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PLACE THE DEATH PENALTY ON A TRIPOD, OR MAKE IT STAND ON ITS OWN TWO FEET?

Margo A. Rocklin

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I. INTRODUCTION

This paper considers differences in evidentiary standards and constitutional limitations during the guilt, eligibility and penalty selection determinations of a capital trial. Capital trials and the subsequent sentencing hearings of guilty defendants require careful procedural safeguards to ensure that juries are able to make distinct guilt, eligibility and penalty determinations, as contemplated by the governing statutes. As a framework for evaluating these issues, this article will consider the two primary federal death penalty statutes, 21 U.S.C. § 848 and 18 U.S.C. § 3593, as well as the limited variety of capital schemes present in state death penalty statutes.

One of the main problems with the federal statutes and most state statutes is that they do not require these distinct determinations to be made in separate phases. The risk of unfair prejudice, confusion of the issues, or misleading the jury increases significantly when jurors are unable to make distinct determinations. However, by procedurally separating the evidence pertinent to the guilt determination, the evidence pertinent to the eligibility determination, and the evidence and information pertinent to penalty selection, a "trifurcated" scheme may help to alleviate the evidentiary and constitutional problems that often arise. For example, a serious conflict occurs

when information pertinent to penalty selection is introduced before the jury makes an official eligibility determination.

Moreover, this paper will establish how the recent use of trifurcation by some courts has helped to alleviate the evidentiary and constitutional problems posed by "bifurcated" capital schemes.[1] Because a trifurcated scheme still retains the rules of evidence that govern the admissibility of additional evidence tending to prove eligibility factors, it may also provide a defendant with greater evidentiary protection during the eligibility determination. Finally, trifurcation may also alleviate potential Confrontation Clause problems by extending the scope of a capital defendant's confrontation rights through the eligibility determination.

However, trifurcation creates a potential risk for a capital defendant during penalty selection. A capital scheme that separates the eligibility determination from penalty selection may allow the prosecution to introduce hearsay evidence during penalty selection which may not be admissible during the sentencing phase of a two-part bifurcated scheme. Nevertheless, the creation of a procedural separation between the eligibility determination and penalty selection will encourage capital jurors to evaluate the evidence pertinent to the distinct guilt and eligibility determinations *prior* to penalty selection.

A. DEFINITION OF TERMS

1. The Bifurcation Requirement

Both federal death penalty statutes require a bifurcated capital proceeding which separates the guilt and penalty determinations into distinct phases.[2] All state death penalty statutes conduct first degree murder trials in at least two phases, and almost all states provide for a bifurcated capital proceeding

[1] This paper acknowledges the extensive literature on the serious racial disparities in death sentencing, and therefore will not address racial bias.

[2] The Federal Death Penalty Act [hereinafter FDPA], 18 U.S.C. § 3593 (1998), and the Continuing Criminal Enterprise statute [hereinafter CCE], 21 U.S.C. § 848 (1998), both provide for a separate sentencing hearing to determine punishment.

which separates the guilt and sentencing phases of the proceeding into two distinct parts.[3]

The ramifications of these procedural separations are significant because both federal statutes and most state statutes place the determination of eligibility for punishment in the sentencing portion of the proceeding, while this type of determination is generally made during the guilt phase in non-capital proceedings.

In order to analyze the evidentiary and constitutional issues that arise with regard to bifurcation in a capital proceeding, it is important to distinguish among the various terms that courts use. Statutes and courts that separate a capital proceeding into two phases, guilt and sentencing, may refer to such a scheme, for example, as a "bifurcated, two-stage proceeding,"[4] a "bifurcated capital proceeding,"[5] a "bifurcated sentencing proceeding,"[6] a "bifurcated trial,"[7] or a "bifurcated proceeding in a capital case."[8] All are intended to mean that the determination of guilt, on the one hand, and the determination of eligibility and penalty selection, on the other, occur in two separate and distinct phases. While this may appear straightforward at first glance, confusion arises when courts refer to a decision that

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[3] *See, e.g.*, ARK. CODE ANN. § 16-97-101 (Supp. 2001), OKLA. STAT. ANN. tit. 21, § 701.10.A (Supp. 2001) (both articulating fairly typical bifurcated proceedings, with guilt and sentencing determined by a jury at two separate phases); TENN. CODE ANN. § 39-13-204 (Supp. 2000) (discussing a capital trial as a "bifurcated proceeding" in which the jury first determines a defendant's guilt or innocence and then, following a guilty verdict, a separate sentencing proceeding takes place); *see also* OHIO REV. CODE ANN. § 2929.03 (West 1997) (Ohio death penalty statute establishing another type of bifurcated capital scheme, in which the eligibility determination is placed within the guilt phase, and the aggravating circumstances or factors which allow a capital defendant to be eligible for the death penalty must be proved to the jury beyond a reasonable doubt during the guilt phase).

[4] Miller v. Oklahoma, 29 P.3d 1077, 1083 (Okla. Crim. App. 2001).

[5] Kasi v. Commonwealth, 508 S.E.2d 57, 59 (Va. 1998).

[6] Muhammad v. Commonwealth, 611 S.E.2d 537, 552 (Va. 2005).

[7] State v. Reddish, 859 A.2d 1173, 1223 (N.J. 2004).

[8] State v. Hughey, 529 S.E.2d 721, 733 (S.C. 2000).

"bifurcated the penalty phase,"[9] or to a "bifurcated jury system."[10] This phraseology can mean not only that the capital proceeding will be separated into two parts, guilt and sentencing, but also that the court will, at some stage, empanel a different jury for the sentencing phase. Adding to the variations, some statutes and courts use "bifurcated [capital] sentencing hearing,"[11] "bifurcated sentencing procedure,"[12] and "bifurcated penalty phase hearing"[13] to refer to a two-phase sentencing scheme in a capital proceeding that technically contains three separate parts.

