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A Cold Day in Appendi-land: *Oregon v. Ice* Brings Unknown Forecast for Appendi's Continued Vitality in the Capital Sentencing Context

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When Charles Appendi fired two .22 caliber gunshots into the home of the first African-American family to move into a previously all-white New Jersey neighborhood, he could not have known that those shots would ring throughout federal constitutional procedure. After pleading guilty to two counts of second-degree possession of a firearm with an unlawful purpose, Appendi faced a sentencing range of ten to twenty years of imprisonment.¹ The State then motioned for an enhanced sentence under New Jersey's hate crime statute and argued that Appendi committed the crime for a biased purpose.² The judge held an evidentiary hearing and concluded by a preponderance of the evidence that the "crime was motivated by racial bias" and that Appendi had the "intention to intimidate."³ Based on these findings, the judge elevated the relevant maximum sentence from twenty years for the two second-degree counts to an aggregate thirty years of imprisonment—ten years above the maximum punishment available on the basis of the guilty plea alone.⁴

Appendi argued on appeal that the Constitution required a jury to make "a factual determination authorizing an increase in the maximum prison sentence for an offense from ten to twenty years . . . on the basis of proof beyond a reasonable doubt."⁵ The New Jersey Supreme Court rejected Appendi's argument and held that the state legislature created the hate-crime enhancement as a sentencing factor rather than an element of the offense. The United States Supreme Court granted review. Holding that the Sixth and Fourteenth Amendments require "any fact that increases the penalty for a crime beyond the prescribed statutory maximum [] be submitted to a jury, and proved beyond a

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¹ Appendi v. New Jersey, 530 U.S. 466, 469-470 (2000).

² *Id.* at 470.

³ *Id.* at 470-71.

⁴ *Id.*

⁵ *Id.* at 469.

reasonable doubt,”⁶ the Court not only reversed *Apprendi*’s sentence—it ignited a constitutional criminal procedure revolution.⁷ By rejecting the distinction between a sentencing factor and an element of a crime, the *Apprendi* Court clarified that the new rule “is one not of form, but of effect.”⁸ Under this consequence-driven approach, the constitutionally relevant question is simply whether the judge’s finding exposes the defendant to a higher sentence than the one authorized by the jury’s verdict.

The Court has since applied *Apprendi* to a variety of contexts,⁹ despite the immense practical difficulties this consequence-driven approach has posed.¹⁰ For example, in *Ring v. Arizona*¹¹, the Court rejected the State’s argument that the finding of an aggravating factor in the penalty phase of a capital trial did not increase the defendant’s maximum possible punishment because the jury’s guilty verdict authorized death as a possible sentence. The Court held: “If 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.”¹² Thus, under the Arizona sentencing scheme, the jury must find the existence of at least one aggravating factor before a death sentence may be imposed. The Court’s recognition of the role of the jury as a buffer between the accused and the State signaled a refashioning of Sixth Amendment jurisprudence to its “historical foundation.”¹³

This term, in *Oregon v. Ice*, a divided Court appears to have frozen *Apprendi*’s expansion.¹⁴ Under Oregon law, a person convicted of multiple offenses will serve the sentences concurrently unless the judge finds that the offenses “do not arise from the same continuous and uninterrupted course of conduct.”¹⁵ *Ice* argued that a jury—and not a judge—should have made the factual findings necessary to sentence him consecutively. The Court disagreed, holding that *Apprendi* was inapplicable to the finding that a defendant should serve consecutive rather than concurrent sentences.¹⁶ *Ice*’s reasoning is even more remarkable than its holding. In a departure from the straightforward consequence-driven approach taken in previous *Apprendi* cases, the *Ice* majority instead

⁶ *Id.* at 490.

⁷ *See, e.g.*, Sam Kamin, *Rerouted on the Way to Apprendi-Land: Booker, Rita, and the Future of Sentencing in the Federal Courts: An Introduction*, 85 DENV. U. L. REV. 1, 1 (2007).

⁸ *Apprendi*, 530 U.S. at 494.

⁹ *See, e.g.*, *United States v. Booker*, 543 U.S. 220 (2005) (federal sentencing guidelines); *Ring v. Arizona*, 536 U.S. 584 (2000) (capital sentencing proceedings).

