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# Two Wrongs Don't Make a Right: Federal Death Eligibility Determinations and Judicial Trifurcations

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**TWO WRONGS DON'T MAKE A RIGHT: FEDERAL  
DEATH ELIGIBILITY DETERMINATIONS AND JUDICIAL  
TRIFURCATIONS\***

*Michael D. Pepson\*\* & John N. Sharifi\*\*\**

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## I. INTRODUCTION

The current federal death penalty statute provides the following relaxed evidentiary standard, which, *inter alia*, governs the method with which the facts that render a defendant eligible for the death penalty (i.e., aggravating factors) may be proven:

The government may present any information relevant to an aggravating factor. . . . Information is admissible *regardless of its admissibility under the rules governing admission of evidence at criminal trials* except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.<sup>1</sup>

Under the Federal Death Penalty Act of 1994 (hereinafter FDPA),<sup>2</sup> after a federal capital defendant has been convicted of a qualifying predicate offense (during the guilt-innocence phase of his or her trial), the government must still prove additional statutorily prescribed aggravating factors,<sup>3</sup> beyond a reasonable doubt, to raise the level of the offense to one that exposes the defendant to the specter of the death penalty. (The defendant is not eligible for the death penalty simply by virtue of his conviction on the predicate offense alone.)<sup>4</sup> This is constitutionally significant because, pursuant to the Supreme Court's holding in *Ring v. Arizona*,<sup>5</sup> aggravating factors function as additional *elements* necessary to constitute a capital crime, which, in essence, is tantamount to an entirely different offense.<sup>6</sup>

The factfinding necessary to establish the existence of the aggravating factors occurs at a separate sentencing hearing, in an adversarial, trial-like setting, with the right to a jury, in what has been

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1. 18 U.S.C. § 3593(c) (2000) (emphasis added).

2. Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-3598 (2000).

3. See 18 U.S.C. § 3592(c) (listing statutory aggravating factors under the FDPA). See also Zant v. Stephens, 462 U.S. 862, 878 (1983) (“Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.”).

4. 18 U.S.C. § 3593(d) (2000) (“If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.”). See Donald M. Houser, *Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation*, 64 WASH. & LEE L. REV. 349, 353 (2007) (As Donald Houser observes, “[u]pon the conclusion of the guilt phase, the maximum punishment facing the defendant if he is found guilty is life in prison.”).

5. 536 U.S. 584 (2002).

6. See *infra* notes 123-144 and accompanying text.

termed the “eligibility determination” or phase (as in *death* eligibility).<sup>7</sup> But yet, notwithstanding the aforementioned application of *Ring*, this hearing occurs within a juridical framework where the nature and scope of the procedural protections afforded the defendant fundamentally differs from that of the trial proper.<sup>8</sup> This disparity is especially glaring with regard to the inequality between the dramatically reduced right of confrontation the FDPA grants capital defendants during their sentencing hearing and the right of confrontation the Sixth Amendment guarantees criminal defendants in all stages of their “criminal prosecution.”<sup>9</sup> To wit, in a federal capital trial, a jury may determine that a defendant is eligible to receive a death sentence (i.e., make findings of fact beyond a reasonable doubt) based on hearsay evidence that would not overcome a Confrontation Clause objection in even a misdemeanor trial.<sup>10</sup>

Broadly speaking, the purpose of this article is to bring attention to this radical and irreconcilable disparity between the unequivocal Sixth Amendment right of confrontation criminal defendants are afforded at trial,<sup>11</sup> and the limited, qualified right of confrontation the FDPA grants federal capital defendants during death-eligibility determinations, which occur as part of the sentencing phase.<sup>12</sup> It advances the argument that there is no tenable principled distinction on which this disparate procedural treatment may rest. We will attempt to demonstrate that, as

7. See, e.g., *United States v. Mills*, 446 F. Supp. 2d 1115, 1119-21 (C.D. Cal. 2006) (for a good description of the factfinding that occurs during the eligibility phase); *United States v. Jordan*, 357 F. Supp. 2d 889, 902 (E.D. Va. 2005) (“The evidentiary and deliberative process in the penalty of a capital case has two facets: eligibility and selection.”); *United States v. Johnson*, 362 F. Supp. 2d 1043, 1099 (N.D. Iowa 2005) (describing the two-facet inquiry the sentencing phase of capital trials conducted pursuant to the FDPA).

8. As Professor John Douglas explains,

Modern criminal prosecution spans two worlds: first a trial, then a sentencing. In capital cases, we know these two worlds as the “guilt” phase and the “penalty” phase . . . . Trial is an adversarial process, conducted under rules set out in a single sentence of the Sixth Amendment . . . . At best, a defendant’s “sentencing rights” are a faint shadow of his “trial rights.” This division of criminal cases into two distinct worlds with different rights holds true even in capital cases . . . .

John G. Douglas, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1967-69 (2005). See Alexander Bunin, *When Trial and Punishment Intersect: New Defects in the Death Penalty*, 26 W. NEW ENG. L. REV. 233, 235 (2004) (observing that “in most death penalty jurisdictions, a capital defendant is prosecuted for some elements of capital murder without the trial protections available even to a person charged with a simple misdemeanor”).

9. Compare 18 U.S.C. § 3593(c), with *Crawford v. Washington*, 541 U.S. 36 (2004); U.S. CONST. amend. VI.

10. See *infra* notes 104-112 and accompanying text.

11. See *infra* Part IV.

12. See 18 U.S.C. § 3593(c). See *infra* notes 99-109 and accompanying text.

written, the statutory provision that governs the admission of evidence at capital sentencings—18 U.S.C. § 3593(c)<sup>13</sup>—is unconstitutional on its face as it applies to death eligibility determinations—and cannot be salvaged by judicial construction.

Specifically, we will argue that the Supreme Court’s holding in *Ring*,<sup>14</sup> read in conjunction with the Court’s holding in *Crawford*,<sup>15</sup> necessarily renders 18 U.S.C. § 3593(c) of the FDPA unconstitutional, because it violates the Confrontation Clause of the Sixth Amendment.<sup>16</sup> Furthermore, notwithstanding judicial efforts to ameliorate this constitutional quandary, application of the cardinal canons of statutory construction inexorably leads to the conclusion that the doctrine of constitutional avoidance may not be invoked to rescue the statute. Indeed, it is our position that judicial attempts to salvage the constitutionality of that provision through trifurcating federal capital trials<sup>17</sup>—i.e., subdividing the sentencing proceedings of a federal capital trial into an eligibility phase (in which the defendant is afforded a Sixth Amendment right of confrontation) and a separate sentence-selection phase—likewise run afoul of the Constitution. That being said, we submit that, consistent with the Constitution, the only viable way in which the aforementioned procedural deficiencies may be corrected is legislatively mandated trifurcation.

In reaching our conclusion, this article will explore, *inter alia*, the extensions of our constitutionally grounded right of confrontation; that is, “[i]n all criminal prosecutions” the Confrontation Clause of the Sixth Amendment unequivocally grants the accused the right “to be confronted with the witnesses against him.”<sup>18</sup> Per that language, the accused is guaranteed the right of confrontation during every stage of his or her criminal prosecution,<sup>19</sup> which, at least as a general proposition, affords the accused two principle procedural rights that are crucial to our

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13. For the relevant statutory text, see *supra* note 1 and accompanying text.

14. *Ring v. Arizona*, 536 U.S. 584 (2002). See *infra* notes 122-127 and accompanying text.

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

16. See *id.* at 68.

17. See *infra* notes 207-216 and accompanying text.

18. U.S. CONST. amend. VI. See, e.g. *United States v. Rondeau*, 430 F.3d 44, 47 (1st Cir. 2005) (explaining that “[t]he Confrontation Clause provides defendants with the right to confront adverse witnesses ‘[i]n criminal prosecutions.’”) (citing U.S. CONST. amend. VI).

19. See U.S. CONST. amend. VI. See also FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 35 (University of Kansas Press 1951) (“The Sixth Amendment, as proposed by Congress and ratified by the states, enumerated certain features of procedure to which an accused should be entitled ‘in all criminal prosecutions.’”).

position: the right to literally confront adverse witnesses at trial, face-to-face, and the right to cross-examine those witnesses.<sup>20</sup>

Furthermore, at least insofar as the government may seek to adduce the testimonial statements of an out-of-court declarant (i.e., testimonial hearsay<sup>21</sup>), if the Sixth Amendment right of confrontation applies, then the additional procedural strictures mandated by Supreme Court's holding in *Crawford v. Washington* also apply, providing criminal defendants with greatly enhanced procedural protections.<sup>22</sup> Those strictures place a per se bar on the admission of uncross-examined, testimonial hearsay—presently admissible under 18 U.S.C. § 3593(c)—thereby precluding the admission of such statements save for when the government can establish not only that the declarant is unavailable but also that the defendant previously had an opportunity to cross-examine her.<sup>23</sup> Additionally, and quite importantly, *Crawford's* holding substantially does away with the idea of a judge acting as a gatekeeper in determining the reliability of out-of-court statements for purposes of admissibility. In fact, *Crawford's* holding, in large measure, rests on the premise that “[a]dmitting [testimonial hearsay] statements deemed reliable by a judge is fundamentally at odds with the [Sixth Amendment] right of confrontation.”<sup>24</sup> Without the support of the judge-as-constitutional-gatekeeper rationale, often invoked to uphold the constitutionality of 18 U.S.C. § 3593(c), that provision falls further into constitutional oblivion.

We are not saying, as a normative matter, that the Sixth Amendment right of confrontation *should* apply to capital sentencing proceedings for public policy or moral reasons, nor are we merely sketching a prescriptive solution to a practical problem (e.g., how to best ensure that evidence *is* reliable or accurate). Likewise, this article does

20. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (plurality opinion). *See, e.g., Kirby v. United States*, 174 U.S. 47, 55 (1899) (“A fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine . . .”).

21. For a good definition of testimonial hearsay, see *Crawford*, 541 U.S. at 50-52. *See also Davis v. Washington*, 547 U.S. 813 (2006) (further discussing and elaborating on the concept). *See generally* FED. R. EVID. 801 (c) (Defining “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”).

22. *See Crawford*, 541 U.S. 36.

23. *See id.* at 68-69. *See also Rondeau*, 430 F.3d at 47 (“In *Crawford*, the Supreme Court held that, in a criminal prosecution, the Sixth Amendment forbids the introduction of an out-of-court testimonial statement unless the witness is unavailable and the defendant has previously had an opportunity to cross-examine her.”) (citation omitted) (emphasis added).

24. *Crawford*, 541 U.S. at 61.

not seek to address the question whether the Constitution requires that the Federal Rules of Evidence apply to the eligibility phase of federal capital trials, nor does it discuss the scope of a capital defendant's due process rights (or, for that matter, other Sixth Amendment rights) at sentencing. We take no position on the morality of capital punishment generally. Furthermore, if, as we argue, 18 U.S.C. § 3593(c), runs afoul of the Confrontation Clause on its face, the question of its severability from the remainder of the FDPA is beyond the scope of this article.<sup>25</sup>

It is worth noting that other factors militate toward our conclusion that—at a *minimum*—the Sixth Amendment right of confrontation applies to the separate eligibility decision required by not only the FDPA but also the Supreme Court's Eighth Amendment jurisprudence:<sup>26</sup> the history of the right of confrontation and the Framers' intent to enshrine it in the Bill of Rights;<sup>27</sup> the fact that the Court has held other Sixth Amendment rights—also limited in scope by the phrase “[i]n all criminal prosecutions”<sup>28</sup>—applicable at sentencing (capital or otherwise),<sup>29</sup> despite the absence of a principled ground on which a disparity in scope could rest;<sup>30</sup> our history of conducting unitary capital trials in which the sentencing decision was, in effect, merged with and collapsed into the determination of guilt, where a capital defendant was thereby *afforded full trial rights throughout*;<sup>31</sup> and the Supreme Court's frequent emphasis

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25. See generally *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987); *United States v. Jackson*, 390 U.S. 570, 585 (1968).

26. See John G. Douglas, *supra* note 8, at 1994-95; *Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998); *Furman v. Georgia*, 408 U.S. 238 (1972).

27. See *infra* notes 163-174 and accompanying text.

28. See U.S. CONST. amend. VI.

29. See *infra* note 141.

30. See *infra* note 129 and accompanying text.

31. See Douglas, *supra* note 8, at 1967 (discussing the “history of unified trials in the era of the Framers, where guilt and death were determined simultaneously by a single jury verdict”). While the Framers may have been willing to allow for the exercise of judicial discretion in sentencing decisions that did not involve the possibility of a death sentence, which is consistent with the common-law tradition for adjudicating misdemeanors, the available evidence strongly suggests that the Framers felt it necessary to accord capital crimes differing treatment: “To them, the question of guilt for a capital crime and the question of death remained inseparable. And they left both questions to juries in the context of a trial featuring full adversarial rights.” *Id.* at 2017-18 (emphasis added). As Professor John Langbein observes, as a practical matter, in English capital trials, the sentencing decision—i.e., whether the defendant would live or die—was essentially “[structur[ed] . . . as an incident of the trial . . . .” JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 59 (Oxford University Press 2003). The legal landscape was substantially similar in colonial America. See *United States v. Wise*, 976 F.2d 393, 407 (8th Cir. 1992) (Arnold, C.J., concurring in part and dissenting in part) (“[T]he Framers of the Bill of Rights knew nothing of sentencing proceedings separate from the trial itself.”). See also *Woodson v. North Carolina*, 428

on the need for enhanced reliability in capital sentencing proceedings.<sup>32</sup> But detailed consideration of those additional arguments will not be discussed in this article. Rather, we focus on the narrowly defined issue presented: the constitutionality of 18 U.S.C. § 3593(c)'s relaxed evidentiary standard.

In Part I, we will attempt to frame the problem we believe needs to be addressed: the manner in which the relaxed evidentiary standard 18 U.S.C. § 3593(c) prescribes deprives capital defendants of the full panoply of their Sixth Amendment confrontation rights during the litigation of facts that are the functional equivalent of elements of federal capital murder, *inter alia*, by allowing the trial judge to admit testimonial hearsay at his or her discretion.<sup>33</sup> In Part II, we will explore the Supreme Court's recent forays into what we shall call, for the purpose of this article, "functional equivalence jurisprudence," to illustrate the constitutional significance of equating statutorily prescribed aggravating factors with elements of an offense, and its resonance with some federal district courts.<sup>34</sup> In Part III, we will advance an alternative argument for applying the right of confrontation to the eligibility determination based on a careful reading of the text of the Sixth Amendment.<sup>35</sup> In Part IV, we will sketch the history of the Sixth Amendment right of confrontation and explore the manner in which the Court's holding in *Crawford* marked a sea change in its Sixth Amendment jurisprudence.<sup>36</sup> In Part V, we will turn to *Crawford's* effect on 18 U.S.C. § 3593(c).<sup>37</sup> In Part VI, we will explore the recent phenomenon of judicially imposed trifurcation in an effort to address the FDPA's constitutional shortcomings, and we will argue that that practice, whether by motion or *sua sponte*, is likewise unconstitutional.<sup>38</sup> Finally, in Part VII, we will propose a pragmatic solution to this constitutional quandary: legislatively mandated trifurcation.<sup>39</sup>

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U.S. 280, 289 (1976) (plurality opinion). *See generally* HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 6-11 (Oxford University Press, 3rd ed. 1982) (1964).

32. *See infra* note 203 and accompanying text.

33. *See infra* notes 40-113 and accompanying text.

34. *See infra* notes 114-149 and accompanying text.

35. *See infra* notes 150-162 and accompanying text.

36. *See infra* notes 163-191 and accompanying text.

37. *See infra* notes 192-206 and accompanying text.

38. *See infra* notes 207-245 and accompanying text.

39. *See infra* notes 246-253 and accompanying text.



