Negative: Acquitted Conduct Sentencing

By “Coach Vance” Trefethen

***The United States Federal Government should significantly reform its policies regarding convicted prisoners under federal jurisdiction***

Case Summary: The AFF plan passes S601, a bill currently pending in Congress. It would stop federal court judges from considering, when sentencing a convicted offender, other charges of which the now-convicted offender was acquitted. It appears that sometimes judges may think that the other acquittal was wrong, but since they can’t punish someone for a crime they were acquitted of, the judge instead adds on more punishment to the crime for which they were convicted. This brief shows why this is not really a problem and why consideration of conduct even in acquitted cases is relevant to justly sentencing an offender.

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Negative: Acquitted Conduct Sentencing – not a problem

NEGATIVE PHILOSOPHY

No way to justify failure to use all the available information about an offender at sentencing in federal court

Judge Lewis B. Schwellenbach 1943 (federal district court judge, 1940-1945) Information vs. Intuition in the Imposition of Sentence, Journal of the American Judicature Society Vol 27 No. 52 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/judica27&div=22&id=&page>= (accessed 18 Dec 2021)

"The knowledge of the life of a man, his background and his family, is the only proper basis for the determination as to his treatment. There is no substitute for information. The sentencing judge in the Federal court has the tools with which to acquire that information. Failure to make full use of those tools cannot be justified."

Important note about Evidence Dates

Some of the evidence we’ll be reading comes from older sources. That’s because the legal principle the Affirmative is trying to overturn has been settled in federal court decisions for many decades. You need to hear from these older sources to understand WHY the Status Quo is the way it is. The legal and ethical values behind these issues haven’t changed, so dates on evidence will not be that important in today’s round. This debate will be more about values and constitutional principles than about any facts that are subject to change that can be updated with more recent evidence.

EXTRA-TOPICALITY

1. Must exclude state prisoners

All Affirmative evidence involving sentencing of state prisoners, or their appeals in federal court, must be dropped

The Affirmative only has the ability to advocate for prisoners under federal jurisdiction. They cannot measure the significance of their plan by using state prisoners, nor can they claim solvency for anyone other than federal prisoners. And they can’t do anything about cases where state prisoners may have appealed their convictions in federal court. Those prisoners are still under state jurisdiction even if they’re claiming a violation of the federal constitution in their sentencing. To win this debate round they must prove a significant number of federal prisoners adversely affected by acquitted conduct sentencing.

INHERENCY

1. Sentencing limits check abuse

As long as the judge sentences the offender within the sentencing guidelines or the statutory maximum, he can use any facts he deems relevant – there’s no constitutional violation

Gregory Garre, Grace Becker, Jessica Silver and Angela Miller 2008. (Garre - Acting Solicitor General. Becker - Acting Assistant Attorney General. Silver and Miller - Attorneys with US Dept of Justice) August 2008 brief for the U.S. to the Supreme Court in the case of Marlowe v. U.S. <https://www.justice.gov/sites/default/files/osg/briefs/2008/01/01/2007-1390.resp.pdf> (accessed 18 Dec 2021)(ellipses and brackets in original)

Because the Guidelines were advisory, the district court had the discretion to sentence petitioner to any term of imprisonment up to the statutory maximum of life authorized by the jury’s finding that petitioner’s violation of Kuntz’s civil rights resulted in his death. See 18 U.S.C. 242. Under those circumstances, the factual findings made by the district court in exercising its sentencing discretion raise no Sixth Amendment concerns. Booker and cases elaborating on that decision make clear that, under an advisory Guidelines regime, judicial fact-finding that supports a sentence within the statutory maximum set forth in the United States Code does not violate the Sixth Amendment. As the Court explained in Booker: We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act of 1984] the provisions that make the Guidelines binding on district judges \* \* \* . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

HARMS / SIGNIFICANCE

1. Almost no federal acquittals

Only 0.4% of federal criminal cases result in acquittal

Doar Rieck Kaley & Mack law firm 2021. (New York law firm) “What you should know about the federal government’s conviction rate” 19 Apr 2021 <https://www.doarlaw.com/blog/2021/04/what-you-should-know-about-the-federal-governments-conviction-rate/> (accessed 17 Dec 2021)

How many defendants does the federal government successfully convict? Data published by the Pew Research Center in 2019 highlighted how federal prosecutors have a 99.6% conviction rate. To put those numbers in perspective, U.S. Attorneys filed 79,704 cases in 2018. Of those, only 320 resulted in acquittals.

