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Confronting Death: Sixth Amendment Rights at Capital Sentencing

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CONFRONTING DEATH: SIXTH AMENDMENT RIGHTS AT CAPITAL SENTENCING

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Trial rights are different from sentencing rights. The Supreme Court has ruled that some Sixth Amendment rights (the right to counsel) apply at sentencing, while others (the right to a jury, the right to confront witnesses) do not. Because some rights are "in" at sentencing, and some are "out," the Court's recent terms have been consumed with cases—from Apprendi v. New Jersey, *to* Ring v. Arizona, *to* Blakely v. Washington, *and finally to* United States v. Booker*—that struggle to draw the line between trial and sentencing. This Sixth Amendment line drawing is especially troublesome in death-penalty cases, where the Eighth Amendment already divides sentencing into eligibility issues and selection issues. As things now stand, the Court applies parts of the Sixth Amendment to parts of a capital sentencing proceeding. The unfortunate result is a confused doctrine that often calls for conflicting constitutional standards in a single sentencing. In this Article, I argue that the basic premise of these Sixth Amendment cases is misplaced when it comes to capital sentencing. Drawing on the history of unified trials in the era of the Framers, where guilt and death were determined simultaneously by a single jury verdict in a trial with full adversarial rights, I argue that the whole of the Sixth Amendment applies to the whole of a capital case. At the time of the framing, popular resistance to mandatory death penalties contributed heavily to the birth of the adversarial rights we now see in the Sixth Amendment. The Framers knew nothing of a "guilt" phase and a "penalty" phase. They crafted the Sixth Amendment not only to protect the innocent from punishment, but also to protect the guilty from undeserved death.*

INTRODUCTION

Modern criminal prosecution spans two worlds: first a trial, then a sentencing. In capital cases, we know these two worlds as the "guilt"

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phase and the "penalty" phase. Whatever we choose to call them, we treat them as separate universes, governed by very different rules.[1]

Trial is an adversarial process, conducted under rules set out in a single sentence of the Sixth Amendment.[2] The defendant gets a speedy and public trial, before a jury, with notice of the charges, the assistance of counsel, the right to confront and cross-examine government witnesses, and the right to call witnesses on his own behalf. An elaborate body of precedent defines each of these Sixth Amendment rights, leaving us with the highly structured, adversarial world of criminal trials. For good measure, Congress, state legislatures, and the courts have created a law of evidence that further refines what happens in the world of a criminal trial.

The sentencing world is a different kind of place: an informal, free-flowing world with few hard rules. Granted, some elements of the adversarial process inhabit the world of sentencing.[3] But few "trial rights" survive intact after a guilty verdict,[4] and some do not survive at all.[5] Indeed, most sentencings take place without any witnesses.[6] When witnesses are called, the rules of evidence typically do not apply.[7] At best, a defendant's "sentencing rights" are a faint shadow of his "trial rights."

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1. In the modern lexicon of Supreme Court discourse, we might refer to the world of trial as "*Apprendi*-land." Ring v. Arizona, 536 U.S. 584, 613 (2002) (Scalia, J., concurring). Beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court's efforts to define the Sixth Amendment border between the land of trial and the land of sentencing have caused major upheavals in sentencing practices in noncapital cases, leading ultimately to the invalidation of the United States Sentencing Guidelines (Federal Sentencing Guidelines) and similar guideline sentencing systems in the states. See United States v. Booker, 125 S. Ct. 738, 759–64 (2005); Blakely v. Washington, 124 S. Ct. 2531, 2537–38 (2004). As I suggest later in this Article, the tremors from *Apprendi*, *Ring*, *Blakely*, and *Booker* are just beginning to be felt in death-penalty sentencing. See infra Part II.D.

2. U.S. Const. amend. VI.

3. See, e.g., Mempa v. Rhay, 389 U.S. 128, 137 (1967) (holding that Sixth Amendment right to appointed counsel extends to sentencing). For a comprehensive catalogue of cases applying, or refusing to apply, "trial rights" at sentencing, see Alan C. Michaels, Trial Rights at Sentencing, 81 N.C. L. Rev. 1771 (2003).

4. See infra Part I.A–B.

5. For example, there is no Sixth Amendment right to be sentenced by a jury. Spaziano v. Florida, 468 U.S. 447, 459 (1984).

6. In the typical, noncapital sentencing, the court relies on a presentence report prepared by a probation officer and submitted to the parties for review, comment, or objection prior to sentencing. See, e.g., 18 U.S.C. § 3552 (2000).

7. See, e.g., Fed. R. Evid. 1101(d)(3) (providing that rules of evidence do not apply in sentencing hearings); Fla. Stat. § 921.141(1) (2004) (providing that probative evidence is admissible at capital sentencing hearings "regardless of its admissibility under the exclusionary rules of evidence"). One researcher found that nineteen death-penalty states did not apply their rules of evidence to capital sentencing hearings, while seventeen states applied their rules to at least part of the capital sentencing process. Robert Alan Kelly, Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical & Practical Support for Open Admissibility of Mitigating Information, 60 UMKC L. Rev. 411, 457 (1992).

This division of criminal cases into two distinct worlds with different rights holds true even in capital cases, where the purpose of the sentencing hearing is to determine who lives and who dies. While the Supreme Court insists that the requirements of due process are heightened at capital sentencing,[8] it is hard to discern a constitutional difference between procedural rights at noncapital sentencing and the "heightened" protections the Court accords to capital sentencing.[9] Instead, the Court has been quick to note that due process, even at capital sentencing, does not "implicate the entire panoply of criminal trial procedural rights."[10]

Unfortunately, the Court has never articulated a coherent theory for identifying which of the rights in the Sixth Amendment "panoply" apply at capital sentencing and which do not. Despite its affinity for textual analysis in other realms of Sixth Amendment law,[11] the Court has never answered the basic textual question whether the Sixth Amendment—which applies "in all criminal prosecutions"—applies to capital sentencing at all. And while today's Court looks to the world of the Framers to resolve other Sixth Amendment issues,[12] its decisions regarding adversarial rights at capital sentencing rest on scant historical analysis that highlights nineteenth-century practice while largely ignoring the forces at play when the Sixth Amendment was conceived.[13]

Rather, through an approach best described as fragmentary, the Court has ruled some trial rights "in" and some rights "out" at capital

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8. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (stating that since "the penalty of death is qualitatively different from a sentence of imprisonment . . . there is a corresponding difference in the need for reliability in the determination that death is . . . appropriate"). The notion of heightened procedural reliability in capital sentencing stems from the Court's statements that "death is different" from other forms of punishment and therefore requires more reliable procedures at sentencing. See Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 370–71 (1995) [hereinafter Steiker & Steiker, Sober Second Thoughts].

9. For an account of the relatively few cases where the Court has invoked the notion of heightened reliability to address procedural rights at capital sentencing, see Carol S. Steiker & Jordan M. Steiker, Judicial Developments in Capital Punishment Law, *in* America's Experiment with Capital Punishment 47, 64–65 (James R. Acker et al. eds., 1998) [hereinafter America's Experiment]; Steiker & Steiker, Sober Second Thoughts, supra note 8, at 397–98.

10. Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977).

11. See, e.g., Crawford v. Washington, 541 U.S. 36, 51 (2004) (holding that phrase "'witnesses' against the accused" in the Confrontation Clause bars "testimonial" hearsay offered by the prosecution); Kirby v. Illinois, 406 U.S. 682, 689–90 (1972) (interpreting Sixth Amendment reference to "criminal prosecutions" to mean that right to counsel attaches only upon commencement of adversarial judicial proceedings); cf. Maryland v. Craig, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting) (decrying "subordination of explicit constitutional text to currently favored public policy").

12. See, e.g., *Crawford*, 541 U.S. at 42–50 (relying on history to conclude that Confrontation Clause excludes hearsay akin to "*ex parte* examinations" in the sixteenth and seventeenth centuries).

13. See infra text accompanying notes 56–59 (discussing Court's limited historical analysis in Williams v. New York, 337 U.S. 241, 246 & nn.4–5 (1949)).

sentencing. The Court has repeatedly rejected the claim that the Sixth Amendment creates a right to jury sentencing in capital cases.[14] In *Williams v. New York*, it declined to apply the right of confrontation to limit a sentencing court's use of uncross-examined hearsay in sentencing a defendant to death,[15] though—without mentioning the Sixth Amendment—it has ruled that courts may not impose a death sentence based on secret information never disclosed to the defendant.[16] By contrast, the Court readily applies the right to appointed counsel at sentencing hearings[17] and defines "effective assistance" at sentencing just as it does at trial.[18] As for the rest of the rights listed in the Sixth Amendment, the Court has said little. Today, the best answer to the question, "Does the Sixth Amendment apply at capital sentencing?" is, "Yes" (right to counsel), "No" (right to jury), and "Maybe" (everything else). Lower courts have responded with their own array of confusion, disagreeing about questions as fundamental as, "Does the right of confrontation apply at capital sentencing?"[19] Through it all, the Court has never attempted to put the Sixth Amendment pieces together into a coherent whole.[20]

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14. See Walton v. Arizona, 497 U.S. 639, 647–49 (1990); Clemons v. Mississippi, 494 U.S. 738, 745 (1990); Hildwin v. Florida, 490 U.S. 638, 640 (1989); Spaziano v. Florida, 468 U.S. 447, 464 (1984); Proffitt v. Florida, 428 U.S. 242, 252 (1976).

15. 337 U.S. at 251–52. Because it was a state prosecution predating the Warren Court era of "selective incorporation," *Williams* is not explicitly a Confrontation Clause case. See infra note 54.

16. Gardner v. Florida, 430 U.S. 349, 360 (1977).

17. Mempa v. Rhay, 389 U.S. 128, 137 (1967).

18. Glover v. United States, 531 U.S. 198, 201–04 (2001); Strickland v. Washington, 466 U.S. 668, 686 (1984).

19. Compare Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002) (holding that Confrontation Clause "applies through the finding of guilt, but not to sentencing, even when that sentence is the death penalty"), with United States v. Fortier, 911 F.2d 100, 103 (8th Cir. 1990) (applying confrontation right even to noncapital sentencing under Federal Sentencing Guidelines), overruled by United States v. Wise, 976 F.2d 393, 401 (8th Cir. 1992) (en banc). For examples of courts explicitly commenting on this confusion, see United States v. Higgs, 353 F.3d 281, 324 (4th Cir. 2003) ("It is far from clear that the Confrontation Clause applies to a capital sentencing proceeding."); cf. United States v. Kikumura, 918 F.2d 1084, 1103 n.19 (3d Cir. 1990) ("We hope . . . that the Supreme Court in the near future will decide whether confrontation clause principles are applicable at sentencing hearings . . . .").

20. Likewise, there has been relatively little scholarly commentary on Sixth Amendment rights at capital sentencing. Prominent scholars have criticized the lack of substance to the Court's notion of heightened procedural safeguards at death sentencing. See, e.g., Steiker & Steiker, Sober Second Thoughts, supra note 8, at 360, 397–402. Most commentary on capital sentencing and the Sixth Amendment has gone the way the Court's decisions in *Apprendi* and *Ring* have led: into a debate centered on the jury right and concerned with drawing the line between trial and sentencing in capital cases. See generally Thomas Aumann, Note, Death by Peers: The Extension of the Sixth Amendment to Capital Sentencing in *Ring v. Arizona*, 34 Loy. U. Chi. L.J. 845 (2003); Marc R. Shapiro, Note, Re-Evaluating the Role of the Jury in Capital Cases After *Ring v. Arizona*, 59 N.Y.U. Ann. Surv. Am. L. 633 (2004). Among the many comments on *Ring*, only Professor Carol Steiker's explicitly recognizes *Ring*'s potential application beyond the jury right to Sixth Amendment rights more generally. See Carol S. Steiker, Commentary,

Instead, for more than a decade, the Court has struggled with a question that is unavoidable when we have two Sixth Amendment worlds: Where should the border be drawn between trial and sentencing? In capital litigation, the Court's most recent effort to clarify that border is *Ring v. Arizona*.[21] *Ring* deals explicitly with only one Sixth Amendment right: the right to a jury trial. But its reasoning applies equally to the entire range of Sixth Amendment rights, including the rights of confrontation and compulsory process.[22] The Sixth Amendment border therefore determines not just who decides the critical facts that may lead to a death sentence, but what information the sentencer may rely upon and how it may be presented.[23]

Unfortunately, despite the obvious significance of the Sixth Amendment border between trial and sentencing, its location has proven hard to fix. *Ring* attempts to draw a bright line, assigning death-eligibility factfinding to the jury, while leaving the ultimate exercise of sentencing discretion—the selection process—beyond the reach of the Sixth Amendment.[24] But as *Ring* itself demonstrates, the constitutional border does not always line up with the division of factfinding labor established in many death-penalty statutes. Most states address both eligibility and selection in a single penalty phase.[25] In those jurisdictions, at least when it comes to the hearsay rules imposed by the Confrontation Clause, *Ring* may call on courts to apply two different constitutional standards in the same proceeding.[26] Even more troublesome, because prosecutors have

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Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty, 77 N.Y.U. L. Rev. 1475, 1481–82 (2002) [hereinafter Steiker, Things Fall Apart] ("If the Sixth Amendment right to a jury trial applies to aggravating circumstances, what about the Sixth Amendment's Confrontation Clause?").

In the arena of noncapital sentencing, there has been significant interest in the topic of Sixth Amendment rights, especially the right of confrontation, and especially in the process of sentencing under the Federal Sentencing Guidelines. See, e.g., Sara Sun Beale, Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence," 35 Wm. & Mary L. Rev. 147 (1993); Note, An Argument for Confrontation Under the Federal Sentencing Guidelines, 105 Harv. L. Rev. 1880, 1888–91 (1992) [hereinafter Note, An Argument for Confrontation].

21. 536 U.S. 584 (2002).

22. See infra text accompanying notes 192–196.

23. The Confrontation Clause not only guarantees the right to cross-examine prosecution witnesses, Davis v. Alaska, 415 U.S. 308, 315–18 (1974), but also limits the use of hearsay by prosecutors, Crawford v. Washington, 541 U.S. 36, 42–69 (2004).

24. *Ring*, 536 U.S. at 597, 609.

25. See Shapiro, supra note 20, at 647–51 (discussing *Ring*'s impact on states formerly employing "strict judicial sentencing" and "hybrid sentencing schemes"). In the wake of *Ring*, three states—Delaware, Montana, and Nebraska—adopted sentencing procedures that call for jury determination of death-eligibility factors followed by a selection process where the judge ultimately determines the sentence. Id. at 650–51. In effect, these states have trifurcated capital cases.

26. In at least one federal case, the court has proposed to divide capital sentencing into distinct eligibility and selection phases, specifically in order to accommodate differing restrictions on hearsay under the Confrontation Clause. See United States v. Jordan, 357 F. Supp. 2d 889, 903–04 (E.D. Va. 2005).

some range of discretion in choosing which facts to allege in establishing death eligibility and which to leave to the selection process, a defendant's right to jury determination of a critical fact, or his right to cross-examine a critical witness, can turn upon the tactical choices of his adversary.[27] Few constitutional protections are so malleable when the stakes are so high.

To heap complexity upon complexity, the Court's recent decisions in *Blakely v. Washington*[28] and *United States v. Booker*[29] may have shifted the Sixth Amendment border in subtle ways that courts have yet to explore in the context of capital sentencing. But lost in the formalistic line drawing of *Ring*, *Blakely*, and *Booker* is a more fundamental Sixth Amendment question, a question the Court has not addressed seriously in a capital case for more than fifty years: Why draw a line at all?

This Article addresses that fundamental question. The Court's fragmentary approach has taken pieces of the Sixth Amendment and applied them to pieces of the capital sentencing process. I contend that the whole of the Sixth Amendment applies to the whole of a capital case, whether the issue is guilt, death eligibility, or the final selection of who lives and who dies. In capital cases, there is one Sixth Amendment world, not two.

In this Article, I argue for a unified theory of Sixth Amendment rights to govern the whole of a capital case. Because both *Williams* and the *Apprendi-Ring-Booker* line of cases purport to rest on an originalist interpretation of the Sixth Amendment, my thesis relies largely on history, a history that today is well documented by leading legal historians[30] but has been ignored or misread by the Court in fashioning its separate world of capital sentencing rights. Two aspects of that history are central to my argument: (1) unitary capital trials conducted as full adversarial proceedings, and (2) jury verdicts that determined life or death.

Unitary capital trials were the norm when the Sixth Amendment was created.[31] The question of guilt and the question of death both were decided in a single jury verdict at the end of a single proceeding conducted as an adversarial trial. Bifurcation—separating the guilt determination from the choice of an appropriate penalty—was a procedure that evolved after the founding, initially for noncapital sentencing. Bifurca-

27. See infra Part II.C.

28. 124 S. Ct. 2531 (2004).

29. 125 S. Ct. 738 (2005).

30. In particular, two recent works by noted legal historians illuminate death sentencing at and before the American constitutional period. Professor Langbein's work documents the critical role of juries and adversarial trial rights in the death-sentencing process in both England and America. See John H. Langbein, The Origins of Adversary Criminal Trial 334–38 (2003) [hereinafter Langbein, Origins]. Professor Banner's work chronicles the development of death-penalty practice and procedure in America from colonial times to the present. See Stuart Banner, The Death Penalty: An American History (2002).

31. See infra text accompanying notes 249–253.

tion spread as popular resistance to the death penalty and the corresponding rise of a prison system gave judges new options and new powers in fixing sentences. Bifurcation came to capital cases quite late in our history, primarily in response to the Court's Eighth Amendment decisions in the mid-1970s. My point in reviewing this history is not that bifurcation is a bad idea, nor that we must try capital cases today as we did in 1791. My point is simply that the separation of trial from capital sentencing is a post-constitutional idea that was born from a movement away from capital punishment, not as a means to implement it. We cannot assume, as the Court seems to have done,[32] that separation of trial and sentencing is part of the natural order of things, or that the "trial rights" of the Sixth Amendment were conceived with such a separation in mind.

That world of unitary trials functioned against a backdrop of substantive criminal law featuring mandatory death penalties for numerous offenses.[33] Judges had little or no discretion in capital sentencing.[34] Instead, juries exercised de facto sentencing discretion in capital cases through their power to issue a general verdict either acquitting the defendant or finding him guilty of a lesser, noncapital offense. Indeed, as one leading historian tells us, the rights which today define our adversarial trial system evolved in large measure as a counterweight to a system of substantive criminal law that featured "too much death."[35] There was no distinction between trial rights and sentencing rights because, in both purpose and effect, the trial was the sentencing.

The modern Court's reluctance to extend full Sixth Amendment protection to capital sentencing stems, in part, from a misreading of that history. It may also stem from the practical concern that rights extended to capital sentencing logically must extend to all sentencing.[36] After all, the Sixth Amendment text speaks of "all criminal prosecutions,"[37] not just "all capital prosecutions." Any doctrine that turned every sentencing into a full-blown jury trial would be impractical in a system with ten times more sentencings than trials.[38]

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32. See Williams v. New York, 337 U.S. 241, 245–46 (1949); see also infra text accompanying notes 57–59.

33. See infra notes 249–252 and accompanying text.

34. "The substantive criminal law tended to be sanction-specific . . . ." Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) (quoting John H. 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) [hereinafter Langbein, English Criminal Trial Jury]).

35. Langbein, Origins, supra note 30, at 334.

36. See, e.g., Spaziano v. Florida, 468 U.S. 447, 459 (1984) ("[A] capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding . . . .").

37. U.S. Const. amend. VI.

38. More than ninety percent of criminal cases are resolved by guilty plea, resulting in a system where sentencings are ubiquitous but trials are comparatively rare. See United States v. Booker, 125 S. Ct. 738, 781 (2005) (Stevens, J., dissenting in part) (noting that guilty pleas resolve ninety-seven percent of federal prosecutions); see also U.S. Dep't of

History, I suggest, answers that concern as well by providing a principled basis to distinguish capital from noncapital sentencing under the Sixth Amendment.[39] In eighteenth-century England and colonial America, many capital trials were essentially sentencing hearings, where the issue of guilt went largely uncontested and the real question was whether the defendant should die for his crime.[40] By the time of the American Constitution, those proceedings had evolved into full adversarial trials, proceedings which formed a model for the rights enumerated in the Sixth Amendment. There is no comparable history of adversarial trials conducted primarily for the purpose of choosing among noncapital sentencing options.[41] To the contrary, before the founding, judges in cases of misdemeanor convictions had exercised sentencing discretion outside of the adversarial trial process.[42] And the first criminal legislation passed by the First Congress made a comparable distinction. That legislation prescribed death as the mandatory punishment for a number of offenses.[43] It prescribed sentencing ranges for a handful of noncapital offenses.[44] But there were no crimes for which a sentencing judge could make a choice between life and death. In allowing that practice today in the absence of full Sixth Amendment protections, the Court sanctions a practice that the Framers never saw and would not have tolerated.