## II. FRAMING THE PROBLEM

### A. United States v. Fields

In 2007, the Fifth Circuit, in essence, recognized the aforementioned incongruity in *United States v. Fields*.<sup>40</sup> The relevant facts before the *Fields* court can be summarized as follows: In the guilt-innocence phase of his trial, a jury had convicted Sherman Fields of a potentially capital offense; following the verdict, the government sought to establish that Fields should be put to death.<sup>41</sup> As part of its efforts at sentencing,<sup>42</sup> the government, *inter alia*, attempted to introduce the following out-of-court statements for the purpose of proving that Fields had, in fact, committed prior violent crimes:

(1) statements made about him by his mother and juvenile probation officers in various records introduced into evidence by a Juvenile Probation Department official; (2) statements made about him by corrections officers in prison records introduced into evidence by state prison officials; (3) statements made by officers in police reports introduced into evidence by someone other than the officer who had made the report; (4) a detective's description, based on the investigating officer's report, of the drive-by shooting that led to Fields's 1992 conviction of attempted murder; and (5) statements made by witnesses to police officers while the officers were investigating various past crimes in which Fields may have been involved but for which he was never charged (the statements being described in the officers' testimony).<sup>43</sup>

Fields's counsel objected on Confrontation Clause grounds; however, the trial court overruled the objection and admitted the aforementioned statements.<sup>44</sup> As a result, those statements were admitted to prove the truth of the matters asserted, even though the declarants never testified, and the veracity of their statements was thus never tested through cross-examination. Based, at least in part, on that uncross-examined hearsay evidence, the jury recommended that Fields

40. 483 F.3d 313, 325 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1065, 169 L.Ed.2d 814 (2008).

41. *See id.* at 324-26.

42. As the *Fields* court noted, the sentencing phase of Fields's trial was conducted as "a typical one-part sentencing proceeding"; in other words, "[t]he court did not hold separate hearings on death eligibility and [sentence] selection, as some courts have recently done in 'trifurcated' capital trials," which are discussed further *infra*. *Id.* at 324, n.4. *See infra* notes 79-81 and accompanying text.

43. *Fields*, 483 F.3d at 324-25.

44. *Id.* at 324.

receive a death sentence; the court agreed and sentenced Fields to death.<sup>45</sup>

The principal issue before the *Fields* court was whether, in light of the Supreme Court's holding in *Crawford v. Washington*,<sup>46</sup> the admission of potentially testimonial hearsay at Fields's capital sentencing proceeding impermissibly impinged upon his Sixth Amendment right of confrontation.<sup>47</sup> Over a vigorous dissent, the majority in *Fields* concluded, *inter alia*, that "in capital cases . . . the Confrontation Clause does not operate to bar the admission of testimony relevant *only* to a capital sentencing authority's *selection decision*."<sup>48</sup> Relying heavily on *Williams v. New York*<sup>49</sup> and its progeny<sup>50</sup>—all of which, at least ostensibly, were decided under the rubric of due process—the *Fields* court reasoned that merely because "the Confrontation Clause is inapplicable to the presentation of testimony relevant *only* to the sentencing authority's [sentence-]selection decision . . . [it] does not doom defendants to being sentenced to death on the basis of unreliable hearsay evidence."<sup>51</sup>

45. *Id.*

46. 541 U.S. 36. *See infra* notes 180-187 and accompanying text.

47. *See Fields*, 483 F.3d at 324.

48. *See id.* at 326 (emphasis added).

49. 337 U.S. 241, 252 (1949) (holding that that the Due Process Clause of the Fourteenth Amendment did not "render[] a [death] sentence void merely because a judge [considered] additional out-of-court information" in deciding on the appropriate sentence). *See also* United States v. Wise, 976 F.2d 393, 408 (8th Cir. 1992) (Arnold, C.J., concurring in part and dissenting in part) ("Williams . . . is not a Confrontation Clause case at all. It is a due-process case from a state court . . ."). *See generally* Penny White, "He Said," "She Said," and *Issues of Life and Death: The Right To Confrontation At Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 402, 406 (2007) ("The authority relied upon most frequently by state and federal courts to reject the application of the [Sixth Amendment] right of confrontation at capital sentencing is the Supreme Court's 1949 decision in *Williams v. New York*."). As Professor Douglas laments, "*Williams* . . . placed capital sentencing outside the world of 'trial' procedure. The result has been a sentencing world with virtually no constitutional limits on hearsay, and with no constitutional assurance that a defendant facing death will be equipped with the basic tools of the adversarial process." Douglas, *supra* note 8, at 1983.

50. *See Fields*, 483 F.3d at 326-332. When the Supreme Court revisited the issue of capital defendants' confrontation rights at sentencing in *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion), Justice Stevens, writing for the plurality, opined: "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Id.* at 358. However, the *Gardner* Court refused to overrule *Williams*, instead electing to distinguish it. *See id.* at 356. *Cf.* *Specht v. Patterson*, 386 U.S. 605, 609-10 (1967) (holding that where a sentencing statute requires a judge to make factual determinations that are "not an ingredient of the offense charged" at sentencing, "[d]ue process . . . requires that [the defendant] . . . be confronted with witnesses against him, [and] have the right to cross-examine . . ."); *United States v. Mills*, 446 F. Supp. 2d 1115, 1125 (C.D. Cal. 2006) (noting that "*Specht* makes clear that some factfinding will give rise to confrontation rights").

51. *Fields*, 483 F.3d at 337 (emphasis added).

The *Fields* court posited that notwithstanding that the Confrontation Clause does not apply to capital sentencing proceedings, there are, nonetheless, some “constitutional limitations on the use of hearsay at such proceedings”—e.g., “[d]ue process requires that some minimal indicia of reliability accompany a hearsay statement.”<sup>52</sup> But with regard to the Sixth Amendment right of confrontation, the court opined: “[N]o other Sixth Amendment right has been applied (*vel non*) differently at capital sentencing from how it is applied at noncapital sentencing, there is little reason to establish divergent rules with regard to the confrontation right when the sentencing authority is selecting a sentence from within an authorized range.”<sup>53</sup>

In other words, because the challenged hearsay was presumably only relevant to the sentencing authority’s normative, morality-based decision of whether to impose a death sentence on a defendant—whose eligibility to receive that sentence had already been established (i.e., a death sentence was within the authorized range of penalties the jury could impose)—that defendant did not have a Sixth Amendment right to confrontation. By negative implication, then, the court’s opinion can be read to mean that if the challenged hearsay had been used to prove the underlying facts necessary to expose the defendant to the possibility of a death sentence—death eligibility—then the result may have been different.

Critical to the majority’s reasoning was the notion that the challenged hearsay statements had not been presented to prove the statutory aggravating factors that the government had alleged—proof of which is a condition precedent to triggering a defendant’s death-eligibility under the FDPA<sup>54</sup>—but rather were only germane to the government’s effort to establish additional, nonstatutory aggravating factors.<sup>55</sup> Therefore, according to the *Fields* majority, that evidence was only relevant to the jury’s sentence-selection decision.<sup>56</sup> But in

52. *Id.* at 337-38 (quoting *United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir. 1993)). *Cf.* *United States v. Tucker*, 404 U.S. 443, 447 (1972) (holding that a defendant cannot constitutionally be sentenced on the basis of “misinformation of constitutional magnitude”).

53. *Fields*, 483 F.3d at 332.

54. *See supra* notes 86-95 and accompanying text.

55. *See Fields*, 483 F.3d at 325 (“None of the challenged statements was presented as part of the government’s effort to establish the statutory aggravating factors that trigger death-eligibility under the [FDPA].”).

56. The *Fields* court opined:

The establishment of nonstatutory aggravating factors is neither necessary nor sufficient to authorize imposition of the death penalty. Nonstatutory aggravating factors may be considered by the jury in selecting an appropriate sentence once a defendant is found eligible for the death penalty, but they are not, and cannot be, used to determine that

concluding that the Confrontation Clause does not apply to the sentence-selection stage of federal capital sentencing proceedings, the *Fields* court recognized “a constitutionally significant distinction between a trial of the elements of an offense and the selection of an appropriate penalty from an available range once guilt has been determined . . . .”<sup>57</sup> Concordant with that notion, in a footnote, the majority unambiguously narrowed the scope of its holding: “[W]e decline to decide the applicability of the Confrontation Clause to the presentation of evidence at sentencing that is relevant only to death eligibility or to both eligibility and selection.”<sup>58</sup>

Although the *Fields* court explicitly declined to consider whether the Confrontation Clause applies to the eligibility phase of federal capital sentencing proceedings, in essence, the court intimated that it would.<sup>59</sup> This article addresses the question the *Fields* court left open: does the Sixth Amendment right of confrontation per *Crawford* apply to the eligibility determination in federal capital sentencing proceedings? As discussed *infra*, in light of recent Supreme Court precedent, we submit that it does.

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eligibility . . . .

*Id. But cf.* United States v. Johnson, 378 F. Supp. 2d 1051, 1056 (N.D. Iowa 2005)) (citing United States v. Johnson, 362 F. Supp. 2d 1043, 1109-10 (N.D. Iowa 2005) (recognizing that, as a practical matter, “if the jury is permitted to hear information on *all* of the factors [i.e., hear information relevant to the defendant’s death eligibility (statutory aggravating factors) *and* evidence relevant to the sentence-selection decision (e.g., non-statutory aggravating factors)] in one proceeding, the jury is reasonably likely to be misled into believing that *all* information is pertinent to the determination of *all* factors and the balance of factors”) (emphasis in original). See also *Simmons v. South Carolina*, 512 U.S. 154, 170-71 (1993).

57. *Fields*, 483 F.3d at 333. Recognizing the differences between those two aspects of the capital decision-making process, the Supreme Court has accorded “differing constitutional treatment” to the eligibility and sentence-selection determinations:

It is in regard to the eligibility phase that [the Supreme Court] ha[s] stressed the need for channeling and limiting the jury’s discretion to ensure that the death penalty is a[n] appropriate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, [the Court] ha[s] emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination.

*Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998) (Citing *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (plurality opinion)). See generally LINDA E. CARTER, UNDERSTANDING CAPITAL PUNISHMENT LAW 106, 117 (LexisNexis 2004) (discussing the constitutional distinction between the eligibility and sentence-selection determinations).

58. *Fields*, 483 F.3d at 326 n.7. In footnote 18, the *Fields* court reiterated that proposition: “Fields’s Confrontation Clause challenge relates only to evidence that the government introduced relevant to the jury’s ultimate selection decision. The applicability of the Confrontation Clause to the establishment of eligibility-triggering factors is therefore not a question squarely presented by this case, and we decline to resolve it definitively.” *Id.* at 331, n.18.

59. See *supra* notes 46-57 and accompanying text.

That conclusion, in turn, ineluctably leads to a follow-up question: Is the disparity in scope between the procedural protections guaranteed a criminal defendant by the Sixth Amendment right of confrontation and the—drastically reduced—procedural protections the FDPA affords capital defendants at sentencing reconcilable? Or, put differently, does the radical incongruity between the procedural rights enumerated in the Confrontation Clause, as defined by *Crawford*, and the procedural rights afforded capital defendants pursuant to the sentencing procedure prescribed by the FDPA render that statute's procedural framework facially unconstitutional? In our view, because the procedures delineated by 18 U.S.C. § 3593(c) eviscerate the procedural safeguards the Sixth Amendment right of confrontation guarantees defendants by ceding essentially unfettered discretion to the trial judge to admit testimonial hearsay while the functional equivalent of elements of a capital crime are still being litigated,<sup>60</sup> the answer is unequivocally yes.<sup>61</sup>

#### B. Previous Challenges to the Constitutionality of the FDPA

*United States v. Fields* was not the first case in which the issue of whether the admission of hearsay during the sentencing phase of capital trials pursuant to 18 U.S.C. § 3593(c) impermissibly impinged on the defendant's constitutional rights has been litigated.<sup>62</sup> For that matter, the constitutionality of the sentencing procedure the FDPA prescribes has been challenged on numerous occasions.<sup>63</sup> Thus far, the relaxed evidentiary standard 18 U.S.C. § 3593(c) prescribes has ultimately survived repeated constitutional challenges.<sup>64</sup> However, recent

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60. As Alexander Bunin observes, “[i]n a capital case, facts that make a defendant eligible for the death penalty are elements of the crime.” Bunin, *supra* note 8, 235. That being said, because the FDPA requires that the eligibility determination takes place in the context of sentencing, in effect, “some elements of capital murder are denied the procedural protections of a trial.” *Id.* at 233.

61. *But see* *United States v. Troya*, No. 06-80171-Cr, 2008 WL 4327004, at \*5 (S.D. Fla. 2008) (“A facial challenge to a federal statute is difficult to mount. To succeed on a facial challenge to the FDPA, [a] Defendant must establish that no set of circumstances exists under which the FDPA would be valid.”) (citations omitted). *See generally* *United States v. Salerno*, 481 U.S. 739, 745 (1987).

62. *See, e.g.,* *United States v. Fell*, 360 F.3d 135 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 369, 543 U.S. 946, 160 L.Ed.2d 259, on remand, 372 F. Supp. 2d 753 (rejecting a post-*Ring*, pre-*Crawford* facial challenge to the constitutionality of the FDPA); *United States v. Mills*, 446 F. Supp. 2d 1115 (C.D. Cal. 2006); *Szabo v. Walls*, 313 F.3d 392 (7th Cir. 2002).

63. *See* Linda E. Jackson, *Be Careful What You Wish For: The Constitutionality of the Federal Death Penalty Act After Ring v. Arizona*, 43 BRANDEIS L.J. 79, 79-80 (2004) (noting the prevalence of litigation challenging the constitutionality of the FDPA's relaxed evidentiary standard at sentencing). *See infra* note 64 and accompanying text.

64. *See, e.g.,* *Fell*, 360 F.3d at 145-46; *United States v. Battle*, 264 F. Supp. 2d 1088 (N.D. Ga. 2003) (holding, *inter alia*, that the FDPA's relaxed evidentiary standard used in the sentencing

jurisprudential developments (i.e., *Crawford*) have, at minimum, cast doubt on the continued viability of that provision.<sup>65</sup> Indeed, even prior to *Crawford*, the evolving jurisprudential landscape led at least one federal district court to conclude that the provision was *facially* unconstitutional.<sup>66</sup>

The Supreme Court has never directly addressed the applicability of the Confrontation Clause to capital sentencing proceedings.<sup>67</sup> Additionally, the Supreme Court's holding in *Crawford*, the most recent seminal right-of-confrontation case, did nothing to clear up this ambiguity, declining to address the scope of the Confrontation Clause.<sup>68</sup> Consequently, there is a significant divergence of authority over the applicability of the Confrontation Clause to capital sentencing proceedings.<sup>69</sup> To date, the Supreme Court has denied certiorari in

phase of a capital trial did not violate the Confrontation Clause); *United States v. Cooper*, 91 F. Supp.2d 90, 98 (D.C. 2000); *United States v. Frank*, 8 F. Supp. 2d 253, 267-71 (S.D.N.Y. 1998); *United States v. Nguyen*, 928 F. Supp. 1525, 1546-47 (D. Kan. 1996); *United States v. McVeigh*, 944 F.Supp. 1478, 1487 (D. Colo. 1996); *United States v. Davis*, No. CR.A.01-282, 2003 WL 1837701, at \*11 (E.D. La. 2003); *United States v. Haynes*, 269 F. Supp. 2d 970, 983-87 (W.D. Tenn. 2003); *United States v. Regan*, 221 F. Supp. 2d 672, 681-83 (E.D. Va. 2002); *United States v. Miner*, 176 F. Supp. 2d 424, 435-436 (W.D. Pa. 2001); *United States v. Johnson*, 362 F. Supp. 2d 1043, 1105 (N.D. Iowa 2005); *United States v. Matthews*, 246 F. Supp. 2d 137, 141-46 (N.D.N.Y. 2002); *United States v. Mikos*, No 02 CR 137-1, 2003 WL 22110948, at \*8 (N.D. Ill. 2003). *See also* *United States v. Green*, No. 5:06CR-19-R, 2008 WL 4000868, at \*11 (W.D. Ky. 2008) (observing an “overwhelming consensus among the federal courts that the relaxed evidentiary standard in § 3593(c) is not unconstitutional” and listing cases).

