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RECENT TRENDS IN THE CRIMINAL LAW

HIRING EX-CONVICTS

Suitable employment following release from prison is a vital element in the rehabilitation of ex-convicts.[1] Several studies indicate that unemployment is among the principal causal factors of recidivism.[2] Upon release from prison, an ex-convict faces substantial job discrimination by both private and public employers, and by statutes which restrict ex-convicts from obtaining licenses to practice various state-regulated trades and professions.[3] Some effort has been made to provide protection to job applicants handicapped by arrest records. For example, Title VII of the Civil Rights Act of 1964 has been held to prevent employers from *absolutely* barring job applicants from employment on the basis of arrest records.[4] But the apparently closer connection between a criminal conviction and fitness for employment has traditionally justified numerous laws and private employment practices which have excluded ex-convicts from public and private employment. During the past few years, there has been some judicial and legislative activity designed, at least in part, to weaken the barriers to employment which confront ex-convicts. In *Green v. Missouri Pacific R. R.*[5], the Eighth Circuit has held that an employer who absolutely bars ex-convicts from employment is practicing racial discrimination in violation of the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964.[6]

The racially discriminatory character of the absolute employment barriers faced by ex-convicts is predicated upon the fact that blacks are disproportionately represented in the class of ex-convicts;[7] and consequently, blacks suffer disproportionately when employers absolutely refuse to hire ex-convicts. This analysis roughly parallels the reasoning of a 1970 case, *Gregory v. Litton Industries, Inc.*,[8] in which the Ninth Circuit held that the exclusion from employment of applicants with records of multiple arrests constituted racial discrimination, in violation of Title VII, because black applicants were substantially more likely to have arrest records than were white applicants. In the *Green* case, the Eighth Circuit has essentially adapted the rationale of the *Gregory* case to the situation involving ex-convicts by finding that even the connection between a criminal conviction and lack of fitness for employment cannot automatically be assumed in a Title VII case; the relationship must be demonstrated by the employer.

Title VII explicitly prohibits employers from denying employment opportunities to individuals on the basis of race.[9] However, courts have interpreted the Act to prohibit employment decisions based on any criterion which would have even an indirect discriminatory impact on the basis of race, color,

[1] D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 7 (1964); Klinge, *Expungement of Criminal Convictions in Kansas: A Necessary Rehabilitative Tool*, 13 WASHBURN L.J. 93, 105 (1974).

[2] D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 329 (1964); G. POWNAL, EMPLOYMENT PROBLEMS OF RELEASED PRISONERS 4 (1969).

[3] *E.g.*, 7 U.S.C. § 12(a) (2) (B) (1970) (Secretary of Agriculture may refuse to register futures commission merchants and floor brokers who have been convicted of a felony in a state or federal court); 29 U.S.C. § 504(a) (1970) (no person convicted of a listed felony can serve as an employee of a labor organization for five years following conviction); CAL. BUS. & PROF. CODE § 475(a) (2) (West Supp. 1975) (provision allowing the suspension or revocation of a license, certificate or registration as a result of a criminal conviction); CAL. GOV'T CODE § 1029 (West Supp. 1975) (convicted felon excluded from employment as a peace officer). *See generally Symposium—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

[4] Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972). The court held that the race-specific effect of such bans violated the proscription of racially discriminatory employment practices contained in the Equal Employment Opportunity Act, 42 U.S.C. §§ 2000(e) *et seq.* The Act provides in pertinent part:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Equal Employment Opportunity Act § 703(a) (1), 42 U.S.C. § 2000e-2(a) (1) (1970).

[5] 523 F.2d 1290 (8th Cir. 1975), *rev'g* 381 F. Supp. 992 (E.D. Mo. 1974).

[6] *See* note 4 *supra*.

[7] The district court received expert testimony that, in urban areas, from 36.9 per cent to 78.1 per cent of all black persons would incur a conviction during their lifetimes, but that from only 11.6 per cent to 16.8 per cent of all white persons would acquire a conviction. Green v. Missouri Pacific R. R., 381 F. Supp. 992, 995 (E.D. Mo. 1974).

[8] 472 F.2d 631 (9th Cir. 1972).

