

## NOTE

# Scared to Death: The Separate Right to Counsel at Capital Sentencing

by JOHN E. SPOMER, III\*

[F]ear brings back the primitive conception of the function of courts; not necessarily, or indeed often, personal fear, but fear of changes; fear on the part of the upholders of the old order; fear of the effects of the discoveries of new truths; fear of emerging into the full light. Where such fear is justice cannot be; a court becomes an instrument of power; judges are soldiers putting down rebellion; a so-called trial is a punitive expedition or a ceremonial execution—its victim a Bruno, a Galileo, or a Dreyfus.<sup>1</sup>

### I. Introduction

To many people, a defense lawyer is “a nettlesome obstacle to the pursuit of wrongdoers.”<sup>2</sup> And while some believe that a defense lawyer has no proper role to play during pre-trial police-citizen encounters, such as interrogations and lineups,<sup>3</sup> the role of defense counsel at trial and post-trial proceedings is less controversial: she serves to safeguard an innocent party from wrongful conviction and to ensure that the guilty receive due process.<sup>4</sup>

In our system of criminal jurisprudence, defense lawyers are “necessities, not luxuries.”<sup>5</sup> They serve as “potential equalizers” in the

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1. SIR JOHN MACDONELL, *HISTORICAL TRIALS* 86 (1929).
2. *Moran v. Burbine*, 475 U.S. 412, 468 (1986) (Stevens, J., dissenting).
3. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 509 (2d ed. 1997).
4. See *id.*
5. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

confrontation between the government's lawyer—whose role is to prosecute—and the person charged with the offense.<sup>6</sup> In sum, defense lawyers are “an antidote to the fear, ignorance and bewilderment” felt by the ordinary defendant.<sup>7</sup>

In a capital trial, where the crime charged is of the most notorious kind, such as murder, it is particularly difficult for a defendant to receive a fair trial.<sup>8</sup> Ignorance, hatred, and fear are the roots of the dilemma in assuring a fair capital trial. First, there is the defendant's ignorance of the rule of law and its importance to his prosecution and possible defense.<sup>9</sup> There is also the public's fear of the accused and their hatred of what he represents and what his asserted offense implies.<sup>10</sup> Consequently, defense counsel dreads “that the fear-engendered hatred of the accused will” bear across to his advocate as well.<sup>11</sup>

Prejudices, such as these, threaten not only the justness of conviction at the guilt phase of the trial, but they also effect the application of the death penalty during the separate sentencing phase. Therefore, in order to ensure a fair and accurate trial, it is imperative that the accused be granted the necessary protections and due process afforded him by the Constitution.<sup>12</sup> Under the seminal case of *Powell v. Alabama*,<sup>13</sup> the Supreme Court declared, albeit very narrowly, that a defendant charged of a capital crime has a right to be represented by counsel at trial.<sup>14</sup> In addition, the Court has suggested that the defendant may also enjoy the right to counsel at the sentencing phase of a capital trial.<sup>15</sup>

Today, under federal statute, the capital defendant not only has the right to an attorney during trial, but he may be entitled to representation by *two* attorneys.<sup>16</sup> However, this right is merely statutory. The trial court is not required to advise the defendant of his right to multiple counsel.<sup>17</sup> Moreover, even if the defendant is aware of this statutory right, the decision to appoint multiple counsel lies solely

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6. DRESSLER, *supra* note 3, at 509.

7. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1179 (1975).

8. See PETER E. KANE, *MURDER, COURTS, AND THE PRESS* 3-4 (1986).

9. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

10. See generally SAMUEL LOCK, *CRIME, PUBLIC OPINION, AND CIVIL LIBERTIES* 76-86 (1999).

11. ELLIOT EVANS CHEATHAM, *A LAWYER WHEN NEEDED* 13 (1963).

12. See U.S. CONST. amends. V, VI.

13. 287 U.S. 45 (1932).

14. *Id.* at 71.

15. See *Mempa v. Rhay*, 389 U.S. 128, 134-37 (1967) (holding defendant has right to counsel at all critical stages of a criminal proceeding).

16. See 18 U.S.C.A. § 3005 (West 1998).

17. See, e.g., *United States v. Williams*, 544 F.2d 1215, 1218 (4th Cir. 1976).

within the discretion of the trial court.<sup>18</sup>

These exceptions to the federal rule expose vulnerabilities within the capital trial process, created by the ignorance and fear that weaken the capital defendant's due process rights. For example, the fact that the trial court does not have to inform the accused of their right to multiple counsel plays upon the capital defendant's ignorance, effectively undermining their right to counsel under *Powell*.<sup>19</sup>

However, it is the jury's fear of the hated defendant and the ensuing hatred for the counsel who represents him during the guilt phase of the trial, which require that a capital defendant possess a separate right to counsel during the sentencing proceeding. If the defendant is convicted at the guilt phase of his trial, his attorney's credibility will come into question by the jury.<sup>20</sup> If the same attorney represents the defendant during the sentencing phase, the jury may become prejudiced. They may say to themselves, "We didn't believe his arguments during the trial, so why should we believe him now at sentencing?"

To date, a separate right to counsel at the penalty phase of a capital trial is not recognized as fundamental under the Sixth Amendment right to counsel.<sup>21</sup> This Note argues that a capital defendant has a constitutional right to have a separate attorney represent him during the sentencing stage. Part II examines the development of the right to counsel under the Sixth and Fourteenth Amendments. Part III analyzes case law surrounding the application of the right to counsel to the sentencing phase of a capital trial and statutes delegating the right to multiple counsel. Finally, Part IV proposes that the Sixth Amendment's right to counsel provision guarantees a defendant a separate right to counsel at the sentencing phase of a capital trial consistent with the due process of law.

## II. Evolution of the Right to Counsel at Capital Trials

### A. Overview of the Capital Trial

The first documented execution on American soil took place nearly 400 years ago, in 1608.<sup>22</sup> Since that time, "the number of death sentences and executions in U.S. history has been minimal compared

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18. See, e.g., *United States v. Blankenship*, 548 F.2d 1118, 1121 (4th Cir. 1976).

19. *Powell v. Alabama*, 287 U.S. at 68-69.

20. See WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES* 77 (1991).

21. See, e.g., *Grandison v. Maryland*, 479 U.S. 873 (1986) (mem.) (Marshall & Brennan, JJ., dissenting as to the Court's denial of the petitioner's writ of certiorari).

22. See V. Schneider and J. Smykla, *A Summary Analysis of Executions in the United States, 1608-1987: The Espy File*, in *THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH* 1, 6 (R. Bohm ed., 1991).

to the number of murders.”<sup>23</sup> Defendants convicted of murder are rarely executed, and less than 10% of capital homicides result in executions.<sup>24</sup> However, there has been a dramatic rise in the rate of executions this decade.<sup>25</sup> Specifically, in 1996, there were more prisoners on death row (more than 2,800) than at any time in U.S. history.<sup>26</sup> The number of death row executions increased from 14 in 1991 to 68 in 1998.<sup>27</sup> As of January 1, 1999, the number of prisoners on death row increased to a record 3,549 people.<sup>28</sup> Approximately 250 people are added to death row each year,<sup>29</sup> and the U.S. Supreme Court continually rejects legal challenges to the death penalty.<sup>30</sup>

When a defendant is charged with a capital crime such as murder, a capital trial ensues. The structure of American capital jurisprudence is unique in several respects. For example, capital trials are bifurcated into a guilt phase and a separate sentencing phase. If a defendant is found guilty at the first phase, a sentence is selected at the sentencing, or “penalty,” phase. During the sentencing phase, “jurors hear testimony pertaining to aggravating and mitigating factors that bear on the circumstances of the offense or the character of the offender. . . . In all but seven states, the jury makes the final sentencing decision.”<sup>31</sup> Most states allow the jury to pronounce a verdict of death “only if aggravating factors outweigh mitigating factors.”<sup>32</sup>

## B. History of the Right to Counsel at Capital Trials

A defendant’s right to counsel at a capital trial is rooted in the U.S. Constitution.<sup>33</sup> The Sixth Amendment guarantees that “[in] all criminal prosecutions, the accused shall enjoy the right . . . to have the

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23. Mark Costanzo and Lawrence T. White, *An Overview of the Death Penalty and Capital Trials: History, Current Status, Legal Procedures and Cost*, in 1 CAPITAL PUNISHMENT: THE PHILOSOPHICAL, MORAL AND PENOLOGICAL DEBATE OVER CAPITAL PUNISHMENT 331, 333 (Margery B. Koosed ed., 1996).

