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PROJECT: THIRTEENTH ANNUAL REVIEW OF CRIMINAL PROCEDURE: UNITED STATES SUPREME COURT AND COURTS OF APPEALS 1982–1983: IV. Sentencing, Parole, and Probation

SUMMARY:

... The sentencing phase of a criminal trial is one of the most critical stages of the judicial process and perhaps the area most vulnerable to criticism. ... The presentence report plays a crucial role in both the sentencing stage of a trial and in the correctional process. ... Last term in *Watts v. Hadden*, however, the Tenth Circuit ruled that the Parole Commission must consider a YCA offender's positive response to treatment as an independant ground for release, notwithstanding the adult guidelines. ... The Court reversed the death sentence after determining that state legislatures and sentencing juries have overwhelmingly rejected imposition of the death penalty in situations similar to the one in *Enmund*. ... *At the time of sentencing, however, the court may specify that the prisoner will be eligible for parole before having served one–third of the term*. ... *In Moody v. Daggett* the Supreme Court held that when a parolee is convicted of a crime committed while on parole, the Commission may issue a parole revocation warrant but stay its execution until the prisoner has served the sentence for the crime committed during parole. ... Although the sentencing judge has discretion to impose terms and conditions of probation, any conditions must bear a reasonable relation to the rehabilitation of the probationer and to the protection of the public. ...

TEXT:

[*599] SENTENCING

The sentencing phase of a criminal trial is one of the most critical stages of the judicial process n2381 and perhaps the area most vulnerable to criticism. n2382 Critics attack the present system of sentencing for the virtually standardless discretion delegated to judges n2383 and the lack of adequate information available to the court at sentencing. n2384 These deficiencies often result in the imposition of widely differing sentences upon similarly situated defendants. n2385 Critics also suggest that the sentences given are often of inappropriate length. n2386

Several parties play a role in determining the eventual sentence. The prosecutor initially influences the sentencing decision through discretionary acts such as charging, plea negotiation, and sentence recommendation. n2387 Probation **[*600]** officers conduct and prepare presentence investigations and reports and thus are responsible for the adequacy, sufficiency, and reliability of the information available to the judge at the time of sentencing. n2388 The legislature establishes the range of sentences for each crime, n2389 while the judge determines the appropriate punishment within that range. In the final analysis the actual length of incarceration is determined by the Parole Commission, which reviews and determines the defendant's eligibility for parole. n2390 This division of sentencing responsibility creates desirable checks and balances and helps maintain the system's flexibility. n2391 This same flexibility, however, makes reform difficult because it renders the system's response to reform unpredictable. n2392

Imposition of Sentence. Rule 32(a)(1) of the Federal Rules of Criminal Procedure governs the sentencing process. n2393 The rule requires the court to impose sentence without unreasonable delay, n2394 to protect the defendant's right to be represented by counsel of his choice, n2395 and to allow counsel to **[*601]** speak on the defendant's behalf at sentencing. n2396 In general, the defendant also has the right and the duty to be present at the imposition of sentence. n2397 Rule 32(a)(1) further requires the court to address the defendant personally and to provide an opportunity for the defendant to make a statement. n2398

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. n2399 After the court imposes sentence in a case that has gone **[*602]** to trial on a plea of not guilty, the court must advise the defendant that he has a right to appeal. n2400 The court also must inform the defendant that he has the right to apply for leave to appeal in forma pauperis if he cannot afford the attorneys' fees on appeal. n2401 Finally, a defendant has the right to know the exact penalty assessed against him for each count on which he is convicted. n2402

The Federal Magistrate Act of 1979 n2403 gives United States magistrates jurisdiction to try persons accused of misdemeanors and to impose sentence upon conviction. n2404 In sentencing youth offenders, a magistrate 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. n2405 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. n2406

Presentence Investigation and Report. The presentence report plays a crucial role in both the sentencing stage of a trial and in the correctional process. n2407 This report contains information about the defendant enabling the judge to impose a sentence tailored to the individual offender. n2408 Rule 32(c) of **[*603]** the Federal Rules of Criminal Procedure governs the presentence investigation and report. n2409 This rule requires the court's probation service to conduct a presentence investigation and provide the sentencing judge with the results of such investigations prior to sentencing. n2410 This term, however, in *United States v. Latner* n2411 the Eleventh Circuit held that the trial judge did not abuse his discretion when he imposed sentence without having received a presentence report. n2412

In general, the presentence report contains information regarding the defendant's past criminal record, financial condition, family history, and any other information that the court may require. n2413 No formal limitations are imposed on the contents of these reports n2414 or the sources from which information may be obtained. n2415 This term in *United States v. Papajohn* n2416 the Eighth Circuit held that due process considerations do not require a court to conduct an evidentiary hearing to determine the accuracy of information contained in a presentence report. n2417 Rather, due process requires only that the court balance the need for reliable information with the public interest in permitting **[*604]** the courts to consider all pertinent information. n2418 This lack of standards regulating the preparation of the presentence report results in some risk that sentencing may be based on unreliable or inaccurate information. n2419

Notwithstanding the absence of guidelines, certain safeguards do exist to alleviate the danger that a defendant will be prejudiced by an inaccurate report. If the prosecutor is aware of the presence of untrue or misleading information in the presentence report, he has a duty to provide the court with supplemental information. n2420 The defense attorney also has a duty to make an independent search for mitigating evidence that may tend to reduce the defendant's sentence. n2421 Furthermore, if it can be shown that the judge relied on inaccurate information contained in the report in imposing sentence, his mistaken reliance may provide the basis for establishing a violation of the defendant's due process rights. n2422

To prevent the contents of the presentence report from influencing the determination of guilt or innocence, rule 32(c) prohibits the probation service from disclosing the contents of the report prior to the adjudication of guilt. n2423 Subject **[*605]** to certain exceptions, n2424 the court must permit the defendant or his counsel to read the presentence report prior to the imposition of sentence. n2425 The defendant must also be given the opportunity to comment on the report and, at the court's discretion, to provide information relating to any alleged factual inaccuracy in the report. n2426 Should the court desire more information than is contained in the initial report, the sentencing judge may commit the defendant to the custody of the Attorney General while the probation service augments its reports n2427

Improper Considerations in Determining Sentence. In an attempt to make punishment commensurate with the charged crime, the trial judge may consider a broad range of information regardless of whether it is contained in the presentence report. n2428 In determining the sentence a judge also may weigh **[*606]** the possibility of rehabilitation, the societal interest in retribution, and the potential deterrent effect of the sentence. n2429 Several constitutional safeguards, however, limit the information that the judge may consider. The sentencing judge may not, consistent with due process, base a sentence on incorrect information or improper assumptions, n2430 information provided by the prosecutor in violations of a plea agreement, n2431 or secret communications from the prosecution. n2432 Due process also prevents a judge from acting vindictively by inflicting a harsher punishment on a defendant for exercising his constitutional right to trial n2433 or appeal, n2434 or his privilege against self–incrimination. n2435 **[*607]** For example, in *Jones v. Cardwell* n2436 the Ninth Circuit held that the sentencing judge could not properly consider a confession, which was made to a probation officer in a presentence interview, when the confession was obtained in violation of the defendant's fifth amendment right. n2437 In addition, first amendment protections preclude the sentencing judge from considering a

defendant's political beliefs in imposing sentence. n2438

The fourth amendment exclusionary rule, which prohibits the use of illegally obtained evidence at trial, does not automatically mandate the exclusion of tainted evidence from consideration in sentencing. n2439 This term in *United* **[*608]** *States v. Butler* n2440 the Fifth Circuit held that a sentencing judge may properly consider the fruits of an illegal search that were excluded at trial. n2441 The court emphasized that the evidence was factually accurate and that the marginal deterrence value of excluding illegally obtained evidence at sentencing was substantially less than at trial. n2442

Uncounseled statements obtained from the defendant in violation of the sixth amendment right to counsel may not be considered by the sentencing judge. n2443 Additionally, the court is barred from considering certain prior uncounseled conviction at sentencing. Prior uncounseled felony convictions also may not be relied upon at sentencing, n2444 nor may uncounseled misdemeanor convictions be considered under repeat offender enhanced penalty statutes. n2445 Nevertheless, the Fifth Circuit held in *Wilson v. Estelle* n2446 that as long as a defendant's prior misdemeanor conviction was constitutionally valid n2447 the sentencing judge may properly consider that conviction in setencing for a subsequent conviction. n2448

[*609] *Credit for Time Served.* Offenders who are incarcerated, n2449 or who are institutionalized under conditions similar to incarceration, n2450 must be given full credit for time served in connection with the crime for which sentence is to be imposed. n2451 The Bureau of Prisons, however, need not give a defendant credit on his federal sentence for time spent in state custody prior to the federal trial unless the defendant establishes that he has not already received credit for that time on a state sentence. n2452 Moreover, the Bureau is not bound to give a defendant credit when the federal sentence is to be served consecutively with the state sentence. n2453 The Bureau has discretion to give a parolee credit for time served on parole when the parole is revoked n2454 or for good time earned prior to parole. n2455

The double jeopardy guarantee against multiple punishments for the same offense requires that defendants convicted and resentenced following a successful appeal be given credit for time served pursuant to the original sentence. n2456

[*610] *Sentencing Under the Federal Youth Corrections Act.* Congress enacted the Federal Youth Corrections Act (YCA) n2457 to promote the rehabilitation n2458 of youth offenders n2459 and to expand the sentencing options of district court judges in dealing with nonadults. n2460 Some commentators today, however, exhibit less faith in the rehabilitation aspects of the YCA than they did in 1950 when Congress enacted the statute. n2461 One criticism of the statute is that, in reality, the current treatment of youthful offenders under the YCA does not differ significantly from the treatment of adult offenders. n2462

[*611] The YCA has been subject to both due process and equal protection challenges on the ground that youth offenders sentenced to indefinite incarceration under section 5010(b) of the Act often serve longer terms in prison than those served by adults convicted of the same crime. n2463 Courts have upheld the constitutionality of the Act in the face of these challenges on the ground that the Act confers compensatory benefits on youth offenders that are not available to similarly situated adults. n2464 Two circuits have avoided the equal protection **[*612]** question by finding that the Federal Magistrates Act of 1979 expresses a congressional intent to prohibit district court judges and magistrates from sentencing youth offenders to terms longer than those that may be imposed upon adults. n2465 Last term, however, the Eighth Circuit in *United States v. Van Lufkins* n2466 rejected this interpretation of the Act, holding that the YCA permits longer terms of confinement for youth offenders than for adults convicted of the same offense. n2467

As a practical matter, youth offenders serving indeterminate sentences pursuant to the YCA frequently serve the same length of time as adult offenders because some courts interpret the Parole Commission and Reorganization Act of 1976 n2468 as governing the provisions of release of all offenders. Thus, the eligibility of youth offenders for release is frequently based on the same criteria as those used for adults. n2469 Last term in *Watts v. Hadden,* n2470 however, the Tenth Circuit ruled that the Parole Commission must consider a YCA offender's positive response to treatment as an independant ground for release, notwithstanding the adult guidelines. n2471

Youth offenders also have challenged the imposition of potentially indeterminate sentences under the YCA on the ground that such sentences are "infamous punishment" requiring grand jury indictment, even if the underlying offense is only a misdemeanor for which an adult would not be subject to imprisonment for more than one year. n2472 The courts have not yet definitely **[*613]** resolved this issue. n2473

In order to sentence a youth offender pursuant to adult penalty provisions, the court must find that the youth will not

derive any benefit from YCA treatment. n2474 The court must make this express "no benefit" finding on the record n2475 but need not accompany the finding with a supporting rationale. n2476

The YCA provides that "insofar as practical, the institutions at which youth offenders are incarcerated shall be used only for treatment of youth offenders, and youth offenders shall be segregated from other offenders." n2477 The circuits have split on the question of whether the qualifying phrase "insofar as practical" **[*614]** applies only to the maintenance of separate institutions for youth offenders or also to the segregation of youths from other offenders within an institution. n2478 Last term in *Watts v. Hadden* n2479 the Eighth Circuit ruled that the Bureau of Prisons was violating the Act by not segregating YCA offenders from adults. n2480 In response to the *Watts* decision the Bureau of Prisons has promulgated a plan requiring more scrupulous adherence to the Act's requirement of separation of youth offenders from the general prison population. n2481 Pursuant to the plan, YCA offenders will be (1) totally segregated from non-YCA prisoners, n2482 (2) screened, evaluated, and classified for individual treatment programs, n2483 and (3) provided educational and vocational training. n2484

Last term in *Ralston v. Robinson* n2485 the Supreme Court ruled 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. n2486 **[*615]** The Court, however, rejected the argument that the Bureau of Prisons has independent authority to deny a youth offender YCA treatment when the judge has deemed special treatment appropriate. n2487 To transform the remainder of a defendant's YCA sentence into an adult sentence, the judge must find that continued YCA treatment would be of no further benefit to the defendant. n2488

The conviction of a youth offender who is committed to the custody of the Attorney General pursuant to section 5010(b) or 5010(c) is untomatically set aside if the offender is unconditionally released prior to the expiration of the maximum sentence imposed. n2489 Similarly, the conviction of a youth offender who is 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. n2490 This term in *Tuten v. United States* n2491 the Supreme Court made clear that the automatic set-aside provisions do not apply when the youth offender is unconditionally discharged after serving the entire sentence of probation imposed. n2492 In such a case, the conviction remains on the youth offender's record and may be used as the basis of an enhanced sentence under statutory recidivism provisions. n2493 The circuits differ regarding the precise rights to which a youth offender is entitled by virtue of the Act's set-aside provisions. n2494

[*616] POST-SENTENCE REVIEW

Scope of Review. Federal trial judges generally have broad discretion in imposing criminal sentences, and sentences within statutory limits are not subject to review. n2495 Sentences that require the defendant to pay restitution as a condition of probation may be subject to review if the amount of restitution fails to comport with the loss suffered by the victim of the crime. n2496 This term **[*617]** in *Bearden v. Georgia* n2497 the Supreme Court held that a state may not automatically convert court-ordered restitution into a prison term solely because the defendant is unable to pay the restitution in full. n2498

Appellate courts will, however, review the procedural aspects of the sentencing process n2499 and vacate sentences in which the udge committed an abuse of discretion by either basing the sentence on improper considerations n2500 or failing to exercise discretion. n2501 It is unclear whether a judge abuses discretion by failing to consider relevant mitigating factors in passing sentence. n2502 Reviewing **[*618]** courts will also consider and clarify ambiguous sentences. n2503

Challenging the sentencing process is often difficult because judges are ordinarily under no obligation to provide reasons for their sentencing decisions. n2504 If a judge does explain his reasons, however, an appellate court may review them. n2505

Defendants may challenge sentences on equal protection grounds. n2506 Appellate courts also have established methods to review non-prejudicial errors committed by trial courts during the sentencing process. n2507 Finally, in limited circumstances, the government may appeal arguably illegal sentences or court orders granting rule 35 reductions of sentence. n2508

Correction or Reduction of Sentence Under Rule 35. Pursuant to rule 35 of the Federal Rules of Criminal Procedure, n2509 a district court may correct an **[*619]** illegal sentence at any time. n2510 The Fifth Circuit held in *United States v. Hay* n2511 that even a defendant whose term of incarceration was fully completed is entitled to an evidentiary hearing

on the legality of the sentence because the defendant's imprisonment might still pose adverse consequences. n2512 The double jeopardy clause does not bar a court from correcting an illegal sentence even if the result of the correction is the imposition of a harsher term. n2513 Under rule 35 a court may reduce a sentence or correct a sentence imposed in an illegal manner (1) within 120 days after sentence is imposed, (2) within 120 days after the court receives a mandate issued upon affirmance of the judgment or dismissal of the appeal, or (3) within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. n2514 An appellate court may reverse a district court's disposition of a motion for reduction of sentence only for abuse of discretion. n2515

The 120–day limit established by rule 35 is jurisdictional. n2516 Courts nevertheless 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 **[*620]** elapsed. n2517 A defendant cannot confer jurisdiction on the district court to reduce sentence by purporting to activate a new 120–day period by filing a pleading years after the case is essentially over n2518 or by styling a second, untimely motion as a "motion to reconsider" or a "motion for reclarification" of a previous, timely motion. n2519

When a court rescinds the original sentence and issues a new sentence, the defendant has 120 days following the imposition of the new sentence to file a rule 35 motion. n2520 When the defendant violates the terms of his probation imposed upon suspension of the imposition of sentence, courts generally allow the defendant 120 days following the probation revocation hearing to move for a reduction in sentence pursuant to rule 35. n2521 The circuits have split, however, as to whether rule 35 permits the defendant a 120–day period following the probation revocation hearing to move for a reduction in sentence when the court initially imposed sentence on the defendant, suspended execution of the sentence, placed the defendant on probation, and reimposed the original sentence after the defendant violated his probation. n2522

CRUEL AND UNUSUAL PUNISHMENT

The eighth amendment prohibits the impsotion of cruel and unusual punishment. n2523 Because the concep of what constitutes cruel and unuasual punishment **[*621]** changes as contemporary standards of decency evolve, n2524 punishments once considered permissible may subsequently be held to violate the eighth amendment. n2525 A criminal sentence is cruel and unusual under modern standards if it is grossly disproportionate to the severity of the crime committed or involves unnecessary infliction of pain. n2526

A defendant may challenge either the type of punishment imposed n2527 or the application of a generally valid punishment to his case. n2528 If a court finds that a particular punishment is cruel and unusual, it may overturn the punishment, n2529 awards money damages, n2530 grant a declaratory judgment, n2531 or grant injunctive relief. n2532

Noncapital Offenses. A sentence imposed for a noncapital offense and within statutory limits will generally withstand challenge n2533 unless the defendant **[*622]** demonstrates that the statute prescribes a sentence which is grossly disproportionate to the crime for which he has been convicted. n2534

This term the Supreme Court removed any doubt as to whether the principle of proportionality applies to sentencing for noncapital felony convictions. In *Solem v. Helm* n2535 the Court held that a life sentence without parole imposed under the South Dakota recidivist statute for the defendant's seventh felony offense was cruel and unusual punishment because the sentence was significantly disproportionate to the crime committed. n2536 The Court articulated three objective criteria that a judge should consider in determining the proportionality of a noncapital sentence: 1) the gravity of the offense and the harshness of the penalty, 2) the sentences imposed on similarly situated criminals in the same jurisdiction, and 3) the sentences imposed on similarly situated criminals in other jurisdictions. n2537

The Court's decision in *Solem* generates significant tension with its decision three years earlier in *Rummel v. Estelle,* n2538 which only last term was cited as controlling in *Hutto v. Davis.* n2539 In *Rummel* the Court held that a mandatory life sentence imposed for the petitioner's third felony conviction under the Texas recidivist statute n2540 was not "grossly disproportionate" to the petitioner's crime. n2541 The *Rummel* Court suggested that the length of felony sentences is "purely a matter of legislative prerogative." n2542 *Solem* retreats **[*623]** from this seemingly absolutist view of legislative discretion, n2543 adopting instead a standard of "substantial deference" to the legislature. n2544 Although the *Solem* Court distinguished *Rummel* on the basis that Rummel eventually would be considered for parole whereas Helm would not, n2545 the *Solem* minority sharply criticized the Court's failure to faithfully follow or candidly overrule *Rummel*. n2546

Death Penalty. Although the death penalty is not per se cruel and unusual punishment, n2547 a plurality of the Supreme Court has held that states may not impose a capital sentence through procedures that create a substantial risk of arbitrary and capricious application. n2548 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. n2549 This term Justice Blackmum, sitting as Circuit Justice, held that a defendant must have at least one opportunity to present a claim to the **[*624]** full Supreme Court that his death penalty has been unconstitutionally imposed. n2550

The Supreme Court has delineated several categories of cases in which the death penalty may not be imposed.In 1976 the Court in *Gregg v. Georgia* n2551 expressly refused to consider whether the death penalty is a disproportionate sanction for crimes in which no life is taken. n2552 One year later, the Court in *Coker v. Georgia* n2553 held that death is a disproportionate penalty for the rape of an adult woman. n2554

Last term in *Edmund v. Florida* n2555 the Court held that the death penalty may not be imposed on a defendant who is convicted of felony murder when he neither committed murder nor intended that his accomplices do so. n2556 Enmund drove the getaway car after his two accomplices had robbed and murdered two people. n2557 The jury found Enmund guilty of first degree felony murder and robbery n2558 and sentenced him to death. n2559 The Court reversed the death sentence n2560 after determining that state legislatures and sentencing **[*625]** juries have overwhelmingly rejected imposition of the death penalty in situations similar to the one in *Enmund.* n2561

Mandatory death sentences are generally prohibited. n2562 Additionally, in order to avoid arbitrary and capricious imposition of the death penalty, a statute must provide specific guidelines for determining when the death penalty may be imposed. n2563 Although the Supreme Court has not conclusively defined the necessary statutory guidelines, the Court has upheld statutes that narrowly define the categories of cases in which a death sentence may be imposed n2564 or that require a jury to find enumerated aggravating circumstances before imposing the death penalty. n2565

