The Impact of *Ring v. Arizona* on Military Capital Sentencing

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Introduction

The Supreme Court recently embarked upon a major redefinition of several core constitutional concepts that apply to criminal cases. Beginning in *Jones v. United States*,[1] the Court redefined what constitutes elements of a criminal offense and, in the process, greatly expanded constitutional protections impacting key constitutional rights[2]—the Sixth Amendment right to a trial by jury, the Fifth Amendment right to a grand jury indictment in federal cases, the Fifth Amendment Due Process right of proof beyond a reasonable doubt, and the Sixth Amendment right to notice of the offense.[3] The Court harkened back to a historical understanding of these rights to expand the universe of facts subject to these guarantees:[4] "any fact that increases the penalty for a crime beyond the prescribed statutory maximum."[5] This change prompted significant changes to both federal and state criminal justice systems: it struck down both state[6] and federal[7] sentencing guidelines; it changed the indictment requirements for federal capital cases;[8] and most significantly, it invalidated several states' capital sentencing procedures.[9]

In *Ring v. Arizona*, the Supreme Court held that a jury, not a judge, must find beyond a reasonable doubt any aggravating factors that are necessary in order for a defendant to be eligible for the death penalty.[10] This holding served as a significant departure from the prior understanding of capital jurisprudence as it overruled a prior Supreme Court opinion upholding the Arizona capital sentencing procedure.[11] Aggravating factors are no longer mere "sentencing considerations," as *Walton v. Arizona* held.[12] Instead, under *Ring*, aggravating factors are now "functional equivalents to an element," subject to the same constitutional guarantees that extend to elements of the offense.[13] The Supreme Court first adopted the concept, "functional equivalent to an element," in *Ring* and *Apprendi v. New Jersey*.[14] The introduction of this new concept resulted in confusion as to the degree to which a "functional equivalent to an element" should be treated as an actual element (i.e., alleged in the charging document and proven at the trial on the merits).[15]

The military also has a capital system that utilizes aggravating factors the government must prove beyond a reasonable doubt in order for a capital accused to be eligible for the death penalty.[16] Rule for Courts-Martial (RCM) 1004 outlines these

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[1] 526 U.S. 227 (1999).

[2] While the Court specifically disavowed that the principles established in these cases were new or novel, *id.* at 252 n.11, the *Jones* dissenters accurately predicted that the principles espoused would radically alter criminal practice: "the Court's sweeping constitutional discussion casts doubt on sentencing practices and assumptions followed not only in the federal system but also in many states." *Id.* at 254 (Breyer, J., dissenting). As future events demonstrated, the *Jones* dissent proved accurate.

[3] *See id.* at 243 n.6.

[4] *E.g.*, Apprendi v. New Jersey, 530 U.S. 466, 478-80 (2000) (expounding on, *inter alia*, the English common law practice at the time of the writing of the U.S. Constitution, Joseph Story's *Commentaries on the Constitution of the United States*, and Blackstone's *Commentaries on the Laws of England*).

[5] *Id.* at 490.

[6] *See* Blakely v. Washington, 124 S. Ct. 2531 (2004).

[7] *See* United States v. Booker, 125 S. Ct. 738 (2005).

[8] *See, e.g.*, United States v. Higgs, 353 F.3d 281, 298 (8th Cir. 2003) (holding that *Jones* and *Ring* require federal indictments to now include capital aggravating factors), *cert. denied*, 125 S. Ct. 627 (2004).

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

[10] *Id.*

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

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

[13] *Ring*, 536 U.S. at 609 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

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

[15] *See* Schriro v. Sumerlin, 124 S. Ct. 2519, 2523-24 (2004) (holding that *Ring* did not substantively change the elements of the underlying offense but was instead a procedural ruling).

[16] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2002) [hereinafter MCM].

aggravating factors and the procedures by which death is adjudged in a court-martial.[17] Already, this rule has come under challenge in light of *Ring*. One accused whose death sentence is pending presidential approval has moved for a writ of *coram nobis* at the Court of Appeals for the Armed Forces (CAAF), claiming that *Ring* renders his death sentence illegal based on two narrow grounds.[18] Of even greater importance are the larger systematic issues raised by *Ring*. Specifically, the primary question raised is the extent to which the phrase "functional equivalent to an element," as applied to capital aggravating factors at courts-martial, changes the legal foundation for aggravating factors and the applicable procedures. In order to answer this question, this article examines several aspects of the development of law in this area: (1) the *Ring* jurisprudence—both the precursor Supreme Court cases that outlined the new rule applied in *Ring* and also the subsequent cases that further developed the law surrounding "functional equivalents to an element;" (2) the impact of *Ring* on federal and state capital practice; and (3) the military capital jurisprudence—*United States v. Matthews*,[19] which served as the foundation for current military capital practice, and RCM 1004, which governs the sentencing procedures that apply to capital courts-martial. Finally, this article addresses whether *Ring* requires any changes to RCM 1004. Some changes are warranted as a policy matter in order to mirror changes in federal practice, but this article argues that *Ring* does not render the current treatment of capital aggravating factors unconstitutional.

Foundation for Change: The *Ring* Line of Cases

In order to place the *Ring* holding in its proper context, this section examines the complete line of decisions that established and implemented the concept of "functional equivalents of an element." The *Ring* holding was not a surprise, two significant cases served as a precursor to the ultimate *Ring* holding and subsequent cases also have shed light on *Ring's* applicability. It is necessary to examine each case prior to discussing *Ring's* applicability to military capital courts-martial.[20]

Jones v. United States

The first case did not focus on constitutional guarantees, but addressed the relatively mundane issue of statutory interpretation. In *Jones v. United States*,[21] the Supreme Court granted certiorari to decide whether the federal carjacking statute established three separate offenses or one offense with a choice of three separate penalties. The federal carjacking statute states the following:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
> (1) be fined under this title or imprisoned not more than 15 years, or both,
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.[22]

The government indicted Jones for violating this provision, but the indictment did not mention any of the sentence aggravating factors listed in the statute, and the judge advised Jones at arraignment that the maximum punishment was confinement for fifteen years.[23] A jury subsequently found Jones guilty of the charged offense.[24] Despite this procedural

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[17] *Id.*

[18] Brief Accompanying Petition for Writ of *Coram Nobis*, Loving v. United States, 58 M.J. 249 (2003) (No. 03-8007/AR) (ordering the government to show cause why the relief should not be granted). In his writ, Loving argues that the President had no authority to promulgate RCM 1004 in light of *Ring* and argues that the requirement that extenuating and mitigating circumstances must be substantially outweighed by the aggravating circumstances must be found beyond a reasonable doubt. *Id.* These issues are pending decision and this article will not substantively address them.

[19] 16 M.J. 354 (C.M.A. 1983) (holding the military death penalty unconstitutional and prescribing measures to fix military capital sentencing).

[20] The Supreme Court also applied the *Apprendi* rule to strike down state and federal sentencing guidelines. *See* United States v. Booker, 125 S. Ct. 738 (2005); Blakely v. Washington, 124 S. Ct. 2531 (2004). Because these guidelines established a baseline statutory maximum punishment with increased sentences based on various aggravating factors, the Court ruled that the guidelines violated *Apprendi*. *Booker*, 125 S. Ct. at 749-51; *Blakely*, 124 S. Ct. at 2537-38. While these rulings significantly changed the use of sentencing guidelines, the application of the *Apprendi* rule in these cases was relatively straightforward and sheds little light on the issue addressed in this article. As a result, this article will not substantively address *Booker* and *Blakely*.

[21] 526 U.S. 227, 229 (1999).

[22] 18 U.S.C. § 2119 (2000).

[23] *Jones*, 526 U.S. at 230-31.

[24] *Id.* at 231.

history, the presentencing report recommended a sentence of confinement for twenty-five years because the victim suffered a perforated eardrum, with numbness and permanent hearing loss, as a result of the carjacking, thus constituting "serious bodily injury" as defined by the statute.[25] The defense objected to the presentencing report, arguing that serious bodily injury was an element of the offense requiring indictment and proof to the jury.[26] The district court disagreed, stating that serious bodily injury was a sentencing consideration and not an element of the offense.[27] Accordingly, the judge found serious bodily injury by a preponderance of the evidence and sentenced Jones to twenty-five years for this offense.[28] The Ninth Circuit affirmed the conviction.[29]

The Supreme Court engaged in a lengthy analysis of whether Congress intended the statute to establish three separate offenses, with the aggravating factors serving as additional elements of a greater offense; or one offense, with the aggravating factors serving as mere sentence enhancers.[30] The Court believed that the former interpretation was correct, but recognized that the issue was not clear: "While we think the fairest reading of § 2119 treats the fact of serious bodily harm as an element, not a mere enhancement, we recognize the possibility of the other view."[31] The Court chose the former interpretation in order to avoid "grave and doubtful constitutional questions."[32]

"[G]rave and doubtful constitutional questions" existed because the latter interpretation tended to violate due process and jury trial guarantees.[33] The Court found fault with the trial judge sentencing Jones to additional confinement based on facts not alleged in the indictment and not proven to a jury beyond a reasonable doubt.[34] The Court recognized that there was no explicit case law explicitly prohibiting such a practice, but dictated an expansive new principle "suggested" by prior case law:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt.[35]

This principle, established in footnote six of the majority opinion, served as the foundation for subsequent decisions.[36]

The majority set forth this principle after discussing several cases affirming the basic constitutional requirement that the government prove to a jury all elements of a criminal offense beyond a reasonable doubt.[37] The opinion, however, failed to link the cases to the principle the Court expounded. In fact, one of these cases, *Almendarez-Torres v. United States*,[38] presented a large hurdle because the case held that a prior conviction, which served to increase the maximum sentence, was not required to be stated in an indictment. The *Jones* majority distinguished *Almendarez-Torres* because tradition and historical practice allowed for treating recidivism in such a fashion.[39] In response, the dissent effectively argued that *Almendarez-Torres* and other case law effectively *rejected* the principle expounded in footnote six.[40] In sum, *Jones* laid the

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 232-39.

[31] *Id.* at 239.

[32] *Id.* (quoting United States *ex rel.* Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 406 (1909)).

[33] *Id.*

[34] *Id.* at 244.

[35] *Id.* at 243 n.6.

[36] *See infra* notes 48-51 and accompanying text.

[37] *Jones*, 526 U.S. at 240-43 (discussing Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); and *In re* Winship, 397 U.S. 358 (1970)).

[38] 523 U.S. 224 (1998).

[39] *Jones*, 526 U.S. at 249.

[40] *Id.* at 265, 268 (Kennedy, J., dissenting). Justice Kennedy cited to *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which had upheld the imposition of mandatory minimum punishments based on the trial judge's determination that the defendant had visibly possessed a firearm during commission of the offense. *Jones*, 526 U.S. at 265. Regarding *McMillan*, Justice Kennedy stated "[t]he opinion made clear that we had already 'rejected the claim that whenever a State links the "severity of punishment" to "the presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt.'" *Id.* (quoting *McMillan*, 477 U.S. at 85 (internal citation omitted)). Similarly, Justice Kennedy discussed *Almendarez-Torres v. United States*, 523

foundation for a new rule that was not entirely grounded in prior case law. In dissent, Justice Kennedy predicted that this new rule would have significant consequences: "it is likely [that the holding] will cause disruption and uncertainty in the sentencing systems of the States."[41] As subsequent cases soon demonstrated, this prediction proved correct.