24. *See id.*

25. *See id.* at 334-35.

26. *See id.* at 335.

27. *See Death Row Executions* (visited Mar. 2, 1999) <<http://www.smu.edu/~deathpen/execyrst1.html>>.

28. *See Prisoners on Death Row* (visited Mar. 2, 1999) <<http://www.essential.org/dpic/dpic5.html>>.

29. *See* K.C. Haas & J.A. Inciardi, *Lingering Doubts about a Popular Punishment*, in CHALLENGING CAPITAL PUNISHMENT 11, 12 (K.C. Haas and J.A. Inciardi eds. 1988).

30. *See* J.R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989*, 27 L. & SOC’Y REV. 65, 65-88 (1993).

31. Costanzo and White, *supra* note 23, at 338. In Arizona, Idaho, Montana and Nebraska, the judge alone makes the sentencing decision. *See id.* In Alabama, Delaware, Florida and Indiana, the judge may override a jury’s sentencing recommendation. *See id.*

32. *Id.*

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

Assistance of Counsel for his defense.”<sup>34</sup> This right is fundamental and applies to the states through the Fourteenth Amendment’s due process clause.<sup>35</sup>

1. *Development of the right to counsel under the Sixth Amendment.*

Because many elements of the United States’ substantive and procedural law have their roots in English common law, it may be assumed that there were precedents in early English law concerning the right to counsel in criminal cases.<sup>36</sup> However, this is not the case. Under English law, a felony defendant was not legally entitled to retain counsel, even though misdemeanor defendants “had a right as broad as that extended in civil litigation.”<sup>37</sup> In fact, persons charged with felonies were not permitted counsel until 1836.<sup>38</sup>

The right to counsel in the American colonies differed from the right of their English ancestors in certain respects. Instead of relegating the issue to judicial discretion, the general rule provided for some form of colonial statutory protection.<sup>39</sup> Connecticut fully surpassed the English custom by providing for court appointed counsel in all cases where the accused needed and could not retain counsel.<sup>40</sup> Other colonies, such as Pennsylvania, South Carolina, and Delaware, went halfway, stating that in capital cases the accused should have counsel upon request.<sup>41</sup> Based on these examples, “[there seems] to have been a greater awareness in American courts that an [unrepresented defendant] was at a serious disadvantage, and this awareness became keener as the number of lawyers increased in colonial America.”<sup>42</sup> “After the Revolution, most states included a clause respecting [the right to] counsel in their constitutions.”<sup>43</sup>

Available legislative history of the Sixth Amendment indicates that no comment or controversy accompanied its Congressional proposal or the subsequent state ratifying conventions.<sup>44</sup> However, a Congress composed of many of the Framers of the Constitution passed two legislative acts, which illuminate the Framers’ conception

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34. *Id.*

35. *See* Gideon v. Wainwright, 372 U.S. at 345 (1963). *See also* U.S. CONST. amend. XIV.

36. *See* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8 (1955).

37. *Id.* at 24.

38. *See id.*

39. *See id.* at 25.

40. *See id.*

41. *See id.*

42. *Id.*

43. *Id.*

44. *See id.* at 27.

of the original meaning of the Sixth Amendment.<sup>45</sup>

First, in the Judiciary Act of 1789, the following clause was inserted the day *before* the Sixth Amendment was proposed by Congress: “In all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts . . . and shall be permitted to manage and conduct causes therein.”<sup>46</sup> If Congress believed that the right to counsel provision under the proposed Sixth Amendment greatly deviated from this statutory rule, some discussion concerning the proposal most likely would have occurred on the floor.<sup>47</sup>

The second insight into the meaning of the Sixth Amendment comes from a congressional act of April 30, 1790, passed seven months before the ratification of the Sixth Amendment, stating:

Any person who shall be indicted of treason . . . [or] other *capital crime shall be allowed to make his full defense by counsel learned in the law*; and the court before whom such person shall be tried, or some judge thereof, shall . . . immediately upon his request to assign to him such counsel, *not exceeding two*, as such person shall, to whom such counsel desire, and they shall have free access at all seasonable hours.<sup>48</sup>

Despite the proposed Sixth Amendment’s guarantee of counsel in all felony cases, Congress passed the Act of April 30, 1790 to mimic the English treason act of 1695 and to also include all capital cases.<sup>49</sup> The act also “placed the right to counsel in federal courts on the same plane as statutes had placed the right to counsel in the state courts of Delaware, Pennsylvania, and South Carolina, where the constitutions merely gave the right ‘to be heard by counsel.’”<sup>50</sup>

The ratification of the Sixth Amendment was not followed by statutory changes, and the acts of 1789 and 1790 remained the dual guideposts marking the legal meaning of the Sixth Amendment until 1938.<sup>51</sup> In 1938, the Supreme Court ruled in *Johnson v. Zerbst*<sup>52</sup> that the “Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.”<sup>53</sup> However, in reaching its Sixth Amendment decision, the Court skirted the

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45. *See id.* at 28.

46. Judiciary Act of 1789, § 35, 1 Stat. 92 (1789).

47. *See* BEANEY, *supra* note 36, at 28.

48. Act of April 30, 1790, 1 Stat. 118 (1790) (emphasis added).

49. *See* BEANEY, *supra* note 36, at 28.

50. *Id.*

51. *See id.*

52. 304 U.S. 458 (1938).

53. *Id.* at 463.

problem of historical analysis in dealing with the amendment's counsel provision.<sup>54</sup> This is in stark contrast to the Court's extensive historical discussions of the Sixth Amendment in *Powell v. Alabama*<sup>55</sup> and *Betts v. Brady*,<sup>56</sup> where the Fourteenth Amendment due process requirement of counsel was at issue.

The waiver rule established in *Zerbst* is a reliable indicator of the strength of the Sixth Amendment. According to *Zerbst*, the constitutional right to counsel may not be waived unless there is "an *intentional* relinquishment or abandonment of a known right or privilege."<sup>57</sup> The validity of a waiver is based on the totality of the circumstances of the case,<sup>58</sup> and the court will "indulge every reasonable presumption *against* waiver."<sup>59</sup>

## 2. *The birth of due process and the right to counsel in Powell v. Alabama.*

In 1932, Justice George Sutherland, writing for the Supreme Court in the watershed case of *Powell v. Alabama*,<sup>60</sup> stated:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>61</sup>

In *Powell*, nine black teenagers were prosecuted for the alleged rape of two white girls in an Alabama community. The Court described the youths as "ignorant and illiterate."<sup>62</sup> Moreover, they were residents of another state, and they were brought to trial less than two weeks after the capital offenses allegedly occurred.<sup>63</sup> No lawyer had

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54. *See id.* at 464-65.

55. 287 U.S. at 60-68 (1932).

56. 316 U.S. 455, 465-71 (1942).

57. *Zerbst*, 304 U.S. at 464.

58. *See id.*

59. *Id.* (emphasis added).

60. 287 U.S. 45.

61. *Id.* at 68-69.

62. *Id.* at 52.