[9] *See* note 6 *supra*.

religion, sex, or national origin.[10] Because of the disproportionate number of blacks who have records of arrest or conviction, any employment criterion based on either arrest or conviction records could potentially have the necessary racial impact to bring it within the scope of Title VII. To state a claim under the Act, an individual affected by a discriminatory employment practice must make a prima facie showing that the practice has a discriminatory impact on a basis which is prohibited by the Act. It then becomes the employer-defendant's burden to show the business necessity of the practice.[11] Such a showing requires that the employer demonstrate that the practice serves some necessary business purpose, and that no less discriminatory practice would sufficiently serve that purpose.

Green v. Missouri Pacific R.R. involved the denial of employment to a job applicant, Green, with a single conviction for refusing military induction. Green alleged that Missouri Pacific's rule against hiring ex-convicts disproportionately disqualified black applicants. The district court held that Green had failed to make a prima facie showing of racial discrimination because the number of job applicants affected by the rule was not significant,[12] and because the Missouri Pacific had adopted its policy of excluding ex-convicts without any intentional racial bias. The court of appeals in *Gregory v. Litton Industries, Inc.* had made clear, however, that employer intent was not the test of discrimination under Title VII.[13] That case involved a job applicant, Gregory, who had been denied employment on the basis of his record of fourteen arrests (no convictions). Noting that blacks comprise eleven per cent of the national population but account for 27 per cent of the reported arrests, the court found that an employer's policy of barring from employment applicants with records of numerous arrests was prima facie discrimination under Title VII. Litton's employment policy was racially discriminatory despite the facts that the policy was racially neutral on its face, that the policy had not been applied discriminatorily, and that the employer had no intent to discriminate.

Following the precedent of *Gregory v. Litton Industries, Inc.*,[14] and similar Title VII cases, the Eighth Circuit Court of Appeals overruled the district court decision in *Green v. Missouri Pacific R.R.* and held that Green's purely statistical analysis of the impact of the employer's practice was a prima facie showing of racial discrimination;[15] blacks were excluded from employment because of prior convictions at over two and one-half times the rate at which whites were being excluded.[16] The fact that relatively few applicants had conviction records and were affected by Missouri Pacific's policy was not controlling because the effect remained significantly discriminatory. The test adopted in *Green* was whether the employer intentionally used an employment policy which discriminates in fact between applicants of different races.[17]

The court having thus found a prima facie case of racial discrimination, the railroad had the burden to show that the practice of excluding ex-convicts from employment fulfilled a business necessity.[18] Although the district court in *Green* had disposed of the case by finding no racial discrimination, it considered the business necessity issue and agreed with the railroad's contention that the considerations which led to the policy of excluding ex-convicts from employment were "relevant" to the safety and efficiency of the railroad's business. Missouri Pacific contended that, by hiring ex-convicts, the company would expose itself to the risk of employee theft, disruption of

[10] Gregory v. Litton Systems, Inc., 316 F. Supp. 401 C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972). (discrimination based on arrest record was racial discrimination because black applicants were more likely to have arrest records).

[11] The plaintiff in a Title VII case may establish a prima facie case of racial discrimination by showing:

(1) that he belongs to a racial minority,

(2) that he applied and was qualified for a job for which the employer was seeking applicants,

(3) that, despite his qualifications, he was rejected, and

(4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[12] Out of 8,488 applicants between September 1971 and November 1973, only 174 black applicants (2.05 per cent) were rejected on the basis of conviction records, which the district court characterized as a *de minimis* racial impact. Green v. Missouri Pacific R.R., 381 F. Supp. 992, 996 (E.D. Mo. 1974).

[13] Gregory v. Litton Industries, Inc., 472 F.2d 631, 632 (9th Cir. 1972), *citing* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[14] *See* note 10 *supra*.

[15] A purely statistical demonstration can be enough to make a prima facie showing of racial discrimination. Carter v. Gallegher, 452 F.2d 315 (8th Cir. 1972), *cert. denied*, 406 U.S. 950 (1972).

[16] One hundred seventy-four of 3,282 black applicants (5.3 per cent) were rejected automatically on the basis of conviction records, whereas 118 of 5,206 white applicants (2.23 per cent) were summarily rejected because of conviction records.

