi*, the Arizona Supreme Court found that *Walton* was “still the controlling authority” and declined to strike down Arizona’s capital sentencing system. *Id.* at 1152.

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

defendant to be ‘expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.’”¹⁵⁶ And the *Ring* Court ultimately ruled—in a 7–2 decision, with six Justices on the majority opinion¹⁵⁷—that “*Apprendi*’s reasoning is irreconcilable with *Walton*’s holding” and “overrule[d] *Walton* in relevant part.”¹⁵⁸

The *Ring* Court declared that under the Sixth Amendment, “[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”¹⁵⁹ Furthermore, while reviewing its decision in *Apprendi*, the *Ring* Court recognized that “[i]f a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”¹⁶⁰ And the *Ring* Court concluded by pronouncing as follows:

The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years [as in *Apprendi*], but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.¹⁶¹

On the other hand, the *Ring* Court noted that the specific claim at issue in that case was “tightly delineated.”¹⁶² The petitioner’s claim was that the Sixth Amendment right to jury trial mandates that the *first* required death penalty finding, the existence of at least one statutory aggravating circumstance, must be made by a jury—not a court—in order for a death sentence to be constitutional.¹⁶³ The *Ring* Court emphasized that the petitioner “makes no Sixth Amendment claim with respect to mitigating circumstances[;] . . . [n]or does he argue that the Sixth Amendment required

156. *Id.* at 588–89 (alterations in original) (quoting *Apprendi*, 530 U.S. at 483).

157. *Id.* at 587. Like many capital cases, *Ring* produced quite a bit of separate writing by the Justices. *See id.* Justice Ginsburg wrote the opinion for the *Ring* Court, which was joined by Justices Stevens, Scalia, Kennedy, Souter, and Thomas. *Id.* Justice Scalia filed a concurring opinion, which was joined by Justice Thomas. *Id.* at 610 (Scalia, J., concurring). Justice Kennedy also filed a concurring opinion. *Id.* at 613 (Kennedy, J., concurring). Justice Breyer filed an opinion concurring in the judgment. *Id.* at 613 (Breyer, J., concurring). And Justice O’Connor filed a dissenting opinion, which was joined by Chief Justice Rehnquist. *Id.* at 619 (O’Connor, J., dissenting).

158. *Id.* at 589 (majority opinion).

159. *Id.*

160. *Id.* at 602 (citing *Apprendi*, 530 U.S. at 482–83); *see also id.* at 600 (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999))).

161. *Id.* at 609.

162. *Id.* at 597 n.4.

163. *Id.* (“*Ring*’s claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.”) It should be noted that the *Ring* Court did here use the term “findings” in this context, just as the Court had done regularly in *Apprendi*.

the jury to make the ultimate determination whether to impose the death penalty.”¹⁶⁴ Thus whether the Sixth Amendment right to jury trial also requires that a jury, rather than a judge, make the *second* finding necessary to sentence a defendant to death, i.e., whether the mitigating circumstances in a case are “sufficiently substantial to call for leniency” or (as this analysis is more typically described by state law) whether any aggravating circumstances in a case “outweigh” any mitigating circumstances, was not before the *Ring* Court. And the *Ring* Court declined to address or even comment on this issue.

Hence the full impact of the *Ring* decision regarding the jury’s constitutionally-required role in capital sentencing under the Sixth Amendment was left unsettled—much like the impact of *Apprendi* in the capital sentencing realm had been left unsettled.

Justice Scalia’s concurrence in *Ring*, in typical pithy form, described the functional, elements-based *Apprendi/Ring* rule thus:

[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the 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.¹⁶⁵

Justice Scalia’s concurring opinion (which was joined by Justice Thomas) is also noteworthy for its commentary about why he (and perhaps other Justices) hesitated to follow the Sixth Amendment rationale of *Jones* and *Apprendi* to its logical conclusion in the capital sentencing context. His opinion may also help explain why the majority opinions in both *Jones* and *Apprendi* seemed to strain to declare that these cases would not impact the Court’s capital sentencing jurisprudence (which for over twenty years had given the states complete discretion about how to use the jury in the capital sentencing context, if at all).

Scalia described the *Ring* case as confronting him “with a difficult choice”¹⁶⁶ because it was the Court’s own cases, beginning with *Furman*, that “compelled Arizona (and many other states) to specify particular ‘aggravating factors’ that must be found before the death penalty can be imposed.”¹⁶⁷ And, Justice Scalia continued, “In my view, that line of decisions had no proper foundation in the Constitution.”¹⁶⁸ He added, “I am therefore reluctant to magnify the burdens that our *Furman* jurisprudence imposes on the States.”¹⁶⁹

164. *Id.* (citation omitted).

165. *Id.* at 610 (Scalia, J., concurring).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

This acknowledgment of “reluctance” to apply constitutional doctrines adopted in the noncapital context to the capital sentencing context is helpful in explaining some of the Court’s unconvincing analysis “distinguishing” the capital cases (such as *Walton*) in *Jones* and *Apprendi*—analysis that the Court ultimately had to discard in *Ring*. It should also be noted that Justice Scalia was actually *much* more critical of the *Woodson-Lockett* line of cases, upon which the *second* required finding in most capital jurisdictions is based (the weighing finding) than he was of *Furman* and its progeny, which form the basis for the first requirement (the finding of at least one aggravating circumstance).¹⁷⁰

In his concurring opinion in *Walton*,¹⁷¹ which upheld the Arizona capital scheme that was struck down in *Ring*,¹⁷² Justice Scalia asserted that although he was dubious of the Court’s decision in *Furman*, because *Furman* was “arguably supported by” the language of the Eighth Amendment, he was “willing to adhere to the precedent established by [the Court’s] *Furman* line of cases.”¹⁷³ Regarding the *Woodson-Lockett* line of cases, however, Scalia declared that “*Woodson* and *Lockett* are rationally irreconcilable with *Furman*.”¹⁷⁴ He insisted that these two fundamental features of modern capital sentencing “cannot be reconciled.”¹⁷⁵ He further maintained that he personally “would not know how to apply them—or, more precisely, how to apply both [*Woodson-Lockett*] and *Furman*—if [he]

170. See Chris Hutton, *Legitimizing Capital Punishment: Rationality Collides with Moral Judgment*, 42 S.D. L. REV. 399, 411 (1998) (“In contrast to his tolerating *Furman*, Justice Scalia ridiculed the *Woodson-Lockett* cases.”). In *Woodson*, the Supreme Court established that sentencing in death penalty cases “requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). The *Woodson* Court likewise held that such decisions could not be “mandatory” based simply upon a conviction of first-degree murder. *Id.* at 302, 305. In *Lockett v. Ohio*, the Court further held that in death penalty cases the Eighth and Fourteenth Amendments “require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” 438 U.S. 586, 604 (1978) (plurality opinion). Hence *Woodson* and *Lockett* are fundamentally about the constitutional requirement that the capital sentencer must be allowed to consider any mitigating evidence that the defendant proffers as a basis for a sentence less than death. See *id.* at 606; *Woodson*, 428 U.S. at 304. And this imperative is typically accomplished by directing the jury to consider the mitigating circumstances in the case and then determine whether the aggravating circumstances in the case “outweigh” the mitigating circumstances, which in most death penalty states is the second requirement for a defendant to be eligible for a death sentence, i.e., the “weighing” requirement. See discussion *infra* Section III.C.

171. *Walton v. Arizona*, 497 U.S. 639, 656–74 (1990) (Scalia, J., concurring), *overruled by Ring*, 536 U.S. 584.

172. *Id.* at 649 (majority opinion).

173. *Id.* at 670–71 (Scalia, J., concurring).

174. *Id.* at 673; see also *id.* at 667 (“It is difficult enough to justify the *Furman* requirement [of limiting capital sentencing discretion] so long as the States are *permitted* to allow random mitigation; but to impose it [*Furman*] while simultaneously *requiring* random mitigation is absurd.”).

175. *Id.* at 664. Scalia added that describing these two lines of cases as forming the “twin objectives” of modern death penalty law, *id.* (quoting *Spaziano v. Florida*, 468 U.S. 447, 459 (1984)), “is rather like referring to the twin objectives of good and evil.” *Id.*

wanted to.”¹⁷⁶ And he added: “*Stare decisis* cannot command the impossible.”¹⁷⁷ Justice Scalia then announced that from then on, he simply would *not* uphold or enforce the *Woodson-Lockett* requirement that the capital sentencer must be allowed to consider any mitigating evidence offered by the defendant.¹⁷⁸

Considering that Justice Scalia was crucial to the slender 5–4 majority decisions in both *Jones* and *Apprendi*,¹⁷⁹ Scalia’s mere grudging acceptance of *Furman*—and his outright hostility regarding *Woodson-Lockett*—may well help explain the Court’s unwillingness to take the fundamental Sixth Amendment principle of *Jones/Apprendi/Ring* to its full legal and logical conclusion in the capital sentencing context, both within those cases and subsequently.¹⁸⁰ While the majority Justices in *Jones*, *Apprendi*, and *Ring* agreed that the Sixth Amendment requires a beyond a reasonable doubt jury finding on all the “elements” of a crime that establish the maximum sentence for that crime, these same Justices were quite deeply divided regarding the Supreme Court’s role in “regulating” the death penalty, through the Eighth Amendment and otherwise.

Nevertheless, the capital sentencing decision in *Ring*, like its *Jones* and *Apprendi* predecessors in the noncapital sentencing context, does seem quite revolutionary. It announced a bold new rule, namely, that states cannot leave capital sentencing entirely to trial judges because the Sixth Amendment provides capital defendants with a right to have a jury (not just a judge) determine whether at least one “aggravating circumstance” exists, which is required for a constitutional death sentence. *Ring* also squarely endorsed the functional approach of *Apprendi*, under which any finding that increases the maximum sentence for an offense functions as an “element” of a greater offense, which must be found by a jury and beyond a reasonable doubt. And *Ring* warned that states could not evade the substance of the Court’s new approach by simply renaming or recharacterizing the finding at issue and rejected Arizona’s attempt to cling to the result in *Walton* (by invoking certain Arizona statutory language) as follows: “If Arizona prevailed on [this] . . . argument, *Apprendi* would be reduced to a ‘meaningless and formalistic’ rule of statutory drafting.”¹⁸¹

176. *Id.* at 673.

177. *Id.*

178. *See id.* (“I cannot adhere to a principle so lacking in support in constitutional text and so plainly unworthy of respect under *stare decisis*. Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer’s discretion has been unlawfully restricted.”).

179. *See Apprendi v. New Jersey*, 530 U.S. 466, 468 (2000); *Jones v. United States*, 526 U.S. 227, 229 (1999).

180. *See Ring v. Arizona*, 536 U.S. 584, 558 (2002); *see also id.* at 610–14 (Scalia, J., concurring). Justice Thomas, who joined Scalia’s concurring opinion in *Ring*, was likewise critical to the bare majority decisions in *Jones* and *Apprendi*. *See id.* at 610, 611–12.

181. *Id.* at 603–04 (majority opinion) (quoting *Apprendi*, 530 U.S. at 541 (O’Connor, J., dissenting)).

