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Federal Criminal Sentencing: The Case for Evidentiary Standards

Frank D. Giorno*

INTRODUCTION

The Federal Rules of Evidence embody many constitutional safeguards applicable to the criminal justice system. They carry forth most clearly the intentions and philosophies inherent in the American legal system of fully recognizing the innocence of an accused person until proven guilty. Nowhere is this concept more apparent than in the system's use of a bifurcated trial, which shields the accused person from highly prejudicial and irrelevant information until liability attaches. Yet in the second stage, the sentencing stage, the various evidentiary protections available during trial on the merits are usually lost to the offender. In fact, the Federal Rules of Evidence are specifically nonapplicable once the sentencing phase begins.1 Almost no restrictions exist regarding the admission of information concerning the background, character and conduct of the convicted offender.2 Except for the sentencing procedures prescribed in capital cases,3 where imposition of the...
death penalty receives strict scrutiny and requires definitive due process application, very few evidentiary proscriptions exist to protect the offender in a non-capital case against the admissibility of adverse information.

Presently, no structured system governs the admissibility of material in the sentencing phase of a non-capital case. Instead, great reliance is placed upon the presentence report, a report required under the Federal Rules of Criminal Procedure. The information contained in the presentence report is used by the sentencing judge to evaluate the convicted offender and to determine his punishment. In addition, the requirement of a presentence report affords the defendant an opportunity to present information in mitigation of his crime. The convicted offender, however, is not entitled to disclosure of the presentence report as a matter of right, even though the information in the report may be of questionable reliability and may be totally unrelated to the crime charged. Disclosure is required only if the sentencing judge relied

4. FED. R. CRIM. P. 32(c)(1).
7. See infra note 182. Gregg v. United States, 394 U.S. 499, 492 (1969) (presentence reports are documents which rule 32 does not make available as a matter of right. There are no formal limitations on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged). But cf. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Rule 32(c)(3), Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Oct. 1981) (this proposal would require disclosure with some exceptions).
   See also Maxey v. Benton, 483 F. Supp. 1 (E.D. Okla. 1977) (presentence reports may contain information bearing no relation to the crime charged).

Amendments to Fed. R. Crim. P. Rule 32(c)(3)(A) and (B) effective Dec. 1, 1975, were designed to allow liberalization of disclosure by allowing the defendant to read the presentence report, except for those parts encompassing sentence recommendation. However, limitations on disclosure contained within the amended version still leave wide discretion to the sentencing judge. See Fed. R. Crim. P. 32 advisory committee note.

Divergent views among the various circuits as to the requirements of disclosure have caused inconsistency and nonuniformity of procedures. See, e.g., Knight v. United States, 611 F.2d 918 (1st Cir. 1979) (criminal defendant not entitled to access to report if counsel has such access); United States v. Winn, 577 F.2d 86 (9th Cir. 1978) (disclosure of presentence report required only on request of defendant or his counsel, and the court has discretion to withhold such information which might result in harm to the defendant or other persons); Iacovetti v. United States, 534 F.2d 1189 (5th Cir. 1976) (disclosure of presentence report rests within discretion of the trial court); United States v. Horsley, 519 F.2d 1284 (6th Cir. 1975), cert. denied, 424 U.S. 944 (1976) (decision of whether to disclose all or part of the presentence report lies within discretion of trial judge); Brawer v. United States, 462 F. Supp. 739 (S.D.N.Y. 1978) (decision to withhold presentence report from defendant held not to be an abuse of discretion); United States v. Krause, 78 F.R.D. 203 (D.C.
upon inaccuracies in passing sentence. Yet disclosure of the presentence report before sentencing is vital because an offender must know the nature of adverse information to be used against him before he can refute it.

Thus, even though sentencing has been deemed a “critical stage”
of a criminal proceeding,\(^\text{10}\) entitling the defendant to representation by counsel, the material that may be entered against an offender is not governed or controlled by any formal rules. Rather, the offender must rely upon the protections afforded by due process, which have been interpreted as not guaranteeing the right of confrontation or cross-examination in the sentencing phase.\(^\text{11}\) The absence of these rights during sentencing affords the judge broad discretion in considering the sources and types of adverse information used to assess proper punishment.\(^\text{12}\) Moreover, support for an exclusionary rule that could be applied to the sentencing stage is lacking thus far, even with regard to blatant violations of primary constitutional rights that would readily require exclusion of evidence during a trial on the merits. The articulated rationale for such a result is that any deterrent effect such exclusionary rule may have on enforcement officials would be insignificant.\(^\text{13}\)

\(^{10}\) Mempa v. Rhay, 389 U.S. 128, 134 (1967). In particular, Townsend v. Burke, 334 U.S. 736 (1948), illustrates the critical nature of sentencing in a criminal case which might well support by itself a holding that the right to counsel applies at sentencing.

Many lower courts have concluded that the sixth amendment right to counsel extends to sentencing in federal cases. Nunley v. United States, 283 F.2d 651 (10th Cir. 1960); McKinney v. United States, 208 F.2d 844 (D.C. Cir. 1953); Martin v. United States, 182 F.2d 225 (5th Cir. 1950). See also Kadish, The Advocate and the Expert—Counsel in the Penocorrectional Process, 45 MINN. L. REV. 803, 806 (1961).

\(^{11}\) The due process approach that can be taken in attacking a sentence imposed based upon allegedly improper, incomplete or inaccurate information is also not without defect. Material that scarcely could be held as proper evidence during the guilt determination stage, may be admitted upon sentencing even if it consists of prior convictions that were reversed on grounds that illegally obtained evidence was utilized in gaining the prior conviction in violation of the defendant's fourth amendment rights. United States v. Lee, 540 F.2d 1205, cert. denied, 429 U.S. 894 (1976).

\(^{12}\) Williams v. New York, 337 U.S. 241 (1949). But cf. STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 4.4 (Tent. Draft 1967) (recommending that the substance of all derogatory information be disclosed to the defendant). See also Specht v. Patterson, 386 U.S. 605 (1967) (while adhering to the Williams pronouncement, the Specht court held that denial of confrontation and cross-examination could not be extended to a proceeding under a state sex offender act, which provided for a new charge leading to increased punishment. Thus, the act closely resembled a recidivist statute, where opportunity to be heard must be given on the habitual criminal issue).

\(^{13}\) See United States v. Lee, 540 F.2d 1205 (1976):

We think that if the exclusionary rule were extended to sentencing in the ordinary case, its additional deterrent effect would be so minimal as to be insignificant. Generally law enforcement officers conduct searches and seize evidence for purposes of prosecution and conviction—not for the purpose of increasing a sentence in a prosecution already pending or one not yet begun.

\emph{Id.} at 1211.

Under this rationale, the net effect of allowing adverse defective information against the convicted offender at sentencing would give the prosecutor a distinct and subtle advantage at the expense of the offender's constitutional rights.
An examination of various guidelines emerging from the few statutory provisions and the limited case law produced to date reveals one very obvious fact: that, except in the capital case, there exists a very large gap between those evidentiary safeguards applicable to the guilt determination stage and the sentencing stage of a criminal proceeding. The existence of this disparity is perhaps justified, but the extremes to which it runs should be questioned.

This article analyzes the federal criminal justice system's sentencing procedures regarding the nonapplicability of formal rules of evidence and the absence of an exclusionary rule that would effectively safeguard the rights of a convicted offender. The exemption of such safeguards, resulting in the admission of adverse information, can lead to abuses and may fail to offer necessary due process protections. This article also examines past and current sentencing legislation and concludes with a suggested format for evidentiary restrictions in the sentencing stage of a trial.

**Current Trends: Constitutional Applications**

Current practices call for the sentencing judge to look to the offense committed and, more importantly, to the nature of the person who perpetrated the crime in order to assess a proper sentence. It is believed that society's, as well as the offender's, best interests will be served by this process. The nature and character of the offender, therefore, becomes preeminent in the sentencing decision. But in the sentencing phase of a non-capital case, the offender is not entitled to the full panoply of rights generally accorded in the guilt determination stage. There exists no right to a jury assessment of proper sentence, nor do reasonable standards regarding proof of facts apply. In addition, the offender possesses no right to confront and cross-examine all witnesses who may proffer information relative to his potential sentence.¹⁴

The Supreme Court has determined that delving into areas during sentencing beyond what would be permissible inquiry during trial on the merits does not offend the Constitution.¹⁵ Even at the sentencing stage, however, there are limits as to what constitutes admissible information. The due process requirement of fundamental fairness to the offender during sentencing mandates that

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the sentencing judge have a full opportunity to assess the offender's character and potential. In addition, due process applies to the quality of evidence presented to and considered by the judge at sentencing. An ex parte conveyance of prejudicial information, for example, by the prosecution to a sentencing judge in the absence of the convicted defendant or his counsel has been held violative of due process guarantees. Moreover, adverse information about the offender's prior criminal activity must be accurate, and sufficient procedural safeguards must be observed so that the offender may test the truth of such information.

The Supreme Court has also held that special classes of offenders, such as habitual offenders and the mentally ill, must be allowed an evidentiary hearing with the right to confront and cross-examine adverse witnesses before a sentence can be imposed. To do otherwise would violate due process by sentencing the offender to a crime for which he was not convicted. The movement toward due process safeguards has continued with the Fifth Circuit's finding that minimum safeguards do exist to prohibit reliance upon erroneous information for sentencing purposes. Thus, the clear prohibition against the application of formal evidentiary rules during sentencing has been buffered somewhat by the decisional law, which attempts to provide at least some degree of fairness, based on due process grounds, to the convicted offender. These cases, however, have created a convoluted backdrop, and yet they stand as the only guide to controlling a most important phase of the criminal justice system.

Analysis reveals a need for more substantial approaches to evidentiary concerns during sentencing than those currently available through case law. The federal circuits have had to fend for themselves in fashioning proper rules for the admissibility of evidence in the sentencing phase. This attempt at "judicial legislation" has resulted in a lack of uniformity, and misdirects the search for proper sentencing goals.

