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THE VALUE OF CONFRONTATION AS A FELONY SENTENCING RIGHT

Shaakirrah R. Sanders*

ABSTRACT

This Article advocates recognition of the Sixth Amendment's Confrontation Clause as a felony sentencing right. In the modern U.S. criminal justice system, the adversarial process does not end once a plea or verdict of guilt is rendered. Fact-finding at felony sentencing hearings is as quantitatively vital as fact-finding at trials. Yet, sentencing courts continue to exercise discretion to increase punishment based on multiple categories of unproven criminal conduct. The denial of an opportunity to cross-examine this type of evidence undermines the core principle that those accused of felony crimes have the right to confront adversarial witnesses.

Williams v. New York, the most historic case on the issue of confrontation rights at felony sentencing, held that cross-examination was not required to test the veracity of information presented at sentencing hearings. Williams was decided before incorporation of the Sixth Amendment's Confrontation Clause. Williams also reflects a sentencing model that assumes judicial authority to consider un-cross-examined testimony for purposes of fixing the punishment. This assumption may be unwarranted in light of recent jurisprudence on criminal procedure rights at felony sentencing.

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Williams constitutes the beginning of the debate on the issue of confrontation rights at felony sentencing, not the conclusion. The standard that applied to confrontation rights at the time of Williams has been reformed. More recent jurisprudence establishes that where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. While this jurisprudence has only been applied during the trial, it can be practically and efficiently applied at felony sentencing.

The Sixth Amendment's other clauses give reason to look beyond Williams. The structurally identical Jury Trial and Counsel Clauses have rejected the "trial-right-only" approach to Sixth Amendment rights. The Counsel Clause applies to all "critical stages" of the "criminal prosecution" which includes sentencing. The Court recently expanded the Jury Trial Clause to any fact that increased the statutory maximum or minimum punishment. In light of this jurisprudence and the growing importance of sentencing hearings, a framework should be established to distinguish between sentencing evidence that should be cross-examined and sentencing evidence that should not be cross-examined.

This Article advocates constitutional recognition of a right to confront felony sentencing evidence and provides a paradigm for doing so. Part I of this Article explains Williams and demonstrates how recent interpretations of confrontation rights at trial should now inform the issue of confrontation at felony sentencing. Part II of this Article explains the development of sentencing rights with regards to the Counsel and Jury Trial Clauses. Part III exposes Williams as a reflection of the indeterminate sentencing model. This Article concludes that confrontation should apply to evidence that is material to punishment and where cross-examination will assist in assessing truth and veracity.

TABLE OF CONTENTS

INTRODUCTION ............................................................................................................. 105
I. THE VALUE OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE ................................................................. 110
II. EMERGENCE OF THE SIXTH AMENDMENT'S COUNSEL AND
INTRODUCTION

The issue of confrontation rights at felony sentencing has long been debated. The most significant Supreme Court decision on this issue is *Williams v. New York*.¹ In this infamous case, the Court held that cross-examination was not required to test the veracity of information presented at sentencing hearings.² From *Williams* emerged the philosophy that trial judges have always enjoyed broad discretion to consider un-cross-examined evidence when fixing punishment. This Article questions this philosophy and offers several arguments in favor of reevaluating *Williams*. First, *Williams* incorrectly assumed that founding-era sentencing judges exercised discretion to consider un-cross-examined testimony for purposes of fixing felony punishment. Second, the structurally identical Jury Trial and Counsel Clauses long ago rejected the "trial-right-only" approach to Sixth Amendment rights. Third, the Court's decision in *Crawford v. Washington*³ casts doubt on whether *Williams* still controls the issue of confrontation rights at felony sentencing. Finally, confrontation principles can be practically and efficiently applied during this stage of the criminal prosecution.

Perhaps in 1949 the *Williams* Court got it right, that cross-examination was not required of statements presented against felony defendants for the first time at sentencing. However, *Williams* should not preclude a reconsideration of constitutional rules that apply to modern felony sentencing hearings. *Williams* arose in a world where indeterminate sentencing was at its height, criminal

¹ 337 U.S. 241 (1949).
² Id. at 249–51.
trials were more common for felony cases, and most constitutional rules of criminal procedure did not apply in state courts. Additionally, the shared reliability standard between confrontation and due process made it less likely that a contrary ruling in Williams would have yielded a different result for most felony defendants.

Today, the modern U.S. criminal justice system verges "on an assembly line." In the current system of plea-bargaining and sentencing, the vast majority of felony defendants do not test the veracity of testimonial statements used against them at the sentencing hearing. While Justice Kennedy instructs that "[t]o note the prevalence of plea bargaining is not to criticize it," it cannot be ignored that in this modern system, the adversarial process does not end once a verdict or plea of guilt is rendered. For most felony defendants, the adversarial process begins at sentencing. There is no conclusive empirical evidence that judges are more reliable fact finders, and recent Confrontation Clause jurisprudence gives reason to reconsider Williams and the value of confrontation at felony sentencing.

Testing the veracity of testimonial statements that are material to punishment is as compelling at felony sentencing as at trial. Felony sentencing courts have discretion to increase punishment

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4 See Jennifer L. Mnookin, Uncertain Bargains: The Rise of Plea Bargaining in America, 57 STAN. L. REV. 1721, 1721 (2005) (describing the occurrence of criminal trials in the modern U.S. justice system as "rare as the spotted owl").


7 Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.") (citation omitted).

8 Id.


10 See generally, Shaakirrah R. Sanders, Making the Right Call for Confrontation at Felony Sentencing, 47 U. MICH. J.L. REFORM 791 (2014) & Shaakirrah R. Sanders, Unbranding Confrontation as Only a Trial Right, 65 HASTINGS L.J. 1257 (2014).
based on un-cross-examined testimonial statements about several categories of unproven criminal conduct.\textsuperscript{11} Thus, findings of fact made at sentencing are as qualitatively vital as findings of fact made at trial.\textsuperscript{12} Due to the current system of plea bargaining,\textsuperscript{13} a vast majority of felony convictions are the result of a guilty plea. Such pleas typically do not afford criminal defendants an opportunity to test the veracity of testimonial statements made against them prior to the sentencing hearing. As such, the fundamental right to cross-examine a witness is unavailable at one of the most critical stages of the criminal prosecution: the sentencing hearing.\textsuperscript{14}

Other changes in the U.S. criminal justice system also support the application of confrontation rights at felony sentencing. In the past, neither the Counsel nor the Jury Trial Clauses automatically applied at felony sentencing.\textsuperscript{15} \textit{Gideon v. Wainwright} eventually applied the Counsel Clause to all "critical stages" of the "criminal prosecution,"\textsuperscript{16} which was ultimately deemed, in \textit{Mempa v. Rhay}, to include sentencing hearings.\textsuperscript{17} \textit{McMillan v. Pennsylvania} initially established that the Jury Trial Clause only applied to "elements" of

\begin{itemize}
\item Williams v. Oklahoma, 358 U.S. 576, 583–84 (1959) (affirming Williams v. New York and holding that a sentencing judge is not restricted to evidence presented at trial for purposes fixing punishment). \textit{But see} Specht v. Patterson, 386 U.S. 605, 607-11 (1967) (holding that a defendant may not be convicted under one statute that authorizes a maximum sentence of 10 years, but sentenced for an indeterminate term under another statute). \textit{See also} Ngov, supra note 9, at 281–83.
\item Frye, 132 S. Ct. at 1407 (citation omitted).
\item Sanjay Chhablani, \textit{Disentangling the Sixth Amendment}, 11 U. PA. J. CONST. L. 487, 520-21 (2009) (discussing the Court's interpretation of "criminal prosecution" among various Sixth Amendment rights); \textit{See also} Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) (applying the Sixth Amendment right to counsel against the states via the Fourteenth Amendment Due Process Clause); Pointer v. Texas, 380 U.S. 400, 403-08 (1965) (applying the Confrontation Clause against the states); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (applying the Jury Trial Clause against the states).
\end{itemize}
the offense, not to "enhancements" to the punishment. The distinction proved significant because while elements must be proven to a jury beyond a reasonable doubt at trial, enhancements need only be proven to a judge by a preponderance of the evidence during sentencing. Apprendi v. New Jersey radically changed the trial "element" versus sentencing "enhancement" distinction and applied the Jury Trial Clause to any fact that increased the statutory maximum punishment. Recently, Alleyne v. United States expanded the scope of Apprendi to include the statutory minimum punishment.

This Article advocates reexamining the theory that confrontation rights only apply at trial. The Counsel, Confrontation, and Jury Trial Clauses are structurally identical and appear to apply in a broad sense "[i]n all criminal prosecutions." Each has been deemed essential to our system of criminal prosecutions, but in the past it was generally well accepted that the Confrontation Clause only "reflect[ed] a preference for face-to-face confrontation at trial." The close link that previously existed between the Confrontation Clause and due process-based hearsay rules led lower courts to rule that confrontation and hearsay were of the same origin (due process) and designed to protect similar values

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18 477 U.S. 79, 82-86 (1986).
19 Id.
21 133 S. Ct. 2151, 2155 (2013).
22 U.S. CONST. amend. VI.
23 Gideon, 372 U.S. at 343-45 (deeming the assistance of counsel a fundamental right in state and federal prosecutions); Pointer, 380 U.S. at 404 (holding confrontation "a fundamental right essential to a fair trial in a criminal prosecution"); Duncan, 391 U.S. at 149 (holding the "trial by jury in criminal cases . . . fundamental to the American scheme of justice").
25 United States v. Kikumura, 918 F.2d 1084, 1102-03 (3d Cir. 1990), overruled by United States v. Grier, 449 F.3d 558 (2006) (reasoning that because hearsay was normally considered at sentencing, a confrontation violation occurred only when a court's reliance on misinformation was of a constitutional magnitude). See also Chhablani, supra note 15, at 498-99 (discussing the Burger Court's reading of confrontation rights to require a showing of reliability).
(trustworthiness and reliability). But the Court's re-examination of the historical origin and text of the Confrontation Clause in *Crawford v. Washington* established that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."

This Article proposes uniform application of the Sixth Amendment's Counsel, Jury Trial, and Confrontation Clauses at felony sentencing. In Part I of this Article, I examine *Williams* and discuss the pre-incorporation rejection that felony defendants cannot cross-examine information contained in a probation report that is presented for the first time at sentencing. Part I explains why the Court's recent interpretations of the Confrontation Clause control the issue of whether cross-examination should be allowed at felony sentencing. Part I concludes that *Williams* was a reflection of the post-founding shift from a determinate to an indeterminate sentencing model, the latter of which was at its height when *Williams* was decided. Part II of this Article discusses the Sixth Amendment's text and structure, and the pre-founding model of determinate sentencing. Part II also explains the origin of the trial-right-only rule and discusses the Counsel Clause's early rejection of the theory. Part II further discusses the erosion of the trial-right-only theory of the Counsel and Jury Trial Clauses and advocates for uniform application of the Sixth Amendment at felony sentencing. Part III offers a framework for reforming confrontation rights at felony sentencing. Part III concludes that confrontation rights should apply where testimonial statements are material to punishment and where cross-examination will assist the fact-finder in assessing truth and veracity of such testimonial statements.

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26 *Roberts*, 448 U.S. at 66 (it is a "truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values...and stem from the same roots'") (internal citations and quotations omitted). See also G. Michael Fenner, *Today's Confrontation Clause (After Crawford and Melendez-Diaz)*, 43 CREIGHTON L. REV. 35, 37-38 (2009) (noting the shared standard between confrontation and hearsay rules prior to *Crawford*).

27 *Crawford*, 541 U.S. at 61 (holding that the right of confrontation "reflects a judgment... about how reliability can be best determined").
I. THE VALUE OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE

The scope of the Sixth Amendment right to confront adversarial witnesses in a "criminal prosecution" has long been debated. Three years after ratification of the Amendment, a North Carolina court of equity, in State v. Webb,28 expressed one of the earliest interpretations of the confrontation right: "it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."29 Over the next century, state and federal courts retreated from Webb and confrontation became linked with due process-based hearsay rules.30 By the late twentieth century, confrontation and hearsay rules were generally thought to arise from the same due process origins and serve the same purposes of trustworthiness and reliability.31

The most significant Supreme Court decision on the issue of confrontation rights at felony sentencing is Williams v. New York,32 which was decided almost 150 years after ratification of the Sixth Amendment. Williams held that cross-examination was not required to test the veracity of information presented at sentencing hearings.33 From Williams emerged the philosophy that trial judges have always enjoyed broad discretion to consider un-cross-examined evidence when fixing punishment.

28 2 N.C. 103 (1794).
29 Id. at 104 (emphasis added).
30 Compare Johnston v. State, 10 Tenn. 58, 59-60 (1821) (reading of deposition testimony into evidence did not violate confrontation principles because the witness died before trial), and Mattox v. United States, 156 U.S. 237, 239-44 (1895) (for purposes of hearsay exception deceased witness sufficiently unavailable for trial), with Motes v. United States, 178 U.S. 458, 471-75 (1900) (due to an insufficient showing of unavailability admission at trial of preliminary hearing testimony violated the Confrontation Clause); see generally Goldsby v. United States, 160 U.S. 70, 73 (1895) (a confrontation violation did not result from the failure to conduct a preliminary examination of the accused).
31 Roberts, 448 U.S. at 66 (espousing common roots and similar purposes of hearsay rules and the Confrontation Clause) (internal citations and quotations omitted); see also Fenner, supra note 26, at 37.
32 337 U.S. 241 (1949).
33 Id. at 249–51.
Williams involved the April 20, 1947 murder of fifteen-year-old Selma Graff, who was fatally bludgeoned by a bedroom intruder in her family's East Flatbush apartment located in Brooklyn, New York.\textsuperscript{34} In the months after the murder, East Flatbush was placed under surveillance due to a series of burglaries that plagued the neighborhood.\textsuperscript{35} At approximately 2:30 a.m. on September 8, 1947, Samuel Tito Williams was taken into custody for suspicion of burglary.\textsuperscript{36} Williams was an eighteen-year-old African-American male with a history of trouble with law enforcement, but no prior convictions.\textsuperscript{37} By most accounts, Williams had difficulty walking due to a rheumatic fever that weakened his heart and caused swelling in his legs.\textsuperscript{38} According to one detective, Williams fit the description of the murderer provided by Graff's nine-year-old brother Donald, who was also injured in the attack.\textsuperscript{39}

Williams orally confessed to Graff's murder on the evening of September 8, 1947, after eighteen continuous hours of

\textsuperscript{34} United States ex rel. Williams v. Fay, 211 F. Supp. 359, 361 (S.D.N.Y. 1962). Graff was awaken when the murderer "entered the premises and began to rifle in the contents of a dresser." Id.

\textsuperscript{35} Id.

\textsuperscript{36} Williams, 323 F.2d at 66. According to detectives, up to that point no evidence indicated that Williams was anything but a burglar. \textit{8 Receive Reward in Solving Murder}, N.Y. TIMES, Sept. 10, 1947, at 28.

\textsuperscript{37} Id.; see also Brief for Relator-Appellant, supra note 34, at 7.

\textsuperscript{38} Williams, 323 F.2d at 66.

\textsuperscript{39} \textit{8 Receive Reward in Solving Murder}, N.Y. TIMES, Sept. 10, 1947, at 28. \textit{But see Brief for Relator-Appellant, supra} note 34, at 43. Detectives had dubbed Graff's murderer the "giggling killer" and maintained that Williams appeared nervous and was inclined to simper or giggle. \textit{8 Receive Reward in Solving Murder}, N.Y. TIMES, Sept. 10, 1947, at 28. Detectives also noted that the killer dropped a green flashlight upon fleeing the scene of the murder. Id. According to detectives, Williams confessed to being the owner of the flashlight, as well as other items found at the scene of other burglaries. Id. See also Brief for Relator-Appellant, supra note 34, at 6. Shortly after Graff's murder, the killer was described as "a white man" and evidence suggests that the police were generally looking for a Caucasian male. Id. at 6–7. At least one news agency reported that Donald, the sole witness of the murder, described the killer as a slender and tall Negro youth. \textit{8 Receive Reward in Solving Murder}, N.Y. TIMES, Sept. 10, 1947, at 28. \textit{But see Brief for Relator-Appellant, supra} note 34, at 43.
interrogation. During the first sixteen hours, detectives were authorized to only ask about the burglaries for which Williams had been arrested. At some point, detectives stopped the interrogation and took Williams to the scene of several suspected burglaries in the hope that a witness could identify Williams as the perpetrator. It is unclear whether anyone was able to do so. After Williams confessed, the District Attorney conducted a stenographically-recorded question and answer session that began at approximately 12:45 a.m. on the morning of September 9, 1947 and was attended by members of the press. Later that morning, between 6:00 a.m. and 8:00 a.m., Williams was booked for murder and taken to felony

40 Williams, 323 F.2d at 66; United States ex rel. Williams v. Fay, 211 F. Supp. 359, 362 (S.D.N.Y. 1962); see also Brief for Relator-Appellant, supra note 34, at 14–16. Detectives promised Williams that upon his confession he could see a chaplain and his mother, the latter whom he had asked for multiple times during the interrogation. Williams, 323 F.2d at 66; see also Brief for Relator-Appellant, supra note 34, at 16–17. Detectives reported to the media that Williams indicated that in the hours before the murder he drank "Sneaky Pete," a tonic concocted of raw whisky and wine, and that Williams burglarized the Graff's home because he needed money to buy more of the beverage. 8 Receive Reward in Solving Murder, N.Y. TIMES, Sept. 10, 1947, at 28.

