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Title X - Dangerous Special Offender Sentencing

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TITLE X—DANGEROUS SPECIAL OFFENDER SENTENCING

I. INTRODUCTION

Undoubtedly the most controversial new provision in the Organized Crime Control Act of 1970 is title X. Title X authorizes a federal prosecuting attorney to notify the defendant and the court before trial that the defendant, if found guilty of the felony on which he is being tried, is in the prosecutor's opinion also subject to the dangerous special offender provisions embodied in the title.[1] Should the defendant be judged guilty of the felony, he then will fall subject to an additional penalty beyond that received for the conviction if the judge finds that he qualifies as one of three types of special offenders: recidivists, professional offenders whose crimes involve special skill or expertise, and conspirators.[2] In addition to establishing that the defendant fits within one of these categories, the prosecutor must also show that the defendant is so dangerous that a longer period of confinement than that provided by the sentence on the felony conviction is needed to protect the public.[3]

The determination of whether the title X special offender provisions are applicable is made by the judge sitting without the jury in a special sentencing hearing.[4] In addition to his right to be present at the hearing, the defendant is entitled to representation by counsel; to limited inspection of the presentence report; to cross-examination of witnesses; and to compulsory process.[5] No limitation is placed on the type of information that the judge may consider in making his determination.[6] If dangerous special offender status is established "by the preponderance of the information,"[7] the judge is authorized to impose a sentence of up to twenty-five years imprisonment in addition to the sentence for the underlying felony conviction.[8] Both the defendant and the United

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[1] Organized Crime Control Act of 1970, 18 U.S.C.A. § 3575(a) (Supp. 1971).

[2] 18 U.S.C.A. § 3575(b), (e) (Supp. 1971).

[3] *Id.* § 3575(g).

[4] *Id.* § 3575(b).

[5] *Id.* In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinions which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court.

[6] 18 U.S.C.A. § 3577 (Supp. 1971).

[7] *Id.* § 3575(b).

[8] *Id.*

States prosecutor may appeal the judge's findings and decision reached in a title X proceeding.[9]

The incorporation of this title was prompted by a Senate staff study for the Judiciary Subcommittee on Criminal Laws and Procedures which revealed that of all organized crime figures sentenced in federal courts from 1960 to 1969, two-thirds faced maximum jail terms of only five years or less, and fewer than one-quarter of these received a maximum sentence.[10] Moreover, in those cases since 1960 where the federal judge possessed discretion in his sentencing, only a bare majority of those convicted received as much as half the maximum sentence.[11] Several defendants, although found guilty, received no jail sentences. Congress also was persuaded to enact title X because of the complexity of an organized crime network, and the serious threat it poses to the economic and political well-being of the nation.[12]

As these reasons for title X indicate, the title was passed principally to curtail the activity of organized crime. The hearings in both the Senate and House spoke exclusively in terms of such organized crime offenders. Nevertheless, there is nothing in the title that would limit its application to organized crime since it applies to virtually any "dangerous" defendant involved in the furtherance of a conspiracy involving four or more people.[13] It also applies to any criminal who in performing his trade exhibits special skills. Yet, within the definitions is the potential that title X would apply to the publisher of an underground newspaper convicted on obscenity charges and found to be dangerous under the questionable definition of section 3575(f). In addition, many student militants or civil rights workers would qualify under the same provisions if found guilty of some underlying felony.[14] Such a broad scope of application did not slip by the Senate unnoticed.

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[9] *Id.* § 3576.

[10] 28 CONG. QUARTERLY WEEKLY REPORT, July 17, 1970, No. 29 at 1812.

[11] *Hearings on S. 30, and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 112 (1970).

[12] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 188 states that

> [t]he purpose of organized crime is not competition with visible, legal government but nullification of it. When organized crime places an official in public office, it nullifies the political process. When it bribes a police official it nullifies law enforcement.

[13] Presumably it would not be difficult to prove that a participant in a conspiracy, at some point, agreed to help plan or organize it. Indeed, under the wording of § 3575(e)(3), the underling who says "Hey, why don't we try this," or "I've got a better idea" qualifies for special offender status if the element of dangerousness is also found.

[14] *Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 472 (1969) [hereinafter cited as *Senate Hearings*] (remarks of Lawrence Speiser, speaking for the American Civil Liberties Union).

One senator introduced an amendment that would limit the force of the bill to those felonies enumerated in title IX of this Act on the rationale that this limitation would confine the application of such severe penalties to those persons to whom the Act was meant to apply—organized crime offenders.[15] His amendment was soundly defeated.[16]

The difficulty that will be encountered in determining what individuals fall within the provisions of the Act creates a potential conflict with the constitutional doctrine of void for vagueness. Many other constitutional arguments also arise from other language in title X. The remainder of this discussion will concentrate on examining the validity of several constitutional attacks which undoubtedly will eventually be directed at this title.

II. VOID FOR VAGUENESS

The Supreme Court has on many occasions addressed the question of what to do with a statute containing terms which seem indefinite and vague.[17] In *Connally v. General Construction Co.*[18] the Court declared:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[19]

In *Lanzetta v. New Jersey*[20] the Court held the essence of the vagueness doctrine to be that "[n]o one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes."[21] This requirement of prior statutory definition serves to limit the discretion and minimize possible prejudice on the part of those who administer the criminal justice system.[22]

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[15] 116 CONG. REC. S415 (daily ed. Jan. 22, 1970) (remarks of Senator Edward Kennedy of Massachusetts).

[16] *Id.* at S419. The vote was sixty-two nays, eleven yeas and twenty-seven not voting.

[17] Baggett v. Bullitt, 377 U.S. 360 (1964) (the Court declared unconstitutional several Washington statutes requiring as a condition for employment, a loyalty oath to be taken by state employees on the gound that the oath provided no ascertainable standard of conduct; Lanzetta v. New Jersey, 306 U.S. 451 (1939) (statute punishing "gangsters" and defining as a gangster "any person not engaged in any lawful occupation, known to be a member of a gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime," voided on vagueness grounds); Jordan v. DeGeorge, 341 U.S. 223 (1951) (phrase "any crime involving moral turpitude" held sufficiently definite in context of deportation legislation).

[18] 269 U.S. 385 (1925) (an Oklahoma statute providing for a certain minimum wage "not less than the current rate of per diem wages in the locality where the work is performed" held too vague a standard to enable a certain determination of what constitutes a current wage in any locality).

[19] *Id.* at 391.

[20] 306 U.S. 451 (1939).

[21] *Id.* at 453

[22] Musser v. Utah, 333 U.S. 95, 97 (1948). *See also* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968).

On close examination, it would appear that title X contains several phrases that may be subject to a void for vagueness attack. Perhaps the most obvious example would be the concept of dangerousness, which is a requisite part of title X conviction.[23] The statute defines dangerousness[24] in terms of "protection of the public from further criminal conduct."[25] Nevertheless, the degree of danger that is to serve as the standard remains indefinite.

