

**SENTENCING REQUIREMENTS UNDER THE
MENTALLY DISORDERED SEX OFFENDER ACT:
STATE V. SHOCKLEY**

INTRODUCTION

The fifth amendment¹ of the United States Constitution requires that a person accused of a crime be afforded certain procedural safeguards to prevent unfair criminal proceedings involving self-incrimination or the deprivation of life, liberty, or property without due process of law.² However, there has been some dispute as to what safeguards should be applied to sentencing proceedings.³ One particular area in which this dispute comes into play involves the conviction of sexual offenders under mentally disordered sex offender statutes providing for the sentence to be served in a mental institution.⁴

The Nebraska Supreme Court, in *State v. Shockley*,⁵ affirmed its position that sentencing under the Nebraska Mentally Disordered Sex Offender Act⁶ does not require the full panoply of criminal due process protections required when determining the guilt or innocence of an accused sex offender.⁷ The *Shockley* court held that the district court had not erred in denying a full evidentiary hearing at the time of sentencing or in refusing to find the Mentally Disordered Sex Of-

1. U.S. CONST. amend. V. The fifth amendment provides "No person shall be held to answer for a capital, or otherwise infamous crime, unless on indictment of Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . ." *Id.*

2. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 13.8, at 484 (3d ed. 1986) some of these procedural safeguards are: 1) adequate notice; 2) a neutral decision maker; 3) opportunity for oral presentation to decision-maker; 4) opportunity to present evidence or witnesses; 5) chance to confront and cross-examine witnesses or evidence; 6) right to have an attorney; 7) a decision based on the record with a statement of reasons for the decision. *Id.* Additionally, criminal trials entail the added safeguards of 1) the right to compulsory process of witnesses; 2) right to pre-trial discovery of evidence; 3) public hearing; 4) a transcript of the proceedings; 5) a jury trial; and 6) a burden of proof on the government greater than a preponderance of the evidence standard. *Id.*

3. *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (disagreeing as to what relevance fifth amendment has in penalty phase of trial); *Gardner v. Florida*, 430 U.S. 349, 354-58 (1977) (discussing development of different notions of what to properly consider in sentencing proceedings); see *infra* note 62 and accompanying text.

4. See *infra* notes 49-62 and accompanying text.

5. 231 Neb. 247, 435 N.W.2d 903 (1989).

6. NEB. REV. STAT. §§ 29-2911 to 29-2921 (1985).

7. *Shockley*, 231 Neb. at 248-50, 435 N.W.2d at 904-05.

fender Act (Act) unconstitutional.⁸ The opinion seems to strengthen the adherence of Nebraska courts to the concept that sentencing procedures under the Act do not command the full array of procedural safeguards that an actual criminal trial requires.⁹

The *Shockley* decision and its rationale provide a good setting for a discussion of what procedural safeguards are adequate in sentencing proceedings and where the line is drawn between acceptable and unacceptable practices in this area.¹⁰ This Note addresses the issue of what due process protections are to be afforded a convicted sex offender in sentencing under the Act.¹¹ This Note concludes that the appropriate level of procedural protection to be given a sex offender at sentencing should be the same as is required in the sentencing proceeding of any other convicted person.¹²

FACTS AND HOLDING

On November 13, 1987, Douglas A. Shockley entered a plea of no contest to first-degree sexual assault on a child in the Lancaster County District Court.¹³ This crime carries a penalty of one to twenty years imprisonment.¹⁴ After Shockley was convicted of this Class III felony, the court ordered a presentence investigation which included a mentally disordered sex offender evaluation as required by the Nebraska Mentally Disordered Sex Offender Act (Act).¹⁵

This evaluation was conducted pursuant to guidelines set forth in the Act requiring the court to appoint a psychiatrist and a psychologist to examine Shockley.¹⁶ On January 13, 1988, Shockley requested and was granted additional evaluations by physicians of his choice,

8. *Id.* at 250, 435 N.W.2d at 904-05.

9. *See infra* notes 199-248 and accompanying text.

10. *See infra* notes 45-248 and accompanying text.

11. *See infra* notes 45-248 and accompanying text.

12. *See infra* notes 199-248 and accompanying text.

13. Brief for Appellant at 5, *State v. Shockley*, 231 Neb. 247, 435 N.W.2d 903 (1989) (No. 88-366).

14. NEB. REV. STAT. § 28-319 (1985).

15. Brief for Appellant at 1. The Act provides in part: "After a person is convicted of a felony sexual offense, the court, prior to sentencing, shall order a presentence investigation which shall include an evaluation to determine whether the defendant is a mentally disordered sex offender. . . ." NEB. REV. STAT. § 29-2912 (1985).

16. Brief for Appellant at 2. The Act provides that:

[t]o conduct the evaluation the court shall appoint a panel of two physicians, licensed to practice medicine and surgery who have had at least three years of special training in treatment of mental disorders or one such physician and one clinical psychologist who has had at least three years of special training in treatment of mental disorders, to conduct individual psychiatric examinations of the defendant. . . .

NEB. REV. STAT. § 29-2913 (1985).

also pursuant to the Act.¹⁷

On March 11, 1988, Shockley filed three motions in the district court with respect to the mentally disordered sex offender issue.¹⁸ The first motion asked the court to declare the Act unconstitutional and unenforceable.¹⁹ The basis for this motion was that the statutes allegedly deprived Shockley of the rights of due process of law, of compulsory process, and of confrontation.²⁰ The second motion dealt with the burden of proof required in determining whether Shockley was a mentally disordered sex offender.²¹ The final motion asked for a full evidentiary hearing on the mentally disordered sex offender issue.²² The court denied all the motions on March 21, 1988.²³

On March 31, 1988, after the presentence investigation had been completed, Shockley was found to be a mentally disordered sex offender and was sentenced to imprisonment under the jurisdiction of the Nebraska Department of Correctional Services for a term of not less than four nor more than eight years.²⁴ Shockley was then committed to the Lincoln Regional Center for treatment of his mental disorder.²⁵ This treatment was for a period of time until he was no longer mentally disordered, or until he had received the maximum benefit of treatment, but should not exceed the length of his original sentence.²⁶

Shockley appealed the sentencing decision to the Nebraska Supreme Court.²⁷ In a per curiam opinion, from which Judges White and Shanahan dissented, the court held that the district court had not erred in denying Shockley a full evidentiary hearing or in not declaring the Act unconstitutional.²⁸ The court adhered to its earlier decision in *State v. Miller*²⁹ in which it had held that the mentally

17. *State v. Shockley*, 231 Neb. 247, 248, 435 N.W.2d 903, 904 (1989). The Act provides that: "[i]f the defendant, or counsel for the defendant, disagrees with the conclusions of the court appointed panel he or she may file a motion with the court requesting an additional evaluation by two other physicians of the defendant's choice . . ." NEB. REV. STAT. § 29-2913 (1985).

18. *Shockley*, 231 Neb. at 248, 435 N.W.2d at 904.

19. *Id.*

20. *Id.* Shockley had argued that he could not confront witnesses against him or produce witnesses on his behalf. Brief for Appellant at 7.

21. *Shockley*, 231 Neb. at 248, 435 N.W.2d at 904.

22. *Id.* The requested hearing was to include confrontation and compulsory process for the determination of his mentally disordered sex offender status. *Id.*

23. *Id.*

24. Brief for Appellant at 6.

25. *Shockley*, 231 Neb. at 248-49, 435 N.W.2d at 904.

26. *Id.* at 248-49, 435 N.W.2d at 904-05.

27. Brief for Appellant at 3.

28. *Shockley*, 231 Neb. at 248-50, 435 N.W.2d at 904-05.

29. 221 Neb. 862, 381 N.W.2d 156 (1986).

disordered sex offender statutes were constitutional.³⁰ The decision in *Shockley* solidified the court's position that the Act was distinguishable from the Colorado Sex Offender Act³¹ which was declared unconstitutional in *Specht v. Patterson*³² by the United States Supreme Court.³³ The Nebraska Supreme Court interpreted *Specht* to hold that greater due process safeguards had to be observed when an additional charge leading to a magnified criminal punishment was introduced in the sentencing proceeding.³⁴ However, the *Miller* court had held that the Nebraska Act had contained no enhanced sentence, and a person being sentenced under the Act had to be afforded only those due process rights that a convicted person normally had in sentencing proceedings.³⁵ The *Shockley* court determined that, as in *Miller*, there were adequate procedural due process safeguards accorded *Shockley* and thus affirmed the district court judgment.³⁶

Judge White, joined by Judge Shanahan, dissented as they had in *Miller*, because of their belief that the *Shockley* decision was incompatible with the constitutional guarantees of due process and equal protection.³⁷ Judge White stated that both *Miller* and *Shockley* were inconsistent with the reasoning of the United States Supreme Court in *Vitek v. Jones*.³⁸ The *Vitek* decision declared section 83-180 of the Nebraska Revised Statutes³⁹ unconstitutional because it lacked adequate due process protections.⁴⁰ The statute in *Vitek* applied to the transfer of prisoners from a correctional facility to a mental institution, without any hearing or other procedural safeguards, upon the recommendation of a physician or psychologist.⁴¹ Judge White could find no valid distinction between transferring a prisoner from a state penal complex to a mental institution, as in *Vitek*, and sentencing a convicted person to prison, but committing him to a mental institu-

30. *Shockley*, 231 Neb. at 249, 435 N.W.2d at 904-05.