Thus, on the one hand, the *Ring* Court appeared to be announcing a rather bold, functional, and nonformalistic approach to future questions about the right to a jury-determined process in the capital sentencing context. And parts of the *Ring* opinion wax in quite poetic terms regarding the significance and centrality of the Sixth Amendment right to trial by jury, including in death cases:

The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be “an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. . . . The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.”¹⁸²

The *Ring* opinion also made a sharp break with many past cases by invoking the language and reasoning of the *dissenters* in prior cases, which certainly sounds revolutionary.¹⁸³ And Justice Scalia asserted that despite his previous “reluctan[ce]” to fully apply the Court’s jury cases in the capital sentencing context, he had “acquired new wisdom” (or “discarded old ignorance”) and now recognized that “[w]e 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.”¹⁸⁴

On the other hand, the *Ring* Court seemed to want to keep the impact of this revolution rather small and to require as few changes to state capital sentencing as possible.¹⁸⁵ Two aspects of the *Ring* opinion are particularly noteworthy in this regard. First, the Court explicitly limited its holding to the first finding of most capital sentencing systems—the finding about whether an aggravating circumstance exists in the case.¹⁸⁶ Second, and perhaps most significantly, the *Ring* Court repeatedly used the terms “fact,” “finding of facts,” or “factfinding,” rather than the broader term

182. *Id.* at 607 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

183. *See, e.g., id.* at 599 (quoting extensively from Justice Stevens’s dissent in *Walton*, including his description of the common law understanding of the jury’s role at the time the Bill of Rights was adopted); *id.* at 601 (quoting Justice Kennedy’s dissent in *Jones* regarding the majority’s attempt to distinguish *Walton*); *id.* at 603 (quoting Justice O’Connor’s dissent in *Apprendi* regarding the majority’s attempt to distinguish *Walton*).

184. *Id.* at 610–12 (Scalia, J., concurring).

185. *See infra* notes 186–87 and accompanying text.

186. *See Ring*, 536 U.S. at 609 (majority opinion) (“[W]e overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.”).

“finding” (or a term like “determination”) to describe the *type* of determination at issue and the rules governing this determination.¹⁸⁷

Although the *Apprendi* Court had sometimes used the term “fact” to describe the kind of determination at issue under its new rule, as explained herein, the *Apprendi* Court often used the broader and more generic term “finding” in this context.¹⁸⁸ And *Apprendi*’s overall analysis revealed that even its use of the term “fact” was essentially synonymous with the more general term “finding.”¹⁸⁹ In addition, the *Apprendi* Court consistently described the determination at issue in that case (whether the defendant had acted with a “purpose to intimidate”) as a “finding” that had to be made by a jury, not just a trial judge.¹⁹⁰ Thus, the *Ring* Court’s use of the terms “fact,” “finding of facts,” and “factfinding,” within its descriptions of the type of capital-stage determinations covered by its new rule, suggests that the *Ring* Court may have had a narrower vision of its new rule than the *Apprendi* Court did or perhaps that the *Ring* Court was more “reluctant” to impose the full logical and legal force of this new rule in the capital context than it was in the noncapital context of *Jones* and *Apprendi*. It is likewise entirely possible that the *Ring* opinion was written with more narrow language to “bring together” as many Justices as possible, including Justices Scalia and Thomas, who had a much different view of the Court’s appropriate role when it came to death penalty cases.¹⁹¹

Regardless of the possible motivation, if any, for the *Ring* Court’s frequent use of the seemingly more narrow terms “fact,” “finding of fact,”

187. See, e.g., *id.* at 589 (“Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”); *id.* at 607 (discussing the inconsistency of “[e]ntrusting to a judge the finding of facts necessary to support a death sentence” with the founder’s vision of the right to jury trial); *id.* at 609 (“The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death.”).

188. See *supra* notes 128–35 and accompanying text.

189. See *supra* text accompanying note 128.

190. See *supra* text accompanying note 124.

191. See *Ring*, 536 U.S. at 612–13 (Scalia, J., concurring). Justice Scalia’s concurring opinion described the *Ring* decision as follows:

[T]oday’s judgment has nothing to do with jury sentencing. What today’s decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of [an] aggravating factor in the sentencing phase, or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Id. Justice Scalia here emphasizes his view that the Constitution does *not* require that a jury make the ultimate capital sentencing decision and his desire that the Court go no further than it was going in *Ring*. Scalia’s view stands in sharp contrast with the view expressed by Justice Breyer in his separate opinion in *Ring*, asserting that the Eighth Amendment *does* require that the jury make the ultimate capital sentencing decision. See *id.* at 614 (Breyer, J., concurring) (“The Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.”). Justice Scalia’s response to this view was rather caustic: “While I am, as always, pleased to travel in Justice Breyer’s company, the unfortunate fact is that today’s judgment has nothing to do with jury sentencing. . . . Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.”) *Id.* at 612–13 (Scalia, J., concurring).

and “factfinding” to describe the *kind* of determination at issue—rather than the more broad and open-ended term “finding,” which *Apprendi* used regularly in this context—this approach left the door open to arguments by death penalty states and the federal government that the weighing finding is *not* a “factual” finding and, thus, is not covered by the *Ring* decision and rule. As will be described in the next section, such arguments were quite successful in the years following *Ring*, despite the *Ring* Court’s emphasis that it was adopting a *functional* approach, rather than a formalistic one, and that it was applying the elements-based approach of *Apprendi* to the capital sentencing context.

The application of *Ring* should have involved looking to the substantive law of the jurisdiction at issue to decide whether a particular determination is necessary to increase the defendant’s maximum possible sentence from some form of imprisonment to death (i.e., whether a particular finding is a required “element” for a death sentence) as the basis for determining whether the Sixth Amendment requires that the determination at issue be made by a jury and beyond a reasonable doubt. Unfortunately, this was not the approach that was typically taken in the years between *Ring* and the Supreme Court’s next big decision in this realm, *Hurst v. Florida*, which was not until 2016.¹⁹²

C. *The Revolution Stalls on Hybrid Juries and Falters on Weighing*

1. From All-Judge Sentencing to Judge-Jury Sentencing

The *Ring* Court recognized that at the time of its 2002 decision, five states had “all-judge” capital sentencing systems.¹⁹³ The Court noted that Arizona, Colorado, Idaho, Montana, and Nebraska all “commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges.”¹⁹⁴ Justice O’Connor remarked in her dissent that the *Ring* majority had effectively declared the capital sentencing schemes of these five states to be unconstitutional.¹⁹⁵ After *Ring*, Arizona, Colorado, and Idaho switched to entirely jury-determined capital sentencing schemes, placing both the key capital findings and the ultimate death penalty decision entirely in the hands of the jury.¹⁹⁶ Montana and Nebraska, on the other hand, responded to *Ring* by altering their schemes to place the aggravating circumstances decision in the hands of the jury, but continued to place the

192. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

193. *Ring*, 536 U.S. at 608 n.6.

194. *Id.* (listing relevant statutes for Colorado, Idaho, Montana, and Nebraska).

195. *Id.* at 620 (O’Connor, J., dissenting).

196. See ARIZ. REV. STAT. ANN. §§ 13-703 to -703.01 (2003) (current version at §§ 13-751 to -752 (2017)); COLO. REV. STAT. § 18-1.3-1201 (2003) (amended 2014); IDAHO CODE § 19-2515 (2003) (amended 2006).

“weighing” finding and the ultimate sentencing decision in the hands of judges.¹⁹⁷

The *Ring* Court also recognized that as of 2002, there were four states with “hybrid” capital sentencing systems, in which the jury rendered an “advisory verdict” about how the jury thought the defendant should be sentenced, but the judge then independently made the required capital findings and the final sentencing decision—which could include a death sentence, even when the jury had recommended imprisonment.¹⁹⁸ *Ring* recognized Alabama, Florida, Delaware, and Indiana as all having such a system.¹⁹⁹ Justice O’Connor worried in her dissent that death row prisoners in these states would “seize on” the *Ring* decision to challenge their sentences.²⁰⁰ She was not wrong, but such prisoners had very little success in this regard (prior to 2016).²⁰¹

In particular, the Supreme Courts of both Florida and Alabama—two of the most “active” death penalty states in America—upheld the constitutionality of their “advisory jury” capital sentencing systems against *Ring*-based Sixth Amendment challenges.²⁰² In response to a *Ring* challenge in a Florida case, the Florida Supreme Court, in a per curiam opinion, noted: (1) that the U.S. Supreme Court had repeatedly upheld Florida’s capital sentencing system in the past (citing *Proffitt*, *Spaziano*, and *Hildwin*), (2) that *Ring* did not directly address the constitutionality of Florida’s system, and (3) that the Supreme Court had lifted a stay in the case at issue without explicitly directing reconsideration in light of *Ring*—and then rejected the defendant’s *Ring* claim without substantive analysis.²⁰³

When faced with a *Ring* challenge in the Alabama case of *Ex parte Waldrop*,²⁰⁴ the Alabama Supreme Court emphasized the differences between the Arizona system at issue in *Ring* and the Alabama capital system,

197. See MONT. CODE ANN. § 46-18-305 (2003); NEB. REV. STAT. §§ 29-2520 to -2522 (2003) (amended 2011). In Montana, after a jury finds at least one aggravating circumstance, the trial judge must decide whether there are “mitigating circumstances sufficiently substantial to call for leniency,” which determines whether the defendant is sentenced to death. See MONT. CODE ANN. § 46-18-305. As in Arizona, Montana effectively defines any sentence less than death in this context as “leniency.” See *id.*; accord ARIZ. REV. STAT. ANN. § 13-751(E) (2017) (disallowing the death penalty unless the jury “determines that there are no mitigating circumstances sufficiently substantial to call for leniency”). In Nebraska, after a jury finds at least one aggravating circumstance, a three-judge panel is used to receive and evaluate mitigating evidence, which includes determining “[w]hether the aggravating circumstances . . . justify imposition of the sentence of death” and “[w]hether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances,” and then make the ultimate death penalty sentencing decision, which must be unanimous if a death sentence is imposed. See NEB. REV. STAT. § 29-2522 (2017).

198. *Ring*, 536 U.S. at 608 n.6.

199. *Id.* (listing relevant statutes from Alabama, Delaware, Florida, and Indiana).

200. *Id.* at 621 (O’Connor, J., dissenting).

201. See *infra* notes 202–10 and accompanying text.

202. See *infra* notes 203–10 and accompanying text.

203. See *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) (per curiam), *abrogated by* *Hurst v. Florida*, 136 S. Ct. 616 (2016).

