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Viii. Criminal Law

However, the Fourth Circuit's liberal treatment of county actions in *Donohoe* may send local land controversies back to the local courts, where the close factual inquiries of de facto taking cases may be more appropriately examined.[44]

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VIII. CRIMINAL LAW

Dangerous Special Offenders

In response to public concern that repeat offenders were receiving lenient sentences,[1] Congress enacted the Organized Crime Control Act of 1970[2] (The Act) which provides that a defendant convicted of a felony may receive a sentence in excess of the normal maximum upon a finding that he is a "dangerous special offender."[3] The statute provides that a defendant is "dangerous" if an increased sentence is needed to protect the public

courts may in fact tend to defer to exercises of regulatory powers by local government in the interest of federalism. *See e.g.*, 567 F.2d at 609 n.15. *See also* note 44 *infra*.

[44] *See generally* Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960) (federal courts should be wary of disturbing federal/state relations through constitutional review of state action); Gorieb v. Fox, 274 U.S. 603, 608 (1927) (state legislatures and city councils are better qualified to deal with land use controversies than federal courts). See also note 24 *supra*.

[1] Two government studies reported in 1969 that most organized crime leaders have long criminal records, STAFF OF SENATE SUBCOMM. ON CRIMINAL LAWS, 90TH CONG., 2D SESS., STUDY ON SENTENCING, *reprinted in*, 115 CONG. REC. 34390 (1969) [hereinafter cited as SENATE STUDY ON SENTENCING] (study based on Federal Bureau of Investigation data), and that the majority of violent crimes are committed by repeat offenders. NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, 90TH CONG., 2D SESS., REPORT OF COMMISSION, *reprinted in* 115 CONG. REC. 35546 (1969). The Commission acquired its data from the Victim-Offender Study conducted by the staff of the House Task Force on Individual Acts of Violence and from standard data of the Federal Bureau of Investigation. *Id.; see* F.B.I., UNIFORM CRIME REPORTS 35 (1968). Recent F.B.I. data revealed that over 65% of violent crimes involved repeat offenders. F.B.I., UNIFORM CRIME REPORTS 42-47 (1975).

A Gallup Poll taken in 1969 reported that seventy-five percent of those interviewed from a sample of the general population believed that the courts did not deal harshly enough with criminals. N.Y. Times, Feb. 16, 1969, § 1, at 47, col. 1; *see* 116 CONG. REC. 35194 (1970) (remarks of Rep. Poff). The Senate Study on Sentencing found that two-thirds of those offenders included in the survey who were members of La Cosa Nostra-organized crime "families" and who were indicted by the federal government between 1960 and 1969, faced maximum jail terms of five years or less. SENATE STUDY ON SENTENCING, *supra* note 1, at 34390. Fewer than one-fourth of these individuals received the maximum sentences authorized by statute, while the sentences of sixty-three percent averaged only forty to fifty percent of the maximums, and twelve percent received no jail terms at all. *Id.; see* McClellan, *The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties?* 46 NOTRE DAME LAW. 55, 147 (1970) [hereinafter cited as McClellan].

[2] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001(a), 84 Stat. 948, (codified at 18 U.S.C. § 3575 (1976)).

[3] 18 U.S.C. § 3575 (1976). Section 3575(b) authorizes the court to sentence a "dangerous special offender" to an overall term of up to twenty-five years.

from further criminal conduct.[4] A defendant is a "special offender" if he has been convicted of felonies on two prior occasions, and if less than five years has elapsed since his release from prison and the commission of his most recent offense.[5] In the recent case, *United States v. Williamson,*[6] the Fourth Circuit Court of Appeals upheld the constitutionality of the recidivist provision of the federal dangerous special offender statute.[7]

Under the Act, the government must petition the court for dangerous special offender sentencing prior to trial.[8] The determination of whether a defendant is a dangerous special offender is made after trial by a judge sitting without a jury.[9] The defendant is entitled to counsel,[10] compulsory process,[11] cross-examination,[12] specific factual findings,[13] and appellate review of this determination.[14] However, the statute permits the sentencing judge to rely upon hearsay in presentence reports.[15] Furthermore, the government may establish the defendant's dangerous special offender status by merely a preponderance of the evidence.[16]

In *Williamson,* the defendant was convicted of possessing a firearm after being convicted of a felony.[17] Prior to trial, the government petitioned for dangerous special offender sentencing.[18] The prosecution relied primarily on Williamson's two prior felony convictions to support its contention that he was a special offender.[19] Following Williamson's conviction on the

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[4] *Id.* at § 3575(f).

