

University of Michigan Journal of Law Reform

Volume 47

2014

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Recommended Citation

Shaakirrah R. Sanders, *Making the Right Call for Confrontation at Felony Sentencing*, 47 U. MICH. J. L. REFORM 791 (2014).

Available at: <https://repository.law.umich.edu/mjlr/vol47/iss3/6>

<https://doi.org/10.36646/mjlr.47.3.making>

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MAKING THE RIGHT CALL FOR CONFRONTATION AT FELONY SENTENCING

Shaakirrah R. Sanders*

Felony sentencing courts have discretion to increase punishment based on un-cross-examined testimonial statements about several categories of uncharged, dismissed, or otherwise unproven criminal conduct. Denying defendants an opportunity to cross-examine these categories of sentencing evidence undermines a core principle of natural law as adopted in the Sixth Amendment: those accused of felony crimes have the right to confront adversarial witnesses. This Article contributes to the scholarship surrounding confrontation rights at felony sentencing by cautioning against continued adherence to the most historic Supreme Court case on this issue, Williams v. New York. This Article does so for reasons beyond the unacknowledged dark racial undercurrent that permeated the facts and circumstances of that case. Instead, this Article challenges the Williams Court's assumption that judicial authority existed in pre-Founding felony cases to consider un-cross-examined testimony for purposes of fixing the punishment. This Article also examines whether recent Court decisions requiring cross-examination of testimonial statements at trial should cause the Court to reconsider its current understanding of confrontation rights at sentencing. Furthermore, this Article addresses the growing importance of sentencing hearings given the prevalence of guilty pleas in the modern U.S. criminal justice system. This work advances the discussion on this issue by proposing a framework to distinguish between testimonial statements that should be cross-examined and those that should not. It concludes that, in some circumstances, confrontation is the right call at felony sentencing and advocates a balanced and practical application of this vital right.

INTRODUCTION

[I]t 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.¹

At his 2005 Senate confirmation hearing for the office of Chief Justice of the United States Supreme Court, then District of Columbia Circuit Judge John Roberts, Jr. likened judges to umpires,

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1. State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (1794).

elucidating, “my job [is] to call balls and strikes, and not to pitch or bat.”² According to the soon-to-be Chief Justice, “[u]mpires don’t make the rules, they apply them . . . [and] make sure everybody plays by the rules.”³ The U.S. criminal justice system may demand more from its judiciary than Roberts described. According to Justice Brennan, “[J]udges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*. . . . Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights.”⁴

Of course, the Framers of the Constitution did not explicitly delineate the line between “umpire” and “lawmaker,” especially with regard to “calls” made by sentencing judges in felony cases. The most significant Supreme Court decision on the issue of judicial discretion to consider untested evidence at sentencing is *Williams v. New York*.⁵ In this infamous case, the Court held that cross-examination was not required to test the veracity of information presented at sentencing hearings.⁶ According to the Court, trial judges have always enjoyed broad discretion to “call balls and strikes” when fixing punishment. This Article questions this truth and makes three arguments in favor of reevaluating *Williams*. First, *Williams* incorrectly assumed that pre-Founding judicial discretion existed to consider un-crossed testimony for purposes of fixing felony punishment. Second, the Court’s decision in *Crawford v. Washington*⁷ casts doubt on whether *Williams* continues to control 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 the *Williams* Court made the right call in 1949 in holding that cross-examination was not required of statements presented against felony defendants for the first time at sentencing. Nevertheless, our trust that the Court made the right call *then* should not prevent us from *now* rethinking constitutional rules for modern felony sentencing. *Williams* arose in a world where indeterminate sentencing was at its height;⁸ criminal trials were more

2. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.).

3. *Id.* at 55.

4. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) (Brennan, J., concurring) (footnote omitted).

5. 337 U.S. 241 (1949).

6. *Id.* at 249–51.

7. 541 U.S. 36 (2004).

8. Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the ‘Elements of the Sentence,’* 35 WM. & MARY L. REV. 147, 152 (1993).

common for felony cases than today;⁹ and unlike today most constitutional rules of criminal procedure did not apply in state courts.¹⁰ Additionally, the shared standard between confrontation and due process that existed at the time¹¹ made it less likely that a contrary ruling in *Williams* would have yielded a different result for most felony defendants.

Today, however, the modern U.S. criminal justice system is “verging on an assembly line.”¹² Due to plea-bargaining, the vast majority of felony defendants do not have the opportunity to test statements made against them before the sentencing hearing.¹³ Justice Kennedy instructs that “[t]o note the prevalence of plea bargaining is not to criticize it.”¹⁴ In this modern system, it can no longer be disputed that the adversarial process does not end once a verdict or plea of guilty is rendered. As Justice Kennedy instructs, the adversarial process extends to sentencing. Now more than ever, factual findings made during felony sentencing hearings are as quantitatively vital as those that were previously only made during trials. There is no conclusive empirical evidence that judges, those primarily making the factual findings at sentencing, are more reliable fact finders than juries.¹⁵ Yet, during these proceedings the rules governing the location of the “strike zone,” i.e. the range of properly exercised discretion, can vary from court to court.

Crawford gives reason to reconsider the applicability of confrontation principles at felony sentencing—the most critical stage of the modern criminal prosecution.¹⁶ This Article focuses on whether *Crawford*’s rejection of hearsay rules as the standard for confrontation reopens doors that many thought *Williams* had irrevocably closed. This Article advocates a limited *Crawford*-based approach to

9. Even if trials were uncommon in 1949, they were not as “rare as the spotted owl” as they are today. See Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1721 (2005) (book review).

10. Beale, *supra* note 8, at 152.

11. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (holding prior testimony must bear some “indicia of reliability” though the witness be unavailable).

12. Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL’Y 53, 62 (2011). Professor Fisher represented defendants in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Crawford v. Washington*, 541 U.S. 36 (2004). Fisher, *supra*, at 53 n.*.

13. See *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.” (internal citation omitted)).

14. *Id.*

15. See Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 281–83 (2009) (discussing the inherent fallibility of judges in the role of fact-finder).

16. Admittedly, this may require substantive changes in Sixth Amendment jurisprudence as it relates to felony sentencing.

confrontation at felony sentencing.¹⁷ Unlike many articles on this subject, this Article distinguishes categories of statements that should require cross-examination from statements that should not require cross-examination. Finally, this Article offers a framework for making the right call in felony cases.¹⁸

Part I of this Article examines *Williams* and discusses its holding that a felony defendant was unable to cross-examine information contained in a probation report that was presented for the first time at sentencing. It 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 examines the application of the Sixth Amendment's Confrontation Clause to felony sentencing before the time of the Founding. It examines whether pre-Founding courts had discretion to consider un-cross-examined testimonial statements for purposes of fixing punishment for felonies. It also explores the post-Founding emergence of bifurcation and plea-bargaining and demonstrates that judicial discretion to consider uncrossed information at felony sentencing most likely developed during the emergence of indeterminate sentencing, not from pre-Founding courts. Part III examines the Court's recent untethering of due process and confrontation principles in *Crawford*. It argues that *Williams* should no longer control whether or when cross-examination is required at felony sentencing. The Article concludes that confrontation is the right call where felony sentencing evidence consists of testimonial statements that are material to punishment and where cross-examination would assist in assessing the truth and veracity of such statements.

17. The following issues are beyond the scope of this Article: whether confrontation is required at felony sentencing as a matter of procedural due process; whether *Crawford* should apply at misdemeanor sentencing hearings; and implications of the Jury Trial Clause jurisprudence that includes *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny.

18. Readers may be surprised to discover that there is an impressive amount of student scholarship related to the topic of this Article. See, e.g., Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992); Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187; Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933 (1995); Amanda Harris, Note, *Surpassing Sentencing: The Controversial Next Step in Confrontation Clause Jurisprudence*, 64 FLA. L. REV. 1447 (2012); David A. Hoffman, Note, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE L.J. 382 (1992); Nigel H. Holder, Comment, *Confrontation at Sentencing: The Logical Connection Between Crawford and Blakely*, 49 HOW. L.J. 179 (2005); Christine Holst, Note, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 2010 U. ILL. L. REV. 1599; Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968).

I. WILLIAMS v. NEW YORK

*It began with a scream . . . [and] touched off one of the city's largest manhunts . . .*¹⁹

On April 20, 1947, fifteen-year-old Selma Graff was fatally bludgeoned by a bedroom intruder in her family's East Flatbush apartment located in Brooklyn, New York.²⁰ In the months after the murder, a series of burglaries plagued the neighborhood, and East Flatbush was placed under surveillance.²¹ At approximately 2:30 a.m. on September 8, 1947, Samuel Tito Williams was taken into custody for suspicion of burglary.²² Samuel was an eighteen-year-old African-American youth with a history of trouble with law enforcement, but no prior convictions.²³ Samuel's physical condition was described as poor. A rheumatic fever weakened his heart and caused swelling in his legs; the latter made it difficult for him to walk.²⁴ Selma's younger brother Donald was also injured in the attack and originally described the killer as a man with reddish skin who needed a shave.²⁵ The media reported, based on an interview with one detective, that Samuel fit Donald's description of Selma's murderer.²⁶

19. Robert McG. Thomas, *Man Freed in Slaying Wins Damages*, N.Y. TIMES, Feb. 18, 1973, at 57.

20. *Id.* The burglar "entered the premises and began to rifle the contents of a dresser," which awoke Selma. Brief for Relator-Appellant app. at 6a, United States *ex rel.* Williams v. Fay, 323 F.2d 65 (2d Cir. 1963) (No. 397-27911) (on file with author).

21. United States *ex rel.* Williams v. Fay, 211 F. Supp. 359, 361 (S.D.N.Y. 1962).

22. *Williams*, 323 F.2d at 66.

23. *Id.*; see also Brief for Relator-Appellant, *supra* note 20, at 7. Detectives indicated that up to that point there was no evidence that Samuel was anything but a burglar. *8 Receive Reward in Solving Murder*, N.Y. TIMES, Sept. 10, 1947, at 28.

24. *Williams*, 323 F.2d at 66.

25. See Brief for Relator-Appellant, *supra* note 20, at 6. A police teletype released shortly after the murder described Selma's killer as "a white man, and the police 'generally' were looking for a white man." *Id.* at 6-7. At least one news agency reported that Donald described the killer as a slender and tall Negro youth. *8 Receive Reward in Solving Murder*, *supra* note 23. *But see* Brief for Relator-Appellant, *supra* note 20, at 43.

