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Due Process Limits on Sentencing Power: A Critique of Pennsylvania’s Imposition of a Recidivist Mandatory Sentence Without a Prior Conviction

Leonard N. Sosnov*

INTRODUCTION

Pretrial diversion programs establish formal procedures for diverting certain criminal defendants from the process leading to trial and verdict. In exchange for avoiding the risk of conviction, these defendants are subject to supervision or treatment for a specified period of time. Successful completion of the treatment program usually leads to dismissal of the charges, while a violation of conditions of the program can lead to reinstatement of the original charges.¹ Whatever form such pretrial diversion programs take, one essential feature, clear from the name itself, is that acceptance into the program does not constitute a conviction.²

While pretrial diversion programs are a rather recent creation,³ recidivist sentencing statutes first appeared in this country in the eighteenth century⁴ and have been present for a long time in every

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² Diversion programs “are procedures to place defendants under informal probation supervision without conviction.” PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134 (1967).
³ The impetus for the adoption of pretrial diversion programs in many jurisdictions was the recommendation by the report issued by the PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, cited at note 2, at 134. See Pretrial Diversion from the Criminal Process, cited at note 1, at 827.
⁴ “Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times.” Parke v. Raley, 113 S. Ct. 517, 521 (1992), reh’g denied, 113 S. Ct. 1068 (1993). See Graham v. West Virginia, 224 U.S. 616, 623 (1912) (recidivist statutes have been enacted in the United States at least since 1796). One commentator has traced the roots of recidivist statutes back to the Book of Leviticus. Alexis M. Durham, III, Justice in Sentencing: The Role of Prior Record of Criminal In-
jurisdiction. Recidivist sentencing statutes impose a harsher penalty scheme for those convicted defendants who have previous convictions. These statutory schemes vary in terms of the prior crimes that are considered relevant, and their impact on the sentence for the current offense, but the essential feature they share is that they are activated by a prior conviction.

Pennsylvania has had recidivist sentencing statutes since the nineteenth century. It also has a pretrial diversion program, known as Accelerated Rehabilitative Disposition (“ARD”), which was established by the Supreme Court of Pennsylvania in 1973.

The Pennsylvania Legislature, with its amendment of the penalty provisions of the driving under the influence law (“DUI”) in 1982, combined the concepts of pretrial diversion and recidivist

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6. Recidivist sentencing statutes may take the form of an enhanced penalty for a particular offense after a conviction or a provision for a separate offense as a habitual offender; or, as with Pennsylvania’s driving under the influence law, there may be no enhancement of the maximum penalty for the offense but rather a mandatory minimum sentence. See note 13 and accompanying text.

7. See, e.g., Harold Dubroff, Note, Recidivist Procedures, 40 N.Y.U. L. REV. 332 (1965); D. Brian King, Note, Sentence Enhancement Based on Unconstitutional Prior Convictions, 64 N.Y.U. L. Rev. 1373 (1989). “All recidivist statutes are predicated upon the existence of a prior conviction.” Fred C. Zacharias, The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act, 1981 DUKE L.J. 477, 492 (1981). This is no longer a universal proposition, however, given a few recent legislative enactments such as the one considered by this article. See note 11 and accompanying text.


10. 75 PA. CONS. STAT. § 3731 (1992). Pennsylvania’s DUI law prohibits driving or being in physical control of a vehicle while under the influence of alcohol or a controlled substance. 75 PA. CONS. STAT. § 3731(a) (1992).
sentencing. The legislature included in its definition of a "prior conviction" for recidivist sentencing purposes any prior acceptance of ARD in a DUI case. It provided for mandatory minimum sentences for DUI convictions which apply equally to those indi-


What makes Pennsylvania unique is that a defendant's acceptance of pretrial diversion involves no admission or finding of guilt. See notes 30-31, 231 and accompanying text.

12. Effective January 14, 1983, the legislature amended the penalty provisions of the DUI law. 75 Pa. Cons. Stat. § 3731 (1992). It provided for a mandatory minimum penalty for a first conviction and for greater mandatory minimum penalties when there have been prior convictions for the same offense. See note 13. Section (e)(2) was amended to provide that ARD (and other pre-trial dispositions not considered here) would be considered a prior conviction. Act of Dec. 15, 1982, No. 289, §9, 1982 Pa. Laws 1268, 1277 (codified at 75 Pa. Cons. Stat. § 3731(e)(2) (1992)).

(2) Acceptance of Accelerated Rehabilitative Disposition or any other form of preliminary disposition of any charge brought under this section shall be considered a first conviction for the purpose of computing whether a subsequent conviction of a violation of this section shall be considered a second, third, fourth or subsequent conviction.

Id.


13. DUI is a misdemeanor of the second degree, which has a maximum penalty of two years imprisonment. 75 Pa. Cons. Stat. § 3731(e)(1) (1992); 18 Pa. Cons. Stat. § 1104(2) (1990). The mandatory minimum penalty for a first conviction is 48 hours imprisonment. The mandatory minimum sentences of imprisonment for DUI for those previously convicted (see note 12) of the same offense, within the last 7 years, are 30 days, 90 days, and 1 year, respectively, upon second, third and fourth conviction. 75 Pa. Cons. Stat. § 3731(e)(1) (1992).

The significance of the mandatory minimum sentence is that a defendant may not be paroled from prison until that portion of the sentence has been served. The judge sentencing pursuant to a mandatory minimum sentencing scheme must impose at least the mandatory minimum sentence and is free to impose a greater minimum sentence and to choose the maximum sentence within statutory limits. See generally, McMillan v. Pennsylvania, 477 U.S. 79, 84-86 (1986) (holding constitutional Pennsylvania mandatory minimum sentencing scheme for certain offenses committed with firearms).

The Pennsylvania sentencing statutes require the imposition of a minimum sentence and a maximum sentence, with the minimum not to exceed one-half the maximum. 42 Pa. Cons. Stat. § 9756(b) (1990). Thus, the maximum penalty for DUI is a sentence of one to two
individuals previously adjudicated guilty of a DUI offense and those previously arrested for DUI who were diverted into ARD without a trial.

This article begins by examining the Pennsylvania pretrial diversion program, and the Pennsylvania appellate decisions construing the import of that program. It then underscores the inconsistency in legislatively treating acceptance of ARD as a prior conviction.

The remainder of this article explores whether this anomaly of state law is a violation of federal due process guarantees. Several due process issues are presented by the statute. Initially this article considers whether the equivalent treatment of a prior acceptance of pretrial diversion and a prior conviction for mandatory sentencing purposes itself violates the United States Constitution. Next the author examines whether a prior acceptance of ARD in a DUI case is a reliable indication of past misconduct. Finding that lacking, the question is whether a mandatory sentencing statute must be based on reliable evidence of past misconduct, or whether it may be unrelated to the question of whether the defendant was guilty of the prior offense. Can a state impose a mandatory sentence based simply on the conclusion that those who have previously accepted a pretrial diversion program are less deterrable?

Contrary to the decisions of the Superior Court of Pennsylvania, and one federal district court, this article reaches the conclusion that considering ARD as a prior conviction is not only an

years imprisonment, which is equivalent to the required penalty for a fourth conviction.

14. See, e.g., Gryger v. Burke, 334 U.S. 728, 731, reh'g denied, 335 U.S. 832 (1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.").


16. Scheinert v. Henderson, 800 F. Supp. 263 (E.D. Pa. 1992). The Scheinert case involved an unsuccessful federal habeas corpus attack on due process and bill of attainder grounds. Id. (The author of this article assisted counsel for Ms. Scheinert in federal court. The due process aspects of this decision are discussed within; however, the bill of attainder claim is beyond the scope of this article.)
oxymoron, but also unconstitutional.  

I. THE SUPREME COURT OF PENNSYLVANIA'S PRETRIAL PROGRAM (ARD) — DIVERSION WITHOUT GUILT

The twin stated goals of ARD are to help the system and the individual. The system is helped by the immense saving of time and expense when cases are promptly diverted without trial or other time consuming proceedings. The individual is helped by whatever rehabilitative measures are taken during the supervised ARD period, along with being offered an opportunity for a fresh start and a clean record if the program is successfully completed.

The supreme court provided no limitation on the kinds of offenders or cases that could be considered for ARD. While stating that the program was intended for minor offenses, the rules are intentionally silent on eligibility because it was thought appropriate for prosecutors to decide which offenses and individuals are suitable for diversion without trial. The rules provide that only the prosecutor can move for admission to the ARD program, thus

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17. Part VIII of this article examines issues of waiver and forfeiture. The question explored is whether accepting ARD can be construed as a relinquishment of the right to challenge its consideration as a prior conviction at future sentencing proceedings. See notes 303-357 and accompanying text.


These are the typical goals of such pre-trial diversion programs. See Jamie S. Gorelick, Comment, Pre-trial Diversion: The Threat of Expanding Social Control, 10 HARV. C.R.-C.L. L. REV. 180, 181 (1975). A more cynical rationale for pretrial diversion programs "is that the present justice system is so bad that any alternative for diverting most offenders out of it, is better than any that will move the offender farther into it." NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS 74 (1973).


20. Lutz, 495 A.2d at 933. Permitting the prosecutor to have sole control over possible eligibility is:

[Intentional and purposeful, for it ensures that no criminal defendant will be admitted to ARD unless the party to the case who represents the interests of the Commonwealth, the district attorney, has made the determination that a particular case is best handled by suspending the prosecution pending the successful completion of a diversionary ARD program.

Id.


21. PA. R. CRIM. P. 176, 177.
neither on the defendant’s motion, nor by action of the court, *sua sponte*, can a defendant receive ARD without prosecutorial approval.\(^2\)

In *Commonwealth v. Lutz*,\(^2\) the Supreme Court of Pennsylvania gave almost unlimited discretion to prosecutors to decide which defendants may be considered for ARD placement, when it held that there is an abuse of discretion only when rejection is “wholly, patently and without doubt unrelated to the protection of society and/or the likelihood of a person’s success in rehabilitation, such as race, religion or such other obviously prohibited considerations. . . .”\(^2\) If the prosecutor is willing to recommend the defendant for ARD, the defendant then decides whether to accept the program, and the judge has the final word on admission and conditions.\(^2\) If the defendant accepts, the defendant must waive speedy trial and statute of limitation rights\(^2\) and further proceedings on the charges are postponed pending the outcome of the ARD program.\(^2\) The court determines the conditions of the program\(^2\) and the length, which may not exceed two years.\(^2\)

A key feature of the program is that there is “no interest in punishment, or even in determining guilt.”\(^\) The court makes no determination of guilt or innocence and the defendant is not required to make any admission; moreover, any consideration of the facts of

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\(23\) 495 A.2d 928 (Pa. 1985).


\(25\) PA. R. CRIM. P. 177-183.

\(26\) PA. R. CRIM. P. 178.

\(27\) PA. R. CRIM. P. 180; 181.

\(28\) PA. R. CRIM. P. 179(c). Any conditions that an individual may receive when placed on probation after conviction for a crime are permissible. PA. R. CRIM. P. 182(a). See \(42\) PA. CONS. STAT. § 9754 (1990 & Supp. 1993) (conditions of probation).

\(29\) PA. R. CRIM. P. 182(b).

\(30\) Specter, cited at note 9, at 691.
the alleged offense must be off the record.\textsuperscript{31}

The defendant who accepts the program is guaranteed that there is no further risk of prosecution unless violation of the conditions of the program occurs.\textsuperscript{32} Indeed, the benefits of ARD go beyond mere avoidance of a conviction. The defendant who accepts ARD must be told that successful completion of the program presents the opportunity not only for dismissal\textsuperscript{33} but also for expungement of the criminal record unless the prosecutor objects and prevails at a hearing.\textsuperscript{34} In \textit{Commonwealth v. Armstrong},\textsuperscript{35} the court held that expungement must be granted after successful completion of ARD and dismissal of the charges "unless the Commonwealth demonstrates an overriding societal interest in retaining that record," beyond any general interest in maintaining accurate records.\textsuperscript{36} The court in \textit{Armstrong} explained that the benefits of expungement for an individual in avoiding possible hardships in seeking employment or schooling and injury to reputation caused by the retention of an arrest record dovetail "with the policy inherent within ARD to offer first offenders a new start.

In 1982, just one year after the \textit{Armstrong} decision, the Pennsylvania General Assembly decided that for DUI offenders who accepted ARD, there would not only be no new start if the defendant were arrested again for DUI within seven years, but that the previous charge which resulted in ARD would loom large if the defend-

\textsuperscript{31} Pa. R. Crim. P. 179(a). The rule further provides that any statement made by a defendant in the process of accepting ARD cannot be used against him for any purpose in a future criminal proceeding except one based on the alleged falsity of the statement. Pa. R. Crim. P. 179(b).

\textsuperscript{32} Pa. R. Crim. P. 184. This was held to be true even for a DUI defendant who was never accepted into ARD but mistakenly in good faith relied on a prosecutor's letter and began attending safe driving classes, one of the conditions of ARD in a DUI case, before being notified with a second letter of his rejection. See \textit{Commonwealth v. McSorley}, 485 A.2d 15, 19-20 (Pa. Super. Ct. 1984), aff'd per curiam, 506 A.2d 895 (Pa. 1986).

A defendant's ARD may be revoked without a violation of ARD conditions only if a prior record, rendering the defendant ineligible for ARD, was concealed at the time of acceptance. \textit{Commonwealth v. Boos}, 620 A.2d 485, 488 (Pa. 1993).

\textsuperscript{33} Pa. R. Crim. P. 178(1).


\textsuperscript{35} 434 A.2d 1205 (Pa. 1981).

\textsuperscript{36} \textit{Armstrong}, 434 A.2d at 1206. The court had reached the same conclusion in a case involving a juvenile who entered into a program like ARD for those charged with delinquency. \textit{Commonwealth v. Wexler}, 431 A.2d 877, 879-80 (Pa. 1981).

\textsuperscript{37} \textit{Armstrong}, 434 A.2d at 1208.
II. THE LEGISLATURE’S RECIDIVIST DRUNK DRIVING STATUTE — ARD ACCEPTANCE AS A PRIOR CONVICTION

For ten years the Supreme Court of Pennsylvania was exclusively in charge of the ARD program that it had created and controlled through its Rules of Criminal Procedure. Its constitutional authority was derived from article V, section 10(c), of the Pennsylvania Constitution which gives it the sole authority to govern judicial practice and procedure. Its rules still exclusively govern the ARD program for all offenses except one, DUI.

In 1982, the legislature made several statutory changes with respect to the offense of DUI. Among them were legislative directives with respect to ARD. The legislature mandated that ARD programs be created in each judicial district for persons charged with DUI, and established minimum requirements for eligibility. Defendants would be deemed ineligible based on certain specified circumstances of the current offense or because of a prior ARD acceptance or DUI conviction within the past seven years. Additionally, it was provided that every defendant who accepted ARD would be subject to mandatory conditions in addition to whatever other conditions of supervision would be deemed suitable by a court. Each defendant would have to attend and complete a highway safety school and remain under court supervision for at least six months, with suspension of driver’s operating privileges for between one and twelve months, as determined by the court.

All of these legislative ARD directives can be viewed as being complementary and consistent with the supreme court’s rules, simply specifying eligibility requirements and conditions for one spe-
cific offense. The legislature's final amendment, however, has far greater implications, because it mandates that a prior acceptance of ARD in a DUI case constitutes a conviction for purposes of the recidivist DUI sentencing provisions, which were enacted at the same time.

The current state of affairs is summarized by the supreme court in its Comment to Rule 178 of the Pennsylvania Rules of Criminal Procedure, which was amended in 1989, and now provides that, "[a]lthough acceptance into an ARD program is not intended to constitute a conviction under these rules, it may be statutorily construed as a conviction for purposes of computing sentences on subsequent convictions."

Not surprisingly, the question of whether acceptance of ARD may or must be considered as a prior conviction has produced confusion and inconsistency in the decisions of the appellate courts of Pennsylvania.

