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Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation

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† Winner of the Washington and Lee University Law Council Law Review Award for best student Note.

* Candidate for Juris Doctor, Washington and Lee University School of Law, May 2007; B.A., with distinction, University of Virginia, 2003. I would like to thank the late Professor Roger D. Groot for suggesting trifurcation as a possible Note topic. I am also grateful for the insights and guidance provided by Erin McCampell and Professors David Bruck and Darryl Brown. Thank you to my family for your support. Finally, I would like to thank the true love of my life, Katherine Evans. This Note is dedicated to you.

I. Introduction

The grieving wife attempts in vain to muffle her sobs as she recounts her final minutes with her late husband.[1] The long pauses between her statements create a screaming silence. Members of the gallery nervously look to the floor, trying not to make eye contact with the wife for fear that they, too, will erupt into tears. Next, the prosecution calls the victim's son to the witness stand.

1. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (finding that the Eighth Amendment does not create a per se bar to the introduction of victim impact statements).

Stories of childhood memories follow, and a wave of sadness washes over the jury. Most of the jurors intermittently blot tears. Members of the gallery try to restrain their emotions. The prosecution then plays a videotape. The tape depicts the victim at his children's birthday parties, opening presents excitedly with his family on Christmas morning, and helping his child learn to ride a bike. As the videotape reaches the half-hour mark, the silence has melted into a soft symphony of shudders and sobs. Upon the conclusion of the video, the prosecutor rises. Pointing to the defendant while addressing the jury box, the prosecutor recounts the defendant's entire criminal record, including incidents for which he was never charged.[2] The prosecutor also restates his claim that the defendant committed the murder for pecuniary gain. At the conclusion, the prosecutor pleads with the jury to find the defendant guilty of federal capital murder and sentence him to death. In his final statement, he repeats to the jury: "The defendant has killed before, don't let him kill again."[3]

Surely American courts prohibit the introduction of such unfairly prejudicial evidence during the adjudication of a criminal offense. Right? That proposition holds true for all cases except one: The federal capital murder trial. Under the bifurcated proceedings of the federal capital trial, a defendant facing the death penalty is afforded fewer procedural protections than most defendants charged with simple misdemeanors.[4] Recent Supreme Court opinions call into question the constitutionality of this structure.[5] A remedy for this problem, however, rests not with repealing the Federal Death Penalty Act (FDPA), but instead with trifurcating the proceedings. To understand both the problem and the solution, it is necessary to have a basic grasp of the structure of federal capital trials. Parts II–V of this Note provide the requisite background materials, address the problem, and offer trifurcation as a possible solution.[6] Parts VI–X posit four arguments supporting trifurcation of federal capital

2. *See* United States v. Grande, 353 F. Supp. 2d 623, 635–36 (E.D. Va. 2005) (permitting the introduction of evidence that the defendant "has engaged in a pattern of criminal activity as an adult"); United States v. Jones, 132 F.3d 232, 238 n.2 (5th Cir. 1998) (noting that the prosecution had introduced evidence of the nonstatutory aggravating factor of future dangerousness).

3. *See Grande*, 353 F. Supp. 2d at 638–39 (allowing the prosecution to introduce evidence that the defendant "poses a future danger based upon the probability that he would commit criminal acts of violence that would constitute a continuing threat to society").

4. *See* Alexander Bunin, *When Trial and Punishment Intersect: New Defects in the Death Penalty*, 26 W. NEW ENG. L. REV. 233, 235 (2004) ("[I]n most death penalty jurisdictions, a capital defendant is prosecuted for some elements of capital murder without the trial protections available even to a person charged with a simple misdemeanor.").

5. *See generally* Bunin, *supra* note 4.

6. *See infra* Parts II–V (offering trifurcation as a possible solution to the current defects in the structure of a federal capital murder trial).

trials.[7] Specifically, Part VI provides an overview of each argument.[8] Part VII argues that the rule against character evidence is embodied in the Due Process Clause of the Fifth Amendment and as a result compels trifurcation.[9] Part VIII contends that the Supreme Court's recent opinion in *Crawford* mandates trifurcation in certain situations.[10] Next, Part IX argues that statutory construction of the FDPA itself requires trifurcation.[11] The final argument is described in Part X.[12] This argument analyzes empirical data to reveal how trifurcation can afford some measure of relief to problems associated with capital jury decision making and the death penalty itself. The Note provides a conclusion in Part XI.[13]

II. Current Structure of a Federal Capital Trial

Today, the proceedings of all federal capital trials are bifurcated.[14] Bifurcation means the trial is divided into a "guilt phase" and a "sentencing phase."[15] The following subparts describe the structure and content of these two phases.

A. Phase One: The Guilt Phase

The guilt phase mirrors what typically comes to mind when one thinks of a criminal proceeding. During this phase, the jury determines whether the

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7. *See infra* Parts VI–X (offering two constitutional arguments, a statutory construction argument, and an empirical argument in support of trifurcation).

8. *See infra* Part VI (providing an overview of each argument).

9. *See infra* Part VII (providing the character evidence argument for trifurcation).

10. *See infra* Part VIII (offering a Confrontation Clause argument for trifurcation).

11. *See infra* Part IX (providing a statutory construction argument in support of trifurcation).

12. *See infra* Part X (offering empirical evidence in support of trifurcation).

13. *See infra* Part XI (arguing that trifurcation might also be applicable to state death penalty jurisdictions).

14. *See* Bunin, *supra* note 4, at 268 (stating that the Federal Death Penalty Act "requires a separate punishment hearing").

15. *See* 18 U.S.C. § 3593(c) (2000) (stating that if the defendant is found guilty of a federal capital offense or pleads guilty to a capital offense, the trial then proceeds to a "sentencing hearing"); Linda E. Jackson, Note, *Be Careful What You Wish For: The Constitutionality of the Federal Death Penalty Act After* Ring v. Arizona, 43 BRANDEIS L. J. 79, 81–82 (2004) (providing an explanation of the structure of the federal capital trial); Bunin, *supra* note 4, at 244 (same); United States v. Matthews, 246 F. Supp. 2d 137, 141 (N.D.N.Y. 2002) (same).

defendant is guilty of the underlying capital offense.[16] Upon the conclusion of the guilt phase, the maximum punishment facing the defendant if he is found guilty is life in prison.[17] Only if the defendant is found guilty by the jury or has pleaded guilty does the trial advance to the next phase—the sentencing phase.[18]

B. Phase Two: The Sentencing Phase

The jury must make two separate and distinct determinations during the sentencing phase of the trial.[19] First, the jury must decide whether the defendant is eligible for the death penalty; that is, the jury must resolve whether the range of possible punishments includes death.[20] Second, the jury must agree upon an appropriate punishment.[21]

1. Is the Defendant Eligible for the Death Penalty?

The prosecution must establish two distinct factors for the defendant to be eligible for the death penalty—intent factors and statutory aggravating factors. First, intent factors require the jury to find that the defendant had the appropriate *mens rea*.[22] Intent factors include evidence that the defendant:

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16. *See* 18 U.S.C. § 3593(b) (2000) (requiring a "separate sentencing hearing to determine the punishment to be imposed"); *see also* 18 U.S.C. § 3591(a)(1), (a)(2), & (b) (2000) (enumerating federal capital offenses); Bunin, *supra* note 4, at 244 (stating that the "first phase was designed to determine guilt").

17. *See* Bunin, *supra* note 4, at 235 ("Absent finding at least one statutory aggravating circumstance by a jury beyond a reasonable doubt, the crime of capital murder is not proven and the death penalty may not be considered."); Joshua Herman, Comment, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1801 (2004) ("If no aggravating factor is found, the death penalty may not be imposed.").

18. *See* 18 U.S.C § 3593(b) (2000) (stating that if the defendant is found guilty of the underlying capital offense the judge "shall conduct a separate sentencing hearing to determine the punishment to be imposed").

19. *See* Bunin, *supra* note 4, at 237 (noting that during the sentencing phase, the capital jury "deliberates upon two very different issues").

20. *See* United States v. Johnson, 362 F. Supp. 2d 1043, 1099 (N.D. Iowa 2005) (describing the two-part determination to be made by the capital jury).

21. *See id.* (stating that the sentencing phase has two components: "(1) the determination of certain gateway factors, which make the death penalty available, and (2) determination, from weighing of all aggravating and mitigating factors, of whether the death penalty is an appropriate punishment").

22. *See* 18 U.S.C. § 3591(a)(2)(A)–(D) (2000) (providing an exhaustive list of requisite mental states for the imposition of the death penalty). For purposes of this Note, these *mens rea*

> intentionally killed the victim, intentionally inflicted serious bodily injury that resulted in the death of the victim, [or] intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person . . . and the victim died as a direct result of the act.[23]

Second, in addition to finding at least one intent factor, the jury must also consider whether the government has established beyond a reasonable doubt at least one aggravating factor enumerated in the FDPA.[24] Examples of these statutory aggravating factors include the government establishing that the underlying capital offense was committed "during the commission of another crime," caused "[g]rave risk of death to additional persons," or was committed for "[p]ecuniary gain."[25] It is important to remember that although the defendant has been found guilty of the underlying offense in the guilt phase, the jury cannot consider death as a possible punishment absent a finding that the government has established at least one intent factor and one statutory aggravating factor.[26] Thus, capital juries must find these two factors beyond a reasonable doubt before they may consider imposing the death penalty.

2. Is Death the Appropriate Punishment?

In determining whether death is the appropriate punishment, the jury must also consider nonstatutory aggravating factors and mitigating factors. The government's presentation of nonstatutory aggravating factors, in addition to the presentation of intent and statutory aggravating factors, begins to blur the distinction between eligibility and punishment.[27] Unlike statutory aggravating

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requirements are called "intent factors."

23. *Id.* § 3591(a)(2)(A)–(C).

24. *Id.* § 3593(e) (requiring that a statutory aggravating factor must be found before the imposition of the death penalty); *id.* § 3593(c) (requiring that a statutory aggravating factor must be "established beyond a reasonable doubt"). For purposes of this Note, these factors are defined as "statutory aggravating factors."

25. *See id.* § 3592(c) (listing the statutory aggravating factors prescribed by the FDPA).

26. *See id.* § 3593(e) (requiring the jury to find a statutory aggravating factor before imposing the death penalty); Herman, *supra* note 17, at 1801 (noting that the death penalty cannot be considered if the government fails to establish a statutory aggravating factor beyond a reasonable doubt).

27. *See* 18 U.S.C. § 3593(c) (2000) (stating that during the sentencing phase of the trial, "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury").

factors, which must be established for the defendant to be eligible for the death penalty, nonstatutory aggravating factors are neither sufficient nor necessary for the jury to sentence the defendant to death.[28] Only if the jury has first found the existence of at least one intent factor and one statutory aggravating factor does a nonstatutory aggravating factor become relevant to the jury's determination of whether to impose the death penalty.[29] There is no specific list of nonstatutory aggravating factors.[30] In fact, the FDPA states that "[a]t the sentencing hearing, information may be presented as to any matter relevant to the sentence . . . ."[31] Nonstatutory aggravating factors include, for example, the future dangerousness of the defendant[32] and victim impact statements.[33]

After the government has concluded its presentation of intent factors, statutory aggravating factors, and nonstatutory aggravating factors, the defense may offer evidence of mitigating factors.[34] Mitigating factors are aspects of the crime or of the defendant that the jury must take into account when deciding upon the appropriate punishment.[35] For example, if the jury is satisfied that the defendant meets the eligibility requirements for the death penalty, the jury must then consider whether the presence of a mitigating factor justifies a reduction in

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28. *See id.* § 3593(e) (requiring that in addition to the underlying statutory offense, at least one statutory aggravating factor must be established in order for the defendant to be eligible for the death penalty); United States v. Lentz, 225 F. Supp. 2d 672, 682 (E.D. Va. 2002) (stating that "the Defendant could not be sentenced to death based solely upon the jurors' finding of non-statutory aggravating factors").

29. *See* 18 U.S.C. § 3593(e) (2000) (implying that the jury is to consider nonstatutory aggravating factors in its determination as to whether death is the appropriate punishment); United States v. Mikos, No. 02 CR 137-1, 2003 U.S. Dist. LEXIS 16044, at *19 (N.D. Ill. Sept. 11, 2003) ("Consideration of non-statutory aggravating factors only assists the jury in individualizing the sentence; they never affect the maximum sentence.").

