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PROJECT: TWELFTH ANNUAL REVIEW OF CRIMINAL PROCEDURE: UNITED STATES SUPREME COURT AND COURTS OF APPEALS 1981–1982: IV. Sentencing, Parole, and Probation.

SUMMARY:
... Sentencing is one of the most critical and one of the most criticized phases of the criminal justice system. ... Further, magistrates who suspend imposition of sentence may not place the youth offender on probation for a period in excess of one year for a misdemeanor or six months for a petty offense. ... The sentencing judge, in order to fit the punishment to the offender, has discretion to consider a wide variety of information, whether or not contained in the presentence report, about the defendant's background, character, and conduct. ... The Fifth Circuit this term in *Henry v. Wainwright* vacated a death sentence because the sentencing jury considered a nonstatutory aggravating circumstance when it imposed the death penalty. ... At the time of the sentencing, however, the court may specify that the prisoner will be eligible for parole before he has served one–third of his term. ... In *Moody v. Daggett* the Supreme Court held that if a parolee is convicted for a crime committed while on parole, the Commission may issue a parole revocation warrant but stay its execution until the prisoner has served his sentence for the crime committed during parole. ...

TEXT:

[*673] SENTENCING

Sentencing is one of the most critical n2344 and one of the most criticized n2345 phases of the criminal justice system. Critics attack the present sentencing system principally for the virtually standardless discretion judges possess in determining sentences n2346 and the lack of adequate information available to the court at sentencing. n2347 These deficiencies frequently result in the imposition of widely differing sentences upon similarly situated defendants. n2348 Critics also charge that sentences are often of inappropriate length. n2349

Several parties play a role in determining a sentence. The prosecutor initially affects the sentence by deciding what charges to bring against the defendant, by engaging in plea bargaining, and by making sentencing recommendations. **[*674]** The probation officer who conducts the presentence investigation and prepares the presentence report affects the sentence through his control of information available to the judge about the defendant. n2350 The legislature determines the range of sentences available to the sentencing judge, the judge selects a sentence within that range, and the Parole Commission through its release decision determines the actual length of time the defendant spends in prison. n2351 This shared sentencing discretion creates desirable checks and balances and maintains the system's flexibility. n2352 This very flexibility, however, makes reform difficult because it renders the system's response to deliberate changes unpredictable. n2353

Imposition of Sentence. Rule 32(a)(1) of the Federal Rules of Criminal Procedure governs the sentencing process. n2354 The rule requires the court to impose sentence without unreasonable delay n2355 and to ensure that the defendant has a right to be represented by counsel and to have counsel speak on his behalf at sentencing. n2356

In general, the defendant also has the right and the duty to be present at the imposition of sentence. n2357 Rule 32(a)(1) further requires the court to address **[*675]** the defendant personally and to provide an opportunity for the defendant to make a statement. n2358 Two circuits have split, however, on whether the defendant has the right to be present and to allocute when the court corrects an illegal sentence by adding a mandatory parole term. In *United States v. Grassi* n2359 the Fifth Circuit remanded for resentencing because the district judge had added a mandatory three year special parole term in the defendant's absence. n2360 In contrast, in *United States v. Connolly* n2361 the Ninth

Circuit held that the defendant, who was present when the district judge added a mandatory three year special parole term pursuant to a rule 35 motion to correct an illegal sentence, did not have a right to allocution. n2362 The Ninth Circuit reasoned that the denial of allocution did not prejudice the defendant because the district court gave the defendant the minimum mandatory additional sentence. n2363

The defendant has additional procedural rights at the imposition of sentence. He has a right to special notice and hearing procedures when the government seeks enhanced sentences pursuant to federal dangerous special offender statutes. n2364 After a court imposes sentence in a case that has gone to **[*676]** trial on a plea of not guilty, the court must advise the defendant that he has a right to appeal. n2365 The court also must advise the defendant that he has the right to apply for leave to appeal in forma pauperis if he cannot afford the attorney fees involved. n2366 Finally, a defendant has the right to know the exact penalty assessed against him for each count on which he is convicted. n2367

The Federal Magistrate Act of 1979 n2368 gives United States magistrates jurisdiction to try persons accused of misdemeanors and to sentence persons after they have been convicted. n2369 Magistrates may exercise such jurisdiction only at the district court's designation n2370 and only with the defendant's written consent specifically waiving trial, judgment, and sentencing by a district court judge. n2371 In sentencing youth offenders, magistrates may not impose a sentence of custody for a period in excess of one year for a misdemeanor or six months for a petty offense. n2372 Further, magistrates who suspend imposition of sentence may not place the youth offender on probation for a period in excess of one year for a misdemeanor or six months for a petty offense. n2373

Presentence Investigation and Report. The presentence report is the most important document at both the sentencing and correctional levels of the criminal justice process. n2374 The presentence report provides the sentencing judge with information concerning the defendant to enable the judge to impose a sentence tailored to the defendant. n2375 **[*677]**

Rule 32(c) of the Federal Rules of Criminal Procedure governs the presentence investigation and report. n2376 This rule requires the court's probation service to conduct the presentence investigation and to provide a report to the judge before imposition of sentence. n2377 The report should contain information about a defendant's prior criminal record, characteristics, financial condition, circumstances, and any other information that the court may require. n2378 There are no formal limitations on the contents of presentence reports n2379 or on the sources from which information may be obtained. n2380 As a result, substantial risk exists that sentencing involves the use of inaccurate and misleading information. n2381

Nevertheless, certain safeguards attempt to protect a defendant from an unfairly prejudicial presentence report. If a prosecutor is aware of any inaccuracy or incomplete information in the presentence report, he has a duty to **[*678]** present accurate or additional information to the court. n2382 Moreover, the defendant's attorney has a duty to make an independent search for mitigating evidence that might persuade the sentencing judge to reduce the defendant's sentence. n2383 If a presentence report contains a factual error, the defendant can show a violation of due process if the judge relied on the incorrect information in imposing sentence. n2384

Also to avoid prejudice to the defendant, rule 32(c) prohibits the probation service from disclosing the contents of a presentence report to the sentencing court until the defendant pleads guilty or nolo contendere or is convicted. n2385 With certain exceptions, n2386 the court must permit the defendant or his counsel to read the presentence report before sentencing. n2387 The court also must give **[*679]** the defendant or his counsel an opportunity to comment on the presentence report and, at the court's discretion, to provide information relating to any alleged factual inaccuracy in the report. n2388 Additionally, if the court desires more detailed information than is available in the presentence report, the court may commit the defendant to the custody of the Attorney General while the probation service augments its study. n2389

Improper Considerations in Determining Sentence. The sentencing judge, in order to fit the punishment to the offender, n2390 has discretion to consider a wide variety of information, whether or not contained in the presentence report, about the defendant's background, character, and conduct. n2391 In determining sentence, the judge also may weigh the possibility of **[*680]** rehabilitation, the societal interest in retribution, and the deterrence effect of the sentence. n2392 Several constitutional provisions, however, limit what the sentencing judge properly may consider. For due process reasons, a judge may not base a sentence on incorrect information or improper assumptions, n2393 information **[*681]** provided by the prosecutor in violation of a plea bargaining agreement, n2394 or secret communications from the prosecution. n2395 Due process also prevents a judge from acting vindictively by inflicting harsher punishments on a defendant for exercising his right to trial n2396 or appeal n2397 or his fifth amendment **[*682]** privilege against

self–incrimination. n2398 In addition, the first amendment prevents a sentencing judge from considering a defendant's political beliefs. n2399

The fourth amendment exclusionary rule may prevent a sentencing judge from considering information obtained through an illegal search and seizure. n2400 In determining whether to apply the exclusionary rule in a particular instance, the sentencing judge should determine whether the marginal deterrence of unlawful police conduct that would result from excluding the evidence outweighs the attendant interference with the legitimate governmental interest in having sentences based on the fullest possible information. n2401

The sixth amendment right to assistance of counsel prevents the sentencing judge from considering some uncounseled prior convictions. For example, the sentencing judge may not consider a defendant's prior uncounseled felony conviction. n2402 Further, a court may not use a prior uncounseled misdemeanor conviction to convert a subsequent misdemeanor into a felony with a prison **[*683]** term pursuant to an enhanced penalty statute. n2403 Nevertheless, in 1980 the Fifth Circuit held in *Wilson v. Estelle* n2404 that as long as a defendant's prior uncounseled misdemeanor conviction was constitutionally valid, n2405 the sentencing judge properly may consider that conviction in sentencing for a subsequent conviction. n2406 The Fifth Circuit left open the question whether the sentencing judge may consider a prior constitutionally invalid misdemeanor conviction obtained in violation of the defendant's right to counsel. n2407

Credit for Time Served. The Bureau of Prisons must give a defendant credit toward service of his sentence for any days spent in custody prior to the imposition of sentence in connection with the offense or acts for which the sentence was imposed. n2408 The Bureau, however, need not give a defendant credit on his federal sentence for time spent in state custody prior to his federal trial unless the defendant establishes that he has not already received credit on a state sentence for that time. n2409 Moreover, the Bureau need not give a defendant credit on his federal sentence when the federal sentence is to be served consecutively to the state sentence. n2410 The Bureau has discretion to give a **[*684]** parolee whose parole is revoked credit for time spent on parole n2411 or for good time accumulated prior to the parole. n2412

The double jeopardy guarantee against multiple punishments for the same offense requires that when a defendant whose conviction is reversed on appeal is reconvicted and resentence, the court must credit him with any time he has already served pursuant to his original sentence. n2413

Sentencing Under the Federal Youth Corrections Act. Congress enacted the Federal Youth Corrections Act (YCA) n2414 to provide rehabilitation n2415 for youth offenders n2416 and to enlarge the sentencing options of district judges. n2417 Some commentators and officials today, however, express much less **[*685]** faith in the possibilities of rehabilitation than they did in 1950 when Congress passed the YCA. n2418 Further, treatment pursuant to the Act today does not differ significantly from normal adult treatment. n2419

Because a youth offender sentenced to an indefinite term pursuant to section 5010(b) of the Act may spend longer in prison than the maximum legal sentence for an adult convicted of the same crime, youth offenders have challenged the Act on due process and equal protection grounds. n2420 Courts have **[*686]** upheld the YCA against these challenges on the ground that the Act confers compensating benefits on youth offenders not available to adult offenders. n2421 Two circuits have avoided equal protection challenges by finding implicit in the Federal Magistrate Act of 1979 that Congress intended neither a district court judge nor a magistrate to sentence a youth offender under the YCA to a term of confinement longer than it could impose on an adult. n2422 This term, however, the Eighth Circuit rejected this interpretation of the Act in *United States v. Van Lufkins,* holding that it does allow longer terms of confinement for youth offenders than for adults. n2423

As a practical matter, a youth offender serving an indeterminate sentence **[*687]** pursuant to the YCA frequently serves the same length of time as an adult offender because some courts interpret the Parole Commission and Reorganization Act of 1976 n2424 as changing the provisions governing release. Thus, youth offenders are now frequently released according to the same criteria as adults. n2425 This term in *Watts v. Hadden,* n2426 however, the Tenth Circuit ruled that the Parole Commission must consider a YCA offender's positive response to treatment as an independent ground for release, notwithstanding the adult guidelines. n2427

Youth offenders have also challenged YCA sentences on the ground that the potential indeterminate sentence pursuant to *18 U.S.C. § 5010*(b) is an "infamous punishment" requiring grand jury indictment even if the underlying offense is a misdemeanor for which an adult would not be subject to imprisonment for more than one year. n2428 Courts have not resolved this issue definitively. n2429

The YCA provides that to sentence a youth offender pursuant to applicable adult penalty provisions, the court must find that the youth offender will not derive benefit from YCA treatment. n2430 The court must make this express "no **[*688]** benefit" finding on the record, n2431 but need not accompany the finding by supporting reasons. n2432

The Act further provides that "insofar as practical, the institutions at which youth offenders are committed shall be used only for treatment of youth offenders, and youth offenders shall be segregated from other offenders." n2433 The circuits have split on whether the qualifying phrase "insofar as practical" applies only to the maintenance of separate institutions for youth offenders, or also to the segregation of youth offenders from other offenders within an institution. n2434 The Eighth Circuit ruled this term in *Watts v. Hadden* n2435 that the Bureau of Prisons was violating the Act because the Bureau was not segregating YCA offenders from adult offenders. n2436 In response to *Watts v. Hadden* the Bureau of Prisons has issued a plan to implement the YCA in a more rigorous manner. n2437 Pursuant to the plan, YCA offenders will be (1) totally **[*689]** segregated from non YCA offenders; n2438 (2) screened, evaluated, and classified for individual treatment programs; n2439 and (3) provided educational and vocational training. n2440

This term the Supreme Court ruled in *Ralston v. Robinson* n2441 that a judge may order a defendant who receives a consecutive adult sentence while serving a YCA sentence to serve the remainder of his YCA sentence as an adult. n2442 The Court, however, rejected the view that the Bureau of Prisons has independent power to deny a youth offender YCA treatment if a judge has ordered the offender to serve a YCA sentence. n2443 To transform the remainder of a defendant's YCA sentence into an adult sentence, a judge must find that the YCA treatment would be of no further benefit to the defendant. n2444

The conviction of a youth offender committed to the custody of the Attorney General pursuant to section 5010(b) or 5010(c) is automatically set aside if the offender is unconditionally released prior to the expiration of the maximum sentence imposed. n2445 Similarly, the conviction of a youth offender placed on probation pursuant to section 5010(a) is automatically set aside if the court unconditionally discharges the offender prior to the expiration of the sentence of probation imposed. n2446 The circuits differ regarding implementation of the **[*690]** provision for setting aside the conviction. n2447

POSTSENTENCE REVIEW

Scope of Review. As a general rule, federal trial judges have broad discretion in pronouncing criminal sentences, and sentences within statutory limits are not subject to review. n2448 Courtsof appeals will, however, review the process by which the sentence was imposed n2449 and will vacate a sentence if the sentencing judge abused his discretion by basing the sentence on improper considerations, n2450 failed to exercise any discretion, n2451 or failed to become familiar **[*691]** enough with the case to assign an appropriate sentence. n2452 In addition, appellate courts will review and clarify sentences that are ambiguous. n2453 Challenging the sentencing process is often difficult because ordinarily judges are under no obligation to provide reasons for their sentencing decisions. n2454 If a judge does explain his reasons, however, an appellate court may review them. n2455 A defendant may be able to challenge his sentence on equal protection grounds. n2456 Finally, courts have established methods to review nonprejudicial errors committed by trial courts during the sentencing process. n2457

Correction or Reduction of Sentence Under Rule 35. Pursuant to rule 35 of the Federal Rules of Criminal Procedure, n2458 a district court may correct an illegal sentence at any time. n2459 The double jeopardy clause does not bar a **[*692]** court from correcting an illegal sentence pursuant to rule 35, even if the court increases the sentence. n2460 Further, the court may reduce a sentence or correct a sentence imposed in an illegal manner (1) within 120 days after the court imposes the sentence, or after the court receives a mandate issued upon affirmance of the judgement or dismissal of the appeal, or (2) after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgement of conviction. n2461 An appellate court may reverse the district court's disposition of a motion for reduction of sentence only for abuse of discretion. n2462

The 120–day limit established by rule 35 is jurisdictional. n2463 Nevertheless, courts have construed the rule to mean that as long as a motion to correct or reduce the sentence has been filed within 120 days of sentencing, the court may rule on the motion within a reasonable time after the 120 days have elapsed. n2464 A defendant cannot confer jurisdiction to reduce sentence on the district court by purporting to activate a new 120–day period through the filing **[*693]** of a pleading years after the case is essentially over n2465 or by styling a second, untimely motion as a "motion to reconsider" or a "motion for reclarification" of a previous, timely motion. n2466

When a court rescinds a defendant's original sentence and grants a new sentence, a defendant has 120 days following

the imposition of the new sentence to file a rule 35 motion. n2467 When the defendant violates his probation imposed upon suspension of the imposition of sentence, courts generally allow the defendant 120 days following his probation revocation hearing to move for a reduction in sentence pursuant to rule 35. n2468 The circuits have split, however, on whether rule 35 permits the defendant a 120–day period following his probation revocation hearing to move for a reduction in sentence when the court initially imposed sentence on the defendant, suspended execution of the sentence and placed the defendant on probation, and reimposed the original sentence when the defendant violated his probation. n2469

CRUEL AND UNUSUAL PUNISHMENT

The eighth amendment prohibits the imposition of cruel and unusual punishment. n2470 Because the concept of what constitutes cruel and unusual punishment changes as contemporary standards of decency evolve, n2471 **[*694]** punishments once considered permissible later may be held to violate the eighth amendment. n2472 A sentence is cruel and unusual if it is grossly disproportionate to the severity of the crime committed or if it serves no penological purpose. n2473

A defendant may challenge either the type of punishment imposed n2474 or the application of a generally valid punishment to his case. n2475 If a court finds that a particular punishment is cruel and unusual, it may overturn the punishment, n2476 award money damages, n2477 grant a declaratory judgment, n2478 or grant injunctive relief. n2479

Noncapital Offenses. A judge generally may impose any sentence within statutory limits for the defendant's crime, n2480 and such a sentence will withstand challenge on review unless the defendant demonstrates extraordinary circumstances. n2481 If a court finds, however, that the statutory penalty is **[*695]** grossly disproportionate to the crime, it may invalidate the statute as unconstitutional. n2482

In order to determine whether the defendant's sentence is grossly disproportionate, a court is not required to consider whether the sentence is proportional to sentences imposed for similar crimes in other jurisdictions or to sentences imposed on other defendants in the same jurisdiction. n2483 In *Rummel v. Estelle* n2484 the Supreme Court rejected the petitioner's argument that a mandatory life sentence imposed under the Texas recidivist statute n2485 was "grossly disproportionate" to his crimes. n2486 Without rejecting the proportionality principle altogether, n2487 the Court did stress the complexities of applying the test. n2488 The Court also indicated that penalties for noncapital offenses generally are a matter of legislative discretion. n2489 The Court upheld Rummel's sentence, finding that the statutory imposition of a mandatory life sentence for repeated criminal behavior was within constitutional limits. n2490 This term in *Hutto v. Davis* n2491 the Supreme Court strongly reaffirmed *Rummel* by reversing a Fourth Circuit decision affirming habeas relief to a Virginia prisoner sentenced to forty years' imprisonment and a $20,000 fine upon his conviction **[*696]** for possession of marijuana with intent to distribute and distribution of marijuana. n2492

The Fifth Circuit applying *Rummel* this term in *Terrebonne v. Blackburn,* n2493 addressed a prisoner's contention that the sentence imposed on him under a Louisiana statute n2494 was so disproportionate to his offense that it violated the eighth amendment. n2495 The Fifth Circuit's en banc decision vacated last term's panel opinion, n2496 which applied a three–prong proportionality analysis n2497 to determine the validity of a petitioner's eighth amendment challenge to his sentence. n2498 The Fifth Circuit en banc rejected the panel's holding that a court must use a proportionality analysis to determine the constitutionality of the petitioner's sentence. n2499 The court held that *Rummel* foreclosed **[*697]** the use of proportionality analysis n2500 and required only that a sentence, as authorized by a legislature and imposed on a defendant, serve substantial state interests. n2501 Based on the petitioner's prior criminal record and evidence of other criminal behavior, n2502 the court in *Terrebonne* concluded that the life sentence imposed on the petitioner served the substantial interests promoted by the statute n2503 and thus, was neither cruel nor unusual punishment under the eighth amendment. n2504

Death Penalty. Although the death penalty is not per se cruel and unusual punishment, n2505 a plurality of the Supreme Court has held that states may not impose a capital sentence through procedures that create a substantial risk **[*698]** of arbitrary and capricious application. n2506 The qualitative difference between capital and noncapital punishment requires that states use more reliable sentencing procedures when imposing the death penalty than when imposing other sentences. n2507 Although the Supreme Court held in *Gregg v. Georgia* n2508 that the death penalty is a permissible punishment for the deliberate killing of another human being, n2509 it expressly refrained from determining whether the death penalty is a disproportionate sanction for crimes in which no life is taken. n2510

This term the Supreme Court held that the death penalty could not be imposed on a defendant convicted of felony murder when he had neither committed murder nor intended that his accomplices commit murder. n2511 In *Enmund v. Florida* n2512 the defendant drove the getaway car after his two accomplices had robbed and murdered two people. n2513 Enmund was found guilty of first degree felony murder and robbery n2514 and sentenced to death. n2515 In reversing the death sentence, the Court applied the objective factor **[*699]** test n2516 enunciated in *Coker v. Georgia* n2517 and determined that state legislatures and sentencing juries have overwhelmingly rejected imposition of the death penalty in situations similar to the one in *Enmund.* n2518

Mandatory death sentences are precluded n2519 in all but the most exceptional cases. n2520 In order to avoid arbitrary and caprious imposition of the death penalty, a statute must provide specific guidelines for determining when the death penalty may be imposed. n2521 Although the Supreme Court has not conclusively **[*700]** defined necessary statutory guidelines, the Court has upheld statutes that require a finding of specifically enumerated aggravating circumstances to support the imposition of capital punishment n2522 or that narrowly define the categories for which a death sentence may be imposed. n2523 Statutory guidelines, however, may not foreclose consideration of any circumstances that may tend to mitigate the seriousness of the of the offense. n2524 Mitigating circumstances **[*701]** include the circumstances of the offense n2525 and any relevant aspects of the defendant's character and record. n2526

In *Lockett v. Ohio* n2527 the Supreme Court held unconstitutional a statute requiring that a defendant convicted of aggravated murder be sentenced to death unless he established one of three specifically enumerated mitigating circumstances. n2528 Although the Supreme Court did not question a state's ability to fix mandatory sentences in noncapital cases, n2529 it recognized that in capital cases the finality of the death sentence necessitates individual consideration before the penalty is imposed. n2530

This term the Supreme Court emphasized that the eighth amendment forbids **[*702]** a trial court from refusing to consider mitigating circumstances proffered by the defendant at sentencing in a capital case. n2531 In *Eddings v. Oklahoma* n2532 a sixteen year–old defendant convicted of first degree capital murder n2533 offered evidence of his emotional disturbances and troubled youth for the sentencing judge to consider as mitigating circumstances. n2534 Although the Oklahoma death penalty statute n2535 permits a person convicted of a capital crime to present evidence of any mitigating circumstances at sentencing, n2536 the trial judge believed that as a matter of law he could not consider a defendant's violent background and emotional disturbances. n2537 The only mitigating circumstance the judge would consider was Eddings' youth which he found did not outweigh the aggravating circumstances and so imposed the death sentence. n2538 The Supreme Court reversed, n2539 holding that the sentencing judge's refusal to consider relevant mitigating evidence violated the eighth amendment under *Lockett.* n2540

In *Zant v. Stephens* n2541 the Supreme Court considered whether the imposition of the death penalty is impaired when a reviewing court finds that one or more of the aggravating circumstances found by the sentencer is constitutionally invalid or not supported by the evidence. n2542 The Supreme Court reviewed **[*703]** the Georgia Supreme Court's decision to sustain the death sentence after having invalidated one of the three aggravating circumstances found by the jury. n2543 The United States Supreme Court did not decide whether the sentence was impaired, however, because it was uncertain about the Georgia Supreme Court's premises for permitting the death sentence to stand. n2544 The Court stated that the Georgia Supreme Court's premises for upholding the death sentence must be clarified before the Court could ascertain whether the Georgia capital–sentencing system would avoid arbitrary and capricious imposition of the death penalty. n2545 Accordingly, the Supreme Court certified a question to the Georgia Supreme Court, asking it to explain its grounds for sustaining the death sentence in this case. n2546

The Fifth Circuit this term in *Henry v. Wainwright* n2547 vacated a death sentence because the sentencing jury considered a nonstatutory aggravating circumstance when it imposed the death penalty. n2548 After Henry was convicted of first degree murder, the trial judge instructed the jury that it could consider mitigating circumstances and all aggravating factors, including, but not limited to, those enumerated in the Florida death penalty statute. n2549 The Fifth Circuit held that because jury discretion in capital sentencing must be sufficiently guided to avoid arbitrary imposition of the death penalty, the trial court's instruction **[*704]** permitting jury consideration of nonstatutory aggravating factors failed to adequately channel the jury's discretion. n2550

Not only must death penalty statutes contain specific guidelines to avoid arbitrary and caparicious imposition of the death penalty, such statutes must be designed in general to ensure that the imposition of a capitial punishment is based on "reason rather than caprice or emotion." n2551 In *Beck v. Alabama* n2552 the Supreme Court held unconstitutional an Alabama statute that precluded a jury from finding a defendant guilty of a lesser included offense in a capital case even if

the evidence supported such a finding. n2553 The Alabama death penalty statute permitted the jury to consider only the capital offense of intentional killing in the course of a robbery, n2554 even though the evidence would have supported a finding of felony murder, a noncapital crime. n2555 The Supreme Court held that in forcing the jury to choose between conviction of a capital offense and acquittal, the statute created an intolerable risk of an unwarranted conviction. n2556

This term in *Hopper v. Evans* n2557 the Supreme Court modified *Beck* by holding that a lesser included offense instruction must be given in a capital case only when the evidence warrants such an instruction. n2558 After being convicted of killing intentionally during the course of a robbery, n2559 the defendant was sentenced to death. n2560 He sought a writ of habeas corpus on the ground that he had been convicted and sentenced under the same statute declared unconstitutional by the Court in *Beck* which precluded instructions on lesser included offenses. n2561 According to the Supreme Court, the invalidity of the statute struck down in *Beck* did not prejudice Evans n2562 because the evidence not only supported the claim that Evans intentionally killed the victim, but affirmatively negated his claim to an instruction on a lesser included offense. n2563

[*705]

PAROLE

The purpose of parole is to integrate a prisoner into society by allowing him to serve a portion of his sentence outside prison. n2564 Release may be mandatory after a prisoner has served a specified portion of his sentence, n2565 or it may be granted at the discretion of the United States Parole Commission. n2566 Numerous conditions attending release often impose significant restraints on a parolee's freedom. n2567 These conditions are designed to ensure that the parolee is adequately supervised and to protect the public welfare. n2568 If a parolee violates a condition, his parole may be revoked n2569 and he may be returned to prison. n2570

A federal prisoner sentenced to a definite term exceeding one year is eligible for parole after serving one–third of his sentence. n2571 At the time of the sentencing, however, the court may specify that the prisoner will be eligible for parole before he has served one–third of his term. n2572 Alternatively, the court may set a maximum term and allow the Commission to determine when the **[*706]** prisoner should be released. n2573 The Commission retains jurisdiction over the parolee until the expiration of the maximum term of his sentence, n2574 unless it decides that early termination of parole is justified. n2575 After five years of parole, the Commission must terminate supervision unless it determines after a hearing that the parolee is likely to engage in criminal acts. n2576

Congress established new statutory standards for parole release determinations when it enacted the Parole Commission and Reorganization Act of 1976. n2577 The statute provides that before the Commission may parole an eligible prisoner, it must determine that the prisoner has an acceptable institutional behavior record. n2578 After deciding this threshold matter, the Commission further must determine that release would not depreciate the seriousness of the prisoner's offense, n2579 promote disrespect for the law, n2580 or jeopardize the **[*707]** public welfare. n2581

The Commission has promulgated guidelines n2582 to promote consistency and fairness in its parole determinations. n2583 Under these guidelines, the Commission determines the prisoner's parole prognosis by calculating his "salient factor score." n2584 The Commission classifies the seriousness of the prisoner's **[*708]** offense according to a chart listing categories of severity. n2585 The matrix of the prisoner's offense severity rating and his salient factor score yields the suggested time range of incarceration before release on parole. n2586 The Commission may deviate from the guidelines, n2587 however, and a court will invalidate the Commission's decisions only if it determines that the Commission has abused its discretion. n2588

