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Criminal Procedure -- Probable Cause and Due Process at Sentencing

Marvin Allen Bethune

court could undertake a further experiment. At the second phase of trial, the jury could be instructed on the factors which would lead to a finding of diminished capacity. Only then would they fix the degree of offense. Should they find, for example, that the defendant was incapable of forming the specific intent to kill, the verdict would be second degree murder. No significant duplication of judicial effort would be involved, and no repetition of expert testimony would be required.

CHARLES O. PEED, JR.

Criminal Procedure—Probable Cause and Due Process at Sentencing

The guilt determination process in the American judicial system is characterized by rigorous procedural and evidentiary standards and extensive appellate review designed to ferret out the slightest harmful error. The criminal defendant's constitutional right to a fair trial is assured by specific procedural guarantees in the Bill of Rights as well as by the broader fourteenth amendment guarantee of due process of law. But once guilt is established, all these procedural safeguards seem to vanish. Although the Supreme Court has said that the sentencing process is subject to scrutiny under the due process clause,[1] the extension of procedural due process safeguards to sentencing has been the exception rather than the rule.[2] Furthermore, there is normally no substantive review of sentences in federal appellate courts,[3] and the vast discretion of the sentencing judge remains largely unfettered. This note will examine the criminal defendant's rights during sentencing and will discuss a case that significantly extends presently recognized due process safeguards surrounding the sentencing process.

Recently in *United States v. Weston*[4] the Ninth Circuit Court of Appeals reviewed the information considered in sentencing a criminal defendant, vacated the sentence, and remanded, holding that "the Dis-

[1]*See* Williams v. New York, 337 U.S. 241, 252 n.18 (1949).

[2]*See* Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 824-25 (1968).

[3]*See* Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671 (1962); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCE 13-15 (Approved Draft 1968). At present fifteen states make appellate review of sentences available on a regular basis. *Id.* at 13.

[4]448 F.2d 626 (9th Cir. 1971).

trict Court may not rely upon the information contained in the presentence report unless it is amplified by information such as to be persuasive of the validity of the charges there made."[5]

Janice Weston was convicted of knowingly receiving, concealing, and facilitating the transportation of illegally imported heroin. The trial judge initially indicated that the minimum mandatory sentence of five years would be appropriate, but upon request of the prosecutor the judge agreed to have a presentence report prepared before imposing sentence.[6] The report contained charges that the defendant was one of the largest distributors of naroctics in the state and that she went to Mexico as often as once every two weeks to obtain drugs. The trial judge imposed the maximum sentence of twenty years on the basis of the report and then, because of the severity of the sentence, examined the information upon which the report was based. This consisted principally of an unsworn memorandum in which a narcotics agent quoted a named informant who had said that on one occasion the defendant was preparing to go to Mexico. The trial judge determined that without a reasonable doubt the presentence report was substantiated by such factual information.

The court of appeals, which also examined the confidential memorandum, did not object to the consideration in sentencing of criminal conduct of which the defendant has been neither formally accused nor convicted;[7] however, the court did object to the use of virtually unsupported allegations of such criminal conduct. The court denounced the use of an unsworn, unverified statement of an informer who had not been shown to be reliable and the fact that the memorandum did not corroborate the broad charges made in the report.[8]

At common law the criminal defendant had two rights at sentenc-

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[5]*Id.* at 634.

[6]*Id.* at 627-28. Preparation of the presentence report is controlled by FED. R. CRIM. P. 32(c)(1), which states:

> The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

[7]448 F.2d at 633. *Contra*, Baker v. United States, 388 F.2d 931, 934 (4th Cir. 1968), in which the court set a rule for the circuit that "[n]o conviction or criminal charge should be included in the report, or considered by the court, unless referable to an official record." The American Bar Association has suggested that all arrests and other dispositions short of adjudication should be excluded from the presentence report. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROBATION 37 (Approved Draft 1970).