[17] Green v. Missouri Pacific R.R., 523 F.2d 1290 (8th Cir. 1975).

[18] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

employment due to recidivism,[19] liability for hiring people with known violent tendencies, and the difficulty of bonding ex-convicts. However, the court of appeals held that the railroad had failed to show a business necessity for its policy. The appropriate test of such a policy is not whether the hiring criteria are "relevant," but whether they are "essential" to the safety and efficiency of the business, and whether no less discriminatory policy could achieve the same purpose.[20] The employer must make such a showing of business necessity with empirical evidence rather than mere allegations.[21] In fact, the railroad presented no empirical evidence to show that hiring ex-convicts would adversely affect its business; no objective evidence was adduced by the railroad to show that the supposed consequences of hiring ex-convicts would actually follow. Consequently, the court of appeals held that the railroad's policy of absolutely excluding ex-convicts from employment violated the Title VII restriction against racially discriminatory hiring practices. Nevertheless, despite the railroad's failure to produce any objective evidence relating criminal records to job performance, the court acknowledged that in some cases a particular conviction might be predictive of job performance. Under such circumstances, an employer would apparently be entitled to take an ex-convict's record into account as a matter of business necessity. The court suggested that such a case would be presented by a convicted embezzler applying for a position which involved handling large sums of money.

The fourteenth amendment has led some courts to essentially the same result in cases involving statutory discrimination against ex-convicts who apply for licenses or public employment. Although Title VII reaches public as well as private employment discrimination, an ex-convict might be forced to rely on the fourteenth amendment if he could not claim to be the victim of racial discrimination,[22] or if he had failed to exhaust his administrative remedies with state and federal agencies enforcing fair employment practices legislation. In *Butts v. Nichols*,[23] an ex-convict was absolutely barred from civil service employment by state law.[24] The plaintiff's Title VII argument claiming racial discrimination in employment was dismissed by the court because the plaintiff had failed to exhaust his administrative remedies under the Act. Reaching the plaintiff's equal protection argument, the court held that the state did not have to show a compelling state interest to bar ex-convicts from public employment. A compelling state interest is required to satisfy the requirements of equal protection only where the plaintiff is a member of a class which is discriminated against on the basis of a suspect criterion (*e.g.*, race), or where the discrimination interferes with fundamental rights.[25]

The court refused to consider discrimination against ex-convicts to be equivalent to discrimination on the basis of race, a suspect criterion, merely because the percentage of black prisoners exceeded the percentage of blacks in the national population. The court also held that the right to civil service employment was not a fundamental right. Consequently, the state's absolute felon-bar to public employment only had to satisfy the rational basis test. Nevertheless, the court held the absolute felon-bar to be an unconstitutional violation of equal protection. Although the state could refuse employment in certain positions where the felony conviction would directly reflect on the ex-felon's qualifications, an across-the-board prohibition against the employment of ex-felons, without tailoring to limit the ban to situations where the felony conviction reflected on job qualification, did not meet the rational basis test.[26] This equal protection test of felon-bans is very similar to the business necessity test of Title VII; and, as in cases under Title VII, the decision would not entirely prohibit the state from considering an ex-convict's record in making employment decisions.[27]

Additional help for ex-convicts seeking employment may derive from recent state and federal legislative activity. At both levels, legislatures have passed or are considering laws to regulate the maintenance and distribution of criminal records. The United States Senate is considering two bills, premised upon the individual's right of privacy, which are designed to regulate the handling of criminal records by federal agencies.[28] A number of

[19] The argument that an employer is justified in refusing to hire an ex-convict because recidivism creates employment problems seems somewhat circular in that unemployment is a principal cause of recidivism. *See* note 2 *supra*.

[20] United States v. St. Louis S.F. Ry., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973).

[21] 29 C.F.R. §§ 1607.6, .7, .13 (1974).

[22] *See* note 6 *supra*.

[23] 381 F. Supp. 573 (S.D. Iowa 1974).

[24] Iowa Code § 365.17(5) (1971).

[25] 381 F. Supp. at 579.