204. 859 So. 2d 1181 (Ala. 2002).

particularly the fact that many of Alabama's second-stage "aggravating circumstances" duplicate or "overlap" with Alabama's "capital offenses," (i.e., the aggravated murder offenses that must be found by a jury during the guilt stage, in order for a defendant to be subject to a possible death sentence).²⁰⁵ In the case at issue, the defendant had been convicted of the capital offense of murder during a robbery, which overlapped with one of the aggravating circumstances alleged in the case (murder during a robbery).²⁰⁶ Consequently, the Alabama Supreme Court asserted that (in effect) "the jury, and not the trial judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty,'" ²⁰⁷ based on the jury's decision to *convict* the defendant, even though the jury had actually recommended a sentence of life imprisonment without parole during the sentencing hearing.²⁰⁸ The *Waldrop* court concluded that Alabama's first-stage narrowing "is all *Ring* and *Apprendi* require,"²⁰⁹ even though the "overlap" between Alabama's first-stage capital offenses and second-stage aggravating circumstances is not complete or perfect in general (i.e., the two lists are not identical) and was not complete or perfect even in that case (because the judge-imposed death sentence in the *Waldrop* case also relied on a second aggravating circumstance, i.e., that the murder was "heinous, atrocious, or cruel," for which there was no corresponding Alabama "capital offense" and no jury finding at trial).²¹⁰

Hence the Florida and Alabama Supreme Courts maintained the constitutionality of their hybrid judge-jury capital sentencing systems in the aftermath of *Ring*, and the legislatures of both states declined to make any changes to their capital systems in light of the *Ring* decision. Indiana, on the other hand, quickly shifted to a jury-dominated capital sentencing system, placing both the required capital findings and the ultimate sentencing decision in the hands of the jury.²¹¹ And Delaware modified its hybrid system by insisting that any death sentence be based upon a "beyond a reasonable doubt" jury finding of at least one aggravating circumstance, but continued to allow the trial court to make its own finding about whether

205. *Id.* at 1188 (quoting *Ex parte* Trawick, 698 So. 2d 162, 178 (Ala. 1997)).

206. *Id.*

207. *Id.* (quoting *Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002)). The *Waldrop* court added, "Therefore, the findings reflected in the jury's [guilt-stage] verdict alone exposed [the defendant] to a range of punishment that had as its maximum the death penalty." *Id.*

208. *Id.* at 1184.

209. *Id.* at 1188.

210. *See id.* at 1185 (quoting *Waldrop v. State*, 859 So. 2d 1138, 1174 (Ala. Crim. App. 2000)); *see also id.* at 1188 (noting the overlap between the capital offense and an aggravating factor). *Compare* ALA. CODE § 13A-5-40 (2017) (listing "capital offenses"), *with* § 13A-5-49 (listing "aggravating circumstances"). The Alabama Supreme Court has continued to rely on the (imperfect) overlap between Alabama's first-stage capital offenses and second-stage aggravating circumstances to uphold the constitutionality of its advisory jury system, even after the Supreme Court struck down Florida's advisory jury system in *Hurst*. *See Hurst v. Florida*, 136 S. Ct. 616, 624 (2016); *Ex parte* Bohannon, 222 So. 3d 525, 528–36 (Ala. 2016) (quoting extensively from *Waldrop*).

211. *See* IND. CODE § 35-50-2-9(1)(1), (2) (2003) (amended 2016) (stating that the jury must find the existence of at least one aggravating circumstance and that any aggravating circumstances "outweigh" the mitigating circumstances).

any aggravating circumstances “outweighed” any mitigating circumstances, which would determine whether the defendant was actually sentenced to death.²¹² Although the Delaware jury was required to make an actual finding on both “the existence of at least [one] aggravating circumstance” and whether “the aggravating circumstances . . . outweigh the mitigating circumstances,”²¹³ the jury’s weighing “recommendation” only had to be given “such consideration as deemed appropriate” by the judge.²¹⁴

Hence soon after the *Ring* decision, there were no more all-judge capital sentencing systems among the states, but there were five states—Florida, Alabama, Delaware, Montana, and Nebraska—that maintained some type of hybrid approach, all of which placed both the weighing determination and the ultimate sentencing decision in the hands of trial judges. In addition, both Florida and Alabama continued to base the death sentences in their states on the findings of the trial judge regarding the aggravating circumstances in the case, which were *not* limited to the aggravating circumstances found by the jury, either implicitly (during the guilt stage in Alabama) or explicitly (during the sentencing stage in either state).²¹⁵ Furthermore, the statutory schemes in both Florida and Alabama continued to allow trial judges to override jury recommendations of life with sentences of death, just as they were doing at the time *Ring* was decided in 2002.²¹⁶ Nevertheless, despite numerous opportunities (particularly in cases from Florida and Alabama) to evaluate the constitutionality of these judge-dominated, hybrid capital systems, the Supreme Court declined to take up any new *Ring*-based capital sentencing challenges for over thirteen years.

2. The Misnomer of Eighth Amendment “Death Eligibility”

For the overwhelming majority of death penalty jurisdictions that already relied entirely upon the jury for all capital sentencing determinations, the fact that *Ring* applied to the first required capital finding, i.e., that any aggravating circumstances must be found by a jury and be found beyond a reasonable doubt, was quite clear and was easily implemented (if any change to existing law was even needed). The bigger question was whether the *Ring* decision meant that the second finding that is required in most capital jurisdictions, i.e., that any aggravating circumstances in a case “outweigh” any mitigating circumstances (or some similar finding), must likewise be found by a jury and be found beyond a reasonable doubt.²¹⁷

212. DEL. CODE ANN. tit. 11, § 4209(d)(1) (2003) (amended 2013).

213. *Id.* § 4209(c)(3)(a)(1), (2).

214. *Id.* § 4209(d)(1).

215. See ALA. CODE §§ 13A-5-46(e), -47(d)–(e) (2003); FLA. STAT. § 921.141(1)–(3) (2003) (amended 2017).

216. ALA. CODE § 13A-5-47(e); FLA. STAT. § 921.141(3).

217. Although different death penalty jurisdictions formulate this “weighing” or “balancing” decision in different ways, the great majority of American death penalty jurisdictions require that the capital decisionmaker make some kind of weighing or balancing finding in order to sentence a defendant to death. See *infra* text accompanying note 243.

As it turns out, resolution of the Sixth Amendment questions of whether the capital weighing finding must be made by a jury and “beyond a reasonable doubt” has been critically impacted by the Supreme Court’s use of a few specific words and concepts: (1) the Court’s use of the word “fact” in *Ring*, and (2) the Court’s use of the word “eligible,” in terms of being “eligible for the death penalty,” in its Eighth Amendment cases. This Article has already addressed the theme that the *Ring* Court’s use of the term “fact” was different than the *Apprendi* Court’s use of this term, which the *Apprendi* Court used more broadly and interchangeably with the more general term “finding”—a generic term that *Apprendi* used to describe *any* determination that must be made in order for a defendant to be sentenced to death.

Before turning to an analysis of how various death penalty states and the federal circuit courts have resolved the applicability of *Apprendi/Ring* to the capital weighing finding, this Article will briefly (and quite summarily) suggest that the Supreme Court’s use of the concept of being “eligible” for the death penalty in the Eighth Amendment context is incomplete and potentially misleading, at least if it is taken too literally or applied in the Sixth Amendment context. In the Sixth Amendment context, an unreflective use of the concept of being “death eligible” (based merely upon the finding of an aggravating circumstance) is particularly likely to lead to incongruous and constitutionally inappropriate results.

In *Tuilaepa v. California*,²¹⁸ the Supreme Court summarized its Eighth Amendment cases as addressing “two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision.”²¹⁹ The Court recognized that a defendant can only be eligible for the death penalty upon conviction “of a crime for which the death penalty is a [constitutionally] proportionate punishment,” such as murder.²²⁰ The Court then made this (seemingly innocuous) statement: “To render a defendant *eligible for the death penalty* in a homicide case, . . . the trier of fact must convict the defendant of murder and find one ‘aggravating circumstance’ (or its equivalent) at either the guilt or penalty phase.”²²¹ Importantly, the Court hereby limited the idea of being “eligible” for a death sentence to simply a murder conviction, followed by a finding of at least one aggravating circumstance (or a functional equivalent). The Court then

218. 512 U.S. 967 (1994).

219. *Id.* at 971.

220. *Id.* at 971–72.

221. *Id.* (emphasis added). The Court noted that this “aggravating circumstance”: (1) could be “contained in the definition of the crime or in a separate sentencing factor (or in both)”; (2) “must apply only to a subclass of defendants convicted of murder”; and (3) “may not be unconstitutionally vague.” *Id.* at 972.

described the remainder of the capital sentencing process as the “selection” phase, “where the sentencer determines whether a *defendant eligible for the death penalty* should in fact receive that sentence.”²²²

The capital sentencing process described in *Tuilaepa* (and other Eighth Amendment cases) has two basic components: (1) a *finding* that at least one aggravating circumstance exists in the case, which (if made) makes the capital defendant eligible for a death sentence, and (2) a *process* during which the decisionmaker considers all the evidence presented and then selects a sentence for the defendant.²²³ The decisionmaker can only proceed to the selection phase if the required finding of an aggravator is made, but the *Tuilaepa* Court made clear that the Eighth Amendment does not require that any specific additional findings be made during the selection process.²²⁴

The problem with this approach to death “eligibility,” however, is that it is *not* based upon an analysis of what is actually *required* by the jurisdiction at issue for a death sentence to be lawfully imposed. In fact, the California statute at issue in *Tuilaepa* (then and now) mandates that in order for a defendant to be sentenced to death, the jury must “conclude[] that the aggravating circumstances outweigh the mitigating circumstances.”²²⁵ Thus, a California defendant is *not* actually eligible for a death sentence—at least not in the sense that this term is typically used—based only on the finding of an aggravating circumstance (i.e., a first-stage “special circumstance” under California law) because California law *also* requires that the jury make a finding/conclusion/determination regarding the weighing of the aggravating and mitigating circumstances in the case. While the U.S. Supreme Court has clearly declined to mandate under the Eighth Amendment that state death penalty systems require such additional findings (beyond the existence of an aggravating circumstance),²²⁶ it is important to recognize that the Court’s use of the concept of death

222. *Id.* (emphasis added). Regarding this selection phase, the *Tuilaepa* Court described the requirements of the Eighth Amendment as follows: “What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.” *Id.* (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)). The Court noted that this requirement “is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.” *Id.*

223. *See id.*

224. *Id.* at 977–80. Hence the *Tuilaepa* Court rejected the petitioners’ claim that the Eighth Amendment requires that specific findings be made about the “selection factors” that a California jury is directed to consider during the capital sentencing process, *id.*, and concluded that “the sentencer may be given ‘unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty,’” *id.* at 979–80 (quoting *Zant*, 426 U.S. at 875).

225. *See* CAL. PENAL CODE § 190.3(k) (West 2017) (death sentence allowed only “if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances”); *id.* (“If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of [imprisonment] . . . for a term of life without the possibility of parole.”).

226. *See Tuilaepa*, 512 U.S. at 979–80.

eligibility (in this Eighth Amendment context) is *not* based upon a determination regarding what the law of a particular jurisdiction actually requires for a death sentence.

In most death penalty jurisdictions, death penalty sentencing actually involves three components: (1) a *finding* about whether an aggravating circumstance exists in the case, which narrows the class of murders to which the death penalty can potentially be applied; (2) a *process* during which the decisionmaker considers all the evidence presented, including all the mitigating circumstances in the case; and (3) a *finding* about whether any aggravating circumstances outweigh any mitigating circumstances in the case (or the functional equivalent of such a finding).²²⁷ In some states, a death sentence follows automatically from this second finding.²²⁸ In other states, there is actually a fourth step, in which the sentencer chooses whether to sentence the defendant to death or to some form of imprisonment (i.e., the sentencer selects the sentence).²²⁹ In both such systems, the second finding is required for a death sentence; and a defendant is not truly eligible to be sentenced to death until the second finding is made.