26. *8 Receive Reward in Solving Murder*, *supra* note 23. *But see* Brief for Relator-Appellant, *supra* note 20, at 43. Detectives, who had dubbed Selma's murderer the "giggling killer," argued that Samuel appeared nervous and was inclined to simper or giggle. Thomas, *supra* note 19; *8 Receive Reward in Solving Murder*, *supra* note 23. Detectives also noted that the killer dropped a green flashlight when he fled the scene of the Graff home on the night of the murder. *Id.* Detectives claimed that Samuel confessed to being the owner of not only the flashlight, but other items found at the scene of burglaries at other homes. *Id.*

Samuel orally confessed to the murder and later submitted a longhand written confession after eighteen continuous hours of interrogation.²⁷ During the first sixteen hours, detectives were authorized to only ask about the burglaries.²⁸ At some point, detectives stopped the interrogation and Samuel was taken to the scene of several suspected burglaries in the hope that a witness could identify him as the perpetrator.²⁹ It is unclear whether anyone was able to do so. After the confessions, the District Attorney conducted a stenographically-recorded question and answer session that began at approximately 12:45 a.m. on September 9, 1947 and was attended by members of the press.³⁰ Later in the morning, between 6:00 a.m. and 8:00 a.m., Samuel was booked for murder and taken to felony court.³¹ After booking, Samuel was taken to Donald's

27. *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 20, at 14–16. Detectives promised Samuel that if he confessed, he could see a chaplain and his mother, the latter for whom he had asked multiple times during the interrogation. *Williams*, 323 F.2d at 66; see also Brief for Relator-Appellant, *supra* note 20, at 16–17. Detectives reported to the media that in his confession, Samuel indicated that in the hours before the murder he drank “Sneaky Pete,” a drink concocted of raw whisky and wine, and that he decided to burglarize the Graff home because he needed money to buy more of the beverage. *8 Receive Reward in Solving Murder*, *supra* note 23.

28. *Williams*, 323 F.2d at 66; *Williams*, 211 F. Supp. at 361; see also Brief for Relator-Appellant, *supra* note 20, at 14.

29. *Williams*, 211 F. Supp. at 361–62; see also Brief for Relator-Appellant, *supra* note 20, at 14.

30. *Williams*, 323 F.2d at 66–67; Brief for Relator-Appellant, *supra* note 20, at 17–18 (describing procedures used and questions asked during the recorded session). The District Attorney was summoned by the police after Samuel had given both the oral and written confessions. *Id.* The recorded questioning ended at 3:00 a.m.—over twenty-four hours after Samuel's arrest. *Id.* It was during this session that Samuel, for the first time, was informed of his right to remain silent, but he was never advised of his right to counsel. *Williams*, 323 F.2d at 67. Soon after, Samuel was taken to the Graff home in order to recreate the murder for detectives. *Williams*, 211 F. Supp. at 361; see also Brief for Relator-Appellant, *supra* note 20, at 18–19; Thomas, *supra* note 19. Upon his arrival, Selma's mother screamed at Samuel: “Why did you kill my little girl?” *8 Receive Reward in Solving Murder*, *supra* note 23; see also Brief for Relator-Appellant, *supra* note 20, at 20. Police had to physically restrain Selma's mother from assaulting Samuel. *8 Receive Reward in Solving Murder*, *supra* note 23; Thomas, *supra* note 19. As Samuel was escorted from the Graff apartment, a mob, which had assembled on the street, began calling Samuel a murderer and poking at him with sticks. *8 Receive Reward in Solving Murder*, *supra* note 23. Approximately twenty Brooklyn police officers were required to escort Samuel from the premises. *Id.*

31. *8 Receive Reward in Solving Murder*, *supra* note 23; see also Brief for Relator-Appellant, *supra* note 20, at 21. Three detectives, two patrolmen, and three other high-ranking police officers were immediately rewarded for solving Selma's murder. *8 Receive Reward in Solving Murder*, *supra* note 23.

school so that a positive identification could be made, which Donald was unable to do.³² Up to this point, Samuel had not been provided with the assistance of counsel.³³

Despite the confessions, Samuel pled not guilty, and his murder trial began in January of 1948.³⁴ Donald, the only witness to the crime, testified during cross-examination that Selma's killer was a white man who had red skin and stood five-feet five-inches tall—seven inches shorter than Samuel, who stood six-feet tall.³⁵ The next day, Donald recanted his description of the killer, claiming he was “all mixed up.”³⁶ Curiously, Donald's recantation came after speaking the previous evening with detectives and the District Attorney, the latter later submitting that his case in chief did not rely on Donald's testimony.³⁷ Regardless, this left the confessions, which defense counsel argued were the result of coercion, as the only evidence of Samuel's guilt.³⁸

The all-male jury³⁹ found Samuel guilty of murder in the first degree, meaning it rejected Samuel's claims that his confessions

32. Brief for Relator-Appellant, *supra* note 20, at 21.

33. See *Williams*, 323 F.2d at 67. Additionally, Samuel was not represented by counsel at his first arraignment. See Brief for Relator-Appellant, *supra* note 20, app. at 5a. Before the second arraignment, held on September 11th or 12th, Samuel was visited by private counsel; it is unclear whether counsel was present at the second arraignment. Compare *id.* app. at 16a, with *id.* at 22.

34. *Williams*, 323 F.2d at 67; Brief for Relator-Appellant, *supra* note 20, at 21–22.

35. *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 20, at 22–23.

36. *Youth Found Guilty of Murdering Girl*, N.Y. TIMES, Jan. 23, 1948, at 46.

37. *Williams*, 323 F.2d at 67; see also *Youth Found Guilty of Murdering Girl*, *supra* note 36; Brief for Relator-Appellant, *supra* note 20, at 23. It is unknown whether based on Donald's testimony the trial court considered exercising judicial discretion to dismiss the case or declare a mistrial.

38. *Williams*, 323 F.2d at 67. Samuel “testified, and not without some corroboration, to brutal torture by the police which had forced him in despair to confess falsely.” *Id.*; see also Brief for Relator-Appellant, *supra* note 20, at 9–11 (summarizing Samuel's testimony of police brutality, which included handcuffing Samuel to a hot radiator, squeezing Samuel's testicles until he was unconscious, threatening to throw Samuel out a window, and threatening to shoot Samuel). Samuel testified that detectives spent a good part of eleven hours beating him with “a blackjack, a rubber hose, and a club.” Thomas, *supra* note 19; *Youth Lays Confession to 3D Degree*, BROOKLYN EAGLE, Jan. 16, 1948, at 1. Samuel also testified that detectives kicked him and punched his left eye. *Id.* Additionally, defense counsel introduced a series of photographs taken of Samuel on September 20, 1947. United States *ex rel.* Williams v. Fay, 211 F. Supp. 359, 362 (S.D.N.Y. 1962). In rebuttal, the prosecutor offered the testimony of detectives and the district attorney, who denied any coercion. *Id.* The prosecution also offered the testimony of the jail clerk who claimed Samuel only complained of swollen legs caused by rheumatic fever. *Id.* The jail physician testified that while he did find some injuries, they were inconsequential compared to the torture described by Samuel. *Id.*

39. *Witness Helps Defense*, *supra* note 35.

were coerced.⁴⁰ The same jury recommended a life sentence.⁴¹ The sentencing judge ordered death by electrocution⁴² based on the evidence presented at trial and additional information obtained from probation officers and other sources pursuant to the New York Criminal Code.⁴³ The sentencing judge found that Samuel committed the uncharged burglaries for which he had originally been arrested,⁴⁴ that Samuel “possessed a morbid sexuality,” and that Samuel was a “menace to society.”⁴⁵ Specifically, Samuel was described as a “psychopathic liar whose personality [was] permeated with psychosexual habits of thought and conduct.”⁴⁶ Convinced that the

40. *Williams*, 323 F.2d at 67; see also *Youth Sentenced to Die in the Chair*, N.Y. TIMES, Mar. 3, 1948, at 48.

41. *Williams*, 323 F.2d at 65; see also N.Y. PENAL LAW § 1045-a (McKinney 1949).

42. *Williams*, 323 F.2d at 65; see also N.Y. PENAL LAW §§ 1045, 1045-a (providing, in part, “[m]urder in the first degree is punishable by death, unless the jury recommends life imprisonment,” but allowing the presiding judge to sentence a defendant to life imprisonment or death regardless of the jury’s recommendation).

43. *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) (emphasis added).

44. *Williams*, 337 U.S. at 244. Specifically, the sentencing judge considered approximately thirty uncharged burglaries to which Samuel had allegedly confessed or had allegedly been identified as a participant. *Id.* Samuel was described as a “well schooled” veteran of burglaries. Brief for Appellant-Defendant at 6, *Williams*, 337 U.S. 241 (No. 671), 1949 WL 50658 at *6.

45. *Williams*, 337 U.S. at 244. The sentencing judge stated:

[Samuel] 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 44, at 9. According to the Court, Samuel did not challenge the accuracy of the report, ask the judge to disregard it, or request an opportunity to refute any portion through cross-examination or any other means. *Williams*, 337 U.S. at 244.

46. *Youth Sentenced to Die in the Chair*, *supra* note 40. The judge during sentencing discussed information from a detective that Samuel was seen taking photographs of young children at public schools. Brief for Appellant-Defendant, *supra* note 44, at 8. The sentencing judge also relied on the following as evidence of Samuel’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 [Samuel’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

recommendation of life imprisonment would have been different if these “facts” had been presented to the jury,⁴⁷ the judge stated that “it would stultify [his] conscience” to accept the jury’s sentence.⁴⁸ A unanimous New York Court of Appeals affirmed the conviction and death sentence.⁴⁹

Samuel appealed to the United States Supreme Court on the narrow ground that due process was offended by the denial of an opportunity to cross-examine or rebut information considered for the first time at sentencing.⁵⁰ The Court held that due process was not “a device for freezing the evidential procedure of sentencing in the mold of trial procedure,” reasoning that such a reading would “hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.”⁵¹ Due process also could not render a sentence void simply because a judge obtained out-of-court information to assist in fixing punishment.⁵²

The *Williams* Court held due process did not require confrontation at felony sentencing, and so a broad range of unchallenged evidence could be used to support a higher sentence.⁵³ The Court

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

Id. at 8–9. This evidence was not admitted at trial. *Id.* at 10.