41 Williams, 323 F.2d at 66; Williams, 211 F. Supp. at 361; see also Brief for Relator-Appellant, supra note 34, at 14.

42 Williams, 211 F. Supp. at 361–62; see also Brief for Relator–Appellant, supra note 34, at 14.

43 Williams, 323 F.2d at 66–67; Brief for Relator-Appellant, supra note 34, at 17–18 (describing procedures used and questions asked during the recorded session). After Williams gave both the oral and written confessions, the District Attorney was summoned by law enforcement. Id. The recorded session ended at 3:00 a.m.-over twenty-four hours after Williams's arrest. Id. During this session Williams for the first time was advised of his right to remain silent, but not his right to assistance of counsel. Williams, 323 F.2d at 67. Afterwards, Williams was taken to the Graff home for purposes of recreating the murder for detectives. Williams, 211 F. Supp. at 361; see also Brief for Relator-Appellant, supra note 34, at 18–19. At the residence, Graff's mother accused Williams of killing her little girl. 8 Receive Reward in Solving Murder, N.Y. TIMES, Sept. 10, 1947, at 28; see also Brief for Relator-Appellant, supra note 34, at 20. Graff's mother was physically restrained by law enforcement from assaulting Williams. 8 Receive Reward in Solving Murder, N.Y. TIMES, Sept. 10, 1947, at 28. As approximately twenty Brooklyn police officers escorted Williams from the premises, a mob, which had assembled on the street, began calling Williams a murderer and poking at Williams with sticks. Id.
After the booking, Williams was taken to Donald's school so that a positive identification could be made, which Donald was unable to do. Up to this point, Williams had not been provided with the assistance of counsel.

Despite his confession, Williams pled not guilty to Graff's murder and his trial began in January of 1948. Donald, the only witness to the crime, testified during cross-examination that his sister's killer was a white man who had red skin and stood five feet five inches tall. Williams height was recorded at six feet. That evening, Donald spoke with detectives and the District Attorney. The next day, Donald recanted his description of the killer, claiming he was "all mixed up." After Donald's recantation, the prosecution informed the court that its case-in-chief did not rely on Donald's

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44 8 Receive Reward in Solving Murder, N.Y. TIMES, Sept. 10, 1947, at 28; see also Brief for Relator-Appellant, supra note 34, at 21. Those rewarded for solving Graff's murder included three detectives, two patrolmen, and three other high-ranking police officers. 8 Receive Reward in Solving Murder, N.Y. TIMES, Sept. 10, 1947, at 28.

45 Brief for Relator-Appellant, supra note 34, at 21.

46 See Williams, 323 F.2d at 67. Williams was not represented by counsel at his first arraignment. See Brief for Relator-Appellant, supra note 34, app. at 5a. Williams was visited by private counsel before his second arraignment on September 11th or 12th, but it is unclear whether counsel was present at the second arraignment. Compare id. app. at 16a, with id. at 22.

47 Williams, 323 F.2d at 67; Brief for Relator-Appellant, supra note 34, at 21-22.

48 Williams, 323 F.2d at 67; Witness Helps Defense, N.Y. TIMES, Jan. 7, 1948, at 20; Slayer Gets Stay From High Court, N.Y. TIMES, Feb. 24, 1949, at 17; see also Brief for Relator-Appellant, supra note 34, at 22-23.

49 Williams, 323 F.2d at 67; Witness Helps Defense, N.Y. TIMES, Jan. 7, 1948, at 20; Slayer Gets Stay From High Court, N.Y. TIMES, Feb. 24, 1949, at 17; see also Brief for Relator-Appellant, supra note 34, at 22-23.

50 Williams, 323 F.2d at 67; see also Youth Found Guilty of Murdering Girl, N.Y. TIMES, Jan. 23, 1948, at 46.

testimony. This left the confessions, which Williams argued were the result of coercion, as the only evidence of guilt.

The jury found Williams guilty of murder in the first degree and recommended a life sentence, but the sentencing judge rejected that recommendation based on evidence presented at trial and additional un-cross-examined sources pursuant to the New York Criminal Code. According to the sentencing judge, this evidence

52 Williams, 323 F.2d at 67; see also Youth Found Guilty of Murdering Girl, N.Y. Times, Jan. 23, 1948, at 46.; Brief for Relator–Appellant, supra note 34, at 23.

53 Williams, 323 F.2d at 67. Williams testified at trial that law enforcement's brutal torture coerced him to give a false confession. Id. Williams testified that detectives beat him with "a blackjack, a rubber hose, and a club" for approximately eleven hours. Youth Lays Confession to 3D Degree, BROOKLYN EAGLE, Jan. 16, 1948, at 1. Williams also testified that detectives kicked him and punched his left eye. Id. See also Brief for Relator–Appellant, supra note 34, at 9–11 (summarizing testimony of police brutality that included handcuffing Williams to a hot radiator, squeezing Williams's testicles until he fell unconsciousness, threatening to throw Williams out a window, and threats to shoot Williams). Defense counsel introduced a series of photographs taken of Williams on September 20, 1947. United States ex rel. Williams v. Fay, 211 F. Supp. 359, 362 (S.D.N.Y. 1962). The testimony of detectives and the district attorney denied any coercion. Id. The jail clerk testified that Williams only complained of swollen legs caused by rheumatic fever. Id. The jail physician testified that while Williams did appear to suffer injury, those injuries were inconsequential compared to Williams's testimony. Id.

54 Williams, 323 F.2d at 65–67; see also N.Y. PENAL LAW § 1045–a. See generally Youth Sentenced to Die in the Chair, N.Y. Times, Mar. 3, 1948, at 48.

55 Williams, 323 F.2d at 65; see also N.Y. PENAL LAW §§ 1045, 1045–a (McKinney 1949) (providing that murder in the first degree is punishable by death unless the jury recommends life imprisonment, but also granting the presiding judge discretion to impose a life imprisonment or death regardless of the jury's recommendation).

56 Williams v. New York, 337 U.S. 241, 242–43 (1949). At the time New York law provided that:

Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric [sic] or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.

N.Y. CRIM. PROC. LAW § 482 (McKinney 1949).
proved by a preponderance that (1) Williams committed the burglaries for which he had originally been arrested but never charged;\(^{57}\) (2) Williams was a "menace to society";\(^{58}\) and (3) Williams "possessed a morbid sexuality" and was a "psychopathic liar whose personality [was] permeated with psychosexual habits of thought and conduct."\(^{59}\) Convinced that the jury's recommendation

\(^{57}\) *Williams*, 337 U.S. at 244. After considering approximately thirty uncharged burglaries to which Williams had allegedly confessed or had allegedly been identified as a participant, the sentencing judge described Williams as a "well-schooled" veteran of burglaries. *Id. See also* Brief for Appellant-Defendant at 6, *Williams*, 337 U.S. 241 (No. 671), 1949 WL 50658 at *6.

\(^{58}\) *Williams*, 337 U.S. at 244. The sentencing judge found:

[Williams] perfected what he thought was a foolproof method of earning a living in an easy way. Like others of this kind, however, he finally found himself in a situation, not to his liking, and decided to destroy whatever was in his way to a continued success in the criminal career chosen by him. It is unfortunate that his path was blocked by this young girl who showed such bravery, in the protection of her life.

Brief for Appellant-Defendant, *supra* note 57, at 9. According to the Court, Williams did not challenge the accuracy of the report, did not ask the judge to disregard it, and did not request an opportunity to refute any portion through cross-examination or any other means. *Williams*, 337 U.S. at 244.

\(^{59}\) *Youth Sentenced to Die in the Chair*, N.Y. TIMES, Mar. 3, 1948, at 48. The sentencing judge considered information from a detective that Williams was seen taking photographs of young children at public schools. Brief for Appellant-Defendant, *supra* note 57, at 8. The sentencing judge also relied on the following as evidence of Williams's morbid sexuality:

We also have the situation involving the Goldiner family who resided in the ground-floor apartment at 145 Legion Street, about two weeks before [Williams's] arrest at about two a.m. At that time, their seven-year-old daughter was asleep alone in a rear room, the parents being in another room. The child says that she was awakened when she felt someone twisting her feet. She says that the lower part of her pajamas had been taken off and the defendant placed himself on top of her and placed his penis between her legs. He had one of his hands over her mouth to prevent her from making any outcry. He then arose, and as he was buttoning his pants, she made an outcry which frightened the defendant, who ran out of the apartment. The mother of the child says that she found evidence of discharge on the bed of the child. The child
of life imprisonment would have been different if all "facts" had been presented, the sentencing judge ordered death by electrocution and reasoned that "it would stultify [his] conscience" to accept the jury's sentence. A unanimous New York Court of Appeals affirmed both the conviction and death sentence.

Williams's appeal to the Supreme Court of the United States focused on the narrow question of whether due process required an opportunity to cross-examine or rebut information considered for the first time at sentencing. The Court evaluated the denial of confrontation as a felony sentencing right under the due process standard. The Court held that due process was not "a device for freezing the evidential procedure of sentencing in the mold of trial procedure"; to so hold would "hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice." Nor could due process render a sentence void simply because a judge obtained out-of-court information to assist in fixing punishment.

also positively identified the defendant as the one who perpetrated this act.

Id. at 8–9. None of the above referenced "evidence" was admitted at trial. Id. at 10.

60 Youth Sentenced to Die in the Chair, N.Y. TIMES, Mar. 3, 1948, at 48.
61 Id.
62 People v. Williams, 83 N.E.2d 698, 698 (N.Y. 1949), amended by 84 N.E.2d 446 (N.Y. 1949) (affirming Williams's conviction and declining to answer whether a Fourteenth Amendment violation occurred because Williams's "sentence of death [was] based upon information supplied by persons with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal.").
63 Williams, 337 U.S. at 243. The Williams's Court also framed the issue of confrontation as a felony sentencing right as follows: "The question relates to the rules of evidence applicable to the manner in which a judge may obtain information to guide him in the imposition of sentence upon an already convicted defendant." Id. at 244.
64 Id. at 251.
65 Id. at 252. According to the Williams Court, "[m]odern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. . . . Under the practice of individualizing punishments, investigation techniques have been given an important role." Id. at 248–49.
Williams described New York's sentencing statute as one that emphasized the "prevalent modern philosophy of penology that punishment should fit the offender, and not merely the crime." The Williams Court rejected confrontation as a felony sentencing right, reasoning that consideration of uncrossed information for purposes of sentencing was a discretionary power that dated to pre-founding times. The Court explained:

[Both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.]

Williams assumes a level of judicial discretion that did not exist in the era of determinate sentencing, which was the dominant sentencing model at the time of the founding. In fact, the sentencing court's discretionary authority described in Williams was actually a cornerstone of the indeterminate sentencing model that emerged after the founding and that was at its height at the time Williams was decided. Because of Williams, sentencing procedures have been allowed to "take whatever shape the states might think appropriate to serve the goals of indeterminate sentencing." Due process did

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66 Id. at 247–48 (noting that indeterminate sentencing replaced rigidly fixed punishments of the determinate era). This ideal is directly reflective of the indeterminate sentencing model, which declared reformation and rehabilitation more important than retribution. Id. The Court provided no guidance of how Williams's death sentence met the goals of rehabilitation or reformation.

67 Id. at 249 (noting the increased involvement of non-judicial agencies, particularly probation and other investigatory agencies).

68 Id. at 246.

69 Id.

70 Williams, 337 U.S. at 247–51 ("The considerations we have set out admonish us against treating the due-process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.").

71 Susan N. Herman, The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process,
not require confrontation at felony sentencing, and a broad range of unchallenged evidence could be used to support a higher sentence.\textsuperscript{72}

Circuit courts that have ruled that confrontation rights do not apply at felony sentencing\textsuperscript{73} not only commonly cite Williams, but also Barber v. Page\textsuperscript{74} and Mancusi v. Stubbs.\textsuperscript{75} Barber succinctly states: "[t]he right to confrontation is basically a trial right."\textsuperscript{76} Barber was not a felony sentencing case.\textsuperscript{77} Neither was Mancusi, although the Court's holding was quite material to punishment. The defendant in Mancusi was convicted and sentenced under New York's second-offender law based in part on a Tennessee murder conviction that had been overturned due to the denial of effective counsel.\textsuperscript{78} The New York court admitted witness statements from the overturned Tennessee trial over the defendant's objection.\textsuperscript{79} The

\textsuperscript{72} Williams, 337 U.S. at 252. Justice Murphy dissented and argued that "[d]ue process of law includes . . . the idea that a person accused of crime shall be accorded a fair hearing through all stages of the proceedings against him." \textit{Id.} at 253 (Murphy, J., dissenting) (also urging sentencing judges to hesitate when increasing punishment beyond that which the jury recommended). Justice Murphy maintained:

\textit{Id.}

The record . . . indicates that the judge exercised his discretion to deprive a man of his life, in reliance on material made available to him in a probation report, consisting almost entirely of evidence that would have been inadmissible at the trial. Some, such as allegations of prior crimes, was irrelevant. Much was incompetent as hearsay. All was damaging, and none was subject to scrutiny by the defendant.


\textsuperscript{74} 390 U.S. at 719 (1968).

\textsuperscript{75} 408 U.S. at 204 (1972).

\textsuperscript{76} Barber, 390 U.S. at 720-21.

\textsuperscript{77} Barber objected at trial to the admission of un-cross-examined preliminary hearing testimony. \textit{Id.} at 720-21. The Court granted habeas relief on the ground that state authorities failed to make good faith efforts to obtain the witness. \textit{Id.} at 724-26.

\textsuperscript{78} Mancusi, 408 U.S. at 207-10.

\textsuperscript{79} \textit{Id.}
Mancusi Court found there was sufficient evidence that the testimony of the unavailable Tennessee witness was reliable. Thus, the overturned Tennessee murder conviction was counted as the predicate offense under New York's second-offender law.

Barber and Mancusi rely heavily on the assumption that confrontation has always enjoyed a peaceful coexistence with hearsay rules. Barber and Mancusi were also decided at a time when literal application of the Confrontation Clause was rejected for fear of abrogating most of the hearsay exceptions. Both cases turn on the prosecution's good faith showing of unavailability and the defendant's prior opportunity to cross-examine the witness. Barber and Mancusi upheld the erroneous principle that because confrontation and hearsay were rooted in due process, reliability was a sufficient surrogate for cross-examination at trial. Ohio v. Roberts best articulates that principle:

[W]hen 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

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80 Id. at 209.
81 Roberts, 448 U.S. at 65-67; but see California v. Green, 399 U.S. 149, 155-56 (1970) (warning against the assumption that the overlap between hearsay rules and confrontation is complete and that confrontation guarantees a right beyond what is provided by hearsay rules).
82 Id. at 63.
83 Id. at 65-77.
84 Id. at 66.
86 United States v. Fatico, 579 F.2d 707, 712 (2d Cir. 1978) (citations omitted).
excluded, at least absent a showing of particularized guarantees of trustworthiness.\(^{87}\)

Like Barber and Mancusi, Roberts presumed that the Confrontation Clause reflected only a "preference for face-to-face confrontation at trial."\(^{88}\) Roberts was arrested and charged with forgery and possession of stolen credit cards that belonged to his girlfriend's parents.\(^{89}\) At trial, Roberts testified that his girlfriend provided the allegedly stolen items with the understanding that he was allowed to use them.\(^{90}\) In response to the prosecution's questioning at the preliminary hearing, Roberts's girlfriend admitted that she knew Roberts and that she permitted Roberts to stay at her apartment for several days while she was away.\(^{91}\) She also testified that she neither gave Roberts her parents' checks and credit cards nor granted to Roberts permission to use them.\(^{92}\) Roberts's girlfriend did not appear at trial\(^{93}\) and the prosecution was allowed to admit her preliminary hearing transcript to rebut Roberts's testimony.\(^{94}\)

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\(^{87}\) Roberts, 448 U.S. at 66.

\(^{88}\) Id. at 630-64 (emphasis added); see also Maryland v. Craig, 497 U.S. 836, 846 (1990) (reasoning that face-to-face confrontation was only a preference because the primary purpose of confrontation was to ensure reliability).

\(^{89}\) Roberts, 448 U.S. at 58. The checks were in the name of Barnard Isaacs and the stolen credit cards belong to both Barnard and Amy Issacs. Id.

\(^{90}\) Id. at 59.

\(^{91}\) Id.

\(^{92}\) Id. According to the Roberts Court, defense counsel neither requested that Roberts's girlfriend be declared a hostile witness nor that she be subjected to cross-examination. Id.

