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Criminal Constitutional Law—Eighth Circuit Applies the Confrontation Clause at a Sentencing Hearing—United States v. Fortier, 911 F.2d 100 (8th Cir. 1990)

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INTRODUCTION

Michael B. Fortier was convicted for possession of cocaine after he pled guilty to Count I of a three-count indictment. The remaining counts were dismissed. In sentencing Fortier, the United States District Court for the District of North Dakota considered a second quantity of cocaine, his alleged possession of which was the basis for dismissed Count II, in addition to the cocaine identified in Count I that Fortier had admitted possessing. Fortier's possession of the second amount of cocaine was established at the sentencing hearing by hearsay evidence that was deemed reliable by the trial court. The United States Court of Appeals for the Eighth Circuit, in United States
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v. Fortier, reversed the district court, holding that Fortier's rights under the confrontation clause had been violated when hearsay evidence was admitted at the sentencing hearing.

The Eighth Circuit reversed the conviction despite the fact that the right of confrontation has consistently been held inapplicable at sentencing hearings. In reversing the conviction, the court departed from the conventional due process analysis for fact situations of this type and recognized an independent and direct right under the confrontation clause. The Fortier court reached its conclusion with a very brief discussion of the legal issue and without refuting the present state of the law.

Regardless of the legal principles applied, the facts in Fortier illustrate the unfairness of sentencing an offender for conduct which did not result in a conviction. The implementation of the sentencing guidelines can make fact-finding an important part of a sentencing hearing. As the facts of Fortier persuasively show, the principles underlying the confrontation clause should apply to some degree at sentencing. Recognizing this premise, however, does not require that the confrontation clause itself be applied at sentencing. The Eighth Circuit's previous analysis, and that which is currently used by other

1. 911 F.2d 100 (8th Cir. 1990).
2. Id. at 101-02.
3. Id. at 101. The confrontation clause states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.
4. For example, in Williams v. Oklahoma, 358 U.S. 576 (1959), the petitioner entered a guilty plea to murder and was sentenced to life imprisonment. Subsequently, in another court, he pled guilty to a kidnapping which occurred with the murder. Prior to the imposition of the kidnapping sentence, the state's attorney read a statement regarding the details of the crimes and the petitioner's criminal record. Id. at 579-80. The Court held that admission into evidence of the statements of the state's attorney did not deprive the petitioner of his right to due process. Id. at 584.
   In Williams v. New York, 337 U.S. 241 (1949), the petitioner was convicted of first degree murder and the jury recommended life imprisonment. Id. at 241. The trial court sentenced appellant to death after considering information regarding his previous criminal record. Id. at 242. Appellant was not permitted to confront or cross-examine the witness on that subject. Id. at 243. The Supreme Court, affirming the lower court, provided that, in considering the sentence to be imposed, including a death sentence, a sentencing judge is not restricted to information received in open court and is granted wide discretion as to the sources and types of information used. Id. at 252.
   In Gardner v. Florida, 430 U.S. 349 (1977), however, the petitioner was convicted of first degree murder and the trial judge imposed the death penalty after considering portions of a presentence investigation report which had not been disclosed to the parties' attorneys. Id. at 353. The Supreme Court concluded that such a procedure does not satisfy the constitutional mandate that no person shall be deprived of life without due process of law. Id. at 362.
5. Fortier, 911 F.2d at 104.
circuits, applies the general principle of confrontation through the due process clause. Greater clarity in the law can resolve the problems which are evident in *Fortier*.

This Case Note argues, as has been argued by at least one other circuit court, that the due process issue in *Fortier* should be given attention by the Supreme Court. Part I surveys the interpretations of the confrontation clause, the policy goals behind the Sentencing Guidelines, and the case law concerning confrontation at sentencing. Part II describes the facts and holding in *Fortier* and discusses the issues the court did not address. The Case Note concludes by proposing that, absent further guidance from the Supreme Court, where a disputed fact at sentencing amounts to a new charge or otherwise has an impact similar to that which it would have at trial, the offender should be afforded the benefits of confrontation as an essential element of due process.

I. BACKGROUND

A. Origin and Evolution of the Confrontation Clause

1. Early Recognition of the Right to Confront

The principle behind the confrontation clause—that a criminal suspect must face his or her accusers to receive a fair trial—was recognized as early as the Roman era, as noted in the sedition trial of the Apostle Paul. In sixteenth century England, the right to face accusers was established by statute for those accused of treason. Despite this codification, however, the right was not consistently ob-

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7. In United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990), the United States Court of Appeals for the Third Circuit expressed its desire for the Supreme Court to address the issue: “The resolution of the question posed in this footnote is vital to the administration of sentencing proceedings under the Sentencing Reform Act regime. We hope therefore that the Supreme Court in the near future will decide whether confrontation clause principles are applicable at sentencing hearings . . . .” Id. at 1103 n.19 (emphasis added).

The *Kikumura* court did not adopt the *Fortier* approach. Instead, it strengthened the offender’s interest in cross-examination by raising the level of reliability necessary for due process requirements to be met.

8. *Acts* 25:1-22. Porcius Festus, when presenting the facts of Paul’s case to King Agrippa of Judea, stated that “it is not the Roman custom to hand over any man before he has faced his accusers, and has had an opportunity to defend himself against their charges.” *Acts* 25:16. As it turned out, the accusers “did not charge him with any of the crimes I had expected. Instead, they had some points of dispute about their own religion . . . .” *Acts* 25:18-19. King Agrippa held that Paul had not done “anything that deserves death or imprisonment.” *Acts* 26:31.

9. 5 Edw. 6, ch. 11 (1552). The statute stated that a person could not be convicted of treason unless “accused by two lawful Accusers [who], if they be then living, shall be brought in Person before the Party so accused.” *Id.* See also *Note, The Sixth Amendment Right of Defendants to Confront Adverse Witnesses*, 26 AM. CRIM. L. REV. 1547, 1547-55 (1989) (providing a historical overview of the right to confront adverse wit-
served. This inconsistency continued until, after declaring its independence from England, the American colonies adopted the notion of due process rights.

The best-known example of the denial of the confrontation right, and probably one of the most egregious, is the 1603 trial of Sir Walter Raleigh. Raleigh was charged for conspiring with Lord Cobham to prevent the coronation of James I. A false affidavit of Cobham’s, induced by torture, led to Raleigh’s conviction and execution fifteen years later.

The right to confront witnesses was increasingly seen as proper in the aftermath of the 1637 trial of John Lilburne, who was charged with importing books which criticized the bishops of the Church of England. He was tried and convicted in the Star Chamber, having not been allowed to face his accusers. He was freed three years later by a resolution of Parliament which also condemned the Star Chamber’s methods as “illegal” and “tyrannical,” thus giving the right to confront accusers a strong endorsement.

nesses, from Parliament’s enactment of confrontation statutes in the sixteenth century to the American colonial adoption of similar due process rights).

10. Note, supra note 9, at 1547 n.1. Apparently, the right to confront was observed at ordinary trials in the assizes but was not observed by specially convened tribunals. The testimony against treason defendants usually consisted of ex parte affidavits and depositions coerced from witnesses by threat of torture or by actual torture. Id. (citing Pollit, The Right of Confrontation: Its History and Modern Dress, 9 J. Pub. L. 381, 388 (1959)).


12. See Raleigh’s Trial, 2 How. St. Tr. 16 (1603).

13. See Note, supra note 9, at 1547-48. Raleigh learned in a letter from Cobham that Cobham had been forced to “admit” Raleigh’s guilt. Cobham recanted his admission in the letter. Id.

At trial, Raleigh said to the court,
It is strange to see how you press me still with Lord Cobham, and yet will not produce him; . . . he is in the house hard by, and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of further proof.

Id. at 1548 n.7.