30. For example, in the federal capital murder trial of Louis Jones, the prosecution introduced the nonstatutory aggravating factor of the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas." United States v. Jones, 132 F.3d 232, 238 (5th Cir. 1998).

31. 18 U.S.C. § 3593(c) (2000).

32. *See* Atkins v. Virginia, 536 U.S. 304, 307–08 (2002) (noting that the prosecution introduced evidence of future dangerousness at the sentencing phase of the trial); Bunin, *supra* note 4, at 254 (citing Simmons v. South Carolina, 512 U.S. 154, 162–63 (1994) for the proposition that evidence of future dangerousness is admissible during the sentencing phase).

33. *See* Bunin, *supra* note 4, at 255 (noting that victim impact statements are routinely admitted during the sentencing phase of a capital trial).

34. *See* 18 U.S.C. § 3593(c) (2000) (stating that at the sentencing phase "[t]he defendant may present any information relevant to a mitigating factor").

35. *See id.* § 3592(a) (stating that in "determining whether a sentence of death is to be imposed on a defendant, the finder of fact *shall* consider *any* mitigating factor") (emphasis added). For an excellent description of mitigating factors, see United States v. Jones, 132 F.3d 232, 238–39 n.3 (5th Cir. 1998).

the sentence to life in prison. Mitigating factors include, but are not limited to, evidence such as impaired capacity, duress, minor participation, equally culpable defendants, and the defendant having no prior criminal record.[36] The defense need only establish mitigating factors by a preponderance of the evidence.[37]

3. *Jury Deliberations*

The sentencing phase culminates with the jury entering deliberations.[38] The jury is charged with making two separate and distinction determinations.[39] First, the jury must decide whether the defendant is eligible for the death penalty.[40] Second, assuming the defendant is eligible for the death penalty, the jury must consider whether "all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death."[41] Or in the "absence of a mitigating factor, [the jury must also determine] whether the aggravating factor or factors alone are sufficient to justify a sentence of death."[42] The jury may sentence the defendant to death only if it is unanimous.[43]

While this discussion of the bifurcated federal capital trial appears to compartmentalize neatly the decision making process of the jury, the reality is that the deliberations function quite differently. Again, the jury must make a two-part determination.[44] They must resolve whether the defendant is eligible for the death penalty, and if so, whether death is the appropriate punishment.[45] However, the jury hears all of the evidence of intent factors, statutory

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36. *See* 18 U.S.C. § 3593(a) (2000) (providing a non-exhaustive list of mitigating factors).

37. *See id.* § 3593(c) (stating that a mitigating factor is not established "unless the existence of such a factor is established by a preponderance of the information").

38. *See id.* § 3593(d) (stating that the jury "shall consider all the information received during the [sentencing] hearing"); Bunin, *supra* note 4, at 268 (noting that the jury must "weigh aggravating and mitigating factors" during the sentencing hearing).

39. *See supra* notes 20–21 (describing the two-part determination).

40. *See* Bunin, *supra* note 4, at 268 (noting that the jury must first determine whether the defendant is eligible for the death penalty).

41. 18 U.S.C. § 3593(e) (2000).

42. *Id.*

43. *See id.* (requiring unanimity among the jurors before the defendant becomes death eligible).

44. *See supra* notes 20–21 and accompanying text (describing the two-part determination).

45. *See supra* notes 20–21 (discussing the decision making process of a federal capital jury during the sentencing phase).

aggravating factors, nonstatutory aggravating factors, and mitigating factors in a single proceeding before making these two determinations.[46] Receiving all of this information in a unitary proceeding creates a problem because the jury's determination of whether the defendant is eligible for the death penalty may be influenced by irrelevant evidence.[47] The jury may find the defendant eligible for the death penalty based on evidence that, even if established beyond a reasonable doubt, fails to satisfy the statutory requirements of death eligibility.[48]

Consider the example at the beginning of this Note.[49] The prosecutor introduced evidence to establish the statutory aggravating factor that the crime was committed for pecuniary gain.[50] In addition, the government also introduced evidence of a nonstatutory aggravating factor—victim impact statements.[51] In theory, the jury must separate the two in its determination of whether the defendant is death eligible.[52] In this example, the jury's determination of whether the government has established that the crime was committed for pecuniary gain must not be influenced by evidence of the victim impact statements. The problem is that these mental gymnastics are nearly impossible for almost anyone, especially the average juror who more than likely lacks background knowledge concerning the FDPA.[53] The end result is that the issue of eligibility and punishment melt into a singular assessment.[54] Moreover, nonstatutory aggravating factors, such as victim impact statements,

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46. *See supra* notes 20–21 and accompanying text.

47. *See* United States v. Johnson, 362 F. Supp. 2d 1043, 1106 (N.D. Iowa 2005) (citing Joshua D. Greenberg, *Is* Payne *Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 IND. L.J. 1349, 1365–66 n.87 (2000), for the proposition that victim impact statements are irrelevant to the determination of whether the defendant is eligible for the death penalty).

48. *See* Bunin, *supra* note 4, at 270 (discussing the potential problem that the jury's determination of whether to impose the death penalty might be influenced by irrelevant factors).

49. *See supra* Part I (providing an example of a federal capital murder trial).

50. *See* 18 U.S.C. § 3592(c)(8) (2000) (enumerating "pecuniary gain" as an aggravating factor).

51. *See id.* § 3593(c) (providing that "[a]t the sentencing hearing, information may be presented as to any matter relevant to the sentence," which necessarily includes victim impact statements).

52. *See id.* § 3593(e) (requiring that the jury first determine whether statutory aggravating factors have been established before considering the impact of other evidence on its determination of the appropriate punishment).

53. *See, e.g.*, Bunin, *supra* note 4, at 262 (citing Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1934) (Hand, J.) (noting the virtual impossibility of curing the admission of prejudicial information with a limiting instruction)).

54. *See id.* at 270 (discussing the possibility that the jury's determination of whether the defendant is eligible for the death penalty may be improperly influenced by irrelevant factors).

can be extremely powerful.[55] The potential influence of nonstatutory aggravating factors on the jury's eligibility decision lies at the heart of this Note.

III. Recent Supreme Court Opinions and the Adequacy of the Bifurcated Structure

This Part describes recent Supreme Court decisions that call into question the adequacy of the current bifurcated structure of federal capital trials. Until the year 2000, the potential influence of nonstatutory aggravating factors on the jury's determination of death eligibility did not give rise to constitutional concerns.[56] The Supreme Court considered intent factors and statutory aggravating factors to be merely sentencing factors, not elements of the crime.[57] All three factors—intent, statutory, and nonstatutory—as traditional sentencing factors, were discretionary factors that the judge or jury could consider when deciding upon the appropriate punishment.[58] Because intent factors and statutory aggravating factors were not considered elements of the crime, all of the elements of federal capital murder were adjudicated in the guilt phase. So long as the guilt phase afforded the defendant all of the requisite constitutional trappings, there was no concern over the potential for the jury to confuse the issues of eligibility and punishment during the sentencing phase. In addition to the Court's jurisprudence as to what constitutes an element of an offense, the Supreme Court had also indicated in older cases that the bifurcated structure

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55. *See* United States v. Johnson, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005) (noting that the victim impact statement was the "most forceful, emotionally powerful, and emotionally draining evidence that I have heard in any kind of proceeding in any case, civil or criminal, in my entire career as a practicing trial attorney and federal judge spanning nearly 30 years").

56. *See* Bunin, *supra* note 4, at 245 ("Until recently, there did not appear to be a conflict between traditional sentencing law, modern capital sentencing procedure, and the right to a jury trial.").

57. *See* Walton v. Arizona, 497 U.S. 639, 648 (1990) (finding statutory aggravating factors to be sentencing factors), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002); Bunin, *supra* note 4, at 257–58 (stating that before *Ring v. Arizona* statutory aggravating factors were not considered elements of the crime); Major Mark A. Visger, *The Impact of* Ring v. Arizona *on Military Capital Sentencing*, 2005 ARMY LAW. 71, 78 (2005) ("Prior to *Ring*, courts treated aggravating factors as mere sentencing considerations and not elements to [sic] an offense.").

58. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 110–11 (2003) (implying that statutory aggravating factors were previously not considered elements of the crime); Bunin, *supra* note 4, at 244 (stating that before *Apprendi* and *Ring* statutory aggravating factors were simply sentencing factors).

that pervades today's federal capital trials provides the degree of reliability necessary to satisfy the Eighth Amendment.[59]

The Supreme Court's opinion in *Apprendi v. New Jersey*[60] called into question this model for understanding what constitutes an element of a crime and what constitutes a sentencing factor.[61] In *Apprendi* the Supreme Court held that any fact which increases the statutory maximum punishment must be treated as an element of the crime.[62] Accordingly, such a factor must be proved beyond a reasonable doubt.[63] Despite *Apprendi*, not until the Supreme Court's opinion in *Ring v. Arizona*[64] did it become clear that intent factors and statutory

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59. *See* Gregg v. Georgia, 428 U.S. 153, 204 (1976) (noting that "it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision"); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (noting that "[i]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death"); United States v. Lentz, 225 F. Supp. 2d 672, 683 (E.D. Va. 2002) (noting that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine") (citing Jurek v. Texas, 428 U.S. 262, 276 (1976)); Bunin, *supra* note 4, at 244 (noting that the Supreme Court found that the current bifurcated structure that pervades today's federal capital trials adequately addresses Eighth Amendment concerns). It is important to note that these Supreme Court opinions were decided well before intent and statutory aggravating factors became elements of the crime of federal capital murder. Instead, when these opinions were announced, intent and statutory aggravating factors were considered simply sentencing factors. Therefore, the bifurcated structure of the federal capital trial did not raise constitutional concerns.

60. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (requiring that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). In *Apprendi* the Supreme Court considered whether a New Jersey Statute that permitted a trial judge to increase the sentence length of a crime beyond the statutory maximum based upon a determination, made by a preponderance of the evidence, that the crime was committed "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity" violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 468. Apprendi was arrested for firing a weapon at the home of an African American family. *Id.* at 469–70. As a result, Apprendi pleaded guilty to, among other crimes, "second degree possession of a firearm for an unlawful purpose." *Id.* at 469. The statutory maximum for this count was ten years. *Id.* at 470. However, based on a determination made by a preponderance of the evidence that this crime was racially motivated, the judge enhanced the sentence to twelve years. *Id.* at 471. Drawing on tradition and recent precedent, the Supreme Court found that New Jersey's procedure, which effectively removed the jury from the determination of guilt or innocence, violated the Due Process Clause. *Id.* at 490.

61. *See id.* at 490 (requiring that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

62. *Id.*

63. *Id.*

64. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) ("Because Arizona's enumerated

aggravating factors enumerated in the FDPA are also elements of the crime.[65] In *Ring*, the Court held that any fact that can increase the severity of punishment to death must be treated as the "functional equivalent" of an element of the crime.[66] Under current Supreme Court precedent, intent factors and statutory aggravating factors are elements of the crime of federal capital murder.[67]

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aggravating factors operate as the functional equivalent of an element of a greater offense . . . the Sixth Amendment requires that they be found by a jury."). The issue presented in *Ring* was whether an aggravating factor required to be found before imposing a death sentence may be found by a judge and not the jury. *Id.* at 597. Timothy Ring was convicted of felony murder by an Arizona jury. *Id.* at 591–92. Under an Arizona statute, once the jury found a defendant guilty of murder, a sentence of death could be imposed only upon a finding by the judge of certain aggravating factors. *Id.* at 592–93. Accordingly, the trial judge sentenced Timothy Ring to death after concluding that Ring had committed the crime for pecuniary gain and that the crime was committed in a particularly "heinous, cruel or depraved manner." *Id.* at 594–95. Drawing heavily on its recent precedent in *Apprendi*, the Supreme Court: (1) ruled that Arizona's procedure violated Ring's Sixth Amendment right to a trial by Jury and (2) expressly overturned its opinion in *Walton v. Arizona*. *Id.* at 609.

65. *See id.* at 609 (stating that factors that can increase the penalty imposed to that of death are the "functional equivalent of an element of a greater offense").

66. *See id.* (stating that findings which are required to be made before imposing a sentence of death "operate as the functional equivalent of an element of a greater offense").

