IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

TIMOTHY STUART RING, :

Petitioner :

v. : No. 01-488

ARIZONA. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, April 22, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

ANDREW D. HURWITZ, ESQ., Phoenix, Arizona; on behalf of the Petitioner.

JANET NAPOLITANO, ESQ., Attorney General of Arizona; Phoenix, Arizona; on behalf of the Respondent.



Alderson Reporting Company
1111 14th Street, N.W. Suite 400 1-800-FOR-DEPO Washington, DC 20005

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 01-488, Timothy Stuart Ring v. Arizona.

Mr. Hurwitz.

ORAL ARGUMENT OF ANDREW D. HURWITZ

ON BEHALF OF THE PETITIONER

MR. HURWITZ: Mr. Chief Justice, and may it please the Court:

In Apprendi v. New Jersey, this Court held that the Sixth Amendment guarantee of jury trial extends to the finding of any fact that exposes the defendant to a greater sentence than he could have received on the basis of the jury verdict alone. We submit that that principle controls this case.

In Arizona, a defendant convicted of first degree murder may be sentenced on the basis of the jury verdict alone only to a sentence of life imprisonment. The judge in Arizona has no power, no legal discretion under the law to sentence a convicted first degree murder defendant to death.

QUESTION: Well, if you're correct, Mr. Hurwitz, I take it we would have to overrule not merely Walton, but Clemons against Mississippi, Cabana against Bullock, and Spaziano against Florida.

MR. HURWITZ: Your Honor, let me take those cases separately because I do not think that at least two of them are implicated by the position that we urge today.

Certainly Walton would be have to be -- would be overruled because it's directly on point.

And certainly, to the extent that Spaziano says that a judge may, in the first instance, make the finding of fact to -- to -- of -- of an aggravating circumstance in order to allow a death sentence, it would be also -- it would be also implicated and overruled by the position we urge today.

With respect to Clemons, Clemons was a case in which a jury made findings of fact on multiple counts that allowed a defendant to be sentenced to death, and the issue on appeal was rather whether, one of more of those factors having fallen out, the remaining factors could be weighed against mitigating factors for purposes of determining in the sentencing phase, the discretionary phase of the -- of the capital punishment issue, whether or not there could be imposed a capital punishment at that point. So, I do not believe that Clemons is implicated by our position today.

Rather, our point is very --

QUESTION: How about Cabana?

MR. HURWITZ: Cabana, Your Honor, I suggest is a

more difficult question. Its reasoning would be implicated by our position today, but I -- as we suggested in our brief, I think there is a distinction. In Cabana -- or Cabana -- the issue was whether or not a particular sentence, where all the facts necessary under State law had been found by the jury, was unconstitutional as applied to a particular defendant. That sort of as-applied analysis is the kind of thing that judges typically do. They look at the law and lay it next to the facts of the case and determine whether or not that law, as applied, is unconstitutional with respect to a particular defendant or a particular sentence.

The issue posed by -- by this case and by Apprendi is, I think, a quite different one. It is when State law expressly requires a number of factors as a prerequisite to the imposition of a particular penalty, the maximum penalty allowed by law, whether or not the State can systematically deny to defendants in those cases the right to a jury trial.

QUESTION: What other States have schemes that under your position would also fail the Apprendi test?

MR. HURWITZ: Your Honor, we -- I think we attempted to summarize the -- the status on page 38 of our brief. We think there are eight or nine States whose systems would be implicated by this. But what is not

clear in all of those States -- and to take Florida as an example, Your Honor -- is whether or not in a system which, as this Court suggested in Jones, where the jury makes, by implication or by necessity, a finding of a particular aggravating factor in order to recommend a death sentence, whether or not that system would -- would be affected by the principle that we urge. Certainly those States where there is no jury involved in finding the necessary aggravating circumstance would be the ones that would be implicated, and I would suggest that that category is probably somewhat less than the category in footnote 35 of our brief.

It is clear, however, that whatever the effect on other States, Arizona's system precisely complies and precisely matches up to the rule that this Court announced in Apprendi. It is simply not possible in Arizona for a judge to impose this sentence of death without first finding a fact that Arizona's State law specifies is necessary for the imposition of that maximum punishment. And under that circumstance, we suggest there is no basis for distinction of Apprendi.

Now, the State has suggested in this case that one basis for a distinction is that the Arizona statute says, within one single statute, the range of punishment, the possible punishment for first degree murder is either

life -- life without possibility of parole, or death. But I would suggest that distinction makes no difference.

Certainly in the Jones case, the precursor to Apprendi, a case that this Court considered a year before Apprendi, a single statute set forth the range of punishment. In the Harris case, the case this Court considered only several weeks ago, where the government conceded that section 841, the drug statute, was covered by Apprendi, several different punishments are set forth in a single statute.

It is difficult to believe that Apprendi would have been -- come out differently, that there would have been a different result in that case, if the statute instead read there's a possible punishment of 20 years for discharging a firearm with racial motivation, but the last 5 years may not be imposed. You may not exceed 15 years in the absence of racial motivation.

QUESTION: If we were to accept your position, Mr. Hurwitz, what would it do to the Federal Sentencing Guidelines?

MR. HURWITZ: Mr. Chief Justice, let me focus on only one aspect of the sentencing guidelines because it seems to me that there's no implication whatsoever for downward departures and that the -- this Court has already made clear, as the guidelines themselves say, that you

can't exceed the maximum sentence provided by the underlying substantive statute.

So, if I can focus on the question of what would happen --

QUESTION: Upward -- upward adjustments within the maximum.

MR. HURWITZ: Yes, Mr. Chief Justice. With respect to those, I think there is a distinction, and let me suggest it to the Court.

In Arizona, the -- the judge simply has no legal power, no discretion, no ability whatsoever to impose a sentence greater than life in the absence of finding a particular aggravating circumstance specified by the State in its statutes.