\(^{93}\) Id. at 59-60. The prosecution sent five subpoenas for four different trial dates to Roberts's girlfriend at her parents' Ohio residence. Id. at 59. Roberts's girlfriend was not present upon execution, nor did she contact the court. Id. Before admission of the preliminary hearing transcript of Roberts's girlfriend, the trial judge conducted a voir dire of Amy Isaacs who testified she infrequently received telephone calls from and knew of no emergency contact information for her daughter. Id. at 59-60.

\(^{94}\) The Ohio Court of Appeals found that the prosecution failed to make a good faith showing of unavailability because the prosecution failed to seek the whereabouts of Roberts's girlfriend for purposes of trial. Id. at 60. The Ohio Supreme Court reinstated the trial court's finding of availability, but held that there was no constitutionally sufficient opportunity to cross-examine Roberts's girlfriend at the preliminary hearing. Id. at 60-61. While increased due diligence would not have procured the attendance of Roberts's girlfriend at trial because her
Roberts made clear that the Confrontation Clause did not require actual confrontation. Instead, where a witness was unavailable, the confrontation requirement was satisfied by hearsay that was reliable and trustworthy. The Court found that the prosecution made a good faith showing of unavailability and that Roberts had an adequate opportunity for cross-examination during the preliminary hearing. Additionally, Roberts postulated that hearsay rules stemmed from the same historical origins as the Confrontation Clause. In such cases, due process only required cross-examination when an actual hearsay violation occurred.

Roberts is an incompatible outlier from the Court's more recent interpretations of the Confrontation Clause. For example, Crawford v. Washington involved the admission of pre-recorded testimonial statements by a wife against her husband, who was the defendant and against whom she could not testify based on spousal privilege. The Supreme Court of Washington affirmed admission of Mrs. Crawford's recorded statements, satisfied that they were both reliable and trustworthy. The Court reversed.

The Crawford Court ruled that the due process standard relied upon in Roberts was unpredictable and that the confrontation standard could not tolerate such unpredictability. Crawford re-examined the historical origins and text of the Confrontation Clause and recognized two historical suggestions about the Founders' whereabouts were entirely unknown, defense counsel's questioning at the preliminary hearing did not amount to a cross examination. Id.

95 Id. at 63-64.
96 Id. at 65-67.
97 Id. at 65-77.
98 Id. at 66.
99 See Fatico, 579 F.2d at 712-13 ("Williams does not hold that all hearsay information must be considered.").
101 Id. at 38-40.
102 Id. at 41. The Washington Court of Appeals found that some of Mrs. Crawford's responses contradicted previous answers to specific questions. In fact, at one point Mrs. Crawford admitted she closed her eyes during the incident for which her husband was on trial. Id.
103 Id. at 42.
104 Id. at 60-67 (examining and discussing inconsistencies in the application of hearsay rules in post-Roberts confrontation cases).
understanding of the confrontation right. First, the Confrontation Clause was intended to prohibit ex-parte examinations as evidence against the accused. Second, pre-ratification testimonial statements of absent witnesses would not have been allowed without a showing of unavailability and a prior opportunity for cross-examination. The Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." The Court ultimately found Mrs. Crawford's statements were of the type the Framers intended the Confrontation Clause to prohibit.

Noting that "testimonial statements" can be used for purposes other than establishing the truth of the matter asserted, Crawford explicitly limited the requirement of confrontation to "witnesses against the accused" who "bear testimony." Thus, Crawford's interpretation of the Confrontation Clause applied only to testimonial statements. Davis v. Washington clarified the distinction between testimonial and non-testimonial statements. Davis involved the admissibility of statements of unavailable witnesses in unrelated criminal trials in Indiana and Washington.

105 Id. at 43-50.
106 Id. at 50.
107 Id. at 53-54.
108 Id. at 61, 68-69 (holding that the due process standard was "fundamentally at odds with the right of confrontation," which reflected "a judgment . . . about how reliability can be best determined.").
109 Id. at 52-53 (holding that statements taken by police officers in the course of an interrogation bear a striking resemblance to examinations by justices of the peace in England); see also Fisher, supra note 6, at 59 (describing Crawford as a "thoroughgoing originalist opinion").
110 Crawford, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).
111 Id. at 51-52.
112 Id. at 68.
114 Id. at 819-21. The victim was found alone on her front porch when officers arrived and she granted permission for the officers to enter her home. Id. at 819. The defendant, the victim's husband, was waiting in the kitchen. Id. The victim was questioned in her living room and afterwards was provided with and signed an affidavit. Id. at 819-20. The defendant attempted to participate in the
State.\textsuperscript{115} \textit{Davis} defined \textit{testimonial} statements as those that are made when the circumstances objectively indicated that no ongoing emergency existed and that the primary purpose of the interrogation (or questioning) was to establish or prove past events potentially relevant to a criminal prosecution.\textsuperscript{116} \textit{Nontestimonial} statements are those that are made when given in the course of an interrogation (or questioning) and where circumstances objectively indicate that the primary purpose of the interrogation was to assist police during an ongoing emergency.\textsuperscript{117}

The \textit{Davis} Court recognized the fluidity of the testimonial/nontestimonial distinction\textsuperscript{118} and instructed that for confrontation purposes statements might begin as nontestimonial—i.e., responsive to an interrogation to determine the need for emergency assistance—but later evolve into testimonial statements once that purpose has been achieved.\textsuperscript{119} Relying on this reasoning, the Court ruled that the recorded 911 statements in Washington state were \textit{nontestimonial}, and properly admitted, because (1) the victim was speaking about events as they were actually happening rather than describing past events, (2) the victim's call for help was against a bona fide physical threat, and (3) elicitation of the victim's conversation, but was retrained by an officer who also remained in the kitchen. \textit{Id.}

\textsuperscript{115} \textit{Id.} at 818-19. The defendant's ex-girlfriend provided a 911 operator with defendant's name and accused him of assault. \textit{Id.} at 817-18. The defendant was present during this portion of the call. \textit{Id}. The victim described the context of the assault and provided other identifying information about the defendant to the operator after the defendant left the scene. \textit{Id.} at 818.

\textsuperscript{116} \textit{Davis}, 547 U.S. at 819-20.

\textsuperscript{117} \textit{Id.} at 822.

\textsuperscript{118} See \textit{id}. The \textit{Davis} Court reasoned that "Confrontation Clause jurisprudence was carefully applied only in the testimonial context" well into the 20th century. \textit{Id.} at 824–25. Testimonial statements were separated from other hearsay that was subject to traditional limitations barring admission, but not under the Confrontation Clause. \textit{Id.} at 821. Statements taken by police officers in the course of interrogations were characterized as a core class of testimonial statements. \textit{Id.} at 822.

\textsuperscript{119} \textit{Id.} at 828. For purposes of the Confrontation Clause, the \textit{Davis} Court was confident that trial courts could recognize the point at which statements became testimonial. \textit{Id.} at 829.
statements was necessary to the resolution of an emergency.\footnote{\textit{Id.} at 826–29. \textit{Davis} reasoned that the statements at issue in \textit{Washington} involved a victim who as unprotected by the police while in apparent immediate danger from the defendant. \textit{Id.} at 831. These statements were not a story about the past, but were an attempt to seek aid in the present. \textit{Id.}} On the other hand, the statements contained in the victim affidavit in Indiana were \textit{testimonial}, and therefore improperly admitted, because (1) there was no emergency in progress, (2) the testifying officer admitted that the interrogation was part of an investigation into possible past criminal conduct, and (3) there was a lapse of time between executing the affidavit and the events described therein.\footnote{\textit{Id.} at 829–32. The Court described the affidavit at issue in Indiana as a narrative of past events that was delivered after the danger ceased. \textit{Id.} at 832. According to the testifying officer, the purpose of the affidavit was to establish events that previously occurred. \textit{Id.}} Later, in \textit{Melendez-Diaz v. Massachusetts}, the Court held that testimonial statements also included sworn certificates by analysts at state crime laboratories.\footnote{557 U.S. 305, 310–11, 329 (2009) ("This case involves little more than the application of our holding in \textit{Crawford}.")} Yet in \textit{Michigan v. Bryant}, the Court held that a dying murder victim's statements were not testimonial even though they were given in response to questions by law enforcement officers responding at the scene before the victim's death.\footnote{131 S. Ct. 1143, 1166–67 (2011).}

\textit{Crawford} makes clear that actual confrontation and cross-examination are the best methods to test the veracity of testimonial statements and \textit{Davis} demonstrates the testimonial/nontestimonial distinction.\footnote{\textit{Davis}, 547 U.S. at 822 (noting that while in \textit{Crawford} a core class of testimonial statements were set forth, it was unnecessary to "endorse any of them because 'some statements qualify under any definition'".)} Despite the fact that the rules of confrontation easily could be applied at felony sentencing, many sentencing guidelines place few limits on the use of un-cross-examined information concerning the background, character, and conduct of a convicted defendant.\footnote{Ngov, \textit{supra} note 9, at 267 (citing 18 U.S.C. § 3661 (2006)); Becker, \textit{supra} note 12, at 154.} Professor Eang Ngov has described how sentencing courts can reach far back in time to determine what conduct relates
to the defendant's convicted offense. This evidence may include statements recorded during telephone interviews or signed witness statements gathered by law enforcement or prosecutors. The Honorable Edward Becker has described such reports and statements as likely to include hearsay, double hearsay, and triple hearsay. Moreover, during the plea negotiations, defense counsel may be unaware which testimonial statements, if any, will be presented at sentencing. There is usually little opportunity to investigate the statement's truth or veracity once its materiality becomes apparent. Despite these serious implications, reliability is the current standard to test information presented at felony sentencing hearings.

126 Ngov, supra note 9, at 237–38.
127 United States v. O'Meara, 895 F.2d 1216, 1223 (8th Cir. 1990) (Bright, J., concurring in part and dissenting in part) (arguing that in federal sentencing, probation officers replaced the court in the exercise of crucial judgment calls); see also John S. Diera, Guidelines Sentencing: Probation Officer Responsibilities and Interagency Issues, FED. PROBATION, Sept. 1989, at 3. According to Diera, in the federal regime probation officers have become an "independent" investigator. Id. For example, probation officers prepare the presentence report provided to the judge, which includes a tentative advisory guideline range based on the information gathered during the sentencing investigation. Id; see also Jack B. Weinstein, A Trial Judge's Second Impression of the Federal Sentencing Guidelines, 66 S. CA. L. REV. 357, 364 (1992); Becker, supra note 12, at 161.
128 Becker, supra note 12, at 161.
130 Ngov, supra note 9, at 258. Ngov argues that use of acquitted conduct as a category of "relevant conduct" essentially second-guesses a prior jury's determination of the truth and veracity of testimonial statements. Id. Sentencing courts are permitted to use acquitted conduct to increase punishment despite the jury's declaration of "legal innocence." Id. at 258–60 nn.142–50, 284, 287 (discussing the impact of acquitted conduct on subsequent proceedings, including probation and parole revocation hearings). Thus, in some cases, "a defendant can be sentenced to the same length of imprisonment that would have been imposed had he actually been convicted of the offense." Ngov, supra note 9, at 242 (footnote omitted). But see 4 WILLIAM BLACKSTONE COMMENTARIES at *361–62 ("If the jury therefore find the prisoner not guilty, he is then forever [sic] quit and discharged of the accusation . . . ") (footnote omitted). Ngov argues that this gives the prosecution a "second bite at the apple" to prove conduct already rejected as punishable, which impermissibly allows the sentencing judge to ignore the jury's previous findings. Ngov, supra note 9, at 261, 267, 288, 291.
Crawford is premised on the rationale that the Court had strayed too far from confrontation's "original meaning." In many respects, the procedures for fixing punishment have also strayed far from those that would be recognized by the Framers. In the modern U.S. criminal justice system, testimonial statements are integral to the process of establishing guilt and fixing punishment. Jurisprudence on the question of confrontation as a felony sentencing right post-dates the founding. As demonstrated in Williams, that jurisprudence is based on the reasoning that consideration of uncrossed information for purposes of sentencing was a discretionary power that dated to pre-founding times. As a result, a broad range of unchallenged evidence continues to be used to support higher criminal sentences.

Without a doubt, the Framers of the United States Constitution and its Bill of Rights would not recognize the modern U.S. criminal justice system. As Justice Kennedy recently acknowledged in Missouri v. Frye, plea bargaining has "become so central to the administration of . . . criminal justice . . . that . . . [i]t is not some

131 Crawford v. Washington, 541 U.S. 36, 42 (2004). But see Thomas Y. Davies, What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington, 71 BROOK. L. REV. 105, 120–89, 196–206 (2005) (questioning Crawford's historical accuracy on the issue of cross-examination and unavailability at the time of the founding, as well as the use of nontestimonial statements). Davies argues that Crawford glosses over important distinctions between felony and misdemeanor procedure. Id. Davies also argues that at the time of the founding, jurisprudence on hearsay or its exceptions had yet to be fully developed. Id.

132 Williams, 337 U.S. at 249 (noting the increased involvement of non-judicial agencies, particularly probation and other investigatory agencies).

133 Id. at 246.

134 Id. at 252. But see id. at 253 (Murphy, J., dissenting) (urging sentencing judges to hesitate when increasing punishment beyond that which the jury recommended).

135 See John G. Douglass, Confronting Death: Sixth Amendment Rights at Capital Sentencing, 105 COLUM. L. REV. 1967, 2015 (2005). Douglass noted that criminal procedure in the framer's world encompassed "a single, unified trial with no separate sentencing." Id. In contrast, modern practice "spans two worlds: first a trial, then a sentencing," which are treated as "separate universes, governed by very different rules." Id. at 1967–68.
adjunct to the criminal justice system; it is the . . . system."

Perhaps plea bargaining occurred at the time of the founding. According to Professor George Fisher, an eminent scholar on plea bargaining, the earliest record of plea bargaining does not appear until 1809. Nevertheless, at the time of the founding the purpose of trial was to establish the specific offense conduct that merited punishment. The purpose of sentencing was to announce the punishment. Evidence suggests that little judicial discretion existed pre-founding to influence felony sentencing.

Unlike in the time of the founding, fact-finding is no longer limited to the trial and also occurs at the sentencing hearing. Due to the prevalence of plea bargaining in the current U.S. system, the vast majority of cases do not result in a trial. As a result, the resolution of the material facts that constitute the offense occurs after the plea and usually requires the use of evidence at sentencing that has never been confronted during a trial or any other proceeding. In this manner, the modern sentencing hearing has become quite similar to a trial. However, counsel is unable to

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137 See George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America 22 (2003). As does Fisher, this Article distinguishes between the expression "clear plea bargaining" and "guilty plea." Id. Fisher uses the term "clear plea bargaining" to refer to cases "in which the clerk's account discloses a concession made in exchange for the defendant's plea." Id. Fisher uses the term guilty plea "to refer to cases in which the defendant pled guilty but the record reveals no compensating concession." Id. This Article uses the simple term "plea bargaining" to refer to what Fisher termed "clear plea bargaining."


139 Id; see also Becker, supra note 12, at 158.

140 4 Blackstone, supra note 130, at *378.


142 James E. Bond, Plea Bargaining and Guilty Pleas 156–57 (1st ed. 1975) (observing that sentencing judges rarely make detailed inquiries regarding the factual basis for the plea before accepting it).

143 Becker, supra note 12, at 159–60; 166–67.
cross-examine testimonial statements that are material to punishment, which ties defense counsel's hands and leaves the defendant with no meaningful opportunity to test the evidence that is material to punishment.\(^{144}\) Counsel's ability to marshal and prove the facts, introduce evidence, and generally aid and assist the defendant is significantly hindered at sentencing.\(^{145}\) The inability to cross-examine evidence that is material to punishment also increases the risk that a defendant will be punished based on unreliable evidence.\(^{146}\)

Many federal courts are disinclined to reexamine whether and to what extent sentencing discretion was limited by application of the Confrontation Clause.\(^{147}\) These courts reasoned that for confrontation purposes, the "criminal prosecution" did not extend beyond the trial.\(^{148}\) These courts have described cross-examination during criminal punishment as impractical and have predicted cross-examination would cause endless delay.\(^{149}\) Most jurisprudence denying the value of confrontation as a felony sentencing right precedes that which incorporated the Sixth Amendment to criminal defendants in state courts.\(^{150}\) Moreover, the denial of confrontation rights at felony sentencing is an anomaly among other Sixth Amendment rights that apply at sentencing. As next discussed, this anomaly denies an important parallelism among the Sixth

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\(^{144}\) Id. at 164–65.

\(^{145}\) Id. at 160–62.

\(^{146}\) Id. at 168 (describing the Confrontation Clause as the obvious candidate to ensure basic fairness at sentencing proceedings).

\(^{147}\) McMurray, supra note 141, at 605–07 (discussing lower court rulings that confrontation did not apply at felony sentencing as a failure to "seriously engage the text of the Sixth Amendment"). For an example of such a lower court ruling, see United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978).

