CAPITAL SENTENCING UNDER AMERICAN CRIMINAL LAW[*]

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ÖZET

Bilindiği üzere, ABD ceza hukukunda ölüm cezası halen dahi uygulanmaktadır. Bu makalede, ABD ceza hukukunda, sanık hakkındaki ölüm cezasının nasıl ve hangi faktörler göz önüne alınarak verildiği anlatılmaktadır. ABD Federal Yüksek Mahkemesi, Ring Davasında, bir sanık hakkında ölüm cezası verilebilmesi için, yargıcın değil, jürinin her türlü şüpheden uzak bir şekilde ağırlaştırıcı sebeplerin varlığını sabit görmesi gerektiğine hükmetmiştir. Yüksek Mahkeme bu kararıyla, aralarında Arizona'nın da bulunduğu bazı eyaletlerin ölüm cezası verme yöntemlerini yürürlükten kaldırmış bulunmaktadır. Önceleri Yüksek Mahkeme ölüm cezasının verilmesi için jüri kararının Anayasal açıdan gerekli bulunmadığını ve yargıcın buna karar verebileceğini kabul ediyordu. Ring kararı bu uygulamaya son vermiş olup, aynen sübuta ilişkin kararlarda olduğu gibi, ölüm cezası verilebilmesi için de artık bu yöndeki jüri kararının varlığı aranmaktadır. Aşağıda incelenecek olan karar beş eyaletin ölüm cezası verme sistemini iptal etmiş olup, jürinin tavsiye kararı üzerine, yargıcın ölüm cezası vermesi gibi, karma bir sistem benimseyen diğer bazı eyaletlerin ceza verme sistemlerini de tartışmalı hale getirmiştir.

ANAHTAR KELİMELER

Yüksek Mahkeme, jüri, yargıç, ağırlaştırıcı sebepler, ölüm cezası, mahkumiyet.

SYNOPSIS

U.S. penal law still has capital punishment practice. This article aims to explain how a defendant can be sentenced to death in U.S. Penal Law. In Ring v. Arizona, the Supreme Court held that a jury, not a judge, must find beyond a reasonable doubt any

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aggravating factors which are necessary for a defendant to be eligible for the death penalty. This holding served as a significant departure from the prior understanding of capital jurisprudence as it overruled a prior Supreme Court opinion upholding the Arizona capital sentencing procedure. Previously, the Supreme Court held that jury sentencing in capital cases was not constitutionally required, and a judge could sentence a defendant to death. Ring curtailed this holding in that a jury now must make any necessary fact-finding in order to render a defendant eligible for death. This ruling invalidated five states' capital sentencing systems and brought into question several states which had a "hybrid" system where a jury rendered an advisory opinion but the judge decided on the ultimate sentence.

KEY WORDS

The Supreme Court, jury, judge, aggravating factors, capital punishment, sentence.

I. Introduction

In Ring v. Arizona, the Supreme Court held that a jury, not a judge, must find beyond a reasonable doubt any aggravating factors which are necessary for a defendant to be eligible for the death penalty. [1] This holding served as a significant departure from the prior understanding of capital jurisprudence as it overruled a prior Supreme Court opinion upholding the Arizona capital sentencing procedure.[2] Aggravating factors were no longer mere "sentencing considerations," as Walton v. Arizona held.[3] Instead, under Ring, aggravating factors were now "functional equivalents to an element," subject to the same constitutional guarantees which extended to elements of the offense.[4] The Supreme Court first adopted the concept, "functional equivalent to an element," in these cases.[5] The introduction of this new concept resulted in confusion as to degree to which a "functional equivalent to an element" should be treated as actual elements (i.e., alleged in the charging document and proven at the trial on the merits).[6]

The Court's jurisprudence contains aspects that are clearly understood and others that are less clearly defined. On one hand, what constitutes the "functional equivalent to an element" is clearly defined—any fact which is a necessary predicate for an increase in the maximum punishment. On the other hand, the procedural protections that "functional equivalents to an element" warrant is less clear and undefined. At the very least, such facts require (1) proof to a jury pursuant to the Sixth Amendment jury trial right, (2) proof beyond a reasonable doubt pursuant to the Fifth or Fourteenth Amendments' due process guarantee, (3) notice to an accused in a grand jury indictment pursuant to the Fifth Amendment Indictment Clause (in federal prosecutions only). For non-federal cases, dicta also indicate that Sixth Amendment notice guarantees also extend to functional equivalents of an element.