With respect to the sentencing guidelines, a judge has discretion, and we know that because you review sentencing decisions for abuse of discretion. So, the judge has the legal discretion to impose a sentence in excess of the so-called presumptive range upon the finding or upon noting in the record any number of particular facts, not specified by statute.

QUESTION: Yes, but he didn't -- it's a strange kind of discretion that can be reversed on appeal. He doesn't have discretion. The whole purpose of the guidelines is to eliminate the discretion, to say you must

give this sentence if these factors exist.

MR. HURWITZ: Justice Scalia, my point is, I think, that in our case the judge has no power at all. He can never find -- he can never exceed that particular limit, the limit being life, in the absence of -- in the absence of finding a fact specified by the State, a fact chosen by the State as necessary to impose the sentence.

The sentencing guidelines strike me as somewhat distinguishable because the range of factors that a judge may choose to depart upwards is -- is by the guidelines relatively unlimited.

QUESTION: Well, in -- in this case, the aggravating fact was killing for pecuniary gain.

MR. HURWITZ: Correct, Justicè --

QUESTION: And that was clearly implicit, if not explicit, in the jury's finding.

MR. HURWITZ: I -- I would suggest neither in this case, Your Honor.

QUESTION: They didn't find a robbery?

MR. HURWITZ: The jury found a robbery, but under Arizona law, as the cases make quite clear, in order in a felony murder case for there to be a finding of pecuniary gain, or in any murder case to be a finding of pecuniary gain, there must be a showing that the murder itself was motivated by a desire for pecuniary gain. And

the Arizona Supreme Court has said on three or four occasions it is not enough that a murder was committed in connection with a robbery or, indeed, even in connection with a felony murder. The issue is motivation for the particular homicide.

In this case, the Arizona Supreme Court said expressly we can't tell from the trial record why the driver was killed. There is virtually no evidence in this trial record as to why the driver was killed. It was on the record made in the post-trial proceedings, the record made on the basis of the accomplice testimony, that the Arizona Supreme Court concluded that.

So, in this case when the Arizona Supreme Court says two things -- one is the issue for pecuniary gain is whether or not there has been proof of the motivation for the murder, and second, in this case we can't tell why the person was murdered -- I would suggest there is neither a necessary, implicit, or even logical finding by the jury in this case of -- of pecuniary gain. The Arizona Supreme Court I think addressed that issue quite straightforwardly and directly.

Now, the State suggests that one distinction between this case and Apprendi is the idea that these aggravating circumstances are so-called sentencing factors, not elements of the crime. But I think that --

that argument was answered in Apprendi.

What this Court said in Apprendi was that the real test is not one of labels. The real test is one of function. Is this a fact that is necessary under the State law to allow the judge to sentence somebody to the maximum sentence provided by law? And plainly it is, and whether you call these aggravating circumstances sentencing enhancements or whether you call them elements, you arrive, I would suggest, at the same result. This case on its face is covered by Apprendi.

One way to -- one way to -- to get into that issue is to -- is to imagine the following circumstance. Let's assume that Arizona law, instead of providing precisely what it does now, said instead that the penalty for first degree murder is life without -- is life with possibility of parole. But that penalty may be increased to life without possibility of parole upon finding of one of 10 specific aggravating circumstances, so that we had exactly the same statute that we have now, but at the first level you get life with possibility of parole after 25 years, and at this next level, you got life without possibility of parole. I don't think there could be any doubt, under those circumstances that on its face the rule this Court set forth in Apprendi would apply.

QUESTION: I think that's true, and I think that

in the -- in the normal circumstance when a State does something like that, even if it is not calling it an element of the crime, it is an element of the crime.

What we have here, however, this -- this statute was enacted in -- in what? '73?

MR. HURWITZ: Initially in '73, Justice Scalia.

QUESTION: Which was the year after Furman. And what Arizona was saying was, you know, we -- we never thought we had to have any finding of aggravated -- aggravating factors in order to impose the death penalty, but the Supreme Court, in a decision that -- that had no -- no rooting in the common law, said that we cannot impose capital punishment without aggravating circumstances. Okay. We'll make a finding of aggravating circumstances necessary and we'll have that finding made by a judge.

Now, I -- I don't regard that as Arizona adopting the aggravating circumstance as an element of the crime, nor does the statute read that way. So, you're -- you're talking about something that is unprecedented in -- in the common law. You're talking about a finding that has been mandated by the Supreme Court and the issue is whether the finding mandated by the Supreme Court has to be made by the jury or -- or the judge. And we've said in several cases that it's enough if it's made by the judge.

Now, why isn't --

MR. HURWITZ: Justice --

QUESTION: -- why isn't that enough to resolve the case?

MR. HURWITZ: Justice Scalia, if the -- if the point here is that the State was forced to do this and, therefore, this cannot be an element under the Apprendi test, I would suggest that presents several analytical problems.

The first is that this Court has said on any number of occasions to the States, here is something that must be in your law. The very same term that this Court decided Furman or the year before, it decided Miller, and in Miller it said if you want to have a constitutional obscenity law, State, you must have a specific definition in that State -- in the law of the kind of conduct that you wish to -- to punish, the kind of -- the depiction of the kind of conduct that you wish to punish. We're not telling you, States, by the way, what specific factor you have to have. You decide. Here are some suggestions.

Arizona, the year after Miller was decided, amended its statutes to add to its obscenity laws a specific requirement with respect to proof of specific types of sexual conduct. This Court made them do that. The Constitution made them do that. But I do not believe

it would be suggested that those specific elements of the crime, those specific factors that are necessary to impose the maximum punishment allowed by law, are somehow exempted from the Sixth Amendment for that reason.

QUESTION: No, but in -- in the -- in the obscenity field, we didn't invite the kind of procedure that -- that was adopted here by -- by establishing a separate -- a separate category, the -- you know, the -- the guilt phase and the penalty phase. We -- we invited the -- the severing of the trial into those -- into those two portions. And it seems to me it's up to us whether the constitutional requirement that we've imposed upon the States requires a finding by the judge or a finding by the jury. It's -- it's simply not was simple as to say, well, it's an element of the crime and therefore has to be found by the jury. It's -- it's rather what does the -- what does the Constitution, as interpreted by this Court, demand.