15. The Star Chamber became the primary criminal court in England during the fifteenth and sixteenth centuries because the Court of Chancery was limited to civil cases. The Star Chamber had great power over both nobility and commoners. See Note, supra note 9, at 1550 (citing 2 L.B. Smith, This Realm of England 85 (2d ed. 1971)). Lilburne was sentenced to stand in the pillory and to be whipped, fined, and imprisoned. Id.

16. See Note, supra note 9, at 1550-51. The right to confront was confirmed with finality in the 1696 trial of Sir John Fenwick. There, the court stated, “Our law requires persons to appear and give their testimony ‘viva voce’; and we see that their testimony appears credible or not by their very countenances and the manner of their delivery; and their falsity may sometimes be discovered by questions that the party
2. American Codification and Interpretation

a. First Recognition

The American colonies inherited the English principle that an accused should have the right to confront accusers. Because cross-examination assists a jury in determining truth, the ability to confront accusers was considered an essential part of the right to a trial by jury.

Because the colonists were denied the right to confront accusers by the British monarchy and by the British governors in America, they doggedly sought to secure the right in their new governments. The Virginia Declaration of Rights, which was a forerunner of the Bill of Rights, explicitly provided for the right. A decade later, citizens insisted upon inclusion of the right to confront accusers in the Constitution. Eventually, the right was adopted in the sixth
amendment of the Bill of Rights.\textsuperscript{23}

\textit{b. Early Interpretations}

The United States Supreme Court first interpreted the confrontation clause in an 1895 decision, \textit{Mattox v. United States}.\textsuperscript{24} In \textit{Mattox}, the Court held that testimony given by a witness in a trial could be introduced in a retrial if the witness had since died.\textsuperscript{25} The Court rejected a literal approach and recognized the common law exceptions to the hearsay rule that existed in England before the Constitution was adopted.\textsuperscript{26} Though the defendant had not faced his accuser in the retrial, the Court reasoned that the confrontation clause "must occasionally give way to considerations of public policy and the necessities of the case."\textsuperscript{27} The result here satisfied the goal of the constitution.

\begin{quotation}
DEBATE IN MASSACHUSETTS RATIFYING CONVENTION (Jan. 30, 1788) in THE FOUNDERS' CONSTITUTION, supra note 16, at 260 (emphasis in original).
\end{quotation}

\begin{quote}
23. The sixth amendment states:

\begin{itemize}
\item In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;
\item to be confronted with the witnesses against him;
\item to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
\end{itemize}

\end{quote}


Although the language of the confrontation clause is absolute and appears to admit no exceptions, it is interpreted otherwise. These interpretations follow the common law hearsay rule, to which there were also exceptions. Professor Wigmore explains that the clause, as interpreted, actually would have a qualifier saying, "\textit{except when the witness is deceased, ill, out of the jurisdiction, or otherwise unavailable.}" WIGMORE, supra note 19, at 158. Thus, Professor Wigmore states that the constitutional right to confront is the right to have the hearsay rule enforced: "The rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein." \textit{Id.}

\begin{quote}
\end{quote}

\begin{quote}
25. \textit{Id.} at 240, 250. The Court noted that the witnesses were cross-examined in the first trial. \textit{Id.} at 240.
\end{quote}

\begin{quote}
26. \textit{Id.} See 9 W. HOLDSWORTH, supra note 11, at 219. The Court, lacking any prior interpretations of the confrontation clause, drew upon both English precedent and cases from the several states. \textit{Mattox}, 156 U.S. at 240-42.
\end{quote}

\begin{quote}
27. \textit{Mattox}, 156 U.S. at 243. The Court explained the flexibility of the clause by noting:

To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the
frontation clause, which was stated by the Court as follows:

The primary object of the constitutional provision in question was to prevent deposition or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.28

The Supreme Court interpreted the confrontation clause again four years later in *Kirby v. United States*.29 In *Kirby*, the Court held that the clause had been violated when prosecutors introduced the written record from the trials of the defendant's co-conspirators.30 This practice, authorized by statute, was found unconstitutional because the defendant had no opportunity to cross-examine witnesses at the trials of the other men. Instead, he was confronted "only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence."31

The principles behind the confrontation clause were delineated further in 1934 by the Court's decision in *Snyder v. Massachusetts*.32 The *Snyder* Court held that the defendant's constitutional rights were not violated when he was absent from the jury's view of a murder scene.33 Justice Cardozo, writing for the Court, stated that the right to confront "is limited to the stages of the trial when there are witnesses to be questioned."34 The jurors' viewing of the murder scene public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

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28. Id. at 242-43.
30. Id. at 55, 61. Two co-conspirators pled guilty and an additional one was found guilty at trial. Id. at 49.
31. Id. at 55. The Court stated that the defendant can be convicted only "by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." Id.
32. 291 U.S. 97 (1934).
33. Id. at 110, 122. Justice Cardozo reasoned that though a defendant's presence will always satisfy the constitutional right, his absence from a particular stage of a proceeding is not necessarily a denial of the right to confront accusers. Id. at 117.
34. Id. at 107. The Court restated the purpose of the confrontation clause: "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination." Id. (quoting *Dowdell v. United States*, 221 U.S. 325, 330 (1911)).
was regarded as a mechanical and formal stage of the trial, not as a stage where evidence was collected and cross-examination was possible.\textsuperscript{35}

Justice Cardozo assumed, for the sake of argument, that the right to confront one’s accusers was a condition of due process, as guaranteed by the fourteenth amendment.\textsuperscript{36} Taking the record as a whole, the practice in \textit{Snyder} was not “so flagrantly unjust that the Constitution of the United States steps in to forbid it.”\textsuperscript{37}

c. Modern Interpretations

Invocation of the right of confrontation has become more common since the 1965 decision in \textit{Pointer v. Texas}.\textsuperscript{38} This decision applied the confrontation clause to the states as a fundamental right encompassed by the fourteenth amendment’s guarantee of due process.\textsuperscript{39} In the years since \textit{Pointer}, many important appeals have come to the United States Supreme Court from the state supreme courts.\textsuperscript{40}

\textit{Pointer} also represents the first case of a second category of confrontation cases. Up to this point, the appellate courts were primarily concerned with defining the constitutional exceptions to the confrontation clause. But \textit{Pointer} and its companion case, \textit{Douglas v. Alabama},\textsuperscript{41} addressed the scope of the right to confront where some confrontation had actually taken place.\textsuperscript{42}

\textsuperscript{35} \textit{Id.} at 114-15. The dissent took issue with this conclusion, stating that the nature of the view, and the presence of all other parties (judge, stenographer, jury, prosecutor, defense counsel) makes the view evidentiary in character. \textit{Id.} at 123-26 (Roberts, J., dissenting).

\textsuperscript{36} \textit{Id.} at 106. The fourteenth amendment states, in relevant part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. \textsc{const.} amend. XIV, § 1.

\textsuperscript{37} \textit{Snyder}, 291 U.S. at 115.

\textsuperscript{38} 380 U.S. 400 (1965).

\textsuperscript{39} \textit{Id.} at 403.

\textsuperscript{40} \textit{E.g.}, Maryland v. Craig, 110 S. Ct. 3157, 3170-71 (1990) (Defendant unsuccessfully challenged a state statute permitting a young victim of sexual abuse to testify via closed-circuit television.); Coy v. Iowa, 487 U.S. 1012, 1021-22 (1988) (Defendant successfully challenged state statute requiring young victims of sexual abuse to testify from behind one-way screens.); Kentucky v. Stincer, 482 U.S. 730, 747-48 (1987) (Defendant unsuccessfully challenged conviction after being excluded from hearing to determine competency of child witnesses; confrontation clause not implicated where no evidence is taken.); Ohio v. Roberts, 448 U.S. 56 (1980) (Defendant unsuccessfully challenged use of testimony given during a preliminary hearing.); Chambers v. Mississippi, 410 U.S. 284 (1973) (Defendant successfully challenged the common-law rule preventing him from questioning his own witness, who testified against him.); California v. Green, 399 U.S. 149 (1970) (Defendant unsuccessfully challenged admissibility of out-of-court statement of witness, who testified at trial and was subject to cross-examination.).

