

Judges v Juries

Mark George examines the far reaching effect of the recent decision of the Supreme Court and looks at reactions in key death penalty states.

Readers of the *Amicus Journal* seldom have much cause to celebrate in relation to death penalty cases, having to make do with the occasional welcome victory in the midst of much sadness and disappointment. It is therefore particularly pleasing to be able to report on matters that should bring some cheer to our hearts, even if tinged with a substantial amount of realism as well.

In her dissenting judgment in *Ring v. Arizona* (24 June 2002) (judgment available from www.findlaw.com, click on "Supreme Court") Justice O'Connor predicted chaos in death penalty states as hundreds of death row sentences would have to be reviewed in the light of the decision of the majority in that case. The Court decided by 7-2 that a death sentence where the necessary aggravating factors are determined by a judge rather than a jury, violates a defendant's constitutional right to a trial by jury. Justice O'Connor warned that the decision not only affected states such as Colorado, Idaho, Montana and Nebraska, which had a sentencing scheme similar to that in Arizona, but also states such as Alabama, Delaware, Florida and Indiana where the jury issues an advisory verdict but the judge makes the ultimate sentencing determination. The numbers of prisoners on death row in these states is significant. There are currently 168 such persons in the Arizona group of states and a massive 529 in the Alabama group.

Happily for opponents of the death penalty, the predicted chaos appears to be occurring, although how much it will ultimately benefit death row inmates remains to be seen. In *Delaware*, prior to *Ring* judges were asked to consider a jury's recommendation on the existence of aggravating circumstances but had the ability ultimately to find otherwise. Following the decision in *Ring*, the Delaware Supreme Court ordered attorneys in each of the eight death penalty appeal cases currently pending before the Court to submit new briefs detailing how the *Ring* decision affects their case. More recently, on 13 September, the President Judge of the Superior Court was reported to have halted all capital murder trials and sentencing hearings until the state's Supreme Court can consider the constitutional propriety of the death penalty in the Delaware cases and a new state law in the light of the decision in *Ring*. The new state law in

question gives jurors the sole authority to decide death eligibility and may be expected to be ruled to be compliant with the decision in *Ring*. Delaware has executed 13 inmates since the resumption of executions in 1976 including two in 2001, but none so far this year.

In *Arizona* itself the state legislature met in special session to amend the state's death penalty statute in the wake of the *Ring* decision so as to allow juries rather than judges to impose the death sentence. The bill was passed and signed by the governor. Interestingly, however, that does not appear to be the end of Arizona's problems. The law still allows the survivors of murder victims to tell the jury whether they want the defendant sentenced to death. The attorney-general has advised the lawmakers that this is unconstitutional and cited US Supreme Court authority in support. However, it was reported in late September that Arizona's Supreme Court has rejected appeals from 31 death row inmates who claimed that they were entitled to be resentenced in the light of the decision in *Ring*. The inmates who have exhausted their direct appeals claimed that the Supreme Court's ruling that juries, not judges, should decide critical sentencing issues, requires that they be resentenced under the new procedures mentioned above. Without further comment the Supreme Court in Arizona disagreed. The Court will decide later this year whether the new procedures will apply to inmates who have not exhausted their direct appeals.

In August, the *Idaho* Supreme Court overturned the death sentence of death row inmate Donald Fetterly in the light of *Ring* on the basis that that decision appears to strike at the heart of the state's death penalty scheme which is similar to that in Arizona. Only one person has been executed in Idaho since 1976.

Since the 1970s *Nebraska* has been one of only two states (the other is Colorado) which has had a three-judge panel to decide whether to impose a death penalty following a jury verdict of guilty. In the light of *Ring*, the attorney-general has asked the state's Supreme Court to decide whether Nebraska can continue sentencing people to death under the current law. The attorney-general argues that since state law says a judge or a jury must sentence capital defendants, jurors could be asked whether the

prosecution had proved any aggravating circumstances that are required before a death sentence can be passed. This "special verdict" would then allow judges to sentence defendants to death based on the juries findings. Such "special verdicts" are allowed in civil cases in Nebraska but defence attorneys have argued that a 1982 decision of the Nebraska Supreme Court found that "special verdicts" are not applicable in criminal cases. Clearly there is much that needs clarification.

Like Nebraska, **Colorado** is one of the states with a system similar to that in Arizona where the judge alone decides whether the death penalty should be imposed. Following *Ring*, the legislature met in special session and approved legislation to change the state's death penalty statute to ensure its constitutionality in the light of the decision in that case. The reform bill returns the sentencing determination in a capital case from a three-judge panel to the trial jury for a unanimous determination. Governor Owens subsequently signed the bill into law.

The execution of two death-row inmates (Linroy Bottonson and Amos King) in **Florida** set for the week the Supreme Court returned its decision in *Ring* were stayed by the Florida Supreme Court so that it could consider whether the state's capital-punishment law is constitutional in the light of that decision. Florida is one of the four states identified by Justice O'Connor that permits a judge to override a non-unanimous jury recommendation of a life sentence and impose the death penalty instead. Two other inmates, however, have execution dates set for October.