[8]448 F.2d at 630.

ing—the right to be present when sentence was pronounced,[9] and the right of allocution.[10] Since virtually all crimes were felonies at common law, and all felonies were punishable by execution and attainder, the trial judge had only ritual duties at sentencing.[11] Nineteenth century penal reform brought about a change from the absolute, legislatively fixed penalty to penalties expressed in statutory minimum and maximum terms of imprisonment.[12] This concept of individually tailored sentences, determined by the presence of mitigating and aggravating circumstances, gives the trial judge vast discretion as to both the appropriate sentence and the relevant criteria that provide the basis for his determination. This rehabilitative approach to penology demands that the sentencing judge be apprised of the background of the defendant. The modern tool for achieving this result is the presentence report—a report based on an investigation conducted by probation officers or social workers.[13] Reform movements gave the trial judge greater discre-

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[9]Lewis v. United States, 146 U.S. 370, 372 (1892) (after indictment nothing can be done in the absence of the defendant; this right cannot be waived in a felony). In North Carolina the defendant has the right to be present throughout all stages of the trial. N.C. CONST. art. I, § 18, *formerly* N.C. CONST. art. I, § 35 (1868), *cited in* State v. Pope, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962), *noted in* 41 N.C.L. REV. 260 (1963). FED. R. CRIM. P. 43 states in part:

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.

Several lower federal courts have cited United States v. Behrens, 375 U.S. 162 (1963) in holding that imposition of sentence in the absence of the defendant was in violation of procedural due process. *See, e.g.*, United States v. Walker, 346 F.2d 428, 429-30 (4th Cir. 1965). However, the decision in *Behrens* was based only on rule 43, as is made clear by Mr. Justice Harlan's concurring opinion: "Whether or not the Constitution would permit any other procedure it is not now necessary to decide." 375 U.S. at 168.

[10]Although technically "allocution is the formal address of the trial court to the prisoner as the prisoner stands at the bar for sentence . . . ," the term is generally used today to mean the implied right to reply. Barrett, *Allocution*, 9 MO. L. REV. 115, 115-16 (1944). For a good discussion of the common law right of allocution and a survey of state law, see *id.* (pts. 1-2), at 115, 232.

[11]Barrett, *supra* note 10, at 119; Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from* Mempa v. Rhay, 47 TEX. L. REV. 1, 17-18 (1968).

[12]Note, 81 HARV. L. REV., *supra* note 2, at 822.

[13]For a discussion of the functions, objectives, and preparation of the presentence report, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE INVESTIGATION REPORT (Pub. No. 103, 1965); for a survey of state practices, see ABA PROJECT FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 200-04 (Approved Draft 1968). N.C. GEN. STAT. § 15-198 (1965) provides for optional presentence investigations before sentencing. *See* State v. Pope, 257 N.C. 326, 334-35, 126 S.E.2d 126, 133 (1962) (presentence investigations are encouraged).

tion, but there was no corresponding growth of procedural or substantive safeguards against judicial error or prejudice.

It was in this milieu of almost total discretion in the trial courts and no procedural safeguards for the convicted defendant that the Supreme Court began to scrutinize the sentencing process for the possibilities of prejudice. In *Townsend v. Burke*,[14] an unrepresented defendant had been sentenced on the basis of a misreading of court records because of the judge's apparent failure to distinguish between prior arrests and prior convictions. The Supreme Court held that the resulting sentence was in violation of due process of law, but the Court failed to make it clear whether the absence of counsel, the materially untrue assumptions, or their juxtaposition violated due process.[15] Recently, however, the Supreme Court cited *Townsend* for the sole holding that due process is denied a defendant who is sentenced on the basis of materially untrue assumptions about his prior criminal record.[16] This reading of *Townsend* provided the basis for the *Weston* decision. The *Weston* court said that it was extending *Townsend* only slightly in holding that information used in sentencing must meet standards of probable accuracy as well as be probative of charges against the defendant.[17] Although the *Weston* court never specifically indicated that its decision was required by the due process clause, both the general language of the opinion and the doctrinal support of *Townsend* indicate that this is a consistent reading of the case. Other lower federal courts have extended the reasoning of *Townsend*, holding that the defendant has a right to be sentenced on the basis of complete information, and have remanded for preparation of a presentence report and resentencing.[18]

One year after *Townsend*, in a decision thought by some writers to have retarded the movement started by *Townsend* toward giving the defendant greater protection at sentencing,[19] the Supreme Court in *Williams v. New York*[20] held that the trial judge was not restricted in the sources and kinds of information he may use in determining sent-

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[14]334 U.S. 736 (1948).

