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CONSTITUTIONAL LAW-DUE PROCESS-USE OF EXTRANEOUS EVIDENCE IN DETERMINING CRIMINAL SENTENCE

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CONSTITUTIONAL LAW—DUE PROCESS—USE OF EXTRANEOUS EVIDENCE IN DETERMINING CRIMINAL SENTENCE—Petitioner was convicted of murder in the first degree with a recommendation for life imprisonment. In reliance on police and probation reports[1] showing petitioner's background which included over thirty burglaries for which he had never been arraigned and a "morbid sexuality," the trial judge disregarded the jury's recommendation and imposed the death sentence.[2] Although petitioner did not have an opportunity to examine the reports prior to the sentence hearing, he was represented by counsel at the hearing and did not challenge them at that time. Petitioner contended that he had been denied due process of law because his sentence had not been based on information supplied by witnesses with whom he could be confronted. *Held,* due process was not violated because extraneous evidence was used to assist the judge in imposing sentence. Justices Murphy and Rutledge dissented. *Williams v. People of State of New York,* (U.S. 1949) 69 S.Ct. 1079.

[1] "Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, phychiatric [sic] or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant." N.Y. Crim. Code (McKinney, 1945) §482.

[2] "A jury finding a person guilty of murder in the first degree . . . may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life." N.Y. Penal Law (McKinney, 1945) §1045-a. The court may disregard the jury's recommendation. People v. Cole, 285 N.Y. 838, 35 N.E. (2d) 503 (1941).

With the change in the emphasis of criminal prosecutions from retribution to reformation and rehabilitation, criminal sentences have been designed to fit the individual rather than the crime.[3] At common law it was the function of the court to sentence, the jury simply returning the verdict. The court could, however, hear additional evidence before imposing sentence.[4] The power to sentence is often vested in the jury by statute, and some confusion has arisen as to the admissibility of evidence at the sentencing stage because of the failure to distinguish between the function of determining guilt or innocence and that of sentencing.[5] Rules of evidence are carefully designed to exclude the accused's past from the jury because of the undue prejudice, unfair surprise and collateral issues involved;[6] but this policy does not apply at the sentencing stage, and the sentencer may consider extraneous evidence inadmissible at the trial.[7] Therefore, whatever limitations are imposed upon the use of extraneous evidence in imposing sentence must be derived from constitutional, and not evidentiary, principles. In the state courts the use of extraneous evidence at sentence hearings has withstood constitutional attacks. While a few courts have indicated that a fair hearing must be granted to the person convicted,[8] the primary ground for upholding the statutes is that the issue of the criminal's guilt or innocence is not affected by them.[9] Under the federal Constitution it is well settled that pro-

[3] See Warner and Cabot, "Changes in the Administration of Criminal Justice in the Past Fifty Years," 50 HARV. L. REV. 583 (1937); Reform in Federal Penal Procedure, 53 YALE L. J. 773 (1944).

[4] Rex v. Wilson, 4 T.R. 487, 100 Eng. Rep. 1134 (1791); Rex v. Bunts, 2 T.R. 683, 100 Eng. Rep. 368 (1788); Fields v. State, 47 Ala. 603 (1872).

[5] People v. Corry, 349 Ill. 122, 181 N.E. 603 (1932); Reppin v. People, 95 Colo. 192, 34 P. (2d) 71 (1934). Cf. People v. Popescue, 345 Ill. 142, 177 N.E. 739 (1931); and see 77 A.L.R. 1199 (1932); 86 A.L.R. 828 (1933).

[6] Certain exceptions exist; where there is a question of motive, identity, mistake, accident, common scheme, or knowledge, courts allow evidence of defendant's past conduct to be admitted. 2 WIGMORE, EVIDENCE, 3d ed., §§300 et seq. (1940). Such evidence is also admissible to impeach defendant as a witness. 3 WIGMORE, EVIDENCE, 3d ed., §889 (1940).

[7] "It is as much for the protection of the accused as it is for the People that after the question of guilt has been admitted by a plea or reached by a verdict the judge should know something of the life, family, occupation and record of the person about to be sentenced." People v. Popescue, 345 Ill. 142 at 152, 177 N.E. 739 (1931). See State v. Summers, 98 N.C. 542, 4 S.E. 120 (1887). Often this is a matter of trial court discretion. State v. Vennum, 149 Wash. 670, 272 P. 62 (1928). A few courts limit such evidence to that obtained from witnesses in open court. People v. Giles, 70 Cal. App. (2d) (Supp.) 872, 161 P. (2d) 623 (1945); Commonwealth v. Johnson, 348 Pa. 349, 35 A. (2d) 312 (1944).

[8] "It would be so clearly contrary to our fundamental law to permit evidence to be introduced and considered against a person convicted or accused . . . in the absence of the person convicted, that we cannot think the Legislature contemplated such a thing." Matter of Fowler, 49 Mich. 234 at 238, 13 N.W. 530 (1882). See also State v. Harvey, 128 S.C. 447, 123 S.E. 201 (1924). Cf. Commonwealth v. Polens, 327 Pa. 554, 194 A. 652 (1937); Commonwealth v. Johnson, supra, note 7, 43 MICH. L. REV. 216 (1944).

[9] "Any person indicted stands before the bar of justice clothed with a presumption of innocence and, as such, is tenderly regarded by the law. Every safeguard is thrown about him. . . . After a plea of guilty admitted murderers are in a much different position. As such they are felons. . . . they are naked criminals, hoping for mercy but entitled only to justice." People v. Riley, 376 Ill. 364 at 368, 33 N.E. (2d) 872 (1941), cert. den., 313 U.S. 586, 61 S.Ct. 1118 (1941). See also State v. Reeder, 79 S.C. 139, 60 S.E. 434 (1908).

cedural due process includes at least the right to a fair hearing, including the right to cross-examine witnesses and reasonable notice of the charges;[10] but the principal case is the first to raise directly the question of due process at the sentence hearing under the federal Constitution. The Court, in holding due process observed, relied upon the fact that petitioner was present, with counsel, at the hearing and that he made no objection to the evidence at that time.[11] The reasoning of the state courts and the desirability of using extrinsic evidence in sentencing apparently influenced the majority. The dissent evidently would exclude such extraneous evidence in capital cases, or at least subject it to the criminal's examination before the hearing.[12] However, petitioner's contentions lose much of their force when it is considered that had the trial judge based his sentence on petitioner's trial mannerisms or other capricious and arbitrary factors, instead of the records actually used, the question in the principal case would not have arisen. There is no doubt that the instant decision renders effective the discretionary and indeterminate types of sentences.

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[10] "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." In re Oliver, 333 U.S. 257 at 273, 68 S.Ct. 499 (1947).

[11] Principal case at 1081 et seq.

[12] Principal case at 1087. See 49 COL. L. REV. 567 (1949) for a report of the case at the trial stage, King's County Court, New York, Mar. 3, 1948, unreported; affd. 298 N.Y. 803, 83 N.E. (2d) 698 (1949).