Sentencing Federal Offenders for Crimes Committed Before November 1, 1987

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Significant Changes Since the June 1985 Revision

It should be noted that this revision incorporates a number of minor changes intended to clarify language, amplify discussion, update citations, etc. Changes of this type are not referred to below. Changes in law and policy that are reflected in this revision are as follows:

PASSIM

Mention of changes brought about by the Comprehensive Crime Control Act of 1984.

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Introduction

The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1976, as amended, enacted major changes in the Criminal Code of the United States. The Act provided for a Sentencing Commission, the principal purpose of which is to establish fair and consistent sentencing policies and practices for the federal criminal justice system by promulgating detailed guidelines and policy statements for use by courts in sentencing criminal offenders. These statutory changes took effect on November 1, 1987. The statute contains detailed instructions, the most important of which require the Sentencing Commission to create categories of offense behavior and offender characteristics. These categories are then coordinated so as to place the particular offender into a prescribed sentence range. The sentencing judge must either select a sentence within the guideline range or, in an atypical case, specify in the record any reasons for departure from the guidelines. On appeal, the court may review a sentence within the guidelines to see if the guideline was correctly applied and a sentence outside the guidelines for the reasonableness of the departure. Because the Act abolishes parole and substantially restructures "good time" adjustments, it requires an offender to serve virtually all of the prison sentence.

Despite these massive changes in the law, a great number of offenders are still being sentenced under the law as it stood before November 1, 1987. For that reason, this publication, the latest in a series of revisions of a work formerly entitled *The Sentencing Options of Federal District Judges,* takes account of statutes and case law in effect before the enactment of the Comprehensive Crime Control Act. It includes some mention throughout of major changes brought about by that legislation, but it is not intended as an exhaustive presentation on the newer law. For an overview of those statutory changes, which include the implementation of a guideline sentencing system, see A. Partridge, The Crime Control and Fine Enforcement Acts of 1984: A Synopsis 3–11 (Federal Judicial Center 1985).

For offenses committed *before* November 1, 1987, when a judge sentences a criminal offender to a term of imprisonment, one thing is nearly certain: the offender will not be imprisoned for the period specified in the sentence. The sentence imposed by the judge is a fiction. Nonetheless, it is a fiction with real consequences. This publication endeavors to describe the judge's sentencing options in terms of those consequences. It goes beyond the formal language of the statutes to consider

the effect of the choice of sentence on the offender's treatment by the U.S. Bureau of Prisons and the U.S. Parole Commission.

This work has been prepared principally for the benefit of newly appointed federal district judges. It should also be useful to more experienced judges, although they will presumably find much less that is new.

As mentioned above, this publication deals primarily with the law in effect before November 1, 1987. The administrative policies described here are those in effect as of September 1, 1991. They are, of course, subject to revision, and revisions may apply to offenders sentenced currently.

Obviously, a publication such as this should not be the sole source of information about the sentencing options available. Ranking high among the other sources are visits to the institutions in which offenders are incarcerated. A 1976 resolution of the Judicial Conference of the United States states that "the judges of the district courts, as soon as feasible after their appointment and periodically thereafter, shall make every effort to visit the various Federal correctional institutions that serve their respective courts." Many judges regard such visits as extremely valuable.

For the newly appointed district judge, the most surprising feature of the system described in this publication will probably be the relationship between the sentencing judge and the Parole Commission. Pursuant to various statutes, the judge has broad authority to determine the sentence of an offender whose crime was committed before November 1, 1987. If the sentence is for imprisonment, the judge's sentence determines the offender's parole eligibility date and (subject to "good time" deductions) the maximum duration of incarceration. Within the limits so established, the Parole Commission determines the actual release date (see Appendix A). Pursuant to 18 U.S.C. § 4203(a)(1) (1982 & Supp. IV 1986), the Commission has issued guidelines for making such determinations. Under those guidelines, the primary determinants of an offender's release date are the severity of the offense committed, prior record, and drug history—all of which are factors the judge knows at the time of sentencing. Contrary to some commonly held notions:

1. It is not the policy of the Parole Commission to release offenders on their parole eligibility dates if their conduct while in prison is merely satisfactory. That probably never was the policy.

2. It is not the policy of the Commission to release offenders upon a determination that they have reached the optimum time for release in terms of rehabilitative progress. That was once an important factor in release decisions, but it no longer is. The current lack of emphasis on this factor reflects the widespread belief among students of corrections that inmates' postrelease behavior cannot reliably be predicted on the basis of behavior during incarceration.

The present policies of the Parole Commission are designed to provide consistency in release dates for similarly situated offenders. They reflect the view that a major function of the parole system is to compensate for disparity in the sentences handed down by the judges. Under the Judicial Improvements Act of 1990, the Parole Commission will be abolished as of November 1, 1997.* Presumably, the Sentencing Guidelines should eliminate such disparities.

Another feature of the system that may come as a surprise is the limited practical importance of one special sentencing authority designed to facilitate rehabilitation—the Narcotic Addict Rehabilitation Act (some provisions of which were repealed by the 1984 law, but which remain in effect until November 1, 1992, pursuant to the savings provision of the Act). The selection by the sentencing judge of this special authority does make a difference in the subsequent treatment of the offender, but the difference is not always what one would expect, based on the statutory language.

As a final introductory note, it bears mentioning that, because at this point in time judges are imposing sentences under both the old law and the Sentencing Guidelines, it is very important for the judge to make clear in the record of each proceeding which law was utilized in the case.

* The Comprehensive Crime Control Act of 1984 had abolished the Commission effective November 1, 1992. The Judicial Improvements Act extends that date to 1997. Pub. L. No. 101-650, § 316.

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Basic Sentencing Options for Adult Offenders

IMPRISONMENT

TERM

The maximum term that the judge may impose is set forth in the statute defining the crime. Generally, the judge may impose any term up to the maximum. A few statutes have minimum terms (e.g., 18 U.S.C. § 844(h)), and a few have fixed terms (e.g., 18 U.S.C. § 2114). Although there were not numerous mandatory minimum provisions, some of the provisions were applicable to a large number of cases, i.e., 21 U.S.C. § 841(b)(1)(A) & (B) (1986).

"GOOD TIME"

A prisoner earns "good time" both through good behavior and through participation in certain kinds of activity. Good time earned reduces the *maximum possible* period of incarceration under the sentence. It does not necessarily reduce the *actual* time served because it does not operate on the parole date; the conduct that generates good time may or may not be considered relevant by the Parole Commission.

PAROLE ELIGIBILITY

Note that the Comprehensive Crime Control Act of 1984 abolished parole release for crimes committed after November 1, 1987. Pub. L. No. 98-473, tit. II, 98 Stat. 1976, as amended. For those crimes, convicted offenders will serve the entire sentence imposed, subject only to good time allowance.

Term of More Than One Year (or Sum of Consecutive Terms More Than One Year)

A prisoner is normally eligible for parole release after serving one third of the term. 18 U.S.C. § 4205(a) (1982).

In the case of a life sentence or a sentence of more than thirty years, the prisoner is eligible after ten years. *Id.* As the Parole Commission interprets § 4205(a), consecutive sentences do not delay eligibility beyond ten years. U.S. Parole Commission, Rules and Procedures Manual 173 (§ M-01(a), (b)(1), (e)) (April 1987).

As part of the sentencing order, the judge may designate an earlier parole eligibility date or specify that the prisoner is immediately eligible. 18 U.S.C. § 4205(b)(1), (2) (1982); *U.S. v. Price*, 474 F.2d 1223 (9th Cir. 1973); *Jones v. U.S.*, 419 F.2d 593 (8th Cir. 1969).

There is a split among the circuits regarding whether judges may sentence an offender to an extremely long term of years (that is, one longer than life) such that the prisoner is ineligible for parole within his or her lifetime. In *U.S. v. O'Driscoll*, 586 F. Supp. 1486 (D. Colo. 1984), the judge imposed a 300-year sentence with no possibility of parole for 99 years (i.e., one year less than one third of the term of years imposed). The Court of Appeals for the Tenth Circuit upheld the sentence, 761 F.2d 589 (10th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986). *Accord U.S. v. Berry*, 839 F.2d 1487 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 863 (1989). *See U.S. v. Tidmore*, 893 F.2d 1209 (11th Cir. 1990), which agrees with *Berry* but places limitations on the sentencing judge's ability to restrict parole in cases where a life sentence is involved. *See also U.S. v. Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987); *Rothgeb v. U.S.*, 789 F.2d 647 (8th Cir. 1986). *Contra U.S. v. Castonguay*, 843 F.2d 51 (1st Cir. 1988); *U.S. v. Dipasquale*, 859 F.2d 9 (3d Cir. 1988); *U.S. v. Fountain*, 840 F.2d 509 (7th Cir.), *cert. denied*, 109 S. Ct. 533 (1988).

Term of Six Months Through One Year (or Sum of Consecutive Terms)

A prisoner is normally not eligible for parole.

At the time of sentencing, the judge may "provide for the prisoner's release as if on parole after service of one-third of such term." 18 U.S.C. § 4205(f) (1982). The Court of Appeals for the Fifth Circuit has held that this language permits the judge to provide for release upon completion of either one third of the term or some larger fraction of it. *U.S. v. Pry*, 625 F.2d 689 (5th Cir. 1980), *cert. denied*, 450 U.S. 925 (1981). Presumably, "good time" statutes continue to apply and might in some cases mandate release before the date established by the judge.

