When does juror "weighing" of factors mean less than meets the eye?

In the sphere of Arizona capital sentencing, a sphere where state courts must instruct jurors that they must "assess" if death is the appropriate penalty, but not instruct that jurors should "find" that mitigation "outweighs" aggravation. So they must assess without finding any facts.

Confused? Imagine how the jurors feel.

Weighing and Non-Weighing

Though something of a misnomer, the term "weighing state" means that the sentencer is only permitted to consider specified "eligibility factors"—Arizona calls them "aggravating factors"—when assessing whether proven mitigation is sufficiently substantial to call for a life sentence when compared to proven eligibility factors.[1] Non-weighing states, on the other hand, allow the sentencer to ultimately consider facts other than or in addition to the "eligibility factors" when making this determination.[2]

Out of the 38 state jurisdictions with death penalty statutes, 25 are "weighing states,"[3] whereas two are hybrid-weighing states;[4] the remainder are "non-weighing" states.[5] Arizona is undeniably a capital sentencing "weighing state."[6]

But if Arizona is such a firmly entrenched weighing state, why then has the Arizona Supreme Court ruled that juries should be not be misled into believing that their function is to "weigh" mitigating and aggravating factors when deciding whether to impose life or death?

The Fear of *Ring IV*

The answer is not hard to discern: The Arizona Supreme Court is not at all interested in seeing the movie *Ring IV: Apprendi's Final Revenge* any time soon. In this futuristic docu-drama, a newly re-constituted United States Supreme Court permanently forecloses any possibility that Arizona, or any other jurisdiction, could return to judge sentencing in capital cases. In that screenplay, the U.S. Supreme Court does so by applying the Sixth and/or Eighth Amendments, along with the Due Process Clause, to the penalty assessment process, thereby requiring that juries find that life or death is the appropriate sentence beyond a reasonable doubt.

Of course, it is true that Arizona's capital sentencing statutes currently require juries to make the life or death decision, but it is only a statutory—not a constitutional—requirement. The U.S. Supreme Court's 2002 decision in *Ring II*[7] was limited in scope, in that it only mandated that Arizona juries find, beyond a reasonable doubt, the existence of aggravating factors.[8] This ruling was based on the Court's determination that the finding that an aggravating factor has been proven is truly a factual finding, absent which a defendant cannot be exposed to the increased punishment of death.[9] And, if a "State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."[10]

This language from *Ring II* has led inexorably to the next legal battleground: the question of whether the process of determining whether mitigation is "sufficiently substantial to call for leniency" in light of found aggravating factors[11] is either all or partly a fact-based process requiring Sixth Amendment jury decision-making based on proof beyond a reasonable doubt.

If answered affirmatively, this would be the death-knell to ever again permitting judge sentencing.

Clearly, the Arizona Supreme Court is not enamored with this prospect, particularly given the dramatic increase in the percentage of cases in which the death penalty is currently being imposed by juries[12] and noticed for appeal. Confronted by these rising figures, the Arizona Legislature in the future might want to rethink the wisdom of having juries impose the sentence in capital cases from a purely pragmatic standpoint. But only if *Ring IV* is never produced.

Baldwin: An Arizona Response

As an insurance policy against this, a unanimous Arizona Supreme Court issued *State ex rel. Andrew Thomas v. Hon. Warren Granville/Baldwin, Real Party in Interest ("Baldwin")*.[13] The main question resolved was that the defense does not bear the burden of proving that mitigation is sufficiently substantial to call for leniency; indeed, neither party bears the burden of persuasion on this matter.[14]

As an ancillary holding, the Court struck down an instruction advising that if any juror had "a doubt" about whether death was the appropriate penalty, that doubt should be resolved in favor of life, on the grounds that it improperly suggested that the State had the burden of proving death is the appropriate sentence beyond "any doubt whatsoever."[15]

Finally, and perhaps most important, the *Baldwin* Court made plain that it did not view the determination of whether mitigation was sufficiently substantial to call for leniency as a fact-based question. To the contrary, the Court described this process as "a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist."[16]