47. *Youth Sentenced to Die in the Chair*, *supra* note 40.

48. *Id.*

49. *People v. Williams*, 83 N.E.2d 698, 698 (N.Y. 1949), *amended by* 84 N.E.2d 446 (N.Y. 1949) (affirming conviction and declining question of whether the conviction “violate[d] the Fourteenth Amendment of the Constitution of the United States in that . . . the 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”).

50. *Williams*, 337 U.S. at 243. The Court added: “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.

51. *Id.* at 251.

52. *Id.* at 252. Moreover, “[u]nder the practice of individualizing punishments, investigational techniques have been given an important role” and by the mid-twentieth century it was more necessary to observe the distinctions between trial and sentencing evidentiary procedure. *Id.* at 248–49.

53. *Williams*, 337 U.S. at 252. Justice Murphy offered a short and direct dissent, arguing 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.” *Id.* at 253 (Murphy, J., dissenting) (also urging sentencing judges to hesitate when increasing punishment beyond that which the jury recommended). Justice Murphy argued:

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

reasoned that consideration of uncrossed information for purposes of sentencing was a discretionary power that dated to Pre-Founding times.⁵⁴ The Court explained:

[B]oth 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.⁵⁵

The Court 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."⁵⁶ New York declared reformation and rehabilitation more important goals than retribution.⁵⁷ The Court was apparently content to let New York (and other states) determine the appropriateness of sentencing procedures "to serve the new goals of indeterminate sentencing."⁵⁸

II. PRE-FOUNDING FELONY SENTENCING AND THE EMERGENCE OF INDETERMINATE SENTENCING

*[T]he sentence is the primary, if not wholly dispositive, stage of the so-called "correctional" process.*⁵⁹

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.

Id.

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

55. *Id.* at 246.

56. *Id.* at 247-48 (noting that indeterminate sentencing took the place of rigidly fixed punishments). This is an ideal directly reflective of the indeterminate sentencing model. *See id.*

57. *Id.* at 248. The Court provided no guidance of how Samuel's death sentence met the goals of rehabilitation or reformation.

58. Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 318-19 (1992) (discussing federalism as a theme in *Williams*).

59. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 2 (1972). Judge Frankel is considered the father of the mid-twentieth century felony sentencing reform. *See United States v. Clark*, 792 F. Supp. 637, 650 (E.D. Ark. 1992) (citing UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 3 n.15 (1987)); *see also* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing*

Without a doubt, the Framers would not recognize the modern American criminal justice system.⁶⁰ As Justice Kennedy recently acknowledged, plea-bargaining has become so central to the administration of criminal justice that it is no longer simply an adjunct of the system, “it is the . . . system.”⁶¹ Perhaps plea-bargaining occurred at the time of the Founding, though the earliest record does not appear until 1809.⁶² Before the Founding, a pre-determined sentence resulted⁶³ if a defendant was found guilty; a common prescription for many felonies was death.⁶⁴ This “determinate” system of unitary trials and sentencing left little or no role for the trial judge regarding a defendant’s sentence. This was quite different from U.S. practice at the time of *Williams*, where guilt (or

Constitutional Rights at Sentencing, 99 CAL. L. REV. 47, 56 (2011) (discussing the critical importance of sentencing in light of the modern practice of plea bargaining).

60. See John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2015 (2005). Douglass noted that in the Framers’ world, criminal procedure encompassed “a single, unified trial with no separate sentencing.” *Id.* In contrast, modern practice “spans two worlds: first a trial, then a sentencing. . . . [W]e treat them as separate universes, governed by very different rules.” *Id.* at 1967–68.

61. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

62. See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 22 (2003). As does Fisher, this work distinguishes between the expressions “clear plea bargaining” and “guilty plea.” *Id.* But, this work uses the simple phrase “plea bargaining” to refer to what Fisher termed “clear plea bargaining.” Fisher uses the phrase clear plea bargaining to refer to cases where the prosecution makes a concession “in exchange for the defendant’s plea.” *Id.* Fisher uses the phrase guilty plea “to refer to cases in which the defendant pled guilty but the record reveals no compensating concession.” *Id.*

63. Penny J. White, “*He Said*,” “*She Said*,” and *Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 396–97 (2007) (describing modern day trials as involving a bifurcated process by which there is a finding of guilt or innocence by a jury and a separate determination of punishment by a judge and distinguishing eighteenth century trials, which collapsed both stages into one).

64. Douglass, *supra* note 60, 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))). Death was by hanging, embowelment, or burning alive. 4 WILLIAM BLACKSTONE, COMMENTARIES *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 myriad of 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.*

innocence) and punishment were determined by bifurcated trial and sentencing proceedings.⁶⁵

The text and structure of the Sixth Amendment reflects pre-Founding determinate sentencing.⁶⁶ 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.⁶⁷

Professor Benjamin McMurray argues that the Sixth Amendment’s “introductory clause, ‘in all criminal prosecutions,’ prefaces all of the rights listed in this amendment,”⁶⁸ which include the rights to counsel, confrontation, jury trial, speedy and public trial, as well as rights relating to notice of conduct and access to witnesses.⁶⁹ However, the term “criminal prosecutions” is left undefined, and Founding era documents do not provide guidance on the meaning or scope of the term.⁷⁰

Scholars who advocate an “original objective meaning” interpretive approach⁷¹ argue that sentencing is clearly within the plain

65. See Douglass, *supra* note 60, at 1967–70 (“Trial is an adversarial process An elaborate body of precedent defines each of the [] Sixth Amendment rights, leaving us with the highly structured, adversarial world The sentencing world is a different kind of place: an informal, free-flowing world with few hard rules. . . . [F]ew ‘trial rights’ survive intact after a guilty verdict . . .”).

66. See Hessick & Hessick, *supra* note 59, at 51 (noting that determinate sentencing schemes “presented no occasion to consider the extent to which constitutional protections should be treated differently at sentencing than at trial”).

67. U.S. CONST. amend. VI (emphasis added).

68. Benjamin C. McMurray, *Challenging Untested Facts at Sentencing: The Applicability of Crawford at Sentencing After Booker*, 37 McGEORGE L. REV. 589, 615 (2006).

69. Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 492, 507 (2009) (explaining seven procedural protections under the Sixth Amendment).

70. See McMurray, *supra* note 68, at 616 & n.191; Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL’Y 45, 46 (2011).

71. “Original objective meaning” or “original public meaning” refers to “the reasonable meaning of the text of the Constitution at the time of the framing.” Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 462. According to Maggs, some Justices, particularly Antonin Scalia, consider this meaning to be the most significant. *Id.* As used in this work, original objective meaning should be distinguished from “original intent” and “original understanding.” Original intent refers to the meaning and understanding of the U.S. Constitution from the perspective of the Framers who participated in the convention that

meaning of the term “criminal prosecution” as understood at the time of ratification.⁷² As Francis Heller, a mid-twentieth century historian, explained: “The ‘criminal prosecution’ begins with the arraignment of the accused and ends when [the] sentence has been pronounced . . . or a verdict of ‘[n]ot guilty’ has cleared the defendant of the charge.”⁷³ Using this same approach,⁷⁴ McMurray turned to the eminent pre-Founding scholar William Blackstone,⁷⁵ who described twelve stages of the prosecution, ranging from the arrest to execution.⁷⁶ Blackstone did not specifically list or separately label sentencing hearings,⁷⁷ still stage nine, which is labeled “judgment and its consequences,” corresponds to our modern understanding of criminal sentencing.⁷⁸ McMurray noted, “Blackstone’s description of what happens at ‘judgment’ is precisely what modern courts do at sentencing.”⁷⁹

proposed the document to the states for adoption and ratification. *Id.* at 461. Original understanding refers to the meaning and understanding of the U.S. Constitution from the perspective of those who participated in the various state ratifying conventions. *Id.*

72. See Douglass, *supra* note 60, at 2008 (“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?”); see also White, *supra* note 63, at 393 (arguing that the right to confront at a capital sentencing hearing is supported by a simple reading of the relevant constitutional text). At least one jurist agreed 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.’”).

73. 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 63, at 395 (“Sixth Amendment rights do not begin and end with the in-court proceeding commonly known as a trial.”); McMurray, *supra* note 68, at 616 (arguing that “the entire process of securing the criminal judgment [is] the prosecution,” and noting 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, [which confirms] that until the defendant has been sentenced, the prosecution is not yet over”).

74. The standard way of determining original objective meaning of the words and phrases of the Constitution is to examine founding period writings. Maggs, *supra* note 71, at 462.

75. See, e.g., McMurray, *supra* note 68, at 616–18 & nn.191–99 (“William Blackstone’s *Commentaries on the Laws of England* . . . was widely read and relied on by the [F]ounders.”).

76. The twelve stages of the criminal prosecution described by Blackstone are 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 64, at *286; see also McMurray, *supra* note 68, at 617. McMurray noted that the term “prosecution,” which is third in this list of stages, refers only to the charging. See *id.*

77. See McMurray, *supra* note 68, at 617–18.

78. See *id.* at 618 (noting that stage nine “falls chronologically right where sentencing falls under modern criminal procedure: between trial and appeal”).

79. *Id.*; see also 4 BLACKSTONE, *supra* note 64, at *368–82.

Post-ratification meaning and common usage of the term criminal prosecution support Blackstone and his followers' understanding that sentencing was considered a part of the criminal prosecution. An early nineteenth century dictionary defined the term "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."⁸⁰ Thus, various sources support Blackstone's description of the sentencing process as one stage of a criminal prosecution.⁸¹

The text of the Sixth Amendment is not only silent on the meaning of the term "criminal prosecution," but on whether a sentencing court has discretionary authority to influence punishment in felony cases. Professors Byrne and F. Andrew Hessick argued that the drafters of the Sixth Amendment had little reason to consider trial authority separate from sentencing authority, primarily because at that time "the process of sentencing was virtually indistinguishable from the process of conviction."⁸² Felony crimes in the pre-Founding determinate era were submitted to a jury, and the defendant could predict a sentence with precision from the face of the charging instrument, which flowed from the alignment of punishment with the crime.⁸³ In this model of unitary prosecution,⁸⁴ sentencing evidence in felony cases was by necessity

80. 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 the prosecution as "the institution and carrying on of legal proceedings against a person"). These definitions clarify that the term includes all aspects of the criminal proceedings, from charge to acquittal or sentencing (and appeals). 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).