20. 481 F.2d 553, 558 (5th Cir. 1973).
The Two-Stage Framework of the Criminal Trial: Comparison of Admissibility Safeguards

First Stage Safeguards

The structure of the American criminal trial is bifurcated, encompassing an initial guilt or innocence determination phase, and a final punishment or sentencing phase. The first stage is formulated to provide the accused a full, fair, and extensive trial devoted to the issue of criminal liability. The second phase of the proceeding is devoted to determine an appropriate sentence for the convicted offender. Underlying this system is the concept that every defendant is presumed innocent until proven guilty.

Various statutory and common law principles govern the substantive and procedural aspects of the proceedings. The principles include such important constitutional guarantees as the right against self-incrimination, the right to counsel, the right to confrontation and cross-examination of witnesses, the right to compulsory process of witnesses, the right to trial by jury, and the right to due process of law. The Constitution protects the individual at the time information and evidence is gathered against him, during his trial, and during confinement after conviction.

Other procedural and substantive provisions ensure proper practices within the system, including the presentation of adverse information and evidence against a defendant during the course of trial, at least during the guilt determination stage.

Other preliminary stages, such as the grand jury proceedings, the preliminary hearing and arraignment, have been built into

22. U.S. Const. amend. V.
23. U.S. Const. amend. VI.
24. Id.
25. Id.
26. Id.
27. U.S. Const. amend. V, XIV.
28. U.S. Const. amend. IV, V.
29. U.S. Const. amend. VIII.
30. See Fed. R. Evid.
the criminal justice system to ensure that only those who deserve prosecution will be subjected to the risk of standing trial. The defendant can curtail or seek to end the proceedings during the preliminary stages of prosecution by presenting motions for dismissal,\(^{35}\) or by requesting exclusionary hearings\(^{36}\) which enable him to examine the evidence-gathering methods employed by law officers. The defendant can also request mental competency hearings\(^{37}\) to determine his fitness to stand trial. All of these procedures are aimed at guaranteeing equality of treatment and fairness to the defendant.\(^{38}\)

Controlling the initial phase of the criminal trial through constitutional and statutory supports ensures that a defendant's guilt or innocence will be determined by the facts and available evidence concerning only the crime or crimes for which he stands accused. For instance, evidence of malevolent character or corrupt background cannot be used to prove that the defendant acted in conformity with such character or background during the first stage of the trial.\(^{39}\) This is in sharp contrast to allowances made during the sentencing stage. Forms of evidence deemed generally unacceptable for use against a criminal defendant in the guilt determination stage have been approved for use in the sentencing phase. These forms of evidence include hearsay, opinion testimony, background and character evidence, and prior convictions. The theory that one accused of a crime deserves substantially more protection than one convicted of a crime derives from a sense of fair play and justice. Yet is it fair to leave the convicted offender stripped of substantial constitutional protections at the sentencing phase? The paucity of evidentiary safeguards available at sentencing leaves too great an imbalance between the two stages of the criminal trial. Such inequity is even ironic inasmuch as the sentencing phase has been declared a critical stage of the proceedings.\(^{40}\)

38. G. Mueller, supra note 21, at 5.
The Sentencing Phase: Lack of Adequate Protections

In the second phase of the trial the court must satisfy certain “correctional-penallogical” requirements. Data concerning the offender’s background, and personality become predominant.41 With guilt determination stage safeguards minimally applied, nearly all evidence bearing upon the offender’s past activities may be admitted against him. The offender’s reputation, honesty, prior criminal record, and behavioral and personality characteristics are examined. The main vehicle for transmittal of such information is the presentence report,42 and prohibitions disclosing the contents of the report can allow inaccuracies to filter into the system. The judge must sift through the information contained in the presentence report, including interviews conducted by investigators with the offender’s friends or enemies, employers, fellow employees, and relatives. Although these interviews contain a great deal of hearsay information, they constitute a significant part of the data-base considered by the sentencing judge.43 As a result, this stage of the proceeding produces the most troubled aspect of the criminal justice system.

In lieu of an exclusionary rule governing the admission of evidence during the sentencing stage, case law has supplied the only real guidance through this maze. But criteria regarding sentencing techniques in the non-capital case vary widely throughout the federal circuits, and aside from the relatively narrow guidelines delineated by the Supreme Court in Williams v. New York44 and Townsend v. Burke,45 the gathering and use of sentencing information has been left virtually uncontrolled. The Second Circuit in United States v. Fatico (Fatico I),46 examined the lack of fundamental rights afforded convicted criminals during sentencing. In Fatico I, information pointing to the defendant’s involvement as a member of an organized crime syndicate was offered as part of the sentencing material. This material was presented at the sentencing hearing through the testimony of an FBI agent, who relayed information given to him by an “undisclosed informant.” The district court held that this procedure was a “violation of the Due Process

41. G. MUELLER, supra note 21, at 10.
42. FED. R. CRIM. P. 32.
43: G. MUELLER, supra note 21, at 12.
45. 334 U.S. 736 (1947).
and Confrontation Clauses of the Constitution because it would allow a critical decision affecting liberty, to be made upon information gathered from a person that the government was effectively barring the defendant from examining. After duly noting that information concerning a convicted offender's involvement with organized crime was a very significant factor in determining proper sentence, the court recognized that due process demands could not be ignored. The Fatico I court examined and rejected the traditional approach taken in Williams v. New York of subjecting the sentencing stage to only minimum due process scrutiny in order to allow the broadest range of information gathering. According to the Fatico I court, the Williams approach amounted to improper rejection of due process at the sentencing stage.

In recognizing the need for due process guarantees, the Fatico I court pointed out that the Supreme Court has in the past expressed concern regarding the reliability of sentencing information. The district court noted certain principles that have surfaced among the various circuit court decisions regarding sentencing information: (1) the sentencing judge must be allowed to consider some hearsay information, although he need not consider all such information as the Williams decision indicates; (2) misinformation, or materially false information concerning prior convictions or facts relevant in sentencing will render this process invalid; (3) a mere possibility that misinformation affected a particular sentence determination can require relief; (4) if a defendant casts some reasonable doubt upon the reliability of adverse sentencing information it is not permissible to burden him with the task of refuting it, even if he cannot show that the information

47. Id. at 1287.
48. Id. at 1289.
49. 337 U.S. 241 (1948).
50. 441 F. Supp. at 1290-91.
51. Id. at 1291-92. The Fatico court cited Townsend v. Burke, 334 U.S. 736 (1948) (sentence imposition held improper when trial judge failed to distinguish prior arrest from prior conviction).
52. 441 F. Supp. at 1293-94.
is untrue;\textsuperscript{55} (5) substantiation of information should be requested of the probation department by the sentencing judge as to challenged information;\textsuperscript{56} and (6) judicial discretion is the final safeguard lodged within the process.\textsuperscript{57}

The \textit{Fatico I} court stressed that because existing formal rules do not apply sufficient safeguards to sentencing the requirement of judicial discretion concerning sentencing information is imperative.\textsuperscript{58} The court also examined confrontation clause requirements and offered its suggestions as to why these requirements should apply to the sentencing stage.\textsuperscript{59} After this comprehensive analysis, the court excluded the sentencing information sought to be introduced by the government, because it could not be adequately tested by "meaningful cross-examination."\textsuperscript{60}

Judge Weinstein's enlightened opinion was rejected on appeal.\textsuperscript{61} The Second Circuit, speaking through Judge Oakes, held that it was erroneous to exclude such testimony during sentencing on the grounds that the evidence was hearsay and violative of "due process and confrontation clause limitations."\textsuperscript{62} In so finding, the Second Circuit stated that since the rules of evidence are not applicable to the sentencing stage, exclusion of evidence based upon hearsay grounds must of necessity derive from due process or confrontation clause restrictions. But although the due process clause is applicable to sentencing, the court reasoned, it does not require procedural safeguards after conviction. The court looked to \textit{Williams v. New York}\textsuperscript{63} for support that the judge's need for relevant information about the offender's background justified limiting due process protection at sentencing, notwithstanding the potential inaccuracies that might occur in information from out-of-court sources. The Second Circuit concluded that a court could deal with such misinformation, if it does exist, by requiring that it be veri-
The court supported its reversal of the order excluding such evidence by noting that in the instant case the challenged FBI testimony was later corroborated through the testimony of co-conspirators, the nature of the crime itself, and other testimony. Finally, the appellate court held that consideration of the out-of-court declarations by an unidentified informant were not precluded where good cause existed for non-disclosure of the informant's identity and where sufficient corroboration of the material was apparent. Still, the Second Circuit did not define the extent of protection afforded by the sixth amendment's confrontation clause nor the extent to which safeguards could be provided by a hearsay exclusionary rule and due process protections.

Upon remand to the district court (Fatico II), Judge Weinstein held that, because of the need to "protect critical rights of liberty," the defendant's membership in an organized crime syndicate could support an enhanced penalty if the government could prove by clear, unequivocal and convincing evidence the fact of such membership. At the same time, however, the opinion stated that this standard of proof is not a fixed standard for all possible disputes encountered at sentencing. After finding that additional proof of the defendant's organized crime involvement was clear and unequivocal, the Fatico II court increased his sentence from a maximum three-year term to a four-year term for hijacking. Although the Fatico II court determined that the material submit-


Additionally, a significant possibility of misinformation justifies the sentencing court in requiring the government to verify the information. See United States v. Bass, 535 F.2d 110, 121 (D.C. Cir. 1976); United States v. Needles, 472 F.2d 652, 658 (2d Cir. 1973); United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972).

But when the defendant does not dispute the truth of the statements sought to be introduced, United States v. Bass, 535 F.2d 110, 120-21 (D.C. Cir. 1976), or the statements are sufficiently corroborated by other evidence, United States v. Needles, 472 F.2d 652, 659 (2d Cir. 1973), hearsay is admissible in sentencing proceedings.

