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Confrontation at Capital Sentencing Hearings: Illinois Violates the Federal Constitution by Permitting Juries to Sentence Defendants to Death on the Basis of Ordinarily Inadmissible Hearsay

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I. INTRODUCTION

In the 1949 case of *Williams v. New York*,[1] the Supreme Court held that a judge imposing a sentence on a convicted criminal may rely on information contained in written presentence reports without granting the defendant an opportunity to confront and cross-examine the out-of-court sources of information. The Court extolled what it regarded as modern theories of penology that urge judges to consider first each defendant's background, record, and character, and then fit a punishment to the criminal as well as to the crime. In the Court's view, individualized sentencing marked a progressive advance from the days when judges pronounced a sentence based solely on the crime and the limited information about the defendant's background that came to light at trial. To gather and apply the wide variety of information relevant to enlightened sentencing, the Court wrote, judges cannot be constrained by the

1. 337 U.S. 241 (1949).

strict procedures and rules of evidence that filter the flow of information in criminal trials.[2] Under the modern practices approved in *Williams*, an officer of the court investigates the convicted defendant's entire record and background. Judges may rely on the subsequent presentence report without violating the due process clause.

The *Williams* decision authorized two departures from the exclusionary rules of evidence that govern criminal trials. First, it recognized that an expanded range of information about the defendant's background is relevant to sentencing and not unfairly prejudicial.[3] Second, it freed judges from the constraints of the hearsay rule and the Constitution's closely-related guarantee that defendants may confront and cross-examine adverse witnesses.[4] *Williams* did not require that states individualize sentencing and required no changes in existing sentencing practices. Likewise, *Williams* did not consider state procedures that left the sentencing determination to the jury. In more than a dozen states, juries determined the sentence for at least some noncapital crimes.[5] Moreover, in almost every state that permitted capital punishment, the jury, not the judge, fixed the sentence in capital cases.[6]

When the Court decided *Williams*, juries set the sentence at the same time they determined the defendant's guilt. The rules of evi-

2. *Id.* at 247.

3. *Id.* at 246-47. As the court observed:

> Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt.

Id. Regardless of whether information about the defendant's background is irrelevant or prejudicial in proving guilt, *Williams* ruled that such ordinarily inadmissible evidence may help the sentencer determine the appropriate punishment. *See also* MODEL PENAL CODE § 210.6 comment 8 (1980).

4. *Williams*, 337 U.S. at 249-51. The Court had earlier held that the due process clause did not permit criminal defendants to be convicted without an opportunity to question adverse witnesses. *Id.* at 245 (citing *In re* Oliver, 333 U.S. 257, 273 (1948)). Despite this holding, the Supreme Court did not squarely hold that the sixth amendment right of confrontation fully applied to the states until 1965. *See* Pointer v. Texas, 380 U.S. 400 (1965).

5. *See* Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 968-69 (1967) (thirteen states in the mid-1960s let the jury determine the sentence for some noncapital crimes).

6. *See* Andres v. United States, 333 U.S. 740, 759, 767 (1948) (Frankfurter, J., concurring) (appendix describes procedures for capital sentencing in every state); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1100-01 (1953).

dence that govern criminal trials limited the information upon which juries could base their sentencing decision. The rules generally prevented the prosecutor from presenting evidence of the defendant's criminal record.[7] They also barred the defendant from offering mitigating evidence that was not relevant to whether he had committed the crime.[8] In capital trials, juries chose between life and death without full information on the defendant's prior criminal record, character and propensities.[9] Jury sentencing thus prevented the individualized punishment that the Supreme Court extolled in *Williams*.

Beginning in the 1950s, some states reformed their sentencing procedures by splitting capital trials in two. After finding a defendant guilty, the jury heard evidence relevant to the sentencing decision in a separate phase of the trial.[10] In 1959, the American Law Institute's Model Penal Code endorsed split trials and further proposed that legislatures specify aggravating and mitigating factors to guide the jury.[11] Although by 1971 six states provided separate sentencing hearings in capital cases, none provided any standards or otherwise instructed the jury how to decide which defendants should live and which should die.[12]

A revolution in capital sentencing procedures ensued after 1972, when the Supreme Court held in *Furman v. Georgia*[13] that every state's capital punishment scheme violated the eighth amendment's ban on cruel and unusual punishment.[14] Each justice wrote a separate opinion in the five-to-four decision, and none joined any of the others. In the aftermath, *Furman*-parsing became sport for commentators and a chore for state legislators who rushed to enact new capital punishment statutes.[15]

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7. Knowlton, *supra* note 6, at 1111-12.

8. *Id.* at 1113.

9. *See* Note, *supra* note 5, at 979; *see also* Knowlton, *supra* note 6, at 1108-11 (noting that at trial some state courts admitted evidence relevant solely to the issue of punishment).

10. *See* Note, *supra* note 5, at 997. California introduced its two-trial system in 1957. Note, *The California Penalty Trial*, 52 CALIF. L. REV. 386, 386-387 (1964). Pennsylvania followed in 1959, *see* Note, *Criminal Procedure*, 110 U. PA. L. REV. 1036, 1037-38 (1962), and New York in 1963, Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50, 51 (1964).

11. McGautha v. California, 402 U.S. 183, 202 (1971) (citing MODEL PENAL CODE § 201.6 (Tent. Draft No. 9, 1959)).

12. *See id.* at 208.

13. 408 U.S. 238 (1972).

14. *Id.* at 240; *see also* Kaplan, *Evidence in Capital Cases*, 11 FLA. ST. U.L. REV. 369, 370 (1983).

15. Within four years after the *Furman* decision, 35 states enacted new laws providing for capital punishment. *See* Gregg v. Georgia, 428 U.S. 153, 179-80 (1976).

In reviewing five of the new statutes in 1976, the Court ended four years of doubt about the constitutionality of capital punishment and set the course of its modern capital sentencing decisions.[16] It rejected statutes that imposed mandatory death sentences, but, influenced by the Model Penal Code, upheld statutes that combined separate penalty hearings with "guided discretion."[17] The Court's modern capital cases recognize that because death differs from all other punishments in its severity and finality, capital sentencing procedures must conform to heightened standards of fairness and reliability.[18] To satisfy the eighth amendment, statutes must specify objective criteria that narrow the class of murderers who are eligible for capital punishment and must also preserve the sentencer's discretion to consider every defendant as an individual.[19] As a corollary, defendants must have the opportunity to offer any mitigating evidence relevant to their background, character, or the circumstances of the crime.[20] Thus, the individualized sentencing praised in the *Williams* opinion became mandatory in capital cases.[21]

16. *See Gregg*, 428 U.S. 153 (1976) (upholding statute); Proffitt v. Florida, 428 U.S. 242 (1976) (same); Jurek v. Texas, 428 U.S. 262 (1976) (same); Woodson v. North Carolina, 428 U.S. 280 (1976) (rejecting statute); Roberts v. Louisiana, 428 U.S. 325 (1976) (same). In each case, Justices Powell, Stewart and Stevens announced the judgment of the Court in a joint opinion. Justices Brennan and Marshall voted to reject each statute, while Justices White, Burger, Rehnquist, and Blackmun voted to approve each statute. The Court thus voted 7-2 to uphold three statutes and rejected the two others by a 5-4 vote. Later opinions regarded the joint opinion of Justices Powell, Stewart, and Stevens as binding precedent. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 601-02 (1978) (Burger, C.J.); Gardner v. Florida, 430 U.S. 349, 364 (1977) (Blackmun, J., concurring).

17. Kaplan, *supra* note 14, at 370 (discussing "guided discretion"). *See* McClesky v. Kemp, 481 U.S. 279, 302 n.24 (1987) (Georgia statute approved in *Gregg* generally followed Model Penal Code); Jurek v. Texas, 428 U.S. 262, 272-73 (1976) (definition of capital murder produces same result as Model Penal Code's aggravating factors and statute also allows sentencer to consider mitigating evidence); Proffitt v. Florida, 428 U.S. 242, 247-48 (1976) (Florida statute patterned after Model Penal Code).

18. *See, e.g.*, Clemons v. Mississippi, 110 S. Ct. 1441, 1448 (1990) ("twin objectives" of "measured consistent application and fairness to the accused"); Murray v. Giarrantano, 109 S. Ct. 2765, 2769-70 (1989) (Rehnquist, C.J.) (finality of death penalty requires greater reliability when it is imposed); Johnson v. Mississippi, 108 S. Ct. 1981, 1986 (1988) (unanimous opinion) (eighth amendment gives rise to special need for reliability in determination that death is the appropriate punishment).

19. *See* Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988).

20. *See* California v. Brown, 479 U.S. 538, 541 (1987); *see also* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (" 'sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death' ") (emphasis in original) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

21. For several years, the Court left open the possibility that the Constitution might permit mandatory sentences of death for some crimes. That possibility closed in 1987, when the Court held that states cannot require automatic sentences of death when life-

The Supreme Court is clearly convinced that capital punishment serves legitimate state interests and can be imposed without violating the eighth amendment. This Article declines to challenge the Court's basic premise. Instead, focusing on the practice in Illinois, it argues that states violate the Court's standards for procedurally fair sentencing hearings when they permit juries to impose death sentences on the basis of ordinarily inadmissible hearsay.[22]

Illinois legislators looked at the Model Penal Code and the stat-

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term prisoners are convicted of killing guards. Sumner v. Shuman, 483 U.S. 66, 78 (1987).

22. Every state that imposes capital punishment provides for a separate hearing in which the sentencer may consider a wider range of information than would be relevant in a criminal trial. But many statutes do not clearly reveal whether the rules against hearsay remain in force. *See* Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1225-27 (1984). Of the 37 states that authorize capital punishment, 30 entrust the final authority over the life-or-death decision to the jury, unless the defendant chooses to be sentenced by a judge. *See* Spaziano v. Florida, 468 U.S. 447, 463 n.9 (1984) (29 excluding Oregon); OR. REV. STAT. § 163.150(1)(a) (Supp. 1990) (effective Dec. 1984). Eighteen of these 30 states enforce criminal trial rules of evidence either throughout the entire sentencing proceeding or at least as the prosecutor presents aggravating evidence.

In seven states that provide for jury sentencing, the statutes clearly forbid hearsay in the prosecution's presentation of aggravating evidence. In Louisiana, Missouri, and Virginia, criminal trial rules of evidence prevail throughout the entire sentencing proceeding. *See* LA. CODE CRIM. PROC. ANN. art. 905.2 (West 1984); MO. ANN. STAT. § 565.030.4 (Vernon Supp. 1990); VA. CODE ANN. § 19.2-264.4(B) (1983). In Arkansas, Connecticut, Massachusetts, and New Jersey, evidence relevant to aggravation must be presented according to the rules of evidence. Evidence relevant to mitigation may be presented without regard to the rules of evidence. *See* ARK. STAT. ANN. § 5-4-602(4) (1987); CONN. GEN. STAT. ANN. § 53a-46a(c) (West 1985); MASS. GEN. LAWS ANN. ch. 279, § 68 (West Supp. 1989); N.J. STAT. ANN. § 2C:11-3(c)(2)(b) (West Supp. 1990).

In 11 additional states that provide for jury sentencing, court decisions reveal that the sentencing hearing proceeds according to the rules of evidence. *See* People v. Bloom, 48 Cal. 3d 1194, 1228, 774 P.2d 698, 719, 259 Cal. Rptr. 669, 690 (1989), *cert. denied*, 110 S. Ct. 1503 (1990); Fair v. State, 245 Ga. 868, 871, 268 S.E.2d 316, 320, *cert. denied*, 449 U.S. 986 (1980); Lanier v. State, 533 So. 2d 473, 486-90 (Miss. 1988); State v. Guzman, 100 N.M. 756, 761-62, 676 P.2d 1321, 1326-27, *cert. denied*, 467 U.S. 1256 (1984); State v. Barts, 321 N.C. 170, 178-82, 362 S.E.2d 235, 239-41 (1987); State v. Glenn, 28 Ohio St. 3d 451, 458-59, 504 N.E.2d 701, 709-10 (1986) (hearsay inadmissible at penalty hearing except for reports of mental examination and presentence investigation, which defendant may choose to forego), *cert. denied*, 482 U.S. 931 (1987); State v. Chatman, 671 P.2d 56, 57 (Okla. Crim. App. 1983); State v. Moen, 309 Or. 45, 82-86, 786 P.2d 111, 134-36 (1990); State v. Stewart, 288 S.C. 232, 236, 341 S.E.2d 789, 791 (1986); Rumbaugh v. State, 589 S.W.2d 414, 417 (Tex. Crim. App. 1979); State v. Bartholomew, 101 Wash. 2d 631, 639, 683 P.2d 1079, 1086 (1984) (holding statute, which permitted prosecution to introduce hearsay, unconstitutional). Some of these decisions discuss only the defendant's evidence. This article assumes that the rules of evidence govern the entire proceeding whenever a court rules that defendants must follow those rules.

In six states, prosecutors are authorized to present aggravating information to the sentencing jury through ordinarily inadmissible hearsay. *See* People v. Salazar, 126 Ill. 2d 424, 467-70, 535 N.E.2d 766, 784-86 (1988), *cert. denied*, 110 S. Ct. 3288 (1990); MD. ANN. CODE art. 27, § 413(c)(iv) (1987) (jury may receive presentence report); NEV. REV.

utes approved in the Supreme Court's 1976 capital cases when enacting a new capital punishment statute in 1977.[23] The Illinois statute provides for a separate sentencing hearing in which a convicted murderer becomes eligible for execution if the jury finds one of several specified aggravating factors.[24] In a second phase of the sentencing hearing, the jury hears additional evidence relevant to aggravation and mitigation and decides whether a death-eligible

STAT. § 175.552 (1985); 7 TENN. CODE ANN. § 39-13-204(c) (1990); UTAH CODE ANN. § 76-3-207(2) (1990); WYO. STAT. § 6-2-102(c) (Supp. 1989).

In the remaining six states in which juries may make the final choice between life and death, the statutes and court decisions do not clearly reveal whether the prosecution may rely on hearsay. *See* COLO. REV. STAT. § 16-11-103(1)(b) (Supp. 1989) (any relevant and probative evidence; fair notice required); DEL. CODE ANN. tit. 11, § 4209(c) (1987) (evidence the court deems relevant and admissible; prior written notice required); KY. REV. STAT. ANN. § 532.025(1) (Michie/Bobbs-Merrill Supp. 1988) (prior notice of aggravating evidence required); N.H. REV. STAT. ANN. § 630.5(II) (1986) (any matter court deems relevant); 42 PA. CONS. STAT. ANN. § 9711(a)(2) (Purdon 1982) (relevant and admissible evidence); S.D. CODIFIED LAWS ANN. § 23A-27A-2 (1988).

In Arizona, Montana, Nebraska, and Idaho, the trial judge determines the sentence without a jury. Arizona prosecutors must follow criminal trial rules of evidence when presenting their case-in-chief, *see* ARIZ. REV. STAT. ANN. § 13-703(C) (1989), but may rebut the defendant's evidence with hearsay, State v. Ortiz, 131 Ariz. 195, 208-09, 639 P.2d 1020, 1033-34 (1981), *cert. denied*, 456 U.S. 984 (1982). The remaining three states permit the trial judge to consider hearsay. *See* Sivak v. State, 112 Idaho 197, 214-15, 731 P.2d 192, 209 (1986); State v. Smith, 217 Mont. 461, 474, 705 P.2d 1087, 1095 (1985), *cert. denied*, 474 U.S. 1073 (1986); State v. Palmer, 224 Neb. 282, 303-04, 399 N.W.2d 706, 722-23 (1986), *cert. denied*, 484 U.S. 872 (1987).

In Alabama, Florida, and Indiana, where the trial judge may sentence a defendant to death even after a jury has recommended life, the status of the right of confrontation is uncertain. The statutes of both Alabama and Florida permit the prosecution to introduce relevant hearsay at the sentencing hearing. *See* ALA. CODE § 13A-5-45(d) (1982); FLA. STAT. ANN. § 921.141(1) (West 1985). The opinions of the Florida Supreme Court are confusing because they appear to require a full right of confrontation while simultaneously permitting the prosecution to introduce hearsay. *Compare* Walton v. State, 481 So. 2d 1197, 1200 (Fla. 1985) (sixth amendment right of confrontation applies throughout the capital sentencing hearing), *cert. denied*, 110 S. Ct. 759 (1990) *with* Dragovich v. State, 492 So. 2d 350, 355 (Fla. 1986) (statute permits hearsay as long as defendant has fair opportunity to rebut). Both Florida and Alabama courts may be influenced by a decision of the Eleventh Circuit that held that a defendant was deprived of his sixth amendment right of confrontation when the sentencing judge relied in part on written reports of a psychiatric examination. *See* Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982), *modified*, 706 F.2d 311 (1983). Some right of confrontation is provided to Alabama defendants in capital sentencing, though its scope is not clear. *See Ex parte* Clisby, 456 So. 2d 95 (Ala. 1983) (remanding for reconsideration of certain evidence in light of *Proffitt v. Wainwright*). The issue is unresolved in Indiana, the third state that permits the trial judge to overrule the jury's sentencing recommendation. *See* Moore v. State, 479 N.E.2d 1264, 1279-80 (Ind. 1985), *cert. denied*, 474 U.S. 1026 (1985).

23. *See* Note, *The 1977 Illinois Death Penalty Statute: Does It Comply with Constitutional Standards?*, 54 CHI.-KENT L. REV. 869, 885 n.136 (1978) (legislators considered Model Penal Code, post-*Furman* statutes in other states, and proposed legislation in Congress).

24. ILL. REV. STAT. ch. 38, para. 9-1(b), (d) (1989).

defendant shall live or die.[25] In this latter stage, the statute expressly discards the ordinary rules of evidence.[26] Although the defendant may cross-examine the witnesses who appear in court, he has no right to confront or cross-examine the out-of-court declarants whose statements are offered in evidence.[27]

The Illinois Supreme Court has relied on *Williams v. New York*[28] to uphold the statute and deny defendants the right to confront adverse witnesses at capital sentencing hearings. This Article argues that the Illinois court has erroneously regarded *Williams* as authority for submitting hearsay evidence to a jury in a modern capital sentencing hearing.[29] After *Furman*, the Supreme Court has characterized the sentencing phases of capital trials as full adversary proceedings[30] that must incorporate many of the procedural protections that apply in all criminal trials.[31] Although the

25. *Id.* para. 9-1(e).

26. The statute provides that information may be presented "regardless of its admissibility under the rules governing the admission of evidence at criminal trials." *Id.*

27. In 1965, shortly after the New York legislature provided for split capital trials with evidentiary rules similar to those prevailing now in Illinois, one commentator offered this criticism:

> A detailed statutory procedure is established which creates the aura of rationality around a proceeding which can never be rational because no institution devised by man can ever possess the facts or the wisdom upon which to base the irreversible judgment of death. But then, as if to flaunt its irrational foundation in our faces, the two-trial system in New York provides that at the hearing to determine life or death none of the existing rules of evidence are applicable, so that all types of hearsay, unproved allegations and even unconstitutionally obtained evidence may be introduced. Presumably the legislators believed that the rules which are designed to assure a fair trial are irrelevant to the determination of life or death.

Redlich, *Edmond Cahn: A Philosopher for the Democratic Man*, 40 N.Y.U. L. REV. 259, 269-70 (1965).

28. 337 U.S. 241 (1949).

29. The Supreme Court has never held that prosecutors may introduce ordinarily inadmissible hearsay before a sentencing jury. Conversely, however, the Court has held that a state violated due process by enforcing its hearsay rule in a manner that prevented the defendant from introducing relevant mitigating evidence in a capital sentencing hearing. Green v. Georgia, 442 U.S. 95, 97 (1979).

30. In an adversary system, the contending parties investigate, present, and control the evidence that they submit to a relatively passive decision maker who generally has no advance knowledge of the case. *See* Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302, 312 (1989). By contrast, in the inquisitorial system that developed in Europe, the decision maker actively develops the case, considers almost any logically probative evidence, including hearsay, and often functions without oral testimony or cross-examination by the parties. *See* Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1018-19 (1974).

31. *See* Strickland v. Washington, 466 U.S. 668, 686-87 (1984); Bullington v. Missouri, 451 U.S. 430, 438 (1981).

Supreme Court has never held that the confrontation clause applies in capital sentencing proceedings, this Article relies on the Supreme Court's capital cases and procedural due process opinions to conclude that Illinois violates the United States Constitution when it fails to provide a right of confrontation throughout the entire capital sentencing hearing.[32]

Part II of this Article explains that the Supreme Court's decisions that first required individualized sentencing in capital cases provide no support for submitting hearsay evidence to a sentencing jury. This Article further demonstrates that by the time Illinois enacted its new capital punishment statute in 1977, the Supreme Court had already undermined the value of *Williams v. New York* as a controlling precedent in capital sentencing.[33] Part III analyzes the uneven reasoning that pervades many of the Illinois Supreme Court's rulings on the evidence that is admissible at capital sentencing hearings. It criticizes the lax standards that permit prosecutors to employ unreliable and ordinarily inadmissible hearsay in their efforts to persuade sentencers to impose death.[34] Part IV explains two rationales that justify the rule against hearsay. It argues that because neither rationale applied in *Williams*, but both apply to modern capital sentencing hearings, the Illinois Supreme Court improperly extended *Williams* to cases in which juries make the life-or-death decision.[35] Part V argues that the Supreme Court's procedural due process decisions require that states permit defendants to cross-examine their accusers in capital sentencing hearings.[36] The Article concludes that the Court's capital cases suggest that a right of confrontation is essential to the procedural fairness that must govern every stage of the decision to end a defendant's

32. In general, this Article regards the right of confrontation as the defendant's right to insist that the prosecution make its case through witnesses who present sworn testimony about their firsthand observations in open court and subject to cross-examination, unless the prosecution's evidence falls within a recognized exception to the hearsay rule. Because the right of confrontation belongs to the defendant, the arguments presented here do not suggest that the state should have an equivalent right to insist that defendants always present their mitigating evidence through the in-court testimony of firsthand witnesses. *Cf.* Green v. Georgia, 442 U.S. 95 (1979), discussed *supra* note 29.

For another argument that defendants should have a right of confrontation at capital sentencing hearings, see Note, *Fairness to the End: The Right to Confront Adverse Witnesses in Capital Sentencing Proceedings*, 89 COLUM. L. REV. 1345 (1989); *see also* Comment, *The Right of Confrontation and Reliability in Capital Sentencing, Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982)*, 20 AM. CRIM. L. REV. 599 (1983).

33. *See infra* notes 38-68 and accompanying text.

34. *See infra* notes 69-294 and accompanying text.

35. *See infra* notes 295-344 and accompanying text.

36. *See infra* notes 345-475 and accompanying text.

life.[37]

II. Individualized Sentencing Does Not Require Admitting Hearsay

In capital cases, the Supreme Court now requires the same individualized sentencing that it praised in *Williams v. New York*.[38] But the Court has not granted juries the same freedom from evidentiary rules that *Williams* extended to judges. Although the Court encourages states to provide sentencing juries with information about the defendant's prior record, character, and criminal propensities, it has never indicated that it would extend *Williams* to permit prosecutors to submit presentence reports or other hearsay evidence to a sentencing jury. On the contrary, the Court's modern cases have seriously diminished the precedential value of the *Williams* opinion in capital cases.

A. Individualized Sentencing

Statutes that first survived the Court's post-*Furman* scrutiny borrowed two features from the proposed Model Penal Code. They combined a separate penalty hearing with legislative standards to guide the sentencer's discretion.[39] A third provision of the Code proposed that the capital sentencing hearing dispense with exclusionary rules of evidence, but retain the law of privilege.[40] In the accompanying commentary, the drafters explained that they would permit the prosecution to submit presentence investigation reports to the jury.[41] The commentary did not discuss *Williams* nor did it analyze whether offering hearsay to the jury would interfere with the defendant's right to confront adverse witnesses.[42]

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37. *See infra* notes 476-499 and accompanying text.

38. 337 U.S. 241 (1949).

39. *See supra* note 17 and accompanying text.

40. The Code provision permits all relevant, unprivileged evidence to be presented, without regard to ordinary rules of admissibility:

> In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence.

MODEL PENAL CODE § 210.6 (1980).

41. *Id.* comment 8.

42. *See id.* In 1970, a commission assigned to propose revisions to the federal crimi-

After the 1976 cases, the Model Code appeared to exemplify a sentencing scheme that met the Court's post-*Furman* standards. The Court has frequently cited the Code with approval in other decisions on capital sentencing.[43] Nonetheless, the decisions that require individualized sentencing have never approved the portion of the Model Penal Code, or any statute, that permits the prosecution to submit ordinarily inadmissible hearsay to a sentencing jury.[44]

For example, in the first of the 1976 cases, *Gregg v. Georgia*,[45] the Supreme Court quoted the Model Penal Code commentary and applauded its suggestion that states abandon, in the sentencing phase of a capital trial, the rules of evidence that restrict what information is relevant. But nothing in the opinion suggests that the Court also endorsed the Model Penal Code's view that the prosecution could permissibly submit hearsay evidence to the jury. Rather, *Gregg* assumed that the Georgia statute revised the rules of evidence only to accommodate a broad view of the types of evi-

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nal code adopted the Model Penal Code's provision for suspending the exclusionary rules of evidence at the penalty hearing. Although the commission noted that California courts prohibited hearsay in the penalty hearing and further noted that one commentator criticized the New York provision that permitted hearsay, it concluded that allowing the defendant to rebut any hearsay statements maintained the fairness of the proceedings. *See Memorandum on the Capital Punishment Issue*, in NATIONAL COMM'N ON REFORM OF FED. CRIMINAL LAW, 2 WORKING PAPERS 1347, 1372-73 (1970).

43. *See, e.g.*, Stanford v. Kentucky, 109 S. Ct. 2969, 2984 (1989) (minimum age for execution); Thompson v. Oklahoma, 487 U.S. 815, 830 n.33 (1988) (execution of children); Tison v. Arizona, 481 U.S. 137, 157 (1987) (some forms of felony murder).

44. The Court first discussed the Model Penal Code's capital sentencing procedures a year before *Furman*. In McGautha v. California, 402 U.S. 183 (1971), an appeal from one of California's bifurcated capital trials, the Court held that the due process clause did not require that states formulate specific statutory standards to guide juries as they decided between life and death. In a case consolidated with *McGautha*, *Crampton v. Ohio*, the Court held that juries may constitutionally decide guilt and punishment in the same proceeding. Despite its holding, the Court recognized the problems posed by unitary trials like Ohio's and also acknowledged that unguided discretion might be undesirable even when states like California provide a separate hearing to determine punishment. The opinion, however, suggested that only state legislatures—not federal courts—could appropriately reform capital sentencing procedures. The Court noted that the American Law Institute's proposed Model Penal Code attempted to solve the problems posed by unitary trials and standardless discretion. The *McGautha* Court doubted whether any legislative formula—including the Model Penal Code's—could adequately determine and articulate in advance exactly which criminals deserved death and which deserved mercy. The Court was also skeptical that any preset written standards would adequately guide a jury in carrying out legislative policy. Nevertheless, the Model Penal Code's suggested capital punishment procedures appear as an appendix to the *McGautha* opinion, which never discussed the provision that suspends the exclusionary rules of evidence at the penalty phase of the capital trial.

45. 428 U.S. 153 (1976).

dence that are relevant to imposing a proper sentence.[46] The Court assumed that Georgia's penalty hearing permitted the parties to submit "relevant information under fair procedural rules."[47] In this light, the Court's comment that Georgia "wisely" had refrained from imposing "unnecessary restrictions" on the evidence admissible at the penalty hearing must be read to approve only a broadened standard of relevance.[48] The *Gregg* opinion does not suggest that the rule against hearsay or the right of confrontation are "unnecessary restrictions."[49] In the Court's view, the jury should have as much information as possible at the sentencing hearing, "[s]o long as the evidence introduced do[es] not prejudice a defendant."[50] The Court did not explain what sort of evidence impermissibly might prejudice defendants in capital sentencing hearings.

The Court in *Proffitt v. Florida*,[51] a companion case to *Gregg*, held that Florida's capital sentencing scheme adequately directed the sentencer's discretion. In Florida, the judge may reject the sentence the jury recommends, and the Court noted that the Florida statute permits the judge to order that a presentence report be prepared. Nothing in the opinion, however, suggests that the Court would approve submitting the hearsay information in a presentence report directly to a sentencing jury. On the contrary, the opinion suggests that presentence reports are appropriate *only* when trial judges impose sentence.[52] Noting that presentence re-

46. In a footnote, the Court noted that it was reviewing an early version of the Georgia statute. An amended version, not before the Court, deleted the phrase "subject to the laws of evidence." Although the Court was not sure whether the amendment aimed simply to increase the "types of evidence" admissible at the sentencing hearing, *id.* at 164 n.7, the Georgia Supreme Court later removed any uncertainty. The sentencing inquiry expands the types of information that may be proved at the punishment phase of capital trials, but the familiar rules of evidence with regard to reliability are retained. Fair v. State, 245 Ga. 868, 871, 268 S.E.2d 316, 320, *cert. denied*, 449 U.S. 986 (1980).

47. *Gregg*, 428 U.S. at 192. The quoted portion is a transition as the Court began to discuss the need for standards to guide the jury's discretion. The Court said, "But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury." *Id.*

48. *Id.* at 203.

49. *Id.* In support of its assertion that Georgia approved "open and far-reaching argument" and imposed no unnecessary restrictions on the evidence admissible at the penalty hearing, the Court cited Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975). *Brown* held that a defendant who declined to testify in the guilt phase cannot be prohibited in the penalty phase from testifying to the circumstances of the crime. *Id.* at 649-50, 220 S.E.2d at 927.

50. *Gregg*, 428 U.S. at 204.

51. 428 U.S. 242 (1976).

52. The Court said: "*Because the trial judge* imposes sentence the Florida court has

ports often contain information relevant to sentencing, the Court cited to a section of the *Gregg* opinion.[53] That section of *Gregg* discusses the ideal of individualized sentencing, as expressed in several law reform studies and Supreme Court opinions, including *Williams v. New York*.[54] These authorities, the *Gregg* opinion noted, all assumed that a judge, not a jury, would determine the appropriate sentence.[55]

Another of the 1976 opinions, *Woodson v. North Carolina*,[56] rejected a statute that mandated death for certain crimes. The Supreme Court declared that in capital cases, the Constitution requires that sentencers consider each defendant's particular background, record, and character, as well as the circumstances of the crime itself.[57] With this decision, the "enlightened policy" that endorsed individualized sentencing in *Williams v. New York* became a constitutional command. Although the Court cited *Williams* as it discussed the goal of individualized sentencing, it never suggested that *Williams*'s technique for conveying information to the sentencer, a hearsay-infected presentence report, would be equally valid in a jury proceeding.

B. Eroding the Williams *Decision*

The rationale of *Williams* has continued to guide the Supreme Court when defendants invoke the Constitution to question a judge's evidentiary basis for imposing a prison sentence.[58] In capital cases, however, the post-*Furman* decisions of the Court have seriously eroded *Williams*'s value as a guide for determining what procedures the Constitution permits at capital sentencing.[59]

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ruled that he may order preparation of a presentence investigation report to assist him in determining the appropriate sentence." *Id.* at 252 n.9 (emphasis added).

53. *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 189 n.37 (1976)).

54. *Gregg*, 428 U.S. at 189.

55. *Id.* at 190.

56. 428 U.S. 280 (1976).

57. *Id.* The court observed:

> While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Id. at 304 (citing Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)).

58. *See, e.g.*, United States v. Grayson, 438 U.S. 41, 48-49 (1978).

59. Even before *Furman* revolutionized capital sentencing procedures, the Supreme Court already had distinguished *Williams* and determined that the due process clause guaranteed defendants the right to counsel, to present evidence, and to confront adverse

In *Gardner v. Florida*,[60] a Florida judge based a sentence of death in part on an undisclosed portion of a presentence report. Because the defendant's counsel had no opportunity to rebut, deny, or explain the secret information, the Court ruled that the sentence violated due process.[61] It distinguished *Williams* as a case in which the judge revealed in detail the facts he used from the presentence report and thus provided the defendant an opportunity to challenge their accuracy.[62] In requiring disclosure, *Gardner* rejected one rationale behind the *Williams* decision—the fear that people who provide crucial information in presentence investigations would refuse to talk if they knew they must later testify in court. Although *Gardner* did not discuss whether defendants could insist that the sources testify in person, the plurality explained that the risk of losing sources could not justify withholding the presentence report from the defendant.

The *Gardner* opinion offered three additional reasons for discounting the precedential value of the *Williams* decision. First, the nature of sentencing had changed. When the *Williams* Court

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witnesses at certain kinds of sentencing proceedings. See the discussion of Specht v. Patterson, 386 U.S. 605 (1967), *infra* notes 371-87 and accompanying text.

