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THE ARYAN BROTHERHOOD, *CRAWFORD*, AND THE DEATH PENALTY

[A]nd Festus put Paul’s case before the king. “There is a man here” he said “whom Felix left behind in custody, and while I was in Jerusalem the chief priests and elders of the Jews laid information against him, demanding his condemnation. But I told them that Romans are not in the habit of surrendering any man, until the accused confronts his accusers and is given an opportunity to defend himself against the charge. So they came here with me, and I wasted no time but took my seat on the tribunal the very next day and had the man brought in. When confronted with him, his accusers did not charge him with any of the crimes I had expected”¹

INTRODUCTION

The Roman Governor Festus insisted on having accusers meet accused face-to-face nearly two millennia ago; however, the theoretical propositions invoked in his bold statement are the very rights preserved in the U.S. Constitution.² In the absence of Supreme Court precedent, however, courts have struggled to interpret the scope of the so-called “Confrontation Clause” with any amount of certainty or confidence.³ In the recently decided case of *Crawford v. Washington*,⁴ the Supreme Court reviewed and essentially redirected the interpretation of the Confrontation Clause courts had been using for nearly twenty-five years.⁵ Rather than citing necessity and “indicia of

1. *Acts* 25:14–18 (The Jerusalem Bible); see Howard W. Anderson III, *Davis v. Washington Narrows the Scope of “Testimonial” Hearsay*, 95 ILL. B.J. 546 (2007).

2. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”) (emphasis added).

3. See *United States v. Mills*, 446 F. Supp. 2d 1115, 1121 (C.D. Cal. 2006) (calling the issue of deciding when the Sixth Amendment applies in capital cases “difficult”); see also John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1969 (2005) (“[T]he Court has never answered the basic textual question whether the Sixth Amendment—which applies ‘in all criminal prosecutions’—applies to capital sentencing at all.”).

4. 541 U.S. 36 (2004).

5. *Id.* at 53 (“In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object”).

reliability” when admitting or refusing to admit declarants’ statements into evidence,⁶ the Court found the pivotal focus to be whether the nature of the statements was testimonial or non-testimonial.⁷ The decision in *Davis v. Washington* followed *Crawford* by attempting to define what “testimonial” and “non-testimonial” statements were.⁸

While the *Crawford* and *Davis* opinions certainly attempted to define the meaning of the Confrontation Clause in this context, they refrained from deciding *when* a defendant has the right to be “confronted with the witnesses against him.”⁹ The language of the Sixth Amendment clearly states that confrontation is required “[i]n all criminal prosecutions,”¹⁰ yet *Crawford* and *Davis* involved non-capital cases and thus only apply definitively to trial phases in criminal proceedings.¹¹ Thus, although a defendant first undergoes a “trial phase” and then, a “penalty phase” (if convicted) in federal capital proceedings, *Crawford* and *Davis* were ambiguous as to what a “criminal proceeding” was under the Sixth Amendment.¹² Moreover, because the penalty phase itself can be divided into the two separate portions of eligibility and selection, a key issue becomes whether the Confrontation Clause should extend to one, both, or neither.¹³ In *United States v. Mills*, the Honorable Judge David O. Carter¹⁴ grappled with several of these difficult questions

6. *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980) (“In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate ‘indicia of reliability.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

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

8. *See generally* *Davis v. Washington*, 547 U.S. 813 (2006) (forming a basis of understanding for “testimonial” and “non-testimonial” statements).

9. U.S. CONST. amend. VI; *see* *Douglass*, *supra* note 3 and accompanying text.

10. U.S. CONST. amend. VI.

11. *Davis*, 547 U.S. at 818, 820 (stating *Davis* was charged with the felony violation of a “domestic no-contact order” and *Hershel* was charged with “domestic battery and with violating his probation”); *Crawford*, 541 U.S. at 40 (stating *Crawford* was charged with “assault and attempted murder”).

12. *See United States v. Mills*, 446 F. Supp. 2d 1115, 1122 (C.D. Cal. 2006) (posing the question as to when the Confrontation Clause applies in light of *Crawford*); *supra* note 3 and accompanying text.

13. *See* Donald M. Houser, *Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation*, 64 WASH. & LEE L. REV. 349, 363–65 (2007), for an explanation of trifurcation and how it may remedy the complexity arising in the sentencing phase of capital cases.

14. Judge Carter has led an inspiring life, graduating with honors from UCLA in 1967, serving as First Lieutenant in the U.S. Marine Corps from 1966–69, receiving the Bronze Medal and Purple Heart Medal, and receiving his J.D. from UCLA in 1972. He served as Senior Trial Attorney in Homicides at the Orange County District Attorney’s office, and later as a Superior

pertaining to the Confrontation Clause, among them, its general applicability to the penalty phase and its extension to the eligibility and selection phases.¹⁵

Part I of this Comment will first offer a history of the Aryan Brotherhood to provide context for the implications and importance of *Mills*. Part II will review the impact *Crawford* and *Davis* have had on the Confrontation Clause. Part III will examine pertinent decisions dealing with the general application of the Sixth Amendment to the penalty phase in capital proceedings, the Federal Death Penalty Act (FDPA), and the courts previously dealing with the application of the Confrontation Clause to the penalty phase. Next, the holding in *Mills* that the Confrontation Clause applies to the penalty phase of a capital trial during both the eligibility and selection portions will be reviewed in Part IV. In Part V, this Comment will critically analyze the *Mills* holding and examine its implications, concluding: (1) the *Mills* court ruled correctly to apply the Confrontation Clause to the penalty phase in its entirety; and (2) the *Mills* court's logical progression was somewhat tenuous, yet acceptable. Finally, the conclusion will explain the overall implication *Mills* has on the penalty phase of capital proceedings and the extent to which the holding in *Mills* can affect cases to come.

I. HISTORICAL ANALYSIS OF THE ARYAN BROTHERHOOD

A. *The History of "The Brand"*

On August 28, 2002, Assistant United States Attorney Gregory Jessner indicted forty suspected members and associates of a predominantly white prison gang known as "The Brand" or the "Aryan Brotherhood."¹⁶ The indictment, running 110 pages in length, declared that the government would be seeking the death penalty for twenty-three defendants—rendering this the largest death penalty case in the history of the American justice system.¹⁷ Allegations of "stabblings, strangulations, poisonings, contract hits, conspiracy to commit murder, extortion, robbery, and narcotics trafficking"¹⁸ are scattered throughout this epic indictment, painting horrific scenes that the Government pledged to prosecute. The government invoked the Racketeer Influenced and

Court Judge in Orange County, California from 1982–99. Judge Carter has served as District Judge, Central District of California, from 1999–present. THE AMERICAN BENCH: JUDGES OF THE NATION 279 (Diana R. Irvine et al. eds., 17th ed. 2007).

15. See *Mills*, 446 F. Supp. 2d at 1127–39.

16. David Grann, *The Brand*, NEW YORKER, Feb. 16, 2004, at 156, 158. For an updated version of the indictment, see First Superseding Indictment, United States v. Mills, 446 F. Supp. 2d 1115 (C.D. Cal. 2006) (CR 02–938(E)).

17. Grann, *supra* note 16, at 158.

18. *Id.* Allegedly, the "hits" were ordered on victims both inside and outside of maximum-security prisons. William Lobdell & Christine Hanley, *Aryan Inmate Capital Trials to Start*, L.A. TIMES, Feb. 13, 2006, at B1.

Corrupt Organizations Act (RICO),¹⁹ likening the Aryan Brotherhood less to a prison gang and more to a national and intricate criminal enterprise.²⁰ Under RICO, not only are those being charged with murder eligible for the death penalty, but those *ordering or transmitting any order* for the murder are also eligible for the death penalty.²¹

The Brand's origins date to 1964 at the San Quentin State Prison, where it was formed in response to "the racially charged 1960s" for the purpose of white inmates "protect[ing] themselves."²² Along with gangs such as the Black Guerilla Family, La Nuestra Familia, and the Mexican Mafia, the Aryan Brotherhood was in a "full-fledged race war" by 1975.²³ In an effort to cut down the violence raging throughout the California prison system, authorities attempted to separate the gangs in 1982.²⁴ While the desired effect was separation and a cessation of violence, the prosecution believed the Palm Hall unit at the California Institution for Men at Chino, which served as a new home for a number of Aryan Brotherhood members, allowed the gang to take on a "hierarchical enterprise with a strict code of conduct."²⁵ Soon after, it is believed the Aryan Brotherhood formalized a federal branch in addition to its California branch, and Barry Mills and T. D. Bingham stepped to the fore of the gang's ranks to lead as "high commissioners."²⁶ The prosecution charged that for the next two decades the three-man commission, of which Mills and Bingham were a part, was responsible for ordering "dozens of hits."²⁷

B. *The Trial*

The first four of the defendants named in the 2002 indictment to go to trial were Barry "The Baron" Mills, Tyler "The Hulk" Bingham, Edgar "Snail" Hevle, and Christopher Gibson.²⁸ On July 29, 2006, after over four months of trial,²⁹ a jury found all four guilty.³⁰ Mills and Bingham were found guilty of

19. 18 U.S.C. §§1961–1968 (2006).