Term of Less Than Six Months (or Sum of Consecutive Terms)

Prisoners are not eligible for parole.

CONCURRENT SERVICE OF STATE SENTENCE

There is no formal mechanism for providing that a federal sentence will be served concurrently with a state sentence. However, 18 U.S.C. § 4082(b) (1982) authorizes the Bureau of Prisons to designate a state institution as the place for service of part or all of a federal sentence. Designating the institution in which an offender is to be incarcerated on a state charge has the effect of making the federal and state sentences run concurrently. The Bureau of Prisons will attempt to make such a designation if requested to do so by the sentencing federal judge; in the absence of such a request,

federal and state sentences will be served consecutively. *See generally U.S. v. Naas*, 755 F.2d 1133 (5th Cir. 1985); *U.S. v. Huss*, 520 F.2d 598 (2d Cir. 1975); *Holleman v. U.S.*, 612 F. Supp. 384 (N.D. Ind. 1985).

Note that the Comprehensive Crime Control Act of 1984 repealed § 4082(b). Pub. L. No. 98-473, § 218(a)(3), 98 Stat. 1976, 2027, as amended. The section remains in effect, however, for crimes committed before November 1, 1987.

RESIDENCE IN HALFWAY HOUSE

The Bureau of Prisons maintains a network of contractor-operated halfway houses—"community treatment centers" (CTCs)—principally for offenders who are approaching the ends of their terms of imprisonment. Halfway house residents generally work or participate in training programs in the community, but are required to return to the halfway house before a specified hour each evening. Inmates are expected to make subsistence payments (usually five dollars per day) to help defray the cost of the program. Newly sentenced offenders may be required to reside in such halfway houses in two ways:

1. The offender may be sentenced to a term of imprisonment, with a request by the judge that the offender serve the sentence in a community treatment center. The Bureau of Prisons will generally honor such a request if the offender qualifies for minimum-security placement. If the placement turns out to be unsatisfactory, the Bureau of Prisons retains discretion to determine how the offender is to serve the remainder of the sentence. Unless the sentencing judge requests assignment to a community treatment center, an offender sentenced to imprisonment will not initially be assigned to one and is likely to be transferred to such a center only for the last few months before release.

2. The offender may be granted probation, with residence in a community treatment center as a probation condition, but only if the Attorney General certifies that adequate facilities, personnel, and programs are available. If the placement turns out to be unsatisfactory and the Bureau concludes that residence should be terminated, the court must make "such other provision" for the probationer as it deems appropriate. 18 U.S.C. § 3651 (1982 & Supp. IV 1986).

The Bureau of Prisons has an alternative method for providing prerelease services to offenders released to communities having no CTCs. This involves using the nearest CTC and a flexible application of policies concerning furloughs and "live out." The legal authority here is 18 U.S.C. § 3624(c), which is applicable to all offenders regardless of date of offense. The offender is first transferred to the CTC for an interim period of thirty days. If deemed appropriate, the offender is then granted structured consecutive thirty-day furloughs to the home community and

finally a thirty-day live out. At all times, daily contact is maintained with the parole officer. The offender returns to the CTC several days before the scheduled release date to execute release certificates and undergo final debriefings. U.S. Bureau of Prisons, Operations Memorandum, #169-85 (7300), Sept. 17, 1985.

Note: The Comprehensive Crime Control Act of 1984 contains a provision requiring the Bureau of Prisons to give each prisoner "a reasonable opportunity to adjust to and prepare for his re-entry into the community," to the extent practicable. Pub. L. No. 98-473 § 212, 98 Stat. 1987, as amended. Although this applies specifically to persons who committed offenses after November 1, 1987, the Bureau utilizes its existing CTCs and various prerelease programs to achieve this goal. U.S. Bureau of Prisons, Program Statement 7333.2 (April 5, 1988).

FINES

For offenses committed on or before December 31, 1984, the maximum fine that may be imposed is set forth in the law defining the offense.

For offenses committed after December 31, 1984, the maximum fine that may be imposed is the largest of the following:

1. the amount set forth in the law defining the offense;
2. double the gross pecuniary gain derived by the defendant from the offense;
3. double the gross pecuniary loss caused by the offense to another person; or
4. (a) $250,000 if the offense was either a misdemeanor resulting in death or a felony and the defendant is an individual,
   (b) $500,000 if the offense was either a misdemeanor resulting in death or a felony and the defendant is an organization,
   (c) $100,000 if the offense was a misdemeanor that did not result in death and is punishable by more than six months' imprisonment.

18 U.S.C. § 3623 (Supp. IV 1986). An offense is a misdemeanor if the maximum authorized term of imprisonment for the offense is one year or less. 18 U.S.C. § 1 (1982).

If multiple counts arise from a common scheme or plan and the offenses did not cause "separable or distinguishable kinds of harm or damage," the aggregate fine that may be imposed under the new provision is twice the amount that could be imposed for the most serious offense. 18 U.S.C. § 3623(c)(2) (Supp. IV 1986).

A fine may be imposed either alone or in addition to imprisonment. If payment is to be in installments and the offense was committed after December 31, 1984, the period of payment shall not exceed five years, excluding any time that the defendant is imprisoned for the offense for which the fine is imposed, and interest on the unpaid

balance accrues at the rate of 1.5% per month. 18 U.S.C. § 3565(b)(2) (Supp. IV 1986).

Under 18 U.S.C. § 3565(d) (Supp. IV 1986), added by the Criminal Fine Enforcement Act of 1984, fines for offenses committed after December 31, 1984, are to be paid to the Justice Department rather than, as formerly, to the clerk of the court. Exceptions may be made by regulations jointly promulgated by the Attorney General and the Director of the Administrative Office of the U.S. Courts.

SPECIAL ASSESSMENT

18 U.S.C. § 3013 (Supp. IV 1986) requires the court to impose a "special assessment" on each convicted offender. For misdemeanors, the mandatory assessment is $25 for an individual defendant and $100 for a defendant other than an individual; for felonies, it is $50 and $200, respectively. A separate assessment is required for each count for which a conviction is obtained and for which a defendant could be separately punished. *U.S. v. Pagan*, 785 F.2d 378 (2d Cir.), *cert. denied*, 479 U.S. 1017 (1986); *U.S. v. Dobbins*, 807 F.2d 130 (8th Cir. 1986); U.S. Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress 184 (1984).

The provision requiring these assessments took effect November 11, 1984. The Department of Justice interprets the effective-date provision to mean that the requirement applies only to offenses committed on and after November 11, 1984. U.S. Department of Justice, Handbook, *supra*, at 187.

The special assessment is collected in the same manner as a fine. 18 U.S.C. § 3013(b) (Supp. IV 1986). It apparently must be imposed even in cases in which it will clearly be uncollectible; there is no exception for indigent defendants. *U.S. v. Rivera-Velez*, 839 F.2d 8 (1st Cir. 1988); *U.S. v. Pagan*, *supra*. Nor is there an exception for petty offenses: conviction of even a $5 parking violation requires a special assessment. Where forfeiture of collateral does not produce a conviction, the special assessment is not imposed in addition to forfeited collateral. *See, e.g., Scharf v. U.S.*, 606 F. Supp. 379 (E.D. Va. 1985).

One court had held that the special assessment provision was unconstitutional because its purpose was to raise money, not to finance a victim assistance program or to punish the offender. As such it should have originated in the House, not, as it did, in the Senate. *U.S. v. Munoz-Flores*, 863 F.2d 654 (9th Cir. 1988). That decision was reversed by the Supreme Court in *U.S. v. Munoz-Flores*, 495 U.S. 385 (1990), holding that special assessments are constitutional.

Before a 1987 amendment to 18 U.S.C. § 3013 (Pub. L. No. 100-185, § 3, 10 Stat. 1279), there was some question regarding whether a special assessment could be imposed on a person convicted under the Assimilative Crimes Act, 18 U.S.C. § 13

(1982). *See, e.g., U.S. v. Mayberry*, 774 F.2d 1018 (10th Cir. 1985). This statute adopts state law for acts committed within federal enclaves when such acts are not criminal under federal law but would be under the law of the state in which the federal enclave is located. The 1987 amendment expressly identified offenses under § 13 as "offense[s] against the United States" for purposes of 18 U.S.C. § 3013. Even so, the assessment may not be imposed on offenders sentenced before the 1987 amendment unless the assimilated state law provides for "like punishment."

PROBATION

WHEN AVAILABLE

Probation is available for a defendant convicted of any offense not punishable by death or life imprisonment. It may be granted whether the offense is punishable by fine, imprisonment, or both. 18 U.S.C. § 3651 (1982).