63. *See id.* at 52-53.

been designated to represent the defendants.<sup>64</sup> On the day of the trial, two lawyers, one of whom was from out of state and unfamiliar with local law, offered to represent the youths.<sup>65</sup> The lawyers were denied a continuance so that they could adequately prepare their defense.<sup>66</sup> Eight of the defendants were convicted in the three one-day trials that followed and were sentenced to death.<sup>67</sup>

“After affirmance of the conviction by the Supreme Court of Alabama, an appeal was taken on the ground the defendants had been denied due process of law.”<sup>68</sup> The lawyers representing the accused “devoted the first half of their brief to a statement of the facts . . . , the swift course of events, the hostility of the community with its effect on the jurors, the trial judge, and evidently the local lawyers, and the lack of a vigorous and sustained defense.”<sup>69</sup> “Though their statement of facts was impressive, the lawyers for the accused were uncertain as to the precise ground of relief under the due process clause of the Constitution of the United States, and in their brief they gave the right to counsel the inconspicuous second place” among the three grounds urged.<sup>70</sup>

Putting aside the other grounds, Justice Sutherland seized upon and declared the right to counsel.<sup>71</sup> Relying on defense counsel’s statement of facts, Justice Sutherland laid down three separate grounds which supported a defendant’s right to counsel. First, there is the character of the right to counsel: “[T]he right involved is of such character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’”<sup>72</sup> Next, there are the two methods by which the right may be satisfied: (1) “reasonable time and opportunity to secure counsel” of the defendant’s choice, and, (2) when the defendant cannot personally obtain counsel, “an effective appointment of counsel” by the trial court itself.<sup>73</sup> Finally, there is the attitude of counsel which gives meaning to the right: counsel should have a “clear appreciation of responsibility or be impressed with that individual sense of duty.”<sup>74</sup>

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64. *See id.* at 49.

65. *See id.* at 53-54.

66. *See id.* at 53-57.

67. *See id.* at 49-50.

68. CHEATHAM, *supra* note 11, at 8.

69. *Id.*

70. *Id.*

71. *See id.*

72. *Powell*, 287 U.S. at 67 (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1925)).

73. *Id.* at 71.

74. *Id.* at 56.



*Powell's* holding was extremely narrow. It was limited to the special circumstances involving capital trials where the accused faced the possibility of the death penalty.<sup>75</sup> However, its narrow holding guaranteed capital defendants the right to counsel in federal cases under the Sixth Amendment, empowered by those "fundamental principles of liberty and justice"<sup>76</sup> which constitute due process. Justice Sutherland declared that the right to counsel had always been protected in the United States as part of a hearing, referring back to the pre-Sixth Amendment statutes of the Judiciary Act of 1789 and the act of April 30, 1790.<sup>77</sup> He stressed that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."<sup>78</sup>

### 3. *What is due process?*

The concept of due process, on which Sutherland relies, is an amorphous one. According to Beane, "The expression originated as a statutory phrase in 1355: 'No man of what state or condition he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law.'"<sup>79</sup> Beane further explains: "[It held the] same meaning as the earlier phrase 'law of the land' found in Section 39 of Magna Carta, in 1225. Both signified that certain established modes of trial were to be followed. Without opposition, it was included in the Fifth Amendment."<sup>80</sup>

In *Powell*, Justice Sutherland cites in support of due process Justice Brown's opinion in *Holden v. Hardy*,<sup>81</sup> stating that there are "certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."<sup>82</sup>

The potency of due process under the Fourteenth Amendment was strengthened in the 1930s with the influential support of Justices Benjamin Cardozo and Felix Frankfurter.<sup>83</sup> Both Justices supported

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75. *See id.* at 71.

76. *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

77. *See Powell*, 287 U.S. at 62-64.

78. *Id.* at 71.

79. BEANEY, *supra* note 36, at 142 (quoting 20 Edw. 3, c. 3, *cited in* E.S. CORWIN, *LIBERTY AGAINST GOVERNMENT* 91 (1948)).

80. *Id.*

81. *See Powell*, 287 U.S. at 68 (citing *Holden v. Hardy*, 169 U.S. 366 (1898)).

82. *Id.*

83. *See DRESSLER, supra* note 3, at 43.

the doctrine of “fundamental rights.”<sup>84</sup> The essence of this doctrine is that the Fourteenth Amendment: “neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause . . . has an independent potency . . . .”<sup>85</sup> According to Justice Frankfurter, “the due process clause did not incorporate, as such, any of the provisions of the Bill of Rights.”<sup>86</sup> Instead, the Fourteenth Amendment due process clause requires that states honor “‘*principle[s] of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental.*’”<sup>87</sup> These “basic principles of fundamental fairness and ordered liberty might indeed happen to overlap wholly or in part with some of the rules of the Bill of Rights, but [they] bear no logical relationship to those rules.”<sup>88</sup>

Over the years, the Supreme Court has articulated various tests by which “fundamentalness” is determined.<sup>89</sup> For example, a right is fundamental if: it is “of the very essence of a scheme of ‘ordered liberty;’”<sup>90</sup> a “fair and enlightened system of justice would be impossible without [it];”<sup>91</sup> it is “at the base of all our civil and political institutions;”<sup>92</sup> its denial would “offend those canons of decency and fairness which express the notions of justice of English-speaking people;”<sup>93</sup> it is “fundamental to the American scheme of justice;”<sup>94</sup> or conduct in derogation of the right “shocks the conscience.”<sup>95</sup>

Today, in the realm of criminal procedure, all but two provisions of the Bill of Rights apply to the states via this “fundamental rights” application of due process.<sup>96</sup> In addition, the Supreme Court has rec-

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84. See, e.g., *Rochin v. California*, 342 U.S. 165, 166-74 (1952); *Adamson v. California*, 332 U.S. 46, 59-68 (1947) (Frankfurter, J., concurring); *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

85. *Adamson*, 332 U.S. at 66 (Frankfurter, J., concurring).

86. DRESSLER, *supra* note 3, at 43.

87. *Palko*, 302 U.S. at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (emphasis added).

88. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193, 1196 (1992).

89. See generally the cases cited at note 84, *supra*.

90. *Adamson*, 332 U.S. at 65 (Frankfurter, J., concurring) (quoting *Palko*, 302 U.S. at 325).

91. *Palko*, 302 U.S. at 325.

92. *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

93. *Adamson*, 332 U.S. at 67 (Frankfurter, J., concurring).

94. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

95. *Rochin v. California*, 342 U.S. 165, 172 (1952).

96. The exceptions are the Fifth Amendment provision that no person shall be held to answer for a serious crime except by indictment or presentment of a grand jury, *Hurtado v. California*, 110 U.S. 516, 534-35 (1884), and the Eighth Amendment “no excessive bail” provision, U.S. CONST. amend. VIII. The Supreme Court has not ruled on the “fundamental rights” status of the latter provision.

ognized rights *not* enumerated in the Constitution, such as the right to privacy and the right to marry, as being deemed fundamental and, thus, protected by due process.<sup>97</sup>

4. *The development of the right to counsel and due process.*

On the heels of *Powell*, the Court was invited, in *Betts v. Brady*,<sup>98</sup> to announce that there is a *per se* constitutional right to appointed counsel.<sup>99</sup> The Court did not accept the invitation.<sup>100</sup> Instead, it rejected the principle that due process requires that an indigent defendant receive counsel in every criminal case.<sup>101</sup> The Court concluded that the right to counsel was not fundamental to a fair trial, considering the “common understanding of those who have lived under the Anglo-American system of law.”<sup>102</sup> Instead, the Court “applied the ‘special circumstances’ standard used in *Powell*” and “concluded that no circumstances existed in the present case to justify the appointment of counsel.”<sup>103</sup>

It was 21 years until *Gideon v. Wainwright*<sup>104</sup> overturned *Betts*.<sup>105</sup> In sum, *Gideon* brought the protections of the Sixth Amendment right to counsel to the states, via the Fourteenth Amendment Due Process Clause.<sup>106</sup> In *Gideon*, the defendant was prosecuted for the felony of breaking and entering a poolroom with intent to commit a misdemeanor.<sup>107</sup> The defendant requested, but was denied, the assistance of counsel.<sup>108</sup> According to the Supreme Court, he conducted his own defense “about as well as could be expected from a layman.”<sup>109</sup> Nonetheless, the jury convicted him and he was sentenced to five years’ imprisonment.<sup>110</sup>

The Court overturned the conviction.<sup>111</sup> Writing for the majority, Justice Hugo Black stated that the Court in *Betts* had “made an abrupt break with its own well-considered precedents,” especially that of

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97. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (establishing the right to marry or not to marry); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (establishing the right to enjoy a zone of privacy).