65. 579 F.2d at 713.
66. Id. at 713-14.
68. Id. at 408.
69. Id. at 409. For example, a sentencing judge can generally assume the defendant's version of a peripheral issue, but as to a more important issue, such as the accuracy of a recent serious felony conviction, "ease of proof" suggests that the court should require proof beyond a reasonable doubt if its existence will enhance the sentence.
Evidentiary Standards

At the subsequent evidentiary hearing satisfactorily supported an enhanced sentence, it indicated that courts must in general “remain dubious of any conclusions based upon hearsay” introduced at the sentencing hearing.\(^70\)

Although Fatico's sentence was affirmed on appeal,\(^71\) the Second Circuit did not fully endorse the district court opinion, especially the suggestion that in some sentencing circumstances the burden of proof should rise to the “beyond a reasonable doubt” standard.\(^72\) The appellate court reiterated its stance in support of the general admissibility of hearsay during the sentencing stage, notwithstanding Judge Weinstein's compelling analysis and opinion.\(^73\)

*Fatico*\(^74\) and the tortuous judicial path of uncertainty it followed on remand and through a second appeal illustrate an attempt to correct sentencing procedures regarding the admissibility of evidence traditionally inadmissible during the guilt determination stage. The case reveals as well a reluctance to surrender the broad discretionary powers of the sentencing judge. The continuing struggle between due process concerns in the sentencing stage and the trial judge's need to know and understand the background, character and potential (either good or bad) of the convicted offender, thus, continues virtually unchecked. With the protections of the federal rules as to character evidence\(^75\) suspended after the guilt determination stage, a great potential for disparity at sentencing exists. Consequently, diverse theories of admissibility have developed and will continue to develop. Although the Supreme Court, in *Townsend v. Burke*,\(^76\) cautioned the sentencing judge against relying upon misinterpretations and inaccuracies regarding a convicted offender's past criminal record and suggested a softening of the *Williams* rule, various decisions handed down since *Williams* and *Townsend* indicate that wide disparity still exists.

In *Haili v. United States*,\(^77\) the sentencing judge stated that he was not relying upon alleged inaccuracies in the presentence report in passing sentence, but rather, was basing his decision upon evidence he viewed during the trial and other evidence presented to

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\(^{70}\) *Id.* at 412.

\(^{71}\) United States v. Fatico, 603 F.2d 1053 (2d Cir.), *cert. denied*, 444 U.S. 1073 (1979).

\(^{72}\) *Id.* at 1057.

\(^{73}\) *Id.* at 1054-55.


\(^{75}\) *Fed. R. Evid.* 404.

\(^{76}\) 334 U.S. 736 (1947).

\(^{77}\) 443 F.2d 1295 (9th Cir. 1971).
him. Therefore, no abuse of discretion resulted. In United States v. Durham,78 a denial of access to a presentence report was upheld, even though it affected the offender's ability to refute alleged inaccuracies, in order to preserve the confidential nature of the report.79

Other courts have viewed the convicted offender's status as one that requires limiting the sentencing judge's broad discretion to consider evidence of the offender's prior behavior and potential for rehabilitation. United States v. Picard,80 for example, held that a presentence report requires disclosure of its substance. Moreover, Picard expressed the view that relaxation of the evidentiary rules and the ability to consider out-of-court, unsworn information during the sentencing stage is not unlimited.81

In keeping with this view, several courts have stated that although disclosure of the entire report is not mandated as a matter of right, at least the defendant's prior convictions listed in the presentence report must be disclosed if requested, and if the sentencing judge relied on the convictions in assessing punishment.82 Disclosure is also favored if a heavier sentence were to be levied after reconviction and during resentencing, in order to protect the defendant's right to appeal without penalty.83 This reasoning was applied in a case where a far more severe sentence was imposed after a second conviction, and after the trial judge had examined a confidential FBI report of an interview with the defendant. The report, however, was kept from the accused. The appellate court determined that because of fundamental fairness requirements, the obligation to disclose exists if the possibility of an enhanced sen-

78. 181 F.2d 503 (D.C. Cir. 1960).
79. Id. at 503-04.
80. 464 F.2d 215 (1st Cir. 1972).
81. Id. at 218-20.
82. United States v. Janiec, 464 F.2d 126, 127 (3d Cir. 1972). Accord United States v. Hodges, 547 F.2d 951 (5th Cir. 1977) (defendant should be allowed to review presentence report to be able to refute factual inaccuracies); United States v. Perri, 513 F.2d 572 (9th Cir. 1975) (fairness dictates that the defendant be apprised of adverse information in the presentence report relied on by sentencing judge); United States v. Powell, 487 F.2d 325 (4th Cir. 1973) (defendant should have an opportunity to refute his designation as the "ringleader of an automobile theft ring"); Baker v. United States, 388 F.2d 931 (4th Cir. 1968) (defendant should be advised, at least orally from the bench, of "such pivotal matters of public record as the conviction, and charges of crime, with date and place attributed to him in the report"); United States v. Long, 411 F. Supp. 1203 (E.D. Mich. 1976) (disclosure of information significant to sentencing provides the defendant with an opportunity to correct error).
tence is considered. Moreover, at least one federal circuit has required resentencing where the defense counsel had inadequate time to review an adverse presentence report, even though disclosure was made.

Concepts of justice, fundamental rights, and fair play appear to govern the decision of whether a convicted offender will be granted access to the specific facts a judge will consider when passing sentence. But it is against the backdrop of Williams v. New York, Townsend v. Burke, Federal Rule of Criminal Procedure 32, and diverse judicial reaction to disclosure of the presentence report, whereby the offender may for the first time gain access to adverse information, that the admissibility of evidence during sentencing must be considered. This examination will demonstrate the stark differences in standards operative in the guilt determination stage and the sentencing stage of the criminal trial.

**Hearsay**

Hearsay evidence, or evidence procured through out-of-court, unsworn statements, is generally inadmissible. Yet, under limited conditions, opinions and conclusions included in the hearsay testimony of laypersons may be admitted in the guilt determination stage. Such evidence is used later, however, to depict a convicted offender's background during the sentencing stage, where evidentiary controls are lacking. Ostensibly, hearsay evidence is allowed so as to reveal telling character traits which will provide a firm basis for rendering proper sentence. Without proper controls on the use of hearsay in sentencing determinations, however, severe abuses can result at the expense of the convicted offender's rights of confrontation and cross-examination, and in contravention of the standards prohibiting irrelevant, propensity evidence in general. Moreover, although hearsay evidence is allowed, appropriate impeachment techniques are not available to test the authenticity or accuracy of the evidence as in the guilt determination stage.

*Williams v. New York* set the tone for broad reliance on out-

84. United States v. McDuffie, 542 F.2d 236 (5th Cir. 1976).
89. Fed. R. Evd. 607.
of-court information during sentencing, and provided the basis for accepting hearsay evidence in most sentencing circumstances. Several circuits have followed the Williams approach. In United States v. Cardi,91 for example, the Seventh Circuit responded to a defendant’s challenge that unsworn, out-of-court information reflected his membership in an organized crime syndicate by stating that:

[T]he sentencing judge is not restricted to evidence derived from the examination and cross-examination of witnesses in open court, that may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or "out-of-court" information relative to the circumstances of the crime and to the convicted person’s life and characteristics.92

As the Seventh Circuit indicated, reputation will figure very prominently in a sentencing judge’s determinations. Thus, membership or association with organized crime is indeed significant.

In United States v. Strauss,93 criminal syndicate association was again accorded great weight in the sentencing decision. In this case, however, the adverse information was supplied through prior sworn testimony taken during the course of formal congressional investigations, where the defendants and their counsels were afforded the opportunity of full rebuttal.94

In similar situations, at least one court has held that the sentencing judge’s reference to adverse testimony given at the defendant’s preliminary hearing in a state criminal proceeding did not constitute a denial of the accused’s constitutional rights to be confronted by witnesses against him.95 According to this reasoning, the inherent broad latitude in considering sources of adverse information established the propriety of such a reference.96 In addition, the mere fact that government information supplied to the sentencing judge contains hearsay information does not itself require automatic exclusion even if an objection is raised. In United States v. Bass,97 for example, highly damaging information revealed by

91. 519 F.2d 309 (7th Cir. 1975).
93. 443 F.2d 986 (1st Cir. 1971).
94. Id. at 990-91.
96. Id. at 690.
government agents concerning the defendant's reputation as a persistent narcotics trafficker was held admissible because the defendant did not deny the allegation when confronted with it. Such a denial can thus lend reliability to the allegations, notwithstanding the possibility of material falsity.

Although extensive use of hearsay evidence during sentencing deliberations has been sanctioned repeatedly, its use is not unlimited. United States v. Weston set forth guidelines reflecting the need for more control of hearsay information either through Supreme Court pronouncement or through the promulgation of effective rules of evidence for the sentencing stage. In Weston, the defendant was convicted of possession of a small quantity of heroin and was given a five-year sentence. After reviewing a presentence report that was prepared at the request of the prosecution, however, the judge imposed a sentence of twenty years imprisonment. The sentencing judge clearly relied upon information contained in the report. This information, supplied by the government, specified that the accused was a principal heroin dealer and was guilty of other serious criminal conduct. The defendant vigorously denied both allegations. The only foundation for the information was an unsworn memorandum from a narcotics agent to his superior, quoting a named informant "previously identified as a reliable cooperating individual." Consequently, the Weston court found that the memorandum was insufficient to support the very broad charges of criminality contained in the presentence report. After outlining both the guidelines set down in Williams, and other case law precluding consideration of evidence illegally obtained, the Weston court rejected the practice of considering information with so weak a foundation. The court also criticized the procedure of requiring the defendant, after denying the adverse information, to "disprove" the acts alleged. Finally, the Weston court called for an extension of Townsend v. Burke to overturn a sentence imposed due to information of minimal value, specifying that only substantial and persuasive information should be examined at this important stage.