[*626] This term produced several cases that focused on the factfinder's consideration of aggravating circumstances. The Supreme Court in *Zant v. Stephens* n2566 upheld the imposition of a death sentence when one of the three aggravating circumstances found by a Georgia jury was subsequently held to be unconstitutionally vague by the state supreme court. n2567 The Court found no constitutional violation arising from the jury's consideration of the invalid aggravating circumstances because the two valid aggravating circumstances adequately and objectively narrowed the class of defendants eligible for the death penalty. n2568 **[*627]** Once the jury found that Stephens was within this class of defendants, it was free to impose a death sentence by making "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." n2569

This term in *Barclay v. Florida* n2570 a plurality of the Supreme Court upheld the imposition of a death sentence when the state trial judge, despite a clear state law which provides only that the absence of a prior record may be considered a mitigating factor, found that the defendant's prior record was an aggravating factor. n2571 The Court found that the other aggravating circumstances relied upon by the trial judge in imposing the death penalty adequately supported the sentence n2572 and concluded that the state law error did not rise to the level of a constitutional violation. n2573 Also this term, the Court held in *Alabama v. Evans* n2574 that a factfinder may consider aggravating circumstances that are unrelated to the offense for which the defendant was convicted. n2575

[*628] This term the Ninth Circuit held in *Harris v. Pulley* n2576 that California's death penalty statute, n2577 which does not place limits on the prosecution's introduction of evidence of nonstatutory aggravating factors, does not impermissibly broaden the jury's discretion to impose the death penalty. n2578 The court held that the jury's consideration of nonstatutory aggravating factors is not objectionable because the statute prevents the jury from imposing death unless it finds at least one statutory aggravating factor. n2579 Further, the court held, the failure of the statute to label circumstances as either aggravating or mitigating is not a defect of constitutional magnitude because the statute establishes factors to guide the jurors' discretion. n2580

Statutory guidelines for imposition of the death penalty may not foreclose consideration of any circumstances that may tend to mitigate the seriousness of the offense. n2581 Mitigating circumstances include the circumstances surrounding the offense n2582 and any relevant aspects of the defendant's character and record. n2583

In *Lockett v. Ohio* n2584 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. n2585 Although the Court did not question a state's ability to fix **[*629]** mandatory sentences in

noncapital cases, n2586 it recognized that in capital cases the finality of the death sentence necessitates individual consideration before the penalty is imposed. n2587 In *Eddings v. Oklahoma* n2588 the Supreme Court followed *Lockett* in reversing a death sentence imposed upon a sixteen–year–old defendant who was convicted of first degree capital murder n2589 and who offered evidence of his emotional disturbances and troubled youth as mitigating circumstances. n2590 The trial judge refused to consider the defendant's violent background and emotional disturbances. n2591 The only mitigating circumstance the judge considered was Eddings' youth, which the judge found did not outweigh the aggravating circumstances. n2592 The Supreme Court held that the sentencing judge's refusal to consider relevant mitigating evidence violated the eighth amendment. n2593

This term in *Goodwin v. Balkcom* n2594 the Eleventh Circuit read *Lockett* to require capital sentencing instructions that clearly guide a jury in its understanding of the purpose of mitigating circumstances. n2595 The court also required that the jury be informed of its option to recommend a life sentence notwithstanding its finding of aggravating circumstances. n2596

[*630] Death penalty statutes not only must contain specific guidelines that prevent arbitrary and capricious imposition of the death penalty, but must also be designed to ensure that the imposition of capital punishment is based on "reason rather than caprice or emotion." n2597 In *Beck v. Alabama* n2598 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. n2599 The Alabama death penalty statute permitted the jury to consider only the capital offense of intentional killing in the course of a robbery, n2600 even though the evidence would have supported a finding of felony murder, a noncapital crime. n2601

In *Hopper v. Evans* n2602 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. n2603 After being convicted of killing intentionally during the course of a robbery, n2604 the defendant in *Evans* was sentenced to death. n2605 A writ of habeas corpus was sought on the ground that the defendant had been convicted and sentenced under the same statute that precluded instructions on lesser included offenses and had been declared unconstitutional by the Court in *Beck.* n2606 The Supreme Court found that the invalidity of the statute struck down in *Beck* had not prejudiced Evans n2607 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. n2608

This term in *California v. Ramos* n2609 the Supreme Court upheld the "Briggs **[*631]** Instruction," n2610 under which a jury deciding between a sentence of death and a sentence of life imprisonment without parole is informed of the Governor's power to commute a life sentence without parole, but is not informed of the Governor's power to commute a death sentence. n2611 Ramos argued that the instruction invites the imposition of the death penalty on the basis of mere speculation concerning the likelihood of commutation in the event of a life sentence. n2612 Ramos also contended that the instruction biases the jury in favor of death by implying that the jury can prevent the defendant's return to society only by imposing that the death penalty. n2613 The Court rejected these arguments, analogizing the speculative nature of the possibility of future commutation to the speculative nature of the factor of future dangerousness, which the Court upheld in *Jurek v. Texas,* n2614 and noting that an instruction disclosing the Governor's power to a commute a death sentence could operate to the defendant's disadvantage. n2615

PAROLE

The purpose of parole is to integrate prisoners into society by allowing them to serve a portion of their sentence outside prison. n2616 Release may be mandatory after a prisoner has served a specified portion of his sentence n2617 or granted at the discretion of the United States Parole Commission. n2618 Numerous conditions attending release often impose significant restraints on a parolee's freedom. n2619 These conditions are designed to ensure that the parolee is **[*632]** adequately supervised and to protect the public welfare. n2620 If a parolee violates a condition of parole, the parole may be revoked n2621 and the parolee may be returned to prison. n2622

A federal prisoner sentenced to a definite term exceeding one year is eligible for parole after serving one–third of the sentence. n2623 At the time of sentencing, however, the court may specify that the prisoner will be eligible for parole before having served one–third of the term. n2624 Alternatively, the court may set a maximum term and allow the Commission to determine when the prisoner should be released. n2625 The Commission retains jurisdiction over the parolee until the expiration of the maximum term of the sentence, n2626 unless it decides that early termination of parole is justified. n2627 After five years of parole, the Commission must terminate supervision unless it decides that the

parolee is likely to engage in criminal acts. n2628 The parolee has the right to a hearing to **[*633]** determine whether termination of supervision is appropriate. n2629

Congress established new standards for parole release determinations when it enacted the Parole Commission and Reorganization Act of 1976. n2630 The statute provides that before the Commission may parole an eligible prisoner, it must first determine that the prisoner has an acceptable record of institutional behavior. n2631 After deciding this threshold matter, the Commission must then determine that release would not depreciate the seriousness of the prisoner's offense, n2632 promote disrespect for the law, n2633 or jeopardize the public welfare. n2634

The Commission has promulgated guidelines to promote consistency and fairness in its parole determinations. n2635 Under these guidelines, the Commission **[*634]** determines the prisoner's parole prognosis by calculating an individual "salient factor score." n2636 The Commission classifies the seriousness of the prisoner's offense according to a chart listing categories of severity. n2637 The matrix of the prisoner's offense severity rating and the individual's salient factor score yields the suggested time range of incarceration before release on parole. n2638 The Commission may deviate from the guidelines, n2639 however, and a court may invalidate the Commission's decisions only if it determines that the Commission has abused its discretion. n2640 Even if the Parole Commission departs from normal procedures prescribed by the sentencing and parole **[*635]** statute, its actions do not violate the statute if they do not prejudice the prisoner. n2641

This term in *Young v. United States Parole Commission* n2642 the Fifth Circuit affirmed that the Parole Commission has considerable discretion in classifying offensive behavior. n2643 The court rejected the prisoner's challenge to the Commission's classification of his offense as "Greatest II Kidnapping" even though the prisoner had never been charged with kidnapping. n2644 In classifying the prisoner's behavior, the Parole Commission relied on the transcript of the prisoner's initial hearing, during which the prisoner testified that he had forcibly abducted persons in the course of the crime for which he had been charged. n2645 The Fifth Circuit agreed with the district court that the Commission's characterization of the prisoner's offense behavior was not "flagrant, unwarranted, or unauthorized" so as to require reversal. n2646

Prisoners sentenced prior to the enactment of the 1976 Act frequently have raised two challenges to the Commission's denial of release under the guidelines. First, prisoners have claimed that the Commission's application of the guidelines to them violates the constitutional prohibition against *ex post facto* laws. n2647 Courts of appeals have split over the validity of such claims. n2648 Second, **[*636]** prisoners have claimed that the Commission's application of the guidelines to them subjects them to longer sentences than those intended by the sentencing courts because courts based their sentencing decisions on suppositions that prisoners would be eligible for early release if they compiled good institutional records. n2649 In 1979, however, the Supreme Court in *United States v. Addonizio* n2650 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. n2651 The Court ruled that the frustration of the sentencing judge's subjective intentions is not a proper basis for collateral review of an otherwise valid sentence. n2652 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. n2653 Several circuit courts recently have applied *Addonizio,* holding that the sentencing judge's expectations of when the prisoner may be paroled have no role in the Parole Commission's determination of when a prisoner will be eligible for parole. n2654

A prisoner is entitled to due process in parole determinations when a legitimate expectancy of parole exists. n2655 In *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex* n2656 the Supreme Court held that the Nebraska statute governing parole determinations n2657 created a legitimate expectancy of **[*637]** parole by directing the parole board to release an inmate unless it finds that certain statutory conditions are met. n2658 After examining the parole determination procedures followed by the Nebraska Parole Board, the Court found that informal hearings and a statement of reasons to the prisoner for porole denial were sufficient to satisfy the requirements of due process. n2659 The Court found that it is not necessary for a parole board to conduct a formal hearing for every inmate eligible for parole. n2660 Nor is it necessary to issue a written explanation of the evidence leading to denial. n2661 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. n2662

In *Connecticut Board of Pardons v. Dumschat* n2663 the Supreme Court distinguished an expectation of parole release that is based on ahe statistical percentage of prior pardon requests granted. n2664 Citing *Greenholtz,* the Court held that the Connecticut pardon procedure did not create a constitutional right to **[*638]** commutation, n2665 despite

the Board of Pardons' record of ruling favorably on seventy–five percent of commutation applications. n2666 Unlike the statute at issue in *Greenholtz*, the Connecticut statute gave the pardon board unlimited discretion and therefore did not create a constitutionally enforceable expectation of parole. n2667

Last term in *Jago v. Van Curen* n2668 the Supreme Court held that when a legitimate expectation of release is not created by a parole statute, the parole board's notice that the prisoner has been ordered released does not create a constitutionally protected liberty interest. n2669 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. n2670 The Court construed the Ohio statute involved in *Jago* to provide that parole determinations are wholly within the discretion of the parole board. n2671 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 **[*639]** parole authorities . . . ." n2672

Applying the *Greenholtz* analysis, several courts have rejected claims alleging violations of procedural due process in parole determinations. n2673 This term in *Slocum v. Georgia State Board of Pardons & Paroles* n2674 the Eleventh Circuit rejected a prisoner's allegations that a state parole board's refusal to grant him parole violated his due process rights. n2675 The court reasoned that although the Georgia parole scheme obligated the board to consider certain specified criteria, the language of the statute gave the Georgia Parole Board substantial discretion in granting parole. n2676 The court found that this discretion distinguished the Georgia statute from the statute in *Greenholtz* and accordingly held that the Georgia statute created no protected liberty interest. n2677

This term in *Walker v. Prisoner Review Board* n2678 the Seventh Circuit held that the Illinois Parole Board Rules governing parole n2679 give inmates a legitimate expectation of access to their files. n2680 The court found that the Board Rules "clearly, mandatorily and without qualification" created for parole candidates a justified expectation of access to records relied upon by the Board in its determinations. n2681

When a federal parolee is alleged to have violated the conditions of parole, the United States Parole Commission may issue a summons ordering the parolee to appear or it may issue a warrant and recommit the parolee. n2682 The **[*640]** Commission must conduct a parole revocation hearing within ninety days after recommitting any parolee who is convicted of a crime committed while on parole, admits violating parole conditions, or waives the right to a preliminary hearing. n2683 If the Commission fails to meet the ninety–day deadline, however, a prisoner will be released from confinement only upon a showing of prejudice. n2684 In *Moody v. Daggett* n2685 the Supreme Court held that when a parolee is convicted of a crime committed while on parole, the Commission may issue a parole revocation warrant but stay its execution until the prisoner has served the sentence for the crime committed during parole. n2686 Federal parolees who have such a detainer lodged against them may submit to the Commission written information, prepared with the assistance of counsel, which attempts to mitigate or explain the alleged violation. n2687 If the Commission fails to review the detainer within 180 days, the prisoner may seek mandamus to compel review. n2688

In *Morrissey v. Brewer* n2689 the Supreme Court establi shed that due process protection applies to a parole revocation proceeding. n2690 Although parolees are subject to many restrictions that other citizens normally do not suffer, n2691 parolees enjoy a conditional liberty, n2692 including many rights usually protected by due process. n2693 Moreover, parolees rely on an implicit promise that their **[*641]** parole will be revoked only if they violate their parole conditions. n2694 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 the parolee's behavior. n2695

The Court in *Morrissey* established due process requirements for each of the two stages in typical parole revocation proceedings. n2696 First, shortly after a parolee is arrested for violating parole conditions, the parolee must receive a preliminary hearing to determine whether there is probable cause to believe that he violated the parole conditions. n2697 If the parolee has been convicted of a crime while on parole, however, due process does not require a preliminary hearing because the conviction itself establishes probable cause to believe there has been a parole violation. n2698 Second, if probable cause has been established, the parole authority must hold a revocation hearing, if the parolee so desires, **[*642]** within a reasonable time after the parolee has been taken into custody. n2699 At this hearing the parolee has an opportunity to show either that the violation did not occur or that mitigating circumstances should prevent revocation. n2700 A "neutral and detached" body, such as the parole board, must make the revocation decision. n2701 This body is required to make a written statement of the evidence and the reasons supporting the revocation of parole. n2702

PROBATION

The Federal Probation Act n2703 authorizes a judge imposing a sentence for an offense not punishable by death or life imprisonment to suspend either the imposition or the execution of the sentence n2704 and to place the offender on conditional probation n2705 for a period not exceeding five years. n2706 If the maximum term for the offense is greater than six months, the judge may 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. n2707

The sentencing judge may order probation to run either consecutively or concurrently with any prison term imposed on the defendant. n2708 Although the **[*643]** judge may grant probation for a period longer than the original sentence or the maximum prison term permitted by the substantive criminal statute, n2709 the judge may not order the defendant to begin probation prior to imprisonment and then to resume probation after release. n2710

Although the sentencing judge has discretion to impose terms and conditions of probation, n2711 any conditions must bear a reasonable relation to the rehabilitation of the probationer and to the protection of the public. n2712 Unnecessarily severe or overbroad probation conditions violate this standard. n2713 Further, conditions must be sufficiently specific to provide the probationer with notice of those acts that will cause the loss of liberty. n2714

Conditions that restrict constitutional rights are subject to careful scrutiny. n2715 In *United States v. Lowe* n2716 a group of political protesters claimed **[*644]** that the terms of their probation were unconstitutional. n2717 The defendants were fined and sentenced for unlawfully entering a naval base, where they conducted a political protest. n2718 The sentencing judge placed them on probation, subject to the condition that they not go within 250 feet of the naval base. n2719 The Ninth Circuit rejected the defendants' argument that this condition violated first amendment rights of speech and association. n2720 The court found that the condition reasonably met the goals of rehabilitation and protection of the public n2721 and that the condition was a less restrictive alternative than imprisonment or some greater limitation upon the defendants' rights of movement, speech, and association. n2722

The Eleventh Circuit addressed a petitioner's claim that several probation conditions violated his constitutional rights. n2723 In *Owens v. Kelley* n2724 the petitioner challenged conditions that required him to participate in a religiously–oriented rehabilitation program, to consent to warrantless searches upon request by any probation or law enforcement officer, and to submit to a psychological stress evaluation. n2725 The petitioner argued that these conditions violated his fourth amendment, fifth amendment and first amendment rights. n2726 The court found no violation of the petitioner's fourth and fifth amendment rights and held that the conditions were reasonably related to the rehabilitation of the pobationer and to the protection of society. n2727 The court noted, however, that the fourth amendment's protection against unreasonably searches and seizures does apply to probationers, although in a different **[*645]** than it applies to ordinary citizens who are free. n2728 In dictum, the court stated that a probation condition that required probationers to adopt religion or to submit themselves to a course advocating the adoption of religion would be a violation of the first amendment. n2729

Probation may be conditioned upon the payment of fines, the restitution to aggrieved parties for actual damage or loss, or the support of persons for whom the defendant is legally responsible. n2730 In ordering restitution, however, the court is limited to the amounts charged in the counts for which the defendant is convicted. n2731 A narrow exception to this majority rule permits courts to order higher amounts of restitution when the defendant has admitted or agreed to a greater amount of damage in the indictment, plea agreement, or presentence proceedings. n2732

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. n2733 The court may even revoke the probation of a **[*646]** defendant who is later acquitted of the crime that resulted in the violation of probation conditions. n2734

The Supreme Court, however, has determined that before a court may revoke probation, due process requires that the probationer receive preliminary and final revocation hearings. n2735 The hearings will be similar to those mandated **[*647]** by the Court in *Morrissey v. Brewer* n2736 for parole revocation. n2737 Due process also requires that a revocation hearing be conducted according to principles of fundamental fairness. n2738 This term in *Bearden v. Georgia* n2739 the Supreme Court announced that it is fundamentally unfair to automatically revoke a defendant's probation for failure to pay a fine or make restitution as required by conditions of probation. n2740 The Court determined that, in revocation proceedings arising from such a failure, due process requires the sentencing court to inquire into the reasons for the probationer's failure to pay. n2741 If the probationer could not pay despite sufficient bona fide efforts to obtain the funds to do so, n2742 the court must consider measures of punishment other than imprisonment. n2743 A probationer

who has made all reasonable efforts to pay may be imprisoned only if alternate measures are not adequate to meet the state's interests in punishment and deterrence. n2744

Probation revocation is not a stage of criminal prosecution. n2745 Not all constitutional **[*648]** and statutory protections therefore apply. n2746 For example, the circuit courts remain divided as to whether *Miranda* protections and the fourth amendment exclusionary rule apply to probation revocation hearings. n2747 If a court determines on the basis of sufficient evidence that the probationer violated the conditions of probation, n2748 the court has broad discretion to revoke probation. n2749 A court revoking probation may impose the original or a reduced **[*649]** sentence n2750 or, if authorized by statute, an increased sentence. n2751

A final revocation hearing must be held within a reasonable time. n2752 Before the hearing, the probationer must receive written notice of both the alleged violation n2753 and the right to counsel. n2754 In addition, the government must disclose the evidence it has against the probationer. n2755 Moreover, at the final hearing the probationer must have an opportunity to appear in court to present evidence n2756 and to question adverse witnesses. n2757 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 the probationer. n2758 The sentencing court has jurisdiction to reconsider the sentence imposed on the probationer within 120 days of the final revocation hearing. n2759

FOOTNOTES:

n2381 *See United States v. DiFrancesco, 449 U.S. 117, 149–50 (1980)* (Brennan, J., with White, Marshall & Stevens, JJ., dissenting) (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 cited as 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 cited as 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.

n2382 *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 2381, at 3 (capricious and arbitrary nature of criminal sentencing may be major flaw in American criminal justice system).

n2383 *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); FAIR AND CERTAIN PUNISHMENT, *supra* note 2381, 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 cited as JUST AND EFFECTIVE SENTENCING]; *see also infra* note 2429 and accompanying text (discussing broad discretion of federal trial judges to consider wide variety of information about defendant's background, character, and conduct in determining sentence).

n2384 *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 decisionmaking); JUST AND EFFECTIVE SENTENCING, *supra* note 2383, at 2–3 (not even most rudimentary requirements of due process apply at sentencing; no requirement that sentence have any rational basis); *infra* notes 2413–19 and accompanying text (some risk of inaccurate or misleading information in presentence report).

n2385 *See* CRIMINAL SENTENCES, *supra* note 2381, 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 2383, 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).

n2386 *See* ABA STANDARDS, *supra* note 1, at 18.45–18.53 (sentences too frequently excessive); FAIR AND CERTAIN PUNISHMENT, *supra* note 2381, 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).

n2387 It is improper for the prosecution to make, or for the court to receive, a direct *ex parte* communication concerning the sentence. *See United States v. Wolfson, 634 F.2d 1217, 1221–22 (9th Cir. 1980)* (sentence vacated and remanded when sentencing judge relied on secret *ex parte* report and recommendation by prosecutors).

n2388 *See* ABA STANDARDS, *supra* note 1, at 18.193 (in some jurisdictions probation authorities who prepare presentence reports actually make operative sentencing decision).

n2389 *Cf. United States v. Schell, 692 F.2d 672, 679 (10th Cir. 1982)* (prime responsibility for rationalizing penalty structure of criminal code falls upon legislature).

n2390 *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 had 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 2383, at 12–13 (Parole Commission engages in sentencing no less than federal trial judge does).

