

“HE SAID,” “SHE SAID,” AND ISSUES OF LIFE AND
DEATH: THE RIGHT TO CONFRONTATION AT CAPITAL
SENTENCING PROCEEDINGS

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The elders said, “As we were walking in the garden alone, this woman came in with two maids, shut the garden doors, and dismissed the maids. Then a young man, who had been hidden, came to her and lay with her. We were in a corner of the garden, and when we saw this wickedness we ran to them.

We saw them embracing, but we could not hold the man, for he was too strong for us, and he opened the doors and dashed out. So we seized this woman and asked her who the young man was, but she would not tell us. These things we testify.” The assembly believed them, because they were elders of the people and judges; and they condemned her to death.

. . . .

And as she was being led away to be put to death, God aroused the holy spirit of a young lad named Daniel Taking his stand in the midst of them, he said, “Are you such fools, you sons of Israel? Have you condemned a daughter of Israel without examination and without learning the facts? Return to the place of judgment. For these men have borne false witness against her.” Then all the people returned in haste. And the elders said to him, “Come, sit among us and inform us, for God has given you that right.” And Daniel said to them, “Separate them far from each other, and I will examine them.” When they were separated from each other, he summoned one of them and said to him, “. . . Now then, if you really saw her, tell me this: Under what tree did you see them being intimate with each other?” He answered, “Under a mastic tree.”

Then he put him aside, and commanded them to bring the other. And he said to him, “. . . Now then, tell me: Under what tree did you catch them being intimate with each other?” He answered, “Under an evergreen oak.” And Daniel said to him, “Very well! You also have lied

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against your own head, for the angel of God is waiting with his sword to saw you in two, that he may destroy you both.” . . . And they rose against the two elders, for out of their own mouths Daniel had convicted them of bearing false witness.¹

INTRODUCTION

The Bible’s story of how Daniel spared the virtuous Susanna, wrongly condemned to death, with the simple tools of sequestration, confrontation, and cross-examination, provides a fitting genesis for this article, which explores the right of confrontation at a capital sentencing hearing. Since the United States Supreme Court revisited the issue of the right to confrontation in *Crawford v. Washington*² in 2004 and in *Davis v. Washington*³ in 2006, volumes⁴ have been written about the right to confront witnesses during the guilt-innocence phase of a criminal trial. But little has been written about whether the cases, or related constitutional developments, require the right to confrontation at a capital sentencing hearing. That is the purpose of this article.

Capital defendants are frequently sentenced to death based upon unchallenged hearsay—evidence of no greater quality, and arguably a significantly lesser quality, than that offered by the scheming, spurned elders who argued for Susanna’s death. In many states,⁵ statutes permit the introduction of “[a]ny evidence which has probative value and is relevant . . . regardless of its admissibility under the . . . rules of evidence”⁶ at a capital sentencing hearing.⁷ Many states construe

¹ *Susanna* 36–61 (Revised Standard Version with the Apocrypha).

² 541 U.S. 36 (2004).

³ 126 S. Ct. 2266 (2006). The companion case to *Davis*, *Hammon v. Indiana*, was also decided by the Court in 2006. *Id.*

⁴ Articles by seven evidence experts appear in this symposium issue alone; other law schools, notably Brooklyn, have produced similar symposia editions on the *Crawford* issue.

⁵ There are notable exceptions to the text’s inference that most states do not provide for confrontation at sentencing. For example, in *Proffitt v. Wainwright*, 685 F.2d 1227, 1255 (1982), the Eleventh Circuit held that the Sixth Amendment guarantees the right to cross-examination at a capital sentencing proceeding. Rather than asserting that the U.S. Supreme Court had foreclosed the issue in *Williams v. New York*, see *infra* text accompanying notes 70–97, the Eleventh Circuit considered it “an issue of first impression” not yet decided by the Supreme Court. *Proffitt*, 685 F.2d at 1253. Focusing on the importance of reliability in capital sentencing proceedings and the Court’s decision in *Estelle v. Smith*, 451 U.S. 454 (1981) (upholding the Fifth Circuit decision *Smith v. Estelle*, 602 F.2d 696, 701 (5th Cir. 1979)), which recognized that a psychiatrist’s testimony that was not cross-examined by the defendant “carrie[d] no assurance of reliability whatsoever,” the Eleventh Circuit upheld the right to cross-examine adverse witnesses at capital sentencing proceedings when necessary to ensure the reliability of the testimony. *Proffitt*, 685 F.2d at 1255.

⁶ ALA. CODE § 13A-5-45(d) (2006); see also ARIZ. REV. STAT. ANN. § 13-703.01(G) (Supp. 2006); FLA. STAT. § 921.141 (Supp. 2006).

similarly broad capital sentencing statutes to allow the introduction of reliable hearsay.⁸ In others, silent death penalty statutes invite judges to apply reasoning tethered to a half-century old U.S. Supreme Court decision that has limited, if any, viability today.⁹

A death sentence under federal law¹⁰ may likewise be based upon unchallenged evidence because the Federal Death Penalty Act provides that “[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.”¹¹

Thus, for example, death sentences have recently been sought or imposed based upon the following evidence: prison investigative reports that included anonymous claims by inmates that the defendants committed assaults and attempted to introduce cyanide into the U.S. penitentiary;¹² a jailhouse informant’s testimony that alleged the

⁷ In this article, I use the phrase “capital sentencing hearing” to include any proceeding which follows a jury determination that the defendant is guilty of an offense for which death is an available punishment. In many jurisdictions, after a jury finds a defendant guilty of a capital offense, the jury is required to consider the existence of aggravating circumstances. If the jury finds the existence of one aggravating circumstance beyond a reasonable doubt, it then considers all mitigating circumstances. Ultimately, the jury considers the aggravating and mitigating circumstances in determining or recommending a sentence of life or death. Although some jurisdictions bifurcate this process, the phrase “capital sentencing hearing” in this article is used to refer to the entire proceeding that follows the jury’s determination that the defendant is guilty of a capital offense.

⁸ See, e.g., GA. CODE ANN. § 17-10-2 (2004); TENN. CODE ANN. § 40-35-209 (2003).

⁹ See *infra* text accompanying notes 70–97 for discussion of *Williams v. New York*, 337 U.S. 241 (1949), and how emerging jurisprudence has undercut its application.

¹⁰ The Federal Death Penalty Act is codified at 18 U.S.C. §§ 3591–3599 (2000).

¹¹ 18 U.S.C. § 3593(c) (2000).

¹² *United States v. Mills*, 446 F. Supp. 2d. 1115 (C.D. Cal. 2006). The defendants were found guilty of murder in violation of the Violent Crime in Aid of Racketeering Act. In seeking a death sentence, the government sought to rely upon “several hundred pages of documents.” *Id.* at 1119. Some of the documents were earlier presentence and postsentence reports. *Id.* at 1135. Within those reports were references to other crimes, including investigative reports and detailed statements of witnesses. Other documents were prison disciplinary reports, so-called IDC reports, which recited various incidents of misconduct attributed to the defendants. *Id.* at 1137. The court described the level of misconduct set forth in the documents as ranging from “delaying a bed count or flooding one’s cell to never-prosecuted acts of murder.” *Id.* at 1119. One particular report alleged that defendant Mills “attempted to introduce cyanide into USP Marion on several occasions in 1987 and 1988. These reports [included] statements by Federal Bureau of Investigation officials . . .” *Id.* at 1137. Another report consisted of internal prison memoranda based on interviews with unidentified inmates and officers who claimed that defendant Mills stabbed and murdered a fellow inmate. *Id.* at 1138. Yet another document that the Government sought to introduce was the Grand Jury testimony of a witness who later testified at trial in direct contradiction to the statement sworn before the Grand Jury. *Id.*

defendant's unadjudicated violent acts by repeating statements of another inmate who asserted his right to remain silent;¹³ a report from a deceased psychiatrist, based on interviews conducted thirteen years earlier, which asserted that the defendant constituted a future danger to society;¹⁴ third-party testimony, repeating statements by a deceased codefendant, that the defendant committed various criminal acts;¹⁵ testimony by a police officer quoting witnesses who claimed to have been victimized by the defendant;¹⁶ and testimony by a witness who appeared

¹³ *United States v. Johnson*, 378 F. Supp. 2d 1051 (N.D. Iowa 2005). Defendant Johnson was convicted of ten counts of capital murder arising out of the murder of witnesses to her former boyfriend's drug-trafficking activities. *Id.* Her former boyfriend, Honken, was convicted in a prior proceeding. *Id.* at 1054. The government sought to introduce the testimony of Vest, a jailhouse informant, who claimed that Honken discussed Johnson's role in the murders with him while the two were incarcerated together. *Id.* at 1056. The court agreed to the introduction of the evidence, reasoning that the right to confrontation did not apply in sentencing proceedings, and in particular, did not apply in this case wherein the court had decided to trifurcate the proceedings, thereby entitling the defendant to confrontation through the eligibility phase of the case. *Id.* at 1062.

¹⁴ *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990). The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's denial of habeas corpus in a capital case in which the defendant claimed ineffective assistance of counsel and a violation of his rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Id.* At the defendant's sentencing hearing, the government introduced a psychological report prepared thirteen years earlier while the defendant was imprisoned on an unrelated, robbery charge. *Id.* at 938. The evaluation was prepared by a prison psychologist who had died in the interim. On habeas, the defendant challenged the use of the report not based on confrontation grounds, but based on the government's failure to provide him with an expert to assist in rebutting the content of the report. *Id.* The Fourth Circuit held that "in a capital sentencing procedure, when the state presents psychiatric evidence of the defendant's future dangerousness, due process requires that the defendant have access to psychiatric testimony, a psychiatric examination, and assistance in preparing for the sentencing stage." *Id.* However, the *Ake* decision was handed down five years after Bassette's capital sentencing hearing. *Id.* Because the Court of Appeals construed *Ake* to be a new rule of constitutional criminal procedure, it did not apply retroactively in a habeas proceeding. *Id.* at 938–39.

¹⁵ *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002), *rev'd on other grounds*, 360 F.3d 135 (2d Cir. 2004). Fell was charged with carjacking and kidnapping resulting in death along with two other crimes. The carjacking and kidnapping charges were capital crimes. *Id.* at 473. The government asserted that it intended to offer a statement allegedly made by Fell's deceased co-defendant, Lee, to establish Fell's death eligibility. *Id.* at 485. The intended use of this and other evidence led the district court to conclude, among other things, that a capital sentencing hearing's use of a "relaxed evidentiary standard" violated the defendant's rights to due process and confrontation. *Id.* The Second Circuit Court of Appeals reversed the district court ruling.

¹⁶ *State v. Bell*, 603 S.E.2d 93 (N.C. 2004). Bell was convicted of kidnapping an elderly woman, assaulting her, and then killing her by setting a car on fire with her in it. *Id.* at 100–01. During the capital sentencing proceeding, the State relied upon the aggravating circumstance of committing a prior crime of violence in order to seek the death penalty. *Id.* at 121. To prove this aggravating circumstance, the State called a police officer to testify about a statement he had taken from a victim who had been robbed by the defendant. *Id.* at 115. The prosecutor told the judge that the victim "was a Hispanic and has left, we tracked, pulled the record, he's left the State and possibly the country." *Id.*

as a surrogate for the victim's family and delivered a message from the family and its therapist.¹⁷

Over objection, the trial court allowed the officer to testify to the contents of a statement given to the officer by the victim. *Id.*

The North Carolina Supreme Court first considered the State's claims that the witness was unavailable. Based on North Carolina authority, the court noted that the State had not established unavailability of the witness as required by the Confrontation Clause. *Id.* at 116. "[O]nce the [S]tate decides to present testimony of a witness to a capital sentencing jury, the Confrontation Clause requires the [S]tate to undertake good-faith efforts to secure the 'better evidence' of live testimony before resorting to the 'weaker substitute' of former testimony." *Id.* at 116 (quoting *State v. Nobles*, 584 S.E.2d 765, 771 (N.C. 2003) (quoting *United States v. Inadi*, 475 U.S. 387, 394–95 (1986))). Here, the State's efforts were insufficient to establish good faith. *Id.*

Because the State had not established that the witness was unavailable, the officer's recitation was admissible only if the witness's statement was nontestimonial. *See infra* notes 191–200 and accompanying text for discussion of testimonial statements. The North Carolina Supreme Court noted that the statement

was in response to structured police questioning . . . regarding the details of the robbery committed by the defendant. There can be no doubt that the statement was made to further [the] investigation of the crime. . . . Therefore [the witness's statement] is testimonial in nature, triggering the requirement of cross-examination set forth by *Crawford*.

Id. at 116.