MR. HURWITZ: Justice Scalia, let me -- let me come at that at -- at two levels.

The first one is I think the basic constitutional principle that underlies the Sixth Amendment. And that principle, as this Court articulated in both Jones and Apprendi, is the notion that before you're handed over to the State and before the State is

allowed to exact the maximum punishment permitted by law, a jury of your peers is allowed to you to find those facts to put the State in that position. Certainly that principle is directly implicated by the death penalty situation on its face. So, this underlying Sixth Amendment principle strikes me as no different.

With respect to bifurcation, there is, of course, no constitutional requirement that the aggravating circumstances be found in a penalty phase of the trial. This Court has made clear on any number of occasions that the aggravating circumstances, these so-called narrowing circumstances, the facts necessary under State law to allow the imposition of a death penalty can be found in the so-called guilt phase of the trial.`

QUESTION: But if -- if Apprendi was based on a long common law history, as -- as it certainly seems to have been, wouldn't that distinguish it from the aggravating/mitigating, which certainly is not based on common law history at all?

MR. HURWITZ: Mr. Chief Justice, it strikes me that the common law history here makes the central principle. The central principle in the common law history is, after all, the one that Apprendi and Jones articulate about the protection of the Sixth Amendment. The procedure faced in Apprendi was not known at the

common law. The procedure of having a specific aggravating factor that might enhance a sentence was unknown to the common law. Yet, this Court in Apprendi said the basic Sixth Amendment principle that underlies -- underlied the adoption of the Sixth Amendment in 1791 should apply to this circumstance. I think that's --

QUESTION: Mr. Hurwitz, may I ask why you have -- you have certainly made a case about the aggravating circumstances, but you haven't put, as part of that case, the so-called Enmund/Tison findings. And it seems to me that if in Arizona someone can be put to death only if he was the triggerman, or was a -- what is the other phrase, a major participant, you haven't made anything of those factors, and I think if -- if the aggravating factor has to be found by the jury, then surely those would have to be as well.

MR. HURWITZ: Justice Ginsburg, that may well be the case. As I think I suggested in response to the Chief Justice's initial question, it -- it has struck us that there is a difference between the sort of as-applied analysis that an Enmund/Tison finding requires, a proportionality analysis, and the issue of whether the State systematically denies with respect to a particular factor that it's picked out, and nothing in this Court's jurisprudence required the State to adopt any particular

aggravating circumstance.

With respect to those particular factors, it strikes us that's at the core of Apprendi. I don't resist the suggestion that perhaps the principle in Apprendi extends farther, and it extends to -- to the Enmund/Tison findings. What I do suggest is that -- is that the core of Apprendi, the very central holding of the case necessarily extends to facts which the State itself has said in its statutes are necessary in order to find -- in order to allow the maximum punishment to be imposed by law.

QUESTION: But -- but the other factor you haven't discussed is the mitigating circumstances.

MR. HURWITZ: Correct, Justice Kennedy.

QUESTION: The common law, in defining elements, doesn't usually have some factors on the other side that -- that are mitigating. Perhaps -- perhaps you can suggest some examples where they do. But again, this goes very much, it seems to me, to show that this is part of our Eighth Amendment protections that have been mandated. In Apprendi, the judge could always, once he or she found the racial animus, enhance the sentence; in fact, had to. Here there's still a balancing that has to take place and -- and that -- that certainly is -- is not something classically reserved for the function and province of the

jury.

MR. HURWITZ: And that's -- that's correct, Justice Kennedy, and we don't suggest that mitigating circumstances or circumstances that suggest leniency must be found by the jury. It has always been the case that once the judge was empowered to enter the maximum sentence allowed by law, that judge could consider whatever factors or the State could consider, in -- in whatever form it did so, those factors that might provide for a sentence of less than the maximum sentence allowed by law.

QUESTION: What about that kind of argument that initially Justices Stewart and Powell and Stevens have made, that there's a necessary connection between the determination that death in a case is nòt cruel and unusual and the jury is doing the weighing in order to show that it reflects a community sentiment in that community that the death penalty is not cruel and unusual?

MR. HURWITZ: And, Justice Breyer, had this Court accepted that as -- as a correct statement of the Eighth Amendment, we obviously wouldn't be here today. We're operating -- we're operating with the constraints of this Court's decisions which have said that kind of jury weighing, that kind of jury sentencing is not required by --

QUESTION: Were it up to you, you would make

that argument if you felt it was open.

MR. HURWITZ: If it were open, it's an argument we might make, but it is --

QUESTION: Well, presumably you would make any argument that's open to you.

MR. HURWITZ: We're open.

(Laughter.)

MR. HURWITZ: To be sure, Mr. Chief Justice.

But -- but my point is it's not an argument we need make in this case. We are not suggesting that jury sentencing is required. We are suggesting that jury fact finding is required.

And if I might, let me suggest the difficulties of adopting a rule that somehow has one -- one approach if something was done pre 1972 and another one after. If Arizona had adopted this very same statute identically worded in 1965, when the ALI first suggested it as a possibility to the States, it seems to me clear, on the basis of Apprendi, that the aggravating circumstances would be elements, or at least sentencing enhancements, as the Court said, and required to be found by the jury.

QUESTION: But if it adopted the statute in 1965, it could have simply had the exact language that it had and said the decision as to whether death or life is simply up to the discretion of the judge, and it would

have been perfectly okay.

MR. HURWITZ: Because Apprendi and Jones had not been decided at that time, Mr. Chief Justice.

QUESTION: And because Furman had not been decided.

MR. HURWITZ: To be sure. But my point is that if this Court -- this Court will enact an unworkable system if what it does is start looking at State statutes and trying to determine whether or not particular factors in those statutes arose in response to Furman, before Furman, after Furman.