31. COLO. REV. STAT. ANN. §§ 39-19-1 to 39-19-10 (1963).

32. 386 U.S. 605, 607 (1967).

33. *Shockley*, 231 Neb. at 249, 435 N.W.2d at 904-05.

34. *Shockley*, 231 Neb. at 249-50, 435 N.W.2d at 905.

35. *Id.* (quoting *Miller*, 221 Neb. at 865, 381 N.W.2d at 158).

36. *Shockley*, 231 Neb. at 249-50, 435 N.W.2d at 905.

37. *Id.* at 250, 435 N.W.2d at 905 (White, J., dissenting).

38. 445 U.S. 480 (1980). *Shockley*, 231 Neb. at 250, 435 N.W.2d at 905 (White, J., dissenting).

39. This statute provided that:

When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or . . . a mental disease or defect . . . the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution . . . where proper treatment is available. . . .

NEB. REV. STAT. § 83-180 (1976).

40. *Vitek*, 445 U.S. at 494-95, 497.

41. *Id.* at 483.

tion before he was incarcerated, as in *Shockley*.⁴² Judge White reasoned that the minimum protections set forth in *Vitek*, which consisted of notice, a hearing, an independent decision maker, an opportunity to present testimony and cross-examine witnesses, and a written statement by a factfinder were to be afforded all individuals sentenced for a crime, whether or not they were in prison.⁴³ Judge White stated that a person sentenced for a crime but not yet incarcerated had the same liberty interests as a person convicted of a crime and already incarcerated.⁴⁴

BACKGROUND

DUE PROCESS REQUIREMENTS IN SENTENCING PROCEDURES

The due process clause of the fifth amendment of the United States Constitution provides that no person in a criminal proceeding shall "be deprived of life, liberty, or property, without due process of law."⁴⁵ The essential safeguards of due process that are usually considered necessary are:

- (1) adequate notice of the charges or basis for government action;
- (2) a neutral decision-maker;
- (3) an opportunity to make an oral presentation to the decision-maker;
- (4) an opportunity to present evidence or witnesses to the decision-maker;
- (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual;
- (6) the right to have an attorney present the individual's case to the decision-maker;
- (7) a decision based on the record with a statement of reasons for the decision.⁴⁶

In criminal trials there are additional procedural due process safeguards.⁴⁷ These are:

- (1) a right to compulsory process of witnesses;
- (2) a right to pretrial discovery of evidence;
- (3) a public hearing;
- (4) a transcript of the proceedings;
- (5) a jury trial;
- (6) a burden of proof on the government greater than a preponderance of the evidence standard.⁴⁸

The combination and number of safeguards which should be afforded to convicted persons during sentencing has produced debate

42. *Shockley*, 231 Neb. at 252, 435 N.W.2d at 906 (White, J., dissenting).

43. *Id.* at 253, 435 N.W.2d at 907 (White, J., dissenting).

44. *Id.*

45. *Shockley*, 231 Neb. at 248, 435 N.W.2d at 904. U.S. CONST. amend. V. The fifth amendment provisions are applicable to the state by incorporation in the fourteenth amendment to the Constitution. See *supra* note 1 and accompanying text.

46. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 13.8, at 484 (3d ed. 1986) (citations omitted).

47. *Id.*

48. *Id.*

in many courts.⁴⁹ These courts have developed several theories which allow different levels of procedural safeguards at different stages within criminal proceedings and in civil commitment proceedings.⁵⁰ The stages of a criminal proceeding requiring different safeguards include pretrial hearings, trial, sentencing, parole, and probation revocation hearings.⁵¹

One theory, as articulated by the United States Supreme Court in *Allen v. Illinois*,⁵² is based on the distinction between proceedings which are civil in nature and those which are criminal in nature.⁵³ In *Allen*, Terry B. Allen was charged with unlawful restraint and deviate sexual assault.⁵⁴ Rather than pursuing these criminal charges, the state filed a civil petition to have Allen declared sexually dangerous under the Illinois Sexually Dangerous Persons Act (Illinois Act).⁵⁵ A bench trial was conducted on the petition to declare Allen a sexually dangerous person in which the testimony of two examining psychiatrists was admitted over Allen's objections.⁵⁶ The examinations were conducted pursuant to the Illinois Act.⁵⁷ The court then determined Allen to be a sexually dangerous person pursuant to the Illinois Act.⁵⁸ The Illinois Appellate Court reversed, stating that the trial court erred in hearing testimony obtained in violation of Allen's right against self-incrimination.⁵⁹ The Illinois Supreme Court determined that the proceeding to declare Allen a sexually danger-

49. See *infra* notes 52-62 and accompanying text.

50. See *infra* notes 52-62 and accompanying text.

51. See *infra* note 62 and accompanying text.

52. 478 U.S. 364 (1986).

53. *Id.* at 368-69. See also, *United States v. Ward*, 448 U.S. 242, 248 (1980) (indicating that the distinction between a civil and criminal penalty has some fifth amendment importance); *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 309 (3d Cir. 1966) (indicating a distinction between civil and criminal proceedings for due process purposes, even though the case was criminal in nature). But see *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (stating that the privilege not to be a witness against oneself or to involuntarily incriminate oneself was available in criminal as well as civil proceedings).

54. *Allen*, 478 U.S. at 365.

55. *Id.* The Sexually Dangerous Persons Act provides for the confinement of those adjudged sexually dangerous because of a mental disorder coupled with criminal propensities to commit sex offenses. ILL. ANN. STAT. ch. 38, para. 105-1.01 to 105-1.12 (Smith-Hurd 1980).

56. *Allen*, 478 U.S. at 366. Allen objected to allowing the testimony because the psychiatrists had obtained information from him in violation of his right against self-incrimination. *Id.*

57. *Id.*

58. *Id.* at 367. The Illinois Act defines a sexually dangerous person as "All persons suffering from a mental disorder . . . exist[ing] for a period of not less than one year . . . coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children . . ." ILL. ANN. STAT. ch. 38, para. 105-1.01 (Smith-Hurd 1980).

59. *Allen*, 478 U.S. at 367.

ous person was civil in nature and thus did not require the full array of procedural safeguards called for in a criminal trial, including the right against self-incrimination.⁶⁰ The United States Supreme Court determined that this procedure did not deal with the issue of guilt or innocence for a crime committed, but rather dealt with a determination of Allen's sexual behavior patterns and the treatment of any sexual disorders and affirmed the Illinois Supreme Court decision.⁶¹

Another theory supporting different levels of procedural safeguards is that the sentencing stage and other stages in a criminal trial which do not establish guilt or innocence are not proceedings which necessitate the full range of procedural safeguards.⁶² This theory was articulated by the United States Supreme Court in *Williams v. New York*.⁶³ The Court concluded that fewer procedural safeguards were necessary during the sentencing phase of a trial to ensure that all relevant information about the convicted person could be made known to the sentencing court.⁶⁴

PROCEDURAL REQUIREMENTS IN SENTENCING

One reason for having due process safeguards in sentencing is because there is a certain liberty interest involved in situations where defendants are incarcerated, or after being incarcerated are subjected to a greater punishment than they were originally sentenced to serve.⁶⁵ However, fewer safeguards are required during sentencing than are required during a proceeding which determines guilt or innocence.⁶⁶ This allows a court to provide a sentence which will be best suited for the individual convicted because all relevant informa-

60. *Id.*

61. *Id.* at 371-72, 375.