Apprendi v. New Jersey

The principle suggested in *Jones* was fully established and applied in *Apprendi v. New Jersey*.[42] In *Apprendi*, the defendant pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of unlawful possession of an antipersonnel bomb.[43] As part of the plea agreement, Apprendi faced a maximum of ten years of confinement for each of the firearm counts.[44] Additionally, the prosecutor reserved the right to request a sentence enhancement on one of the firearm counts because the crime was motivated by racial bias.[45] After an evidentiary hearing on the issue of motive, the trial judge found by a preponderance of the evidence that one of the firearm counts was motivated by racial bias.[46] As a result of this finding, the judge sentenced Apprendi to twelve years' confinement for that offense.[47]

The Supreme Court applied the principle suggested in *Jones* and held that the New Jersey procedure violated the due process right of proof beyond a reasonable doubt and the right to a jury trial.[48] The Court adopted the principle suggested in footnote six of *Jones*,[49] stating: "Fourteenth Amendment *commands* the same answer in this case involving a state statute."[50] In essence, the Court established an expansive new rule through a "Texas two-step" maneuver.[51] In *Jones*, the Court examined broad, seminal cases on the due process right and right to a jury trial and stated that these cases "suggested" this principle. Shortly thereafter in *Apprendi*, the Court established this new rule as a command.

Of even greater importance, the Court introduced the concept of "the functional equivalent of an element."[52] This concept applied to facts that increased the maximum sentence.[53] The test for determining whether a fact constituted a "functional equivalent of an element" was solely based on whether the fact served to increase the maximum sentence: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[54] The Court adopted this phrase because of the historical practice: "Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense."[55] Such facts were considered *actual elements* in historical practice, and the Court henceforth would require the same constitutional procedural protections given to elements.[56] This

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U.S. 224 (1998), which had upheld an increase in the maximum punishment based on evidence of a prior conviction. *Jones*, 526 U.S. at 268. Justice Kennedy stated: "In *Almendarez-Torres*, we squarely rejected the petitioner's argument that 'any significant increase in a statutory maximum sentence would trigger a constitutional "elements" requirement'; as we said, the Constitution 'does not impose that requirement.'" *Id.* at 268 (quoting *Almendarez-Torres*, 523 U.S. at 247.).

[41] *Jones*, 526 U.S. at 271 (Kennedy, J., dissenting).

[42] 530 U.S. 466 (2000).

[43] *Id.* at 469-70.

[44] *Id.* at 470. The agreement also provided that the sentence for the bomb count would run concurrently with the firearm offenses. *Id.*

[45] *Id.* If the prosecution succeeded in establishing this motive, Apprendi faced a maximum of twenty years' confinement for the offense. *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 477.

[49] *See supra* note 35 and accompanying text.

[50] *Apprendi*, 530 U.S. at 476 (emphasis added).

[51] *See id.* at 524 (O'Connor, J., dissenting) ("Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*.").

[52] *Id.* at 494 n.19.

[53] *Id.*

[54] *Id.* at 490.

[55] *Id.* at 483 n.10.

[56] *See id.* at 484.

> We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears "that the jury right could be lost only by gross denial, but by erosion." But practice must at least adhere to the basic

concept, adopted in a footnote, served to greatly expand the set of facts subject to constitutional guarantees such as due process, notice, and the right to a jury trial.

Ring v. Arizona

While *Apprendi* represented a significant change for states that had enhanced sentencing schemes similar to New Jersey, a greater impact occurred when the Supreme Court applied the *Apprendi* principle to invalidate capital sentencing procedures in *Ring v. Arizona*.[57] In *Ring*, the Court extended the *Apprendi* rule to aggravating factors required as a prerequisite to a death sentence.[58] Under Arizona law, the factfinder was required to find the existence of at least one aggravating circumstance in order to render a defendant eligible for the death penalty.[59] In *Ring*, the trial judge found the aggravating factor in question and sentenced the accused to death.[60] The Supreme Court overruled precedent that previously upheld Arizona's capital sentencing scheme and ruled that *Apprendi* applied to aggravating factors that served as a prerequisite for imposition of the death penalty.[61] The Court stated that such aggravating factors in a capital case "operate as 'the functional equivalent of an element of a greater offense.'"[62] The *Ring* decision invalidated capital punishment schemes in Arizona and in four other states whose procedures authorized judges to find the necessary aggravating factors, and opened the door for 168 prisoners then on death row in these states to challenge their sentences.[63]

United States v. Cotton

In *United States v. Cotton*,[64] the Supreme Court shed further light on *Ring* and *Apprendi* in a plain error review of an *Apprendi* violation. In *Cotton*, the government indicted and convicted multiple defendants for conspiracy to distribute, distribution, and possession with intent to distribute "a detectible amount" of cocaine and cocaine base, which provided for a maximum sentence of twenty years' confinement.[65] Another part of the statute increased the maximum penalty to imprisonment for life if the offense involved at least fifty grams of cocaine base.[66] Because of this latter provision, the court sentenced two of the defendants to confinement for thirty years and the remainder of the defendants to confinement for life even though the indictment and conviction were for the lesser period of confinement. While their appeals were pending, the Supreme Court decided *Apprendi*.

Due to the change in the law occasioned by *Apprendi*, the defendants advanced two arguments on appeal. First, they claimed jurisdictional error—that the failure of the indictment to include the facts necessary to increase the sentence rendered the district court without jurisdiction to increase the sentence.[67] Second, they claimed that the violation of the right to a jury trial and the Indictment Clause constituted plain error that mandated reversal.[68] The Court unanimously rejected both arguments, providing an instructive plain error analysis. Under the plain error standard, the error must "seriously affect the

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> principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense and proving those facts beyond reasonable doubt.

Id. (citation omitted).

[57] 536 U.S. 584 (2002).

[58] *Id.* at 597.

[59] *Id.* at 593.

[60] *Id.* at 595.

[61] *Id.* at 588-89.

[62] *Id.* at 609 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

[63] *Id.* at 620-21 (O'Connor, J., dissenting) (noting the states which had the same system as Arizona which would be invalidated and stating that the *Ring* ruling called into question capital sentencing in four states which have hybrid state sentencing systems where the jury renders an advisory verdict but the judge decides the ultimate sentence); *see also* Casey Laffey, Note, *The Death Penalty and the Sixth Amendment: How Will the System Look after* Ring v. Arizona, 77 ST. JOHN'S L. REV. 371, 382-91 (2003) (evaluating the impact of *Ring* on the different state capital sentencing systems).

[64] 535 U.S. 625 (2002).

[65] *Id.* at 628 (citing 21 U.S.C. § 841(b)(1)(C) (2000)).

[66] *Id.* (citing 21 U.S.C. § 841(b)(1)(A)).

[67] *Id.* at 629.

[68] *Id.* at 631. The defendants failed to object at trial, thereby requiring the defendants to meet the plain error test. *Id.* at 628.

fairness, integrity, or public reputation of the judicial proceedings."[69] The Court ruled that, because the evidence as to the amounts of cocaine involved was "overwhelming" and "essentially uncontroverted," there was no basis for concluding that the error "seriously affected the fairness, integrity or public reputation of the judicial proceedings."[70]

Harris v. United States

In *Harris v. United States*,[71] the Court addressed the next logical extension of the *Apprendi* rule—whether the same procedural protections should apply to facts resulting in a mandatory minimum sentence. Prior to *Apprendi*, *McMillan v. Pennsylvania* held that facts resulting in a mandatory minimum sentence were not elements of the offense and not subject to the same protections.[72] In *Harris*, the defendant claimed that courts should extend the logic of *Apprendi* to facts that result in mandatory minimum sentences—overruling *McMillan*.[73] The Court declined to adopt such a position.[74] In *Harris*, the Court affirmed the distinction between facts constituting "sentencing factors" and facts increasing the maximum authorized sentence.[75]

The *Harris* decision was based primarily on historical practice. In a plurality opinion,[76] the Court described *Apprendi* as a decision based on historical practice: "Any 'fact that . . . exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone,' the Court concluded [in *Apprendi*], would have been, under the prevailing historical practice, an element of an aggravated offense."[77] The traditional practice existed, according to *Apprendi*, "because the function of the indictment and jury had been to authorize the State to impose punishment."[78] The same reasoning did not apply to mandatory minimum punishments for two reasons. First, there was no comparable historical practice for mandatory minimum sentences.[79] Second, the rationale of the *Apprendi* rule does not apply because a mandatory minimum sentence is, by definition, a lesser sentence than the authorized maximum sentence.[80] Once the government observes all of the procedural guarantees, the Court noted, "the Government has been authorized to impose any sentence below the maximum."[81]

In *Harris*, the Court reiterated that the *Apprendi* rule applies only to facts that increase the maximum authorized punishment. While logic or fairness may have dictated that facts triggering mandatory minimums be afforded the same protections as *Apprendi*, the Court would strictly rely on historical practice in its application of *Apprendi*.

Schriro v. Sumerlin

The last case relevant to the *Ring* decision is *Schriro v. Sumerlin*.[82] In this case, the Supreme Court granted certiorari to determine whether *Ring* should apply retroactively to invalidate death sentences that had already completed final appellate review. Under *Teague v. Lane*, new rulings apply retroactively only if they involve substantive rules of criminal law or if the

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[69] *Id.* at 631-32 (quoting Johnson v. United States, 520 U.S. 461, 467 (1997)).

[70] *Id.* at 633.

[71] 536 U.S. 545 (2002).

[72] 477 U.S. 79 (1986).

[73] *Harris*, 536 U.S. at 556.

[74] *Id.* at 568-69.

[75] *Id.* at 559-62.

[76] *Id.* at 548. Justice Breyer, who dissented in *Apprendi*, wrote an opinion concurring in the judgment. He stated: "I cannot easily distinguish *Apprendi v. New Jersey* from this case in terms of logic." *Id.* at 569 (citation omitted). Justice Breyer declined to overrule *McMillan*, stating: "And because I believe that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences, I cannot yet accept its rule." *Id.*

[77] *Id.* at 563 (citations omitted).

[78] *Id.* at 564.

[79] *Id.* at 563 ("There was no comparable historical practice of submitting facts increasing the mandatory minimum to the jury, so *Apprendi* rule did not extend to those facts.").

[80] *Id.* at 565.

[81] *Id*.

[82] 124 S. Ct. 2519 (2004).

ruling is procedural and constitutes a "watershed rule[] of criminal procedure."[83] The *Schriro* Court applied the *Teague* framework and determined that *Ring* does not apply retroactively.[84]

The Court first addressed whether the *Ring* ruling substantively modified the elements of the offense of capital murder in Arizona.[85] The Ninth Circuit ruled that *Ring* did modify the elements of the offense, stating that *Ring* "reposition[ed] aggravating factors as elements of the separate offense of capital murder and reshap[ed] the structure of Arizona murder law."[86] The Supreme Court disagreed, noting that the conduct punishable by death remained the same after *Ring*.[87] In sum, the Court found that *Ring* "did not alter the range of conduct Arizona law subjected to the death penalty."[88] Instead, the Court focused on the procedural protections that should be attached: "*Ring* held that, *because* Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements."[89]

The Court further ruled that *Ring* did not constitute a "watershed rule of criminal procedure."[90] The Court framed this analysis by examining "whether judicial factfinding so 'seriously diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach."[91] According to the majority, a judge-alone trial was not inherently unfair and did not render inherently inaccurate verdicts.[92] While the right to a jury trial was a significant constitutional guarantee, it was not so significant to justify re-trial of capital defendants whose trials and appeals had already been finalized.[93] As a result, the Court declined to give retroactive effect to this procedural rule change.