To this end, the Court decided that it was henceforth discouraging any instructions suggesting that the jury find that mitigation "outweighs" aggravation. Though acknowledging that the Court had itself at times referred to the evaluation of mitigation as a "weighing" process,[17] the Court dismissed this historical line and concluded that references to "weighing" when describing mitigation assessment in jury instructions are now generally *verboten*, because our statutes do not expressly use that terminology.[18]

The Fact of the Matter

Arizona now stands in the small majority of jurisdictions that have considered the issue and rejected the notion that the final penalty determination is a fact-finding process.[19]

By resolving this question on a purely statutory-constructionist level, the Arizona Supreme Court effectively distin-

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guished itself from the one weighing jurisdiction, Nevada, which came to the opposite conclusion based upon the particular nuances of that state's capital sentencing statute.

Specifically, the Nevada statute requires that juries "find" that there are no mitigating circumstances sufficient to outweigh aggravating circumstances"[20] rather than "take into account" the found aggravating and mitigating circumstances and then "determine" the appropriate sentence, as is the case in Arizona's statutory scheme.[21]

Colorado and Missouri, the two other jurisdictions reaching the same conclusion as Nevada, are non-weighing states and as such are more readily distinguishable because both have key differences in the structure of their capital sentencing processes.[22]

U.S. Supreme Court Analysis

When the United States Supreme Court finally addresses this issue head on, it is doubtful that the Court will be so particular in parsing the nuances of a state statute's linguistic choices. As it previously warned in *Apprendi*, "The relevant inquiry is one not of form, but of effect."[23]

Moreover, the Court recently reasserted that in "*all* capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence."[24] Thus, the issue of whether a jury is asked to "find" or "assess" if death is the appropriate penalty may fall away as a matter of semantics to the larger issue—whether the Court views the weighing process as one that results in a finding upon which the legislature conditions an increase in the maximum punishment. That issue is the touchtone under *Ring II* that accords the Sixth Amendment right to a jury trial.[25]

Sixth Amendment

It is unlikely that the U.S. Supreme Court will find that the weighing process is such a condition of death eligibility for Sixth Amendment purposes primarily because it defies logic—at least in the weighing states, such as Arizona. Under our sentencing statutes, A.R.S. §§ 13-703 and 13-703.01, after a jury returns a verdict finding at least one aggravating factor proved beyond a reasonable doubt, the maximum life sentence for which the defendant becomes eligible at the conclusion of the guilt phase[26] is expanded to include death. The defendant enters the penalty phase with the already-enhanced sentencing range of life or death, and no further penalty phase finding can enlarge that range.[27]

If anything, a jury's consideration of proffered mitigating circumstances only potentially removes that defendant from the pool of death-eligible offenders if the jury concludes that the mitigation is sufficiently substantial to call for leniency—a finding akin to the *Enmund/Tison* requirement.[28] Some jurisdictions have already applied this rationale.[29]

Moreover, the certainty with which a jury actually imposes a death sentence does absolutely nothing to narrow the pool of defendants who receive a death sentence, as mandated by *Furman v. Georgia*.[30] Whether and how the defendant actually receives the death penalty may present myriad issues under the Eighth Amendment, but the Sixth Amendment has been satisfied at the time that the jury finds that at least one aggravating factor has been proved.[31]

Eighth Amendment

On June 26, the U.S. Supreme Court affirmed, in *Kansas v. Marsh*,[32] that the Eighth Amendment does not require that there be any burden of persuasion on the weighing process, and it is unlikely that the Court will impose any such burden on the level of certitude required of a jury when imposing a death sentence in the future.[33]

In *Marsh*, the Court upheld a Kansas statute permitting imposition of the death penalty whenever the State proved beyond a reasonable doubt that mitigation did not outweigh found aggravating factors, including situations in which the mitigating and aggravating factors were in "equipoise." Though the language of the Kansas statute included the reasonable doubt standard, the five-justice majority made unmistakably clear that, pursuant to its long line of capital sentencing cases, in particular *Walton v. Arizona*,[34] "a state death penalty statute may [constitutionally] place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances." *A fortiori*, the Kansas statute

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passed constitutional muster, because it provided the enhanced protection not only that the State prove that the mitigation does not outweigh the aggravating factors, but that it do so beyond a reasonable doubt.