62. See *Maroney*, 355 F.2d at 309 (asserting the idea that the right to confrontation and cross-examination did not apply to sentencing in a criminal conviction); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (proposing that parole revocation proceedings were not a part of the criminal prosecution and thus the full panoply of rights due in such a proceeding did not apply to parole revocations); *Humphrey v. Cady*, 405 U.S. 504, 510 (1972) (stating in dicta possible distinctions between punishment stages of criminal proceedings justifying different procedural safeguards); *State v. Goodpasture*, 215 Neb. 341, 344-45, 338 N.W.2d 446, 449 (1983) (expressing a distinction in evidence allowed in the trial and conviction stage and that which was allowed after trial and before sentencing). But see *Estelle v. Smith*, 451 U.S. 454, 463 (1981) (stating that the fifth amendment privileges had relevance in the penalty phase of a murder trial).

63. 337 U.S. 241 (1949). See *infra* notes 64-79 and accompanying text.

64. *Id.* at 250-52.

65. See *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (holding that a prisoner was entitled to due process safeguards when undergoing a procedure to remove him from a prison to a mental ward resulting in a deprivation of liberty); *Specht v. Patterson*, 386 U.S. 605, 608-09 (1967) (stating that a person convicted of a sexual offense and sentenced under a statute imposing a new charge or magnified sentence was entitled to certain procedural due process safeguards).

66. See *Williams*, 337 U.S. at 242-50 (holding that the due process clause of the

tion about the crime and the individual, which may not have been admissible at trial, can be considered by the court.⁶⁷

The United States Supreme Court articulated the distinction in due process protections between the "guilt" phase of a trial and its sentencing phase in the murder case of *Williams v. New York*.⁶⁸ Williams was found guilty of first-degree murder in a New York state court.⁶⁹ The jury recommended that Williams be given a life sentence.⁷⁰ The trial judge then ordered a presentence investigation which revealed many facts about Williams' background, including a probation report containing Williams' past criminal record and other testimony which could not have been entered into evidence at trial.⁷¹ After considering this information and letting all the parties involved know of the use of the report, the judge sentenced Williams to death.⁷² The Court of Appeals of New York affirmed the lower court in both its conviction and sentencing decisions.⁷³

The case was appealed to the United States Supreme Court which set forth a rationale allowing a trial court judge a significant amount of discretion in sentencing.⁷⁴ In allowing broad discretion as to evidence received and taken into account for sentencing purposes, the Court noted that the trial court could acquire pertinent information in order to individualize a sentence, thus complying with the "modern philosophy of penology that the punishment should fit the offender and not merely the crime."⁷⁵

The Court rejected Williams' argument that the due process clause of the fourteenth amendment provided an absolute right to cross-examine adverse witnesses who contributed to a sentencing report.⁷⁶ The Court stated that after the guilt of a party had been established, endless and costly delays in criminal prosecutions would result if stringent due process safeguards were incorporated into sen-

fourteenth amendment did not require a hearing when determining a sentence to be imposed).

67. *Id.* See also *State v. Reeves*, 216 Neb. 206, 221, 344 N.W.2d 433, 444 (1984) (holding that the traditional rules of evidence were relaxed after conviction so that all pertinent information could be received by the court).

68. *Williams*, 337 U.S. at 251.

69. *Id.* at 242.

70. *Id.*

71. *Id.* at 244.

72. *Id.* at 242.

73. *Id.* at 243. The decision was affirmed despite Williams' contention that he had had no opportunity to cross-examine witnesses and information used during the sentencing. *Id.*

74. *Id.* at 244-45.

75. *Id.* at 247 (citing *People v. Johnson*, 252 N.Y. 387, 392, 169 N.E. 619, 621 (1930)).

76. *Id.* at 245.

tencing proceedings.⁷⁷

The dissent agreed with the use of probation reports in the modern sentencing proceeding.⁷⁸ However, the dissent found that in a capital case in which the jury recommended a life sentence, the recommendation should be given greater deference.⁷⁹

In *Gardner v. Florida*,⁸⁰ the Supreme Court was again faced with a capital murder conviction and a death sentence which was based partially on a presentence report.⁸¹ Daniel Wilbur Gardner was tried in the Circuit Court of Citrus County, Florida for killing his wife.⁸² He was found guilty of first-degree murder by a jury on January 10, 1974.⁸³ In a separate sentencing hearing held on that same day, the jury heard evidence regarding aggravating and mitigating circumstances of the murder to be used in determining whether Gardner should be sentenced to life in prison or death.⁸⁴ The judge then ordered a presentence investigation of Gardner.⁸⁵ On January 10, 1974, the jury returned with its advisory verdict that Gardner be sentenced to life in prison.⁸⁶ After reviewing the presentence investigation report that contained a confidential portion which was not disclosed to all the parties, the judge sentenced Gardner to death.⁸⁷ The Court's plurality opinion, reversing the sentence, distinguished the case from *Williams*.⁸⁸ The plurality distinguished *Gardner* from *Williams* because the presentence report used by the sentencing judge in *Gardner* was kept confidential and Gardner had had no opportunity to see, rebut, or explain its contents.⁸⁹ In *Williams*, the report was disclosed to Williams and his attorneys at the sentencing hearing and "the statements made by the judge . . . [were] not challenged by [Williams] or his counsel, nor was the judge asked to disregard any of them or to afford [Williams] a chance to refute or discredit any of

77. *Id.* at 250. The Court stated that delays would result from cross-examination of every information source and the retrial of collateral issues. *Id.* at 250.

78. *Id.* at 253 (Murphy, J., dissenting).

79. *Id.*

80. 430 U.S. 349 (1977).

81. *Id.* at 353.

82. *Id.* at 351.

83. *Id.*

84. *Id.* at 351-52. The jury also had to determine whether the aggravating or mitigating circumstances outweighed each other in its determination of a sentence of life in prison or death. *Id.* at 352.

85. *Id.* at 352.

86. *Id.* at 352-53.

87. *Id.* at 353.

88. *Id.* at 356. Justice Stevens, writing for the Court, was joined by Justices Stewart and Powell. Justices White and Blackmun wrote separate concurrences, while Justice Brennan and Chief Justice Burger concurred in the judgment. Justice Marshall and Justice Rehnquist filed dissents. *Id.* at 351-71.

89. *Id.* at 356.

them by cross-examination or otherwise.'"⁹⁰

The plurality further distinguished *Gardner* from *Williams* through a re-examination of modern attitudes toward the death penalty.⁹¹ This re-examination stemmed from the fact that many of the Justices found that death was a different form of punishment than any type of punitive imprisonment and thus called for greater due process safeguards in the sentencing proceeding.⁹²

Although the death sentence in *Gardner* was reversed, it was not obvious whether the concurring votes were based on due process grounds or on eighth amendment considerations.⁹³ Justices Stevens, Stewart, and Powell believed that due process required adherence to all the procedural safeguards of a criminal trial in the sentencing phase of the case.⁹⁴ The remaining votes for reversal came from four separate concurrences by the Chief Justice and Justices White, Blackmun, and Brennan, all noting different due process and eighth amendment considerations.⁹⁵ There was no clear consensus that *Gardner* was denied due process when the results of a presentence investigation were considered in the sentencing aspect of his trial.⁹⁶

In *United States ex rel. Gerchman v. Maroney*,⁹⁷ the United States Court of Appeals for the Third Circuit applied the *Williams* position that "the right of confrontation and cross-examination [did] not apply to sentencing pursuant to a criminal conviction."⁹⁸ Carl G. Gerchman pleaded guilty to separate counts of assault with intent to ravish, indecent assault, assault and battery, and aggravated assault and battery.⁹⁹ At the sentencing proceeding, the trial court heard testimony regarding the crime itself and the mental condition of Gerchman.¹⁰⁰ The court then invoked the Barr-Walker Act¹⁰¹ which

90. *Id.* (quoting *Williams*, 337 U.S. at 247-48).

91. *Id.* at 357.

92. *Id.* at 357-58.

93. *Gardner*, 430 U.S. at 362-65.

94. *Id.* at 358.

95. *Id.* at 362-65. Chief Justice Burger concurred in the judgment without filing an opinion expressing the basis for his concurrence. Justices White and Blackmun refused to address the due process issue, but voted to concur on eighth amendment grounds. Justice Brennan, while basing his dissent on a violation of the eighth amendment, implied that the sentence also violated due process. *Id.* The eighth amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

96. *Gardner*, 430 U.S. at 362-65.

97. 355 F.2d 302 (3d Cir. 1966).

98. *Id.* at 309 (citing *Williams*, 337 U.S. at 245).

99. *Id.* at 305. Gerchman abducted a young mentally retarded woman and proceeded to beat and torture the woman before tying her to a tree and abandoning her in a wooded area. *Id.*

100. *Id.* at 305-06.