20. Grann, *supra* note 16, at 169. An evidentiary advantage to using RICO is that members in the enterprise are necessarily partakers in the enterprise's conspiracy, allowing for the possibility of out-of-court statements to be admitted into evidence as an exception to hearsay. 18 U.S.C. §§ 1959(a)(1), 1961 (2006); *see also* § 3591(a)(1)(C); FED. R. EVID. 801(d)(2)(E).

21. 18 U.S.C. §§ 1959(a)(1), 1961 (2006); *see also* § 3591(a)(1)(C).

22. Tori Richards, *Trials Seek to Crush Aryan Brotherhood*, S.F. CHRON., Mar. 14, 2006, at A1.

23. Grann, *supra* note 16, at 158–59.

24. Joe Mozingo, *Prison Gang Trial Reveals a Treacherous World*, L.A. TIMES, Dec. 30, 2006, at B1.

25. *Id.*

26. Grann, *supra* note 16, at 160–62.

27. Lobdell & Hanley, *supra* note 18.

28. Grann, *supra* note 16, at 160; Tori Richards, *Aryan Brotherhood Leaders Are Convicted in Murders*, N.Y. TIMES, July 29, 2006, at A11.

29. The date of opening arguments was March 14, 2006. Richards, *supra* note 22.

conspiring to murder Frank Joyner and Abdul Salaam at the United States Penitentiary in Lewisburg, Pennsylvania, in 1997.³¹ In seeking the death penalty for both Mills and Bingham, the Government revealed its intention to prove non-statutory aggravating factors under the Federal Death Penalty Act (FDPA)³² by admitting, among others, presentence investigation reports, post-sentence reports, Institution Discipline Committee (IDC) reports, prison records of convictions, internal prison memoranda, and grand jury testimony.³³ As this Comment will discuss, the *Mills* Court found that *Crawford* and the Confrontation Clause applied to both the eligibility and selection phases.³⁴ Consequently, much of this evidence was ruled inadmissible because defendants Mills and Bingham would be deprived of their right to confront their accusers were the court to admit the out-of-court statements.³⁵

II. CRAWFORD'S IMPACT ON THE CONFRONTATION CLAUSE

A. Roberts and “Indicia of Reliability”

In the landmark case of *Ohio v. Roberts*, the Supreme Court attempted to answer definitively the question of when the Confrontation Clause bars the admission of evidence.³⁶ The *Roberts* Court focused on the way in which the Confrontation Clause limited evidence otherwise admissible under an exception to the rule against hearsay.³⁷ The Court called attention to the importance of the “means of testing accuracy”³⁸ and applied an “indicia of reliability” requirement to determine whether an out-of-court statement violated the Confrontation Clause.³⁹ After a showing of unavailability, adequate “indicia of reliability” will render an out-of-court statement admissible, and according to the Court, “[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”⁴⁰ Thus, *Roberts*

30. Richards, *supra* note 28.

31. United States v. Mills, 446 F. Supp. 2d 1115, 1119 (C.D. Cal. 2006).

32. See 18 U.S.C. §§ 3591–3593 (2006).

33. *Mills*, 446 F. Supp. 2d at 1135–40.

34. *Id.* at 1131.

35. See *id.* at 1136, 1138, 1140.

36. 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

37. *Id.* at 65. The Court referred to the “truism that ‘hearsay rules and the Confrontation Clause are generally designed to protect similar values’ and ‘stem from the same roots.’” *Id.* at 66 (quoting California v. Green, 399 U.S. 149, 155 (1970); Dutton v. Evans, 400 U.S. 74, 86 (1970)).

38. *Id.* at 64, 66 (emphasis added).

39. *Id.* at 65–66.

40. *Id.* at 66.

seemed to relieve the Confrontation Clause of any independent significance, rendering it coextensive with the firmly rooted hearsay exceptions.

B. Crawford: An Entirely New Outlook on Confrontation

The Supreme Court drastically changed the assessment of a defendant's rights in *Crawford v. Washington*. Rather than applying *Roberts* to settle the controversy debated among the lower courts, the Court went a step further by effectively overruling *Roberts* and its "amorphous notions of reliability."⁴¹ After reciting English and American histories of the Confrontation Clause, Justice Scalia (writing for the majority) used the 1828 version of Webster's Dictionary of the English Language and argued that the text of the Confrontation Clause reflected the original emphasis of "witnesses" being those who "bear testimony."⁴² Similarly, Justice Scalia noted that "'testimony'" was defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"⁴³ Thus, the Court heavily relied on the history and text of the Confrontation Clause in determining whether the statement was testimonial or non-testimonial.⁴⁴

However, Justice Scalia, in following historical exceptions as closely as possible, found that prior opportunity for cross-examination and unavailability allow for a statement to meet Confrontation Clause requirements for admissibility of testimonial statements:

Where *nontestimonial hearsay* is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that *exempted such statements from Confrontation Clause scrutiny altogether*. Where *testimonial evidence* is at issue, however, the Sixth Amendment demands what the common law required: *unavailability and a prior opportunity for cross-examination*.⁴⁵

41. *Crawford*, 541 U.S. at 61, 63. Justice Scalia conceded that the Supreme Court "could resolve this case by simply reweighing the 'reliability factors' under *Roberts* and finding that Sylvia Crawford's statement falls short." *Id.* at 67. However, Scalia indicated that *Roberts* and previous interpretations of the Confrontation Clause revealed "a fundamental failure on [the Supreme Court's] part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* For more language asserting *Crawford* as overruling *Roberts*, see *id.* at 69 (Rehnquist, C.J., concurring) ("I dissent from the Court's decision to overrule *Ohio v. Roberts*." (citation omitted)); see also *Davis v. Washington*, 547 U.S. 813, 825 n.4 (2006) ("We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.").

42. *Id.* at 51 (citations omitted) (internal quotation marks omitted).

43. *Id.* (citations omitted).

44. *Id.* at 53 ("In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object . . .").

45. *Id.* at 68 (emphasis added). Justice Scalia argues that this is "faithful to the Framers' understanding." *Id.* at 59.

Where testimonial evidence was involved, the procedural process of cross-examination was the vehicle by which reliability would be delivered.⁴⁶ Thus, rather than the Confrontation Clause and hearsay being decided simultaneously in a single inquiry, an out-of-court statement must meet the requirements of the two separate inquiries of the Confrontation Clause and of a hearsay analysis. However, the Court remained silent as to whether the Confrontation Clause should apply to sentencing hearings.⁴⁷

C. Davis: Defining “Testimonial” and “Non-Testimonial”

Just two years later, the Supreme Court attempted to define the terms “testimonial” and “non-testimonial” in *Davis v. Washington*.⁴⁸ After briefly discussing the Confrontation Clause and *Crawford*, Justice Scalia (writing for the majority) stated:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an *ongoing emergency*. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to *establish or prove past events potentially relevant to later criminal prosecution*.⁴⁹

Interestingly, this inquiry fixes upon the purpose of the interrogation per analysis of the declarant’s statements and “not the interrogator’s questions.”⁵⁰ In applying this rule to the facts of *Davis*, Justice Scalia focused on: (1) the description of events “*as they were actually happening*, rather than ‘describ[ing] past events’”; (2) whether a reasonable person would find the situation to be an “ongoing emergency” (“a call for help against a bona fide physical threat”); (3) whether the elicited statements were “necessary . . . to *resolve* the present emergency” or to learn “what had happened in the past”; and (4) whether the declarant’s statements were either frantic or calm.⁵¹ However, the *Davis* Court was silent on the issue of *Crawford*’s application (or lack thereof) to sentencing hearings.⁵²

46. *Crawford*, 541 U.S. at 61 (“[T]he 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 . . . by testing in the crucible of cross-examination.”); see also Penny J. White, “*He Said,*” “*She Said,*” and *Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 423–24 (2007) (highlighting the importance of cross-examination).

47. See Douglass, *supra* note 3, at 1969.

48. 547 U.S. 813 (2006) (argued March 20, 2006, and decided June 19, 2006).

49. *Id.* at 822 (emphasis added).

50. *Id.* at 822–23 n.1.

51. *Id.* at 827 (alteration in original) (citations omitted).

52. See Douglass, *supra* note 3, at 1969.

Nevertheless, as it stands today, the primary question as to the admissibility of out-of-court statements is whether the statements are testimonial or non-testimonial.⁵³ If the statements are testimonial, they may still be admitted into evidence if the witness is sufficiently unavailable and there has been a prior opportunity to cross-examine the declarant.⁵⁴

III. THE BREADTH OF THE CONFRONTATION CLAUSE

Now that *Crawford*'s impact on the Confrontation Clause has been explored, the breadth or scope of the right to confront one's accusers must be examined. First, Supreme Court decisions dealing with the issue of confrontation during a capital sentencing hearing will be discussed. Second, it will be necessary to look briefly at the change to what has become known as "constitutionally significant factfinding" in recent Supreme Court decisions. Third, the FDPA's language will reveal what kind of evidence is deemed admissible. Fourth, a pre-*Crawford* decision will show the application of the Sixth Amendment to the various parts of the penalty phase in a capital proceeding. Fifth, post-*Crawford* decisions will demonstrate how courts have grappled with the issue of applying the Confrontation Clause to the penalty phase of capital proceedings.