If the offense is punishable by both fine and imprisonment, the judge may impose a fine and place the defendant on probation as to imprisonment, thereby combining probation with a fine. *Id.*

Probation cannot normally be combined with imprisonment, but there are two exceptions:

1. *"Mixed sentence."* Upon a conviction on multiple counts, the court may impose imprisonment on one or more counts, followed by probation on one or more of the others. For this reason, some judges generally refuse to accept a guilty plea to one count of a multiple-count indictment; they insist on a plea to two counts in order to gain greater latitude in sentencing. However, the Ninth Circuit has held that it is improper for a district judge to adopt such a policy. *U.S. v. Miller*, 722 F.2d 562 (9th Cir. 1983). Some caution is advisable with mixed sentences in that the Judgment and Commitment Order should explicitly provide when the probation part of the sentence is to begin, i.e., upon release from incarceration or upon completion of the "full term" of the imprisonment counts.

2. *"Split sentence."* Upon a conviction on one count, the court may impose a sentence of imprisonment for more than six months and provide that the defendant be confined for a stated period of six months or less and then placed on probation with respect to the remainder of the sentence. 18 U.S.C. § 3651 (1982). This authority is limited to offenses punishable by imprisonment for more than six months but not punishable by death or life imprisonment. The provision was enacted to give the court some of the latitude in one-count cases that the mixed sentence affords in multiple-count cases, but there is authority for imposing split sentences in multiple-count cases as well. *U.S. v. Entrekin*, 675 F.2d 759 (5th Cir. 1982).

Note: For crimes committed on or after November 1, 1987, the Comprehensive Crime Control Act establishes probation as a sentence in its own right, and does not

require the suspension of another sentence first. Probation is not available for felonies punishable by imprisonment of twenty-five years or more. *See* definition of B felony in 18 U.S.C. § 3559(a)(2). Authorized terms of probation are specified for other felonies, misdemeanors, and infractions. Split and mixed sentences are abolished. Pub. L. No. 98-473, tit. II, 98 Stat. 1976, as amended (1984).

HOW IMPOSED

The court may suspend *imposition* of sentence and place the defendant on probation. If probation is revoked, the court then has the available full range of sentencing options. 18 U.S.C. § 3651 (1982).

Alternatively, the court may impose a sentence of imprisonment or a fine or both, suspend *execution* of the sentence, and place the defendant on probation. If probation is revoked, the court may reduce—but not increase—the sentence imposed. *See* Fed. R. Crim. P. 35.

Either of these methods can also be used to impose a fine and grant probation only as to imprisonment: The court can impose a fine and suspend *imposition* with respect to imprisonment, or can impose a sentence including both fine and imprisonment and suspend *execution* of the imprisonment portion. The court may require that the fine be paid as a condition of the probation.

For a case in which a fine is imposed and *execution* of the fine is suspended, the last paragraph of 18 U.S.C. § 3651 (1982 & Supp. IV 1986) states that successful completion of probation will not extinguish liability for the fine. While this statement is almost certainly the result of drafting error, it may caution courts against putting an offender on probation by imposing a fine and then suspending its execution.

Note that there is no authority for the court to suspend a sentence without putting the offender on probation. *U.S. v. Elkin*, 731 F.2d 1005 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984); *U.S. v. Sams*, 340 F.2d 1014 (3d Cir.), *cert. denied*, 380 U.S. 974 (1965).

DURATION

The term of probation may not exceed five years. 18 U.S.C. § 3651 (1982). It has been held that consecutive terms may not be used to go beyond this limit. *E.g., U.S. v. Albano*, 698 F.2d 144 (2d Cir. 1983), and cases cited therein.

The term of probation is not limited by the maximum term of imprisonment for the offense. Five years' probation may be given for an offense punishable by six months' imprisonment. After placing an offender on probation, the court retains discretion to modify the term. 18 U.S.C. § 3651 (1982).

If probation is revoked, time spent on probation is not credited as service against a term of imprisonment.

PROBATION CONDITIONS

Probation is "upon such terms and conditions as the court deems best." 18 U.S.C. § 3651 (1982).

Probation may be supervised or unsupervised. If supervised, the frequency of reporting to the probation officer will generally depend upon probation office assessment of the likelihood of violation of probation.

The "conditions" specifically authorized by statute (18 U.S.C. § 3651 (1982)) are:

- residence in a halfway house or participation in its programs (see page 7);
- payment of costs incident to residence in a halfway house;
- participation in a drug program;
- payment of a fine (see *supra*);
- support of persons for whose support the offender is legally responsible;
- restitution or reparation (see *infra*).

A number of federal judges have used probation conditions requiring offenders to perform "community service." Under former law, there was no specific statutory authority for imposing community service as a probation condition, and authority had to be found in the general power to grant probation "upon such terms and conditions as the court deems best." *See U.S. v. Restor*, 679 F.2d 338 (3d Cir. 1982). The Comprehensive Crime Control Act of 1984 expressly provided for community service as a condition of probation for persons convicted of felonies and misdemeanors. Pub. L. No. 98-473, § 212 (a)(2), 98 Stat. 1987, 1993. *See also* 18 U.S.C. § 3563(b)(13).

Probation offices must generally rely on local resources because they have no funds for providing job training, medical care, or similar services. Probationers required to participate in halfway-house or drug-care programs are exceptions. Halfway houses are supported by the Bureau of Prisons. Drug-care programs are supported by the Probation Division of the Administrative Office of the U.S. Courts and can provide their clients a wide range of supportive services that go beyond drug treatment and surveillance as narrowly defined.

RESTITUTION

There are two authorities in the Criminal Code for ordering restitution: the Victim and Witness Protection Act and the probation statute. Since the two statutes require consideration of different factors, it is best if the sentencing court specifies in the

record the statute under which it is acting. *U.S. v. Stuver*, 845 F.2d 73 (4th Cir. 1988); *U.S. v. Shackleford*, 777 F.2d 1141 (6th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986).

The Victim and Witness Protection Act (VWPA), enacted in 1982, added 18 U.S.C. §§ 3579–3580 to the code, effective with respect to offenses committed on and after January 1, 1983. (Pursuant to the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3579 and 3580 are renumbered 18 U.S.C. §§ 3663 and 3664, effective November 1, 1987, with only a few minor technical and conforming amendments. Pub. L. No. 98-473, tit. II, ch. II, § 211, 98 Stat. 1976, 1987, as amended.) These provisions are applicable only to offenses under Title 18 and to certain criminal violations of the Federal Aviation Act of 1958. 18 U.S.C. § 3579(a)(1) (1982 & Supp. IV 1986). When sentencing an offender convicted of such an offense, the court must either order restitution to victims of the offense or state on the record the reasons for not doing so. 18 U.S.C. § 3579(a) (1982 & Supp. IV 1986). Restitution may be "in addition to or in lieu of any other penalty authorized by law." 18 U.S.C. § 3579(a)(1) (1982 & Supp. IV 1986). If the offender is placed on probation, any restitution ordered must be made a condition of probation; if the defendant is imprisoned and subsequently paroled, it must be made a condition of parole. 18 U.S.C. § 3579(g) (1982). With the victim's consent, the court may order that restitution be made in services in lieu of money or that restitution be made to a third party designated by the victim. 18 U.S.C. § 3579(b)(4) (1982). Either the victim or the United States may enforce the restitution order as if it were a judgment in a civil action. 18 U.S.C. § 3579(h) (Supp. IV 1986).

The procedures for issuing an order of restitution are set forth in 18 U.S.C. § 3580 (1982). This section identifies factors to be considered in determining whether restitution shall be ordered and the amount of such restitution. It also allocates the burden of proof for resolving disputes regarding the amount or type of restitution. As noted above, 18 U.S.C. § 3579(a)(2) (1982) requires the court to place in the record the reasons for its determination if full restitution is not ordered.

Although the legislative history shows that, in passing the VWPA, Congress intended to broaden the authority of federal judges to order restitution so as "to restore the victim to his or her prior state of well-being as far as possible," S. Rep. No. 97-532, 97th Cong., 2d Sess. 30, *reprinted in* U.S. Code Cong. & Ad. News 2515, 2536, courts have shown some reluctance to use the Act's restitution provisions. However, a split among the circuits existed for a while on the question of whether the VWPA's broad purpose allowed the imposition of a restitution order in an amount that exceeded that specified in the indictment. A number of courts had allowed such restitution orders so long as the amount was supported by a preponderance of the evidence. Similarly, other courts allowed restitution under the VWPA on counts that had been dismissed. The Supreme Court, in *Hughey v. U.S.*, 495 U.S. 411, 110 S. Ct. 1979 (1990), reversed this line of cases, holding that a VWPA award

is authorized only for the loss caused by the specific conduct that is the basis of the offense of conviction. The Court cautioned that the provisions of § 3580(a) of the VWPA, which directs the sentencing judge to consider such other factors as the court deems appropriate, should not be construed as expanding the defendant's liability for restitution beyond the offense of conviction.

Although 18 U.S.C. § 3580(a) (1982 & Supp. IV 1986) requires a court to consider the financial resources of the defendant in determining whether, and in what amount, to order restitution, it does not prohibit imposing a sentence of restitution upon a defendant who is indigent. *U.S. v. Keith, supra; U.S. v. Fountain*, 768 F.2d 790 (7th Cir. 1985), *amended*, 777 F.2d 345 (7th Cir. 1985), *cert. denied*, 475 U.S. 1124 (1986); *U.S. v. Atkinson*, 788 F.2d 900 (2d Cir. 1986).