[*709] This term in *Garcia v. Neagle* n2589 the Fourth Circuit reversed a district court's holding that guidelines promulgated by the Parole Commission were invalid because they emphasized the defendant's offense rather than the sentence imposed. n2590 The Commission had applied its severity of offense guidelines to give a nonviolent fraudulent offense the same severity rating as an offense involving potential injury to life. n2591 The Fourth Circuit reversed the district court's invalidation of these guidelines and their application on the basis that the district court exceeded its powers under the Parole Act to review the Commission's discretionary parole determinations. n2592 It was within the **[*710]** Commission's discretion to create a parole policy that considered the nature of the offense and the characteristics of the offender, and not the sentence imposed. n2593

Prisoners sentenced prior to the enactment of the 1976 Act frequently have challenged the Commission's denial of release under the guidelines on two grounds. First, prisoners have claimed that the Commission's application of the

guidelines to them violates the *ex post facto* clause of the Constitution. n2594 Courts of appeals have split over this issue. n2595 Second, prisoners have claimed that they are being subjected to a longer sentence because trial judges based their sentences on a supposition that prisoners would be eligible for early release if they compiled good institutional records. n2596 In *United States v. Addonizio,* n2597 however, the Supreme Court already has held that a federal prisoner may not seek resentencing on the ground that the Parole Commission's application of the new parole release guidelines frustrated the intentions of the sentencing judge. n2598 The Court ruled that the frustration of the sentencing judge's subjective intentions is not a proper basis fo collateral review of an otherwise valid sentence n2599 and that the sentencing judge's incorrect expectations concerning future parole determinations do not constitute so fundamental an error as to render the entire proceeding invalid. n2600 Last term several circuit courts applied *Addonizio,* holding that the sentencing judge's expectations of when the prisoner may be paroled has no role in the Parole Commission's determination of when the prisoner will be eligible for parole. n2601

A prisoner is entitled to due process in parole determinations only when he has a legitimate expectation of parole. n2602 In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex* n2603 the Supreme Court held that the **[*711]** Nebraska statute governing parole determinations n2604 created a legitimate expectation of parole by directing the parole board to release an inmate unless it finds that certain statutory conditions are met. n2605 In approving Nebraska's procedure calling for informal hearings and a statement of reasons to the prisoner for parole denial, the Court held that a parole board need not conduct a formal hearing for every inmate eligible for parole. n2606 Nor does due process require a full written explanation of the evidence on which the parole board relied in reaching its decision. n2607 The Court also held that the mere possibility of parole, as distinguished from a legitimate expectation of parole, does not entitle an inmate to due process protection in the parole determination. n2608

Last term in *Connecticut Board of Pardons v. Dumschat* n2609 the Supreme Court distinguished a legitimate statutory expectation of parole release from a statistical expectation of a pardon. n2610 Citing *Greenholtz,* the Court held that the Connecticut pardon procedure did not create a constitutional right to commutation, n2611 despite the Board's record of ruling favorably on approximately seventy–five percent of commutation applications. n2612 Unlike the statute at issue in *Greenholtz,* the Connecticut statute endowed the pardon board with unlimited discretion and therefore does not engender a constitutionally **[*712]** enforceable expectation of parole. n2613

This term in *Jago v. Van Curen* n2614 the Supreme Court held that when a parole statute itself does not create a legitimate expectation of release, the parole board's notice to the prisoner that it has ordered his release does not create a constitutionally protected liberty interest. n2615 Relying upon *Greenholtz* and *Dumschat,* the Court held that the parole board could rescind its parole order without a hearing because the prisoner had no protected liberty interest in the board's order. n2616 The Court interpreted the Ohio statute involved in *Jago* to provide that parole determinations are wholly within the discretion of the parole board. n2617 The Court explained that it would not hold that the parole board's decision created a protected liberty interest because such a holding "would severely restrict the necessary flexibility of prison administrators and parole authorities." n2618

Several courts of appeals have applied *Greenholtz* to reject claims alleging violations of procedural due process in parole determinations. n2619 This term in **[*713]** *Staton v. Wainwright* n2620 the Fifth Circuit found that the Florida parole system n2621 satisfies due process requirements. n2622 The Court rejected the prisoner's allegation that the institution's refusal to grant him an initial parole interview in the time required by Florida law violated his due process rights. n2623 The court reasoned that although Florida's parole scheme established objective criteria for determining parole, the language was qualified by giving the Florida Parole Commission substantial discretion to grant parole. n2624 This distinguishes the Florida statute from the statute in *Greenholtz,* and accordingly the Florida statute created no protected liberty interest under the rationale of *Greenholtz.* n2625

In *United States ex rel. Scott v. Illinois Parole & Pardon Board* n2626 the Seventh Circuit held that the Illinois parole statute n2627 creates a legitimate expectation of parole because it directs the parole board not to grant parole if it finds one of the statutorily specified grounds for denial. n2628 The prisoner had claimed the Illinois parole board had violated his due process rights by denying his request for parole. n2629 The Seventh Circuit considered the Illinois parole statute to be the mirror image of the statute in *Greenholtz,* n2630 and remanded for the district court to determine whether the board's stated reasons **[*714]** for denial were sufficient under the Illinois parole statute. n2631

When a federal parolee is alleged to have violated the conditions of his parole, the federal Parole Commission may issue a summons ordering the parolee to appear or it may issue a warrant and recommit the parolee. n2632 The Commission must conduct a parole revocation hearing within ninety days after recommitting any parolee who either

waives the right to a preliminary hearing, admits violating parole conditions, or is convicted for a crime committed while on parole. n2633 If the Commission fails to meet this deadline, however, a prisoner will be released from confinement only upon a showing of prejudice. n2634 In *Moody v. Daggett* n2635 the Supreme Court held that if a parolee is convicted for a crime committed while on parole, the Commission may issue a parole revocation warrant but stay its execution until the prisoner has served his sentence for the crime committed during parole. n2636 Federal parolees who have such a detainer lodged against them may submit to the Commission written information prepared with the assistance of counsel. n2637 If the Commission fails to review the detainer within 180 days, the prisoner may seek mandamus to compel review. n2638

In *Morrissey v. Brewer* n2639 the Supreme Court established that due process **[*715]** protection applies to a parole revocation proceeding. n2640 Although parolees are subject to many restrictions that other citizens normally do not suffer, n2641 they enjoy a conditional liberty, n2642 including many rights usually protected by due process. n2643 Moreover, parolees rely on an implicit promise that their parole will be revoked only if they violate their parole conditions. n2644 Thus, due process requires that parole be revoked only through a procedure designed to ensure that the finding of a violation is factually correct and that the discretionary decision to recommit the parolee to prison is based on an accurate assessment of his behavior. n2645

The Court in *Morrissey* established due process requirements for each of the two stages in the typical parole revocation proceeding. n2646 First, shortly after a parolee is arrested for violating his parole conditions, he must receive a preliminary hearing to determine whether there is probable cause to believe that he has violated his parole conditions. n2647 If the parolee has been convicted of a crime while on parole, however, due process does not require a preliminary hearing because the conviction establishes probable cause of a parole violation. n2648 Second, if probable cause has been established, the parole authority must hold a revocation hearing, if the parolee so desires, within a reasonable **[*716]** time after the parolee has been taken into custody. n2649 At this hearing the parolee has an opportunity to show either that the violation did not occur or that mitigating circumstances should prevent revocation. n2650 A "neutral and detached" body, such as a parole board, must make the revocation decision. n2651 This body is required to make a written statement of the evidence and the reasons supporting the revocation of parole. n2652

PROBATION

The Federal Probation Act n2653 authorizes a judge imposing a sentence for an offense not punishable by death or life imprisonment n2654 to suspend either the imposition or the execution of the sentence n2655 and to place the offender on conditional probation n2656 for a period not exceeding five years. n2657 If the maximum term for the offense is greater than six months, the Act also permits the judge to impose a split sentence by ordering the defendant to serve up to six months in prison, suspending the remainder of the sentence, and granting probation. n2658 Although the sentencing judge may grant probation for a period longer than the original sentence or the maximum prison term permitted by **[*717]** the substantive criminal statute, n2659 the judge may not order the defendant to begin probation prior to imprisonment and then to resume probation after his release. n2660

Although the sentencing judge has discretion to impose terms and conditions of probation, n2661 any conditions must bear a reasonable relation to the rehabilitation of the probationer and to the protection of the public. n2662 Unnecessarily severe or overbroad probation conditions have been held to violate this standard. n2663 Further, conditions must be sufficiently specific to provide the probationer with notice of what acts will cause the loss of liberty. n2664

Conditions that restrict constitutional rights are subject to careful scrutiny n2665 Last term in *United States v. Lowe* n2666 a group of political protesters claimed that the terms of their probation were unconstitutional. n2667 The defendants were fined and sentenced for unlawfully entering a naval base, where they conducted a political protest. n2668 The sentencing judge placed them on **[*718]** probation, subject to the condition that they not go within 250 feet of the naval base. n2669 The Ninth Circuit rejected the defendants' argument that this condition violated their first amendment rights of speech and association. n2670 The court decided that the condition reasonably met the goals of rehabilitation and protection of the public n2671 and that the condition was a less restrictive alternative than imprisonment or some greater limitation upon the defendants' rights of movement, speech and association. n2672

This term the Third Circuit also rejected a petitioner's claim that a probation condition impermissibly restrained his constitutional rights. n2673 In *United States v. Stine* n2674 the petitioner challenged a condition requiring that he participate in a program of psychological counseling, n2675 on the grounds that this condition infringed his rights of privacy and mentation. n2676 The Third Circuit held that the trial court's imposition of this condition was not an abuse

of discretion because it was reasonably related to the ends of rehabilitation and public safety. n2677 The court noted that it was not holding that a psychological counseling condition could never be an infringement of the constitutional right of privacy. n2678 The court merely held that there was no severe intrusion upon the defendant's rights in the case before it. n2679

Probation may be conditioned upon the payment of fines, the restitution to aggrieved parties for actual damages or loss, or the support of persons for whom the defendant is legally responsible. n2680 This term the Ninth Circuit **[*719]** held in *United States v. Margala* n2681 that a trial court could impose probation conditions requiring a defendant convicted of securities and mail fraud to forfeit his retirement pension benefits and surrender all stocks acquired during his employment at the defrauded company. n2682 In contrast, the Fifth Circuit in *United States v. Touchet* n2683 held that a defendant convicted of attempted income tax evasion could not be required to pay tax deficiencies as a probation condition. n2684 The Fifth Circuit reasoned that a trial court may not condition probation upon payment of a sum that has not been conclusively determined in either a civil or criminal proceeding. n2685

A court may revoke probation if the probationer fails to comply with the conditions of probation even if the improper conduct does not involve antisocial or dangerous behavior. n2686 In *Gagnon v. Scarpelli* n2687 the Supreme Court **[*720]** determined that before a court may revoke probation, due process requires that the probationer receive preliminary and final revocation hearings similar to the hearings that the Court mandated in *Morrissey v. Brewer* n2688 for parole revocation. n2689 Due process also requires that a revocation hearing be conducted according to the principles of fundamental fairness. n2690 Because probation revocation is not a stage of criminal prosecution, n2691 however, not all constitutional and statutory protections apply. n2692 For example, the circuits remain **[*721]** split over whether *Miranda* protections and the fourth amendment exclusionary rule should apply to probation revocation hearings. n2693 If a court determines on the basis of sufficient evidence that the probationer violated the conditions of probation, n2694 the court has broad discretion to revoke probation. n2695 A court revoking probation may impose the original or a reduced sentence, n2696 or, if authorized by statute, an increased sentence. n2697

A final revocation hearing must be held within a reasonable time. n2698 Before the hearing, the probationer must receive written notice of both his **[*722]** alleged violation n2699 and his right to counsel. n2700 In addition, the government must disclose the evidence it has against the probationer. n2701 Moreover, at the final hearing the probationer must have an opportunity to appear to present evidence n2702 and to question adverse witnesses. n2703 Any modification of the terms and conditions of probation requires a hearing at which the probationer is represented by counsel, unless the change in probation conditions is favorable to him. n2704 The sentencing court has jurisdiction to reconsider the sentence imposed on the probationer within 120 days of the final revocation hearing. n2705

FOOTNOTES:

n2344 *See United States v. DiFrancesco, 449 U.S. 117, 149–50 (1980)* (Brennan, J., with White, Marshall & Stevens, JJ., dissenting) (suggesting that sentencing phase as critical to defendants as guilt–innocence phase); FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 8 (1976) (sentencing decision by far most critical formal judicial decision for vast majority of criminal defendants) [hereinafter FAIR AND CERTAIN PUNISHMENT]; M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER vii (1973) (imposition of sentence probably most critical point in criminal justice system) [hereinafter CRIMINAL SENTENCES]. Judge Frankel considers sentencing extremely important in part because the great majority of those charged with crimes plead guilty. *Id.* at vii. He suggests that the sentence is society's "fundamental judgment determining how, where, and why the offender should be dealt with for what may be much or all of his remaining life." *Id.* at vii–viii.

n2345 *See United States v. DiFrancesco, 449 U.S. 117, 142 (1980)* (noting commentators' view that sentencing is one area of criminal justice system most in need of reform); ABA STANDARDS, *supra* note 1, at 18.5 (probably no other area of criminal justice during last decade has witnessed as intense debate over fundamental assumptions as sentencing); FAIR AND CERTAIN PUNISHMENT, *supra* note 2344, at 3 (capricious and arbitrary nature of criminal sentencing might be major flaw in American criminal justice system).

n2346 *See United States v. DiFrancesco, 449 U.S. 117, 143 (1980)* (basic problem in present system of sentencing is unbridled power of courts to be arbitrary and discriminatory) (quoting CRIMINAL SENTENCES,

supra note 2344, at 49); FAIR AND CERTAIN PUNISHMENT, *supra* note 2344, at 11 (discussing absence of articulated criteria for determining sentences); P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 1 (1977) (judges sentence criminals virtually without legal guidance or control) [hereinafter JUST AND EFFECTIVE SENTENCING]; *see also infra* note 2391 and accompanying text (discussing discretion of federal trial judges to consider wide variety of information about defendant's background, character, and conduct in determining sentence); *infra* note 2448 and accompanying text (discussing broad discretion of federal trial judges in pronouncing sentences in criminal cases, and limited scope of appellate review).

n2347 *See* ABA STANDARDS, *supra* note 1, at 18.344 (empirical findings point to unreliability of information used at sentencing and parole as major constraint on improved decision making); JUST AND EFFECTIVE SENTENCING, *supra* note 2346, at 2–3 (not even most rudimentary requirements of due process apply at sentencing; no requirement that sentence have any rational basis); *infra* notes 2378–81 and accompanying text (substantial risk of inaccurate or misleading information in presentence report).

n2348 *See* CRIMINAL SENTENCES, *supra* note 2344, at 21 (judges mete out widely divergent sentences explainable only by variations among judges, not material differences among defendants or crimes); JUST AND EFFECTIVE SENTENCING, *supra* note 2346, at 10 (substantial disparities inevitable result of judicial discretion unfettered by legislatively or judicially established criteria and not subject to requirements of procedural regularity); A. PARTRIDGE & W. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES 5–10 (1974) (survey indicates federal judges impose widely disparate sentences on defendants with identical files).

n2349 *See* ABA STANDARDS, *supra* note 1, at 18.45–18.53 (sentences too frequently excessive); FAIR AND CERTAIN PUNISHMENT, *supra* note 2344, at 6 (courts impose sentences at upper range far more frequently and sentences are far longer in United States than in other countries for comparable offenses and offenders; courts also often impose sentences involving no imprisonment).

n2350 *See* ABA STANDARDS, *supra* note 1, at 18.193 (in some jurisdictions probation authorities who prepare presentence reports actually make operative sentencing decision).

n2351 *See United States v. Addonizio, 442 U.S. 178, 188–90 (1979)* (judge has no enforceable expectations regarding actual release of sentenced defendant before end of his statutory term; Congress has decided Parole Commission in best position to determine when release appropriate and thereby to moderate disparities in sentencing practices among judges); *United States v. Grayson, 438 U.S. 41, 47 (1978)* (sentencing judge initially determines extent of federal prisoner's confinement, selecting term within often broad congressionally prescribed range; Parole Commission on review then may order conditional release any time after prisoner serves one third of judicially fixed term); ABA STANDARDS, *supra* note 1, at 18.9 (parole agency effective in mitigating excessive severity and eliminating disparities in sentencing); JUST AND EFFECTIVE SENTENCING, *supra* note 2346, at 12–13 (Parole Commission engages in sentencing no less than federal trial judge).

One section of the Parole Commission and Reorganization Act of 1976 empowers federal district judges to provide for a prisoner's release on judicial parole, after the prisoner has served one third of his sentence, if the term is between six months and one year. *18 U.S.C. § 4205*(f) (1976). The Fifth Circuit has rejected a prisoner's contention that this provision allowed a judge to release a defendant only after service of exactly one third of the sentence, instead interpreting the statute to give a district judge discretion to order release at any specified time after the prisoner has completed one–third of his term. *United States v. Pry, 625 F.2d 689, 692–93 (5th Cir. 1980), cert. denied, 450 U.S. 925 (1981).*

n2352 *See* ABA STANDARDS, *supra* note 1, at 18.10 (sharing of sentencing discretion among multiple agencies creates desirable structure of checks and balances and maintains system's flexibility to respond to unanticipated developments).

n2353 *See id.* at 18.7 (attempts to abolish discretion tend merely to reallocate it).

n2354 FED. R. CRIM. P. 32(a)(1).

n2355 *Id.* The Supreme Court has implied that the sixth amendment guarantee of a speedy trial might apply to the imposition of sentence. *See Pollard v. United States, 352 U.S. 354, 361 (1957)* (assuming that sentencing is part of trial for sixth amendment purposes, no violation of sixth amendment or rule 32(a)(1) when two-year delay in sentencing not purposeful or oppressive and oversight corrected after discovery).

n2356 FED. R. CRIM. P. 32(a)(1); *cf. Mempa v. Rhay, 389 U.S. 128, 137 (1967)* (defendant has right to counsel at imposition of sentence following probation revocation); *United States v. Johns, 638 F.2d 222, 223 & n.2, 224 (10th Cir. 1981)* (defendant's right to effective assistance of counsel at imposition of sentence following probation revocation not denied when counsel stated that defendant desired to admit violation of probation terms and did not wish to contest application to revoke probation; counsel's conduct consistent with desire to avoid having entire matter more fully explored by sentencing judge).

n2357 FED. R. CRIM. P. 43(a); *see United States v. Horton, 646 F.2d 181, 188-89* (5th Cir.) (on rule 35 motion for reduction of sentence, court should consider defendant's argument that enhancement of sentence was improper because he was denied hearing and was not present at time of enhancement), *cert. denied, 454 U.S. 970 (1981).* In prosecutions for offenses punishable by fine or imprisonment of not more than one year, the court, with the written consent of the defendant, may impose a sentence in the defendant's absence. FED. R. CRIM. P. 43(c)(2).

n2358 FED. R. CRIM. P. 32(a)(1); *see Hill v. United States, 368 U.S. 424, 426 (1962)* (rule 32(a) requires district judge to afford convicted defendant opportunity to speak personally before imposition of sentence; judge's failure to do so not subject to collateral attack); *Green v. United States, 365 U.S. 301, 304-05 (1961)* (Frankfurter, J.) (plurality opinion) (rule 32(a) requires court to afford defendant opportunity to speak before imposition of sentence; merely affording defendant's counsel opportunity to speak does not satisfy rule 32(a)); *United States v. Sparrow, 673 F.2d 862, 865-66 (5th Cir. 1982)* (failure of sentencing judge to ask defendant whether he had anything to say in mitigation of sentence and statements by judge indicating sentencing hearing was mere formality violate defendant's right of allocution and require new sentence); *United States v. Meyers, 646 F.2d 1142, 1146 (6th Cir. 1981)* (rule 32(a) requires sentencing judge specifically to invite defendant to speak on own behalf; defendant permitted to speak cannot complain because he failed to persuade judge to impose lesser sentence); *United States v. Navarro-Flores, 628 F.2d 1178, 1184 (9th Cir. 1980)* (per curiam) (rule 32(a) requires remand for resentencing when district judge fails to ask defendant whether he wishes to make statement and defendant makes no attempt to speak on own behalf). The court must give the attorney for the government an equivalent opportunity to address the court. FED. R. CRIM. P. 32(a)(1); *see United States v. Doe, 655 F.2d 920, 927-29 (9th Cir. 1980)* (remanding for new sentencing hearing and resentencing because trial court denied government's request to make statement); *cf. United States v. Heldt, 668 F.2d 1238, 1281 (D.C. Cir. 1981)* (per curiam) (statement by government did not violate prior agreement with defendant to waive allocution, because agreement reserved government's right to dispute factually incorrect statements), *cert. denied, 102 S. Ct. 1971 (1982).*

n2359 *616 F.2d 1295 (5th Cir. 1980), cert. denied, 449 U.S. 956 (1981).*

n2360 *Id. at 1304.* The district court added the parole term by written order one day after imposing sentence. *Id.*

n2361 *618 F.2d 553 (9th Cir. 1980).*

n2362 *Id. at 556.*

n2363 *Id.*

n2364 The federal dangerous special offender statutes are *18 U.S.C. § 3575* (1976) (enhanced sentence for dangerous special offender status based on prior convictions, pattern of criminal activity, or racketeering) and *21 U.S.C. § 849* (1976) (enhanced sentence for dangerous special drug offender status based on similar criteria).

If the government seeks an enhanced sentence pursuant to these provisions, the defendant is entitled before trial

or acceptance by the court of a plea of guilty or nolo contendere to notice of the grounds on which the government intends to seek the sentence. *18 U.S.C. § 3575*(a) (1976); *21 U.S.C. § 849*(a) (1976). The defendant also is entitled before trial or acceptance by the court of a plea of guilty or nolo contendere to a hearing on the issues of his dangerousness and eligibility for the special sentence. *18 U.S.C. § 3575*(b) (1976); *21 U.S.C. § 849*(b) (1976). At the hearing, the defendant has the right to assistance of counsel, confrontation of witnesses, and compulsory process. *18 U.S.C. § 3575*(b) (1976); *21 U.S.C. § 849*(b) (1976).

A similar advance notice provision applies when the government seeks an enhanced sentence pursuant to *21 U.S.C. §§ 841*(b)(1)(A), 851 (1976), providing a maximum penalty for persons with one or more prior narcotics convictions that is double the normal maximum penalty. Section 851(a)(1) requires the United States Attorney to file an information with the court before trial, stating the previous convictions to be relied upon.*See United States v. Gill, 623 F.2d 540, 542–43* (8th Cir.) (information filed before district court approved defendant's waiver of jury trial, received written stipulations, and took cause under submission), *cert. denied, 449 U.S. 873 (1980).* For § 841(b)(1)(A) to apply, the prior convictions must "have become final," *21 U.S.C. § 841*(b)(1)(A) (1976), which requires that the defendant have exhausted all avenues of direct appeal of those convictions. *United States v. Lippner, 676 F.2d 456, 466–68 (11th Cir. 1982)* (prior convictions pending appeal at time of sentencing not final).

n2365 FED. R. CRIM. P. 32(a)(2). The court need not advise the defendant of any right to appeal if the defendant pleaded either guilty or nolo contendere. *Id.*

n2366 *Id.*

n2367 *See United States v. Scott, 664 F.2d 264, 264–65 (11th Cir. 1981)* (per curiam) (defendant entitled to know precise penalty for each count and order in which sentences to be served); *Benson v. United States, 332 F.2d 288, 292 (5th Cir. 1964)* (same).

n2368 *18 U.S.C. § 3401* (Supp. IV 1980).

n2369 *Id.* § 3401(a).

n2370 *Id.*

n2371 *Id.* § 3401(b).

n2372 *Id.* § 3401(g).

n2373 *Id.* § 3401(g)(3).

n2374 Fennell & Hall, *Due Process in Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts, 93 HARV. L. REV. 1615, 1623, 1627–28 (1980)* (presentence report is virtually only source of information in overwhelming majority of cases when defendant pleads guilty; report should contain broad and comprehensive picture of defendant to assist judge in imposing individualized sentence; report continues to serve after sentencing as central N

n2375 *See Gregg v. United States, 394 U.S. 489, 492 (1969)* (presentence report enables judge to give defendant sentence suited to his particular character and potential for rehabilitation); *Williams v. New York, 337 U.S. 241, 247 (1949)* (judge's possession of fullest information possible concerning defendant's life and characteristics highly relevant if not essential to selection of appropriate sentence); *United States v. Burton, 631 F.2d 280, 282 (4th Cir. 1980)* (purpose of probation report is to give sentencing judge fullest possible information concerning defendant's life and characteristics to enable him to impose appropriate sentence).

n2376 FED. R. CRIM. P. 32(c).

n2377 *Id.* 32(c)(1). There are several exceptions to the requirement of a presentence investigation and report.

First, the defendant, with the permission of the court, may waive the presentence investigation and report. *Id.* Second, the court may order the presentence investigation and report omitted if it finds that the record contains sufficient information. *Id.; cf. United States v. Colmenares-Hernandez, 659 F.2d 39, 42-43* (5th Cir.) (judge's statement that presentence report useless because true identity of defendant unknown did not indicate judge failed to consider defendant as individual in imposing sentence, because judge explained there was sufficient information in record for court meaningfully to exercise sentencing discretion), *cert. denied, 102 S. Ct. 979 (1981); United States v. Torrez-Flores, 624 F.2d 776, 782 (7th Cir. 1980)* (judge granted probation without presentence report on basis of defendant's representation that he had no prior record, but court reserved right to revoke probation if defendant misrepresented record). The court must explain this finding on the record. FED. R. CRIM. P. 32(c)(1); *cf. United States v. Long, 656 F.2d 1162, 1163-64 (5th Cir. 1981)* (judge may not sentence defendant without first obtaining presentence report or finding that information in record sufficient to allow meaningful exercise of discretion, even though defendant convicted of crime for which life sentence mandatory, because judge could recommend that defendant be eligible for parole after serving lesser term). Third, correction of an illegal sentence pursuant to rule 35 does not require a presentence report. *See United States v. Connolly, 618 F.2d 553, 555 (9th Cir. 1980)* (rule 35 does not require presentence report for nondiscretionary court order adding mandatory parole term to defendant's sentence pursuant to rule 35 motion by United States Attorney).

It is improper for the prosecution to make, or for the court to receive from the prosecution, a direct *ex parte* communication bearing on the sentence. *See United States v. Wolfson, 634 F.2d 1217, 1221-22 (9th Cir. 1980)* (vacating sentence and remanding for resentencing by another judge because first sentencing judge relied on secret *ex parte* sentencing report and recommendations by United States Attorney's office).

n2378 FED. R. CRIM. P. 32(c)(2). *See generally* Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice, 73 MICH. L. REV. 1361 (1975)* (advocating standardization of scope of presentence investigations to achieve greater consistency in sentencing process).

n2379 *See Gregg v. United States, 394 U.S. 489, 492 (1969)* (dictum) (no formal limitation on contents of presentence report, which may rest on hearsay and contain information bearing no relation to crime with which defendant charged); *United States v. Legrano, 659 F.2d 17, 18 (4th Cir. 1981)* (presentence report may include information about crimes for which defendant was indicted but not convicted); United States *ex rel Goldberg v. Warden, Allenwood Federal Prison Camp, 622 F.2d 60, 65* (3rd Cir.) (presentence report may comment on charges dismissed with prejudice pursuant to plea bargain), *cert. denied, 440 U.S. 871 (1980); see also infra* note 2391 and accompanying text (sentencing judge has discretion to consider wide variety of information about defendant's background, character, and conduct).

n2380 *See United States v. Burton, 631 F.2d 280, 282 (4th Cir. 1980)* (probation service may obtain information from defendant's wife); *United States v. Avery, 621 F.2d 214, 216 (5th Cir. 1980)* (probation service may obtain information from United States Attorney and case agent; plea agreement cannot obligate government to withhold disclosure of character and background information about defendant from sentencing judge), *cert. denied, 450 U.S. 933 (1981).*

n2381 *See* ABA STANDARDS, *supra* note 1, at 18.336 & n.5, 18.344 & n.35 (almost without exception, empirical researchers point to unreliability of information in presentence reports); *Due Process in Sentencing, supra* note 2374, at 1639 (concluding on basis of empirical study that current sentencing practices are likely to involve inaccurate and misleading information).

n2382 *See United States v. Block, 660 F.2d 1086, 1091-92 (5th Cir. 1981)* (because prosecutor has duty to ensure that court has complete and accurate information to enable court to impose appropriate sentence, prosecutor aware that presentence report contains inaccuracy or that court under mistaken impression must bring correct information to attention of court, even if he promised in plea bargain to remain silent during sentencing), *cert. denied, 102 S. Ct. 1753 (1982).* Standard 3-6.2 of the ABA STANDARDS states:

(a) The prosecutor should assist the court in basing its sentence on complete and accurate information for use in the presentence report. The prosecutor should disclose to the court any information in the prosecutor's files relevant to the sentence. If incompleteness or inaccurateness in the presentence report comes to the prosecutor's attention,

the prosecutor should take steps to present the complete and correct information to the court and to defense counsel. (b) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all information in the prosecutor's files which is relevant to the sentencing issue.