[5] *Id.* at § 3575(e)(1). A defendant may also qualify as a "special offender" if he is a professional criminal or has participated in a criminal conspiracy. *Id.* A defendant is a professional criminal if he derives a substantial amount of his income from criminal activity. *Id.* at § 3575(e)(2). An accused is a participant in a criminal conspiracy if he committed his most recent felony to further a conspiracy involving three or more other persons. *Id.* at § 3575(e)(3).

[6] 567 F.2d 610 (4th Cir. 1977).

[7] *Id.* at 617.

[8] 18 U.S.C. § 3575(a) (1976). To prevent prejudicing the determination of the defendant's guilt, the petition for dangerous special offender sentencing may not be disclosed to the jury or presiding judge prior to the defendant's conviction. *Id.;* H.R. REP. No. 91-1549, 92d Cong., 2d Sess. 2, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4037 [hereinafter cited as HOUSE REPORT]; *see* United States v. Bailey, 537 F.2d 845 (5th Cir. 1976), *cert. denied sub nom,* 429 U.S. 1051 (1977) (increased sentence invalidated when petition disclosed to presiding judge); *cf.* United States v. Edwards, 379 F. Supp. 617 (D.C. Fla. 1974) (petition filed after defendant's conviction not timely).

[9] 18 U.S.C. § 3575(b) (1976).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] 18 U.S.C. § 3576 (1976). Either the defendant or the United States may appeal an increased sentence imposed pursuant to § 3575. *Id.*

[15] *See id.* at § 3575(b). Section 3577 provides that there are no limitations on the type of information which the judge may consider to assist him in setting an appropriate sentence.

[16] *Id.* at § 3575(b).

[17] 567 F.2d at 611. 18 U.S.C. App. § 1202(a)(1) (1976) prohibits the possession of firearms by a convicted felon.

[18] 567 F.2d at 612; *see* note 8 *supra.*

[19] 567 F.2d at 614; *see* text accompanying note 5 *supra.* The government relied on a 1965

firearms charge, the district court conducted a hearing on the government's petition, and determined that he was a dangerous special offender.[20] The court sentenced Williamson to six years more than the maximum of two years he would have received absent the determination that he was a dangerous special offender.[21] On appeal, Williamson contended that the term "dangerous" as used in the dangerous special offender statute was unconstitutionally vague as a violation of due process,[22] that the district court erred in determining that he was a recidivist,[23] that the dangerous special offender proceeding involved a new finding of fact which required the procedural safeguards of a formal trial,[24] and that his eight-year sentence was disproportionately severe.[25]

The Fourth Circuit rejected Williamson's contention that the term "dangerous" was overly vague,[26] emphasizing that the determination of dangerousness was implicit in all sentencing decisions.[27] The court reasoned that the dangerous special offender statute simply requires sentencing judges to consider the likelihood that the defendant will engage in further criminal conduct if he receives a short sentence.[28] Implicit in the Fourth Circuit's treatment of the vagueness issue was its recognition that

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conviction for house-breaking and larceny and a 1972 manslaughter conviction to support its contention that Williamson was a special offender. *Id.* The government further contended that Williamson came within the ambit of 18 U.S.C. § 3575(e)(1) (1976) because he had completed serving his sentence for manslaughter less than five years before his firearms conviction. 567 F.2d at 614. The government alleged that Williamson was dangerous since he had committed several violent offenses after his release from prison and, as a result, the maximum two-year sentence for a firearms conviction under § 1202(a)(1) would be insufficient to protect the public from further criminal conduct by Williamson. Brief for Appellee at 7, United States v. Williamson, 567 F.2d 610 (4th Cir. 1977).

