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# CONSTITUTIONAL LAW—SIXTH AMENDMENT—BRAVING CONFRONTATION: ARKANSAS'S PROGRESSIVE POSITION REGARDING CRIMINAL DEFENDANTS' CONFRONTATION RIGHTS AT SENTENCING.

## I. INTRODUCTION

Recognizing the importance of a criminal defendant's confrontation rights and the impact on everyone if those rights are denied, Justice Scalia wrote: "But he surely has not received [his just deserts] pursuant to the procedures that our Constitution requires. And what has been taken away from him has been taken away from us all."[1]

To ensure that individuals would be guarded against this type of government action, the Framers[2] added a number of rights to the Constitution to protect the life and liberty of Americans.[3] As a shining example, the Sixth Amendment grants specific rights to defendants during criminal proceedings:[4]

> 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 [sic].[5]

A majority of courts, however, have drawn a distinction between the guilt phase and the sentencing phase of criminal proceedings and have not applied the right to confrontation during the latter phase.[6] The Supreme Court of the United States[7] has examined how courts apply the Confrontation Clause in the guilt phase of a trial and has recently expanded the scope of its application. The Court's decisions in subsequent cases have simultaneously confirmed the importance of a defendant's right to confront witnesses yet remained silent on the application of that right at sentencing.[8]

In 2004, the Court overruled the standard it had followed for over two decades with its decision in *Crawford v. Washington*.[9] In *Crawford*, the Court rejected the reliability standard[10] for out-of-court testimonial statements that it had previously applied.[11] Instead, the Court held that out-of-court statements that were testimonial in nature were not admissible unless the declarant testified at trial or, if unavailable, the defendant had been given a prior opportunity to cross-examine the declarant.[12] Since *Crawford*, the Court has decided several cases dealing with the Confrontation Clause, further expanding criminal defendants' right to confront witnesses in various forms.[13] The Court, however, has never addressed a criminal defendant's

right of confrontation at the sentencing phase.[14] States, therefore, have no explicit guidance for confrontation rights at sentencing.

Recently, the Arkansas Supreme Court issued a monumental decision regarding confrontation rights of criminal defendants. In *Vankirk v. State*,[15] the court held that criminal defendants have a right of confrontation at sentencing under the United States and Arkansas Constitutions.[16] With this decision, Arkansas has joined a small group of state and federal courts that recognize the importance of this Sixth Amendment right at the sentencing phase. Arkansas, however, stands alone with its explicit holding that the Confrontation Clause must apply at sentencing in both capital and non-capital cases, without limiting that right to sentencings where the jury is finding facts that could increase the defendant's sentence beyond the statutory maximum.[17]

This note argues that all courts should follow Arkansas's lead and should apply the Sixth Amendment Confrontation Clause at both the guilt and sentencing phases of trial. First, this note covers the history of the Confrontation Clause's application at sentencing in the Supreme Court, in state courts, and in Arkansas prior to *Vankirk*.[18] Next, this note examines the *Vankirk* decision and discusses the future of sentencing in Arkansas after *Vankirk* in light of recent Supreme Court Confrontation Clause jurisprudence.[19] Finally, this note proposes that other states should follow Arkansas's lead on this issue and that the Supreme Court should rule that the Confrontation Clause must apply at the sentencing phase of trial.[20] In support of this proposal, this note makes five distinct arguments.

The first argument is that the plain meaning of the Sixth Amendment supports the Confrontation Clause's application at both the guilt and sentencing phases of trial. The second argument is that the Framers did not contemplate a bifurcated trial process; thus, they did not specifically state that confrontation rights apply at the sentencing phase. The third argument is that allowing evidence to be presented at sentencing that has not been tested through cross-examination is the principal evil that the Framers intended to guard against with the Confrontation Clause. The fourth argument is that *Williams v. New York*,[21] which many courts use to deny confrontation rights at sentencing, is not Supreme Court precedent for this purpose. The fifth, and last, argument is one of fairness—that confrontation rights at both phases of trial are necessary to maintain the integrity of the justice system.

## II. BACKGROUND

To understand how the *Vankirk* decision departed from traditional Confrontation Clause decisions, the history of its application at sentencing is essential. This section first examines that history in Supreme Court cases.[22] Next, this section focuses on how other states have applied the Confrontation Clause at sentencing.[23] Finally, this section discusses how Arkansas

courts have applied the Confrontation Clause at the sentencing phase prior to *Vankirk*.[24]

A. History of the Confrontation Clause at Sentencing

1. *Supreme Court of the United States*

Although the Supreme Court has analyzed the Confrontation Clause in several cases,[25] the Court has not addressed the right of confrontation at sentencing.[26] Many courts, however, erroneously rely on *Williams v. New York*[27] as Supreme Court precedent on this issue.[28] In *Williams*, the defendant was convicted of first-degree murder, and the jury recommended life in prison.[29] After considering other evidence, however, the trial judge sentenced him to death.[30] At sentencing, the judge stated that the presentence report contained information of the defendant's participation in other burglaries and of his "'morbid sexuality,'" which the judge believed merited the harsher sentence.[31]

The defendant appealed to the Supreme Court and claimed that imposing a harsher sentence than was recommended by the jury, based on information not presented to the jury, was a violation of his due process right under the Fourteenth Amendment.[32] The Court, however, ruled that sentencing judges need access to as much information as possible so that the sentence imposed can be tailored to the defendant.[33] The Court conceded "that most 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."[34] Nevertheless, the Court concluded that the trial was conducted fairly, including the judge's use of out-of-court information in sentencing.[35]

Justice Rutledge and Justice Murphy disagreed with the majority.[36] In his dissent, Justice Murphy stated that a sentencing judge should increase sentencing "only with the most scrupulous regard for the rights of the defendant."[37] Furthermore, he concluded that in *Williams*, the judge sentenced the defendant to death based on information that was inadmissible at trial, was comprised mostly of hearsay, was damaging, and was not subject to the defendant's scrutiny.[38] Therefore, Justice Murphy argued that the defendant's due process right was violated at sentencing.[39] He stated that "[d]ue process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through all the stages of the proceedings against him."[40] The Court majority, however, did not agree.