98. 316 U.S. 455 (1942).

99. See *id.* at 462-63.

100. See *id.*

101. See *id.* at 473.

102. *Id.* at 464.

103. DRESSLER, *supra* note 3, at 514.

104. 372 U.S. 335 (1963).

105. See *id.* at 345.

106. See *id.* at 367.

107. See *id.* at 336-37.

108. See *id.* at 337.

109. *Id.*

110. See *id.*

111. See *id.* at 345.

*Powell*.<sup>112</sup> Black described as an “obvious truth” the fact that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>113</sup> He also observed:

Governments . . . quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. [The implication of this is] . . . that *lawyers in criminal courts are necessities, not luxuries*. The right of one charged with crime to counsel may not be deemed fundamental . . . in some countries, but it is in ours.<sup>114</sup>

The defendant was retried, but this time with the assistance of counsel.<sup>115</sup> The jury returned a not guilty verdict in one hour.<sup>116</sup>

Many of the major Supreme Court “right to counsel” decisions, post-*Gideon*, have focused on misdemeanor cases rather than capital trials.<sup>117</sup> Most notably, the Court held in *Argersinger v. Hamlin*<sup>118</sup> that the Sixth Amendment requires that an indigent criminal defendant may not be sentenced to imprisonment unless the State has afforded him the right to counsel in his defense.<sup>119</sup>

### III. The Current Status of the Right to Counsel at Capital Trials

In the context of capital trials, it is clear that *Powell* gives the accused the right to counsel, under the Sixth Amendment in federal courts, and this right is made applicable to the states through the Fourteenth Amendment, as announced in *Gideon*.<sup>120</sup> In 1967, the Court unfolded the constitutional origami further in *Mempa v. Rhay*,<sup>121</sup> when it held that the right to counsel under the Sixth and Fourteenth Amendments applies at *all stages* of a criminal prosecution where “substantial rights of a criminal accused may be affected.”<sup>122</sup>

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112. *Id.* at 344.

113. *Id.*

114. *Id.* (emphasis added).

115. See ANTHONY LEWIS, *GIDEON’S TRUMPET* 226-37 (1964).

116. See *id.* at 237.

117. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

118. *Id.*

119. See *id.* at 37.

120. See *Gideon*, 372 U.S. at 341-45.

121. 389 U.S. 128 (1967).

122. *Id.* at 134.

Likewise, today, the American Bar Association has declared that its objective for the Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases is "to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel *during all stages of the case*."<sup>123</sup> This declaration of the right to counsel in capital trials not only accurately reflects the right to counsel provisions of the modern individual state constitutions, but it is an accurate summary of the evolution of the right to counsel under the Sixth and Fourteenth Amendments.

#### A. Application of the Sixth Amendment Right to Counsel to the Sentencing Phase of the Capital Trial

In *Mempa v. Rhay*,<sup>124</sup> the Court held that the right to counsel under the Sixth and Fourteenth Amendments applies at *all stages* of a criminal prosecution where "substantial rights of a criminal accused may be affected."<sup>125</sup> In recognizing this absolute right, the Court suggested, but did not hold, that the sentencing proceeding of a criminal trial is also guarded by the right to counsel.<sup>126</sup> Many lower courts have since concluded that the Sixth Amendment right to counsel applies at sentencing.<sup>127</sup> In addition, the Supreme Court has also held in *Strickland v. Washington*<sup>128</sup> that due process requires effective assistance of counsel at the sentencing phase of a capital trial.<sup>129</sup>

##### 1. *The bifurcated nature of the capital trial.*

The need for counsel is greater in capital cases than it is in other cases. "A capital trial is, in substance, two separate trials: the guilty/not guilty trial and the penalty trial."<sup>130</sup> Therefore, trial counsel in capital cases must prepare not just for the guilt phase, as in other cases, but also for the separate sentencing phase, at which the defense is entitled to present any mitigating evidence with respect to punishment. The Supreme Court, in *Gregg v. Georgia*,<sup>131</sup> explained that the bifurcated system is more likely to eliminate constitutional abuses when "a human life is at stake and when the jury must have informa-

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123. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES § 1.1 (1989) (emphasis added).

124. 389 U.S. 128 (1967).

125. *See id.* at 134.

126. *See id.*

127. *See, e.g.,* Braun v. Rhay, 416 F.2d 1055 (9th Cir. 1969); *In re Cortez*, 6 Cal. 3d 78, 88 (1971); Machwat v. State, 222 So. 2d 38 (Fla. Dist. Ct. App. 1969); *People v. Fitch* 269 N.Y.S.2d 521 (N.Y. App. Div. 1966).

128. 466 U.S. 668 (1984).

129. *See id.* at 686-87.

130. ABA GUIDELINES, *supra* note 123, at § 1.1 (Commentary).

131. 428 U.S. 153 (1976).

tion prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence.”<sup>132</sup>

In many capital cases, no credible argument for innocence exists, so . . . the . . . issue of punishment is the real focus of the entire case. The Constitution requires individualization of the capital sentencing process. A capital defendant has the right to present his or her sentencer with any mitigating evidence that might save his or her life. Therefore, defense counsel should be aware of methods [which] effectively advocate for the life of the client.<sup>133</sup>

## 2. *Unique characteristics of the sentencing phase.*

Before determining whether the right to counsel applies separately to the sentencing phase, it is important to understand why this phase of a capital trial is considered a *separate proceeding* apart from the guilt phase. First, both the prosecution and defense may support their case with a much broader range of evidence at sentencing. “[T]he government is free to offer any evidence relevant to a statutorily defined aggravating circumstance.”<sup>134</sup> “[T]he defense is permitted to present evidence that is relevant not only to a statutorily defined mitigating circumstance but also to *any* circumstance the defense claims is mitigating.”<sup>135</sup> Assuming, of course, that the parties take advantage of these opportunities, sentencing provides the jury with a more complete exposure to the committed offense and the personal characteristics of the offender. In the Supreme Court’s view, the presentation of aggravating and mitigating circumstances will lead to the imposition of death sentences that are more accurate because they are based on a more complete evaluation of relevant information.<sup>136</sup> Furthermore, evidentiary rulings occurring in the guilt phase based upon concerns such as relevancy and hearsay do not have automatic application to the separate sentencing phase.<sup>137</sup>

Besides evidentiary differences, sentencing may be decided by a jury different from the one that decided the guilt phase.<sup>138</sup> In these situations, the court may empanel a “nondeath-qualified” jury and try the case as to the issue of guilt, and empanel a separate “death-qualified” jury to hear the sentencing phase.<sup>139</sup> Some courts have found

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132. *Id.* at 191-92.

133. ABA GUIDELINES, *supra* note 123, at § 1.1 (Commentary).

134. *Id.* at 74.

135. *Id.* (emphasis added).

136. *See id.*

137. *See, e.g.,* Evans v. Nevada, 926 P.2d 265, 282 (Nev. 1996).

138. *See* New Jersey v. Monturi, 478 A.2d 1266, 1269 (N.J. Super. Ct. 1984); *see also* Lockhart v. McCree, 106 S.Ct. 1758 (1986) (rejecting a challenge to the current practice of death-qualifying a jury in capital cases before the guilt phase of the trial).