The court's analysis had little effect on the ultimate disposition. Because the defendant had been convicted of robbing the victim and because in North Carolina the common-law crime of robbery required an element of "taking . . . by means of violence or fear," the introduction of the witness's statement, through the officer, was cumulative, and therefore harmless. *Id.* at 117.

¹⁷ *United States v. Brown*, 441 F.3d 1330 (11th Cir. 2006). Meier Jason Brown was found guilty of stabbing the victim, a part-time postmistress, to death while he was robbing the U.S. Post Office in Fleming, Georgia. *Id.* Her sister presented classic victim impact testimony, detailing how the victim's death had affected her family. She then further testified as follows:

[One of the victim's sons] "felt under his emotional state of mind that he could not [go to college] at this time. He could not concentrate to go onto college." . . . "I just spoke with [the victim's husband] just a few minutes ago. He could not appear. His emotional state, he is going through therapy. . . . And he knew that under the advise [sic] of his therapist, and a counseling group that he had gone to with other family members that have lost closed [sic] loved ones, that he could not, he could not manage to go through this court hearing."

Id. at 1360.

Since counsel failed to object, the appellate court reviewed the error under the plain error standard. *Id.* The U.S. Court of Appeals for the Eleventh Circuit concluded: (1) none of the statements were hearsay; (2) if they were hearsay, the Federal Rules of Evidence did not apply to the penalty phase of a capital trial; and (3) if the Confrontation Clause applied at a capital sentencing hearing, the statements were not testimonial under the *Crawford* definition. *Id.* at 1360–61.

In an implausible opinion, the Eleventh Circuit reasoned that the statements were not hearsay because they "did not include statements," but were merely the witness's impressions. *Id.* at 1360. The statements were not testimonial because "[t]hey were made by one grieving family member to another. They were not made in the context of an examination, were not recorded in a formal document, and were not made under circumstances that would lead a reasonable person to believe they would later be used at

In these and many other cases, the decision to sentence a defendant to die is based upon evidence that is neither challenged nor confronted, and upon statements of witnesses who neither appear nor are cross-examined. This article discusses whether the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"¹⁸ is violated by the introduction of such evidence in capital sentencing proceedings.

Because the right to confrontation flows from the text of the Constitution, the discussion begins with a short consideration of the relevant text of the Sixth Amendment in Part I.¹⁹ Next, the article briefly reviews the historical background of sentencing in Part II²⁰ and capital sentencing in Part III.²¹ Part IV of the article considers the current viability of *Williams v. New York*,²² the Supreme Court precedent most often relied upon by courts holding that the right of confrontation does not apply at sentencing.²³ This section of the article suggests that several constitutional developments not only have eviscerated that precedent, but in the aggregate now mandate the right to confrontation in capital sentencing proceedings. One of those constitutional developments, the right to have a jury determine all facts of constitutional significance, is discussed in detail in Part V.²⁴ The final section of the article, Part VI, examines briefly the Supreme Court decisions in *Crawford v. Washington*²⁵ and *Davis v. Washington*²⁶ and discusses why the right to confrontation as delineated in those decisions is instrumental to a fair capital sentencing proceeding.²⁷

trial." *Id.* at 1361. The court also found that defense counsel "could have called any of [the family members] as witnesses" for the purpose of cross-examining them, thereby exercising the defendant's right to confrontation. *Id.*

¹⁸ U.S. CONST. amend. VI.

¹⁹ See *infra* text accompanying notes 28–41. For a more thorough review of the history surrounding the adoption of the Sixth Amendment, which is beyond the scope of this article, see FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* (1951).

²⁰ See *infra* text accompanying notes 42–50. An exhaustive review of the history of sentencing in the United States is beyond the scope of this article. Many good books and articles have tackled that topic. See, e.g., JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2005); Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 798 (2005).

²¹ See *infra* text accompanying notes 51–69.

²² 337 U.S. 241 (1949).

²³ See *infra* text accompanying notes 70–148.

²⁴ See *infra* text accompanying notes 149–83.

²⁵ 541 U.S. 36 (2004).

²⁶ 126 S. Ct. 2266 (2006).

²⁷ See *infra* text accompanying notes 184–218.

I. CONFRONTATION AT CAPITAL SENTENCING BASED ON CONSTITUTIONAL TEXT

A simple reading of the relevant constitutional text supports the argument that the right to confrontation applies at a capital sentencing hearing. The Sixth Amendment applies to “criminal prosecutions.”²⁸ Thus, the Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”²⁹

The Sixth Amendment is not the only amendment in the Bill of Rights³⁰ that provides guarantees applicable to the criminal process. While the Fourth, Fifth, and Eighth Amendments all clearly apply to aspects of the criminal process, only the Fifth and the Sixth Amendment utilize phrases which limit the scope of the protections they provide.

The scope of the Sixth Amendment is limited by the use of the phrase “in all criminal prosecutions,” while parts of the Fifth Amendment protections are limited by use of the phrase “in any criminal case.”³¹ This distinction has been characterized as a deliberate choice, which narrows the application of the Sixth Amendment in comparison to the Fifth Amendment.³²

Thus, unlike the rights enumerated in the Fifth Amendment, the Sixth Amendment rights³³ are applicable only to the accused “in criminal prosecutions.” The use of the term “accused” in conjunction with the phrase “in all criminal prosecutions” infers that the Amendment protects

²⁸ The Sixth Amendment provides, in its entirety:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.

U.S. CONST. amend. VI.

²⁹ *Id.*

³⁰ The Constitution also references the criminal process, using slightly different language, in Article III, Section 2. There the phrase used is “trial of all crimes.” This section establishes the right to trial by jury (except for impeachment) and the right to be tried in the venue where the crime occurred.

³¹ U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”). For a thorough discussion of how the Supreme Court has failed to effectuate the Framers’ intent in its Fifth Amendment jurisprudence, see Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right”* in Chavez v. Martinez, 70 TENN. L. REV. 987, 1009–18 (2003).

³² See *infra* note 35 and accompanying text for a discussion of *Counselman v. Hitchcock*.

³³ See *supra* note 28.

those who have been charged with a crime. For the most part, that construction is borne out by the nature of the rights included in the Amendment. For example, the Amendment guarantees a speedy and public trial, at a precise location, and with precise protections. While some of the enumerated rights by definition apply only during the proceeding at which the guilt and sentence are determined, commonly referred to as the “trial,” the very nature of other rights, for example the right to “have compulsory process for obtaining witnesses,” lends credence to the interpretation that the Sixth Amendment applies from the time of arrest until the time of judgment.³⁴

As early as 1892, the Supreme Court characterized the guarantees of the Sixth Amendment as being applicable to those accused and tried for the commission of a crime.

[The phrase “in all criminal prosecutions” in the Sixth Amendment] distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under article 6 of the amendments is much narrower than a “criminal case,” . . . under article 5 of the amendments.³⁵

But the Court broadened its interpretation more recently, focusing specifically on some of the additional rights guaranteed by the Sixth Amendment. Thus, for example, the right to counsel has been interpreted to apply after the commencement of adversary criminal

³⁴ The Supreme Court has frequently used the phrase “trial rights” in reference to the rights enumerated in the Sixth Amendment. The use of the term “trial” is unfortunate, in light of its inaccuracy and ramifications. *Cf. infra* text accompanying note 203 for Webster’s definition of “prosecution” at common law. For example, in *Barber v. Page*, 390 U.S. 719, 725 (1968)—decided the same day as *Pointer v. Texas*, 380 U.S. 400 (1968)—in which the Court held the right applicable to the states, the Court focused on the “trial” nature of the right to confrontation. *Barber*, 390 U.S. at 725. “The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.” *Id.* As is discussed, the expansive holding in *Williams v. New York*, *see infra* text accompanying notes 70–97, and the repeated reference to confrontation as a “trial right” would replace any meaningful analysis by the Supreme Court of what actually constituted a trial. In time, “trial” became synonymous with the guilt phase of a criminal proceeding.

³⁵ *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892). In *Counselman*, the government attempted to limit the application of the Fifth Amendment’s right to be free from self-incrimination to cases in which an accused had been charged. *Id.* While testifying before a Grand Jury as a witness, the petitioner declined to respond to some of the questions asked of him, stating “[t]hat I decline to answer, . . . on the ground that it might tend to criminate me.” *Id.* at 548. He was held in contempt of court for refusing to answer and incarcerated on the contempt charge. His argument on appeal was that he had a right under the Fifth Amendment to refuse to answer. The government urged the Court to restrict the application of the Fifth Amendment to cases in which defendants had pending charges. On appeal, the U.S. Supreme Court upheld the petitioner’s right to refuse to answer and reversed the courts below which had denied him habeas corpus relief on the contempt incarceration. *Id.*

proceedings,³⁶ to apply not only at trial, but also at all “critical stages” of the prosecution,³⁷ and to apply in certain proceedings that occur after trial.³⁸ This recognition that rights seemingly connected with a criminal trial may also apply *before* and *after* a trial returns the emphasis to where it belongs—on the actual phrase used in the Amendment, “in all criminal prosecutions.”

The very nature of a criminal prosecution requires the interpretation that Sixth Amendment rights do not begin and end with the in-court proceeding commonly known as a trial. Many of the tenets of our criminal justice system—the presumption of innocence, the right to remain silent, the right to have fair notice of the accusations against the accused—would be meaningless were the Sixth Amendment read to apply only at trial.

Historians of the Sixth Amendment have defined the phrase broadly, in such a manner as to include all steps, beginning with the criminal charge and concluding with the imposition of punishment. Francis Heller, writing about the Sixth Amendment in the late 1950s, concluded: “The ‘criminal prosecution’ begins with the arraignment of the accused and ends when sentence has been pronounced on the convicted or a verdict of ‘[n]ot guilty’ has cleared the defendant of the charge.”³⁹

This historical interpretation reinforces the accepted meaning and common usage of the term “prosecution.” Webster’s *An American Dictionary of the English Language* defined “prosecution” as the

³⁶ In *Massiah v. United States*, 377 U.S. 201 (1964), the U.S. Supreme Court found a violation of the Sixth Amendment right to counsel “when there was used against [Massiah] at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.” *Id.* at 206. In 1977, the Court applied the right to state prosecutions. *Brewer v. Williams*, 430 U.S. 387 (1977).

³⁷ *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *see also* *United States v. Ash*, 413 U.S. 300, 321 (1973) (Stewart, J., concurring). In addition to its application at trial, the Court has held that the right to counsel applies at a pretrial lineup, *United States v. Wade*, 388 U.S. 218 (1967); a preliminary hearing, *Coleman*, 399 U.S. 1; at certain arraignments, *Hamilton v. Alabama*, 368 U.S. 52 (1961); and at sentencing, *Mempa v. Rhay*, 389 U.S. 128 (1967).

³⁸ The Sixth Amendment by its terms does not address its application to appeals. While this may be as a result of the absence of routine criminal appeals in 1789, the U.S. Supreme Court has held that the Fourteenth Amendment Due Process Clause requires that counsel be appointed for indigent defendants on appeal by states that provide for an appeal as of right. *Douglas v. California*, 372 U.S. 353 (1963). Similarly, the Court utilized the Due Process Clause to require certain protections, set forth in the Sixth Amendment, for those facing a parole revocation, but specifically declined to decide whether counsel was also required. *Morrissey v. Brewer*, 408 U.S. 471, 499 (1972). *See infra* text accompanying notes 139–48 for a discussion of *Morrissey*’s impact on the right to confrontation at sentencing.

³⁹ HELLER, *supra* note 19, at 54; *see also* LANGBEIN, *supra* note 20.

“institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment.”⁴⁰ Similarly, dictionaries in everyday use define “prosecution” as “the institution and carrying on of legal proceedings against a person” and “following up on something undertaken or begun, usually to its completion.”⁴¹ These definitions clarify that the term is properly recognized to include all aspects of the criminal proceeding, from charge to incarceration or acquittal; they do not support a conclusion that “prosecution” refers solely to the guilt phase of a criminal case. Thus, the relevant constitutional text of the Sixth Amendment suggests that the right to confrontation applies at capital sentencing proceedings.

II. CONFRONTATION AT CAPITAL SENTENCING BASED ON HISTORY OF CRIMINAL SENTENCING

The nature of the criminal proceeding at the time the Sixth Amendment was adopted similarly illuminates the issue of whether the right to confrontation applies at sentencing. The criminal process in the early days of America differed significantly from modern criminal proceedings. Modern criminal proceedings involve a finding of guilt or innocence by a jury and the subsequent determination of punishment, most frequently by a judge. This bifurcated process, in which different rules and procedures often govern the two stages, each requiring distinct roles for the jury and judge, has been altered significantly from the procedure followed in the seventeenth and eighteenth centuries and at the time of the writing and adoption of the Sixth Amendment. When the Sixth Amendment was adopted, the time of critical importance to the analysis in *Crawford*,⁴² the sentencing decision was “collaps[ed] . . . into the proceeding for determining guilt.”⁴³ Even as late as the introduction

⁴⁰ 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 45 (New York, S. Converse 1828). This is the same dictionary from which Justice Scalia drew his definition for “witness” and “testimony” in *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

⁴¹ RANDOM HOUSE UNABRIDGED DICTIONARY 1552 (2d ed. 1993).