2. *States Other Than Arkansas*

Without explicit guidance from the Supreme Court, the states are split on confrontation rights at sentencing. The majority of state supreme courts[41] and federal courts of appeal[42] have held that the Confrontation Clause does not apply at sentencing. A few states, however, have extended the right to jury sentencing when the court asked the jury to find facts during the sentencing phase that could increase the possible punishment.[43] In *State v. Rodriguez*,[44] the Minnesota Supreme Court held that the right of confrontation should apply at jury sentencing where the jury finds facts that lead to a sentence enhancement.[45] In its analysis, the court discussed prior Supreme Court decisions and held that allowing testimonial statements by witnesses who had not been cross-examined was exactly what the Confrontation Clause was designed to prevent.[46] The court stated that "[b]ecause cross-examination is a core component of a defendant's right to a jury trial, we hold that the right of confrontation guaranteed by the Sixth Amendment applies in jury sentencing trials."[47]

In *State v. Hurt*,[48] the Court of Appeals of North Carolina also recognized a defendant's confrontation right at sentencing.[49] In that case, the court did not rely upon the *Williams* decision to decline extending confrontation rights at sentencing but instead relied upon the Supreme Court's decision in *Specht v. Patterson*[50] to support extending those rights.[51] During its analysis, the court in *Hurt* also reviewed other Supreme Court cases where juries were charged with fact-finding at sentencing to help decide a punishment.[52] The court held that at jury sentencing "the defendant endures another 'mini-trial,' which has often been bifurcated or even trifurcated from the trial on the substantive offense, to discover whether he will lose more liberty than otherwise allowable under the applicable statute."[53] Therefore, the *Hurt* court held that a defendant's confrontation right applied at both capital and non-capital jury sentencings where a jury determines any facts that could increase the defendant's sentence.[54]

B. History of the Confrontation Clause in Arkansas

Arkansas courts have not been exempt from cases involving Confrontation Clause implications, though none had reached the Arkansas Supreme Court prior to *Vankirk v. State*. As the *Vankirk* court noted, the issue of the Confrontation Clause's application at the sentencing phase of trial was an issue of first impression with the court.[55] The Arkansas Court of Appeals, however, has had the opportunity to examine this issue twice in less than two years, and, in both cases, it held that the right of confrontation does not apply at sentencing.[56] In *Wallace v. State*,[57] the circuit court allowed a records-intake supervisor to testify about the defendant's prison record at sentencing.[58] The defendant appealed, and the appellate court held that, without

binding authority on the issue, it would not apply the Confrontation Clause at sentencing.[59] Therefore, the court was reluctant to make that ruling without first having specific guidance from the Supreme Court.[60]

Recently, in *Doles v. State*,[61] the court of appeals had another opportunity to rule on whether the Confrontation Clause applies at sentencing. In *Doles*, the defendant objected to the court's admission of a 911 call in which the caller alleged that the defendant was pointing a gun at her.[62] The court of appeals did not analyze the objection in light of the Confrontation Clause's application at sentencing but instead focused on the nature of the 911 recording.[63] The court held that the circuit court's ruling on the nature of the 911 recording was correct and held that the 911 call was not testimonial in nature but was instead an attempt to get assistance from the police in an emergency situation.[64] Thus, by finding that the 911 call was not testimonial in nature, the court avoided the Confrontation Clause issue. Recently, however, the Arkansas Supreme Court directly confronted the issue of a defendant's right to confront witnesses at sentencing and found that the Confrontation Clause must apply.[65]

## III. ARGUMENT

The *Vankirk* court parted with previous Confrontation Clause jurisprudence when it held that a criminal defendant has a right to confrontation at the sentencing phase and should be followed by other courts.[66] This section begins with a discussion of the *Vankirk* decision, focusing first on its background and analysis.[67] Next, it will briefly evaluate the impact *Vankirk* could have on sentencing in Arkansas.[68] Finally, it will conclude with an examination of five arguments that support the *Vankirk* decision, as well as with a proposal that state and federal courts adopt the *Vankirk* holding.[69]

### A. *Vankirk*: An Improvement on Confrontation Clause Jurisprudence

#### 1. *Background of* Vankirk *and the Court's Analysis*

In January 2010, Ira Gene Vankirk was charged with three counts of rape.[70] His twelve year old niece, C.V., was his accuser.[71] Vankirk pled guilty to the charges[72] and sought a jury sentencing.[73] At sentencing, the state introduced a videotaped interview between C.V. and an Arkansas State Police Crimes Against Children investigator in which C.V. accused Vankirk of sexual abuse that spanned several years.[74] In the video, C.V. stated that Vankirk's sexual abuse started when she was five or six years old.[75]

Vankirk objected to the prosecution's showing of the videotape to the jury.[76] The circuit court judge overruled the objection and stated that the rules of evidence did not apply at sentencing and that the video was a victim impact statement.[77] Vankirk also made a statement at sentencing and re-

counted years of abuse that his uncle inflicted on him.[78] In addition, he admitted to molesting not only C.V. but another niece and nephew as well.[79] After considering the evidence presented, the jury returned a verdict of three consecutive life sentences.[80] Vankirk appealed the sentence and alleged that the circuit court denied him his constitutional rights, under both the United States and Arkansas Constitutions, to confront the witnesses against him by allowing the jury to view the videotaped interview.[81]

On appeal, the state had three main arguments: (1) Vankirk did not preserve his right to confrontation under the Arkansas Constitution; (2) Vankirk waived his right to confront witnesses when he pled guilty to the charges; and (3) Vankirk's argument failed on the merits because the Supreme Court of the United States held, in *Williams v. New York* that the Confrontation Clause did not apply at sentencing.[82] Vankirk argued that the Confrontation Clause should be extended to sentencing and that nothing in the Sixth Amendment limits that right to only the guilt phase of trial.[83]

The court found the state's first argument to be meritless[84] by relying on *Pointer v. Texas*,[85] which was the first case to use the Fourteenth Amendment to incorporate the Sixth Amendment's Confrontation Clause and to make it applicable to the states.[86] The court also noted that it had previously held that the Confrontation Clauses in both the United States and the Arkansas Constitutions were interpreted "to provide identical rights."[87] In addition, the court rejected the state's second argument, finding that Vankirk did not waive his right to confront the witnesses against him solely because he pled guilty to the charges.[88]

The court then moved on to the heart of the case: the application of the Confrontation Clause at sentencing.[89] The court recognized that the Supreme Court of the United States's decision in *Crawford v. Washington*[90] was the correct starting place for its Confrontation Clause analysis.[91] Using *Crawford*, the court determined that the video was testimonial because "[t]he statements of the victim in the video were made to a state investigator for the purpose of proving events relevant to a criminal investigation. As such, the statements were testimonial in nature, and the Confrontation Clause was thereby implicated."[92] The court next addressed whether the Confrontation Clause applies during the sentencing phase of trial.[93]

The court began by looking at how sentencing works in Arkansas.[94] Specifically, the court relied on the analysis in *Hill v. State*,[95] which interpreted the changes that Arkansas made to jury trials in 1993[96] when it codified a statute that provides for separate guilt and sentencing phases, also known as bifurcated proceedings.[97] The court agreed with the *Hill* court's statement that "sentencing is now, in essence, a trial in and of itself, in which new evidence may be submitted."[98] Because of the sentencing phase in a bifurcated trial, the court concluded that "constitutional standards cannot be ignored."[99]