[20] 567 F.2d at 611.

[21] *Id.* at 616. The penalty for a firearms conviction under 18 U.S.C. App. § 1202(a)(1) (1976) is a maximum fine of $10,000 or imprisonment not to exceed two years, or both. *Id.* at § 1202.

[22] 567 F.2d at 613; *see* text accompanying note 4 *supra.* Williamson's vagueness challenge was based on United States v. Duardi, 384 F. Supp. 874, 885 (W.D. Mo. 1974), *aff'd,* 529 F.2d 123 (8th Cir. 1975). The *Duardi* court held that § 3575 was unconstitutionally vague because it failed to establish a definite standard for determining dangerousness. *Id.* at 886; *see* U.S. CONST. amend. XIV, § 1. The *Duardi* court reasoned that the absence of a legally fixed standard invited discriminatory application because potential defendants would not know what conduct would bring them within the ambit of the statute. 384 F. Supp. at 886; *see* Note, *Organized Crime Control Act of 1970,* 4 MICH. J.L. REF. 546, 631 (1971) [hereinafter cited as *Organized Crime Control Act*].

[23] 567 F.2d at 614; *see* text accompanying note 38 *infra.* Williamson asserted that he was not a dangerous special offender because he was not a special offender under § 3575(e)(1). *See* 567 F.2d at 614.

[24] 567 F.2d at 614; *see* text accompanying note 43 *infra.*

[25] 567 F.2d at 616. Williamson contended that his eight-year sentence was disproportionately severe because it was four times the maximum sentence for a firearms possession conviction. *Id. See* text accompanying note 49 *infra.*

[26] 567 F.2d at 613; *see* note 22 *supra.*

[27] 567 F.2d at 613.

[28] *Id., quoting* United States v. Neary, 552 F.2d 1184 (7th Cir.), *cert. denied,* 434 U.S. 864 (1977).

the dangerous special offender statute is applied only after a guilty verdict.[29]

Due process requires the terms of a penal statute to be sufficiently explicit to provide fair warning of precisely what conduct is prohibited.[30] The *Williamson* court, however, held that this requirement is inapplicable to the dangerous special offender statute because the statute merely increases the penalty for a criminal offense and does not create a new offense.[31] The Fourth Circuit apparently adopted the position that the two requirements of the dangerous special offender statute serve different purposes. The finding that the defendant is a recidivist "special offender" exposes him to a longer sentence than he would otherwise receive for the offense charged.[32] The function of the finding of "dangerousness" is to determine whether, and to what extent, a sentence in excess of the statutorily prescribed maximum is appropriate.[33] This position is supported by the parallel which the *Williamson* court drew between the dangerous special offender proceeding and an ordinary sentencing proceeding.[34] Since the dangerous special offender statute does not provide express criteria for determining whether a defendant poses a danger to society,[35] the Fourth Circuit properly placed this determination within the discretion of the sentencing judge.[36]

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[29] *See* 18 U.S.C. § 3575(b) (1976).

[30] *See* Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939); Conally v. General Constr. Co., 269 U.S. 385, 393-95 (1926).

[31] 567 F.2d at 614-15; *see* United States v. Bowdach, 561 F.2d 1160, 1175-76 (5th Cir. 1977); United States v. Neary, 552 F.2d 1184, 1194-95 (7th Cir. 1977); United States v. Stewart, 531 F.2d 326, 332 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976).

[32] 567 F.2d at 614; *see* note 33 *infra*.