\textsuperscript{41} 380 U.S. 415 (1965).

\textsuperscript{42} In \textit{Pointer}, the Court found that the defendant’s right of confrontation had
This second category of cases, those where confrontation is permitted but the effectiveness of cross-examination is questioned, has yielded results based on rather literal interpretations of the confrontation clause.\textsuperscript{43} The Court, however, has continued to observe the

been denied where he came face-to-face with his accuser only at a preliminary hearing where he was not represented by counsel. \textit{Pointer}, 380 U.S. at 406-07. Likewise, in \textit{Douglas}, the Court found that the defendant's right of confrontation was denied where an accomplice's statement was read into the record. The accomplice could not be cross-examined because he claimed his fifth amendment right not to be compelled to be a witness against himself. \textit{Douglas}, 380 U.S. at 418-19. In both of these cases, the Court was not merely concerned that a confrontation literally occurred. Instead, the Court inquired further into the quality of the confrontation to determine whether the defendant had a full opportunity to cross-examine his accuser. \textit{See also 5 Wigmore, supra note 19, § 1365, at 28} (Confrontation clause exists to ensure cross-examination, the essential element of a fair jury trial.).

The United States Supreme Court found a constitutional violation where the defendant was not allowed to cross-examine his own witness. \textit{Chambers v. Mississippi}, 410 U.S. 284 (1973). The common law had allowed cross-examination only for "adverse" witnesses. In \textit{Chambers}, although the witness implicated the defendant by giving a different version of the facts than he did in a pretrial statement, the trial court did not consider him to be an "adverse" witness. \textit{Id.} at 297. The Supreme Court rejected this formal distinction and found that the witness' interests were, in reality, hostile to those of the defendant: "We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word 'against.'" \textit{Id.} at 298. Thus, stated the Court, the defendant is not afforded due process of law without confronting this witness. \textit{Id.}

The Court explored the scope of the right of confrontation in \textit{California v. Green}, 399 U.S. 149 (1970). In \textit{Green}, the Court held that the defendant's right was not violated even though the witness had a loss of memory. Thus, the witness' testimony given at a pretrial hearing was admissible. \textit{Id.} at 158-61.

The Court considered similar facts 10 years later in \textit{Ohio v. Roberts}, 448 U.S. 56 (1980). Though the witness in \textit{Roberts} did not appear at trial, the witness' pretrial testimony was admitted because the defendant's counsel engaged in meaningful cross-examination at the pretrial hearing. \textit{Id.} at 70-71. The Court also repeated the suggestion of \textit{Green} that the mere opportunity to cross-examine at a pretrial hearing, without actual cross-examination, might be sufficient to satisfy the constitutional right of confrontation. \textit{Id.} at 70 (citing \textit{Green}, 399 U.S. at 200 n.8 (Brennan, J., dissenting)).

Most recently, the Court has considered the quality of confrontation in the special case where young victims of alleged sexual abuse testify against the alleged abuser. In \textit{Coy v. Iowa}, 487 U.S. 1012 (1988), the Court held that a state statute allowing any young victim of abuse, as a matter of right, to testify from behind a one-way screen was unconstitutional. But, in \textit{Maryland v. Craig}, 110 S. Ct. 3157 (1990), the Court held that the confrontation clause does not prohibit a victim from testifying by closed-circuit television if a finding of necessity is made. \textit{Id.} at 3171. Thus, the right to confront includes only the right of the accused to face the accuser and not the right of the accused to have the accuser face the accused, as a dissent argued it should. \textit{Id.} at 3171-76 (Scalia, J., dissenting) (Text of sixth amendment was intended to ensure a procedure where the witness would endure face-to-face confrontation while testifying, thus assuring reliable evidence.).

\textsuperscript{43} For a thorough discussion of the two categories of confrontation clause juris-
hearsay exceptions when considering the first category of confrontation cases, those concerning the admissibility of out-of-court statements where no confrontation takes place.44 In two recent cases, United States v. Inadi,45 and Bourjaily v. United States,46 the Court admitted out-of-court statements by co-conspirators.47 Furthermore, the Court stated that “firmly-rooted exceptions” to the hearsay rule may be presumed constitutionally sound without separate analysis.48

B. Right of Confrontation and Discretionary Sentencing

1. Decisions of the United States Supreme Court

As discussed above, the confrontation clause has been invoked at trials and at pre-trial hearings to ensure that no defendant's guilt is based upon unreliable information. To achieve this purpose, the right of confrontation has been applied at all stages that have a bearing on a defendant's guilt.49 However, the United States Supreme Court has never held that the right of confrontation applies equally to the penalty phase of trial.50

Williams v. New York51 is the only Supreme Court case which deals squarely with this question. In Williams, the defendant was convicted of murder and sentenced to death.52 At sentencing, the judge considered information53 contained in a mandatory presentence report that was prepared by a probation officer. The defendant argued on

prudence and the different analysis involved with each, see Shaviro, The Supreme Court's Bifurcated Interpretation of the Confrontation Clause, 17 HASTINGS CONST. L.Q. 383, 386-97 (1990).

44. See id. at 392-97.
47. In Inadi, the Court considered statements made during the course of conspiracy, obtained by an authorized wiretap, to be more reliable than in-court statements. Inadi, 475 U.S. at 395. And in Bourjaily, the Court held that the hearsay exception for co-conspirator statements contained in the Federal Rules of Evidence is also an exception to the confrontation clause. Bourjaily, 483 U.S. at 183-84 (citing FED. R. EVID. 801(d)(2)(E)).
48. Bourjaily, 483 U.S. at 183-84.
49. See, e.g., Snyder v. Massachusetts, 291 U.S. 97 (1934) (Defendant has a right of confrontation when that right has a substantial relation to his opportunity to defend himself.).
50. The penalty phase is the portion of a criminal proceeding where an offender (a defendant who has been found guilty or who has pled guilty) is sentenced. In contrast, the guilt phase is that portion of a criminal proceeding where a jury hears evidence and determines guilt or innocence. See Williams v. New York, 337 U.S. 241, 246-47 (1949).
51. Id.
52. Id. at 242.
53. The judge learned that the defendant had confessed to or had been a participant in 30 prior burglaries, although he had not been convicted of any of the burglaries. Id. at 244.
appeal that he was denied due process because the sentence was "based upon information supplied by witnesses with whom [he] had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal." The Court affirmed the conviction and held that due process does not include a right to face accusers at the penalty phase of a trial.

The Court centered its discussion around the history of evidentiary limitations at sentencing. The Court noted that, in both England and America, courts have always exercised "wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed." Wide discretion promotes the objective that "the punishment should fit the offender and not merely the crime."

Williams rests on a crucial distinction between the guilt phase of a criminal proceeding and the penalty phase. The strict evidentiary rules of a trial protect a defendant by ensuring that only reliable evidence is used to determine guilt or innocence. Also, the defendant is protected by rules which prohibit irrelevant evidence. But, under the sentencing policies in use at the time of the Williams decision, the narrow rules which confined a trial court as to the question of a defendant's guilt or innocence, did not so confine the court in imposing the sentence. The policy basis for this varying treatment of evidence is that a court trying to fit a punishment to the particular

54. Id. at 243 (quoting People v. Williams, 298 N.Y. 803, 804, 83 N.E.2d 698, 699 (1949)).
55. Id. at 251.
56. Id. at 246-47.
57. Id. at 246. The Court noted that such discretion is manifested in the Federal Rules of Criminal Procedure. Id. (citing Fed. R. Crim. P. 32).
58. Id. at 247. The Court added, "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." Id. In New York, it was the policy for a sentencing judge to consider an offender's "past life, health, habits, conduct, and mental and moral propensities." Id. at 245.
59. If a tribunal is "concerned solely with the issue of guilt of a particular offense[.]," [the tribunal should not be] influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct." Id. at 247.
60. Id. at 248-49. In other words, where there is more discretion in sentencing, there is a greater justification for the distinction between the two phases. This implies that, where there is less discretion in sentencing, as there is today, there is less justification for the distinction.
61. Even where a judge has wide discretion in issuing a sentence, however, that sentence cannot be based on misinformation. See, e.g., United States v. Tucker, 404 U.S. 443, 447 (1972) (Court reversed sentence that was based on judge's consideration of two prior convictions which were later found unconstitutional.).
needs of the offender and the situation requires information that is not directly relevant to proof of the commission of the crime.62

The Court further justified its decision by noting that extending the procedural rules of the guilt phase to the penalty phase would be impractical.63 Requiring in-court presentation of all evidence used at sentencing, the Court stated, would impede "efforts to improve the administration of criminal justice."64 Assuming that efficiency and accuracy in fact-finding are sometimes in conflict, it is clear that practicality is a feature the Court values highly.