65. *See infra* notes 163-188 and accompanying text.

66. *See* *United States v. Fell*, 217 F. Supp. 2d 469, 474 (D. Vt. 2002), *vacated by* 360 F.3d 135 (2d Cir. 2004). *Accord* *United States v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002); *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002).

67. *See* *United States v. Kikumura*, 918 F.2d 1084, 1103 n.19 (3rd Cir. 1990) (recognizing that the Supreme Court has yet to explicitly decide whether the Confrontation Clause applies at sentencing); *Maynard v. Dixon*, 943 F.2d 407, 414 n.5 (4th Cir. 1991) (same); *Proffitt v. Wainright*, 685 F.2d 1227, 1253 (11th Cir. 1982) (same); *see also* *United States v. Higgs*, 353 F.3d 281, 324 (4th Cir. 2003) (“It is far from clear that the Confrontation Clause applies to a capital sentencing proceeding.”); *United States v. Gray*, 362 F. Supp. 2d 714, 725 (S.D. WV. 2005) (“The Supreme Court . . . has never decided whether sentencings are “criminal prosecutions” for Sixth Amendment purposes.”).

68. *See* *United States v. Katzopoulos*, 437 F.3d 569, 574 (6th Cir. 2006) (“An issue unaddressed by *Crawford* is whether the Sixth Amendment right to confront witnesses applies . . . at sentencing.”); *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005) (“[T]here is no precedent . . . from the Supreme Court establishing that the Confrontation Clause prohibits the admission of hearsay evidence at sentencing proceedings”).

69. *Compare* *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir.2002) (Sixth Amendment right of confrontation “applies through the finding of guilt, but not to sentencing, even when that sentence is the death penalty”); *State v. McGill*, 140 P.3d 930, 940-42 (Ariz. 2006) (*Crawford* applies to eligibility but not penalty phase of capital trial); *State v. Stephenson*, 195 S.W.3d 574, 590-91 (Tenn. 2006) (same), *with* *Rodgers v. State*, 948 So.2d 655, 663 (Fla. 2006) (holding that “a defendant’s rights under the Confrontation Clause apply to the guilt phase, the penalty phase, and

*United States v. Fell* (upholding the constitutionality of the FDPA post-*Ring*, pre-*Crawford*),<sup>70</sup> and, likewise, in *United States v. Fields*.<sup>71</sup> But it has never had occasion to directly confront the issue we raise in this article: whether, when read in conjunction with one another, the holdings in *Crawford* and *Ring* require the conclusion that the Confrontation Clause applies to the eligibility phase of capital trials conducted per 18 U.S.C. § 3593(c).

Prior to delving into the support for the aforementioned conclusion, let us begin with a descriptive overview of the FDPA. Interestingly, its foundational premise, followed by its procedural guidelines, will prove to be relevant in evaluating the application of principles drawn from *Crawford*, *Ring*, and, a necessary precursor to *Ring*, *Apprendi v. New Jersey*.<sup>72</sup>

### C. The FDPA: Design and Scope

Signed into law by President Clinton in 1994, the FDPA is part of an omnibus crime bill, the Violent Crime Control and Law Enforcement Act of 1994,<sup>73</sup> which was enacted by Congress to not only provide for an increased number of federal capital offenses but also expand the scope of the federal death penalty system.<sup>74</sup> Interestingly, while the FDPA dramatically expanded the number of federal capital crimes, it did not create entirely new crimes but rather made numerous preexisting crimes potentially capital offenses.<sup>75</sup> It can thus be described as “a sentencing

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sentencing,” and that *Crawford* applies to the penalty phase of a capital trial), *cert. denied*, 128 S.Ct. 59, 169 L.Ed.2d 50 (2007); *Rousseau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005), *cert. denied*, 126 S.Ct. 2982 (2006); *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93, 115-16 (N.C. 2004) (holding that, in light of *Crawford*, the introduction of testimonial hearsay at the sentencing phase of a capital trial violated the Confrontation Clause); *Proffitt*, 685 F.2d at 1254-55 (11th Cir. 1982) (recognizing defendants’ right to cross-examination in the sentencing phase of a capital trial); *Rodriguez v. State*, 753 So.2d 29, 43 (Fla. 2000) (stating that the Sixth Amendment right of confrontation applies to all three phases of a capital trial).

70. See *supra* note 62.

71. See *supra* note 40.

72. 530 U.S. 466 (2000).

73. RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 871 (Carolina Academic Press, 2nd ed. 2001).

74. Joshua Herman, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1799-1800 (2004). See COYNE, *supra* note 73, at 871 (explaining that “this expansion was accomplished by (1) creating new federal crimes which are punishable by death; (2) adding death as a sentencing option to recently-created federal offenses; and (3) resurrecting dormant, pre-*Furman* death penalty statutes by purporting to cure their constitutional deficiencies”).

75. As Joshua Herman explains:

The FDPA expanded the death penalty to sixty different crimes, but this does not mean

statute under which certain enumerated federal crimes are eligible for capital punishment.”<sup>76</sup>

The procedures delineated by the FDPA will apply to “any [federal] offense for which a sentence of death is provided.”<sup>77</sup> 18 U.S.C. § 3593(b) of the FDPA, which outlines the basic procedures governing federal capital trials, requires that prior to a determination of the appropriate sentence the jury first adjudicate the defendant’s guilt.<sup>78</sup> Pursuant to the FDPA, capital trials are thus bifurcated into two separate and distinct phases: a guilt-innocence phase, in which “the jury determines whether the defendant is guilty of the underlying capital offense,” and the sentencing (or penalty) phase.<sup>79</sup> At the conclusion of the guilt-innocence phase of federal capital trials, the defendant is not yet subject to the death penalty—the maximum sentence that may be imposed at that juncture is life in prison.<sup>80</sup> It is at this point—after the defendant has been convicted of the predicate offense during the guilt-innocence phase of his or her trial—that the sentencing (penalty) phase commences.<sup>81</sup>

#### *D. Outlining the FDPA’s Penalty Phase*

There are two distinct components of the penalty phase: a determination of whether the defendant is eligible, under the FDPA, to receive a death sentence (i.e., “whether the range of possible punishments includes death”) and, if so, a determination of whether the

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that the FDPA created sixty crimes. One way to consider the effect the FDPA has on existing substantive criminal law is that it “merely applies its procedural provisions to these crimes, making them death eligible.” For example, the FDPA transformed carjacking into a capital crime by adding the death penalty as the maximum punishment and not by changing the elements of carjacking.

Herman, *supra* note 74, at 1800-01.

76. Bunin, *supra* note 8, at 268; *see* 18 U.S.C. § 3592 (2000) (listing the aggravating factors to be considered in determining whether a defendant is eligible for the death penalty as well as potential countervailing mitigating factors weighing against the conclusion that the defendant should be sentenced to death).

77. 18 U.S.C.A. § 3591(a)(2). It should be noted that other federal statutes that authorize the imposition of capital punishment, e.g., 21 U.S.C. § 848 (1998), prescribe a procedural framework that is identical to that supplied by the FDPA. *See* United States v. Jordan, 357 F. Supp. 2d 889, 894 n.6 (E.D. Va. 2005).

78. 18 U.S.C. § 3593(b).

79. Houser, *supra* note 4, at 352-53.

80. *Id.* at 352. *See* 18 U.S.C. § 3593(b).

81. *See* 18 U.S.C. § 3593(b) (prescribing a separate sentencing hearing to determine the appropriate punishment for defendants who are convicted of or plead guilty to the predicate capital offense).



imposition of a death sentence is appropriate.<sup>82</sup> The FDPA prescribes the procedures that govern the entire penalty phase of all federal capital trials,<sup>83</sup> i.e., both the eligibility determination and sentence-selection components of federal capital sentencing hearings.

The FDPA contemplates a unitary sentencing proceeding, consolidating the eligibility determination and sentence-selection determination into a single hearing.<sup>84</sup> The same procedural framework applies to both determinations.<sup>85</sup> However, the nature of these two aspects of the capital decision-making process—i.e., the determination of whether a defendant who has been convicted of the underlying offense is even eligible to receive a death sentence and, if so, the selection of the appropriate sentence—is substantially different.<sup>86</sup> The eligibility determination involves a fact-based legal determination (whether, based on the facts of this case, this defendant *may* be sentenced to death under this statute). The sentence-selection decision, on the other hand, entails a moral, normative assessment of the defendant's culpability (whether this defendant *should* receive—that is, deserves—a death sentence). Notwithstanding the fundamental differences between the two inquiries, given that the FDPA prescribes a unitary sentencing proceeding that subsumes within it both determinations, evidence relevant to each facet of the penalty phase is received simultaneously.<sup>87</sup>

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82. Houser, *supra* note 4, at 353. See 18 U.S.C. § 3593(c) (2000) (discussing the manner in which a sentencing hearing is conducted); *supra* note 79 and accompanying text.

83. See *United States v. Mills*, 446 F. Supp. 2d 1115, 1119 (C.D. Cal. 2006); 18 U.S.C. § 3593.

84. See, e.g., 18 U.S.C. § 3593(b) (“the judge . . . shall conduct a separate sentencing hearing to determine the punishment to be imposed . . .”) (emphasis added); 18 U.S.C. § 3593(c) (2000) (“[a]t the sentencing hearing”) (emphasis added). See *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1222 (D. Colo. 2007) (noting that the statute neither authorizes nor even mentions a bifurcated sentencing proceeding); *Mills*, 446 F. Supp. 2d at 1131 n.16 (noting that “dividing the penalty phase [is] a procedure not foreseen by the FDPA”). *But cf.* *United States v. Bodkins*, No. CRIM.A.4:04CR70083, 2005 WL 1118158, \*7 (W.D. Va. 2005) (“A bifurcated process is not required by 18 U.S.C. § 3593(c) . . . . In fact, the statute contemplates the possibility of a unitary proceeding . . . . Nevertheless, neither does the statute forbid a bifurcated proceeding.”).

85. See generally *Mills*, 446 F. Supp. 2d at 1119-21.

86. See *Buchanan*, 522 U.S. at 275 (“In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty . . . . In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant.”). See also *United States v. Jones*, 132 F.3d 232, 240 (5th Cir. 1998), *aff’d*, 527 U.S. 373 (1999) (“After finding the existence of at least one statutory aggravating factor [under the FDPA], the jury may consider the existence of nonstatutory aggravating factors for which notice has been given by the government”).

87. See, e.g., *Mills*, 446 F. Supp. 2d at 1119-20; see 18 U.S.C. § 3593. This fact is relevant to the issues raised by this article because it plays significantly into the remedy we will propose, discussed *infra*.

### *E. The Eligibility Determination and its Statutory Factors*

The threshold question a jury must answer during the sentencing phase of a federal capital trial is whether the defendant, after being convicted of the predicate capital offense, meets the statutory criteria to make him or her eligible for capital punishment—the eligibility stage of the sentencing proceeding.<sup>88</sup> As a condition precedent to receiving a death sentence, the defendant must be death-eligible.<sup>89</sup> That determination involves a two-prong inquiry that is litigated in an adversarial setting as part of the sentencing proceeding.

Before a federal capital defendant is eligible to receive a death sentence, the government must first establish beyond a reasonable doubt that the defendant committed the predicate offense with the requisite *mens rea* by proving a statutory intent factor.<sup>90</sup> Second, the government must establish at least one statutory aggravating factor beyond a reasonable doubt.<sup>91</sup> Therefore, as Alexander Bunin observes, “The effect of the [FDPA] is that a defendant is not eligible for the federal death penalty until a jury has found, beyond a reasonable doubt, the culpable mental state and at least one statutory aggravating factor.”<sup>92</sup>

It follows, then, that until the jury determines that the government has met its burden of proof in the eligibility phase, the maximum punishment that a defendant who has been convicted of a predicate offense faces is life in prison.<sup>93</sup> As a result, both the statutory intent factor and the statutory aggravating factor can fairly be described as “*elements of federal capital murder*”<sup>94</sup>—or, at least, their “functional equivalent.”<sup>95</sup>

88. See Bunin, *supra* note 8, at 268-69; see also *Mills*, 446 F. Supp. 2d at 1119-20 (“Upon finding the intent factor and one statutory aggravating factor, a defendant becomes ‘eligible’ for the death penalty.”).

89. See generally *United States v. Mayhew*, 380 F. Supp. 2d 936, 937-42 (S.D. Ohio 2005).

90. 18 U.S.C. § 3591(a)(2) (2000) (prescribing the culpable mental states that may make a defendant eligible for the death penalty under the FDPA).

91. 18 U.S.C. § 3593(c)-(e). See, e.g., *United States v. Lentz*, 225 F. Supp. 2d 672, 682 (E.D. Va. 2002) (the court explained that “the Defendant could not be sentenced to death based solely upon the jurors’ finding of non-statutory aggravating factors”).

92. Bunin, *supra* note 8, at 268. See *United States v. Fell*, 372 F. Supp. 2d 753, 762-63 (D. Vt. 2005) (outlining the government’s burden during the eligibility phase).

93. 18 U.S.C. § 3593(d) (“If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.”). See *supra* note 83 and accompanying text.

94. Bunin, *supra* note 8, at 268 (emphasis added).

95. See *Ring v. Arizona*, 536 U.S. 584, 605-09 (2002) (explaining that aggravating circumstances operate as the “functional equivalent” of elements of a capital offense).

Due to its adversarial nature, the penalty phase of a federal capital trial (and therefore the eligibility determination), in many respects, resembles the guilt-innocence phase.<sup>96</sup> As the dissent in *Fields* observed, the penalty phase of capital sentencing proceedings conducted under the FDPA conspicuously mirrors the characteristics of a criminal trial in several ways:

The FDPA provides for jury sentencing. . . . Both sides are represented by counsel and present evidence; the Court instructs the jury; the Government, and then defense counsel, presents closing argument; the Government must prove aggravating factors beyond a reasonable doubt; the jury returns a formal verdict, and its verdict must be unanimous.<sup>97</sup>

Also, like a criminal trial, the eligibility determination of a federal capital sentencing proceeding, in particular, requires the jury to make significant factual determinations,<sup>98</sup> as discussed *supra*: (1) whether the Government has established the statutory intent factor beyond a reasonable doubt;<sup>99</sup> and (2) whether the Government has proven beyond a reasonable doubt the existence of at least one statutory aggravating factor.<sup>100</sup>

Notwithstanding this very trial-like proceeding, during the penalty phase of a federal capital trial, “a defendant facing the death penalty is afforded fewer procedural protections than most defendants charged with simple misdemeanors.”<sup>101</sup> As to the right of confrontation, Professor Douglas put it this way: “[W]hen it comes to confrontation, we now have a sentencing world that accords a . . . criminal defendant

96. See 18 U.S.C. § 3593(b)-(d). See also *United States v. Fields*, 483 F.3d 313, 371-72 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1065, 169 L.Ed.2d 814 (2008) (Benavides, C.J., dissenting) (for a good discussion of the similarities between the guilt-innocence phase and the penalty phase of federal capital trials).

97. *Fields*, 483 F.3d at 372 (Benavides, C.J., dissenting) (citing 18 U.S.C. § 3593(b)). See 18 U.S.C. § 3593(b). See also *United States v. Sablan*, No. 00-00531, 2008 WL 700172, at \*2, 75 Fed. R. Evid. Serv. 1187 (D. Colo. 2008) (“Under the FDPA, there are trial-like procedures that require specific findings by the jury, including not only the existence of the statutory aggravating factors (the eligibility phase) but also the existence of nonstatutory aggravating factors which must be proved beyond a reasonable doubt.”).

