of the reasons relied upon in revoking probation.[3233]

PAROLE

The purpose of parole is to integrate prisoners into society by allowing them to serve a portion of their sentences outside prison.[3234] While on parole, the parolee is subject to the continuing supervision[3235] of a parole or probation officer and to the conditions and rules imposed.[3236] These conditions may significantly restrain the parolee's freedom.[3237] If a parolee vio-

3233. Black v. Romano, 471 U.S. at 612; *Gagnon,* 411 U.S. at 786; *see* United States v. Holland, 850 F.2d 1048, 1050 (5th Cir. 1988) (although probationer admitted violation, failure of court to provide written statement setting forth its reasons for revocation violated due process); United States v. Smith, 767 F.2d 521, 524 (8th Cir. 1985) (although hearing transcript existed, requirement that probationer be given written statement of reasons for revocation not satisfied when impossible to determine from record reasons for revocation).

3234. Morrissey v. Brewer, 408 U.S. 471, 477 (1972). Parole also reduces the costs society must bear for the confinement of criminals and eases the pressure on overcrowded prisons. *Id.*

3235. *See* Taylor v. United States Parole Comm'n, 734 F.2d 1152, 1153 (6th Cir. 1984) (parole is convict's conditional release before term's expiration, subject to appropriate public authority's continuing supervision and reimprisonment for violation of parole conditions).

3236. Under the Sentencing Reform Act, the sentencing judge imposes conditions, in contrast to previous law, which gave the Parole Commission that responsibility. *Compare* 18 U.S.C. § 3583(d) (Supp. IV 1986) (articulating conditions sentencing judge may impose) *with* 18 U.S.C. § 4209 (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 1987, 2027 (articulating conditions Parole Commission may impose). Parole conditions are designed to ensure that the parolee is adequately supervised and that the public welfare is protected. *See* United States v. Jarrad, 754 F.2d 1451, 1454 (9th Cir.) (parole officers serve dual function of protecting societal interests and helping rehabilitate parolee), *cert. denied,* 474 U.S. 830 (1985).

Under new law after the Sentencing Reform Act, the probation officer replaces the parole officer as the direct supervising authority for parolees. 18 U.S.C. § 3603(a) (Supp. IV 1986). Prisoners incarcerated before Nov. 1, 1987, however, will be supervised under the old law until Nov. 1, 1992. Sentencing Reform Act of 1984, Pub L. No. 98-473, 98 Stat. 1987, 2032 *reprinted in* 18 U.S. C. § 3551 note (Supp. IV 1986).

3237. *See* United States v. Kreager, 711 F.2d 6, 8 (2d Cir. 1983) (per curiam) (no abuse of discretion to impose parole condition requiring parolee to file delinquent income tax returns); Bagley v. Harvey, 718 F.2d 921, 925 (9th Cir. 1983) (parole condition forbidding parolee from traveling to former state of residence permissible when evidence indicated he threatened several individuals there). A parolee has a lesser privacy expectation than a normal citizen and therefore a more limited sphere of fourth amendment protections. *See* United States v. Thomas, 729 F.2d 120, 123-24 (2d Cir.) (parole officer's examination in his office of parolee's forearm for needle injection marks and subsequent search of his person and clothing not violation of parolee's privacy expectation), *cert. denied,* 469 U.S. 846 (1984); United States v. Scott, 678 F.2d 32, 35 (5th Cir. 1982) (parole officer's deceptive seizure of parolee's handwriting and typewriting sample permissible when based on reasonable suspicion); United States v. Pagel, 854 F.2d 267, 271-72 (7th Cir. 1988) (warrantless stop and search of parolee's car which was in possession of parolee's friend permissible when parole officer had searched parolee's home and found gun different from gun parolee suspected of having); United States v. Rabb, 752 F.2d 1320, 1322-23 (9th Cir. 1984) (parolee's arrest upheld when officer, suspecting criminal activity, entered hotel room after discovering that parolee was not at registered address, because society's interest in apprehending parole violators outweighs parolee's privacy interest), *cert. denied,* 471 U.S. 1019 (1985); *cf.* Griffin v. Wisconsin, 107 S. Ct. 3164, 3169 (1987) (warrantless search of probationer's residence based on "reasonable grounds" permissible under fourth amendment and reflects supervisory nature of relationship). *But see* United States v. Brad-

lates a parole condition, the parole may be revoked and the parolee reincarcerated.[3238]

Repeal of the Parole Commission and Reorganization Act. The law governing parole of federal prisoners before November 1, 1987, was the Parole Commission and Reorganization Act of 1976 ("PCRA").[3239] The PCRA was repealed, effective November 1, 1987,[3240] and replaced by the Sentencing Reform Act of 1984.[3241]

Although the Sentencing Reform Act became effective November 1, 1987, the Parole Commission and corresponding statutory provisions related to parole will govern prisoners who committed crimes before November 1, 1987, until November 1, 1992.[3242] Before the end of this five-year period, the Parole Commission must set a release date for all individuals incarcerated under the PCRA.[3243] The Parole Commission may give prisoners the option of being released under the Sentencing Reform Act if that sentence would be

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ley, 571 F.2d 787, 790 (4th Cir. 1978) (parole officer must secure warrant before searching parolee's residence).

3238. 18 U.S.C. §§ 4213(a)(2) & 4214(d)(5) (1982) (repealed 1984). Upon parole revocation, the parolee may be required to forfeit his good time credits earned prior to parole revocation. Thompson v. Lacey, 817 F.2d 1315, 1317 (8th Cir. 1987) (per curiam); *see* Culp v. Keohane, 822 F.2d 641, 642 (6th Cir. 1987) (per curiam) (prisoner reincarcerated for parole violation need not be credited with "good time" earned prior to parole).

3239. Pub. L. No. 94-233, 90 Stat. 219 (codified as amended at 18 U.S.C. §§ 4201-4218 (1982) (repealed 1984)).

3240. Sentencing Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728, *reprinted in* 18 U.S.C. § 3551 note (Supp. IV 1986) (delaying effective date of Sentencing Reform Act one year to Nov. 1, 1987).

3241. Pub. L. No. 98-473, § 218(a)(5), 235, 98 Stat. 1987, 2027 (codified as amended at 18 U.S.C. 3551-59, 3561-66, 3571-74, 3581-86, 28 U.S.C. §§ 991-98 (Supp. IV 1986). In general, the Sentencing Reform Act's purpose is to modernize criminal sentencing and minimize reliance on the rehabilitative model of sentencing. S. REP. No. 225, 98th Cong., 1st Sess., at 38-39, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 221-22. The Act is also intended to reduce the sentencing disparity under old law and to provide greater certainty for prisoners in their release date calculations. *Id.*

3242. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 2032 (1984), *reprinted in* 18 U.S.C. § 3551 note (Supp. IV 1986) (chapter 311 to remain in effect for five years after Sentencing Reform Act takes effect); *see* Romano v. Luther, 816 F.2d 832, 837-39 (2d Cir. 1987) (five-year transition period starts on effective date of Sentencing Reform Act).

Although the Parole Commission and Reorganization Act has been repealed by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 218(a), 225, 98 Stat. 1987, 2027, the cases decided under the old law have been retained for the benefit of those *Criminal Procedure Project* users eligible for parole under the old law.

3243. S. REP. No. 225, *supra* note 1, at 189 & n.430, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3372 & n.430; *see* Romano v. Luther, 816 F.2d 832, 837 (2d Cir. 1987) (provision requiring Parole Commission to set release dates after five years became effective on Sentencing Reform Act's effective date: Nov. 1, 1987); Kele v. Carlson, 854 F.2d 338, 340 (9th Cir. 1988) (per curiam) (same). The Parole Commission need not set the parole release date within the prisoner's applicable guidelines, but it must be early enough to permit the parolee to appeal before the end of the transitional period. Romano v. Luther, 816 F.2d at 839. Prisoners who will be on parole or mandatory supervised release before November 1, 1992, are not entitled to a release date set under

shorter.[3244]

Under the PCRA, the Parole Board had the power to release a prisoner on a supervised basis before he had fully served his sentence.[3245] Any conditions imposed could only be in effect for the remainder of the sentence.[3246] In contrast, under the Sentencing Reform Act, the prisoner must serve the actual length of his sentence and, additionally, a term of supervised release after his term of imprisonment if the sentencing judge requires it.[3247] The court must order a term of supervised release when a sentence of imprisonment for more than one year is imposed and may order a term of supervised release for lesser sentences.[3248] Furthermore, the Sentencing Reform Act specifies various factors for the sentencing judge to consider in determining the defendant's need for supervision after release from prison.[3249] A judge may terminate the term of supervised release after one year.[3250]

The United States Sentencing Commission has developed guidelines to help judges decide the length of a supervised release.[3251] The guidelines require terms ranging from one year for misdemeanors and less serious felonies to five years for more serious felonies.[3252] The Sentencing Reform Act also allows a judge to impose any condition reasonably related to the Act's policy goals or to any guidelines promulgated by the Commission.[3253] In addition, the judge must order the defendant not to commit another violation of the law while on supervised release.[3254]

Under the new law, probation officers replace parole officers in supervising

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the Sentencing Reform Act. Lightsey v. Kastner, 846 F.2d 329, 332 & n.16 (5th Cir. 1988); Miller v. Story, 814 F.2d 320, 320-21 (6th Cir. 1987) (per curiam); Kele v. Carlson, 854 F.2d at 340.

