CRIMINAL PROCEDURE — CONFRONTATION CLAUSE — FOURTH CIRCUIT FINDS NO RIGHT TO CONFRONTATION DURING SENTENCE SELECTION PHASE OF CAPITAL TRIAL. — *United States v. Umaña*, 750 F.3d 320 (4th Cir.), *reh'g en banc denied*, 762 F.3d 413 (4th Cir. 2014).

In *Ring v. Arizona*,[1] the Supreme Court held that during capital sentencing, a criminal defendant has a Sixth Amendment right to a jury determination of all facts necessary to render him eligible for the death penalty.[2] However, the Court has never decided whether a capital defendant enjoys Sixth Amendment Confrontation Clause rights[3] during sentencing[4] — and, in particular, during the final phase of sentencing in which the sentencer decides whether an eligible defendant receives life imprisonment or death.[5] Recently, in *United States v. Umaña*,[6] the Fourth Circuit held that the Confrontation Clause does not prevent the introduction of hearsay evidence during the final phase of capital sentencing.[7] The doctrinally sound reasoning in *Umaña* illustrates why other courts are unlikely to find that the Confrontation Clause applies during the final phase of capital sentencing. But a disagreement between the majority and the dissent over the Supreme Court's requirement of "heightened reliability" in capital sentencing highlights an alternative argument for confrontation stemming from Eighth Amendment precedents.

Alejando Enrique Ramirez Umaña was an enforcer for a violent Central American gang known as MS–13.[8] Due to his reputation for violence, he was dispatched to North Carolina to settle infighting

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[1] 536 U.S. 584 (2002).

[2] *Id.* at 609.

[3] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

[4] *Ring* did not make clear whether Sixth Amendment trial rights other than the right to a jury determination of requisite facts extend to capital sentencing. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1969–70 (2005) (describing ambiguity in Sixth Amendment application to capital sentencing); Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1774 (2003) ("Confusion about the extent of trial rights at sentencing undoubtedly traces from the Court's utter failure to articulate a consistent explanation for whether and when constitutional adjudication rights apply to sentencing proceedings.").

[5] *See, e.g.*, United States v. Fell, 217 F. Supp. 2d 469, 486 (D. Vt. 2002) (acknowledging that the Court has not decided whether the Confrontation Clause applies at capital sentencing), *vacated*, 360 F.3d 135 (2d Cir. 2004). The Court decided in *Williams v. New York*, 337 U.S. 241 (1949), that *due process* does not prohibit a judge from considering "additional out-of-court information" during a state capital sentencing. *Id.* at 252. But because the Confrontation Clause had not yet been incorporated against the states through the Fourteenth Amendment, the *Williams* Court did not address the Clause's application. *See* Douglass, *supra* note 4, at 1976 n.54. Thus, "although it adjudicated confrontation-like rights, the *Williams* Court never considered — or even mentioned — the Sixth Amendment text or its history." *Id.*

[6] 750 F.3d 320 (4th Cir.), *reh'g en banc denied*, 762 F.3d 413 (4th Cir. 2014).

[7] *Id.* at 348.

[8] *Id.* at 329.

among the MS–13 cliques in Charlotte.[9] During this sojourn, Umaña and MS–13 associates entered into an altercation with fellow diners at a local Mexican restaurant.[10] Having perceived a slight when one diner, Ruben Salinas, referred to MS–13 as "fake," Umaña stayed behind after his associates left.[11] He shot and killed Ruben Salinas and his brother, Manuel Salinas.[12] Following Umaña's arrest, a federal grand jury indicted him for the two murders.[13] The prosecution sought the death penalty under the Federal Death Penalty Act[14] (FDPA).[15]

At trial, the jury convicted Umaña of murdering both Salinas brothers.[16] The jury then found two statutory aggravating factors that rendered Umaña death-eligible under the FDPA.[17] But to impose a death sentence after finding a defendant death-eligible, the jury must make a final determination: whether all aggravating factors — statutory and nonstatutory — sufficiently outweigh all mitigating factors so as to justify a death sentence.[18] Accordingly, the case proceeded to the sentence "selection" phase where the jury hears evidence and ultimately decides whether to impose a death sentence.[19]