ABA STANDARDS, *supra* note 1, at 3.95.

n2383 *See Washington v. Strickland, 673 F.2d 879, 892–901 (5th Cir. 1982)* (counsel representing defendant at sentencing hearing has duty to make independent search to develop evidence that might mitigate punishment; failure to do so will not invalidate sentence, however, unless omission by counsel contributed to sentence).

n2384 *See United States v. Cimino, 659 F.2d 535, 537–38 (5th Cir. 1981)* (trial judge did not violate due process by considering inaccurate presentence report when judge acknowledged inaccuracies and gave no indication that he considered information in sentencing).

n2385 FED. R. CRIM. P. 32(c)(1); *see Gregg v. United States, 394 U.S. 489, 491–92 (1968)* (submission of presentence report to court before defendant pleads guilty or is convicted constitutes error if report influences judge or jury). A judge properly may examine the presentence report after he accepts the defendant's plea of guilty. He does not have to recuse himself for prejudice from subsequently hearing the defendant's motion to withdraw his plea of guilty. *United States v. Navarro–Flores, 623 F.2d 1178, 1182 (9th Cir. 1980)* (per curiam).

A 1974 amendment to rule 32(c)(1) provides that a judge may inspect a presentence report at any time with the written consent of the defendant. *See United States v. Sonderup, 639 F.2d 294, 295–96* (5th Cir.) (when judge rejects plea agreement after seeing presentence report with written consent of defendant, judge need not rescue himself from presiding over trial), *cert. denied, 452 U.S. 920 (1981).* This amendment creates an exception to the earlier statement in *Gregg v. United States, 394 U.S. 489, 491–92 (1968),* that the probation service must not "under any circumstances" submit the presentence report to the court before the defendant pleads guilty or is convicted.

n2386 Rule 32(c)(3)(A) provides four exceptions to the requirement of full disclosure of the presentence report to the defendant or his counsel. Disclosure is not required (1) of any recommendations of sentence; or of material which in the opinion of the court contains (2) diagnostic opinion that might seriously disrupt a program of rehabilitation; (3) sources of information obtained upon a promise of confidentiality; or (4) any information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. FED. R. CRIM. P. 32(c)(3)(A). The court, however; must provide an oral or written summary of the undisclosed factual information on which it will rely in determining the sentence. FED. R. CRIM. P. 32(c)(3)(B). *See generally Due Process in Sentencing, supra* note 2374, at 1651–66 (use of confidentiality exceptions and nondisclosure of evaluative summary and sentencing recommendations adversely affect rule's policy of ensuring factual accuracy).

n2387 FED. R. CRIM. P. 32(c)(3)(A); *see United States v. Clements, 634 F.2d 183, 185–86* (5th Cir.) (1975) amendments to rule 32(c)(1) requiring sentencing judge to allow defendant or his attorney opportunity to review presentence report before sentencing not retroactive), *cert. denied, 454 U.S. 840 (1981).* Disclosure pursuant to this rule is not automatic, however; the defendant must request to see his presentence report. Moreover, the court is not required to inform the defendant of his right to disclosure. FED. R. CRIM. P. 32(c)(3)(A); *United States v. Bell, 648 F.2d 212, 215* (5th Cir.) (per curiam) (federal rules do not entitle defendant to resentencing for trial judge's failure to disclose summary of presentence report when defendant and counsel aware judge consulted report, but did not ask to see it), *cert. denied, 454 U.S. 903 (1981).* In addition, the government is not required to provide advance notice of evidence it will use against a defendant at a sentencing hearing to supplement the presentence report, as long as the defendant has a reasonable opportunity to rebut that evidence at the hearing. *United States v. Jackson, 649 F.2d 967, 978–79* (3rd Cir.), *cert. denied, 454 U.S. 1034 (1981).* Even if a defendant's attorney has seen the presentence report but the defendant has not, legal issues can arise. *See United States v. Donn, 661 F.2d 820, 824 (9th Cir. 1981)* (defense counsel's failure to show defendant his presentence report falls below standards of reasonably competent representation and is prejudicial to defendant if report contained materially false information on which trial court relied).

In federal court, presentencing reports are frequently disclosed to the defendant although courts sometimes employ procedures that reduce the meaningfulness of the disclosure. *See Due Process in Sentencing, supra* note

2374, at 1640–51, 1690 (empirical study finding relatively high rate of disclosure but use of several practices that have significant adverse impact on rule 32(c)(3) policy of ensuring factual accuracy of presentence reports).

n2388 FED. R. CRIM. P. 32(c)(3)(A). This promotes the rule 32(c)(3) policy of ensuring the accuracy of the presentence report. FED. R. CRIM. P. 32(c)(3) advisory committee note; *cf. United States v. Aguero–Segovia, 622 F.2d 131, 132 (5th Cir. 1980)* (per curiam) (defendant has right not to be sentenced on basis of untrue information, and court must give defendant opportunity to rebut information on which sentencing judge explicitly relied). A defendant may obtain a continuance of his sentencing hearing when additional time is necessary to rebut a presentence report. *See United States v. Williams, 668 F.2d 1064, 1072 (9th Cir. 1981)* (abuse of discretion to deny defendant's request for continuance to present evidence of inadequate statements in presentence report); *United States v. Gonzales, 661 F.2d 488, 495 (5th Cir. 1981)* (two week continuance of sentencing hearing to give defendant time to rebut government's evidence adequate to comply with due process); *cf. United States v. Plisek, 657 F.2d 920, 924–25 (7th Cir. 1981)* (defendant waived objection to factual accuracy oo presentence report when defendant did not indicate alleged error in statement of defendant's previous convictions, had adequate time to review report, and had attested to accuracy of report).

n2389 *18 U.S.C. § 4205*(c) (1976). The rule limits the length of such commitment to the maximum sentence prescribed by law for the defendant's crime. *Id.* The Director of the Bureau of Prisons must furnish the results of the study and any recommendations to the court within three months unless the court grants an extension of up to three months for further study. *Id.* After receiving the reports and recommendations, the court has the discretion to place the offender on probation, to affirm the original sentence of imprisonment, or to reduce the original sentence. *Id.; see United States v. Jones, 640 F.2d 284, 285–86 (10th Cir. 1981)* (trial court committed defendant to custody of Attorney General and reserved sentencing pending further psychiatric, psychological, and medical evaluations of defendant to determine extent of defendant's mental disorders and drinking problem brought out by defense counsel arguing for mitigation of punishment).

n2390 *Williams v. New York, 337 U.S. 241, 247 (1949).*

n2391 *See Roberts v. United States, 445 U.S. 552, 557–58 (1980)* (sentencing judge may consider defendant's refusal to cooperate with government as relevant to defendant's attitudes toward society and prospects for rehabilitation); *United States v. Grayson, 438 U.S. 41, 50–52 (1978)* (sentencing judge may consider defendant's readiness to lie under oath as probative of prospects for rehabilitation); *United States v. Tucker, 404 U.S. 443, 446 (1972)* (sentencing judge may consider previous convictions although constitutionally invalid because of absence of counsel); *Williams v. New York, 337 U.S. 241, 250–51 (1949)* (sentencing judge may consider hearsay information about defendant's background); *United States v. Tracey, 675 F.2d 433, 441 (1st Cir. 1982)* (sentencing judge may consider uncorroborated hearsay in absence of specific denial by defendant of truth of statements); *United States v. Ammirato, 670 F.2d 552, 557 (5th Cir. 1982)* (sentencing judge may consider hearsay evidence; no violation of due process because defendant had adequate opportunity to refute evidence and evidence corroborated by others); *United States v. Ochoa, 659 F.2d 547, 548–49 (5th Cir. 1981)* (sentencing judge may consider prior conviction even though conviction still under appeal; judge also has discretion to urge Parole Commission to reduce defendant's time in prison if defendant's prior conviction is later overturned), *cert. denied, 102 S. Ct. 1472 (1982); United States v. Plisek, 657 F.2d 920, 927–28 (7th Cir. 1981)* (sentencing judge may consider defendant's prior arrest and acquittal on homicide charge when defendant had full opportunity to explain his arrest); *United States v. Lowe, 654 F.2d 562, 566 (9th Cir. 1981)* (sentencing judge may consider defendant's prior peace protest activities even though criminal charge against defendant for those activities was dismissed); *United States v. Saade, 652 F.2d 1126, 1139 (1st Cir. 1981)* (sentencing judge may consider responsible out–of–court information relevant to circumstances of crime); *Durham v. Wyrick, 649 F.2d 587, 588 (8th Cir. 1981)* (sentencing judge may consider pardoned felony convictions); *United States v. Bangert, 645 F.2d 1297, 1308–09* (8th Cir.) (sentencing judge may consider his belief that defendants lied at trial and lacked remorse), *cert. denied, 454 U.S. 860 (1981); United States v. Bradford, 645 F.2d 115, 116–18 (2d Cir. 1981)* (sentencing judge may consider defendant's refusal to cooperate with law enforcement authorities by incriminating others when defendant did not offer evidence to support claim of fear for himself and his family as grounds for noncooperation); *United States v. Larios, 640 F.2d 938, 941–42 (9th Cir. 1981)* (sentencing judge may consider evidence found through illegal search when illegality result of technical error in affidavit); *United States v. Sampol, 636 F.2d 621, 677–79 (D.C. Cir. 1980)* (per curiam) (sentencing judge

may consider defendant's guilty plea, waiver of constitutional privilege against self–incrimination, and cooperation with government); *Watkins v. Thomas, 623 F.2d 387, 388* (5th Cir.) (sentencing judge may consider two prior convictions for which defendant received presidential pardon because he performed undercover activities in service of Federal Bureau of Narcotics and Dangerous Drugs), *cert. denied, 449 U.S. 1065 (1980).*

See also supra notes 2379–80 and accompanying text (no formal limitations on contents of presentence reports or on sources from which probation service may obtain information). In addition, the government is not required to provide advance notice of evidence it uses against defendant at a sentencing hearing, although not referred to in the presentence report, as long as the defendant has a reasonable opportunity to rebut that evidence. *United States v. Jackson, 649 F.2d 967, 978–79* (3rd Cir.), *cert. denied, 454 U.S. 1034 (1981).*

n2392 *See Williams v. New York, 337 U.S. 241, 248–49 n.13 (1949)* (sentencing **judge** may consider protection of society against wrongdoers, punishment of wrongdoer, reformation and rehabilitation of wrongdoer, and deterrence of others from commission of like offenses) (quoting S. **Ulman** in GLUECK, PROBATION AND CRIMINAL JUSTICE 113 (1933)); *United States v. Dazzo, 672 F.2d 284, 289–90* (2d Cir.) (sentencing **judge** may emphasize deterrent purposes), *cert. denied, 51 U.S.L.W. 3255* (U.S. Oct. 5, 1982); *United States v. Snyder, 668 F.2d 686, 691* (2d Cir.) (sentencing **judge** may consider deterrent effect on defendant), *cert. denied, 102 S. Ct. 3494 (1982); Blair v. United States, 665 F.2d 500, 508 (4th Cir. 1981)* (sentencing **judge** may impose heavy sentence on defendant to deter others but not to retaliate for defendant's refusal to divulge names).

n2393 *See Townsend v. Burke, 334 U.S. 736, 740–41 (1948)* (fifth amendment due process clause prohibits sentence based on materially untrue assumptions concerning defendant's criminal record); *United States v. Shelton, 669 F.2d 446, 466–67* (7th Cir.) (due process clause prohibits sentence based on faulty assumption that defendant was guilty of crime that was subject of another ongoing criminal proceeding), *cert. denied, 102 S. Ct. 1989 (1982); United States v. Tobias, 662 F.2d 381, 388–89 (5th Cir. 1981)* (due process clause prohibits sentence based on incorrect information regarding material evidence and eligibility of defendant for Youth Corrections Act treatment), *cert. denied, 102 S. Ct. 2908 (1982); United States v. Doe, 655 F.2d 920, 928–29 (9th Cir. 1980)* (due process prohibits sentence based on assumption that defendant is lying at sentencing hearing when government not permitted to verify or contradict defendant's statements); *United States v. Vasquez, 638 F.2d 507, 534 (2d Cir. 1980)* (due pocess clause prohibits sentence based on inappropriate assumption that jury had found that defendant was leader of drug operation), *cert. denied, 454 U.S. 935 (1981). But cf. United States v. Horton, 676 F.2d 1165, 1173 (7th Cir. 1982)* (judge may base sentence on assumption that defendant was "major criminal force in this community . . . for a number of years" when judge carefully considered presentence report, defendant's comments, and defendant's record).

n2394 *See United States v. Wilson, 669 F.2d 922, 923 (4th Cir. 1982)* (defendant should be resentenced before another judge when prosecutor breached plea agreement to waive allocation at original sentencing hearing by mentioning other offenses of which defendant was suspected). *But see United States v. Block, 660 F.2d 1086, 1091–92 (5th Cir. 1981)* (prosecutor has duty to correct mistaken impression of court even if prosecutor agreed in plea bargaining to waive allocution), *cert. denied, 102 S. Ct. 1753 (1982); but cf. United States v. Heldt, 668 F.2d 1278–81 (D.C. Cir. 1981)* (per curiam) (government did not violate agreement not to allocute when it disputed statements of fact on matter with which it disagreed because government did not agree to remain silent when defendant lied), *cert. denied, 102 S. Ct. 1971 (1982).*

n2395 *See United States v. Alverson, 666 F.2d 341, 348–49 (9th Cir. 1982)* (judge may not receive *ex parte* communication prior to resentencing even though communication came from government case agent, not prosecutor, and *ex parte* communication duplicated information in presentence report); *United States v. Wolfson, 634 F.2d 1217, 1221–22 (9th Cir. 1980)* (judge may not rely on secret *ex parte* sentencing report and recommendations of United States Attorney's office). *But see United States v. Kenny, 645 F.2d 1323, 1348–49* (9th Cir.) (sentencing judge did not err by failing to disclose prior to sentencing hearing existence of letter he had received about defendants, because letter contained no factual allegations or sentence recommendations), *cert. denied, 452 U.S. 920 (1981).*

n2396 *See Longval v. Meachum, 651 F.2d 818, 819–21 (1st Cir. 1981)* (improper appearance of vindictiveness created when judge strongly urged defense counsel to advise defendant to plead guilty to avoid lengthy sentence,

and defendant after jury trial received more severe sentence than codefendant who pleaded guilty); *cf. United States v. Roberts, 676 F.2d 1185, 1188–89 (8th Cir. 1982)* (per curiam) (no punishment for exercising right to trial when defendant received harsher sentence for four counts than codefendant who pleaded guilty to one count, because defendant supplier of drugs and had criminal record while codefendant only middleman and first offender); *Smith v. Wainwright, 664 F.2d 1194, 1197–98 (11th Cir. 1981)* (no vindictiveness when defendant received life sentence after jury trial and judge commented that petitioner might have received lighter sentence had he pleaded guilty, because defendant sentenced after careful assessment of relevant sentencing variables by court and no plea negotiations attempted); *United States v. Lupo, 652 F.2d 723, 729 (7th Cir. 1981)* (no vindictiveness when defendant after trial received harsher sentence than coconspirator who pleaded guilty, because defendant had prior record and coconspirator did not), *cert. denied, 102 S. Ct. 2964 (1982); United States v. Clements, 634 F.2d 183, 185* (5th Cir.) (no evidence of vindictiveness when defendant after jury trial received harsher sentence than codefendant who pleaded guilty), *cert. denied, 454 U.S. 840 (1981); United States v. Fitzharris, 633 F.2d 416, 423 (5th Cir. 1980)* (no evidence of vindictiveness when defendants after jury trial received harsher sentences than leaders of conspiracy who pleaded guilty and were sentenced by different judge), *cert. denied, 451 U.S. 988 (1981).*

n2397 *See North Carolina v. Pearce, 395 U.S. 711, 725–26 (1969)* (due process bars vindictive imposition of more severe sentence on retrial). The Supreme Court in *Pearce* held that, to assure the absence of vindictiveness, a judge who imposes a more severe sentence upon a defendant after a new trial must place his reasons for doing so on the record and base them upon objective information concerning identifiable conduct of the defendant occurring after the original sentencing proceeding. *Id. at 726; see Papp v. Jago, 656 F.2d 221, 223–24* (6th Cir.) (defendant's prior sentence must be reinstated when judge altered concurrent life sentences to consecutive life sentences after retrial and record did not contain any reasons for increased sentence, even though state offered judge's unofficial subsequent explanation), *cert. denied, 454 U.S. 1035 (1981); see also United States v. Williams, 651 F.2d 644, 647–48 (9th Cir. 1981)* (sentencing judge must point to identifiable conduct of defendant to justify increased punishment after retrial).

When the danger of vindictiveness is minimal, however, the prophylactic rule of *Pearce* does not apply. *See Ludwig v. Massachusetts, 427 U.S. 618, 627 (1976)* (vindictiveness minimal in two–tier court system; *Pearce* inapplicable); *Chaffin v. Stynchcombe, 412 U.S. 17, 25–28 (1973)* (vindictiveness minimal in jury resentencing because jury not informed of prior sentence, would have no personal stake in prior conviction and, unlike judge, no motivation to engage in self–vindication, and unlikely to have interest in discouraging meritless appeals that might occasion higher sentences); *Colton v. Kentucky, 407 U.S. 104, 112–19 (1972)* (vindictiveness minimal in two–tier court system because de novo second tier court is different from first tier trial court from which defendant appealed; second tier court is not asked to reconsider its decision or to find error in another court's work and probably is not informed of sentence imposed by inferior court); *see also Cooper v. Mitchell, 647 F.2d 437, 440* (4th Cir.) (after retrial following defendant's successful appeal of first conviction, second jury free to alter punishment imposed by first jury because second without knowledge of sentence imposed by first and thus not vindictive), *cert. denied, 454 U.S. 849 (1981).*

The First Circuit has held that a prosecutor does not violate due process when he threatens a defendant with a higher sentence if he appeals, because the judge, not the prosecutor, determines the sentence. *Koski v. Samaha, 648 F.2d 790, 794–99 (1st Cir 1981). See generally* Comment, *Prosecutorial Vindictiveness: Expanding the Scope of Protection to Increased Sentence Recommendations,* Koski v. Samaha, *70 GEO. L.J. 1051 (1981)* (criticizing *Koski).*

n2398 *See United States v. Roe, 670 F.2d 956, 972–73 (11th Cir. 1982)* (sentencing judge may not present defendant with choice between admitting guilt and enduring harsher sentence for failing to do so); *cf. Roberts v. United States, 445 U.S. 552, 559–61 (1980)* (argument that sentencing judge punished defendant for exercising fifth amendment privilege against self–incrimination would have merited serious consideration if defendant had presented argument to sentencing judge rather than for first time on appeal); *United States v. Pool, 660 F.2d 547, 555–56 (5th Cir. 1981)* (same).

n2399 *See United States v. Bangert, 645 F.2d 1297, 1308* (8th Cir.) (dictum) (sentencing judge may not consider defendant's political beliefs because in doing so he would impair defendant's first amendment rights), *cert. denied, 454 U.S. 860 (1981).*

n2400 *See Armpriester v. United States, 256 F.2d 294, 297* (4th Cir.) (consideration of evidence obtained illegally improper even when used only to determine sentence), *cert. denied, 358 U.S. 856 (1958).*

n2401 *Cf. United States v. Calandra, 414 U.S. 338, 348–52 (1974)* (speculative and minimal incremental deterrent effect of extending fourth amendment exclusionary rule to grand jury proceedings does not outweigh interference with effective and expeditious discharge of grand jury's duties). *Compare United States v. Larios, 640 F.2d 938, 941–42 (9th Cir. 1981)* (sentencing judge may consider evidence discovered through illegal search and seizure when officers obtained search warrant before search, search not overextensive in scope or conducted inappropriately, and illegality caused by technical error in affidavit in support of warrant; police misconduct not sufficient to justify interference with individualized sentencing) *with Verdugo v. United States, 402 F.2d 599, 611–12 (9th Cir. 1968)* (sentencing judge may not consider evidence resulting from warrantless and "blatantly illegal" search), *cert. denied, 397 U.S. 925 (1970).*

n2402 *See United States v. Tucker, 404 U.S. 443, 449 (1972)* (permitting conviction obtained in violation of *Gideon* to enhance punishment for another offense erodes principle of the case); *Durham v. Wyrick, 665 F.2d 185, 187 (8th Cir. 1981)* (per curiam) remanding for determination of whether defendant's sentence unconstitutionally enhanced due to sentencing court's consideration of prior uncounseled felony conviction); *Walker v. United States, 636 F.2d 1138, 1138–39 (6th Cir. 1980)* (vacating sentences explicitly based on prior uncounseled felony conviction). Courts require the presence of three conditions before holding that a *Tucker* error exists: (1) a prior conviction rendered invalid by *Gideon,* (2) the sentencing judge's mistaken belief that the prior conviction was valid, and (3) enhancement of the defendant's sentence because of that conviction. *See Owens v. Cardwell, 628 F.2d 546, 547 (9th Cir. 1980)* (per curiam) (district court not required to hold evidentiary hearing to determine constitutional validity of prior felony conviction when state judge found after full and fair hearing that sentencing judge did not use prior conviction in enhancing sentence).

n2403 *Baldasar v. Illinois, 446 U.S. 222, 224 (1980)* (per curiam). An Illinois court convicted the misdemeanor defendant in *Baldasar* of stealing a shower head worth $29 from a department store and sentenced him to one to three years pursuant to the Illinois enhancement statute. *Id. at 223.* This statute was applicable because the defendant had a previous uncounseled misdemeanor theft conviction. *Id.* The Court's per curiam opinion contained no discussion of its reasoning. *Id. at 222–24.* Instead, the five member majority produced three separate concurrences, explaining with significant variations why the Court's 1979 ruling in *Scott v. Illinois, 440 U.S. 367, 373–74 (1979),* that a misdemeanor defendant has a right to counsel only when his conviction results in imprisonment, requires exclusion of an uncounseled misdemeanor conviction for enhancement purposes even though the defendant had not been jailed for the conviction. *See id.* at 224 (Stewart, J., with Brennan & Stevens, JJ., concurring) (imposition of increased term of imprisonment *only* because of prior uncounseled misdemeanor conviction violates constitutional rule of *Scott)* (emphasis in original); *id.* at 224–29 (Marshall, J., with Brennan & Stevens, JJ., concurring) (uncounseled misdemeanor conviction insufficiently reliable to permit use for purpose of increasing prison term pursuant to repeat offender statute); *id.* at 229–30 (Blackmun, J., concurring) (uncounseled conviction should be invalid if punishable by more than six months imprisonment; within this "bright line" test, original conviction invalid and may not be used to support enhancement).

n2404 *625 F.2d 1158 (5th Cir. 1980)* (per curiam), *cert. denied, 451 U.S. 912 (1981).*

n2405 An uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. *Scott v. Illinois, 440 U.S. 367, 373–74 (1979).*

n2406 *Wilson v. Estelle, 625 F.2d 1158, 1159 (5th Cir. 1980)* (per curiam) (court properly admitted at punishment stage of trial evidence of prior uncounseled misdemeanor conviction for carrying pistol for which defendant had received only fine and not imprisonment), *cert. denied, 451 U.S. 912 (1981).*

n2407 *Id. at 1160* (at punishment stage of state court trial for vicious murder with malice, admission of evidence of prior uncounseled misdemeanor conviction for shoplifting for which defendant received three day prison sentence harmless error).

n2408 *18 U.S.C. § 3568* (1976). The imposition of restrictive conditions of a defendant's appellate bail limiting his travel and requiring surrender of bail is not custody for which a defendant should be given credit against his sentence. *Cerrella v. Hanberry, 650 F.2d 606, 607* (5th Cir.) (per curiam), *cert. denied, 454 U.S. 1034 (1981).*

n2409 *See United States v. Grimes, 641 F.2d 96, 99 & n.6 (3d Cir. 1981)* (defendant who received state sentence against which state could credit pretrial incarceration time has burden of demonstrating that state did not credit time); *cf. Roche v. Sizer, 675 F.2d 507, 509–10 (2d Cir. 1982)* (denying defendant credit on federal sentence for time spent in state custody between date that defendant posted bond on federal charges and date defendant released from state custody and delivered to federal custody). In addition, a defendant may not apply time spent in pretrial custody as credit against a parole violation term when he received full credit for that time against the sentence for a subsequent conviction. *Doyle v. Elsea, 658 F.2d 512, 515 (7th Cir. 1981)* (per curiam).

n2410 *See Cox v. Federal Bureau of Prisons, 643 F.2d 534, 537 (8th Cir. 1981)* (per curiam) (Bureau of Prisons need not give defendant credit for time spent serving state sentence when federal sentence consecutive to state sentence); *United States v. Grimes, 641 F.2d 96, 99–100 (3d Cir. 1981)* (same); *cf. United States v. Campisi, 622 F.2d 697, 699–70 (3d Cir. 1980)* (per curiam) (federal sentence to be served in state prison consecutively to existing sentence does not begin to run until state sentence completed). In addition, when a federal prisoner is in custody of state authorities and faces criminal charges, he will not receive credit toward the federal sentence for time spent in the state prison when the state and federal offenses are unrelated. *United States v. Luck, 664 F.2d 311, 312 (D.C. Cir. 1981)* (per curiam).

n2411 *See* United States *ex rel Del Genio v. United States Bureau of Prisons, 644 F.2d 585, 588 (7th Cir. 1980)* (within discretion of Bureau of Prisons not to credit defendant with time spent on parole when defendant convicted of crime punishable by imprisonment committed during parole); *Frick v. Quinlin, 631 F.2d 37, 39 (5th Cir. 1980)* (within discretion of Parole Commission not to credit defendant for time served on parole prior to revocation or for good time earned during first sentence when defendant convicted of crime committed during parole); *Lambert v. Warden, United States Penitentiary, 591 F.2d 4, 8 (5th Cir. 1979)* (per curiam) (Parole Commission has authority to forfeit defendant's good time credit and credit for time spent on parole when defendant convicted of felony committed during parole); *18 U.S.C. § 4210*(b)(2) (1976) (Parole Commission shall determine whether unexpired term being served at time of parole shall run concurrently or consecutively with sentence imposed for new offense punishable by incarceration committed by parolee; total term imposed not to exceed maximum term for new offense); 28 C.F.R. § 2.52(c)(2) (1981) (Parole Commission regulation revoking street time whenever parolee is convicted of crime punishable by imprisonment).

n2412 *See* United States *ex rel Del Genio v. United States Bureau of Prisons, 644 F.2d 585, 589 (7th Cir. 1980)* (within discretion of Bureau of Prisons not to credit prisoner with good time accumulated prior to parole when returned to custody as parole violator).

n2413 *North Carolina v. Pearce, 395 U.S. 711, 718–19 (1969).*

n2414 *18 U.S.C. §§ 5005*–5026 (1976).

n2415 *See Durst v. United States, 434 U.S. 542, 545 (1978)* (core concept of YCA to substitute rehabilitative treatment for retribution as sentencing goal); *Dorszynski v. United States, 418 U.S. 424, 433–34 (1974)* (YCA focused primarily on correction and rehabilitation); H.R. REP. No. 2979, 81st Cong., 2d Sess. 3 (1950) (underlying theory of YCA is to substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies).

n2416 The act defines "youth offenders" as persons under the age of 22 years at the time of conviction. *18 U.S.C. § 5006*(d) (1976). Courts do not ordinarily apply the YCA to convicted persons under the age of 18 who are eligible for sentencing as juveniles. *Dorszynski v. United States, 418 U.S. 424, 433 n.9 (1974); 18 U.S.C. §§ 5031*–5042 (1976). A court has discretion to sentence a "young adult offender," one who is at least 22 but less than 26 years old at the time of conviction, under the YCA if the court finds reasonable grounds to believe that the defendant will benefit from YCA treatment. *18 U.S.C. § 4216* (1976); *cf. United States v. Ford, 627 F.2d 807, 808*

(7th Cir.) (section 4216 not applicable when crimes charged violate only District of Columbia Code), *cert. denied, 449 U.S. 923 (1980); United States v. Boydston, 622 F.2d 398, 399 (8th Cir. 1980)* (per curiam) (refusal to sentence defendant *nunc pro tunc* when defendant indicted nine days after 26th birthday, thus denying her YCA eligibility, not abuse of discretion).

n2417 *See Dorszynski v. United States, 418 U.S. 424, 436–42 (1974)* (Congress intended YCA to enlarge, not restrict, sentencing options of federal trial courts); *Micklus v. Carlson, 632 F.2d 227, 235 (3rd Cir. 1980)* (Congress intended YCA to expand sentencing options of federal judges to permit confinement of youth offenders in rehabilitative environments); *United States v. May, 622 F.2d 1000, 1004* (9th Cir.) (Congress intended YCA to expand, not limit, sentencing options available to judge, and thus broaden his discretion), *cert. denied, 449 U.S. 984 (1980).*

The YCA gives the sentencing judge four options. The judge may place the youth offender on probation. *18 U.S.C. § 5010*(a) (1976); *see Durst v. United States, 434 U.S. 542, 544 (1978)* (when placing youth offender on probation pursuant to § 5010(a), sentencing judge may require restitution and, when otherwise applicable penalty provision permits, impose fine as condition of probation); *United States v. Calder, 641 F.2d 76, 79* (2d Cir.) (express language of YCA permits suspension of imposition of sentence and placement of defendant on probation), *cert. denied, 451 U.S. 912 (1981); cf. United States v. Condit, 621 F.2d 1096, 1099 (10th Cir. 1980)* (imposition of adult sentence upon revocation of YCA probation is within statutory limits). *But cf. United States v. Calder, 641 F.2d 76, 80* (2d Cir.) (Mansfield, J., concurring in part and dissenting in part) (imposition of probation consecutive to maximum sentence pursuant to § 5010(c) places impermissible condition on discharge of defendant upon expiration of such sentence in violation of § 5017(d) requiring unconditional release upon expiration of maximum sentence), *cert. denied, 451 U.S. 912 (1981).* Judge Mansfield's argument could apply equally to maximum sentences under section 5010(b).