The amount of notice, however, has not been clearly defined. For example, these cases do not answer the question of whether the government must provide notice in the charging document, whether the government must pro-

[1] Ring v. Arizona, 536 U.S. 584 (2002).

[2] *Id.* at 608 (overruling Walton v. Arizona, 497 U.S. 639 (1990)).

[3] *Walton*, 497 U.S. at 648.

[4] *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

[5] *Apprendi*, 530 U.S. at 494 n.19.

[6] *See* Schriro v. Sumerlin, 124 S. Ct. 2519, 2523-2524 (2004) (holding that *Ring* did not substantively change the elements of the underlying offense but was instead a procedural ruling).

vide notice prior to trial or prior to the sentencing hearing, or whether the sentencing factors contained in the relevant statutes provide sufficient constructive notice.

II. Capital Cases in American Practice

The ruling that capital aggravating factors are "functional equivalents to an element" raised significant issues for the federal government and states that had the death penalty. Previously, the Supreme Court held that jury sentencing in capital cases was not constitutionally required, and a judge could sentence a defendant to death.[7] Ring curtailed this holding in that a jury now must make any necessary fact-finding in order to render a defendant eligible for death.[8] This ruling invalidated five states' capital sentencing systems and brought into question several states which had a "hybrid" system where a jury rendered an advisory opinion but the judge decided on the ultimate sentence.[9]

The basic concept of notice of the offense is central to the American criminal justice system.[10] In establishing basic notice requirements, the Court reviewed the basic notice protections noted in nineteenth century case law and applied the same principles to modern practice. According to the Court, notice provides two well-known functions: (1) it apprises the defendant of what he must be prepared to meet, and (2) it protects an accused against a second prosecution for the same offense, in violation of double jeopardy. The Court then reiterated several foundational principles in establishing what constitutes sufficient notice: (1) the notice must contain more than a mere definition of the statutory terms of the offense;[11] (2) the notice must give the defendant reasonable certainty of the nature of the accusation against him[;](3) the notice should set forth all the elements of the offense intended to be punished; and (4) the notice must be accompanied with such a statement of the facts and

[7] Harris v. Alabama, 513 U.S. 504 (1995) (holding that the trial judge alone may impose a capital sentence and that the state is not required to specify how much weight to accord a jury's advisory verdict).

[8] Ring v. Arizona, 536 U.S. 584, 607-09 (2002).

[9] *Ring*, 536 U.S. at 620-21 (O'Connor, J., dissenting) (noting the states which had the same system as Arizona which would be invalidated and stating that the *Ring* ruling called into question four states' hybrid capital sentencing systems); *see also* Laffey, 382-91 (evaluating the impact of *Ring* on the different state capital sentencing systems).

[10] *In re* Oliver, 333 U.S. 257, 273-74 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence . . . .").

[11] *Id.* at 764-766.

circumstances as will inform the accused of the specific offense, coming under the general description [under the statute], with which he is charged. The Court specifically indicated that these ancient principles applied in modern practice, noting that "these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading."[12]

III. Notice Requirements for Death and Capital Aggravating Factors

While case law clearly requires notice of the essential elements of the offense, less clear is the notice necessary to apprise a capital defendant that the government is seeking the death penalty and which aggravating factors the government intends to prove. These aggravating factors were established in order to meet the Eighth Amendment requirement that the death penalty be imposed in a rational manner.[13] Aggravating factors are generally necessary to render a defendant eligible for the death penalty.[14] As a result, the same Sixth Amendment notice requirement that applies to elements of the offense arguably also apply to aggravating factors which serve as functional equivalents to an element. Prior to Ring, no reported case classifies aggravating factors as elements of an offense such that they would have to be alleged in the charging document. State practice varied widely both on the issue of notice of the state's intent to seek the death penalty and on notice of the aggravating factors which the government intends to prove.