60. 430 U.S. 349 (1977) (plurality opinion).

61. *Id.* at 362 (plurality opinion). The plurality opinion, written by Justice Stevens and joined by Justices Powell and Stewart, represented the views of the three justices who controlled the outcomes in the 1976 capital cases.

Spurning the plurality's due process analysis, Justice White concurred, but relied on the eighth amendment's heightened need for reliability in capital cases. *Id.* at 363-64 (White, J., concurring). Thus, Justice White would regard the *Gardner* plurality opinion as precedent in capital cases.

Justice Blackmun concurred on the ground that the result in *Gardner* followed from the joint opinion of Justices Powell, Stewart, and Stevens in the two 1976 cases that rejected mandatory capital sentencing, which Justice Blackmun evidently regarded as binding precedent. *Id.* at 364 (Blackmun, J., concurring) (citing Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976)). Chief Justice Burger concurred in the judgment without opinion. *Id.* at 362. Justices Brennan and Marshall both agreed with the plurality's due process analysis but dissented from the Court's decision to remand for resentencing. *See id.* at 364-65 (Brennan, J., dissenting); *id.* at 365 (Marshall, J., dissenting).

Five members of the Court thus agreed with the plurality's due process analysis, and Justice White can be counted as a sixth vote if *Gardner*'s procedural requirements were restricted to capital cases. Likewise, the concurrences of Justice Blackmun and Chief Justice Burger contribute to the strength of *Gardner*'s holding as a precedent in capital cases. Only Justice Rehnquist would have affirmed the judgment of the Florida Supreme Court. *Id.* at 371 (Rehnquist, J., dissenting).

62. *Id.* at 356 (plurality opinion). The *Gardner* Court did not suggest how judges should proceed when defendants challenge the facts contained in a presentence report. The plurality opinion regarded some sort of hearing as necessary if the judge could not simply disregard the disputed information. It considered "the time invested ascertaining the truth" to be worthwhile if it makes a difference in the judge's decision. *Id.* at 355-56 (plurality opinion).

wrote in 1949, judges wielded complete discretion and could impose any penalty within the limits set by the legislature. Their decisions were virtually unreviewable and reversible error was almost impossible. By 1977, however, the Court recognized that capital sentencing is different from other sentencing,[63] a proposition that *Williams* explicitly rejected.[64] According to *Gardner*'s modern view of capital sentencing, defendants and society both have a stake in ensuring that death sentences are based on reason, not whim or passion.[65] Second, thirty years after *Williams*, the Court's cases had more clearly applied the guarantees of the due process clause to sentencing procedures.[66] A final reason for limiting *Williams* appeared in the text of the opinion itself, which "recognized that the passage of time justifies a re-examination of capital sentencing procedures."[67] In *Gardner*, the Court acknowledged its continuing responsibility to conduct that re-examination in the light of "evolving standards of procedural fairness in a civilized society."[68] As the next section will demonstrate, Illinois violates those evolving standards of procedural fairness by permitting juries to sentence defendants to death on the basis of information that does not fit any of the standard exceptions to the rules against hearsay or the right of confrontation.

63. *Id.* at 357-58 (plurality opinion).

64. Williams v. New York, 337 U.S. 241, 251 (1949).

65. *Gardner*, 430 U.S. at 357-58 (plurality opinion).

66. *Id.* at 358 (plurality opinion). As examples, the Court cited Mempa v. Rhay, 389 U.S. 128 (1967) and Specht v. Patterson, 386 U.S. 605 (1967). *Mempa* extended the right to counsel to the sentencing phase of criminal trials. *Specht* granted defendants the right to present evidence, as well as the rights to counsel and confrontation, at certain kinds of sentencing proceedings. For further discussion of *Specht*'s application to a right of confrontation at capital sentencing, see *infra* notes 371-87 and accompanying text. The *Gardner* Court further noted that even when sentencers have total discretion, and defendants thus have no legitimate stake in any particular outcome, they retain a stake in the character of the proceedings. For this proposition, the Court cited Witherspoon v. Illinois, 391 U.S. 510, 521-23 (1968) (state cannot excuse jurors for cause simply because they harbor conscientious scruples against the death penalty). A footnote in the *Gardner* opinion noted that application of due process to sentencing did not necessarily incorporate all the procedural protections of a criminal trial. *Gardner*, 430 U.S. at 358 n.9 (plurality opinion). As the Court's discussion concerned post-*Williams* developments, it omitted Townsend v. Burke, 334 U.S. 736 (1948), which held that judges violate due process when they impose sentences based on information that is actually erroneous. *See generally* Note, Gardner v. Florida *and the Application of Due Process to Sentencing*, 63 VA. L. REV. 1281 (1977).

67. *Gardner*, 430 U.S. at 356 (plurality opinion).

68. *Id.* at 357.

III. CONFRONTATION AT ILLINOIS CAPITAL SENTENCING HEARINGS

A. The Illinois Capital Punishment Statute

The Illinois capital punishment statute,[69] enacted in 1977, provides for a separate sentencing hearing to determine whether defendants convicted of first-degree murder shall be sentenced to death.[70] The guilt-phase jury also determines the sentence, unless the defendant elects to be sentenced by the judge.[71] The penalty hearing proceeds in two separate stages.[72]

First, the jury determines whether the defendant is eligible for the death penalty in a fact-finding hearing conducted according to the rules of evidence and procedure that govern criminal trials.[73] The jury decides whether the prosecution has proved beyond a reasonable doubt that any of the aggravating circumstances listed in the statute apply to the defendant's crime.[74] If so, the penalty

69. *See* ILL. REV. STAT. ch. 38, para. 9-1 (1989). The Illinois procedures for imposing capital punishment in 1972 were unconstitutional under the holding of Furman v. Georgia, 408 U.S. 238 (1972). *See* Moore v. Illinois, 408 U.S. 786, 800 (1972).

The first post-*Furman* capital sentencing statute in Illinois, enacted in 1973, provided that a specially convened three-judge court would sentence eligible defendants to death unless there were compelling reasons for mercy. The Illinois Supreme Court held that the grounds for mercy were unconstitutionally vague under *Furman* and further ruled that the Illinois Constitution of 1970 granted the legislature no power to establish three-member panels of trial court judges. The court thus ruled that the 1973 statute was unconstitutional. *See* People *ex rel.* Rice v. Cunningham, 61 Ill. 2d 353, 336 N.E.2d 1 (1975); *see also* Note, *supra* note 23, at 870.

70. The hearing takes place only if the prosecution so requests. In this respect, the Illinois statute differs from any capital punishment statute yet approved by the United States Supreme Court. *See* Eddmonds v. Illinois, 469 U.S. 894, 896 (1984) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari).

71. A defendant who pleads guilty to first-degree murder or who is convicted in a bench trial may still choose to be sentenced by a jury. ILL. REV. STAT. ch. 38, para. 9-1(d) (1989). When referring in general terms to the Illinois sentencing procedures, this Article will assume that juries make the sentencing decision.

72. *See* ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS, CRIMINAL No. 7B.00 (2d ed. Supp. 1989). The Illinois statute does not actually require that courts conduct the penalty trial in two stages. The Illinois Supreme Court prefers bifurcated hearings, *see* People v. Albanese, 104 Ill. 2d 504, 539, 473 N.E.2d 1246, 1262 (1984), *cert. denied*, 471 U.S. 1044 (1985), but it continues to uphold sentences of death imposed after unitary proceedings, *see, e.g.*, People v. Thompkins, 121 Ill. 2d 401, 448-50, 521 N.E.2d 38 (jury waived), *cert. denied*, 488 U.S. 871 (1988); People v. Lego, 116 Ill. 2d 323, 343-44, 507 N.E.2d 800, 807 (1987), *cert. denied*, 488 U.S. 902 (1988) (jury sentencing).

73. ILL. REV. STAT. ch. 38, para. 9-1(e), (g) (1989).

74. *See id.* para. 9-1(b). The aggravating factors, briefly stated, are:

1. the victim was a peace officer or fireman killed in the course of duty;
2. the victim was a prison or jail employee killed in the course of duty, or an inmate or official visitor killed within the prison;

hearing proceeds to a second stage. Here, the jury decides only one issue: whether the defendant shall die.[75] The parties may introduce evidence relevant to any aggravating or mitigating factors, whether they are listed in the statute or not.[76] Although evidence must be relevant, the statute expressly abandons the rest of the rules of evidence that ordinarily prevail in criminal trials.[77] Under this scheme both sides may introduce hearsay testimony, and the defendant has no right to confront and cross-examine out-of-court declarants. If the jury unanimously determines that no mitigating factors preclude the death penalty, the judge must sentence the defendant to death.[78]

B. The Illinois Supreme Court's Treatment of the Statute

The Illinois Supreme Court holds that the statute "suspends" the rules of evidence at the second stage of the sentencing proceed-

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3. the defendant has been convicted of murdering two or more people;
4. the murder was the result of hijacking;
5. the murder was by contract;
6. the victim was killed in the course of certain felonies committed by the defendant;
7. the victim was under 12, and the murder was exceptionally brutal, heinous, or cruel;
8. the murder was done to prevent testimony;
9. the murder was part of a conspiracy; or
10. the murder was cold, calculated, and premeditated.

Id.

75. *Id.* para. 9-1(g).

76. *Id.* para. 9-1(e).

77. The statute provides: "Any information relevant to any additional aggravating factors or any mitigating factors indicated in subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials." *Id.* para. 9-1(e). Subsection (c) provides a nonexclusive list of mitigating factors.

As paragraph 9-1(b) provides that the prosecution must follow the rules of evidence when introducing evidence relevant to any of the aggravating factors actually listed in the statute, a literal reading of paragraph 9-1(e) would confine the prosecution's use of hearsay to showing nonstatutory aggravating factors and the absence of mitigating factors. This reading would bar the prosecutor, even in the second stage, from introducing hearsay evidence that is arguably relevant to one of the statutory aggravating factors. The Illinois Supreme Court has not read the statute so literally. Once the prosecution has proved a statutory aggravating factor beyond a reasonable doubt, further evidence that is also relevant to statutory aggravating factors may be introduced in the second stage without regard to ordinary trial rules of evidence. *E.g.*, People v. Davis, 95 Ill. 2d 1, 47, 447 N.E.2d 353, 375-76, *cert. denied*, 464 U.S. 1001 (1983) (permitting the prosecution to introduce, in the second phase of the penalty hearing, hearsay evidence that defendant was the triggerperson, a statutory aggravating factor under subsection (b)(6)).

78. ILL. REV. STAT. ch. 38, para. 9-1(g) (1989).

ing.[79] The court has upheld this provision without adequately addressing the fact that the law has generally been willing to relax the rules against hearsay only when judges, not juries, evaluate evidence.[80] When defendants have demanded the right to confront the witnesses against them, the Illinois Supreme Court has relied on *Williams v. New York* without analyzing whether the stricter procedural safeguards required in post-*Furman* capital penalty trials have diminished *Williams*'s value as precedent.

If the statute literally suspended the rules of evidence, prosecutors could introduce a broad range of potentially unfair and untrustworthy evidence. For example, the test of mere relevance would not bar anonymous letters accusing the defendant of additional crimes, nor would it forbid a polygraph examiner from testifying to the veracity of other prosecution witnesses.[81] At first, the Illinois Supreme Court appeared ready to limit this potential for unfairness by requiring judges to ensure that only accurate information reaches the jury.[82] The court later permitted sentencing juries to hear any evidence that is both relevant and reliable.[83] As this section will show, however, the court has offered unclear and inconsistent standards for determining when evidence is properly admitted. Because the rationales the court advances are not persuasive, its rulings on evidence sometimes appear as nothing more than unexamined ad hoc justifications for upholding the trial judge's decision to admit ordinarily inadmissible hearsay against defendants who face a sentence of death.

1. Early Cases: A Tough Standard

The ancestor of the Illinois Supreme Court's opinions on the evidence admissible at post-*Furman* capital sentencing hearings is

79. *See* People v. Free, 94 Ill. 2d 378, 422, 447 N.E.2d 218, 239, *cert. denied*, 464 U.S. 865 (1983).

80. *See infra* note 317.

81. Suspending the rules of evidence leaves additional room for the prosecutor's creativity. If not constrained by the rules of privilege, the state could compel testimony from the defendant's priest, spouse, psychotherapist, attorney, or even the defendant himself. Evidence seized in violation of the fourth amendment might be permitted, and a clairvoyant could arguably qualify as an expert in his field and offer an opinion based on "facts" gleaned from a rhapsodic vision. With no statutory guidance about the meaning of "any additional" aggravating factors, *see* ILL. REV. STAT. ch. 38, para. 9-1(e) (1989), and thus no statutory limits on what information is relevant to the life-or-death decision, the prosecution could conceivably introduce evidence that the defendant was a lineal descendant of Richard Speck and argue that a theory of bad genes supported a verdict of death.

82. *See infra* notes 84-96 and accompanying text.

83. *See infra* notes 118-277 and accompanying text.

People v. La Pointe,[84] a 1981 decision allowing judges to consider evidence of prior unadjudicated crimes. Evidence of other crimes—adjudicated or not—is ordinarily inadmissible in the guilt phase of a criminal trial.[85] However, the *La Pointe* court, relying on *Williams v. New York*, explained that a broader standard of relevance operates as a judge considers the appropriate sentence.[86] The court nevertheless warned that trial judges must proceed carefully when admitting evidence of prior unadjudicated crimes.[87] They "must exercise care to insure the accuracy of information"[88] and "should be sensitive to the possibilities of prejudice to defendant if inaccurate information is considered."[89] In this case, the court said, the other-crimes evidence appeared trustworthy because the defendant had the opportunity for in-court cross-examination and did not challenge the accuracy of the testimony.[90]

Another early case, *People v. Devin*,[91] articulated a tough standard for evaluating the accuracy of information introduced in a capital sentencing hearing. In *Devin*, the court admonished prosecutors that they must not offer questionable evidence even to judges and reminded judges that they must scrupulously insulate themselves from the possible influence of improper information.[92] Psychiatric testimony in *Devin* described the defendant as a soci-

84. 88 Ill. 2d 482, 431 N.E.2d 344 (1981). Subsequent capital sentencing cases have cited *La Pointe* and quoted its standard without noting or attributing any significance to the fact that the *La Pointe* sentencing was not imposed under the capital punishment statute. *See, e.g.*, People v. Ramirez, 98 Ill. 2d 439, 460-61, 457 N.E.2d 31, 41-42 (1983), *cert. denied*, 110 S. Ct. 1796 (1990). Because the prosecutor did not seek the penalty of death after La Pointe pled guilty to murder, the judge sentenced under what is now ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(1)(b) (1989), which permits judges to impose a maximum sentence of natural life if they find any of the aggravating circumstances listed in the capital punishment statute. *See La Pointe*, 88 Ill. 2d at 490-91, 431 N.E.2d at 347-48.

85. Knowlton, *supra* note 6, at 1111-12.

86. The *La Pointe* court quoted extensively from *Williams* and approved a wide-ranging inquiry into the defendant's character, background, morals, and inclinations to commit other crimes. *See La Pointe*, 88 Ill. 2d at 496-98, 431 N.E.2d at 350-51.

87. *Id.* at 498, 431 N.E.2d at 351.

88. *Id.* at 494, 431 N.E.2d at 349 (quoting People v. Adkins, 41 Ill. 2d 297, 300-01, 242 N.E.2d 258, 260 (1968)).

89. *Id.* at 499, 431 N.E.2d at 351.

90. Because firsthand testimony supplied the evidence of the prior crime, *id.*, the *La Pointe* opinion did not consider any arguments that hearsay, lack of confrontation, or otherwise unreliable evidence tainted the sentencing.

91. 93 Ill. 2d 326, 444 N.E.2d 102 (1982).

92. The *Devin* court warned both prosecutors and judges to be wary of incompetent evidence:

> [T]he prosecutor is under both a legal and moral duty not to offer anything for the consideration of the trial judge which may be of doubtful competency and materiality. . . .

opath.[93] The supreme court considered that evidence relevant to whether he could reform or instead would commit future crimes.[94] The court took exception, however, when witnesses testified that the defendant bragged that he had once pushed a Viet Cong prisoner out of a helicopter, that he had murdered in cold blood, and that he had been well paid as a hired killer.[95] Because no evidence corroborated this testimony, and because the medical evidence already suggested that the defendant fantasized, the court reasoned that the trial judge should have issued an instruction to steer the jury from reaching a conclusion about the conduct of the defendant solely on the basis of his fantasies. The high court reversed the death sentence because the trial judge failed to "exercise care to insure the accuracy of information considered."[96] In later cases, however, the Illinois Supreme Court evaluated trial judges' evidentiary rulings with much greater deference.

2. No Difference Between Judge and Jury

In two cases decided a few weeks apart in late 1982 and early 1983, the Illinois Supreme Court announced that the evidentiary standards applicable when a judge imposes sentence also govern when juries determine a defendant's punishment. However, the court failed to provide convincing reasons to support its view that judge and jury sentencing are equivalent.

. . . .

> Obviously the trial judge owes the same duty to the defendant to protect his own mind from the possible prejudicial effect of incompetent evidence that he would owe in protecting a jury from the same contaminating influence. The prosecutor in such circumstances owes the duty of not only protecting the defendant but also the judge from such prejudicial matter.

Id. at 346-47, 444 N.E.2d at 112 (quoting People v. Riley, 376 Ill. 364, 367-68, 369, 33 N.E.2d 872, 874, 875, *cert. denied*, 313 U.S. 586 (1941)).

93. *Id.* at 342, 444 N.E.2d at 110.

94. *Id.* at 342-44, 444 N.E.2d at 110-11.

95. *Id.* at 348, 444 N.E.2d at 113.

96. *Id.* at 349, 444 N.E.2d at 113. The reports of the defendant's out-of-court boasting raise no concerns under the hearsay rules or the confrontation clause, as they are admissions by a party, which are defined as nonhearsay under the federal rules and as an exception to the hearsay rule under Illinois common law. *See* FED. R. EVID. 801(d)(2); E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 802.1 (4th ed. 1984). Nevertheless, the court questioned whether the statements were reliable evidence that the defendant actually engaged in the exploits he reported. A limiting instruction would have reminded the jury that there was no independent corroborating evidence.

The fact that the statements were made, however, appears to be reliable evidence of the defendant's fantasies, which are further evidence of his sociopathic personality and thus relevant to his prospects for rehabilitation. It is unclear whether the court regarded the defendant's fantasies themselves as proper evidence in support of a sentence of death. The opinion did not specify how the trial judge should have framed a limiting instruction.

In the first of these cases, *People v. Jones*,[97] the court cited cases from other jurisdictions to support its holding that a sentencing jury may properly receive the same information as a sentencing judge. But the authorities cited do not support the court's reading of them. After first reviewing the goal of matching the sentence to both the offender and the crime, the court declared that juries deserve the same latitude as judges in considering information relevant to sentencing.[98] It asserted that other courts had reached the same conclusion, and in support, cited cases collected in American Law Reports.[99]

The court next rejected the defendant's argument that he was deprived of the right to confront and cross-examine adverse witnesses when the jury considered secondhand information compiled by an investigator from the probation office.[100] Relying on *Williams v. New York*,[101] the court simply declared that defendants have no right to cross-examine all out-of-court declarants who supply information to the sentencer.[102] Citing again to the cases in American Law Reports, the court asserted that sentencers may properly rely on presentence reports for information about a defendant's prior criminal activity.[103]

The reasoning in *Jones* is faulty because the court obscured and overlooked the distinction between two separate aspects of the evidentiary freedom that judges enjoy under the holding of *Williams v. New York*.[104] First, *Williams* recognized that the range of information relevant to sentencing is broad enough to include the defendant's background, character, previous criminal record, and employment history.[105] The cases the Illinois Supreme court cited in *Jones* do support the proposition that juries serving as sentencers may assess this broader range of information.[106]

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97. 94 Ill. 2d 275, 447 N.E.2d 161 (1982), *cert. denied*, 464 U.S. 920 (1983).

98. *Id.* at 286, 447 N.E.2d at 166.

99. *Id.* (citing Annotation, *Court's Right, in Imposing Sentence, to Hear Evidence of, or to Consider, Other Offenses Committed by Defendant*, 96 A.L.R.2d §§ 13-16, at 768, 811-18 (1964 & Later Case Servs. 1976 & 1981)).

100. *Id.* at 287, 447 N.E.2d at 167.

101. 337 U.S. 241 (1949).

102. *Jones*, 94 Ill. 2d at 288, 447 N.E.2d at 167.

103. *Id.*

104. *See supra* text accompanying notes 3-4.

105. Williams v. New York, 337 U.S. 241, 246 (1949).

106. Indeed, the United States Supreme Court considers it "essential" that the sentencing jury be able to consider "all possible relevant information" about the defendant. Jurek v. Texas, 428 U.S. 262, 274-76 (1976). Moreover, states cannot preclude capital sentencing juries from looking for mitigating factors in any aspect of the defendant's background and character. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978).

Second, *Williams* permitted sentencing judges to consider hearsay without affording defendants the right to confront and cross-examine the out-of-court sources of information.[107] The collected cases the Illinois Supreme Court cited in American Law Reports[108] do *not* support the proposition that courts have permitted sentencing juries to consider hearsay evidence. Indeed, cases that appear in the cited section of the annotation reached the opposite conclusion.[109] Although one section of the annotation collects cases supporting the court's narrow statement that sentencers may properly consider information in presentence reports, none of those cases involved sentencing by juries.

The *Jones* court correctly ruled that both juries and judges must be equally free to consider the broader range of information that is relevant to sentencing. The court, however, failed to explain why they should be equally free to consider hearsay. By blurring the distinction between broadening the standard of relevance and relaxing the constraints of the hearsay rule, the *Jones* opinion obscured the fact that the cases it cited do not support fully its holding. This confusing and misleading clouding of the distinction is especially apparent in the court's discussion of the broadened standard of relevance that individualized sentencing permits. The court quoted from an older opinion, which noted that judges may consider information that would be excluded in an adversary trial.[110] Like *Williams*, the quoted decision refused to limit either the "sources" or "types" of information that judges may consider in sentencing.[111] This quotation supports both relaxed hearsay rules and a broader standard of relevance, and the *Jones* court announced, without further analysis, that "there is no valid reason to apply a different rule where the jury makes the determination."[112]

Jones was also the first case to hold that a sentencing jury had properly considered evidence of prior unadjudicated crimes.[113] As

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107. *Williams*, 337 U.S. at 246-52.

108. People v. Jones, 94 Ill. 2d 275, 286-88, 447 N.E.2d 161, 166-67 (1982), *cert. denied*, 464 U.S. 920 (1983).

109. *See* Annotation, *supra* note 99 parenthetical (citing Harmon v. State, 277 Ark. 262, 641 S.W.2d 21 (1982) (certificate signed by warden inadmissible hearsay evidence of prior conviction); People v. Purvis, 56 Cal. 2d 93, 362 P.2d 713, 13 Cal. Rptr. 801 (1961) (reversing death sentence because sentencing jury heard hearsay evidence of prior crimes); State v. English, 367 So. 2d 815 (La. 1979) (parole officer's testimony about defendant's prior conviction inadmissible hearsay)).

110. *Jones*, 94 Ill. 2d at 286, 447 N.E.2d at 166 (quoting People v. Adkins, 41 Ill. 2d 297, 300, 242 N.E.2d 258, 260 (1968)).

111. *Id.*

112. *Id.*

113. Jones pled guilty to the murders for which he was being sentenced, and the jury

if to bolster confidence that its ruling would not foster unfair proceedings, the court remarked that judges and prosecutors remain duty-bound to reject evidence that is more prejudicial than relevant.[114]

A few weeks later, in *People v. Free*, the court proclaimed a new standard to govern the admissibility of evidence at the second phase of the capital sentencing hearing: "relevance and reliability."[115] The court declared that the sentencer's identity made no difference: "The same benchmarks of relevance and reliability apply whether the sentencing authority is the trial judge or the jury."[116] The *Free* court cited no authority for this proposition and offered no analysis at all.[117]

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was convened only to decide his punishment. While in custody, Jones volunteered information about additional killings for which he claimed responsibility; he directed detectives to additional evidence that substantiated his admissions. At the sentencing hearing, the jury heard Jones's six-page confession to these uncharged crimes and some additional corroborating evidence. In holding that the evidence was properly submitted, the court relied on a 1938 case, United States v. Dalhover, 96 F.2d 355, 360 (7th Cir. 1938). *Dalhover* permitted the prosecution to present a similar confession to uncharged crimes before a jury convened solely to decide the punishment for a defendant who pled guilty. Without articulating any general principles that would necessarily apply to all evidence of uncharged crimes, the *Jones* decision held that the evidence was proper in this case. The court based its conclusion on the defendant's plea of guilty, the voluntary confession to the additional crimes, and the "substantial" corroboration of the defendant's detailed admissions. *Jones*, 94 Ill. 2d at 291-92, 447 N.E.2d at 167-69.

114. *Jones* considered, but rejected, the defendant's argument that the jury was inflamed and prejudiced when the prosecution introduced grotesque photos depicting the victims of the uncharged killings. The court explained that the photographs added nothing to the "grim and detailed description" in the defendant's confession. They showed one victim with a bludgeoned head and severely lacerated throat. Another victim had been decapitated. In the court's view, the photos were relevant evidence of the defendant's brutality. *Jones*, 94 Ill. 2d at 292-93, 447 N.E.2d at 169-70.

By a strange twist of reasoning, the court concluded that the photos were not impermissibly prejudicial, because after viewing the photos the jury decided on the death penalty in only twenty minutes:

> Since the jury deliberation took approximately 20 minutes it is clear that there was little difficulty in deciding that the death penalty was warranted, and we do not believe that the admission of these photographs at this late date in the proceedings deprived defendant of the right to be sentenced by a rational tribunal.

Id. at 294, 447 N.E.2d at 170. The court did not consider whether the photographs helped speed the jury's decision.

115. People v. Free, 94 Ill. 2d 378, 426, 447 N.E.2d 218, 241-42, *cert. denied*, 464 U.S. 865 (1983). Although the court cited People v. La Pointe, 88 Ill. 2d, 431 N.E.2d 344 (1981), the standard of relevance and reliability was first enunciated in the *Free* case. For a discussion of *La Pointe*, see *supra* notes 84-90 and accompanying text.

116. *Free*, 94 Ill. 2d at 423, 447 N.E.2d at 240.

117. The opinion in *Free* did not mention *Jones*, which had been decided only a few weeks earlier.

Later, again without citing any authority, the court tacitly assumed that whether juries or judges make the sentencing decision, the same standard generally governs the admissi-

3. The Standard of Relevance and Reliability

The central concern of the confrontation clause, the Supreme Court maintains, is to ensure that the prosecution's case rests only upon testimony that is reliable.[118] Live testimony, which is preferred,[119] sufficiently ensures reliability because the fact finder can observe the demeanor of the witnesses as they testify under oath and endure the test of cross-examination.[120] Nonetheless, the pros-

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bility of evidence of prior unadjudicated crimes. At the sentencing hearing in People v. Ramirez, 98 Ill. 2d 439, 457 N.E.2d 31 (1983), *cert. denied*, 110 S. Ct. 1798 (1990), the jury heard evidence of seven arrests that had not resulted in trials or convictions. In holding that the evidence was relevant, the court simply quoted and applied the holding of *LaPointe*, *see supra* notes 84-90 and accompanying text, without noting that a judge determined the sentence in *LaPointe*. Because the majority cited no authority for extending the holding of *LaPointe* to jury sentencings, it is not evident that the court regarded the difference between judges and juries as even potentially significant. *Ramirez*, 98 Ill. 2d at 460-61, 457 N.E.2d at 41-42. Only the specially concurring opinion of Justice Simon raised the issue whether different considerations should apply when juries hear evidence of unadjudicated criminal activity. The entire *Ramirez* court seemed unaware that a year earlier in *Jones*, it permitted a sentencing jury to hear evidence of an unadjudicated crime when the defendant voluntarily admitted it and led detectives to "substantial" corroborating evidence that was presented in court. *See supra* note 113 and accompanying text. No citation to *Jones* appears in either the majority opinion or in the separate opinion of Justice Simon, who regarded *Ramirez* as the first case to consider whether juries may hear such evidence at capital sentencing hearings. *See Ramirez*, 98 Ill. 2d at 473-77, 457 N.E.2d at 48-50 (Simon, J., concurring). The Illinois Supreme Court continues to cite *LaPointe*, but not *Jones*, when permitting juries to hear evidence of unadjudicated crimes at capital sentencing hearings. *See, e.g.*, People v. Young, 128 Ill. 2d 1, 54, 538 N.E.2d 461, 475 (1989); People v. Owens, 102 Ill. 2d 88, 110, 464 N.E.2d 261, 271, *cert. denied*, 469 U.S. 963 (1984).

118. Maryland v. Craig, 110 S. Ct. 3157, 3163 (1990). The Supreme Court has also said that the confrontation clause aims to "advance . . . the accuracy of the truth-determining process in criminal trials." Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion), *quoted in* United States v. Inadi, 475 U.S. 387, 396 (1986). The Court has been criticized for overemphasizing the utilitarian value of confrontation and cross-examination. Aside from its value in uncovering the truth, the right of confrontation is also basic to our sense that judicial proceedings are conducted fairly. *See* Halpern, *The Confrontation Clause and the Search for Truth in Criminal Trials*, 37 BUFFALO L. REV. 165, 168 (1988); Massaro, *The Dignity Value of Face-To-Face Confrontations*, 40 U. FLA. L. REV. 863 (1988).

119. *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980).

120. *Craig*, 110 S. Ct. at 3163 (citing California v. Green, 399 U.S. 149, 158 (1970)). Some opinions suggest that defendants are not deprived of the opportunity to cross-examine out-of-court declarants if they could be subpoenaed as defense witnesses and questioned as adverse witnesses during the defense's case. *See* Lee v. Illinois, 476 U.S. 530, 549 n.3, (1986) (Blackmun, J., dissenting); United States v. Inadi, 475 U.S. 387, 397 (1986) (defense right of compulsory process cited as reason for relieving prosecution of need to show that a coconspirator is unavailable); Dutton v. Evans, 400 U.S. 74, 88 n.19 (1970) (plurality opinion); *id.* at 96 n.3 (Harlan, J., concurring); *see also* Booth v. Maryland, 482 U.S. 496, 506 (1987) (defense "presumably" could cross-examine declarants who provide information used in victim impact statements). In at least one case, the Illinois Supreme Court has noted that the defendant was not deprived of the right of confrontation when the prosecution introduced double hearsay in the capital sentencing

ecution may introduce out-of-court statements that bear sufficient "indicia of reliability."[121] A statement falling within a traditional exception to the hearsay rule is sufficiently reliable,[122] while state-

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hearing, because the absent declarant could have been subpoenaed as a defense witness and cross-examined. *See* People v. Davis, 95 Ill. 2d 1, 47, 447 N.E.2d 353, 376, *cert. denied*, 464 U.S. 1001 (1983), discussed *infra* note 212. The Supreme Court has never held that defendant's right of compulsory process, by itself, is sufficient to satisfy the confrontation clause, and commentators have criticized such an interpretation. The compulsory process clause supplements, but does not replace, the confrontation clause, which puts the burden on the prosecution to produce its witnesses and tender them for the defendant to cross-examine. Moreover, cross-examination is most effective immediately after the fact finder has heard the direct testimony. Defendants should not be forced to defer cross-examination until after the prosecution's case-in-chief. *See* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 135 (1972); Halpern, *The Confrontation Clause and the Search for Truth in Criminal Trials*, 37 BUFFALO L. REV. 165, 193-94 (1988); Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. FLA. L. REV. 207, 229-32 (1984); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 577-79 (1978).

121. Idaho v. Wright, 110 S. Ct. 3139, 3146 (1990). In Ohio v. Roberts, 448 U.S. 56 (1980), the Court held that the state may introduce transcripts of former testimony that bear sufficient indicia of reliability if the prosecutor also demonstrates that the declarant is not available to testify in person. Although the Court continues to ascribe some importance to a preliminary showing that the declarant is unavailable to testify, *see Wright*, 110 S. Ct. at 3146-47, such a showing is not necessary to introduce the out-of-court statements of coconspirators, United States v. Inadi, 475 U.S. 387, 400 (1986).