81. *See, e.g.*, Bibas, *supra* note 70, at 46, 48; Chhiblani, *supra* note 69, at 507; Douglass, *supra* note 60, at 2008; Hessick & Hessick, *supra* note 59, at 51; McMurray, *supra* note 68, at 618; White, *supra* note 63, at 395, 397.

82. Hessick & Hessick, *supra* note 59, at 51 (noting that colonial era judges did not conduct a formal sentencing proceeding following conviction; instead, most crimes carried a particular penalty, and the conviction determined the punishment); *see also* Douglass, *supra* note 60, at 1972, 2011 (cautioning against the temptation to conclude that "the Sixth Amendment contemplates no sentencing rights" simply "because it contemplates no separate sentencing proceeding"). *See generally* Bibas, *supra* note 70, at 46; Herman, *supra* note 58, at 302–03; White, *supra* note 63, at 396.

83. *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000); *see also* 4 BLACKSTONE, *supra* note 64, at *369 (after verdict "the court must pronounce that judgment, which the law hath annexed to the crime"); Bibas, *supra* note 70, at 46, 48 (noting that punishment was immediately imposed); Douglass, *supra* note 60, at 1977 (describing English and early U.S. criminal law as dominated by mandatory penalties, not sentencing discretion). *See generally* McMurray, *supra* note 68, at 592; White, *supra* note 63, at 397.

84. *See* Douglass, *supra* note 60, at 2008 (observing that for the Framers, "a unitary trial and single jury verdict determined not only guilt or innocence, but life or death as well. With

presented—and confronted—during the trial.⁸⁵ According to Professor John Douglass, “in both purpose and effect, the trial was the sentencing.”⁸⁶ Unfortunately, few Sixth Amendment cases of significance were decided during the determinate era,⁸⁷ and none concerned whether un-cross-examined evidence could be presented for purposes of fixing felony punishment or establishing the limits of judicial discretion at felony sentencing hearings.

Sentencing courts’ discretionary authority in felony cases likely emerged during the era of indeterminate sentencing. By the early twentieth century, determinate sentencing was no longer the dominant sentencing model, and by the mid-twentieth century, felony sentencing reflected indeterminate ideals.⁸⁸ Indeterminate sentencing was greatly influenced by the public’s growing aversion to the death penalty,⁸⁹ the use of prisons as a sentencing alternative,⁹⁰ and, as revealed in *Williams*, an emerging penological focus on individualized punishment.⁹¹ *Williams* demonstrates how this culminated in a highly discretionary rehabilitative model that tasked courts 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 63, at 397.

85. See Douglass, *supra* note 60, at 2008, 2016. The rules appeared to be different for misdemeanors. *Id.* at 2016 (noting that in the late eighteenth century, English and colonial American judges “exercised a range of discretion in choosing punishment for misdemeanants”); see also *Apprendi*, 530 U.S. at 480 n.7 (noting that, upon misdemeanants, judges frequently imposed sentences of fines or whippings).

86. Douglass, *supra* note 60, at 1972–73 (“Bifurcation—separating the guilt determination from the choice of an appropriate penalty—was a procedure that evolved after the [F]ounding, initially for noncapital sentencing.”); see also *id.* at 2020; Hessick & Hessick, *supra* note 59, at 51 (describing pre-Founding sentencing as part of the trial); White, *supra* note 63, at 397 (noting that pre-Founding felony juries decided both the defendant’s guilt and punishment).

87. Chhablani, *supra* note 69, at 492.

88. *Williams v. New York*, 337 U.S. 241, 247–51 (1949) (explaining due process was not 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”).

89. Douglass, *supra* note 60, at 2018 (citing STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 94–100 (2002); Caren Myers, Note, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 COLUM. L. REV. 787, 791–92 (1997)) (noting the dramatic decline in the number of capital offenses from the 1790s through the mid-nineteenth century); see also Sam B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 HARV. L. REV. 583, 587 (1937) (noting that the community saw the need “to reduce the severity of punishments for crime, which in the early part of the nineteenth century were far in excess of what the public approved” and arguing that “[b]y 1886, punishments for crime had been brought into line with community opinion”).

90. Douglass, *supra* note 60, at 2018 (citing BANNER, *supra* note 89, at 99, 102). Douglass argues that the lack of prison cells made imprisonment a relatively rare form of punishment until the late eighteenth century. *Id.* at 2016.

91. *Id.* at 2018 (citing BANNER, *supra* note 89, at 102–03; Myers, *supra* note 89, at 792 n.19).

ensuring that the punishment fit the defendant as well as the crime.⁹²

Williams demonstrates that at the height of the indeterminate era, sentencing courts had almost absolute discretion to increase or decrease punishment within given statutory ranges.⁹³ In the *Williams* era, judicial discretion was curbed only by the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment.⁹⁴ Early indeterminate era judges often imposed sentences based on judge-found facts and rarely sought guidance from the jury in making such determinations.⁹⁵ This contrasts sharply with determinate sentencing, where judges in felony cases did not appear to engage in post-verdict fact-finding to fix punishment.⁹⁶

92. See Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 654 (2005). Berman describes this as a "rehabilitative medical model," and states "[t]he rehabilitative ideal was often 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)). Berman described sentencing judges and parole officers as administrative decision makers who "were expected to craft individualized sentences 'almost like a doctor or social worker exercising clinical judgment.'" *Id.* at 655 (citing *United States v. Mueffelman*, 327 F. Supp. 2d 79, 83 (D. Mass. 2004)); see also Douglass, *supra* note 60, at 2018 n.295 (describing individualized punishment as "reflecting a 'scientific' view that crime was a form of sickness that might be cured with proper treatment"); SANDRA SHANE-DUBOW ET AL., U.S. DEP'T OF JUSTICE, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 5–6 (1985); Hessick & Hessick, *supra* note 59, at 52; McMurray, *supra* note 68, at 592.

93. Hessick & Hessick, *supra* note 59, at 52. Hessick and Hessick noted that discretionary schemes were originally premised on the punishment rationale of rehabilitation and that judges' assessments were based on specific sentencing characteristics "with an eye towards reforming 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.*

94. McMurray, *supra* note 68, at 592.

95. *Id.* (citing Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 697 (2005)); see also Jenia Iontcheva, *Jury Sentencing as Democratic Process*, 89 VA. L. REV. 311, 316–19, 354 (2003) (discussing jury sentencing and noting that by 1796, one state sentenced by jury; by 1919, fourteen states sentenced by jury; but by 2003, only six states continued this practice). *But see* Douglass, *supra* note 60, at 2013–14 (describing the widespread practice of jury sentencing in capital cases during the American constitutional period).

96. McMurray, *supra* note 68, 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 only in exceptional cases did determinate era sentencing judges exercise discretion to impose fines and determine the length of imprisonment. 4 BLACKSTONE, *supra* note 64, at *371. Generally, the "nature of the punishment . . . [either] by fine or imprisonment [was] . . . fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances." *Id.*; see also Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1814–25 & n.180 (2003).

Two other notable changes developed during the post-Founding emergence of indeterminate sentencing: bifurcated trials with guilt and sentencing phases⁹⁷ and plea-bargaining.⁹⁸ Bifurcation evolved from the “parallel movements” towards judicial discretion and individualized punishment.⁹⁹ Unlike determinate sentencing where the punishment for most felonies was death, indeterminate sentencing allowed broader discretion to imprison convicted felons.¹⁰⁰ A sentencing judge’s determination of the length of imprisonment required indeterminate sentencing judges to consider the nature of the offense and the unique circumstances of the individual.¹⁰¹ Accordingly, Douglass posited that indeterminate judges needed more information—which was presented during a separate sentencing process—than their determinate-era counterparts.¹⁰² While the exact causation is unclear, the advent of offender and offense-oriented sentencing factors established sentencing as a distinct procedural phase of the trial.¹⁰³ Once guilt was entered, there were

97. See Douglass, *supra* note 60, at 2018–19. See generally Iontcheva, *supra* note 95, at 314–30 (discussing origins of jury sentencing in the United States and causes of its decline); Michaels, *supra* note 96, at 1814 n.180.

98. See Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860*, 33 LAW & SOC’Y REV. 161, 161, 174–75 (1999) (noting the emergence of plea bargaining during the 1830s and 1840s); see also *supra* note 62 and accompanying text (noting 1809 as the earliest example of clear plea bargaining in the U.S. colonies). The adoption of adult parole and probation services was also an important development during the post-Founding era. See Warner & Cabot, *supra* note 89, at 599 (discussing creation of reformatories for young male offenders and arguing that adoption of the indeterminate sentencing model and parole law occurred together). While the sentencing judge decided the punishment, it was the parole board that decided the date of release. *Id.* at 607. Warner also noted that the first instances of probation occurred in seventeenth century Massachusetts, and that by 1910 twenty states adopted adult probation statutes. See *id.* at 598–99. Warner indicated that the duty of the probation officer was to furnish the judge with information about a defendant’s criminal history. *Id.* at 607. See generally Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 11 (2010) (discussing early statutory history of probation in federal system).

99. Douglass, *supra* note 60, at 2018. Douglass suggests that bifurcation was the result of the need to separately consider information at a sentencing hearing that could not be introduced at trial. *Id.* at 2018–19 (arguing that the rules of evidence conflicted with the emerging preference for making punishment fit not only the crime, but also the individual criminal because evidence relating to bad character was considered unfairly prejudicial and inadmissible at trial).

100. *Id.* at 2016–17; see also White, *supra* note 63, at 397–98 (noting that the nineteenth century saw both the creation of felony sentencing discretion and the division of felony trials into separate guilt and sentencing phases).

101. McMurray, *supra* note 68, at 592.

102. Douglass, *supra* note 60, at 2018 (noting indeterminate era judges’ newfound ability to exercise discretion and individualize sentences and arguing that “[i]f judges were to tailor their sentences to fit individual offenders, they needed to know more about that individual than a trial—or guilty plea—was likely to tell them”).