⁴² *Crawford v. Washington*, 541 U.S. 36, 44 (2004).

⁴³ 4 WILLIAM BLACKSTONE, COMMENTARIES *298, *368 (“The next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. . . . [T]he next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors, . . . is that of *judgment*.”); see also LANGBEIN, *supra* note 20, at 48. Juries would routinely manipulate their verdicts in order to lessen the sentence because the conviction of a specific offense mandated a particular punishment. This practice was referred to as “downvaluing” in the case of stolen goods, LANGBEIN, *supra* note 20, at 58, and, by Blackstone, as “pious perjury” in cases in which the jury decided either to acquit or to find the defendant guilty of a lesser crime in order to save the defendant from execution. *Id.* (citing 4 BLACKSTONE, *supra*, at *239).

of the Sixth Amendment in 1789, a criminal trial was treated as a whole, with the jury deciding both the guilt and, as a result, the sentence of the defendant.⁴⁴

In 1789, a “criminal prosecution” began with the return of an indictment that contained sufficient facts to notify the defendant of the charge.⁴⁵ The jury in the case then heard the evidence and determined both the guilt and the punishment of the defendant. This finding of guilt and setting of punishment were accomplished in one proceeding, the “criminal prosecution,” to which the Framers referred when they drafted the Sixth Amendment.⁴⁶

As the Supreme Court would note in reference to criminal proceedings in the late eighteenth century, “[t]he substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense.”⁴⁷ It was not until the nineteenth century, with the invention of the penitentiary,⁴⁸ that statutes began to provide judges

⁴⁴ LANGBEIN, *supra* note 20, at 36–37.

⁴⁵ 4 BLACKSTONE, *supra* note 43, at *298, *368; *see also* JOHN F. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 16 (1st ed. 1822) (stating that an indictment must contain “all the facts and circumstances, which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant be convicted”).

⁴⁶ The language ultimately used in the Sixth Amendment was in large part derived from state constitutions, already in place and in practice at the time of the writing of the Bill of Rights. The Virginia Bill of Rights of 1776 provided in Section 8 that in “all capital or criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses.” 7 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 1492–1908, at 3813 (Francis Newton Thorpe ed., 1909). (The June 29, 1776 Constitution of Virginia is part of the Avalon Project at the Yale Law School and can be viewed at <http://www.yale.edu/lawweb/avalon/states/va05.htm>.) Seven more states drafted constitutions between 1776 and 1791, the date of the Bill of Rights, and each included provisions similar to Virginia’s.

Those who authored the state constitutions and experienced their impact for more than a decade were among the attendees at the Constitutional Convention of 1789, at which the Bill of Rights was introduced. HELLER, *supra* note 19, at 23–34. James Madison introduced the Sixth Amendment on June 8, 1789, using substantially the same language as that used in the Virginia Constitution, with the notable addition of the right to counsel, and drawing on the language used in the New York Constitution. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 185 n.255 (2005). After some addition and revision, the Amendment, and the others included in the Bill of Rights, were adopted on December 15, 1791. HELLER, *supra* note 19, at 23–34.

⁴⁷ *Apprendi v. New Jersey*, 530 U.S. 466, 479 (2000) (citing John Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900*, at 13, 36–37 (Antonio Padoa Schioppa ed., 1987)).

⁴⁸ 2 DOUGLAS HAY, *CRIME AND JUSTICE IN EIGHTEENTH- AND NINETEENTH-CENTURY ENGLAND* 54–55 (1980).

discretion in sentencing, and prosecutions began to be divided into separate guilt and sentencing phases.⁴⁹ It was on this slate—with joined guilt and sentencing phases—that the Framers chose the words “in all criminal prosecutions” and provided that “the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁵⁰

III. CONFRONTATION AT CAPITAL SENTENCING BASED ON HISTORY OF CAPITAL SENTENCING

Unlike the history of the criminal process in America, which supports the argument that confrontation rights apply at sentencing, the history of capital trials in America is less instructive on the topic. The American colonists brought with them the English fervor for capital punishment. In England, in the 1600s and 1700s, numerous crimes carried a mandatory sentence of death.⁵¹ When the colonists came to America, they tracked this heritage by making many offenses punishable by a mandatory sentence of death.⁵² Once a jury found a defendant guilty of the crime, the defendant was automatically sentenced to death.

⁴⁹ This historical reality was recognized by the Court in *Williams v. New York*, 337 U.S. 241 (1949), and chosen as one of the primary reasons for upholding a judge’s use of evidence not subject to confrontation or challenge to sentence a defendant to death. *Id.* at 246. In another case, the Court noted the same history and relied upon a 1942 law review article as support. *Apprendi*, 530 U.S. at 481 (citing Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L. REV. 715 (1942)). For those applying originalism in interpreting the Constitution, the consolidation of guilt and punishment at the time of the framing supports the conclusion that confrontation rights were intended to apply throughout the entirety of the criminal prosecution.

⁵⁰ U.S. CONST. amend. VI.

⁵¹ Herbert S. Hadley offers this description of the criminal justice process in England:

It is difficult to realize the unfairness, the brutality, the almost savage satisfaction in conviction and execution that characterized criminal prosecutions in England up to well along in the nineteenth century. You may recall the denunciation of the English judges “For two hundred years . . . the Judges in England sat on the bench condemning to the penalty of death, every man, woman and child who stole property to the value of five shillings and during that time not one Judge remonstrated against the law.”

Herbert S. Hadley, *The Reform of Criminal Procedure*, 10 PROC. ACAD. POL. SCI. 90, 92 (1923) (quoting HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 191 (Random House 1931) (1918)); see also 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 457–92 (London, Macmillan 1883).

⁵² In STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002), the author reports that

English colonists of the seventeenth and eighteenth centuries came from a country in which death was the penalty for a list of crimes that seems shockingly long today. Treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, theft—all were capital crimes in England. All became capital crimes in the American colonies as well.

Id. at 5.

This history of capital trials in America fails to instruct on the issue of the right of confrontation at a capital sentencing for a number of reasons,⁵³ the most prominent of which is the Supreme Court's rejection of mandatory death sentences.⁵⁴ Following the Court's determination in 1972 in *Furman v. Georgia*⁵⁵ that the death penalty as administered violated the Eighth Amendment's prohibition on cruel and unusual punishment, states undertook to revise their death penalty statutes to meet the Court's concerns.⁵⁶

In complete contrast to capital prosecutions at the time of the Sixth Amendment's framing, most states chose to bifurcate the capital proceedings, separating the guilt-innocence phase from the penalty phase.⁵⁷ Some states, however, chose instead to revise their criminal statutes to impose a mandatory death penalty for some crimes.⁵⁸ Those statutes requiring mandatory death sentences, mimicking the laws in place in the early colonies, were declared unconstitutional.⁵⁹ In ruling on the mandatory death penalty statutes of North Carolina and Louisiana,

The U.S. Supreme Court has described the history of capital punishment in the United States in its opinion in *Woodson v. North Carolina*, 428 U.S. 280 (1976):

At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses. Although the range of capital offenses in the American Colonies was quite limited in comparison to the more than 200 offenses then punishable by death in England, the Colonies at the time of the Revolution imposed death sentences on all persons convicted of any of a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy. As at common law, all homicides that were not involuntary, provoked, justified, or excused constituted murder and were automatically punished by death. Almost from the outset jurors reacted unfavorably to the harshness of mandatory death sentences. The States initially responded to this expression of public dissatisfaction with mandatory statutes by limiting the classes of capital offenses. This reform, however, left unresolved the problem posed by the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences.

Id. at 289–90 (citations omitted).

⁵³ See *infra* text accompanying notes 55–69.

⁵⁴ See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion). The Court applied the Eighth Amendment's prohibition of cruel and unusual punishment to the states in *Robinson v. California*, 370 U.S. 660, 666 (1962).

⁵⁵ 408 U.S. 238 (1972).

⁵⁶ The effect of *Furman* was to eliminate death penalty statutes that did not discourage arbitrariness. In response to *Furman*, and in an effort to redraft statutes that would not run afoul of the Constitution, states devised different methods to address the issue of arbitrariness.

⁵⁷ See *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵⁸ See, e.g., *Woodson*, 428 U.S. at 286; *Roberts*, 428 U.S. at 328.

⁵⁹ *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336.

the Supreme Court outlined three aspects of the statutes that it characterized as “shortcomings”:

[O]ne of the most significant developments in our society’s treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense. [This] mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments’ requirement that the State’s power to punish “be exercised within the limits of civilized standards.”

A separate deficiency of [this] mandatory death sentence statute is its failure to provide a constitutionally tolerable response to *Furman*’s rejection of unbridled jury discretion in the imposition of capital sentences. Central to the limited holding in *Furman* was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments. [These mandatory statutes] . . . have simply papered over the problem of unguided and unchecked jury discretion.

. . . .
A third constitutional shortcoming of the . . . statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.⁶⁰

The Supreme Court’s outright rejection of mandatory death sentences in *Furman* diminishes or perhaps eliminates any consideration of the procedures used in framing-era capital trials to analyze the right to confrontation at modern capital sentencing proceedings. But while the procedure in those framing-era cases has been rendered irrelevant to the analysis, the reasoning for the rejection of mandatory death sentences is not. Implicit in every aspect of the Court’s rationale was the need for reliable information on which to base the life or death decision.

First, the Court noted the function that societal standards play in the decision to implement and impose capital punishment. Society has determined that a death sentence should not be imposed on every person who commits a particular crime.⁶¹ Thus, society’s demand for reliable information upon which to differentiate between offenders obligates the courts to assure that those charged with the task of determining which offenders should live and which should die are provided sufficient, reliable information upon which to base that decision.

⁶⁰ *Id.* at 301–03 (citations omitted).

⁶¹ In Justice Brennan’s words, “The progressive decline in and the current rarity of the infliction of death demonstrate that our society seriously questions the appropriateness of the punishment today.” *Furman v. Georgia*, 408 U.S. 238, 299 (1972) (Brennan, J., concurring).

Few tasks are more demanding than determining whether another citizen should live or die. The responsibility placed upon jurors in capital cases⁶² has been described as “truly awesome,”⁶³ and the Court has disallowed procedures or instructions that diminish that responsibility.⁶⁴ In order to exercise that responsibility conscientiously, those asked to impose this ultimate sentence must be provided with reliable evidence. They should not be expected to decide whether a defendant should be sentenced to life or death based on evidence that has not been subjected to challenge or confrontation.

Additionally, the Court reiterated a point that had been made earlier in *Furman* and which became the capstone of the Court’s capital punishment jurisprudence.

[M]embers of this Court acknowledge what cannot fairly be denied that death is a punishment different from all other sanctions in kind rather than degree. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.⁶⁵

The recognition that “death is different” has led the Court to conclude that death sentences demand “unique safeguards,”⁶⁶ specifically

⁶² Most states place the responsibility for determining the sentence on the jury, although some states still require that the jury recommend a sentence, but that the judge actually select the sentence. See *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002).

Of the 38 states with capital punishment [at the time of the decision in *Ring*], 29 generally commit sentencing decisions to juries. Other than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges. Four States have hybrid systems, in which the jury renders an advisory verdict but the judges makes the ultimate sentencing determinations.

Id. (citations omitted).

⁶³ *McGautha v. California*, 402 U.S. 183, 208 (1971). In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Court expressed confidence that jurors take their capital sentencing responsibilities very seriously:

Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an “awesome responsibility” has allowed th[e] Court to view sentencer discretion as consistent with and indispensable to the Eighth Amendment’s “need for reliability in the determination that death is the appropriate punishment in a specific case.”

Id. at 331 (quoting *Woodson*, 428 U.S. at 305).

⁶⁴ *Caldwell*, 472 U.S. at 328–29 (“[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who had been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”).

⁶⁵ *Woodson*, 428 U.S. at 304–05 (citations omitted).