The second option of the sentencing judge is to commit the youth offender to the custody of the Attorney General for treatment and supervision for an indefinite term. *18 U.S.C. § 5010*(b) (1976). The defendant must be released conditionally under supervision no later than four years from the date of his conviction and must be discharged unconditionally no later than six years from the date of his conviction. *18 U.S.C. § 5017*(c) (1976).

The third option of the sentencing judge is to commit the youth offender to the custody of the Attorney General for a term that may exceed six years, up to the maximum period authorized by law for the offense. *18 U.S.C. § 5010*(c) (1976). The defendant must be released conditionally under supervision not later than two years before the expiration of the term imposed and may be discharged unconditionally not less than one year later. *18 U.S.C. § 5017*(d) (1976). The defendant must be discharged unconditionally on or before the expiration of the maximum sentence imposed as computed without interruption from the date of conviction. *Id.*

The fourth option of the sentencing judge is to sentence pursuant to any other applicable penalty provision. *18 U.S.C. § 5010*(d) (1976).

n2418 *See United States v. Amidon, 627 F.2d 1023, 1026 (9th Cir. 1980)* (Bureau of Prisons and Parole Commission generally have abandoned original rehabilitative purposes of YCA); Partridge, Chaset & Eldridge, *The Sentencing Options of Federal District Judges, 84 F.R.D. 175, 200 (1980)* (YCA product of time at which there was much greater optimism than exists today about possibility of changing behavior patternsof young offenders) [hereinafter *Sentencing Options*].

n2419 *See United States v. Amidon, 627 F.2d 1023, 1026 (9th Cir. 1980)* (those sentenced pursuant to YCA are assigned by Bureau of Prisons to same institutions, receive same educational and vocational opportunities, and usually are released by Parole Commission pursuant to same guidelines as those sentenced as adult offenders); *United States v. Wallulatum, 600 F.2d 1261, 1263 (9th Cir. 1979)* (prison officials' treatment of YCA inmates virtually identical to treatment given other prisoners); *United States v. Leming, 532 F.2d 647, 652–55 (9th Cir. 1975)* (Weigel, J., dissenting) (YCA confinement not different from ordinary prison incarceration in general conditions or in rehabilitative and correctional opportunities; only significant difference between sentence under YCA and one of ordinary imprisonment "is the label"), *cert. denied, 424 U.S. 978 (1976); Sentencing Options, supra* note 2418, at 200 (language of YCA suggests that YCA sentences will have consequences that in fact will not result). *But see infra* notes 2437–40 and accompanying text (discussing Bureau of Prisons' plan to implement YCA in more

rigorous manner).

n2420 *See United States v. Amidon, 627 F.2d 1023, 1026 (9th Cir. 1980)* (youth offender sentenced for up to six years of some restraint on liberty pursuant to § 5010(b) following guilty plea to mutilating national bank obligations claimed due process and equal protection violations because YCA irrationally discriminates against those between ages of 18 and 26); *United States v. Wallulatum, 600 F.2d 1261, 1262 (9th Cir. 1979)* (youth offender sentenced for up to six years of some restraint on liberty pursuant to § 5010(b) for manslaughter claimed equal protection violation because maximum adult sentence would be three years); *see also United States v. Leming, 532 F.2d 647, 654 (9th Cir. 1975)* (Weigel, J., dissenting) (youth offenders convicted of misdemeanors have repeatedly challenged on due process and equal protection grounds sentences of confinement pursuant to § 5010(b) because maximum term under YCA longer than one year maximum provided for adults who commit misdemeanors), *cert. denied, 424 U.S. 978 (1976).*

n2421 The leading cases upholding the YCA against due process and equal protection challenges are *Cunningham v. United States, 256 F.2d 467, 472 (5th Cir. 1968)* (rather than providing youths with greater penalties and punishments than are imposed upon adult offenders, YCA provides opportunity to escape from physical and psychological traumas attendant upon serving ordinary penal sentence and to obtain benefits of corrective treatment), and *Carter v. United States, 306 F.2d 283, 285 (D.C. Cir. 1962)* (Burger, J.) (rehabilitation is *quid pro quo* for longer confinement but under different conditions and terms than a defendant would undergo in ordinary prison). The courts reason that although a defendant suffers from a longer sentence, he benefits from the superior YCA treatment he receives. This rationale was undermined by the Supreme Court's ruling last year in *Ralston v. Robinson, 484 U.S. 201 (1981).* In *Ralston* the Court ruled that a judge may order a defendant serving a YCA sentence to serve the remainder of his sentence as an adult after the offender has received a consecutive adult term and if the court finds that the youth will not benefit from further YCA treatment during the remainder of the original sentence. *Id. at 217.* The dissent in *Ralston* noted that "[i]f a second sentencing judge is able to convert an unexpired YCA sentence into an adult sentence, the quid pro quo vanishes. The youth offender who is sentenced to a longer term of confinement when sentenced under the YCA than if he were sentenced as the adult, may end up . . . serving that lengthier sentence under the adult condition he paid a price to avoid." *Id. at 232* (Stevens, J., with Brennan & O'Connor, JJ., dissenting). The majority countered that the converted sentence was in response to the offender's changed circumstances and that, at any rate, the respondent was sentenced pursuant to section 5010(c), making speculative the dissent's contention that the respondent received a longer term than he would have as an adult. *484 U.S. at 217–18 n.10, 219–20 n.13* (majority opinion). The majority did concede that serious statutory and equal protection issues would arise if a YCA sentence pursuant to section 5010(b) were modified so that a youth effectively served an adult sentence of greater length than an adult could receive. *Id. at 219–20 n.13.*

The *quid pro quo* rational is undercut when YCA offenders receive the same treatment as adult offenders. *See United States v. Hudson, 667 F.2d 767, 770 (8th Cir. 1982)* (dictum) (when YCA offenders are not given special treatment in accordance with law but instead have same terms of confinement as adult offenders, imposition of longer sentence on youths raises "potential stumbling block of constitutional dimension") (quoting *Watts v. Hadden, 651 F.2d 1354, 1365 (10th Cir. 1981)).* This objection, however, might be moot as a result of the implementation of a plan by the Bureau of Prisons to segregate and rehabilitate YCA offenders. *See United States v. Van Lufkins, 676 F.2d 1189, 1193–94 (8th Cir. 1982)* (court may sentence defendant to longer YCA sentence than possible adult sentence because Bureau of Prisons has implemented plan to restore *quid pro quo* by improving treatment of YCA offenders); *United States v. Hudson, 667 F.2d 767, 770–71 (8th Cir. 1982)* (same); *see also infra* notes 2437–40 and accompanying text (discussing Bureau of Prisons' plan).

n2422 *See United States v. Amidon, 627 F.2d 1023, 1026–27 (9th Cir. 1980)* (Federal Magistrate Act of 1979 prohibits magistrates and implicitly district court judges from sentencing youth offender to term of confinement longer than that which could be imposed on adult); *United States v. Glenn, 667 F.2d 1269, 1274 (9th Cir. 1982)* (same); *United States v. Hunt, 661 F.2d 72, 76 (6th Cir. 1981)* (dictum) (same); *United States v. Luckey, 655 F.2d 203, 205–06 (9th Cir. 1981)* (same); *United States v. Lowe, 654 F.2d 562, 565 (9th Cir. 1981)* (same).

n2423 *676 F.2d 1189 (8th Cir. 1982).*The court in *Van Lufkins* rejected the underlying assumption of *United States v. Amidon, 627 F.2d 1023 (9th Cir. 1980),* that the government has abandoned the rehabilitative purpose of

the YCA. *676 F.2d at 1194.* In addition, the court reasoned that the plain language of the Federal Magistrate Act of 1979 refers only to magistrates, not district judges.*Id.* Further, some parts of the legislative history of the Federal Magistrate Act of 1979 refute the suggestion in *Amidon* that the legislative history supports the conclusion that YCA offenders could not serve longer sentences than adult offenders. *Id.* Finally, *Amidon's* interpretation of the Federal Magistrate Act of 1979 would implicitly repeal YCA sections 5010(b) and 5017(c). *Id.*

n2424 *18 U.S.C. § 4201*–4218 (1976).

n2425 *See Marshall v. Garrison, 659 F.2d 440, 443 (4th Cir. 1981)* (Congress in passing Parole Act intended to apply same parole criteria to all federal prisoners, youth offenders and adults); *United States v. Amidon, 627 F.2d 1023, 1026 (9th Cir. 1980)* (Parole Commission generally uses same guidelines for determing release date for both adults and YCA offenders); *United States v. Wallulatum, 600 F.2d 1261, 1262–63 (9th Cir. 1979)* (Parole Commission treats youth offenders no differently from other prisoners in determining eligibility for release).

n2426 *651 F.2d 1354 (10th Cir. 1981).*

n2427 *Id. at 1379–82* (Congress intended Parole Commission to consider not only factors set forth in Parole Act, but also factors made relevant by YCA, in evaluating parole prognosis of YCA offenders).

n2428 *See United States v. Amidon, 627 F.2d 1023, 1024–26 (9th Cir. 1980)* (court may sentence defendant who pleaded guilty to misdemeanor information to custody for indeterminate sentence pursuant to *18 U.S.C. § 5010*(b) (1976) upon revocation of probation when defendant had no desire to be indicted and did not reply when government offered to obtain indictment, government initiated prosecution by felony indictment, and court dismissed felony indictment after conviction accepting guilty plea to misdemeanor); *cf. United States v. May, 622 F.2d 1000, 1003–05* (9th Cir.) (government properly charged defendants with misdemeanor by information rather than indictment when trial judge issued pretrial order limiting potential punishment to six months and informed defendants before trial that he would not impose YCA sentences), *cert. denied, 449 U.S. 984 (1980).*

n2429 *See United States v. May, 622 F.2d 1000, 1005 n.6* (9th Cir.) (not reaching question whether possibility of YCA sentencing requires charge by indictment even though maximum sentence for underlying offense would not because judge issued pretrial order that court would not sentence defendants, if convicted, pursuant to YCA), *cert. denied, 449 U.S. 984 (1980).* The Ninth Circuit in *United States v. Ramirez, 556 F.2d 909 (9th Cir. 1976), cert. denied, 434 U.S. 926 (1977),* concluded that a defendant who is potentially subject to the extended confinement prescribed by the YCA upon conviction for a misdemeanor is subject to "infamous punishment" for which an indictment is required. *Id. at 909–10.* On petition for rehearing, however, the Government disclosed for the first time that it had initiated the criminal proceedings against Ramirez by indictment on several underlying felony counts and not by information. Finding that the defendant made no objection to the superseding misdemeanor information and that the court did not dismiss the underlying felony indictment until the defendant was sentenced, the Ninth Circuit withdrew its earlier opinion. *Id. at 925–26.*

The District of Columbia Circuit in *Harvin v. United States, 445 F.2d 675* (D.C. Cir.) (en banc), *cert. denied, 404 U.S. 943 (1971),* held that a YCA sentence for an offense carrying an adult punishment not to exceed six months is not invalid when prosecution was by information, even though the defendant might be imprisioned pursuant to the YCA for up to four years. *Id. at 677–82; see also United States v. Amidon, 627 F.2d 1023, 1025 (9th Cir. 1980)* (YCA sentence not precluded on ground that defendant not subject to indictment involving same facts as misdemeanor information, notwithstanding that indictment dismissed after conviction instead of sentence).

n2430 *18 U.S.C. § 5010*(d) (1976); *see United States v. Tobias, 662 F.2d 381, 388–89 (5th Cir. 1981)* (if defendant within coverage of YCA at time of conviction, trial court obligated to make finding that YCA sentencing would be of no benefit before sentencing defendant as adult), *cert. denied, 102 S. Ct. 2908 (1982).*

n2431 *See Dorszynski v. United States, 418 U.S. 424, 441–44 (1974)* (Congress required "no benefit" finding to ensure that sentencing judge consider option of YCA treatment before rejecting it; finding must be explicit on record to obviate need for case–by–case examination); *Watts v. Hadden, 651 F.2d 1354, 1372 (10th Cir. 1981)* (to

sentence youthful offender pursuant to adult provisions, trial court must first find that defendant would not benefit by YCA treatment and supervision); *United States v. May, 622 F.2d 1000, 1004* (9th Cir.) (to sentence youthful offender pursuant to adult provisions, trial judge must make clear that he considered option of YCA treatment), *cert. denied, 449 U.S. 984 (1980); see also United States v. Wilson, 621 F.2d 927, 929* (8th Cir.) (per curiam) (requirement of express "no benefit" finding can be satisfied by *ex post facto* finding, made on basis of record alone, of judge considering § 2255 motion to vacate judgement), *cert. denied, 451 U.S. 975 (1980); cf. United States v. Sparrow, 673 F.2d 862, 865–66 (5th Cir. 1982)* (decision by sentencing judge that defendant would not profit by YCA treatment flagrant contradiction of congressional intent to require "no benefit" ruling when decision based solely on judge's opinion that anyone nineteen years of age would not benefit by sentencing under YCA); *United States v. Menghi, 641 F.2d 72, 75–76* (2d Cir.) (sentencing judge who makes required "no benefit" ruling, but who states further that he regards YCA as of absolutely no benefit in any case he will ever have and that he will never sentence under YCA, fails to make required exercise of discretion in particular case), *cert. denied, 451 U.S. 975 (1981).*

n2432 *See Ralston v. Robinson, 454 U.S. 201, 207 (1981)* (dictum) (court need not give reason supporting "no benefit" finding); *Dorszynski v. United States, 418 U.S. 424, 443–44 (1974)* (court need not give reasons supporting "no benefit" finding because sentencing judge has unreviewable discretion to sentence youth offenders outside of YCA).

n2433 *18 U.S.C. § 5011* (1976).

n2434 *Compare Outing v. Bell, 632 F.2d 1144, 1145–46* (4th Cir.) (Bureau of Prisons must segregate youth offenders from other offenders only if practical), *cert. denied, 450 U.S. 1001 (1981), with Robinson v. Ralston, 642 F.2d 1077, 1080, 1082–83* (7th Cir.) (according to terms of YCA, Bureau of Prisons must segregate youth offenders from adult prisoners), *rev'd on other grounds, 454 U.S. 201 (1981) and Outing v. Bell, 632 F.2d 1144, 1147–48 (4th Cir. 1980)* (Hall, J., dissenting) (majority's refusal to recognize that statute requires mandatory segregation of YCA inmate contrary to overwhelming weight of authority), *cert. denied, 450 U.S. 1001 (1981) and Micklus v. Carlson, 632 F.2d 227, 237 (3d Cir.1980)* (segregation of youth offenders sentenced pursuant to YCA from adult prisoners mandatory obligation of Director of Bureau of Prisons) *and* United States *ex rel Dancy v. Arnold, 572 F.2d 107, 113 (3d Cir. 1978)* (qualifying phrase "insofar as practical" applies only to maintenance of separate institutions and does not affect segregation requirement of statute).

n2435 *651 F.2d 1354 (10th Cir. 1981).*

n2436 *Id. at 1366.* In *Watts v. Hadden* prisoners sentenced pursuant to the YCA sued the Bureau of Prisons and the United States Parole Commission for violating the requirements of the YCA. The Tenth Circuit agreed that the Bureau was not complying with the YCA because the Bureau had "abandoned attempts to segregate and provide special treatment for YCA offenders." *Id. at 1360.* The court ruled that the YCA "requires the Bureau of Prisons to establish complete segregation of youth offenders from other offenders as the norm. . . . Only within this framework, in which complete segregation of youth offenders is the usual practice, may occasional aberrations be allowed for reasons of practicality." *Id. at 1366.* The court did not define what exceptions would be permissible.

n2437 FEDERAL PRISON SYSTEM, U.S. DEP'T OF JUSTICE, PLAN FOR THE IMPLEMENTATION OF THE YOUTH CORRECTIONS ACT AT THE ENGLEWOOD, COLORADO, FEDERAL CORRECTIONAL INSTITUTION (1982) (copy on file at *Georgetown Law Journal).*

n2438 *Id.* at 6–7.

n2439 *Id.* at 2–3.

n2440 *Id.* at 3–6.

n2441 *454 U.S. 201 (1981).*

n2442 *Id. at 217.* Writing for the majority, Justice Marshall first argued that Congress never intended for corrigible youth offenders to be interned with hardened youth offenders. *Id. at 214.* If a judge did not have the authority to amend a repeat offender's YCA sentence, the result would frequently be "the continuation of futile YCA treatment." *Id. at 215.*

Justice Marshall then argued that a judge already has the power to order a youth who is sentenced pursuant to the YCA to be treated as an adult offender for what would otherwise be the remainder of his YCA sentence. The Court gave three examples of this power. First, the YCA permits a court to sentence a defendant to an adult term if he commits an adult offense after a court had earlier suspended the imposition of sentence for another crime and placed the offender on probation. Second, the YCA permits a judge to impose a concurrent adult sentence on a defendant who is serving a YCA term. The adult term would commence at the time it was imposed and would modify the YCA treatment the offender would otherwise receive. Finally, an offender who is sentenced pursuant to the YCA must be released conditionally two years before the end of his sentence. But if the offender commits another crime during the conditional period, an adult sentence may be imposed immediately. *Id. at 215–17.*

Justice Stevens in dissent argued that none of the majority's examples directly supports the ruling in the case. *Id. at 226–29* (Stevens, J., with Brennan & O'Connor, JJ., dissenting). None of the three examples describes a situation in which a second judge imposes adult treatment on an offender who continues to be imprisoned on the basis of his original YCA sentence. *Id. at 228–29.*

n2443 *Id. at 210–11.* Justice Powell disagreed with this view in his concurrence, arguing that the Director of Prisons has independent authority to treat a youth offender sentenced pursuant to the YCA as an adult offender even in the absence of a subsequent felony conviction. *Id. at 223* (Powell, J., concurring). In support of his conclusion, Justice Powell noted that various provisions of the YCA demonstrate that Congress intended to give broad discretion to the Director. In particular, Justice Powell relied on the YCA provision that requires youth offenders to be separated from adult offenders "[i]nsofar as practical . . . ." *18 U.S.C. § 5011* (1976). Justice Powell asserted that occasions will arise when, because of a youth offender's threat to the safety of other youths, it would be highly impractical to continue his segregation in a youth center. *454 U.S. at 222–23* (Powell, J., concurring).

n2444 *454 U.S. at 217.* The standards that a district court should use to determine if an offender will obtain further benefit from YCA treatment are the same as those a court uses to determine whether a YCA sentence originally should be imposed. *Id. at 218.* The court should make a judgement based on the rehabilitative purposes of the YCA and the realistic circumstances of the offender. *Id. at 219.*

n2445 *18 U.S.C. § 5021*(a) (1976).

n2446 *Id.* § 5021(b). Last term in *United States v. Arrington, 618 F.2d 1110 (5th Cir. 1980), cert. denied, 449 U.S. 1086 (1981),* the Fifth Circuit held that expunction of a youth offender's conviction is automatic after he has completed the maximum six year term of a section 5010(b) sentence. *618 F.2d at 1124.* The express language of section 5021(a), which requires unconditional discharge *before* the expiration of the maximum sentence imposed as the precondition for setting aside the offender's conviction, does not appear to warrant this result.

n2447 *See 618 F.2d at 1124 & n.8* (YCA entitles youthful offender unconditionally discharged to complete and automatic removal of disabilities of criminal conviction; conviction set aside "as if it had never been"; government may not use expunged felony conviction to charge offender with violating *18 U.S.C. § 1202*(a)(1), which proscribes possession of firearms by convicted felon; unnecessary to decide whether § 5021(a) expunges record of conviction); *Doe v. Webster, 606 F.2d 1226, 1231, 1244–45 (D.C. Cir. 1979)* (YCA does not entitle youth offender whose conviction is set aside to expunction of arrest records or to physical destruction of conviction records, but youth entitled to procedures preventing set–aside convictions from appearing on public records); *United States v. Doe, 556 F.2d 391, 392 (6th Cir. 1977)* (YCA contains no provision for expunction of record of conviction after it has been set aside); *United States v. McMains, 540 F.2d 387, 389 (8th Cir. 1976)* (YCA does not authorize expunction of record of conviction). It is not clear whether the setting aside of the conviction removes the conviction from police computers. *United States v. Wallulatum, 600 F.2d 1261, 1262 n.1 (9th Cir. 1979). But see Doe v. Webster, 606 F.2d 1226, 1244–45 (D.C. Cir. 1979)* (record of YCA conviction must be physically removed from central criminal files and placed in separate storage facility not to be opened other than in course of bona fide criminal

investigation; record may not be disseminated or used for any other purpose). In determining release dates, the Parole Commission considers convictions that have been set aside. *Sentencing Options, supra* note 2418, at 203.

n2448 *See, e.g., Dorszynski v. United States, 418 U.S. 424, 431 (1974)* (generally, once appellate court determines that sentence is within statutory limits, review is at end); *United States v. Tucker, 404 U.S. 443, 447 (1972)* (same); *Gore v. United States, 357 U.S. 386, 393 (1958)* (severity of punishment peculiarly matter of legislative policy; Supreme Court has no power to revise sentences); *Townsend v. Burke, 334 U.S. 736, 741 (1948)* (severity of sentence within statutory limits not grounds for relief).

n2449 *See United States v. Cimino, 659 F.2d 535, 537 (5th Cir. 1981)* (although severity of sentence not reviewable, court will review claim that sentence based on materially inaccuracy information; *United States v. Clements, 634 F.2d 183, 186 5th* Cir.) (although severity of sentence within statutory limits not ordinarily reviewable court will review when district judge automatically imposes maximum sentence in certain class of offenses), *cert. denied, 454 U.S. 840 (1981).*

n2450 *See supra* notes 2393–2407 and accompanying text (improper considerations in determining sentence).

n2451 *See Dorszynski v. United States, 418 U.S. 424, 443–44 (1974)* (sentencing judge must actually exercise discretion if he chooses not to commit youth offender for YCA treatment); *United States v. Rosenthal, 673 F.2d 722, 723 (4th Cir. 1982)* (defendant must show that sentencing judge consistently and deliberately disregarded factors clearly relevant to fixing of appropriate sentence; defendant's allegations that trial judge imposed like sentences for like offenses plainly inadequate); *Neidinger v. United States, 647 F.2d 408, 410–11* (4th Cir.) (sentencing judge must in fact exercise discretion rather than sentence mechanistically), *cert. denied, 454 U.S. 858 (1981); United States v. Menghi, 641 F.2d 72, 75–76* (2d Cir.) (sentencing judge must actually exercise discretion in choosing not to apply YCA to youth offender; judge who makes blanket refusal to apply YCA incapable of exercising required discretion), *cert. denied, 451 U.S. 975 (1981); United States v. Clements, 634 F.2d 183, 186–88* (5th Cir.) (sentencing judge must not abuse discretion by mechanistically imposing maximum sentences on all defendants in drug cases; prisoner collaterally attacking sentence entitled to evidentiary hearing to prove sentencing judge urged such a policy), *cert. denied, 454 U.S. 840 (1981); cf. United States v. Elliott, 674 F.2d 754, 755–56 (8th Cir. 1982)* (sentencing process not mechanical when judge weighed defendant's favorable individual record against generalized need for deterrence); *United States v. Reed, 674 F.2d 128, 129 (1st Cir. 1982)* (sentencing process not mechanical when judge weighed defendant's favorable individual record and character witnesses against seriousness of offense and need for deterrence in drug cases); *United States v. Fountain, 642 F.2d 1083, 1097–98* (7th Cir.) (sentencing process not mechanical when court permitted defendant to correct presentencing reports in open court, did not automatically impose maximum sentences, and considered need for punishment of defendant's particular crime as well as deterrence), *cert. denied, 451 U.S. 993 (1981); United States v. Ford, 627 F.2d 807, 813* (7th Cir.) (sentencing process not mechanical when court after sentencing reviewed results of physical and psychological examinations of defendant and then substantially reduced sentence sua sponte), *cert. denied, 449 U.S. 923 (1980).*

n2452 *See United States v. Larios, 640 F.2d 938, 942–43 (9th Cir. 1981)* (sentencing judge who did not preside over trial abused discretion by refusing to review trial transcript before imposing sentence and otherwise displaying lack of familiarity with case); *cf. United States v. Colmenares–Hernandez, 659 F.2d 39, 42–43* (5th Cir.) (sentencing judge did not abuse discretion by refusing to order presentence report when true identity of defendant was unknown and stated record sufficient to permit exercise of sentencing discretion), *cert. denied, 102 S. Ct. 979 (1981).*

n2453 *See United States v. McDonald, 672 F.2d 864, 867 (11th Cir. 1982)* (resolving variations between oral and written version of same sentence in favor of oral version). Also, a district court must stay the imminent execution of a state prisoner seeking federal habeas relief to give the courts of appeal time to resolve substantial issues raised by the habeas petition. *See Goode v. Wainwright, 670 F.2d 941, 941–42 (11th Cir. 1982)* (defendant's execution stayed when claim for relief depended upon substantial constitutional issues pending in cases before court of appeals).