101. The Barr-Walker Act allows the court to determine if a person before it, convicted of "indecent assault, incest, assault with intent to commit sodomy, solicitation to

provided that a convicted sex offender who was considered a threat to the public or a mentally ill habitual offender could be alternatively sentenced to a mental hospital.¹⁰² A presentence investigation report containing a letter from the Commission of Mental Health and a psychiatric report was submitted to the court to aid in sentencing Gerchman.¹⁰³ Gerchman was sentenced to pay the costs of the prosecution and then committed to a Correctional Diagnostic and Classification Center for a term of imprisonment of not less than one day nor greater than his natural life.¹⁰⁴

The Third Circuit, in vacating the district court's denial of habeas corpus, found that Gerchman had been deprived of due process because he was denied the opportunity to confront and cross-examine the witnesses against him.¹⁰⁵ The court held that those protections were necessary for a fair trial on the issues involved.¹⁰⁶ Yet the court affirmed the concept that those safeguards were not required in sentencing proceedings.¹⁰⁷ The court further held that the present proceedings were not civil in nature, nor were they part of the sentencing process, but rather, they were essentially an independent criminal proceeding.¹⁰⁸ The court determined that because the commitment procedure was criminal by nature and by operation, and because the true rationale behind the proceeding was to punish the defendant, the proceeding had to afford a defendant the same due process guarantees required at a criminal trial.¹⁰⁹

NEBRASKA PROCEDURAL DUE PROCESS REQUIREMENTS IN SENTENCING

The law in Nebraska seems to be well-settled that a trial court is afforded wide discretion in sentencing after guilt has been determined.¹¹⁰ In *State v. Goodpasture*,¹¹¹ the Nebraska Supreme Court

commit sodomy, sodomy, assault with intent to ravish or rape would, if at large, constitute a threat of bodily harm to members of the public, or is an habitual offender and mentally ill . . ." PA. STAT. ANN. tit. 19, §§ 1166 to 1174 (Purdon 1964). The court could sentence the person to a state institution for an indeterminate term from one day to life. *Id.* See also *Maroney*, 355 F.2d at 304.

102. *Maroney*, 355 F.2d at 304.

103. *Id.* at 306.

104. *Id.* at 307.

105. *Id.* at 308, 315.

106. *Id.* at 308.

107. *Id.* at 309 (citing *Williams*, 337 U.S. at 245).

108. *Id.* at 312.

109. *Id.* at 310-11.

110. See *State v. Rose*, 183 Neb. 809, 811, 164 N.W.2d 646, 648 (1969) (stating that a presentence investigation does not deal with the issue of guilt); *State v. Hylton*, 175 Neb. 828, 830, 124 N.W.2d 230, 232 (1963) (imposing prison sentence rather than probation); *Maher v. State*, 144 Neb. 463, 482, 13 N.W.2d 641, 653 (1944) (holding that it was not error to impose sentence before refusal of new trial was recorded in journal).

determined that a trial court judge was to be afforded broad discretion during the sentencing proceeding.¹¹² Rosco Goodpasture pleaded *nolo contendere* to a charge of disturbing the peace.¹¹³ This charge was a Class III misdemeanor which was punishable by "imprisonment not to exceed [three] months, or a fine not to exceed \$500, or both a fine and imprisonment."¹¹⁴ At the sentencing hearing, the trial court judge revealed that he had been approached by the complaining witness but would not consider any statements made to him out of court by the witness.¹¹⁵ Goodpasture's counsel was given the presentence investigation report before the sentence was imposed.¹¹⁶ Goodpasture was sentenced to thirty days in a county jail.¹¹⁷

On appeal to the Nebraska Supreme Court, Chief Justice Krivosha stated that "[t]here [was] no question that the trial court could consider any statements made by the complaining witness once guilt was determined, particularly where, as here, the statements were included in the presentence investigation, a copy of which was given to Goodpasture."¹¹⁸ In support of this determination the court quoted from *State v. Rose*:¹¹⁹

It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the source [sic] and type of evidence he can use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. . . . [T]he trial court can consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue. The latitude allowed a sentencing judge . . . is almost without limitation as long as it is relevant to the issue.¹²⁰

111. 215 Neb. 341, 338 N.W.2d 446 (1983).

112. *Id.* at 345, 338 N.W.2d at 449 (citing *State v. Porter*, 209 Neb. 722, 723, 310 N.W.2d 926, 927 (1981)). See *supra* notes 110-11 and accompanying text.

113. *Goodpasture*, 215 Neb. at 342, 338 N.W.2d at 448.

114. *Id.*

115. *Id.* at 343, 338 N.W.2d at 448.

116. *Id.* The defense counsel was fully aware of the contents of the report. *Id.*

117. *Id.* at 342, 338 N.W.2d at 448.

118. *Id.* at 346, 338 N.W.2d at 449.

119. 183 Neb. 809, 164 N.W.2d 646 (1969).

120. *Goodpasture*, 215 Neb. at 344-45, 338 N.W.2d at 449 (quoting *Rose*, 183 Neb. at 811, 164 N.W.2d at 648-49. See also *Reeves*, 216 Neb. at 222, 344 N.W.2d at 444 (1984) (holding that the presentence investigation was a valuable tool in the sentencing of persons convicted of murder as long as the reports were made available to defense counsel before sentencing); *State v. Dobbins*, 221 Neb. 778, 780-81, 380 N.W.2d 640, 642

The Nebraska Supreme Court affirmed the trial court decision in *Goodpasture* and thus reinforced the flexible nature and use of information in the sentencing proceeding.¹²¹

SENTENCING STATUTES LEADING TO ENHANCED PUNISHMENT

Sentencing Requirements Under Mentally Disordered Sex Offender Statutes

The United States Supreme Court addressed the issue of procedural safeguards in sentencing sexual offenders in *Specht v. Patterson*.¹²² In *Specht*, Francis Eddie Specht was convicted of the crime of indecent liberties which provided for a maximum sentence of ten years.¹²³ Specht was then sentenced under the Colorado Sex Offenders Act (Colorado Act)¹²⁴ for a period of one day to life imprisonment.¹²⁵

The Court stated that the Colorado Act could be invoked when the trial court found that a person convicted of specified sex offenses "constitute[d] a threat of bodily harm to members of the public, or [was] an habitual offender and mentally ill."¹²⁶ The Court stated that once such a determination was made, the trial court was required to follow the procedures of the Colorado Act which provided that a psychiatric examination be conducted and a report prepared for the court containing all the relevant facts and findings of the examiners and their opinions as to whether the defendant should be committed to a state hospital.¹²⁷ All of these necessary reports and

(1986) (stating evidence showing defendant's life, character, conduct, and prior convictions was relevant when determining a proper sentence); *State v. Dillon*, 222 Neb. 131, 134, 382 N.W.2d 353, 356 (1986) (holding that the Nebraska Rules of Evidence did not apply at a sentence hearing); *State v. Anderson*, 207 Neb. 51, 72, 296 N.W.2d 440, 453 (1980), *cert. denied*, 450 U.S. 1025 (1981) (stating that there was no requirement in the law "that a sentencing court [could] consider only information adduced at trial when exercising discretion in imposing sentence").

121. *Goodpasture*, 215 Neb. at 347, 338 N.W.2d at 450. See also *supra* note 120 and accompanying text.

122. 386 U.S. 605 (1967).

123. *Id.* at 607. See *infra* note 141 and accompanying text.

124. COLO. REV. STAT. §§ 39-19-1 to 39-19-10 (1963). The Colorado Act provides for the sentencing of sex offenders who are determined to be a threat to the public or habitual offenders and mentally ill to an indeterminate term of one day to life in a state hospital. *Id.*

125. *Specht*, 386 U.S. at 607.

126. *Id.* at 607 (citing COLO. REV. STAT. § 39-19-1 (1963)).