⁶⁶ *Spaziano v. Florida*, 468 U.S. 447, 468 (1984). See generally Margaret Jane Radin, *Cruel Punishment and the Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980). Professor Radin is credited with coining the phrase “super due process” in capital cases.

a heightened standard of fairness in the proceeding and a heightened standard of reliability in the determination that death is the appropriate punishment: “because a deprivation of liberty is qualitatively different from a deprivation of property, heightened procedural safeguards are a hallmark of Anglo-American criminal jurisprudence. But that jurisprudence has also unequivocally established that a State’s deprivation of a person’s life is also qualitatively different from any lesser intrusion on liberty.”⁶⁷

These heightened standards of fairness and reliability apply not only to the determination that the defendant committed an offense punishable by death, but also, perhaps even more, to the determination that the defendant deserves a sentence of death.⁶⁸ Thus, the Supreme Court has specifically recognized the importance of reliability at a capital sentencing proceeding: “[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.”⁶⁹

IV. CONFRONTATION AT CAPITAL SENTENCING BASED ON SUPREME COURT PRECEDENT

Courts almost uniformly hold that the right to confrontation does not apply at sentencing. The authority relied upon most frequently by state and federal courts to reject the application of the right to confrontation at capital sentencing proceedings is the Supreme Court’s 1949 decision in *Williams v. New York*.⁷⁰ However, subsequent cases⁷¹ and other constitutional developments have significantly undermined the Court’s reasoning in *Williams*, leaving it, at best, diluted.

⁶⁷ *Spaziano*, 468 U.S. at 468 (Stevens, J., dissenting). This concept of qualitative difference had been recognized by the Court even before *Furman*. In *Reid v. Covert*, 354 U.S. 1 (1957), for example, the Court said, “It is in capital cases especially that the balancing of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.” *Id.* at 46.

⁶⁸ Capital proceedings are generally bifurcated, even though bifurcation is not constitutionally required. First, the factfinder determines whether the defendant committed a capital offense. If so, the factfinder determines the appropriate sentence. Some states require juries to weigh aggravating and mitigating circumstances, while others require that the jury answer specific questions regarding the defendant’s likely future behavior. Still others require “consideration” of all the factors. The different state configurations do not alter the premise of this article: the right to confrontation applies at a capital sentencing hearing. If a state were to attempt to return to a unified procedure, then the issue of confrontation would be simplified, since there is no logical basis for altering constitutional requirements within a single procedure.

⁶⁹ *Gregg v. Georgia*, 428 U.S. 153, 190 (1986).

⁷⁰ 337 U.S. 241 (1949).

⁷¹ *See infra* text accompanying notes 98–183.

A. Williams v. New York

Williams was decided more than a decade before the Supreme Court held that the Eighth Amendment's prohibition against cruel and unusual punishment was incorporated into the Due Process Clause of the Fourteenth Amendment.⁷² Additionally, the *Williams* decision predated each of the series of cases significant to the resolution of the issue raised in this article. As discussed above, *Williams* was decided before the Court's nine separate opinions in *Furman v. Georgia*,⁷³ which prompted the wholesale revision of state capital punishment laws⁷⁴ and resulted in the adoption of standards of heightened due process, fairness, and reliability for both the guilt and sentencing determinations.⁷⁵ As a result, the decision predated the recognition by a majority of the Court that "death is different" and, thus, demands heightened accuracy.⁷⁶ *Williams* was decided in advance of cases delineating due process guarantees in various proceedings.⁷⁷ Similarly, it was decided more than five decades before the quintet of cases, beginning in 2000, which retooled the jury's role as factfinder in criminal cases.⁷⁸ And, finally, *Williams* was decided before the Court undertook to redefine the meaning of the Sixth Amendment Confrontation Clause in *Crawford* and *Davis*.⁷⁹

The New York procedure in place at the time of Samuel Tito Williams's trial for murder in the first degree required the jury to determine the guilt or innocence of the defendant and, upon finding guilt, to recommend the sentence.⁸⁰ Williams was found guilty of first-degree murder, a crime that was punishable by "death, unless the jury

⁷² *Robinson v. California*, 370 U.S. 660, 666 (1962).

⁷³ 408 U.S. 238 (1972).

⁷⁴ See generally Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982).

⁷⁵ See *supra* text accompanying notes 55–69.

⁷⁶ Justice Stevens noted in *Gardner v. Florida* that "five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." 430 U.S. 349, 357 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 181–88 (1976)).

Counsel for Williams urged the Court to adopt a "death is different" stance in the case. The Court noted that it was urged to "draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed." *Williams*, 337 U.S. at 251. But the Court declined. "We cannot say that the due process clause renders a sentence void merely because the judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence." *Id.*

⁷⁷ See *infra* text accompanying notes 98–148.

⁷⁸ See *infra* text accompanying notes 150–83.

⁷⁹ See *infra* text accompanying notes 184–218.

⁸⁰ *Williams*, 337 U.S. at 243 n.2.

recommends life imprisonment.⁸¹ Williams's jury recommended that he receive a life sentence, but the trial judge imposed the death sentence, relying upon sentencing information provided to the court in accordance with New York law.⁸² The sentencing information employed to overrule the jury recommendation included allegations detailed in a presentence investigation report.⁸³ Counsel argued that the judge's use of the untested sentencing information had violated Williams's right to due process of law.⁸⁴

The Supreme Court's opinion upholding the trial judge's actions repeatedly emphasized that Williams did not "challenge" the report, nor ask for an opportunity "to refute or discredit [it] . . . by cross-examination or otherwise."⁸⁵ Despite the carefully framed constitutional argument raised,⁸⁶ the U.S. Supreme Court described the issue as

⁸¹ *Id.* (quoting N.Y. PENAL LAW § 1045). A subsequent section provided:

A jury finding a person guilty of murder in the first degree . . . may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life.

Id. (quoting N.Y. PENAL LAW § 1045-a). It was this provision that gave the judge the discretion to sentence a defendant to death, despite the jury recommendation.

⁸² The New York law required that "[b]efore rendering judgment or pronouncing sentence the court shall cause the defendant's criminal record to be submitted to it . . . and may seek any information that will aid the court in determining the proper treatment of such defendant." *Id.* at 243 (quoting N.Y. CRIM. CODE § 482).

⁸³ Included in the information the judge recited as the basis for the jury override was Williams's involvement in "thirty other burglaries," none of which Williams had been convicted of committing, and Williams's "morbid sexuality." *Id.* at 244.

⁸⁴ Counsel based the argument upon the Due Process Clause because *Williams* was decided before the Court's determination that the right to confrontation, under the Sixth Amendment, was applicable in state criminal trials. The Supreme Court held that the right to confrontation applied in state courts in *Pointer v. Texas*, 380 U.S. 400 (1965). The opinion exalts the importance of the right:

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one . . . would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.

Id. at 404 (citations omitted).

⁸⁵ At the time of the *Williams* decision, the significance of the Court's repeated reference to this "quasi-waiver" argument was at best unclear. The Court did not base the decision on waiver, but emphasized waiver throughout the decision. Almost thirty years later, in *Gardner v. Florida*, 430 U.S. 349 (1977), the Court latched upon these facts as a crucial basis for distinguishing a factually similar case. See *infra* text accompanying notes 98-119.

⁸⁶ The New York Court of Appeals describes Williams's argument as follows:

relating “to the rules of evidence applicable to the manner in which a judge may obtain information to guide him in the imposition of sentence upon an already convicted defendant.”⁸⁷

Relying upon what the Court characterized as a historical basis,⁸⁸ as well as “sound practical reasons,”⁸⁹ the Court affirmed Williams’s death sentence. In the most often quoted language from the *Williams* decision, the Court emphasized the demanding task of trial judges:

To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentence would be unavailable if the information were restricted to that given in open court by witnesses subject to cross-examination.⁹⁰

The majority’s rationale in *Williams* is that the judge needs more, not less, information in order to impose an individually appropriate sentence.⁹¹ Trial judges need the fullest amount of information possible about a defendant’s background and personality in order to individualize the punishment. Despite the fact that the judge in *Williams* used the unconflicted and unconfirmed information to override the jury’s

[T]he conviction and sentence . . . are in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States “in that the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal”

Williams, 337 U.S. at 244 (quoting *People v. Williams*, 83 N.E.2d 698, 699 (N.Y. 1949)).

⁸⁷ *Id.*

⁸⁸ The Court noted that

both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Id. at 246. This statement ignores the fact that capital sentences were originally mandated based on the nature of the conviction. This was true not only in capital cases, but in all criminal cases. 4 BLACKSTONE, *supra* note 43, at *37; see BANNER, *supra* note 52. *But see Williams*, 337 U.S. at 247–48 (“This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial.” (citing 4 BLACKSTONE, *supra* note 43, at *375, *376–77)).

⁸⁹ *Williams*, 337 U.S. at 246.

⁹⁰ *Id.* at 250.

⁹¹ It is ironic that the Court emphasizes that modern penological policy, which is described as promoting and providing for individualized sentences, has

not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.

Id. at 249. This rationale obviously has no application to the case before the Court in which Williams’s life sentence was replaced with a sentence of death.

recommendation of a life sentence and impose a death sentence, the Court reasoned that modern changes in the treatment of offenders (so-called penological procedural policy) required sufficient information in order to assist in rehabilitation.

The Court's decision in *Williams* has become synonymous with an absolute rule of law; it is cited definitively—and frequently⁹²—as a well-established holding that the right to confrontation does not apply at sentencing.⁹³ But this standardization of and reliance on the *Williams*

⁹² At last look, the case had been cited over 1700 times in reported decisions. The frequency of citations to *Williams*, however, does not mean that courts are properly characterizing the case. Cf. Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996) (arguing that the *Miller* case has been routinely mischaracterized by the courts).

⁹³ Some courts also cite to a second *Williams* case: *Williams v. Oklahoma*, 358 U.S. 576 (1959). In that case, the defendant pleaded guilty to kidnapping after having been sentenced to life imprisonment for murder in another Oklahoma court for events arising out of the same criminal incident. When he entered his guilty plea to the kidnapping charge, the judge warned him that he faced a death sentence. Before imposing the sentence, the judge allowed the prosecutor to make a statement in which the prosecutor recounted the details of the kidnapping and murder and also detailed the defendant's prior criminal record. The judge sentenced the defendant to death. *Id.* at 580–81.

On appeal, the defendant claimed that the death sentence violated due process because the court had not pursued a formal procedure for receiving sentencing information as outlined in the Oklahoma statutes. *Id.* at 582. Because the use of the statutory procedure was discretionary and because the defendant did not request a hearing or an opportunity to put on evidence in mitigation, the Supreme Court affirmed the death sentence. *Id.* at 583. In a succinct opinion with little analysis, the Court stated summarily:

Nor did the State's Attorney's statement of the details of the crime and of petitioner's criminal record deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination. . . . [In addition to failing to request a hearing,] petitioner, upon interrogation by the court, stated that the recitals of the [prosecutor's] statement were true. This alone should be a complete answer to the contention. But we go on to consider this Court's opinion in *Williams v. New York*

These considerations make it clear that the State's Attorney's statement of the details of the crime and of petitioner's criminal record—all admitted by petitioner to be true—did not deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination. *Id.* at 583–84.

The case has numerous unique circumstances, which limit its effect on the issue of confrontation at a capital sentencing proceeding. The information provided by the prosecutor was limited to the defendant's prior criminal record and the details of an offense to which the defendant had pleaded guilty and had been sentenced to life imprisonment. The defendant admitted the truth of the details and of his record. In addition, the Oklahoma statute, which provided for a more formal presentation, allowed either party to "suggest[] . . . there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment." *Id.* at 582 (quoting OKLA. STAT. tit. 22, § 973 (1951)). Counsel for the defendant had not requested a hearing or an opportunity to put on evidence. Counsel similarly had not challenged the prosecutor's right to make a statement to the court and had not, until appeal, claimed a violation of due process or confrontation.

holding fails to consider the Court's capital punishment,⁹⁴ due process,⁹⁵ constitutionally significant factfinding,⁹⁶ and confrontation⁹⁷ jurisprudence.

*B. Reconsidering Williams After the Court's Due Process Jurisprudence:
Gardner v. Florida, Specht v. Patterson, and Morrissey v. Brewer*

1. Gardner v. Florida

Almost thirty years after *Williams* was decided, the Supreme Court revisited the issue of confrontation, albeit in due process clothing, at a capital sentencing in another judicial override case.⁹⁸ As with the statute at issue in New York, Florida's capital punishment statute in effect in 1973 provided for a jury recommendation of sentence, but allowed a judge to override a recommendation of a life sentence with a death sentence.⁹⁹ The Citrus County Circuit Court judge overrode a jury's recommendation of a life sentence in *Gardner v. Florida*, basing his decision to sentence Gardner to death upon evidence at trial and sentencing, and upon "factual information contained in [a] presentence investigation [report]."¹⁰⁰ Unlike in *Williams*, however, part of the report was not disclosed to Gardner or his counsel.¹⁰¹

The focal point of the State's argument in *Gardner* was that the Court had resolved the issue in *Williams* and needed to neither revisit nor revise its decision. The Court, however, distinguished *Williams* on several grounds,¹⁰² and ultimately concluded that Gardner "was denied

These distinctions make the case very fragile authority for the proposition that the Confrontation Clause does not apply to sentencing proceedings.