The court also rejected the state's argument that *Williams v. New York*[100] was Supreme Court precedent prohibiting the Confrontation Clause's application at sentencing.[101] The court held that *Williams* did not apply because it involved a Due Process challenge as opposed to a Confrontation Clause challenge.[102] In addition, the court found the *Williams* argument unpersuasive because it was decided years before *Pointer* applied the Confrontation Clause to the states.[103] Furthermore, *Williams* involved judge sentencing as opposed to jury sentencing.[104] Thus, the court disposed of *Williams* by distinguishing it. Consequently, the court held that *Williams* was not controlling and instead relied on *United States v. Mills*,[105] a death-penalty case involving jury sentencing.[106] Particularly, the court found the *Mills* conclusion persuasive, which stated that a sentencing body's need to access more evidence does not merit admission of evidence that is unconstitutional.[107]

The court also discussed other rights that criminal defendants have at sentencing in Arkansas,[108] such as the rules of evidence[109] and the rules of discovery.[110] In addition, the court noted that other Sixth Amendment rights, such as the right to counsel[111] and the right to a speedy sentencing, already apply at sentencing.[112] Consequently, the court found that the defendant's Confrontation Clause right at sentencing was consistent with rights the court has already recognized at sentencing in Arkansas.[113] Therefore, the court stated that after recognizing "the nature of sentencing as a separate proceeding"[114] and after reviewing "the other rights afforded a defendant during the sentencing phase," it was "convinced that the right of confrontation, guaranteed by both the Sixth Amendment and article 2, section 10, extends to Appellant's sentencing proceeding before a jury."[115]

After determining that the Confrontation Clause applied at sentencing, the court then proceeded to subject the violation to a harmless-error analysis and found that the video's admission was not harmless error.[116] The court reversed and remanded for resentencing.[117]

### 2. *Impact of Supreme Court Cases on Arkansas Sentencing After* Vankirk

Because *Vankirk* gave criminal defendants confrontation rights at sentencing, Arkansas courts must now evaluate evidence at that phase in accordance with the Arkansas Rules of Evidence and current Supreme Court jurisprudence regarding the Confrontation Clause. As this note previously pointed out, the Supreme Court has yet to rule on whether the Confrontation Clause must apply at sentencing.[118] The Court has, however, decided several cases involving the Confrontation Clause in relation to evidence admissible at trial.[119] To determine if evidence presented passes "constitutional muster,"[120] Arkansas courts will first need to conduct a *Crawford* testimonial examination of evidence presented at the sentencing phase to determine if

the Confrontation Clause is triggered.[121] If the evidence is testimonial, the courts will then need to consider if one of the exceptions applies before it can be admitted.[122] For example, if the prosecution presents a statement made to the police as evidence, the courts must determine if the statement was made with a primary purpose of assisting in an ongoing emergency.[123] In its analysis, the court must conduct an objective evaluation of the circumstances, the statements, and the actions of the party to determine if the statement was made with that purpose.[124] If after examination the court finds the statements were made with the primary purpose of assisting in an ongoing emergency, then the statements are not testimonial.[125] Conversely, if the statements are found to be testimonial, then the Confrontation Clause must apply.[126]

Additionally, the Confrontation Clause analysis at sentencing will not only be limited to statements—reports and records will also need to be tested.[127] If a court were considering admitting a report as evidence during the sentencing phase of trial, the actual author of the report must be present to testify about the contents.[128] Although admitting evidence at jury sentencings will now have to pass a more stringent test, the *Vankirk* court correctly ruled that the Confrontation Clause should apply at sentencing.

### B. The Vankirk Decision is Supported by Five Arguments and Should be Adopted by Other State and Federal Courts

This section focuses on five arguments that support why other state and federal courts should adopt the *Vankirk* decision holding that a criminal defendant's confrontation rights extend to the sentencing phase. The first argument focuses on the text of the Sixth Amendment itself.[129] The second argument explains that the Framers of the Bill of Rights did not envision separate guilt and sentencing phases and, therefore, could not have intended the Confrontation Clause's application at only the guilt phase.[130] The third argument is that the Confrontation Clause must be applied at sentencing to guard against the principal evil it was intended to prevent—that is using evidence against the defendant that has not been subjected to adversarial tests.[131] The fourth argument is that courts have erroneously relied on *Williams v. New York* to deny confrontation rights at sentencing.[132] Finally, the fifth argument focuses on fairness throughout trial by applying the Confrontation Clause at both the guilt and sentencing phases.[133]

#### 1. *Textualist Argument*

Interpretation of any constitutional provision has to begin with the text itself.[134] The Sixth Amendment is no exception to this method of interpretation, and its text supports what the *Vankirk* court found—that sentencing should be considered part of a criminal prosecution.[135] The text of the Sixth

Amendment begins with the phrase"[i]n *all* criminal prosecutions."[136] Many have argued that once the defendant has been found guilty of a crime, the prosecution has ended.[137] Justice Arnold noted, however, "If 'plain meaning' is the criterion, this is an easy case. Surely no one would contend that sentencing is not a part, and a vital one, of a 'criminal prosecution.'"[138]

Similarly, Professors Francis Heller and Penny White argued that the criminal prosecution actually starts with arraignment and ends with the defendant either being sentenced or acquitted.[139] If the defendant has been found guilty, it stands to reason that the punishment phase of the trial is a very important part of the criminal prosecution itself. Without punishing guilty defendants, the guilt phase is deemed meaningless.[140] Consequently, the sentencing phase of trial must be considered part of the criminal prosecution.

Another term in the text that supports a court's application of the Confrontation Clause at sentencing is the Framers' use of "accused" to describe the criminal defendant.[141] It has been argued that once a defendant has been found guilty, he is no longer the "accused" but is instead the "convicted."[142] At least one other Sixth Amendment right, however, has consistently been available to the convicted at sentencing—the right to counsel.[143] Strangely enough, the Right to Counsel Clause appears in the Sixth Amendment with the Confrontation Clause, and most courts, including the Supreme Court, have repeatedly found this right applicable at sentencing.[144] The right to counsel, however, is only applicable to those that are "accused" as mandated by the Sixth Amendment.[145] If the "accused" defendant has a right to counsel at sentencing after he has been "convicted," it logically follows that the convicted also has a right to confront witnesses.

The Framers likely intended the "accused" to simply mean the criminal defendant that has been charged with a crime.[146] The defendant charged with the crime and subsequently found guilty in the guilt phase of trial is, undeniably, the same individual who then goes on to sentencing.[147] This concept is especially true when one acknowledges that the purpose of the guilt phase of trial is to determine guilt and then proceed to punishment of the guilty.[148] When considered in that context, it follows that the Sixth Amendment rights that apply at the guilt phase must also apply at the sentencing phase. Thus, in following the text of the Sixth Amendment, other courts should recognize a criminal defendant's confrontation rights at the sentencing phase of trial.

