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Surpassing Sentencing: The Controversial Next Step in Confrontation Clause Jurisprudence

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NOTE

SURPASSING SENTENCING: THE CONTROVERSIAL NEXT STEP IN CONFRONTATION CLAUSE JURISPRUDENCE

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Abstract

After *Crawford v. Washington* opened the door to a Confrontation Clause debate in 2004, the United States Supreme Court has consistently confronted confrontation issues arising out of the *Crawford* interpretation. One issue that the Supreme Court has not yet tackled is whether the Confrontation Clause applies during non-capital and capital sentencing. While many states and federal courts continue to hold that no right of confrontation during sentencing exists, many other courts have chosen to apply a right of confrontation in both capital and non-capital sentencing. This Note takes two new approaches to the Confrontation Clause at sentencing debate. First, this Note addresses both the text of the Sixth Amendment and the history surrounding the Confrontation Clause to conclude that the right of confrontation should apply during sentencing, or at least during capital sentencing. Second, this Note rejects the rationale that *Williams v. New York* is the controlling precedent in the confrontation at sentencing debate. Under this approach, applying the Confrontation Clause at sentencing may be the next logical step in Confrontation Clause jurisprudence.

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INTRODUCTION

The scene in a London courtroom on April 17, 1554, had all the underpinnings of a modern Hollywood drama. Nicholas Throckmorton was on trial and charged with "compassing and imagining the death of the Queen, levying war against the Queen within the realm . . . intending to depose the Queen of her Royal estate, and so to destroy her, falsely and traitorously desiring and concluding to take the Tower of London."[1] If being accused of "intending to depose the Queen" was not bad enough, multiple "wrangle[s] ensued between the Bench and the prisoner,"[2] and the defendant was forced to "call[] upon

1. J.W. WILLIS BUND, A SELECTION OF CASES FROM THE STATE TRIALS 157 (1879).
2. *Id.*

the Crown to prove it[s]"[3] case. The Crown's case relied largely on several conspirators' confessions.[4] At one point, Throckmorton objected to the read confessions and said, "Master Crofts [another confessor] is yet living, and is here this day. How happeneth it he is not brought face to face to justify this matter, neither hath been of all this time?"[5] This demand for confrontation was denied.[6] To make matters worse for poor Throckmorton (or not so poor if he was actually trying to overthrow the Queen), the jury's not guilty verdict was tossed out and the jurors were themselves thrown into prison.[7] While Throckmorton's trial was not the picture of modern justice, it showcases an idea that dates back to Roman times.[8] Throckmorton's case, and the more notorious Sir Walter Raleigh[9] case, are both examples of an inherent desire of the accused to confront witnesses against them.[10]

Notably, Throckmorton did not have the ability to confront his accusers, and "[t]o be sure, the norm of confrontation was not always respected."[11] While one scholar may have gone a bit far by insisting that, "the right of confrontation is an American innovation, not an import from England,"[12] the origins of confrontation, and what exactly confrontation means, are still heavily debated. Whatever one's view on the origins of the right of confrontation, or whether confrontation should even be a fundamental procedural right at all, the history of the Confrontation Clause must guide one's understanding of the Clause's meaning and scope. Why? The answer is simple: because the Supreme Court said so.[13]

The Supreme Court's decision in *Crawford v. Washington*[14] spoke clearly; the "Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising."[15] The

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3. *Id.* at 158.

4. *Id.* at 158–59.

5. NICHOLAS THROCKMORTON, THE TRIAL OF NICHOLAS THROCKMORTON 39 (Annabel Patterson ed., 1998).

6. Crawford v. Washington, 541 U.S. 36, 43 (2004).

7. WILLIS BUND, *supra* note 1, at 161.

8. *Crawford*, 541 U.S. at 43.

9. *See* WILLIS BUND, *supra* note 1, at 345.

10. *See Crawford*, 541 U.S. at 44.

11. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1204 (2002).

12. Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 220 (2005).

13. *Crawford*, 541 U.S. at 43 ("We must therefore turn to the historical background of the Clause to understand its meaning.").

14. 541 U.S. 36 (2004).

15. *Id.* at 67. Thus, the Court overruled the *Ohio v. Roberts* precedent of the "reliability" standard. *Id.*; *see also* discussion *infra* Section I.C.

Crawford holding opened a Pandora's Box of questions; among them is whether this procedural right and historical view of the Confrontation Clause apply during the sentencing phase of a criminal trial. The Court has never squarely addressed whether sentencing is included as part of "all criminal prosecutions" in the text of the Sixth Amendment.[16]

Because the Court determined that when it comes to confrontation, a *historical* right and not just reliability is at stake,[17] Part I of this Note takes a journey through a historical analysis of the Confrontation Clause, as well as a brief history of the unified trial and sentencing concept, which was common at the time the Constitution was drafted. Part I will also briefly address the textual analysis of *Crawford* and other Supreme Court post-*Crawford* decisions. Part II will investigate why some state courts have ruled that the Confrontation Clause applies during non-capital sentencing, while all federal courts facing the same issue have held the opposite. Part III explores the view of some courts that death is different, and thus, the Confrontation Clause applies during capital sentencing only. In Part IV, two original ideas are explored. First, by taking a textual outlook within a historical framework, Part IV seeks to textually answer the question *What Would the Framers Do?*. Second, Part IV also questions the precedent of *Williams v. New York*[18] in determining whether the Confrontation Clause applies during sentencing. Finally, the Conclusion combines history, the text of the Confrontation Clause, and the nature of sentencing proceedings to conclude that the right of confrontation should exist at sentencing, or at the very least during capital sentencing.

I. WWFD? WHAT WOULD THE FRAMERS DO?

A. *An Unclear View of Confrontation Clause History*

"I told them that it is not the Roman custom to hand over any man before he has faced his accusers and has had an opportunity to defend himself against their charges."[19]

The Confrontation Clause may not be as attention grabbing (at least pre-*Crawford*) as its more well-known counterparts in the Sixth Amendment and the Bill of Rights in general, but its late bloomer status is rather

16. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1969 (2005).

17. *Crawford*, 541 U.S. at 55 ("We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility . . . ."); *id.* at 61 (The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

18. 337 U.S. 241 (1949).

19. *Acts* 25:16 (New International Version).

deceiving. The *Crawford* decision restored debate to the formerly hibernating Confrontation Clause,[20] whose interpretation had remained unchanged for nearly twenty-five years.[21] In relevant part, the Sixth Amendment states simply, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[22] To be sure, this is a long way from early English courts where treason defendants often demanded that their accusers be brought to them "face to face," but only sometimes enjoyed such a luxury.[23]

Confrontation gained some traction in Tudor England, and by the middle of the seventeenth century, English courts regularly "required that treason witnesses testify before the accused and be subjected to questioning by him."[24] As previously noted, the most notorious case concerning the right of confrontation is that of Sir Walter Raleigh, in which Raleigh demanded, "the Proof of the Common Law is by witness and jury: let Cobham [Raleigh's accuser] be here, let him speak it. Call my accuser before my face . . . ."[25] While it is true, as one scholar humorously suggested, that Sir Walter Raleigh did not come over on the Mayflower,[26] it does appear that early Americans embraced this Raleigh-like right of confrontation.[27]

As early as 1647, Massachusetts provided protection for the criminally accused with a statute that stated, "[I]n all *capital cases* all witnesses shall be present wheresover they dwell."[28] Scholars Richard D. Friedman and Bridget McCormack attribute a more rapid development of the right of confrontation in early America than in English Courts partly to the American "adversarial spirit," which created a necessity of such a protection in the American system.[29] The scholars also emphasize the growing importance of confrontation in the Revolutionary period, during which many states began including the right of confrontation in state constitutions using both the historical "face to face" language, as well as language more closely mirroring that of the later-to-come Sixth Amendment.[30]

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20. John H. Blume & Emily C. Paavola, *Crime Labs and Prison Guards: A Comment on* Melendez-Diaz *and its Potential Impact on Capital Sentencing Proceedings*, 3 CHARLESTON L. REV. 205, 206 (2009).

21. *Id.* at 210.

22. U.S. CONST. amend. VI.

23. Friedman & McCormack, *supra* note 11, at 1205.

24. *Id.*

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

26. Graham, *supra* note 12, at 209.

27. Friedman & McCormack, *supra* note 11, at 1206.

28. *Id.* (emphasis added). Interestingly, this statute may support the viewpoint of some courts that death is different. *See* discussion *infra* Part III.

29. Friedman & McCormack, *supra* note 11, at 1206.

30. *Id.*

In today's world some scholars insist that the Framers created the Sixth Amendment "holistically"[31] or as a "unified"[32] set of rights, and *all* the rights flowing from the Sixth Amendment must apply at *all* stages of the trial.[33] Other scholars view the Confrontation Clause independently as a procedural right within a trial, discussing it separately from other trial rights.[34] As Justice Antonin Scalia noted in *Crawford*, Abraham Holmes at the Massachusetts ratifying convention feared that in the absence of a confrontation clause, trials would become "little less inauspicious than a certain tribunal in Spain . . . the Inquisition."[35] Holmes's concern was alleviated when Congress included the Confrontation Clause in the Sixth Amendment.[36] Much later the Court also held that the right of confrontation extends to state prosecutions via the Fourteenth Amendment.[37]

B. *Drawing a Proverbial Line in the Sand: Unitary Capital Trials and the Unforeseen Problem Arising from Bifurcation in Trials*

"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."[38]

One of the biggest challenges of viewing the Confrontation Clause in its historical context is trying to determine what the Framers would have done in the sentencing framework that exists today. While the modern bifurcated framework[39] did not exist during the Framers' time,[40]

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31. Graham, *supra* note 12, at 210.

32. *See* Douglass, *supra* note 16, at 2008 ("This unified theory of Sixth Amendment rights flows naturally from the constitutional text, which grants those rights without distinction 'in all criminal prosecutions.'").

33. *See id.* at Part III. In Part III of Professor Douglass's article, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, he argues that "Sixth Amendment rights support each other." *Id.* at 2010. He insists that the right to counsel, the right of cross-examination, the right to a speedy public trial by a jury, and all rights flowing from the Sixth Amendment must apply together because the text of the Constitution supports a unified theory of rights. *Id.* at 2008–10. Douglass makes a textual argument that capital sentencing is part of "all criminal prosecutions." *Id.* at 2008. Further, since the text of the Sixth Amendment is drafted as one sentence, each right is necessary in "all criminal prosecutions," and thus, *all* Sixth Amendment rights must apply. *Id.*

34. *See* Crawford v. Washington, 541 U.S. 36, 48–49 (2004).