127. *Id.* at 607-08. The provision setting out this procedure provides:

... (2) A complete psychiatric evaluation shall have been made of him by the psychiatrists of the Colorado psychopathic hospital or by psychiatrists designated by the district court; and (3) A complete written report thereof submitted to the district courts. Such report shall contain all facts and findings, together with recommendations as to whether or not the person is treatable under the provisions of this article; whether or not the person should be com-

examinations were completed with regard to *Specht*.¹²⁸ However, *Specht* claimed that the statute failed to provide for a full evidentiary hearing in which he could confront and cross-examine witnesses and present evidence of his own by compulsory process.¹²⁹ Additionally, *Specht* argued that the evidence allowed was primarily hearsay and was not provided to him prior to the imposition of the sentence.¹³⁰

The Court held that the requirements of due process were not satisfied by the procedures provided for under the Colorado Act.¹³¹ However, the Court affirmed its prior decision in *Williams* that permitted the use of presentence reports to individualize sentencing and punishment.¹³² The Court distinguished *Williams* from the "radically different" situation in *Specht*.¹³³ In distinguishing *Specht* from *Williams*, the Court held that under the Colorado Act, the commission of a sex crime was not the basis for sentencing, but rather, the particular conviction for that sex crime was the basis for instigating a further proceeding to decide whether the person was mentally ill.¹³⁴ The majority contended that a determination that the sex offender fell under the purview of the Act was a new finding of fact which was not a part of the original offense charged.¹³⁵ The majority also compared the procedures in *Specht* to those in *Maroney* in which Gerchman was to be given a full judicial hearing complete with adequate procedural protections before any magnified sentence was imposed.¹³⁶ The Court continued by stating that additional due process protections were required because utilizing the Colorado Act in effect entailed a new charge with additional punishment.¹³⁷

The Court found the Colorado Act lacking in due process protection because: (1) it provided for a magnified sentence resulting from what amounted to a separate criminal proceeding after *Specht*'s original conviction, (2) there was no opportunity to be present with counsel or opportunity to be heard, and (3) there was no opportunity for *Specht* to confront and cross-examine witnesses or to offer

mitted to the Colorado state hospital or to the state home and training schools as mentally ill or mentally deficient. Such report shall also contain the psychiatrist's opinion as to whether or not the person could be adequately supervised on probation.

COLO. REV. STAT. § 39-199-1 (1963).

128. *Specht*, 386 U.S. at 608.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* The commitment proceedings involved in *Specht* were not similar to the death sentence proceeding in *Williams*. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 609-10 (citing to *Maroney*, 355 F.2d at 312).

137. *Id.* at 610.

evidence.¹³⁸

In *People v. White*,¹³⁹ the Colorado Supreme Court had the opportunity to decide whether the due process safeguards lacking in *Specht* were present in a subsequent Colorado Sex Offenders Act (Colorado Act).¹⁴⁰ Larry W. White pleaded guilty to the rape of a thirteen-year-old girl.¹⁴¹ White was then advised of his rights and of the possibility of being sentenced under the Colorado Act.¹⁴² Proceedings were then commenced under the Colorado Act, and accordingly, White was examined by court appointed psychiatrists.¹⁴³ The probation department was ordered to prepare a report concerning White to be used at his sentencing hearing.¹⁴⁴ A full evidentiary hearing was then held in which the court determined whether White was a sex offender and whether he constituted a threat of bodily harm to the public.¹⁴⁵ The court then committed White to the Department of Institutions for an indeterminate sentence of one day to life.¹⁴⁶

The Colorado Supreme Court affirmed the district court and held that the Colorado Act adequately cured the due process deficiencies contained in its predecessor which had been declared unconstitutional in *Specht*.¹⁴⁷ The court stated that the holding of the Supreme Court in *Specht* had been that the fundamental due process

138. *Id.* at 610-11.

139. 656 P.2d 690 (Colo. 1983).

140. *Id.* at 692-93. COLO. REV. STAT. §§ 16-13-201 to 16-13-216 (1986). The Colorado Act provides that: "[T]he district court . . . in lieu of sentence otherwise provided by law, commit a sex offender to the custody of the department for an indeterminate term having a minimum of one day and a maximum of his natural life." COLO. REV. STAT. § 16-13-202 (1986). The major difference in the present Colorado Act's language, which was not in its predecessor, declared unconstitutional in *Specht*, is that a hearing is provided for in which the defendant has all the procedural protections of a regular trial on the mental defect issue. See COLO. REV. STAT. § 16-13-210 (1986).

141. *White*, 656 P.2d at 692. White was charged under section 40-3-401(1)(d), now contained in section 18-3-402 of the Colorado Revised Statutes, which directs that sentencing be made pursuant to section 18-1-105(9)(e). COLO. REV. STAT. § 18-3-402 (1986). Rape is a class two felony punishable by imprisonment of up to eight years. *Id.* Section 18-1-105(9)(e) provides that the court has to sentence the defendant to a greater term than the maximum range in section 18-1-105. COLO. REV. STAT. § 18-1-105(9)(e). Section 18-1-105 provides for the range in these cases of "[e]ight to twelve years plus one year of parole. . . ." COLO. REV. STAT. § 18-1-105 (1986).

142. *White*, 656 P.2d at 692.

143. *Id.* at 692. Section 16-13-207 provides that: "If committed to the Colorado state hospital . . . the defendant shall be examined by two psychiatrists of the . . . institution." COLO. REV. STAT. § 16-13-207 (1986).

144. *White*, 656 P.2d at 692. Section 16-13-208 provides that: "Upon the commencement of proceedings under this part 2, the court shall order an investigation and report to be made by the probation officer . . ." COLO. REV. STAT. § 16-13-208 (1986).

145. *White*, 656 P.2d at 692. See COLO. REV. STAT. § 16-13-211(2) (1986) (containing the prerequisites for sentencing).

146. *White*, 656 P.2d at 692.

147. *Id.* at 693.

right to a hearing had been lacking.¹⁴⁸ The court interpreted this requirement of a hearing to include "the right to be present there with counsel, to have an opportunity to be heard, to confront adverse witnesses, to cross-examine, to offer evidence, and to appeal" prior to sentencing under the Colorado Act.¹⁴⁹

The court found no violation of White's due process rights in the sentencing proceeding or in the review procedures set out for post-commitment relief.¹⁵⁰ The court concluded that there had been an adequate hearing at the sentencing and an opportunity for a hearing after commitment to treatment.¹⁵¹

DUE PROCESS REQUIREMENTS WHEN A LIBERTY INTEREST IS INVOLVED

In *Vitek v. Jones*,¹⁵² the United States Supreme Court was confronted with the issue of whether a Nebraska prison inmate could be transferred from prison to a state mental institution, pursuant to section 83-180 of the Nebraska Revised Statutes, without the benefit of a hearing on the matter.¹⁵³ The Court granted certiorari after the United States District Court for the District of Nebraska declared the statute unconstitutional on procedural due process grounds.¹⁵⁴ The Court affirmed the district court, with the addition of one modification.¹⁵⁵

Jones was convicted of robbery and sentenced to a term of three to nine years in prison on May 31, 1974.¹⁵⁶ In January of 1975, he was transferred to the penitentiary hospital, and two days after his arri-

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* The court stated that a review by the board of parole within six months after commitment also satisfied due process requirements. *Id.*

152. 445 U.S. 480 (1980).

153. *Id.* at 494-95. Section 83-1380 provides that:

(1) When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a . . . mental disease or defect . . . [and] is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer . . . to any medical correctional facility, or to another institution . . . where proper treatment is available. . . . (2) When the physician or psychologist . . . finds that a person committed to the department suffers from a physical or mental disease or defect . . . the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. . . .

NEB. REV. STAT. § 83-180 (1976).

154. *Vitek*, 445 U.S. at 485-87.

155. *Id.* at 497. The modification of the district court decision was the state would not have to provide an attorney, but rather, could provide any independent assistance. *Id.*

156. *Id.* at 484.

val he was put in solitary confinement.¹⁵⁷ After Jones set fire to his mattress and severely burned himself, he was subjected to a psychiatric examination pursuant to section 83-180.¹⁵⁸ The examination indicated that Jones was suffering from a mental illness or defect which could not be properly treated in the penal complex.¹⁵⁹ He was then transferred to the security unit of the Lincoln Regional Center, a mental facility under the jurisdiction of the Department of Public Institutions.¹⁶⁰ Jones challenged the procedures utilized by the penitentiary officials in transferring prisoners from prison to the mental hospital on procedural due process grounds.¹⁶¹ The district court declared section 83-180 unconstitutional, holding that the due process clause of the fourteenth amendment was violated when a prisoner was transferred to a mental hospital without adequate notice or a hearing.¹⁶² The district court stated that to comply with fourteenth amendment requirements the "transfers must be accompanied by adequate notice, an adversary hearing before an independent decision[]maker, a written statement by the factfinder of the evidence relied on and the reasons for the decision, and the availability of appointed counsel for indigent prisoners."¹⁶³ The district court permanently enjoined the state from transferring Jones for the Lincoln Regional Center unless the procedures set out in its opinion were followed.¹⁶⁴

The Supreme Court affirmed the district court with the modification that an attorney did not have to be appointed for the prisoner for these transfer proceedings.¹⁶⁵ The Court affirmed the determination of the district court that Jones had a liberty interest which was protected by the due process clause and this interest was infringed when he was transferred to a mental institution.¹⁶⁶ In support of this contention the Court adopted the district court's reasoning that a prisoner could expect to be transferred to a mental hospital only if found to be suffering from a mental illness not treatable in the correctional facility.¹⁶⁷ The Court also noted the district court's rationale that a prisoner's liberty interest was infringed by characterizing

157. *Id.*

158. *Id.* See *supra* note 153.