III. To Be or Not To Be a Prior Conviction — Appellate Decisions and ARD

A. No, Not a Conviction

At times, ARD has been viewed as being entirely dissimilar to a conviction. The superior court, en banc, has held that a defendant who had successfully completed ARD was entitled to have his record expunged. The court observed that the exercise of prosecutorial discretion in approving the case for ARD demonstrated the belief that the defendant was not deserving of conviction. Indeed, the court compared successful completion of ARD

47. This was the court's view in Commonwealth v. Lutz, 495 A.2d 928, 933 (Pa. 1985), although that case did not involve an article V, section 10(c) challenge to the statutes. See note 39 and accompanying text.
52. Briley, 420 A.2d at 584-86.
to an acquittal, stating that "the Commonwealth's judgment here that appellant should be placed in the ARD program is not equivalent to a jury's acquittal. In practical effect, however, it is not much different, for upon appellant's successful completion of the program, the Commonwealth [is] forever barred from convicting him on the charges lodged." 53

In *Commonwealth v. Krall*, 54 the superior court had to decide whether, for impeachment purposes, a witness could be questioned concerning her prior acceptance of ARD in a retail theft case. 55 The court recognized that proof of a prior conviction for a crime of dishonesty (such as retail theft) constituted proper impeachment, but had no difficulty in reaching the conclusion that acceptance of ARD was not a conviction. 56 Likewise, in *Commonwealth v. Knepp*, 57 the superior court held that acceptance into ARD could not be considered to be a conviction for sentencing purposes and stated "admission to an ARD program is not equivalent to a conviction under any circumstances . . . ." 58 These decisions, however, did not involve the amended DUI law, which dictates that ARD be considered a prior conviction for mandatory sentencing purposes.

When ARD is considered in the context of a DUI case, the analysis is far less consistent, as evidenced by the case of *Commonwealth v. Feagley*. 59 Feagley had accepted ARD in a DUI case but was dissatisfied with one of the conditions imposed, namely, the length of his driver's license suspension. 60 He appealed to the superior court, 61 which has jurisdiction only over appeals from final orders such as a conviction. 62 A panel majority dismissed his appeal, holding that ARD was not a conviction, and therefore, not a final

53. *Id.* at 586.
55. *Krall*, 434 A.2d at 100.
60. *Feagley*, 538 A.2d at 896.
61. *Id.*
appealable order. The court noted that acceptance of ARD in a DUI case had already been held by that court to constitute a prior conviction for mandatory recidivist sentencing purposes under the statute but held that it "operates as a conviction for that purpose only." The court emphasized that ARD was a diversionary program aimed at pre-trial rehabilitation, concluding that "[a]cceptance of ARD is not the equivalent of a conviction." A dissenting judge complained that it was irrational and inconsistent to treat the same act of accepting ARD in a DUI case as a conviction for one purpose and not a conviction for another purpose.

B. Yes, A Conviction

The recidivist sentencing statute is unambiguous in providing that acceptance of ARD in a DUI case is to be considered a prior conviction for mandatory sentence purposes under the DUI law. A trial judge, perhaps remembering the story of the Emperor's New Clothes, refused to impose a mandatory recidivist sentence for a defendant who was convicted of DUI after the defendant had previously accepted and completed ARD. The trial court declared, "ARD is not a conviction as far as this court is concerned," and was reversed for want of statutory discretion to question such matters.

The provision of the law that makes acceptance of ARD a prior conviction for mandatory sentencing purposes can yield peculiar results. For example, an accused could be placed on a period of ARD supervision for DUI and then be arrested for a new DUI offense while on ARD. This in turn could lead to reinstatement of the charges on the original offense, trial, and a not guilty verdict. If found guilty on the second charge, the statute would re-
quire sentencing as a second offender with a prior conviction because of the ARD acceptance even though there had been an acquittal on the first offense.  

In Commonwealth v. Becker, the superior court en banc confronted that possibility in a case where the defendant's ARD supervision was revoked shortly after he accepted it because he was arrested for another DUI charge. He was convicted on the second offense while the reopened charges on the first were still pending. The Commonwealth appealed after the trial judge refused, despite the defendant's prior acceptance of ARD, to sentence him as a recidivist. Becker's statutory argument was that only a completed period of ARD or an actual conviction should be considered a prior conviction, not a revocation of ARD based on pending charges that might result in acquittal.

While recognizing the possibility of acquittal on the first offense, the majority of the court rejected these claims. It correctly held that the language of the statute was clear and unambiguous in providing that it was acceptance of ARD, not completion, which constituted a prior conviction, and pointed out another anomaly which would be created by adopting Becker's argument. Becker, who had been arrested six days after accepting ARD would be held not to have a prior conviction while someone who had successfully completed a period of ARD supervision at an earlier time would have been held to have had one. The majority found that it would be curious and ironic if Becker were treated more leniently under the sentencing provision.

A dissenting opinion, authored by Judge Cirillo, on behalf of three judges, reached the opposite conclusion. It urged that only completion of ARD should constitute a prior conviction, with obvi-

73. PA. R. CRIM. P. 184. Another peculiar outcome would result if the defendant were convicted after trial on the first offense. For mandatory sentencing purposes the defendant would have been convicted twice on the same offense, first by accepting ARD, and then again by an actual adjudication of guilt. Presumably, the defendant would not be considered a third offender under such circumstances.
75. Becker, 530 A.2d at 889.
76. Id.
77. Id.
78. Id. at 890.
79. Id.
80. Becker, 530 A.2d at 890-91.
81. Id. at 893.
82. Id.
83. Id. at 895 (Cirillo, J., dissenting).
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ous concern for the other potential curious and ironic outcome of the defendant being sentenced as a recidivist based on a prior offense for which the defendant ultimately may be acquitted. Judge Cirillo was correct in pointing out the irony of such a result. Yet his own reasoning in support of sentencing as a recidivist someone who had successfully completed a prior ARD was equally curious and ironic, as well as being unconstitutional:

This sentencing provision indicates a presumption that if the defendant had not participated in ARD, but rather was tried on those charges, he would be convicted. However, this issue is not even reached where ARD has been revoked, because the defendant must now be prosecuted on the original charges, and will therefore be presumed innocent. Thus, treating appellee Becker as a second offender on the instant conviction merely because he was previously accepted into ARD would serve to strip him of that presumption of innocence when he is tried on the original charges. It is precisely the fact that a defendant can never be tried on the charges if he successfully completes ARD which justifies treatment as a second offender for subsequent convictions.

Despite the dissenting opinion's views, if the DUI sentencing statute comports with due process requirements, it is clear that it must be on some basis other than a presumption of guilt for a defendant who accepted and completed ARD and was never tried.

The Becker en banc majority expressly declined to rule on the constitutionality of the statute because the issue was not raised by the parties. Two panel decisions of the superior court, Commonwealth v. Scheinert and Commonwealth v. Wagner, which rejected due process claims, as well as Scheinert's unsuccessful federal habeas corpus challenge, provide the rough contours for the remainder of this article. Those decisions propose several different rationales for upholding the statute against claims that it violates due process of law.

According to one rationale, it is proper to consider unadjudi-
cated arrests as a sentencing factor, including an arrest resulting in an ARD acceptance. The statutory label of "conviction" is viewed as meaningless to the analysis.

A second rationale for upholding the statute, unrelated to questions of guilt or innocence, is based on deterrence theory. This theory posits that the constitutionality of the mandatory minimum punishment scheme lies in the legislature’s rational conclusion that those who previously accepted ARD are less deterrable than other first time offenders.

Waiver is yet another basis offered to validate the statute. The theory is that by voluntarily accepting ARD under the amended DUI sentencing provision, the accused agreed to this possible future consequence arising from the acceptance.

Each of these rationales is examined below after initially addressing the broader question of whether it is ever constitutional to consider some prior conduct or contact with the criminal justice system as the equivalent of a conviction for recidivist sentencing purposes.

IV. DUE PROCESS AND RECIDIVISM — EQUATING PRIOR MISCONDUCT WITH A PRIOR CONVICTION

As discussed earlier, recidivist sentencing statutes are a well established feature of the American criminal justice system. The principal reasoning behind these statutes is that guilt for the second offense is aggravated by the defendant's repeated violation of the law, as evidenced by the prior record of convictions. These

90. *Scheinert*, 519 A.2d at 427 (Kelly, J., concurring).
91. Judge Kelly's concurring opinion in *Scheinert* stated:
The legislature has not turned the non-adjudicatory ARD into a conviction. Rather, it has designated two separate sentencing factors (A.R.D. participation or a prior conviction) as being equally adequate to trigger the imposition of a mandatory minimum sentence. That the triggering factors are of unequal weight as sentencing factors is of no consequence. See 42 Pa. C.S.A. § 9714 (prior felonies of varying degrees of severity are equally effective in triggering mandatory sentence provisions). Thus, the conflict was one of semantics and not substance.

*Scheinert*, 519 A.2d at 427 (footnote omitted) (Kelly, J., concurring).
94. See notes 303-357 and accompanying text.
95. See notes 4-5 and accompanying text.
96. See generally, Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. Rev. 332 (1965). For a good explanation of the desert theory of justice for those convicted of crime a second time, see Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 Minn. L. Rev. 591 (1981). Although this is the rationale most often expressed by the courts, there are others as well, such as general deterrence, specific deterrence, and incapac-
statutes have withstood constitutional attack on double jeopardy and related grounds because they are not viewed as a second punishment for the first offense, but rather as providing for increased penalties deserved for the second offense.  

Many statutory schemes have been interpreted to require that the second offense be committed after the first conviction. Only those who, once convicted, have failed to learn the error of their ways are deemed deserving of the recidivist penalty under such schemes. That is, harsher punishment is warranted not simply because of the repetitive criminal nature of the defendant, but also because of the defendant's "incorrigibly anti-social" nature.

Almost all recidivist statutes in Pennsylvania have been interpreted in this manner. In 1992, the Superior Court of Pennsylvania emphasized the importance of this concept in interpreting the recidivist provisions of the DUI law. In Commonwealth v. Tobin, a defendant was arrested for DUI while he had another DUI case awaiting trial. He pled guilty to both offenses the same day and the judge sentenced him pursuant to the mandatory minimum recidivist provisions for the conviction on the second offense. The superior court reversed, holding that the mandatory recidivist pro-
vision did not apply because the defendant had not been convicted when he committed the second DUI offense, stating that:

Moveover, Tobin does not fall within that class of persons for which the enhancement penalty was intended.

It was not intended that the heavier penalty prescribed for the commission of a second offense should descend upon anyone except the incorrigible one, who after being reproved, "still hardeneth his neck." If the heavier penalty prescribed for the second violation is visited upon the one who has not had the benefit of the reproof of a first conviction, then the purpose of the statute is lost.

This is the same recidivist statute which is applied to a person who previously accepted ARD in a DUI case despite the fact that he or she has not had the reproof of a first conviction. Of course, this observation does not end the inquiry regarding the statute's constitutionality. Merely because notions of recidivism have always emphasized the necessity of a prior conviction does not prevent a legislature from taking a new approach. It may be unartful to designate acceptance of ARD as a prior conviction. Yet is it a denial of due process if the legislature wishes to punish someone with something less than a conviction as severely as if he or she had a prior conviction?

In *Townsend v. Burke*, the United States Supreme Court considered the constitutionality of the defendant's sentence of ten to twenty years of imprisonment. The sentencing judge had relied in part on three prior cases where criminal charges had been brought against the defendant. The Supreme Court noted that in one of the cases the charges had been dismissed and that the other two had resulted in acquittals. The Court held that the defendant's due process rights were violated because the defendant was sentenced as if he had had prior convictions. From the trial court's remarks at sentencing, it was not clear whether the trial judge had acted inadvertently, either on the basis of misinformation supplied by the prosecutor, or on its own incorrect reading of the defendant's record, or whether the judge had intentionally given the prior charges the same weight as if they had been convic-

103. *Id.* at 1260.
104. *Id.*
105. 334 U.S. 736 (1948).
107. *Id.* at 739-40.
108. *Id.* at 740.
109. *Id.*
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The Court concluded that "[the sentencing] savors of foul play or carelessness . . . ." 111

Thus Townsend seems to suggest that it would be a violation of due process not only to consider misinformation concerning a defendant's prior record, but also to consider correct information in an improper manner. Specifically, at all sentencing proceedings, a court would be prohibited from considering prior charges not leading to a conviction as harshly against a defendant as prior convictions. As with traditional recidivist statutes, the fact of conviction would play a unique role of greater weight against a defendant which cannot be equated with a prior record of something less than a conviction.

This proposition is further supported by subsequent cases which have held it unconstitutional to consider prior uncounseled convictions against a defendant at sentencing. In Gideon v. Wainwright, 112 the Court held that there was a Sixth Amendment right to counsel for felony trials, applicable to the states through the Fourteenth Amendment. 113 The constitutional right to counsel was later extended to any case where imprisonment is imposed as part of the sentence. 114 Gideon recognized that counsel was essential to a fair trial and a reliable determination of the defendant's guilt. 115

In Burgett v. Texas, 116 the Court held that a defendant could not be sentenced to an enhanced punishment pursuant to a recidivist statute when the prior conviction was obtained in violation of the right to counsel. 117 In United States v. Tucker, 118 the Court reached the same conclusion concerning a sentencing proceeding not involving a recidivist statute. 119 It held that a defendant is entitled to resentencing when a judge considers against the defendant

110. Id.
111. Townsend, 334 U.S. at 740. "[T]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law." Id. at 741.

115. Gideon, 372 U.S. at 344-45. "'Without it (counsel), though [the defendant] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.'" Id. at 345 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)). See Strickland v. Washington, 466 U.S. 668, 694 (1984) ("An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable . . . .").
118. 404 U.S. 443 (1972).
convictions which were constitutionally invalid because there was no counsel. The Court noted that for the sentencing judge, who was unaware of the constitutional invalidity of two prior convictions, "the factual circumstances of the respondent's background would have appeared in a dramatically different light...." The Court held that even though the defendant could receive the same sentence under the discretionary sentencing scheme, it would have to be for a reason other than reliance on the constitutionally invalid prior convictions. Therefore, the defendant was entitled to resentencing.

Both Burgett and Tucker relied on Gideon, which rested in large part on the view that counsel is required because un counselled convictions are factually unreliable. In Lewis v. United States, the Court upheld application of a statute prohibiting a felon from possessing a firearm against a defendant who had no counsel at the prior proceeding. Even though counsel had been constitutionally required for the prior predicate felony proceedings, the Court decided that Congress could rationally require all convicted felons to clear their status before obtaining a firearm. Such individuals are on notice not to obtain a firearm as long as a prior conviction is on their record. The Court took pains to distinguish Burgett and Tucker from the case at bar, explaining that those cases involved sentences that were constitutionally invalid under the Sixth Amendment because they "depended upon the reliability of a past un counselled conviction." Townsend, Burgett, Tucker and Baldasar v. Illinois decided

120. Id.
121. Id. at 448.
122. Id. at 448-49 n.8.
123. Id. at 448-49.
127. Id. at 67.
128. See id.
129. Id. Loper v. Beto, 405 U.S. 473 (1972), was distinguished on the same basis. Lewis, 445 U.S. at 66-67. Loper had held that an un counselled conviction could not be used to impeach the general credibility of a defendant. Loper, 405 U.S. at 483.
130. 446 U.S. 222, reh'g denied, 447 U.S. 930 (1980). The Court was presented with the question of whether a constitutionally valid conviction without counsel could be utilized in a recidivist sentencing scheme to enhance a misdemeanor to a felony. Baldasar, 446 U.S. at 222. Baldasar was sentenced to prison after a second conviction. Id. at 223. The original conviction for theft was without counsel but constitutionally valid because no prison sentence had resulted. Id. at 226. See notes 113-114 and accompanying text. A majority of the Court, with no majority rationale, held that the prior un counselled misdemeanor conviction
a few months after *Lewis*, raise the question of whether any disposition of a criminal case other than a valid, counseled prior conviction could be considered reliable enough to subject a defendant to being punished as a recidivist. However, unless a defendant's prior criminal history stands on a different constitutional footing than all other sentencing factors, the answer seems to have been supplied in 1991 by *Chapman v. United States*.

In *Chapman*, the Court made it clear that it would not be receptive to constitutional challenges to a sentencing scheme on the ground that it punishes unequally situated defendants equally. *Chapman* involved a federal statute which provided for a mandatory minimum sentence of five years for the offense of distributing more than one gram of a mixture or substance containing LSD. The mandatory minimum sentence was thus triggered on

could not be used to enhance the subsequent conviction to a felony under the recidivist statute. *Baldasar*, 446 U.S. at 224. Justice Marshall, on behalf of Justices Brennan, Stevens, and himself, emphasized that the problem with such a conviction is that it "is not sufficiently reliable to support the severe sanction of imprisonment" and "does not become more reliable merely because the accused has been validly convicted of a second offense." *Id.* at 227-28 (Marshall, J., concurring) (citations omitted). The Court is now considering a case which may definitively answer the question left open in *Baldasar*, whether the Constitution permits an uncounseled conviction, valid at the time it was rendered, to be considered as a factor in enhancing a prison sentence following a subsequent conviction. *Nicholas v. United States*, No. 92-8556 (Jan. 10, 1994).