98. Under the FDPA, a jury usually conducts the factfinding that takes place during the sentencing phase. The defendant has a statutory right to a jury determination regarding both his or her death eligibility and the appropriate sentence; however, a jury is not required, and the defendant may waive this right. With the permission of the government, a judge may make both determinations. See 18 U.S.C. § 3593 (c).

99. See 18 U.S.C. § 3591(a) (2).

100. See 18 U.S.C. § 3593 (c)-(d).

101. Houser, *supra* note 4, at 351 (2007). See 18 U.S.C. § 3593(c).

facing death no more procedural rights than we accord a civil defendant contesting monetary damages.”<sup>102</sup>

Indeed, the sentencing procedure prescribed by the FDPA explicitly dispenses with the formal rules of evidence. In other words, during the penalty phase of federal capital trials, the government need not adhere to the strictures imposed by the Federal Rules of Evidence.<sup>103</sup> During the sentencing phase of a federal capital trial, 18 U.S.C. § 3593(c), by its terms, authorizes judges, subject only to a limited balancing test and the trial judge’s discretion, to admit *any* information that is relevant to an aggravating factor.<sup>104</sup> The statutory rubric delineated by 18 U.S.C. § 3593(c) only circumscribes the government’s ability to offer evidence that is prejudicial, confusing, or misleading, thereby ceding to federal judges substantial discretion regarding the type of evidence they may admit during this stage of federal capital trials.<sup>105</sup>

This relaxed evidentiary standard prescribed by 18 U.S.C. § 3593(c) has led to a disturbing result: in the sentencing phase of federal capital cases the government has been permitted to adduce as evidence “statements of witnesses who neither appear nor are cross-examined.”<sup>106</sup> In the sentencing phase of federal capital trials conducted under the FDPA, for example, courts have allowed the government to elicit third-party testimony regarding the statements of an unavailable witness,<sup>107</sup> as well as testimony from a police officer as to what others had told him or her about the defendant’s alleged conduct or uncharged prior criminal activity.<sup>108</sup> In a similar vein, transcripts of witnesses’ testimony have

102. Douglas, *supra* note 8, at 1983. See 18 U.S.C. § 3593(c).

103. See 18 U.S.C. § 3593(c).

104. 18 U.S.C. § 3593(c). See *United States v. Lee*, 274 F.3d 485, 494 (8th Cir. 2001) (“The Federal Death Penalty Act . . . erects very low barriers to the admission of evidence at capital sentencing hearings.”).

105. See 18 U.S.C. § 3593(c).

106. White, *supra* note 49, at 392.

107. *Id.* at 390 (2007). See, e.g., *United States v. Brown*, 441 F.3d 1330, 1360-61 (11th Cir. 2006) (the court applied the Confrontation Clause per *Crawford* but yet allowed a witness to testify to the contents of a discussion she had with the victim’s husband, reasoning that those statements were nontestimonial); *United States v. Fell*, 217 F. Supp. 2d 469, 485 (D. Vt. 2002) (witness was permitted to testify to statements made by a deceased codefendant); *United States v. Johnson*, 378 F. Supp. 2d 1051, 1054-62 (N.D. Iowa 2005) (the court allowed testimony by jailhouse informant regarding what the defendant’s former boyfriend told him about her involvement in the charged crime).

108. See, e.g., *United States v. Fields*, 483 F.3d 313, 325 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1065, 169 L.Ed.2d 814 (2008) (During the sentencing phase of Fields’s trial, the court admitted “statements made by witnesses to police officers while the officers were investigating various past crimes in which Fields may have been involved but for which he was never charged [the statements being described in the officers’ testimony].”); *Chandler v. Moore*, 240 F.3d 907, 918 (11th Cir. 2001); *United States v. Grande*, 353 F. Supp. 2d 623, 635-38 (E.D. Va. 2005). This

been admitted over Confrontation Clause objections.<sup>109</sup> Consequently, the government has been able to establish, beyond a reasonable doubt no less, the death eligibility of federal capital defendants based, at least in part, on statements of declarants whom the defendant has not had the opportunity to cross-examine.

The allowance of the aforementioned evidence within the FDPA's procedural mandate generally stems from the significantly limited scope of a defendant's confrontation rights in sentencing proceedings.<sup>110</sup> However, in light of the fact that the sentencing hearing is a forum in which the litigation of "aggravating factors [that] operate as 'the functional equivalent of . . . element[s] of . . . [the] greater offense' " of federal capital murder takes place<sup>111</sup>—and, therefore, involves more than just a sentence-selection decision<sup>112</sup>—a failure to decouple the eligibility determination from the sentence selection, for constitutional purposes, renders hollow more recent landmark Supreme Court precedent, tracing its genesis to *Apprendi v. New Jersey*.<sup>113</sup>

### III. THE CONCEPT OF "FUNCTIONAL EQUIVALENCE" AT SENTENCING

#### A. The Landmark Decisions of *Apprendi* and *Ring*

*Apprendi* involved a challenge to a New Jersey statute that, after a defendant had been convicted of a qualifying predicate offense under a separate statute, allowed the trial judge to enhance that defendant's

problem is not confined to federal capital trials. See, e.g., *People v. Moore*, 662 N.E.2d 1215, 1232-33 (Ill. 1996) (law enforcement officer permitted to testify as to what a correctional officer had told him about defendant's propensity for violence). But see *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93, 115-16 (N.C. 2004) (in a capital sentencing context, the court applied the Confrontation Clause, as interpreted by *Crawford*, and concluded that a police officer's testimony as to statements by an alleged victim of the defendant regarding his alleged prior criminal conduct were testimonial and thus inadmissible); *Rousseau v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005), cert. denied, 126 S.Ct. 2982 (2006).

109. See *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002); *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1387-88 (7th Cir. 1994).

110. See, e.g., *United States v. Cantellano*, 430 F.3d 1142, 1146 (11th Cir. 2005) (declining to extend *Crawford* to non-capital sentencing proceedings, the court opined that "[t]he right to confrontation is not a sentencing right"); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005), cert. denied, 546 U.S. 1024, 126 S.Ct. 671, 163 L.Ed.2d 541 (2005) (observing that neither the Confrontation Clause nor *Crawford* apply at sentencing). See *White*, supra note 49, at 402. See also *Douglas*, supra note 8, at 1981 (The Federal Death Penalty Act (FDPA) of 1994 likewise codifies Williams for federal capital cases.)

111. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)). See *Bunin*, supra note 8, at 235 (pointing out that aggravating factors are, in reality, elements of federal capital murder).

112. See *infra* notes 122-143 and accompanying text.

113. 530 U.S. 466 (2000).

sentence if he or she concluded that the underlying offense constituted a hate crime.<sup>114</sup> The New Jersey statute prescribed a sentencing procedure whereby the trial judge could impose a sentencing enhancement if he or she found by preponderant evidence that “[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.”<sup>115</sup> In striking down New Jersey’s sentencing scheme, the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>116</sup>

The Court endorsed the view that “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.”<sup>117</sup> In reaching that conclusion, the Court noted that a survey of the historical record evinces a single, recurring theme: “The judge’s role in sentencing is constrained at its outer limits by the facts . . . found by the jury. [F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense.”<sup>118</sup>

114. See *Apprendi*, 530 U.S. at 468-75, 492-93.

115. *Id.* at 468-69.

116. *Id.* at 490. It is worth mentioning that the Court did not decide *Apprendi* in a jurisprudential vacuum. In *Jones v. United States*, 526 U.S. 227 (1999), a precursor to *Apprendi*, in construing a federal statute, the Court intimated the result in *Apprendi*, noting that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Id.* at 243, n.6. See generally Thomas Aumann, Note, *Death by Peers: The Extension of the Sixth Amendment to Capital Sentencing in Ring v. Arizona*, 34 LOY. U. CHI. L.J. 845, 871 (2003) (explaining that “the [*Jones*] Court created a ‘maximum punishment test’ to gauge whether a sentence enhancer should be treated as an element of a crime”).

117. *Apprendi*, 530 U.S. at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring) (alterations omitted)). See also *Jones*, 526 U.S. at 244 (In discussing “the history bearing on the Framers’ understanding of the Sixth Amendment,” the Court noted the Framers’ general intolerance of procedures that allowed for “exclusively judicial factfinding to peg penalty limits.”).

118. *Apprendi*, 530 U.S. at 483 n.10. The Court’s holding in *Apprendi* generated at least one facial challenge to an existing capital punishment scheme, e.g., *Oken v. State*, 786 A.2d 691 (Md. 2001), *cert. denied*, 535 U.S. 1074 (2002). In *Oken*, *inter alia*, the Maryland Court of Appeals cursorily rejected the argument that Maryland’s death penalty statute was rendered unconstitutional by the Court’s decision in *Apprendi*, because “*Apprendi* ‘represents a watershed rule of Constitutional law that fundamentally alters the standard of proof and the manner in which capital sentencing hearings are to be conducted in this State,’” as well as the argument that “[i]n light of *Apprendi*, the Maryland death penalty statute is unconstitutional on its face because it provides that a sentence of death may be imposed if the State proves that the aggravating factors outweigh any

In rejecting the notion that a legislature could dispense with defendants' Sixth Amendment right to a jury trial through categorizing additional post-conviction facts as "sentencing factors," the Court opined: "[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"<sup>119</sup> As the Court further elucidated:

[W]hen the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the *functional equivalent* of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.<sup>120</sup>

Accordingly, *Apprendi* announced a "bright-line rule" that expanded the scope of the Sixth Amendment right to a jury trial to include post-conviction proceedings—regardless of label—where factual findings, other than the fact of a prior conviction, are made that can increase the maximum penalty to which a defendant is exposed.<sup>121</sup>

Two years after *Apprendi* was decided, in *Ring v. Arizona*,<sup>122</sup> the Supreme Court extended *Apprendi*'s holding to apply to capital sentencing proceedings.<sup>123</sup> At issue in *Ring* was the scope of the "Sixth Amendment right to a jury trial in capital prosecutions."<sup>124</sup> In *Walton v. Arizona*, decided ten years before *Apprendi*, the Court had upheld an Arizona capital sentencing scheme on the ground that the State is not constitutionally "required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence

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mitigating factors by only a preponderance of the evidence." *Id.* at 196-98. After *Ring* and *Crawford*, however, the constitutional analysis has significantly changed, and there are additional grounds on which to mount a facial challenge of existing capital punishment schemes.

119. *Apprendi*, 530 U.S. at 494.

120. *Id.* (emphasis added). As the Court explained in *Blakely v. Washington*, 542 U.S. 296 (2004), "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis in original).

121. See *Cunningham v. California*, 549 U.S. 270, 288-89 (2007) (citation omitted). The *Cunningham* majority explained: "As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." *Id.* at 274-75 (citing *Apprendi*, 530 U.S. 466; accord *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely*, 542 U.S. 296; *United States v. Booker*, 543 U.S. 220 (2005)).

122. 536 U.S. 584.

123. *Id.* at 609.

124. *Id.* at 588.

of such circumstances.”<sup>125</sup> Under Arizona’s capital sentencing statute, “following a jury adjudication of a defendant’s guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required . . . for imposition of the death penalty.”<sup>126</sup> The Court in *Ring* struck down the Arizona capital punishment scheme, reasoning that “[b]ecause 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.”<sup>127</sup>

To be sure, on its face, *Ring*’s holding was limited to addressing the scope of the Sixth Amendment right to trial by jury; however, its holding has much broader implications.<sup>128</sup> Professor Douglas argues that where *Ring* applies, it not only grants capital defendants a Sixth Amendment right to a jury trial but also, *inter alia*, affords defendants a Sixth Amendment right of confrontation:

[T]his conclusion flows logically from *Ring*’s statement that a fact that elevates the potential maximum punishment is the “functional equivalent of an element” of a crime. Whatever else the Sixth Amendment covers, there can be little doubt that it applies, in all respects, at a proceeding before a jury where adversaries contest elements of a criminal offense.<sup>129</sup>

The plurality opinion in *Harris v. United States*,<sup>130</sup> decided by the Supreme Court the same day as *Ring*, bolsters that conclusion. In *Harris*, Justice Kennedy, writing for the plurality, explained: “[T]hose facts setting the outer limits of a sentence, and of the judicial power to

125. *Walton v. Arizona*, 497 U. S. 639, 649 (1990).

126. *Ring*, 536 U.S. at 588.

127. *Id.* at 609 (quoting *Apprendi v. New Jersey*, 530 U. S. 466, 494 n.19 (2000)).

128. See Douglas, *supra* note 8, at 1997. Cf. *Szabo v. Walls*, 313 F.3d 392, 399 (7th Cir. 2002) (“We need not attempt to predict how the Supreme Court’s jurisprudence will develop; *Apprendi* and *Ring* may portend more changes and may eventually be applied to the balancing phase of capital sentencing . . .”).

129. Douglas, *supra* note 8, at 1997. Professor Douglas’s argument makes an eminent amount of sense, because, as he points out, the Sixth Amendment’s text “suggests a distinction between the jury right, which by the terms of the Amendment applies to a ‘trial,’ and the rights to notice, confrontation, compulsory process, and counsel, which apply more broadly to the whole criminal prosecution . . . .” *Id.* at 2009. See *HELLER*, *supra* note 19, at 35 (observing that, as a textual matter, the ambit of the Sixth Amendment right of confrontation is limited by the phrase “in all criminal prosecutions”). In short, as a textual matter, if the narrower Sixth Amendment jury-trial right applies, it necessarily follows that the Confrontation Clause also applies.

130. 536 U.S. 545 (2002) (plurality opinion). *Harris* involved the issue of factfinding in the context of 218 U.S.C. § 924(e), which, like the statute at issue in *Apprendi*, provided for mandatory minimum sentences. *Id.*



impose it, are the elements of the crime for the purposes of the constitutional analysis.”<sup>131</sup> As Professor Douglas observes, his position also finds support in Justice Scalia’s majority opinion in *Schriro v. Summerlin*.<sup>132</sup> According to Justice Scalia’s reasoning, *Ring* stands for the broad proposition that where statutory aggravating factors, as a matter of law, limit “the class of death-eligible defendants, those aggravators *effectively* [are] elements for federal constitutional purposes, and [are therefore] subject to the procedural requirements the Constitution attaches to a trial of elements.”<sup>133</sup>

In a similar vein, Alexander Bunin submits that, at least as of 2003, there was a consensus understanding in the Supreme Court that “[l]ike it or not, statutory aggravating circumstances are capital elements.”<sup>134</sup> As Bunin points out,<sup>135</sup> in *Sattazahn v. Pennsylvania*, Justice Scalia’s opinion announcing the judgment of the Court, in which then-Chief Justice Renquist and Justice Thomas joined, explained that any facts that must be established as a condition precedent to imposing a death sentence are elements of capital murder—the particular label affixed to the proceeding in which that factfinding occurs is immaterial.<sup>136</sup> As Justice Scalia put it, “‘murder plus one or more aggravating circumstances’ is a separate offense from ‘murder’ *simpliciter*.”<sup>137</sup> As a corollary to that proposition, *Sattazahn* made it clear that any factfinding that is necessary to expose a capital defendant to the possibility of a death sentence must take place within a framework that provides the defendant with at least some trial protections—e.g., a jury must make

131. *Id.* at 567 (plurality opinion). In his concurring opinion in *Ring*, Justice Scalia put it thus: “[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane*—must be found by the jury beyond a reasonable doubt.” *Ring*, 536 U.S. at 610 (Scalia, J. concurring).