The probation statute, 18 U.S.C. § 3651 (1982 & Supp. IV 1986), has long contained authority to require restitution as a condition of probation. The 1982 legislation left this provision undisturbed. However, the Sentencing Reform Act of 1984 repealed § 3651. Thus this section remains applicable only for crimes committed before November 1, 1987.

The language governing restitution in the former probation statute is as follows: "While on probation, and among the conditions thereof, the defendant . . . [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . ." This language has been held to strictly limit monetary probation conditions to fines, restitution, and support payments, thus precluding monetary payments to charitable or other groups not damaged by the crime. *U.S. v. Haile*, 795 F.2d 489 (5th Cir. 1986); *U.S. v. John Scher Presents, Inc.*, 746 F.2d 959 (3d Cir. 1984); *U.S. v. Missouri Valley Construction Co.*, 741 F.2d 1542 (8th Cir. 1984) (en banc); *U.S. v. Prescon Corp.*, 695 F.2d 1236 (10th Cir. 1982). *Contra U.S. v. Gurtunca*, 836 F.2d 283 (7th Cir. 1987).

The quoted language from the probation statute has generally been held to limit restitution to damages attributable to the counts on which the defendant has been convicted. *U.S. v. Pollak*, 844 F.2d 145 (3d Cir. 1988); *U.S. v. Elkin*, 731 F.2d 1005 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984); *U.S. v. Brown*, 699 F.2d 704 (5th Cir. 1983); *U.S. v. Gering*, 716 F.2d 615 (9th Cir. 1983); *U.S. v. Johnson*, 700 F.2d 699 (11th Cir. 1983); *Dougherty v. White*, 689 F.2d 142 (8th Cir. 1982).

Some courts have, however, carved out exceptions. For example, a court might fix an amount larger than that attributable to the counts on which the defendant was convicted if such larger amount is "judicially established," *U.S. v. Gering, supra*, or where it is consented to in a plea agreement, *U.S. v. Orr*, 691 F.2d 431 (9th Cir. 1982). Where conviction occurs as a result of a plea bargain, however, a court abuses its discretion if it imposes restitution as a condition of probation where the parties did not enter into a plea agreement concerning restitution and the indictment counts did not state actual dollar losses sustained by the victims. *U.S. v. Whitney*, 838 F.2d 404

(9th Cir. 1988), *amending* 785 F.2d 824 (9th Cir. 1986). Other courts have made an exception where the counts pleaded to were part of a pattern of conduct and the total amount of damage had been admitted or adjudicated. *U.S. v. Paul*, 783 F.2d 84 (7th Cir. 1986); *U.S. v. McMichaels*, 699 F.2d 193 (4th Cir. 1983); *U.S. v. Davies*, 683 F.2d 1052 (7th Cir. 1982).

Upon repeal of § 3651, the authority to order restitution simply as a condition of probation was lost. Restitution is now specifically authorized as a sentence pursuant to 18 U.S.C. § 3556, which, in turn, references §§ 3663–3664 (formerly §§ 3579–3580—see page 13). In addition, conditions of probation are authorized by 18 U.S.C. § 3563. These include discretionary conditions, among which is found "mak[ing] restitution to a victim of the offense pursuant to the provisions of §§ 3663 and 3664 (but not subject to the limitations of § 3663(a))." In any event, § 3563(b)(20) contains general authority for the court to impose other conditions of probation in its discretion. Thus, although § 3651 has been repealed, courts retain the authority to impose restitution as a condition of probation. This is especially important in areas that the VWPA does not cover. In non-Title 18 and 49 cases, restitution can be imposed solely as a condition of probation.

In *U.S. v. Kallash*, 785 F.2d 26 (2d Cir. 1986), the Second Circuit considered whether the substantive and procedural rules of 18 U.S.C. §§ 3579–3580 (1982 & Supp. IV 1986) apply not only to restitution ordered as a sentence separate and apart from probation, but also to restitution required as a condition of probation. The court of appeals rejected the argument that §§ 3579 and 3580 were enacted only to extend power to award restitution in cases where there was no probation, without affecting restitutionary awards in probation cases. Relying on the legislative history and the provisions of the Act itself, the court concluded that Congress indeed intended to apply the new substantive and procedural provisions to all awards of restitution, including those attached to probation. Therefore, the provisions of 18 U.S.C. §§ 3579–3580 (now §§ 3663–3664) must be followed whenever there is an order of restitution in connection with any Title 18 (or applicable Title 49) offense. Apparently, the provisions would not apply when ordering restitution for offenses under other titles.

SENSE OF THE SENATE RESOLUTION

In January 1984, the Senate added a resolution expressing the sense of the body about sentencing practices that should be followed in the period before implementation of the guidelines. 130 Cong. Rec. S545 (daily ed. Jan. 31, 1984). This resolution ultimately became § 239 of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1976, 1987, as amended. Although it appears in a statute, it remains in terms of a nonbinding declaration of the "sense of the Senate."

The resolution refers to the need to treat prison beds as a scarce resource and urges judges to consider "the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant has not been convicted of a crime of violence or otherwise serious offense." It encourages the "increased use of restitution, community service, and other alternative sentences" in such cases. The legislative history indicates the intent to urge that imprisonment be used in cases in which incapacitation is needed and not where the principal purpose of sentencing is deterrence or retribution—that is, that an "otherwise serious offense" is one, such as a drug distribution offense, suggesting that the defendant would be a continuing danger to the community if allowed to remain at large. 130 Cong. Rec. S542–43 (daily ed. Jan. 31, 1984) (remarks of Senator Nunn).

3

"Good Time"

FUNCTION

"Good time," awarded by the Bureau of Prisons, has the effect of reducing the stated term of the sentence—that is, it advances the date as of which release will be mandatory if the offender is not paroled earlier.

The award of good time does not in itself advance the offender's release date. It has that effect only if the offender would not otherwise be paroled before the mandatory date.

The behavior for which good time is awarded may also be considered by the Parole Commission in setting a parole date. That is not always done, however. Even when good time is so considered, the extent of the benefit to the offender may not be equivalent to the good time earned.

"STATUTORY GOOD TIME"

Good time may be earned for satisfactory behavior at the rate of fifty-four days for each year actually served, except that no good time is earned in the first year.

At the beginning of a prisoner's sentence, the full amount of statutory good time is credited, subject to forfeiture if the prisoner commits disciplinary infractions. 18 U.S.C. §§ 4161, 4165 (1982).

If the sentence is for five years or longer, 18 U.S.C. § 4206(d) (1982) requires the Parole Commission to release an offender after serving two thirds of the sentence, unless the Commission determines that the offender has seriously or frequently violated institution rules or regulations or that there is a reasonable possibility that the offender will commit a crime following release. For offenders serving sentences of five to ten years, this provision may mandate release materially before the date established by subtracting statutory good time from the sentence.

Statutory good time does not apply to life sentences or to sentences under the Youth Corrections Act. It does apply to a split sentence if the period of confinement is exactly six months; a shorter period does not qualify for good time under the statute, and a longer period cannot be part of a split sentence.

"EXTRA GOOD TIME"

Under 18 U.S.C. § 4162 (1982), prisoners may be awarded good time, in addition to statutory good time, for employment in an industry or prison camp or for performing exceptionally meritorious service or duties of outstanding importance. Bureau of Prisons regulations provide that extra good time is awarded automatically to inmates working in prison industries, to those assigned to camps or community treatment centers, and those participating in work-release or study-release programs. It is awarded on a discretionary basis for exceptionally meritorious service in work assignments or for performing duties of outstanding importance. It is not used to reward participation in education or training programs. Extra good time is awarded at the rate of three days per month of eligible service for the first year of such service and at the rate of five days per month thereafter. These are aggregate limits; they apply even if the inmate qualifies for two types of extra good time. 28 C.F.R. pt. 523 (1988).

Lump sum awards of extra good time are also used to reward exceptional acts. 28 C.F.R. § 523.16 (1988).

Extra good time does not apply to sentences under the Youth Corrections Act. 28 C.F.R. § 523.17(k) (1988).

The Comprehensive Crime Control Act of 1984 repealed 18 U.S.C. §§ 4161–4166, but provided that the sections remain in effect for five years after repeal (i.e., until November 1, 1992) for individuals who committed offenses or acts of juvenile delinquency before the effective date (i.e., November 1, 1987) and as to terms of imprisonment during the time before the promulgation of the Sentencing Guidelines. Pub. L. No. 98-473, §§ 218(a)(4), 235(a)(1), (b)(1)(B), 98 Stat. 2027, 2031, as amended. Congress does not appear to have extended these provisions beyond the five years. As such, there may be ex post facto considerations here for offenses that occurred prior to November 1, 1987.

Bureau of Prisons regulations do now allow for meritorious and extra good time to be earned during the first year. Life sentences must be served in full. *Id.* at § 212(a), 98 Stat. 1987.

4

Determining the Date of Release from Incarceration—Adult Sentence of a Year and a Day or More

PAROLE COMMISSION PROCEDURES

INITIAL HEARING

An initial parole hearing is normally held within 120 days of an offender's arrival at a Bureau of Prisons institution. Following the initial hearing, a presumptive date of release is established. 28 C.F.R. § 2.12 (1988).