98. Id. at 120-21.
99. 448 F.2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972).
100. Id. at 630.
101. Id. at 630-31.
102. Id. at 634.
103. Id. at 634. Cf. United States v. Needles, 472 F.2d 652 (2d Cir. 1973) (sentencing may take into account statements of an unidentified undercover agent where defendant has
The weight of authority thus allows hearsay evidence during the sentencing stage, if ample foundation for its use exists, so that the judge may have access to all sources of usable information. The obvious dangers that can befall a defendant who is deprived of substantial evidentiary safeguards during sentencing indicates that some modicum of protection should be built into the sentencing phase to either curtail the extensive use of hearsay or to require an affirmative showing of reliability when it is so used.

**Prior Bad Acts and Convictions**

Other than general reputation evidence, nothing is more revealing about a convicted offender's character than a record of criminal convictions, arrests, or charges against him. As a result, evidence of prior bad acts is carefully weighed by the judge at the guilt determination stage and, except for limited purposes of impeachment and for proof as to an issue other than an accused's propensity to commit a criminal act, is inadmissible.\(^{104}\) Similarly, evidence as to prior convictions must pass strict scrutiny before it is admitted.\(^ {105} \)

The admissibility of information concerning a convicted offender's past criminal conduct at the sentencing stage is currently supported by Federal Rule of Criminal Procedure 32\(^ {106} \) and by the absence of restrictions upon such information under federal procedural guidelines.\(^ {107} \) Although the rules allow for almost unlimited admissibility of information at this stage, decisional law seems to reach beyond these liberal allowances. *Jones v. United States*,\(^ {108} \) for example, held that prior criminal activity not resulting in a conviction may be considered during sentencing,\(^ {109} \) including indictments for other criminal activity for which the defendant had not yet been tried. Such indictments were found sufficiently reliable to warrant consideration by the sentencing judge\(^ {110} \) because

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\(^{104}\) See Fed. R. Evid. 404.
\(^{105}\) See Fed. R. Evid. 609.
\(^{106}\) Fed. R. Crim. P. 32(c)(2).
\(^{108}\) 307 F.2d 190 (D.C. Cir. 1962).
\(^{109}\) Id. at 192.
\(^{110}\) United States v. Metz, 470 F.2d 1140 (3d Cir. 1972).
they manifested greater reliability than "unsworn evidence detailing otherwise unverified statements of a faceless informer that would not even support a search warrant or an arrest."111

In United States v. Doyle,112 the dismissal of several other counts of an indictment under which the defendant pleaded guilty did not preclude the trial judge from considering the dismissed counts when the defendant was sentenced.113 Yet such prosecutorial control of the sentencing process can work to the severe disadvantage of the defendant. If the offender is induced to plead guilty upon the consideration that other counts of an indictment will be dismissed with the allowance that the "dismissed counts" might be considered upon sentencing, the bargain, though still advantageous to the offender, gains an added dimension of which the offender and his counsel should be aware.114 United States v. Sweig,115 represents perhaps the most extreme decision under the liberal application of rules which allow the gathering of information concerning the offender's past criminal activity. Sweig held that it was proper to consider at sentencing evidence of charges in a prior case of which the defendant was acquitted.116

Thus, charges dismissed without prior adjudication, prior crimes for which the defendant was not tried, dismissed counts on a multicount indictment, and even charges of which the offender was previously acquitted have been admitted at the sentencing stage. The need for more control in this area is obvious, particularly when contrasted with the notions of admissibility at the guilt determination stage.

One other example that illustrates the lengths to which sentencing considerations may run under the current system of minimal guidelines is found in United States v. Cavazos.117 In Cavazos, the defendant pleaded guilty to a charge of possession with intent to distribute approximately ten ounces of heroin. During the sentencing phase, the court was informed that the defendant had no prior

111. Id. at 1142.
112. 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843 (1965).
113. Id. at 721.
114. United States v. Majors, 490 F.2d 1321, 1324 (10th Cir. 1974) (defendant asserted that his rights were violated when the prosecutor used a dismissed charge of auto theft to enhance punishment for escape).
115. 454 F.2d 181 (2d Cir. 1972).
116. Id. at 184. See also Henry v. State, 20 Md. App. 296, 315 A.2d 797 (1974) (the judge may consider during sentencing "facts" he hears adduced at trial, even though the jury did not base its verdict on such facts).
117. 530 F.2d 4 (5th Cir. 1976).
record and had never before been involved in criminal activity. The trial judge, nonetheless, stated that FBI and Bureau of Prisons statistics showed that because an individual had never before been arrested for criminal activity did not necessarily prove a lack of prior criminal involvement. The court pointed out that an average of up to six prior successful criminal acts could occur before a person was apprehended. These statistics demonstrated to the court that "a person gets by with ten, fifteen, twenty, sometimes as many as 200 narcotics sales." The Cavazos judge, in imposing a maximum sentence of fifteen years imprisonment to be followed by a special parole term of fifteen years, made it clear that these hearsay statistics and the nature of the crime itself reflected a "prior record." The court of appeals vacated and remanded for resentencing and stated that:

The use of statistics, even if calculated from a sound base and placed in proper context, neither of which was shown to have been done here, is an invalid premise on which to impose sentence. This approach injects hypothetical extraneous considerations into the sentencing process and contradicts the judicially approved policies of individualizing sentences that are tailored to fit the offender.

Even though relief was granted the offender on appeal in Cavazos, an obvious potential for abuse exists. This potential could be alleviated by the promulgation of rules or guidelines broad enough to give the sentencing judges sufficient information to assess pertinent characteristics of the convicted offender necessary for proper sentence imposition, yet narrow enough to limit or even preclude consideration of irrelevant and highly prejudicial data. Bizarre conclusions which find a prior bad record from the very absence of past criminal activity through nebulous, irrelevant, and unauthenticated statistics or other information during the sentencing phase could be avoided through such rules and guidelines.

Unlike evidence of prior bad acts resulting in arrest or indictment, evidence of prior convictions in general is relevant to determining proper sentence. Nevertheless, the use of prior convictions during sentencing is not free from abuse. In United States v. Tucker, a landmark case in sentencing, the Supreme Court held

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118. *Id.* at 5.
119. *Id.*
120. *Id.* at 6.
121. 404 U.S. 443 (1972).
that the use of prior uncounseled convictions during sentencing would seriously and impermissibly erode the rule of Gideon v. Wainwright, that a person may not stand trial for a felony without counsel, unless right to counsel was validly waived. The stance taken by the Supreme Court in 1972 seems clear and unequivocal. Yet various circuits have interpreted the Tucker rule differently when faced with constitutional challenges concerning invalid prior convictions or the prior dismissal of charges as evidence of previous misconduct. For example, in reviewing various applications of the Tucker rule, the court in United States v. Atkins held that the reversal of a prior conviction did not impair the sentencing judge’s ability to consider the facts underlying the prior overturned conviction as long as he considered the constitutional infirmity and its effect.

Another area of controversy emerging from varying interpretations of Tucker concerns the exhaustion of remedies doctrine. The issue is whether a convicted offender must invalidate his alleged unconstitutionally obtained prior convictions in the jurisdiction where the convictions were obtained before beginning an attack in the federal forum under a habeas corpus challenge. The Fifth Circuit, in Lipscomb v. Clark, distinguished Tucker by finding that in Tucker the unconstitutionality of prior convictions had been adjudicated fully in the state courts, while in Lipscomb only the defendant’s allegations that the prior convictions had violated Gideon were offered in an attempt to place his prior convictions within the Tucker rule. The Lipscomb court held, however, that the mere allegations were sufficient and recommended on remand for resentencing that set procedures be followed to determine the extent to which the invalidly obtained prior convictions were considered in the sentencing of the defendant. First, the district court was to consider whether treating the prior state conviction as invalid would have prompted the imposition of the same maximum sentence. If the same sentence would be imposed, the court reasoned, then the Tucker rule would be followed. If, however, the district court found on remand that the prior conviction was unconstitutional and void, and that the maximum sentence was not warranted, then the defendant should be able to present evidence.

123. 480 F.2d 1223 (9th Cir. 1973).
125. 468 F.2d 1321 (5th Cir. 1972).
at an evidentiary hearing that the prior convictions were unconstitutional under *Gideon*. If the district court found after the hearing that the convictions were constitutionally invalid, the court stated, resentencing would then take place.126

In *Brown v. United States*127 the Fourth Circuit took an opposite approach to *Lipscomb* concerning the jurisdictional issue. Whereas the *Lipscomb* court stated that the constitutionality of prior convictions was best handled in the district court on remand, the *Brown* court disagreed. *Brown* held that if state convictions had been invalidated for want of counsel in habeas corpus actions also initiated in the state courts, then *Tucker* would mandate resentencing. If, however, the state convictions had not been attacked in the state courts, then the federal district court could rightly consider dismissal of a convicted offender's challenge as premature.128 Although *Brown* agreed with the procedures announced in *Lipscomb* regarding the need for resentencing where the judge relied on unconstitutional prior convictions, it rejected *Lipscomb* insofar as *Lipscomb* allowed the federal district court to determine the validity of the challenged convictions.

