

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

DONALD FELL, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALEXANDER BUNIN  
Federal Public Defender  
Northern New York and Vermont

*Counsel of Record*

Gene V. Primomo,  
Assistant Federal Public Defender

39 North Pearl Street, 5<sup>th</sup> Floor  
Albany, New York 12207  
Telephone: (518) 436-1850

Paul S. Volk, Esquire

QUESTION PRESENTED

- I. Whether the Federal Death Penalty Act (FDPA) violates the Fifth, Sixth, and Eighth Amendments to the United States Constitution by allowing the government to prove elements of capital murder by information that is inadmissible in all other criminal trials.



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OPINION BELOW

A panel of the United States Court of Appeals for the Second Circuit issued an opinion reversing the district court, which had stricken the government's notice of intent to seek the death penalty, and rendered unconstitutional 18 U.S.C. § 3591 et. seq. "The Federal Death Penalty Act" (FDPA). United States v. Fell, 360 F.3d 135 (2d Cir. 2004). Appendix A.

JURISDICTION

Fell's Motion for Rehearing was denied on May 21, 2004. Appendix B. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case concerns 18 U.S.C. § 3591 et seq., which provides in pertinent part, at § 3593 (c) that, at a capital sentencing hearing:

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.

## STATEMENT

### A. Proceedings Below.

On February 1, 2001, Donald Fell was indicted in the District of Vermont for kidnapping, carjacking, and two counts of illegally possessing a firearm. On January 30, 2002, the United States filed a notice of intent to seek the death penalty.

On July 8, 2002, a superseding indictment charged Fell with the original four counts and alleged the statutory aggravating factors that were previously in the government's Notice of Intent to Seek the Death Penalty. These were listed under the heading "Notice of Special Findings."

Fell filed motions to dismiss the government's death penalty notice. Fell sought to have the FDPA declared unconstitutional.

On August 29, 2002, the district court held a hearing on the constitutionality of the FDPA. On September 24, 2002, the district court issued a written order declaring the FDPA unconstitutional and striking the special findings from the indictment. United States v. Fell, 217 F.Supp. 469 (D. Vt. 2002). Appendix D.

On March 2, 2004, a panel of the court of appeals reversed the order of the district court and remanded the case for trial. Fell, 360 F.3d at 135. Appendix A. A petition for rehearing was filed by Fell on March 15, 2004 and denied by summary order on May 21, 2004. Appendix B. The court of appeals granted a stay of mandate until August 23, 2004. Appendix C. Pursuant to Federal Rule of Appellate Procedure 41 (d) (2) (B) that stay will remain in effect until a final disposition by the Court.

B. Facts.

Donald Fell and Robert Lee were accused of abducting and murdering Terseca King on November 27, 2000. Co-defendant Lee died on September 20, 2001.

The government sought Fell's execution based upon factors listed under the FDPA, and four non-statutory factors. The statutory factors were that (1) Fell was 18 years old at the time of the offense, (2) he acted intentionally and with the requisite knowledge of the risk of death, (3) the death occurred during a kidnapping, (4) the offense was committed in an especially heinous, cruel, or depraved manner, and that (5) he killed or attempted to kill more than one person during a single criminal episode.

At a hearing on August 29, 2002, the government stated its intention to introduce deceased former co-defendant Robert Lee's statements during the punishment phase of the trial. The statements were made under interrogation by law enforcement. Fell objected that the government intended to rely upon the testimonial statements of an unavailable witness to prove elements of capital murder - the statutory aggravating factors. The government agreed that such evidence was inadmissible during the guilt phase of trial.

On September 24, 2002, the district court found that it could neither honor Fell's Sixth Amendment right to confrontation, nor his Fifth Amendment right to due process, under the FDPA. The court held the FDPA unconstitutional.

## REASON FOR GRANTING THE PETITION

The panel's opinion conflicts with relevant precedents of the Court by allowing the government to prove elements of capital murder by information that is inadmissible in all other criminal trials.

A. The FDPA Denies Capital Defendants Trial Protections Available to All Other Defendants.

The panel found that the FDPA standard allows a judge to exclude evidence prohibited by the Constitution only if the judge also finds it is unfairly prejudicial. The panel applied this standard to a testimonial statement, offered against a capital defendant, even though the statement had never been subject to cross examination and the witness was dead.