132. Douglas, *supra* note 8, at 1997-98.

133. *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) (citing *Ring*, 536 U.S. at 609) (emphasis in original).

134. Bunin, *supra* note 8, at 248. *But see* *State v. Mata*, 745 N.W.2d 229, 247 (Neb. 2008) (“We reaffirm our holding . . . that *Ring* is not a substantive change in Sixth Amendment requirements and did not make aggravating circumstances essential elements of capital murder.”).

135. Bunin, *supra* note 8, at 247.

136. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106-11 (2003) (plurality opinion) (holding that if a defendant is acquitted of capital elements—i.e., the jury finds an absence of aggravating factors—the Fifth Amendment’s Double Jeopardy Clause bars a death sentence on retrial). As Justice Scalia explained in *Sattazahn*, “If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that “acquittal” on the offense of “murder plus aggravating circumstance(s).” *Id.* at 112.

137. *Id.* at 112.

those factual findings beyond a reasonable doubt.<sup>138</sup> And, as Bunin notes, the four dissenting justices in *Sattazahn*—Justices Ginsberg, Souter, Stevens, and Breyer—reached the same conclusion:<sup>139</sup> “for purposes of the Double Jeopardy Clause, capital sentencing proceedings involving proof of one or more aggravating factors are to be treated as trials of separate offenses, not merely sentencing proceedings.”<sup>140</sup>

As the foregoing cases make clear, the guilt-innocence phase of a capital trial does not conclusively demarcate the outer boundary of a capital defendant’s Sixth Amendment rights.<sup>141</sup> Rather, the Supreme Court’s Sixth Amendment jury-trial right jurisprudence, per *Apprendi* and *Ring*, indicates that at least some of a capital defendant’s Sixth Amendment trial rights are fully operative at least up until the eligibility determination, where further proof is required to establish additional

138. *See id.* at 110-11.

139. Bunin, *supra* note 8, at 247.

140. *Sattazahn*, 537 U.S. at 126 n.6 (Ginsburg, J, dissenting). *Accord* *Bullington v. Missouri*, 451 U.S. 430, 446 (1981) (“Because the sentencing proceeding at [issue] was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury . . . is available to [the defendant], with respect to the death penalty . . .”). In *Spaziano v. Florida*, 468 U.S. 447, 459 (1984), the Court cautioned that that analogy should not be read too broadly: “The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause . . . does not mean that it is like a trial in the respects significant to the Sixth Amendment’s guarantee of a jury trial.” However, the limiting phrase for the Sixth Amendment right to a jury trial is more restrictive than the phrase “in all criminal prosecutions,” which limits the scope of the Confrontation Clause, *see supra* note 129. *Cf.* *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892) (“A criminal prosecution under article 6 of the amendments, is much narrower than a ‘criminal case,’ under article 5 of the amendments.”). Thus, O.H. Eaton’s assertion that because *Spaziano* “recognized that a penalty-phase proceeding is ‘like a trial,’ at least for Fifth Amendment double-jeopardy purposes. . . it logically follows that an accused has the Sixth Amendment right of confrontation if testimony is offered at ‘trial’ “ may be quite valid. Hon. O.H. Eaton, Jr., *Capital Punishment: An Examination of Current Issues and Trends and How These Developments May Impact the Death Penalty in Florida*, 34 STETSON L. REV. 9, 39 (2005).

141. *See, e.g., Mempa v. Rhay*, 389 U.S. 128, 134-37 (1967) (holding that the Sixth Amendment right to counsel applies at sentencing, whether capital or otherwise). *See* *Strickland v. Washington*, 466 U.S. 668, 686-87 (1998); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Estelle v. Smith*, 451 U.S. 454 (1981). *See generally Bullington*, 451 U.S. at 438-39 & n.10 (1981) (in holding that the Double Jeopardy Clause applied to a capital sentencing hearing because it had a trial-like format, which provided for opening statements, formal testimony, jury instructions, proof beyond a reasonable doubt of aggravating factors, final arguments, and a formal jury verdict, the Court indicated that if a sentencing hearing is adversarial in character, i.e., it bears the “hallmarks of the trial on guilt or innocence,” certain “trial rights” will apply); *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O’Connor, J., concurring in the judgment) (“As a practical matter [the Court] ha[s] virtually required that the death penalty be imposed only when a guilty verdict has been followed by separate trial-like sentencing proceedings, and we have extended many of the procedural restrictions applicable during criminal trials into these proceedings.” (citations omitted)).

elements of a new offense.<sup>142</sup> Moreover, post-*Williams*, *Apprendi* and its progeny have made clear that there is a distinct difference in the application of constitutional rights during the litigation of statutory aggravating factors (i.e., the eligibility determination) and sentence selection. This includes the right of confrontation, and at least four federal trial courts have interpreted *Ring* to stand for such a proposition.<sup>143</sup>

### B. Applying Theory in the District Courts

In *United States v. Mills*, for example, the court concluded that *Ring* “support[s] the proposition that a defendant’s Sixth Amendment trial rights extend at least to the eligibility phase of capital sentencing, where a jury is required to find facts that make the defendant eligible for the death penalty.”<sup>144</sup> Reasoning analogically, the *Mills* court noted that although *Ring* did not squarely address the scope of capital defendants’ Sixth Amendment right of confrontation, the Court’s analysis and extension of the Sixth Amendment jury-trial right to the eligibility determination “strongly suggests that the Confrontation Clause . . . applies to the eligibility phase.”<sup>145</sup> The *Mills* court put it this way: “[O]nce the activity of a sentencer stops being an exercise of discretion and becomes constitutionally significant factfinding, the right to confrontation attaches.”<sup>146</sup>

The *Mills* case followed, both chronologically and as a matter of precedent, other federal trial courts that had found that the nature of death eligibility determinations, in light of *Ring*, triggered the Confrontation Clause per *Crawford*. The courts in *United States v. Johnson*, *United States v. Jordan*, and *United States v. Bodkins*, adopted

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142. Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1481 (2002) (recognizing the potential long-term ramifications of the Court’s holding in *Ring*).

143. See *United States v. Mills*, 446 F. Supp. 2d 1115, 1125 (C.D. Cal. 2006). In a similar vein, in *United States v. Jordan*, the district court concluded that the Confrontation Clause, as interpreted in *Crawford*, applies to bar the admission of testimonial hearsay relevant to the eligibility determination in federal capital trials. 357 F. Supp. 2d 889, 903-04 (E.D. Va. 2005). Accord *United States v. Johnson*, 378 F. Supp. 2d 1051, 1064-65 (N.D. Iowa 2005); *United States v. Bodkins*, No. CRIM.A-4:04CR70083, 2005 WL 1118158, at \*4-\*5 (W.D. Va. 2005); *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1221 (D. Colo. 2007) (“[U]nder *Crawford*, the Confrontation Clause is applicable at both the eligibility phase and at least a portion of the selection phase . . . [Because] the existence of all the aggravating factors are constitutionally significant facts that should be found by the jury.”).

144. *Mills*, 446 F.Supp.2d. at 1125.

145. *Id.* at 1127-28.

146. *Id.* at 1125.

the view shared later in *Mills* and, at least with respect to the applicability of the Confrontation Clause to federal eligibility determinations, espoused by the authors.<sup>147</sup> Moreover, state courts in Florida, North Carolina, and Texas have reached similar conclusions within the context of their respective capital sentencing schemes.<sup>148</sup>

Beginning with *Jordan*, through *Mills*, and into the state courts, there is more than ample evidence that *Ring* is a hugely pivotal case in this realm of capital sentencing jurisprudence, and that its holding has dramatically altered the juridical landscape. Its recency and the contextual trend within which it was decided render it all the more noteworthy when evaluating the viability of any proposed application of the Sixth Amendment to capital litigation. Finally, its language has been perceived by other courts to be clear and persuasive enough that, in effect, its holding served as the jurisprudential anchor undergirding the holdings in the aforementioned cases.

Interestingly enough, however, language drafted more than two centuries ago—memorialized in the text of the Sixth Amendment itself—further suggests what we seek to extrapolate from *Ring*, which was recognized in *Johnson* and *Mills, et al.*: The Sixth Amendment right of confrontation extends to federal death-eligibility determinations. Below, we discuss the significance and meaning of the Sixth Amendment's key limiting phrase—"[i]n all criminal prosecutions"—and the effect its accurate interpretation should have on the application of the Confrontation Clause to death-eligibility determinations.<sup>149</sup>

#### IV. ELIGIBILITY DETERMINATIONS AND "CRIMINAL PROSECUTIONS"

*Apprendi*, *Ring*, and logical extensions of *stare decisis* aside, a parallel analysis of our issue begins with the literal text of the Sixth Amendment and its unequivocal statement that the right of confrontation applies "[i]n all criminal prosecutions."<sup>150</sup> We use the word "parallel" because this analysis begs the question. That is, one could conclude that the aforementioned case law proves that the Confrontation Clause is operative at federal death eligibility determinations, and, therefore, it is

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147. See *supra* note 143.

148. See *supra* note 69.

149. U.S. CONST. amend. VI. Of course, as Professor Douglas points out, "[t]he Framers knew nothing of a 'guilt' phase and a 'penalty' phase" of a capital trial; at that time, the guilt and penalty determinations were collapsed into a single jury verdict, rendered at the conclusion of the defendant's trial. Douglas, *supra* note 8, at 1967.

150. See U.S. CONST. amend. VI. See also *United States v. Rondeau*, 430 F.3d 44, 47 (1st Cir. 2005) (observing "that the Confrontation Clause focuses on 'criminal prosecutions'").

within the meaning of the phrase “criminal prosecution,” as that phrase is used in the Sixth Amendment. Or one could draw the same conclusion as to the ambit of the Confrontation Clause by beginning with the definition of “criminal prosecution” and working vice versa.<sup>151</sup> In this section, we do the latter.

As Professor Penny White notes, Webster’s *An American Dictionary of the English Language*, which was published in 1828—the dictionary Justice Scalia used to define “witness” and “testimony” in *Crawford*,<sup>152</sup> and Justice Thomas referred to in his concurring opinion in *White v. Illinois*<sup>153</sup>—defines the term “prosecution” as follows: 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.”<sup>154</sup> As Penny White points out, modern dictionaries supply substantially similar definitions.<sup>155</sup> An edition of Webster’s printed in 1972, for example, defines the term thus: “the institution and continuance of a criminal suit involving the process of pursuing formal charges against an offender to final judgment.”<sup>156</sup>

Indeed, in his *Commentaries*, Sir William Blackstone expressly assumes that the term “criminal prosecution” subsumes within it proceedings subsequent to the guilt-innocence determination:

[T]he next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors . . . is that of judgment. For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner; he is either immediately, or at a convenient time soon after, asked by the court, if he has anything to offer why judgment should not be awarded against him.<sup>157</sup>

Needless to say, his understanding of that phrase is of special relevance, because Blackstone’s *Commentaries* served as a conduit through which English jurisprudential developments influenced the

151. See White, *supra* note 49, at 393-96 (for a good overview of that argument); HELLER, *supra* note 19, at 35 (Heller submits that “[w]hat th[o]se . . . opening words of the [Sixth A]mendment, could be taken to mean would determine, therefore, where and how far the rights guaranteed by th[at] amendment could be invoked.”).

152. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

153. 502 U.S. 346, 360 (1992) (Thomas, J., concurring).

154. White, *supra* note 49, at 395-96 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 45 (New York, S. Converse 1828)).

155. *Id.* at 395-96.

156. WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 684 (G. & C. Merriam Company 1972) (1916).

157. 4 WILLIAM BLACKSTONE, COMMENTARIES \*375.

Framers and thus affected the development of the Constitution.<sup>158</sup> According to Professor Jonakait, Blackstone's *Commentaries* had such a profound influence on the Framers' generation that it "was often used by practitioners 'as a shortcut to the law.'"<sup>159</sup>

Constitutional historian Francis Heller drew a similar conclusion. He opined that "[t]he language of the Sixth Amendment"—which, at least as a general proposition, is limited in scope by the phrase "criminal prosecution"—"has been interpreted to make its guarantees effective only in the course of criminal trials proper," which "terminate[] with the pronouncement of sentence by the court."<sup>160</sup> Concordant with that view, in *United States v. Reisinger*, the Supreme Court endorsed the proposition that "the word 'prosecution' . . . 'usually denotes a criminal proceeding.'"<sup>161</sup> More recently, in *Morrissey v. Brewer*, in concluding that parole revocation hearings are outside the ambit of the Sixth Amendment, the Court at least tacitly intimated that the phrase "criminal prosecution" includes sentencing, noting that "[p]arole arises after the end of the criminal prosecution, *including imposition of sentence*."<sup>162</sup>

The definitional authority buttresses the position that when a new offense is created through the addition of an element, as is the case during the eligibility determination per *Apprendi* and *Ring*, *supra*, there continues the criminal prosecution. Syllogistically speaking, then, the right of confrontation should apply during the eligibility determination, because the eligibility determination falls squarely within the ambit of the term "criminal prosecution."

With that said, let us turn from the scope of the right of confrontation, as defined in the text of the Sixth Amendment itself, to its substance. This is germane to our discussion because, as discussed

158. See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 97 (1995). See also BEDAU, *supra* note 31, at 6.

159. Jonakait, *supra* note 158, at 95, n.94 (1995) (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 112 (1985)).

160. HELLER, *supra* note 19, at 54.

161. 128 U.S. 398, 402-03 (1888) (quoting *United States v. Ulrici*, 3 Dillon 532, 328 F. Cas. 328 (C.C.Mo. 1875)) (as the *Reisinger* Court explained, in *Ulrici*, "[i]t became necessary . . . to determine the meaning of the word[] 'prosecution' "). To be sure, the FDPA expressly provides that the Federal Rules of Evidence do not apply to proceedings conducted under it. See 18 U.S.C. 3593(c) (2000). See also FED. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."). It is worth noting, however, that the Federal Rules of Evidence seem to recognize a similar dichotomy between criminal proceedings and sentencing. Compare FED. R. EVID. 1101(b) ("These rules apply generally to . . . criminal cases and *proceedings* . . .") (emphasis added), with FED. R. EVID. 1101(d) ("The [Federal Rules of Evidence] . . . do not apply [at] . . . sentencing . . .").

162. 408 U.S. 471, 480 (1972) (emphasis added).

*infra*, the exact nature of the procedural protections the Sixth Amendment right of confrontation requires has now been famously specified by the Supreme Court in *Crawford*; and those procedures precisely seek to prevent the admission of evidence that is now so easily offered against capital defendants under the FDPA.

## V. THE SIXTH AMENDMENT RIGHT OF CONFRONTATION, ITS HISTORY, AND *CRAWFORD*

### A. *The Framers' Intent*

In *Crawford*, the Supreme Court had the opportunity to flesh out the exact nature of the procedural right the Confrontation Clause of the Sixth Amendment affords criminal defendants.<sup>163</sup> The specific issue in *Crawford* was whether, consistent with the Sixth Amendment's Confrontation Clause, a witness's tape-recorded statement to police regarding the alleged criminal conduct of the defendant could be admitted at his criminal trial, "even though he had no opportunity for cross-examination" and the witness did not testify.<sup>164</sup> Drawing substantially from the Framers' original intent,<sup>165</sup> the Court ruled that the statement was inadmissible, holding, in essence, that anything to the contrary would violate the most basic premise of the right of confrontation.<sup>166</sup> Accordingly, the specifics of *Crawford* should be preceded with a brief discussion of the historical context within which it was decided, so that the rationale undergirding its holding can more readily be understood.