At the selection phase, the prosecution introduced proof of additional nonstatutory aggravating factors, including evidence that Umaña had previously committed three murders in California.[20] Umaña objected and argued that permitting detectives to testify that incarcerated MS-13 gang members had identified him as the killer in the California shootings violated his Sixth Amendment right to confront those gang members.[21] The district court overruled Umaña's objection.[22] As a result, evidence of the California murders served as a

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[9] *Id.* at 331.

[10] *Id.*

[11] *Id.* (internal quotation mark omitted).

[12] *Id.*

[13] *Id.* at 332.

[14] 18 U.S.C. §§ 3591–3596 (2012).

[15] *Umaña*, 750 F.3d at 333.

[16] *Id.* The jury convicted Umaña of, inter alia, murdering the Salinas brothers "in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1)," and of "using a firearm in relation to a crime of violence, resulting in the death of the Salinas brothers, in violation of 18 U.S.C. § 924(c) and (j)(1)." *Id.* The § 1959 and § 924 counts allowed the prosecution to seek the death penalty under the FDPA.

[17] *Umaña*, 750 F.3d at 333; *see* 18 U.S.C. §§ 3592(c)(5), (16), 3593(d). Specifically, the jury found that Umaña "had created a grave risk of death to one or more persons in addition to each victim" and "killed more than one person in a single criminal episode." *Umaña*, 750 F.3d at 333.

[18] 18 U.S.C. § 3593(e).

[19] *See Umaña*, 750 F.3d at 333.

[20] *Id.*

[21] *Id.* at 345–46.

[22] *Id.* at 345. The district court acknowledged that the applicability of the Confrontation Clause "to a capital sentencing proceeding is unsettled in this jurisdiction." United States v. Umana, 707 F. Supp. 2d 621, 633 (W.D.N.C. 2010). The court then "agree[d] with the districts [sic] courts in [the Fourth Circuit] that have determined" that the clause applies only at the eligibility phase and not at the selection phase. *Id.*

cornerstone of the prosecution's successful case for death.[23] Umaña appealed the district court's decision that the Confrontation Clause does not apply to the selection phase of a capital trial.[24]

The Fourth Circuit affirmed the conviction and sentence.[25] Writing for the panel, Judge Niemeyer[26] relied on *Williams v. New York*[27] for the proposition that "[c]ourts have long held that the right to confrontation does not apply at sentencing, even in capital cases."[28] Despite Umaña's claim that intervening case law had eroded *Williams*, the court found that the case "remains good law" and that it "squarely dispose[d] of Umaña's [Sixth Amendment] argument."[29] The court further observed that sentencing policies underlying *Williams*'s holding remain relevant today. Sentencing is a highly discretionary, individualized process rightly unfettered by "rigid adherence to restrictive rules of evidence properly applicable to the trial."[30] Umaña's claim that the Confrontation Clause should govern evidence at the selection phase would "frustrate the policy of presenting full information to sentencers" and therefore "be a setback for reliable sentencing."[31]

The court also rejected Umaña's argument that the jury engages in "constitutionally significant" factfinding of aggravating factors during the sentence selection stage, which would potentially trigger additional protections under Sixth Amendment. According to the majority, in the selection phase, jurors do not undertake factfinding that "alters the legally prescribed range [of punishment] . . . in a way that aggravates the penalty."[32] Instead, when weighing aggravating and mitigating factors, "a jury is not legally required to find any facts" because "facts are neither

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[23] *See Umaña*, 750 F.3d at 362 (Gregory, J., dissenting). The prosecution referred to the killings on "[n]early every page of the transcript of [its] summation argument in the third phase of the trial." *Id.* For his part, Umaña established mitigating factors, which included that the murder "occurred during an emotionally charged argument" and "as a result of Umaña's indoctrination into the ways and thinking of MS–13." *Id.* at 333 (majority opinion).

