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SOME ASPECTS OF PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS CONSIDERED BY THE SUPREME COURT OF THE UNITED STATES

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When a state court admits evidence in a trial of a case before that court, or when the court uses information outside the evidence after the verdict has been rendered to enable it to exercise its function of imposing sentence in a criminal trial, such action by the court may be erroneous and may constitute reversible error. Whether it does or not is initially a question of state law and should be determined by the highest appellate court of the state. Under ordinary circumstances the decision by such appellate court will be final and will not be reviewed by the Supreme Court of the United States, simply because no federal question is involved. One is then within the field of the law of evidence and a further discussion of these problems is beyond the scope of this paper.

In many cases, however, it may be asserted that the circumstances are extra-ordinary, in that the court's ruling is both erroneous and also effective to deny to one of the parties that due process of law to which he is entitled under the Fourteenth Amendment to the Constitution of the United States before his life, liberty or property can be taken from him by any state. The latter contention may, of course, raise a federal question which requires a determination by the Supreme Court, and it is with this problem that this paper is concerned. To state the problem succinctly: Under what circumstances will the erroneous admission and use of evidence by a state court have the effect of depriving a person of life, liberty or property without due process of law, and so constitute a violation of the Fourteenth Amendment to the Constitution of the United States? That such conduct by the state court will rarely have that effect is clearly shown by the following discussion, based upon what are believed to be the only cases decided by the Supreme Court on this precise issue.

The Supreme Court of the United States has recently said, "Rules of evidence, being procedural in their nature, are peculiarly discretionary with the law-making authority, one of whose primary responsibilities is to prescribe procedures for enforcing its laws." [1] This declaration by the Court amounts to a re-affirmation of a well established rule that the final determination of the admissibility and of the use of evidence rests with the state courts, without restraint imposed by the due process clause of the Fourteenth Amendment, leaving to each state the power to prescribe the evidence which is to be received in its own courts.[2] The state

[1] Salsburg v. State of Maryland, 346 U. S. 545, 74 S. Ct. 280 (1954).
[2] Hawes v. Georgia, 258 U. S. 1, 12 S. Ct. 204, 66 L. Ed. 431 (1922).

court may commit error in its rulings on the admissibility of evidence, but it is settled that the due process clause gives to the Supreme Court no authority to review such errors, although they may be material, since they are regarded by the Court as being only erroneous constructions of state rules and laws, involving no federal question.[3]

To be distinguished from a merely erroneous ruling as to the admissibility of particular evidence is an erroneous ruling by a state court which entirely excludes evidence offered to rebut other evidence already admitted and which thus forecloses the proponent of such rebutting evidence from any opportunity to present it. This kind of ruling denies to the proponent his fundamental right to be heard and amounts to a denial of due process.[4] It would appear that the effect of an error by a state court as being violative of due process or not may well be a matter of degree, and if the error is serious enough to invade a fundamental right it will also be treated as a denial of due process and within the proscription of the Fourteenth Amendment. The various specific problems presented in attacks made upon the admission of evidence of various kinds and of that obtained by a variety of methods will be considered below. It should be noted that in every case cited the denial of due process was the basis for the objection to the admission and use of the evidence.

THE ADMISSION OF PERJURED TESTIMONY

It was not until 1935 that the Court was presented with the question whether the use of perjured testimony constituted a denial of due process, and then, as it turned out, the question was not material to a decision, since the petitioner for an original writ of habeas corpus was held not to have exhausted his state remedies in California.[5] Nevertheless the Court made a significant statement that if the district attorney had used perjured testimony, knowing it to be such (as the petitioner alleged he had done), that a conviction based thereon would rest upon a mere pretense of a trial and would be a denial of due process because such a trial would be inconsistent with the rudimentary demands of justice.[6] This dictum furnished the only clue as to the Court's attitude on the subject until 1942, when the question again arose upon certiorari to review an order of the Supreme Court of Kansas denying petitioner's application for a writ of habeas corpus.[7] Again the petition alleged that the conviction had resulted from the use of testimony known to the prosecuting attorney to be perjured, as well as from the suppression of evidence favorable to the petitioner. This time the Court could rule upon the precise question, and in doing so, held that the petitioner should be allowed to prove

[3] Buchalter v. New York, 319 U. S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1943).
[4] Saunders v. Shaw, 244 U. S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917).
[5] Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935).
[6] *Id.* at 112.
[7] Pyle v. State of Kansas, 317 U. S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942).

his allegations, because if they were true they would show a deprivation of rights guaranteed to the petitioner by the Constitution of the United States. This rule was once more approved by the Court in its dictum in a case decided three years later.[8]

The use of perjured testimony, in a criminal case, on behalf of the prosecution, when it is known to the prosecution that perjury has been committed, offends those principles which find their support in the fundamental conceptions of justice which the Court has many times said lie at the base of our civil and political institutions. To date the question has not been presented in any civil action.