The Supreme Court has primarily resorted to three related approaches in attempting to determine the certainty of congressional statutes.[26] In *People v. Ruthenberg*[27] the Michigan Supreme Court rejected a vagueness attack on the Criminal Syndicalism Act of Michigan. The court held that terms such as "sabotage" and "violence" have a definite meaning especially when used in connection with the Communist Party.[28] This holding evinces the "common meaning" approach, which was also adopted in *United States v. Rumely*[29] and *United States v. Harriss*,[30] involving the Federal Regulation of Lobbying Act.[31] Petitioner attacked, *inter alia*, a provision of the Act requiring registration of hired lobbyists.[32] The statute, it was contended, did not adequately define "lobbying." In both cases, the Court rejected this contention and instead held that "lobbying" should be treated in its "commonly accepted sense."[33]

A second approach utilized by the Court might be termed the "technical or special meaning" approach as exemplified in *Hygrade Provision Co. v. Sherman*,[34] which involved a statute providing punishment for the fraudulent sale of kosher meat. In rejecting a vagueness claim, the Court held that the "term 'kosher'

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[23] 18 U.S.C.A. § 3575(e) (Supp. 1971).

[24] The concept of dangerousness is not novel in the law. In Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968), the district court dealt with the District of Columbia Sexual Psychopath Act, 22 D. C. Code § 3503-11 (1967), which included a "dangerousness" standard pertaining to sexual misconduct. Because the term is defined as "likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of his desire (§ 3503(1)), the Court found no ambiguity in the use of "dangerousness" in connection with sexual misconduct.

[25] 18 U.S.C.A. § 3575(f) (Supp. 1971).

[26] *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 69 (1960). The author states that except for the Lever Act involved in United States v. Cohen Grocery Co., 255 U.S. 81 (1921), and its progeny, no federal statute has been struck down on a void for vagueness analysis.

[27] 229 Mich. 315, 201 N.W. 358 (1924).

[28] *Id.* at 325-26, 201 N.W. at 361.

[29] 345 U.S. 41 (1953).

[30] 347 U.S. 612 (1954).

[31] 2 U.S.C. §§ 261-70 (1946).

[32] *Id.* § 267.

[33] United States v. Rumely, 345 U.S. 41, 47 (1953); United States v. Harriss, 347 U.S. 612, 620 (1954).

[34] 266 U.S. 497 (1925).

has a meaning well enough defined to enable one engaged in the trade to correctly apply it."[35] In other cases the Supreme Court has upheld statutes as sufficiently defined when contested terms had specifically well-settled common-law meanings.[36] This approach was also explained in *United States v. Cohen Grocery Co.*[37] as affording a standard "found to result either from the text of the statute involved or the subjects with which they dealt."[38]

The third approach utilized in *Lanzetta v. New Jersey*[39] is an attempt to adopt common usage as the applicable standard. The *Lanzetta* case required a determination of the definitional clarity of the term "gang,"[40] The Court, citing five different dictionary meanings and several sociological studies, found no certainty in the term. The Court came to a similar conclusion concerning the term "gangster" after a similar investigation before voiding the statute on vagueness grounds.

The application of any of these three approaches does not seem to remove the stigma of vagueness from the "dangerousness" definition embodied in section 3575(f).[41] Certainly, physical danger to the public would be the minimum level. Perhaps danger to property is sufficient as the statute is now written. It is conceivable under this Act that a union leader guilty of conspiracy to incite a civil disturbance could be given the additional penalty on the basis that he presented a danger to social tranquility. These examples seem to accentuate the fact that dangerousness has varied common meanings and usages. The tests of common usage applied in *Rumely, Ruthenberg* and *Lanzetta* should not obviate the apparent vagueness of such a term. Moveover, in the context of criminal law where the only guidance is a "public protection" standard,[42] dangerousness takes on no technical or special meaning as in *Connally*. Finally, neither the text of the statute nor the subject with which it deals seems to clarify the degree of dan-

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[35] *Id.* at 502.

[36] Nash v. United States, 229 U.S. 373 (1912) (upholding the Sherman Antitrust Act and construing "restraint of trade" as being certain in a common law context).

[37] 255 U.S. 81 (1921).

[38] *Id.* at 92. Perhaps the use of this technical approach explains the absence of successful vagueness challenges against general statutes. As pointed out in Connally v. General Constr. Co., 269 U.S. 385, 391-92 (1926) the decisions of the Court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or special meaning, well enough known to enable those within their reach to correctly apply them.

[39] 306 U.S. 451 (1939).

[40] The term was defined under N. J. REV. STAT. § 2:136-4 (1937), as "consisting of two or more persons."

[41] "A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."

[42] 18 U.S.C.A. § 3575(f) (Supp. 1971).

gerousness by which the court is to be guided.[43] The uncertainty surrounding the applicable standard of dangerousness and the necessity of guessing at the statute's prohibitory meaning is precisely what the Court held unconstitutional in *Lanzetta*.

Similar problems of vagueness will also be encountered under the language of the professional offender provision where congress attempts to define "special skill"[44] and "pattern of criminal conduct."[45] In general, the Act defines special skill in terms of unusual knowledge, or the ability to "facilitate" any managerial aspect of a crime. Thus, while the Act does attempt to define special skill, it does so only in terms equally ambiguous. What constitutes unusual knowledge seems to be an unknown. For example, one might ask whether an automobile thief's ability to start a car constitutes special knowledge. Pattern of criminal conduct is generally defined as criminal acts which have similar purposes, participants, victims or are otherwise interrelated. This definition leaves unclear the numbers or degrees of such activities. Nevertheless, it should be recognized that both above definitions must be given greater certainty by the additional language of the provision that the activity must constitute a substantial source of the defendant's income.[46] On the other hand, the requirements of pattern of conduct, special skill, and substantial source of income even when taken together do not seem to express or limit definitively the concept of professional offender.

III. DUE PROCESS

A "sentencing" proceeding which could increase a two year maximum sentence by twenty-five years, the amount authorized under section 3575(a), may encounter serious due process objections. Indeed, it may be imperative that the sentence hearing, out of which may come factual determinations as important as the original determination of guilt, be bound by all the substantive due process rules applicable to trial. The findings made by the court

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[43] Certainly, "dangerousness" would involve physical danger to the public. However, the inclusion of conspiratorial defendants in title X may reflect congressional intent to punish social disorders with which conspiracies are commonly associated as well as crimes of violence.

[44] 18 U.S.C.A. § 3575(e) (Supp. 1971) defines special skill or expertise in criminal conduct to include, "unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of the criminal conduct, the enlistment of accomplices in such conduct . . . or the disposition of the fruits or proceeds of such conduct."