159. *Vitek*, 445 U.S. at 484.

160. *Id.*

161. *Id.* See *supra* note 153.

162. *Vitek*, 445 U.S. at 485. The case was heard by a three-judge district court panel which declared section 83-180 unconstitutional with regards to Jones. *Vitek*, 445 U.S. at 484-85. See *Miller v. Vitek*, 437 F. Supp. 569, 575 (D. Neb. 1977) (allowing Jones to intervene in action brought by other prisoners against the proper state officials).

163. *Vitek*, 445 U.S. at 485 (citing *Miller*, 437 F. Supp. at 575(1)).

164. *Id.* See *infra* note 174 and accompanying text.

165. *Vitek*, 445 U.S. at 497.

166. *Id.* at 487-88.

167. *Id.*

him as mentally ill and transferring him to a mental facility.¹⁶⁸ The Court agreed that such a transfer had a stigmatizing effect and constituted a major change in the conditions of confinement that amounted to a grievous loss to the prisoner.¹⁶⁹

The Court stated that once a liberty interest was identified or granted by statute due process protections attached to that liberty interest.¹⁷⁰ The Court stated that while a convicted prisoner forfeited certain liberties, a liberty interest in not being transferred to a mental institution was retained.¹⁷¹ The Court noted that the civil commitment of an ordinary citizen to a mental hospital had been held to be a great curtailment of liberty requiring due process protection.¹⁷² The Court found that "[t]he loss of liberty produced by an involuntary commitment [was] more than a loss of freedom from confinement."¹⁷³ Thus, the Court held that a conviction for a crime and a sentence to confinement did not give the state a right to determine that a prisoner was mentally ill and to involuntarily commit the prisoner to a mental hospital without providing additional due process protections.¹⁷⁴

168. *Id.* at 488.

169. *Id.*

170. *Id.* at 488. See also *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979) (noting that if a state granted a prisoner parole by executive action it did not automatically entail a liberty interest in the parole release proceeding which required due process protections); *Morrissey*, 408 U.S. at 480-82 (stating that although not a criminal proceeding requiring the full panoply of due process rights, the protections required in the parole revocation proceeding depended on whether the individual would suffer a grievous loss which could implicate a liberty interest).

171. *Vitek*, 445 U.S. at 491.

172. *Id.* at 491-92 (citing *Humphrey*, 405 U.S. at 509); See also *Addington v. Texas*, 441 U.S. 418, 425 (1979) (dealing with standards of due process utilized).

173. *Vitek*, 445 U.S. at 492.

174. *Id.* at 493-94. The minimum due process requirements articulated by the district court consisted of:

- A. [A] [w]ritten notice to the prisoner . . . ;
- B. A hearing . . . at which disclosure to the prisoner [was] made of the evidence being relied upon for the transfer . . . ;
- C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state . . . ;
- D. An independent decisionmaker;
- E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
- F. [The] [a]vailability of legal counsel . . . ;
- G. [An] [e]ffective and timely notice of all the foregoing rights.

Miller, 437 F. Supp. at 575. All of the requirements but procedure "F" were adopted by the Supreme Court. *Vitek*, 445 U.S. at 497.

THE NEBRASKA MENTALLY DISORDERED SEX OFFENDER ACT AND SENTENCING PROCEDURES

The Nebraska Mentally Disordered Sex Offender Act (Act) provides a sentencing procedure which can be invoked when a person is convicted of a sexual offense.¹⁷⁵ The Act allows the trial court to commit a person to a regional center for treatment of a mental disorder, if such a disorder is found and is treatable, after first sentencing the person as provided by law.¹⁷⁶ The Nebraska Supreme Court has previously upheld these statutory provisions against constitutional procedural due process attacks.¹⁷⁷

The sentencing procedure set forth in the Act is meant to allow for an alternative sentence for those who have been convicted of a sex offense and determined to be mentally disordered.¹⁷⁸ The determination that an offender is mentally disordered follows a presentence investigation which includes an evaluation of the defendant conducted by qualified medical personnel.¹⁷⁹ The entire proceeding set forth under this Act is deemed a critical stage of a criminal prosecution and thus is afforded all the procedural safeguards a defendant has in any ordinary sentencing proceeding.¹⁸⁰

The Nebraska Supreme Court interpreted and upheld the statu-

175. NEB. REV. STAT. §§ 29-2911 to 29-2921 (1985). See *infra* note 176 and accompanying text.

176. NEB. REV. STAT. § 29-2915 (Reissue 1985). Section 29-2915 provides that: If the court determines that: "(1) The defendant is a mentally disordered sex offender based on the information and conclusions in the presentence investigation; (2) the disorder is treatable; and (3) such treatment is available in the state, the court shall, after first sentencing the defendant as provided by law for the offense for which he or she has been convicted, commit the defendant for treatment to one of the regional centers until such time as the court determines . . . that the defendant is no longer mentally disordered or until the defendant has received the maximum benefit of treatment, except that no sentence to treatment shall exceed the maximum length of such offender's sentence. . . ." *Id.*

177. See *State v. Miller*, 221 Neb. 862, 381 N.W.2d 156 (1986).

178. NEB. REV. STAT. § 29-2914 (1985). Section 29-2914 provides that: "If the court determines that the defendant is not a mentally disordered sex offender, or is . . . non-treatable, or that treatment is not available in the state, . . . the court shall sentence the defendant as provided by law on the offense for which he or she has been convicted." *Id.*

179. NEB. REV. STAT. § 29-2912 (1985). Section 29-2912 provides that: "[a]fter a person is convicted of a felony sexual offense, the court, prior to sentencing, shall order a presentence investigation which shall include an evaluation to determine whether the defendant is a mentally disordered sex offender. . . ." *Id.* See also NEB. REV. STAT. § 29-1913 (1985); *supra* note 16.

180. NEB. REV. STAT. § 29-2915 (1985). Section 29-2915 provides that: "that no sentence to treatment shall exceed the maximum length of such offender's sentence . . . the entire proceeding . . . shall be deemed a critical stage of a criminal prosecution at which the defendant shall be accorded all the rights a defendant has in sentencing proceedings. . . ." *Id.*

tory provisions of the Act in *State v. Miller*.¹⁸¹ In *Miller*, Jerald Miller entered a plea of no contest to a misdemeanor charge of third-degree sexual assault.¹⁸² The trial court then ordered a presentence investigation which included an evaluation by a psychologist and a psychiatrist to determine whether Miller was a mentally disordered sex offender.¹⁸³ After completion of this evaluation, Miller requested and was granted a second evaluation by a different psychiatrist and psychologist pursuant to the Act.¹⁸⁴

On April 25, 1985, Miller filed motions to have an evidentiary hearing on the mentally disordered issue, to confront witnesses against him, and to declare the Act unconstitutional.¹⁸⁵ These motions were denied and at the sentencing hearing, after receiving all the relevant reports, Miller was declared a mentally disordered sex offender.¹⁸⁶ Miller was sentenced to a prison term of one year and was ordered to serve the sentence at the Lincoln Regional Center.¹⁸⁷

Miller argued that his right to due process and right to confrontation had been infringed when the trial court denied a full evidentiary hearing on the mentally disordered sex offender issue.¹⁸⁸ He based his argument on the United States Supreme Court decision in *Specht*.¹⁸⁹ The Nebraska Supreme Court rejected his contention, stating that *Specht* required additional safeguards because that case involved a sentencing proceeding in which a new charge leading to magnified criminal punishment had been made.¹⁹⁰ Judge Boslaugh, writing for the majority, distinguished the Nebraska Act from the Colorado Act involved in *Specht* which had allowed for a sentence of an indeterminate term of from one day to life.¹⁹¹ The court noted that the Nebraska Act provided that no sentence to treatment could exceed the length of any offender's sentence.¹⁹² The court asserted that the statute gave a convicted individual all the due process protections any defendant had in a sentencing proceeding.¹⁹³ The court determined that this meant that Miller was entitled to due process in

181. 221 Neb. 862, 866, 381 N.W.2d 156, 158 (1986).

182. *Id.* at 863, 381 N.W.2d at 157. The original charge was first-degree sexual assault on a child. *Id.*

183. *Id.* at 863, 381 N.W.2d at 157. See *supra* note 179 and accompanying text.