¹⁰ *See, e.g.*, *Booker*, 543 U.S. at 220 (rendering the Federal Sentencing Guidelines merely advisory); *Ring*, 536 U.S. at 620 (O’Connor, J., dissenting) (“It is simply beyond dispute that *Apprendi* threw countless criminal sentences into doubt and thereby caused an enormous increase in the workload of an already overburdened judiciary.”).

¹¹ *Ring*, 536 U.S. 584.

¹² *Id.* at 602.

¹³ *Apprendi*, 530 U.S. at 477 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) (hereinafter Blackstone)).

¹⁴ *Oregon v. Ice*, 129 S. Ct. 711 (2009).

¹⁵ *Id.* at 715.

¹⁶ *Id.* at 717.

adopts an analysis driven by the “twin considerations” of “historical practice and respect for state sovereignty.”¹⁷

The Court’s retrenchment from *Apprendi*’s bright-line rule creates confusion for the lower courts. *Ice* requires lower courts to make Sixth Amendment decisions about the appropriate factfinder based upon a balancing test that weighs constitutional history and state autonomy. Unfortunately, the Court in *Ice* did not provide the lower courts with sufficient guidance on how to weigh these factors. The resulting confusion is especially threatening to *Apprendi*’s core values in the capital context. Though *Ice* does not question *Ring*’s holding explicitly, the majority’s mode of considering historical practice leaves *Ring* on shaky ground. While the Court has not yet addressed *Apprendi*’s applicability to capital sentencing determinations beyond the finding of an aggravating factor,¹⁸ *Ice* leaves open the possibility that the Court will permit a defendant to be sentenced to death by a single judicial officer, based upon something less than proof beyond a reasonable doubt.¹⁹ The reasoning of the *Ice* opinion throws the holding of *Ring* into question. The Supreme Court should reaffirm the holding of *Ring*, limit the effects of *Ice*, and reassert the Court’s commitment to a meaningful right to trial by jury.

Warmer Days: *Ring v. Arizona*

The *Apprendi* decision had specifically excluded capital sentencing determinations from its grasp—and affirmed *Walton v. Arizona*²⁰—by characterizing the judge’s choice between a punishment of life and death as one between options “pre-authorized” by the guilty verdict. In dissent, Justice O’Conner labeled such pre-authorization reasoning as “demonstrably untrue.”²¹ “[U]nder Arizona law,” she explained, “a defendant convicted of first-degree murder can be sentenced to death only if the judge finds the existence of a statutory aggravating factor.”²² Two years later, the Court conceded Justice O’Connor’s point. “Because Arizona’s enumerated aggravating factors operate[d] as the functional equivalent of an element of a greater offense,” the *Ring* Court found that “[c]apital defendants, no less than non-capital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”²³ Therefore, *Ring* held that a jury must find a statutory aggravating circumstance beyond a reasonable doubt. Concurring, Justice Scalia explained that because “it is impossible to identify with certainty those aggravating

¹⁷ *Id.*

¹⁸ See *Ring*, 536 U.S. at 597 n.4 (2002) (“Ring’s claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.”).

¹⁹ In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Court rejected the claim that a jury must serve as the ultimate sentencer in capital cases. *Ring* called that holding into question.

²⁰ 497 U.S. 639 (1990) (holding that the Sixth Amendment does not require that every finding of fact underlying a sentencing decision be made by a jury rather than by a judge).

²¹ *Apprendi*, 530 U.S. at 484 (O’Connor, J., dissenting).

²² *Id.* at 483.

²³ *Ring*, 536 U.S. at 588.

factors whose adoption has been wrongfully coerced by *Furman*,²⁴ as opposed to those that the State would have adopted in any event,” a departure from *Apprendi* would precipitate the decline of the jury trial right.²⁵

Ring on Thin Ice

The *Ice* Court identified *Apprendi*'s “animating principle” as “preservation of the jury’s historic role as a bulwark between the State and the accused at the trial for an alleged offense.”²⁶ The Court “accordingly considered whether the finding of a particular fact was understood as within the ‘domain of the jury . . . by those who framed the Bill of Rights.’”²⁷ This analytical framework has significant implications for *Ring* and sentencing in capital cases.

If the Court takes a literal view of whether the Framers understood a particular finding as within the domain of the jury, then the Court’s Sixth Amendment jurisprudence cannot be home to both *Ring* and *Ice*. Because the death penalty was mandatory at the Framing,²⁸ a jury at that time made no separate factual finding that a convicted murderer deserved a death sentence.²⁹ Therefore, the literalist would understand *Ice* to overturn *Ring* and enable a judge to make factual findings necessary to sentence a defendant to death.

