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Bruce T. Cunningham

Heather Rattelade

Amanda Zimmer

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ARTICLES

RING V. ARIZONA AND CAPITAL PROCEEDINGS: BRAVE NEW WORLD OR A REVERSION TO THE OLD WORLD?

BRUCE T. CUNNINGHAM*
HEATHER L. RATTELADE**
AMANDA ZIMMER***

*"[F]or purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'"*¹

—Justice Scalia in *Sattazahn*

*"[T]oday's judgment has nothing to do with jury sentencing."*²

—Justice Scalia concurring in *Ring*

In *Apprendi v. New Jersey*³ and *Blakely v. Washington*,⁴ the Supreme Court of the United States declared it is the exclusive role of a jury to determine all facts necessary to convict a defendant of a particular crime. In *Ring v. Arizona*,⁵ the Court extended *Apprendi*'s bedrock Sixth Amendment principles to the context of capital punishment. In the first installment of this two-part article, the au-

* Bruce T. Cunningham, Jr. graduated from UNC-Chapel Hill with a B.A. in Political Science as a Morehead Scholar in 1970. He has been a criminal defense attorney since earning his J.D. at the University of Virginia Law School in 1973. Mr. Cunningham has represented defendants charged with murder for over thirty years.

** Ms. Rattelade graduated from North Carolina State University with a Bachelor's Degree in Political Science in 2005. She is a J.D. Candidate at North Carolina Central University School of Law and will graduate in 2008. Ms. Rattelade has worked as a Mitigation Specialist since 2003.

*** Ms. Zimmer earned her J.D. from Wake Forest University in 2006, where she was a member of Moot Court Board and competed in the Stanley Moot Court Competition, where she was Runner Up for Best Brief. A 2003 graduate of East Carolina University, majoring in Economics, minoring in Business, Ms. Zimmer has been with the Law Offices of Bruce Cunningham for over a year.

1. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003).

2. *Ring v. Arizona*, 536 U.S. 584, 612 (2002) (Scalia, J., concurring).

3. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

4. *Blakely v. Washington*, 542 U.S. 296 (2004).

5. *Ring*, 536 U.S. 584.

thors explored the implications of *Apprendi/Blakely* on North Carolina's Structured Sentencing Act⁶ ("SSA"), suggesting that the SSA as we know it cannot withstand the full impact of the Supreme Court's current view of the jury trial right.⁷

In this part, the authors argue that *Ring*'s extension of the *Apprendi* principle will revolutionize the way capital cases are tried in North Carolina to the benefit of persons charged with capital crimes. Developments in death penalty jurisprudence, beginning with the Eighth Amendment challenge in *Furman* and ending with the Sixth Amendment challenge in *Ring*, establish that "Capital Murder" or "Aggravated First Degree Murder" is a crime which is separate from and greater than "First Degree Murder" or "Murder Simpliciter."⁸

We believe that in order to understand *Ring*'s impact on capital litigation, the case must be viewed not as a foray into the uncharted territory of a constitutional role for juries in sentencing; rather as a return to the understanding of the jury's role at the time of the Founding Fathers, which was simply to determine whether a defendant committed a particular crime or not.⁹

All of the opinions expressed by the authors are based on the concept that the Founding Fathers strongly believed that a defendant should be found guilty of a crime because of what he did, not who he is. So too, we believe, in First Degree Murder trials, defendants should be exposed to the possibility of a death sentence because of what they do, not who they are. We contend that *Ring* requires that only characteristics of the capital offense may comprise the elements of the crime which makes a defendant eligible for death, and then characteristics of the capital defendant, plus characteristics of the offense, may be used to decide whether death is the appropriate punishment. While this notion appears simple, it has enormous consequences for North Carolina in the way death penalty trials are conducted and would require a number of changes in current law.

First, we believe that *Ring* will require the State to give the defendant notice before trial of which particular aggravating factors the

6. N.C. GEN. STAT. § 15A-1340.10-1340.33 (2007).

7. Bruce Cunningham, Heather Rattelade & Amanda Zimmer, *Apprendi/Blakely: A Primer for Practitioners*, 30 N.C. Cent. L. Rev. 1 (2007).

8. *Sattazahn*, 537 U.S. at 112 ("Murder plus one or more aggravating circumstances is a separate offense from 'murder' *simpliciter*."). Since the authors believe that calling a crime "Capital Murder" necessarily suggests to a jury that a person convicted of Capital Murder should receive capital punishment, we will refer to murder plus an aggravating factor as "Aggravated First Degree Murder."

9. See *Apprendi*, 530 U.S. at 499 (stating that the inquiry in *Apprendi* turned on the "the seemingly simple question of what constitutes a 'crime'").

State contends exist in a case, thereby overruling *State v. Taylor's* holding to the contrary.¹⁰

Second, we contend that North Carolina's list of aggravating factors must be divided into two lists of aggravators known as "death eligibility factors" and "death selection factors."¹¹ The list of eligibility factors must contain only facts related to the circumstances of the crime or the circumstances of the victim (e.g. whether the victim is a policeman). Circumstances of the defendant may not be used as an eligibility aggravator.¹² The eligibility factor functions as the distinguishing element between First Degree Murder and Aggravated First Degree Murder. Once the jury has decided the elements of the crime, it then must consider sentencing for the greater crime of Aggravated First Degree Murder. In his article, "*Conceptualizing Blakely*," Professor Douglas Berman, a leading expert on criminal sentencing issues, discusses at length the "offense/offender characteristic" dichotomy. Professor Berman says, "[S]entencing is about assessing both the offense and the offender to impose a just and effective punishment."¹³ Therefore, the second list of aggravators, or selection factors, may contain facts related to the status of the defendant in addition to circumstances of the crime or the victim.¹⁴

Third, in the post-*Ring* world, we contend that the State will no longer be able to convert a crime which was non-capital when committed into a crime which is capital when tried, overruling *State v. Squires*.¹⁵ Under current law, a defendant who is charged with committing both a violent felony and a homicide can be tried for the felony first in an effort by the state to manipulate the defendant's prior

10. *State v. Taylor*, 304 N.C. 249, 257 (1983). The aggravating factors in North Carolina are found in N.C. GEN. STAT. § 15A-2000(e) (2007), are collected and categorized in Appendix A following this article.