122. Statements admitted under "firmly rooted" hearsay exceptions are sufficiently reliable. Bourjaily v. United States, 483 U.S. 171, 183 (1987). In *Bourjaily*, the Court held that the exception that permits the prosecution to use the out-of-court statements of coconspirators, as formulated in FED. R. EVID. 801(d)(2)(E), is firmly rooted in our legal traditions, thus requiring no independent inquiry into reliability. Unlike most of the exceptions to the rule against hearsay, the rationale for admitting the statements of coconspirators, like the rationale for admitting the out-of-court admissions of the defendant, does not rest on the purported trustworthiness of the statements. Instead, these exceptions are regarded as products of the adversary system. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 262, at 775-76 (3d ed. 1984). Because out-of-court admissions by the defendant and his coconspirators traditionally are allowed, but do not share the indicia of trustworthiness otherwise associated with admissible hearsay, the federal rules define both types of statements as nonhearsay. *See id.* at 775 n.6; FED. R. EVID. 801(d)(2). After *Bourjaily* approved the use of out-of-court statements under a hearsay exception that is not traditionally associated with guarantees of trustworthiness, several commentators predicted that the Court will find that the requirements of the confrontation clause are satisfied whenever a statement is admissible under the Federal Rules of Evidence. *See, e.g.*, 4 J. WEINSTEIN, WEINSTEIN'S EVIDENCE 800-35 (1988); Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 U.C.L.A. L. REV. 557, 570-74 (1988); Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 881 (1988) ("justices . . . warming to Wigmore's argument that whenever the hearsay rules, as they evolve, are satisfied, the confrontation clause requirements are also met"). While the rules reflect the standard announced in *Roberts* that the declarant be unavailable before the prosecution may introduce former testimony, only a few of the hearsay exceptions depend on the declarant's unavailability. Thus, the decision in *Inadi*, that the statements of an available coconspirator are admissible, is also consistent with the federal rules. The decision in *Wright*, which held that statements admitted under

ments that the hearsay rules would exclude are presumed unreliable without "particularized guarantees of trustworthiness."[123]

The Court's reference to "guarantees of trustworthiness" brings to mind the residual exceptions to the hearsay rules, which sometimes permit out-of-court statements that carry "circumstantial guarantees of trustworthiness" equivalent to those of the recognized hearsay exceptions.[124] That standard suggests that courts should look to the rationale that justifies the hearsay exceptions and determine whether the declarant made the statement in circumstances that reduce the risk that it was the product of insincerity, faulty memory, impaired perception, or poor narrative ability.[125] Indeed, in *Idaho v. Wright*,[126] the Court confirmed that the rationale for carving out exceptions to the rule against hearsay should direct courts as they determine whether traditionally inadmissible hearsay is nevertheless acceptable under the confrontation clause.[127] Consequently, courts must confine their search for particularized guarantees of trustworthiness to the circumstances that surround the making of the statement.[128] Only when the totality of those circumstances suggests that the declarant is particularly worthy of belief, so that foregoing cross-examination would not pose a significant risk of unreliable testimony, does the confrontation

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Idaho's clone of FED. R. EVID. 803(24) are inadmissible under the confrontation clause, does not refute these commentator's predictions. *See infra* note 129.

123. Lee v. Illinois, 476 U.S. 530, 543 (1986) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

124. *See* FED. R. EVID. 803(24), 804(b)(5); *see also* Jonakait, *supra* note 122, at 573.

125. Cross-examination can expose the witness's faulty perception, poor memory, ambiguous description, and lack of sincerity. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE, § 6.1, at 182-83 (2d ed. 1987). Admitting hearsay creates the danger that these latent defects in the declarant's report, the so-called "hearsay dangers," will pass without detection. Jonakait, *Subversion of the Hearsay Rule: Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 434 n.13 (1985). Most statements that are admissible under the traditional exceptions to the rule against hearsay are made under circumstances that suggest that at least one of the hearsay dangers is not present. *See id.* at 475; 5 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1422, at 254 (Chadbourn rev. 1974). Consequently, when determining whether a statement fits a traditional hearsay exception, courts look to the circumstances under which the statement was made. Commentators have urged courts to follow a similar approach in applying the residual hearsay exceptions and the exceptions to the confrontation clause. *See* Jonakait, *supra*, at 474; Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 879 (1982). *See also* E. CLEARY, MCCORMICK ON EVIDENCE, § 324.2, at 908-09 (3d ed. 1984) ("equivalent circumstantial guarantees of trustworthiness" refer to factors operating when declarant made statement).

126. 110 S. Ct. 3139 (1990).

127. *Id.* at 3148.

128. *Id.* at 3148-49.

clause permit an exception to the normal rule of live testimony.[129]

The Illinois Supreme Court has reiterated that evidence at capital sentencing hearings must be both relevant and reliable, a determination left to the discretion of the trial judge.[130] By declaring that trial judges should admit only reliable testimony, the court appears to set a standard that matches the standard of the confrontation clause. In practice, however, the Illinois Supreme Court's standard of reliability is often far more lenient than the Supreme Court's confrontation cases would permit.[131] When admitting evidence that does not fall within a traditional exception to the hearsay rules, the Illinois Supreme Court rarely looks for reliability in the circumstances under which the statement was made and seldom appears concerned with finding particularized guarantees of trustworthiness. Instead, the court has erratically applied several "tests" of reliability that prosecutors find easy to meet.

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129. *Id.* In *Wright*, the trial judge admitted the hearsay statements under Idaho's residual hearsay exception. *Id.* at 3144. Relying in part on independent evidence that partially corroborated the hearsay, the Idaho Supreme Court agreed that the statements were admissible under the state rule of evidence, which duplicates the language of FED. R. EVID. 803(24). Nevertheless, the Idaho Court held that the statements were admitted in violation of the confrontation clause. *Wright*, 110 S. Ct. at 3145.

The Supreme Court affirmed. After ruling that the residual hearsay exception is not "firmly rooted," the Supreme Court also concluded that the statements lacked the particularized guarantees of trustworthiness that the confrontation clause requires. *Id.* at 3147-48. The Court thus held that statements admissible under Idaho's equivalent of FED. R. EVID. 803(24) are nevertheless inadmissible under the confrontation clause.

This ruling does not refute the commentators who predict that the Supreme Court will find that statements admissible under the Federal Rules of Evidence will also satisfy the demands of the confrontation clause. *See supra* note 122. Rules of evidence formulated by state legislatures or developed by state courts may admit hearsay more liberally than the Federal Rules of Evidence. Although the Supreme Court had no power to say that Idaho courts had misapplied the state's residual hearsay exception, the *Wright* opinion strongly suggests that the Supreme Court would have reached the opposite result under the identically worded provision of FED. R. EVID. 803(24). The rationale of *Wright* suggests that when the courts look for "circumstantial guarantees of trustworthiness" equivalent to those of the other hearsay exceptions codified in the federal rules, they must look solely to the circumstances in which the out-of-court statement was made and not to any independent corroborating evidence. Consequently, the hearsay statements in *Wright* would fail to satisfy Rule 803(24) for the same reason they failed to satisfy the confrontation clause. *Wright* thus suggests that the Federal Rules of Evidence would exclude some hearsay, including the hearsay in this case, that the Idaho rules would approve.

130. *See, e.g.*, People v. Rogers, 123 Ill. 2d 487, 521, 528 N.E.2d 667, 683 (1988), *cert. denied*, 109 S. Ct. 878 (1989); People v. Foster, 119 Ill. 2d 69, 96, 518 N.E.2d 82, 94 (1987), *cert. denied*, 486 U.S. 1047 (1988).

131. In a few cases, however, the Illinois Supreme Court has deemed testimony to be unreliable even when it would satisfy the standards of the confrontation clause. *See infra* notes 150-53 and accompanying text; *see also* People v. Barrow, 133 Ill. 2d 226, 283, 549 N.E.2d 240, 266, *cert. denied*, 110 S. Ct. 3257 (1990) (discussed *infra* note 159).

The Illinois Supreme Court purports to apply the same standard of admissibility in all capital sentencing hearings. In nonjury sentencings, however, the court will often presume, without explanation, that the trial judge considered only reliable evidence.[132] In the court's view, hearsay is reliable if the defendant does not directly challenge its accuracy[133] or if it is corroborated by other evidence.[134] The court considers double hearsay to be reliable when other evidence corroborates just a portion of the out-of-court statements.[135] In some cases, the court declares that the prosecution's hearsay evidence is reliable simply because a police officer gathered the secondhand information during an official investigation[136] or because the out-of-court declarations were not "inherently unreliable."[137] In other cases, for example when permitting the prosecution to present hearsay evidence of the opinions that nontestifying psychiatrists have formed about the defendant, the court simply rejects defendants' challenges without explaining why the secondhand evidence meets the standard of reliability.[138] In only one area has the Illinois Supreme Court really scrutinized ordinarily inadmissible hearsay to see if it contains particularized guarantees of trustworthiness. Tacitly abandoning the reasoning of earlier decisions, the court now holds that some statements of absent accomplices are presumptively unreliable and should not be used as a basis for imposing a sentence of death.[139]

a. Evidence When Trial Judges Sentence

The Illinois Supreme Court has repeatedly ruled that the same standard of relevance and reliability applies whether juries or judges fix the sentence.[140] When defendants waive jury sentencing and object to the evidence presented to the judge, the court sometimes has explained why it regards the disputed evidence to be relevant and reliable.[141] Because the rationales of these decisions

132. *See infra* text accompanying notes 140-160.
133. *See infra* text accompanying notes 161-202.
134. *See infra* text accompanying notes 203-24.
135. *See infra* text accompanying notes 225-42.
136. *See infra* text accompanying notes 243-49.
137. *See infra* text accompanying notes 250-53.
138. *See infra* text accompanying notes 254-63.
139. *See infra* notes 264-77 and accompanying text.
140. *See, e.g.*, People v. Harris, 129 Ill. 2d 123, 162-65, 544 N.E.2d 357, 374-75 (1989), *cert. denied*, 110 S. Ct. 1323 (1990); People v. Free, 94 Ill. 2d 378, 423, 447 N.E.2d 218, 240, *cert. denied*, 464 U.S. 865 (1983).
141. *See, e.g.*, People v. Foster, 119 Ill. 2d 69, 98-99, 518 N.E.2d 82, 95 (1987), *cert. denied*, 486 U.S. 1047 (1988).

reappear in opinions that review evidentiary rulings in jury sentencings,[142] this Article draws its examples from cases analyzing both jury and nonjury sentencing.

Despite the purportedly unwavering standard of relevance and reliability, the Illinois Supreme Court sometimes reviews the record of nonjury sentencings with less scrutiny. The court readily presumes that a judge considered only proper evidence and screened out improper evidence.[143] Such a presumption may be warranted when the court reviews bench trials, because judges are experienced at applying the rules governing evidence in criminal trials.[144] It may be unwarranted, however, as judges struggle with the new and unfamiliar rules governing evidence in capital sentencing hearings.[145]

The decisions of the Illinois Supreme Court are sometimes unclear and inconsistent in explaining the standards of both relevance and reliability. Although some decisions suggest that uncorroborated hearsay is unreliable,[146] other cases consider it trustworthy enough if the out-of-court declarant supplied the information to a police officer.[147] Generally, victims and other eyewitnesses may re-

142. For example, in People v. Salazar, 126 Ill. 2d 424, 535 N.E.2d 766 (1989), *cert. denied*, 110 S. Ct. 3288 (1990), the sentencing jury heard secondhand evidence suggesting that the defendant belonged to a gang. The court explained that the information was reliable because a police officer gathered it in the course of an official investigation and the defendant did not directly challenge its accuracy. The court first articulated these rationales while reviewing capital sentencing hearings conducted without a jury, and the case cited in *Salazar* was also a nonjury sentencing. *Id.* at 468-69, 535 N.E.2d at 785.

143. *See, e.g.*, People v. Foster, 119 Ill. 2d 69, 96-97, 518 N.E.2d 82, 94 (1987), *cert. denied*, 486 U.S. 1047 (1988); People v. Erickson, 117 Ill. 2d 271, 300, 513 N.E.2d 367, 380 (1987), *cert. denied*, 486 U.S. 1017 (1988); People v. Johnson, 114 Ill. 2d 170, 205, 499 N.E.2d 1355, 1371 (1986), *cert. denied*, 480 U.S. 951 (1987); People v. Eddmonds, 101 Ill. 2d 44, 65-66, 461 N.E.2d 347, 357, *cert. denied*, 469 U.S. 894 (1984). On occasion, the court has first acknowledged that certain disputed testimony may have been unreliable before invoking the magic prosecution-saving presumption that the judge considered only proper evidence. *See, e.g.*, *Erickson*, 117 Ill. 2d at 300, 513 N.E.2d at 380.

144. *See* Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 HARV. L. REV. 407, 412-13 (1965).

145. *See generally* Kaplan, *Evidence in Capital Cases*, 11 FLA. ST. U.L. REV. 369 (1983); *cf.* United States v. Jackson, 390 U.S. 570, 578-81 (1968) (noting that the prospect of separate proceedings on penalty pose novel procedural and evidentiary questions and thus "[i]ndividuals forced to defend their lives . . . must do so without the guidance that defendants ordinarily find in a body of procedural and evidentiary rules spelled out in advance," and explaining that legislatures, not judges, should determine the propriety of and procedure for separate penalty proceedings).

146. *See, e.g.*, People v. Erickson, 117 Ill. 2d 271, 513 N.E.2d 367 (1987), *cert. denied*, 486 U.S. 1017 (1988), discussed *infra* notes 228-40 and accompanying text.

147. *See infra* text accompanying notes 243-49. Other decisions, without considering whether the out-of-court statements are corroborated or not, have approved hearsay and double hearsay by simply announcing either that it is reliable or that the rules of evidence

liably provide firsthand testimony accusing the defendant of prior crimes, even without any corroborating evidence.[148] Even when that live testimony squarely conflicts with other testimony and is not corroborated by independent documentary records that would presumably exist if the state's witness were testifying accurately, the court has held the testimony admissible and left the determination of credibility for the fact finder.[149] Nevertheless, the court also has applied a stricter standard and held that some live cross-examined testimony is unreliable.[150] For example, instead of permitting the fact finder to evaluate credibility in *People v. Harris*,[151] the court ruled that firsthand testimony implicating the defendant in a prior killing was unreliable and thus inadmissible.[152] The court discounted the testimony because other evidence contradicted it and because impeaching evidence revealed the bias of one witness.[153]

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and the right of confrontation do not apply at sentencing. *See, e.g., infra* text accompanying notes 260-63 (out-of-court psychiatric experts); *see also* People v. Davis, 95 Ill. 2d 69, 518 N.E.2d 82 (1987), *cert. denied*, 486 U.S. 1047 (1988), discussed *infra* note 212.

148. *E.g.*, People v. Erickson, 117 Ill. 2d 271, 299, 513 N.E.2d 367, 379 (1987) (uncorroborated rape), *cert. denied*, 486 U.S. 1017 (1988); People v. Ramirez, 98 Ill. 2d 439, 460-61, 457 N.E.2d 31, 41-42 (1983), *cert. denied*, 481 U.S. 1053 (1987). In another case, however, the court ruled without explanation that a victim's firsthand but uncorroborated testimony of a jailhouse rape was too unreliable to consider at a capital sentencing hearing. *See* People v. Foster, 119 Ill. 2d 69, 100, 518 N.E.2d 82, 96 (1987), *cert. denied*, 486 U.S. 1047 (1988), discussed *infra* note 251.

149. In People v. Brisbon, 129 Ill. 2d 200, 544 N.E.2d 297 (1989), *cert. denied*, 110 S. Ct. 1796 (1990), a prison guard testified that he saw the defendant stab another inmate. The prosecution produced no medical records to corroborate the testimony, and the inmate testified and denied that Brisbon stabbed him. The court held that the guard's testimony, even though contradicted and uncorroborated, was sufficiently reliable to be admissible and that the jury should be the judge of its credibility. *Id.* at 213, 544 N.E.2d at 306.

150. *See* People v. Harris, 129 Ill. 2d 123, 143-46, 164, 544 N.E.2d 357, 365-67, 375 (1989), *cert. denied*, 110 S. Ct. 1323 (1990); *Foster*, 119 Ill. 2d at 100, 518 N.E.2d at 95-96; *see also* People v. Barrow, 133 Ill. 2d 226, 245, 283, 549 N.E.2d 240, 248 (1989), *cert. denied*, 110 S. Ct. 3257 (1990) (excluding some firsthand evidence as unreliable by applying what is really a rule of relevance), discussed *infra* note 159.

151. 129 Ill. 2d 123, 544 N.E.2d 357 (1989), *cert. denied*, 110 S. Ct. 1323 (1990).

152. *Id.* at 164-65, 544 N.E.2d at 374-75.

153. *Id.* at 143-46, 164, 544 N.E.2d at 365-67, 375. The court explained that both witnesses were unreliable because they testified that the defendant used a rifle, while the defendant's ballistics expert demonstrated that a handgun was used. *Id.* at 146, 164, 544 N.E.2d at 367, 375. One witness was further impeached by a prior inconsistent statement and the other by his membership in a gang that had a rivalry with the defendant's gang. *Id.* at 164, 544 N.E.2d at 375.

Even when evaluating whether hearsay testimony is sufficiently reliable, the court generally does not examine the believability of the out-of-court declarant so closely. For example, in People v. Salazar, 126 Ill. 2d 424, 535 N.E.2d 766 (1988), *cert. denied*, 110 S. Ct. 3288 (1990), the court held that a hearsay accusation blaming the defendant for a shooting was sufficiently reliable, even though the secondhand report shared the same

The court's standard of relevance also varies. Because the sentencer may consider any evidence that shows the defendant's character, the court has held that evidence of mere suspicious activity is relevant to show the defendant's "propensity to conduct himself in a particular manner."[154] Hearsay evidence of prior criminal activity is reliable and relevant to show the defendant's "character," "past conduct," or "unprosecuted misconduct,"[155] even when there has been no arrest[156] or when charges have been dismissed for lack of probable cause.[157] Despite that seemingly broad standard of relevance and reliability, however, the court occasionally holds that trial judges should have excluded reports of the defendant's past suspicious behavior or criminal conduct, even when eyewitnesses testified in court and submitted to cross-examination.[158] In

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defects as the firsthand accusations in *Harris*. *Id.* at 470-71, 535 N.E.2d at 786. Ferguson, the out-of-court declarant in *Salazar*, was also a member of a rival gang, *id.* at 472, 535 N.E.2d at 787, a fact the court did not even mention when evaluating whether his statement was sufficiently reliable. He had also given contradictory statements to the police, and his version of the shooting differed in arguably material details from the reports of eyewitnesses. Ferguson told police that Salazar fired while driving an automobile that also carried three black men. Two independent eyewitnesses, however, said that the assailant rode alone on a motorcycle. *Id.* at 471, 535 N.E.2d at 786. The court in *Salazar* chose to overlook this inconsistency, which seems no less impeaching than the discrepancy in *Harris* over whether a rifle or a handgun was used. For further discussion of *Harris*, see *infra* note 159.

154. People v. Salazar, 126 Ill. 2d 424, 468, 535 N.E.2d 766, 785 (1988), *cert. denied*, 110 S. Ct. 3288 (1990).

155. *See* People v. Richardson, 123 Ill. 2d 322, 361-62, 528 N.E.2d 612, 628 (1988), *cert. denied*, 109 S. Ct. 1577 (1989) (history); People v. Hall, 114 Ill. 2d 376, 417, 499 N.E.2d 1335, 1352 (1986), *cert. denied*, 480 U.S. 951 (1987) (unprosecuted misconduct); People v. Morgan, 112 Ill. 2d 111, 142-44, 492 N.E.2d 1303, 1316-17 (1986), *cert. denied*, 479 U.S. 1101 (1987) (character); People v. Brisbon, 106 Ill. 2d 342, 364-65, 478 N.E.2d 402, 412, *cert. denied*, 474 U.S. 908 (1985) (past conduct).

156. *See, e.g.*, People v. Foster, 119 Ill. 2d 69, 97-99, 518 N.E.2d 82, 94-95 (1987), *cert. denied*, 486 U.S. 1047 (1988); People v. Montgomery, 112 Ill. 2d 517, 528-33, 494 N.E.2d 475, 479-81 (1986), *cert. denied*, 479 U.S. 1101 (1987).

157. In People v. Brisbon, 106 Ill. 2d 342, 478 N.E.2d 402, *cert. denied*, 474 U.S. 908 (1985), the court held that hearsay evidence linking the defendant to an earlier killing was relevant to show the defendant's "past conduct," even though charges had been dismissed for lack of probable cause. *Id.* at 364-65, 478 N.E.2d at 412; *see also* People v. Morgan, 112 Ill. 2d 111, 142-44, 492 N.E.2d 1303, 1316-17 (1986) (charges dismissed), *cert. denied*, 479 U.S. 1101 (1987).

The court even has suggested that evidence of an arrest, by itself, is relevant to the sentencing decision, even without further evidence of misconduct. *See* People v. Hall, 114 Ill. 2d 376, 417, 499 N.E.2d 1335, 1352 (1986), *cert. denied*, 480 U.S. 951 (1987) ("hearsay testimony that the defendant had been charged in an earlier murder, but that the charges were dismissed for want of probable cause, admissible at sentencing hearing as relevant to defendant's unprosecuted misconduct"; summarizing the holding of *Brisbon*).

158. *See, e.g.*, People v. Barrow, 133 Ill. 2d 226, 245, 283, 549 N.E.2d 240, 248, 266 (1989), *cert. denied*, 110 S. Ct. 3257 (1990); People v. Adams, 109 Ill. 2d 102, 128-29, 485

these decisions, the court tacitly applied a more narrow standard of relevance.[159]

N.E.2d 339, 349 (1985), *cert. denied*, 475 U.S. 1088 (1986). The relevance-based rationale of these cases conflicts with other holdings of the Illinois Supreme Court. For an analysis, see *infra* note 159.

159. The Illinois Supreme Court's most explicit ruling that evidence of a prior crime should be excluded as irrelevant came in *People v. Harris*, in which the court also ruled that firsthand eyewitness testimony, which implicated the defendant in an earlier and unrelated 1969 killing, was unreliable. The defendant had been charged with murder in the prior case, but the prosecutor dropped the charges in 1972. The Illinois Supreme Court ruled that the trial judge in *Harris* erred by refusing to admit a transcript of the 1972 nolle prosequi hearing in which the prosecutor explained that he believed Harris was not guilty. The Illinois Supreme Court found reasons to distrust the eyewitnesses, concluded that their testimony was unreliable, and also regarded the excluded statement of the prosecutor as probative of Harris's innocence. *See* People v. Harris, 129 Ill. 2d 123, 143-46, 162-65, 544 N.E.2d 357, 365-68, 374-75 (1989), *cert. denied*, 110 S. Ct. 1323 (1990); *see also* discussion *supra* note 153. This persuasive evidence of the defendant's innocence explains the court's ruling that the testimony of the eyewitnesses was irrelevant as well as unreliable. As the United States Supreme Court noted in another context, evidence of other crimes is relevant only if there is sufficient credible evidence to conclude that the crime occurred and the defendant was the actor. *See* Huddleston v. United States, 485 U.S. 681, 689 (1988).

In other cases, the rule of relevance supplies the sole rationale for the court's conclusion that evidence was improperly admitted at the capital sentencing hearing. These cases are not easily distinguishable from other decisions that would appear to regard the same evidence as proper.

The principle of relevance best explains two decisions in which the Illinois Supreme Court ruled that some firsthand cross-examined testimony should have been excluded at the sentencing hearing. In People v. Adams, 109 Ill. 2d 102, 485 N.E.2d 339 (1985), *cert. denied*, 475 U.S. 1088 (1986), an officer testified that when he responded to a report of a robbery, he found "two blacks" getting into a car about two blocks from the scene. When they ran in different directions, the officer chased and apprehended one, who was the defendant. As no other evidence linked the defendant to that robbery, no charges were filed. The court speculated that the robbery victim probably failed to identify the defendant. Without articulating whether the evidence failed the test of relevance or the test of reliability, the court concluded that the officer's testimony was improperly admitted. *Id.* at 128-29, 485 N.E.2d at 349.

Similarly, in People v. Barrow, 133 Ill. 2d 226, 245, 549 N.E.2d 240, 248 (1989), *cert. denied*, 110 S. Ct. 3257 (1990), a witness who worked with the defendant at a convenience store testified that she saw him weigh several packets of white powder on a scale. *Id.* at 245, 549 N.E.2d at 248. Again, the court ruled that this live, cross-examined testimony about the witness's firsthand observations was improperly admitted. The court explained that the testimony was unreliable evidence that the defendant possessed drugs and therefore did not meet the standard of accuracy that governs information offered in the sentencing hearing. *Id.* at 283, 549 N.E.2d at 266.

As the witnesses in *Barrow* and *Adams* conveyed their firsthand observations in court where the defendant had an opportunity to cross-examine, their reports satisfy the confrontation clause and other decisions of the Illinois Supreme Court that have defined the standard of reliability. Although *Barrow* stated that the testimony about the powder was unreliable, not irrelevant, both *Barrow* and *Adams* make sense when viewed as rulings on conditional relevance: the otherwise sufficiently reliable testimony must be excluded without more substantial or additional evidence linking the defendant to the proposition the prosecution is attempting to prove.

In evaluating the relevance of the state's evidence, however, the Illinois Supreme Court

Without consistent guidance on the meaning of relevance and reliability, trial judges will have trouble distinguishing between evidence the high court would approve and evidence it would spurn. When the record clearly reveals that the judge relied on testimony that the Illinois Supreme Court later concludes was improper, it will reverse a sentence of death.[160] But trial judges do not invariably list every scrap of testimony that affected their decision. Given the uncertainties about what evidence is proper, the Illinois Supreme Court may be too trusting in its deferential approach.

b. Reliable Because Defendant Fails to Challenge

The Illinois Supreme Court has sometimes explained that the statements of out-of-court declarants are reliable, and therefore admissible, because the defendant never "directly challenged" the prosecution's hearsay.[161] In these cases, the court clearly avoids

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has failed to provide trial courts with clear and consistent guidance in how to match the probative value of the state's evidence with the propositions the prosecution may permissibly prove.

For example, the court held in People v. Free, 94 Ill. 2d 378, 447 N.E.2d 218, *cert. denied*, 464 U.S. 865 (1983), that an officer properly testified about stopping and questioning the defendant around 4 a.m. the day before the defendant committed the murder for which he was convicted. *Id.* at 424, 447 N.E.2d at 240. Although the testimony presented no evidence of criminal behavior, the court regarded Free's conduct as "suspicious" and in later cases cited *Free* when explaining that evidence is relevant when it merely shows a defendant's "propensity to conduct himself in a particular manner." People v. Salazar, 126 Ill. 2d 424, 468, 535 N.E.2d 766, 785 (1988) (characterizing the holding of *Free*), *cert. denied*, 110 S. Ct. 3288 (1990); *see also* People v. Johnson, 128 Ill. 2d 253, 284, 538 N.E.2d 1118, 1132 (1989) (Free's conduct "suspicious"). A similar rationale could have permitted the testimony in *Adams*, on the ground that defendants act suspiciously and show their character and propensities when they flee from police officers. Likewise, a court could regard the testimony in *Barrow* as relevant evidence of the defendant's lifestyle, "suspicious" conduct, and "propensity to conduct himself in a particular manner," even without direct evidence identifying the powder in Barrow's packets. *Barrow* and *Adams* are difficult to reconcile with *Free* and other cases that hold evidence properly relevant if it shows anything about the defendant's character or past conduct. These contradictory rulings do not inspire confidence that trial judges will automatically rely only on the evidence the Illinois Supreme Court considers proper.

160. *See* People v. Harris, 129 Ill. 2d 123, 164-65, 544 N.E.2d 357, 374-75 (1989), *cert. denied*, 110 S. Ct. 1323 (1990) (reversing sentence of death because trial judge acknowledged relying on evidence that the Illinois Supreme Court considered improper).

161. *See, e.g.*, People v. Salazar, 126 Ill. 2d 424, 469, 535 N.E.2d 766, 785 (1988), *cert. denied*, 110 S. Ct. 3288 (1990) (defendant "never directly challenged" hearsay testimony that he was gang member); People v. Foster, 119 Ill. 2d 69, 98-99, 518 N.E.2d 82, 95 (1987), *cert. denied*, 486 U.S. 1047 (1988) (hearsay "never directly challenged"); People v. Hall, 114 Ill. 2d 376, 400-01, 417, 499 N.E.2d 1335, 1344, 1353 (1986), *cert. denied*, 480 U.S. 951 (1987) (secondhand report of misconduct reliable because defendant "did not claim at trial that the incident did not occur"); People v. Johnson, 114 Ill. 2d 170, 206, 499 N.E.2d 1355, 1371 (1986), *cert. denied*, 480 U.S. 951 (1987) (secondhand report of uncharged killing "never directly challenged"). In most of these opinions, the court

asking whether the declarant made the statement under circumstances that suggest it is worthy of belief. Instead, the court borrows a principle that generally operates when judges sentence convicted felons—that judges may properly rely on any uncontested information contained in presentence reports.[162] The Illinois Supreme Court should not automatically assume, however, that it may properly apply the same rule in the trial-like procedures of capital sentencing, where adverse parties control the evidence and present it all in open court before a jury.[163] Moreover, by applying this rule of felony sentencing in capital proceedings, the Illinois Supreme Court has made it more difficult for defendants to alert the sentencer that it may be relying on inaccurate information.

In practice, the rule evaluates the admissibility of evidence only in retrospect. Until both parties have presented their witnesses, the court does not know whether the defendant has directly challenged the prosecution's hearsay. In nonjury proceedings, judges are accustomed to hearing all potentially questionable evidence and ruling later on its admissibility or basing their decision only on the clearly admissible evidence.[164] With a jury, however, such a procedure is untrustworthy, as evidentiary rules of exclusion aim to keep improper evidence from ever reaching the jury.[165] Courts attempt

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offered additional reasons for finding the hearsay reliable. Yet the opinions suggest that the defendant's failure to challenge can be sufficient, by itself, to consider the prosecution's hearsay admissible.

162. Such reliance is proper when defendants have the opportunity to review and criticize the contents of the reports. *See, e.g.*, 3 STANDARDS FOR CRIMINAL JUSTICE § 18-6.4 commentary (1979); Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 GEO. L.J. 1515, 1529 (1978); *see also* Gardner v. Florida, 430 U.S. 349, 362 (1977) (sentencer may rely only on information that defendant has had a chance to deny or explain), discussed *supra* notes 60-68 and accompanying text.

163. The Illinois Supreme Court maintains that the same standards of relevance and reliability govern the admissibility of evidence at all capital sentencing hearings, whether they are conducted before a judge or jury. *See supra* text accompanying note 140. The court has reasoned that unchallenged hearsay is reliable in both jury and nonjury sentencings. *See* People v. Salazar, 126 Ill. 2d 424, 468, 535 N.E.2d 766, 785 (1988), *cert. denied*, 110 S. Ct. 3288 (1990) (jury sentencing); People v. Hall, 114 Ill. 2d 376, 416-17, 499 N.E.2d 1335, 1352 (1986), *cert. denied*, 480 U.S. 951 (1987) (judge).

164. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16:3(5) (2d ed. 1979). Similarly, when sentencing judges decline to rely on a disputed section of a presentence report, they remain aware of the information they purport to disregard.

165. *Cf.* E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 103.9 (4th ed. 1984) ("[t]o the extent practicable, proceedings are to be conducted so as to prevent inadmissible evidence from being suggested to the jury by any means"); *see also* E. CLEARY, MCCORMICK ON EVIDENCE § 353 (3d ed. 1984) ("[a]dmission of evidence in a jury trial is often considered the last effective legal control over the use (or abuse) of such evidence because of the assumption that the jury will rely upon or be swayed by it regardless of whether its reliability has been established").

to correct the occasional error by instructing the jury to disregard improper testimony. Yet it seems anomalous to fashion a rule of admissibility that permits the jury to hear all the prosecution's hearsay and then relies on later instructions to strike the inadmissible portions.[166] Sitting as a court of review, the Illinois Supreme Court can examine all the evidence with hindsight and determine that the defendant did not directly challenge the state's hearsay. But such a backward-looking evaluation provides no guidance to trial judges who must decide, in the middle of a jury proceeding, whether the prosecution's hearsay is sufficiently reliable to be admitted as evidence.

Defendants could conceivably challenge the prosecution's hearsay by presenting their own witnesses or by cross-examining the prosecution's witnesses. However, the Illinois Supreme Court applies a strict standard in judging whether a defendant's challenge is sufficiently direct.[167] It sometimes appears that defendants cannot "directly challenge" the prosecution's hearsay unless they personally take the witness stand.[168] For example, while cross-examining a correctional officer who testified for the state, the defendant in *People v. Hall*[169] challenged a hearsay allegation that he helped other inmates stab a prisoner. He elicited evidence that a mere fistfight took place,[170] thus countering the hearsay allegation of an armed assault with evidence that no weapons were involved. Yet the Illinois Supreme Court reasoned that the defendant did not challenge the accusation directly because he did not deny in court that the altercation occurred.[171]

Defendants also have failed to "directly challenge" the prosecution's hearsay even when calling friendly witnesses to rebut the state's evidence. In *People v. Salazar*,[172] the defendant presented two character witnesses to counter the prosecution's hearsay evidence that he belonged to a street gang. The court's ruling that these witnesses did not directly challenge the evidence of gang membership appears to leave defendants little opportunity for

166. If some evidence were indeed admissible solely because the defendant failed to challenge it, then the judge's decision to allow the prosecution to present hearsay would become an error of law as soon as the defendant later produced witnesses who directly challenged its accuracy. Presumably the judge would then instruct the jury to disregard the now-inadmissible hearsay.