2. Trifurcation

Originally, the most common use of trifurcation occurred in a jury override scheme, utilized by a small number of state statutes, whereby the jury decides guilt and recommends sentencing, but the judge ultimately determines the penalty.[14] Recently, one court was faced with a trifurcation proposal requesting a three-part capital sentencing hearing after the defendant pled guilty, and the only issue remaining was punishment.[15] However, a more common phenomenon is the

[9] State v. Fortin, 843 A.2d 974, 990 (N.J. 2004); *see also* N.J. STAT. ANN. § 2C:11-3(c) (Supp. 2001) (allowing trial court to empanel separate sentencing jury upon showing of "good cause"); *Reddish*, 859 A.2d at 1223.

[10] Atkins v. Commonwealth, 534 S.E.2d 312, 314 (Va. 2000) (discussing Virginia's bifurcated jury system as applied when a case is remanded for a new sentencing hearing before a different jury).

[11] 720 ILL. COMP. STAT. ANN. 5/9-1 (West 1998) (formerly cited as ILL. REV. STAT. CH. 38, ¶ 9-1 (1977); *see also* Williams v. Chrans, 742 F. Supp. 472, 477 (N.D. Ill. 1990)(explaining that the Illinois death penalty statute provides for a "bifurcated capital sentencing hearing," first with an eligibility phase and then a second [penalty] phase.

[12] United States v. Jordan, 357 F. Supp. 2d 889, 903 (E.D. Va. 2005).

[13] State v. Reynolds, 836 A.2d 224, 316 (Conn. 2003).

[14] *See* Abe Muallem, *Harris v. Alabama: Is the Death Penalty In America Entering a Fourth Phase?*, 22 J. LEGIS. 85 (1996).

[15] *See* Memorandum in Opposition to Defendant's Motion for Trifurcation of Penalty Phase, United States v. Moussaoui, 1:01cr455-ALL (E.D. Va. Oct. 14, 2005) (No. 1346)(filed in opposition to defendant's motion filed under seal

utilization of the term trifurcation to refer to a three-part capital proceeding with a two-part jury sentencing scheme.[16] While no federal statute explicitly establishes a trifurcated scheme, the Illinois and Arizona death penalty statutes separate guilt, eligibility, and penalty selection into *three* distinct phases.[17] Therefore, because the prefix "tri" most commonly refers to three separate and distinct phases of a capital proceeding, this paper will hereafter utilize the term "trifurcation," and its derivatives, to describe a three-part capital proceeding with a two-part jury sentencing hearing. Finally, statutes and courts utilizing three-part capital proceedings may refer to the three separate phases as: 1) "guilt" or "merits" phase, 2) "eligibility" or "aggravation" phase,[18] and 3) "penalty" or "selection" phase. In

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requesting the judge break up the death sentencing hearing into three parts); *see also Posting of Lyle Denniston to SCOTUSblog,* http://www.scotusblog.com/movabletype/archives/2005/10/death_penalty_a.html (Oct. 20, 2005, 19:14 EST).

[16] *See, e.g.*, United States v. Johnson (Johnson I), 362 F. Supp. 2d 1043, 1103-04 (N.D. Iowa 2005); Gallego v. State, 23 P.3d 227, 241 (Nev. 2001) (discussing defendant's argument that the "district court erred in denying his motion to trifurcate or bifurcate the penalty hearing"); Williams v. State, 22 P.3d 702, 715 (Okla. Crim. App. 2001)(discussing a "motion to trifurcate… proceedings" or "motion to hold [a] trifurcated trial"); Bruce v. State, 616 A.2d 392, 400 (Md. 1992) (discussing the court's refusal to "'trifurcate' the proceedings" or "trifurcate a capital sentencing"). Incidentally, the Model Penal Code also established a trifurcated capital scheme with a "trial… phase to determine guilt or innocence, an exclusion phase to determine if death is precluded, and a penalty phase to determine if death or life should be imposed." Margery Malkin Koosed, *Averting Mistaken Executions By Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 52 (Spring 2001).

[17] 720 ILL. COMP. STAT. ANN. 5/9-1; *see also* Williams v. Chrans, 742 F. Supp. 472, 477 (explaining that 720 ILL. COMP. STAT. ANN. 5/9-1 provides for a "bifurcated capital sentencing hearing" wherein the government "must prove the existence of at least one of seven aggravating factors beyond a reasonable doubt" in the first eligibility phase, and "presents evidence of and argues any aggravating factor and the defendant presents evidence of and argues any mitigating factors" in the second "aggravation/mitigation phase"); *see also* ARIZ. REV. STAT. ANN.§ 13-703 B, C (Supp. 1995) (separating the sentencing phase of a capital proceeding into an aggravation phase and a distinct penalty phase).

[18] Some courts may also refer to the eligibility determination as a "principalship" issue. *See, e.g.,* Booth v. State, 608 A.2d 162, 170 (Md. 1992).

order to maintain uniformity, this paper will refer to "guilt," "eligibility," and "penalty" selection to discuss the three phases of a trifurcated capital proceeding.

II. EVIDENTIARY STANDARDS

A. ADDITIONAL EVIDENCE OR INFORMATION AFTER "GUILT"

1. The Differences Between "Eligibility" and "Penalty" Selection

A bifurcated capital proceeding, which places the eligibility determination in the same phase as penalty selection, raises significant issues regarding the admission of new evidence or information during each determination. First, it is necessary to recognize that the analysis and decision-making which occur during each determination are vastly different. For example, during penalty selection, a capital jury has already determined the aggravating factors that must be found in order for the defendant to be death eligible. Moreover, the only consideration remaining for the jury during penalty selection is a discretionary punishment decision that involves weighing and balancing, with no fixed standard of proof.

