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Articles

**\*233 WHEN TRIAL AND PUNISHMENT INTERSECT: NEW DEFECTS IN THE DEATH PENALTY**

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Introduction

Most death penalty schemes in the United States today determine whether a defendant is guilty of capital murder during a sentencing hearing. In every other criminal case, a trial determines guilt, and a sentencing hearing selects a punishment for a guilty defendant.

The effect of this is that some elements of capital murder are denied the procedural protections of a trial. Providing a less reliable procedure for determining elements of a capital crime is without any precedent in American law or its common law foundations. This disparity has been revealed by recent Supreme Court cases distinguishing between the elements of a crime and sentencing factors.

A. Trial vs. Sentence

A sentencing hearing is fundamentally different from a trial. It permits evidence that is not admissible to prove guilt. [\[FN1\]](#) There is no presumption of innocence. [\[FN2\]](#) It may be decided by a preponderance of the evidence. [\[FN3\]](#) A judge may select the sentence. [\[FN4\]](#)

A trial is restricted by formal rules of evidence and procedure. [\[FN5\]](#) \*234 A defendant is presumed innocent. [\[FN6\]](#) The prosecution must prove all elements of the offense beyond a reasonable doubt. [\[FN7\]](#) A jury is required. [\[FN8\]](#)

Elements of a criminal offense are any facts the prosecution must prove to make a defendant eligible for the highest punishment set by the legislature. [\[FN9\]](#) It does not matter how the legislature chooses to characterize those facts. [\[FN10\]](#) If a fact increases the maximum punishment for a crime, it is an element of that crime. [\[FN11\]](#) Each element must then be proven to a jury beyond a reasonable doubt before a defendant is guilty of the crime. [\[FN12\]](#)

It is only the conviction of a crime, which fixes the sentencing range required by statute. [\[FN13\]](#) The statutory range is located between the minimum and maximum sentences for the crime of conviction. [\[FN14\]](#) Once those parameters are set by the finding of guilt, the selection of punishment is a choice of sentences within that range. [\[FN15\]](#) The determination of a sentence within the appropriate range can then be made, without jury participation, and by a mere preponderance of evidence. [\[FN16\]](#)

For example, Title 18 of the United States Code contains most of the criminal offenses enacted by the Congress. Each statute is defined by certain facts. These facts are elements of a crime that must be proven to a jury beyond a reasonable doubt before a defendant may be found guilty. If Congress adds a new fact that increases the maximum punishment, then Congress has created a new, greater crime. That additional fact must be proven to a jury beyond a reasonable doubt in order for a defendant



to be guilty of the greater offense.

**\*235 B. Capital Cases**

In a capital case, facts that make a defendant eligible for the death penalty are elements of the crime. [FN17] These capital elements are called 'statutory aggravating circumstances.' [FN18] Absent a finding of at least one statutory aggravating circumstance by a jury, beyond a reasonable doubt, the crime of capital murder is not proven and the death penalty may not be considered. [FN19]

In most death penalty cases, the existence of statutory aggravating circumstances is not decided during the guilt phase of trial, but rather during the sentencing hearing. [FN20] A capital jury receives proof of the elements and information for selecting punishment, together at a unitary proceeding. [FN21] Therefore, 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.

This manner of bifurcating a capital trial was implemented by legislatures to answer Eighth Amendment concerns about restricting the class of persons eligible for the death penalty, and assuring that those persons could present mitigating evidence. [FN22] These laws \*236 were designed before recent Supreme Court cases applying the definition of offense elements to mandatory sentencing factors. [FN23]

The issue is not whether bifurcation of a capital trial and the sentencing hearing is proper. It is. The question is at what point must the trial end and the sentencing hearing begin? The answer is that the selection of punishment may be decided once the elements of the crime have been proven. Yet in most capital cases, the sentencing hearing begins before all the elements of capital murder are decided.

In jurisdictions where statutory aggravating circumstances are not decided until the sentencing hearing, the following anomaly occurs. At the guilt phase, a jury may only convict a defendant of a crime that is less than capital murder. [FN24] After conviction of this lesser crime, the jury then enters a sentencing phase. [FN25] Only then are the capital elements decided. [FN26]

The sentencing hearing is not subject to the rules of evidence [FN27] or the presumption of innocence. [FN28] The jury receives the evidence of guilt along with other information supporting a death sentence. [FN29] This other information usually includes the effect on the victim's family and community, [FN30] predictions of the defendant's future dangerousness, [FN31] the defendant's prior uncharged conduct, [FN32] examples of the defendant's bad character, [FN33] and hearsay, [FN34] none of which is generally admissible at the guilt phase of the trial. [FN35]

\*237 The jury then deliberates upon two very different issues, whether the defendant is guilty of capital murder and whether a death sentence is appropriate. [FN36] Although eligibility for the death penalty must be decided beyond a reasonable doubt, the selection of punishment may be decided by a preponderance of evidence. [FN37] Selection may be determined by a judge. [FN38]

By deciding the capital elements at the sentencing hearing, the defendant does not receive protections provided during the proof of guilt for any other crime. [FN39] To the extent that capital elements are proved, it is a sentencing hearing in name only. Calling it a sentencing hearing does not resolve the discord caused by deciding the capital elements without traditional trial protections. Three related areas of law have converged to cause this conflict: the right to a jury in criminal trials, traditional sentencing law, and modern capital sentencing law. Although these areas overlap, their development has generally



received separate treatment.

### I. The Right to Jury Trial

Sir William Blackstone warned in the 1760s that jury trials could be undermined by 'new and arbitrary methods of trial' and that the inconvenience of jury trials was 'the price all free nations must pay for their liberty in more substantial matters.' [FN40] Two hundred years later, the United States Supreme Court struck down a Maine statute for reducing the prosecution's burden of proof in a \*238 murder case. [FN41] By presuming a defendant acted with premeditation, the statute eliminated the necessity for a jury finding of the mens rea for murder, and infringed upon a defendant's Sixth Amendment right to jury trial. [FN42]

Two decades later, the Supreme Court addressed the effect of proving facts that raise the statutory maximum for an offense. In *Jones v. United States*, [FN43] the Court stated 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) [FN44] that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' [FN45]

The following year, in *Apprendi v. New Jersey*, the Court distinguished between offense elements and sentencing factors. [FN46] Offense elements are those facts necessary to subject a defendant to the statutory punishment range. [FN47] Sentencing factors direct a sentencer to choose punishments within the statutory range. [FN48] Whether a finding is an offense element or sentencing factor depends upon the effect of the inquiry, not how the legislature chose to characterize the finding. [FN49] For example, a finding that the crime was based upon the victim's race, subjecting the defendant to a higher maximum punishment, is an offense element. [FN50] On the other hand, a finding that a defendant brandished a firearm, to establish a mandatory minimum punishment, is a sentencing factor. [FN51]

\*239 Although this article is concerned with the effect on capital cases, particularly in the federal courts, the Supreme Court's ruling in *Apprendi* changed the way many crimes are prosecuted. For instance, under federal law, possession with intent to distribute 100 grams of heroin has a maximum punishment of forty years imprisonment. [FN52] Absent proof of at least that quantity of heroin, the maximum punishment may not exceed twenty years. [FN53]

Before *Apprendi*, such drug quantities could be found by a judge relying on a report from a probation officer. [FN54] Now the issue must be alleged by indictment and decided by a jury during the guilt phase of trial. [FN55] After *Blakely v. Washington*, even minor sentencing enhancements may require such treatment. [FN56] By placing the determination of drug quantities during the guilt phase, it is now subject to both the rules of evidence [FN57] and the presumption of innocence. [FN58] A sentencing hearing lacks these protections. [FN59]

The Supreme Court was then confronted with its previous decisions regarding a defendant's eligibility for the death penalty. Ten years before *Apprendi*, the Court held in *Walton v. Arizona* that the aggravating circumstances introduced at a capital sentencing hearing were sentencing factors, not offense elements. [FN60] Dissenting in *Apprendi*, Justice O'Connor pointed out that the effect of an aggravating circumstance was to make a defendant eligible for the death penalty. Thus, under the Court's new analysis, an aggravating circumstance \*240 would have to be treated as an offense element. [FN61] *Walton*, which allowed a judge to make the findings regarding aggravating circumstances, appeared to be in opposition to *Apprendi*'s requirement of a jury verdict.

Two years after *Apprendi*, the Court overruled *Walton* in *Ring v. Arizona*, [FN62] raising the question of what other ramifications exist for a capital sentencing hearing that combines proof of elements and the determination of a sentence. An examination of traditional sentencing and modern capital sentencing explains why offense elements must belong as part of the guilt phase of a trial and not the sentencing hearing.



## II. A Brief History of Sentencing

At common law, a judge was required to impose sentences specifically sanctioned by criminal statutes. [FN63] In other words, punishments were mandatory, of which most were death sentences. [FN64] If a judge thought a sentence was inappropriate, the judge had to invoke the pardon process to commute the punishment. [FN65] Since there was no range of sentences to choose from, limiting judicial discretion was unnecessary. A judge simply had little discretion to constrain. [FN66]

\*241 That system carried over to the Colonies. [FN67] Punishments were mostly fines, whippings, stocks, banishment, and the gallows. [FN68] Originally, the jury did not impose the sentence. [FN69] Jurors merely found whether the defendant was guilty of the statute. [FN70]

It was only by the 1820s that prisons became a standard form of punishment in the United States. [FN71] With the creation of prisons, judges were given discretion regarding how long a prisoner could be confined. [FN72] State legislatures and Congress began creating criminal laws with ranges of punishment. [FN73] Legislatures set the minimum and maximum punishments allowed. [FN74] Judicial discretion increased with devices like probation and indeterminate sentences. [FN75]

Absent mandatory sentencing considerations, a judge has discretion to sentence a defendant anywhere within the statutory range. [FN76] This can lead to drastically divergent sentencing policies among judges even in a single jurisdiction. [FN77] In recent decades, legislatures \*242 became concerned with further limiting judicial discretion. [FN78] Reacting to sentencing diversity, legislatures imposed greater limitations on judicial discretion in an effort to make sentencing more uniform. [FN79]

The new limitations on discretion were in the form of specific factual considerations affecting the length of sentence. [FN80] Whether contained within the charged criminal statute, or referenced in a separate sentencing law, these considerations came to be known as sentencing factors. [FN81] The most dramatic examples of sentencing factors are mandatory minimum punishments [FN82] and sentencing guidelines. [FN83]

The appearance of escalating minimum sentences, based upon a finding of additional facts, has only recently become widespread. [FN84] Quantities of drugs, [FN85] the presence of firearms, [FN86] and 'hate crimes' [FN87] all have been predicates for higher mandatory minimum sentences.

Sentencing guidelines are based upon numerical scales that define the seriousness of the offense and the severity of a defendant's criminal history. [FN88] By adding and subtracting points assigned to various factors, a judge is given a far more limited choice of sentences than the statutory minimum and maximum. [FN89] A judge may ignore these restrictions only for strictly defined reasons. [FN90]

The Supreme Court approved both mandatory-minimum \*243 sentences [FN91] and sentencing guidelines. [FN92] When sentencing factors are used to restrict judicial discretion below the statutory maximum punishment they do not offend the Constitution. [FN93] However, when those systems require judges to find facts that increase the maximum sentence, they violate the Sixth Amendment. [FN94]

The Supreme Court has long recognized that the different procedures at trial and sentencing are based upon their different goals. [FN95] Therefore, prior to the advent of sentencing factors there was little reason for any factual findings at a sentencing hearing. [FN96] Due process did not require trial protections and no jury participation was necessary. [FN97]

## III. The Modern Death Penalty

In 1972, the Supreme Court struck down all existing death penalty statutes in the United States. [FN98] Those statutes were



found to violate the Eighth Amendment by giving juries unfettered discretion to impose the death penalty. [FN99] Legislatures enacted new death penalty schemes that attempted to restrict the class of persons eligible for the death penalty and to limit jury discretion. [FN100]

To comply with the Eighth Amendment, the death penalty must be proportionate to the offense charged. [FN101] Individual culpability \*244 for capital murder is required. [FN102] Certain classes of persons are completely excluded from the reach of capital punishment. [FN103] Mandatory death penalty laws are prohibited, [FN104] and the jury must be allowed to consider mitigating evidence. [FN105]

In order to meet these Eighth Amendment concerns, legislatures bifurcated capital jury trials. [FN106] The first phase was designed to determine guilt. [FN107] If a defendant was convicted, the second phase decided punishment. [FN108] By this separation, the guilt phase maintained all of the protections of a trial. [FN109] The sentencing hearing was to assure that only an eligible defendant received a death sentence, and that they were able to present any evidence that mitigated against death. [FN110] In general, prosecutors were given the same freedom from the rules of evidence. [FN111]

At the time these laws were enacted, a jury was allowed to consider imposing a death sentence as long as the criminal statute had a maximum punishment of death. [FN112] Statutory aggravating factors merely were considered sentencing factors, not offense elements. [FN113]

The Supreme Court did not require any specific model for the \*245 new capital punishment schemes. [FN114] Most procedures restricted eligibility for the death penalty during the sentencing phase after aggravating factors were proven. [FN115] Subsequently, if proven, the death penalty, or some lesser sentence, could be selected. [FN116]

The Sixth Amendment does not require that a jury select the punishment. [FN117] As long as a jury finds all the elements of capital murder beyond a reasonable doubt, a judge may choose between death and lesser sentences. [FN118] However, instead of requiring proof of all elements of the offense at a trial, many capital schemes left proof of aggravating circumstances until the sentencing hearing. [FN119] In those schemes, the jury must participate as fact finders during the punishment hearing to find the existence of at least one statutory aggravating circumstance. [FN120]

#### IV. A Conflict of Laws

Until recently, there did not appear to be a conflict between traditional sentencing law, modern capital sentencing procedure, and the right to a jury trial. If a jurisdiction required proof of a fact during the guilt phase of trial, then that fact received all the protections of the rules of evidence [FN121] and the presumption of innocence. [FN122] However, since proof of at least one statutory aggravating circumstance is now considered an element of capital murder, [FN123] then proving that aggravating circumstance during the sentencing phase needs to be reconciled with the constitutional requirements of the guilt phase of a trial.

##### \*246 A. Ring v. Arizona

In *Walton v. Arizona*, [FN124] the United States Supreme Court approved Arizona's capital punishment scheme allowing a judge to make the factual findings necessary before a death sentence could be considered. In Arizona, a judge could determine the existence of facts narrowing the class of persons eligible for the death penalty. [FN125] The supporting rationale of *Walton* was that the Arizona legislature had set the maximum statutory range of punishment at death; therefore, the jury's guilty verdict satisfied the Sixth Amendment right to a jury trial. [FN126] That reasoning was sufficient when the focus was on how the legislature worded the statute.