The *Brown* decision appears to place an extremely severe burden on the offender challenging such convictions and could result in a procedural logjam at the state and federal levels.129 As *Lipscomb* and *Brown* demonstrate, a seemingly straightforward rule developed to promote constitutionally required goals may become fraught with difficulty when subjected to interpretative nuances within the various circuits. Current law indicates that even a prior conviction obtained in violation of *Gideon* is not totally precluded. Rather than relying on a codified rule that would eliminate judicial consideration of such infirm convictions at the sentencing stage, the convicted offender must accept the judge's word that such prior convictions will not affect the sentence imposed. Even assuming the judge possesses a requisite sense of fairness, the post-*Tucker* subjective standard leaves room for concern that the judge's impressions formed during trial will influence his sentencing decision. An objective rule would help to eliminate much of the judicial guesswork and hindsight currently pervading the circuits on the exhaustion of remedies issue. Furthermore, under prevailing inter-

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126. *Id.* at 1323. *See also* United States v. Sawaya, 486 F.2d 890 (1st Cir. 1973).
127. 483 F.2d 116 (4th Cir. 1973).
128. *Id.* at 118.
Evidentiary Standards

interpretations of the Tucker rule, serious hardships can result to defendants who seek to exclude evidence of prior convictions obtained in violation of constitutional rights during the post-conviction and incarceration period. An objective rule, framed in conformity with Tucker, could also resolve this current conflict among the circuits\textsuperscript{130} and provide for an evenhanded approach to this highly provocative and prejudicial evidence that so seriously affects a convicted offender's liberty.

\textbf{USE OF ILLEGALLY OBTAINED EVIDENCE AT SENTENCING}

An interesting conflict exists between the exclusionary rule which operates at the guilt determination stage to prohibit the introduction of illegally obtained evidence, and the principle which allows judges wide ranging access to diverse sources of evidence at the sentencing stage.\textsuperscript{131} As previously noted, strict evidentiary rules do not apply to the sentencing phase where the policy of individualizing sentences and judicial discretion control.\textsuperscript{132} Exclusionary rules applicable at trial on the merits comprise two categories: one affecting evidence obtained through illegal searches and seizures in violation of the fourth amendment,\textsuperscript{133} and the second affecting improperly obtained statements of the accused in violation of the fifth amendment.\textsuperscript{134} Divergent views exist as to whether such evidence is admissible at sentencing, creating a serious lack of

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\item Strader v. Troy, 571 F.2d 1263, 1268 n.4 (4th Cir. 1978).
\item Weeks v. United States, 232 U.S. 383 (1914). The Court based the exclusion upon the prohibition against unreasonable searches and seizures pursuant to the fourth amendment. Subsequent Supreme Court decisions base such exclusions upon constitutional guarantees against self-incrimination and on the theory that it is within the exercise of the Court's supervisory powers over the administration of criminal justice in the federal judicial system to develop such rules.
\item See also Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the rule announced in Weeks is applicable to such illegally obtained evidence in state courts); Annot., 22 A.L.R. Fed. 856, 858-59 (1975); 29 Am. Jur. 2d Evidence § 411 (1967).
\item Miranda v. Arizona, 384 U.S. 436 (1966) (rendering inadmissible a confession obtained by police for failing to advise accused of rights guaranteed by the fifth and sixth amendments). See also Escobedo v. Illinois, 378 U.S. 478 (1964) (rendering inadmissible damaging statements extracted by police during interrogation); Mallory v. United States, 354 U.S. 449 (1957) (rendering inadmissible confessions obtained during illegal detention by police authorities); McNabb v. United States, 318 U.S. 332 (1943) (rendering inadmissible incriminating statements for failure to bring the accused before a judicial officer as required by law).
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uniformity and fairness within the system.

In *United States v. Schipani*,\(^{138}\) for example, the court held that illegally obtained evidence procured in violation of the fourth amendment was properly considered during sentencing even though the evidence had been excluded from trial. In *Schipani*, the defendant’s first conviction for tax evasion had been reversed because of the improper admission during trial of evidence obtained by illegal wiretapping. On retrial, the defendant was convicted without the use of such evidence. A severe sentence was imposed: three years imprisonment on each of five counts with sentences running concurrently, in addition to a fine of $2500 on each of the five counts. The severity of the defendant’s sentence was due in large measure to the perception that he was a “professional criminal,” a perception created by evidence procured through the illegal wiretaps originally excluded from trial.\(^{136}\) In reaching its decision, the appellate court addressed the conflict between the exclusionary rule and the rule favoring broad access to information on sentencing. The court stated that the exclusionary rule’s deterrent purpose of discouraging unconstitutional searches and seizures by law enforcement authorities would not be enhanced by a second application of the rule during sentencing. The court found it unlikely that authorities would gather evidence illegally to effect a greater sentence, when such evidence would be inadmissible to prove guilt.\(^{137}\)

The case of *United States v. Lee*\(^{138}\) agreed with the holding in *Schipani*. During sentencing for a conviction of illegal possession of a firearm, information regarding a prior state court conviction for possession of heroin was admitted, even though the heroin conviction had been reversed on appeal. The reversal resulted because probable cause for the defendant’s arrest was lacking, rendering illegal the search incident to that arrest. The *Lee* court stated that illegally obtained evidence is not necessarily unreliable, and that exclusion of such evidence at the initial trial stage was meant to fulfill deterrence goals.\(^{139}\) The *Lee* court also noted that extending the exclusionary rule to the sentencing stage would have an insignificant deterrent effect because law enforcement authorities con-

\(^{135}\) 435 F.2d 26 (2d Cir. 1970). See also *United States v. Baratta*, 360 F. Supp. 512 (D.C.N.Y. 1973) (sentencing judge considered at sentencing a report which indicated an admittedly unlawful entry and search of defendant’s home).

\(^{136}\) 435 F.2d 26, 27 (2d Cir. 1970).

\(^{137}\) *Id.* at 28.

\(^{138}\) 540 F.2d 1205 (4th Cir. 1976).

\(^{139}\) *Id.* at 1211.
duct searches and seizures for purposes of prosecution and conviction, not for purposes of enhancing sentences. In addition, the court found that extending the exclusionary rule to sentencing would severely delay the proceedings because the evidence must be subjected to hearings to determine the legality of police activity in gathering the information. These complications could discourage sentencing judges from relying on broad and wideranging sources of information in the interest of expediency and in order to avoid fourth amendment challenges. These harmful side effects, according to the Lee court, could easily be avoided by not applying the exclusionary rule to sentencing.\textsuperscript{140}

The Lee decision upheld a prior opinion of the same circuit in Armprister v. United States,\textsuperscript{141} in which the court had held that a statement made by the accused while illegally detained, and otherwise inadmissible at his trial, could be used at his sentencing proceeding.\textsuperscript{142} The Armprister court noted that no additional evidence had resulted from the accused's statement because the police possessed, prior to the statement, evidence sufficient to induce the accused to plead guilty. In dictum, however, the court stated that evidence so obtained should not normally be used even at sentencing.\textsuperscript{143}

Conversely, the case of Verdugo v. United States\textsuperscript{144} held that evidence illegally obtained in violation of the defendant's fourth amendment rights could have been obtained for the specific purpose of enhancing sentence rather than for merely prosecutorial purposes. In Verdugo, police officers conducted an illegal warrantless search of the defendant's home at a time when they possessed sufficient evidence to prosecute on narcotics sales charges.\textsuperscript{145} The

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\item \textsuperscript{140} Id. at 1211-12.
\item \textsuperscript{141} 256 F.2d 294 (4th Cir.), cert. denied, 358 U.S. 856 (1958).
\item \textsuperscript{142} Armprister v. United States, 256 F.2d 294, 297 (4th Cir.), cert. denied, 358 U.S. 856 (1958). The McNabb-Mallory Rule established the inadmissibility of statements taken from an accused during a period of illegal detention where a delay occurred in bringing the accused before a federal magistrate. See supra note 134.
\item \textsuperscript{143} 256 F.2d at 297. See 540 F.2d 1205, 1212. See also United States v. Calandra, 414 U.S. 338 (1974) (illegally obtained evidence may be considered by grand jury); United States v. Harris, 401 U.S. 222 (1971) (illegally obtained confession may be used for impeachment if voluntary); Alderman v. United States, 394 U.S. 165 (1969) (only defendant who was a victim of search may challenge admission of seized evidence).
\item \textsuperscript{144} 402 F.2d 599 (9th Cir. 1968), cert. denied, 402 U.S. 961 (1971).
\item \textsuperscript{145} The evidence sufficient for conviction had been gathered through controlled "buys" by narcotic agents from the defendant. The agents, therefore, had much to gain and little to lose by conducting the unlawful search. If the evidence were suppressed at trial, the defendant could still be convicted and his sentence could be enhanced if the evidence were al-
purpose of the search was to uncover an amount of narcotics large enough to depict the defendant as a drug dealer, and not a person guilty of just one narcotics transaction.

The court, in analyzing whether such illegally obtained evidence could be used at sentencing, observed that justification for its use could not always derive simply from the judge's need for great latitude in obtaining information from wideranging sources. Instead, the court extolled the deterrent value of the exclusionary rule, even though it often justified the release of guilty persons. This, in the court's view, was not "too great a price for insuring observance of Fourth Amendment restraints by law enforcement officers." The Verdugo court concluded that if the product of an illegal search could be used to increase sentences, the exclusion of such illegally obtained evidence at trial would have little deterrent effect on illegal searches and seizures. According to the Verdugo court, an exception to the exclusionary rule allowing admission of illegally obtained evidence at sentencing could easily foster conscious efforts to gather such evidence.

The court-created prohibition of illegally obtained evidence in the sentencing phase was also applied in United States ex rel. Rivers v. Myers, where following a plea of guilty to a murder charge and entry of a death penalty the appellate court ordered a new hearing to consider the sentence imposed. One of the defendant's

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146. 402 F.2d at 611.
147. Id. at 611-12.
148. It might be suggested that police officers are unlikely to be concerned with the sentence ultimately imposed, and, therefore, that excluding evidence at the sentencing stage cannot serve as a substantial deterrent. But this cannot be said, even now, of "the highly specialized unit which deals with specific kinds of offenses, such as those associated with narcotics, which are very serious in nature, where the investigation task is difficult, and where offenders are likely to be recidivists. Here, there may, indeed, be a specific police objective of lengthy incarceration, since the specialized unit may consider premature release of the offender back into the community as making more difficult their job." Ohlin & Remington, Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice, 23 LAW AND CONTEMP. PROBS., 494, 501 (1958). And even if it were true that there is now no general consciousness of the potential utility of illegally seized evidence to enhance sentence, we could not ignore the fact that announcement of an exception to the exclusionary rule would inevitably produce it (footnotes omitted).