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 allows 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).*

n2391 *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).

n2392 *See id.* at 18.7 (attempts to abolish discretion tend merely to reallocate it).

n2393 FED. R. CRIM. P. 32(a)(1).

n2394 *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).

n2395 FED. R. CRIM. P. 32(a)(1); *see United States v. Green, 680 F.2d 183, 188 (D.C. Cir. 1982)* (sentencing is critical stage of proceeding at which defendant entitled to effective assistance of counsel), *cert. denied, 103 S. Ct. 1204 (1983).* The defendant has the right to be represented by the counsel of his choice unless compelling reasons

mandate that the particular attorney should be denied the right to appear. *See* United States *ex rel. Spurlark v. Wolff, 683 F.2d 216, 222 (7th Cir. 1982)* (court's summary denial of appearance by defendant's chosen counsel at sentencing is arbitrary denial of sixth amendment right).

n2396 FED. R. CRIM. P. 32(a)(1); *see United States v. Green, 680 F.2d 183, 188 (D.C. Cir. 1982)* (sentencing is critical stage of criminal proceeding at which defendant entitled to effective assistance of counsel), *cert. denied, 103 S. Ct. 1204 (1983); 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 not denied effective assistance of counsel at imposition of sentence 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).

n2397 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, courts should consider defendant's argument that enhancement of sentence improper because defendant denied hearing and 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).

n2398 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. 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); *cf. United States v. Compton, 704 F.2d 739, 742 (5th Cir. 1983)* (due process requires court to afford defendant opportunity to rebut factual assumptions relied on by judge at sentencing); *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). The attorney for the government must be given 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, 456 U.S. 926 (1982).* Rule 32(a)(1) does not give a defendant the right to present witnesses on his own behalf at sentencing. *See United States v. Jackson, 700 F.2d 181, 191 (5th Cir. 1983)* (trial court did not err in refusing to permit defendant's wife to address court at sentencing).

n2399 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 contendre 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 is entitled before trial or acceptance by the court of a plea of nolo contendere to a hearing on the issue 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) and 851 (1976), which provide 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 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 for enhancement of sentence filed before district court approved defendant's waiver of jury trial, received written stipulations, and took cause under submission, so filed before non–jury trial began), *cert. denied, 449 U.S. 873 (1980).* For § 841(b)(1) to apply, the prior convictions must "have become final," *21 U.S.C. § 841*(b)(1)–(6) (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," so imposition of enhanced sentences under § 841(b)(1)(B) improper).

Although the dangerous special offenders statutes guarantee the defendant the right to a hearing, assistance of counsel, compulsory process, appeal, and the opportunity to cross–examine adverse witnesses, the full panoply of trial rights is not available. *See United States v. Jarrett, 705 F.2d 198, 208 (7th Cir. 1983)* (hearsay evidence available to court in dangerous special offender proceedings); *United States v. Schell, 692 F.2d 672, 677 (10th Cir. 1982)* (court may constitutionally employ preponderance of evidence standard in determining whether defendant is dangerous offender within meaning of Act).

n2400 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.*

n2401 *Id.*

n2402 *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 sentence is to be served); *Benson v. United States, 332 F.2d 288, 292 (5th Cir. 1964)* (same). *But cf. United States v. Baylin, 696 F.2d 1030, 1037 (3d Cir. 1982)* (trial judge accepting guilty plea not required to inform defendant of parole prospects under Parole Guidelines).

n2403 *18 U.S.C. § 3401* (Supp. V 1981).

n2404 *Id.* § 3401(a). Magistrates may exercise such jurisdiction only at the district court's designation, *id.*, contingent upon the defendant's written consent specifically waiving trial, judgment, and sentencing by a district court judge. *Id.* § 3401(g).

n2405 *Id.* § 3401(g).

n2406 *Id.* § 3401(g)(3).

n2407 Fennell and Hall, *Due Process in Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports and 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 document in correctional process) [hereinafter cited as *Due Process in Sentencing]*.

n2408 *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 imposition of appropriate sentence); *United States v. Burton, 631 F.2d 280, 282 (4th Cir. 1980)* (purpose of report is to provide judge with fullest possible information concerning defendant and thereby enable judge to impose appropriate sentence).

n2409 FED. R. CRIM. P. 32(c).

n2410 *Id.* 32(c)(1). Several exceptions dilute 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 suspend the presentence investigation if it finds that the record contains sufficient information on which to base the sentence. *Id.; see United States v. Latner, 702 F.2d 947, 949–50 (11th Cir. 1983)* (no abuse of discretion when trial judge imposes sentence without presentence report when he has opportunity to gain sufficient information through observation and questioning of defendant at trial). The court must explain this finding on the record. FED. R. CRIM. P. 32(c)(1).

Correction of an illegal sentence pursuant to rule 35 of the Federal Rules of Criminal Procedure does not require a presentence report. *See United States v. Connolly, 618 F.2d 553, 555 (9th Cir. 1980)* (rule 35 motion for modification of sentence resulting in nondiscretionary court order adding mandatory parole term to defendant's sentence not a resentencing requiring a presentence report).

New rule 32(c)(3)(D) provides for the situation in which a factual inaccuracy is alleged or shown.As to each matter controverted, the sentencing judge must either make a finding as to the accuracy of the challenged fact or determine that no reliance will be placed on the proposition at the time of sentencing. FED. R. CRIM. P. 32(c)(3)(D).

n2411 *702 F.2d 947 (11th Cir. 1983).*

n2412 *Id. at 949–50.*

n2413 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).

n2414 *Gregg v. United States, 394 U.S. 489, 492 (1969)* (dictum) (no limitation on contents of presenten ce report, which may rest on hearsay evidence and contain information bearing no relation to crime with which defendant charged); *see United States v. Scanlon, 702 F.2d 736, 739 (8th Cir. 1983)* (per curiam) (presentence report may include prior foreign convictions); *United States v. Garcia, 693 F.2d 412, 416 (5th Cir. 1982)* (presentence report may include criminal acts for which defendantnever indicted).

n2415 *See United States v. Papajohn, 701 F.2d 760, 763 (8th Cir. 1983)* (presentence report may contain hearsay information provided by government investigators relating to defendant's past criminal activity); *United States v. Garcia, 693 F.2d 412, 416 (5th Cir. 1982)* (presentence report may contain hearsay information from drug enforcement agents relating to defendant's prior criminal activity). *But see United States v. Baylin, 696 F.2d 1030, 1036 (3d Cir. 1982)* (presentence report may contain information provided by IRS investigators only if information accompanied by minimum indicia of reliability beyond mere allegations).

n2416 *701 F.2d 760 (8th Cir. 1983).*

n2417 *Id. at 763.*

n2418 *Id.*

n2419 *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 2407, at 1639 (concluding on basis of empirical study that current sentencing decisions likely to involve inaccurate and misleading information).

n2420 The ABA Standards state:

(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 iompleteness 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.

n2421 *See Washington v. Strickland, 673 F.2d 879, 892–901 (5th Cuir. 1982)* (counsel representing defendant at sentencing hearing has duty to make independent search to develop evidence that may mitigate punishment; failure to do so will not invalidate sentence, however, unless omission by counsel contributed to sentence), *cert. granted, 103 S. Ct. 2451 (1983).*

n2422 *Cf. United States v. Garcia, 693 F.2d 412, 415 (5th Cir. 1982)* (no due process violation when defendant fails to show judge's reliance on materially inaccurate information); *Hardy v. United States, 691 F.2d 39, 40 (1st Cir. 1982)* (presentence report that erroneously describes defendant as major narcotics trafficker does not give rise to due process violation when district judge specifically noted that he did not rely upon erroneous information in sentencing).

If the inaccuracy contained in the report could have been corrected by counsel prior to sentencing, the defendant has no basis for relief.*Hardy v. United States, 691 F.2d 39, 40 (1st Cir. 1982)* (no due process violation when defendant's counsel has reviewed presentence report and does not object to information contained therein); *United States v. Corsentino, 685 F.2d 48, 52 (2d Cir. 1982)* (same).

If the defendant is given an opportunity to rebut the allegedly inaccurate information in the presentence report, the court is not required to make findings of fact that resolve possibly conflicting versions of the information presented by the government. *United States v. Stevens, 699 F.2d 534, 537 (11th Cir. 1983).*

The opportunity for collateral attack against inaccurate presentence reports giving rise to due process violations is also very limited. *Hampton v. Mouser, 701 F.2d 766, 777 (8th Cir. 1983)* (per curiam) (habeas corpus petition alleging due process violations based on inaccuracies in presentence report fails to state constitutional deprivation cognizable under § 1983).

n2423 FED. R. CRIM. P. 32(c)(1); *see Gregg v. United States, 394 U.S. 489, 491–92 (1969)* (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 is not required to excuse himself for prejudice from subsequently hearing the defendant's motion to withdraw his plea of guilty. *United States v. Navaarro–Flores, 628 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 Unites States v. Sonderup, 639 F.2d 294, 295–96* (5th Cir.) (when judge rejects plea agreement after examining presentence report with written consent of defendant, judge need not excuse 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 (1969),* that the probation service must not "under any circumstances" submit the presentence report to the court before the defendant pleads guilty or is convicted.

n2424 Rule 32(c)(3)(A) provides four exceptions to the requirement of full disclosure of the presentence report to the defendant or his counsel. The court need not disclose any recommendations of sentence or material which in the court's opinion contains diagnostic opinion that may seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any information that, if disclosed, may 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 2407, at 1651–66 (use of confidentiality exceptions and nondisclosure of evaluative summary and sentencing recommendations adversely affect rule's policy of ensuring factual accuracy).

n2425 FED. R. CRIM. P. 32(c)(3)(A); *see United States v. Coletta, 682 F.2d 820, 826–27 (9th Cir. 1982)* (disclosure required only upon request of defendant or counsel), *cert. denied, 103 S. Ct. 1187 (1983).*

n2426 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; *United States v. Papajohn, 701 F.2d 760, 763 (8th Cir. 1983)* (defendant must be given opportunity to rebut or explain information in presentence report; procedure for rebuttal lies within discretion of trial court).

n2427 *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 problems brought out by defense counsel arguing for mitigation of punishment).

n2428 *Williams v. New York, 337 U.S. 241, 247 (1949); see Roberts v. United States, 445 U.S. 552, 557–58 (1980)* (sentencing judge may consider defendant's attitude toward society and prospects for rehabilitation); *United States v. Grayson, 438 U.S. 41, 50–52 (1978)* (sentencing judge may consider defendant's willingness 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 constitutionally invalid because of absence of counsel); *United States v. Ismond, 704 F.2d 1155, 1157 (9th Cir. 1983)* (sentencing judge may consider defendant's pattern of illegal entry into country); *United States v. Scanlon, 702 F.2d 736, 738 (8th Cir. 1983)* (per curiam) (sentencing judge may consider prior foreign conviction); *United States v. Papajohn, 701 F.2d 760, 763* (8th cir. 1983) (sentencing judge may consider past criminal activity for which defendant never prosecuted); *United States v. Jones, 696 F.2d 479, 493 (7th Cir. 1982)* (sentencing judge may consider prior criminal charges for which defendant not convicted). *cert. denied, 103 S. Ct. 2453 (1983); United States v. Donelson, 695 F.2d 583, 609 (D.C. Cir. 1982)* (sentencing judge may consider provious charges for which defendant acquitted); *United States v. Garcia, 693 F.2d 412, 416 (5th Cir. 1982)* (sentencing judge may consider hearsay reports implicating defendant in crimes for which defendant never indicted); *United States v. Madison, 689 F.2d 1300, 1315 (7th Cir. 1982)* (sentencing judge may consider defendant's sexual attack on kidnap victim), *cert. denied, 103 S. Ct. 754 (1983); United States v. Campbell, 684 F.2d 141, 154 (D.C. Cir. 1982)* (sentencing judge may consider bribery count dismissed due to expiration of statute of limitations); *United States v. Ray, 683 F.2d 1116, 1120* (7th Cir.) (sentencing judge may consider defendant's conduct including shaving of hands to refute identification testimony, escape from halfway house, shouting of obscenities at state court judge, and harassment of juror), *cert. denied, 103 S. Ct. 578 (1982).*

n2429 *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 similar offenses) (quoting S. **Ulman** in GLUECK, PROBATION AND CRIMINAL JUSTICE 113 (1933)); *United States v. Hansen, 701 F.2d 1078, 1084 (2d Cir. 1983)* (sentencing **judge** may consider prior criminal conduct for which defendant not responsible because of mental illness in selecting sentence that meets defendant's need for rehabilitation and treatment and community's need for protection); *United States v. Barbara, 683 F.2d 164, 167 (6th Cir. 1982)* (sentencing **judge** may consider societal need for retribution and general deterrence as most important factors in sentencing determination); *United States v. Milik, 680 F.2d 1162, 1166 (7th Cir. 1982)* (sentencing **judge** may consider general deterrent effect on foreign citizens in sentencing alien who entered country carrying contraband); *United States v. Restor, 679 F.2d 338, 340 (3d Cir. 1982)* (per curiam) (sentencing **judge** may consider special or general deterrence factors).

n2430 *See Townsend v. Burke, 334 U.S. 736, 740–41 (1948)* (fifth amendment due process clause prohibits sentence based on material untrue assumptions concerning defendant's criminal record); *United States v. Baylin, 696 F.2d 1030, 1040–41* (3d cir. 1982) (due process requires that factual matters be considered for sentencing purposes only if they possess minimal indicia of reliability).

n2431 *See United States v. Diamond, 706 F.2d 105, 106 (2d Cir. 1983)* (when government promises not to recommend sentence as part of plea agreement but reserves right to present trial court with information relevant to sentencing, due process not violated by prosecutorial memo urging court to consider need for deterrent sentence).

n2432 *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); *cf. United States v. Kenny, 645 F.2d 1323, 1348–49* (9th Cir.) (sentencing judge did not err in failing to disclose receipt of letters concerning defendants prior to sentencing hearing because letters contained no factual allegations or sentence recommendation), *cert. denied, 452 U.S. 920 (1981).*

n2433 *See United States v. Medina–Cervantes, 690 F.2d 715, 716 (9th Cir. 1982)* (sentencing judge's statement that defendant had "a lot to lose" by going to trial establishes impermissible sentencing consideration); *United States v. Fields, 689 F.2d 122, 128* (7th Cir.) (mere fact that defendant standing trial receives three–year sentence while codefendant who pleads guilty receives three–month sentence is insufficient to establish vindictiveness), *cert. denied, 103 S. Ct. 573 (1982).*

When an appellate court vacates a sentence on the ground that the judge improperly considered the defendant's decision to go to trial, the appellate court may still remand the case to the same trial judge for resentencing. *See United States v. Medina–Cervantes, 690 F.2d 715, 717 (9th Cir. 1982)* (remand to original sentencing judge on belief that judge will consider only legally permissible factors in imposing sentence). In this circumstance the judge would be directed to state all reasons underlying the sentence to avoid the appearance of vindictiveness. *Id.*

n2434 *See North Carolina v. Pearce, 395 U.S. 711, 725–26 (1969)* (due process bars vindictive imposition of more severe sentence upon 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 state 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 proceding. *Id. at 726; see also United States v. Monaco, 702 F.2d 860, 885 (11th Cir. 1983)* (when aggregate sentence of three years at first trial increased to four years on retrial, appearance of vindictiveness arises, and trial court's failure to state reasons for increase in sentence makes enhancement constitutionally impermissible). *But see United States v. Wasman 700 F.2d 663, 669–70 (11th Cir. 1983)* (court may properly impose increased sentence based on intervening conviction on different charge, even though conduct underlying that conviction occurred prior to first sentencing), *cert. granted, 52 U.S.L.W. 3329* (U.S. Nov. 1, 1983) (No. 83–173).

When the danger of vindictiveness is minimal, however, the prophyactic 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, has no personal stake in prior conviction, and, unlike judge, has 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 nova second–tier court is different from first–tier trial court from which defendant appealed; second–tier court not asked to reconsider its decision or to find error in another court's work and probably not informed of sentence imposed by inferior court).

As a rule, double jeopardy considerations do not bar the imposition of a harsher sentence on retrial following a successful appeal. *Robinson v. Wade, 686 F.2d 298, 310 (5th Cir. 1982).* When the harsher sentence is based on new evidence or circumstances not adduced at the first trial, a longer sentence is permissible. *Robinson v. Scully, 690 F.2d 21, 24 (2d Cir. 1982)* (new evidence at retrial exposing defendant's greater culpability will not support enhanced sentence when information based on activities predating original sentence and information known to court at original sentencing); *United States v. Hayes, 676 F.2d 1359, 1364–65* (11th Cir.) (trial court may properly impose greater sentence upon retrial when enhancement based upon new evidence, excluded at joint first trial, regarding defendant's efforts to elude police), *cert. denied, 103 S. Ct. 455 (1982).*

Courts have responded to the possibility that longer sentences upon retrial may implicate the defendant's due process protection by imposing the maximum sentence following trial in order to preserve the discretion of fellow judges should the conviction be reversed. *See United States sv. Roper, 681 F.2d 1354, 1362 (11th Cir. 1982), cert. denied, 103 S. Ct. 1197 (1983).* This approach was repudiated by the Eleventh Circuit in *Roper* as an attempt to circumvent the Superme Court's ruling in *Pearce. Id.*

The First Circuit has held that a prosecutor does not violate due process when he threatens a defendant with a longer 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*).

n2435 *See United States v. Roe, 670 F.2d 956, 972–73* (11th Cir.) (sentencing judge may not present defendant with choice between admitting guilt or enduring harsher sentence for failing to do so), *cert. deneid, 103 S. Ct. 126 (1982); 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).

n2436 *686 F.2d 754 (9th Cir. 1982).*

n2437 *Id. at 757.*

n2438 *See United States v. Bangert, 645 F.2d 1297, 1308* (8th Cir.) (dictum) (sentencing judge may not consider defendant's political beliefs because doing so would impair defendant's first amendment rights), *cert. denied, 454 U.S. 860 (1981).*

n2439 *Compare* Armpriester v. United States, 256 f.2d 294, 297 (4th Cir.) (consideration of illegally obtained evidence improper even when used only for limited purpose of determining sentence), *cert. denied, 358 U.S. 856 (1958) with* United States v. butler, *680 F.2d 1055, 1056 (5th Cir. 1982)* (consideration of illegally obtained evidence excluded at trial proper at sentencing when there is no potential for factual inaccuracy and low deterrent value of exclusion).

n2440 *680 F.2d 1055 (5th Cir. 1982).*

n2441 *Id. at 1056.*

n2442 *Id.; 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).*

n2443 *See United States v. Pineda, 692 F.2d 284, 287 (2d Cir. 1982)* (uncounseled incriminating statements obtained by immigration officer in violation of defendant's sixth amendment right inadmissible against defendant at sentencing hearing).

n2444 *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 that case).

n2445 *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 (1979),* which

held that a misdemeanor defendant has a right to counsel only when his conviction results in imprisonment, *id. at 373–74*, requires exclusion of an uncounseled misdemeanor conviction for enhancement purposes even though the defendant had not been jailed for the original conviction. *See 446 U.S. 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; under this "bright line" test, original conviction invalid and may not be used to support enhancement).

n2446 *625 F.2d 1158 (5th Cir. 1980)* (per curiam), *cert. denied, 451 U.S. 912 (1981).*

n2447 An uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. *See Scott v. Illinois, 440 U.S. 367, 373–74 (1979).*

n2448 *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).* The Fifth Circuit left open the question of whether the sentencing judge may consider a prior constitutionally invalid misdemeanor conviction obtained in violation of the defendant's right to counsel. *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 harless error).

n2449 When a parole violator receives less than the maximum sentence, he is presumed to have been credited for time served prior to sentencing unless the record affirmatively shows that credit was not given. *Granger v. United States, 688 F.2d 1296, 1297 (9th Cir. 1982)* (per curiam).

n2450 *See Johnson v. Smith, 696 F.2d 1334, 1338 (11th Cir. 1983)* (failure to credit prisoner for time spent at community treatment center prior to sentencing and under restrictions similar to those of prison violates equal protection clause).

n2451 *18 U.S.C. § 3568* (1976).

n2452 *Shaw v. Smith, 680 F.2d 1104, 1106 (5th Cir. 1982)* (to receive credit for time served in state custody prisoner must show state confinement to be exclusively product of federal agency such that state incarceration is practical equivalent of federal imprisonment).

n2453 *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, 699–700 (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 the 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).

n2454 *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; 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); *see United States v. Briones–Garza, 680 F.2d 417, 423* (5th Cir.) (upon revocation of parole, district court may require defendant to serve previously imposed sentence and not credit time served on probation), *cert. denied, 103 S. Ct. 229 (1982); cf. Powell v. United States Bureau of Prisons, 695 F.2d 868, 871 (5th Cir. 1983)* (prisoner's work credits for time served in Mexican prison are not immutable sentence reduction and are forfeitable

upon revocation of parole).

n2455 *See Powell v. United States Bureau of Prisons, 695 F.2d 868, 871–72 (5th Cir. 1983)* (Bureau of Prisons may refuse to credit prisoner with good time accumulated prior to parole when returned to prison upon parole revocation); United States *ex rel. Del Genio v. United States Bureau of Prisons, 644 F.2d 585, 589 (7th Cir. 1980)* (same), *cert. denied, 449 U.S. 1084 (1981).*

n2456 *North Carolina v. Pearce, 395 U.S. 711, 718–19 (1969).*

n2457 *18 U.S.C. §§ 5005*–5026 (1976).

n2458 *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 to substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies).

n2459 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 age 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 D.C. 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).

n2460 *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).