[26] *Id. Accord*, Watson v. Cronin, 384 F. Supp. 652 (D. Colo. 1974) (approving official's rationally based refusal to grant a press pass to an ex-convict employed by a magazine).

[27] United States v. Chesterfield Cty. Sch. Dist., 484 F.2d 70 (4th Cir. 1973).

[28] S. 2963, S. 2964, 93d Cong., 2d Sess. (1974).

state legislatures have passed various statutes to provide for the expungement of criminal records as a method of dealing with their misuse. Although aimed generally at arrest records, especially those arrests not followed by prosecution or conviction, such laws would restore somewhat the social status of ex-convicts by relieving some of the employment discrimination that generally attaches to a criminal conviction. A recent Kansas statute expressly allows an ex-convict whose conviction record has been expunged to deny on an employment application that he was ever convicted of the crime.[29] But such legislation only indirectly affects the employment problems of ex-convicts by preventing prospective employers from having easy access to the criminal records of job applicants. Expungement statutes do not directly restrict an employer from arbitrarily discriminating against ex-convicts in the hiring process.

Few states have provided explicit protection for the employment rights of ex-convicts.[30] Possibly, as suggested by the executive director of the American Civil Liberties Union, "... the legal attack [against felon-bans] will focus on the racially discriminatory impact of denying employment on the basis of conviction records."[31] The racial impact of such employment practices provides the basis for applying Title VII and its enforcement apparatus to the employment problems of the ex-convict. In view of the vigorous enforcement given to the provisions of Title VII of the Equal Employment Opportunity Act, Title VII may become the major vehicle for winning employment opportunities for ex-convicts.

Dangerous Special Offender

Congress passed the Organized Crime Control Act in 1970[32] in an effort to curtail the operation of organized crime.[33] From the beginning, Title X of the Act has drawn criticism for its dubious constitutionality.[34] Title X authorizes a sentencing judge to substantially increase the term of imprisonment of a convicted felon beyond the normal term for the crime if the judge finds, without benefit of jury determination, that the convict is a "dangerous" "special offender" within the meaning of the Act. The District Court for the Northern District of Texas recently held, in *United States v. Holt*,[35] that Title X does not violate a convict's constitutional guarantees of due process of law. The court explicitly rejected the reasoning of an earlier Missouri case, *United States v. Duardi*,[36] in which the Missouri court held that Title X violated due process in the sentencing procedure. Rather than representing inconsistent holdings as the *Holt* court seemed to allege, the cases may be distinguished.

Under Title X, a sentencing judge who finds, by only a preponderence of the information, that a convicted felon is both a "special offender" and "dangerous" may increase or enhance the felon's sentence up to a maximum of twenty-five years.[37] The definition of special offender is designed to reach criminals who are engaged in organized crime. The class includes (1) the recidivist, whose felony was part of a history of felony convictions, (2) the professional criminal, whose felony was part of a

[29] Kan. Stat. Ann. §§ 21-4616, -4617 (1974). The statute provides not only for expungement of criminal records, but also that:

> In any application for employment, license or other civil right or privilege, or any appearance as a witness, a person whose conviction of crime has been expunged under this statute may state that he has never been convicted of such crime.

Kan. Stat. Ann. § 21-4717 (c) (1974).

[30] Hawaii Employment Relations Act gives discrimination on the basis of conviction records the same status as discrimination on the basis of race:

> It shall be an unlawful employment practice or unlawful discrimination,
>
> (1) for an employer to refuse to hire or employ or to bar or discharge from employment, any individual because of his race, sex, age, religion, color, ancestry or arrest and court [conviction] record which does not have a substantial relationship to the functions and responsibilities of the prospective or continued employment.

Hawaii Rev. Stat. § 378-2 (Supp. 1974).

Montana has amended its constitution to restore rights to an ex-convict:

> Laws for the punishment of crime shall be founded on the principles of prevention and reformation. Full rights are restored by termination of state supervision for any offense against the state.

Mont. Const. Art. II, § 28.

[31] A. Neier, Dossier 117–18 (1975).

[32] 18 U.S.C. §§ 3575–78 (1970).

[33] H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970), as cited in 2 U.S. Code Cong. & Ad. News 4007, 4074 (1970) (remarks of Rep. Dennis of Indiana).

