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United States v. Allen No. 98-2549, 2004 WL 188080, at -1 (8th Cir. Feb. 2, 2004) State v. Fortin No. A-31-2001, 2004 WL 190051, at '1 (N.J. Feb. 3, 2004)

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United States v. Allen
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I. Introduction

In 2002, the United States Supreme Court in *Ring v. Arizona*¹ invalidated Arizona's capital sentencing scheme because it allowed a judge, rather than a jury, to determine "fact[s] on which the legislature conditions an increase in . . . maximum punishment."² Relying on *Apprendi v. New Jersey*,³ the Court noted that a factor " 'used to describe an increase beyond the maximum authorized statutory sentence . . . is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.' "⁴ Although *Ring* expressly reserved judgment on the question of whether aggravators must be alleged in an indictment, the Court previously stated in *Jones v. United States*⁵ that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment."⁶ In light of these decisions, Billie Jerome Allen ("Allen") and Steven Fortin ("Fortin") petitioned the United States Court of Appeals for the Eighth Circuit and the Supreme Court of New Jersey, respectively, to reconsider the courts' prior holdings that aggravating factors do not need to be charged in an indictment.⁷

1. 536 U.S. 584 (2002).

2. *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

3. 530 U.S. 466 (2000).

4. *Ring*, 536 U.S. at 605 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)); see *Apprendi*, 530 U.S. at 494 n.19 (stating that a sentencing factor is the functional equivalent of an element).

5. 526 U.S. 227 (1999).

6. *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999); see *Ring*, 536 U.S. at 597 n.4 (reserving judgment on the indictment issue).

7. *United States v. Allen*, No. 98-2549, 2004 WL 188080, at *1, *3 (8th Cir. Feb. 2, 2004); *State v. Fortin*, No. A-31-2001, 2004 WL 190051, at *1, *46 (N.J. Feb. 3, 2004).

II. Holding

In *Allen*, the United States Court of Appeals for the Eighth Circuit vacated Allen's death sentence and remanded his case to the district court for the imposition of a life sentence.⁸ The court held that the Grand Jury Clause of the Fifth Amendment requires that aggravating factors be submitted to the grand jury and charged in the indictment.⁹ In *Fortin*, the Supreme Court of New Jersey reversed and remanded on other grounds but held that pursuant to *Ring* and the New Jersey Constitution's guarantee in all criminal trials of the right to a grand jury indictment, aggravators must be charged in the indictment.¹⁰ The New Jersey rule applies prospectively to all capital murder trials that have yet to reach the penalty phase.¹¹

III. Analysis and Application in Virginia

The failure of an indictment to charge aggravators denies a defendant the protections of the Fifth Amendment Grand Jury Clause in a federal prosecution and the Sixth Amendment right to notice.¹² *Allen* and *Fortin*, however, limited the inquiry to the right to a grand jury indictment.¹³ The Eighth Circuit, subjecting Allen's indictment defect to harmless-error review, found that Allen "was denied the first of a constitutionally-mandated two-tiered check on prosecutorial power—a protection which reaches paramount importance in a capital case."¹⁴ The court noted that if it was to consider all indictment errors harmless, the Fifth Amendment right would be strictly curtailed.¹⁵

In *Fortin*, the Supreme Court of New Jersey held that aggravators must be charged in the indictment but that the new rule would only be applied prospectively because the court was expressly overruling prior precedent and the accu-

8. *Allen*, 2004 WL 188080, at *12.

9. *Id.* at *2; see U.S. CONST. amend. V (stating that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury"). For a complete discussion and analysis of these issues, see generally Maxwell Smith, Case Note, 16 CAP. DEF. J. 499 (2004) (analyzing *United States v. Higgs*, 353 F.3d 281 (4th Cir. 2003)).

10. *Fortin*, 2004 WL 190051, at *46; see N.J. CONST. art. 1, § 8 (guaranteeing that no person shall be held for a criminal offense unless charged by a grand jury indictment).

11. *Fortin*, 2004 WL 190051, at *54.

12. See *United States v. Hooker*, 841 F.2d 1225, 1230 (4th Cir. 1988) (stating that an indictment that fails to allege an element violates the Sixth Amendment right to notice); see also *United States v. Cotton*, 535 U.S. 625, 627 (2002) (stating that the Fifth Amendment requires facts that increase a penalty beyond the statutory maximum to be charged in the indictment).

13. The notice issue was not raised with the Supreme Court of New Jersey, and the Eighth Circuit found that the case at issue did not present the usual problems of notice accompanying deficient indictments. *Allen*, 2004 WL 188080, at *5.

14. *Id.* at *10.

15. *Id.* at *9.

raciness of the sentence was not seriously affected by the failure.¹⁶ The court also noted that its decision should not limit the flexibility of the prosecutors "as they go about the difficult task of deciding which murder cases merit a capital prosecution."¹⁷ If the prosecutor should choose to seek the death penalty at a later time, he could seek a supplemental indictment by later submitting the aggravators to a grand jury.¹⁸

In Virginia, there is no constitutional right to a grand jury indictment. However, the statutory right to a grand jury indictment has existed since Virginia was a colony and has been vigorously protected since that time.¹⁹ The failure of the Commonwealth to allege aggravators in the indictment violates this statutory right and results in a charge of capital murder, but the defendant cannot be eligible for the death penalty.

IV. Conclusion

The Supreme Court of Virginia is likely to be confronted with the issue of aggravators in the indictment in the near future. Capital defense attorneys should, therefore, continue to follow the case law on this subject matter. In addition, because there are several important tactical considerations at play, practitioners are invited to contact the Virginia Capital Case Clearinghouse.

K. Brent Tomer

16. *Fortin*, 2004 WL 190051, at *54.

17. *Id.* at *55.

18. *Id.*

19. See An Act Directing the Method of Trial of Criminals for Capital Offenses, and for Other Purposes Therein Mentioned, 1748, 22 Geo. 2, c. 13, § 5 (Va.) (directing a grand jury to first inquire into all treasons and felonies before prosecution); see also *Commonwealth v. Cawood*, 4 Va. (2 Va. Cas.) 527, 541 (1826) (stating that a proper accusation from a grand jury "is as indispensable as the conviction").