[45] 18 U.S.C.A. § 3575(e) (Supp. 1971) provides that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

[46] 18 U.S.C.A. § 3575(e)(2) (Supp. 1971).

under title X, and the resulting power to punish, differ substantially from the sentencing process involved in a typical recidivist statute.

The constitutionality of the practice of imposing severe criminal penalties upon habitual offenders is no longer open to serious challenge. The Supreme Court has consistently upheld the validity of state recidivist statutes in a variety of contexts. As early as *Graham v. West Virginia,*[47] the Court recognized that trial of a prior offender, under a provision imposing additional imprisonment, violated no constitutional prohibition. While denial of an opportunity to obtain counsel in the face of an habitual criminal accusation has been held a clear violation of the due process clause of the fourteenth amendment,[48] the Court has required no more than that the defendant be given a reasonable opportunity to defend against the habitual criminal accusation,[49] and has not invalidated convictions obtained through selective enforcement.[50] Furthermore, as recently as 1967, the Supreme Court said that a procedure whereby the jury was allowed to consider evidence of the defendant's prior convictions, upon the instruction that such matters were not to be considered in passing upon defendant's guilt or innocence on the pending charge, was not an unconstitutional means of serving the valid state purpose of enforcing habitual criminal statutes.[51]

It is important to recognize that title X differs considerably from the typical recidivist statutes involved above in which the trier of fact had only to establish the accused's identity, consider his past criminal record, and set punishment accordingly. A defendant may be classified a "special offender" if he is found to meet any one of three sets of criteria. The first set[52] involves a determination of the defendant's past criminal record, an issue much like that to which recidivist statutes are normally addressed. However, the last two sets of criteria involve quite different issues. The judge must determine if the defendant displayed a pattern of criminal conduct which constituted a substantial source of his income and in which he manifested special skill.[53] This seems equivalent to a determination of guilt. The final criterion requires similar determinations to be made in proceedings against conspiratorial offenders.[54] Whether there was a conspiracy involving

[47] 224 U.S. 616 (1912).

[48] Chandler v. Fretag, 348 U.S. 3 (1954); Chewning v. Cunningham, 368 U.S. 443 (1962).

[49] Oyler v. Boles, 368 U.S. 448 (1962).

[50] *Id.*

[51] Spencer v. Texas, 385 U.S. 554 (1967).

[52] 18 U.S.C.A. § 3575(e)(1) (Supp. 1971).

[53] *Id.* § 3575(e)(2).

[54] *Id.* § 3575(e)(3).

a pattern of criminal conduct, and whether the defendant agreed to initiate, organize, plan, finance, direct, manage or supervise such conduct, are all inquiries which the judge alone must determine. Under each of the three special offender classifications, the judge must decide the additional question of whether the defendant is "dangerous," *i.e.*, that confinement for longer than the penalty for the underlying felony is necessary to protect the public.[55] The answers to these questions, decided without a jury and without full trial procedures, can be the basis of a sentence of up to twenty-five years.[56]

The Supreme Court has had an opportunity to rule on the problem of distinguishing between determination of guilt and discretion in sentencing which will most likely arise in cases under title X. The leading case of *Williams v. New York*[57] involved a defendant convicted of murder in the first degree, with a jury's recommendation of life imprisonment. The judge considered outside information as to appellant's previous criminal record without permitting appellant to confront or cross-examine the witnesses on that subject. Citing, *inter alia,* the probation report's conclusion, the trial judge sentenced the defendant to death.[58] The Supreme Court, on review, upheld the judge's sentence. The Court distinguished between the trial contest which is confined to the issue of guilt and the sentencing procedure:

> A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.[59]

The Court voiced a broad conception of the judge's role in the normal sentencing process:

> [M]odern concepts of individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence. . . .[60]

The decision in *Williams,* however, did not settle the issue. Again, the Supreme Court considered the problems of sentencing and habitual offenders in *Specht v. Patterson.*[61] In *Specht,* the appellant was convicted of the crime of indecent liberties under a

[55] *Id.* § 3575(f).
[56] *Id.* § 3575(b).
[57] 337 U.S. 241 (1949).
[58] *Id.* at 242.
[59] *Id.* at 247.
[60] *Id.*
[61] 386 U.S. 605 (1967).

Colorado statute which carried a maximum sentence of ten years. Petitioner was sentenced, however, under the state Sex Offenders Act for an indeterminate term of from one day to life imprisonment.[62] On review, the Supreme Court struck down the sentencing procedure, because the Sex Offender Act in *Specht* did not make the commission of a specified crime the basis for sentencing:

> It 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.[63]

The Court held that this new finding of fact amounted to an additional charge leading to increased criminal punishment. The defendant, therefore, had to be granted greater protections under the due process clause than those referred to in *Williams,* in which all the court had to do was determine the defendant's prior convictions. These additional protections include the right to presence of counsel, to testify in one's own behalf, to confront and cross-examine witnesses, to offer evidence on one's own behalf, and to receive findings of fact adequate to make meaningful any permissible appeal.[64]

The *Specht* Court relied on the United States Court of Appeals' decision in *Gerchman v. Maroney.*[65] The statute involved in *Gerchman* is remarkably similar to the Act in question here. Under the Pennsylvania Barr-Walker Act,[66] the trial court may sentence a person to an indeterminate term after a conviction of a specified sex crime and a finding by the court that the defendant "if at large would constitute a threat of bodily harm" to the public. In addressing the question of how the scope of due process rights are to be applied, the Court of Appeals for the Third Circuit distinguished *Williams* on the basis that the *Barr-Walker* process was criminal, constituting an essentially independent proceeding, rather than a mere sentencing procedure. The issues in *Gerchman* involved a new factual determination, similar to the determination

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[62] The Colorado Sex Offender Act applied if the trial court believed that a defendant convicted of a specified sex offense "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." (*Id.* at 607). This provision should be compared to the corresponding title X provision: "A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." 18 U.S.C.A. § 3575(f) (Supp. 1971).

[63] 386 U.S. at 608.

[64] *Id.* at 608-11.

[65] 355 F.2d 302 (3d Cir. 1966).