It seems equally clear that the burden rests upon the petitioner to prove that the prosecution attorney knowingly made use of such perjured testimony. If this fact is not established to the satisfaction of the state court, and it finds that knowledge on the part of the prosecuting officer was not shown, its finding of lack of knowledge will not be disturbed where the record shows that the finding was justified from the facts before the state court. The Court has held that such a finding is simply the determination of a state question and presents no problem of due process.[9] This immediately suggests that the Court might find a denial of due process if the record clearly did not support the finding of lack of knowledge on the part of the prosecuting attorney. Such a case has not been before the Court.

From these decisions, then, it seems safe to say that a conviction based upon perjured testimony does violence to the due process clause only if it clearly appears that the perjured testimony was used by the prosecuting officer with full knowledge of its falsity, and that unless such knowledge is clearly established, there is simply no federal question presented.

RECANTATION OF TESTIMONY

Very closely related to the use of perjured testimony is action by a state court in refusing to set aside a conviction in a case in which a witness for the prosecution recants after the verdict and judgment have been entered. Such a state of facts carries a double implication. It indicates that the conviction may well have been based upon perjured testimony and that without such testimony there might easily have been insufficient evidence to establish guilt beyond a reasonable doubt. Whether or not a state court commits an error of law in refusing to set aside a conviction under these circumstances is not within the scope of our study. Our problem, on the contrary, is whether or not a state court which refuses to set aside such a conviction thereby denies to the defendant his life or liberty without due process of law.

This constitutional question has been presented to the Court only once,[10] and the Court very quickly disposed of the problem in

[8] White v. Ragan, 324 U. S. 760, 65 S. Ct. 978, 89 L. Ed. 1348 (1945).
[9] Hysler v. Florida, 315 U. S. 411, 62 S. Ct. 688, 86 L. Ed. 932 (1941).
[10] *Ibid.*

these words: "(Petitioner) cannot, of course, contend that mere recantation of testimony is in itself ground for invoking the Due Process Clause against a conviction." The position taken by the Court indicates quite clearly that the possible effect of perjury on the jury and the possible insufficiency of the evidence are both problems which concern the state alone, and that the state's solution of that problem will be of no concern to the federal judiciary. It should be noted that the record sustained the finding by the state court that there was no responsibility resting on the state officials for the use of the allegedly false testimony in the first place.

THE USE OF PRIOR RECORDED TESTIMONY

The use of testimony taken and recorded in a prior hearing or judicial proceeding is a common device in civil actions, representing a well established exception to the hearsay rule. In a criminal prosecution the problem of confrontation arises and the action of a state court in permitting the use of prior recorded testimony or of depositions, immediately suggests the possibility of an attack upon constitutional grounds. Strangely enough, however, such an attack has been pressed all the way to the Supreme Court only once,[11] and on that occasion the facts clearly showed that the defendants had appeared at the taking of a deposition of a witness against them and had fully cross-examined this witness. The use of the deposition at the trial was unsuccessfully challenged by the defendants under the due process clause, in spite of the fact that the witness was proven to be a non-resident and permanently absent. Affirming the conviction of the Court made it clear that whether the state court erred in its decision on the proper use of the deposition was not a federal question. It decided the constitutional question of due process by pointing out that the admission of the deposition was but a slight extension of the common law rule as to showing of non-availability of the witness and that the extension was not so fundamental as to amount to a deprivation of due process, since the defendant had been confronted with the witness and had cross-examined him. The Court apparently regarded the facts of confrontation and cross-examination as significant, and it could well be argued that they are an essential part of due process. Whether the Court will say so is a matter of conjecture until a proper case raises the question. A later decision of the Court dealing with this problem indirectly follows *West v. Louisiana.*[12]

THE USE OF DEMONSTRATIVE EVIDENCE

When there is introduced into evidence the lethal weapon, the tell-tale bullet, the blood-stained garment, the accusatory forgery, the identifying fingerprints and the marked ransom money, we meet the familiar objection to the use of such demonstrative evidence—it is too prejudicial and unduly inflames the minds of

[11] West v. Louisiana, 194 U. S. 258, 24 S. Ct. 650, 48 L. Ed. 965 (1904).
[12] DeLaRama v. DeLaRama, 241 U. S. 154, 36 S. Ct. 518, 60 L. Ed. 932 (1916).

the jury! Even if the admission of evidence of this sort might be deemed to be error, that problem is beyond the scope of this work. We ask only, is its admission, even though erroneous, a denial of due process?