35. *Id.*

36. *Id.* at 49.

37. Pointer v. Texas, 380 U.S. 400, 403 (1965) ("[T]he Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States . . . ."). Notably, states later interpreting the right of confrontation at sentencing have chosen to interpret the federal Constitution, despite having similarly drafted protections in their own state confrontation clauses. *See* State v. Hurt, 702 S.E.2d 82, 87–88 (N.C. Ct. App. 2010).

38. Douglass, *supra* note 16, at 1972.

39. Bifurcation, the separation of the guilt and penalty phase of a trial, became popular

one must still "turn to the historical background."[41] At the time the Sixth Amendment was drafted, unitary capital trials, where a jury determined both guilt and death with a single verdict, were standard.[42] As John G. Douglass notes in his article *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, "[t]he 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."[43] With this in mind, it is easy to understand Douglass's theory that the Framers crafted a set of rights through the Sixth Amendment to govern *all* proceedings "in *all* criminal prosecutions."[44]

This history still begs the question, how could the Framers have drafted a clause that addresses a bifurcated trial system that did not become widespread until the mid-1970s,[45] nearly two hundred years after the drafting of the Constitution? The reality, of course, is that the Framers could not have foreseen this bifurcated system, but the inquiry cannot stop there. History shows a few important and relevant observations that may shed some light on *WWFD, What Would the Framers Do?*. First, early American criminal law "was dominated by mandatory penalties, not by discretionary sentencing."[46] Second, the Framers were concerned with confrontation, not hearsay, when they drafted the Sixth Amendment because the hearsay doctrine and evidentiary law were not well developed during the Framers' time.[47] Third, the Framers drafted the Sixth Amendment in the absence of any thoughts of separate "trial rights" and "sentencing rights" because such separation simply did not exist.[48] Fourth, a guilty verdict for a capital offense, at the time of the Framers, was usually a death sentence.[49]

Thus, with such a historical narrative in mind, the question is simply: Is the bifurcated trial setting where "trial rights" and "sentencing rights" are divided, simply a proverbial line that courts have drawn in the sand? Of course, this is not to say that bifurcation is bad or

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after the rise of public opposition to the death penalty and the evolution of the modern prison system. *Id.* at 1972–73.

40. *Id.* at 1972.

41. *Crawford*, 541 U.S. at 43.

42. Douglass, *supra* note 16, at 1972.

43. *Id.* at 2008.

44. *Id.* (emphasis added).

45. *Id.* at 1973. There was also a shift during the nineteenth century from mandatory sentencing towards a more flexible sentencing range. *See* Apprendi v. New Jersey, 530 U.S. 466, 481 (2000).

46. *See Apprendi*, 530 U.S. at 479 ("The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence . . . ."); Douglass, *supra* note 16, at 1977.

47. Friedman & McCormack, *supra* note 11, at 1208.

48. Douglass, *supra* note 16, at 2011.

49. *Id.*

unconstitutional; it simply creates an issue unknown to, and unaddressed by, the Framers. The answer may turn on whether one believes that the Framers drafted the Sixth Amendment simply "to protect the innocent from punishment"[50] or whether the Framers also thought the Sixth Amendment protects "the guilty from undeserved death,"[51] or even, the guilty from undeserved excessive punishment. The answer may also depend on whether or not one believes the sentencing phase of a trial is part of "all criminal prosecutions"[52] under the Sixth Amendment.

Finally, the varying sentencing frameworks across jurisdictions throws another proverbial wrench into determining an answer to *WWFD?*. Non-capital jury sentencing procedures vary; some jurisdictions require bifurcated proceedings, others do not.[53] Importantly, states also differ on what type of information, including prior offenses, may be introduced during sentencing; in fact, the desire to allow prosecutors to introduce evidence about a defendant's prior criminal history is a large reason bifurcated proceedings were adopted by the states.[54] In general, "[e]ach state's jury sentencing law and practice has developed its own individual characteristics, shaped by the unique legal and political skeleton that supports it."[55] On the other hand, federal death penalty statutes require bifurcated "guilt and penalty determinations."[56] Further, while all states use some form of bifurcation in capital proceedings,[57] others divide capital sentencing into trifurcated proceedings, including: the guilt phase, the capital-eligibility phase, and the "balancing" or penalty phase where the judge or jury determines a sentence.[58] With such differing frameworks, it is difficult to generalize sentencing issues, but for purposes of this Note, the discussion is predominately limited to discussing noncapital and capital sentencing in a general sense.

50. *Id.* at 2028.

51. *Id.*

52. U.S. CONST. amend. VI.

53. Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 891 (2004).

54. *Id*. at 892.

55. *Id.*

56. Margo A. Rocklin, *Place the Death Penalty on a Tripod, or Make it Stand on Its Own Two Feet?*, 4 RUTGERS J.L. & PUB. POL'Y 788, 789 (2007).

57. *Id.* at 789–90.

58. *See, e.g.*, Szabo v. Walls, 313 F.3d 392, 399 (7th Cir. 2002). *See generally* Rocklin, *supra* note 56, at 792–93.

C. *Confronting* Crawford *and Its Offspring*

"Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[59]

Courts have described the decision in *Crawford v. Washington* as "a 'bombshell,' a 'renaissance,' and a 'newly shaped lens' through which to view the Confrontation Clause."[60] Thunderstruck as the legal community remains six years later, it is worth pausing briefly to understand the textual interpretation of the Sixth Amendment from *Crawford* and the way that definition has been applied in later Supreme Court confrontation cases.

To begin, one must first understand the decision that controlled courts for twenty-five years, *Ohio v. Roberts*.[61] In *Roberts*, the Court held that the purpose of the Confrontation Clause was to allow the defendant to test adverse evidence, and developed a two-prong test in which the prosecutor could bring evidence before a jury by showing both unavailability of the witness and that the evidence bore "indicia of reliability."[62] Further, the *Roberts* Court reiterated its view that hearsay evidentiary rules and the Confrontation Clause were designed to protect "'similar values.'"[63] Because reliability could be "inferred" when evidence fell "within a firmly rooted hearsay exception,"[64] the *Roberts* standard became a per se rule that all but eliminated a defendant's separate right of confrontation.[65]

Twenty-five years later in Crawford's trial for assault and attempted murder,[66] the prosecution played tape-recorded statements made by Crawford's wife to the police.[67] Crawford's wife was unavailable to testify because Washington marital privilege law prohibited a spouse from testifying without the other spouse's consent.[68] Because Crawford's wife was unable to testify, Crawford was unable to cross-

59. Crawford v. Washington, 541 U.S. 36, 61 (2004).

60. Blume & Paavola, *supra* note 20, at 206.

61. 448 U.S. 56 (1980).

62. To meet the two-prong test: first, the prosecutor must show the declarant is unavailable and, second, the statements must "bear[ ] adequate 'indicia of reliability'" (by being either a "firmly rooted hearsay exception" or by bearing "particularized guarantees of trustworthiness"). *Id.* at 66.

63. *Id*. at 66 (quoting California v. Green, 399 U.S. 149, 155 (1969)).

64. *Id.*

65. Valerie J. Silverman, *Testing the Testimonial Doctrine: The Impact of* Melendez-Diaz v. Massachusetts *on State-Level Criminal Prosecutions and Procedure*, 91 B.U. L. REV. 789, 795 (2011).

66. Crawford v. Washington, 541 U.S. 36, 40 (2004).

67. *Id.* at 38.

68. *Id.* at 40.

examine her at trial.[69] On appeal, the Supreme Court shocked the legal world by holding that the State unconstitutionally admitted testimonial statements by Crawford's wife.[70]

At its core, *Crawford* overturned *Ohio v. Roberts*, and held that the Confrontation Clause bars testimonial statements of witnesses who do not appear at trial, unless that witness is unavailable and the defendant has been given an opportunity to cross-examine the witness.[71] Central to this decision was that the Sixth Amendment, "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[72] Thus, the Confrontation Clause under *Crawford* is inherently inflexible. Reliability must be achieved in a particular manner, and that manner is cross-examination.[73] Importantly, this right to confrontation "is a procedural rather than a substantive guarantee."[74] *Crawford* was a profound shift from the "indicia of reliability" standard created in *Roberts*.[75]

Justice Scalia arrived at this holding through a similar historical analysis as reviewed briefly in Section I.A.,[76] but he also went a step further by focusing on the *text* of the Confrontation Clause.[77] First, from an 1828 dictionary, Justice Scalia defined a "witness" as one who "bears testimony."[78] Further, "'[t]estimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[79] Thus, text, history, and the original meaning of the plain language in the Confrontation Clause are all essential to the *Crawford* holding. Importantly, absent, and often outright rejected, in the *Crawford* rationale are words like practicality,[80] hearsay,[81] substantive reliability,[82] and balancing tests.[83] Justice Scalia was

69. *Id.* at 38.

70. *Id.* at 68.

71. *Id.* at 53–54, 68.

72. *Id.* at 61.

73. *Id.*

74. *Id.*

75. *See* Charles Short, *Guilt by Machine: The Problem of Source Code Discovery in Florida DUI Prosecutions*, 61 FLA. L. REV. 177, 197 (2009) ("In *Crawford*, the Supreme Court moved away from these rationales of reliability and accuracy.").

76. *See* discussion *supra* Section I.A.

77. *See Crawford*, 541 U.S. at 60–69.

78. *Id.* at 51 (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828)).

79. *Id.* (second alteration in original).

80. The word practicality never appears in the *Crawford* opinion. *See generally* Crawford v. Washington, 541 U.S. 36 (2004).

81. *Crawford*, 541 U.S. at 51 (Justice Scalia actually rejects the hearsay argument by noting, "[N]ot all hearsay implicates the Sixth Amendment's core concerns.").

82. *Crawford* also notes that while reliability is the ultimate goal of the Confrontation

emphatic about ridding the Confrontation Clause of vague standards, which provided judges with too much discretion.[84] Even "run-of-the-mill assault prosecutions" like *Crawford* require confrontation.[85]

The Court's post-*Crawford* decisions largely addressed the issue of which types of statements are "testimonial" within the meaning of the Confrontation Clause. In *Davis v. Washington*,[86] the Court determined that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[87] In contrast, statements are testimonial when, considering the circumstances objectively, there is no ongoing emergency, and "the primary purpose of interrogation is to establish or prove *past events* potentially relevant to later *criminal prosecution*."[88]

Importantly, crime lab reports that were at issue in another post-*Crawford* case, *Melendez-Diaz v. Massachusetts*,[89] also seem to fit this past–present distinction[90] because the crime lab reports at issue were sworn affidavits that were completed after the crime to prove past events.[91] The Court held that an analyst is both a witness for purposes of the Sixth Amendment[92] and also a person who provides testimony against a defendant,[93] as required by the text of the Sixth Amendment. Justice Scalia reasoned that the Confrontation Clause "contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution must produce the former, the defendant may call the latter . . . [t]here is not a third category of witness, helpful to the prosecution, but somehow immune from confrontation."[94]

Thus *Crawford* and its offspring interpret the Sixth Amendment right of confrontation rigidly. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[95] Importantly, reliability for reliability's sake is no

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Clause, it is "a procedural rather than a substantive guarantee." *Id.* at 61.