[33] *See* 567 F.2d at 613-14. In United States v. Neary, 552 F.2d 1184 (7th Cir. 1977), the court noted a significant difference between the type of issue to be decided by the determination of special offender status under § 3575(e) and the issue decided by the determination of dangerousness under § 3575(f). 552 F.2d at 1193. While § 3575(e)(1) involves the historical fact of prior convictions, § 3575(f) involves both evaluation of the defendant's character and prediction of his future conduct. Since the determination of the defendant's dangerousness has traditionally been left to the discretion of the sentencing court, the *Neary* court concluded that the findings of dangerousness and special offender status serve separate and distinct functions. *Id.*

[34] 567 F.2d at 613 n.7.

[35] *See* 18 U.S.C. § 3575(f) (1976). Rather than providing criteria for predicting future dangerousness, § 3575(f) merely states that a finding of dangerousness is grounds for increased incarceration under the statute. *Id.; see* MODEL SENTENCING ACT § 5 (2d ed. 1972); Comment, *Dangerous Special Offenders*, 62 IOWA L. REV. 1204, 1210 (1977) [hereinafter cited as *Dangerous Special Offenders*]. The Model Sentencing Act provides that a prediction of future dangerousness may be based on a defendant's past dangerous conduct and a finding that he is suffering from a severe mental disorder.

[36] The *Williamson* court's treatment of the "dangerousness" issue was consistent with the approach taken by the Fifth, Seventh and Sixth Circuits. In United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977), the Fifth Circuit held that § 3575 was not unconstitutionally vague. 561 F.2d at 1176. The *Bowdach* court emphasized that the term "dangerous", as used in § 3575(f), is a familiar concept in criminal law because district courts must constantly determine dangerousness when granting, denying or setting bail. *Id.* at 1175. The Fifth Circuit noted that the inclusion of the term "dangerous" in § 3575 granted even greater protection

The Fourth Circuit also rejected Williamson's contention that the district court erred in concluding that he was a recidivist "special offender."[37] Williamson asserted that his 1965 conviction was too remote in time to indicate repetitious criminal conduct.[38] Although the statute does not limit the time frame from which convictions may be considered, Williamson urged the Fourth Circuit to adopt a "ten-year rule" which would exclude any conviction received more than ten years before the current charge from consideration in dangerous special offender proceedings.[39] In rejecting this "ten-year rule," the *Williamson* court reasoned that a time limit would be inconsistent with the purpose of the statute to punish repeat offenders who commit felonies soon after their release from prison.[40] The court reasoned that the rule proposed by Williamson would prevent courts from imposing an increased sentence on a defendant who had served more than ten years on his most recent prison term.[41] The Fourth Circuit also noted that the requirement that the defendant's most recent offense must have occurred within five years of his release from prison ensures that the defendant's criminal conduct is sufficiently repetitious to warrant a finding that he is a recidivist "special offender."[42]

Williamson's assertion that the government must prove dangerousness beyond a reasonable doubt without the use of hearsay evidence assumed

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to a defendant since the statute would be constitutional without any explicit dangerousness requirement. *Id.* This view assumes that § 3575 does not make "dangerousness" a separate criminal offense, but rather is directed at the sentencing of defendants who have already been convicted. *See* United States v. Stewart, 531 F.2d 326, 334 (6th Cir. 1976). In United States v. Neary, 552 F.2d 1184 (7th Cir. 1977), the Seventh Circuit compared the dangerous special offender proceeding with ordinary sentencing proceedings. Because the potential danger that a defendant poses to society is a determination inherent in all sentencing decision, the *Neary* court concluded that the term "dangerous" in § 3575 was not overly broad or vague. *Id.* at 1194. In United States v. Stewart, 531 F.2d 326 (6th Cir. 1976), the Sixth Circuit held that § 3575 was not unconstitutionally vague, rejecting the district court's reasoning in United States v. Duardi, 384 F. Supp. 874 (W.D. Mo. 1974). 531 F.2d at 336; *see* note 22 *supra*. The *Stewart* court noted that the Eighth Circuit affirmed the dismissal of the government's petition for dangerous special offender sentencing in *Duardi* on the ground that the petition failed to comply with the requirements of § 3575, 531 F.2d at 336, but emphasized that the Eighth Circuit did not reach the district court's contention in *Duardi* that the term "dangerous" was unconstitutionally vague. *Id.; see* United States v. Duardi, 529 F.2d 123 (8th Cir. 1975).