131. *Baldasar*, 446 U.S. at 222. The federal courts have not been consistent in their interpretation of the import of these cases. Some courts have held that a defendant can challenge an enhanced sentence based on a prior conviction by demonstrating that the prior conviction was constitutionally invalid on any basis. *See*, e.g., *United States v. Paleo*, 967 F.2d 7, 11 (1st Cir. 1992). Other courts have limited challenges to those types of constitutional violations, such as denial of the right to counsel, which are viewed as undermining the factual accuracy and reliability of the prior conviction. *See* D. Brian King, *Note, Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 N.Y.U. L. Rev. 1373, 1389-93 (1989); Paul D. Leake, *Limits to the Collateral Use of Invalid Prior Convictions to Enhance Punishment for a Subsequent Offense: Extending Burgett v. Texas and United States v. Tucker*, 19 COLUM. HUM. RTS. L. REV. 123, 139-41 (1987).

The Court recently observed that, "[t]he States' freedom to define the types of convictions that may be used for sentence enhancement is not unlimited." *Parke v. Raley*, 113 S. Ct. 517, 522, *reh'g denied*, 113 S. Ct. 1068 (1992). However, it provided no guidance as to the extent of those limits, simply referencing the prohibition against the use of uncounseled convictions.

Certain due process claims challenging valid convictions, on grounds other than lack of counsel have been unsuccessful. Attempting to extend *Baldasar*, these claims asserted that petty offense convictions, and juvenile adjudications, where there is no right to a jury trial, lack enough reliability to be utilized for enhancement purposes. *See*, e.g., *McCullough v. Singletary*, 967 F.2d 530, 532 (11th Cir. 1992); *Westmoreland v. Demosthenes*, 737 F. Supp. 1127, 1129-30 (D. Nev. 1990).

134. *Id.* at 1923.
the basis of weight, and the Court construed the statute to include not just the weight of the LSD, but also the weight of the carrier, such as blotter paper, containing the LSD.\textsuperscript{135} Because LSD is sold in doses, the congressional choice to include the weight of the carrier in determining the critical weight would result in dealers who sold different amounts of doses being subject to the same mandatory penalty.\textsuperscript{136} A lot less LSD, and far fewer doses, sold on a heavier carrier, such as a sugar cube, would result in the same mandatory penalty applied to a much larger LSD dealer who used a much lighter carrier, like blotter paper.\textsuperscript{137}

The Chapman Court rejected a due process and equal protection challenge that argued that construing the statute in such a manner would produce an arbitrary and irrational result.\textsuperscript{138} The Court found the scheme constitutional because it concluded that Congress could rationally decide that the harm caused by retailers who keep the street markets going is such that they could be punished as severely as those further up the chain who might sell the drug in pure form without a carrier.\textsuperscript{139} The distributors of LSD control this weight factor by choosing the carrier,\textsuperscript{140} and the carrier is a tool of the trade because it makes it “easier to transport, store, conceal, and sell.”\textsuperscript{141} Also, like heroin and cocaine mixed with cutting agents, the carrier used with LSD, “the blotter paper, gel, or sugar cube carrying LSD can be and often is ingested with the drug.”\textsuperscript{142}

Examining all of these factors the Court concluded that the result will usually be “exactly what the sentencing scheme was designed to do—punish more heavily those who deal in large amounts of drugs.”\textsuperscript{143} However, it did acknowledge that sometimes, simply because carriers of varying weight were chosen, certain individuals would be subject to the mandatory minimum sentence even though they were less culpable because they sold fewer doses.\textsuperscript{144} The Court found no constitutional problem, relying on the unassailable observation that there is no constitutional right to individ-

\begin{itemize}
\item \textsuperscript{135} Id. at 1925.
\item \textsuperscript{136} Id. at 1928.
\item \textsuperscript{137} Id. at 1923-24.
\item \textsuperscript{138} Chapman, 111 S. Ct. at 1927-28.
\item \textsuperscript{139} Id. at 1928-29.
\item \textsuperscript{140} Id. at 1928 n.6.
\item \textsuperscript{141} Id. at 1928.
\item \textsuperscript{142} Id. at 1926.
\item \textsuperscript{143} Chapman, 111 S. Ct. at 1928.
\item \textsuperscript{144} Id.
\end{itemize}
ualized sentences:145

Petitioners argue that those selling different numbers of doses, and, therefore, with different degrees of culpability, will be subject to the same minimum sentence because of choosing different carriers. The same objection could be made to a statute that imposed a fixed sentence for distributing any quantity of LSD, in any form, with any carrier. Such a sentencing scheme—not considering individual degrees of culpability—would clearly be constitutional. . . .

That distributors of varying degrees of culpability might be subject to the same sentence does not mean that the penalty system for LSD distribution is unconstitutional.146

Chapman makes clear that even in the context of a mandatory sentencing scheme, any constitutional challenge based on a claim of equal treatment without equal culpability will likely fall on deaf ears.147 As long as the sentencing factor specified for enhanced punishment is rationally directed at those who are more culpable than those not receiving the enhanced punishment, the Constitution does not require that it reflect equal culpability for all those subject to the greater penalty.

While Chapman involved the circumstances of a present offense, there is no reason to believe the due process analysis or result would be any different if the case involved the circumstances of the defendant's prior history of alleged misconduct. Because there is no right to individual sentences, a state obviously could, and sometimes does, punish all offenders uniformly with mandatory sentences without regard to any prior record of convictions or consideration of other prior wrongdoing. Under Chapman's analysis, if

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145. Id. at 1928-29.
146. Id.
147. Id. Of course, it does not logically follow that because Congress or a state need not make such distinctions between convicted defendants for sentencing purposes, that every distinction should be constitutionally acceptable. Chapman did not entirely foreclose the possibility that a punishment might be so arbitrary in a particular case that it would be unconstitutional. Chapman, 111 S. Ct. at 1928. Any limits that do exist, however, are unclear. For now, such due process claims are consistently rejected. See, e.g., United States v. Belden, 957 F.2d 671, 675-76 (9th Cir.), cert. denied, 113 S. Ct. 234 (1992); United States v. Webb, 945 F.2d 967, 968-69 (7th Cir. 1991), cert. denied, 112 S. Ct. 1228 (1992); United States v. Collado-Gomez, 834 F.2d 280, 281 (2d Cir. 1987), cert. denied sub nom., Quintero-Gonzalez v. United States, 485 U.S. 969 (1988); United States v. Turner, 928 F.2d 956, 959-60 (10th Cir.), cert. denied, 112 S. Ct. 230 (1991). That such claims are quickly and routinely rejected is in part a sign of the times. "Over the last decade, forces from across the political spectrum have been attacking sentence disparity - the sentencing of like cases differently." Peter B. Pope, How Unreliable Factfinding Can Undermine Sentencing Guidelines, 95 YALE L. J. 1258, 1258 (1986). One response to this concern has been the proliferation of mandatory sentencing statutes which treat unlike cases the same, without much judicial scrutiny of the fundamental fairness of the particular statutory scheme.
a state does decide to promulgate a "recidivist" sentencing scheme, whether based on prior convictions,\textsuperscript{148} or simply prior misconduct, it need not differentiate between those individuals of varying culpability. As long as it can be rationally contended that the person is more blameworthy because of evidence of prior wrongdoing, the state could treat the person as a recidivist without a conviction.\textsuperscript{149}

Thus, Pennsylvania's mandatory minimum recidivist DUI statute is not unconstitutional solely because it lumps together for equally severe punishment those who have a prior DUI conviction and those who have never been convicted. If the prior acceptance of DUI evidences a prior instance of culpable drinking and driving, an assumption deserving further scrutiny, it can rationally be isolated for the same increased punishment as imposed on those previously convicted. The following discussion questions that assumption and explores its due process implications. Does a prior acceptance of ARD provide constitutionally requisite proof of prior wrongdoing? If so, what procedures must be provided at sentencing for its consideration?

V. DUE PROCESS RELIABILITY REQUIREMENTS — CONSIDERING ARD ACCEPTANCE AS EVIDENCE OF PRIOR WRONGDOING

In the seminal case of \textit{Williams v. New York},\textsuperscript{150} the Court held that there was no due process violation when a court considered the information in a presentence report at sentencing.\textsuperscript{151} The Court rejected an argument that there was a right to confront and cross-

\begin{footnotesize}
\footnotesize{148. See, e.g., State v. Freitas, 602 P.2d 914, 922-24 (Haw. 1979).}
\footnotesize{149. This is not to say that the resulting statutory scheme could never be found to be unconstitutional. One could imagine a scheme where the prior wrongdoing is so infinitesimal compared to the wrongdoing involved in the prior convictions that treating them similarly, by having either one trigger a harsher sentence, would be unconstitutional. See discussion at note 146.}
\footnotesize{150. 337 U.S. 241, reh'g denied, 337 U.S. 961 (1949).}
\footnotesize{151. \textit{Williams}, 337 U.S. at 249-52.}
\end{footnotesize}
examine those who supplied information to the probation officer whose report the judge relied on in imposing sentence. Because the sentencing scheme was discretionary and individualized, the judge's decision regarding the appropriate punishment did not depend on any particular factual finding. The Court distinguished this process from that governing trial and verdict, taking the view that the more information, the better when it came to the sentencing phase. "Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." This theme was continued in later cases, as the Court has noted more than once, "[b]efore making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."

Enormous trust is placed in judges when they are told that they may consider any information at sentencing. The only possible justification for such a sentencing system, where irrelevant and potentially seriously prejudicial evidence is routinely provided, without any right to confrontation, is that it would be too burdensome a process if defendants could raise objections to presentence reports and other sentencing information on relevance and prejudice grounds. Even if justified on this basis, the system, at best, just postpones basic questions of consideration until the sentencing determination is made.

152. Id. at 250.
153. Id. at 250-51.
154. Id.
155. Id. at 247. Stated more simply, "the sentencing judge is entitled to all the help he can get." United States v. Majors, 490 F.2d 1321, 1322 (10th Cir. 1974), cert. denied, 420 U.S. 932 (1975).
157. "Trial-type hearings would involve great cost to the state, would extend the already lengthy time period from apprehension of the offender to disposition, and might clog the criminal justice system (including, probably, its jails), slowing it to a molasses-like caseflow." ABA STANDARDS FOR CRIMINAL JUSTICE § 18-6.4, commentary at 18.451 (1986).
158. At worst, in a sentencing system not dependent on specific factfinding, the defendant, without recourse, may be sentenced on the basis of unarticulated prejudicial information. United States v. Chaikin, 960 F.2d 171 (D.C. Cir. 1992) ("[A]bsent a 'trial judge's laudable explication of his reasons for imposing a sentence,' rarely could a reviewing court discern the factual basis for the sentence" Chaikin, 960 F.2d at 174 (citations omitted)). Under such a system, the judge simply does not state reasons for the sentence, or omits, either negligently or intentionally, the impermissible factor in a statement of the basis for the sentence. See Pope, cited at note 147, at 1281-82. "[S]entencing as a whole has long
A holding that confrontation rights do not apply at sentencing and that almost limitless information can be received, does not carry with it, however, a corollary principle that any kind of information may be considered against a defendant. While Williams states that the sentencing determination is not limited at all in the information which may be considered, in reality, it means only that unlimited information may be received. How the information is utilized presents a separate question. Some information concerning a defendant clearly cannot be a basis for a higher sentence. For example, the defendant's national origin, sex, lack of religious convictions, or the fact that the defendant is an unmarried father, would not be permissible reasons for a harsher sentence. It is clear that a factor relied on when imposing sentence may be so arbitrary, unreliable, or unfair that its consideration violates the Due Process Clause.


159. The holding in Williams that there is no right to confrontation at sentencing proceedings has been seriously questioned when the sentencing proceeding, unlike the one in Williams, depends on proof of specific facts at sentencing. See, e.g., Note, An Argument For Confrontation Under The Federal Sentencing Guidelines, 105 HARV. L. REV. 1880 (1992); David A. Hoffman, Note, The Federal Sentencing Guidelines and Confrontation Rights, 42 DUKE L.J. 382 (1992). Challenges have arisen most frequently under the Federal Sentencing Guidelines, [hereinafter U.S.S.G.], promulgated pursuant to 28 U.S.C. §§ 991-998 (1993). The Guidelines are found at 18 U.S.C. App. 4 (Supp. 1993). Those challenges have so far been unsuccessful. Several federal circuit courts have held that there is no right to confrontation at such sentencing proceedings. See, e.g., United States v. Petty, 982 F.2d 1365, 1369 (9th. Cir. 1993); United States v. Silverman, 976 F.2d 1502, 1510-11 (6th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1595 (1993); United States v. Wise, 976 F.2d 393, 401 (8th Cir. 1992) (en banc); United States v. Kikumura, 918 F.2d 1084, 1102-03 (3d Cir. 1990); United States v. Beaulieu, 893 F.2d 1177, 1180-81 (10th Cir.), cert. denied, 497 U.S. 1038 (1990). The Court has held that the Due Process Clause guarantees confrontation rights at a sentencing proceeding where a specified finding would result in the maximum penalty for an offense being an indefinite term to life, instead of a maximum of 10 years. Specht v. Patterson, 386 U.S. 605, 610-11 (1967). Whether Specht's confrontation holding extends to other sentencing proceedings has not been decided but the Court has held generally that a mandatory minimum sentencing hearing dependent on a specific factual finding does not trigger Specht protections. See McMillan v. Pennsylvania, 477 U.S. 79, 88-89 (1986).

160. United States v. Borrero-Isaza, 887 F.2d 1349, 1355-56 (9th Cir. 1989) (improper to sentence Columbian defendant to higher sentence to send message to Columbian drug dealers.)


A sentence based on misinformation, for example, may also violate the Due Process Clause. In *Townsend v. Burke*, the Court held that due process was violated at sentencing when the judge erroneously considered as prior convictions previously acquitted and dismissed charges. The sentencing court seemed unconcerned with the actual dispositions of the prior cases. The Court's primary due process concern was with a sentencing predicated on incorrect assumptions concerning the defendant's prior record because of "misinformation or misreading of court records." Because the sentence in *Townsend* may have been based on misinformation concerning the defendant's prior record, the Court did not have to squarely decide whether dismissed unadjudicated charges, considered correctly for what they are, may be utilized against a defendant at sentencing.

A. ARD as a Mere Arrest

By legislative fiat, Pennsylvania has converted the misinformation of *Townsend* into a command for sentencing judges. The DUI recidivist statute mandates that judges consider certain unadjudicated charges as if they were convictions. Even though a judge at a DUI recidivist sentencing hearing knows that a defendant with a prior DUI charge resulting in ARD was not previously convicted, the judge is statutorily required to consider the prior acceptance of ARD as a prior conviction. The due process question is whether this correct information may be considered against a defendant.

In Philadelphia, the largest county in Pennsylvania, an individual arrested for a misdemeanor, such as DUI, receives a trial listing at a preliminary arraignment shortly after arrest. Before trial,
there is no indictment, information, or preliminary hearing.171 The charge is by criminal complaint which must provide notice of the charges, but is not required to state underlying facts sufficient to support a finding of probable cause for the charges.172 Therefore, when the individual accepts ARD, which itself involves no determination relating to guilt or innocence,173 he or she is in no different position from any individual who has been arrested and had charges dropped without any factfinding proceeding on the charges. Acceptance of ARD is simply one form of an unadjudicated arrest.

Pennsylvania courts have had a mixed response to the consideration of prior arrests against a defendant at sentencing. The Supreme Court of Pennsylvania, in a death penalty case, very strongly condemned admission and consideration of unadjudicated arrests for sentencing purposes.174 The court, in language not restricted to the death penalty context, held that evidence of prior arrests is inadmissible at sentencing because arrest records are not relevant and have no probative value.175

171. See Pa. R. Crim. P. 6001 (Philadelphia Municipal Court has jurisdiction over all cases with no offense punishable by more than 5 years imprisonment); Pa. R. Crim. P. 6003(e) (Municipal court trial listing scheduled at preliminary arraignment for at least 20 days later); Pa. R. Crim. P. 122, 130 (arrested individual shall be brought before issuing authority for preliminary arraignment without unnecessary delay).

The charging document, a complaint, is received at the preliminary arraignment. See Pa. R. Crim. P. 140(a). The next scheduled court action is trial unless the defendant is offered and accepts pretrial diversion such as ARD. Pa. R. Crim. P. 6003.


173. See notes 30-31 and accompanying text.


175. Jones, 50 A.2d at 344. The Jones court stated:
The superior court, seemingly unaware of that decision, has taken a different approach to consideration of arrest records. In Commonwealth v. Shoemaker, the court concluded that the trial judge improperly considered a prior arrest record as showing criminal conduct. The trial court's use of the arrest record "ignored the presumption of innocence, and amounted to basing a sentence not simply on evidence not before the court but on no evidence at all." The same opinion, however, observed generally that there was no error in including a record of arrests in the presentence report, and in relying "upon the sound judgment of the sentencing judge in making use of the reference." Later decisions of the superior court, relying on Shoemaker, have squarely held that arrests may be considered at sentencing as long as they are not considered as evidence of criminal conduct or convictions and are not given undue weight.