Although not all death penalty jurisdictions require a weighing-type finding, most do.²³⁰ Consequently, whatever merit the concept of being “death eligible” might have in the Eighth Amendment realm—based merely upon a murder conviction and a finding of at least one aggravator—because this concept is *not* based upon a review of the substantive law of the jurisdiction at issue, this term is potentially quite misleading in the Sixth Amendment context. While the Eighth Amendment approach of cases like *Tuilaepa* simply declares, in general, that in order to become “eligible for the death penalty[.], . . . the trier of fact must convict the defendant of murder and find one ‘aggravating circumstance,’”²³¹ the Sixth Amendment approach of *Ring/Apprendi* mandates a review of the substantive law of the jurisdiction at issue to determine the required elements for a death sentence in *that* jurisdiction. This jurisdiction-specific review is

227. See, e.g., COLO. REV. STAT. § 18-1.3-1201(1), (2) (2017). Such weighing-type findings can include a determination that based upon all the evidence in the case, a death sentence is “justified” or “appropriate.” See *id.*

228. See, e.g., ALA. CODE § 13A-5-46(e)(3) (2017) (“If the jury determines that one or more aggravating circumstances . . . exist and that they outweigh the mitigating circumstances, if any, it shall return a verdict of death”); ARIZ. REV. STAT. ANN. § 13-751(E) (2017) (“The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.”).

229. See, e.g., OKLA. UNIF. JURY INSTR. CRIM. 4-80 (2d ed. 2017) (“If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances. Even if you find that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.”).

230. See *infra* note 243 and accompanying text.

231. *Tuilaepa*, 512 U.S. at 971–72.

required by the Sixth Amendment because it is these jurisdiction-specific required elements for a death sentence that must be found by a jury and beyond a reasonable doubt under *Apprendi* and *Ring*. A defendant is not truly “eligible” for a death sentence in *any* jurisdiction until the prosecution has established all the required elements for a death sentence in that jurisdiction. And under the approach of *Apprendi/Ring*, it is precisely these elements that must be found both by a jury and beyond a reasonable doubt.

3. Rejection of the *Ring* Rule for the Weighing Finding

By 2002, most death penalty states required that before a capital defendant could be sentenced to death, the sentencing decisionmaker (usually a jury) had to find that the aggravating circumstances in the case outweighed the mitigating circumstances (or make some similar “weighing” type finding).²³² Yet few state statutes contained a particular standard of proof or “certainty standard” by which this decision had to be made.²³³ Hence, after *Ring*, death penalty states that did not require all-jury sentencing *and* states that did have jury sentencing but did not require that the weighing finding be made beyond a reasonable doubt both began facing claims that under *Apprendi* and *Ring*, the Sixth Amendment *requires* that the weighing finding be made by a jury and beyond a reasonable doubt.²³⁴ Unfortunately for the capital defendants and death row inmates who were making these claims, however, such claims were rejected by the great majority of the state courts of last resort that decided them.²³⁵

Alabama appears to have been the first state supreme court to address this issue in detail, taking it up in *Ex parte Waldrop*,²³⁶ the same year that *Ring* was decided. As noted earlier, this decision addressed (and upheld) post-*Ring* the constitutionality of Alabama’s hybrid judge-jury system.²³⁷ *Waldrop* also addressed whether the weighing determination had to be made by a jury and beyond a reasonable doubt. The *Waldrop* court rejected this claim and distinguished *Ring*, asserting that “the weighing process is not a *factual* determination” and “is not susceptible to any quantum of proof.”²³⁸ Rather, the court found, “[I]t is a moral or legal judgment that takes into account a theoretically limitless set of facts.”²³⁹ The *Waldrop* court also invoked the Supreme Court’s Eighth Amendment eligibility cases to support its ruling that the weighing finding is not an element of a death sentence.²⁴⁰ The court concluded: “Thus, the determination whether

232. See *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2003) (“Of the [thirty-eight] States with capital punishment, [twenty-nine] generally commit sentencing decision to juries.”); see also *infra* note 243 and accompanying text (listing state death penalty statutes requiring “weighing” type findings).

233. See *infra* note 339 and accompanying text.

234. See *infra* note 236 and accompanying text.

235. See *infra* note 243 and accompanying text.

236. See *Ex parte Waldrop*, 859 So. 2d 1188, 1188–90 (Ala. 2002).

237. See *supra* text accompanying notes 204–10.

238. *Waldrop*, 859 So. 2d at 1189 (emphasis added).

239. *Id.*

240. See *id.*

the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, *Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.”²⁴¹ The court likewise concluded that the weighing finding does not have to be made beyond a reasonable doubt.²⁴²

The Alabama Supreme Court’s approach set the tone for what would be a steady stream of state court rejections of the claim that the Sixth Amendment rule of *Apprendi/Ring* applies to the capital weighing finding. Under the functional and elements-based rule of *Apprendi/Ring*, these state courts should have been focused on determining whether the weighing finding (or whatever finding was at issue) was *required* for a death sentence under the law of that jurisdiction, i.e., whether the weighing finding was required in order to increase a convicted murderer’s maximum possible sentence from some form of imprisonment to death. Instead, state courts of last resort that addressed the weighing issue overwhelmingly concluded that *Ring* does not even *apply* to the weighing finding because a weighing determination is not the kind of “fact” or “factual finding” that is covered by *Ring*—often while also emphasizing that because a defendant is considered “eligible” for a death sentence (under the Eighth Amendment) after a proper finding of an aggravating circumstance, any weighing determination that occurs after that is merely part of the process of selecting the defendant’s punishment, rather than a required element for a death sentence.²⁴³

241. *Id.* at 1190.

242. *Id.* (“While the *existence* of an aggravating or mitigating circumstance is a fact susceptible to proof . . . , the relative *weight* is not. The process of weighing . . . , unlike facts, is not susceptible to proof by either party.”) (first emphasis added) (citations omitted) (quoting *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983)).

243. *See, e.g.*, *People v. Prieto*, 66 P.3d 1123, 1147 (Cal. 2003) (rejecting a *Ring* weighing claim because “the penalty phase determination ‘is inherently moral and normative, not factual’” (quoting *People v. Rodriguez*, 726 P.2d 113, 144 (Cal. 1986))); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (finding that “[a]lthough a judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors,” because a defendant becomes “eligible” for a death sentence based on “the finding of [a] statutory aggravator[.] . . . *Ring* does not extend to the weighing phase”), *overruled by Rauf v. State*, 145 A.3d 430 (Del. 2016); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004) (because defendant is already “eligible” for death penalty before required weighing finding, *Apprendi* and *Ring* do not require “that weighing be done under a reasonable doubt standard”); *Oken v. State*, 835 A.2d 1105, 1151 (Md. 2003) (“[T]he weighing process is not a fact-finding one based on evidence The weighing process is purely a judgmental one, of balancing the mitigator(s) against the aggravator(s) to determine whether death is the appropriate punishment in the particular case.”); *State v. Gales*, 658 N.W.2d 604, 628 (Neb. 2003) (rejecting a claim that *Ring* applies to a weighing finding by a three-judge panel and concluding that “[i]t is the determination of ‘death eligibility’ [by the finding of an aggravating circumstance] . . . [that] triggers the Sixth Amendment right to jury determination as delineated in *Apprendi* and *Ring*”); *Nunnery v. State*, 263 P.3d 235, 241 (Nev. 2011) (concluding that “weighing of the aggravating and mitigating circumstances is not a factual determination” under *Apprendi* and *Ring*); *State v. Addison*, 87 A.3d 1, 178 (N.H. 2013) (per curiam) (“[T]he weighing process is neither a ‘fact’ nor an element of the charged offense.” (citing *U.S. v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007))); *State v. Fry*, 126 P.3d 516, 531, 534 (N.M. 2005) (after noting that “[t]he jury can sentence a defendant to death only if it unanimously determines that the aggravating circumstances outweigh the mitigating circumstances,” rejecting a *Ring* weighing claim

A few state supreme courts rejected a claim that the Sixth Amendment *Ring* rule applies to a capital weighing finding even after specifically recognizing that the state death penalty statute at issue *required* that the weighing finding be made in order for a defendant to be sentenced to death. In other words, these state courts specifically recognized that the weighing finding was necessary to “increase[] a defendant’s maximum possible sentence,”²⁴⁴ which is exactly the trigger for the functional rule of *Apprendi/Ring*, but then still concluded that the *Ring* rule did not apply.²⁴⁵ For example, the Supreme Court of Indiana recognized that “before the jury can recommend the death penalty, it must find that . . . ‘any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.’”²⁴⁶ Nevertheless, in the same opinion the court went on to conclude that this required weighing finding was not covered by *Ring* because an Indiana defendant becomes “eligible” for the death penalty based merely upon the finding of an aggravating circumstance.²⁴⁷ And the Nevada Supreme Court, after emphasizing that the weighing finding does not involve a finding of fact,²⁴⁸ actually stated: “[E]ven if the result of the weighing determination increases the maximum sentence for first-degree murder beyond the prescribed statutory maximum, it is not a factual finding that is susceptible to the beyond-a-reasonable-doubt standard of proof.”²⁴⁹ The court thereby turned the functional, elements-based test of *Ring* upon its head.

There were a few state courts that applied the *Apprendi/Ring* test to the weighing finding in the functional manner that these decisions established, but not many. The Supreme Court of Missouri carefully and

because “[t]he balancing process does not contemplate the finding of a ‘fact’ that increases a defendant’s maximum possible sentence within the meaning of *Apprendi*”); *State v. Belton*, 74 N.E.3d 319, 337 (Ohio 2016) (“Weighing is *not* a fact-finding process subject to the Sixth Amendment, because ‘[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.’” (quoting *Gales*, 658 N.W.2d at 628)); *id.* (“[T]he weighing process amounts to ‘a complex moral judgment’ about what penalty to impose upon a defendant who is already death-penalty eligible.” (quoting *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013))); *Torres v. State*, 58 P.3d 214, 216 (Okla. Crim. App. 2002) (summarily rejecting a *Ring* weighing claim); *Commonwealth v. Roney*, 866 A.2d 351, 360–61 (Pa. 2005) (rejecting a weighing claim because it “does not implicate the ‘fact-finding’ concerns articulated in *Apprendi* and *Ring*”).

244. *Fry*, 126 P.3d at 534.

245. *See, e.g., Brice*, 815 A.2d at 322; *Fry*, 126 P.3d at 531, 534; *see also supra* note 243.

246. *Ritchie*, 809 N.E.2d at 264–65 (quoting IND. CODE § 35-50-2-9(1)(2) (2003)).

247. *Id.* at 265–66. Similarly, although the California Supreme Court upheld a California standard death penalty jury instruction because it correctly and “clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating,” *People v. Duncan*, 810 P.2d 131, 144 (Cal. 1991) (en banc), that court has also held that “*Ring* imposes no new constitutional requirements on California’s penalty phase proceedings,” because a California defendant is already “eligible” for a death sentence based upon the guilt-phase narrowing process in California. *Prieto*, 66 P.3d at 1147; *see also People v. Samuels*, 113 P.3d 1125, 1152 (Cal. 2005) (concluding that *Ring* does not require “that the jury be instructed concerning burden of proof” for weighing determination).