[24] *Id.* at 345 (majority opinion). Umaña also appealed the constitutionality of the statute under which he was convicted, *id.* at 336, the reliability of the evidence presented at sentencing, *id.* at 348, and allegedly inappropriate statements made by the prosecution at sentencing, *id.* at 351.

[25] *Id.* at 330.

[26] Judge Niemeyer was joined by Judge Agee.

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

[28] *Umaña*, 750 F.3d at 346 (citing *Williams*, 337 U.S. 241).

[29] *Id.* Judge Niemeyer observed that the Supreme Court cited *Williams* as recently as 2013 for the proposition that the Sixth Amendment does not govern "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" *Id.* at 348 (quoting Alleyne v. United States, 133 S. Ct. 2151, 2161 n.2 (2013)) (emphasis omitted).

[30] *Id.* at 347 (quoting *Williams*, 337 U.S. at 247) (internal quotation mark omitted).

[31] *Id.* The court considered a death sentence "reliable" if based on procedures that (1) "delineate, *ex ante*, the particular offenses for which death is a proportionate punishment" and (2) permit jurors "to consider all factors . . . relevant to choosing an appropriate punishment once the death penalty is in play." *Id.* (quoting United States v. Fields, 483 F.3d 313, 336 (5th Cir. 2007)).

[32] *Id.* at 348 (quoting *Alleyne*, 133 S. Ct. at 2161 n.2).

necessary nor sufficient to impose the death penalty — they merely guide the jury's discretion."[33] In fact, "[i]t is only during [the guilt and eligibility] phases that the jury makes 'constitutionally significant' factual findings."[34] Thus, "the Confrontation Clause does not preclude the introduction of hearsay statements during the sentence selection phase."[35]

Judge Gregory dissented.[36] He reasoned that "the Confrontation Clause applies at every stage of an FDPA trial."[37] After conceding that the text of the Confrontation Clause does not provide clear guidance, the dissent characterized the clause's history as supporting its position,[38] and, in particular, disparaged the majority's reliance on *Williams*.[39] Recent Supreme Court decisions governing "the Sixth Amendment right to factfinding at sentencing, death penalty procedure, and the Confrontation Clause" have undermined *Williams*'s relevance to modern capital sentencing procedure.[40] Finding *Ring* particularly apposite, the dissent challenged the majority's assertion that the jury does not make factual findings during the selection phase.[41] Instead, the dissent observed, "the jury's burden in stage three — a finding that the aggravating factors sufficiently outweigh the mitigating factors — 'is not optional.'"[42] Although selection "involves some jury discretion, juries must nonetheless make certain factual findings . . . before a death sentence can be imposed."[43] And because "the permissible range of sentencing is increased" after the jury makes these required findings, the Confrontation Clause attaches.[44]

Finally, the dissent dismissed the majority's concerns about providing jurors insufficient information, noting that quantity of information is "but one principle of death sentence jurisprudence"; it must yield "to the more important principle that a death sentence be based on accurate factfinding."[45] Because "[d]eath, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two," there is a heightened need for reliability in the selection of a death sentence.[46] The Confrontation Clause is "the constitutional-

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[33] *Id.*

[34] *Id.*

[35] *Id.* The court also rejected each of Umaña's other claims. *See id.* at 359–60.

[36] *Id.* at 360 (Gregory, J., dissenting).

[37] *Id.* at 369.

[38] *See id.* at 364–65.

[39] *See id.* at 366–68.

[40] *Id.* at 367.

[41] *See id.* at 366.

[42] *Id.* (quoting United States v. Green, 372 F. Supp. 2d 168, 177 (D. Mass. 2005)).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 367.