If evidence of an arrest may not be considered as a prior conviction, or as evidence of criminal conduct at sentencing, the question fairly can be asked what weight against a defendant would not be undue weight. Because the Pennsylvania legislature has unambiguously declared that the weight accorded a prior DUI arrest resulting in ARD at a DUI sentencing proceeding shall trigger a mandatory minimum sentence, the question is no longer confined to what is undue weight under state law but whether the

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Unless convicted, a man remains innocent and the law cannot in justice cast a shadow on his character for a mere arrest. It could not help the jury to know what manner of man the accused was, because the mere fact of an arrest does not prove or disprove anything.

Id.

177. Shoemaker, 313 A.2d at 347.
178. Id. at 347 (footnote omitted).
179. Id. at 346.
181. Commentators have urged that arrest records not be included in a presentence report because no valid use of this information can be made against the defendant at sentencing. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE § 18-5.1(d)(ii), commentary at 18-350 to 18-352 (1986); John C. Coffee, Jr., The Future of Sentencing Reform - Emerging Legal Issues in the Individualization of Justice, 73 Mich. L. Rev. 1361, 1378 (1975) ("[T]hese records are relevant to the pre-sentence inquiry only if they are viewed as evidencing the guilt of the defendant").
182. See note 12 for discussion of the penalty provisions of the DUI law.
183. State courts are divided on the issue of whether evidence of mere arrests can be considered against a defendant at sentencing. See B. H. Glenn, Annotation, Court's Right in
constitution is offended by consideration of this sentencing factor.

Evidence of past criminal conduct or other wrongdoing may rationally be considered against a defendant in choosing an appropriate sentence. Thus, unless the sentencing scheme is a recidivist one dependent on proof of a prior conviction, it has long been accepted that the prior wrongdoing need not be proved by a past conviction.\textsuperscript{184} It is well established that for due process purposes, it is irrelevant whether the prior conduct resulted in a conviction, or merely an arrest, or neither.\textsuperscript{185} What the Due Process Clause does require however, is that the information concerning past miscon-
duct be reliable.\textsuperscript{186}

Reliability, by itself, is a somewhat elusive concept, subject to widely varying interpretations unless given some further definition. For factual determinations, such as the commission of alleged prior misconduct, one method of insuring reliability is to restrict the kinds of information the factfinder receives. Rules of evidence, such as the Federal Rules, attempt to screen out that which is untrustworthy or unduly prejudicial, so "that the truth may be ascertained and proceedings justly determined."\textsuperscript{187} However, the rules of evidence generally do not apply at sentencing proceedings.\textsuperscript{188} Furthermore, restrictions on admissibility simply do not exist because a judge is "largely unlimited either as to the kind of information he may consider, or the source from which it may come."\textsuperscript{189} This notion, coupled with the denial of the right to confrontation at sentencing,\textsuperscript{190} results in no quality control on the evidence before the sentencing judge.\textsuperscript{191}

The reliability of factual determinations is dependent not only on whatever rules limit the admissibility of information, but also on guidance as to what assurance, if any, the factfinder should have that the underlying fact actually exists.\textsuperscript{192} Perhaps because a

\textsuperscript{186} See, e.g., United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972) (reliance on unreliable allegations in presentence report violates due process); Moore v. United States, 571 F.2d 179, 183 (3d Cir. 1978) (if relied upon alleged criminal conduct in presentence report was based on unreliable information due process was violated); United States v. Reme, 738 F.2d 1156, 1167 (11th Cir. 1984), cert. denied sub nom., Pierrot v. United States, 471 U.S. 1104 (1985) (reliance on hearsay statement lacking reliability violated due process); United States v. Radix Lab., Inc., 963 F.2d 1034, 1040 (7th Cir. 1992) (due process not violated by consideration of hearsay statements because they were reliable); United States v. Carmona, 873 F.2d 569, 574 (2d Cir. 1989) (no due process violation because hearsay considered was reliable). See also Williams v. Oklahoma, 358 U.S. 576, 584, reh'g denied, 359 U.S. 956 (1959) (consistent with Due Process Clause, court may consider "responsible unsworn or 'out-of-court' information").

\textsuperscript{187} FED. R. EVID. 102.

\textsuperscript{188} See, e.g., FED. R. EVID. 1101(d)(3) (Rules inapplicable to sentencing proceedings).

\textsuperscript{189} United States v. Tucker, 404 U.S. 443, 446 (1972) (citations omitted).

\textsuperscript{190} See note 159 for discussion of right to confrontation at sentencing proceeding.


\textsuperscript{192} "[T]he standards for admissibility of evidence and of the requisite level of proof are closely related, at least in terms of measuring the ultimate fairness of sentencing proceedings." Becker and Orenstein, cited at note 191, at 891. The Supreme Court has said: 

"[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what hap-
purely discretionary system is not dependent on the finding of any particular facts, and a judge is not even constitutionally required to state any reasons for the sentence imposed, factual findings which are made are viewed almost as gratuitous and entitled to negligible constitutional protection.

A number of courts have held that due process requires that proof of alleged misconduct at sentencing be only slightly more reliable than a bare allegation. Some evidentiary basis to support such findings has been deemed sufficient.

The United States Supreme Court endorsed the same exceedingly low standard in the context of prison disciplinary proceedings involving the loss of good time credits for a sentenced prisoner. "Requiring a modicum of evidence . . . will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens." The Court held that the evidence, although it "might be characterized as meager," was constitutionally sufficient because the record was not devoid of support.

There is no acceptable rationale for treating meager evidence, with only minimal indicia of reliability, as constitutionally sufficient to justify imposing heavier sentences. Coupled with the lack of quality control on the evidence considered, this standard serves virtually no screening function at all. It is not surprising that at

pened. Instead, all the factfinder can acquire is a belief of what probably happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.


193. See e.g., United States v. Garcia, 617 F.2d 1176, 1178 (5th Cir. 1980); United States v. Inmon, 594 F.2d 352, 354 (3d Cir.) (per curiam), cert. denied, 444 U.S. 859 (1979); United States v. Thompson, 541 F.2d 794, 795-796 (9th Cir. 1976); United States v. Brown, 479 F.2d 1170, 1173-74 (2d Cir. 1973).

194. See Pope, cited at note 147, at 1281-82.


198. Hill, 472 U.S. at 455.


sentencing proceedings courts often simply assume the accuracy of any allegation of wrongdoing by the defendant, essentially placing the burden on the defendant to disprove such allegations.\textsuperscript{201}

In \textit{McMillan v. Pennsylvania},\textsuperscript{202} in 1986, the United States Supreme Court for the first time addressed the issue of burden of proof at sentencing proceedings.\textsuperscript{203} A Pennsylvania statute provided for mandatory minimum penalties if a defendant, convicted of an enumerated offense, was proven at sentencing to have visibly possessed a gun during the commission of the offense.\textsuperscript{204} The statute provided that this factual determination had to be established at sentencing by a preponderance of the evidence.\textsuperscript{205} By a 5-4 vote, the Court rejected a due process claim that challenged the burden of proof as being too low, holding that "the preponderance standard satisfies due process."\textsuperscript{206} \textit{McMillan} has been interpreted to require governmental proof by a preponderance of the evidence whenever a sentencing scheme provides that a judge must make specific factual determinations at sentencing which may produce a higher sentence.\textsuperscript{207}

\begin{itemize}
  \item \textsuperscript{201} See, e.g., United States v. Westbrook, 986 F.2d 180, 182 (7th Cir. 1993) (defendant has burden to produce evidence to challenge reliability of factual allegations in presentence report); United States v. Miller, 588 F.2d 1256, 1267 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979) (defendant cannot remain silent and rely on counsel's bare assertion that information is incorrect and demand that government's version of facts be disregarded). See also United States v. Barnhart, 980 F.2d 219, 226 (3d Cir. 1992) (no due process violation when judge considered pending arrests in imposing sentence, because defendant "failed to demonstrate that misinformation of a constitutional magnitude had been provided to the district court").
  \item \textsuperscript{202} 477 U.S. 79 (1986).
  \item \textsuperscript{203} \textit{McMillan}, 477 U.S. at 80-81.
  \item \textsuperscript{204} Id. at 81.
  \item \textsuperscript{205} Id.
  \item \textsuperscript{206} Id. at 91. This author believes that the burden of proof should be greater than a preponderance of the evidence, but having unsuccessfully presented that claim as counsel in \textit{McMillan}, that argument will not be made again here. For an analysis concluding that \textit{McMillan} was wrongly decided, see Susan N. Herman, \textit{The Tail That Wagged The Dog: Bifurcated Fact-Finding Under The Federal Sentencing Guidelines and The Limits of Due Process}, 66 S. Cal. L. Rev. 289, 325-37 (1992).
  \item \textsuperscript{207} See, e.g., United States v. Galloway, 976 F.2d 414, 422-23 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1420 (1993); United States v. Sanchez, 967 F.2d 1383, 1385-87 (9th Cir. 1992); United States v. Trujillo, 959 F.2d 1377, 1381-82 (7th Cir.), cert. denied, 113 S. Ct. 277 (1992); United States v. Mieres-Borges, 919 F.2d 652, 662 (11th Cir.), cert. denied, 111 S. Ct. 1633 (1992). Where establishing the factual predicate produced a particularly severe enhancement, increasing the defendant's sentence from thirty months to thirty years, the Third Circuit has held that due process requires proof by clear and convincing evidence instead of the preponderance. United States v. Kikumura, 918 F.2d 1084, 1100-01 (3d Cir. 1990). Recently, the Court held that a sentence enhancement under the Sentencing Guidelines for defendant's alleged perjury at trial was constitutionally permissible, without addressing the issue of the requisite burden of proof for the sentencing judge's factual deter-
pears to be a more stringent constitutional requirement than a minimum indicia of reliability beyond mere allegations or some evidence, and should be treated so, yet several courts equate these standards.

"The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions." The preponderance standard, the lowest burden of proof, serves this function to a limited extent. The government must establish that it is more likely than not that the fact exists. The evidence must be such that the factfinder "believe[s] that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence."

Some evidence beyond a mere allegation of prior misconduct should not be constitutionally sufficient under the preponderance standard because "the phrase (preponderance) does not mean simply [the] volume of evidence or number of witnesses." Judges should evaluate the government's evidence more carefully under the preponderance standard to determine whether it is substantial and probative enough to convince them that the defendant engaged in the prior misconduct.

Pennsylvania's DUI mandatory minimum sentencing scheme de-


208. See, e.g., United States v. Guest, 978 F.2d 577, 579 (10th Cir. 1992); United States v. Kikumura, 918 F.2d 1084, 1100-03 (9th Cir. 1990).


211. See United States v. Wise, 976 F.2d 393, 402 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1592 (1993) ("To be sure, the preponderance of the evidence standard of proof is a lesser burden for the government to satisfy than that necessary to establish a defendant's guilt, but it is not without rigor.").


214. See United States v. Monroe, 978 F.2d 433, 435-36 (8th Cir. 1992) (judge erred at sentencing by employing fact-finding standard of record being merely adequate to make an appeal meaningful rather than preponderance standard which required finding that sentencing fact was more likely than not). See also Woodby v. Immigration and Naturalization Serv., 385 U.S. 276, 287-88 (1966) (Clark, J., dissenting) (Congressional standard requiring reasonable, substantial, and probative evidence intended to mean proof by preponderance of the evidence). The Commentary to the Sentencing Guidelines requires a court to find sufficient indicia of reliability to support the probable accuracy of hearsay which is considered. U.S.S.G. App. 4 § 6A1.3(a) (Supp. 1993).
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pends on proof of a particular fact. The mandatory recidivist provisions are triggered by proof of a prior conviction for DUI, or a prior acceptance of ARD, which is considered a prior conviction. It is clear that a prior conviction for DUI is evidence of a judicial determination that the defendant on a prior occasion drove under the influence of alcohol or drugs. On the other hand, a prior acceptance of ARD, since it is not a judicial determination of guilt, is meaningless in itself. Therefore, due process should require that acceptance of ARD is a valid sentencing factor only if it establishes by a preponderance of the evidence the underlying fact of having previously driven under the influence.

If measured against a preponderance standard, a prior arrest and acceptance of ARD, without more, falls woefully short of constitutionally acceptable proof of prior misconduct. Even if measured against the less strict due process standard of a minimal indicia of reliability, the legal result should be the same, with the evidence only being slightly less constitutionally deficient.

In United States v. Baylin, the Third Circuit applied a minimal indicia of reliability standard in reviewing the sentencing court's adverse consideration of potential charges involving the defendant. The government had granted, and the defendant had accepted, immunity from prosecution on potential charges. The sentencing court concluded that the immunity from prosecution for diverting foreign shipments and receiving stolen goods, tendered as part of the guilty plea, reflected adversely on the defendant's character. The Third Circuit reversed, holding that the Due Process Clause was violated because there was no evidence to

215. A conviction after trial represents a finding beyond a reasonable doubt that the defendant committed the crimes charged. See, e.g., Herrera v. Collins, 113 S. Ct. 853, 859-60 (1993). Likewise, if conviction follows a guilty plea, there has been a factual determination of guilt before the plea was accepted. See, e.g., Pa. R. Crim. P. 319. One court explained the relationship between disposition and conduct in applying a recidivist DUI statute to a defendant with previous DUI guilty plea convictions, as follows:

When appellant pleaded guilty to his prior charges, he was deemed to have admitted driving while intoxicated. Repeated admissions of such conduct demonstrated a propensity for driving while intoxicated. . . . The statute does nothing substantive to appellant's constitutional rights. As with other recidivist statutes, it ensures that an offender's prior and related conduct does not escape the statute's grasp; it enhances punishment based on prior conduct, not on the basis of particular prior dispositions alone.

State v. Acton, 665 S.W.2d 618, 620 (Mo. 1984) (en banc).

216. 696 F.2d 1030 (3d Cir. 1982).
217. Baylin, 696 F.2d at 1040-42.
218. Id.
219. Id.
support the sentencing court's inference of prior culpable illegal activities, only a government promise not to prosecute.\textsuperscript{220}

In \textit{Brothers v. Dowdle},\textsuperscript{221} the Ninth Circuit considered a defendant's challenge on due process grounds to the lower court's adverse consideration at sentencing of numerous contacts with the law which did not result in conviction.\textsuperscript{222} The court noted that it could not determine from the record whether the lower court considered the prior arrests.\textsuperscript{223} It remanded the case to the lower court for that determination, holding that if there had been consideration of the arrest record against the defendant, it violated due process of law.\textsuperscript{224}

In essence, the constitutional problem with consideration of an arrest record against a defendant is that a "mere arrest tells the sentencing court nothing."\textsuperscript{225} A DUI arrest resulting in an ARD acceptance, in and of itself, is devoid of any evidence to support the allegation of drunken driving. Just as a promise not to charge and prosecute an individual is no indication of guilt and is sometimes offered because the prosecutor believes the defendant "is not guilty of the . . . offenses,"\textsuperscript{226} diversion is sometimes offered because the prosecutor has a very weak case and could not prove any wrongdoing.\textsuperscript{227}

\begin{itemize}
\item 220. \textit{Id.} at 1045-46.
\item 221. 817 F.2d 1388 (9th Cir. 1987).
\item 222. \textit{Brothers}, 817 F.2d at 1389-90.
\item 223. \textit{Id.}
\item 224. \textit{Id.}
\item 225. \textit{Id.} at 1390 (citations omitted).
\item 226. Bernard V. O'Hare, Comment, \textit{Procedural and Substantive Fairness in Sentencing: An Unnecessarily Unappealing Subject to Pennsylvania Higher Courts}, 82 DICK. L. REV. 379, 389 (1978). The problem with the utilization of arrest records as a sentencing factor extends beyond their lack of probative value. Many individuals have unjustly acquired arrest records since police exercise their discretion to arrest more routinely when poor people or members of minority groups are involved. \textit{See}, e.g., \textit{Coffee}, cited at note 181, at 1381; \textit{Commonwealth v. Malone}, 366 A.2d 584, 588-89 (Pa. Super. Ct. 1976). The suspected middle-class or upper-class drunk drivers who are stopped while driving their cars are more likely to get a ride home from the police rather than an arrest.
\item 227. \textit{Baylin}, 696 F.2d at 1041.
\item 227. One reason diversion programs are often popular with prosecutors is that "diversion permits state intervention without proof of guilt." Jamie S. Gorelick, Comment, \textit{Pre-
Nor does the acceptance of ARD indicate consciousness of guilt on the part of the defendant. The defendant waives only speedy trial and statute of limitations rights when accepting ARD.\textsuperscript{228} Given the guaranteed dismissal of the charges after successful completion of the ARD program,\textsuperscript{229} the incentive to accept ARD is great for all defendants, even the innocent.\textsuperscript{230} The completely factually innocent defendant has no certainty of acquittal at trial, thus ARD is a very attractive alternative to risking possible conviction, criminal record and imprisonment.\textsuperscript{231}

Because acceptance of ARD in Philadelphia in a DUI case occurs without any proof of guilt, it lacks the reliability required by the Due Process Clause for consideration against a defendant at any future sentencing proceeding.\textsuperscript{232} In counties other than Philadelphia, with different procedures, the due process question is more complicated and the requisite preponderance standard becomes more significant.