184. *Miller*, 221 Neb. at 863, 381 N.W.2d at 157. See *supra* note 16.

185. *Miller*, 221 Neb. at 863, 381 N.W.2d at 157.

186. *Id.* at 863-64, 381 N.W.2d at 157.

187. *Id.* at 864, 381 N.W.2d at 157.

188. *Id.* at 864, 381 N.W.2d at 157-58 (Miller assigned five errors dealing with the single issue of due process rights).

189. *Id.*

190. *Id.* at 865, 381 N.W.2d at 158.

191. *Id.* (citing NEB. REV. STAT. § 29-2915 (1979)).

192. *Id.*

193. *Id.*

the sentencing proceeding, but that the United States Constitution did not require the full panoply of rights accorded when the issue was guilt or innocence.¹⁹⁴ The court found that because Miller had been given an opportunity to deny or explain the findings of the presentence report, the minimum procedural due process requirements had been met and the district court decision was affirmed.¹⁹⁵

Judge White, joined by Judge Shanahan, dissented because he reasoned that the procedure utilized was inconsistent with due process and equal protection of the law.¹⁹⁶ Judge White stated that this inconsistency was evident in the fact that a person could be confined to the same institution as a mentally ill patient and labeled a sex offender without having any opportunity to examine the results of his or her mental examination.¹⁹⁷ Conversely, Judge White noted that a mentally ill patient had the right to cross-examine adverse witnesses and evidence in a civil commitment proceeding pursuant to section 83-1058 of the Nebraska Revised Statutes.¹⁹⁸

ANALYSIS

THE *SHOCKLEY* MAJORITY AND DUE PROCESS SENTENCING REQUIREMENTS

In *State v. Shockley*,¹⁹⁹ the Nebraska Supreme Court addressed the issue of the requisite due process protections in the sentencing provisions of the Nebraska Mentally Disordered Sex Offender Act.²⁰⁰ In upholding the constitutionality of the Act, the per curiam opinion adhered to the rationale of its earlier decision in *State v. Miller*²⁰¹ which also dealt with the issue of what procedural safeguards should be followed in sentencing.²⁰²

The majority opinion again distinguished the Nebraska Act from

194. *Id.* at 865-66, 381 N.W.2d at 158. See *supra* notes 68-96 and accompanying text.

195. *Miller*, 221 Neb. at 866, 381 N.W.2d at 158-59.

196. *Id.* at 866-67, 381 N.W.2d at 159 (White, J., dissenting).

197. *Id.*

198. *Id.* Section 83-1058 provides for the civil commitment of individuals and states that:

The subject of a petition shall have the right at a hearing held under this act to confront and cross-examine adverse witnesses and evidence equivalent to the rights of confrontation granted by amendments VI and XIV of the Constitution of the United States, and Article I, section 11, of the Constitution of Nebraska.

NEB. REV. STAT. § 83-1058 (1985).

199. 231 Neb. 247, 435 N.W.2d 903 (1989).

200. *Id.* at 248-50, 435 N.W.2d at 904-05. See NEB. REV. STAT. §§ 29-2911 to 29-2921 (1985).

201. 221 Neb. 862, 381 N.W.2d 156 (1986).

202. *Shockley*, 231 Neb. at 249, 435 N.W.2d 904-05, *Miller*, 221 Neb. at 863, 381 N.W.2d at 157.

the Colorado Act in *Specht v. Patterson*²⁰³ which had been declared unconstitutional.²⁰⁴ The Colorado Act had provided that a court was allowed to enhance the sentence imposed upon a sex offender from the time allowed by statute to an indeterminate period of one day to life.²⁰⁵ The Nebraska Act at issue in *Shockley* does not provide for an enhanced or magnified sentence from that which was originally available in the sentencing.²⁰⁶ Rather, the Act provides that a sentence to treatment in a mental institution shall not exceed the length of the offender's sentence.²⁰⁷

The court stated that because *Shockley* was given a hearing at the time of sentencing in which he had the opportunity to explain, rebut, or deny any finding set out in the presentencing report the minimal due process requirements necessary in a sentencing proceeding were fulfilled.²⁰⁸ The court adopted the rationale of *Miller*, stating that the procedures utilized in *Shockley* were sufficient to pass constitutional muster under United States Supreme Court sentencing standards.²⁰⁹ In *Williams v. New York*,²¹⁰ the United States Supreme Court established what due process procedural safeguards were required in sentencing after a murder conviction.²¹¹ The Court condoned the use of presentence reports which included testimony which could not be admitted at trial in sentencing the defendant.²¹² Because all the parties were advised of the content of the reports and the defendant had been given the opportunity to rebut their content, the defendant's due process protections had not been violated.²¹³ The *Williams* opinion also held that after the issue of criminal guilt or innocence had been determined a trial court had discretion in sentencing within the range of punishments provided for by the statute.²¹⁴

The Nebraska Supreme Court in *Shockley* seems to interpret the Act to have adopted the sentencing requirements of *Williams* and *Specht*, such as full disclosure of reports and a non-enhanced sen-

203. 386 U.S. 605 (1967).

204. *Shockley*, 231 Neb. at 249-50, 435 N.W.2d at 905. See *Specht*, 386 U.S. at 610-11. See *supra* notes 122-38 and accompanying text.

205. *Specht*, 386 U.S. at 607-08. See COLO. REV. STAT. §§ 39-19-1 to 39-19-10 (1963).

206. NEB. REV. STAT. § 29-2915 (1985); *supra* note 180.

207. NEB. REV. STAT. § 29-2915 (1985); *supra* note 180.

208. See *supra* note 35 and accompanying text.

209. *Shockley*, 231 Neb. at 249, 435 N.W.2d at 905; *Miller*, 221 Neb. at 866, 381 N.W.2d at 158 (1986).

210. 337 U.S. 241 (1949).

211. *Williams*, 337 U.S. at 246-52. See *supra* notes 68-79 and accompanying text.

212. *Williams*, 337 U.S. at 244, 250-51. See *supra* note 67 and accompanying text.

213. *Williams*, 337 U.S. at 252. See *supra* notes 72-77 and accompanying text.

214. *Williams*, 337 U.S. at 250-51. See *supra* notes 68-79 and accompanying text.

tence.²¹⁵ Because Shockley had been allowed to see the reports used at his sentencing prior to its occurrence, had been allowed to conduct further examinations to be used on his own behalf in rebutting any report of the state, and the sentence that had been imposed was one within the time range of the original statutory penalty, the due process protections set out in *Williams* and *Specht* had been sufficiently made available to Shockley.²¹⁶

The *Shockley* decision also comported with the due process requirements outlined in *Gardner v. Florida*²¹⁷ by the United States Supreme Court.²¹⁸ The *Gardner* Court asserted that the *Williams* holding had precedential value, but distinguished it on the facts because Gardner had not been allowed to examine, rebut, or explain any presentence reports used by the court.²¹⁹

The *Gardner* Court placed its emphasis on the punishment which was rendered during sentencing and not on the procedures utilized in reaching the sentence.²²⁰ The *Williams* Court did not focus as much on the sentence imposed but rather on the procedures allowed in reaching the sentence.²²¹ The importance of this distinction is that the *Gardner* Court was not necessarily rejecting the due process position of *Williams*, but rather was re-evaluating the punishment itself.²²² The Nebraska Supreme Court thus correctly held fast to its prior determination in *Miller* that there were adequate procedural protections provided by statute in sentencing under the Nebraska Mentally Disordered Sex Offender Act.²²³

THE DISSENTING OPINION IN *SHOCKLEY*

The dissenting opinion by Judge White, and joined by Judge Shanahan, in *Shockley* focused on the idea that Shockley was sentenced for a sexual offense and then committed to a mental facility without being able to confront and cross-examine the analysts who had performed the examinations on Shockley and had prepared the presentence reports for the state.²²⁴ The dissent also stated that the majority's reasoning in *Shockley* and in *Miller* was inconsistent with

215. See *supra* notes 72-77, 122-38, 181-98 and accompanying text.

216. *Shockley*, 231 Neb. at 248-49, 435 N.W.2d at 904. See *supra* notes 72-77, 122-38, 181-98 and accompanying text.

217. 430 U.S. 349 (1977).

218. See *supra* notes 80-96 and accompanying text.

219. *Gardner*, 430 U.S. at 356-58. See *supra* notes 80-96 and accompanying text.