And it’s even less than that…

Out of those 0.4% who were acquitted, not all of them are arrested again and convicted of something later on in another case. AFF needs to tell us what percentage of those 0.4% could actually be affected by their plan.

Why there are so few acquittals: Only 2% of federal criminal cases even go to trial, where they could have a chance of being acquitted. Most plead guilty in a plea bargain

John Gramlich 2019 (senior writer/editor at Pew Research Center) 11 June 2019 “Only 2% of federal criminal defendants go to trial, and most who do are found guilty” https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/

Trials have been relatively rare in the federal criminal justice system for decades, but they have become [even less common over time](https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html). The share of defendants who went to trial fell from 7% in fiscal 1998 to 2% two decades later. In absolute terms, the number of defendants who went to trial plummeted from 4,710 in 1998 to 1,879 in 2018, even though the overall number of defendants in federal cases increased substantially during that span. As trials have become rarer, guilty pleas have become more common.

2. Not unjust

Consideration of prior acquittals gives the judge information needed for a sentence that fits the crime and the offender specifically

Judge James M. Carter 1979 (federal 9th Circuit Court of Appeals judge) decision of the court in the case of US v. Morgan 14 March 1979 citation: 595 F.2d 1134 <https://scholar.google.com/scholar_case?case=16861411275459759144&q=%22695+F.2d+583%22&hl=en&as_sdt=2006> (accessed 18 Dec 2021)

Finally, it is important to understand the manner in which Judge Thompson considered the prior acquittal. It appears from the Record that he did not conclude there was necessarily criminal behavior lurking behind the acquittal. Rather, he viewed the acquittal as Morgan's confrontation with the legal process which may have contributed to his having maintained a clean slate for several years. Judge Thompson specifically mentioned that he considered the acquittal in an attempt to understand what caused Morgan to be good for so long and then suddenly turn bad. Viewed in this light, it is just as reasonable to assume that his consideration of the acquittal resulted in his imposing the relatively light sentence of two years, as it is to assume, as Morgan implies was the case, that his sentence was "enhanced" because of the prior acquittal. We do not wish to discourage probation officers from obtaining as much relevant information as possible on a criminal defendant. Nor do we wish to discourage sentencing judges from considering as much information as possible in arriving at a sentence designed to fit the particular person being sentenced. We hold, therefore, that it was proper for the sentencing judge to consider facts relating to a prior acquittal in his effort to fashion a sentence appropriate to Morgan's particular case.

3. It’s about conduct, not guilt

**Example: A man may have had an incident where he was recklessly waving a gun around and it went off and killed someone. He was tried for manslaughter but the jury acquitted him. Later he is arrested for killing someone else while waving his gun around and this time he’s convicted. The judge may consider the facts of his conduct (previously waving a gun around and knowing the fatal consequences) when sentencing him on the second event. His acquittal on the first one doesn’t erase the facts of his conduct that play into the level of punishment that would be fair for his conviction later on. His conduct in the first incident speaks to his character and level of knowledge about the dangerousness of his behavior, even if he wasn’t convicted for it.**

It’s about conduct, not guilt: A judge may consider past “conduct” if it’s proved by a preponderance of evidence even if acquitted

US Supreme Court 1997. (this was a “per curiam” opinion, meaning it is not attributed to any one specific judge) decision in the combined cases of UNITED STATES v. Vernon WATTS. UNITED STATES v. Cheryl PUTRA. 6 Jan 1997 (These cases were combined and ruled together because they both deal with exactly the same issue: what prior conduct a judge may consider at sentencing) 519 US 148 <https://www.law.cornell.edu/supremecourt/text/519/148> (accessed 18 Dec 2021)

We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence.The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue. We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