167. *See infra* notes 169-74 and accompanying text.

168. *Id.*

169. 114 Ill. 2d 376, 499 N.E.2d 1335 (1986), *cert. denied*, 480 U.S. 951 (1987).

170. *Id.* at 400-01, 499 N.E.2d at 1344.

171. *Id.* at 400-01, 417, 499 N.E.2d at 1344, 1352.

172. 126 Ill. 2d 424, 535 N.E.2d 766 (1989), *cert. denied*, 110 S. Ct. 3288 (1990).

mounting a sufficiently direct challenge unless they take the witness stand themselves.[173] Indeed, without cooperative testimony from self-admitted gang members, which nonmembers would have difficulty arranging, it is difficult to imagine any other method by which a defendant could directly challenge a hearsay allegation that he belonged to a street gang. The court's opinions in *Hall* and *Salazar* do not expressly rely on the defendant's failure to testify. Nevertheless, by concluding in these cases that the defendant's challenge to the state's hearsay is not sufficiently direct and that the absence of direct challenge renders the state's hearsay reliable, the court infers far too much from the defendant's silence.[174]

The Supreme Court long has recognized that there are many reasonable explanations why even an innocent defendant may de-

173. *Id.* at 469-70, 535 N.E.2d at 785-86. In *Salazar*, the state presented secondhand evidence that the defendant belonged to a street gang in the summer before the September 1984 murder for which he was being sentenced and additional hearsay that he was a lieutenant. To rebut this accusation, the defendant presented two character witnesses who testified that they had known him for many years and had never known him to be a gang member or to carry a gun. In the court's view, these defense witnesses did not directly challenge the evidence of membership. *Id.* One witness knew the defendant since junior high school, but had seen him only once in the fourteen months before the murder. The second witness, a boxing coach, had not seen the defendant since 1983 and admitted hearing rumors of the defendant's membership. By pointing out the dates that these witnesses were best acquainted with the defendant, the court appeared at first to regard their testimony as probative, but stale. Yet if the witnesses have presented relevant and probative evidence that the defendant was not a gang member in 1983, then it seems they have challenged the prosecution's evidence that the defendant was a top-level officer only a year later. As the court ruled that these witnesses did not directly challenge the evidence of membership, *id.*, it appears that the defendant can realistically hope to mount a sufficiently direct challenge only by taking the witness stand himself.

174. People v. Johnson, 114 Ill. 2d 170, 499 N.E.2d 1355 (1986), *cert. denied*, 480 U.S. 951 (1987), provides another example in which the defendant's failure to challenge the prosecution's hearsay does not logically support an inference that it is reliable. At the sentencing hearing, the prosecution presented secondhand and some thirdhand testimony implicating Johnson in another murder for which he was not yet charged. On review, the Illinois Supreme Court announced that the secondhand evidence was sufficiently reliable because Johnson did not directly challenge its accuracy. *Id.* at 206, 499 N.E.2d at 1371. Yet if prosecutors were planning to file criminal charges for this second murder, the need to prepare a defense provides an alternative explanation for Johnson's silence. Anticipating a trial in that as-yet-unfiled murder case, a defense lawyer might reasonably discourage Johnson and his witnesses from providing sworn testimony that prosecutors might later turn to their advantage, especially because the out-of-court declarants, who would have to testify in person at the upcoming trial, had neither appeared, given testimony, nor been cross-examined. This obvious explanation, the dictates of trial strategy and preparation, reasonably accounts for the defendant's silence and also preserves the presumption of innocence that must govern the upcoming trial. The Illinois Supreme Court appeared confident that the sentencer, who knew charges had not yet been filed, properly weighed the secondhand evidence of the second murder. The opinion did not explain how the fact that no charges had yet been filed affected the weight to be given the secondhand evidence.

cline to testify at a criminal trial.[175] Some witnesses will present poorly to a jury, especially if they are nervous or inarticulate and must explain suspicious or embarrassing actions.[176] A defendant may have even more reason to remain silent in a capital sentencing hearing when confronted with hearsay accusations that he has, for example, committed additional crimes or belongs to a criminal organization.[177] If the defendant testified in the guilt phase of the trial, the vote to convict may reflect the jury's view that he lied. In the sentencing phase, even if the defendant truthfully rebuts the prosecution's additional hearsay allegations, a jury that has already voted to convict may view his testimony with undue skepticism.[178] Furthermore, the defendant cannot take the witness stand simply to rebut the prosecution's hearsay evidence of one particular act of misconduct; he must submit to complete cross-examination if he testifies at all.[179] Some defendants may choose to forego this all-encompassing cross-examination[180] before a jury from which the most potentially sympathetic listeners—citizens who are the most hesitant to impose the penalty of death—have already been removed by law.[181]

If, as the Illinois Supreme Court suggests,[182] the state's hearsay

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175. As the Court observed almost a hundred years ago:

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.

Wilson v. United States, 149 U.S. 60, 66 (1893), *quoted in* Carter v. Kentucky, 450 U.S. 288, 300 n.15 (1981).

176. *Id.*

177. In another context in which the Court debunked the probative value of a defendant's silence, it recognized that even innocent people are more likely to remain justifiably silent in proceedings in which they cannot cross-examine their accusers. *See* Grunewald v. United States, 353 U.S. 391, 422-23 (1957).

178. Indeed, the defendant in *Salazar* testified in the guilt phase of the trial, but not in the penalty phase. *See* People v. Salazar, 126 Ill. 2d 424, 447, 535 N.E.2d 766, 776 (1989), *cert. denied*, 110 S. Ct. 3288 (1990).

179. *See* People v. Szabo, 113 Ill. 2d 83, 95, 497 N.E.2d 995, 1000 (1986), *cert. denied*, 479 U.S. 1101 (1987).

180. *See* Burger v. Kemp, 483 U.S. 776, 792 (1987) (experienced trial counsel may properly decide to forego presenting mitigating evidence because cross-examination of defendant or his witnesses may harm chances for a life sentence).

181. *See* Wainwright v. Witt, 469 U.S. 412, 433 (1985) (explaining standard for removing, for cause, jurors whose scruples against capital punishment inhibit their willingness to vote for death); Witherspoon v. Illinois, 391 U.S. 510, 513-23 (1968).

182. *See, e.g.*, People v. Hall, 114 Ill. 2d 376, 417, 499 N.E.2d 1335, 1352 (1986), *cert. denied*, 480 U.S. 951 (1987).

is reliable because the defendant failed to challenge it directly, then the prosecutor presumably could present such an argument to the sentencing jury. But that argument collides with the defendant's fifth amendment rights, which fully apply in capital sentencing trials.[183] The fifth amendment forbids the prosecutor from reminding the jury in any way that the defendant failed to testify.[184] When the missing rebuttal could have come only from the defendant himself, the prosecutor may overstep the line if he argues that the government's hearsay has gone unchallenged.[185] Indeed, whether the prosecution makes the argument or not, neither the judge nor the jury may draw any adverse inference from the defendant's silence.[186] Consequently, when the Illinois Supreme Court regards the prosecution's hearsay as reliable because the defendant did not challenge it directly, and if it also looks to the defendant's testimony as the sole source of a sufficiently direct challenge,[187] the court draws inferences forbidden by the fifth amendment.[188]

Moreover, importing the rule of felony sentencing into capital sentencing proceedings raises concerns that lie beyond the scope of

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183. Estelle v. Smith, 451 U.S. 454, 462-63 (1981).

184. *See* Carter v. Kentucky, 450 U.S. 288, 297-98 (1981); Griffin v. California, 380 U.S. 609, 613-15 (1965).

185. Professor Cleary believes that prosecutors may sometimes violate the fifth amendment by arguing that the state's evidence is uncontradicted:

> [I]t is permissible as a general matter for the prosecution to argue that particular evidence is uncontradicted, although *Griffin* may be violated by such an argument if it appears that the jury would most likely conclude that the natural source of contradictory evidence would have been the defendant's personal testimony.

E. CLEARY, MCCORMICK ON EVIDENCE § 131, at 321 (3d ed. 1984).

186. Carter v. Kentucky, 450 U.S. 288, 301 (1981).

187. *See supra* notes 169-74 and accompanying text.

188. Even if the fifth amendment sometimes forbids sentencers in capital proceedings from inferring that unchallenged hearsay is reliable, it does not necessarily forbid similar inferences in noncapital sentencing. When the Supreme Court held that the fifth amendment applied to capital sentencing, it relied on the similarities between a capital sentencing hearing and a criminal trial. *See* Estelle v. Smith, 451 U.S. 454, 462-63 (1981). Barring the prosecutor from commenting on the defendant's failure to testify follows naturally from the rationale and holding of *Smith*. It is not clear, however, that the Court would extend *Smith*'s fifth amendment holding to nonadversary sentencings in which a judge relies on a presentence report. *See* 1 J. WIGMORE, EVIDENCE § 4 n.54 (Tiller rev. 1983). When the fifth amendment is not implicated, the Court has permitted the fact finder to draw adverse inferences from the silence of the accused. *See* Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) ("aside from the privilege against compelled self-incrimination, the Court consistently has recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause") (prison disciplinary proceeding). The Illinois Supreme Court never has considered the fifth amendment implications of its view that unchallenged hearsay is reliable in capital sentencing proceedings.

the fifth amendment. When uprooted from its home turf and transplanted into the world of adversary capital sentencing proceedings, the rule that unchallenged hearsay is reliable poses a greater risk that the sentencer may rely on information that actually is inaccurate. The adversary format in capital cases makes it more difficult for defendants to challenge unfounded hearsay.

In a system without specific mandatory penalties for every crime, the procedures for sentencing convicted felons are designed to help the trial court exercise its discretion to choose a sentence within the range authorized by the legislature.[189] Felony sentencing is not a purely adversary process, as the prosecution and the defendant do not control the information provided to the decision maker. Although the parties may provide supplementary evidence in an adversary format, an officer of the court, who is theoretically neutral, prepares the presentence report.[190] Defendants generally may examine presentence reports in advance and thus may determine whether and how to challenge any inaccurate information.[191] Assertedly incorrect information may be brought to the judge's attention by way of objection that can be resolved informally if the judge announces he will ignore the disputed portion of the report and rely only on the unchallenged facts.[192] As a result, the defendant may sometimes correct an inaccurate presentence report without necessarily giving sworn testimony and submitting to cross-examination. In addition, Illinois felons retain the common law right of allocution, the right to make an unsworn statement before being sentenced.[193]

Capital sentencing works differently. The parties control the evidence, which they present in a trial-like adversary proceeding.[194]

189. *See* United States v. Grayson, 438 U.S. 41, 45-49 (1978).

190. *See* United States v. DiFrancesco, 449 U.S. 117, 136-37 (1980) (sentencing inquiry "nonadversary in nature"); Note, *supra* note 162, at 1529 (presentence report prepared by neutral officer).

191. *See, e.g.*, FED. R. CRIM. P. 32(c)(3)(A); ILL. REV. STAT. ch. 38, para. 1005-3-4(b)(2) (1989).

192. *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 25.2(i) (1985); *see also* People v. Meeks, 81 Ill. 2d 524, 411 N.E.2d 9, 14 (1980); FED. R. CRIM. P. 32(c)(3)(A) (defendant provided opportunity to comment on report); 32(c)(3)(D)(ii) (court may disregard disputed portions).

193. ILL. REV. STAT. ch. 38, para. 1005-4-1(a)(5) (1989); *see also* People v. Gaines, 88 Ill. 2d 342, 378-80, 430 N.E.2d 1046, 1062-65 (1981), *cert. denied*, 456 U.S. 1001 (1982).

194. The Illinois Supreme Court clearly holds the defendant—not the court—responsible for marshaling and submitting mitigating evidence at capital sentencing hearings. For example, in People v. Wright, 111 Ill. 2d 128, 160, 490 N.E.2d 640, 653 (1986), *cert. denied*, 479 U.S. 1101 (1987), the defendant was convicted of murder and some related noncapital felonies. A presentence report prepared for sentencing on the latter charges

The Illinois statute does not provide for presentence reports,[195] and the Illinois Supreme Court has held that the prosecution has no obligation to disclose its witnesses or its evidence to the defense in advance.[196] Consequently, defendants sometimes will not know what hearsay accusations they must challenge until the formal hearing begins.[197] Moreover, the decisions of the Illinois Supreme Court prevent defendants from presenting their own versions of the facts unless they submit to cross-examination, even though they have no right to cross-examine the prosecution's hearsay declarants.[198] For example, after holding that defendants have no right

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turned up mitigating evidence that was not considered at the defendant's earlier capital sentencing hearing. Despite the existence of this mitigating evidence, the court ruled that the defendant must suffer the consequences of his own failure to submit the evidence to the capital sentencer.

195. Although the Illinois statute does not require presentence reports in capital sentencing, *see* People v. Madej, 106 Ill. 2d 201, 211-12, 478 N.E.2d 392, 396, *cert. denied*, 474 U.S. 935 (1985) (nonjury sentencing); People v. Gaines, 88 Ill. 2d 342, 372-74, 430 N.E.2d 1046, 1061-62 (1981), *cert. denied*, 456 U.S. 1001 (1982) (jury sentencing), judges have sometimes ordered them prepared when the defendant has waived jury sentencing, *see, e.g.*, People v. Boclair, 129 Ill. 2d 458, 486, 544 N.E.2d 715, 728 (1989). In some early cases, probation officers investigated the defendant's background and testified to their findings in court before the sentencing jury. *See, e.g.*, People v. Free, 94 Ill. 2d 378, 424-26, 447 N.E.2d 218, 240-41, *cert. denied*, 464 U.S. 865 (1983); People v. Jones, 94 Ill. 2d 275, 287, 447 N.E.2d 161, 167 (1982), *cert. denied*, 464 U.S. 920 (1983).

196. *See* People v. Foster, 119 Ill. 2d 69, 101-03, 518 N.E.2d 82, 96-97 (1987), *cert. denied*, 486 U.S. 1047 (1988). Some prosecutors apparently supply the defense with a list of witnesses even though they are not required to do so. *See, e.g.*, People v. Collins, 106 Ill. 2d 237, 280-81, 478 N.E.2d 267, 286, *cert. denied*, 474 U.S. 935 (1985).

197. Even a list of witnesses would not necessarily help the defendant prepare to rebut the prosecution's hearsay in a capital sentencing hearing. A list would reveal only the names of persons who may actually testify, not the names of the out-of-court declarants whose accusations the named witnesses might report. Even if the prosecution provided a list of all the hearsay declarants, the defendant would often be the only one who could directly challenge the prosecution's evidence of prior unadjudicated crimes. The prosecution could easily put on hearsay evidence of a ten-year-old crime simply by finding the officer who investigated it or by finding a different officer to testify to the contents of a ten-year-old report. Even with prior notice that the state intended to use this evidence, the defendant would have a much harder time tracking down witnesses who could rebut it. Thus, even if the hearsay accusations are false, the defendant may be faced with the choice of countering the accusation with personal testimony or not at all. A judge sentencing on the basis of a presentence report, when advised that the defendant disputes the report's version of a decade-old incident, might choose to avoid unfairness by declining to rely on the contested information. A sentencing jury could not implement a similar solution.

198. When an FBI agent testified for the state at the sentencing hearing in *People v. Ramirez*, the defendant attempted to elicit, on cross-examination, an item of mitigating information: that he telephoned the FBI and offered to surrender peacefully on a prior charge. The court's opinion reveals that a written FBI report confirmed the defendant's version and the prosecution did not dispute its accuracy. The testifying agent, however, did not receive the defendant's call and had no firsthand knowledge of the conversation. Because the defendant's question asked for hearsay, the trial judge ruled that the agent

of allocution at capital sentencing,[199] the court ruled that trial judges may forbid expert witnesses from recounting their conversations with the defendant.[200] Such testimony, the court explained, would permit defendants to submit unsworn statements.[201] Judges also may exclude the defendant's sworn statements if they are submitted as affidavits instead of testimony.[202] These rulings make it more difficult for defendants to controvert the government's case, and the Illinois Supreme Court cannot safely presume that defendants accept the accuracy of the prosecution's hearsay simply because they fail to challenge it directly.

c. Corroboration

A majority of the Supreme Court now has held that the existence of independent corroborating evidence is irrelevant to a court's inquiry into whether an otherwise inadmissible out-of-court statement carries such particularized guarantees of trustworthiness that it qualifies as an exception to the confrontation clause.[203] In an earlier plurality opinion, and in cases in which the confrontation clause did not apply, the Court sometimes noted that the exist-

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could not answer. He further ruled that if the defendant testified about the call, the FBI report could be admitted as corroborating evidence. In upholding the trial judge's ruling, the Illinois Supreme Court noted that the defendant could have testified personally. Despite previous rulings that permitted hearsay at the sentencing hearing, the court said that the defendant "defie[d] logic" by arguing that he was prevented from presenting mitigating evidence by a ruling that merely barred a witness from testifying about "a conversation to which [he] was not even a party." People v. Ramirez, 98 Ill. 2d 439, 464, 457 N.E.2d 31, 43 (1983).

199. People v. Gaines, 88 Ill. 2d 342, 374-80, 430 N.E.2d 1046, 1062-65 (1981), *cert. denied*, 456 U.S. 1001 (1982).

200. People v. Stewart, 104 Ill. 2d 463, 496-97, 473 N.E.2d 1227, 1242 (1984), *cert. denied*, 471 U.S. 1120 (1985).

201. "We do not consider that the trial court abused discretion in refusing to allow these witnesses to pass on to the jury what the defendant had told them. An accused should not be permitted to make in this way what would be an unsworn statement to the jury." *Id.* (citation omitted). *But see* People v. Gacy, 125 Ill. 2d 117, 131, 530 N.E.2d 1340, 1345 (1988) (in explaining basis for diagnosis, psychiatric expert may relate conversations with defendant); People v. Anderson, 113 Ill. 2d 1, 12-13, 495 N.E.2d 485, 490, *cert. denied*, 479 U.S. 1012 (1986) ("[psychiatric] expert must be allowed to repeat [defendant's] statements if relevant").

202. People v. Perez, 108 Ill. 2d 70, 88-89, 483 N.E.2d 250, 259 (1985), *cert. denied*, 474 U.S. 1110 (1986). Nor may defendants take the stand with a guarantee that cross-examination will be limited to a narrow issue on which the defendant seeks to offer evidence. People v. Szabo, 113 Ill. 2d 83, 95, 497 N.E.2d 995, 1000 (1986), *cert. denied*, 479 U.S. 1101 (1987). Defendants also failed to benefit from the suspension of the rules of evidence when the court held that the results of polygraph tests are inadmissible in the second phase of an Illinois capital sentencing hearing. People v. Szabo, 94 Ill. 2d 327, 362-63, 447 N.E.2d 193, 210 (1983), *cert. denied*, 479 U.S. 1101 (1987).

203. *See* Idaho v. Wright, 110 S. Ct. 3139, 3150 (1990).

ence of independent corroborating evidence bolsters the reliability of hearsay that may be otherwise inadmissible under state or common law rules of evidence that govern criminal trials.[204] Corroboration functions in these decisions to supplement some indicia of reliability that the Court has already found in the circumstances in which the out-of-court statement was made.[205] The Supreme Court has never held that corroboration, by itself, can transform inadmissible hearsay into reliable evidence that may be submitted to a jury,[206] and commentators have criticized lower court opinions that rely solely on corroboration to find guarantees of trustworthiness purportedly equivalent to those provided by the traditional exceptions to the hearsay rule.[207]

In contrast, the Illinois Supreme Court regards the existence of minimal corroborating evidence as a sufficient condition for admitting hearsay in capital sentencing hearings, without any inquiry at all into the circumstances surrounding the making of the out-of-court statement.[208] In some of these cases, moreover, the court appears unconcerned even when the most damaging details of the out-of-court accusations pass with no corroboration at all.

When the prosecution has introduced evidence in capital sen-

204. *See, e.g.*, Green v. Georgia, 442 U.S. 95, 97 (1979); Chambers v. Mississippi, 410 U.S. 284, 298-301 (1973); Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (plurality opinion).

205. *Green* and *Chambers* did not implicate the principles of the confrontation clause, because the defendant contested the exclusion of his evidence, not the admission of the prosecution's testimony. The plurality opinion in *Dutton*, which interpreted the confrontation clause, pointed to corroboration as one of four factors that suggested that the hearsay in that case carried indicia of reliability. The Supreme Court has now explained that *Dutton*'s mention of corroborating evidence is "more appropriately" viewed as an explanation that any error in admitting the hearsay in that case was harmless. Idaho v. Wright, 110 S. Ct. 3139, 3150-51 (1990).

206. In Bourjaily v. United States, 483 U.S. 171, 180-81 (1987), the Court held that corroborated hearsay can be sufficiently probative under FED. R. EVID. 104, which provides that trial judges may determine preliminary issues of fact without regard to the rules of evidence. The Court noted that corroboration may increase the probative value of information that is unreliable in isolation. Although trial judges may make preliminary evidentiary determinations without regard to the rules of evidence, *Bourjaily* did not hold that corroboration is a sufficient guarantee of reliability to submit ordinarily inadmissible hearsay to a jury. *See also* United States v. Matlock, 415 U.S. 164, 172-77 (1974) (corroborated hearsay sufficiently reliable when trial judge decides motion to suppress evidence).

207. *See, e.g.*, Cole, *Residual Exceptions to the Hearsay Rule*, LITIGATION, Fall 1989, at 26, 30; Grant, *The Equivalent Circumstantial Guarantees of Trustworthiness Standard for Federal Rule of Evidence 803(24)*, 90 DICK. L. REV. 75, 97-99 (1985); Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 465-66 (1985); Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 884 (1982).

208. *See infra* notes 209-24 and accompanying text.

tencing hearings of the defendant's prior criminal activity, the Illinois Supreme Court has permitted police to relate the contents of self-serving out-of-court statements taken from former accomplices just after their arrest.[209] The court reasoned that the statements of former codefendants are reliable when they are corroborated by the defendant's conviction of the prior offense.[210] The court's reasoning ignores the fact that a conviction establishes only the bare elements of a crime as the statutes define it. It does not corroborate the juicy details that former accomplices can include in their accusations. This is especially true when a former accomplice names the defendant as the ringleader, the initiator of a pre-conceived plan to murder,[211] or the triggerperson.[212] The Illinois Supreme Court persisted in its lenient attitude toward codefendants' accusations even after the United States Supreme Court, in *Lee v. Illinois*,[213] identified the finger-pointing statements of code-

209. *See* People v. Foster, 119 Ill. 2d 69, 98, 518 N.E.2d 82, 95 (1987), *cert. denied*, 486 U.S. 1047 (1988); People v. Lyles, 106 Ill. 2d 373, 415, 478 N.E.2d 291, 309 (1985), *cert. denied*, 474 U.S. 859 (1985).

210. For example, in People v. Foster, 119 Ill. 2d 69, 98, 518 N.E.2d 82, 95 (1987), *cert. denied*, 486 U.S. 1047 (1988), the court approved secondhand testimony about the role the defendant played in an earlier tavern robbery for which he was convicted. An accomplice arrested for that crime told police that he purposely foiled the defendant's purported plan to kill the bartender. Although the accomplice did not testify and submit to cross-examination, his postarrest statement was "clearly reliable," the court explained, because it was corroborated by the defendant's conviction for robbery. *See also* People v. Lyles, 106 Ill. 2d 373, 415, 478 N.E.2d 291, 309 (1985), *cert. denied*, 474 U.S. 859 (1985) (double hearsay about defendant's 1968 juvenile crime, consisting of former state's attorney's testimony about contents of investigators' interviews with former codefendant in juvenile proceedings, "strongly corroborated" by defendant's plea in juvenile court).

211. *See, e.g.*, *Foster*, 119 Ill. 2d at 97, 518 N.E.2d at 94.

212. In People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353, *cert. denied*, 464 U.S. 1001 (1983), the defendant was convicted of murder. In the sentencing hearing, the prosecution introduced a videotape that depicted a pretrial discussion between the defendant and the state's attorney. In the recorded interview, the state's attorney told the defendant that Holman, a second man arrested for the killing, named the defendant as the triggerperson. *Id.* at 47, 447 N.E. 2d at 375. Because no such evidence surfaced during the guilt phase of the trial, the sentencing jury's only information that Davis allegedly pulled the trigger came from this recording portraying the unsworn, nontestifying state's attorney announcing that an unsworn, out-of-court co-arrestee made the accusation.

The court did not assert that the verdict of guilt corroborated the accusation, nor did it conclude that the videotaped hearsay was otherwise reliable. The court simply declared that the rules of evidence do not apply at the second stage of a capital sentencing hearing. *Id.* at 42-43, 447 N.E.2d at 373. In response to the defendant's objection that he could not test the reliability of the accusation by cross-examination, the court said that the defendant could have called Holman to the stand as an adverse witness. *Id.* at 47, 447 N.E.2d at 376. For criticism of the view that the defendant's right to subpoena witnesses adequately satisfies the right of confrontation, see *infra* note 120.

213. 476 U.S. 530 (1986). The Illinois Supreme Court decided People v. Foster, 119 Ill. 2d 69, 518 N.E.2d 82 (1987), *cert. denied*, 486 U.S. 1047 (1988), one year after *Lee v. Illinois*.

fendants as particularly unreliable and stated that cross-examination is essential for subjecting these suspect accusations to appropriate scrutiny.[214]

More recently, the Illinois court changed course and abandoned its view that convictions adequately corroborate codefendants' accusations.[215] Nevertheless, the court continues to apply laxly its "test" of corroboration when the presumptively suspect statements of accomplices are not at issue. In *People v. Young*,[216] a decade-old out-of-court statement from a surviving victim of a robbery-murder accused the defendant of pulling the trigger in that earlier crime.[217] When questioned in 1978, the defendant admitted participating in the robbery, but maintained that he merely stood guard while an accomplice carried out the crime that left one victim dead and one wounded.[218] In the view of the Illinois Supreme Court, the defendant's admitted presence at the scene sufficiently corroborated the out-of-court assertion that he fired the actual shots.[219] At a murder trial, whether the defendant pulled the trigger would not matter to a jury that followed instructions; the defendant's explanation of the ten-year-old crime amounted to an admission of felony murder. But who fired the shot is more important to a jury pondering whether someone should live or die. On a key item of fact that determined the degree of Young's moral responsibility, his prior statement *directly challenged* that of the out-of-court declarant. Nevertheless, in a perverse twist of logic, the Illinois Supreme Court reasoned that Young's statement sufficiently *cor-*

214. " '[T]he [post]arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.' " Lee v. Illinois, 476 U.S. 530, 541 (1986) (quoting Bruton v. United States, 391 U.S. 123, 141 (1968) (White, J., dissenting) (citations omitted)). The *Lee* opinion explained that "when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Id.*

215. *See infra* notes 264-77 and accompanying text.

216. 128 Ill. 2d 1, 538 N.E.2d 461 (1989), *cert. denied*, 110 S. Ct. 3290 (1990).

217. *Id.* at 52-53, 538 N.E.2d at 474. At Young's sentencing hearing, a police officer testified that he investigated a 1978 incident in which one person was killed and another wounded. The surviving victim, who said he was robbed and shot after two intruders placed a robe over his head, reportedly identified the defendant as the triggerperson. Charges filed against the defendant for this prior crime had been dismissed. *Id.*

218. *Id.* at 53, 538 N.E.2d 474. Although the *Young* opinion describes the defendant's version in only one sentence, it appears that Young admitted participating in the robbery, but not the shootings. The opinion says that "[f]ollowing his arrest [for the 1978 incident], the defendant made an oral statement in which he admitted to standing in the doorway of the apartment while an accomplice committed the attacks." *Id.*

219. *Id.* at 54, 538 N.E.2d at 475.

roborated the absent accuser's version.[220] This corroboration rendered the out-of-court statement reliable, and therefore admissible.[221]

The purportedly corroborating evidence in *Young* came from the defendant's earlier statement, which is admissible under the confrontation clause and the rules of evidence.[222] Yet the Illinois Supreme Court has also held that hearsay is sufficiently reliable when it is corroborated by other hearsay that does not fit any standard exceptions to the rule of exclusion.[223] It appears that hearsay may sufficiently corroborate other hearsay even when the reports of out-of-court declarants differ in significant material details.[224] These decisions, along with the cases discussed in the next section, show that when the prosecution presents hearsay or even double hearsay in capital sentencing hearings, the Illinois Supreme Court will regard the presence of even slight corroborating evidence as a sufficient condition for finding that the statements of out-of-court declarants are reliable, without any independent inquiry into the circumstances in which the hearsay statements were made. Even without corroboration, however, the prosecution may introduce hearsay evidence if it otherwise satisfies the Illinois Supreme Court's generally lenient standards of relevance and reliability.

d. Double Hearsay and Corroboration

Under the usual rules of evidence, double hearsay is admissible only if each out-of-court statement falls within an exception to the rule against hearsay.[225] In capital sentencing hearings, the Illinois Supreme Court considers double hearsay to be sufficiently reliable

220. *Id.*

221. *Id.*

222. The defendant's statements are admissions by a party. See *supra* note 96.

223. *See, e.g.*, People v. Salazar, 126 Ill. 2d 424, 467-70, 535 N.E.2d 766, 784-86 (1988), *cert. denied*, 110 S. Ct. 3288 (1990) (hearsay report of gang membership corroborated by hearsay report that defendant was officer in gang).

224. In *Salazar*, the court held that a police officer properly told the sentencing jury about an accusation made by Ferguson. After telling police that he was shot by a Mexican who drove a car that also carried three black passengers, Ferguson identified the defendant as his attacker. In holding that Ferguson's accusation was reliable, the court relied in part on the secondhand reports of two eyewitnesses. Although they told police that the assailant rode on a motorcycle, alone, the court explained that they corroborated the "fact and location" of the shooting. *Id.* at 470-71, 535 N.E.2d at 786. The court could just as easily have regarded the inconsistencies in the reports as grounds for finding Ferguson's report unreliable. See *supra* note 153 for a comparison of *Salazar* and People v. Harris, 129 Ill. 2d 123, 544 N.E.2d 357 (1989), *cert. denied*, 110 S. Ct. 1323 (1990).

225. *See* FED. R. EVID. 805; E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 805 (4th ed. 1984).

if other evidence corroborates "at least some parts" of the out-of-court declarants' assertions.[226] The court's decisions are confusing, as they sometimes approve double hearsay without applying this "test" of partial corroboration,[227] while other cases seem to suggest that corroboration is necessary before even "single" hearsay can be deemed reliable.

The Illinois Supreme Court nearly concluded that some of the prosecution's uncorroborated hearsay was improper in *People v. Erickson*.[228] In that case, a police detective testified about a conversation with the defendant's ex-girlfriend.[229] She reportedly said that the defendant slapped her and threatened to kill her if she told anyone that he got her pregnant.[230] She also said, according to the police officer's testimony, that the defendant claimed he once stabbed a man to death.[231] Under the Illinois common law rules of evidence, the report of the stabbing is double hearsay, while the report of the slapping and the threat is "single" hearsay.[232] Recalling that a prior decision preferred at least some corroboration before permitting double hearsay, the court noted that the record corroborated none of the police officer's testimony.[233] This "raised

226. People v. Erickson, 117 Ill. 2d 271, 300, 513 N.E.2d 367, 379-80 (1987), *cert. denied*, 486 U.S. 1017 (1988).

227. *See, e.g.*, People v. Brisbon, 106 Ill. 2d 342, 364-65, 478 N.E.2d 402, 412, *cert. denied*, 474 U.S. 908 (1985) (double hearsay); People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353, *cert. denied*, 464 U.S. 1001 (1983), discussed *supra* note 212; *see also* People v. Jones, 94 Ill. 2d 275, 287, 447 N.E.2d 161, 167 (1982), *cert. denied*, 464 U.S. 920 (1983) (investigator related contents of psychiatrist's written report on defendant).

228. 117 Ill. 2d 271, 513 N.E.2d 367 (1987), *cert. denied*, 486 U.S. 1017 (1988).

229. *Id.* at 285, 513 N.E.2d at 372-73.

230. *Id.* at 285, 513 N.E.2d at 373.

231. *Id.*

232. See *infra* note 233.

233. In the court's analysis, the double hearsay included two statements the defendant allegedly made to his ex-girlfriend: the threat and his report that he had once stabbed a man. *Id.* at 299-300, 513 N.E.2d at 379.