Next, it is essential to consider the Supreme Court decisions in *Blakely*,[19] *Apprendi*,[20] *Ring*,[21] and *Booker*,[22] which established that capital juries must now make factual determinations on *all* factors that could increase the maximum

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[19] Blakely v. Washington, 542 U.S. 296 (2004); *see also* Robert Weisberg, *Excerpts from "The Future of American Sentencing: A National Roundtable on Blakely,"* 2 OHIO ST. J. CRIM. L. 619, 623 (Spring 2005) (noting that "the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant").

[20] Apprendi v. New Jersey, 530 U.S. 466, 476-77 (2000).

[21] Ring v. Arizona, 536 U.S. 584, 585-87 (2002) (holding that *Apprendi* also applies to capital cases).

[22] United States v. Booker, 543 U.S. 220 (2005).

punishment *before* reaching the sentencing portion of the proceeding.[23] Moreover, *Ring* definitively established that proof of at least one statutory aggravating circumstance is a necessary requirement for eligibility and an *element* of capital murder.[24] These cases raise an important issue regarding the nature of the eligibility determination in a capital proceeding. If death eligibility is a crucial jury determination that could directly increase the maximum punishment, and a capital defendant may only be eligible for the death penalty after all requisite elements have been proven, including at least one statutory aggravating circumstance, then the rules of evidence which govern during the trial should *also* apply during the eligibility determination. Therefore, since a statutory aggravating circumstance is an element of capital murder, the next logical question is whether the eligibility determination in a capital proceeding should be part of the sentencing hearing.

Nearly all death penalty statutes insert the jury's eligibility determination into the sentencing hearing, but no uniform rule exists to help courts delineate exactly when a capital jury must evaluate the statutory aggravating factors pertinent to the eligibility determination.[25] Under the commonly utilized bifurcated scheme, any new evidence pertinent to eligibility will be presented to the jury during the sentencing hearing. This is significant because certain types of information may be admitted during sentencing despite prohibitions on the admission of such information during the trial under capital statutes,[26] the Federal Rules of Evidence, or state rules of

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[23] Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 705 (January 2004).

[24] *See Ring*, 536 U.S. at 585-87; Alexander Bunin, *When Trial and Punishment Intersect: New Defects in the Death Penalty*, 26 W. NEW ENG. L. REV. 233, 246-48 (2004).

[25] The *Apprendi* line of cases does not require that aggravating factors be proved in a proceeding designated as a trial rather than a sentencing proceeding or penalty phase. United States v. Johnson (Johnson I), 362 F. Supp. 2d 1051, 1103 (N.D. Iowa 2005); Booker, 543 U.S. 220; *Ring*, 536 U.S. at 603-08; Apprendi, 530 U.S. at 466.

[26] For example, the FDPA provides its own admissibility standard which states that "information may be excluded if its probative value is outweighed by

evidence.[27] In other words, any evidence introduced during the sentencing hearing of a bifurcated proceeding will be subject to relaxed evidentiary standards, as opposed to the strict rules applicable during the trial.

Yet two Supreme Court cases have clearly distinguished between two very different aspects of the capital sentencing process, the eligibility phase and the penalty selection phase.[28] Moreover, the core difference is that in the eligibility phase, the jury decides whether the defendant is eligible for the death penalty, usually by determining whether the crime involved statutory aggravating circumstances.[29] But in the penalty selection phase, the jury decides whether a death-eligible defendant should be put to death. Moreover, courts and commentators alike have recognized that evidence of non-statutory aggravating factors, in particular victim impact evidence, while relevant to the penalty selection phase, is not relevant to the eligibility phase.[30]

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the danger of creating unfair prejudice, confusing the issues, or misleading the jury". 18 U.S.C. § 3593(c) (1998).

[27] For example, both the CCE and the FDPA statutes, as well as most state death penalty statutes, permit the jury to consider information as well as evidence at the sentencing phase of a death penalty proceeding. FDPA, 18 U.S.C. § 3593(c); CCE, 21 U.S.C. § 848(j) (1998). Under the FDPA Standard, "judges continue their role as evidentiary gatekeepers and [pursuant to the balancing test set forth in § 3593(c)] retain the discretion to exclude any type of unreliable or prejudicial evidence that might render a trial fundamentally unfair." United States v. Battle, 264 F. Supp. 2d 1088, 1106 (N.D. Ga. 2003); *see also* United States v. Fell, 360 F.3d 135, 145 (2d Cir. 2004); United States v. Johnson (Johnson II), 239 F. Supp. 2d 924, 946 (N.D. Iowa 2003)(holding that 21 U.S.C. § 848(j) "expressly supplants only the [federal] rules of evidence, not constitutional standards").

[28] Buchanon v. Angelone, 522 U.S. 269, 273 (1998); Tuileapa v. California, 512 U.S. 967, 971-73 (1994).

[29] *See* Buchanon, 522 U.S. at 273; Tuileapa, 512 U.S. at 971-73.

[30] Joshua D. Greenberg, *Is Payne Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 IND. L.J. 1349, 1382 (2000).