The Sentencing Reform Act of 1987 in clarifying the Parole Commission's role, provides that the Commission must set parole release dates pursuant to its general parole release statute. Sentencing Act of 1987, Pub. L. No. 100-182, § 2(b)(2), 101 Stat. 1266, 1266 (1987).

3244. S. REP. No. 225, *supra* note 1, at 189 & n.430, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3372 & n.430.

3245. 18 U.S.C. § 4205 (1982) (repealed 1984).

3246. *See* S. REP. No. 225, *supra* note 1, at 122-25, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3305-08 (discussing PCRA provisions and changes under new law).

3247. 18 U.S.C. § 3583 (Supp. IV 1986); *see* S. REP. No. 225, *supra* note 1, at 122-24 (discussing how supervised release is separate component of defendant's sentence), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3306-07.

3248. *Sentencing Guidelines*, § 5D3.1, *supra* note 1.

3249. 18 U.S.C. § 3583(c) (Supp. IV 1986) (factors include offense's nature and circumstances, defendant's history and characteristics, need for deterrence, public protection, and defendant's need for educational or vocational training), *amended by* Sentencing Act of 1987, Pub. L. No. 100-182, § 9, 101 Stat. 1266, 1267 (1987).

3250. *See id.* § 3583(e) (governing term or condition modification).

3251. *See generally Sentencing Guidelines, supra* note 1.

3252. *Id.* § 5D3.2.

3253. 18 U.S.C. § 3583(d) (Supp IV 1986) (conditions must be reasonably related to seriousness of offense, adequacy of deterrence, and provision of vocational training).

3254. *Id.*

the released prisoners.[3255] The probation officer must provide the prisoner with a clear statement of the conditions of the supervision.[3256] Any violation can be construed as contempt of court[3257] and may justify the imposition of sanctions.[3258] The court must revoke probation upon finding a violation of supervised release involving new criminal conduct, unless the criminal conduct only constitutes a petty offense[3259]

Parole Under the Parole Commission and Reorganization Act. The Parole Commission's discretion to release a defendant is very broad.[3260] A federal prisoner sentenced to a definite term exceeding one year is normally eligible for parole after serving one-third of the sentence.[3261] A prisoner serving a life sentence or a sentence exceeding thirty years is eligible for parole after serving ten years.[3262] The circuits are in disagreement, however, as to whether the sentencing judge may specify a mandatory minimum incarceration term that exceeds ten years.[3263] The sentencing judge also has the au-

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3255. *Id.*; S. REP. NO. 225, *supra* note 1, at 125, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3308.

3256. 18 U.S.C. § 3583(f) (Supp. IV 1986).

3257. *Id.* § 3583(e)(2); *see* S. REP. NO. 225, *supra* note 1, at 125, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3308 (discussing availability of contempt orders pursuant to 18 U.S.C. § 401(3)).

3258. *Id.* Congress intended that for most violations, criminal contempt proceedings would be adequate. S. REP. NO. 225, *supra* note 1, at 125, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3308. A court may modify the conditions upon violations. *Id.*

3259. *Sentencing Guidelines,* § 7A1.3, *supra* note 1.

3260. *See* Bryant v. Warden, 776 F.2d 394, 397 (2d Cir. 1985) (Parole Commission has broad discretion to grant or deny parole, as well as to determine weight of mitigating factors; Parole Commission need not credit chronic parole violator with excess time served on previous parole violator term), *cert. denied,* 475 U.S. 1023 (1986); Goble v. Matthews, 814 F.2d 1104, 1108-09 (6th Cir. 1987) (Parole Commission's power to implement statutory provisions for parole is "'broad' "; therefore, Commission may reaffirm presumptive release date based on inadvertently overlooked file information) (quoting Williams v. United states Parole Comm'n, 707 F.2d 1060, 1063 (9th Cir. 1983)); Turner v. Henman, 829 F.2d 612, 614-15 (7th Cir. 1987) (because parole decisions committed to agency discretion, prisoner challenging Commission's alleged failure to follow its own regulations and rules in determining his parole date not entitled to habeas relief unless some constitutional provision also violated); Turner v. United States Parole Comm'n, 810 F.2d 612, 617 (7th Cir. 1987) (dictum) (Parole Commission, in its discretion, need not grant parole even when court reduced minimum sentence to time served); *cf.* Kramer v. Jenkins, 800 F.2d 708, 709 (7th Cir. 1986) (per curiam) (when prisoner appeals from Parole Commission's decision to deny parole, court will grant bail only in exceptional circumstances).

3261. 18 U.S.C. § 4205(a) (1982) (repealed 1984).

3262. *Id.*

3263. Courts have read 18 U.S.C. § 4205(a) and 18 U.S.C. § 4205(b)(1) conjunctively to permit the trial judge to prescribe a minimum incarceration period exceeding ten years if it serves the ends of justice and the public interest. *See* Rothgeb v. United States, 789 F.2d 647, 652-53 (8th Cir. 1986) (upholding 69-year minimum prison term); United States v. Gwaltney, 790 F.2d 1378, 1387-88 (9th Cir. 1986) (upholding requirement that defendant serve at least 30 years of 90-year sentence), *cert. denied,* 479 U.S. 1104 (1987); United States v. O'Driscoll, 761 F.2d 589, 598-600 (10th Cir. 1985) (upholding 99-year minimum prison term requirement), *cert. denied,* 475 U.S. 1020

thority to specify that the prisoner will be eligible for parole before having served one-third of the sentence.[3264] Alternatively, the sentencing judge may set a maximum term and allow the Parole Commission to determine when the prisoner should be released.[3265]

The Comprehensive Drug Abuse Prevention and Control Act of 1970[3266] requires judges to supplement sanctions for certain narcotics violations with supervised release terms of at least five years if the defendant has no prior convictions, or at least ten years if there are prior convictions.[3267] If a parolee violates a condition of supervised release, the parolee's original sentence may be increased by the length of this supervised release term, with no reduced sentence for time spent on special parole.[3268] Courts have uniformly held that the special parole terms violate neither the due process clause nor separation of powers.[3269]

Before the Parole Commission may parole an eligible prisoner, it must determine that the prisoner has an acceptable record of institutional behavior.[3270] If the prisoner meets this threshold requirement, the Parole

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(1986); United States v. Berry, 839 F.2d 1487, 1488 (11th Cir. 1988) (per curiam) (upholding 59-year minimum prison term). *But see* United States v. Castonguay, 843 F.2d 51, 54-56 (1st Cir. 1988) (absent indication that Congress intended to give courts carte blanche to extend parole eligibility dates without limit, court not authorized to set minimum incarceration term of 25 years when sentencing defendant to 75-year term); United States v. Fountain, 840 F.2d 509, 523 (7th Cir. 1988) (sentencing judge not entitled to impose 50-year minimum incarceration with sentence of life plus 150 years because sentencing judge cannot set minimum term beyond ten years).

3264. 18 U.S.C. § 4205(b)(1) (1982) (repealed 1984) (court imposing sentence exceeding one year may designate minimum term, not exceeding one-third of maximum sentence, after which prisoner eligible for parole). *But cf.* United States v. Dean, 752 F.2d 535, 544 (11th Cir. 1985) (authority to determine length of prisoner's confinement vested in Parole Commission, not trial judge; sentence not illegal when judge mistakenly believed defendant would be released before end of sentence), *cert. denied,* 479 U.S. 824 (1986); King v. United States Parole Comm'n, 744 F.2d 1449, 1451 (11th Cir. 1984) (sentencing court has no authority to order particular release date; judge's recommendation that any parole revocation sentence not exceed four-year adult term not binding on Parole Commission).

3265. 18 U.S.C. § 4205(b)(2) (1982) (repealed 1984) (court imposing sentence exceeding one year may fix maximum term and specify that Parole Commission determine when to grant parole).

3266. Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. § 841 (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat 2030, 2031, *reprinted in* 18 U.S.C. § 3551 note (Supp. IV 1986)).

3267. 21 U.S.C. § 841(b)(1)(A) (1982) (repealed 1984). The statute provides for a minimum special parole term, but no maximum, which presumably would be life.

3268. 21 U.S.C. § 841(c) (1982) (repealed 1984).