The attention has since changed from the words of the statute to their effect. [FN127] The clear effect of the Arizona statute was to make a defendant eligible for the death penalty only after there was a finding of at least one fact that narrowed the class of persons eligible for the death penalty. [FN128] Although the Apprendi majority attempted to distinguish capital findings, by the time of Ring, the entire Court was convinced of the irreconcilability of the two cases. [FN129] Some felt Walton should be overruled [FN130] and others wanted to do away with Apprendi. [FN131] Ring overruled Walton and the analysis of Apprendi prevailed. [FN132]

Ring answered the question about the necessity for jury findings, but raised other issues. One question raised by Ring was whether the statutory aggravating circumstances in capital cases are actually offense elements. [FN133] The Ring Court called statutory aggravating circumstances 'the functional equivalent of an element,' \*247 [FN134] but it was unclear whether the Court meant there was a difference between an element and a 'functional equivalent,' or whether the Court was simply uncomfortable with referring to elements.

#### B. Sattazahn v. Pennsylvania

In Sattazahn v. Pennsylvania, Justice Scalia, writing for three members of the Court, stated that before Apprendi and Ring 'capital-sentencing procedures were understood to be just that: sentencing proceedings.' [FN135] Justice Scalia then explained that until the elements of the greater offense of capital murder are proven, a defendant is only exposed to the underlying lesser offense of murder. [FN136] Chief Justice Rehnquist and Justice Thomas joined Scalia in holding that whether it is called a sentencing hearing or not, the protections of a trial apply to proving elements of a capital crime. [FN137]

The dissent agreed. [FN138] Justice Ginsberg, writing for Justices Stevens, Souter, and Breyer stated, 'This Court has determined . . . that 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.' [FN139] Therefore, seven members of the Supreme Court clearly stated that statutory aggravating circumstances are elements of capital murder. [FN140]

Justices Kennedy and O'Connor did not join in either statement. \*248 They both dissented in Apprendi. [FN141] In Ring, Justice Kennedy grudgingly accepted Apprendi, [FN142] while Justice O'Connor continued to reject Apprendi and its progeny. [FN143] However, they both apparently believe, despite their objections, that Ring and Sattazahn hold that proof of at least one aggravating circumstance is now treated as an element of capital murder. Therefore, the Court is unanimous. Like it or not, statutory aggravating circumstances are capital elements. [FN144]

Every federal court that has reviewed this issue after Sattazahn has agreed that proof of at least one statutory aggravating circumstance is necessary to prove a capital crime. [FN145] Courts have also applied the Grand Jury Clause of the Fifth Amendment to federal capital cases even though the federal capital statutes require only written notice of the intent to seek the death penalty. [FN146]

Before the Supreme Court's decisions in Ring and Sattazahn, it was possible to say that the relaxed evidentiary standards approved by the Supreme Court for capital sentencing hearings applied to statutory aggravating circumstances [FN147] and that no presumption of innocence was necessary. [FN148] It is now clear that a defendant is eligible for the death penalty only after he has been convicted of all the \*249 elements of capital murder, including at least one statutory aggravating circumstance. [FN149] The next question is whether due process requires that, during proof of those elements, a defendant receive the protections of the rules of evidence and the presumption of innocence.



#### V. Effect of Ring and Sattazahn

The obvious effect of Ring and Sattazahn is that in many jurisdictions the elements of capital crimes are not addressed until the sentencing hearing. A review of the practical differences between the proof of guilt and the determination of punishment demonstrates the irrationality and unconstitutionality of these procedures.

##### A. Rules of Evidence

Rules of evidence began to develop in sixteenth century England when judges started admitting oral testimony during jury trials. [FN150] Before that time, verdicts were based on jurors' own knowledge, with the assistance of legal documents. [FN151] As one commentator described the early development of oral testimony, 'the absence of clear rules as to admissibility of evidence, and as to the conduct of a trial, were used to give advantages to the crown.' [FN152]

By the time the Framers began drafting the United States Constitution, four exclusionary rules of criminal evidence were firmly in place in English common law: the character rule, the corroboration rule, the confession rule, and the hearsay rule. [FN153] The character rule prevented the prosecution from introducing evidence of the defendant's bad character, especially evidence of former crimes, except by way of rebuttal. The corroboration rule required evidence in addition to that of the accomplice in order for the jury to convict. The confession rule excluded evidence that the accused had made in an out-of-court confession of the crime, unless the confession was voluntary. The hearsay rule rejected testimony by one person about what another person said when that testimony was offered to prove the truth of the out-of-court statement. [FN154]

\*250 The evolution of these rules has varied. The character rule has continued to this day. [FN155] The accomplice rule exists in many states, but not the federal courts. [FN156] The confession rule was made a constitutional right. [FN157] The hearsay rule, as it applies to testimonial evidence in a criminal case, also has constitutional protection. [FN158]

The importance, however, is not in what form these rules survive, but in the Framers' understanding of the need for exclusionary rules of evidence for the protection of criminal defendants. [FN159] The creation of such rules occurred shortly before the time the Constitution and the Bill of Rights were born. As the Supreme Court stated:

Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property. [FN160]

The above quote is another way of saying that the rules of evidence are essential to protect rights that are specifically stated in the Constitution. The rules of evidence have a significance similar to Miranda warnings. [FN161] Although Miranda warnings are not themselves a protection stated in the Constitution, they are necessary to \*251 enforce the right against self-incrimination. [FN162]

Rules of evidence now apply during the guilt phase in all criminal jury trials. [FN163] Except for some who commit misdemeanors and petty offenses, all defendants have the right to jury trials. [FN164]

The rules of evidence are rules of limitation. [FN165] They restrict the quality of evidence that a proponent may introduce. [FN166] A prosecutor is the proponent of evidence when proving elements of a crime. [FN167] A criminal defendant is the opponent. Therefore, when a prosecutor seeks to prove capital elements, the government benefits from the absence of rules of evidence, while the defendant suffers from their loss. [FN168] Unlike sentencing rules, rules of evidence do not merely depend upon a judge's individual sense of fairness. [FN169] They exclude certain evidence as a matter of law. [FN170]



## 1. Relevance

There is a difference in substance between evidence at the guilt phase of a trial and information presented at a sentencing hearing. [FN171] That distinction can best be viewed through the evidentiary concept of relevance. [FN172] "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less \*252 probable than it would be without the evidence." [FN173] Some evidence is of consequence to guilt and other information relates to punishment, but very often the two purposes are exclusive. [FN174]

For instance, proof of a prior conviction is sometimes an element of an offense. [FN175] Prior crimes are also important in deciding an appropriate punishment. [FN176] In some situations, a prior conviction may be relevant to both phases of a trial. [FN177]

However, the reverse is not true. Punishment information is not necessarily relevant to proving guilt. [FN178] Whether or not the defendant used illegal drugs is not relevant evidence to prove whether or not he robbed a bank. [FN179] It makes guilt no more or less probable. The information may have some value when assessing a sentence, but it is not relevant to determine whether the defendant robbed a bank. [FN180]

'[W]here the jury has sentencing responsibilities in a capital trial, many issues that are irrelevant to the guilt-innocence determination step into the foreground and require consideration at the sentencing phase.' [FN181] A great deal of information that is completely acceptable at a sentencing hearing would never be properly admitted during a trial, capital or noncapital. [FN182]

Even relevant evidence may unfairly prejudice a jury against a defendant. [FN183] Rules of evidence protect criminal defendants from exposure to certain types of information that have been deemed \*253 unfairly prejudicial to proving guilt. [FN184]

## 2. Character Evidence

Unfair prejudice occurs at a trial when a defendant is harmed by violations of the rules of evidence. [FN185] The best example of prejudicial evidence that has been limited by rule is character evidence. [FN186] The rules of evidence generally prohibit the introduction of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. [FN187] However, at a sentencing hearing, virtually all facets of a defendant's character are relevant. [FN188] Although the defendant's propensity to commit crime is generally a legitimate sentencing concern, it is prohibited at a trial. [FN189]

One exception the Supreme Court has made to the general prohibition against admitting prior acts is when a statute makes proof of a prior conviction an element of the offense. [FN190] However, proof of the prior conviction at trial is limited to the conviction itself, not the underlying facts. [FN191] The Court has referred to the application of the rules of evidence as one of the procedural \*254 safeguards making recidivist statutes constitutional. [FN192]

The exclusion of bad acts evidence is founded not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds. [FN193]

At a trial, 'similar acts evidence is to be considered only for the proper purpose for which it was admitted.' [FN194] When that evidence is offered merely to prove that the defendant has a bad character, it must be excluded. [FN195]



Propensity and character evidence are routinely used during a sentencing hearing. [FN196] It is relevant and admissible to show that a convicted defendant deserves a more severe punishment because the defendant's history indicates he is likely to commit future crimes. [FN197] It is as difficult to imagine a sentencing hearing without propensity and character evidence as it is to conceive of a trial where a defendant is alleged to be guilty based solely on unrelated past conduct or the quality of his character.

The Supreme Court has been careful to exclude unnecessary prejudicial information when it might taint a jury verdict. [FN198] This rule goes back to common law [FN199] and has been incorporated into due process protections in the Constitution. [FN200] However, at sentencing, prior crimes need only be proven by a preponderance of the evidence, [FN201] including offenses that previously resulted in \*255 acquittals. [FN202]

At a capital sentencing hearing, the examination of a defendant's character is even more complex. Psychiatric evidence that the defendant will commit future crimes is admissible. [FN203] Lay witness testimony of future dangerousness is also admissible. [FN204] Even the defendant's 'low rehabilitative potential' may be introduced. [FN205]

Such evidence would never be admitted during the guilt phase of a trial. [FN206] Beyond the obvious notion of unfair prejudice, predictions of future behavior are simply not relevant to any element of a criminal offense. [FN207] Thus, it is not probative to any issue of guilt. [FN208]

### 3. Victim Impact Information

There are instances where the effect upon a victim is relevant to proving offense elements. [FN209] For instance, bodily injury or financial loss may be elements of an offense. However, evidence regarding the impact of the crime on third persons is never relevant at the guilt stage of trial. [FN210] Defense counsel has even been found to be ineffective for failure to object to the admission of such victim impact evidence during a trial. [FN211]

At a capital sentencing hearing, it is common to introduce information about the effect of the victim's loss upon others. [FN212] Surviving family members have been allowed to read poems of 'deep \*256 sadness and regret.' [FN213] In the Oklahoma City bombing trial, the government presented evidence of family members' last contacts with the deceased victims, the trauma of efforts to discover the victims' fates, the impact on learning of their deaths, the histories of the victims, the innocence of child victims, and the overall impact on the surviving families. [FN214] Evidence of the victims' religious activities has also been permitted. [FN215]

Showing the potential effect on prison employees, who will be responsible for the defendant, has been allowed. [FN216] The latent risk to others from a capital defendant's actions is a proper basis to consider imposing the death penalty. [FN217]

### 4. Hearsay

A further difference between proving guilt and determining punishment is the use of hearsay evidence. Subject to limited exceptions, hearsay is not allowed to prove a defendant's guilt at a trial. [FN218] Hearsay is another example of limited admissibility evidence. [FN219] A hearing that allows hearsay is entirely different in nature from a trial that requires the declarant to testify, subject to limited exceptions. [FN220] It is unclear whether the Confrontation Clause of the Sixth Amendment even applies to the sentencing. [FN221] \*257 If it does, then a great deal of traditional sentencing evidence would be barred. [FN222]

A sentencing hearing is a procedure that gives the jury or judge complete information about a defendant and the effect of the



crime for which the defendant has been convicted. [FN223] Hearsay is admissible and welcome during sentencing hearings. [FN224] Presentence reports, police reports, out-of-court witness statements, and other second-hand information is regularly admitted at a sentencing hearing. [FN225]

#### 5. Application of Rules

A good example of a pre-Ring case examining the application of the rules of evidence to a capital sentencing hearing is *United States v. Pitera*. [FN226] In *Pitera*, the district court rejected the application of the Federal Rules of Evidence during a capital sentencing hearing, finding that the rules only applied to proof at the guilt phase. [FN227] Pursuant to *Walton*, that was the proper ruling in 1992. [FN228] Proof of statutory aggravating factors were not considered to be elements of a capital case and therefore, did not have the protection of the rules of evidence. It was not until *Ring* that it became clear that capital elements and traditional sentencing considerations were unhappily married in one proceeding. [FN229] Today, the same reasoning \*258 in *Pitera* - that only elements of the crime require the rules of evidence - produces an opposite conclusion.

If the rules of evidence apply to trials but not sentencing hearings, then the important issue is whether the determination of capital elements is properly part of a trial or part of a sentencing hearing. The definition does not depend merely upon what the legislature chose to call the proceeding. [FN230] As with the definitions of elements and sentencing factors, their meaning depends upon their effect. [FN231] The determination of elements is logically a part of the guilt phase of trial [FN232] and requires the rules of a trial. To paraphrase Justice Scalia, whether it is called a trial, a sentencing hearing 'or *Mary Jane*,' [FN233] if the effect is to prove elements of the offense, trial protections should apply.

An argument exists here because no particular set of rules of evidence is constitutionally required. There is no right to proceed under any specific set of rules. [FN234] However, this contention misses the point. To exclude capital elements from the rules that apply to all other criminal trials denies due process of law and has no historical basis. To do so would also contradict all of the Supreme Court's previous Eighth Amendment case law requiring greater reliability in capital cases. [FN235]

#### 6. Reliability of Judicial Discretion

In *Crawford v. Washington*, the Supreme Court found that statements from an unavailable witness, offered against a criminal defendant, without a previous opportunity for cross examination, violated the Confrontation Clause of the Sixth Amendment. [FN236] The Court rejected the admission of such testimonial evidence, even if a judge has deemed it reliable. [FN237]

\*259 In doing so, the Court examined the historical basis for the Confrontation Clause and the abuses it sought to avoid. As an example, the Court pointed to the trial of Sir Walter Raleigh in 1603. [FN238] He was convicted upon a letter read by the prosecutor to the jury. In *A History of English Law*, W. S. Holdsworth examined Raleigh's trial and stated:

It is clear that this new fashion of examining witnesses for the crown, and, in light of their depositions, elaborately preparing the case against the prisoner, enormously increased the severity of the rules which refused him a copy of the indictment, refused him professional advice, and refused to allow him to call witnesses. And these advantages possessed by the crown pressed all the more hardy on him, because, as we have seen, the modern rules of evidence hardly as yet existed. [FN239]

Rules of evidence protect criminal defendants, who would otherwise be left to the discretion of the trial judge. As the Supreme Court stated in *Crawford*:

We have no doubt the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They 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. [FN240]

Simply leaving the admission of evidence to a trial judge's sense of reliability offends the very reason why the rules of evidence were developed. If a defendant has the right to have the elements proven, subject to the rules of evidence and the presumption of innocence, then this right cannot be avoided simply by placing the proof of some elements during a sentencing hearing.