B. ARD Acceptance After a Preliminary Hearing

In Pennsylvania counties other than Philadelphia, an arrested individual usually has a preliminary hearing shortly after arrest.\textsuperscript{233}


\begin{itemize}
\item \textsuperscript{228} See notes 26-31 and accompanying text.
\item \textsuperscript{229} \textit{Pa. R. Crim. P.} 178, 184, 185.
\item \textsuperscript{230} This is apparent when comparing the defendant who accepts ARD, thereby giving up no trial rights and risking no conviction, to the defendant who enters a plea of guilty. Even in that context, it is recognized that a defendant who asserts his or her innocence may wish to forego trial and the risk of even more severe consequences if the conviction was after a trial. See \textit{North Carolina v. Alford}, 400 U.S. 25, 32-33 (1970).
\item \textsuperscript{231} A first conviction in a DUI case in Pennsylvania results in a minimum mandatory term of imprisonment of 48 hours. 75 \textit{Pa. Cons. Stat.} § 3731(e)(1) (Supp. 1993).
\item \textsuperscript{232} The Pennsylvania scheme stands in stark contrast with those in other states where the prior acceptance of pretrial diversion being utilized as a conviction for recidivist sentencing purposes has withstood constitutional attack. In Massachusetts and Kansas, where no due process violation was found, defendants admit guilt before being accepted into the pretrial diversion program. \textit{State v. Clevenger}, 683 P.2d 1272, 1275-76 (Kan. 1984); \textit{Commonwealth v. Murphy}, 451 N.E.2d 95, 99-100 (Mass. 1983).
\item \textsuperscript{233} In Philadelphia, a misdemeanor case, such as DUI, is scheduled for trial without a preliminary hearing. See notes 170-171 and accompanying text. In other counties, a preliminary hearing is scheduled within 3-10 days of the arrest. \textit{Pa. R. Crim. R.} 141(d)(1). A continuance can be granted for good cause. \textit{Pa. R. Crim. P.} 142. A defendant may waive the...
At a preliminary hearing in Pennsylvania the defendant has the right to confront and cross-examine witnesses. At a preliminary hearing in Pennsylvania the defendant has the right to confront and cross-examine witnesses. The Commonwealth has the burden of establishing a prima facie case of guilt at the hearing or the charges must be dismissed. By competent evidence, the Commonwealth must prove that a crime was committed and that it is probably the defendant who committed the crime. Therefore, most defendants in counties other than Philadelphia will have had a preliminary hearing determination that there is sufficient evidence to hold them for trial before there has been an offer and acceptance of ARD. The individuals who have had such a preliminary hearing, unlike their Philadelphia counterparts, are no longer merely arrested individuals when they accept ARD, because there has been a prior determination of probable culpable illegal conduct of driving under the influence. Whether this is evidence of sufficient reliability to comport with due process requirements depends on which constitutional test of reliability is utilized.

Proof that a defendant was previously held for court on DUI charges, following a preliminary hearing prior to acceptance of ARD, certainly provides at least some minimally reliable evidence of a prior occasion of DUI. If that is the due process test, it has been fulfilled. However, if the standard is a preponderance of the preliminary hearing (PA. R. CRIM. P. 140A), but waivers are rare. See David Rudovsky and Leonard Sosnow, PENNSYLVANIA CRIMINAL PROCEDURE, Comment, § 5.1, 50-51 (1991).

234. PA. R. CRIM. P. 141(c)(2). Hearsay evidence is generally inadmissible. However, the superior court has held that it may be used when it is clear that the Commonwealth will be able to present non-hearsay evidence at trial, with this exception usually applied to hearsay evidence which establishes the results of scientific tests or analysis. See Commonwealth v. Branch, 437 A.2d 748, 750 (Pa. Super. Ct. 1981); Commonwealth v. Rick, 366 A.2d 302, 304 (Pa. Super. Ct. 1976). The Pennsylvania Constitution arguably guarantees full confrontation and cross-examination at the preliminary hearing. See Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172, 173-74 (Pa. 1990) (plurality opinion), cert. denied sub nom., Stevens v. Buchanan, 499 U.S. 907 (1991). In any event, the cross-examination takes place before there has been discovery (see PA. R. CRIM. P. 305), which limits its effectiveness. See Commonwealth v. Bazemore, 614 A.2d 684,687-88 (Pa. 1992).

The defendant also has a right to present evidence and his or her own testimony (PA. R. CRIM. P. 141(c)(3)), in an attempt to negate the existence of probable cause. Commonwealth v. Mullen, 333 A.2d 755, 757 (Pa. 1975).

235. "If a prima facie case of the defendant's guilt is not established at the preliminary hearing . . . the issuing authority shall discharge the defendant." PA. R. CRIM. P. 141(d).

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Evidence, which McMillan suggests, it is very doubtful that the mere fact that a prima facie case was established at a preliminary hearing satisfies that constitutional test.

The preliminary hearing judge decides whether the Commonwealth has presented sufficient evidence to establish probable cause to believe the defendant has committed the crime, but this determination must be made without considering the credibility of the evidence. "The committing magistrate is precluded from considering the credibility of a witness who is called upon to testify during the preliminary hearing." A Pennsylvania judge who concludes that a prima facie case has not been established because the judge finds the crucial witness unbelievable will be reversed because the judge has no such power.

Therefore, the fact that it was ruled that a prima facie case of DUI was established at the preliminary hearing does not even represent a belief by the preliminary hearing judge that it is more likely than not that the defendant drove under the influence. It would make little sense, therefore, for a sentencing judge to view the preliminary hearing results as establishing by a preponderance of the evidence that the defendant had a prior incidence of drunken driving.

The United States Supreme Court has observed that probable cause determinations generally do not meet the preponderance standard. The Court stated that "[a probable cause determination] does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt." Without further evaluation of the evidence presented at a preliminary hearing, the mere finding of probable cause should be deemed constitutionally deficient to establish prior wrongful conduct under the Due Process Clause. However, even if acceptance of ARD following a preliminary hearing were considered constitutionally sufficient indicia of prior wrongdoing to justify a higher sentence, Pennsylvania's treatment of ARD still violates the Due Pro-

237. See notes 202-206 and accompanying text.
238. Wojdak, 466 A.2d at 997.
240. Liciaga, 566 A.2d at 248.
242. Gerstein, 420 U.S. at 121.
C. The Opportunity to be Heard

A prior guilty verdict, through plea or trial, constitutes a judicial determination of the defendant's guilt. The defendant is not entitled to relitigate the issue of guilt once the defendant has been convicted. In contrast, acceptance of ARD entails no judicial finding of guilt. Whatever evidence of guilt ARD acceptance may constitute, it is just that, mere evidence. Pennsylvania's legislative choice to treat ARD as if it were a prior conviction precludes the defendant from presenting any evidence to dispute the underlying allegation of driving under the influence on the occasion that led to the arrest and acceptance of ARD. Upon the mere proof of the defendant's prior acceptance of ARD, the sentencing judge is required to impose the minimum mandatory recidivist DUI penalty.

Because the defendant may not submit any argument or evidence concerning the alleged prior incidence of misconduct which led to the acceptance of ARD, the statute violates "[t]he fundamental requisite of due process of law [which] is the opportunity to be heard." In other post-conviction contexts, the Court has held that the Due Process Clause guarantees the right to rebut the government's allegations through argument and evidence.

Further, a primary function of the constitutional right to counsel at sentencing proceedings is to protect against the sentencing court possibly reaching incorrect and uncorrected conclusions concerning the defendant's alleged commission of prior criminal acts. Therefore, it is clear that the Due Process Clause requires that the defendant be given the opportunity to rebut any unadjudicated allegation of past criminal activity by presenting his or her own ver-

246. See, e.g., Mempa v. Rhay, 389 U.S. 128, 136-37 (1967) (constitutional right to counsel at sentencing recognized in case where sentence was based on alleged commission of untried offenses). See Townsend v. Burke, 334 U.S. 736, 744 (1948) (due process violated by sentence imposed based on prejudicial misinformation concerning the defendant's prior record "which the prisoner had no opportunity to correct by the services which counsel would provide.").
sion of the events.247

Even in a civil context, the fact that there has been a judicial determination at a preliminary hearing of probable cause to believe a defendant has committed a crime has not been granted irrefutable conclusiveness.248 In this criminal context, a sentencing factor is treated as a prior conviction and determines a mandatory minimum sentence that materially affects liberty interests. Before inflicting punishment on this basis, if the Due Process Clause requires that the prior incidence of drunk driving be established by a preponderance of the evidence, proof of the prior acceptance of ARD becomes, in effect, a mandatory irrebuttable presumption of that necessary fact. While the statute on its face requires proof only of the acceptance of ARD, it suffers from the same constitutional defect that it would if it explicitly provided for a mandatory minimum sentence based on the defendant having engaged in a prior incidence of drunk driving, and it had specified that acceptance of ARD would be conclusive irrebuttable proof of the requisite prior wrongdoing.

Mandatory irrebuttable presumptions have no place where liberty is at stake in a criminal proceeding.249 They have been invali-

247. Federal appeals courts have consistently held that this right to respond by the defense is a sentencing due process protection. See, e.g., United States v. Silverman, 976 F.2d 1502, 1509-10 (6th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1595(1993); United States v. Wise, 976 F.2d 393, 405 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1592 (1993); United States v. Berzon, 941 F.2d 8, 16-17 (1st Cir. 1991); United States v. Castellanos, 904 F.2d 1490, 1495 (11th Cir. 1990); United States ex rel. Welch v. Lane, 738 F.2d 863, 865-66 (7th Cir. 1984).

On non-constitutional grounds, interpreting Federal Rule of Criminal Procedure 32, the Court has held that before the sentencing hearing a defendant must be furnished with notice of an intent to depart upward from an applicable Federal Sentence Guidelines range and notice of the factor the court intends to rely upon. Burns v. United States, 111 S. Ct. 2182, 2187 (1991). The Court emphasized that deprivations of liberty require that the affected individual have notice and an opportunity to be heard. Burns, 111 S. Ct. at 2187. It intimated that such notice, in addition to the opportunity to be heard, may be constitutionally required because it observed that if the court did not construe Rule 32 to require notice, "we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." Id.

248. Courts have consistently held that plaintiffs who bring civil rights actions under § 1983 of title 42 of the United States Code for malicious prosecution who must prove a lack of probable cause for their arrest by state authorities are not barred from doing so even if there had been an indictment or a preliminary hearing determination in state court. There is a recognized right to present proof to rebut the finding. See, e.g., Robinson v. Maruffi, 895 F.2d 649, 657 (10th Cir. 1990); Rose v. Bartle, 871 F.2d 331, 353 (3d Cir. 1989); White v. Frank, 855 F.2d 956, 961-62 (2d Cir. 1988).

249. They have been condemned in civil contexts as well. For example, in Stanley v. Illinois, 405 U.S. 645 (1972), the Court held that it violated due process to presume that an unwed father is unfit and to take his children away without a hearing where unfitness was
dated by the Court in the criminal trial context not only because a presumption which rests on proof of the basic fact relieves the government's burden to prove the elemental fact beyond a reasonable doubt, but, more importantly, because they invade the factfinding function and preclude the defendant from having a meaningful opportunity to be heard.250 The presumption either prohibits the defendant from presenting evidence, or renders the defendant's presentation meaningless because the ultimate fact will be found "regardless of the totality of the facts or the evidence offered by the defendant to rebut the presumption."251 It should be constitutionally irrelevant that the burden of proof used at sentencing to decide legislatively determinative facts is by a preponderance of the evidence rather than beyond a reasonable doubt, because, whatever the burden, there is a denial of an opportunity to be heard.252 The Pennsylvania DUI mandatory sentencing statute ap-


250. In Sandstrom v. Montana, 442 U.S. 510 (1979), the Court held that where intent is an element of the crime, a jury instruction which may have been interpreted as a mandatory irrebuttable presumption on that issue violated due process of law. Sandstrom, 442 U.S. at 522. The instruction was that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Id. at 512. "A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. . . . A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect." Id. at 522 (quoting Morissette v. United States, 342 U.S. 246, 256 (1952) (emphasis added)).

In the context of a criminal trial, the Court has held that even a rebuttable mandatory presumption with respect to an element of the offense violates due process of law. Francis v. Franklin, 471 U.S. 307 (1985).

251. McLean v. Moran, 963 F.2d 1306, 1310 (9th Cir. 1992) (instructions in DUI case violated due process because they included a conclusive irrebuttable presumption that blood alcohol test exceeding .10% at time of testing 45 minutes after arrest established element of the offense that blood alcohol at time of driving exceeded .10%).

252. In United States v. Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990), the court construed a statute which provided for forfeiture as an additional punishment following conviction to require proof by a preponderance of the evidence. Hernandez-Escarsega, 886 F.2d at 1577. It held that a statutory presumption concerning a critical fact the government had to establish was constitutional because it was not irrebuttable. Id. "[T]he point is that a rebuttable presumption is permissible whereas a conclusive presumption would not be." Id. at 1577 n.10. See United States v. Sandini, 816 F.2d 869, 875 (3d Cir. 1987) (criminal forfeiture facts following conviction had to be established by the government by a preponderance of the evidence; case remanded to determine if stat-
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pears to be unconstitutional because it denies the defendant the opportunity to be heard on the issue of past misconduct.

The next section discusses whether the statute can be sustained on another basis unrelated to increased culpability, because of an alleged prior incidence of driving under the influence. The question addressed is whether the statute is constitutional based on a theory that the convicted DUI defendant with a prior DUI arrest and ARD is less deterrable than another first offender.

VI. ARD Acceptance as a Rational Sentencing Factor Unrelated to Prior Misconduct

Denise Scheinert, sentenced as a recidivist for her DUI conviction because of her prior acceptance of ARD in a DUI case, lost her constitutional claims in the Superior Court of Pennsylvania in 1986.\textsuperscript{253} The Supreme Court of Pennsylvania refused to hear her case the following year.\textsuperscript{254} When she was ordered to report to serve her mandatory sentence of thirty days imprisonment, she filed a petition for a writ of habeas corpus in federal district court.\textsuperscript{255} She lost once again, but this time the constitutionality of the statute was upheld on a basis other than those relied on by the superior court.\textsuperscript{256}

The district court concluded that “it must be assumed that an innocent person wrongly charged with driving under the influence might elect ARD,”\textsuperscript{257} but held that the statute was constitutional “without regard to her guilt or innocence of the underlying charge.”\textsuperscript{258} It concluded, relying exclusively on cases not construing the statute under review, that ARD is generally not treated as a conviction and that the legislature has not decreed that it is.\textsuperscript{259} The statute was sustained on the theory that it does not purport to punish alleged past misconduct, but is instead based on a rational assumption that past participation in ARD indicates that a defendant may be less susceptible to deterrence than other defendants might be.\textsuperscript{260} Sustaining the statute on this basis creatively

\textsuperscript{256} Scheinert, 800 F. Supp. at 268.
\textsuperscript{257} Id. at 266.
\textsuperscript{258} Id. at 267 n.3.
\textsuperscript{259} Id. at 267-68.
\textsuperscript{260} Id. at 268. The court said that:
sidesteps the sticky due process issue of a defendant being sentenced as a second offender without any proof whatsoever of commission of a prior offense. Though creative, the court’s analysis is unfounded.