139. *See* Monturi, 478 A.2d at 1269-70.

justification for a separate "death-qualified" jury within the Sixth Amendment and the right to an impartial jury trial.<sup>140</sup> In addition to Sixth Amendment arguments, at least one lower court has declared that concepts of "*due process, fundamental fairness and judicial economy* permit the court to declare before the guilt phase . . . that a non 'death-qualified' jury will be empanelled to hear the guilt phase and a separate 'death-qualified' jury will be empanelled to hear the penalty phase."<sup>141</sup>

### 3. *Difficulties posed by the bifurcated structure.*

However, the most significant mistakes made by attorneys in capital cases are based on misunderstandings regarding the highly complex bifurcated trial.<sup>142</sup> Many lawyers focus solely on the guilt phase and neglect to prepare for the crucial sentencing phase, even though there may be little hope of avoiding conviction but a substantial possibility of avoiding imposition of the death penalty.<sup>143</sup> Indeed, defense lawyers who handle capital cases agree that the presentation of evidence of mitigating circumstances at sentencing "often results in sentences less than death."<sup>144</sup>

To further complicate matters, court-appointed private attorneys in capital cases are so poorly compensated for their services that they are uneager to represent their clients vigorously. For example, in the Supreme Court, the Justices only recently increased from \$2,500 to \$5,000 the cap on compensation of lawyers appointed to represent indigent capital defendants before the high court.<sup>145</sup> A defense attorney, discouraged by being under-compensated, may be more inclined to "quit" on his client's case after a guilty verdict is announced and not vigorously prepare a sentencing argument which could save his client's life.

The results of an attorney's neglect to prepare for the sentencing phase are devastating. For example, in 1984, Johnny Taylor was executed in Louisiana after his attorney failed "to adduce any testimony or to make any argument to the jury at the sentencing stage."<sup>146</sup> In 1986, Daniel Thomas was executed in Florida after his attorney made a strategic choice not to present any background information relating to the defendant but rather "to remain consistent in the eyes of the

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140. See, e.g., *Grigsby v. Mabry*, 569 F. Supp. 1273, 1313 (E.D. Ark. 1983).

141. *Monturi*, 478 A.2d at 1270 (emphasis added).

142. See Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L. REV. 59, 73 (1989).

143. See *id.*

144. Stephen S. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1865 (1994).

145. See *In re Berger*, 498 U.S. 233, 236 (1991).

146. *Taylor v. Maggio*, 727 F.2d 341, 349 n.10 (4th Cir. 1984).

jury by continuing his guilt phase strategy of appealing to the concept of reasonable doubt that Thomas had committed the crimes rather than trying to play on the jury's sympathy."<sup>147</sup> As one commentator suggested, death sentences are doled out in capital cases "not for the worst crime[s] but for the worst lawyer[s]."<sup>148</sup>

Experienced capital defense attorneys agree that the problem identified by Thomas' counsel is a crucial one.<sup>149</sup> A defense attorney must consider whether he will appear consistent in front of the jury.<sup>150</sup> Like Thomas' attorney, many defense lawyers are so short-sighted during the guilt phase that they make arguments which are completely inconsistent with their subsequent arguments in the penalty phase.<sup>151</sup> This inconsistency can fatally undermine the defense attorney's credibility before jurors. For example, if an attorney argues at the guilt phase that her client is innocent and then, at the penalty phase, has the defendant testify that he committed the offense and is sorry, she will lose credibility with the jury.<sup>152</sup> The jury, already motivated by its fear and vengeance towards the convicted defendant, is further repulsed by the defense counsel, who was defeated in the guilt phase and now lacks any credibility needed to effectively represent her client. Given this scenario, the right to counsel at the penalty phase takes on a vital significance.

#### 4. *Application of constitutional protections to the sentencing phase.*

Although the Supreme Court has not yet recognized a defendant's separate right to counsel during the sentencing phase of a capital trial, the Court has applied other constitutional protections to the bifurcated sentencing procedure.

In *Bullington v. Missouri*,<sup>153</sup> the defendant was indicted for capital murder in Missouri.<sup>154</sup> At the guilt phase of the defendant's trial, the jury returned a verdict of guilty.<sup>155</sup> After the following presentence hearing, the jury returned its additional verdict, which sentenced the defendant to life imprisonment.<sup>156</sup> The defendant then moved, on various grounds, for a judgment of acquittal or, in the alternative, for a new trial.<sup>157</sup>

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147. *Thomas v. Wainwright*, 767 F.2d 738, 746 (11th Cir. 1985).

148. Bright, *supra* note 144, at 1864.

149. See WHITE, *supra* note 20, at 77.

150. See *id.*

151. See Tabak & Lane, *supra* note 142, at 257.

152. See WHITE, *supra* note 20, at 77.

153. 451 U.S. 430 (1981).

154. See *id.* at 435.

155. See *id.*

156. See *id.* at 435-36.

157. See *id.* at 436.



When the trial court granted the defendant's motion for a new trial, the prosecution served and filed notice, stating that once again it would seek the death penalty and specifying the same aggravating circumstances the state sought to prove at the first trial.<sup>158</sup> The defense moved to strike the notice, arguing that the double jeopardy clause of the Fifth Amendment barred the imposition of the death penalty when the first jury had declined to impose the death sentence.<sup>159</sup>

The Supreme Court held that the protection afforded by the double jeopardy clause of the Fifth Amendment to a person acquitted by a jury was available to a person convicted of capital murder and sentenced to life imprisonment, with respect to the death penalty, at his retrial.<sup>160</sup> The Court reached this conclusion because it found that *a sentencing hearing is like a separate trial*.<sup>161</sup> Writing for the majority, Justice Blackmun declared: "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. *It was itself a trial on the issue of punishment . . .*"<sup>162</sup>

In *Mempa v. Rhay*,<sup>163</sup> the defendant pleaded guilty, on the advice of court-appointed counsel, to the offense of "joyriding."<sup>164</sup> The defendant was given a deferred sentence and placed on probation.<sup>165</sup> During his probation, he was charged with a burglary.<sup>166</sup> At a subsequent hearing, the defendant "was not represented by counsel and was not asked whether he wished to have counsel appointed for him."<sup>167</sup> "Nor was any inquiry made [concerning] the appointed counsel who had previously represented him."<sup>168</sup> The court revoked the defendant's probation and sentenced him to ten years' imprisonment.<sup>169</sup> The defendant filed a writ of habeas corpus, claiming that he had been deprived of his right to counsel at the proceeding where his probation was revoked and sentence imposed.<sup>170</sup>

The Supreme Court reversed the defendant's sentence and held that the "appointment of counsel for an indigent is required *at every stage of a criminal proceeding where substantial rights of a criminal*

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158. *See id.*

159. *See id.*

160. *See id.* at 446.

161. *See id.*

162. *Id.* at 438 (emphasis added).

163. 389 U.S. 128 (1967).

164. *See id.* at 130.

165. *See id.*

166. *See id.* at 130-31.

167. *Id.* at 131.