[15]*Id.* at 740-41.

[16]United States v. Tucker, 92 S. Ct. 589, 592 (1972).

[17]448 F.2d at 634.

[18]*E.g.*, Leach v. United States, 353 F.2d 451, 452 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 917 (1966), *noted in* 74 YALE L.J. 379 (1964).

[19]Pugh & Carver, *Due Process and Sentencing: From* Mapp *to* Mempa *to* McGautha, 49 TEX. L. REV. 25, 29 (1970).

[20]337 U.S. 241, 250-51 (1949).

ence.[21] The defendant's principal contention was that he had a right to disclosure of the information and to cross-examine the sources of the information. The Court did not rule on his disclosure argument, presumably because the sentencing judge voluntarily disclosed the information, but held that due process does not assure the defendant the right to confront and cross-examine the sources of the information.[22]

The Court emphasized the need for efficient collection of information for sentencing and explained its decision on two grounds. First, both English and American judicial history indicated that at common law the sentencing judges were free to consider any information in determining sentence.[23] Secondly, the Court feared that to extend the traditional due process safeguards to sentencing would turn sentencing into a second trial with the consequence of preventing all courts "from making progressive efforts to improve the administration of criminal justice."[24]

The *Weston* court distinguished *Williams* because there the defendant had failed to object to consideration of the burglary charges in determining sentence on the grounds that they were not true. His objection was that the charges had not been introduced in a trial-type hearing. Janice Weston, on the other hand, not only denied the accuracy of the charges but also objected to their consideration without further substantiation.[25]

In 1967 the Supreme Court held in *Mempa v. Rhay*[26] that every defendant has a right to counsel at sentencing, a "critical stage" in the criminal trial. Unfortunately, however, the extension of due process safeguards at sentencing has been left largely to the lower federal courts.[27] One issue frequently raised is whether the defendant has a right to see the presentence report.[28] At present the Federal Rules of Criminal

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[21] *Accord*, State v. Thompson, 267 N.C. 653, 655, 148 S.E.2d 613, 615 (1966).

[22] 337 U.S. at 250-51.

[23] *Id.* at 246.

[24] *Id.* at 251.

[25] 448 F.2d at 631. The dissenting judge in *Weston* thought that the majority holding was a repudiation of the rule of *Williams*. *Id.* at 634.

[26] 389 U.S. 128, 134 (1967).

[27] Although the Court in *Williams* refused to extend the traditional due process safeguards of confrontation and cross-examination to sentencing, a footnote indicates that the decision is not to be read broadly: "What we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause. See *Townsend v. Burke*, 334 U.S. 736." 337 U.S. at 252 n.18.

[28] Guzman, *Defendant's Access to Presentence Reports in Federal Criminal Courts*, 52 IOWA L. REV. 161, 163-64 (1966).

Procedure leave disclosure entirely in the discretion of the trial judge.[29] Many writers feel that one logical and necessary implication of *Townsend* is that unless counsel is allowed to inspect the report, he will be unable to ensure that the defendant is not sentenced on the basis of materially untrue assumptions.[30] Although commentators contend that the Supreme Court has implicitly recognized a constitutional basis for the right of disclosure, the Court has not expressly so held.[31] Janice Weston was fortunate to have the opportunity to read the presentence report, for disclosure is generally denied in the federal courts.[32]

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[29]The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence *may* disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

FED. R. CRIM. P. 32(c)(2) (emphasis added).