Even in **Missouri**, which is not named amongst the nine states that appeared to have a death row regime that conflicted with the Constitution in the light of *Ring*, some of its death sentences may be overturned as a result of that ruling. Attorney-General Jay Nixon has announced that the state will thoroughly review the cases of its 68 death row inmates to ensure compliance with the Supreme Court's ruling. Nixon noted that nearly one in every six Missouri death row inmates was condemned by a judge instead of a jury. Missouri law allows judges to impose death sentences in some instances, including when a jury that convicts a defendant deadlocks about sentencing. **Nevada** also allows a panel of judges to make death-sentencing decisions in some cases. In **Connecticut**, a three-judge

panel can decide on death sentences in resentencing hearings following successful appeals.

Even the **federal jurisdiction** has been affected by the *Ring* decision. The Supreme Court has vacated the death sentence of federal death row inmate Billie J. Allen and remanded the case back to the Eighth Circuit for reconsideration in the light of its recent ruling in *Ring*. Although under federal law the jury makes the finding as to whether aggravating circumstances exist which would warrant the death penalty, the specific circumstances that the government intended to prove were not part of the indictment before the jury as the Supreme Court in *Ring* decided was an essential part of a jury trial.

It is clear that a number of states have acted quickly to try to ensure that their death penalty statute is constitutionally compliant in the light of the *Ring* decision. That, however, only affects future capital cases. It does nothing to address the situation of the almost 700 inmates on death row in the nine states directly affected by *Ring*. The prospect of each of those cases having to be carefully reviewed in the light of the *Ring* decision means that it could be years before final decisions are reached.

As a further indication of the extent of the earthquake brought about by *Ring* there have been other interesting

developments even in states not apparently directly affected by the Supreme Court's ruling. In **New Jersey** it was reported on 16 September that defence lawyers with the support of the state's attorney-general and, indeed, prosecutors are seeking a state-wide freeze of capital cases until the N.J. Supreme Court can assess the state's death penalty statute in the light of *Ring*.

Meanwhile in **New Mexico** a trial judge has ruled that the state's death penalty statute is unconstitutional. The *Albuquerque Journal* reported on 28 September that Judge Don Maddox has ruled that the decision in *Ring* means that juries, not judges, now have the sole authority to determine whether a defendant is mentally retarded. Currently judges determine this issue after the jury has determined that the defendant is guilty of the offence. This is obviously crucial in the light of the recent US Supreme Court decision in *Atkins v. Virginia*, where the Court ruled that executing the mentally retarded is a violation of a defendant's constitutional rights guaranteed by the Eighth

The Court decided by 7-2 that a death sentence where the necessary aggravating factors are determined by a judge rather than a jury, violates a defendant's constitutional right to a trial by jury.

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Amendment not to be subjected to cruel and unusual punishment. And in **Vermont** a federal judge has declared the federal death penalty unconstitutional in the second such ruling in the last three months. US District Judge William Sessions ruled on 24 September that the law does not adequately protect a defendant's rights. His decision in the case of *US v. Donald Fell* is based on the US Supreme Court's decision in *Ring* that matters which are relevant to whether the death penalty should be imposed should be decided by a jury. In his ruling Judge Sessions said:

"If the death penalty is to be part of our system of justice, due process of law and the fair trial guarantees of the Sixth Amendment require that standards and safeguards governing the kind of evidence juries may consider must be rigorous, and constitutional rights and liberties scrupulously protected."

This ruling only applies to the instant case for the present time but the philosophy behind it is indicative of the unease some judges now feel about the death penalty. In July, US District Judge Jed Rakoff in New York City became the first federal judge to declare the 1994 Death Penalty Act unconstitutional, citing evidence that innocent people had been put to death.

There is, of course, a certain irony in all this which will not be lost on opponents of the death penalty. The principle ground on which the death penalty was ruled unconstitutional in *Furman v. Georgia* 408 U.S. (1972) was that its imposition was arbitrary and capricious because it was left to the whim of the jury in a particular case to decide who should live and who should die. As a result, states amended their death penalty statutes to require juries to find at least

one aggravating feature before a death penalty could be imposed. Some states, such as Nebraska and Colorado went even further and removed the decision from the jury altogether in order to try to eliminate arbitrariness in this crucial decision. Now those states find themselves in trouble again and will have to return to a position in which the jury make the ultimate decision. Meanwhile, Justice Scalia, an ardent supporter of the right of states to execute their citizens, will no doubt be delighted that the decision in *Ring*, which he supported, can be said to be the inevitable consequence of what he regards as the unnecessary and unconstitutional restriction placed on states' rights by what he calls the "*Furman* jurisprudence" – see the first paragraph of his judgment in *Ring*.

The state of confusion may take some time to resolve. If, however, even only one death row inmate is spared as a result of the reconsideration forced upon the states by *Ring*, it will have been worthwhile. On the other hand it is important not to get carried away. The states involved in the most anxious considerations set out above are mostly amongst those with the lowest execution rates in the country. Only Florida, with 51 executions since 1976, is amongst the most prolific in imposing the death penalty. Meanwhile, Texas, which is far and away the most bloodthirsty state with 279 out of the total of 795 executions since 1976 and which had already executed 23 inmates this year by the end of August, is unaffected by the decision in *Ring* since the judge in a Texas capital case is bound by the unanimous vote of the jury for life or death.

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