\(^{148}\) See Sunrhodes, 831 F.2d at 1543 (citing Mancusi v. Stubbs, 408 U.S. 204, 211 (1972)). Mancusi involved a New York felony defendant sentenced as a second offender based, in part, on a prior murder conviction in Tennessee. Mancusi, 408 U.S. at 205. Stubbs challenged the sentence, arguing violations of substantive and procedural due process. Id. at 209. The Mancusi Court held that confrontation was "basically a trial right" that included "both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." Id. at 211; see also Barber v. Page, 390 U.S. 719, 725 (1968).

\(^{149}\) Fatico, 579 F.2d at 711–12.

\(^{150}\) Berman, supra note 14, at 391.
Amendment's interrelated rights of counsel, jury trial, and confrontation.

II. **EMERGENCE OF THE SIXTH AMENDMENT'S Counsel and Jury Trial CLAUSES AS FELONY SENTENCING RIGHTS**

The current approach to the Sixth Amendment's Confrontation Clause recognizes the right at trial, but not at sentencing. This approach to the Sixth Amendment is not unique to confrontation. But the trial-right-only rule has endured longer in confrontation jurisprudence than other Sixth Amendment guarantees.\textsuperscript{151}

The Sixth Amendment provides:

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.\textsuperscript{152}

The Amendment enshrines seven distinct rights that apply during a "criminal prosecution."\textsuperscript{153} For purposes of this Article, the most important rights include the right to confront adversarial witnesses, the right to counsel, and the right to trial by jury.\textsuperscript{154}

The rule that the Sixth Amendment's Confrontation Clause does not apply at felony sentencing rests on the assumption that proceedings related to punishment are not part of the "criminal prosecution." Francis Heller, a mid-twentieth century Sixth Amendment historian, describes the term "criminal prosecution" in

\textsuperscript{151} See generally, Shaakirrah R. Sanders, *Unbranding Confrontation as Only a Trial Right*, 65 Hastings L.J. 1257 (2014).

\textsuperscript{152} U.S. CONST. amend. VI (emphasis added).

\textsuperscript{153} See also Chhablani, *supra* note 15, at 492–507 (outlining the seven procedural protections provided under the Sixth Amendment).

\textsuperscript{154} McMurray, *supra* note 141, at 615.
the Framer's era as beginning with an arraignment and ending with either a verdict that pronounces the defendant's innocence or a sentence that pronounces the defendant's punishment. But founding era documents regarding the Amendment offer little guidance on the question of what proceedings constituted the "criminal prosecution." Nor do founding era documents define the meaning or scope of the term. Nevertheless, an early nineteenth century dictionary defines a "prosecution" as the "institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment." Eminent founding era scholar William Blackstone described felony prosecutions in the framer's era as involving twelve stages.

155 FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 54 (1951). See also White, supra note 138, at 395–397. White explains that "Sixth Amendment rights do not begin and end with the in-court proceeding commonly known as a trial." Id. According to White, during the time of the founding the verdict and sentence were accomplished in one proceeding. Id. That unified procedure is what the framers described as the "criminal prosecution" when drafting the Sixth Amendment. Id.; see also McMurray, supra note 141, at 616 (arguing that "the entire process of securing the criminal judgment [is] the prosecution"). McMurray argues that "where a defendant pleads guilty to one count in exchange for the government's promise to dismiss other counts, the government will typically not dismiss the other counts until after the defendant has been sentenced." McMurray, supra note 141, at 616. This confirmed that the prosecution was complete when the defendant had been sentenced. Id.

156 See id. at 616 & n.191; Stephanos Bibas, Two Cheers, Not Three, for Sixth Amendment Originalism, 34 HARV. J.L. & PUB. POL’Y 45, 46 (2011).

157 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); see also RANDOM HOUSE UNABRIDGED DICTIONARY 1552 (Stuart B. Flexner & Leonore C. Hauck eds., 2d ed. 1993) (defining a prosecution as "the institution and carrying on of legal proceedings against a person"). For an example of the Supreme Court turning to the 1828 version of Webster's dictionary in order to interpret the Confrontation Clause, see Crawford v. Washington, 541 U.S. 36, 51 (2004).

158 See Douglass, supra note 135, at 2008. Douglass argues that if "the textual question is simply whether a sentencing is part of a 'criminal prosecution,' the answer would seem self-evident. After all, why bother with the process of criminal prosecution if not for the sentence?" Id.; see also White, supra note 138, at 393 (arguing that a simple reading of the relevant constitutional text supports the right to confront evidence presented at capital sentencing hearings). The Honorable Ronald Arnold, the late Chief Judge of the United States Court of
ranging from the arrest to execution. But Blackstone did not specifically list or separately label sentencing hearings. But Professor Benjamin McMurray argues that Blackstone's stage nine, which is labeled "judgment and its consequences," corresponds to our modern understanding of criminal sentencing. McMurray suggests that proceedings related to punishment were part of founding era "criminal prosecutions" because "Blackstone's description of what happens at 'judgment' is precisely what modern courts do at sentencing."

The Sixth Amendment's failure to offer guidance on whether criminal sentencing constitutes part of the "criminal prosecution" is not a failure that can be attributed to the Framers. Professors Carissa and F. Andrew Hessick have theorized that the text and structure of the Amendment reflect the founding-era model of determinate sentencing. Professors Nancy King and Susan Klein have argued

Appeals for the Eighth Circuit, appeared to agree with Douglass and White. See United States v. Wise, 976 F.2d 393, 407 (8th Cir. 1992) (en banc) (Arnold, C.J., concurring in part and dissenting in part) ("Surely no one would contend that sentencing is not a part, and a vital one, of a 'criminal prosecution.'").

The twelve stages of prosecution include arrest, commitment and bail, prosecution, process upon indictment, arraignment and its incidents, plea and issue, trial and conviction, benefit of clergy, judgment and its consequences, reversal of judgment, reprieve and pardon, and execution. 4 BLACKSTONE, supra note 130, at *286; see also McMurray, supra note 141, at 617. As theorized by McMurray, the term "prosecution" as listed in Blackstone's stage three refers only to the charging stage. See McMurray, supra note 141, at 617.

See id. at 617–18.

See id. at 618 (hypothesizing that stage nine "falls chronologically right where sentencing falls under modern criminal procedure: between trial and appeal").


Id.; see also 4 BLACKSTONE, supra note 130, at *368–82.

that at the time of the founding, there were relatively few felony offenses. According to Professor Penny White, a pre-determined sentence resulted if a defendant was found guilty. The most common punishment for felony convictions was death. Hessick and Hessick hypothesize that the founding-era practice of unitary trials and sentencing left little or no role for the trial judge regarding a felony defendant's sentence. Thus, argue Hessick and Hessick, the drafters of the Sixth Amendment had little reason to consider trial authority separate from sentencing authority.

Sentencing schemes "presented no occasion to consider the extent to which constitutional protections should be treated differently at sentencing than at trial").

Nancy J. King & Susan R. Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1507–08 (2001). King and Klein found that the First Congress had enacted only twenty-two crimes by 1790. Id.

White, supra note 138, at 396–97. White describes modern day trials as involving a bifurcated process by which there is a finding of guilt or innocence by a jury and a subsequent determination of punishment by a judge. Id. In contrast, eighteenth century trials collapsed both stages into one and each offense mandated a particular punishment. Id.

Douglass, supra note 135, at 2011 (citing Whitman J. Hou, Capital Retrials and Resentencing: Whether to Appeal and Resentencing Fairness, 16 Cap. Def. J. 19, 30 (2003)); see also Woodson v. North Carolina, 428 U.S. 280, 289 (1976) ("At the time the [Bill of Rights] was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses." (citing Hugo Adam Bedau, The Death Penalty in America 5–6, 15, 27–28 (rev. ed. 1967))). Blackstone describes death by hanging, embowelment, or burning alive. 4 Blackstone, supra note 130, at *370. Punishment for other felonies included mutilation or dismembering, slitting of the nostrils, branding of the hand, whipping, hard labor, exile, banishment, loss of liberty, and temporary imprisonment. Id. Despite these options, Blackstone made clear that the quantity or degree of punishment was "ascertained for every offence; and that it [was] not left in the breast of any judge, nor even of a jury, to alter that judgment." Id. at *371. Blackstone warned that "if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates, and would live in society without knowing exactly the conditions and obligations which it lays them under." Id.

Hessick & Hessick, supra note 164, at 51.

Id. According to Hessick and Hessick, colonial era judges did not conduct a formal sentencing proceeding. Id. Instead, the conviction determined the punishment, as punishment for most crimes carried particularized sentences. Id.; see also Douglass, supra note 135, at 2011 (cautioning against the temptation to conclude that because the Sixth Amendment contemplated no separate sentencing proceeding, it also contemplated no sentencing rights). See generally
Professor John Douglass has opined that in the pre-founding era, the alignment of punishment with the crime allowed the defendant to precisely predict a sentence from the face of the charging instrument. In this model of unitary prosecution, sentencing evidence in felony cases was by necessity presented—and confronted—during the trial. This resulted in a more determinate trial and sentencing procedure than that which exists today. As posited by Douglass, "in both purpose and effect, the trial was the sentencing." Hessick and Hessick extend Douglass's reasoning to argue that in pre-founding felony cases "the process of

Bibas, supra note 156, at 46; Douglass, supra note 135, at 1972; Herman, supra note 71, at 302–03; White, supra note 138, at 396.

170 Apprendi v. New Jersey, 530 U.S. 466, 478 (2000); see also 4 BLACKSTONE, supra note 130, at *369 (after verdict "the court must pronounce that judgment, which the law hath annexed to the crime"); Bibas, supra note 156, at 46, 48 (arguing that punishment was immediately imposed); Douglass, supra note 135, at 1977 (describing English and early U.S. criminal law as dominated by mandatory penalties, not sentencing discretion); White, supra note 138, at 397 (characterizing substantive criminal law as sanction-specific, which proscribed a specific sentence for an offense); McMurray, supra note 141, at 592 (describing sentences in the determinate era as corporal punishment or specific fine and theorizing that, from the face of the charging instrument, defendants could predict a sentence with precision).

171 See Douglass, supra note 135, at 2008 ("The Framers lived in a system of . . . litigation where a unitary trial and single jury verdict determined not only guilt or innocence, but life or death as well. With that system as their point of reference, they crafted a single set of adversarial rights to govern all of the proceedings . . . "); see also White, supra note 138, at 397.

172 See Douglass, supra note 135, at 2008, 2016. The rules appeared to be different for misdemeanors. Id. at 2016 (hypothesizing that in the late eighteenth century, English and colonial U.S. judges "exercised a range of discretion in choosing punishment for misdeemeanants"); see also Apprendi, 530 U.S. at 480 n.7 (noting judges frequently imposed sentences of fines or whippings upon misdemeanants).

173 Douglass, supra note 135, at 1972–73. Douglass argues that separating the guilt determination from the choice of an appropriate penalty "was a procedure that evolved after the founding, initially for noncapital sentencing." Id. at 1972–73, 2020; see also Hessick & Hessick, supra note 164, at 51 (describing pre-founding sentencing as part of the trial); White, supra note 138, at 397 (noting that pre-founding felony juries decided both the guilt and punishment).
sentencing was virtually indistinguishable from the process of conviction.\textsuperscript{174}

Bifurcated trials and sentencing\textsuperscript{175} was one of the most notable post-founding developments that affected felony sentencing.\textsuperscript{176} Douglass opines that bifurcation evolved "from the parallel movements towards judicial discretion and individualization."\textsuperscript{177} Sentencing in the indeterminate era allowed broader discretion to incarcerate convicted felons, unlike determinate-era sentencing

\textsuperscript{174} Hessick & Hessick, supra note 164, at 51.


\textsuperscript{176} Another notable development was plea-bargaining. See Mary E. Vogel, The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860, 33 LAW & SOCY REV. 161, 161, 174–75 (1999) (noting the emergence of plea bargaining during the 1830s and 1840s); see also Fisher, supra note 137, at 22 (noting 1809 as the earliest example of clear plea bargaining in the U.S. colonies). The adoption of adult parole and probation services was another important post-founding development. See Sam B. Warner & Henry B. Cabot, Changes in the Administration of Criminal Justice During the Past Fifty Years, 50 HARV. L. REV. 583, 599 (1937). Warner and Cabot discuss the creation of reformatories for young male offenders and argue that adoption of the indeterminate sentence model and parole law occurred together. \textit{Id.} While the sentencing judge decided the length of punishment, the parole board decided the date of release. \textit{Id.} at 607. Warner and Cabot discuss the first instances of probation, which occurred in Massachusetts during the seventeenth century. See \textit{id.} at 598–99. Warner and Cabot found that by 1910, twenty states had adopted adult probation statutes. \textit{Id.} Warner and Cabot indicated that the duty of the probation officer was to furnish the judge with information about a defendant's criminal history. \textit{Id.} at 607; see also Ricardo J. Bascuas, The American Inquisition: Sentencing After the Federal Guidelines, 45 WAKE FOREST L. REV. 1, 11 (2010) (discussing early history of statutory of probation in the federal system).

\textsuperscript{177} Douglass, supra note 135, at 2019. Douglass suggests that bifurcation was the result of the need to separately consider sentencing evidence that would have been inadmissible at trial. \textit{Id.} at 2018–19. Douglass postulates that the rules of evidence conflicted with the emerging preference for making punishment fit not only the crime but also the individual criminal. \textit{Id.} According to Douglass, evidence of bad character would be considered unfairly prejudicial and inadmissible at trial. \textit{Id.}
where the punishment for most felonies was death.\textsuperscript{178} McMurray observed that indeterminate-era sentencing also required a judicial determination of the length of imprisonment, which by necessity compelled consideration of the nature of the offense and the unique circumstances of the individual.\textsuperscript{179} Douglass has posited that the information needed by indeterminate-era judges—which was presented during a separate sentencing process—differed in quantity and type from their determinate-era counterparts.\textsuperscript{180} Professor Susan Herman has hypothesized that while the exact causation is unclear, the advent of offender-oriented indeterminate sentences established sentencing as a distinct procedural phase of the "criminal prosecution."\textsuperscript{181} Professors Sam B. Warner and Henry B. Cabot also observed that once guilt was entered in an indeterminate-era felony case, there were few controls to limit the sentencing judge's discretion to decide a defendant's punishment.\textsuperscript{182}

Like bifurcation, guilty pleas also flourished during the indeterminate era. While there is some evidence of guilty pleas prior to the founding, Professor Mary Vogel described guilty pleas as rare in English common law cases and infrequent in colonial America.\textsuperscript{183} Vogel's comprehensive study of the emergence of guilty pleas in the U.S. criminal justice system demonstrates that by the late 1830s in Boston, guilty pleas began to appear in significant numbers in common law-based cases, and that ten years later they were accepted for virtually every sort of offense.\textsuperscript{184} According to Vogel,

\textsuperscript{178} Id. at 2016–17. White hypothesizes that the nineteenth century saw both the creation of felony sentencing discretion and the division of felony trials into separate guilt and sentencing phases. See White, supra note 138, at 397–98.
\textsuperscript{179} McMurray, supra note 141, at 592.
\textsuperscript{180} Douglass, supra note 135, at 2018. Douglass describes the newfound ability to exercise discretion of indeterminate era judges and their ability to individualize sentences. Id. Douglass extends this reasoning to argue that indeterminate era judges "needed to know more about an individual than a trial—or guilty plea—was likely to tell them" if they were to individually tailor sentences. Id.
\textsuperscript{181} See Herman, supra note 71, at 302.
\textsuperscript{182} Warner & Cabot, supra note 176, at 606–07.
\textsuperscript{183} See Vogel, supra note 176, at 172; see also Fisher, supra note 137, at 22.
\textsuperscript{184} See Vogel, supra note 176, at 175. Vogel found a surge in guilty pleas in the Boston Police Court docket from less than 15 percent in 1830, to 28.6
guilty pleas were solidly institutionalized by the 1860s.\textsuperscript{185} By the late nineteenth century, judges across the nation willingly engaged in plea bargaining.\textsuperscript{186} Even though pinpointing when guilty pleas became common can be difficult,\textsuperscript{187} by the 1920s, plea bargaining was well established.\textsuperscript{188}

Early plea bargaining did not necessarily develop at the initiation of the prosecution or the defense. Justin Miller, an early twentieth-century commenter on plea bargaining, suggested that prosecutors may not have initiated plea offers or even participated in plea negotiations.\textsuperscript{189} Miller observed that some trial judges initiated early plea bargaining, which could have involved openly negotiating in court with the accused or making offers of a dismissal, a plea of guilty to a lesser offense, or a plea of guilty to

percent in 1840, 52 percent in 1850, 55.6 percent in 1860, and 88 percent in 1880.\textsuperscript{186}

\textsuperscript{185} See id. at 174–75 (discussing early practice of plea bargaining in Boston).

\textsuperscript{186} Mookin, supra note 4, at 1723, 1728.

\textsuperscript{187} See Moley, supra note 187, at 106–07 (finding a generational increase in the proportion of pleas).