11. See *Brown v. Sanders*, 546 U.S. 212, 216 at n.2 (2006) ("Our cases have frequently employed the terms 'aggravating circumstance' or 'aggravating factor' to refer to those statutory factors which determine death eligibility in satisfaction of *Furman's* narrowing requirement."). See *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). The terminology surrounding the statutory factors for the death penalty becomes confusing when, as in *Tuilaepa*, a State employs the term "aggravating circumstance" to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty; see also Cal. Penal Code Ann. § 190.3 (West 1999).

12. See, e.g., N.C. GEN. STAT. § 15A-2000 (e)(3) ("Aggravating circumstances which may be considered shall be limited to the following: [t]he defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.").

13. Douglas A. Berman, *Conceptualizing Blakely*, 17 FED. SENT'G REP. 89, 89 (2004).

14. Selection factors may include the fact that the defendant is a recidivist. See also Appendix A, *supra*.

15. *State v. Squires*, 357 N.C. 529, 591 S.E.2d 837 (2003) (declining to impose a requirement that the conviction for the prior felony precede the occurrence of the capital murder itself).

record to create the prior violent felony aggravator,¹⁶ which did not exist on the date of offense, in order to make the defendant eligible for death.¹⁷

Fourth, the Rules of Evidence must apply to the determination of eligibility factors. Under current North Carolina law, sentencing proceedings are exempted from the Rules of Evidence.¹⁸ Since a conviction for Aggravated First Degree murder depends upon the finding of an eligibility factor, the Rules of Evidence should apply to it in the same manner in which the Rules apply to the determination of other elements of the crime.

Finally, we believe that the Eighth Amendment's requirement of a narrowing of the class of persons convicted of murder to the class of persons eligible for death must take place at the guilt phase. In his *Ring* concurrence, Justice Scalia makes this point, stating that the determination of aggravating factors making a defendant eligible for death "logically belongs" in the first phase of a trial.¹⁹ Under current North Carolina law, the narrowing function takes place after a finding of guilt at the penalty phase,²⁰ because a person convicted of premeditated murder or felony murder, nothing else appearing, is not exposed to the possibility of a death sentence. Rather, a sentence of life without parole must be imposed for all persons currently convicted of first degree murder at the guilt phase.²¹ After *Ring*, a defendant is exposed to death only upon a conviction for Aggravated First Degree Murder.

This article begins with a summary of the two primary animating principles of the Court's capital jurisprudence: the Eighth Amendment requirements that a jury's discretion to find a defendant guilty of a death-qualifying crime be guided and the jury be able to consider characteristics of the defendant before selecting death as the appropriate punishment. A brief summary of *Apprendi* follows.

Next, the authors discuss *Ring v. Arizona* and *Sattazahn v. Pennsylvania*. *Ring* extends the *Apprendi* Rule to capital litigation and Justice Scalia's opinion in *Sattazahn* sets forth the basic proposition that First Degree Murder is a crime separate from and lesser than Aggravated First Degree Murder. The article concludes with the prediction

16. N.C. GEN. STAT. § 15A-2000(e)(3) (2007).

17. See *Squires*, 357 N.C. at 538, 591 S.E.2d at 843.

18. See N.C. R. EVID. 1011.

19. *Ring*, 536 U.S. at 612-613 (holding that "Those States that leave the ultimate life-or-death decision to the judge may continue to do so by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.").

20. *State v. Williams*, 317 N.C. 474, 298 S.E.2d 645 (1983).

21. See N.C. GEN. STAT. § 15A-2000.

of inevitable revolutionary change in the trials of capital cases in North Carolina.

PART ONE: HISTORICAL CONTEXT

A. *Furman, Lockett and the Eighth Amendment*

In *Furman v. Georgia*,²² the Supreme Court issued a plurality opinion which held that the death penalty was unconstitutional.²³ The controlling ground was that the death penalty violated the Eighth and Fourteenth Amendments because it was arbitrarily inflicted.²⁴ Although each of the concurring Justices rested their opinions on different grounds,²⁵ the prevailing principle requires a jury to be guided by objective standards in order to limit the class of murderers eligible to receive the death penalty.²⁶

In an effort to alleviate the Court's concern about arbitrarily inflicted death sentences, thirty-five States adopted new capital sentencing procedures.²⁷ Four years later, the Court issued five separate plurality opinions as to whether the various new death penalty sentencing procedures implemented in North Carolina,²⁸ Louisiana,²⁹ Texas,³⁰ Georgia,³¹ and Florida³² overcame the constitutional deficiencies raised in *Furman*.³³

North Carolina and Louisiana argued their new death schemes removed the "unbridled jury discretion" by mandating death for certain crimes. The Court struck down these schemes as unconstitutional because mandating death for certain offenses still failed to allow a jury

22. *Furman v. Georgia*, 408 U.S. 238 (1972).

23. *Id.* at 239-240.

24. *Id.*

25. *Id.* at 414-415 (Dissenting, J. Powell, joined by Blackmun and Rehnquist) ("Mr. Justice DOUGLAS concludes that capital punishment is incompatible with notions of 'equal protection' that he finds to be 'implicit' in the Eighth Amendment. Mr. Justice BRENNAN bases his judgment primarily on the thesis that the penalty 'does not comport with human dignity.' Mr. Justice STEWART concludes that the penalty is applied in a 'wanton' and 'freakish' manner. For Mr. Justice WHITE it is the 'infrequency' with which the penalty is imposed that renders its use unconstitutional. Mr. Justice MARSHALL finds that capital punishment is an impermissible form of punishment because it is 'morally unacceptable' and 'excessive.'") (internal citations omitted).