168. *Id.*

169. *See id.*

170. *See id.*

*accused may be affected.*<sup>171</sup> In support of its conclusion, the Court cited *Townsend v. Burke*,<sup>172</sup> where it found that the absence of counsel during sentencing after a plea of guilty, coupled with “assumptions concerning his criminal record that were materially untrue,” deprived the defendant of due process.<sup>173</sup> The *Mempa* Court stated that *Townsend* now “might well be considered to support by itself a holding that the [Sixth Amendment] right to counsel applies to sentencing,”<sup>174</sup> and a number of lower courts have so held.<sup>175</sup>

However, this holding has not been directly construed as to guarantee a defendant, during the sentencing phase of a capital trial, the right to counsel under the Sixth Amendment. Instead, it has been limited to guarantee a criminal defendant the right to “effective assistance” of counsel at any stage of the trial where the accused’s rights may be affected.<sup>176</sup>

Since *Mempa*, the Court has continued to assemble the constitutional tools necessary to forge a separate right to counsel at capital sentencing under the Sixth Amendment. In *Gardner v. Florida*,<sup>177</sup> for example, the Court not only affirmed that the sentencing process of a capital trial guaranteed the defendant the right to effective assistance of counsel, but it also held that this sentencing phase must comply with due process, just as the guilt phase, because it is a critical stage of the proceeding.<sup>178</sup> Since *Gardner*, the Supreme Court has held that the imposition of the death penalty, where the state has given notice that it will not recommend death, is a violation of due process.<sup>179</sup> In addition, the Ninth Circuit has held that a capital defendant, *pro se* or not, has a due process right to speak at sentencing.<sup>180</sup> Other courts have also held that a defendant is entitled to cross-examine witnesses at the penalty phase in accordance with due process.<sup>181</sup>

## B. The Statutory Right to Multiple Counsel at Capital Trials

### 1. Title 18 U.S.C. § 3005 and ABA Guideline 2.1.

“The need for properly funded, competent counsel is greater in capital cases than in other cases.”<sup>182</sup> The defense counsel must not

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171. *Id.* at 134 (emphasis added).

172. 334 U.S. 736 (1948).

173. *Id.* at 741.

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

175. See generally cases cited in note 127, *supra*.

176. See *Williams v. Turpin*, 87 F.3d 1204, 1209 (11th Cir. 1996).

177. 430 U.S. 349 (1977).

178. See *id.* at 358.

179. See *Lankford v. Idaho*, 500 U.S. 110, 127 (1991).

180. See *Boardman v. Estelle*, 957 F.2d 1523, 1524 (9th Cir. 1992).

181. See, e.g., *Proffitt v. Wainwright*, 685 F.2d 1227, 1255 (11th Cir. 1982).

182. *Tabak & Lane*, *supra* note 142, at 70.

only prepare for the guilt phase, as in other cases, but also for the separate sentencing phase.<sup>183</sup> However, “due to lack of support staff and time, most attorneys handling capital cases . . . are unable to [undertake] the comprehensive investigations necessary to effectively represent the defendant at what are essentially two trials.”<sup>184</sup> These problems are compounded by the racial, cultural, and class differences between such attorneys and their clients.<sup>185</sup> Under these typically adverse circumstances, defense counsel in capital cases may fail to aggressively plea bargain and get their clients to accept reasonable offers of life sentences.<sup>186</sup> Consequently, “[i]n some cases, death penalties will result although no one—prosecutor, judge, or even jury—really wants the defendant to be executed.”<sup>187</sup>

In recognizing the finality of capital punishment, Congress adopted a two-counsel provision under 18 U.S.C. § 3005. This provision declares in relevant part:

Whoever is indicted for treason or other *capital crime* shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant’s request, *assign 2 such counsel*, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours.<sup>188</sup>

Although there is no legislative history as to why Congress adopted the provision or has continued it in force, the Seventh Circuit, in *United States v. Shepard*,<sup>189</sup> has inferred two “humane” reasons behind the statute.<sup>190</sup> First, the court declared that the purpose of the two-counsel provision was to “reduce the chance that an innocent defendant would be put to death because of inadvertence or errors in judgment of his counsel.”<sup>191</sup> Second, the court reasoned that the provision of multiple counsel was an “attempt to prevent mistakes that would be irrevocable because of the finality of the punishment.”<sup>192</sup> In light of these reasons, the two-counsel provision under section 3005 is designed to protect a capital defendant from the mistakes made by his *own* counsel.

The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases have also declared that in capital

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183. *See id.*

184. *Id.* at 70-71.

185. *See id.* at 71.

186. *See id.* at 72.

187. *Id.*

188. 18 U.S.C.A. § 3005 (West 1998) (emphasis added).

189. 576 F.2d 719 (7th Cir. 1978).

190. *Id.* at 728.

191. *Id.* at 729.

192. *Id.*

cases “two qualified trial attorneys should be assigned to represent the defendant.”<sup>193</sup> In addition to the aforementioned purposes of section 3005 above, the ABA also supports two other reasons behind the right to multiple counsel. First, “the duties of defense counsel in capital cases are definably different from those performed by counsel in [other] criminal cases.”<sup>194</sup> Second, there are many rapid developments in the complex body of law affecting death penalty cases.<sup>195</sup>

Both of these factors focus upon the defense attorney’s knowledge of the capital trial process and death penalty law. The phrase “two heads are better than one” fits appropriately in this context. For in the increasingly complex field of capital litigation, where a single mistake in legal judgment may result in the defendant’s death, it is critical that each decision by a defense attorney is capable of being checked by the legal knowledge of another attorney so as to safeguard against any fatal and irreversible error at trial. In addition, the two-counsel provision allows both attorneys to split the trial in half, whereby one attorney would try the guilt phase and, if the defendant is found guilty, the second attorney would argue the sentencing phase. Therefore, ABA Guideline 2.1 ensures that a capital defendant will have sufficient quality and quantity of representation so as to prepare an adequate defense at trial.<sup>196</sup>

2. *Difficulties in associating the right to multiple counsel with a separate right to counsel at sentencing.*

Although the multiple counsel provisions of both section 3005 and ABA Guideline 2.1 can be read with the quixotic notion that a capital defendant has a separate right to counsel at sentencing, there are several reasons why this is not the case.

Under section 3005, the courts have limited the statutory right to multiple counsel in capital cases. First, the Fourth Circuit, in *United States v. Williams*,<sup>197</sup> has determined that a court is not required to call the two-counsel right to the attention of the defendant because the right is merely statutory.<sup>198</sup> Several other federal courts have held likewise.<sup>199</sup> Consequently, the court presumes a waiver of section 3005 unless it is clearly requested.<sup>200</sup> This ease in waiver is in severe

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193. ABA GUIDELINES, *supra* note 123, at § 2.1.

194. *Id.* at § 2.1 (Commentary).

195. *See id.*

196. *See id.*

197. 544 F.2d 1215 (4th Cir. 1976).

198. *See id.* at 1218.

199. *See, e.g.,* *United States v. Blankenship*, 548 F.2d 1118 (4th Cir. 1976); *Harried v. United States*, 389 F.2d 281 (D.C. Cir. 1967); *Barkan v. United States*, 305 F.2d 774 (7th Cir. 1962); *United States v. Morris*, 178 F. Supp. 694 (E.D. Pa. 1959).

200. *See Williams*, 544 F.2d at 1219.

contrast to waiver of the Sixth Amendment right to counsel, where the defendant can only waive her constitutional right if it passes the exacting “knowingly, voluntarily and intelligently” waiver test set out in *Johnson v. Zerbst*.<sup>201</sup> Second, even if the capital defendant invokes her two-counsel right, the ultimate decision to appoint additional counsel is within the discretion of the trial court.<sup>202</sup> Hence, there is no guarantee that, even if a defendant exercises her statutory right, she will be able to invoke it.

Even if the trial court grants her additional counsel, as section 3005 makes clear, only one of the two counsel must be “learned in the law applicable to capital cases.”<sup>203</sup> This provision reinforces a defendant’s constitutional right to sufficient quality of legal representation by providing a co-counsel who is expected to assist lead counsel in the heavy responsibilities of preparing for both the guilt and sentencing phases. However, co-counsel is not expected to emerge from his shadow at the sentencing phase to solely represent the convicted defendant because he is not required to be “learned in the law” of capital cases. He is there merely as a legal sidekick.