The FDPA is unconstitutional because it allows evidence of a defendant's character, propensity, prior uncharged conduct, impact on a victim's family and community, as well as untested testimonial statements, to prove elements of capital murder. These defects cannot be remedied by a system that allows an individual judge to admit or exclude constitutionally prohibited evidence based solely upon his or her own sense of what is unfair prejudice.

In light of the Court's granting expedited review of United States v. Booker, \_S.Ct.\_, 2004 WL 1713654 (Aug. 2, 2004) and United States v. Fanfan, \_S.Ct.\_, 2004 WL 1713655 (Aug. 2, 2004), this issue is timely. If elements of a crime cannot be fairly addressed at a capital sentencing hearing, then they are an equal problem in federal non-capital cases where facts that were once considered to be merely sentencing enhancements must now be treated as elements.

1. The FDPA Combines Proof of Guilt With the Determination of Punishment.

This Court held that a criminal defendant is not guilty of capital murder until a jury finds at least one statutory aggravating factor beyond a reasonable doubt. Sattazahn v. Pennsylvania, 537 U.S. 101, 110-11 (2003). Another element of federal capital murder is that the jurors must find the defendant had the necessary mental state to have committed the crime. 18 U.S.C. § 3591.

Under the FDPA, neither, a finding of a statutory aggravating factor, nor a culpable mental state, are determined until a sentencing hearing. § 3591 et. seq. The panel below refused to recognize that there is any difference between the protections necessary at a trial and procedures allowed at a sentencing hearing.

2. The FDPA Sentencing Hearing Abandons All Rules of Evidence That Apply to Criminal Trials.

At a federal capital sentencing hearing, "*Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials...*" § 3593 (c). Instead, a judge may exclude evidence only if he or she decides that it is unfairly prejudicial, confusing, or misleading.

The FDPA contemplates an elastic hearing where anything may be admitted unless the judge finds its admission would unfairly prejudice a party. Unlike in any other criminal trial, a federal district judge may rely merely upon his or her discretion to admit evidence offered to prove elements of capital murder.

3. A Trial and a Sentencing Hearing are Inherently Different Proceedings.

Even in a non-capital case, a sentencing hearing is fundamentally different from a trial. It permits evidence that is not admissible to prove guilt. Williams v. New York, 337 U.S. 241, 246 (1949). There is no presumption of innocence. Delo v. Lashley, 507 U.S. 272, 278-79 (1993). The selection of punishment may be decided by a preponderance of evidence. Harris v. United States, 536 U.S. 545, 558 (2002). A judge may select the sentence. Spaziano v. Florida, 468 U.S. 447, 462-63 (1984). Therefore, a federal capital defendant is prosecuted for some elements of capital murder without the trial protections available even to a person charged with a simple misdemeanor.

In contrast, the guilt phase of a trial is restricted by formal rules of evidence and procedure. Williams, 337 U.S. at 246 ("Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations"). A defendant is presumed innocent. Estelle v. Williams, 425 U.S. 501, 503 (1976). The prosecution must prove all elements of the offense beyond a reasonable doubt. Jones v. United States, 526 U.S. 227, 243 (1999). A jury is required. Id. These protections are necessary even when proving facts that will only incrementally increase the potential sentence. Blakely v. Washington, 124 S.Ct. 2531, 2543 (2004).

4. Combining Trial and Sentencing In a Capital Trial is Unfair.

Under the FDPA, the trial of guilt and sentencing are

intermingled. The following anomalies occur: At the guilt phase, a jury may only convict a defendant of a crime that is less than capital murder. Sattazahn, 537 U.S. at 110-11. After conviction of this lesser crime, the jury then enters a sentencing phase. 18 U.S.C. § 3593 (d). Only then are the capital elements decided. § 3593 (c).