3269. *See* United States v. Butler, 763 F.2d 11, 15-16 (1st Cir. 1985) (twelve-year special parole term for conviction on three narcotics counts not due process violation); Walberg v. United States, 763 F.2d 143, 147-49 (2d Cir. 1985) (eight-year special parole term for conviction on three narcotics counts not unconstitutionally vague under due process clause); United States v. Arellanes, 767 F.2d 1353, 1358-59 (9th Cir. 1985) (ten-year special parole term for conviction on two narcotics counts not unconstitutionally vague or unlawful delegation of legislative power to judicial branch); United States v. Carcaise, 763 F.2d 1328, 1334-35 (11th Cir. 1985) (three-year special parole term for conviction on five narcotics counts not violation of due process clause or separation of powers).

3270. 18 U.S.C. § 4206(a) (1982) (repealed 1984); 28 C.F.R. § 2.18 (1986) (substantial obser-

Commission must determine that the release would not detract from the seriousness of the prisoner's offense,[3271] promote disrespect for the law,[3272] or jeopardize the public welfare.[3273] In order to make such determinations, the PCRA authorizes the Parole Commission to consider information supplied by the prisoner, the incarcerating institution, the sentencing judge, and the psychological examiner, including the prisoner's criminal record,[3274] the presentence investigation report,[3275] the parole status of the prisoner's

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vance of prison rules is prerequisite to parole release); *see* Nunez-Guardado v. Hadden, 722 F.2d 618, 624 (10th Cir. 1983) (weight to be accorded prisoner's conduct is matter of Parole Commission's discretion; decision to go beyond guidelines in face of favorable institutional record not abuse of discretion); Jonas v. Wainwright, 779 F.2d 1576, 1577 (11th Cir.) (upholding Parole and Probation Commission's decision to move back prisoner's presumptive parole date because prisoner's escape from prison constituted unacceptable behavior), *cert. denied,* 479 U.S. 830 (1986).

3271. 18 U.S.C. § 4206(a)(1) (1982) (repealed 1984); *see* Resnick v. United States Parole Comm'n, 835 F.2d 1297, 1301 (10th Cir. 1987) (good cause requirement satisfied when prisoner denied parole because of conviction on several crimes, including drug conspiracy and two murders, because grant of present parole would depreciate seriousness of offenses, notwithstanding very favorable penitentiary record).

3272. *Id.*

3273. *Id.* § 4206(a)(2); *see* Schramm v. United States Parole Comm'n, 767 F.2d 509, 511-12 (8th Cir. 1985) (consideration of whether prisoner's release would jeopardize public welfare does not require Parole Commission to distinguish between prisoners with prior misdemeanor convictions and those with prior felony convictions; therefore, no abuse of discretion when prisoner with record of burglary and nonviolent misdemeanors received same salient factor score as prisoners with several violent felonies).

3274. *See* Schramm v. United States Parole Comm'n, 767 F.2d 509, 512 (8th Cir. 1985) (Parole Commission's consideration of prisoner's prior misdemeanor convictions does not increase punishment for them, and thus is not violation of *ex post facto* clause).

3275. *See* Ochoa v. United States, 819 F.2d 366, 373 (2d Cir. 1987) (prisoner's due process rights not violated by hearsay statements in presentence report when he had opportunity to testify at hearing and submit additional information); United States v. Ursillo, 786 F.2d 66, 72 (2d Cir. 1986) (when prisoner alleged false representations in presentence report, Parole Commission given discretion to resolve factual disputes therein and consider information in prisoner's presentence report accordingly); Montgomery v. United States Parole Comm'n, 838 F.2d 299, 301 (8th Cir. 1988) (per curiam) (Commission can rely on any information in presentence report that was not disavowed by sentencing court, because court will not reassess credibility of information used by Commission in classifying offenses); Melvin v. Petrovsky, 720 F.2d 9, 10-11 (8th Cir. 1983) (Parole Commission may consider presentence report valuing thefts at $560,000 when indictment valued thefts at $96,000); Walker v. United States, 816 F.2d 1313, 1317 (9th Cir. 1987) (per curiam) (evidence in presentence report need not meet trial evidentiary standards); Anderson v. United States Parole Comm'n, 793 F.2d 1136, 1137 (9th Cir. 1986) (Parole Commission's consideration of history of violence in prisoner's presentence report in setting severity rating and salient factor score not due process violation); Jones v. United States, 783 F.2d 1477, 1482 (9th Cir. 1986) (Parole Commission's consideration of contested information in prisoner's presentence report permissible when prisoner failed to establish that information was false and that Parole Commission actually relied on it); Robinson v. Hadden, 723 F.2d 59, 61-62 (10th Cir. 1983) (Parole Commission may consider presentence report that contained four dismissed bank robbery counts), *cert. denied,* 466 U.S. 906 (1984); *cf.* Lynch v. United States Parole Comm'n, 768 F.2d 491, 498-99 (2d Cir. 1985) (inmate's due process rights violated when Parole Commission failed to disclose presentence report to counsel).

The Supreme Court has determined that the Freedom of Information Act requires that the Commission disclose presentence reports to the defendant. United States Dep't of Justice v. Julian, 108

codefendants,[3276] and any other relevant information.[3277] The Parole Commission has promulgated guidelines to foster consistency and fairness in its

S. Ct. 1606, 1612 (1988) (citing 5 U.S.C. § 552 (1927 & Supp. 1988)). Information relating to confidential sources, diagnostic opinions, and other information that may cause harm to the defendant or third parties is exempted from the disclosure requirement. *Id.* at 1611. The Sentencing Reform Act grants the defendant an automatic right to the information in his files. 18 U.S.C. § 3552(d) (Supp. IV 1986).

3276. *See* Lynch v. United States Parole Comm'n, 768 F.2d 491, 497 (2d Cir. 1985) (within Parole Commission's discretion to consider parole status of felon's codefendants); *cf.* Sheary v. United States Parole Comm'n, 822 F.2d 556, 559 (5th Cir. 1987) (due process rights of prisoner with six-year sentence not violated when he received less favorable parole consideration than codefendant with three-year sentence); Augustine v. Brewer, 821 F.2d 365, 372 (7th Cir. 1987) (Commission has discretion to make prisoner serve one year longer than codefendant when prisoner participated in conspiracy for one year longer than codefendant); Coleman v. Perrill, 845 F.2d 876, 879 (9th Cir. 1988) (Commission not bound to follow its own internal regulations concerning treatment disparity of codefendant, because similar treatment for codefendants is one of Commission's aspirations and not one of its requirements).

3277. 18 U.S.C. § 4207 (1982) (repealed 1984)); *see* Marshall v. Lansing, 839 F.2d 933, 937 (3d Cir. 1988) (Commission can consider amount of narcotics involved in prisoner's criminal activity in determining parole eligibility even though indictments did not specifically charge any amount); Hackett v. United States Parole Comm'n, 851 F.2d 127, 130-31 (6th Cir. 1988) (per curiam) (Parole Commission can consider victim's unsubstantiated rape allegations in setting prisoner's presumptive parole date, even though sentencing court stated it did not consider allegation when setting sentence); Augustine v. Brewer, 821 F.2d 365, 368-69 (7th Cir. 1987) (Commission free to consider information not contained in indictment when prosecution did not expressly make representations during plea bargaining to defendant concerning parole prospects); Walker v. Prisoner Review Bd., 769 F.2d 396, 400-02 (7th Cir. 1985) (board allowed to consider newspaper articles pertaining to prisoner's crimes), *cert. denied,* 474 U.S. 1065 (1986); Mullen v. United States Parole Comm'n, 756 F.2d 74, 75 (8th Cir. 1985) (Parole Commission not limited by state court's dismissal of weapons charge when it made independent findings that violation occurred); Otsuki v. United States Parole Comm'n, 777 F.2d 585, 586-87 (10th Cir. 1985) (per curiam) (Parole Commission may, but is not obligated to, consider prisoner's "superior program achievement" status); Nunez-Guardado v. Hadden, 722 F.2d 618, 622 (10th Cir. 1983) (Parole Commission may consider evidence related to thirteen deaths contained in counts dismissed during plea bargaining, when no express or implied agreement that such information would not be considered and prisoner given opportunity to challenge evidence). *But cf.* Donn v. Baer, 828 F.2d 487, 489 (8th Cir. 1987) (prisoner's performance in state prison system would have little, if any, significance in Commission's post-revocation consideration of parole on federal violator term); Dunn v. United States Parole Comm'n, 818 F.2d 742, 745 (10th Cir. 1987) (per curiam) (Parole Commission not allowed to use insanity acquittal in determining only whether release would encourage disrespect for law or detract from offense's seriousness; there must be risk of assaultive behavior based on current mental illness); Paz v. Warden, 787 F.2d 469, 473 (10th Cir. 1986) (Parole Commission not allowed to base decision on prisoner's unwillingness to confess to crime with which prisoner had not been formally charged); Gholston v. Jones, 848 F.2d 1156, 1160 (11th Cir. 1988) (parolee's depression and medication had little relevance and could not be considered by Parole Commission in evaluating sole charge of failing to "not violate any law").