The Court has passed upon this question in but two cases, and both of them involved convictions of murder in the California Courts.[13] Undoubtedly the evidence in both cases was highly prejudicial—particularly in the *Lisenba* case—and might well have had an effect on the jury which was highly prejudicial to the defendant. Nonetheless, the Court could find no denial of due process in either case, pointing out that the shocking nature of such evidence does not, for that reason alone, render its reception a denial of due process.

It is doubtful if any general principle can be deduced from this slight bit of authority, particularly since the Court did not elaborate upon the doctrine. It does seem clear, however, that the ordinary objection to such evidence will not avail to support the contention of a denial of due process. Only future cases will disclose what, if any, elements which might arise will cause such evidence to run counter to the due process clause.

EVIDENCE OF OTHER SIMILAR OFFENSES

It is a well established principle that evidence of other offenses, or of acts of misconduct, is not admissible to prove directly the commission of an act in issue, but that such evidence is admissible to prove intent, scheme, design, common plan or purpose, motive, identity and the like when any such factor is relevant to the issue of the commission of the act in question. If a state court erroneously admits such evidence there may be presented the question whether this error constitutes a denial of due process. Such ruling by a state court has been challenged in two criminal prosecutions by the defendant, on the ground that the admission of such evidence deprived him of due process.[14] The Court could find no violation of any federal constitutional right in either case, pointing out that the Fourteenth Amendment leaves the state free to adopt a rule of relevance, which it did in both instances, as shown

[13] Lisenba v. California, 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166 (1941)—rattlesnakes to which deceased had been forced to submit herself by defendant were admitted into evidence after being identified; Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947)—stocking tops found in defendant's room admitted, although they did not match the rest of the stockings found on deceased's body.

[14] Lisenba v. California, 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166 (1941)—in a murder prosecution for killing his wife, evidence of circumstances which would show that defendant had killed a former wife in Colorado was admitted to show intent and design to commit the offense charged; Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947)—stocking tops found in defendant's room admitted, where the tops of deceased's stockings were missing, "because this interest in women's stocking tops is a circumstance that tends to identify the defendant." The tops in defendant's possession did not match the stockings found on deceased's body. (Rehearing denied 332 U. S. 784, 68 S. Ct. 27, 92 L. Ed. 367.)

by the determination by the state supreme court that the admission of such evidence was not error under the state rule. It is interesting to conjecture what the result might have been if the Supreme Court of California had found that the trial court had committed error but that the error was not prejudicial and hence did not require a reversal. Would the Court say that an error in the application of such a rule of evidence would be a denial of due process? Would the decision that the error was not prejudicial be a denial of due process? It would appear that in such a case the rule that the state is free to determine its own rules as to the admissibility of evidence might not apply and that then a federal question would be presented. The Court has not said so, however.

ILLEGALLY OBTAINED EVIDENCE

Evidence which has been seized in connection with an unreasonable search and seizure or as an incident to an unlawful arrest is commonly described as illegally obtained evidence, although the Constitution itself does not use that terminology. Nor is the prohibition against an unreasonable search and seizure spelled out in the Fourteenth Amendment. Many state courts have adopted the rule that so-called illegally obtained evidence is admissible in their own courts, even though unreasonable searches and seizures are prohibited by the state constitution. This rule of admissibility was bound, eventually, to be challenged as a denial of due process under the Fourteenth Amendment, and it is rather surprising that the first case squarely presenting that issue was not before the Court until thirty-six years after the amendment was adopted.[15] In answer to the defendant's contention that the reception in evidence of his private papers illegally seized constituted a violation of the due process clause by the state, the Court held that the state's action constituted no viloation of the constitutional guaranty of privilege from unreasonable search and seizure. It is quite apparent that the Court refused to read into the concept of due process required of the states any restriction on the power of a state to declare a rule of admissibility of evidence even though it was seized in violation of a provision of the constitution of the state. Neither the Fourth Amendment nor a similar provision of the state constitution was to be incorporated by reference into the Fourteenth Amendment.