However, *Ring* will survive *Ice* if the Court retains a functional analysis of the jury’s historical role in capital sentencing determinations. While “the jury traditionally played no part” in determining if distinct offenses should be served concurrently or consecutively,³⁰ the Framers did expect the criminal petit jury to protect the individual from the State’s over-zealousness (and nowhere could this be more important than in the capital context).³¹ For example, John Adams described this balance of power as follows:

²⁴ In multiple lengthy opinions, the Supreme Court in *Furman v. Georgia* ultimately held that state capital sentencing statutes must prevent the arbitrary imposition of the death penalty by: (1) narrowing the class of offenders eligible for the sentence; and (2) channeling the discretion of the jury. *Furman v. Georgia*, 408 U.S. 238 (1972). In *Gregg v. Georgia*, the Supreme Court approved of Georgia’s use of aggravating circumstances to narrow the class of offenders. *Gregg v. Georgia*, 428 U.S. 153 (1976).

²⁵ *Ring*, 536 U.S. at 611-612 (Scalia, J., concurring)

²⁶ *Oregon v. Ice*, 129 S. Ct. 711, 717 (2009).

²⁷ *Id.* (quoting *Harris v. United States*, 536 U.S. 545, 557 (2002)).

²⁸ See *Woodson v. North Carolina*, 428 U.S. 280, 289-90 (1976) (“At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common law practice of making death the exclusive and mandatory sentence for certain specified offenses.”).

²⁹ Interestingly, the judge-jury dichotomy at the center of the *Apprendi* framework is not in play here. Because the legislature made the death penalty the only available punishment for a convicted murderer, there were no findings of death-worthiness to be made.

³⁰ *Ice*, 129 S. Ct. at 717.

³¹ See AKHIL REED AMAR, *AMERICA’S CONSTITUTION* 238 (2005) (At the founding, “[i]f either the judge or jury found the underlying criminal statute unconstitutional, the defendant would walk free.”); *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, J.,

as the constitution requires that the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of the government, it requires that the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature.³²

Juries thus served a critical function as a bulwark between the individual and potential State oppression. In this important role, founding era juries exercised their responsibilities with vigor and to great effect.³³ Over time, as jurors with qualms over mandatory capital punishment became unwilling to convict palpably guilty defendants,³⁴ states reduced the number of capital crimes and began to distinguish between degrees of murder and corresponding severity of punishments.³⁵ This division into degrees, however, proved insufficient, as juries still found mandatory death sentences excessive.³⁶ “By 1963, [every death penalty jurisdiction] had replaced their automatic death penalty statutes with discretionary jury sentencing.”³⁷ The role that the jury played in limiting the application of the death penalty highlights the rich history of the jury’s functional role in capital sentencing.³⁸ The functional understanding of the jury’s role in capital cases would preserve the *Ring* holding even in light of the questions raised by *Ice*.

There is a third potential resolution to *Ring*’s fate after *Ice*. Arguably, the development of Eighth Amendment jurisprudence renders *Ice*’s use of the Founding as

for a unanimous court sitting in original jurisdiction) (“Gentleman, . . . you have . . . a right to take upon yourselves to judge of both . . . the law as well as the facts in controversy.”).

³² John Adams Diary Entry (Feb. 12, 1771), in JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 253 (Charles Francis Adams ed., Little, Brown and Company 1850).

³³ See *Woodson*, 428 U.S. at 289.

³⁴ *Id.* at 289-290 (“The States initially responded to this expression of public dissatisfaction with mandatory statutes by limiting the classes of capital offenses. This reform, however, left unresolved the problem posed by the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences.”).

³⁵ *Id.* at 290.

³⁶ *Id.* at 289 (“Despite the broad acceptance of the division of murder into degrees, the reform proved to be an unsatisfactory means of identifying persons appropriately punishable by death Juries continued to find the death penalty inappropriate in a significant number of first-degree murder cases, and refused to return guilty verdicts for that crime.”).

³⁷ *Id.* at 291-92.