Beyond *Schriro's* holding that *Ring* was not retroactive, the case also served to further clarify the meaning of "functional equivalent to an element." The *Schriro* Court confirmed that the substantive law of the offense remained unchanged and different procedural rules could apply to "functional equivalents to an element" so long as the rules met the minimum constitutional requirements.[94] Instead of being actual elements of the offense, facts that increased the maximum penalty simply triggered the same federal constitutional protections that apply to elements.[95] As such, *Schriro* indicated that *Ring* should be treated as a procedural ruling only.

Synthesis and Summary

The Court's jurisprudence contains aspects that are clearly understood and others that are less clearly defined. On one hand, what constitutes the "functional equivalent to an element" is clearly defined—any fact which is a necessary predicate for an increase in the maximum punishment. On the other hand, the procedural protections that "functional equivalents to an element" warrant is less clear and undefined. At the very least, such facts require the following: (1) proof to a jury pursuant to the Sixth Amendment jury trial right, (2) proof beyond a reasonable doubt pursuant to the Fifth or Fourteenth Amendments' due process guarantee, (3) notice to an accused in a grand jury indictment pursuant to the Fifth Amendment Indictment Clause (in federal prosecutions only). For non-federal cases, *dicta* also indicate that Sixth Amendment notice guarantees extend to functional equivalents of an element. The amount of notice, however, has not been clearly defined. For example, the following questions remain unanswered: whether the government must provide notice of aggravating factors in the charging document; whether the government must provide notice prior to trial or prior to the sentencing hearing; or

[83] 489 U.S. 288, 311 (1989).

[84] *Schriro*, 124 S. Ct. at 2524-25.

[85] *Id.* at 2523.

[86] Summerlin v. Stewart, 341 F.3d. 1082, 1105 (9th. Cir. 2003), *rev'd*, 124 S. Ct. 2519 (2004).

[87] *Schriro*, 124 S. Ct. at 2524.

[88] *Id.* at 2523.

[89] *Id.*

[90] *Id.* at 2526.

[91] *Id*. at 2525 (quoting Teague v. Lane, 489 U.S. 288, 312-13 (1989)).

[92] *Id.*

[93] *Id.* at 2525-26 (quoting DeStefano v. Woods, 392 U.S. 631 (1968)).

[94] *Id.* at 2524.

[95] *Id.*

whether the sentencing factors contained in the relevant statutes provide sufficient constructive notice. In addition to the notice issue, also left unanswered is whether any additional constitutional protections, not specified in these cases, apply.

Ring's Impact on Capital Cases in Civilian Practice

Introduction

The ruling that capital aggravating factors are "functional equivalents to an element" raised significant issues for the federal government and states with the death penalty. Previously, the Supreme Court held that jury sentencing in capital cases was not constitutionally required, and a judge could sentence a defendant to death.[96] *Ring* curtailed this holding in that a jury now must make any necessary factfinding in order to render a defendant eligible for death.[97] This ruling invalidated five states' capital sentencing systems and brought into question several states that had a "hybrid" system where a jury rendered an advisory opinion, but the judge decided on the ultimate sentence.[98]

In addition, *Ring* raised questions about the method by which the government charges a defendant with a capital offense and notifies him of the capital aggravating factors the government intends to prove. Prior to *Ring*, courts treated aggravating factors as mere sentencing considerations and not elements to an offense.[99] Aggravating factors were a recent creation, created in large part to meet the Supreme Court's Eighth Amendment jurisprudence.[100] Accordingly, jurisdictions have enacted different procedures for notifying a capital accused of the aggravating factors upon which the government intends to rely.[101] Because the *Ring* line of cases also specifies that the Fifth Amendment Indictment Clause and the Sixth Amendment Notice Clause apply to "functional equivalents to an element,"[102] the notice requirements applicable to capital aggravating factors should be re-examined. This section examines the notice requirements applicable to civilian jurisdictions, with a focus on the extent to which *Ring* requires increased notice of capital aggravating factors.

Sixth Amendment Notice Generally

The basic concept of notice of the offense is central to the American criminal justice system.[103] In *Russell v. United States*, the Supreme Court invalidated a conviction because the indictment failed to provide sufficient notice.[104] In that case, the indictment stated that Russell failed to answer pertinent questions before a congressional subcommittee.[105] The indictment was found deficient because it failed to notify the defendant of the subject matter under investigation during the subcommittee meeting, thus rendering it impossible for Russell to defend himself by claiming that the questions were not pertinent to the matter under investigation.[106]

In establishing basic notice requirements, the *Russell* Court reviewed the notice protections noted in nineteenth century case law and applied the same principles to modern practice.[107] According to the Court, notice provides two well-known

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

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

[98] *Id.* at 620-21 (O'Connor, J., dissenting) (noting the states that had the same system as Arizona, which would be invalidated, and stating that the *Ring* ruling called into question four states' hybrid capital sentencing systems); *see also* Laffey, *supra* note 63, at 382-91 (evaluating the impact of *Ring* on the different state capital sentencing systems).

[99] *See* Walton v. Arizona, 497 U.S. 639, 647-49 (1990) (discussing cases).

[100] *See* Gregg v. Georgia, 428 U.S. 153, 162-68 (1976) (outlining the Georgia death penalty statute, including the aggravating factors which the government must establish, which was amended after *Furman v. Georgia*, 408 U.S. 238 (1972)).

[101] *See infra* notes 118-42 and accompanying text.

[102] *See, e.g.*, Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

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

[104] 369 U.S. 749, 768-72 (1962).

[105] *Id.* at 752.

[106] *Id.* at 771-72. While the Court decided the issue based on a deficient indictment in violation of the Fifth Amendment Indictment Clause, *id.* at 760, the Court stated that the Fifth Amendment Due Process Clause and the Sixth Amendment Notice Clause were both "brought to bear" on the issue. *Id.* at 761.

[107] *Id.* at 765-66.

functions: (1) it "apprises the defendant of what he must be prepared to meet,"[108] and (2) it protects an accused against a second prosecution for the same offense, in violation of double jeopardy.[109] The Court then reiterated several foundational principles in establishing what constitutes sufficient notice: (1) the notice must contain more than a mere definition of the statutory terms of the offense;[110] (2) the notice must give the defendant "reasonable certainty of the nature of the accusation against him[;]"[111] (3) the notice should "set forth all the elements of the offense intended to be punished[;]"[112] and (4) the notice "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description [under the statute], with which he is charged."[113] The Court specifically indicated that these ancient principles applied in modern practice, noting that "these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading."[114]

The same notice principles apply to military practice. Rule for Courts-Martial 307(c)(2) requires specifications to contain "a plain, concise and definite statement of the essential acts charged," and to "allege[ ] every element of the charged offense expressly or by necessary implication."[115] Similarly, modern military notice cases cite to *Russell* as the basis for the Sixth Amendment right to notice.[116] As a result, the notice issues raised by *Ring* in the civilian context also apply to courts-martial.

Notice Requirements for Death and Capital Aggravating Factors in State Courts Prior to *Ring*

While case law clearly requires notice of the essential elements of the offense, less clear is the amount of notice necessary to apprise a capital defendant that the government is seeking the death penalty and which aggravating factors the government intends to prove. These aggravating factors were established in order to meet the Eighth Amendment requirement that the death penalty be imposed in a rational manner.[117] Because aggravating factors are generally necessary to render a defendant eligible for the death penalty,[118] they fall under *Ring's* purview. As a result, the same Sixth Amendment notice requirement that applies to elements of the offense arguably also applies to aggravating factors that serve as "functional equivalents to an element." Prior to *Ring*, no reported case classified aggravating factors as elements of an offense such that they would have to be alleged in the charging document. In fact, state practice varied widely both on the issue of notice of the state's intent to seek the death penalty and on notice of the aggravating factors that the government intends to prove.

The state system with the least notice prior to *Ring* was Illinois.[119] Under the Illinois system, the government, *after* it obtained a conviction for first-degree murder, requested a separate sentencing hearing to determine whether death should be imposed.[120] At that hearing the state must prove at least one statutory aggravating factor in order to render a defendant

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[108] *Id.* at 763 (citations omitted).

[109] *Id.* at 764.

[110] *Id.* at 765 (citing United States v. Cruikshank, 92 U.S. 542, 558 (1876)).

[111] *Id.* (quoting United States v. Simmons, 96 U.S. 360, 362 (1878)).

[112] *Id.* (quoting United States v. Carll, 105 U.S. 611, 612 (1882)).

[113] *Id.* (quoting United States v. Hess, 124 U.S. 483, 487 (1888)).

[114] *Id.* at 765-66.

[115] MCM, *supra* note 16, R.C.M. 307(c)(2).

[116] United States v. Bryant, 30 M.J. 72, 73 (C.M.A. 1990) (citing *Russell*, 369 U.S. at 763-64 and Wong Tai v. United States, 273 U.S. 77, 80-81 (1927)) (reading specification with "maximum liberality" to meet notice requirements where accused pleaded guilty and did not challenge the specification until his appeal); United States v. Watkins, 21 M.J. 208, 209 (C.M.A. 1986) (citing Russell v. United States, 369 U.S. 749 (1962)) (affirming conviction where specification could be construed to imply all elements of the offense, the accused pleaded guilty, the accused did not challenge the specification at trial, and the accused was not misled).

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

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

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

[120] ILL. REV. STAT. ch. 38, para. 9-1 (1989).

eligible for the death penalty.[121] The state was not required to notify the defendant of the aggravating factors that the state intended to prove, although the statute listed only eight possible aggravating factors.[122] As a result, a defendant could go to trial on a first degree murder charge without knowing whether the state intended to seek the death penalty. Prior to *Ring*, the Seventh Circuit upheld the statute's constitutionality against a claim that the statute provided insufficient notice.[123] In *Silagy v. Peters*, the court rejected a claim that this lack of notice resulted in ineffective assistance of counsel and a violation of procedural due process.[124] The court noted that an indictment for first degree murder under Section 9-1 of the *Illinois Criminal Code* constituted "constructive notice" that the defendant is eligible for death because that section also contains the statutory provisions for death sentencing proceedings.[125] Similarly, such a defendant is afforded additional peremptory challenges at a capital trial.[126] The court stated that the "sentencing authority's decision to *impose* a sentence of death under the Illinois statute clearly requires notice to the accused."[127] The notice provided by the state, albeit post-trial, was sufficient to meet these requirements.[128]

One year after the Seventh Circuit decided *Silagy*, the Supreme Court addressed the minimum notice requirements for capital cases in *Lankford v. Idaho*.[129] In *Lankford*, the prosecutor stated on the record that the state would not seek the death penalty and no arguments were made on the appropriateness of a death sentence.[130] The trial judge, however, sentenced Lankford to death.[131] The Court reversed because the defendant did not have notice that death was a possible punishment.[132] The Court's analysis focused on Lankford's counsel's lack of opportunity to address the factual and legal issues surrounding whether Lankford should receive the death penalty.