In later cases this rule has been re-affirmed by the Court,[16] which has pointed out that the fact that evidence admitted at the trial in a state court was obtained under circumstances which would render it inadmissible in a federal prosecution because in violation of the Fourth Amendment, did not render such evidence inadmissible under the due process clause of the Fourteenth Amend-

[15] Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1904).

[16] Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 S. Ct. 178, 52 L. Ed. 327 (1908); Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

ment. On the contrary, the Court stated, in the *Wolf* case,[17] "We hold, therefore, that in a prosecution in a state court for a state crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

The rule adopted by the Court by these decisions stood unchallenged for only three years, when a startling case reached the Court from California and afforded counsel for the defendant an opportunity to test the validity of any such sweeping general principle. This case was *Rochin v. California.*[18] The Court now had to define more closely what it meant by an unreasonble search and seizure within the rule of admissibility which it had adopted, for here was a case in which the incriminating evidence had been swallowed by the defendant after state officers had tried to prevent his doing so and was then removed forcibly from his stomach by the administration of an emetic. The capsules thus recovered constituted the major portion of the evidence against him. The defendant's conviction for violation of the state narcotic act could not stand if this evidence was inadmissible, and to rule it out would would require the Court to re-define its rule of admissibility. This the Court did without hesitation, Mr. Justice Frankfurter speaking for the Court and Mr. Justice Black and Mr. Justice Douglas concurring specially. The conviction in the state court was reversed on the ground that these proceedings did more than offend fastidious squeamishness about combatting crime too energetically, but clearly shocked the conscience, and was offensive to even hardened sensibilities. The Court pointed out that these were "methods too close to the rack and the screw to permit of constitutional differentiation" and that to sanction such brutal conduct "would be to afford brutality the cloak of law."

It appears, then, that a search and seizure may be so brutal in its methods, so irregular in its form, so shocking to the conscience and so offensive to even hardened sensibilities that the use of the evidence obtained thereby would be a deprivation of life or liberty without due process of law if such evidence contributed in any substantial degree to a conviction. If there is to be found a standard of conduct which has the condemnation of the Court it would appear to consist of the use of force to the extent applied in the *Rochin* case. That this may well be the real test which the Court meant to establish as the standard could be said to be illustrated by a Colorado case [19] in which blood was taken from the defendant without force but while the defendant was unconscious and another sample after the defendant had regained consciousness without objection from the defendant but without his consent either and the result of the analysis for alcohol content used against the defendant. The Court refused to grant certiorari to

[17] Wolf v. Colorado, *supra* note 16.
[18] 342 U. S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952).
[19] Block v. People, 125 Colo. 36, 240 P. 2d 512 (1951).

review the conviction.[20] This order, of course, does not indicate an approval of the method used by the Colorado officers, but may point a pathway which does not incur such sharp disapproval as was evoked by the *Rochin* case.

In the most recent decision of the Court [21] there is found a confirmation of the suggestion that to require the exclusion of illegally obtained evidence on the ground that its admission would constitute a denial of due process force must have been used and such force must have been exerted against the person. In the *Irvine* case the defendant was suspected of gambling, in violation of the California law. Local police entered the Irvine home by felonious means, having secured a key by the aid of a locksmith and having by this means effected the entry in the Irvines' absence. Once in the home the police installed a microphone and wired it to a receiver in another building. Thereafter they made two more entries in the Irvines' absence to change the location of the microphone. The device was in operation for about a month altogether and enabled the listening officers to obtain incriminating evidence. The selfsame key once more enabled the officers to enter Irvine's home when the time was ripe, arrest him and ransack the house, although they had no search warrant. At the trial the testimony of witnesses as to what had been heard over the electronic device was admitted over the defendant's objection which properly raised the constitutional ground that its admission was violative of the Fourteenth Amendment. By what appears to us as an inconclusive decision the conviction was affirmed, the opinion of the Court containing this significant statement: "However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping." The Court followed the rule of the *Wolf* case,[22] finding that the facts in both cases were substantially identical and refusing to overrule that case because to do so would be to introduce vague and subjective distinctions in the law of search and seizure. The decision is inconclusive, we believe, because Mr. Justice Clark concurred "with great reluctance" on the ground that the law was settled "and, as such, is entitled to the respect of this Court's membership." Mr. Justice Black wrote a dissent in which Mr. Justice Douglas joined; Mr. Justice Frankfurter wrote a dissent in which Mr. Justice Burton joined; while Mr. Justice Douglas wrote a separate dissent of his own. Mr. Justice Black thought that the Fourteenth Amendment should draw unto itself the Fifth Amendment and Mr. Justice Frankfurter thought that the principle of the *Rochin* case [23] applied.