\textsuperscript{188} Justin Miller, The Compromise of Criminal Cases, 1 S. CAL. L. REV. 1, 2 (1927). Miller discussed the concept of forgiveness by an aggrieved person, which he described as "condonation." Id. Miller argued that condonation was long recognized by 1927 and that the practice was not intended to prevent prosecutions. Id. Yet in practice, "condonation and compromise of criminal cases [was] frequent and the methods of evading the clear purpose of the written law [were] varied." Id.; see also Raymond Moley, The Vanishing Jury, 2 S. CAL. L. REV. 97, 118 (1928). Moley found that by 1926 in Cook County, Illinois, 13,117 felony prosecutions entered preliminary hearing and 492 resulted in a complete jury trial. Id. During the same year in Chicago, slightly more than one percent of cases initiated as felonies resulted in a jury verdict of guilty on the felony charge. Id. Moley does not specify whether the remaining cases were resolved by dismissals, guilty pleas, or bench trials. Warner and Cabot argued that almost a decade later there also appeared to be an increase in jury trial waivers, presumably in favor of bench trials. See Warner & Cabot, supra note 176, at 592 (finding that by the late nineteenth century, waiver of jury trial in criminal cases was common in few states, but that by 1937 it was permitted in the federal courts and those of over half of the states).

\textsuperscript{189} Miller, supra note 187, at 8, 10.

\textsuperscript{190} Id.; see also Moley, supra note 187, at 103. Moley characterized guilty pleas in early cases as favorable to both the prosecutor and the defense, neither of whom would be "compelled to carry through an onerous and protracted trial." Id. Moley also theorized that guilty pleas also allowed judges to escape the danger of reversal on questions of law. Id.
the charged offense. Miller also observed that other trial judges either refused to have any part in compromises or privately expressed the propriety of a settlement to the parties. Miller commonly witnessed pleas in the following types of cases: desertion or failure to provide for wife or children; violation of liquor laws; automobile thefts; sex cases, including seduction and statutory rape; and larceny or accusations for issuing fraudulent checks or obtaining money or property by fraudulent means.

The rise in plea bargaining also coincided with increases in the number of criminal offenses, which burdened enforcement officials, courts, and the public. Miller argued that the "professional banditry of [the] scientific age" combined with inadequate law enforcement staff, equipment, and cohesive administrative guidance and direction made it impossible for law enforcement "to combat criminal activity." Miller also argued that improved means of transportation and communication brought people closer together, multiplied frictions, and increased

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191 Id. at 10.
192 Id.
193 Miller, supra note 187, at 12.
194 Id. at 13–14.
195 Id. at 14–15.
196 Id. at 15.
197 Id. at 16. Miller attributed the frequency of pleas in fraud cases to the difficulty of securing convictions. Id. Miller also describes a prosecutorial incentive to accept pleas to lesser crimes for purposes of avoiding the expense of trials and the risk of acquittal. Id. at 15–16.
198 Id. at 19.
199 See Miller, supra note 187, at 20. Miller described courts as unable to accommodate increased burdens of trial. Id. Miller also described jury duty as an "irksome burden" on the public. Id. Mnookin argued that increased caseloads significantly contributed to the judiciary's changing attitude about the merits of negotiated pleas. Mnookin, supra note 4, at 1728; see also Warner & Cabot, supra note 176, at 590 (discussing the striking growth in the number of cases per judge, and finding that the number of judges did not keep pace with the growth of the population).
200 Miller, supra note 187, at 12.
201 Id. at 19.
202 Id.
Like Miller, Warner and Cabot described the early twentieth century as one characterized by a "recent revival... of outlawry," which was attributed to large increases in the number of petty offenses and the inability of the courts and authorities to handle modern crime. Another early twentieth-century commenter, J.C. McWhorter, lamented that the public had become accustomed and listlessly indifferent to lawlessness due to unpunished crime becoming a "matter-of-course."

As the number of criminal acts began to increase, so too did the role of counsel in felony cases. The U.S. Constitution reflected an early acceptance of the adversarial system and a rejection of the English common law prohibition on defense counsel. Randolph N. Jonakait studied the emergence of colonial-era defense bars. Jonakait described the expertise developed by criminal defense attorneys on substantive and procedural constitutional rights as an advantage for defendants. According to Jonakait, by the mid-eighteenth century, the acquittal rate for represented defendants in New Jersey was seventy-seven percent, while the acquittal rate for unrepresented defendants was merely eighteen percent. Jonakait found that by 1810 almost every defendant in New York exercised the right to representation by counsel. The mere presence of

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203 Id. at 18; see also J.C. McWhorter, Abolish the Jury, 29 W. VA. L. Q. & B. 97, 98 (1923) (opining that automobiles afforded criminals the ability to "play hide and seek" with law enforcement).

204 Warner & Cabot, supra note 176, at 590, 595.

205 McWhorter, supra note 203, at 97.

206 Id.

207 Miller, supra note 187, at 16-18. Miller described the creation of new laws that prohibited the manufacture and sale of liquor, regulated automobiles and securities, and governed the issuances of checks and other evidences of value. Id.; see also Warner & Cabot, supra note 176, at 585 (noting the increase in crimes committed and prosecuted).


209 See id. at 323, 327, 329, 331, 333.

210 See, e.g., id. at 333.

211 Id. at 330-31 (finding that mid-eighteenth century defendants in colonial New Jersey were roughly four times more likely to be acquitted if represented by counsel).

212 Id. at 332–33.
counsel did not mean that the adversarial system as we know it today was in operation during the nineteenth and early twentieth centuries. The point here is that by the height of the indeterminate era, the United States had developed a distinct adversarial system.

It should be noted that the expanded role of counsel in U.S. criminal cases also overlapped with the recognition of the Sixth Amendment's Counsel Clause as a fundamental felony sentencing right in state and federal courts. By the millennium, the Sixth Amendment's Criminal Jury Trial Clause would also be deemed applicable at felony sentencing. These developments provide grounds to reevaluate the current rejection of confrontation as a felony sentencing right, as such rejection occurred before the Sixth Amendment was interpreted to apply to criminal defendants in state courts.

Supreme Court decisions regarding the scope of Sixth Amendment rights at felony sentencing do not appear until the early twentieth century, when in *Johnson v. Zerbst* the Court turned its attention to the Counsel Clause. Without benefit of counsel, Johnson was charged, tried, convicted, and sentenced in federal district court. The Court ruled Johnson's conviction and sentence could not stand under the Sixth Amendment because he was not represented by and had not competently and intelligently waived counsel. In the decades after *Johnson*, due process became the

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213 *Id.* at 334.
215 *Berman*, *supra* note 14, at 391.
216 304 U.S. 458 (1938).
217 *Johnson*, 304 U.S. at 460.
218 *Id.* at 468. Much of the *Johnson* Court's reasoning focused on the significant role of counsel in felony cases. *Id.* at 462–67. The Counsel Clause was described as "one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty." *Id.* at 462. If counsel were unavailable, the right to be heard would mean little as defendants were in need of the "guiding hand of counsel at every step of the proceedings." *Id.* at 463. Counsel's purpose was to protect defendants from conviction and sentences that could result from their own ignorance of legal and constitutional rights. *Id.* at 465. Ten years later, the Court affirmed *Johnson* in *Townsend v. Burke*, 334 U.S. 736 (1948), but declined to hold that counsel was required in all cases. Instead, *Townsend* reasoned that the conviction and sentence were predicated on misinformation or a misreading of
vehicle through which the Sixth Amendment and virtually all Bill of Rights protections were interpreted to apply to criminal defendants in state courts. However, the Sixth Amendment was not incorporated in whole. Interpretations of what due process required varied between the Amendment's clauses, each of which had to be separately deemed fundamental or essential to a fair trial. Additionally, some clauses were deemed only to apply at the trial stage of the criminal prosecution, while others applied beyond the trial. With regard to sentencing rights, the Confrontation Clause provided the least protection (actually none). Long before incorporation, the Counsel Clause provided the broadest protection, and as held in Gideon v. Wainwright, was interpreted to apply at all critical stages of federal criminal prosecutions.

Johnson embodies the Court's case-by-case approach to whether the lack of counsel at state and federal sentencing hearings

court records that could have been prevented had counsel been provided. Id. at 741.

219 Berman, supra note 14, at 391.

220 See Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963) (holding that the Fourteenth Amendment Due Process Clause makes the Sixth Amendment right to counsel obligatory on the states); Pointer v. Texas, 380 U.S. 400, 406 (1965) (incorporating the Confrontation Clause); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating the Jury Trial Clause).

221 Chhablani, supra note 15, at 520–21 (discussing interpretations of the "criminal prosecution" as dependent on the procedural right at issue and advocating for a broad definition of the term).

222 See, e.g., Pointer, 380 U.S. at 404 (holding that the appearance of confrontation rights in the Sixth Amendment's text reflects the Framers' belief that "confrontation was a fundamental right essential to a fair trial in a criminal prosecution"); Duncan, 391 U.S. at 149 ("[W]e believe that trial by jury in criminal cases is fundamental to the U.S. scheme of justice . . .").

223 Mancusi v. Stubbs, 408 U.S. 204, 211 (1972) (holding that confrontation only applies to trials). See generally Michaels, supra note 175, at 1779–81 (comparing the Court's interpretation of "criminal prosecution" between the clauses of the Sixth Amendment itself and between the Fifth and Sixth Amendments).

224 Mempa v. Rhay, 389 U.S. 128, 134–36 (1967) (reasoning that Gideon did not enumerate the various stages in a criminal proceeding where the right to counsel applied and holding that counsel was required at every "critical stage" of the criminal prosecution, including sentencing and probation hearings).

225 See Gideon, 372 U.S. at 343–45.
THE VALUE OF CONFRONTATION

violated due process. After Johnson but before Gideon, the Court squarely rejected the trial-right-only theory of the Counsel Clause in Moore v. Michigan and held that counsel's representation was not confined only to the trial. After Gideon, Mempa v. Rhay applied the Counsel Clause to an array of post-conviction proceedings, including sentencing, appeals, and probation hearings.

Mempa remains the preeminent case discussing the application of the Counsel Clause at felony sentencing proceedings in state and federal courts. Mempa involved unrelated convictions of two defendants who pled guilty in Washington state court on the advice of counsel. Both defendants were sentenced to terms of imprisonment and released on probation under Washington's deferred sentencing statutes. Washington moved to have the probations revoked because both defendants allegedly committed other crimes after their initial release. Neither defendant was

226 See, e.g., Johnson, 304 U.S. at 468 ("[T]he Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence...") (emphasis added); see also Townsend, 334 U.S. at 739–41 (holding that due process does not allow a defendant to be sentenced on an untrue record, especially where the assistance of counsel could have prevented the court from proceeding on false assumptions).

227 355 U.S. 155 (1957). The Moore Court famously held that the Sixth Amendment's Counsel Clause was not confined to representation during the trial on the merits. Id. at 160–65.

228 Id. at 160. Moore was a seventeen-year-old African-American male who was charged with murdering an elderly Caucasian woman. Id. at 156. After confessing to the murder, Moore received a life sentence of solitary confinement and hard labor. Id. Moore's conviction and sentence were appealed based on Michigan's failure to provide Moore with the assistance of counsel during the plea and sentencing hearings. Id. Michigan argued that the trial judge's inquiry into the voluntariness of the plea fulfilled the state's constitutional duty. Id. at 158. The Court held that Moore fell within the class of cases in which the intervention of counsel was an essential element of a fair hearing. Id. at 159. The fact that Moore may have intelligently waived counsel was not outcome determinative. Id. at 161. The assistance of counsel was of such critical importance as to be an element of Due Process under the Fourteenth Amendment. Id.

229 Mempa, 389 U.S. at 134, 136.

230 Id. at 130.

231 Id. at 130–33.

232 Id.

233 Id.
provided with counsel at his probation revocation hearing.\textsuperscript{234} Both were re-incarcerated on the grounds of a probation violation.\textsuperscript{235} Both defendants filed habeas petitions and claimed violations of the Counsel Clause.\textsuperscript{236} The Court reversed the Supreme Court of Washington's denial of habeas relief.\textsuperscript{237}

Admittedly, \textit{Mempa} does not answer the question whether the Confrontation Clause applies at sentencing. But \textit{Mempa} ultimately rejected the trial-right-only theory of the Counsel Clause. \textit{Mempa} also acknowledged that post-trial proceedings could be of a critical nature in a criminal case.\textsuperscript{238} In doing so, the \textit{Mempa} Court was unpersuaded by arguments that the revocation hearing was a mere formality or that any violation of the Counsel Clause was remedied because defendants were provided with the assistance of counsel at the initial trial.\textsuperscript{239} Counsel was necessary at the revocation hearing for marshaling and proving the facts, introducing evidence, and generally aiding and assisting the defendants.\textsuperscript{240} Fundamentally, \textit{Mempa} affirmed \textit{Gideon}'s mandate of counsel at every stage of the "criminal prosecution" that implicated critical and fundamental procedural and substantive rights.

Shortly after \textit{Mempa}, scholars began to further question the lack of other procedural and substantive rules governing the sentencing hearings.\textsuperscript{241} The Honorable Marvin E. Frankel, widely considered

\textsuperscript{234} \textit{Id.}  
\textsuperscript{235} \textit{Mempa}, 389 U.S. at 130–33.  
\textsuperscript{236} \textit{Id.}  
\textsuperscript{237} \textit{Id.}  
\textsuperscript{238} \textit{Id.} The Court also noted that lower courts had already ruled that the Sixth Amendment Counsel Clause extended to sentencing in federal cases. \textit{Id.} at 134 n.4 (citing Martin v. United States, 182 F.2d 225 (5th Cir. 1950); McKinney v. United States, 208 F.2d 844 (D.C. Cir. 1953); Nunley v. United States, 283 F.2d 651 (10th Cir. 1960)).  
\textsuperscript{239} \textit{Mempa}, 389 U.S. at 135.  
\textsuperscript{240} \textit{Id.}  
the father of modern sentencing reform, lamented wide disparities in punishment, which he argued substantively "turned arbitrarily upon the variegated passions and prejudices of individual judges." Judge Frankel also noted the absence of procedural rules and the limited role of appellate courts, which had authority to review sentences only on rare or extraordinary grounds. Judge Frankel pondered whether the rehabilitative goals of indeterminate sentencing were necessary and realistic and noted that judges and probation officers rarely communicated about a defendant or their "treatment." Finally, Judge Frankel described the trial court's physical observations of the defendant as a minor and fleeting factor at best; at worst, overdrawn and overweighed judicial folklore.

Critique of the lack of procedural and substantive criminal sentencing rules would be partially addressed in In re Winship, Mullaney v. Wilbur, and Patterson v. New York. Winship dubbed the reasonable doubt standard a protectant of the presumption of innocence and established that every fact


244 Frankel, supra note 241, at 5, 7, 23–24 (arguing that indeterminate era sentences were unreviewable "if within the commonly extravagant bounds of the statute," unless there were "egregious departures from lawful criteria"); see also Saltzburg, supra note 241, at 243 (arguing that indeterminate era sentences were "largely uncontrolled by appellate review" regardless of whether imposed by a judge or by a jury).


246 Frankel, supra note 241, at 5, 10–12, 37–38 (describing the "poor performance record" of probation offices and questioning the common practice of separating questions of guilt from punishment).

247 Id. at 27.


251 Winship, 397 U.S. at 363.
necessary to constitute the charged offense\textsuperscript{252} must be proven beyond a reasonable doubt.\textsuperscript{253} Winship remained silent on how to determine which facts were necessary to prove the charge.\textsuperscript{254} A narrow approach was chosen in Mullaney, which only required

\textsuperscript{252} Id. at 358–59. Section 712 of the New York Family Court Act defined a juvenile delinquent as "a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." Id. at 359. Winship, a twelve-year-old male, and allegedly stole $112.00 from a woman's pocket book. Id. at 359–60. Section 744(b) of the New York Family Code required that "[a]ny determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did act or acts must be based on a preponderance of the evidence." Id. at 360. Winship received an eighteen-month sentence, which annually could be extended until his eighteenth birthday. Id. at 359–60. The Appellate Division of the New York Supreme Court affirmed without opinion. Id. at 360. See also \textit{In re Samuel W.}, 24 N.Y.2d 196, 197, 299 N.E. 2d 253 (1969). The New York Court of Appeals held that a lawyer's duty in a criminal case was to ensure acquittals, a reduction of charges, or the minimization of punishment. Id. at 199. In contrast, in a juvenile proceeding the lawyer's duty was to act in the best interest of the child. Id. Moreover, findings of guilt in juvenile adjudications were not convictions that affected substantive or procedural rights or privileges. Id. at 200. Additionally, juvenile convictions enjoyed the protective cover of confidentiality. Id. Winship's case involved no deprivation of due process because delinquency status was not a crime and juvenile proceedings were not criminal. Id. at 203. Equal protection arguments also failed based on this distinction between juvenile proceedings and adult criminal prosecutions. Id.