[30]*E.g.*, Guzman, *supra* note 28, at 174. In support of the argument that right to counsel requires the right of disclosure, some writers rely partially on the general language of Oyler v. Boles, 368 U.S. 448, 452 (1962), a case in which a defendant was sentenced without notice under a recidivist statute: "[I]t would [be] an idle accomplishment to say that due process requires counsel but not the right to reasonable notice and opportunity to be heard." For further discussion, see Pugh & Carver, *supra* note 19, at 41.

[31]The case most frequently cited to support the argument for indirect recognition of this constitutional right is Kent v. United States, 383 U.S. 541 (1966). There the Supreme Court held that under the governing statute in the District of Columbia, a juvenile "was entitled to a hearing, including access by his counsel to the social records and probation or similar reports" before the juvenile court could waive jurisdiction. *Id.* at 557. The Court further characterized the failure of the juvenile court to provide the petitioner with a hearing as failure to act with "procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness." *Id.* at 553 (dictum); *see* Katkin, *Presentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues*, 55 MINN. L. REV. 15, 26-29 (1970).

In Specht v. Patterson, 386 U.S. 605, 606 (1967), the Supreme Court characterized *Williams* as holding "that the Due Process Clause of the Fourteenth Amendment does not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed." Although such a broad reading of *Williams* seems to weaken significantly any argument for disclosure and the opportunity to rebut, there are several indications that *Williams* is no bar to the assertion that due process must require these safeguards at sentencing. The portion of the *Williams* opinion referred to in *Patterson* deals with the impossibility of gathering information if the judge were restricted to information received in open court, and therefore it is arguable that the hearings referred to by the Court included the procedural safeguards of confrontation and cross-examination. This narrow reading of *Williams* is also supported by the facts of the case and the issues raised by the defendant.

[32]*See* Note, *The Presentence Report: An Empirical Study of Its Use in the Federal Criminal Process*, 58 GEO. L.J. 451, 474 (1970). *See also* United States v. Bryant, 442 F.2d 775, 776 (D.C. Cir. 1971) (abuse of discretion for trial judge to have uniform policy of nondisclosure).

Another implication to be drawn from this line of cases is that the defendant has the right to rebut adverse information. Although rule 32(a)(1)[33] gives the defendant the opportunity to present personally any information in mitigation of punishment, the Supreme Court has held that failure of the trial judge to ask the defendant if he had anything to say before sentence was imposed was neither a constitutional error nor "an omission inconsistent with the rudimentary demands of fair procedure."[34] However, the Court has pointed out that it has never decided whether it would be a violation of due process affirmatively to deny the defendant an opportunity to speak in mitigation of punishment.[35] But even this limited right will prove to be of substantial value to the defendant only when there is disclosure of the information used in sentencing.

The Anglo-American system of justice traditionally has relied upon

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However, the principal arguments against disclosure—that informational sources would dry up if the report were not kept confidential and that disclosure would unjustifiably extend sentencing—have now been discredited, and the 1970 proposed changes to the Federal Rules of Criminal Procedure provide for mandatory disclosure of the factual information to be used in determining sentence. COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE, 48 F.R.D. 553, 614-15 (1970). A good summary of arguments for and against disclosure is found in *id.* at 618 (Advisory Committee Note). Although the judiciary has not provided the principal impetus for the proposed change, there has been some judicial recognition of the advisability of a change in procedure. United States v. Fischer, 381 F.2d 509, 512 (2d Cir. 1967), *cert. denied*, 390 U.S. 973 (1968).

[33]FED. R. CRIM. P. 32(a)(1) states:

> Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

In Green v. United States, 365 U.S. 301, 304 (1961), the Supreme Court noted that this rule had evolved from the common law right of allocution.

[34]Hill v. United States, 368 U.S. 424, 428 (1962). However, at common law such an omission was grounds for reversal of the penalty of attainder. Barrett, *supra* note 10, at 121.