The Court emphatically rejected arguments that the Eighth Amendment imposes restrictions on the manner in which aggravating and mitigating circumstances be considered. This suggests that the Court (at least the 5-justice majority) is not, at least now, amenable to imposing the reasonable doubt requirement on a jury's level of certitude in imposing a death sentence. To do so would contravene decades of case law reflecting the Court's unwillingness to tread on state independence in this area.

Indeed, as noted in *Marsh*, the Supreme Court has repeatedly stated that the Eighth Amendment is not offended by the absence of guidelines on how to conduct the weighing process in capital sentencing proceedings.[35] States have been left free to "shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence."[36] To alter this historic line of reasoning by permitting states to set any standard for the actual weighing process only so long as the trier of fact comes to its decision "beyond a reasonable doubt" (imposing the standard on the level of certitude) does little to decrease the possibility that the death penalty will be imposed in a "freakish" and "wanton" manner.[37]

In addition to contravening the Court's own pronouncements, imposing a reasonable doubt standard would not be justified by the reasoning of either lower federal courts or state courts. Federal courts have remained steadfastly corseted within the Court's principle that "there is no federal constitutional obligation for a jury in weighing matters in aggravation or mitigation in a capital case to find the aggravators outweigh the mitigators beyond a reasonable doubt."[38] And most federal courts that either have required or suggested the use of a burden of persuasion in the capital weighing process have rejected the reasonable doubt standard in favor of a lesser standard.[39]

As for the 38 state jurisdictions with the death penalty, of the 25 purely "weighing states" and two hybrid-weighing states, six have statutes that incorporate a burden of persuasion of beyond a reasonable doubt.[40] The majority of the remaining weighing states that have considered federal constitutional challenges to the absence of a burden of persuasion in their statutes have rejected such claims.[41] And those states that have imposed some burden of persuasion under their own state constitutions have not necessarily placed that burden at beyond a reasonable doubt.[42]

Guidance From *Marsh*

There was some expectation that the language in *Marsh* might shed light on how the Court views the weighing process for purposes of determining whether mitigation is a "fact finding" process. But the hopes for such a preview were dashed. Though the opinion is peppered with references to the "weighing" process and to what "weight" should be given to aggravating and mitigating factors, the Court failed to tip its hand as to whether mitigating circumstances or the ultimate sentencing determination could be viewed as "findings of fact."

The opinion does indicate, however, a continued unwillingness to equate "weighing" with "fact-finding"—a fact that, in time, could break down barriers at the Arizona Supreme Court that bar Arizona jurors, who *live* in a capital "weighing state," from hearing the one word that lives in all of our thoughts and words, but dare not be spoken—"weighing."

Conclusion

Explaining the process of weighing is helpful for jurors in understanding the process they are asked to perform. It is also arguably required under already-existing language from the United States Supreme Court. Because of that, such linguistic reinforcement from the High Court would be beneficial for Arizona.

Moreover, it is unlikely that reintroducing the idea of weighing will diminish the future possibility of returning to a judge-sentencing scheme (if that is what Arizona ultimately wants), because the Supreme Court will not likely be making *Ring IV* any time soon—a movie too scary even for the over-17 crowd.

