SUPREME COURT OF THE UNITED STATES

No. 01–488

TIMOTHY STUART RING, PETITIONER *v.* ARIZONA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

[June 24, 2002]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

The question whether *Walton* v. *Arizona,* 497 U. S. 639 (1990), survives our decision in *Apprendi* v. *New Jersey,* 530 U. S. 466 (2000), confronts me with a difficult choice. What compelled Arizona (and many other States) to specify particular "aggravating factors" that must be found before the death penalty can be imposed, see 1973 Ariz. Sess. Laws ch. 138, §5 (originally codified as Ariz. Rev. Stat. §13–454), was the line of this Court's cases beginning with *Furman* v. *Georgia,* 408 U. S. 238 (1972) *(per curiam).* See *Walton*, 497 U. S., at 659–660 (SCALIA, J., concurring in part and concurring in judgment). In my view, that line of decisions had no proper foundation in the Constitution. *Id.,* at 670 ("'[T]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed'" (quoting *Gardner* v. *Florida*, 430 U. S. 349, 371 (1977) (REHNQUIST, J., dissenting))). I am therefore reluctant to magnify the burdens that our *Furman* jurisprudence imposes on the States. Better for the Court to have invented an evidentiary requirement that a judge can find by a preponderance of the evidence, than to invent one that a unanimous jury must find beyond a reasonable doubt.

On the other hand, as I wrote in my dissent in *Almendarez-Torres* v. *United States,* 523 U. S. 224, 248 (1998), and

as I reaffirmed by joining the opinion for the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

The quandary is apparent: Should I continue to apply the last-stated principle when I know that the only reason the fact *is* essential is that this Court has mistakenly said that the Constitution *requires* state law to impose such "aggravating factors"? In *Walton*, to tell the truth, the Sixth Amendment claim was not put with the clarity it obtained in *Almendarez-Torres* and *Apprendi*. There what the appellant argued had to be found by the jury was not all facts essential to imposition of the death penalty, but rather "*every* finding of fact underlying the sentencing decision," including not only the aggravating factors without which the penalty could not be imposed, but also the *mitigating* factors that might induce a sentencer to give a lesser punishment. 497 U. S., at 647 (emphasis added). But even if the point had been put with greater clarity in *Walton*, I think I still would have approved the Arizona scheme—I would have favored the States' freedom to develop their own capital sentencing procedures (already erroneously abridged by *Furman*) over the logic of the *Apprendi* principle.

Since *Walton*, I have acquired new wisdom that consists of two realizations—or, to put it more critically, have discarded old ignorance that consisted of the failure to realize two things: First, that it is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event. Some States, for example, already had aggravating-factor

requirements for capital murder (*e.g.*, murder of a peace officer, see 1965 N. Y. Laws p. 1022 (originally codified at N. Y. Penal Law §1045)) when *Furman* was decided. When such a State has added aggravating factors, are the new ones the *Apprendi*-exempt product of *Furman*, and the old ones not? And even as to those States that did not previously have aggravating-factor requirements, who is to say that their adoption of a new one today—or, for that matter, even their retention of old ones adopted immediately post-*Furman*—is still the product of that case, and not of a changed social belief that murder *simpliciter* does not deserve death?

Second, and more important, my observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt "sentencing factors" determined by judges that increase punishment beyond what is authorized by the jury's verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK, see *Apprendi*, *supra,* at 523 (O'CONNOR, J., dissenting), cause me to believe that our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

Accordingly, *whether or not* the States have been erroneously coerced into the adoption of "aggravating factors," wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.

I add one further point, lest the holding of today's deci-

sion be confused by the separate concurrence. JUSTICE BREYER, who refuses to accept *Apprendi*, see 530 U. S., at 555 (BREYER, J., dissenting); see also *Harris* v. *United States*, *ante,* p. ___ (BREYER, J., concurring in part and concurring in judgment), nonetheless concurs in today's judgment because he "believe[s] that jury sentencing in capital cases is mandated by the Eighth Amendment." *Post*, at 1 (opinion concurring in judgment). While I am, as always, pleased to travel in JUSTICE BREYER's company, the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. There is really no way in which JUSTICE BREYER can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, JUSTICE BREYER is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.