> Whether petitioner would ultimately prevail on this argument is not at issue at this point; rather, the question is whether inadequate notice concerning the character of the hearing frustrated counsel's opportunity to make an argument that might have persuaded the trial judge to impose a different sentence, or at least to make different findings than those he made.[133]

Lankford had no impact on Illinois practice. Shortly after *Lankford*, the Seventh Circuit denied a petition for *habeas corpus* seeking to overrule *Silagy* based on *Lankford*.[134] The court reiterated that the post-trial notice combined with the separate sentencing hearing was sufficient notice to meet due process requirements.[135] Similarly, the Illinois Supreme Court also interpreted *Lankford* narrowly, holding that *Lankford* only requires notice that the state is seeking the death penalty and that post-trial notice was sufficient.[136] The Illinois Supreme Court also rejected the argument that *Lankford* requires actual notice of the aggravating factors upon which the state intends to rely.[137]

Like Illinois, *Lankford* had little impact on other states' practice. Most states either had specific provisions for notifying an accused that the state was seeking the death penalty or provided for an automatic sentencing hearing upon conviction for a

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[121] *Id.* para. 9-1(g).

[122] *Id.* para. 9-1(b).

[123] Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990).

[124] *Id.* at 994-97.

[125] *Id.* at 995.

[126] *Id.*

[127] *Id.* at 996.

[128] *Id.*

[129] 500 U.S. 110 (1991).

[130] *Id.* at 115-16.

[131] *Id.* at 117.

[132] *Id.* at 127.

[133] *Id.* at 124.

[134] Williams v. Chrans, 945 F.2d 926, 938-39 (7th Cir. 1991) (holding that the Illinois procedure provides sufficient notice to a capital defendant).

[135] *Id.*

[136] People v. Henderson, 662 N.E.2d 1287, 1296 (Ill. 1996) (distinguishing *Lankford* because the defendant had actual notice that the state was seeking the death penalty).

[137] People v. Brown, 661 N.E.2d 287, 303-04 (Ill. 1996) (rejecting defendant's argument that *Lankford* requires the state to notify him of the aggravating factors on which the state intends to rely).

capital offense.[138] Only one reported case reversed a death penalty for lack of notice for aggravating factors.[139] In *Smith v. Commonwealth*, the Kentucky Supreme Court ruled that six-days notice prior to trial that the state is seeking the death penalty was inadequate notice for both the guilt and penalty phases of the trial.[140] Relying on *Lankford*, the court noted that six-days notice is inadequate to allow counsel to prepare for the guilt phase and the sentencing phase.[141] Similarly, the Utah Supreme Court construed *Lankford* to require the government to allege aggravating circumstances be alleged in order for the defendant to prepare a defense. [142] The Utah capital murder statute, however, includes the aggravating circumstances as elements of the capital offense,[143] which would arguably mandate that aggravating circumstances be alleged notwithstanding *Lankford*. Only three other state courts have considered challenges based on *Lankford* and each has narrowly construed *Lankford*.[144]

Notice of Aggravating Factors after *Ring* in the States

While *Ring* placed states on clear notice that a jury must find capital aggravating factors beyond a reasonable doubt, state courts have grappled with the issue of what notice protections also apply. State courts have considered arguments both under the Indictment Clause and under the Sixth Amendment notice guarantee. All states except one ruled that an indictment need not include aggravating factors.[145] The only state court to rule that the indictment must allege aggravating factors, the New Jersey Supreme Court, based its ruling on the New Jersey Constitution.[146] The remaining state courts relied on two rationales for ruling that indictments were not required for capital aggravating factors. First, several courts noted that *Ring* did not present an Indictment Clause issue, because *Ring* was based solely on the jury trial right.[147] This rationale, however, is problematic in light of the *dicta* in the other cases that extended constitutional guarantees to "functional equivalents to an element."[148] Second, several courts noted that the Indictment Clause did not apply to the states.[149] In addition, many courts

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[138] *See* Reinberg, *supra* note 119, at 274-75 (noting the state practices).

[139] Smith v. Commonwealth, 845 S.W.2d 534, 537-38 (Ky. 1993).

[140] *Id.* at 537-38.

[141] *Id.*

[142] State v. Lovell, 984 P.2d 382, 391 (Utah 1999).

[143] UTAH CODE ANN. § 76-5-202 (2004); *see* Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986) (interpreting the Utah statute).

[144] People v. Dist. Court, Gilpin County, 825 P.2d 1000, 1002-03 (Colo. 1992) (stating that notice received forty-one days prior to trial of intent to seek death penalty sufficient); Connecticut v. Johnson, No. CR 970135375, 1999 Conn. Super. LEXIS 3530, *4-5 (Conn. Super. Ct. 1999) (stating that the pretrial notice was sufficient and denying a request for a bill of particulars); State v. Clark, 920 P.2d 187, 189 (Wash. 1996) ("Due process in sentencing requires only adequate notice of the possibility of the death penalty.").

[145] *See* McKaney v. Foreman, 100 P.3d 18, 20-21 (Ariz. 2004) (stating that *Ring* and *Apprendi* do not implicate Fifth Amendment grand jury right and grand jury guarantee does not apply to states; concluding that "the only federal mandate applicable to McKaney in the context of the instant case is the Fourteenth Amendment due process requirement that a defendant receive adequate notice of the charges against him"); Terrell v. State, 572 S.E.2d 595, 602-03 (Ga. 2002) (holding that written notice of statutory aggravating factors several months prior to trial was sufficient notice and rejecting argument that indictment required for capital aggravating factors because *Ring* did not extend to indictments and Indictments Clause only applies to federal prosecutions); People v. Schrader, Ill. App. 3d, 684, 694-95 (Ill. App. Ct. 2004) (following *McClain* analysis); People v. McClain, 799 N.E.2d 322, 336 (Ill. App. Ct. 2003) (affirming extended sentence based on aggravating factors, holding that indictment need not allege aggravating factor, and noting that the defendant received written notice of intent to seek an extended sentence prior to trial, which was reasonable notice under Sixth Amendment); Soto v. Commonwealth, 139 S.W.3d 827, 842-43 (Ky. 2004) (holding that indictment on aggravating factors is not required, instead, all that is required is timely, formal notice of the intent to seek death and of the aggravating circumstances upon which government is relying); Stevens v. State 867 So. 2d 219, 227 (Miss. 2003) (holding that indictment on aggravating factors not required), *cert. denied*, 125 S. Ct. 222 (2004); State v. Edwards 116 S.W.3d 511, 543-44 (Mo. 2003) (stating that, according to death penalty statute, the state must give pretrial notice of statutory aggravating factors and that such notice is sufficient in lieu of charging in information or indictment), *cert. denied*, 540 U.S. 1186 (2004); State v. Tisius, 92 S.W.3d 751, 766 (Mo. 2002) (rejecting argument that murder plus aggravating factors constituted a greater offense for which indictment was required); State v. Hunt, 582 S.E.2d 593, 604 (N.C. 2003) (holding that capital aggravating factors need not be alleged in indictment, noting that "[t]he only possible constitutional implication that Ring and Apprendi may have in relation to our capital defendants is that they must receive reasonable notice of aggravating circumstances, pursuant to the Sixth Amendment's notice requirement"), *cert. denied*, 539 U.S. 1151 (2004); Primeaux v. State, 88 P.3d 893, 899-00 (Okla. Crim. App.) (stating that *Ring* does not apply to indictments), *cert. denied*, 125 S. Ct. 371 (2004); State v. Oatney, 66 P.3d 475, 487 (Or. 2003) (rejecting argument based on *Ring* that indictment must include aggravating factors on the basis that *Ring* did not rule on indictments), *cert. denied*, 540 U.S. 1151 (2004); State v. Edwards, 810 A.2d 226, 234 (R.I. 2002) (ruling that notice of aggravating factors necessary for life without parole that the government served on defense within twenty days of the arraignment was sufficient notice—there is no requirement for indictment on aggravating factors); Moeller v. Weber, 689 N.W.2d 1, 20-22 (S.D. 2004) (stating that aggravating factors were not elements that the government must allege in indictment and holding that there was sufficient notice where the government gave formal notice of statutory aggravators and written notice of intent to seek the death penalty eight months prior to trial).

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

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

[148] *See supra* notes 21-56 and accompanying text.

specifically held that the pretrial notice for capital aggravating factors complied with Sixth Amendment notice requirements.[150] The Mississippi Supreme Court, however, denied a claim that *Ring* required notice of aggravating factors.[151] The court followed a rationale similar to the Illinois notice cases discussed above,[152] reasoning that a charge of capital murder puts a capital defendant on notice of the statutory aggravating factors that the state may use against him.[153] Finally, because Illinois placed a moratorium on the death penalty, the Illinois statute has not been substantively examined in light of *Ring*.[154]

Even more problematic is Florida's capital sentencing scheme, which contains significant weaknesses in light of *Ring*. In Florida, the trial judge is the sentencing authority, but the jury must render an advisory verdict as to the following: (1) whether "sufficient [enumerated] aggravating factors exist[;]" (2) whether sufficient mitigating circumstances exist which outweigh the aggravating factors; and (3) whether, based on the aggravating circumstances and mitigating circumstances, the defendant should be sentenced to life imprisonment or death.[155] The advisory verdict is decided by a majority vote.[156] The statute, however, does not specify a standard of proof.[157] After the advisory verdict, the trial judge makes the ultimate sentencing decision. If the judge imposes death, he or she must issue written findings that "sufficient aggravating circumstances exist as enumerated in subsection (5)," and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."[158] This system is clearly suspect in many respects after *Ring*, particularly because a judge could find aggravating factors after the jury failed to do so.[159] The Florida Supreme Court summarily denied a challenge to this system in a wholly unsatisfactory opinion in *Kormondy v. State*.[160] In *Kormondy*, the court summarily distinguished *Ring* because "the trial court and the jury are cosentencers under our capital scheme."[161] The court also summarily denied a defense challenge to the notice provisions by simply noting: "While *Ring* makes *Apprendi* applicable to death penalty cases, *Ring* does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."[162] The court seemed to rely on the Supreme Court's upholding of the Florida capital sentencing system prior to *Ring* and the Supreme Court's denial of certiorari on two Florida capital cases on the same day *Ring* was decided.[163]

In contrast to Florida, the New Jersey Supreme Court applied the *Ring* line of cases to the maximum extent possible to the New Jersey death penalty statute. In *State v. Fortin*,[164] the New Jersey Supreme Court concluded that the New Jersey constitutional indictment guarantee required that capital aggravating factors be alleged in the indictment. The court extensively reviewed *Ring*, consistently stating that aggravating factors now constitute elements of a capital offense.[165] On

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[149] *See McKaney*, 100 P.3d at 20-21; *Terrell*, 572 S.E.2d at 602-03; *McClain,* 799 N.E.2d at 336; *Soto*, 139 S.W.3d at 842; *Hunt*, 582 S.E.2d at 603; *Moeller*, 689 N.W.2d at 21-22.

[150] *See Edwards,* 116 S.W.3d at 543-44; *Hunt*, 582 S.E.2d at 604.

[151] *Stevens*, 867 So. 2d at 227.

[152] *See supra* notes 119-26 and accompanying text.

[153] *Stevens*, 867 So. 2d at 227.

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

[155] FLA. STAT. ch. 921.141(2) (2004).

[156] *Id.* ch. 921.141(3).

[157] *Id.*

[158] *Id.*

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

[160] 845 So. 2d 41 (Fla. 2003), *cert. denied*, 540 U.S. 1151 (2004).

[161] *Id.* at 54. In contrast, Alabama has a very similar system as Florida and now requires that the jury find at least one aggravating factor beyond a reasonable doubt. *Ex parte* Waldrop, 859 So. 2d 1181 (Ala. 2002).

[162] *Kormondy*, 845 So. 2d at 54.