26. *Brown*, 546 at 216.

27. *Walton v. Arizona*, 497 U.S. 639, 659 (1990) (Scalia, J. concurring).

28. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

29. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

30. *Jurek v. Texas*, 428 U.S. 262, 263 (1976).

31. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

32. *Proffitt v. Florida*, 428 U.S. 242 (1976).

33. The Harvard Law Review Association, *The Supreme Court, 1977 Term; Constitutional Law*, 92 HARV. L. REV. 57, 99 n.6 (1978) ("Four decisions accompanied *Gregg v. Georgia*, 428 U.S. 153 (1976). . . . The controlling votes in each case were cast by Justices Stewart, Powell, and Stevens (hereinafter "the plurality").").

to focus on the circumstances of the particular offense and the character and propensities of the defendant.³⁴ The Court held the Texas, Georgia, and Florida schemes complied with *Furman* because they “genuinely narrowed the class of persons eligible for the death penalty” by requiring a finding of at least one statutory aggravating circumstance, in addition to allowing the sentencer to consider the circumstances of the particular offense and the character and propensities of the defendant when determining whether to impose a death sentence.³⁵ In short, *Furman* requires an “eligibility phase,” which seeks to constrain the discretion of the jury when convicting a defendant of a capital crime.³⁶

Lockett v. Ohio struck down Ohio’s new capital sentencing procedure, which required a defendant to be sentenced to death if at least one of seven specified aggravating circumstances and none of the three statutory mitigating circumstances were found to exist.³⁷ The procedure was unconstitutional because once a determination was made that none of the three statutory mitigating factors existed at the bifurcated penalty hearing, the statute effectively mandated the death penalty without allowing a jury to consider additional information regarding the character and propensities of the defendant.³⁸ *Lockett* stands for the proposition that the Eighth Amendment requires that the sentencer must not be prevented from considering any characteristics of the offender and any of the circumstances surrounding the crime when deciding whether a defendant convicted of Aggravated First Degree Murder should receive a death sentence.³⁹ In other words, *Lockett* requires a selection phase, which expands the discretion of the sentencer by allowing an “individualized consideration” of all potentially mitigating or aggravating evidence.⁴⁰

The combined effect of *Furman* and *Lockett* requires capital convictions “to be governed by objective standards to ensure regularity and consistency of application”, while at the same time allowing capital sentencing to “remain infinitely sensitive to the circumstances of the particular case” and offender.⁴¹

34. *Roberts*, 428 U.S. at 333-334.

35. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). See *Gregg*, 428 U.S. at 164, 196-197, 206; see also *Proffitt*, 428 U.S. at 242, 256-257 n.14 (opinion of Stewart, Powell, and Stevens, JJ.).

36. Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama’s Capital Sentencing Regime after Ring v. Arizona*, 54 ALA. L. REV. 1157, 1196 (2002-2003).

37. *Lockett v. Ohio*, 438 U.S. 586, 600 (1978).

38. *Id.* at 608 (re-affirming the principle set forth in the plurality opinion in *Woodson v. North Carolina*, 428 U.S. 280).

39. *Id.* at 604; *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

40. Forrester, *supra* note 36, at 1196.

41. *Id.*

B. *Apprendi Summary*

On June 24, 2000, the Supreme Court, in a five to four decision, decided *Apprendi v. New Jersey*,⁴² bringing about a shift in the roles of judges and juries when deciding whether someone is guilty of a crime.

Mr. Apprendi was charged with possession of a firearm for an unlawful purpose, a crime for which he could receive 10 years in prison.⁴³ However, because a judge found that Mr. Apprendi was motivated by racial animus the sentence was “aggravated” to 12 years.⁴⁴ The Supreme Court reversed, holding that the Sixth and Fourteenth Amendments prohibited a judge from increasing the potential punishment by finding a fact which should have been submitted to a jury. The Court announced the following rule: “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.”⁴⁵

In the capital litigation context, the “prescribed statutory maximum” for First Degree Murder is life without parole. Therefore, any fact which increases a defendant’s exposure to include a sentence of death is an element of a greater offense and must be found by a jury beyond a reasonable doubt.

In his concurring opinion, Justice Thomas succinctly states the issue: “This case turns on the seemingly simple question of what constitutes a crime.”⁴⁶ Following *Apprendi*, the definition of “crime” applicable to non-capital cases was dependent on the punishment to which a defendant was exposed. All facts essential to support a certain level of punishment are elements of the crime.

The authors contend that *Apprendi* means that there are no more “aggravated” sentences, only aggravated crimes. It is that basic proposition, extended to the capital arena, which ushered in the new era in capital litigation.

C. *Ring Summary*

In *Ring v. Arizona*,⁴⁷ the Court was confronted with the issue of whether the Sixth Amendment right to a jury trial applied to aggravating factors which were necessary in order to make a defendant eligible to receive a death sentence. Twelve years earlier in *Walton v. Ari-*

42. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

43. *Id.* at 469-70.

44. *Id.* at 471.

45. *Id.* at 490.

46. *Id.* at 499 (Thomas, J. concurring).