endnotes

1. *See Brown v. Sanders*, 546 U.S. 1, 4 (2006); *Stringer v. Black*, 503 U.S. 222, 229 (1992).
2. *Sanders,* 546 U.S. at 4; *see State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. 2003) ("As in Colorado, Missouri is considered a non-weighing state because of the discretion given to the jury at this point to impose a life sentence without regard to the weight it gave to aggravators and mitigators found").
3. Generally accepted weighing states include: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Maryland, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee and Wyoming. Not all authorities agree on these categorizations in some cases. For example, recently the Supreme Court defined California as a non-weighing state when it had previously been categorized as a weighing state by other jurisdictions. *See Sanders,* 546 U.S. at 2 (finding that California is a non-weighing state); *and cf. State v. Rizzo*, 833 A.2d 363, 395 n.23 (Conn. 2003) (listing California as a weighing state).
4. Utah and Colorado. Some authorities refer to these states as "non-weighing" states, and some refer to them as "hybrid" states.
5. These are: California, Georgia, Kentucky, Louisiana, Missouri, Oregon, South Carolina, South Dakota, Texas, Virginia and Washington.
6. *See Richmond v. Lewis*, 506 U.S. 40, 47-48 (1992).
7. *Ring v. Arizona ("Ring II")*, 536 U.S. 584 (2002).
8. The Court specifically noted in *Ring II* that the issue was a narrow one and did not include the issues raised in this article. *See Ring II*, 536 U.S. at 597 n.4 ("Ring's claim is tightly delineated. … He makes no Sixth Amendment claim with respect to mitigating circumstances. … Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty."). *Also see id.* at 612-13:

   > [T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

   (Scalia, J., concurring)
9. Pursuant to A.R.S. § 13-703, a jury must find that the State has proven the existence of at least one of 14 enumerated aggravating factors in order to make a defendant death-eligible. These factors include things such as the victim's youthful or advanced age, the defendant's criminal history of serious offenses, the existence of multiple homicide victims, and so forth. Should the jury find at least one aggravating factor has been proven, the trial then moves to the "penalty phase," in which the defendant may present mitigation evidence and the jury makes the life–death decision.
10. *Ring II*, 536 U.S. at 602; *see also id.* at 602-09.
11. This is the statutory standard for deciding whether to impose life or death. For complete statutory language, s*ee infra* note 21.
12. The capital staff attorneys for Maricopa and Pima counties performed an analysis of the number of death sentences imposed in

recent years as compared to past years. Using data collected from various sources, the staff attorneys concluded that juries impose the death penalty between 75 percent and 80 percent of the time, whereas judges previously imposed the death penalty in slightly more than 20 percent of the capital cases before them.

13. 123 P.3d 662 (Ariz. 2005).
14. *Id.* ¶¶ 14, 17, 24.
15. *Id.* ¶ 23.
16. *Id.* ¶ 21.
17. *See, e.g., State v. Hinchey*, 890 P.2d 602, 610 (1995) ("Consideration of aggravating and mitigating circumstances necessarily requires a balancing or weighing. We have consistently stated in our opinions that mitigation must 'outweigh' the aggravating circumstances in order to be sufficiently substantial to call for leniency"), *cert. denied*, 516 U.S. 993 (1995).
18. 123 P.3d 662 ¶ 20.
19. *See Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983) (rejecting application of *In Re Winship)* finding:

    > While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.

    (internal citations omitted) (emphasis in original), *cert. denied*, 464 U.S. 865 (1983); *United States v. Sampson*, 335 F. Supp. 2d 166, 238 (D. Mass. 2004):

    > The sentencing decision in a capital case is … fundamentally different than any other task that a jury is called upon to perform in our criminal justice system. The jury is not acting as a finder of fact. Rather, it is exercising discretion in sentencing that is ordinarily exercised by judges. Whether a jury's sentencing decision is right or wrong is not something that is capable of proof in the traditional sense.

    See also People v. Prieto, 66 P.3d 1123, 1147 (Cal.), *cert. denied*, 540 U.S. 1008 (2003) (rejecting the argument that after *Ring II* the jury must find aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt on the grounds that "the penalty phase determination in California is normative, not factual"); *Oken v. State*, 835 A.2d 1105 (Md. 2003) ("[T]he weighing process is not a fact-finding one based on evidence. … The weighing process is purely a judgmental one, of balancing the mitigator(s) against the aggravator(s) to determine whether death is the appropriate punishment in the particular case), *cert. denied*, 541 U.S. 1017 (2004); *Ex Parte Waldrop v. State*, 859 So. 2d 1181, 1189 (Ala. 2002) (the weighing determination is a "moral or legal judgment" that is wholly subjective and "not susceptible to any quantum of proof"), *cert. denied*, 540 U.S. 968 (2003).
20. *See Johnson v. State,* 59 P.3d 450, 460 (Nev. 2002) (Nevada Supreme Court finds that weighing aggravation and mitigation is "in part a factual determination, not merely discretionary weighing," and subject to *Ring II's* Sixth Amendment requirement, based upon the fact that the capital sentencing statute "requires two distinct findings to render a defendant death-eligible: 'The jury … may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found'") (quoting N.R.S. § 175.554(3) (2005)) (emphasis in original).
21. *See* A.R.S. § 13-703(E):