One example is suggested in our brief. The State of New York in the mid-1960s determined to narrow its capital punishment laws and apply them only when the victim was a peace officer. Arizona made that decision in 1988. Was Arizona's decision in response to a mandate from this Court, or was Arizona's decision because, as New York, it made a policy decision?

QUESTION: Arizona has decided to apply its capital punishment only to when the victim was a peace officer?

MR. HURWITZ: No. That's one of the -- one of the narrowing circumstances in Arizona law. And my -- my point, Mr. Chief Justice, is let's assume two States, one of which made that decision in 1965, and another one made

that decision in 1988, and it was the only aggravating circumstance that that State had adopted. Would this Court then say, with respect to State number one, the aggravating --

QUESTION: But here it's a whole procedure designed to have express mitigation and -- and aggravation to be considered by the same trier of fact and balanced. And you -- you seem to give again very -- very little force to the mitigation aspect.

MR. HURWITZ: Justice Kennedy, I don't mean to. I think it is entirely appropriate and entirely possible for a State to design that weighing and that mitigation issue to a -- to a jury. But this Court has made clear, not only in this context, but in other contexts, that -- that a defendant is not entitled to a jury trial to establish mitigation from the maximum sentence that the law might allow.

Once again, I would return, I think, to the underlying Sixth Amendment principle, as this Court stated it in Jones and Apprendi. The notion was in 1791 that before a defendant was put, in effect, into the tender mercies of the State to be -- to be subjected to whatever sentence the law might allow, first that defendant got the right to have a jury of his peers find the facts that were necessary to do so. He did not have the right at that

time to have a jury of his peers find whatever facts might persuade the sentencer to give him less than the maximum allowed by law.

So, I would suggest that when you return to the underlying Sixth Amendment principle here, it does provide a distinction between facts that would call for leniency and facts that -- that are necessary under the State's law to impose a particular sentence.

QUESTION: Except that Arizona has designed its system, and you could design other systems, but it's designed its system in order to sort out the most culpable offenders and it uses this balancing mechanism.

MR. HURWITZ: Well, I would separate, Justice Kennedy, the two parts of the death penàlty process.

There is a sorting at the front end. There is a narrowing that is required in order to determine which defendants among all those convicted of homicide are, in effect, the most culpable and can be sentenced to death.

There is a second proceeding. The second proceeding is the sentencing proceeding. And what this Court has made clear is that with respect to that first proceeding, there must be specified facts. That's the Furman analysis. And that's the aggravating circumstance that we contend is required under the Constitution to be found by the jury.

With respect to the second decision, this Court has made plain on any number of occasions that that can be made a discretionary decision for the judge. Proportionality measurements are no longer required at that level. What this Court has said, however, is you just have to let the defendant have the opportunity at that circumstance to argue for individualized treatment or to argue about leniency, to bring the facts pertinent to his case to the attention of the court. So, I would suggest it is at this first stage, this narrowing stage, that the Apprendi principle applies.

QUESTION: What you're saying is you're not entitled to a finding of -- of mitigation. You are entitled to a finding of -- of aggravation.

MR. HURWITZ: Precisely so, Justice Scalia. And I -- and I think not only are you not entitled to it, but -- but there is nothing in this Court's jurisprudence that requires that the State specify a particular fact in mitigation.

Here we have facts chosen perhaps under the compulsion of the Constitution, but nonetheless chosen by the State as necessary prerequisites to the punishment.

Unless the Court has other questions, I will reserve the balance of my time.

QUESTION: Very well, Mr. Hurwitz.

General Napolitano, we'll hear from you.

ORAL ARGUMENT OF JANET NAPOLITANO

ON BEHALF OF THE RESPONDENT

MS. NAPOLITANO: Mr. Chief Justice, and may it please the Court:

Opposing counsel began with Apprendi, but let me take up on the suggestion by Justice Scalia that this case really begins with Furman because after Furman, the States were left with the mandate that death penalty decisions could not be left unguided under the Eighth Amendment, but requires a standard of judgment.

Some States imposed mandatory death sentences, a practice this Court later found unconstitutional. In contrast, Arizona amended its death penalty statute to comply with Furman by adding a series of factors which the judge would take into account in choosing between the alternative punishments of life or death.

In Walton, this Court fully considered and upheld the constitutionality of Arizona's law. The question now is whether at this late date Apprendi requires you to overrule Walton. And the answer is no. Apprendi is a Sixth Amendment issue. Furman, Walton, and this case Ring concern the Eighth Amendment.

In addition, principles of stare decisis are heavily implicated here because, as Chief Justice

Rehnquist mentioned, there have been any number of precedents in this Court that would be implicitly, if not explicitly, overruled should this Court overrule Walton.

Let me, if I might, turn to two important distinctions between Ring and -- and Apprendi. One is substantive and one I would call formal.

The substantive distinction is this. The sentencing statute in Arizona derived from Furman. It was passed in 1973. The pecuniary gain aggravating factor was one of the original aggravating factors in that statute. There was never a -- a suggestion that Arizona was playing a game, moving something that previously had been an element into the sentencing factor side of the statute. There's never been any suggestion that this was anything other than a way to decide which of all first degree murders deserve the death penalty.

QUESTION: Are we going to have to try to figure that out case by case with -- with respect to every State's statute, as Mr. Hurwitz suggested we -- we would have to do?

MS. NAPOLITANO: Your Honor, I think --

QUESTION: I mean, what about the New York statute that -- you know, that makes an aggravating circumstance the death of a -- of a peace officer?

MS. NAPOLITANO: Your Honor, I think what you

have to do is just look at what was the underlying first degree murder statute, what is the underlying statute which gives rise to the possibility of a death penalty.

In Arizona, the underlying first degree murder statute has been the same since 1901, and in fact, around the country, most first degree murder statutes can trace their routes to England in terms of how they are defined, the mens rea, the actus reus, and the causation requirements.

QUESTION: But you're --

MS. NAPOLITANO: It's not a difficult process to go through.