[37] 567 F.2d at 614.

[38] *Id.*

[39] *Id.* The "ten-year rule" advanced by Williamson would exclude a conviction received more than ten years before the current charge from consideration as one of the defendant's prior felony offenses under § 3575(e)(1). *Id.* The suggested ten-year limitation is based upon FED. R. EVID. 609(b) which sets a ten-year limit on the introduction of evidence of prior convictions for the purpose of impeaching a witness' testimony. *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* The adoption of the five-year limitation amendment in § 3575(e)(1) was suggested by the American Bar Association because "the judgment of likely recurrence which repeated criminality permits . . . becomes progressively diluted as the time between the present and the last offense increases." *See* HOUSE REPORT, *supra* note 8, at 4065; A.B.A. STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 3.3(b)(i) (1967).

that the determination of dangerousness was a new finding of fact not an element of the firearms charge.[43] Williamson contended that a defendant in such a proceeding was entitled to the full range of due process protections guaranteed in state criminal proceedings.[44] The Fourth Circuit rejected Williamson's contention, reasoning that the determination of whether a defendant is a dangerous special offender involves a "distinct issue" but does not create a separate criminal charge.[45] The defendant is not being punished because he is a dangerous special offender; rather, he is being punished more severely because the finding that he is a dangerous special offender aggravates his most recent offense.[46] The court concluded that since a dangerous special offender proceeding is closely analogous to a normal sentencing proceeding, the procedural and evidentiary safeguards of a formal trial are unnecessary.[47] Since sentencing should not be confined to a narrow inquiry into guilt, the Fourth Circuit also reasoned that hearsay evidence concerning Williamson's character and history was admissible to aid the judge in setting an appropriate sentence.[48]

The Fourth Circuit dismissed Williamson's final argument that increasing his sentence to four times the maximum for the firearms conviction was disproportionately severe, constituting cruel and unusual punish-

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[43] Williamson's contention that the dangerous special offender proceeding involved a new finding of fact which was not an element of the firearms charge was apparently based on Specht v. Patterson, 386 U.S. 605 (1967). In *Specht*, the Court declared unconstitutional the Colorado Sex Offenders Act, COLO. REV. STAT. §§ 39-19-1 to -10 (1963), which provided for the imposition of an indeterminate sentence upon a defendant convicted of certain crimes if a court determined that he either posed a threat of bodily harm to the public or was both a habitual offender and mentally ill. 386 U.S. at 607; *see* COLO. REV. STAT. § 39-19-2 (1963). The *Specht* Court concluded that due process entitles a defendant in a proceeding under the Colorado Act to the right to counsel, an opportunity to be heard and to confront adverse witnesses, the right of cross-examination, an opportunity to offer exculpatory evidence, and to have findings placed in the record which are adequate to permit a meaningful appellate review. 386 U.S. at 610.

[44] 567 F.2d at 614; *see* 386 U.S. at 609; Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966) (defendant entitled to procedural protections at hearing under Pennsylvania sex offenders statute).

[45] 567 F.2d at 614-15, *citing* United States v. Stewart, 531 F.2d 326, 332 (6th Cir. 1976).

[46] *See Hearings on the Organized Crime Control Act Before the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. (1970) (letter from Department of Justice), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4059, 4069-70; McClellan, *supra* note 1, at 164. Courts upholding the constitutionality of state recidivist statutes have reasoned that the defendant's prior convictions aggravate the commission of his most recent offense. *See* Gryger v. Burke, 334 U.S. 728 (1948) (recidivist statute not violative of double jeopardy prohibition); Graham v. West Virginia, 224 U.S. 616 (1912) (recidivist statutes do not constitute cruel and unusual punishment). Although § 3575(b) requires an additional finding of dangerousness, the Fourth Circuit reasoned that sentencing under the recidivist "special offender" provisions was analogous to sentencing under state recidivist statutes. *See* 567 F.2d at 616.