³⁸ At the adoption of the Sixth Amendment, “the jury’s role in finding facts that would determine a homicide defendant’s eligibility for capital punishment was particularly well established. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations,” *Walton v. Arizona*, 497 U.S. 639, 711 (1990) (Stevens, J., dissenting) (internal citations omitted); See generally John C. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005).

the historical reference point inappropriate in the capital context.³⁹ It is *Furman v. Georgia*⁴⁰ and *Woodson v. North Carolina*⁴¹ that compel the jury's role in capital sentencing determinations; there is no constitutional analogue that requires consideration of concurrent versus consecutive sentencing.⁴² *Furman* required state legislatures to narrow the instances where a death sentence can be imposed so that only the most severe crimes are subject to a death sentence.⁴³ *Woodson* held that the mandatory death penalty was unconstitutional (regardless of how narrowly legislatures defined capital crimes or how aggravated the circumstances of the offense or the offender) and explained that mitigation evidence must be examined before a person can receive a possible death sentence so that only the most culpable murderers are executed.⁴⁴ In sum, the Eighth Amendment now dictates that only the most severe murders committed by the most culpable murderers can be eligible for a death sentence. State legislatures responded to these constitutional commands by bifurcating the guilt and penalty phases. During the guilt phase, the jury must decide whether the defendant committed a crime that renders him eligible for death. Therefore, under the Eighth Amendment—regardless of how one understands the jury's involvement in capital cases at the Founding—juries serve a critical role in narrowing the class of offenders who may be subjected to the death penalty.⁴⁵

While there is nothing inherently objectionable about this bifurcated structure, the protections afforded by the Sixth Amendment right to trial by jury are diluted if judges are allowed to find facts in the penalty phase that persuade them that death is the appropriate punishment, since these are the types of sentence-elevating facts that judges would not be permitted to find in the guilt phase. This approach would allow legislative disaggregation of the guilt and penalty phases pursuant to the Eighth Amendment to undermine the vital role of the jury as buffer between defendant and the State. It would enable the judge—not the jury—to make factual findings during the penalty phase that

³⁹ Cf. *Georgia v. Randolph*, 547 U.S. 103, 143 (2006) (“It is entirely clear, however, that if the matter did depend solely on property rights, a latter-day alteration of property rights would also produce a latter-day alteration of the Fourth Amendment outcome—without altering the Fourth Amendment itself.”). Similarly, a latter-day alteration of the prohibition on cruel and unusual punishments would produce a latter-day alteration of the Sixth Amendment outcome, without altering the Sixth Amendment itself.

⁴⁰ 408 U.S. 238 (1972).

⁴¹ 428 U.S. 280 (1976).

⁴² See, e.g., *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (“Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”) (internal quotation omitted).

⁴³ See *Furman*, 408 U.S. 238.

⁴⁴ See *Woodson*, 428 U.S. at 301.

⁴⁵ See also *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (“Jury sentencing has been considered desirable in capital cases in order ‘to maintain a link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’”).

elevate a defendant's sentence from life in prison to death, even though *Apprendi* explicitly forbids this sort of sentence enhancement.

***Ring* on Trial (by Proxy)**

During the penalty phase of capital sentencing, the fact-finder is required to determine the defendant's culpability by considering mitigating evidence in the context of aggravating circumstances. Whether death should be imposed depends upon the force of the mitigation evidence.⁴⁶ *Apprendi* has left lower courts divided on whether the Sixth Amendment requires juries to decide culpability, and the same logic by which *Ring* will sink or swim in light of *Ice* applies with equal force to the culpability determination.⁴⁷ If the literalist approach to the historical analysis prevails, neither *Ring* nor the culpability determination is *Apprendi*-bound and a judge can act as factfinder during both the guilt and penalty phases. If the functional approach prevails, *Apprendi* applies to both, and a jury must act as fact-finder during the guilt phase and decide culpability during the penalty phase. The legislature cannot disaggregate the question of death-deservedness, requiring a jury to find only one of two component parts, because a death sentence is excessive if imposed for either an insufficiently aggravated crime or an insufficiently culpable offender. Thus, if the modern evolution of Eighth Amendment jurisprudence marks the relevant focal point for the historical inquiry, the culpability determination during the penalty phase functions as a prerequisite to a possible death sentence just as the finding of an aggravating factor during the guilt phase does.⁴⁸ Though some attempt

⁴⁶ *Apprendi*'s applicability to these findings deeply divides the lower courts. See, e.g., *Duest v. State*, 855 So. 2d 33, 50 (Fla. 2003) (Pariante, J., specially concurring) ("those cases [addressing the applicability of *Ring* to the weighing determination] . . . illustrate that *Ring* has raised at least as many questions in the state courts as it has answered.").