The court, however, should not regard the report of the threat as double hearsay. A statement is not hearsay unless it is an assertion offered to prove the truth of what it asserts and thus relies on the credibility of an out-of-court declarant. E. CLEARY, MCCORMICK ON EVIDENCE § 246, at 730 (3d ed. 1984). The threat is significant because it was made; it is not an assertion and is not offered to prove the truth of its contents. To conclude that the threat was made, the fact finder needs to rely on the credibility of the girlfriend, not the credibility of the threatener. As the ex-girlfriend could testify in court and recount the threat without violating the rule against hearsay, the detective's second-hand report of the threat, like the report of the slapping, is only "single" hearsay.

The report of the stabbing is double hearsay under the Illinois common law rules of evidence, as the fact finder must accept the credibility of two absent declarants: the ex-girlfriend and the defendant. The report of the second declarant, the defendant, would pose no problem under the hearsay rules. Admissions by a party are exceptions to the

at least a question" about reliability.[234] Without answering that question, however, the court presumed that the trial judge, who determined the sentence without a jury, considered only proper evidence.[235]

The *Erickson* decision illustrates how erratically the Illinois Supreme Court decides what evidence the prosecution may introduce at capital sentencing trials. By recognizing that a defendant may legitimately object to evidence by invoking the rule against hearsay, the opinion departs from prior rulings without explaining the inconsistency.[236] The court's suggestion that double hearsay is unreliable without partial corroboration undermines other decisions that approved double hearsay by simply declaring, without explanation, that the testimony was reliable or that the rules of evidence do not apply.[237]

The *Erickson* decision is confusing because it begins by considering only double hearsay and thus seems to overlook the defendant's objection to the "single" hearsay that Erickson slapped his girlfriend.[238] In pointing out that the police officer's testimony lacked

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hearsay rule in Illinois and are defined as nonhearsay under the federal rules. See *supra* note 96.

234. *Erickson*, 117 Ill. 2d at 299-300, 513 N.E.2d at 390-80.

235. *Id.* at 304, 513 N.E.2d at 381.

236. In People v. Perez, 108 Ill. 2d 70, 483 N.E.2d 250 (1985), *cert. denied*, 474 U.S. 1110 (1986), the court held that defendants cannot rely on the rules against hearsay as a basis for objecting to testimony introduced in the sentencing hearing, because hearsay is not objectionable per se under the capital sentencing statute. Under *Perez*, defendants can get the court's attention only by asserting that the prosecution's evidence is unreliable. *Id.* at 87, 483 N.E.2d at 258; *see also* People v. Owens, 102 Ill. 2d 88, 110, 464 N.E.2d 261, 271, *cert. denied*, 469 U.S. 963 (1984).

237. *See, e.g.*, People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353, *cert. denied*, (1983), discussed *supra* note 212. In People v. Brisbon, 106 Ill. 2d 342, 364-65, 478 N.E.2d 402, 412, *cert. denied*, 474 U.S. 908 (1985), the court approved the use of single and double hearsay that accused the defendant of a prior homicide. A police detective testified that the victim, before dying, named the defendant as the assailant. The detective also related a conversation with the defendant's girlfriend, who reportedly said that the defendant admitted the shooting. A charge of murder was dismissed for lack of probable cause, however, when neither the girlfriend nor any eyewitnesses testified at a preliminary hearing. The *Brisbon* court declined to analyze whether the victim's statement fit the dying declaration exception to the hearsay rule, because evidence at the sentencing hearing need not comply with the hearsay exceptions. Without explanation or analysis, the court declared that "[c]onsidering the circumstances," the out-of-court statements of both the victim and the girlfriend were reliable. *Id.* at 365, 478 N.E.2d at 412.

238. *See Erickson*, 117 Ill. 2d at 299, 513 N.E.2d at 379. Opening the discussion of the detective's testimony, the court said, "Defendant next challenges the admission of Detective Greenway's double hearsay testimony in aggravation." *Id.* The defendant's objection, however, clearly covered the detective's entire testimony about his conversation with the girlfriend, including the "single" hearsay that the defendant slapped her. *See* Supplementary Brief and Argument of Defendant-Appellant at 56-57, People v. Er-

corroboration, however, the court appeared to question the reliability of *all* the police officer's testimony.[239] The *Erickson* opinion leaves it unclear whether the court looks to corroborate only what it characterizes as double hearsay, or whether even "single" hearsay must be corroborated.[240]

A few months after *Erickson*, when reviewing a police officer's "single" hearsay testimony that the defendant bound and beat a woman twelve years earlier, the court in *People v. Foster* appeared to look for corroboration.[241] There was none. Nevertheless, the

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ickson, 117 Ill. 2d 271, 513 N.E.2d 367 (1987) (No. 59058), *cert. denied*, 486 U.S. 1017 (1988).

The opinion further confuses by regarding the report of the threat as "double" hearsay, even though it relies on the credibility of only one out-of-court declarant, the ex-girlfriend. *See supra* note 233.

239. The court stated that "the record of the death penalty proceeding in this case does not reveal corroboration of any portion of [Detective] Greenway's testimony, therefore raising at least a question of its reliability." *Erickson*, 117 Ill. 2d at 300, 513 N.E.2d at 380.

240. Nowhere else in the opinion does the *Erickson* court discuss the reliability of the detective's report that the girlfriend accused the defendant of slapping her. This failure to discuss the "single" hearsay separately suggests at least four possible interpretations.

First, the court may have suggested that all of the detective's testimony was unreliable. This reading of *Erickson* suggests that without corroboration, the report of the slapping is not sufficiently reliable, even though it rests on the credibility of only one out-of-court declarant. Such an interpretation is consistent with other decisions that look for corroborating evidence before branding "single" hearsay as reliable. *See, e.g.*, People v. Salazar, 126 Ill. 2d 424, 470-71, 535 N.E.2d 766, 786 (1988), *cert. denied*, 110 S. Ct. 3288 (1990). But in other cases the court has not looked for such corroboration. *See, e.g.*, People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353 (1983), discussed *supra* note 212.

Second, the court may have looked to corroborate only what it considered to be double hearsay and may not object to uncorroborated "single" hearsay. This interpretation of *Erickson* is consistent with the court's comment that the hearsay nature of secondhand information goes to its weight, but not its admissibility. *Erickson*, 117 Ill. 2d at 299, 513 N.E.2d at 379. In later decisions, the court explicitly stated that uncorroborated hearsay is sufficiently reliable when a police officer relates what an out-of-court declarant purported to observe. *Cf. infra* notes 243-49 and accompanying text (hearsay reliable if gathered in course of official investigation).

Third, the court may simply have neglected to address the defendant's objection to this "single" hearsay. In other capital sentencing cases in which defendants raised evidentiary objections, the court's opinion has similarly failed to discuss or analyze all of the challenged testimony. *See, e.g.*, People v. Montgomery, 112 Ill. 2d 517, 528-33, 494 N.E.2d 475, 479-81 (1986), *cert. denied*, 479 U.S. 1101 (1987) (court did not discuss defendant's objection to social worker's testimony that ten years earlier, the defendant's mother said that the defendant carried guns and had once stabbed someone).

Finally, the *Erickson* court may have been satisfied that it adequately answered the defendant's objection to the "single" hearsay by repeating the formula that a judge is presumed to consider only proper evidence. Trial judges would have an easier time living up to this presumption if they received more guidance about what evidence the Illinois Supreme Court considers proper.

241. *See* People v. Foster, 119 Ill. 2d 69, 98-99, 518 N.E.2d 82, 94-95 (1987), *cert. denied*, 486 U.S. 1047 (1988). In *Foster*, a police officer testified about a conversation that

state high court listed three additional reasons, never suggested in *Erickson*, for approving the hearsay: the testimony was not inherently unreliable; the testifying officer obtained the information during an official inquiry; and the defendant did not directly challenge the substance of the testimony.[242] Nothing in the reported decisions suggests that these same rationales could not have equally supported admission of the uncorroborated testimony in the *Erickson* case.

e. Obtained During Official Police Investigation

Even when the Illinois Supreme Court has found no corroboration for the statements of out-of-court declarants, it has approved the admission of hearsay on the theory that information obtained by police in the course of an official investigation is sufficiently reliable. At the sentencing hearing in *People v. Morgan*,[243] for example, a police officer implicated the defendant in a ten-year-old crime.[244] The officer admitted that he had not seen the events himself and further testified that charges filed against the defendant had been dismissed.[245] Nevertheless, the Illinois Supreme Court upheld the trial court's refusal to strike the testimony. "[G]iven the facts that the officer compiled the information during an official investigation . . . we cannot say that the judge abused his discretion in finding the testimony to be reliable."[246]

In criminal trials, even when written police reports fall within an exception to the hearsay rule, only the firsthand observations of police officers may be admitted as evidence.[247] What bystanders

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took place twelve years earlier, when a woman named the defendant and three others as the people who had tied her up and beat her. The Illinois Supreme Court acknowledged that the testimony was not corroborated. *Id.*

242. The court did not enunciate these factors in the form of a three-part test, but merely offered them as reasons why the trial judge did not abuse his discretion in admitting the hearsay. *Id.* at 98-99, 518 N.E.2d at 95.

243. 112 Ill. 2d 111, 492 N.E.2d 1303 (1986), *cert. denied*, 479 U.S. 1101 (1987).

244. The officer testified that he investigated a reported robbery-shooting and learned that Morgan had "shot two female Blacks in his apartment." *Id.* at 143, 492 N.E.2d at 1316.

245. *Id.*

246. *Id.* at 144, 492 N.E.2d at 1317.

247. Police reports that record the firsthand observations of officers may be admissible under the public records exception, which applies only in civil, not criminal, cases. *See* FED. R. EVID. 803(8)(B); G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 7.19, at 274 (2d ed. 1987). Reports may also qualify as business records under FED. R. EVID. 803(6). As the exception covers only information recorded in the ordinary course of business, it does not include the accounts of bystanders who relate information to the police. *See* FED. R. EVID. 803(6) advisory committee note; G. LILLY, *supra*, § 7.17, at 266-67.

tell the police does not fall within any exception, and the Illinois Supreme Court has not explained why the sentencer has an adequate basis for evaluating the truth of what the police are told during their investigations.[248] Nevertheless, the court continues to employ the "official investigation" rationale to approve the use of hearsay when both judges and juries determine whether defendants shall live or die.[249]

f. Not Inherently Unreliable

The court's most baffling explanation for approving evidence to which the defense has objected is that the information is "not inherently unreliable."[250] Because this rationale has so far appeared only in cases in which the sentencing hearing was conducted without a jury, it may simply restate the Illinois Supreme Court's faith that judges will not rely on evidence that is actually unreliable.[251] Nevertheless, it marks an unsettling departure from the court's

248. *Cf.* California v. Green, 399 U.S. 149, 161 (1970) (confrontation clause aims to assure that fact finder has "satisfactory basis for evaluating the truth of the prior statement").

249. *See* People v. Salazar, 126 Ill. 2d 424, 469, 535 N.E.2d 766, 785 (1988), *cert. denied*, 110 S. Ct. 3288 (1990) (jury sentencing); People v. Foster, 119 Ill. 2d 69, 98-99, 518 N.E.2d 82, 95 (1987), *cert. denied*, 486 U.S. 1047 (1988) (nonjury sentencing). In People v. Richardson, 123 Ill. 2d 322, 362, 528 N.E.2d 612, 628 (1988), *cert. denied*, 109 S. Ct. 1577 (1989), the court held that hearsay evidence of four unadjudicated crimes was reliable, as the police officers who testified in court had talked with the complaining witnesses.

250. In People v. Whitehead, 116 Ill. 2d 425, 508 N.E.2d 687, *cert. denied*, 484 U.S. 33 (1987), the prosecution produced reports containing statements the defendant had made ten years earlier, when he signed himself into a mental hospital while charges were pending against him for attempted rape and aggravated battery. There was evidence that the defendant hoped to fabricate an insanity defense, and he told hospital staff that after suffering feverish feelings that generally lasted a week, he often committed sexual attacks against young girls whom he found in deserted areas. There was no independent evidence that any such crimes ever occurred, yet the trial judge mentioned these purported molestations in explaining why he decided to sentence the defendant to death. *Id.* at 451-53, 508 N.E.2d at 697-98. Although the Illinois Supreme Court acknowledged that the defendant's uncorroborated admissions were not sufficient evidence to convict him of those crimes under Illinois law, sentencing was different. Because the defendant's statements were not "inherently unreliable," the Illinois Supreme Court upheld the trial court's use of the evidence. *Id.* at 454-55, 508 N.E.2d at 698-99.

Later, in People v. Foster, 119 Ill. 2d 69, 518 N.E.2d 82 (1987), *cert. denied*, 486 U.S. 1047 (1988), the court upheld a trial judge's decision to admit secondhand evidence of an unprosecuted battery after citing *Whitehead* and pointing out that the uncorroborated hearsay was "not inherently unreliable." *Id.* at 98-99, 518 N.E.2d at 95.

251. In *People v. Foster*, the court appeared to distinguish between testimony that cannot be considered reliable and testimony that is "inherently" unreliable. Only the latter, it appears, would serve as grounds for reversing a trial court's decision to impose a sentence of death: "We consider that Wagner's testimony . . . lacked sufficient corroboration to be considered reliable. Nevertheless, we do not judge that thereby the defendant

earlier admonition that trial judges must take care to ensure the accuracy of information considered at sentencing.[252] By upholding the admission of any evidence that is not inherently unreliable, the Illinois Supreme Court neglects the proper inquiry: whether there is reason to regard the challenged evidence as worthy of belief.[253]

g. Hearsay Reports of Psychiatric Experts

In *Barefoot v. Estelle*,[254] the United States Supreme Court refused to bar the prosecution from offering expert psychiatric testimony to predict a defendant's future dangerousness, despite vigorous arguments that such predictions are extremely unreliable.[255] The Court regarded the asserted unreliability of the predictions to be a matter of weight the jury should consider, rather than grounds for wholesale exclusion.[256] The Court reasoned that defendants had the procedural and evidentiary tools to expose unreliable opinion testimony to the jury.[257] In *Barefoot*, the prosecution's psychiatric expert testified in court subject to cross-examination.[258] The opinion, written in broad language, appeared to assume that confrontation would always accompany such expert testimony in capital sentencing hearings.[259]

The Illinois Supreme Court, however, has permitted hearsay evidence of psychiatric evaluations, depriving the defendant of the face-to-face confrontation that the Supreme Court assumed would accompany the presentation of such evidence of expert opinion. In *People v. Del Vecchio*, a prosecution psychiatrist testified about the opinions of other psychiatrists who also had examined the defendant but who did not testify at the sentencing hearing.[260] The Illi-

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was denied a fair sentencing hearing, because it was not inherently unreliable . . . ." *Foster*, 119 Ill. 2d at 100, 518 N.E.2d at 96 (citations omitted).

252. *See supra* text accompanying notes 87-89.

253. *See Whitehead*, 116 Ill. 2d at 471, 508 N.E.2d at 706 (Simon, J., concurring in part and dissenting in part).

254. 463 U.S. 880 (1983).

255. *Id.* at 896.

256. *Id.* at 898-99.

257. *Id.* at 901.

258. *Id.* at 884.

259. "[T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party." *Id.* at 898. As the Texas sentencing in *Barefoot* was conducted according to the rules of evidence, the Court found no constitutional violation. The decision does not actually require that other states present psychiatric testimony according to the rules of evidence. *See infra* notes 493-96 and accompanying text.

260. People v. Del Vecchio, 105 Ill. 2d 414, 437-38, 475 N.E.2d 840, 851, *cert. denied*, 474 U.S. 883 (1985).

nois Supreme Court refrained from invoking some familiar justifications for admitting this hearsay. The court did not claim that the hearsay testimony was corroborated or that the defendant failed to challenge the testimony directly. Nor did the court otherwise attempt to assert that the out-of-court psychiatric testimony was reliable. When the defendant argued that he was deprived of his right to confront and cross-examine the absent psychiatrists, the Illinois Supreme Court simply recited the fact that the capital punishment statute suspends the rules of evidence at sentencing hearings.[261]

The court took the identical approach in *People v. Lyles*, in which one psychiatrist offered, as substantive evidence, the opinions of six additional out-of-court experts.[262] In *People v. Jones*, the state supreme court approved, without explanation, the testimony of a probation investigator who recounted the contents of a written psychiatric report that he found in the defendant's files at the parole board.[263] With these decisions, defendants cannot expose potential unreliability to the jury by cross-examining psychiatric experts face-to-face. Although the Illinois court repeats its formulaic incantation that evidence must be both relevant and reliable, it has designed no substitutes for the procedural safeguards that the *Barefoot* Court presumed would govern the presentation of psychiatric opinions in capital sentencing hearings.

h. Accusations of Former Accomplices

In a tacit repudiation of earlier cases,[264] the Illinois Supreme Court has now held that the admissions of an accomplice are "presumptively unreliable."[265] Accordingly, the court reversed death sentences in two cases in 1988 and 1989 because the record did not include sufficient additional indicia of reliability to overcome the

261. *Id.*

262. People v. Lyles, 106 Ill. 2d 373, 417-18, 478 N.E.2d 291, 311, *cert. denied*, 474 U.S. 859 (1985).

263. People v. Jones, 94 Ill. 2d 275, 287-88, 447 N.E.2d 161, 167 (1982), *cert. denied*, 464 U.S. 920 (1983).

264. *See supra* notes 209-14 and accompanying text.

265. "[I]n the sentencing hearing the confessions of an accomplice which incriminate the defendant are presumptively unreliable and should not be admitted into evidence, unless sufficient indicia of reliability exist to overcome the presumption." People v. Turner, 128 Ill. 2d 540, 567, 539 N.E.2d 1196, 1207-08 (1989), *cert. denied*, 110 S. Ct. 337 (1990) (characterizing the court's view of the holding in People v. Rogers, 123 Ill. 2d 487, 521, 528 N.E.2d 667, 684 (1988), *cert. denied*, 109 S. Ct. 878 (1989)). The court relied partly on Lee v. Illinois, 476 U.S. 530 (1986), in which the United States Supreme Court regarded the self-serving statements of codefendants as especially suspicious and more unreliable than ordinary hearsay. *See supra* note 214.

presumption.[266] In both cases, the Illinois court examined the accomplices' statements at length and in depth, analyzing them in the light of all the other evidence.

In the first case, *People v. Rogers*,[267] the prosecution introduced the tape-recorded confessions of two codefendants.[268] The opinion said nothing about depriving the defendant of the right to confront and cross-examine witnesses, but simply noted several factors, specific to the facts of the case, that convinced the court that the contents of the recordings were not sufficiently reliable.[269] In the second case, *People v. Turner*,[270] a police officer testified to the statements of a co-arrestee.[271] The prosecution argued that other testimony sufficiently corroborated the accomplice's statements.[272] If the Illinois Supreme Court had applied the standard of prior cases,[273] the defendant's conviction itself would have sufficiently corroborated the additional details supplied by the nontestifying accomplice. Instead, the court declared that a confession of a codefendant requires special scrutiny when "it minimizes his own role and shifts greater blame to the defendant."[274] After several pages that compared in detail the challenged testimony with the other evidence, the court noted several instances in which the accomplice's story did not fit perfectly with other evidence.[275] The court concluded, "Because [the accomplice] did not testify, the defense was unable to cross-examine him on these differences, inconsistencies, and things he left out."[276] By emphasizing the value of

266. *See* People v. Turner, 128 Ill. 2d 540, 539 N.E.2d 1196 (1989), *cert. denied*, 110 S. Ct. 337 (1990); People v. Rogers, 123 Ill. 2d 487, 528 N.E.2d 667 (1988), *cert. denied*, 109 S. Ct. 878 (1989).

267. 123 Ill. 2d 487, 528 N.E.2d 667 (1988), *cert. denied*, 109 S. Ct. 878 (1989).

268. *Id.* at 493, 528 N.E.2d at 670.

269. In a later review of the *Rogers* decision, the court offered three reasons to explain why the tape-recorded confessions of the defendant's two accomplices were erroneously admitted at Rogers's sentencing hearing: the two codefendants had notice of their impending arrest and thus had a chance to contrive their stories; the accomplices' statements did not correspond with some other evidence, including the defendant's statement that he did not pre-plan the killing; and one accomplice had a criminal record. *See Turner*, 128 Ill. 2d at 567, 539 N.E.2d at 1208.

270. 128 Ill. 2d 540, 539 N.E.2d 1196 (1989), *cert. denied*, 110 S. Ct. 337 (1990).

271. *Id.* at 556-57, 539 N.E.2d at 1202.

272. *Id.* at 572, 539 N.E.2d at 1210.

273. *See, e.g.*, People v. Foster, 119 Ill. 2d 69, 518 N.E.2d 82 (1987), *cert. denied*, 486 U.S. 1047 (1988); People v. Lyles, 106 Ill. 2d 373, 478 N.E.2d 291, *cert. denied*, 474 U.S. 859 (1985).

274. *Turner*, 128 Ill. 2d at 572, 539 N.E.2d at 1210.

275. *See id.*

276. *Id.* at 573, 539 N.E.2d at 1210.

cross-examination in the sentencing hearing, the *Turner* court moved a step toward endorsing the thesis of this Article.

In these two cases, the Illinois Supreme Court concluded that the prosecution must either dispense with the challenged hearsay testimony or produce the accomplices in court, where the defense can cross-examine them. The court reversed the death sentences in these cases without acknowledging that its holding conflicted with earlier cases[277] and without altering its view that the prosecution may use ordinarily inadmissible hearsay against defendants in capital sentencing hearings. In these cases, however, the court appeared willing for the first time in many years to hold the prosecution to a meaningful standard that actually would exclude some hearsay testimony as unreliable. Continued close scrutiny and rigorous enforcement of the standard of reliability could eventually achieve the same result this Article advocates, by requiring the prosecution to present its case through the live testimony of witnesses who are subject to cross-examination.

4. Confrontation Revisited

When defendants have challenged the introduction of the statements of out-of-court declarants on confrontation grounds, the Illinois Supreme Court has usually dismissed the argument quickly. The court has relied on the statement in *Williams v. New York*[278] that defendants do not have a due process right to cross-examine all out-of-court statements upon which the sentencer relies.[279] The

277. In earlier cases, the court permitted the prosecution to introduce evidence of the defendant's prior crimes through the out-of-court accusations of his former accomplices. The court reasoned that the defendant's conviction for those prior crimes adequately corroborated the accomplice's statements. *See supra* notes 209-14 and accompanying text. In *Rogers* and *Turner*, the accomplices were coparticipants in the very crime for which the defendant was being sentenced. If that is a significant difference that explains the court's closer scrutiny, it is not evident from reading the opinions. Moreover, the postarrest statements of coparticipants in crime should be equally suspect, whether the statements are offered to prove a ten-year-old crime or the crime for which the defendant is being sentenced.

By requiring that the prosecution produce its witnesses for cross-examination, *Rogers* and *Turner* also silently undermine the ruling in People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353, *cert. denied*, 464 U.S. 1001 (1983). In *Davis*, the defendant argued that he was deprived of the opportunity to cross-examine his accuser when the prosecution introduced a videotape that portrayed the state's attorney conveying the accusation of an absent accomplice. The court replied that the defendant could cross-examine the accomplice by calling him as a defense witness. *Id.* at 47, 447 N.E.2d at 376. See the discussion of *Davis supra* note 212.

278. 337 U.S. 241, 250 (1949).

279. *See, e.g.*, People v. Foster, 119 Ill. 2d 69, 98, 518 N.E.2d 82, 95 (1987), *cert. denied*, 486 U.S. 1047 (1988); People v. Johnson, 119 Ill. 2d 119, 149, 518 N.E.2d 100,

court has not questioned whether *Williams* applies to adversary capital penalty trials conducted before a jury.[280]

Given the court's repeated refusal to apply the right of confrontation in capital sentencing, its opinion in *People v. Szabo*[281] is puzzling. After Szabo's first conviction and death sentence were set aside, the trial court reinstated Szabo's conviction on remand.[282] At a second sentencing hearing, the prosecution simply read the transcripts of five witnesses' testimony from the previous penalty hearing.[283] The defendant argued that this procedure violated his right to confront adverse witnesses.[284] In an unusual departure from prior cases, the Illinois Supreme Court did not cite *Williams v. New York* but instead appeared to accept that the confrontation clause applied at the sentencing stage.[285] Analyzing the Supreme Court's confrontation cases, the Illinois court reasoned that the sixth amendment permits the state to introduce prior testimony in criminal trials if the witness is presently unavailable and sufficient "indicia of reliability" suggest that the prior testimony is trustworthy.[286] In this case, the court said, the transcripts clearly bore the required indicia of reliability because the defendant had ample opportunity to cross-examine the witnesses in the former hearing.[287] The court then stated, "It is not clear whether the unavailability requirement applies at sentencing as well as during the guilt phase of the trial."[288] The court disposed of the case on procedural grounds without deciding the merits of the confrontation issue.[289]

Although the *Szabo* court appeared to accept that the right of confrontation applied at a capital sentencing trial, it made no effort to reconcile its reasoning with past cases. The court appeared ob-

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114 (1987), *cert. denied*, 486 U.S. 1047 (1988); People v. Brisbon, 106 Ill. 2d 342, 365, 478 N.E.2d 402, 412, *cert. denied*, 474 U.S. 908 (1985); People v. Jones, 94 Ill. 2d 275, 286, 447 N.E.2d 161, 166 (1982), *cert. denied*, 464 U.S. 920 (1983).

280. *See infra* notes 325-44 and accompanying text.

281. 113 Ill. 2d 83, 497 N.E.2d 995 (1986), *cert. denied*, 479 U.S. 1101 (1987).

282. *Id.* at 87, 497 N.E.2d at 996.

283. *Id.* at 88, 497 N.E.2d at 996.

284. *Id.* at 94, 497 N.E.2d at 999.

285. *Id.*

286. *Id.* at 94, 497 N.E.2d at 999-1000.

287. *Id.* at 94, 497 N.E.2d at 1000.

288. *Id.*

289. *Id.* at 93-95, 497 N.E.2d at 999-1000. Earlier in the opinion, the court ruled that despite the statute authorizing automatic appeal of a death sentence to the Illinois Supreme Court, the defense waives any objections to the penalty proceedings that are not contained in a posttrial motion that lists alleged errors. Because the posttrial motion had not been filed, the court reviewed the record only for plain error. *Id.* at 93-94, 497 N.E.2d at 999. The court decided that the confrontation violation, if there was one, was not sufficiently egregious. *Id.* at 94-95, 497 N.E.2d at 1000.

livious to the fact that a host of prior evidentiary rulings depended on rejecting a right of confrontation at sentencing.

Nor did the court follow up on *Szabo* in future cases. By avoiding decision on the confrontation question, the opinion appeared to leave open the possibility that the prosecution must first show that a declarant is unavailable before introducing his out-of-court statements. In a later case, however, the Illinois Supreme Court simply rewrote history and invented a new version of *Szabo*'s analysis. In *People v. Johnson*,[290] the court cited *Szabo* for the proposition that "hearsay testimony is not 'per se' inadmissible during the second phase of a sentencing proceeding . . . even where there has been no showing that the declarant is unavailable to testify."[291] *Johnson* thus cited *Szabo* as authoritative support for a proposition that the *Szabo* court itself regarded as an open question.

The Illinois Supreme Court also declined to follow *Szabo*'s confrontation analysis in *People v. Rogers*, in which it ruled that the tape-recorded confessions of two accomplices were too unreliable to be admitted as evidence against the defendant in the sentencing hearing.[292] Although one accomplice was available to testify, the state's attorney in *Rogers* admitted that he preferred to rely on the tape; he feared his witness would not be credible testifying in person and subject to cross-examination.[293] The Illinois Supreme Court thus had the opportunity to answer the question left open in *Szabo*: whether the prosecution must produce an available witness for live testimony. Instead, the court simply declared that the tape-recorded statements were unreliable, without mentioning *Szabo* or the right to confront or cross-examine witnesses.[294]

As this section has shown, the Illinois Supreme Court has permitted prosecutors to introduce ordinarily inadmissible hearsay evidence at the second stage of a capital sentencing hearing. Although the court purports to impose limits by allowing only evidence that is both relevant and reliable, the court's decisions all too frequently dispatch defendants' challenges with a cursory dismissal that does not truly explain why the state's evidence is worthy of belief. The court's refusal to grant defendants the right to confront the witnesses against them is ultimately based on one fundamental

290. 119 Ill. 2d 119, 518 N.E.2d 100 (1987), *cert. denied*, 486 U.S. 1047 (1988).

291. *Id.* at 149, 518 N.E.2d at 114.

292. People v. Rogers, 123 Ill. 2d 487, 521, 528 N.E.2d 667, 684 (1988), *cert. denied*, 109 S. Ct. 878 (1989). See the discussion of *Rogers supra* notes 267-69 and accompanying text.

293. *Rogers*, 123 Ill. 2d at 522, 528 N.E.2d at 684.

294. *Id.*

premise: that *Williams v. New York* permits both judges and juries to consider hearsay when determining sentences. As the next section will demonstrate, the Illinois Supreme Court has erroneously extended the holding of *Williams*.

IV. THE RATIONALE OF *WILLIAMS* DOES NOT JUSTIFY SUBMITTING HEARSAY TESTIMONY TO A JURY IN AN ADVERSARY PROCEEDING

In approving the prosecution's use of hearsay evidence at the second stage of capital sentencing hearings, the Illinois Supreme Court has mistakenly relied on *Williams v. New York*.[295] As this section will show, two traditional rationales for excluding hearsay did not apply to the sentencing the Supreme Court considered in *Williams*, but they do apply to modern capital sentencing hearings. Moreover, the Supreme Court has never suggested that its holding in *Williams* would support submitting hearsay evidence to a jury deciding a sentence in an adversary proceeding. On the contrary, the Court's cases suggest that the adversary nature of modern capital sentencing and the jury's role as decision maker provide two independent reasons to distinguish *Williams* and require a full right of confrontation throughout the entire capital sentencing proceeding.

A. Two Explanations for the Rule Against Hearsay

Scholars offer two overlapping explanations for the origins of the exclusionary rules of evidence.[296] First, they point to the fear that a jury of lay people cannot rationally evaluate certain types or forms of evidence.[297] Courts often have quoted Professor Thayer,[298] who regarded the exclusionary rules, including the rule against hearsay, as "the child of the jury system."[299] Professor Morgan offered a second explanation. He argued that the exclusionary rules, including the rules governing hearsay and the right to confront and cross-examine witnesses, are products of the adver-

295. 337 U.S. 241 (1949).

296. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 244 (3d ed. 1984).

297. *See, e.g.*, 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16:3, at 225 (2d ed. 1979); 1 J. WIGMORE, EVIDENCE 19 (3d ed. 1940) ("the system of Evidence rules was devised for the special control of trials by jury"), *quoted in* Brinegar v. United States, 338 U.S. 160, 174 n.12 (1949); Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 255 (1936).

298. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 179 n.2 (1987); United States v. Matlock, 415 U.S. 164, 175 n.12 (1973).

299. J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 47 (1899).

sary system.[300] Even without the institution of the jury, Morgan wrote, an adversary system would still develop a rule requiring in-court face-to-face testimony.[301] In the *Williams* era, judges determined criminal sentences without an adversary hearing and without a jury. Thus, neither rationale for developing a rule against hearsay applied. Both rationales apply, however, to modern capital sentencing trials, in which juries decide the sentence in what the Supreme Court regards as a full-fledged adversary proceeding.

B. Juries Are Different from Judges

The *Williams* case itself discussed only judicial sentencing.[302] Although jury sentencing was not unknown at the time, juries determined sentences in the same proceeding in which they determined guilt. In those unitary trials, the rules against hearsay already restricted the evidence the jury received. Bifurcated trials, in which the jury determines the sentence in a second hearing with broader standards of relevance, did not develop until after the *Wil-*

300. Morgan attributed the rules of hearsay and cross-examination to a system in which the parties, not the judge and not the jury, control the introduction of evidence. He acknowledged that cross-examination is sometimes said to advance the accuracy of the ultimate verdict by preventing an unskilled jury from ascribing too much weight to the testimony of a witness with concealed bias, impaired memory, defective perception, or poor ability to narrate. He pointed out, however, that parties are not obligated to cross-examine, although they cannot be deprived of the opportunity. Furthermore, the rule against hearsay does not protect the jury from potentially untrustworthy evidence when the adversary consents or fails to object. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 253-56 (1936).

Morgan conceded, however, that the jury system underlies at least a portion of the legal system's concern about the dangers of hearsay. "In judicial discussions dealing with accepted or proposed exceptions to the hearsay rule, there is much to be found indicating a distrust of the jury's capacity to handle such hearsay as does not carry some warranty of verity." *Id.* at 255.