[163] *Id.* (citing Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002)). The Supreme Court stayed the execution in both cases while *Ring* was pending. *Bottoson*, 833 So. 2d at 694; *King*, 831 So. 2d at 144. On the day the Court decided *Ring*, the Court lifted the stays and summarily denied *certiorari* in both cases. *See* Bottoson v. Moore, 123 S. Ct. 657 (2002); King v. Moore, 123 S. Ct. 657 (2002). The Florida Supreme Court recited this history and then summarily concluded that *Ring* was not applicable to the Florida system, noting that the Supreme Court previously upheld the constitutionality of the Florida capital system. *See Bottoson*, 833 So. 2d at 694; *King*, 831 So. 2d at 144.

[164] 843 A.2d 974 (N.J. 2004).

[165] *See, e.g.*, *id.* at 1027 ("[W]e can see no principled reason for our continued adherence to the notion that aggravating factors are not elements of capital murder."); *id.* at 1031 ("[A]ggravating factors … are deemed elements that must be tried to a jury and proven beyond a reasonable doubt."); *id.* at 1036 ("In light of *Ring*, federal constitutional law now clearly defines elements of capital murder in a way that is fatally at odds with [prior case law].").

the other hand, the court specified different procedures for the guilt-phase and penalty-phase and indicated that capital aggravating factors were to be tried at sentencing.[166] The *Fortin* court stated that the aggravating factors on the indictment should not be read to the jury unless the aggravating factors also constitute an element of the offense or unless the same jury will decide the ultimate sentence.[167] As a result, the *Ring* decision resulted in substantial changes in New Jersey capital procedure.

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

The Federal Death Penalty Act Notice Provisions

The Federal Death Penalty Act of 1994 (FDPA) is the current law for the death penalty in the federal criminal system.[168] Under the FDPA, death may be adjudged for espionage, treason, specified homicides, and specified drug offenses.[169] Further, death may be adjudged only if the government establishes, beyond a reasonable doubt,[170] at least one of the specified aggravating factors.[171] The government must provide notice of the following prior to trial: the government's belief that a death sentence is justified, the government intention to seek the death penalty, and the aggravating factor or factors upon which the government intends to rely.[172] The government is not limited to the aggravating circumstances specified in the FDPA and may present evidence of other aggravating factors relevant to the offense, including "the effect of the offense on the victim and the victim's family, . . . a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information."[173] These aggravating circumstances, called nonstatutory aggravating factors, are relevant only in determining whether death is justified after the prosecution establishes a statutory aggravating factor.[174] The FDPA does not establish strict time limits for government notice of intent to seek death, except that the notice must occur "a reasonable time before trial or before acceptance by the court of a plea of guilty."[175] Importantly, the FDPA does not include a provision for including aggravating factors in the indictment and the practice prior to *Ring* was not to include the aggravating factors in the indictment.

In pre-*Ring* FDPA practice, there were minimal issues regarding notice. Because the FDPA contained provisions for pretrial notice, the *Lankford* holding was not applicable to the federal system. Several capital defendants argued that the indictment should include the aggravating factors, but the courts consistently rejected this argument.[176] Some courts, however, did rule that the government's pretrial notice of intent to seek death and the aggravating factors upon which it

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[166] *Id.* at 1037-38.

[167] *Id.* at 1038 (emphasis added). Under New Jersey procedure, different juries could be empanelled for the guilt phase and penalty phase of the trial. *Id.* If the same jury sat for both phases, the jurors were informed of the aggravating factors without reference to the indictment in order to voir dire prospective jurors. *Id.*

[168] 18 U.S.C. § 3591-3598 (2000).

[169] *Id.* § 3591(a) & (b).

[170] *Id.* § 3593(c).

[171] *Id.* § 3593(d).

[172] *Id.* § 3593(a).

[173] *Id.*

[174] *Id.* § 3593(e). The sentencing authority is required to:

> consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.

Id.

[175] *Id.* § 3593(a).

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

would rely was not reasonable and prohibited the government from seeking the death penalty on this basis.[177] Other challenges to the sufficiency of pretrial notice, which were otherwise in compliance with the statute, were summarily denied.[178]

The FPDA Notice Provisions after *Ring*

After *Ring*, federal capital practice changed because of the indictment requirement previously stated in *Jones*. The government already had the burden of proving capital aggravating factors to a jury beyond a reasonable doubt,[179] so the FDPA already met the *Ring* standard. While *Ring* did not specifically hold that the indictment must allege the capital aggravating factors; *Ring*, read in conjunction with *Jones*, clearly indicate that this is required. Accordingly, every federal court addressing this issue ruled that the indictment must specify a statutory aggravating factor.[180] Similarly in homicide prosecutions, the indictment must also specify the minimum specific intent required under the FDPA.[181] In fact, the government generally did not contest this requirement and sought superseding indictments that included all facts necessary for death.[182] These superseding indictments usually included the statutory aggravating factors, the requisite specific intent (for homicide cases), and a statement that the accused was over eighteen years old at the time of the offense.[183] This last fact also falls within the *Ring* and *Jones* protections because the FDPA provides that no person who was less than eighteen years–old at the time of the offense may be sentenced to death.[184]

After *Ring*, federal capital defendants attacked both the structure of the FDPA and the specific notice provisions. The most significant attack on the structure of the FDPA involved the FDPA's failure to provide for indictment on the capital aggravating factors. Specifically, capital defendants have argued that the FDPA is unconstitutional because it provides for notice of the statutory aggravating factors in the government's pretrial notice of intent to seek the death penalty and not in an indictment.[185] In essence, the defendants argue that, because the FDPA does not provide for indictment on statutory aggravating factors and *Ring* now requires indictment on these factors, the FDPA must explicitly authorize the government practice of seeking indictment on aggravating factors. All courts who have considered this argument have universally rejected it and upheld the FDPA.[186]

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[177] United States v. Hatten, 276 F. Supp. 2d 574, 579 (S.D.W.Va. 2003) (holding that thirty-six days' pretrial notice of intent to seek death and aggravating factors was objectively unreasonable where other factors indicated that notice was unreasonable); United States v. Colon-Miranda, 985 F. Supp. 31, 35-36 (D.P.R. 1997) (holding pretrial notice unreasonable); *see also* United States v. Ferebe, 332 F.3d 722, 737 (4th Cir. 2003) (establishing framework for analyzing objective reasonableness of government's pretrial notice).

[178] United States v. Edelin,134 F. Supp. 2d 59, 71-72 (D.D.C. 2001) (noting the court's previous holding that the pretrial notice "meets the applicable constitutional and statutory notice requirements"); *Kee*, 2000 U.S. Dist. LEXIS 8785, at *17-20 (summarily rejecting the argument that pretrial notice "is so vague that it fails to provide the notice of the aggravating factors the Government intends to prove, in violation of the Fifth and Sixth Amendments and 18 U.S.C. § 3593(a)").

[179] 18 U.S.C. § 3592(c) (2000).

[180] United States v. Barnette, 390 F.3d 775, 784-85 (4th Cir. 2004); United States v. Higgs, 353 F.3d 281, 298 (4th Cir. 2003), *cert. denied*, 125 S. Ct. 627 (2004); United States v. Jackson, 327 F.3d 273, 284 (4th Cir. 2003), *cert. denied*, 540 U.S. 1019 (2003); United States v. Quinones, 313 F.3d 49, 53 n.1 (2d Cir. 2002); United States v. Williams, No. S1 00 Cr. 1608 (NRB), 2004 U.S. Dist. LEXIS 25644, *37-38 (S.D.N.Y. 2004); United States v. Mikos, No. 02 CR 137-1, 2003 U.S. Dist. LEXIS 16044, *13 (N.D. Ill. 2003); United States v. Haynes, 269 F. Supp. 2d 970, 978 (W.D. Tenn. 2003); United States v. Sampson, 245 F. Supp. 2d 327, 332 (D. Mass. 2003); United States v. Regan, 221 F. Supp. 2d 672, 679 (E.D. Va. 2002); United States v. O'Driscoll, No. 4:CR-01-00277. 2002 U.S. Dist. LEXIS 25864, *6 (M.D. Pa. 2002).

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

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

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

[184] 18 U.S.C. § 3591(a); *see Regan*, 221 F. Supp. 2d at 679 n.3 (noting that the age provision is also subject to indictment requirement and that the superseding indictment properly alleged that the defendant was at least eighteen years-old).

[185] *See, e.g.*, United States v. Cuong Gia Le, 327 F. Supp. 2d 601, 609 (E.D. Va. 2004) (outlining defense argument).

[186] United States v. Barnette, 390 F.3d 775, 790 (4th Cir. 2004); *Williams*, 2004 U.S. Dist. LEXIS 25644, at *39-43; *Cuong Gia Le*, 327 F. Supp. 2d at 609; *Acosta-Martinez* 265 F. Supp. 2d at 185; *Haynes*, 269 F. Supp. 2d at 982-83; United States v. Battle, 264 F. Supp. 2d 1088, 1104-05 (N.D. Ga. 2003); *Davis*, 2003 U.S. Dist. LEXIS 5745, at *16-21; *Sampson*, 245 F. Supp. 2d at 330-38; United States v. Mikos, No. 02 CR 137-1, 2003 U.S. Dist. LEXIS 16044, *16-17 (N.D. Ill. 2003); *Regan*, 221 F. Supp. 2d at 680; *Lentz*, 225 F. Supp. 2d at 680-81.

More significant are defense attempts to expand the universe of facts subject to indictment. While the statutory aggravating factors and the minimum specific intent requirements clearly fall under the *Ring* and *Apprendi* framework, capital defendants argue for the expansion of facts subject to the indictment requirement. Many capital defendants have argued that the indictment should also allege the nonstatutory aggravating factors, an argument the courts universally reject because nonstatutory aggravating factors are not a prerequisite for the death penalty.[187] Courts also rejected defense arguments that the grand jury was required to allege the mitigating factors and state that the aggravating factors outweighed the mitigating factors.[188] In denying this argument, one district court noted that only the government's intent and the statutory aggravating factors rendered a defendant eligible for the death penalty; the sentencing authority used these remaining "selection factors" to determine if an accused should actually receive the death penalty.[189] Similarly, the indictment need not contain specific notice that the government intends to seek the death penalty; rather, notice of the statutory aggravating factors are sufficient for the indictment.[190]

Conclusion

While there has been much sound and fury regarding the impact of *Ring* on capital cases, little has changed. The additional jury trial and requirement of proof beyond a reasonable doubt altered a few states' trial procedure, but the pretrial notice provisions remain unchanged. The jurisdictions that now require indictment on aggravating factors—the federal system and New Jersey—did so on the basis of their respective indictment clauses, which are expressly inapplicable to the military. This new indictment requirement in New Jersey and the federal system has not resulted in overturned death sentences. The New Jersey Supreme Court in *Fortin* announced that this requirement would apply prospectively.[191] For federal death sentences pending when the Court decided *Ring*, all courts except one ruled either that the deficient indictment was harmless and affirmed the death sentence; or that the indictment actually included at least one of the necessary aggravating factors.[192] Courts have denied all other challenges to pretrial notice based on *Ring*.

The Military Capital Process

In order to apply *Ring* to capital courts-martial, it is necessary to review the basis for the procedural protections that are incorporated into RCM 1004.[193] Rule for Courts-Martial 1004 incorporated capital procedures in order to comply with Supreme Court decisions requiring procedural protections for capital defendants in accordance with the Eighth Amendment prohibition against cruel and unusual punishment.[194] These same protections apply to service members through Article 55, Uniform Code of Military Justice (UCMJ),[195] which grants service members more protection against cruel and unusual punishment than the Eighth Amendment.[196] This section first discusses the case that established the framework for minimum capital procedural protections, *United States v. Matthews*, and then outlines the capital procedures established by the President in RCM 1004.