#### B. Unitary Proceeding

Unlike anywhere else in criminal law, many death penalty \*260 schemes combine trial and sentencing evidence in a single proceeding. [FN241] A jury hears all the evidence at once and decides the issues during one deliberation. [FN242] No distinction is made between the evidence offered to prove the capital elements and information offered regarding the appropriate punishment. [FN243]

The Supreme Court has previously recognized that proof of guilt and the determination of punishment in capital cases should be separate:

When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman* [v. Georgia]. [FN244]

Since legislatures voluntarily created bifurcated capital schemes, the Court never had to decide whether a unitary capital trial and sentencing hearing could satisfy *Furman*. However, because the jury's decision at the sentencing hearing is now the equivalent to a guilty verdict of capital murder, a valid segregation of guilt and punishment evidence is necessary. [FN245]

In other contexts, problems of prejudice are often addressed by limiting instructions. [FN246] However, limiting instructions given during a capital sentencing hearing will not work. The jury will hear all the sentencing evidence at one proceeding. The jury cannot receive evidence about punishment and then mentally put it aside while they consider proof of the capital elements. [FN247] A limiting instruction that requires a jury to view a defendant as innocent with respect to some factual findings, but guilty as to others, requires overcoming a \*261 level of cognitive dissonance tolerated nowhere else in jury trials. [FN248]

In *Jackson v. Denno*, the Supreme Court struck down a state court procedure, which submitted the issue of the voluntariness of a confession to a trial jury. [FN249] Under the procedure, if a jury found the confession was involuntary, the jurors were then expected to ignore the statement while deliberating about the defendant's guilt. [FN250] The Court found this untenable. [FN251] Jurors are simply not capable of ignoring such obviously damaging evidence. Not only would the procedure merely mask the unfair prejudice to the defendant, [FN252] it would be impossible to present the issue on appeal because there would be no way to measure if jurors improperly relied on the statement in order to convict. [FN253]

The procedure in *Denno* is analogous to the situation faced by juries in many capital procedures. At a capital sentencing hearing, the jury is given evidence regarding offense elements and information supporting punishment. [FN254] When jurors deliberate on those issues at the same time, they cannot be expected to disregard the punishment information while deciding guilt.

In *Bruton v. United States*, the Supreme Court found that it was insufficient to instruct a jury to limit its consideration of a confession to only one of two defendants when the statement incriminated both. [FN255] The statement in *Bruton* was an admission by one \*262 defendant but hearsay as to the other. [FN256] It met no exception to the rule against hearsay. If the



latter defendant had been tried alone there was no question the statement would have been excluded. [FN257] The Court found that the government could not benefit by their joint trial in order to use otherwise inadmissible evidence. [FN258]

Rather than being told to completely disregard prejudicial evidence, capital jurors would be expected to make use of the information, but only for the limited purpose of selecting the punishment. [FN259] In *Bruton*, this type of mental exercise was found to be impossible. The remedy in *Bruton* was to conduct separate trials. [FN260] In capital cases, the remedy is to separate proof of guilt from proof supporting punishment. No limiting instruction can correct that structural defect. [FN261]

Courts have often relied on statements of common sense to condemn such procedures: "one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and . . . 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'" [FN262] As the Supreme Court quoted one juror, 'You can't forget what you hear and see.' [FN263]

Individual judges have stated the problem in their own words. Justice Robert Jackson said, 'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.' [FN264] Judge Learned Hand stated that the limiting instruction is a 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else.' [FN265]

Social science has confirmed the validity of these sayings. Jurors view a trial as a cohesive story, not a collection of separate \*263 issues. [FN266] A court may tell a jury to limit what it considers, but once that information has been heard, each juror will weigh the information anyway to resolve the issues. [FN267]

A procedure may involve 'such a probability that prejudice will result that it is deemed inherently lacking in due process.' [FN268] Other than outside influences, like publicity, [FN269] some trial practices have been held to deny due process.

In *Turner v. Louisiana*, the two principal witnesses for the prosecution in a death penalty case were deputy sheriffs responsible for sequestering the jury. [FN270] Even though there was no showing that either deputy discussed the case in the jurors' presence, prejudice was presumed. [FN271] Actions by judges [FN272] and prosecutors [FN273] \*264 have also been held to be inherently prejudicial when it was obvious they could not be ignored.

Additionally, whenever a capital defendant presents mitigating evidence, the government may rebut that evidence. [FN274] That rebuttal evidence will also be considered by the jury at the same time it considers the capital elements and the non-statutory aggravating evidence. [FN275] There is no separation, nor can there be, in a single proceeding. Therefore, anytime a capital defendant puts on mitigating evidence there is not only a risk of facing rebuttal evidence, which is not subject to the restrictions of the rules of evidence, but that the rebuttal evidence may also influence the jury to convict on the capital elements.

Courts do have some experience limiting the effects of prejudicial evidence. [FN276] Even absent rules of evidence, judges may still exclude prejudicial evidence. [FN277] The question is whether it is possible for courts to allow the introduction of traditional sentencing evidence and still protect capital defendants from the type of prejudicial information prohibited at trial.

It is difficult to imagine how an effective instruction, cautioning against combining proof of guilt with the determination of sentence, could be worded. Capital jury instructions do not prescribe which evidence goes with which issues, nor can they. [FN278] The prosecution's first witness might be a family member of the victim, whose testimony only concerns how much the victim meant to her, or the prosecution's first witness might be a government-retained psychiatrist offering the opinion that the defendant is likely to commit future acts of violence. The first witness might be a police officer detailing the defendant's prior arrests and other bad conduct.



In many cases, a prosecutor will present no new evidence, relevant to the capital elements, at the sentencing hearing. In those cases, nothing but punishment information will be introduced. \*265 Thus, none of the proof at the sentencing hearing will be relevant to the capital elements. The jury may have to sit through entirely irrelevant and prejudicial information before deciding whether the defendant is even guilty of capital murder.

### C. Presumption of Innocence

The presumption of innocence is a basic tenet of American law. [FN279] That presumption 'is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' [FN280] A jury instruction that undermines the presumption of innocence is unconstitutional. [FN281]

No presumption of innocence exists at a sentencing hearing. [FN282] By definition, defendants may only be sentenced after guilt is determined. Sentencing considerations which are not elements are thus not subject to the Constitution's indictment, jury and proof requirements. [FN283]

A jury can hardly presume a defendant is innocent of capital murder after the jurors have already deliberated and convicted the defendant of murder. This contradiction is compounded by the fact that the proceeding during which this will occur is called a 'sentencing hearing.' [FN284] This means that unlike any other crime, a capital defendant is without the presumption of innocence as to elements of the offense. [FN285] The elements in question are the very ones that \*266 make it a capital case. [FN286]

In *Taylor v. Kentucky*, the defendant was convicted of robbery. [FN287] At trial, he testified that he was not present at the victim's home at the time of the robbery. [FN288] Although the trial court gave an instruction on reasonable doubt, the defendant's requested instruction on the presumption of innocence was denied. [FN289] The Supreme Court found that failure to give an instruction on the presumption of innocence denied the defendant due process of law. [FN290] In reaching this conclusion, the Court weighed aspects of the trial that vitiated against the presumption of innocence: the prosecutor's argument condemning all defendants, the skeletal reasonable doubt instruction, and the swearing match between victim and defendant. [FN291]

Proving capital elements during the sentencing hearing is worse than the denial of a jury instruction in *Taylor*. Not only is a capital defendant without the presumption of innocence, but the jury is told the defendant is guilty. [FN292] No instruction on reasonable doubt can possibly remedy that defect. Even if instructions on the presumption of innocence were given regarding the capital elements, they could not logically overcome the fact that the jury has already found the defendant guilty of a murder, or that evidence of capital murder is then combined with information supporting a death sentence. [FN293]

In *Estelle v. Williams*, the Supreme Court held that as long as a criminal defendant files a timely objection the defendant cannot be compelled to stand trial in prison clothing. [FN294] The Court recognized that guilt must be established by probative evidence and not assumed \*267 by the defendant's status. [FN295] At a sentencing hearing, where capital elements are proven, jurors are actually told that the defendant is guilty of the murder before they even decide the elements of capital murder. [FN296]

In *Beck v. Alabama*, the death penalty statute prohibited jurors from considering imposing a conviction for a crime less than capital murder. [FN297] The Court found that the unavailability of a lesser charge created an unwarranted risk of conviction for capital murder. [FN298] In other words, it was unfair to ask jurors to overcome their natural tendency to convict when faced with the alternative of letting a person they believed to be guilty of a lesser offense go free.



Under the procedures that resolve capital elements at a sentencing hearing, jurors are similarly led toward conviction. They begin with the knowledge that the defendant has already been convicted of the murder and must then resolve the capital elements while also deciding punishment. [FN299] This comes dangerously close to creating a presumption in favor of guilt regarding the capital elements. [FN300]

The importance of those elements is diminished by their placement during the sentencing hearing. Instead of determining guilt of capital murder independently, the jury may balance that decision against the potential sentence. In other words, they may convict the defendant of capital murder knowing that they will simultaneously balance that with a life verdict. More ominously, they might convict a defendant merely because they know those findings must be made in order to also impose a death sentence.

\*268 The presumption of innocence is further confused by the defendant's burden at the punishment hearing. While the government must prove aggravating circumstances, a defendant has the burden of proving mitigating circumstances. [FN301] Even if the standard is only a preponderance of evidence and a jury need not be unanimous in finding mitigating evidence, the fact that a defendant has some burden of proof will prevent the jury from applying a presumption of innocence to the capital elements.

#### VI. The Federal Death Penalty Act

The Federal Death Penalty Act (hereinafter 'FDPA') is an example of a scheme in direct conflict with the premise that statutory aggravating circumstances must be treated as capital elements. [FN302] The FDPA is a sentencing statute under which certain enumerated federal crimes are eligible for capital punishment. [FN303] The FDPA requires a separate punishment hearing where a jury must determine beyond a reasonable doubt (1) whether a defendant had the requisite culpable mental state for capital murder [FN304] and (2) whether there existed at least one statutory aggravating factor. [FN305] Only then is the jury allowed to weigh aggravating and mitigating factors to determine punishment. [FN306]

The effect of the statute 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. [FN307] Both of those findings are elements of federal capital murder. [FN308]

The statute dispenses with the rules of evidence at the sentencing hearing. [FN309] Section 3593(c) expressly contradicts any effort to reconcile the sentencing hearing admissibility standard with the Federal Rules of Evidence, by stating unequivocally that in this hearing, '[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials.' \*269 [FN310] Thus, in the statute no presumption of innocence is contemplated. The very first sentence of the FDPA states, '[a] defendant who has been found guilty of . . . .' [FN311] Therefore, the FDPA explicitly prohibits a defendant from receiving the protections of the rules of evidence and the presumption of innocence regarding capital elements.

Congress could not have intended that proof of guilt and punishment be commingled. Congress created this complex sentencing procedure at a time when Walton indicated that aggravating factors were merely sentencing factors, not offense elements. [FN312] There is nothing in the FDPA meant to affect the proof of guilt. [FN313] The only procedure in the FDPA that occurs before conviction of the underlying murder is when the Attorney General provides notice to the defendant that the death penalty will be sought. [FN314] The statute says that notice requires no pleading or appearance in court. [FN315]

Amongst other reasons, a trial is meant to protect an innocent person from conviction. [FN316] On the other hand, a sentencing hearing is used to secure an appropriate sentence for a guilty defendant. [FN317] Both are different stages in a criminal proceeding, thus requiring different protections and seeking different goals. The FDPA confuses these goals.



#### A. Facial Challenges

If there is no procedure that will allow the FDPA to operate as it is written, and no discrete portion that may be severed, then it is unconstitutional. [FN318] Only Congress has the authority to rewrite the \*270 law. [FN319]

After Ring and Sattazahn, a trial judge in a federal capital case has a 'Hobson's choice.' The judge can restrict the sentencing hearing pursuant to the rules of evidence, thereby treating the capital crime elements like other elements of the charge, or alternatively, the judge can allow relaxed evidentiary standards at sentencing. In the former instance, the judge will explicitly violate the statute. [FN320] In the latter case, the judge will allow otherwise inadmissible evidence to be considered in determining the capital elements.

The problem with the FDPA is that all of the issues are introduced and decided together. Jurors have no idea what distinctions there are among the various pieces of evidence they receive. There is no reason to believe that compelling testimony about the effect on a victim's family, or evidence of the defendant's future dangerousness will have an adverse influence on the jury's decision to convict on the capital elements.

In *United States v. Jackson*, the Supreme Court considered Fifth and Sixth Amendment challenges to a sentencing provision that authorized the death penalty only upon a jury's recommendation. [FN321] The Court held that the provision unconstitutionally burdened the rights of an accused to proof beyond a reasonable doubt and to a jury trial because a defendant could only avoid a potential death sentence by a plea of guilty or a waiver of jury trial. [FN322] To save the death penalty portion of the statute the government proposed a number of alternative constructions and cited procedures developed by other district courts as remedies for the constitutional problems. The Supreme Court rejected each approach in favor of legislative and not judicial action. [FN323]

\*271 In *Jackson*, the Court pointed out that the kidnapping statute set forth no procedure for imposing the death penalty upon a defendant who waived the right to jury trial or upon one who pleaded guilty. [FN324] The Court did not desire to create new rules in order to save an unconstitutional procedure. [FN325]

In *Arizona v. Fulminante*, the Supreme Court defined structural error as a situation when the entire conduct of a trial is affected. [FN326] In that situation a harmless error analysis does not apply. [FN327] Structural error occurs when 'a reviewing court can only engage in pure speculation--its view of what a reasonable jury would have done.' [FN328] Nothing could be more speculative than trying to figure out whether a jury was influenced to convict a defendant of capital murder based upon punishment evidence. Regardless of what jurors are told to do, there is no way to know whether they improperly considered punishment evidence while deliberating about capital elements, especially after a combined hearing and during a single deliberation.

The placement of offense elements during a sentencing hearing will affect the entire conduct of a trial. In jurisdictions where offense elements are left to the sentencing hearing, if a defendant wants to contest the charge of capital murder, but not contest a lesser included offense such as simple murder, the defendant must either sit mute during the trial or plead guilty to the underlying murder and then participate in a sentencing hearing to determine whether he is guilty of capital murder.

This is different than any other kind of criminal trial (where proof of guilt and punishment are completely separate) and affects \*272 every decision by a capital defendant, from what questions to ask during voir dire to the substance of closing argument. Imagine a non-capital case where an element of the crime is not considered until after conviction. [FN329] It would be ridiculous but no different than leaving capital elements to be decided at a capital sentencing hearing.