The Department of Justice regulations also authorize the Parole Commission to consider information supplied by defense attorneys, prosecutors, and other interested parties. 28 C.F.R. § 2.19(d) (1986). The Department of Justice has recommended that United States Attorneys inform the Parole Commission of charges dropped during plea bargaining and the degree of defendant's cooperation. *See* PRINCIPLES OF FEDERAL PROSECUTION (July 1980), at 55-56. The Justice Department has also recommended that United States Attorneys furnish a transcript of the sentencing proceedings to the defendant. *Id.*

parole determinations.[3278] Under these guidelines, the Parole Commission has established a formula for determining when a prisoner may be released on parole.[3279] The Parole Commission determines the prisoner's parole prospects by calculating a prisoner's "salient factor score"[3280] and then classifying the offense according to a chart listing categories of severity.[3281] The matrix of the prisoner's offense severity rating and the salient factor score yields the suggested time range of incarceration before release on parole.[3282]

In some cases, the Parole Commission may deviate from the guidelines.[3283]

3278. 28 C.F.R. § 2.20(a) (1985).

3279. *Id.*

3280. *Id.* § 2.20(e). The salient factor score focuses on the offender's characteristics, includes the inmate's history of criminal behavior, age, and drug usage, 28 C.F.R. § 2.20 notes, and attempts to predict the potential parole violation risk. *Id.* § 2.20(e); *see* Allen v. Hadden, 738 F.2d 1102, 1103-04 (10th Cir. 1984) (discussing the formula's application).

3281. 28 C.F.R. § 2.20(b) (1986). The severity of offenses ranges from "Category 1" (formerly "low severity"), which includes violations such as mere possession of illicit drugs, to "Category 8" (formerly "greatest severity"), which includes offenses such as murder and treason. *Id.* The Commission may consider mitigating and aggravating circumstances when determining the offense severity level. *Id.* § 2.20(d); *see* Augustine v. Brewer, 821 F.2d 365, 368-69, 371 (7th Cir. 1987) (in determining offense severity rating, Commission can consider information about drug conspiracy not contained in indictment when defendant pleaded guilty; Commission may include nature and duration of criminal conduct at issue in determining presence of aggravating circumstances); Roberts v. Corrothers, 812 F.2d 1173, 1178-79 (9th Cir. 1987) (in determining severity rating, Commission not limited to trial evidence); Bowen v. United States Parole Comm'n, 805 F.2d 885, 888 (9th Cir. 1986) (consideration of unadjudicated allegations in determining severity rating not due process violation); *cf.* Schramm v United States Parole Comm'n, 767 F.2d 509, 511-12 (8th Cir. 1985) (Parole Commission with its wide discretion can give same severity rating to both prior misdemeanor and felony). *But see* Ceniceros v. United States Parole Comm'n, 837 F.2d 1358, 1361 (5th Cir. 1988) (Commission may not consider specific conduct in evaluating prisoner's offense severity rating when jury has acquitted prisoner for that same conduct, because jury has necessarily determined that prisoner did not engage in that conduct).

3282. 28 C.F.R. § 2.20(b) (1986). The time ranges fixed by the guidelines are predicated on good institutional adjustment and program progress. *Id.* There are separate guidelines for prisoners sentenced under the Narcotic Rehabilitation Act, 42 U.S.C. § 3401 (1982); 28 C.F.R. § 2.20(h)(2) (1986). *See* Marshall v. Lansing, 839 F.2d 933, 949 (3d Cir. 1988) (prisoner incarcerated for cocaine sale not entitled to be assigned middle range of parole eligibility under guidelines merely because amount of cocaine possession was within middle range of offense severity index).

3283. 18 U.S.C. § 4206(c) (1982) (repealed 1984) (Commission may grant or deny parole notwithstanding guidelines if good cause exists, provided it gives prisoner notice); *see* Patterson v. Gunnell, 753 F.2d 253, 255 (2d Cir. 1985) (Parole Commission has discretion to set minimum confinement above what guidelines prescribe even if it previously chose not to exceed higher guidelines that had been incorrectly applied to prisoner); Hackett v. United States Parole Comm'n, 851 F.2d 127, 131 (6th Cir. 1988) (court cannot substitute its judgement for that of Commission as to what constitutes good cause for departing from guidelines; victim's unsubstantiated rape allegations were legitimate consideration when determining presumptive parole date); Merki v. Sullivan, 853 F.2d 599, 600-01 (8th Cir. 1988) (Commission could consider general implications of prisoner's association with paramilitary organization to set presumptive parole date beyond guidelines even though 17 of 21 counts were dropped and government had entered plea agreement to fully and accurately inform Commission of prisoner's cooperation in government investigation); Coleman v. Perrill, 845 F.2d 876, 879-80 (9th Cir. 1988) (showing of good cause, which requires that Commission advance in good faith reasons that are not arbitrary, irrational, unreasonable, irrelevant, or

Courts employ two different standards in reviewing Parole Commission decisions to make such deviations. Several circuits have held that courts have the power to decide whether the Commission properly weighed the factors in making its decision. Even if the Commission stayed within its statutory power, therefore, a court may reverse the decision if it finds that the Commission failed to meet a certain standard of rationality.[3284] The second view,

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capricious, satisfied when parolee violated prohibition against association with convicted criminals and engaged in high speed chase to elude police). *But see* Joost v. United States Parole Comm'n, 698 F.2d 418, 419 (10th Cir. 1983) (per curiam) (Parole Commission must furnish more than standard reason to justify parole denial that exceeds guidelines and must show good cause for continued incarceration; Commission must rebut allegations that it relied on murder charges of which petitioner was acquitted). Many courts prohibit the Parole Commission from using factors to justify exceeding the guideline recommendations for a parolee if those factors were used in determining the severity category or salient factor score. Such practice is called "double counting" and is an impermissible abuse of discretion. *Cf.* Maddox v. United States Parole Comm'n, 821 F.2d 997, 1002 (5th Cir. 1987) (use of possession of 96,000 pounds of marijuana used to satisfy 20,000 pound severity requirement and to support exceeding the guidelines not double counting); Romano v. Baer, 805 F.2d 268, 271 (7th Cir. 1986) (use of characteristics peculiar to RICO and Hobbs Act violations as aggravating factors not double counting when not used in placing prisoner in severity category); Coleman v. Perrill, 845 F.2d 876, 879 (9th Cir. 1988) (use of high speed chase to elude police as aggravating factor not double counting when offense severity rating based on reckless driving); Walker v. United States, 816 F.2d 1313, 1316 (9th Cir. 1987) (per curiam) (use of number of convictions to arrive at salient factor score, and use of nature and circumstances of offenses to exceed guidelines not double counting); Ammirato v. Hanberry, 797 F.2d 961, 962 (11th Cir. 1986) (per curiam) (use of multiple offenses to elevate offense to greatest severity category and to extend release date beyond guidelines not double counting when many offenses fell to severity just below greatest, prisoner's conduct was well beyond greatest, and prisoner was involved in sophisticated and continuing criminal activity).

3284. Many courts, therefore, will reverse the Commission if it abuses its discretion or acts "arbitrarily" or "capriciously." *See* Misasi v. United States Parole Comm'n, 835 F.2d 754, 758 (10th Cir. 1987) (abuse of discretion to fix prisoner's parole eligibility date at 60 months rather than at the 14-20 months specified under parole guidelines, when one reason given factually incorrect, other reason insufficiently specific to support departure, and neither supported by United States Attorney's report upon which Commission placed sole reliance in ordering departure); Paz v. Warden, 787 F.2d 469, 473 (10th Cir. 1986) (abuse of discretion to demand prisoner's confession as prerequisite to determining sufficient rehabilitation for parole); *cf.* Lynch v. United States Parole Comm'n, 768 F.2d 491, 496 (2d Cir. 1985) (Commission's determination that prisoner was to be continued to another hearing in 1991 because earlier release would detract from seriousness of offense not abuse of discretion); Marshall v. Lansing, 839 F.2d 933, 950 (3d Cir. 1988) (Commission justified in placing prisoner in poorest eligibility position within his offense severity index, because rearrest for second offense of selling cocaine while on bail from another cocaine-related offense demonstrated prisoner's lack of remorse); Augustine v. Brewer, 821 F.2d 365, 370 (7th Cir. 1987) (aggregation of direct and indirect involvement in drug trafficking conspiracy not abuse of discretion so long as vicarious responsibility for which prisoner held accountable involved acts over which prisoner exercised some control or which reasonably could have been foreseen); Kele v. United States Parole Comm'n, 775 F.2d 243, 244-45 (8th Cir. 1985) (no abuse of discretion when Parole Commission set parole date 152 months later than presumptive release date, guidelines open ended and decision based on severity of offense); Schramm v. United States Parole Comm'n, 767 F.2d 509, 512 (8th Cir. 1985) (Commission's practice of giving attempted bank robbery and bank robbery same severity classification not abuse of discretion); Moore v. Dubois, 848 F.2d 1115, 1116 (10th Cir. 1988) (no abuse of discretion when Commission reviewing revocation hearing without receiving live testimony rejected credibility determination of hearing examiner as to whether victim had truthfully reported

consistently embraced by the Ninth Circuit, is that courts can only decide whether the Commission weighed the proper factors in making its decision; the Commission's substantive decisions are unreviewable even for abuse of discretion.[3285] In either case, when the Parole Commission departs from procedural requirements of the PCRA, its actions violate the statute only if they prejudice the prisoner.[3286]