220. See *supra* notes 93-96 and accompanying text.

221. See *supra* notes 68-79 and accompanying text.

222. See *supra* notes 210-14, 217-19 and accompanying text.

223. See *supra* notes 199-219 and accompanying text.

224. *Shockley*, 231 Neb. at 250, 435 N.W.2d at 905 (White, J., dissenting).

the reasoning given in *Vitek v. Jones*²²⁵ by the United States Supreme Court.²²⁶

The *Vitek* Court affirmed a district court decision declaring a Nebraska statute unconstitutional that had allowed the transfer of a prison inmate to a mental institution merely on the recommendation of a physician or psychologist.²²⁷ Judge White stated that the requirement of due process protections for the transfer of a prisoner from a prison to a mental hospital as set forth in *Vitek* were equally applicable to the proceedings conducted in *Shockley* pursuant to the Act.²²⁸ Judge White stated that additional procedural protections were necessary under *Vitek* for two reasons: (1) an involuntary commitment resulted in a greater loss of liberty than a mere sentence of confinement, and (2) the consequence of commitment was different than the consequence of normal confinement.²²⁹ Judge White went even further, stating that:

[T]here is no legitimate basis for distinguishing between a prisoner who is transferred from prison to a mental hospital and a person who is convicted of a crime, subject to a specific statutory sentence, and then found to be a mentally disordered sex offender and ordered to serve his or her sentence, by means of involuntary commitment, in a mental hospital.²³⁰

However, an analysis of the relevant cases referred to by Judge White and those relied upon by the majority actually show the sentencing aspect of the Act to be a valid legislative instrument for fitting the sentence to the crime and the convicted individual.²³¹ The flexibility of the Act's sentencing proceeding and the procedural protections afforded a defendant being sentenced under it are sufficient to pass due process scrutiny.²³²

The *Vitek* decision held that the confinement of a prisoner in a penal complex pursuant to statute gave that prisoner a certain liberty interest in remaining confined in a prison rather than a mental institution.²³³ The *Vitek* Court also stated that as with any other involuntary commitment to a mental hospital the procedure used had to

225. 445 U.S. 480 (1980).

226. *Shockley*, 231 Neb. at 250, 435 N.W.2d at 905 (White, J., dissenting). See *supra* notes 152-75 and accompanying text.

227. *Vitek*, 445 U.S. at 495-97.

228. *Shockley*, 231 Neb. at 253, 435 N.W.2d at 906 (White, J., dissenting).

229. *Id.* at 251, 435 N.W.2d at 906 (White, J., dissenting).

230. *Id.* at 252, 435 N.W.2d at 906 (White, J., dissenting).

231. See *supra* notes 68-77, 80-109, 122-38, 152-75, 181-95 and accompanying text.

232. See *infra* notes 241-42 and accompanying text.

233. *Vitek*, 445 U.S. at 487-88. See *supra* notes 152-75 and accompanying text.

be supported by at least some procedural due process protections.²³⁴ The *Shockley* case involved a commitment of a convicted person to a mental institution during his sentencing proceeding and before actually being confined to prison.²³⁵ The Nebraska Mentally Disordered Sex Offender Act gives the convicted individual all the procedural safeguards accorded any defendant in sentencing.²³⁶

Judge White seems to be stating that the proper sentencing of a convicted individual under the Act cannot be accomplished without the full array of due process procedural protections required in the guilt or innocence stage of a criminal trial.²³⁷ The commitment procedures required in *Shockley* differed from those required in *Vitek* because in *Vitek* the transfer of prisoners occurred after the sentencing phase of the trial and consequently the procedure lacked notice and the opportunity to be heard.²³⁸ The procedures utilized in *Vitek* could be likened to an involuntary commitment to a mental facility because the prisoner had no notice or opportunity to contest the matter at trial and thus suffered a curtailment of his liberty after he had been sentenced.²³⁹ In *Shockley*, Shockley's commitment to a mental facility came at the sentencing phase of the trial and thus no statutory liberty interest had been granted to Shockley by a sentence and confinement in prison.²⁴⁰ Thus, the district court in *Shockley* could properly sentence Shockley to the mental facility because adequate due process protections had been provided by the Act.²⁴¹

COMPARISON OF *SHOCKLEY* WITH OTHER JURISDICTIONS

The sentencing requirements under the Nebraska Act which provides for all the procedural protections of a regular sentencing proceeding are compatible with the sex offender statutes of other jurisdictions.²⁴² In *Specht*, the Supreme Court determined that the Colorado Act was constitutionally flawed because its due process safeguards were inadequate in a proceeding where an enhanced sentence could be imposed.²⁴³ In deciding the fate of its successor statute, the Colorado Supreme Court held that the additional procedural protections of a hearing with counsel, compelled witnesses, admission

234. *Vitek*, 445 U.S. at 491-92. See *supra* notes 152-75 and accompanying text.

235. *Shockley*, 231 Neb. at 248-49, 435 N.W.2d at 904.

236. NEB. REV. STAT. § 29-2915 (1985); *supra* note 180 and accompanying text.

237. *Shockley*, 231 Neb. at 250-53, 435 N.W.2d 905-07 (White, J., dissenting). See *supra* notes 45-48 and accompanying text.

238. See *supra* notes 24-26, 156-64 and accompanying text.

239. See *supra* notes 170-74 and accompanying text.

240. See *supra* notes 24-26, 175-80 and accompanying text.

241. See *supra* notes 12-120, 180, 224-40 and accompanying text.

242. See *supra* notes 101-03, 140-50, 175-80 and accompanying text.

243. See *supra* note 138 and accompanying text.

of defense evidence, and cross-examination were enough to satisfy due process standards when the result of the sentencing led to a greater punishment than called for by the criminal statute violated.²⁴⁴ The United States Court of Appeals for the Third Circuit followed this rationale in *United States ex rel. Gerchman v. Maroney*²⁴⁵ and required a broader range of due process protections when a magnified sentence was imposed under a sex offender act.²⁴⁶

The Nebraska Act can be distinguished from those of other jurisdictions in that it contains no possibility of a magnified sentence.²⁴⁷ The Nebraska Supreme Court has decided that because the sentencing aspect of the statute does not impose a magnified sentence, the procedures used are adequate to pass constitutional due process muster.²⁴⁸

COMPARISON OF *SHOCKLEY* WITH OTHER NEBRASKA DECISIONS

The *Shockley* court seems to have solidified the position it took in *Miller* regarding sentencing procedures under the Act.²⁴⁹ The rationale behind these decisions is that the Act provides adequate procedural protections in the sentencing phase of the defendant's trial.²⁵⁰ The court did not address any of the liberty interests implicated in *Vitek* because the Act does not expressly grant any liberty interest in any sentencing scheme.²⁵¹ The convicted offender in *Vitek* had already been sentenced for his crime and was serving his sentence in prison.²⁵² It was then a deprivation of liberty to enhance that prisoner's sentence by involuntary commitment to a mental hospital without adequate due process protections.²⁵³

Thus, the decision in *Shockley* is consistent with *Miller* on the issue of procedural due process protection in sentencing under the Act.²⁵⁴ The *Shockley* decision is also consistent with the decision in *Vitek* in that it allows for adequate protections at the sentencing stage and does not deprive a convicted person of any liberty associated with a prior sentencing under a different statute.²⁵⁵

244. *People v. White*, 656 P.2d 690, 693 (Colo. 1983). See *supra* notes 139-40, 147-50 and accompanying text.

245. 335 F.2d 302 (3d Cir. 1966).

246. *Id.* at 312. See *supra* notes 97-109 and accompanying text.

247. See *supra* notes 124-25, 140-41, 180 and accompanying text.

248. *Shockley*, 231 Neb. at 249-50, 435 N.W.2d at 905.

249. *Id.* at 249, 435 N.W.2d at 905.

250. See *supra* notes 36, 192-95 and accompanying text.

251. See *supra* notes 166-71, 175-76 and accompanying text.

252. *Vitek*, 445 U.S. at 484.

253. *Id.* at 494.

254. See *supra* notes 249-53 and accompanying text.

255. See *supra* notes 249-53 and accompanying text.

CONCLUSION

The Nebraska Mentally Disordered Sex Offender Act provides an alternative sentence for those convicted of sexual offenses and in need of psychiatric treatment. The procedure by which the offender is sentenced to a mental institution for treatment comports with the procedural guidelines set forth by the United States Supreme Court and other states enacting laws to deal with the problem of mentally disordered sex offenders. To this extent, *State v. Shockley*²⁵⁶ illustrates that these alternative sentencing statutes aimed to benefit both society and the convicted individual can be implemented without violating the defendant's due process rights.

Daniel P. Bracht—'91

256. 231 Neb. 247, 435 N.W.2d 903 (1989).