This Article is divided into three parts. Part I critiques the Court's efforts to distinguish "trial rights" from "sentencing rights" in capital cases. That effort began in 1949 with *Williams v. New York*,[45] a much-criticized ruling that survives despite its roots in now-discredited history and despite its reliance on a rehabilitative theory of punishment that logically has no place in the death-penalty discussion. The result of the Court's post-*Williams* efforts, I suggest, is a fragmented doctrine which recognizes some adversarial rights at capital sentencing, rejects others, and seldom bothers to explain the difference.

Part II turns to *Ring*, *Blakely*, and *Booker*, tracing the Court's efforts to fix the Sixth Amendment border between trial and sentencing. Whatever the merits of that Sixth Amendment line drawing in noncapital cases, its application to capital cases invites cat-and-mouse games that distort the adversary system at sentencing. A defendant's right to cross-examine a

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Justice, Sourcebook of Criminal Justice Statistics 448 (1996) (noting that 48,196 out of 52,270 (or about ninety-two percent) of defendants convicted in federal cases were convicted pursuant to guilty pleas).

39. See infra Part III.B.3.

40. See Langbein, Origins, supra note 30, at 59.

41. See infra text accompanying notes 280–283.

42. See Apprendi v. New Jersey, 530 U.S. 466, 480 n.7 (2000).

43. Act of Apr. 30, 1790, ch. 9, §§ 1, 3, 8–10, 14, 23, 1 Stat. 112, 112–17; see also infra note 286 and accompanying text.

44. §§ 5–7, 11–13, 16, 17, 21–23, 26, 28, 1 Stat. at 113–18; see also infra note 287 and accompanying text.

45. 337 U.S. 241 (1949).

crucial witness should not turn upon a legislature's designation of eligibility factors and selection factors, an often artificial distinction that bears little relationship to the real issues affecting the choice between life and death. A defendant's right to have a jury decide his fate should not turn on the tactical choices of the prosecutor. Yet that is where *Ring, Blakely*, and *Booker* have left us.

In Part III, I argue for a unified theory of Sixth Amendment rights for capital trial and sentencing. To begin, I argue that the constitutional text is more consistent with a unified theory than with the Court's fragmented approach. The text suggests a series of interdependent adversarial rights that apply throughout a "criminal prosecution." I then turn from text to history. The Framers knew a world of unitary capital trials where mandatory death penalties often turned trials into de facto sentencing proceedings, with juries acting as the final arbiter of life and death. In the Sixth Amendment, I argue, the Framers created a single set of adversarial rights with that unified system in mind. Finally, Part III turns from the Framers' age to the modern, post-*Furman* age of capital litigation. I argue that the Sixth Amendment rights of notice, counsel, confrontation, compulsory process, and the right to a jury do not conflict with Eighth Amendment concerns about consistency, proportionality, and the sentencer's need for broad access to information. Instead, Sixth Amendment rights will complement Eighth Amendment values and make modern capital sentencing fairer.

I. Two Sixth Amendment Worlds: Trial Rights Versus Sentencing Rights in Capital Cases

Among the various "trial rights" set out in the Sixth Amendment, only the right to a jury trial, the right of confrontation, and the right to counsel have received significant attention from the Court in the realm of capital sentencing. The Court embraces the right to counsel at sentencing, while it rejects the right to jury sentencing, as well as most aspects of the right of confrontation. The Court has tended to address each right in isolation, without pausing to reflect on their common origins in the text and history of the Sixth Amendment. The result is a sentencing world that differs markedly from the world of trial; but, when we look at the Court's sentencing rights cases as a whole, the reasons for the difference appear ill-defined and inconsistent.

A. *The Right of Confrontation*

The Sixth Amendment grants an accused the right "to be confronted with the witnesses against him."[46] At the guilt phase of trial, the Confrontation Clause embraces the defendant's right to be present,[47] to see gov-

46. U.S. Const. amend. VI.

47. Kentucky v. Stincer, 482 U.S. 730, 739–40 (1987).

ernment witnesses face to face,[48] and to cross-examine those witnesses.[49] As an outgrowth of the right of cross-examination, the Court has held that the Confrontation Clause also functions as a constitutional hearsay rule, excluding at least some out-of-court statements that have not been subject to cross-examination.[50]

At sentencing, the defendant's confrontation rights are much more limited. While the Court has never explicitly stated whether the Confrontation Clause applies at sentencings generally or at capital sentencings in particular, the Court has held that due process at capital sentencing does not require the trial-like procedure of open-court testimony by witnesses subject to cross-examination. Its sweeping opinion in *Williams v. New York* allows a sentencing court to consider virtually any out-of-court source in arriving at a death sentence, even though the defendant may have no opportunity to question that source.[51] Because *Williams* lays the constitutional foundation for current practice—which largely ignores the law of confrontation when it comes to sentencing—our examination of confrontation rights at capital sentencing begins there.

A New York jury found Samuel Williams guilty of murder and recommended life imprisonment. At sentencing, the judge relied on information from unspecified sources in the presentence investigation to conclude that Williams had committed thirty burglaries for which he had never been convicted and that he possessed "a morbid sexuality."[52] Calling Williams "a menace to society," the judge sentenced him to death.[53] In the Supreme Court, Williams argued that the sentencing court's reliance on out-of-court information deprived him of due process in violation of the Fourteenth Amendment.[54]

The Court rejected this argument: "[W]e do not think the Federal Constitution restricts the view of the sentencing judge to the information

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48. See Maryland v. Craig, 497 U.S. 836, 845–48 (1990) (noting that face-to-face confrontation is guaranteed absent compelling circumstances).

49. Davis v. Alaska, 415 U.S. 308, 316–17 (1974).

50. Crawford v. Washington, 124 S. Ct. 1354, 1364–65 (2004). For an extensive commentary on the application of the Confrontation Clause in the years leading up to *Crawford*, see generally John G. Douglass, Confronting the Reluctant Accomplice, 101 Colum. L. Rev. 1797 (2001).

51. 337 U.S. 241, 251–52 (1949).

52. Id. at 244.

53. Id.

54. Id. at 243. In a technical sense, Williams was not making a Sixth Amendment claim. In 1949, when *Williams* was decided, the Court had yet to apply the Confrontation Clause to state prosecutions through the process of Fourteenth Amendment incorporation. Accordingly, although it adjudicated confrontation-like rights, the *Williams* Court never considered—or even mentioned—the Sixth Amendment text or its history. Still, incorporation of the confrontation right was not really the problem in *Williams*. The Court acknowledged as much when it said that the right to notice and the right to cross-examination—"salutary and time-tested protections"—were components of due process that applied to the guilt phase of a state prosecution. Id. at 245. The basic question, then, was whether these protections applied to capital sentencing.

received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."[55] In other words, the essential elements of the confrontation right—testimony in open court by witnesses subject to cross-examination—simply did not extend to the world of sentencing.

For more than fifty years, *Williams* has stood as the principal barrier to confrontation rights in capital sentencing.[56] Yet much of *Williams*'s rationale was questionable from the beginning, and more of its foundation has been eroded by time. To begin with, the *Williams* Court's view of history is seriously flawed. According to *Williams*,

> [B]oth 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.[57]

But to support that claim, the Court relied on a series of annotations from law digests, none of which contains a capital case from any American jurisdiction prior to—or even near—the founding.[58] The more historically accurate view is that English and early American criminal law was dominated by mandatory penalties, not by discretion in sentencing.[59] In

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55. Id. at 251.

56. See, e.g., Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002) ("[T]he Supreme Court . . . has never questioned the precise holding of *Williams* . . . .").

57. *Williams*, 337 U.S. at 246. According to *Williams*, New York's practice of relying on presentence investigations by probation officers was merely a modern manifestation of an "age-old practice of seeking [sentencing] information from out-of-court sources." Id. at 250–51.

58. Id. at 246 n.5. In fact, the vast majority of the noted cases are noncapital cases from the nineteenth century, a period during which the historical practice of mandatory sentences was giving way to discretionary sentencing. See infra text accompanying notes 292–296. *Williams* also cites a law review note which, upon examination, flatly contradicts the Court's assertion that broad sentencing discretion was a fixture during and before the American constitutional period. See Note, The Admissibility of Character Evidence in Determining Sentence, 9 U. Chi. L. Rev. 715, 717 (1942) [hereinafter Note, Admissibility] (noting that "[b]y statute in many jurisdictions the power of sentencing was taken from the court and vested in the jury" in the early nineteenth century), cited in *Williams*, 337 U.S. at 246 n.5. The Note accurately confirms that discretionary sentencing developed during the nineteenth and twentieth centuries and that in earlier times "practically all felonies called for the death sentence." Note, Admissibility, supra, at 715–16 & n.1.

59. See Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) ("[T]he English . . . judge of the later eighteenth century had very little explicit discretion in sentencing." (quoting Langbein, English Criminal Trial Jury, supra note 34, at 36–37); McGautha v. California, 402 U.S. 183, 228 n.7 (1971) (Douglas, J., dissenting) ("[T]he common law judge generally had no discretion as to the quantum of punishment in felony cases . . . ." (quoting Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821, 832–33 (1968) [hereinafter Note, Procedural Due Process])); The Death Penalty in America 9 (Hugo Adam Bedau ed., 3d ed. 1982) ("Traditionally, under English law, death penalties were mandatory; once the defendant was found guilty of a capital offense, the court had no alternative but a death sentence."); Note, Admissibility, supra note 58, at 715 & n.1

that world, there was little need for a court to seek out-of-court sources in order to tailor its sentence because the court had little power to determine the sentence in the first place.

Aside from its misplaced reliance on history, *Williams* also claims "sound practical reasons" for eliminating confrontation rights at sentencing.[60] According to *Williams*, probation officers and sentencing courts need unlimited access to out-of-court sources of information in order to tailor an appropriately individualized sentence. That process, in turn, promotes rehabilitation of offenders and allows them to be "restored sooner to complete freedom and useful citizenship."[61] Toward that end, *Williams* points out, probation officers are trained "not . . . to prosecute but to aid offenders."[62] Whether this idealized notion of sentencer-as-friend reflected reality in 1949 seems doubtful. But regardless of the accuracy of its premise, the Court's chain of reasoning fails for a more obvious reason: It simply does not apply to a capital case.[63] In capital sentencing, individualization means choosing who, among the class of convicted murderers, deserves to die. The government does not offer individualized information at sentencing with the goal of making the defendant a better person in the long run. The government seeks to execute him. It is hard to imagine a more adversarial moment in the criminal process. Whether in the name of rehabilitation or of individualization, it is hard to see why the Founders would choose that moment to strip a defendant of the principal tools of the adversarial process: the right to see, hear, and cross-examine the sources of information that might lead to his death.

The final pillar of *Williams*'s reasoning has collapsed in the face of the Eighth Amendment revolution spawned by *Furman v. Georgia*.[64] *Williams* was decided when unguided sentencing discretion was the constitutionally blessed norm in capital cases—when, as *Williams* put it, a sentencer might issue a death sentence "giving no reason at all."[65] But

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(explaining that discretionary sentencing did not develop until the nineteenth and twentieth centuries); see also Langbein, Origins, supra note 30, at 334–35 (describing practice of English juries to convict for lesser, noncapital offenses to avoid mandatory death penalties); Banner, supra note 30, at 89–90 (describing similar practice in American colonies).

60. 337 U.S. at 246.

61. Id. at 249.

62. Id.

63. As the Court acknowledged years later in rejecting the same argument that *Williams* had embraced, 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." Gardner v. Florida, 430 U.S. 349, 360 (1977); see also Beale, supra note 20, at 157–58 ("The rhetoric of the rehabilitative ideal also led courts to characterize the [sentencing] proceedings as non-adversarial. While the reality did not live up to this vision, the vision nonetheless played an important role in shaping the *Williams* ruling." (citation omitted)).

64. 408 U.S. 238 (1972) (per curiam).

65. *Williams*, 337 U.S. at 252. The Court continued to approve of absolute discretion in capital sentencing for decades after *Williams*, though that discretion was typically

Furman concluded that unguided discretion violates the Eighth Amendment.[66] If capital sentencing discretion is subject to constitutional limits, then it follows that there must be at least some adversarial process to enforce those limits. The Court itself recognized as much when it decided *Gardner v. Florida* only a few years after *Furman*.[67] Unfortunately, that recognition alone was not enough to give *Williams* the burial it deserved.

In the intervening years between *Williams* and the time *Gardner* came before the Court, the world of capital punishment changed dramatically. *Furman* not only had washed away the notion of unlimited discretion in capital sentencing, but it had given rise to the idea that "death is different" and should be accompanied by heightened protections to insure reliable sentencing decisions based on reason rather than whim.[68] These changes could have formed the basis for rejecting *Williams* and causing a major shift that would have brought Sixth Amendment protections to the new, post-*Furman* world of capital sentencing.[69] But that never happened. At least six members of the Court rejected the notion that a death sentence might be imposed based on secret information from sources never identified, much less cross-examined.[70] Yet none chose to

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entrusted to juries, not judges. See McGautha v. California, 402 U.S. 183, 207 (1971) ("[W]e find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.").

66. See *Furman*, 408 U.S. at 274 (Brennan, J., concurring) (explaining that arbitrary punishments are prohibited by Eighth Amendment); id. at 309–10 (Stewart, J., concurring) (concluding that random imposition of death penalty is unconstitutional).

67. *Gardner*, 430 U.S. at 360 (plurality opinion) ("Florida argues that trial judges can be trusted to exercise their discretion in a responsible manner, even though they may base their decisions on secret information. However acceptable that argument might have been before *Furman v. Georgia*, it is now clearly foreclosed.").

Gardner presented the Court with facts almost identical to those in *Williams*. Gardner had been found guilty of murder by a jury that recommended a life sentence. After taking into account additional information developed out of court in a presentence investigation, the trial court sentenced Gardner to death. The principal distinguishing feature in *Gardner* was that a small "confidential" portion of the presentence report was never disclosed to the defense. Id. at 355–56 (plurality opinion).

68. See Steiker & Steiker, Sober Second Thoughts, supra note 8, at 370–71 (noting that "death as punishment differs in kind, and not merely degree, from all other punishments").

69. Given changes in constitutional criminal procedure, and in death-penalty procedure under *Furman*, it would have taken no large leap to apply Sixth Amendment "trial rights" to capital sentencing in the process of deciding *Gardner*. The Court had already applied the Confrontation Clause to state prosecutions. See Pointer v. Texas, 380 U.S. 400, 403 (1965). It readily applied one Sixth Amendment protection—the right to counsel—even to noncapital sentencing. See Mempa v. Rhay, 389 U.S. 128, 134 (1967). And the new requirements of *Furman* gave the Court a principled basis by which to distinguish capital from noncapital sentencing, thus avoiding the serious practical difficulty of turning all sentencings into trials.

70. *Gardner*, 430 U.S. at 359–61 (plurality opinion); id. at 364 (White, J., concurring); id. (Brennan, J., concurring); id. at 365 (Marshall, J., dissenting).

rest an opinion on the portion of the Constitution most clearly designed to prevent that kind of evil. In the six opinions written in *Gardner*, the words "Sixth Amendment" and "confrontation" never appear.

Instead, without mentioning the Sixth Amendment, Justice Stevens's plurality opinion accepted the premise of *Williams*: that capital sentencing was something less than a "normal adversary proceeding."[71] Still, the plurality acknowledged, due process required some measure of procedural protection to insure that courts complied with the substantive limits *Furman* had placed on sentencing discretion.[72] Unfortunately, the *Gardner* plurality made little effort to define what level of procedural protection was constitutionally adequate. In a narrow ruling, the plurality simply concluded that Florida failed to provide due process when it imposed a death sentence "on the basis of information which [the defendant] had no opportunity to deny or explain."[73] Ever cautious, the opinion added, "The fact that due process applies [at sentencing] does not, of course, implicate the entire panoply of criminal trial procedural rights."[74]

The Court has never said that the right to "deny or explain" sentencing information includes the confrontation rights that *Williams* rejected: the right to see, hear, and cross-examine the sources of that information. Nor has the Court ever employed *Gardner*—or the Confrontation Clause for that matter—to exclude hearsay offered by prosecutors at sentencing. Instead, in a string of noncapital cases reaching well into the 1990s, the Court has continued to cite *Williams* favorably for the broad proposition that there are no constitutional limits on the sources of information that a court may consider in the process of sentencing.[75]

Today, federal appellate courts continue to cite *Williams* for the proposition that the Confrontation Clause does not apply at sentencing,[76] whether capital or otherwise.[77] At sentencing, prosecutors remain free to rely on hearsay that would be barred at trial by the Confrontation Clause. Thus, in capital sentencings, courts have allowed summary testimony from police[78] and from expert witnesses,[79] noting that such testimony satisfies the Constitution so long as the defendant is given an opportunity to rebut it.

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71. Id. at 356 (plurality opinion).

72. Id. at 360–61.

73. Id. at 362.

74. Id. at 358 n.9.

75. See, e.g., United States v. Watts, 519 U.S. 148, 151–52 (1997); Roberts v. United States, 445 U.S. 552, 556 (1980); United States v. Grayson, 438 U.S. 41, 49 (1978); United States v. Tucker, 404 U.S. 443, 446–47 (1972).

76. See, e.g., United States v. Wise, 976 F.2d 393, 397–98 (8th Cir. 1992) (en banc); United States v. Kikumura, 918 F.2d 1084, 1100 (3d Cir. 1990).

77. See, e.g., Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002); Bassette v. Thompson, 915 F.2d 932, 939 (4th Cir. 1990).

78. Chandler v. Moore, 240 F.3d 907, 918 (11th Cir. 2001).

79. Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1387–88 (7th Cir. 1994).

Williams's profound impact on evidence at sentencing has been codified in federal law and in the evidentiary rules of many states. In 1970, Congress passed a statute providing, "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[80] The House Report on that provision cited *Williams*.[81] Two years later, the proposed Federal Rules of Evidence included Rule 1101(d)(3), still in effect today, which provides that the rules of evidence do not apply at sentencing. In support of that provision, the Advisory Committee Note cites *Williams* for the proposition that "due process does not require confrontation or cross-examination in sentencing . . . and that the judge has broad discretion as to the sources and types of information relied upon."[82]

The Federal Death Penalty Act (FDPA) of 1994 likewise codifies *Williams* for federal capital cases. The FDPA provides that, at the sentencing phase, "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials."[83] With a nod to *Gardner* and due process principles of "reliability," the FDPA adds, "information may be excluded [at sentencing] if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury . . . . The government and the defendant shall be permitted to rebut any information received at the hearing."[84] Most death-penalty states follow the federal practice, conducting capital sentencing hearings that are not subject to the same state rules of evidence that apply at the guilt phase.[85]

Williams did not deal directly with the procedural side of the confrontation right; that is, it did not tell us explicitly what the Constitution requires when the government actually calls a witness for live testimony at capital sentencing. At trial, the Confrontation Clause guarantees the

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80. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 951 (codified at 18 U.S.C. § 3661 (2000)).

81. H.R. Rep. No. 91-1549, at 63 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4040; see also United States v. Grayson, 438 U.S. 41, 50 n.10 (1978) (recounting Congress's reliance on *Williams* in enacting statute).

82. Fed. R. Evid. 1101(d)(3) advisory committee's note. Years later, the Federal Sentencing Guidelines followed suit, providing that, "In determining the sentence . . . the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S. Sentencing Guidelines Manual § 1B1.4 (2004). The Federal Sentencing Guidelines further provide that, "In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." Id. § 6A1.3(a).