A. *Williams and Gardner: Confrontation Clause in Capital Sentencing Hearings*

Courts largely cite *Williams v. New York*⁵⁵ when holding the Confrontation Clause does not apply during the sentencing phase in a death-penalty case.⁵⁶ In *Williams*, the Supreme Court affirmed a death sentence imposed by a judge who not only went against the jury's unanimous recommendation for life-imprisonment but also considered material not admitted into evidence.⁵⁷ The Court stated, "[T]he punishment should fit the offender and not merely the crime,"⁵⁸ and claimed, "The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."⁵⁹ Thus, the Court found the rules of evidence should not apply to the penalty phase of a trial, no matter if that penalty phase carries with it the possibility of death.⁶⁰ Justices Rutledge and Murphy noted in their dissent that

53. See *supra* note 49 and accompanying text.

54. See *id.*

55. 337 U.S. 241 (1949).

56. White, *supra* note 46, at 402.

57. *Williams*, 337 U.S. at 252; see also *id.* at 252–53 (Murphy, J., dissenting).

58. *Id.* at 247 (majority opinion).

59. *Id.* at 251.

60. See *id.* ("It is urged, however, that we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed. We cannot accept the contention.").

due process ensured a defendant's right to be "accorded a fair hearing through *all the stages* of the proceedings against him."⁶¹

Nearly thirty years later in *Gardner v. Florida*, the Supreme Court addressed a situation remarkably similar to *Williams*—but distinguished *Williams* and held for the defendant.⁶² In *Gardner*, the jury returned an advisory verdict to the judge, recommending the defendant receive life because the mitigating factors outweighed the aggravating factors.⁶³ The judge consulted a presentence investigation report (which the judge ordered and received *after* the jury's recommendation was delivered) and imposed a death sentence on the defendant.⁶⁴ The Government contended *Williams* controlled and was directly applicable to the facts of *Gardner*.⁶⁵

The Court declined to apply *Williams* and proceeded to distinguish the *Gardner* facts.⁶⁶ The Court relied on two points: (1) the defendant in *Gardner* had no opportunity to challenge the presentence investigation report, which was absent from the record; and (2) the evolution of the death penalty.⁶⁷ Justice Stevens, delivering the majority opinion, noted that in the intervening thirty-year period between *Williams* and *Gardner*, "five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country."⁶⁸ He further noted, "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."⁶⁹ Justice Stevens declared that due process, while not an "entire panoply of criminal trial procedural rights," applied to the sentencing process.⁷⁰ The purpose was to provide "quality" and not just "quantity" of information to the judge, so that the sentencing court can be relatively free from "the average rumor or item of gossip."⁷¹ The overarching purpose of disclosing the presentence investigation report to the defense was reliability in

61. *Id.* at 253 (Murphy, J., dissenting) (emphasis added).

62. *Gardner v. Florida*, 430 U.S. 349, 357, 362 (1977). For an excellent comparison of *Gardner* and *Williams*, see White, *supra* note 46, at 403–10.

63. *Gardner*, 430 U.S. at 352–53. Interestingly, a significant mitigating factor was that the defendant's level of intoxication before committing the offenses was such that he could not even remember the assault. *Id.* at 352.

64. *Id.* at 353.

65. *Id.* at 355.

66. *Id.* at 356 ("[It is] clear that the *holding* of *Williams* is not directly applicable to this case.").

67. *Id.* at 356–57.

68. *Gardner*, 430 U.S. at 357; *see also* *Furman v. Georgia*, 408 U.S. 238 (1972) (discussing, in an extensive opinion, the notion that "death is different").

69. *Gardner*, 430 U.S. at 358.

70. *Id.* at 359 n.9.

71. *Id.* at 359.

a case of life and death.⁷² While courts to this day may have to decide whether to follow *Williams* or *Gardner*, the general trend is to follow *Williams* so long as all information is disclosed to the defense.⁷³

B. *Apprendi*, *Ring*, and “Constitutionally Significant Factfinding”

In the decisions in *Apprendi v. New Jersey*⁷⁴ and *Ring v. Arizona*,⁷⁵ the Supreme Court called attention to constitutional safeguards that were to be afforded to a defendant if certain kinds of factfinding were to be taking place.

In *Apprendi*, the Supreme Court found that a New Jersey judge’s legislatively prescribed ability to impose a sentencing enhancement for hate crimes was unconstitutional.⁷⁶ Justice Stevens, writing for the majority, stated, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁷⁷ The “practice” of allowing a judge to make separate findings of fact by a preponderance of the evidence to enhance the sentence of a conviction “cannot stand.”⁷⁸

Ring applied the rationale of *Apprendi* in striking down an Arizona statute allowing a judge to make a finding of at least one aggravating factor after a jury delivered a guilty verdict for the crime committed.⁷⁹ The *Ring* Court reasoned, “The dispositive question . . . is one not of form, but of effect If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”⁸⁰ In so reasoning, the court seemed to attach “constitutional significance” to the factfinding of at least one aggravating factor, necessitating the Sixth Amendment guarantee of a jury trial and the accompanying “beyond a reasonable doubt” burden of proof.⁸¹

The Supreme Court’s recent emphasis that certain kinds of factfinding bear constitutional significance poses the questions of what other findings of fact bear constitutional significance and which constitutional guarantees are to be provided when findings of fact are determined to have such significance.⁸² In

72. *Id.* at 359–60 (“[T]he time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death.”).

73. White, *supra* note 46, at 409.

74. 530 U.S. 466 (2000).

75. 536 U.S. 584 (2002).

76. *Apprendi*, 530 U.S. at 497.

77. *Id.* at 490.

78. *Id.* at 491–92.

79. *Ring*, 536 U.S. at 588–89.

80. *Id.* at 602 (citations and internal quotation marks omitted).

81. *See* *United States v. Mills*, 446 F. Supp. 2d 1115, 1124–31 (C.D. Cal. 2006).

82. *See id.* (dealing with the issues of what is constitutionally significant factfinding and whether the Confrontation Clause applies).

particular, the question becomes whether the findings of fact reserved to a jury pursuant to the Federal Death Penalty Act of 1994 (FDPA)⁸³ bear constitutional significance, and whether the Sixth Amendment's right to confrontation subsequently extends to these findings of fact.

C. *The Federal Death Penalty Act: The More, the Better*

A jury is entrusted with several burdensome tasks under the FDPA. Specifically, the jury must proceed through six steps if a death sentence is to be handed down to the guilty defendant. According to Judge Carter's analysis in *Mills*, the entire jury must find:

- (1) that the statutory intent factor has been proven beyond a reasonable doubt;
- (2) that at least one statutory aggravating factor has been established beyond a reasonable doubt;
- (3) that any additional statutory factors have been established beyond a reasonable doubt;
- (4) that any non-statutory aggravating factor has been established beyond a reasonable doubt;
- (5) whether any single juror has found a mitigating factor by preponderance of the evidence; and
- (6) "whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death."⁸⁴

Typically, the first two steps, which the government must prove beyond a reasonable doubt, are classified as part of what is called the "eligibility phase"; the final four steps, where the jury weighs all statutory and non-statutory factors, are part of the "selection phase."⁸⁵

In these six steps, the statute provides that the government may introduce evidence relevant to the sentence, and the defense may introduce evidence relevant to a mitigating factor.⁸⁶ The statute then declares: "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."⁸⁷ Thus, the rules of evidence

83. Pub. L. No. 103-322, 108 Stat. 1959 (codified as amended in scattered sections of 18 U.S.C.).

84. *Mills*, 446 F. Supp. 2d at 1119–21 (citing 18 U.S.C. §§ 3591–3593) (other citations omitted). For a list of the statutory aggravating and mitigating factors, see 18 U.S.C. § 3592 (a)–(c) (2006).

85. See *United States v. Fell*, 360 F.3d 135, 140–41 (2d Cir. 2004); *United States v. Johnson*, 378 F. Supp. 2d 1051, 1061–62 (N.D. Iowa 2005) (stating that the penalty phase is split into two "to avoid the Confrontation Clause problem by limiting evidence that purportedly implicated the Confrontation Clause to the selection phase, where the Confrontation Clause was not applicable, even if the Confrontation Clause was applicable to the eligibility phase"); see also *supra* note 13 and accompanying text.

86. 18 U.S.C. § 3593(c) (2006).