[66] PA. STAT. ANN. tit. 19, §§1166-74 (1964).

of dangerousness under title X, which could result in a much enlarged punishment for an essentially independent criminal offense.[67] The defendant's conviction was not allowed to stand for two reasons: the sentencing was based solely on a hearing commission's report containing a confidential psychiatric examination and a probation investigation; and the defendant was deprived of his right to confront and cross-examine the witness against him.[68]

If "due process embodies the differing rules of fair play . . . associated with differing types of proceedings,"[69] then certainly the relevant protections referred to in *Gerchman* take on added significance in the context of the discretion given the judge under title X. Since the due process protections must be expanded to comply with the rights demanded by the nature of the proceeding, the possibility of heavy penalties under title X would seem to require protection relatively equivalent to that afforded in the original determination of guilt. One commentator, in discussing the constitutional implications of title X before the Senate Judiciary Subcommittee,[70] stated that *Williams* would not support taking issues wholesale from the jury to give them to the judge for resolution at the time of sentencing; it would not, for example,

> justify a life sentence for a parking ticket because the judge found as part of the sentencing process that the defendant also committed a premeditated murder.[71]

Though the example may be rather extreme, it raises fundamental issues. On constitutional analysis, it would seem that the factual basis of a determination of guilt which prompts the major portion of a long term sentence should be proved to a jury in the normal criminal trial. Under title X, the judge is in fact assessing the defendant's guilt in an expedited sentencing scheme. While the Supreme Court has recently reaffirmed the idea that the judge should have considerable discretion in sentencing criminal defendants,[72] that discretion may not be as broad as title X suggests.

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[67] 355 F.2d at 309.

[68] *Id.* at 311.

[69] Hannah v. Larche, 363 U.S. 420, 442 (1960).

[70] Remarks of Professor Peter Low of the University of Virginia Law School. *Senate Hearings* 184-213.

[71] *Id.* 187 n.5. Professor Low spoke of a thirty year penalty because under the initial draft of the Act the judge could sentence a defendant to thirty years. This was reduced in the House bill to twenty-five years.

[72] North Carolina v. Pearce, 395 U.S. 711 (1969). The Court held that while basic fifth amendment guarantees against double jeopardy are violated when time already served for an offense is not fully credited in imposing a new sentence after retrial, there is no absolute constitutional bar to imposing a more severe sentence on reconviction. The Court added, however, that the reasons for imposition after retrial of a more severe sentence must affirmatively appear in the record and must be based on objective information concerning the defendant's identifiable conduct after the original sentencing proceeding.

Probably the most basic constitutional question involved in the sentencing provision of title X is whether the right to trial by jury can be denied a defendant simply by calling the judge's function "sentencing." The factual determinations of dangerousness, pattern of criminal conduct, and conspiracy are closely analogous issues usually reserved to the decisions of a jury in the traditional trial setting. Furthermore, the Supreme Court has made clear that the severity of possible punishment is a major factor in deciding if the trial is subject to sixth amendment mandates,[73] and that an offense carrying penalties of more than a few months will entitle the accused to a jury trial.[74] This argument for the requirement of jury trial does not answer the fundamental question of whether the decision made by the judge really constitutes a "trial." However it does point up the fact that by casting the court's discretion in the sentencing format, the necessity of providing a jury trial of issues possibly leading to severe punishment is avoided.

Similarly avoided are traditional rules of admissibility of evidence. Title X places no limitation on the type of "information" the court may receive in assessing the defendant's special offender status.[75] The unlimited definition given to "information"—that which concerns the background, character, and conduct of defendant—would seem to include hearsay, rumor, and even illegally seized evidence. While it is not clear that a court in this setting would or could admit the latter under the exclusionary rule of *Weeks v. United States*,[76] to do so would clearly encourage law enforcement officials to use any method to obtain evidence damaging to the defendant. Indeed, once the initial basis of underlying crime can be proven, there is no practical reason why the police would not be predisposed to employ illegal methods to help the prosecution convince the judge of title X status. While these

[73] District of Columbia v. Clawans, 300 U.S. 617, 625-27 (1937). The Court held, however, that an offense punishable by fine of not more than three hundred dollars or imprisonment of not more than ninety days, is to be classed as a petty offense and may be tried without a jury.

[74] Cheff v. Schnackenberg, 384 U.S. 373 (1966), held that crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. The recent case of Duncan v. Louisiana, 391 U.S. 145 (1968), held that the fourteenth amendment guarantees a right of jury trial in all criminal cases which, were they to be tried in a federal court, would come within the sixth amendment's guarantee of a jury trial. The Court reversed the conviction of the defendant on a battery charge, a misdemeanor punishable by fine of not more than three hundred dollars or imprisonment for not more than two years or both. The defendant had actually been sentenced to a sixty-day term. *Compare* Singer v. United States, 380 U.S. 24 (1965), upholding Federal Rule 23(a)'s provision conditioning an accused's waiver of a jury trial on the court's approval and the Government's consent.

[75] 18 U.S.C.A. § 3577 (Supp. 1971).

[76] 232 U.S. 383 (1914). *Weeks* held that the fourth amendment prevents the use of evidence secured through an illegal search and seizure in a federal prosecution. *See* Mapp v. Ohio, 367 U.S. 643 (1961), extending exclusionary rules to state courts.

possibilities may be avoided by the courts, it is clear that title X contains few internal controls on admissibility of prejudicial, irrelevant or even illegal information.

The problem of admissibility of evidence should be put in the perspective of other due process safeguards afforded the defendant. He is advised at the time of the indictment of his status under title X,[77] and the court can take steps to insure that the defendant's trial is not prejudiced by disclosure of that fact.[78] Prior to sentencing under title X, the defendant is entitled to notice and a hearing at which he can have the assistance of counsel, compulsory process, and the right to cross-examine such witnesses as appear at the hearing.[79] The United States and counsel for the defendant or the defendant himself also have the right to inspect the presentence report a reasonable time before the hearing.[80]

This right of the defendant to inspect the presentence report, one of the more important sources of information to the judge in considering a sentence, is hesitantly given because title X further provides that:

> In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court.[81]

The judge must inform the parties when he withholds such information and state the reason in the record,[82] but a decision to prevent disclosure in a proceeding in which the defendant has so much at stake still raises serious questions of propriety and fundamental fairness.

Initially, it is not clear why the provision allows the judge to withhold irrelevant material. If there exists certain material irrelevant to a proper sentence and yet the judge has, in fact, considered it, there appears to be no valid reason why it should not be included in the record and made known to all parties. The two other situations in which the judge may withhold information, *i.e.*, where there is a diagnostic opinion, and where the material was previously disclosed in open court, may not seriously hinder the defendant in the preparation of his case against the imposition of dangerous special offender status. However, the language which

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[77] 18 U.S.C.A. § 3575(a) (Supp. 1971).
[78] *Id.*
[79] *Id.* § 3575(b).
[80] *Id.*
[81] *Id.*
[82] *Id.*

permits withholding information obtained on a promise of confidentiality may be quite deleterious to the defendant in preparing his case.