83. 18 U.S.C. § 3593(c).

84. Id.

85. See Kelly, supra note 7, at 457.

right to physically confront such a witness—i.e., the right of the defendant to see and hear the witness testify in person. Likewise it would guarantee a "full and fair opportunity" to cross-examine that witness[86] and would prohibit the court from restricting cross-examination reasonably calculated to test the accuracy and credibility of that witness.[87] On its face, *Williams* appears to negate these procedural rights as well. After all, if it is constitutionally permissible for a judge to assemble sentencing information from sources out of court, whom the defendant never sees, hears, or cross-examines, it seems hard to complain when the source at least shows up to testify, even if the court decides to limit cross-examination or dispense with it altogether. And, under *Williams*, if the prosecution fears cross-examination of its witness, it could simply submit his story in the form of an affidavit.

Still, it seems more than peculiar—indeed, all of our instincts about courtroom procedure tell us it would be inherently unfair—for a witness to answer the prosecutor's questions and then walk away before the defense counsel had an opportunity to probe. To me, the obvious unfairness of that scenario is reason enough to rethink *Williams*. Certainly it is reason enough not to read *Williams* broadly, as many courts have done, to mean simply that the Confrontation Clause does not apply at sentencing. Indeed, as a matter of universal practice, where witnesses testify in sentencing proceedings, courts allow cross-examination by the defense and, I suggest, would never imagine doing otherwise. The Court's own words confirm that basic instinct. In *Barefoot v. Estelle*, for example, the Court approved the prosecution's use of psychiatric testimony regarding the defendant's future dangerousness partly on the grounds that the defendant would have "the benefit of cross-examination" in countering that testimony.[88] Similarly, in *Caldwell v. Mississippi*, while holding that the Eighth Amendment right to consideration of individualized mitigating factors cannot be satisfied merely by appellate review of such factors, the Court said, "When we held that a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence . . . and see the witnesses."[89] Without addressing *Williams* directly, both passages suggest an understanding that both physical confrontation and cross-examination of witnesses should be the procedural norm at capital sentencing. Whether, if asked, the Court would make it the constitutional norm, and how it might choose to distinguish *Williams* in the process, are questions yet to be answered.

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86. Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (per curiam).

87. See, e.g., Olden v. Kentucky, 488 U.S. 227, 231 (1988) (per curiam) (finding violation of Confrontation Clause where defendant was prohibited from cross-examining regarding bias); Davis v. Alaska, 415 U.S. 308, 315–17 (1974) (same).

88. 463 U.S. 880, 898 (1983).

89. 472 U.S. 320, 330–31 (1985) (citations omitted).

For the moment at least, *Williams* has placed capital sentencing outside the world of "trial" procedure. The result has been a sentencing world with virtually no constitutional limits on hearsay, and with no constitutional assurance that a defendant facing death will be equipped with the basic tools of the adversarial process. And despite its recognition that adversarial rights are "often essential to the truth-seeking function of trials,"[90] *Gardner* did very little to import those rights into the world of sentencing. Ironically, when it comes to confrontation, we now have a sentencing world that accords a convicted criminal defendant facing death no more procedural rights than we accord a civil defendant contesting monetary damages.[91] The same, we are about to see, is true when it comes to the role of the jury.

B. *The Right to Jury Sentencing*

Two passages in the Constitution recognize the right to trial by jury. Article III, Section 2, provides: "The trial of all crimes, except in cases of impeachment, shall be by jury . . . ."[92] The Sixth Amendment repeats that guarantee, and explicitly adds the requirement of impartiality: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[93] Neither passage tells us whether a "trial" encompasses sentencing.

The near-universal reliance on jury sentencing in capital cases,[94] and the Court's early reluctance to apply the jury right in state prosecutions,[95] may account for the fact that, before the Warren years, the Supreme Court never faced the question whether a defendant had a constitutional right to a jury determination of life or death. In 1968, only months after *Duncan v. Louisiana* held that the Sixth Amendment right to trial by jury applied to the states through the Fourteenth Amendment,[96] the Court had its first opportunity to explore that question. Whether it decided the issue, however, is open to debate.

In *Witherspoon v. Illinois*, the defendant was found guilty and sentenced to death by a jury after the trial court struck for cause all potential jurors who said they opposed the death penalty or had conscientious scruples against it.[97] Witherspoon contended that he had been deprived of his right to an "impartial" jury at both the guilt and sentencing

90. Gardner v. Florida, 430 U.S. 349, 360 (1977).

91. See Beale, supra note 20, at 157.

92. U.S. Const. art. III, § 2.

93. U.S. Const. amend. VI.

94. By 1948, only three states allowed judges to impose a death sentence that was not recommended by a jury. See Andres v. United States, 333 U.S. 740, 758 (1948) (Frankfurter, J., concurring).

95. See Palko v. Connecticut, 302 U.S. 319, 322–25 (1937) (noting that right to jury trial is not component of Fourteenth Amendment due process protection in state prosecutions).

96. 391 U.S. 145, 149 (1968).

97. 391 U.S. 510, 513 (1968).

phases.[98] After rejecting his claim with respect to the guilt phase, the Court addressed sentencing, explicitly invoking the Sixth Amendment in the process: "[I]n its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which petitioner was entitled under the Sixth and Fourteenth Amendments."[99] That sentence is as close as the Court has ever come to holding that the Sixth Amendment encompasses a right to jury sentencing in capital cases. The Court quite clearly states that Witherspoon's entitlement to an impartial jury at sentencing stems from the Sixth Amendment. And, one might argue, the Sixth Amendment could not extend the right to an *impartial* jury to the sentencing process were there no right to a *jury* in the first place.[100] On the other hand, despite *Witherspoon*'s broad language, it may be equally valid to read the opinion more narrowly, as holding merely that *if* a jury participates in capital sentencing, due process requires that it be impartial.[101] Whatever the Warren Court may have intended in *Witherspoon*, the ruling seems to have had no influence on later decisions regarding the jury right at capital sentencing. When the issue next appeared before the Court, *Witherspoon* was simply ignored.

In the wake of *Furman v. Georgia*, eight states changed their death-penalty statutes to allow judges to make the ultimate life-or-death decision.[102] After twice declining to address the constitutionality of statutes authorizing judge-ordered death,[103] the Court finally confronted the issue in *Spaziano v. Florida*.[104] Spaziano was tried before a jury and convicted of first-degree murder. After a sentencing hearing, the same jury recommended life imprisonment. Under Florida's statute, the trial judge had the power to weigh aggravating and mitigating factors independently and thereby arrive at his or her own sentencing decision.[105] Following that "override" procedure, the judge sentenced Spaziano to death.[106] In the Supreme Court, Spaziano argued that Florida violated both his Sixth and Eighth Amendment rights when a judge sentenced him to death without the concurrence of a jury. Thus, the "fundamental" question, as

98. Id. at 516–18.

99. Id. at 518.

100. In dissent, Justice White implicitly acknowledges that argument by attacking it. Noting that mandatory death penalties do not violate the Constitution, White argues, "Why, then, should [the legislature] be disabled from delegating the penalty decision to a group who will impose the death penalty more often than would a group differently chosen?" Id. at 541 (White, J., dissenting).

101. This narrower reading is consistent with the Court's statement that "nothing in our decision turns upon whether the judge is bound to follow [the jury's] recommendation." Id. at 518 n.12.

102. See Stephen Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 18 n.79 (1980).

103. See Bell v. Ohio, 438 U.S. 637, 642 n.* (1978); Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978).

104. 468 U.S. 447 (1984).

105. Id. at 451–52.

106. Id. at 458.

the Court framed it, was whether "the capital sentencing decision is one that, in all cases, should be made by a jury."[107]

The Court rejected Spaziano's claims under both the Sixth and Eighth Amendments. The Court's Sixth Amendment ruling is remarkable for its brevity and, I suggest, for its shallow analysis. The portion of the opinion dealing with the Sixth Amendment occupies only two paragraphs.[108] It makes no mention of the constitutional text. It says nothing of the history, origin, and purpose of the Sixth Amendment right to a jury. It makes no attempt to explain, distinguish, or limit *Witherspoon*. Instead, the Court simply concludes, "[A] capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual."[109] The Court adds without elaboration, "The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue."[110] In other words, the sum of *Spaziano*'s Sixth Amendment analysis is merely that (a) the principal issue in capital sentencing is essentially the same as ordinary sentencing, and (b) there has never been a right to a jury for ordinary sentencing.

Both conclusions are flawed. First, to suggest that capital sentencing "involves the same fundamental issue" as ordinary sentencing is to ignore *Furman* and the countless post-*Furman* cases whose main purpose is to demonstrate how capital sentencing is fundamentally different from ordinary sentencing. To begin with, of course, there is the oft-quoted observation that "death is different" in its uncorrectable finality and that, therefore, capital sentencing calls for heightened procedural safeguards.[111] Further, the principal constitutional difference, after *Woodson*, is that sentencing is itself a constitutionally required procedure in capital cases,[112] whereas legislatively imposed mandatory penalties are permissible if death is not at issue.[113] It is a great deal easier to dismiss the idea of Sixth Amendment rights at sentencing when there is no right to any sentencing at all.[114] After *Furman* and *Woodson*, of course, that is never the case when death is at issue.

Second, by concluding in a single, unsupported sentence that "[t]he Sixth Amendment has never been thought" to guarantee jury sentencing, the *Spaziano* Court repeated the erroneous historical assumption at the heart of *Williams*. *Williams* had regarded judicial discretion in sentencing as an "age-old" norm when, in fact, it was merely the predominant nine-

107. Id.
108. Id. at 458–59.
109. Id. at 459.
110. Id.
111. See supra note 68.
112. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
113. See Harris v. United States, 536 U.S. 545, 567–68 (2002).
114. Cf. Ross v. Moffitt, 417 U.S. 600, 609–11 (1974) (declining to extend right to appointed counsel to discretionary review in state supreme court and noting that "[s]tate need not provide any appeal at all").

teenth-century practice in noncapital cases.[115] To assume that the Sixth Amendment right to jury trial "has never been thought" to encompass sentencing is to ignore the world of the founders, where a unitary proceeding adjudicated guilt and punishment with a single jury verdict. And, contrary to *Spaziano*'s conclusion, the question of "appropriate punishment" was not only at issue in those unified proceedings, but was often the principal issue faced by the jury.[116]

Though they were decided during different epochs in the history of our constitutional criminal procedure, and though they address different trial rights in the context of capital sentencing, *Spaziano* and *Williams* are cut from the same cloth. Both decisions assume as a starting point that judicial discretion is part of the natural order of the sentencing world, a historical perspective that is both unsupported and unsupportable. Both decisions treat capital sentencing as if it were fundamentally the same as ordinary sentencing, a view that conflicts with dozens of the Court's Eighth Amendment decisions. Both seem consumed with matters of sentencing policy, while largely ignoring the adversarial values at the heart of the Sixth Amendment. And the two decisions reach the same conclusion: A defendant faces capital sentencing without the rights that protect him at trial.

Since 1984, the Court has been unwilling to revisit *Spaziano*'s basic holding that the Sixth Amendment does not mandate jury sentencing in capital cases. If anything, the Court has implicitly affirmed that holding in other contexts.[117]

C. *The Right to Counsel*

At trial, the Sixth Amendment guarantees not only the right to counsel, but the right of an indigent defendant to the appointment of coun-

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115. Williams v. New York, 337 U.S. 241, 250 (1949).

116. See infra text accompanying note 265. In contrast to its truncated treatment of the Sixth Amendment, the Court considered Spaziano's Eighth Amendment claims at length before ultimately rejecting them. Perhaps it is understandable that Eighth Amendment issues dominated the Court's attention in *Spaziano*. After all, in the decades following *Furman*, the Eighth Amendment had become the constitutional touchstone for virtually all death-penalty litigation. Still, in my view, *Spaziano* stems from a kind of constitutional myopia. It is at least curious that the Court proved so willing to dissect the role of juries in relation to the perceived purposes of the Eighth Amendment—giving voice to "community outrage" and insuring compliance with "contemporary standards of decency"—while largely ignoring the jury's critical function in the adversarial system spelled out in the Sixth Amendment. See Spaziano v. Florida, 468 U.S. 447, 461, 464 (1984).

117. See, e.g., Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that sentencing factors that may lead to imposition of death must be found by jury, but failing to embrace capital sentencing by juries); Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding Alabama's procedure allowing judicial override of jury recommendation against death does not violate Eighth Amendment).

sel[118] and the right to effective assistance of counsel.[119] The basic right of an accused to the assistance of counsel "[i]n all criminal prosecutions" appears in the same Sixth Amendment sentence that guarantees the rights of confrontation and of trial by jury.[120] Yet, in contrast to its treatment of those other Sixth Amendment rights at sentencing, the Court has never balked at extending the right to counsel to sentencing hearings—capital or noncapital—in the same manner the right applies at trial.

Even before *Gideon v. Wainwright*, the Court found that the absence of appointed counsel during sentencing could render the proceeding unfair under the Due Process Clause.[121] And shortly after *Gideon* had incorporated the Sixth Amendment right to appointment of counsel into state proceedings, the Court in *Mempa v. Rhay* extended that right to sentencing.[122] The *Mempa* Court held that the right to counsel applies at "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."[123] The unanimous Court had no trouble concluding that sentencing was such a "critical" stage where appointment of counsel was necessary to protect substantial rights.[124]

Two decades after *Mempa*, the Court, in *Strickland v. Washington*, not only extended the right to effective assistance of counsel to the capital sentencing process, but also held that the constitutional standard for effective assistance is the same at capital sentencing as at trial.[125] Though *Strickland* and *Spaziano* were decided only months apart, their perspectives on capital sentencing are at opposite poles. In *Strickland*, the Court took pains to link the world of capital sentencing with the world of trial:

> A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision.[126]

In *Spaziano*, the Court noted that capital sentencing "involves the same fundamental issue" as ordinary sentencing.[127] Neither opinion mentioned the other. And neither sought to explain why capital sentenc-

118. Gideon v. Wainwright, 372 U.S. 335, 339–45 (1963).

119. Strickland v. Washington, 466 U.S. 668, 686–87 (1984).

120. U.S. Const. amend. VI.

121. Townsend v. Burke, 334 U.S. 736, 741 (1948).

122. 389 U.S. 128, 134–35 (1967).

123. Id. at 134.

124. Id.

125. 466 U.S. 668, 686–87 (1984).

126. Id. The Court has extended the right to effective assistance of counsel to ordinary sentencing as well, including cases where counsel's ineffectiveness has relatively minimal impact. See, e.g., Glover v. United States, 531 U.S. 198 (2001).

127. Spaziano v. Florida, 468 U.S. 447, 459 (1983).

ing is like ordinary sentencing for purposes of the jury right, but like a trial for purposes of the right to counsel.[128]

D. *Other Sixth Amendment Rights at Capital Sentencing*

This Article has focused on the right of confrontation, the right to trial by jury, and the right to counsel because those are the trial rights that have received significant attention from the Court in the context of capital sentencing. However, it is worth noting the Court's treatment—or lack of treatment—of other Sixth Amendment rights, if only to demonstrate further the gaps and inconsistencies that characterize the Court's fragmentary approach to trial rights at capital sentencing.

1. *Notice.* — The Sixth Amendment grants an accused the right "to be informed of the nature and cause of the accusation."[129] Both *Williams* and *Gardner* are, in part, notice cases, though both address the question under the Due Process Clause rather than the Sixth Amendment.[130] In *Gardner*, the defendant's principal complaint was that the trial court failed to disclose portions of a presentence report. The Supreme Court's narrow holding addresses little more than that complaint, finding that due process forbids capital sentencing based on information never disclosed to defendant.[131]

More recently, the Court has suggested, though it has not explicitly held, that due process requires notice of facts that may elevate a noncapital sentence. In *Burns v. United States*, the Court held that a federal court must give a defendant adequate notice before departing upward from the United States Sentencing Guidelines (Federal Sentencing Guidelines).[132] While the case was decided by interpreting the Federal Rules of Criminal Procedure, the *Burns* Court concluded by noting that "were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause."[133] Taken together, *Gardner* and *Burns* probably establish a right to be apprised of information the sentencer will consider, as well as

128. In the context of trial, the Court has identified other aspects of the right to counsel, including the right to counsel of choice and the right to self-representation. The Court has never explicitly addressed these rights in the context of sentencing, capital or noncapital. Perhaps because of *Mempa*'s categorical language—"the right to counsel applies at sentencing," 389 U.S. at 134—most lower courts have either assumed or held that these other aspects of the right to counsel apply at sentencing as well as at trial. Michaels, supra note 3, at 1794–97.

129. U.S. Const. amend. VI.

130. *Williams* acknowledged that the right to "reasonable notice of the charges" is inherent in principles of due process that govern trial. Williams v. New York, 337 U.S. 241, 245 (1949) (citing In re Oliver, 333 U.S. 257, 273 (1948)).

131. Gardner v. Florida, 430 U.S. 349, 362 (1977).

132. 501 U.S. 129, 138–39 (1991) (requiring "reasonable notice" to defendant before upward departure on grounds not known to parties).

133. Id. at 138.

a right to respond to that information in some fashion. Still, neither case suggests that the Sixth Amendment is the source of that right.

2. *Compulsory Process.* — At trial, the Sixth Amendment provides that an accused "shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[134] The right extends beyond the power to issue a subpoena and encompasses the right to call witnesses and present favorable evidence. Relying both on the Compulsory Process Clause and principles of due process, the Court has held that state evidentiary rules may not arbitrarily limit a defendant's right to present favorable testimony at trial.[135]

In *Green v. Georgia*, the Court overturned a death sentence where a state court had applied the hearsay rule to exclude key defense evidence at the sentencing phase of a capital case.[136] Significantly, *Green* draws no distinction between trial and sentencing in addressing a defendant's right to present favorable evidence. The opinion proceeds as if it were assumed that the right to present evidence applied equally at the sentencing phase. Curiously, the Court even uses the word "trial" in referring to the sentencing process in its holding: "Because the exclusion of . . . testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated . . . ."[137] The lone dissenter, Justice Rehnquist, never challenges the notion that a defendant's right to present evidence applies at the sentencing phase.[138] Whether *Green* establishes a right to present evidence at sentencing—just as the right exists at trial—or whether it stands for something more limited, is hard to say. At least in noncapital cases, most lower courts continue to insist that there is no general right for a defendant to call witnesses or present evidence at sentencing.[139]

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134. U.S. Const. amend. VI.

135. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that state cannot apply hearsay rule "mechanistically" where right to present witnesses is implicated); Washington v. Texas, 388 U.S. 14, 23 (1967) (finding state evidentiary rules may not "arbitrarily" deny defendant's compulsory process rights).

136. 442 U.S. 95 (1979). *Green* does not rely explicitly on the Sixth Amendment and states only that the sentencing violated the Due Process Clause. Id. at 97. But *Green* relies on *Chambers*, a case that constructed a right to present evidence out of both due process and Sixth Amendment principles, and *Green* further relies on Professor Westen's popular article that identifies Sixth Amendment sources for that right. See id. at 97 & n.4 (citing Peter Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 592–93 (1978)).

137. Id. at 97.

138. Id. at 98–99 (Rehnquist, J., dissenting) (stating that Court cannot supercede state's evidentiary rules and determinations to serve its own notion of justice). The absence of discussion on this pivotal issue is surprising. In its only other encounter with the right to present evidence at capital sentencing, the Court expressly acknowledged that it had never decided the question. See McGautha v. California, 402 U.S. 183, 218–19 (1971).

139. See Michaels, supra note 3, at 1846 (explaining that lower courts find due process right to rebut state's evidence but no "general right to call witnesses at sentencing").