    > In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances … and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

    See also A.R.S. § 13-703.01(H) (at the penalty phase, "[t]he trier of fact shall determine unanimously whether death is the appropriate sentence").
22. In the Missouri and Colorado schemes, after the jury (1) finds at least one aggravating factor; (2) assesses what, if any, mitigation has been proven; and (3) weighs mitigation against the proven aggravating factors; the jury then (4) considers all of the circumstances to determine if death is the appropriate sentence, and is not bound to consider only the weight assigned to the found aggravating factors and mitigation. Both of these state courts cited to these statutory differences in finding that all the steps leading up to the last step, together, qualified as the "eligibility" stage subject to the Sixth Amendment requirements imposed by *Ring II. See Woldt v. People*, 64 P.3d 256, 264-67 (Colo.) (describing Colorado's four-step process set forth in pre-*Ring II* statutes and concluding that it violates *Ring II*), *cert. denied*, 540 U.S. 938 (2003); *and see* Colorado Revised Statutes Annotated § 18-1.3-1201 (2005). As noted *supra* at note 6, some have dubbed Colorado, like Utah, a "hybrid" state, rather than a purely "non-weighing state."
23. *Apprendi*, 530 U.S. at 494.
24. *Sanders*, 546 U.S. at 4 (emphasis in original).
25. *Ring II*, 536 U.S. at 589.
26. *Id.* at 597.
27. *See Ring II*, 536 U.S. at 604 (the "required finding [of an aggravated circumstance] expose[s] [a defendant] to a greater punishment than that authorized by the jury's guilty verdict") (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (first brackets in original)).
28. Under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), a defendant convicted of felony-murder who did not actually kill the victim cannot receive the death penalty unless it is proved that the defendant at least was a

major participant to the offense who demonstrated reckless disregard for human life. As a constitutional matter, to date, this finding may be made by a reviewing court, and need not be made by the trier of fact, because it is viewed as removing a defendant from the pool of death-eligible offenders rather than placing him into the eligibility pool. *See State v. Ring ("Ring III")*, 204 Ariz. 534, 564-65 (2003).

29. *See, e.g., Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (holding that "the weighing of aggravating circumstances against mitigating circumstances does not increase the punishment … [but instead] ensures that the punishment imposed is appropriate and proportional").