QUESTION: But you're saying -- the implication of what you're saying is that any, in effect, departure or innovation in the modern law which doesn't have a clear antecedent, at least as of the time of the -- of the framing, is exempt -- is a fact exempt from the jury trial requirement. I mean, that's -- that -- we'd have to adopt that rule in order to see it your way.

MS. NAPOLITANO: No. No, Your Honor, you would not have to adopt such a blanket rule. What I am suggesting is this. In a situation where you have a statutory scheme that quite clearly, plainly, and unequivocally derives from this Court's Eighth Amendment jurisprudence, some of the Sixth Amendment questions that

were raised in Apprendi are not implicated. And you can make --

QUESTION: So, if the State comes up with a new condition, the jury trial guarantee applies. If this Court comes up with it, for whatever reason, it does not apply.

MS. NAPOLITANO: Not necessarily, Your Honor. And it gets you into the discussion of what is the intent of the legislature, what does it mean to be an element of the crime in the first place. But under --

QUESTION: Why -- why does it matter whether it's an element or not? I mean, doesn't Apprendi say call it an element, call it a factor, we don't care what you call it? If it's a fact necessary, et cetera, it's got to be found by the jury.

MS. NAPOLITANO: Well, I think in -- in looking at McMillan and Jones and Apprendi and that whole line, there has been a question created by this Court as what is an element because if it's an element, what this Court has said is it has to be charged, it has to be proved beyond a reasonable doubt, and it has to go to the jury. If it's a sentencing factor, if it's -- if that's what's going on, those requirements do not apply.

QUESTION: Well, let me -- let me go back. I -- in effect, I sort of put you off track here. You -- you

were saying that there isn't a simple distinction on your theory between facts added by a legislature and facts required by this Court. So, tell me -- tell me why there isn't such a distinction as -- as you're arguing it now.

MS. NAPOLITANO: What we're arguing, Your Honor, is that when a fact is found purely for the purpose of sentencing -- and -- and recognize the fact here murder for pecuniary gain was never a part of the definition of first degree murder. First degree murder is the intentional killing of another or a felony murder with certain underlying felony predicates. The jury found that here. It was charged here. There was a death notice in the actual indictment.

QUESTION: Right.

MS. NAPOLITANO: The jury was death qualified. So, there's no question of surprise here.

QUESTION: Well, are you -- are you saying then that if a legislature adds a fact -- call it an element if you want -- purely for purposes of determining the sentence, that that too would be exempt from the -- the guarantee of the jury trial?

MS. NAPOLITANO: I think it could be exempt depending on the circumstances, yes, Your Honor.

QUESTION: But would it be -- I mean, is that the theory that you're arguing?

MS. NAPOLITANO: Yes that there are --

QUESTION: I just want to know what you're -- you're arguing.

MS. NAPOLITANO: Yes, Your Honor. I'm sorry. That there are some facts that the legislature is entitled to find which don't go to the definition of the crime but go to the punishment. And this Court has never held that there's a Sixth Amendment right to jury sentencing.

QUESTION: What -- what do you do with the broader principle which we express from time to time that the -- the ultimate point of the jury right in -- in a criminal case is to -- is to place the jury between the defendant and the State? If -- if that's a fair statement, then you're saying, well, only part way between the defendant and the State.

MS. NAPOLITANO: In the death penalty context, Your Honor, this Court has already limited the kind of offenses for which the death penalty can even be a possibility. So, you don't have the kind of broad ranging legislative discretion that you would in another circumstance. That's why I say you -- you -- in those kinds of non-death cases, you may have to do a different kind of analysis.

But in the unique context of the death penalty world where you have to have either a first degree murder

or a felony murder -- and if it's a felony murder and you have a non-shooter, you have to make the Enmund/Tison finding, and that has to be made and can be made by the judge -- there -- the legislature is not -- they're not charging the death penalty for jaywalking.

And then the question is, all right, is the legislature entitled under the Eighth Amendment or does the legislature under the Eighth Amendment have to channel discretion? And they do.

And then the question is, does Apprendi somehow require that that Eighth Amendment jurisprudence be converted into a jury right on this -- on the aggravating factors? And as this Court has said time and time again, no, starting with Proffitt v. Florida all the way through Walton. Poland v. Arizona is a great example where --

QUESTION: But -- but your -- your principle, in fact, is broader than that because, as I understand it, your principle is that what we have traditionally referred to as sentencing factors -- maybe change that to a neutral term, facts that bear solely on sentencing -- they can be excluded from the -- the jury finding guarantee.

MS. NAPOLITANO: Yes. In the unique context of the death penalty and then it remains for this Court to decide whether you want to broaden it. But the rule proposed by the petitioner here would be equally broad

taken out of the death penalty context because you could have no fact that enhanced a sentence that didn't first have to be found by a jury.

And in response to a question that was posed earlier, that would throw into question the Federal Sentencing Guidelines and their structure and -- any many State sentencing structures where, once you are convicted of a particular offense, the State law requires the judge to give you a presumptive sentence unless he finds additional facts, in which case he can depart upwards. It's not just the Federal Sentencing Guidelines that use that structure. Many States use that structure. So, if you are to hold that an aggravating factor even in a death penalty case has to go to the jury, it is hard to imagine why that wouldn't extend throughout the sentencing systems of the States.

QUESTION: General Napolitano, how many death sentence case are there presently in Arizona that would be affected by a reversal here?

MS. NAPOLITANO: We've had 89 death sentences imposed since Walton, and approximately 30 are in some type of direct review. So, it's a substantial number, and that's just in -- in Arizona.

QUESTION: Maybe Apprendi throws into play some of those earlier cases, even if you don't agree with

Apprendi or feel it's quite limited.

What about the other cases I mentioned where Powell and -- and Stewart -- Stevens all thought that a jury should make this determination as part of the Eighth Amendment jurisprudence because it's very important that the death penalty be applied only where opinion in that community believes that it is consistent with the cruel and unusual punishment prohibition?