2. The Potential for Unfair Prejudice, Confusion of the Issues and Misleading the Jury

The main problem with introducing new evidence pertinent to the eligibility determination during a bifurcated proceeding is that jurors might be tempted to make an eligibility determination based upon victim impact evidence which should only be used to evaluate factors pertinent to penalty selection.[31] Furthermore, jurors may have trouble distinguishing which information is actually pertinent to a particular issue. This is especially likely with the introduction of evidence intended to prove gateway factors or statutory aggravating factors, and information pertinent to non-statutory aggravating factors, such as victim impact.[32] Effectively, even though specific jury instructions should indicate that each determination must be made on the basis of its own distinct factors, jurors may think that all of the evidence and information should be used to determine eligibility factors and penalty selection together.[33]

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[31] Victim impact testimony is meant to provide jurors with complete information regarding the impact of the defendant's crime, and is admissible to prove victim impact as a non-statutory aggravating factor for penalty selection under both the CCE and the FDPA. The potential for unfair prejudice during capital sentencing was recently discussed at length by the *Johnson I* court, which noted that "'*information'* concerning non-statutory aggravating factors has an 'undue tendency' to suggest decision on the 'gateway' and 'statutory' aggravating factors [eligibility] on an improper basis." *Johnson I*, 362 F. Supp. 2d at 1106.

[32] *Id.* at 1109; Niru Shanker, *Getting a Grip on Payne and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy McVeigh Case and Various State Approaches Compared*, 26 HASTINGS CONST. L.Q. 711, 740 (1999) ("[t]hanks in part to poorly articulated parameters in *Payne* [*v. Tennessee*, 501 U.S. 808 (1991)], victim impact testimony in capital sentencing walks a fine line between allowing particularized attention to the damage caused by the crime on the one hand, and leaving the jury to be inundated with prejudicial outpourings irrelevant to the defendant's guilt on the other"); *see also* Stanford Law and Policy Review's 2004 Symposium, *Capital Concerns: The Death Penalty in America*, 15 STAN. L. & POL'Y REV. 447 (2004) (providing useful discussions of the use and effect of victim impact evidence in death penalty cases).

[33] For example, the process for jury decision-making under 21 U.S.C. § 848(k) and (j) is complex and very specific, to ensure that each determination is made with regard to relevant evidence or information. After the jury finds the defendant guilty, finds one "gateway aggravating" factor, and finds at least one "statutory aggravating" factor, only then *may* the jury find one or more "non-

Of course, the judge must provide the jury with clear instructions regarding evidence and information pertinent to specific determinations. Jury instructions serve a crucial function: to help jurors fully understand and carry out their constitutional responsibilities. At a minimum, a judge's capital-sentencing instructions should clearly explain the scope of the penalty selection so that jurors understand the factual basis for making a life and death determination. Yet research indicates that jury instructions often fail to convey this message.[34] For instance, jury instructions frequently fail to clarify that other factors, "such as the background and character of the defendant, should be taken into account."[35] Moreover, proper jury instructions are often ineffective. The lengthy process of presenting testimony can easily distract jurors from making the crucial distinction between evidence intended to prove gateway and statutory aggravating factors, and evidence or information intending to prove non-statutory aggravating factors such as victim impact.[36] Consequently, jurors often downplay the specific findings required by statutes and jury instructions and substitute their own personal views to justify implementation of the death penalty.[37]

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statutory" aggravating factors and one or more mitigating factors, and must balance *all* of these factors to determine the appropriate penalty.

[34] Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447 (1997).

[35] *Id.* at 1457.

[36] For example, prosecutors will utilize as many victim impact witnesses as possible, with the procession of friends and family members reliving their pain and suffering on the stand lasting several days or even weeks.

[37] *See* United States v. Johnson (Johnson I), 362 F. Supp. 2d 1051, 1109 (N.D. Iowa 2005) (noting that in a capital proceeding with a single sentencing phase "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"). Moreover, studies on capital juries reveal that jurors often have trouble separating guilt and sentencing determinations. The Capital Jury Project, a well-known empirical study of jury behavior, cited an Indiana study which found that half of the jurors had actually made up their minds about the appropriate penalty once they had found the defendant guilty, long before the subsequent sentencing hearing. A sizable number of jurors who participated in the Capital Jury Project recall that in deciding guilt, there was explicit

Clearly, a trial judge presiding in a capital proceeding has to make an important choice regarding the timing of the eligibility determination. The goal is to maximize the jurors' understanding of the evidence pertinent to each distinct determination. One possibility is to place the eligibility determination in the sentencing hearing, thereby implementing relaxed evidentiary standards[38] for any evidence introduced to prove eligibility. This, however, will result in jury evaluation of information pertinent to penalty selection alongside evidence tending to prove the capital elements pertinent to eligibility,[39] and may fail to protect a capital defendant against the introduction of potentially prejudicial information irrelevant to the jury's eligibility determination.

The judge can also elect to separate the eligibility determination and penalty selection, by placing the eligibility determination in a distinct phase prior to sentencing. This "restrict[s] the sentencing hearing pursuant to the rules of evidence, thereby treating the capital crime elements like other elements of the charge."[40]

3. The Remedies

a. The Ohio-type Scheme

Incorporating the jury's evaluation of aggravating factors pertinent to eligibility into the determination of guilt is one way that a capital statute might provide a defendant with protection against unfair prejudice during the eligibility determination. Consequently, the strict rules of evidence applicable to the trial would also apply during the jury's eligibility determination.

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discussion of what the defendant's punishment would or should be. Willian J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1088-89, tbl.4 (Fall 1995). In addition, roughly forty percent of the capital jurors surveyed in the Indiana study believed that the heinousness of the crime compelled a sentence of death. *Id.* at 1091, tbl.7.

[38] Bunin, *supra* note 24, at 270.