67. *See id.* (characterizing as elements factors that increase a criminal penalty to death); *see also* Sattazahn v. Pennsylvania, 537 U.S. 101, 110–11 (2003) (plurality opinion) (affirming the reasoning of *Ring* that the "existence of any fact . . . [which] increases the maximum punishment that may be imposed . . . constitutes an element, and must be found by a jury beyond a reasonable doubt"); K. Brent Tomer, Ring *Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 CAP. DEF. J. 61, 62 (2004) ("The statutory aggravating factors demarcated the line between life and death, and as such, the Court concluded, were to be treated as elements of an aggravated offense of capital murder."); Bunin, *supra* note 4, at 246–47 (discussing the implications of *Ring* on capital trials). There is some dispute over whether a functionally equivalent element is the same as an element. *Compare* Julia Marcelle Foy Hilliker, Note, *The Evolving Meaning of the Fifth and Sixth Amendments: Sentencing Effects of Aggravating Factors as Elements of the Crime*, 80 NOTRE DAME L. REV. 403, 422–23 (2004) ("[W]here an aggravating factor can be used to increase the maximum penalty, the elements of the crime consist of murder plus an aggravating factor"), *with* Catherine M. Guastello, Comment, *The Tail That Wags the Dog: The Evolution of Elements, Sentencing Factors and the Functional Equivalent of Elements—Why Aggravating Factors Need To Be Charged in the Indictment*, 37 ARIZ. ST. L.J. 199, 202 (2005) ("[W]e now have three levels of facts with differing levels of constitutional protection: 1) elements which have full constitutional protection . . . 2) functional equivalents of elements that have some constitutional protection . . . [and] 3) sentencing enhancements that have little or no constitutional protections . . . ."). Describing an element as a functional equivalent, however, must mean that it is equivalent to an element. As equivalent, it must be treated no differently. Moreover, the Supreme Court in Sattazahn v. Pennsylvania, 537 U.S. 101 (2003), began moving away from the amorphous language of functional equivalence. In *Sattazahn* the Court noted that its recent opinion in *Apprendi* had clarified what constitutes an "element of an offense." *Id.* at 111. The Court continued: "Put simply, if the existence of any fact . . . increases the maximum

IV. The Problem

Because factors once considered simply sentencing factors are now elements of the crime, the bifurcated trial structure set out in the FDPA raises serious constitutional concerns.[68] Indeed, the determination of guilt or innocence is now merged with the determination of punishment.[69] This fact alone goes against the very core of criminal prosecution.[70] In the context of the FDPA, however, the problem is even more pronounced. The judge does not apply the Federal Rules of Evidence when deciding whether to admit evidence of intent factors, statutory aggravating factors, nonstatutory aggravating factors and mitigating factors.[71] Evidence that a court would never admit at trial, such as victim impact statements, hearsay, and character evidence, is unquestionably permissible at the sentencing phase.[72] The only safeguard is the judge, who "may . . . exclude . . . [evidence] if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."[73]

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punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt." *Id.* Thus, this Note treats intent factors and statutory aggravating factors as elements of the crime of federal capital murder.

68. *See* Bunin, *supra* note 4, at 249 (questioning the constitutionality of the bifurcated structure of most capital murder trials); Visger, *supra* note 57, at 78 ("*Ring* raised questions about the method by which the government charges a defendant with a capital offense and notifies him of the capital aggravating factors the government intends to prove."); Victoria Johnson, Comment & Note, *Elemental Facts: Did* Ring v. Arizona *Redefine Capital Sentencing?*, 16 REGENT U. L. REV. 191, 231 (2003) (describing the constitutional confusion that ensued after the Supreme Court's opinion in *Ring*).

69. *See* Bunin, *supra* note 4, at 236 ("Yet in most capital cases, the sentencing hearing begins before all the elements of capital murder are decided.").

70. *See* Marshall v. Lonberger, 459 U.S. 422, 447 (1983) (Stevens, J., dissenting) ("Criminal prosecution involves two determinations: whether the defendant is guilty or innocent, and what the appropriate punishment should be if he is guilty. . . . This case involves the unfairness that may result from an attempt to merge the two stages.").

71. *See* 18 U.S.C. § 3593(c) (2000) (stating that in the sentencing phase "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials").

72. *See* United States v. Higgs, 353 F.3d 281, 320–22 (4th Cir. 2003) (discussing the admissibility of victim impact statements and obstruction of justice as nonstatutory aggravating factors); United States v. Matthews, 246 F. Supp. 2d 137, 149 (N.D.N.Y. 2002) (permitting the introduction of prior unadjudicated criminal actions as nonstatutory aggravating factors); Bunin, *supra* note 4, at 251–57 (describing the types of evidence that would never be admitted during the guilt phase but are routinely admitted during the sentencing phase).

73. 18 U.S.C. § 3593(c) (2000).

Consider the example described at the beginning of this Note.[74] The prosecution's introduction of victim impact statements and the defendant's long criminal record would be excluded during the guilt phase of the trial.[75] While probative for determining the defendant's appropriate punishment, the Federal Rules of Evidence require the judge to exclude such evidence.[76]

During the sentencing phase of the bifurcated federal capital trial, however, this type of evidence is admissible.[77] Accordingly, the effect of this procedure is that the jury's determination of the existence of an intent factor and a statutory aggravating factor, now elements of the crime, is given none of the protections afforded the other elements of the crime adjudicated in the guilt phase.[78] As Alexander Bunin remarks in the context of the bifurcated state capital trial: "[I]n most death penalty jurisdictions, a capital defendant is prosecuted for some elements of capital murder without the trial protections available even to a person charged with a simple misdemeanor."[79] While the Supreme Court has found that the Federal Rules of Evidence are not constitutionally mandatory per se,[80] it has not addressed the problems associated with evidence of nonstatutory aggravating factors influencing the jury's determination of intent and statutory aggravating factors.[81] It is clear, however, that the current bifurcated structure of federal capital trials, which merges the determination of guilt with the determination of punishment, impinges on the defendant's constitutional right to a fair trial.[82]

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74. *See supra* Part I (providing a hypothetical federal capital trial sentencing phase).

75. *See* FED. R. EVID. 404(a) (prohibiting the introduction of the defendant's character or previous bad acts as evidence that the defendant acted in conformity therewith on a certain occasion).

76. *See supra* note 75 (summarizing Rule 404(a)).

77. *See* Bunin, *supra* note 4, at 251–57 (describing the types of evidence that are permitted during the sentencing phase but would be excluded during the guilt phase); *see also* 18 U.S.C. § 3593(c) (2000) (expressly providing that the Federal Rules of Evidence do not apply to the sentencing phase).

78. *See* Bunin, *supra* note 4, at 237 (stating that "[b]y deciding the capital elements at the sentencing hearing, the defendant does not receive protections provided during the proof of guilt for any other crime").

79. *Id.* at 235.

80. *See* Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.").

81. *See* Bunin, *supra* note 4, at 275 (noting that "when the Supreme Court upheld a relaxed evidentiary proceeding in capital cases, it was in reference to selecting punishment and not to determining the elements of an offense").

82. *See id.* at 243 (describing the "unconstitutionality" of the current bifurcated capital murder trial). This Note wants to be clear concerning its stance on juries. This Note does not assume that juries cannot think critically. This Note does, however, argue that nonstatutory

V. A Solution: Trifurcation

Very recently, a few federal district courts began trifurcating capital trials to relieve some of the problems associated with the bifurcated structure addressed in Part II.[83] The judge divides the trial into three phases under a trifurcated structure: A guilt or merit phase, an eligibility phase, and a sentencing phase.[84] As with the bifurcated structure, the jury determines whether the defendant is guilty of the underlying capital offense during the guilt phase.[85] Also, just as under the bifurcated structure, even if the defendant is found guilty, he is not yet eligible for the death penalty.[86] The trial proceeds

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aggravating factors must, at some level, taint the jury's analysis of intent factors and statutory aggravating factors. This view is not held by all. *See* Timothy J. Heaphy, *A Comment on Erin McCampell's Tipping the Scales: Seeking Death Through Comparative Value Arguments*, 63 WASH. & LEE L. REV. 421, 430 (2006) (strongly contesting the view that juries are "easily misled by a lawyer's rhetoric"). Heaphy characterizes this assertion as "patronizing" jurors. *Id.* Instead, Heaphy draws upon his own prosecutorial experience to assert that "[j]urors generally do as they are instructed, basing their decisions on the facts they find and the law as given by the judge." *Id.* While Heaphy's personal experience is entitled to deference, extensive empirical data demonstrate that despite their best efforts, jurors do sometimes base their decisions on irrelevant information. *See* William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1515–29 (1998) (revealing that many capital jurors do not follow the law in making the life or death decision of whether the defendant should receive the death penalty). Over half of the 916 capital jurors interviewed indicated that they had already made their decision regarding whether to impose the death penalty before the conclusion of the sentencing phase. *Id.* at 1495. Moreover, despite the fact that the death penalty is never mandatory, some jurors indicated that their decision to impose the death penalty was based on a mistaken belief that the law required them to do so upon finding the defending guilty of the underlying offense. *Id.* at 1497. Therefore, this Note maintains that jurors are sometimes influenced by irrelevant information—nonstatutory aggravating factors included—when deciding whether the defendant is eligible for the death penalty.

83. *See* United States v. Johnson, 362 F. Supp. 2d 1043, 1110–11 (N.D. Iowa 2005) (trifurcating the proceedings of a federal capital trial); United States v. Bodkins, No. 04CR70083, 2005 U.S. Dist. LEXIS 8747, at *13–14 (W.D. Va. May 11, 2005) (same); United States v. Jordan, 357 F. Supp. 2d 889, 904–05 (E.D. Va. 2005) ("Accordingly, if this case reaches the penalty stage, the proceedings will be divided between the eligibility and selections phases."); United States v. Mayhew, 380 F. Supp. 2d 936, 957 (S.D. Ohio 2005) ("The Court . . . will bifurcate the sentencing phase on the theory that victim impact evidence has no probative value with regard to the statutory aggravating factors or the *mens rea* requirement in this case, but that such evidence carries with it a substantial risk of prejudicing the jury."); United States v. Davis, 912 F. Supp. 938, 949 (E.D. La. 1996) (bifurcating the sentencing phase of a capital trial).

84. *See* United States v. Johnson, 362 F. Supp. 2d 1043, 1110–11 (N.D. Iowa 2005) (providing an explanation of the structure of a trifurcated trial).

85. *See id.* at 1111 (describing the merits phase of a trifurcated trial).

86. *See id.* ("[I]f the defendant is found guilty in the first phrase of the trifurcated proceedings . . . this case will enter the second phase.").

to the eligibility phase only if the defendant has been found guilty or has pleaded guilty to the underlying capital offense. As the name suggests, the jury determines whether the defendant is eligible for the death penalty in this phase.[87] Accordingly, the government may present only evidence of intent factors and statutory aggravating factors.[88] Evidence of nonstatutory aggravating factors is not permitted.[89] Only if the jury finds that the government has met its burden of proof that the defendant is eligible for the death penalty will the trial proceed to the sentencing phase.[90] At this final phase, having found the defendant eligible for the death penalty, the jury then considers whether death is the appropriate punishment.[91]

VI. Arguments for Trifurcating the Federal Capital Trial

Trifurcation is an intuitive solution to the problems associated with the current structure of federal capital trials.[92] More importantly, trifurcation is one approach that will cure the constitutional defects associated with bifurcation.[93] This Note first contends that trifurcation is mandatory for the federal capital trial to comply with the Due Process Clause of the Fifth Amendment.[94] Second, in certain cases, it argues that trifurcation is necessary to quell Confrontation Clause concerns.[95] Third, it holds that statutory construction of the FDPA itself, especially in light of *Apprendi* and *Ring*, compels trifurcation.[96] Finally, it reasons that trifurcation is responsive to empirical

87. *See id.* (describing the eligibility phase).

88. *See id.* ("[A]n eligibility phrase will involve only argument, instruction, and deliberation on the gateway factors . . . and the statutory aggravating factors . . . that the government has identified as applicable here. . . .").

89. *See Johnson*, 363 F. Supp. 2d at 1111 (permitting the prosecution to establish only the existence of statutory aggravating factors during the eligibility phase).

90. *See id.* (stating that "there will be no penalty phase" if the jury fails to find a statutory aggravating factor).