3. *Speedy Trial.* — The Supreme Court has never decided whether the Sixth Amendment guarantee of a speedy trial includes the right to a speedy sentencing.[140] The matter is unlikely to arise at the time of initial sentencing, as sentencings typically follow soon after trial. Still, resentencings are not uncommon following successful appeals in capital cases, and such sentencings often occur years after the original conviction. Under those circumstances, some lower federal courts have found, and others have suggested, that Sixth Amendment speedy trial rights encompass sentencing.[141]

4. *Public Trial.* — Both the First and the Sixth Amendments call for public access to court proceedings when (1) the type of proceeding historically has been open to the public, and (2) public access would play a "significant positive role" in the functioning of the proceeding.[142] The Court has held that the right to open proceedings extends to voir dire,[143] to pretrial hearings on motions to suppress evidence,[144] and to preliminary hearings.[145] It has never decided whether the right to public trial extends to sentencing.[146]

Nevertheless, it seems obvious that sentencings generally, and capital sentencings in particular, are encompassed by the right to open proceedings. Based on historical practice, there is no reason to distinguish a public sentencing from a public trial, because sentencing was part of a unified trial where a single verdict determined both guilt and punishment.[147] And public access at sentencing, no less than at the guilt phase, serves the constitutional goals of ensuring fairness to the defendant and promoting public confidence in judicial proceedings. Indeed, both the retributivist and deterrence theories of punishment at the heart of our criminal justice system would be undermined if sentences were imposed in secret.[148]

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140. Id. at 1828 (citing Pollard v. United States, 352 U.S. 354, 361–62 (1957), in which the Court assumed, arguendo, existence of the right and then found no violation under the facts of the case).

141. See id. at 1828–29 (reviewing federal and state court decisions regarding speedy trial right at sentencing).

142. Press-Enterprise Co. v. Superior Court (*Press-Enterprise II*), 478 U.S. 1, 8 (1986); see also Waller v. Georgia, 467 U.S. 39, 46 (1984) (highlighting public trial analysis under First and Sixth Amendments and discussing purpose of public access).

143. Press-Enterprise Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501, 510–11 (1984).

144. *Waller*, 467 U.S. at 47–48.

145. *Press-Enterprise II*, 478 U.S. at 10.

146. Michaels, supra note 3, at 1832.

147. See infra text accompanying notes 249–253.

148. While the right almost certainly extends to courtroom sentencing proceedings, it is less clear that it grants public access to sentencing-related documents, such as presentence reports. Presentence reports typically have been treated as confidential, and at least one federal appellate court has exempted such reports from public disclosure on that basis. See United States v. Corbitt, 879 F.2d 224, 229 (7th Cir. 1989).

E. *A Fragmented Sixth Amendment at Capital Sentencing*

As our tour through the world of capital sentencing demonstrates, there is no single, comprehensive answer as to whether the Sixth Amendment governs capital sentencing. The Court has provided some unequivocal answers with respect to some rights. *Spaziano* tells us that "the Sixth Amendment does not require jury sentencing."[149] *Mempa* states just as categorically, but in the affirmative, that "the right to counsel applies at sentencing."[150] With respect to other Sixth Amendment rights, as we have seen, the answer is more complex. The confrontation right, at least as far as it means excluding hearsay, is currently not part of the capital sentencing world in light of *Williams*.[151] Whether other aspects of the confrontation right survive *Williams* is more problematic. Some right to notice exists under *Gardner*, and a right to present favorable evidence may exist in some form under both *Gardner* and *Green*.[152] Still, each of those opinions speaks explicitly of due process, leaving the Sixth Amendment on the sidelines. As for the guarantee of a speedy and public trial, the Court has yet to speak in the context of sentencing.[153] In sum, other than the right to counsel, we see only shadows of the Sixth Amendment in the world of capital sentencing.

From the Court's flat rejection of jury sentencing in *Spaziano*, its rejection of confrontation-like rights in *Williams*, and its failure even to mention the Sixth Amendment in *Gardner* and *Green*, it is tempting to conclude that the Court views sentencing generally, and even capital sentencing in particular, as governed only by principles of "fundamental fairness" under the Due Process Clause, and not by the specific "trial rights" guaranteed in the Sixth Amendment. Indeed, the Court came close to saying as much in *Gardner* when it commented: "The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights."[154]

A "fundamental fairness" approach to capital sentencing rights, however, is inconsistent with the Court's right-to-counsel decisions. Both *Mempa* and *Strickland* are explicitly Sixth Amendment opinions. Both opinions share as a common starting point the notion that they are adjudicating a right to counsel enumerated in the Sixth Amendment and made applicable to the states through the Fourteenth.[155] Indeed, as recently as 2001, the Court has reaffirmed the right to effective assistance of counsel at sentencing and has found "Sixth Amendment significance" in

149. Spaziano v. Florida, 468 U.S. 447, 464 (1984).

150. Mempa v. Rhay, 389 U.S. 128, 134 (1967) (citing Sanford H. Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 806 (1961)).

151. See supra Part I.A.

152. See supra Part I.D.1–2.

153. See supra Part I.D.3–4.

154. Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977).

155. See supra Part I.C.

any increase in jail time that results from counsel's errors.[156] Implicitly then, the Court treats sentencing—even noncapital sentencing—as part of a "criminal prosecution" under the Sixth Amendment for at least some purposes.

It has been characteristic of the Court's fragmented approach to sentencing rights to address them one right at a time, without reference to the others. For example, *Mempa* never mentions *Williams*, even though *Williams* was at the time the Court's only significant ruling regarding procedural rights at capital sentencing. *Spaziano* and *Strickland* both were pending before the Court at the same time and were decided only months apart. Both, quite explicitly, consider whether a basic Sixth Amendment gnarantee applies at capital sentencing. Yet neither opinion mentions the other.

The Court has reached opposing conclusions about various trial rights at capital sentencing by comparing capital sentencings to trial for some purposes, but to ordinary sentencings for other purposes, with little explanation for its differing perspectives. In the eyes of the *Strickland* Court, capital sentencing is just like trial in its "adversarial format" and its "standards for decision," while it is unlike ordinary sentencing "which may involve informal proceedings and standardless discretion in the sentencer."[157] Similarly, the Court in *Green* called the capital sentencing phase a "trial on the issue of punishment."[158] By contrast, *Spaziano* found that "a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding."[159] Likewise, *Williams* was quick to dismiss the argument that a capital sentencing is different from an ordinary sentencing and therefore merits the procedural protections of a trial.[160] To the *Strickland* and *Green* Courts, capital sentencing is a trial. To the *Williams* and *Spaziano* Courts, it is an ordinary sentencing. The decisions are worlds apart in perspective, and the Court has never tried to explain the difference.

Just as the Court's approach to the Sixth Amendment at capital sentencing is marked by unexplained inconsistency, its determination to limit "trial rights" at capital sentencing is hard to reconcile with the rest of its death-penalty doctrine. Put more bluntly, the Court's Sixth Amendment results have not matched its Eighth Amendment rhetoric. A pillar of its Eighth Amendment doctrine is the notion that death is different from any other form of punishment. "Because of that qualitative difference," the Court has said, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[161] In theory, the need for reliability in

156. Glover v. United States, 531 U.S. 198, 203 (2001).
157. Strickland v. Washington, 466 U.S. 668, 686 (1984).
158. Green v. Georgia, 442 U.S. 95, 97 (1979).
159. Spaziano v. Florida, 468 U.S. 447, 459 (1984).
160. Williams v. New York, 337 U.S. 240, 251–52 (1949).
161. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

the context of the death penalty translates into a heightened degree of procedural protection, which, the Court suggests, should distinguish capital sentencings from the ordinary sentencing process. But, at least with regard to the rights listed in the Sixth Amendment, the Court's rules for capital sentencing are essentially the same as for noncapital sentencing.[162] The Court's remark in *Spaziano*, that "a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding,"[163] has carried the day. When it comes to Sixth Amendment rights at sentencing, it seems, death is not so different after all.

II. *RING*, *BLAKELY*, *BOOKER*, AND BEYOND: TROUBLE AT THE BORDER BETWEEN TWO SIXTH AMENDMENT WORLDS

The Court insists there is a difference between "trial rights" and "sentencing rights." Thus, it becomes necessary to answer a fundamental question: When does "trial" end and "sentencing" begin? On its surface, the answer seems self-evident. Trial is over when the defendant is found guilty; sentencing follows. That, after all, was the simple line that *Williams* drew between the process of "passing on the guilt of a defendant"[164] and the very different process of "imposition of sentence upon an already convicted defendant."[165] *Furman* changed the world of capital sentencing, but, at least initially, appeared to leave *Williams*'s simple line intact. Under post-*Furman* death-penalty statutes,[166] the guilt phase and penalty phase seemed to match up nicely with the two Sixth Amendment worlds that *Williams* had created.

In the last decade, however, trouble has emerged at the Sixth Amendment border between trial and sentencing. *Apprendi v. New Jersey* warned that legislative labels distinguisbing "sentencing factors" from elements of an offense no longer control that border.[167] *Ring v. Arizona* followed in short order, drawing a line between trial and capital sentencing that no longer matches up with the typical statutory line between a guilt phase and a penalty phase.[168] Initially, *Ring* caused a minor resbuffling in states that entrust capital sentencing to judges rather than ju-

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162. See Steiker & Steiker, Sober Second Thoughts, supra note 8, at 397 ("[C]lose examination of the Court's decisions over the past twenty years reveals that the procedural safeguards in death cases are not as different as one might suspect.").

163. 468 U.S. at 459.

164. 337 U.S. at 246.

165. Id. at 244.

166. The Georgia statute at issue in Gregg v. Georgia, 428 U.S. 153 (1976), is typical of the post-*Furman* statutes. It bifurcates the case into a guilt phase and a single penalty phase. Id. at 158.

167. 530 U.S. 466, 494 (2000) (quoting McMillan v. Pennsylvania, 477 U.S. 79, 86 (1985)).

168. 536 U.S. 584, 609 (2002) (holding that sentencing judge alone cannot find aggravating circumstances because they are like elements of offense and must be found by jury under Sixth Amendment).

ries.[169] In the longer run, as a few cases are just beginning to signal,[170] *Ring*'s impact will stretch beyond the question of jury sentencing to encompass all Sixth Amendment rights at capital sentencing, most significantly the right of confrontation and its corresponding limits on hearsay. For that reason, *Ring* will impact rules of evidence and procedure at sentencing in every death-penalty jurisdiction, not just those few who leave sentencing to judges. Finally, *Blakely v. Washington*[171] and *United States v. Booker*[172] raise the prospect of even more fundamental realignments of the Sixth Amendment border between trial and sentencing in capital cases.

In this Part, I will highlight some of the troublesome questions that *Ring*, *Blakely*, and *Booker* are beginning to raise. I do not propose to offer point-by-point answers to all of those questions because, in my view, the questions themselves are unnecessary and inappropriate in the context of capital sentencing. My more modest aim is simply to demonstrate the turmoil, inconsistency, and fragmentation that is inevitable when we seek to apply two sets of Sixth Amendment rules to the series of complex, overlapping decisions that post-*Furman* death-penalty litigation has spawned.

A. Ring v. Arizona: *Drawing the Line Between Two Worlds*

Under *Furman*'s system of gnided discretion, capital sentencing is governed by an elaborate body of Eighth Amendment law requiring two basic steps. The first step is to narrow the class of guilty defendants subject to the death penalty and to do so in a rational and nonarbitrary way.[173] To satisfy this step, in the wake of *Furman*, death-penalty jurisdictions adopted statutes listing "aggravating factors" that purport to define crimes so serious and defendants so reprehensible or dangerous that they are especially deserving of death.[174] Under the typical death-penalty statute, the finding of one or more such factors makes a defendant "eligible"

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169. As a result of *Ring*, Arizona, Colorado, Idaho, and Indiana amended their statutes to provide for jury sentencing. Shapiro, supra note 20, at 650. Delaware, Montana, and Nebraska chose trifurcated proceedings which feature a guilt phase, an eligibility phase, and a selection phase. Id. at 650–51.

170. See United States v. Jordan, 357 F. Supp. 2d 889, 903 (E.D. Va. 2005) (ruling in limine that sentencing hearing must be split into separate phases because confrontation rights would exclude certain hearsay at eligibility phase but not at selection phase); United States v. Fell, 217 F. Supp. 2d 469, 489 (D. Vt. 2002) (finding Federal Death Penalty Act unconstitutional for failure to include evidentiary standards consistent with confrontation right during death-eligibility determination), vacated, 360 F.3d 135 (2d Cir. 2004).

171. 124 S. Ct. 2531 (2004).

172. 125 S. Ct. 738 (2005).

173. See Lowenfield v. Phelps, 484 U.S. 231, 244–45 (1988); Zant v. Stephens, 462 U.S. 862, 877 (1983); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

174. See Steiker & Steiker, Sober Second Thoughts, supra note 8, at 372–73 (exploring narrowing doctrine and noting that death eligibility has remained remarkably broad as some states' lists of "aggravating factors" could arguably extend to every murder).

for a death sentence.[175] The second step requires the sentencer to consider a broader range of information and to exercise discretion.[176] At this stage, the sentencer must consider all aggravating and mitigating factors surrounding the defendant and his offense, in order to determine whether death is the appropriate sentence.[177] In theory then, arbitrariness is avoided by a narrowing process at the eligibility stage, while individualization and an opportunity for mercy are preserved at the selection stage.

In the years after *Furman* and *Gregg v. Georgia*,[178] all death-penalty states abandoned unitary trials in favor of bifurcated proceedings that separate the case into a "guilt" phase and a "penalty" phase.[179] The federal system and most states now place both the eligibility and selection determinations in a single penalty phase.[180] And, at least until very recently, the Sixth Amendment border between trial rights and sentencing rights fell just where states had drawn the statutory line between the guilt phase and the penalty phase.

Then came *Ring v. Arizona*.[181] In most respects, Arizona had a typical death-penalty statute in the mold described above. The key difference was that Arizona, like a minority of death-penalty states, sent the jury home after the guilt phase and left the sentencing phase to the judge.[182] Timothy Ring was found guilty of felony murder by a jury. But, under Arizona law, he was eligible for the death penalty only if the judge found at least one aggravating circumstance listed in the statute.[183]

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175. See, e.g., 18 U.S.C. § 3593(d) (2000) ("If no aggravating factor . . . is found to exist, the court shall impose a sentence other than death . . . ."); see also *Zant*, 462 U.S. at 878 (noting that statutory aggravating factors "circumscribe the class of persons eligible for the death penalty").

176. See Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

177. In effect, the selection step is required under Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976), which struck down mandatory death penalties and required consideration of each individual defendant's character and circumstance. See infra text accompanying note 230.

178. 428 U.S. at 190 (suggesting bifurcation of capital cases to allow for admissibility at sentencing of evidence relating to defendant's character).

179. See Beth S. Brinkmann, Note, The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing, 94 Yale L.J. 351, 366 (1984).

180. See 18 U.S.C. § 3593; Shapiro, supra note 20, at 647–51.

181. 536 U.S. 584 (2002).

182. Id. at 592.

183. Id. at 591–92. Ring was one of three suspects in the robbery of an armored car that resulted in the killing of the driver. At the guilt phase, there had been no evidence to identify Ring as the shooter or as a leader in the criminal plot. Before Ring's sentencing hearing, however, one of his codefendants agreed to cooperate with authorities in exchange for a reduced sentence. At the sentencing phase, that codefendant testified that Ring was both the leader and the shooter, and that Ring had bragged about his murderous act. Relying largely on that new information and the findings at trial, the judge was able to determine that Ring was the killer and that he exhibited reckless disregard for human life as a major participant in the felony. The judge further found, as statutory aggravating factors, that Ring killed "for pecuniary gain" and that the killing was "especially heinous, cruel or depraved." Id. at 592–95. Those findings made Ring eligible for the death

In the Supreme Court, Ring argued that Arizona violated the Sixth Amendment's jury trial requirement when it entrusted the judge with findings of fact that were necessary to expose him to a death sentence. Ring's argument was a narrow one. He did not contend that the Sixth Amendment granted a right to jury sentencing.[184] Instead, he argued in essence that Arizona had drawn the line between trial and sentencing in the wrong place. Ring contended that the death-eligibility decision, to the extent that it requires further factfinding, was subject to the Sixth Amendment right to trial by jury.[185]

The Court agreed. Indeed, it had little choice in light of recent precedent. Two years earlier the Court held in *Apprendi v. New Jersey* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is, in effect, an "element" of the offense.[186] Accordingly, such facts "must be submitted to a jury, and proved beyond a reasonable doubt."[187] The Court's task in *Ring* was to apply *Apprendi* to Arizona's capital sentencing statute. Under that statute, Ring could not be punished by death unless the court found at least one statutory aggravating factor.[188] The result under *Apprendi* was clear.[189] "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" *Ring* held, "the Sixth Amendment requires that they be found by a jury."[190]

After *Apprendi* and *Ring*, the simple line that divided trial from sentencing in *Williams* no longer looks so simple.[191] In the capital sentenc-

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penalty. The judge then considered the aggravating factors in conjunction with the single mitigating factor of Ring's minimal criminal record and sentenced Ring to death. Id.

184. See id. at 597 n.4 ("Nor does [defendant] argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty.").

185. Id.

186. 530 U.S. 466, 490 (2000). Apprendi pled guilty to possession of a firearm for an unlawful purpose. His sentence was extended by the judge, who applied a "hate crime enhancement," sentencing Apprendi to twelve years based on his finding that Apprendi had been motivated by racial animus. Id. at 470–73. The United States Supreme Court struck down the sentence, holding that the hate crime enhancement, which New Jersey had called a sentencing "enhancer," was in effect a separate, aggravated crime with an additional element. Id. at 495–97.

187. Id. The Court made an exception for facts establishing prior convictions. Id. at 487–90.

188. *Ring*, 536 U.S. at 593.

189. Indeed, in light of *Apprendi*, the outcome in *Ring* would have been easy to predict had it not been for Walton v. Arizona, 497 U.S. 639, 647–49 (1990). In *Walton* the Court had upheld the same Arizona statute against essentially the same Sixth Amendment attack. In *Ring*, the Court was stuck with two conflicting precedents. It chose *Apprendi* and overruled *Walton*. *Ring*, 536 U.S. at 609.

190. *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

191. "Rather than squinting at the formerly clear line between guilt and punishment . . . it would be better to accept the need for bifocals, and acknowledge that the [capital sentencing proceeding] has both features of a traditional trial and features of a traditional sentencing." United States v. Fell, 217 F. Supp. 2d 469, 483 (D. Vt. 2002), vacated, 360 F.3d 135 (2d Cir. 2004).

ing world, *Ring* tells us we can no longer rely on legislative decisions that assign some facts to the guilt phase and others to the sentencing phase. If the fact is essential to bring the death penalty into play, it is effectively an element of an aggravated offense and must be found by a jury.

Under most death-penalty statutes, then, the somewhat awkward effect of *Ring* is to redraw the Sixth Amendment border between the world of trial and the world of sentencing at a place that is different from the line the statute has drawn between the guilt phase and the penalty phase. Until the defendant is found guilty, of course, he enjoys full Sixth Amendment trial rights. But after *Ring*, the eligibility finding must satisfy the Sixth Amendment rules of the trial world as well, even though a state statute may place that finding in the sentencing phase. Still, the final selection phase remains in the world of sentencing, subject only to a watered-down version of constitutional protection.

B. Ring*'s Unexamined Impact: Those Other Sixth Amendment Rights*

Ring is all about one Sixth Amendment right: the right to trial by jury. But its impact goes well beyond the right to a jury. *Ring* means that a defendant contesting facts which may expose him to death is entitled not just to a jury, as *Ring* explicitly decided, but to the Sixth Amendment rights of notice, confrontation, compulsory process, and speedy and public trial as well.[192] To reach this conclusion, we need not go so far as to say that wherever one Sixth Amendment right applies, all the others apply as well. We already know that the Court thinks otherwise. Instead, this conclusion flows logically from *Ring*'s statement that a fact that elevates the potential maximum punishment is the "functional equivalent of an element"[193] of a crime. Whatever else the Sixth Amendment covers, there can be little doubt that it applies, in all respects, at a proceeding before a jury where adversaries contest elements of a criminal offense. If the "entire panoply of criminal trial procedural rights"[194] do not apply in that context, it is hard to imagine when they would apply.