MS. NAPOLITANO: Two responses to that, Your Honor. One is this Court itself in a later case mentioned that they thought judicial sentencing may, in fact, be a better way to guarantee against the arbitrary imposition of the death penalty.

QUESTION: The statistics seem to suggest that it is absolutely no reason to think that.

MS. NAPOLITANO: The statistics seem to suggest that there is absolutely no reason to think that jury sentencing is any different, that they're a wash. But there hasn't been a lot of literature on this subject. And --

QUESTION: Well, yes, but there has -- there was a long -- you know, Potter Stewart went into all of this.

MS. NAPOLITANO: Yes.

QUESTION: Go ahead. I don't want to interrupt you. I'm sorry.

MS. NAPOLITANO: But --

QUESTION: I want to hear your answer. Now, please go ahead.

MS. NAPOLITANO: Well, the jury is involved in this case. The jury is a protector in this case. This was an indicted case, indicted for first degree murder. That went to the grand jury. It was then presented to the petit jury. They made the determination about the felony murder. They weighed the evidence. They knew or were on notice that this was a death case. The jury right was embraced here, just as it was pre Furman. The only difference is the post-Furman addition of the sentencing factors.

QUESTION: No. The difference is that the individual juror does not have to take the individual responsibility of saying I as a human being have decided that this person should be sentenced to death. Now, that's quite a difference.

MS. NAPOLITANO: Your Honor, even under petitioner's argument, an addition -- and a -- and a juror may not have to make that decision because even petitioner's argument says, we just want them to find a fact.

QUESTION: That's true.

MS. NAPOLITANO: We still say it's okay for the

judge --

QUESTION: I -- I grant you that. That's why --

MS. NAPOLITANO: So, go ahead and do the weighing and so forth.

QUESTION: I -- I -- you're quite right on that. That's why I want to see what the answer to the full argument is on your part.

MS. NAPOLITANO: Well, the answer is that the jury here is embraced and is performing the function of juries that has come down from colonial times or pre-colonial times. There's nothing different. The jury has to find intent to kill. The jury has to find a death. The jury has to find causation. The instructions are the same to the jury.

QUESTION: But it could make all those findings and it would not authorize the death penalty.

MS. NAPOLITANO: Excuse me?

QUESTION: It could make all those findings that you just recited, and yet the law of Arizona would not permit the imposition of the death penalty.

MS. NAPOLITANO: The jury verdict at that case, under that part of our statute, would say that the maximum death penalty is death. But you're right, Justice. It can't be enforced until the judge conducts the second sentencing hearing.

QUESTION: Unless the judge makes an additional finding of fact.

MS. NAPOLITANO: He must find an aggravating fact and then he can find -- weigh those against the mitigators and make the determination as to whether death is the appropriate punishment.

But again, this is part of the process this Court has dictated to the States to determine which of the worst murders deserve the worst penalty.

QUESTION: General Napolitano, the -- the expanded argument that Justice Breyer is -- is suggesting, which -- which isn't urged by Mr. Hurwitz, is really an Eighth Amendment argument rather than a Sixth Amendment argument, isn't it? That is, the fact that the jury should also be required to do the weighing and to make the final determination that this person deserves the death penalty. That's not a Sixth Amendment argument; it's an Eighth Amendment.

MS. NAPOLITANO: I think it could be construed as an Eighth Amendment argument, yes, Your Honor.

And -- and as I said at the beginning of my argument, this whole situation, this whole statute derives from Furman and from the Eighth Amendment. It does not implicate the Sixth Amendment or the concerns that were expressed in Apprendi.

And let me, if I might, go to the stare decisis part of my argument, because it's not just the cases you listed, Your Honor, that I think would be implicitly overruled, but let me give you a list: Proffitt v. Florida, Spaziano, Cabana v. Bullock, which does allow the --

QUESTION: But do you think it's perfectly clear -- you cite a couple of Florida cases -- that if the Florida advisory jury made the findings of fact that would be -- make them -- the defendant eligible for the death penalty, that that case would be covered by the decision in this case?

MS. NAPOLITANO: Yes, and I think it's important to understand how the Florida system works under Florida law. What happens is after conviction, the jury hears a separate sentencing proceeding.

QUESTION: Correct.

MS. NAPOLITANO: And it comes out with really a unitary form, and all that form says is life or death. It does not specify which aggravating facts the jury may have found or which mitigating facts the jury may have found. And then the trial judge takes that form --

QUESTION: But supposing it did just to -- just to go with me on the -- on the hypo.

MS. NAPOLITANO: Okay.

QUESTION: Supposing, as a part of the procedure, the judge did require the jury to accompany its recommendation with a finding of fact as to the aggravating circumstance. Would that then be covered by this case?

MS. NAPOLITANO: I think it would, Your Honor, because you're still allowing the judge to make the final determination. And if the judge is able to disagree on the facts --

QUESTION: But that's the Eighth Amendment issue. The judge is making the final determination but not necessarily -- but it would be supported by a jury finding that was sufficient to authorize the death penalty.

MS. NAPOLITANO: In this case, the jury finding of first degree felony murder authorized the death penalty. The question was, could it be imposed and what is the -- what is the way to do --

QUESTION: It doesn't authorize it without an additional finding by the judge.

MS. NAPOLITANO: It authorizes the judge to go forward and conduct a separate sentencing hearing.

QUESTION: In some -- in some States, it's my understanding that the jury simply makes a finding that the aggravating circumstances outweigh the mitigating

circumstances without specifying either. Now, would that be affected, at least by Justice Breyer's argument?

MS. NAPOLITANO: I think it -- it could conceivably. I mean, I -- you know, what we're dealing with here is a very difficult --

QUESTION: But -- but isn't it clear that the aggravating circumstances could not outweigh the mitigating circumstances unless there were a finding of at least one aggravating circumstance?

MS. NAPOLITANO: Yes.

QUESTION: Which in turn --

MS. NAPOLITANO: But you could have --

QUESTION: -- would make him eligible for the death penalty.