[47] *Id.* at 615.

[48] *Id.; see* Williams v. New York, 337 U.S. 241, 250-52 (1949). In *Williams*, the Court upheld the use of hearsay in presentence reports. 337 U.S. at 249-50. Because much information about a defendant's character and personal history would be inadmissible under formal evidentiary rules, the Supreme Court held that the formal rules of evidence do not apply to sentencing proceedings. *Id.* at 250-52; *see* 18 U.S.C. § 3577 (1976); note 15 *supra*.

ment.[49] The court emphasized that Williamson's propensity for violent crime was established at the sentencing hearing. As a result, the eight-year sentence was justified by the need to protect the public from further criminal conduct.[50]

The language and legislative history of the dangerous special offender statute clearly support the *Williamson* rulings. There is no indication that Congress considered limiting the time frame in which the defendant's previous convictions could be considered for purposes of determining special offender status.[51] Thus, the court correctly refrained from adopting the "ten-year rule" urged by Williamson.[52] The Fourth Circuit properly concluded that Williamson's eight-year sentence represented a penalty for his firearms offense rather than a punishment for being a dangerous special offender.[53] The dangerous special offender statute explicitly provides that

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[49] 567 F.2d at 616; *see* U.S. CONST. amend. VIII. In Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974), the Fourth Circuit held that the mandatory life sentence imposed by the West Virginia recidivist statute, W. VA. CODE § 61-11-18 (1966), was so severe in relation to the nature of the defendant's offenses that it constituted cruel and unusual punishment. 483 F.2d at 142-43. This approach focuses on the excessiveness of the punishment relative to the offense, rather than on the nature of the punishment. *See Fourth Circuit Review*, 31 WASH. & LEE L. REV. 61, 223 (1974); Comment, *Recidivist Statutes*, 1974 WASH. U.L.Q. 147, 149 (1974) [hereinafter cited as *Recidivist Statutes*]. In *Coiner*, the defendant had been previously convicted of passing a bad check for $50, transporting forged checks and committing perjury at the murder trial of his son. 483 F.2d at 138. The Fourth Circuit concluded that the defendant's sentence was disproportionately severe, relying on the nature of the offense itself, the legislative purpose behind the punishment, and a comparison with the punishment authorized in other jurisdictions. *Id.* at 140-43. In *Williamson*, the court relied on these same factors in reviewing Williamson's sentence. 567 F.2d at 616. However, the court only discussed the nature of Williamson's prior offenses which also would have supported the conclusion that Williamson was dangerous. *Id.* The *Williamson* court apparently reasoned that state recidivist statutes could be used as a yardstick to measure the sentence under § 3575. The court concluded that Williamson's sentence was not cruel and unusual punishment because it was less severe than the sentences authorized by states' statutes. 567 F.2d at 617; *see e.g.*, COLO. REV. STAT. § 16-13-101 (1973); N.J. STAT. ANN. § 2A:85-12 (West 1969); N.Y. PENAL LAW § 70.10 (McKinney 1975); WASH. REV. CODE § 9.92 090 (1970). Historically, state recidivist statutes have been held constitutional, surviving challenges based on the due process, equal protection, privileges and immunities, double jeopardy and ex post facto clauses of the Constitution. *See* U.S. CONST. art. 1, § 10, cl. 1; amend. V; amend. XIV, § 1. *See generally Recidivist Statutes, supra* at 148. Recidivist statutes have generally withstood challenges based on the eighth amendment's proscription of cruel and unusual punishment. Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Cooper v. United States, 114 F. Supp. 464 (S.D.N.Y. 1953); Bennett v. State, 455 S.W.2d 239 (Tex. Crim. App. 1970); State v. Fisher, 123 W. Va. 745, 18 S.E.2d 649 (1941).

[50] 567 F.2d at 616.

[51] *See* HOUSE REPORT, *supra* note 8.