n2454 *See United States v. Vasquez, 638 F.2d 507, 534 (2d Cir. 1980)* (ordinarily judge under no obligation to give reasons for sentencing), *cert. denied, 454 U.S. 935 (1981); United States v. Garcia, 617 F.2d 1176, 1178 (5th Cir. 1980)* (per curiam) (judges encouraged but not required to announce reasons for severity of sentence).

n2455 *See United States v. Vasquez, 638 F.2d 507, 534 (2d Cir. 1980)* (reasons for sentencing decisions, once given, may be considered and basis for sentence scrutizned by court of appeals), *cert. denied, 454 U.S. 935 (1981); cf. United States v. Hawkins, 658 F.2d 279, 289–90 (5th Cir. 1981)* (upholding sentence when judge's explanation for sentence indicates that sentence based on correct information).

n2456 *Britton v. Rogers, 631 F.2d 572, 577 (8th Cir. 1980)* (difference of four years in average sentences given to black and white convicted rapists in Arkansas does not indicate discriminatory purpose), *cert. denied, 451 U.S. 939 (1981); cf. United States v. Mack, 655 F.2d 843, 847 (8th Cir. 1981)* (indigent prisoner may not be incarcerated for longer period than nonindigent prisoner solely because of nonpayment of fine).

n2457 *See Jamerson v. Estelle, 666 F.2d 241, 245 (5th Cir. 1982)* (habeas petitioner properly sentenced despite state's failure to include member of court in cumulative sentencing order pursuant to state procedure); *United States v. Rowan, 663 F.2d 1034, 1035–36 (11th Cir. 1981)* (per curiam) (defendant indicted for violation of general federal conspiracy statute properly sentenced pursuant to statute specifically prohibiting conspiracy to distribute heroin when facts in indictment supported latter charge); *Kelsie v. Trigg, 657 F.2d 155, 157 (7th Cir. 1981)* (habeas petitioner properly sentenced despite state jury's failure to include recommended sentence in verdict pursuant to state law when judge imposed minimum allowable sentence); *United States v. Durant, 648 F.2d 747, 752 (D.C. Cir. 1981)* (defendant's sentence upheld despite appellate court's vacating defendant's convictions on two of three charges when all three sentences to run concurrently).

n2458 FED. R. CRIM. P. 35.

n2459 *Id.; see United States v. Counter, 661 F.2d 374, 376–77 (5th Cir. 1981)* (district court has jurisdiction to consider motion to correct illegal sentence despite expiration of 120–day limitation on motion to reduce legal sentences); *United States v. Romero, 642 F.2d 392, 395 (10th Cir. 1981)* (district court's timing in granting government's motion to correct illegal sentence not issue because rule 35 permits such correction at any time); *United States v. Connolly, 618 F.2d 553, 555–56 (9th Cir. 1980)* (district court properly corrected defendant's illegal 1972 sentence by adding mandatory parole term in 1978 pursuant to rule 35 motion filed by United States Attorney).

n2460 *See United States v. Connolly, 618 F.2d 553, 556 (9th Cir. 1980)* (no question of double jeopardy when district court corrects illegal sentence pursuant to rule 35 by adding mandatory parole term).

n2461 FED. R. CRIM. P. 35; *See United States v. Ramsey, 655 F.2d 398, 400–01 (D.C. Cir. 1981)* (sentencing judge's failure to comply with precise procedure for imposing enhanced sentence does not render sentence illegal; defendant's motion to reduce sentence barred because not filed within 120 days).

n2462 *See United States v. Lacey, 661 F.2d 1021, 1022 (5th Cir. 1981)* (district court's denial of motion to reduce five–year sentence for drug possession and distribution not abuse of discretion when defendant on probation found in possession of drugs and using another's driver's license), *cert. denied, 102 S. Ct. 2036 (1982); United States v. Ligori, 658 F.2d 130, 132 (5th Cir. 1981)* (district court's denial of motion to vacate fine for drug distribution not abuse of discretion because district court could properly assess defendant's claim that he had not profited from crime); *United States v. Mooney, 654 F.2d 482, 488 (7th Cir. 1981)* (district court's denial of motion to reduce 25–year sentence for bank robbery not abuse of discretion when defendant had extensive criminal record and ongoing propensity to commit serious crimes); *United States v. Bedrosian, 631 F.2d 582, 583 (8th Cir. 1980)* (per curiam) (district court's denial of motion to reduce six–month sentence for obstructing mails not abuse oiscretion when basis for motion was that defendant's pregnant fiancee needed him).

n2463 *See United States v. Addonizio, 442 U.S. 178, 189 (1979)* (dictum) (120–day time period of rule 35 is jurisdictional and may not be extended); *United States v. Llinas, 670 F.2d 993, 993–95 (11th Cir. 1982)* (district court without jurisdiction to consider motion to reduce sentence filed within 120 days of court's prior reduction of sentence but more than 120 days after imposition of sentence); *United States v. Mariano, 646 F.2d 856, 857 (3d Cir. 1981)* (district court without jurisdiction to consider motion to reduce sentence made more that 120 days after receipt of mandate of affirmance despite stay of defendant's incarceration pending his participation in secret witness program). *But see United States v. Colvin, 644 F.2d 703, 706–07 (8th Cir. 1981)* (district court has jurisdiction to

consider motion to reduce sentence within 120 days of parole revocation despite passage of more than 120 days since original sentence imposed).

n2464 *See United States v. Johnson, 634 F.2d 94, 95 n.1 (3d Cir. 1980)* (district court has jurisdiction to consider timely motion to reduce sentence for reasonable time after expiration of 120–day period). *Compare United States v. DeMier, 671 F.2d 1200, 1207 (8th Cir. 1982)* (district court has jurisdiction to reduce sentence six months after expiration of 120–day period) *with United States v. Pollack, 655 F.2d 243, 246 (D.C. Cir. 1980)* (district court has no jurisdiction to reduce sentence ten months after expiration of 120–day period).

The Ninth Circuit this term rejected a defendant's argument that a district judge who waited six months after the expiration of the 120–day period before denying the defendant's motion to reduce his sentence thereby deprived himself of jurisdiction to deny the motion. *United States v. Smith, 650 F.2d 206, 209 (9th Cir. 1981)* (if six–month delay unreasonable as defendant claimed, district court had no jurisdiction to consider motion at all).

n2465 *See United States v. Gonzales–Perez, 629 F.2d 1081, 1083 (5th Cir. 1980)* (per curiam) (denial of certiorari did not trigger new 120–day period because defendant did not petition for writ of certiorari until more than eight years after conviction).

n2466 *See United States v. Inendino, 655 F.2d 108, 109–10 (7th Cir. 1981)* (district court had no jurisdiction to reconsider court's denial of motion to reduce sentence when motion to reconsider filed 165 days after sentence imposed); *United States v. Hetrick, 644 F.2d 752, 756 (9th Cir. 1981)* (district court had no jurisdiction to entertain second, untimely motion to reduce sentence despite styling of subsequent motion as "motion for reconsideration"); *United States v. United States District Court, 509 F.2d 1352, 1356 (9th Cir. 1975)* (district court has no jurisdiction to consider second, untimely motion to reduce sentence despite defendant's contention that second motion was merely for "clarification" of earlier order). *But see United States v. Parker, 617 F.2d 141, 143 n.1 (5th Cir. 1980)* (although federal procedural rules do not permit rehearing of denial of rule 35 motion, defendant's "petition for rehearing" construed as motion for collateral review within *28 U.S.C. § 2255* because defendant alleged "fundamental defect" in sentence).

n2467 *See United States v. DeWald, 669 F.2d 590, 592 (9th Cir. 1982)* (district court has jurisdiction to hear defendant's motion for reduction of sentence filed less than 120 days after resentencing but more than 120 days after original sentencing).

n2468 *See United States v. Johnson, 634 F.2d 94, 96–97 (3rd Cir. 1980)* (probation revocation hearing of defendant whose sentence originally suspended triggers 120–day period for filing of rule 35 motion).

n2469 *Compare United States v. Colvin, 644 F.2d 703, 704–07 (8th Cir. 1981)* (district court has jurisdiction over rule 35 motion for reduction of sentence filed within 120 days of revocation of defendant's probation and reimposition of previously suspended sentence) *and United States v. Johnson, 634 F.2d 94, 98 (3d Cir. 1980)* (same) *with United States v. Rice, 671 F.2d 455, 462–63 (11th Cir. 1982)* (district court has no jurisdiction over rule 35 motion for reduction of sentencing filed following revocation of defendant's probation and reimposition of previously suspended sentence when motion filed more than 120 days after original sentence imposed) *and United States v. Kahane, 527 F.2d 491, 492 (2d Cir. 1975)* (same).

n2470 The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. The eighth amendment applies to the states through the fourteenth amendment. *Robinson v. California, 370 U.S. 660, 666–67 (1962).* The eighth amendment ban on cruel and unusual punishment protects only persons convicted of a crime. *Ingraham v. Wright, 430 U.S. 651, 664 (1977)* (eighth amendment inapplicable to paddling of students in public schools); *Garcia v. United States, 666 F.2d 960, 965 (5th Cir. 1982)* (eighth amendment inapplicable when drug informer terminated from witness protection program), *cert. denied, 51 U.S.L.W. 3254* (U.S. Oct. 5, 1982) (No. 81–2235).

n2471 *See Furman v. Georgia, 408 U.S. 238, 241–42 (1972)* (per curiam) (Douglas, J., concurring) (proscription of cruel and unusual punishment acquires meaning from public opinion enlightened by humane justice); *Trop v.*

Dulles, 356 U.S. 86, 101 (1958) (eighth amendment draws meaning from evolving standards of decency that mark progress of maturing society).

n2472 *Compare In re Kemmler, 136 U.S. 436, 447 (1890)* (death penalty not cruel and unusual unless manner of execution inhuman and barbarous) *with Gregg v. Georgia, 428 U.S. 153, 188 (1976)* (plurality opinion) (death penalty cruel and unusual if sentencing procedures create substantial risk of arbitrary and capricious imposition).

n2473 *Gregg v. Georgia, 428 U.S. 153, 173 (1976)* (plurality opinion) (penalty excessive when involves "unnecessary and wanton infliction of pain" or when grossly out of proportion to severity of crime); *see Coker v. Georgia, 433 U.S. 584, 592 (1977)* (death penalty cruel and unusual because disproportionate and excessive for rape of adult woman).

n2474 *See Trop v. Dulles, 356 U.S. 86, 101–02 (1958)* (denationalization of citizen constitutes cruel and unusual punishment); *Weems v. United States, 217 U.S. 349, 364, 381–82 (1910)* (imprisonment for 12–20 years at hard labor in chains, forfeiture of parental authority, property rights and suffrage, and perpetual surveillance constitute cruel and unusual punishment); *cf. United States v. Tunnell, 667 F.2d 1182, 1188 (5th Cir. 1982)* (forfeiture of motel used for prostitution not cruel and unusual punishment because keyed to magnitude of offense).

n2475 *See Enmund v. Florida, 102 S. Ct. 3368, 3377 (1982)* (death penalty not per se cruel and unusual punishment but death disproportionate penalty for accomplice to first degree murder and robbery); *Terrebonne v. Blackburn, 646 F.2d 997, 1002–03 (5th Cir. 1981)* (en banc) (plurality opinion) (statutory imposition of life sentence for distributing heroin not facially invalid; appropriateness must be determined by considering nature of offense and strength of state interest), *vacating 624 F.2d 1363 (5th Cir. 1980).*

n2476 *See Furman v. Georgia, 408 U.S. 238, 239–40 (1972)* (per curiam) (death sentences overturned as cruel and unusual); *Henry v. Wainwright, 661 F.2d 56, 60 (5th Cir. 1981)* (per curiam) (death sentence vacated because of risk of arbitrary and capricious imposition), *cert. denied, 102 S. Ct. 2922 (1982).*

n2477 *See Chapman v. Pickett, 586 F.2d 22, 28 (7th Cir. 1978)* (district court erred in denying money damages in civil action based on eighth amendment violation).

n2478 *See Jones v. Diamond, 594 F.2d 997, 1029–30 (5th Cir. 1979)* (granting declaratory judgment that overcrowding and racial segregation of pretrial detainees violates due process), *cert. dismissed, 453 U.S. 950 (1981).*

n2479 *See id.* (enjoining overcrowding and racial segregation of pretrial detainees).

n2480 *Dorszynski v. United States, 418 U.S. 424, 431, 441 (1974); United States v. Dazzo, 672 F.2d 284, 289* (2d Cir.), *cert. denied, 51 U.S.L.W. 3255* (U.S. Oct. 4, 1982) (No. 81–2320); *United States v. Wilkins, 659 F.2d 769, 773* (7th Cir.), *cert. denied, 102 S. Ct. 681 (1981); United States v. Anderson, 654 F.2d 1264, 1271* (8th Cir.), *cert. denied, 102 S. Ct. 978 (1981); Jones v. Purvis, 646 F.2d 127, 128 (4th Cir. 1981)* (per curiam).

n2481 *See United States v. Dazzo, 672 F.2d 284, 289* (2d Cir.) (sentence of 15 years, $45,000 fine, and lifetime special parole term for multiple narcotics offenses not cruel and unusual punishment because within statutory limits and defendant failed to show that court relied on material misinformation or constitutionally impermissible factors), *cert. denied, 51 U.S.L.W. 3255* (U.S. Oct. 4, 1982) (No. 81–2320); *United States v. Wilkins, 659 F.2d 769, 773* (7th Cir.) (sentence of 15 years and $10,000 fine for bank robbery not cruel and unusual punishment because within statutory limits and within court's discretion to assign little or no weight to mitigating factors presented by defendant), *cert. denied, 102 S. Ct. 681 (1981); Terrebonne v. Blackburn, 646 F.2d 997, 1000–01 (5th Cir. 1981)* (en banc) (plurality opinion) (sentence of life imprisonment for heroin distribution not so excessive as to constitute cruel and unusual punishment because within statutory limits and court free to disregard factors that might weigh in favor of clemency), *vacating 624 F.2d 1363 (5th Cir. 1980).*

n2482 *See Coker v. Georgia, 433 U.S. 584, 597 (1977)* (plurality opinion) (statutorily prescribed death penalty

disproportionate punishment for rape of adult woman); *cf. Robinson v. California, 370 U.S. 660, 667 (1962)* (state statute calling for imprisonment of drug addicts constitutes cruel and unusual punishment in violation of fourteenth amendment).

n2483 *See Rummel v. Estelle, 445 U.S. 263, 281 (1980)* (even if sentence more stringent than sentence in any other state, that severity would not render defendant's sentence grossly disproportionate).

n2484 *445 U.S. 263 (1980).*

n2485 TEX PENAL CODE ANN. tit. 3, § 12.42(d) (Vernon 1974) (if defendant convicted for felony after having been convicted previously at two separate times for felonies, life imprisonment imposed).

n2486 *445 U.S. at 265.* Although the petitioner did not challenge the constitutionality of the statute, he objected that his sentence was disproportionate to the circumstances of his case. *Id. at 268.* Prior to Rummel's third and final conviction for fraudulently obtaining $120.75, he had been convicted and imprisoned for credit card fraud and for passing a forged check in the amount of $23.36. *Id. at 265.* Upon his third conviction the trial court imposed the life sentence mandated by the Texas recidivist statute. *Id. at 266.*

n2487 *Id. at 274 n.11* (dictum) (proportionality principle could be valid in extreme cases of life imprisonment for trivial offense).

n2488 *Id. at 280–81.* In response to Rummel's argument that his sentence would have been less severe in almost any other state, the Court remarked that the difference in penalties was "subtle rather than gross." *Id. at 279.*

n2489 *Id. at 285.* The Texas legislature is entitled to choose the appropriate punishment for "one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State," subject only to constitutional limits. *Id. at 284; see also Hutto v. Davis, 102 S. Ct. 703, 705 (1982)* (per curiam) (lower court improperly intruded upon legislative prerogative when declared $20,000 fine and 40 year sentence "grossly disproportionate" to crime of possessing less than nine ounces of marijuana).

n2490 *445 U.S. at 285.* Four justices dissented, *id.* (Powell, J., with Brennan, Marshall & Stevens, JJ., dissenting), arguing not only that a life sentence for a noncapital offense might be unconstitutionally disproportionate, but also that the petitioner's mandatory life sentence was indeed "grossly disproportionate" to his crimes under the eighth amendment. *Id. at 286–87.* Justice Powell indicated that when applying the proportionality test, a court should consider the nature of the offense, the sentence imposed in other jurisdictions for the same crime, and the sentence imposed upon other defendants in the same jurisdiction for various crimes. *Id. at 295.* Applying these objective criteria, Justice Powell concluded that a court could not lawfully sentence an offender convicted of defrauding persons of approximately $230 to a mandatory life sentence under the eighth amendment. *Id. at 307.*

n2491 *102 S. Ct. 703 (1982).*

n2492 *102 S. Ct. 703, 705–06 (1982).* The Fourth Circuit decision followed remand of the case by the Supreme Court for reconsideration in light of the Court's decision in *Rummel. Id. at 704.* The Court reviewed the Fourth Circuit's determination that the sentence violated the ban on cruel and unusual punishment as ignoring, "either consciously or unconsciously," the *Rummel* decision, and reminded lower federal courts that "a precedent of this Court must be followed . . . no matter how misguided the judges of [lower federal courts] may think it to be." *Id. at 705.*

n2493 *646 F.2d 997 (5th Cir. 1981)* (en banc) (plurality opinion), *vacating 624 F.2d 1363 (5th Cir. 1980).* Terrebonne, a 21–year–old drug addict, had volunteered to obtain a small amount of heroin for two undercover agents and a paid informant. *Id.* at 998–99. For a discussion of the panel opinion, see *Project: 1979–80 Term, supra* note 1, at 745–46.

n2494 LA. REV. STAT. ANN. § 40:966B(1) (West 1977) (mandating life imprisonment for heroin distribution

convictions).

n2495 *646 F.2d at 999.* The prisoner also claimed that the statute was unconstitutional on its face because it imposed a mandatory sentence. *Id. at 1000–01.* In disposing of the prisoner's claim, the court stated that "[i]n light of the deference to state legislative judgments mandated by *Rummel,* we cannot say that such a sentence . . . necessarily violates the eighth amendment." *Id. at 1001.*

n2496 *Terrebonne v. Blackburn, 624 F.2d 1363 (5th Cir. 1980), vacated, 646 F.2d 997 (5th Cir. 1981)* (en banc) (plurality opinion). After the panel remanded the case to the district court for an evidentiary hearing, the Fifth Circuit agreed to consider the case en banc. *646 F.2d at 999.*

n2497 *624 F.2d at 1371.* Under the three–prong test applied by the panel, a trial court must consider the nature of the offense, the penalty imposed by other jurisdictions for the same offense, and the penalty imposed within the sentencing jurisdiction for other offenses. *Id. at 1368.* Four justices endorsed this test in their dissenting opinion in *Rummel v. Estelle, 445 U.S. at 295* (Powell, J., with Brennan, Marshall & Stevens, JJ., dissenting).

The *Terrebonne* panel admitted that the Supreme Court's opinion in *Rummel* could be read to prohibit a proportionality challenge to the length of a sentence. *624 F.2d at 1366.* The court believed, however, that *Rummel* did not actually foreclose the use of a proportionality test when determining whether the length of a sentence constitutes cruel and unusual punishment. *Id. at 1367.* The panel maintained that the *Rummel* court not only endorsed the continued viability of the proportionality principle, but even applied a proportionality analysis in rejecting Rummel's claims. *Id. at 1367–68.* The court interpreted the Supreme Court's comparison of state recidivist statutes as a tacit application of the proportionality analysis. *Id.*

The panel assigned to the district court the complicated task of predicting the term that Terrebonne probably would serve, and of considering its appropriateness in light of the individual facts of Terrebonne's criminal act, the sentence imposed by other jurisdictions for the same offense, and the sentences imposed by Louisiana for other criminal acts. *Id. at 1368–71.*

n2498 *Id. at 1371.* According to the panel, Terrebonne did not challenge the constitutionality of the statute, but rather objected that this sentence was disproportionate to his crime. *Id. at 1366.*

n2499 *646 F.2d at 1001–02* (plurality opinion). The court was sharply divided, with only 10 of the 23 judges sitting en banc joining the decision. *Id. at 997.* One judge filed a concurring opinion, and three judges joined in a specially concurring opinion. *Id. at 1003.* The remaining nine judges dissented. *Id. at 1003–09.*

The Fifth Circuit en banc ruled that the panel misconstrued Terrebonne's petition for habeas corpus and that, in fact, Terrebonne had attacked both the sentence as applied and the facial constitutionality of the statute. *Id. at 999–1000.* The court rejected Terrebonne's contention that the mandatory life sentence was imposed without statutory provision for considering the circumstances of each case. *Id.* The court reasoned that the sentencing judge was not precluded from considering mitigating factors or choosing between alternative sentences, although the trial judge in Terrebonne's case did not do so. *Id. at 1000–01.*

n2500 *Id. at 1001.* Although the Supreme Court in *Rummel* affirmed the end banc decision of the Fifth Circuit denying Rummel relief, the *Terrebonne* court noted that "the Court rejected the proportionality analysis suggested in our majority and dissenting opinions." *Id. (Rummel* court gravely restricted proportionality principle to "extreme example," such as life sentence for overtime parking).

n2501 *Id. at 1002.* According to the *Terrebonne* court, the Supreme Court in *Rummel* only examined whether the sentence "served an obvious and substantial state interest," determining that Texas "has a right to protect its citizens from incorrigible recidivists." *Id.*

n2502 *Id.* The Fifth Circuit ruled that the trial court could consider more than the offense for which the petitioner was convicted when determining the state interest in imposing a life sentence on the petitioner. *Id.* The sentencing judge could consider Terrebonne's prior convictions and the evidence indicating that Terrebonne was a drug addict

who probably "resorted to crime to allay his addiction." *Id.*

n2503 *Id.* The Fifth Circuit reasoned that "[a] life sentence for the crime of distributing hereoin serves substantial state interests in the same manner that state interests were served by a life sentence for recidivism in *Rummel." Id.*

n2504 *Id. at 1003.* In contrast to the plurality, the dissent agreed with the panel's interpretation of *Rummel. Id. at 1004–06* (F. Johnson, J., dissenting). The dissent argued that the Court in *Rummel* in fact had utilized the concept of proportionality, but had found the peculiar character of recidivist statutes and the related state interests to mandate a rejection of Rummel's petition. *Id. at 1004.* According to the dissent, *Rummel* did not foreclose the use of proportionality criteria in cases challenging other types of statutes. *Id. at 1006.*

Other circuits that have rejected proportionality challenges this term have relied on *Rummel's* instruction to defer to the discretion of the legislature when establishing the length of prison sentences. *See United States v. Dazzo, 672 F.2d 284, 290* (2d Cir.) (*Rummel* precludes proportionality challenge where sentence within statutory maximum and case does not qualify as one of rare instances for successful proportionality challenge under *Rummel;* 15–year sentence, $45,000 fine, and lifetime special parole for multiple narcotics offenses upheld), *cert. denied, 51 U.S.L.W. 3255* (U.S. Oct. 4, 1982) (No. 81–2320); *Sneed v. Smith, 670 F.2d 1348, 1356 (4th Cir. 1982)* (per curiam) (20–year sentence for forgery and uttering of $188.90 check upheld under *Hutto v. Davis, 102 S. Ct. 703 (1982),* which applies *Rummel); United States v. Phillips, 664 F.2d 971, 1043 (5th Cir. 1981)* (sentences not excessive under *Rummel* and *Terrebonne;* long sentences and large fines for numerous defendants on multiple narcotics offenses upheld), *cert. denied, 102 S. Ct. 2965 (1982); Gaines v. Hess, 662 F.2d 1364, 1370 (10th Cir. 1981)* (under *Rummel* length of sentence matter of legislative prerogative; 50–year sentence for narcotics distribution upheld); *Cerrella v. Hanberry, 650 F.2d 606, 608* (5th Cir.) (per curiam) (under *Rummel* length of prison sentences not subject to disproportionality challenge; 16–year sentence for extortion upheld), *cert. denied, 454 U.S. 1034 (1981); Francioni v. Wainwright, 650 F.2d 590, 591 (5th Cir. 1981)* (per curiam) (*Rummel* and *Terrebonne* reject proportionality analysis and limit inquiry to substantial state interest test; 3–year sentence for aggravated assault and use of firearm in the commission of felony upheld); *Jones v. Purvis, 646 F.2d 127, 128 (4th Cir. 1981)* (per curiam) (*Rummel* precludes challenges to disproportionality of sentence within statutory authorization; 20–year sentence and $10,000 fine for possession of drugs with intent to distribute upheld).

n2505 *Gregg v. Georgia, 428 U.S. 153, 169 (1976)* (plurality opinion). Only two current Justices of the Supreme Court have consistently argued that the death penalty is a per se violation of the eighth and fourteenth amendments. *Enmund v. Florida, 102 S. Ct. 3368, 3379 (1982)* (Brennan, J., concurring) (death penalty under all circumstances cruel and unusual punishment prohibited by eighth and fourteenth amendments); *Hopper v. Evans, 102 S. Ct. 2049, 2054 (1982)* (Brennan, J., with Marshall, J., concurring in part and dissenting in part) (same); *Zant v. Stephens, 102 S. Ct. 1856, 1859 (1982)* (Marshall, J., with Brennan, J., dissenting) (same); *Eddings v. Oklahoma, 102 S. Ct. 869, 877 (1982)* (Brennan, J., concurring) (same).

n2506 *Gregg v. Georgia, 428 U.S. 153, 188, 193–95 (1976)* (plurality opinion); *see Furman v. Georgia, 408 U.S. 238, 309–10 (1972)* (per curiam) (Stewart, J., concurring) (eighth and fourteenth amendments forbid unique penalty of death "to be so wantonly and so freakishly imposed"); *id. at 274* (Brennan, J., concurring) (eighth amendment prohibits arbitrary infliction of severe punishment); *id. at 255–56* (Douglas, J., concurring) (eighth amendment prohibits arbitrary, discriminatory and selective imposition of death penalty); *cf. Spinkellink v. Wainwright, 578 F.2d 582, 604 (5th Cir. 1978)* (unnecessary to analyze sentencing procedures on case–by–case basis to ensure death penalty not arbitrarily applied; if state follows constitutionally mandated guidelines for exercise of discretion, possibility of arbitrariness removed), *cert. denied, 441 U.S. 937 (1979).*

n2507 *Lockett v. Ohio, 438 U.S. 586, 604 (1978)* (plurality opinion); *Woodson v. North Carolina, 428 U.S. 280, 305 (1976)* (plurality opinion); *see Gregg v. Georgia, 428 U.S. 153, 187 (1976)* (plurality opinion) (because death penalty unique in its severity and irrevocability, greater need for safeguards in sentencing).