    For an excellent legal discussion clearly delineating this argument, the substance of which this author gratefully acknowledges as having provided inspiration and authority for portions of this article, please see *Whitfield*, 107 S.W.3d at 277-79 (Lymbaugh, C.J., dissenting).
30. 408 U.S. 238 (1972).
31. The argument that a defendant should only become death-eligible after a jury determines that the proven mitigating circumstances are not sufficiently substantial to call for leniency presents potential due process concerns. To say that the final determinant of whether a defendant receives or does not receive the death penalty is whether a particular jury on a given day believes that it should be "merciful" or exhibit "leniency" in the face of other, concrete evidence, smacks of the type of arbitrariness that our capital sentencing systems, in principle, seek to avoid. Though it is true that any jury in Arizona is ultimately free to render its decision based on mercy, at least the capital sentencing statutes demand that the jurors conduct their evaluation and base their decision on defined and discrete evidence. *See Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) ("[T]he 'crucial assumption' underlying the system of trial by jury 'is that juries will follow the instructions given them by the trial judge'") (quoting *Parker v. Randolph*, 442 U.S. 62, 73 (1979)).
32. 548 U.S. ___ (No. 04-1170, 2006).
33. The reasonable doubt argument comes in two varieties: the allegation that the Eighth Amendment demands that aggravators actually outweigh mitigation beyond a reasonable doubt and the claim that, whatever the weighing standard (such as "sufficiently substantial"), the trier of fact's certitude in the result must be beyond a reasonable doubt. *See Rizzo*, 833 A.2d at 399-401, *and Sampson*, 335 F. Supp. 2d at 236 (defining these two categories of claims).
34. 497 U.S. 639, 652 (1990), *overruled on other grounds, Ring II.*
35. *See Buchanan v. Angelone*, 522 U.S. 269, 276-77 (1998) ("But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. And indeed, our decisions suggest that complete jury discretion is constitutionally permissible"); *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision"); *McCleskey v. Kemp*, 481 U.S. 279, 313 n.37 (1987) ("[The] discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed is essential"); *Zant v. Stephens*, 462 U.S. 862, 875 (1983) (the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty").
36. *Buchanan*, 522 U.S. at 276; *see, e.g., Tennard v. Dretke*, 542 U.S. 274 (2004) (Eighth Amendment violation to require defendant to show "nexus" between low mental capacity and the commission of the crime before being able to offer such evidence in mitigation).
37. *Lockett v. Ohio*, 438 U.S. 586, 620 (1978).
38. *Tillman v. Cook*, 25 F. Supp. 2d 1245, 1267 (D. Utah 1998), *aff'd,* 215 F.3d 1116 (10th Cir.), *cert. denied*, 531 U.S. 1055 (2000).
39. *See, e.g., United States v. Flores*, 63 F.3d 1342, 1376 (5th Cir. 1995) (court approved instruction that aggravators must "sufficiently outweigh" mitigators and rejected argument that reasonable doubt standard applied, noting that the Supreme Court "has never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"), *cert. denied*, 519 U.S. 825 (1996); *United States v. Chandler*, 996 F.2d 1073, 1091 (11th Cir. 1993) ("That the jury need only be instructed that the aggravating factors sufficiently outweigh the mitigating factors is entirely appropriate. A capital sentencing scheme is constitutional even if it does not require that a specific burden of proof govern the jury's weighing process"), *cert denied*, 512 U.S. 1227 (1994); *and see United States v. Edelin*, 134 F. Supp. 2d 59, 67 n.6 (D.D.C. 2001) (approving instruction that aggravators "sufficiently outweigh" mitigation).
40. Arkansas, New Jersey, New York, Ohio, Tennessee and Utah.
41. *See, e.g.*, *Ex Parte Waldrop*, 859 So. 2d at 1181 (Ala.); *Prieto*, 66 P.3d at 1123 (Cal.); *Oken*, 835 A.2d at 1105; *Ritchie v. State*, 809 N.E.2d 258 (Ind.), *cert. denied*, 126 S. Ct. 42 (2004); *State v. Smith*, 863 P.2d 1000, 1011 (Mont. 1993); *Murphy v. State*, 54 P.3d 556, 566 (Okla. Crim. App. 2002), *holding modified on other grounds at Lane v. Bass*, 87 P.3d 629 (Okla. Crim. App. 2004).
42. *See Rizzo*, 833 A.2d at 390 (state constitution requires that the jury's "level of certitude" in the correctness of its final decision be "beyond a reasonable doubt," but this standard does not apply to the weighing "outcome"); *Baker v. State*, 790 A.2d 629, 676 (Md.) (statute requiring that aggravating circumstances outweigh mitigating circumstances by "a preponderance of the evidence" found to be constitutional under article 24 of the Maryland Decl. of Rights), *cert. denied*, 535 U.S. 1050 (2002); *State v. Cohen*, 604 A.2d 846, 851 (Del. 1992) (court rejects "beyond a reasonable doubt standard," finding that the statutory requirement that aggravation outweigh mitigation by a preponderance of the evidence is constitutional under both state and federal law); *People v. Tenneson*, 788 P.2d 786, 793 (Colo. 1990) (under state law, beyond a reasonable doubt standard is required for the jury's level of certitude in its final decision).