The YCA gives the sentencing judge four options. The first option is to 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).

The sentencing judge's second option 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).Under this option 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 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 sentencing judge's fourth option is to sentence pursuant to any other applicable penalty provision. *18 U.S.C. § 5010*(d) (1976); *see United States v. Duran, 687 F.2d 347, 351 (11th Cir. 1982)* (sentencing under YCA optional; trial judge may sentence youthful offender as adult), *cert. denied, 103 S. Ct. 1781 (1983).*

The applicability of the YCA to all United States territories is uncertain. In *Ware v. United States, 699 F.2d 474 (9th Cir. 1983)* (per curiam), the Ninth Circuit remanded an appeal brought by a youthful offender to determine whether, given the seriousness of the crime, the YCA would have been applied but for the decision of the District Court for the District of Guam that the Act is inapplicable to a territorial court. *Id. at 474–75.* If the Act would not

have been applied in any event, the court held, the question is moot. *Id.*

n2461 *See United States v. Amidon, 627 F.2d 1023, 1026 (9th Cir. 1980)* (Bureau of Prisons and Parole Commission generally have abandoned original rehabilitative purpose 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 about possibility of changing behavior patterns of young offenders).

n2462 *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 institution, receive same educational and vocational opportunities, and are usually 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);* Partridge, Chaset & Eldridge, *supra* note 2461, at 200 (language of YCA suggests that YCA sentences will have consequences that in fact will not result). *But see infra* notes 2481–84 and accompanying text (discussing Bureau of Prisons plan to implement YCA in more rigorous manner).

n2463 *See United States v. Amidon, 627 F.2d 1023, 1026 (9th Cir. 1980)* (youth offenders 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 offenders 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).* One reason for the disparate length in prison terms between youth offenders and adults may be that YCA sentences that impose fixed, inflexible terms of incarceration undercut the rehabilitative goals of the Act. *Cf. United States v. Smith, 683 F.2d 1236, 1237 (9th Cir. 1982)* (YCA sentence imposing inflexible terms are disapproved), *cert. denied, 103 S. Ct. 740 (1983).*

n2464 The leading cases upholding the YCA against due process and equal protection challenges are *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), and *Cunningham v. United States, 256 F.2d 467, 472 (5th Cir. 1958)* (rather than provide 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). The courts reasoned that although a defendant suffers from a longer sentence, he benefits from the superior YCA treatment he receives. This rationale was largely undermined by the Supreme Court's ruling in *Ralston v. Robinson, 454 U.S. 201 (1981).* In *Ralston* the Court held that a judge may order a defendant serving a YCA sentence to serve the remainder of his sentence as an adult when the offender has received a consecutive adult term and 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 § 5010(c), making speculative the dissent's contention that the respondent received a longer term than he would have received 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 § 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* rationale also 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, may 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 2481–84 and accompanying text (discussing Bureau of Prisons' plan).

n2465 *See United States v. Glenn, 667 F.2d 1269, 1274 (9th Cir. 1982)* (Federal Magistrates Act prohibits magistrates and, by implication, judges from sentencing youth offender to term of confinement longer than that which could be imposed on adult); *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); *United States v. Amidon, 627 F.2d 1023, 1026–27 (9th Cir. 1980)* (same).

n2466 *676 F.2d 1189 (8th Cir. 1982).*

n2467 The court in *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, the court found, some parts of the legislative history of the Federal Magistrates Act of 1979 refute the suggestion in *Amidon* that the legislative history indicates that YCA offenders could not serve longer sentences than adult offenders. *Id.* Finally, such an interpretation of the Federal Magistrates Act of 1979 would implicitly repeal YCA §§ 5010(b) and 5017(c). *Id.*

n2468 *18 U.S.C. §§ 4201–*4218 (1976).

n2469 *See Marshall v. Garrison, 659 F.2d 440, 443 (4th Cir. 1981)* (Congress intended Parole Act to apply same parole criteria to all federal prisoners, youth offenders as well as adults); *United States v. Amidon, 627 F.2d 1023, 1026 (9th Cir. 1980)* (Parole Commission generally uses same guidelines for determining 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).

n2470 *651 F.2d 1354 (10th Cir. 1981).*

n2471 *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 eligibility of YCA offenders).

n2472 *See United States v. Amidon, 627 F.2d 1023, 1024–26 (9th Cir. 1980)* (court may sentence defendant who pleaded guilty to misdemeanor to custody for indeterminate sentence pursuant to *18 U.S.C. § 5010*(b) (1976) when defendant had no desire to be indicted and did not reply when government offered to obtain indictment, initiated prosecution by felony indictment, and court dismissed felony indictment after 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).*

n2473 *Cf. 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 adult sentence for underlying offense

would not require indictment, 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 criminal proceedings against the defendant 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 D.C. 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 imprisoned 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 after sentence).

n2474 *18 U.S.C. § 5010*(c) (1976) *see United States v. Duran, 687 F.2d 347, 357 (11th Cir. 1982)* (before denying youth sentencing under YCA, court must find that YCA sentencing would be of no benefit to defendant), *cert. denied,* 1203 SD. Ct. 1781 (1983); *Puete v. United States, 676 F.2d 141, 143 (5th Cir. 1982)* (same).

n2475 *See Dorszynski v. United States, 418 U.S. 424, 441–44 (1974)* (Congress required "no benefit" finding to ensure that sentencing judges consider option of YCA treatment before rejecting it; such finding must be explicit on record to obviate need for case–by–case examination); *United States v. Duran, 687 F.2d 347, 357 (11th Cir. 1982)* (express finding of "no benefit" necessary to ensure that trial judge considers YCA option and exercises discretion), *cert. denied, 103 S. Ct. 1781 (1983); cf. Puente v. United States, 676 F.2d 141, 143 (5th Cir. 1982)* (finding that YCA inapplicable to youth insufficient when such finding fails to make clear whether inapplicability due to unlikelihood of defendant deriving benefit or sentencing judge's misapplication of Act).

In determining whether a youth would derive no benefit, the court should place emphasis on the individualized record of the defendant and not on the instant crime except to the extent that it reflects on the defendant's character. *See United States v. Duran, 687 F.2d 347, 354 (11th Cir. 1982), cert. denied, 103 S. Ct. 1781 (1983).* Although an express "no benefit" finding is necessary when the defendant is less than 22 years old, a similar express finding is unnecessary when the defendant is between 22 and 26 years of age. *Id. at 352.*

n2476 *See Ralston v. Robinson, 454 U.S. 201, 207 (1981)* (dictum) (court need not give reasons 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); *United States v. Duran, 687 F.2d 347, 352 (11th Cir. 1982)* (no explanation necessary to support "no benefit" finding because YCA not designed to limit discretion of sentencing judge), *cert. denied, 103 S. Ct. 1781 (1983).*

n2477 *18 U.S.C. § 5011* (1976); *see Hernandez v. United States Attorney Gen., 689 F.2d 915, 921 (10th Cir. 1982)* (Attorney General's authority to designate place of confinement limited by YCA).

n2478 *Compare Outing v. Bell, 632 F.2d 1144, 1145–46 (4th Cir. 1980)* (Bureau of Prisons must segregate youth offenders from other offenders only if practical), *cert. denied, 450 U.S. 1001 (1981) with United States v. Smith, 683 F.2d 1236, 1240–41 (9th Cir. 1982)* (youth offenders who receive split sentences under YCA must be kept segregated from adults and, insofar as practical, must be kept in separate facilities), *cert. denied, 103 S. Ct. 740 (1983) and 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 (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).

n2479 *651 F.2d 1354 (10th Cir. 1981).*

n2480 *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 Act. 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.

n2481 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*).

n2482 *Id.* at 6–7.

n2483 *Id.* at 2–3.

n2484 *Id.* at 3–6.

n2485 *454 U.S. 201 (1981).*

n2486 *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 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. *Id.* 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. *Id. at 215–16.* Second, the YCA permits a judge to impose a concurrent adult sentence on a defendant who is serving a YCA term. *Id. at 216–17.* The adult term would commence at the time it was imposed and would modify the YCA treatment the offender otherwise would receive. *Id.* Finally, an offender who is sentenced pursuant to the YCA must be released conditionally two years before the end of his sentence. *Id. at 217.* But if the offender commits another crime during the conditional period, an adult sentence may be imposed immediately. *Id.*

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). The dissent argued that 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.*

n2487 *Id. at 210–11* (majority opinion). 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 "insofar as practical." *Id. at 222–23.* 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.*Id.*

n2488 *Id. at 217* (majority opinion). 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 judgment based on the rehabilitative purposes of the YCA and the realistic circumstances of the offender. *Id. at 219.*

n2489 *18 U.S.C. § 5021*(a) (1976).

n2490 *Id.* § 5021(b).

n2491 *103 S. Ct. 1412 (1983).*

n2492 *Id. at 1416–17.*

n2493 *Id. at 1417.*

n2494 *See United States v. Arrington, 618 F.2d 1110, 1124 & n.8 (5th Cir. 1980), cert. denied, 449 U.S. 1086 (1981)* (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; recored may not be disseminated or used for any other purpose). In determining release dates, the Parole Commission considers convictions that have been set aside. Partridge, Chaset & Eldridge, *supra* note 2461, at 203.

n2495 *See Dorszynski v. United States, 418 U.S. 424, 431 (1974)* (court review generally ends once determination that sentence within statutory limits); *United States v. Tucker, 404 U.S. 443, 447 (1972)* (same); *Gore v. United States, 357 U.S. 386, 393 (1958)* (Supreme Court without power to revise sentences because severity of punishment peculiarly matter of legislative policy); *Townsend v. Burke, 334 U.S. 736, 741 (1948)* (severity of sentence within statutory limits not grounds for relief); *see also United States v. Robinson, 700 F.2d 205, 214 (5th Cir. 1983)* (sentence of 14 years and $30,000 fine upon conviction under Hobbs Act not subject to review when within statutory limit); *United States v. Albano, 698 F.2d 144, 149–50 (2d Cir. 1983)* (sentence imposing 10–year period of probation exceeds statutory limit and subject to review); *United States v. Jackson, 696 F.2d 320, 321 (5th Cir. 1983)* (per curiam) (sentence within statutory maximum not subject to review notwithstanding defendant's confession and claim that sentencing judge should have been more lenient); *United States v. Merchant, 693 F.2d 767, 770 (8th Cir. 1982)* (sentence of 10–year imprisonment for receiving stolen goods within statury maximum and not abuse of discretion); *United States v. Flemino, 691 F.2d 1263, 1267 (8th Cir. 1982)* (sentence of 15 years to organizer and chief perpetrator of crimes within statutory maximum and beyond review notwithstanding sentence of probation imposed on conspirator who pleaded guilty); *United States v. Collins, 690 F.2d 670, 674 (8th Cir. 1982)* (sentence much harsher than that imposed on informant who testified against defendant within statutory maximum and not cruel and unusual punishment); *United States v. Madison, 689 F.2d 1300, 1315 (7th Cir. 1982)* (sentence of defendant to 37 years greater punishment than received by codefendant within statutory maximum and not subject to review when differences exist between defendants), *cert. denied, 103 S. Ct. 754 (1983); United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982)* (sentence of three concurrent three–year terms of imprisonment and $5,000 fine for conspiracy to violate RICO within statutory maximum and not subject to review), *cert. denied, 103 S. Ct. 823 (1983); United States v. Cain, 685 F.2d 326, 327 (9th Cir. 1982)* (sentence of 10 years imprisonment for bank robbery within statutory limit and beyond scope of review); *United States v. Gilman, 684 F.2d 616, 622 (9th Cir. 1982)* (sentence of 15 years imprisonment for mailing obscene material within statutory maximum and not subject to review); *United States v. Ray, 683 F.2d 1116, 1123* (7th Cir.) (sentence of three years imprisonment for criminal contempt within statutory maximum and not subject to review), *cert. denied, 103 S. Ct. 578 (1982); United States v. Munoz, 681 F.2d 1372, 1375 (11th Cir. 1982)* (sentence of consecutive five–year terms of imprisonment and $150,000 fine for importing marijuana within statutory limit and not subject to review), *cert. denied, 103 S. Ct.*

1229 (1983); United States v. Thompson, 680 F.2d 1145, 1149 (7th Cir.) (sentence of three years imprisonment for conspiracy to manufacture methamphetamine within statutory maximum and not subject to review), *cert. denied, 103 S. Ct. 573 (1982), 103 S. Ct. 735 (1983); United States v. Magnuson, 680 F.2d 56, 59 (8th Cir. 1982)* (per curiam) (sentence of concurrent five-year terms and consecutive five-year terms for wire fraud and conspiracy within statutory limit and not subject to review); *United States v. Mennuti, 679 F.2d 1032, 1037 (2d Cir. 1982)* (sentence of two-and-one-half years for conspiracy to commit mail fraud within statutory maximum and not subject to review); *United States v. Mennuti, 679 F.2d 1032, 1037 (2d Cir. 1982)* (stor, *679 F.2d 338, 340 (3d Cir. 1982)* (per curiam) (sentence of six months imprisonment and $1,000 fine for criminal contempt beyond statutory maximum and subject to review); *United States v. Mitsubishi Int'l Corp., 677 F.2d 785, 787 (9th Cir. 1982)* (sentence of $20,000 fine for violation of Elkins Act within statutory limit and not subject to review).

The sentencing judge has similarly broad discretion to impose conditions of probation that may not be overturned except for abuse of discretion. *Fiore v. United States, 696 F.2d 205, 207-08 (2d Cir. 1982)* (condition of probation must bear reasonable relationship to rehabilitation of defendant and protection of public; reviewable only upon abuse of discretion). A term of probation may not be used to increase the statutory prescribed maximum sentence. *United States v. Mitsubishi Int'l Corp., 677 F.2d 785, 788 (9th Cir. 1982).* A defendant generally may choose to reject probation and elect to have sentence imposed. *Id.*

n2496 *See United States v. Lynch, 699 F.2d 839, 845 (7th Cir. 1982)* (restitution cannot exceed amount of loss actually incurred); *United States v. Davies, 683 F.2d 1052, 1054 (7th Cir. 1982)* (restitution can exceed amount defendant admits causing victim to lose provided restitution reflects actual damage to victim).*But see United States v. Orr, 691 F.2d 431, 433-34 (9th Cir. 1982)* (absent fully bargained plea agreement, restitution cannot exceed amount charged in counts for which defendant convicted).

Although the amount of restitution cannot exceed the loss suffered, the trial judge may impose restitution in excess of what was proven. *See United States v. Lynch, 699 F.2d 839, 845 (7th Cir. 1982)* (court may base restitution on assumption as to victim's actual injury because of defendant's fraud in light of loss actually proven).

The authority of a trial judge to condition probation on the payment of restitution does not permit a judge to require the defendant to pay money to a person not aggrieved by a crime.*United States v. Preson Corp., 695 F.2d 1236, 1243 (10th Cir. 1982); cf. United States v. William Anderson Co., 698 F.2d 911, 913-14 (8th Cir. 1982)* (sentencing judge may impose sentence lowering amount owed to government if defendant elects to pay part to charity).

n2497 *103 S. Ct. 2064 91983).*

n2498 *Id. at 2070.* The Court held that the state interest in securing restitution for victims of violent crime does not warrant automatic revocation of probation when a probationer fails to make the required restitution. *Id. at 2071-72.* Before remanding the defendant to prison for failure to pay restitution, the sentencing court must determine that the alternatives to imprisonment are not adequate to meet the state interest in punishment and deterrance. *Id. at 2073.* If the probationer wilfully refuses to pay restitution when he has the means to do so, however, the state is entitled to use imprisonment as a sanction to enforce collection. *Id. at 2070.*

n2499 *See* United States *ex rel. Spurlark v. Wolff, 683 F.2d 216, 222 (7th Cir. 1982)* (abuse of discretion when denial of defendant's chosen substitute counsel's right to appear as cocounsel at sentencing); *United States v. Roper, 681 F.2d 1354, 1361 (11th Cir. 1982)* (judicial sentencing process subject to appellate scrutiny), *cert. denied, 103 S. Ct. 1197 (1983).*

n2500 *See supra* notes 2428-48 and accompanying text (discussing improper considerations in determining sentence).

n2501 *See Dorszynski v. United States, 418 U.S. 424, 443-44 (1974)* (sentencing judge choosing not to commit youth offender for treatment under Youth Corrections Act must exercise discretion by making express finding that offender would not benefit from such treatment); *United States v. Greenman, 700 F.2d 1377, 1378 (11th Cir. 1983)* (sentencing judge's statement that he had "already made a decison as to what sentence should be" merely response

to defenant's claim of improper influence an not admission of preisposition showing failure to exercise discretion); *Hickerson v. Maggio, 691 F.2d 792, 795 (5th Cir. 1982)* (sentencing judge's statement of lack of discretion in imposing life sentence creates factual question entitling habeas corpus petitioner to evidentiary hearing); *Comin v. Estelle, 689 F.2d 1244, 1245 (5th Cir. 1982)* (sentence of life imprisonment without explanation deprived defendant of right to have trial judge exercise discretion when indictment contained two enhancing counts with respect to which jury returned no verdict); *United States v. Lopez–Gonzales, 688 F.2d 1275, 1277 (9th Cir. 1982)* (failure to exercise discretion when automatic imposition of maximum sentence whenever illegal alien apprehended after flight); *Prater v. Maggio, 686 F.2d 346, 350 (5th Cir. 1982)* (discretion exercised when sentencing judge's order upon denial of resenting motion indicated awareness of option to suspend defendant's sentence or place on probation); *United States v. Roper, 681 F.2d 1354, 1361–62 (11th Cir. 1982)* (failure to exercise discretion when imposition of maximum sentence to protect second trial judge's discretion on possible appeal), *cert. denied, 103 S. Ct. 1197 (1983); United States v. Sachs, 679 F.2d 1015, 1021 (1st Cit. 1982)* (discretion exercised when identical sentence imposed on 17 draft protesters convicted of same crime; identical sentence proof of consistent sentencing policy, not failure to exercise discretion).

ompson, *680 F.2d 1145, 1149* (7th Cir.) (discretion exercised when three–year sentence imposed and codefendant given differnt sentence), *cet. denied 103 S. Ct. 573 (1982), 103 S. Ct. 735 (1983); UnitedseStates v. Sachs, 679 F.2d 1015, 1021 (1st Cir. 1982)* (discretion exercised when identical sentence imposed on 17 draft protesters convicted of same crime; identical sentence proof of consistent sentencing policy, not failure to exercise discretion).