⁹⁴ See *supra* text accompanying notes 55–69.

⁹⁵ See *infra* text accompanying notes 98–148.

⁹⁶ See *infra* text accompanying notes 150–83.

⁹⁷ See *infra* text accompanying notes 184–218.

⁹⁸ *Gardner v. Florida*, 430 U.S. 349 (1977).

⁹⁹ FLA. STAT. § 921.141 (Supp. 1976), cited in *Gardner*, 430 U.S. at 351 n.1.

¹⁰⁰ 430 U.S. at 353.

¹⁰¹ As was true in *Williams*, the Court legitimately could have decided the issue strictly on waiver grounds, avoiding the due process issue altogether. The Supreme Court noted in the *Gardner* opinion that the trial judge had found that counsel and Gardner had been given copies of the "portion [of the report] to which they are entitled," and that "counsel made no request to examine the full report or to be apprised of the contents of the confidential portion." *Id.* at 353 (alteration in original).

Interestingly, the report was not included as an exhibit to the appellate record at any level of the state court proceedings. See *Gardner v. State*, 313 So. 2d 675, 678 (Fla. 1978) (Ervin & Boyd, JJ., dissenting). The Supreme Court noted that the State of Florida placed "a copy of the confidential portion of the presentence report" in the appendix to its brief. 430 U.S. at 354 n.5. For obvious reasons, the Court declined to consider the contents of the report.

¹⁰² See *infra* text accompanying notes 108–10 for a discussion of the distinctions that the Court drew.

due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.”¹⁰³

The State relied upon the underpinnings of *Williams* as a basis for upholding the death sentence in *Gardner*.¹⁰⁴ Adding to the argument that the trial judge needs “more, not less” information to do the best job possible in sentencing, the State contended that since much of the information relevant to sentencing is sensitive, the state needed to give “assurance[s] of confidentiality” in order to acquire the information.¹⁰⁵ The Court disagreed with the State’s argument, noting that “the interest in reliability plainly outweighs” the State’s claimed justification.¹⁰⁶

Similarly, drawing upon the rationale in *Williams*, the State argued that confidentiality was necessary to foster a defendant’s rehabilitation.¹⁰⁷ The irony of the argument—that the potential for rehabilitation was in any way relevant to a sentence of death—did not escape the Court this time and the Court dismissed the argument outright:

[W]hatever force that argument may have in noncapital cases, it has absolutely no merit in a case in which a judge has decided to sentence the defendant to death. Indeed, the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different in kind from any other sentence a State may legitimately impose.¹⁰⁸

Among the distinctions the Supreme Court found between the case before it and *Williams* were counsel’s failure in *Williams* to challenge or refute the information relied upon by the judge and the judge’s narration of the information into the record in open court in the presence of the defendant and counsel.¹⁰⁹ Perhaps the most important difference relied upon by the Court to justify reaching a different result in *Gardner*, however, was the passage of time’s effect on capital sentencing.

Justice Stevens explained the significance of the intervening three decades by noting that Justice Black, the author of *Williams*, had himself recognized the need to reevaluate capital sentencing

¹⁰³ *Gardner*, 430 U.S. at 362. Perhaps the choice of these two verbs—“deny” and “explain”—leads to the narrow reading of *Gardner* by many courts today.

¹⁰⁴ The State also argued that full disclosure of the information to the defense would cause delay. *Id.* at 355. The Court discounted this argument because the importance of ascertaining the validity of the information easily outweighs any asserted state interest in efficiency. *Id.* at 357–58.

¹⁰⁵ *Id.* at 358.

¹⁰⁶ *Id.* at 359.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 360.

¹⁰⁹ *Id.* at 356.

procedures.¹¹⁰ Since *Williams*, “two constitutional developments . . . require[d] [the Court] to scrutinize a State’s capital-sentencing procedures more closely than was necessary in 1949.”¹¹¹ Those two constitutional developments were the recognition by a majority of the Court that “death is . . . different,”¹¹² and the recognition that sentencing is a “critical stage of the criminal proceeding.”¹¹³

Gardner, unlike *Williams*, came after the U.S. Supreme Court’s decision in *Furman v. Georgia*.¹¹⁴ Despite the differences in the reasoning of the five Justices in the *Furman* majority, the pervasive theme in the opinions¹¹⁵ was a theme of fairness. As one example, in recognizing the importance of this development since *Williams*, Justice Stevens specifically noted in *Gardner* that death sentences must be determined based on “reason.”¹¹⁶ Throughout the Court’s discussion of the State’s proffered justifications, the Court emphasized the need for reliability in the capital sentencing proceeding.¹¹⁷

Today, courts faced with the issue of the right of confrontation at sentencing often straddle the *Williams/Gardner* tightrope, if acknowledging *Gardner* at all. The courts cite *Williams* for the overly-broad proposition that a judge, or jury, may consider inadmissible and unchallenged evidence in determining a sentence and confine *Gardner* to circumstances in which a sentence is based on secretive, nondisclosed information.¹¹⁸ Therefore, as long as the court discloses all of the sentencing information upon which it relied to a defendant, the second-hand, unconfirmed, and unchallenged nature of the information was of no constitutional consequence.

¹¹⁰ *Id.* at 356–57 (quoting *Williams v. New York*, 337 U.S. 241, 247–48 (1949)).

¹¹¹ *Id.* at 357.

¹¹² *Id.* at 357–58; see *supra* text accompanying notes 65–69.

¹¹³ *Id.* at 358.

[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

Id.

¹¹⁴ 408 U.S. 238 (1972).

¹¹⁵ In *Furman v. Georgia*, the Court issued a single paragraph per curiam opinion, but each Justice wrote separately. *Id.* at 239.

¹¹⁶ 430 U.S. at 358.

¹¹⁷ *Id.* at 359.

¹¹⁸ See, e.g., *Ex parte Smith*, 557 So. 2d 13 (Ala. 1988); *Nukapiqak v. State*, 576 P.2d 982 (Alaska 1978); *People v. Arbuckle*, 587 P.2d 220 (Cal. 1978); *People v. Lowery*, 642 P.2d 515 (Colo. 1982); *State v. Fuller*, 744 A.2d 931 (Conn. 2000); *State v. Harmon*, 157 A.2d 594 (Conn. 1960); *Mayes v. State*, 604 A.2d 839 (Del. 1992); *Thompson v. Yuen*, 623 P.2d 881 (Haw. 1982); *State v. Pizutto*, 810 P.2d 680 (Idaho 1991); *People v. Williams*, 599 N.E.2d 913 (Ill. 1992); *Moore v. State*, 479 N.E.2d 1264 (Ind. 1985).

This broadening of *Williams* and narrowing of *Gardner* ignores three essential distinctions in the two cases. First, *Williams*'s counsel did not raise the issue at trial, thereby technically waiving the issue on appeal.¹¹⁹ Second, since *Williams* the Court has demanded heightened reliability and accuracy in death penalty cases. The third distinction was the other "constitutional development" that the Court said required more scrutiny than had been necessary at the time of the *Williams* decision. That development was the Court's recognition that sentencing was a critical stage in the criminal justice process that required due process.

2. *Specht v. Patterson*

This second constitutional development—applying the fundamental aspects of due process, including the right to counsel, not only to trials but also to all "critical stages" in the criminal proceeding¹²⁰—was far from mature at the time of *Williams*.¹²¹ Just seven years before *Williams*, the Supreme Court had declined to find that the right to counsel was a "fundamental right, essential to a fair trial."¹²² But both the right to counsel¹²³ and an understanding of the requirements of due process¹²⁴

¹¹⁹ Because the issue is the admission of evidence, the rules of evidence with regard to preservation of error apply. The federal rules from which most state rules are drawn, for example, requires a timely objection or a timely motion to strike. FED. R. EVID. 103(a)(1).

¹²⁰ *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

This Court has held that a person accused of crime "requires the guiding hand of counsel at every step in the proceedings against him," and that that constitutional principle is not limited to the presence of counsel at trial. "It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."

Id. at 7 (citation omitted).

¹²¹ In 1949, the year of the *Williams* decision, the Court was still viewing the right to counsel provided by the Sixth Amendment as a limited right. *HELLER*, *supra* note 19, at 120–28; see Penny J. White, *A Noble Ideal Whose Time Has Come*, 19 MEMPHIS ST. L. REV. 223 (1988).

¹²² *Betts v. Brady*, 316 U.S. 455, 471 (1942).

[I]n the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.

Id. at 471–72.

¹²³ See *Coleman*, 399 U.S. 1; *Gideon v. Wainwright*, 372 U.S. 335 (1963). In *Mempa v. Rhay*, for example, decided a decade before *Gardner* but relied upon by the Court in *Gardner*, the Court recognized:

had matured by the time *Gardner* was decided. Ten years before *Gardner*, in *Specht v. Patterson*,¹²⁵ the Court merged the two concepts.

Defendant Specht was convicted in a Colorado court for the crime of indecent liberties, which carried a maximum punishment of ten years.¹²⁶ Following his conviction, the court sentenced Specht to an indeterminate sentence of “from one day to life” based upon a procedure set out in the Colorado Sex Offenders Act.¹²⁷ The statutory procedure that Specht challenged allowed a defendant who was found guilty of a specified offense to receive a significantly increased sentence based upon the judge’s finding of an additional fact. The additional fact was “not an ingredient of the offense charged,”¹²⁸ but rather a new fact, found after conviction. As the Supreme Court would later explain, Specht “was examined as required and a psychiatric report prepared and given to the trial judge But there was no hearing in the normal sense, no right of confrontation and so on.”¹²⁹

Specht argued that the additional factfinding of the judge in Colorado’s sentencing procedure violated due process because it allowed a “critical finding to be made . . . without a hearing at which the person so convicted may confront and cross-examine adverse witnesses . . . and on the basis of hearsay evidence to which the person involved is not allowed access.”¹³⁰ As in *Gardner*, the State relied upon *Williams* to support its contention that the sentencing procedure was satisfactory.¹³¹

On certiorari, the U.S. Supreme Court distinguished the case before it from *Williams*, but unfortunately described the decision in *Williams*

There was no occasion in *Gideon* to enumerate the various stages in a criminal proceeding at which counsel was required, but *Townsend*, *Moore*, and *Hamilton*, when the *Betts* requirement of special circumstances is stripped away by *Gideon*, clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.

389 U.S. 128, 134 (1967). The Court specifically credited *Townsend* with “illustrat[ing] the critical nature of sentencing in a criminal case” and noted that it “might well be considered to support by itself a holding that the right to counsel applies at sentencing.” *Id.* (citing *Townsend v. Burke*, 334 U.S. 736 (1948)).

¹²⁴ See, e.g., *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mempa*, 389 U.S. 128.

¹²⁵ 386 U.S. 605 (1967).

¹²⁶ *Id.* at 607.

¹²⁷ *Id.* The Sex Offenders Act could be used by a trial court who was “of the opinion that any . . . person [convicted of specified sex offenses], if at large, constitute[d] a threat of bodily harm to members of the public, or is an habitual offender and mentally ill.” *Id.* (quoting Sex Offenders Act, COLO. REV. STAT. §§ 39-19-1–10 (1963)).

¹²⁸ *Id.*

¹²⁹ *Id.* at 608.

¹³⁰ *Id.*

¹³¹ *Id.*

broadly as holding that due process “did not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when [the judge] came to determine the sentence to be imposed.”¹³² Despite this obvious overstatement of the *Williams* holding, to which the Court said it “adhere[d],” the Court described the State’s argument in *Specht* as extending the *Williams* rationale to a “radically different situation.”¹³³

The Court analogized the Colorado statute to habitual criminal and recidivist statutes, which implicate the procedural protections of the Due Process Clause.¹³⁴ The Court concluded that

[d]ue process, in other words, requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.¹³⁵

Because the Colorado statute lacked all of these protections, it was “deficient in due process,”¹³⁶ and violated the Fourteenth Amendment.

The holding and rationale in *Specht v. Patterson*¹³⁷ clearly supported the Court’s decision in *Gardner*, but the Court’s reliance on *Specht* would also foreshadow another relevant constitutional development. *Specht* was the Court’s first foray into what has come to be known as “constitutionally significant factfinding,” but its significance in that area would not be realized for thirty years.¹³⁸ Importantly, when the holdings in *Gardner* and *Specht* are considered together, they lead inescapably to the conclusion that due process at sentencing includes not only the right

¹³² *Id.* at 606. After this unfortunate, and incorrect, statement, the Court recited *Williams*’s precise language and clarified the context in which the issue in that case arose. *Id.* at 606–07 (quoting *Williams*, 337 U.S. at 249–50).