91. *See id.* (noting that the jury will determine whether death is the appropriate punishment in the penalty phase).

92. *See supra* Part IV (describing the constitutional deficiencies associated with the bifurcated structure of federal capital trials).

93. *Id.*

94. *See infra* Part VII (arguing that the rule prohibiting the introduction of character evidence is a constitutional right under the Due Process Clause of the Fifth Amendment).

95. *See infra* Part VIII (offering a Confrontation Clause argument for trifurcation).

96. *See infra* Part IX (offering a statutory construction argument in support of trifurcation).

studies that have illuminated flaws in both the decision making process of a capital jury and capital punishment itself.[97]

VII. The Rule Against Character Evidence is a Constitutional Right Under the Due Process Clause of the Fifth Amendment

A. Overview

Although the Supreme Court has never squarely addressed the prohibition against the introduction of character evidence, an exhaustive review reveals that the rule enjoys deep-seated roots in Anglo-American jurisprudence.[98] The result is that a defendant's protection against the use of character evidence in a criminal proceeding is not simply a creation of Congress, but is instead mandated by the Due Process Clause of the Fifth Amendment.[99] Under this conception of character evidence, the defendant enjoys a constitutional protection that prohibits the prosecution from using his previous bad acts or offenses as evidence that he committed the current offense. Before the Supreme Court's opinion in *Ring* this fact was moot as applied to federal capital cases. The guilt phase contained all of the elements of federal capital murder. During this phase the defendant enjoyed the protection against the use of character evidence provided by the Federal Rules of Evidence.[100] Now that intent factors and statutory aggravating factors constitute elements of the crime after *Ring*, part of the adjudication of the crime of federal capital murder spills over into the sentencing phase. The defendant, therefore, has a constitutional right not to have character evidence used against him during the adjudication of these intent and statutory aggravating factors.

The problem is that the prosecution often introduces evidence of the defendant's bad character during the sentencing phase.[101] Before the jury

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97. *See infra* Part X (offering trifurcation as a partial solution to defects in capital jury decision making as revealed by empirical data).

98. *See* Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991) (stating that "we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime"). The prohibition against character evidence is addressed in Part II of this Note.

99. *See* Drew D. Dropkin & James H. McComas, *On a Collision Course: Pure Propensity Evidence and Due Process in Alaska*, 18 ALASKA L. REV. 177, 190–91 (2001) (incorporating the long common law history prohibiting the use of character evidence to support an argument that both the federal and Alaska Due Process Clauses prohibit its use).

100. *See* FED. R. EVID. 404(a) (prohibiting the use of character evidence offered by the prosecution to prove that the defendant "acted in conformity therewith").

101. *See* Bunin, *supra* note 4, at 270 (discussing the problems associated with the

deliberates to determine whether the government has established the crucial final elements of the crime—an intent factor and a statutory aggravating factor—they are inundated with character evidence regarding the defendant.[102] Because the Constitution forbids character evidence, the sentencing phase is now constitutionally deficient. Simultaneously, however, because the Supreme Court has expressed the necessity of admitting as much information concerning the defendant as possible in capital trials, simply excluding character evidence from the sentencing phase altogether is not a viable option.[103] The only solution that satisfies the defendant's right not to have character evidence used against him, while also allowing the jury to hear as much information about the defendant as possible, is to trifurcate the proceedings.

B. What is Character Evidence?

At its core, character evidence is "[e]vidence that a person has a particular character trait generally . . . [used] to show that the person acted in conformity with that trait at a particular time."[104] Federal Rule of Evidence 404(a) explicitly forbids the admission of previous acts or character traits of a defendant offered for this purpose.[105] It is important to distinguish, however, between the prohibited and permissible uses of prior acts or character traits of a defendant.[106] As a companion to Rule 404(a), Federal Rule of Evidence 404(b) permits the introduction of character traits for "other purposes, such as proof of motive, opportunity, [or] intent . . . ."[107] Rule 404(b), however, is not an exception to the prohibition against the illicit use of character traits. The defendant's character traits may not be offered to prove action in conformity

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intermingling of elements of the crime and sentencing factors).

102. *See id.* at 254 (noting that character evidence is regularly admitted during the sentencing phase).

103. *See supra* note 59 (describing Supreme Court cases requiring that a capital jury receive as much individualized information as possible when deciding whether to sentence a defendant to death).

104. GEORGE FISHER, EVIDENCE 132 (Foundation Press 2002).

105. *See* FED. R. EVID. 404(a) (prohibiting the introduction of character evidence offered as proof of conduct in conformity therewith). For purposes of this note, character evidence offered to prove action in conformity therewith will also be described as "propensity reasoning."

106. *Compare* FED. R. EVID. 404(a) (prohibiting the introduction of a defendant's prior acts offered to establish that the defendant acted in conformity therewith), *with* FED. R. EVID. 404(b) (permitting the introduction of a defendant's prior acts for purposes other than establishing that the defendant acted in conformity therewith).

107. *See* FED. R. EVID. 404(b) (permitting the use of prior acts offered to prove something other than that defendant acted in conformity therewith on a particular occasion).

therewith. This distinction is important because the Supreme Court has specifically upheld the use of prior acts or character traits offered pursuant to Rule 404(b).[108] However, the Court has expressly left open the question of whether the prohibition against the use of character evidence embodied in 404(a) is constitutionally required.[109]

C. Character Evidence and the Sentencing Phase of a Federal Capital Trial

At the sentencing phase of a bifurcated federal capital trial, character evidence is regularly admitted against the defendant in the form of nonstatutory aggravating factors.[110] For example, the future dangerousness of the defendant is one consideration the jury may take into account when considering the appropriate punishment for the defendant.[111] Asserting that the defendant's previous actions make him more likely to commit crimes in the future is the purest form of character evidence. While future dangerousness is probative of the appropriate punishment for a crime, its introduction during the same phase of the trial that includes an adjudication of elements of the crime—the existence of an intent factor and a statutory aggravating factor—raises concerns. Justice Souter has identified this precise trepidation, which includes "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling

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108. *See* Old Chief v. United States, 519 U.S. 172, 191–92 (1997) (upholding a state statute that permitted the introduction of prior felonies offered to prove legal status rather than that the defendant acted in conformity therewith); Spencer v. Texas, 385 U.S. 554, 556, 569 (1967) (upholding a Texas recidivist statute permitting the introduction of a prior offense for the purpose of assessing punishment but not for "assessing the defendant's guilt or innocence under the current indictment").

109. *See* Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991) (stating that "we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime").

110. *See* 18 U.S.C. § 3593(c) (2000) (stating that at the sentencing hearing "[i]nformation is admissible regardless of its admissibility under the rules governing the admission of evidence at criminal trials"); United States v. Grande, 353 F. Supp. 2d 623, 635–36 (E.D. Va. 2005) (permitting the introduction of evidence that the defendant "has engaged in a pattern of criminal activity as an adult"); Bunin, *supra* note 4, at 254 (stating that "[p]ropensity and character evidence are routinely used during a sentencing hearing").

111. *See* Simmons v. South Carolina, 512 U.S. 154, 162–64 (1994) (permitting the introduction of evidence of future dangerousness); *Grande*, 353 F. Supp. 2d at 638 (allowing the prosecution to introduce evidence that the defendant "poses a future danger based upon the probability that he would commit criminal acts of violence that would constitute a continuing threat to society").

for preventive conviction even if he should happen to be innocent momentarily)."[112] Moreover, prosecutors enjoy relative ease in admitting this type of evidence because testimony is not restricted to experts, such as psychologists. Even a defendant's neighbor can offer character evidence.[113] Although admissible during the sentencing phase, character evidence is unquestionably excluded during the guilt phase.[114]

D. Locating a Right Prohibiting the Use of Character Evidence in the Due Process Clause of the Fifth Amendment

The Supreme Court has suggested that the Fifth Amendment forbids the introduction of character evidence, although it has never addressed the issue directly.[115] As a result of this dearth of case law, an in-depth analysis is required to reveal the constitutional foundations of the rule against character evidence. This analysis of whether the Due Process Clause of the Fifth Amendment proscribes the introduction of character evidence turns on "whether the introduction of this type of evidence is so extremely unfair that its admission violates 'fundamental conceptions of justice.'"[116] As noted by the Supreme Court, when attempting to determine whether the admission of such evidence does in fact violate fundamental conceptions of justice, "[w]e begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."[117] Analyzing character evidence through this framework reveals that a rule proscribing its use is a fundamental right inherent in the Due Process Clause of the Fifth Amendment.

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112. *Old Chief*, 519 U.S. at 180–81.

113. *See* Bunin, *supra* note 4, at 254 (describing the different means by which character evidence can enter the sentencing phase of the trial).

114. *See* FED. R. EVID. 404(a) (prohibiting the introduction of character evidence to prove action in conformity therewith); Bunin, *supra* note 4, at 254 (describing the different means by which character evidence can enter the sentencing phase of the trial).

115. *See infra* notes 138–43 and accompanying text (describing the Supreme Court cases that suggest the introduction of character evidence would violate the Constitution).

116. Dowling v. United States, 493 U.S. 342, 352 (1990) (quoting United States v. Lovasco, 431 U.S. 783, 790 (1977)).

117. Washington v. Glucksberg, 521 U.S. 702, 710 (1997); *see also* Montana v. Egelhoff, 518 U.S. 37, 43 (1996) ("Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice."); Honda Motor Co. v. Oberg, 512 U.S. 415, 421 (1994) (stating that in determining whether state action violates Due Process, the Court must look to the state's deviation from "established common-law procedures"); Burnham v. Superior Court of California, 495 U.S. 604, 622 (1990) (stating that a "doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably" satisfies the Due Process Clause).

1. The Prohibition of Character Evidence Enjoys a Long Common Law History

The prohibition against the use of character evidence enjoys a long common law tradition because its use is so unfairly prejudicial.[118] In fact, one of the first opinions assailing the use of character evidence dates back to *Hampden's Trial* in 1684.[119] The court expressed its distaste for character evidence as follows:

> Mr. Williams. You know the case adjudged lately in this Court, a person was indicted of forgery, we would not let them give evidence of any other forgeries, but that for which he was indicted, because we would not suffer any raking into men's course of life, to pick up evidence that they cannot be prepared to answer to.[120]

The next prominent example of the deep roots of the rule against character evidence in Anglo-American jurisprudence occurs less than a decade later in *Harrison's Trial*.[121] In this case the "Lord Chief Justice excluded evidence of a

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118. *See* Marshall v. Lonberger, 459 U.S. 422, 448 n.1 (1983) (Stevens, J., dissenting) (noting that the "common law has long deemed it unfair to argue that, because a person has committed a crime in the past, he is more likely to have committed a similar, more recent crime"); Michelson v. United States, 335 U.S. 469, 475 (1948) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt."); McKinney v. Rees, 993 F.2d 1378, 1380 (9th Cir. 1993) ("The use of 'other acts' evidence as character evidence is not only impermissible under the theory of evidence codified in the California rules of evidence . . . and the Federal Rules of Evidence . . . but is contrary to firmly established principles of Anglo-American jurisprudence."); *see also* Dropkin, *supra* note 99, at 190–91 (incorporating the long common law history prohibiting the use of character evidence to support the argument that both the federal and Alaska Due Process Clauses prohibit its use); Mark A. Sheft, *Federal Rules of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 80 (1995) (noting that the rule against the use of character evidence has been a "seminal part of American jurisprudence since the Nation's inception").

119. *See* Hampden's Trial, 9 How. St. Tr. 1054, 1124 (K.B. 1684) (finding Mr. Hampden guilty of conspiring in an insurrection against the King of England). In *Hampden's Trial*, Mr. Hampden was indicted on charges, among others, that he "falsely, unlawfully, unjustly, maliciously, and seditiously did consult, consent, conspire and confederate of an insurrection within this kingdom of England . . . ." *Id.* at 1055. During the course of his trial, Mr. Williams, the counsel for Mr. Hampden, sought to introduce evidence of a witness's reputation. *Id.* at 1103. However, drawing support from a previous case, the Lord Chief Justice refused to permit the evidence. *Id.*

120. *Id.* at 1103.