A sentencing judge's failure to consider the Narcotics Rehabilitation Act is a sentencing procedure is not an abuse of discretion when the judge has no reason to know that the defendant has a drug problem. *United States v. Taylor, 689 F.2d 1107, 1109* (D.C. qir. 1982).

n2502 *Compare United States v. Roper, 681 F.2d 1354, 1361 (11th Cir. 1982)* (sentencing judge must fully consider mitigating and aggravating circumstances to insure punishment commensurate with crime), *cert. denied, 103 S. Ct. 1197 (1983) with Ford v. Strickland, 696 F.2d 804, 813 (11th Cir. 1983)* (failure to consider non–statutory mitigating evidence regarding defendant's family life, education, and work history not creating substantial likelihood that defendant unfairly prejudiced).

n2503 *See United States v. Patrick Petroleum Corp., 703 F.2d 94, 98 (5th Cir. 1982)* (sentencing judge has obligation to express sentence in clear terms and reveal intent; courts may review and remand unclear sentence for clarification); *United States v. Adair, 681 F.2d 1150, 1151 (9th Cir. 1982)* (sentencing order unclear as to when probationary period commences may be clarified by reviewing court); *United States v. Faust, 680 F.2d 540, 542 (8th Cir. 1982)* (order commuting sentence to time served and providing that defendant's incarceration ends on last day of time served ambiguous and reviewable by appellate court).

n2504 *See United States v. Vasquez, 638 F.2d 507, 534 (2d Cir. 1980)* (judge ordinarily under no obligation to give reasons for sentencing), *cert. denied, 454 U.S. 847, 975 (1981); United States v. Garcia, 617 F.2d 1176, 1178 (5th Cir. 1980)* (per curiam) (judge encouraged but not required to announce reasons for severity of sentence). When the court imposes restitution as a condition of probation, it is less certain whether a trial judge may refrain from providing a rationale for the sentence. *See United States v. Johnson, 700 F.2d 699, 701 (11th Cir. 1983)* (per curiam) (remand for resentencing required when unclear what facts trial judge relied on in reaching figure for restitution).

n2505 *See United States v. Vasquez, 638 F.2d 507, 534 (2d Cir. 1980)* (reasons for sentencing decisions, once given, must be considered and scrutinized by court of appeals), *cert. denied, 454 U.S. 847, 975 (1981); cf. United States v. Hawkins, 658 F.2d 279, 289–90 (5th Cir. 1981)* (upholding sentence when judge's explanation indicates sentence based on correct information).

n2506 *See Clark v. Solem, 693 F.2d 59, 62 (8th Cir. 1982)* (10–years sentencing difference between appellant and codefendant not violation of equal protection absent showing that record of both defendants so similar as to cause disparity to be unjust), *cert. denied, 103 S. Ct. 1787 (1983); 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 not

indicative of 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).

n2507 *See Jamerson v. Estelle, 666 F.2d 241, 245 (5th Cir. 1982)* (habeas petitioner properly sentenced despite state failure to include court number in cumulative sentencing order pursuant to state procedure); *United States v. Rowan, 663 F.2d 1034, 1035–36 (11th Cir. 1981)* (per curiam) (defendant indicated for violation of general federal conspiracy statute properly sentenced pursuant to statute specifically prohibiting conspiracy to distribute heroin when facts in indictments supported conviction under latter); *United States v. Durant, 648 F.2d 747, 752 (D.C. Cir. 1981)* (sentence upheld despite appellate court's vacating defendant's conviction on two of three charges when all sentences run concurrently).

n2508 *See United States v. Prescon Corp., 695 F.2d 1236, 1241 (10th Cir. 1982)* (government may appeal sentences against corporation convicted of bid rigging when appeal does not place defendnt in double jeopardy); *Robinson v. Wade, 686 F.2d 298, 310 (5th Cir. 1982)* (double jeopardy clause does not bar government from appealing sentences considered impermissibly lenient); *United States v. Godoy, 678 F.2d 84, 87 (9th Cir. 1982)* (court of appeals may hear government appeal of forfeiture order government contends illegal). *But see United States v. Ferri, 686 F.2d 147, 151 (3d Cir. 1982)* (government has no inherent right to appeal criminal judgments and may not invoke general federal appellate jurisdiction to appeal order reducing sentence), *cert. denied, 103 S. Ct. 1205 (1983).*

n2509 FED. R. CRIM. P. 35.

n2510 *Id.; see United States v. Counter, 661 F.2d 374, 376 (5th Cir. 1981)* (district court has jurisdiction to consider motion to correct illegal sentence despite expiratin of 120–day limitation on motion to reduce legal sentences); *United States v. Romero, 642 F.2d 392, 395 (10th Cir. 1981)* (district court timing in granting government 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 corrects defendant's illegal sentence by adding mandatory parole term pursuant to rule 35 motion filed by United States Attorney).

A rule 35 motion may not, however, be used to examine trial errors that occur prior to sentencing. *See United States v. Scott, 688 F.2d 368, 369 (5th Cir. 1982)* (alleged error in presentence report not raised at sentencing hearing not considered on appeal from determination of rule 35 motion).

n2511 *702 F.2d 572 (5th Cir. 1983).*

n2512 *Id. at 574* (post–conviction attack on fully served sentence entitles defendant to evidentiary hearing on detrimental collateral consequences pursuant to application for writ of error *coram nobis).*

n2513 *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).

n2514 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).

n2515 *See United States v. Holt, 704 F.2d 1140, 1144 (9th Cir. 1983)* (per curiam) (district court's decision not to hold hearing pursuant to rule 35 motion reversible only for abuse of discretion); *United States v. Hooton, 693 F.2d 857, 859 (9th Cir. 1982)* (motion for reduction of sentence essentially plea for leniency and addressed to sound discretion of district court); *United States v. Niemiec, 689 F.2d 688, 692–93 (7th Cir. 1982)* (denial of rule 35 motion not abuse of discretion when district judge reviews entire record and articulates reason for denying motion); *United States v. Moore, 688 F.2d 433, 435 (6th Cir. 1982)* (denial of rule 35 motion abuse of discretion when sentencing judge incorrectly views continuation of kidnapping after bank robbery as separate offense from putting victims' lives in danger during bank robbery); *United States v. Eddy, 677 F.2d 656, 657 (8th Cir. 1982)*

(denial of rule 35 motion not abuse of discretion notwithstanding government's failure to oppose motion).

n2516 *See United States v. Addonizio, 442 U.S. 178, 189 (1979)* (dictum) (120–day time period of rule 35 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 original sentence); *United States v. Mariano, 646 F.2d 856, 857–58* (3d Cir.) (district court without jurisdiction to consider motion to reduce sentence made more than 120 days after receipt of mandate of affirmance despite stay of defendant's incarceration pendiang his participation in secret witness program), *cert. denied, 454 U.S. 856 (1981). 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 imposition of original sentence).

n2517 *See United States v. Krohn, 700 F.2d 1033, 1038 (5th Cir. 1983)* (10–month delay in rendering decision reasonable and court properly ruled on motion when delay caused by court decision to hear codefendants' challenges contemporaneously); *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. Smith, 650 F.2d 206, 209 (9th Cir. 1981)* (district court without jurisdiction to consider rule 35 motion if six–month delay after motion filed unreasonable as defendants claimed).

n2518 *See United States v. Gonzalez–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).

n2519 *See United States v. Janovich, 688 F.2d 1227, 1228* (9th Cir.) (per curiam) (district court without jurisdiction to entertain second, untimely motion to reduce sentence despite styling of subsequent motion as "motion for reconsideration"), *cert. denied, 103 S. Ct. 228 (1982); United States v. Inendino, 655 F.2d 108, 109–10 (7th Cir. 1981)* (district court without jurisdiction to reconsider denial of motion to reduce sentence when motion to reconsider filed 165 days after sentence imposed); *United States v. United States Dist. Court, 509 F.2d 1352, 1356* (9th Cir.) (district court without jurisdiction to consider second, untimely motion to reduce sentence despite defendant's contention that second motion merely for "clarification" of earlier order), *cert. denied, 421 U.S. 962 (1975). 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).

n2520 *See United States v. DeWald, 669 F.2d 590, 592* ((th Cir. 1982) (district court hasjurisdiction to hear defenbant's motin forreduction of sentnec filed less than 120 ds after resentencing but more than 120 ays after origninal sentencing).

n2521 *See United States v. Johnson, 634 F.2d 94, 96–97 (3d Cir. 1980)* (probation revocation hearing of defendant whose sentence originally suspended triggers 120–day period for filing of rule 35 motion).

n2522 *Compare United States v. Colvin, 644 F.2d 703, 706–07 (8th Cir. 1981)* (district court has jurisdiction over rule 35 motion for reduction of sentence filed within 120 das of revocation of defendant's probatio 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 without jurisdiction over rule 35 motion for reduction of sentence 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).

n2523 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 crimes. *Ingraham v. Wright, 430 U.S. 651, 664 (1977)* (eighth amendment inapplicable to paddling of students in public schools); *see Blake v. Katter, 693 F.2d 677, 682 (7th Cir. 1982)* (eighth amendment does not apply to pretrial detainees).

n2524 *See Furman v. Georgia, 408 U.S. 238, 241–42 (1972)* (per curiam) (Douglas, J., concurring) (proscription of cruel and unusual punishment acquires meaning as public opinion is enlightened by humane justice); *Trop v. Dulles, 356 U.S. 86, 101 (1958)* (eighth amendment must draw meaning from evolving standards of decency that mark progress of maturing society).

n2525 *Compare In re Kemmler, 136 U.S. 436, 447 (1980)* (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).

n2526 *See Solem v. Helm, 103 S. Ct. 3001, 3010 (1983)* (criminal sentence must be proportionate to crime for which defendant convicted); *Coker v. Georgia, 433 U.S. 584, 592 (1977)* (penalty excessive when involves unnecessary infliction of pain or when grossly out of proportion to severity of crime); *Gregg v. Georgia, 428 U.S. 153, 173 (1976)* (plurality opinion) (same).

n2527 *See Trop v. Dulles, 356 U.S. 86, 101–02 (1958)* (denationalization of citizen successfully challenged as 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, perpetual surveillance, and forfeiture of parental authority, property rights, and suffrage successfully challenged as cruel and unusual punishment); *cf.* Whitson v. Baker, No. 82–7186, slip op. (11th Cir. Jan. 3, 1983) (per curiam) (cruel and unusual punishment may be found when conditions of confinement shock court's conscience).

n2528 *See Enmund v. Florida, 102 S. Ct. 3368, 3377 (1982)* (death penalty not per se cruel and unusual but is disproportionate punishment for accomplice to first–degree murder and robbery); *Rummel v. Estelle, 445 U.S. 263, 268, 284–85 (1980)* (application of valid recidivist sentencing statute upheld when defendant convicted of three felonies).

n2529 *See Solem v. Helm, 103 S. Ct. 3001, 3016 (1983)* (sentence of life without parole for seventh felony offense overturned as cruel and unusual); *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), *vacated and remanded on other grounds, 457 U.S. 1114 (1982).*

n2530 *See Chapman v. Pickett, 586 F.2d 22, 28 (7th Cir. 1978)* (district court erred in denying money damages in civil action which was based on eighth amendment violation).

n2531 *Cf. Jones v. Diamond, 594 F.2d 997, 1003–04, 1029–30 (5th Cir. 1979)* (granting declaratory judgment that overcrowding and racial segregation in county jail violates due process; pretrial detainees' claim of unconstitutional conditions of confinement must be analyzed in due process terms rather than cruel and unusual punishment terms), *cert. dismissed, 453 U.S. 950 (1981).See id.* (enjoining overcrowding and racial segregation in county jail).

n2533 *Dorszynski v. United States, 418 U.S. 424, 431, 441 (1974); see United States v. Compton, 704 F.2d 739, 742 (5th Cir. 1983)* (15–year sentence for possession of cocaine with intent to distribute not cruel and unusual punishment when within statutory limit); *United States v. Slocum, 695 F.2d 650, 657 (2d Cir. 1982)* (12–year sentence for criminal fraud not cruel and unusual when within statutory limit), *cert. denied, 103 S. Ct. 1260 (1983); United States v. Collins, 690 F.2d 670, 674 (8th Cir. 1982)* (sentence of three concurrent three–year terms for unlawful purchase and possession of food stamps not cruel and unusual punishment when within statutory limit).

n2534 *See Solem v. Helm, 103 S. Ct. 3001, 3016 (1983)* (sentence of life without parole under recidivist statute for seventh nonviolent felony conviction cruel and unusual); *cf. Robinson v. California, 370 U.S. 660, 677 (1962)* (statute providing for imprisonment of drug addicts violates prohibition against cruel and unusual punishment).

n2535 *103 S. Ct. 3001 (1983).*

n2536 *Id. at 3016.* Prior to 1979, when the defendant was convicted of uttering a "no account" check, he had been convicted of burglary three times, of obtaining money under false pretenses, of grand larceny, and of driving while intoxicated. *Id. at 3004–05.*

n2537 *Id. at 3010, 3016.*

n2538 *445 U.S. 263 (1980).* The objective criteria set forth by the Court in *Solem* were those outlined by the dissent in *Rummel. See id. at 295* (Powell, J., with Brennan, Marshall & Stevens, J.J., dissenting).The *Solem* majority was composed of the dissenting Justices in *Rummel* and Justice Blackmun, who was part of the *Rummel* majority.

n2539 *454 U.S. 370, 372 (1982)* (per curiam) (lower court improperly intruded upon legislative prerogative when court declared $20,000 fine and 40–year sentence "grossly disproportionate" to crime of possessing less than nine ounces of marijuana).

n2540 TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974) (life imprisonment imposed on defendant convicted of felony after two previous felony convictions on separate occasions).

n2541 *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 felony conviction, which was for fraudulently obtaining money, he had been convicted and imprisoned for credit card fraud and for passing a forged check. *Id. at 265–66.* Upon the third conviction, the trial court imposed the life sentence mandated by the Texas recidivist statute. *Id. at 266.*

n2542 *Id. at 274.* The *Solem* Court de–emphasized this language, stating that the *Rummel* Court did not adopt a "legislative prerogative" standard. *Solem v. Helm, 103 S. Ct. at 3009 n.14.* Chief Justice Burger, dissenting in *Solem,* argued that the quoted language of *Rummel* affirmatively stated a rule of law. *Id. at 3018* (Burger, C.J., with White, Rehnquist & O'Connor, JJ., dissenting).

Prior to the Court's decision in *Solem,* circuit courts following *Rummel* rejected proportionality challenges to the length of prison sentences. *See United States v. Compton, 704 F.2d 739, 742 (5th Cir. 1983)* (*Rummel* followed in holding that 15–year sentence for possession of cocaine with intent to distribute not cruel and unusual); *United States v. Nichols, 695 F.2d 86, 93 (5th Cir. 1982)* (*Rummel* followed in upholding 40–year sentence for mail fraud); *United States v. Schell, 692 F.2d 672, 675 (10th Cir. 1982)* (dictum) (suggesting *Rummel* raises question whether any noncapital sentence for felony conviction is cruel and unusual); *Fowler v. Parratt, 682 F.2d 746, 752–53 (8th Cir. 1982)* (*Rummel* followed in rejecting allegation of disproportionality of 10–to–15–year sentence for embezzlement); *United States v. Sachs, 679 F.2d 1015, 1021–22 (1st Cir. 1982)* (*Rummel* and *Hutto* followed in upholding 30–day sentence and $50 fine for disorderly conduct in federal building); *United States v. Dazzo, 672 F.2d 284, 290* (2d Cir.) (*Rummel* usually precludes proportionality challenge when sentence within statutory maximum), *cert. denied, 103 S. Ct. 81 (1982); Sneed v. Smith, 670 F.2d 1348, 1356 (4th Cir. 1982)* (per curiam) (Hutto) followed in upholding 20–year sentence for forgery and uttering check); *United States v. Phillips, 664 F.2d 971, 1042–43 (5th Cir. 1981)* (*Rummel* followed in upholding sentences and fines for conviction on multiple narcotics offenses), *cert. denied, 102 S. Ct. 2965 (1982); Gaines v. Hess, 662 F.2d 1364, 1370 (10th Cir. 1981)* (*Rummel* followed in upholding 50–year sentence for narcotics distribution); *Cerrella v. Hanberry, 650 F.2d 606, 608* (5th Cir.) (per curiam) (*Rummel* followed in upholding 16–year sentence for extortion), *cert. denied, 454 U.S. 1034 (1981); Francioni v. Wainwright, 650 F.2d 590, 591–92 (5th Cir. 1981)* (per curiam) (*Rummel* followed in upholding three–year sentence for aggravated assault and use of firearm in commission of felony); *Jones v. Purvis, 646 F.2d 127, 128 (4th Cir. 1981)* (per curiam) (*Rummel* followed in upholding 20–year sentence and $10,000 fine for narcotics conviction).

n2543 The *Rummel* Court recognized the validity of the proportionality principle only in extreme cases, such as life imprisonment for trivial offenses. *Rummel v. Estelle, 445 U.S. at 274 n.11.*

n2544 *Solem v. Helm, 103 S. Ct. at 3009.*

n2545 *Id. at 3016 n.32.* The Court rejected the argument that the possibility that the governor might commute Helm's sentence made *Rummel* controlling. *Id. at 3016.* The Court noted that the prospect of parole differs from the prospect of a commuted sentence because the former is part of rehabilitation while the latter is merely the hope of an ad hoc grant of clemency. *Id. at 3015–16.*

n2546 *Id. at 3020–21* (Burger, C.J., with White, Rehnquist & O'Connor, JJ., dissenting).

n2547 *Gregg v. Georgia, 428 U.S. 153, 169 (1976)* (plurality opinion). Only two current Justices of the Supreme Court have argued that the death penalty is a per se violation of the eighth and fourteenth amendments. *See 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, 456 U.S. 605, 614 (1982)* (Brennan, J., with Marshall, J., concurring in part and dissenting in part) (same); *Eddings v. Oklahoma, 455 U.S. 104, 117 (1982)* (Brennan, J., concurring) (same).

n2548 *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 wanton, freakish imposition of death penalty); *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, 604–05 (5th Cir. 1978)* (case–by–case analysis unnecessary to ensure death penalty not arbitrarily applied if state follows constitutionally mandated guidelines for exercise of discretion).

n2549 *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 uniquely severe and irrevocable, greater need for safeguards in sentencing); *Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982)* (same).

n2550 *Williams v. Missouri, 103 S. Ct. 3521, 3522 (1983)* (Blackmun, J., Circuit Justice) (staying execution to allow defendant to file petition for writ of certiorari). This term in *Barefoot v. Estelle, 103 S. Ct. 3383 (1983),* the Supreme Court clarified the procedure for courts' disposition of applications for stays of execution on habeas corpus appeals pursuant to a certificate of probable cause. First, the district court must determine whether to grant or withhold a certificate of probable cause. *Id. at 3394.* In making this determination, the court properly may consider the nature of the death penalty. *Id.* Second, if the certificate of probable cause is granted, the petitioner must be given an opportunity to address the merits of his claim, and the court must decide the case on the merits. *Id.,* The court should grant a stay of execution, when necessary, pending disposition of the case. *Id.* Third, the court may dismiss the appeal after a hearing on the motion for a stay. *Id.* If the court determines that the appeal is not frivolous, the court may, unless time constraints prevent a considered decision, expedite the hearing on the merits and render an opinion that disposes of both the merits and the motion for a stay.*Id. at 3395.* Fourth, even when successive habeas petitions may not be dismissed under rule 9(b) of the Section 2254 Rules *supra* note 1, which permits dismissal if the petition does not allege new grounds for relief or constitutes an abuse of the writ, the district court may expedite consideration of the petition. *Id.* Fifth, when a prisoner seeks a petition for a writ of certiorari seeking review of a court of appeals' denial of habeas relief, a stay of execution will be granted pending disposition of the petition only if the prisoner demonstrates a "reasonable probability" that four Justices would grant certiorari.*Id.*

n2551 *428 U.S. 153 (1976)* (plurality opinion).

n2552 *Id. at 187 & n.35* (upholding imposition of death penalty for murder; declining to address whether death penalty proper sanction for crimes such as rape, kidnapping, or armed robbery).

n2553 *433 U.S. 584 (1977)* (plurality opinion).

n2554 *Id. at 599–600.*

n2555 *102 S. Ct. 3368 (1982).*

n2556 *Id. at 3379* (death penalty excessive punishment for one who did not murder, who was not present at murder, and who neither intended nor anticipated murder); *cf. Stanley v. Zant, 697 F.2d 955, 973 (11th Cir. 1983)* (*Emmund* not followed when defendant enticed victim to place of robbery, handled pistol, dug grave, guarded victim, and buried him alive).

n2557 *Enmund v. Florida, 102 S. Ct. at 3370–71.*

n2558 *Id. at 3370.* As the driver of the getaway car, Enmund was an aider, abettor, and principal in first degree murder and robbery under Florida law. *Id.* The defendant's lack of intent to kill was irrelevant. *Id. at 3372.*

n2559 *Id. at 3370.* The sentencing judge found four statutory aggravating circumstances: (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 find that Enmund's relatively minor role in the crime was a mitigating circumstance. *Id. at 3371.*

n2560 *Id. at 3379.* The Court applied an objective factor test similar to that enunciated in *Coker v. Georgia, 433 U.S. 584 (1977).* In *Coker* the Court stressed that courts judging whether a death penalty violates the eighth amendment must use objective evidence of contemporary values, such as history, precedent, legislative attitudes, and jury response. *Id. at 592, 596.*

n2561 *Enmund v. Florida, 102 S. Ct. at 3372–76.* After examining state statutes, the Court concluded that only nine states authorize the death penalty for defendants who participate in robberies in which 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 those of *Enmund. Id. at 3373.* The Court cited statistics indicating that juries overwhelmingly repudiate imposition of the death penalty when the defendant has no intent to kill. *Id. at 3375–76.*

Justice Brennan, concurring in the Court's opinion, restated his conviction that the death penalty is per se unconstitutional. *Id. at 3379* (Brennan, J., concurring). The dissent 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 opinion as making culpable intent a matter of federal constitutional law. *Id. at 3391.* She concluded, however, 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, thereby violating the Court's mandate in *Lockett v. Ohio. Id. at 3394 & n.46; 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 sentences consider all relevant mitigating factors).

n2562 *See Lockett v. Ohio, 438 U.S. at 606–08* (reversing death sentence imposed under Ohio statute that 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 penalty statute unconstitutional even when categories of capital crimes limited). The Court has declined to rule that all statutes prescribing mandatory death sentences are unconstitutional. *See Lockett v. Ohio, 438 U.S. at 604 & n.11* (declining to address whether need to deter certain types of homicide could justify mandatory death sentence). *See generally* Note, *Constitutionality of the Mandatory Death Penalty for Life–Term Prisoners Who Murder, 55 N.Y.U. L. REV. 636 (1980)* (arguing that mandatory death penalty for prisoner who murders is constitutional).

n2563 *Godfrey v. Georgia, 446 U.S. 420, 428 (1980)* (plurality opinion) (state has constitutional duty to tailor

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) (jury may not consider nonstatutory aggravating factors and statute must sufficiently guide jury discretion in capital sentencing to avoid arbitrary and selective imposition of death penalty), *vacated and remanded, 457 U.S. 1114 (1982)* (remanded for further consideration in light of *Engle v. Isaac, 456 U.S. 107 (1982)).*

The Supreme Court has stated that the constitutional requirement that the death penalty not be imposed arbitrarily and capriciously is satisfied when a reviewing state court compares the defendant's sentence to sentences imposed on similarly situated defendants. *Gregg v. Georgia, 428 U.S. 153, 195, 198 (1976)* (plurality opinion).

n2564 *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).

n2565 *See Gregg v. Georgia, 428 U.S. 153, 159 (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).