Williams v. New York was reaffirmed a decade later in Williams v. Oklahoma.65 In this case, a defendant was sentenced to death after the state's attorney gave an unsworn statement at the sentencing hearing. The statement recounted the details of the defendant's crime and his criminal record.66 The Court, citing Williams v. New York, held that the defendant was not denied due process by the judge's consideration of the undisputed facts when giving the sentence.67

Although Williams v. New York has not been overruled, the Supreme Court has noted that there are exceptional situations where that holding must yield. In Specht v. Patterson,68 the Supreme Court held that a defendant has the right to confront his accusers if new fact-finding at a sentencing hearing is the equivalent of a separate

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62. "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." Williams, 337 U.S. at 247.
63. "The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues." Id. at 250.
64. Id. at 251.
66. Id. at 579-80.
67. The Court stated:
   [O]nce the guilt of the accused has been properly established, the sentencing judge . . . is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but 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.
   . . . [T]he State's Attorney's statement of the details of the crime and of petitioner's criminal record—all admitted by petitioner to be true—did not deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination.
   . . . Upon [the guilty] plea it became the duty of the trial judge to impose an appropriate sentence . . . . Necessarily, the exercise of a sound discretion in such a case required consideration of all the circumstances of the crime . . . . In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.
   Id. at 584-85 (footnotes omitted).
68. 386 U.S. 605 (1967).
criminal proceeding. In Specht, the defendant was convicted of a criminal sexual offense with a juvenile. After a jury entered a guilty verdict, he was sentenced under a separate statute, the Sex Offenders Act, which may be applied at sentencing if the trial court believes that the offender is a continuing threat to public safety. The defendant was given an indeterminate sentence of up to life in prison.

Pointing out that the second statute requires findings of fact that were not included in the first statute, the Court held that the application of a new statute was actually a "new charge." Thus, the defendant was entitled to due process, which included the right to "be confronted with witnesses against him [and to] have the right to cross-examine [them]."

The Supreme Court has shown that Williams v. New York has other limitations as well. In Gardner v. Florida, the Court held that a defendant sentenced to death was denied due process by the judge's use of information in a presentence report that was not revealed to the parties. Though the facts of Gardner were similar to Williams, the Court stated that Williams did not apply directly because the defendant in Gardner did not have an opportunity to challenge the information. Also, the defendant in Gardner was given the penalty of death, a penalty whose procedures require closer examination.

The Gardner decision linked the application of the due process clause to the critical stage theory. The Gardner Court stated that

69. Id. at 610.
70. The defendant was originally charged with only the first statute. The second statute was applied at sentencing by the trial judge, who considered the underlying conviction and the additional factors of "whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill." Id. at 608. Thus, the defendant was subjected to an additional charge at sentencing which carried an additional sentence.
71. Id. at 607.
72. In Specht, the additional finding of fact was the defendant's danger to society. This factor was not an element of the underlying crime, which considered only the defendant's conduct. Id. at 608.
73. Id. at 610.
74. Id.
76. Id. at 356.
77. Id. at 357-58. The Court stated:
[D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
78. The critical stage theory serves the function of determining when the right to

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sentencing is a critical stage of a criminal proceeding, a proposition supported by *Mempa v. Rhay* 79 and *Specht v. Patterson*. 80 The defendant in *Gardner* was denied due process because his attorney could not attack the information contained in the presentence report. Thus, the sentencing phase is recognized as an important stage where an offender’s rights must be protected. Part of the protection required by *Gardner* is a limit on the judicial discretion that existed at the time of *Williams*.

2. Decisions of the Eighth Circuit Court of Appeals

In the Eighth Circuit, *Williams* has been interpreted in various ways. In an early case, the Eighth Circuit held that the trial court’s use of information from the probation officer’s report was consistent with due process. 81 Most Eighth Circuit cases applying *Williams* have allowed wide latitude to courts in their sentencing procedures. 82 *Williams* was applied differently in 1973, however, when an Eighth Circuit panel interpreted it to *require* a unique and individualized sentence. 83 But the most recent case applying *Williams* properly construed it to give a judge flexibility to issue any reasonable sentence. 84

By contrast, the Eighth Circuit has largely forgotten *Specht v. Patterson*. 85 A dissenting opinion in *United States v. Dace* 86 utilized *Specht* to counsel, as guaranteed by the sixth amendment, applies. *See* United States v. Wade, 388 U.S. 218, 227 (1967).

80. 386 U.S. 605 (1967).
81. Friedman v. United States, 200 F.2d 690, 697 (8th Cir. 1952). The court stated, “The contention of the appellants that they were denied due process ... is, we think, sufficiently answered by the opinion of the Supreme Court in *Williams v. New York*.” *Id.* (citation omitted).
82. *See*, e.g., Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980) (Lack of standards for jury in determining length of sentence is constitutionally sound.); United States v. Short, 597 F.2d 1122 (8th Cir. 1979) (Trial court was within its discretion to consider fact that defendant gave a forged copy of her college transcript to probation officer.).
83. Woosley v. United States, 478 F.2d 139, 143-44 (8th Cir. 1979) (Judge may not apply a mechanical sentence but must follow *Williams*’ individualized sentencing guidelines; judge must determine type and extent of punishment to fit the offender.).
84. United States v. Blade, 811 F.2d 461 (8th Cir. 1987). The *Blade* court held that the trial court properly considered hearsay implicating defendant in a shooting because the defendant did not show that the challenged evidence was materially false or unreliable and was the basis of his sentence. *Id.* at 469. The *Blade* decision quoted from *Williams* extensively and asserted that “the rationale of *Williams v. New York* . . . still applies.” *Id.* at 468.
85. 386 U.S. 605 (1967).
86. 502 F.2d 897 (8th Cir. 1974).
support the proposition that additional allegations should be proved at trial, rather than argued at sentencing to increase the sentence. But in many intervening cases, Specht has been used for the more general proposition that due process at sentencing requires a hearing. Some cases have applied Specht in the context of a civil commitment hearing. Only recently has Specht been applied as intended to ensure that defendants receive the benefits of confrontation at sentencing where additional fact-finding was necessary. These decisions indicate that the central proposition in Specht may not be fully understood. Not surprising then, without such an understanding, courts have not used Specht to invoke more constitutional protections for offenders at sentencing.