2. *Bifurcated Trial Not Contemplated by Framers Argument*

Furthermore, courts should adopt the *Vankirk* reasoning because applying the Confrontation Clause at sentencing will ensure that information that may deprive a defendant of liberty does not go untested. As Justice Scalia pointed out in his dissent in *Michigan v. Bryant*, preventing *ex parte* examinations at trial is what the Framers intended when the Confrontation Clause

was included in the Constitution.[149] Many courts have erroneously claimed that the sentencing phase of trial is not what the Framers thought of as part of a criminal prosecution.[150] However, history shows that trials in the past were not divided into two separate phases and thus could not have been contemplated as such by the Framers when constructing the Confrontation Clause.[151] Instead, when this country was founded, the trial process and the sentencing process were one in the same.[152] As Judge Arnold noted, both the text and the context are important when interpreting the Sixth Amendment, and he recognized that "the Framers of the Bill of Rights knew nothing of sentencing proceedings separate from the trial itself. Most sentences followed automatically from conviction. In general, the punishment for felony was death."[153] This method of utilizing only one proceeding for the guilt and sentencing of a criminal defendant continued until the nineteenth century.[154] Thus, the Framers only knew of a trial comprised of both parts and fashioned the Confrontation Clause of the Sixth Amendment with that understanding in mind.[155] Therefore, both the history surrounding the birth of the Confrontation Clause and the purpose that the Framers intended the clause to serve support the *Vankirk* holding.

3. *Avoiding the "Principal Evil" Argument*

Another reason state and federal courts should follow the *Vankirk* decision is that applying the Confrontation Clause at sentencing protects criminal defendants from evidence that has not been subjected to the adversarial tests. In *Crawford*, the Court stated that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[156] This "principal evil" can only be fully prevented if the constitutional safeguards that the Framers adopted apply throughout the criminal prosecution—including sentencing.

For example, if the prosecution is allowed to present evidence at sentencing that was obtained outside of trial, the possibility of abuse is increased,[157] and the evidence could be considered an *ex parte* examination.[158] This type of evidence is contrary to the very purpose of the Sixth Amendment, which is focused on seeking the truth and protecting the rights of the accused.[159] As scholars have noted, "[c]onstitutional rights are designed to limit the state's ability to deprive individuals of their liberty. Sentencing is the process through which the state deprives those convicted of crimes of their liberty. Thus, the recognition of constitutional rights at sentencing is paramount."[160] Additionally, the Confrontation Clause "provides assurance that prosecution witnesses will give their testimony in the way demanded for centuries by Anglo-American courts—in the presence of the accused, subject to cross-examination—rather than any other way."[161]

Consider, for example, *United States v. Wise*,[162] where the defendant pled guilty to the charges against him and was sentenced using the Federal Sentencing Guidelines.[163] During the sentencing phase, the probation officer was allowed to testify regarding factual matters included in the presentence report.[164] His testimony, however, also contained allegations from other criminal defendants claiming Wise was the organizer of the counterfeiting scheme.[165] Individuals outside of the courtroom provided the information that the officer testified to, and, though the officer had never even met those individuals, that information was used to increase Wise's sentence by twelve months through a four-level enhancement.[166] Although one additional year in jail may not seem too extreme, it becomes a very serious matter when one considers that the information used to justify the extra time had not been tested for its truthfulness and, in fact, was possibly a complete lie. For an even more egregious example, consider *Williams v. New York*, where the defendant was sentenced by the jury to life imprisonment, but the judge used untested information[167] to increase his sentence to death.[168] For these reasons, to ensure that only tested information is used in determining the sentence that a criminal defendant receives, other courts should follow the Arkansas Supreme Court's lead in *Vankirk* and rule that the Confrontation Clause must apply at sentencing.

4. *Wrong Precedent Argument*

Additionally, other courts should hold, as the Arkansas Supreme Court did, that *Williams v. New York*[169] is not Supreme Court precedent for denying the Confrontation Clause's application at sentencing.[170] For years, courts throughout the country have relied on *Williams* as precedent because the Supreme Court has not decided a case since then that comes as close to an analysis of confrontation rights at sentencing.[171] As noted by the *Vankirk* court, however, *Williams* involved a Due Process Clause analysis as opposed to a Confrontation Clause analysis.[172] Although there are certainly due process concerns involved when a defendant is denied the right to confront witnesses, the two constitutional issues are distinct—located in two different amendments and providing for two different rights.[173]

In *Williams*, the Court was concerned with allowing as much information as possible into the sentencing process because it allowed the sentencing judge to provide an individualized punishment that the Court believed would lead to better offender rehabilitation and reformation.[174] Since *Williams*, however, the Court has transformed its Confrontation Clause analysis and has recognized the importance of truthful evidence over abundant evidence.[175]

Additionally, as attorney Benjamin McMurray remarked, "[r]ather than mechanically applying old cases, courts should carefully consider the various reasons why their precedents were misguided."[176] Relying strictly on a

case that only involves a due process challenge as a means to deny a criminal defendant's confrontation right at sentencing is fundamentally flawed. This statement becomes especially true when one considers the changes that the Supreme Court has made in the last decade alone regarding its Confrontation Clause jurisprudence.[177] Consequently, the *Williams* decision, essentially holding "the more, the better" in regard to evidence, does not hold up in today's jurisprudence and, as well noted by the *Vankirk* court, should not be used as Supreme Court precedent to deny confrontation rights at sentencing.

5. *Fairness Argument*

Finally, courts should adopt the *Vankirk* decision because allowing a defendant his confrontation rights at sentencing ensures that the entire trial is fair, from start to finish. If the Confrontation Clause is not applied at sentencing, the fairness of the trial is in question, the integrity of the justice system is weakened, and the travesty of Sir Walter Raleigh's trial vividly comes back to mind.[178]

The Supreme Court has recognized fairness during the trial process as one of the Framers' central concerns when drafting the Bill of Rights.[179] For fairness to exist throughout trial, the defendant must be able to confront the witnesses against him at sentencing and must be able to test the facts asserted at sentencing to decide his fate. In rejecting the reliability standard previously followed, the *Crawford* Court noted that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[180]

Allowing the Sixth Amendment's Confrontation Clause at sentencing serves the fairness purpose in two important ways. First, it is a means of testing the credibility and reliability of the declarant's testimony.[181] Second, it also serves as a check on the government's power to create evidence regardless of reliability.[182] Without applying the Confrontation Clause or requiring cross-examination at sentencing, witnesses could testify about any number of things, such as atrocities that the criminal defendant allegedly committed, without corroboration of the charges. This is a very dangerous proposition, and one that must be guarded against. Courts that subject evidence to cross-examination also help avoid prosecutorial misconduct and help ensure that only evidence that has undergone the truth-seeking process is what is ultimately used to determine the sentence a criminal defendant receives.[183] As the *Crawford* Court remarked, the Confrontation Clause's goal was to ensure the reliability of evidence by assessing it through the process of cross-examination.[184]

