



Capital Punishment/The Death Penalty Trends in 2003: Post-*Ring* Developments

Knowledge and Information Services
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History

Since the U.S. Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), Arizona and similarly situated states have grappled with the outcome. The majority in *Ring* held that juries, not judges, must be the ones who decide aggravating or mitigating factors during capital sentencing, because such decisions involve fact-finding. The result was that sentencing schemes in Arizona, Colorado, Idaho, Montana, and Nebraska were found to be an unconstitutional violation of a defendant's Sixth Amendment right to a jury trial.¹

Ninth Circuit

The question remained: How should *Ring* and defendants like him be sentenced? The Ninth Circuit found that *Ring* applied retroactively so as to require that death sentences be vacated in cases in which a judge rather than a jury decided the sentence. Thus, each case needed to be reexamined under the new sentencing scheme.

Summerlin

A new decision sheds light on the reasoning and philosophy behind *Ring*. In [Summerlin v. Stewart](#), No. 98-99002 (9th Cir. Sept. 2, 2003), the majority quotes Mark Twain, "truth is often stranger than fiction because fiction has to make sense," and tells the tale of Summerlin's trial.

Summerlin, who is functionally mentally retarded and mentally ill, entered an *Alford* plea because the prosecutor (who, with defense counsel, engaged in conflict-of-interest activity) did not believe he had committed a capital offense. However, the judge rejected the plea. Eventually, the case was reassigned to a judge who sentenced Summerlin to death after finding aggravating factors, a procedure that *Ring* would later forbid.²

The decision notes the "near rote conditions" under which judges impose the death penalty, in contrast to jury sentencing. The court found that "fact-finding by a jury, rather than by a judge, is more likely to heighten the accuracy of capital sentencing proceedings."

Moreover, the court found a [Teague](#) exception: the new rule "seriously enhances the accuracy of the proceeding," and "alter[s] our understanding of bedrock procedural elements essential to the fairness of the proceeding."

Finally, in a tip of the hat to Arizona's judicial system, the opinion congratulates "the many excellent trial judges in Arizona, many of whom have been national leaders in improving the jury system."

The U.S. Supreme Court is currently hearing the appeal. The outcome will determine the applicability of *Ring* to other cases where judges rather than juries decided aggravating and mitigating factors.

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¹ David Rottman et al., "[Table 46: Sentencing Procedures in Capital and Non-Capital Felony Cases](#)," in [State Court Organization, 1998](#) (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2000).

² This judge had a substance abuse problem and was subsequently disbarred.

Responses in the States

The cases of all Arizona defendants affected by *Ring* were consolidated. Earlier this year, the Arizona Supreme Court established guidelines for remanding and resentencing defendants affected by *Ring*, [CR-97-0428-AP](#) (Apr. 3, 2003). Since that time, the court, in a supplemental opinion, remanded *Ring*'s case for resentencing, [No. CR-97-0428-AP](#) (Sept. 5, 2003).

More recently, the U.S. Supreme Court issued an order stating that it will consider the key issue of retroactivity left unresolved by the *Ring* decision.

Colorado, as noted above, had changed from jury sentencing to a three-judge panel in 1995.³ In July 2002, a special legislative session convened to respond to the *Ring* decision.⁴ The state supreme court committee on criminal rules regarding death penalty rules has attempted to fashion new rules of criminal procedure (32.1 and 32.2) that are in concert with the new statute. (The current rule still refers to the three-judge panel.)

In Idaho, a 2003 statute⁵ outlines the 10 aggravators that the prosecution may list. If the defendant is found guilty, the jury must vote unanimously in the sentencing stage for at least one aggravator and vote unanimously to impose the death penalty. The state supreme court also vacated a death sentence in 2003, imposing a sentence of life without parole. However, the court has not yet overturned the state statute affected by *Ring*.⁶

Montana⁷ does not show much activity on this issue. One case (*Turner v. State*) includes motions for the court to consider *Ring*'s effects. M.C.A. [46-18-303](#) lists aggravating circumstances. M.C.A. [46-18-306](#) requires written finding of fact regarding aggravating and mitigating circumstances, while [46-18-305](#) requires the "court" to take aggravating and mitigating circumstances into account and requires that the death penalty be imposed "if the *trier of fact* found beyond a reasonable doubt" the existence of one or more aggravator and insufficient mitigation.⁸ In 46-1-401(1)(b), the jury is required to find separately a penalty-enhancing act, omission, or fact unanimously and beyond a reasonable doubt.⁹

Nebraska first considered the effect of *Ring* on its own state's sentencing scheme in *State v. Gales*, 658 N.W.2d 604 (2003). In *Gales*, the court applied *Ring* and held that it required that the existence of any aggravating circumstance used in the imposition of a sentence of death, other than a prior criminal conviction, must be determined by a jury. Because the jury had made no explicit determination that statutory aggravating circumstances existed, the procedure violated the Sixth Amendment and *Ring*, and the death sentences were vacated.

Nebraska's second *Ring*-related challenge was *State v. Lotter*, 664 N.W.2d 892 (2003). In *Lotter* the defendant sought to challenge those sentences in postconviction proceedings. The court denied the defendant's motions to vacate his sentence based upon a determination that *Ring* did not apply to collateral challenges to sentences that were final when *Ring* was decided.