C. The Sentencing Guidelines

The Sentencing Reform Act of 1984 (the Act) enacted fundamental sentencing reforms. The Act’s chief purpose was to create sentences which are more uniform and consistent. To accomplish

87. Id. at 901 (Lay, J., dissenting).
88. See United States v. Luster, 896 F.2d 1122, 1129 (8th Cir. 1990) (Due process requires a hearing but does not require a jury trial on each fact that results in an increase in a sentence.); United States v. Gooden, 892 F.2d 725, 728 (8th Cir. 1989) (Constitution does not demand a standard of proof for factual issues at a sentencing hearing.); Irwin v. Wolff, 529 F.2d 1119, 1122 (8th Cir. 1976) (In a habeas corpus proceeding, a federal court may use a state court’s finding of facts if the federal court has examined the proceeding transcripts and is convinced the proceedings are fair.).
90. United States v. Blade, 811 F.2d 461, 468-69 (8th Cir. 1987) (applying Specht to sentencing under the Special Dangerous Offenders Act but finding that the sentence did not rely on unreliable hearsay testimony). See also United States v. Duardi, 384 F. Supp. 861, 867 (W.D. Mo. 1973) (requiring, for increase in sentence, that defendant be both a “special offender” and dangerous).
92. The Act promoted goals which were first expressed more than a decade earlier. Judge Marvin Frankel, United States District Court for the Southern District of New York, was the most visible proponent of the reforms furthered by the Act. U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 2-3 (June 18, 1987). Judge Frankel suggested more uniform sentences in a series of lectures at the University of Cincinnati Law School, which were published at Frankel, Lawlessness in Sentencing, 41 U. CIN. L. REV. 1 (1972).
this, it circumscribed the discretion of a sentencing judge by prescribing a narrow range of possible sentences. 93

The new approach embodied in the Act represented a distinct break from the "outmoded rehabilitation model" 94 used in the past. The rehabilitation model was considered ineffective because then-current prison conditions were not conducive to rehabilitation and, even if they were, the parole commission was unable to detect when a prisoner was finally rehabilitated. 95 Thus, the 1984 reform consisted of "a totally new and comprehensive sentencing system . . . based on a coherent philosophy." 96

Though the sentencing reform legislation sought to ensure the fairness and certainty of sentences and sentencing practices, the legislation also retained some flexibility within a prescribed range. Specifically, the Act provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense . . . for the purpose of imposing an appropriate sentence." 97 The Sentencing Commission gave this section effect by requiring a probation officer to prepare a presentence report, commenting on the offender's personal characteristics. This report is then used by the sentencing judge to determine an appropriate sentence. 98 If there is a dispute between the parties as to any factor in the presentence report, "the court may consider relevant

94. Id. at 38, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3221. The new approach has not been received with unanimous approval. One member of the Fortier panel, Chief Judge Donald P. Lay, has expressed displeasure with the policy embodied in the 1984 reforms:

[The present criminal justice system] is accomplishing nothing more than exorbitantly wasting tax dollars, creating a warehouse of human degradation and, in the long run, breeding societal resentment that causes more crime.

In the federal system the commitment to . . . sentence by the crime and not by the individual is simply a corollary to this societal attitude.

. . . .

With our nation facing both societal and fiscal crises of unrivaled proportions, we must move quickly and forcefully to overhaul the current system.

96. Id. The Fifth Circuit has noted that "Congress abandoned the maxim that 'the punishment should fit the offender and not merely the crime.'" United States v. Burch, 873 F.2d 765, 768 (5th Cir. 1989) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).
information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." 99

D. Confrontation at Sentencing Under the Guidelines

Since the sentencing guidelines were enacted, federal courts have routinely followed the procedures stated by the new policy. 100 But the change in sentencing philosophy has not been accompanied by a change in the method of analysis of defendants' constitutional challenges. Despite the fact that the new sentencing policy gives greater

99. Id. at § 6A1.3(a). The Commission explained:

In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing consequence. This situation will no longer exist under the sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.

Id. at § 6A1.3, comment.

For a description of the hazards of a system where casual factfinding attains great importance, see Note, How Unreliable Factfinding Can Undermine Sentencing Guidelines, 95 YALE L.J. 1258 (1986). The Note points out that factfinding at sentencing hearings has an unwarranted degree of error. The Note likens this to putting a fresh coat of paint on an old car—it looks better but actually works no better than before. Id. at 1260.

100. The sentencing guidelines themselves were upheld as constitutional in Mistretta v. United States, 109 S. Ct. 647 (1989), against a claim that the Sentencing Commission's status as an article III body violates the case and controversy clause and that the Commission's existence violated the separation of powers. The Court noted that the Commission was constitutionally sound, considering the "flexible understanding of separation of powers . . . ." Id. at 659. Also, the Court said Congress could assign to the courts duties that are "'necessary and proper... for carrying into execution all the judgments which the judicial department has power to pronounce.'" Id. at 663 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825).

Justice Scalia disagreed in a strident dissent:

Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence, to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, as its name suggests, it is a prescribed structure, a framework, for the conduct of Government. In designing that structure, the Framers themselves considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document. That is the meaning of the statements concerning acceptable commingling made by Madison in defense of the proposed Constitution, and now routinely used as an excuse for disregarding it. . . . He would be aghast, I think, to hear those words used as justification for ignoring that carefully designed structure so long as, in the changing view of the Supreme Court from time to time, 'too much commingling' does not occur.

Id. at 682-83 (Scalia, J., dissenting) (citations omitted; emphasis in original).
emphasize to fact-finding at sentencing, courts have not made adjustments in the legal standards which are applied.

Many courts cite two cases, both decided before the sentencing guidelines were enacted, which have shaped the law in this area. United States v. Marshall stated that any information may be considered so long as it has "sufficient indicia of reliability to support its probable accuracy . . . ." Marshall followed United States v. Fatico, the case which gave its name to the "Fatico hearing." The Court in Fatico held that hearsay may be considered "where there is good cause for the nondisclosure of [the declarant's] identity and there is sufficient corroboration by other means."

While a few courts have discussed the right of confrontation somewhat explicitly, most courts of appeals typically analyze Fortier-type situations on due process grounds, as was done in Williams. A prototypical case is the Tenth Circuit's decision in United States v. Beaulieu. The Beaulieu court relied in part on Williams in refining the "differences between the guilt phase and the sentencing phase of a criminal proceeding." Thus, the court stated, an offender does not have an absolute right of confrontation at sentencing. "We believe the better rule, therefore, is that reliable hearsay . . . may be used at sentencing to determine the appropriate punishment."


102. 519 F. Supp. at 754.

103. 579 F.2d 707 (2d Cir. 1978).

104. Id. at 713.

105. See, e.g., United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir. 1990) (Confrontation rights of an offender are severely restricted at sentencing hearing.); United States v. Luna, 734 F. Supp. 552, 554 (D. Me. 1990) (Confrontation right is insufficient to preclude use of reliable hearsay at noncapital sentencing proceedings.).

106. Appellant was found guilty after a fairly conducted trial. His sentence followed a hearing conducted by the judge. Upon the judge's inquiry as to why [the death] sentence should not be imposed, the defendant made statements. His counsel made extended arguments. The case went to the highest court in the state, and that court had power to reverse for abuse of discretion or legal error in the imposition of the sentence. That court affirmed. We hold that appellant was not denied due process of law.


107. 893 F.2d 1177 (10th Cir. 1990).

108. Id. at 1180.

109. Id.

110. Id. at 1181. The Tenth Circuit applied the same reasoning again in United States v. Reid, 911 F.2d 1456, 1464 (10th Cir. 1990) (reliable hearsay may be used at sentencing). Most other circuits have applied a similar test. See United States v. Sciarrino, 884 F.2d 95, 97 (3d Cir. 1989) ("[W]e reject [the] contention that the district courts may never rely in a sentencing hearing on hearsay evidence for the truth
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Beaulieu concluded that the offender was not denied due process.\textsuperscript{111} The problem presented in Fortier was perhaps dealt with best in United States v. Luna.\textsuperscript{112} Luna relied on Williams and Beaulieu to decide that the government's information may be relied upon to increase the offender's sentence.\textsuperscript{113} The Luna court also rejected the approach taken in United States v. Castellanos,\textsuperscript{114} where that court did not rely on any particular precedent at all.\textsuperscript{115}

Prior to Fortier, United States v. York\textsuperscript{116} was the most frequently cited case in the Eighth Circuit. York held that uncorroborated hearsay evidence contained in a presentence report may be considered by the sentencing judge provided the persons sentenced are given an opportunity to explain or rebut the evidence.\textsuperscript{117}

E. Summary of Background

Traditionally, courts have had wide latitude in determining what information will be considered at sentencing. The sentencing reforms of Congress in 1984 sought to narrow the range of possible sentences and to make them predetermined by the facts of the case. This change in policy has had little, if any, impact on courts' analyses of whether the right of confrontation may be invoked at a sentencing hearing.