One of the ways that cross-examination helps ensure reliability is by allowing the defendant to be present and question the witness. Studies have

shown that people express themselves differently, through both facial expressions and body language, when they are face-to-face with one another.[185] It is generally harder for one to lie to a person's face than it is to lie in their absence.[186] This characteristic has a scientific basis, as strong emotions have been shown to often produce "tells," which are not likely to be present absent a face-to-face interaction.[187] Consequently, less interaction will produce fewer "tells" that a declarant is lying, especially when the declarant is not being put to the scrutiny of the defendant.[188]

The defendant's scrutiny of the witness in order to determine the witness's truthfulness is one of the core principles of the Confrontation Clause and is one that courts, unfortunately, have not recognized at sentencing. By not allowing cross-examination as a check on testimony, a witness may make accusations that are entirely false but that are used to determine the sentence imposed. Therefore, other courts should follow the Arkansas Supreme Court's reasoning and hold that the Confrontation Clause must apply at sentencing in order to test the witness's testimony. By doing so, courts will be holding true to the fairness principles that the Framers intended the Clause to provide and will be ensuring that only accurate and tested information is used to punish a defendant. As Judge Arnold stated, "The right of confrontation is worth the cost. It is, after all, not a 'technicality' serving some extraneous purpose . . . . It bears directly on and significantly advances the truth-seeking function of sentencing hearings. Confrontation is required by due process."[189]

## IV. CONCLUSION

Persons accused of crimes have important rights enumerated in the Constitution intended to protect them before and during trial.[190] The right to confront witnesses has long been one of the most essential rights of criminal defendants. Most courts, though, have denied defendants that right during the sentencing phase of trial. The courts do this because the Supreme Court has yet to hold that the Confrontation Clause applies at sentencing, and states are unwilling to do so without prior guidance from the Court.

However, the Arkansas Supreme Court recently took that gallant step and held that the Confrontation Clause does apply at sentencing. After a well-reasoned analysis, the court found that the right to confront witnesses logically followed other Sixth Amendment rights already allowed at sentencing, such as the right to counsel and the right to a speedy sentencing. By boldly recognizing that criminal defendants have rights, even if they have been found guilty of crimes, the Arkansas Supreme Court did something that very few courts have done. Yet, the court's monumental decision was not unfounded; it is supported by the text of the Sixth Amendment, by the nature of the sentencing proceeding, and by the very notion of fairness and justice. It was also an important step in protecting individual rights provided

by the Constitution. Therefore, the court's extension of a criminal defendant's confrontation rights at sentencing, keeping in line with the intent of the Framers when they conceived the Bill of Rights, is a role model for state and federal courts across the country.

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1. Michigan v. Bryant, 131 S. Ct. 1143, 1176 (2011) (Scalia, J., dissenting).
2. The use of "Framers" throughout this note refers to the first Congress that drafted the Bill of Rights. *See generally Founding Documents*, BILL OF RIGHTS INSTITUTE, http://billofrightsinstitute.org/founding-documents/bill-of-rights/ (last visited Mar. 9, 2012) (containing information about the first Congress and its role in the development of the Constitution).
3. *See* U.S. CONST. amends. I–X.
4. U.S. CONST. amend. VI.
5. *Id.*
6. *See* Davis v. Greer, 13 F.3d 1134, 1139 (7th Cir. 1994); United States v. Hammer, 3 F.3d 266, 272 (8th Cir. 1993); United States v. Petty, 982 F.2d 1365, 1369 (9th Cir. 1993); United States v. Silverman, 976 F.2d 1502, 1510 (6th Cir. 1992).
7. For the remainder of the note, Supreme Court of the United States will be referred to as either "Supreme Court" or "Court."
8. *See* Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); Davis v. Washington, 547 U.S. 813 (2006); Blakely v. Washington, 542 U.S. 296 (2004); Crawford v. Washington, 541 U.S. 36 (2004).
9. 541 U.S. 36, 54–65 (2004) (overturning the reliability standard the courts had been following since Ohio v. Roberts, 448 U.S. 56 (1980)).
10. The reliability standard meant that the court allowed an unavailable witness's statement to be admitted into evidence as long as the statement had an "adequate 'indicia of reliability.'" *Id.* at 40 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980).
11. *Id.*
12. *See id.* at 68.
13. *See* Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); Michigan v. Bryant, 131 S.Ct. 1143 (2011); Davis v. Washington, 547 U.S. 813 (2006); United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004).
14. Many courts, however, cite to the Court's decision in *Williams v. New York* for this proposition. For a further discussion of *Williams* see *infra* Part II.A.1.
15. 2011 Ark. 428, 385 S.W.3d 144.
16. *Id.* at 10, 385 S.W.3d 151.
17. *See id.* at 9, 385 S.W.3d at 150.
18. *See infra* Part II.
19. *See infra* Part III.A.
20. *See infra* Part III.B.
21. 337 U.S. 241 (1949).
22. *See infra* Part II.A.1.
23. *See infra* Part II.A.2.
24. *See infra* Part II.B.
25. *See* Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); Michigan v. Bryant, 131 S.Ct. 1143 (2011) Crawford v. Washington, 541 U.S. 36 (2004).

26. *See* United States v. Gray, 362 F. Supp.2d 714, 725 (2005) ("The Supreme Court, however, has never decided whether sentencings are 'criminal prosecutions' for Sixth Amendment purposes."). *See also* Michael S. Pardo, *Confrontation Clause Implications of Constitutional Sentencing Options*, 18 FED. SENT'G REP. 230 (2006) ("Although the Supreme Court has not answered definitively whether a confrontation right ever applies at sentencing, several federal circuits have concluded that it does not.").

27. 337 U.S. 241 (1949).

28. *See, e.g.*, United States v. Littlesun, 444 F.3d 1196, 1200 (9th Cir. 2006) (holding that *Williams* was still good law and that the right of confrontation does not extend to judge sentencings in noncapital cases); State v. Phillips, 381 S.E.2d 325, 326 (1989) (relying on *Williams* to say that using hearsay evidence at sentencing does not violate the Constitution); *but see* United States v. Mills, 446 F. Supp.2d 1115, 1131–35 (C.D. Cal. 2006) (finding that *Williams* was no longer binding authority after subsequent Supreme Court decisions).

29. *Williams*, 337 U.S. 241.

30. *Id.*

31. *Id.* at 244.

32. *Id.* at 245.

33. *Id.* at 247. The Court went further and explained that to better individualize punishment for each defendant the judge should be able to assess all necessary information to more accurately form that judgment and not be stymied by strict rules. Therefore, the Court wanted the judge to have access to any and all information that he found essential to better suit the punishment to the defendant. *See id.*

34. *Williams*, 337 U.S. at 250. The Court also stated that depriving judges of this information would "undermine modern penological procedural policies" that had been put into place. *Id.*

35. *Id.* at 252.

36. *Id.*

37. *Id.* at 253 (Murphy, J., dissenting).