The Court itself acknowledged the broader implications of *Ring* in *Schriro v. Summerlin*.[195] Justice Scalia, writing for the Court, described *Ring* as holding "that, *because* Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those ag-

192. See United States v. Jordan, 357 F. Supp. 2d 889, 903 (E.D. Va. 2005) (applying Confrontation Clause to eligibility issues at sentencing in light of *Ring*); *Fell*, 217 F. Supp. 2d at 489 (holding FDPA unconstitutional because its evidentiary standards at sentencing fail to comply with Confrontation Clause); see also Steiker, Things Fall Apart, supra note 20, at 1481 ("If the Sixth Amendment right to a jury trial applies to aggravating circumstances, what about the Sixth Amendment's Confrontation Clause?"); Adam Thurschwell, After *Ring*, 15 Fed. Sent'g Rep. 97, 102 (2002) (suggesting, in light of *Ring*, that all Sixth Amendment rights now extend to sentencing proceedings where aggravating factors are at issue).

193. *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

194. Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977).

195. 124 S. Ct. 2519 (2004).

gravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements."[196] It was not a slip of the pen, I suggest, when the Court wrote of "procedural requirements" collectively without distinguishing among them. After *Ring*, any proceeding to determine death eligibility is, in effect, a trial where the defendant enjoys *all* Sixth Amendment rights.

Most notable among those other Sixth Amendment rights is the right of confrontation. At trial, the Confrontation Clause not only requires live testimony subject to cross-examination, but places a constitutional limit on hearsay as well.[197] That constitutional limit stands in stark contrast to the evidentiary rules—or, perhaps more accurately, the absence of evidentiary rules—that developed in capital sentencing proceedings in most death-penalty jurisdictions following *Williams*.[198]

At capital sentencing hearings, *Ring* means that sentencing courts must limit hearsay to satisfy the Confrontation Clause, at least insofar as that hearsay affects the death-eligibility decision.[199] And the Court's latest confrontation-hearsay decision, *Crawford v. Washington*, may limit hearsay in ways that are particularly significant to capital sentencing.[200] For example, it is not unusual at capital sentencing for prosecutors to rely on summary testimony from police or probation officers to prove facts relating to uncharged crimes or other misconduct by the defendant, or to show his future dangerousness.[201] Similarly, in federal capital sentencings, prosecutors have sought to use hearsay statements made to police by

196. Id. at 2524.

197. See supra notes 46–50 and accompanying text.

198. See supra text accompanying notes 80–85.

199. See United States v. Jordan, 357 F. Supp. 2d 889, 903 (E.D. Va. 2005) (splitting sentencing phase into eligibility stage and selection stage and applying Confrontation Clause to eligibility stage).

200. 541 U.S. 36 (2004). For decades, the Court held that hearsay satisfied the Confrontation Clause as long as the hearsay possessed "indicia of reliability" that matched up, roughly, with the traditional exceptions to the hearsay rule. See, e.g., Ohio v. Roberts, 448 U.S. 56, 66 (1980). Thus, the Confrontation Clause typically required no more than the law of evidence. And evidence law in turn has become remarkably generous toward prosecution hearsay. See generally John G. Douglass, Balancing Hearsay and Criminal Discovery, 68 Fordham L. Rev. 2097, 2106–33 (2000).

But *Crawford* announced a sea change in confrontation-hearsay doctrine. Under *Crawford*, "testimonial" hearsay, which apparently includes most statements made to law enforcement officers in the course of an investigation, see 541 U.S. at 52, violates the Confrontation Clause unless the declarant is unavailable and the defendant has had an opportunity to cross-examine. Id. at 68. Thus, summary testimony presented by police and probation officers at sentencings would almost certainly run afoul of *Crawford* if the Confrontation Clause applied at sentencing as it does at trial. After *Crawford*, the gap between trial rights and sentencing rights, at least as far as confrontation is concerned, is now wider than ever.

201. See, e.g., People v. Moore, 662 N.E.2d 1215, 1232–33 (Ill. 1996) (allowing deputy sheriff to testify at capital sentencing that correctional officer told him that defendant had attacked other officers).

informants or accomplices.[202] Those forms of hearsay—all previously sanctioned by *Williams*—are precisely the kinds of evidence that are constitutionally barred under *Crawford*. As a result, *Ring* and *Crawford* together put serious limits on the most popular forms of hearsay in prosecutors' death-sentencing arsenal, at least where death eligibility is at issue.

Under the death-penalty statutes of many jurisdictions, the confrontation-hearsay rules imposed by *Ring* will prove even more complex. *Ring* extends Sixth Amendment protection only to the death-eligibility determination. But in federal capital cases and in most states, the sentencer addresses both eligibility and selection at a single penalty-phase hearing. In effect, *Ring* calls on those courts to apply two different hearsay rules in the same penalty proceeding. When prosecutors seek to prove aggravating circumstances required for death eligibility, *Crawford* and the Confrontation Clause provide the evidentiary standard. When they seek to prove aggravating facts not essential to eligibility, or when they respond to mitigating evidence offered by the defense, *Williams* provides the standard and puts virtually no constitutional limit on their use of hearsay.[203] Thus, before the judge can rule on a sentencing-phase objection to hearsay, she must first determine whether the hearsay goes to eligibility, selection, or both.[204]

In some instances, conducting a single proceeding under two different hearsay rules may not prove all that difficult. For example, if the sole statutory aggravator is the fact that the defendant was incarcerated at the time he killed, it should be simple enough to distinguish evidence offered to prove that fact from other evidence offered at sentencing. But where the prosecution seeks to prove death eligibility because the killing was "outrageously or wantonly vile," or because the defendant poses a "continuing serious threat to society,"[205] it may be virtually impossible to distinguish death-eligibility evidence from selection evidence.

One solution to the problem of inconsistent Confrontation Clause rules at sentencing would be to realign capital cases by assigning all eligibility factfinding to the guilt phase, thereby freeing the penalty phase from Sixth Amendment constraints. In his concurring opinion in *Ring*, Justice Scalia suggested that solution: "placing the aggravating-factor de-

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202. See *Jordan*, 357 F. Supp. 2d at 899 (considering, for purposes of sentencing, prosecution's proffer of videotaped statement of eyewitness); United States v. Fell, 217 F. Supp. 2d 469, 485 (D. Vt. 2002) (considering government's proffer of statement made by deceased codefendant), vacated, 360 F.3d 135 (2d Cir. 2004).

203. Williams v. New York, 337 U.S. 241, 246 (1949).

204. In the wake of *Ring*, at least two federal courts have proposed splitting the sentencing hearing into an eligibility phase and a selection phase in order to accommodate two different standards for admitting hearsay. See *Jordan*, 357 F. Supp. 2d at 889, 903 (citing United States v. Simmons, No. 5:04CR314-01 (W.D. Va. 2005) (unpublished decision)).

205. The quoted passages are death-eligibility criteria in Virginia. See Va. Code Ann. § 19.2-264.2 (2004).

termination (where it logically belongs anyway) in the guilt phase."[206] Of course, that kind of realignment would solve one problem by creating another. It would reopen the various evidentiary conflicts that led courts to abandon unitary trials in favor of bifurcated proceedings in the first place.[207]

Some state legislatures responded to *Ring* by "trifurcating" their capital cases into (1) a guilt phase before a jury, (2) a death-eligibility phase before the same jury, and (3) a selection phase before the judge sitting without a jury.[208] Trifurcation avoids the problem of inconsistent Sixth Amendment rules in a single proceeding. It also avoids the prejudice to the defendant that would come from litigating some kinds of aggravating factors before a jury that is simultaneously considering the question of guilt. But trifurcation also demonstrates how easy it can be to marginalize the jury's role at capital sentencing. Under current Sixth Amendment doctrine, as long as the jury finds a single aggravating factor necessary to establish death eligibility, the judge might base her selection decision on aggravating facts that the jury rejected at the eligibility stage.[209] In *Ring*, Justice Scalia bemoaned the decline of our nation's commitment to the criminal jury as an institution and wrote, "That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed."[210] It is hard to imagine a situation more likely to diminish the stature of trial by jury than "the spectacle of a man's going to his death" based on facts *rejected* by a jury. Yet, *Ring* and trifurcation may increase the likelihood that we will see such cases.

C. Ring*'s Ripple Effects: How Charging Decisions by Prosecutors Can Limit Sixth Amendment Protection at Capital Sentencing*

Constitutional adjudication often creates ripple effects, unintended consequences that stem from choices made by litigants or legislatures in response to the Court's rulings. One troubling ripple effect of *Ring* is that it can make a defendant's Sixth Amendment rights at the sentencing

206. Ring v. Arizona, 536 U.S. 584, 613 (2002) (Scalia, J., concurring).

207. See Note, Admissibility, supra note 58, at 716–17 (describing conflict between evidentiary rules limiting character evidence at trial and need for broader admissibility of character evidence for sentencing). Justice Scalia's solution would prove impractical and unfair in a variety of contexts. For example, imagine the predicament of a defendant if statutory aggravators relating to past crimes or future dangerousness were submitted to the jury at the same time as the question of guilt.

208. See supra note 25. For a discussion of Nebraska's trifurcated system, see State v. Gales, 658 N.W.2d 604, 626–28 (Neb. 2003).

209. There is nothing in *Ring* that would preclude a court from considering facts at the selection stage that were rejected by a jury. And the Court's permissive approach to "acquitted conduct" in noncapital sentencing suggests that neither due process nor double jeopardy principles would prohibit a court from considering such facts. See United States v. Watts, 519 U.S. 148, 157 (1997).

210. *Ring*, 536 U.S. at 612 (Scalia, J., concurring).

phase depend upon choices that rest in the hands of the prosecutor. This fact gives prosecutors an incentive to make choices that will limit Sixth Amendment protection for many defendants. To see how this process might play out, we need only look at a capital case from the perspective of the prosecutor at the time she chooses how to frame her indictment and death-penalty notice.

Imagine a case, similar to *Ring*, where a defendant and his accomplice killed a security guard in the course of an armed robbery. Call the defendant "Dan." Imagine further that the accomplice confessed to the police, saying that Dan laughed as he tortured and killed the victim. The only catch is that, unlike in *Ring*, the accomplice is now either dead, unavailable, or takes the Fifth. Thus, the prosecutor knows she has powerful evidence to convince a sentencer to vote death, but she also knows that hearsay evidence is inadmissible in a proceeding where the Confrontation Clause applies.[211] Our prosecutor is contemplating a capital murder charge under a typical death-penalty statute which, like Arizona's, lists a host of statutory aggravating factors and makes the defendant eligible for death upon proof of any one of them. And, just as in Arizona, the statutory aggravators include the following: (a) that defendant killed for pecuniary gain, and (b) that the killing was "in an especially heinous, cruel or depraved manner."[212] How will our prosecutor craft her death-penalty notice in order to maximize the likelihood of a death sentence?

The answer is that she will craft it in such a way that the Sixth Amendment will not stop her from using the accomplice's hearsay statement, even though Dan will never have the opportunity to see, hear, and cross-examine the accomplice. Under *Ring*, she has the power to do just that. If her death-penalty notice lists two statutory aggravators—pecuniary gain and "depraved manner"—her hearsay likely will be barred at sentencing by the Confrontation Clause, because it is relevant to prove a fact—depraved manner—which goes to the eligibility determination. But if she lists "pecuniary gain" as her sole statutory aggravating factor, then the Sixth Amendment will not affect the admissibility of that powerful hearsay, because the hearsay has nothing to do with the only fact necessary to make Dan eligible for death. Instead, under her more narrowly framed charge, the hearsay now goes only to the selection determination, where Sixth Amendment rules do not apply and hearsay is welcome under *Williams*.[213] She can ensure that her hearsay will be relevant and

211. The facts outlined in the hypothetical are not entirely fictional. See United States v. Jordan, 357 F. Supp. 2d 889, 903–05 (E.D. Va. 2005) (considering admissibility at capital sentencing of grand jury testimony and videotaped statement of eyewitness who committed suicide); United States v. Fell, 217 F. Supp. 2d 469, 485 (D. Vt. 2002) (considering admissibility at capital sentencing of statement made by deceased codefendant), vacated, 360 F.3d 135 (2d Cir. 2004).

212. See *Ring*, 536 U.S. at 592 n.1 (quoting Ariz. Rev. Stat. Ann. § 13-703(G) (West Supp. 2001) (current version at Ariz. Rev. Stat. Ann. § 13-703(F) (West Supp. 2004))).

213. See supra text accompanying note 51.

admissible for the selection decision merely by identifying the defendant's laughter and acts of torture as nonstatutory aggravating factors.

In this manner, our imaginary prosecutor can limit the coverage of the Sixth Amendment by carefully crafting her charging decision. Indeed, *Ring* gives her a powerful incentive to do exactly that. *Ring* extends full Sixth Amendment protection to the death-eligibility determination but not to the ultimate selection of who lives and who dies.[214] Accordingly, where full Sixth Amendment trial rights pose an impediment to the prosecutor's goal of a death sentence, we can anticipate charging decisions that make fewer facts relevant to eligibility and more facts relevant to selection. And *Ring* leaves state legislatures with considerable power to define death-eligibility facts in ways that make such tactical choices even more readily available to prosecutors.

In sum, by tying Sixth Amendment rights to death-eligibility factfinding, *Ring* puts significant new power into the hands of legislators and prosecutors to control the rules of the Sixth Amendment playing field where life and death issues are contested. It also creates a level of inconsistency in capital sentencing rights among similarly situated defendants where the only real difference is a prosecutor's tactical choice. The *Ring* majority wrote that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished" if that right did not encompass "the factfinding necessary to put [the defendant] to death."[215] Yet *Ring* leaves prosecutors with broad discretion to limit the "factfinding necessary to put [the defendant] to death" while often leaving the most crucial factfinding—the factfinding that really leads a sentencer to impose death—beyond the protection of the Sixth Amendment.

D. Blakely *and* Booker*: Loose Language? Or an Earthquake at the Sixth Amendment Border?*

Efforts at constitutional line drawing inevitably create troublesome questions in gray areas near constitutional borders. *Ring* is no exception. *Ring* tries to draw a bright line between factfinding necessary to establish eligibility for death, on one side, and the final exercise of sentencing discretion—the selection step—on the other. But identifying which factfindings fall on which side of the line is not always as easy as scanning a state statute to identify "statutory aggravating factors." In felony-murder cases, for example, the Eighth Amendment forbids capital punishment absent findings that the defendant was "a major participant" in the felony and that he exhibited "reckless indifference to human life."[216] Under *Ring*, therefore, it would seem that such findings must be made by a jury beyond a reasonable doubt. But *Ring* itself was a felony-murder case

214. See supra text accompanying notes 184–191.

215. *Ring*, 536 U.S. at 609.

216. See Tison v. Arizona, 481 U.S. 137, 158 (1987); Enmund v. Florida, 458 U.S. 782, 801 (1982).

where the sentencing judge made these "*Enmund/Tison*" findings himself, without the benefit of a jury.[217] Nevertheless, the Court never said—at least explicitly—that such findings exceeded the judge's authority under the Sixth Amendment. And, after remand, the Arizona Supreme Court held that *Enmund/Tison* findings need not be made by a jury because they are not "elements" but merely factors that satisfy the "proportionality" demands of the Eighth Amendment.[218] Whatever the wisdom of that ruling, it illustrates the kind of line-drawing problems that *Ring* has spawned. Other similar dilemmas, no doubt, will follow.[219]

The difficult line-drawing problems spawned by *Apprendi* and *Ring* have been further complicated by the Court's latest efforts to define the Sixth Amendment border between trial and sentencing. *Blakely v. Washington*[220] and *United States v. Booker*[221] struck down mandatory sentencing guideline schemes that left to judges, rather than juries, the factfinding necessary to elevate the maximum sentence a court could impose. Of course, neither *Blakely* nor *Booker* was a capital case. But their implications for capital sentencing are intriguing at the least, and monumental if the Court really meant what it said.

Writing for a five-Justice majority in *Blakely*, Justice Scalia began with *Apprendi*'s now familiar mantra that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is, in effect, an element of an offense and, accordingly, must be proved to a jury in order to satisfy the Sixth Amendment.[222] In *Blakely*, Justice Scalia added, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[223] He continued, "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[224] Interpreting, or perhaps expanding on, *Apprendi* and *Ring*, Justice Scalia wrote that Blakely's sentence violated the Sixth Amendment because "the jury's verdict alone does not authorize the sentence."[225] *Booker* followed predictably in *Blakely*'s Sixth Amendment footsteps, striking down the Federal Sentencing Guidelines for es-

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217. See *Ring*, 536 U.S. at 594.

218. See State v. Ring, 65 P.3d 915, 944–46 (Ariz. 2003).

219. In light of Atkins v. Virginia, 536 U.S. 304 (2002), one open question is whether the Sixth Amendment allows a judge, rather than a jury, to determine whether a defendant is mentally retarded. See Steiker, Things Fall Apart, supra note 20, at 1482.

220. 124 S. Ct. 2531 (2004).

221. 125 S. Ct. 738 (2005).

222. *Blakely*, 124 S. Ct. at 2536 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

223. Id. at 2537.

224. Id.

225. Id. at 2538.

sentially the same reasons that *Blakely* had invalidated Washington's sentencing scheme.[226]

When applied to capital cases, the language of *Blakely*[227] suggests a significant expansion upon *Ring*. Arguably, *Blakely* extends the reach of the Sixth Amendment beyond the death-eligibility determination to reach any factfinding that matters at capital sentencing, including those findings that contribute to the final selection process. In the language of *Blakely*, no judge—or jury for that matter—may impose death "*solely on the basis of the facts reflected*" in the finding of death eligibility.[228] Moreover, "the jury's verdict alone [at the eligibility stage] does not authorize the sentence" of death.[229] The reason is that, under both Eighth Amendment case law and state statutes that attempt to follow those cases, "additional findings" are required at the selection stage, after the eligibility finding is made. In striking down mandatory death penalties, *Woodson v. North Carolina* held that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[230] In my view, outside of unusual cases where there are no disputes about facts that may contribute to the selection process, there is no way to satisfy the constitutional mandate of *Woodson* without making "additional findings."

An example helps illustrate both the possibilities and the uncertainties that arise when we apply *Blakely* in the world of capital sentencing. Imagine an armed robbery—for simplicity's sake, not charged as a felony murder—where a lone robber intentionally kills his victim in the course of stealing a wallet. To simplify matters, imagine a capital murder prosecution where the state alleges a single statutory aggravating factor: that the defendant killed "for pecuniary gain." Imagine a trial in three stages: a guilt phase, an eligibility phase, and a selection phase. At the guilt phase the jury's verdict necessarily finds that the defendant robbed and killed the victim. At the eligibility stage, the jury's verdict explicitly finds that the defendant acted for pecuniary gain. Now comes the selection stage, and the big question under *Blakely* is: Can the sentencer impose death "without any additional findings?" After *Blakely*, I suggest there are at least three plausible answers to that question: (1) No; (2) Yes; and (3) Maybe. Here is why:

(1) No. Our defendant cannot be sentenced to death without additional findings. After *Furman*, *Woodson*, and *Lockett v. Ohio*, no death sentence can ever be imposed even on a death-eligible defendant until the

226. See *Booker*, 125 S. Ct. at 769.

227. Because *Booker* adds little of substance to *Blakely*'s Sixth Amendment analysis, I refer only to *Blakely* throughout the rest of this Part.

228. *Blakely*, 124 S. Ct. at 2537.

229. Id. at 2538.

230. 428 U.S. 280, 304 (1976) (citation omitted).

sentencer considers "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[231] Except in the rare case where all relevant aspects of a defendant's character and all circumstances of the offense are admitted or established at trial or in the eligibility phase, there is no way for a sentencer to "consider" them without first finding—as a matter of fact—that they do or do not exist. The "weighing" or "selection" process required by the Eighth Amendment cannot occur without those "additional findings."[232] In our hypothetical, to rule otherwise is to say, in effect, that the sentencer can view an armed-robbery killing as deserving mandatory death without regard to any other circumstances. *Woodson* and *Lockett* prohibit a death sentence imposed on that basis.

(2) Yes. Our death-eligible robber-murderer can be sentenced to death "*without* additional findings" as *Blakely* uses that phrase.[233] Under *Ring*, there is still a constitutionally significant difference between facts sufficient to expose a defendant to death, and facts that actually lead a sentencer to impose death. The findings required by *Woodson* and *Lockett* do nothing to elevate the maximum penalty that an already death-eligible defendant faces. If *Blakely*'s broad language suggests otherwise, it is just dictum. To hold otherwise is to conclude that *Blakely* overruled both *Spaziano* and *Williams* without saying so.