248. *See Nunnery*, 263 P.3d at 251–53 (citing cases finding that capital weighing is not “fact-finding” under *Ring* and quoting dictionary definition of “fact”).

249. *Id.* at 250.

thoughtfully applied the *Ring* rule to the specific requirements of Missouri's death penalty statute.²⁵⁰ In particular, the court concluded that because a death sentence requires a finding that any mitigating evidence is not "sufficient to outweigh the evidence in aggravation,"²⁵¹ this determination is a "factual finding[]" under *Ring* that must be made by a jury.²⁵² Similarly, the Colorado Supreme Court recognized that because the (former) Colorado death penalty statute established that a death sentence required a finding (by a three-judge panel) that "[t]here are insufficient mitigating factors to outweigh the aggravator or factors that were proved," this weighing determination constitutes a "finding of fact" under *Ring*, and thus that both the finding of an aggravator and the weighing finding have to be made by a jury.²⁵³ Hence the court concluded that the Colorado death penalty statute under which the defendants had been sentenced—based upon the findings of a three-judge panel—was unconstitutional under *Ring*.²⁵⁴ Alas, this kind of careful, functional analysis was the exception, not the norm, in the years after *Ring*.²⁵⁵

In the federal realm, federal circuit courts considering the Federal Death Penalty Act (FDPA)²⁵⁶ have likewise overwhelmingly concluded that *Ring* does not apply to capital weighing and thus that federal capital juries need *not* apply the "beyond a reasonable doubt" standard when making the weighing evaluation required by the FDPA.²⁵⁷ In the sentencing phase of an FDPA case, "the jury must make three determinations . . . before it can impose the death penalty."²⁵⁸ The first two determinations—that the defendant acted with the required *mens rea* and that at least one statutory aggravating factor exists in the case—must be found unanimously and beyond a reasonable doubt.²⁵⁹ The third determination, however, while it must be found unanimously by the jury, need not be found "beyond a reasonable doubt" under the FDPA.²⁶⁰ Rather, the jury must

250. See *State v. Whitfield*, 107 S.W.3d 253, 256–62 (Mo. 2003) (en banc).

251. *Id.* at 258 (quoting MO. REV. STAT. § 565.030.4(4) (1994)).

252. See *id.* at 261. This required finding (and others) had been made by the trial judge in that case, after a jury voted 11–1 in favor of a life sentence. *Id.* at 261. The Missouri Supreme Court struck down the defendant's death sentence. *Id.* at 256, 262 ("This process clearly violated the requirements of *Ring* that the jury rather than the judge determine the facts on which the death penalty is based.").

253. *Woldt v. People*, 64 P.3d 256, 266–67 (Colo. 2003) (quoting COLO. REV. STAT. § 16-11-103(2)(b)(II)(A)–(B) (2000) (repealed 2002)).

254. *Id.*

255. See, e.g., *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) (per curiam) (concluding that because a death sentence in Nevada requires a finding "that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found[.]" . . . *Ring* requires a jury to make this finding" (quoting NEV. REV. STAT. § 175.554(3) (1998))), *overruled by Nunnery*, 263 P.3d 235. *But see Nunnery*, 263 P.3d at 250–51 (overruling *Johnson*'s analysis of the *Ring* weighing issue).

256. See 18 U.S.C. §§ 3591–99 (2012).

257. See *infra* note 262 and accompanying text.

258. *United States v. Purkey*, 428 F.3d 738, 749 (8th Cir. 2005).

259. *Id.* (citing 18 U.S.C. §§ 3591–93).

260. See 18 U.S.C. § 3593(e).

decide “whether all the aggravating factor or factors found to exist *sufficiently outweigh* all the mitigating factor or factors found to exist to justify a sentence of death.”²⁶¹

As in the state realm, federal defendants sentenced to death under the FDPA have challenged the FDPA’s failure to require that this weighing finding be made “beyond a reasonable doubt” as a violation of the Sixth Amendment under *Apprendi/Ring*. Thus far, the federal circuit courts have rejected this claim, mostly by ruling that the weighing finding is not a “factual” determination under the terms of *Apprendi/Ring*.²⁶² These courts typically contrast the type of factual determination that the jury must make (and make beyond a reasonable doubt) under *Ring* with the highly subjective and largely moral “judgment” that must be made about whether a defendant should be sentenced to death.²⁶³

There are currently no federal circuits that hold that the jury’s FDPA weighing finding must be made beyond a reasonable doubt, although there was one circuit court panel that did so find. In 2011, in *United States v. Gabrion*,²⁶⁴ a panel of the Sixth Circuit Court of Appeals reversed a death sentence based upon its conclusion that under *Apprendi/Ring* the FDPA weighing determination is subject to the reasonable doubt standard.²⁶⁵ Although the five circuits that had addressed the issue at the time had ruled

261. *Id.* (emphasis added).

262. *See, e.g., Purkey*, 428 F.3d at 750 (asserting that “it makes no sense to speak of the weighing process mandated by [the FDPA] as an elemental fact”); *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007) (“[T]he *Apprendi/Ring* rule should not apply here because the jury’s decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. . . . The *Apprendi/Ring* rule applies by its terms only to findings of fact, not to moral judgments.”); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) (rejecting a claim for assuming “that the weighing of aggravating and mitigating factors is a *fact*” and concluding that “the requisite weighing constitutes a process, not a fact to be found”); *United States v. Barrett*, 496 F.3d 1079, 1107–08 (10th Cir. 2007) (quoting and adopting analysis of the Fifth Circuit in *Fields*, 483 F.3d at 346); *United States v. Mitchell*, 502 F.3d 931, 993–94 (9th Cir. 2007) (questioning whether weighing involves finding of “fact,” noting “no authority” suggesting *Apprendi* extends this far and rejecting the claim under plain error review); *United States v. Fields*, 516 F.3d 923, 950 (10th Cir. 2008) (clarifying that analysis of *Barrett*, 496 F.3d 1079, which involved the death penalty under a different federal statute, “applies with equal force in connection with the FDPA”); *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013) (joining the “four other circuits [that] have held that the reasonable-doubt standard does not apply to the weighing of aggravating and mitigating factors, reasoning that that process constitutes not a factual determination, but a complex moral judgment”); *United States v. Gabrion*, 719 F.3d 511, 532 (6th Cir. 2013) (en banc) (“The problem with [the defendant’s] argument is that *Apprendi* does not apply to every ‘determination’ that increases a defendant’s maximum sentence. Instead it applies only to findings of ‘fact’ that have that effect.”).

263. *See, e.g., Fields*, 483 F.3d at 346 (contrasting “findings of fact” with the weighing determination, which “is a ‘highly subjective,’ ‘largely moral judgment’ ‘regarding the punishment that a particular person deserves’” (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985))); *Barrett*, 496 F.3d at 1107–08 (quoting *Fields*, 483 F.3d at 346); *see also Mitchell*, 502 F.3d at 993 (characterizing weighing as an “individualized judgment whether a death sentence is justified”); *Gabrion*, 719 F.3d at 532–33 (characterizing FDPA’s weighing requirement as “not a finding of fact, but a moral judgment”).

264. 648 F.3d 307 (6th Cir. 2011), *rev’d en banc*, 719 F.3d 511 (6th Cir. 2013).

265. *Id.* at 329 (“[O]ur determination that [the defendant] was entitled to a reasonable doubt instruction as to the weighing of aggravating and mitigating factors requires the reversal of his death sentence.”).

otherwise, the Sixth Circuit panel undertook a functional approach to the question at issue—just as the Supreme Court had instructed in *Apprendi* and *Ring*.²⁶⁶

The *Gabrion* panel, in an opinion by Judge Merritt, noted that “the [FDPA] plainly requires as a necessary precondition to a capital defendant’s receiving the sentence of death that the government prove and the jury find that [the] aggravators outweigh the mitigators.”²⁶⁷ The panel described the government’s argument that, under the FDPA, the defendant becomes eligible for a death sentence when the jury finds the presence of at least one aggravator (i.e., prior to any weighing) as “an empty formalism of the sort the Supreme Court explicitly rejected in *Ring*.”²⁶⁸ The panel’s functional analysis was as follows:

It is plain from the Act that, even after the jury finds the presence of aggravators beyond a reasonable doubt, more needs to be proven before the defendant may be sentenced to death: a defendant is not truly “eligible” for the death penalty . . . unless and until the jury makes the determination that the aggravators outweigh the mitigators. . . . [T]he range of penalties to which he is exposed does not include the death penalty until the jury makes that required factual finding of this element of the offense.²⁶⁹

Consequently, the panel held that “a jury’s finding that the aggravating factors outweigh the mitigating factors is an element of the death penalty and must be found beyond a reasonable doubt.”²⁷⁰ Nevertheless, the *Gabrion* panel’s careful functional analysis was reversed on precisely this issue upon en banc review by the entire Sixth Circuit Court of Appeals.²⁷¹

IV. THE CAPITAL JURY TODAY: *HURST V. FLORIDA* AND BEYOND

A. *The Limits and Promise of Hurst for Completing Ring*

Remarkably, sixteen years after the Supreme Court’s decision in *Ring*, the Court *still* has not directly taken up the lingering issue of whether

266. *Id.* at 325–29.

267. *Id.* at 326.

268. *Id.* at 327 (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

269. *Id.* Judge Reinhardt’s opinion in *Mitchell*, dissenting from the Ninth Circuit panel’s rejection of the defendant’s claim that the FDPA weighing determination must be made “beyond a reasonable doubt,” reflects this same kind of thoughtful, careful, functional analysis. See *United States v. Mitchell*, 502 F.3d 931, 1011–13 (2007) (Reinhardt, J., dissenting) (“From this functional perspective, there is no practical difference between the increase in punishment due to the finding of an aggravating factor and the increase due to the finding that aggravators outweigh mitigators. Because the [FDPA] requires both findings in order for a judge to sentence a defendant to death, the Sixth Amendment requires a jury to make these findings beyond a reasonable doubt.”).

270. *Gabrion*, 648 F.3d at 325.