Application of the PCRA guidelines to prisoners sentenced prior to the PCRA's enactment does not violate the constitutional prohibition against *ex post facto* laws.[3287] Nor may prisoners seek resentencing because the Parole

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that parolee had raped her); Tobon v. Martin, 809 F.2d 1544, 1546 (11th Cir. 1987) (per curiam) (Commission's consideration of drug dealer's weapon possession as aggravating circumstance sufficient to justify deviation from presumptive parole date not abuse of discretion); Whitehead v. United States Parole Comm'n, 755 F.2d 1536, 1537 (11th Cir. 1985) (Commission finding parole violation because of state criminal pandering charge not abuse of discretion in parole revocation decision).

3285. The Ninth Circuit has taken the position that Congress intended that substantive decisions by the Parole Commission be unreviewable. *See* Walker v. United States, 816 F.2d 1313, 1316 (9th Cir. 1987) (per curiam) (no jurisdiction to scrutinize Commission decisions exceeding guideline range of 60 to 72 months when no double counting); Roberts v. Corrothers, 812 F.2d 1173, 1176, 1179 (9th Cir. 1987) (no jurisdiction to review Commission's judgment on heroin amount possessed by prisoner when evidence properly before Commission); Wallace v. Christensen, 802 F.2d 1539, 1545 (9th Cir. 1986) (no jurisdiction over claim that Commission abused discretion in classifying offense when judgment exercised over range of possible choices and options). Under this view, therefore, a court may address only two issues in reviewing a Commission decision: (1) whether it has acted outside congressionally-set statutory limits, and (2) whether it has violated the Constitution. Coleman v. Perrill, 845 F.2d 876, 878 (9th Cir. 1988).

3286. *See* Sacasas v. Rison, 755 F.2d 1533, 1534-35 (11th Cir. 1985) (per curiam) (failure to hold hearing after five years on parole not actionable when no prejudice shown because parolee would have had parole extended anyway).

3287. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or *ex post facto* Law shall be passed"). Prisoners have had little success with this claim. *See* Beltempo v. Hadden, 815 F.2d 873, 875 (2d Cir. 1987) (parole guidelines "'not laws'" under *ex post facto* clause) (quoting DiNapoli v. Northeast Regional Parole Comm'n, 764 F.2d 143, 147 (2d Cir.), *cert. denied,* 474 U.S. 1020 (1985)); Timpani v. Sizer, 732 F.2d 1043, 1048 (2d Cir. 1984) (Commission policy of applying revised guidelines retroactively only if application results in more favorable severity rating not violation of *ex post facto* clause); Royster v. Fauver, 775 F.2d 527, 533-34 (3d Cir. 1985) (parole regulations may be laws for purposes of *ex post facto* clause; however, since their application did not prejudice prisoner, no *ex post facto* violation); Lightsey v. Kastner, 846 F.2d 329, 333-34 (5th Cir. 1988) (no *ex post facto* violation when guideline in effect at time of offense same as guideline in effect at time of parole determination, notwithstanding fact that law changed during interim); Sheary v. United States Parole Comm'n, 822 F.2d 556, 558 (5th Cir. 1987) (federal parole guidelines not laws within meaning of *ex post facto* clause); United States v. Manni, 810 F.2d 80, 84 (6th Cir. 1987) (per curiam) (Commission can apply new guidelines to prisoner when sentenced even though he relied on old guidelines when he submitted guilty plea because parole guidelines not "laws" within prohibition of *ex post facto* clause); Prater v. United States Parole Comm'n, 802 F.2d 948, 953-54 (7th Cir. 1986) (no *ex post facto* claim because guidelines merely interpretive and PCRA not harsher than old statute considered as a whole); Yamamoto v. United States Parole Comm'n, 794 F.2d 1295, 1296-99 (8th Cir. 1986) (no *ex post facto* claim because parole guidelines not "laws" within meaning of *ex post facto* clause, and application of new guidelines not more onerous); Rush v. Petrovsky, 756 F.2d 675, 676 (8th Cir. 1985) (per curiam) (no *ex post facto* claim when prisoner failed to show more favorable determination would have been reached under old guidelines); Ver-

Commission's application of the parole guidelines was not consistent with the trial judge's expectations at the time of sentencing.[3288] The sentencing judge's expectations are not binding on the Parole Commission.[3289]

The Parole Commission retains jurisdiction over the parolee until the expiration of the maximum term of the sentence,[3290] unless it determines that early parole termination is justified.[3291] After five years of parole, the parolee has the right to a hearing to determine whether termination of supervision is

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mouth v. Corrothers, 827 F.2d 599, 602, 604 (9th Cir. 1987) (Parole Commission regulations not laws for *ex post facto* clause purposes; prisoner has no basis to expect parole guidelines with respect to severity ratings for cocaine offenses to remain constant in light of Commission's authority to grant or deny parole and to create or amend guidelines); Resnick v. United States Parole Comm'n, 835 F.2d 1297, 1300 (10th Cir. 1987) (no *ex post facto* violation when revised guidelines only made explicit 'enormity of offense' factor which always has been legitimate basis for denying parole); Warren v. United States Parole Comm'n, 659 F.2d 183, 194-96 (D.C. Cir. 1981) (when prisoner committed new crime on parole, and new guidelines promulgated after prisoner's first crime, no *ex post facto* violation because prisoner charged with notice of new guidelines), *cert. denied,* 455 U.S. 950 (1982). *But cf.* Marshall v. Garrison, 659 F.2d 440, 443-45 (4th Cir. 1981) (retroactive application of new guidelines under Youth Corrections Act requiring consideration of severity of offense violates *ex post facto* clause).

3288. United States v. Addonizio, 442 U.S. 178, 190 (1979). The district judge who sentenced Addonizio to a ten-year term for extortion and conspiracy expected the defendant would be eligible for parole after serving one-third of his sentence. *Id.* at 181 n.3. Under the Parole Commission's new guidelines, which placed added emphasis on the severity of the offenses, the Parole Commission twice denied Addonizio parole based on the seriousness of his crimes. *Id.* at 182. Because the prisoner was challenging his sentence and not the application of the new guidelines, the Court did not reach the *ex post facto* question. *Id.* at 184.

3289. *See* Staege v. United States Parole Comm'n, 671 F.2d 266, 269 (8th Cir. 1982) (per curiam) (Parole Commission may disregard sentencing court's expectations of defendant's parole release date); Artez v. Mulcrone, 673 F.2d 1169, 1170-71 (10th Cir. 1982) (per curiam) (trial judge has no enforceable expectations as to date when prisoner would be released on parole; Parole Commission has discretion to determine whether individual will serve sentence inside or outside prison); King v. United States Parole Comm'n, 744 F.2d 1449, 1451 (11th Cir. 1984) (sentencing court has no authority to order particular parole date; sentencing judge's recommendations not binding on Parole Commission). *But cf.* Williams v. United States Parole Comm'n, 707 F.2d 1060, 1064-65 (9th Cir. 1983) (sentencing judge's parole comment form that was unavailable and not considered at initial hearing is "new information" upon which parole date can be reconsidered).

3290. 18 U.S.C. § 4210(b)(2) (1982) (repealed 1984) (Parole Commission's jurisdiction over parolee terminates no later than maximum term's expiration, unless parolee commits another crime after release or fails to respond to reasonable Parole Commission request, order, summons, or warrant); *cf.* Barrier v. Beaver, 712 F.2d 231, 238 (6th Cir. 1983) (while Parole Commission cannot keep parolee beyond jurisdictional time limit, issuance of parole violation warrant tolls statute; because warrant execution runs statute again, Parole Commission cannot issue supplement after execution followed by time remaining on original offense); Martin v. Luther, 689 F.2d 109, 114 (7th Cir. 1982) (Parole Commission retains jurisdiction to revoke parole of mandatory parolee after maximum term's expiration if violation warrant issued prior to term's expiration); Gray v. United States Parole Comm'n, 668 F.2d 349, 350 (8th Cir. 1981) (per curiam) (§ 4210(b)(1) allows earlier jurisdiction termination only for prisoners on mandatory release and not for those granted parole).