The hearing is neither subject to rules of evidence nor the presumption of innocence. Id. The jury receives evidence of guilt along with other information supporting a death sentence. United States v. Jones, 527 U.S. 373, 376-77 (1999). This other information usually includes the effect on the victim's family and community, Payne v. Tennessee, 501 U.S. 808, 827 (1991); predictions of the defendant's future dangerousness, Simmons v. South Carolina, 512 U.S. 154, 161 (1994); the defendant's prior uncharged conduct, Nichols v. United States, 511 U.S. 738, 747 (1994); examples of the defendant's bad character, United States v. Watts, 519 U.S. 148, 151 (1997); and hearsay (including testimonial statements), Williams, 337 U.S. at 244-47; none of which is generally admissible at the guilt phase of the trial.<sup>1</sup>

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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

The jury then deliberates upon two very different issues: (1) whether the defendant is guilty of capital murder and (2) whether a death sentence is appropriate. Jones, 527 U.S. at 376-77. 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. Harris, 536 U.S. at 558.

To the extent that capital elements are proven, 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.

The determination of elements is logically a part of the guilt phase of trial, Ring v. Arizona, 536 U.S. 584, 613 (2002) (Scalia, J., concurring), and requires the rules of a trial. To borrow a phrase from Justice Scalia, whether it is called a trial, a sentencing hearing "or Mary Jane", Id., at 610, if the effect is to prove elements of the offense, trial protections should apply.

B. Eliminating Rules of Evidence Changes the Nature of a Proceeding.

The rules of evidence are rules of limitation. See James Bradley Thayer, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, p. 264 (Little, Brown, and Company 1898) ("This excluding function is the

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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.

Williams, 337 U.S. at 246-47.

characteristic one in our law of evidence"). They restrict the quality of evidence that a proponent may introduce.

A prosecutor is the proponent of evidence when proving elements of a crime. See Bourjaily v. United States, 483 U.S. 171, 175-76 (1987). 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 defendant suffers by their loss. See Payne, 501 U.S. at 860 (Stevens, J., dissenting). Unlike at a sentencing hearing, rules of evidence do not merely depend upon a judge's individual sense of fairness. Nichols, 511 U.S. at 747. They exclude certain evidence as a matter of law. Williams, 337 U.S. at 246.

1. Relevance.

There is a difference in substance between evidence at the guilt phase of a trial and information presented at a sentencing hearing. Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993). That distinction can best be viewed through the evidentiary concept of relevance. Huddleston v. United States, 485 U.S. 681, 689 (1988) (relevance exists as a relation between an item of evidence and the matter to be proven). Some evidence is of consequence to guilt, and other information relates to punishment, but very often the two purposes are exclusive. See Jones, 527 U.S. at 401-02.

For instance, proof of a prior conviction is sometimes an element of an offense. See e.g. 18 U.S.C. § 922 (g) (1). Prior crimes are also important to deciding an appropriate punishment. United States v. Dalhover, 96 F.2d 355, 359 (7th Cir. 1938). In

some situations, a prior conviction may be relevant to both phases of trial. See Taylor v. United States, 495 U.S. 575, 602 (1994).

However, the reverse is not true. Punishment information is not necessarily relevant to proving guilt. United States v. Tucker, 404 U.S. 443, 446 (1972). Whether or not someone used illegal drugs is not relevant evidence to prove whether or not they robbed a bank. United States v. Madden, 38 F.3d 747, 752 (4th Cir. 1994). It makes guilt no more or less probable. The information may have some value when assessing a sentence, but it is not relevant to determining whether the defendant robbed a bank. Id.

## 2. Character Evidence.

Unfair prejudice occurs at a trial when a defendant is harmed by violations of the rules of evidence. Old Chief v. United States, 519 U.S. 172, 181 (1997). The best example of prejudicial evidence that has been limited by rule is character evidence. See Fed. R. Evid. 404. 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. Huddleston, 485 U.S. at 686. However, at a sentencing hearing, virtually all facets of a defendant's character are relevant. Gregg v. Georgia, 428 U.S. 153, 204 (1976). Although the defendant's propensity to commit crime generally is a legitimate sentencing concern, it is prohibited at a trial. Old Chief, 519 U.S. at 181.

One exception the 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. Spencer v. Texas, 385 U.S. 554, 562 (1967). However, proof of recidivism at trial is limited to the conviction itself, not the underlying facts. Id., at 652-53. The Court has referred to the application of the rules of evidence as one of the procedural safeguards making recidivist statutes constitutional. Monge v. California, 524 U.S. 721, 725 (1998).