It’s about background, character and conduct. It’s essential information for fair sentencing, and doesn’t violate the Constitution

US Supreme Court 1997. (this was a “per curiam” opinion, meaning it is not attributed to any one specific judge) decision in the combined cases of UNITED STATES v. Vernon WATTS. UNITED STATES v. Cheryl PUTRA. 6 Jan 1997 (These cases were combined and ruled together because they both deal with exactly the same issue: what prior conduct a judge may consider at sentencing) 519 US 148 <https://www.law.cornell.edu/supremecourt/text/519/148> (accessed 18 Dec 2021) (brackets in original)

We begin our analysis with [18 U.S.C. § 3661](https://www.law.cornell.edu/uscode/text/18/3661), which codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information. The statute states:  
 ''No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.'' We reiterated this principle in Williams v. New York, [337 U.S. 241](https://www.law.cornell.edu/supremecourt/text/337/241), [69](https://www.law.cornell.edu/supremecourt/text/519/148) S.Ct. 1079, 93 L.Ed. 1337 (1949), in which a defendant convicted of murder and sentenced to death challenged the sentencing court's reliance on information that the defendant had been involved in 30 burglaries of which he had not been convicted. We contrasted the different limitations on presentation of evidence at trial and at sentencing: ''Highly relevant-if not essential-to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.'' Id., at 247, 69 S.Ct., at 1083 (footnote omitted); see Nichols, supra, at 747, 114 S.Ct., at 1928 (noting that sentencing courts have traditionally and constitutionally ''considered a defendant's past criminal behavior, even if no conviction resulted from that behavior'') (citing Williams, supra ); BMW of North America, Inc. v. Gore, 517 U.S. ----, ---- n. 19, 116 S.Ct. 1589, 1597 n. 19, 134 L.Ed.2d 809 (1996) (''A sentencing judge may even consider past criminal behavior which did not result in a conviction'') (citing Williams, supra ).

Earlier acquittal doesn’t mean the facts of his earlier behavior didn’t happen, and may not even mean he is innocent

US Supreme Court 1997. (this was a “per curiam” opinion, meaning it is not attributed to any one specific judge) decision in the combined cases of UNITED STATES v. Vernon WATTS. UNITED STATES v. Cheryl PUTRA. 6 Jan 1997 (These cases were combined and ruled together because they both deal with exactly the same issue: what prior conduct a judge may consider at sentencing) 519 US 148 <https://www.law.cornell.edu/supremecourt/text/519/148> (accessed 18 Dec 2021) (brackets and ellipses in original)

The Court of Appeals likewise misunderstood the preclusive effect of an acquittal, when it asserted that a jury ''rejects'' some facts when it returns a general verdict of not guilty. Putra, [78 F.3d, at 1389](https://www.law.cornell.edu/rio/citation/78_F.3d_1389) (quoting Brady, supra, at 851). The Court of Appeals failed to appreciate the significance of the different standards of proof that govern at trial and sentencing. We have explained that ''acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.'' United States v. One Assortment of 89 Firearms, [465 U.S. 354](https://www.law.cornell.edu/supremecourt/text/465/354), [361](https://www.law.cornell.edu/supremecourt/text/519/148), 104 S.Ct. 1099, 1104, 79 L.Ed.2d 361 (1984). As then-Chief Judge Wallace pointed out in his dissent in Putra, it is impossible to know exactly why a jury found a defendant not guilty on a certain charge. ''[A]n acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences . . . . '' [78 F.3d, at 1394](https://www.law.cornell.edu/rio/citation/78_F.3d_1394).

Acquittal doesn’t mean the crime never happened, and the offender isn’t being sentenced for crimes he didn’t commit

Judge Deborah L. Cook 2008. (federal appeals court judge, US 6th Circuit Court of Appeals) 551 F.3d 381 opinion of the Court in the case of US v. White 24 Dec 2008 <https://casetext.com/case/us-v-white-121> (accessed 19 Dec 2021)

The dissent also errs in saying that defendant is being sentenced to additional years "for three crimes the jury in its verdict said he did not commit." The jury verdict says no such thing. It says something very different — that the conduct had not been proved beyond a reasonable doubt. Lawyers have long recognized the distinction between proof beyond a reasonable doubt — the standard for criminal conviction — and proof by a preponderance of the evidence — the standard for civil trials. Laypersons have become familiar with the distinction from the pair of O.J. Simpson trials, in which one jury found the crime not proved beyond a reasonable doubt, but another jury found civil liability by a preponderance of the evidence.