121. *See* Harrison's Trial, 12 How. St. Tr. 834, 871 (Old Bailey 1692) (finding Henry Harrison guilty of murder). Henry Harrison was indicted for the murder of a local doctor. *Id.* at 834. Towards the end of the trial, the prosecution sought to admit testimony of a witness, Mr. Bishop. *Id.* at 864. However, because Mr. Bishop's testimony pertained to acts that occurred years before the murder and amounted to an attack on Henry Harrison's character, the Lord

prior wrongful act of a defendant who was on trial for murder, saying to the prosecution: 'Hold, what are you doing now? Are you going to arraign his whole life? Away, away that ought not be; that is nothing to the matter.'"[122]

Approximately seventy years later, this common law prohibition had crossed the Atlantic and had taken root in colonial America. In *King v. Doaks*,[123] a 1763 trial, the court refused to permit evidence offered by the prosecution of the "defendant's prior acts of lasciviousness to bolster its allegations that the defendant was operating a bawdy house."[124] Later, in an 1807 prosecution for treason, a federal court refused to permit evidence of a "treasonous military expedition in Kentucky"[125] intended to prove that the defendant committed a treasonous act in Virginia.[126] The prohibition against character evidence endured and was affirmed in an 1835 New York state case involving counterfeit money.[127] In this instance, the court held it improper to introduce evidence of a prior conviction.[128] Later, in 1865 Chief Justice Cockburn made the following remarks concerning character evidence:

> The truth is, this part of our law is an anomaly. Although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation of innocence, yet you cannot, on the part of the prosecution, go into evidence as to bad character.[129]

Finally, a case that sits temporally on the cusp between what is considered common law tradition and what is considered modern Supreme Court practice, is the 1890 Supreme Court case of *Boyd v. United States*.[130] In this case, the Supreme Court stated that "[h]owever depraved in character, and however full

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Chief Judge excluded the testimony. *Id.*

122. Dropkin, *supra* note 99, at 188 (quoting Harrison's Trial, 12 How. St. Tr. 834, 864 (Old Bailey 1692)).

123. *See* King v. Doaks, Quincy Mass. Reports 90, 90–91 (Mass. Sup. Ct. 1763) (refusing to admit character evidence).

124. Dropkin, *supra* note 99, at 189 (citing King v. Doaks, Quincy Mass. Reports 90, 90–1 (Mass. Sup. Ct. 1763)).

125. Marshall v. Lonberger, 459 U.S. 422, 449 n.1 (1983) (Stevens, J., dissenting) (citing United States v. Burr, 25 Fed. Cas. 187, 198 (No. 14,694) (CC Va. 1807) (Marshall, C.J.)).

126. *See* United States v. Burr, 25 Fed. Cas. 187, 198 (No. 14,694) (CC Va. 1807) (Marshall, C.J.) (prohibiting the introduction of evidence offered for propensity reasoning).

127. *See* People v. White, 14 Wend. 111, 113–14 (N.Y. Sup. Ct. 1835) (prohibiting the introduction of prior criminal acts).

128. *Id.*

129. Reg. v. Rowton, 10 Cox's Criminal Cases 25, 29–30 (Ct. Crim. App. 1865).

130. Boyd v. United States, 142 U.S. 450, 458 (1892) (noting that the defendant's prior acts should have no bearing as to whether he committed the present offense).

of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged."[131]

These cases make clear that the prohibition against character evidence is a deep-seated notion that owes its origins to the common law and has been firmly incorporated into American jurisprudence.[132] This long lineage alone lends credence to the constitutional weight of the rule. But also impressive is the fact that the prohibition against character evidence pre-dates by one hundred years the constitutional requirement that a criminal defendant be found guilty beyond a reasonable doubt.[133] This time difference is especially important considering the emphasis the Supreme Court placed on history in locating the right to proof beyond a reasonable doubt in the Due Process Clause.[134] Thus, given its long common law history, the rule against character evidence is constitutionally mandated by the Due Process Clause of the Fifth Amendment.

2. *Supreme Court Practice Recognizes the Importance of Preventing the Introduction of Character Evidence*

In every case that the Supreme Court has approved the introduction of evidence pertaining to a character trait or a prior act of the defendant, the prosecution sought to admit the disputed evidence for purposes other than to establish that the defendant acted in conformity therewith.[135] This delicate balance between admitting this type of evidence for a permissible purpose under Rule 404(b) and admitting it for an impermissible purpose in contravention of Rule 404(a) has fueled controversy.[136] Yet, it is through this

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131. *Id.* at 458.

132. *See* Sheft, *supra* note 118, at 80 (noting that the ban against the use of character evidence is a "seminal part of American Jurisprudence").

133. *See* In Re Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). In holding that proof beyond a reasonable doubt is a constitutional requirement of criminal prosecution, the Court noted that the "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798." *Id.* at 361; *see also* Dropkin, *supra* note 99, at 188 ("Moreover, the prohibition against the admission of pure propensity evidence antedates the beyond a reasonable doubt standard by more than a century.").

134. *See* In Re Winship, 397 U.S. at 373–75 (Harlan, J., concurring) (noting the very long history of the requirement of proof beyond a reasonable doubt in criminal adjudications).

135. *See, e.g.*, Estelle v. McGuire, 502 U.S. 62, 69 (1991) (permitting the introduction of prior act evidence for the purpose of establishing intent).

136. *See* Michelson v. United States, 335 U.S. 469, 484–85 (1948) (noting that the confusion between permissible and impermissible uses of evidence pertaining to character traits

controversy that the Supreme Court has consistently illuminated its practice of banning the introduction of character evidence.[137]

In *Michelson v. United States*,[138] the Supreme Court expressed in dicta that "[t]he state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime."[139] The most profound and instructive statement concerning character evidence, however, is contained in *Spencer v. Texas*.[140] Chief Justice Warren announced the following:

> Whether or not a State has recidivist statutes on its books, it is well established that evidence of prior convictions may not be used by the State to show that the accused has a criminal disposition and that the probability that he committed the crime currently charged is increased. While the Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decision exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals

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"are such that even lawyers and judges, after study and reflection, often are confused"). This confusion resulted in one of the seminal Supreme Court opinions concerning the use of character evidence. *See infra* note 138 (providing a detailed discussion of the Court's opinion).

137. *See infra* notes 138–43 and accompanying text (describing the Supreme Court's practice of prohibiting the introduction of character evidence).

138. *See* Michelson v. United States, 335 U.S. 469, 486–87 (1948) (upholding the use the defendant's prior acts as a means of testing the level of knowledge a character witness has concerning the defendant's reputation). "Michelson was convicted of bribing a federal revenue agent." *Id.* at 470. To question how well a character witness actually knew Michelson's reputation, the prosecutor inquired into a previous conviction of Michelson. *Id.* at 472. Despite the trial judge's admonition to the jury that Michelson's prior conviction was being offered only to test the knowledge of the character witness, and not to prove Michelson had in fact committed the prior crime, Michelson protested the introduction of his prior acts. *Id.* at 473. Carefully noting that the introduction of Michelson's prior crime was not character evidence, but was instead offered to test how well the character witness knew Michelson's reputation, the Supreme Court affirmed the lower court's approval of this type of evidence. *Id.* at 486–87.

139. *See id.* at 487 (upholding the introduction of the defendant's prior acts as a means for testing the level of knowledge a character witness has concerning the defendant's reputation).

140. *See* Spencer v. Texas, 385 U.S. 554, 569 (1967) (upholding a Texas statute that permitted a defendant's sentence to be enhanced upon a showing of prior convictions). "[Spencer] was indicted for murder, with malice, of his common-law wife." *Id.* at 557. Because Spencer had previously been convicted of murder, the jury was instructed that a Texas statute permitted the jury to consider death as a possible punishment upon finding Spencer guilty of the current offense. *Id.* at 557–58. "The jury was instructed as well that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried." *Id.* Spencer was convicted and sentenced to death. *Id.* at 558. Spencer contested the introduction of his prior conviction. *Id.* at 557–58. In affirming Spencer's death sentence, the Supreme Court relied on both the judge's ability to prevent prejudice and the "[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement." *Id.* at 566.

> and state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause.[141]

Finally, as recently as 1997, the Supreme Court has expressed in dicta that character evidence is impermissible.[142] The Court noted that it would be improper for the jury to generalize "a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged . . . ."[143]

3. Every Jurisdiction Has Enacted Evidentiary Rules Prohibiting the Use of Character Evidence

The Supreme Court has also looked to state practice for guidance in locating a fundamental Due Process right.[144] While perhaps not sufficient alone to establish a fundamental right, the greater number of states that recognize a right the stronger the argument that the right is embodied in the Due Process Clause.[145] Turning to the prohibition of character evidence, the Court of Appeals for the Ninth Circuit noted that "[t]he rule against using character evidence to show behavior in conformance therewith . . . is now established not only in the California and federal evidence rules, but in the evidence rules of thirty-seven other states and in the common-law precedents of the remaining twelve states and the District of Columbia."[146] That every jurisdiction has

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141. *See id.* at 569 (upholding a Texas statute that permitted a defendant's sentence to be enhanced upon a finding of prior convictions).

142. *See* Old Chief v. United States, 519 U.S. 172, 180 (1997) (noting the Court's disapproval of character evidence).

143. *Id.*

144. *See* Lawrence v. Texas, 539 U.S. 558, 570–71 (2003) (drawing on the actions of a majority of the states to support the finding of a Due Process right); Washington v. Glucksberg, 521 U.S. 702, 716–17 (1997) (emphasizing the fact that almost every state prohibits physician assisted suicide in finding that there exists no Due Process right to physician assisted suicide).

145. *See Lawrence*, 539 U.S. at 573 (noting the number of states that had repealed their sodomy laws since the Supreme Court had last visited the issue).

146. McKinney v. Rees, 993 F.2d 1378, 1381 (9th Cir. 1993). In this case the Ninth Circuit noted that the following states have enacted evidentiary rules prohibiting the use of character evidence: "ALASKA EVID. CODE § 404; ARIZ. R. EVID. 404; ARK. R. EVID. 404; CAL. EVID. CODE § 1101; COLO. R. EVID. 404; DEL. R. EVID. 404; FLA. STAT. ch. 90.404; HAW. R. EVID. 404; IDAHO R. EVID. 404; IOWA R. EVID. 404; KAN. STAT. ANN. § 60-447; KY. R. EVID. 404; LA. CODE EVID. ANN. art. 404; ME. R. EVID. 404; MICH. R. EVID. 404; MINN. R. EVID. 404; MISS. R. EVID. 404; MONT. R. EVID. 404; NEB. REV. STAT. § 27-404 (Reissue 1989); NEV. REV. STAT. § 48.045 (1986); N.H. R. EVID. 404; N.J. R. EVID. 47; N.M. STAT. ANN. § 11-404 (Michie 1986); N.C. GEN. STAT. § 8c-1, Rule 404 (1988 & Cumm. Supp. 1990); N.D. R. EVID. 404;

established rules prohibiting the use of character evidence is strong evidence of our "Nation's history, legal traditions, and practices" and supports a Due Process right prohibiting the introduction of such evidence in criminal prosecutions.[147]

4. Exceptions to the Rule: Federal Rules of Evidence 413 and 414

One particular exception to the rule against character evidence is found in Rules 413 and 414 of the Federal Rules of Evidence.[148] In cases involving sexual abuse or child molestation, these two Rules permit the prosecution to introduce "evidence of the defendant's commission of another offense or offenses" of sexual assault or child molestation for the purpose of establishing that the defendant committed the current offense.[149] Analysis of these two exceptions is important. At first glance these two Rules appear to undercut the argument that the ban against character evidence is required by the Due Process Clause. Upon further inspection, however, it becomes clear that these Rules do not undermine this Note's primary argument. In fact, these exceptions support it.