¹³³ *Id.* at 608.

¹³⁴ *Id.* at 610. The Court also cited, and quoted, from a Third Circuit case, interpreting a similar Pennsylvania statute:

It is a separate criminal proceeding . . . [at which] [p]etitioner . . . was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.

Id. at 609–10 (quoting *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1966)).

¹³⁵ *Id.* at 610.

¹³⁶ *Id.* at 611.

¹³⁷ *Id.* at 610–11.

¹³⁸ See *infra* text accompanying notes 150–83.

to counsel, but also the right to confront and cross-examine the government's witnesses.

3. *Morrissey v. Brewer*

The Supreme Court has recognized the importance of confrontation, as an element of due process, in contexts other than sentencing. The holding of one such case, that applies the right to confrontation at a parole revocation hearing, bolsters the proposition that mature due process includes the right to confrontation at capital sentencing proceedings.

In *Morrissey v. Brewer*,¹³⁹ two defendants¹⁴⁰ challenged the procedures by which their parole was revoked resulting in their return to prison. In both cases, the revocation was based upon a written report, filed by a parole officer, which recited various violations of the conditions of parole. In neither case did the defendant receive a hearing.¹⁴¹

The appellate court approved the parole revocation procedures relying on the traditional view that parole was a privilege rather than a right and that prison authorities need broad discretion to further the objectives of penological policy.¹⁴² The Supreme Court reversed, holding that due process requires, at a minimum, written notice of the alleged violations, disclosure to the defendant of the evidence against him or her, an opportunity to be heard and to present witnesses and evidence before a neutral and detached hearing body, "the right to confront and cross-examine adverse witnesses," and a written decision outlining the reasons for the decision.¹⁴³

The Court invoked a traditional due process analysis, characterizing the parolee's liberty interest as conditional and "indeterminate," but concluding that "[b]y whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its

¹³⁹ 408 U.S. 471 (1972).

¹⁴⁰ *Morrissey* was paroled from the Iowa State Penitentiary on a charge of uttering bad checks. Seven months after his release he was arrested and jailed locally. One week later, the Iowa Board of Parole revoked his parole and returned him to the state penitentiary, based upon the officer's written report. Co-petitioner Booher was paroled after service of two years of a ten year sentence. Eight months after his release, he was arrested and placed in the county jail. Some weeks later, the Iowa Board of Parole revoked his parole and returned him to the penitentiary based on the parole officer's written report. Neither inmate received a hearing prior to their arrest or their revocation. *Id.* at 472-74.

¹⁴¹ *Id.* at 474.

¹⁴² *Id.* at 474-75. The deference given to prison officials in the appellate decision is similar to the deference the Court gave to judges in *Williams*. Both are based on an unwillingness to interfere with corrections policy. See *supra* text accompanying notes 84-97.

¹⁴³ *Id.* at 489.

termination calls for some orderly process, however informal.”¹⁴⁴ Notwithstanding the “overwhelming”¹⁴⁵ state interests at issue, the Court concluded that the State has no interest “in revoking parole without some informal procedural guarantees.”¹⁴⁶

Thus, even after conviction and incarceration, when there is no question as to guilt or sentence, but only a question as to the manner of service of the sentence, and when the state’s interests are strong, due process demands that an accused parolee have the right to confront and cross-examine witnesses before parole is revoked. That due process would require less when the issue is whether a defendant should be sentenced to life or death is inconceivable.

The extent of procedural protections required by due process depends upon “the extent to which an individual will be ‘condemned to suffer grievous loss.’”¹⁴⁷ The loss that a parolee might suffer upon revocation is not remotely comparable to that which a capital defendant faces. At a capital sentencing proceeding, the defendant’s interest in life and liberty are ultimate; no greater “core value” than life exists.¹⁴⁸ The government, too, has an interest in the sanctity of life and in assuring that it only seeks to execute those who are clearly deserving of the most severe penalty. Any government interest in efficiency is trivial by comparison to the interest both parties share in assuring reliability in the sentencing process.

V. RECONSIDERING *WILLIAMS* AFTER THE COURT’S CONSTITUTIONALLY SIGNIFICANT FACTFINDING JURISPRUDENCE: *APPRENDI V. NEW JERSEY*, *RING V. ARIZONA*, FEDERAL AND STATE SENTENCING GUIDELINES CASES

Specht v. Patterson is a focal point for a crucial analytical element of confrontation rights at capital sentencing. After *Specht*, it is clear that only factual findings derived from a proceeding at which certain due process protections are honored may be relied upon to enhance a criminal sentence. *Specht* requires specifically that the accused have the right to counsel, the right to be heard, the right to offer evidence, and, most importantly, the right to confrontation and to cross-examination.¹⁴⁹

¹⁴⁴ *Id.* at 482.

¹⁴⁵ *Id.* at 483.

¹⁴⁶ *Id.* at 484.

¹⁴⁷ *Id.* at 481 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1950) (Frankfurter, J., concurring)).

¹⁴⁸ *Id.* at 482. In determining whether a parolee had a liberty interest protected by due process, the Court analyzed whether the parolee’s interests included “the core values of unqualified liberty” and whether termination of parole would inflict a “grievous loss” on the parolee. *Id.*

¹⁴⁹ *See supra* text accompanying note 135.

The question which *Specht* did not address was *who* must make the “new factual finding” necessary to enhance the sentence. This question was resolved in *Apprendi v. New Jersey*,¹⁵⁰ in the first of five cases in which the Court delineated the right to have a jury determine constitutionally significant facts.¹⁵¹

In *Apprendi*, a state criminal case, the trial judge enhanced a convicted defendant’s sentence after finding that the defendant committed the crime “with a purpose to intimidate an individual or group of individuals . . . because of race.”¹⁵² The court based the enhancement upon a New Jersey statute which gave the court discretion, upon request by the state, to extend the prison sentence based upon a finding by a preponderance of the evidence that the crime had been committed with the “purpose to intimidate” because “the crime was motivated by racial bias.”¹⁵³

Although the issue had not been analyzed in state criminal cases, a year earlier, the Court had faced a similar issue in two federal cases. In the earlier of the two, *Almendarez-Torres v. United States*,¹⁵⁴ the trial court enhanced the defendant’s sentence for violation of a deportation statute based upon the defendant’s admission that his prior deportation had been as a result of prior convictions.¹⁵⁵ The Court upheld the sentence, concluding that the statute under which the judge had sentenced the defendant was a “penalty provision.”¹⁵⁶ Because that statute did not create a separate crime, the government was not required to include the fact of the prior convictions in the indictment as the defendant argued.¹⁵⁷

In the second case, *Jones v. United States*,¹⁵⁸ a judge enhanced a defendant’s sentence for carjacking based upon provisions of a federal statute that allowed enhancement when the carjacking caused serious bodily injury or death.¹⁵⁹ Like the defendant in *Almendarez-Torres*, Jones argued that the fact of serious bodily injury or death was an element of

¹⁵⁰ 530 U.S. 466 (2000).

¹⁵¹ See *infra* text accompanying notes 152–83.

¹⁵² 530 U.S. at 468 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000)).

¹⁵³ *Id.* at 471.

¹⁵⁴ 523 U.S. 224 (1998).

¹⁵⁵ *Id.* at 226–27. *Almendarez-Torres* was a case in which, following a guilty plea to a violation of the deportation statute, an offense with a two year maximum sentence, the trial court sentenced the defendant to eighty-five months based on his admission that his prior deportation had been as a result of prior convictions. *Id.*

¹⁵⁶ *Id.* at 226.

¹⁵⁷ *Id.*

¹⁵⁸ 526 U.S. 227 (1999).

¹⁵⁹ *Id.* at 230–31.

the offense, and had to be pleaded in the indictment and proven beyond a reasonable doubt to the jury.¹⁶⁰

The Supreme Court saw the two cases as distinguishable, based upon the nature of the facts necessary to allow enhancement. In *Almendarez-Torres*, the enhancement was based on prior convictions which had “been established through procedures satisfying [due process].”¹⁶¹ In *Jones*, however, the facts used to enhance the sentence were “new” and in addition to the elements necessary to constitute the offense. The federal statute at issue allowed enhancement upon the finding of additional facts—either serious bodily injury or death—and those facts must be found by a jury based upon proof beyond a reasonable doubt.¹⁶²

The state case, on the Court’s docket a year later, could not support a different result. Thus, the Court held in *Apprendi* that the Fourteenth Amendment provided the same due process protections in a state criminal case: “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”¹⁶³

The decision in *Apprendi* is significant for several reasons. The trial judge in *Apprendi*, unlike the trial judge in *Specht*, conducted an “evidentiary hearing” before determining whether to enhance punishment.¹⁶⁴ This distinguished the case from the one before the Court in *Specht*. Additionally, the New Jersey statute at issue in *Apprendi* required the trial judge to find the facts by a preponderance of the evidence standard. This forced the Court to decide the narrow issue, which it described as “starkly presented,”¹⁶⁵ of whether a “factual determination authorizing an increase in the maximum prison sentence .

¹⁶⁰ *Id.* at 231.

¹⁶¹ *Id.* at 249. Unlike other factors used to enhance sentences, the fact of a prior conviction “must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” *Id.*

¹⁶² *Id.* at 230–32.

¹⁶³ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (alteration in original) (quoting *Jones*, 526 U.S. at 252–53 (Stevens, J., concurring)).

¹⁶⁴ *Id.* at 470. It does not appear that the statute at issue actually required a hearing. The statute specifically provided that the “court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, . . . to an extended term if it finds, by a preponderance of the evidence, the [requisite] grounds.” *Id.* (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000)). Because *Apprendi* entered a guilty plea, the evidentiary hearing which the court conducted was the only opportunity for the court to hear evidence concerning the alleged “purpose to intimidate . . . because of race.” *Id.* at 469–70.

¹⁶⁵ *Id.* at 476.

. . . [must] be made by a jury on the basis of proof beyond a reasonable doubt.”¹⁶⁶

Crucially, *Apprendi* also involved a noncapital crime. The Court had struggled previously to draw lines between elements of an offense, which must be determined beyond a reasonable doubt by a jury, and “sentencing factors,” which could be utilized by a judge in determining a sentence.¹⁶⁷ *Apprendi* provided the Court with an opportunity to reconcile the conflicting cases outside the politically charged climate of a capital case.

The Court’s holding, reiterated from its two prior cases,¹⁶⁸ was that “any fact [other than a prior conviction¹⁶⁹] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁷⁰ The Court attempted to dilute any effect that its decision would have on capital sentencing proceedings, citing Justice Scalia’s dissenting opinion in *Almendarez-Torres*,¹⁷¹ a holding that it had already clearly distinguished: “[f]or reasons we have explained, the capital cases are not controlling.”¹⁷² The

¹⁶⁶ *Id.* at 469.

¹⁶⁷ The Court had recognized in *Jones* that “[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.” *Jones*, 526 U.S. at 232.

¹⁶⁸ *See id.*; *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The Court took pains to avoid overruling *Almendarez-Torres* in *Apprendi*, although the majority was obviously troubled by the potential lack of consistency:

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, . . . *Apprendi* does not contest the decision’s validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

530 U.S. at 489–90.

¹⁶⁹ In *Jones* the Court distinguished *Almendarez-Torres*: “The Court’s repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing.” 526 U.S. at 249. The reason for the distinction was obvious. Unlike other factors used to enhance sentences, the fact of a prior conviction “must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated by reading the carjacking statute as the Government urges.” *Id.* at 249.

¹⁷⁰ 530 U.S. at 490.

¹⁷¹ *See* 523 U.S. at 257 n.2 (Scalia, J., dissenting).

¹⁷² *Apprendi*, 530 U.S. at 496 (citing *Walton v. Arizona*, 497 U.S. 639, 647–49 (1990), *overruled in part by* *Ring v. Arizona*, 536 U.S. 584 (2002)). Justice O’Connor, a former Arizona state judge, and a dissenter in *Apprendi*’s predecessor, *see Jones*, 526 U.S. at 254 (O’Connor, J., dissenting), knew better. “The distinction of [the Court’s decisions in the

attempted distinction was not readily accepted by those vigilant about fairness in capital punishment schemes. Within months of the ruling in *Apprendi*, the Court was squarely faced¹⁷³ with the issue of whether its *Apprendi* logic did not apply with full force to many capital punishment schemes.¹⁷⁴

As the dissenting Justices in *Apprendi* had predicted, the majority's holding could not be tailored to fit only noncapital cases. Thus, in *Ring v. Arizona*, the Court announced that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."¹⁷⁵ Thus, if a defendant found guilty of a capital crime could only be sentenced to life imprisonment absent some aggravating circumstance, the facts necessary to prove the aggravating circumstance, and thereby elevate the life sentence to death, must be found by a jury beyond a reasonable doubt. In *Ring*, the Court overruled prior authority to the "extent that it allows a sentencing judge, sitting without a jury, to

capital cases] offered by the Court today is baffling, to say the least." *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting).