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[187] United States v. Higgs, 353 F.3d 281, 298-99 (4th Cir. 2003), *cert. denied*, 125 S. Ct. 627 (2004); *Jackson*, 327 F.3d at 287; *Mikos*, 2003 U.S. Dist. LEXIS 16044, at *18; *Regan*, 221 F. Supp. 2d at 680-81; *Lentz*, 225 F. Supp. 2d at 681-82.

[188] *Haynes*, 269 F. Supp. 2d at 979-80 (mitigating factors and balancing); *Regan*, 221 F. Supp. 2d at 681 n.4 (mitigating factors); *Lentz*, 225 F. Supp. 2d at 682 n.4 (mitigating factors).

[189] *Haynes*, 269 F. Supp. 2d at 980.

[190] United States v. Davis, No. 01-282 Section "R"(1), 2003 U.S. Dist. LEXIS 5745, *22-*24 (E.D. La. 2003).

[191] State v. Fortin, 843 A.2d 974, 1037-38 (N.J. 2004).

[192] United States v. Barnette, 775 F.3d 775, 784-86 (4th Cir. 2004); United States v. Lee, 374 F.3d 637, 651 (8th Cir. 2004); United States v. Higgs, 353 F.3d 281, 304-07 (4th Cir. 2003), *cert. denied*, 125 S. Ct. 627 (2004). One court reversed a federal death sentence based on a deficient indictment, but the ruling was vacated and the case is pending *en banc* review at the Eighth Circuit Court of Appeals. *See* United States v. Allen, 357 F.2d 745 (8th Cir.), *vacated and reh'g en banc granted*, 2004 U.S. App. LEXIS 9190 (8th Cir. May 11, 2004).

[193] MCM, *supra* note 16, R.C.M. 1004.

[194] *Id.* R.C.M. 1004 analysis, at A21-73.

[195] UCMJ art. 55 (2002). Article 55 reads, in relevant part: "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter." *Id.*

[196] United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983) (quoting United States v. Wappler, 9 C.M.R. 23, 26 (C.M.A. 1953)).

United States v. Matthews: What Is Required in a Capital Court-Martial?

The seminal case for modern military capital jurisprudence is *United States v. Matthews*.[197] *Matthews* was the first military capital case to implement the Supreme Court's ruling in *Furman v. Georgia*, which reinstated the death penalty but required additional procedural protections prior to imposing death.[198] As a preliminary matter, the *Matthews* court stated that a service member is entitled to protection from cruel and unusual punishment under the Eighth Amendment, but also that Article 55, UCMJ, grants service members even greater protection than the Eighth Amendment.[199] The *Matthews* court then exhaustively reviewed *Furman*, including each concurring and dissenting opinion, and the eleven subsequent decisions that applied *Furman*.[200] After this review, the *Matthews* court distilled the Supreme Court's rulings into five procedural protections necessary under the Eighth Amendment in capital cases:

1. A Bifurcated Sentencing Procedure Must Follow the Finding of Guilt Of a Potential Capital Offense;
2. Specific Aggravating Circumstances Must Be Identified To the Sentencing Authority;
3. The Sentencing Authority Must Select and Make Findings On the Particular Aggravating Circumstances Used As a Basis For Imposing the Death Sentence;
4. The Defendant Must Have Unrestricted Opportunity To Present Mitigating and Extenuating Evidence, and
5. Mandatory Appellate Review Must Be Required To Consider the Propriety Of the Sentence As To the Individual Offense and Individual Defendant and To Compare the Sentence To Similar Cases Statewide.[201]

The court then found the military capital procedures defective because they did not require the court members to "specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty."[202] As a result, "meaningful appellate review" was "impossible."[203] Not only did the court hold the procedure to be unconstitutional, the court specified means by which the defects could be remedied. The court recognized that Congress could correct this problem through an amendment to the UCMJ, but suggested that the President could also remedy the problem under Articles 36 and 56, UCMJ, which allows the President to promulgate rules of procedure and establish limits for sentences.[204]

RCM 1004

Shortly after *Matthews*, the President promulgated RCM 1004, which was drafted and submitted for public comment prior to *Matthews*.[205] Rule for Courts-Martial 1004 added several procedural protections. First, an accused is eligible for the death penalty only if the members agree unanimously that he is guilty of a death-eligible offense.[206] Second, the government must prove, beyond a reasonable doubt, one of the aggravating factors enumerated in RCM 1004(c).[207] In addition, if death is adjudged, the panel president must announce which aggravating factors the panel found beyond a reasonable doubt.[208] Third, during sentencing, the accused is accorded "broad latitude to present evidence in extenuation and mitigation."[209] Fourth, the members are required to unanimously "concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances . . . ."[210] and all members must actually vote to adjudge the death penalty.[211]

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[197] *Id.* at 368.

[198] 408 U.S. 238 (1972).

[199] *Matthews*, 16 M.J. at 368 (quoting United States v. Wappler, 9 C.M.R. 23, 26 (C.M.A. 1953)). The Court did note that military necessity might limit the applicability of procedural rules for offenses committed during combat conditions or for violations of the law of war. *Id.*

[200] *Id.*

[201] *Id.* at 377.

[202] *Id.* at 379.

[203] *Id.* at 380.

[204] *Id.* (citing UCMJ arts. 36 & 56 (1969)).

[205] MCM, *supra* note 16, R.C.M. 1004 analysis, at A21-73.

[206] *Id.* R.C.M. 1004(a)(2).

[207] *Id.* R.C.M. 1005(b)(4)(B).

[208] *Id.* R.C.M. 1004(b)(8).

[209] *Id.* R.C.M. 1004(b)(3).

[210] *Id.* R.C.M. 1004(b)(4)(C).

[211] *Id.* R.C.M. 1004(b)(7), 1006(d)(4)(A).

Finally, the rules also provide for mandatory appellate review, including a proportionality review of the death sentence at the service-level court of appeals[212] and mandatory review by the CAAF.[213]

Three aspects of RCM 1004 are significant in light of *Ring*. First, capital aggravating factors appear to meet the *Ring* test and constitute the "functional equivalent to an element." According to RCM 1004(c), "[d]eath may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors . . . ."[214] This statement clearly places the capital aggravating factors within the *Ring* and *Apprendi* rule. Second, the President placed the rule in Chapter X of the Rules for Courts-Martial, Sentencing, and clearly indicated that the procedures necessary to adjudge death should apply to the sentencing phase of the trial. Indeed, the *Matthews* court specifically stated that the Eighth Amendment and Article 55 required procedural protections during the pre-sentencing phase of the trial.[215] Third, the President established specific notice procedures for the RCM 1004 aggravating factors that the government intends to prove. The trial counsel is not required to allege the capital aggravating factors in the capital specification. Instead, the trial counsel must give written notice prior to arraignment of the aggravating factors the prosecution intends to prove.[216] As a result, capital aggravating factors merit the similar procedural protections as elements of a military offense (i.e., proof beyond a reasonable doubt to a panel). On the other hand, the procedural rules clearly imply that capital aggravating factors are not treated as actual elements because the rules specifically do not require the government to charge capital aggravating factors at preferral or prove them during the trial on the merits.

Applicability of *Ring* to Capital Courts-Martial

Despite the sweeping language in the *Ring* and *Apprendi* rule, the actual impact of the *Ring* holding in the military appears to be minimal. Rule for Courts-Martial 1004 already incorporates many of the procedural guarantees established in *Ring*. The government must prove capital aggravating factors beyond a reasonable doubt, thereby satisfying the *Ring* Fifth Amendment due process requirement. Even though the right to a jury trial does not extend to the military as a matter of constitutional law,[217] *Ring's* jury trial requirement is met because the panel must unanimously agree that an aggravating factor exists.[218] Finally, similar to the states, the grand jury right is expressly inapplicable to the military by the very terms of the Fifth Amendment.[219] One military capital appellant used *Ring* to attack the weighing conducted by the members by arguing that the decision must be made beyond a reasonable doubt and to also attack the authority of the President to promulgate capital aggravating factors as a violation of the separation of powers.[220] This case is pending decision at CAAF and this article will not substantively discuss the issues raised in that case.

The notice question that confronts civilian courts, however, also has potential applicability in the military: does RCM 1004 comply with the Sixth Amendment notice requirement? Currently, RCM 1004 only requires that the trial counsel notify an accused in writing of the relevant aggravating factors prior to arraignment.[221] Capital aggravating factors are not alleged in the charge sheet, investigated at an Article 32 investigation, referred to court-martial by the convening authority, nor found at the trial on the merits. This practice is contrary to the standard practice for aggravating factors in non-capital courts-martial. Aggravating factors in non-capital courts-martial are treated as elements of the offense, which means that the aggravating factor must be alleged in the charge sheet, investigated at an Article 32 investigation, and found beyond a reasonable doubt at trial. Because RCM 1004 aggravating factors are properly considered "functional equivalents to an

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[212] *Id.* R.C.M. 1201(b)(1).

[213] *Id.* R.C.M. 1204(a)(1).

[214] *Id.* R.C.M. 1004(c).

[215] United States v. Matthews, 16 M.J. 354, 377 (C.M.A. 1983).

[216] MCM, *supra* note 16, R.C.M. 1004(b)(1). The rule also provides that the trial counsel can notify an accused *after* arraignment and would only be barred from doing so if the defense proves specific prejudice as a result of the late notice which a continuance or a recess cannot remedy. *Id.*

[217] *Ex parte* Quirin, 317 U.S. 1, 40 (1942) (noting that the Sixth Amendment right to a jury trial do not extend to military members). While the right to a jury trial does not extend to a service member as a matter of constitutional law, many provisions in the UCMJ and Rules for Courts-Martial extend similar jury trial protections. *See, e.g.*, UCMJ art. 25 (2002) (establishing requirements for court-martial panels); MCM, *supra* note 16, R.C.M. 502(a) (establishing qualifications and duties of courts-martial members).

[218] MCM, *supra* note 16, R.C.M. 1004(c).

[219] U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger . . . .").

[220] Brief Accompanying Petition for Writ of *Coram Nobis*, Loving v. United States, 58 M.J. 249 (2003) (No. 03-8007/AR) (ordering the government to show cause why the relief should not be granted).

[221] MCM, *supra* note 16, R.C.M. 1004(b)(1).

element" under *Ring*, the question arises whether RCM 1004 aggravating factors should be treated the same as non-capital aggravating factors. This section reviews the legal principles that apply to non-capital aggravating factors and then examines the extent to which these principles should apply to RCM 1004 aggravating factors.