OHIO R. EVID. 404; OKLA. STAT. tit. 12, § 2404 (1991); OR. R. EVID. 404; R.I. R. EVID. 404; S.D. CODIFIED LAWS ANN. § 19-12-5 (1992); TENN. R. EVID. 404; TEX. R. CRIM. EVID. 404; UTAH R. EVID. 404; VT. R. EVID. 404; WASH. R. EVID. 404; W. VA. R. EVID. 404; WIS. R. EVID. 904.03; WYO. R. EVID. 404." *Id.* The twelve states remaining and the District of Columbia have adopted the prohibition against character evidence through case law. *Id.* These decisions include: Artis v. United States, 505 A.2d 52, 56 (D.C. App. 1986), *cert. denied*, 479 U.S. 964 (1986); Anonymous v. State, 507 So. 2d 972, 973–74 (Ala. 1987); State v. Holliday, 268 A.2d 368, 369 (Conn. 1970); Brown v. State, 398 S.E.2d 34, 34 (Ga. Ct. App. 1990); People v. Kannapes, 567 N.E.2d 377, 379–80 (Ill. App. Ct. 1990); Penley v. State, 506 N.E.2d 806, 808 (Ind. 1987); Ross v. State, 350 A.2d 680, 684 (Md. 1976); Commonwealth v. Chalifoux, 291 N.E.2d 635, 638 (Mass. 1973); State v. Clark, 801 S.W.2d 701, 703 (Mo. Ct. App. 1990); People v. Powell, 543 N.Y.S.2d 818, 819 (1989); Commonwealth v. Lark, 543 A.2d 491, 497 (Pa. 1988); State v. Griffin, 285 S.E.2d 631, 633–34 (S.C. 1981); Brooks v. Commonwealth, 258 S.E.2d 504, 506 (Va. 1979). *Id.*

147. *Washington*, 521 U.S. at 710.

148. *See* FISHER, *supra* note 104, at 182 (noting that Rules 412 and 413 are true exceptions to the rule against character evidence).

149. *See* FED. R. EVID. 413 ("In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."); FED. R. EVID. 414 ("In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.").

First, unlike the long common law heritage that the ban against the "traditional use"[150] of character evidence enjoys, the common law did not regularly prohibit these specific uses of character evidence.[151] Not only does the prohibition of this type of evidence lack common law roots, but the recent practice of many states has also permitted these two exceptions.[152] Second, even lacking common law roots, these two exceptions have faced vigorous opposition. Indeed, Congress failed to heed the Judicial Conference's strong recommendation that these two exceptions be, at the very least, redrafted.[153] The Conference noted that the "overwhelming majority of judges, lawyers, law professors, and legal organizations . . . opposed new Evidence Rules 413 . . . [and] 414."[154] Moreover there was "highly unusual unanimity of the members of the Standing and Advisory Committees" that these Rules should be reconsidered.[155] But the strong opposition to these two Rules did not stop with the Judicial Conference. In fact, one Judge, in a dissenting opinion, argued that the Eighth Circuit should rehear a case en banc to determine whether Rule 413 violates Due Process.[156] The fact that this subset of character evidence, which lacks the same long history and universal disapproval as traditional character evidence, still raises Due Process concerns underscores how completely the traditional prohibition of character evidence is ingrained in American jurisprudence.

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150. Note that "traditional" use of character evidence means any character evidence other than prior acts of sexual assault or child molestation offered in a prosecution concerning such offenses.

151. United States v. Castillo, 140 F.3d 874, 881 (10th Cir. 1998) (noting that unlike the general ban against character evidence, "the historical record regarding evidence of one's sexual character is much more ambiguous").

152. *See* FISHER, *supra* note 104, at 186 (noting that many states have liberalized admission of prior sexual crimes evidence in sex crimes); *see also Castillo*, 140 F.3d at 881 ("More than a century ago, courts regularly admitted a defendant's prior acts as proof of the crime of incest."); Lannan v. State, 600 N.E.2d 1334, 1335 (Ind. 1992) (overturning Indiana's long settled exception permitting, "in prosecutions for incest, sodomy, criminal deviate conduct or child molesting, evidence of certain kinds of prior sexual conduct").

153. *See* REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (Submitted to Congress Feb. 9, 1995) (strongly opposing Federal Rules of Evidence 413 and 414).

154. *Id.*

155. *Id.*

156. *See* United States v. Mound, 157 F.3d 1153, 1153–54 (8th Cir. 1998) (Arnold, J., dissenting) (urging a rehearing en banc to consider the Due Process implications of Rule 413).

E. Implications for the Federal Capital Trial

The Due Process right prohibiting the introduction of character evidence renders the bifurcated proceedings of a federal capital trial constitutionally deficient. As discussed above, intent factors and statutory aggravating factors—elements of the crime—are adjudicated in a proceeding awash with character evidence.[157] Prohibiting the introduction of character evidence is not a viable solution as it would simply trade one constitutional deficiency for another. While the Constitution prohibits the introduction of character evidence during the adjudication of guilt or innocence, it also requires the capital trial to include as much individualized information as possible about the defendant.[158] Banning character evidence would greatly reduce this particularized and individualized examination.[159]

Trifurcation respects both of these constitutional requirements. First, the adjudication of intent factors and statutory aggravating factors, the final elements of federal capital murder, occurs during the eligibility phase.[160] This phase occurs after the guilt phase but before the sentencing phase.[161] The defendant enjoys the protection of the Federal Rules of Evidence during this phase. Assuming the prosecution has established both an intent factor and a statutory aggravating factor, the elements of federal capital murder have been satisfied. The defendant is death eligible. Thus, the trial proceeds to the sentencing phase.[162] Under a trifurcated structure, the sentencing phase does not include elements of the crime. The prosecution can therefore admit evidence necessary for the jury to make a particularized and individualized assessment of the defendant without impinging upon the defendant's Due Process right prohibiting the introduction of character evidence.[163] Trifurcation

157. *See* Bunin, *supra* note 4, at 254 ("It is as difficult to imagine a sentencing hearing without propensity and character evidence as it is to conceive of a trial where a defendant is alleged to be guilty based solely on unrelated past conduct or the quality of his character.").

158. *See supra* note 59 (discussing the requirement that a capital jury receive as much information about the defendant as possible).

159. This results from the fact that character evidence is "routinely" admitted during the sentencing hearing. *See* Bunin, *supra* note 4, at 254 (noting that character evidence is often admitted during sentencing hearings).

160. *See supra* Part V (describing the contents of the eligibility phase under a trifurcated trial structure).

161. *See supra* Part V (describing the structure of a trifurcated trial).

162. *See supra* Part V (describing the progression of a trifurcated capital trial).

163. *See supra* note 59 (discussing the constitutional importance of a capital jury receiving as much particularized and individualized information about the defendant as possible); *supra* Part VII (arguing that a criminal defendant enjoys a constitutional protection against the introduction of character evidence).

is the only available procedural solution that satisfies both of these constitutional requirements.

VIII. The Unique Instance Arising After the Supreme Court's Opinion in Crawford v. Washington

A. Overview

Crawford v. Washington[164] marked a shift in the Supreme Court's Sixth Amendment jurisprudence.[165] Under this new analysis of the Confrontation Clause, judges no longer retain discretion in determining whether to admit certain testimonial hearsay evidence.[166] Assuming that the Confrontation Clause does indeed apply to the capital sentencing phase, the absolute bar of the Confrontation Clause now trumps the FDPA's balancing test for determining whether to admit certain evidence.[167] While excluding certain evidence satisfies Confrontation Clause concerns, it simultaneously cuts against the Eighth Amendment requirement that a court admit as much individualized

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164. Crawford v. Washington, 541 U.S. 36, 68 (2004) (holding that statements made by an unavailable witness to police violated the Confrontation Clause when introduced against the defendant at trial).

165. The issue in *Crawford* turned on whether the prosecution's introduction of a tape-recorded statement by the wife of the accused violated the Confrontation Clause of the Sixth Amendment. *Id.* at 42. "Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife . . . ." *Id.* at 38. At his trial, the prosecution introduced his wife's testimony in the form of a tape recording. *Id.* at 61. Because of marital privilege the Petitioner's wife was unavailable for cross-examination concerning the statement. *Id.* at 40. The trial court admitted the hearsay statement pursuant to *Ohio v. Roberts*, 448 U.S. 56 (1980), finding that it did not violate the Confrontation Clause because it bore a "'particularized guarantee of trustworthiness.'" *Id.* The Supreme Court, however, rejected the rationale of *Roberts*. *Id.* at 60. Instead, the Court held that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability." *Id.* at 61. Because the testimony at issue in this case was "testimonial" and the accused did not have an opportunity to cross-examine the witness concerning the statement, the Supreme Court held its introduction violated the Sixth Amendment. *Id.* at 68.

166. *See id.* at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."). For an in-depth discussion as to what constitutes "testimonial" hearsay evidence, see generally Major Robert Wm. Best, *To Be or Not to Be Testimonial? That is the Question: 2004 Developments in the Sixth Amendment*, 2005 ARMY LAW. 65 (2005).

167. *See* United States v. Jordan, 357 F. Supp. 2d 889, 902 (E.D. Va. 2005) (noting that the Constitution trumps the FDPA); *see also* United States v. Bodkins, No. 04CR70083, 2005 U.S. Dist. LEXIS 8747, at *13–14 (W.D. Va. May 11, 2005) (finding that *Crawford* requires trifurcated proceedings).

evidence as possible during the sentencing phase of a capital trial.[168] A trifurcated structure is the only procedure that ameliorates both of these constitutional concerns.

B. *Federal Capital Trials Post-*Crawford

The court in *United States v. Jordan* directly addressed the issue raised by *Crawford* in the context of the federal capital trial.[169] In this case the government sought to introduce hearsay testimony of a deceased witness.[170] After finding that the Confrontation Clause barred the deceased witness's statements during the guilt phase, the court went forward to consider *Crawford*'s implications for the sentencing phase of the trial.[171] It noted that "[t]he task before this Court is to define the interplay between . . . [the FDPA] and the scope of the Confrontation Clause as enunciated in *Crawford*."[172] In addressing this issue, the court found itself in a conundrum. On the one hand, it noted the constitutional restraints placed on the admission of hearsay evidence after *Crawford*.[173] On the other hand, the court observed that the "Supreme Court has also urged trial courts to admit more evidence, not less, on the presence or absence of aggravating and mitigating factors."[174]

Faced with a tug-of-war between competing constitutional objectives, the court responded by trifurcating the proceedings.[175] In doing so, the court began by first dividing the sentencing phase into its "two facets: eligibility and selection."[176] Because the eligibility phase involves the adjudication of the "functional equivalent of elements of the capital offense," the court found that

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168. *See supra* note 59 (describing the requirement that the jury should have as much individualized information as possible about a capital defendant).

169. *See Jordan*, 357 F. Supp. 2d at 898 (addressing the implications of *Crawford* in the context of the federal capital trial).

170. *See id.* at 898 (describing the hearsay statements sought to be admitted by the government).

171. *See id.* at 901 ("Having concluded that the Confrontation Clause bars the admissibility of Brown's statements to the . . . [police] absent cross-examination in guilt phase, the Court will now turn to the permissible use of such a statement during the penalty phase of the trial.").

172. *Id.*

173. *See id.* ("The Supreme Court has consistently counseled that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death.").

174. United States v. Jordan, 357 F. Supp. 2d 889, 901 (E.D. Va. 2005).

175. *See id.* at. 903 (noting that trifurcating the trial is appropriate "under the facts of this case").

176. *Id.* at 902.

the constitutional safeguard of the Confrontation Clause applied.[177] Applying the Confrontation Clause to the final elements needed to establish federal capital murder—intent factors and statutory aggravating factors—satisfied the Sixth Amendment. Next, to provide the "individualized treatment"[178] required by the Eighth Amendment, the court held that the Confrontation Clause and the Federal Rules of Evidence do not apply if the trial progresses to the selection phase.[179] Therefore, trifurcation provided a solution to both the Sixth and Eighth Amendment concerns that arise during the federal capital trial.

C. Crawford*'s Impact on Trifurcation*

While *Crawford* is important because it illustrates the unique case in which the Confrontation Clause requires trifurcation, it is important to realize the limits of this analysis. The Confrontation Clause will rarely be an issue during the sentencing phase. *Crawford*'s application to trifurcation, therefore, may be attenuated. More illuminating and perhaps more important, however, is that the application of *Crawford* to the federal capital trial reveals that trial courts are amenable to trifurcation. These courts have implicitly found that trifurcation is not prohibited by the FDPA.[180] Viewed in this sense, *Crawford*'s greatest value lies in the fact that it reinforces the notion that trifurcation is a viable alternative to the current bifurcated structure of federal capital trials.

IX. Statutory Construction of the FDPA Compels Trifurcation

During the sentencing phase of the trial, the judge continues to screen the admission of evidence in his traditional capacity as gatekeeper.[181] The tool with which the judge screens evidence, however, is not the Federal Rules of

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177. *Id.*

178. *See* Stringer v. Black, 503 U.S. 222, 230 (1992) (noting the "well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases").