It is impossible to know whether Congress would want to apply the Federal Rules of Evidence to the statutory aggravating circumstances and culpability findings alone, or whether Congress would want to apply them to the other findings as well - such as mitigating circumstances and non-statutory aggravating factors. [FN330] Applying the Federal Rules of Evidence to mitigating proof would seriously impinge on a defendant's Eighth Amendment right to introduce any and all mitigating evidence. [FN331]

Legislatures could have done what Justice Scalia suggested in Ring: 'plac[e] the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.' [FN332] However, Congress chose not to. We can only assume that Congress meant to meet constitutional requirements at the time they enacted the FDPA. [FN333] Those requirements have now changed because of Ring. We do not know which of these policy choices, each one fraught with practical complexities on one side and potential constitutional problems on the other, Congress would have chosen in light of the Court's new approach to treating sentencing hearing findings as elements of a capital crime.

#### B. Federal Cases

Since Ring, federal courts have examined two issues regarding the validity of the FDPA: (1) whether indictments must allege the capital elements, [FN334] and (2) whether the rules of evidence apply at \*273 capital sentencing hearings. [FN335] The first issue has been fairly uncontroversial. Courts have agreed that federal indictments require notice of the facts necessary to seek capital punishment. [FN336] Federal prosecutors generally concede this issue and now supercede indictments to allege capital elements whenever the decision is made to seek the death penalty. [FN337]

The latter issue, the application of the rules of evidence, is having mixed responses. Only one district judge has found the FDPA unconstitutional for failure to apply the Federal Rules of Evidence to prove the culpable mental state and statutory aggravating factor. [FN338] That decision was later reversed by the Second Circuit. [FN339]

Some judges have ordered the Federal Rules of Evidence be applied to the government at the sentencing hearing despite the prohibition under the FDPA. [FN340]

Other courts have assumed that evidence, which would violate a capital defendant's constitutional rights at trial, such as evidence prohibited by the Confrontation Clause, is also inadmissible at the sentencing hearing. [FN341] However, there may not be authority to support \*274 such a right. [FN342] Some courts have simply found that rules of evidence do not apply at a federal capital sentencing hearing at all. [FN343]

Absent guidance from the Supreme Court, district courts are likely to try many options; however, all appear to be flawed. Either they violate the clear language of the statute by imposing rules of evidence, or they violate due process by the disparate treatment of capital elements. For example, a court could try applying the rules of evidence to the government's proof of the capital elements. There are at least two problems with this method. First, it violates the plain language of the FDPA, which prohibits the rules of evidence at capital sentencing hearings. Second, it fails to address the effect of other punishment evidence, inadmissible under the rules of evidence, which would be introduced at the same hearing.

Another option might be to apply the rules of evidence to all prosecution proof at capital sentencing hearings. That solution also violates the plain words of the statute, but the effect would be more dramatic. Under the Federal Rules of Evidence virtually no traditional sentencing information would be admissible. There would be little character evidence, and no proof of propensity. [FN344] There would be no victim impact evidence that was not relevant to an element of the crime. [FN345] Hearsay would be prohibited, except for recognized exceptions. [FN346] Proof of prior acts by defendants would be limited. Therefore, very little traditional punishment evidence would be admissible, other than the facts of the crime.



A court might 'trifurcate' a capital trial. In other words, first there would be a trial of the underlying murder. Second, if the defendant were convicted, there would be a trial of the additional elements of capital murder. Third, if the defendant were convicted of capital murder, there would be a sentencing hearing. The problem with trifurcation is that it requires rewriting the FDPA. The statute clearly approves only a very specific bifurcated procedure. [FN347] For a \*275 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. [FN348] While judges have wide authority to interpret laws, they are not entitled to write them. [FN349]

The only issues the courts have reached are the failure of the FDPA to require indictment of capital elements and the prohibition against applying the Federal Rules of Evidence. All courts have agreed that although capital elements must be indicted, the FDPA is not invalid for only requiring written notice. [FN350] As to the latter issue, one court has held the FDPA unconstitutional for its abandonment of the rules of evidence, [FN351] while all other courts have rejected the claim. [FN352]

The courts that have rejected this claim do so on the basis that the Federal Rules of Evidence are not constitutionally guaranteed and because the Supreme Court has upheld relaxed evidentiary procedures at capital sentencing hearings. [FN353] As stated earlier, these responses are beside the point. First, there is no precedent for treating some elements of capital murder to less exacting proof than any other crime. Second, when the Supreme Court upheld a relaxed evidentiary proceeding in capital cases, it was in reference to selecting punishment and not to determining elements of an offense. [FN354] Third, that would mean that Congress can enact crimes that are exempt from any evidentiary rules.

The one case where the FDPA was held unconstitutional for failure to apply the Federal Rules of Evidence was *United States v. Fell*. [FN355] In that case, the district court reasoned that capital elements must be treated like any other offense element, including application \*276 of the rules of evidence. [FN356] The district court stated, 'In effect, the government would approve death eligibility as the federal criminal justice system's sole exception to the practice of requiring that offense elements be proven by admissible evidence comporting with due process and fair trial guarantees. This makes no sense.' [FN357]

The Second Circuit reversed the district court's order striking down the FDPA. [FN358] The court of appeals found that the admissibility standard of the FDPA, which states '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,' allowed the court to exclude evidence that violated *Fell*'s constitutional rights.

In *Fell*, at issue was a confession taken by law enforcement officers from *Fell*'s co-defendant, *Lee*. [FN359] *Lee* later died. He was never cross-examined. The government intended to use the statement at the sentencing hearing to prove aggravating factors alleged in the indictment. It was undisputed that the statement was inadmissible hearsay under the Federal Rules of Evidence. [FN360]

The court of appeals found that since the Federal Rules of Evidence were not constitutionally mandated, that the FDPA standard was a reliable substitute. The court held that the district court might exclude the statement pursuant to the FDPA's test for unfair prejudice. [FN361]

One week later, the Supreme Court issued *Crawford v. Washington*. [FN362] That case affected the *Fell* decision in two ways. First, the Second Circuit's direction to the district court that it had discretion to exclude the statement based on unfair prejudice was incorrect, since *Crawford* commanded that such a statement must be excluded as a matter of constitutional law. [FN363] Second, and more important, the court of appeals' premise, that a judge's decision about the reliability of evidence



can be a sufficient test for admissibility, \*277 was completely undermined by Crawford. [FN364]

Prior to this decision, leaving the admissibility of evidence completely up to a judge's discretion had never been described as 'heightened reliability.' As discussed above, the history of Anglo-American law has been one of criminal jury trials in which defendants are protected by exclusionary rules of evidence, not merely by the discretion of judges.

### C. Retroactivity

Retroactivity of a precedent is an issue if the ruling has changed, not merely clarified, the law of the jurisdiction. [FN365] A substantive change in the law is generally retroactive. [FN366] If the change is procedural, then analysis is necessary to see if its retroactive application is barred. [FN367] This analysis involves examining when the conviction and sentence became final and finding whether the Constitution compelled the rule at that time. [FN368] If it was constitutionally compelled, the rule is retroactive. [FN369] If it was not, then it must meet one of two exceptions: (1) that it punishes 'a class of defendants because of their status or offense;' [FN370] or (2) that it enhances accuracy and alters our understanding of the bedrock procedural elements essential to the fairness of a particular conviction. [FN371]

In *Schriro v. Summerlin*, the Supreme Court held that its ruling in *Ring* was a procedural change that did not affect fundamental fairness. [FN372] The Court found that *Ring* did not affect the range of conduct subject to the death penalty under Arizona law, only the \*278 methods of its determination. [FN373] Since the Court could not say that a judicial finding seriously diminishes accuracy, it was not held to be fundamentally unfair. [FN374] *Ring* is therefore not retroactive, and is inapplicable to cases that were final at the time.

There are two reasons why a successful challenge to the FDPA may be retroactive. First, although applying rules of evidence is only procedural, its effect is far more pervasive than the speculative difference between the accuracy of a judge and a jury. It is much easier to see why prohibiting character evidence and hearsay would fundamentally change the nature of a proceeding.

Second, it is not merely the lack of evidentiary rules that is at issue, but the combination of the trial of guilt and the sentencing hearing. If it were held that those proceedings had to be separated, that could require a change to the substantive crimes that are eligible for the death penalty. Such a change would likely be retroactive. [FN375]

### VII. State Capital Procedures

A review of various state capital procedures indicates many have the same problems contained in the FDPA. [FN376] In other words, capital elements are decided during the sentencing hearing without rules of evidence.

Before *Ring*, the Supreme Court found there were two types of capital schemes: those that narrowed the class of defendants eligible for the death penalty at the guilt phase, and those that did so during the sentencing phase. [FN377] For example, the Court found Texas to be of the former definition before *Ring*. [FN378]

A post-*Ring* analysis produces a different result. In Texas, capital\*279 jurors must answer three special issues. [FN379] The first concerns the probability that the defendant will be a continuing threat by future acts of violence. The second is whether the defendant intended or anticipated that human life would be taken. The third asks the jury to consider any evidence mitigating against the death penalty. The jury must answer affirmatively to the first two, and negatively to the third, before a death sentence may be imposed. [FN380]

After *Ring*, it would seem that the first two issues of the Texas scheme are elements of capital murder. They require a jury to



find facts, which if proven, make a defendant eligible for the death penalty. Only after those facts are found, can they be weighed against mitigating facts to decide whether the death penalty is appropriate.

In California and Washington, aggravating factors are pleaded by indictment and tried during the guilt phase. [\[FN381\]](#) This would seem to avoid the problems caused by mixing trial and punishment. However, even those systems may require additional proof of elements at sentencing in cases where the trial instructions fail to address whether someone convicted solely as an accomplice can be eligible for a death sentence. [\[FN382\]](#)

Maryland requires that aggravating factors outweigh mitigating factors before a death sentence may be imposed. [\[FN383\]](#) A majority of the Maryland Supreme Court held that this requirement was not an element of capital murder, as a defendant was eligible for a death sentence once a single aggravating factor was established. [\[FN384\]](#) Only Nevada has held that the weighing of factors requires jury participation. [\[FN385\]](#)

In Florida, the jury's role at a capital sentencing is advisory, both as to eligibility and selection. [\[FN386\]](#) However, even after Ring, Florida's highest court has found the procedure is valid. [\[FN387\]](#)

Some legislatures are revising their capital statutes in light of \*280 Ring, but those are jurisdictions where judges had been responsible for finding the capital elements. [\[FN388\]](#) A few state courts have reviewed their states' capital schemes after Ring, but none have found them invalid for combining trial and punishment procedures. [\[FN389\]](#)

#### Conclusion

Many capital punishment schemes in the United States determine whether a defendant is guilty of capital murder after a hearing that is without the protection of a trial. Recent Supreme Court cases put the constitutionality of those procedures in doubt.

By allowing evidence that would be inadmissible to prove guilt, by eliminating the presumption of innocence, and by requiring a jury to combine findings regarding elements of the crime with the selection of punishment, such death penalty schemes violate due process of law and the right to jury trial. There is no historical precedent for such disparity. The only solution 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.

Although that might seem an easy remedy, there are some difficult political implications. Adding new elements to existing homicide statutes is a substantive change. Persons whose offenses occurred before the enactment of such new laws would not be eligible for the death penalty. Even a system of trifurcation might be so fundamental a change as to require relief for those sentenced to death under old schemes.

Legislatures would also have to deal with issues such as whether to include stronger protections against convicting the innocent, the high cost of capital punishment, and evidence of declining support for death sentences. Such a situation would require a comprehensive, but necessary, reexamination of capital punishment.

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[\[FN1\]](#). See [Williams v. New York, 337 U.S. 241, 246 \(1949\)](#) (distinguishing procedures at trial and sentencing).

[\[FN2\]](#). [Delo v. Lashley, 507 U.S. 272, 278-79 \(1993\)](#) (no presumption of innocence exists at a sentencing hearing).



- [FN3]. [Harris v. United States, 536 U.S. 545, 558 \(2002\)](#) (burden of 'beyond a reasonable doubt' not required).
- [FN4]. [Spaziano v. Florida, 468 U.S. 447, 462-64 \(1984\)](#) (Sixth Amendment does not require that a jury select punishment).
- [FN5]. [Williams, 337 U.S. at 246](#) ('Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations.').
- [FN6]. [Estelle v. Williams, 425 U.S. 501, 503 \(1976\)](#) (presumption of innocence is a basic tenet of American trials).
- [FN7]. [Jones v. United States, 526 U.S. 227, 243 n.6 \(1999\)](#) (burden of 'beyond a reasonable doubt' is required at trial).
- [FN8]. Id.
- [FN9]. [Apprendi v. New Jersey, 530 U.S. 466, 482-83 \(2000\)](#) (proof of a fact that increases the statutory maximum punishment is an element of the crime).
- [FN10]. [Harris v. United States, 536 U.S. 545, 549-50 \(2002\)](#).
- [FN11]. [Blakely v. Washington, 124 S.Ct. 2531, 2536 \(2004\)](#).
- [FN12]. [Jones, 526 U.S. at 243](#) (portions of a single statute containing escalating statutory maximum punishments are separate crimes).
- [FN13]. [McMillan v. Pennsylvania, 477 U.S. 79, 87-88 \(1986\)](#) (conviction of a crime sets the statutory range).
- [FN14]. [Harris, 536 U.S. at 549](#) (the statutory range is between the minimum and maximum punishments set by the legislature).
- [FN15]. [Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 \(2002\)](#) ('a specific sentence within the range authorized by the jury's finding...').
- [FN16]. Id.
- [FN17]. [Ring v. Arizona, 536 U.S. 584, 609 \(2002\)](#) (A fact that is necessary to make a defendant eligible for the death penalty must be found by a jury beyond a reasonable doubt.).
- [FN18]. Id. (sometimes also called aggravating factors).
- [FN19]. [Sattazahn v. Pennsylvania, 537 U.S. 101, 111 \(2003\)](#) ('[F]or purposes of the Sixth Amendment's jury-trial guarantee the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances ....').
- [FN20]. See [18 U.S.C. § 3593 \(1997\)](#); [21 U.S.C. § 848 \(e\) \(1996\)](#); [Ala. Code § 13A-5-45 \(e\), \(f\) \(1981\)](#); [Ariz. Rev. Stat. § 13-703 \(G\) \(2001\)](#); [Ark. Code Ann. § 5-4-602 \(1993\)](#); [Cal. Penal Code § 190 \(2003\)](#); [Colo. Rev. Stat. § 18-1.3-1201 \(2003\)](#); [Conn. Gen. Stat. § 53a-54b \(2003\)](#); [Del. Code Ann. tit. 11, § 4209 \(2002\)](#); [Fla. Stat. ch. 921.141 \(2002\)](#); [Ga. Code Ann. § 17-10-30 \(2003\)](#); [Idaho Code § 19-2515 \(2001\)](#); [720 Ill. Comp. Stat. 5/9-1 \(d\) \(2004\)](#); [Ind. Code § 35-50-2-9a \(2001\)](#); [Kan. Stat. Ann. § 21-4624 \(b\) \(1994\)](#); [Ky. Rev. Stat. Ann. § 532.025 \(2001\)](#); [La. Rev. Stat. Ann. § 905.3 \(1988\)](#); [Md. Code Ann., Crim. Law § 2-303 \(b\) \(2003\)](#); [Miss. Code Ann. § 99-19-101 \(1973-2000\)](#); [Mo. Rev. Stat. § 565.030 \(2002\)](#); [Mont. Code](#)



[Ann. § 46-18-305](#) line (2002); [Neb. Rev. Stat. § 29-2520](#) (2004); [Nev. Rev. Stat. 175.554](#) (2002); [N.H. Rev. Stat. Ann. § 630:5 \(IV\)](#) (1991); [N.J. Stat. Ann. § 2C:11-3 \(c\)](#) (2002); [N.M. Stat. Ann. § 31-20A-1](#) (2002); [N.Y. Crim. Proc. Law § 400.27](#) (Consol. 2003); [N.C. Gen. Stat. § 15A-2000](#) (2003); [Okla. Stat. tit. 21, § 701.11](#) (1987); [Or. Rev. Stat. § 163.150](#) (2001); [Pa. Cons. Stat. § 9711](#) (2003); [S.C. Code Ann. § 16-3-20 \(B\)](#) (1985); [S.D. Codified Laws § 23A-27A-4](#) (1979); [Tenn. Code Ann. § 39-13-204](#) (2002); [Tex. Crim. Proc. Code Ann. § 37.071](#) (2001); [Utah Code Ann. § 76-3-207](#) (2003); [Va. Code Ann. § 19.2-264.4](#) (2003); [Wyo. Stat. Ann. § 6-2-102](#) (2001). Compare [Ohio Rev. Code Ann. § 2929.04](#) (2002) with [Wash. Rev. Code § 10.95.060](#) (1981).