MS. NAPOLITANO: I -- yes, Your Honor, but you could have the situation such as a State like Florida where the judge doesn't know what aggravating circumstance was found, and you're still --

QUESTION: Well, he doesn't know which is found, but he knows that one is found. It seems to me if you say that's not enough, then you are making the Stewart Eighth Amendment argument, aren't you?

MS. NAPOLITANO: Yes. And -- and the -- the problem there is if the Eighth -- if an aggravating circumstance is found by a jury and the judge doesn't know

what it is, and the judge still has to go through all of the evidence and do the weighing as to what weight that aggravating circumstance should find versus the mitigating, the basic -- one basic question is, well, what is the function of the jury there anyway? What is the protection the Sixth Amendment is providing to a defendant there?

And I would suggest that a defendant such as Ring and such as a defendant in Florida has already received all the protections that the Sixth Amendment entitles him or her to. And all that is going on here is a narrowing process where the judge's discretion is actually being narrowed in sentencing, not broadened. In Apprendi, you could actually say the discretion was being broadened, the same as in Jones, but it is being narrowed.

QUESTION: Yes, but it's narrowed to the extent that he now knows he must make an additional -- one single additional finding of fact in order to put this man to death, which is -- the jury has not made that finding of fact.

MS. NAPOLITANO: Well, yes, Your Honor, at a -- at a statutory level in Arizona that is absolutely true.

QUESTION: That's what your Supreme Court says is the case here.

MS. NAPOLITANO: Yes.

Now, in -- in the Ring case, there -- there is the issue of the fact that he was convicted of armed robbery and conspiracy to commit armed robbery.

QUESTION: May I ask if you disagree with your opponent's analysis of the pecuniary circumstance issue? He says that there's a difference between armed robbery on the one hand which is for a pecuniary purpose and the pecuniary motivation in a death case, and that has to be the motivation for the killing itself, is that the robbery -- robbery alone would not satisfy that. Do you disagree with that?

MS. NAPOLITANO: Yes, Your Honor. And I would cite the -- this Court to State v. Gretzler which is cited in our brief.

But on the record before this Court and on the --

QUESTION: You'd cite State v. Gretzler to the Court.

MS. NAPOLITANO: Yes. It's in our brief, Your Honor. It's an Arizona Supreme Court case.

But I would also add that in this case, based on the trial transcript and the sentencing hearing transcript, which are part of the joint appendix before the Court, it's very clear that the reason Mr. Magoch was killed was because he unfortunately was the driver of an

armored car that Mr. Ring decided to rob.

QUESTION: I -- I agree when you say sentencing transcript, but what about just the guilt phase transcript? Would you make the same -- the same --

MS. NAPOLITANO: Yes, I would, Your Honor

QUESTION: -- draw the same conclusion?

MS. NAPOLITANO: Yes, Your Honor, and -- and I think that's why the jury convicted him of armed robbery and conspiracy to commit armed robbery and rendered a unanimous verdict on the felony murder portion even though they didn't render a unanimous verdict on the premeditated --

QUESTION: General Napolitano, will you correct me if I'm wrong about this, but I thought that the proof at the trial itself didn't even place the defendant at the scene of the crime. Certainly he was involved in planning it. They -- but they didn't even place him at the scene of the crime at the trial. That didn't come up until sentencing when the co-defendant testified. So, how could the jury have made the finding that he killed for pecuniary gain when he wasn't even at the scene?

MS. NAPOLITANO: Your Honor, it goes to the fact that he was at a minimum a major -- major conspirator in a conspiracy that resulted in the death of an armored car driver. The purpose of the conspiracy was to rob the

armored car. The jury, by finding the armored car robbery, the -- the membership in the conspiracy, and then the sentencing court and then later the Arizona Supreme Court making the Enmund/Tison finding impliedly, if not explicitly, proved the pecuniary gain issue.

But if there's any question for this Court on that point, and should you be inclined to overrule Walton, which you should not, that's a matter that always could be remanded back to the State Supreme Court for further explanation.

QUESTION: Would you tell me how one would explain to a citizen that you can't get 5 years added on to your sentence unless the jury makes the critical finding, but you can be put to death with the judge making the critical finding?

MS. NAPOLITANO: Because, Your Honor, the -- the difference is what is the source of the punishment. Where does it come from? What is the source of the sentencing at issue? And in the prior situation, in a -- in a non-death penalty case, what the Court has been doing and what Apprendi does is expand the range of the jury trial. But what the Court has not done is expand the Eighth Amendment protections that it -- that it incorporated onto the original elements of first degree murder for death penalty cases and say not only are these Eighth Amendment issues,

now we're going to even transfer it further and make them Sixth Amendment issues. And -- and the implications are large.

QUESTION: It seems to me that you're making a novel application of the principle we've repeated several times, that death is different.

MS. NAPOLITANO: Death is different.

QUESTION: Yes.

MS. NAPOLITANO: I mean, there's no doubt about it, Your Honor. And -- and your jurisprudence has said that. But, you know, you don't have this kind of elaborate sentencing procedure in a non-death case either. I mean, this is all driven by -- by Furman and all of Furman's progeny to make sure that we are getting the right defendants and imposing the right penalty on those defendants. And that's an Eighth Amendment issue and has not been, by this Court, expanded to the Sixth Amendment.

And -- and again, if this Court were to overrule Walton and reopen all of the cases in Arizona, at least that are on direct review and in the other States, it's hard to imagine how you then would not also have to overrule Clemons, Hildwin, Poland, all the cases we've cited to the Court before, because they all recognize and state that these cases are different and that there is a separate rule for the judge in these kinds of cases.

QUESTION: The -- the difference obviously is that, of course, it's different. It's worse, not better. So, the obvious argument is that if you're going to insist that a jury find a fact that could enhance a sentence from 10 years to 15, surely a jury, when you're under the Eighth Amendment or the Sixth Amendment, should find the fact that could enhance the sentence from life in prison to death. I mean, I think that's what it's --

MS. NAPOLITANO: Well, I think that's --

QUESTION: -- is the underlying point here.