47. *Ring*, 536 U.S. 584.

zona,⁴⁸ the Court had upheld the Arizona capital sentencing scheme against a similar Sixth Amendment challenge. However, *Walton* was decided before *Apprendi v. New Jersey*⁴⁹ and was discussed by the Court in *Apprendi*. In *Apprendi*, the Court noted that under the Arizona sentencing scheme at issue in both *Walton* and *Ring* the judge did not “determine the existence of a factor which makes a crime a capital offense.”⁵⁰ However, while the Arizona first degree murder statute provided that a conviction is punishable by either life imprisonment or death, a death sentence could not be imposed without the finding of an additional aggravating factor.⁵¹ Seemingly, the rule in *Walton* conflicted with *Apprendi*’s mandate that “[o]ther 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.”⁵² Despite language in *Apprendi* supporting the continued validity of *Walton*, the Arizona Supreme Court determined that its capital sentencing scheme violated *Apprendi*.⁵³ However, because the Arizona Supreme Court was bound by the precedent set out by the United States Supreme Court in *Walton*, it ultimately ruled against *Ring*’s Sixth Amendment challenge.⁵⁴ In *Ring*, when the Supreme Court was directly confronted with the issue of whether *Apprendi* and *Walton* were in conflict, it determined that *Walton* had to be overruled.⁵⁵

In *Ring*, the Defendant was convicted by a jury of first degree felony murder which occurred during the course of a robbery.⁵⁶ The judge then made two critical findings. First, the judge determined that *Ring* was the one who killed the victim and was a major participant in the robbery. Such a finding was necessary to impose the death penalty for felony murder under *Enmund v. Florida*⁵⁷ and *Tison v. Arizona*.⁵⁸ Second, the judge determined that two aggravating factors existed.⁵⁹ Without these findings, *Ring* would not have been eligible

48. *Walton v. Arizona*, 497 U.S. 639.

49. *Apprendi*, 530 U.S. 466.

50. *Id.* at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 (1998) (Scalia, J., dissenting)).

51. ARIZ. REV. STAT. §§ 13-1105(d), 13-703(e) (West Supp. 2007).

52. *Apprendi*, 530 U.S. at 490.

53. *State v. Ring*, 200 Ariz. 267, 280 25 P.3d 1139, 1152 (2001).

54. *Id.*

55. *Ring*, 536 U.S. at 609.

56. *Id.* at 591.

57. *Enmund v. Florida*, 458 U.S. 782 (1982) (stating that before death can be imposed in a felony murder case, Eighth Amendment requires that the defendant either killed or attempted to kill the victim).

58. *Tison v. Arizona*, 481 U.S. 137 (1987) (qualifying *Enmund*, and holding that Eighth Amendment allows death as punishment when the defendant was a major participant in the felony and demonstrated “reckless indifference to human life”).

59. *Ring*, 536 U.S. at 594.

for death. The judge then weighed the aggravating factors against the one mitigating factor that he found and concluded that a death sentence was appropriate.⁶⁰

Before the Supreme Court, Ring argued that even though the statute authorized the punishment of death for first degree murder, that punishment could not have been imposed without the additional fact finding made by the judge.⁶¹ The Court agreed and determined that the Arizona system violated the Sixth Amendment.⁶²

In making this determination, the Court reiterated that the *Apprendi* Rule inquiry is one not of form but of effect.⁶³ While technically the statute authorized a punishment of death for the crime of first degree murder, the “defendant’s death sentence required the judge’s factual findings.”⁶⁴ Because of this, the finding by the judge of an aggravating circumstance exposed Ring to a greater punishment than the jury verdict alone authorized.⁶⁵ The finding of an aggravating factor acted as “the functional equivalent of an element of a greater offense,” and the Sixth Amendment requires that it be found by a jury.⁶⁶ In this way, *Ring* made the definition of a “crime” in non-capital cases applicable to capital cases as well. Therefore, murder plus one aggravator is a crime separate from simple murder and the Sixth Amendment requires that a jury must decide whether the defendant is guilty of that greater offense. In his *Ring* concurrence Justice Scalia, chief architect of the reversion to the original view of the scope of the jury trial right which existed at the founding, makes it absolutely clear that *Ring* is not about capital sentencing. “While I am, as always, pleased to travel in Justice Breyer’s company, the unfortunate fact is that today’s decision has nothing to do with jury sentencing.”⁶⁷ It is about who finds someone guilty of a capital crime.

In *Sattazahn v. Pennsylvania*,⁶⁸ the United States Supreme Court confronted another challenge to a death sentence and reiterated that murder with an aggravating factor is a different crime from murder without any aggravating factors.⁶⁹ The challenge in *Sattazahn* was based, not on the Sixth Amendment right to a jury trial, but, on the Fifth Amendment protection against Double Jeopardy.⁷⁰ The case is

60. *Id.* at 595.

61. *Id.* at 595.

62. *Id.* at 609.

63. *Id.* at 602, 604.

64. *Id.* at 603 (quoting *Arizona v. Ring*, 200 Ariz. 267, 279 (2001)).

65. *Id.* at 604.

66. *Id.* at 609 (quoting *Apprendi*, 530 U.S. 466, 494, n.19).

67. *Id.* at 612.

68. *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003).

69. *Id.* at 111.

70. *Id.* at 103.

relevant to Sixth Amendment jurisprudence because, in deciding Sattazahn's Fifth Amendment claim, the Court confronted the issue of what constitutes a capital offense, and in doing so, clarified that *Ring* stood for the principle that murder where death is a possible punishment is a different crime than murder with life imprisonment as the most severe punishment.⁷¹

Sattazahn was charged with murder after a restaurant manager was killed during a robbery.⁷² The State gave notice of its intent to seek the death penalty.⁷³ The State alleged two aggravating factors.⁷⁴ The jury found Sattazahn guilty and recommended a sentence of death.⁷⁵

In addressing the issue of what constitutes an "offense" for double jeopardy purposes, the Court addressed the implications of *Apprendi* and *Ring* on capital proceedings.⁷⁶ Justice Scalia stated "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death."⁷⁷ Justice Scalia explained that there was no "principled reason" to distinguish what constitutes an offense under the Sixth Amendment and what constitutes an offense under the Fifth Amendment.⁷⁸ Therefore, "If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).'"⁷⁹

Justice Scalia reiterated that, following *Ring*, "'murder plus one or more aggravating circumstances' is a separate offense from 'murder' *simpliciter*."⁸⁰ It is "properly understood to be a lesser included of-

71. See *id.* at 111. The authors recognize that only Justices Thomas and Rehnquist joined Part III of Justice Scalia's opinion for the Court, which is the part in which the offense discussion occurs. However, it is reasonable to assume that Justices Stevens, Souter, and Ginsburg, members of the *Apprendi* majority, would have joined Part III had they not dissented from the Fifth Amendment holding.