(3) Maybe. It seems at least plausible that *Blakely* might, or might not, extend Sixth Amendment protection to our hypothetical defendant, depending upon whether the sentencer finds it necessary to make any additional factfinding before he can exercise sentencing discretion. *Blakely* allows a judge to impose death on our death-eligible defendant as long as he can do so without finding any additional facts not established at the eligibility stage. So let's return to our hypothetical. Imagine that, aside from the facts established by the guilty verdict and eligibility verdict—i.e., the fact that the defendant robbed and killed his victim for pecuniary gain—the prosecution has nothing further to offer at sentencing. Imagine that, in mitigation, the defendant proffers only that he was drunk at the time of the shooting. Now imagine that our sentencer con-

231. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Burger, C.J., dissenting).

232. The Federal Death Penalty Act further illustrates the problem. The FDPA requires the sentencer to find at least one statutory aggravating factor in order to make a defendant eligible for death. 18 U.S.C. § 3593(d) (2000). In addition, the FDPA requires the sentencer to make and record findings of fact regarding otber aggravating and mitigating factors before determining whether the aggravating factors "found to exist" outweigh the mitigating factors "found." Id. With the possible exception of cases where neither party has identified an aggravating or mitigating factor beyond the factor(s) determining eligibility, this scheme does not authorize the sentencer to impose death without making—and explicitly recording—additional findings beyond those necessary for death eligibility. Thus, in my view, sentencing under the FDPA would violate the Sixth Amendment unless the court accords the defendant full Sixth Amendment rights—including, most significantly, the right to restrict hearsay under the Confrontation Clause—throughout the sentencing hearing.

233. *Blakely*, 124 S. Ct. at 2537.

cludes that, even assuming the factual accuracy of the defendant's claim of drunkenness, death is still the appropriate sentence. Under these circumstances, our sentencing judge can comply with *Blakely*, because he can impose death without any additional factfinding. And he can comply with *Woodson* and *Lockett*, because he has considered all facts and circumstances proffered by the defendant. In other words, the sentencer can make his final selection decision without any factfinding beyond what occurred at trial and at the eligibility phase.

But now let's change the facts a bit. Imagine our death-eligible defendant proffers that at the time of the offense his judgment was clouded by prescription painkillers to which he had become addicted. Imagine that our sentencer concludes that, if true, the facts of the defendant's clouded judgment and addiction are sufficiently mitigating to result in a life sentence. The prosecutor protests, saying she knows of no facts to support defendant's claims. To resolve the factual dispute, the judge spurns open-court proceedings and asks for a presentence report. Based on a probation officer's report summarizing police reports and other collected hearsay, the judge concludes that the defendant was not really addicted or impaired. Rejecting—as a matter of fact—the mitigating factors proffered by the defendant, the judge imposes death. Under these circumstances, the judge *did not* impose death without additional factfinding. And, I suggest, he *could not* do so and still fulfill his Eighth Amendment responsibility under *Woodson* and *Lockett* to consider the proffered mitigating facts. His failure to allow confrontation and submit the pivotal factfinding to a jury would violate the Sixth Amendment.

If my hypothetical debate over *Blakely* brings to mind angels dancing on the head of a pin, then perhaps I have made my point. When we overlay complex doctrines of Eighth Amendment law with the equally complex questions posed by *Apprendi*, *Ring*, and *Blakely*, we begin to see how narrow and formalistic the Court's Sixth Amendment jurisprudence has become in the world of capital sentencing.

If we step back a bit, it may be easier to see what is really at stake when we try to draw a Sixth Amendment line somewhere in the middle of a complex capital sentencing process. *Ring* draws that line after a finding of death eligibility, but death-eligibility facts often have little to do with the real reasons a sentencer might choose death. A defendant may be eligible for death because he sought money when he killed, because he was in jail when he killed, or because his victim was a teenager. But those facts, standing alone, are seldom the reason a sentencer would choose death. More likely, the real facts influencing the death sentence will be something else: for example, that the defendant has a history of unadjudicated violent crimes, or that he killed with gratuitous cruelty.[234]

234. There are several fine studies of the factors that actually influence juries in life-and-death decisions and how those factors often differ from the structured elements in post-*Furman* jury instructions. See, e.g., William J. Bowers & Benjamin D. Steiner,

Depending upon the circumstances, and perhaps depending upon the prosecutor's tactical choices, these facts may play no formal role in the eligibility decision and thus, under *Ring*, get no protection from the Sixth Amendment. Similarly, the adjudication of mitigating facts, which may play a critical role in the sentencer's decision, falls outside the Sixth Amendment according to *Ring*. In all of the many death-penalty cases where the real reasons for choosing life or death have little to do with a statutory aggravating factor, *Ring* exalts form over substance because it grants Sixth Amendment protection to the factfinding that matters least, while denying that protection where heavily contested facts matter most.

The Court justifies its ruling in *Blakely* based on "the need to give intelligible content to the right of jury trial."[235] If *Blakely* really does extend that right to all factfinding that contributes to a death sentence—whether it relates to eligibility or selection—then the Court may have succeeded in giving new and "intelligible content" to that Sixth Amendment right. However, if *Blakely* means something less than that, then we are left with *Ring*'s more formalistic line, a line that still leaves the Sixth Amendment with little practical significance in many capital sentencings.

Stated a little differently, *Ring* tells us that the Sixth Amendment protects a defendant when we adjudicate facts that *can* lead to death. The question, after *Blakely*, is whether it also protects him when we adjudicate facts that *do* lead to death and facts that can lead to life. If, as a practical matter, it seems odd that there should be any difference, then perhaps I have achieved my goal here in Part II. Often there is no practical difference and, I suggest, there should be no Sixth Amendment difference, between eligibility facts and selection facts. *Blakely* may have nudged us ever so slightly toward a world where the Sixth Amendment governs all of capital sentencing, but we are not there yet.

III. A Unified Theory of Sixth Amendment Rights at Capital Sentencing

The Court's current approach to Sixth Amendment rights at capital sentencing is a process of fragmentation heaped upon fragmentation. The Court applies pieces of the Sixth Amendment to pieces of a capital sentencing. Sometimes two sets of Sixth Amendment rights govern different issues in a single proceeding. As a practical matter, it is a system that can provide the least protection at the moment it is most needed: when the sentencer determines critical facts that tip the ultimate balance between life and death. It is a system where adversarial rights may exist or disappear based on choices made by an adversary. It is not, I suggest, a system that many would design if given a clean slate and asked to produce a fair, just, and accurate process for deciding who lives and who dies.

Choosing Life or Death: Sentencing Dynamics in Capital Cases, *in* America's Experiment, supra note 9, at 309.

235. *Blakely*, 124 S. Ct. at 2538.

More importantly—since our task here is to interpret a constitution—it is not a system that readily comes to mind upon reading the language of the Sixth Amendment and considering that language in the context of its history and purpose.

Instead, as I argue in this Part, all of the rights listed in the Sixth Amendment should apply throughout a capital case, including the sentencing. This unified theory of Sixth Amendment rights flows naturally from the constitutional text, which grants those rights without distinction "in all criminal prosecutions."[236] A unified theory makes sense historically. The Framers lived in a system of capital litigation where a unitary trial and a single jury verdict determined not only guilt or innocence, but life or death as well. With that system as their point of reference, they crafted a single set of adversarial rights to govern all of the proceedings that might lead to the penalty of death. Finally, in the post-*Furman* age, a unified theory ensures that full adversarial rights remain available when they may be most essential: at the moment a defendant contests the question of life or death.

A. *The Sixth Amendment Text*

Plain meaning often is in the eye of the beholder. Mindful of that limitation, I turn to a question that the Supreme Court has never explicitly addressed: What can the constitutional text tell us about Sixth Amendment rights at capital sentencing?

The Sixth Amendment consists of a single sentence:

> 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 favor, and to have the Assistance of Counsel for his defense.[237]

All of the rights enumerated in the Sixth Amendment apply "in all criminal prosecutions." If the textual question is simply whether a sentencing is part of a "criminal prosecution," the answer would seem self-evident. After all, why bother with the process of criminal prosecution if not for the sentence? As one eminent jurist remarked: "If 'plain meaning' is the criterion, this is an easy case. Surely no one would contend that sentencing is not a part, and a vital one, of a 'criminal prosecution.'"[238]

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236. U.S. Const. amend. VI.

237. Id.

238. United States v. Wise, 976 F.2d 393, 407 (8th Cir. 1992) (en banc) (Arnold, C.J., concurring in part and dissenting in part); see also Note, An Argument for Confrontation, supra note 20, at 1888 (arguing that plain meaning of "criminal prosecution" includes sentencing). Indeed, in a somewhat different context, the Supreme Court has found it

Unfortunately, that "easy case" may prove too much, for it would require a full-blown jury trial for the most ordinary of noncapital sentencings. Regardless of its textual appeal, that notion seems doomed for practical reasons. It would invalidate practices that have been almost universal in noncapital sentencings for over a century.

A closer look at the text suggests a distinction between the jury right, which by the terms of the Amendment applies to a "trial," and the rights to notice, confrontation, compulsory process, and counsel, which apply more broadly to the whole "criminal prosecution," and thus to sentencing. This interpretation avoids the practical difficulty of requiring a jury for every sentencing, while still protecting the basic adversarial rights of confrontation, compulsory process, and counsel at sentencing.[239] In the capital sentencing context, this reading of the text casts doubt on the Court's approach to confrontation rights in *Williams*, which viewed the basic rights to see, hear, and cross-examine witnesses as rights of "trial procedure."[240] The Sixth Amendment text suggests those rights extend beyond trial.[241]

The Sixth Amendment text calls for a consistency that has not been part of the Court's sentencing-rights doctrine. The text suggests that, whenever the rights of notice, confrontation, compulsory process, and counsel apply, they apply together. All of those rights are in the same sentence, which, as a matter of simple grammar, lists them collectively as the rights an accused "shall enjoy" "in all criminal prosecutions." There is no textual reason for limiting the right of confrontation to trial, while extending the right to counsel through all critical stages of a criminal prosecution, including sentencing. Yet, as our discussion of *Williams* and *Mempa v. Rhay* reveals, that is just what the Court has done.[242] At a mini-

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hard to resist the textual link between sentencing and "criminal prosecution." See Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (declining to apply Sixth Amendment to parole revocation hearings because "[p]arole arises after the end of the criminal prosecution, including imposition of sentence").

239. In the context of guideline sentencing, this reading has been favored by some commentators who advocate greater adversarial rights in resolving factual disputes. See, e.g., Beale, supra note 20, at 160–61 (taking view that trial is "but one part of the criminal prosecution"); Note, An Argument for Confrontation, supra note 20, at 1889 n.70 (arguing jury right applies to trial, but "not to other stages of prosecution").

240. Williams v. New York, 337 U.S. 241, 251 (1949). Though *Williams* was a due process opinion, it effectively has nullified Sixth Amendment confrontation rights at sentencing. See supra note 54.

241. One also might rely on the Sixth Amendment text to argue that the confrontation right applies in any proceeding where the prosecution relies on "witnesses against" the accused. And, in light of recent authority, "witnesses against" an accused include those hearsay declarants who provide "testimonial" hearsay through, for example, affidavits, grand jury testimony, or statements in response to police questioning. See Crawford v. Washington, 541 U.S. 36, 50–54 (2004). Thus, many declarants whose hearsay is assembled in a presentence report or summarized at sentencing through the testimony of a police officer are "witnesses against" the accused. The Sixth Amendment entitles a defendant to exclude such hearsay in the absence of confrontation.

242. See supra text accompanying notes 54–67, 122–124.

mum, the Sixth Amendment text gives us a good reason to prefer consistency over the Court's fragmented approach.

The rights enumerated together in the Sixth Amendment share a common purpose.[243] In the words of one constitutional historian, those rights evolved as interdependent rights that establish an adversarial system, one that "was not dependent on any one right or procedure, but on a confluence of advocacy tools that permitted the accused to challenge the prosecution's case."[244] In other words, Sixth Amendment rights support each other. Without counsel, the right of cross-examination may be an exercise in futility. Without the right to cross-examine the state's witnesses or to present favorable evidence, the right to counsel may be an empty formalism.[245]

It may be tempting to rely on the text for more than it will bear. The right to a jury applies at trial, one might argue, and therefore the jury has no constitutional role at sentencing. The problem with this reading is that it assumes that the capital sentencing phase is not part of the trial. Our twenty-first-century perspective may lead us too easily toward that assumption. After all, at least since *Gregg v. Georgia*, we have become accustomed to seeing "trial" and "sentencing" as separate parts of a bifurcated proceeding.[246] But our frame of reference has shifted over two centuries. Bifurcated proceedings in capital cases are a relatively recent phenomenon. The Framers "knew nothing of sentencing proceedings separate from the trial itself."[247] History, then, requires us to view the "trial" through a different lens. We turn to that history next.

B. *Sixth Amendment History: An Integrated Set of Adversarial Rights for a Unified World of Trial and Sentencing*

In the Court's most recent exploration of Sixth Amendment history, Justice Scalia wrote, "Any attempt to determine the application of a con-

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243. The early history of those rights is not altogether a common history. There was, for example, no right to counsel in felony cases in eighteenth-century England. Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77, 82–83 (1995). Still, as Professor Langbein points out, the rights later enumerated in the Sixth Amendment share a common history in that the development of one influenced and encouraged development of the others. See Langbein, Origins, supra note 30, at 291 ("Cross-examining prosecution witnesses was the primary task for which the judges admitted defense counsel to the felony trial.").

244. Jonakait, supra note 243, at 164–65.

245. "It has also been argued that the right to counsel at sentencing implies a right to confrontation because exercise of the former is futile if it does not include the latter." Note, An Argument for Confrontation, supra note 20, at 1889 n.70 (citing Herring v. New York, 422 U.S. 853, 857 (1975)).

246. See Gregg v. Georgia, 428 U.S. 153, 190–91 (1976) (suggesting bifurcation of capital cases to allow for admissibility at sentencing of evidence relating to defendant's character). See generally infra text accompanying notes 309–313 (explaining existence of bifurcation despite fact that practice is not constitutionally mandated).

247. United States v. Wise, 976 F.2d 393, 407 (8th Cir. 1992) (en banc) (Arnold, C.J., concurring in part and dissenting in part).

stitutional provision to a phenomenon that did not exist at the time of its adoption . . . involves some degree of estimation . . . but that is hardly a reason not to make the estimation as accurate as possible."[248] We are faced with that kind of task when we try to determine whether Sixth Amendment rights apply at capital sentencing because capital sentencing, as a phenomenon separate from trial, did not exist in the Framers' world.

1. *The Framers' World: Unified Proceedings Where the Jury Verdict Resulted in a Sentence Fixed by Law.* — Those who crafted the Bill of Rights had little reason to consider "trial rights" separately from "sentencing rights" in capital cases because, in effect, trial and sentencing were one. The questions of guilt and punishment both were resolved in a single proceeding which ended with a single jury verdict. Unified proceedings were the norm because, at the time of the founding, the substantive criminal law in England and America "tended to be sanction-specific; it prescribed a particular sentence for each offense."[249] Trial concluded with a jury verdict after which, in Blackstone's words, "the court must pronounce that judgment, which the law hath annexed to the crime."[250] For a long list of felonies,[251] the prescribed sentence was death.[252]

In that world, there was no separate capital sentencing proceeding of any consequence. A jury verdict for a capital offense was, in effect, a death sentence. After a verdict, the court paused only for the defendant's brief allocution, a process that involved neither additional factfinding nor the exercise of sentencing discretion by judge or jury.[253] Pronouncement of sentence by the court was, for practical purposes, a ministerial act.

It is tempting to rely on this history to argue that the Sixth Amendment contemplates no sentencing rights at all, because it contemplates no separate sentencing proceeding. Put differently, if the Framers tolerated a system where the penalty was mandatory upon a finding of guilt,

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248. Crawford v. Washington, 541 U.S. 36, 53 n.3 (2004).

249. Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) (quoting Langbein, English Criminal Trial Jury, supra note 34, at 36–37).

250. 4 William Blackstone, Commentaries *376, quoted in *Apprendi*, 530 U.S. at 479.

251. Whitnan J. Hou, Capital Retrials and Resentencing: Whether to Appeal and Resentencing Fairness, 16 Cap. Def. J. 19, 30 (2003) (noting 222 crimes punished by death in eighteenth-century England).

252. "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." Woodson v. North Carolina, 428 U.S. 280, 289 (1976) (citing Hugo Adam Bedau, The Death Penalty in America: An Anthology 5–6, 15, 27–28 (rev. ed. 1967)).

253. See McGautha v. California, 402 U.S. 183, 228 n.7 (1971) (Douglas, J., dissenting) (quoting Note, Procedural Due Process, supra note 59, at 832–33) (describing allocution merely as opportunity for defendant to present legal reason he should avoid sentencing); Caren Myers, Note, Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity, 97 Colum. L. Rev. 787, 798–99 (1997) (describing allocution as right to present "any legal impediment to the execution of the sentence").

then any process that allowed a sentencer to assign a lesser penalty to a guilty defendant would be more generous than the Constitution required. This approach treats any exercise of sentencing discretion as an undeserved act of mercy.[254]

This interpretation of history is at the heart of *Apprendi* and *Ring*.[255] It assumes that the world of mandatory penalties was a world without sentencing discretion. In that world, legislators prescribed sentences, and juries merely found facts that matched legislative definitions of the elements of a crime. But that assumption ignores a fundamental characteristic of unified seventeenth-century trials: the jury's role as capital sentencer.

2. *The Jury's Role as Capital Sentencer in a Unified System.* — In eighteenth-century England and colonial America, the letter of the law often called for more death than the people would tolerate. And the people spoke through juries.

Early English common law recognized only a small number of capital crimes, ranging from rape and murder to burglary and larceny.[256] Through the seventeenth and eighteenth centuries, legislation expanded England's "Bloody Code" to include dozens more. By the reign of George III, English law punished around 150 to 200 crimes with death.[257] The American colonists proved more reluctant to legislate death, but early colonial efforts to limit capital punishment were defeated in the eighteenth century when the Crown imposed stricter penal codes on the colonists.[258] By the time of the Revolution, Americans were familiar with a substantive criminal law that imposed mandatory death for a wide range of crimes, but they were also familiar with a long history through which juries had resisted the mechanistic application of that law by exercising de facto sentencing discretion in a variety of ways.

Part of that history had been enshrined in the law of homicide. Long before the eighteenth century, the law of homicide had merged the jury's role as factfinder and its role as de facto sentencer. By choosing

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254. In the nineteenth century, as the growth of a prison system allowed for judicial discretion in noncapital cases, this "mercy" theme offered a basis for rejecting procedural rights in the sentencing process. See Harris v. United States, 536 U.S. 545, 561–62 (2002) (plurality opinion) (citing 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure § 85, at 54 (2d ed., Boston, Little, Brown & Co. 1872)). As we have seen, the theme of judicial mercy played a central role in *Williams*, where the Court found no reason to limit a sentencer's use of out-of-court sources in considering a death sentence because, as the Court put it, the sentencer could impose a death sentence "giving no reason at all." Williams v. New York, 337 U.S. 241, 252 (1949); see also supra text accompanying notes 65–67.

255. See *Apprendi*, 530 U.S. at 479–80.

256. The Death Penalty in America, supra note 59, at 6.

257. Id.; see also Hou, supra note 251, at 30 & n.93 (noting 222 capital crimes in eighteenth-century England); Note, Admissibility, supra note 58, at 715 n.1 ("In Blackstone's day Parliament had provided that the death sentence should be imposed in not less than 160 different crimes.").

258. See The Death Penalty in America, supra note 59, at 7.

between murder, which was punished by mandatory death, and manslaughter, which was not,[259] juries effectively made capital sentencing decisions. As a matter of form, of course, juries in homicide cases were making factual determinations relating to "malice," the element that distinguished the two crimes.[260] As a practical matter, however, "the murkiness of the required factual determinations inevitably vested the jury with considerable discretion."[261] As a result, manslaughter convictions often reflected a jury's judgment that death was not the appropriate penalty under the circumstances of a particular homicide.