Section 27–2534.1(b) of the Georgia Code provides an example of a death penalty statute which has been the subject of substantial litigation. Under this statute, for all crimes except aircraft hijacking or treason, 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).

The statute has twice been upheld by the Supreme Court. *See Zant v. Stephens, 103 S. Ct. 2733, 2757 (1983); Gregg v. Georgia, 428 U.S. 153, 207 (1976).* In *Godfrey v. Georgia, 446 U.S. 420 (1980),* however, the Court held that subsection (b)(7) of the statute was unconstitutionally vague as it was applied in that case. *Id. at 432–33.* This term the Eleventh Circuit held that a jury instruction on subsection (b)(7) was not error warranting

habeas relief when the instruction properly required a finding of depravity of mind and torture of the victim. *Stanley v. Zant, 697 F.2d 955, 971–72 (11th Cir. 1983).* The Georgia Supreme Court has held that the aggravating circumstances described in subsection (b)(1) — " a substantial history of serious assaultive criminal convictions" — is unconstitutionally vague. *Arnold v. State, 236 Ga. 534, 539–42, 224 S.E.2d 386, 391–92 (1976); see also infra* notes 2566–69 and accompanying text (discussing *Zant v. Stephens,* which addresses validity of death sentence based upon subsection (b)(1) and two other aggravating circumstances). In light of this ruling, the Georgia General Assembly has modified subsection (b)(1) of the statute, deleting "a substantial history of serious assaultive criminal convictions" as an aggravating circumstance.GA. CODE ANN. § 27–2534.1(b)(1) (Supp. 1982).

For examples of other death penalty statutes that have been upheld by the Supreme Court, see *Jurek v. Texas, 428 U.S. 262, 276 (1976)* (plurality opinion) (upholding TEX. PENAL CODE ANN. § 19.03 (Vernon 1974) and TEX. CODE CRIM. PROC. art. 37.071 (Vernon Supp. 1975–76)) and *Proffitt v. Florida, 428 U.S. 242, 260 (1976)* (upholding FLA. STAT. § 921.141 (Supp. 1975–76)). The Supreme Court has granted certiorari in a case challenging various aspects of the California death penalty statute. *Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982)* (per curiam), *cert. granted, 103 S. Ct. 1425 (1983).*

n2566 *103 S. Ct. 2733 (1983).*

n2567 *Id. at 2748–49.*

n2568 *Id. at 2743–44.* The defendant argued that under the Court's decision in *Furman v. Georgia, 408 U.S. 238 (1972)* (per curiam), a death penalty statute may not permit the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class which the statute makes eligible for that penalty. *Zant v. Stephens, 103 S. Ct. at 2742.* The *Stephens* Court noted that Georgia's statutory scheme guided the jury's discretion by providing a bifurcated procedure and "meaningful appellate review." *Id. at 2741.*

n2569 *Id. at 2744* (emphasis in original). The Court also noted that the Georgia Supreme Court, per its custom, reviewed the death sentence to determine whether it was arbitrary, excessive, or disproportionate. *Id.*

n2570 *103 S. Ct. 3418 (1983)* (plurality opinion).

n2571 *Id. at 3428.* Barclay and others, pursuing a plan to start a revolution by killing "any white person that they came upon under such advantageous circumstances that they could murder him, her, or them," participated in the murder of a young hitchhiker. *Id. at 3420* (quoting *Barclay v. State, 343 So. 2d 1266, 1267–69 (Fla. 1977)).*Overturning the jury's recommendation of a life sentence, the trial judge found, in derogation of state law, that Barclay's history of prior convictions was an aggravating circumstance. *Barclay v. Florida, 103 S. Ct. at 3422.*

n2572 *Id. at 3422; see Harris v. Pulley, 692 F.2d 1189, 1194 (9th Cir. 1982)* (per curiam) (consideration of nonstatutory mitigating or aggravating circumstances not objectionable when at least one statutory aggravating circumstances found prior to imposition of death penalty), *cert. granted, 103 S. Ct. 1425 (1983).* Prior to *Barclay,* the Fifth and Eleventh Circuits had reached the conclusion that it was constitutional error to permit consideration of nonstatutory aggravating circumstances in imposing the death sentence. *See Henry v. Wainwright, 686 F.2d 311, 315 (5th Cir. 1982)* (constitutional error to permit jury to consider nonstatutory aggravating circumstances at sentencing hearing), *vacated, 51 U.S.L.W. 3937* (U.S. June 29, 1983) (No. 82–840) (remanded in light of *Barclay); Proffitt v. Wainwright, 685 F.2d 1227, 1269 (11th Cir. 1982)* (constitutional error for trial judge to rely on nonstatutory aggravating circumstances in sentencing defendant).In *Proffitt* the defendant challenged three of four aggravating circumstances considered by the court. *685 F.2d at 1268.* The court did not explicitly consider whether the one aggravating circumstances not challenged was sufficient to support the death penalty. In denying the petition for rehearing in *Proffitt,* the Eleventh Circuit instructed the district court to consider the effect of *Barclay. 706 F.2d at 312.*

This term the Fifth Circuit held that jury instructions that permit consideration of general nonstatutory aggravating circumstances are unconstitutional because such instructions do not adequately guide the jury in sentencing a defendant in a capital case. *See Bell v. Watkins, 692 F.2d 999, 1011–12 (5th Cir. 1982)* (jury instruction

unconstitutional when judge offered no definition of aggravating or mitigating circumstances but left jury to decide grounds for mercy or retribution); *Jordan v. Thigpen, 688 F.2d 395, 397* (5th Cir.) (per curiam) (ambiguous jury instruction unconstitutional when permitted consideration of nonstatutory aggravating circumstances), *clarifying Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982).*

n2573 *Barclay v. Florida, 103 S. Ct. at 3428.* Justice Stevens, in a separate concurrence joined by Justice Powell, expressed the view that although a death sentence may not rest solely on a nonstatutory aggravating factor, the Constitution does not prohibit the consideration of information at sentencing that is not directly related to statutory aggravating or mitigating factors, as long as the information is relevant to the character of the defendant or the circumstances of the crime.*Id. at 3433* (Stevens, J., with Powell, J., concurring). The concurring Justices also noted that the Constitution requires only one valid statutory aggravating circumstances to support a death sentence, provided that none of the invalid aggravating circumstances is supported by erroneous or misleading information. *Id. at 3433–34.*

n2574 *103 S. Ct. 1736 (1983)* (per curiam).

n2575 *Id. at 1738–39.* The trial court in *Evans* found that through his involvement in multiple armed robberies and kidnappings, the defendant, who was convicted of murder, had knowingly created a great risk of death to many persons, an aggravating circumstances under Alabama law. *Id. at 1738.*

n2576 *692 F.2d 1189 (9th Cir. 1982)* (per curiam), *cert. granted, 103 S. Ct. 1425 (1983).* The court made clear that it was concerned solely with the death penalty statute as enacted prior to the adoption on November 7, 1978 of an initiative measure, Proposition 7, which broadened the application of the California death penalty provisions. *Id. at 1193 n.1.*

n2577 CAL. PENAL CODE § 190 (Deering 1977).

n2578 *See Harris v. Pulley, 692 F.2d at 1194.* The statute also places no limits on the defendant's introduction of evidence of mitigating factors. *Id.*

n2579 *Id.* The court also found that (1) the statute is not unconstitutional for failure to require proof beyond a reasonable doubt that the death penalty was appropriate, *id. at 1194–95,* and (2) because the statute requires the judge to make written findings as to whether the evidence supports the jury's finding in imposing the death penalty, failure to require such written findings of the jury does not render the statute unconstitutional. *Id. at 1195–96.*

n2580 *Id. at 1194.* The Ninth Circuit nonetheless vacated the death sentence because the California Supreme Court failed to conduct a review to determine whether the penalty was proportionate to other sentences for similar crimes. *Id. at 1196.*

n2581 *See Eddings v. Oklahoma, 455 U.S. 104, 116 (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).

n2582 *Lockett v. Ohio, 438 U.S. at 604.*

n2583 *Id.; see Eddings v. Oklahoma, 455 U.S. 104, 116–17 (1982)* (death sentence reversed because judge imposing sentence refused to consider defendant's emotional instability and troubled youth as mitigating circumstance); *Woodson v. North Carolina, 428 U.S. 280, 304 (1976)* (plurality opinion) (statute unconstitutional because failed to allow jury to consider relevant aspects of defendant's character and record before imposing death penalty).

The Fifth Circuit has 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.), *reh'g granted, 678 F.2d 23 (5th Cir. 1982), cert. granted, 103 S. Ct. 2451 (1983).* 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.*

n2584 *438 U.S. 586 (1978).*

n2585 *Id. at 608.*

n2586 *Id. at 605 n.13.*

n2587 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.

n2588 *455 U.S. 104 (1982).*

n2589 *Id. at 112–16.* Eddings stood trial as an adult because he was found not be amendable to rehabilitation within the juvenile system. *Id.*

n2590 *Id. at 107.* 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.*

n2591 *Id. at 109.*

n2592 *Id.*

n2593 *Id. at 113.* The Court found no distinction under *Lockett* between a trial judge's refusal to consider mitigating evidence and a statutory provision precluding a judge or jury from such consideration: "Just as the state may not be 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 113–14.* The Court reasoned that a judge's refusal to consider evidence has the same effect as a judge's instruction to a jury to disregard the defendant's proffered evidence. *Id.*

Eddings leaves unclear whether a sentencer must state explicitly the method 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 sentences articulate their weighing methods). This term the Ninth Circuit held that the failure to require written findings of a jury that imposed the death sentence did not render the death penalty statute unconstitutional. *Harris v. Pulley, 692 F.2d 1189, 1195–96 (9th Cir. 1982)* (per curiam), *cert. granted, 103 S. Ct. 1425 (1983).* The court noted that the appellate review function was made possible because the statute required the judge independently to set forth written findings concerning the presence of aggravating circumstances. *Id.*

n2594 *684 F.2d 794 (11th Cir. 1982), cert. denied, 103 S. Ct. 1798 (1983).*

n2595 *Id. at 801–02.* The court held that the trial judge's mere reference to "evidence in mitigation" during his explanatory statement to the jury probably could not be considered part of the charge to the jury and that even if it could be so considered it was constitutionally inadequate. *Id. at 802.*

n2596 *Id. at 803.* The Eleventh Circuit also held this term that when the trial judge instructs the jury to consider "only" the enumerated aggravating factors and, omitting the "only," to consider the "following" mitigating factors, it was reasonable to conclude that the jury's perception was not unconstitutionally restricted to the consideration of only the specified mitigating circumstances. *Ford v. Strickland, 696 F.2d 804, 812–13 (11th Cir. 1983)* (en banc); *see also Booker v. Wainwright, 703 F.2d 1251, 1260 (11th Cir. 1983)* (upholding instruction when rational to conclude that jury did not perceive restriction on its authority to consider mitigating circumstances).

n2597 *Beck v. Alabama, 447 U.S. 625, 637–38 (1980)* (quoting *Gardner v. Florida, 430 U.S. 349, 357–58 (1977)).*

n2598 *447 U.S. 625 (1980).*

n2599 *Id. at 627.*

n2600 *Id. at 628.*

n2601 *Id. at 630.*

n2602 *456 U.S. 605 (1982).*

n2603 *Id. at 611–12.*

n2604 *Id. at 612.* The defendant confessed to the crime and testified that he intentionally killed the victim. *Id.*

n2605 *Id.* The trial judge 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), aff'd, 361 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979).*

n2606 *Hopper v. Evans, 456 U.S. at 608.* The district court rejected the defendant's claims, *Evans v. Birtton, 472 F. Supp. 707, 711–12 (S.D. Ala. 1979),* but the Fifth Circuit reversed. *Evans v. Britton, 628 F.2d 400 (5th Cir. 1980), modified, 639 F.2d 221 (5th Cir. 1981), rev'd sub nom. Hopper v. Evans, 456 U.S. 605 (1982).*

n2607 *Hopper v. Evans, 456 U.S. at 613–14.*

n2608 *Id. at 613.* The Court reviewed the evidence indicating that Evans had 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 614* (Brennan, J., with Marshall, J., concurring in part and dissenting in part).

n2609 *103 S. Ct. 3446 (1983).*

n2610 *Id. at 3459.* The instruction takes its name from a 1978 California voter initiative, popularly known as the Briggs initiative, which incorporated the instruction into the California Penal Code. *Id. at 3450 n.4.*

n2611 *Id. at 3450.*

n2612 *Id. at 3453–54.*

n2613 *Id. at 3458.*

n2614 *Id. at 3453; see Jurek v. Texas, 428 U.S. 262, 274–76 (1976)* (upholding capital–sentencing scheme in

which jury is asked to determine whether defendant, if not killed, would commit future acts of violence). The *Ramos* Court reasoned that by raising the possibility that the defendant may be returned to society, the instruction focuses the jury's attention upon the issue of the defendant's probable future dangerousness. *103 S. Ct. at 3454.* Justices Marshall and Brennan dissented, arguing that the instruction was not analagous to the future dangerousness factor considered in *Jurek,* because the instruction did not require a finding of future dangerousness and the jury had not been provided with evidence on which to base such a finding. *Id. at 3462* (Marshall, J., with Brennan & Blackmun, JJ., dissenting).

n2615 *Id. at 3458* (majority opinion). The Court noted that informing a jury that the death sentence may be commuted may diminish the jury's appreciation for the gravity of their sentencing decision. *Id.* The dissenters argued that if there are compelling reasons for not informing the jury of the governor's power to commute a death sentence, then the solution is to prohibit any consideration of commutation. *Id. at 3461–62* (Marshall, J., with Brennan & Blackmun, JJ., dissenting).

n2616 *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 and provides relief from the pressure of overcrowded prisons. *Id.*

n2617 *18 U.S.C. § 4206*(d) (1976) (prisoner serving sentence of 5 years or more released after serving shorter of two–thirds of term or 30 years unless prisoner seriously violated prison rules or likely to commit crime upon release).

n2618 *Morrissey v. Brewer, 408 U.S. 471, 477–78 (1972); see United States v. Chagra, 669 F.2d 241, 264* (5th Cir.) (parole release wholly contingent on either affirmative statutory entitlement or grace of parole authorities), *cert. denied, 103 S. Ct. 102 (1982); 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).

n2619 *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 under North Carolina statute 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.*

n2620 28 C.F.R. § 2.40(a) (1982).

n2621 *18 U.S.C. § 4214*(d)(5) (1976); *see Hopper v. United States Parole Comm'n, 702 F.2d 842, 846 (9th Cir. 1983)* (detainer lodged after parolee arrested for robbery); *Pierre v. Washington State Bd. of Prison Terms & Paroles, 699 F.2d 471, 473 (9th Cir. 1983)* (parole revoked after parolee convicted of violation of securities laws). *But cf. Morrissey v. Brewer, 408 U.S. 471, 479 (1972)* (parole office 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 2689–2702 and accompanying text.

n2622 *See 18 U.S.C. § 4213*(a)(2) (1976) (if violation of parole alleged, Parole Commission may issue warrant to return to custody).

n2623 *18 U.S.C. § 4205*(a) (1976). A prisoner serving a life sentence or a sentence exceeding 30 years is eligible for parole after serving 10 years except as provided by law. *Id.*

n2624 *See 18 U.S.C. § 4205*(b)(1) (1976) (court imposing sentence exceeding one year may fix maximum term not exceeding one–third of maximum sentence, after which prisoner eligible for parole).

n2625 *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); *see also United States v. Capo, 693 F.2d*

1330, 1337 (11th Cir. 1982) (imposition of sentence under code provision specifically providing for special parole term in addition to term of imprisonment valid), *cert. denied, 103 S. Ct. 1793 (1983); United States v. Counts, 691 F.2d 348, 349 (7th Cir. 1982)* (per curiam) (same); *United States v. Munoz, 681 F.2d 1372, 1375 (11th Cir. 1982)* (same), *cert. denied, 103 S. Ct. 1229 (1983); Rouse v. Foster, 672 F.2d 649, 652 (8th Cir. 1982)* (under Nebraska law, for purposes of parole eligibility, statutory minimum sentence applied in absence of court–imposed mandatory minimum); *Pierre v. Thompson, 666 F.2d 424, 426 (9th Cir. 1982)* (under Washington law, parole board required to fix mandatory minimum term when court returns statutorily defined special finding).

n2626 *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); *see Martin v. Luther, 689 F.2d 109, 111 (7th Cir. 1982)* (Commission has statutory authority to render revocation after expiration of maximum term of violation warrant timely issued); *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).

n2627 *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 at least annually to decide whether to terminate supervision. *Id.* § 4211(b).

n2628 *18 U.S.C. § 4211*(c)(1) (1976); *cf. Caballery v. United States Parole Comm'n, 673 F.2d 43, 45–46* (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, 457 U.S. 1136 (1982); Henrique v. United States Marshal, 653 F.2d 1317, 1322 (9th Cir. 1981)* (same), *cert. denied, 455 U.S. 950 (1982).*

n2629 *18 U.S.C. § 4211*(c)(1) (1976); *see* United States *ex rel. Pullia v. Luther, 635 F.2d 612, 616–17 (7th Cir. 1980)* (under section 4211, parolee has right to hearing and decision on parole termination after five years unless Commission terminates supervision without hearing).

n2630 Pub. L. No. 94–233, 90 Stat. 219 (codified at *18 U.S.C. §§ 4201*–4218 (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 constitutional prohibition against *ex post facto* laws, U.S. CONST. art. I, § 9, cl. 3 ("no . . . *ex post facto* [l]aw shall be passed"). *See infra* note 2648 (discussing retroactive application of Act). The Fifth Circuit has determined the extent to which the 1976 Act superseded parole provisions in other statutes. *United States v. Chagra, 669 F.2d 241, 262–66* (5th Cir.), *cert. denied, 103 S. Ct. 102 (1982).* The prisoner in *Chagra* was convicted of possession of cocaine and operating a narcotics enterprise in violation of *21 U.S.C. § 848* (1976), which expressly precludes parole or probation for such convictions. *United States v. Chagra, 669 F.2d at 247.* The prisoner made what the court characterized as 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.United States v. Chagra, 669 F.2d at 262–63.* The Fifth Circuit rejected this argument, holding that in the absence of express statutory intent and in the presence of *18 U.S.C. § 4205*(h), which denies eligibility under the Act when a prisoner is ineligible under other provisions of law, the 1976 Act does not supersede any other federal law denying a prisoner the opportunity for parole. *United States v. Chagra, 669 F.2d at 264–66.*

n2631 *18 U.S.C. § 4206*(a) (1976). Essentially the same requirement appears in Department of Justice regulations. *See* 28 C.F.R. § 2.18 (1982) (substantial observance of prison rules prerequisite to parole release).

n2632 *18 U.S.C. § 4206*(a)(1) (1976); *see Campbell v. United States Parole Comm'n, 704 F.2d 106, 112 (3d Cir. 1983)* (Commission could deny parole based on aggravating factor of circumstances surrounding offense). *But see Joost v. United States Parole Comm'n, 698 F.2d 418, 419 (10th Cir. 1983)* (per curiam) (Commission must furnish more than standard reasons for parole denial that exceeds guidelines, must show good cause for continued incarceration, and may not rely on reasons outside its scope of authority).

n2633 *18 U.S.C. § 4206*(a)(1) (1976).

n2634 *Id.* § 4206(a)(2) (1976). This term the Seventh Circuit had before it a case of first impression that raised the question whether state parole board officials reviewing a parole application enjoy absolute immunity from civil liability under *42 U.S.C. § 1983*. United States *ex rel. Powell v. Irving, 684 F.2d 494 (7th Cir. 1982)*. The court, following the Ninth Circuit's view, found that the burden on board members would be too great if they did not enjoy absolute immunity. *Id. at 497*. The court, however, found that when the prisoner's allegations and statistics tend to demonstrate impermissible discrimination by board members, a live controversy remains, *id. at 497–98*, and declaratory relief may be possible. *Id. But cf. Humann v. Wilson, 696 F.2d 783, 784 (10th Cir. 1983)* (per curiam) (rape by inmate transferred to community corrections facility to remote a consequence of board's actions to hold board members liable to victim).

n2635 28 C.F.R. § 2.20(a) (1982). The Parole Commission and Reorganization Act authorizes the Commission to consider information supplied by the prisoner, institution, sentencing judge, medical examiner, and 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) (1982). 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; *see Campbell v. United States Parole Comm'n, 704 F.2d 106, 114 (3d Cir. 1983)* (Commission has discretion to consider murder charge dismissed during plea bargaining); *United States v. Chicago, 699 F.2d 1012, 1014 (9th Cir. 1983)* (photographic depiction of brutal murder relevant to determination of parole date); *Fardella v. Garson, 698 F.2d 208, 210–11 (4th Cir. 1982)* (Commission may reopen parole determination upon receipt of trial transcript); *Page v. United States Parole Comm'n, 651 F.2d 1083, 1086 (5th Cir. 1981)* (per curiam) (Commission may consider serious charges dismissed in earlier plea bargain). *But see Joost v. United States Parole Comm'n, 698 F.2d 418, 419 (10th Cir. 1983)* (per curiam) (Commission may not consider separate offense on which prisoner acquitted).

n2636 28 C.F.R. § 2.20(e) (1982).The score reflects such factors as the inmate's history of criminal behavior and drug usage, 28 C.F.R. § 2.20 notes, at 93 (1982), and attempts to predict the potential risk of parole violation. 28 C.F.R. § 2.20(e) (1982).

n2637 *Id.* § 2.20(b). The severity of offenses 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 Reynolds v. McCall, 701 F.2d 810, 813–14 (9th Cir. 1983)* (Commission may increase severity rating of defendant's bank robbery and kidnapping offense from "Greatest I" to "Greatest II"). The Commission may consider mitigating and aggravating circumstances when determining the offense severity level. 28 C.F.R. § 2.20(d) (1982); *see Stroud v. United States Parole Comm'n, 668 F.2d 843, 846–47 (5th Cir. 1982)* (although Commission had discretion to consider prisoner's alcoholism and wife's illness, these factors deemed insignificant compared to prior convictions).