3291. 18 U.S.C. § 4211(a) (1982) (repealed 1984) (Parole Commission may terminate jurisdiction over parolee prior to expiration of maximum term). Beginning two years after release on parole, the Parole Commission must review the parolee's status at least annually to decide whether to terminate supervision. *Id.* § 4211(b).

appropriate.[3292] At that time the Parole Commission must terminate supervision unless it decides that the parolee is likely to engage in criminal acts.[3293]

Due Process Considerations in Parole Decisions. In *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex,*[3294] the Supreme Court held that state prisoners do not have a constitutionally protected interest in parole unless a parole statute contains mandatory language restricting the parole board's discretion in making its decision.[3295] In such a case, a prisoner gains a legitimate expectation of parole that cannot be denied without due process.[3296] In *Greenholtz,* an informal hearing related to the parole decision and a statement of the reasons for the denial satisfied due process.[3297]

Some statutes or regulations merely provide that the parole board "may" release an inmate if certain criteria are met. Such statutes do not create a

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3292. 18 U.S.C. § 4211(c)(1) (1982) (repealed 1984); *see* United States *ex rel.* Pullia v. Luther, 635 F.2d 612, 616-17 (7th Cir. 1980) (under § 4211, parolee has right to hearing and decision on parole termination after five years unless Commission first terminates supervision without hearing); Tatum v. Christensen, 786 F.2d 959, 963 (9th Cir. 1986) (parolee entitled to automatic extension hearing, not automatic release, after five years of parole); *cf.* Sacasas v. Rison, 755 F.2d 1533, 1535-36 (11th Cir. 1985) (per curiam) (proper remedy to enforce right to hearing after five years is writ of mandamus, not habeas corpus).

3293. 18 U.S.C. § 4211(c)(1) (1982) (repealed 1984); *cf.* Sacasas v. Rison, 755 F.2d 1533, 1534-35 (11th Cir. 1985) (per curiam) (while parole statute mandates hearing after five years to determine whether to extend parole, no actual prejudice found from failure to hold hearing when likely Parole Commission would extend parole period).

3294. 442 U.S. 1 (1979).

3295. In *Greenholtz,* a Nebraska statute provided that the Board of Parole "shall" release an inmate "unless" it concludes that reasons require otherwise. *Id.* at 11. The Court held that the mandatory nature of the language created an expectancy of release or "liberty interest" which was entitled to some constitutional protection. *Id.* at 12; *see* Newbury v. Prisoner Review Bd., 791 F.2d 81, 85 (7th Cir. 1986) (due process requirements vary; prisoner seeking parole afforded less constitutional protection than criminal defendant at trial or prisoner at parole revocation hearing). *But see* D'Amato v. United States Parole Comm'n, 837 F.2d 72, 76 (2d. Cir. 1988) (Parole Commission's internal procedures manual does not create an expectancy of release entitled to due process protection).

3296. *Greenholtz,* 442 U.S. at 11-12 (statutory language dictating that board "shall" release inmate "unless" one of four reasons found creates presumption that parole release will be granted, giving rise to legitimate release expectation and some constitutional protection).

3297. *Id.* at 15-16. The Supreme Court has held that particularizing the due process requirements requires an examination of the precise nature of the government function as well as the private interest affected. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The Court has specified factors in making such an analysis: (1) the private interest affected; (2) the risk of an erroneous deprivation of such interest through procedures used; and (3) the government's interest. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see* Newbury v. Prisoner Review Bd., 791 F.2d 81, 85-87 (7th Cir. 1986) (due process does not require that all three members of panel voting on parole application be present at inmate's parole hearing); Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987) (due process satisfied at parole board hearing when prisoner received advance written notice of hearing, opportunity to be heard, access to all materials considered by board, and right to be accompanied by person of his choice).

protected liberty interest protected by due process.[3298] The Supreme Court has held that when a parole statute does not give rise to a protected liberty interest, the issuance of a parole notice can be revoked without a hearing.[3299] Two years after *Greenholtz,* the Supreme Court held that a statute governing commutation policy did not give rise to a protected liberty interest even though the Board of Pardons granted favorable rulings seventy-five percent of the time.[3300]

In *Board of Pardons v. Allen,*[3301] the Supreme Court found that the language of the Montana statute governing parole eligibility created a protected liberty interest.[3302] Although the statute directed that the Board "shall" re-

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3298. Board of Pardons v. Allen, 107 S. Ct. 2415, 2420-21 & n.10 (1987); *see* Scales v. Mississippi State Parole Bd., 831 F.2d 565, 566 (5th Cir. 1987) (per curiam) ("'every prisoner . . . whose record of conduct shows that such prisoner has . . . *may* be released on parole' ") (quoting MISS. CODE ANN. § 47- 7-3 (1972 & Supp. 1986)) (emphasis in original); Dace v. Mickelson, 816 F.2d 1277, 1281 (8th Cir. 1987) ("The board *may* issue an order to the warden of the penitentiary that the inmate shall be paroled if it is satisfied that . . .") (quoting S.D. CODIFIED LAWS ANN. § 24-15-8 (1979)) (emphasis in original); Gale v. Moore, 763 F.2d 341, 343 (8th Cir. 1985) ("When in its opinion there is a reasonable probability that an inmate . . . can be released without detriment to the community or to himself, the board *may in its discretion* release or parole such person") (quoting MO. REV. STAT. § 217.690 (1983)) (emphasis added by court); *cf.* Tuitt v. Fair, 822 F.2d 166, 180 (1st Cir.) (because prisoner has no constitutional or inherent right to parole or good-time credit, statute not unconstitutionally vague merely because of indeterminacy of state's parole award to prisoner serving life sentence), *cert. denied,* 108 S. Ct. 333 (1987).

3299. *See* Jago v. Van Curen, 454 U.S. 14, 21 (1981) (per curiam) (revocation of decision to grant parole permissible because no liberty interest through statute or mutually explicit understandings). *But cf.* Green v. McCall, 822 F.2d 284, 290, 293 (2d Cir. 1987) (prisoners whose early effective parole date had been set, but who had not yet been released, had protectable liberty interest entitling them to due process hearing before rescission of early release date, whereas inmates who had received only presumptive parole release date not entitled to same procedural protections).

3300. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 461 (1981). In *Dumschat,* the Court distinguished an expectation of parole release, which is based on a mandatory statutory provision, from an expectation of a pardon, which is based on the statistical percentage of prior pardons granted. *Id.* at 465. The Court held that the pardon procedure did not give rise to a protected liberty interest because the statute gave the Board unlimited discretion. *Id.* at 466. The Ninth Circuit has held that when a prisoner sentenced without the possibility of parole had received eight administrative reviews while in prison, each confirming that he would be paroled, the government was estopped from revoking his parole when the error was discovered 15 months after his release. Johnson v. Williford, 682 F.2d 868, 871-73 (9th Cir. 1982). The parolee's parole expectation was created shortly after he began his sentence and was heightened by successive administrative reviews. *Id.* at 872. The court held that to revoke his parole under these circumstances would violate due process. *Id.* at 874.

3301. 107 S. Ct. 2415 (1987).

3302. Although the Court undertook an analysis of statutory language, the majority noted that "[f]our members of this Court are of the view that the existence of a liberty interest in parole release is not solely a function of the wording of the governing statute." *Id.* at 2418 n.3. Justices Marshall, Brennan, and Stevens have argued that "*all* prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular statutory language that implements the parole system." *Greenholtz,* 442 U.S. at 22 (emphasis in original). Justice Powell has stated that "the presence of a parole system is sufficient to create a liberty interest, protected by the Constitution, in the parole-release decision." *Id.* at 19.

lease prisoners "when" the criteria are met, and the statute in *Greenholtz* stated that prisoners "shall" be released "unless" certain reasons require imprisonment, the Court saw no difference in the mandatory character of the language.[3303]

Parole Revocation. When a federal parolee is alleged to have violated the conditions of parole, the Parole Commission may issue a summons ordering the parolee to appear before it, or it may issue a warrant and reimprison the parolee.[3304] The Parole Commission must conduct a full parole revocation hearing within ninety days after recommitting a parolee if the defendant either is convicted of a crime while on parole and admits violating parole conditions, or waives the right to a preliminary hearing.[3305] If the Commission fails to meet the ninety-day deadline, a prisoner is entitled to relief from confinement only upon a showing of prejudice.[3306]

3303. *Allen,* 107 S. Ct. at 2420-21. If the statute creates substantive standards to guide parole decisions, a liberty interest is created. *See* Winsett v. McGinnes, 617 F.2d 996, 1007 (3d Cir. 1980) (en banc) (regulations governing work release program create liberty interest when prisoner meets eligibility requirements), *cert. denied,* 449 U.S. 1093 (1981). Courts are split on whether statutes that state a prisoner may not be released unless certain requirements are met create a liberty interest. *See* Huggins v. Isenbarger, 798 F.2d 203, 205, 206 (7th Cir. 1986) (statute requiring Parole Board give written notice and reasons for denial of parole and forbidding parole under some circumstances but never requiring it, does not grant prison inmate property or liberty interest in applying for parole); Patten v. North Dakota Parole Bd., 783 F.2d 140, 142 (8th Cir. 1986) (statute providing that "'[n]o parole *shall* be granted to any person confined in the penitentiary or state farm *unless* . . .' " does not create protected liberty interest in parole) (quoting N.D. CENT. CODE ANN. § 12-59-07 (1985)) (emphasis in original). *But see* Scott v. Illinois Parole & Pardon Bd., 669 F.2d 1185, 1188 (7th Cir.) (statute providing that "'[t]he Board shall not parole a person eligible for parole if it determines that . . .' " creates protected liberty interest in parole) (quoting ILL. REV. STAT. ch. 38, para. 1003-3-5(c) (1979)), *cert. denied,* 459 U.S. 1048 (1982).