⁴⁷ See, e.g., *Walton v. Arizona*, 497 U.S. 639, 666 (1990) (Scalia, J., concurring) (portraying the narrowing function of both aggravating and mitigating factors as "impossible" to distinguish).

⁴⁸ See *Woodson*, 428 U.S. at 288 ("the 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."); *Oregon v. Ice*, 129 S. Ct. 711, 720 (2009) (Scalia, J., dissenting) (citing *United States v. Booker*, 543 U.S. 220, 232 (2005)) ("A bare three years ago, in rejecting the contention that the facts determining application of the Federal Sentencing Guidelines did not have to be found by the jury, we again set forth the pragmatic, practical, non-formalistic rule in terms that cannot be mistaken: The jury must find the existence of any particular fact that the law makes essential to a defendant's punishment."); *Id.* ("We have taken pains to reject artificial limitations upon the facts subject to the jury-trial guarantee."); cf. Model Penal Code § 210.6(2) (1981) ("The Court . . . and the jury . . . shall not impose or recommend [a] sentence of death unless it finds one of the aggravating circumstances . . . and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency."); Model Penal Code § 210.6 cmt. 7 ("[The sentencing] proceeding will call for a balance of aggravating and mitigating factors and will not permit the imposition of a

to distinguish the culpability finding from the finding of aggravating factors because the sentencer can only “lower” but never increase the maximum punishment during the penalty phase, this claim disguises the reality that a death sentence cannot be imposed unless the sentencer has determined that the defendant is culpable enough to be considered among the worst of the worst offenders.

In addition to generating difficult interpretive questions for lower courts, *Ice* also creates logical lacunae for the culpability determination. *Ice* delineates a distinction between facts about the offense (ostensibly controlled by the Sixth Amendment right to a jury trial) and facts about the defendant.⁴⁹ Then, as the dissent notes, *Ice* “distinguish[es] Oregon’s sentencing scheme by reasoning that the rule of *Apprendi* applies only to the length of a sentence for an individual crime and not to the total sentence for a defendant.”⁵⁰ These aspects of *Ice* further cloud its implications for capital defendants. After all, the death penalty is not imposed based solely upon the offense, but also on the character, propensities, and history of the offender.⁵¹

Conclusion

While it is unclear whether or how far *Ice* will strike at *Apprendi*’s roots, there is no doubt that the decision destabilizes *Ring*. Though the jury’s historic role included protection against political and prosecutorial overreaching,⁵² *Ice* leaves open the possibility that the Court will permit a defendant to be sentenced to death by a judge, based upon something less than proof beyond a reasonable doubt. If the Court intends to retreat from *Apprendi* in the capital context, it should overtly acknowledge that the Eighth Amendment protections created by the Court correspondingly diminish the protections guaranteed by the Sixth Amendment. If, however, the Court intends to hold firm to *Apprendi* in capital cases, the Court must declare that a person cannot be sentenced to death unless the jury decides—beyond a reasonable doubt—that that person is culpable enough to receive a possible death sentence. This outcome—one that

sentence of death unless an aggravating circumstance . . . has been found and no overriding mitigation is found to exist.”).

⁴⁹ *Ice*, 129 S. Ct. at 719 (“Trial judges often find facts about the nature of the offense or the character of the defendant . . .”). *But see* *Cunningham v. California*, 549 U.S. 270, 291 n.14 (rejecting Justice Kennedy’s proposed distinction between facts concerning the offense (to be subject to *Apprendi*) and facts concerning the offender).

⁵⁰ *Ice*, 129 S. Ct. at 720 (Scalia, J., dissenting).

⁵¹ *See Woodson*, 428 U.S. at 304. Of note, “facts that concern the offender” suffice as aggravating factors. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (fact of a prior conviction need not be proven to a jury). It is possible that *Ice* sought merely to extend the *Almendarez-Torres* prior conviction exception to contemporaneous convictions, though the Court did not address the logic for that expansion.

⁵² *See Jones v. United States*, 526 U.S. 227, 245 (1999) (“The potential or inevitable severity of sentences was indirectly checked by juries’ assertions of a mitigating power . . . This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as “pious perjury” on the jurors’ part.”).

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reaffirms the commitment to the Sixth Amendment—is the right one. After all, in the words of Justice Scalia, “[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.”⁵³

⁵³ Ring v. Arizona, 536 U.S. 584, 611-12 (2002) (Scalia, J., dissenting).

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