87. *Id.*

have no place in FDPA sentencing proceedings. Nevertheless, the pre-*Crawford* and post-*Crawford* cases addressing treatment of the Sixth Amendment shed light as to whether the FDPA's provision on evidence comports with the defendant's constitutional right to confrontation.

D. United States v. Fell, Roberts, and the Confrontation Clause

In its decision delivered just two days before the Supreme Court decided *Crawford*, the Second Circuit in *United States v. Fell* reversed the district court of Vermont's declaration that the FDPA was unconstitutional because of its relatively lax evidentiary safeguards.⁸⁸ The district court insisted that "heightened reliability" is essential if a court is to impose a death sentence and found the FDPA denied this reliability to the defendant.⁸⁹ The Second Circuit agreed that "heightened reliability" was essential, but claimed "the FDPA does not undermine 'heightened reliability,' it promotes it."⁹⁰ The Second Circuit stated, "What the district court failed to acknowledge, however, is that the Supreme Court has also made clear that in order to achieve such 'heightened reliability,' more evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors[.]"⁹¹ The fact that the FDPA even bars evidence where the probative value is outweighed (not substantially outweighed) was more generous to the defendant than the Federal Rules of Evidence.⁹² The Court concluded with the imposing words, "So long as . . . defendants receive a fundamentally fair trial, the [FDPA] satisfies constitutional requirements."⁹³

E. Post-Crawford Applications of the Confrontation Clause to the Penalty Phase

Lower courts have applied *Crawford* in various ways to the penalty phase in capital proceedings.⁹⁴ A few cases in particular show a gradual evolution toward applying *Crawford* to the eligibility portion of the penalty phase in capital proceedings, yet courts cite *Williams* in their reluctance to extend the Confrontation Clause any further.

88. *Fell*, 360 F.3d at 137.

89. *United States v. Fell*, 217 F. Supp. 2d 469, 485 (D. Vt. 2002) (relying largely on the newly delivered *Ring* decision).

90. *Fell*, 360 F.3d at 144.

91. *Id.* at 143 (drawing upon *Williams* in the assertion that more is better).

92. *Id.* at 145.

93. *Id.*

94. See *infra* note 136 and accompanying text (discussing different courts taking different tactics).

1. *United States v. Jordan*: Eligibility but Not Selection

In *United States v. Jordan*,⁹⁵ Judge Hudson of the Eastern District of Virginia found that the government could not introduce a witness's grand jury testimony and other statements during the eligibility phase of the capital proceeding.⁹⁶ The *Jordan* court based this decision on the premise that the eligibility phase is the "most critical" from a "constitutional perspective," in that the intent and aggravating factors decided in the eligibility phase are the "functional equivalent of elements of the capital offense."⁹⁷ Thus, equating the eligibility phase with the trial phase, the *Jordan* court held that the defendant is to be protected by the Sixth Amendment safeguards, including the right to confrontation.⁹⁸

However, the *Jordan* court held that the right to confrontation did not extend to the selection phase.⁹⁹ Judge Hudson reasoned, "Unlike the eligibility phase, the selection phase is intended to be less structured and less encumbered by strict adherence to the Rules of Evidence. . . . [T]he jury should 'have as much information before it as possible when it makes the sentencing decision.'"¹⁰⁰ Seeming to rely on this intention of having a "less structured" proceeding, the *Jordan* court explained little more about its decision to apply the Confrontation Clause in such a manner. Nevertheless, *Jordan*'s decision to apply the Confrontation Clause to the eligibility phase marked a gradual shift toward finding constitutional significance under the FDPA.¹⁰¹

2. *United States v. Johnson*: Following in *Jordan*'s Footsteps

In *United States v. Johnson*, the Northern District of Iowa answered the question of whether *Crawford* and *Ring* indicated extension of a defendant's right to confrontation into the penalty phase of the trial, as did the *Jordan* and *United States v. Bodkins* courts.¹⁰² The court found the "constitutional

95. 357 F. Supp. 2d 889 (E.D.Va. 2005).

96. *Id.* at 903.

97. *Id.* at 902 (citing *United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003)). Interestingly, the *Jordan* Court discusses *Fell*, yet here places the eligibility phase as constitutionally equivalent to the trial phase. *Id.*

98. *Id.*

99. *Id.* at 903.

100. *Jordan*, 357 F. Supp. 2d at 903 (quoting *Gregg v. Georgia*, 428 U.S. 153, 203–04 (1976)).

101. See *United States v. Bodkins*, WL 1118158, at *4–5 (W.D. Va. May 11, 2005) (following *Jordan* in holding that *Crawford* applies to the eligibility phase but not the selection phase).

102. *United States v. Johnson*, 378 F. Supp. 2d 1051, 1061 (N.D. Iowa 2003) ("Consistent with the constitutional safeguards identified by the United States Supreme Court, as interpreted by the Fourth Circuit, this Court is of the opinion that with respect to the eligibility phase of the penalty stage of a capital trial, the Confrontation Clause is equally applicable." (quoting *Jordan*, 357 F. Supp. 2d at 902–03) (emphasis added by court)).

safeguards” of the Confrontation Clause should apply to the eligibility phase just as they apply to the trial phase.¹⁰³ Similarly, the court endorsed an ideology of “the more, the better” in refusing to apply *Crawford* to the selection phase by citing the Eighth Circuit’s recent proposition that “the confrontation clause does not apply in sentencing proceedings.”¹⁰⁴ More importantly, the *Johnson* court quoted *Jordan*’s recognition of an absence of case law applying the Confrontation Clause to the selection phase of a capital proceeding.¹⁰⁵ In doing so, the *Johnson* court recognized—yet declined the defense’s invitation to be—the first to expand the application of *Crawford* to the selection phase.¹⁰⁶

3. Uncharted Territory

While the Second Circuit in *Fell* used strong language indicating the FDPA fully complied with the Constitution, the glaring mark on the record remains the fact that it was decided before *Crawford*.¹⁰⁷ Although courts such as *Jordan*, *Bodkins*, and *Johnson* have all decided to extend *Crawford* to the eligibility phase, no court had ventured to apply *Crawford* to the selection phase of a capital proceeding.¹⁰⁸ Moreover, no circuit court had even addressed the specific issue of whether the Confrontation Clause applied to the penalty phase at all.¹⁰⁹ It is this hole created by *Crawford* and *Ring*, the unavailability of law at the circuit court level, and the sparse and hesitant district court decisions of *Jordan*, *Bodkins*, and *Johnson* that paved the way for Judge Carter’s order in *United States v. Mills*.

IV. JUDGE CARTER’S ANALYSIS IN *MILLS*

On August 17, 2006, the Honorable Judge David O. Carter¹¹⁰ issued an unprecedented order regarding penalty phase procedures—he applied the

103. *Id.*

104. *Id.* at 1060–62 (quoting *United States v. Wallace*, 408 F.3d 1046, 1048 (8th Cir. 2005)) (internal quotations omitted).

105. *Id.* at 1061 (“[N]o court has applied the teachings of *Ring* beyond the statutory factors at issue in the eligibility phase.”) (citation omitted).

106. *See id.* at 1062.

107. *See supra* notes 88–94 and accompanying text.

108. *See infra* note 213 and accompanying text.

109. The closest a court has come to addressing this issue was in *United States v. Brown*, 441 F.3d 1330 (11th Cir. 2006). The Court cited *Jordan*, *Bodkins*, and *Johnson*, yet concluded:

We do not decide whether *Crawford* applies at the penalty phase of a federal capital trial precisely because the challenged evidence offered in this case was so clearly non-testimonial. Moreover, we offer no opinion on the propriety of trifurcating a federal capital trial so that the penalty phase would be conducted in two distinct parts.

Id. at 1362 n.12.

110. For background information on Judge Carter, see *supra* note 14.

Confrontation Clause to both the eligibility and selection phases.¹¹¹ After a brief summary of the facts, the opinion began by explaining the FDPA.¹¹² Then the opinion methodically and logically proceeded through the various questions concerning precedent and the appropriateness of applying the Confrontation Clause to the penalty phase.¹¹³ After determining that the Confrontation Clause applied to the eligibility and selection phases, Judge Carter determined that much of what the government desired to introduce was testimonial, thus requiring the witness to be present for admission of the statements.¹¹⁴

A. *The Federal Death Penalty Act*

Judge Carter began with a brief explanation of the FDPA.¹¹⁵ In particular, Carter specifically pointed out that the bifurcated process of the penalty phase was created to ensure “a greater degree of reliability” because it is “qualitatively different from all other forms of punishment.”¹¹⁶ Carter explained the eligibility phase as the first two of six steps, enabling a jury to see whether a death sentence may even be imposed on a defendant, while the final four steps are a matter of weighing factors to decide whether the defendant should receive a sentence of death.¹¹⁷ While Section 3593(c) calls for the admission of evidence regardless of evidentiary rules (unless the “probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury”),¹¹⁸ the overriding question remained whether the Constitution, in particular the Sixth Amendment’s Confrontation Clause, allowed for the admission of such evidence.¹¹⁹

B. *Right to Confrontation During Capital Sentencing*

Judge Carter referenced the recent change in Sixth Amendment law under *Crawford* and *Davis*¹²⁰—specifically how the change in law and recent Supreme Court decisions have led the prosecution, the defense, and the *Mills* court itself to “struggle[] to apply” the Confrontation Clause.¹²¹

111. *United States v. Mills*, 446 F. Supp. 2d 1115, 1135 (C.D. Cal. 2006).