Exceptions: If the parole eligibility date is ten years from the beginning of service of the sentence pursuant to 18 U.S.C. § 4205(a) (1982), the initial hearing is not held until shortly before the eligibility date. 28 C.F.R. § 2.12(a) (1988).

If the offender delays applying for parole, the initial hearing will be commensurately delayed. 28 C.F.R. § 2.11(a)–(c) (1988).

If the Commission concludes that release within fifteen years of the initial hearing is not warranted, it will not establish a presumptive date. At the end of fifteen years, a "reconsideration hearing"—similar to an initial hearing—will be held. 28 C.F.R. §§ 2.12(b), 2.14(c) (1988).

The schedule for abolishing the Parole Commission will require some initial hearings and reconsideration hearings to be held earlier than the current regulations provide. See the discussion on page 26 of procedures upon abolition of the Commission.

INTERIM HEARINGS

Interim hearings are held from time to time to consider significant developments or changes in status occurring after the initial hearing. Following these hearings, presumptive release dates may be "rescinded" based on disciplinary infractions. Presumptive release dates and the dates of fifteen-year reconsideration hearings may also be advanced. However, it is Commission policy that, once set, a presumptive release date shall be advanced only for superior program achievement or other clearly exceptional circumstances. 28 C.F.R. § 2.14(a)(2)(ii) (1988).

For offenders serving sentences (including a sum of consecutive sentences) of less than seven years, interim hearings are held at eighteen-month intervals; for

those serving sentences of seven years or more, at twenty-four-month intervals. However, the first interim hearing will not be held earlier than the docket immediately preceding the parole eligibility date. 28 C.F.R. § 2.14(a)(1) (1988).

PRERELEASE REVIEW

Shortly before a presumptive parole date, a review of the record is conducted to determine whether the prisoner has continued his or her good conduct and has submitted a satisfactory release plan. The regional commissioner has a limited authority to change the release date without a further hearing or pending a hearing. 28 C.F.R. § 2.14(b) (1988).

CRITERIA FOR RELEASE DECISIONS

GENERAL

To the extent permitted by the sentence, the Parole Commission uses its own criteria for determining the appropriate length of incarceration. The Commission may be prevented from using those criteria by the term of the sentence (less good time) or the parole eligibility date. Even in such cases, the Parole Commission will adhere to its own criteria as closely as possible. Some offenders will accordingly be released on their parole eligibility dates. Others will not be released until their mandatory release dates, even assuming exemplary conduct.

The Commission has issued guidelines setting forth the "customary time to be served" for the guidance of Commission personnel in making release decisions. 28 C.F.R. § 2.20 (1988). These guidelines assume good conduct by the prisoner during incarceration.

The guideline table is reproduced on the following page. "Offense severity" categories are listed down the left-hand side of the table and "parole prognosis" categories are listed across the top. Formerly, this table contained two ranges, one for adults and one for youths. Presently, both groups are subject to the same range, but youthfulness (i.e., the offender's being less than eighteen years of age at the commission of the offense) is considered as a mitigating factor. 28 C.F.R. § 2.20(h) (1988). Hearing examiners have considerable discretion to choose a period of incarceration within the guideline range as well as to depart from the guidelines, with statements of reasons, if the circumstances of the particular case warrant such a departure. 28 C.F.R. § 2.20(c), (d) (1988). (The note following the table was amended by 52 Fed. Reg. 46,596 (1987); however, for crimes committed before November 1, 1987, the table as printed here was in effect.)

GUIDELINES FOR DECISION-MAKING

[Guidelines for Decision-Making, Customary Total Time To Be Served Before Release (Including Jail Time)]

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1981) Very Good (10–8)	Good (7–6)	Fair (5–4)	Poor (3–0)
		Guideline Range		
Category One	<=4 months	<=8 months	8–12 months	12–16 months
		Guideline Range		
Category Two	<=6 months	<=10 months	12–16 months	16–22 months
		Guideline Range		
Category Three	<=10 months	12–16 months	18–24 months	24–32 months
		Guideline Range		
Category Four	12–18 months	20–26 months	26–34 months	34–44 months
		Guideline Range		
Category Five	24–36 months	36–48 months	48–60 months	60–72 months
		Guideline Range		
Category Six	40–52 months	52–64 months	64–78 months	78–100 months
		Guideline Range		
Category Seven	52–80 months	64–92 months	78–110 months	100–148 months
		Guideline Range		
Category Eight*	100+ months	120+ months	150+ months	180+ months

*Note: For Category Eight, no upper limits are specified due to the extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category BY MORE THAN 48 MONTHS, the pertinent aggravating case factors considered are to be specified in the reasons given (e.g., that a homicide was premeditated or committed during the course of another felony; or that extreme cruelty or brutality was demonstrated).

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SEVERITY OF OFFENSE

The Commission's guideline table is supplemented by an "Offense Behavior Severity Index." 28 C.F.R. § 2.20 (1988). The index contains instructions for assigning various offenses to severity categories. These instructions are quite detailed, as is illustrated by the instructions for counterfeiting and related offenses, reproduced *infra* (with a footnote omitted) from Chapter 3 of the index.

> **Subchapter E—Counterfeiting and Related Offenses**
>
> **341 Passing or Possession of Counterfeit Currency or Other Medium of Exchange**
>
> (a) If the face value of the currency or other medium of exchange is more than $1,000,000, grade as Category Six;
>
> (b) If the face value is more than $200,000 but not more than $500,000, grade as Category Five;
>
> (c) If the face value is at least $40,000 but not more than $200,000, grade as Category Four;
>
> (d) If the face value is at least $2000 but less than $40,000, grade as Category Three;
>
> (e) If the face value is less than $2000, grade as Category Two.
>
> **342 Manufacture of Counterfeit Currency or Other Medium of Exchange or Possession of Instruments for Manufacture**
>
> Grade manufacture or possession of instruments for manufacture (e.g., a printing press or plates) according to the quantity printed (see passing or possession), but not less than Category Five. The term "manufacture" refers to the capacity to print or generate multiple copies; it does not apply to pasting together parts of different notes.

Chapter 12 of the Offense Behavior Severity Index states that, for offenses not listed, "the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed." Chapter 13 includes instructions for handling multiple offenses and other matters of general applicability.

In determining the severity classification, the Commission refers to "offense behavior"—that is, the conduct that brought the offender into contact with the law—rather than to the offense of conviction. It takes into account "any substantial information available" and resolves disputed issues by a preponderance standard; including charges upon which a prisoner was found not guilty after trial or acquittal if, among other things, the Commission is satisfied that the record before it is adequate "notwithstanding the acquittal." 28 C.F.R. § 2.19(c) (1991).

A Commission statement of the rationale for this practice is reproduced as Appendix B. In it, the Commission notes that many convictions are based on plea agreements that result in dismissal of charges supported by persuasive evidence, and that in some cases jurisdictional reasons prevent federal prosecution of the most serious offense (as where a robber is prosecuted only for interstate transportation of

stolen goods). It argues that consideration of "reliable information about the actual criminal transaction" is essential to responsible consideration of the "nature and circumstances of the offense," as required by 18 U.S.C. § 4206(a) (1982).

As a practical matter, the "reliable information" is more often than not the "prosecution version" of the offender's conduct as reported in the presentence report.

PAROLE PROGNOSIS

The parole prognosis is determined through the "salient factor score." That score determines which column in the guideline table is to be used to find the guideline for the particular offender. The method of determining the salient factor score is indicated on the worksheet on the following page. Instructions for completing the worksheet are found at U.S. Parole Commission, Rules and Procedures Manual 61–65 (§ 2.20) (April 1987). These instructions are available in probation offices.

The salient factor score is based entirely on information about the offender that antedates incarceration on the present charge. The Commission has concluded, on the basis of empirical studies, that behavior during incarceration is not a good statistical predictor of parole success. The Commission, thus, does not attempt to determine when an offender is "ready" for release in the sense of having been rehabilitated. The rationale for using the salient factor score is essentially incapacitation: higher-risk offenders are incarcerated longer not because it is thought that longer incarceration will change their risk status, but because it will reduce the opportunities for further criminal conduct in society.

DISCIPLINARY INFRACTIONS

In establishing a presumptive release date at initial hearings, good institutional conduct for the remainder of the term is presumed. 28 C.F.R. § 2.12(d) (1988). Thereafter, at interim hearings, a presumptive date may be set back because of disciplinary infractions. 28 C.F.R. § 2.14(a)(2)(iii) (1988).

Infractions of administrative rules, including those involving alcohol abuse, are generally thought to warrant a delay in release of not more than sixty days per instance of misconduct, or not more than eight months per use or possession of illicit drugs or refusal to provide a urine sample. New criminal conduct (including escape) is sanctioned more severely. 28 C.F.R. § 2.36 (1988).

SALIENT FACTOR SCORE (SFS 81)

Item A: PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE) .....

None ..... = 3
One ..... = 2
Two or Three ..... = 1
Four or More ..... = 0

Item B: PRIOR COMMITMENT(S) OF MORE THAN THIRTY DAYS ..... (ADULT OR JUVENILE)

None ..... = 2
One or Two ..... = 1
Three or More ..... = 0

Item C: AGE AT CURRENT OFFENSE/PRIOR COMMITMENTS .....