83. *Id.* at 67–68 ("[B]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.").

84. *Id.* at 68.

85. *Id.*

86. 547 U.S. 813 (2006).

87. *Id.* at 822.

88. *Id.* (emphasis added).

89. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).

90. Blume & Paavola, *supra* note 20, at 228.

91. *Melendez-Diaz*, 129 S. Ct. at 2535.

92. *Id.* at 2532.

93. *Id.* at 2533.

94. *Id.* at 2534.

95. Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

longer the requirement of the Confrontation Clause. Instead, when asking *WWFD?*, *Crawford* explains that the Framers prescribed a means of achieving reliability, not a substantive guarantee of reliability itself.[96]

II. TO APPLY OR NOT TO APPLY THE CONFRONTATION CLAUSE AT SENTENCING, THAT IS THE QUESTION

Most scholarship on the subject of the right of confrontation at sentencing has been devoted to federal district and circuit court rulings discussing whether the right of confrontation applies during *capital sentencing*.[97] What may be missing is some insight into why, despite every federal court addressing the issue holding otherwise, some state courts have applied the Sixth Amendment right of confrontation to noncapital sentencing. Since the Confrontation Clause applies equally to the states, it is only fair to look at what they have to say. Tougher yet may be reconciling recent Court definitions and interpretations of the Confrontation Clause and earlier Court decisions, like the heavily debated case of *Williams v. New York*.[98] Thus, when it comes to the right of confrontation at sentencing, to apply or not to apply, that is the question.

A. *Choosing to Apply: A Modern Trend among the States?*

"[W]e are convinced that the right of confrontation, guaranteed by . . . the Sixth Amendment . . . extends to Appellant's sentencing proceeding before a jury."[99]

1. *Vankirk v. State*

The most recent court to tackle the issue of whether the right of confrontation applies during sentencing is the Arkansas Supreme Court in a 2011 case, *Vankirk v. State*.[100] In *Vankirk*, the defendant pleaded guilty to three counts of rape, but chose to have a jury sentence him in a bifurcated proceeding.[101] During sentencing, the judge permitted the State to introduce a videotaped interview of a police investigator questioning the victim about the rape allegations; the victim did not appear at sentencing.[102] On appeal, the court reasoned that in Arkansas, trials are divided in "separate and distinct stages,"[103] that is guilt and sentencing. Thus, at least in Arkansas, sentencing is "in essence, a trial

96. *Id.* at 61.
97. *See* discussion *infra* Part III.
98. 337 U.S. 241 (1949).
99. Vankirk v. State, 2011 Ark. 428, *10 (2011).
100. Vankirk v. State, 2011 Ark. 428 (2011).
101. *Id.* at *1–2.
102. *Id.* at *2.
103. *Id.* at *6 (quoting Hill v. State, 318 Ark. 408, 412 (1994)).

in and of itself, in which new evidence may be submitted."[104] While the court did not make an outright *textual* rationale, its findings are consistent with the text of the Sixth Amendment because the court reasoned that sentencing is essentially another trial and a defendant's rights must still apply.[105] Thus, sentencing in this context is a part of "all criminal prosecutions" in which the defendant maintains a right "to confront the witnesses against him" as guaranteed by the text of the Sixth Amendment.[106]

The *Vankirk* court sided with a capital sentencing case, *United States v. Mills*,[107] and emphasized, "[W]e agree with the *Mills* court that a sentencing body's need for the admission of more evidence 'does not sanction the admission of unconstitutional evidence against the defendant.'"[108] Further, the *Vankirk* court reasoned that the weighty decisions made during the sentencing phase make the right of confrontation even more crucial and noted, "Given the gravity of the decision to be made at the penalty phase, the [government] is not *relieved* of the obligation to observe fundamental constitutional guarantees."[109] The *Vankirk* court also noted that applying the right to confrontation during sentencing was consistent with applying other rights during sentencing, including the rules of evidence, discovery, the Sixth Amendment right to counsel, and the right to speedy sentencing, all of which apply in Arkansas sentencing.[110] Finally, the court in *Vankirk* also rejected the idea that *Williams v. New York*, a 1949 Supreme Court case,[111] controls whether there is a right to confrontation at sentencing.[112] Thus, the Arkansas Supreme Court broke away from a large number of courts that have used *Williams* as at least partial justification for refusing to apply the right of confrontation during sentencing.[113]

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104. *Id.* at *7 (quoting Hill v. State, 318 Ark. 408, 413 (1994)).

105. *Id.* at *10.

106. U.S. CONST. amend. VI.

107. 446 F. Supp. 2d 1115, 1115 (C.D. Cal. 2006).

108. *Vankirk*, 2011 Ark. at *9 (quoting *Mills*, 446 F. Supp. 2d. 1115, 1130 (C.D. Cal. 2006)).

109. *Id.* (quoting United States v. Mills, 446 F. Supp. 2d 1115, 1130 (C.D. Cal. 2006) (internal citation and quotation marks omitted)).

110. *Id*. at *10. This opinion is consistent with the idea that Sixth Amendment rights are a unitary set of rights, which cannot be divided. *See supra* note 32 and accompanying text.

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

112. *Vankirk*, 2011 Ark. at *7.

113. Cases that cite *Williams* as at least partial justification for not applying the right of confrontation during sentencing include: United States v. Wallace, 408 F.3d 1046, 1048 (8th Cir. 2005), United States. v. Roche, 415 F.3d 614, 618–19 (7th Cir. 2005), Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002), United States v. Johnson, 378 F. Supp. 2d 1051, 1060 (N.D. Iowa 2005), State v. McGill, 140 P.3d 930, 941 (Ariz. 2006), People v. Banks, 934 N.E.2d 435, 461 (2010).

In *Williams*, a jury found Williams guilty of first-degree murder and recommended life in prison, but the trial judge imposed a death sentence based on evidence from trial as well as other pre-sentencing information, including evidence of other crimes where the defendant was considered a perpetrator but never was convicted.[114] Notably, under New York law the judge could consider information "obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine."[115] The Supreme Court held that Williams had not been denied due process of law, and reasoned that sentencing judges in early America, as well as in England, always exercised wide discretion in determining the sources and types of evidence to consider when administering punishment under law.[116]

The court in *Vankirk* rejected the application of *Williams* to the issue of confrontation during sentencing for four reasons.[117] First, the *Williams* Court decided the case based on the Due Process Clause, not the Confrontation Clause.[118] Second, the Supreme Court considered the *Williams* case more than fifteen years prior to *Pointer v. Texas*, which applied the Confrontation Clause to the states via the Fourteenth Amendment.[119] Third, the Arkansas court made an interesting, albeit brief, distinction between judge and jury decisions, holding that the Confrontation Clause applies in jury sentencing.[120] The distinction between judge and jury is consistent with the *Vankirk* court's refusal to deem the *Williams* decision controlling[121] because the *Williams* decision was originally decided, according New York statute, by a trial judge, not a jury.[122] Finally, the *Vankirk* court made another distinction between the modern proceedings and those in *Williams* by indicating that a bifurcated jury sentencing may be more like a criminal prosecution,[123] or at least a "separate proceeding," making the right of

114. *Williams*, 337 U.S. at 242, 244.

115. *Id.* at 245.

116. *Id.* at 246, 252.

117. *Vankirk*, 2011 Ark. at *8.

118. *Id.*

119. *Id.*

120. *Id.* at *8, 10. It is unclear what the Arkansas Supreme Court would have held had a judge sentenced the case.

121. *Id.* at *8 ("Moreover, the issue as framed in *Williams* differs significantly from the one presented to us today in that *Williams* involved a judge and what information he could consider in sentencing, whereas, here, there was a jury impaneled to weigh evidence and impose punishment.").

122. Williams v. New York, 337 U.S. 241, 251–52 (1949) ("Under New York statutes a state judge cannot escape his grave responsibility of fixing sentence.").

123. *Vankirk*, 2011 Ark. at *6 ("Thus, it is obvious that this new procedure [of bifurcation] differs considerably from the prior conduct of trials where the jury assessed both guilt and sentence during one proceeding." (quoting Hill v. State, 887 S.W.2d 275, 277 (1994))).

confrontation necessary.[124] Thus, the Arkansas Supreme Court not only held, but was "convinced that the right of confrontation . . . extends to Appellant's sentencing proceeding before a jury."[125]

2. *State v. Rodriguez*

Another court choosing to apply the Confrontation Clause at sentencing was the Supreme Court of Minnesota in *State v. Rodriguez*.[126] In *Rodriguez*, the defendant pleaded guilty to several drug-related offenses, but during his jury sentencing, the district court refused to apply the Confrontation Clause.[127] The Minnesota Supreme Court overturned this decision and held that the Sixth Amendment right of confrontation applies during jury sentencing trials.[128] The *Rodriguez* court based its decision largely on the Supreme Court's emphasis on the "fundamental and historical importance" of the right of cross-examination and the right to a trial by jury.[129] The *Rodriguez* court pointed to three Supreme Court cases that guided its decision, *Apprendi v. New Jersey*,[130] *Blakely v. Washington*,[131] and, of course, *Crawford v. Washington*.[132]

In *Apprendi*, the Court held a New Jersey statute that allowed for upward sentencing was unconstitutional[133] because a "trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'"[134] Next, in *Blakely*, the Court reemphasized its decision in *Apprendi*, and reversed a Washington court's decision to give the defendant upward sentencing because the upward decision was based on facts not admitted by the defendant or

124. *Id.* at *10.

125. *Id.* Notably in *Apprendi*, the Court acknowledged that judges maintain discretion in individual cases, but recognized a limitation on the judge's discretion. Apprendi v. New Jersey, 530 U.S. 466, 482 (2000). In dicta, the Court also noted that the Court in *Williams* "held that the Constitution does not restrict a judge's sentencing decision to information that is charged in an indictment and subject to cross-examination in open court." *Id.* at 546. From that sentence, it is unclear as to whether the Court equates the right to cross-examine a witness with the right of confrontation, and whether that observation is limited within the due process challenge or within the Sixth Amendment context as well.