112. *Id.* at 1119–21. For a similar explanation, see *supra* Part III.C.

113. *Mills*, 446 F. Supp. 2d at 1121–35.

114. *Id.* at 1135–40.

115. *Id.* at 1119; see *supra* Part III.C.

116. *Mills*, 446 F. Supp. 2d at 1120 (citations and internal quotation marks omitted).

117. *Id.*

118. 18 U.S.C. § 3593(c) (2006).

119. *Mills*, 446 F. Supp. 2d at 1120.

120. *Id.* at 1121. Note that Judge Carter’s order came only two months after the Supreme Court decided *Davis*. *Id.* For a discussion of the drastic change in Confrontation Clause law and the importance it bears, see *supra* Part II.

121. *Mills*, 446 F. Supp. 2d at 1122.

1. *Williams v. New York* and Broad Discretion in Sentencing

Judge Carter sought to answer whether the Confrontation Clause applies to the eligibility phase, the selection phase, both, or neither by examining *Williams*.¹²² Judge Carter called attention to the *Williams* assertion that “a judge’s ability to exercise broad discretion at sentencing should not be restricted by limitations on uncross-examined hearsay evidence.”¹²³ The trial judge was affirmed in *Williams* in his ability to consult a “probation report and other sources” off the record, effectively giving judges “wide discretion in sentencing,” which did not require any amount of confrontation.¹²⁴

However, Judge Carter noted the evolution in death penalty jurisprudence, the resulting newfound constitutional rights for the defendants, and the overall “maturing case law recogniz[ing] the unique nature of death as the ultimate penalty and the concomitant need for heightened procedural protections.”¹²⁵ Here, Judge Carter seemed to depart from *Williams* and follow *Gardner*’s implications of change in the notion of “death is different.”¹²⁶ Rather than place himself in an ostentatious and contravening position of deciding whether *Williams* is good law for the situation, Judge Carter specifically stated that the sentencing scheme under the FDPA is different from that of *Williams* in that it “places the ultimate sentencing decision with the jury.”¹²⁷

2. Constitutional Significance of Factfinding

Judge Carter then proceeded to determine whether the FDPA’s shift of sentencing power to the jury designated such factfinding “constitutionally significant.” Judge Carter began this inquiry by turning to *Specht v. Patterson*.¹²⁸ The Supreme Court in *Specht* unanimously reversed a Colorado judge’s enhancing of a sentence, holding that because the additional sentence relied upon a factfinding by the judge of an ingredient absent from the offense charged, it violated due process.¹²⁹ Specifically, such a factfinding denied the defendant the right “[to] be confronted with witnesses against him, [and] have the right to cross-examine.”¹³⁰ Judge Carter concluded, “Therefore, once the activity of a sentencer stops being an exercise of discretion and becomes constitutionally significant factfinding, the right to confrontation attaches.”¹³¹

122. *Id.*

123. *Id.*

124. *Id.* at 1123 n.5.

125. *Id.* at 1123.

126. *Mills*, 446 F. Supp. 2d at 1124; *see also supra* note 68 and accompanying text.

127. *Mills*, 446 F. Supp. 2d at 1124.

128. *Id.* (citing *Specht v. Patterson*, 386 U.S. 605 (1967)).

129. *Specht*, 386 U.S. at 608; *Mills*, 446 F. Supp. 2d at 1125.

130. *Specht*, 386 U.S. at 610.

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

While *Specht* assisted Judge Carter reaching this conclusion, it failed to answer *what* constitutes constitutionally significant factfinding.

To answer this, Judge Carter delved deeper into the Supreme Court cases of *Apprendi* and *Ring*. *Apprendi* importantly prohibited judges from enhancing a punishment beyond the punishment established for the offense of which a defendant has been found guilty.¹³² Thus, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹³³

Judge Carter then noted that in *Ring*, the Supreme Court similarly struck down an Arizona death penalty statute where the judge, among other requirements, was to find an aggravating factor.¹³⁴ Judge Carter concluded, “However, *Ring* left open the question of whether facts found as part of the ‘selection’ function must be the subject of jury findings, with all of the attendant constitutional protections.”¹³⁵ Thus, even though the Sixth Amendment jury provision applies to the eligibility phase, does the Sixth Amendment Confrontation Clause apply to the selection phase where a jury is present as mandated under the FDPA?

Judge Carter looked elsewhere in evaluating the apparent trends of courts, veering from *Williams*, and coming closer to the rationale endorsed by *Gardner*. Some courts tend to follow *Williams* strictly in a capital context; some have opined that *Williams* should no longer be followed; others have “sought to avoid the issue”; and still other courts have applied the Confrontation Clause “to the penalty phase without noting any controversy regarding its applicability.”¹³⁶

Judge Carter noted that the *Jordan* court had addressed the very question at bar and had answered that *Crawford* barred testimonial statements during the eligibility phase in a death proceeding but *not* in the selection phase.¹³⁷ Carter agreed to follow in *Jordan*’s footsteps with respect to applying *Crawford* to the eligibility phase.¹³⁸ However, he expressly disagreed with *Jordan*’s “the more, the better” rationale,¹³⁹ stating, “while the Court recognizes the policy reasons encouraging the admission of the maximum quantum of evidence during the

132. *Id.* at 1126; see *supra* Part III.C.

133. *Mills*, 446 F. Supp. 2d at 1126 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

134. *Id.* at 1127.

135. *Id.*

136. *Id.* at 1128 (citation omitted).

137. *Id.* at 1129.

138. *Mills*, 446 F. Supp. 2d at 1129.

139. *Id.* (citing *United States v. Jordan*, 357 F. Supp. 2d 889, 903 (E.D. Va. 2005)).

selection phase, that policy is insufficient to override Defendants' right to confront witnesses during such a critical portion of the capital trial."¹⁴⁰

Judge Carter re-fixed his focus on constitutionally significant factfinding by examining two recent Supreme Court decisions.¹⁴¹ In *Blakely v. Washington*, the Supreme Court struck down a judge's decision to sentence a defendant to ninety months after finding aggravating circumstances, when the standard range prescribed by the Sentencing Reform Act (rather than the statute's ten year maximum) was from forty-nine to fifty-three months.¹⁴² The Court concluded, "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."¹⁴³ In *Blakely*, the judge overstepped constitutional boundaries by finding aggravating circumstances to deliver an enhanced sentence.¹⁴⁴ The jury's findings in *Mills* and (after *Booker* and *United States v. Green*¹⁴⁵) under the FDPA constrain a judge by authorizing a specific sentence.¹⁴⁶ Judge Carter agreed that any factfinding done beyond what the trial jury's verdict reflects, necessarily, is constitutionally significant factfinding.¹⁴⁷ Indeed, the *Green* court found all factors (statutory and non-statutory) to be weighed by the factfinder were "legally essential."¹⁴⁸ Finally, Judge Carter concluded that the weighing process trusted to the jury by the FDPA is set forth in such a fashion that "bear[s] many of the hallmarks of constitutionally significant facts falling under the ambit of *Blakely*."¹⁴⁹ Thus, because the jury in the selection phase engages in constitutionally significant factfinding, the defendant must be afforded "the same constitutional protections as those which accompany [him during] the trial of elements"—necessarily meaning *Crawford*, *Davis*, and the right to confrontation.¹⁵⁰

140. *Id.* at 1130 (pointing out that *Jordan* failed to examine "Supreme Court decisions expanding the constitutional significance of factfinding as established by *Ring*").

141. Although Judge Carter also addressed *United States v. Booker*, 543 U.S. 220 (2005), in his decision, the author only discusses *Blakely* in this section.

142. 542 U.S. 296, 303–04, 314 (2004).

143. *Id.*

144. *Id.*

145. 372 F. Supp. 2d 168 (D. Mass. 2005).

146. See *United States v. Mills*, 446 F. Supp. 2d 1115, 1132 (C.D. Cal. 2006) ("For when a trial judge exercises his discretion to select a *specific sentence* within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." (quoting *United States v. Booker*, 543 U.S. 220, 233 (2005))).

147. *Id.* at 1135.

148. *Id.* at 1133 (citation omitted).

149. *Id.* at 1133–35 (taking the middle road of "constitutionally significant factfinding" between the two extreme options of "pure factfinding" and "pure sentencing discretion").

150. *Id.* at 1135.