Age at commencement of current offense

26 years of age or more ..... = 2
20–25 years of age ..... = 1
19 years of age or less ..... = 0

***Exception: If five or more prior commitments of more than thirty days (adult or juvenile), place an "X" here _____ and score this item ..... = 0

Item D: RECENT COMMITMENT-FREE PERIOD (THREE YEARS) .....

No prior commitment of more than thirty days (adult or juvenile) or released to the community from last such commitment at least three years prior to the commencement of the current offense ..... = 1
Otherwise ..... = 0

Item E: PROBATION/PAROLE/CONFINEMENT/ESCAPE STATUS VIOLATOR THIS TIME .....

Neither on probation, parole, confinement, or escape status at the time of the current offense; nor committed as a probation, parole, confinement, or escape status violator this time ..... = 1
Otherwise ..... = 0

Item F: HEROIN/OPIATE DEPENDENCE .....

No history of heroin/opiate dependence ..... = 1
Otherwise ..... = 0

TOTAL SCORE .....

Note: For purposes of the Salient Factor Score, an instance of criminal behavior resulting in a judicial determination of guilt or an admission of guilt before a judicial body shall be treated as a conviction, even if a conviction is not formally entered.

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The regulations provide that the guideline ranges are "for cases with good institutional adjustment and program progress." 28 C.F.R. § 2.20(b) (1988). However, they apparently do not permit a presumptive release date to be set back based on disappointing program progress, such as failure to complete an educational program.

EXCEPTIONAL CONDUCT OR SUPERIOR PROGRAM PERFORMANCE

The Parole Commission's regulations permit a limited advancement of the presumptive release date for "sustained superior program achievement over a period of 9 months or more." 28 C.F.R. § 2.60 (1988). They indicate that this achievement may be in the context of prison industries, educational or vocational training, or counseling programs. The maximum reduction in a prisoner's time served, based on one or more concessions for superior program achievement, is set forth in the regulations. Some examples of these maximums are as follows:

If time of service until presumptive release date established at initial hearing is—	*Maximum reduction in time is—*
Two years	Two months
Three years	Three months
Five years	Seven months
Ten years	Seventeen months

What constitutes "superior program achievement" is left to be worked out case by case, as is the amount of time within the maximum that is to be awarded for any particular achievement. The standards, however, are clearly not the same as those used to determine whether an inmate will be awarded extra good time.

OTHER CONSIDERATIONS

The date of a prisoner's parole may also be influenced by such matters as cooperation with the prosecution, medical problems, and the relationship between the sentence for the current offense and other state or federal sentences that may run consecutively. 28 C.F.R. § 2.63 (1988); U.S. Parole Commission, Rules and Procedures Manual 73–74 (§ 2.20-05, C.8–C.10) (April 1987).

PROCEDURES AND CRITERIA FOR RELEASE AFTER ABOLITION OF THE PAROLE COMMISSION

Under the Judicial Improvements Act of 1990, the Parole Commission is to be abolished effective November 1, 1997. For offenders sentenced under old law who are still within the Commission's jurisdiction on that date, the Commission is required, before November 1, 1997, to set a fixed release date. Pub. L. No. 101-650, § 316.

It is the Commission's interpretation of § 235(b)(3) that persons who will be incarcerated at the expiration of ten years after the effective date of the Act, and whose sentences provide for parole eligibility, shall, before the expiration of the ten-year period, be given release dates by the Commission within the guideline ranges found by the Commission to be appropriate for their cases. 28 C.F.R. § 2.64(a) (1988). The Commission interprets the phrase "within its jurisdiction" to mean its parole-releasing, not its post-release supervisory, jurisdiction. Thus, § 235(b)(3) does not require release dates within the guideline ranges for persons who will be parolees at the end of the ten-year phaseout. 28 C.F.R. § 2.64(c) (1988).

The Commission also takes the position that § 235(b)(3) does not require release dates to be set any earlier in the ten-year period than three to six months (needed to permit an administrative appeal of the date) before the end of the ten-year period. 28 C.F.R. § 2.64(b) (1988).

Finally, § 235(b)(3) neither changes the parole eligibility date established by the prisoner's sentence nor confers parole eligibility on prisoners whose sentences do not provide for parole. 28 C.F.R. § 2.64(d) (1988).

5

Duration of Parole Supervision; Effects of Revocation; Adult Sentence of a Year and a Day or More

LIMITS ON PAROLE COMMISSION DISCRETION

Supervision of an inmate released mandatorily—that is, incarcerated until the expiration of his or her sentence less good time—must terminate 180 days before the expiration of his or her sentence. 18 U.S.C. § 4164 (1982).

Supervision of an inmate released by action of the Parole Commission may continue until the expiration of the sentence. However, the Commission is required to terminate supervision five years after release unless it determines, after a hearing, that such supervision should not be terminated because there is a likelihood that the parolee will engage in criminal conduct. 18 U.S.C. § 4211(c) (1982).

The Commission *may* terminate supervision at any time up to November 1, 1997. It is required to review each case periodically to determine the need for continued supervision. 18 U.S.C. § 4211(a), (b) (1982).

GUIDELINES FOR EARLY TERMINATION OF SUPERVISION

Supervision of parolees with "very good" salient factor scores (8, 9, or 10) will normally be terminated after two years of supervision. Supervision of parolees with lower salient factor scores will normally be terminated after three years. In both cases, the Commission assumes that the parolee has not engaged in new criminal behavior or committed any other serious parole violation. 28 C.F.R. § 2.43(e)(1) (1988).

REVOCATION OF PAROLE

If parole is revoked, time spent in the community ("street time") is normally credited toward service of the sentence. 18 U.S.C. § 4210(b) (1982).

Exceptions. If the parolee has absconded or intentionally refused to comply with a Commission order, street time may be forfeited in an amount equal to the time during which the parolee was in noncompliance. 18 U.S.C. § 4210(c) (1982); 28 C.F.R. § 2.52(c)(1) (1988).

If the parolee has been convicted of an offense committed while on parole, and such an offense is punishable by imprisonment, all street time is forfeited. 28 C.F.R. § 2.52(c)(2) (1988). If a term of imprisonment is in fact imposed on the new conviction, the Commission then determines whether the remaining time is to be served concurrently or consecutively with the new sentence. 18 U.S.C. § 4210(b)(2) (1982).

Revocation does not imply that the remainder of the sentence will be served in prison. Policies for reparole are set forth at 28 C.F.R. § 2.21 (1988).

TERMS OF SUPERVISED RELEASE UNDER TITLE 21

Sections 841, 845, and 960 of Title 21 of the U.S. Code require that judges impose on defendants convicted of certain drug offenses terms of supervised release in addition to, and following, the period of supervision under a regular sentence. (Before a 1986 amendment, these were called "special parole terms.")

The Sentencing Reform Act of 1984 eliminated special parole terms for drug offenders after incarceration and provided for the new system of supervised release to be overseen by the sentencing judge. The effective date of the supervised release provisions was delayed until November 1, 1987. For offenses under the Anti-Drug Abuse Act of 1986 (which contains provisions for a special parole term) committed before November 1, 1987, the Supreme Court provided guidance in *Gozlon-Peretz v. U.S.*, 112 S. Ct. 840 (1991) by holding that supervised release applies, rather than the special parole term provisions of the Act. See Appendix C (Memo dated July 8, 1991).

Under 21 U.S.C. § 841(c) (1982 & Supp. IV 1986), if a "special parole" is revoked, the parolee may be committed for the duration of the "special term." Although this section states that the parolee will not receive credit for street time, the Commission views this provision as superseded by the subsequently enacted 18 U.S.C. § 4210(b) (1982 & Supp. IV 1986). Both 18 U.S.C. § 4210 and 21 U.S.C. § 841(c) were repealed by the Comprehensive Crime Control Act of 1984. However, 18 U.S.C. § 4210 remains in effect for ten years after repeal (until November 1, 1997) for individuals who committed an offense or act of juvenile delinquency before the effective date and as to a term of imprisonment during the time before the promulgation of the Sentencing Guidelines. Pub. L. No. 98-473, §§ 218(a)(5), 224(a)(2), 235(a)(1), (b)(1)(A), 98 Stat. 2027, 2030–2031, as amended.

The Commission considers the special parole term to be separate from the regular sentence, to begin immediately upon termination of supervision under the regular sentence or, if the prisoner is released without supervision, upon such release. 28 C.F.R. § 2.57(a) (1988). Hence: if parole on the regular sentence is revoked, the maximum amount of time to be served on revocation is limited by the term of the

regular sentence and is not affected by the special parole term. 28 C.F.R. § 2.57(c) (1988).

If the Commission terminates supervision under the original sentence pursuant to its authority to terminate supervision early, the guidelines for termination of supervision will apply anew to the special parole term, generally requiring an additional period of supervision. 28 C.F.R. § 2.57(e) (1988).

SUPERVISION AFTER ABOLITION OF PAROLE COMMISSION

The Comprehensive Crime Control Act of 1984 abolished parole release for offenses committed after November 1, 1987. Pub. L. No. 98-473, tit. II, 98 Stat. 1976, as amended. Offenders will serve the sentence imposed subject only to good time allowance. However, a sentence of imprisonment may include a term of "supervised release" after incarceration.

