



THE DEATH PENALTY — WHO DECIDES, JUDGE OR JURY?

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Thirty-eight states, including Colorado, have the death penalty. Colorado has had the death penalty since 1890, though it was repealed from 1967-1974. Until 1995, juries determined the sentence in capital cases. In 1995, three-judge panels became the deciding body. Colorado currently has five men on death row, and a three-judge panel sentenced three of those men.

On June 24, 2002, the United States Supreme Court ruled Arizona's death penalty unconstitutional. The U.S. Supreme Court concluded that if a defendant's sentence can increase based on a finding of fact, then that fact must be found by a jury. This *Issue Brief* provides a summary of how the death penalty is decided in Colorado and other states.

Colorado Law

Three-judge panel. Prior to 1995, the death penalty was imposed by a unanimous jury. In 1995, the Colorado General Assembly instituted the three-judge panel. Under the statute, when a defendant is convicted by a jury of a class 1 felony (committed on or after July 1, 1995), a panel of three judges conducts a separate sentencing hearing. The panel determines the sentence of death or life in prison, unless the defendant is under 18 years of age at the time of the offense or is mentally retarded. In these circumstances the state cannot impose the death penalty.

The three-judge panel consists of the judge who presided at the trial and two additional district court judges designated by the Chief Justice of the Colorado

Supreme Court. The panel must convene within 60 days of the verdict. In addition to hearing evidence presented by both the defense and the prosecution, the three-judge panel must consider the transcripts of the trial. The panel must unanimously decide to impose a sentence of death based upon the following questions:

- T Has one aggravating factor been proved?
- T Do sufficient mitigating factors exist which outweigh any aggravating factors?

In order to impose the death sentence, the panel must unanimously find one aggravating factor that mitigating factors do not outweigh. Possible *aggravating factors* include, but are not limited to:

- ! the defendant was already in prison, convicted for a class 1, 2, or 3 felony;
- ! the defendant has a class 1 or 2 felony on his or her record;
- ! the defendant killed a peace officer, firefighter, judge, elected official or federal law enforcement officer;
- ! the defendant killed a person who was kidnapped or being held hostage;
- ! the defendant was party to an agreement to kill the victim; or
- ! the defendant ambushed the victim or used an explosive device.¹

¹ For a complete listing of aggravating factors refer to Section 18-1.3-1201 (5), C.R.S.

Possible *mitigating factors* include, but are not limited to:

- ! the defendant's age;
- ! the defendant's capacity to understand that what he or she did was wrong;
- ! any unusual and substantial distress that the defendant may have been under; or
- ! the defendant was a lesser participant in the crime than his or her accomplices.²

Colorado's death row. Colorado currently has five inmates on death row. A three-judge panel sentenced three of those individuals. Since 1995, three-judge panels have sentenced five individuals to life imprisonment.

The Death Sentence in Other States

Capital sentencing decisions. Thirty-eight states, including Colorado, have the death penalty. Like Colorado, five states rely on a single judge or a panel of judges for sentencing.³ In three states, juries provide a recommendation to a judge and the judge makes the final sentencing decision.⁴ Thirty states rely solely on a jury, and each of the thirty states requires a unanimous decision in order to impose the death penalty.⁵

Federal Case Law

In *Walton v. Arizona* (1990), Walton challenged Arizona's death penalty law claiming that Arizona's sentencing scheme violated the Sixth Amendment right to a jury trial. Under Arizona law, the judge was allowed, without a jury, to find aggravating factors necessary to sentence the defendant to death instead

of life imprisonment. The U.S. Supreme Court held that Arizona's sentencing structure was compatible with the Sixth Amendment right to a jury trial in capital cases because aggravating factors were sentencing considerations and not elements of the crime.

However, in 2000, in a non-death penalty case in New Jersey (*Apprendi v. New Jersey*), Apprendi challenged his enhanced sentence for possession of a firearm because the sentencing judge, and not a jury, found that his crime had been motivated by racial hatred — an element of the crime. The U.S. Supreme Court ruled that if a defendant's sentence can increase based on a finding of fact (including an aggravating factor), that fact must be found by a jury, beyond a reasonable doubt, in order to be consistent with the Sixth Amendment.

Ring v. Arizona. The U.S. Supreme Court addressed the conflict between the *Walton* and *Apprendi* decisions in *Ring v. Arizona*. On a 7-2 decision, the Court ruled that it was unconstitutional for a judge to find additional facts that would increase a defendant's sentence when those facts include elements of the crime.⁶ The Court held that a defendant is entitled to a jury determination of any fact on which the law conditions an increase in his or her maximum punishment, overruling *Walton* in relevant part.

In Arizona, one judge conducts a separate sentencing hearing. Like Colorado, the judge may only impose the death penalty if he or she finds at least one aggravating factor and that no mitigating factors are substantial enough to call for leniency.

² For a complete listing of mitigating factors refer to Section 18-1.3-1201 (4), C.R.S.

³ Arizona, Colorado, Idaho, Montana, and Nebraska.

⁴ Alabama, Delaware, and Florida.

⁵ Arkansas, California, Connecticut, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming and Missouri.

⁶ Justice Ruth Bader Ginsburg delivered the opinion of the court. Justices Stevens, Scalia, Kennedy, Souter, Thomas, and Breyer concurred. Justice Scalia, Kennedy, and Breyer each wrote separate concurring opinions. Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor provided a dissenting opinion.