C. Crawford's Application in the Present Penalty Phase

After Judge Carter's exhaustive discussion on the applicability of the Confrontation Clause to both the eligibility and the selection phases, he turned to defendants Mills and Bingham of the Aryan Brotherhood and the case at bar.¹⁵¹ Judge Carter defined the standard of the Confrontation Clause after *Crawford* and *Davis*: "If the statement was made by a person who would reasonably believe his statement would be available for use at a later trial, then it must be excluded under *Crawford*, notwithstanding the fact that the report itself was not prepared in anticipation for trial."¹⁵² He then proceeded to bar several evidentiary propositions and allow others,¹⁵³ closing his order with strong words concerning the death penalty:

Death is fundamentally different from all other forms of punishment. Because the death penalty is uniquely different in its finality and severity, increased scrutiny is required at every step of the capital process to ensure that death is the appropriate penalty. Capital jurisprudence has traveled far from the time when death was automatic. This Court's holding is in line with maturing federal death penalty jurisprudence and its recognition of the need for increased reliability in capital sentencing.¹⁵⁴

V. ANALYSIS OF THE *MILLS* DECISION

The *Mills* decision, because it was the first case to apply *Crawford* to the selection phase of a capital proceeding, was certainly a radical departure from the admittedly sparse, non-controlling case law which existed at the time.¹⁵⁵ While *Mills* had no controlling case law to follow, the question remains whether *Mills*'s holding and rationale are correct. As this analysis of the decision will show, Judge Carter's holding was correct, although the rationale was somewhat tenuous.

A. Crawford and Ring: Non-Dispositive Yet Insightful Dicta

The *Mills* decision correctly found that *Crawford* and *Ring* were not dispositive of the issue at hand.¹⁵⁶ While the *Mills* court should not have based its argument on *Crawford*'s dicta, Judge Carter should have acknowledged

151. See *Mills*, 446 F. Supp. 2d at 1135–39 (allowing presentence investigation reports and minor IDC reports to be admitted during the penalty phase, but barring descriptions in presentence investigation reports relying upon investigative reports, post-sentence reports, internal prison memoranda documenting information transmitted from "unidentified inmate witnesses," "snitches," and a witness's grand jury testimony).

152. *Id.* at 1136.

153. See *id.* at 1136–39.

154. *Id.* at 1140.

155. See *supra* note 140 and accompanying text.

156. See *Mills*, 446 F. Supp. 2d at 1121–22, 1127.

Crawford's lessons. Particularly, Justice Scalia's opinion in *Crawford* begins with a historical narrative of the right to confront one's accuser(s).¹⁵⁷ At the fore of this narrative was Sir Walter Raleigh's trial, whereupon "the jury convicted, and Raleigh was sentenced to death."¹⁵⁸ It was *the jury* who made findings of fact and returned a guilty verdict that carried with it a mandatory death sentence.¹⁵⁹ Although this historical connection is temporally removed from the Confrontation Clause as it currently stands, it is still significant because Scalia called attention to the right to confront one's accusers by drawing upon history and citing a case where the jury considered an out-of-court testimonial statement in finding Raleigh guilty of a crime where he must be sentenced to death.¹⁶⁰ While the *Mills* court (or the *Jordan*, *Bodkins*, and *Johnson* courts, for that matter) did not note this line of reasoning, which could be deduced from *Crawford*, failure to do so was hardly fatal.

While *Crawford*'s historical narrative provides some insight into the issue, *Ring*'s dicta strongly suggests the Sixth Amendment should apply to the eligibility phase. Indeed, this was one of the most logically sound points presented in *Mills*. According to the court in *Mills*:

Although *Ring* extends the Sixth Amendment's right to a jury trial to the eligibility phase, it does not squarely address the right presently at issue: namely, the right to confrontation. However, the Supreme Court's analysis in *Ring* strongly suggests that the Confrontation Clause also applies to the eligibility phase, in contravention of the Court's earlier holding in *Williams*.¹⁶¹

157. *Crawford v. Washington*, 541 U.S. 36, 43–50 (2004).

158. *Id.* at 44 ("Raleigh demanded that the judges call him to appear, arguing that '[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face. . . .' The judges refused, and, despite Raleigh's protestations that he was being tried 'by the Spanish Inquisition', the jury convicted, and Raleigh was sentenced to death.") (citations omitted).

159. *Id.*; see CHARLES KNIGHT, POLITICAL DICTIONARY; FORMING A WORK OF UNIVERSAL REFERENCE, BOTH CONSTITUTIONAL AND LEGAL; AND EMBRACING THE TERMS OF CIVIL ADMINISTRATION, OF POLITICAL ECONOMY AND SOCIAL RELATIONS, AND OF ALL THE MORE IMPORTANT STATISTICAL DEPARTMENTS OF FINANCE AND COMMERCE 187–88 (Charles Knight and Co. 1846) (noting that death was prescribed for the crime of High Treason under English Law); see also *infra* note 196 and accompanying text.

160. See *Crawford*, 541 U.S. at 44 ("[T]he justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.") (quoting DAVID JARDINE, 1 CRIMINAL TRIALS 520 (1832)). A (perhaps more) persuasive counterargument is that the jury in Sir Walter Raleigh's trial was merely responsible for assessing culpability, where the statute itself prescribed the punishment. Nevertheless, it is difficult to ignore the fact that the jury would be fully aware of the consequences of a guilty verdict.

161. *Mills*, 446 F. Supp. 2d at 1127–28.

Focusing on *Ring* in this matter elicited a strong argument for applying *Crawford* to both the eligibility and selection phases, as it convincingly reaffirmed the importance of *Williams* and *Gardner*.¹⁶²

B. The Crux of the Argument: Williams After Ring

The crux of *Mills*'s logical progression was correctly placed on the extent to which *Williams* is good law after *Ring*.¹⁶³ *Ring* may have answered the question of *when* to apply the Sixth Amendment's right to a jury without mentioning *Williams* whatsoever, yet the original holding of *Williams* is undeniably narrowed by *Ring*.

To be specific, *Williams* stood for the proposition that a judge could consult additional materials (specifically a presentence report involving out-of-court statements) in imposing the death sentence on a defendant.¹⁶⁴ However, *Ring*'s statement that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt"¹⁶⁵ contravenes *Williams*'s statement that "[w]e cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."¹⁶⁶

However, *Mills* uses *Harris v. United States*¹⁶⁷ in arriving at the conclusion that "*Ring* left open the question of whether facts found as part of the 'selection' function must be the subject of jury findings, with all of the attendant constitutional protections."¹⁶⁸ This conclusion is weak, at best. *Harris* is a non-capital case dealing with the issue of whether *Apprendi* attached to the raising of a mandatory minimum sentence by a judge.¹⁶⁹ According to *Harris*, "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."¹⁷⁰ Even though the trial judge in *Ring* engaged in the very factual determination prescribed by Arizona statute, which included finding at least one aggravating

162. *See id.* at 1122–24, 1128.

163. *Id.*

164. *See Williams v. New York*, 337 U.S. 241, 252 (1949); *see also supra* note 57 and accompanying text.

165. *Ring v. Arizona*, 536 U.S. 584, 602 (2002).

166. *Williams*, 337 U.S. at 252 (relying on "fundamental fairness" conception of due process).

167. 536 U.S. 545 (2002).

168. *United States v. Mills*, 446 F. Supp. 2d 1115, 1127 (C.D. Cal. 2006).

169. *Harris*, 536 U.S. at 551 (quoted in *Mills*, 446 F. Supp. 2d at 1127 n.10).

170. *Id.* at 558 (quoted in *Mills*, 446 F. Supp. 2d at 1127 n.10).

factor and weighing it against any mitigating factors,¹⁷¹ the Supreme Court reversed, holding the judge was barred from making any findings of fact as to aggravating factors “necessary for imposition of the death penalty” in a capital proceeding’s unbifurcated penalty phase.¹⁷²

As the FDPA structures the penalty phase of a capital proceeding, *Mills* helpfully, yet perhaps misleadingly, divides the process into six steps.¹⁷³ Particularly, bifurcating the process set out by the FDPA confuses the constitutional issues more than it helps to clarify their application. The statute dictates that “imposition of a sentence of death is justified” after the jury’s “consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593.”¹⁷⁴ The FDPA reiterates that after intent and at least one statutory aggravating factor are found beyond a reasonable doubt, “the jury . . . shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death . . . by unanimous vote”¹⁷⁵ Thus, the jury is given the responsibility of finding aggravating factors during the final four of *Mills*’s steps.¹⁷⁶ Yet, in light of *Ring*, these final four steps, involving the finding of aggravating factors, are “necessary for imposition of the death penalty,” and thus constitutionally require a jury.¹⁷⁷ In other words, the bifurcation of a sentencing scheme does not constitutionally require a jury for one phase but not the other—the Constitution requires a jury in the penalty phase in its entirety, so long as aggravating factors are being found beyond a reasonable doubt. *Harris* is immaterial to this analysis because a death sentence is not “authorized” until all aggravating factors (whether statutory or non-statutory) are found beyond a reasonable doubt.¹⁷⁸ For, as Justice Scalia insightfully stated in his concurrence in *Ring*:

I believe that the fundamental meaning of the jury trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the

171. *Ring v. Arizona*, 536 U.S. 584, 592–93 (2002) (“[T]he judge is to determine the presence or absence of the enumerated ‘aggravating circumstances’ and any ‘mitigating circumstances.’ The State’s law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance and ‘there are no mitigating circumstances sufficiently substantial to call for leniency.’” (quoting ARIZ. REV. STAT. ANN. § 13-703(F))).