This question of the disclosure of identity upon a promise of confidentiality should be read in light of developments in the area of police and prosecution nondisclosure of informants' identity, since the statute does not explain upon whose promise the material may be withheld. The Supreme Court passed on the question of the informer's privilege in *McCray v. Illinois*,[83] holding that the police do not have to disclose the identity of an informer at a probable cause hearing. The Court was careful, however, to distinguish between a hearing on a motion to suppress evidence where the issue was probable cause to arrest, and instances where the privilege was invoked at a trial for determination of ultimate guilt. In the latter situation, the informer's privilege is severely restricted. In *Roviaro v. United States*,[84] the Court treated nondisclosure at trial by saying:

> Where disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause, the privilege must give way.[85]

The Court has sought in a variety of contexts to protect an accused's right of access to prosecution information which may be helpful in preparing a defense. In *Jencks v. United States*,[86] a case decided soon after *Roviaro*, the Court held that the accused were entitled to inspect the reports made to the FBI by two undercover agents who testified at trial. More importantly, the court disapproved of the practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused.[87] Similarly, in *Brady v. Maryland*[88] the Court said that the suppression by the prosecution of evidence favorable to the accused, *i.e.*, an accomplice's statement admitting the killing, violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. It also appears that unless the Government prefers to dismiss a case rather than disclose information obtained through illegal eavesdropping, persons having the proper standing are entitled to examine the government's eavesdropping

[83] 386 U.S. 300 (1967).
[84] 353 U.S. 53 (1957).
[85] *Id.* at 60–61.
[86] 353 U.S. 657 (1957).
[87] *Id.* at 669.
[88] 373 U.S. 83 (1963).

records, to determine to what extent the eavesdropping may have contributed to the prosecution's case.[89]

The rights of confrontation and cross-examination granted in section 3575 will indeed be illusory if the identities of key witnesses are withheld upon "a promise of confidentiality." For example, the defendant need not be convicted on a conspiracy charge to be given an additional sentence as a conspiracy offender, and the judge is evidently authorized to conclude that a conspiracy took place on the basis of information given by an alleged co-conspirator whose identity may be withheld. All this might occur despite the Supreme Court's liberal interpretation of the accused's right to access to sources of prosecutorial information and the Court's decisions since *Pointer v. Texas*[90] construing the accused's constitutional right to confront the witnesses against him.[91] A defendant's right to a fair trial may be severely impaired if the ultimate rationale for the judge's decision is hidden behind confidential or irrelevant information and the nonappearance of damaging informants.

There are, on the other hand, three principal reasons given for nondisclosure of certain information: (1) that sources of information would dry up; (2) that full disclosure would turn a sentencing hearing into a longer affair than the initial trial; and (3) that full disclosure may harm the defendant's eventual chances of

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[89] Alderman v. United States, 394 U.S. 165 (1969). On the standing issue, the Court held that co-conspirators and codefendants whose rights were not directly violated by the illegal eavesdropping had no standing to object to the admission of the fruits of eavesdropping. The owner of the premises, on the other hand, did have standing even if he was not present and did not participate in the conversation which was overheard.

[90] 380 U.S. 400 (1965).

[91] In *Pointer*, the Supreme Court established that the right granted an accused by the sixth amendment to confront witnesses against him, which includes the right of cross-examination, is a fundamental right essential to a fair trial and is made obligatory on the states by the fourteenth amendment. The conviction in the state proceeding was reversed, since the introduction of the transcript of a preliminary hearing in a federal criminal case would have been a clear denial of the right of confrontation if there had, as here, been no cross-examination. In the companion case of Douglas v. Alabama, 380 U.S. 415 (1965), the Court held that the petitioner's inability to cross-examine an alleged accomplice about a purported confession implicating the petitioner and the prosecutor's reading of the confession in cross-examination, even though the accomplice refused to testify on fifth amendment grounds, denied petitioner the right to cross-examine the witness. Three years later in Bruton v. United States, 391 U.S. 123 (1968), the Court reversed the conviction of a defendant at a joint trial because the trial court admitted the codefendant's confession inculpating the defendant. This was held to violate the petitioner's right of cross-examination, despite the court's qualifying instruction. *But see* California v. Green, 399 U.S. 149 (1970), which held that the prior statement of a witness made at a preliminary hearing, under oath, and subject to full cross-examination by defendant's counsel was admissible, and Dutton v. Evans, 400 U.S. 74 (1970) which upheld Georgia's co-conspirator hearsay exception, even though it did not coincide with the narrower exception applicable in federal conspiracy trials. Georgia's rule allowed into evidence a co-conspirator's out-of-court statement made during the concealment phase of the conspiracy.

rehabilitation.[92] After a study of reports and testimony drawn from jurisdictions which lived with a system of full disclosure, an ABA study committee rejected all three justifications.[93] To deprive the defendant of a chance to attack the evidence against him weakens what faith he has in the judicial system. Conversely, by affording access to such information, the defendant is at least given the opportunity to arrive at some understanding of the sentencing process.[94] Finally, full disclosure, with the limited exception of diagnostic material, might result in the improved quality of investigation and reporting.[95] On strictly policy grounds, then, there is an argument that title X is not the best approach to a special penal problem.

Analogous constitutional arguments can be raised against the final phrase of the sentencing process under title X. After all the evidence from whatever source has been submitted, the judge is to make his finding of "dangerous special offender" on a bare "preponderance of the information,"[96] rather than the usual standard of "beyond a reasonable doubt" often cited as an element of due process in criminal cases.[97] Though *Williams v. New York*[98] clearly allows a standard below reasonable doubt in the normal sentencing hearing, determinations by the judge under title X involve considerably more important issues than in the usual

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[92] ADVISORY COMMITTEE ON SENTENCING AND REVIEW, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE 218-23 (Tent. Draft, Dec. 1967), reprinted in part L. HALL, Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1074-77 (3d ed. 1969).

[93] The study committee concluded that the first reason had no basis in fact. *See also* P. TAPPAN, CRIME, JUSTICE AND CORRECTION 558 (1960), pointing out that disclosure is needed to offset the reports "in which emotionally intoned value judgments are liberally distributed, diagnostic terms loosely and inaccurately used, (and) prejudicial epithets ('immoral', 'depraved', 'corrupt') employed." The second proposition was rejected as an attempt to avoid providing constitutional protections on the ground of expedience. Such nondisclosure would prevent the defense attorney from adequately representing the defendant. MODERN CRIMINAL PROCEDURE *supra* note 92, at 1076. Even if legitimate, the final rationale was unacceptable in the view of the ABA committee as a justification for denying the disclosure of any information relevant to the defense of the accused. *Id.* 1077. Full disclosure may be an important aid in the possible rehabilitation of a defendant. When an individual is placed in prison without learning of the exact reason for the imposition of his sentence, his willingness to cooperate is reduced greatly. Speech by B. James Wright, Director of Citizens Probation Authority, Genessee County, Michigan, to the Institute for Continuing Legal Research, Detroit, Michigan, Jan. 22, 1971. His ability to mentally adjust to prison life is similarly affected. To remove this mental block would in many instances greatly enhance the chances of eventual rehabilitation. *Id.*

[94] S. RUBIN, THE LAW OF CRIMINAL CORRECTION 93 (1963).