[46] *Id.* at 360 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion)) (internal quotation mark omitted).

ly prescribed method of assessing reliability," and the district court erred in permitting the jury to consider unconfronted testimony when selecting between life imprisonment and death.[47] The Fourth Circuit denied rehearing en banc.[48]

The Umaña court claimed to straightforwardly dispose of Umaña's claim under *Williams*.[49] But this rhetoric disguised the consequence of the court's characterization of the jury's deliberations during the selection phase as purely discretionary. This characterization poses a challenge to defendants who seek certain Sixth Amendment protections — including the Confrontation Clause — during the selection phase. Because the Fourth Circuit's reasoning is ultimately persuasive, it is likely the Sixth Amendment's Confrontation Clause will prove unavailing to capital defendants seeking confrontation rights during sentence selection. Such defendants might instead focus on the Eighth Amendment's heightened-reliability requirement.

The Confrontation Clause's application to the selection phase turns not on *Williams*'s continuing vitality but on whether sentence selection is understood to entail factfinding. In *Ring*, the Supreme Court held that the Sixth Amendment jury right — and likely by extension the structurally identical Confrontation Clause[50] — governs up to the point in sentencing where all facts necessary to impose a death sentence are established,[51] but no further. Because the Court did not locate that point along the multistage timeline of capital sentencing, *Ring* sparked a decade of litigation over when factfinding ends and selection between possible punishments begins.[52]

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[47] *Id.* at 368 (quoting Crawford v. Washington, 541 U.S. 36, 62 (2004)).

[48] United States v. Umaña, 762 F.3d 413 (2014). Judge Wilkinson wrote separately to note that it would be improper for the court to preemptively overrule *Williams*, which he characterized as controlling Supreme Court precedent. *Id.* at 414 (Wilkinson, J., concurring in the denial of rehearing en banc). Judge Gregory penned a dissent urging the Supreme Court to address whether capital defendants have confrontation rights during sentencing because he felt the majority in *Umaña* had misread five decades of relevant precedent and that uniformity across federal courts could only be achieved through Supreme Court review. *Id.* at 416–18 (Gregory, J., dissenting from the denial of rehearing en banc).

[49] *Umaña*, 750 F.3d at 346.

[50] Though *Ring* concerned the jury right, many judges have either directly or indirectly applied *Ring*'s reasoning to conclude that the Confrontation Clause applies to the eligibility phase of capital sentencing. *See, e.g.*, United States v. Umana, 707 F. Supp. 2d 621, 633 (W.D.N.C. 2010); United States v. Concepcion Sablan, 555 F. Supp. 2d 1205, 1222 (D. Colo. 2007); United States v. Mills, 446 F. Supp. 2d 1115, 1129 (C.D. Cal. 2006). However, this remains an unresolved question. *See* Petition for a Writ of Certiorari at 11–18, Dunlap v. Idaho, 135 S. Ct. 355 (2014) (No. 13-1315), 2014 WL 1712085, at *11–18 (describing lower court split); Dunlap v. Idaho, 313 P.3d 1 (Idaho 2013), *cert. denied*, 2014 WL 1714473 (U.S. Oct. 14, 2014).

[51] *See* Ring v. Arizona, 536 U.S. 584, 609 (2002); Douglass, *supra* note 4, at 1971.

[52] *See generally* Adam Thurschwell, *After* Ring, 15 FED. SENT'G REP. 97 (2002) (describing the aftermath of *Ring*); Casey Laffey, Note, *The Death Penalty and the Sixth Amendment: How Will the System Look After* Ring v. Arizona*?*, 77 ST. JOHN'S L. REV. 371 (2003) (same). The Supreme Court has never addressed directly the nature of the jury's burden during the selection

The majority and dissent in *Umaña* disagreed on the answer to this key question. The majority characterized the deliberations as purely discretionary because "any facts that the jury might find during [selection] do not alter the range of sentences it can impose on the defendant."[53] The dissent responded plainly, "[t]his is incorrect."[54] Though the defendant is death-eligible before the selection phase, the jury must still determine that aggravating factors outweigh mitigating factors — a finding that is necessary to the imposition of a death sentence.