This term the Fourth Circuit decided that the Commission may reopen a case upon the receipt of information that existed, but was not considered, at the time of the initial parole hearing. *Fardella v. Garson, 698 F.2d 208 (4th Cir. 1982)*. Adopting the rationale of both the Second and Tenth Circuits, the court found that information in a trial transcript may be "new" and therefore receivable under 28 C.F.R. § 2.28(f) (1982). *Fardella v. Garson, 698 F.2d at 211*. The court stated that the Commission is not an investigative agency and therefore information is "new" to the Commission if it is received from outside sources after the initial parole determination. *Id.*

n2638 28 C.F.R. § 2.20(b) (1982). The time ranges fixed by the guidelines are predicated upon good institutional adjustment and program progress. *Id.* § 2.20 notes, at 92. 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) (1982).

n2639 *18 U.S.C. § 4206*(c) (1976) (Commission may grant or deny parole notwithstanding guidelines if good cause exists, provided it gives 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 defendants convicted of possessing and defendant's

role in international operations, and to disregard guidelines suggesting earlier release); *Stroud v. United States Parole Comm'n, 668 F.2d 843, 846–47 (5th Cir. 1982)* (Commission justified in recommending later parole date than that in guidelines in consideration of defendant's prior convictions); *Hayward v. United States Parole Comm'n, 659 F.2d 857, 859–61 (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 reasons"), *cert. denied, 456 U.S. 935 (1982). But see Joost v. United States Parole Comm'n, 698 F.2d 418, 419 (10th Cir. 1983)* (per curiam) (Commission must furnish more than standard reason to justify parole denial that exceeds guidelines and must show good cause for continued incarceration).

n2640 *See Campbell v. United States Parole Comm'n, 704 F.2d 106, 112–14 (3d Cir. 1983)* (denial of parole not abuse of discretion when Commission considers as aggravating factor murder committed by confederates prior to bank robbery in which prisoner participated); *Reynolds v. McCall, 701 F.2d 810, 814 (9th Cir. 1983)* (Commission's modification of hearing examiner panel's recommendation not abuse of discretion considering severity of crime); *Hatton v. Keohane, 693 F.2d 88, 89–90 (9th Cir. 1982)* (Commission's modification of hearing examiner panel's recommendation not abuse of discretion when initial recommendation below applicable guideline); *Young v. United States Parole Comm'n, 682 F.2d 1105, 1111* (5th Cir.) (denial of parole not abuse of discretion when Commission properly computed prisoner's term of imprisonment in determining his parole eligibility), *cert. denied, 103 S. Ct. 387 (1982).*

n2641 *See Reynolds v. McCall, 701 F.2d 810, 813 (9th Cir. 1983)* (no violation due to lack of timely notification when parolee suffered no prejudice); *Hanahan v. Luther, 693 F.2d 629, 634–35 (7th Cir. 1982)* (delay in parole revocation hearing not violation when parolee suffered no prejudice), *cert. denied, 103 S. Ct. 815 (1983); Young v. United States Parole Comm'n, 682 F.2d 1105, 1110* (5th Cir.) (no violation when hearing held prior to statutorily established date), *cert. denied, 103 S. Ct. 387 (1982).*

n2642 *682 F.2d 1105* (5th Cir.), *cert. denied, 103 S. Ct. 387 (1982).*

n2643 *Id. at 1108.*

n2644 *Id.* The prisoner, who was convicted of bank extortion, insisted that the Commission could not classify his behavior as "kidnapping" because he was never charged with kidnapping and none of the elements of that offense were ever proved. *Id.*

n2645 In response to questions asked during his initial hearing, the prisoner explained that during the commission of his extortion offense he transported persons by car against their will through the use of firearms and physical force. *Id. at 1107–08.*

n2646 *Id. at 1108.* Kidnapping is "Greatest II" when it involves ransom, terrorism, the taking of hostages, or harm to the victim. *Id.* The court reasoned that the prisoner's behavior involving forcible abduction and bank extortion was sufficiently similar to kidnapping for ransom to qualify as "Greatest II." *Id.*

n2647 *See* U.S. CONST. art. I, § 9, cl. 3 ("no . . . ex post facto [l]aw shall be passed"); *see also infra* note 2648 (discussing *ex post facto* challenges).

n2648 *Compare Hayward v. United States Parole Comm'n, 659 F.2d 857, 862 (8th Cir. 1981)* (because defendant had no reasonable expectation at time he committed crime that he would be considered for parole under any particular parole system, no violation of *ex post facto* clause), *cert. denied, 456 U.S. 935 (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), *cert. denied, 455 U.S. 950 (1982) with Marshall v. Garrison, 659 F.2d 440, 442–43 (4th Cir. 1981)* (retroactive application of new guidelines, which emphasize general deterrence, to defendant sentenced under youth corrections statute, which emphasized rehabilitation, violates *ex post facto* clause) *and United States v. Ferri, 652 F.2d 325, 328–29 (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; remanded for defendant to show prejudice). *See also 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. Last term 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. *Welsh v. Mizell, 668 F.2d 328, 331* (7th Cir.), *cert. denied, 103 S. Ct. 235 (1982).* The court stated that the purpose of the pre–1973 guidelines, which were in effect when the defendant was convicted, was to deter the individual defendant from committing additional crimes. *Id. at 330.*The court concluded that under those guidelines the defendant probably would have been entitled to parole because of his exemplary institutional record. *Id. at 331*. The Illinois parole board, however, denied parole under the 1973 guidelines because those guidelines recommend denial of parole if continued incarceration would deter others from committing the crime. *Id.* The court held that retroactive application of the 1973 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. at 332–33.*

n2649 *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); see also 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).

n2650 *442 U.S. 178 (1979).*

n2651 *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.*

n2652 *Id. at 186.*

n2653 *Id.*

n2654 *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); *Staege v. United States Parole Comm'n, 671 F.2d 266, 269 (8th Cir. 1982)* (per curiam) (Parole Commission may disregard sentencing court's expectation of prisoner's early release on parole because trial court has no enforceable expectations); *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).

n2655 *Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 12 (1979)* (prisoners entitled to due process protection because Nebraska parole statute created legitimate expectancy of parole).

n2656 *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 that a case–by–case analysis, relying on the language of each statute, would be necessary to determine whether due process protections should apply to parole release decisions. *Id.*

n2657 The statute at issue in *Greenholtz* provided that:

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 promose 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).

n2658 *Greenholtz, 442 U.S. at 12.* In *Greenholtz* prisoners instituted a class action against members of the Nebraska Board of Parole alleging that Nebraska's discretionary parole procedures denied them procedural due process. *Id. at 3–4.* First, they claimed that a constitutionally protected liberty interest is created whenever a state provides for the possibility of parole.*Id. at 8–9.* In rejecting this argument, Chief Justice Burger's majority opinion emphasized the differences between parole denial, which forecloses a *potential* liberty, and parole revocation, which deprives one of *actual* liberty. *Id. at 9–11.* Second, the prisoners argued that because the Nebraska statute requires release of an eligible prisoner unless one of four statutory reasons for denial exists, the statute creates a legitimate expectation of parole that entitles the prisoners to due process protection. *Id. at 11–12.* The Court accepted this argument, *id. at 12,* but emphasized 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 in other states. *Id.*

n2659 *Id. at 16.*

n2660 *Id. at 14–15* (Nebraska statute that provides two informal hearings to inmates eligible for parole satisfies due process); *see also Williams v. Missouri Bd. of Probation & Parole, 661 F.2d 697, 700 (8th Cir. 1981)* (inmates of Missouri Penal Institution must be advised of adverse information in their files that may lead to unfavorable decision on parole release and must be given opportunity to address it), *cert. denied, 455 U.S. 993 (1982).*

n2661 *Greenholtz, 442 U.S. at 15–16. But cf. Joost v. United States Parole Comm'n, 698 F.2d 418, 419 (10th Cir. 1983)* (per curiam) (Commission must furnish more than standard reason to justify parol denial that exceeds guidelines and must show cause for continuing incarceration).

n2662 *Greenholtz, 442 U.S. at 7.* The Court held that, because a convicted person has no constitutional right to be conditionally released before the expiration of a valid sentence, *id.*, 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.; cf. Hall v. Maggio, 697 F.2d 641, 643 (5th Cir. 1983)* (per curiam) (attorney's explanation of possibility of parole after 10 years of Louisiana life sentence not a promise that would invalidate guilty plea); *Williams v. Missouri Bd. of Probation & Parole, 661 F.2d 697, 698 (8th Cir. 1981)* (when statute compels release ifcertain guidelines are met, inmates have protected liberty interest rooted in state law), *cert. denied, 455 U.S. 993 (1982).*

n2663 *452 U.S. 458 (1981).*

n2664 *Id. at 465.*

n2665 *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.*

n2666 *Id. at 461.*

n2667 *Id. at 466.*

n2668 *454 U.S. 14 (1981)* (per curiam).

n2669 *Id. at 21–22.* 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 15; see* OHIO REV. CODE ANN. § 2967.31 (Page 1981). Pursuant to this statute, the parole board interviewed the prisoner and ordered his release.

Jago v. Van Curen, 454 U.S. at 14–15. 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 15.* 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, 415–16* (6th Cir.), *rev'd, 454 U.S. 14 (1981)* (per curiam). 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. *Van Curen v. Jago, 641 F.2d at 416* (citing *Perry v. Sindermann, 408 U.S. at 601,* in which Court held that mutually explicit understandings about tenured professor's contract renewal 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* "do not . . . lend themselves to determining the existence of constitutionally protected liberty interests in the setting of prisoner parole." *Jago v. Van Curen, 454 U.S. at 18.*

n2670 *Jago v. Van Curen, 454 U.S. at 21–22.*

n2671 *Id. at 20–21.* 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 in 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.

OHIO REV. CODE ANN. § 2967.31 (Page 1981).

n2672 *Jago v. Van Curen, 454 U.S. at 19.*

n2673 *See, e.g., Walker v. Prisoner Review Bd., 694 F.2d 499, 502 (7th Cir. 1982)* (no due process violation where Board repeatedly used same grounds for denying parole when statute did not limit number of times reasons could be used as grounds for denial); *Thomas v. Sellers, 691 F.2d 487, 489 (11th Cir. 1982)* (per curiam) (Alabama statute creates no constitutionally protected interest in parole); *Ross v. Woodard, 683 F.2d 846, 847 (4th Cir. 1982)* (no due process violation when state refused to provide potential parolee with access to his files); *Slocum v. Georgia State Bd. of Pardons & Paroles, 678 F.2d 940, 941* (11th Cir.) (Georgia statute creates no constitutionally protected interest in parole), *cert. denied, 103 S. Ct. 462 (1982).*

n2674 *678 F.2d 940* (11th Cir.), *cert. denied, 103 S. Ct. 462 (1982).*

n2675 *Id. at 942.* The Georgia Code contains a requirement that parole consideration "shall be automatic" upon the expiration of a set period of confinement. GA. CODE ANN. § 77–525(a) (Supp. 1982).

n2676 *Slocum, 678 F.2d at 941.*

n2677 *Id.* The court expressly followed the analysis used in *Staton v. Wainwright, 665 F.2d 686, 688* (5th Cir.) (Florida parole statute did not create constitutionally protected liberty interest because decision to grant parole entirely discretionary), *cert. denied, 456 U.S. 909 (1982).*

n2678 *694 F.2d 499 (7th Cir. 1982).*

n2679 The Illinois Prisoner Review Board's Rules Governing Parole provide in part:

Records Access: A parole candidate shall have access to all documents which the Board considers in denying parole or setting a release date. If such documents have not been disclosed to the candidate before the interview, they shall be disclosed to him during the interview. If, in light of the documents, the candidate so desires, he shall be granted a 30–day continuance.

Ill. Admin. Reg. Vol. II, No. 44, Rule IV–C. According to the court, there is little doubt that the State of Illinois intended for this rule to benefit parole candidates and to fulfill its due process obligations to them. *Walker, 694 F.2d at 503.*

n2680 *Walker, 694 F.2d at 503.* Last term the Seventh Circuit held that the Illinois parole statute creates a legitimate expectation of parole because it directs the parole board to deny parole only if one of the statutorily specified grounds for denial is found. United States *ex rel. Scott v. Illinois Parole & Pardon Bd., 669 F.2d 1185, 1190* (7th Cir.) (per curiam), *cert. denied, 103 S. Ct. 468 (1982).*

n2681 *Walker, 694 F.2d at 503. But see Ross v. Woodard, 683 F.2d 846, 847 (4th Cir. 1982)* (state not required to provide potential parolee with access to personal prison files); *Slocum v. Georgia State Bd. of Pardons & Paroles, 678 F.2d 940, 942* (11th Cir.) (same), *cert. denied, 103 S. Ct. 462 (1982).* The *Walker* court remanded the case to the district court for a determination of whether the Board considered records to which it did not allow the inmates access. *Walker, 694 F.2d at 505.*

n2682 *18 U.S.C. § 4213*(a) (1976).

n2683 *18 U.S.C. § 4214*(c) (1976). The Ninth and Seventh Circuits have held, however, that when a parolee is in custody for a separate offense and a parole violation warrant is lodged as a detainer, the parole revocation hearing need not be held within the 90–day period because the incarceration is not based solely on the parole violation warrant. *Hopper v. United States Parole Comm'n, 702 F.2d 842, 848 (9th Cir. 1983); Doyle v. Elsea, 658 F.2d 512, 517 (7th Cir. 1981)* (per curiam).

n2684 *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).

n2685 *429 U.S. 78 (1976).*

n2686 *Id. at 87.* The Commission derives its authority from *18 U.S.C. § 4214*(b)(1) (1976). Instead of staying execution of a parole 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. *429 U.S. at 87; see United States v. Newton, 698 F.2d 770, 772 (5th Cir. 1983)* (per curiam) (Commission has discretion to determine whether unexpired time on parole violator's original sentence will run consecutively or concurrently with new sentence imposed and to order forfeiture of time spent on parole); *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); *Harris v. Day, 649 F.2d 755, 760 (10th Cir. 1981)* (Commission has discretion to determine whether unexpired time on parole violator's original sentence will 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).

n2687 *18 U.S.C. § 4214*(b)(1) (1976).

n2688 *See Carlton v. Keohane, 691 F.2d 992, 993 (11th Cir. 1982)* (per curiam) (Commission's failure to hold dispositional review within 180 days ordinarily warrants writ of mandamus to compel review; release not appropriate remedy absent prejudice or bad faith).

n2689 *408 U.S. 471 (1972).*

n2690 *Id. at 482* (parolees' liberty interests protected by fourteenth amendment).

n2691 *See supra* note 2619 (discussing parole restrictions).

n2692 *See Morrissey v. Brewer, 408 U.S. at 480* (parolees' liberty not absolute but conditioned on observance of parole restrictions).

n2693 *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). The circuits, however, are split over the rights of a parolee against searches and seizures. *See United States v. Scott, 678 F.2d 32, 35 (5th Cir. 1982)* (parole officer's fraudulent seizure of parolee's handwriting and typewriting exemplars permissible when based on reasonable suspicion); *United States v. Bradley, 571 F.2d 787, 790 (4th Cir. 1978)* (parole officer must secure warrant before searching parolee's residence); *Latta v. Fitzharris, 521 F.2d 246, 248–49* (9th Cir.) (searches permissible when parole officer has reasonable belief that search necessary to performance of supervisory duty), *cert. denied, 423 U.S. 897 (1975).*

n2694 *Morrissey v. Brewer, 408 U.S. at 482.* This term the Ninth Circuit found that when a prisoner sentenced without the possibility of parole had received 8 administrative reviews while in prison, each confirming that he would be paroled, the government was estopped from revoking his parole when the error was discovered 15 months after he was released. *Johnson v. Williford, 682 F.2d 868, 874 (9th Cir. 1982).* The parolee's expectation of release on parole was raised shortly after he began his sentence and encouraged and heightened by successive administrative review. *Id. at 872.* The court held that to revoke his parole under these circumstances would violate due process. *Id. at 874.*

n2695 *Morrissey v. Brewer, 408 U.S. at 484.* Parole revocation requires the board to make a two–step inquiry: First, it must determine whether the parolee violated the parole conditions; second, it must determine whether the parolee should be recommitted to prison. *Id. at 479–80.* The first question involves a retrospective factual determination. *Id. at 480.* The second question is more complex, requiring the board to predict the parolee's ability to live in society. *Id.*

n2696 *Id. at 485.*

n2697 *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, a summary of the proceedings and a statement of the reasons and evidence supporting the finding of probable cause must be made. *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, 1110 (S.D.N.Y. 1981)* (no double jeopardy violation when parole revocation proceeding based on charges contained in indictment dismissed with prejudice), *aff'd, 677 F.2d 225 (2d Cir. 1982).* In dictum the *Thomas* court stated that there would be no double jeopardy bar even when parole revocation proceedings were based on charges for which the parolee was acquitted. *527 F. Supp. at 1110.*

If no preliminary hearing is held, the parolee may be entitled to damages for the deprivation of 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), *cert. denied, 103 S. Ct. 751 (1983). But see Pierre v. Washington State Bd. of Prison Terms & Paroles, 699 F.2d 471, 473 (9th Cir. 1983)* (preliminary hearing unnecessary when final parole revocation hearing held promptly and hearing satisfied due process requirements).

n2698 *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 to believe parole conditions violated); *see 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. 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); *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 committed on parole, the issuance of a parole violation warrant does not deprive the parolee of liberty. *Moody v. Daggett, 429 U.S. at 86 n.7.*

n2699 *See Morrissey v. Brewer, 408 U.S. at 488* (two–month delay not necessarily unreasonable); *Hanahan v. Luther, 693 F.2d 629, 634–35 (7th Cir. 1982)* (eight–month delay not necessarily unreasonable), *cert. denied, 103 S. Ct. 815 (1983); 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 parolee in custody for another crime does not prejudice defendant). However, United States Parole Commission procedures require a parole revocation hearing upon a prisoner's return to a federal institution or completion of 24 months in confinement on the state charge, whichever is earlier. 28 C.F.R. § 2.47(b)(1)(a) (1983). Before the revocation hearing the parolee must receive written notice of the alleged parole violation. *Morrissey v. Brewer, 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, the parolee must be allowed to cross–examine witnesses unless the hearing officer specifically finds good cause for preventing such confrontations. *Id.*

n2700 *Morrissey v. Brewer, 408 U.S. at 488.*

n2701 *Id. at 489.*

n2702 *Id. at 488–89.*

n2703 *18 U.S.C. § 3651* (1976). The D.C. Circuit has addressed but deferred ruling upon the issue of whether the Federal Probation Act applies to a defendant convicted in the federal district court under the criminal law of the District of Columbia. *United States v. Garnett, 653 F.2d 558, 562 (D.C. Cir. 1981)* (court remands for clarification of whether trial court applied federal or local law in denying probation).

n2704 *See United States v. Carter, 704 F.2d 1063, 1069 (9th Cir. 1983)* (judge may not reduce sentence for rape conviction to probation because rape punishable by life imprisonment); *United States v. Garnett, 653 F.2d 558, 562 (D.C. Cir. 1981)* (sentencing judge has wide discretion in deciding whether to suspend or impose sentence); *United States v. Torrez–Flores, 624 F.2d 776, 784 (7th Cir. 1980)* (judge has discretion to deny or revoke probation on basis of prior record or misrepresentation of prior record); *cf. United States v. Caesar, 632 F.2d 645, 646 (5th Cir. 1980)* (judicial decision to sentence paraplegic to imprisonment rather than probation on basis of defendant's history of antisocial behavior not abuse of discretion).