[95] P. TAPPAN, *supra* note 93, at 558.

[96] 18 U.S.C.A. § 3575(b) (Supp. 1971).

[97] *See* Frankfurter, J., dissenting in Leland v. Oregon, 343 U.S. 790 (1952); Maxwell v. Dow, 176 U.S. 581 (1900); Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953). *See generally Waiver of Jury Unanimity-Some Doubts About Reasonable Doubt,* 21 U. CHI. L. REV. 438 (1954); Ryan, *Less Than Unanimous Verdicts in Criminal Trials,* 58 J. CRIM. L.C. & P.S. 211 (1967).

[98] 337 U.S. 241 (1949).

criminal case. *Specht v. Patterson*[99] stands for the principle that a defendant must be afforded certain due process procedural rights in a particular kind of sentencing hearing in which there is a separate determination of fact which may lead to an increased term. Surely title X is more like the statute involved in *Specht* than the one in *Williams*—whether the defendant is dangerous and belongs to one of the three categories of special offender seem to be independent determinations of fact. If this is the case, the prosecution should be required to meet a reasonable doubt standard before the defendant can constitutionally be subjected to the increased penalties of title X. Yet, even should the preponderance of the information standard be found within the requirements of due process when standing alone, considered in conjunction with the other provisions of the Act, the constitutionality of title X must be questioned.

IV. PRESUMPTIONS

The legislative presumption established by section 3575(e) is also vulnerable to a due process challenge. For a defendant to be properly placed in the special offender category under this provision, it is only necessary that three conditions be fulfilled: (1) the felony must be a part of a criminal pattern of conduct; (2) the defendant must exhibit a special skill or expertise in the commission of the crime; and (3) the income derived from the criminal pattern of conduct must account for a substantial portion of the defendant's income. The section provides that substantial property or income in a defendant's name or under his control, otherwise unexplained, may be presumed to be derived from a criminal pattern of conduct. This provision thus shifts the burden of proof necessary to classify a defendant as a "special offender" under section 3575(e) from the prosecution to the defendant. Therefore, the defendant must satisfactorily explain the sources of his income and property in order to rebut the presumption they they flowed to him as the fruits of a criminal pattern of conduct.

It is well established that legislatures have the power to regulate the introduction of evidence in the courts.[100] The establishment of a presumption is merely an exercise of this authority

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[99] 386 U.S. 605 (1967).

[100] Fong Yue Ting v. United States, 149 U.S. 698, 729 (1893). The Supreme Court upheld the validity of a statute which declared that the failure of a Chinese alien to have a certificate of residence in his possession gave rise to a natural inference of an intentional failure to procure such a certificate and unlawful residence in the United States. *See also* Tot v. United States, 319 U.S. 463, 467 (1943); Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35, 42 (1910); Adams v. New York, 192 U.S. 585, 599 (1904).

to prescribe what evidence is admissible,[101] whether in criminal[102] or civil cases.[103] However, the authority of Congress to create such presumptions is limited by the due process clause of the fifth amendment.[104] Early cases were unclear as to exactly what limits were imposed by the due process clause,[105] but the Supreme Court, in *Tot v. United States,*[106] adopted the "rational connection" test between the basic fact and the presumed fact. In *Tot,* the Court struck down a statutory inference that possession of a firearm or ammunition by a person convicted of a crime of violence was presumptive evidence that such firearm or ammunition was shipped in interstate or foreign commerce. In invalidating the presumption, the Court declared that "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed. . . ."[107] Because some states did not have firearms registration requirements, the firearms could have been acquired unlawfully, or prior to the adoption of state regulations, or prior to the adoption of the statute. Thus the Court felt that a rational connection between the fact proved (possession) and the fact presumed (illegal interstate shipment) did not exist.[108]

The "rational connection" test, originally promulgated in two civil cases,[109] has been employed by the Supreme Court in four cases involving criminal statutory presumptions handed down since *Tot.* In *Leary v. United States,*[110] which invalidated the statutory presumption that possession of marijuana was prima

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[101] Fong Yue Ting v. United States, 149 U.S. 698, 729 (1893); Tot v. United States, 319 U.S. 463, 467 (1943).

[102] Adams v. New York, 192 U.S. 585 (1904). In *Adams,* a legislative presumption that possession of a policy slip was evidence of knowing possession thereof was held valid. Similarly, in Hawes v. Georgia, 258 U.S. 1 (1922), the presumption that the physical presence of a still was evidence that the person in actual possession of the premises knew of its existence was sustained.

[103] Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910), involved the inference in a Mississippi statute that injury to persons or property by railroads was prima facie evidence of want of skill on the part of the railroad.

[104] Tot v. United States, 319 U.S. 463, 467 (1943).

[105] Leary v. United States, 395 U.S. 6, 32 (1969). These tests included asking whether there was a "rational connection" between the basic fact and presumed fact, whether the basic fact from which the presumption authorized the inference was itself a crime, and whether it was more convenient for the defendant, as opposed to the prosecution, to produce the facts. *Id.* at 32, n.56.

[106] 319 U.S. 463 (1943).

[107] *Id.* at 467.

[108] *Id.* at 468.

[109] Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910); McFarland v. American Sugar Ref. Co., 241 U.S. 79 (1916). In *McFarland,* the Court enjoined the threatened enforcement of a statute which made a sugar refinery's act of paying a lower price for sugar in Louisiana than in other states presumptive evidence that the refinery was a party to a conspiracy to monopolize.

[110] 395 U.S. 6 (1969).

facie evidence of illegal importation and that the defendant knew of such illegal importation, the Court stated "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[111] After empirical examination of the importation of marijuana, the Court concluded that most domestically consumed marijuana is in fact imported.[112] Nevertheless, the Court still struck down the presumption. It was impossible, the Court believed, to state that marijuana users were aware of the origin of the product they were consuming, because a significant percentage of domestically consumed marijuana may not have been imported.[113] The Court rejected the hypothesis that possessors of marijuana were aware of the proportion actually imported, without proof to that effect.[114]

For the section 3575(e) presumption to be sustained under the *Leary* test, it must be more likely than not that a defendant who has committed a felony which is part of a special pattern of criminal conduct, and who has exhibited some special expertise, draws a substantial part of his income from such pattern of conduct. For a source of income to be "substantial" under the Act, it must exceed $3200 over a period of one year,[115] and equal over one-half of the defendant's adjusted gross income under section 62 of the *Internal Revenue Code*.[116] Thus a factory worker who sold betting cards at his place of employment, netting $1500 yearly out of a total income of nine thousand dollars yearly, would be subject to the presumption of section 3575(e), although he would not come within the "substantial source of income" definition. To maintain that it is more likely than not that such a felon, with such expertise, derives a substantial source of his income from such criminal activity borders on the specious. Under the

[111] *Id.* at 37.