Non-Capital Aggravating Factors

As part of the President's authority to establish maximum sentences for an offense, the President has established certain facts that aggravate an offense and increase the maximum punishment.[222] The President has the authority to establish such aggravating factors as part of his authority to establish maximum sentences for UCMJ violations.[223] Another foundation for the President's authority is Article 36, UCMJ, which provides that the President may prescribe "[p]retrial, trial and post-trial procedures, including modes of proof."[224] The President listed aggravating factors as elements of the relevant offenses in Part IV of the *Manual for Courts-Martial* (the *Manual*) and included aggravating factors in the model specifications of the offense.[225]

For all intents and purposes, these aggravating factors are elements of the offense. They are listed as elements in Part IV of the *Manual* and are included in the model specifications.[226] Further, RCM 307(c)(3) states that a specification is sufficient "if it alleges every element of the charged offense."[227] The discussion accompanying this provision states that "[a]ggravating circumstances which increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment."[228] These statements reflect early UCMJ case law that required aggravating factors that increased the maximum authorized punishment to be "(1) alleged in the specification, (2) covered by instructions, and (3) established as part of the government's case beyond a reasonable doubt."[229] There are many early cases that state this requirement, but these cases cite no statutory or constitutional foundation for this statement of law.[230] Each of these cases cite back to prior case law, not constitutional or statutory authority.[231] The earliest cases cited as authority for this proposition are two pre-UCMJ decisions by the Army Board of Review.[232] These two cases, *United States v. Lyle*,[233] and *United States v. Toy*,[234] provide no further insight as both cases simply cite earlier cases for this proposition.[235] As a result, non-capital aggravating factors are treated as elements of the offense as a matter of common usage and case law and not pursuant to a specific statutory or constitutional requirement.

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[222] United States v. Flucas, 49 C.M.R. 449, 450 (C.M.A. 1975) (holding that the President has the authority to establish aggravating factors and that aggravating factors are treated as elements of the offense).

[223] UCMJ art. 56 (2002). Article 56 states: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." *Id.*

[224] *Id.* art. 36.

[225] *See, e.g.*, MCM, *supra* note 16, pt. IV, ¶ 35 (establishing physical injury as an additional aggravating element for drunken or reckless operation of a vehicle, aircraft, or vessel and increasing the maximum punishment from six months' confinement, total forfeiture of pay and allowances, and a bad-conduct discharge to eighteen months' confinement, total forfeiture of pay and allowances, and a dishonorable discharge if physical injury is established).

[226] *Id.*

[227] *Id.* R.C.M. 307(c)(3).

[228] *Id.* R.C.M. 307(c)(3) discussion (C)(ix).

[229] United States v. Nickaboine, 11 C.M.R. 152, 155 (C.M.A. 1953).

[230] *See, e.g.*, United States v. Lovell, 22 C.M.R. 235, 238 (C.M.A. 1956) ("If the punishment for an offense depends upon aggravating matter, such matter must be both alleged and established beyond a reasonable doubt by the evidence." (citations omitted)); United States v. Beninate, 15 C.M.R. 98 (C.M.A. 1954) ("Punishment for a desertion terminated by apprehension requires appropriate allegation in the specification and proof beyond a reasonable doubt in the record of trial." (citations omitted)); *Nickaboine*, 11 C.M.R. at 155 ("Yet to justify the imposition of the greater punishment provided in such a case, it is necessary under service authorities that this fact be (1) alleged in the specification, (2) covered by instructions, and (3) established as part of the Government's case beyond a reasonable doubt." (citations omitted)); United States v. Grossman, 9 C.M.R. 36, 41 (C.M.A. 1953) ("A sentence is limited by the facts alleged in the specification and the personal injuries should not have been considered to increase the severity of the sentence." (citations omitted)).

[231] *See* cases cited *supra* note 230.

[232] *Nickaboine*, 11 C.M.R. at 155 (citing United States v. Lyle, 74 B.R. 367, 368 (A.B.R. 1947); United States v. Toy, 4 B.R.-J.C. 73, 74 (A.B.R. 1949)); *Grossman*, 9 C.M.R. at 41.

[233] 74 B.R. at 368.

[234] 4 B.R.-J.C. at 74.

[235] *Toy*, 4 B.R.-J.C. at 74 (citing United States v. Lyle, 74 B.R. 367 (A.B.R. 1947); United States v. Cote, 74 B.R. 359 (A.B.R. 1947)); *Lyle*, 74 B.R. at 368 (citing United States v. Cote, 74 B.R. 359 (A.B.R. 1947).

Another case shedding further light on the legal status of aggravating factors is *United States v. Flucas*.[236] In that case, Flucas was charged with two specifications of assault upon a noncommissioned officer (NCO), but the government presented no evidence that Flucas knew the status of one of the victims, as required by the *Manual*, and the panel was not instructed on this knowledge requirement for either of the victims, who were both NCOs.[237] On appeal, the government argued that lack of knowledge was an affirmative defense instead of an element because the President does not have the power to establish elements of an offense.[238] The court rejected this argument with an instructive analysis:

> True, as we have many times held, the President has no authority to prescribe in the Manual matters of substantive law, his powers in connection with the Code being generally limited to the promulgation of modes of proof and rules of procedure. Nevertheless, the Manual provision is valid, for the "element" of knowledge in each assault is expressly provided as part of an aggravating factor increasing the maximum permissible punishment "when the victim has a particular status or is performing a special function." In addition to his power under Article 36 to prescribe rules of procedure and modes of proof, the President also has authority to prescribe maximum limits of punishment for offenses under the Code when the Code itself does not prescribe a particular sentence. He may provide for increased punishment upon allegation, proof and instructions regarding an aggravating factor.[239]

In essence, the *Flucas* decision was a precursor to the *Ring* and *Apprendi* concept of "functional equivalent to an element." Congress did not establish the aggravating factors as elements in the UCMJ, but because the President established them in order to increase the maximum sentence, they served as elements as a functional matter in that they had to be alleged, instructed upon, and proven beyond a reasonable doubt.

Capital Aggravating Factors versus Non-capital Aggravating Factors: Are They Distinguishable?

The question that follows from the analysis of non-capital aggravating factors is whether the same rationale applies to aggravating factors under RCM 1004. At first glance, it appears that capital aggravating factors and non-capital aggravating factors operate in the same fashion: the government must prove both beyond a reasonable doubt in order to subject an accused to the greater punishment. Similarly, the same statutory bases exist for the President to establish capital aggravating factors as non-capital aggravating factors. On the other hand, the Eighth Amendment establishes a higher procedural standard during sentencing proceedings in order to adjudge the death penalty.[240] Another differentiating factor is that the President has established specific rules of procedure for capital aggravating factors that are distinct from non-capital aggravating factors.[241] This section examines the similarities and differences between the two aggravating factors, in light of the rule that capital aggravating factors now qualify as "functional equivalents to an element." Based on these similarities and differences, this section determines whether the rules that apply to non-capital aggravating factors should also apply to capital aggravating factors.

After the President promulgated RCM 1004, capital defendants challenged his authority, claiming that Congress did not delegate the authority for the President to establish capital aggravating factors. Prior to RCM 1004, the *Matthews* court stated that Articles 36 and 56, UCMJ, and the President's inherent constitutional authority as commander-in-chief gave the President the authority to correct the defects that rendered capital punishment unconstitutional.[242] According to the *Matthews* court, the defect was an issue of sentencing procedure: "The great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases."[243] After the President promulgated RCM 1004, both the Court of Military Appeals (COMA) and the Supreme Court upheld the President's promulgation authority, holding that Congress actually delegated this authority to the President.[244] Both courts cited Articles 18, 36, and 56, UCMJ, as the basis for this

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[236] 49 C.M.R. 449 (C.M.A. 1975).

[237] *Id.* at 450-51.

[238] *Id.* at 450.

[239] *Id.* (citations omitted).

[240] *See supra* notes 196-204 and accompanying text.

[241] MCM, *supra* note 16, R.C.M. 1004.

[242] United States v. Matthews, 16 M.J. 354, 380-81 (C.M.A. 1983).

[243] *Id.* at 381.

[244] United States v. Loving, 517 U.S. 748, 769-71 (1996); United States v. Curtis, 32 M.J. 252, 261-63 (C.M.A.), *set aside and remanded on other grounds*, 33 M.J. 101 (C.M.A. 1991).

delegation.[245] In addition, both courts cited to Article 106a, UCMJ, passed in 1985, as illustrative.[246] Article 106a prohibited espionage, authorized the death penalty for espionage, established aggravating factors necessary to sentence an accused to death for espionage, and specifically stated that the President may promulgate additional capital aggravating factors pursuant to Article 36, UCMJ.[247] The Supreme Court in *Loving* seemed doubtful that Article 36, standing alone, was sufficient, but relied on Congress passing Article 106a, to ratify the promulgation of RCM 1004.[248] The Court concluded: "Whether or not Article 36 would stand on its own as the source of delegated authority, we hold that Articles 18, 36, and 56 together give clear authority to the President for the promulgation of RCM 1004."[249]

In essence, the authority for both capital and non-capital aggravating factors is the same. Both the *Flucas* and *Matthews* courts cite to Articles 36 and 56 as the primary source of the President's authority for establishing both aggravating factors.[250] *Curtis* and *Loving* add Article 18 as a source of authority for the promulgation of RCM 1004, but the language of Article 18 also applies to non-capital aggravating factors: "general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter."[251] In fact, the *Curtis* court stated that Articles 18 and 56 provide the authority for non-capital aggravating factors, such as desertion terminated by apprehension and driving while drunk resulting in death.[252]

Notwithstanding their functional similarity, the primary difference with capital aggravating factors is that the President specified procedures for capital aggravating factors, which include notice prior to trial and findings on the aggravating factors at sentencing.[253] The President, however, has not established specific procedures for non-capital aggravating factors although the fact that they are listed as elements of the offense indicates that the President intends for the procedures established through case law to apply.[254] On the other hand, the President established the RCM 1004 aggravating factors in order to meet the heightened procedural requirements for the death sentence pursuant to Article 55, UCMJ, and the Eighth Amendment.[255] Indeed, the *Matthews* court specifically indicated that new rules were needed to remedy "defects in sentencing procedure"[256] because "[the Supreme] Court considers that the death penalty is unique and that the procedure used to impose it requires a greater degree of judicial scrutiny."[257] Despite their functional similarity to non-capital aggravating factors, the President established different procedural rules for RCM 1004 aggravating factors. Simply because both non-capital aggravating factors and capital aggravating factors are in the same category of "functional equivalents to an element," it does not follow that both should be treated the same procedurally. Instead, the procedural rules for RCM 1004 aggravating factors should meet the basic procedural guarantees established in *Ring*.[258]

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[245] *Loving*, 517 U.S. at 770; *Curtis*, 32 M.J. at 261-62.

[246] *Loving*, 517 U.S. at 770; *Curtis*, 32 M.J. at 262.

[247] UCMJ art. 106a (2002). Article 106a(c) states:

> A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:
>
> . . .
>
> (4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36).

Id.

[248] *Loving*, 517 U.S. at 770.

[249] *Id.*

[250] United States v. Matthews, 16 M.J. 354, 380-81 (C.M.A. 1983); United States v. Flucas, 49 C.M.R. 449, 450 (C.M.A. 1975).

[251] UCMJ art. 18.

[252] United States v. Curtis, 32 M.J. 252, 261 (C.M.A.), *set aside and remanded on other grounds*, 33 M.J. 101 (C.M.A. 1991).

[253] *See* MCM, *supra* note 16, R.C.M. 1004(b) (establishing procedures for adjudging death in a capital case).

[254] *See supra* notes 229-36 and accompanying text.

[255] *See supra* notes 205-10 and accompanying text.

[256] *Matthews*, 16 M.J. at 380.

[257] *Id.* at 377.

[258] As a matter of logic, it follows that the procedural guarantees for capital aggravating factors should be at least as great as the procedural guarantees for non-capital aggravating factors, especially because the Supreme Court no longer differentiates between capital and non-capital aggravating factors. Nevertheless, *Ring* establishes the minimum procedural requirements for capital aggravating factors. As a result, RCM 1004 must meet the *Ring* standards.

Does RCM 1004 Provide for Sufficient Notice?