103. See Herman, *supra* note 58, at 302.

few controls to limit the sentencing judge's discretion to decide a defendant's punishment.¹⁰⁴

Like bifurcation, guilty pleas also flourished during the indeterminate sentencing era. While there is some evidence of guilty pleas prior to the Founding, such instances were rare in English common law cases and were infrequent in the U.S. colonies.¹⁰⁵ By the late 1830s in Boston, guilty pleas began to appear in significant numbers in common-law-based cases; ten years later, they were accepted for virtually every sort of offense.¹⁰⁶ By 1860, guilty pleas were solidly institutionalized,¹⁰⁷ and by the late nineteenth century, judges across the nation had become willing partners in the plea bargaining process.¹⁰⁸ Pinpointing when guilty pleas became common is difficult,¹⁰⁹ although by the 1920s the practice was well established.¹¹⁰

It may be tempting to assume that early plea-bargaining developed at the initiation of the prosecution, the defense, or both. However, Justin Miller, an early twentieth century legal commentator, suggested that prosecutors may not have initiated plea offers and, in some cases, may not have participated in plea negotiations at all.¹¹¹ Instead, Miller opined that trial judges initiated early plea-bargaining, which could have involved a dismissal, a plea of guilty to a lesser offense, or a plea of guilty to the charged offense.¹¹²

104. Warner & Cabot, *supra* note 89, at 606–07.

105. See Vogel, *supra* note 98, at 172; see also *supra* note 62 and accompanying text (noting 1809 as the earliest example of clear plea bargaining in the U.S. colonies).

106. See Vogel, *supra* note 98, at 175 (demonstrating a surge in guilty pleas in the Boston Police Court docket from less than fifteen percent in 1830, to 28.6 percent in 1840, fifty-two percent in 1850, 55.6 percent in 1860, and eighty-eight percent in 1880).

107. See *id.* at 174–75 (discussing early practice of plea bargaining in Boston).

108. Mnookin, *supra* note 9, at 1723, 1728.

109. See Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 106–07 (1928) (noting a generational increase in the proportion of pleas).

110. Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1, 2 (1927). Miller argued that the concept of forgiveness by an aggrieved person, which he described as “condonation,” was long recognized by 1927 but was “supposed to have no effect in preventing prosecution. . . . In practice, however, the 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 Moley, *supra* note 109, at 97, 118 (noting that by 1926 in Cook County, Illinois, 13,117 felony prosecutions entered preliminary hearing and 492 resulted in a complete jury trial; 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; these sources do not specify whether the remaining cases were resolved by dismissals, guilty pleas, or bench trials). There also appeared to be an increase in jury trial waivers, presumably in favor of bench trials. See Warner & Cabot, *supra* note 89, at 592 (noting that in 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 over half of the states).

111. Miller, *supra* note 110, at 8, 10.

112. *Id.* at 10.

Miller also presented evidence that trial judges refused to have any part in compromises. Other trial judges privately expressed to the parties the propriety of a settlement. Still other trial judges openly bargained in court with the accused.¹¹³ Cases in which pleas were commonly used included desertion or failure to provide for wife or children;¹¹⁴ violation of liquor laws;¹¹⁵ automobile thefts;¹¹⁶ sex cases, including seduction and statutory rape;¹¹⁷ and larceny or accusations of issuing fraudulent checks or obtaining money or property by fraudulent means.¹¹⁸

The rise in guilty pleas coincided with increases in the number of criminal offenses, which burdened law enforcement officials,¹¹⁹ the courts,¹²⁰ and the public.¹²¹ Miller argued that inadequate staff, equipment, and cohesive administrative guidance and direction made it impossible for law enforcement “to cope successfully with the professional banditry of [the] scientific age.”¹²² Professors Sam Warner and Henry Cabot noted large increases in the number of petty offenses and the “recent revival . . . of outlawry,” which was attributed to the inability of the courts and authorities to handle modern crime.¹²³ J.C. McWhorter, another early twentieth century legal commentator, lamented that the public had become so accustomed and listlessly indifferent to lawlessness that unpunished crime had become “a matter-of-course thing in the public mind.”¹²⁴ Finally, Miller argued that improved means of transportation and

113. *Id.*; see also Moley, *supra* note 109, at 103 (describing the early use of guilty pleas as a defense strategy that also had advantages for prosecutors, who would not be “compelled to carry through an onerous and protracted trial,” and judges, who “escape[] the danger of being reversed on some point of law”).

114. Miller, *supra* note 110, at 12.

115. *Id.* at 13–14.

116. *Id.* at 14–15.

117. *Id.* at 15.

118. *Id.* at 16. Miller attributed the frequency of pleas in fraud cases to the prosecutor’s difficulty of securing convictions, desire to avoid the expense of a trial, and outright fear of an acquittal. *Id.* at 15–16.

119. *Id.* at 19.

120. See *id.* at 20 (noting the inadequacy of courts to accommodate increased case loads and the irksome burden of jury duty on the public); see also Mnookin, *supra* note 9, at 1728 (arguing that increased caseloads significantly contributed to the judiciary’s changing attitude about the merits of negotiated pleas); Warner & Cabot, *supra* note 89, at 590 (discussing the striking growth in the number of cases per judge and noting that the number of judges did not keep pace with the rapid population growth).

121. Miller, *supra* note 110, at 12.

122. *Id.* at 19.

123. Warner & Cabot, *supra* note 89, at 590, 595.

124. J.C. McWhorter, *Abolish the Jury*, 29 W. VA. L. Q. & B. 97, 97 (1923).

communication brought people closer together, multiplied frictions, and increased governmental supervision.¹²⁵

The increase in the number of criminal acts allowed for an expanded role for counsel.¹²⁶ The U.S. Constitution reflected an early acceptance of the adversarial system and a rejection of the English common law prohibition on defense counsel.¹²⁷ Experienced defense bars emerged in most U.S. colonies,¹²⁸ and these lawyers were knowledgeable about the constitutional rules governing substantive and procedural criminal rights.¹²⁹ Originally, this system worked to the defendant's advantage. 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.¹³⁰ From at least 1810 on, almost every defendant in New York exercised the right to representation by counsel.¹³¹

The mere presence of counsel did not mean that the adversarial system as we know it today operated during the nineteenth and early twentieth centuries.¹³² Still, by the height of the indeterminate sentencing era the United States had developed a distinct adversarial system. Nevertheless, few constitutionally prescribed controls limited the sentencing judge's discretion to decide a defendant's punishment. In the next Part, this Article questions whether recent developments in confrontation jurisprudence require reconsideration of confrontation rights at felony sentencing.

125. Miller, *supra* note 110, at 18; *see also* McWhorter, *supra* note 124, at 98 (opining that automobiles afforded criminals the ability to "play hide and seek" with law enforcement).

126. Miller, *supra* note 110, at 16–18 (noting the creation of new laws prohibiting the manufacture and sale of liquor, regulating securities, and governing the issuances of checks and other evidences of value, as well as new laws regulating automobiles); *see also* Warner & Cabot, *supra* note 89, at 585 (noting the increase in crimes committed and prosecuted).

127. Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 327–28 (2009).

128. *See id.* at 323, 327, 329, 331, 333.

129. *See, e.g., id.* at 333.

130. *Id.* at 330–31 (noting that by the middle of the eighteenth century, a defendant in colonial New Jersey was roughly four times more likely to be acquitted if represented by counsel).

131. *Id.* at 332–33.

132. *Id.* at 334.

III. A RENEWED COMMITMENT TO CROSS-EXAMINATION

*[C]ross-examination is the greatest legal engine ever invented for the discovery of truth.*¹³³

In the decades after *Williams*, due process became the vehicle through which the Sixth Amendment and virtually all Bill of Rights protections were interpreted to apply to criminal defendants in state courts.¹³⁴ But the Sixth Amendment was not incorporated in whole during the six years in which the Court considered whether the Counsel, Confrontation, and Jury Trial Clauses applied against the states.¹³⁵ Interpretations of what due process required varied between the Amendment's clauses,¹³⁶ each of which had to be separately deemed fundamental or essential to a fair trial.¹³⁷ Additionally, some clauses were deemed to only 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).¹³⁸ The Counsel Clause provided the broadest protection¹³⁹ and had already been interpreted to apply at all critical stages of federal criminal prosecutions.¹⁴⁰ In fact, for years before *Williams*, the Court had determined on a case-by-case basis whether the lack of counsel at state

133. *Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980) (quoting *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940))), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004) (internal quotation marks omitted).

134. Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 391 (2006).

135. 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).

136. Chhablani, *supra* note 69, at 520–21 (discussing the Court's interpretation of "criminal prosecution," the meaning of which depends on the procedural right at issue, and advocating for a broad definition based on the term "criminal offense").

137. 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 American scheme of justice . . .").

138. *Mancusi v. Stubbs*, 408 U.S. 204, 211 (1972) (holding that confrontation only applies to trials). See generally Michaels, *supra* note 96, 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).

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

140. See *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) ("[T]he Sixth Amendment stands as a jurisdictional bar to a valid conviction and *sentence* . . .") (emphasis added).

and federal sentencing hearings violated due process.¹⁴¹ By the late 1960s, counsel was required for an array of post-verdict proceedings, including sentencing, appeals, and probation hearings.¹⁴²

In the years following the expansion of the Sixth Amendment, lower federal courts remained disinclined to reexamine whether and to what extent sentencing discretion was limited by application of the Confrontation Clause.¹⁴³ Relying on the close link with hearsay rules, many lower federal courts held that confrontation did not apply post-trial.¹⁴⁴ Actual cross-examination was unnecessary to determine reliability, which was all that due process required.¹⁴⁵ These

141. See, e.g., *id.*; *Townsend v. Burke*, 334 U.S. 736, 739–41 (1948) (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); *Moore v. Michigan*, 355 U.S. 155, 160–65 (1957) (“The right to counsel is not a right confined to representation during the trial on the merits.”).

142. *Mempa*, 389 U.S. at 134.

143. *McMurray*, *supra* note 68, at 605–07 (discussing lower courts’ failure to “seriously engage the text of the Sixth Amendment” in ruling that confrontation did not apply at felony sentencing); see, e.g., *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978).