[34] *Id.*

[35] 397 F. Supp. 1397 (N.D. Tex. 1975).

[36] 384 F. Supp. 874 (W.D. Mo. 1974).

[37] 18 U.S.C. § 3575(b) (1970). Under this section when there is a plea of guilty or nolo contendere or a guilty verdict of such felony, the court sitting without a jury shall hold a hearing before sentence is imposed. At this time, defendant and counsel for defendant may inspect the presentence report and cross examine witnesses. If it appears by a preponderance of the information that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not in excess of twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony.

pattern of criminal conduct in which the felon exhibits special skill and which provides a substantial source of his income, and (3) the conspirator, whose conviction is for conspiracy to engage in a pattern of criminal conduct.[38] Such a criminal is "dangerous" if the judge also finds that a period of confinement longer than that provided for the underlying felony is required for the protection of the public. The *Holt* case involved the sentencing of a twenty-nine year old who had a ten-year record of felony convictions, including an armed robbery for which he had been sentenced by the state to a nintey-nine year prison term. The recurrent felony offenses were the basis of the court's finding that Holt was a special offender; his overall record, lack of employment history and drug addiction led the court to hold that he was also dangerous. Finding no constitutional infirmities with Title X, the court extended Holt's sentence as provided by the Act.

The determination under Title X that a defendant is a dangerous special offender raises essentially two due process issues: first, whether "dangerous" as defined by the statute is too vague or overbroad; and second, whether the determination of dangerous special offender status involves fact-finding by the court which infringes upon the defendant's right to be tried by a jury and judged by the reasonable doubt standard rather than by the sentencing hearing standard of the preponderence of the information. With respect to the first problem, the court in *United States v. Duardi* held that the standard of dangerousness was unconstitutionally vague. The government had asked the court to find that Duardi was a threat to public safety on the basis of allegations that he was connected with organized crime and that he had conspired with others in an attempt to murder a government witness.[39] The court felt that to substantially increase Duardi's prison term on the basis of such allegations would be tantamount to convicting him for being "dangerous," which was too imprecise a standard to be a category of criminal conduct.[40] The court in *United States v. Holt* noted, however, that the determination of dangerousness was properly a part of a sentencing proceeding; the court's role was to sentence the convict appropriately for the underlying conviction rather than for being dangerous. Although "dangerousness" is too vague for a standard defining criminal conduct, the court felt that the term need not be that specific merely to be considered in determining the appropriate treatment for a convicted defendant. The *Holt* court relied upon cases which have held that a court could constitutionally deny bail pending appeal to a convict which the court found to be dangerous.[41]

The second due process issue raised by Title X actually underlies the *Duardi* court's finding that "dangerousness" was too vague a standard for enhancing criminal sentences under the Act. In order to establish that a felon qualifies as a dangerous special offender, the court must act as a fact-finder in the sentencing proceeding, and the prescribed standard of proof is the preponderence of the information rather than beyond a reasonable doubt.[42] To find that a felon is dangerous, the court must decide that an extended sentence is necessary in order to protect the public. To find that the defendant is also a special offender, the court must find that the felony was part of a pattern of crime from which the felon derives substantial income, or that the felony was a conspiracy to engage in a pattern of criminal conduct, or that the felon has committed several serious felonies. Consequently, the over-all sentencing process prescribed by Title X involves more than traditional

[38] 18 U.S.C. §§ 3575(e) (1), (2), (3) (1970). *See* H.R. REP. No. 1549, 91st Cong., 2d Sess. (1970), as cited in 2 U.S. CODE CONG. & AD. NEWS 4007, 4038 (1970). Under this section a defendant is a special offender if the defendant has previously been convicted under various circumstances, has committed a felony as part of a pattern of conduct which was criminal under the applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise, or the felony was or the defendant committed it in furtherance of a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction.

[39] United States v. Duardi, 384 F. Supp. 874, 878 (W.D. Mo. 1974).

[40] *Id.* at 885, *citing* Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[41] The cases which the court cited were considering a provision of the Bail Reform Act of 1966, 18 U.S.C. § 3148 (1970), which provides in part that:

> [If] the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community . . . the person may be ordered detained.