The state system with the least notice prior to Ring was Illinois.[15] Under the Illinois system, the government, after it had obtained a conviction for first-degree murder, requested a separate sentencing hearing to determine whether death should be imposed.[16] At that hearing the state must prove at least one statutory aggravating factor in order to render a defendant eligible for the

[12] *Russell*, 369 U.S. at 765-66.

[13] *See* United States v. Matthews, 16 M.J. 354, 377 (C.M.A. 1983) (reviewing Supreme Court precedent and concluding that the law requires that the sentencing authority to identify aggravating circumstances to support the imposition of the death penalty and the purpose of additional procedures in capital cases is to "ensure that the death penalty is not meted out arbitrarily or capriciously").

[14] *See* Tuilaepa v. California, 512 U.S. 967, 971-72 (1994) (noting the requirement that aggravating factors be established to render a defendant eligible for the death penalty).

[15] Daniel S. Reinberg, Comment, *The Constitutionality of the Illinois Death Penalty Statute: The Right to Pretrial Notice of the State's Intention to Seek the Death Penalty*, 85 Nw. U.L. Rev. 272, 274-75 (1990).

[16] Ill. Rev. Stat. ch. 38, para. 9-1 (1989).

death penalty.[17] The state was not required to notify the defendant of the aggravating factors, which the state intended to prove, although the statute listed only eight possible aggravating factors.[18] As a result, a defendant could go to trial on a first-degree murder charge without knowing whether the state intended to seek the death penalty. The court stated that the sentencing authority's decision to impose a sentence of death under the Illinois statute clearly requires notice to the accused. The notice provided by the state, albeit post-trial, was sufficient to meet these requirements.

IV. Notice of Aggravating Factors after Ring in the States

While Ring placed states on clear notice that a jury must find capital aggravating factors beyond a reasonable doubt, state courts have grappled with the issue of what notice protections also apply. State courts have considered arguments both under the Indictment Clause and under the Sixth Amendment notice guarantee. All states except one ruled that an indictment need not include aggravating factors. The only state court to rule that the indictment must allege aggravating factors, the New Jersey Supreme Court, based its ruling on the New Jersey Constitution.[19]

The remaining state courts relied on two rationales for ruling that indictments were not required for capital aggravating factors. First, several courts noted that Ring did not present an Indictment Clause issue, because Ring was based solely on the jury trial right.[20] This rationale is problematic in light of the dicta in the other cases which extended constitutional guarantees to functional equivalents to an element. Second, several courts noted that the Indictment Clause did not apply to the states.[21] In addition, many courts specifically held that the pretrial notice for capital aggravating factors complied with Sixth Amendment notice requirements. On the other hand, the Mississippi Supreme Court denied a claim that Ring required notice of aggravating factors. The court followed a rationale similar to the Illinois notice cases discussed above, reasoning that a charge of capital murder puts a capital defendant on notice

[17] Ch. 38, para. 9-1(g).

[18] Ch. 38, para. 9-1(b).

[19] State v. Fortin, 843 A.2d 974 (N.J. 2004).

[20] *McKaney*, 100 P.3d at 20-21; *Terrell*, 572 S.E.2d at 602-03; *Stevens*, 867 So. 2d at 227; *Hunt*, 582 S.E.2d at 603; *Primeaux*, 88 P.3d at 899-900; *Oatney*, 66 P.3d at 487; *Edwards*, 810 A.2d at 234; *Moeller*, 689 N.W.2d at 20-22.