[FN21]. [Jones v. United States](#), 527 U.S. 373, 376-77 (1999) (describing federal capital sentencing procedures).

[FN22]. See [Eddings v. Oklahoma](#), 455 U.S. 104, 110 (1982) (capital sentencer must be allowed to consider any relevant mitigating evidence); [Gregg v. Georgia](#), 428 U.S. 153, 189 (1976) (capital statute must channel the sentencer's discretion).

[FN23]. See supra note 20.

[FN24]. [Sattazahn](#), 537 U.S. at 110-11.

[FN25]. See, e.g., [18 U.S.C. § 3593 \(d\)](#) ('[r]eturn of special findings').

[FN26]. See, e.g., [18 U.S.C. § 3593 \(c\)](#) ('[p]roof of mitigating and aggravating factors').

[FN27]. Id.; compare [Ark. Code Ann. § 5-4-602](#) (1993) with [La. Rev. Stat. Ann. § 905.3](#) (1988) (applying rules of evidence).

[FN28]. See, e.g., [18 U.S.C. § 3591 \(a\)](#) ('[a] defendant who has been found guilty ....').

[FN29]. [United States v. Jones](#), 527 U.S. 373, 376-77 (1999) (describing federal capital procedures).

[FN30]. [Payne v. Tennessee](#), 501 U.S. 808, 827 (1991) (victim impact statements are admissible at a capital sentencing hearing).

[FN31]. [Simmons v. South Carolina](#), 512 U.S. 154, 161 (1994) (predictions of a capital defendant's propensity for future violence are admissible at sentencing).

[FN32]. [Nichols v. United States](#), 511 U.S. 738, 747 (1994) (prior criminal behavior is admissible at sentencing hearing).

[FN33]. [United States v. Watts](#), 519 U.S. 148, 151 (1997) (character evidence is an appropriate sentencing consideration).

[FN34]. [Williams v. New York](#), 337 U.S. 241, 244-47 (1949).

[FN35]. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.



Id. at 246-47.

[FN36]. [Jones v. United States](#), 527 U.S. 373, 376-77 (1999).

[FN37]. [Harris v. United States](#), 536 U.S. 545, 558 (2002).

[FN38]. [Spaziano v. Florida](#), 468 U.S. 417, 462-63 (1984).

[FN39]. See [Delo v. Lashley](#), 507 U.S. 272, 278-79 (1993) (no presumption of innocence at sentencing hearing); [Williams](#), 337 U.S. at 246-47 (no rules of evidence at sentencing hearing).

[FN40]. 4 William Blackstone, Commentaries on the Laws of England 342-44 (n.p. 1769).

[FN41]. [Mullaney v. Wilbur](#), 421 U.S. 684, 698 (1975) ('[T]he distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.').

[FN42]. [Id.](#) at 703-04.

[FN43]. [Jones v. United States](#), 526 U.S. 227, 251-52 (1999) (holding that proof of serious bodily injury or death for higher maximum punishments were additional offense elements of carjacking).

[FN44]. An exception for prior convictions was stated in [Almendarez-Torres v. United States](#), 523 U.S. 224, 243-44 (1998) by a 5-4 majority. However, one member of that majority has since announced his vote was in error, raising the possibility that this exception may someday be extinguished. [Apprendi v. New Jersey](#), 530 U.S. 466, 520-21 (2000) (Thomas, J., concurring).

[FN45]. [Jones](#), 526 U.S. at 243 n.6.

[FN46]. [Apprendi](#), 530 U.S. at 494.

[FN47]. [Id.](#) at 483.

[FN48]. [Id.](#) at 494 n.19 ('The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense.')

[FN49]. [Id.](#) at 494 ('[T]he relevant inquiry is one not of form, but of effect....').

[FN50]. [Id.](#) at 482-83.

[FN51]. [Harris v. United States](#), 536 U.S. 545, 568 (2002).

[FN52]. 21 U.S.C. § 841(b)(1)(B) (federal criminal penalties for controlled substances).

[FN53]. See [United States v. Cotton](#), 535 U.S. 625, 628 (2002) (drug quantity is an element of 21 U.S.C. § 841).

[FN54]. Fed. R. Crim. P. 32(d) (Presentence Report).

[FN55]. [United States v. Thomas](#), 274 F.3d 655, 660 (2d Cir. 2001) (en banc).



We conclude, following Apprendi's teachings, that if the type and quantity of drugs involved in a charged crime may be used to impose a sentence above the statutory maximum for an indeterminate quantity of drugs, then the type and quantity of drugs is an element of the offense that must be charged in the indictment and submitted to the jury.

Id.

[FN56]. See [United States v. Booker](#), 375 F.3d 508 (7th Cir. 2004), cert. granted, 73 U.S.L.W. 3074 (U.S. Aug. 2, 2004).

[FN57]. [Fed. R. Evid. 1101\(b\)](#) ('These rules apply generally... to criminal cases and proceedings.').

[FN58]. [Delo v. Lashley](#), 507 U.S. 272, 278 (1993) (presumption of innocence exists during guilt phase of trial).

[FN59]. [Fed. R. Evid. 1101\(d\)\(3\)](#) ('The rules (other than with respect to privileges) do not apply in the following situations:... Proceedings for... sentencing...').

[FN60]. [Walton v. Arizona](#), 497 U.S. 639, 648 (1990) (citing [Poland v. Arizona](#), 476 U.S. 147, 156 (1986)).

[FN61]. [Apprendi v. New Jersey](#), 530 U.S. 466, 537-38 (2000) (O'Connor, J., dissenting) ('The distinction of Walton offered by the Court today is baffling, to say the least.').

[FN62]. [Ring v. Arizona](#), 536 U.S. 584, 609 (2002).

[FN63]. [Apprendi](#), 530 U.S. at 479 (citing Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *The Trial Jury in England, France, Germany 1700-1900*, 36-37 (A. Schioppa, ed. 1987)).

[FN64]. *The Death Penalty in America* 9 (Hugo Adam Bedau ed., 3rd ed. 1982); see also [McGautha v. California](#), 402 U.S. 183, 197-98 (1971) (most common-law murders required a mandatory death penalty); Justice Antonin Scalia, Sherman J. Bellwood Lecture, University of Idaho (Sept. 7, 2000), in Alice Koskela, *Scalia Shows Textualists Have a Sense of Humor*, 43-OCT *Advoc.* 31 (2000) ('There was a trial, and they were either released or hung.').

[FN65]. [Mullaney v. Wilbur](#), 421 U.S. 684, 692-94 (1975).

[FN66]. Id. An example of the extreme lengths necessary to avoid injustice was the 'benefit of clergy.'

[T]he widespread use of capital punishment was ameliorated further by extension of the ecclesiastic jurisdiction. Almost any person able to read was eligible for 'benefit of clergy,' a procedural device that effected a transfer from the secular to the ecclesiastic jurisdiction. And under ecclesiastic law a person who committed an unlawful homicide was not executed; instead he received a one-year sentence, had his thumb branded and was required to forfeit his goods. At the turn of the 16th century, English rulers, concerned with the accretion of ecclesiastic jurisdiction at the expense of the secular, enacted a series of statutes eliminating the benefit of clergy in all cases of 'murder of malice prepensed.' Unlawful homicides that were committed without such malice were designated 'manslaughter,' and their perpetrators remained eligible for the benefit of clergy. 12 Hen. 7, c. 7 (1496); 4 Hen. 8, c. 2 (1512); 23 Hen. 8, c. 1, ss 3, 4 (1531); 1 Edw. 6, c. 12, s 10 (1547).

Id.

[FN67]. [Apprendi](#), 530 U.S. at 477 ('[T]he historical foundation for our recognition of these principles extends down centuries into the common law.').

[FN68]. David J. Rothman, *The Oxford History of the Prison* 112 (Norval Morris & David J. Rothman eds., 1995).



[FN69]. [Appendi, 530 U.S. at 478](#) ('trial by jury, and judgment by court').

[FN70]. The practice of jury sentencing arose in this country during the colonial period for cases not involving capital punishment. It has been suggested that this was a 'reaction to harsh penalties imposed by judges appointed and controlled by the Crown' and a result of 'the early distrust of governmental power.'

[McGautha v. California, 402 U.S. 183, 200 n.10 \(1971\)](#) (quoting President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 26 (1967)).

[FN71]. Rothman, *supra* note 68, at 111 ('[A]n idea developed: those convicted of crimes would be confined behind walls, in single cells, and would follow rigid and unyielding routines.').

[FN72]. *Id.* at 126 ('[T]he prison sentence was to substitute confinement for execution....').

[FN73]. [Appendi, 530 U.S. at 481](#) ('Since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range....').

[FN74]. *Id.* ('That discretion was bound by the range of sentencing options prescribed by the legislature.').

[FN75]. [Williams v. New York, 337 U.S. 241, 248-49 \(1949\)](#) (holding that non-judicial devices such as a probation report may be used by a court in a sentencing decision).

[FN76]. [Appendi, 530 U.S. at 481](#) (judge has wide discretion within minimum and maximum punishments).

[FN77]. See A. Partridge & W. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (Federal Judicial Center, No. 74-4 1974).

[FN78]. [Mistretta v. United States, 488 U.S. 361, 366 \(1989\)](#) (sentencing guidelines mandated by Congress do not violate the separation of powers between the branches of government).

[FN79]. [Harris v. United States, 536 U.S. 545, 558 \(2002\)](#) ('In the latter part of the 20th century, many legislatures, dissatisfied with sentencing disparities among like offenders, implemented measures regulating judicial discretion.').

[FN80]. See, e.g., [21 U.S.C. § 841 \(2004\)](#) (providing mandatory minimum sentences based upon drug quantities).

[FN81]. [Appendi, 530 U.S. at 494 n.19.](#)

[FN82]. [McMillan v. Pennsylvania, 477 U.S. 79, 93 \(1986\)](#) (approving mandatory minimum punishment for possession of a firearm).

[FN83]. [Mistretta, 488 U.S. at 367](#) (discussing federal sentencing guidelines).

[FN84]. See [Jones v. United States, 526 U.S. 227, 251-52 \(1999\)](#) (discussing whether a fact is an element of an offense or a sentencing factor).

[FN85]. [United States v. Thomas, 274 F.3d 655, 663 \(2d Cir. 2001\).](#)

[FN86]. [McMillan, 477 U.S. at 93.](#)



[FN87]. [Apprendi v. New Jersey](#), 530 U.S. 466, 491-93 (2000).

[FN88]. See, e.g., Federal Sentencing Guidelines Manual (2003) [hereinafter U.S.S.G.].

[FN89]. See, e.g., U.S.S.G. § 5A ('Determining the Sentence').

[FN90]. See [U.S.S.G. § 5K2.0](#) (known as 'departures').

[FN91]. [Harris v. United States](#), 536 U.S. 545, 567-68 (2002) (explaining judicial finding of fact establishing mandatory minimum sentence did not violate defendant's right to jury trial).

[FN92]. [Mistretta v. United States](#), 488 U.S. 361, 412 (1989) (approving formation of the United States Sentencing Commission to set sentencing guidelines).

[FN93]. [Harris](#), 536 U.S. at 558 ('Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.').

[FN94]. [Blakely v. Washington](#), 124 S.Ct. 2531, 2543 (2004).

[FN95]. [Williams v. New York](#), 337 U.S. 241, 246 (1949) (contrasting trial and sentencing procedures).

[FN96]. See [Ewing v. California](#), 538 U.S. 11, 20-22 (2003) (holding that the Eighth Amendment does not require strict proportionality between crime and sentence).

[FN97]. [Walton v. Arizona](#), 497 U.S. 639, 648 (1990) (citing [Hildwin v. Florida](#), 490 U.S. 638, 640-41 (1989)), overruled by [Ring v. Arizona](#), 536 U.S. 584 (2002).

[FN98]. [Furman v. Georgia](#), 408 U.S. 238 (1972) (per curiam).

[FN99]. [Gregg v. Georgia](#), 428 U.S. 153, 188 (1976) ('Because of the uniqueness of the death penalty, Furman held it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.').

[FN100]. See supra note 20.

[FN101]. [Coker v. Georgia](#), 433 U.S. 584, 600 (1977) (holding that the death penalty is a disproportionate punishment for rape).

[FN102]. [Tison v. Arizona](#), 481 U.S. 137, 158 (1987) (finding that the death penalty requires at least a 'reckless indifference to human life').

[FN103]. See [Atkins v. Virginia](#), 536 U.S. 304 (2002) (mentally retarded persons); [Thompson v. Oklahoma](#), 487 U.S. 815 (1988) (persons less than sixteen years old); [Ford v. Wainwright](#), 477 U.S. 399 (1986) (insane persons).

[FN104]. [Woodson v. North Carolina](#), 428 U.S. 280, 305 (1976) (explaining that the mandatory death sentence for first degree murder violated the Eighth Amendment).

[FN105]. [Lockett v. Ohio](#), 438 U.S. 586, 606-08 (1978) (holding that a procedure that failed to consider a defendant's lack of



specific intent to commit murder violated Eighth Amendment).