Outside of homicide cases, eighteenth-century juries had an even clearer role in protecting against the prospect of death under rapidly expanding criminal codes. English statutes punished a variety of property crimes by death, often distinguishing capital from noncapital crimes based on the value of the stolen property.[262] In the decades surrounding the American Revolution, the practice of juries issuing "partial verdicts" or "downvaluing" stolen goods in order to avoid death sentences was widespread, immortalized through Blackstone's colorful phrase, "pious perjury."[263] Indeed, the practice was so commonplace that it "was largely responsible for the virtual suspension of the operation of many capital statutes."[264]

In his well-documented history of the Anglo-American adversarial trial, Professor Langbein argues that de facto jury sentencing often was the principal purpose of an eighteenth-century jury trial:

> The jury's power to mitigate sanctions profoundly affected the purpose of the criminal trial for those many offenses in which the jury might return a partial verdict. Only a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence. In many cases, perhaps most, the accused had been caught in the act or with the stolen goods or otherwise had no credible defense. To the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction.[265]

Aside from the fact that this kind of jury sentencing was widespread by the American constitutional period, and that its clear aim was to protect against death sentences, three other aspects of this history bear par-

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259. Id. at 6.

260. See McGautha v. California, 402 U.S. 183, 198 (1971) (discussing history of concept of malice).

261. Welsh S. White, Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial, 65 Notre Dame L. Rev. 1, 8 (1989). Indeed, it was partly the insistence of juries on exercising this kind of discretion that led to the murder-manslaughter distinction in the first place. See Thomas A. Green, The Jury and the English Law of Homicide, 1200–1600, 74 Mich. L. Rev. 413, 415 (1976).

262. Leon Radzinowicz, A History of English Criminal Law and Its Administration from 1750, at 94 (1948).

263. 4 Blackstone, supra note 250, at *239.

264. Radzinowicz, supra note 262, at 95.

265. Langbein, Origins, supra note 30, at 59.

ticular note. First, it is quite clear from historical accounts that these juries were not merely finding facts; they were exercising sentencing discretion.[266] Indeed, the practice of juries in issuing partial verdicts—Blackstone's "pious perjury"—was remarkable precisely because those verdicts were contrary to fact.[267] Second, the power of juries to exercise this kind of sentencing discretion by issuing unreviewable verdicts, even if contrary to the evidence, had become an accepted characteristic of jury trials by the time of the American Constitution.[268] Earlier battles to curb jury power through a variety of means—including directed verdicts, punishments for wayward juries, and limiting juries to special verdicts on limited issues of fact—had largely been defeated.[269] Third, the sentencing role of juries was not confined to England. This fact was well known to the Framers, both because juries exercised the same power in colonial trials[270] and because the practice was documented by Blackstone, a source quite familiar to American lawmakers.[271] If anything, the jury's role as capital sentencer was even more entrenched in America than in England.[272] Lawmakers in the First Congress, the same Congress that passed the Bill of Rights, recognized and apparently respected the death-defeating aspect of jury discretion. When Congress considered making forgery a capital offense, the principal argument against the legislation was that juries would not convict.[273]

Eighteenth-century English and American juries exercised de facto sentencing discretion as a means to resist overbroad application of the death penalty. In a similar vein, the adversarial rights of notice, confron-

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266. "Juries at the time of the framing could not be forced to produce mere 'factual findings,' but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence." United States v. Gaudin, 515 U.S. 506, 513 (1995) (citing Edmund M. Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 Yale L.J. 575, 591 (1922)).

267. Perhaps the most prominent examples of jury verdicts contrary to fact are the many cases where English juries refused to recognize the full value of stolen goods in order to issue "partial verdicts" and thereby allow for punishment other than death. Professor Langbein's study of cases at the Old Bailey in the 1750s suggests that juries returned such partial verdicts nearly a quarter of the time. See Langbein, Origins, supra note 30, at 58–59.

268. See Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 49–50 (2003).

269. See Langbein, Origins, supra note 30, at 328–31.

270. See Woodson v. North Carolina, 428 U.S. 280, 289–90 (1976).

271. 4 Blackstone, supra note 250, at *239. Blackstone's text was in high demand among lawyers in the American colonies during the decades leading up to independence. See Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 Minn. L. Rev. 557, 581–82 (1992).

272. See Jenia Iontcheva, Jury Sentencing as Democratic Practice, 89 Va. L. Rev. 311, 316–23 (2003).

273. 1 Annals of Cong. 1573–74 (Joseph Gales ed., 1834). The legislation passed with the death penalty for forgers. Act of Apr. 30, 1790, ch. 9, § 14, 1 Stat. 112, 115. But there was never a suggestion that its efficacy should be enhanced by removing the capital sentencing role from juries and assigning it to judges.

tation, compulsory process, and, ultimately, the right to counsel evolved at least in part as counterweights to a substantive criminal law that threatened death in proportions that the public—and sometimes the judiciary—could not tolerate. An adversarial system evolved in eighteenth-century England not so much because it was a superior process for finding the truth, but at least partly because it served the "truth-defeating" function of avoiding death where the facts called for hanging. Professor Langbein's detailed history of the adversary system draws a clear parallel between England's Bloody Code and the development of the rights associated with adversarial trial:

> English criminal justice threatened more capital punishment than those who administered it were willing to impose. To avoid a bloodbath, evasions of many sorts were practiced. Adversary criminal trial procedure was shaped in this milieu, absorbing what [foreign observers] saw as indifference to truth. If we are to understand why the Anglo-American criminal procedure that emerged in this period is so truth-disserving, we must bear in mind that we settled on our procedures for criminal adjudication at a moment when we did not want all that much truth.[274]

An adversarial system emerged in England not so much because it insured accurate results, but because it equipped a defendant with tools to fight the mechanism that sought to kill him. Americans of the revolutionary generation embraced these adversarial rights.[275] Indeed, as of 1791, Americans were a step ahead of their English brethren. When Americans adopted the Sixth Amendment, England only allowed counsel to play an extremely limited role in felony cases, where life was at stake, while permitting counsel for misdemeanors, where death was not at issue.[276] Both American colonial practice and the Sixth Amendment rejected that limit.[277] In effect, by expanding upon existing common law practice, the Framers declared that the adversarial rights enshrined in the Sixth Amendment belonged at the heart of the proceeding that determined life and death. And in the Framers' world, that proceeding was a single, unified trial with no separate sentencing.

3. *Another View of Judicial Sentencing Discretion in the Framers' World: Noncapital Sentencing.* — In *Williams v. New York*, the Court felt free to disregard trial rights at sentencing in part because

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274. Langbein, Origins, supra note 30, at 336.

275. "[T]he right[s] articulated in the Sixth Amendment . . . are not designed to make trustworthiness the defining principle. Rather, the central principle is that the Framers chose an adversarial system . . . ." Robert P. Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 754.

276. Jonakait, supra note 243, at 82–84 ("A defense attorney could help present legal arguments, but could not present evidence, examine or cross-examine witnesses, or address the jury in opening or closing statements." (footnote omitted)).

277. Id. at 94–96.

> 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.[278]

As we have seen, at least when it comes to sentencing that involves a choice between life and death, that conclusion has no support in our constitutional history.[279] Both judicial discretion in capital sentencing and the notion that capital sentencing information might be presented outside of an adversarial trial are post-constitutional phenomena.

There is, however, a different history for sentencing decisions that did not call for death. At common law, misdemeanors by definition were not capital offenses; punishment for a misdemeanor could not "touch life or limb."[280] Though the absence of prison cells made terms of imprisonment relatively rare until the late eighteenth century, English and colonial American judges still exercised a range of discretion in choosing punishment for misdemeanants. Fines and whipping were among the judicial options.[281] The eighteenth-century English and American authorities cited in *Williams*[282] do suggest that judges exercised sentencing discretion in choosing among these kinds of punishments and in fixing terms of imprisonment, and that they exercised that discretion in sentencing proceedings that lacked the formality of jury trials.[283]

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278. 337 U.S. 241, 246 (1949).

279. See supra text accompanying notes 249–253.

280. Apprendi v. New Jersey, 530 U.S. 466, 480 n.7 (2000) (quoting J.H. Baker, An Introduction to English Legal History 584 (3d ed. 1990)).

281. Id.

282. *Williams*, 337 U.S. at 246 n.5 (citing Annotation, Right of Court in Imposing Sentence to Consider Other Offenses Committed by Defendant, in Absence of Statute in that Regard, 86 A.L.R. 832, 832–39 (1933); Annotation, Right of Court to Hear Evidence for Purpose of Determining Sentence to be Imposed, 77 A.L.R. 1211, 1211–15 (1932); Annotation, Admissibility of Evidence in Criminal Case after Conviction in Mitigation or Aggravation of Sentence, 14 Am. & Eng. Cases Ann. 968, 968–70 (1909)). *Williams* cites those collected cases to support the view that courts at and before the constitutional period exercised sentencing discretion in capital cases. While the authorities fail to support that view, they do offer numerous examples of judicial discretion in noncapital cases, especially during the nineteenth and twentieth centuries. See, e.g., Tractenberg v. United States, 293 F. 476, 480 (D.C. Cir. 1923) (holding that court's consideration of defendant's prior convictions in "the imposition of [a] sentence" was a permissible "exercise of . . . discretion" in automobile theft case); Smith v. People, 75 P. 914, 915 (Colo. 1904) (confirming in perjury case that court possesses discretion "as to the extent of punishment" and must consider mitigating and aggravating evidence); Tracey v. State, 64 N.W. 1069, 1070 (Neb. 1895) (noting that character evidence in robbery case "may induce the court 'to temper justice with mercy'").

283. See, e.g., State v. Smith, 2 S.C.L. (2 Bay) 62, 62 (1796) (noting that affidavits in mitigation may be presented to court in advance of sentencing defendant convicted of assault); Rex v. Sharpness, (1786) 99 Eng. Rep. 1066, 1066 (K.B.) (allowing prosecutor to read affidavit in aggravation before sentencing defendant to one month imprisonment on conviction for crime of "suffering a prisoner to escape").

But judges were not given the power to choose between life and death.[284]

There is even more direct historical evidence that the Framers distinguished capital from noncapital cases in assigning sentencing discretion to judges.[285] The First Congress passed the first federal criminal legislation. That statute included mandatory death penalties for seven offenses.[286] The same statute defined thirteen noncapital offenses for which it provided sentencing ranges of fines and imprisonment.[287] Though the statute does not explicitly identify the sentencing authority in noncapital cases, contemporary practice[288] suggests that the judge was to choose within the authorized range of punishments.[289] Most critically, the criminal legislation of the First Congress created no crimes for which a judge might choose between life and death.[290]

The clear distinction that the Framers drew between mandatory penalties for capital convictions and discretionary sentencing for noncapital offenses is critical when it comes to applying Sixth Amendment trial rights at sentencing. As legislators, the Framers seemed comfortable entrusting noncapital sentencing to an informal, post-trial sentencing process run by judges. That, after all, had been the common law model for misdemeanors. But when it came to death, the Framers envisioned a different process. To them, the question of guilt for a capital crime and the

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284. None of the eighteenth-century cases relied upon by *Williams* reflect a capital sentencing process where the question of life or death was determined by the judge at sentencing. In a system with mandatory death penalties, that hardly seems a surprise. See supra text accompanying notes 256–265. There were, however, other outlets for mercy in the years leading up to the creation of the Federal Constitution. Along with the inconsistent practice of avoiding execution for some crimes by awarding "benefit of clergy" to first-time offenders, see Banner, supra note 30, at 62–64, the process of executive pardon was exercised more freely then than in the modern age, see Myers, supra note 253, at 792.

285. For the notion that the Framers embraced judicial sentencing discretion, rather than fixed penalties for all crimes, I am indebted to Professor Rory Little, who made this point in a *Blakely* filing. See Petition for Rehearing on Behalf of the State of Washington at *2–*4, Blakely v. Washington, 124 S. Ct. 2531 (2004) (No. 02-1632) 2004 WL 1686266.

286. Act of Apr. 30, 1790, ch. 9, §§ 1 (treason), 3 (murder), 8 (piracy), 9 (piracy), 10 (accessories), 14 (forgery), 23 (aiding escape of person convicted of any capital crime), 1 Stat. 112, 112–17.

287. Id. §§ 2 (misprision of treason), 5 (rescue of body after execution), 6 (misprision of felony), 7 (manslaughter), 11 (concealing a pirate), 12 (confederacy to become pirates), 13 (maiming), 15 (stealing or falsifying court records), 16 (larceny), 17 (receiving stolen goods), 18 (perjury), 21 (bribery), 22 (obstruction of process).

288. See supra note 283.

289. Other criminal legislation passed by the First Congress explicitly vested judges with noncapital sentencing discretion. See Act of Aug. 4, 1790, ch. 35, § 66, 1 Stat. 175, 175–76 (providing for "fine or imprisonment, or both, in the discretion of the court . . . the fine shall not exceed one thousand dollars, and the term of imprisonment shall not exceed twelve months" in cases of certain customs offenses).

290. Indeed, that legislation abolished the "benefit of clergy," a sentencing practice that English courts sometimes had used to avoid imposing otherwise mandatory death sentences. See Act of Apr. 30, 1790 § 31, 1 Stat. at 119.

question of death remained inseparable. And they left both questions to juries in the context of a trial featuring full adversarial rights.[291]

4. *Bifurcated Trials: The Evolution of Sentencing as a Separate Proceeding.* — When the Sixth Amendment was written, juries decided the question of guilt and the question of death in a single proceeding governed by the adversarial rules of trial. That unified system gradually gave way, the first signs of the erosion coming shortly after the new nation was formed when states began to question the range of capital crimes.[292] Three forces slowly changed the landscape of sentencing: (1) a growing aversion to the death penalty;[293] (2) the development of prisons as a sentencing alternative;[294] and (3) an emerging penology that focused on the individualization of punishment.[295]

By the mid-nineteenth century, these three forces had "produced a general shift in this country from criminal statutes 'providing fixed-term sentences to those providing judges discretion within a permissible range.'"[296] Along with judicial discretion and individualization of sentences came a need for information. If judges were to tailor their sentences to fit individual offenders, they needed to know more about that individual than a trial—or guilty plea—was likely to tell them. The question at trial was whether the defendant committed the offense, not whether the defendant was a bad person. At trial, evidence relating to the offense was relevant, while evidence of a defendant's bad character was regarded as unfairly prejudicial.[297] The restrictive rules of evidence at trial conflicted with the emerging preference for making the punishment fit not only the crime, but also the individual criminal.

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291. The same criminal legislation that established the first federal capital offenses also specified a full range of adversarial rights for defendants in capital cases, including the rights to appointed counsel, to a copy of the indictment, to a jury list in advance of trial, and to compel the attendance of witnesses. See id. § 29, 1 Stat. at 118–19.

292. See Banner, supra note 30, at 94–97.

293. From the 1790s through the mid-nineteenth century, the number of capital offenses declined dramatically. See id. at 94–100; Myers, supra note 253, at 791–92.

294. See Banner, supra note 30, at 99, 102 (describing historical shift from death penalty to use of prisons); see also Apprendi v. New Jersey, 530 U.S. 466, 480 n.7 (2000) (noting that "until the late 18th century . . . 'the idea of prison as a punishment would have seemed an absurd expense'" (quoting J.H. Baker, Criminal Courts and Procedure at Common Law 1550–1800, *in* Crime in England 1550–1800, at 15, 43 (J.S. Cockburn ed., 1977))).

295. Individualization of punishment gained momentum throughout the nineteenth century, reflecting a "scientific" view that crime was a form of sickness that might be cured with proper treatment of an individual. See Banner, supra note 30, at 102–03 (explaining emerging viewpoint that criminals were product of "malign influence beyond [their] control"); Myers, supra note 253, at 792 n.19 (noting that punishment began to be tailored to fit the individual crime).

296. Harris v. United States, 536 U.S. 545, 558 (2002) (quoting *Apprendi*, 530 U.S. at 481).

297. See generally Note, Admissibility, supra note 58, at 716 (highlighting importance of evidence about defendant's character in determining proper sentence).

The solution to that conflict was bifurcation, a process that evolved naturally from the parallel movements toward judicial discretion and individualization. By the middle of the twentieth century, the bifurcated process which we regard as typical today—a guilty plea or a jury trial concluding in a guilty verdict, followed by a separate sentencing before the court—was gaining widespread acceptance in noncapital sentencing.[298]

Separation of trial and sentencing followed a different path in the world of capital litigation. As we have seen, eighteenth-century juries exercised effective control over death sentencing through their power to issue general verdicts.[299] The result, in many cases, was acquittal of factually guilty defendants whom juries were unwilling to condemn to the gallows. Legislatures reacted to this form of jury nullification in two ways. In many jurisdictions, they reduced the number of capital offenses[300] or redefined homicide crimes to allow noncapital options.[301] In others, they explicitly authorized juries to choose between life and death for serious felonies.[302] Throughout the nineteenth century, several states and the federal government passed statutes allowing juries to issue verdicts that explicitly chose death, or something less, as punishment.[303]

Despite the spread of formalized sentencing discretion, most jurisdictions continued to conduct unitary capital trials. Bifurcation came to capital cases much more slowly than to noncapital cases. In 1957, California became the first state to bifurcate capital cases into guilt and sentencing phases.[304] As late as 1970, only six states had laws separating the guilt phase of a capital case from the sentencing phase.[305]

That changed abruptly in the mid-1970s. First, *Furman v. Georgia* effectively invalidated every death-penalty statute in the nation.[306] In response, state legislatures revised their statutes in an effort to limit and channel sentencing discretion. Then, in *Woodson v. North Carolina*, the Court struck down a statute which mandated the death penalty for first-degree murder.[307] The companion case, *Gregg v. Georgia*, built on *Wood-*

298. See id. at 721 (advocating, in 1942, a more widespread acceptance of bifurcation). *Williams* itself reflects this modern approach to sentencing. In effect, *Williams* treats the evolving twentieth-century norm in noncapital cases as if it were the "age-old practice" for capital cases. Williams v. New York, 337 U.S. 241, 250–51 (1949).

299. See supra text accompanying notes 263–273.

300. See Banner, supra note 30, at 131–32 (highlighting state legislation that decreased the number of crimes punishable by death).

301. See Winston v. United States, 172 U.S. 303, 310–11 (1899).

302. See McGautha v. California, 402 U.S. 183, 199–200 (1971); Andres v. United States, 333 U.S. 740, 753 (1948); *Winston*, 172 U.S. at 310–11.

303. See *Winston*, 172 U.S. at 310–11. The federal statute provided that "the jury may qualify their verdict by adding thereto 'without capital punishment.'" Act of Jan. 15, 1897, ch. 29, § 1, 29 Stat. 487, 487.

304. See Act of Sept. 11, 1957, 1957 Cal. Stat. 1968 (replaced by Cal. Penal Code § 190.1 (1973)), cited in Myers, supra note 253, at 795 n.38.

305. See *McGautha*, 402 U.S. at 208 & n.19.

306. 408 U.S. 238, 239–40 (1972).

307. 428 U.S. 280, 304 (1976); see also supra note 177.

son's theme of individualization.[308] In order to make an individualized determination that death is the appropriate punishment, the Court noted, a sentencer has a "vital need" for information concerning "the character and individual circumstances" of the defendant.[309] But that kind of information presents "special problems" at a unified trial, where it may be irrelevant to the issue of guilt and highly prejudicial to the defendant.[310] The solution, the Court suggested, is bifurcation. Relying heavily on procedures outlined in the Model Penal Code,[311] *Gregg* concluded:

> As a general proposition, these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.[312]

Though *Gregg* did not hold that bifurcation was constitutionally mandated, no state legislature since *Gregg* has been willing to risk a departure from the best practice outlined there by the Court. Today, every American death-penalty statute separates capital cases into at least two parts: a guilt phase and a penalty phase.[313]

This brief history of bifurcated trials offers important insights when we try to interpret the Sixth Amendment. When our Constitution was written, a capital case consisted of a unified trial in which a jury considered the question of life or death as inseparable from the question of guilt, and in which a defendant enjoyed full adversarial trial rights throughout.[314] It was largely after the framing that the unified world evolved into two separate worlds. That evolution started much earlier, and advanced much faster, in the case of noncapital trials. And the movement toward bifurcated trials was part of a movement *away from* the death penalty. The very notion of a separate sentencing proceeding with lesser rights than at trial evolved only where death was *not* at issue.