First, its basic premise rests on an apparent misreading of the statute. The statute does not provide that prior participation in an ARD program in a DUI case is the triggering factor for treatment as a second offender.\(^{261}\) The statutory language provides that the triggering factor is a prior “[a]cceptance of [ARD],”\(^{262}\) and the Pennsylvania appellate courts have interpreted this phrase in accord with its clear language.\(^{263}\) In *Commonwealth v. Becker*,\(^{264}\) whose dictum was relied on by the district court, the superior court held that acceptance of ARD constituted a prior conviction.\(^{265}\) Therefore, Becker, who had been arrested for his second DUI offense just six days after he had accepted ARD,\(^{266}\) was properly considered a second offender when he was convicted on the new offense.\(^{267}\)

Thus, under Pennsylvania law, a defendant would be considered

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It is rational for the legislature to conclude that persons who choose to drive while intoxicated after being placed under court supervision, attending a highway safety school, losing their driving privileges, undergoing counseling and paying costs are less deterrible and more dangerous than one who drives while intoxicated without any prior exposure to such a criminal justice system program. *Id.* at 266-67.

\(^{261}\) The opinion also overstates what participation in an ARD program entails. Counseling or any kind of treatment for an alcohol problem is not a mandatory prerequisite for acceptance. If counseling is not believed to be necessary, it will not be a condition of the ARD probation. See 75 PA. CONS. STAT. § 3731(e)(6)(v) (Supp. 1993) and 75 PA. CONS. STAT. § 1548(c) (Supp. 1993). 

\(^{262}\) 75 PA. CONS. STAT. § 3731(e)(2) (Supp. 1993). See note 12 for statutory language.


\(^{265}\) *Becker*, 530 A.2d at 894.

\(^{266}\) *Id.* at 889. That acceptance of ARD, not participation in a program, is the legislatively significant factor for recidivist sentencing purposes is also demonstrated by the fact that there are other pretrial dispositions specified by the legislature whose mere acceptance is considered a first conviction. See 75 PA. CONS. STAT. § 3731(e)(2) (Supp. 1993). Significantly, in a DUI case, a prior acceptance of a juvenile consent decree, a pretrial disposition like ARD for juveniles, is considered a first conviction. Acceptance of a juvenile consent decree, with the approval of the prosecutor and the court, has no mandatory conditions of any kind during the probationary period. *See 42 PA. CONS. STAT. § 6340* (1982 & Supp. 1993).

\(^{267}\) *Becker*, 530 A.2d at 893.
to have a prior conviction if, immediately after accepting ARD, the defendant left court, went to a bar and got drunk, and was arrested for DUI while driving home. The lack of participation in the ARD program through safe-driving classes and other requirements of the program is statutorily irrelevant because acceptance is the defining critical event. Thus the district court's substitution of "participation" for "acceptance" in the ARD program as the crucial factor is erroneous. Though the court's analysis has its own internal logic, i.e., that of deterrence, it is clearly contrary to the state court's reading of the statute. Although courts should strive to construe statutes to avoid, if possible, an unconstitutional construction, "it is 'not a license for the judiciary to rewrite language enacted by the legislature.'"268 The state court's construction of the state statute was binding on the federal court.269

The Scheinert court's conclusion that the mandatory minimum punishment based on a prior acceptance of ARD is unrelated to guilt or innocence ignores the legislative context of the statute. The legislature chose to explicitly provide for increased DUI punishment based on a prior acceptance of ARD, and clearly equated that prior acceptance with a prior conviction for sentencing purposes. The United States Supreme Court has properly made clear in the past that a statute's legislative context is important under a constitutional analysis. In Bell v. Burson,270 a Georgia statute required that an uninsured motorist involved in an accident have the vehicle registration and the motorist's driver's license suspended unless the driver posted security to cover the amount of damages claimed by the other party.271 At the hearing provided under the statutory scheme, there was no provision for consideration of evidence concerning fault, as the determinative evidence was only whether an accident had occurred and whether the requisite security had been posted.272 The Court rejected Georgia's argument that fault and innocence are irrelevant factors at the hearing.273 It held that due process required an inquiry into fault at the hearing, as

272. Id. at 537-38.
273. Id. at 541.
well as a determination that there was a reasonable probability of an eventual judgment against the driver.\textsuperscript{274} The Court concluded that "we are not dealing here with a no-fault scheme. Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing."\textsuperscript{275}

Likewise, Pennsylvania's DUI recidivist sentencing scheme, indeed, any recidivist sentencing scheme, cannot properly be viewed as a no-fault scheme. The holding in \textit{Bell v. Burson} is equally applicable here where the stakes are much higher for the individual — potential loss of liberty. The district court in \textit{Scheinert} incorrectly concluded that the Pennsylvania scheme was not concerned with a defendant's guilt or innocence, and, in turn, incorrectly held "there was no due process violation in not conducting a presentence hearing regarding her guilt of that charge."\textsuperscript{276}

\textbf{VII. DUE PROCESS AND AN ENHANCED SENTENCE BASED SOLELY ON DETERRENCE}

A more difficult due process question would be posed by a statute which actually had the features ascribed to the Pennsylvania statute by the \textit{Scheinert} opinion; that is a statute that in a no-fault context, expressly provided that prior \textit{participation} in an ARD program triggered an enhanced sentence.

Sentencing schemes often include the goals of rehabilitation, incapacitation, general deterrence, specific deterrence and retribution.\textsuperscript{277} Except for retribution, based on a theory of deserved punishment for what has occurred, sentencing goals are forward-looking. They are utilitarian and concerned with "maximizing the general good; the latter [retribution] is addressed to principles of justice, fairness and equity."\textsuperscript{278}

In a discretionary sentencing scheme, a court, according to its individual sentencing philosophy, obviously may place greater

\begin{itemize}
  \item \textsuperscript{274} Id. at 542.
  \item \textsuperscript{275} Id. at 541.
  \item \textsuperscript{276} \textit{Scheinert}, 800 F. Supp. at 267 n.3.
  \item \textsuperscript{278} Gottfredson and Gottfredson, cited at note 277, at 172.
\end{itemize}
weight on a particular factor than another court would.\textsuperscript{279} In an effort to lessen the disparity resulting from discretionary sentencing, the trend in Congress and the state legislatures has been to enact uniform sentencing schemes aimed at retribution which consider greater culpability as the primary sentencing factor.\textsuperscript{280} The due process question posed by this author is whether a state can enact an enhanced sentencing scheme based solely on a factor divorced from increased deserved punishment due to greater culpability.\textsuperscript{281} Specifically, in the ARD context, the question is whether a factor rationally related to deterrence alone can justify an enhanced sentence. When the isolated factor is not rationally related to greater culpability, commission of a more serious offense, or a background involving prior misconduct, can the state constitutionally up the ante with a mandatory sentence?

Specific deterrence, the Scheinert court's rationale for upholding the constitutionality of the Pennsylvania DUI statute, is based on the notion that the offender is less susceptible to deterrence than the ordinary offender. As a result, this offender may be more likely than the usual criminal to commit future offenses.\textsuperscript{282} It may be

\textsuperscript{279} See, e.g., United States ex rel. D'Agostino v. Keohane, 877 F.2d 1167, 1170 (3d Cir. 1989) ("Each individual judge's sentencing philosophy factors into his decision of an appropriate sentence."); United States v. Moss, 631 F.2d 105, 107 (8th Cir. 1980) (no constitutional claim when sentencing judge does not consider impermissible factor but places more weight on certain legitimate factors such as deterrence of future crimes and need for isolation than defendant's remorse).


\textsuperscript{281} An important objection to the desert theory is "that retributivism fails to supply any coherent analysis of the proper amount of punishment for any particular crime." David Dolinko, Three Mistakes of Retributivism, 39 UCLA L. Rev. 1623, 1652 (1992) (footnote omitted). This is a valid criticism and this article is not intended as an endorsement of the desert theory as the only proper sentencing factor when considering punishment. However, the statute under consideration here punishes the exact same criminal conduct differently, with a specified yet undeserved increase for the prior ARD recipient. Whatever problems there are with the desert theory providing guidance on the proper amount of punishment for a particular crime, the increase in punishment here is based solely on an undeserved factor and therefore should be viewed as improper, whatever the amount.

\textsuperscript{282} CAMPBELL, cited at note 277, at 25. In contrast, general deterrence as a sentencing goal is concerned not with deterring the individual being sentenced from repeating the criminal activity, but with deterring others. It is an oft-stated justification for sentences of im-
true that an individual who previously participated in an ARD program which includes attendance at highway safety school, no matter whether successfully completed or minimally started, who is later arrested and convicted for DUI is less deterrable than the convicted individual who never had contact with such a program. In other words, individuals, who have previously accepted ARD, by virtue of having participated in a rehabilitative program, may present a somewhat higher risk of another incidence of DUI after conviction than the person for whom education and rehabilitation has never been tried at all. Even in the absence of any empirical data to support this notion, it is not an irrational supposition.283

It often has been held that a legislative scheme does not violate due process of law if it has a rational basis.284 Thus, some courts may consider a no-fault sentencing scheme based on deterrence to be perfectly constitutional, as the Scheinert court did.285 However, an equally important due process criminal law requirement is fundamental fairness.286 A legislative scheme may in some instances be rational and yet fundamentally unfair, and fundamental unfairness should not be constitutionally tolerated even if it is


283. See, e.g., State v. Roberts, 779 P.2d 732, 738 (Wash. Ct. App.), review denied, 782 P.2d 1069 (Wash. 1989), upholding a sentence for DUI where one factor considered by the sentencing judge was prior treatment for alcohol abuse. “Roberts had received alcohol treatment in the past, yet continued to drive a car with alcohol in her system. This further supports the conclusion that she is not amenable to treatment and will likely reoffend.” Roberts, 779 P.2d at 738. A legislative determination to employ such a sentencing factor could not be concluded to be irrational and unconstitutional simply because there is no legislative record of statistics to support the legislative judgment. See Vance v. Bradley, 440 U.S. 93, 111 (1979).

284. See, e.g., Chapman v. United States, 111 S. Ct. 1919 (1991) (Congressional LSD sentencing scheme does not violate due process because it is rational). Marshall v. United States, 414 U.S. 417 (1974) (no due process or equal protection violations because it was rational for sentencing scheme to exclude from consideration of narcotics treatment those with two or more prior felony convictions).


286. See, e.g., Bearden v. Georgia, 461 U.S. 660, 673 (1983) (“fundamental fairness required by the Fourteenth Amendment.”) (footnote omitted); Parke v. Raley, 113 S. Ct. 517, 525 (1992) (holding that state rule which placed burden of production on defendant to challenge validity of prior guilty plea conviction for recidivist sentence purposes did not violate Due Process Clause.). The Court has made it clear that due process violations will not be readily found on this basis. “In the field of criminal law, we have defined the category of infractions that violate ‘fundamental fairness’ very narrowly. . . .” Medina v. California, 112 S. Ct. 2572, 2576, reh’g denied, 113 S. Ct. 19 (1992) (quoting in part Dowling v. United States, 493 U.S. 342, 352 (1990)).
rational.\textsuperscript{287}

When the recidivist with a prior conviction is sentenced to an enhanced punishment, the greater sentence may arguably be justified on deterrence grounds, but there is no question that it is morally justified under a retribution theory.\textsuperscript{288} If deterrence alone can be isolated as the basis for an enhanced sentencing scheme, then a legislature could enact the following statute:

A first conviction for DUI shall require a mandatory minimum penalty of 48 hours imprisonment. If the defendant has a prior DUI conviction or has previously participated in a highway safety school or alcohol treatment program, [the defendant] shall be subject to a mandatory minimum sentence of at least 30 days imprisonment upon conviction.

The only difference between this statute and the Pennsylvania statute discussed in this article is that the former includes all individuals who have ever participated in a highway safety or alcohol

\begin{footnotesize}
\textsuperscript{287} The Court has sometimes spoken of rationality and fundamental fairness both being requirements of due process, with rationality being a necessary but not necessarily sufficient condition of due process. In Schad v. Arizona, 111 S. Ct. 2491, \textit{reh'g denied}, 112 S. Ct. 28 (1991), the Court considered "the concept of due process with its demands for fundamental fairness . . . and for the rationality that is an essential component of that fairness." \textit{Schad}, 111 S. Ct. at 2500. In \textit{Schad}, the Court held that due process did not require instructions that the jury must agree on one of two alternative theories before convicting the defendant of first degree murder. The Court analyzed the statutory framework and the two alternative theories, premeditation and felony murder. It concluded that the state could treat them simply as alternate means of finding the requisite mens rea element for the same offense of first degree murder and instruct accordingly, because the state could rationally conclude that there was a moral equivalency between felony murder and premeditated murder. Because it was convinced that such a conclusion of moral equivalency would be reasonable, the "jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality." \textit{Id.} at 2504.

In the sentencing context, fundamental fairness, while not requiring absolute moral equivalency for offenders sentenced in a like manner, should at least require some increased culpability before the state singles out a defendant for increased punishment. Notions of culpability should play some role, albeit a reduced one, when assessing the due process rights of those who have been convicted.

Usually, a sentencing scheme will be found to be rational and therefore constitutional precisely because there is some basis for concluding that the greater sentence provided is based on greater culpability. See, e.g., United States v. Belden, 957 F.2d 671 (9th Cir.), \textit{cert. denied}, 113 S. Ct. 234 (1992); United States v. Buckner, 994 F.2d 975 (8th Cir. 1990).

\textsuperscript{288} The moral propriety of increased punishment is usually based on the view that the offender deserves more because of past transgressions. See David Dolinko, \textit{Three Mistakes of Retributivism}, 39 UCLA L. Rev. 1623, 1635-36 (1992). "The logic lies in the attempt to deter repeated criminal activity, while the fairness is obvious in the notion that a recidivist should receive a stiffer sentence than a first time offender." Commonwealth v. Arriaga, 618 A.2d 1011, 1013 (Pa. Super. Ct. 1993). Considering post-plea criminal activity at sentencing is permissible because it "makes the defendant more culpable and suggests the likelihood of recidivism and future criminal conduct." United States v. Tabaka, 982 F.2d 100, 102 (3d Cir. 1992).
\end{footnotesize}
treatment program, even those who did so voluntarily, rather than in connection with a prior arrest. What should be considered constitutionally offensive in the above-suggested statute is not simply the equating of prior voluntary participation in an alcohol treatment program with a prior conviction. It also should be held invalid even if it provided for a more onerous sentence, without any statutory provision specifying that a prior conviction was an alternative ground for the mandatory minimum sentence. The constitutional problem is that the critical factual determination is divorced from any notion of increased culpability.

Of course, unlike the hypothetical statute, the Pennsylvania statute only applies to those previously arrested for DUI who had accepted an ARD program before being arrested a second time and then convicted of DUI. The fact of a prior arrest, like a prior participation in a highway safety or alcohol treatment program, might rationally be related, although certainly less so, to concerns of specific deterrence. Those previously arrested who are arrested a second time and then convicted, may be more likely to commit another crime than those who did not have a prior arrest. Some courts have justified the consideration of an arrest record against a defendant on this basis of specific deterrence.

For example, in Tunstill v. State, the Indiana Supreme Court held that a judge had erred by considering a record of prior arrests as evidence of prior criminal activity for purposes of imposing an enhanced sentence. It held that alleged prior instances of criminal conduct must be "shown by probative evidence" and that "[a] bare record of arrest will not suffice to meet this standard." The relief for the defendant was a remand for a new sentencing hearing and for a new statement of reasons to support the enhanced sentence or the imposition of a lesser sentence. Guidance was given to the lower court on remand; the prior arrests could be used against the defendant as long as a different reason was substituted.

289. See Don M. Gottfredson, Guidelines for Parole & Sentencing 48-49 (1978) (prior arrests are excluded from study of factors for parole release decision because, although predictive, inclusion is viewed as posing ethical problems).
292. Tunstill, 568 N.E.2d at 544-45.
293. Id. at 544.
294. Id.
295. Id. at 545-46.
296. Id. at 545. The court said:
This is a very dangerous notion. The same rationale could of course justify the use of all prior unreliable convictions against a defendant\textsuperscript{297} or even any other contact with the criminal justice system, no matter what the result, without any proof whatsoever that the person ever committed any prior criminal conduct.\textsuperscript{298} It nullifies the constitutional requirement that there be some degree of reliability before prior alleged criminal conduct may be considered against the individual.\textsuperscript{299} Instead, the involuntary act of being arrested, even for the innocent individual, becomes the justification for considering the later imposition of an enhanced punishment scheme. Because individuals happen to get arrested for all sorts of reasons, including sometimes improper and discriminatory ones,\textsuperscript{300} it is clearly morally unjustifiable to utilize a mere arrest record against a defendant at sentencing.

When a statute specifies a factual determination as a basis for an enhanced sentence, courts must show a heightened awareness of due process concerns at sentencing.\textsuperscript{301} The due process requirement of reliability of allegations of prior misconduct should not be

\[\text{Id.}\]


298. Recidivist statutes could be restructured to include in the definition of prior conviction, a prior arrest, whether or not conviction resulted. An absurd definition of conviction to be sure, but not necessarily an unconstitutional result in the view of some courts if they are willing to overlook what they may perceive as simply a semantical problem.