n2705 *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.*

n2706 *Id. See United States v. Rodriguez, 682 F.2d 827, 829–30 (9th Cir. 1982)* (probationer's consent can never justify exceeding five–year maximum probationary period); *United States v. Adair, 681 F.2d 1150, 1151 (9th Cir. 1982)* (when sentencing order silent, strong presumption exists that term begins running on date of sentencing); *United States v. Espindola, 650 F.2d 1064, 1065 (9th Cir. 1981)* (percuriam) (five–year probation term begins running on date petitioner confined, not date sentenced, when petitioner requests stay of confinement).

n2707 *18 U.S.C. § 3651* (1976); *see United States v. Entrekin, 675 F.2d 759, 762 (5th Cir. 1982)* (court may order split sentences on both multi–count and single–count convictions).

n2708 *See United States v. Rodriguez, 682 F.2d 827, 829 (9th Cir. 1982)* (strong presumption when record silent that probationary term commences on date sentence imposed and runs concurrently with any period of

imprisonment imposed on any remaining count or counts).

n2709 *See United States v. Nunez, 573 F.2d 769, 772* (2d Cir.) (sole limitation upon length of probationary period in split sentence is five-year maximum; duration of suspended prison sentence irrelevant), *cert. denied, 436 U.S. 930 (1978); cf. Fiore v. United States, 696 F.2d 205, 209-10 (2d Cir. 1982)* (court may not require probationer as condition of probation to pay corporate codefendant's $10,000 fine when maximum fine set by Congress for individual defendant $1,000 and one-year imprisonment).

n2710 *See United States v. Brown, 555 F.2d 407, 424 n.43 (5th Cir. 1977)* (dictum) (error to bifurcate probation on one count so that it runs both prior and subsequent to prison terms imposed on other counts), *cert. denied, 435 U.S. 904 (1978).*

n2711 *See United States v. McMichael, 699 F.2d 193, 194 (4th Cir. 1983)* (Federal Probation Act clearly places decision of what conditions to impose on probation within trial judge's broad discretion); *Fiore v. United States, 696 F.2d 205, 207 (2d Cir. 1982)* (same); *United States v. Romero, 676 F.2d 406, 407 (9th Cir. 1982)* (same); *cf. United States v. Chancey, 695 F.2d 1275, 1277 (11th Cir. 1982)* (per curiam) (extension of probation within court's discretion); *United States v. Hooton, 693 F.2d 857, 859 (9th Cir. 1982)* (grant or denial of early termination of probation within court's discretion).

n2712 *See Fiore v. United States, 696 F.2d 205, 208 (2d Cir. 1982)* (probation condition requiring probationer to pay fine or serve term of codefendant not reasonably related to rehabilitation or protection of public); *United States v. Restor, 679 F.2d 338, 340-41 (3d Cir. 1982)* (per curiam) (probation condition requiring striking air traffic controllers to perform eight hours of community service per week for 50 weeks per year for three years may be more excessive than necessary to accomplish goals of probation); *United States v. Romero, 676 F.2d 406, 407 (9th Cir. 1982)* (probation condition requiring defendant convicted of heroin distribution to refrain from associating with others convicted of drug offenses or who are unlawfully involved with drugs reasonable measure for rehabilitation and protection of the public); *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, 458 U.S. 1100 (1982); United States v. Consuelo-Gonzalez, 521 F.2d 259, 262-64 (9th Cir. 1975)* (condition requiring probationer to submit to search of person or property at any time impermissibly permits some searches not reasonably related to rehabilitation of person and protection of public); *18 U.S.C. § 3651* (1976) (probation must serve ends of justice and best interests of public and defendant).

n2713 *Compare United States v. Restor, 679 F.2d 338, 341 (3d Cir. 1982)* (per curiam) (requirement that air traffic controllers convicted of striking illegally provide eight hours of community service per week for 50 weeks per year for three years not unnecessarily harsh) *with 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 three years unnecessarily harsh because not reasonably related to rehabilitation of offender or protection of public) *and 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).*

n2714 *See United States v. Torrez-Flores, 624 F.2d 776, 783 (7th Cir. 1980)* (trial judge's conditioning of 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).

n2715 *See United States v. Stine, 675 F.2d 69, 72* (3d Cir.) (court will carefully review imposition of probation conditions when conditions might infringe rights of privacy), *cert. denied, 458 U.S. 1100 (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); *cf. United States v. Grugette, 678 F.2d 600, 603 (5th Cir. 1982)* (claim that equal protection violated by probation condition requiring restitution of $50,000 because imposed regardless of ability to pay not ripe for review when probationer satisfied restitution

requirement, probationer not imprisoned nor threatened with imprisonment because of inability to make restitution, and presentence report indicated ability to pay).

n2716 *654 F.2d 562 (9th Cir. 1981).*

n2717 *Id. at 567.*

n2718 *Id. at 564.*The defendants participated in a premeditated entry upon a naval submarine base to protest the government's maintenance of the Trident weapons system. *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. at 567–68.*

n2719 *654 F.2d at 567–68.*

n2720 *Id.*

n2721 *Id. at 567.* Although such a limitation on the political activities of an ordinary citizen would have been improper, probationers were subject to restrictions that ordinary persons are not. *Id. at 568.* The court noted that the trial judge did not forbid participation in antinuclear speech or in the antinuclear movement. *Id. at 567–68.*

n2722 *Id. at 568.*

n2723 *Owens v. Kelley, 681 F.2d 1362 (11th Cir. 1982).*

n2724 *Id.*

n2725 *Id. at 1364.* In *Owens* the petitioner had pleaded guilty to two violations of the Georgia Controlled Substances Act.*Id.* The petitioner claimed the psychological stress evaluation was a type of lie detector test. *Id.*

n2726 *Id.*

n2727 *Id. at 1367–70.* The court stated that the condition of consenting to warrantless searches did not violate the petitioner's fourth amendment right to be free from unreasonable searches and seizures so long as the searches were conducted for probationary purposes only and not as a subterfuge for criminal investigations. *Id. at 1368–69.* The condition of submitting to stress evaluation did not violate the petitioner's fifth amendment rights because the condition did not stipulate that the probationer had to answer incriminating questions. *Id. at 1369.* The court would not, however, permit the use of a lie detector for probation revocation purposes. *Id.*

n2728 *Id. at 1367.* For example, the state may place some restrictions on probationers' fourth amendment rights in order to effectuate its compelling interest in protecting society. *Id.* Additionally, having been convicted of crimes for which they could be incarcerated, probationers have a diminished expectation of privacy. *Id. at 1368.*

n2729 *Id. at 1365.* The district court had granted summary judgment against the petitioner on his first amendment claim. *Id.* Because there was a material factual dispute, the Eleventh Circuit remanded. *Id.*

n2730 *18 U.S.C. § 3651* (1976); *see United States v. McMichael, 699 F.2d 193, 195 (4th Cir. 1983)* (condition requiring defendant to make restitution in greater amount than indicted for or convicted of permissible when loss certain and defendant's actions direct cause of loss); *United States v. Carson, 669 F.2d 216, 217 (5th Cir. 1982)* (condition requiring defendant to make restitution to defrauded party permissible even though debt previously discharged in bankruptcy proceeding); *United States v. Margala, 662 F.2d 622, 627 (9th Cir. 1981)* (conditions requiring defendant to forfeit pension benefits and surrender stocks permissible because rehabilitative purpose served).

The Seventh Circuit held in *United States v. Lynch, 699 F.2d 839 (7th Cir. 1983),* that a court may order a defendant to make restitution even if the victim obtains compensation for the loss from another source. *Id. at 845.* The court rejected as irrelevant the defendant's argument that he never profited from the crime, reasoning that restitution damages are based on the loss to victims of the crime and not on the benefit to the perpetrators of crime.*Id. at 846.*

n2731 *See United States v. Johnson, 700 F.2d 699, 701 (11th Cir. 1983)* (per curiam) (in multiple count indictment, restitution restricted to amount in counts that result in conviction); *Fiore v. United States, 696 F.2d 205, 209 (2d Cir. 1982)* (court cannot require defendant to pay reparations for crimes for which not convicted); *United States v. Orr, 691 F.2d 431, 433–44 (9th Cir. 1982)* (court may only impose restitution of amounts charged in counts for which defendant convicted absent fully bargained plea agreement for restitution in amount greater than conviction as condition of probation); *Dougherty v. White, 689 F.2d 142, 144–45 (8th Cir. 1982)* (defendant cannot be ordered to pay restitution for crimes for which not convicted).

n2732 *See United States v. McMichael, 699 F.2d 193, 195 (4th Cir. 1983)* (probation condition ordering restitution of amount greater than defendant indicted for or convicted of permissible after defendant's admission that he caused higher amount of loss); *United States v. Davies, 683 F.2d 1052, 1054–55 (7th Cir. 1982)* (limiting restitution to amount of defendant's admitted depredations mitigates potential perception of unfairness which might result absent such admission); *United States v. Grugette, 678 F.2d 600, 604 (5th Cir. 1982)* (court did not exceed authority in ordering restitution when defendant admitted causing greater loss).

n2733 *See United States v. Faust, 680 F.2d 540, 541–42 (8th Cir. 1982)* (probation revocation justified when defendant left halfway house and travelled out of judicial district to visit ex–wife without notifying probation officer); *United States v. Rea, 678 F.2d 382, 383–84 (2d Cir. 1982)* (probation revocation justified when defendant travelled 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)* (probation revocation justified when defendant maintained checking account in violation of condition); *cf. United States v. Chancey, 695 F.2d 1275, 1276 (11th Cir. 1982)* (per curiam) (extension of probation justified when defendant received two traffic tickets in jurisdictions other than those in which permitted).*But see United States v. Ramirez, 675 F.2d 707, 710 (5th Cir. 1982)* (per curiam) (probation revocation not justified for failure to pay fine and report traffic tickets when facts unclear concerning defendant's remittance to his attorney of funds sufficient to cover amount of traffic tickets).

Probation may not be revoked unless some action is taken within the five–year maximum term provided by statute. *See United States v. O'Quinn, 689 F.2d 1359, 1360 (11th Cir. 1982)* (per curiam) (defendant's probation may be revoked at any time during five–year statutory period so long as acts causing revocation occurred within probation period); *United States v. Rodriguez, 682 F.2d 827, 830 (9th Cir. 1982)* (after expiration of five–year period, court has no jurisdiction over probationer; probationer's consent does not justify exceeding five–year period); *United States v. Adair, 681 F.2d 1150, 1152 (9th Cir. 1982)* (court has no power to revoke probation when no arrest warrant or summons issued or other similar action taken within five–year statutory period); *cf. United States v. Briones–Garza, 680 F.2d 417, 424* (5th Cir.) (court may extend or modify period of probation not to exceed five years), *cert. denied, 103 S. Ct. 229 (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; subsequent to imprisonment for one probation violation court may revoke other three sentences and impose prison terms).

Additionally, a probationer may not challenge the 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 based on that conviction), *cert. denied, 454 U.S. 1156 (1982).* A probationer may challenge revocation, however, when it is based on an invalid conviction for a crime committed during the defendant's 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, 103 S. Ct. 387 (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 ample evidence apart from guilty plea to satisfy judge that probationer's conduct did not conform to probation conditions).

The Seventh Circuit 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. *See Ware v. Gagnon, 659 F.2d 809, 812 (7th Cir. 1981)* (per curiam) (states constitutionally permitted to provide for administrative revocation of court–imposed probation).

n2734 *See Morishita v. Morris, 702 F.2d 207, 210 (10th Cir. 1983)* (revocation order need not be set aside when defendant later acquitted of possession of weapon, which violated probation conditions). A court may nonetheless revoke probation in this instance because the state has a lower burden of proof to show that probation conditions have been violated than to obtain a conviction. In probation revocation proceedings, the state must satisfy the preponderance of the evidence standard rather than the more stringent beyond a reasonable doubt standard. *Id. at 210; see also Morgan v. Wainwright, 676 F.2d 476, 479–80* (11th Cir.) (state bears burden of proving facts sufficient to justify revocation of probation), *cert. denied, 103 S. Ct. 380 (1982).* Other courts have held that a judge need only be "reasonably satisfied" that the conduct of the probationer has not been as good as that required by the probation conditions to justify revocation. *United States v. O'Quinn, 689 F.2d 1359, 1361 (11th Cir. 1982)* (per curiam); *United States v. Ramirez, 675 F.2d 707, 709 (5th Cir. 1982)* (per curiam); *cf. United States v. Chancey, 695 F.2d 1275, 1277 (11th Cir. 1982)* (per curiam) (uncontradicted evidence that defendant travelled outside those jurisdictions in which allowed justifies court order extending probation); *United States v. Briones–Garza, 680 F.2d 417, 424* (5th Cir.) (trial court has discretion to extend probation without finding probation violation if changed circumstances warrant modification), *cert. denied, 103 S. Ct. 229 (1982).*

n2735 *Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); 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 probationers must be notified of the hearing and its purpose, of the alleged violation, and of the right to be represented by counsel. FED. R. CRIM. P. 32.1(a)(1)(A), (D).Probationers must be allowed to appear at the hearing and present evidence in their own behalf. *Id.* 32.1(a)(1)(B).Upon request, the probationer must be granted 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 a probationer has violated the probation conditions, the probationer may be held for a final revocation hearing. *Id.* 32.1(a)(1).

n2736 *408 U.S. 471 (1972).*

n2737 *See id. at 481–89* (outlining due process protections that apply to parole revocation); *see also 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, 661 F.2d 1021 (5th Cir. 1981), cert. denied, 456 U.S. 961 (1982);*

n2738 *Compare Morishita v. Morris, 702 F.2d 207, 209–10 (10th Cir. 1983)* (fundamental fairness not violated when judge fails to make written findings of fact and conclusions of law because reviewing court able to determine basis of trial judge's decision; no fundamental fairness violation when order revoking probation not set aside although defendant acquitted of criminal charge that resulted in probation revocation) *and United States v. Rice, 671 F.2d 455, 459 (11th Cir. 1982)* (fundamental fairness not violated when probation revoked despite defendant's claims that probation violations consist of stale minor traffic offenses, mitigating circumstances existed, and 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 files same revocation charges twice; withdrawal of first charge based not on motive to delay but on desire to utilize rehabilitative process), *cert. denied, 454 U.S. 1156 (1982) with United States v. Ferguson, 624 F.2d 81, 83 (9th Cir. 1980)* (per curiam) (fundamental fairness

violated when district court refuses to consider mitigating circumstances in probation revocation hearings) *and United States v. Tyler, 605 F.2d 851, 853 (5th Cir. 1979)* (per curiam) (fundamental fairness violated when district court revokes probation on basis of old misdemeanor convictions, which probation officer purposefully did not allege as violations in earlier revocation proceedings).

n2739 *103 S. Ct. 2064 (1983).*

n2740 *Id. at 2070–71.* The state's interests in rehabilitating the probationer, protecting society, punishing the law breaker, and deterring others from criminal behavior do not require imprisoning a probationer for failure to pay a fine. *Id. at 2072.*

n2741 *Id. at 2072–73.*

n2742 These efforts include attempts to seek employment or to borrow money. *Id. at 2070.*

n2743 *Id. at 2073.* If the probationer willfully refuses to pay or fails to make sufficient bona fide efforts legally to acquire the funds to pay, however, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. *Id.*

n2744 *Id. at 2072.* The Court held that to do otherwise would deprive probationers of their conditional freedom simply because, through no fault of their own, they cannot pay fines or restitution. *Id.* Such a deprivation would be contrary to the fundamental fairness required by due process. *Id.* The Court limited its holding that lack of fault in violating a probation condition prevents a court from revoking probation to the context of a probationer's failure to pay a fine or restitution. *Id. at 2070 n.9.*

n2745 *See Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)* (probation revocation not stage of criminal prosecution although loss of liberty may result); *Morgan v. Wainwright, 676 F.2d 476, 480* (11th Cir.) (probation revocation not stage of criminal prosecution), *cert. denied, 103 S. Ct. 380 (1982).*

n2746 *See Morgan v. Wainwright, 676 F.2d 476, 478–79* (11th Cir.) (no right to jury trial at probation revocation hearing), *cert. denied, 103 S. Ct. 380 (1982); United States v. Stehl, 665 F.2d 58, 59 (4th Cir. 1981)* (FED. R. CRIM. P. 11(c) requiring defendant receive advice before accepting guilty plea inapplicable to probation revocation proceedings), *cert. granted, 455 U.S. 906 (1982); United States v. Whitney, 649 F.2d 296, 298 (5th Cir. 1981)* (per curiam) (double jeopardy clause inapplicable to probation revocation hearings), *modifying 632 F.2d 654 (5th Cir. 1980);* FED. R. EVID. 1101(d)(3) (except for rules of privilege, Federal Rules of Evidence 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, 661 F.2d 1021 (5th Cir. 1981), cert. denied, 456 U.S. 961 (1982).*

In *United States v. Rea, 678 F.2d 382 (2d Cir. 1982),* the Second Circuit held that probationary status limits the probationer's fifth amendment right to remain silent when questioned by probation officers about a violation of probation conditions. *Id. at 390.* The court also held that probationers do not have a sixth amendment right to have an attorney present during questioning by probation officers. *Id.* At his probation revocation hearing, the defendant challenged the admissibility of statements made during his interview with his probation officer after his probation officer denied his request to have an 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 probationers are not completely deprived of their fifth amendment rights, they may be charged with a violation of probation if they refuse to answer their probation officer's questions. *Id.*

n2747 *Compare United States v. MacKenzie, 601 F.2d 221, 222 (5th Cir. 1979)* (per curiam) (*Miranda* protection inapplicable to probation 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.) (fourth amendment exclusionary rule inapplicable to probation revocation proceeding if no harassment by police because rule would not serve deterrence purpose), *cert. denied, 423 U.S. 987 (1975) with Owens v. Kelley, 681 F.2d 1362, 1369 (11th Cir. 1982)* (dictum) (results of forced lie detector test may not be used for probation purposes) *and 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).

The Second Circuit has held that a probation officer is required to obtain a search warrant prior to conducting a search of the 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.* In the court's view, the deterrent purposes of the exclusionary rule would be best served if evidence illegally seized by a probation officer is not admissible in the probation revocation hearing. *Id. at 388–90.*

n2748 *See supra* note 2734 (discussing burdens and standard of proof).

n2749 *See 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 also United States v. Faust, 680 F.2d 540, 542 (8th Cir. 1982)* (decision to revoke probation necessarily discretionary); *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 violated conditions by possessing drugs), *modifying 648 F.2d 441 (5th Cir. 1981), cert. denied, 456 U.S. 961 (1982); cf. United States v. Chancey, 695 F.2d 1275, 1277 (11th Cir. 1982)* (per curiam) (trial court has great latitude in determining whether to extend a term of probation); *United States v. Hooton, 693 F.2d 857, 859 (9th Cir. 1982)* (per curiam) (early termination of probation within court discretion).

The district court's decision to revoke probation will be reversed only upon a clear showing of abuse of discretion. *See United States v. Ramirez, 675 F.2d 707, 709 (5th Cir. 1982)* (per curiam) (court will reverse revocation order only upon clear abuse of discretion); *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, 456 U.S. 961 (1982); United States v. Brown, 656 F.2d 1204, 1207 (5th Cir. 1981)* (per curiam) (same), *cert. denied, 454 U.S. 1156 (1982); United States v. Martinez, 650 F.2d 744, 745 (5th Cir. 1981)* (per curiam) (remanding to district court because it failed to meet minimum due process requirements in probation revocation hearing).

n2750 *18 U.S.C. § 3653* (1976); *see United States v. Rice, 671 F.2d 455, 460 (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. *Id.*

n2751 *Williams v. Wainwright, 650 F.2d 58, 61 (5th Cir. 1981)* (no double jeopardy violation when greater sentence imposed following probation revocation in accordance with statutory scheme).

n2752 FED. R. CRIM. P. 32.1(a)(2).A reasonable time ordinarily 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 cited as Advisory Committee Note to Rule 32.1]. What constitutes a reasonable time, however, must always be determined on the facts of each specific case. *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 based 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 deprecating the seriousness of the probation violation. *Id. at 105.*

n2753 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 that received at the preliminary hearing. Advisory Committee Note to Rule 32.1, *supra* note 2752, at 104.

n2754 FED. R. CRIM. P. 32.1(a)(2)(E). Although the Supreme Court in *Gagnon v. Scarpelli, 411 U.S. 778 (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).

n2755 FED. R. CRIM. P. 32.1(a)(2)(B).

n2756 *Id.* 32.1(a)(2)(C).

n2757 *Id.* 32.1(a)(2)(D). The probationer does not have to make a specific request to question witnesses at a final hearing, as must be done at a preliminary hearing. Advisory Committee Note to Rule 32.1, *supra* note 2752, at 104.

n2758 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: When probation conditions are ambiguous or when the probation officer makes unreasonable demands or fails to perform his job properly. Advisory Committee Note to Rule 32.1, *supra* note 2752, at 105.

n2759 *See* FED. R. CRIM. P. 35(b) (court may reduce sentence within 120 days after sentence imposed).The Eleventh Circuit held, however, that reimposing the defendant's original sentence after probation revocation was not sentencing for the purposes of a Rule 35(b) motion to reduce sentence. *United States v. Rice, 681 F.2d 455, 460 (11th Cir. 1982).*