"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." United States v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985). At a trial, "similar acts evidence is to be considered only for the proper purpose for which it was admitted." Huddleston, 485 U.S. at 691. When that evidence is offered merely to prove the defendant has a bad character, it must be excluded. See Fed. R. Evid. 404 (a) (1).

Propensity and character evidence are routinely used during a sentencing hearing. Barclay v. Florida, 463 U.S. 939, 949 (1983) (defendant's racial hatred may be considered); Eddings v. Oklahoma, 455 U.S. 104, 115-17 (1982) (defendant's youth is a consideration); Williams, 337 U.S. at 247-48 (defendant's background generally may be considered). It is relevant and admissible to show that a convicted defendant deserves a more severe punishment because the defendant's history indicates she is likely to commit future crimes. Simmons, 512 U.S. at 162-163. 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 Court has been careful to exclude prejudicial character evidence when it might taint a jury verdict for conviction. Old Chief, 519 U.S. at 181-82. This rule goes back to common law. Michelson v. United States, 335 U.S. 469, 475-76 (1948). It has been said to be incorporated into due process protections in the Constitution. United States v. Castillo, 140 F.3d 874, 880 (10th Cir. 1998).

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. Id; Barefoot v. Estelle, 463 U.S. 880, 896-97 (1983); Jurek v. Texas, 428 U.S. 262, 272-73 (1976). Lay witness testimony of future dangerousness is also admissible. See Johnson v. Texas, 509 U.S. 350, 355-56 (1993). Even the defendant's "low rehabilitative potential" may be introduced. United States v. Spivey, 958 F.Supp. 1523, 1535 (D. N.M. 1997).

Such evidence would never be admitted during the guilt phase of a trial. Simmons, 512 U.S. at 163. Beyond the obvious unfair prejudice, predictions of future behavior are simply not relevant to any element of a criminal offense. Huddleston, 485 U.S. at 689. It is not probative to any issue of guilt. Old Chief, 519 U.S. at 181-82.

3. Victim Impact Information.

There are instances where the effect upon a victim is relevant to proving offense elements. See e.g. Jones, 526 U.S. at 243. 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. See United States v. Copple, 24 F.3d 535, 545-46 (3d Cir.), cert. denied, 513 U.S. 989 (1994). Defense counsel have even been found to be ineffective for failure to object to the admission of such victim impact evidence during a trial. Sager v. Maas, 907 F.Supp 1412, 1421 (D. Or.), affirmed, 84 F.3d 1212 (9th Cir. 1996).

At a capital sentencing hearing, it is common to introduce information about the effect of the victim's loss upon others. Jones, 527 U.S. at 401. Surviving family members have been allowed to read poems of deep sadness and regret. United States v. Barnette, 211 F.3d 803, 818 (4th Cir. 2000). 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. United States v. McVeigh, 153 F.3d 1166, 1201-03 (10th Cir. 1998). Evidence of the victims' religious activities has also been permitted. United States v. Bernard, 299 F.3d 467, 479-80 (5th Cir. 2002).

Showing the potential effect on prison employees, who will be

responsible for the defendant, has been allowed. United States v. Battle, 173 F.3d 1343, 1350-51 (11th Cir. 1999). The latent risk to others from a capital defendant's actions is a proper basis to consider imposing the death penalty. Alabama v. Evans, 461 U.S. 230, 232 (1983).

4. Hearsay.

Another 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. Moore v. United States, 429 U.S. 20, 22-23 (1976). Hearsay is another example of limited admissibility. See e.g. Fed R. Evid. 802. A proceeding that allows hearsay is entirely different in nature from a trial that requires the declarant to testify, subject to limited exceptions. Nichols, 511 U.S. at 747. It is unclear whether the Confrontation Clause to the Sixth Amendment even applies to the selection of a sentence. See United States v. Higgs, 353 F.3d 281,324 (4th Cir. 2003).

A sentencing hearing is a procedure to give the jury or judge complete information about a defendant and the effect of the crime for which the defendant has been convicted. Williams, 337 U.S. at 247. Hearsay is admissible and welcome. Id, at 251. Presentence reports, police reports, out-of court witness statements, and other second-hand information is regularly admitted at a sentencing hearing. Id, at 249-50. The opposite is true during the guilt phase.

