

The *Ring* Cycle:
What Do We Know about Weighing, Juries, and Death?

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Abstract

When it was decided in 2002, *Ring v. Arizona*, 536 U.S. 584 appeared to be a watershed in the way capital sentences are handed out in the United States. *Ring* announced that the rule of *Apprendi v. New Jersey* applied to capital sentences and required that any fact necessary to the imposition of the death penalty be proven to a jury beyond a reasonable doubt. No longer could states remove capital decision-making entirely from juries (as many states had done prior to *Ring*); rather *Ring* appeared to signal that the jury has an important role to play in determining who lives and who dies.

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; it overturned several states' death penalty statutes and appeared to imperil many more. Yet seven years after the case was decided, it is not clear what, if anything, *Ring* in fact demands of the states. As Justice Scalia made clear in his *Ring* concurrence, the case does not grant the right to have a jury determine a capital sentence; rather it only precludes a judge from finding the *facts* that make the defendant eligible for a sentence of death. The ultimate sentence may still be imposed by a judge sitting without a jury. However, determining exactly what constitutes fact-finding, and therefore which tasks must be carried out by the capital jury rather than a judge, remains a challenging task.

In this article we investigate the impact of *Ring* by analyzing several typical capital statutes against both the language of the *Ring* opinion and the broader context of the Court's Sixth Amendment jurisprudence. What we find is that in all but the most obvious cases, *Ring*'s mandate is an extraordinarily weak one. Beyond the easiest cases, fact-finding is a difficult concept to define and, as a result, there has been considerable difference of opinion in the states regarding what capital sentencing questions may, and may not, be given to judges rather than to juries.

To the extent states are unwilling to hand complete control of capital cases over to juries (and, for various reasons many seem unwilling to do so) *Ring* creates perverse incentives: Juries can be removed from the equation simply by making capital decision-making open-ended rather than fact-based. Such open-ended decision-making, however, creates significant Eighth Amendment concerns; the Supreme Court held in *Gregg v. Georgia* 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." We argue that a possible solution to this tension lies in the argument of Justice Breyer's concurrence in *Ring* that the Eighth Amendment requires jury sentencing in all capital cases.