Sellers v. United States, 89 S.Ct. 36 (1968) (by Black, J., as individual Justice, decision on application for bail pending appeal) (defendant who was convicted of non-violent crime, failure to submit for induction, was not dangerous); Russell v. United States, 402 F.2d 185 (D.C. Cir. 1968) (convicted defendant was denied bail pending appeal on the basis of his history of convictions indicating that he was dangerous to the community); United States v. Nelson, 346 F. Supp. 926 (S.D. Fla. 1972), *aff'd*, 467 F.2d 944 (5th Cir. 1972) (defendant found to be dangerous and held without bail where he was convicted of a narcotics violation while on bond from a prior narcotics conviction).

[42] 18 U.S.C. § 3575(b) (1970).

consideration of a felon's undisputed personal history.[43] In *United States v. Duardi*, the government sought to have the defendant's sentence enhanced in part on the basis of information that Duardi had conspired to commit murder. The court held that to increase Duardi's sentence on that basis would be equivalent to convicting him of the conspiracy without due process, without trial by jury and based on the preponderence of the information rather than beyond a reasonable doubt based on evidence.

The Supreme Court considered an analogous situation in *Specht v. Patterson*.[44] Under the Colorado Sex Offenders Act, a felon convicted of certain sex offenses could have his sentence enhanced if, in the court's opinion, the offender represented a threat of bodily harm to the public at large. The Supreme Court held that such a statute ". . . makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public. . . . That is a new finding of fact. . .that was not an ingredient of the offense charged."[45] As a result, such a proceeding requires more protection for the defendant's constitutional rights than is found in an ordinary sentencing hearing. In fact, the Organized Crime Control Act does provide specific protection for the defendant's rights to be represented by counsel, to inspect presentence reports, to cross-examine witnesses and to the benefit of compulsory process.[46]

However, even such explicit guarantees were not sufficient to save the statute in *United States v. Duardi*. There the government wanted the judge to find that the defendant was a special offender based on information which, if true, would itself constitute a separate criminal act—conspiracy to commit murder. If such allegations could be used to establish that a defendant was a special offender and consequently liable for enhanced sentencing, the court felt that the sentencing proceeding would effectively become a trial, without the full due process guarantees which a trial affords to a defendant. Although the court in *United States v. Holt* disagreed with *Duardi*, the *Holt* court was faced with a more traditional situation where the government had established Holt's special offender status on the basis of his record of felony convictions. The court was not asked to find facts relating to patterns of criminal conduct or alleged organized crime connections; rather, the court was asked to consider Holt's recidivism, which Title X also allows as the basis for special offender status. As a result, although *Holt* upholds the constitutionality of Title X, the court was faced with an easier case than that which faced the *Duardi* court.

The constitutionality of Title X is apparently related to the extent to which a court is called upon to act as fact-finder in an enhanced sentencing proceeding. A defendant's constitutional rights are not violated in a traditional sentencing proceeding where a court, relying on a presentence report unconstrained by rules of evidence, may vary a defendant's sentence from one to twenty years.[47] However, to the extent that fact-finding involves information which is essentially the basis of a new criminal charge leading to punishment in an enhanced sentencing proceeding, traditional due process safeguards must be observed.[48] An additional problem is that every Title X case will also involve judicial fact-finding relating to the defendant's dangerousness, and similar provisions in enhanced sentencing statutes have been held unconstitutional for that reason.[49] Cases which have upheld the denial of bail on the basis of a defendant's dangerousness are not relevant because the severity of the punishment provided by Title X is far greater than merely a denial of bail, and the severity of possible punishment facing the defendant in a proceeding is a major factor in testing the sufficiency of due process safeguards.[50]

[43]No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence. 18 U.S.C. § 3577 (1970).

[44]386 U.S. 605 (1967).

[45]*Id.* at 608.

[46]18 U.S.C. § 3575(b) (1970).

[47]Williams v. New York, 337 U.S. 241 (1949).

[48]Specht v. Patterson, 386 U.S. 605 (1967); Gerchman v. Maroney, 355 F.2d 302 (1966).

[49]*Id.*

[50]District of Columbia v. Clawans, 300 U.S. 617, 639 (1937).

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