[35]McGautha v. California, 402 U.S. 183, 219 (1971). Mr. Justice Douglas, however, feels that it is already settled that allocution is a "constitutional right—the right to speak to the issues touching on sentencing before one's fate is sealed." *Id.* at 238 (dissenting opinion); *accord*, State v. Pope, 257 N.C. 326, 126 S.E.2d 126 (1962).

In *McGautha*, the Supreme Court held that allowing capital juries absolute discretion, uncontrolled by any standards, does not violate due process of law. However, because juries decide sentences only on evidence which has been introduced in open court, subject to control by procedural rules and traditional due process safeguards, the situation does not present the same problems as sentencing by a trial judge, who is not restrained in what information he may consider in his determination of sentence. For a discussion of *McGautha*, see Note, *Criminal Procedure—Capital Sentencing by a Standardless Jury*, 50 N.C.L. REV. 118 (1971).

the adversary system to bring out the facts; the impartiality of a judge has not been considered sufficient to ensure adequate investigation.[36] But as the sentencing stage of the criminal trial evolved, the impartiality of the sentencing judge became the only safeguard for the defendant. The convicted defendant might have a constitutional right to be present and to make a statement before sentence is pronounced, and he definitely has the right to be represented by counsel at sentencing and to be sentenced on the basis of accurate information. However, without the appropriate procedural safeguards, these rights are nothing more than hollow promises of justice. Can the impartiality of the judge assure the defendant the right not to be sentenced on the basis of inaccurate information? The usual answer to this question has been that disclosure and the right to rebut any adverse charges would provide the defendant with the necessary safeguards.[37] In *Weston*, the defendant denied the allegations, but the trial judge ruled that unless she could refute the charges with factual information, he had no alternative but to accept them as true.[38] The appellate court recognized that the procedure in the trial court allowed narcotics agents to accuse a convicted defendant of a second and more serious crime, presenting as evidence only the "unverified statements of a faceless informer," knowing that the defendant would have the burden of disproving the charge.[39] The court asserted that to burden the defendant with this difficult task of "proving a negative" would be a "great miscarriage of justice."[40]

The *Weston* court's primary concern seemed to be that the judicial system has a duty to ensure that every defendant is treated according to the broad requirement of fundamental fairness. The court asserted that "[a] rational penal system must have some concern for the probable accuracy of the informational imputs in the sentencing process."[41] In effect, the *Weston* court held that the trial judge had abused his discretion by basing the sentence on information of little probative value.[42]

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[36]The one notable exception to this has been by necessity in the issuance of search warrants by a magistrate.

[37]*See* Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291 (1952).

[38]The trial judge also informed defendant's counsel that pursuant to rule 35 of the Federal Rules of Criminal Procedure, if within 120 days after imposition of sentence facts were submitted that contradicted the charges in the presentence report, the sentence could be modified. 448 F.2d at 629.

[39]*Id.* at 631.

[40]*Id.* at 634.

[41]*Id.*

[42]Although the court never actually said that the trial judge had abused his discretion, this is the only logical implication of the holding.

The holding in *Weston* seems to be grounded in the proposition that this abuse of discretion resulted in a denial of due process.[43] Some support for this proposition is found in *Williams*, in which the Court recognized that "[l]eaving a sentencing judge free to avail himself of out-of-court information in making such a fateful choice of sentence does secure to him a broad discretionary power, one susceptible of abuse,"[44] and implied that such an abuse would be a violation of due process.[45] Although appellate courts readily recognize that a trial judge can abuse his discretion in sentencing,[46] only rarely is this indicated by anything other than dicta.[47] In *Weston* the court recognized that the safeguard of voluntary disclosure is largely illusory and attempted to set up a standard to ensure that sentences are based on accurate information that is probative of some assertion relevant to sentencing.