72. *Id.* at 103.

73. *Id.* at 105.

74. *Id.* (The aggravating factors were commission of the murder while in the perpetration of a felony (robbery) and significant history of felony convictions involving the use or threat of violence to the person. The second aggravating factor was based on guilty pleas entered after the defendant's first trial but before the second trial.).

75. *Id.*

76. *Id.* at 112 (addressing the double jeopardy application to capital sentencing issue, which Justices Thomas and Rehnquist joined); *id.* at 116 (O'Connor, J., concurring) (declining to extend the application of *Apprendi* any further.).

77. *Id.* at 111.

78. *Id.*

79. *Id.* at 112.

80. *Id.*

fense of 'first-degree murder plus aggravating circumstance(s).'

⁸¹ The Court ultimately concluded the Double Jeopardy clause did not bar the state from trying the defendant for aggravated first degree murder after he had been convicted of first degree murder at his first trial, but the jury could not reach a unanimous verdict on aggravated first degree murder.⁸²

As a result of *Ring* and *Sattazahn*, it is clear that what is currently referred to as a capital sentencing proceeding is truly a continuation of the guilt phase. The jury is not merely finding aggravating factors in order to impose a greater sentence—they are finding the facts necessary to convict the defendant of a greater crime: Aggravated First Degree Murder. Upon such a conviction, the death penalty becomes a sentencing option. Under murder simpliciter, or murder of an ordinary person with the specific intent to kill, the death penalty is simply not available as a punishment.

PART TWO: CHANGES FOLLOWING *RING*

Following *Ring*, First Degree Murder is no longer a capital crime in North Carolina. By definition, upon conviction of First Degree Murder the only sentence a defendant is exposed to is life without parole.⁸³ The only way for a defendant to be exposed to a sentence of death is for the jury to find beyond a reasonable doubt that an aggravating factor exists.

It is critical to understand this basic shift in the definition of what crime is considered a capital offense, as the change in definition is the reason that other changes must take place. Above all else, the core principle of *Ring* is that "Capital Murder" or "Aggravated First Degree Murder" is a crime which is separate from and greater than "First Degree Murder" or "Murder Simpliciter." The differentiating element between First Degree Murder and Aggravated First Degree Murder is the finding of one death eligibility fact. In a memorable line from his *Ring* concurrence, Justice Scalia makes it clear that it matters not what the legislature chooses to call the fact separating First Degree Murder from Aggravated First Degree Murder. "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amend-

81. *Id.*

82. *Id.* at 112-13. See *id.* at 116 (O'Connor, J., concurring) (not agreeing with Scalia's opinion of *Ring*); *id.* at 126 (Ginsburg, J., dissenting) (concluding that "Sattazahn's case was fully tried and the court, on its own motion, entered a final judgment—a life sentence—[and] terminat[ed] the trial proceedings").

83. *State v. Williams*, 317 N.C. 474, 298 S.E.2d 645 (1983); see also N.C.P.I.—CRIM. 150.10, 28 (2007) ("On the other hand, if you unanimously find from the evidence that none of the aggravating circumstances existed, . . . you would answer Issue One, 'No.' If you answer Issue One, 'No,' . . . you must recommend that the defendant be sentenced to life imprisonment.").

ment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”⁸⁴

Thus, upon a finding of a death eligibility factor, a defendant is then exposed to two possible punishments, life without parole or death.

A. Notice and Bills of Particulars

The Due Process Clause of the Fourteenth Amendment requires the State to give a defendant reasonable notice of what crime the State contends the defendant committed.⁸⁵

[I]n all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law, where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offense, so that he may appear in court prepared to meet every feature of the accusation against him.⁸⁶

Following *Apprendi*, the pertinent question became, “What is the defendant entitled to notice of?” Justice Scalia answers that question in what the authors believe is the most important sentence in the entire Sixth Amendment line of cases: “The jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.”⁸⁷ Therefore, the Due Process Clause requires notice of “the crime the State actually seeks to punish,”⁸⁸ which can only be provided if the prosecutor divulges before trial what death eligibility factors the state seeks to submit to a jury.

One possible means of providing notice to the defendant of what he is being charged with is through the use of a Bill of Particulars. Section 15A-925 of the North Carolina General Statutes allows the defendant to file a motion asking that the trial court require the State to file a Bill of Particulars specifying information “necessary to enable the defendant adequately to prepare or conduct his defense.”⁸⁹

84. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

85. *Hodgson v. Vermont*, 168 U.S. 262 (1897).

86. *Id.* at 269.

87. *Blakely*, 542 U.S. at 306-307.