[52] Since the language of § 3575 is plain and unambiguous and makes no mention of a limitation on the time frame in which the defendant's previous convictions may be considered, the Fourth Circuit was proper in enforcing the statute according to its obvious meaning. *See* Harrison v. Northern Trust Co., 317 U.S. 476, 479, 490 (1943); Caminetti v. United States, 242 U.S. 470, 485 (1917); 18 U.S.C. § 3575 (1976).

[53] The report of the Senate Judiciary Committee specifically stated that only circumstances of aggravation of the defendant's most recent offense are before the court in a § 3575

the increased sentence cannot be "disproportionate in severity to the maximum term otherwise authorized for such felony."[54] By tying the defendant's sentence to the maximum authorized for his most recent offense, Congress apparently attempted to insure that the defendant's sentence represented a penalty for the crime charged rather than a penalty for being a dangerous special offender.[55]

The due process protections of proof beyond a reasonable doubt and exclusion of hearsay are not relevant to dangerous special offender sentencing even if the dangerous special offender statute involves a new finding of fact.[56] A recent Supreme Court holding suggests that due process does not require proof beyond a reasonable doubt at sentencing.[57] Because due

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proceeding. S. REP. No. 91-617, 91st Cong., 1st Sess. 92-93, 163-64 (1969) [hereinafter cited as SENATE REPORT]; McClellan, *supra* note 1, at 165.

[54] 18 U.S.C. § 3575(b) (1976).

[55] The Fourth Circuit's conclusion that the finding of dangerous special offender status aggravates the defendant's present offense is consistent with the approach taken by the Sixth Circuit. In United States v. Stewart, 531 F.2d 326 (6th Cir. 1976), the defendant was charged with assisting in the escape from jail of a codefendant in violation of 18 U.S.C. § 752(a) (1976). 531 F.2d at 327. The district court rejected the government's dangerous special offender petition on the ground that § 3575 was unconstitutionally vague. *Id.* at 330; *see* note 22 *supra.* Since the Supreme Court had held that the determination of habitual offender status under traditional recidivist statutes did not relate to a separate criminal charge, Gryger v. Burke, 334 U.S. 728, 732 (1948); Graham v. West Virginia, 224 U.S. 616, 623-24 (1942); McDonald v. Massachusetts, 180 U.S. 311, 312 (1901), the Sixth Circuit concluded that § 3575 did not create a separate charge either. *Id.* at 332; *see* note 46 *supra.* The *Williamson* court explicitly adopted the reasoning of the *Stewart* court. 567 F.2d at 614-15.

[56] The Fourth Circuit's opinion in *Williamson* was still consistent with Specht v. Patterson, 386 U.S. 605 (1967), because § 3575 incorporates all of the due process safeguards specifically required by *Specht.* 18 U.S.C. § 3575(b) (1976); *see* note 43 *supra.*

[57] In Gardner v. Florida, 430 U.S. 349 (1977), the Supreme Court reversed the imposition of the death penalty on the defendant because the trial judge's decision had been based partly on information contained in a presentence report which had not been disclosed to the defendant. 430 U.S. at 351. Although *Gardner* held that the due process clause applied at sentencing, the Court stated that due process did not require full criminal procedural rights at sentencing. *Id.* at 358. In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Court required the government to prove all essential elements of the murder charge beyond a reasonable doubt, including absence of the defense that the defendant acted in the heat of passion. *Id.* at 703-04. Some commentators have interpreted *Mullaney* as requiring proof of any fact affecting the degree of criminal culpability beyond a reasonable doubt. *See, e.g.,* Note, *Affirmative Defenses After* Mullaney v. Wilbur: *New York's Extreme Emotional Disturbance,* 43 BROOKLYN L. REV. 171 (1976); Comment, *Unburdening the Criminal Defendant:* Mullaney v. Wilbur *and the Reasonable Doubt Standard,* 11 HARV. C.R.-C.L. L. REV. 390 (1976); Note, *Affirmative Defenses in Ohio After Mullaney v. Wilbur,* 36 OHIO ST. L.J. 828 (1975). In Patterson v. New York, 432 U.S. 197 (1977), however, the Court stated that *Mullaney* should not be read so broadly. 432 U.S. at 214-15.