38. *Id.*

39. *Id.*

40. *Williams*, 337 U.S. at 253 (Murphy, J., dissenting).

41. *See, e.g.*, State v. Galindo, 774 N.W.2d 190, 242 (Neb. 2009), *cert. denied*, 130 S. Ct. 1887 (2010); State v. McGill, 140 P.3d 930, 941-42 (Ariz. 2006).

42. *See, e.g.*, United States v. Powell, 650 F.3d 388, 394 (4th Cir. 2011); United States v. Bras, 483 F.3d 103, 109 (D.C. Cir. 2007); United States v. Robinson, 482 F.3d 244, 246 (3d Cir. 2007); United States v. Beydoun, 469 F.3d 102, 108 (5th Cir. 2006); United States v. Bustamante, 454 F.3d 1200, 1202–03 (10th Cir. 2006); United States v. Littlesun, 444 F.3d 1196, 1200 (9th Cir. 2006); United States v. Stone, 432 F.3d 651, 654 (6th Cir. 2005); United States v. Cantellano, 430 F.3d 1142, 1146 (11th Cir. 2005); United States v. Brown, 430 F.3d 942, 943–44 (8th Cir. 2005); United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005); United States v. Luciano, 414 F.3d 174, 179 (1st Cir. 2005); United States v. Martinez, 413 F.3d 239, 242 (2d Cir. 2005).

43. *See* Peters v. State, 984 So.2d 1227, 1224 (Fla. 2008) (holding that probation revocation proceedings are not equated to criminal prosecutions; therefore, the Confrontation Clause does not apply); State v. Rodriguez, 754 N.W.2d 672 (Minn. 2008); State v. Hurt,702 S.E.2d 82, 92–93 (N.C. Ct. App. 2010).

44. 754 N.W.2d 672 (2008).

45. *Id.* at 678–80.

46. *Id.* The court also noted that its conclusion was supported by prior cases decided by the court regarding due process and confrontation rights. *Id.* at 680.

47. *Id.* at 680.

48. 702 S.E.2d 82, 88 (2010).

49. *See id.* at 94–95.
50. 386 U.S. 605, 610 (1967) (extending the confrontation rights at the enhancement stage of sentencing for a sex offender when a state statute allowed the judge to make a finding of whether the defendant constituted a threat of bodily harm or was an habitual offender or mentally ill).
51. *Hurt*, 702 S.E.2d at 91.
52. *Id.* at 89 (discussing Apprendi v. New Jersey, 530 U.S. 466 (2000) and its progeny).
53. *Id.* at 95.
54. *Id.* at 87. The court conceded that though death or capital cases have been considered different, it believed that "the importance of safeguarding the accuracy and propriety of jury fact-finding in sentencing" applied to capital and non-capital cases. *Id.* at 94.
55. Vankirk v. State, 2011 Ark. 428, at 2, 385 S.W.3d 144, 147.
56. *See* Doles v. State, 2011 Ark. App. 476, 385 S.W.3d 315; Wallace v. State, 2010 Ark. App. 706, 378 S.W.3d 269.
57. *Wallace*, 2010 Ark. App. 706, 378 S.W.3d 269.
58. *Id.* at 3, 378 S.W.3d at 273.
59. *Id.*, 378 S.W.3d at 273.
60. *Id.* at 6, 378 S.W.3d 269, 273. "The United States Supreme Court has never applied the Confrontation Clause to sentencing, and the *Melendez-Diaz* decision does not extend that application. . . . Accordingly, there is no precedent, including the holding in *Melendez-Diaz*, upon which to expand the holding in *Crawford* to sentencing." *Id.*
61. 2011 Ark. App. 476, 385 S.W.3d 315.
62. *Id.* at 2, 385 S.W.3d at 316–17.
63. *Id.* at 3, 385 S.W.3d at 318.
64. *Id.*, 385 S.W.3d at 318.
65. Vankirk v. State, 2011 Ark. 428, at 10, 385 S.W.3d 144, 151.
66. *Id*.
67. *See infra* Part III.A.1.
68. *See infra* Part III.A.2.
69. *See infra* Part III.B.1–5.
70. *Vankirk*, 2011 Ark. 428, at 1, 385 S.W.3d at 146. Vankirk was charged under ARK. CODE ANN. § 5-14-103 (2006 & Supp. 2011).
71. *Vankirk*, 2011 Ark. 428, at 1–2, 385 S.W.3d at 146.
72. *Id.* at 2, 385 S.W.3d at 146.
73. *Id.*; ARK. CODE ANN. § 16-97-101(6) (2006 & Supp. 2011).
74. *Vankirk*, 2011 Ark. at 2, 385 S.W.3d at 186.
75. *Id.*, 385 S.W.3d at 186.
76. *Id.*, 385 S.W.3d at 186.
77. *Id.*, 385 S.W.3d at 186. The trial court mistakenly ruled that the rules of evidence did not apply at sentencing. The Arkansas Supreme Court had previously held that the rules did apply during the sentencing phase. *See* Hill v. State, 318 Ark. 408, 413, 887 S.W.2d 275, 277 (1994). A victim impact statement is "[a] statement read into the record during sentencing to inform the judge or jury of the financial, physical, and psychological impact of the crime on the victim and the victim's family." BLACK'S LAW DICTIONARY 1703 (9th ed. 2009).
78. *Vankirk*, 2011 Ark. at 2, 385 S.W.3d at 146.
79. *Id.*, 385 S.W.3d at 146
80. *Id.* at 1, 385 S.W.3d at 146.
81. *Id.*, 385 S.W.3d at 146.
82. *Vankirk*, 2011 Ark. at 3, 7, 385 S.W.3d at 147, 149.
83. *Id.* at 3, 385 S.W.3d at 147.
84. *Id.*, 385 S.W.3d at 147.
85. 380 U.S. 400 (1965).

86. *Id.* at 406.

87. *Vankirk*, 2011 Ark. at 3–4, 385 S.W.3d at 147, (citing Hale v. State, 343 Ark. 62, 83, 31 S.W.3d 850, 863 (2000)). The Arkansas Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed; provided, that the venue may be changed to any other county of the judicial district in which the indictment is found, upon the application of the accused, in such manner as now is, or may be prescribed by law; and to be informed of the nature and cause of the accusation against him, and to have a copy thereof; and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be heard by himself and his counsel.

ARK. CONST. art. II, § 10.

88. *Vankirk*, 2011 Ark. at 4, 385 S.W.3d at 147. The court found the state's reliance on ARK. R. CRIM. P. 24.4 (e) (2012) to be erroneous because that rule did not contemplate a bifurcated trial.

89. *Id.*, 385 S.W.3d at 147

90. 541 U.S. 36 (2004). If the tape was not found to be testimonial, there would be no Confrontation Clause issue.

91. *Vankirk*, 2011 Ark. at 5, 385 S.W.3d at 148.