\textsuperscript{253} Winship, 397 U.S. at 364. Winship found that the requirement of guilt beyond a reasonable doubt dated at least to the founding and was long assumed to be constitutionally required in criminal cases. Id. at 360, 362 (citations omitted). But see id. at 377 (Black, J. dissenting) (doubting whether the Constitution demanded guilt by proof beyond a reasonable doubt). The Winship majority also found that at the time of the founding, guilt by proof beyond a reasonable doubt was required in both delinquency proceedings against juveniles and criminal proceedings against adults. Id. at 367–68. But see id. at 377 (Black, J. dissenting).

proof beyond a reasonable doubt of the "elements of the offense."\textsuperscript{255} Two years later, \textit{Patterson} excluded facts that establish affirmative defenses from the category of those that must be proved beyond a reasonable doubt.\textsuperscript{256}

Less than a decade after \textit{Winship}, \textit{Mullaney}, and \textit{Patterson}, the federal government and the states heeded calls for less judicial discretion at criminal sentencing and established structured rules that provided tougher appellate review of sentences.\textsuperscript{257} The Sentencing Reform Act\textsuperscript{258} ("the SRA") was passed in 1984 and would provide the blueprint for felony sentencing in federal courts. The SRA created the United States Sentencing Commission ("the Commission"), which was tasked with drafting the U.S. Sentencing Guidelines ("the Guidelines").\textsuperscript{259} The Guidelines rejected

\textsuperscript{255} \textit{Mullaney v. Wilbur}, 421 U.S. 684 (1975). The \textit{Mullaney} Court interpreted a Maine law that defined murder as an unlawful killing with malice aforethought, which was presumed. \textit{Id.} at 686 n.3 (quoting ME. REV. STAT. ANN. TIT. 17, 2651 (West 1964)). A killing without malice aforethought was manslaughter. \textit{Id.} Maine argued that defendants should have the burden to prove heat of passion, which would qualify the killing as manslaughter. \textit{Id.} at 699. The Court reasoned that \textit{Winship} was not limited to "elements" as defined by state law. \textit{Id.} Accordingly, the prosecution has the burden to prove heat of passion beyond a reasonable doubt. \textit{Id.}

\textsuperscript{256} \textit{Patterson}, 432 U.S. at 205–08. \textit{Patterson} distinguished between affirmative defenses and statutory elements on the basis that affirmative defenses did not allow the state to presume or infer any fact against a defendant. \textit{Id.} See also Nelson E. Roth et al., \textit{The Felony-Murder Rule: A Doctrine at Constitutional Crossroads}, 70 CORNELL L. REV. 446, 462–63 (1985). Roth characterized the tension between \textit{Mullaney} and \textit{Patterson} as "a dispute over how to delineate the limits of a state's power to define the 'essential facts of a crime.'" \textit{Id.} Michaels extends that reasoning to hypothesize that the constitutional presumption of innocence did not apply at sentencing. Michaels, supra note 175, at 1778. \textit{See generally} Mark D. Knoll et al., \textit{Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania}, 22 SEATTLE U. L. REV. 1057, 1081 (1999) ("\textit{Patterson} opened the door for creative legislatures to evade the fundamental protections afforded in \textit{Winship} by carefully drafting their statutes.").

\textsuperscript{257} Berman, supra note 14, at 394; Frankel, supra note 241, at 54.


\textsuperscript{259} Stephen Breyer, \textit{The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest}, 17 HOFSTRA L. REV. 1, 4–5 (1988); see also Saltzburg, supra note 241, at n.2 (citations omitted).
rehabilitation as the central principle for sentencing and expressly called for sentences the provided "just punishment."260 The Guidelines calculated punishment by assigning points to specific facts261 about the offender and the offense.262 The Guidelines were mandatory; sentencing courts were required to explain the basis for departures from the applicable range of punishment263 and appellate courts were granted increased authority to review sentences.264

Structured sentencing rules were tested in McMillan v. Pennsylvania,265 which challenged Pennsylvania's Mandatory Minimum Sentencing Act ("the Act").266 The Act imposed a minimum sentence of five years for offenses committed while in "visible possession" of a firearm.267 In making this finding, the Act permitted sentencing judges to consider evidence already introduced at trial as well as evidence produced for the first time at sentencing.268 If the firearm enhancement was proven by a preponderance of the evidence, the Act divested sentencing judges of discretion to impose a sentence of less than five years.269 Presumably, sentences in excess of the statutory maximum also were not authorized.270 Four Pennsylvania sentencing judges refused to apply the firearm enhancement because it did not allow the jury to evaluate visible possession.271

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260 Berman, supra note 245, at 280; see also Kyron Huigens, Solving the Williams Puzzle, 105 COLUM. L. REV. 1048, 1052 (2005) (discussing policy arguments for discretionary and guidelines sentencing).
261 Breyer, supra note 259, at 7–8. Categories and sentence length were determined by an analysis of 10,000 actual cases. Id. at 7. See also Becker, supra note 12, at 158.
262 Breyer, supra note 259, at 5. See also Bascuas, supra note 176, at 8–9 (discussing guidelines methodology) and Becker, supra note 12, at 158 (same).
264 Breyer, supra note 259, at 5–6; see Bascuas, supra note 176, at 28 (discussing standard of review under federal guidelines).
266 Breyer, supra note 259, at 3; Berman, supra note 14, at 394.
267 McMillan, 477 U.S. at 80.
268 Id.
269 Id.
270 Id.
271 Id. at 82–84.
coined the term "sentencing enhancement," which was distinguishable from an "offense element," and held that state legislatures had authority to designate certain facts as "enhancements." McMillan established the element/enhancement distinction as the constitutional limit to legislative authority, but allowed state legislatures to designate which facts were elements or enhancements.

By the millennium, Jones v. United States limited McMillan to require Congress and state legislatures to include traditional elements in the definition of crimes. The next year, in Castillo v. United States, the Court appeared to provide a framework to distinguish between "traditional elements" and sentencing

272 *Apprendi*, 530 U.S. at 500 (Thomas, J., concurring) (describing sentencing enhancements as a special fact spawn by *McMillan*); *Knoll*, supra note 256, at 1058 (describing *McMillan* as birthing the "sentencing factor."). *See also* *Fisher*, supra note 6, at 62 (defining a sentencing factor as a fact which the legislature deems should increase a defendant's sentence).

273 *McMillan*, 477 U.S. at 85–86. According to the *McMillan* majority, Pennsylvania did not disregard the presumption of innocence. *Id*. at 86–87. Pennsylvania in fact created no presumptions. *Id*. Nor did Pennsylvania relieve the prosecution of its burden of proof, alter the maximum penalty for the crime committed, or create a separate offense calling for a separate penalty. *Id*. at 87–88. Finally, Pennsylvania retained the definition of any existing offense. *Id*. at 88–90. *See also* *Bibas*, supra note 254, at 1106 (detailing factors supporting the *Apprendi* Court's finding that the sentencing enhancements were unconstitutional).


275 *Id*. at 85 (quoting *Patterson*, 432 U.S. at 201–02) (holding that states normally have authority to regulate procedures, including the burdens of production and persuasion). *See also* *Berman*, supra note 14, at 399.


277 *Id*. at 231–44. *Jones* held section 2119 defined three separate offenses and that each must be proved beyond a reasonable doubt. *Id*. at 231–39. The Court noted that its holding was not a matter of constitutional law, but of statutory interpretation. *Id*. at 252 n.11. *See also* Andrew Levine, The Confounding Boundaries of 'Apprendi Land': Statutory Minimums and the Federal Sentencing Guidelines, 29 AM. J. CRIM. L. 377, 398 (2002).

Castillo was indicted for conspiring to murder federal officers in violation of 18 U.S.C. § 924(c)(1), which prohibited the use or carrying of a "firearm" in relation to a crime of violence. Penalties increased dramatically when the firearm was a "machine gun." The Castillo Court held that the "machine gun" finding constituted an element of a separate offense, despite Congress's designation of firearm type a sentencing enhancement.

Jones and Castillo did little to calm the escalating tension between the Jury Trial Clause and McMillan's broad grant of legislative authority to choose between elements and enhancements. The debate focused on procedural and substantive characteristics of felony sentencing at the time of the founding. Additionally, a slight majority of the Court had come to believe Douglass's hypothesis that in the pre-founding era, a pre-determined sentence resulted once the jury found guilt. This majority also believed

\[\text{Id. at 124-31.}\]
\[\text{Id. at 122.}\]
\[\text{Id. at 121.}\]
\[\text{Id. at 124.}\]

The Castillo Court made five specific findings to support its holding that the type of firearm was an offense element rather than a sentencing enhancement. First, the statute listed the basic offense elements in the first sentence and the sentencing enhancements in the remaining subsequent sentences. Second, the type of firearm had not typically or traditionally been a sentencing factor because it neither involved characteristics of the offender nor special features the offense. Third, to ask a jury, rather than the judge, to determine the type of firearm would rarely complicate trial or result in unfairness. Fourth, the legislative history did not support interpreting section 924(c) as setting forth sentencing factors. Finally, the twenty-five year increase attached to the machine gun finding was extreme. Id. at 131.

See generally Donald A. Dripps, The Constitutional Status of Reasonable Doubt Rule, 75 CALIF. L. REV. 1665, 1701 (1987); Herman, supra note 71, at 323-25, 328, 344; Knoll, supra note 256, at 1061-62, 1067-68, 1078-79 (discussing the historical distinction between an offense and its elements, as well as elements and enhancements).


White, supra note 138, at 396 (describing modern day trials as bifurcated processes whereby a jury determined guilt or innocence and the judge determined punishment); Douglass, supra note 135, at 1968 (describing trials as a highly structured and elaborate body of precedent defining substantive rights and
the Sixth Amendment's text and structure reflected pre-founding determinate "jury sentencing" in felony cases.288

On the day Castillo ruled firearm type an element under section 924(c), Apprendi v. New Jersey overturned a sentence that was also based, in part, on post-verdict judicial fact-finding.289 Apprendi was convicted under a New Jersey statute that classified unlawful possession of a firearm a second-degree offense.290 Punishment ranged between five and ten years.291 Under a separate statute, New Jersey extended the term of imprisonment for possession of a firearm while committing a racially motivated crime.292 The racial motive or "hate crime" enhancement only need be proved to a sentencing judge by a preponderance of the evidence and increased punishment to a range of ten to twenty years.293 Apprendi pled guilty to the firearm violation and was never charged with any type of hate crime.294 The sentencing judge imposed a twelve-year sentence based on the finding that Apprendi's acts were racially motivated.295 The Supreme Court of New Jersey, relying on McMillan, affirmed and held that a finding on motivation was nothing more than a traditional sentencing enhancement.296

The Apprendi Court qualified McMillan's longstanding deference to legislative choice between elements and enhancements. Apprendi reasoned that the right to a jury determination of guilt beyond a reasonable doubt of every element of the crime was a

describing sentencing as informal, free-flowing, and applying few hard rules). According to Douglass, "few 'trial rights' survive intact after a guilty verdict." Id.

Hessick & Hessick, supra note 164, at 51 (noting that founding era sentencing schemes "presented no occasion to consider the extent to which constitutional protections should be treated differently at sentencing than at trial"); but see Fenner, supra note 26 at 37; see also King & Klein, supra note 165, at 1507–08.

Apprendi, 530 U.S. at 468–90; see also Michaels, supra note 175, at 1814 n.180 (citation omitted).

Apprendi, 530 U.S. at 468.
id. at 468.

Id. at 468–69.
id.

Id. at 469.
id.

Apprendi, 530 U.S. at 471–74.
historical foundation of the common law. Reflecting on criminal prosecutions at the time of the founding, the Court found that little judicial discretion existed to alter punishment because criminal laws were sanction-specific. Additionally, guilt and punishment were invariably linked, and there was no distinction between an element and an enhancement. In the Court's view, even though the practice of unitary trial and sentencing may have changed, "modern courts must still adhere to these basic principles."

Apprendi also found that because the jury trial right was one of surpassing importance in the common law, there was no "principled basis for treating [enhancements and elements] differently." Guilt beyond a reasonable doubt was designated a historically significant companion right to a jury verdict. Both reflected "a profound judgment about the way in which law should be enforced and justice administered." Apprendi limited McMillan to the extent that designating certain facts elements rather than enhancements could thwart Winship. To combat circumvention of Winship, Apprendi embraced a principle foreshadowed a year earlier in Jones: "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." By its terms, Apprendi

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297 Id. at 477 (citing 4 BLACKSTONE, supra note 130, at *343).
298 Id. at 479 (citations omitted).
299 Id. at 485.
300 Id. at 483–84 (emphasis added); but see id. at 518 (Thomas, J., concurring) (describing Apprendi as a return to the status quo and a reflection of the Sixth Amendment's original meaning, rather than a sharp break from the past).
301 Id. at 476. (majority opinion)
302 Apprendi, 530 U.S. at 476.
303 Id. at 478.
304 Id.
305 Id. at 485; see also Knoll, supra note 256, at 1114 ("Winship lives again").
306 Apprendi, 530 U.S. at 484–86 & 487 n.13 (noting the unconstitutionality of a legislature's removal from the purview of the jury "the assessment of facts that increase the prescribed range of penalties"); see also Fisher, supra note 6, at 56 (describing the firearm enhancement as a classic example of an aggravated crime and characterizing Apprendi as a very easy case).
307 See Jones, 526 U.S. at 243 n.6.
308 Apprendi, 530 U.S. at 476 (citation omitted); see also Knoll, supra note 256, at 1114 (hypothesizing that Jones adopted a Sixth Amendment constitutional
applied only when post-verdict judicial fact-finding involved imposition of a sentence more severe than the statutory maximum.\(^{309}\) Without reference to \textit{Castillo, Apprendi} ruled that motivation required a jury determination of guilt beyond a reasonable doubt.\(^{310}\)

A broad reading of \textit{Apprendi} seemed to require a jury determination of all facts that increase the punishment, which would fundamentally implicate structured sentencing schemes like the Guidelines. At least one member of the \textit{Apprendi} majority rejected this view; one dissenter predicted the threat.\(^{311}\) Arguments that \textit{McMillian} authorized legislatures, not sentencing commissions, to choose between elements and enhancements strengthened after \textit{Apprendi}.\(^{312}\) The Guidelines and other structured sentencing schemes were alleged to have confined judicial discretion too

\(^{309}\) \textit{Apprendi}, 530 U.S. at 487 n.13. See also Levine, supra note 277, at 405.

\(^{310}\) \textit{Apprendi}, 530 U.S. at 475–76 ("The question whether [Mr.] Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.") (emphasis added).

\(^{311}\) Compare \textit{Apprendi}, 530 U.S. at 523 n.11 & 13 (Thomas, J., concurring), with id. at 552 (O'Connor, J., dissenting). See also Alex Ricciardulli, \textit{The U.S. Supreme Court's Surprise Ruling on Sentence Enhancements}, 23 Los Angeles Lawyer 15, 15 (2000). Ricciardulli characterized \textit{Apprendi} as a big a case that received little attention. \textit{Id.} Ricciardulli also predicted that the Guidelines did not implicate \textit{Apprendi} unless a sentence greater than the maximum authorized by statute was imposed. \textit{Id.} Ricciardulli explained that laws that merely allowed increases in punishment within the statutory range fell within \textit{Apprendi}'s limiting principle. \textit{Id.} at 16. "Laws that allow increases beyond the range, on the other hand, are in trouble." \textit{Id.} See also Herman, supra note 71, at 296–97, 336–37 (questioning the applicability of \textit{McMillan} to the issue of the constitutionality of the Guidelines).

\(^{312}\) \textit{Id.}
greatly, which in turn lead to increased prosecutorial authority and harsher punishment. \textit{Apprendi} supported arguments that structured sentencing was a "trial-like enterprise" and that \textit{McMillian}'s elements/enhancement distinction violated the Jury Trial Clause. Notable critic of structured sentencing, Professor Douglas Berman, argued that the Guidelines failed to provide comprehensive substantive and procedural constitutional protections.


Saltzburg, \textit{supra} note 241, at 248, 251 & n.19; see also Albert W. Alschuler, \textit{The Failure of Sentencing Guidelines: A Plea for Less Aggregation}, 58 U. CHI. L. REV. 901, 926 (1991) (discussing increased prosecutorial discretion within the federal sentencing guidelines); Bradford C. Mank, \textit{Rewarding Defendant Cooperation Under the Federal Sentencing Guidelines: Judges vs. Prosecutors}, 26 CRIM. L. BULL. 399, 402–04 (1990) (discussing issues related to increased prosecutorial discretion within the federal sentencing guidelines); Bascuas, \textit{supra} note 176, at 12–13 (discussing the role of the probation officer within the federal sentencing guidelines as one that shifted from social worker to range compotator). Bascuas also discusses the presentence report's transformation from an instrument of potential mercy and mitigation to an instrument of inquisition and punishment. \textit{Id.}


Barkow, \textit{supra} note 263, at 109–12 (arguing that the factual determinations required by the federal sentencing guidelines were traditionally made by juries); Berman, \textit{supra} note 245, at 286 (arguing that guidelines sentencing schemes "changed the landscape" to fixing punishment to such an extent that Sixth Amendment principles were implicated).