149. 384 F.2d 737 (3d Cir. 1967).
two confessions had been illegally obtained and admitted against him. The Myers court found that the tainted confession appeared more damaging than the one properly obtained and, thus, might have been a factor in the sentencing decision.

In step with Myers, the Third Circuit in United States ex rel. Brown v. Rundle held that sentencing procedures lacked due process where a confession, which was inadmissible at trial, was entered during sentencing as part of the background information considered by the sentencing judge. The judge gave weighty consideration to material adverse to the defendant that was not admissible during the guilt determination stage. The case was remanded for resentencing.

The need for firm guidance in this most sensitive area is essential. Although the ability of the sentencing judge to examine as much background material as possible must be preserved, admission of inflammatory and highly prejudicial information during sentencing, which is clearly violative of a defendant's constitutional rights and immune from any exclusionary rule, vitiates principles of fairness and due process. Historically, concern for procedural and substantive rights at the sentencing stage was assigned a low priority. But the criminal justice system has not completed its task if a judge's almost unfettered discretion stands as the only real bulwark against the denial of basic rights, and conflicting interpretations of constitutional safeguards prevail throughout the various circuits. The effect of allowing at sentencing evidence that is the product of an illegal search and seizure or improper interrogation is to disregard the deterrent goals of an exclusionary rule and to endanger an accused's basic constitutional rights. This lapse in safeguards affords the authorities an advantage in gleaning information from a person who, initially, has only been charged with an offense. A clear and unequivocal rule, as applied in Verdugo, should be promulgated to prevent such unfair advantage and to control the gathering of evidence which will be used against a convicted offender at sentencing.

FAILURE TO PLEAD GUILTY AND EXPRESSIONS OF REMORSE

Sentence enhancement may be applied through other and

150. 417 F.2d 282 (3d Cir. 1969). See also United States v. Weston, 448 F.2d 626 (9th Cir. 1971) (when a trial judge relies on evidence gathered in violation of constitutional rights, any sentence imposed thereunder will be vacated and the cause remanded for resentencing without consideration of the infirm evidence).
more subtle means. A convicted offender's attitude after the verdict is reached plays an important role in the judge's final determination of sentence. The defendant's actions and behavior during trial make lasting impressions on the judge, and may influence his judgment when determining sentence. An effort to control the impermissible bases upon which sentences are imposed has led to careful scrutiny of the weight assigned by the sentencing judge to a defendant's failure to plead guilty initially or his lack of contrition after a guilty verdict.

In United States v. Stockwell, the district court had informed the defendant before trial that he could be given a three-year sentence if he pleaded guilty to one count of counterfeiting, but would receive a five to seven-year sentence if convicted after electing to stand trial. The defendant received concurrent seven-year sentences after electing to stand trial. The Stockwell court struck down the sentences. Analogizing this situation to imposing a greater punishment because a defendant exercised his right to appeal after reconviction, a practice condemned in North Carolina v. Pearce, the Stockwell court stated that a judge may not impede the accused's right to stand trial nor use the promise of a lighter sentence to induce the guilty plea as a docket-clearing expedient. A judge may, however, consider a guilty plea in mitigation of sentence.

Similarly, the defendant cannot be coerced into "admitting his guilt" after conviction by using his failure to express remorse as a factor in increasing sentence. Attempts to do so have been viewed as violative of the defendant's fifth amendment rights. In Thomas v. United States, a defendant convicted of bank robbery was given a harsher sentence because he would not admit or "confess" his part in the criminal activity. In reversing the sentence, the court of appeals stated that the defendant had "paid a judicially imposed penalty for exercising his constitutionally guaranteed rights."

151. 472 F.2d 1186 (9th Cir. 1973).
153. 472 F.2d at 1187-88. See also Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969); Johnson v. State, 336 A.2d 113 (Md. 1975) (Maryland state case expressing dissatisfaction with the trial judge's allusion to sentence enhancement for failure of accused to plead guilty, citing federal precedent); see generally STANDARDS RELATING TO PLEAS OF GUILTY § 1.8, at 36-37 (1968).
154. 368 F.2d 941 (5th Cir. 1966).
155. Id. at 946 (citing language from Note, The Influence of the Defendant's Plea on
Although in general the defendant may be protected after conviction from coercion to admit guilt or remorse, the same protection is not accorded in situations where the accused took an affirmative role in denying his guilt at trial while testifying under oath. The offering of perjured testimony can be considered in the sentencing decision. Thus, the decision to have an accused testify at his trial is one which requires defense counsel's most careful consideration. For once the privilege against self-incrimination is waived by testifying, the accused is subject to cross-examination which may reveal prior conviction or other adverse and impeaching information.

Another important issue in this area is whether the sentencing judge may review testimony believed to be perjurious in determining sentence after conviction. United States v. Sanders held that the sentencing judge properly noted that "Sanders had obviously fabricated his defense and testified falsely at his trial, thus committing a further crime of perjury; . . ." Allowing this assessment to figure into the sentencing determination, however, is tantamount to a judge concluding summarily that another crime was committed. It amounts to levying punishment for a second crime without the benefits and protections available at the guilt determination stage of trial.

This problem was effectively, but perhaps not equitably, dealt

Judicial Determination of Sentence, 66 Yale L.J. 204, 220). See United States v. Garcia, 544 F.2d 681 (3d Cir. 1976) (defendant's failure to cooperate with authorities by not disclosing knowledge of further criminal activity of others cannot be used to deny leniency at sentencing because it would exact from the defendant the "price" of waiving fifth amendment rights and cause him to risk further prosecution); Poteet v. Fauver, 517 F.2d 393 (3d Cir. 1975); United States v. Hopkins, 464 F.2d 816 (D.C. Cir. 1972).

But see Roberts v. United States, 445 U.S. 552 (1980), which allowed sentence enhancement upon conviction where the defendant, after voluntarily disclosing his own drug trafficking involvement, refused to further disclose names of others involved. This failure to cooperate could not be justified on any ground of legitimate fear of retaliation or self-incrimination, as neither of these theories has been offered to the district court during sentencing and, therefore, were not timely raised. The Court also opined that since failure to cooperate evinces a rejection on the defendant's part of an obligation to community life, an obligation that must be evident before rehabilitation can begin, sentence enhancement was proper.

See also Williams v. United States, 273 F.2d 469, 470 (10th Cir. 1959) (judicial discretion was deemed broad enough to allow consideration of continuing assertions of innocence by the defendant after conviction for sentence enhancement). This rule is significant in that it shows the possibility of severe conflict among the circuits in this highly suspect category of material used in consideration of sentence.

156. 435 F.2d 165 (9th Cir. 1970) (per curiam).
157. Id. at 165.
with in United States v. Hendrix. In Hendrix, the appellant argued that to enhance a sentence because of perjured testimony allegedly occurring during trial amounted to conviction for an additional crime "without the safeguards of indictment and trial." The court found, however, that this consideration was allowable in order to preserve judicial access to information to determine proper sentence, if based upon a rational finding by the sentencing judge measured by a reasonable doubt standard. After holding that such consideration was proper under certain circumstances, the court cautioned that "perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it."

In United States v. Grayson, the Supreme Court reversed the holding of the Third Circuit that consideration of false testimony was improper and set forth guidelines for using false trial testimony during sentencing proceedings. The district court in Grayson had perceived Grayson's defense as "a complete fabrication without the slightest merit whatsoever," and passed sentence accordingly. Relying essentially on the case of Poteet v. Fauver, the Supreme Court held that Grayson's sentence could not stand. The Court reasoned that Poteet mandated sentencing reversal if an additional penalty were assessed because the judge believed the convicted offender lied while testifying on the merits of a criminal case. In Poteet, however, the sentencing judge assessed a higher penalty following a colloquy with the defendant who had refused to admit guilt after conviction. The judge in Poteet stated that he did not believe the defendant's continued protestations of innocence. This distinction is quite important because the reliance on Poteet in Grayson was misplaced. The Poteet decision follows a

158. 505 F.2d 1233 (2d Cir. 1974).
159. Id. at 1235.
160. Id. at 1236-37. Hendrix also provides a concise review of the holdings of other circuits and points out the dangers of imposing a "flat and unrealistic rule" disallowing all perjury considerations. The Second Circuit opted instead for a reasonable doubt measurement allowing restraint that would discourage perjury from flowing from the witness stand, even if the standard had a "chilling effect."
163. Id. at 108.
164. 517 F.2d 393 (3d Cir. 1975).
line of precedent establishing the principle that under the fifth amendment a defendant cannot be penalized for failing to express remorse and for maintaining his innocence after conviction.

In contrast, the sentence imposed upon Grayson resulted from a finding that he had testified falsely under oath at his trial. This had been established earlier as a permissible factor to be taken into account on sentencing. In announcing that perceived perjured testimony offered during trial may be considered during sentencing, the Supreme Court relied heavily upon the Williams principle in according the sentencing judge full and broad opportunity to obtain information from a variety of sources. Finally, in evaluating the permissibility of considering such evidence, the Court rejected an "exclusionary rule" that would, in its view, promote perjury. The Court did caution, however, that a judge should not automatically enhance a sentence in a case where he believes false testimony exists, but should do so only if he believes the testimony is willfully and materially false. This observation appears to approach the Hendrix holding, but does not go quite as far. In Hendrix it was determined that the sentencing judge could consider perjured testimony only if he believed beyond a reasonable doubt that the defendant had lied on the stand.