One traditional common law exception to the rule against hearsay permits parties to introduce admissions that their opponents made out of court. Most commentators agree that this exception owes its origin to the adversary system and not to a belief that the admissions are trustworthy. *See* FED. R. EVID. 801(d)(2) advisory committee's note.

301. The revisers of the latest edition of Wigmore's treatise lend some support to Morgan's thesis. They note that when the decision maker has little role in investigation, the rules against hearsay force the parties to find and produce the most trustworthy evidence: live testimony from witnesses with firsthand knowledge. Referring the reader to a section that discusses the rules of presenting evidence before administrative tribunals, which conduct adversary proceedings without juries, the treatise states:

> [W]e have suggested that rules of evidence, such as the hearsay rule, effectively function as preferential rules that force the parties to look for and produce more reliable evidence—a matter of no small concern when the finding and presentation of evidence is largely left in the hands of the parties rather than the court.

1 J. WIGMORE, EVIDENCE § 4D.1, at 230 (Tiller rev. 1983).

302. Williams v. New York, 337 U.S. 241, 242 (1949).

liams decision.[303]

There is evidence, however, that the Court of the *Williams* era distrusted the jury's ability to handle hearsay evidence. Three weeks after *Williams*, the Court explained why judges, in *ex parte* hearings to determine probable cause, are trusted to consider evidence that the law forbids juries to ponder.[304] The primary reason, the Court explained in a quotation from Wigmore, is that " 'the system of Evidence rules was devised for the special control of trials by jury.' "[305] The Court trusted judges to appropriately handle evidence that juries might misunderstand or misuse. It also suggested that judges possess a superior ability to assess the trustworthiness and probative value of testimony that has not been subject to cross-examination.[306]

The Court of the *Williams* era also regarded sentencing by juries and sentencing by judges as different. A few years after *Williams*, in *Chandler v. Fretag*,[307] the Court reviewed a case in which a jury concluded that the defendant was an habitual offender, a finding that authorized a life sentence.[308] In ruling that the defendant should have had the right to retain counsel, the Court, without discussion, distinguished a jury sentencing from the judicial sentencing in *Williams*.[309]

As the movement for bifurcated trials gained momentum in the late 1960s, the Supreme Court indicated that *Williams* had not settled what rules of evidence would govern a separate capital sentencing hearing conducted before a jury. In *United States v. Jackson*,[310] the Court explained that the prospect of conducting

303. *See supra* note 10 and accompanying text. Early commentators who wrote about bifurcated trials believed that the *Williams* holding clearly applied only to judges and would not justify submitting hearsay evidence to sentencing juries. Courts in California and Pennsylvania, the first states to adopt bifurcated capital trials, did not permit the jury to consider hearsay evidence in the sentencing phase. *See* Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 997-1000 (1967); Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50, 61-73 (1964).

304. Brinegar v. United States, 338 U.S. 160 (1949).

305. *Id.* at 174 n.12 (quoting 1 J. WIGMORE, EVIDENCE 19 (3d ed. 1940)).

306. *Id.* at 173.

307. 348 U.S. 3 (1954).

308. *Id.* at 5.

309. "Even though the [Habitual Offender] Act does not create a separate offense, its applicability to any defendant charged with being an habitual criminal must be determined by a jury in a judicial hearing. Compare *Williams v. New York*." *Id.* at 8.

310. 390 U.S. 570 (1968). The government charged the defendants with violating the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1964). The statute provided for a sentence of death only if the jury so recommended. As the Court read the statute, defendants could avoid the risk of execution by pleading guilty and being sentenced by the judge. The statute thus unconstitutionally pressured defendants to waive their right to jury trial.

jury proceedings solely to determine punishment posed many difficult and unanswered questions, including whether conventional rules of evidence and privilege would apply.[311] The *Jackson* opinion thus recognized that sentencing by juries posed different questions than the *Williams* case resolved.[312]

More recently, in *Chaffin v. Stynchcombe*,[313] the Court noted that jury sentencing differs from judicial sentencing "in a number of fundamental ways."[314] Separating the guilt and sentencing phases, the Court observed, "would not wipe away the fundamental differences between jury and judicial sentencing."[315] Judges can explain on the record the reasons for the sentences they impose. Even with bifurcated proceedings, a jury cannot. This difference suggests that sentencing juries should not be permitted to consider uncross-examined hearsay. The fear that a jury inappropriately weighed marginally reliable evidence could never be dispelled by examining the record.

The Court's post-*Furman*[316] cases have reduced some of the differences between judge and jury sentencing in capital cases. But they have not changed the law's traditional view that a jury cannot

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Jackson, 390 U.S. at 583. The government unsuccessfully argued that the statute, by implication, authorized trial judges to accept guilty pleas and then impanel a jury that would consider only the sentence to be imposed. Although the Court noted that some state legislatures had already authorized separate penalty hearings, it declined to divine any similar Congressional intent in the kidnapping act. *See id.* at 578-79.

311. *Id.* at 579.

312. When future Chief Justice Warren Burger served as a judge on the District of Columbia Circuit Court of Appeals, he also recognized that Williams v. New York did not necessarily resolve the evidentiary questions raised by conducting sentencing proceedings before a jury instead of a judge:

> Other problems exist to which the advocates of a two-trial system have not addressed themselves: Who would prove what at the "second trial" and what would be the standard of proof? Would the conventional rules of evidence, including the exclusionary rules, be abrogated for the second proceeding as has always been true on imposition of penalty by the "penalty-fixer" in order to permit the penalty to be determined in the light of pre-sentence reports and other sources not subject to cross-examination?

Frady v. United States, 348 F.2d 84, 115 (D.C. Cir. 1965) (Burger, J., concurring in part and dissenting in part) (citing Williams v. New York, 337 U.S. 241 (1949)).

313. 412 U.S. 17 (1973). To guard against the potential for vindictive sentencing after a defendant has won a new trial and been convicted a second time, the Court requires judges to state valid reasons if they impose a more severe sentence. North Carolina v. Pearce, 395 U.S. 711 (1969). In *Chaffin*, the Court ruled that *Pearce* does not apply when juries decide the sentence after a retrial. *Chaffin*, 412 U.S. at 26-28.

314. *Chaffin*, 412 U.S. at 28 n.15. One fundamental difference, no longer applicable to modern capital cases, was that sentencing juries did not set the sentence in a separate proceeding.

315. *Id.*

316. Furman v. Georgia, 408 U.S. 238 (1972).

be trusted to make a final determination affecting substantial rights on the basis of the uncross-examined statements of out-of-court declarants.[317] Although the jury's function as sentencer justifies a broader standard of what evidence is relevant, the Court's cases have never suggested that the nature of the sentencing decision justifies abolishing every exclusionary rule of evidence that traces its origin to the jury system.

On the contrary, *Booth v. Maryland*[318] strongly suggests that the Court continues to regard judge and jury sentencing as sufficiently different to warrant new exclusionary rules of evidence. *Booth* evaluated a capital sentencing statute that permitted the jury to hear evidence of the crime's effect on the victim's surviving family.[319] The Court held that this evidence, prepared as a "victim impact statement," was not relevant to the decision juries must make in a capital sentencing hearing.[320] Although *Booth* also will apply when judges sentence defendants convicted of capital crimes, the opinion reveals that the Court was primarily concerned that juries cannot rationally process the information contained in victim impact statements.[321] The Court explained that the evidence could "inflame" and "divert the jury's attention" and could "distract the sentencing jury" from considering the defendant's crime and record.[322] This is the language of jury control, and it is inconceivable that the Court would voice such fears if the decision

317. The law has relaxed the exclusionary rules of evidence for some preliminary issues and for final determinations in a range of adjudications. Except for grand juries, the decision maker who is permitted to rely on hearsay is either a judge or a professional hearing officer, not a jury. For a review of authorities who regard exclusionary rules of evidence as the product of the jury system and who urge dropping the "erratic, eccentric and anomalous" rules of evidence in hearings before judges and hearing officers, see 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 16:2-16:3 (2d ed. 1978). Although grand jurors may consider hearsay evidence, their decision to indict is merely a preliminary determination that there is probable cause to initiate criminal proceedings. Any final conviction must be based entirely on admissible evidence. In contrast, there is nothing preliminary about a jury's decision to sentence a defendant to death. *Cf.* Caldwell v. Mississippi, 472 U.S. 320 (1985) (state may not diminish sentencing jury's sense of responsibility by suggesting that vote for death is only preliminary pending review by state supreme court).

318. 482 U.S. 496 (1987).

319. *Id.* at 499-500. An officer of the court interviewed the family and prepared a report called a "victim impact statement." The Maryland statute provided that this report could be read to the jury. *Id.* at 499. The hearsay nature of the evidence was not an issue in the case.

320. *Id.* at 507.

321. *Id.* at 508.

322. *Id.* The Maryland procedure posed another problem that is specific to jury sentencing. In the Court's view, the jury might mistakenly regard the victim impact statement, prepared by the department of parole and probation, as representing the official

maker were a judge presiding over an ordinary criminal sentencing. Indeed, the Court restricted its holding to capital cases, even though its relevance-based rationale would seemingly apply with equal force to any criminal sentencing.[323] Just as *Booth* excludes evidence that may prejudice the jury, the reliability-based rules of exclusion, including the rule against hearsay, also should apply when juries determine capital sentences.[324]

C. Williams *Does Not Apply to an Adversary Proceeding*

The exclusionary rules of evidence also owe their existence to the adversary system.[325] Nevertheless, the procedure in *Williams*, and in most noncapital sentencing hearings, features two basic attributes of inquisitorial procedure, the very antithesis of an adversarial model. First, the judge or a judicial officer is primarily responsible for developing the evidence, usually in the form of a presentence

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views of the state. *Id.* at 509 n.11. The Court did not discuss use of a limiting instruction, the ordinary solution for such potential confusion.

323. By limiting its holding to capital cases, the *Booth* Court avoided disrupting the statutes of 36 states that "permit the use . . . in some contexts" of victim impact statements. *Id.* at 509 n.12.

324. The Illinois legislature could conceivably mute the force of the argument presented in this section by providing that capital sentencing hearings be conducted without a jury. Such legislation, however, might violate the state constitution's jury-trial guarantee even though, under Spaziano v. Florida, 468 U.S. 447 (1984), it would not violate the sixth amendment to the United States Constitution.

In People *ex rel.* Daley v. Joyce, 126 Ill. 2d 209, 222, 533 N.E.2d 873, 879 (1988), the Illinois Supreme Court held that the Illinois Constitution of 1970, which preserves the right to trial by jury "as heretofore enjoyed," grants defendants a broader right than the sixth amendment to the United States Constitution. The United States Supreme Court has held that the sixth amendment right to a jury does not entitle a defendant to waive that right and insist on a bench trial. Thus, in Singer v. United States, 380 U.S. 24 (1965), the Court upheld FED. R. CRIM. PRO. 23(a), which provides that prosecutors must agree before a nonjury trial can be held. Under the holding of *Joyce*, however, an Illinois defendant's right to a jury is also a right to waive a jury.

When Illinois voters ratified the state constitution in 1970, juries had been entrusted with the capital sentencing decision for 96 years. *See* Note, *The New Illinois Death Penalty: Double Constitutional Trouble*, 5 LOY. U. CHI. L.J. 351, 354 n.30 (1974) (citing BEDAU, CAPITAL PUNISHMENT 7, 31 (J. McCafferty ed. 1972)). An extension of *Joyce* could hold that the Illinois Constitution of 1970 preserves the right of defendants, "as heretofore enjoyed," to submit the issue of life or death to the jury.

Even if the Illinois legislature could eliminate the jury's role in capital sentencing, this Article argues that the adversary nature of the penalty trial also requires a right of confrontation. *See infra* notes 325-44 and accompanying text; *see also* Herring v. New York, 422 U.S. 853 (1975) (bench trial is adversary proceeding and counsel cannot be deprived of right of summation and final argument). Even though judges are generally trusted to avoid the influence of unreliable hearsay, the rules of evidence and the right of confrontation nevertheless prevail when defendants waive a jury and contest their guilt in an adversary trial conducted before the court.

325. *See supra* notes 300-01.

report.[326] Second, the judge is not merely the umpire, but an active participant in the proceedings.[327] In the *Williams* era, the length of the sentence and the manner of deciding it were purely discretionary, and judges had no obligation to permit defendants to participate in the decision making at all.[328] The *Williams* view of discretionary sentencing no longer applies to modern capital sentencing hearings,[329] which the Supreme Court regards as fully developed adversary proceedings that require many of the formal procedural protections of criminal trials.[330] If the rule excluding the statements of uncross-examined out-of-court declarants is the child of the adversary system, the rule must be applied to capital sentencing hearings.

The difference in the adversary nature of capital and noncapital sentencing is highlighted in the Court's decisions that apply the fifth amendment's double jeopardy clause to capital sentencing but not to ordinary felony sentencing. In 1980, the Court in *United States v. DiFrancesco*[331] rejected a double jeopardy challenge to a statute that permitted the United States to appeal a judge's sentence in certain circumstances.[332] The Court described the ordinary criminal sentencing as a "purely judicial determination" that is based largely on out-of-court information from a presentence re-

326. *See* Note, *supra* note 162, at 1529.

327. *See* Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1018-19 (1974); Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 n.3, 313 (1989). Goldstein specifically notes the inquisitorial elements of American sentencing practices, in which the trial judge works with a presentence report that resembles the "dossier" used in European criminal proceedings. Goldstein, *supra*, at 1021.

328. As the Court explained in a later decision, *Williams* ruled that the Constitution "did 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." Specht v. Patterson, 386 U.S. 605, 606 (1967).

In most noncapital sentencing proceedings today, defendants may supplement the presentence report with additional evidence and may cross-examine witnesses who actually appear in court for the prosecution, thus adding some elements of adversary procedure to the basic inquisitorial character of the sentencing proceeding. Nevertheless, the Court regards felony sentencing as primarily nonadversarial. *See infra* text accompanying notes 330-34.

329. *See* Gardner v. Florida, 430 U.S. 349, 357-60 (1977).

330. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 686-87 (1984).

331. 449 U.S. 117 (1980).

332. The Organized Crime Control Act of 1970, 18 U.S.C. § 3576 (1976), applied to defendants found to be "dangerous special offenders." It authorized prosecutors to ask for a longer sentence on appeal if they believed the trial judge was too lenient. The defendant argued that the judge had "acquitted" him of the maximum sentence by setting a shorter term in prison.

port.[333] The sentencing inquiry, the Court said, is "nonadversary in nature."[334]

The Court distinguished *DiFrancesco* a year later. In *Bullington v. Missouri*,[335] the Court characterized a capital sentencing hearing as an adversary trial on the issue of life or death, because the Missouri statute required the prosecution to prove its case that death is the appropriate punishment.[336] Because capital sentencing hearings are therefore so different from ordinary sentencing proceedings and so much like criminal trials, *Bullington* extended the protection of the double jeopardy clause.[337]

The Court further distinguished felony sentencing from the adversary nature of capital sentencing in *Strickland v. Washington*, in which a defendant asserted that he was sentenced to death in violation of his sixth amendment right to effective assistance of counsel.[338] The Court announced that counsel's performance in capital sentencing hearings must be measured by the same constitutional standard that is applied in criminal trials.[339] Both types of proceedings feature standards for decision, Justice O'Connor explained, and depend on the adversary process to produce just results.[340] Therefore, the role of counsel is the same—to ensure

333. *DiFrancesco*, 449 U.S. at 136-37.

334. *Id.* at 137. The Federal Sentencing Guidelines have narrowed significantly the range of choices judges may make when exercising their sentencing discretion. *See generally* Mistretta v. United States, 488 U.S. 361, 652 (1989) (rejecting separation-of-powers challenge to the sentencing guidelines promulgated under the Sentencing Reform Act of 1984, 18 U.S.C. § 3551-3586 (1988), and 28 U.S.C. §§ 991-998 (1988)); Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988). They preserve, however, the characteristics that led the *DiFrancesco* Court to regard sentencing as a "purely judicial determination." *See DiFrancesco*, 449 U.S. at 137. Under the Sentencing Guidelines, judges continue to rely on presentence reports for most of the information required in fixing a sentence. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 6A1.1 commentary (1990). Although both the prosecution and the defense may supplement the report by presenting witnesses, and the defense may cross-examine the witnesses who actually testify in court, these elements of adversary procedure were already a part of the sentencing proceedings that the *DiFrancesco* Court concluded were "nonadversary in nature." *See DiFrancesco*, 449 U.S. at 137.

335. 451 U.S. 430 (1981).

336. *Id.* at 438.

337. Later decisions read *Bullington* broadly to apply to all capital sentencings. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 311 n.33 (1987); Spaziano v. Florida, 468 U.S. 447, 458 (1984); *see also infra* notes 418-22 and accompanying text (discussing *Bullington*).

338. Strickland v. Washington, 466 U.S. 668, 675 (1984).

339. *Id.* at 686.

340. *Id.* at 687.

that the opponent's case is subjected to "adversarial testing."[341] In contrast, because "ordinary" sentencing may "involve informal proceedings and standardless discretion," a different standard may apply.[342]

Although the *Williams* decision still permits judges to rely on hearsay when they sentence felons to prison terms, capital sentencing today is different. Unlike the sentencing the Court approved more than forty years ago in *Williams*, which featured "informal proceedings and standardless discretion,"[343] Illinois capital sentencing hearings are fully adversary proceedings conducted before a jury.[344] Whether the rule against hearsay is the heir of the jury system or the child of the adversary system, the Illinois Supreme Court incorrectly relied on *Williams* when it permitted prosecutors to introduce hearsay in these very different proceedings.

V. Due Process Requires a Right of Confrontation Throughout the Entire Capital Sentencing Hearing

Although the Constitution expressly guarantees the right of confrontation only to defendants in criminal trials, confrontation also stands as an important procedural component of the due process clauses of the fifth and fourteenth amendments. Due process usually requires some kind of proceeding in which a target of government action has an opportunity to be heard before losing life, liberty, or property.[345] In criminal cases, the general mandate of the due process clauses supplement the specific protections in the Bill of Rights, and the Supreme Court premised its first forays into supervising state court criminal procedures on the principle that the fourteenth amendment's due process clause requires states to observe "fundamental fairness."[346] As the Court gradually incor-

341. *Strickland* recognized that modern capital sentencing hearings are adversary proceedings:

> A capital sentencing proceeding like the one involved in this case . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision.

Id. at 686-87 (citations omitted).

342. *Id.* at 686.

343. *Cf. id.*

344. *See* People v. Wright, 111 Ill. 2d 128, 160, 490 N.E.2d 640, 653 (1986), *cert. denied*, 479 U.S. 1101 (1987), discussed *supra* note 194.

345. *See generally*, Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

346. *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 2.4 (1985).

porated almost the entire Bill of Rights into the fourteenth amendment, decisions on the right to counsel, the right to remain silent, and the right to cross-examination, for example, became known as fifth and sixth amendment precedents rather than due process holdings.[347] The Bill of Rights, however, does not govern every detail of criminal procedure between crime and confinement. When filling gaps, the Supreme Court turns to the fundamental fairness that due process requires.[348]

The due process clause and the right of confrontation also restrict the government in administrative proceedings. Whenever the government has authority to deprive individuals only under certain conditions, the due process clause requires that fair procedures determine whether and when those conditions exist.[349] Especially when the validity of a threatened deprivation turns on a question of fact, the due process clause protects the individual's stake in assuring that decision makers determine that fact reliably.[350] It also guards the individual's opportunity to show that the government's case relies on untrustworthy evidence.[351] More than thirty years ago, in *Greene v. McElroy*, the Supreme Court lauded the right of confrontation as one of the most important elements of this right to contest the government's proof.[352]

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347. Once the Court incorporates a provision of the Bill of Rights, the same precedents and standards govern both state and federal court prosecutions. *Id.* § 2.5(a). In reviewing state court decisions, the Court sometimes applies the Bill of Rights without mentioning either the fourteenth amendment or due process. *See, e.g.*, Arizona v. Roberson, 486 U.S. 675 (1988) (fifth amendment); Tennessee v. Garner, 471 U.S. 1 (1985) (fourth amendment); Holloway v. Arkansas, 435 U.S. 475 (1978) (sixth amendment).

348. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51 (1988) (destruction of potentially exculpatory evidence); Ake v. Oklahoma, 470 U.S. 68, 76 (1985) (indigent defendant's access to psychiatric expert).

349. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 13.8, at 487 (3d ed. 1986).

350. *See* Greene v. McElroy, 360 U.S. 474, 496 (1959).

351. *See id.*

352. The Court explained that the right of confrontation derives from principles that are deeply rooted in our nation's legal heritage:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal

In the years after the Supreme Court decided *Williams* in 1949, the reach of both the due process clause and the right of confrontation expanded on two fronts. First, the Court held that states must provide almost every procedural protection outlined in the Bill of Rights, including the right of confrontation.[353] Additional opinions further expanded the reach of the due process clause in criminal cases.[354] Second, the Court launched a "due process revolution" by broadening the range of interests the clause protects and imposing procedural formalities in a host of previously unregulated settings.[355]

The due process clause now sets the minimum procedures that the government must follow to suspend a driver's license, fire permanent employees, suspend students, terminate welfare benefits, adjudicate a juvenile offender, or revoke probation or parole.[356] Although the Constitution often mandates a right of confrontation, the Court has always applied due process flexibly, requiring procedures that vary according to the public and private interests at stake. In some cases, the Court simply announced the specific procedures that due process required.[357] Later, *Mathews v. Eldridge*[358] articulated a balancing test to determine what procedures are required in a given case. Under *Eldridge* the Court weighs the public and private interests against the incremental benefits and costs of

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cases the accused shall enjoy the right to "be confronted with the witnesses against him."

Id. at 496-97 (footnote omitted).

353. *See* Pointer v. Texas, 380 U.S. 400, 403-06 (1965) (confrontation); Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1063 (1984) (Bill of Rights).

354. *See, e.g., In re* Winship, 397 U.S. 358 (1970) (criminal convictions require proof beyond a reasonable doubt); Brady v. Maryland, 373 U.S. 83 (1963) (prosecutor must disclose exculpatory evidence).

355. The Court's decision in Goldberg v. Kelly, 397 U.S. 254 (1970), "signaled the Court's willingness to extend due process protections to the daily operations of virtually every state and federal administrative agency . . . ." Rubin, *supra* note 354, at 1063; *see also* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 29 (1976) ("due process revolution").

356. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (employees); Goss v. Lopez, 419 U.S. 565 (1975) (school suspensions); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); *In re* Gault, 387 U.S. 1 (1967) (juvenile adjudication).

357. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972); Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970); *In re* Gault, 387 U.S. 1, 56-57 (1967); Specht v. Patterson, 386 U.S. 605, 610 (1967).

358. 424 U.S. 319 (1976).

more stringent procedures.[359] The Court first applied the *Eldridge* balancing in administrative cases to analyze deprivations of property and liberty interests created by statute—the so-called "new property."[360] More recently, the *Eldridge* factors appear in decisions that examine what fundamental fairness requires when the government deprives individuals of liberty and property rights that exist independent of statutes.[361]

It once appeared that the Court considered its procedural due process decisions in criminal cases to be conceptually distinct from their civil and administrative law counterparts.[362] Criminal procedure opinions rarely cite *Eldridge*, although in 1985 the Court decided *Ake v. Oklahoma*, which balanced the *Eldridge* factors and concluded that states must provide expert psychiatric witnesses to indigent defendants who raise an insanity defense.[363] In modern capital cases, rulings on the procedures required at sentencing hearings usually rely on the eighth amendment.[364] Some also rely

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359. *Eldridge* announced that courts should weigh three factors when determining what process is due:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

360. As late as 1984, Professor Rubin wrote that the Supreme Court had never indicated that it would employ the *Eldridge* balancing to determine what due process requires in "traditional common law and nonadministrative cases." Rubin, *supra* note 354, at 1137.

361. *See, e.g.*, Brock v. Roadway Express, Inc., 481 U.S. 252, 274 n.2 (1987) (Stevens, J., dissenting) (contract rights); Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (termination of parental rights); *see also*, Rakoff, Brock v. Roadway Express, Inc., *and the New Law of Regulatory Due Process*, 1987 SUP. CT. REV. 157. The Court has also cited *Eldridge* in two cases approving statutes that authorize preventive detention. *See* Salerno v. United States, 481 U.S. 739, 746 (1987) (adults); Schall v. Martin, 467 U.S. 253, 264 (1984) (juveniles).

362. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (due process cases protecting property from government deprivation "inapposite and irrelevant in the wholly different context of the criminal justice system"); *see also* Nowak, *Foreword—Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L & CRIMINOLOGY 397, 402 (1979) (*Eldridge*'s "purely utilitarian" balancing of accuracy against cost not appropriate in criminal cases, where fairness is also important).

363. Ake v. Oklahoma, 470 U.S. 68, 83 (1985); *see also* United States v. Raddatz, 447 U.S. 667, 677-81 (1980).

364. *See, e.g.*, Booth v. Maryland, 482 U.S. 496 (1987) (evidence of crime's impact on victim inadmissible at capital sentencing); Caldwell v. Mississippi, 472 U.S. 320 (1985) (jury instruction violated eighth amendment).

on the due process clause,[365] and in another section of *Ake*, the Court expressly applied the *Eldridge* factors to discern the procedures required at capital sentencing.[366]

In the following section, this Article examines the due process jurisprudence that developed in the years after the *Williams* court nixed a right of confrontation for convicted defendants in sentencing hearings. This section first examines *Specht v. Patterson*,[367] which distinguished *Williams* and granted defendants a right of confrontation in some kinds of sentencing proceedings. After concluding that *Specht* does not unambiguously require a right of confrontation at the second stage of an Illinois capital sentencing hearing, this section proceeds to balance the *Eldridge* factors in the light of the changes in capital sentencing law since *Williams*. It concludes that due process guarantees defendants the right to insist, during the entire sentencing proceeding, that adverse witnesses present their testimony in court where they are subject to cross examination.

A. The Relevance of Specht v. Patterson

One decade after *Williams*, the Court noted in *Greene v. McElroy* that individuals may generally confront adverse witnesses when the legitimacy of a threatened government action depends on a finding of fact.[368] The *McElroy* decision, however, did not undermine *Williams*, because the validity of a judge's sentence did not depend on any facts that a postconviction proceeding may or may not determine.[369] As the Court later noted, the sentencing statutes of the *Williams* era granted judges almost unfettered discretion to pronounce any sentence within a specified range.[370]

The Supreme Court later distinguished *Williams* and held that defendants may insist on confronting adverse witnesses at certain kinds of sentencing hearings. In *Specht v. Patterson*,[371] a Colorado statute provided that a defendant convicted of a crime carrying a

365. *See, e.g.*, Green v. Georgia, 442 U.S. 95 (1979); Gardner v. Florida, 430 U.S. 349 (1977).

366. *Ake*, 470 U.S. at 83-84; *see also*, Ford v. Wainwright, 477 U.S. 399, 425 (1986) (Powell, J., concurring) (citing *Eldridge* in discussing the procedures required when a prospective execution is challenged on the grounds that the prisoner is insane).

367. 386 U.S. 605 (1967).

368. Greene v. McElroy, 360 U.S. 474, 496-97 (1959), discussed *supra* note 352 and accompanying text.

369. A sentence actually based on inaccurate information, however, did violate the due process clause. *See* Townsend v. Burke, 334 U.S. 736 (1948).

370. Gardner v. Florida, 430 U.S. 349, 357 (1977).

371. 386 U.S. 605 (1967).

maximum sentence of ten years could be sentenced for an indefinite period, up to life in prison, if the judge found after trial that the defendant endangered the public or was a mentally ill habitual offender.[372] The Court held that the due process clause guaranteed defendants the right to have counsel, to present evidence, and to confront and cross-examine witnesses at this posttrial hearing.[373] The *Specht* opinion adhered to *Williams*, but refused to extend it to what the Court viewed as a "radically different situation."[374] Describing *Williams* as a case in which the judge pronounced sentence at the trial's conclusion and in the same proceeding, the *Specht* opinion reaffirmed that due process generally provides convicted defendants no procedural rights before sentencing.[375] In contrast, however, Specht was convicted under one statute, but sentenced under another, and the basis for the increased sentence was a new finding of fact that was not an element of the original offense.[376] The *Specht* opinion does not clearly explain which differences between the *Williams* and *Specht* sentencings the Court regarded as legally significant. It is therefore difficult to predict how the Court would view sentencing statutes that incorporate only some features of the Colorado statute.[377]

A later opinion revealed, however, that the Court clearly believed that *Specht* controlled modern capital sentencings where a posttrial finding of an aggravating circumstance must precede any sentence of death. In *Bullington v. Missouri*,[378] the Court noted that *Specht*'s due process protections, including the right to confront adverse witnesses, are required at sentencing hearings in which a new finding of fact serves as the basis for an increased sentence.[379] *Specht* would therefore apply to an Illinois capital sentencing proceeding, in which a murder conviction, by itself, justifies at most a life sentence, but a defendant becomes eligible for the more severe sanction of death if the sentencer finds a statutory ag-

372. *Id.* at 607. The Colorado procedures permitted the judge to make this finding without a hearing, simply on the basis of a written psychiatric report. *Id.*

373. *Id.* at 610.

374. *Id.* at 608.

375. *Id.*

376. *Id.*

377. *See* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356, 368-69 (1975).

378. 451 U.S. 430 (1981).

379. In a parenthetical summarizing the holding of *Specht*, the *Bullington* Court wrote: "[D]ue process protections such as right to counsel, right to confront witnesses, and right to present favorable evidence are available at hearing at which sentence may be imposed based upon 'a new finding of fact . . . that was not an ingredient of the offense charged.'" *Id.* at 446 (quoting *Specht*, 386 U.S. at 608).

gravating factor. It would follow that Illinois must provide the *Specht* protections, including the right to confront adverse witnesses, to defendants in capital sentencing proceedings.

The format of the Illinois capital sentencing hearings complicates the application of *Specht*. Illinois separates the eligibility phase of the death hearing from the selection phase.[380] In the first stage, the prosecution must prove the existence of an aggravating circumstance beyond a reasonable doubt.[381] The rules of evidence apply, and the defendant may confront and cross-examine witnesses.[382] Thus, the full procedural protections that *Specht* requires already are provided when an Illinois sentencing jury returns the specific finding that puts a defendant at risk of a death sentence.

Once the jury finds the defendant eligible for death, the hearing enters its second phase, and only then does the Illinois defendant lose the right to confront witnesses.[383] The jury continues to receive evidence, but it makes no further discrete finding of historical fact. Without specific instructions on how to evaluate or balance the additional evidence in aggravation and mitigation,[384] the court simply asks that the jury decide whether any mitigating factors are sufficient to preclude the ultimate punishment.[385]

If the entire Illinois penalty trial were viewed as a whole, then *Bullington* appears to require the procedural protections mandated in *Specht*. Examining the second stage separately, however, could suggest a different result. Applying *Specht*'s slippery rationale, a court would inquire whether the Illinois procedure more closely resembles the unconstitutional Colorado sentencing that *Specht* disapproved or the *Williams* sentencing that *Specht* countenanced.[386] The second stage of the Illinois capital sentencing hear-

380. Although the Illinois statute does not require that courts conduct the penalty trial in two stages, the Illinois Supreme Court prefers a split hearing. *See supra* note 72.

381. ILL. REV. STAT. ch. 38, para. 9-1(f) (1989).

382. *Id.* para. 9-1(e).

383. *See* People v. Free, 94 Ill. 2d 378, 447 N.E.2d 218, *cert. denied*, 464 U.S. 865 (1983).

384. *See* People v. Brownell, 79 Ill. 2d 508, 534, 404 N.E.2d 181, 194 (1980).

385. *See* ILLINOIS SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS, CRIMINAL No. 7C.06 (2d ed. Supp. 1989).

386. *See* 1 J. WIGMORE, EVIDENCE § 4, at 93-96 n.52 (Tiller rev. 1983) (discussing problem of deciding whether a particular sentencing statute is governed by *Williams* or by *Specht*); *cf.* McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) ("[o]ur inability to lay down any 'bright line' test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* than is the Pennsylvania statute to depend on differences of degree").

ing may correspond more closely to the procedurally permissive sentencing in *Williams*. The preliminary finding of an aggravating circumstance in the eligibility phase is analogous to the guilty verdict in *Williams*. The selection stage, which parallels the *Williams* sentencing, could be said to occur at the conclusion of the eligibility stage and in the same proceeding. Although the Illinois statute permits a death sentence only if the selection stage jury finds a new fact—that sufficient mitigating factors do not exist—this is probably not dispositive. Because the jury already has found the prerequisite aggravating circumstance, a further finding of insufficient mitigating factors does not seem so far removed from the scope of the already-proven facts that the *Specht* Court would have required special procedural protections.[387] If the statute at issue in *Specht* had simply required the judge to impose the maximum sentence unless a written presentence report persuaded him that mitigating factors were sufficient to preclude it, the Court would hardly have characterized the situation as "radically different" from the one in *Williams*. The relationship between the first and second stages of the Illinois capital sentencing hearing appears more analogous to the connection between the guilt and sentencing phases of the *Williams* trial. If that analogy is apt, the *Specht* opinion is not broad enough by itself to require a right of confrontation at the second stage of an Illinois capital sentencing hearing. Nevertheless, additional due process cases suggest that Illinois courts must permit defendants to confront adverse witnesses who provide aggravating evidence in the selection phase.

