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IN THE SUPREME COURT OF THE UNITED STATES

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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.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

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

5 Mr. Hurwitz.

6 ORAL ARGUMENT OF ANDREW D. HURWITZ

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

23 Rather, our point is very --

24 QUESTION: How about Cabana?

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

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

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

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

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

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

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

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

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

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

11 It is difficult to believe that Apprendi would
12 have been -- come out differently, that there would have
13 been a different result in that case, if the statute
14 instead read there's a possible punishment of 20 years for
15 discharging a firearm with racial motivation, but the last
16 5 years may not be imposed. You may not exceed 15 years
17 in the absence of racial motivation.

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

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

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

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

5 QUESTION: Upward -- upward adjustments within
6 the maximum.

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

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

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

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

1 give this sentence if these factors exist.

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

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

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

14 MR. HURWITZ: Correct, Justice --

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

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

19 QUESTION: They didn't find a robbery?

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

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

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

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

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

1 that argument was answered in Apprendi.

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

11 One way to -- one way to -- to get into that
12 issue is to -- is to imagine the following circumstance.
13 Let's assume that Arizona law, instead of providing
14 precisely what it does now, said instead that the penalty
15 for first degree murder is life without -- is life with
16 possibility of parole. But that penalty may be increased
17 to life without possibility of parole upon finding of one
18 of 10 specific aggravating circumstances, so that we had
19 exactly the same statute that we have now, but at the
20 first level you get life with possibility of parole after
21 25 years, and at this next level, you got life without
22 possibility of parole. I don't think there could be any
23 doubt, under those circumstances that on its face the rule
24 this Court set forth in Apprendi would apply.

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

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

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

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

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

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

1 Now, why isn't --

2 MR. HURWITZ: Justice --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 aggravating circumstance.

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

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

14 MR. HURWITZ: Correct, Justice Kennedy.

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

1 jury.

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

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

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

25 QUESTION: Were it up to you, you would make

1 that argument if you felt it was open.

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

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

6 MR. HURWITZ: We're open.

7 (Laughter.)

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

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

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

22 QUESTION: But if it adopted the statute in
23 1965, it could have simply had the exact language that it
24 had and said the decision as to whether death or life is
25 simply up to the discretion of the judge, and it would

1 have been perfectly okay.

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

4 QUESTION: And because Furman had not been
5 decided.

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

12 One example is suggested in our brief. The
13 State of New York in the mid-1960s determined to narrow
14 its capital punishment laws and apply them only when the
15 victim was a peace officer. Arizona made that decision in
16 1988. Was Arizona's decision in response to a mandate
17 from this Court, or was Arizona's decision because, as New
18 York, it made a policy decision?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 QUESTION: Very well, Mr. Hurwitz.

1 General Napolitano, we'll hear from you.

2 ORAL ARGUMENT OF JANET NAPOLITANO

3 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

21 MS. NAPOLITANO: Your Honor, I think --

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

25 MS. NAPOLITANO: Your Honor, I think what you

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

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

10 QUESTION: But you're --

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

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

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

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

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

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

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

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

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

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

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

14 QUESTION: Right.

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

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

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

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

1 MS. NAPOLITANO: Yes that there are --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Apprendi or feel it's quite limited.

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

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

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

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

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

23 MS. NAPOLITANO: Yes.

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

1 MS. NAPOLITANO: But --

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

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

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

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

24 QUESTION: That's true.

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

1 judge --

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

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

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

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

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

17 MS. NAPOLITANO: Excuse me?

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

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

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

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

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

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

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

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

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

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

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

17 QUESTION: Correct.

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

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

25 MS. NAPOLITANO: Okay.

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

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

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

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

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

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

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

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

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

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

10 MS. NAPOLITANO: Yes.

11 QUESTION: Which in turn --

12 MS. NAPOLITANO: But you could have --

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

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

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

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

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

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

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

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

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

25 MS. NAPOLITANO: Yes.

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

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

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

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

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

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

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

1 armored car that Mr. Ring decided to rob.

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

5 MS. NAPOLITANO: Yes, I would, Your Honor

6 QUESTION: -- draw the same conclusion?

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

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

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

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

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

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

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

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

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

7 MS. NAPOLITANO: Death is different.

8 QUESTION: Yes.

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

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

1 QUESTION: The -- the difference obviously is
2 that, of course, it's different. It's worse, not better.
3 So, the obvious argument is that if you're going to insist
4 that a jury find a fact that could enhance a sentence from
5 10 years to 15, surely a jury, when you're under the
6 Eighth Amendment or the Sixth Amendment, should find the
7 fact that could enhance the sentence from life in prison
8 to death. I mean, I think that's what it's --

