

**SEE NO EVIL, HEAR NO EVIL, SPEAK NO EVIL: AN ARGUMENT
FOR A JURY DETERMINATION OF THE ENMUND/TISON
CULPABILITY FACTORS IN CAPITAL FELONY MURDER CASES**

INTRODUCTION

"[D]eath is different."¹ When used to punish, death taps society's most primal urges. It is meant to be a deterrent for potential offenders, triggering in them the innate reflex for self-preservation. For society, it is meant to feed the primal desire for retribution. For these very reasons, it is often claimed that death is only reserved for the worst of the worst.

However, in trying to ensure that the above axioms remain true, courts have struggled.² Most capital murder prosecutions proceed in at least two phases: a guilt phase and a sentencing/penalty phase.³ During the guilt phase, the Sixth Amendment entitles a defendant to a jury determination of every fact necessary to establish the elements of the offense with which he is charged.⁴ In the sentencing phase, the judge or the jury weighs aggravating factors—facts or circumstances that, if found, militate for a harsher punishment—against mitigating factors—circumstances which call for a more lenient punishment—to determine the appropriate sentence for the defendant.⁵ Until recently, the Supreme Court has held that the defendant does not have a constitutional right to a jury determination of sentencing factors in the sentencing phase.⁶ In other words, Sixth Amendment rights that applied to factual determinations in the guilt phase had not been constitutionally required for factual determinations traditionally made in the penalty phase.⁷ As capital criminal prosecutions developed, a clear line between the fact finding in the guilt phase and the fact finding in the sentencing phase crystallized.⁸

1. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

2. Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 476 (2005).

3. *See e.g., Gregg*, 428 U.S. at 195 (holding that a bifurcated criminal proceeding did satisfy constitutional concerns).

4. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speed and public trial, by an impartial jury")

5. *Spaziano v. Florida*, 468 U.S. 447, 459 (1984).

6. *Id.*; *see also Cabana v. Bullock*, 474 U.S. 376, 385–86 (1986).

7. *Cabana*, 474 U.S. at 385–86.

8. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1968 (2005).