MS. NAPOLITANO: I think that's petitioner's basic argument, and -- and our response is it's more complicated than that. That doesn't really answer the question because in the death penalty world, the case law is different, the tradition is different. This is all a creation of Supreme Court precedent, really not of the common law as it came down through colonial times. And what is going on here are additional protections for a defendant, not fewer protections for a defendant.

And remember, in this case, you know, if you just took the -- the literal language of Apprendi and -- and didn't go beneath it, and you took the literal language of the Arizona first degree murder statute, the maximum penalty under the statute is death, and the judge is simply making a choice between life or death. And the

jury's verdict authorizes the judge to go forward and enter into that sentencing proceeding. And that is a procedure that this Court has embraced, upheld, and specifically said does not violate the Sixth Amendment.

QUESTION: Would you comment on your opponent's suggestion that that would apply to other statutes like the drug statute? The maximum penalty under the same statute is life in prison and so forth, but nevertheless, Apprendi applies. Or Apprendi itself -- supposing the two -- instead of two statutes, there had been one. Would that have made a difference?

MS. NAPOLITANO: You know, in the statutory analysis that Apprendi suggests, part of that analysis is you have to look at each statute and how it was constructed and so forth. I don't know whether automatically it would apply because, again, as I've made the argument today, the Eighth Amendment death penalty cases just are different.

But, again, if you overrule Walton, it -- it is hard to imagine how any judge would have the authority under the Sixth Amendment to find any kind of fact that would be used to enhance a sentence. And if that's what Apprendi is supposed to mean, that's a very, very broad ruling.

QUESTION: To -- to enhance a sentence beyond

that which was otherwise authorized by law by the jury's verdict.

MS. NAPOLITANO: Well, or enhance a sentence beyond the presumptive sentence, because what's the difference between a sentence authorized and a presumptive sentence set forth in either guidelines or in legislation? We're cutting very fine hairs here.

And I think the ultimate question is, what is the role of a jury? Was that jury's role embraced by Arizona? Yes. Did the role of the jury in this case change at any time from what it was pre-Furman to post-Furman? No. Did the jury in this case know it was a death case? Yes. Did the defendant know it was a death case? Yes. Everyone knew it was a death case. There's no surprise. There's no adding on at the end, oh, by the way, we're going to ask for an additional 10- to 20-year enhancement like they did in Apprendi or an additional 10-year enhancement as in Jones. None of that happened. This was a death case from the beginning and it should be a death case now.

Thank you, Your Honors.

QUESTION: Thank you, General Napolitano.

Mr. Hurwitz, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF ANDREW D. HURWITZ

ON BEHALF OF THE PETITIONER

QUESTION: Mr. Hurwitz, would you address the question that General Napolitano made about this is an Eighth Amendment requirement, not a Sixth Amendment requirement, and that's a huge difference?

MR. HURWITZ: I -- I will, Justice Ginsburg. It seems to me that the State's position is that when a fact is required by State law at the policy whim of legislators in order to impose the maximum punishment allowed by law, that fact gets Sixth Amendment protection. But when a fact is required by the Constitution or by decisions of this Court, that it somehow obtains less Sixth Amendment protection. I would suggest there is no basis in the jurisprudence of this Court for that kind of conclusion.

What the Attorney General seems to be saying to you today are two things. First, the State doesn't like Apprendi. Hence, the distinction between facts that we added in order to impose sentences and facts that were elements of the crime. But I suggest that problem was solved in Apprendi.

The separate question is whether or not, as Justice Stevens put it, death is so different as to require a different rule than in Apprendi. And I would suggest that the purpose of the Sixth Amendment here, the protection of the right to jury trial, applies with no less force under a circumstance where the enhanced

sentence may be from life to death than under a circumstance where the enhanced sentence may be from 10 years to 12 years.

It may well be true that this Court's Eighth Amendment jurisprudence is unique, but in the context of the Sixth Amendment, in the context of the facts necessary and specified by State law, in order to allow the maximum punishment allowed by law, there should not be an Eighth Amendment exception.

The State has chosen to make specific facts necessary for the imposition of the ultimate sentence, and when the State chooses to do so, whether it chooses to do so because it merely thinks it's a good idea or it chooses to do so because the Constitution of the United States requires it to do so, the same Sixth Amendment principle ought to obtain. And that Sixth Amendment principle is that you're entitled to have the jury find those facts.

With respect to the question Justice Breyer asked -- and I think as clarified, it's important to note, the second issue is really an Eighth Amendment issue, and that Eighth Amendment issue is not one that we -- that we urge in this case. But even if you don't urge that Eighth Amendment issue, the underlying Sixth Amendment issue strikes us as precisely the same. And therefore, you may have a system under which a judge can do this ultimate

weighing, this ultimate discretionary decision at the second level of whether this is a particular penalty that's appropriate for this defendant. But the State's narrowing, the State's choosing of factors and putting them in its law and saying to the defendant, this is a fact that must be found before you can receive this maximum sentence, is a Sixth Amendment point.

One final point. With respect to notice, this is plainly not a notice case. I don't believe Apprendi would have come out a single bit differently if, before his trial, Mr. Apprendi was told you're going to be tried on the firearms charge and at the end of the charge, the judge is going to determine whether there's racial motivation and he's going to give you an additional sentence. Apprendi was not about notice. This case is not about notice.

This case is, however about that central Sixth Amendment point, and I would suggest to the Court that try as you might, unless you simply say in the end we're going to have a different rule for capital punishment, you can't distinguish the issues in this case and the underlying Sixth Amendment principle from the principles in Apprendi. And for that reason, we suggest that this case is controlled by Apprendi and that the sentence of death imposed on this petitioner was inappropriate under the

Sixth Amendment.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hurwitz.

The case is submitted.

(Whereupon, at 12:00 p.m., the case in the above-entitled matter was submitted.)

**T**