4. Not “double jeopardy”

**[“Double jeopardy” refers to the US Constitution’s protection against anyone being tried a second time for the same crime after being acquitted the first time. AFF position is that the sentencing in the second case is a violation of “double jeopardy” because it again puts them in legal jeopardy by punishing them for the earlier crime of which they were acquitted. The Supreme Court says that’s not so.]**

Sentencing enhancements do not punish a defendant for crimes of which he was not convicted

US Supreme Court 1997. (this was a “per curiam” opinion, meaning it is not attributed to any one specific judge) decision in the combined cases of UNITED STATES v. Vernon WATTS and UNITED STATES v. Cheryl PUTRA. 6 Jan 1997 (These cases were combined and ruled together because they both deal with exactly the same issue: what prior conduct a judge may consider at sentencing) 519 US 148 <https://www.law.cornell.edu/supremecourt/text/519/148> (accessed 18 Dec 2021) (brackets in original)

The Court of Appeals asserted that, when a sentencing court considers facts underlying a charge on which the jury returned a verdict of not guilty, the defendant '' 'suffer[s] punishment for a criminal charge for which he or she was acquitted.' '' Watts, 67 F.3d. at 797 (quoting Brady, [928 F.2d, at 851](https://www.law.cornell.edu/rio/citation/928_F.2d_851)). As we explained in Witte, however, sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction.

Doesn’t violate Double Jeopardy because it’s about behavior (not guilt) that influences the punishment for the second case

US Supreme Court 1997. (this was a “per curiam” opinion, meaning it is not attributed to any one specific judge) decision in the combined cases of UNITED STATES v. Vernon WATTS and UNITED STATES v. Cheryl PUTRA. 6 Jan 1997 (These cases were combined and ruled together because they both deal with exactly the same issue: what prior conduct a judge may consider at sentencing) 519 US 148 <https://www.law.cornell.edu/supremecourt/text/519/148> (accessed 18 Dec 2021) (brackets in original)

In Witte, we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. We concluded that ''consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted.'' Id., at ----, 115 S.Ct., at 2207. Rather, the defendant is ''punished only for the fact that the present offense was carried out in a manner that warrants increased punishment . . . . '' Id., at ----, 115 S.Ct., at 2207-2208; see also Nichols, [511 U.S., at 747](https://www.law.cornell.edu/supremecourt/text/519/148), [114](https://www.law.cornell.edu/supremecourt/text/519/148) S.Ct., at ----.

Facts considered at sentencing aren’t Double Jeopardy punishment for acquitted charges and are justified for fair sentencing

Judge Peter Fay 1977. (federal 5th Circuit Court of Appeals) 26 Oct 1977 opinion of the court in case of U.S v. Bowdach 561 F2d. 1160 <https://scholar.google.com/scholar_case?case=14206390733362926003&q=%22695+F.2d+583%22&hl=en&as_sdt=2006> (accessed 18 Dec 2021)

At a sentencing, a Court can consider many matters that might not be admissable at a trial including evidence of crimes for which the defendant has been indicted but not convicted, and evidence of other crimes. Such consideration does not constitute double jeopardy since the defendant is not punished a second time for the same offense, but the repetition of criminal conduct aggravates his guilt and justifies heavier penalties when he is again convicted. Even *facts* disclosed during the course of a prior trial which ended in an acquittal or was reversed on appeal can be considered by the Court.