\textsuperscript{111} Beaulieu, 893 F.2d at 1181.
\textsuperscript{112} 734 F. Supp. 552 (D. Me. 1990).
\textsuperscript{113} \textit{Id.} at 554-55.
\textsuperscript{114} 882 F.2d 474 (11th Cir. 1989).
\textsuperscript{115} "No specific rationale for this conclusion [in Castellanos] and no basis for that conclusion, other than that set forth above, is stated in the opinion." Luna, 734 F. Supp. at 554.
\textsuperscript{116} 830 F.2d 885 (8th Cir. 1987) (per curiam).
\textsuperscript{117} \textit{Id.} at 893. \textit{See also} United States v. Evans, 891 F.2d 686 (8th Cir. 1989) (Trial court could consider estimate of state chemist regarding defendant's drug manufacturing capability even though the chemist himself did not testify at the sentencing hearing.).
II. CASE DESCRIPTION AND ANALYSIS

A. The Decision in United States v. Fortier

1. Facts

Michael Fortier was arrested on December 3, 1987, in Grand Forks, North Dakota, for possession of cocaine. Law enforcement officers found 139 grams of cocaine in Fortier's clothing after stopping and searching his vehicle. No charges were filed at that time.¹¹⁸

On April 5, 1988, an informant told law enforcement officers he had seen Fortier give approximately one pound of cocaine to another person. The informant also surrendered approximately 249 grams of cocaine that allegedly belonged to Fortier. Several undercover attempts to purchase cocaine from Fortier were unsuccessful.¹¹⁹

On October 26, 1988, federal officers indicted Fortier, relying chiefly on evidence from his first arrest. Count I charged Fortier with possession of the 139 grams of cocaine found in his clothing in December 1987. Count II charged him with possession of the 249 grams of cocaine obtained from the confidential informant. Count III charged him with conspiracy to distribute one pound of cocaine, based on the informant's statement of Fortier's interaction with the other person.¹²⁰

When Fortier pled guilty to Count I, Counts II and III were dismissed. The Government recommended a sentence of twenty-seven months, as had been agreed to during the plea negotiations. At the sentencing hearing, counsel for Fortier argued that there was insufficient proof that Fortier actually possessed the cocaine identified in Count II to include that information in the sentencing determination. Nonetheless, the trial court found, by a preponderance of the evidence, that Fortier had possessed the cocaine identified in Count II.¹²¹ The court therefore considered this amount in calculating a sentence of twenty-seven months and a $3,050 fine.¹²²

2. Discussion

The Eighth Circuit reviewed the district court's decision with respect to one issue only: the confrontation clause.¹²³ The court of appeals stated that the evidence considered at the sentencing hear-

¹¹⁸ United States v. Fortier, 911 F.2d 100, 101 (8th Cir. 1990).
¹¹⁹ Id.
¹²⁰ Id. at 101-02.
¹²¹ Id. at 102. The court found this by using the presentence report, prepared by an employee of the United States Probation Office. Id.
¹²² Id. at 103.
¹²³ Id. Part II of the Eighth Circuit's opinion begins: "Fortier's most compelling argument on appeal, and the ground on which we reverse his sentence, is that the
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ing was hearsay of a type not admissible under either procedural rules or the sentencing guidelines.

In its brief discussion of the confrontation clause, the court stated plainly that “the Confrontation Clause . . . does apply” at a sentencing hearing. After establishing this, the court dismissed the co-conspirator exception as inapplicable. The court found that the fact-finding contained in the presentence report, which was relied upon by the district court, was not subject to cross-examination and thus was a violation of the confrontation clause.

B. Analysis

The opinion in Fortier is faulty for two reasons. First, the court’s analysis is abrupt and incomplete. Second, after incorrectly stating the law regarding the application of the confrontation clause to the sentencing phase, the court applied the confrontation clause directly, rather than applying the fourteenth amendment’s due process protections.

The Eighth Circuit reached its decision without discussing several relevant cases, including Williams v. New York. The lack of completeness in the analysis is likely the reason for the erroneous state-

evidence relied upon by the District Court to include the 249 grams of cocaine in calculating his sentence violated his rights under the Confrontation Clause.” Id.

124. A court is required, if facts in a presentence report are disputed, either to resolve the dispute or to state that the court is not considering disputed facts when issuing a sentence. FED. R. CRIM. P. 32(c)(3)(D).

125. If the parties dispute facts included in the presentence report, a court may resolve the dispute only with information which has “sufficient indicia of reliability to support its probable accuracy.” SENTENCING GUIDELINES, supra note 98, § 6A1.3(a).

126. Fortier, 911 F.2d at 103. Fortier cites, as authority for this proposition, United States v. Streeter, 907 F.2d 781, 791-92 (8th Cir. 1990). This assertion in Streeter is, however, completely unsupported by any authority from either the Eighth Circuit or the Supreme Court.

127. Fortier, 911 F.2d at 104.

128. Id. at 102, 104.

129. Id. at 103.

130. 337 U.S. 241 (1949) (Due process clause does not require that a person convicted after a fair trial be confronted with and permitted to cross-examine witnesses.).

The Fortier court received little assistance from defense counsel, whose brief was abrupt and devoid of judicial authority. The defendant’s argument for a reversal based on the confrontation clause read, in its entirety, as follows:

Article 6 provides in part;

“(T)he accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”

The unreliable informant wasn’t there. The SA of unknown reliability [sic] wasn’t there. The only witness against Fortier as to the conduct in Count 2 was the P.S.I.

It is difficult to confront and cross-examine a conclusory document prepared by an obviously prosecutorial probation officer from unknown sources alluding to unreliable information.

Fortier was denied his right to confront witnesses against him.
ment that the confrontation clause applies directly to a sentencing hearing.\textsuperscript{131} The court cited its recent decision in \textit{United States v. Streeter} \textsuperscript{132} as authority for this proposition; however, \textit{Streeter} itself is flawed because its statement of this rule cites no support.\textsuperscript{133} Meanwhile, the decision ignored many cases from the Eighth Circuit and other circuit courts which have interpreted the few applicable Supreme Court cases.\textsuperscript{134}

\textit{Fortier} stands alone in that it analyzes the issue in terms of the confrontation clause only.\textsuperscript{135} Nearly all precedent—from \textit{Williams} to present-day drug sentencing cases—indicates that the proper question is whether the defendant received due process.\textsuperscript{136} Though the confrontation clause is perhaps more workable because it is a bright line that has been clearly marked by decades of decisions, \textit{Williams} held that it simply does not apply at sentencing.\textsuperscript{137}

\textsuperscript{131} The confrontation clause has an indirect application at sentencing, which is recognized by applying a due process test. See supra text accompanying notes 105-11.

\textsuperscript{132} 907 F.2d 781 (8th Cir. 1990) (89-5179-ND).

\textsuperscript{133} See supra note 127.

\textsuperscript{134} See supra notes 84-89 and accompanying text. Recently, the Third Circuit indirectly criticized \textit{Fortier}, saying that, while it sympathizes with \textit{Fortier}'s goal, its own approach avoids "the doctrinal pitfalls that would accompany adoption of the \textit{Fortier} rationale." United States v. Kikumura, 918 F.2d 1084, 1103 n.19 (3d Cir. 1990).