[39] *Id.*

[40] *Id.*

Ohio has the only capital statute that places the eligibility determination into the guilt phase.[41]

Moreover, this author was unable to locate any courts outside of Ohio that have ordered capital proceedings to be structured with the eligibility determination during the guilt phase. The only opinion outside of Ohio which has even discussed the possibility of incorporating such a scheme was *United States v. Johnson (Johnson I).* When faced with the defendant's motion to trifurcate, the *Johnson I* court proposed a scheme similar to the Ohio statute, which would have incorporated the jury's determination of eligibility factors into the determination of guilt. However, the prosecution in *Johnson I* did not wish to introduce additional evidence to prove eligibility, and contended that such a proposal would depart from the statutory penalty phase scheme set forth in the CCE and FDPA.[42]

Interestingly, the Johnson defense team also viewed an Ohio-type scheme as unfavorable. Perhaps capital defendants would be likely to oppose an Ohio-type scheme because the jury could confuse evidence intended to prove guilt with evidence intended to prove eligibility. Such confusion could inadvertently render a jury more likely to find a defendant guilty in the first place Obviously, if a capital defendant is never found guilty, a jury cannot invoke the death penalty. Indeed, to avoid the possibility of placing prejudicial or irrelevant evidence in front of the jury before the guilt determination, a separate punishment phase exists in capital cases to permit the presentation of a wide range of evidence about the defendant's past character and conduct.[43] Thus, one reason why defendants do not move to reorder a capital proceeding with an Ohio-type scheme may be because they fear a greater potential for unfair prejudice, misleading the jury, or confusion of the issues prior to the guilt determination. For example, the argument provided by

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[41] *See* Ohio REV. CODE ANN. § 2929.03 (West 1997). Ohio's scheme is significantly different from either a bifurcated or a trifurcated scheme because the prosecution must prove enhancement facts during the guilt phase. *Id.*

[42] *Johnson I*, 362 F. Supp. 2d at 1101.

[43] State v. Johns, 34 S.W.3d 93, 113 (Mo. 2000); State v. Nicklasson, 967 S.W.2d 596, 618 (Mo. 1998) (en banc).

the Johnson defense in objection to the court's proposal for an Ohio-type scheme was that "such a process would obscure the purpose of the 'gateway' factors [pertinent to eligibility], where determinations of guilt and determinations on the 'gateway' factors serve different purposes."[44]

b. Trifurcated Schemes

Trifurcated schemes not only apply the same rules of evidence through the determination of aggravating factors pertinent to eligibility,[45] but also procedurally separate the eligibility and penalty selection determinations. Consequently, defendants may prefer trifurcation to an Ohio-type scheme for two reasons. First, defendants may prefer trifurcation because it appears to be the best way to protect the guilt determination from the eligibility determination.[46] Second, trifurcated schemes may also provide a defendant with significant evidentiary protection during eligibility without allowing potentially prejudicial information pertinent to penalty selection to be admitted before the jury makes an eligibility determination.

Due to relaxed evidentiary standards during sentencing, separation of the eligibility determination from the penalty selection phase is especially important when the prosecution wishes to introduce evidence or information which would be inadmissible on the issue of eligibility but admissible during penalty selection. The most likely type of such potentially prejudicial information is victim impact evidence used to prove non-statutory aggravating factors pertinent to penalty selection. A trifurcated scheme can ensure that powerful victim impact testimony intended to influence penalty selection will be separated from the jury's determination of eligibility. The horrific experience of listening to the pain and suffering by family members of a brutal murder victim can have a critical

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[44] *Johnson I*, 362 F. Supp. 2d at 1101.

[45] *See* 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2000); *see also* ARIZ. REV. STAT. ANN. § 13-703 B (2006).

[46] *See, e.g., Johnson I*, 362 F. Supp. 2d at 1101 (prosecution stating that it would "prefer the defendant's proposed 'trifurcation' to combining the determination of 'gateway' factors [eligibility] with the determination on the 'merits' [guilt] of the charges against Johnson [an Ohio-type scheme])".

influence on juror decision-making.[47] In fact, the judge in *Johnson I* noted that the victim impact testimony during the preceding companion case before that court 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."[48]

In *U.S. v. Moussaoui*, the defense team's motion under seal to trifurcate the sentencing hearing also illustrates how holding a separate eligibility phase can attempt to avoid unfair prejudice and jury confusion during the eligibility determination.[49] Due to the complexity of issues and the fact that Moussaoui pled guilty and waived his right to a trial on the merits, the defense believed a separate penalty selection phase was crucial to ensure that the jury would not hear and see evidence of the 9/11 attacks. The sights and sounds of the devastation, the cockpit voice recorders, video footage of the World Trade Centers collapsing, and pictures of thousands of victims would therefore not be presented to the jury until the penalty selection phase, *after* the eligibility determination had already been made.[50]

Interestingly, federal prosecutors in *Moussaoui* were not opposed to a two-step sentencing hearing[51] because they believed that proof of the *nature* of the defendant's crimes, including evidence of the 9/11 attacks, would be admissible during the eligibility phase.[52] Moreover, the prosecution conceded that it would not oppose a proposal which established that "the victim-impact evidence that is considered by the

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[47] Haney, *supra* note 28, at 1458.

[48] *Id.* at 1107

[49] *See* Memorandum in Opposition to Defendant's Motion for Trifurcation of the Penalty Phase by USA as to Moussaoui, United States v. Moussaoui, 1:01cr455-ALL (E.D. Va. Oct. 14, 2005) (No. 1346).

[50] *See* Denniston, *supra* note 15.

[51] Memorandum in Opposition to Defendant's Motion for Trifurcation of Penalty Phase, United States v. Moussaoui, 1:01cr455-ALL (E.D. Va. Oct. 14, 2005) (No. 1346).

[52] *Id.*

defense to be so potentially prejudicial will not be offered in the eligibility phase."[53] In fact, the prosecution stated that one reason why they were consenting to a bifurcation between eligibility and penalty selection was because "the victim-impact evidence that we will offer in the selection phase will undoubtedly be emotionally charged."[54] Thus, it appears that the prosecution recognized the likelihood of unfair prejudice and potential juror confusion which might result from a capital sentencing hearing that did not separate the eligibility determination from penalty selection.