144. See, e.g., *Fatico*, 579 F.2d at 711–12 (“[M]ost of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.” (quoting *Williams v. New York*, 337 U.S. 241, 250 (1949))); *United States v. Sunrhodes*, 831 F.2d 1537, 1541 (10th Cir. 1987) (“Because restitution hearings are part of the sentencing process, [only] the Due Process Clause applies . . .”); see also *United States v. Beaulieu*, 893 F.2d 1177, 1180–81 (10th Cir. 1990) (distinguishing between rights at trial and rights at sentencing and concluding that confrontation rights did not apply at sentencing); *United States v. Marshall*, 910 F.2d 1241, 1244 (5th Cir. 1990) (holding that hearsay is admissible for sentencing purposes); *United States v. Johnson*, 935 F.2d 47, 50–52 (4th Cir. 1991) (holding that cross-examination at sentencing is not required of probation officers regarding the substance of information included in the PSR); *United States v. Tardiff*, 969 F.2d 1283, 1287 (1st Cir. 1992) (“[A] defendant’s Sixth Amendment right to confront the witnesses . . . does not attach during the sentencing phase.”); *United States v. Silverman*, 976 F.2d 1502, 1511 (6th Cir. 1992) (en banc) (“Many of [the] rights, applicable at trial, are not applicable to the sentencing process. . . . [C]onfrontation rights are among those in the latter category.”); *United States v. Petty*, 982 F.2d 1365, 1368 (9th Cir. 1993) (agreeing that confrontation rights do not apply at sentencing), *amended by* 992 F.2d 1015 (9th Cir. 1993); *United States v. Francis*, 39 F.3d 803, 810 (7th Cir. 1994) (holding that a criminal sentencing hearing is not within the meaning of the Sixth Amendment). Not all circuits initially adopted this majority view. See *United States v. Fortier*, 911 F.2d 100, 103–04 (8th Cir. 1990) (holding that while there is a right to cross examine witnesses at criminal sentencing, the hearsay standard of reliability governs confrontation challenges), *overruled by* *United States v. Wise*, 976 F.2d 393, 400 (8th Cir. 1992) (en banc) (“[P]rotections of the right of confrontation apply at the guilt phase, but it does not follow that the same protections apply at sentencing simply because facts proved at sentencing may increase a defendant’s sentence.”).

145. *United States v. Kikumura*, 918 F.2d 1084, 1102–03 (3d Cir. 1990) (arguing that confrontation violations occur only when a court relies on misinformation of a constitutional magnitude because hearsay is normally considered at sentencing as long as the due process standard is met); see also *Chhablani*, *supra* note 69, at 498–99 (discussing the Burger Court and its reading of confrontation rights to require a showing of unreliability as a definitional element).

courts reasoned that, for confrontation purposes, the criminal prosecution did not extend beyond Blackstone's stage seven,¹⁴⁶ which referred to trial and conviction.¹⁴⁷ Cross-examination was viewed as impractical and was predicted to cause endless delay.¹⁴⁸ *Williams* was given the broadest interpretation,¹⁴⁹ and thus, unlike the right to counsel,¹⁵⁰ confrontation was not required beyond the trial.¹⁵¹

Until recently, the Confrontation Clause did not require actual cross-examination at trial. In fact, it was generally accepted that the Confrontation Clause and hearsay rules were of the same origin—due process—and designed to protect similar values—trustworthiness and reliability.¹⁵² *Ohio v. Roberts* best articulated the shared standard:

[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

146. See *supra* note 76 and accompanying text.

147. 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 that had been overturned. *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: "The right to confrontation is basically a trial right. It includes 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).

148. *Fatico*, 579 F.2d at 711–12.

149. Even after *Booker v. United States*, 543 U.S. 220 (2005), which recognized limited jury trial rights at sentencing, federal courts remained unwilling to reconsider whether confrontation also applied at felony sentencing. See, e.g., *United States v. Paull*, 551 F.3d 516, 527–28 (6th Cir. 2009); *United States v. Brown*, 441 F.3d 1330, 1359–61 (11th Cir. 2006). At least one state court appeared willing to consider the issue. *State v. Hurt*, 702 S.E.2d 82, 87–95 (N.C. Ct. App. 2010) (holding upon *de novo* review that the Confrontation Clause applies during non-capital jury sentencing).

150. Chhablani, *supra* note 69, at 495–96 (discussing expansive extension of right to counsel to some pre-trial proceedings, interrogations, and identification proceedings).

151. *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959) (pre-incorporation case relying on *Williams* to hold due process did not require, at sentencing, confrontation of unsworn or out of court information relevant to the offense or offender characteristics); see also, Beale, *supra* note 8, at 152 ("Because *Williams* was decided before the Confrontation Clause was held applicable to state proceedings, the Court applied the Due Process Clause.").

152. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) ("[It is a] truism that hearsay rules and the Confrontation Clause are generally designed to protect similar values . . . and stem from the same roots . . ." (citations and internal quotation marks omitted)); see also G. Michael Fenner, *Today's Confrontation Clause (After Crawford and Melendez-Diaz)*, 43 CREIGHTON L. REV. 35, 37 (2009) (noting that until *Crawford*, confrontation jurisprudence "more or less tracked the hearsay rule").

other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.¹⁵³

The *Roberts* Court affirmed the rule that where a witness was unavailable, the Constitution was satisfied by hearsay that was reliable and trustworthy.¹⁵⁴ In *Roberts*, the defendant was arrested and charged with forging a check and possessing stolen credit cards.¹⁵⁵ Anita Isaacs, the daughter of the victims,¹⁵⁶ testified at the preliminary hearing and admitted that she knew the defendant and that she permitted the defendant to stay at her apartment for several days while she was away; she also testified that she neither gave the defendant her parents' checks and credit cards nor granted the defendant permission to use them.¹⁵⁷ At trial, the defendant testified that Anita provided the checkbook and credit cards with the understanding that he was allowed to use them.¹⁵⁸ Anita did not appear at trial and, after the judge found that she was unavailable, the prosecution was allowed to admit her preliminary hearing transcript to rebut the defendant's testimony.¹⁵⁹ The intermediate courts in Ohio reversed, finding no good faith showing of unavailability because the prosecution failed to seek Anita's whereabouts for purposes of trial or otherwise determine whether she could be found.¹⁶⁰ Ohio's highest court reinstated the finding that Anita was unavailable, reasoning that increased due diligence would not have procured Anita's attendance at trial because her whereabouts were entirely unknown.¹⁶¹ Still, defense counsel's questioning at the preliminary hearing did not amount to a cross-examination, nor was the defendant afforded constitutionally sufficient confrontation for purposes of trial.¹⁶² On review, the Court found that the prosecution made a good faith showing of unavailability and that the

153. *Roberts*, 448 U.S. at 66.

154. *Id.*

155. *Id.* at 58.

156. The checks were in the name of Barnard Isaacs, and the stolen credit cards belonged to both Isaacs and his wife, Amy. *Id.*

157. *Id.* According to the Court, defense counsel neither asked to have Anita declared a hostile witness nor requested permission to cross-examine her. *Id.*

158. *Id.* at 59.

159. *Id.* at 59–60. Prosecutors sent five subpoenas for four different trial dates to Anita at her parents' Ohio residence. *Id.* at 59. Anita was not present upon execution, nor did she contact the court. *Id.* Before admission of the transcript, the trial judge conducted a *voir dire* of Anita's mother, who testified that she infrequently received telephone calls from and knew of no emergency contact information for her daughter. *Id.* at 59–60.

160. *Id.* at 60.

161. *Id.* at 60–61.

162. *Id.* at 61.

defendant had an adequate opportunity to cross-examine Anita at the preliminary hearing.¹⁶³

Roberts acknowledged that while the Confrontation Clause was intended to limit some hearsay, literal application of the Clause had been rejected for fear that virtually every hearsay exception would be abrogated.¹⁶⁴ When weighed against competing interests furthered by hearsay rules, *Roberts* made clear that the Confrontation Clause only “reflect[ed] a *preference* for face-to-face confrontation at trial.”¹⁶⁵ Additionally, the Court opined that some hearsay rules stemmed from the same historical origins as the Confrontation Clause.¹⁶⁶ In such cases, reliability was a sufficient surrogate,¹⁶⁷ as due process only required cross-examination when an actual hearsay violation occurred.¹⁶⁸

Perhaps persuaded that hearsay rules strayed too far from confrontation’s “original meaning,”¹⁶⁹ the Court reexamined the historical origins and text of the Confrontation Clause twenty-five years after *Roberts* in *Crawford v. Washington*.¹⁷⁰ The *Crawford* Court ruled that confrontation principles prohibited admission of testimonial statements by a wife against her husband, the defendant, and against whom she could not testify based on spousal privilege.¹⁷¹ The Washington Supreme Court had previously affirmed admission of Mrs. Crawford’s recorded statements, apparently satisfied that they were reliable and trustworthy in accord with *Roberts*.¹⁷²

163. *Id.* at 73, 75.

164. *Id.* at 63.

165. *Id.* at 63–64 (emphasis added); see also *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (reasoning that the primary purpose of confrontation is to ensure reliability and that face-to-face confrontation is only a preference).

166. *Roberts*, 448 U.S. at 66.

167. Chhablani, *supra* note 69, at 514 (quoting John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WAS. L. REV. 191, 206 (1999)).

168. See *United States v. Fatico*, 579 F.2d 707, 712–13 (2d Cir. 1978) (“*Williams* does not hold that all hearsay information must be considered.”).

169. *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 historical accuracy of *Crawford*’s reasoning that cross-examination and unavailability would have been required at the time of the Founding, as well as the use of nontestimonial statements; also arguing that *Crawford* glossed over important distinctions between felony and misdemeanor procedure and that at the Founding, the law had not fully developed hearsay rules or their exceptions).

170. *Crawford*, 541 U.S. at 43–50.

171. *Id.* at 38–40, 68–69.