271. See *Gabrion*, 719 F.3d at 531–33. The en banc court’s analysis was not functional, *see supra* note 262 (quoting en banc opinion), and failed to discuss or even cite *Ring*. See *Gabrion*, 719 F.3d at 531–33. The court did note that the other six circuits that had addressed a claim that the FDPA’s weighing finding requires a beyond a reasonable doubt jury finding had all rejected it, and the en banc court seemed quite pleased to announce: “Today we become the seventh.” *Id.* at 533.

the Sixth Amendment requires the involvement of a jury in the process of death penalty decision-making, beyond the finding of an aggravating circumstance. It is hard to believe that forty-plus years into the age of the modern death penalty, such a basic question as “who decides?” remains unresolved, particularly in light of the Supreme Court’s extensive regulation of other aspects of capital sentencing (and even the minutia of some aspects of capital sentencing).²⁷² It is likewise remarkable that over thirteen years passed before the Supreme Court addressed the impact of its *Ring* decision for Florida’s “advisory jury” capital sentencing system (or the similar one in Alabama), especially when, in terms of its structure, Florida’s very active capital sentencing system was still the same judge-dominated and judge-determined system that the Court first addressed and upheld in 1976 in *Proffitt* (and then upheld again in *Spaziano* and *Hildwin*).²⁷³ After all of the *Ring* Court’s strong language about the need for a jury to make the required finding of an aggravating circumstance in a capital case, for over thirteen years post-*Ring*, capital defendants in Florida (and Alabama) continued to be sentenced to death based upon a judge’s finding of at least one aggravating circumstance, with only an advisory role for the jury in this regard, in addition to a judge’s finding regarding the weighing of aggravating and mitigating circumstances.²⁷⁴

On January 12, 2016, in *Hurst v. Florida*, the Supreme Court finally again took up (and this time struck down) Florida’s capital sentencing scheme.²⁷⁵ This time the vote was 8–1, with seven Justices on the majority opinion; and the Court opinion by Justice Sotomayor was direct, concise, and emphatic.²⁷⁶ Regarding Florida’s capital sentencing system, the *Hurst* Court declared: “We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.”²⁷⁷

The *Hurst* Court focused upon the actual content of Florida’s statutory provisions (as a proper Sixth Amendment elements-based analysis should) and appeared to have little trouble concluding that its decisions in *Ring* and *Apprendi* dictated that Florida’s “advisory jury” capital sentencing scheme must be struck down—even though this also meant (finally)

272. See STEIKER & STEIKER, *supra* note 26, at 2–3.

273. See FLA. STAT. § 921.141(2)–(3) (2015) (amended 2017); see also ALA. CODE §§ 13A-5-45 to -47 (2015).

274. See FLA. STAT. § 921.141(2)–(3); ALA. CODE §§ 13A-5-45 to -47; see also *supra* notes 202–10 and accompanying text.

275. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

276. *Id.* at 618. Justice Sotomayor’s opinion for the *Hurst* Court was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, and Kagan. *Id.* Justice Breyer concurred in the judgment. *Id.* at 624 (Breyer, J., concurring). Justice Alito dissented. *Id.* at 624 (Alito, J., dissenting).

277. *Id.* at 619 (majority opinion).

explicitly overturning its decisions in *Spaziano* and *Hildwin*, which had upheld precisely this system.

We now expressly overrule *Spaziano* and *Hildwin* in relevant part.

Spaziano and *Hildwin* summarized earlier precedent to conclude that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” Their conclusion was wrong, and irreconcilable with *Apprendi*.²⁷⁸

In other words, under *Hurst*, the Sixth Amendment *does* “require that the specific *findings* authorizing the imposition of [a] sentence of death be made by [a] jury.”²⁷⁹ Importantly, the *Hurst* Court here reaches back not just to *Ring*, but to *Apprendi*’s broader language about the “findings” that authorize a death sentence (rather than merely the fact of an aggravator). Thus, the *Hurst* Court declared—in broader language and with broader potential consequences than in *Ring*—a full and complete break with the Court’s first twenty years of its modern capital sentencing (no jury needed) jurisprudence. In the words of Justice Sotomayor: “Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*.”²⁸⁰

Furthermore, while the narrow holding of *Hurst*, like that of *Ring*, focuses upon the need for a jury to make the required finding of at least one aggravating circumstances in a capital case,²⁸¹ the *Hurst* Court’s overall approach and language are significantly broader than in *Ring* and more similar to that of *Apprendi*. Like *Ring*, the *Hurst* Court articulates and relies upon the functional approach of *Apprendi*. In particular, *Hurst* summarizes *Apprendi* as holding “that any fact that ‘expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict’ is an ‘element’ that must be submitted to a jury.”²⁸² Thus, *Hurst* is explicitly premised on the functional and elements-based approach of both *Apprendi* and *Ring*. On the other hand, while the *Hurst* Court here and otherwise refers to the finding of “facts” and “factfinding,” the *Hurst* Court also repeatedly refers more generally to the “findings” that must be made during a capital sentencing, and the *Hurst* opinion uses the terms “facts” and “factfinding” interchangeably with the broader term “findings,” within its descriptions of the *type* of determination that must be made before a defendant can be sentenced to death—much as the *Apprendi* Court had done (but unlike *Ring*).

278. *Id.* at 623 (citation omitted) (quoting *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989) (per curiam)).

279. *See id.* (emphasis added) (quoting *Hildwin*, 490 U.S. at 640–41).

280. *Id.* at 624.

281. *See id.* (noting that *Spaziano* and *Hildwin* “are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty”).

282. *Id.* at 621 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

In its description of the Florida capital sentencing scheme, the *Hurst* Court repeatedly refers to “findings,” including when quoting Florida law, which also used the term “findings” to refer to the type of determination that had to be made within its capital system.²⁸³ And the *Hurst* Court clearly recognized that a defendant could only be sentenced to death in Florida (as in most other states) based upon *multiple* findings, not just a single finding that an aggravating circumstance exists.²⁸⁴ As the *Hurst* Court worked through applying the *Apprendi/Ring* functional “increase-in-the-maximum-sentence” analysis to the Florida system, it noted that the maximum sentence that a convicted first-degree murderer could receive in Florida (based upon just the murder conviction) was life imprisonment.²⁸⁵ The *Hurst* Court noted that such a person could receive a death sentence “only if an additional sentencing proceeding ‘results in *findings* by the court that such person shall be punished by death.’”²⁸⁶ Although the Florida system did use an advisory jury as part of its capital sentencing scheme, this jury did not render any specific findings on aggravating circumstances or on the weighing of aggravating and mitigating circumstances, but gave only an “advisory sentence” (based upon a majority vote) of either death or imprisonment for life, without specifying the basis for its recommendation.²⁸⁷

The *Hurst* Court emphasized that Florida’s capital scheme did require that certain findings be made before a defendant could be sentenced to death but also that these findings had to be made by the trial judge (not the advisory jury):

[T]he Florida sentencing statute does not make a defendant eligible for death until “findings *by the court* that such person shall be punished by death.” The trial court *alone* must find “the facts . . . [t]hat sufficient aggravating circumstances exist” and “[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.”²⁸⁸

This quotation is significant because it exemplifies the *Hurst* Court’s recognition: (1) that a defendant is *not* “eligible” for the death penalty under Florida law until multiple “findings” are made by the trial court, and (2) that these required “findings” include *both* the existence of “sufficient aggravating circumstances” (i.e., at least one) *and* that the mitigating circumstances in the case are “insufficient” to “outweigh” the aggravating

283. For example, the *Hurst* Court noted that under Florida law, “[i]f the court imposes death, it must ‘set forth in writing its findings upon which the sentence of death is based.’” *Id.* at 620 (quoting FLA. STAT. § 921.141(3) (2010) (amended 2017)).

284. See *id.* (noting that in *Hurst* the sentencing judge sentenced Hurst to death based on two aggravating circumstances).

285. *Id.* (citing FLA. STAT. § 775.082(1)).

286. *Id.* (quoting FLA. STAT. § 775.082(1)) (emphasis added).

287. *Id.* (summarizing Florida law).

288. *Id.* at 622 (citations omitted) (quoting FLA. STAT. §§ 775.082(1), 921.141(3)).

circumstances.²⁸⁹ This passage is also noteworthy because (while describing Florida law) it describes *both* of these findings as “facts.” This suggests that the weighing finding may actually already be covered by the “fact” language of the holdings of both *Ring* and *Hurst*.²⁹⁰

This interpretation is further supported by the *Hurst* Court’s application of *Ring* to the case at issue, in which the Court clearly recognized that multiple findings—not just a single finding about the existence of an aggravating circumstance—are required as the basis for a death sentence. The *Hurst* Court wrote:

Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical *findings* necessary to impose the death penalty. Rather, Florida requires a judge to find these *facts*. . . . “It is true that in Florida the jury recommends a sentence, but it does not make the specific *factual findings* with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge.”²⁹¹

And the *Hurst* Court summarized its application of *Ring* as follows: “As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made *findings* was life in prison without parole. As with Ring, a judge increased Hurst’s authorized punishment based on her own *factfinding*. In light of *Ring*, we hold that Hurst’s sentence violates the Sixth Amendment.”²⁹²

The quotations provided in the preceding paragraph show the *Hurst* Court using the terms “findings,” “facts,” “factual findings,” and “factfinding” interchangeably in this context *and* using all of these terms to apply to *all* the findings that are required for a death sentence, including the weighing finding—rather than in a way that suggests that the finding of an aggravator is a narrower “factual” finding, which may be unlike the weighing finding (a possibility that was left open in *Ring*).

Consequently, although the *Hurst* Court does not actually address the issue of whether, under the Sixth Amendment, a capital defendant has a right to a jury finding regarding the “weighing” of aggravating and mitigating circumstances, because the Court’s analysis recognizes that all

289. *See id.*; *see also id.* at 620 (discussing Florida death penalty procedure). The *Hurst* Court likewise quoted the following language from a decision by the Florida Supreme Court: “[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely.” *Id.* at 622 (quoting *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005)).

290. *See id.* at 619 (holding that “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death”); *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (holding that capital defendants “are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment”).

291. *Hurst*, 136 S. Ct. at 622 (emphasis added) (citation omitted) (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)).

292. *Id.* (emphasis added).

“findings” that are required for a death sentence under the law of the jurisdiction must be made by a jury *and* that both an aggravator finding and a weighing finding are required for a death sentence in Florida, it logically follows that the weighing finding, along with the finding of an aggravating circumstance, must be made by a jury.²⁹³ Furthermore, under the Sixth Amendment rule of *Apprendi/Ring*, this weighing finding must be made “beyond a reasonable doubt.”²⁹⁴

Justice Alito, the sole dissenter in *Hurst*, likewise recognized the decision in broad terms and described *Hurst* as “holding that the Sixth Amendment *does* require that the specific *findings* authorizing a sentence of death be made by a jury.”²⁹⁵ Although Alito disagreed with this conclusion, he recognized its broad scope, which he believed to be an unwise “extension” of *Ring*.²⁹⁶

The conclusion of the *Hurst* opinion also reflects a more expansive vision of the capital jury, invoking the idea of a right to a “jury’s verdict” in the death penalty context—arguably suggesting a right to have the jury be the ultimate *sentencer* in a capital case—a suggestion that goes beyond the more limited Sixth Amendment *Apprendi/Ring* right to a jury determination on all the “elements” that are required for a death sentence in the jurisdiction at issue. The *Hurst* Court wrote: “The Sixth Amendment protects a defendant’s right to an impartial jury. This right required Florida to base Timothy Hurst’s death sentence on a jury’s *verdict*, not a judge’s fact-finding.”²⁹⁷ The Court then concluded that Florida’s sentencing scheme “is therefore unconstitutional.”²⁹⁸ Although the *Hurst* Court did not otherwise suggest that there is a constitutional right to a jury “verdict” on the ultimate sentencing issue of whether a defendant is actually sentenced to death, this expansive language is consistent with the broad language and overall approach of the *Hurst* opinion, which *does* strongly suggest that where a jurisdiction requires a weighing finding as a precondition for a death sentence, this finding must be made by a jury and beyond a reasonable doubt.

B. *The Role of the Capital Jury Post-Hurst*

Judicial and legislative responses to the Supreme Court’s 2016 *Hurst* decision among the death penalty states arguably affected by it have

293. It should be noted that this Sixth Amendment analysis always depends upon the actual content of the underlying statutory provisions at issue, i.e., the actual requirements for a death sentence in the jurisdiction at issue.

294. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

295. *Hurst*, 136 S. Ct. at 625 (Alito, J., dissenting) (second emphasis added).

296. *Id.* (arguing that “even if *Ring* is assumed to be correct,” he “would not extend it,” as the majority does in *Hurst*).

297. *Id.* at 624 (majority opinion) (emphasis added).

298. *Id.*

ranged from enthusiastic implementation (or at least acquiescence) to defiance (or at least inaction). Much of the silence/inaction is likely attributable to the fact that “death penalty states” (defined herein as states that currently have in place a statutory death penalty system)²⁹⁹ vary so widely in terms of how often this penalty is actually sought or imposed.³⁰⁰ In addition, death penalty prosecutions nationally are currently at or near historic lows for the modern era, and the number of actual executions in the United States has dropped to the lowest level since the early 1990s.³⁰¹ Consequently, in the many states where death penalty prosecutions and executions are legal but rare, it is not surprising that *Hurst* has not sparked much specific response.

Among the five hybrid states that did not have all-jury capital sentencing at the time of *Hurst*—i.e., Florida, Alabama, Delaware, Montana, and Nebraska—Montana and Nebraska seem to fall into this category. While they continue to have their same judge-jury sentencing systems in place, they are not particularly “active” in the death penalty realm.³⁰² Delaware, Florida, and Alabama, on the other hand, have all responded to *Hurst*.

Delaware’s Supreme Court was the first to address the impact of *Hurst* on its hybrid capital sentencing system, and its ruling was quite stunning. The Delaware Supreme Court declared, in a per curiam opinion, that “Delaware’s current death penalty statute violates the Sixth Amendment role of the jury as set forth in *Hurst*.”³⁰³ And by answering a series of questions that had been certified to the court, it further declared that under the Sixth Amendment, as applied to Delaware law: (1) a jury must “find” the existence of an “aggravating circumstance”; (2) this “finding” must be both unanimous and beyond a reasonable doubt; (3) a jury must “find” “that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist”; and (4) this “finding” must be both unanimous and beyond a reasonable doubt.³⁰⁴ The court ruled that Delaware’s

299. This Article includes in its definition of “death penalty states” states that continue to have statutory death penalty schemes in place, even if they also have a governor-imposed moratorium on executions. See *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited May 16, 2018) (listing states with a gubernatorial moratorium).

300. See *State by State Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state_by_state (last visited May 16, 2018) (providing a searchable database regarding state death penalty imposition).

301. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2018), <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

302. See MONT. CODE ANN. § 46-18-305 (2017) (trial judge decides whether there are “mitigating circumstances sufficiently substantial to call for leniency,” after a jury finds at least one aggravating circumstance); NEB. REV. STAT. §§ 29-2520 to -2522 (2017) (following a jury finding of at least one aggravating circumstance, three-judge panel evaluates mitigating evidence, makes various determinations, and determines sentence). Montana and Nebraska have both executed three persons in the modern era. See *State by State Database*, *supra* note 300 (select “Montana” from the “select a State” dropdown menu); *id.* (select “Nebraska” from the “Select a State” dropdown menu).

303. *Rauf v. State*, 145 A.3d 430, 433 (Del. 2016) (per curiam).

304. *Id.* at 433–34.

death penalty statute violated all four of these requirements and thus, was “unconstitutional” for all of these reasons.³⁰⁵ The court then struck down Delaware’s entire death penalty statute, declaring that it would be left up to the Delaware General Assembly “whether to reinstate the death penalty.”³⁰⁶

Nearly two years later, the Delaware legislature has not reinstated the death penalty.³⁰⁷ Thus, as a result of *Hurst* and the Delaware Supreme Court’s interpretation of *Hurst*, Delaware is no longer a death penalty state.³⁰⁸

Because Florida’s capital sentencing scheme was struck down in *Hurst*, the Florida legislature was forced to act, and it significantly amended its capital statute in 2016.³⁰⁹ Under this revised statute, a jury is required to find at least one “aggravating factor,” unanimously and beyond a reasonable doubt, in order for a defendant to be sentenced to death.³¹⁰ The jury is also required to determine “[w]hether sufficient aggravating factors exist” and “[w]hether aggravating factors exist which outweigh the mitigating circumstances” before deciding whether or not to “recommend[]” a death sentence—and a judge may not impose a death sentence without a jury recommendation of death.³¹¹ Thus, Florida no longer relegates the jury to a merely advisory role, and it no longer allows for judicial override of a jury’s recommendation of a “non-death” sentence.³¹² On the other hand, the 2016 revised statute allowed a trial judge to sentence a defendant to death if at least ten of twelve jurors voted to recommend a death sentence.³¹³

In *Hurst v. State*,³¹⁴ upon remand from the U.S. Supreme Court, the Florida Supreme Court evaluated the 2016 amended version of Florida’s death penalty statute under the Supreme Court’s decision in *Hurst*.³¹⁵ The Florida Supreme Court interpreted *Hurst* broadly and recognized its applicability to *all* “findings” that are required for a death sentence:

The Supreme Court in *Hurst v. Florida* has now made clear that the critical findings necessary for imposition of a sentence of death are the sole province of the jury. And because these findings occupy a position on par with elements of a greater offense, we conclude that *all the[]*

305. *Id.*

306. *Id.* at 434.

307. *See States With and Without the Death Penalty*, *supra* note 299.

308. *See id.*

309. *See* FLA. STAT. § 921.141 (2016) (amended 2017)).

310. *Id.* § 921.141(2)(b).

311. *Id.* § 921.141(2)(b), (3)(a).

312. *Compare id.* (requiring jury recommendation of death in order for defendant to be sentenced to death by trial court), *with* FLA. STAT. § 921.141 (2015) (providing for “advisory” jury sentence that does not limit the trial court’s choice of actual sentence).

313. FLA. STAT. § 921.141(2)(c), (3) (2016).

314. 202 So. 3d 40 (Fla. 2016) (*per curiam*).

315. *Id.* at 43–45.

*findings necessary for the imposition of a sentence of death must be made by the jury . . .*³¹⁶

And the court ruled that in Florida, the “specific findings required to be made by the jury include the existence of each aggravator factor . . . , the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.”³¹⁷ Hence the Florida Supreme Court ruled that the *Ring* rule applies to Florida’s required weighing finding and also to Florida’s requirement that the aggravators be “sufficient.” And the Florida Supreme Court, like the Delaware Supreme Court, used the term “finding” throughout its analysis.³¹⁸

But the Florida Supreme Court went even further and ruled, in an expansive and wide-ranging opinion, that Florida’s *state* constitution includes a requirement for *unanimity* in criminal jury verdicts and that in capital cases this requirement of unanimity applies to *all* the findings that must be made, including the jury’s ultimate decision about whether to recommend a death sentence.³¹⁹ Hence, notwithstanding all the improvements in Florida’s amended death penalty statute, the Florida Supreme Court ruled, in a separate case that was decided the same day as *Hurst v. State*, that the 2016 statute’s allowance a death sentence based upon a non-unanimous jury recommendation was unconstitutional.³²⁰ In 2017, the Florida legislature responded by again amending its capital statute—this time to require that the jury be unanimous in order to recommend a death sentence.³²¹

Unlike Delaware and Florida, the Alabama Supreme Court remained completely unrepentant regarding the constitutionality of Alabama’s judge-jury capital system and its own post-*Ring* decisions upholding this system. In *Ex parte Bohannon*,³²² an 8–0 decision, with seven justices joining the majority opinion, the Alabama Supreme Court concluded: “*Ring* and *Hurst* require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less.”³²³ The court essentially pronounced that it found nothing new or significant in *Hurst* and that “*Hurst* was based on an application, not an expansion, of *Apprendi* and *Ring*.”³²⁴ The court concluded: “Our reading of *Apprendi*, *Ring*,

316. *Id.* at 57 (emphasis added).

317. *Id.* at 44.

318. *See, e.g., id.* (noting that “specific findings” must “be made by the jury” in death penalty sentencing).

319. *Id.* at 53–54.

320. *Perry v. State*, 210 So. 3d 630, 634 (Fla. 2016) (per curiam).

321. *See* FLA. STAT. § 921.141(2)(c) (2017).

322. 222 So. 3d 525 (Ala. 2016).

323. *Id.* at 532, 537.

324. *Id.* at 533.

and *Hurst* leads us to the conclusion that Alabama’s capital-sentencing scheme is consistent with the Sixth Amendment.³²⁵

Nevertheless, in 2017 the Alabama legislature amended Alabama’s death penalty statute in some significant ways. Alabama law now provides capital defendants with a right to a “beyond a reasonable doubt” jury finding regarding the existence of at least one “aggravating circumstance” (though a verdict of guilt on a capital offense that overlaps with an aggravating circumstance is still considered an adequate jury finding in this regard).³²⁶ In addition, Alabama capital defendants now have a right to insist upon a jury finding that any aggravating circumstances in the case “outweigh the mitigating circumstances.”³²⁷ Hence Alabama is no longer a hybrid state, in terms of allowing a judge to give a sentence different from that of the jury, and Alabama judges can no longer override a jury’s decision *not* to recommend a death sentence.³²⁸ On the other hand, Alabama law does allow a defendant to be sentenced to death based upon a jury recommendation of a death sentence by just ten of the twelve jurors.³²⁹ Consequently, although a jury finding on weighing is required, it need not be unanimous, *and* there is no requirement in the statute that it be beyond a reasonable doubt.³³⁰

Looking back, the impact of *Hurst* on the death penalty systems of Delaware, Florida, and Alabama has been quite striking. The Supreme Courts of Delaware and Florida interpreted *Hurst* broadly and as applying to all the findings that are required for a death sentence in their particular jurisdictions. Furthermore, despite the foot-dragging of the Alabama Supreme Court, the Alabama legislature has likewise implemented a rather expansive vision of *Ring/Hurst*, which includes a right to a jury finding on all the elements of a death sentence in that state, and which does not allow a death sentence unless the jury (i.e., at least ten jurors on the jury) recommends a death sentence.³³¹

Consequently, in America today, every death penalty state (except Montana and Nebraska) provides capital defendants with a statutory right

325. *Id.* at 532.

326. ALA. CODE §§ 13A-5-45(e), -46(e)(3) (2017).

327. *Id.* § 13A-5-46(e)(2), (3).

328. *See id.* § 13A-5-47(a) (“Where the jury has returned a verdict of death, the court shall sentence the defendant to death. Where a sentence of death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole.”).

329. *Id.* § 13A-5-46(f) (“The decision of the jury to recommend a sentence of death must be based on a vote of at least [ten] jurors.”); *see also* ALA. R. CRIM. P. 18.4(f) (specifying the number of people on a jury).

330. *See* ALA. CODE § 13A-5-46(e)–(f).