\textsuperscript{135} The \textit{Fortier} approach has been reaffirmed in several cases since it was announced. See United States v. Lowrimore, 923 F.2d 590 (8th Cir. 1991) (Admission of hearsay statements violated confrontation clause.); United States v. Cammisano, 917 F.2d 1057 (8th Cir. 1990) (Confrontation clause applied at sentencing). But see United States v. Rivers, 917 F.2d 369 (8th Cir. 1990) (applying due process analysis).

\textit{Fortier} was applied with considerable disagreement, however, in United States v. Wise, 923 F.2d 86 (8th Cir. 1991) (per curiam), vacated and reh’g granted (March 15, 1991). The \textit{Wise} court explicitly stated that the confrontation clause applied at sentencing and enumerated the procedures the trial court should have taken. A dissent argued that the "better view" was that expressed by Kikumura and Beaulieu, where the confrontation clause was held not to apply and a due process clause analysis was employed. Id. at 87-88 (Gibson, J., dissenting). A concurring opinion expressed sympathy with the dissent but voted to reverse the conviction "only because . . . \textit{Fortier} compels such a holding." Id. at 87 (Wollman, J., concurring).

\textsuperscript{136} See, e.g., United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990); United States v. Beaulieu, 893 F.2d 1177 (10th Cir. 1990). See also supra note 110.

1. The Question Not Discussed by Fortier

Despite its faults, Fortier raises a provocative question: Considering that the sentencing reforms have created nearly automatic consequences for particular fact patterns, should the law respond by requiring confrontation during the sentencing phase of a criminal proceeding? The justifications for the current state of the law are not unassailable. However, few judges or commentators have attempted to argue for a change.\footnote{138}

A survey of the cases interpreting the confrontation clause reveals that the fundamental purpose of the clause is to guarantee accuracy by cross-examination so that no defendant is punished without first being found guilty in a fair and accurate trial. This purpose should be reexamined and the scope of the protection expanded to ensure that the degree of punishment is fair. Such an expansion of the purpose should not be undertaken lightly, especially considering that the current state of the law already recognizes that confrontation may be essential for due process.

a. The Distinction Between the Guilt Phase and the Penalty Phase

The rights conferred by the confrontation clause apply at all "criminal prosecutions."\footnote{139} This clause has been interpreted to require confrontation only at the guilt phase of a criminal proceeding. The distinction between the guilt phase of a criminal proceeding, at which guilt or innocence is determined, and the penalty phase, at which convicted offenders are sentenced, was drawn clearly in Williams v. New York.\footnote{140} Judges construe evidentiary rules strictly during the guilt phase "to prevent tribunals . . . from being influenced to convict for [an] offense by evidence that the defendant had habitually

\footnote{138. One exception is Taparauskas, An Argument for Confrontation at Sentencing: Bringing the Offender into the Sentencing Process, 8 CUMB. L. REV. 403 (1978). The article argued that Williams is based on a view of sentencing that existed at the time of the adoption of the Bill of Rights and should be updated. Id. at 438-39.}

\footnote{139. U.S. CONST. amend. VI.}

\footnote{140. 337 U.S. 241, 246-48 (1949); see also supra text accompanying notes 59-61.}
engaged in other misconduct."141 But in sentencing, a judge is not so confined because the "fullest information" is "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence."142 These arguments followed naturally from the then "modern philosophy of penology that the punishment should fit the offender and not merely the crime."143

The philosophy that undergirds Williams has been replaced by a newer philosophy. The general sentencing policy now in place, explicitly stated by Congress in 1984, is that sentencing should be consistent. While Congress allowed some degree of judicial discretion to remain,144 its overriding goal was to reduce the "unjustifiably wide range of sentences"145 by attaching uniform penalties to similar crimes committed under similar circumstances. The result can be virtually a formula which replaces discretionary sentencing with mandatory sentences determined by underlying facts.146

Considering this change in policy, it is clear that the facts considered at sentencing have more importance than they did before 1984. Instead of merely being relevant information whose impact on the sentencing decision was unknowable, now each fact may have a direct and certain consequence.147 The importance of Williams, which was premised upon a system which tailored a sentence to each offender, is diminished. One commentator said, "As applied to a sentencing reform system designed to limit the general range of information considered relevant in sentencing, to narrow the judge's discretion, and to exclude rehabilitative concerns in most instances, Williams could be considered thoroughly anachronistic."148

141. Id. at 247.
142. Id.
143. Id. (citing People v. Johnson, 252 N.Y. 387, 392, 169 N.E. 619, 621 (1930)).
144. See supra text accompanying notes 97-98.
145. See S. REP. No. 225, supra note 93, at 38, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3221.
146. See United States v. Burch, 873 F.2d 765, 768 (5th Cir. 1989) ("In adopting the [sentencing] guidelines, Congress abandoned the maxim that 'the punishment should fit the offender and not merely the crime.'" (quoting Williams v. New York, 337 U.S. 241, 247 (1949))).
147. There is no better example than Fortier's own experience. Though he was convicted of possessing 139 grams of cocaine, he was sentenced as if he were convicted of possessing 388 grams, based on information from an informant which was not introduced as evidence at the guilt stage of the trial. United States v. Fortier, 911 F.2d 100, 102 (8th Cir. 1990).
148. Schulhofer, supra note 139, at 762. The author reasoned as follows:

[RE]liance on Williams would seem particularly difficult because the Court's approval of flexible procedures in that case was quite explicitly grounded on their importance for the effective operation of a regime of indeterminate sentences, involving assessment of diverse facets of the offender's personality and an increase in the discretionary powers exercised in fixing punishments.
Given the underlying effect of the sentencing guidelines on the precedential value of Williams, the question arises as to whether a new doctrine should be adopted. Some Supreme Court decisions interpreting the confrontation clause suggest an argument that could be used to extend the right of confrontation to sentencing. For example, the Court, in Chambers v. Mississippi,149 rejected a conclusory label and held that a defendant's confrontation clause rights should depend on the degree to which his or her interests are at risk. The Court focused on the "function" of testimony, not its "form,"150 arguably allowing cross-examination whenever such would benefit a defendant. This rationale could also apply at sentencing, where a defendant can benefit by cross-examination just as much as at trial, despite the different purpose of the evidence presented at each stage. Similarly, if the same approach were applied to facts similar to those in Fortier, the Court might conclude that the potential harm to a defendant's interests is more determinative of whether the right exists than is the stage of the proceeding.

In addition, because substantial rights of an accused are affected, the sixth amendment right to assistance of counsel151 could be extended to confrontation at sentencing. In Mempa v. Rhay,152 the Court held that the defendant had a right to counsel at sentencing because sentencing is "a stage of a criminal proceeding where substantial rights of a criminal accused may be affected."153 Similarly, a defendant may need the right of confrontation at sentencing, since he or she may have substantial rights which are put at risk at that stage.

These arguments for applying the confrontation clause at sentencing were countered by the Court in Specht v. Patterson,154 which found a due process violation where a court did not permit confrontation at sentencing and where the fact-finding process amounted to a new

\[Id.\] (citations omitted).


150. The Court specifically identified the function of cross-examination as ensuring the "accuracy of the truth-determining process." \[Id.\] at 295. In Chambers, the Court held that the accused has an absolute right to confront and cross-examine damaging testimony. \[Id.\] at 297-98. Whether or not the accused put that witness on the stand is immaterial in defending that right. \[Id.\]

151. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. CONST. amend. VI.


153. In an attempt to revoke probation, the court allowed incriminating hearsay testimony from the probation officer of the accused. \[Id.\] at 132. During this proceeding the accused was not appointed counsel by the court. \[Id.\] at 131. In Mempa, the accused was charged with another crime at sentencing, thus, "substantial rights" were affected. \[Id.\] at 134.

154. 386 U.S. 605 (1967); see also supra text accompanying notes 68-74.
charge against the offender. The sentencing procedure in Specht is analogous to that in Fortier, in that the trial court imposed a new sentence because of facts presented at the sentencing hearing. Specht resolves the problem within the due process framework, but does so by elevating the rights of the offender to a degree that approximates the rights under the confrontation clause.