The uniqueness of the death penalty has been recognized in other circumstances. This term, for example, in *Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981),* the Tenth Circuit held that the "obviously irreversible nature" of the death penalty made extensive physical examinations and mental evaluations of a death row inmate with a history of prior disorders critically necessary when his mental competency to prosecute his appeal was questioned

by his next of friend. *Id. at 1005, 1013* (remanding to determine competency).

n2508 *428 U.S. 153 (1976)* (plurality opinion).

n2509 *Id. at 187*. The imposition of capital punishment for the most violent and heinous crimes comports with the Court's understanding of contemporary standards of decency. *Id. at 179–82.*

n2510 *Id. at 187 n.35* (declining to address whether death penalty proper sanction for crimes such as rape, kidnapping, or armed robbery). The Court has since ruled that death is a disproportionate penalty for the crime of rape when no life is taken. *Coker v. Georgia, 433 U.S. 584, 599 (1977)* (plurality opinion).

n2511 *Enmund v. Florida, 102 S. Ct. 3368, 3379 (1982)* (death penalty excessive punishment for one who did not murder, who was not present at the murder, and who neither intended nor anticipated murder).

n2512 *102 S. Ct. 3368 (1982).*

n2513 *Id. at 3370–71*.

n2514 *Id. at 3370.* Under Florida law, driving the getaway car made Enmund an aider, abettor, and principal in first degree murder and robbery.*Id.* The defendant's lack of intent to kill was irrelevant under the Florida statute. *Id. at 3372.*

n2515 *Id. at 3370.* The sentencing judge found four statutory aggravating circumstances to exist: (1) the defendant committed a capital felony while an accomplice to the commission of an armed robbery, (2) the crime was committed for pecuniary gain, (3) the crime was heinous, atrocious or cruel, and (4) the defendant had previously been convicted of a felony involving the use or threat of violence. *Id.* The judge did not consider Enmund's relatively minor role in the crime a mitigating circumstance. *Id. at 3371*.

n2516 *Id. at 3379.*

n2517 *433 U.S. 584, 592, 596 (1977)* (in judging whether death penalty violates eighth amendment, courts must use objective evidence of contemporary values, such as history and precedent, legislative attitudes, and response of juries).

n2518 *102 S. Ct. at 3373–78.* After examining state statutes, the Court concluded that only nine states authorize the imposition of the death penalty on defendants who participate in robberies where another robber commits a murder. *Id. at 3372.* The Court noted that three states do not categorize felony murder as a capital crime, eleven require that some culpable mental state be found with respect to the homicide, and nine require the existence of some aggravating factor. *Id. at 3372–74.* Four states prohibit the imposition of the death penalty in circumstances similar to *Enmund. Id. at 3373.* The Court proffered statistics indicating that juries have overwhelmingly repudiated imposition of the death penalty when the defendant had no intent to kill. *Id. at 3375–76.*

Justice Brennan, concurring in the Court's opinion, also restated his conviction that the death penalty is per se unconstitutional. *Id. at 3379* (Brennan, J., concurring). The dissent sharply disputed the majority's analysis of the state statutes and the jury statistics, contending that the available data did not demonstrate that society has conclusively rejected the death penalty for felony murder. *Id. at 3387–90* (O'Connor, J., with Burger, C.J., Powell & Rehnquist, JJ., dissenting). Justice O'Connor interpreted the majority's opinion as making culpable intent a matter of federal constitutional law. *Id. at 3391*. The dissent, however, concluded that a remand for a new sentencing hearing was required because the trial judge refused to consider Enmund's minor role in the crime as a mitigating circumstance in violation of *Lockett v. Ohio. Id. at 3394; see Lockett v. Ohio, 438 U.S. 586, 605 (1978)* (plurality opinion) (nonavailability in capital offenses of sentence–modifying techniques such as parole and probation require that sentencers consider all relevant mitigating factors).

n2519 *438 U.S. at 604; see id. at 593–94, 608* (reversing death sentence imposed under Ohio statute which

required death penalty unless sentencer found that victim induced offense, defendant was under duress, or offense was produced by mental deficiency); *Roberts v. Louisiana, 428 U.S. 325, 333 (1976)* (mandatory death statute unconstitutionally inflexible even if categories of capital crimes limited).

n2520 The Court has declined to rule the mandatory death sentence unconstitutional in all instances.*See Lockett v. Ohio, 438 U.S. 586, 604 & n.11 (1978)* (plurality opinion) (declining to address whether need to deter certain types of homicide could justify mandatory death sentence).

n2521 *Godfrey v. Georgia, 446 U.S. 420, 428 (1980)* (plurality opinion) (state authorizing capital punishment has constitutional duty to tailor and apply law to avoid arbitrary and capricious infliction of death penalty); *Woodson v. North Carolina, 428 U.S. 280, 303 (1976)* (plurality opinion) (statute unconstitutional because failed to provide adequate standards to guide jury in imposing death penalty); *Henry v. Wainwright, 661 F.2d 56, 58–59 (5th Cir. 1981)* (per curiam) (statute must sufficiently guide jury discretion in capital sentencing to avoid arbitrary and selective imposition of death penalty; jury may not consider nonstatutory aggravating factors because jury discretion not sufficiently guided to avoid arbitrary imposition), *cert. denied, 102 S. Ct. 2922 (1982); cf. Smith v. Balkcom, 660 F.2d 573, 584 (5th Cir. 1981)* (arbitrariness and capriciousness conclusively removed if sentencer follows properly drawn statute in imposing death penalty), *modified per curiam on other grounds, 671 F.2d 858 (5th Cir. 1982); Williams v. Blackburn, 649 F.2d 1019, 1025–26 (5th Cir. 1981)* (per curiam) (arbitrariness and capriciousness removed if sentencer meticulously follows detailed and constitutional procedure provided by statute; jury need find only one statutory aggravating factor).

In *Gregg v. Georgia, 428 U.S. 153 (1976)* (plurality opinion), the Supreme Court stated that the constitutional concern that the death penalty not be imposed arbitrarily and capriciously is satisfied when a state–reviewing court compares the defendant's death sentence to sentences imposed on similarly situated defendants. *Id. at 195, 198.* Twice this term the Fifth Circuit addressed the issue whether Louisiana, when reviewing death penalty cases and the finding of aggravating factors, may conduct a review of a death penalty case by comparing it only to other cases in the same judicial district, and not on a state–wide basis. *Baldwin v. Blackburn, 653 F.2d 942, 953 (5th Cir. 1981); Williams v. Blackburn, 649 F.2d 1019, 1021 (5th Cir. 1981)* (per curiam). In both cases, the circuit court upheld Louisiana's district–based, rather than state–wide, review of death sentences. In *Baldwin* and *Williams* the Fifth Circuit noted that the Supreme Court, although approving appellate review procedures of various states, never has sanctioned any one system as sacrosanct. *653 F.2d at 953; 649 F.2d at 1021.*

n2522 *See Gregg v. Georgia, 428 U.S. 153, 195 (1976)* (plurality opinion) (upholding statutory sentencing system that provides for bifurcated proceeding at which sentencer may impose death penalty only after finding statutory aggravating circumstance); *see also Henry v. Wainwright, 661 F.2d 56, 58–59 (5th Cir. 1981)* (per curiam) (jury may not consider nonstatutory aggravating circumstance that defendant wounded arresting officer after committing crime for which sentenced to death); *cf. Battie v. Estelle, 655 F.2d 692, 699 (5th Cir. 1981)* (death sentence based on aggravating circumstance established by illegally obtained evidence vacated); *Baldwin v. Blackburn, 653 F.2d 942, 951–52 (5th Cir. 1981)* (no reversible error when instructions on aggravating circumstances given in wrong phase of bifurcated guilt–sentencing process because no unfairness demonstrated).

Section 27–2534.1(b) of the Georgia Code provides an example of a constitutionally acceptable death penalty statute. *Gregg v. Georgia, 428 U.S. 153, 207 (1976).* Although § 27–2534.1(a) of the statute provides that the death penalty may be imposed without considering mitigating circumstances in any case of aircraft hijacking or treason, the Supreme Court has not passed on the constitutionality of this provision. For all other crimes, the judge or jury must specifically find one of the following aggravating circumstances before the death penalty may be imposed:

(1) The offense of murder, rape, armed robbery or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the

lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duties.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement to avoid or prevent arrest of himself or another.

GA. CODE ANN. § 27–2534.1(b)(1978).

In *Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976),* the Georgia Supreme Court invalidated that part of § 27–2534.1(b)(1) that authorized a jury to consider whether a defendant has a "substantial history of serious assaultive criminal convictions." The court found that this provision was unconstitutionally vague. *236 Ga. at 541–42, 224 S.E.2d at 391–92; see infra* notes 2541–46 and accompanying text (discussing *Zant v. Stephens'* consideration of conviction based on jury's application of this unconstitutional provision).

n2523 *See Jurek v. Texas, 428 U.S. 262, 270 (1976)* (narrowing categories of murder for which death sentence may be imposed serves same purpose as defining aggravating circumstances that justify imposition of death penalty).

n2524 *Eddings v. Oklahoma, 102 S. Ct. 869, 875 (1982)* (eighth amendment requires that sentencer be permitted to consider any relevant aspect of defendant's character or record as mitigating circumstance); *Lockett v. Ohio, 438 U.S. 586, 604 (1978)* (plurality opinion) (eighth and fourteenth amendments require that sentencer be permitted to consider mitigating factors relating to circumstances of offense, or defendant's character or record).

In *Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982),* the Ninth Circuit upheld an Arizona death penalty statute against a challenge that it was void because it was vague and violated the eighth and fourteenth amendments. *Id. at 1258–59.* Section 13–454(F) of the statute listed mitigating circumstances that the sentencer had to consider before imposing the death penalty. ARIZ. REV. STAT. ANN. § 13–454(F) (1973). In 1976 the Arizona Supreme Court interpreted this list of mitigating circumstances to be exclusive. *State v. Richmond, 114 Ariz. 186, 195, 560 P.2d 41, 50 (1976), cert. denied, 433 U.S. 915 (1977).* In response to *Lockett v. Ohio, 438 U.S. 586 (1978),* the Arizona Supreme Court subsequently held that Arizona's death penalty statute as interpreted in *State v. Richmond* was unconstitutional because it precluded the sentencer from considering mitigating circumstances not listed in the statute. *State v. Watson, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978), cert. denied, 440 U.S. 924 (1979).* The Arizona Supreme Court stated that the unconstitutional portion of the statute was severable and therefore could be deleted from the statute with the result that the constitutional portions could remain in effect. *Id. In Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982),* death row inmates challenged this version of the statute, claiming that it was vague because the statute was left with meaningless references to what they interpreted to be the deleted subsection. *Id. at 1259.* The prisoners claimed that the statute as interpreted by the Arizona Supreme Court violated the eighth and fourteenth amendments because it now left no authorization to consider mitigating factors. *Id.* The Ninth Circuit rejected these challenges, holding that the Arizona Supreme Court in *Watson* did not delete § 13–454(F) but merely invalidated its prior interpretation that the list was exclusive. Id. Accordingly, the Ninth Circuit held that the Arizona death penalty statute was not void for vagueness and did not violate the eighth and fourtheenth amendments. *Id.*

n2525 *Lockett v. Ohio, 438 U.S. 586, 604 (1978)* (plurality opinion).

n2526 *Id; see Eddings v. Oklahoma, 102 S. Ct. 869, 875–76 (1982)* (death sentence reversed because judge refused to consider as mitigating circumstances when imposing sentence, defendant's emotional instability and troubled youth); *Woodson v. North Carolina, 428 U.S. 280, 304 (1976)* (plurality opinion) (statute unconstitutional because it fails to allow jury to consider relevant aspects of defendant's character and record before imposing death penalty); *cf. Granviel v. Estelle 655 F.2d 673, 675–76 (5th Cir. 1981)* (during sentence deliberation jury could consider evidence of defendant's mental instability introduced during guilt phase of trial, although evidence not specifically submitted as mitigating factor), *cert. denied, 102 S. Ct. 1636 (1982).*

This term the Fifth Circuit held that in order to provide effective assistance of counsel, a defense attorney must conduct an independent investigation to discover mitigating evidence to be introduced at his client's capital sentencing hearing. *Washington v. Strickland, 673 F.2d 879, 892 (5th Cir. 1982).* An attorney must make a sufficient inquiry into mitigating circumstances, such as the defendant's character and his disposition to commit other crimes, to be able to make an informed and reasonable evaluation of what evidence to introduce. *Id. at 892–94.*

n2527 *438 U.S. 586 (1978).*

n2528 *Id. at 608.*

n2529 Id.

n2530 The Court stated:

A variety of flexible techniques — probation, parole, work furloughs, to name a few — and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Id. at 605.

n2531 *Eddings v. Oklahoma, 102 S. Ct. 869, 875–76 (1982); cf. Washington v. Strickland, 673 F.2d 879, 894 (5th Cir. 1982)* (defense attorney has duty to investigate statutory and non–statutory mitigating circumstances).

n2532 *102 S. Ct. 869 (1982).*

n2533 *Id. at 872.* Eddings stood trial as an adult because he was found not to be amenable to rehabilitation within the juvenile system. *Id.*

n2534 *Id. at 872–73.* After the defendant presented substantial evidence of his troubled youth and family life, psychiatrists testified that Eddings was emotionally disturbed but capable of treatment and rehabilitation. *Id.*

n2535 OKLA. STAT. tit. 21, § 701.10 (1976).

n2536 *Id.* The Oklahoma statute provided that "[i]n the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in the act." *Id.* The statute listed seven statutory aggravating circumstances under which the death penalty may be imposed, *id.* § 701.12, three of which the trial court found had been proven beyond a reasonable doubt. *102 S. Ct. at 873.*

n2537 *Id.* The Supreme Court majority interpreted this statement to mean not that the sentencing judge evaluated the evidence of mitigation and found it unconvincing as a matter of fact, but that the judge believed as a matter of law that he was unable even to consider the evidence. *Id. at 875.* The dissent, however, construed the judge's language differently, arguing that the statement was ambiguous and probably was a comment on the sufficiency of the evidence. *Id. at 881* (Burger, C.J., with White, Blackmun & Rehnquist, JJ., dissenting).

n2538 *Id. at 873.*

n2539 *Id. at 877.* The Court remanded to the lower court for a full consideration of all relevant mitigating evidence. *Id.*

n2540 *Id. at 875.* The Court noted that there was no distinction under *Lockett* between the trial judge's refusal to consider mitigating evidence and a state statute's precluding a judge or jury from such consideration: "Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Id. at 876.* The Supreme Court reasoned that a judge's refusal to consider evidence has the same effect as a judge's instructing a jury to disregard the defendant's proffered evidence. *Id.*

Eddings leaves unclear whether a sentencer must state explicitly the method it used in deciding to impose the death sentence. One commentator has argued that an appellate court may determine whether a death sentence was imposed in an arbitrary and capricious manner only if the sentencer is required to articulate its method of weighing aggravating and mitigating evidence. Note, *The Bitter Fruit of* McGautha: Eddings v. Oklahoma *and the Need for Weighing Method Articulation in Capital Sentencing, 20 AM. CRIM. L. REV. 63, 77, 87–93 (1982)* (proposing procedures for making sentencers articulate their weighing methods).

n2541 *102 S. Ct. 1856 (1982)* (per curiam).

n2542 *Id. at 1857.*

n2543 *Id. at 1857.* After the defendant had been convicted of murder, *id. at 1856,* the sentencing jury found three statutory aggravating circumstances: (1) the defendant had a prior conviction for a capital felony, (2) he had a substantial history of serious assaultive criminal convictions, and (3) he had escaped from the lawful custody of an officer, or his place of confinement. IId. at 1857; *see* GA. CODE ANN. § 27–2534.1(b)(1),(9) (1973) (Georgia death penalty statute) (current version at GA. CODE ANN. § 27–2534.1(b)(1),(9) (1978)). On appeal, the Georgia Supreme Court affirmed the sentence, but set aside one of the three statutory aggravating circumstances found by the jury. *102 S. Ct. at 1857; see supra* note 2522 (discussing Georgia Supreme Court's invalidation of part of Georgia death penalty statute that permitted consideration of whether defendant has substantial history of serious assaultive criminal convictions).

n2544 *102 S. Ct. at 1859.* In *Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938 (1980),* the Georgia Supreme Court held that "[w]here two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." *244 Ga. at 599, 261 S.E.2d at 358.* The United States Supreme Court noted, however, that the Georgia Supreme Court had never explained the rationale for this position. *102 S. Ct. at 1858.*

n2545 *102 S. Ct. at 1859.*

n2546 *Id.* The Court certified the following question: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" *Id.*

According to the dissenters in *Zant* a post hoc construction of a death penalty statute by a state court could not remedy the fact that the jury was instructed to consider an aggravating circumstance later found by the Georgia Supreme Court to be unconstitutionally vague. *Id. at 1859* (Marshall J., with Brennan, J., dissenting); *see Arnold v. State, 236 Ga. 534, 541–42, 224 S.E.2d 386, 391–92 (1976)* (finding unconstitutionally vague consideration as aggravating factor whether defendant has substantial history of serious assaultive criminal convictions). The dissent argued that the Supreme Court has "consistently declined to speculate about whether a particular jury would have reached the same conclusion in the absence of an unconstitutional instruction." *102 S. Ct. at 1862.* The dissent recognized that the jury weighs valid statutory aggravating circumstances against any mitigating circumstances, *id. at 1861, 1864,* and in light of the invalidity of one of the aggravating circumstances relied on would have remanded

for resentencing. *Id. at 1859.*

n2547 *661 F.2d 56 (5th Cir. 1981).*

n2548 *Id. at 58–60.*

n2549 *Id. at 57; see* FLA. STAT. ANN. § 921.141(5) (West Supp. 1981) (list of statutory aggravating factors). The nonstatutory factor that the jury considered during the sentencing proceeding was testimony that the defendant wounded a police officer while attempting to avoid arrest for the murder for which he was convicted. *661 F.2d at 56.*

n2550 *661 F.2d at 58.* According to the court, permitting the consideration of nonstatutory aggravating factors opens too wide a door for the influence of arbitrary factors on the sentencing decision. *Id. at 59.*

n2551 *Beck v. Alabama, 447 U.S. 625, 637–38 (1980)* (quoting *Gardner v. Florida, 430 U.S. 349, 357–58 (1977).*

n2552 *447 U.S. 625 (1980).*

n2553 *Id. at 627.*

n2554 *Id. at 628.*

n2555 *Id. at 630.*

n2556 *Id. at 637, 642–43.*

n2557 *102 S. Ct. 2049 (1982).*

n2558 *Id. at 2053.*

n2559 *Id.* The defendant confessed to the crime and even testified that he intentionally killed the victim. *Id.*

n2560 *Id.* The trial judge had made written findings that the aggravating circumstances far outweighed any mitigating circumstances. *Id.* The conviction and sentence were affirmed on appeal. *Evans v. State, 361 So.2d 654 (Ala. Crim. App. 1977), Iaff'd, 361 So.2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979).*

n2561 *102 S. Ct. at 2051.* The district court rejected the defendant's claims, *Evans v. Britton, 472 F. Supp. 707, 711–12 (S.D. Ala. 1979),* but the Fifth Circuit reversed. *Evans v. Britton, 628 F.2d 400 (1980), modified, 639 F.2d 221 (5th Cir. 1981), rev'd sub nom. Hooper v. Evans, 102 S. Ct. 2049 (1982).*

n2562 *102 S. Ct. at 2054.*

n2563 *Id.* The Court reviewed the evidence indicating that Evans intentionally killed his victim, including his confessions and testimony. *Id.* Based on this evidence, the Court concluded that an instruction on the offense of unintentional killing was not warranted. *Id.*

Justices Brennan and Marshall concurred in reversing the Fifth Circuit's invalidation of the conviction, but dissented because they continue to believe that the death penalty is cruel and unusual in all circumstances. *Id. at 2054.* (Brennan, J., with Marshall, J., concurring in part and dissenting in part).

n2564 *See Morrissey v. Brewer, 408 U.S. 471, 477 (1972)* (purpose of parole to help prisoners reintegrate into society as constructive individuals).Parole also reduces the costs society must bear for the confinement of criminals. *Id.*

n2565 *18 U.S.C. § 4206*(d) (1976) (prisoner serving sentence of five years or more shall be released after serving shorter of two–thirds of term or 30 years unless he seriously violated prison rules or likely to commit crime upon release).

n2566 *Morrissey v. Brewer, 408 U.S. at 477; see United States v. Chagra, 669 F.2d 241, 264 (5th Cir. 1982)* (parole release wholly contingent on either affirmative statutory entitlement or grace of parole authorities); *18 U.S.C. § 4206*(a) (1976) (Commission shall grant parole to eligible prisoner who observes prison rules if release would not jeopardize public welfare, depreciate seriousness of offense, or promote disrespect for law).

n2567 *See Morrissey v. Brewer, 408 U.S. 471, 478 (1972)* (purpose of parole requires restrictive conditions exceeding ordinary restrictions imposed by law on citizens); *Evans v. Garrison, 657 F.2d 64, 66 (4th Cir. 1981)* (parole condition may require parolee to make restitution to victims). In *Evans* the Fourth Circuit held that although restitution to a victim was a valid condition of parole, a parolee may not be required as a condition of parole to reimburse a government agency for its investigatory expenses. *Id.*

In addition to specific conditions imposed by the Parole Commission, every parolee must observe certain other conditions. All parolees must refrain from using alcohol or habit–forming drugs, avoid associating with undesirable persons, report regularly to their probation officers, report promptly any change of employment or residence, and obtain written permission to possess firearms or to leave a prescribed area. 28 C.F.R. §§ 2.40(a)(1)–(11) (1981).

n2568 28 C.F.R. § 2.40(a) (1981).

n2569 *18 U.S.C. § 4214*(d)(5) (1976); *see Staege v. United States Parole Comm'n, 671 F.2d 266, 267 (8th Cir. 1982)* (per curiam) (parole revoked after parolee convicted for burglary); *Beebe v. Phelps, 650 F.2d 774, 775 (5th Cir. 1981)* (per curiam) (parole revoked after parolee convicted for possession of firearms); *Harris v. Day, 649 F.2d 755, 756 (10th Cir. 1981)* (parole revoked when parolee convicted for burglary). *But cf. Morrissey v. Brewer, 408 U.S. 471, 479 (1972)* (parole officer has broad discretion to forego parole revocation unless violations serious or continuous). For a discussion of the due process implications of parole revocation proceedings, see *infra* notes 2639–52 and accompanying text.

n2570 *See 18 U.S.C. § 4213*(a)(2) (1976) (if violation of parole alleged Parole Commission may issue warrant to return parolee to custody).

n2571 *Id.* § 4205(a). A prisoner serving a life sentence or a sentence exceeding thirty years is eligible for parole after serving ten years. *Id.*.

n2572 *See 18 U.S.C. § 4205*(b)(1) (1976) (court imposing sentence exceeding one year may designate minimum term, not exceeding one–third of maximum sentence, after which prisoner eligible for parole). Although the court may specify when the prisoner will be eligible for parole, the Parole Commission, and not the court, has authority to grant parole. *See United States v. Pollack, 655 F.2d 243, 244–46 (D.C. Cir. 1980)* (when district court granted motion to reduce sentence, it could not order immediate parole because parole decision within jurisdiction of Parole Commission).

n2573 *See 18 U.S.C. § 4205*(b)(2) (1976) (court imposing sentence exceeding one year may fix maximum term and specify that Commission may determine when to parole prisoner); *Rouse v. Foster, 672 F.2d 649, 652 (8th Cir. 1982)* (when court sets mandatory prison term, Parole Commission may determine parole release date after statutory minimum term has been served); *Pierre v. Thompson, 666 F.2d 424, 426 (9th Cir. 1982)* (same).

n2574 *See 18 U.S.C. § 4210*(b)(2),(c) (1976) (Commission's jurisdiction over parolee terminates no later than expiration of maximum term unless parolee commits another crime subsequent to release or fails to respond to reasonable Commission request, order, summons, or warrant); *cf. Gray v. United States Parole Comm'n, 668 F.2d 349, 350 (8th Cir. 1981)* (per curiam) (section 4210(b)(1) allows earlier termination only for prisoners on mandatory release and not those granted parole).

n2575 *See 18 U.S.C. § 4211*(a) (1976) (Commission may terminate jurisdiction over parolee prior to expiration of maximum term). Beginning two years after release on parole, the Commission reviews the parolee's status annually to decide whether to terminate supervision. *Id.* § 4211(b).

n2576 *Id.* § 4211(c)(1); *cf. Caballery v. United States Parole Comm'n, 673 F.2d 43, 45* (2d Cir.) (six–year parole term of offender sentenced under Youth Corrections Act, *18 U.S.C. §§ 5005,* 5006, 5110–5126 (1976), tolled when parolee absconded from parole supervision), *cert. denied, 102 S. Ct. 2965 (1982); Henrique v. United States Marshal, 653 F.2d 1317, 1322 (9th Cir. 1981)* (same).

n2577 Pub. L. No. 94–233, 90 Stat. 219 (codified at *18 U.S.C. §§ 4201*–4208 (1976)) (repealing *18 U.S.C. §§ 4201*–4210 (1970) and creating United States Parole Commission to replace United States Parole Board). Prisoners convicted prior to the enactment of the statute have claimed that its application to them violates the *ex post facto* clause of the constitution, U.S. CONST. art. I, § 9, cl. 3 ("no . . . ex post facto [l]aw shall be passed"). *See infra* note 2583 (discussing retroactive application of act). In *United States v. Chagra, 669 F.2d 241 (5th Cir. 1982),* the Fifth Circuit had to decide the extent to which the 1976 Act superseded previous parole statutes. *Id. at 264–66.* The prisoner was convicted for possession of cocaine and operating a narcotics enterprise in violation of *21 U.S.C. § 848* (1976), which expressly precluded parole or probation for such convictions. *669 F.2d at 247; see 21 U.S.C. § 848*(c) (1976). The prisoner made an elaborate argument that the 1976 Act implicitly repealed *21 U.S.C. § 848,* and that accordingly he was entitled to parole under *18 U.S.C. § 4205. 669 F.2d 262–63.* The Fifth Circuit rejected this argument, holding that, in the absence of express statutory intent, the 1976 Act does not supersede any other federal law denying a prisoner the opportunity for parole. *Id. at 264–65.*

n2578 *18 U.S.C. § 4206*(a) (1976). Essentially the same requirement appears in the Department of Justice regulations. *See* 28 C.F.R. § 2.18 (1981) (substantial observance of prison rules prerequisite to parole release). The Commission has discretion to deny parole to a prisoner who compiles an acceptable institutional behavior record when this record is outweighed by other factors. *See Staege v. United States Parole Comm'n, 671 F.2d 266, 267–69 (8th Cir. 1982)* (per curiam) (prisoner with excellent institutional adjustment denied parole because of severity of offense); *Hayward v. United States Parole Comm'n, 659 F.2d 857, 861 (8th Cir. 1981)* (same), *cert. denied, 102 S. Ct. 1991 (1982).*

n2579 *18 U.S.C. § 4206*(a)(1) (1976); *see Staege v. United States Parole Comm'n, 671 F.2d 266, 267–69 (8th Cir. 1982)* (per curiam) (Commission could deny parole when severity of offense outweighed excellent institutional record); *Garcia v. Neagle, 660 F.2d 983, 991 (4th Cir. 1981)* (Commission could deny parole based on severity of offense because severity is touchstone of parole determination); *Hayward v. United States Parole Comm'n, 659 F.2d 857, 861–62 (8th Cir. 1981)* (Commission could deny parole based on sophistication and seriousness of offense), *cert. denied, 102 S. Ct. 1991 (1982).* Once the Commission has established the effective parole date, it may defer release if it later discovers additional damaging information about the defendant.*See Iuteri v. Nardoza, 662 F.2d 159, 160–61 (2d Cir. 1981)* (after already having set parole release date, Commission could deny parole when it received sentencing transcript and summary of criminal record providing new information militating against parole).

n2580 *18 U.S.C. § 4206*(a)(1) (1976).

n2581 *Id.* § 4206(a)(2).

n2582 28 C.F.R. § 2.20 (1981); *see Garcia v. Neagle, 660 F.2d 983, 985 (4th Cir. 1981)* (Commission did not violate statutory mandate by promulgating parole guidelines emphasizing the severity of the offense rather than sentence imposed as parole criteria).

n2583 28 C.F.R. § 2.20(a) (1981). The act authorizes the Commission to consider information supplied by the prisoner, institution, sentencing judge, medical examiner, or psychological examiner, as well as the prisoner's criminal record, presentence investigation report, and any other relevant information. *18 U.S.C. § 4207* (1976). The Department of Justice regulations also authorize the Commission in its discretion to consider information supplied by the defense attorney and prosecutor. 28 C.F.R. § 2.19(d) (1981). The Department of Justice has recommended that United States Attorneys inform the Commission of charges dropped during plea bargaining and the degree

of the defendant's cooperation, and that the attorneys furnish a transcript of the sentencing proceedings to the defendant. PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 1, at 55–56.