B. The Eldridge *Balancing Test*

This section of the Article analyzes the *Eldridge* factors and argues that, especially in light of the changes in death penalty law that have occurred since *Williams v. New York*, defendants have a due process right to confront the sources of adverse information the prosecution presents in the second stage of an Illinois capital sentencing hearing.

1. The Defendant's Stake

The first factor in the *Eldridge* equation is the private interest at stake,[388] which in capital cases is the defendant's very life. In all

387. Nevertheless, the fact that the defendant's fate turns on the jury's specific factual finding—the existence or not of sufficient mitigating factors—bolsters the case for procedural protections at the second stage. *See infra* note 389.

388. Matthews v. Eldridge, 424 U.S. 319, 332-33 (1975).

the pages of the United States Reports, no private interest is more weighty.[389] The Court now recognizes that because the penalty of

389. The fact that a defendant has been convicted of a capital crime does not diminish his constitutionally protected stake in his life during the sentencing hearing. In the only Supreme Court case that explicitly applied an *Eldridge* analysis to capital sentencing procedures, the Court did not distinguish the weight of the defendant's private interest during the guilt trial from its significance during the capital sentencing hearing. In both cases, the Court described the defendant's interest in fair and accurate adjudication as "compelling." Ake v. Oklahoma, 470 U.S. 68, 78, 83 (1985).

Ake measured the convicted defendant's stake at a time when the sentencing jury had not made the factual finding that Ake was eligible for capital punishment. The Supreme Court has made it clear that once a jury finds a statutory aggravating factor, the eighth amendment requires no further substantive, reviewable, legislatively set standards to constrain the jury's freedom to choose which death-eligible defendants shall live and which shall die. At the selection stage, the Constitution permits juries to wield standardless discretion. *See* Lowenfield v. Phelps, 484 U.S. 231, 246 (1988); California v. Ramos, 463 U.S. 992, 1008 n.22 (1983) (jury at selection stage may exercise "unbridled discretion"); Zant v. Stephens, 462 U.S. 862, 874-80 (1983).

The Court's relaxed scrutiny of the selection stage raises the question whether, for purposes of an *Eldridge* analysis, the defendant's stake becomes less significant once the finding of eligibility is made. The Court's ruling in McMillan v. Pennsylvania, 477 U.S. 79 (1986), also suggests this question. In *McMillan*, the Court reviewed a ruling of the Pennsylvania Supreme Court that applied an *Eldridge* analysis to a statute that governed sentencing proceedings for certain noncapital felonies. The statute prohibited probation and provided for a mandatory minimum sentence of five years if, at a posttrial hearing, the judge found by a preponderance of the evidence that the defendant committed the crime while visibly possessing a firearm. *Id.* at 81 & n.1. The defendant argued unsuccessfully that due process required the state to shoulder a heavier burden of proof. The Pennsylvania court opined that convicted felons retain only a "diminished" interest in liberty at their sentencing hearings. *Id.* at 83-84.

Although the Supreme Court did not explicitly adopt the Pennsylvania court's view that a conviction reduced the defendant's stake in accurate fact-finding at the sentencing hearing, it held that proof by a preponderance satisfied due process. The Court based its conclusion, in part, on the view that the Constitution already considers convictions, by themselves, sufficient to justify imprisonment. *Id.* at 92 n.8. Similarly, the Court could conclude that a postconviction finding of death-eligibility is itself sufficient to justify the ultimate punishment, as long as the sentencer first considers the defendant's mitigating evidence. *See, e.g.*, Lowenfield v. Phelps, 484 U.S. at 246 (1988).

However, even if a postconviction finding of an aggravating circumstance does diminish, in the *Eldridge* scales, the weight of the defendant's constitutionally protected stake, the language of the Illinois statute may grant an additional constitutionally protected interest in reliable fact-finding during the second stage of the sentencing hearing. When state law sets up "substantive predicates" and "mandat[es] the outcome to be reached upon a finding that the relevant criteria have been met," it creates an expectation that due process protects. *See* Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. 1904, 1909 (1989).

Justices O'Connor and White applied this principle in their dissent in Ford v. Wainwright, 477 U.S. 399 (1986). They disagreed with the Court's holding that the Constitution guaranteed death row inmates the right to be free from execution while they are insane. Yet they agreed that Florida statutes established that right, and they concluded that the due process clause governed the procedures employed to determine whether Florida prisoners were insane or not. "[W]here a statute indicates with 'language of an unmistakable mandatory character[]' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation pro-

death extinguishes life itself, it differs in quality from all other punishments. Consequently, modern capital cases repeatedly emphasize the heightened need for reliable procedures to determine in each case whether this ultimate, irremediable punishment is appropriate.[390] As Justice Stevens noted, by recognizing that death is different, the Court abandons the view it held in the *Williams* era.[391]

2. The Risk of an Erroneous Deprivation

The second step in the *Eldridge* balance assesses the risk that a jury functioning under current procedures may decide erroneously, and analyzes the likelihood that decision making will improve if defendants can insist that the prosecution produce its declarants in court for cross-examination.[392] The risk that a capital sentence

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tected by the Due Process Clause." *Id.* at 428 (O'Connor, J., dissenting, joined by White, J.) (quoting Hewitt v. Helms, 459 U.S. 460, 471-72 (1983)).

The Illinois statute clearly forbids a sentence of death without a specific substantive predicate: the second-stage jury must determine that there are no mitigating factors sufficient to preclude the death penalty. It also mandates a verdict of life if there are sufficient mitigating factors. Although the fact-finding required here may not qualify as the sort of new findings of fact that require additional procedural protections under the holding of *Specht v. Colorado*, 386 U.S. 605 (1967), *see supra* text accompanying note 387, the standard is sufficiently concrete to create a constitutionally protected interest even if none would exist in its absence.

Indeed, the Illinois Supreme Court regards the jury's second-stage ruling as sufficiently objective to review it on the merits. In an early case, the court announced that its automatic review of every death sentence "also considers whether there are no mitigating factors sufficient to preclude imposition of the death sentence." People v. Brownell, 79 Ill. 2d 508, 543, 404 N.E.2d 181, 199 (1980). The Illinois court has reversed some sentences of death on the basis of the mitigating evidence. *See, e.g.*, People v. Johnson, 128 Ill. 2d 253, 281, 538 N.E.2d 1118, 1130 (1989) (defendant not a person who deserves death); People v. Buggs, 112 Ill. 2d 284, 293-95, 493 N.E.2d 332, 335-37 (1986) (same); *see also* People v. Carlson, 79 Ill. 2d 564, 587-90, 404 N.E.2d 233, 244-45 (1980) (sentence of death reversed after Illinois Supreme Court reweighed aggravating and mitigating evidence); *cf.* People v. Gleckler, 82 Ill. 2d 145, 161-71, 411 N.E.2d 849, 856-61 (1980) (reversing jury-imposed sentence of death on the merits of the mitigating evidence, but basing decision in part on comparison to sentences codefendants received after separate trials).

Determining that the language of the Illinois statute confers a constitutionally protected expectation, however, does not necessarily reveal how strongly the Court would weigh the defendant's interest nor how that factor would affect the ultimate resolution of what procedures are required.

390. *See, e.g.*, Lowenfield v. Phelps, 484 U.S. 231, 238-39 (1988) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)) (" 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed' "); Caldwell v. Mississippi, 472 U.S. 320, 329 (1985); California v. Ramos, 463 U.S. 992, 998-99 (1983).

391. *See* Gardner v. Florida, 430 U.S. 349, 357 (1977).

392. *See Eldridge*, 424 U.S. at 345.

will be imposed erroneously has also changed since the *Williams* era, when a judge's decision to impose the penalty of death was almost unreviewable as long as the legislature authorized capital punishment for the defendant's crime. With no limits on the judge's discretion, there was little concept that legal error could taint the sentencing decision.[393] In contrast, the possibility of an unreliable or erroneous verdict of death is now a recurrent theme in the Court's more recent opinions on capital sentencing.[394]

Assessing the risk of error and the value of additional procedures requires an analysis of the nature of the jury's decision.[395] At

393. *Gardner*, 430 U.S. at 357.

394. The rhetoric of error and accuracy pervades the Court's rulings on procedural due process, figures prominently in capital punishment cases, and thus also appears in this Article. The Court has said it fashions rules of procedure to reduce the risk of error that inheres in the search for truth. *See Eldridge*, 424 U.S. at 344. Yet judgments that include a subjective moral determination seem less properly regarded as correct or incorrect than pure findings of objective fact. *Cf.* Ingraham v. Wright, 430 U.S. 651, 678 (1977) (the Court broke temporarily from the language of accuracy to speak of "unjustified" and "unreasonable" paddling of schoolchildren). The concept of an "erroneous" outcome seems especially misplaced in discussing a jury's decision to vote for life or death.

The Court has recognized, but not resolved, this conceptual difficulty in discussing the rule that prevents habeas petitioners from raising federal constitutional claims that are already barred by state procedural rules of waiver. *See* Smith v. Murray, 477 U.S. 527, 537 (1986). Ordinarily, federal courts require a petitioner to show both good cause for such a procedural default and consequent prejudice. The Supreme Court provides an exception, however, if applying this standard of cause and prejudice would result in a " 'fundamental miscarriage of justice.' " *Id.* at 537-38 (quoting Engle v. Issal, 456 U.S. 107, 135 (1982)). Petitioners qualify under this exception when they can show that the asserted violation of their constitutional rights "has probably resulted in the conviction of one who is actually innocent." *See* Murray v. Carrier, 477 U.S. 478, 496 (1986). Although the Court acknowledges that it has not explained what it means to be "actually innocent" of a sentence of death, it continues to refer to such ultimate judgments in terms of accuracy. *See* Dugger v. Adams, 109 S. Ct. 1211, 1218 n.6 (1989) (petitioners do not establish a fundamental miscarriage of justice by demonstrating constitutional violations of the type that "might affect" the "accuracy" of a death sentence).

One commentator explains that in capital cases, the Court's attention to accuracy and reliability is not actually grounded in a view that life or death is a "correct" decision in any particular case. Instead, it reflects the Court's concern that the sentencer's discretion be adequately informed, with fair procedures that are not impermissibly skewed to favor execution. *See* Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1043 (1985).

As a matter of state law, however, the Illinois Supreme Court has regarded some sentences of death as "incorrect" and reversed on the merits of the mitigating evidence. *See supra* note 398. Thus, under Illinois case law, it is more clear that a sentencer's second-stage verdict can be analyzed under *Eldridge* as a factual finding. It carries a risk of error that improved procedures could mitigate.

395. *Eldridge*, 424 U.S. at 343. ("[c]entral to the evaluation . . . is the nature of the relevant inquiry"); *see also* Parham v. J.R., 442 U.S. 584, 608 (1979) ("[w]hat process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made").

the second stage of an Illinois capital sentencing hearing, the jury hears evidence of aggravation and mitigation and can impose death only after a unanimous finding that there are no mitigating factors sufficient to preclude a sentence of death.[396] To make its judgment, the jury sifts evidence of historical fact about the defendant's crime, character, and life history.[397] Because some evidence may suggest that the defendant could be rehabilitated or, conversely, would be dangerous in the future, the jury also must predict. Its verdict also includes a discretionary, subjective moral evaluation[398] that is only partially informed by the legislature's list of aggravating and mitigating factors.[399] The Illinois jury may weigh each factor as it chooses but must base its decision on the evidence.[400]

a. Historical Fact

The Court has said that juries cannot rationally impose a sentence of death unless they rely on accurate information.[401] The Illinois sentencing hearing currently carries a grave risk of error when witnesses relate historical facts about the defendant's life. The rules against hearsay owe their existence in part to fears that juries will inappropriately weigh unreliable testimony.[402] Especially when the veracity or credibility of witnesses is at issue, confrontation is the time-honored procedural tool for advancing the determination of the truth.[403] Illinois penalty trials provide ample opportunity for a jury to overvalue the statements of out-of-court

396. ILL. REV. STAT. ch. 38, para. 9-1(g) (1989).

397. *See* People v. Free, 94 Ill. 2d 378, 428, 447 N.E.2d 218, 242, *cert. denied*, 464 U.S. 865 (1983).

398. *See* Turner v. Murray, 476 U.S. 28, 33, 35 (1986) (jury's judgment discretionary and "highly subjective"); Caldwell v. Mississippi, 472 U.S. 320, 340 n.7 (1985) (O'Connor, J., concurring) ("largely a moral judgment"); Barclay v. Florida, 463 U.S. 939, 950 (1983) ("moral, factual, and legal judgment").

399. In addition to the aggravating and mitigating factors listed in the statute, the jury may consider "any additional" aggravating or mitigating factors. ILL. REV. STAT. ch. 38, para. 9-1(e) (1989).

400. *See* People v. Boclair, 129 Ill. 2d 458, 493, 544 N.E.2d 715, 731 (1989) (based on evidence); People v. Brownell, 79 Ill. 2d 508, 534, 404 N.E.2d 181, 194, *cert. dismissed*, 449 U.S. 811 (1980) (weighing).

401. In Gregg v. Georgia, 428 U.S. 153 (1976), the Court explained that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." *Id.* at 190.

402. *See* Brinegar v. United States, 338 U.S. 160, 173-74 & n.12 (1949); E. CLEARY, MCCORMICK ON EVIDENCE § 353 (3d ed. 1984) ("[j]ury trial rules of evidence exclude hearsay on the theory that it is untrustworthy unless within an exception"); Morgan, *supra* note 300, at 255.

403. Davis v. Alaska, 415 U.S. 308, 316 (1974) ("[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested");

declarants whose credibility might shatter under cross-examination in court.[404]

The risk is amplified when the prosecution introduces hearsay statements that implicate the defendant in prior crimes that never resulted in prosecution or conviction.[405] Such evidence is particularly inflammatory,[406] especially when the prosecution has introduced testimony, however slight, that links the defendant to other murders.[407] Because the prosecution need not prove the prior crimes beyond a reasonable doubt,[408] and because the jury receives

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see also Brock v. Roadway Express, Inc., 481 U.S. 252, 266 (1987); Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

404. *See supra* notes 161-263 and accompanying text. By permitting the jury to consider "any additional aggravating factors" at the selection stage, the Illinois statute allows the prosecution to introduce a potentially unbounded range of information. The statute's unrestricted definition of relevant evidence intensifies the risk of error by allowing the prosecution numerous opportunities to prove propositions with hearsay testimony.

In contrast, lack of confrontation poses less risk of error when the prosecution may introduce only information that is relevant to certain types of aggravating circumstances specified by the legislature. For example, Pennsylvania restricts admissible aggravating information to facts about the circumstances of the crime, the status of the victim, and the defendant's criminal convictions. *See* Blystone v. Pennsylvania, 110 S. Ct. 1078, 1091-92 (1990) (Brennan, J., dissenting). Proof of the victim's status and other circumstances of the crime will generally emerge during the guilt phase of the trial, according to the rules of evidence, while prior convictions can be proved by documentary records that easily comport with the hearsay rule. Thus, even if Pennsylvania permitted prosecutors to introduce hearsay at capital sentencing hearings, they would seldom need to rely on it. Although 120 defendants waited on Pennsylvania's death row by 1990, *see* NAACP LEGAL DEFENSE & EDUC. FUND, INC., DEATH ROW, U.S.A. 27-28 (May 30, 1990), research turned up no decisions that reveal whether or not Pennsylvania prosecutors must prove their case for death by following the rules of evidence. *See supra* note 22. The silence in the reported cases suggests that Pennsylvania prosecutors have not relied on ordinarily inadmissible hearsay when asking juries to impose sentences of death.

405. *See, e.g.*, People v. Young, 128 Ill. 2d 1, 52-54, 538 N.E.2d 461, 474-75 (1989), *cert. denied*, 110 S. Ct. 3290 (1990), discussed *supra* notes 216-21 and accompanying text.

406. *Cf.* Spencer v. Texas, 385 U.S. 554, 562 (1967) (presenting evidence of other crimes in documentary form minimizes inflammatory impact).

407. Sentencing juries in Illinois may even hear evidence that implicates the defendant in prior killings for which the charges were dismissed for lack of probable cause. *See, e.g.*, People v. Hall, 114 Ill. 2d 376, 417, 499 N.E.2d 1335, 1352 (1986), *cert. denied*, 480 U.S. 951 (1987). The Illinois Supreme Court later ruled, however, that when a prosecutor dismisses a charge because he believes the defendant is innocent, evidence linking the defendant to the unadjudicated crime cannot be introduced at a capital sentencing hearing. *See* People v. Harris, 129 Ill. 2d 123, 162-65, 544 N.E.2d 357, 374-75 (1989), *cert. denied*, 110 S. Ct. 1323 (1990), discussed *supra* notes 150-53 & 159 and accompanying text.

408. People v. Sanchez, 115 Ill. 2d 238, 277, 503 N.E.2d 277, 292 (1986), *cert. denied*, 483 U.S. 1010 (1987); *see also* People v. Erickson, 117 Ill. 2d 271, 299, 513 N.E.2d 367, 379 (1987) (testimony accusing defendant of rape admissible even though it would be insufficient to sustain finding of guilt beyond a reasonable doubt), *cert. denied*, 486 U.S. 1017 (1988); *cf.* People v. Balderas, 41 Cal. 3d 144, 205-06, 711 P.2d 480, 516, 222 Cal. Rptr. 184, 219-20 (1985) (sentencing authority must be instructed to disregard evidence

no instructions on evaluating the other-crimes evidence,[409] the risk of error is compounded.[410] The prosecution has relied on out-of-court statements made by unfriendly acquaintances, ex-lovers, members of a rival gang, and former accomplices in crime,[411] all of whom may have harbored animosity against the defendant and stretched the truth. It is critical that these other-crimes witnesses present their accusations in court. Only then, after the defense has a chance to cross-examine them, will the jury have a satisfactory basis for evaluating whether they are worthy of belief.[412]

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of other crimes unless it first finds beyond a reasonable doubt that the defendant committed them); State v. Lafferty, 749 P.2d 1239, 1260 (Utah 1988) (same).

409. *See* ILLINOIS SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS, CRIMINAL No. 7C.06 (2d ed. Supp. 1989). The evidence of uncharged crimes is relevant to the sentencing decision, and thus admissible, only if it is sufficiently probative for a reasonable juror to conclude that the defendant was involved. *See, e.g.*, People v. Adams, 109 Ill. 2d 102, 128-29, 485 N.E.2d 339, 349 (1985), *cert. denied*, 475 U.S. 1088 (1986); *cf.* Huddleston v. United States, 485 U.S. 681, 689 (1988) (evidence of similar acts irrelevant under federal rules unless reasonable jury could conclude the act occurred and the defendant was the actor). Presumably, jurors should not sentence a defendant on the basis of uncharged crimes unless they *actually* conclude that the crimes occurred and the defendant committed them. Such a standard suggests that jurors must be convinced, at least by a preponderance of the evidence, that the defendant is guilty of the uncharged misconduct. *Huddleston*, 485 U.S. at 690. Without any instructions to that effect, however, or any other instructions, it is not clear how jurors will process evidence that the defendant committed additional crimes.

410. In assessing whether the defendant committed the unadjudicated crimes, there is a considerable risk that the jurors would evaluate erroneously even if the court did issue guiding instructions. Because the jurors will have already found the defendant guilty of the murder for which he is being sentenced, they will not be objective as they assess the additional evidence. They will tend to overvalue the uncross-examined statements of the out-of-court declarants who accuse the defendant of additional crimes. In some states, courts attempt to compensate for this risk of error by instructing the jury that they cannot consider the evidence of other crimes unless they are first convinced, beyond a reasonable doubt, that the defendant committed them. *See supra* note 408. Because the Illinois Supreme Court has rejected that standard, however, and because it does not otherwise require judges to instruct sentencing juries on how to assess or weigh the evidence of additional crimes, the risk of error continues unabated.

411. *See, e.g.*, People v. Young, 128 Ill. 2d 1, 52-54, 538 N.E.2d 461, 474 (1989), *cert. denied*, 110 S. Ct. 3290 (1990) (acquaintance); People v. Salazar, 126 Ill. 2d 424, 468-69, 535 N.E.2d 766, 785-86 (1988), *cert. denied*, 110 S. Ct. 3288 (1990) (rival gang member); People v. Foster, 119 Ill. 2d 69, 97-98, 518 N.E.2d 82, 95-96 (1987), *cert. denied*, 486 U.S. 1047 (1988) (former accomplice); People v. Erickson, 117 Ill. 2d 271, 285, 513 N.E.2d 367, 372-73 (1987), *cert. denied*, 486 U.S. 1017 (1988) (ex-girlfriend).

412. Even if prosecutors presented evidence of prior unadjudicated crimes through in-court testimony with a full right of confrontation, there are strong reasons to conclude that such evidence is improper. *See* Williams v. Lynaugh, 484 U.S. 935, 937 (1987) (Marshall, J., and Brennan, J., dissenting from denial of certiorari). The Supreme Court has never ruled whether such evidence—presented through hearsay or not—is admissible.

b. *Predictive Judgments*

The Supreme Court's cases also emphasize that confrontation can help the decision maker make predictive judgments. In *Specht v. Patterson*,[413] the Court granted a right to confront witnesses in a hearing that determined whether the defendant was mentally ill or an habitual offender who would be dangerous if released. Similarly, at the selection stage of capital sentencing hearings, the prosecution often calls psychiatrists who testify that the defendant would be dangerous in the future.[414] Although these medical witnesses are experts in their field, the Court has considered the risk of error severe enough to require cross-examination even when life is not at stake, such as in commitment proceedings.[415] The decision to revoke probation or parole also mixes findings of historical fact with evaluative and predictive judgments. Here, too, the Court has emphasized the value of live testimony and has permitted only narrow exceptions to the right of confrontation.[416]

c. *Discretionary Moral Judgment*

The fact that the sentencing jury admittedly brings its discretionary moral judgment to bear on the verdict distinguishes the capital sentencing inquiry from most of the Court's due process cases. The Court's opinions do not agree on how significantly these discretionary features of the jury's decision differentiate capital sentencing from other fact-findings.[417] Nor do they agree on whether the jury's discretion requires greater procedural safeguards.

By minimizing the extent to which the sentencing jury wields discretion, the Court justified increased procedural protections in *Bullington v. Missouri*.[418] The Court regarded a capital sentencing

413. 386 U.S. 605 (1967).

414. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68 (1985); Barefoot v. Estelle, 463 U.S. 880 (1983).

415. "It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings." Vitek v. Jones, 445 U.S. 480, 495 (1980) (transfer of prisoner to mental hospital) (quoting Addington v. Texas, 441 U.S. 418, 430 (1979) (civil confinement)); *see also* Barefoot v. Estelle, 463 U.S. 880, 898-900 (1983) (cross-examination valuable safeguard to expose flaws in psychiatric predictions of future dangerousness), discussed *infra* notes 493-96 and accompanying text.

416. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole); *cf.* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (decision to grant parole is subjective and predictive; cross-examination not an issue).

417. *See* Dolinko, *Foreword: How to Criticize the Death Penalty*, 77 J. CRIM. L. & CRIMINOLOGY 546, 564 (1986).

418. 451 U.S. 430 (1981).

jury's discretion to be sufficiently constrained so that a decision against death should be accorded the same finality as an acquittal.[419] Instead of selecting among a range of possible sentences, the jury was permitted to vote only yes or no.[420] By limiting the options available to the jury and requiring it to evaluate evidence according to substantive standards, the penalty trial differed from discretionary noncapital sentencing and resembled a full trial on the issue of life or death.[421] Consequently, the Court concluded, to guard against the risk that subsequent penalty retrials might result in an "erroneous" verdict of death, the principles underlying the double jeopardy clause must apply to the sentencing phase of capital proceedings.[422]

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419. *Id.* at 446.

420. *Id.* at 438.

421. *Id.*

422. *Id.* at 445-46. Ordinarily, defendants who contest their convictions and win a retrial face the risk of a greater sentence if they are subsequently reconvicted. *See* North Carolina v. Pearce, 395 U.S. 711, 719-21 (1969).

Instead of writing in broad language that could easily apply to all capital sentencings, the *Bullington* Court grounded its opinion in the provisions of the Missouri statute. Although the Court emphasized trial-like features that are common to most capital sentencing schemes, it also appeared to rely on some features of Missouri's procedures that constrain the sentencing jury's discretion more severely than the legislation of other states. For example, sentencing juries in Missouri make the eligibility and selection decisions in one combined hearing. The prosecution must disclose aggravating evidence in advance, must follow the rules of evidence and shoulder the burden of proof on every issue, and the jury must be convinced beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that the aggravating factors are sufficient to warrant the penalty of death. Evidence is restricted to the statutory aggravating factors, which serve as the exclusive basis for any sentence of death. *Bullington*, 451 U.S. at 432-35. The *Bullington* opinion did not reveal how it would apply to capital sentencing statutes that did not follow all of Missouri's stringent procedures.

When the Court later applied *Bullington*'s holding to Arizona capital sentencings, in which juries play no role, the Court identified three features of the Missouri statute that determined the outcome in *Bullington*. First, the sentencer's choice was restricted to two alternatives. Second, substantive standards guided the sentencer's evaluation of evidence, which was presented in a separate trial-like proceeding. Finally, no sentence of death was permitted unless the prosecutor established certain facts beyond a reasonable doubt. *See* Arizona v. Rumsey, 467 U.S. 203, 209-10 (1984). Although *Rumsey* took a broad view of *Bullington* by distilling the holding of that case, the Court did not express any opinion on *Bullington*'s application to the capital sentencing procedures of additional states.

Nevertheless, the Court later characterized *Bullington* even more broadly and suggested that it applies to all capital sentencings. *See* McCleskey v. Kemp, 481 U.S. 279, 312 n.33 (1987) ("[*Bullington*] held that the Double Jeopardy Clause of the Constitution prohibits a State from asking for a sentence of death at a second trial when the jury at the first trial recommended a lesser sentence"); Spaziano v. Florida, 468 U.S. 447, 458 (1984).

The trial analogy that underlies the *Bullington* rationale fits most closely with the first stage of an Illinois capital sentencing hearing, in which the prosecution must follow the rules of evidence to prove specific facts beyond a reasonable doubt. *See Rumsey*, 467 U.S. at 209-10. Accordingly, the Illinois Supreme Court has held that once a defendant has

Although the rationale of *Bullington* downplayed the discretionary nature of the jury's decision in order to justify greater procedural protections, the Court in *Turner v. Murray*[423] achieved a similar result by emphasizing that discretion. Distinguishing the fact-finding function of ordinary felony trials, the *Turner* opinion explained that the discretion accorded capital sentencing juries provided a "unique" opportunity for racism to affect the ultimate decision.[424] Accordingly, defendants facing capital trials for crimes involving interracial violence may ask prospective jurors about racial prejudice.[425]

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been deemed ineligible for death, *Bullington* prevents the state from trying again. *See* People v. Davis, 112 Ill. 2d 78, 82, 491 N.E.2d 1163, 1164-65 (1986).

Questions of how broadly to apply *Bullington* in Illinois turn on how the Illinois Supreme Court characterizes the selection stage of the capital sentencing hearing. Although the jury must choose between only two options, its discretion is otherwise much broader than in Missouri or Arizona. Because the jury may rely on *any* evidence it deems aggravating, its discretion is not confined by preset standards formulated by the legislature. Furthermore, the prosecutor has no obligation to prove any specific facts, is not bound by the rules of evidence, and has no burden of proof. *See* People v. Williams, 97 Ill. 2d 252, 302-03, 454 N.E.2d 220, 225-26 (1983) (no burden of proof), *cert. denied*, 466 U.S. 981 (1984). In these respects, the second-stage proceeding resembles sentencing proceedings that, even after *Bullington*, did not raise concerns under the principles that bar double jeopardy. *See Bullington*, 451 U.S. at 439-41 (distinguishing cases that permitted a higher sentence after a second trial); *id.* at 443-44 & n.16 (lack of substantive standards); *cf. supra* notes 386-87 and accompanying text (second-stage proceeding analogous to the sentencing in *Williams v. New York*, 337 U.S. 241 (1949)).

If a jury found a defendant eligible for death, but voted for life in the second stage, the question remained whether *Bullington* would bar a second capital sentencing hearing if the conviction were reversed and the case retried. The Illinois Supreme Court has answered affirmatively. Without analyzing the difference between the two stages of the penalty hearing, the court cited *Bullington* as authority for according finality to the jury's second-stage verdict against death. *See* People v. Jimerson, 127 Ill. 2d 12, 53-54, 535 N.E.2d 906, 923-24 (1989), *cert. denied*, 110 S. Ct. 3288 (1990). The Illinois court thus accepted the broad view of *Bullington* suggested by the Supreme Court's language in *McCleskey* and *Spaziano*. Yet it seems anomalous to regard the second-stage proceeding as sufficiently trial-like to require *Bullington*'s protections against double jeopardy, but not sufficiently trial-like to require that prosecutors follow the rules of evidence.

423. 476 U.S. 28 (1986).

424. *Id.* at 35. In a footnote, the Court said: "Notwithstanding Justice Powell's attempt to minimize the significance of the discretion entrusted to the jury at a capital sentencing hearing, we are convinced that such discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to factfinding." *Id.* at 36 n.8 (citation omitted).

425. Defendants in noncapital cases cannot insist on such questioning unless special circumstances present a risk that racism will affect the trial. *Id.* at 37-38 (reaffirming Ristaino v. Ross, 424 U.S. 589 (1976)).

Despite the concerns articulated in *Turner*, the Court feared that eliminating all opportunity for the jury to act on the admittedly impermissible basis of race would abolish the discretion that is crucial to the current system of capital punishment. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the defendant produced the Baldus study, which marshaled statistical evidence to demonstrate that race actually has functioned as a sentencing con-

Conversely, the Court relied on the sentencing jury's discretion as a reason to reject the defendant's claim of procedural error in *California v. Ramos*.[426] The *Ramos* jury considered only two sentencing options: death or life in prison without possibility of parole.[427] The trial court told the jury that the governor could commute the latter sentence.[428] This instruction, the defendant argued, with its hint that only an execution would guarantee that he would never return to society, could divert the jury from its main job of evaluating his crime, background, and character.[429] Speaking for the Court, Justice O'Connor responded that a sentencing jury had no central task from which it could be distracted.[430] Because the sentencing jury is free to focus on "countless" factors, the Court explained, its mission differs fundamentally from the task of determining guilt or innocence.[431] Once the jury properly found an aggravating circumstance that made the defendant eligible for death, the Constitution posed no bar to an exercise of "unbridled discretion."[432] Free to focus on a "myriad of factors," the jury could permissibly consider the defendant's prospects of someday endangering the community if future governors and parole boards permitted release.[433]

With such discretion, the jury obviously may assign whatever weight it wishes to the various parcels of information it considers. In another context, however, the Court has recognized that such freedom can increase the risk of erroneous decision making, especially when the ultimate standard of decision is vague.[434] In *Santosky v. Kramer*, the Court applied an *Eldridge* analysis and demanded stiffer procedural protections before states may terminate parental rights.[435] When parents face charges that they neglect their children, the Court explained, "numerous" factors

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sideration in the practice of post-*Furman* capital sentencing juries in Georgia. The Court concluded that the study showed, at the most, a disparity in sentencing that appeared to correlate with race. The Court held that existing procedures met the Constitution's requirements. *Id.* at 312-13.

426. 463 U.S. 992 (1982).

427. *Id.* at 995.

428. *Id.* at 995-96.

429. *Id.* at 998.

430. *Id.* at 1008. *But see* Booth v. Maryland, 482 U.S. 496, 508 (1987) (evidence of crime's impact on victim's family could "divert [the sentencing jury] from deciding the case on the relevant evidence concerning the crime and the defendant").

431. *Ramos*, 463 U.S. at 998 n.21, 1008.

432. *Id.* at 1008 n.22.

433. *Id.* at 1008.