[FN106]. See [Lowenfield v. Phelps](#), 484 U.S. 231, 244-45 (1988) (comparing various state schemes).

[FN107]. See, e.g., [Proffitt v. Florida](#), 428 U.S. 242, 247-48 (1976).

[FN108]. *Id.* (explaining that a guilty verdict is followed by a separate evidentiary hearing to determine sentence).

[FN109]. [Gregg v. Georgia](#), 428 U.S. 153, 203-04 (1976) ('So long as the evidence introduced and the arguments made at the pre-sentence hearing do not prejudice a defendant, it is preferable not to impose restrictions.').

[FN110]. [Tuilaepa v. California](#), 512 U.S. 967, 971-73 (1994) (describing capital procedures consistent with Eighth Amendment).

[FN111]. See, e.g., [18 U.S.C. § 3593 \(c\) \(2000\)](#) ('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.');

cf. [Ark. Code Ann. § 5-4-602 \(4\) \(1993\)](#) (requiring that the rules of evidence apply to proof of aggravating factors).

[FN112]. [Walton v. Arizona](#), 497 U.S. 639, 648 (1990).

[FN113]. *Id.*

[FN114]. See [Spaziano v. Florida](#), 468 U.S. 447, 464 (1984) ('The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.').

[FN115]. See *supra* note 20.

[FN116]. [Buchanan v. Angelone](#), 522 U.S. 269, 276 (1998) ('[I]n the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination.').

[FN117]. [Spaziano](#), 468 U.S. at 462-63.

[FN118]. *Id.* (holding that a capital sentence may be imposed by a judge).

[FN119]. See *supra* note 20.

[FN120]. [Jones v. United States](#), 527 U.S. 373, 376-77 (1999) (holding that a jury must find a statutory aggravating circumstance).

[FN121]. [Williams v. New York](#), 337 U.S. 241, 246-47 (1949) (holding that the rules of evidence apply at the guilt phase of a criminal trial).

[FN122]. [Delo v. Lashley](#), 507 U.S. 272, 278-79 (1993) (holding that a presumption of innocence applies at the guilt phase of a criminal trial).

[FN123]. [Sattazahn v. Pennsylvania](#), 537 U.S. 101, 110-11 (2003).



[FN124]. [Walton v. Arizona](#), 497 U.S. 639, 648 (1990).

[FN125]. [Ring v. Arizona](#), 536 U.S. 584, 594-95 (2002).

[FN126]. [Id.](#) at 602 (finding that the Arizona legislature gave first degree murder a maximum sentence of death).

[FN127]. [Apprendi v. New Jersey](#), 530 U.S. 466, 494 (2000) ('[I]nquiry is not one of form, but of effect....').

[FN128]. [Ring](#), 536 U.S. at 604.

[FN129]. [Id.](#) at 609 (Ginsburg, J., joined by Stevens, Scalia, Kennedy, Souter and Thomas, JJ.); [id.](#) at 613 (Kennedy, J., concurring); [id.](#) at 614 (Breyer, J., concurring); [id.](#) at 619-20 (Rehnquist, C.J., and O'Connor, J. dissenting).

[FN130]. [Id.](#) at 609 ('Walton and Apprendi are irreconcilable .... '); [id.](#) at 613 (Kennedy, J., concurring) ('Apprendi is now the law .... '); [id.](#) at 614 (Breyer, J., concurring in judgment) (relying on the Eighth Amendment).

[FN131]. [Id.](#) at 619-20 (O'Connor, J., dissenting) ('Yet in choosing which to overrule, I would choose Apprendi, not Walton.').

[FN132]. [Id.](#) at 609 ('Accordingly, we overrule Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.').

[FN133]. [Id.](#) at 598.

[FN134]. [Id.](#) ('Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.') (quoting [Apprendi v. New Jersey](#), 530 U.S. 466, 494 (2000)).

[FN135]. [Sattazahn v. Pennsylvania](#), 537 U.S. 101, 110-11 (2003) (holding that to bar a death sentence on retrial, a defendant must be acquitted of capital elements).

[FN136]. [Id.](#) at 111.

[FN137]. [Id.](#) This is consistent with Apprendi's rule of looking to the effect of the finding, and not legislative labels. [Apprendi v. New Jersey](#), 530 U.S. 466, 494 (2000).

[FN138]. [Sattazahn](#), 537 U.S. at 126 n.6 (Ginsberg, J., dissenting).

[FN139]. [Id.](#)

[FN140]. See [United States v. Fell](#), 360 F.3d 135, 142 (2d Cir. 2004).

In [Ring](#), the Supreme Court held that the aggravating factors necessary for imposition of the death penalty under Arizona's analogous state death penalty act were elements of a capital crime, such that they had to be submitted to a jury and proved beyond a reasonable doubt in conformity with the reasoning of [Apprendi](#).

[Id.](#) (emphasis added); [Esparza v. Mitchell](#), 310 F.3d 414, 420 (6th Cir. 2002), rev'd on other grounds, 540 U.S. 12 (2003) (recognizing that a majority of the Supreme Court has reached this view).

[FN141]. [Apprendi v. New Jersey](#), 530 U.S. 460, 523-54 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Kennedy, J., and Breyer, J.).



[FN142]. [Ring v. Arizona, 536 U.S. 584, 613 \(2002\)](#) (Kennedy, J., concurring).

[FN143]. [Sattazahn, 537 U.S. at 116-17](#) (O'Connor, J., concurring) ('I do not join Part III, which would further extend the reach of Apprendi... because I continue to believe that case was wrongly decided.').

[FN144]. [Schriro v. Summerlin, 124 S.Ct. 2519, 2524 \(2004\)](#) ('Ring held that, because Arizona's statutory aggravators restricted [as a matter of state law] the class of death-eligible defendants, those aggravators effectively were elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements. ') (emphasis added).

[FN145]. See [United States v. Fell, 360 F.3d 135, 140-41 \(2nd Cir. 2004\)](#); [Esparza v. Mitchell, 310 F.3d 414, 420 \(6th Cir. 2002\)](#); [United States v. Haynes, 269 F. Supp. 2d 970, 974-76 \(W.D. Tenn. 2003\)](#); [United States v. Sampson, 245 F. Supp. 2d 327, 332-33 \(D. Mass. 2003\)](#); [United States v. Matthews, 246 F. Supp. 2d 137, 146 \(N.D.N.Y. 2002\)](#); [United States v. Denis, 246 F. Supp. 2d 1250, 1254 \(S.D. Fla. 2002\)](#).

[FN146]. See [Haynes, 269 F. Supp. 2d at 978-79](#); [Matthews, 246 F. Supp. 2d at 146](#); [Denis, 246 F. Supp. 2d at 1255](#); [Sampson, 245 F. Supp. 2d at 332](#); [United States v. Regan, 221 F. Supp. 2d 672, 674 \(E.D. Va. 2002\)](#); [United States v. Lentz, 225 F. Supp. 2d 672, 675 \(E.D. Va. 2002\)](#); [United States v. Fell, 217 F. Supp. 2d 469, 478-79 \(D. Vt. 2002\)](#).

[FN147]. [Gregg v. Georgia, 428 U.S. 153, 204 \(1976\)](#) ('We think desirable for the jury to have as much information before it as possible when it makes the sentencing decision.').

[FN148]. [Delo v. Lashley, 507 U.S. 272, 278 \(1993\)](#) ('Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears.').

[FN149]. [Sattazahn v. Pennsylvania, 537 U.S. 101, 110-11 \(2002\)](#).

[FN150]. 9 Sir William Holdsworth, *A History of English Law* 126 (Methuen & Co. Ltd. et al. eds., 1926) (1966).

[FN151]. *Id.* at 131.

[FN152]. *Id.* at 224.

[FN153]. John H. Langbein, *The Origins of Adversary Criminal Trial* 179 (Oxford University Press 2003).

[FN154]. *Id.*

[FN155]. See [Michelson v. United States, 335 U.S. 469, 475 \(1948\)](#) ('Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.').

[FN156]. [Caminetti v. United States, 242 U.S. 470, 495 \(1917\)](#) (no absolute rule preventing convictions based on the testimony of accomplices).

[FN157]. [Lynum v. Illinois, 372 U.S. 528, 537-38 \(1963\)](#) (holding conviction cannot be based upon coerced confession).

[FN158]. [Crawford v. Washington, 124 S. Ct. 1354, 1374 \(2004\)](#) (Confrontation Clause bars statements by unavailable witnesses who were not previously subject to cross-examination).



[FN159]. From the standpoint of modern comparative law, what is distinctive about the Anglo-American law of evidence is its exclusionary character, that is, its undertaking to deal with suspect classes of proof by excluding the evidence from the jury, rather than allowing such weaknesses to affect credit as in most modern Continental practice. Langbein, *supra* note 153, at 250.

[FN160]. [Brinegar v. United States](#), 338 U.S. 160, 174 (1949) (comparing need for rules of evidence at trial with an evidentiary hearing).

[FN161]. See [Miranda v. Arizona](#), 384 U.S. 436 (1966) (requiring law enforcement to warn suspects before taking custodial statements).

[FN162]. [Dickerson v. United States](#), 530 U.S. 428, 440-41 n.6 (2000) (holding Constitution requires Miranda warnings in order to secure Fifth Amendment rights).

[FN163]. [Williams v. New York](#), 337 U.S. 241, 246 (1949) ('Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations.').

[FN164]. [Baldwin v. New York](#), 399 U.S. 66, 69 (1970) (noting the right to jury trial for sentences exceeding six months).

[FN165]. James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 264 (1898) ('This excluding function is the characteristic one in our law of evidence.').

[FN166]. See [Fed. R. Evid. 103](#) (rules admit or exclude evidence).

[FN167]. See [Bourjaily v. United States](#), 483 U.S. 171, 175 (1987) ("Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules....").

[FN168]. See [Payne v. Tennessee](#), 501 U.S. 808, 860 (1991) (Stevens, J., dissenting).

[FN169]. [Nichols v. United States](#), 511 U.S. 738, 747 (1994) (explaining how sentencing hearing is a less exacting procedure than proof of guilt).

[FN170]. [Williams v. New York](#), 337 U.S. 241, 246 (1949) ('In addition to the historical basis... there are sound practical reasons for the distinction.').

[FN171]. [Wisconsin v. Mitchell](#), 508 U.S. 476, 485 (1993) ('Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant.').

[FN172]. [Huddleston v. United States](#), 485 U.S. 681, 689 (1988) (discussing how relevance exists as a relation between an item of evidence and the matter to be proven).

[FN173]. [Fed. R. Evid. 401](#) ('Definition of 'Relevant Evidence)').

[FN174]. See [Jones v. United States](#), 527 U.S. 373, 401-02 (1999) (finding victim impact is relevant to selection phase of capital sentencing).

[FN175]. See, e.g., [18 U.S.C. § 922\(g\)\(1\)](#) (2000) (felon in possession of a firearm).



[FN176]. [United States v. Dalhover](#), 96 F.2d 355, 359 (7th Cir. 1938) (uncharged robberies could be considered at sentencing).

[FN177]. See [Taylor v. United States](#), 495 U.S. 575, 602 (1990) (prior offenses may trigger sentencing enhancements).

[FN178]. [United States v. Tucker](#), 404 U.S. 443, 446 (1972) (traditionally, sentencing evidence was 'largely unlimited'). This case has been superseded by statute as stated in [United States v. Waford](#), 894 F.2d 665, 667 (4th Cir. 1990), [United States v. Bushert](#), 997 F.2d 1343, 1347 (11th Cir. 1993), and [United States v. Scroggins](#), 880 F.2d 1204, 1212 (11th Cir. 1989) (stating that due to the Sentencing Reform Act, judges are no longer 'largely unlimited' in what they may consider when deciding sentence).

[FN179]. [United States v. Madden](#), 38 F.3d 747, 752 (4th Cir. 1994) ('[W]e do not believe that evidence of occasional drug use should be admitted; financial need is the key element to establish motive.').

[FN180]. *Id.* (testimony merely 'tars Madden as a drug user in the eyes of the jury').

[FN181]. [Simmons v. South Carolina](#), 512 U.S. 154, 163 (1994) (instruction on parole ineligibility was required to answer argument of future dangerousness).

[FN182]. [Romano v. Oklahoma](#), 512 U.S. 1, 6 (1994) (finding admission of prior death sentence allowed).

[FN183]. [Old Chief v. United States](#), 519 U.S. 172, 180 (1997) (holding that the identity of defendant's prior felony was unfairly prejudicial when defendant agreed to its existence).

[FN184]. [Payne v. Tennessee](#), 501 U.S. 808, 860 (1990) (Stevens, J., dissenting) ('Rules of evidence are also weighted in the defendant's favor. For example, the prosecution generally cannot introduce evidence of the defendant's character to prove his propensity to commit a crime, but the defendant can introduce such reputation evidence to show his law-abiding nature.').

[FN185]. [Old Chief](#), 519 U.S. at 180-81.

[FN186]. See [Fed. R. Evid. 404](#) ('Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes').

[FN187]. [Huddleston v. United States](#), 485 U.S. 681, 686 (1988) ('The threshold inquiry a court must make before admitting similar acts evidence under [Rule 404\(b\)](#) is whether that evidence is probative of a material issue other than character.').

[FN188]. [Gregg v. Georgia](#), 428 U.S. 153, 203-04 (1976) ('wide scope of evidence').

[FN189]. [Old Chief](#), 519 U.S. at 181 ('Although... 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.' (quoting [United States v. Moccia](#), 681 F.2d 61, 63 (1st Cir. 1982))).

[FN190]. [Spencer v. Texas](#), 385 U.S. 554, 562 (1967) (upholding recidivist statute that required proof of prior convictions at trial).

[FN191]. *Id.* at 562-63 ('The evidence itself is usually, and in recidivist cases almost always, of a documentary kind, and in the cases before us there is no claim that its presentation was in any way inflammatory.').

[FN192]. [Monge v. California](#), 524 U.S. 721, 725 (1998) (upholding California 'three-strikes' law).



[FN193]. [United States v. Daniels](#), 770 F.2d 1111, 1116 (D.C. Cir. 1985) (deciding enhancement for prior crime did not need to be severed).

[FN194]. [Fed. R. Evid. 404\(b\)](#); [Huddleston v. United States](#), 485 U.S. 681, 691-92 (1998).

[FN195]. See [Fed. R. Evid. 404\(a\)\(1\)](#) (character not admissible to prove action in conformity therewith, unless first raised by the accused).

[FN196]. [Barclay v. Florida](#), 463 U.S. 939, 949, 951 (1983) (allowing defendant's racial hatred to be considered); [Eddings v. Oklahoma](#), 455 U.S. 104, 115-17 (1982) (defendant's youth is a consideration); [Williams v. New York](#), 337 U.S. 241, 247-48 (1949) (defendant's background generally may be considered).

[FN197]. [Simmons v. South Carolina](#), 512 U.S. 154, 162-63 (1994) (future dangerousness is admissible).