179. *See* United States v. Jordan, 357 F. Supp. 2d 889, 904 (E.D. Va. 2005) (noting that the court will admit evidence "[w]ithout the *Crawford* limitations" and that evidence will be admitted according to the balancing test prescribed by the FDPA).

180. *Compare* Bunin, *supra* note 4, at 274 (stating that trifurcation "requires rewriting the FDPA"), *with* United States v. Jordan, 357 F. Supp. 2d 889, 903 ("A close examination of the governing statute . . . reveals that the statute does not necessarily mandate a single unitary proceeding.").

181. *See* United States v. Johnson, 362 F. Supp. 2d 1043, 1105 (N.D. Iowa) (noting that "the court retains at least part of its gatekeeper function" during the capital sentencing phase of the trial).

Evidence.[182] The judge must limit evidence according to the FDPA. The FDPA states that "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."[183] For analytical purposes, this requirement is a slightly less stringent version of the balancing test embodied in Federal Rules of Evidence 403.[184] Applied to the sentencing phase, the test described in the FDPA tilts strongly in favor of excluding the admission of intent factors, statutory aggravating factors, and nonstatutory aggravating factors in a single proceeding. Excluding any factor completely from the trial is not a viable option.[185] The optimal solution, which reduces the risks associated with a unitary proceeding while also complying with the FDPA, is trifurcation.[186]

This Note is firm in its belief that the Due Process Clause of the Fifth Amendment protects a defendant from the introduction of character evidence.[187] This Note also acknowledges the sweeping implications that such a right would have for all criminal trials. As a result, judges might be hesitant to recognize the constitutional stature of the rule against character evidence. Therefore, while a statutory construction argument based on the FDPA does not carry the force of the Constitution, its narrow focus might also be its savior. Avoiding a constitutional issue, the argument that statutory construction of the FDPA compels trifurcation may be more successful.

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182. *See* 18 U.S.C. § 3593(c) (2000) ("Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials . . . .").

183. *Id.*

184. *See* FED. R. EVID. 403 (permitting a court to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"); *see also Johnson*, 362 F. Supp. 2d at 1105 (noting that the limitation in the FDPA "appears to be analogous to" Federal Rules of Evidence 403). *But see Johnson*, 362 F. Supp. 2d at 1105 (suggesting that the FDPA's test is less stringent than Federal Rules of Evidence 403).

185. *See supra* Part II (describing the requirements of the FDPA). Prohibiting the introduction of either statutory or nonstatutory aggravating factors is in direct conflict with the text of the FDPA.

186. *See supra* Part II (describing the decision making process of the capital jury during the sentencing phase).

187. *See supra* Part VII (describing the character evidence argument).

A. United States v. Johnson[188]

Judge Bennett's decision to trifurcate the proceedings of the federal capital murder trial of Angela Johnson provides the best example of this statutory argument.[189] As the gatekeeper, the judge may exclude evidence "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."[190] The question becomes, therefore, whether the probative value of evidence of nonstatutory aggravating factors is outweighed by the risk of unfair prejudice, confusing the issues, or misleading the jury.[191]

The first step in the analysis is to consider the meaning of "probative" in the context of the FDPA. As Judge Bennett stated in *Johnson*:

> [T]here is no reason to suppose that probative value within the meaning of the . . . [FDPA] means anything different than probative value within the meaning of Rule 403 of the Federal Rules of Evidence. Probative value within the meaning of Rule 403, in turn, is essentially the relevance of the evidence.[192]

Accordingly, in order for evidence to be relevant it must have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[193] Whether the introduction of evidence of nonstatutory aggravating factors has "any tendency" to establish the existence of a statutory aggravating factor is at the core of the statutory construction argument for trifurcation.[194] In *Johnson*, Judge Bennett found that the nonstatutory aggravating factors likely to be introduced by the prosecution were not probative to the jury's determination of the existence of intent factors or statutory aggravating factors.[195] Indeed evidence of nonstatutory aggravating factors is never probative of the existence of intent factors or statutory

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188. United States v. Johnson, 362 F. Supp. 2d 1043 (N.D. Iowa 2005).

189. *See id.* at 1103–11 (discussing the statutory justification for trifurcating the trial).

190. 18 U.S.C. § 3593(c) (2000); *see Johnson*, 362 F. Supp. 2d at 1105 (discussing the judge's role as gatekeeper during the sentencing phase of the trial).

191. *See Johnson*, 362 F. Supp. 2d at 1104–10 (engaging in an analysis of whether the probative value of victim impact statements is outweighed by the risks of unfair prejudice, confusion of the issues, and misleading the jury).

192. *Id.* at 1105.

193. FED. R. EVID. 401.

194. *Id.*

195. *See* United States v. Johnson, 362 F. Supp. 2d 1043, 1099 (N.D. Iowa 2005) (describing the two-part determination that the jury must make during the sentencing phase of a federal capital murder trial).

aggravating factors. The jury is required to make two separate and independent determinations: whether the defendant is eligible for the death penalty, and if so, whether death is the appropriate punishment.[196] Because the FDPA requires the jury to make these determinations independent of one anther,[197] evidence of nonstatutory aggravating factors can never be probative of intent factors or statutory aggravating factors.[198]

As a result, the probative value of nonstatutory aggravating factors can be assigned a value of zero.[199] Even the slightest risk of unfair prejudice, misleading the jury, or confusing the issues justifies excluding nonstatutory aggravating factors. As Judge Bennett notes, however, the risk of unfair prejudice during the sentencing phase can be enormous.[200] For instance, Judge Bennett made the following remarks concerning the power of victim impact statements in the companion murder trial of Dustin Honken:

> I have already presided over the penalty phase in the companion case against Dustin Honken. This case will likely involve victim impact evidence that is substantially similar to the victim impact evidence in Honken's case, because this case involves the same alleged murders of the same victims. I can say, without hesitation, that the victim impact testimony presented in Honken's trial was the most forceful, emotionally powerful, and emotionally draining evidence that I have heard in any kind of proceeding in any case, civil or criminal, in my entire career as a practicing trial attorney and federal judge spanning nearly 30 years.[201]

From this statement, the potential for evidence of a nonstatutory aggravating factor to result in unfair prejudice is clear.[202] To be sure, not only

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196. *See id.* at 1106 ("The Supreme Court itself has 'distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase.'") (citing Buchanan v. Angelone, 522 U.S. 269, 273 (1998)).

197. *See* 18 U.S.C. § 3592(c) (2000) (providing an exhaustive list of statutory aggravating factors). Combined with § 3593(e)(2), which requires the jury to find a statutory aggravating factor listed in § 3592(c) before imposing the death penalty, it is clear that nonstatutory aggravating factors are to have no influence on the jury's determination of statutory aggravating factors.

198. *See Johnson*, 362 F. Supp. 2d at 1107 ("To pretend that . . . [victim impact statements are] not potentially unfairly prejudicial on issues to which it has little or no probative value is simply not realistic.").

199. *See id.* ("[S]uch potent, emotional evidence is a quintessential example of information likely to cause a jury to make a determination on an unrelated issue on the improper basis of inflamed emotion and bias . . . .").

200. *See id.* at 1106–07 (describing the power of victim impact statements).

201. *Id.*

202. *See id.* at 1107–09 (citing literature discussing the incredible impact of victim impact statements on the capital jury).

can victim impact statements result in unfair prejudice, but evidence of any nonstatutory aggravating factor can also produce this result.[203]

Again consider the example at the beginning of this Note.[204] In an effort to establish the nonstatutory aggravating factor of future dangerousness,[205] the prosecution flooded the jury with the defendant's entire criminal record.[206] The introduction of this evidence creates the risk that the jury may find the statutory aggravating factor of pecuniary gain based on evidence of the nonstatutory aggravating factor of future dangerousness.[207] Under the FDPA, the judge must exclude the simultaneous introduction of evidence of intent and statutory aggravating factors and nonstatutory aggravating factors to prevent this unfair prejudice.

The potential for evidence to cause the jury to confuse issues is also grounds for the judge to exclude evidence pursuant to the FDPA.[208] Having already established that the probative value of evidence of nonstatutory aggravating factors is virtually non-existent, any risk that the jury will confuse the issues tilts the balance enough to justify the exclusion of such evidence. In *Johnson*, Judge Bennett stated that the "[i]ntroduction of extraneous

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203. Adjectives are important to understanding what constitutes unfairly prejudicial evidence. Strickler v. Greene, 527 U.S. 263, 289 (1999) ("[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial . . . ."). The key to understanding what constitutes "unfair prejudice" is that the prejudice must be *unfair*. Obviously, the prosecution's goal is to present evidence that is prejudicial to the defendant. Rule 403 prohibits evidence, therefore, only when it is unfairly prejudicial. FED. R. EVID. 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). The Supreme Court has noted that evidence is unfairly prejudicial when it may prompt a jury to base a decision on an improper basis. United States v. Old Chief, 519 U.S. 172, 180 (1997). In the context of the FDPA, basing a finding of an intent factor or a statutory aggravating factor on evidence of a nonstatutory aggravating factor is an improper basis.

204. *See supra* Part I (providing a hypothetical example of the sentencing phase of a bifurcated federal capital murder trial).

205. *See* 18 U.S.C. § 3593(c) (2000) ("At the sentencing hearing, information may be presented as to any matter relevant to the sentence . . . .").

206. *See* United States v. Matthews, 246 F. Supp. 2d 137, 149 (N.D.N.Y. 2002) (permitting the introduction of prior unadjudicated criminal actions as nonstatutory aggravating factors).

207. *See supra* Part I (providing a hypothetical example of the evidence introduced during the sentencing phase of a federal capital murder trial).

208. *See* 18 U.S.C. § 3593(c) (2000) ("Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.").

information into the jury's determination of . . . statutory aggravating factors could . . . only tend to confuse the issues."[209]

Finally, the judge may also exclude evidence if its probative value is outweighed by the risk that the evidence will "mislead the jury." Judge Bennett succinctly summarized this risk:

> If the jury is permitted to hear information on all of the factors in one proceeding, the jury is reasonably likely to be misled into believing that all information is pertinent to the determination of all factors and the balance of factors, when the process under . . . [the FDPA] is actually sequential and cumulative: The jury must first find the defendant guilty; then must find at least one . . . statutory aggravating factor; then may find one or more non-statutory aggravating factors and one or more mitigating factors; then must balance all of the factors to determine the appropriate penalty.[210]

Because the FDPA instructs judges to exclude evidence that may mislead the jury, and because the probative value of nonstatutory aggravating factors will always be outweighed by the risk of misleading the jury, the FDPA can only be read as allowing, and perhaps even requiring, trifurcation.

B. The Implications of Statutory Construction for Trifurcation

From the analysis above, the simultaneous presentation of evidence of intent factors, statutory aggravating factors, and nonstatutory aggravating factors creates a sufficient risk to justify the exclusion of nonstatutory aggravating factors. When combined with the fact that the FDPA and the Constitution mandate the introduction of nonstatutory aggravating factors,[211] statutory construction justifies trifurcation. However, this justification is simply a reason or a rationale to support a trial judge's decision to trifurcate the proceedings.[212] It does not carry with it the mandatory implications of the constitutional character argument. But the statutory argument's simplicity makes it powerful nonetheless. Moreover, because the statutory argument avoids a constitutional challenge to the FDPA and has direct support in case law, it is perhaps more likely to be successful.

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209. United States v. Johnson, 362 F. Supp. 2d 1043, 1109 (N.D. Iowa 2005).

210. *Id.*

211. *See supra* note 59 (discussing the importance of introducing as much evidence as possible in capital trials).

212. *See Johnson*, 362 F. Supp. 2d at 1104 (noting that the FDPA provides "[o]ther grounds for 'trifurcation'").

X. Trifurcation Ameliorates Problems Associated with Capital Jury Decision Making

The Constitution requires jurors to make a "reasoned moral judgment" when deciding whether the defendant should live or die.[213] Jurors unable to "meet the constitutionally mandated standards of impartiality in capital sentencing . . . must not serve as capital jurors."[214] Despite this constitutional requirement, empirical research demonstrates that many jurors have already decided the defendant's fate long before the trial progresses to the sentencing phase.[215] Trifurcating the proceedings, while surely not able to cure this fundamental failing of the capital trial, can hopefully relieve some of the symptoms.