Closely allied to the problem of unreasonable search and seizure is that of wire tapping. The Supreme Court has never over-

[20] Block v. Colorado, 343 U. S. 978, 72 S. Ct. 1076, 96 L. Ed. 1370 (1952).
[21] Irvine v. California, 347 U. S. 128, 74 S. Ct. 381 (1954).
[22] Note 16 *supra.*
[23] Note 18 *supra.*

ruled the *Olmstead* case,[24] which held that in a federal prosecution the Fourth Amendment did not preclude the use of evidence obtained by wire tapping. If a state court permits the use of such evidence in a state prosecution will such use be a denial of due process under the Fourteenth Amendment? The problem has not been before the Court in that form, but a problem which is germane to it arose in the case of *Schwartz v. State of Texas*.[25] It was urged by the defendant that evidence obtained by wire tapping was inadmissible against him under the Federal Communications Act (47 U. S. Code sec. 605) because of a Texas statute which made inadmissible any evidence obtained in violation of the constitution or laws of Texas or of the Constitution of the United States. The defendant did not urge a denial of due process as a basis for excluding the evidence nor as a reason for reversal, so the case is not in point on the problem under consideration. However, a statement by Mr. Justice Minton, who spoke for the Court, is significant. He said: "Indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court." This dictum may very well indicate that the Court would adopt the rule of the *Olmstead* case in a state prosecution where a denial of due process is urged, especially since the Texas statute prohibited the admission of evidence obtained in violation of the Constitution of the United States and the Court saw no reason to exclude this evidence. Of course, the defendant did not raise the point himself and the Court was not obliged to pass upon it, so it cannot be said that the point was actually decided.

A recent decision by the Court also precludes the possibility of injunctive relief by a federal court to prevent the use of evidence in a state court where such evidence was obtained by means which would have made it inadmissible in a federal prosecution because taken in violation of the Fourth Amendment. The Court affirmed the United States District Court's dismissal of the defendant's petition for equitable relief for violation of the Civil Rights Act (8 U. S. Code sec. 43) which provides redress against those who under certain circumstances deprive another of rights under the Constitution.[26]

TESTIMONY OF AN ACCOMPLICE

Whether the uncorroborated testimony of an accomplice who has turned state's evidence, which has been erroneously admitted against the defendant, constitutes a denial of due process, is a problem upon which the Court has had little opportunity to speak. In the single case where this issue was raised by the defendant [27] the Court disposed of the matter quite summarily by adopting the

[24] Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928).
[25] 344 U. S. 199, 73 S. Ct. 232, 97 L. Ed. 231 (1952).
[26] Stefanelli v. Minard, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 99 (1951).
[27] Lisenba v. California, 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166 (1941).

simple rule that the Fourteenth Amendment does not forbid a state court to construe and apply its own law regarding the testimony of an accomplice and that the use of the testimony of one who turns state's evidence is no denial of due process.

EXCLUSION OF EVIDENCE TO ESTABLISH A DEFENSE

In a state prosecution the defendant may take the position that certain evidence is admissible to establish a defense. If the state court excludes this evidence it may do so because it decides that such a defense is not appropriate to the charge and is not relevant or material, or it may do so because it decides that the evidence would not sustain the defense, even assuming it to be a proper one. Such a ruling by the trial court may be erroneous on either ground. Whether it denies to the defendant the due process to which he is entitled is another question. It seems clear that whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are purely questions of state law. The determination of those questions by the state court is not open to the constitutional objection that due process was denied thereby.[28]

THE RIGHT TO CROSS-EXAMINATION AND THE DETERMINATION OF THE SCOPE THEREOF

Whether it is error under local practice to deny to a party the right to cross-examine the opposing witnesses, and under what circumstances the right exists is a subject not within the scope of this study. The problem here is whether an erroneous ruling by a state court which deprives a party of such right where it exists constitutes a denial of due process under the Fourteenth Amendment. Insofar as can be ascertained, the Court has never had before it a ruling by a state court which had this effect. The problem has arisen in hearings before administrative bodies.[29]