Nevertheless, as Justice Stewart stated in his dissent, the total effect of the majority's decision was to impose a penalty upon "the defendant's exercise of his constitutional and statutory rights to plead guilty and to testify in his own behalf." Justice Stewart also decried the lack of even minimal due process in this circumstance to avoid punishment for the additional crime of perjury. He correctly noted that only those defendants who chose to testify and actually did so faced the real prospect of "a greater sentence based upon the trial judge's unreviewable perception that the testimony was untruthful."

The absence of due process limitations or safeguards increases the possibility that a defendant's truthful testimony might be perceived as false, thereby exposing him to sentence enhancement and additional liability. This could unduly encumber his decision to
testify and could place him "at a serious disadvantage, as compared with any other witness at trial." Whereas other witnesses can be exposed to punishment for perjurious statements only after indictment and conviction, the defendant is faced with the additional risk that his testimony, if disbelieved by the judge, may result in additional prison time. Justice Stewart also disagreed that the Williams rationale would allow a sentencing judge to enhance punishment merely because of his personal belief that the defendant testified untruthfully at trial. Moreover, the justification for allowing this practice with its attendant additional risks to the defendant, according to Justice Stewart, pales when balanced against such "a minimal contribution that the defendant's possibly untruthful testimony might make to an overall assessment of his potential for rehabilitation."

The wisdom of Justice Stewart's arguments can be applied to the sentencing phase in general. The convicted offender stands to lose many rights that are guaranteed him immediately before conviction. The perjury issue is just one example of such a loss, albeit a unique one, because it can curtail severely a defendant's ability to defend himself during the guilt determination stage. Nonetheless, it reflects the overly broad discretionary power that pervades the entire sentencing system in its present form, resulting in an extreme dichotomy between controls placed upon the two phases of the criminal trial.

The neglect of the sentencing phase has been addressed in diverse ways over the years and more recently in proposed federal legislation designed to overhaul the federal criminal code. These attempts at reform, however, have failed to provide necessary safeguards where they are most needed. The path leading to sentencing reform thus far has been impeded, but progress has at least begun in several areas, including the correction of sentencing disparity among convicted individuals similarly situated, in the use of prior criminal records, in reviewing the nature of the crime committed through sentencing guidelines, and in death penalty cases.

174. Id.
175. Id. at 58.
176. Id.
Recent attempts at sentencing reform have been motivated by severe criticism of the disparity in penalties imposed for similar crimes upon convicted individuals with similar backgrounds and characteristics. Also criticized is the lack of guidance for sentencing judges in imposing those penalties. The current view reflects the need for guidelines to enable a sentencing judge to categorize properly the background and personality information he receives concerning the convicted offender, in order to achieve uniformity in sentencing. This guidelines approach will greatly aid the sentencing judge in rendering equitable penalties. However, it manifests a very obvious fault in that it fails to outline, from an evidentiary standpoint, what items of information the sentencing judge may consider in categorizing the offender.

The sentencing guidelines operate only after the offender has been "individualized" by the trial judge in the sentencing stage; but it is precisely that part of the process in the criminal justice system that requires revision. The unsettling dilemma of quality control remains. Sentencing guidelines without evidentiary standards allow a result to be reached without the controlled input necessary to insure a cohesive, well-structured system of penalty application.

**Sentencing Commission**

An alternative proposal to reform the sentencing phase which has received various legislative endorsements is the creation of a sentencing commission. This concept has been proposed as both a separate legislative reform vehicle and as part of a larger attempt at recodification of the federal criminal code. The sentencing commission is hailed as the best alternative to sentencing reform because it would create an independent agency designed expressly

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for establishing sentencing guidelines for judges. The commission would draw upon individuals from each branch of the criminal justice system, including judges, prosecutors, defense counsel, corrections personnel, lay persons and legislators in selecting its members. This group would represent a composite of sentencing “experts” with a broad spectrum of viewpoints, thereby avoiding the advocacy of a particular bias or philosophy of sentencing. The duties of these commissioners would include collecting data on current sentencing techniques and procedures with a view toward defining sentencing parameters. These parameters would be based upon identifying and categorizing serious crimes as well as questions of substance, such as recidivist differentiation, aggravating and mitigating circumstances, and the ranking of serious crimes.

The creation of this commission would go far in alleviating sentencing disparity concerning the amount of prison time imposed. In addition, the commission would help to insure fairness and consistency in the imposition of such penalties. However, as in the proposals concerning sentencing guidelines, there is a serious lack of consideration given to the qualitative aspect of the sentencing phase. No provision is made for proscriptions on the kind of information that a sentencing judge may consider before he turns to the sentencing guidelines to determine an appropriate sentence. Without providing for these evidentiary considerations, current sentencing reform proposals treat only half the problem confronting the sentencing morass that currently exists.

Amendments to Federal Rule of Criminal Procedure 32

Another move toward reform is currently pending in the form of proposed amendments to the Federal Rules of Criminal Procedure, and particularly rule 32. The proposed changes attempt to

179. See generally M. Frankel, Criminal Sentences, Law Without Order 119 (1973):
The proposed commission would be a permanent agency responsible for (1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules to which the studies pointed; and (3) the actual enactment of rules subject to traditional checks by Congress and the courts. The third is emphasized not because of a claim to novelty, but because it is thought to be especially important if the commission is to be an effective instrument of reform rather than a storage place. (emphasis in original).


181. See generally supra note 178.

182. See generally supra note 7. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Committee on Rules of Practice and Procedure of the
clarify some convoluted and ambiguous applications of rule 32 through: (1) a determination by the sentencing judge as to whether the defendant and his counsel have had an opportunity to review the presentence report;183 (2) a requirement that the sentencing judge allow the defendant and his counsel to read the complete...
report with nondisclosure of those items pertaining to diagnoses for rehabilitation, confidential opinions or information that might cause harm to the defendant or others; and, (3) a requirement that the sentencing authority make a definitive ruling on each challenged factual inaccuracy relied upon in sentencing or specifically advise the defendant or counsel that no reliance will be placed upon the particular items challenged in imposing sentence. 184 The

Though it is thus important that the defendant be aware now of all these potential uses, the Advisory Committee has considered but not adopted a requirement that the trial judge specifically advise the defendant of these matters. The Committee believes that this additional burden should not be placed upon the trial judge, and that the problem is best dealt with by a form attached to the presentence report, to be signed by the defendant, advising of these potential uses of the report. This suggestion has been forwarded to the Probation Committee of the Judicial Conference.

Id. at 49-50.

184. The proposed changes to rule 32 further provide:

(c)(3)(D) If the comments of the defendant and his counselor testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

Id. at 47-48.

The Advisory Committee Note for this section provides:

Subdivision (c)(3)(D) is entirely new. It requires the sentencing court, as to each matter controverted, either to make a finding as to the accuracy of the challenged factual proposition or to determine that no reliance will be placed on that proposition at the time of sentencing. This new provision also requires that a record of this action accompany any copy of the report later made available to the Bureau of Prisons or Parole Commission.

As noted above, the Bureau of Prisons and the Parole Commission make substantial use of the presentence investigation report. Under current practice, this can result in reliance upon assertions of fact in the report in the making of critical determinations relating to custody or parole. For example, it is possible that the Bureau or Commission, in the course of reaching a decision on such matters as institutional assignment, eligibility for programs, or computation of salient factors, will place great reliance upon factual assertions in the report which are in fact untrue and which remained unchallenged at the time of the sentencing because defendant or his counsel deemed the error unimportant in the sentencing context (e.g., where the sentence was expected to conform to an earlier plea agreement, or where the judge said he would disregard certain controverted matter in setting the sentence).

The first sentence of new subdivision (c)(3)(D) is intended to ensure that a record is made as to exactly what resolution occurred as to controverted matter. The second sentence is intended to ensure that this record comes to the attention of the Bureau or Commission when these agencies utilize the presentence investiga-
Evidentiary Standards

amendment also provides for comment by the defendant and his counsel and allows the court to exercise discretion in permitting the introduction of testimony or other material relative to factual inaccuracies allegedly contained within the report.\footnote{185}

These new and enlarged provisions are the benchmarks of an enlightened and realistic outlook promoting application of due process to the sentencing procedure. The change outlined in rule 32(c)(3)(D) is especially important because it provides a kind of exclusionary device by allowing the convicted offender to object to certain adverse material. The judge may then grant a ruling as to the "usability" of such information or at least assure the defendant that, absent a factfinding presentation, the information will not be considered. This particular provision may also resolve the current conflict regarding the application of the \textit{Tucker} principle,\footnote{186} in that a defendant may at sentencing protect the use of a prior conviction obtained in violation of his sixth amendment rights. The various circuits have interpreted the applicability of this principle differently. An exhaustion of state remedies may be required before the defendant will be granted relief in the federal courts on a habeas corpus petition.\footnote{187} The conflicting view that has evolved would not require the offender to resort to such exhaustion of remedies prior to federal court relief.\footnote{188} Under the proposed rule change, it appears that the federal sentencing court would be required to decide the validity of prior convictions before using them in sentencing considerations. In addition, the convicted offender would receive the benefit of challenging an allegedly defective, uncounseled conviction prior to its erroneous use in determining his sentence, or at least be assured of its nonuse without having to raise the challenge later after incarceration. This procedure would
help eliminate the possibility of the offender being denied federal relief if he had not exhausted state remedies by overturning the conviction in the jurisdiction in which it was obtained.