Walton v. Arizona, which the Court cited in *Apprendi*, was an Arizona capital case in which the Court upheld Arizona's capital sentencing scheme. 497 U.S. at 647. The Arizona statute required a separate sentencing hearing at which the judge would "impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated [in the statute] and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 644 (quoting ARIZ. REV. STAT. ANN. § 13-703(E) (1989)). In *Walton*, the Court relied upon prior authority in which it had concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.* at 648 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989) (per curiam)). As Justice O'Connor explained in her dissent:

[U]sing the terminology that the Court itself employs to describe the constitutional fault in the New Jersey sentencing scheme . . . under Arizona law, the judge's finding that a statutory aggravating circumstance exists "exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

Apprendi, 530 U.S. at 537 (O'Connor, J., dissenting) (quoting *id.* at 482 (majority opinion)).

¹⁷³ See *Ring*, 536 U.S. 584.

¹⁷⁴ Thirty-eight states had authorized capital punishment at the time of the decision in *Ring*. *Id.* at 608 n.6. Unlike Arizona, the vast majority assigned the sentencing decision to a jury. Five states, including Arizona, required the judge to both find the facts essential to a death sentence and ultimately determine sentence. *Id.* The remaining four states utilized a system in which the jury reached an advisory verdict, but the ultimate sentencing authority was left to the judge. *Id.*

¹⁷⁵ *Id.* at 589. In a demonstration of the power of the Supremacy Clause, the Arizona State Supreme Court noted its agreement with Justice O'Connor's dissent in *Apprendi*, see *supra* note 172, and the persuasion of Ring's argument on appeal, but upheld the death sentence based on *Walton*, which the majority in *Apprendi* had specifically endorsed. *State v. Ring*, 25 P.3d 1139, 1151-52 (Ariz. 2001).

find an aggravating circumstance necessary for imposition of the death penalty.”¹⁷⁶

But the Court’s journey through the land of “factual findings requiring a unanimous jury determination,” so-called “constitutionally significant facts,” did not end with its overruling of prior capital cases in *Ring*. Instead, three other cases allowed the Court to refine its decisions. These cases, though not involving capital proceedings, bolster the proposition that the right of confrontation must apply at a capital sentencing.

In 2004 and 2005, and most recently in 2007, the Court reviewed federal and state noncapital sentencing schemes in light of the *Apprendi* rationale. In *Blakely v. Washington*,¹⁷⁷ *United States v. Booker*,¹⁷⁸ and

¹⁷⁶ 536 U.S. at 609.

¹⁷⁷ 542 U.S. 296 (2004). The Washington criminal punishment scheme was at issue in *Blakely*. In the Washington criminal statutes, offenses were punished by broad indeterminate sentences, but the appropriate sentence for a particular offender was narrowed to a lesser indeterminate sentence of months within the broader sentence range based on stated criteria. Upon a finding of “substantial and compelling reasons justifying an exceptional sentence,” a judge could sentence above the offender’s set range. *Id.* at 299 (quoting WASH. REV. CODE § 9.94A.123(2) (2000)). An “exceptional sentence” could only be imposed if the judge found the existence of factors other than those used in computing the initial sentence range. *Id.* at 298. *Blakely* was charged with an offense which carried a maximum sentence of ten years; his maximum exposure, however, was forty-nine to fifty-three months. *Id.* at 299. After *Blakely* pleaded guilty, the judge found that he had acted with “deliberate cruelty,” which was a statutorily listed ground allowing departure from a range sentence, and sentenced *Blakely* to ninety months. *Id.* at 300.

¹⁷⁸ 543 U.S. 220 (2005). The defendants in *Booker* and the companion case of *United States v. Fanfan* were sentenced pursuant to the United States Federal Sentencing Guidelines. Both defendants were subject to an increased sentence after the respective judges found, by a preponderance of the evidence, the existence of factors that authorized an increase. *Id.* at 227–29. The Supreme Court held that the analysis in *Blakely* applied:

[T]here is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case. This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges.

If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.

Id. at 233–34. (citations omitted). A different majority, led by Justice Breyer, delivered the remainder of the opinion in *Booker*, severing the provisions of the Guidelines that made them mandatory and turning a determinate sentencing scheme into an indeterminate one. *Id.* at 245.

Cunningham v. California,¹⁷⁹ the Court struck down sentencing schemes that permitted the judge to impose a higher sentence based upon a judicial finding of certain enumerated aggravating factors.¹⁸⁰ The Court reiterated that any fact that is not an element of the crime and that is necessary to increase a sentence beyond the statutory range is of constitutional significance and must be found beyond a reasonable doubt by a jury.¹⁸¹

If the Sixth Amendment requires that a jury find, beyond a reasonable doubt, the factors necessary to impose a sentence outside the statutory range, then the majority of death penalty statutes in the United States require a jury determination of the sentence of death.¹⁸² When a statute authorizes either a life or death sentence, but imposes a life sentence absent the finding of certain aggravating circumstances, the facts constituting the aggravating circumstance are facts of constitutional significance and must be found by a jury.

When a jury is required to find facts beyond a reasonable doubt, the decision in *Specht* requires the presence of other important aspects of due process, including the right to counsel, the right to cross-examine, and the right to confrontation.¹⁸³ The extent to which those aspects of due process apply in a capital sentencing proceeding depends upon which facts in the proceeding are of constitutional significance. If a fact is of constitutional significance, then the accused has a right to have that fact found beyond a reasonable doubt by a jury in a hearing at which the accused has the benefit of counsel and the opportunity to confront and challenge the evidence presented.

¹⁷⁹ 127 S. Ct. 856 (2007). In *Cunningham*, California's determinate sentencing law was at issue. The Determinate Sentencing Law, called the DSL, was described as "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." *Id.* at 860. This sentencing scheme, to no one's surprise, was found to violate the Sixth and Fourteenth Amendments of the United States Constitution. *Id.*

California argued that the scheme withstood *Blakely* and *Booker* analysis because, in most cases, it reduced sentences, and because the statutory enhancement factors were required to be charged in the indictment. *Id.* at 865–66. Disagreeing, the Supreme Court enumerated California's options. Either the state could preserve the determinate sentencing scheme by allowing juries to find the facts necessary to the imposition of an elevated sentence or judges could continue to sentence but only within the statutory range. *Id.* at 871.

¹⁸⁰ The specific aggravating factors in both the federal and California sentencing schemes were enumerated in various statutes. *Id.* at 862.

¹⁸¹ *Id.* at 868.

¹⁸² All of the states that require the jury to determine the ultimate punishment, based upon finding and weighing the aggravating and mitigating circumstances, would fit in this category. The Court has not held, however, that judges may not be responsible for determining the ultimate sentence, based upon facts found by a jury.

¹⁸³ *See supra* notes 120–36.

VI. EFFECT OF *CRAWFORD* AND *DAVIS* ON APPLICATION OF CONFRONTATION RIGHTS TO CAPITAL SENTENCINGS

A. Background

In *Crawford v. Washington*¹⁸⁴ and *Davis v. Washington*¹⁸⁵ the U.S. Supreme Court dramatically altered the parameters of the Sixth Amendment Confrontation Clause. In *Crawford*, the Court held that testimonial statements¹⁸⁶ may not be introduced against a defendant unless the witness is unavailable¹⁸⁷ and the defendant has had a prior opportunity to cross-examine.¹⁸⁸ After a discussion of the history leading to the Sixth Amendment,¹⁸⁹ the Court reached its conclusion by focusing

¹⁸⁴ 541 U.S. 36 (2004).

¹⁸⁵ 126 S. Ct. 2266 (2006).

¹⁸⁶ Justice Scalia, who authored the majority opinion in both cases, reached the conclusion that the Confrontation Clause applied only to testimonial statements in this way:

[N]ot all hearsay implicates the Sixth Amendment's core concerns. . . .

The text of the Confrontation Clause reflects [that it] applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." . . . The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Id. at 51 (citations omitted).

In the next sentence, Justice Scalia began to use the phrase "testimonial" statements, *id.*, which he sprinkled throughout the remainder of the opinion, concluding his opinion with this statement: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68–69.

¹⁸⁷ While the Court has spoken on occasion about the requirements of unavailability, *see Barber v. Page*, 390 U.S. 719 (1968), the issue of what the Constitution requires to establish unavailability, as compared to what the rules of evidence require, *see* FED. R. EVID. 804(a), has never been resolved, and remains the topic of debate. In both *Crawford* and *Davis*, however, the Court suggested that the need to establish unavailability could be avoided by emphasizing that the right to confrontation is waived by "one who obtains the absence of a witness by wrongdoing." *Davis*, 126 S. Ct. at 2280 (citing *Crawford*, 541 U.S. at 62).

¹⁸⁸ The Court provided no discussion of what would constitute a "prior opportunity to cross-examine." Although the Court previously discussed what was meant by a prior opportunity to cross-examine in *Ohio v. Roberts*, 448 U.S. 56, 69–73 (1980), that discussion was in the context of the now-discarded confrontation test, leaving the appropriate standard unclear. *See* Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy Crawford?*, 19 REGENT U. L. REV. 319 (2006-2007).

¹⁸⁹ 541 U.S. at 43–50. At least one of the country's premier constitutional historians has questioned the validity of some of the historical underpinnings of the opinion:

If one consults the framing-era evidence authorities to assess the scope of the Confrontation right in 1789—which Justice Scalia did not do in either *Crawford* or *Davis*—one finds that framing-era evidence doctrine imposed a total ban against unsworn hearsay evidence to prove a criminal defendant's guilt. In other words, by the date of the framing judges had not yet invented

first on the word “witness” in the Sixth Amendment. Employing a dictionary definition of “witness” as one who “bear[s] testimony,”¹⁹⁰ and a second definition of “testimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,” the Court concluded that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”¹⁹¹

Thus, the Court concluded that the Confrontation Clause “reflects an especially acute concern with a specific type of out-of-court statement,” pegged “‘testimonial’ statements.”¹⁹² Although the Court admitted that it was not fully defining this term in *Crawford*, it referred to “[v]arious formulations” including

“*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” . . . “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” . . . “statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”¹⁹³

the hearsay “exceptions” that now constitute a prominent feature of criminal evidence law. Rather, nineteenth century judges invented the hearsay exceptions that now apply to criminal trials only after the framing. Hence, it is plain that the Framers did not design the Confrontation Clause so as to accommodate the admission of unsworn hearsay statements.

Rather the framing-era sources indicate that the confrontation right actually was understood to be one of several principles that required the total ban against the use of hearsay statements as evidence of the defendant’s guilt. The condemnations of hearsay that appeared in prominent and widely used framing-era authorities typically recognized that the admission of any hearsay statement would deprive the defendant of the opportunity to cross-examine the speaker, and cross-examination was understood to be a salient aspect of the confrontation right. Thus, the framing-era sources actually indicate that the Framers would not have approved of the hearsay exceptions that were later invented because the Framers would have perceived such exceptions as violations of a defendant’s confrontation rights.

Hence, *Crawford’s* testimonial formulation of the scope of the confrontation right does not reflect “the Framers’ design.” Rather, *Crawford’s* permissive allowance of unsworn hearsay is inconsistent with the premises that shaped the Framers’ understanding of the right.

Thomas Y. Davies, *Not “the Framers’ Design”: How The Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y (forthcoming 2007).

¹⁹⁰ *Crawford*, 541 U.S. at 51 (quoting 2 WEBSTER, *supra* note 40, at 114).

¹⁹¹ *Id.* (quoting 2 WEBSTER, *supra* note 40, at 91).

¹⁹² *Id.*

¹⁹³ *Id.* at 51–52 (citations omitted).

To that laundry list the Court added “[s]tatements taken by police officers in the course of interrogations.”¹⁹⁴

Just as the Court declined to fully define “testimonial statements,” it likewise left to another day the definition of “interrogation.”¹⁹⁵ The opportunity to refine this new language, at least with regard to testimonial statements and interrogation, came to the Court two years later in *Davis v. Washington* and its companion, *Hammon v. Indiana*.¹⁹⁶ Both cases involved police questioning of victims contacted as a result of calls to 911 emergency operators.