Some federal courts, in addition to *Johnson I* and *Moussaoui*, have indicated that trifurcation may be *necessary* in some circumstances to ensure that jurors are able to separate evidence pertinent to eligibility factors from information pertinent to penalty selection.[55] However, even if trifurcation is crucial for a defendant to avoid unfair prejudice, confusion of the issues, or misleading the jury, it must nonetheless conform to constitutional requirements and evidentiary limitations provided by death penalty statutes with bifurcated schemes.[56] Although some commentators believe that bifurcated statutes

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[53] *Id.*

[54] *Id.*

[55] *See* United States v. Davis, 912 F. Supp. 938, 949 (E.D. La. 1996) (declaring intention to separate hearing into two parts to avoid improper exposure to unrelated information at inappropriate times); United States v. Johnson (Johnson I), 362 F. Supp. 2d 1051, 1043 (N.D. Iowa 2005) (noting that *Davis* was the only published decision that either the court or the parties could find which considered a similar question); United States v. Jordan, 357 F. Supp. 2d 889, 902-03 (E.D. Va. 2005) (dealing with similar risk by dividing the sentencing stage of the trial into separate eligibility and penalty selection phases to avoid a potential Confrontation Clause problem posed by allowing information pertinent to penalty selection during eligibility determination); United States v. Gilbert, 120 F. Supp. 2d 147 (D. Mass. 2000) (trifurcating proceedings in unpublished jury instructions but not entering a written order to trifurcate nor explain on the record its reason for doing so); *see also* Preliminary Instructions for Phase One of Capital Hearing, United States v. Gilbert, 98-CR-30044-MAP, *2 (Mar. 19, 2001), (unpublished jury instructions referring to separate and distinct "phase one" and "phase two" of sentencing hearing); United States v. Bodkins, 2005 WL 1118158, *5 (W.D. Va. May 11, 2005).

[56] *Johnson I*, 362 F. Supp. 2d at 1105.

intrinsically prohibit trifurcation,[57] nothing in either of the federal statutes explicitly forbids a court from trifurcating. Therefore, there is no reason why a capital statute that specifically establishes a bifurcated scheme would necessarily prohibit trifurcation. Furthermore, no federal court and only one state jurisdiction has ever held that a statute with separate guilt and penalty selection phases precludes a judge from ordering a trifurcated proceeding.[58] Even though only two state death penalty statutes place the eligibility determination in a distinct phase,[59] and only a handful of federal courts have ordered trifurcation of proceedings, a bifurcated scheme is a minimum standard established by legislators to ensure that a capital defendant receives a fair punishment. Therefore, trifurcation is not necessarily inconsistent with a bifurcated two-part scheme and expands upon the protections afforded by a separate sentencing hearing.

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[57] *See* Bunin, *supra* note 20, at 274-75 (arguing that trifurcation requires rewriting the FDPA because the statute clearly approves only a very specific bifurcated procedure).

[58] Only Maryland courts have indicated that MD. ANN. CODE art. 27, § 413(a) (1995), with its bifurcated two-part capital scheme, precluded discretion to trifurcate. Booth v. State, 608 A.2d 162, 170-71 (Md. 1992) ("the trial judge did not have discretion to bifurcate the sentencing proceeding in order to separate out the principalship issue . . . the rule makes clear that principalship and the other sentencing-related issues are resolved in a unitary sentencing proceeding"); Bruce v. State, 616 A.2d 392, 399-400 (Md. 1992) (holding that trial judge does not have discretion to grant a bifurcated penalty hearing because Maryland death penalty statute expressly mandated a unitary sentencing hearing). Some state courts have also noted the absence of a prohibition on trifurcation in a state statute. *See* State v. Reynolds, 836 A.2d 224, 316 (Conn. 2003) (noting absence of any prohibition on trifurcation but declining to grant trifurcation under the circumstances of the case); Ploof v. State, 856 A.2d 539, 546 (Del. Super. Ct. 2004) (noting that even though the broad language in Delaware's statute does not explicitly permit a bifurcated sentencing hearing [trifurcated proceeding], at the same time "it does not forbid that practice either").

[59] 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2000); ARIZ. REV. STAT. ANN.§ 13-703 B (2006).

III. ADDITIONAL EVIDENCE DURING "PENALTY" SELECTION: THE DOWNSIDE OF "TRIFURCATION"?

A. HEARSAY AND CONFRONTATION RIGHTS DURING SENTENCING

While some courts have recently begun trifurcating to protect a capital defendant's rights during the jury's guilt and eligibility determinations, trifurcation may not always be beneficial to the defendant because a capital defendant retains no confrontation rights during a separate penalty selection phase. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[60] Most courts and commentators agree that the Sixth Amendment Confrontation Clause right to confront witnesses does *not* apply at sentencing.[61] Meanwhile, *Apprendi* and *Ring* require the jury to decide all facts which could increase a defendant's maximum punishment prior to sentencing,[62] however, neither case mentions a defendant's rights under the Confrontation Clause.[63] Even the landmark Supreme Court decisions in *Blakely*, *Apprendi*, *Ring*, and *Booker* did not overturn the majority of

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[60] U.S. CONST. amend. VI.

[61] *See, e.g.,* United States v. Rodríguez, 336 F.3d 67, 71 (1st Cir. 2003) ("[A] defendant's Sixth Amendment right to confront the witnesses against him does not attach during the sentencing phase.") (*quoting* United States v. Tardiff, 969 F.2d 1283, 1287 (1st Cir. 1992)); United States v. Navarro, 169 F.3d 228, 236 (5th Cir. 1999) (holding that "there is no Confrontation Clause right at sentencing"); *see also* United States v. Francis, 39 F.3d 803, 810 (7th Cir. 1994).