A. Empirical Research: The Capital Jury Project

A recent study analyzed the decision making process of 916 jurors serving on state capital murder trials.[216] The results revealed that almost half of these capital jurors had decided the defendant's punishment before the trial entered the sentencing phase.[217] Moreover, the study also exposed that this preliminary punishment decision was not tenuous.[218] "Most jurors who said they took a stand for either life or death during the guilt stage of the trial told us that they were 'absolutely convinced' of their stand at that early point."[219] These jurors' tenacious and steadfast adherence to their initial decision continued throughout the proceedings to the actual entry of a life or death verdict.[220]

For trifurcation to alleviate this problem, the jurors' pre-sentencing punishment decisions must be made sometime after the trial commences. Trifurcation cannot

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213. Bowers, *supra* note 82, at 1483.

214. *Id.* at 1486.

215. *See id.* at 1477 ("Interviews with 916 capital jurors in eleven states reveal, however, that many jurors reached a personal decision concerning punishment before the sentencing stage of the trial, before hearing the evidence or arguments concerning the appropriate punishment, and before the judge's instructions for making the sentencing decision.").

216. *See id.* (noting that the study interviewed "916 jurors in eleven states").

217. Every state has adopted procedures similar to the federal capital trial. The proceedings are divided into a guilt phase and a sentencing phase. This research, therefore, is applicable to analysis of the federal capital trial.

218. *See* Bowers, *supra* note 82, at 1477 (noting that most jurors who decide upon the defendant's fate before the sentencing phase are "absolutely convinced" of their decision).

219. *Id.* at 1489.

220. *See id.* at 1491 ("Most conspicuously, jurors who take early pro-death and early pro-life stands tend to hold their initial stands for the rest of the decision-making process.").

assuage the problem if jurors enter the trial already knowing whether they are going to sentence the defendant to life or death. Most jurors who formed premature punishment opinions, however, indicated that their decisions coalesced during the presentation of guilt evidence or during jury deliberations.[221] Specifically, focusing on those jurors who decided upon death prematurely, the study found that "[m]any early pro-death jurors appear to have operated under a presumption that unequivocal proof of guilt justified the death penalty. A number of early pro-death jurors declared that either the law or their own personal views required them to impose death when they determined unquestionable guilt."[222] To a certain extent a capital juror's decision as to the appropriate punishment appears to be malleable.

Trifurcation is responsive because it refocuses the juror's attention to the issue at hand. Separating the intent factors and statutory aggravating factors from the nonstatutory aggravating factors, trifurcation reiterates that, although the defendant has been found guilty of the underlying capital offense, the death penalty is not yet an available punishment.[223] Certainly for the juror who is under the mistaken impression that the law requires the imposition of death upon finding the defendant guilty, trifurcation will be elucidating.[224] Even for jurors who base their decision for death upon evidence during the guilt phase or personal beliefs,[225] trifurcation will provide a final level of protection that will force each juror to ask once more whether death is the appropriate punishment.

This research reveals defects with the capital jury so basic that a solution more fundamental than trifurcation is required. Whatever that solution may be, it is beyond the scope of this Note. Until that solution is implemented, trifurcation can hopefully provide some measure of improvement.

B. Empirical Research: State Capital Cases

At the request of the Chair of the Senate Judiciary Committee, James Liebman, Jeffery Fagan and Valerie West began a major research effort to study the

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221. *See id.* at 1496 ("Thus, most early deciding jurors point to the presentation of guilt evidence and to jury deliberations on guilt as the points at which they made up their minds . . . .").

222. *Id.* at 1497.

223. *See* 18 U.S.C. § 3593(e)(2) (2000) (requiring the jury to find a statutory aggravating factor listed in § 3592(b)–(d) before imposing a sentence of death).

224. *See* Bowers, *supra* note 82, at 1497 (noting that "[a] number of early pro-death jurors declared that either the law or their own personal views required them to impose death when they determined unquestionable guilt").

225. *See id.* at 1499 ("In effect, a number of jurors seemed to have a preconception that the death penalty was the appropriate punishment for murder.").

frequency with which relief was granted in state capital cases.[226] The research spanned twenty-three years and analyzed 5,760 state capital sentences and 4,578 capital appeals.[227] While this research focused solely on state capital cases, because of the overlap in terms of both procedure and substance, a review of federal capital trials would have likely yielded similar results.

The results of the study are staggering. "More than two out of every three capital judgments reviewed by the courts during the twenty-three-year study period were found to be seriously flawed."[228] Of the 5,760 state capital sentences, 4,578 were appealed to the state's highest court.[229] In over forty percent of these appeals, the state's highest court found serious error and reversed the death sentence.[230] Moreover, of the death sentences that failed to be overturned in state court, 599 of the remaining appeals reached federal courts on a habeas petition.[231] Of those 599 federal habeas petitions, over forty percent were granted.[232]

The extremely high rate of error in state capital cases is worrisome in the context of the federal capital trial. There is no reason to assume that simply because the defendant is prosecuted pursuant to the FDPA that serious error is any less likely to occur. The likelihood that error is also present in federal capital trials is reinforced by the fact that the primary reason for serious error was not particular to the state court system. In fact, the primary reason for reversal was "egregiously incompetent defense lawyering."[233] There is nothing to suggest that federal capital defendants somehow have access to higher quality counsel. Moreover, the research found that the second leading reason for reversal was "prosecutorial suppression of evidence."[234] Again, there is

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226. *See* James S. Liebman et al., *Broken System: Error Rates in Capital Cases 1973-1995* (2000), http://www.thejusticeproject.org/press/reports/pdfs/Error-Rates-in-Capital-Cases-1973-1995.pdf, at I (last visited Nov. 25, 2006) ("As this study documents . . . judicial review takes so long precisely *because* American capital sentences are so persistent and systematically fraught with error that seriously undermines their reliability.") (on file with the Washington and Lee Law Review).

227. *See id.* at 2 (describing the scope of the study).

228. *Id.*

229. *See id.* at 5 ("Of the 5,760 death sentences imposed during the study period, 4,578 (79%) were finally reviewed on 'direct appeal' by a state high court.").

230. *See id.* ("Of those, 1,885 (41%; over two out of five) were thrown out because of serious error . . . .").

231. *See* Liebman, *supra* note 226, at 6 (noting the number of death sentences that reached federal court on habeas petition).

232. *See id.* (noting that 40% were overturned for serious error).

233. *See id.* at 6 (noting that the most common error was "egregiously incompetent defense lawyering").

234. *Id.* at 6.

nothing to indicate that state capital cases are wrought with either more ineffective defense attorneys or more prosecutorial misconduct.[235] These results are illuminating for the federal capital trial and support the argument for trifurcation.

Trifurcation can hopefully reduce what appears to be persistent error in federal capital trials. Regardless of one's stance on the death penalty, separating the determination of death eligibility from the determination of punishment is beneficial. The obvious benefit is that trifurcation forces the jury to address squarely the issue of whether the government has established an intent factor and a statutory aggravating factor beyond a reasonable doubt, thus ensuring that only defendants who meet the statutory eligibility requirements will be sentenced to death. Another benefit is that reducing error can hopefully reduce the lengthy and expensive appeals process, while also increasing confidence in the judicial system.

XI. Conclusion

Surprisingly, the recent Supreme Court opinions in *Apprendi* and *Ring* call into question the very capital trial structure that heralded the return of the death penalty in 1976. State legislatures, and later the FDPA, adopted bifurcation to satisfy Eighth Amendment concerns that rendered prior death penalty schemes unconstitutional.[236] After *Apprendi* and *Ring*, however, some of the elements of federal capital murder are adjudicated during the sentencing phase.[237] This

235. This Note's point is not to disparage federal prosecutors. Rather, this Note simply points out that data concerning the occurrence of prosecutorial misconduct at the state level is likely transferable to the federal level. The federal capital murder trial of Zacarias Moussaoui provides a recent example. On March 14, 2006, the trial judge halted the sentencing phase of the trial after learning that a government lawyer, albeit not a part of the prosecution, had violated rules concerning the coaching of witnesses. *See* Neil A. Lewis, *Judge Calls Halt to Penalty Phase of Terror Trial*, N.Y. TIMES, March 14, 2006, at A1 (quoting Judge Brinkema). Judge Brinkema declared that "[i]n all my years on the bench, I've never seen a more egregious violation of the rule about witnesses." *Id.*

236. *See* Bunin, *supra* note 4, at 244 (noting that state legislatures enacted bifurcated death penalty statutes in order to satisfy the Eighth Amendment); Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime after* Ring v. Arizona, 54 ALA. L. REV. 1157, 1157 (2003) (noting that "[m]any states . . . went to a bifurcated system" after the death penalty was reinstated in 1976); Bunin, *supra* note 4, at 244 (noting that state legislatures enacted bifurcated death penalty statutes in order to satisfy the Eighth Amendment).

237. *See supra* Part IV (discussing the problems associated with the current bifurcated structure of federal capital trials).

result violates the defendant's Fifth Amendment rights and also cuts against the very core of criminal prosecution.[238]

The Supreme Court must reconcile its opinion in *Ring* with the current structure of the FDPA. The impact of this decision could prove enormous. While this Note focused solely on the FDPA, bifurcation pervades all death penalty jurisdictions in America.[239] This Note's arguments, therefore, may be equally applicable to every death penalty statute. As bifurcation rescued the death penalty in the past, perhaps trifurcation will be its savior in the future.

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238. *See* Marshall v. Lonberger, 459 U.S. 422, 447 (1983) (Stevens, J., dissenting) ("Criminal prosecution involves two determinations: whether the defendant is guilty or innocent, and what the appropriate punishment should be if he is guilty . . . . This case involves the unfairness that may result from an attempt to merge the two stages.").

239. *See* Bunin, *supra* note 4, at 235 ("In most [state] death penalty cases, the existence of statutory aggravating circumstances is not decided during the guilt phase of the trial, but rather during the sentencing hearing."). In the following states, adjudication of aggravating factors necessary to impose the death penalty occurs during the sentencing phase:

> ALA. CODE § 13A-5-45(e), (f) (1981); ARIZ. REV. STAT. § 13-703(G) (2001); ARK. CODE ANN. § 5-4-602 (1993); CAL. PENAL CODE § 190 (2003); COLO. REV. STAT. § 18-1.3-1201 (2003); CONN. GEN. STAT. § 53a-54b (2003); DEL. CODE ANN. tit. 11, § 4209 (2002); FLA. STAT. ch. 921.141 (2002); GA. CODE ANN. § 17-10-30 (2003); IDAHO CODE § 19-2515 (2001); 720 ILL. COMP. STAT. 5/9-1 (d) (2004); IND. CODE § 35-50-2-9a (2001); KAN. STAT. ANN. § 21-4624(b) (1994); KY. REV. STAT. ANN. § 532.025 (2001); LA. REV. STAT. ANN. § 905.3 (1988); MD. CODE ANN., CRIM. LAW § 2-303(b) (2003); MISS. CODE ANN. § 99-19-101 (2000); MO. REV. STAT. § 565.030 (2002); MONT. CODE ANN. § 46-18-305 line (2002); NEB. REV. STAT. § 29-2520 (2004); NEV. REV. STAT. § 175.554 (2002); N.H. REV. STAT. ANN. § 630:5 (IV) (1991); N.J. STAT. ANN. § 2C:11-3 (c) (2002); N.M. STAT. ANN. § 31-20A-1 (2002); N.Y. CRIM. PROC. LAW § 400.27 (Consol. 2003); N.C. GEN. STAT. § 15A-2000 (2003); OKLA. STAT. tit. 21, § 701.11 (1987); OR. REV. STAT. § 163.150 (2001); PA. CONS. STAT. § 9711 (2003); S.C. CODE ANN. § 16-3-20 (B) (1985); S.D. CODIFIED LAWS § 23A-27A-4 (1979); TENN. CODE ANN. § 39-13-204 (2002); TEX. CRIM. PROC. CODE ANN. § 37.071 (2001); UTAH CODE ANN. § 76-3-207 (2003); VA. CODE ANN. § 19.2-264.4 (2003); WYO. STAT. ANN. § 6-2-102 (2001).

Id. at 235 n.20.

ARTICLES