434. Santosky v. Kramer, 455 U.S. 745, 762-63 (1982).

435. *Id.* at 761.

combine to amplify the prospect of unjust outcomes.[436] In a statement that applies with equal force to capital sentencing, the Court explained that an imprecise standard of decision provided unusual freedom to underweigh probative facts according to personal subjective values.[437] The Court also noted that cultural and class bias can easily infect proceedings where the defendants are frequently poor, uneducated, and nonwhite.[438] The proceeding challenged in *Kramer* already provided for cross-examination. The Court compensated for the risk of error by requiring that the state shoulder a heavier burden of proof.[439]

Even the broadest view of the jury's sentencing discretion still suggests that cross-examination would make the results more reliable and just. Although the jury may weigh as it wishes, cross-examination can reduce the risk that the jury will overvalue the statements of the prosecution's out-of-court declarants. In the Court's view, the capital sentencing decision should reflect "a reasoned moral response" to the crime and the individual defendant's background and character.[440] Thus, the jury ultimately decides by applying a discretionary moral judgment to some view of historical fact.[441] When it forms that view by processing the state's information about the defendant's background and character, the jury can evaluate more accurately when the sources present their testimony in court.

When civil juries hear tort suits that seek punitive damages, they, too, wield absolute discretion to render a decision that combines a finding of historical fact with a subjective, moral evaluation.[442] A plaintiff's bid for punitive damages provides a useful analogy to a prosecutor's request that a jury sentence a defendant

436. *Id.* at 762.

437. *Id.*

438. *Id.* at 762-63.

439. *Id.* at 766-68.

440. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987)).

441. *Cf.* Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 20 (1978) (Powell, J., concurring) ("unless the parole board makes parole-release determinations in some arbitrary or random fashion, these subjective evaluations about future success on parole also must be based on retrospective factual findings").

442. *See* Smith v. Wade, 461 U.S. 30, 52 (1983) (decision to award punitive damages is "discretionary moral judgment"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("reprehensible" conduct); D. DOBBS, REMEDIES § 3.9, at 204, 218 (1973) (absolute discretion to award; amount sometimes subject to reduction); J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW & PRACTICE § 12.04 (1985); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (deliberate, outrageous conduct).

to death. First, plaintiffs and prosecutors share some reasons for requesting their remedies: to punish reprehensible conduct and deter others.[443] Second, tortfeasors are not liable for punitive damages unless the jury first determines that the defendant's conduct was sufficiently aggravated. Third, once defendants are "eligible," civil juries enjoy full discretion to award punitive damages or not.[444] Finally, courts commonly require juries to determine liability in one proceeding and damages in another, just as capital trials proceed in two phases. Judges sometimes order an additional severance and conduct a separate hearing dedicated solely to the issue of punitive damages.[445] A proceeding focusing only on punitive damages is especially comparable to the second phase of an Illinois capital sentencing trial.[446] Once a civil jury determines that a defendant acted egregiously enough to risk liability for punitive damages, new evidence becomes relevant. Because punitive damages are imposed to punish, evidence of the defendant's wealth and income is relevant on the theory that the jury must be able to fix an award large enough to inflict the appropriate level of financial pain.[447] The jury returns no finding on the defendant's net worth; the evidence is offered simply to aid the jury's ultimate discretion-

443. *Compare* Tison v. Arizona, 481 U.S. 137, 148 (1987) (retribution, deterrence, and death) *with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (punishment, deterrence, and punitive damages).

444. While capital sentencing juries can vote only yes or no, civil juries exercise vast discretion to fix the amount of punitive damages, often without judicially or legislatively imposed maximums. Justice O'Connor has suggested that this discretion deserves judicial scrutiny. *See* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 86 (1988) (O'Connor, J., concurring in part). When the Court held that the eighth amendment's bar of excessive fines does not apply to suits between private parties, the opinion cited Justice O'Connor's criticism of punitive damages and suggested that the due process clause might impose some limits on juries' discretion. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2921 (1989). The Court is unlikely to actually abolish punitive damages, however, and any future constitutional limits on civil juries' discretion will not disturb the analogy this Article proposes. No imminent constitutional ruling will prompt courts or legislatures to decide that juries may hear ordinarily inadmissible hearsay when pondering whether to impose punitive damages.

445. The rules of procedure in federal courts permit such a severance. FED. R. CIV. P. 42(b); *see also* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 407 n.16 (5th Cir. 1986) (trial court should consider holding separate trial on issue of punitive damages after liability and compensatory damages are already determined); Campolongo v. Celotex Corp., 681 F. Supp. 261 (D.N.J. 1988) (citing cases). State courts, too, sometimes conduct bifurcated hearings when evidence of the defendant's wealth—relevant to punitive damages—may prejudice the jury's decision on compensatory damages. D. LAYCOCK, MODERN AMERICAN REMEDIES 610 (1985).

446. In some cases, civil juries are even told they may consider the defendant's character in deciding whether to award punitive damages. *See Browning-Ferris*, 109 S. Ct. at 2913 (quoting instruction of state trial court).

447. D. LAYCOCK, *supra* note 445, at 610.

ary decision. Yet the plaintiff must present the evidence of the defendant's wealth according to the usual rules of evidence.[448] When juries consider punitive damages or capital sentences, they hear some evidence of historical fact that may or may not be crucial to their final discretionary decisions. Cross-examination, whether guaranteed by the rules of evidence or the right of confrontation, reduces the risk that a jury will evaluate some information erroneously and thus taint its ultimate decision.

3. The Government's Interest

The *Eldridge* balancing test next weighs the government function involved and the burden of requiring an additional procedure. The government's interest in foregoing confrontation also has changed since *Williams*. The *Williams* Court referred to the government's interest in relying on sources who might not otherwise provide information if they knew they would inevitably sacrifice their time and their anonymity repeating their story in court.[449] In *Gardner v. Florida*, however, the Court decided that any legitimate government interest in relying on secret information must succumb to the defendant's right to challenge, rebut, or explain.[450] Since *Gardner*, judges who sentence defendants to death must reveal the information they rely on, and when juries serve as sentencers, the information all comes out in open court. The government could theoretically preserve the anonymity of out-of-court informants by presenting their information secondhand through the testimony of police officers or probation investigators. The defense could cross-examine these witnesses when they appear in court, however, and demand to know their sources. In this manner, the defense could learn the names of the out-of-court sources, even without a right to cross-examine them personally. Thus, the *Williams*-era government interest in encouraging anonymous sources to provide sentencing information does not survive the changes in capital sentencing procedures that have already occurred.[451]

448. This would include documentary evidence that fits the exceptions to the rule against hearsay. State rules of evidence will generally produce the same result as complying with the confrontation clause, except when they allow some hearsay that the Federal Rules of Evidence would exclude. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 800-35 (1988) and discussion *supra* notes 122, 129.

449. Williams v. New York, 337 U.S. 241, 250 (1949).

450. Gardner v. Florida, 430 U.S. 349, 360 (1977).

451. Once it is clear that the government must disclose the declarants' identities and the information they furnished, Judge Friendly suggests that courts should then balance the value of cross-examination against any further harm it might cause:

> [T]he question whether cross-examination should be denied must generally be

In the only capital sentencing case to weigh the *Eldridge* factors, the Court said the state shares the defendant's "compelling" interest in avoiding erroneous decisions.[452] The gravity of the life-and-death decision implicates another government interest first articulated in the years after *Williams*. The state, which must preserve the execution's legitimacy in the eyes of the community, has a "vital" interest in the appearance of fairness.[453] The government would certainly foster this appearance of fairness by granting the defendant one of the fundamental procedural protections contained in the Bill of Rights.[454] In other contexts, the Court has noted that providing a right of confrontation promotes the perception that proceedings are fair.[455]

Affording a right of confrontation would impose far less fiscal and administrative costs on the government than the *Williams* Court contemplated. Because the *Williams* Court did not regard capital sentencing as a special class, a ruling requiring confrontation would have applied to all sentencing proceedings. The formidable administrative burden looming before the *Williams* Court—drawn-out evidentiary hearings and clogged court calendars—should pose no barrier to a right of confrontation in capital sentencings, which comprise a small proportion of all sentencing.[456]

> viewed from an incremental standpoint—assuming that the name of the witness and the content of his testimony will have been disclosed, how much further harm, if any, will be caused by allowing cross-examination when contrasted with its value.

Friendly, *supra* note 345, at 1286. In citing Judge Friendly's article, the Supreme Court has referred to the author as a "knowledgeable and thoughtful observer." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985).

While requiring cross-examination may undermine authority or increase tension in prisons and semicustodial institutions like public schools, it is not apparent what sort of harm confrontation might pose in court proceedings, where cross-examination is normal and expected. The value of cross-examination in capital sentencing, however, is clear. Judge Friendly's analysis thus supports a right of cross-examination in capital sentencing hearings.

452. *See* Ake v. Oklahoma, 470 U.S. 68, 83-84 (1985).

453. In *Gardner*, the Court observed, "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358; *see also* Booth v. Maryland, 482 U.S. 496, 508 (1987).

454. *See* Pointer v. Texas, 380 U.S. 400 (1965) (confrontation is fundamental right).

455. *See* Coy v. Iowa, 487 U.S. 1012, 1019 (1988) ("[t]he perception that confrontation is essential to fairness has persisted over the centuries"). In *Coy*, the Court also said that "the right . . . 'contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.' " *Id.* at 1018-19 (quoting Lee v. Illinois, 476 U.S. 530, 540 (1986)).

456. The ABA Project on Standards for Criminal Justice applied the *Eldridge* bal-

Forcing the government to produce all capital sentencing witnesses for in-court testimony presents another burden to consider in the due process equation. Witnesses who can provide information on the defendant's entire life history may be scattered across the country. The Supreme Court considered this problem when it decided that probationers and parolees may confront adverse witnesses in revocation hearings.[457] In those cases, in which the government threatened to deprive individuals only of conditional liberty, the Court suggested that traditional substitutes for live testimony sometimes might suffice. But the Court clearly preferred live testimony, which it regarded as sometimes indispensable.[458]

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ancing test to analyze noncapital sentencing procedures. The Project advocated a limited right to an evidentiary hearing in which defendants could contest disputed facts in presentence reports. In the commentary, the authors report two reasons for stopping short of recommending a full-fledged trial-type hearing with the right to confront the sources of all sentencing information. Neither of these reasons applies to capital sentencing.

First, in analyzing the final factor in the due process analysis, the Project authors concluded that the fiscal and administrative burden of a full hearing with a right of confrontation would be too great. If defendants gridlocked court calendars by dragging out sentencing proceedings, legislatures would respond by adopting determinate sentences based strictly on the crime committed. The Project authors opposed strict determinate sentencing. *See* 3 STANDARDS FOR CRIMINAL JUATICE § 18-6.4 commentary at 451 (1979). Because capital sentencing comprises only a small portion of all sentencing, a full right of confrontation would affect court calendars only insignificantly. Moreover, legislatures cannot require determinate sentences in capital cases. Sumner v. Shuman, 483 U.S. 66 (1987) (statute fixing mandatory sentence of death violates eighth amendment).

Second, the Project authors explained that rules of procedure must balance the dangers and benefits of underinclusion and overinclusion. In criminal trials, the policy requiring proof beyond a reasonable doubt represents a decision to underinclude—to let some guilty people go free. In sentencing, the Project reasoned, the considerations favoring underinclusion fade: it may not matter if loose procedures erroneously overinclude and thus regard some convicts as more dangerous than they really are. That choice may be preferable to establishing strict procedures that may underinclude and thus permit some truly dangerous criminals to escape the label their record would merit. *See* 3 STANDARDS FOR CRIMINAL JUSTICE § 18-6.4 commentary at 451 (1979). When evaluating capital sentencing procedures, however, the risk that the penalty of death may be imposed in error remains the paramount consideration. The procedures for sending defendants to death row should therefore err on the side of underinclusion.

457. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 n.5 (1973); Morrissey v. Brewer, 408 U.S. 471, 487 (1972).

458. In *Gagnon*, the Court explained that affidavits and depositions may sometimes substitute for live testimony in revocation hearings:

> An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence.

Because the state could dispense with confrontation in that setting only on a showing of necessity,[459] the cases suggest that fiscal and administrative burdens do not justify the Illinois statute's blanket denial of confrontation.

When considering whether a state must offer additional procedural protections, the Court sometimes looks to the practice of other states.[460] A survey of other states reveals that more than half the states that entrust the capital sentencing decision to the jury require the prosecution to follow the rules of evidence,[461] and the states that endorse capital punishment most enthusiastically are the most procedurally strict. Seventy percent of the post-*Furman* executions have been carried out in states that exclude hearsay from the prosecution's case for death, while the states that clearly deny defendants a right of confrontation are responsible for less than six percent of the executions.[462] Even when including the states that leave the final sentencing decision to the trial judge, more than sixty-three percent of all death sentences outside Illinois have been handed down in states that require prosecutors to present their aggravating evidence according to the rules that govern criminal trials. The states that clearly permit hearsay in the prosecution's case account for less than nine percent of all sentences of death.[463] The statistics from our nation's most heavily populated

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Gagnon, 411 U.S. at 782 n.5 (dealing with probation revocation and explaining Morrissey v. Brewer, 408 U.S. 471 (1972), which dealt with parole).

459. *Morrissey* guaranteed parolees the right to confront the sources of adverse information unless the hearing officer determined that an informant's safety required anonymity. *Morrisey*, 408 U.S. at 487.

460. *See* Ake v. Oklahoma, 470 U.S. 68, 78-79 & n.4 (1985).

461. Of the 30 states that permit the jury to make the final sentencing decision, 18 require prosecutors to present their case for death according to the rules of evidence. A few additional states permit the prosecutor to use hearsay in rebutting the defendant's mitigating evidence. For a detailed survey of the practice of other states, see *supra* note 22.

462. As of May 30, 1990, states had executed 128 prisoners since capital punishment was restored in 1976. Texas, Louisiana, Georgia, Virginia, North Carolina, Mississippi, South Carolina, and Missouri, all states that apply the rules of evidence in the sentencing proceeding, executed 90 prisoners, while Utah and Nevada, which permit hearsay, executed seven. Another 31 executions were carried out in Florida, Alabama, and Indiana, where the status of the right of confrontation is unclear. NAACP LEGAL DEFENSE & EDUC. FUND, INC., DEATH ROW, U.S.A. 5 (May 20, 1990) (listing executions by state).

463. As of May 30, 1990, 2213 prisoners waited in death rows in states other than Illinois, and another 128 had already been executed since the moratorium on executions ended in the 1970s. *Id.* at 5-33. Of these 2341 capital sentences, 1485 (63.43%) were handed down in states that require the prosecution to follow the rules of evidence when presenting its case in aggravation. The evidentially permissive states accounted for 210 capital sentences, or 8.97%. The remaining states, where the status of confrontation is not clear, were responsible for 659 sentences, or 28.15%. *See supra* note 22. These

death rows thus demonstrate that following the rules of evidence would not unduly interfere with Illinois prosecutors' ability to seek the ultimate punishment.

4. The Final Balance

Although the Court has included the right to confront adverse witnesses in lists of the "minimum" and "rudimentary" elements of due process,[464] confrontation is not always required whenever the due process clause applies. The Court has occasionally declined to require confrontation when the private interest at stake is small,[465] especially when the security concerns of prisons merit deference.[466] Sobered by the prospect of imposing potentially large administrative burdens,[467] the Court also prefers to defer to educational,[468] correctional,[469] medical,[470] and other professional specialists[471] who are accustomed to operating with minimal judicial interference. Some cases that decline to require confrontation decide only the requirements of a preliminary predeprivation hearing. The Court has approved minimal procedures in these cases with the understanding that a more extensive adversary hearing, often with a right of confrontation, will follow.[472] Finally, the Court has occasionally approved some forms of written and documentary evi-

figures are not precise, as they do not include prisoners who died or committed suicide while on death row, and some prisoners are under sentences of death in more than one state.

464. *See* Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972) ("minimum requirements"); Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) ("rudimentary").

465. *See* Hewitt v. Helms, 459 U.S. 460, 473 (1983) (prisoner's interest in remaining in general population not "of great consequence"). Young people, too, are sometimes light weights in the Court's balancing scales. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 604 (1979) (commitment to mental hospital); Goss v. Lopez, 419 U.S. 565, 583 (1975) (school suspension); *see also* Schall v. Martin, 467 U.S. 253, 265 (1984) ("juveniles, unlike adults, are always in some form of custody").

466. *See, e.g.*, *Hewitt*, 459 U.S. at 476; Wolff v. McDonnell, 418 U.S. 539, 567-68 (1974).

467. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 347-48 (1976); *Goss*, 419 U.S. at 583 (school suspensions).

468. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 682 (1977) (corporal punishment).

469. *See, e.g.*, *Hewitt*, 459 U.S. at 477 (segregation); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 15-16 (1979) (parole release); Wolff v. McDonnell, 418 U.S. 539, 568-69 (1974) (good time credits).

470. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 608-09 (1979).

471. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 322-23 (1982) (institution for developmentally disabled).

472. *See, e.g*, Brock v. Roadway Express, Inc., 481 U.S. 252, 266 (1987). In Ingrahan v. Wright, 430 U.S. 651 (1977), the Court held that state tort remedies provide sufficient process for students to redress allegedly unreasonable paddlings in public school. The rules of evidence would prevail at such a proceeding, with opposing witnesses subject to cross-examination. *See supra* note 448.

dence as a substitute for live testimony.[473]

None of these cases applies to the second phase of the Illinois capital sentencing trial. In contrast to the prison cases, the private interest at stake is far heavier, and providing a right of confrontation poses no greater threat of disruption to the courts than any

cross-examine the out-of-court sources of adverse information would increase appreciably the fairness of the proceeding and enhance the reliability of the evidence on which the jury must rely. Finally, the burden on the government would be minimal. Even if the *Specht* decision does not conclusively govern the second stage of an Illinois penalty trial, the *Eldridge* formula forcefully suggests that due process requires a right of confrontation.

VI. The Right of Confrontation Is Essential to the Supreme Court's View of a Fair Trial on the Issue of Life or Death

The Supreme Court has long regarded the right of confrontation in criminal trials as a fundamental right.[476] In demanding that capital sentencing hearings meet heightened standards of procedural fairness, the Court has admonished that states must observe "fundamental constitutional guarantees."[477] By comparing the capital sentencing hearing to a criminal trial and holding that some sections of the Bill of Rights govern the proceedings, the Court has forced states to provide procedural protections ordinarily associated only with adversary criminal trials.[478] The Court has not pursued the trial analogy fully, however,[479] and its rejection of a sixth amendment right to jury sentencing demonstrates that not every provision of the Bill of Rights applies to capital sentencing.[480] Nevertheless, although the Court has never held that the right of

476. Pointer v. Texas, 380 U.S. 400, 403 (1965).

477. Estelle v. Smith, 451 U.S. 454, 463 (1981).

478. *See* Thompson v. Oklahoma, 487 U.S. 815, 856-57 (1987) (O'Connor, J., concurring). Although the fifth amendment privilege against self-incrimination ordinarily applies only to statements that could lead to criminal prosecution, the Court now applies it when the state seeks to use the defendant's involuntary statements as grounds for a sentence of death. Consequently, before interviewing a defendant who is in custody, a state-hired psychiatrist must recite *Miranda* warnings. Psychiatric testimony that is based on statements made without a valid *Miranda* waiver are not admissible as part of the prosecution's case in support of a sentence of death. *Estelle*, 451 U.S. at 466-69. Even when a state psychiatrist complies with *Miranda*, he nevertheless violates a represented defendant's sixth amendment right to counsel by interviewing a defendant without first notifying his lawyer. *Id.* at 469-71; *see also* Strickland v. Washington, 466 U.S. 668, 686 (1984) (effective assistance of counsel); Bullington v. Missouri, 451 U.S. 430, 438 (1981) (double jeopardy).

479. *See, e.g.*, Clemons v. Mississippi, 110 S. Ct. 1441, 1449 (1990) (when one of several aggravating factors found by jury is invalid, eighth amendment does not require new jury sentencing; appellate court may reweigh remaining valid aggravating factors against mitigating evidence); Cabana v. Bullock, 474 U.S. 376, 392 (1986) (eighth amendment does not forbid appellate court to make some factual findings that are necessary prerequisites to a valid sentence of death); *see also* Dolinko, *Foreword: How to Criticize the Death Penalty*, 77 J. Crim. L. & Criminology 546, 560-64 (1986).

480. *See* Spaziano v. Florida, 468 U.S. 447, 464 (1984).

confrontation applies in capital sentencing hearings, the opinions of the justices demonstrate that it is an essential component of their view of a fair hearing on the punishment to be imposed at a capital trial.

Strickland v. Washington[481] reveals that the Court's view of a fair trial is tied to those provisions of the sixth amendment guaranteeing that significant issues of criminal liability, either in a criminal trial or a capital sentencing hearing, will be decided in accordance with the rules of adversary procedure. The basic elements of a fair trial, *Strickland* explained, are laid out in the sixth amendment, which the Court quoted in full. In a summary that conspicuously omitted the provision for trial by jury, the Court concluded that "[t]hus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding."[482]

As *Strickland* suggests, adversary hearings can proceed without a jury as long as there is still a neutral decision maker.[483] The key to the Court's view of a fair trial, that evidence be presented and subject to adversarial testing, depends on retaining the remaining provisions of the sixth amendment.[484] These include the right to counsel, the right to compel favorable testimony, and the right to confront adverse witnesses, which the Court has called "the full panoply of adversary safeguards."[485] *Strickland* describes the attorney's role in capital sentencing as ensuring the functioning of

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481. 466 U.S. 668 (1984).

482. *Id.* at 684-85.

483. *See* Herring v. New York, 422 U.S. 853 (1975) (bench trial is an adversary proceeding).

484. In Faretta v. California, 422 U.S. 806, 818 (1975), the Court held that the right to counsel also guarantees the right to self-representation. The Court regarded the remaining provisions of the sixth amendment, except for the right to jury trial, as essential components of the adversary system:

> Because these rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States. The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

Id. (footnote omitted).

485. Gerstein v. Pugh, 420 U.S. 103, 119 (1975) ("the full panoply of adversary safeguards [includes] counsel, confrontation, cross-examination, and compulsory process for witnesses").

the "the adversarial testing process."[486] To subject an opponent's evidence to adversary testing, an effective lawyer must have the right to insist that his opponent produce his witnesses in court for cross-examination.[487] *Strickland*'s rationale therefore suggests that in post-*Furman* capital sentencing proceedings, a right of confrontation is an unseverable part of the adversary battle over whether the defendant shall live or die.[488]

The right of confrontation appears so closely tied to the Court's view of fair penalty trials that some opinions assume that defendants already have a right to confront the witnesses against them. For example, in *Bullington v. Missouri*,[489] the Court noted that de-

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486. *Strickland*, 466 U.S. at 686-87.

487. Professor Lilly regards the rule against hearsay as an essential part of an adversary proceeding:

> [A]ttempts to abandon or nullify the rule against hearsay evidence are unlikely to be successful so long as the basic tenets of the adversary proceeding are retained. Because the adversarial posture demands the opportunity for cross-examination, the hearsay rule—which protects that right by rejecting "untested" evidence not within an exception-is not easily forsaken.

G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 7.28, at 306 (2d ed. 1987).

488. The defendant in *Strickland* was sentenced to death in Florida, where the jury does not make the final sentencing decision. Moreover, because the defendant waived his right to an advisory jury, the judge was the sole sentencing authority. *Strickland*, 466 U.S. at 672. *Strickland* thus provides support for the view that the adversary nature of capital sentencing itself—even without a jury—requires the customary rules of adversary procedure, like the rights of confrontation and cross-examination, even though they are not required in less formal noncapital sentencings. *See also* Arizona v. Rumsey, 467 U.S. 203, 210 (1984) (applying *Bullington*'s holding on double jeopardy and finding "[t]hat the sentencer in Arizona is the trial judge rather than the jury does not render the sentencing proceeding any less like a trial").

Relying on *Strickland* as independent authority for a right of confrontation creates some tension with earlier Supreme Court opinions that did not object to Florida trial judges relying on presentence reports, *see* Proffitt v. Florida, 428 U.S. 242 (1976), discussed *supra* notes 51-55 and accompanying text, as long as the defendant had the opportunity to challenge the accuracy of the information they contain, *see* Gardner v. Florida, 430 U.S. 349 (1977), discussed *supra* notes 60-68 and accompanying text. *See also* Barclay v. Florida, 463 U.S. 939, 944-46 (1983).

The hallmark of the adversary system is that the parties investigate, control, and present the information on which the decision maker relies. Because presentence reports are prepared by an agent of the court, any reliance on presentence reports dilutes the adversary nature of the capital sentencing hearing. *See supra* notes 162-63 & 327-28 and accompanying text. In *Strickland*, however, there was no presentence report. Indeed, the defendant's attorney deliberately declined to ask for a presentence investigation, in order to maintain control of the information on which the decision maker could rely. *Strickland*, 466 U.S. at 673. Even if Florida judges independently order a presentence investigation in other cases, *Strickland* and *Proffitt* can be substantially reconciled if defendants may confront adverse witnesses at any evidentiary hearing the judge convenes to resolve disputes about facts in the presentence report. For a discussion of the unsettled procedural issues such hearings present, see Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 GEO. L.J. 1515 (1979).

489. 451 U.S. 430 (1981).

fendants already enjoyed the right of confrontation in capital sentencing hearings that resemble Missouri's, because *Specht v. Patterson*[490] requires that defendants be afforded the right of confrontation in sentencing proceedings where a new finding of fact, not an element of the offense proven at trial, serves as the basis for an new or increased sentence.[491] And in *Booth v. Maryland*, when discussing the problems defendants would face in attempting to challenge or rebut a probation investigator's report on the crime's impact on the surviving family, the Court said that defendants "presumably" could cross-examine the declarants.[492]

More specifically, the Court relied on the adversarial testing process and the defendant's right of confrontation in *Barefoot v. Estelle*, when it held that Texas prosecutors may use expert psychiatric testimony to predict whether defendants would be dangerous in the future.[493] The defendant argued that such predictions were extremely unreliable.[494] Writing in general language instead of grounding the holding in the specific practice in Texas, which follows the rules of evidence, the Court appeared to assume that all defendants would be able to cross-examine psychiatric experts, expose arguably unreliable opinions, and argue the issue of weight to the jury.[495] Although the opinion does not hold that states must afford capital defendants a right of confrontation and cross-examination, it suggests that the Court would disapprove the Illinois practice of allowing the state to introduce the uncross-examined opinions of out-of-court psychiatrists.[496]

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490. 386 U.S. 605 (1967).

491. *Bullington*, 451 U.S. at 446. The rule of *Specht*, as the *Bullington* court described it, does not clearly grant defendants a right to confront adverse witnesses in the second stage of an Illinois capital sentencing trial. *See supra* text accompanying notes 288-99.

492. Booth v. Maryland, 482 U.S. 496, 506 (1987). The Court did not explain why it could only "presume" that the right of cross-examination operated at the penalty hearing. Nor did the Court explain what form this cross-examination would take. According to the opinion, the Maryland statute provided that the victim impact statement could be read to the jury, or the family members might be called for live testimony. *Id.* at 499. If the statement is simply read to the jury, then the defense can cross-examine the declarants only by calling them as defense witnesses. It is not clear, however, that the *Booth* Court actually considered how the defense would be able to cross-examine the prosecution's absent witnesses. For criticism of the view that defendant's right to compulsory process can substitute for the right to cross-examine the prosecution's out-of-court declarants, see *supra* note 120.

493. Barefoot v. Estelle, 463 U.S. 880, 902-03 (1983).

494. *Id.* at 898.

495. *Id.*

496. *See supra* notes 254-63 and accompanying text (discussing Illinois cases allowing hearsay evidence of psychiatric opinions). The *Barefoot* holding itself does not necessarily render the Illinois practice invalid. Because the rules of evidence govern Texas pen-

Although the Court has often emphasized the value of cross-examination in furthering the goal of accurate fact-finding,[497] truth seeking is not the only goal that animates rules of criminal procedure. They must also be fair. The Court has reiterated that fairness to the accused remains a prime concern in its review of capital sentencing proceedings.[498] The Court's sixth amendment cases also emphasize that the right to confront and cross-examine witnesses is basic to our sense that criminal trials are conducted fairly,[499] and the reasoning of these decisions applies with equal force to the penalty phase of capital trials. Indeed, decisions like *Strickland*, *Booth*, and *Barefoot* strongly suggest that the Court includes the right of confrontation in its vision of a fair hearing on the penalty to be imposed after a capital trial. When states permit juries to sentence defendants to death on the basis of accusations that they cannot cross-examine, the proceedings are unfair.

VII. CONCLUSION

The cases of the United States Supreme Court provide no support for denying defendants the right to confront the witnesses who testify against them in capital sentencing hearings. In drafting the provision that suspends the rules of evidence in capital sentencing hearings, the Illinois legislature apparently was influenced by the Model Penal Code.[500] Although some portions of the Code's capital sentencing provisions drew an approving nod from the Supreme Court in the mid-1970s, it never commented on the Code's proposal to permit hearsay at the sentencing hearing.[501]

Instead of evaluating testimony according to the rules of evidence, the Illinois Supreme Court has substituted the standard of relevance and reliability. Although a scrupulous application of that standard might produce nearly the same results as a right of

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alty trials, *see* Rumbaugh v. State, 589 S.W.2d 414, 417 (Tex. Crim. App. 1979), the psychiatrist in *Barefoot* testified in court and the defendant had the opportunity to cross-examine and rebut. Although the Court said the rules of evidence are a constitutionally sufficient safeguard, it did not decide whether they are inevitably necessary. By writing in broad language about the right of cross-examination, however, instead of tying its holding to procedures available specifically in Texas, the Court appears to regard confrontation and cross-examination as procedural protections accorded to every capital defendant.

497. *See, e.g.*, United States v. Inadi, 475 U.S. 387, 396 (1986).

498. *See, e.g.*, Clemons v. Mississippi, 110 S. Ct. 1441, 1448 (1990) ("twin objectives" of "measured consistent application and fairness to the accused").

499. *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1019 (1988); Lee v. Illinois, 476 U.S. 530, 540 (1986).

500. See Note, *supra* note 23, at 885 n.136.

501. See *supra* notes 39-57 and accompanying text.

confrontation, the Illinois court has generally adopted an extremely deferential approach when trial judges decide to admit ordinarily inadmissible hearsay. It has offered confusing and contradictory explanations that fail to demonstrate that the prosecution's evidence is truly reliable. With its sometimes terse and cursory treatment of defendants' evidentiary objections, the court has appeared unconcerned about the risk of admitting untrustworthy evidence.[502] The court's holding that the prosecution may introduce evidence of prior unadjudicated crimes, even through double hearsay, compounds the problem.

The Illinois Supreme Court first approved submitting uncross-examined hearsay to a sentencing jury by relying on a mistaken view of some collected state court authorities and incorrectly extending *Williams v. New York*.[503] Although *Williams* permitted a judge to rely on hearsay information, it did not extend similar evidentiary freedom to sentencing juries. Moreover, the precedential value of *Williams* has declined as states have responded to later Supreme Court rulings by transforming capital sentencing hearings into adversary trials on the issue of life or death.[504]

The Court's due process cases strongly support a right of confrontation at capital sentencing,[505] and the Court has suggested that a fair penalty trial will feature most of the adversary procedural protections of the sixth amendment. Moreover, by occasionally assuming that the right of confrontation already prevails in capital sentencing hearings, the Court suggests that it regards confrontation as an essential component of the rigorously fair procedures that must govern the life or death decision.[506]

The cases of the Supreme Court thus present a powerful indict-

502. A recent case is an exception. In People v. Harris, 129 Ill. 2d 123, 162-65, 544 N.E.2d 357, 374-75 (1989), *cert. denied*, 110 S. Ct. 1323 (1990), the court reversed a sentence of death because the trial judge relied on evidence that the Illinois Supreme Court considered irrelevant and unreliable which implicated Harris in a 1969 homicide. *See supra* notes 150-53 & 159 and accompanying text. To show that the trial judge should not have believed the witnesses who implicated the defendant, the court thoroughly analyzed the testimony from the sentencing hearing. Although the prosecution did not rely on hearsay and the court had no occasion to discuss the defendant's right of confrontation, the *Harris* decision contrasts sharply with many of the court's other rulings that consider what evidence is proper at the capital sentencing hearing: it subjected the prosecution's evidence of old unadjudicated misconduct to the detailed scrutiny it rightly deserves.

503. See the discussion of *People v. Jones*, 94 Ill. 2d 275, 286, 447 N.E.2d 161, 166 (1982), *cert. denied*, 464 U.S. 920 (1983), *supra* notes 97-114 and accompanying text.

504. *See supra* notes 295-344 and accompanying text.

505. *See supra* notes 345-475 and accompanying text.

506. *See supra* notes 476-99 and accompanying text.

ment. States like Illinois violate the federal Constitution when they permit juries to sentence defendants to death on the basis of accusations that they cannot cross-examine.