88. *Id.*

89. N.C. GEN. STAT. § 15A-925(c).

In *State v. Taylor*,⁹⁰ the North Carolina Supreme Court held that the State may not be compelled to divulge before the trial the aggravator or aggravators upon which it relies to seek a sentence of death. The North Carolina Supreme Court stated, "Although some other states which also leave the question of punishment to the jury do require the prosecution to provide evidence to defendant of the aggravating circumstances the State will pursue, such a requirement is purely statutory. . . . Our legislature has not enacted such a requirement."⁹¹ The rationale was that aggravators were sentencing factors only and a defendant is not entitled to know in advance facts affecting the sentence in a case as opposed to knowing all elements of a crime.⁹² We believe that *State v. Taylor*⁹³ cannot withstand *Ring*'s conversion of one offense characteristic aggravator from a sentencing factor into an element of the greater crime of Aggravated First Degree Murder with One Aggravator. Since the finding of one aggravator by a jury beyond a reasonable doubt is an essential element of Aggravated First Degree Murder, in the post-*Ring* world a defendant is entitled to know what crime he is being tried for: Is it Aggravated First Degree Murder with the Murder being committed against a policeman? Or possibly, Aggravated First Degree Murder with the aggravator being that the killing occurred during the commission of armed robbery, burglary, kidnapping, etc.

The Bill of Particulars statute requires the prosecution to divulge "any or all of the items of information requested [in the motion for a bill of particulars which] are necessary to enable the defendant adequately to prepare or conduct his defense."⁹⁴ Therefore, following *Ring*, the State is required to divulge aggravators it contends supports the conviction of a crime exposing a defendant to death, even though *State v. Taylor*⁹⁵ determined the State was not required to do so.

B. *Death Eligibility Factors and Death Selection Factors*

In the Introduction, the authors stated that only offense characteristics (including characteristics of the victim, such as whether the victim is a police officer or a government official) can serve to elevate the crime of First Degree Murder to the crime of Aggravated First Degree Murder. Therefore, the current list of aggravating factors listed in N.C. Gen. Stat. section 15A-2000(e) needs to be divided into two lists of factors: death eligibility factors and death selection factors. In Ap-

90. *State v. Taylor*, 304 N.C. 249, 257, 283 S.E.2d 761, 768 (1981).

91. *Id.*

92. *See State v. Hunt*, 357 N.C. 257, 275-76, 582 S.E.2d 593, 605-06 (2003).

93. *Taylor*, 304 N.C. 249, 283 S.E.2d 761.

94. N.C. GEN. STAT. § 15A-925(c).

95. *Taylor*, 304 N.C. at 257, 283 S.E.2d at 768.

pendix A, the authors have divided the current list of aggravators N.C. Gen. Stat. section 15A-2000(e) into the two recommended categories.

Basically, any aggravator which describes a status or characteristic⁹⁶ of the defendant may not serve as an eligibility factor necessary to convict a defendant of Aggravated First Degree Murder. This is because, as Professor Berman suggests, “[t]he jury trial right should be understood to concern offense conduct and not offender characteristics because the state defines ‘crimes’ and accuses and prosecutes based on what persons do and not based on who they are. . . . In short, an essential offense/offender distinction should inform the jury trial right.”⁹⁷ This fundamental principle appears in many contexts in the Constitution. The Bill of Attainder Clause protects citizens against legislation punishing them based on their heritage.⁹⁸ The Equal Protection Clause guarantees that laws are applied evenly to all groups.⁹⁹ The First Amendment guarantees that no person is punished based on their particular religious beliefs or what they say as opposed to what they do.¹⁰⁰

The most prominent offender characteristic is the fact of a prior crime of violence. As Justice Breyer states in his *Almendarez-Torres* decision, “[R]ecidivism is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence.”¹⁰¹ Since a prior conviction of violence is the classic offender characteristic,¹⁰² the authors believe it can no longer serve as an eligibility factor used to convict a defendant of Aggravated First Degree Murder.¹⁰³

96. Or if the factor implies a characteristic of the defendant, such as “[t]he capital felony was committed by a person lawfully incarcerated.” N.C. GEN. STAT. § 15A-2000(e)(1).

97. Berman, 17 FED. SENT’G REP. at 89.

98. U.S. CONST. art. I, § 9, cl. 3; see also *id.* § 10, cl. 1.

99. U.S. CONST. amend XIV.

100. U.S. CONST. amend I. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (“The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.’ A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.”) (internal citations omitted).

101. *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998).

102. See N.C. GEN. STAT. § 15A-2000(e)(3) (2007).

103. In *Almendarez-Torres*, the Court held that a prior conviction was not an element of the offense but rather a sentencing factor. *Almendarez-Torres*, 523 U.S. at 246. While the authors recognize that *Almendarez-Torres* has not been overruled, its continued validity has been questioned by the Court. See *Monge v. California*, 524 U.S. 721, 741 (Scalia, J., dissenting) (“[The *Almendarez-Torres*] holding is in my view a grave constitutional error affecting the most fundamental of rights.”); *Shepard v. United States*, 544 U.S. 13, 27 (2005) (Thomas, J., concurring) (“*Almendarez-Torres* . . . has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”).

The Constitution frames the jury trial right in terms of 'crimes,' which are the basis for a 'prosecution' of 'the accused.' This language connotes that the jury trial right attaches to all *offense conduct* for which the state seeks to impose criminal punishment, but the language also connotes that the jury trial right does not attach to any *offender characteristics* which the state may deem relevant to criminal punishment.¹⁰⁴

Therefore, in our opinion, if the only aggravating factor is a prior conviction of violence, following *Ring*, a defendant may not be exposed to death since he cannot be convicted of Capital Murder. However, if there are other eligibility factors found, the jury may use the prior crime of violence as a selection factor.