Several circuits held this term that when considering parole, the Commission may examine any criminal behavior or activity of the prisoner. *See Solomon v. Elsea, 676 F.2d 282, 288 (7th. Cir. 1982)* (per curiam) (Commission has discretion to consider information in presentence report even though never proven in adversary setting); *Stroud v. United States Parole Comm'n, 668 F.2d 843, 846 (5th Cir. 1982)* (Commission has discretion to emphasize prisoner's prior convictions); *Page v. United States Parole Comm'n, 651 F.2d 1083, 1086 (5th Cir. 1981)* (per curiam) (Commission has discretion to consider smuggling charge dismissed in exchange for plea bargain); *Arias v. United States Parole Comm'n, 648 F.2d 196, 200 (3d Cir. 1981)* (Commission has discretion to consider dismissed indictments). *Contra Marshall v. Garrison, 659 F.2d 440, 446 (4th Cir. 1981)* (Commission may not consider separate alleged offense when no substantial information as to prisoner's guilt).

The circuits have split over whether the Parole Commission may apply the 1976 Act and interpretative guidelines to prisoners convicted prior to enactment of the statute without violating the *ex post facto* clause of the constitution. *See* U.S. CONST. art. I, § 9, cl. 3 ("no . . . ex post facto [l]aw shall be passed"). *Compare Hayward v. United States Parole Comm'n, 659 F.2d 857, 862 (8th Cir. 1981)* (because defendant had no reasonable expectation at the time he committed the crime that he would be considered for parole under any particular parole system, no violation of *ex post facto* clause), *cert. denied, 102 S. Ct. 1991 (1982) and Warren v. United States Parole Comm'n, 659 F.2d 183, 194 (D.C. Cir. 1981)* (when new guidelines promulgated after defendant committed first crime, but before released on parole and committed second crime, no violation of *ex post facto* clause because defendant charged with notice of new guidelines) *with Marshall v. Garrison, 659 F.2d 440, 442–43 (4th Cir. 1981)* (retroactive application of new guidelines that emphasize general deterrence to defendant sentenced under youth corrections statute that emphasized rehabilitation violates *ex post facto* clause) *and United States v. Ferri, 652 F.2d 325, 328 (3d Cir. 1981)* (retroactive application of new guidelines gives rise to *ex post facto* claim, but defendant failed to allege detrimental impact or actual denial of parole; remanding for defendant to show prejudice); *cf. Gill v. Garrison, 675 F.2d 599, 601 (4th Cir. 1982)* (violation of *ex post facto* clause to consider severity of post–parole offenses of youth offender convicted prior to 1976 amendments to the Youth Corrections Act, *18 U.S.C. § 5017*(a) (1976); no violation, however, to consider fact of criminal activity).

State prisoners have also claimed that changes in state parole criteria violate the *ex post facto* clause. This term in *Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982),* the Seventh Circuit held that the *ex post facto* clause prevented the application of 1973 Illinois parole criteria to a prisoner who committed a crime in 1962.*Id. at 331.* The court stated that the guidelines in effect when the defendant was convicted emphasized specific deterrence, meaning deterring further crimes by the prisoner. *Id.* Under these guidelines, the court concluded that the defendant probably would have been entitled to parole because of his exemplary institutional record. *Id.* The Illinois parole board denied parole, however, under new guidelines that recommend denial of parole if continued incarceration would deter others from committing the crimes. *Id.* The circuit court held that retroactive application of the new criteria to deny parole violated the *ex post facto* clause, and remanded to the Parole Board for reconsideration under the guidelines in effect when the defendant was convicted. *Id.*

n2584 28 C.F.R. § 2.20(e) (1981). The score reflects such factors as the inmate's history of criminal behavior and drug usage, Salient Factor Score, 28 C.F.R. § 2.20(e) notes, at 93 (1981), and predicts the potential risk of parole violation, 28 C.F.R. § 2.20(e) (1981).

n2585 *Id.* § 2.20(b). The severity of offenses scale ranges from "Low," which includes violations such as simple possession of illicit drugs, to "Greatest II," which includes offenses such as murder and treason. *Id.* The Commission has authority to reclassify an offense and give it a higher severity rating. *See Staege v. United States Parole Comm'n, 671 F.2d 266, 268 (8th Cir. 1982)* (per curiam) (Commission may increase severity rating of defendant's bank robbery offense from "high" to "very high").

This term the Fourth Circuit rejected a prisoner's challenge to a guideline that classified nonviolent fraud involving a large amount of money as a "Greatest I" offense, even though all other offenses in that category involved potential injury to life. *Garcia v. Neagle, 660 F.2d 983, 990 (4th Cir. 1981).* The court reasoned that classification of crimes was within the Commission's discretion. *Id.* The Tenth Circuit similarly rejected a prisoner's argument that categorization of his offense as "Greatest II" violated his right to equal protection because it is the only category that

does not specify a maximum release date. *Artez v. Mulcrone, 673 F.2d 1169, 1171 (10th Cir. 1982)* (per curiam). The court held that the Commission's classification did not involve a fundamental right or an inherently suspect class, and that society has a legitimate state interest in ensuring that "prisoners convicted of serious crimes not be released before serving their full sentence unless they are rehabilitated." *Id.*

The Commission may consider mitigating or aggravating circumstances when determining the offense severity level. 28 C.F.R. § 2.20(d) (1980); *see Stroud v. United States Parole Comm'n, 668 F.2d 43, 846–47 (5th Cir. 1982)* (although Commission has discretion to consider prisoner's alcoholism and wife's illness, these factors deemed insignificant compared to prior convictions).

n2586 28 C.F.R. § 2.20(b) (1980). The time ranges fixed by the guidelines are predicated upon good institutional adjustment and program progress. *Id.* There are separate guidelines for youth offenders and for prisoners sentenced under a provision of the Narcotic Addict Rehabilitation Act (NARA), *18 U.S.C. § 4254* (1976); *see* 28 C.F.R. § 2.20(h)(2) (1980).

This term two circuits disagreed over the weight that the Parole Commission must give to the special program and treatment progress of defendants sentenced as narcotics addicts and youth offenders. *See Allen v. United States Parole Comm'n, 671 F.2d 322, 324 (9th Cir. 1982); Watts v. Hadden, 651 F.2d 1354, 1377 (10th Cir. 1981).* In *Allen* the Ninth Circuit held that the Parole Commission is not required to actively consider a certification of NARA program completion, or provide specific reasons why it believes certification is insufficient to warrant release of a prisoner sentenced under NARA. *671 F.2d at 324.* The court reasoned that because the certification does not carry an absolute right to parole, the Parole Commission may find that other considerations outweigh the prisoner's completion of the NARA program. *Id.* In contrast, the Tenth Circuit held in *Watts* that the Parole Commission must consider a youth offender's response to treatment because the Youth Corrections Act, *18 U.S.C. §§ 5005,* 5006, 5110–5126 (1976), made such response the primary criteria for determining release on parole. *651 F.2d at 1377.* The court rejected the Commission's argument that when Congress enacted the 1976 Parole Act it implicitly repealed the Youth Corrections Act's criteria for parole eligibility. *Id. at 1375.*

n2587 *18 U.S.C. § 4206*(c) (1976) (Commission may grant or deny parole notwithstanding guidelines if good cause exists, provided it gives proper notice to prisoner); *see Solomon v. Elsea, 676 F.2d 282, 287 (7th Cir. 1982)* (per curiam) (Commission has discretion to consider amount of drugs defendant convicted of possessing and to disregard guidelines suggesting earlier release); *Stroud v. United States Parole Comm'n, 668 F.2d 843, 846–47 (5th Cir. 1982)* (Commission has authority to emphasize prior convictions over mitigating circumstances such as defendant's alcoholism and wife's poor health when determining parole date); *Hayward v. United States Parole Comm'n, 659 F.2d 857, 860–61 (8th Cir. 1981)* (Commission has discretion to impose parole decision above guidelines when sophistication of offense outweighs institutional adjustment; good cause for deviation means substantial reason), *cert. denied, 102 S. Ct. 1991 (1982); Warren v. United States Parole Comm'n, 659 F.2d 183, 193, 195 (D.C. Cir. 1981)* (dictum) (Commission has discretion to change or deviate from guidelines); *Arias v. United States Parole Comm'n, 648 F.2d 196, 200–01 (3d Cir. 1981)* (Commission has discretion to go beyond guidelines and consider dismissed indictments).

n2588 *See Solomon v. Elsea, 676 F.2d 282, 290 (7th Cir. 1982)* (per curiam) (denial of parole not abuse of discretion when Commission determines that large amount of drugs defendant convicted of possessing justified deviation from guidelines recommending early parole); *Staege v. United States Parole Comm'n, 671 F.2d 266, 268 (8th Cir. 1982)* (per curiam) (denial of parole not abuse of discretion when Commission reclassified seriousness of offense); *Stroud v. United States Parole Comm'n, 668 F.2d 843, 846–47 (5th Cir. 1982)* (denial of parole not abuse of discretion when Commission determines that prior convictions outweighed defendant's alcoholism and wife's poor health); *Garcia v. Neagle, 660 F.2d 983, 991 (4th Cir. 1981)* (denial of parole not abuse of discretion when fraudulent offense involving large sum of money placed in category with crimes involving harm to human life); *Hayward v. United States Parole Comm'n, 659 F.2d 857, 860–61 (8th Cir. 1981)* (denial of parole not abuse of discretion when Commission determines that unusual sophistication of particular offense outweighed institutional adjustment), *cert. denied, 102 S. Ct. 1991 (1982); Page v. United States Parole Comm'n, 651 F.2d 1083, 1085–86 (5th Cir. 1981)* (per curiam) (denial of parole not abuse of discretion when Commission decides that drug smuggling offense more serious than rating indicates); *Arias v. United States Parole Comm'n, 648 F.2d 196, 200 (3d Cir. 1981)* (denial of parole not abuse of discretion when Commission determines that defendant with previous indictments

and prior criminal conduct should not be paroled).

Even if the Parole Commission departs from the normal procedures prescribed by the sentencing and parole statute, its actions do not violate the statute if they do not prejudice the prisoner. *See Staege v. United States Parole Comm'n, 671 F.2d 266, 268–69 (8th Cir. 1982)* (per curiam) (prisoner's claim that notice of parole denial insufficient because failed to explain sufficiently reclassification of his offense no error because defendant answered and not prejudiced); *Goodman v. Keohane, 663 F.2d 1044, 1046 (11th Cir. 1981)* (per curiam) (although Commission required to hold revocation hearing within 90 days, no error to hold within 111 days because delay not prejudicial); *Harris v. Day, 649 F.2d 755, 760–61 (10th Cir. 1981)* (although Commission required to appoint counsel in timely manner, eight month delay in appointing counsel not error because delay not prejudicial); *Spotted Bear v. McCall, 648 F.2d 546, 547 (9th Cir. 1980)* (although Commission required to hold speedy revocation hearing, delay in holding hearing not error because defendant in custody for another charge and thus delay not prejudicial); *Franklin v. Fenton, 642 F.2d 760, 764 (3d Cir. 1980)* (although Commission did not provide dispositional review of parole violation warrant within statutorily required 180 days, no error because parolee not prejudiced when revocation hearing held within statutorily required 90 days after execution of warrant).

n2589 *660 F.2d 983 (4th Cir. 1981).*

n2590 *Id. at 985*. Federal courts of appeals have upheld state statutes granting state parole boards similar discretion to deny parole because of severity of offense. *See Artway v. Pallone, 672 F.2d 1168, 1179 (3d Cir. 1982)* (parole board could deny parole on finding that sex offender was presently dangerous and that illegal conduct might be repeated); United States *ex rel. Scott v. Illinois Parole and Pardon Bd., 669 F.2d 1185, 1187–88 (7th Cir. 1982)* (per curiam) (although parole board may deny parole based on seriousness of prisoner's offense, case remanded for Board to state sufficient reasons for denial).

n2591 The defendant had been convicted of three counts of fraud that involved more than $500,000. *660 F.2d at 985*. The Parole Commission's guidelines rated property offenses not exceeding $500,000 in the "Very High" severity of offense category. *Id. at 990*. Because the prisoner's offense involved more than $500,000, the Commission ranked her offenses as "Greatest I" even though that category included only offenses involving potential injury to life. *Id. at 990.* The Commission classified her offense according to its notes to the guidelines, *id.*, which state that "if an offense behavior is not listed . . . , the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed." 28 C.F.R. § 2.20 notes, at 92 (1981). Because of this application of the severity of offense rating, the Commission denied her parole until two–thirds of her prison sentence had been served. *660 F.2d at 985*. The district court held that this violated the Parole Act and constituted an abuse of discretion. *Id. at 986.*

n2592 *660 F.2d at 989*. The Fourth Circuit agreed with the Commission that there was no statutory or constitutional prohibition against rating non–violent fraudulent offenses involving large sums of money equal in severity to offenses involving injury or loss of life. *Id. at 987*. The court emphasized that because the Commission's promulgation and application of guidelines could be reviewed only when the Commission abused its discretion, the district court had exceeded the proper scope of judicial review. *Id. at 988.*

n2593 *Id. at 991*. The Fourth Circuit found no indication that Congress intended the sentence imposed to be the primary basis for parole decisions. *Id.*

n2594 *See supra* note 2583 (discussing *ex post facto* challenges).

n2595 *See id.* (discussing split in circuits).

n2596 *Artez v. Mulcrone, 673 F.2d 1169, 1170 (10th Cir. 1982)* (per curiam); *United States v. Ferri, 652 F.2d 325, 325–26 (3d Cir. 1981); Staege v. United States Parole Comm'n, 671 F.2d 266, 269 (8th Cir. 1982)* (per curiam) (prisoner claimed Commission's refusal to have state and federal sentences run concurrently for parole purposes frustrated intent of sentencing judge).

n2597 *442 U.S. 178 (1979).*

n2598 *Id. at 190.* The district judge who sentenced Addonizio to a 10–year term for extortion and conspiracy expected that the defendant would be eligible for parole after serving one–third of his sentence. *Id. at 180–81 & 181 n.3.*Under the Commission's new guidelines, which place added emphasis on the severity of the offense, the Commission twice denied Addonizio parole based on the seriousness of his crimes. *Id. at 182.*

n2599 *Id. at 186.*

n2600 *Id.*

n2601 *Staege v. United States Parole Comm'n, 671 F.2d 266, 269 (8th Cir. 1982)* (per curiam) (Parole Commission may disregard sentencing court's recommendation on parole because trial court has no enforceable expectations); *Artez v. Mulcrone, 673 F.2d 1169, 1170–71 (10th Cir. 1982)* (per curiam) (trial judge has no enforceable expectations as to date when prisoner would be released on parole; Commission has discretion to determine whether individual will serve sentence inside or outside prison walls); *Page v. United States Parole Comm'n, 651 F.2d 1083, 1086 (5th Cir. 1981)* (per curiam) (trial judge has no enforceable expectations as to defendant's parole release date).

n2602 *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 12 (1979)* (prisoner entitled to due process protection because Nebraska parole statute created legitimate expectation of parole).

n2603 *442 U.S. 1 (1979).* The court based its holding on the unique structure and language of the Nebraska statute. *Id. at 12.* The Court emphasized, however, that a case–by–case analysis, relying on the language of each state statute, would be necessary to determine whether due process protections should apply to parole release decisions. *Id.*

n2604 The statute at issue in *Greenholtz* provided that:

(1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release *unless* it is of the opinion that his release should be deferred because: (a) There is a substantial risk that he will not conform to the conditions of parole; (b) His release would depreciate the seriousness of his crime or promote disrespect for the law; (c) His release would have a substantially adverse effect on institutional discipline; or (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law–abiding life when released at a later date.

NEB. REV. STAT. § 83–1,114(1) (1976) (emphasis added).

n2605 *442 U.S. at 12; see supra* note 2604 (quoting Nebraska statute).

n2606 *442 U.S. at 14, 16* (Nebraska statute that provides two informal hearings to inmate eligible for parole satisfies due process); *see also Williams v. Missouri Bd. of Probation and Parole, 661 F.2d 697, 700 (8th Cir. 1981)* (inmates of Missouri penal institution must be advised of adverse information in their file that may lead to an unfavorable decision on parole release and be given an opportunity to address it), *cert. denied, 102 S. Ct. 1621 (1982).*

n2607 *442 U.S. at 15–16. But cf. Solomon v. Elsea, 676 F.2d 282, 286 (7th Cir. 1982)* (per curiam) (due process requires that United States Parole Commission set forth statement summarizing grounds for denial of parole and essential facts upon which Commission's inferences are based).

n2608 The prisoners in *Greenholtz* claimed they were entitled to due process because when the state provided for the possibility of parole, a constitutionally protected liberty interest was created. *442 U.S. at 8–9.* They based their argument on the analogy between parole determination and parole revocation, for which there is due process protection under *Morrissey v. Brewer, 408 U.S. 471 (1972). 442 U.S. at 9.* In rejecting this argument, the Court emphasized the differences between parole denial, which forecloses a *potential* liberty, and parole revocation, which

forecloses an *actual* liberty.*Id. at 9–11.* A convicted person has no constitutional right to be conditionally released before the expiration of a valid sentence. *Id. at 7.* Therefore, denial of a prisoner's abstract hope or unilateral expectation of release is not the type of deprivation of liberty or property that is entitled to due process protection. *Id.*

n2609 *452 U.S. 458 (1981).*

n2610 *Id. at 465.*

n2611 *Id.* The Court observed that, despite the frequency with which states grant petitions for pardon, a petition for commutation is merely an appeal for clemency that creates no constitutionally protected interest. *Id.*

n2612 *Id. at 461.*

n2613 *Id. at 466.*

n2614 *102 S. Ct. 31 (1981)* (per curiam).

n2615 *Id. at 35–36.* Ohio had a "shock parole" statute which provided for the early release of first offenders who had served more than six months in prison for nonviolent crimes. *Id. at 32; see* OHIO REV. CODE ANN. § 2967.31 (Page 1982). Pursuant to this statute, the parole board interviewed the prisoner and ordered his release. *102 S. Ct. at 32.* After the prisoner had attended prerelease classes and was measured for civilian clothes, the board rescinded its order without a hearing because the prisoner had misrepresented the amount of money he had embezzled and his plans after release. *Id. at 32–33.* The Sixth Circuit accepted the prisoner's argument that recission of a parole determination is like a parole revocation for which *Morrissey v. Brewer, 408 U.S. 471 (1972),* requires due process protection. *Van Curen v. Jago, 641 F.2d 411, 415, 416 (6th Cir. 1981).* The Sixth Circuit went on to apply *Perry v. Sindermann, 408 U.S. 593 (1972),* in which the Supreme Court held that "mutually explicit understandings" about a protected interest may give rise to a right to due process. *641 F.2d at 416* (citing *Perry v. Sindermann, 408 U.S. 593, 601 (1972))* (mutually explicit understandings about tenured professor's contract renewal may give rise to protected interest that state may not take away without due process). The Supreme Court reversed the Sixth Circuit, however, holding that contract principles such as the one developed in *Perry v. Sindermann "do not . . . lend themselves to determining the existence of constitutionally protected liberty interests in the setting of prisoner parole." 102 S. Ct. at 34.*

n2616 *102 S. Ct. at 35–36.*

n2617 *Id. at 33; see* OHIO REV. CODE ANN. § 2967.31 (Page 1981). The Ohio Statute provides in part:

Notwithstanding any other provision for determining parole eligibility, a prisoner confined in a state penal or reformatory institution may be released on parole at any time after serving six months in the custody of the department of rehabilitation and correction, when all of the following apply:

(A) The offense for which the prisoner was sentenced was an offense other than aggravated murder or murder.

(B) The prisoner has not previously been convicted of any felony for which, pursuant to sentence, he was confined for thirty days or more in a penal or reformatory institution in this state or in a similar institution in any other state or the United States.

(C) The prisoner is not a dangerous offender as defined in section 2929.01 of the Revised Code.

(D) The prisoner does not need further confinement in a penal or reformatory institution for his correction or rehabilitation.

(E) The history, character, condition, and attitudes of the prisoner indicate that he is likely to respond affirmatively to early release on parole, and is unlikely to commit another offense.

Id.

n2618 *102 S. Ct. at 34–35.*

n2619 *See Artway v. Pallone, 672 F.2d 1168, 1180 (3d Cir. 1982)* (no due process violation in parole denial when no protected liberty interest created by state parole statute); United States *ex rel. Scott v. Illinois Parole and Pardon Bd., 669 F.2d 1185, 1188 (7th Cir. 1982)* (per curiam) (Illinois statute that is mirror image of statute in *Greenholtz* creates legitimate expectation of parole in prisoner); *Staton v. Wainwright, 665 F.2d 686, 687* (5th Cir.) (Florida statute creates no constitutionally protected interest in a parole interview), *cert. denied, 102 S. Ct 1757 (1982).*

In *Solomon v. Elsea, 676 F.2d 282 (7th Cir. 1982)* (per curiam), the Seventh Circuit held that the mandatory language of the Federal Parole Statute created a legitimate expectation of parole. *Id. at 285.*The court found, however, that the due process clause was not violated because the Commission's statement of reasons for parole denial was constitutionally sufficient. *Id. at 285–86.*

n2620 *665 F.2d 686* (5th Cir.), *cert. denied, 102 S. Ct. 1757 (1982).*

n2621 The Florida parole statute provided in pertinent part:

No person shall be placed on parole until and unless the commission shall find that there is reasonable probability that, if he is placed on parole, he will live and conduct himself as a respectable and law–abiding person and that his release will be compatible with his own welfare and the welfare of society. No person shall be placed on parole unless and until the commission is satisfied that he will be suitably employed in self–sustaining employment, or that he will not become a public charge.

FLA. STAT. § 947.18 (1977).

n2622 *665 F.2d at 688; accord Hunter v. Florida Parole & Probation Comm'n, 674 F.2d 847, 848 (11th Cir. 1982)* (per curiam) (*Staton* conclusively determined that Florida parole statute created no liberty interest; defendant's due process claim rejected).

n2623 *665 F.2d at 688.* The defendant brought this claim under *42 U.S.C. § 1983* (1976), seeking compensatory and punitive damages for the denial of his alleged due process rights. *665 F.2d at 688.*

n2624 *665 F.2d at 688.*

n2625 *Id.*

n2626 *669 F.2d 1185 (7th Cir. 1982)* (per curiam).

n2627 The Illinois parole statute provides in part:

The Board *shall not* parole a person eligible for parole *if* it determines that:

(1) there is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or

(3) his release would have a substantial adverse effect on institutional discipline.

ILL. REV. STAT. ch. 38, § 1003–3–5(c) (1979) (emphasis added).

n2628 *669 F.2d at 1190.*

n2629 *Id. at 1187.* The Parole Board denied the petitioner's request for the stated reason that his release would deprecate the seriousness of his offense. *Id.*

n2630 *Id. at 1188.* The court noted that the Illinois statute could be read as creating a legitimate expectation of parole, or it could be read merely as a statement of legitimate reasons for which the Board must deny parole. *Id.*

at 1189. The court concluded, however, that the Council Commentary and the Board's own rules place the former construction on the statute, and required that the Board release an inmate who is eligible for parole unless one of the specified reasons for denial is found. *Id.*

n2631 *Id. at 1191–92.* According to the court, the statement of reasons must be sufficient to enable a court to determine whether parole has been denied for an impermissible reason or for no reason at all. *Id. at 1191.*

n2632 *18 U.S.C. § 4213*(a) (1976).

n2633 *Id.* § 4214(c). This term two circuits held, however, that when a parolee is in custody for another offense, the parole revocation hearing need not be held within the 90–day period because the delay does not prejudice the parolee. *Goodman v. Keohane, 663 F.2d 1044, 1046 (11th Cir. 1981)* (per curiam); *Doyle v. Elsea, 658 F.2d 512, 517 (7th Cir. 1981)* (per curiam).

n2634 *See Goodman v. Keohane, 663 F.2d 1044, 1046 (11th Cir. 1981)* (per curiam) (failure to demonstrate prejudice precludes relief); *Doyle v. Elsea, 658 F.2d 512, 517 (7th Cir. 1981)* (per curiam) (same); *Spotted Bear v. McCall, 648 F.2d 546, 547 (9th Cir. 1980)* (same).

n2635 *429 U.S. 78 (1976).*

n2636 *Id. at 87.* The Commission derives its authority from *18 U.S.C. § 4214* (b)(1) (1976).Instead of staying execution of a parole revocation warrant, the Commission may decide, after a hearing, to dismiss the warrant or to revoke parole immediately so that the parole violation term runs concurrently with the sentence for the subsequent conviction. *Id.; see Doyle v. Elsea, 658 F.2d 512, 514–15 (7th Cir. 1981)* (per curiam) (Commission has discretion to order parole violator's term to run consecutively with new sentence imposed while on parole and may order forfeiture of good–time credit); *Harris v. Day, 649 F.2d 755, 760 (10th Cir. 1981)* (Commission has discretion to order unexpired time on parole violator's original sentence either to run consecutively or concurrently with new sentence imposed); *cf. Franklin v. Fenton, 642 F.2d 760, 762–63 (3d Cir. 1980)* (Commission may defer parole revocation pending outcome of subsequent prosecution).