The *Umaña* majority's reasoning is likely to prevail if the question is ever posed to the Supreme Court.[55] A capital defendant does not have a Sixth Amendment right to be sentenced by a jury.[56] This remains true even in the wake of *Ring*, suggesting that the ultimate sentencing decision does not entail factfinding of the kind protected by *Ring*.[57] And the Court has observed that when a jury *is* tasked with selecting a sentence, as it is under the FDPA, "its deliberations assume a different tenor."[58] After a defendant is found death-eligible, "[t]he emphasis shifts" from consideration of "objective factors" to weighing aggravating and mitigating factors to make an "individualized consideration of a particular defendant."[59] The Court's remarks support a view of selection as a moral decision untethered from the requirement of formal factfinding, and thus unprotected by some of the Sixth Amendment guarantees. The *Umaña* majority's reasoning comports with this understanding and suggests attempts to secure confrontation rights during the selection phase under the Sixth Amendment will ultimately be unsuccessful.

However, an alternative argument might be found in the other familiar theme addressed by both the *Umaña* majority and dissent: "death is different."[60] Since *Woodson v. North Carolina*,[61] the Su-

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phase. *But see* Woodward v. Alabama, 134 S. Ct. 405, 410–11 (2013) (Sotomayor, J., dissenting from denial of certiorari) (discussing the issue).

53 *Umaña*, 750 F.3d at 347.

54 *Id.* at 366 (Gregory, J., dissenting). Some district court judges have agreed with the dissent's characterization. *See, e.g.*, *Concepcion Sablan*, 555 F. Supp. 2d at 1222; *Mills*, 446 F. Supp. 2d at 1129–31; United States v. Green, 372 F. Supp. 2d 168, 172 (D. Mass. 2005). Justice Sotomayor has also agreed that selection entails factfinding. *See Woodward*, 134 S. Ct. at 410–11 (Sotomayor, J., dissenting from denial of certiorari) ("The statutorily required finding that the aggravating factors . . . outweigh the mitigating factors is therefore necessary to impose the death penalty. . . . [T]his factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole.").

55 However, the Court denied certiorari in October 2014 of a case that presented the question of whether the Confrontation Clause applies during the eligibility phase of capital sentencing. *See Dunlap*, 2014 WL 1714473.

56 *See* Spaziano v. Florida, 468 U.S. 447, 460 (1984).

57 The Court declined to reconsider *Spaziano* in 2013. *See Woodward*, 134 S. Ct. 405, 405.

58 Sawyer v. Whitley, 505 U.S. 333, 342 (1992).

59 *Id.* at 343.

60 Ford v. Wainwright, 477 U.S. 399, 411 (1986).

61 428 U.S. 280 (1976).

preme Court has marked death as a sentence "qualitatively different from a sentence of imprisonment," deserving of a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[62] And although the Supreme Court has often imposed "limitations on capital sentence decisionmaking" based on its belief that death is different, "it has not yet delineated the exact scope of constitutional procedural protection to which capital defendants are entitled."[63]

The ambiguity of the heightened-reliability requirement persists.[64] In *Umaña*, the judges splintered again over the procedural prerequisites to a "reliable" death sentence. The majority required only procedures that suitably modulate sentencing discretion at each decision point: procedures must specify ex ante the offenses for which death is a permissible punishment (cabin discretion at eligibility) and then ensure consideration of all evidence relevant to selection of punishment once the defendant is death-eligible (expand discretion at selection).[65] Here, "where the Court discusses the need for reliability in the Eighth Amendment context," it does not mean "reliability of evidence."[66]

Yet the majority's interpretation is by no means the required reading of Eighth Amendment precedent. Without disclaiming the requirement of "streamlin[ed] discretion,"[67] the dissent adopted some of the arguments advanced by Umaña and looked beyond decisionmaking procedures to also consider the quality of information relied upon in the ultimate sentencing decision. Though this reasoning lacks an *explicit* grounding in precedent, the Supreme Court has been willing to police the content of information presented to sentencers under the auspices of the Constitution since *Gardner v. Florida*,[68] where the Court again referenced an "interest in reliability" when it prohibited consider-

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[62] *Id.* at 305; *see also* Spaziano v. Florida, 468 U.S. 447, 449 (1984) (referring to the "constitutional requirement of reliability in capital sentencing"); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 397–401 (1995) (describing instances where the Supreme Court has invoked *Woodson*'s heightened-reliability standard).