C. *Turning Noncapital Murder into Capital Murder After the Fact*

In *State v. Burke*¹⁰⁵ and *State v. Squires*,¹⁰⁶ the North Carolina Supreme Court approved the practice of prosecutors turning non-capital cases into capital cases by trying a defendant for a crime after he was arrested for the murder but before being tried for murder. After *Ring*, such manipulation of the crime the defendant is accused of violates the separation of powers clause of the North Carolina Constitution¹⁰⁷ and the ex post facto clause of the United States Constitution.¹⁰⁸

The authors first contend that, as set forth above, prior convictions can no longer be used as a death eligibility factor. But, regardless of that argument, non-capital murder and capital murder constitute two different crimes. Suppose a defendant kills someone on January 1, at which time he has no prior convictions and no other aggravating factors exist. The worst sentence he could face upon conviction would be life without parole because he could only be charged with First Degree Murder. However, a common practice has been to delay the trial of the murder case if there is a pending violent felony charge which could be tried first. Suppose the District Attorney tries the defendant for Armed Robbery on June 1 and then contends that a death eligibility aggravator exists. Under that scenario, what is the date of the offense of Aggravated First Degree Murder? It would have to be June 1, when the defendant was already in jail, because all the essential

104. Douglas A. Berman, 17 FED. SENT'G REP. at 89 (emphasis in original).

105. *State v. Burke*, 343 N.C. 129, 159, 469 S.E.2d 901, 916 (1996) ("[I]t is not necessary that a defendant be convicted before the commission of the capital murder so long as defendant has been convicted of the violent felony prior to the capital trial.").

106. *Squires*, 357 N.C. at 529, 591 S.E.2d at 837.

107. N.C. CONST. art. I, § 6.

108. U.S. CONST. art. I, § 9; see also N.C. CONST. art. I, § 16.

elements of Capital Murder did not exist until the defendant was convicted of the Armed Robbery charge.

Only the legislature can determine the parameters of punishment for a crime.¹⁰⁹ A prosecutor manipulating the timing of a conviction in order to support a death eligibility factor violates the legislative dictate of what punishment applies to a crime in violation of the separation of powers clause of the North Carolina Constitution. The *ex post facto* clause prohibits states from enacting a law that “changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.”¹¹⁰ The prosecutor should not be able to achieve what the legislature could not. Therefore, the maximum possible sentence a defendant can face should be set as of the date of the killing, not a date six months later when the State tries the defendant for another crime.

D. *Application of the Rules of Evidence to Eligibility Factor Determination*

Current law in North Carolina is that the Rules of Evidence do not apply at the sentencing phase of a capital trial.¹¹¹ *Ring* overrules this precedent and make the Rules of Evidence applicable against the State for the determination of the death eligibility factor. The rationale for this change is that, after *Ring*, the determination of the eligibility factor which exposes a defendant to death is part of the trial of an offense greater than First Degree Murder because the eligibility factor is an element of the greater offense.¹¹² Therefore, under N.C. Gen. Stat. section 8C-1, Rule 101, the Rules of Evidence apply to the determination of guilt to Aggravated First Degree Murder since it is, in effect, a trial of a substantive offense. Rule 101 states, “These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101.”¹¹³ Under Rule 1101, the Rules are inapplicable during sentencing.¹¹⁴ As the determination of the eligibility factor is no longer a matter of sentencing, or any other exception to the Rules of Evidence, the Rules must apply to its determination. Once the eligibility factor has been found, the defendant has been convicted of Aggravated First Degree Murder.

109. *State v. Gardner*, 315 N.C. 444, 471, 340 S.E.2d 701, 718 (1986).

110. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

111. *State v. Raines*, 362 N.C. 1, 17, 653 S.E.2d 126, 136 (2007) (“[T]he Rules of Evidence are not controlling in a capital penalty proceeding.”); *See State v. Rose*, 339 N.C. 172, 200-01, 451 S.E.2d 211, 227-28 (1994), *cert. denied*, 515 U.S. 1135 (1995).

112. *Sattazahn*, 537 U.S. at 112 (stating that first degree murder is “properly understood to be a lesser included offense of ‘first-degree murder plus aggravating circumstance(s).’”).

113. N.C. R. EVID. 101.

114. N.C. R. EVID. 1101.

The Rules of Evidence would not have to apply to selection factors or mitigating factors. These factors go only to sentencing. There is no constitutional requirement that selection factors or mitigating factors be treated in the same manner as elements of the offense. If the determination of whether an eligibility factor exists is made during a "sentencing phase," as it is currently referred to in North Carolina, the trial court would be required to apply the Rules of Evidence to some evidence at that proceeding but not all of the evidence.

E. Narrowing During the Guilt Phase

As only one eligibility factor is a required element necessary to convict a defendant of Aggravated First Degree Murder, its determination logically should take place in the first or guilt phase of the capital proceeding.¹¹⁵ By placing the determination of an eligibility factor in the first part of the trial, the narrowing requirement of the Eighth Amendment would be met because the jury would be able to determine if the defendant was guilty of Aggravated First Degree Murder or the lesser offense of First Degree Murder based on the evidence presented. *Only* those convicted of Aggravated First Degree Murder would be eligible for the death penalty.

Placing the determination of an eligibility factor in the guilt phase would simplify the procedure used to convict a defendant of Aggravated First Degree Murder. The Rules of Evidence would apply to its determination in the same way they apply to all criminal trials and evidence in support of all the elements of the offense would be presented at one time. Also, once the jury had determined that the defendant was guilty of Aggravated First Degree Murder, they no longer have a constitutional role to play in the trial. Under North Carolina statutory law, the jury would have a role to play in sentencing because they are called upon to weigh the selection factors and the mitigating factors and recommend a sentence.

By moving the determination of the eligibility factor from the sentencing phase to the guilt phase, the entire trial procedure for Aggravated First Degree Murder would be the same as trials for other offenses. The guilt phase of the trial would determine whether a defendant should be convicted of a crime and, if so, which one, and the sentencing phase of the trial would determine the appropriate punishment following that conviction. The problem of having to conduct

115. *Ring*, 536 U.S. at 612-613 ("Those States that leave the ultimate life-or-death decision to the judge may continue to do so by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.").

both a hearing on an element of a crime and on the sentence for that crime would no longer exist.