C. The Federal Rules of Evidence Must Apply to All Elements of a

Federal Crime.

The panel held that the Federal Rules of Evidence are not required by the Constitution. This is only partly true. Some of the Federal Rules of Evidence have a constitutional basis, but others do not. The issue is not whether any particular set of rules is constitutionally required. The point is that a set of rules that protects defendants in all other federal trials cannot be abandoned in the single instance when the defendant is facing the most serious crime, a capital offense.

Before the Supreme Court's decisions in Ring and Sattazahn, it was possible to say that the relaxed evidentiary standards approved by the Court for capital sentencing hearings applied to statutory aggravating circumstances, Gregg, 428 U.S. at 204, and no presumption of innocence was necessary. Delo, 507 U.S. at 278. It is now clear that a defendant is eligible for the death penalty only after he has been convicted of all the elements of capital murder, including at least one statutory aggravating circumstance. Sattazahn, 537 U.S. at 110-11.

At common law, a judge was required to impose sentences specifically sanctioned by criminal statutes. Apprendi v. New Jersey, 530 U.S. 466, 479 (1999). In other words, punishments were mandatory. Most were mandatory death sentences. McGautha v. California, 402 U.S. 183, 197-98 (1971). There was nothing like what is today called a sentencing hearing.

All evidence against a defendant, was admitted during the guilt phase of trial, subject to rules of evidence. The idea that

a judge could decide which evidence to allow, based upon the judge's own sense of reliability or fairness, would have seemed incredible to the Framers of the Constitution. There is a long history, from the common law, of using rules of evidence to prove a defendant's guilt:

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.

Brinegar v. United States, 338 U.S. 160, 174 (1949).

The Court recently held that any fact increasing the maximum sentence is an element of the crime. Blakely, 124 S.Ct. at 2536. The result is that defendants who once had sentencing enhancements decided by judges, may in many cases, have the right to have a jury decide even minor sentencing issues beyond a reasonable doubt.<sup>2</sup>

This means that a non-capital defendant may now have greater protection defending a increase of a few months in custody, than a capital defendant has defending a charge of capital murder. This

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<sup>2</sup> "The Federal Rules of Evidence also specifically do not apply to sentencing. Presumably, if sentence-enhancing facts must now be charged and proven to a jury beyond a reasonable doubt, constitutional evidentiary safeguards will apply. Thus, both the standard of proof required and the evidentiary procedures in applying the [Federal Sentencing] Guidelines violate the Supreme Court's holdings in *Apprendi* and its progeny." United States v. Croxford, \_\_ F.Supp. 2d \_\_, 2004 WL 1521560 (D. Utah July 7, 2004) (Cassell, D.J.).

makes no sense, and defies any notion of higher reliability required for capital cases.

Although, the panel mentioned the need for higher reliability in capital cases, there was no explanation of how an individual judge, applying mere discretion, could possibly be more reliable than rules of evidence. A less reliable procedure violates the Eighth Amendment. Murray v. Giarrantano, 492 U.S. 1, 8-9 (1989).

D. Constitutional Rules Are Not Discretionary.

The panel held that constitutionally based rules could still apply under the FDPA. The panel presumed that "rules governing admission of evidence at criminal trials" meant only the Federal Rules of Evidence, but not those exclusionary rules implied by the Constitution. The panel found that constitutionally based rules could still be applied, albeit at the trial judge's discretion.

1. History of Rules of Evidence.

Rules of evidence began to develop in Sixteenth Century England when judges started admitting oral testimony during jury trials. W.S. Holdsworth, *A HISTORY OF ENGLISH LAW*, Vol. IX, p. 126 (Little, Brown and Co. 1926). Before that time, verdicts were based upon jurors' own knowledge, with the assistance of legal documents. Id., at 131. As one commentator described the early development of oral testimony, "[T]he absence of clear rules as to the admissibility of evidence, and as to the conduct of a trial, were used to give advantages to the crown." Id., at 224.

By the time Framers drafted 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. John H. Langbein, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL*, p. 179 (Oxford University Press 2003). 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 an out-of-court confession of a 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. Id.