172. *Id.* at 41. The Washington Court of Appeals reversed and found that Mrs. Crawford’s statements contradicted previous statements made in response to specific questions, and that at one point Mrs. Crawford admitted that she closed her eyes during the incident for which her husband was on trial. *Id.*

The *Crawford* Court reasoned that history supported two inferences about the Founder's understanding of confrontation rights. First, the Confrontation Clause was intended to prohibit ex-parte examinations as evidence against an accused.¹⁷³ Second, testimonial statements of absent witnesses were not allowed without a showing of unavailability *and* a prior opportunity for cross-examination.¹⁷⁴ The Court examined application of hearsay rules in other confrontation cases, including *Roberts*, and held that the due process standard was (perhaps inherently) unpredictable and unreliable.¹⁷⁵ Confrontation standards were higher than due process requirements: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."¹⁷⁶ Mrs. Crawford's statements closely paralleled those that the Framers intended to regulate,¹⁷⁷ and the Court found that admission of her statements violated confrontation principles.¹⁷⁸ Noting that "testimonial statements" can be used for purposes other than establishing the truth of the matter asserted,¹⁷⁹ the Court explicitly limited the scope of the Confrontation Clause to "witnesses against the accused" who "bear testimony."¹⁸⁰

After *Crawford*, use of testimonial statements required more than the due process standard of "minimum indicium of reliability."¹⁸¹ The Court left for another day how to distinguish between statements that were testimonial and those that were not.¹⁸² This distinction was clarified in *Davis v. Washington*.¹⁸³ *Davis* involved the admissibility of statements of unavailable witnesses in criminal trials in both Washington state and Indiana. The Washington courts concluded that statements made in response to questions by a 911

173. *Id.* at 50.

174. *Id.* at 53–54.

175. *Id.* at 60–67 (examining and discussing inconsistencies in the application of the reliability standard in post-*Roberts* confrontation cases).

176. *Id.* at 68–69; *see also id.* at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation[, which] reflects a judgment . . . about how reliability can best be determined.").

177. *See id.* at 52–53 (concluding that statements taken by police officers in the course of interrogations bear a striking resemblance to examinations by justices of the peace in England); *see also* Fisher, *supra* note 12, at 59 (describing *Crawford* as a "thoroughgoing originalist opinion").

178. *Crawford*, 541 U.S. at 53–55. The Court found irrelevant both the absence of an oath and the fact that the interrogators were police officers. *Id.* at 52–53.

179. *Id.* at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

180. *Id.* at 51–52 (internal quotation marks omitted).

181. *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

182. *Crawford*, 541 U.S. at 68.

183. 547 U.S. 813 (2006).

operator who answered a victim's call about a domestic dispute were nontestimonial and admissible.¹⁸⁴ The Indiana courts disagreed about whether to admit a victim's affidavit that was executed and given to law enforcement officers who responded to a domestic disturbance complaint at the victim's home.¹⁸⁵ According to the *Davis* Court, statements were *testimonial* when the circumstances objectively indicated that no ongoing emergency existed and the primary purpose of the interrogation (or questioning) was to establish or prove past events potentially relevant to a subsequent criminal prosecution.¹⁸⁶ Statements were *nontestimonial* when given in the course of an interrogation (or questioning) and where circumstances objectively indicated that the primary purpose of the interrogation was to assist police during an ongoing emergency.¹⁸⁷

Recognizing that *Crawford* did not require cross-examination of every statement, *Davis* demonstrates the fluidity of the testimonial/nontestimonial distinction.¹⁸⁸ The Court 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.¹⁸⁹ Relying on this reasoning, the Court ruled that the recorded 911 statements in Washington state were *nontestimonial*, and properly admitted, because (1) the victim spoke about events not in the past, but as they actually happened, (2) the victim's call for help was against a bona fide physical threat, and (3) elicitation of the victim's statements was necessary to the

184. *Id.* at 818–19. In the call, the Indiana defendant's ex-girlfriend provided defendant's name and accused him of assault. *Id.* at 817–18. The defendant was present during this portion of the call. *Id.* After informing the operator that the defendant had left the scene, the victim described the context of the assault and provided other identifying information about the defendant. *Id.* at 818.

185. *Id.* at 819–21. In *Washington*, officers found the victim alone on her front porch; she later gave permission for officers to enter the home where the defendant, her husband, was waiting in the kitchen. *Id.* at 819. After questioning the victim in her living room, officers provided an affidavit, which she filled out and signed. *Id.* at 819–20. One officer remained in the kitchen with the defendant, who attempted to participate in the conversation. *Id.*

186. *Id.* at 822.

187. *Id.*

188. *See id.* The *Davis* Court reasoned that “[w]ell into the 20th century . . . Confrontation Clause jurisprudence was carefully applied only in the testimonial context.” *Id.* at 824–25. The testimonial character of the statement separated it from hearsay that was subject to traditional limitations barring admission under due process, but not confrontation, principles. *Id.* at 821. Statements taken by police officers in the course of interrogations were considered to be in a core class of testimonial statements. *Id.* at 822.

189. *Id.* at 828. The Court expressed confidence in the trial courts' ability to recognize the point at which statements became testimonial for confrontation purposes. *Id.* at 829.

resolution of an emergency.¹⁹⁰ On the other hand, the statements contained in the victim affidavit in *Indiana* were *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 notable lapse of time between executing the affidavit and the events described therein.¹⁹¹ The Court later held that testimonial statements also included sworn certificates by analysts at state crime laboratories,¹⁹² as opposed to statements made by a dying murder victim in response to questions by law enforcement officers responding at the scene before the victim's death.¹⁹³

Testing the veracity of testimonial statements that are material to punishment is as compelling at felony sentencing as *Crawford* and *Davis* recognized it is at trial. Originally, the purpose of trial was to establish the specific offense conduct that constituted a crime, and the purpose of sentencing was to announce the punishment.¹⁹⁴ Little judicial discretion existed pre-Founding to influence felony punishment.¹⁹⁵ Fact-finding at the latter stage resulted from bifurcation, which was a post-Founding development.¹⁹⁶ Modern plea-bargaining has shifted fact-finding on offense conduct—and to a lesser extent offender characteristics—into a structured sentencing hearing.¹⁹⁷ Once guilt is accepted, either as a result of a trial or a plea, sentencing becomes the focus of all parties, and an accurate determination of material facts that influence the sentence is of primary importance for the accused.

This is not to say that confrontation should be required for all felony sentencing information. 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. This Article does not suggest exclusive factors or a

190. *Id.* at 826–29. The Court reasoned that the statements were taken when the victim was in apparent immediate danger from the defendant and unprotected by the police. *Id.* at 831. The Court described the statements as not a story about the past, but as seeking aid in the present. *Id.*

191. *Id.* at 829–32. The Court described the affidavit as a narrative of past events delivered at some point in time after the danger ended, and, according to the testifying officer, the purpose of the affidavit was to establish events that previously occurred. *Id.* at 832.

192. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11, 329 (2009) (“This case involves little more than the application of our holding in *Crawford*.”).

193. *Michigan v. Bryant*, 131 S. Ct. 1143, 1166–67 (2011).

194. *See supra* notes 83–86 and accompanying text.

195. *See supra* notes 83–86 and accompanying text.

196. *See supra* notes 86, 95–96 and accompanying text.

197. *See supra* text accompanying notes 97–110.

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 three general categories of statements that are regularly considered by sentencing courts. Each is discussed in turn.

A. Category One: Testimonial Statements to Prove the Existence of a Prior Conviction

Undoubtedly, prior convictions are material to punishment. Nonetheless, 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.

B. Category Two: Testimonial Statements to Prove Facts Related to the Sentencing Offense

Testimonial statements to prove facts related to the sentencing offense or offenses are material to punishment, especially in our plea-bargaining system. Defendants who bargain for a plea serve lower sentences¹⁹⁸ because prosecutors do not pursue the most serious charges or the most severe punishment.¹⁹⁹ Determining whether this category of testimonial statements would assist in an assessment of truth and veracity is unnecessary where material facts about the sentencing offense are admitted by the defendant and entered into the record (or included in the plea agreement) at the time the plea is accepted. Most police reports, victim and witness statements, and other documents containing material facts should have been gathered during the investigatory stage and, upon the request of defense counsel, disclosed before the plea.²⁰⁰ The trial

198. Scott & Stuntz, *supra* note 61, at 1909. "Before contracting, the defendant bears the risk of conviction with the maximum sentence while the prosecutor bears the reciprocal risk of a costly trial followed by acquittal." *Id.* at 1914. Scott and Stuntz argue that "[c]riminal defendants, as a group, are able to reduce the risk of the imposition of maximum sanctions" but that prosecutors more than criminal defendants "obtain a larger net return from criminal convictions" through plea bargaining. *Id.* at 1915.

199. *Id.* at 1909.

200. 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"). This includes documents or objects

judge 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 state courts establish the facts material to the sentencing offense after accepting the plea.²⁰¹ At first glance, this appears part of the promissory exchange—the defendant has waived his right to trial in exchange for the prosecutor's recommendation of a specific sentence.²⁰² Still, plea bargains are not enforced according to “garden-variety” contract principles of offer and acceptance. Defendants negotiate with the prosecutor but contract with the judge.²⁰³ The defendant who agrees to a plea has a lower reliance on a prosecutor's promises,²⁰⁴ which rarely include those related to veracity of testimonial statements regarding the sentencing offense. Moreover, a prosecutor can only recommend a sentence to the judge, who alone determines punishment.²⁰⁵ Unlike a prosecutor's promises, a defendant's are rarely revocable after the plea has been entered. Thus, a defendant's promise to enter a plea is a somewhat one-sided agreement.²⁰⁶

Allowing limited cross-examination of testimonial statements to prove the facts material to the sentencing offense increases the odds that a defendant will get the agreement for which the parties have 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

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).

201. JAMES E. BOND, *PLEA BARGAINING AND GUILTY PLEAS* 156–59 (1975).

202. Scott & Stuntz, *supra* note 61, at 1921. “The entire structure of the criminal justice system presupposes that the relevant entitlements belong . . . to the defendant and prosecutor.” *Id.* at 1917. Even without a plea deal, defendants are free to enter a guilty plea. *Id.*

203. *Id.* at 1954–55. 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. *Id.* at 1954. Scott and Stuntz argue that 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. *Id.* A defendant who pleads bears the risk that the court will not follow the prosecutor's recommendation. *Id.* at 1956.

204. *Id.* at 1953. Additionally, the bargain has a presumption of enforceability. *Id.* at 1917, 1919. While Scott and Stuntz reject arguments that plea-bargaining is socially and morally harmful, they note that the bargaining process may be burdened by process defects. *Id.* at 1919.

205. *Id.* at 1953. The right to take a case to trial is a valuable entitlement, one for which a prosecutor will pay handsomely. *Id.* at 1921.

206. *Id.* at 1954. Most plea bargains are 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.*

exercising their sentencing discretion, as well as defense counsel's sense of the going "market price" for the crime.²⁰⁷ 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.²⁰⁸ In this manner, the sentencing hearing itself becomes quite similar to a trial, but results in sentencing by ambush from the defendant's perspective. 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 is the right call.