The amendments as outlined, however, should not be viewed as a panacea to correct all potential abuses that can occur at the sentencing stage. Nevertheless, these proposals would go a long way in correcting excesses and would assist in providing a large measure of procedural protection to the convicted offender in lieu of a definitive exclusionary rule. The proposed procedures would afford the convicted offender the opportunity to conduct inquiries sufficient to dispel misconceptions and correct misinformation when the need arose, and would allow the parties to subpoena, confront and cross-examine persons who offer adverse information that has been challenged as inaccurate. Providing an adequate record of the sentencing proceedings is also required by these proposed amendments and is supported by previous recommendations on that subject. 189

189. See Standards for Criminal Justice, Sentencing Alternatives and Procedures § 18-6.4 (1980). See also National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 5.17 (1973), which provides:

Sentencing Hearing—Rights of Defendant: Sentencing courts should adopt immediately the practice of holding a hearing prior to imposition of sentence and should develop guidelines for such hearing reflecting the following:

1. At the hearing the defendant should have these rights:
   a. To be represented by counsel or appointed counsel.
   b. To present evidence on his own behalf.
   c. To subpoena witnesses.
   d. To call or cross-examine the person who prepared the presentence report and any person whose information, contained in the presentence report, may be highly damaging to the defendant.
   e. To present arguments as to sentencing alternatives.

2. Guidelines should be provided as to the evidence that may be considered by the sentencing court for purposes of determining sentences, as follows:
   a. The exclusionary rules of evidence applicable to criminal trial should not be applied to the sentencing hearing, and all evidence should be received subject to the exclusion of irrelevant, immaterial, or unduly repetitious evidence. However, sentencing decisions should be based on competent and reliable evidence. Where a person providing evidence of factual information is reasonably available, he should be required to testify orally in order to allow cross-examination rather than being allowed to submit his testimony in writing.
   b. Evidence obtained in violation of the defendant's constitutional rights should not be considered or heard in the sentence hearing and should not be referred to in the presentence report.
   c. If the court finds, after considering the presentence report and whatever information is presented at the sentence hearing, that there is a need for further study and observation of the defendant before he is sentenced, it
Presently, within the federal system there exists a parallel sub-system of criminal justice that should not be ignored. Advances in this area are both enterprising and intelligent and can serve as a model to the entire network of federal criminal justice. This system, known as military justice, is the body of law developed to govern and provide jurisdiction over offenses committed by those in the armed forces. Historically, the military system has viewed the sentencing segment of the criminal tribunal as an adversarial proceeding.\textsuperscript{180} Although discretion is granted the sentencing authority,

\begin{itemize}
  \item may take necessary steps to obtain that information. This includes hiring of local physicians, psychiatrists, or other professionals; committing the defendant for no more than 30 days to a local or regional diagnostic center; and ordering a more complete investigation of the defendant's background, social history, etc.
\end{itemize}

\textit{Id.} at 190.

\textbf{National Advisory Comm'n on Criminal Justice Standards and Goals, Corrections, Standard 5.19 (1973) provides:}

\textbf{Imposition of Sentence.}

Sentencing courts immediately should adopt the policy and practice of basing all sentencing decisions on an official record of the sentencing hearing. The record should be similar in form to the trial record but in any event should include the following:

1. A verbatim transcript of the sentencing hearing including statements made by all witnesses, the defendant and his counsel, and the prosecuting attorney.
2. Specific findings by the court on all controverted issues of fact and on all factual questions required as a prerequisite to the selection of the sentence imposed.
3. The reasons for selecting the particular sentence imposed.
4. A precise statement of the terms of the sentence imposed and the purpose that sentence is to serve.
5. A statement of all time spent in custody or under supervision for which the defendant is to receive credit under Standard 5.8.
6. The record of the sentencing hearing should be made part of the trial record and should be available to the defendant or his counsel for purposes of appeal. The record also should be transmitted to correctional officials responsible for the care or custody of the offender.

\textit{Id.} at 195.

\textbf{190. Manual for Courts-Martial, United States }\S 75-76 (rev. ed. 1969). Under these procedures, the prosecution and defense may present matters to aid the court, a military judge sitting alone, or a court with members (jury), in determining the type and amount of punishment to be imposed. Provision is also made for rebuttal evidence to be presented by either side. \textit{Id.} at \S 76e. Argument on sentencing is permitted. \textit{Id.} at \S 76f. The defense is also specifically allowed to introduce matters of extenuation and mitigation. \textit{Id.} at \S 75c(1). Statements of the accused, along with personnel data, from the defendant's records are allowed, with the defense having the right to correct any inaccuracies contained therein. \textit{Id.} at \S 75b(1). Evidence of previous convictions may be admitted against the convicted offender, however, any conviction from a prior courts-martial may only be admitted if the offenses relate to those committed during the six years preceding commission of any offense of which
it is subject to strict limitations, including maximum punishments allowable for a particular offense.\textsuperscript{191} In addition to procedures outlined for the sentencing phase itself, a very worthwhile and far reaching plan was recently completed when the Military Rules of Evidence became effective. This task was accomplished after a two-year effort, performed and completed pursuant to executive order.\textsuperscript{192} The Military Rules of Evidence, which now control trial proceedings under the military justice system, provide a comprehensive scheme of formalized applications of rules derived from the Federal Rules of Evidence. Many of the standard rules currently utilized in the federal civilian system applicable to trials in the federal district courts were directly assimilated with appropriate adaptations to specific military requirements.\textsuperscript{193}

Although fashioned after the Federal Rules of Evidence, the military model made a significant departure in applying evidentiary rules to sentencing.\textsuperscript{194} The Military Rules of Evidence provide that rules governing admissibility of material at the guilt determination phase are relaxed, rather than disregarded, in the sentencing phase.\textsuperscript{195} This one distinction has accomplished much in the way of

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the offender stands convicted. \textit{Id.} at ¶ 75b(2).
\end{quote}

\textsuperscript{191} \textit{Id.} at ¶¶ 76a(1)-(5).


\textsuperscript{193} \textit{Manual for Courts-Martial, United States} (rev. ed. 1969), app. 18 (1980) provides:

\begin{quote}
The Executive Order substitutes the Military Rules of Evidence for the present rules of evidence found in Chapter XXVII and prescribes numerous conforming changes. The Military Rules of Evidence are taken in large part from the Federal Rules of Evidence but include specific privilege rules and a partial codification of the law of self-incrimination, confessions and admissions, search and seizure, and eyewitness identification. The change substantially changes present law in numerous respects. Particularly significant are new rules for mental examinations, Rule 302, intrusive body searches, Rule 312, and inspections, Rule 313.
\end{quote}


\begin{quote}
The decisions of the United States Court of Military Appeals and of the Courts of Military Review must be utilized in interpreting these Rules. While specific decisions of the Article III courts involving rules which are common both to the Military Rules and the Federal Rules should be considered very persuasive, they are not binding; see Article 36 of the Uniform Code of Military Justice. It should be noted, however, that a significant policy consideration in adopting the Federal Rules of Evidence was to ensure, where possible, common evidentiary law.
\end{quote}

\textsuperscript{194} MIL. R. EVID., \textit{Manual for Courts-Martial, United States} (rev. ed. 1969), § XI: "Rule 1101. Applicability of Rules . . . (c) Rules Relaxed. The Application of these rules may be relaxed in sentencing proceedings as provided under paragraph 75c and otherwise as provided in this Manual."

\textsuperscript{195} FED. R. EVID. 1101(d): "Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations: . . . (3) Miscellaneous Proceedings . . .
due process guarantees afforded a defendant who appears before a military tribunal. By employing relaxed evidentiary rules at sentencing, some form of control operates on the admission of adverse material without fully sacrificing the wide discretion of the sentencing authority. This is a compatible blend that can serve as a prototype for proper procedures for all criminal trials.196

The military model has preserved for the sentencing phase procedures conducive to the fair administration of justice. These rules add a new dimension and refinement to a most important part of the criminal proceeding, merely by allowing rules already promulgated concerning the admissibility of adverse information at trial to be applied to the sentencing stage. This procedure is clearly in keeping with the demands of fairness in so sensitive an area as sentencing.

**CONCLUSION**

Subjecting the non-capital sentencing phase of the criminal trial to strict and formalized evidentiary standards is a task not easily accomplished and one not readily amenable to quick solutions or unreasoned thought. The concern for full due process rights, criminal procedural rules, and rules of evidence at the guilt determination stage fades once initial accusation is transformed into conviction. Instead of closely regulated burdens of proof and elemental allocations, the sentencing phase is guided principally by judicial discretion. The only exception is found in some judicially created standards affecting the admissibility of information in a few narrow areas. In addition, nonuniformity exists among the federal circuits in almost every aspect of sentencing, from disclosure of the presentence report to a convicted offender’s challenge regarding the use of a prior invalid, uncounseled conviction. Although sentencing is a critical stage in the criminal proceeding, the courts are left to grapple with the diverse and conflicting standards that have arisen. The vast differences in evidentiary standards between the two trial phases have created an imbalance that promotes dispa-

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196. Manual for Courts-Martial, United States (rev. ed. 1969), app. 18 at A 18-20: (c) Rules Relaxed. Rule 1101(c) conforms the rules of evidence to military sentencing procedures as set forth in Manual ¶ 75c. Courts-martial are bifurcated proceedings with sentencing being an adversarial proceeding. Partial application of the rules of evidence is thus appropriate. The Rule also recognizes the possibility that other Manual provisions may now or later affect the application of the rules of evidence.
rate sentences based upon loosely guided foundations.

The sentencing guidelines system and the creation of a sentencing commission to aid sentencing judges in determining punishment are concerned chiefly with a quantitative reevaluation of the current system. In order to achieve complete sentencing reform, qualitative analysis is indispensable. The proposed amendments to rule 32 portend the shifting tide in realizing sentencing goals by allowing the convicted offender more access to adverse information and by granting him the opportunity to challenge it. The Military Rules of Evidence offer an example, already in practice, of the way in which rules of evidence may be successfully applied to the sentencing stage.

The goals of current criminal code and sentencing reform will be more fully realized by the recognition that evidentiary standards have a purposeful place in the sentencing phase of the criminal trial. If these steps are not taken, however, current sentencing reform will provide merely a treatment of the symptoms of sentencing disparity, but will not perfect a cure.