Although Chapter 311 on Parole was repealed, it remains in effect until November 1, 1997 for individuals who committed an offense or an act of juvenile delinquency before November 1, 1987, and as to a term of imprisonment during the time before the promulgation of the Sentencing Guidelines. In addition, under the terms of the Crime Control Act, all laws in effect on October 31, 1987 pertaining to an individual already on parole or released on parole within the ten-year phaseout period remain in effect as to that individual until the expiration of the sentence, except that district courts will have the authority, after October 31, 1997, to revoke parole or amend the conditions of parole for those offenders. Pub. L. No. 106-650, tit. 3, § 316, 104 Stat. 5115 (Dec. 1, 1990).

6

Determining the Date of Release from Incarceration and the Duration of Supervision: Sentences of One Year or Less

An offender sentenced to a term of a year or less is ineligible for release on parole. Statutory good time is earned at the rate of five days for each month of sentence, but only if the sentence is for six months or more. The maximum extra good time that can be earned is three days for each month of service. 18 U.S.C. § 4161 (1982); 28 C.F.R. pt. 523 (1988).

A sentence of a year or less may be imposed in the following ways:

1. "Regular" sentence (*X* months' imprisonment). Under such a sentence, the offender is confined for the stated sentence less good time. There is no post-release supervision.

2. "Split" sentence (*X* months' imprisonment, the defendant to be confined for *Y* months and the remainder of the term to be suspended, followed by *Z* years' probation). The stated prison term under such a sentence may exceed one year, but the period of confinement may not exceed six months. The period of confinement is subject to reduction for good time, but statutory good time is earned only if the stated period of confinement is exactly six months. The defendant will be subject to postrelease supervision for the period of probation specified by the court, which is limited only by the five-year maximum specified in the probation statute.

3. Sentence with release "as if on parole" (*X* months' imprisonment, provided that the offender shall be released as if on parole after *Y* months). The stated sentence must be at least six months and not more than a year, and the release date must be "after service of one-third" of the sentence. 18 U.S.C. § 4205(f). The quoted language has been interpreted in *U.S. v. Pry*, 625 F.2d 689 (5th Cir. 1980), *cert. denied*, 450 U.S. 925 (1981), to mean upon service of either one third or some larger fraction. Under such a sentence, the offender will be released on the specified release date and will be subject to postrelease supervision until the expiration of the stated sentence.

Note that the sentence with release "as if on parole" adds very little to the other authorities. If the defendant is to be released as if on parole in six months or less, the same combination of confinement and supervision could be achieved with a split sentence. If the defendant is to be released as if on parole after a period greater than six months, that would not be true. However, since the sentence cannot exceed one year, the period of postrelease supervision in such a case would be quite short.

Note that the Comprehensive Crime Control Act of 1984 abolished parole. Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 2027, as amended.

7

Conditions of Incarceration

MANAGEMENT OBJECTIVES OF THE BUREAU OF PRISONS

The Bureau of Prisons seeks to maintain safe and humane institutions in which educational, vocational, and other self-improvement programs are available for those inmates who wish to take advantage of them. Inmates are assigned to institutions with the least restrictive environment that is consistent with adequate supervision.

Offenders sentenced under the regular adult authority are required to accept work assignments, but generally are not required to participate in programs of self-improvement. 28 C.F.R. § 524.12(c) (1988). An exception is made for inmates who test below the eighth-grade level in reading, writing, or mathematics. Such inmates are required to participate in programs of adult basic education for a period of ninety days or until the eighth-grade level is achieved, whichever is earlier. 28 C.F.R. §§ 544.70–.75 (1988). *See also* 18 U.S.C. § 3624(f).

Young offenders who do not score at the sixth-grade level are screened by psychological and educational staff for possible learning disabilities. If a specific learning disability is diagnosed, an individualized educational program is developed to meet the needs of the particular offender.

INITIAL ASSIGNMENT

The Bureau of Prisons classifies institutions into five security categories: minimum, low, medium, high, and administrative. The institution to which an inmate is initially assigned is determined under guidelines based on the severity of the current offense, the expected length of incarceration, the severity of charges on which any detainers are based, the severity of offenses resulting in previous imprisonment, any history of violence, any history of escapes, and the status before commitment (whether released on recognizance or on a voluntary-surrender basis). U.S. Bureau of Prisons, Program Statement 5100.3 (January 1, 1991).

A variety of other considerations also influence the determination as to which institution the offender is sent. One consideration is the proximity of the institution to the offender's home. However, the nearest institution of an appropriate security category is often a substantial distance from the inmate's home community.

Bureau of Prisons regulations indicate that a judicial recommendation that an inmate be assigned to a specific institution or a particular kind of program will generally not override the security classification, but that every effort will be made to follow such recommendations where consistent with the security classification. *Id.*, § 9, at 10–11 (March 3, 1986; August 1, 1985). In practice, the Bureau may be even more accommodating than the regulations suggest.

Age is not a major factor in assignments. A young offender who is sentenced under the adult authority is likely to be confined with offenders of all ages. The Bureau of Prisons has found that there is less violence in institutions with mixed age groups than in youth institutions.

Offenders may also be placed in local jails. Generally, these are used only for inmates serving sentences of a year or less. *Id.*, § 7, at 1–2 (April 8, 1985; July 5, 1983). As noted on page 6, nonfederal facilities are also used for the purpose of making state and federal sentences run concurrently.

Offenders are initially assigned to community treatment centers only upon a judge's request. *Id.*, § 7, at 2 (July 5, 1983). In the absence of such a request, an offender is likely to be assigned to such a center only for the last few months before release.

TRANSFERS

Following initial placement, the appropriate security category is reviewed from time to time. Such reviews take into account changes in the information used to make the initial security classification; in particular, the inmate's expected duration of incarceration is recalculated on the basis of Parole Commission action. Reviews also take into account the offender's behavior during incarceration. *Id.*, §§ 10–12 (October 7, 1982, as amended through March 3, 1986).

Transfers within the system are also made for a variety of reasons other than as a result of changes in the security level.

VOLUNTARY-SURRENDER PROCEDURE

An offender remanded to custody immediately upon sentencing is likely to spend several days in a local facility before being transported by the U.S. Marshals Service to the institution of initial assignment and may also spend time in other local jails in the course of transportation. Time spent in local jails is often traumatic, particularly for offenders experiencing their first commitment. Hence, a "voluntary surrender" procedure has been developed, under which offenders may travel unaccompanied to the designated institution and present themselves for service of sentence.

The procedure may be used only if the offender meets the standards set forth under the Bail Reform Act of 1984 for release pending execution of sentence. To delay execution of the sentence and order the defendant released, the court must find "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community." 18 U.S.C. § 3143(a) (Supp. IV 1986). If such a finding is made, the defendant is released under the provisions of 18 U.S.C. § 3142(b) or (c) (Supp. IV 1986) (governing conditions of release before trial). Failure to surrender for service of sentence pursuant to the court's order is a violation of the bail-jumping statute. 18 U.S.C. § 3146(a)(2) (Supp. IV 1986).

There is no requirement that the voluntary-surrender procedure be used in any case. If voluntary surrender is ordered, the offender normally pays subsistence and transportation expenses. However, an offender without sufficient funds may petition the court for an order directing the marshal to pay such expenses. Memorandum of Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, Sept. 26, 1974.

8

Special Sentences for Youthful Offenders

CONTINUED APPLICABILITY OF THE YOUTH CORRECTIONS ACT

The Youth Corrections Act, which provided additional sentencing options for judges sentencing offenders less than twenty-six years old at the time of conviction, was repealed by the Comprehensive Crime Control Act of 1984. Because of ex post facto considerations, however, its provisions may continue to apply to some offenders. In some cases in which the Act applies, the court must consider a Youth Corrections Act sentence.*

The repeal took effect on the date of enactment of the Comprehensive Crime Control Act, October 12, 1984. Pub. L. No. 98-473, § 235(a)(1)(A), 98 Stat. 1837, 1976, 2031, as amended. Four sections (18 U.S.C. §§ 5017–5020) governing parole of offenders sentenced under the Act were explicitly saved "as to a sentence imposed before the date of enactment." *Id.*, § 235(b)(1)(E), 98 Stat. at 2032. The clear implication is that only these four provisions of the Act apply if the offender was sentenced before enactment, and that no provisions apply if sentencing followed enactment. However, it is widely understood that the ex post facto clause preserves the Act for offenses committed on or before October 12, 1984, in cases in which the repeal would operate to the detriment of the defendant. *See U.S. v. Countryman*, 758 F.2d 574, 579 n.2 (11th Cir. 1985); *U.S. v. Romero*, 596 F. Supp. 446 (D.N.M. 1984); U.S. Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress 32 (1984).

Since the Youth Corrections Act was repealed, the number of inmates sentenced under the Act has continued to decrease as their sentences expire. At this point, members of the Youth Corrections Act population fall mostly into one of two categories: (1) parole violators serving the remainder of their sentences imposed under 18 U.S.C. § 5010(b)(1982); and (2) inmates serving lengthy sentences imposed under § 5010(c), including the maximum sentence authorized for an adult.