3304. 18 U.S.C. § 4213(a) (1982) (repealed 1984).

3305. *Id.* § 4214(c); *see* D'Amato v. United States Parole Comm'n, 837 F.2d 72, 75-76 (2d Cir. 1988) (parolees already in custody on new federal charges when parole violation warrants issued not entitled to preliminary hearing because statutory right to preliminary hearing not triggered until warrant executed); Donn v. Baer, 828 F.2d 487, 489, 490 (8th Cir. 1987) (while Commission has virtually complete discretion to decide when to execute violator warrant, it lacks authority to withdraw executed warrant because execution triggers constitutional duty to provide due process protections); Still v. United States Marshal, 780 F.2d 848, 850-53 (10th Cir. 1985) (Parole Commission may not suspend executed parole violation warrant and lodge it as detainer; once the Parole Commission executes a parole revocation warrant, it is required to provide hearing within ninety days). *But see* Franklin v. Fenton, 642 F.2d 760, 763 (3d Cir. 1980) (Parole Commission may suspend executed warrant and avoid procedural requirements of § 4214(c)); Thigpen v. United States Parole Comm'n, 707 F.2d 973, 977 (7th Cir. 1983) (same); *cf.* Alexander v. United States Parole Comm'n, 721 F.2d 1223, 1228 (9th Cir. 1983) (Parole Commission not required to schedule revocation hearing for prisoner arrested while on pass from federal halfway house because parole term had not commenced before arrest).

3306. *See* Still v. United States Marshall, 780 F.2d 848, 854 (10th Cir. 1985) (when prejudice demonstrated, parolee credited for time served in custody under parole violation warrant). *But see* Perry v. United States Parole Comm'n, 831 F.2d 811, 813 (8th Cir. 1987) (parolee not prejudiced when parole revocation hearing initially scheduled six days past deadline and postponed at parolee's request, and parolee failed to demonstrate loss of favorable evidence or witnesses from delay), *cert.*

Beyond these statutory requirements for federal parole revocation proceedings, the due process clause provides additional protections for all prisoners in this area.[3307] Although parolees are subject to many restrictions, they enjoy a protected liberty interest in conditional freedom.[3308] Moreover, parolees rely on an implicit promise that their parole will be revoked only if they violate their parole conditions.[3309] Due process requires, therefore, that parole be revoked only through a procedure designed to ensure that the finding of a violation is factually correct and that the discretionary decision to recommit the parolee to prison is based on an accurate assessment of the parolee's behavior.[3310]

The Supreme Court has established due process requirements for each of the two stages in a typical parole revocation proceeding.[3311] First, shortly after a parolee is arrested for a parole violation, a preliminary hearing must be held to determine whether probable cause exists to believe that the parolee violated the parole conditions.[3312] If the parolee has been convicted of a

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denied, 108 S. Ct. 1230 (1988); Donn v. Baer, 828 F.2d 487, 490 (8th Cir. 1987) (defendant not prejudiced when Commission failed to grant timely parole revocation; defendant received full credit for time served in state custody, and defendant's opportunity to serve state sentence concurrently with parole violator term was not frustrated); Goodman v. Keohane, 663 F.2d 1044, 1046 (11th Cir. 1981) (per curiam) (failure to demonstrate prejudice from being held 111 days after being taken into federal custody precludes relief).

3307. The Supreme Court has held that due process protection applies to parole revocation proceedings for state prisoners. Morrissey v. Brewer, 408 U.S. 471 (1972). The Court held that the parolee's interest in continued liberty is significant enough to require procedural protection, and that the nature of the interest is within the scope of liberty protected by the fourteenth amendment. *Id.* at 481-82.

3308. *See id.* at 480, 482 (parolee's liberty interest not absolute but conditioned on observance of parole conditions; parolee's liberty, although indeterminate, allows wide range of activities enjoyed by public; termination of parole inflicts grievous loss and deserves due process protection); *cf.* Newbury v. Prisoner Review Bd., 791 F.2d 81, 85 (7th Cir. 1986) (parolee entitled to more due process protection in parole revocation hearing than prisoner seeking parole for first time).

3309. *Morrissey,* 408 U.S. at 482.

3310. *Id.* at 484. Parole revocation requires the board to make a two-step inquiry. First, it must determine whether the parolee violated the parole conditions. *Id.* at 479. Second, it must determine whether the parolee should be recommitted to prison. *Id.* at 479-80. The first question involves a retrospective factual determination. *Id.* at 479. The second question is more complex, requiring the board to predict the parolee's ability to live in society. *Id.* at 480; *see* Ellard v. Alabama Bd. of Pardons & Paroles, 824 F.2d 937, 945-46 (11th Cir. 1987) (before state can declare parole granted in clear violation of guidelines void, due process clause requires procedural protections similar to when valid parole is revoked) *cert. denied,* 108 S. Ct. 1280 (1988); *see* Gholston v. Jones, 848 F.2d 1156, 1160-61 (11th Cir. 1988) (parolee's due process right violated when parole revocation based solely on parole officer's unsworn violation report stating that parolee had engaged in criminal mischief, because there was no indication parolee requested parole officer's presence at parole revocation hearing or had access to report).

3311. *Morrissey,* 408 U.S. at 489.

3312. In *Morrissey,* the Court announced that the hearing officer cannot have any connection with the case, and that the parolee must receive notice of the alleged violations and hearing's purpose. *Id.* at 486-87; *see* Miller v. Hadden, 811 F.2d 743, 747 (2d Cir. 1987) (notice requirement met when parolee received written warrant that listed only allegations on which revocation based). The

crime while on parole, however, no preliminary hearing is required because the conviction itself establishes probable cause to believe that there has been a parole violation.[3313] Second, once probable cause has been established, the parole authority must hold a revocation hearing,[3314] if the parolee so desires, within a reasonable time after the parolee has been taken into custody.[3315]

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parolee is entitled to an opportunity to appear and present evidence on his behalf. *Morrissey,* 408 U.S. at 487. The parolee is also entitled to confront and cross-examine adverse witnesses, unless the hearing officer determines that the witness would be subject to risk of harm if his identity were disclosed. *Id.* If the hearing officer determines that probable cause exists to hold the parolee for a final revocation decision, the officer must make a summary of the proceedings and a statement of the reasons and evidence supporting the probable cause finding. *Id.* at 487; *cf.* Faheem-El v. Klincar, 841 F.2d 712, 722 (7th Cir. 1988) (en banc) (due process does not require that parolees receive bail hearing prior to conclusion of revocation proceedings).

If no preliminary hearing is held, the parolee may be entitled to damages for the deprivation of his due process rights. *See* Wolfel v. Sanborn, 666 F.2d 1005, 1006 (6th Cir. 1981) (defendant entitled to damages when held for 27 days without preliminary hearing to determine probable cause of parole violation), *vacated on other grounds,* 458 U.S 1102 (1982); *cf.* Pierre v. Washington Bd. of Prison Terms & Paroles, 699 F.2d 471, 473 (9th Cir. 1983) (preliminary hearing unnecessary with prompt final parole revocation hearing satisfied due process requirements). *But see* Heath v. United States Parole Comm'n, 788 F.2d 85, 90 (2d Cir. 1986) (joint dispositional hearing permissible when prisoner not prejudiced by delay), *cert. denied,* 479 U.S. 253 (1986).