172. *Id.* at 592–93, 609.

173. *Mills*, 446 F. Supp. 2d at 1119–20; *see also supra* Part III.C.

174. 18 U.S.C. § 3591 (2006).

175. *Id.* § 3593(e).

176. *Mills*, 446 F. Supp. 2d at 1120.

177. *See supra* note 172 and accompanying text.

178. *See supra* note 170 and accompanying text.

offense, sentencing facts, or Mary Jane—must be found by the jury beyond a reasonable doubt.¹⁷⁹

The facts determined by the jury in the selection phase are “essential” in that the judge bases her final imposition of life or death on these facts, and thus the nature of the facts being found in the selection phase constitutionally necessitates that it be done by a jury.¹⁸⁰

Thus, in applying *Ring* to the FDPA’s procedures, a jury is not only statutorily prescribed but constitutionally mandated to engage in all factfinding occurring in all six steps.¹⁸¹ *Ring* limits *Williams* to the extent that a judge is no longer free to consult additional aggravating factors unless found by a jury beyond a reasonable doubt. The *Mills* court ultimately came to this conclusion, but only after assuming that *Ring* left this question open¹⁸² and subsequently consulting *Green*, *Booker*, and *Blakely* to justify an extension of *Ring*.¹⁸³ *Ring* did not leave this question open and *Mills*’s consideration of other cases is helpful but *unnecessary*. Nevertheless, *Mills* eventually arrived at the correct conclusion—that the factfinding occurring in the penalty phase was of constitutional significance.¹⁸⁴

C. *Death Is Different*

Whereas this exhaustive discussion of *Ring* et al. discusses the rule of law (or lack thereof), almost equally important is the policy discussion as to why capital defendants should be provided with the constitutional safeguard of confrontation. *Mills* prudently called attention to the principle that “death is

179. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

180. *See supra* Part III.C.

181. *See supra* notes 163–180 and accompanying text. The counterargument is any factfinding occurring in the selection phase does not go to enhance or increase a punishment by the facts which the jury has found beyond a reasonable doubt in the eligibility phase. However, the jury further considers additional statutory aggravating factors, non-statutory aggravating factors, and mitigating factors before making their recommendation. *See supra* Part III.C. The judge, in light of the recommendation, imposes the sentence, which necessarily consults facts found by the jury in the selection phase. The fact that this determination is based on additional facts found by the jury deems the facts found by the jury in the selection phase as “constitutionally significant” under *Ring*. *See supra* notes 164–181 and accompanying text.

182. *United States v. Mills*, 446 F. Supp. 2d 1115, 1127 (C.D. Cal. 2006).

183. *See supra* Part IV.B.2.

184. The *Jordan*, *Bodkins*, and *Johnson* courts thus wrongly interpreted *Ring*. *See supra* note 150 and accompanying text. Had these courts interpreted *Ring* in this suggested manner (the Sixth Amendment’s right to a jury applies wholesale to the FDPA’s scheme of factfinding) and recognized the constitutional significance of the penalty phase proceedings, their logical analyses would have led them to conclude the Confrontation Clause applies to the entirety of the penalty phase. *See supra* note 105.

different” in the order,¹⁸⁵ but did not allow such a theory to take precedence over the legal issues.¹⁸⁶ *Mills*’s penultimate paragraph tastefully reminds us that death is “fundamentally different from all other forms of punishment” and “uniquely different in its finality and severity.”¹⁸⁷ *Mills*’s placement of these assertions effectively called attention to the policy of the ultimate decision in *Mills* without rendering the order a patently judicially activist order.

D. Post-Mills Case Law

Cases decided after the *Mills* decision was handed down on August 17, 2006 both challenged and supported the *Mills* outcome. In particular, *United States v. Fields* and *Summers v. State* declined invitations to extend the right to confrontation in the selection phase of capital cases.¹⁸⁸ *United States v. Concepcion Sablan* examined the *Mills-Jordan* discrepancy—and followed *Mills*.¹⁸⁹ These cases, at the very least, cast a shadow of uncertainty over the law espoused in *Mills*.

1. *Fields: Williams* Is Dispositive for Selection Phase

The Fifth Circuit addressed the issue of confrontation at the penalty phase in *Fields* and concluded the right extends only to the eligibility phase (not to the selection phase).¹⁹⁰ The majority opinion largely relied on *Williams*, stating, “caselaw definitively maintains the *Williams* principle in the noncapital context and establishes that the right does not apply at sentencing.”¹⁹¹ Following this, the majority concluded that the right to confrontation should not extend to capital sentencing selection proceedings when the right is absent

185. See *Mills*, 446 F. Supp. 2d at 1123 (“[D]eath penalty jurisprudence has evolved significantly in recognition of a capital defendant’s constitutional rights. . . . The maturing case law recognizes the unique nature of death as the ultimate penalty and the concomitant need for heightened procedural protections.”).

186. See *id.* at 1119–31 (analyzing *Williams*, *Ring*, *Jordan*, *Booker*, *Blakely*, and *Green*).

187. *Id.* at 1140 (briefly discussing “[d]eath is . . . different” in the disposition section).

188. *United States v. Fields*, 483 F.3d 313, 335 (5th Cir. 2007) (refusing to apply Confrontation Clause to selection phase); *Summers v. State*, 148 P.3d 778, 783 (Nev. 2006) (refusing to apply Confrontation Clause to penalty phase under Nevada statute).

189. *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1221 (D. Colo. 2007) (“Having independently analyzed *Ring*, *Apprendi*, *Booker*, and *Blakely*, I agree with *Mills* that under *Crawford*, the Confrontation Clause is applicable at both the eligibility phase and at least a portion of the selection phase.”).

190. *Fields*, 483 F.3d at 335 (“Neither the text of the Sixth Amendment nor the history of murder trials supports the extension of the Confrontation Clause to testimony relevant only to penalty selection in a capital case.”).

191. *Id.* at 332. The *Fields* Court did not address the issue of *Ring* and any effect it may or may not have had on *Williams*.

from noncapital proceedings.¹⁹² Quoting John G. Douglass's law review article,¹⁹³ the *Fields* court rejected the argument that the issue of life and death changes the analysis, concluding, "[w]hen it comes to Sixth Amendment rights at sentencing, it seems, death is not so different after all."¹⁹⁴

The *Fields* dissent focused on, among others, the history of confrontation during capital proceedings.¹⁹⁵ The dissent pointed out:

At the time the Confrontation Clause was written, a capital trial was a single, unified proceeding at which both guilt and sentence were decided. The Framers knew nothing of capital sentencing proceedings separate from trial. . . .

. . . .

The critical point is this: because these de facto capital sentencing proceedings took the form of full criminal trials, the defendant possessed full trial rights of confrontation. However, the notion that capital sentencing might be conducted "outside of an adversarial trial" is strictly a "post-constitutional" phenomenon.¹⁹⁶

The majority flat-out rejected this argument, arguing "[t]his logic is flawed" in that noncapital proceedings, as the Framers knew them, did not allow for confrontation of one's accusers.¹⁹⁷ In this way, the *Fields* majority clings to *Williams* in determining that an extension of the right to confrontation is not constitutionally mandated and quite simply unprecedented.¹⁹⁸

2. *Summers*: *Williams* Is Dispositive and Unbifurcated Proceedings

Like *Fields*, *Summers* based its decision on *Williams*, finding that the Confrontation Clause does not apply in the penalty phase.¹⁹⁹ In a relatively short opinion, *Summers* noted that *Williams* had been called into doubt, but it

192. *Id.* ("Given that, as shown above, no other Sixth Amendment right has been applied (*vel non*) differently at capital sentencing from how it is applied at noncapital sentencing, there is little reason to establish divergent rules with regard to the confrontation right when the sentencing authority is selecting a sentence from within an authorized range.").

193. Douglass, *supra* note 3. For other citations to Douglass's aforementioned article, see *Fields*, 483 F.3d at 368 n.7 (Benavides, J., dissenting); *United States v. Mills*, 446 F. Supp. 2d 1115, 1122 n.4 (C.D. Cal. 2006).

194. *Fields*, 483 F.3d at 331 (quoting Douglass, *supra* note 3, at 1993).

195. *Id.* at 370–71 (Benavides, J., dissenting).

196. *Id.* at 370–71 (quoting Douglass, *supra* note 3, at 2016) (citations omitted).

197. *Id.* at 335 (majority opinion).