[21] *McKaney*, 100 P.3d at 20-21; *Terrell*, 276 Ga. at 41-42; *McClain,* 799 N.E.2d at 336; *Soto*, 139 S.W.3d at 842; *Hunt*, 582 S.E.2d at 603; *Moeller*, 689 N.W.2d at 21-22.

of the statutory aggravating factors, which the state may use against him. Finally, because Illinois placed a moratorium on the death penalty, the Illinois statute has not been substantively examined in light of Ring.[22]

Even more problematic, though, is Florida's capital sentencing scheme, which contains significant problems in light of Ring. In Florida, the trial judge is the sentencing authority, but the jury must render an advisory verdict as to (1) whether sufficient [enumerated] aggravating factors exist, (2) whether sufficient mitigating circumstances exist which outweigh the aggravating factors; and (3) whether, based on the aggravating circumstances and mitigating circumstances, the defendant should be sentenced to life imprisonment or death.[23] A majority vote decides this advisory verdict and the statute does not specify a standard of proof. After the advisory verdict, the trial judge makes the ultimate sentencing decision. If the judge imposes death, he or she must issue written findings that (1) sufficient aggravating circumstances exist as enumerated in subsection (5), and (2) there are insufficient mitigating circumstances to outweigh the aggravating circumstances. This system is clearly suspect in many respects after Ring, particularly because a judge could find aggravating factors after the jury failed to do so. The Florida Supreme Court summarily denied a challenge to this system in a wholly unsatisfactory opinion in Kormondy v. State. [24]

In sum, state courts seem loathe to impose new additional requirements in light of Ring. The one state that decided to require indictment on aggravating factors did so on the parallel state constitutional indictment provision. Most state courts summarily denied Ring-based claims and many expressly held that current notice provisions are sufficient. Indeed, no post-Ring state court found insufficient notice of aggravating factors. All but one state has maintained the status quo with regard to notice and indictments.

V. The Federal Death Penalty Act Notice Provisions

The Federal Death Penalty Act of 1994 (FDPA) is the current law for the death penalty in the federal criminal system. Under the FDPA, death may

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[22] Diana L. Kanon, Note, *Will the Truth Set Them Free? No, But the Lab Might: Statutory Responses to Advancements in DNA Technology*, 44 Ariz. L. Rev. 467, 470 (2002) (explaining that the moratorium was announced in response to exonerations of death-row inmates by DNA testing).

[23] Fla. Stat. ch. 921.141(2) (2004).

[24] *See* Robert Baley, *Sentencing: Taking Florida Further into "*Apprendi-*Land*," Fla. Bar J. Feb. 2003, at 26 (noting problems with Florida capital sentencing after *Ring*).

be adjudged for espionage, treason specified homicides and specified drug offenses. Further, death may be adjudged only if the government establishes, beyond a reasonable doubt, one of the specified aggravating factors for each offense. The government must provide notice prior to trial that the government believes that a death sentence is justified, that the government intends to seek the death penalty, and the aggravating factor or factors upon which the government intends to rely. The government is not limited to the aggravating circumstances specified in the FDPA and may present evidence of other aggravating factors relevant to the offense, including the effect of the offense on the victim and the victim's family, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. [25]

These aggravating circumstances, called nonstatutory aggravating factors, are relevant only in determining whether death is justified after the prosecution establishes a statutory aggravating factor. The FDPA does not establish strict time limits for government notice of intent to seek death, except that the notice must occur a reasonable time before trial or before acceptance by the court of a plea of guilty. Importantly, the FDPA does not include a provision for including aggravating factors in the indictment and the practice prior to Ring was to not indict on the aggravating factors.[26]

Several capital defendants argued that the indictment should include the aggravating factors but the courts consistently rejected this argument.[27] Then, federal capital practice changed because of the indictment requirement. The government already had the burden of proving capital aggravating factors to a jury beyond a reasonable doubt.[28] The indictment must allege the capital aggravating factors; this is required. Accordingly, every federal court addressing this issue ruled that the indictment must specify a statutory aggravating

[25] 18 U.S.C. § 3591 *et seq.* (2000).

[26] 18 U.S.C. § 3593(e). The sentencing authority is required to „consider 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, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death."