5. Doesn’t overturn the work of the acquitting jury

Considering acquitted conduct is perfectly consistent with hundreds of years of legal tradition and does not violate the role of the jury that previously acquitted the now-convicted offender

Judge Deborah L. Cook 2008. (federal appeals court judge, US 6th Circuit Court of Appeals) 551 F.3d 381 opinion of the Court in the case of US v. White 24 Dec 2008 <https://casetext.com/case/us-v-white-121> (accessed 19 Dec 2021)

When a layperson such as Juror # 6 in the *Canania* case expresses frustration that the court system does not seem to respect the juror's contribution, the best response is not to confirm the misunderstanding; it is to explain that indeed the juror's contribution is being faithfully acted upon, that under our system judges have the power  within a statutory range to determine the punishment for the crime that the juror did find beyond a reasonable doubt, and that the judge may take into account facts about the defendant that the judge determines to be more probable than not, even though the jurors could not find those facts beyond a reasonable doubt. That difference is a cornerstone of criminal procedure, and it is the distinction that has been embedded in our common law legal tradition for hundreds of years.

6. Doesn’t lead to bad sentencing. The “Jo Jo” case

**Just because a judge takes into account acquitted conduct, it doesn’t mean the sentence is unjust. Here’s an example in 3 pieces of evidence from the federal criminal case of U.S. versus Joseph Jones, a.k.a. “Jo Jo,” along with two associates. All 3 were convicted by a jury for distributing crack cocaine, but were acquitted of being part of a conspiracy with others to distribute drugs. The Judge took that “acquitted conduct” evidence into consideration when sentencing them on the conviction.**

First, the background of the case: One conviction, one acquittal, and an appeal of the sentencing based on acquitted conduct

Judge Thomas B. Griffith 2014. (US Court of Appeals for the District of Columbia Circuit) 14 Mar 2014 opinion of the Court in the case of “U.S. versus Joseph Jones, also known as Jo Jo” <https://www.cadc.uscourts.gov/internet/opinions.nsf/EF97673D47DDE5AE85257C9B004E5DA0/%24file/08-3033-1483944.pdf> (accessed 18 Dec 2021)

Following a lengthy trial, a jury convicted Joseph Jones, Desmond Thurston, and Antwuan Ball of distributing small quantities of crack cocaine, but acquitted them of conspiracy to distribute drugs. At sentencing, the district court nevertheless found that all three defendants had engaged in the charged conspiracy and, based largely on that finding, sentenced them to terms of imprisonment ranging from fifteen to nearly nineteen years. They now appeal, arguing that their sentences were procedurally and substantively unreasonable and were unconstitutionally predicated upon acquitted conduct.

Second, the appeal: The appeals court found that even though the sentences were higher than they would have been without the acquitted conduct, they were still lower than what the offenders could have been sentenced under the statutory maximum penalty for the crime of which they were convicted

Judge Thomas B. Griffith 2014. (US Court of Appeals for the District of Columbia Circuit) 14 Mar 2014 opinion of the Court in the case of “U.S. versus Joseph Jones, also known as Jo Jo” <https://www.cadc.uscourts.gov/internet/opinions.nsf/EF97673D47DDE5AE85257C9B004E5DA0/%24file/08-3033-1483944.pdf> (accessed 18 Dec 2021)

Appellants also argue that their sentences violated their Sixth Amendment right to trial by jury because they were based, in part, on appellants’ supposed involvement in the very conspiracy that the jury acquitted them of participating in. Take their acquitted conduct out of the calculation, they contend, and their Guidelines ranges would have been between 27 and 71 months, a mere fraction of the sentences they received. Although we understand why appellants find sentencing based on acquitted conduct unfair, binding precedent of this court establishes that the practice does not violate the Sixth Amendment when the conduct is established by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime.

**END QUOTE.**

So for example, Judge, an offender may be convicted of a crime that has a 10 year maximum sentence. He may have been sentenced to 3 years in prison, until the Judge looks at the acquitted conduct and bumps it up to 4 years. The offender has no right to complain that his rights were violated, because he’s still getting less prison time than he could have under the law. That leads us to…

Third, widespread consensus agrees: All other US federal courts agree with this ruling

Judge Thomas B. Griffith 2014. (US Court of Appeals for the District of Columbia Circuit) 14 Mar 2014 opinion of the Court in the case of “U.S. versus Joseph Jones, also known as Jo Jo” <https://www.cadc.uscourts.gov/internet/opinions.nsf/EF97673D47DDE5AE85257C9B004E5DA0/%24file/08-3033-1483944.pdf> (accessed 18 Dec 2021)(brackets and ellipses in original)