92. *Id.* at 6, 385 S.W.3d at 148. In interpreting the *Crawford* testimonial requirement, the court also relied on its decision in *Seely v. State*, 373 Ark. 141, 282 S.W.3d 778 (2008). *Id.* at 5, 385 S.W.3d at 148. In *Seely*, the court looked at the statements as made to officials or non-officials, the circumstances surrounding the statements, and the primary purpose behind the statements to determine if the statements were testimonial. *Seely*, 373 Ark. at 152, 282 S.W.3d at 787.

93. *Vankirk*, 2011 Ark. at 6, 385 S.W.3d at 148.

94. *Id.* at 6, 385 S.W.3d at 148–49.

95. 318 Ark. 408, 887 S.W.2d 275 (1994).

96. *Id.* at 412, 887 S.W.2d at 277.

97. ARK. CODE ANN. § 16-97-101 (2006 & Supp. 2011). "After a plea of guilty, the defendant, with the agreement of the prosecution and the consent of the court, may be sentenced by a jury impaneled for purposes of sentencing only." *Id.* at (6).

98. *Hill*, 318 Ark. at 413, 887 S.W.2d at 277. "The introduction of evidence during this stage must be governed by our rules of admissibility and exclusion; otherwise these proceedings would not pass constitutional muster, which is all the more reason to permit appeal." *Id.* at 413, 887 S.W.2d at 278.

99. *Vankirk*, 2011 Ark. at 7, 385 S.W.3d at 149.

100. 337 U.S. 241 (1949).

101. *Vankirk*, 2011 Ark. at 8, 385 S.W.3d at 149.

102. *Id.* at 8, 385 S.W.3d at 150.

103. *Id.*, 385 S.W.3d at 150

104. *Id.*, 385 S.W.3d at 150

105. 446 F. Supp.2d 1115 (C.D. Cal. 2006).

106. *Id.* "We are cognizant of the fact that *Mills* is a death-penalty case but find the court's analysis of the constitutional protections afforded during sentencing to be noteworthy nonetheless." *Vankirk*, 2011 Ark. at 8–9, 385 S.W.3d at 150.

107. *Vankirk*, 2011 Ark. at 9, 385 S.W.3d at 150 (quoting from United States v. Mills, 446 F.Supp.2d 1115, 1130 (C.D. Cal. 2006)).

108. *Id.* at 10.

109. *Id.* (citing Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994)).

110. *Id.* (citing Phillips v. State, 321 Ark. 160, 900 S.W.2d 526 (1995)).

111. *Id.* (citing Smith v. State, 329 Ark. 238, 947 S.W.2d 373 (1997)).
112. *Vankirk*, 2011 Ark. at 10, 385 S.W.3d at 151.
113. *Id.*, 385 S.W.3d at 151.
114. *Id.*, 385 S.W.3d at 151.
115. *Id.*, 385 S.W.3d at 151.
116. *Id.* at 11, 385 S.W.3d at 151. The court found that the jury watching the young victim recount incidents of abuse beginning at age five or six would be prejudicial, that the statements were uncorroborated, and that the state could have produced C.V. to testify and be cross-examined. *Id.*
117. *Id.* at 12, 385 S.W.3d at 152. Vankirk has not yet been resentenced as of May 16, 2013.
118. *See supra* note 26 and accompanying text.
119. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011); Davis v. Washington, 547 U.S. 813 (2006); Blakely v. Washington, 542 U.S. 296 (2004); Crawford v. Washington, 541 U.S. 36 (2004).
120. Hill v. State, 318 Ark. 408, 413, 887 S.W.2d 275, 2787 (1994).
121. *Crawford*, 541 U.S. at 68. Testimonial evidence includes but is not limited to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* The Confrontation Clause is not implicated unless the evidence is testimonial.
122. *See* Michigan v. Bryant, 131 S. Ct. 1143 (2011) (holding that the victim's statements to police officers were not testimonial and did not violate the Confrontation Clause because the primary purpose of the statements was to aid police officers in an ongoing emergency); Davis v. Washington, 547 U.S. 813 (2006) (holding that a victim's statements during a 911 call were not testimonial as they were to aid police in an ongoing emergency but a domestic battery victim's statements to police in an affidavit were testimonial because there was no emergency in progress).
123. Davis v. Washington, 547 U.S. 813–14 (2006).
124. Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011). The Court found that the subjective intent of the individual was not relevant. *Id.*
125. *Davis*, 547 U.S. at 822.
126. *See supra* note 123 and accompanying text.
127. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717 (2011); Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2540 (2009). Records can include—among other things—reports, certificates, and affidavits. *Melendez-Diaz*, 129 S. Ct. at 2538–39.
128. *Bullcoming*, 131 S. Ct. at 2713. Otherwise, the report's author must be unavailable and must have been previously cross-examined by the defendant before the report may be admitted at sentencing. *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 68 (2004)).
129. *See infra* Part III.B.1.
130. *See infra* Part III.B.2.
131. *See infra* Part III.B.3.
132. *See infra* Part III.B.4.
133. *See infra* Part III.B.5.
134. United States v. Wise, 976 F.2d 393, 406 (8th Cir. 1992) (Arnold, J., concurring in part, dissenting in part). In *Wise*, the defendant was convicted of counterfeiting. *Id.* at 395 (majority opinion).
135. *Id.* at 407 (Arnold, J., concurring in part, dissenting in part).
136. U.S. CONST. amend VI (emphasis added).
137. *See, e.g.*, United States v. Francis, 39 F.3d 803, 810 (7th Cir. 1994) ("A sentencing hearing, however, is not a 'criminal prosecution' within the meaning of the Sixth Amendment because its sole purpose is to determine only the appropriate punishment for the offense, not the accused's guilt."). *See also* United States v. Wise, 976 F.2d 393, 400–01 (8th Cir. 1992)

(holding that the sentencing guidelines did not change sentencing into a separate criminal proceeding where the right to confront witnesses was applicable).

138. *Wise*, 976 F.2d at 407 (Arnold, J., concurring in part, dissenting in part).

139. *See* Francis H. Heller, The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development 54 (1951); 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, 395–96 (2006) (including the Webster's definition of prosecution).

140. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2008 (2005).

141. *See* U.S. CONST. amend VI.

142. G. Michael Fenner, *Today's Confrontation Clause (After* Crawford *and* Melendez-Diaz), 43 CREIGHTON L. REV. 35, 41 (2009) (referring to then-Judge Sotomayor's opinion in U.S. v. Martinez, 413 F.3d 239, 242 (2d Cir. 2005)).

143. *See* Douglass, *supra* note 142, at 1970.

144. *Id.* (citing Mempa v. Rhay, 389 U.S. 128 (1967)).

145. *See* U.S. CONST. amend. VI.

