

## A Supreme Court Ruling Roils Death Penalty Cases

By ADAM LIPTAK

Not long after the United States Supreme Court invalidated Arizona's death penalty statute in June and only a week before the Arizona Legislature enacted emergency legislation to reinstate it, two men accused of murder tried a bold legal maneuver that may save their lives. They pleaded guilty.

The prosecutor was surprised but candid: he said the men could plead guilty without fear of execution. He has since changed his mind. The judge, in Holbrook, Ariz., will hear arguments Thursday on the prosecutor's motion to undo the pleas.

He will not be alone in trying to untangle the consequences of the Supreme Court's decision in *Ring v. Arizona*, which said juries rather than judges must make the crucial factual determinations that support the death penalty. Courts and legislatures in the nine states where juries do not make such findings, or render only advisory verdicts, have had a busy summer doing the same thing.

"It's a can of worms," said Richard C. Dieter, the executive director of the Death Penalty Information Center, a Washington advocacy group critical of capital punishment.

Immediately after the decision, even prosecutors said that at least some of the 800 people already on death row in those states would be entitled to new sentences. But prosecutors in Arizona, the state most directly affected by the decision, have retreated from that position. In pending cases like the one in Holbrook, the Ring decision has created intense procedural confusion in several states.

which Mr. Sizemore would be exposed," he told the judge. He added a similar comment about Mr. Brian.

The judge, Dalo P. Neilson, agreed, telling the defendants that life in prison was the maximum sentence and accepting their pleas. He scheduled a sentencing hearing for September. In Mr. Brian's case, as everyone in the courtroom that day understood it, the hearing would be pointless. He had gotten a free pass for the killing and would face no additional fine or other consequences for it.

A week later, the Arizona Legislature enacted emergency legislation, saying it wanted "no hiatus in the imposition of the death penalty."

A month after that, and just days before the sentencing, Mr. Duarte had his own surprise for the court. He said in court papers that he had been wrong about the death penalty and that the sentencing could proceed under the new law. He suggested that the defendants should be allowed to withdraw their pleas.

This drew a strong reaction from one of Mr. Sizemore's lawyers in a court filing.

"Why, in the name of God, would Mr. Sizemore want to withdraw?" the lawyer, Thomas J. Phalen, asked. "So that the state can kill him?"

Arizona, Colorado, Delaware, Indiana and Montana have all enacted laws to address the Ring decision. Some of the statutes became effective after the decision but were drafted in anticipation of it.

Defense lawyers have complained about aspects of the new statutes. In Arizona, for instance, the Legislature

In its ruling, the Supreme Court answered one question and created half a dozen others, including how the new rule affects defendants at various stages in the cases against them; whether the decision requires actions in states where juries render advisory verdicts; what new laws are required to fix the problem the court identified; and what happens in cases like the one in Arizona.

The Ring decision effectively declared the death penalty statutes in five states unconstitutional, and it called into question statutes in four other states where juries render advisory verdicts but judges make the ultimate decision.

The five states in which judges made all of the relevant decisions are Arizona, Colorado, Idaho, Montana and Nebraska. The four so-called hybrid states are Alabama, Delaware, Florida and Indiana. About 630 death row prisoners are in the hybrid states, most of them in Florida and Alabama.

Several legislatures have acted quickly, sometimes by convening special sessions, to fix their statutes by giving juries a larger role. The supreme courts in a handful of states are considering Ring-related issues.

People on death row who have exhausted their direct appeals face daunting obstacles in arguing that the decision should apply to them retroactively. Courts have not been receptive to similar arguments.

People with pending appeals are in a much stronger position. But they, too, are facing vigorous arguments from prosecutors.

On the day Ring was decided, for instance, Kent Cattani, chief counsel of the death penalty appeals unit in the Arizona attorney general's office, said the 30 people on death row in Arizona who had not exhausted their direct appeals would be entitled to resentencings involving juries. But in August, Mr. Cattani's office filed papers in the Arizona Supreme Court arguing that the original death penalties should stand.

In a recent interview, Mr. Cattani said the revised position was the result of case-by-case analysis. He said all the Ring-related errors in these cases were harmless because factors supporting the death penalty were found implicitly by juries in an earlier phase of the trial, and because the Arizona Supreme Court rigorously reviewed death sentences.

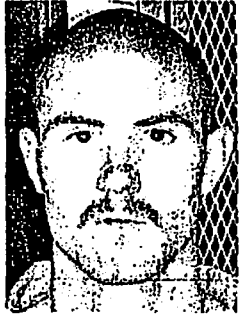
That leaves people whose cases were pending at the trial court level when Ring was decided.

Nicholas S. Sizemore and Scott B. Brian, the two Arizona men who pleaded guilty, were already serving time for murder when they fatally stabbed Carlos R. Ceniceros, a fellow inmate, in November 2000. Mr. Sizemore, 21, was in the fourth year of a 30-year sentence. Mr. Brian, 38, was serving a life sentence.

They were charged with first-degree murder, and the prosecution sought the death penalty. The case proceeded fitfully until a routine hearing on July 24, when the men announced they were pleading guilty.

The pleas startled the prosecutor, Joseph Duarte. Serious criminal cases generally end in plea bargains and occasionally result in trials. They almost never end in simple acknowledgments of guilt, and the defendant who simply pleads is rarely better off as a consequence.

But in court that day, Mr. Duarte acknowledged that this case was the exception. "There does not appear to be a viable death penalty sentence to



Photographs by Arizona Department of Corrections  
Lawyers for Nicholas S. Sizemore, top, and Scott B. Brian advised them to plead guilty to murder to avoid the death penalty.

limited the ability of both the trial and supreme courts to review a jury's verdict and allowed victims a larger role in proceedings than Supreme Court precedent allows, said John Stookey, an Arizona lawyer who represents capital defendants.

Before Arizona acted, lawyers for Mr. Sizemore and Mr. Brian swayed about their tactical decision, nervous that they were missing something. In the end, they advised their clients to plead guilty.

"It was like a window open," Mr. Phalen concluded, "and it was clear as a matter of law that there was no death penalty statute."

Mr. Brian's lawyer, Patrick McGillicuddy, said his client followed Mr. Sizemore's "bold move."

Mr. Duarte, the prosecutor, did not return a telephone call.

Mr. Cattani, of the attorney general's office, said Mr. Duarte had mis-spoken. "The prosecutor was wrong in terms of saying there's no statute under which they can be sentenced," he said. "They could even have been sentenced under the old statute."

That analysis is at odds with a statement in a letter Attorney General Janet Napolitano sent to Arizona judges the day Ring was decided. Ms. Napolitano argued the Ring case in the Supreme Court and is now a candidate for governor.

"It would now be unconstitutional to conduct a capital sentencing under the present version" of the death penalty statute, she wrote in June, urging judges not to proceed "until the statute is amended to conform to the law." She did not say what should happen to defendants who pleaded guilty in the meantime.