299. See notes 291-296 and accompanying text.

300. See note 225 and accompanying text.

301. See, e.g., McMillan, 477 U.S. at 79, discussed in notes 202-215 and accompanying text, requiring as a matter of due process that critical facts on which a mandatory minimum sentence depends be established by a preponderance of the evidence although no burden of proof is generally required for facts considered at sentencing. Many commentators have urged the need for greater due process protections when sentences are determined in large part by specific factual determinations which must be made at the sentencing hearing. See, e.g., Herman, cited at note 206, at 289; James C. Weissman, Sentencing Due Process: Evolving Constitutional Principles, 18 WAKE FOREST L. REV. 523 (1982); Pope, cited at note 147, at 1258.
circumvented by merely using a deterrence rationale to justify otherwise unconstitutional sentencing decisions. While a prior arrest, followed by participation in a highway safety program or alcohol treatment program may rationally be related to a conclusion that the individual is less deterrable than one who merely has a prior arrest, that difference should be constitutionally irrelevant. Nothing plus nothing still equals nothing: the lack of a relationship of the sentencing factor to increased culpability.

Whether an enhanced sentencing scheme is based on a prior arrest, prior participation in an alcohol treatment program, or any other factor which fails to reflect that the individual deserves more punishment, that scheme is fundamentally unfair and violates due process of law if it utilizes such a fact as the sole basis for an enhanced punishment. Thus, even if Pennsylvania’s scheme, which treats a prior acceptance of ARD as a prior conviction, is viewed as being based on a deterrence rationale unrelated to notions of guilt and innocence, it nevertheless violates due process.

The only remaining possible rationale for sustaining Pennsylvania’s statute on due process grounds is discussed in the remainder of the article. The question explored is whether it is constitutional to construe acceptance of ARD as a waiver of future due process rights at sentencing in the event of a subsequent arrest and conviction.

VIII. WAIVER THEORY AND THE CONSTITUTION — ARD ACCEPTANCE AND ITS SUBSEQUENT CONSIDERATION AS A PRIOR CONVICTION

The ensuing discussion of waiver theory and whether an acceptance of ARD can be considered a prior conviction for recidivist sentencing purposes considers two alternative scenarios, depending on how the preceding constitutional question is resolved. First, if it is concluded that Pennsylvania’s treatment of a prior ARD as a prior conviction complies with due process requirements, the only possible challenge could be to the constitutional validity of the colloquy leading to the prior ARD acceptance. The utilization of the ARD at the sentencing proceeding following the subsequent DUI arrest and conviction could be successfully challenged, only if there are some constitutional prerequisites for advising the individual of
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this possible consequence which were violated when ARD was accepted, rendering it an invalid prior conviction.

The alternative question presented, while also backward-looking, is dramatically different: if Pennsylvania's utilization of ARD acceptance as an adverse sentencing factor violates a defendant's due process rights. If defense counsel objects at the sentencing proceeding to the consideration of the defendant's prior ARD acceptance, the issue is squarely and timely raised and must be decided in the defendant's favor on due process grounds unless the government can rely on waiver theory to avoid this result. In other words, the question is whether the government can successfully claim that the defendant at the prior ARD proceeding waived the right to assert otherwise valid due process claims at the future sentencing proceeding. The final portion of this article will examine the requirements of waiver in such a situation and the serious question of whether any purported waiver should be considered constitutionally acceptable.

A. Waiver and Prior ARD Acceptance as a Valid Sentencing Enhancement

When an individual pleads guilty, consent is given to the imposition of a judgment of conviction and sentence without trial. The individual agrees that the plea and conviction comprehend all of the factual and legal elements necessary to sustain a binding final judgment of guilt and a lawful sentence. For this consent to be constitutionally valid under the Due Process Clause, the Supreme Court has relied on waiver and forfeiture theory. Waiver is "an intentional relinquishment or abandonment of a known right or privilege," while "forfeiture occurs by operation of law without regard to the defendant's state of mind." The Court has held that if the defendant has been informed of the nature of the charges and the potential sentence and agrees to relinquish certain core trial rights, then the plea will be considered knowing, intelligent and voluntary under the Due Process Clause and the ensuing

conviction will be binding against collateral attack.\textsuperscript{307} The knowing and voluntary relinquishment of what are viewed as the most important trial rights is considered sufficient to invoke the doctrine that other trial and pre-trial rights have been forfeited. Thus, for example, in United States v. Broce,\textsuperscript{308} a defendant who entered a guilty plea to two counts of conspiracy subsequently sought to overturn the conviction and sentence on one count on double jeopardy grounds, contending that there was only one conspiracy, not two.\textsuperscript{309} The Court held that the guilty plea was a knowing, intelligent and voluntary decision to accept a finding of guilt and conviction and that such an attack was foreclosed.\textsuperscript{310} The defendant was said to "have forfeited the opportunity to dispute the separate nature of the conspiracies."\textsuperscript{311} . . . Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty.\textsuperscript{312}

Not surprisingly, a knowing, intelligent, and voluntary guilty plea has not been held to require advice of possible adverse consequences flowing from the guilty plea, other than information concerning the sentence about to be imposed. Given that the Court has held that an explicit waiver of important trial and pre-trial rights is not considered constitutionally essential to the validity of a guilty plea, courts have shown little concern for complaints that the plea was not knowing or voluntary because no information was provided concerning adverse consequences beyond the sentence itself, which could result from the decision to plead guilty. All other consequences have been deemed collateral. "A collateral consequence is one that is not related to the length or nature of the sentence imposed on the basis of the plea."\textsuperscript{313} Once labelled collateral, no advice or warning during the guilty plea colloquy is constitutionally required, no matter how serious the consequence.\textsuperscript{314}

\textsuperscript{307} In the past, the Court had reached the same conclusion with respect to other rights; that the validity of the guilty plea could not be attacked later even if there was no waiver of those rights during the guilty plea colloquy. See, e.g., Tollett v. Henderson, 411 U.S. 258 (1973) (black citizens unconstitutionally excluded from grand jury which indicted the defendant); Brady v. United States, 397 U.S. 742 (1970) (sentencing statute subsequently declared unconstitutional cannot be challenged).

\textsuperscript{308} 488 U.S. 563 (1989).

\textsuperscript{309} Broce, 488 U.S. at 565.

\textsuperscript{310} Id. at 571.

\textsuperscript{311} Id. at 571 n.

\textsuperscript{312} Id. at 573.

\textsuperscript{313} United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir. 1988).

\textsuperscript{314} See, e.g., Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1365-66 (4th Cir.), cert. denied, 414 U.S. 1005 (1973) (conviction made defendant eligible for civil commit-
In a general sense, every defendant knows that consent to a conviction may result in adverse consequences beyond the sentence. However, with respect to any specific adverse consequence, the lack of a requirement of warnings cannot and is not based on the defendant's supposed knowledge. "A defendant cannot be expected to learn of these consequences on his own. Quite often the defendant discovers the collateral consequences of a guilty plea after the fact." A principal rationale for the courts not being required to inform the defendant concerning adverse consequences deemed collateral is that the courts are also ignorant of these at the time of sentencing. There are simply too many possible collateral consequences of a guilty plea and conviction and they are in the control of other agencies, therefore constitutionally requiring notice is viewed as imposing an undue burden on the courts and can lead to too many collateral attacks on pleas.

This rationale is completely inapplicable to the defendant who accepts ARD in a DUI case. Since acceptance is not considered a prior conviction for any other criminal purpose under Pennsylvania law, its utilization for recidivist sentencing purposes presents the single possible adverse consequence. It would obviously not be too taxing for the judiciary to be aware of this possible consequence and to communicate it to the defendant during the colloquy, to determine whether the defendant is knowingly and voluntarily accepting ARD. It is, however, highly doubtful that it is constitutionally necessary because another rationale for not requiring notice of some collateral consequences is that the consequences are remote and in the control of the defendant. "[T]he determina-
tion that a particular consequence is 'collateral' has rested on the fact that it was in the hands of another government agency or in the hands of the defendant himself."  

Courts have consistently held that a guilty plea is not rendered invalid because a defendant has not been advised that it may have an enhancement or other severe effect if the defendant later commits another offense. A recidivist consequence is by no means automatic, unlike some other collateral consequences of a conviction, and rather than presume the worst, courts and prosecutors need not provide warnings because they "have a right to assume that the defendant will not be guilty of a subsequent offense." This seems particularly true with an individual who, unlike the defendant pleading guilty, is being admitted to a pretrial program like ARD because the individual is viewed as being amenable to possible successful intervention without the necessity of a trial and possible conviction. Thus, the failure to inform the ARD recipient concerning this possible valid collateral consequence of recidivist treatment will not be held to violate due process of law.

There is one aspect of ARD acceptance which remains troubling if there is no requirement that the defendant be warned it may be considered a conviction for sentencing purposes upon a subsequent conviction. Pennsylvania law requires no such warning, but the absence of information is fundamentally different from providing false or misleading information. At the hearing to determine that the defendant understands the ARD program, before acceptance it must be "ascertained on the record [that] the defendant understands that . . . acceptance into and satisfactory completion of the accelerated rehabilitative disposition program offers the defendant an opportunity to earn a dismissal of the pending charges."

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318. Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988).
319. See, e.g., United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990); United States v. Persico, 774 F.2d 30, 33 (2d Cir. 1985); Wright v. United States, 624 F.2d 557, 561 (5th Cir. 1980); Weinstein v. United States, 325 F. Supp. 597, 600 (C.D. Cal. 1971).
323. Pa. R. Crim. P. 178. Additionally, the defendant is informed that he or she is only waiving speedy trial and statute of limitation rights, and that the charges will be reinstated if there is a violation of ARD. Thus, in effect, the defendant is told that in no event, successfully completed or not, will ARD be considered a conviction. The defendant is told that,
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Dismissal of the charges seems inconsistent with the charges later being considered, despite dismissal, to be a prior conviction for sentencing purposes. A defendant who accepts ARD is misled into thinking there could be no consideration later under any circumstances that the defendant was convicted in the past.\textsuperscript{324} "[I]t is likely that an individual enters the ARD program with the understanding that upon completion he will have earned a clean record."\textsuperscript{328} The lack of a requirement to warn about a possible collateral consequence does not mean that the defendant who is actively misled should be treated the same as a defendant whose colloquy contained no mention of the possible adverse consequence at all.

In \textit{United States v. Russell},\textsuperscript{328} the District of Columbia Circuit held that it was an abuse of discretion not to permit a defendant to withdraw a guilty plea where a well-intended prosecutor incorrectly advised the defendant that his guilty plea could not result in deportation.\textsuperscript{327} "The government may not be required to inform defendants of collateral plea consequences such as deportation, but it does have an obligation not to mislead them."\textsuperscript{328} The court found the plea involuntary under the Federal Rules of Criminal Procedure,\textsuperscript{329} and did not have to reach the constitutional issue.\textsuperscript{330}

On balance, \textit{Russell}'s approach makes sense, and should be adopted as a matter of Pennsylvania law with respect to the ARD acceptance colloquy.\textsuperscript{331} However, even misinformation probably

\textsuperscript{324} Id.


\textsuperscript{326} 686 F.2d 35 (D.C. Cir. 1982).

\textsuperscript{327} \textit{Russell}, 686 F.2d at 41-42.

\textsuperscript{328} Id. at 41.

\textsuperscript{329} FED. R. CRIM. P. 11.

\textsuperscript{330} \textit{Russell}, 686 F.2d at 41-42.

\textsuperscript{331} In Commonwealth v. Becker, 530 A.2d 888 (Pa. Super. Ct. 1987) (en banc), \textit{alloc. denied}, 551 A.2d 213 (Pa. 1988), the Superior Court of Pennsylvania en banc expressly left open the question of "whether a defendant who was not informed of § 3731(e)(2) at the time he agreed to enter ARD may be sentenced as a recidivist." \textit{Becker}, 530 A.2d at 892 n.4. However, a panel of that court has concluded that "[a]s desirable as [that] practice may be, there is simply no legislative provision requiring it." Commonwealth v. Reeb, 593 A.2d 853, 857 (Pa. Super. Ct. 1991), \textit{alloc. denied}, 610 A.2d 45 (Pa. 1992).

If warnings are required concerning possible future recidivist status, courts will have to be especially careful to clarify the defendant's status and not simply advise the defendant of the potential for dismissal of the charges. In other contexts, confusing warnings which tend to cancel each other out without proper clarification have been held to be no better than no warnings at all, and sometimes worse. See, e.g., Commonwealth v. Danforth, 608 A.2d 1044(Pa. 1992) (confusing, contradictory warnings concerning rights with respect to refusal of breathalyzer test following DUI arrest); Commonwealth of the Northern Mariana Islands
does not constitute a violation of due process, given the prevailing view that possible recidivist status is a remote, uncertain collateral consequence peculiarly within the sole control of the defendant.

B. Waiver and Prior ARD Acceptance as a Sentencing Enhancement Which Violates Due Process of Law

If a prior acceptance of ARD may not be considered as an adverse sentencing factor under the Due Process Clause, its utilization at sentencing, over objection, can only be constitutionally justified if the government can establish that these sentencing due process rights were waived at the prior ARD proceeding. In other words, if the prior acceptance of ARD is in effect, a constitutionally unreliable invalid sentencing factor, utilization of this prior acceptance against the defendant must be sustained, if at all, on the government establishing that the defendant relinquished the future right to complain when the defendant accepted ARD.

The Superior Court of Pennsylvania has been inconsistent in its approach to the question of notice and waiver when ARD is accepted. The court has held that an ARD acceptance may not be considered a prior conviction for recidivist DUI purposes if it occurred before the DUI act was amended to provide that ARD acceptance would have this consequence. In part, those decisions were based on the perceived unfairness of counting a prior ARD as a prior conviction, when the individual had been advised when accepting ARD, pursuant to the governing rules, that successful completion would lead to dismissal of the charges.

However, without any record support in the individual cases, nor citation to any governing rules or statutes, in a series of decisions which were the legal equivalent of whispering down the lane, the superior court simply assumed that notice of the possible recidivist consequences was required and given to each ARD recipient after the DUI act was amended to provide for this result. Such an unsupported presumption clearly is not sufficient to find a waiver

v. Mendiola, 976 F.2d 475 (9th Cir. 1992) (confusing, contradictory Miranda warnings).
332. See notes 150-302 and accompanying text.
333. See notes 341-357 and accompanying text for a discussion of whether these sentencing due process rights should be considered constitutionally waivable.
335. Godsey, 492 A.2d at 47; Frost, 492 A.2d at 450.
of a defendant's right to complain at a future proceeding of what would otherwise be a due process violation; a mandatory sentence based solely on unreliable evidence of a prior DUI violation, the ARD acceptance, with no opportunity to respond.

Constitutional rights in criminal cases cannot be presumed to be waived, and silent records can never provide a basis for a finding of waiver. The well-established "standard applicable to waiver in a criminal proceeding . . . is, that it be voluntary, knowing, and intelligently made, . . . 'an intentional relinquishment or abandonment of a known right or privilege'." Pennsylvania courts have been far too amenable to finding waiver of a defendant's future due process sentencing rights without the required careful examination of the record of the ARD proceeding to determine whether there was a voluntary, knowing, intelligent relinquishment of those due process rights.


340. See note 336. Compare the approach of those cases with that of the Supreme Court in D.H. Overmyer Co., where the Court examined all of the circumstances of a civil litigant's signing of a cognovit provision, waiving in advance debtor due process rights by consenting to the holder obtaining a judgment without notice or hearing. Only after such an examination did the Court conclude that the cognovit clause was not violative of the Due Process Clause. It noted, among other factors, that it was a voluntary, knowing waiver, and that the litigant was not rendered defenseless because the judgment could be opened with the showing of a valid defense. D.H. Overmyer, 405 U.S. at 187-88. The ARD recipient does not have that luxury when the prior acceptance is considered a prior conviction at a future sentencing proceeding.