[FN198]. [Old Chief v. United States](#), 519 U.S. 172, 181-82 (1997) (identity of prior felony excluded).

[FN199]. [Michelson v. United States](#), 335 U.S. 469, 475 (1948).

[FN200]. [United States v. Castillo](#), 140 F.3d 874, 880 (10th Cir. 1998).

[FN201]. [Nichols v. United States](#), 511 U.S. 738, 748 (1994) (noting that prior criminal acts need only be proven by preponderance of evidence to be used to enhance sentence).

[FN202]. [United States v. Watts](#), 519 U.S. 148, 157 (1997) (holding acquitted conduct is admissible at sentencing).

[FN203]. See [Barefoot v. Estelle](#), 463 U.S. 880, 896-97 (1983); [Jurek v. Texas](#), 428 U.S. 262, 272-73 (1976).

[FN204]. See [Johnson v. Texas](#), 509 U.S. 350, 355-56 (1993) (numerous witnesses testified to defendant's previous acts of violence).

[FN205]. [United States v. Spivey](#), 958 F.Supp. 1523, 1535 (D. N.M. 1997); see also Eighth Circuit Model Death Penalty Jury Instructions 12.08 (Nonstatutory Aggravating Factors) (2003).

[FN206]. [Simmons v. South Carolina](#), 512 U.S. 154, 163 (1994) ('jury is not free to convict a defendant simply because he poses a future danger').

[FN207]. [Huddleston v. United States](#), 485 U.S. 681, 689 (1988) (noting extrinsic acts reflecting upon an actor's character are generally prohibited).

[FN208]. [Old Chief v. United States](#), 519 U.S. 172, 181-82 (1997) (deciding identity of prior felony was unfairly prejudicial at trial).

[FN209]. See, e.g., [Jones v. United States](#), 526 U.S. 227, 243 (1999) (proof of death or serious bodily injury).

[FN210]. See [United States v. Copple](#), 24 F.3d 535, 545-46 (3d Cir. 1994), cert. denied, 513 U.S. 989 (1994) (error to admit victims' testimony about harm to their health and savings during trial).

[FN211]. [Sager v. Maass](#), 907 F.Supp 1412, 1421 (D. Or. 1995), aff'd, 84 F.3d 1212 (9th Cir. 1996).



[FN212]. [Jones, 527 U.S. at 401](#) (victim impact may be relevant in every capital sentencing hearing).

[FN213]. [United States v. Barnette, 211 F.3d 803, 818 \(4th Cir. 2000\)](#) (victim impact reviewed only for bias and caprice).

[FN214]. [United States v. McVeigh, 153 F.3d 1166, 1219 \(10th Cir. 1998\)](#) ('The devastating effects that the deaths of the victims had on their families and loved ones is 'certainly part and parcel of the circumstances' of the crime properly presented to the jury at the penalty phase of trial.').

[FN215]. [United States v. Bernard, 299 F.3d 467, 479-80 \(5th Cir. 2002\)](#) ('Because religion played a vital role in Todd and Stacie Bagleys' lives, it would be impossible to describe their 'uniqueness as individual human beings' without reference to their faith.').

[FN216]. Q. If the jury were to impose the death penalty in this case, do you have an opinion about what impact that would have on... the operation of USP Atlanta in terms of the staff and security issues that you have there? A. [Officer Hawkins] I believe that this would send a very clear signal to the inmates and staff members as well that you cannot commit this type of infraction. You cannot kill a staff member and just absolutely nothing be done about it.

[United States v. Battle, 173 F.3d 1343, 1350-51 \(11th Cir. 1999\)](#).

[FN217]. [Alabama v. Evans, 461 U.S. 230, 232 \(1983\)](#) (defendant 'knowingly created a great risk of death to many persons').

[FN218]. [Moore v. United States, 429 U.S. 20, 22-23 \(1976\)](#) (holding informant's hearsay statement was not admissible to support conviction).

[FN219]. See, e.g., [Fed R. Evid. 802](#) ('Hearsay Rule').

[FN220]. [Nichols v. United States, 511 U.S. 738, 747 \(1999\)](#) (contrasting trial and sentencing procedures).

[FN221]. [United States v. Higgs, 353 F.3d 281, 324 \(4th Cir. 2003\)](#).

[FN222]. See [Crawford v. Washington, 124 S. Ct. 1354, 1374 \(2004\)](#) (Confrontation Clause bars statements by unavailable witnesses who were not previously subject to cross-examination).

[FN223]. [Williams v. New York, 337 U.S. 241, 247 \(1949\)](#).

[FN224]. [Id.](#) at 251.

[FN225]. [Id.](#) at 249-50.

[FN226]. [795 F. Supp. 546, 564-65 \(E.D. N.Y. 1992\)](#).

The Federal Rules of Evidence are critical to the conduct of criminal trials to enable 'truth [to] be ascertained and proceedings [to be] justly determined.' But the focus of a trial is singular: 'whether a defendant is guilty of having engaged in criminal conduct of which he has been specifically accused.'... An individualized consideration of sentence, by contrast, necessitates a broader inquiry into all aspects of the defendant's life and the crime committed. A simple example best illustrates why the concerns of the two proceedings are not best served by the Federal Rules of Evidence. At trial, a jury generally cannot consider evidence of a defendant's past criminal conduct in deciding whether he has committed the charged offense. That precise evidence is, however, deemed highly probative at sentencing.

[Id.](#) (citations omitted).



[FN227]. *Id.* at 565-66.

[FN228]. *Walton v. Arizona*, 497 U.S. 639, 648 (1990), overruled by *Ring v. Arizona*, 536 U.S. 584 (2002).

[FN229]. *Ring*, 536 U.S. at 609 (overruling *Walton*).

[FN230]. *Harris v. United States*, 536 U.S. 454, 550 (2002) (stating that legislatures may not merely label every fact a sentencing factor).

[FN231]. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (meaning depends upon whether effect is to raise maximum punishment).

[FN232]. *Ring*, 536 U.S. at 612-13 (Scalia, J., concurring).

[FN233]. *Id.* at 610 (Scalia, J., concurring).

[FN234]. See *Montana v. Egelhoff*, 518 U.S. 37, 55 (1996) (holding that rules of evidence may exclude some defense evidence without violating due process).

[FN235]. See *Murray v. Giarratano*, 492 U.S. 1, 8-9 (1989) ('We have recognized on more than one occasion that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death. The finality of the death penalty requires 'a greater degree of reliability' when it is imposed.') (citations omitted).

[FN236]. *Crawford v. Washington*, 124 S.Ct. 1354, 1374 (2004).

[FN237]. 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 the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

*Id.* at 1370.

[FN238]. *Id.* at 1360.

[FN239]. Holdsworth, *supra* note 150, at 228.

[FN240]. *Crawford*, 124 S.Ct. at 1373.

[FN241]. See *supra* note 20.

[FN242]. *Jones v. United States*, 527 U.S. 373, 385 (1999) (describing federal capital procedures).

[FN243]. *Id.* at 386; see also *Harris v. United States*, 536 U.S. 545, 609 (2002) (holding that a fact increasing the minimum penalty without exceeding the maximum penalty was appropriately found as a sentencing element by a judge rather than an offense element to be determined by the jury).

[FN244]. *Gregg v. Georgia*, 428 U.S. 153, 191-92 (1976) (explaining reasoning for bifurcated capital trials).

[FN245]. Dissenting in *Blakely v. Washington*, 124 S.Ct. 2531, 2546 (2004), Justice O'Connor pointed out that the rule



prohibiting character evidence during the guilt phase of a trial might now require legislatures to bifurcate non-capital trials, when a defendant's prior acts will increase the sentence. *Id.*

[FN246]. See, e.g., [Fed. R. Evid. 105](#) ('Limited Admissibility').

[FN247]. [Bruton v. United States, 391 U.S. 123, 131 \(1968\)](#) (quoting [People v. Aranda, 63 Cal. 2d 518, 528-29 \(1965\)](#)) (finding jurors cannot merely ignore prejudicial information).

[FN248]. See [id. at 135](#) (limiting instruction cannot cure all prejudice).

[FN249]. [Jackson v. Denno, 378 U.S. 368, 396 \(1964\)](#).

[FN250]. [Id. at 374-75](#).

[FN251]. Due process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion be tried by an unprejudiced trier, and, regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it. *Id.* at 383-84 n.10.

[FN252]. It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there any indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or the other. *Id.* at 379-80.

[FN253]. *Id.* at 380 ('Being cloaked by the general verdict, petitioners do not know what result they really are attacking here.') (quoting [Stein v. New York, 346 U.S. 156, 177-78 \(1953\)](#)).

[FN254]. See *supra* note 20.

[FN255]. [Bruton v. United States, 391 U.S. 123, 135-37 \(1968\)](#) ('[T]he risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.').

[FN256]. [Id. at 126 n.2](#).

[FN257]. [Moore v. United States, 429 U.S. 20, 22-23 \(1976\)](#) (stating unreliable hearsay may not be basis for a criminal conviction).

[FN258]. [Bruton, 391 U.S. at 137](#) (reversed for new trial).

[FN259]. [Id. at 131](#) ('A jury cannot segregate evidence into separate intellectual boxes.') (quoting [People v. Aranda, 63 Cal. 2d 518, 528-29 \(1965\)](#)).

[FN260]. *Id.* at 137 (prejudice could not be cured by limiting instruction).

[FN261]. See [Caldwell v. Mississippi, 472 U.S. 320, 336 \(1985\)](#) (finding jury must not be misled regarding the role it plays at capital sentencing).



[FN262]. [Dunn v. United States, 307 F.2d 883, 885-86 \(5th Cir. 1962\)](#) (prosecutor's opening statement claimed the case was the most flagrant fraud ever in district).

[FN263]. [Irvin v. Dowd, 366 U.S. 717, 728 \(1961\)](#) (stating jury should not have a preconceived notion of the defendant's guilt).

[FN264]. [Krulewitch v. United States, 336 U.S. 440, 453 \(1949\)](#) (Jackson, J., concurring) (admission of hearsay statements voided conviction).

[FN265]. [Nash v. United States, 54 F.2d 1006, 1007 \(2d Cir. 1932\)](#).

[FN266]. See, e.g., [Ballew v. Georgia, 435 U.S. 223, 234-35 \(1978\)](#); see also W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgement in American Culture* 149 (1981) ('Instead of viewing the trial as a black box in which any number of separate factors operate in mysterious ways, the story perspective shows how those factors enter the judgment process and how they can operate together to affect trial outcomes.').

[FN267]. Our theory shows how ordinary means of telling and interpreting stories are used in trials to assess the credibility of competing claims. This perspective views the formal rules of the court as ritual that facilitates the presentation of a case but does not dictate its interpretation. In other words, the formal procedures limit the information that will be perceived as relevant to a story, but within the range of admissible information, the actual presentation and interpretation of cases depend primarily on the storytelling and storyhearing abilities of the courtroom actors (i.e., judge, jurors, defense, prosecutor, witnesses). The use of stories to reconstruct the evidence in cases casts doubt on the common belief about justice as a mechanical and objective process.

Bennett & Feldman, *supra* note 266, at ix.

[FN268]. [Estes v. Texas, 381 U.S. 532, 542-43 \(1965\)](#) (live radio and televised proceedings required reversal even absent a showing of actual prejudice); see also [Tumey v. Ohio, 273 U.S. 510, 532 \(1927\)](#).

Every procedure which would offer a possible temptation to the average man... to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law.

*Id.*

[FN269]. See [Sheppard v. Maxwell, 384 U.S. 333, 338-40 \(1966\)](#) (jurors exposed to publicity of defendant's character and prior acts); [Estes, 381 U.S. at 542-43](#) (national publicity); [Rideau v. Louisiana, 373 U.S. 723, 725 \(1963\)](#) (film of defendant's confession was broadcast pretrial); [Irvin v. Dowd, 366 U.S. 717, 725-26 \(1961\)](#) (publicity revealed defendant's criminal history and confession).

[FN270]. [Turner v. Louisiana, 379 U.S. 466, 471-72 \(1965\)](#) ('The failure to accord an accused a fair hearing violates even the minimal standards of due process.').

[FN271]. [Id. at 472-74](#) ('The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.').

[FN272]. See [In re Murchison, 349 U.S. 133, 134-39 \(1955\)](#) (holding violation of due process when judge acted as judge in grand jury and trial judge during contempt prosecution).



[FN273]. [United States v. Shoupe, 548 F.2d 636, 640 \(6th Cir. 1977\)](#) (prosecutor introduced witness's disavowed, unsworn prior statements to impeach his claimed lack of memory).

[FN274]. [Payne v. Tennessee, 501 U.S. 808, 825 \(1991\)](#).

[FN275]. *Id.*

[FN276]. See, e.g., [Fed. R. Evid. 105](#) ('Limited Admissibility').

[FN277]. See, e.g., [18 U.S.C. § 3593\(c\) \(2001\)](#) ('[s]pecial hearing to determine whether a sentence of death is justified').

[FN278]. See [Bryan v. United States, 524 U.S. 184, 199 \(1998\)](#) (error in instructions must be evaluated in context of the entire instructions).

[FN279]. [Estelle v. Williams, 425 U.S. 501, 503 \(1976\)](#) ('The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.').

[FN280]. [T]here can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show: 'Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day.'

[Coffin v. United States, 156 U.S. 432, 453-54 \(1895\)](#).

[FN281]. See [Sandstrom v. Montana, 442 U.S. 510, 522-23 \(1979\)](#) (a conclusive presumption in this case 'would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime') (quoting [Morissette v. United States, 342 U.S. 246, 274-75\(1952\)](#)).

[FN282]. [Delo v. Lashley, 507 U.S. 272, 278-79 \(1993\)](#) (per curiam) ('Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears.').

[FN283]. [Harris v. United States, 536 U.S. 545, 554-58 \(2002\)](#) (not all sentencing factors are elements).

[FN284]. [Jones v. United States, 527 U.S. 373, 376 \(1999\)](#).

[FN285]. See [Herrera v. Collins, 506 U.S. 390, 398-99 \(1993\)](#) (explaining presumption of innocence and constitutional protections attach when crime is charged).

[FN286]. [Sattazahn v. Pennsylvania, 537 U.S. 101, 110-11 \(2003\)](#) (finding murder is a lesser included crime of capital murder).

[FN287]. [Taylor v. Kentucky, 436 U.S. 478, 485 \(1978\)](#) (due process requires that the presumption of innocence be honored).

[FN288]. *Id.* at 480.

[FN289]. *Id.* at 480-81.

[FN290]. *Id.* at 490.



[FN291]. [Id. at 486-87.](#)

[FN292]. See, e.g., Judicial Committee on Model Jury Instructions for the Eighth Circuit, Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 12.01 (2003) [hereinafter Eighth Circuit Manual of Model Jury Instructions] ('Members of the jury, you have unanimously found the defendant guilty of the offense as charged in Count [repeat for each offense] of the indictment.').