The facts in Specht are similar to those in Fortier, where the sentence was increased by a new finding of fact. Although a formal distinction between assessing a new sentence and increasing the sentence of an existing conviction exists, the result is the same—extended incarceration. Specht and Fortier can be reconciled, however, by viewing them as cases concerning situations where a trial court gives identical treatment to either a finding of fact or a new charge in increasing the defendant's sentence. In fact, Specht has been applied to a sentence issued under the sentencing guidelines in United States v. Blade, where the Eighth Circuit found that a "new charge" existed.

Because Fortier received the same sentence as if he had been convicted of Count I and Count II, the discretionary consideration of Fortier's second alleged possession of cocaine, supported at the sentencing hearing by triple hearsay, is arguably identical to a new charge. It is apparent that Specht could have been applied to the facts in Fortier to reverse the conviction without overhauling established law.

b. The Sufficiency and Practicality of a Due Process Analysis

Almost all jurisdictions facing this issue have applied a due process test which recognizes only the general principle of confrontation. The due process test permits hearsay evidence if it has "sufficient indicia of reliability." This test was applied in Williams v. New York.

The due process test as explained in Williams can be more beneficial, in the long run, for defendants. The Williams Court explained that technical violations of the confrontation clause should be ex-
cused because the additional information may ease defendants’ sentences.161 This is no longer true since additional factors can, and usually do, cause an increase in an offender’s sentence. A modern Court might argue, however, that a due process analysis is preferable because, with its inherent flexibility, it will bring about the result that appears most fair in the present case. This fairness principle may have been the real motivation for the rationale stated in Williams.

Regardless of the results of the due process test, it is clear that the due process test has the disadvantage of vagueness. The confrontation clause has been interpreted often and therefore has the advantage of offering a “brighter line” by which to make decisions. Under a confrontation clause analysis, inadmissible evidence is more easily distinguishable from admissible evidence.

The due process analysis is perhaps more desirable for reasons of practicality. Applying the confrontation clause could cause sentencing hearings to become longer and more complex. Some courts have stated that applying the confrontation clause to sentencing would be impractical.162 While this view shows a degree of honesty, it may undermine a criminal justice system that strives to assure just treatment and due process at every stage. An instance of unfairness, or the mere perception of unfairness, in an otherwise fair system could have damaging effects upon the public trust.163

Extending the confrontation clause to the sentencing phase is not, however, necessary to solving the problem of unfairness to offender-

161. Id. at 248-50. The Court stated that the purpose for changes in sentencing procedure was to reduce sentences and return rehabilitated offenders back to society as useful citizens. Id.

162. See, e.g., United States v. Agyemang, 876 F.2d 1264 (7th Cir. 1989). The Court stated:

There is also a practical reason for allowing hearsay: given the breadth of information properly allowable at a sentencing hearing, not allowing the court to consider hearsay could turn the sentencing hearing “into an endless parade of witnesses . . . .” To require the government to present live witnesses or other admissible evidence to support every assertion in a pretrial report, just as it must support every element of a crime at trial, would turn the sentencing hearing into a trial, something a sentencing hearing was not meant to be.

Id. at 1271 (citations omitted).

163. The recent securities fraud prosecution of Michael Milken, former investment banker at Drexel Burnham Lambert, provides a good example of how impractical a sentencing hearing can be if, because fairness is thought to be especially important, an offender is afforded all procedural rights: “A federal judge delayed the sentencing of Michael Milken . . . and ordered an unusual hearing to consider additional crimes the government has alleged Mr. Milken committed, but to which he hasn’t pleaded guilty.” Hearing Will Delay Milken Sentencing, Wall St. J., Sept. 28, 1990, at B6, col. 1. The government’s efforts to raise Milken’s sentence due to additional factors raised protests among some writers not usually associated with the rights of the criminally accused: “Prosecutors who originally sought a sentence of 520 years have decided the only “trial” they will risk is a sentencing hearing without niceties
The existing due process framework will give offenders the right to cross-examine witnesses when fairness so dictates. The decision in *Specht* implies that, when faced with a situation like *Fortier*, the Court may create a solution without drastically altering the application of the confrontation clause. Even without a new statement of the law by the United States Supreme Court, the principle of confrontation can be honored via the due process analysis if *Specht* is given its proper interpretation.

2. *Fortier* and *Stare Decisis*

Regardless of what the law *should* be, the right of confrontation does not currently exist at sentencing. However, following the time-honored principle of *stare decisis*, the Eighth Circuit should not implement such a right until the Supreme Court does so. Arguments favoring application of the confrontation clause at sentencing should not be implemented by a lower court. But, the arguments should be raised and discussed by the lower courts to prompt action by the Supreme Court.

**CONCLUSION**

Traditional notions of due process at sentencing hearings have merged with a new policy allowing only minimal discretion in sentencing. As a result, the sentencing decision has become more fact-dependent. The presentence report, prepared by a nameless proba-


It is interesting to note that the prolonged sentencing hearing actually benefitted the offender. At the sentencing hearing, which lasted approximately two weeks, one witness changed his earlier testimony, which was inculpatory of Milken, after he received immunity from prosecution. Crovitz, *Who Gets Presumption of Innocence? Milken, Not Prosecutors*, Wall St. J., Oct. 31, 1990, at A15, col. 6. Thus, there is evidence that procedural rights may benefit defendants even where unexpected. See United States v. Milken, No. SS 89 Cr. 41 (S.D.N.Y. Nov. 23, 1990) (allowing character evidence that was otherwise inadmissible during the sentencing hearing).

164. "*Stare decisis*" is the "[p]olicy of courts to stand by precedent and not to disturb settled point." It is the "[d]octrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." The doctrine is "grounded on [the] theory that security and certainty require that accepted and established legal principles, under which rights may accrue, be recognized and followed." *Black's Law Dictionary* 1406 (6th ed. 1990).

165. See, e.g., United States v. Jefferson, 906 F.2d 346 (8th Cir. 1990). *Jefferson* concerned a different legal issue but is an example of an intermediate appellate court deferring to the Supreme Court as the sole authority to initiate developments in the law: "The time has come, it seems to me, for a serious reexamination of the exclusionary rule .... This Court, however, is not the forum in which such a reexamination can take place." *Id.* at 352 (Bowman, J., concurring).
tion officer determines the fate of a criminal offender. But the probation officer, and the sources that officer uses, are not subject to cross-examination.

The facts contained in a presentence report are especially important in convictions involving illegal drugs, where the sentence is determined in part by the quantity of drugs. The quantity upon which a sentence is based can be, according to the sentencing guidelines, more than the quantity for which the offender was convicted. Because forty-four percent of federal criminal cases involve drug possession, this issue is one which frequently confronts our federal courts.

The Supreme Court has not yet addressed the issue presented by Fortier. Supreme Court review of the application of the confrontation clause and due process guarantees to the sentencing phase of a criminal action would clarify this area. This issue “is vital to the administration of sentencing proceedings under the Sentencing Reform Act.”

It is likely that the Court will not apply the confrontation clause directly to the sentencing phase. Instead, the Court should expand the principle of Specht v. Patterson to allow cross-examination when particular facts are the equivalent of a new prosecution. Appellate courts should take this approach to maintain consistency with Supreme Court precedent. By doing so, appellate courts could consider a broad range of information and still protect the criminal offender from the risk of being sentenced for crimes that have been alleged but not proven.

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167. United States v. Kikumura, 918 F.2d 1084, 1103 n.19 (3d Cir. 1990) (applying higher standards of proof and higher standards of reliability for hearsay evidence at a sentencing hearing; declined to adopt the Fortier approach but attempted to satisfy its concerns).
168. 386 U.S. 605, 608 (1967) (allowing confrontation if offender is charged with a separate offense at sentencing).