[62] *See* Lilliquest, *supra* note 23.

[63] Apprendi v. New Jersey, 530 U.S. 466, 476-77 (2000) (holding that due process under the Fourteenth Amendment, and the right to a speedy and public trial by an impartial jury under the Sixth Amendment, indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"); *see also* Ring v. Arizona, 536 U.S. 584, 585-87 (2002) (holding that *Apprendi* also applies to capital cases)..

non-capital case law which continues to hold that the Confrontation Clause does not apply during sentencing.[64]

Moreover, the recent landmark decision by the Supreme Court in *Crawford v. Washington* may have revamped the way in which courts evaluate hearsay admissibility, but says nothing about a defendant's Confrontation Clause rights during sentencing.[65] Indeed, the decision in *Crawford* is so recent that very few courts have had the opportunity to interpret the scope of its application. Some courts have read *Crawford* to mean that there is no Confrontation Clause issue at all regarding the admissibility of non-testimonial hearsay.[66] Other courts have interpreted *Crawford* to mean that it does not disturb *Ohio v. Roberts* as the appropriate analysis of Confrontation Clause requirements for non-testimonial hearsay.[67] Regardless, a defendant who no longer retains confrontation rights at all can no longer invoke *Crawford* or *Roberts* to prevent admission of hearsay on that basis. Therefore, the scope of the Confrontation Clause itself should be the key for determining whether *Crawford* or *Roberts* bars hearsay evidence during the eligibility determination or penalty selection in a capital proceeding.

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[64] Admittedly, the U.S. Supreme Court held in *Specht v. Patterson*, often referred to as "a precursor" of *Apprendi* and *Ring*, that the Confrontation Clause applies to those portions of a sentencing proceeding that can lead to an increase in the maximum punishment. 386 U.S. 605, 609-11 (1967). However, even though *Specht* was decided many decades ago and has never been overruled, neither has the 1949 decision in *Williams v. New York*, which held that "the Confrontation Clause does not apply to capital sentencing… It applies through the finding of guilt, but not to sentencing, even when that sentence is the death penalty." Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002). Note, some courts have misread a key holding of *Specht*. For example, one Florida court interpreted *Specht* to stand for the general proposition that the "right of confrontation protected by cross-examination is a right that has been applied to the sentencing process." Engle v. State, 438 So.2d 803, 814 (Fla. 1983). The opinion failed to recognize, though the dissent noted, that *Specht* deals with a "radically different situation," where a sentencing procedure introduces a new charge at the sentencing phase that could increase the maximum punishment. *Id.* (Alderman, J., dissenting).

[65] 541 U.S. 36 (2004).

[66] *See, e.g.,* United States v. Reyes, 362 F.3d 536, 541 n. 4 (8th Cir. 2004).

[67] Ohio v. Roberts, 448 U.S. 56 (1980) (providing test on admissibility of non-testimonial hearsay statements); *see also* United States v. Gibson, 409 F.3d 325, 338 (6th Cir. 2005).

B. HEARSAY AND CONFRONTATION RIGHTS DURING ELIGIBILITY AND PENALTY SELECTION

Case law is currently unsettled as to whether the Confrontation Clause must apply to the eligibility determination of a capital proceeding. Some post-*Crawford* courts have recently held that *Crawford* may bar certain kinds of hearsay evidence during the eligibility phase of a capital proceeding.[68] This appears to correctly extend the logic of *Apprendi*, which would apply *Crawford* to hearsay evidence during the eligibility determination because aggravating factors are like elements of the capital offense and therefore the nature of the eligibility determination would require similar treatment. Thus, all constitutional protections and rights that are protected during the guilt portion of the trial should be extended to the eligibility determination of a capital proceeding.

Unsurprisingly, these post-*Crawford* courts also hold that there are no such "*Crawford* limitations" on penalty selection phase evidence.[69] While courts continue to hold that the Confrontation Clause does not apply to a capital sentence hearing,[70] "no court has held that *Crawford* applies to the entire penalty proceeding."[71] Moreover, "United States courts have a

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[68] *See* United States v. Johnson (Johnson III), 378 F. Supp. 2d 1051, 1064-65 (N.D. Iowa 2005); United States v. Jordan, 357 F. Supp. 2d 889, 903-04 (E.D. Va. 2005); United States v. Bodkins, 2005 WL 1118158, *4-*5 (W.D. Va. May 11, 2005).

[69] *See Johnson III*, 378 F. Supp. 2d at 1063-65; *Jordan*, 357 F. Supp. 2d at 903-04; *Bodkins*, 2005 WL 1118158 at *4-*5; *see also* United States v. Luciano, 414 F.3d 174, 179-80 (1st Cir. 2005) (holding there is no Sixth Amendment right to confront witnesses during the sentencing phase); United States v. Martinez, 413 F.3d 239, 244 (2nd Cir. 2005) (holding, post-*Booker*, that the Sixth Amendment rights of confrontation do not bar judicial consideration of hearsay testimony at sentencing proceedings). Of course, *Booker*, *Apprendi* and its progeny must still be satisfied.

[70] United States v. Higgs, 353 F.3d 281, 324 (4th Cir. 2003), *cert. denied*, 543 U.S. 999, (2004); *see also Luciano*, 414 F.3d at 179-80 (holding that *Crawford* does not alter the previous conclusion that there is no Sixth Amendment Confrontation Clause right at sentencing).