[FN293]. See [Sandstrom v. Montana](#), 442 U.S. 510, 526 (1979).

[FN294]. [Estelle v. Williams](#), 425 U.S. 501, 503 (1976) ('To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.') (quoting [In re Winship](#), 397 U.S. 358, 364 (1970)).

[FN295]. [Id. at 504-05.](#)

[FN296]. See, e.g., Eighth Circuit Manual of Model Jury Instructions, *supra* note 291, at 12.01.

[FN297]. [Beck v. Alabama](#), 447 U.S. 625, 628-29 n.3 (1980) (holding that due process requires charge on lesser offense).

[FN298]. In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime.  
[Id. at 642.](#)

[FN299]. [Jones v. United States](#), 527 U.S. 373, 386 n.7 (1999) (describing federal capital sentencing procedures).

[FN300]. See [Tot v. United States](#), 319 U.S. 463, 467 (1943) (holding that due process bars a presumption in favor of an element of the prosecution's case); [McFarland v. American Sugar Refining Co.](#), 241 U.S. 79, 86 (1916) ('[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.').

[FN301]. [18 U.S.C. § 3593\(c\) \(2000\).](#)

[FN302]. [18 U.S.C. §§ 3591-3598 \(2000\)](#); see also [21 U.S.C. §§ 848\(a\)-\(r\) \(2000\).](#)

[FN303]. [18 U.S.C. § 3592 \(2000\).](#)

[FN304]. [Apprendi v. New Jersey](#), 530 U.S. 466, 493 (2000) ('The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense element.') (quotations omitted).

[FN305]. [18 U.S.C. § 3593\(d\).](#)

[FN306]. [Jones v. United States](#), 527 U.S. 373, 384-85 (1999).

[FN307]. See [Ring v. Arizona](#), 536 U.S. 584, 609 (2002).

[FN308]. [Sattazahn v. Pennsylvania](#), 537 U.S. 101, 110-11 (2003).



[FN309]. [18 U.S.C. § 3593\(c\)](#).

[FN310]. *Id.*

[FN311]. [18 U.S.C. § 3591\(a\) \(2000\)](#) (emphasis added) (preamble to FDPA).

[FN312]. [Walton v. Arizona](#), 497 U.S. 639, 648 (1990), overruled by [Ring v. Arizona](#), 536 U.S. 584 (2002).

[FN313]. [18 U.S.C. § 3591\(a\)](#) ('[a] defendant who has been found guilty....').

[FN314]. [18 U.S.C. § 3593\(a\) \(2000\)](#) ('the attorney shall... serve on the defendant, a notice...').

[FN315]. *Id.*

[FN316]. See [County Court of Ulster v. Allen](#), 442 U.S. 140, 156 (1979) ('[I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.').

[FN317]. [Jones v. United States](#), 527 U.S. 373, 376 (1999) (holding that a decision to seek the death penalty under FDPA is in the government's discretion).

[FN318]. See [City of Chicago v. Morales](#), 527 U.S. 41, 55-56 n.22 (1999) ('[When] vagueness permeates the ordinance, a facial challenge is appropriate.').

[FN319]. [United States v. Hudson](#), 11 U.S. (7 Cranch) 32, 32-34 (1812) (stating that federal criminal law may only be created by statute).

[FN320]. [Carlisle v. United States](#), 517 U.S. 416, 426 (1996) (holding that courts have no inherent power to circumvent rules, statutes, or the Constitution).

[FN321]. [United States v. Jackson](#), 390 U.S. 570, 571 (1968) (holding the death penalty provision of kidnapping statute unconstitutional because it made the risk of death the price for asserting one's constitutional right to a jury trial).

[FN322]. *Id.* at 581.

[FN323]. For example, the government proposed a construction of the statute under which 'even if the trial judge accepts a guilty plea or approves a jury waiver, the judge remains free... to convene a special jury for the limited purpose of deciding whether to recommend the death penalty.' *Id.* at 572. The government also suggested that the Court might save the statute by reading it to make imposition of the death penalty discretionary on the part of the sentencing judge. *Id.* at 575. The Court rejected these proposed remedies.

[FN324]. 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. *Id.* at 580.

[FN325]. *Id.* at 580 n.17 ('It is not surprising that courts confronted with such problems have concluded that their solution requires 'comprehensive legislative and not piecemeal judicial action.') (quoting [State v. Mount](#), 152 A.2d 343, 358 (N.J.



1959)).

[FN326]. [Arizona v. Fulminante](#), 499 U.S. 279, 309-10 (1991) (listing examples of constitutional errors).

[FN327]. See, e.g., [Vasquez v. Hillery](#), 474 U.S. 254, 262-64 (1986) (holding unlawful an exclusion of members of the defendant's race from a grand jury); [Waller v. Georgia](#), 467 U.S. 39, 49 n.9 (1984) (the right to public trial); [McKaskle v. Wiggins](#), 465 U.S. 168, 177 n.8 (1984) (the right to self-representation at trial).

[FN328]. [Sullivan v. Louisiana](#), 508 U.S. 275, 281 (1993) (holding that a deficient reasonable doubt instruction required reversal).

[FN329]. Cf. [Neder v. United States](#), 527 U.S. 1, 9 (1999) (dispensing with jury finding of minor element of materiality in white collar tax case was subject to harmless error analysis).

[FN330]. See [Jones v. United States](#), 527 U.S. 373, 384 (1999) ('[I]n light of congressional silence, we will not exercise our supervisory powers to require that an instruction of the sort petitioner sought be given in every case.').

[FN331]. See [Lockett v. Ohio](#), 438 U.S. 586, 606-07 (1978) (limiting defendants' mitigating evidence would clearly violate the Eighth Amendment).

[FN332]. [Ring v. Arizona](#), 536 U.S. 584, 613 (2002) (Scalia, J., concurring).

[FN333]. See [Rust v. Sullivan](#), 500 U.S. 173, 191 (1991) (discussing that Congress is assumed to legislate in light of constitutional limitations).

[FN334]. See, e.g., [United States v. Haynes](#), 269 F. Supp. 2d 970, 979 (W.D. Tenn. 2003) (the mens rea and aggravating factors must be charged by indictment).

[FN335]. See, e.g., [United States v. Matthews](#), 246 F. Supp. 2d 137, 142 (N.D.N.Y. 2002) ('The Federal Rules of Evidence are not constitutionally mandated per se.').

[FN336]. See [Fed. R. Crim. P. 7\(a\)](#) (requiring indictment for offenses 'punishable by death'); [Smith v. United States](#), 360 U.S. 1, 8 (1959) (requiring indictment in capital cases); [United States v. Higgs](#), 353 F.3d 281, 297 (4th Cir. 2003).

[FN337]. See [Haynes](#), 269 F. Supp. 2d at 973 (discussing capital elements added by superceding indictment).

[FN338]. [United States v. Fell](#), 217 F. Supp. 2d 469, 490 (D. Vt. 2002) (Sessions, J.). But see [United States v. Battle](#), 291 F. Supp. 2d 1367, 1373-74 (N.D. Ga. 2003) (granting certificate of appealability based on Fell).

[FN339]. [United States v. Fell](#), 360 F.3d 135, 146 (2d Cir. 2004).

[FN340]. The Government is further advised that it may only proffer evidence that meets the requirement of heightened reliability as reflected by, at a minimum, the Federal Rules of Evidence both at trial and sentencing for the reasons stated on the record. However, Mr. Bass is not bound by the Federal Rules of Evidence or any heightened standard as it relates to the penalty phase of the trial.

[United States v. Bass](#), No. 97-80235 (E.D. Mich. 2003) (Tarnow, J.). See also [United States v. Denis](#), 246 F. Supp. 2d 1250, 1255 n.5 (S.D. Fla. 2002) ('In this case, the government has agreed not to introduce hearsay and the court will apply the strict



rules of evidence.); *United States v. Mikos*, No. 02-137-1, 2003 U.S. Dist. WL 22110948, at \*11 (N.D. Ill. Sept. 11, 2003) (ruling that the Federal Rules of Evidence will be applied if the case goes to a sentencing phase).

[FN341]. See, e.g., *United States v. Lentz*, 225 F. Supp. 2d 672, 684 (E.D. Va. 2002) (alleging that Sixth Amendment Confrontation Clause concerns are protected at federal capital sentencing); see also *United States v. Acosta-Martinez*, 265 F. Supp. 2d 181, 185 (D.P.R. 2003).

[FN342]. See *United States v. Higgs*, 353 F.3d 281, 324 (4th Cir. 2003) (questioning whether Confrontation Clause applies at sentencing).

[FN343]. See *United States v. Haynes*, 269 F. Supp. 2d 970, 977-79 (W.D. Tenn. 2003); *United States v. Johnson*, 239 F. Supp. 2d 924, 946 (N.D. Iowa 2003); *United States v. Matthews*, 246 F. Supp. 2d 137, 141-46 (N.D.N.Y. 2002).

[FN344]. See *Fed. R. Evid. 404* ('Character Evidence Not Admissible To Prove Conduct').

[FN345]. See *Payne v. Tennessee*, 501 U.S. 808, 819 (1991) (stating that victim impact is relevant to guilt when it is probative of an element of the crime).

[FN346]. See *Fed. R. Evid. 802-05, 807* ('Hearsay Rule' and 'Hearsay Exceptions').

[FN347]. 18 U.S.C. §§ 3591-3598 (2000) (trial precedes sentencing hearing).

[FN348]. *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) (Congress, not the courts, make the laws).

[FN349]. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (only Congress can create elements of a crime).

[FN350]. See *Esparza v. Mitchell*, 310 F.3d 414, 420 (6th Cir. 2002) (noting that FDPA does not prohibit indictment of capital elements), rev'd by, *Mitchell v. Esparza*, 124 S.Ct. 1124 (2004).

[FN351]. *United States v. Fell*, 217 F. Supp. 2d 469, 490 (D. Vt. 2002) (FDPA held unconstitutional), vacated by, 360 F.3d 135 (2d Cir. 2004).

[FN352]. See, e.g., *United States v. Matthews*, 246 F. Supp. 2d 137, 142-46 (N.D.N.Y. 2002) (explaining that particular rules of evidence are not constitutionally required).

[FN353]. *Id.* (citing to various Supreme Court opinions).

[FN354]. *Walton v. Arizona*, 497 U.S. 639, 648 (1990), overruled by, *Ring v. Arizona*, 536 U.S. 584 (2002).

[FN355]. *United States v. Fell*, 217 F. Supp. 2d 469, 490 (D.Vt. 2002).

[FN356]. *Id.* at 488 ('Every crime set forth in the United States Code is defined in terms of elements, and every element must not only be proven to a jury beyond a reasonable doubt, but be proven by evidence found to be reliable by application of the Federal Rules of Evidence.').

[FN357]. *Id.*

[FN358]. *United States v. Fell*, 360 F.3d 135, 146 (2d Cir. 2004).



[\[FN359\]. Fell, 217 F. Supp. 2d at 485.](#)

[\[FN360\]. Id.](#)

[\[FN361\]. Crawford v. Washington, 124 S.Ct. 1354 \(2004\).](#)

[\[FN362\]. Id.](#)

[\[FN363\]. Id. at 1374.](#)

[\[FN364\]. Id. at 1375.](#)

[\[FN365\]. See Fiore v. White, 531 U.S. 225, 228-29 \(2001\)](#) (holding that retroactivity analysis need not be applied to ruling by a state's highest court which merely clarified state law).

[\[FN366\]. Bousley v. United States, 523 U.S. 614, 620-21 \(1998\)](#) (allowing defendant to rely, in his defense, on a previous substantive change in law).

[\[FN367\]. Teague v. Lane, 489 U.S. 288, 310 \(1989\)](#) ('[N]ew constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.').

[\[FN368\]. O'Dell v. Netherland, 521 U.S. 151, 156-57 \(1997\)](#) (holding that change to procedure was a new rule and not retroactive).

[\[FN369\]. Teague, 489 U.S. at 306-07.](#)

[\[FN370\]. Penry v. Lynaugh, 492 U.S. 302, 330 \(1989\).](#)

[\[FN371\]. Graham v. Collins, 506 U.S. 461, 478 \(1993\)](#) ('clearly meant to apply only to a small core of rules requiring observance of "those procedures that... are implicit in the concept of ordered liberty"') (quoting [Teague, 489 U.S. at 311](#)) (quoting [MacKey v. United States, 401 U.S. 667, 693 \(1971\)](#) (Harlan, J., concurring in part and dissenting in part) (quoting [Palko v. Connecticut, 302 U.S. 319, 325 \(1937\)](#))).

[\[FN372\]. Schriro v. Summerlin, 124 S.Ct. 2519, 2526-27 \(2004\).](#)

[\[FN373\]. Id. at 2524.](#)

[\[FN374\]. Id. at 2525.](#)

[\[FN375\]. Id. at 2523](#) ('A rule is substantive rather [than] procedural if it alters the range of conduct or the class of persons that the law punishes. ') (citing [Bousley v. United States, 523 U.S. 614, 620-21 \(1998\)](#)).

[\[FN376\]. See supra note 20 and accompanying statutes.](#)

[\[FN377\].](#) It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.



[Lowenfield v. Phelps, 484 U.S. 231, 246 \(1988\).](#)

[FN378]. [Id. at 245-46.](#)

[FN379]. [Tex. Code Crim. Proc. Ann. art. 37.071](#) (Vernon 2003) (Texas capital sentencing procedure).

[FN380]. [Id.](#)

[FN381]. [Cal. Penal Code § 190.3](#) (West 2003); [Wash. Rev. Code § 10.95.060 \(1981\).](#)

[FN382]. [State v. Roberts, 14 P.3d 713, 734 \(Wash. 2000\)](#) (reversing death sentence for defendant who was not proven to be 'major participant').

[FN383]. [Md. Code Ann., Crim. Law § 2-303\(g\)](#) (2003).

[FN384]. [Oken v. State, 835 A.2d 1105, 1157-58 \(Md. 2003\)](#) (upholding death sentence).

[FN385]. [Johnson v. State, 59 P.3d 450, 460 \(Nev. 2002\).](#)

[FN386]. [Fla. Stat. ch. 921.141\(2\)](#) (2002).

[FN387]. [Bottoson v. Moore, 833 So. 2d 693, 694-95 \(Fla. 2002\)](#) (per curiam).

[FN388]. See, e.g., [Del. Code Ann., tit. 11, § 4209](#) (2002).

[FN389]. See [Ritchie v. State, 809 N.E.2d 258, 268 \(Ind. 2004\)](#); [Brice v. State, 815 A.2d 314, 326-27 \(Del. 2003\)](#); [Nebraska v. Gales, 658 N.W.2d 604, 631-32 \(Neb. 2003\).](#)

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