Even though *Ring* does not mandate that RCM 1004 capital aggravating factors be treated as actual elements (i.e., alleged in charge sheet, investigated, and proven at trial on the merits), the RCM 1004 aggravating factors must meet the same procedural guarantees extended to elements of the offense. While RCM 1004 meets many of the constitutional requirements,[259] there is a question about whether the rules provide sufficient notice in order to comply with the Sixth Amendment. The primary function of notice of RCM 1004 factors is to provide an opportunity for the accused to prepare a defense because the underlying offense alleged in the charge sheet provides sufficient defense against double jeopardy.[260] Notice of aggravating factors at arraignment does have the potential to place a capital accused at a disadvantage because, even though aggravating factors are found at sentencing, the panel can find that an aggravating factor exists based on evidence introduced at the trial on the merits.[261] This fact could theoretically lead to a trial with very short notice of the aggravating factors that the government intends to prove. Not one military capital accused, however, has challenged the notice provisions on appeal. The only reported instance of an issue surrounding notice of RCM 1004 aggravating factors is in the CAAF opinion in *United States v. Loving*, in which the court rejected a challenge to the lack of notice of "aggravating circumstances" introduced pursuant to RCM 1001(b)(4) in the government's sentencing case.[262] Even though there is the potential for trial with little notice of the aggravating factors, the rules afford a capital accused substantial pretrial rights, including broad discovery rights[263] and an Article 32 pretrial investigation,[264] which would assist defense counsel in identifying potential aggravating circumstances. Similarly, the military judge is given broad authority to grant continuances "for reasonable cause."[265] Given these procedural protections, it is unlikely that the rules would apply to deprive a capital accused of sufficient time to prepare a defense against the RCM 1004 aggravating factors. Further, the rule provides more notice than some state statutes discussed earlier.[266] The COMA in *Curtis* concluded: "as we construe RCM 1004, it not only complies with due process requirements but also probably goes further than most state statutes in providing safeguards for the accused."[267]

Even If Not Legally Required, Should the Military Alter Its Practice?

Even though many constitutional provisions do not apply to the armed services, additional sources of protection exist that often exceed the rights afforded to civilian defendants.[268] These protections are generally established through the UCMJ and the RCM, as well as by regulation.[269] While not constitutionally required, these protections are considered essential to maintaining a good public perception of the military justice system and upholding morale in an all-volunteer military.

Similarly, Article 36, UCMJ, states that the procedural rules established by the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[270] Under the current system, a capital indictment must allege aggravating factors in order for a federal capital defendant to be eligible for the death penalty[271] There is no similar procedural requirement for military capital

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[259] *See supra* text accompanying notes 217-17.

[260] *See supra* notes 103-12 and accompanying text.

[261] MCM, *supra* note 16, R.C.M. 1004(b)(5).

[262] United States v. Loving, 41 M.J. 213, 267 (1994), *aff'd*, 517 U.S. 748 (1996). The aggravating circumstances are different from the RCM 1004 aggravating factors. Aggravating circumstances are admitted pursuant to RCM 1001(b)(4) and may be considered, once an aggravating factor has been found, in determining whether the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances. MCM, *supra* note 16, R.C.M. 1004(b)(4)(C).

[263] *See* MCM, *supra* note 16, R.C.M. 701 (outlining discovery rules).

[264] *See id.* R.C.M. 405 (outling procedural rules for the pretrial investigation). The Discussion to Rule 405 states that the investigation "also serves as a means of discovery." *Id.* R.C.M. 405(a) discussion.

[265] UCMJ art. 40 (2002). Article 40 states: "The military judge or a court-martial without a military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." *Id.*

[266] *See supra* notes 119-64 and accompanying text.

[267] United States v. Curtis, 32 M.J. 252, 269 (C.M.A.), *set aside and remanded on other grounds*, 33 M.J. 101 (C.M.A. 1991).

[268] *See* Colonel Francis A. Gilligan, *The Bill of Rights and Service Members*, ARMY LAW., Dec. 1987, at 3 (discussing the broad rights afforded to service members).

[269] *Id.*

[270] UCMJ art. 36.

cases.[272] The question remains, then, whether the military should, as a matter of policy, alter its current practice by requiring aggravating factors be charged at preferral and be subject to investigation at an Article 32 pretrial investigation.

Ring changed the current federal capital procedure only in that statutory aggravating factors are now alleged in the indictment—aggravating factors are not litigated at trial and are still litigated during the sentencing proceedings.[273] Several federal courts have upheld this procedure.[274] Federal prosecutors commence capital prosecutions by including a "notice of special findings" in the indictment that alleges the aggravating factors.[275] This change to federal indictments accords additional procedural protections only to the extent that the capital defendant has additional advance notice that the government is seeking the death penalty and notice of the specific aggravating factors upon which the government intends to rely. The other protection intended by the grand jury indictments clause is to "provid[e] for a body of citizens that acts as a check on prosecutorial power."[276] While this aspect of the grand jury requirement channels and limits prosecutorial discretion, however, it does not provide a substantive trial right. Given these facts, it is not surprising that no court has overturned an adjudged federal death penalty because of an indictment that fails to allege the aggravating factors. Most courts have either held any adjudged error to be harmless[277] or have interpreted the indictment liberally to find that it contained an allegation of one of the statutory aggravating factors.[278] As a result, the change in federal practice adds a substantial additional layer of procedure, but the procedure affords little additional protections for an accused.

The military criminal justice system, however, now lacks a procedural protection that exists in the federal system. While the grand jury right does not extend to the military, the Article 32 pretrial investigation is designed to add similar protections and function as a rough parallel to the grand jury.[279] In fact, the Article 32 pretrial investigation affords substantially more rights to an accused than the federal grand jury.[280] The additional step of alleging RCM 1004 aggravating factors and investigating them at the Article 32 investigation would create a minimal additional burden on the government, especially because the government routinely follows the same practice for non-capital aggravating factors.[281] Such a procedural change would not limit the government's decision to seek death because the government would not be required to proceed on a capital prosecution because it alleged and investigated the capital aggravating factors. As a result, a change to comport with federal practice would appear to be a minimal burden on the military and the President could issue such a rule in accordance with the principles established in Article 36, UCMJ.[282] Unless a substantial reason exists not to change military procedure to allow similar protections, the military procedure should be altered to require aggravating factors to be alleged in the charge sheet and investigated at the Article 32 pretrial investigation. Such a practice would bring the military criminal justice

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[271] While a federal capital indictment includes one or more aggravating factors necessary to impose death, these aggravating factors continue to be litigated during the sentencing proceedings and not during the guilt phase of the trial. *Cf.* United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002) (holding FDPA unconstitutional because relaxed evidentiary standard used for aggravating factors during sentencing), *rev'd*, 360 F.3d 135 (2nd Cir.), *cert. denied*, 125 S. Ct. 369 (2004).

[272] United States v. Turner, No. NMCM 854044, 1986 CMR LEXIS 2275 (N.M.C.M.R. 1986) (holding that investigation of capital aggravating factors at the Article 32 pretrial investigation is not required), *rev'd on other grounds*, 25 M.J. 324 (C.M.A. 1987).

[273] *See* 18 U.S.C. § 3593(b) (2000) (requiring separate sentencing hearing for capital cases).

[274] *Fell*, 360 F.3d at 145-46 (stating that aggravating factors properly adjudicated at sentencing hearing); United States v. Haynes, 269 F. Supp. 2d 970, 983-84 (W.D. Tenn. 2003) (stating that relaxed evidentiary standards at sentencing hearing for aggravating factors does not render FDPA unconstitutional for lack of due process); United States v. Johnson, 239 F. Supp. 2d 924, 938, 942 (N.D. Iowa 2003) (stating that *Ring* does not prohibit bifurcated proceedings where aggravating factors are found at sentencing and FDPA clearly mandates a bifurcated proceeding for aggravating factors); United States v. Regan, 221 F. Supp. 2d 672, 678-79 (E.D. Va. 2002) (stating that *Ring* does not create a greater offense which must be found at trial); United States v. Lentz, 225 F. Supp. 2d 672, 682-83 (E.D. Va. 2002) (same); *accord*, State v. Fortin, 843 A.2d 974, 1037-38 (N.J. 2004) (mandating similar rule for New Jersey sentencing procedures).

[275] *See Fortin*, 843 A.2d at 1034 (noting federal practice and citing to federal cases).

[276] United States v. Cotton, 535 U.S. 625, 634 (2002).

[277] United States v. Barnette, 390 F.3d 775, 786 (4th Cir. 2004) (holding alternatively that alleged error in indictment was harmless beyond a reasonable doubt); United States v. Lee, 374 F.3d 637, 651 (8th Cir. 2004) (holding that failure to allege aggravating factors was not plain error because the deficiency "did not seriously affect the fairness and integrity of judicial proceedings"); United States v. Higgs, 353 F.3d 281, 304-07 (4th Cir. 2003) (holding alternatively that alleged error in indictment was harmless beyond a reasonable doubt), *cert. denied*, 125 S. Ct. 627 (2004).

[278] *See, e.g.*, *Barnette*, 390 F.3d at 784-86; United States v. Jackson, 327 F.3d 273, 289 (4th Cir.).

[279] *E.g.*, United States v. Loving, 41 M.J. 213, 267 (1994) (noting that Article 32, UCMJ, was "intended to provide a substitute for the grand jury"), *aff'd*, 517 U.S. 748 (1996).

[280] *E.g.*, *Loving*, 41 M.J. at 297 (outlining the additional rights afforded an accused at an Article 32 investigation, including: right to appear; right to counsel; right to cross-examine the witnesses against him; right to examine the evidence against him; and right to present matters in defense, extenuation or mitigation).

[281] *See supra* text accompanying notes 222-27.

[282] UCMJ art. 36 (2002).

practice in line with the federal criminal practice. A proposed amendment to the rules to accomplish this change is located in the Appendix. At the very least, until the appellate courts rule definitively on this issue, military prosecutors are well advised to allege capital aggravating factors in the capital charge sheet and ensure that the aggravating factors are investigated at the Article 32 investigation.

Conclusion

The broad new concepts and language found in *Ring* and its progeny are troubling in their potential applicability to military capital procedures, but upon closer review there is minimal impact. This is largely because the military already affords substantial legal procedural protections to capital accused. Also significant is that while the term "functional equivalent to an element" seems very broad in theory and implies that any such fact should be treated as an element of the offense, subsequent cases and practice have limited the applicability of the term. While RCM 1004 aggravating factors are "functional equivalents to an element," this classification only requires that the same constitutional procedural protections apply. Because RCM 1004 already mandates the procedural protections *Ring* required, *Ring* does not add any new requirements. As a result, while the President should reconsider RCM 1004 as a policy matter, the current system meets all constitutional mandates.

Appendix

R.C.M. 307(c) shall be amended to add the following subsection:

(5) *Capital Offenses*. If a specification alleges an offense punishable by death, the specification shall also allege the relevant aggravating factors listed in R.C.M. 1004(c) in order to permit the death penalty. The aggravating factors alleged in the specification shall be established in accordance with the procedure in R.C.M. 1004.

R.C.M. 1004(b)(1) shall be amended by striking the lined-through language and adding the underlined language.

(1) *Notice.* ~~Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate.~~ Death may be adjudged only if the government establishes at least one aggravating factor which has been alleged in the specification pursuant to R.C.M. 307(c)(5) and investigated pursuant to R.C.M. 405. Changes to the charge and specification are authorized subject to the procedures in R.C.M. 603.