Berman, \textit{supra} note 245, at 659–60, 672 (exploring the federal sentencing guidelines and their lack of procedural and substantive limitations). \textit{See also} Stith
Notwithstanding critique of the Guidelines by Berman and others, a plurality of the Court affirmed McMillan's elements/enhancements distinction in *Harris v. United States.* Harris involved whether 18 U.S.C. § 924(c) defined a single crime, to which brandishing is a sentencing factor that may be considered by a judge after the trial, or multiple crimes, to which brandishing is an essential element that must be proved to a jury. In its indictment, the prosecution neither alleged brandishing nor referenced the subsection of the code that specifically mentioned brandishing. Instead, the indictment charged that Harris knowingly carried a firearm during and in relation to a drug trafficking crime. Harris was sentenced to seven years based on the finding at the sentencing hearing that he brandished a firearm. The Fourth Circuit ruled brandishing a sentencing factor, et al., *supra* note 270, at 154; Herman, *supra* note 71, at 315; Thomas W. Hutchinson et al., *Federal Sentencing Law and Practice* § 6A1.3 (1998).


*Id.* at 549–50. Section 924(c) provided in relevant part:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

*Id.*

551.

*Id.*

*Id.*

*Id.*
as had every other federal circuit court to address the question.\textsuperscript{325} The plurality agreed.\textsuperscript{326} 

\textit{Harris} grounded itself on \textit{Mcmillan}'s broad grant of legislative authority to determine which facts are offense elements and which facts are sentencing enhancements.\textsuperscript{327} The plurality acknowledged that section 924(c)(1)(A) did not explicitly designate brandishing an element or sentencing factor, but offered two competing interpretations of the statute. One, that section 924(c)(1)(A) is structured like most federal statutes, which list the offense elements in a single sentence and the separate sentencing factors into subsections.\textsuperscript{328} Or two, section 924(c)(1)(A) is a statute that appears to list all offense elements in a single sentence, but nevertheless should be interpreted as setting out the elements of multiple offenses.\textsuperscript{329} The plurality identified two "critical textual clues" to distinguish between its two interpretations. First, historically Congress had not treated brandishing as an offense element.\textsuperscript{330} Second, the two-year increase for brandishing was insignificant.\textsuperscript{331} 

\textit{Harris} also distinguished between \textit{Mcmillan}-type facts that increase the mandatory minimum sentence and \textit{Apprendi}-type facts that increase the mandatory maximum sentence.\textsuperscript{332} The plurality denied there was a fundamental inconsistency between \textit{Apprendi} and \textit{Mcmillan}. The Framers would have considered an \textit{Apprendi} fact an element of an aggravated offense and thus the domain of the jury.\textsuperscript{333} Facts that trigger a mandatory minimum sentence, like that at issue in \textit{Mcmillan} and \textit{Harris}, cannot make the same claim

\textsuperscript{325} \textit{Harris}, 536 U.S. at 552–53 (designating brandishing a sentencing factor).  
\textsuperscript{326} \textit{Id.} at 552–53.  
\textsuperscript{327} \textit{Id.} at 552–56.  
\textsuperscript{328} \textit{Id.} at 552–53.  
\textsuperscript{329} \textit{Id.} at 553–54.  
\textsuperscript{330} \textit{Id.}  
\textsuperscript{331} \textit{Id.} at 554–55. The \textit{Harris} plurality described the two-year increase as "consistent with traditional understandings about how sentencing factors operate" and "precisely what one would expect" when designating matters for a sentencing judge's consideration when fixing punishment. \textit{Id.} at 554.  
\textsuperscript{332} \textit{Id.} at 557–58.  
\textsuperscript{333} \textit{Harris}, 536 U.S. at 557.
because the jury's verdict would have authorized imposition of the minimum punishment with or without the finding.\textsuperscript{334} Judicial fact-finding in the course of selecting a sentence outside the authorized maximum range implicates the Sixth Amendment.\textsuperscript{335} As even \textit{Apprendi} acknowledges (albeit in a footnote), only increases in the penalty above what the law provides function like traditional elements.\textsuperscript{336} Thus, only "those facts setting the outer limits of a sentence . . . are the elements of the crime for the purposes of the constitutional analysis."\textsuperscript{337}

Despite \textit{Harris}, the Court declared \textit{Apprendi} applied more broadly to state and federal sentencing guidelines in \textit{Blakely v. Washington}. The \textit{Blakely} Court invalidated a thirty-seven month enhancement for "deliberate cruelty" on the grounds that the determination was not made by a jury.\textsuperscript{338} The next year, the Court

\footnotesize{\textsuperscript{334} Id.\\
\textsuperscript{335} Id. at 558.\\
\textsuperscript{336} Id. at 562–64 (citing \textit{Apprendi}, 530 U.S. at 487, n.13 ("We do not overrule \textit{McMillan}. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict").)\\
\textsuperscript{337} Id. at 567.\\
\textsuperscript{338} 542 U.S. 296 (2004). Washington's sentencing guidelines permitted departures from the minimum guidelines range in an amount up to the maximum guidelines range if the sentencing judge found appropriate mitigating or aggravating circumstances by a preponderance. \textit{Id.} at 298. \textit{See also} Kevin R. Reitz, \textit{The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes}, 105 COLUM. L. REV. 1082, 1089 (2005) (citation omitted). The sentencing judge was required to justify any departure writing and any enhancement must be found by a preponderance of the evidence. \textit{Blakely}, 542 U.S. at 298–99. The \textit{Blakely} Court reasoned that the relevant 'statutory maximum' for \textit{Apprendi} purposes was not the maximum sentence after the additional facts, but the maximum sentencing without the additional facts. \textit{Id.} at 303. Such additional facts must be found by a jury because they were essential to punishment. \textit{Id.} \textit{Blakely} expressly declined to determine whether its reasoning extended to the federal sentencing guidelines. \textit{Id.} at 305 n.9, 313 (the federal sentencing guidelines "are not before us, and we express no opinion on them."); see generally Stephanos Bibas & Susan Klein, \textit{The Sixth Amendment and Criminal Sentencing}, 30 CARDOZO L. REV. 775, 785 (2008) (discussing state sentencing models and finding that twenty-nine were unaffected by \textit{Blakely} or \textit{Booker}); Fisher, \textit{supra} note 6, at 56–57 (discussing the \textit{Blakely} Court's reasoning that Washington's sentencing guidelines undermined the framers' design); Reitz,
considered whether the Guidelines were unconstitutional. In United States v. Booker, and its companion case United States v. Fanfan, defendants received sentencing enhancements in federal court based on amounts of drugs, role in the offense, and obstruction of justice. In separate majority opinions, the Booker Court ruled the Guidelines violated the Apprendi rule, but not fatally so. The first Booker majority concluded that a jury determination of facts that raised the sentencing ceiling was constitutionally protected as a firmly rooted basic precept of the common law. This majority held that for Sixth Amendment purposes, mandatory guidelines implicated the Jury Trial Clause but advisory guidelines did not. The first Booker majority agreed with Blakely that the statutory maximum for Apprendi purposes was "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." The Guidelines violated the Jury Trial Clause to the extent that judicial fact-finding at sentencing hearings was required. The second Booker majority focused on whether the Guidelines could be remedied. Exercising its power of severability, the Court ruled

supra note 337, at 1086; Klein, supra note 314, at 709–12; Berman, supra note 245, at 674.


340 At sentencing, Booker received an enhancement for obstruction of justice and an enhancement for possession of an additional 566 grams of crack. Booker, 543 U.S. at 226–28. Fanfan's jury found 500 or more grams of cocaine were involved, but the sentencing court found Fanfan responsible for 2.5 kilograms of cocaine powder and 261.6 grams of crack. Id. at 543 U.S. at 228–29. The sentencing judge also found that Fanfan played a leadership role in the criminal activity for which he was convicted. Id.

341 Booker, 543 U.S. at 244–45, 258–62; see also Timothy Lynch, One Cheer for United States v. Booker, 2005 CATO SUP. CT. REV. 215, 215 (2005) (describing the Booker oral argument as a direct reflection of the Court's reticence to "untangle the knots" that existed between McMillan and Apprendi's interpretations of the criminal jury trial right).

342 Booker, 543 U.S. at 230.

343 Id. at 233 (reasoning that advisory sentencing guidelines implicated no Sixth Amendment principles).

344 Id. at 233 (reasoning that discretionary sentencing authority did not require a jury determination of the facts relevant to punishment).

345 Id. at 232 (quoting Blakely, 542 U.S. at 303).

346 Id. at 244–45.
that the mandatory nature of the Guidelines made them incompatible with the federal constitution.\textsuperscript{347} Advisory guidelines and a reasonableness standard of appellate review cured these incompatibilities.\textsuperscript{348}

In 2013, the Court reconsidered the \textit{Harris} plurality's distinction between mandatory \textit{minimum} and \textit{maximum} sentences in \textit{Alleyne v. United States}.\textsuperscript{349} \textit{Alleyne} involved the same federal criminal statute as that at issue in \textit{Harris} and asked the same question as \textit{Harris}: whether brandishing was an essential element or a sentencing enhancement.\textsuperscript{350} Unlike Harris, Alleyne was charged with brandishing a firearm.\textsuperscript{351} However, the jury did not find Alleyne guilty of that offense.\textsuperscript{352} At sentencing, the district court imposed the mandatory minimum sentence of seven years based on the finding that by a preponderance of the evidence brandishing occurred.\textsuperscript{353} The \textit{Alleyne} Court ruled that \textit{Apprendi} encompassed "not only facts that increase the ceiling, but . . . those that increase the floor."\textsuperscript{354}

\textsuperscript{347} \textit{Id}. at 258.
\textsuperscript{348} \textit{Booker}, 543 U.S. at 261–63. The \textit{Apprendi} rule was reinforced in \textit{Southern Union Co. v. United States}, 132 S. Ct. 2344 (2012), when the Court extended the Sixth Amendment Jury Trial Clause to criminal fines. \textit{Id}. at 2348–49. \textit{Southern Union Co.} involved the imposition of a $38.1 million fine under the Resource Conservation and Recovery Act of 1976 ("RCRA"), which set a maximum fine of $50,000 per day of violation. \textit{Id}. The trial jury was not asked to determine the precise duration of the violation. \textit{Id}. at 2349. At the sentencing, the district court found that Southern Union Co. violated RCRA for 762 days. \textit{Id}. The circuit court ruled \textit{Apprendi} applicable to criminal fines, creating a split among the circuits. \textit{Id}. (citing United States v. Pfaff, 619 F.3d 172 (2d Cir. 2010) (per curiam) and United States v. LaGrou Distribution Sys., Inc., 466 F.3d 585 (7th Cir. 2006)). The Court held that longstanding common-law practice would not permit treating criminal fines differently than other forms of punishment. \textit{Id}. at 2350–57.
\textsuperscript{349} \textit{Alleyne}, 133 S. Ct. at 2155.
\textsuperscript{350} \textit{Id}.
\textsuperscript{351} \textit{Id}.
\textsuperscript{352} \textit{Id}.
\textsuperscript{353} \textit{Id}. at 2156.
\textsuperscript{354} \textit{Id}. at 2158.
Alleyne is premised on the "clear" relationship at common law between crime and punishment. Additionally, in the common law a particular sentence was prescribed for a particular offense. Alleyne reasoned that at common law the "legally prescribed" penalty affixed to the crime included both ends of the punishment range. Any fact that triggered both the mandatory (or statutory) maximum and minimum sentence were "ingredients" of that offense. Alleyne recognized that elevating the low-end or "floor" of a sentencing range heightened "the loss of liberty associated with the crime" and was as relevant as the high-end or "ceiling." Apprendi's foundation was to ensure that a defendant can predict the penalty from the face of the indictment, which was a significant return to founding-era practice. In the Alleyne Court's view, expanding Apprendi to include facts necessary to increase the mandatory minimum sentence allows a defendant to do so.

Alleyne also acknowledged judicial fact-finding at felony sentencing as a post-founding development. At the time of the founding, little judicial discretion existed to influence felony punishment. Offense conduct that merited punishment was determined during the trial and sentencing only consisted of announcing the judgment. Modern bifurcation of the trial and sentencing stages of the criminal prosecution has shifted fact-finding on offense conduct (and to a lesser extent offender characteristics) into a structured sentencing hearing. Once guilt is accepted (either as a result of a trial or a plea), sentencing becomes the focus of all parties. Mempa establishes felony sentencing as a critical stage of the criminal prosecution for which counsel is necessary. Apprendi and its progeny, as most recently demonstrated

355 Alleyne, 133 S. Ct. at 2158.
357 Alleyne, 133 S. Ct. at 2160.
358 Id. at 2160–61.
359 Id. at 2161.
360 Id.
361 Id.
362 Id. at 2163–64.
in *Alleyne*, establish that the jury's fact-finding role also extends beyond the trial stage of the criminal prosecution.

Despite *Apprendi* and *Alleyne*, the Sixth Amendment's structurally identical Counsel, Jury Trial, and Confrontation Clauses are interpreted differently with regards to their application at felony sentencing. The rejection of confrontation as a felony sentencing right continues to rest on the *Williams* Court's reasoning that "both before and since the U.S. colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." This Article advocates acceptance of the Confrontation Clause as a felony sentencing right. This Article urges state and federal courts to allow cross-examination of testimonial statements that are material to punishment and where cross-examination assists in assessing truth and veracity. In the next part, this Article offers a framework for recognition of confrontation rights at felony sentencing.

III. THE VALUE OF CONFRONTATION AS A FELONY SENTENCING RIGHT

As demonstrated in *Williams*, many states and the federal government once adopted highly discretionary felony sentencing procedures that adhered to "an emerging penology that focused

\[363\] *Williams*, 337 U.S. at 246.

\[364\] See Berman, *supra* note 245, at 654. Berman describes a "rehabilitative medical model" that was "conceived and discussed in medical terms—"with offenders described as 'sick' and punishments aspiring to 'cure the patient.""](Id. (citing J.L. MILLER ET AL., SENTENCING REFORM: A REVIEW AND ANNOTATED BIBLIOGRAPHY 1–6 (1981))). In this scheme, sentencing judges and parole officers were administrative decision makers who crafted individualized sentences "almost like a doctor or social worker exercising clinical judgment." Berman, *supra* note 245, at 655 (citing United States v. Mueffelman, 327 F. Supp. 2d 79, 83 (D. Mass. 2004)). See also Douglass, *supra* note 135, at 2018 n.295 (describing individualized punishment as reflective of a "scientific view that crime was a form of sickness that might be cured with proper treatment of an individual"); SANDRA SHANE-DUBOW ET AL., U.S. DEPT OF JUSTICE,
on [individualized] punishment."\textsuperscript{365} Williams established that at the height of the indeterminate era, sentencing courts had almost absolute discretion to increase or decrease punishment within given statutory ranges.\textsuperscript{366} McMurray contends that in the Williams era, judicial discretion was curbed only by the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment.\textsuperscript{367} Unlike in the determinate era, where judges in felony cases rarely engaged in post-verdict fact-finding to fix punishment,\textsuperscript{368} indeterminate era judges imposed sentences based on judge-found facts and rarely sought guidance from the jury.\textsuperscript{369}

As demonstrated in Apprendi, by the millennium, felony sentencing in state and federal courts shifted to a structured model that imposed maximum and minimum punishment by assigning

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\textsuperscript{365} Douglass, supra note 135, at 2018 (citing BANNER, supra note 373, at 102–03).

\textsuperscript{366} Hessick & Hessick, supra note 164, at 52. Hessick and Hessick hypothesize that discretionary sentencing schemes were originally premised on the goal of rehabilitation. Id. A sentencing judge's assessment relied on specific sentencing characteristics that would cure the criminal defendant's "lawbreaking ways." Id. Sentencing characteristics included the defendant's age, prior criminal history, employment history, family ties, educational level, military service, and charitable activities. Id.

\textsuperscript{367} McMurray, supra note 141, at 592.

\textsuperscript{368} McMurray, supra note 141, at 592 (noting that confrontation at sentencing was irrelevant under the determinate model because there was no fact-finding at the time the sentence was announced and thus, no witnesses to confront). Blackstone reported that for the most part punishment was "fixed and determinate." 4 WILLIAM BLACKSTONE, supra note 130, at *371. Only in exceptional cases did determinate era sentencing judges exercise discretion to impose fines and determine the length of imprisonment. Id. See also Michaels, supra note 175, at 1814–25, 1825 n.180.

\textsuperscript{369} Klein, supra note 314, at 697; Professor Jenia Iontcheva has extensively explore jury sentencing and has found that by 1796 only one state sentenced by jury, that by 1919 only fourteen states sentenced by jury, and that by 2003 only six states sentenced by jury. Iontcheva, supra note 175, at 354. But see Douglass, supra note 135, at 2013–14 (describing the widespread practice of jury sentencing in capital cases during the U.S. colonial era).
points to specific facts about the offender and the offense. Apprendi held that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This Article questions whether the right to a criminal jury trial is fully effective if counsel is unable to use the best method of challenging the veracity of the evidence presented to a jury.