331. *See id.* §§ 13A-5-45(e), -46(e)–(f). Alabama’s willingness to allow a death sentence based upon the recommendation of ten of twelve jurors makes Alabama the only state that still allows a death sentence based upon a non-unanimous jury recommendation. *Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital-Sentencing Proceedings*, DEATH PENALTY INFO. CTR. (Jan. 17, 2018), <https://deathpenaltyinfo.org/Non-Unanimous-Jury-Votes-in-Capital-Sentencing-Proceedings>.

to insist that the findings required for a sentence of death be made by a jury. Furthermore, every death penalty state (except Montana and Nebraska) places the ultimate death penalty decision in the hands of the jury rather than a judge.³³² While in some states a judge can impose a lesser sentence than the jury recommends, in America today a judge may not impose a sentence of death when a jury has recommended a sentence of life.³³³

The main lingering issue in America today regarding completion of the *Ring* revolution is whether the *Ring* rule mandates that any required weighing finding (and any other required finding in the jurisdiction at issue) must be made “beyond a reasonable doubt.” Despite the Supreme Court’s failure to require a weighing finding for a valid death sentence, the majority of death penalty states in America today do require that before a defendant can be sentenced to death, the decisionmaker must make some type of finding that the aggravating circumstances in the case “outweigh” (or are not outweighed by) the mitigating circumstances in the case.³³⁴ Out

332. *Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital-Sentencing Proceedings*, *supra* note 331. Although in many states the jury’s ultimate sentencing decision is described as a “recommendation,” as of the summer of 2017, there are no longer any states in which a trial judge is allowed to “override” a jury recommendation of “not death,” i.e., some form of imprisonment, with a sentence of death. See *Alabama Abolishes Judge Override in Death Penalty Cases*, EQUAL JUST. INITIATIVE (Apr. 4, 2017), <https://eji.org/news/alabama-legislature-passes-law-abolishing-judicial-override> (noting that Alabama abolished judicial override in death penalty cases, becoming the final state to abolish the practice).

333. See *Alabama Abolishes Judge Override in Death Penalty Cases*, *supra* note 332.

334. See ALA. CODE § 13A-5-46(e)(2) (no death penalty unless jury “determines” that any aggravating circumstances “outweigh the mitigating circumstances”); ARK. CODE ANN. § 5-4-603(a)(2) (2017) (no death penalty unless jury finds that “[a]ggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist”); CAL. PENAL CODE § 190.3(k) (West 2017) (no death penalty unless jury “concludes that the aggravating circumstances outweigh the mitigating circumstances”); COLO. REV. STAT. § 18-1.3-1201(2)(b)(II) (2017) (no death penalty unless jury “unanimously finds and specifies in writing that . . . [t]here are insufficient mitigating factors to outweigh the aggravator factor or factors that were proved”); FLA. STAT. § 921.141(2)(b)(2)(b) (2017) (no death penalty unless jury finds that “aggravating factors exist which outweigh the mitigating circumstances found to exist”); IND. CODE § 35-50-2-9(I)(1)–(2) (2017) (death sentence requires that jury “find that . . . any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances”); KAN. STAT. ANN. § 21-6617(e) (2017) (no death penalty unless “the jury finds beyond a reasonable doubt . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances”); MISS. CODE ANN. § 99-19-101(3)(c) (2017) (death sentence requires that jury “find . . . [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances”); MO. REV. STAT. § 565.030(4)(3) (2017) (no death penalty if the jury “concludes that there is evidence in mitigation of punishment, . . . which is sufficient to outweigh the evidence in aggravation of punishment”); NEB. REV. STAT. § 29-2522(2) (2017) (death sentence requires “determination” by three-judge panel “[w]hether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances”); NEV. REV. STAT. § 175.554(3) (2017) (no death sentence unless jury “finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found”); N.H. REV. STAT. ANN. § 630:05(IV) (2017) (no death sentence unless “the jury concludes that the aggravating factors outweigh the mitigating factors”); N.C. GEN. STAT. § 15A-2000(c)(3) (2017) (death sentence requires “finding[]” by jury “[t]hat the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found”); OHIO REV. CODE ANN. § 2929.03(D)(1) (West 2017) (no death penalty unless prosecution establishes “by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation”); OKLA. STAT. tit. 21, § 701.11 (2017) (no death penalty “if it is found [by the jury] that any such aggravating circumstances [are] outweighed by the finding of one or

of the current thirty-one death penalty states in America, eighteen (58%) require a weighing finding.³³⁵ And an additional five death penalty states require some type of finding that despite the mitigating circumstances in the case, the defendant “deserves” a death sentence.³³⁶ Thus, twenty-three out of America’s thirty-one current death penalty states (over 74%) require a weighing finding or some similar “deserves-a-death-sentence” finding before a capital defendant can be sentenced to death.³³⁷ The other eight capital states only require that jurors “consider” mitigating evidence, without requiring any particular findings in this regard.³³⁸

On the other hand, of the twenty-three states that require a weighing or some kind of “deserves death” finding, only six states statutorily mandate that this required finding be made “beyond a reasonable doubt.”³³⁹ Hence only 26% (six of twenty-three) of the states that require such a finding also require that it be made beyond a reasonable doubt.³⁴⁰ Thus, while nearly 75% of death penalty states do require a weighing or similar finding, almost 75% of these states do *not* require that it be made beyond a reasonable doubt.³⁴¹

more mitigating circumstances”); 42 PA. CONS. STAT. § 9711(c)(1)(iv) (2017) (no death sentence unless “the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances”); TENN. CODE ANN. § 39-13-204(f)(2) (2017) (no death penalty unless prosecution proves that any “aggravating circumstance[s] . . . outweigh any mitigating circumstance or circumstances beyond a reasonable doubt”); UTAH CODE ANN. § 76-3-207(5)(b) (West 2017) (no death penalty unless “the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation”).

335. See *supra* note 334.

336. See ARIZ. REV. STAT. ANN. § 13-751(E) (2017) (no death penalty unless the jury “determines that there are no mitigating circumstances sufficiently substantial to call for leniency”); IDAHO CODE § 19-2515(3)(b), (8)(a)(ii) (2017) (jury must make finding “whether all mitigating circumstances, when weighed against the aggravating circumstance, are sufficiently compelling [such] that the death penalty would be unjust”); MONT. CODE ANN. § 46-18-305 (2017) (death sentence requires that trial court “find[] that there are no mitigating circumstances sufficiently substantial to call for leniency”); TEX. CODE CRIM. PROC. ANN. art. 37.071(e)(1) (West 2017) (death sentence requires unanimous jury finding that there is not “a sufficient mitigating circumstance or circumstances to warrant . . . a sentence of life imprisonment without parole rather than a death sentence”); WASH. REV. CODE §§ 10.95.060(4), .080(2) (2017) (no death penalty unless jury is unanimously “convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency”). The Idaho statute, as quoted herein, contains both weighing language and language about whether a death sentence would be “unjust.” IDAHO CODE § 19-2515(3)(b), (8)(a)(ii). Because the idea of “justice” seems to be primary in the statute, Idaho is included within the “deserves-a-death-sentence” states listed here.

337. See *supra* notes 334–36 and accompanying text.

338. See GA. CODE ANN. § 17-10-30(b) (2017); KY. REV. STAT. ANN. § 532.025(2) (West 2017); LA. CODE CRIM. PROC. ANN. art. 905.3 (2017); OR. REV. STAT. § 163.150(1)(c) (2017); S.C. CODE ANN. § 16-3-20(C) (2017); S.D. CODIFIED LAWS § 23A-27A-1 (2017); VA. CODE ANN. § 19.2-264.4(A)–(B) (2017); WYO. STAT. ANN. § 6-2-102(d)(iii) (2017).

339. These states are Arkansas, Kansas, Ohio, Tennessee, Utah, and Washington; and among these six states, the finding at issue is a weighing finding for all but Washington. See *supra* notes 333 and 335.

340. See *supra* notes 334 and 336.

341. See *supra* notes 334 and 336.

This analysis suggests that there is a substantial amount of work left to do in terms of completing the *Ring* revolution, by ensuring that all findings that are required for a death sentence be made by a jury *and* beyond a reasonable doubt. In addition, this analysis also reveals a limitation of the Sixth Amendment approach. The eight “consider” states, which do not require any particular post-aggravator findings, are not covered by this Article’s Sixth Amendment approach because the extent of the Sixth Amendment’s reach (as addressed herein) is based upon the content of the underlying law of the jurisdiction at issue. And these eight states do not require any specific death penalty findings other than the existence of at least one aggravating circumstance (or a functional equivalent).³⁴²

Nevertheless, as shown by the very significant changes that *Hurst* has inspired in the death penalty schemes of Delaware, Florida, and Alabama—including abolition of the death penalty in Delaware—the Sixth Amendment approach of *Apprendi/Ring/Hurst* is powerful indeed. In addition, this Sixth Amendment approach, if taken to its logical and legal end in this realm—by applying it to *all* required death penalty findings—has the very significant advantage (over any potential Eighth Amendment approach) of being *mandatory* under the existing decisions of *Apprendi*, *Ring*, and *Hurst*.³⁴³ In addition, as shown by shown by the 8–1 vote in *Hurst*, with seven Justices on the majority opinion, the basic Sixth Amendment approach has already acquired broad agreement among the Justices on the U.S. Supreme Court.³⁴⁴ The Sixth Amendment approach has already had significant impact upon the states in this realm, and this impact seems likely to continue to expand.

CONCLUSION

In *In re Winship*,³⁴⁵ the Supreme Court held that the Fourteenth Amendment right to due process includes the right not to be convicted of a crime “except upon proof beyond a reasonable doubt.”³⁴⁶ The Court wrote:

No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable

342. See *supra* note 338.

343. Although the Supreme Court still has not directly addressed the applicability of the *Apprendi/Ring* rule to the weighing finding, Justices Sotomayor and Breyer have indicated that they have concluded that the Sixth Amendment does extend this far. See, e.g., *Woodward v. Alabama*, 134 S. Ct. 405, 405, 410–11 (2013) (Sotomayor, J., dissenting from denial of cert. review) (concluding that because Alabama’s capital weighing finding is “necessary to impose the death penalty” in that state, “[u]nder *Apprendi* and *Ring*, [this] finding . . . must be made by a jury”).

344. See *Hurst v. Florida*, 136 S. Ct. 616, 618–19 (2016). Among the Court’s current membership, six were part of the majority opinion in *Hurst*. See *id.* In particular, Justice Sotomayor’s *Hurst* majority opinion was joined by Chief Justice Roberts, as well as Justices Kennedy, Thomas, Ginsburg, and Kagan. *Id.*

345. 397 U.S. 358 (1970).

346. *Id.* at 364.

doubt the existence of every fact necessary to constitute the crime charged.³⁴⁷

In America today, no capital defendant should be deprived of life unless the jurors who try and sentence that defendant are able, upon their consciences, to declare that every finding that is necessary for a death sentence has been established beyond a reasonable doubt.

The Sixth Amendment rule of *Apprendi/Ring/Hurst* requires this result. No defendant can be constitutionally sentenced to death in America unless a *jury* finds that every element that is required by law for a death sentence has been established *beyond a reasonable doubt*. When it comes to *all* of the required findings for a death sentence—including any finding regarding the weighing of aggravating and mitigating circumstances—the jury must be the decisionmaker, and the standard must be “beyond a reasonable doubt.” In this matter of life and death, the jury must decide, and the jury must be sure.

347. *Id.* at 363 (quoting *Davis v. United States*, 160 U.S. 469, 486 (1895)).