146. Fenner, *supra* note 144, at 42.

147. *Id.* at 42–43. "At sentencing the person has not changed and we cannot ignore the fact that sentencing generally is a vital part of the criminal prosecution." *Id.*

148. Douglass, *supra* note 142, at 2008.

149. 131 S. Ct. at 1171 (Scalia, J., dissenting). "Preventing the admission of 'weaker substitute[s] for live testimony at trial' such as this is precisely what motivated the Framers to adopt the Confrontation Clause and what motivated our decisions in *Crawford* and in *Hammon v. Indiana*, decided with *Davis*." *Id.* (internal citation omitted).

150. *See supra* Part A.2.

151. Douglass, *supra* note 142, at 1967. Although this author focuses on capital sentencing, many of the arguments apply at non-capital sentencing as well.

152. Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 51 (2011).

153. United States v. Wise, 976 F.2d 393, 407 (8th Cir. 1992) (Arnold, J., concurring in part, dissenting in part). As Professor John Douglass phrased it, "The Framers knew nothing of a 'guilt' phase and a 'penalty' phase. They crafted the Sixth Amendment not only to protect the innocent from punishment, but also to protect the guilty from undeserved death." Douglass, *supra* note 142, at 1967. Instead, both guilt and sentencing, which was death if found guilty, happened in only one proceeding and was based on only one verdict. *Id.* at 1972.

154. White, *supra* note 141, at 397–98.

155. *Id.* at 398. "It was on this slate—with joined guilt and sentencing phases—that the Framers chose the words 'in all criminal prosecutions.'" *Id.*

156. Crawford v. Washington, 541 U.S. 36, 50 (2004). The Court went on to state that, when interpreting the Sixth Amendment, the principal evil has to be kept in mind in order to avoid it. *Id.*

157. *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 561 (1992). Additionally, the witness's testimony can be shaped to fit the theory that the prosecution has for the case and may not be as close to the truth as it would be if tested during cross-examination. *Id.*

158. *See, e.g.*, *Crawford*, 541 U.S. at 47–66 (discussing what evidence is considered *ex parte*).

159. *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 643 (1996).

160. Hessick, *supra* note 155, at 49. The article goes on to state that because many criminal defendants plead guilty as opposed to going to trial, sentencing is now "a critically important phase of the criminal justice system." *Id.* at 56.

161. Richard D. Friedman, *Who Said the* Crawford *Revolution Would be Easy?*, 26 CRIM. JUST. 14 (2012).

162. 976 F.2d 393 (8th Cir. 1992). This case was decided prior to the current Supreme Court Confrontation Clause jurisprudence.

163. *Id.* at 396.

164. *Id.* at 395–96.

165. *Id.* Because the probation officer was testifying at sentencing, the hearsay statements were allowed. *Id.*

166. *Id.* at 405–06 (Arnold, J., concurring in part, dissenting in part).

167. *Id.* at 242–44. In *Williams*, the judge considered information contained in the presentence report, such as allegations implicating the defendant in burglaries that he had never been convicted of and information that the judge considered to be reflective of the defendant's "'morbid sexuality'" and status as a "'menace to society,'" which the defendant did not have an opportunity to challenge or rebut. 337 U.S. 241, 244 (1949). This information was what swayed the judge to depart from the jury's recommendation of life imprisonment and to instead sentence the defendant to death. *Id.*

168. *Id.* at 242.

169. 337 U.S. 241 (1949).

170. Vankirk v. State, 2011 Ark. 428, 8, 385 S.W.3d 144, 150.

171. Though in *Specht v. Patterson*, the Supreme Court did find that due process required attachment of confrontation rights to any enhancement of a sentence during the sentencing phase. 386 U.S. 605, 610 (1967). *See also* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that any fact increasing the defendant's penalty beyond the statutory maximum has to be submitted to the jury and proved beyond a reasonable doubt).

172. *Vankirk*, 2011 Ark. at 8, 385 S.W.3d at 150.

173. *See* U.S. CONST. amends. V, VI, XIV.

174. *Williams*, 337 U.S. at 248.

175. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011) (holding that blood-alcohol analysis reports were testimonial and that the defendant had a right to confront the certifying analyst); Davis v. Washington, 547 U.S. 813 (2006) (holding that a victim's statements during a 911 call were not testimonial as they were to aid police in an ongoing emergency, but a domestic battery victim's statements to police in an affidavit were testimonial because there was no emergency in progress); Blakely v. Washington, 542 U.S. 296 (2004) (holding that a trial court's upward enhancement to the statutory sentence range based on a judicial determination made after the plea violated defendant's Sixth Amendment rights); Crawford v. Washington, 541 U.S. 36 (2004) (holding that out-of-court statements by witnesses, if testimonial, will not be admitted unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine, regardless of the statement's reliability); *see also* White, *supra* note 139, at 421–424 (analyzing the effects of recent Supreme Court Confrontation Clause decisions on capital sentencings).

176. Benjamin C. McMurray, *Challenging Untested Facts at Sentencing: The Applicability of* Crawford *at Sentencing after* Booker, 37 MCGEORGE L. REV. 589, 625 (2006). This article also provides a chronological look at how sentencing has changed throughout the years, including adoption of the Federal Sentencing Guidelines. *Id.* at 591–605.

177. *See* White, *supra* note 139, at 406–07 (2006). The article also notes changes made regarding other individual rights since the *Williams* decision. *Id.*

178. *See* Crawford v. Washington, 541 U.S. 36, 44–45 (2004). *See also* W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After* Crawford v. Washington: *Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 7–9 (2005) (recounting the trial of Sir

Walter Raleigh). Sir Walter Raleigh was sentenced to death because of a letter that was read aloud to the jury that accused him of treason. His sentencing occurred without him ever being given an opportunity to question the writer who accused him of the crime. *Id.*

179. Pointer v. Texas, 380 U.S. 400, 404 (1965). Speaking of the right of confrontation, the Court stated that "[t]he fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Id.*

180. *Crawford*, 541 U.S. at 62.

181. *See* Counseller & Rickett, *supra* note 178, at 8.

182. *Id. See also* Berger, *supra* note 159, at 561. The author states that the Bill of Rights was created to check the government's power, and that the Confrontation Clause prevents the government from being able to present evidence that was shaped to fit its case, which would make it more susceptible to abuse. *Id.*

183. *See* Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383, 383 (1990).

184. *Crawford*, 541 U.S. at 61. "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.*

185. *See* Jery Payne, *Sometimes, You Just Have to be There*, 40 COLO. LAW. 107, 109 (2011). The article is premised on the idea that even video testimony will produce less truthful witnesses than if the witnesses were actually face-to-face with the defendant. *Id.* at 111.

186. *See id.* at 109.

187. *See id.*

188. *See id.* at 110–11. "Less interaction means fewer tells. Distance beclouds guile." *Id.*

189. United States v. Wise, 976 F.2d 393, 412 (8th Cir. 1992) (Arnold, J., concurring in part, dissenting in part).

190. *See* Heller, *supra* note 141, at Preface.

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