[112] *Id.* at 44.

[113] *Id.* at 46.

[114] In the 1970 case of Turner v. United States, 396 U.S. 398 (1970), the Supreme Court utilized the same standard as in *Leary* to sustain a similar legislative presumption regarding heroin and to invalidate one involving cocaine. The other two cases in which the Supreme Court has examined a criminal statutory presumption are United States v. Gainey, 380 U.S. 63 (1965), and United States v. Romano, 382 U.S. 136 (1965). In the former, the presumption that a defendant's presence at an illegal still was evidence that he was carrying on the business of a distiller was allowed to stand. In the latter, the presumption that a defendant's presence at an operating still was evidence of his control over it was held unconsititutional, because the defendant's presence at the still, without proof of his function, had too tenuous a connection with control.

[115] This figure is based on the minimum wage as set down in 29 U.S.C.A. § 206(a)(1) (Supp. 1970) for a forty hour week and a fifty week year.

[116] 18 U.S.C.A. § 3575(e) (Supp. 1971).

Leary test, there can be no "substantial assurance" that the presumed fact is more likely than not to flow from the established fact in such a situation. The fact that the defendant has access to the information which can rebut the presumption cannot sustain an otherwise invalid presumption.[117] To analogize section 3575(e) to the *Leary* line of cases might be questioned because the unconstitutional statutory presumptions all involved determinations of guilt rather than of sentencing. For the reasons discussed in the preceding section, however, it would seem permissible to regard a title X proceeding as a de facto determination of guilt. In any event, the due process standard has been applied to both civil and criminal statutory presumptions.[118]

V. DOUBLE JEOPARDY

The last major area of controversy embodied in title X is the provision allowing either the defendant or the prosecutor to appeal sentences rendered under the Act.[119] This will, no doubt, raise double jeopardy challenges. Most appeals of criminal cases are currently initiated by the defendant and not the prosecutor. Those instances in which prosecutors may appeal from erroneous trial rulings appear to be limited to some state proceedings,[120] and the only appeal previously allowed the federal government applied to interlocutory orders.[121]

Section 3576 concerns only the "imposition, correction, or reduction of the sentence" after the title X sentencing hearing. It

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[117] Leary v. United States, 395 U.S. 6, 32–34 (1969); Tot v. United States, 319 U.S. 463, 467, 469–70 (1943).

[118] The § 3575(e) presumption may also violate the fifth amendment privilege against self-incrimination, in that the presumption applies unless the defendant comes forward to explain the sources of his property and income. United States v. Gainey, 380 U.S. 63, 76 (1965) (Black, J. dissenting); Turner v. United States, 396 U.S. 398, 432 (1970) (Black & Douglas, JJ., dissenting). "Presumptions . . . tend to coerce and compel the defendant into taking the witness stand in his own behalf, in clear violation of the accused's Fifth Amendment privilege against self-incrimination." *Id.* at 432. However, in *Gainey*, the Court held that a statutory presumption that presence at an illegal still was presumptive evidence of the crime of carrying on the business of a distillery was not a comment on the defendant's failure to take the stand in his own behalf. Similarly, in the latest Supreme Court pronouncement on the issue, it was noted that the lower court had rejected the petitioner's self-incrimination claim, and that the high court was addressing itself to another issue. Turner v. United States, 396 U.S. 398, 403 (1970). Several United States Court of Appeals decisions have specifically addressed the self-incrimination claim and rejected it. United States v. Turner, 404 F.2d 782 (3d Cir. 1968), *rev'd in part on other grounds*, 396 U.S. 398 (1970); United States v. Armone, 363 F.2d 385 (2d Cir. 1966); United States v. Secondino, 347 F.2d 725 (2d Cir.), *cert. denied*, 382 U.S. 931 (1965); Williams v. United States, 328 F.2d 256 (8th Cir.), *cert. denied*, 377 U.S. 969 (1964).

[119] 18 U.S.C.A. § 3576 (Supp. 1971).

[120] *See, e.g.*, State v. Lee, 65 Conn. 265, 30 A. 1110 (1894); State v. Witte, 243 Wis. 423, 10 N.W.2d 117 (1943).

[121] 18 U.S.C. §§ 3731, 2518(10) (1964).

allows for appeal by either party to the court of appeals.[122] At the same time, the section provides several safeguards for the defendant. To prevent the prosecutor from appealing as a harassment technique, any review by the United States must be taken at least five days prior to the defendant's deadline. Moreover, any appeal by the Government becomes an automatic appeal by the defendant. If an appeal is taken by either party, the court of appeals is authorized to affirm or remand any sentence. In addition, the appeals court may impose or direct imposition on any sentence which the sentencing court could have originally imposed. However, any increase in sentence may only be pursuant to a Government appeal and following a court hearing.[123] Finally, the court of appeals must include in the record the reasons for its decision.

A study of these provisions of title X suggests that a double jeopardy attack on this section may be made on the basis of *Kepner v. United States*.[124] In that case the Supreme Court held governmental appeal from an acquittal would violate the double jeopardy prohibition of the sixth amendment. Although *Kepner* is still good law, present interpretations of that case might well emphasize the fact that the case was appealed on the question of guilt. Modern cases still forbid relitigation that will result in a finding of greater guilt. For example, in *Green v. United States,*[125] the defendant was charged with first degree murder, but convicted of second degree. After successfully appealing his conviction, he was retried and convicted on the original first degree charge. The

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[122] This section is ambiguous in the sense that it doesn't specify which sentence may be appealed. It would seem that the obvious intent of this section would be to allow appeal of the "special offender" sentencing only. However, under a reasonable reading, the prosecutor could also appeal the sentence for the underlying or triggering offense. This could come about where the trial judge refused a finding of special offender status.

[123] 18 U.S.C.A. § 3576 (Supp. 1971), includes three provisions each underlining the proposition that there may be no increase in sentence upon defendant's appeal.

[124] 195 U.S. 100 (1904). Although prior to this decision, the Supreme Court had in United States v. Ball, 163 U.S. 662 (1896), upheld the permissibility of retrial after reversal on defendant's appeal of a guilty finding, *Kepner* did not fall within the parameters of the principal theory that has been advanced to support retrial after reversal. This theory was articulated in United States v. Tateo, 377 U.S. 463 (1964), where the Court suggested that retrial following reversal was proper based on the society's interest in punishing a guilty defendant who obtains reversal merely on technical grounds. The *Kepner* decision is distinguishable from the *Ball* decision on the ground that the defendant in *Ball* had achieved reversal of his conviction on the basis of procedural defects in the indictment thus permitting retrial of the issue of his guilt, whereas the defendant in *Kepner* was acquitted after a trial on the merits by the jury. Thus, in the words of the *Kepner* court, "we are not here dealing with [a situation in which defendant] is legally put in jeopardy, as where a discharge is had upon a motion to quash, *or a demurrer to the indictment*. . . ." 195 U.S. at 130. Thus, where acquittal is based on reversal due to technical or procedural defects, retrial of the issue of guilt is permissible. However, where a competent court has convicted the accused on the merits of the accusation, the double jeopardy clause bars his retrial.