[63] Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982); *see also* Steiker & Steiker, *supra* note 62, at 371 (asking "What did the *Woodson* plurality mean by 'reliability'?"); Edward S. West, Case Comment, *The Right of Confrontation and Reliability in Capital Sentencing*, 20 AM. CRIM. L. REV. 599, 599–600 (1983) ("The Court has stressed . . . that 'reliability' in sentencing determinations is an essential element in any death penalty jurisprudence, although it has not clearly articulated a standard by which to define reliability.").

[64] *See, e.g.*, United States v. Brown, 441 F.3d 1330, 1361 n.12 (11th Cir. 2006) (discussing split among lower federal courts, partly due to "death is different" doctrine).

[65] *See Umaña*, 750 F.3d at 347; United States v. Fields, 483 F.3d 313, 337–38 (5th Cir. 2007).

[66] *Fields*, 483 F.3d at 336. The majority in *Umaña* explicitly adopted the Fifth Circuit's reasoning in *Fields*. *See Umaña*, 750 F.3d at 347.

[67] *Fields*, 483 F.3d at 336.

[68] 430 U.S. 349 (1977).

ation of secret presentence reports during capital sentencing.[69] The Court appears to have at least contemplated that a singular focus on the quantity of information presented at sentencing must give way to a "greater concern for the quality of such information."[70] The Court's emphasis in *Gardner* "on the reliability of the factfinding underlying the decision whether to impose the death penalty"[71] lends support to the extension of the confrontation right — the "greatest legal engine ever invented for the discovery of truth" — to sentencing.[72]

More recently, in *Kansas v. Marsh*,[73] four dissenting justices, concerned by recent exonerations, maintained "[t]he Eighth Amendment . . . demands both form and substance, both a system for decision and one geared to produce morally justifiable results."[74] The dissenters argued that empirical evidence of wrongful convictions "must be accounted for in deciding what . . . the Eighth Amendment guarantees should tolerate."[75] Similarly, a concern for wrongfully imposed death sentences might inform what the Eighth Amendment requires. Reliance on faulty evidence renders jurors incapable of fulfilling the "truly awesome responsibility" of imposing a morally justifiable death sentence.[76]

The Eighth Amendment case for some form of confrontation during capital sentencing proceedings is not widely accepted, but if it gains traction, it might provide an alternative route to an outcome that will likely be unavailable under the Sixth Amendment. The argument is not susceptible to the artificial line-drawing between factfinding and discretion laid down in *Ring*. Furthermore, capital sentencing is easily distinguished from noncapital sentencing under the Eighth Amendment, so extending confrontation rights in the capital context would not upset noncapital sentencing schemes that do not require confrontation.

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[69] *Id.* at 359.

[70] Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982) (characterizing *Gardner*).

[71] *Id.* at 1254.

[72] *Id.* (quoting California v. Green, 399 U.S. 149, 158 (1970)) (internal quotation marks omitted).

[73] 548 U.S. 163 (2006).

[74] *Id.* at 205 (Souter, J., dissenting). Perhaps signaling a willingness to consider additional procedural safeguards, the dissenters argued, "the constitutional demand . . . goes beyond the minimal requirement to replace unbounded discretion with a sentencing structure; . . . a system must meet an ultimate test of constitutional reliability in producing 'a reasoned moral response to the defendant's background, character, and crime.'" *Id.* at 204–05 (quoting Penry v. Lynaugh, 492 U.S. 302, 319 (1989)).

[75] *Id.* at 207.

[76] Caldwell v. Mississippi, 472 U.S. 320, 341 (1985); McGautha v. California, 402 U.S. 183, 208 (1971); *see also* Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 426 (2007) (arguing use of unconfronted testimony at capital sentencing "cannot be reconciled with the Eighth Amendment's heightened reliability requirements in modern death penalty jurisprudence").