No Supreme Court majority has ever recognized the validity of such challenges, and among the courts of appeals the consensus is clearer still: every circuit to have considered such challenges has rejected them as inconsistent, in principle, with the post-Booker rule that “[f]or Sixth Amendment purposes, the relevant upper sentencing limit established by the jury’s finding of guilt is . . . the statutory maximum, not the advisory Guidelines maximum corresponding to the base offense level.” Settles, 530 F.3d at 923; see United States v. Norman, 465 F. App’x 110, 120-21 (3d Cir. 2012) (collecting cases). And though our circuit has not specifically considered such challenges, our precedent is equally categorical: judicial fact-finding does “not implicate the Sixth Amendment even if it yield[s] a sentence above that based on a plea or verdict alone.” Bras, 483 F.3d at 107 (internal quotation marks omitted). Accordingly, we must reject appellants’ Sixth Amendment claims. The district court did not violate their right to trial by jury by sentencing them within the statutory range based on acquitted conduct that it found by a preponderance of the evidence.

Finally, the impact on the round: The Affirmative harms have no harm

In Jo Jo’s case, the judge used acquitted evidence and still gave him a shorter sentence than the maximum penalty for his crime. Jo Jo wasn’t harmed but maybe society was, since he will be out on the street sooner than he could have been if the judge had really given him the maximum penalty.

DISADVANTAGES

1. Justice denied

Unjust sentencing: Many valid facts relevant to a fair sentence are found not solely in the record of past convictions

Justice Hugo Black 1949. (US Supreme Court) 6 June 1949 decision of the Court in the case of Williams v. New York, 337 U.S. 241 <https://supreme.justia.com/cases/federal/us/337/241/> (accessed 18 Dec 2021)

After each of his three lawyers had appealed to the court to accept the jury's recommendation of a life sentence, the judge gave reasons why he felt that the death sentence should be imposed. He narrated the shocking details of the crime as shown by the trial evidence, expressing his own complete belief in appellant's guilt. He stated that the pre-sentence investigation revealed many material facts concerning appellant's background which, though relevant to the question of punishment, could not properly have been brought to the attention of the jury in its consideration of the question of guilt. He referred to the experience appellant "had had on thirty other burglaries in and about the same vicinity" where the murder had been committed. The appellant had not been convicted of these burglaries, although the judge had information that he had confessed to some and had been identified as the perpetrator of some of the others. The judge also referred to certain activities of appellant as shown by the probation report that indicated appellant possessed "a morbid sexuality," and classified him as a "menace to society." The accuracy of the statements made by the judge as to appellant's background and past practices were not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise.

Outside information is “essential” to just sentencing

Justice Hugo Black 1949. (US Supreme Court) 6 June 1949 decision of the Court in the case of Williams v. New York, 337 U.S. 241 <https://supreme.justia.com/cases/federal/us/337/241/> (accessed 18 Dec 2021) (ellipses in original)

A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information "as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant. . . ." In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures, there are sound practical reasons for the distinction. In a trial before verdict, the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task, within fixed statutory or constitutional limits, is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Banning outside information at sentencing would block efforts to improve administration of criminal justice

Justice Hugo Black 1949. (US Supreme Court) 6 June 1949 decision of the Court in the case of Williams v. New York, 337 U.S. 241 <https://supreme.justia.com/cases/federal/us/337/241/> (accessed 18 Dec 2021)

In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder, if not preclude, all courts -- state and federal -- from making progressive efforts to improve the administration of criminal justice.

2. Harm to society

Federal Judge admits: Society was harmed by his failure to consider unconvicted offenses during sentencing

Judge Lewis B. Schwellenbach 1943 (federal district court judge, 1940-1945) Information vs. Intuition in the Imposition of Sentence, 27 Journal of the American Judicature Society Vol 27 No. 52 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/judica27&div=22&id=&page>= (accessed 18 Dec 2021)