126. 754 N.W.2d 672, 680 (Minn. 2008).

127. *Id.* at 675.

128. *Id.* at 681.

129. *Id.*

130. 530 U.S. 466 (2000).

131. 542 U.S. 296 (2004).

132. *Rodriguez*, 754 N.W.2d at 678.

133. *Id.*

134. *Apprendi*, 530 U.S. at 477 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

found by a jury.[135] Finally, as previously discussed, the Court in *Crawford* held that the right of confrontation bars all testimonial statements offered against a defendant, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.[136] Taken together, the *Rodriguez* court interpreted the three cases to "establish not only that the facts on which certain sentence enhancements are based must be found by a jury, but also that the right of cross-examination guaranteed by the Confrontation Clause is a core component of the right to a jury trial."[137] Ultimately, the court also concluded that the right of confrontation is a "core component" of a jury trial; since jury sentencing is essentially a trial, the right of confrontation must apply.[138]

3. *State v. Hurt*

An interesting twist in the confrontation puzzle came in *State v. Hurt*,[139] a 2010 North Carolina Court of Appeals case, where the court also chose to apply the Confrontation Clause during sentencing.[140] However, unlike the *Vankirk* and *Rodriguez* courts, the *Hurt* court chose to place a qualification on the right to confrontation; that is, the court determined that the right to confrontation "applies to all sentencing proceedings where a *jury makes the determination of a fact or facts that, if found, increase the defendant's sentence beyond the statutory maximum*."[141] Markedly, the *Hurt* court chose to interpret the United States Constitution, despite having a similar state confrontation clause.[142] While the court acknowledged that the vast majority of other state and federal courts have chosen not to interpret the Confrontation Clause as applicable to sentencing, the *Hurt* court made clear that "the issue is far from outright settled."[143]

The North Carolina Supreme Court had already applied the right of confrontation at capital sentencing.[144] However, the same North Carolina Court of Appeals that decided *Hurt* had previously declined to extend that right to noncapital sentencing.[145] The *Hurt* court chose to

135. *Rodriguez*, 754 N.W.2d at 679.

136. Crawford v. Washington, 541 U.S. 36, 54 (2004); *see supra* Section I.C.

137. *Rodriguez*, 754 N.W.2d at 678.

138. *See id.* at 680–81.

139. 702 S.E.2d 82 (N.C. Ct. App. 2010).

140. *Id.* at 87.

141. *Id.* (emphasis added).

142. *Id.*

143. *Id.*

144. *Id.* at 89; *see also* State v. Bell, 603 S.E.2d 93, 115–16 (N.C. 2004) (relying on *Crawford v. Washington* to hold that the Confrontation Clause applies in capital sentencing).

145. *Hurt*, 702 S.E.2d at 89 (noting that "our holding [in *State v. Sings*] cannot be read to encompass the facts of this case, where the factor potentially augmenting Defendant's sentence

make a distinction between a sentencing jury deciding facts impacting Hurt's sentence, and their previous ruling that did not include jury sentencing.[146] Like the Minnesota Supreme Court reasoned in *Rodriguez*, the *Hurt* court provided that the decisions of the Supreme Court in *Blakely*,[147] *Apprendi*, and *Booker* "[have] eroded any notion of a clear line separating trial from sentencing and distinguishing the procedural rights that must be afforded defendants at each phase."[148] The *Hurt* court also acknowledged that other "courts have clung steadfastly to *Williams*," but refused to deem it controlling since no North Carolina appellate court has cited to *Williams* after the Court's decision in *Crawford*.[149] Moreover, the *Hurt* court determined that since aggravating factors warrant a jury determination beyond a reasonable doubt as required by *Blakely* (at least in North Carolina), then "the same Confrontation Clause protections that are guaranteed at the guilt–innocence phase of trial also apply to evidence presented at sentencing hearing" under the same circumstances.[150]

Despite the uncertainty and even lack of real uniformity among the rationales of the *to apply* side of the confrontation at sentencing debate, one thing is clear: "*Crawford v. Washington* . . . has breathed new life into the debate."[151] Moreover, one question has gone unanswered by the final arbiters of the Constitution and that is, "whether sentencings are 'criminal prosecutions' for Sixth Amendment purposes."[152]

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was determined by a jury"); State v. Sings, 641 S.E.2d 370, 372 (N.C. Ct. App. 2007) ("[W]e see no basis for extending [the ruling of *State v. Bell*] to noncapital sentencing hearings.").

146. *Hurt*, 702 S.E. 2d at 89.

147. Blakely v. Washington, 542 U.S. 296, 303–04 (2004) ("[T]he 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.").

148. *Hurt*, 702 S.E.2d at 91.

149. *Id.*

150. *Id.* at 93.

151. United States v. Gray, 362 F. Supp. 2d 714, 724 (S.D. W. Va. 2005) (holding that the Confrontation Clause does not apply at sentencing because post-*Booker* sentencing guidelines are no longer mandatory and confrontation procedural protections are thus unnecessary at sentencing).

152. *Id.* at 725.

B. *To Not Apply: Following the Status Quo?*

"Leaving *Crawford*'s Confrontation Clause rule where it is found"[153]

1. *State v. McGill*: A State Outlook

Not every state court[154] has embraced the Arkansas and Minnesota courts' interpretation of the right of confrontation during sentencing or more specifically, the courts' interpretations of *Williams*.[155] In fact, many courts have based much of their decision not to extend the right to confrontation to sentencing (and capital sentencing) on *Williams*.[156] In *State v. McGill*, for example, the Arizona Supreme Court relied on *Williams* to hold that the Confrontation Clause does not apply at sentencing generally, or capital sentencing more specifically.[157] In fact, the *McGill* court read the *Williams* decision quite broadly, outright stating that the *Williams* Court "held that the right [of confrontation] does not apply to sentencing proceedings."[158] However, notably, the *Williams* decision did not base its decision on the Confrontation Clause at all.[159]

The *McGill* court also reasoned that the *Williams* decision was based on a historical analysis, similar to that in *Crawford*.[160] It is true that both *Williams* and *Crawford* took a historical approach, but looking at *Williams* and *Crawford* side by side, it is difficult to reconcile each version of history. In *Williams*, the Court reasoned, "[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."[161] Further, the *Williams* Court even recognized that "[l]eaving a sentencing judge free to avail himself of out-of-court information in

153. United States v. Paull, 551 F.3d 516, 528 (5th Cir. 2009).

154. And no federal court that has decided the issue of the applicability of the Confrontation Clause in noncapital sentencing cases has applied the Confrontation Clause. *See infra* note 187.

155. *See* State v. McGill, 140 P.3d 930, 941 (Ariz. 2006); *see also* People v. Banks, 934 N.E.2d 435, 461 (Ill. 2010).

156. *See* discussion *infra* Part III.

157. *McGill*, 140 P.3d at 941.

158. *Id.* Ironically this interpretation of *Williams v. New York* seems illogical. As Justice Hurwitz noted in his dissent in *State v. McGill*, "*Williams* was not a Confrontation Clause case. Indeed, under the Supreme Court's jurisprudence in 1949 it could not have been; the Court did not hold the Confrontation Clause applicable to the States until sixteen years later . . . ." *Id.* at 948 (Hurwitz, J., dissenting).

159. *See* Williams v. New York, 337 U.S. 241, 252 (1949) ("We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence.").

160. *McGill*, 140 P.3d at 941.

161. *Williams*, 337 U.S. at 246.

making such a fateful choice of sentences does secure to him a broad discretionary power, one susceptible of abuse."[162]

However, this is the very type of discretion that Justice Scalia, in *Crawford*, said the Framers wanted to avoid. In *Crawford*, Justice Scalia reasoned that the Framers "knew that judges . . . could not always be trusted to safeguard the rights of the people."[163] In fact, the Framers "were loath to leave too much discretion in judicial hands."[164] Justice Scalia insisted that the danger of British judges' discretion was a recent memory to the Framers, and thus, the Confrontation Clause was drafted as a "categorical constitutional guarantee."[165] Notably, the type of judicial discretion that Justice Scalia and the Framers were concerned about limiting was discretion concerning a defendant's constitutional rights, not his evidentiary or other protections.[166] Thus, the courts disagree not just about whether *Williams* applies in the case of sentencing and confrontation rights, but the courts may disagree more fundamentally about the holding and the historical approach in *Williams*.[167]

The *McGill* court gave three additional reasons for refusing to apply the Confrontation Clause during sentencing.[168] First, the court concluded that the penalty phase is not "a criminal prosecution."[169] Second, "historical practices support the use of out-of-court statements in sentencing."[170] Lastly, the sentencing body needs a complete set of information to determine sentencing.[171] While the court gave these reasons, it provided little elaboration on those points, except as to

162. *Id.* at 251.

163. Crawford v. Washington, 541 U.S. 36, 67 (2005).

164. *Id.*

165. *Id.*

166. *Id.*

167. To be fair, however, the Court in *Crawford* addressed the right to confrontation during the course of a trial, not at sentencing specifically. The *Crawford* Court was ultimately concerned with constraining the judicial discretion that had run rampant under the *Roberts* standard, which allowed judges to determine which kind of statement was subject to the Confrontation Clause. *Id.* However, it is quite unclear how the Court would rule about judicial discretion during regular or capital sentencing. One thing is clear: the *Crawford* Court was emphatic that for testimonial statements, confrontation is required. *Id.* at 68–69. Notably, the evidence admitted during the sentencing phase of trials is very often of the "testimonial" nature that *Crawford* and *Melendez-Diaz* outright prohibited (for instance, the testimony of inmates, parole officers, prison workers, or social workers). *See* Rocklin, *supra* note 56, at 806–07; Blume & Paavola, *supra* note 20, at 224–27.

168. State v. McGill, 140 P.3d 930, 942 (Ariz. 2006).

169. *Id.* The court, however, provides no historical definition or rationale as to why the penalty phase of sentencing is not a "criminal prosecution." Thus, the court correctly points to textualism and history, but provides no history or textual argument to support its broad conclusions.