PART THREE: SUMMARY AND CONCLUSION

A. *Summary*

The authors believe that *Ring's* reversion to principles in existence at the founding requires a wholesale revision of North Carolina's capital trial process. We will conclude the article with a summary of the basic principles which North Carolina's new capital jurisprudence must embrace.

- 1) The State must give the defendant reasonable notice of "the crime the State actually seeks to punish" by informing the defendant before trial of which eligibility factors the State contends may be used to convict the defendant of Aggravated First Degree Murder, thus making him eligible for a sentence of death.
- 2) The current list of aggravating factors contained in N.C. Gen. Stat. § 15A-2000(e) must be divided into two lists. The first list consists of facts which are offense characteristics and victim characteristics. The second list may contain offender characteristics as well as offense and victim characteristics.
- 3) The State may no longer elevate a murder which was non-capital when committed into a capital murder when tried.
- 4) The Rules of Evidence must apply to the determination of the death eligibility factor since it is an essential element of the greater offense and its determination is a matter for trial in the ordinary sense of the term.
- 5) During the trial of a capital defendant, the determination of the death eligibility fact must take place during the guilt phase since it is an element of the greater substantive offense of Aggravated First Degree Murder.

B. *Conclusion*

More than any other area of the criminal law, capital jurisprudence is a morass, made that way by decades of complicated rules superimposed on top of each other. There is currently an inherent "tension" in the process related to trying a defendant for a substantive crime simultaneously with conducting a sentencing hearing. Naturally, there are things, which are relevant to sentencing, which focus on traits of the defendant, which are extremely prejudicial to a defendant during the phase where the inquiry is whether or not he committed a capital crime. *Furman* requires an objective process to determine guilt. *Lockett* requires a subjective process to select an appropriate sen-

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tence. *Ring* supplies the framework to reconcile the predicament which occurs when conducting both an objective proceeding and a subjective one at the same time. By trying death eligibility factors at phase one and trying death selection factors at phase two, a defendant is not placed in an impossible situation of disputing his guilt and presenting evidence which implies his guilt at the same time, such as evidence of intoxication.

There has been very little litigation in North Carolina concerning the possible benefits of *Ring* for capital defendants.¹¹⁶ Hopefully, that will change and the capital defense bar will use the Supreme Court's reversion to the Founder's understanding of the Sixth Amendment to benefit their clients.

116. Most litigation related to *Ring* has involved challenges to the short-form indictment as not providing sufficient notice of the crime. See *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003); see also *Squires*, 357 N.C. 529, 591 S.E.2d 837.

**APPENDIX A: N.C. GEN. STAT. § 15A-2000(e) CAPITAL
AGGRAVATING FACTORS CLASSIFIED**

<i>Aggravating Factor</i>	<i>Is the factor Offender- or Offense-Based?</i>	<i>Eligibility or Selection Factor?</i>	<i>Why it can/cannot be used as a death-eligibility factor</i>
(1) The capital felony was committed by a person lawfully incarcerated.	Mixed	Selection	While it refers to the circumstances of the offense, it implicates characteristics of the defendant and improperly injects recidivism before the jury. Therefore, it is not valid as an eligibility factor but would be valid as a selection factor.
(2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.	Offender	Selection	While recidivism is valid as a selection factor, it should not be used as an eligibility factor because it punishes the defendant for who he is when the crime was committed.
(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.	Offender	Selection	While recidivism is valid as a selection factor, it should not be used as an eligibility factor because it punishes the defendant for who he is when the crime was committed.

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<i>Aggravating Factor</i>	<i>Is the factor Offender- or Offense-Based?</i>	<i>Eligibility or Selection Factor?</i>	<i>Why it can/cannot be used as a death-eligibility factor</i>
(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.	Mixed	Both	As to avoiding or preventing lawful arrest, it describes the circumstances surrounding the crime and the purpose in committing it. Therefore, as to the first part, it is a valid eligibility factor. As to escape from custody, while the factor refers to the circumstances of the offense, it implicates characteristics of the defendant and improperly injects recidivism before the jury. Therefore, as to the second part, it is not valid as an eligibility factor but valid as a selection factor.
(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.	Offense	Eligibility	Describes the circumstances surrounding the crime and the purpose in committing it. Therefore, it is a valid eligibility factor.

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<i>Aggravating Factor</i>	<i>Is the factor Offender- or Offense-Based?</i>	<i>Eligibility or Selection Factor?</i>	<i>Why it can/cannot be used as a death-eligibility factor</i>
(6) The capital felony was committed for pecuniary gain.	Offense	Eligibility	Describes the circumstances surrounding the crime and the purpose in committing it. Therefore, it is a valid eligibility factor.
(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.	Offense	Eligibility	Describes the circumstances surrounding the crime and the purpose in committing it. Therefore, it is a valid eligibility factor.
(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.	Offense	Eligibility	Describes the circumstances surrounding the crime and the purpose in committing it. Therefore, it is a valid eligibility factor.

<i>Aggravating Factor</i>	<i>Is the factor Offender- or Offense-Based?</i>	<i>Eligibility or Selection Factor?</i>	<i>Why it can/cannot be used as a death-eligibility factor</i>
(9) The capital felony was especially heinous, atrocious, or cruel.	Offense	Selection	While related to the offense, this factor can not withstand constitutional scrutiny as an eligibility factor because it is unconstitutionally vague when used as an element of a crime rather than a sentencing factor. May still permissibly be used as a selection factor.
(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.	Offense	Selection	While related to the offense, this factor can not withstand constitutional scrutiny as an eligibility factor because it is unconstitutionally vague when used as an element of a crime rather than a sentencing factor. May still permissibly be used as a selection factor.
(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.	Offense	Eligibility	Describes the circumstances surrounding the crime. Therefore, it is a valid eligibility factor.