[27] United States v. Plaza, 179 F. Supp. 2d 444, 453 (E.D. Pa. 2001); United States v. Minerd, 176 F. Supp. 2d 424, 444 (W.D. Pa. 2001); United States v. Kee, No. S1 98 CCR 778 (DLC), 2000 U.S. Dist. LEXIS 8785, *31-*35 (S.D.N.Y. 2000); United States v. Spivey, 958 F. Supp. 1523, 1527-28 (D.N.M. 1997).

[28] 18 U.S.C. § 3592(c) (2000).

factor.[29] Similarly in homicide prosecutions, the indictment must also specify the minimum specific intent required under the FDPA.[30] In fact, the government generally did not contest this requirement and sought superseding indictments, which included all facts necessary for death.[31]

These superseding indictments usually included the statutory aggravating factors, the requisite specific intent (for homicide cases) and the fact that the accused was over eighteen years old at the time of the offense.[32] This last fact also falls within the Ring/Jones protections because the FDPA provides that no person may be sentenced to death who was less than eighteen years old at the time of the offense.[33]

VI. Conclusion

In sum, while there has been much sound and fury regarding the impact of Ring on capital cases, not much has changed. The additional jury trial and requirement of proof beyond a reasonable doubt altered a few states' trial procedure, but the pretrial notice provisions remain unchanged. The jurisdictions which now require indictment on aggravating factors, the federal system did so on the basis of their respective indictment clauses.

This new indictment requirement the federal system has not resulted in overturned death sentences. For federal death sentences pending when the Court decided Ring, all courts except one ruled either that (1) the deficient indictment was harmless and affirmed the death sentence; or (2) the indictment

[29] United States v. Barnette, 390 F.3d 775, 784-85 (4th Cir. 2004).

[30] *Higgs*, 353 F.3d at 298; *Haynes*, 269 F. Supp. 2d at 978-79; *Sampson*, 245 F. Supp. 2d at 332; *see* 18 U.S.C. § 3591(a)(2) (2000) (establishing intent prerequisites for capital homicide).

[31] *Quinones*, 313 F.3d at 53 (noting that government obtained superseding indictment); *Williams*, 2004 U.S. District LEXIS 25644, at *38 n.19 (describing government concession); *Sampson*, 245 F. Supp. 2d at 332 ("[T]he government does not dispute [claim that indictment must allege aggravating factors]."); *O'Driscoll*, 2002 U.S. Dist. LEXIS 25864, at *6-*7 (noting that government notified court of intent to seek a superseding indictment in light of *Ring*); United States v. Lentz, 225 F. Supp. 2d 672, 678 (E.D. Va. 2002) (agreeing with government argument that superseding indictment containing aggravating factors and mens rea requirements was sufficient).

[32] *Williams*, 2004 U.S. District LEXIS 25644, at *39; United States v. Acosta-Martinez, 265 F. Supp. 2d 181, 184 (D.P.R. 2003) (superseding indictment with "notice of special findings"); *Haynes*, 269 F. Supp. 2d at 973 (superseding indictment with "notice of special findings"); United States v. Davis, No. 01-282 Section "R"(1), 2003 U.S. Dist. LEXIS 5745, *16 (E.D. La. 2003) (superseding indictment with requisite mens rea and two aggravating factors).

[33] 18 U.S.C. § 3591(a); *see Regan*, 221 F. Supp. 2d at 679 n.3 (noting that the age provision is also subject to indictment requirement and that the superseding indictment properly alleged that the defendant was at least eighteen years-old).

actually included at least one of the necessary aggravating factors.[34] Courts have denied all other challenges to pretrial notice based on Ring.

Also significant is the fact that, while the term "functional equivalent to an element" seems very broad in theory and implies that any such fact should be treated as an element of the offense, subsequent cases and practice have limited the term. As a result, the current system meets all constitutional mandates.

[34] United States v. Barnette, 775 F.3d 775, 784-86 (4th Cir. 2004).