170. *Id.*

171. *Id.*

reason that there is long-standing precedent.[172]

2. United We Stand: Federal Courts and the Refusal to Apply the Confrontation Clause at Noncapital Sentencing

The United States Court of Appeals for the Seventh Circuit also refused to apply the Confrontation Clause during the sentencing phase because "witnesses providing information to the court after guilt is established are not accusers within the meaning of the confrontation clause."[173] In coming to this conclusion, the court relied on *Williams* and concluded that, "the relevant provision at sentencing is the due process clause [sic], not the confrontation clause [sic]."[174] However, this reasoning may be difficult to reconcile with the Court's more recent rationale in *Melendez-Diaz*, which concluded that the Constitution only contemplates two types of witnesses, those against the defendant and those in favor.[175]

The United States Court of Appeals for the Eighth Circuit also examined the issue, and refused to apply the Confrontation Clause during sentencing, at least in part, because "[a]s long as the out-of-court information relative to the circumstances of the crime bears an indicia of reliability, then the sentencing court can consider it without providing the defendant with a right to confrontation."[176] Yet the Eighth Circuit gave this rationale in *United States v. Wallace*[177] in 2005, a year after the Court's decision in *Crawford* had outright rejected that substantive reliability was the sole aim of the Confrontation Clause.[178] Instead, the Eighth Circuit upheld its own precedent in *United States v. Due*.[179] The Eighth Circuit devoted one line to rejecting the Confrontation Clause in *Due*, and noted simply, "[h]earsay is admissible at sentencing, if the Court finds it reliable, and the Confrontation Clause does not apply."[180]

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172. *Id.*

173. United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005). The Seventh Circuit relied on *Williams* to draw this conclusion, but never makes clear why a case like *Williams*, decided on due process grounds, would define "accuser" for Sixth Amendment purposes. *See id.*

174. *Id.* However, the Court in *Williams* could not have applied the Confrontation Clause because it was a New York state case and the Confrontation Clause had not yet been incorporated to the states. *See McGill*, 140 P.3d at 948 (Hurwitz, J., dissenting).

175. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2534 (2009). To be fair, Justice Scalia also indicated that the drug analyst in *Melendez-Diaz* was an accuser because the analyst was "proving one fact necessary for his [defendant's] conviction." *Id.* at 2533. One issue in the confrontation right at sentencing debate may be whether Justice Scalia's analysis of two types of witnesses continues to sentencing, and whether proving one fact necessary for a harsher or perhaps capital sentencing is akin to proving a fact towards conviction.

176. United States v. Wallace, 408 F.3d 1046, 1048 (2005).

177. 408 F.3d 1046 (2005).

178. Crawford v. Washington, 541 U.S. 36, 61 (2004).

179. *Wallace*, 408 F.3d at 1048.

180. United States v. Due, 205 F.3d 1030, 1033 (8th Cir. 2000).

In the absence of any rationale for such a broad conclusion, the Eighth Circuit either linked its interpretation of the Confrontation Clause with the reliability standard or determined that the sentencing phase is not a part of "all criminal prosecutions" under the Sixth Amendment. The former rationale does not seem to withstand *Crawford*, but the notion that sentencing is not part of all "criminal prosecutions" may very well be at the heart of the confrontation at sentencing debate.

Finally, the United States Court of Appeals for the Sixth Circuit may have said it best in *United States v. Paull*[181] when it announced, "We underscore that this cautious approach to a changing area of law is the proper result of following our precedent. *Crawford* dealt only with the content of what the Confrontation Clause requires and not the scope of *when* it applies."[182] In *Paull*, the defendant was convicted of possession of child pornography pursuant to a plea agreement, and appealed both his conviction and sentence.[183] The Sixth Circuit briefly rejected the petitioner's appeal on confrontation grounds, and while the court acknowledged "recent developments" in both sentencing and Confrontation Clause jurisprudence, it held steadfast in its own precedent in the absence of any direct Supreme Court guidance.[184] Thus, the Sixth Circuit dubbed its approach to confrontation at sentencing as the "leaving *Crawford*'s Confrontation Clause rule where it is found" approach.[185] The court reiterated that it simply followed suit with all the circuits that have faced the issue, and all had ruled not to apply the right to confrontation at noncapital sentencing.[186] Whether or not the Sixth Circuit's ruling will ultimately win the day, it is certainly correct that in the absence of Supreme Court guidance, the most popular approach is to not apply the Confrontation Clause during noncapital sentencing at all.[187]

181. F.3d 516 (6th Cir. 2009).

182. *Id.* at 528.

183. *Id.* at 519.

184. *Id.* at 527.

185. *Id.* at 528.

186. *Id.*

187. *Id.*; United States v. Beydoun, 469 F.3d 102, 109 (5th Cir. 2006) ("*Crawford* does not extend a defendant's rights under the Confrontation Clause to sentencing proceedings."); United States v. Cantellano, 430 F.3d 1142, 1146 (11th Cir. 2005) ("*Crawford* does not extend to non-capital sentencing."); United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005) (" [W]itnesses providing information to the court after guilt is established are not accusers within the meaning of the confrontation clause."); United States v. Luciano, 414 F.3d 174, 179 (1st Cir. 2005) ("Nothing in *Crawford* requires us to alter our conclusion that there is no Sixth Amendment Confrontation Clause right at sentencing."); United States v. Martinez, 413 F.3d 239, 243 (2d Cir. 2005) (holding that *Crawford* provides "no basis to question prior Supreme Court decisions that expressly approved the consideration of out-of-court statements at sentencing").

III. DEATH IS DIFFERENT, EXCEPT WHEN IT ISN'T: THE CONFRONTATION CLAUSE AT CAPITAL SENTENCING

As united as the circuits may be on the issue of confrontation during noncapital sentencing, there is at least a fracture forming among the circuits as to whether the right of confrontation applies during capital sentencing. In fact, in 2007 when the United States Court of Appeals for the Fifth Circuit rejected a right of confrontation during capital sentencing, overzealous legal bloggers frantically geared up for a Supreme Court showdown,[188] but after the Supreme Court denied certiorari in that case,[189] the bloggers moved on to tackle more juicy cases ripe for Supreme Court picking. While the majority of circuits weighing in on the issue have continued to reject a right of confrontation at capital sentencing, the issue is far from dead. The reality of such a divide is that defendants maintain different constitutional rights based solely on jurisdiction. More confusing still may be why the same circuit rejecting a right of confrontation during noncapital sentencing found a right of confrontation during capital sentencing. Thus, in the absence of Supreme Court guidance, death is different (in some jurisdictions), except when it isn't (in others).

A. *The Chosen Few: Circuit Courts Acknowledging a Right of Confrontation at Capital Sentencing*

1. *Proffitt v. Wainwright*: A Case Ahead of Its Time

"Because the death penalty, unlike other punishments, is permanent and irrevocable, the procedures by which the decision to impose a capital sentence is made bring into play constitutional limitations not present in other sentencing decisions."[190]

Since *Crawford* landed on the scene in 2004, the Confrontation Clause has definitely gained popularity among legal scholars, but the United States Court of Appeals for the Eleventh Circuit confronted the Confrontation Clause long before it was the legal trend. In fact, the year was 1982, two decades before *Crawford*, and even then the Eleventh Circuit in *Proffitt* v. *Wainwright*[191] called the right of confrontation a "procedural protection," and indicated that the Supreme Court had not yet determined the scope of such procedural protections awarded to

188. *See, e.g.*, Lyle Denniston, *Bid for Confrontation Right at Death Sentencing*, SCOTUSBLOG (Sept. 12, 2007, 8:17 PM), http://www.scotusblog.com/2007/09/bid-for-confrontation-right-at-death-sentencing/; *see also Fifth Circuit Rejects Application of* Crawford *at Capital Sentencing*, SENTENCING LAW AND POLICY (Mar. 30, 2007, 7:56 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2007/03/fifth_circuit_r.html.

189. United States v. Fields, 128 S. Ct. 1065 (2008) (denying petition).

190. Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982).

191. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).

capital defendants during sentencing.[192] By calling the Confrontation Clause a "procedural protection,"[193] the *Wainwright* court may well have been ahead of its time. Racing even further ahead of its peers, the Eleventh Circuit also held that the Confrontation Clause applies during capital sentencing.[194]

In *Wainwright*, the jury convicted the defendant of first-degree murder and recommended a sentence of death.[195] After the jury recommendation, the trial judge suggested that the defendant be examined by two court-appointed psychiatrists prior to the final sentencing determination.[196] The doctors submitted reports to the court.[197] Over the defense attorney's request to cross-examine one of the doctors who was unavailable, the judge admitted the doctor's report without allowing the defendant to cross-examine the witness.[198]

While acknowledging that courts traditionally have not placed as great a significance on the sentencing portion of a trial, the *Wainwright* court placed great interest in Supreme Court decisions like *Furman v. Georgia*[199] and *Gardner v. Florida*,[200] among other contemporary Supreme Court cases that emphasized "minimizing the risk of arbitrary decisionmaking [sic]."[201] The cases examined by the *Wainwright* court often focused on the Eighth Amendment, but the court generalized the decisions as ensuring that a defendant had the opportunity to explain or rebut evidence offered against him.[202] Moreover, true to its post-*Ohio v. Roberts* and pre-*Crawford* timeframe, the *Wainwright* court also emphasized that "[r]eliability in the factfinding aspect of sentencing has

192. *Id.* at 1253.

193. *Id.*

194. *Id.* at 1254 ("Finally, we note . . . our conclusion that appellant had a constitutional right to cross-examine Dr. Sprehe before the doctor's report could be used in determining sentence."). Another case ahead of its time is a case from a state located in the Eleventh Circuit, *Rodriguez v. State*. In that pre-*Crawford* case, the Supreme Court of Florida reasoned, "The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. The right of confrontation *protected by cross-examination* is a right that has been applied in the sentencing process." Rodriguez v. State, 753 So. 2d 29, 43–44 (Fla. 2000) (quoting Engle v. State, 438 So. 2d 803, 813–14 (Fla. 1983) (emphasis added)).

195. *Wainwright*, 685 F.2d at 1233.

196. *Id.* at 1250.

197. *Id.*

198. *Id.*

199. 408 U.S. 238, 242 (1972) ("There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary . . . penalties of a severe nature.").

200. 430 U.S. 349 (1977).

201. *Wainwright*, 685 F.2d at 1253. Notably, this type of thinking is in line with the *Crawford* Court rationale, which sought to interpret the Constitution in a way that minimized judicial discretion. Crawford v. Washington, 541 U.S. 36, 67 (2004).

