

Response to defendant's motion that new sentencing statutes violate the ex post facto clause:

New statutes providing for jury sentencing in capital cases do not violate the prohibitions against ex post facto laws.

In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) (*Ring II*), the court held that capital defendants were entitled to jury determination of any fact that would increase their maximum punishment. In response to *Ring II*, the Arizona legislature amended the capital sentencing procedures in A.R.S. §§ 13-703 and 13-703.01 so that the jury would be the trier of fact in the aggravation and penalty phases.

Defendant argues that because the charged offenses occurred before the statutes were amended, applying the amendments to him would violate the prohibitions against ex post facto laws. Our supreme court rejected this argument in *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003) (*Ring III*). The court relied in part on *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290 (1977), and *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715 (1990), in which the United States Supreme Court found that sentencing under amended procedures was not a substantive change and therefore did not violate the ex post facto clause.

As *Collins* established, rights secured by the Sixth Amendment jury trial right, the right at issue here, are inherently procedural. . . . Under the holding of *Dobbert*, Arizona's change in the statutory method for imposing capital punishment is clearly procedural: The new sentencing statutes alter the method used to determine whether the death penalty will be imposed but make no change to the punishment attached to first degree murder. The new sentencing statutes added no new element, or functional equivalent of an element, to first degree murder.

Ring III, 204 Ariz. at 547, 65 P.3d at 928. Because the new sentencing statutes do not place defendants in jeopardy of any greater punishment than already imposed under the superseded statutes, “applying the new sentencing statutes does not violate the federal or state Ex Post Facto Clause.” *Id.*

In *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900 (2005), defendant asserted that retroactive application of the new death penalty statute violated the ex post facto clauses of the state and federal constitutions. Citing *Ring III*, the court stated that it had “already held that this new sentencing scheme does not violate the federal or state Ex Post Facto Clause.” *Id.* at —, 107 P.3d at 906. The court also stated that the United States Supreme Court reached the same conclusion in *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004), by finding that *Ring II* had announced a new procedural, rather than substantive, rule. “Because *Ring II* announced a new procedural rule, application of the new statute to Carreon does not violate either the federal or state Ex Post Facto Clause.” *Carreon*, 210 Ariz. at —, 107 P.3d at 907.

In *State v. Roseberry*, 210 Ariz. 360, 111 P.3d 402 (2005), defendant argued that § 13-703.01 violated the ex post facto provisions of the state and federal constitutions. The court once again rejected this argument. In *Ring III*, “this court held that A.R.S. § 13-703.01 does not violate either the state or federal constitutional prohibitions against ex post facto laws because jury sentencing is not a substantive change from prior Arizona law, but rather is merely a procedural change. . . . Because this procedural change does not retroactively alter the

definition of the crime of murder or increase the penalty, Roseberry's ex post facto claim fails." *Id.* at —, 111 P.3d at 406-407.

Defendant raises the same argument already rejected by the court in *Ring III*, *Carreon* and *Roseberry*. Because the statutory changes providing for jury sentencing are procedural, they do not violate the prohibitions against ex post facto laws.

6/28/05