The constitutional instinct to maintain jury control over questions of life and death was so strong that unified proceedings persisted in capital cases long after they began to disappear in noncapital cases. In noncapital cases, judicial sentencing had provided a kind of natural bifurcation.[315] But without a separate *sentencer* in capital cases, there was no inclination toward a separate *sentencing*. And, of course, without a separate

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308. See 428 U.S. 153 (1976).

309. Id. at 189–90 & n.38 (plurality opinion).

310. Id. at 190.

311. Id. at 191 (citing Model Penal Code § 201.6 cmt. 5 (Tentative Draft No. 9, 1959)).

312. Id. at 195.

313. See Kelly, supra note 7, at 428; Myers, supra note 253, at 787.

314. See supra notes 253–255 and accompanying text.

315. See Myers, supra note 253, at 794 ("[J]udicial sentencing in itself contained a concept of bifurcation.").

sentencing proceeding, there was no distinction between "trial rights" and "sentencing rights."

After almost two hundred years of capital sentencings governed by full, adversarial trial rights, it took the Eighth Amendment revolution spawned by *Furman* to break apart the unified world of capital cases. And once that happened, bifurcated capital cases raised new questions about sentencing rights, questions that were seldom at issue in a unified world. Further, *Woodson*'s requirement of individualization and the corresponding need for broader information put new pressures on adversarial trial rights that could limit sentencing information. In sum, the Eighth Amendment revolution created both new opportunities and new reasons to limit Sixth Amendment rights at capital sentencing. Ironically, a constitutional movement that sought to limit the state's power to impose death had also limited the adversarial rights of defendants who confronted death.

C. *Drawing New Conclusions from the Framers' World*

From its cursory look at history, *Williams* purports to find an "age-old practice" of judicial discretion in sentencing based on "information from out-of-court sources."[316] While that view may reflect historical practice in misdemeanor cases,[317] and nineteenth-century practice in a broader range of noncapital cases,[318] it is quite distant from the reality of capital litigation in the Framers' era. The Framers' practice featured mandatory death penalties imposed pursuant to jury verdicts in unitary proceedings conducted as full adversarial trials. *Williams*'s notion of unchecked judicial discretion in capital sentencing would have been foreign—and, I believe, downright frightening—to the Framers.

Years later, the Court drifted closer to historical accuracy in *Apprendi*. There, the Court at least recognized the "sanction-specific" nature of eighteenth-century criminal law.[319] But *Apprendi*, and later *Ring*, made more of that history than it will bear. Because, historically, a jury's felony verdict effectively authorized the punishment fixed by law for a given offense, the *Apprendi* Court concluded that the jury's constitutional role is to find any fact necessary to subject a defendant to the maximum penalty prescribed by statute.[320] Then, by way of dictum, the Court added, "nothing in this history suggests that it is impermissible for judges to exercise discretion . . . in imposing a judgment *within the range* prescribed by statute."[321] In other words, the Court decided that the Sixth Amendment world of "trial rights" ends when we find all the facts sufficient to impose

316. Williams v. New York, 337 U.S. 241, 250–51 (1949).

317. See supra notes 280–283 and accompanying text.

318. See supra text accompanying notes 296–298.

319. Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) (quoting Langbein, English Criminal Trial Jury, supra note 34, at 36–37).

320. Id. at 482–83.

321. Id. at 481.

a given penalty. But the discretionary world of sentencing can operate under different rules. A few years later, *Ring* imported the same analysis into the capital sentencing process, extending the jury right to any factfinding that renders a defendant eligible for the maximum penalty of death, but leaving the final selection decision outside Sixth Amendment protection.[322]

In relation to history, *Apprendi* and *Ring* make sense, but only to a point. History certainly supports the view that Sixth Amendment protections were intended to protect a defendant during the adjudication of facts that could lead to a prescribed, or maximum, punishment. And, for sentencings that did not involve death, history supports the exercise of judicial sentencing discretion outside of the adversarial trial process: the kind of sentencing discretion that existed in misdemeanor cases at the time of the founding. But, when it comes to capital cases, there is no historical support for the line that *Ring* attempts to draw between factfinding to establish death eligibility, on the one hand, and the ultimate sentencing, or selection decision, on the other. There simply was no eighteenth-century practice that limited juries to a purely factfinding role, while granting judges the ultimate power to choose a death sentence.[323] To the contrary, in 1791—and indeed for more than a century thereafter—the unified nature of capital trials left the ultimate decision of life or death in the hands of juries.

Viewed through the lens of history, *Ring*'s line drawing is wrong on two counts. First, like *Williams*, it assumes a discretionary role for judges in capital sentencing that did not exist in the Framers' world. Second, it ignores the de facto sentencing discretion exercised by juries. In excluding capital-case juries from the ultimate choice of life or death, the Court overlooks both the historical purpose of the general verdict and the most celebrated exercise of that power by juries. In England and colonial America, juries stood as a form of popular resistance to unpopular laws.[324] Nowhere was that power more important, and more frequently exercised, than in resisting the imposition of death sentences under an unpopular criminal code.

The power to issue general verdicts effectively turned juries into sentencing bodies in capital cases, and juries exercised that power as an indi-

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322. See supra text accompanying notes 185–190.

323. See supra text accompanying notes 249–253, 263–273. Indeed, in another context, the Court has stated that there is "absolutely no historical support" for the notion that the jury's role is limited to determining "factual components of the essential elements" of a crime. United States v. Gaudin, 515 U.S. 506, 512 (1995) (holding that "materiality" of false statement in perjury prosecution must be determined by jury). The *Gaudin* Court rejected the concept of the criminal jury as "mere factfinder," and confirmed that "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts." Id. at 514.

324. See Barkow, supra note 268, at 37 (describing jury's power to issue a general verdict as "a critical check on the government" and "a mechanism for correcting overinclusive general criminal laws"); see also supra text accompanying notes 263–273.

visible element of the unitary capital trial envisioned by the Sixth Amendment. Read in light of history, the constitutional text suggests that all of the rights we now associate with trial were intended to govern all of the proceedings that lead to a death sentence. In capital cases, the world of trial and the world of sentencing are one.

D. *What "Trial Rights" Belong in a Capital Sentencing?*

Today, Eighth Amendment case law has established a death sentencing structure different than the unitary trials known to the Framers. Moreover, Eighth Amendment values have shaped the Court's decisions limiting Sixth Amendment rights at capital sentencing. The Court's rejection of the right to jury sentencing, for example, rests in part on the notion that jury sentencing conflicts with the Eighth Amendment goals of consistency and proportionality.[325] *Gregg* and later Eighth Amendment rulings call for a breadth of information at capital sentencing that may conflict with limits on hearsay under the Confrontation Clause.[326] In thinking about a unified world of Sixth Amendment rights for capital cases, we need to consider not just the world of the Framers, but the modern world of capital sentencing as well. We need to ask whether trial rights belong in the modern world of capital sentencing created by *Furman* and its Eighth Amendment offspring.

1. *The Artificial Line Between Factfinding and Selection.* — Current Eighth Amendment doctrine divides capital sentencing into two tasks: (1) determining death eligibility, and (2) selecting which eligible defendants most deserve death. Under Eighth Amendment theory, this division of sentencing labor is supposed to (a) avoid arbitrary results by narrowing the range of defendants facing death, and (b) produce reliable judgments that death is "appropriate" in a given case.[327] *Ring* realigned the Sixth Amendment world to match these Eighth Amendment divisions: assigning eligibility to the world of jury trial while leaving selection to a judge under the more fluid rules of the sentencing world.

This Sixth Amendment division of sentencing labor has a serious practical deficiency: The line is artificial. Assigning eligibility to one sentencer and selection to another fails to account for the significant overlap between the two. Much factfinding is a matter of degree. When a jury makes an eligibility decision by finding that a murder was "especially heinous," how heinous does that mean? When a different sentencer weighs that fact, how much weight should it then receive? Factfinding can be a matter of degree in another sense. A jury may find a fact beyond a rea-

325. See Proffitt v. Florida, 428 U.S. 242, 252 (1976) (highlighting consistency advantages of judicial sentencing).

326. See Gregg v. Georgia, 428 U.S. 153, 190–92 (1976) (urging that information relevant to sentencing decisions be made admissible by instituting a bifurcated trial).

327. For a more thorough description and analysis of the Court's Eighth Amendment doctrine of "guided discretion" in the decades after *Furman*, see Steiker & Steiker, Sober Second Thoughts, supra note 8, at 361–71.

sonable doubt, for purposes of guilt or death eligibility, yet still harbor some uncertainty about that fact. Juries sometimes vote for life to account for those lingering doubts, but a division of sentencing labor cannot account for that subtlety. The sentencing judge cannot *weigh* the jury's lingering doubt. He only knows that they have *found* the fact.

As in a childhood game of "telephone," elements of truth are lost each time a fact is conveyed from one person to another. The division of capital sentencing labor suffers from exactly that problem. The unified theory which I propose at least eliminates the possibility that facts can get lost in translation. It makes sense, as a constitutional matter, to unify a decisionmaking process that suffers, as a practical matter, when we try to divide it.

2. *Proportionality and Consistency.* — *Furman*'s principal concern was that death sentencing had become arbitrary. As Justice Stewart famously remarked, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[328] A major source of that arbitrariness, according to Justice White's concurrence in *Furman*, was that juries exercised sentencing discretion without direction.[329] When Florida's system of judicial sentencing came before the Court in the wake of *Furman*, the Court's response was predictable: "[J]udicial sentencing should lead . . . to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."[330]

There are several responses to the notion that capital sentencing by juries defeats the aim of consistency in applying the death penalty. First, there is no evidence that judges are any more consistent than juries in distinguishing "appropriate" cases for capital punishment.[331] Individual judges are no less likely than individual jurors to be influenced by their own experiences, fears, personal morality, religion, politics, or any of the many circumstances that may affect sentencing judgments.[332] Indeed, the perceived inconsistency of judges in noncapital sentencing was re-

328. Furman v. Georgia, 408 U.S. 238, 309 (1971) (Stewart, J., concurring).

329. See id. at 314 (White, J., concurring) (noting "the recurring practice of delegating sentencing authority to the jury and the fact that a jury . . . may refuse to impose the death penalty no matter what the circumstances of the crime").

330. *Proffitt*, 428 U.S. at 252.

331. And, as we have seen, the notion—imbedded in *Williams*—that judges and probation officers bring to sentencing an expertise in matters of offender rehabilitation is a notion that has no application to a death sentence. See supra text accompanying notes 60–64.

332. Political pressures in highly publicized cases pose special dangers in jurisdictions where judges are elected. See Harris v. Alabama, 513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting) ("The danger that [elected judges] will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.").

sponsible for a nationwide movement toward mandatory guidelines.[333] The popular image of a "hanging judge" would not exist without the contrast provided by others less willing to call for a rope.

Second, acknowledging the jury's constitutional role in capital sentencing does not mean removing the judge from the process. The Sixth Amendment, I suggest, commands that no capital sentence may be imposed without a jury verdict that calls for death. But no constitutional rule forbids judges from reviewing jury-issued death verdicts and mitigating those that appear aberrational. Indeed, that kind of review already occurs at both the trial and appellate levels under state statutes[334] and under the FDPA.[335]

Finally, while there is no evidence that judges are more consistent than juries in selecting appropriate candidates for death, there is considerable evidence that the division of sentencing labor leads to disagreements between judges and juries. Our current constitutional order not only permits judges to determine death sentences, it allows them to do so by "overriding" jury recommendations to the contrary.[336] In the handful of death-penalty jurisdictions that allow the override practice, experience shows that judges frequently exercise the authority to impose death where juries have voted for life.[337]

A unified theory applying full Sixth Amendment protection throughout the capital sentencing process would eliminate that practice. No one can say that the results would, or would not be, more appropriate, but eliminating the override procedure would at least dispense with inconsistent judgments in a single case. The current practice, which amounts to disregarding jury verdicts, does nothing to promote public respect for the institution of trial by jury.

3. *Confrontation, Rules of Evidence, and Reliable Sentencing Information.* — Aside from requiring jury sentencing, the principal impact of a unified theory would be to require confrontation at capital sentencing which, in turn, would restrict the prosecution's reliance on hearsay. *Williams* rejected that idea because, the Court claimed, "most of the information now relied upon by judges to guide them in the intelligent imposition of

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333. See United States v. Booker, 125 S. Ct. 738, 783–86 (2005) (Stevens, J., dissenting in part) (recounting history of movement toward guideline sentencing).

334. See, e.g., Va. Code Ann. § 19.2-264.5 (2004) (permitting court, after review of presentence report, to set aside jury verdict of death and impose life imprisonment).

335. See 18 U.S.C. § 3595(c) (2000) (permitting court of appeals to remand case when it finds that "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor").

336. See *Harris*, 513 U.S. at 509–12 (holding that sentencing judge may treat jury's decision as an "advisory verdict" and that state need not determine what weight judge places on this verdict).

337. In his dissent in *Harris*, for example, Justice Stevens noted forty-seven cases where Alabama judges had imposed death in the face of jury recommendations for life. Id. at 521. In Florida from 1972 to early 1992, 134 death sentences resulted from similar judicial overrides. Id. at 521 n.8.

sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination."[338]

The notion that trial rights will unduly limit the flow of capital-sentencing information is wrong for a variety of reasons. First, experience tells us that trial-like proceedings work at capital sentencing. Most states already provide for jury sentencing.[339] Some states—including very active death-penalty jurisdictions—conduct sentencing hearings pursuant to their normal rules of evidence, including their restrictions on hearsay.[340] Yet nothing in the experience of those states suggests that their proceedings have been handicapped by a dearth of information.

Second, the alternative to adversarial trial rights has its own imperfections. *Williams* approved a capital-sentencing process that reduced factfinding to the conclusions in a probation officer's presentence report. Despite the professionalism of most probation officers, by training and experience they tend not to be well equipped for the role of an independent investigator.[341] Their principal source of information often turns out to be the files of the prosecutor and police. Nothing in that model suggests that it is likely to produce more, or better, sentencing information than a process that leaves fact investigation and presentation to the adversarial process.[342] Moreover, to the extent that presentence investigations produce useful information, nothing in the Sixth Amendment prevents that information from being provided to the parties and presented through live testimony subject to cross-examination. Nor is a court prevented from relying on a presentence report when considering whether to impose a death sentence already approved by a jury at an adversarial hearing.[343]

Third, applying the Sixth Amendment to capital sentencing need not limit sentencing information to that admissible under the law of evidence. Most rules of evidence are not constitutionally required.[344] Con-

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338. Williams v. New York, 337 U.S. 241, 250 (1949).

339. When *Ring* was decided, twenty-nine of the thirty-eight death-penalty states left capital sentencing to juries. Ring v. Arizona, 536 U.S. 584, 608 n.6 (2002). Since *Ring*, four more states have moved to jury sentencing throughout all stages of capital sentencing. See Shapiro, supra note 20, at 647–50.

340. Louisiana, Missouri, and Virginia all have death-penalty statutes expressly providing that the rules of evidence for trials also govern capital sentencings. Kelly, supra note 7, at 437.

341. See Sharon M. Bunzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 104 Yale L.J. 933, 961–62 (1995) (noting that probation officers are not well trained or well suited to roles of factfinder and investigator thrust upon them by guideline sentencing).

342. Cf. Blakely v. Washington, 124 S. Ct. 2531, 2542 (2004) (criticizing fairness of process that elevates defendant's maximum sentence "not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong").

343. See, e.g., Va. Code Ann. § 19.2-264.5 (2004).

344. See, e.g., Dowling v. United States, 493 U.S. 342, 352–54 (1990) (holding that admitting evidence in violation of Federal Rules of Evidence did not violate defendant's

sistent with the Sixth Amendment, states are free to suspend their normal rules of evidence to accommodate a broad range of information relevant to a defendant's character or his crime.

The Sixth Amendment would limit hearsay at capital sentencing, but only to the extent such hearsay violates the Confrontation Clause. Applying current confrontation-hearsay doctrine to the sentencing process would prohibit the government from relying on "testimonial" hearsay statements to support a death sentence.[345] Under *Crawford v. Washington*, "testimonial" hearsay includes most statements made to law enforcement officers investigating a crime.[346] Hence, at sentencing, *Crawford* would prohibit police from summarizing that information for the jury. It would also prohibit use at capital sentencing of a presentence report collecting that hearsay from government files.

Still, in many cases, applying *Crawford*'s confrontation principles at capital sentencing need not limit the information available to a sentencer. Where a hearsay declarant is available to testify, *Crawford* merely requires the government to present that information in a different, albeit less convenient, form: through the live testimony of the witness with direct knowledge of the facts. And when the witness testifies, the Confrontation Clause becomes a rule of inclusion rather than exclusion, guaranteeing the right to develop further information on cross-examination. Thus, the result of confrontation at capital sentencing may be more, not less, information.[347] The cost may be no more than time and inconvenience. The benefit is preserving a defendant's right to test government evidence.[348]

No doubt confrontation rights would keep some information out of some sentencings. Where the original source of "testimonial" hearsay is unavailable, there may be no means to put that information before a sentencer without depriving a defendant of an opportunity to cross-examine the source. In the end, however, that is the same dilemma that the Confrontation Clause presents at the guilt phase. When it comes to determining guilt or innocence, the *Crawford* Court resolved that dilemma in

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due process rights); United States v. Fell, 360 F.3d 135, 144–45 (2d Cir. 2004) (noting that Federal Rules of Evidence "establish neither the floor nor the ceiling of constitutionally permissible evidence").

345. See Crawford v. Washington, 541 U.S. 36, 51–52 (2004).

346. Id.

347. The Confrontation Clause operates in many respects as a rule including, rather than excluding, evidence. See generally, John G. Douglass, Beyond Admissibility: Real Confrontation, Virtual Cross-examination, and the Right to Confront Hearsay, 67 Geo. Wash. L. Rev. 191 (1999).

348. Similarly, guaranteeing the right of compulsory process at capital sentencing would add, not remove, information available to the sentencer. The Compulsory Process Clause prohibits some state evidentiary rules that unfairly restrict exculpatory evidence. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 300–02 (1973) (holding that exclusion of trustworthy evidence violated "fundamental standards of due process"); Washington v. Texas, 388 U.S. 14, 23 (1967) (holding that petitioner was denied due process where state rule prevented him from calling defense witness).

favor of confrontation. *Crawford* singled out "testimonial" hearsay in part because "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse."[349] The same potential for abuse is present when police and prosecutors collect out-of-court statements that purport to show that a particular defendant is more deserving of death than are others.[350] The answer, under the Confrontation Clause, should be the same when defendant is confronting death.

CONCLUSION

The Sixth Amendment was intended to equip a defendant with adversarial tools to challenge the mechanism of government that sought his death. Today, we divide that mechanism into a guilt phase, an eligibility determination, and a final selection decision. But those divisions did not exist in the Framers' world. They exist today to serve Eighth Amendment goals. They should not, and need not, limit the reach of the Sixth Amendment.

Williams v. New York proclaimed that capital sentencing is more reliable without trial rights. Faith in our adversarial system should lead us to question that claim. But even if it were true, that would be insufficient reason to limit Sixth Amendment rights at capital sentencings. The Framers had more than reliability in mind when they adopted the Sixth Amendment. They lived in a world of mandatory penalties where "too much truth brought too much death."[351] They were willing to sacrifice accurate factfinding for fair verdicts that reflected the considered judgment of a jury of their peers. They crafted the Sixth Amendment not just to protect the innocent from punishment, but to protect the guilty from undeserved death.

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349. *Crawford*, 541 U.S. at 56 n.7.

350. Indeed, at the sentencing phase, police-generated testimonial hearsay may appear most often in the form of summary testimony relating to a defendant's uncharged prior crimes. See, e.g., Hatch v. Oklahoma, 58 F.3d 1447, 1465 (10th Cir. 1995) (relying on *Williams* and concluding that unadjudicated crimes may be considered in capital sentencing). In that context, the "unique potential" for abuse is magnified because such crimes may be distant in time, may never have passed the probable cause determination of a magistrate or grand jury, and indeed may have remained uncharged precisely because they were not readily subject to proof.

351. Langbein, Origins, supra note 30, at 334.