202. *Wainwright*, 685 F.2d at 1253.

been a cornerstone of these decisions."[203] The court thus held, "The Supreme Court's emphasis in . . . capital sentencing cases on the reliability of the factfinding underlying the decision whether to impose the death penalty convinces us that the right to cross-examine adverse witnesses applies to capital sentencing hearings."[204]

Although at least part of the *Wainwright* court's rationale may be outdated in a post-*Crawford* world, it is still good law in the Eleventh Circuit, even after the same circuit held that the right of confrontation does not apply in noncapital sentencing in *United States v. Cantellano*.[205] While the Eleventh Circuit acknowledged in *Cantellano* the right of confrontation extends, at least in the Eleventh Circuit, to capital sentencing, it provided little reasoning to answer why, in terms of confrontation, death (capital sentencing) is different.[206] In fact, the Eleventh Circuit quoted a Supreme Court case discussing the Confrontation Clause in a pretrial context and noted, "[T]he right to confrontation is a *trial* right."[207] If this is the Eleventh Circuit's rationale for noncapital sentencing, it is difficult to understand why a capital sentencing hearing is a trial, while a noncapital sentencing hearing is not.[208]

2. *United States v. Mills*: Because Death is Different

"Because the death penalty is uniquely different in its finality and severity, increased scrutiny is required at every step of the capital process to ensure that death is the appropriate penalty."[209]

United States v. Mills answered the question that the Eleventh Circuit left open. At least to the *Mills* court, the punishment of death is different.[210] *Mills* has become something of a poster child for courts later interpreting that a right of confrontation exists in some form of sentencing.[211] In *Mills*, a jury found two defendants guilty of a violent

203. *Id.* While reliability remains an important component of the Confrontation Clause post-*Crawford*, Justice Scalia called for reliability "assessed in a particular manner," not reliability as a substantive guarantee. *Crawford*, 541 U.S. at 61.

204. *Wainwright*, 685 F.2d at 1254.

205. 430 F.3d 1142, 1146 (11th Cir. 2005).

206. *Id.*

207. *Id.* (quoting Pennsylvania v. Richie, 480 U.S. 39, 52 (1987)) (internal quotation marks omitted).

208. Under this reasoning, capital sentencing would be more like a trial (thus deserving a right to confrontation), while regular sentencing (even sentencing where life in prison is at stake) is more like a pretrial hearing. It is difficult to understand why the gravity of punishment would affect whether sentencing is more trial-like or more like a pretrial hearing.

209. United States v. Mills, 446 F. Supp. 2d 1115, 1140 (C.D. Cal. 2006).

210. *Id.*

211. *See* Vankirk v. State, 2011 Ark. 428, *8 (2011) ("We believe that the federal district court's decision in *United States v. Mills* . . . to be more persuasive [than *Williams v. New*

crime in aid of racketeering.[212] The prosecution sought to introduce hundred-page pre-sentencing and post-sentencing reports alleging misconduct "ranging in severity from delaying a bed count or flooding one's cell to never-prosecuted acts of murder."[213]

The *Mills* court determined that the reports introduced during sentencing contained some testimonial statements.[214] It is worth noting that the type of reports at issue in *Mills* are similar to reports that the Supreme Court has ruled are among the "core class of testimonial statements,"[215] at least during the guilt-determination phase of the trial. The *Melendez-Diaz* Court also further emphasized the importance of the procedural ability to cross-examine a live witness's "honesty, proficiency, and methodology."[216] It follows that such concerns should be important even during the sentencing portion of a trial. Courts must be concerned with the ability of a convicted defendant to confront a witness, as in *Mills*, who alleges during sentencing that the defendant committed such terrible and prejudicial crimes as unprosecuted murder.

The *Mills* court ultimately held that the Confrontation Clause applies during both the selection phase[217] and at least part of the eligibility phase[218] of capital sentencing and performed an extensive analysis of the evolution of capital sentencing.[219] The court recognized that *Williams v. New York* has never been overturned, but made a distinction between sentencing by a judge (as was the case in *Williams*) and by jury, which is required under the Federal Death Penalty Act (FDPA).[220] The *Mills* court recognized steps the Supreme Court has

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York]."); *see also* United States v. Concepcion, 555 F. Supp. 2d 1205, 1221 (D. Colo. 2007) ("I agree with *Mills* that under Crawford, the Confrontation Clause is applicable at both the eligibility phase and at least a portion of the selection phase.").

212. *Mills*, 446 F. Supp. 2d at 1119.

213. *Id.*

214. *Id.* at 1136.

215. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009) (quoting White v. Illinois, 502 U.S. 346, 365 (1992)) (internal quotation marks omitted); *see also id.* (noting affidavits "are functionally identical to live, in-court testimony").

216. *Melendez-Diaz*, 129 S. Ct. at 2538.

217. The selection phase is the phase where the jury determines whether a defendant should receive the death penalty. *See Mills*, 466 F. Supp. 2d at 1120.

218. The eligibility phase is the phase in which a jury determines whether a defendant is eligible for the death penalty. *Id.* at 1125.

219. *Id.* at 1131.

220. *Id.* at 1119–20, 1122–24. The FDPA sets the procedures in a capital trial in federal court. *Id.* at 1119. The Act leaves to the jury the ultimate decision of whether to impose the death penalty. *Id.* at 1119–20. The *Mills* court described the six-step procedure the FDPA requires the jury to undertake,

> (1) that the statutory intent factor has been proven beyond all reasonable doubt, (2) that at least one statutory aggravating facto[r] [sic] has been established beyond a reasonable doubt, (3) that any additional statutory factors have been

taken in recent case law to protect the rights of convicted individuals who may face the death penalty.[221] For example, the *Mills* Court reasoned that the Supreme Court in *Ring v. Arizona*[222] held "that a jury must find, beyond all reasonable doubt, whatever facts are necessary to satisfy the 'eligibility' function of a capital sentencing scheme."[223] The court reasoned that while the Supreme Court in *Ring* did not resolve the issue of confrontation at sentencing, the Court at least "strongly suggests" that the Confrontation Clause applies during the eligibility phase of sentencing.[224] The *Mills* Court reiterated the reasoning from *Ring*, noting that a sentencing scheme like the one at issue in that case—which required a finding of an aggravating factor beyond a reasonable doubt before the defendant could qualify for capital punishment—operated as a finding of an element of a greater offense.[225] Thus, a sentencing scheme that requires a finding of an aggravating factor to qualify for capital punishment is protected by the Sixth Amendment right to a jury.[226] The court's reasoning in *Mills* is sound because a Sixth Amendment jury right only applies if this aspect of sentencing is considered a "criminal prosecution" for purposes of the Sixth Amendment. Since the Supreme Court held that a jury right does apply, it follows that the defendant would also have confrontation rights guaranteed by the same Sixth Amendment, at least during the eligibility phase of sentencing.[227]

> established beyond a reasonable doubt, (4) that any non-statutory aggravating factor has been established beyond a reasonable doubt, (5) whether any single juror has found a mitigating factor by preponderance of the evidence, and (6) "whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.

Id. (internal citations omitted); *see also* discussion *infra* Section IV.B.

221. *Id.* at 1124–28.

222. 536 U.S. 584 (2002). In *Ring*, the defendant was found guilty of felony-murder. *Id.* at 597. Under Arizona law, the maximum punishment for his conviction was life imprisonment. *Id.* In addition, the defendant could only be sentenced to capital punishment if an aggravating factor was proved beyond a reasonable doubt. *Id.* However, the Court held that the Sixth Amendment, applied to the states under the Fourteenth Amendment, requires that a jury, not a judge, make the finding. *Id.*

223. *Mills*, 466 F. Supp. 2d at 1127 (noting also that the Court did not answer whether facts found in the "selection" function must be subject to a jury finding).

224. *Id.* at 1127–28. The Supreme Court in *Ring v. Arizona* did reason, "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense' the Sixth Amendment requires that they be found by a jury.'" *Ring*, 536 U.S. at 609 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

225. *Mills*, 466 F. Supp. 2d at 1127.

226. *Id.*

227. Notably, the debate is more complicated than such simple logic because the Court has

B. *The Refusal to Extend the Right of Confrontation to Capital Sentencing*

1. *United States. v. Fields*:[228] Because Death is Not Different

"Neither the text of the Sixth Amendment nor the history of murder trials supports the extension of the Confrontation Clause to testimony relevant only to penalty selection in a capital case."[229]

The majority in *United States v. Fields* rejected that a right to confrontation exists during capital sentencing.[230] While the *Fields* court acknowledged that *Williams v. New York* was decided on due process rather than Sixth Amendment grounds, nearly the entire court's rationale rested on *Williams* and the Supreme Court's decision not to overturn *Williams* in *Gardner v. Florida*.[231] The *Fields* court reasoned that reports made by correctional officers, the defendant's mother, juvenile probation officers, the police, and other witnesses were all relevant in determining Field's past violent conduct and future dangerousness.[232] Ultimately the court was persuaded that the Court in *Williams* "was urged to 'draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed,' but it explicitly refused to do so."[233] The *Fields* court also placed significance in *Williams* dicta indicating the importance of allowing a wide body of information during sentencing.[234]

This rationale from *Fields* is flawed for two reasons. First, the *Fields* majority admits that *Williams* does not address the scope of a defendant's Sixth Amendment rights during capital sentencing, but then claims that the *Williams* Court had an opportunity to draw a line concerning procedures during capital sentencing. While the *Fields* majority is correct in saying the *Williams* Court had an opportunity to decide capital sentencing procedures for *due process* purposes, *Crawford* makes it clear that confrontation, for *Sixth Amendment* purposes, is a procedural issue in its own right.[235] Furthermore, the Court, practicing judicial restraint, would not bring up a Sixth

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chosen to separate Sixth Amendment rights, applying some of them during capital sentencing, while choosing not to apply others. Douglass, *supra* note 16, at 1967. John G. Douglass's argument that the Sixth Amendment should apply during the entire case would certainly simplify the confrontation debate, as well as make textual sense in light of the way the Sixth Amendment is constructed. *See id.* at 1972.

228. 483 F.3d 313 (5th Cir. 2007).

229. *Id.* at 335.

230. *Id.* at 326–27.

231. *Id.* at 326–29.

232. *Id.* 324–25.

233. *Id.* at 326 (quoting Williams v. New York, 337 U.S. 241, 251 (1949)).

234. *Id.* at 327.