It would seem that informing a group of ARD recipients en masse that the ARD acceptance could be considered a prior conviction for subsequent violations of the DUI law would not be constitutionally sufficient in itself. See United States v. Gonzalez-Mendoza, 985 F.2d 1014 (9th Cir. 1993), and United States v. Lopez-Vasquez, 1 F.3d 751 (9th Cir. 1993) (per curiam) (unconstitutional to presume waiver of right to appeal deportation order from silent waiver by group of aliens warned of rights en masse). Contra Commonwealth v. Wagner, 507 A.2d 1237 (Pa. Super. Ct. 1986). Given that contrary information is often provided that ARD acceptance and completion of the program will lead to dismissal of the charges, more clarification of the situation is necessary. See notes 322-331 and accompanying text. "For a waiver of constitutional rights in any context must, at the very least, be clear." Fuentes v. Shevin, 407 U.S. 67, 95 (1972). The defendant should be informed that the use of the ARD acceptance as a prior conviction could be challenged on due process grounds at a future sentencing proceeding unless the defendant waives that right, and it then should be ascertained that the right is being relinquished voluntarily.
One question, not yet considered by any court, remains. That is, whether these sentencing due process rights are waivable at all, or whether the Due Process Clause should be held to invalidate any such purported waiver at an ARD proceeding.

The ARD recipient obviously has a powerful incentive, even if innocent, to accept and successfully complete the ARD, thereby avoiding the risk of a trial and possible conviction. This no doubt produces much pressure to accept ARD regardless of the circumstances of the arrest and alleged DUI offense, but it is clear that there is nothing constitutionally offensive about such pressure. The pressure to accept ARD stems, in large part, from the substantial benefit which will be received, and certainly presents nowhere near the pressure involved with defendants facing much more serious charges, where plea bargaining sometimes involves life and death decisions. The Court has made clear that the Due Process Clause permits bargaining arrangements concerning the charges even when no plea results as part of the defendant’s side of the bargain. In Town of Newton v. Rumery, the

What is crystal clear is that the Commonwealth Court of Pennsylvania waiver holding in another context is plain wrong. That court has held that ARD acceptance is a waiver of the right to complain in the future that it cannot be considered a prior conviction because defendant’s ARD acceptance is a waiver of the right to prove innocence. See, e.g., In re Elias, 453 A.2d 372 (Pa. Comw. Ct. 1982); Department of Transp., Bureau of Traffic Safety v. McDevitt, 427 A.2d 280 (Pa. Comw. Ct. 1981), aff’d per curiam, 458 A.2d 939 (Pa. 1983). In America there is no requirement that an accused establish his or her innocence. In re Winship, 397 U.S. 358 (1970) (Due Process Clause requires that government establish guilt beyond a reasonable doubt). Further, no waiver of rights, other than the rights to a speedy trial and statute of limitations is ordinarily requested or received when ARD is accepted. PA. R. CRIM. P. 178.

341. See, e.g., Commonwealth v. Murphy, 451 N.E.2d 95, 100-01 (Mass. 1983) (rejecting claim that consideration of prior acceptance of pre-trial diversion in DUI case as a first conviction violated due process of law because defendant allegedly felt compelled to accept this option which was much more attractive than trial).

342. Corbitt v. New Jersey, 439 U.S. 212, 222 n.12 (1978). See, e.g., Brady v. United States, 397 U.S. 742, 751 (1970) (“We decline to hold ... that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty.”); Bordenkircher v. Hayes, 434 U.S. 357, 363, reh’g denied, 435 U.S. 918 (1978) (“Plea bargaining flows from ‘the mutuality of advantage’ to defendants and prosecutors, each with his own reasons for wanting to avoid trial.”).


343. Corbitt, 439 U.S. at 222 n.12.

344. 480 U.S. 386 (1987). There was a plurality opinion on behalf of four Justices, with
Court held that it was not per se illegal to condition dismissal of the charges on the defendant signing an agreement releasing his right to file a civil rights action under 42 U.S.C. § 1983 against those responsible for the charges against him.\footnote{345}

It is also clear, however, that the lack of undue coercion and voluntariness will not constitutionally validate every promise or waiver of rights made by a defendant in order to receive a benefit concerning pending criminal charges. The Court has said, "[w]e do not suggest that every conceivable statutory sentencing structure, plea-bargaining system, or particular plea bargain would be constitutional."\footnote{346} For example, "[n]o court would knowingly permit a prosecutor to agree to accept a defendant's plea to a lesser charge in exchange for the defendant's cash payment to the police officers who arrested him."\footnote{347}

Outside of such an outrageous example, it is not clear what constitutional limits exist in the bargaining and sentencing process. \textit{Rumery} provides little guidance, given that it involved the defendant agreeing to give up a possible civil benefit of a lawsuit\footnote{348} rather than the usual criminal justice bargaining situation where the defendant is asked to waive criminal justice system rights. A majority of the Court in \textit{Rumery} held that there was no per se violation of federal law with the use of release-dismissal agreements, because these agreements sometimes serve the public interest by advancing legitimate public interests.\footnote{349} Such agreements will often serve the public by protecting government officials from the burden of de-

\footnote{345. \textit{Rumery}, 480 U.S. at 392-94. "In other contexts criminal defendants are required to make difficult choices that effectively waive constitutional rights. ... We see no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted." \textit{Id.} at 393 (citations omitted).}
\footnote{346. \textit{Corbitt}, 439 U.S. at 225 n.15. "Plea bargaining is not a private contractual arrangement unaffected by the public interest." United States v. Fine, 975 F.2d 596, 604 (9th Cir. 1992). \textit{See also}, Young v. State, 182 N.W.2d 262 (Wis. 1971) (guilty plea deal is void \textit{ab initio} if agreed facts substituted for real facts at sentencing). Even in the civil context the Court, responding to a due process challenge to a provision of a contract which it found permissible as a matter of contract law, continued with its analysis to determine whether or not it was also constitutionally valid. \textit{D.H. Overmyer Co.}, 405 U.S. at 183 ("More than mere contract law, however, is involved here." \textit{Id.}).}
\footnote{347. \textit{Rumery}, 480 U.S. at 401 (O'Connor, J., concurring).}
\footnote{348. Even with respect to the narrow issue it did address, release-dismissal agreements, the Court has been criticized for having "failed to elaborate standards for identifying which agreements would be upheld." Seth F. Kreimer, \textit{Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges}, 136 U. Pa. L. Rev. 851, 859 (1988).}
\footnote{349. \textit{Rumery}, 480 U.S. at 395-97.}
fending marginal and frivolous lawsuits.\textsuperscript{350} Additionally, such bargains often serve a valid criminal justice interest, such as sparing the complainant the possible emotional distress of testifying.\textsuperscript{351} Prosecutorial discretion, traditionally trusted with respect to the charging function and the pursuit of charges, need not be viewed with a jaundiced eye to prohibit such release-dismissal arrangements per se. A majority of the Court found that \textit{Rumery's agreement} was voluntary, that there were legitimate government reasons for it in his case, and that no prosecutorial misconduct occurred; therefore, the release dismissal agreement was held valid and enforceable.\textsuperscript{352} In contrast to \textit{Rumery}, what causes due process concerns in the ARD waiver context now considered is that no sufficient legitimate government interest is fostered, and the result is enhanced criminal penalties.

At the sentencing hearing after a subsequent DUI conviction, the government is saved the time and expense of having to establish in any way that the defendant engaged in the alleged prior incidence of misconduct which led to ARD acceptance. However, with no reliable proof of guilt, either when the defendant accepted ARD or at the subsequent conviction sentencing proceeding, there is no moral justification for the mandatory minimum sentence which results, because there is no increased culpability and the sentencing court is being forced to consider unreliable evidence having serious consequences. The judge, who says, as one Pennsylvania judge did, that a prior acceptance of ARD is not a conviction in his court,\textsuperscript{353} is required by the operation of the statute and a purported waiver of sentencing due process rights, to consider evidence which the judge properly wishes to reject.

This situation is in contrast to bargaining and guilty plea proceedings. While it is not clear that the constitution requires a fac-

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350. \textit{Id.}
351. \textit{Id.}
352. \textit{Rumery}, 480 U.S. at 394-98. Justice O'Connor, who supplied the fifth vote for the decision, agreed with much of the plurality's analysis, but wrote separately principally "to emphasize that it is the burden of those relying upon such covenants to establish that the agreement is neither involuntary nor the product of an abuse of the criminal process." \textit{Id.} at 399 (O'Connor, J., concurring). \textit{See} Lynch v. City of Alhambra, 880 F.2d 1122 (9th Cir. 1989). It is clear that even if voluntary, release dismissal agreements will sometimes be found invalid. The Third Circuit recently held unenforceable a Pennsylvania prosecutor's blanket policy of requiring a waiver of potential civil rights claims before ARD would be offered to a defendant. A purported waiver pursuant to such a policy "will not support a determination that the public interest requirement of \textit{Rumery} has been satisfied." \textit{Cain v. Darby Borough}, 7 F.3d 377, 383 (3d Cir. 1993) (en banc).
353. \textit{See} notes 68-70 and accompanying text.
\end{flushright}
tual basis of guilt before a guilty plea can be accepted, there is no jurisdiction that forces a judge to accept a plea resulting in a conviction without a factual basis to support a belief that the defendant committed the crime for which conviction is sought. In other words, on the basis of a bargain alone, courts are not re-

354. The Court has given mixed signals as to whether there must be factual support for every conviction to ensure its reliability or whether a voluntary and intelligent decision by the defendant is all that is constitutionally required. See Kevin C. McMunigal, Disclosure and Accuracy in the Guilty Plea Process, 40 HASTINGS L.J. 957, 1017 n.171 (1989). "[Are we concerned with the justice of the bargain or the justice of the conviction?], has not been definitively answered. Charles W. Smith, Note, Equivocal Guilty Pleas—Should They Be Accepted, 75 DICK. L. REV. 366, 372-73 (1971).

In North Carolina v. Alford, 400 U.S. 25 (1970), the Court held that a guilty plea without an admission of guilt was constitutional. In so holding, the Court emphasized not only the voluntary and intelligent decision by the defendant, but also the fact that "the record before the judge contains strong evidence of actual guilt." Alford, 400 U.S. at 37. The Court noted that guilty pleas should not be accepted without a factual basis, but did not indicate whether this is a constitutional prerequisite. Id. at 38 n.10. Additionally, four members of the Court in Henderson v. Morgan, 426 U.S. 637, 647-48 (1976), concluded that either through trial or plea "factual guilt of a defendant . . . [has to] be established such that he may be deprived of his liberty consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Morgan, 426 U.S. at 647-48 (White, J., concurring).

On the other hand, nolo contendere pleas are considered constitutional without any requirement of a factual basis. See Alford, 400 U.S. at 35-37; Lott v. United States, 367 U.S. 421 (1961); Hudson v. United States, 272 U.S. 451 (1926); FED. R. CRIM. P. 11. Since a nolo contendere plea waives all of the criminal trial rights waived by a guilty plea and results in conviction and sentence the same as a guilty plea it is difficult to sustain a constitutional argument that a defendant cannot be convicted without a factual basis to support the conviction. A majority of the courts which have considered the issue have concluded that there is no constitutional requirement of a factual basis for a guilty plea conviction. See, e.g., Higgason v. Clark, 984 F.2d 203 (7th Cir. 1993); Wallace v. Turner, 695 F.2d 545 (11th Cir.), reh'g denied, 706 F.2d 318 (11th Cir. 1983); Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975), cert. denied, 424 U.S. 950 (1976); Ruddy v. Black, 516 F.2d 1380 (6th Cir.), cert. denied, 423 U.S. 1001 (1971). Contra, United States v. Briggs, 939 F.2d 222 (5th Cir. 1991); United States ex rel. Dunn v. Casscles, 494 F.2d 397 (2d Cir. 1974).

Many jurisdictions require a factual basis for guilty pleas only in felony cases, and generally do not require such a showing for nolo contendere pleas. See John L. Barkai, Accuracy Inquires For All Felony And Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?, 126 U. PA. L. REV. 88 (1977). Additionally, courts which do require a factual basis for guilty pleas have varying standards for determining if there is a sufficient factual basis. Curtis J. Shipley, Note, The Alford Plea: A Necessary But Unpredictable Tool for the Criminal Defendant, 72 IOWA L. REV. 1063, 1086-87 (1987).

355. There is no constitutional right to plead guilty or nolo contendere and courts generally have discretion to reject such pleas. See, e.g., Santobello v. New York, 404 U.S. 257, 262 (1971); North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970); Shipley, cited at note 354, at 1086-87 (many judges do not accept any pleas without admission of guilt while others will not do so when there is not strong factual basis); United States v. Penes, 577 F.2d 754 (1st Cir. 1978) (no abuse of discretion to reject nolo contendere plea because no factual basis for charge).
quired to sanction what is perceived as an unreliable or unjust result.\textsuperscript{356}

If acceptance of ARD, with no proof of guilt on the underlying DUI charge, can be considered a prior conviction at a subsequent proceeding on the basis of the defendant's waiver of the right to complain about this unreliable result, then there are dangerous implications for more pervasive abuse of the criminal process. Whether provided by statute, or routinely at the insistence of the prosecutor, every discharged case could be considered a prior conviction if a waiver was obtained at the time of discharge. As with the prior ARD acceptance, at the subsequent conviction and sentencing proceeding, the discharged case would be considered conclusive and irrebuttable evidence of prior guilt, with no opportunity to even present evidence establishing innocence of the previous incident leading to arrest and discharge.

Unlike the civil release-dismissal agreement considered in Rumery, such conviction-dismissal agreements would constitute a direct perversion of the criminal justice sentencing process. If bargained-for ARD pre-trial diversion agreements or dismissal agreements have due process limits on enforceability, perhaps the line should be drawn where the courts are forced at sentencing to consider a defendant, presumed innocent with no proof of guilt of prior charges,\textsuperscript{357} to have been guilty of those charges.

**CONCLUSION**

The legislative choice to require consideration of a prior acceptance of ARD in a DUI case as a prior conviction, reflects a natural disappointment that the defendant is once again charged with the same offense after a rehabilitative opportunity. Having once received a break, the defendant failed to take advantage of it. This

\textsuperscript{356}. In a somewhat analogous context, although jurisdictions are divided, many courts have held that the results of lie detector tests, considered inadmissible because they are unreliable, do not become admissible on stipulation of the parties. See generally, Joseph T. Bockrath, Annotation, Admissibility of Lie Detector Test Taken Upon Stipulation that the Result Will be Admissible in Evidence, 53 A.L.R. 3d 1005 (1973 & Supp. 1993). See, e.g., Commonwealth v. Pfender, 421 A.2d 791, 796 (Pa. Super. Ct. 1980) ("evidence of results of the polygraphic tests is not admissible in evidence even in the face of a knowing, voluntary and intelligent stipulation that they may be submitted in evidence."); State v. Dean, 307 N.W.2d 628, 647 (Wis. 1981) ("[O]rdinarily a stipulation can admit facts but not change the law. The law is that polygraph evidence is not admissible.").

\textsuperscript{357}. In Rumery, the plurality opinion, on behalf of four Justices, found the fact that Rumery was presumed to be innocent to be of no consequence, because unlike the instant case, his civil rights action was "a civil case, in which Rumery bears the ultimate burden of proof." Rumery, 480 U.S. at 397 n.8.
natural disappointment has, however, produced an unconstitu-
tional result. The break previously afforded the accused was pro-
vided to a person who must be presumed innocent. ARD was a
break for the system as well, because control was assumed over the
defendant without the burden of a trial or any proof of guilt.

Considering a prior ARD as a prior conviction without any evi-
dence of guilt does not comport with due process of law because it
is based on a presumption of guilt without any evidence that the
defendant engaged in the alleged misconduct that was the basis for
the prior charges. Due process requires proof by a preponderance
of the evidence of the underlying facts on which the mandatory
recidivist DUI sentence depends.

Because the Pennsylvania statute equates a prior ARD accept-
ance with a prior conviction and specifies that it shall be treated as
a prior conviction, the above constitutional deficit cannot be
glossed over in the guise of another rationale such as deterrence.
More fundamentally, deterrence should be unacceptable as a con-
stitutional rationale for punishing more severely those with prior
histories of contact with the criminal justice system, even if it
could be demonstrated that they are less deterrable than others. If
a prior acceptance of ARD, or a prior arrest or some other contact
could be utilized against a defendant under this rationale, a sleight
of hand word game will have done away with the due process re-
quirement of proof by reliable evidence of alleged prior miscon-
duct, before the misconduct could be considered against a
defendant.

Finally, a waiver of such sentencing due process rights at the
ARD proceeding may not be presumed. Even if there is a colloquy
at the time of ARD acceptance that fully informs the defendant of
possible future recidivist sentencing consequences, and there is a
voluntary informed decision to waive the right to complain of un-
proven conduct being considered as a prior conviction, a serious
question remains whether such a waiver should be considered con-
stitutionally valid. A sentencing judge is forced by an agreement at
a prior proceeding to consider as a prior conviction what the judge
knows is not a prior conviction, and the judge, not wishing to par-
ticipate in the charade for mandatory sentencing purposes, is nev-
ertheless forced to do so.