[125] 355 U.S. 184 (1957).

Supreme Court reversed on the ground that the original jury decision implied an acquittal of the first degree charge. The Court thereby determined that a decision for lesser guilt creates a double jeopardy bar to relitigation producing greater guilt.

The question of guilt or innocence is not what Congress apparently intended, however, in drafting title X. Instead, the role of the judge purportedly is sentencing. The judge determines whether the defendant falls within the special offender provisions and, if so, the length of additional sentence to be imposed.[126] If the Government appeals, then the appellate court may affirm, reverse, remand, or itself impose any sentence the trial court could have originally imposed.[127] If the proceeding under title X is only a mechanism for altering the sentence, then it is a proceeding which has been sanctioned by the Supreme Court. In *North Carolina v. Pearce*,[128] the Court held that the fifth amendment double jeopardy clause consists of three factors:[129] (1) protection against a second prosecution for the same offense after acquittal;[130] (2) protection against a second prosecution for the same offense after a conviction;[131] and (3) protection against multiple punishments.[132] The Court qualified this second factor by citing the precedent established in *United States v. Ball* that the defendant may always be retried after he succeeds in getting his first conviction reversed,[133] and that if the defendant is reconvicted, the court may impose a legally authorized sentence whether or not it is greater than the sentence imposed after the first conviction.[134]

Nevertheless, realizing that due process problems might arise because of "retaliatory motivations" by a judge against defendants who successfully appeal, the Court created a new test with which the trial court must comply. Whenever a judge imposes a more severe sentence, the reasons must be based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentence proceeding."[135]

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[126] 18 U.S.C.A. § 3575(b) (Supp. 1971).

[127] *Id.* § 3576.

[128] 395 U.S. 711 (1969).

[129] *Id.* at 717.

[130] Citing United States v. Ball, 163 U.S. 662 (1896), and Green v. United States, 355 U.S. 184 (1957).

[131] Citing *In re* Nielsen, 131 U.S. 176 (1889).

[132] Citing United States v. Benz, 282 U.S. 304 (1931).

[133] 395 U.S. at 719-20:

> At least since 1896, when *United States v. Ball* . . . was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside.

[134] 395 U.S. at 720.

[135] *Id.* at 726. In addition, these factors must be placed on the record for further appeal.

Three arguments may be asserted that would deny *Pearce* controlling effect over the application of title X. First, it can be suggested that *Kepner* should be read to prohibit still all government appeals. Second, it may be alleged that the special test set forth in *Pearce* cannot be met by either the appellate or trial court on remand because the basis for overturning the title X sentence was not objective information gained by the court about defendant's conduct after the first sentencing. Finally, and most importantly, the defendant may argue that the trial court's determination under title X is really a judgment of guilt and not a sentencing determination. If title X does create judgments on guilt, then the prohibitions of *Green v. United States,*[136] since not only approved but applied to the states through *Benton v. Maryland,*[137] deny a relitigation that could entail a finding of greater guilt.

Moreover, there are several countervailing policy reasons militating against the prosecutor's appeal provision in title X. Perhaps the most convincing argument is the added plea bargaining power that such a measure would inherently bestow upon the United States Attorneys. In a statement to the Senate Subcommittee on Criminal Laws and Procedures, one critic of the provision made the following observations:

> Of course, one of the major difficulties posed by the sentencing structure suggested by this bill is the fact that an additional weapon—the capacity to charge or not to charge an offender with being a recidivist or a professional offender—is added to the arsenal of the prosecutor available for use in the guilty plea bargaining process. . . . In many if not most cases, a more serious charge is possible as an inducement to plead guilty to a less serious offense. . . .[138]

The danger embodied in such an extension of power becomes all the more important when analyzed in light of the scope of the offenses involved. Title X will be available for use in most conspiracy cases as well as individual cases involving "professional offenders." In view of the recent Supreme Court decision involving acceptance of guilty pleas by a hesitant defendant,[139] the magnitude of this inherent power is greatly increased.

In concurring, Justice Douglas expressed the belief that under no circumstances should a greater punishment be imposed after successful attack of a previous conviction. *Id.* at 732–33. Justice Harlan agreed with this rationale given in the decision in Benton v. Maryland, 395 U.S. 784 (1969) which made the double jeopardy clause binding on the states through the fourteenth amendment.

[136] *See* text accompanying note 125 *supra.*

[137] 395 U.S. 784 (1969).

[138] *Senate Hearings* 197 (remarks by Professor Peter Low of University of Virginia Law School).

[139] In North Carolina v. Alford, 400 U.S. 25 (1970), the Supreme Court greatly ex-

A second reason for eliminating the government's right to appeal is based upon the traditional nature of the sentencing process. Sentencing is the function of the judge, not the prosecutor. As stated by the Supreme Court in *Williams v. New York,* the sentencing judge's "task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined."[140] The American Bar Association, citing an English study of the judge's role in sentencing, said that the prosecutor's appeal, though logical, "would be a complete departure from our tradition that the prosecutor takes no part, or the minimum part, in the sentencing process."[141]

VI. CONCLUSION

Title X is an attempt to deal with an urgent problem. The need to protect the public from the oppression of organized crime cannot be doubted. However, urgency alone does not justify the abandonment of either constitutional principles or common sense. Much of the language in title X does seem to threaten constitutional rights even if not to abridge them. Certainly, by congressional intent, the title X defendant is not to be given those rights that inhere in the ordinary criminal process where facts are applied to purported wrongdoing and the guilt thereof is determined.

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panded the courts' ability to accept guilty pleas despite a disclaimer of guilt. Appellee was indicted on a first degree murder charge. Appellee's attorney recommended and the prosecutor accepted a plea of guilty for second degree murder. Appellee so pleaded, although disclaiming guilt, because of the threat of the death penalty upon a finding of guilty by a jury. The court of appeals reversed, holding that the guilty plea was involuntary. The Supreme Court reversed the appeals court. The Court held that the standard remains "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.* at 31. Attaching great weight to defendant's representation of competent counsel, the Court refused to find a violation of this standard:

> Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered . . . its validity cannot be seriously questioned. *Id.* at 37-38.

[140] 337 U.S. 241, 246 (1949).

[141] *See* ABA STANDARDS, APPELLATE REVIEW OF SENTENCES, 141-42 (Tent. Draft. April, 1967). *See also* Professor Low's comments in *Senate Hearings* 197.