235. Crawford v. Washington, 541 U.S. 36, 61 (2004).

Amendment issue not before it; nor could it since the Confrontation Clause was not yet applicable to the states.[236] Second, the *Fields* court is also correct that the Court in *Williams* referenced the importance of having a large body of information available at sentencing, but the application of the Confrontation Clause does not serve to limit the quantity of information—it only limits the manner in which the information is to be presented.[237]

The *Fields* court also relied on the Seventh Circuit case *United States v. Roche* to conclude that witnesses at sentencing are not accusers within the meaning of the Confrontation Clause.[238] However neither the *Fields* majority nor the court in *Roche* provide much explanation as to why witnesses testifying after guilt is established are not accusers under the Sixth Amendment.[239] The *Roche* court reasoned that the applicable provision at sentencing is the Due Process Clause, not the Sixth Amendment and pointed to *Williams* for support.[240] The *Fields* court appears to have accepted this rationale.[241] However, clearly due process concerns are not the only applicable constitutional considerations during sentencing. After all, the Supreme Court in *Mempa v. Rhay*[242] held that the Sixth Amendment right to counsel applies during sentencing proceedings.[243] Of course, the Due Process Clause makes the Sixth Amendment applicable to the states.[244] However, the Due Process Clause cannot be the only constitutional provision relevant at sentencing, particularly at the federal level where the Bill of Rights apply without the aid of the Due Process Clause.

236. Notably, *Williams v. New York* was an appeal from a *state* case, where the Confrontation Clause did not yet apply. The decision to apply the Confrontation Clause to the states did not occur until sixteen years later. *See* Pointer v. Texas, 380 U.S. 400, 406 (1965) (applying the Confrontation Clause to the states).

237. *Fields*, 483 F.3d at 374 (Benavides, J., dissenting) ("[I]t is far from clear that applying the Confrontation Clause would result in 'less evidence.'").

238. *Id.* at 328.

239. *Id.*; United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005).

240. *Roche*, 415 F.3d at 618.

241. *See Fields*, 483 F.3d at 328.

242. 389 U.S. 128 (1967).

243. *Id.* at 134–36.

244. Gideon v. Wainwright, 372 U.S. 335, 343 (1963).

The *Fields* majority also reasoned that *Gardner v. Florida*[245] was not a "*Williams*-killer," for two reasons.[246] First, the *Fields* court reasoned that since *Gardner* was also based on the Due Process Clause, and since it also made no mention of the Confrontation Clause, it further proves that the *Williams* due process analysis is controlling for sentencing questions, even though *Williams* was decided pre-incorporation.[247] Second, *Gardner* did not overrule *Williams*, and thus, the *Williams* holding that due process does not prevent a judge from admitting out-of-court statements in sentencing proceedings is controlling.[248] Ultimately, the *Fields* court determined that, when it comes to a right of confrontation during capital sentencing, the Supreme Court's "death is different" jurisprudence is superseded by the ultimate precedent of *Williams v. New York* and nothing, not even death, can change the relevance of that case.[249]

2. Far From Clear: Other Federal Courts, Their Holdings or Lack Thereof

"It is far from clear that the Confrontation Clause applies to a capital sentencing proceeding."[250]

Three other federal cases have attempted to address the right of confrontation at sentencing, but their holdings and rationales remain far from clear. In *United States v. Johnson*[251] the Northern District of Iowa in the Eighth Circuit indicated that there is no right of confrontation during sentencing, noting that the appellant had "not convinced the court that the Confrontation Clause also applies in the final phase of these trifurcated proceedings . . . ."[252] However, oddly, the court went

245. The Court in *Gardner* did note that, "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." Gardner v. Florida, 430 U.S. 349, 358 (1977). However, it is unclear why the Court would have brought up the Confrontation Clause on its own accord, as the court in *Fields* suggests it would have done were a right to exist. *Fields*, 483 F.3d at 329 ("Asked to examine what rights defendants have under the Due Process Clause with regard to the presentation of evidence at Capital sentencing, the Court . . . made no mention of the right of confrontation . . . ."). Yet the Court in *Gardner* was asked only to examine rights under the Due Process Clause, not the Sixth Amendment. The Court in *Gardner* did acknowledge, however, that, "five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." *Gardner*, 430 U.S. at 357.

246. *Fields*, 483 F.3d at 329.

247. *Id.*

248. *Id.*

249. *Id.* at 331.

250. United States v. Higgs, 353 F.3d 281, 324 (4th Cir. 2003).

251. 378 F. Supp. 2d 1051 (N.D. Iowa 2005).

252. *Id.* at 1062. The trifurcated proceedings in the case consisted of a merit phase, to determine guilt or innocence of the defendant, an eligibility phase, to determine whether the defendant was eligible for the death penalty, and finally, the penalty phase to determine the

on to conclude that even if the Confrontation Clause applied during the penalty phase of capital sentencing, the testimony at issue did not violate the Confrontation Clause.[253] Why the court addressed the constitutionality of the Confrontation Clause in the first place is confusing if the testimony at issue was not subject to Sixth Amendment protections, anyway.

In *Szabo v. Walls*,[254] a 2002 case, the Seventh Circuit was clearer when holding that the Confrontation Clause does not apply during capital sentencing.[255] The Seventh Circuit insisted that, "the Supreme Court has held that the Confrontation Clause does not apply to capital sentencing."[256] Of course, its support for this statement was *Williams v. New York*, a pre-incorporation case, and a pre-*Crawford* decision, decided on due process grounds.[257] Thus, it is far from clear that this rationale would withstand close scrutiny.

Finally, in *United States v. Higgs*,[258] decided a year before *Crawford*, the Fourth Circuit essentially reasoned that it did not need to reach a conclusion on the confrontation at sentencing issue because the issue was not raised in the lower court.[259] Thus, the court was only reviewing the decision for plain error.[260] The appellant, who argued that allowing a police officer to testify about a co-defendant's confession violated his right of confrontation, had to prove that error occurred, that the error was plain, and that it affected a substantial right.[261] Thus, the *Higgs* court held "[E]ven if the introduction of Haynes's statements . . . during the sentencing proceeding was error, we cannot say that the error was plain since it even remains unclear whether the Confrontation Clause applies in this circumstance."[262] Thus, the Confrontation Clause dilemmas contemplated and left unanswered by the Fourth Circuit in 2003 are the same as those that are still being pondered by courts in 2012. Whether a right of confrontation exists during capital sentencing is simply unclear.

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aggravating and mitigating factors and whether to impose a death sentence. *Id.* at 1055.

253. *Id.* at 1062.

254. 313 F.3d 392 (7th Cir. 2002).

255. *Id.* at 398.

256. *Id.*

257. *See* Williams v. New York, 337 U.S. 241, 245 (1949) ("The sentencing judge may consider such information even though obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine."). However, the term "Confrontation Clause" does not appear on any page of the opinion. *See generally id.*

258. 353 F.3d 281 (4th Cir. 2003).

259. *Id.* at 324.

260. *Id.*

261. *Id.*

262. *Id.*

IV. THE ROAD LESS TRAVELED: TEXTUALISM, HISTORY, AND A DEPARTURE FROM *WILLIAMS*

Courts addressing the issue of a right of confrontation during sentencing are somewhat misguided for three reasons. The courts fail to listen to the guidance set forth in *Crawford* that the Court has steadfastly followed in both *Crawford* and its offspring. That is, courts have largely ignored both history and textualism.[263] Courts have also grasped for precedent where none exists. The Supreme Court has never explicitly decided whether a right of confrontation exists at any time or at any stage of sentencing.[264] The road less traveled, that is a textual and historical approach, may provide the best answer to the applicability of the Confrontation Clause at sentencing debate, but absent a Supreme Court opinion, it all remains just speculation.

A. *A Textual Approach with a Historical Answer*

"The issue before us, therefore, is whether the penalty phase of a capital sentencing proceeding is part of a criminal prosecution. As a matter of pure logic and textualism, it is difficult to characterize the penalty phase as anything other than part of a criminal prosecution."[265]

In light of the Supreme Court's "fragmented" application of the Sixth Amendment during sentencing, textualism alone is unlikely to divulge the full answer to the confrontation puzzle.[266] However, Justice Scalia's use of an 1828 dictionary to define both witness[267] and testimony in *Crawford*[268] at least point toward a textualist approach. When determining *WWFD?*, one may not necessarily need to invent a time machine; the clues to the answer may rest instead within the binds of a simple dictionary. After all, the text of the Sixth Amendment is not explicitly broken into sections, with some rights applying to a criminal prosecution and others not. Instead, the Sixth Amendment reads, "In *all criminal prosecutions*, the accused *shall enjoy* . . ." each right granted by the Sixth Amendment.[269]

The same 1828 dictionary used in *Crawford* defines "prosecution" as, "The institution and carrying on of a suit in a court of law or equity to obtain some right, *or to redress and punish some wrong*."[270] The

263. Notably, the court in *Fields* partially relied on a historical and textual rationale but reached a different conclusion. *See* United States v. Fields, 483 F.3d 313, 335 (5th Cir. 2007).

264. *See* Douglass, *supra* note 16, at 1976.

265. State v. McGill, 140 P.3d 930, 947 (Ariz. 2006) (Hurwitz, J., dissenting).

266. *See* Douglass, *supra* note 16, at 1974.

267. A witness is one who "bear[s] testimony." Crawford v. Washington, 541 U.S. 36, 51 (2004).

268. *Id.*

269. U.S. CONST. amend. VI (emphasis added).

270. *Prosecution Definition*, WEBSTER, AN AMERICAN DICTIONARY, http://www.1828-

second definition of "prosecution" is, "The institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and *pursuing them to final judgment*."[271] An 1860 Legal Dictionary defines prosecution as, "The means adopted to bring a supposed offender to *justice and punishment* by due course of law."[272] Further, an accuser is "one who accuses; one who brings a charge of crime *or fault*."[273]

Such definitions, taken alone, cannot answer the question of whether a right of confrontation should apply during sentencing, or at the very least during capital sentencing. However, these definitions are strong evidence to support the intent of the Framers. After all, as Justice Scalia has suggested, "[W]e are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[274] Each of the definitions of "prosecution" above indicate in some way that sentencing is part of a criminal prosecution, and each definition sheds light on what an ordinary voter at the time of the Framers would have understood as the meaning of a criminal prosecution. Thus, these definitions further the notion that the Confrontation Clause should apply during sentencing, or at least during capital sentencing.

Importantly, such definitions must be taken together with history to truly provide a possible answer to the confrontation during sentencing debate. These definitions seem to indicate that punishment is part of a criminal prosecution, but what does history suggest? The *Crawford* Court pointed to *State v. Campbell*,[275] an 1844 South Carolina case, to help interpret the right of confrontation.[276] The *Campbell* court held that a coroner's signed deposition could not be admitted against the defendant because the witness was unavailable for cross-examination at trial and had not been cross-examined when the report was taken.[277] The court noted:

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dictionary.com/d/search/word,Prosecution (emphasis added).