[71] *Bodkins*, 2005 WL 1118158, at *4.

long history of using reliable hearsay for sentencing,"[72] and even though "any testimonial hearsay evidence offered during the eligibility phase would have to meet the requirements of *Crawford* before it could be presented to the jury . .. [t]hose same requirements would not apply to hearsay evidence, testimonial or non-testimonial, offered during the [penalty] selection phase."[73]

Thus, since a capital defendant no longer retains Confrontation Clause protection during the penalty selection phase, a trifurcated capital scheme that separates the eligibility determination from penalty selection may harm a capital defendant during penalty selection because of the potential admission of harmful hearsay testimony regarding non-statutory aggravating factors.[74]

For a striking example of how this might affect a capital defendant during the penalty selection phase of a trifurcated proceeding, consider the recent *Johnson I* court order to grant the defendant's pretrial motion to trifurcate proceedings.[75] The defense argued that Ms. Johnson would be unfairly prejudiced if the court did not trifurcate proceedings and separate the eligibility determination from the penalty selection, during which the defense argued that otherwise inadmissible and prejudicial evidence will be received.[76] The defense was likely concerned about the risk of unfair prejudice affecting the eligibility determination, but seemed to be unaware that highly

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[72] *Higgs*, 353 F.3d at 324; United States v. Terry, 916 F.2d 157, 161 (4th Cir. 1990).

[73] *Bodkins,* 2005 WL 1118158, at *4-*5; *see also Jordan*, 357 F. Supp.2d at 903-04; *Johnson III*, 378 F. Supp. 2d at 1064.

[74] Of course, such hearsay is only admissible as long as it meets the constitutional due process standards for admissibility in the penalty phase. However, the constraints upon hearsay evidence during the penalty selection phase of a capital case are governed by the same tenets of due process as any other non-capital case, and there is no general due process bar to hearsay evidence in capital sentencing hearings.

[75] Johnson (Johnson I), 362 F. Supp. 2d at 1111.

[76] *See* Defendant's Brief in Support of Motion to Trifurcate Proceedings, United States v. Johnson, No. CR 01-3047-MWB (N.D. Iowa Jan. 7, 2005) (No. 274).

incriminating hearsay testimony from a prison inmate, regarding statements made by Johnson's convicted co-conspirator, might be admissible during the penalty selection phase of a trifurcated proceeding.[77] Johnson's co-conspirator had refused to testify at his own capital proceeding and was therefore legally unavailable for cross-examination. However, because Johnson no longer retained confrontation rights during the penalty selection phase, the court was able to admit the inmate's testimony because it was relevant to and probative of a non-statutory aggravating factor.[78]

Thus, if hearsay testimony is probative of issues that are to be balanced and weighed during the penalty selection phase of a trifurcated capital proceeding, a court would be prudent to consider admitting such evidence because a guilty, death-eligible defendant no longer has Confrontation Clause protections. Moreover, perhaps courts *should* admit this type of evidence in order to ensure that the jury can make an informed penalty selection determination. Indeed, it has long been established that the reliability of the penalty phase of a capital case is enhanced by the admission of more, rather than less evidence.[79]

IV. CONCLUSION

The differences in evidentiary standards and constitutional limitations during a capital trial and the subsequent sentencing hearing of a guilty defendant require careful procedural safeguards to ensure that capital juries are able to make distinct determinations as to guilt, eligibility, and penalty assessment. By procedurally separating the evidence relevant to the eligibility determination and the information relevant to penalty

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[77] *See* Motion In Limine Re: Steven Vest, United States v. Johnson, No. CR 01-3047-MWB (N.D. Iowa May 25, 2005), (No. 529).

[78] *See Johnson III*, 378 F. Supp. 2d at 1063-65. Incidentally, the court found that even if confrontation rights were theoretically extended to the penalty selection phase, there were sufficient indicia of reliability for the non-testimonial hearsay statements at issue to be admissible non-testimonial hearsay under the second prong of the *Ohio v. Roberts* test. *Id.* at 1064-66.

[79] Gregg v. Georgia, 428 U.S. 153, 203-04 (1976).

selection, the trifurcated schemes used by the Illinois and Arizona statutes, as well as a handful of federal courts, seem to provide a more balanced solution to the evidentiary and constitutional problems which arise when penalty selection information is introduced *before* the jury makes an eligibility determination.

Consequently, the potential for unfair prejudice, confusion of issues, and misleading the jury may be decreased under a trifurcated scheme that encourages jurors to separate evidence regarding gateway and statutory aggravating factors from information regarding non-statutory aggravating factors such as victim impact. Either a trifurcated scheme or an Ohio-type scheme still retains the rules of evidence during the eligibility determination. Therefore, while bifurcated capital schemes may significantly broaden the type of evidence that the prosecution may introduce to prove eligibility, trifurcated and Ohio-type schemes provide a defendant with greater evidentiary protection. However, even though an Ohio-type scheme separates evidence relating to eligibility and penalty selection, it may increase the risk of unfair prejudice, confusion of the issues, or misleading the jury at the guilt stage of a capital proceeding. A trifurcated scheme is, therefore, a more effective method for ensuring that jurors distinguish between evidence of guilt, and evidence intended to prove aggravating factors during the eligibility determination.

Moreover, trifurcation may also alleviate potential Confrontation Clause problems by extending the scope of a capital defendant's confrontation rights through the eligibility determination. Courts may even need to trifurcate proceedings in some cases to prevent the unfair prejudice that may occur if jurors hear powerful victim impact testimony before they have made an eligibility determination. Indeed, some courts have recently exercised judicial discretion to trifurcate capital proceedings in the interest of justice.

However, trifurcation is not always beneficial to the defendant during all phases of a capital proceeding. A capital scheme that separates the eligibility determination from penalty selection may allow the prosecution to introduce hearsay evidence during penalty selection which may not be admissible during the sentencing phase of a two-part bifurcated capital scheme. Nevertheless, a *procedural* separation between the eligibility determination and penalty selection is crucial for

instructing and guiding capital jurors to evaluate the evidence and information relevant to the distinct guilt, eligibility, and penalty determinations in a capital proceeding.