In *Mata*, the defendant's judgment had not yet been determined at the time of *Ring*.¹⁰ Thus, *Ring* applied. However, *Mata* did not argue at trial that he was entitled to a jury determination of aggravating circumstances. Thus, the issue was whether the violation of *Ring* constituted plain error. The court found that it did, and vacated *Mata*'s sentence, remanding to the district court for resentencing.

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³ Colo. Crim. P. 32.1.

⁴ H.B. 02S-1005.

⁵ S. 1001, 57th Leg., 1st Reg. Sess., § 1.

⁶ Stephen Shaw, "Perspectives: Federal Jurisprudence, State Autonomy: New Death Penalty Statute in Idaho," *Albany Law Review* 66 (2003): 867.

⁷ *Turner v. State*, No. 00-770

⁸ Emphasis added.

⁹ [S.B. 68](#).

¹⁰ [State v. Mata, S-00-600, 266 Neb. 668](#) (September 5, 2003).

Hybrid States

States with a hybrid sentencing system, in which the jury recommends a sentence to the judge, who may then override it, include Alabama, Delaware, Florida, and Indiana. The question for these states is whether an advisory jury recommendation can satisfy *Ring*'s requirements.¹¹

Unanimity is another issue for such states. While juries must decide the death penalty and all elements unanimously, it is not clear whether they must also be unanimous in deciding the aggravators. Indeed, it is reportedly difficult to know which aggravators the jury focused on.¹² (Note that the new Idaho statute includes unanimity requirements.)

Finally, the question of whether instructions to advisory juries adequately convey the gravity of the jurors' role could arise.¹³

Alabama law permits a judge to impose death without a jury's specific finding of aggravating circumstances. In the first case to address the issue, the Alabama Supreme Court held that Alabama's sentencing scheme did not run afoul of *Ring* in a case in which the jury's recommendation of a sentence of life imprisonment without parole was overridden by the judge, who imposed death. *Ex parte Waldrop*, No. 1001194, 2002 WL 31630710, at 6 (Ala. Nov. 22, 2002).

Florida law permits a judge to impose death without a jury's specific finding of aggravating circumstances. The jury's sentence recommendation to the judge is nonbinding, and the jury must unanimously agree on all elements. Note that *Ring* reclassifies aggravators as "tantamount to elements."¹⁴ The state supreme court rejected a *Ring* challenge to Florida's provision for judicial override of an advisory jury recommendation. See *infra* notes 139-40 (discussing [Bottoson v. Moore, 833 So. 2d 693 \(Fla. 2002\)](#) [per curiam]; [King v. Moore, 831 So. 2d 143 \(Fla. 2002\)](#) [per curiam]).

In *Wrinkles v. State*, [82S00-0207-SD-407](#), the defendant was not entitled to postconviction relief on the basis of *Ring* because the jury found him guilty of multiple murders (the aggravator). Thus, the court did not have to examine the questions of whether *Ring* applied retroactively to the case, or whether **Indiana's** sentencing procedures were affected by *Ring*.

But see *Bostick*: "Because of the absence of a jury determination that qualifying aggravating circumstances were proven beyond a reasonable doubt, we must therefore vacate the trial court's sentence of life without parole."¹⁵

Delaware amended its jury advisory system to comport with *Ring* but still has cases on appeal or in postconviction in which the sentence was determined under the prior system.¹⁶

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What Will Juries Do?

Will heightened jury involvement affect the outcomes? History of jurisdictions that changed (from judge to jury, or vice versa), sentencing statistics, and recent studies show what to expect.

Judges in Maricopa County, **Arizona**, sentenced 11 out of 75 (14.7 percent) first-degree murder defendants to death from 1995 to 1999, according to the state's [Capital Case Commission](#). Statewide, 29 out of 143 (20.3 percent) capital defendants received the death penalty from judges during this same time period. Now, however, 7 out of 8 capital defendants in Maricopa, and 10 such defendants statewide, have received the death penalty.

¹¹ Bryan A. Stevenson, "The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing," *Alabama Law Review* 54 (Summer 2003): 1117.

¹² Stevenson, 1116-117.

¹³ Stevenson, citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985), 1119-1120.

¹⁴ Stevenson, 1116-117.

¹⁵ [State v. Bostick](#), 33S00-9911-CR-651 (2002).

¹⁶ Del. Code Ann. Tit. 11 § 4209(d)(1) Determination of Sentence (amended to comply with *Ring* July 22, 2002). See also SB 449.

Colorado, whose sentencing procedures were likewise overturned by [Ring](#), had originally moved to the judge panel because juries did not impose death often enough.¹⁷

See Jim Walsh, "[Jurors Dish Out Death in Arizona](#)," *Arizona Republic* (November 12, 2003). See also Stevenson's discussion of sentencing statistics under judges and juries and legislative changes in Colorado and elsewhere.¹⁸

Whether juries are more or less lenient than judges remains to be seen. However, it is certain that the most immediate effect will be on voir dire, jury instructions, and juror stress. These will become more complicated because the onus of a life-or-death decision is on jurors.

The clarification from the U.S. Supreme Court is intended to shed light on the effects of *Ring*. States would do well to monitor *Ring*-related activity, as such cases could affect sentencing procedures, increase appeals, and require more of juries.

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¹⁷ *People v. Martinez*, 22 P. 3d 915 (Colo. 2001). Colo. Rev. Stat. § 16-11-103 (2000). See also Stevenson, fn. 287.

¹⁸ Stevenson, 1091, 1141-145.