Similarly, the same question of due process may be suggested by a ruling of a state court on the scope of the cross-examination permitted by the Court. A state may have adopted a rule closely limiting the cross-examination to matters covered on the examination-in-chief. Or the local rule may be broader and permit cross-examination on any subject germane to the direct examination. Or it may be still broader and permit cross-examination on any matter pertinent or relevant to the issues in the case, whether covered by the examination-in-chief or not. It may be asserted that the choice of one rule over another is a denial of due process, or it may be contended that error by a state court in permitting the cross-examination to go beyond the limits set by the local rule is a denial of due process. Less than two decades after the adop-

[28] Chaplinsky v. State of New Hampshire, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)—prosecution for use of offensive language. Evidence of provocation and of the truth of the utterances excluded at the trial. Approved.

[29] Market Street Railway Co. v. Railroad Commission of California, 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).

tion of the Fourteenth Amendment the Court, in deciding a case where this issue was raised, adopted the principle that whether the cross-examination must be confined to matters pertinent to the testimony in chief, or may be extended to all of the matters in issue, was solely a question of state law as administered locally, and was no concern of federal law.[30] This decision would seem to settle that both the choice of the rule as to the scope of cross-examination and the application of the rule chosen are questions the determination of which in no way involves due process.

The *Spies* case[31] was one in which no attack was made upon the cross-examination as not being pertinent to the issues. It was admitted that matters covered on the cross-examination were relevant to the actual issues in the case. This leaves undetermined the question as to due process where the cross-examination is erroneously permitted to extend beyond any issue in the case. It is suggested that such a ruling would not involve a constitutional problem of due process, since it is unlikely that it could encroach upon any fundamental rights of the party, and due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on ultimate rights.[32]

If cross-examination is limited, so as erroneously to preclude questioning on matters which are properly the subject of cross-examination under the local rule, the court comes perilously close to denying a fair hearing, and may actually violate the principle that due process requires a fair opportunity to be heard.

THE USE OF INFORMATION OUTSIDE OF THE EVIDENCE IN IMPOSING SENTENCE

A state trial court may properly use information secured from records which are themselves inadmissible under local law for purposes of imposing sentence and determining the penalty in a criminal case. This is not a denial of due process.[33] The reason for this rule was stated by the Court to be that the rules limiting the use of evidence to establish guilt have always differed from those relating to the use of evidence to fix punishment, and the Constitution does not restrict the sentencing judge to evidence actually received in the trial in open court. To so regard the requirements of due process would be to make it a device for freezing the evidential procedure of sentencing in the mold of trial procedure, thus hindering, if not precluding, all progressive efforts to improve the administration of criminal justice. Due process does not render a sentence void because a judge uses "out-of-court

[30] Spies v. Illinois, 123 U. S. 131, 8 S. Ct. 22, 31 L. Ed. 80 (1887).

[31] Note 30 *supra*.

[32] Note 29 *supra*, at 562.

[33] Williams v. New York, 337 U. S. 241, 69 S. Ct. 1079, 93 L .Ed. 1337 (1949)—the court used inadmissible records of defendant's criminal activities, short of actual convictions, and information as to his morbid sexuality to determine that he was a menace to society and should suffer the death penalty, after the jury had recommended life imprisonment.

information" to assist him in imposing sentence, even though the sentence be one of the death penalty.

It should be noted that the defendant's contention that this procedure denied to him both the right of confrontation and the right of cross-examination was unavailing, in the view which the Court took of the use made of this information. The problem appears to be quite distinct from that relating to confrontation and cross-examination as to evidence received on the issue of guilt as distinguished from that used to determine the sentence to be imposed.

This is not to say, however, that the state trial judge is under no restriction imposed by due process under any circumstances. If he knowingly uses false and untrue records of the defendant's history which show a criminal record which does not in fact exist, and then misreads these records to the defendant's disadvantage, even though the defendant has pleaded guilty, a sentence based upon such procedures is inconsistent with due process and cannot stand.[34] Standards of fairness as shown by a crupulous and diligent search for truth by the sentencing judge are essential. Dishonest records must be excluded and misinterpretation of the records must be avoided if the requirements of due process are to be met.

[34] Townsend v. Burke, 334 U. S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948)—the defendant pleaded guilty in a Pennsylvania court and a false record was used in the imposing of sentence.