271. *Id.* (emphasis added).

272. JOHN BOUVIER, BOUVIER LAW DICTIONARY VOLUME II 396 (1860) (emphasis added).

273. *Accuser Definition*, WEBSTER, AN AMERICAN DICTIONARY, http://www.1828-dictionary.com/d/search/word,Accuser (emphasis added). Some courts like the Seventh Circuit in *United States v. Roche* outright declare that witnesses during sentencing are not accusers within the meaning of the Confrontation Clause, without using either a textual or historical approach. *Cf.* United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005).

274. District of Columbia v. Heller, 554 U.S. 570, 576 (2008).

275. 30 S.C.L. 124 (S.C. Ct. App. 1844).

276. Crawford v. Washington, 541 U.S. 36, 49 (2004).

277. *Campbell*, 30 S.C.L. at 131.

> I cannot conceive how judges could have resolved, that the depositions of deceased witnesses, when examined by the coroner, should be received as competent evidence at the final *trial of life and death*- but by assuming that the written testimony had been taken under all the guards and tests of the common law, and *especially those of the cross-examination*.[278]

The language "final trial of life and death"[279] from the *Campbell* opinion indicates that Campbell's trial was a capital case, and true to the era, the death penalty was likely "the exclusive and mandatory sentence."[280] Thus, reviewing the historical context in which the Confrontation Clause was applied in *Campbell*, taken together with a textual meaning of the Confrontation Clause, the historical answer to the confrontation question is that the Framers and citizens would have assumed that the right of confrontation exists both for guilt determination and sentencing. This is because guilt and sentencing were usually one in the same, and for specified offenses, that punishment was death.[281]

This "sanction-specific" type of punishment, especially as it relates to capital punishment, is relevant because it reinforces the idea that the people in the Framers' world simply would not have understood the bifurcated system with separate trial and sentencing rights that exists in today's world.[282] Taking these historical definitions of criminal prosecution and accuser, together with the *Crawford* definition of testimony, [283] two inferences can be made. One, an accuser who gave testimony in a criminal prosecution during the time of the Framers was one who gave information, to prove some fact, and to help establish some crime or fault of the defendant, for the ultimate goal of convicting, *and punishing* the defendant. Two, if the crime in question was murder, treason, piracy, arson, rape, robbery, burglary, or sodomy,[284] the accuser was giving information about the defendant for purposes of imposing capital punishment. Thus, particularly with the regard to the death penalty, the right of confrontation protected the defendant from an accuser who was not only seeking to help achieve a conviction, but also a punishment of death. In the words of the *Campbell* court, "[O]ne of the *indispensable conditions* of such due course of law is, that

278. *Id.* (emphasis added).

279. *Id.*

280. Woodson v. North Carolina, 428 U.S. 280, 289 (1976).

281. *Id.*

282. *See* Douglass, *supra* note 16, at 2011.

283. Crawford v. Washington, 541 U.S. 36, 51 (2004) (noting that testimony is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact").

284. *Woodson*, 428 U.S. at 289.

prosecutions be carried on to the conviction of the accused, by witnesses confronted by him [the defendant], and subjected to his personal examination."[285] If, under *Crawford*, the Confrontation Clause is truly to be interpreted "by the expectation of the Framers at the time the Sixth Amendment was adopted in 1791,"[286] then both text and history suggest that some sort of confrontation right exists during at least capital sentencing, if not beyond.

B. *Grasping for Precedent: The Questionable Historical Approach and Applicability of* Williams v. New York *to Confrontation at Sentencing*

"Williams's notion of unchecked judicial discretion in capital sentencing would have been foreign—and, I believe, downright frightening—to the Framers."[287]

Since many courts choosing not to apply the Confrontation Clause during sentencing have done so, at least in part, in reliance on *Williams v. New York*, it is worth understanding why such reliance may be questionable in light of the historical approach in *Crawford* and the grounds on which *Williams* was originally decided.

The *Williams* Court recognized that the death penalty was an "automatic and commonplace result of conviction[]" in early America, but maintained that sentencing judges had much discretion.[288] This begs the question, discretion as to what? If capital punishment was automatic in early America, then judges could not have had discretion over what evidence was permitted when considering sentencing because sentencing was determined by the crime, not the multitude of factors considered by modern courts. This is a question that the Supreme Court must address: do judges maintain discretion during sentencing? If so, what protections does a defendant have in those situations? The history and the text of the Sixth Amendment provide little help in the way of answering these questions, particularly in light of capital sentencing. One indicator may be Justice Scalia's emphasis on the procedural protection of confrontation and its ability to limit judicial discretion.[289] Another may be his indication that prior to *Crawford*, there was a failure to interpret the Constitution in a manner that achieves constraint on judicial discretion.[290] However it is unclear whether Justice Scalia and the rest of the Court would also advocate interpreting the Sixth Amendment to constrain judicial discretion during sentencing.

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285. State v. Campbell, 30 S.C.L. 124, 125 (S.C. Ct. App. 1844) (emphasis added).
286. State v. McGill, 140 P.3d 930, 949 (Ark. 2006).
287. Douglass, *supra* note 16, at 2021.
288. Williams v. New York, 337 U.S. 241, 246, 247 (1949).
289. Crawford v. Washington, 541 U.S. 36, 67 (2004).
290. *Id.*

Additionally, the Court in *Williams* recognized that modern courts were trending towards individualized sentencing,[291] which is consistent with a modern bifurcated system. However, under New York law at the time *Williams* was decided, first-degree murder was punishable by death, "unless the jury recommend[ed] life imprisonment."[292] This type of sentencing was somewhat individualized in that it gave the jury discretion to recommend a departure and the judge the ability to make the ultimate decision. However, the similarity of *Williams* to the situation in early America is that the jury convicted and recommended a life sentence for the defendant based only on information provided at trial.[293] In fact, the reports later viewed by the judge in *Williams* were not admissible at trial.[294] If *Williams* had been decided in today's jurisprudence, that is post-incorporation, the information at trial would have been subject to all the protections of the Sixth Amendment. Only after the jury conviction and sentence recommendation, did the judge look at reports, not subject to the Confrontation Clause, submitted to him under New York law.[295] Thus, under this rationale, it is easy to understand why courts like the Arkansas Supreme Court in *Vankirk*, chose to draw a line between judge and jury; at the very most *Williams* stands for the idea that there is no right of confrontation during judge sentencing, not jury sentencing.

Looking at *Williams* more narrowly, it is also quite plausible that "*Williams* is simply a case setting forth the minimum requirements of Fourteenth Amendment due process with respect to the use of hearsay testimony."[296] After all, as previously noted, *Williams* could not have been decided on Confrontation Clause grounds because that Sixth Amendment right did not apply to the states at the time *Williams* was decided.[297] Furthermore, *Williams* must be understood in light of *Crawford* and post-*Crawford* decisions. Due process under *Williams* may require a certain degree of substantive reliability, but *Crawford*

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291. *Williams*, 337 U.S. at 248

292. *Id.* at 242 n.2.

293. *Id.* at 243 ("The judge instructed the jury that if it returned a verdict of guilty as charged, without recommendation for life sentence, 'The Court must impose the death penalty,' but if such recommendation was made, 'the Court may impose a life sentence.'"). At the time the Constitution was drafted the decision as to whether a defendant should be put to death was also made solely on the basis of evidence introduced during the course of the trial. State v. McGill, 140 P.3d 930, 950 (Ariz. 2006).

294. *Williams*, 337 U.S. at 253 (Murphy, J., dissenting) (" [I]n a capital case, against the unanimous recommendation of a jury, where the report would concededly not have been admissible at the trial, and was not subject to examination by the defendant, I am forced to conclude that the high commands of due process were not obeyed.").

295. *Id.* at 244.

296. State v. McGill, 140 P.3d 930, 948 (Ariz. 2006).

297. *Pointer v. Texas* was decided in 1965 and made the Confrontation Clause applicable to the states. Pointer v. Texas, 380 U.S. 400, 406 (1965).

requires *procedural* reliability.[298] Thus, *Williams* only addressed substantive due process reliability of evidence at sentencing, not the procedural Confrontation Clause method of achieving reliability through cross-examination. In the absence of Supreme Court guidance, courts will continue to grasp for precedent, using *Williams* as a shield to protect a decision not to apply the Confrontation Clause at sentencing. With defendants having different protections during sentencing from jurisdiction to jurisdiction and from capital to noncapital sentencing, the Supreme Court must draw a line. That line must be drawn with an eye towards history and text, and not based on a case that lacks relevance to the issue at hand.

CONCLUSION: THE LOGICAL NEXT STEP

"The Supreme Court has recognized cross-examination as 'the greatest legal engine ever invented for the discovery of the truth.'"[299]

As discussed briefly in Subsection II.A.2,[300] the Court's recent decisions in *Apprendi*, *Blakely*, and *Crawford* point toward the next logical next step: that the right of confrontation should apply during sentencing. Each of these three decisions was based, in part, on historical grounds, with an eye toward how voters during the Framers' time would have understood Sixth Amendment protections. In *Apprendi*, the Court addressed the historical relevance of a trial by jury, and the importance of determining "the truth of every accusation."[301] *Blakely* reinforced that, "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment."[302] Finally, *Crawford* resurrected the Confrontation Clause from its former convolution in hearsay and substantive reliability. These cases, taken together,[303] emphasize two key points. First, these cases emphasize protecting a defendant throughout the course of trial and sentencing. Second, they do so on the basis of history. Thus, a logical extension of both defendant protection and history may very well be that the Confrontation Clause must apply during at least capital sentencing, if not parts of noncapital sentencing more generally.

More importantly, in the absence of Supreme Court guidance, defendants have varying abilities to confront witnesses during sentencing hearings from jurisdiction to jurisdiction. With such lofty

298. *See McGill*, 140 P.3d at 948.

299. Proffitt v. Wainwright, 685 F.2d 1227, 1254 (11th Cir. 1982) (quoting California v. Green, 399 U.S. 149, 158 (1970)).

300. *See* discussion *supra* Subsection II.A.2.

301. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)) (internal quotation marks omitted).

302. Blakely v. Washington, 542 U.S. 296, 313 (2004).

303. *See supra* Subsection II.A.2.

decisions as life or death, and varying degrees of prison terms at stake, it is crucial that the Court make a final interpretation on whether the right of confrontation applies during sentencing. Until the Confrontation Clause surpasses the sentencing barrier, the confrontation at sentencing debate remains the logical next step in Confrontation Clause jurisprudence.