Likewise, the ABA suggests that “one of the two attorneys at each stage should be designated and act as the lead counsel, while the other is [designated] as co-counsel.”<sup>204</sup> If only one attorney is experienced in capital cases, as required under section 3005, the lead counsel at the guilt phase must also be the lead counsel in the sentencing phase. The alternative is that the co-counsel, inexperienced and unaware of the intricacies of a capital trial, is left as inadequate substitute as lead counsel at either the guilt or sentencing phase.

The limitations of section 3005 and ABA Guideline 2.1 strip a capital defendant of any guarantee to a separate attorney during the sentencing trial. As a federal statute or a legal guideline, neither are equipped to carry the weight of a separate right to counsel by itself.

#### **IV. A Proposal: The Separate Right to Counsel at Capital Sentencing Within the Sixth Amendment & Due Process Clause**

##### **A. *Grandison v. Maryland***

In *Grandison v. Maryland*,<sup>205</sup> the defendant, Mr. Grandison, was

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201. 304 U.S. 458 (1938).

202. See *Blankenship*, 548 F.2d at 1121.

203. 18 U.S.C.A. § 3005 (West 1997).

204. ABA GUIDELINES, *supra* note 123, at § 2.1 (Commentary).

205. 479 U.S. 873 (1986) (mem.) (Marshall & Brennan, JJ., dissenting as to the Court’s denial of the petitioner’s writ of certiorari).

convicted of murder and sentenced to death by the jury.<sup>206</sup> During the guilt phase of the trial, Mr. Grandison opted to represent himself with court-appointed standby counsel.<sup>207</sup> However, after his conviction, Mr. Grandison told the trial court that he wished to terminate his self-representation.<sup>208</sup> He requested, instead, to have his standby counsel represent him during the sentencing phase.<sup>209</sup> However, the trial court denied his request for new counsel.<sup>210</sup> In his appeal to the Maryland Court of Appeals, Mr. Grandison claimed that he was entitled to make a new decision about counsel representation because capital sentencing constituted a separate trial.<sup>211</sup> The Court of Appeals cursorily dismissed his claim.<sup>212</sup>

Although the Supreme Court denied certiorari to Mr. Grandison, Justices Thurgood Marshall and William Brennan dissented and called for a capital defendant's separate right to counsel at the sentencing phase. Justice Marshall emphasized that the sentencing phase "is in all respects a separate trial on the issue of punishment."<sup>213</sup> In support of this claim, he noted the Court's decision in *Bullington*, which held that the double jeopardy clause applied to the sentencing phase of a bifurcated trial.<sup>214</sup> He also listed procedural examples which infer that sentencing is a separate trial: (1) selection of a new jury; (2) evidence is offered; (3) the parties may present argument; (4) the jury is instructed; and, (5) the jury deliberates and determines the sentence.<sup>215</sup> All of these factors are components of a separate trial. As Justice Marshall stressed, issues regarding "the right to counsel at the first 'trial' on guilt or innocence *should have no more bearing on a defendant's right to counsel in the sentencing phase than it would on that defendant's right to counsel in a separate trial on related crimes.*"<sup>216</sup> Therefore, a capital defendant should be entitled to a separate right to counsel during sentencing because the sentencing phase is, in itself, a new trial.

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206. *See id.* at 873.

207. *See id.* at 874.

208. *See id.*

209. *See id.*

210. *See id.* at 874-75.

211. *See id.* at 875.

212. *See id.*

213. *Id.*

214. *See id.*

215. *See id.*

216. *Id.* (emphasis added).

## B. Constitutional Values Which Give Rise to the Separate Right to Counsel

As discussed earlier, the Supreme Court in *Mempa v. Rhay*<sup>217</sup> held that the right to counsel under the Sixth and Fourteenth Amendments applies at *all stages* of a criminal prosecution where “substantial rights of a criminal accused may be affected.”<sup>218</sup> The Court suggested, but did not hold, that the sentencing proceeding of a criminal trial is also guarded by the right to counsel. However, many lower courts have since concluded that the Sixth Amendment right to counsel applies at sentencing.<sup>219</sup>

In addition, the Supreme Court has held that the right to *effective assistance of counsel* applies to “any stage of the prosecution.”<sup>220</sup> This holding protects the defendant’s assistance of counsel from any *governmental* conduct which may render it ineffective. On the other hand, Congress has enacted 18 U.S.C. § 3005, which gives a capital defendant the right to two counsel (though not necessarily two attorneys competent in capital cases).<sup>221</sup> According to *Shepard*, the purpose of this legislation was to protect the defendant from his *own counsel’s* inadvertence or poor judgment.<sup>222</sup> Therefore, a capital defendant’s right to assistance of counsel is extremely strong; not only is it protected from prosecutorial interference, but it is also protected from the misfeasance of the defendant’s own attorney.

Logic dictates that a defendant cannot be deprived of effective assistance of counsel unless he already has a general constitutional right to counsel under the Sixth Amendment. Therefore, although *Townsend*, *Mempa*, *Kirby*, and *Gardner* did not specifically hold that the right to counsel applies at sentencing, the fact that they hold that the right to effective assistance of counsel applies at this stage must imply the former position.<sup>223</sup>

If the right to counsel applies equally to both guilt and sentencing phases, the right should apply *separately* to the sentencing stage of the capital trial. As the Supreme Court held in *Bullington v. Missouri*,<sup>224</sup> a sentencing hearing is a separate trial because it is itself “a trial on the issue of punishment.”<sup>225</sup> Therefore, the Court held that the

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217. 389 U.S. 128 (1967).

218. *Id.* at 134.

219. *See, e.g.*, *Braun v. Rhay*, 416 F.2d 1055, 1058 (9th Cir. 1969); *In re Cortez*, 6 Cal. 3d 78, 88 (1971); *Machwart v. State*, 222 So. 2d 38, 41 (Fla. Dist. Ct. App. 1969); *People v. Fitch* 269 N.Y.S.2d 521(N.Y. App. Div. 1966).

220. *United States v. Wade*, 388 U.S. 218, 230 (1967).

221. *See supra* note 203 and accompanying text.

222. *See United States v. Shepard*, 576 F.2d 719, 728-29 (7th Cir. 1978).

223. *See, e.g.*, *Blankenship v. Johnson*, 106 F.3d 1202, 1204 (5th Cir. 1997).

224. 451 U.S. 430 (1981).

225. *Id.* at 438.

double jeopardy clause applies to the sentencing phase of a bifurcated trial.<sup>226</sup>

Other aspects of the sentencing phase indicate that it is not only a *new* trial, but a much *different* trial. For example, the defendant's right to present mitigating evidence at sentencing is significantly expanded.<sup>227</sup> Evidentiary rulings based upon relevancy and hearsay at the guilt stage, do not have automatic application to the penalty stage.<sup>228</sup> Finally, a separate "death-qualified" jury may be empanelled to hear sentencing arguments.<sup>229</sup> Because courts allow a capital defendant to be tried by a separate jury, under the Sixth Amendment at the sentencing phase, it seems reasonable that the Sixth Amendment also extends the right to be represented by separate counsel.<sup>230</sup> These components of the sentencing phase further Justice Marshall's opinion that it is "in all respects a separate trial."<sup>231</sup> Even the ABA has declared that "a capital trial is, in substance, two separate trials."<sup>232</sup> Therefore, a defendant's decision regarding his right to counsel at the guilt phase of a capital trial should under no circumstances bind him in the sentencing phase. The capital defendant is entitled to have a separate right to counsel at sentencing and, thus, a separate attorney represent him under the Sixth Amendment.

### C. Due Process and the "Fear Trial"

One may still believe that the sentencing phase is technically not a separate trial for Sixth Amendment purposes, and that, therefore, a capital defendant does not have a right to separate counsel at this phase. However, Justice Sutherland's words in *Powell* should still ring clear: "[A capital defendant's right to counsel is] of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"<sup>233</sup> I propose that there are concepts of due process and fundamental fairness which exist beyond the realm of trial procedure that give the capital defendant a right to separate counsel at sentencing under the Due Process Clause of the Fourteenth Amendment. Specifically, the jury's prejudicial feelings of resentment

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226. *See id.* at 446.