Apprendi warned that modern courts must adhere to constitutional principles even though the practice of unitary trial and sentencing may have changed. Alleyne provided a timely reminder of the interrelatedness of the Sixth Amendment's Counsel, Jury, and Confrontation Clauses. The Guidelines allowed reconsideration of Alleyne's acquitted conduct, specifically the brandishing charge, as a category of "relevant conduct." As a result, the prosecution was allowed to re-allege brandishing as an "enhancement" and prove it by a lower burden. Alleyne was punished as if the jury actually found brandishing. Alleyne's vigorous (and successful) defense of the brandishing "element" was

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370 Breyer, supra note 259, at 7–8. In the federal sentencing guidelines, the categories of offenses and sentence lengths were determined by an analysis of 10,000 actual cases. Id. at 7. See also Becker, supra note 12, at 158.

371 Breyer, supra note 259, at 5. See also Bascuas, supra note 176, at 8–9 (discussing guidelines methodology); Becker, supra note 12, at 158 (same).

372 Apprendi, 530 U.S. at 476 (citation omitted); see also Knoll, supra note 256, at 1114.

373 Apprendi, 530 U.S. at 483–84 (emphasis added).

374 Ngov, supra note 9, at 267 (citing 18 U.S.C. § 3661 (2006)).

375 Ngov, supra note 9, at 258–60 nn. 142–50, 242, 284 & 287 (discussing the impact of acquitted conduct on subsequent proceedings, including probation and revocation hearings). The Court has addressed the use of acquitted conduct as a basis for punishment in a pre-Crawford per curiam opinion that held use of such information did not violate the Double Jeopardy Clause. See generally United States v. Watts, 519 U.S. 148, 155 (1997) (per curium) ("[A]n acquittal is not a finding of any fact."). Ngov argues that even if acquittals do not prove actual innocence, reconsideration of acquitted conduct is inherently unfair. Ngov, supra note 9, at 242 (citing Barry L. Johnson, If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing, 75 N.C. L. REV. 153, 182–83 (1996)).
essentially rendered meaningless.\textsuperscript{376} For the \textit{Alleyne} Court, the inherent unfairness of these procedures was no trivial matter and from a sentencing perspective was quite troubling.\textsuperscript{377} So too was that fact that defense counsel was not allowed use of the most effective tools to re-defend the brandishing allegation, namely cross-examination of the testimonial statements that supported the post-trial "finding" that brandishing occurred.

\textit{Crawford}'s return to founding-era principles on the issue of the meaning and scope of the Sixth Amendment's Confrontation Clause is more than just a cosmetic incarnation; rather, it is a recognition of the fundamental importance and value of the right. In this respect, \textit{Crawford} and \textit{Davis} provide a workable framework for the application of confrontation at felony sentencing. In the same way the Confrontation Clause was intended to prohibit ex-parte examinations as evidence against the accused at trial,\textsuperscript{378} so too should the Confrontation Clause prohibit ex-parte examinations as evidence against the accused at sentencing. Moreover, just as the Confrontation Clause intended to prevent un-cross-examined testimonial statements of absent witnesses at trial,\textsuperscript{379} so too should the Confrontation Clause prevent un-cross-examined testimonial statements of absent witnesses at sentencing. Finally, where at trial "the only indicium of reliability sufficient to satisfy constitutional demands is...confrontation,"\textsuperscript{380} so too at sentencing should confrontation be the preferred method of testing reliability.

This is not to say that confrontation should be required for all felony sentencing evidence. The \textit{Davis} distinction between testimonial and nontestimonial statements should be the first step in determining whether an un-cross-examined statement should be admitted for sentencing purposes. Accordingly, statements that are susceptible to the confrontation requirement are those that are made when (1) the circumstances objectively indicate that no ongoing emergency existed and (2) the primary purpose of the interrogation...

\textsuperscript{376} Ngov, supra note 9, at 261, 267, 288, 291. Ngov argues that new evidence should be presented to warrant or justify a court's reconsideration of acquitted conduct. \textit{Id}.

\textsuperscript{377} Ngov, supra note 9, at 242 (citing Johnson, supra note 374, at 182–83).


\textsuperscript{379} \textit{Id}. at 53–54.

\textsuperscript{380} \textit{Id}. at 68–69; see also \textit{Id}. at 61.
(or questioning) was to establish or prove past events potentially relevant to a criminal prosecution should be limited.\textsuperscript{381} Additionally, when determining whether to require cross-examination of testimonial statements at felony sentencing, two key factors are the statement's materiality to punishment and whether cross-examination will assist in assessing veracity or truth. However, these are not the exclusive factors. Nor should there be a sliding scale whereby the greater the statement's quantitative value the more likely cross-examination assists in truth-finding. Both, however, are important to a determination of whether cross-examination should be necessary for statements that are regularly considered by sentencing courts.

The rationale for application of confrontation rights at felony sentencing is particularly salient with two primary categories of testimonial statements that are submitted for purposes of increasing punishment at felony sentencing. The first category is testimonial statements used to prove the existence of facts related to the sentencing offense. The second category is testimonial statements used to prove the existence of facts related to prove relevant conduct. To be sure, prior convictions are material to punishment. However, in most cases cross-examination of this category of testimonial statements is unnecessary. Prior convictions are commonly proved by certified court records, which are non-testimonial and widely available electronically. Only in rare cases will testimonial statements assist in an assessment of the truth of a prior conviction.

Testimonial statements that are used to prove facts related to the sentencing offense or offenses are material to punishment, especially in the current pleabargaining system.\textsuperscript{382} Where facts are


\textsuperscript{382} Scott & Stuntz, supra note 136, at 1921. Scott and Stuntz describe modern plea-bargaining as one that at first glance appears to allow a promissory exchange whereby a defendant waives their right to trial in exchange for the prosecutor's recommendation of a specific sentence. \textit{Id.} at 1953–54. Yet, argue Scott and Stuntz, plea bargains are not enforced according to "garden-variety" contract principles of offer and acceptance. \textit{Id.} at 1954–55. While Scott & Stuntz reject arguments that plea bargaining is socially and morally harmful, they note that the bargaining process may be burdened by process defects. \textit{Id.} at 1919. For
admitted by the defendant and entered into the record (or plea agreement) at the time the plea is accepted, confrontation would do little to assist in an assessment of truth and veracity. Additionally, most police reports, victim and witness statements, and other documents containing material facts should have been gathered during the investigatory stage and are usually disclosed before the plea. Thus, trial judges can ascertain the defendant's knowing, intelligent, and voluntary acceptance of the statements' veracity in the same manner as the court establishes the knowing, intelligent, and voluntary waiver of other constitutional rights.

Unfortunately, many courts establish the facts material to the sentencing offense after accepting the plea. Allowing limited cross-examination of testimonial statements to prove the facts material to the sentencing offense lessens the risk that a defendant will not get the agreement for which counsel bargained. In the plea bargaining context, the difference between a good and bad deal depends on defense counsel's knowledge of likely trial outcomes, including the behavior of judges exercising their sentencing example, defendants negotiate with the prosecutor but contract with the judge. ld. While a prosecutor can promise to recommend a given sentence or sentencing range, there is no guarantee that a defendant will actually receive that sentence. ld. at 1954. The prosecutor's "offer" is nothing more than an invitation to negotiate and the deal is sealed only when the parties appear before the court. ld. A defendant who pleas bears the risk that the prosecutor's recommendation will not be followed by the court and has a lower reliance on a prosecutor's promises, which rarely include those related to veracity of testimonial statements regarding the sentencing offense. ld. at 1953–56. Additionally, the bargain has a presumption of enforceability and constitutes nothing more than "an agreement by both sides to present the case to the sentencing judge in a particular way—from the defendant's side, an agreement to plead guilty to specified offenses; from the government's side, a promise to say (or to avoid saying) particular things at sentencing." Id. 1917–19. Finally, a prosecutor can only recommend a sentence to the judge, who alone determines punishment and unlike a prosecutor's promises, a defendant's are rarely revocable after the plea has been entered. ld. at 1953–56. Thus, a defendant's promise to enter a plea is a somewhat one-sided agreement. ld.

383 See Fed. R. Crim. P. 16(a)(1)(E)(i). In federal cases, a document or object is discoverable if "the item is material to preparing the defense." ld. This includes documents or objects relating to guilt or innocence regardless of whether the material is inculpatory or exculpatory or favorable or unfavorable. See Robert M. Cary et al., Federal Criminal Discovery 92 (2011).

384 BOND, supra note 142, at 156–57.
discretion, as well as defense counsel's sense of the going "market price" for the crime. Even though defense counsel may be well positioned to have both kinds of information, the process suffers from a lack of predictability—particularly for the defendant. Resolution of the material facts constituting the offense does not occur until after the plea and usually requires the use of testimonial statements. In this manner, the sentencing hearing itself becomes quite similar to a trial, but, from the defendant's perspective, results in sentencing by ambush. The inability to cross-examine testimonial statements ties counsel's hands and leaves the defendant with no meaningful opportunity to test the material evidence that supports the punishment. Where the parties agree on the material facts, inclusion of testimonial statements in the plea agreement reduces these risks. Where the parties do not agree, cross-examination should be allowed.

Like testimonial statements to prove conduct related to the sentencing offense, testimonial statements to prove conduct relevant to the offender are also material to punishment. In both state and federal courts, "under the concept of relevant conduct, the defendant's sentence can be increased by the consideration of uncharged, dismissed, or even acquitted conduct." The Guidelines place few limitations on the use of information concerning the background, character, and conduct of a convicted defendant. Sentencing courts can reach "far back in time" to determine what conduct relates to the defendant's convicted offense. Relevant conduct increases the offense level, and

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385 Scott and Stuntz, supra note 136, at 1959.
386 BOND, supra note 142, at 156–57 (noting that before accepting at plea, judges rarely make detailed inquiries regarding the factual basis that support the plea).
387 Ngov, supra note 9, at 236–37.
388 Id. at 267 (citing 18 U.S.C. § 3661 (2006)).
389 Ngov, supra note 9, at 237–38.
390 Three theories of offense level exist. See id. at 245–47. The first is a "pure charge" offense system imposes sentences that is based on the "offenses for which a conviction was obtained." Id. at 246. The second is a "real offense system" that "imposes punishment for all the circumstances underlying the defendant's offense, regardless of whether the additional conduct amounted to convictions or charges." Id. The third is the "modified real offense system" that
according to Ngov, could potentially turn an initial sentence of probation into a mandatory life sentence.\textsuperscript{391}

Cross-examination of testimonial statements that prove relevant conduct aids the search for veracity, especially regarding dismissed and uncharged conduct. It is less likely that testimonial statements regarding dismissed and uncharged conduct have been tested by a jury or admitted by the defendant at a trial or any other proceedings. This evidence may include statements recorded by probation officers during telephone interviews and signed witness statements gathered by law enforcement or prosecutors.\textsuperscript{392} In the federal regime, the Guidelines were established to infuse structure and takes into consideration the defendant's relevant conduct. \textit{Id.} at 247. The United States Sentencing Commission, which promulgated the Federal Sentencing Guidelines, adopted the modified real offense system \textit{Id.}

\textsuperscript{391} \textit{Id.} at 284–85. Ngov argues that relevant conduct can add up to eighteen points to the base offense level for fraud or tax evasion, twenty points for theft, and thirty-six points for drug offenses. \textit{Id.} Ngov found that a thirty-six point increase on a drug offense could turn an initial sentence of probation into a mandatory life sentence. \textit{Id.} See also United States v. Wong, 2 F.3d 927, 932 (9th Cir. 1993) (Norris, J., dissenting) (noting that relevant conduct roughly doubled the defendant's sentence from eighteen months to thirty months); United States v. McCrory, 930 F.2d 63, 66 (D.C. Cir. 1991) (involving a relevant conduct enhancement that increased the sentencing range from two to three years to twenty to twenty-five years). Ngov argues that offense sentencing of both uncharged and unconvicted conduct results in the harshest penalties outside of capital punishment, including life sentences. See Ngov, supra note 9, at 239–49. Moreover, "the determination of facts that underlie relevant conduct can be made without affording the defendant the rights and procedures normally accorded at trial" such as the right to confront witnesses and a right to a jury determination of facts. \textit{Id.} at 248. Nor do the rules of evidence apply. \textit{Id.}

\textsuperscript{392} See United States v. O'Meara, 895 F.2d 1216, 1223 (8th Cir. 1990) (Bright, J., concurring in part and dissenting in part) ("[I]t is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers . . ."); see also John S. Dierna, \textit{Guideline Sentencing: Probation Officer Responsibilities and Interagency Issues}, Fed. Prob., Sept. 1989, at 3. In the federal regime, probation officers play a critical role as the court's independent investigator. \textit{Id.} Probation officers prepare all sections of the presentence report provided to the judge, including the tentative advisory guideline range based on the information gathered during the investigation. \textit{Id.} See also Weinstein, supra note 127.
predictability into the sentencing process. Yet, determining whether the right call will be made with regard to the admission of such evidence is anything but predictable.

Originally, circuit courts were split on the standard to determine whether dismissed and uncharged conduct could affect punishment. The Commission sought to clarify the role of this type of sentencing evidence by amending the Guidelines to allow courts to consider, without limitation, any information concerning the defendant's background, character, and conduct. Specifically, section 5K2.21 explicitly approved consideration of uncharged and dismissed offenses. Circuits are now split regarding the relationship between such conduct and the sentencing offense. Some circuits require a "meaningful relationship," while others require no more than a "remote connection."

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394 Higginbotham, supra note 392, at 274–75. Originally, a majority of courts allowed uncharged offenses to serve as the basis for upward departures if prosecutors could prove by a preponderance of the evidence that the conduct was related to the underlying convictions. Id. at 280–81. A minority of courts allowed consideration of uncharged offenses if doing so adequately reflected the seriousness of the actual offense behavior. Id. at 277.
395 Id. at 275.
396 See id. at 275–76. The text of the amendment provides:

The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

U.S. SENTENCING GUIDELINES MANUAL § 5K2.21 (2013).
397 Higginbotham, supra note 392, at 281–82; compare United States v. Newsom, 508 F.3d 731, 735 (5th Cir. 2007), United States v. Rogers, 423 F.3d 823, 828 (8th Cir. 2005), and United States v. Smith, 267 F.3d 1154 (D.C. Cir. 2001), with United States v. Ellis, 419 F.3d 1189, 1193 (11th Cir. 2005), and United States v. Amirault, 224 F.3d 9, 12 (1st Cir. 2000).
398 Higginbotham, supra note 392, at 282–98. Conduct that is meaningfully related "sheds further light on the true nature of the offense of conviction." Id. at
Despite the serious implications of using uncharged or dismissed conduct to increase a sentence, reliability is the current standard to test the veracity and truth of such testimonial statements. Crawford and Davis make clear that actual confrontation and cross-examination are the best methods to assess testimonial statements. The fundamental unfairness and prejudice associated with punishing a defendant based on un-cross-examined testimonial statements about uncharged or dismissed conduct is no less compelling at sentencing than at trial. For this reason, the Court should allow cross-examination of testimonial statements related to all categories of relevant conduct.

CONCLUSION

Whether the Confrontation Clause applies to testimonial statements that are material to the issue of punishment is of utmost importance, for an accurate determination of the facts that support the punishment is primary to the integrity of the U.S. criminal justice system. The text and structure of the Sixth Amendment reflects a system of unitary prosecution. In the pre-founding felony cases, judicial discretion did not exist to increase punishment based on conduct proved by uncrossed statements. Criminal procedure in the United States has taken sharp turns since the ratification of the Sixth Amendment. In our modern system, the vast majority of felonies are resolved by a plea of guilty, and as a matter of practice, few plea agreements provide the factual details necessary to make qualitative decisions about punishment. Such decisions, as well as considerations or judgments regarding a defendant's background and character, are left to the discretion of the sentencing judge. Punishing a defendant based on un-cross-examined testimonial statements is fundamentally unfair and prejudicial.

Eliminating the "trial-right-only" theory of the Sixth Amendment's Confrontation Clause creates uniformity with the structurally identical Counsel and Jury Trial Clauses. The Court has acknowledged that factual disputes are resolved at felony sentencing hearings. To the extent that testimonial statements are material to

282. Even where there is a remote connection, the court is allowed to consider unlimited information regarding a defendant's background. Id. at 283.
resolution of factual disputes affecting punishment at felony sentencing hearings, cross-examination should be allowed in order to assess the truth and veracity of such statements. To be sure, confrontation should not be required for all evidence presented at felony sentencing hearings. Two key factors when determining whether to require cross-examination of testimonial statements at felony sentencing are the statement's materiality to punishment and whether cross-examination will assist in assessing truth and veracity. Where both prongs of this inquiry are met, confrontation should be expanded through sentencing.

399 See Klein, supra note 314, at 730–31 (noting increase in sentence length post–Booker).
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