Again, the Court was hesitant to provide broad guidance about what kinds of interrogations produced testimonial statements.¹⁹⁷ Confining its holding to the precise facts in the two cases before it, the Court held that

[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹⁹⁸

The Court acknowledged that the facts of the cases prompted its focus on statements made in response to interrogation, but added that the focus did not exclude other statements, made without interrogation, from Confrontation Clause analysis.¹⁹⁹

While ambiguity remains following *Crawford* and *Davis* about the kinds of statements at which the Confrontation Clause is aimed, the Court left no uncertainty about the process required when testimonial statements are at issue. The government may not introduce testimonial statements against the accused unless the witness is unavailable to testify and the accused has had a prior opportunity for cross-examination. In acknowledging this straightforward and absolute

¹⁹⁴ *Id.* at 52. The Court noted that the use of the term “interrogation” was not in its “technical, legal sense,” but rather in its “colloquial” sense. *Id.* at 53 n.4.

¹⁹⁵ *Id.* at 53 n.4. Previewing the issue that would arise in *Davis*, the Court commented in *Crawford* that “one can imagine various definitions of ‘interrogation,’ and we need not select among them in this case.” *Id.*

¹⁹⁶ 126 S. Ct. 2266 (2006).

¹⁹⁷ *Id.* at 2273. The Court’s caution is reflected in Justice Scalia’s statement: “Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows . . .” *Id.*

¹⁹⁸ *Id.* at 2273–74.

¹⁹⁹ *Id.* at 2274 n.1.

requirement of the Constitution, the Court emphasized the procedural nature of the constitutional right:

To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. [The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined.²⁰⁰

Crawford and *Davis/Hammon* involved statements offered against the accused during the guilt phase of a criminal trial. Thus, the Court had no real occasion to comment on the right to confrontation at sentencing. But the recognition of the absolute procedural demands of the right to confrontation, together with reliance on the nature of criminal proceedings at the time of the framing of the Sixth Amendment, exact the conclusion that the right to confrontation applies equally to testimonial statements offered at a capital sentencing proceeding. At a capital sentencing proceeding, the sentencer must determine whether an eligible defendant should live or die based upon factual information presented as evidence. This factual information is introduced either through the testimony of witnesses or exhibits. The defendant is entitled to challenge the factual information for the purpose of providing the sentencer, be it judge or jury, with a means of assessing the accuracy and reliability of the evidence it has heard. Determining the accuracy and reliability of sentencing information is no less important than determining the accuracy and reliability of information related to guilt. The best mechanism for assessing reliability is confrontation.

B. Implications

If one follows Justice Scalia's practice²⁰¹ of beginning with a dictionary definition, as this article has emulated,²⁰² the Sixth Amendment text guarantees the right to confrontation at a capital sentencing. The Sixth Amendment applies to "all criminal prosecutions." The same dictionary that Justice Scalia used to formulate his definition of "witness," provides that a prosecution is the "institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal,

²⁰⁰ *Crawford*, 541 U.S. at 61.

²⁰¹ In addition to using *Webster's* to begin his analysis of the constitutional text in *Crawford*, Justice Scalia consulted a dictionary to begin his analysis in *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (using WEBSTER'S NEW INTERNATIONAL DICTIONARY 1247 (2d ed. 1950) to determine the meaning of "impartiality").

²⁰² See *supra* text accompanying notes 28–41.

and pursuing them to final judgment.”²⁰³ Common dictionary definitions of “prosecution” include “the institution and carrying on of legal proceedings against a person” and “following up on something undertaken or begun, usually to its completion.”²⁰⁴ A criminal prosecution begins with a charge or arrest and ends, ordinarily,²⁰⁵ with either an acquittal or punishment. The right to confront the witnesses is guaranteed at every stage in the prosecution by the very terms of the Amendment. Testimonial statements, therefore, may not be admitted at sentencing²⁰⁶ without the right to confrontation unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.

An additionally compelling argument for the application of confrontation rights at sentencing flows from the Court’s recognition in *Crawford* that the purpose of the Clause, ensuring reliability, is only constitutionally acquired in one way—by cross-examination.²⁰⁷ The Court made clear that the Confrontation Clause requires not only that evidence be reliable, but that its reliability be tested in a particular way.²⁰⁸ In essence, reliable evidence is insufficient to satisfy the Confrontation Clause; only evidence that has been subjected to cross-examination and confrontation suffices. This is because cross-examination is *the* criterion for reliability in a criminal prosecution.

²⁰³ 2 WEBSTER, *supra* note 40, at 45.

²⁰⁴ RANDOM HOUSE UNABRIDGED DICTIONARY 1552 (2d ed. 1993).

²⁰⁵ Many criminal prosecutions terminate with a guilty plea or a dismissal, and still others result in a mistrial before verdict.

²⁰⁶ Although the text and history of the Sixth Amendment would support the conclusion that confrontation applies at *all* sentencings, this article has not discussed the Supreme Court’s willingness to draw bold lines of demarcation between capital and noncapital sentencings. For more on this topic, see the discussion in *Lockett v. Ohio*, 438 U.S. 586, 602–03 (1978).

²⁰⁷ Although *Crawford* has affected the viability of many of the Court’s prior Confrontation Clause cases, the decision in *Crawford* is consistent with much of what the Court has said about the importance of cross-examination to a fair criminal trial. For example, in *Pointer v. Texas*, 380 U.S. 400 (1965), the Court noted that:

It cannot be seriously doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one . . . would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.

Id. at 404 (citations omitted).

²⁰⁸ The majority in *Crawford* said that “[t]o be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” 541 U.S. at 61.

“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”²⁰⁹

Reliability is no less important at sentencing—particularly at a capital sentencing—than at trial. The Supreme Court’s call for “heightened reliability” in capital proceedings underscores the need for “adversarial testing” to “beat[] and bolt[] out the [t]ruth”²¹⁰ even more so than in a noncapital case. The recognition by a majority of the Supreme Court that the qualitative difference in the penalty of death demands a “corresponding difference in the need for reliability”²¹¹ only punctuates the point.

The Court’s nearly sixty-year old precedent, *Williams v. New York*, which upheld a judge’s use of uncontroverted evidence to override a jury recommendation of a life sentence, cannot be reconciled with the Eighth Amendment’s heightened reliability requirements in modern death penalty jurisprudence, nor with the Sixth Amendment’s demand that testimonial statements be tested by cross-examination. The *Williams* decision placed a premium on the quantity of information available to the sentencing authority, but the Eighth Amendment’s demand for reliability and the Sixth Amendment’s demand for confrontation establish that the focus must shift to the quality, not the quantity, of sentencing information.

In each of the case scenarios outlined in the introduction to this article—and dozens more occurring daily in capital sentencing proceedings—the government sought to introduce testimonial statements at a capital sentencing hearing. Statements of witness-inmates made to prison officials investigating a prior prison disturbance, and then recorded by those officials into a prison investigative report, are equivalent to statements of a witness-citizen given to a responding police officer after the occurrence of a crime.²¹² The testimony of a

²⁰⁹ *Id.* at 62.

²¹⁰ *Id.* at 61–62 (quoting MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 258 (1713)). Justice Scalia also quoted Hale’s famous statement about cross-examination, as recorded by Blackstone, in his discussion of the Confrontation Clause’s cross-examination requirement: “This open examination of witnesses . . . is much more conducive to the clearing up of truth.” *Id.* (quoting 3 BLACKSTONE, *supra* note 43, at *373).

²¹¹ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also Lockett*, 438 U.S. at 604 (“We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”).

²¹² The prison reports in *Mills*, *see supra* note 12, are comparable to the police report and battery affidavit that summed up Amy Hammon’s statements in *Hammon*. Both statements were recorded by officials after the passage of an ongoing emergency for the purpose of investigating the past events in order to prove those facts in a later prosecution. *Compare Davis v. Washington*, 126 S. Ct. 2266, 2272–73 (2006) *with United States v. Mills*, 446 F. Supp. 2d. 1115, 1137–38 (C.D. Cal. 2006). The inmates interviewed in *Mills* and

jailhouse informant repeating statements of a witness who has asserted the right to remain silent and who has not been cross-examined, does not differ from the testimony of an officer repeating statements of a witness who has invoked the marital privilege and refused to testify.²¹³ The investigative report of a psychiatrist containing statements by multiple individuals is indistinguishable from the ex parte examinations condemned in *Crawford*.²¹⁴ Similarly, the testimony by a witness, repeating statements by a now-deceased, never cross-examined witness, is the precise kind of extrajudicial statement prohibited by the Court in *Crawford*.²¹⁵ A police officer's testimony repeating a victim's statement, given after the event, equates to ex parte in-court testimony, specifically disallowed by both *Crawford*²¹⁶ and *Davis*.²¹⁷ And absent witnesses' statements repeated by a surrogate who testifies would fit under the most stringent definition of "testimonial."²¹⁸

None of these statements would be admissible had they been offered into evidence at the guilt phase of a criminal prosecution. The

Amy Hammon bore testimony that they reasonably expected would be used prosecutorially. *Davis*, 126 S. Ct. at 2278; *Mills*, 466 F. Supp. 2d at 1138.

²¹³ The use of the informant's testimony in *Johnson*, see *supra* note 13, is comparable to the state's use of the tape recorded statement made by Sylvia Crawford. Because the witness whose testimony the informant reported invoked his Fifth Amendment privilege to remain silent, Johnson was denied the right to cross-examine the witness. *United States v. Johnson*, 378 F. Supp. 2d 1051, 1064–65 (N.D. Iowa 2005). Because Sylvia Crawford invoked Washington's marital privilege, defendant Michael Crawford was denied the right to cross-examine her. *Crawford*, 541 U.S. at 40, 68.

²¹⁴ The reports in *Bassette*, see *supra* note 14, bear remarkable resemblance to the eighteenth century practice instituted by the Virginia Governor and contested by its Council of "privately issu[ing] several commissions to examine witnesses against particular men *ex parte*." *Crawford*, 541 U.S. at 47 (citing A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 ENGLISH HISTORICAL DOCUMENTS 253, 257 (Merrill Jensen ed., Oxford Univ. Press 1969)).

²¹⁵ The facts at issue in *Fell*, see *supra* note 15 and accompanying text, are similar to those in the Court of King's Bench case cited by the Court, *King v. Paine*, 87 Eng. Rep. 584 (K.B. 1696). *Crawford*, 541 U.S. at 45. That case is cited as holding that "even though a witness was dead, his examination was not admissible where 'the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of cross-examination.'" *Id.* (citing *King*, 87 Eng. Rep. at 585).

²¹⁶ *Crawford*, 541 U.S. at 69.

²¹⁷ The officer's testimony in *Bell*, see *supra* note 16, taken from the victim following the robbery is identical to the officer's report in *Hammon* summarizing the victim's statements after the assault. Compare *State v. Bell*, 603 S.E.2d 93, 116–17 (N.C. 2004), with *Davis*, 126 S. Ct. at 2277–73.

²¹⁸ The statements introduced in *Brown*, see *supra* note 17, are comparable to evidence presented by affidavits, with the only difference being the medium. *United States v. Brown*, 441 F.3d 1330, 1360–61 (11th Cir. 2006). An affidavit delivers facts to the factfinder in writing from a witness who does not appear for cross-examination. The testifying witness in *Brown* delivered facts to the factfinder orally from witnesses who did not appear for cross-examination. *Id.* In *Crawford*, the Court referred to affidavits as "formulation" of the "core class of 'testimonial' statements." 541 U.S. at 51–52.

Confrontation Clause would have barred their admission. Based upon the reasoning in *Crawford* and *Davis*, the Confrontation Clause should also bar the admission of unchallenged hearsay in capital sentencing proceedings.

CONCLUSION

In biblical times in the story of Susanna, Daniel poignantly demonstrated the crucial impact that confrontation had on determining the reliability of the elders' testimony. In modern times in dozens of cases, the sentencing of innocent people to death clearly demonstrates the effects of allowing unopposed evidence to be considered in capital cases.²¹⁹

Neither the Constitution's text, its history, nor interpretive precedent provide a reasoned basis for denying a person facing death the right to confront the witnesses at a capital sentencing proceeding. On the contrary, the text, the history, and a half-century of constitutional development mandate that the Sixth Amendment right to confrontation be given full effect in the most significant of criminal prosecutions, the capital sentencing proceeding.

²¹⁹ One of the major causes of wrongful convictions and death sentences has been found to be the use of jailhouse informants. This problem is exacerbated when the jailhouse informant is allowed to testify to the statements of others. See The Innocence Project, Understand the Causes: Informants, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited Mar. 13, 2007) (discussing the causes of wrongful convictions).