If the Commission delays execution of the revocation warrant until after the prisoner has served his sentence for the intervening offense, due process does not require that the prisoner receive an immediate revocation hearing because the prisoner's confinement results from the intervening conviction and not from the parole revocation. *Moody v. Daggett, 429 U.S. 78, 86–87 (1976).* Eventual execution of the parole revocation warrant and subsequent custody thereunder, however, triggers a loss of liberty protected by due process. *Id. at 87.* Delaying the execution of the warrant permits the Commission to consider the prisoner's institutional record while serving his sentence for the intervening offense at the revocation hearing. *Id. at 89.*

n2637 *18 U.S.C. § 4214*(b)(1) (1976).

n2638 *See Maslauskas v. United States Board of Parole, 639 F.2d 935, 938 (3d Cir. 1980)* (Commission's failure to hold dispositional review within 180 days ordinarily warrants court order to compel review; release appropriate remedy only if delay unreasonable and prejudicial to protected interest).

n2639 *408 U.S. 471 (1972).*

n2640 *Id. at 482* (parolees' liberty interest protected by fourteenth amendment).

n2641 *See supra* note 2567 (discussing parole restrictions).

n2642 *See Morrissey v. Brewer, 408 U.S. at 480* (parolees' liberty not absolute but conditional on observance of special parole restrictions).

n2643 *Id. at 482* (parolees' liberty, although indeterminate, permits parolees wide range of activities enjoyed by

public; termination of parole inflicts grievous loss and deserves due process protection).

n2644 *Id.*

n2645 *Id. at 484.* Parole revocation involves a two–step inquiry: first, whether the parolee has violated the parole conditions, and second, whether he should be recommitted to prison.*Id. at 479–80.* The first question involves a retrospective factual determination of whether the conditions of parole were violated. *Id. at 480.* The second question is more complex, requiring the board to predict the parolee's ability to live in society. *Id.*

n2646 *408 U.S. at 485.*

n2647 *Id.* The hearing officer may not have any connection with the case. *Id.* The parolee must be given notice of the hearing and an explanation of its purpose. *Id. at 486–87.* If the hearing officer determines that probable cause exists to hold the parolee for a final revocation decision, he must make a summary of the proceedings and a statement of the reasons and evidence supporting the finding of probable cause. *Id. at 487.* The fifth amendment prohibition against double jeopardy does not bar a proceeding to revoke parole based on criminal charges for which the defendant was never convicted. *See* United States *ex rel. Carrasquillo v. Thomas, 527 F. Supp. 1105, 1109 (S.D.N.Y. 1981)* (no double jeopardy violation when parole revocation proceeding held based on charges contained in indictment dismissed with prejudice; in dictum court stated no double jeopardy bar when parole proceeding held based on charges for which parolee was acquitted), *aff'd, 677 F.2d 225 (2d Cir. 1982).* If no preliminary hearing is held, the parolee may be entitled to damages for the deprivation of his due process rights. *See Wolfel v. Sanborn, 666 F.2d 1005, 1006 (6th Cir. 1982)* (defendant entitled to damages when held for 27 days without preliminary hearing to determine probable cause of parole violation).

n2648 *Moody v. Daggett, 429 U.S. 78, 86 n.7 (1976)* (preliminary hearing unnecessary because conviction for crime committed while on parole sufficient probable cause of parole violation); *see Doyle v. Elsea, 658 F.2d 512, 516 (7th Cir. 1981)* (per curiam) (preliminary hearing unnecessary when defendant accused of and in custody for crime committed while on parole, even though not convicted); *Terry v. Rucker, 649 F.2d 563, 564 (8th Cir. 1981)* (per curiam) (need for preliminary hearing obviated when defendant convicted of crimes committed while on parole); *cf. Kenner v. Martin, 648 F.2d 1080, 1081 (6th Cir. 1981)* (per curiam) (state parolee has no right to prompt revocation hearing on parole violation warrant based on intervening conviction and imprisonment for federal offense). An additional reason why a preliminary hearing is not required is that if a parolee is already incarcerated for a conviction for a crime he committed on parole, the issuance of a parole violation warrant does not deprive the parolee of liberty. *Moody v. Daggett, 429 U.S. 78, 86 n.7 (1976).*

n2649 *See Morrissey v. Brewer, 408 U.S. at 488* (two–month delay not necessarily unreasonable); *Doyle v. Elsea, 658 F.2d 512, 516 (7th Cir. 1981)* (per curiam) (three–month delay reasonable); *cf. Spotted Bear v. McCall, 648 F.2d 546, 547 (9th Cir. 1980)* (failure to hold speedy revocation hearing when in custody for another crime does not prejudice defendant).

Before the revocation hearing the parolee must receive written notice of the alleged parole violation. *408 U.S. at 487–89.* At the hearing the evidence against the parolee must be disclosed, and the parolee must be given an opportunity to present witnesses and documentary evidence. *Id.* In addition, he must be allowed to cross–examine witnesses unless the hearing officer specifically finds good cause for preventing such confrontations. *Id.*

n2650 *Id. at 488.*

n2651 *Id. at 489.*

n2652 *Id. at 488–89.*

n2653 *18 U.S.C. § 3651* (1976).

n2654 This term the District of Columbia Circuit addressed the issue of whether the Federal Probation Act, *18*

U.S.C. § 3651 (1976), applies when the defendant is convicted in the federal district court under the criminal law of the District of Columbia. In *United States v. Garnett, 653 F.2d 558 (D.C. Cir. 1981),* the defendant was charged in the United States District Court for the District of Columbia with one count of armed robbery under both District of Columbia and federal law, and with three other counts under District of Columbia law. *Id. at 559.* The defendant pled guilty to the count of armed robbery under District of Columbia law, which carries a maximum penalty of life imprisonment. *Id.* District of Columbia law permits the Superior Court of the District of Columbia to grant probation, without limiting the offenses for which probation may be granted as does the Federal Probation Act. 16 D.C. CODE ANN. § 710 (1973). The trial judge sentenced the defendant to three to nine years' imprisonment, but refused to grant probation, stating that, "this is not an offense subject to probation." *653 F.2d at 559–60.* On appeal the defendant argued that the trial court was mistakenly applying the Federal Probation Act, which forbids probation for offenses punishable by life imprisonment such as armed robbery. *653 F.2d at 560.* The circuit court remanded the case for the trial court to clarify whether it was applying federal or state law when denying probation, and deferred ruling on the issue of whether the Federal Probation Act applies to District of Columbia offenses. *Id. at 562.*

n2655 *653 F.2d at 562.* The sentencing judge has wide discretion in deciding whether to suspend or impose the sentence. *See United States v. Caesar, 632 F.2d 645, 646 (5th Cir. 1980)* (judge's decision to sentence paraplegic to imprisonment rather than probation on basis of defendant's history of antisocial behavior not abuse of discretion).

n2656 *18 U.S.C. § 3651* (1976). The sentencing judge must determine that probation will serve the ends of justice and the best interests of the public and the defendant. *Id.*

n2657 *Id.; see United States v. Espindola, 650 F.2d 1064, 1065 (9th Cir. 1981)* (per curiam) (five–year probation term begins running on release from confinement, not on date of sentencing).

n2658 *18 U.S.C. § 3651* (1976).

n2659 *United States v. Nunez, 573 F.2d 769, 771–72* (2d Cir.), *cert. denied, 436 U.S. 930 (1978).*

n2660 *See United States v. Brown, 555 F.2d 407, 424 n.43 (5th Cir. 1977)* (dictum) (error to bifurcate probation on one count into pre–and post–incarceration terms, in effect ordering probation to run both concurrently and consecutively with prison terms imposed for conviction on other counts because parole revocation in post–incarceration period could lead to additional imprisonment; no statute or rule justifies such bifurcation), *cert. denied, 435 U.S. 904 (1978).*

n2661 *United States v. Stine, 675 F.2d 69, 71* (3d Cir.), *cert. denied, 102 S. Ct. 3493 (1982); United States v. Carson, 669 F.2d 216, 217 n.2 (5th Cir. 1982); United States v. Margala, 662 F.2d 622, 627 (9th Cir. 1981), cert. denied, 102 S. Ct. 3484 (1982); United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981).*

n2662 *United States v. Consuelo–Gonzalez, 521 F.2d 259, 262–64 (9th Cir. 1975); see United States v. Stine, 675 F.2d 69, 72* (3d Cir.) (probation condition requiring psychological counseling may promote rehabilitation and decrease harm to society), *cert. denied, 102 S. Ct. 3493 (1982); United States v. Carson, 669 F.2d 216, 217–18 (5th Cir. 1982)* (probation condition requiring defendant convicted of fraud to repay money even though debt discharged in bankruptcy serves purposes of rehabilitation and reform and protects community's interest in having victims of crime made whole); *United States v. Margala, 662 F.2d 622, 627 (9th Cir. 1981)* (probation conditions requiring defendant convicted of fraud to forfeit pension benefits and surrender stock may serve rehabilitative purpose), *cert. denied, 102 S. Ct. 3484 (1982); United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981)* (probation conditions prohibiting persons convicted of illegal entry onto naval base from approaching within 250 feet of base serves ends of rehabilitation and protection of public); Federal Probation Act, *18 U.S.C. § 3651* (1976) (probation must serve ends of justice and best interests of public and defendant).

n2663 *See Higdon v. United States, 627 F.2d 893, 898 (9th Cir. 1980)* (probation condition requiring soldier convicted of illegal kickbacks to forfeit all assets and work without pay for 6,200 hours unnecessarily harsh because not reasonably related to rehabilitation of offender or protection of public); *United States v. Patterson, 627 F.2d*

760, 761 (5th Cir. 1980) (per curiam) (probation condition prohibiting tax violator from advocating disobedience of any law unnecessarily harsh because overbroad; condition modified to proscribe advocating disobedience of Internal Revenue Code), *cert. denied, 450 U.S. 925 (1981); United States v. Smith, 618 F.2d 280, 282* (5th Cir.) (per curiam) (same), *cert. denied, 449 U.S. 868 (1980).*

n2664 *See United States v. Torrez-Flores, 624 F.2d 776, 783 (7th Cir. 1980)* (trial judge's warning to defendant, conditioning probation on truthfulness of defendant's assurances of no prior criminal record, constituted sufficient notice to permit probation revocation when prior criminal record discovered); *United States v. McDonough, 603 F.2d 19, 24 (7th Cir. 1979)* (probation condition requiring tax violator to file corrected tax forms for past, present, and future years not impermissibly vague).

n2665 *See United States v. Stine, 675 F.2d 69, 72* (3d Cir.) (imposition of probation conditions will be carefully reviewed when conditions might infringe rights of privacy and mentation), *cert. denied, 102 S. Ct. 3493 (1982); United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981)* (exercise of discretion in imposing probation reviewed carefully when conditions restrict fundamental rights of free speech and association).

n2666 *654 F.2d 562 (9th Cir. 1981).*

n2667 *Id. at 567.*

n2668 *Id. at 564.* The defendants had participated in a premeditated entry upon a naval submarine base to protest the government's maintenance of the Trident weapons systems. *Id.* They were charged with and convicted of unlawful entry upon navy property in violation of *18 U.S.C. § 1382* (1976). *654 F.2d at 564.* The numerous defendants received various fines and sentences, but the court suspended the sentences for most of the defendants. *Id.*

n2669 *654 F.2d at 567-68.*

n2670 *Id.*

n2671 *Id. at 567.* Although such a limitation on the political activities of an ordinary citizen would be improper, probationers are subject to restrictions that ordinary persons are not. *Id.* The court did note that the trial judge did not forbid participation in anti-nuclear speech or in the anti-nuclear movement. *Id.*

The dissent argued that the probation condition impermissibly infringed the defendants' constitutional rights and was not carefully tailored to meet the goals of rehabilitation or public safety. *Id. at 568-69* (Boochever, J., concurring in part and dissenting in part). According to the dissent, the reviewing court should have recognized that the minimal probational benefits were unwarranted when weighed against the substantial infringement imposed and invalidated the condition. *Id. at 569.*

n2672 *Id. at 568.*

n2673 *United States v. Stine, 675 F.2d 69* (3d Cir.), *cert. denied, 102 S. Ct. 3493 (1982).*

n2674 *Id.*

n2675 *Id. at 70.* After the defendant had been convicted for illegally receiving firearms and sentenced to three years' imprisonment, his sentence was suspended and he was placed on five years of probation. *Id.* Initially Stine cooperated with the counseling requirement, but later refused to participate and had his probation revoked. *Id.* Stine thereafter challenged the constitutionality of the condition. *Id.*

n2676 *Id.*

n2677 *Id. at 71.* Courts may impose limits on probationers from which other persons are free as long as these

limitations are reasonably related to the goals of probation. *Id.*

n2678 *Id. at 72.*

n2679 *Id. at 71*. The petitioner had not been threatened with seclusion or the injection of psychochemical drugs, nor was there any intrusion into his family life, marital relations, or bodily integrity.

Id.

n2680 *18 U.S.C. § 3651* (1976); *see United States v. Carson, 669 F.2d 216, 217 (5th Cir. 1982)* (condition requiring defendant to make restitution to defrauded party permissible even though defendant bankrupt); *United States v. Margala, 662 F.2d 622, 627 (9th Cir. 1981)* (conditions requiring defendant to forfeit pension benefits and surrender stocks permissible because serve rehabilitative purpose), *cert. denied, 102 S. Ct. 3484 (1982); but cf. United States v. Touchet, 658 F.2d 1074, 1076 (5th Cir. 1981)* (per curiam) (condition requiring defendant to pay tax deficiency impermissible because sum had not been determined or established in legal proceedings).

n2681 *662 F.2d 622 (9th Cir. 1981).*

n2682 *Id. at 627*. The defendant had acquired the stocks and the pension benefits from the same company that he was convicted of defrauding. *Id.* The Ninth Circuit reasoned that these conditions may serve a rehabilitative purpose by requiring the defendant to sever his ties with the defrauded corporation. *Id.* In response to Margala's claim that such conditions would exhaust his savings, the court remarked that Margala failed to show that he would be ruined or that the harshness was not justified. *Id.*

n2683 *658 F.2d 1074 (5th Cir. 1981)* (per curiam).

n2684 *Id. at 1076.* The trial court had ordered the defendant to pay the tax deficiencies as a precondition to release from confinement and as a condition of probation. *Id. at 1075.*

n2685 *Id. at 1076.* The court held that the defendant was entitled to litigate his civil liability for the tax deficiencies. *Id.*

n2686 *See United States v. Rea, 678 F.2d 382, 383–84 (2d Cir. 1982)* (probation revocation justified when defendant traveled outside judicial district without probation officer's permission and failed to notify probation officer of questioning by police officer about automobile accident); *United States v. Johns, 625 F.2d 1175, 1176 (5th Cir. 1980)* (maintenance of checking account in violation of condition justifies revocation of probation); *United States v. Rodgers, 588 F.2d 651, 653–54 (8th Cir. 1978)* (per curiam) (failure to file monthly reports and to notify probation officer of change of address and employment in violation of condition justifies revocation of probation); *cf. United States v. Lacey, 661 F.2d 1021, 1022 (5th Cir. 1981)* (probation revocation justified when court finds offender incapable of avoiding antisocial activity), *modifying 648 F.2d 441 (5th Cir. 1981), cert. denied, 102 S. Ct. 2036 (1982); United States v. Brown, 656 F.2d 1204, 1205–06 (5th Cir. 1981)* (per curiam) (probation revocation justified when defendant failed to secure gainful employment and to notify probation officer of arrest), *cert. denied, 102 S. Ct. 1029 (1982).*

The Supreme Court will decide during the 1982–83 term whether revoking the probation of an indigent defendant for failure to pay a fine and restitution imposed as a condition of his probation violates the equal protection clause of the fourteenth amendment. *Bearden v. State, 288 S.E. 2d 662, 663 (Ga. App. 1982)* (failure of indigent convicted of theft by receiving stolen property and burglary to pay $550 balance of fine and restitution justified revocation of probation), *cert. granted, 102 S. Ct. 3482 (1982).*

Because probation is granted separately for each conviction, revocation of probation on one conviction does not result automatically in the revocation of probation periods the defendant must serve for other convictions. *McGaughey v. United States, 596 F.2d 796, 797–98 (8th Cir. 1979)* (per curiam) (revocation of one of four concurrent probation sentences does not operate to merge all sentences; court subsequent to imprisonment for one probation violation may revoke other three probation sentences and impose prison terms).

Additionally, a probationer may not challenge his original conviction as a defense in a revocation proceeding. *See United States v. Brown, 656 F.2d 1204, 1207 (5th Cir. 1981)* (per curiam) (challenge to state conviction on grounds of defendant's innocence no defense to charge of probation violation), *cert. denied, 102 S. Ct. 1029 (1982).* A probationer may challenge revocation, however, when it is based on an invalid conviction for a crime committed while the defendant was on probation. *See United States v. Singleterry, 646 F.2d 1014, 1015 (5th Cir. 1981)* (vacating probation revocation based on conviction during probation obtained by prosecutorial misconduct), *cert. denied, 102 S. Ct. 2038 (1982). But cf. United States v. Rice, 671 F.2d 455, 458 (11th Cir. 1982)* (upholding probation revocation based on probationer's pleading guilty to misdemeanor when not represented by counsel because there was ample evidence apart from guilty plea to satisfy judge that probationer's conduct did not conform to probation conditions).

The Seventh Circuit this term rejected a probationer's argument that the Wisconsin Department of Health and Social Services, the agency supervising his probation, could not revoke the court–ordered probation because of the separation of powers doctrine. *Ware v. Gagnon, 659 F.2d 809, 810–12 (7th Cir. 1981)* (per curiam). The court reasoned that the states are constitutionally permitted to provide for administrative revocation of court–imposed probation. *Id. at 812.*

n2687 *411 U.S. 779 (1973).*

n2688 *408 U.S. 471, 482 (1972)* (due process protections apply to parole revocation).

n2689 *Gagnon v. Scarpelli, 411 U.S. at 782; see United States v. Martinez, 650 F.2d 744, 745 (5th Cir. 1981)* (per curiam) (because *Morrissey* due process requirements apply to probation revocation hearings, court must make written findings and state evidence relied upon); *United States v. Lacey, 648 F.2d 441, 445* (5th Cir.) (same), *modified on other grounds, 661 F.2d 1021 (5th Cir. 1981), cert. denied, 102 S. Ct. 2036 (1982); cf.* FED. R. CRIM. P. 32.1(a)(1) (probationer in custody for probation violation must be given prompt preliminary hearing to determine whether probable cause exists to hold for revocation hearing).

Before the preliminary hearing the probationer must be notified of the hearing and its purpose, of the alleged violation, and of his right to counsel. FED. R. CRIM. P. 32.1(a)(1)(A), (D). The probationer must be allowed to appear at the hearing and present evidence in his own behalf. *Id.* 32.1(a)(1)(B). Upon request, the probationer must have an opportunity to question witnesses unless the magistrate or court determines that justice does not require the appearance of the witness. *Id.* 32.1(a)(1)(C). If the magistrate or court finds that probable cause exists to believe that the probationer has violated his probation conditions, the probationer may be held for a final revocation hearing. *Id.* 32.1(a)(1).

n2690 *Compare United States v. Rice, 671 F.2d 455, 458–59 (11th Cir. 1982)* (fundamental fairness not violated when probation revoked despite defendant's claims that probation violations consisted of stale minor traffic offenses, that mitigating circumstances existed, and that defendant capable of rehabilitation) *and United States v. Brown, 656 F.2d 1204, 1207–08 (5th Cir. 1981)* (per curiam) (fundamental fairness not violated when probation officer filed same revocation charges twice, when withdrawal of first charge based not on motive to delay but on desire to utilize rehabilitative process) *with United States v. Ferguson, 624 F.2d 81, 83 (9th Cir. 1980)* (per curiam) (district court's refusal to consider mitigating circumstances in probation revocation hearing violates requirement of fundamental fairness) *and United States v. Tyler, 605 F.2d 851, 853 (5th Cir. 1979)* (per curiam) (district court's revocation of probation on basis of old misdemeanor convictions, which probation officer purposefully did not allege as violations in earlier revocation proceeding, violates requirement of fundamental fairness).

n2691 *Gagnon v. Scarpelli, 411 U.S. at 782* (probation revocaton not stage of criminal prosecution although loss of liberty may result); *cf. Morgan v. Wainwright, 676 F.2d 476,*

n2692 *See Morgan v. Wainwright, 676 F.2d 476, 478–79 (11th Cir. 1982)* (no right to jury trial at probation revocation hearing); *United States v. Stehl, 665 F.2d 58, 59 (4th Cir. 1981)* (rule 11(c) of the Federal Rules of Criminal Procedure requiring advice to defendant before accepting guilty plea inapplicable to probation revocation proceedings), *cert. granted, 102 S. Ct. 1752 (1982); United States v. Whitney, 649 F.2d 296, 298 (5th Cir. 1981)* (per curiam) (double jeopardy clause not applicable to probation revocation hearings), *modifying 632 F.2d 654 (5th*

Cir. 1980); FED. R. EVID. 1101(d)(3)(Federal Rules of Evidence except for rules of privilege not applicable to probation revocation hearing). *But see United States v. Lacey, 648 F.2d 441, 444* (5th Cir.) (probation revocation cannot be based on improper hearsay testimony), *modified on other grounds, 661 F.2d 1021 (5th Cir. 1981), cert. denied, 102 S. Ct. 2036 (1982).*

This term in *United States v. Rea, 678 F.2d 382 (2d Cir. 1982),* the Second Circuit held that a probationer has no fifth amendment right to remain silent when being questioned by his probation officer about a violation of probation conditions. *Id. at 390.* The court also held that a probationer does not have a sixth amendment right to have an attorney present while being questioned by his probation officer. *Id.* At his probation revocation hearing, the defendant challenged the admissibility of statements made in his interview with his probation officer after his probation officer denied his request to have his attorney present. *Id.* The Second Circuit responded that the duty to report and answer questions posed by a probation officer "is an integral obligation of the probationary status." *Id.* Moreover, the court stated that although a probationer is not completely deprived of his fifth amendment rights, he may be charged with a violation of probation if he refuses to answer his probation officer's questions. *Id.*

n2693 *Compare United States v. MacKenzie, 601 F.2d 221, 222 (5th Cir. 1979)* (per curiam) (*Miranda* protection inapplicable to revocation proceedings), *cert. denied, 444 U.S. 1018 (1980) and United States v. Frederickson, 581 F.2d 711, 713 (8th Cir. 1978)* (per curiam) (fourth amendment exclusionary rule inapplicable to probation revocation proceedings) *and United States v. Vandemark, 522 F.2d 1019, 1020 (9th Cir. 1975)* (fourth amendment exclusionary rule inapplicable to probation revocation proceedings if at time of unlawful search police did not know or have reason to believe defendant on probation) *and United States v. Farmer, 512 F.2d 160, 162 (6th Cir. 1975)* (fourth amendment exclusionary rule inapplicable to probation revocation proceedings if no harassment by police because rule would not serve deterrence purpose) *with United States v. Rea, 678 F.2d 382, 390 (2d Cir. 1982)* (fourth amendment exclusionary rule precludes admission of unconstitutionally seized evidence in probation revocation hearing) *and United States v. Workman, 585 F.2d 1205, 1211 (4th Cir. 1978)* (same).

This term the Second Circuit held that a probation officer is required to obtain a warrant prior to conducting a search of a probationer's home unless the search falls into one of the categories of exceptions to the fourth amendment requirement. *United States v. Rea, 678 F.2d 382, 387 (2d Cir. 1982).* If the warrant requirement is violated, any evidence seized during the illegal search is inadmissible at a probation revocation hearing. *Id. at 388–90.* The court reasoned that there was neither any statutory provision authorizing a probation officer to conduct a warrantless search of a probationer's home nor any case law holding that an individual's status as a probationer exempts a probation officer from the warrant requirement. *Id. at 387.* The deterrent purposes of the exclusionary rule would be best served if evidence illegally seized by a probation officer was not admissible in the probation revocation hearing. *Id. at 388–90.*

n2694 *See Schneider v. Housewright, 668 F.2d 366, 368 (8th Cir. 1981)* (preponderance of evidence showing that probationer sold and possessed drugs sufficient to justify probation revocation; state need not prove violation of probation conditions beyond reasonable doubt); *United States v. Lacey, 661 F.2d 1021, 1022 (5th Cir. 1981)* (same), *modifying 648 F.2d 441 (5th Cir. 1981), cert. denied, 102 S. Ct. 2036,* (1982); *United States v. Brown, 656 F.2d 1204, 1207 (5th Cir. 1981),* (per curiam) (evidence that probationer convicted of drug possession sufficient to justify probation revocation), *cert. denied, 102 S. Ct. 1029 (1982).*

n2695 *Burns v. United States, 287 U.S. 216, 220 (1932)* (trial judge has "exceptional degree of flexibility" in determining whether to grant or revoke probation); *see United States v. Rice, 671 F.2d 455, 458–59 (11th Cir. 1982)* probation revocation within sound discretion of trial court when defendant committed numerous offenses during probation); *United States v. Lacey, 661 F.2d 1021, 1022 (5th Cir. 1981)* (trial judge has broad discretion to revoke probation when defendant has violated conditions by possessing drugs), *modifying 648 F.2d 441 (5th Cir. 1981), cert. denied, 102 S. Ct. 2036 (1982).*

The district court's decision to revoke probation will be reversed only upon a clear showing of abuse of discretion. *See United States v. Rice, 671 F.2d 455, 459 (11th Cir. 1982)* (reviewing court will disturb trial court's probation revocation only when clear abuse of discretion); *United States v. Lacey, 661 F.2d 1021, 1022 (5th Cir. 1981)* (same), *modifying 648 F.2d 441 (5th Cir. 1981), cert. denied, 102 S. Ct. 2036 (1982); United States v. Brown, 656 F.2d 1204, 1207,* (5th Cir. 1981) (per curiam) (same), *cert. denied, 102 S. Ct. 1029 (1982); United States v.*

Martinez, 650 F.2d 744, 745 (5th Cir. 1981) (per curiam) (remanding because district court failed to meet minimum due process requirements in probation revocation hearing).

n2696 *18 U.S.C. § 3653* (1976); *see United States v. Rice, 671 F.2d 455, 457 (11th Cir. 1982)* (court may reimpose original prison sentence at probation revocation). In *Rice* the Eleventh Circuit held that reimposing the defendant's original sentence upon probation revocation was not a sentencing for the purposes of a rule 35(b) motion to reduce sentence under the *Federal Rules of Criminal Procedure. 671 F.2d at 460.*

n2697 *Williams v. Wainwright, 650 F.2d 58, 61 (5th Cir. 1981)* (no double jeopardy violation when greater sentence imposed upon probation revocation in accordance with statutory scheme).

n2698 FED. R. CRIM. P. 32.1(a)(2). Ordinarily, a reasonable time will be measured from the preliminary hearing or from the issuance of an order to show cause why probation should not be revoked. FED. R. CRIM. P. 32.1 advisory committee note, H.R. DOC. No. 112, 96th Cong., 1st Sess. 104 (1979) [hereinafter Advisory Committee Note to Rule 32.1]. What constitutes a reasonable time, however, must always be determined on the facts. *Id.*

At the final hearing the court determines whether the probationer has committed a probation violation that warrants revocation. *Id. at 105.* The Advisory Committee Note indicates that the hearing need not meet the formal requirements of a trial. *Id. at 104.* For example, the usual rules of evidence need not apply and probation may be revoked on evidence that falls short of establishing guilt beyond a reasonable doubt. *Id.* The court may revoke probation and send the probationer to prison if it finds that confinement is necessary to protect the public, to provide correctional treatment, or to avoid depreciating the seriousness of the probation violation. *Id. at 105.*

n2699 FED. R. CRIM. P. 32.1(a)(2)(A). Because this hearing ultimately will determine whether probation is actually revoked, the probationer is entitled to greater protection than he receives at the preliminary hearing. Advisory Committee Note to Rule 32.1, *supra* note 2698, at 104.

n2700 FED. R. CRIM. P. 32.1(a)(2)(E). Although the Supreme Court in *Gagnon v. Scarpelli, 411 U.S. 779 (1973),* did not impose the constitutional requirement of right to counsel in all probation revocation hearings, *id. at 789–90,* a defendant has the statutory right to be represented by counsel whenever charged with a violation of probation. *18 U.S.C. § 3006A*(b) (1976).

n2701 FED. R. CRIM. P. 32.1(a)(2)(B).

n2702 *Id.* 32.1(a)(2)(C).

n2703 *Id.* 32.1(a)(2)(D). The probationer does not have to make a specific request to question witnesses at a final hearing, as he must do at a preliminary hearing. Advisory Committee Note to Rule 32.1, *supra* note 2698.

n2704 FED. R. CRIM. P. 32.1(B). The rules do not require a hearing or assistance of counsel when the probationer requests modification of probation conditions and the request results in favorable modification. *Id.* The Advisory Committee Note explains two circumstances that should entitle the probationer to apply to the sentencing court for clarification or modification of probation conditions: an ambiguous probation condition or the failure of a probation officer to perform his job properly. Advisory Committee Note to Rule 32.1, *supra* note 2698, at 105.

n2705 *See* FED. R. CRIM. P. 35(b) (court may reduce sentence within 120 days after sentence imposed). This term, however, the Eleventh Circuit held that reimposing the defendant's original sentence after probation revocation was not a sentencing for the purposes of a rule 35(b) motion to reduce sentence. *United States v. Rice, 671 F.2d 455, 460 (11th Cir. 1982).*