Unlike the limited due process right of confrontation that criminal defendants enjoy in certain post-conviction proceedings, which finds its genesis in a judicial decision rendered less than forty years ago,<sup>167</sup> the

163. See *Crawford v. Washington*, 541 U.S. 36, 55 (2004).

164. See *id.* at 38.

165. See Kristen Sluyter, Note, *Evidence—Sixth Amendment and the Confrontation Clause—Testimonial Trumps Reliable: The United States Supreme Court Reconsiders Its Approach to the Confrontation Clause*, *Crawford v. Washington*, 541 U.S. 26 (2004), 27 U. ARK. LITTLE ROCK L. REV. 323, 342-44 (2005) (observing that the *Crawford* majority reached its ultimate conclusion by reference to the history of the right of confrontation). See generally Thomas J. Walsh, *The Confrontation Clause After Crawford v. Washington: Clarifying the Meaning of Testimonial Statements in Criminal Trials*, 85 U. DET. MERCY L. REV. 163, 179-180 (2008); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 514-15 (2005).

166. See *Crawford*, 541 U.S. at 68-69.

167. See *Morrissey*, 408 U.S. 471, 489 (holding that, *inter alia*, due process requires that a parolee have "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)" at a parole revocation hearing).

more expansive right of confrontation enumerated in the Confrontation Clause is firmly rooted in our system of jurisprudence. As Richard Friedman explains, today we take for granted “the idea that witnesses testify under oath in an open proceeding in the presence of the accused, ‘face-to-face’”; but the idea that the accused has a right to confront his or her accusers is no mere transient notion, indeed, with exceptions, “for centuries it has been the English way.”<sup>168</sup> To be sure, according to conventional wisdom, the right of confrontation guaranteed by the Sixth Amendment finds its proximate genesis in the English common law.<sup>169</sup> However, the underlying concept—the right of the accused to confront his or her accusers face-to-face—is much older, dating back to Roman times.<sup>170</sup> In *Coy v. Iowa*, the Supreme Court explicitly recognized the right of confrontation’s historical underpinnings: “[It] ‘comes to us on

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(emphasis added). *Accord* *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (applying an identical standard in probation revocation proceedings). The *Morrissey* Court reasoned that parolees do have a “conditional liberty” interest, *see Morrissey*, 408 U.S. at 484, which cannot, consistent with the Fourteenth Amendment, be deprived without at least some due process, *see id.* at 482. The Court noted, however, that “due process is flexible, and calls for such procedural protections as the particular situation demands.” *Id.* at 481. Applying the foregoing standard, the *Morrissey* Court ultimately concluded that parolees were only entitled to a limited, qualified right of confrontation, which could be abridged at the discretion of the trial judge. *See id.* at 488-89.

168. Richard Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022-23 (1997). Of course, not all English trials were conducted in this manner. *See id.* at 1024. *See also* LANGBEIN, *supra* note 31, at 233-35 & n.241 (discussing the history of the confrontation policy).

169. HELLER, *supra* note 19, at 104 (noting that the “immediate source” of the right of confrontation embodied in the Sixth Amendment is the English common law). *See Salinger v. United States*, 272 U.S. 542, 548 (1926) (“The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions . . .”). *See also* *Davis v. Washington*, 547 U.S. 813, 826 (2006) (noting that English cases “were the progenitors of the Confrontation Clause”). *Cf.* Friedman, *supra* note 169, at 1022 (“The origins of the [Confrontation] Clause are famously obscure”). *But see* Jonakait, *supra* note 158, at 81 (arguing “that while seventeenth century English history, and other English actions, may have affected the development of American constitutional rights . . . [they] were not the prime or immediate cause of the Confrontation Clause”). For a thorough overview of the history of confrontation at English common law, *see generally* Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959).

170. *Crawford*, 541 U.S. at 43 (citing *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988)). *See* JOSEPH PLESCIA, *THE BILL OF RIGHTS AND ROMAN LAW* 84 (Austin & Winfield 1995). *See generally* Frank R. Herrmann, S.J., and Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT’L L. 481 (1994) (providing a thorough overview of the history and origin of the right of confrontation). Indeed, according to one scholar, “[a]s far back as the ancient Babylonians there is reference to the procedure used to call forth witnesses in cases where a person stands accused of violating the law.” Walsh, *supra* note 165, at 164.



faded parchment,' with a lineage that traces back to the beginnings of Western legal culture."<sup>171</sup>

The historical underpinnings of the right of confrontation secured by the Confrontation Clause are worthy of discussion because, as the Supreme Court pointed out over one hundred years ago in *Mattox v. United States*, those underpinnings inform the jurisprudential lens through which the scope and nature of that right is interpreted:

We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta.<sup>172</sup>

Showing similar deference to the Framers' intent,<sup>173</sup> Justice Scalia, writing for the majority in *Crawford*, put it thus: "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."<sup>174</sup>

171. *Coy*, 487 U.S. at 1015 (quoting *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring)). See *Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("the requirements of confrontation and cross-examination . . . have ancient roots . . . [and] find expression in the Sixth Amendment"). See generally Herrmann & Speer, *supra* note 171.

172. 156 U.S. 237, 243 (1895). See *Crawford*, 541 U.S. at 60 ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."). Cf. Jonakait, *supra* note 158, at 81 (arguing that "the Confrontation Clause, and related Sixth Amendment provisions, sought to constitutionalize criminal procedure as it then existed in the states").

173. In *Crawford*, Justice Scalia explicitly recognized the inherent difficulties presented by any attempt to divine the Framers' intent with regard to a practice that did not exist at the time of the framing but nonetheless thought it was a worthwhile endeavor. See *Crawford*, 541 U.S. at 52 n.3. To be sure, the Sixth Amendment right of confrontation is not a substantive guarantee but rather a procedural right. *Id.* at 61. See *HELLER*, *supra* note 19, at 35. But, nonetheless, as Justice Frankfurter suggests, this does not diminish its importance to our system of jurisprudence: "[P]rocedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property.'" *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276 (1942). See also *Pointer v. Texas*, 380 U.S. 400, 404 (1965) ("The fact that [right of confrontation] appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.").

174. *Crawford*, 541 U.S. at 67. Cf. Jonakait, *supra* note 158, at 82 (arguing that the Sixth Amendment "constitutionaliz[ed]" aspects of "criminal procedure"). But see *Green*, 399 U.S. at 176 (1970) (Harlan, J., concurring) ("Rights amendments [e.g., the Sixth Amendment] were primarily concerned with the political consequences of the new clauses, and paid scant attention to the definition and meaning of particular guarantees.").

### B. *Abrogating Judicial Determinations of “Reliability”*

Prior to *Crawford*, under *Ohio v. Roberts*, it was permissible for courts to admit testimony in the form of hearsay, even where the witness had never been cross-examined and was unavailable to testify, provided that the testimony was deemed sufficiently reliable by the trial judge.<sup>175</sup> Per *Roberts*, at the trial judge’s discretion, testimonial hearsay could be admitted in a criminal trial provided that it bore “adequate ‘indicia of reliability.’”<sup>176</sup> To comply with the *Roberts* reliability standard and overcome any Confrontation Clause-based objection, such hearsay was required to satisfy at least one prong of a disjunctive, two-part test: it must either be within the ambit of a “firmly rooted hearsay exception” or demonstrate “particularized guarantees of trustworthiness.”<sup>177</sup> Under *Roberts*, then, testimony in the form of hearsay would survive a Confrontation Clause objection based on a substantive, discretionary judicial determination that such hearsay was sufficiently reliable, thereby operating to deprive criminal defendants of two fundamental procedural safeguards: the right to confront, face-to-face, their accuser and the corollary right of cross-examination.

Relying on *Ohio v. Roberts*, the trial court in *Crawford* found that the challenged statement bore “particularized guarantees of trustworthiness” and thus satisfied the demands of the Confrontation Clause, and it admitted the statement.<sup>178</sup> The defendant was ultimately convicted and appealed.<sup>179</sup> After applying a nine-factor test, the Washington Court of Appeals determined that the statement did not bear particularized guarantees of trustworthiness and reversed.<sup>180</sup> The Washington Supreme Court reversed the Washington Court of Appeals and unanimously concluded that the tape-recorded statement was admissible, reasoning that despite the absence of any firmly rooted

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175. 448 U.S. 56 (1980), *abrogated by* *Crawford*, 541 U.S. 36. Under *Roberts*, the Confrontation Clause “does not bar admission of an unavailable witness’s statement against a criminal defendant if the statement bears ‘adequate “indicia of reliability.”” To meet that test, evidence must either fall within a ‘firmly rooted hearsay exception’ or bear ‘particularized guarantees of trustworthiness.’” *Crawford*, 541 U.S. at 40 (citing *Roberts*, 448 U.S. at 66).

176. *See Roberts*, 448 U.S. at 66-68.

177. *See id.* at 66 (delineating a test for whether the Confrontation Clause operates to bar the admission of hearsay during a criminal trial). *See generally* Friedman, *supra* note 169, at 1017-22 (for a good overview of the *Roberts* test). Interestingly, even the *Roberts* Court notes “the Framers’ preference for face-to-face accusation” but concludes that, under the Sixth Amendment, exceptions exist out of “necessity.” *Roberts*, 448 U.S. at 65.

178. *See Crawford*, 541 U.S. at 40-41.

179. *See id.*

180. *See id.*

hearsay exception, the statement was sufficiently reliable to overcome any Confrontation Clause objection.<sup>181</sup> The *Crawford* Court, however, disagreed and abrogated *Roberts* to the extent that its holding applied to testimonial evidence,<sup>182</sup> concluding that the admission of testimonial hearsay in a criminal trial violated the Confrontation Clause.<sup>183</sup>

At least regarding testimonial evidence,<sup>184</sup> the majority in *Crawford* was troubled both by the substantive focus of the admissibility standard delineated by the Court in *Roberts* and the discretionary aspects of that framework.<sup>185</sup> The problem with the *Roberts* reliability test: “Reliability is an amorphous, if not entirely subjective, concept. . . . Whether a Statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.”<sup>186</sup> Consequently, the *Crawford* Court held that, regardless of how reliable the trial court may deem an out-of-court statement to be, the Confrontation Clause operates as a per se bar to the admission of out-of-court testimony by a witness—i.e., testimonial hearsay—unless that

181. See *Crawford v. Washington*, 54 P.3d 656, 663-64 (Wash. 2002), *rev'd*, *Crawford*, 541 U.S. 36 (The Washington Supreme Court opined: “[W]hen a codefendant’s confession is virtually identical [to, i.e., interlocks with] that of a defendant, it may be deemed reliable.” (quoting *State v. Rice*, 844 P.2d 416, 427 (Wash. 1993))).

182. The *Crawford* Court declined to take the opportunity to provide a comprehensive definition of the term “testimonial.” See *Crawford*, 541 U.S. at 53, 68, n.4, & n.10, but it noted that, “at a minimum,” the term encompassed “prior testimony at a preliminary hearing, before a grand jury, or at least a former trial; and to police interrogations,” *id.* at 68, as well as “statements taken by police officers,” *id.* at 52. *But cf.* *Davis v. Washington*, 547 U.S. 813, 823-30 (2006) (further refining the definition of “testimonial” and concluding that statements made in the context of an ongoing emergency are non-testimonial). The *Crawford* Court did, however, provide a general, analogically based framework with which to analyze whether statements—oral or written, sworn or unsworn—should be construed as testimonial:

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

*Crawford*, 541 U.S. at 51-52.

183. *Crawford*, 541 U.S. at 68-69.

184. See *id.* at 68 (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”).

185. See *id.* at 61-63.

186. *Id.* at 63.

witness is unavailable and the defendant had a prior opportunity to cross-examine him or her:

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." . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands not that evidence be reliable but rather that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.<sup>187</sup>

In light of *Crawford*, then, to comply with the evidentiary strictures prescribed by the Confrontation Clause, absent meeting a two-part, conjunctive test—a showing of both witness unavailability and the defendant having had a prior opportunity to cross-examine the witness—testimonial statements may only be adduced in a certain form: live, in-court testimony by the declarant, subject to cross-examination.<sup>188</sup> Therefore, the *Crawford* decision necessarily changed the constitutional analysis of 18 U.S.C. § 3593(c), because the gatekeeping function of the trial judge as to the reliability of out-of-court statements (which had been invoked to allow the statute to survive both pre- and post-*Ring* facial challenges) was no longer recognized as a constitutional judicial practice, at least insofar as it collided with and impinged upon criminal defendants' procedurally grounded Sixth Amendment right of confrontation.

The Supreme Court recently made it clear *a fortiori* that the right of confrontation recognizes no exceptions based on the perceived reliability

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187. *Id.* at 61. See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 754 (1993) ("The right[s] articulated in the Sixth Amendment generally, and the confrontation right specifically, are not meant to make trustworthiness the defining principle. Rather, the central principle is that the Framers chose an adversarial system . . ."). As Justice Scalia elucidates, "the [Confrontation] Clause . . . reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined." *Crawford*, 541 U.S. at 61 (citation omitted). He illustrates his point analogically: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 62.

188. *Crawford*, 541 U.S. at 68-69 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination . . . the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.). *But cf.* *Maryland v. Craig*, 497 U.S. 836, 853 (1990) (noting that the Sixth Amendment right of literal, face-to-face confrontation is not absolute, and in some circumstances, may be outweighed by sufficiently compelling interests).

of certain types of testimonial statements to its absolute bar on the use of testimonial hearsay in criminal prosecutions. The Court's decision in *Melendez-Diaz v. Massachusetts*, decided in June, 2009, is significant because it is indicative of the extent to which the procedurally based Sixth Amendment right of confrontation is not subject to utilitarian calculus or judicial fiat, and it reinforces the conclusion that that right is not susceptible to abrogation by the legislature or the courts for *any* reason.<sup>189</sup> In *Melendez-Diaz*, the Court echoed *Crawford*'s teaching that the Confrontation Clause provides a "procedural rather than a substantive guarantee," explaining that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."<sup>190</sup>

In expounding on the definition of "testimonial" and holding that *Crawford*'s mandate applies to certificates authenticating forensic or lab reports prepared for use at trial, the *Melendez-Diaz* Court implied that practical considerations in no way affect the scope or substance of the Sixth Amendment right of confrontation:

Respondent and the dissent may be right that there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.<sup>191</sup>

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189. 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009). Indeed, the Court summarily dispensed with the state's utilitarian argument against extending *Crawford*'s holding to include scientific reports prepared for use in criminal trials:

[R]espondent asks us to relax the requirements of the Confrontation Clause to accommodate the "necessities of trial and the adversary process." . . . It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.

*Id.* at 2540.

190. *Id.* at 2536 (quoting *Crawford*, 541 U.S. at 61-62). As the dissent implicitly recognized, the *Melendez-Diaz* majority eschewed a cost-benefit analysis in favor of a principled application of the principles announced in *Crawford*:

For the sake of . . . negligible benefits, the Court threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician, now invested by the Court's new constitutional designation as the analyst, simply does not or cannot appear.

*Id.* at 2549 (Kennedy, J., dissenting).

191. *Id.* at 2536. Conversely, the dissent emphasized the practical consequences of the majority's holding, characterizing it as "driven by nothing more than a wooden application of the

The Court's reasoning in *Melendez-Diaz* is instructive insofar as it illustrates the unequivocal, absolute, and unyielding character of the right of confrontation that the Sixth Amendment affords criminal defendants. In other words, where the right of confrontation applies, pragmatic considerations or judicial assessments of reliability are inapposite; its categorical proscription against the admission of testimonial hearsay recognizes *no* exceptions.

#### VI. 18 U.S.C. § 3593(C) POST-CRAWFORD

The effect of *Crawford's* holding on 18 U.S.C. § 3593(c)'s constitutionality is twofold. First, as mentioned above, in removing from the purview of judicial discretion the authority to make reliability-based determinations concerning the admissibility of testimonial out-of-court statements, it moots a response to a post-*Ring* challenge of the statute. Namely, that notwithstanding the right of confrontation, the *Roberts* decision effectively ensured that the statute is not facially unconstitutional by enabling the courts to decide on the admissibility of statements based on their perceived reliability. Second, it precisely defines the parameters of the right of confrontation. Both effects are resounding, insofar as they are applicable.