The requirement established by the *Weston* court to ensure that this discretion is not abused is that information used to support a presentence recommendation must "be persuasive of the validity of the charges there made."[48] This rather vague standard becomes clearer when read in conjunction with the court's pointed comparison of the information in the confidential report with a valid search or arrest warrant.[49] Apparently the *Weston* court has suggested that the trial judge should apply a probable cause test to the presentence report. Certain similarities between an affidavit for issuance of a warrant and a presentence report easily lead to such an analysis. Both frequently are based on information from informers or on other unsworn statements. Both can be based on evidence not legally competent in a criminal trial.[50] Hearsay can be the

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[43]448 F.2d at 632. The court's citation of *Townsend* as precedent for its decision and the general language used indicating the unfairness of the procedure followed in the trial court leads to the conclusion that *Weston* is based on the due process clause.

[44]337 U.S. at 251.

[45]*Id.* at 251-52.

[46]*See, e.g.*, Welch v. United States, 371 F.2d 287, 294 (10th Cir.), *cert. denied*, 385 U.S. 957 (1966) (dictum).

[47]*But see* United States v. Daniels, 446 F.2d 967 (6th Cir. 1971) (imposition of uniform sentences for *all* violators of draft orders is abuse of discretion).

[48]448 F.2d at 634.

[49]*Id.* at 631. The court said:

> [The conviction] is followed by a determination, based on unsworn evidence detailing otherwise unverified statements of a faceless informer that would not even support a search warrant or an arrest, and without any of the constitutional safeguards, that Weston is probably guilty of additional and far more serious crimes, for which she is then given an additional sentence of fifteen years.

Id.

[50]*Compare* Draper v. United States, 358 U.S. 307, 311 (1959), *with* Williams v. New York,

basis for the issuance of a warrant just as it can be the basis for a trial judge's determination of sentence.[51] And just as reviewing courts have been directed to pay deference to the determination of probable cause by a magistrate, appellate courts overrule the discretion of the trial judge in sentencing only when there has been a gross abuse of discretion.[52] Both are used in stages of the judicial process in which a trial-type hearing complete with standard rules of evidence and all the traditional due process safeguards would be either impossible or highly impractical.[53] Perhaps the most important similarity is the imperative need for standards to govern both the issuance of warrants and the use of presentence reports at sentencing. The fourth amendment has supplied the basic standard of probable cause to guard against unreasonable searches and seizures, and the Supreme Court has interpreted what this standard requires in situations such as in the use of hearsay.[54] The *Weston* decision suggests that the same standard should be used at sentencing.

The problem with setting this type of standard is that enforcement falls on the overburdened appellate courts. Although appellate courts traditionally have not reviewed the probative value of information used in sentencing, the appellate court does have a corresponding role in the guilt determination stage of the criminal trial.[55] The Supreme Court in *In re Winship*[56] held that the due process clause requires that an accused be criminally convicted only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. Although the standard of proof necessary to allow use of information in sentencing is not as high, the principle is the same.

Federal appellate courts have no authority to undertake substantive

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337 U.S. 241, 247 (1949). But there are limits to what can be considered. It would be a denial of due process for the trial judge to determine sentence on the basis of an alleged confession the constitutional admissibility of which has not been established. United States *ex rel* Brown v. Rundle, 417 F.2d 282, 285 (3d Cir. 1969).

[51]*Compare* Jones v. United States, 362 U.S. 257, 272 (1960), *with* Williams v. New York, 337 U.S. 241, 250 (1949).

[52]*Compare* Jones v. United States, 362 U.S. 257, 270-71 (1960), *with* United States v. Daniels, 446 F.2d 967 (6th Cir. 1971).

[53]*See* Williams v. New York, 337 U.S. 241 (1949).

[54]An affidavit must meet certain requirements before a warrant will be issued on the basis of information from an informer. *See* Spinelli v. United States, 393 U.S. 410, 415-19 (1969).

[55]Some support for review of the probative value of information used in sentencing is found in Arciniega v. Freeman, 92 S. Ct. 22 (1971) (per curiam), in which the Court decided that petitioner's parole status had been revoked without "satisfactory evidence."