In United States v. Neary, 552 F.2d 1184 (7th Cir. 1977) the Seventh Circuit suggested that the § 3575 preponderance of the evidence standard may be constitutionally inadequate because the proof of prior convictions constitutes a finding of fact which increases the defendant's culpability. 552 F.2d at 1193. However, the court apparently relied on the interpretation commentators had given to *Mullaney* prior to *Specht.* In a recent case, United States v. Inindino, 47 U.S.L.W. 2278 (N.D. Ill. 1978), the federal district court held that § 3575 involves a post-conviction proceeding at which the reasonable doubt standard does not apply. *Id.; see* Williams v. New York, 337 U.S. 241 (1949).

process is a flexible concept,[58] hearsay contained in presentence reports should not be excluded automatically from consideration in a dangerous special offender proceeding despite the defendant's inability to cross-examine those who prepared the reports.[59] Due process only requires that the procedural protections meet the demands of the particular situation.[60] The inquiry into the necessity of cross-examination should focus on the significance of cross-examination to truth finding in the context of resolving particular factual issues.[61] In a dangerous special offender proceeding, the defendant has already been convicted of a crime and is almost certain to be incarcerated. The inquiry is not limited to deciding whether or not the defendant committed a particular act, but rather, to whether he is dangerous.[62] This determination can be made most effectively when the sentencing judge is free to consider all information, both hearsay and non-hearsay, relating to the defendant's character and personal history.[63]

The Fourth Circuit's decision in *Williamson* strengthens the constitutional foundation for imposing increased sentences pursuant to the recidivist provisions of the dangerous special offender statute. This does not mean, however, that all increased sentences imposed pursuant to the dangerous special offender statute will be free from constitutional challenge in the Fourth Circuit.[64] The statute may not be immune from challenge on different grounds than those presented in *Williamson.* Constitutional challenges may still be raised regarding the improper application of the provisions of the dangerous special offender statute in a particular case.[65]

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[58] Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In *Morrissey,* the Supreme Court outlined the due process protections required at a parole revocation hearing, specifically rejecting the approach of *Specht* that the defendant must be afforded the "full panoply" of procedural protections of a formal trial. 408 U.S. at 489; *see* note 43 *supra.*

[59] The unavailability of witnesses who have prepared presentence reports raises an issue of the constitutional right to confront adverse witnesses. The presentence report is hearsay evidence, relied upon by the sentencing court without affording the defendant an opportunity to cross-examine the sources of information utilized in the report. *See* Uelman, *Proof of Aggravation Under the California Uniform Determinate Sentencing Act: The Constitutional Issues,* 10 LOY. L.A. L. REV. 725, 739 (1977).

[60] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[61] *See* Chambers v. Mississippi, 410 U.S. 284, 295 (1973); Dutton v. Evans, 400 U.S. 74, 89 (1970).

[62] 18 U.S.C. § 3575 (1976); *see* note 33 *supra.*

[63] 567 F.2d at 615.

[64] The application of the non-recidivist provisions of § 3575, *see* note 5 *supra,* may engender constitutional issues different from those present in the *Williamson* case. The determination that a defendant is a professional criminal or a participant in a conspiracy involves a more complex adjudication of guilt or criminal tendencies than the determination that the defendant is a repeat offender. *See generally* United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); United States v. Duardi, 384 F. Supp. 874 (W.D. Mo. 1974). The complexity of a non-recidivist dangerous special offender proceeding may demand greater procedural safeguards than those present in a recidivist proceeding under § 3575. *See* 18 U.S.C. § 3575 (1976).

[65] *See* SENATE REPORT, *supra* note 53, at 92 (1969); McClellan, *supra* note 1, at 165 (1970). An increased sentence imposed pursuant to § 3575 is only constitutional when the court