227. *See supra* note 135 and accompanying text.

228. *See supra* note 137 and accompanying text.

229. *See supra* note 139 and accompanying text.

230. *See, e.g.,* Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983); New Jersey v. Monturi, 478 A.2d 1266 (N.J. Super. Ct. Law Div. 1984).

231. Grandison v. Maryland, 479 U.S. 873, 875 (1986) (mem.) (Marshall & Brennan, JJ., dissenting as to the Court's denial of the petitioner's writ of certiorari).

232. ABA GUIDELINES, *supra* note 123, at § 1.1 (Commentary).

233. Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1925)).



and doubt toward his counsel require that the capital defendant possess a right to separate counsel at the sentencing phase.

These prejudices are the result of several fears. First, there is the *jury's fear* of the convicted defendant. At the guilt trial, the jury fears the defendant who has been accused of an atrocious crime—often, the crime is murder. If the jury convicts, hatred is added to the fear—hatred of the crime that the defendant now represents and hatred of the convict himself.

As a result, another kind of hatred falls across the defendant's advocate. If defense counsel is responsible for controlling the legal movements of the defendant throughout trial, it is fair to say that the jury is fully capable of seeing the puppet and looking for the string. The jury convicted at the guilt stage because they believed beyond a reasonable doubt that the defendant committed the capital offense. They convicted because they did not believe the defense counsel's string-pulling arguments of non-culpability. So why should the jury believe defense counsel now at the sentencing phase? Why should they even listen to her arguments? To say that the jury will put aside their prejudices and make an unbiased decision regarding life and death is to ignore the human condition.

State courts have responded to this "serious possibility of prejudice"<sup>234</sup> by empanelling a separate "death-qualified" jury to hear the sentencing phase.<sup>235</sup> Although conceived out of the best intentions, this measure does little to combat jury prejudice. The second jury which hears the sentencing arguments is obviously aware that they are faced with a convicted murderer, who is also likely to be represented by the same attorney who was disbelieved by a preceding jury. The same prejudices regarding hatred for the accused and doubt of his counselor are not removed by the insertion of a new jury panel.

These fears not only affect the jury, but they also reflect on the *defense counsel's* strategy at sentencing. It has already been established that many attorneys who represent capital defendants do not understand the significance of the sentencing trial. They may have little capital defense experience and be unaware of the procedural and evidentiary differences that comprise such a trial. If their client is convicted, they may not have prepared an adequate strategy for sentencing. They are aware of the jury's hatred of the defendant, and, instead of playing to the jury's sympathy, they decide to remain consistent in the eyes of the jury by appealing to the concept of reasonable doubt. No mitigating evidence is offered, and, often times, the defendant is

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234. *Monturi*, 478 A.2d at 1268.

235. *See, e.g., id.* at 1269-70.

sentenced to die.<sup>236</sup> Johnny Taylor and Daniel Thomas, whose cases were discussed earlier, are the fatal results of this too familiar scenario.<sup>237</sup>

Finally, there is the *defendant's fear*. Here is a person who has committed an atrocious crime—one worthy of having his life taken away under law. Yet under the Constitution, he is still entitled to a fair trial and the right to be effectively represented by counsel in his defense. As Justice Sutherland noted in *Powell*, the defendant “lacks both the skill and knowledge adequately to prepare his defense . . . and requires the guiding hand of counsel at every step in the proceedings against him.”<sup>238</sup> Without the ability to be properly represented at his sentencing, the defendant will lack the “skill” and “knowledge” necessary to defend his life to an already prejudiced jury. There can be no greater fear than to not know how to save your own life.

These fears—those of the jury, defense counsel, and defendant—deprive a capital defendant of due process at the sentencing phase of his trial. The Supreme Court has already declared, in *Gardner v. Florida*,<sup>239</sup> that the sentencing phase of a capital trial must comply with due process.<sup>240</sup> Due process applies many of the constitutional guarantees found in the Bill of Rights to the states; it also requires that states honor certain “fundamental rights” outside of those enumerated in the Constitution.<sup>241</sup>

The right to an impartial jury trial is a fundamental right under the Sixth Amendment.<sup>242</sup> I insist that the convicted defendant cannot be guaranteed a fair capital trial unless he is afforded the right to have a “new face” represent him during the sentencing phase. Without separate counsel, the defendant is inadequately equipped to deal with the overwhelming prejudices lined up against him as he tries to avoid a death sentence. Fundamental fairness dictates that each defendant be given a fair trial and the right to counsel at this trial. And in capital trials, where the finality of the punishment is so severe, a defendant should be given added protections to ensure that the individual receives a fair hearing both at the guilt and sentencing phases. The statutory right to multiple counsel under section 3005 is not sufficient.

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236. See, e.g., *Straight v. Wainwright*, 772 F.2d 674 (11th Cir. 1985) (no mitigating evidence presented); *Dillon v. Duckworth*, 751 F.2d 895 (7th Cir. 1984) (very little mitigating evidence presented); *Milton v. Procnier*, 744 F.2d 1091 (5th Cir. 1984) (no mitigating evidence presented); *Porter v. Raleigh*, 478 So. 2d 33 (Fla. 1985) (no mitigating evidence presented).

237. See *supra* notes 146-47 and accompanying text.

238. *Powell*, 287 U.S. at 69.

239. 430 U.S. 349 (1977).

240. See *id.* at 358.

241. See *supra* note 88 and accompanying text.

242. U.S. CONST. amend. VI.

Under the statute, only one of the attorneys need be competent in capital matters.<sup>243</sup> The appointment of such counsel is left to the discretion of the trial court, and, if the defendant does not clearly assert the statutory right, it is automatically waived.<sup>244</sup>

The Supreme Court must recognize these weaknesses in the case and statutory law and declare a right to separate counsel during capital sentencing under either the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.

## V. Conclusion

The constitutional right to counsel should provide the separate right to counsel at the sentencing phase of the capital trial. The Supreme Court has already made several significant holdings which step towards recognizing this right. The Court has held that the right to counsel applies to capital trials and to all critical stages therein (including the sentencing phase). It has held that the right to effective assistance of counsel applies at the sentencing phase of these trials. And the Court has also found that capital sentencing must comport with the slippery notion of due process. From these holdings, a right to counsel under the Sixth Amendment at the sentencing phase is drawn.

From there, it becomes necessary to examine the structure of the bifurcated trial. Specifically, the procedural and evidentiary components that make up the sentencing phase signify that it is, indeed, a separate trial. In response to these facts, the Court has held that the double jeopardy clause applies to the capital sentencing "trial." Therefore, a defendant's decision regarding his right to counsel at the guilt phase of a capital trial should under no circumstances bind him in the sentencing phase.

But of equal importance, there are inherent prejudices within the capital jury which prevent a convicted defendant from being assured an impartial trial and which deny him due process. These prejudices are grown out of fear and hatred towards the convict, and they cast a disbelieving shadow over his attorney's credibility. Although a separate right to counsel at sentencing would not relieve all these prejudices, it is the least protection that the Constitution can provide a person whose life rests in the hands of strangers. As Justice Harry Blackmun stressed, "When we execute a capital defendant in this

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243. See *supra* note 203 and accompanying text.

244. See *supra* notes 198, 200 and accompanying text.

country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing."<sup>245</sup>

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245. *McFarland v. Scott*, 512 U.S. 1256, 1264 (1994) (mem.) (Blackmun, J., dissenting). Justice Blackmun passed away during the production of this Note on March 4, 1999. During his tenure on the Court, Justice Blackmun helped expand and protect the rights of the criminally accused. In doing so, he was a champion of the individual liberties we all cherish but often take for granted.