[56]397 U.S. 358, 364 (1970).

review of sentences so long as the sentence falls within the statutory limits.[57] The majority of the *Weston* court said that its review was justified because "[t]here is a difference between reviewing a sentence and deciding that certain types of information should not, for various reasons, be considered in sentencing."[58] In support of the procedure chosen—vacating the sentence and remanding with instructions to disregard the objectionable information—the court cited several cases as precedents.

In *Verdugo v. United States*,[59] the Ninth Circuit Court of Appeals held that when evidence obtained in violation of constitutional rights is used in sentencing, the case would be remanded for resentencing without considering the evidence so obtained. *Tucker v. United States*,[60] another Ninth Circuit case and one that was subsequently affirmed by the Supreme Court, held that in determining sentence the trial judge could not consider prior uncounseled convictions invalid under *Gideon v. Wainwright*.[61] These cases set rules that a trial judge can easily follow without the necessity of extensive appellate court involvement. However, the *Weston* decision virtually demands appellate review of every case in which a presentence report is used. In *Weston* the trial judge examined the supporting information apparently in a manner similar to that which would be required under the probable cause standards, but the appellate court differed in its estimation of the probative value of the information. The dissenting judge may be correct in his assertion that the majority is making an end run around the cases barring review of sentences and thus opening up Pandora's box on procedure at sentencing.[62] But the real question is not whether such a procedure goes against precedent or will be burdensome; rather, it is whether fundamental fairness requires such a result.

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[57]Gore v. United States, 357 U.S. 386, 393 (1958) (dictum); *accord*, Gurera v. United States, 40 F.2d 338, 340-41 (8th Cir. 1930). *But see* United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), which some commentators feel may signal a penological revolution in the federal appellate courts. *Wiley* is discussed in Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671, 683-84 (1962). Presumably, however, this rule would not prevent review of a sentence on the grounds of a violation of the eighth amendment prohibition against cruel and unusual punishment.

[58]448 F.2d at 631.

[59]402 F.2d 599, 610-13 (9th Cir. 1968), *cert. denied*, 402 U.S. 961 (1971). *Contra*, United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

[60]431 F.2d 1292 (9th Cir. 1970), *aff'd*, 92 S. Ct. 589 (1972).

[61]372 U.S. 335 (1963).

[62]448 F.2d at 634 (dissenting opinion).

Perhaps the Bill of Rights does not provide safeguards at sentencing, but in the late eighteenth century, no safeguards were needed. At that time, sentences were fixed for the crime, not individualized by the sentencing judge to fit the defendant. Today the convicted defendant needs protection from mistakes and arbitrary and capricious action during sentencing just as much as the accused during trial. In a sector of the judicial process in which the stakes for society and the defendant are so high as they are at sentencing, and in which procedural safeguards are inadequate, there is a strong case for developing a body of substantive standards to ensure that sentences are not based on inaccurate assumptions of little probative value. Disclosure of the presentence report and opportunity to rebut adverse charges is certainly a safeguard that should be guaranteed to the criminal defendant. However, as *Weston* has shown, that alone is not sufficient. Perhaps the best solution would be to provide for an appellate system to review sentences of all defendants. Short of such a radical change, however, the solution of the *Weston* court may provide a viable alternative.

MARVIN ALLEN BETHUNE

Professional Responsibility—Covenants Not To Compete Between Attorneys

A, a lawyer, wishes to hire *X*, another lawyer, to workfor him in a small town in western North Carolina. Because the town is small, *A* would like somehow to ensure that *X* will not later leave his employment and set up a competing practice in the same community. *A* most likely will ask *X* to agree in writing not to practice law in the town for one year after the termination of employment. *X*, understanding *A*'s position and intending to leave the town after a few years anyway, agrees. Whether or not this is a common situation in this state or around the country, it appears that this would be a reasonable approach to the problem provided the lawyers have a full understanding of their contract. However, according to the Council of the North Carolina State Bar, *A*, and probably *X*, is guilty of unethical conduct.

On October 21, 1971, the Council responded to two inquries related to the problem of *A* and *X:*

(1) Is it unethical for an attorney employing another attorney to