C. Category Three: Testimonial Statements to Prove Relevant Conduct

Like testimonial statements to prove prior convictions and the sentencing offense, testimonial statements to prove relevant conduct 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 [or] dismissed . . . conduct."²⁰⁹ The United States Sentencing Guidelines (the Federal Guidelines) place no limitations on the use of information concerning the background, character, and conduct of a convicted defendant.²¹⁰ Sentencing courts can reach far back in time to determine what conduct relates to the defendant's convicted offense.²¹¹ Relevant conduct increases the offense level.²¹² According to Professor Eang Ngov, relevant conduct could potentially add eighteen to thirty-six points to the base offense level,

207. *Id.* at 1959.

208. BOND, *supra* note 201, at 156–57 (noting that before accepting a plea, sentencing judges rarely make detailed inquiries regarding its factual basis).

209. Ngov, *supra* note 15, at 236–37.

210. *Id.* at 267 (citing 18 U.S.C. § 3661 (2006)).

211. *Id.* at 237–38.

212. Currently, there are three theories of offense level. *See id.* at 245–47. In a "pure charge offense system," punishment is based on the offenses for which a defendant was convicted. *Id.* at 246. In a "real offense system" punishment is based on "all the circumstances underlying the defendant's offense, regardless of whether the additional conduct amounted to convictions or charges." *Id.* In a "modified real offense system" the defendant's relevant conduct is taken into consideration. *Id.* at 247. The United States Sentencing Commission, which promulgated the Federal Sentencing Guidelines, adopted a "modified real offense system." *Id.*

depending on the offense, the latter of which could turn an initial sentence of probation into a mandatory life sentence.²¹³ Relevant conduct determinations dramatically increase sentences, greatly prejudice criminal defendants,²¹⁴ and can potentially undermine the foundation of the U.S. criminal justice system by creating the risk that society will no longer respect the rule of law.²¹⁵

Cross-examination of testimonial statements offered to prove dismissed and uncharged conduct aids the search for veracity. 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.²¹⁶ Such testimonial statements are likely to include hearsay, double hearsay, and triple hearsay. During the plea negotiations, defense counsel may be unaware which statements, if any, will be presented at sentencing, and there is usually little opportunity to investigate witnesses once the materiality of the statement becomes apparent. In the federal regime, the Federal Guidelines were established to implement structure and predictability into the sentencing process.²¹⁷ However, determining

213. *Id.* at 284–85 (noting that relevant conduct could 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 and calculating that a thirty-six point increase on a drug offense could turn an initial sentence of probation into a mandatory life sentence); *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).

214. *See* Ngov, *supra* note 15, at 239. Offense sentencing, of both uncharged and unconvicted conduct, results in the harshest penalties outside of capital punishment, including life sentences. *Id.* at 249. 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. *Id.* at 248. The rules of evidence also do not apply. *Id.*

215. *Id.* at 296–300.

216. *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 [Federal] 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, *Guideline Sentencing: Probation Officer Responsibilities and Interagency Issues*, FED. PROBATION, Sept. 1989, at 3. In the federal regime, probation officers play a critical role as the court’s independent investigator. *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. *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).

217. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988); Erin A. Higginbotham, *A Meaningless*

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.²¹⁸ The Federal Sentencing Commission sought to clarify the role of this type of sentencing evidence by amending the Federal Guidelines to allow courts to consider, without limitation, any information concerning the defendant's background, character, and conduct.²¹⁹ Specifically, section 5K2.21 explicitly approved consideration of uncharged and dismissed offenses.²²⁰ Circuits are now split regarding the relationship between such conduct and the sentencing offense.²²¹ Some circuits require a "meaningful relationship," while others require no more than a "remote connection."²²²

Despite the serious implications of using uncharged or dismissed conduct, reliability is the current standard to test the veracity and truth of such testimonial statements.²²³ *Crawford* and *Davis* make

Relationship: The Fifth Circuit's Use of Dismissed and Uncharged Conduct Under the Federal Sentencing Guidelines, 40 ST. MARY'S L.J. 267, 270–71 (2008).

218. Higginbotham, *supra* note 217, 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.

219. *Id.* at 275.

220. *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 COMM'N, GUIDELINES MANUAL § 5K2.21 (2013).

221. Higginbotham, *supra* note 217, at 281–82. *Compare* *United States v. Newsom*, 508 F.3d 731, 735 (5th Cir. 2007) (holding that a remote connection was sufficient for upward departure based on relevant conduct), *and* *United States v. Rogers*, 423 F.3d 823, 828 (8th Cir. 2005) (same), *with* *United States v. Ellis*, 419 F.3d 1189, 1193 (11th Cir. 2005) (requiring a meaningful relationship for upward departure based on relevant conduct), *United States v. Smith*, 267 F.3d 1154, 1164 (D.C. Cir. 2001) ("the conduct forming the basis for the departure must be descriptively or logically, and not merely temporally, connected to the crime for which the defendant was actually convicted"), *and* *United States v. Amirault*, 224 F.3d 9, 12 (1st Cir. 2000) (stating that relevant conduct must "relate meaningfully to the offense of conviction").

222. Higginbotham, *supra* note 217, at 282–98. Conduct that is meaningfully related "sheds further light on the true nature of the offense of conviction." *Id.* at 282. Even where there is a remote connection, the court is allowed to consider unlimited information regarding a defendant's background. *Id.* at 283.

223. Acquitted conduct is also included in the category of "relevant conduct" and essentially second-guesses a prior jury's determination of the truth and veracity of testimonial statements. A jury has found the testimony insufficient to prove a criminal offense. Despite

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 is no less compelling at sentencing than at trial. For this reason, the Court should find that cross-examination of testimonial statements related to all categories of relevant conduct is the right call.

CONCLUSION

*[T]he very nature of the Sixth Amendment commands fidelity to its roots.*²²⁴

In pre-Founding felony cases, judicial discretion did not exist to call the “balls and strikes” that increased punishment. The text and structure of the Sixth Amendment is reflective of the pre-ratification procedure of unitary prosecution. But criminal sentencing has taken sharp turns since the Founding. In our modern system, the vast majority of felonies are resolved by a plea of guilty. As a matter of practice, few plea agreements provide the factual details necessary to make qualitative decisions about punishment. Today, factual disputes regarding punishment, including those related offense

the jury’s declaration of “legal innocence,” sentencing courts have received authorization to consider acquitted conduct to increase the punishment. *Id.* at 258–60 nn.142–50, 284, 287 (discussing impact of acquitted conduct on subsequent proceedings, including probation and parole revocation hearings). Until recently, the Court had only addressed this issue in a per curiam opinion that held the use of such information did not violate the Double Jeopardy Clause. *See* *United States v. Watts*, 519 U.S. 148, 155 (1997) (per curiam) (“[A]n acquittal is not a finding of any fact. . . . Without specific jury findings, no one can logically or realistically draw any factual inferences . . .” (quoting *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996))). Thus, some defendants were “sentenced to same length of imprisonment that would have been imposed had he actually been convicted of the offense.” Ngov, *supra* note 15, at 242. *But see* 4 BLACKSTONE, *supra* note 64, at *355 (“If the jury therefore find the prisoner not guilty, he is then for ever [sic] quit and discharged of the accusation . . .”). Ngov argued that even if acquittals did not prove actual innocence, but that the reasonable doubt standard was unmet, reconsideration of acquitted conduct was inherently unfair. Ngov, *supra* note 15, at 242. The prosecution was given a “second bite at the apple” to prove conduct already rejected as punishable, which allowed the sentencing judge to ignore the jury’s previous findings. Ngov, *supra* note 15, at 261, 267, 288, 291 (arguing that it would be impossible for innocence to have any significance if the sentencing court is allowed to use acquitted conduct to increase the sentence; that there should be new evidence to warrant or justify a court’s reconsideration of acquitted conduct; and that such an outcome is nonsensical and in contravention of recent Supreme Court Jury Trial Clause precedent, including *Apprendi* and its progeny). Currently, the constitutionality of the use of acquitted conduct for purposes of felony sentencing remains in question. *See generally* *Alleyn v. United States*, 133 S. Ct. 2151 (2013). (overturning the trial judge’s application of a sentencing factor that the jury had already rejected as a proven element of the offense).

224. Fisher, *supra* note 12, at 61.

characteristics and the defendant's background and character, are left to the discretion of the sentencing judge. The issue of whether the Confrontation Clause applies to uncrossed testimonial statements presented at felony sentencing is thus of utmost importance. To the extent that such statements are material,²²⁵ cross-examination is the right call where doing so would assist in the assessment of truth and veracity.

Whether the right calls were made in *Williams* is no longer in question.²²⁶ Like many judges today, Samuel's judge was confident of the "strike zone." He was also sure that a jury in possession of all the facts would agree that Samuel's sentence was just. Still, Samuel was released from prison after the Second Circuit granted habeas relief in 1964,²²⁷ approximately fifteen years after the post-verdict finding that he was a "menace to society." A civil jury ruled against the City of New York almost ten years after Samuel's release and awarded compensatory damages in the amount of forty thousand dollars for malicious prosecution.²²⁸ This verdict no doubt would have "stultified" the conscious of Samuel's judge. The Second Circuit affirmed the award and found it indisputable that the Brooklyn police acted on no more than a mere suspicion in arresting Samuel for Selma's murder.²²⁹ Surely, these post-conviction developments cast doubt on the original calls about the reliability of the sentencing information used against Samuel. Regrettably for Samuel, it took twenty-five years to make the *right* calls.

225. See Klein, *supra* note 95, at 730–31 (noting increasing sentence lengths post-*Booker*).

226. See Davies, *supra* note 169, at 216 (arguing that "[o]riginalism cannot provide valid justifications for contemporary criminal procedure rulings because the authentic history involves far more discontinuity than is commonly expected").

227. *Fay v. Williams*, 376 U.S. 915 (1964).

228. See *Williams v. City of New York*, 508 F.2d at 356, 358 (2d Cir. 1974); see also *Ex-Inmate of Death House Sues City for \$8 Million*, N.Y. TIMES, Sept. 11, 1964, at 16.

229. See *Williams*, 508 F.2d at 358 ("That the City police acted on no more than mere suspicion seems indisputable.").