The evolution of those rules has varied. The character rule has continued to this day. See Michelson, 335 U.S. at 475. The accomplice rule exists in many states, but not the federal courts. Caminetti v. United States, 242 U.S. 470, 495 (1917). The confession rule was made a constitutional right. Lynumn v. Illinois, 372 U.S. 528, 537-38 (1963). The hearsay rule, as it applies to testimonial evidence in a criminal case, has constitutional protection. Crawford v. Washington, 124 S.Ct. 1354, 1375 (2004).

The importance, however, is not in what form these rules survive, but that the Framers understood the need for exclusionary

rules of evidence for the protection of criminal defendants.<sup>3</sup> Rules of evidence now apply during the guilt phase in all criminal jury trials. Except for some misdemeanors and petty offenses, all defendants have the right to jury trials. Williams, 337 U.S. at 246.

Some rules that exclude evidence are constitutionally based and others are not. Recently, this Court held that a testimonial statement, that was not previously subject to cross examination, may not be introduced against a criminal defendant at trial if the witness is unavailable. Crawford, 124 S.Ct. at 1374. The basis for that ruling was the Confrontation Clause of the Sixth Amendment. The same prohibition is also in Federal Rule of Evidence 802.

Prohibiting evidence of a defendant's character or past acts, that are merely used to prove he or she was likely to have committed the charged offense, appear to be based in the Due Process Clause of the Fifth Amendment. See Boyd v. United States, 142, U.S. 450, 458 (1892) ("However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."); See also Castillo, 140 F.3d at 881. This rule and its exceptions are also covered by Federal Rules

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<sup>3</sup> Langbein, at 250 ("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 weaknesses to affect credit as in most modern Continental practice").

of Evidence 404,413 and 414.<sup>4</sup>

Some constitutionally based exclusionary rules are not addressed in the Federal Rules of Evidence. Those include statements taken in violation of a defendant's Fifth Amendment right against self-incrimination, and evidence seized in violation of a defendant's Fourth Amendment right against unreasonable searches and seizures.

2. Application of Constitutional Exclusionary Rules at Sentencing Hearings.

The FDPA states that no rules of evidence governing criminal trials apply at the sentencing hearing. It makes no reference to the Federal Rules of Evidence, and states no distinction between evidentiary rules that are constitutionally based and those that are not. The FDPA is consistent with the Court's cases on the law of capital sentencing hearings before Ring.

Before Ring, courts found that most constitutionally based exclusionary rules simply do not apply at a sentencing hearing. See United States v. Tejada, 956 F.2d 1256, 1263 (2d Cir. 1992) (illegally seized evidence must be used to enhance sentence). More important, most punishment evidence is never admissible during the trial. See e.g. Simmons, 512 U.S. at 161 (predictions of the defendant's future dangerousness); Watts, 519 U.S. at 151 (examples of the defendant's bad character). Only the Fifth Amendment's right

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<sup>4</sup> Dissenting in Blakely 124 S.Ct. at 2546, Justice O'Connor recognized 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.

against self-incrimination has consistently been applied to all criminal proceedings. See Estelle v. Smith, 451 U.S. 454, 462-63 (1981).

The opinion below held that the Confrontation Clause might apply to a capital sentencing hearing, but only if the judge found the evidence unfairly prejudicial. No other court has applied the Confrontation Clause to sentencing hearings. Other courts have uniformly said it does not apply. See e.g. Higgs, 353 F.3d at 324; United States v. Drew, 200 F.3d 871, 879 (D.C. Cir. 2000); United States v. Petty, 982 F.2d 1365, 69 (9th Cir. 1993); United States v. Silverman, 976 F.2d 1502, 1513 (6th Cir. 1992) (en banc).

A cursory review of capital cases, shows that evidence which is constitutionally prohibited at trial, is almost always allowed at sentencing hearings. E.g. Barclay, 463 U.S. at 949 (Defendant's racial hatred could be considered at sentencing); McVeigh, 153 F.3d at 1201-03 (effect on victims' families and loved ones is admissible). The FDPA simply cannot honor any rules of evidence - neither the Federal Rules of Evidence, nor those implied by the Constitution - and still function as a sentencing hearing.