3313. Moody v. Daggett, 429 U.S. 78, 86 n.7 (1976); *see* Kenner v. Martin, 648 F.2d 1080, 1081 (6th Cir. 1981) (per curiam) (revocation hearing not required when parolee convicted of federal offense); *cf.* Doyle v. Elsea, 658 F.2d 512, 516 (7th Cir. 1981) (per curiam) (preliminary hearing unnecessary when defendant accused of, and in custody for, crime committed while on parole, even though not convicted).

3314. *Morrissey,* 408 U.S. at 487-88. *But cf.* Pickens v. Butler, 814 F.2d 237, 239-40 (5th Cir.) (parolee entitled to show excuse for parole violation only when factfinder has discretion to continue parole; because Louisiana law required parole forfeiture upon felony conviction, felon had no due process right to final revocation hearing), *cert. denied,* 108 S. Ct. 284 (1987).

Before the revocation hearing, the parolee must receive written notice of the alleged parole violation. *Morrissey,* 408 U.S. at 489; *see* D'Amato v. United States Parole Comm'n, 837 F.2d 72, 77-78 (2d Cir. 1988) (notice adequate although notice of charges to be considered at parole revocation hearing not given, because notice given was of charges to be considered at initial parole hearing and same offenses were basis for both hearings); Bryan v. Petrovsky, 726 F.2d 431, 432 (8th Cir. 1984) (per curiam) (*Morrissey* notice requirement satisfied when parolee received violation warrant charging four violations; failure to receive Commission's letter finding probable cause on all charges did not invalidate parole revocation hearing); Raines v. United States Parole Comm'n, 829 F.2d 840, 843 (9th Cir. 1987) (per curiam) (notice inadequate when parole denied opportunity to prepare defense because warrant not specific enough to inform parolee that time spent on parole subject to forfeiture). *But see* D'Amato v. United States Parole Comm'n, 837 F.2d 72, 78 (2d Cir. 1988) (Parole Commission not required to give parolee prior notice that forfeiture of time spent on parole resulted from new conviction during parole). At the hearing, the evidence against the parolee must be disclosed, and the parolee must be given an opportunity to present witnesses and documentary evidence. *Morrissey,* 408 U.S. at 489. In addition, the parolee must be allowed to cross-examine witnesses unless the hearing officer specifically finds good cause for preventing such confrontations. *Id.*; *see* Country v. Bartee, 808 F.2d 686, 687 (8th Cir. 1987) (per curiam) (right to confront and cross-examine adverse witnesses not absolute because revocation hearing not part of criminal prosecution).

3315. *See Morrissey,* 408 U.S. at 488 (two-month delay not necessarily unreasonable); Hanahan v. Luther, 693 F.2d 629, 634-35 (7th Cir. 1982) (eight-month delay not necessarily unreasonable), *cert. denied,* 459 U.S. 1170 (1983); Doyle v. Elsea, 658 F.2d 512, 516 (7th Cir. 1981) (per curiam)

At this hearing, the parolee may show either that the violation did not occur or that mitigating circumstances should preclude revocation.[3316] A "neutral and detached" body, such as the parole board, must make the revocation decision.[3317] This body is required to make a written statement of the evidence and the reasons supporting revocation of parole.[3318] Due process does not require appointment of counsel for all indigent parolees in revocation hearings.[3319]

In *Moody v. Daggett*,[3320] the Supreme Court held that when a parolee is convicted of a crime committed while on parole, the Parole Commission may issue a parole revocation warrant but stay its execution until the prisoner has served the sentence for the crime committed during parole.[3321] Federal pa-

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(three-month delay reasonable); *cf.* Spotted Bear v. McCall, 648 F.2d 546, 547 (9th Cir. 1980) (failure to hold speedy revocation hearing when parolee serving sentence for another crime does not prejudice defendant). United States Parole Commission procedures, however, require a parole revocation hearing upon the return of a prisoner serving a state or local sentence to a federal institution, or upon completion of 24 months in confinement on the state charge, whichever is earlier. 28 C.F.R. § 2.47(b)(1)(i) (1986).

3316. *Morrissey*, 408 U.S. at 488.

3317. *Id.* at 489.

3318. *Id.*

3319. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973). The Court held that the parole agency must be allowed considerable discretion in its decision whether to appoint counsel. *Id.* Counsel should be provided when the parolee requests it and has a timely and colorable claim that he did not commit the violation, or that substantial reasons justify or mitigate the violation. *Id.* The agency also should consider, especially in doubtful cases, whether the parolee appears to be capable of speaking effectively *pro se*. *Id.* at 790-91. If the agency refuses the request for counsel, it should succinctly state the grounds for refusal in the record. *Id.* at 791. The Tenth Circuit, however, has interpreted federal parole statutes to *require* appointment of counsel for indigent parolees in parole revocation proceedings. Baldwin v. Benson, 584 F.2d 953, 958-59 (10th Cir. 1978) (en banc) (citing 18 U.S.C.A. § 4214(a)(2)(B) and 18 U.S.C. § 3006(A)).

3320. 429 U.S. 78 (1976).

3321. *Id.* at 87. The Commission derives its authority to issue warrants from 18 U.S.C. § 4214(b)(1) (1982) (repealed 1984); *see* Heath v. United States Parole Comm'n, 788 F.2d 85, 91 (2d Cir.) (placing detainer against parolee does not constitute execution of parole violation warrant), *cert. denied*, 479 U.S. 953 (1986). Instead of staying the execution of a parole warrant, the Parole Commission may decide, after a hearing, to dismiss the warrant or to revoke parole immediately so that the parole violation term runs concurrently with the sentence for the subsequent conviction. Moody v. Daggett, 429 U.S. 78, 86-87 (1976); *see* D'Amato v. United States Parole Comm'n, 837 F.2d 72, 78-79 (2d Cir. 1988) (Parole Commission has authority to require parole violation terms to be commenced following parolee's release from new term of imprisonment); Garafola v. Wilkinson, 721 F.2d 420, 426 (3d Cir. 1983) (Parole Commission has authority to deny federal prisoner credit for time spent while on parole upon revocation based on subsequent state conviction), *cert. denied*, 466 U.S. 905 (1984); Battle v. United States Parole Comm'n, 834 F.2d 419, 420 (5th Cir. 1987) (per curiam) (Parole Commission, in revoking special parole term, has discretion to impose term consecutively to new sentence); United States v. Newton, 698 F.2d 770, 772 (5th Cir. 1983) (per curiam) (Parole Commission has discretion to determine whether unexpired time on parole violator's original sentence will run concurrently with new sentence imposed and to order forfeiture of time spent on parole); Doyle v. Elsea, 658 F.2d 512, 514-15 (7th Cir. 1981) (per curiam) (Parole Commission has discretion to order parole violator's term to run consecutively with new sentence imposed); Harris v. Day, 649 F.2d 755, 760 (10th Cir. 1981) (Parole Commission has discretion to determine

rolees who have such a detainer lodged against them may submit to the Parole Commission written information, prepared with the assistance of counsel, attempting to mitigate or explain the alleged violation.[3322] If the Parole Commission fails to review the detainer within 180 days, the prisoner may seek mandamus to compel review.[3323] Subsequent to a dispositional review of the detainer, the prisoner has a right to a revocation hearing after serving twenty-four months of the intervening sentence or upon return to a federal institution.[3324]

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whether unexpired time on parole violator's original sentence will run concurrently or consecutively with new sentence imposed); *cf.* Franklin v. Fenton, 642 F.2d 760, 762-63 (3d Cir. 1980) (Commission may defer parole revocation pending outcome of subsequent prosecution). If a prisoner is serving a state charge concurrently with a federal charge and is later paroled from the federal charge and released to the state prison, the confinement in state prison will not be considered continuation of federal confinement for purposes of determining the parolee's entitlement to credit against the federal sentence. Weeks v. Quinlan, 838 F.2d 41, 46 (2d Cir. 1988).

3322. 18 U.S.C. § 4214(b)(1) (1982) (repealed 1984).

3323. *See* Heath v. United States Parole Comm'n, 788 F.2d 85, 89 (2d Cir.) (writ of mandamus appropriate remedy for § 4214 default, not writ of habeas corpus), *cert. denied,* 479 U.S. 953 (1986); Carlton v. Keohane, 691 F.2d 992, 993 (11th Cir. 1982) (per curiam) (Parole Commission's failure to hold dispositional review within 180 days ordinarily warrants writ of mandamus to compel review; release not appropriate remedy in absence of prejudice or bad faith); Sutherland v. McCall, 709 F.2d 730, 732 (D.C. Cir. 1983) (writ of mandamus appropriate remedy for § 4214 default, not writ of habeas corpus to compel release on parole).

3324. 28 C.F.R. § 2.47(b)(1)(A)-(B) (1986); *see* Heath v. United States Parole Comm'n, 788 F.2d 85, 91 (2d Cir.) (dispositional revocation hearing timely when held less than 24 months after parolee was arrested and convicted of crime committed while on parole), *cert. denied,* 479 U.S. 953 (1986).