Logic dictates that *Crawford's* mandate should apply to the eligibility determination phase of federal capital trials.<sup>192</sup> As discussed, it is during this phase that the prosecution must prove two statutorily defined elements in order for a capital defendant to be exposed to the possibility of a death sentence.<sup>193</sup> Consistent with *Apprendi* and *Ring*, when a fact must be proven beyond a reasonable doubt in order to enhance the exposure of a defendant, or capital defendant, an additional element has been added to the original offense, thereby creating a new offense.<sup>194</sup> As the narrower Sixth Amendment right to a jury trial

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*Crawford* and *Davis* definition of 'testimonial,' " *id.* at 2547 (Kennedy, J., dissenting), and arguing that the majority's "ruling has vast potential to disrupt criminal procedures." *Id.* at 2545 (Kennedy, J., dissenting).

192. See *United States v. Sablan*, No. 00-00531, 2008 WL 700172, at \*3, 75 Fed. R. Evid. Serv. 1187 (D. Colo. 2008) ("[I]t appears undisputed that *Crawford* applies to the eligibility phase of the penalty stage, where the statutory aggravating factors must be found that make the defendant eligible for death."). See also *United States v. Brown*, 441 F.3d 1330, 361 n.12 (11th Cir. 2006) ("District courts . . . have held that the Confrontation Clause and *Crawford* apply in the "eligibility" portion of the penalty phase (where the jury determines whether the defendant is statutorily eligible for the death penalty) but not in the "selection" portion of the penalty phase (where the jury determines whether it will actually impose the death penalty.)" (citations omitted)).

193. See *supra* notes 88-95 and accompanying text.

194. See *supra* notes 122-140 and accompanying text.

applies, so must the broader Sixth Amendment right of confrontation.<sup>195</sup> The application of the Confrontation Clause should not vary depending on which element the government is seeking to prove.

Indeed, it is evident that an intellectually honest assessment would render the conclusion that the Confrontation Clause does, in fact, apply to eligibility determinations. As such, eligibility determinations conducted pursuant to the FDPA per the relaxed evidentiary standard delineated by 18 U.S.C. § 3593(c)—which provides only for an abridged, qualified right of confrontation that may be denied based on the whim and caprice of the trial judge<sup>196</sup>—are irreconcilably inconsistent with the Sixth Amendment right of confrontation as defined in *Crawford*.<sup>197</sup> As mentioned above, this highlights the importance of the *Crawford* decision on this discussion.

In affirming the constitutionality of the FDPA, courts have reasoned that the “FDPA does not eliminate this function of the judge as gatekeeper of constitutionally permissible evidence; nor does it alter or ‘eliminate the constitutional baseline for the admissibility of evidence in a criminal trial.’”<sup>198</sup> But as *Crawford* makes clear, the problem with that line of reasoning is self-evident: under the procedural framework that the FDPA delineates, the judge, in his or her role as constitutional gatekeeper, is entrusted with an impermissible degree of discretion at capital sentencing hearings.<sup>199</sup> Indeed, the notion that the Confrontation Clause does not permit judges to make determinations that testimonial evidence is reliable but rather prescribes a particular *procedure* that must be used to assess the reliability of testimonial evidence is central to the

195. See *supra* note 129 & 140 and accompanying text.

196. See *supra* notes 102-109 and accompanying text.

197. See *supra* notes 183-189 and accompanying text.

198. *United States v. Fell*, 360 F.3d 135, 145 (2d Cir. 2004) (quoting *United States v. Matthews*, 246 F. Supp. 2d 137, 144-45 (N.D.N.Y. 2002)). See, e.g., *United States v. Johnson*, 239 F. Supp. 2d 924, 946 (N.D. Iowa 2003) (holding that the FDPA “expressly supplants only the rules of evidence, not constitutional standards . . . .”); *United States v. Jordan*, 357 F. Supp. 2d 889, 902 (E.D. Va. 2005); *United States v. Fields*, 483 F.3d 313, 343 n.27 (5th Cir. 2007) (same) (quoting *Johnson*, 239 F. Supp. 2d at 946). See also *United States v. Jones*, 132 F.3d 232, 242 (5th Cir. 1998) (concluding that the evidentiary standard the FDPA prescribes “does not impair the reliability or relevance of information at capital sentencing hearings”).

199. See *supra* notes 102-109 and accompanying text. Cf. *Crawford v. Washington*, 541 U.S. 36, 67 (2004) (“The Framers . . . knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands.”). In colonial America, as in England, judicial discretion was traditionally circumscribed in capital cases through the use of mandatory penalties. See Douglas, *supra* note 8, at 2016-18.

rationality undergirding the holding in *Crawford*.<sup>200</sup> This should be particularly true in capital cases.

The Supreme Court has long recognized that “[b]ecause of th[e] qualitative difference [between receiving a death sentence and life imprisonment], there is a corresponding difference in the need for reliability” in the penalty phase of capital trials.<sup>201</sup> As the Court explained in *Gregg v. Georgia*, in capital cases, “accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.”<sup>202</sup> In light of these unique concerns, the Court has frequently emphasized that “the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death,” because “the finality of the death penalty requires a ‘greater degree of reliability.’”<sup>203</sup>

Finally, it should be noted that if the Confrontation Clause is at all operative in the penalty phase of federal capital trials, under the applicable rules of statutory construction,<sup>204</sup> it is immaterial whether the Confrontation Clause’s application is limited to the eligibility determination or applies to both the sentence-selection decision and the eligibility determination. Some commentators have argued that the Confrontation Clause applies to the totality of the penalty phase in all—state and federal—capital trials.<sup>205</sup> Indeed, one commentator went so far as to advance the idea that the Confrontation Clause applies at *all* sentencing proceedings, capital or otherwise.<sup>206</sup> This article, however, does not address the merits of those positions. The narrow question here is, as stated, whether, in light of the holding in *Crawford*, the relaxed evidentiary standard 18 U.S.C. § 3593(c) explicitly prescribes violates the Confrontation Clause. It is our position that—leaving aside the question whether the Sixth Amendment applies during sentence selection—even if, *arguendo*, the Confrontation Clause only applies to the eligibility determination under that provision of the FDPA, that statute, on its face, is unconstitutional. Having said that, though,

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200. See *supra* notes 183-189 and accompanying text.

201. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

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

203. *Murray v. Giarratano*, 492 U.S. 1, 8-9 (1989) (internal citations omitted). See also *Monge v. California*, 524 U.S. 721, 732 (1998) (noting the “acute need for reliability in capital sentencing proceedings”); *Simmons v. South Carolina*, 512 U.S. 154, 161-62 (1994).

204. See *infra* Part VI.

205. For thoughtful, insightful arguments advancing that position, see generally Douglas, *supra* note 8; White, *supra* note 49.

206. See Nigel Hugh Holder, Comment, *Confrontation at Sentencing: The Logical Connection Between Crawford and Blakely*, 49 *How. L.J.* 179, 180-83 (2005).



evaluating the pragmatic application of the argument is as important as the argument itself; and, interestingly, that evaluation leads us into a separate constitutional discussion altogether, without which our initial argument stands incomplete.

Again, we posit that 18 U.S.C. § 3593(c) is facially unconstitutional as it applies to the eligibility determination. If the Supreme Court were to agree, and Congress was then to insert into the statute language consistent with the notion that the right of confrontation applies to the eligibility determination, how would such a hearing manifest itself in light of the unitary nature of the penalty phase in federal capital trials? In other words, how would a court reconcile the application of the right of confrontation as to eligibility evidence but not as to sentence-selection evidence, given that the evidence is being received simultaneously? Practicality dictates a utilitarian answer: *legislatively mandated* trifurcation. The emphasis on the phrase “legislatively mandated” is for good reason: It is the only constitutional method of implementing trifurcation, given the current language of 18 U.S.C. § 3593(c).

Arriving at this remedy necessarily calls for a discussion of an occasionally applied *unconstitutional* remedy—what amounts to the second of “two wrongs.” The title of the proceeding section is clear enough, although we begin with an overview of trifurcation and its application in capital trials.

## VII. JUDICIAL TRIFURCATION IS UNCONSTITUTIONAL

### A. *The Concept of Trifurcation*

To ameliorate perceived constitutional shortcomings in the capital-sentencing framework prescribed by 18 U.S.C. § 3593(c), commentators have proposed trifurcating federal capital trials—i.e., during sentencing, severing the eligibility determination from the sentence-selection decision.<sup>207</sup> Indeed, Douglas Houser unequivocally submits “that statutory construction of the FDPA itself . . . compels trifurcation.”<sup>208</sup> Simply put, proponents of trifurcation advocate dividing capital trials into three separate and distinct hearings: a guilt-innocence phase; an eligibility phase; and finally, a sentence-selection phase.<sup>209</sup>

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207. See, e.g., Houser, *supra* note 4, at 377-86 (2007); Margo A. Rocklin, Note, *Place the Death Penalty on a Tripod, or Make It Stand On Its Own Two Feet*, 4 RUTGERS J. L. & PUB. POL’Y 788 (2007).

208. Houser, *supra* note 4, at 364.

209. See *id.* at 378-79. See generally Rocklin, *supra* note 208.

Under a so-called trifurcated framework, the Confrontation Clause would apply to the guilt-innocence and eligibility determinations but not the sentence-selection decision.<sup>210</sup> Consequently, during the eligibility phase, any testimonial evidence proffered would have to comply with the strictures delineated by the *Crawford* Court; however, neither the Confrontation Clause nor the holding in *Crawford* could be invoked to bar the admission of testimonial hearsay during the sentence-selection phase.<sup>211</sup> Indeed, a few federal district courts have adopted a trifurcated framework during federal capital trials in an effort to avoid addressing 18 U.S.C. § 3593(c)'s constitutional shortcomings, (including *Johnson*,<sup>212</sup> *Jordan*,<sup>213</sup> and *Bodkins*,<sup>214</sup> *et al.*<sup>215</sup>), reasoning that trifurcation is permissible because the statute does not explicitly forbid the practice.<sup>216</sup>

### B. *The Inapplicability of Constitutional Avoidance*

The problem with judicially imposed trifurcation, at least in the context of the FDPA, as Alexander Bunin explains, is that judicially

210. See *United States v. Jordan*, 357 F. Supp. 2d 889, 903-04 (E.D. Va. 2005) (splitting sentencing phase into eligibility stage and selection stage and applying Confrontation Clause to eligibility stage); *United States v. Johnson*, 362 F. Supp. 2d 1043, 110-11 (N.D. Iowa 2005) (outlining the structure of a trifurcated capital trial). See generally Houser, *supra* note 4, at 377-86 (sketching the procedural distinction between trifurcated and bifurcated capital trials and explaining the rationale for adopting a trifurcated framework).

211. See, e.g., *United States v. Bodkins*, No. CRIM.A.4:04CR70083, 2005 WL 1118158, \*5 (W.D. Va. 2005) (noting that “any testimonial hearsay evidence offered during the eligibility phase would have to meet the requirements of *Crawford* before it could be presented to the jury. Those same requirements would not apply to hearsay evidence, testimonial or non-testimonial, offered during the selection phase.”).

212. See *Johnson*, 378 F. Supp. 2d at 1064-65.

213. See *Jordan*, 357 F. Supp. 2d at 903-04 (dividing the “evidentiary and deliberative process in the penalty phase of a capital case” into two distinct, compartmentalized inquiries: “eligibility and selection”).

214. See *Bodkins*, 2005 WL 1118158 at \*4-5.

215. See also *United States v. Mayhew*, 380 F. Supp. 2d 936, 957 (S.D. Ohio 2005); *United States v. Davis*, 912 F. Supp. 938, 949 (E.D. La. 1996).

216. See, e.g., *Jordan*, 357 F. Supp. 2d at 903 (“A close examination of the governing statute, however, reveals that the statute does not necessarily mandate a single unitary proceeding.”); *Bodkins*, 2005 WL 1118158 at \*7 (the court elected to divide the penalty phase in the manner sketched above—i.e., it required separate, compartmentalized eligibility and sentence-selection decisions—reasoning that that was permissible because the FDPA does not “forbid a bifurcated sentencing proceeding.”); see also *United States v. Perez*, No. 3:02CR7, 2004 WL 935260, \*2 n.2 (D. Conn. 2004) (“[T]he evidentiary standard in the FDPA is but *one* way of achieving compliance with constitutional mandates; ultimately the Constitution must govern evidentiary decisions.”); *Johnson*, 378 F. Supp. 2d at 1059-62 (explaining rationale for trifurcation). But see *United States v. Fell*, 217 F. Supp. 2d 469, 491 (D. Vt. 2002) (“[c]ourts cannot, and should not, rewrite an unambiguous Congressional directive regarding th[e] process” the FDPA delineates).

imposed trifurcation is beyond the scope of the proper and properly limited role of the judiciary:

For a court to simply create a new procedure that changes the entire dynamic of a capital trial would seem to violate the separation of powers between the judicial and legislative branches of government. While judges have wide authority to interpret laws, they are not entitled to write them.<sup>217</sup>

As the Supreme Court explained in *Palermo v. United States*, even its “power . . . to prescribe rules of procedure and evidence for the federal courts exists *only in the absence of a relevant Act of Congress*.”<sup>218</sup> Put differently, Congress alone has the authority to promulgate or revise federal legislation;<sup>219</sup> it is not the courts’ prerogative to, in essence, rewrite the law.

To be sure, under the doctrine of constitutional avoidance, “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court’s] duty is to adopt the latter.”<sup>220</sup> Because it is a canon principle of statutory construction that, “out of respect for Congress,” reviewing courts are bound to “assume [that Congress] legislates in the light of constitutional limitations . . . .”<sup>221</sup> To invoke the rule of constitutional avoidance, however, “the statute must be genuinely susceptible to two constructions,” for it is “[o]nly then [that] the statutory construction that avoids the constitutional question [is] a ‘fair’ one.”<sup>222</sup> The doctrine of constitutional avoidance has limits; a reviewing

217. Bunin, *supra* note 8, at 274-75.

218. 360 U.S. 343, 353 n.11 (1959) (emphasis added).

219. Bunin, *supra* note 8, at 275-76 (citing *United States v. Hudson*, 11 U.S. 32, 32-34 (1812) (stating that federal criminal law may only be created by statute)). *Cf.* Jackson, *supra* note 63, at 91 (arguing that although Congress has authority to amend the FDPA, “recent failed attempts to abolish the Act indicate that any such Congressional action is highly unlikely in the near future.”) (citing Federal Death Penalty Act of 2003, H.R. 2574, 108th Cong. (2003)).

220. *Jones v. United States*, 526 U.S. 227, 239 (1999) (quoting *United States ex rel. Att’y General v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)). *See also* *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (As Justice Holmes opined: “A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”) (citations omitted).

221. *Jones*, 526 U.S. at 239-40 (quoting *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)). *Cf.* *Tot v. United States*, 319 U.S. 463, 467 (1943) (although “Congress has power to prescribe what evidence is to be received in the courts of the United States,” that power must be exercised concordant with the Constitution).

222. *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998).

court “cannot press statutory construction ‘to the point of disingenuous evasion’ even to avoid a constitutional question.”<sup>223</sup>

Application of the foregoing standard to 18 U.S.C. § 3593(c) leads us to the conclusion that the provision falls outside of the ambit of the rule of constitutional avoidance. 18 U.S.C. § 3593(c), by its terms, contemplates a single, unified sentencing hearing.<sup>224</sup> In fact, numerous courts have recognized that the language of the statute provides for a unitary sentencing framework.<sup>225</sup> 18 U.S.C. § 3593(c) is devoid of language that either explicitly mentions or would even implicitly suggest a bifurcated sentencing proceeding. Thus, the language of that provision is reasonably susceptible to only one construction: The FDPA contemplates a unitary sentencing proceeding.