3. The Facts Below Show the Dilemma.

The panel found that, under the FDPA, rules of evidence (even those mandated by the Constitution), are subject to a balancing test. Under that reasoning, evidence previously excluded by the Constitution at the guilt phase, may be introduced at the sentencing hearing, as long as the judge finds no unfair prejudice.

In this case, after his arrest but before his death, Fell's

co-defendant Lee made a confession to law enforcement officers. Fell, 217 F. Supp. 2d at 485. The government asserted its intention to use the statement at Fell's sentencing hearing.

The panel found that at the sentencing hearing, the judge is a "gatekeeper of constitutionally permissible evidence." In regard to the above facts the panel stated,

In the instant case, then, if the district court were to conclude that admission of statements by Fell's deceased co-defendant would unfairly prejudice Fell, it would be obligated by the FDPA Standard to exclude them. We, of course, take no position on the question.

Fell, 360 F.3d at 145.

This ruling has two possible interpretations. First, it could mean that judges are free to ignore constitutionally based exclusionary rules and substitute their own sense of "unfair prejudice." Second, it could mean that all violations of constitutionally based rules implicitly create unfair prejudice and the evidence must be excluded. Neither view survives scrutiny.

The former view is defeated by this Court's decision in Crawford v. Washington, issued one week after the panel's decision in Fell. In Crawford, this Court stated,

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

124 S.Ct. at 1370.

In other words, reliability is determined, not by a judge's

sense of fairness, but by what the Constitution commands. Testimonial statements, like the one in *Fell*, must be excluded as a matter of law. The balancing test contained in the FDPA is inconsistent with the Confrontation Clause of the Sixth Amendment.

The latter interpretation is equally unsupportable. That view would prohibit most traditional sentencing evidence. Imagine a sentencing hearing without character evidence, propensity evidence, testimonial statements, or evidence of impact on the victim's family and community. Other than proof admitted during the guilt stage, there would be little punishment evidence for the government to present.

E. The Entire FDPA is Unconstitutional

The problem with the FDPA goes well beyond one statement in one case. Issues of guilt simply do not receive adequate constitutional protection at a sentencing hearing. 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. See *City of Chicago v. Morales*, 527 U.S. 41, 55-56, n. 22 (1999). Only Congress has the authority to rewrite the law. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

Congress could have done what Justice Scalia suggested in *Ring*: "plac[e] the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Ring*, 536 U.S. at 612 (Scalia, J., concurring). Congress did not. We can only assume Congress meant to meet constitutional requirements at the time they enacted the FDPA. See *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

Those requirements have now changed because of Ring and Sattazahn. We do not know which of these policy choices Congress would have made, in light of the new treatment of sentencing hearing findings as elements of a capital crime.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

Respectfully submitted,

ALEXANDER BUNIN  
Federal Public Defender  
Northern New York and Vermont  
Attorney for Petitioner  
39 North Pearl Street, 5<sup>th</sup> Floor  
Albany, New York 12207

Date: August 16, 2004

Telephone: (518) 436-1850

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

DONALD FELL  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

CERTIFICATE OF SERVICE

ALEXANDER BUNIN, a member of the Bar of this Court and appointed under the Criminal Justice Act, certifies that, pursuant to Rule 29.5, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents by Federal Express, and addressed to:

The Honorable Theodore B. Olsen,  
Solicitor General of the United States  
Room 5614, Department of Justice  
10th and Pennsylvania Ave., N.W.  
Washington, D.C. 20530

Mr. Robert Erickson, Deputy Chief Appellate Section, Criminal  
Division, Room 6102, Patrick Henry Building  
601 D. Street, N.W.  
Washington, D.C. 20530

Mr. David Kirby  
United States Attorney  
11 Elmwood Avenue, U.S. Courthouse  
Burlington, VT 05401

and further certifies that all were served on August 16, 2004.

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ALEXANDER BUNIN

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MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS

Petitioner, DONALD FELL, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the District of Vermont and on appeal to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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ALEXANDER BUNIN  
Federal Public Defender  
Districts of Northern New York  
And Vermont  
*Counsel for Petitioner*  
39 North Pearl Street, 5<sup>th</sup> Floor  
Albany, New York 12207

Telephone: (518) 436-1850

Date: August 16, 2004.