198. *Id.*

199. *Summers v. State*, 148 P.3d 778, 782 (Nev. 2006) ("Guiding our decision today is the Supreme Court's 1949 opinion *Williams v. New York*. . . . [I]n our view . . . it remains good law."). Whereas *Fields* applied the Confrontation Clause to the eligibility but not the selection phase under the FDPA, *Fields*, 483 F.3d at 332, *Summers* considered the Clause's application to an unbifurcated Nevada state sentencing hearing. *Summers*, 148 P.3d at 780, 783.

remained “good law” in the Ninth Circuit.²⁰⁰ In addition, as in *Crawford*, the court found “no intent or basis to extend the Sixth Amendment to capital penalty hearings.”²⁰¹ In ruling that the right to confrontation did not extend to the penalty phase, the *Summers* court determined Nevada’s unbifurcated capital proceedings comported with the Constitution because juries were competent enough to exclude testimonial, out-of-court statements when finding a defendant eligible to receive a death sentence.²⁰²

As though responding to the *Fields* majority, the dissent in *Summers* stated that “[t]he majority opinion relies on a fifty-seven-year-old United States Supreme Court case that was decided well before any of the United States Supreme Court’s more recent death penalty pronouncements” and that the Court “has given very clear indications that *Williams v. New York* is no longer viable.”²⁰³ However, the dissent stops short of advocating application of the Confrontation Clause to the entire penalty phase by stating that there is “no basis in either *Ring* or *Crawford* to extend to the Sixth Amendment confrontation right to the selection phase of a capital hearing.”²⁰⁴ The court found that the selection phase required a “broad inquiry” in which “the sentencer decides the actual sentence based on the offense, which has already been established, and its accompanying sentencing parameters.”²⁰⁵ In this way, not only does the *Summers* majority think that *Crawford* should not apply to the penalty phase at all, but the dissent also believes the selection phase should be free from the restraint of the right to confrontation.²⁰⁶

3. *Concepcion Sablan*: Constitutionally Significant Factfinding and Procedural Difficulty

Judge Wiley Y. Daniel issued a startling opinion on February 26, 2007, where the district court of Colorado became the first and only court to follow in *Mills*’s footsteps.²⁰⁷ In *Concepcion Sablan*, the court examined the opposing decisions of *Jordan* and *Mills* and found that the *Mills* school of thought prevailed primarily for two distinct reasons.²⁰⁸ First, the court agreed with the legal principal that the factfinding conducted during the eligibility and

200. *Summers*, 148 P.3d at 782.

201. *Id.*

202. *Id.* at 783–84.

203. *Id.* at 784–85 (Rose, C.J., concurring in part and dissenting in part) (internal citation omitted).

204. *Id.* at 787–88.

205. *Summers*, 148 P.3d at 788 (quoting *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998)).

206. *See supra* notes 199–205 and accompanying text.

207. *See United States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1218–19 (D. Colo. 2007) (finding no circuit court opinions regarding whether *Crawford* applies to the sentencing phase of a death penalty proceeding, but that two district courts—*Jordan* and *Mills*—address the issue).

208. *Id.* at 1219–22.

selection phases was constitutionally significant.²⁰⁹ To this issue, the court explained as follows:

[U]nder the structure of the FDPA, it is not the finding of a statutory aggravating factor that actually increases the punishment. The fact that actually increases the punishment is the existence of all the aggravating factors found by the jury (taken together) which the jury finds justify a sentence of death. Indeed, the jury is not allowed to recommend a sentence of death until it considers whether *all* the aggravating . . . factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.²¹⁰

Secondly, the *Concepcion Sablan* court took a more practical approach in applying the Confrontation Clause to the entirety of the sentencing phase. Bifurcation of the sentencing phase into eligibility and selection portions was “a procedure not foreseen by the FDPA,” and which would “invite gamesmanship on the part of the government in allocating statutory aggravators between eligibility and selection.”²¹¹ Moreover, in allowing the government to first introduce evidence during the eligibility phase to prove the statutory aggravating factor, and then allowing the government to introduce new testimonial out-of-court statements (otherwise banned by *Crawford*) in the selection phase to prove the same aggravating factor, would be “confusing to the jury.”²¹² While the *Concepcion Sablan* court remained relatively terse on formulating its own independent reasoning for adopting *Mills*, its emphasis on constitutionally significant factfinding and procedural difficulty spoke strongly to the issue at hand.

E. *Mills's Impact*

Mills, in holding that *Crawford* and the Confrontation Clause apply to both the eligibility and selection phases in an FDPA proceeding, remains the first of only two courts to come to this conclusion.²¹³ In addition, *Mills* undeniably is contained by its classification as a district-level decision out of California.

209. *Id.* at 1221.

210. *Id.*

211. *Id.* at 1222 (quoting *United States v. Mills*, 446 F. Supp. 2d 1115, 1131 n.16 (C.D. Cal. 2006)).

212. *Concepcion Sablan*, 555 F. Supp. 2d at 1222.

213. *See supra* note 207 and accompanying text. A few state courts have come to the conclusion that *Crawford* applies to the entire sentencing phase in a capital case. *See, e.g.*, Respondent's Supplemental Brief at 10, *California v. Fuiava*, No. S055652, 2008 WL 2337455 (Cal. May 9, 2008) (citing *Rodgers v. State*, 948 So.2d 655 (Fla. 2006)) (offering very little legal reasoning while citing a pre-*Crawford* Florida Supreme Court case in finding *Crawford* should apply to all three phases of a death penalty case). Such cases are unhelpful for the purposes of the present legal analysis.

Previous cases such as *Jordan*, *Bodkins*, and *Johnson* refused to rule as *Mills* ruled, and later cases such as *Fields* and *Summers* declined to follow the logical progression employed by *Mills*.²¹⁴ In short, there are many areas indicating *Mills* has a slight, if any, impact on American jurisprudence.

However, given the relative recentness of the Supreme Court decisions of *Ring* (2002), *Crawford* (2004), and *Davis* (2006), *Mills* may have more of an impact than one may initially suspect. At the least, the dissents in both *Fields* and *Summers* cite *Mills*.²¹⁵ The growing discontent with *Williams* (1949) as being good law, as noticed in the *Summers* dissent, reveals that the evolution of the Confrontation Clause's application in the penalty phase is relatively young.²¹⁶ *Mills* serves to place a theoretical debate, posited by Douglass's article, for example, into practice.²¹⁷ By doing so, the absence of a Supreme Court decision on the issue becomes glaringly obvious, highlighting the need for a decision determining the application of *Crawford* to capital sentencing hearings in general. In light of *Concepcion Sablan*, *Mills* could very well stand as the first in a long line of cases to come to afford defendants the right to confrontation in life or death situations.

Practically speaking, Barry Mills and T.D. Bingham were afforded the constitutional safeguard of confrontation during both the eligibility and selection phases.²¹⁸ While it is impossible to say whether this safeguard had an effect on the jury's recommendation, the jury was "deadlocked" 9-3 in favor of death with respect to Mills and 8-4 in favor of life for Bingham.²¹⁹ Furthermore, the decision may have an impact on courts in the Central District of California in determining confrontation rights for the remaining defendants of the original twenty-three, for whom the government seeks death.

CONCLUSION

The case law regarding a criminal defendant's right to confrontation during the penalty phase is sparse and ambiguous. Combining the evolution of death penalty jurisprudence since *Williams* with the recent decisions of *Ring* and *Crawford* suggests a vast transformation in Sixth Amendment rights is underway. Being in the midst of this transformation, *Mills* departed from previous decisions in holding that the right to confrontation not only extends into the eligibility portion of the penalty phase, but also to the selection

214. See *supra* Parts III.E. & V.D.

215. See *United States v. Fields*, 483 F.3d 313, 363 n.1 (5th Cir. 2007) (Benavides, J., dissenting); *Summers v. State*, 148 P.3d 778, 787 n.29 (Nev. 2006) (Rose, J., dissenting).

216. See *Summers*, 148 P.3d at 786 (Rose, J., dissenting); but see *supra* note 199 and accompanying text.

217. See Douglass, *supra* note 3.

218. See *supra* note 150 and accompanying text.

219. Christopher Goffard, *Prison Gang Leaders Get Life Terms*, L.A. TIMES, Sept. 16, 2006, at B3.

portion. *Mills* will certainly have an impact on the legal community to the extent that it highlights the importance and controversy surrounding the debate. Although a countervailing argument may posit “the more, the better” with respect to the admission of evidence in the penalty phase, a constitutional right belongs to the defendant to invoke or to waive, and *Mills* was the first to recognize such an assertion to such an extent.²²⁰ Indeed, just as Justice Gaudy realized “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh,”²²¹ so too may *Mills* spur a Supreme Court Justice to realize the justice of America will have never been so degraded and injured as by the condemnation of those who have not been afforded the right to confrontation in capital sentencing proceedings.

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220. See *Ring v. Arizona*, 536 U.S. 584, 607 (2002) (“The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders.”).

221. JARDINE, *supra* note 160, at 520.

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