Since the FDPA was enacted in 1994—eight years before *Ring* was decided and ten years prior to *Crawford*—it is doubtful that Congress could have anticipated the manner in which *Crawford* and *Ring* would fundamentally alter the constitutional requirements during the eligibility phase of capital sentencing proceedings.<sup>226</sup> The FDPA’s legislative history does note that its overarching purpose was “to establish Constitutional procedures for the imposition of the Federal death penalty.”<sup>227</sup> But Congress could not have legislated consistent with—or even in anticipation of—constitutional strictures that, except through divination, it could not have foreseen. That proposition holds true especially in light of the fact that Congress did, in fact, craft a sentencing procedure that, when the FDPA was initially promulgated, was entirely

223. *United States v. Locke*, 471 U.S. 84, 96 (1985) (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.)).

224. *See* 18 U.S.C. § 3593(b) (2000) (“the judge . . . shall conduct a separate sentencing hearing to determine the punishment to be imposed . . .”) (emphasis added); 18 U.S.C. § 3593(c) (“[a]t the sentencing hearing”) (emphasis added); 18 U.S.C. § 3593(d) (referring to “the hearing”) (emphasis added).

225. *E.g.*, *United States v. Barnette*, 390 F.3d 775, 810 (4th Cir. 2004) (“By its terms, the Federal Death Penalty Act contemplates only a single sentencing hearing . . .”); *United States v. Bodkins*, No. CRIM.A.4:04CR70083, 2005 WL 1118158, \*7 (W.D. Va. 2005) (explaining that 18 U.S.C. § 3593(c) “contemplates the possibility of a unitary proceeding”). *See also* *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1222 (D. Colo. 2007) (“the FDPA does not in any way refer to or authorize bifurcation of the penalty phase”). *See* *Bunin*, *supra* note 8, at 274 (Alexander Bunin submits that given that the FDPA “clearly approves only a very specific bifurcated procedure,” judicial trifurcation “requires rewriting the FDPA.”).

226. *See* *United States v. Fell*, 217 F. Supp. 2d 469, 490 (D. Vt. 2002) (“When Congress enacted the FDPA, it could not have anticipated that death-eligibility factors would be regarded as the functional equivalent of elements.”); *Jordan*, 357 F. Supp. 2d at 903 (“It is . . . doubtful that Congress, in drafting the statute, could have forecast the scope or impact of *Crawford* on its legislation.”). *See also* *United States v. Mills*, 446 F. Supp. 2d 1115, 1131 n.16 (C.D. Cal. 2006) (noting that “dividing the penalty phase [is] a procedure not foreseen by the FDPA”).

227. H.R. REP. NO. 103-467 (1994).

consonant with the Court's then-prevailing capital-sentencing-rights and Confrontation Clause jurisprudence.<sup>228</sup> Thus, it is highly unlikely that Congress could have intended to legislate consistent with judicially imposed constitutional limitations—here, by providing for bifurcation—that did not even exist at that time. If that were the case, Congress would have drafted the statute in a manner that explicitly required or at least tacitly authorized bifurcated capital sentencing proceedings.

The notion that 18 U.S.C. § 3593(c) reflects a congressional intent to grant, *carte blanche*, the federal courts the authority to devise and implement any capital sentencing procedure that they deem fit so long as it was not explicitly prohibited by that statute is, to say the least, highly problematic. Indeed, *reducio ad absurdum*, acceptance of that proposition—i.e., if judges are not statutorily prohibited from taking a given action, then that action must be within the scope of their discretion—would lead to patently untenable consequences. The plain language of a statute places some constraints on judicial construction; and judges do not have the unrestricted authority to interpret statutes however they see fit. The FDPA is no different.

In *Caminetti v. United States*, the Court described the so-called plain meaning rule this way:

When the language of a statute is plain and does not lead to absurd or impracticable results, there is no occasion or excuse for judicial construction; the language must then be accepted by the courts as the sole evidence of the ultimate legislative intent, and the courts have no function but to apply and enforce the statute accordingly.<sup>229</sup>

More recently, the Court has explained:

[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: “judicial inquiry is complete.”<sup>230</sup>

In other words, unless otherwise defined by statute, courts should presume that words are used in accordance with their common meaning and should construe them accordingly.<sup>231</sup> Likewise, in construing a

228. See *supra* notes 73-77 and accompanying text.

229. 242 U.S. 470, 471 (1917).

230. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

231. *Perrin v. United States*, 444 U.S. 37, 42 (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary,

statute, courts should look to its grammatical construction.<sup>232</sup> The legislature “is presumed to know the meaning of words and the rules of grammar.”<sup>233</sup>

Under the doctrine of *noscitur a sociis* [it is known from its associates],<sup>234</sup> the meaning of an ambiguous word in a statute may be discerned by reference to the meaning of the words surrounding it and the context in which it is used, i.e., its meaning may be ascertained by looking at the words used in the rest of the statute in context.<sup>235</sup> (For that matter, legislative intent may be gleaned in the same manner.)<sup>236</sup>

18 U.S.C. § 3593 is entitled, “Special hearing to determine whether a sentence of death is justified”; it only refers to “a hearing,” “a separate sentencing hearing,” and “the hearing.”<sup>237</sup> 18 U.S.C. § 3591 of the FDPA, likewise, refers to the penalty phase conducted pursuant to 18 U.S.C. § 3593 as “a hearing”—not once, but twice.<sup>238</sup> Concordantly, 18

common meaning.” (citations omitted); *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J. dissenting) (“In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning.”); *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 788 (Alaska 1996) (“In assessing statutory language, ‘unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage.’”) (quoting *Tesoro Alaska Petroleum Co v. State*, 746 P.2d 896, 905 (1987)).

232. See *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897) (“The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used . . . The courts have no function of legislation, and simply seek to ascertain the will of the legislator.”). See also *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989) (the Court noted that its reading of the statute was, *inter alia*, “mandated by the grammatical structure of the statute”).

233. *Goldenberg*, 168 U.S. at 102-03.

234. BLACK’S LAW DICTIONARY 956 (5th ed. 1979) (“The meaning of a word is or may be known from the accompanying words.”).

235. See *United States v. LaBrecque*, 419 F. Supp. 430, 434 (D.N.J. 1976) (“The maxim *noscitur a sociis* is employed to ascertain the meaning of an ambiguous or doubtful word . . . by reference to other words with which it is associated . . .”). See also *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) (“The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.”); *Wong Kam Wo v. Dulles*, 236 F.2d 622, 626 (9th Cir. 1956).

236. See *Neal v. Clark*, 95 U.S. 704, 709 (1877) (“In the construction of statutes . . . the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently the intention of the legislature being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter.” (quoting BROOM’S LEGAL MAXIMS, 455)).

237. See 18 U.S.C. § 3593 (2000). See also *Neal*, 95 U.S. at 709 (“[W]here the meaning of any particular word is doubtful or obscure, . . . the intention of the party who has made use of it may frequently be ascertained and carried unto effect by looking at the adjoining words.” (quoting BROOM’S LEGAL MAXIMS, 450)).

238. See 18 U.S.C. § 3591. Likewise, under the *in pari materia* canon of statutory construction, the meaning of an ambiguous term or phrase in a statute may be determined by reference to other statutes concerning the same subject matter. See *Erlenbaugh v. United States*, 409 U.S. 239, 243-

U.S.C. § 3595 refers to “the sentencing hearing.”<sup>239</sup> An analysis of the totality of the FDPA thus reflects an unmistakable legislative intent to create a unitary sentencing proceeding.

To be sure, “in the exercise of supervisory powers, federal courts may, *within limits*, formulate procedural rules not specifically required by the Constitution or the Congress.”<sup>240</sup> But as the Supreme Court explained in *United States v. Jackson*,

It is one thing to fill a minor gap in a statute to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.<sup>241</sup>

For that matter, the notion that the judiciary lacks the “discretionary power to disregard the considered limitations of the law it is charged with enforcing” is a fundamental precept of our system of checks and balances.<sup>242</sup> In short, however well intentioned and well reasoned a response to the FDPA’s constitutional deficiencies judicially imposed trifurcation may be, it is outside of the purview of judicial discretion.<sup>243</sup>

It is not the province of the courts to salvage an otherwise unconstitutional statute through judicial fiat—implementing a procedure that the plain language of the statute unequivocally rejects,<sup>244</sup> by reading it in a manner that Congress almost certainly could not have intended. Irrespective of the rebuttable presumption that Congress legislates consistent with the Constitution, federal courts cannot, *ipse dixit*, impute a congressional intent to allow for the possibility of trifurcation to statute that, by its terms, contemplates a unitary sentencing proceeding.<sup>245</sup> Rather, the onus is on Congress to cure 18 U.S.C. § 3593(c)’s constitutional deficiencies through promulgating legislation that reflects

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244 (1972) (characterizing “[t]he rule of *in paria materia*” as “but a logical extension of the principle that individual sections of a single statute should be construed together”). See also *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 316 (2006).

239. See 18 U.S.C. § 3595.

240. *United States v. Hasting*, 461 U.S. 499, 505 (1983) (emphasis added).

241. 390 U.S. 570, 580 (1968).

242. *United States v. Payner*, 447 U.S. 727, 737 (1980).

243. *Thomas v. Arn*, 474 U.S. 140, 148 (1985) (“Even a sensible and efficient use of [judicial] supervisory power . . . is invalid if it conflicts with constitutional or *statutory* provisions.”) (emphasis added).

244. *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (federal courts lack the inherent authority to fashion rules and procedures that circumvent or conflict with the Constitution or legislation).

245. See *supra* notes 84 & 225-226 and accompanying text.

contemporary Sixth Amendment jurisprudence—by amending the statute, thus codifying a trifurcated framework.

### VIII. CONCLUSION

The application of the statute at issue has created the reality that drives the need for this discussion. It expressly delineates an unconstitutionally lax evidentiary standard that creates the possibility that a capital defendant may become eligible for the death penalty based on testimonial statements provided by an out-of-court declarant; that is, under 18 U.S.C. § 3593(c), the government may establish facts necessary to prove the greater crime of federal capital murder with uncross-examined testimonial hearsay.<sup>246</sup> Because that provision, by its terms, enables the trial judge, at his or her discretion, to admit *any* evidence—including testimonial hearsay—relevant to establishing an aggravating factor, so long as the government has provided adequate notice to the defendant that it intends to prove that aggravating factor.<sup>247</sup>

18 U.S.C. § 3593(c), therefore, deprives capital defendants of an unabridged Sixth Amendment right of confrontation, as defined by *Crawford*, by allowing for the admission of almost any type of hearsay statement (irrespective of whether that statement is testimonial) during the sentencing hearing, in which the eligibility phase is housed. But if the eligibility phase of a capital trial conducted under the FDPA is, as we argue, within the ambit of the Confrontation Clause, it necessarily follows that federal capital defendants *must* be afforded a full-fledged Sixth Amendment right of confrontation during that stage of their prosecution. It stands to reason, then, that a statute that explicitly affords a judge untrammelled discretion to violate a capital defendant's right of confrontation so long as he or she deems the testimonial hearsay at issue sufficiently reliable, and therefore allows a judge to deny a capital defendant a fundamental constitutional right, is constitutionally infirm.

While the evidentiary standard prescribed by 18 U.S.C. § 3593(c) may have been constitutional when that statute was initially promulgated, because of the jurisprudential sea change created by *Ring v. Arizona* and *Crawford v. Washington*, that proposition is no longer true. *Ring* created a constitutional mandate, and *Crawford* crafted guiding principles, with respect to the Sixth Amendment right of

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246. See 18 U.S.C.A. § 3593(c).

247. See 18 U.S.C.A. § 3593(c) (2000). See also *United States v. Jones*, 132 F.3d 232, 240 n.5 (5th Cir. 1998).



confrontation, by which that mandate must be applied. Because 18 U.S.C. § 3593(c) is within the scope of *Ring*'s constitutional mandate, it must comply with the constitutional requirements outlined in *Crawford*. On its face, the lax, all-too-malleable evidentiary standard 18 U.S.C. § 3593(c) delineates is irreconcilably inconsistent with *Crawford*'s guiding principles but also its specific holding. After *Crawford*, the concept of admitting out-of-court statements based on a judicial determination of reliability is no longer constitutional, and, therefore, allowing the government to prove statutory aggravating factors—at least the functional equivalent of elements of federal capital murder—with testimonial hearsay, even where the defendant has never had an opportunity to cross-examine the declarant(s), is not constitutional either.

Notwithstanding the doctrine of constitutional avoidance, judicial trifurcation is an untenable response to the foregoing constitutional quandary, which is, in and of itself, unconstitutional. The notion that an unconstitutional evidentiary standard can somehow be cured or cancelled out by an equally unconstitutional judicial response is no less a logical fallacy than the notion that two wrongs make a right. We submit that although there may be other ways in which the inherent structural problems caused by the FDPA's procedural framework could be remedied,<sup>248</sup> legislatively mandated trifurcation would best alleviate the aforementioned constitutional deficiencies.

As Alexander Bunin points out,<sup>249</sup> legislatures could always heed Justice Scalia's counsel, tacitly offered in his concurring opinion in *Ring*, and "plac[e] the aggravating-factor determination (where it logically belongs anyway) in the guilt phase."<sup>250</sup> Indeed, Bunin's proposal for alleviating constitutional concerns with the evidentiary standards governing capital sentencing proceedings—to wit, revising capital murder statutes, adding additional death-eligibility elements, and litigating a capital defendant's death eligibility in the guilt-innocence phase of his or her trial<sup>251</sup>—makes an eminent amount of sense with regard to *state* capital statutes with an analogous procedural framework.

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248. For example, Alexander Bunin submits that "[t]he only solution [to this dilemma] is for legislatures to rewrite those capital statutes to require that all elements of a capital crime be proven during the guilt phase of trial." Bunin, *supra* note 8, at 280.

249. *Id.* at 272.

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

251. Bunin, *supra* note 8, at 280.

But given that the FDPA, in essence, is a sentencing statute,<sup>252</sup> which, *inter alia*, modified the penalty schemes for existing federal criminal statutes, revising the FDPA to provide for litigating a capital defendant's death eligibility during the guilt-innocence phase of his or her trial is neither pragmatic nor even feasible. The FDPA does not simply create federal capital crimes but rather expands the number of federal crimes for which the government may seek death sentences and prescribes the procedures that govern federal capital sentencing proceedings.<sup>253</sup> To implement Bunin's proposal in the context of the FDPA, then, would thereby necessitate revising literally dozens of federal statutes to reflect the dictates of contemporary Sixth Amendment jurisprudence.

Realistically, that leaves Congress with only two *constitutional* alternatives: either scrap the FDPA *in toto* or revise it in a manner such as to not only authorize but require trifurcation, thereby affording capital defendants, at minimum, an unabridged right of confrontation through the death-eligibility determination. As noted *supra*, the ambit of capital defendants' rights at sentencing is beyond the scope of this article, as is a discussion of other potential constitutional concerns with the FDPA's procedural framework. For that matter, we do not herein express a view as to which of those two choices is preferable; rather, the purpose of this article is strictly limited to highlighting what we believe to be an unconstitutional evidentiary practice and an equally unconstitutional judicial response. That being said, assuming *arguendo* that the FDPA's constitutional shortcomings may be cured through statutorily affording capital defendants an unfettered Sixth Amendment right of confrontation through the death-eligibility determination, we submit that revising 18 U.S.C. § 3593(c) to provide for mandatory bifurcation of the penalty phase of federal capital trials (i.e., trifurcation) is the only viable method of curing those deficiencies short of repealing the statute.

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252. See *supra* notes 73-79 and accompanying text.

253. See *supra* note 75.