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

10 QUESTION: -- is the underlying point here.

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

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

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

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

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

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

25 QUESTION: To -- to enhance a sentence beyond

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

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

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

21 Thank you, Your Honors.

22 QUESTION: Thank you, General Napolitano.
23 Mr. Hurwitz, you have 4 minutes remaining.

24 REBUTTAL ARGUMENT OF ANDREW D. HURWITZ
25 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

1 Sixth Amendment.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Hurwitz.

4 The case is submitted.

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

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<p>ability 8:11 able 37:8 about 4:24 12:20,21 15:24 16:8 18:11 23:8 25:22 32:2 33:8 41:3,14 43:9 47:2 49:15,16,17 above-entitled 1:10 50:6 absence 7:17 8:12 9:5,6 absolutely 32:15,17 39:22 abuse 8:17 accept 7:18 accepted 18:19 accompany 37:2 accomplice 10:11 account 24:16 actual 28:13 actually 39:13,14 actus 26:8 add 13:22 40:21 added 28:2 42:12 47:17 adding 24:15 46:15 addition 24:24 33:12,20 additional 31:10 35:1 37:20 39:17,18 44:18 46:16,17 49:14 address 47:1 addressed 10:20 adds 28:18 adjustments 8:5 adopt 16:25 26:18,21 adopted 14:7 19:16,22 21:2 adopting 12:18 19:14 adoption 16:5 advisory 36:9 affected 6:7 31:19 38:2 after 11:20 12:7 13:21 15:23 19:15 20:11 24:8 36:15 again 17:18 21:8,18 30:13 35:7 43:18 45:16,19 against 3:24,24,25 4:17 32:12 35:4 aggravated 12:9 aggravating 4:8 6:5,9 8:13 9:13 10:24 11:7,18 12:10,13,14,18 15:8 15:11 16:2,8,14 17:1 19:19 21:1,4 22:23 25:9,10,23 30:12 31:13 35:3 36:20 37:4,25 38:7,9,17,24 39:3 aggravating/mitigating 15:18 aggravation 21:6 23:14 ago 7:7 agree 31:25 41:2 ahead 32:24 33:3 34:3 ALI 19:17 allow 4:9 11:5 15:13 17:10 21:17,23 36:5 48:7 allowed 4:14 5:17 14:3 15:1,2 18:7,10 22:3 47:8 48:8 allowing 37:7</p>	<p>alone 3:14,18 40:10 already 7:24 29:17 39:9 alternative 24:17 always 17:21 18:5 42:8 amended 13:22 24:14 Amendment 3:11 14:4,23 15:6,24 16:4,5 17:20 18:20 21:19 22:5 24:10 24:22,23 26:24,25 29:8 30:7,8,11 32:5 35:13,13,17,18,20,23,24 37:10 38:22 39:6,10 42:22,25 43:2,16,17 44:6,6 45:4,17,21 47:3,3,9,11,23 48:5,6,9,15,16,20,21,23,23 49:7,18 49:22 50:1 among 22:17 analysis 5:8 16:21,22 22:23 29:23 40:5 45:13,13 analytical 13:8 ANDREW 1:14 2:3,8 3:6 46:24 animus 17:22 announced 6:15 another 19:15 20:25 28:10 29:20 answer 24:21 33:2 34:6,8 44:13 answered 11:1 antecedent 26:16 anything 16:13 25:14 anyway 39:5 appeal 4:15 8:23 APPEARANCES 1:13 appendix 40:23 application 43:5 applied 5:7,8,11 32:6 applies 23:11 27:4 45:9 47:24 apply 11:24 16:6 20:14,19 27:6,23 45:6,16 Appendi 3:10 5:14,21 6:16,21 7:4,5,9 7:11 10:23 11:1,2,10,24 13:7 14:24 15:15,23,25 16:3 17:3,4,7,21 19:19 20:2 21:20 23:11 24:6,20,22 25:5 27:1,12,17 30:10 31:24 32:1 35:25 39:14 42:21 44:21 45:9,9,13,23 46:17 47:16,19,22 49:9,11,15,22,24 approach 19:14 appropriate 21:11 35:6 49:3 approximately 31:21 April 1:9 arbitrary 32:12 argue 23:7,8 arguing 28:4,5,25 29:3 argument 1:11 2:2,7 3:3,6 11:1 18:11 19:1,2,5,9 24:2 33:20,22 34:7 35:11 35:13,14,17,20,22 36:2 38:2,22 44:3 44:12 45:17 46:24 Arizona 1:6,14,16,17 3:4,16,19 6:16 6:23 8:10 9:21 10:1,6,12,13,19 11:13 12:8,17 13:21 16:11 19:16 20:15,19,23 22:9 24:14 25:8,11 26:4 30:15 31:18,23 34:19 39:22 40:20</p>	<p>42:3 43:19 44:23 46:10 Arizona's 6:14,18 20:16,17 24:19 armed 40:2,3,6 41:8,9 armored 41:1,24 42:1,1 arose 20:10 around 26:5 arrive 11:9 articulate 15:24 articulated 14:23 asked 48:19 aspect 7:22 21:9 assume 11:13 20:24 as-applied 16:20 attempted 5:23 attention 23:9 Attorney 1:16 47:14 authority 45:20 authorize 34:16 37:13,19 authorized 37:16 46:1,5 authorizes 37:21 45:1 automatically 45:16 a.m 1:12 3:2</p>
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