* It is assumed that the offender has been convicted in a criminal proceeding. This publication does not deal with proceedings under the Federal Juvenile Delinquency Act.

IMPRISONMENT UNDER THE YOUTH CORRECTIONS ACT

Authorities

The basic sentence of imprisonment under the Youth Corrections Act was the so-called "indeterminate sentence" under 18 U.S.C. § 5010(b). Under such a sentence, the offender had to be released under supervision on or before the expiration of four years from the date of conviction and discharged unconditionally on or before the expiration of six years from such date.

Conditions of Incarceration

Even though the provisions about treatment of committed youth offenders are not among those that were explicitly saved by the Comprehensive Crime Control Act as to sentences imposed before the date of enactment, the Bureau of Prisons expects to follow the Youth Corrections Act with respect to any offender sentenced under it. However, as the population of offenders sentenced under the Youth Corrections Act continues to decline, this policy will be subject to increasing strain.

In a series of class-action proceedings stemming from *Watts v. Hadden*, 469 F. Supp. 223 (D. Colo. 1979), *aff'd*, 651 F.2d 1354 (10th Cir. 1981), the district court ordered the Bureau of Prisons to segregate Youth Corrections Act inmates from adult prisoners. In response, the Bureau confined almost all Youth Corrections Act inmates at its facility in Englewood, Colorado. The Bureau issued regulations governing programs for offenders sentenced under the Youth Corrections Act which are codified at 28 C.F.R. §§ 524.20–.30 (1988). Because of the "treatment" requirement of the Act, participation in self-improvement programs is required of Youth Corrections Act offenders rather than optional, as is generally the case for offenders sentenced under the adult authority. A "program plan" is developed for each inmate, and failure to comply with it provides a basis for disciplinary action. The programs do not differ materially from those available to inmates elsewhere.

There are a variety of circumstances in which an offender may be subject to both a sentence under the Youth Corrections Act and a concurrent or consecutive sentence under other authority, either state or federal. In one such circumstance—where an offender sentenced under the Youth Corrections Act is subsequently sentenced on another federal conviction to a consecutive term as an adult—the judge imposing the subsequent sentence should indicate whether the Bureau of Prisons is to continue to handle the offender in accordance with the Youth Corrections Act. *Ralston v. Robinson*, 454 U.S. 201, 217–19 (1981). Bureau of Prisons regulations deal in some detail with a number of other possible combinations. 28 C.F.R. § 524.21 (1988).

Determining the Date of Release from Incarceration

The maximum period of incarceration was four years under 18 U.S.C. § 5010(b) (1982) and two years less than the term imposed under 18 U.S.C. § 5010(c) (1982). *See* 18 U.S.C. § 5017(c), (d) (1982).

18 U.S.C. § 5017 (1982) provided that the above periods should be computed from the "date of conviction," which the Bureau of Prisons interprets as the date of sentencing.

Neither statutory good time nor extra good time could be earned by offenders sentenced under the Youth Corrections Act. Parole eligibility is immediate.

The *Watts* class action required the Parole Commission to make inmate response to treatment a significant factor in parole decision making for the class members. *See, e.g., Watts v. Hadden*, 651 F.2d 1354 (10th Cir. 1981); *Benedict v. Rodgers*, 748 F.2d 543 (10th Cir. 1984) (related case); *Watts v. Hadden*, 627 F. Supp. 727 (D. Colo. 1986). The Commission implemented a policy for class members under which response to treatment, the seriousness of the offense, and the original parole prognosis were all weighed in determining parole-release dates. (Before *Watts*, the Commission took the position that offenders sentenced under the Youth Corrections Act were, in most cases, to be released pursuant to the same general criteria applicable to other offenders.) Under the new policy, decisions were made on a case-by-case basis and no one factor was permitted to cancel out the others. Pursuant to this policy, the presumptive release date could be advanced proportionately if the prisoner had responded to a sufficient degree to his or her treatment program.

Initially, this policy was not extended to the Youth Corrections Act inmates who were not *Watts* class members. Recently, given the decline in the number of these inmates, the Bureau of Prisons has been transferring many of them from Englewood to other institutions, preferably closer to their homes. As part of this plan, the *Watts* parole policies have been extended to all Youth Corrections Act inmates and are set out at 28 C.F.R. § 2.65 (1988). This regulation took effect on January 9, 1989, for any hearing or record review conducted on or after that date with regard to a Youth Corrections Act inmate or parolee. The Bureau of Prisons believes that the new procedures will facilitate monitoring of the treatment of the remaining inmates wherever they are confined and reduce the possibility of disciplinary problems caused by the use of different parole policies. 53 Fed. Reg. 49,653–49,654 (1988).

Duration of Parole Supervision

The Youth Corrections Act authorized "unconditional discharge" any time after one year of parole supervision; it required unconditional discharge after six years in the case of the indeterminate sentence or upon expiration of the term imposed under 18 U.S.C. § 5010(c). 18 U.S.C. § 5017(b), (c) (1982).

Parole Commission guidelines for early termination of supervision—"unconditional discharge" within the meaning of the Youth Corrections Act—are the same as those used for adult sentences. 28 C.F.R. § 2.43(a)(2), (e)(1) (1988). They contemplate termination after two years of "clean" supervision for offenders with "very good" salient factor scores, and after three years of clean supervision for others.

Certificate Setting Aside Conviction

If the Youth Corrections Act offender is discharged unconditionally before the expiration of the maximum sentence, the conviction is automatically "set aside." 18 U.S.C. § 5021 (1982). This provision is not among those explicitly saved by the Comprehensive Crime Control Act as to sentences imposed before the date of enactment, but the Parole Commission will continue to issue certificates setting aside convictions under the Youth Corrections Act.

9

Special Sentences for Narcotics Addicts

APPLICABILITY AND PURPOSE OF THE NARCOTIC ADDICT REHABILITATION ACT

The Comprehensive Crime Control Act of 1984 repealed, effective November 1, 1987, the Title 18 sections of the Narcotic Addict Rehabilitation Act (NARA). However, pursuant to the savings provision, these sections remain in effect until November 1, 1992, for an individual who committed an offense or an act of juvenile delinquency before the effective date and as to a term of imprisonment during the time before the promulgation of the Sentencing Guidelines. Pub. L. No. 98-473, §§ 218(a)(6), 235(a)(1), (b)(1)(C), 98 Stat. 2027, 2031, as amended (1984).

Under 18 U.S.C. §§ 4251–4255 (1982), certain narcotic addicts convicted of criminal offenses may be sentenced for treatment.* Eligible offenders exclude those whose conviction is for a crime of violence or for dealing in narcotics, as well as those with certain prior records. 18 U.S.C. § 4251(f) (1982).

Sentences under the Act are for an indeterminate period not to exceed ten years, but are in no event for longer than the maximum sentence that could otherwise have been imposed. 18 U.S.C. § 4253(a) (1982). At any time after six months of treatment, the Attorney General may report to the Parole Commission as to whether the offender should be conditionally released under supervision. After receipt of the Attorney General's report, and certification from the Surgeon General that the offender has made sufficient progress to warrant conditional release, the Commission may order such release. 18 U.S.C. § 4254 (1982). The statute contemplates that drug treatment will continue in the community after the offender's conditional release. 18 U.S.C. § 4255 (1982 & Supp. IV 1986).

Although a reading of NARA would suggest that NARA offenders receive special rehabilitative treatment, this impression is largely erroneous. Bureau of Prisons policy today is to make drug treatment available to all offenders who need it, regardless of the authority under which they were sentenced. Policies governing release on parole are only slightly different for offenders sentenced under NARA

* Again, it is assumed that the offender has been convicted in a criminal proceeding. This publication does not deal with civil commitments under 28 U.S.C. §§ 2901-2906, under which certain addicted defendants may be given an opportunity for commitment to the custody of the Surgeon General on the understanding that prosecution will be dropped upon successful completion of the treatment program.

than for others. The Parole Commission generally requires parolees with histories of addiction to participate in community drug treatment programs, again regardless of the authority under which they were sentenced. Hence, the experience of an offender sentenced under NARA is generally quite similar to that of an addict sentenced under other statutory provisions.

SENTENCING OPTIONS

GENERAL

Any sentence may be given to a narcotics addict that may be given to a convicted offender who is not an addict. Invocation of NARA is, at the first step, entirely discretionary. 18 U.S.C. § 4252 (1982). As noted *infra*, however, some discretion is lost once the first step in the statutory procedure has been taken.

NARA SENTENCES

Sentencing Procedures

If the court believes that an eligible offender is an addict, it may place the offender in the custody of the Attorney General for an examination "to determine whether he is an addict and is likely to be rehabilitated through treatment." 18 U.S.C. § 4252 (1982). The Attorney General is to report within thirty days or such additional period as is granted by the court. If, after receipt of the report, the court determines that the offender is an addict likely to be rehabilitated through treatment, a sentence under the Act is mandatory. 18 U.S.C. § 4253(a) (1982). The decision to commit the offender for an examination under 18 U.S.C. § 4252 (1982) may, therefore, be regarded as a decision to impose a NARA sentence subject to a subsequent factual determination.

The examination is directed at resolving two separate issues: first, whether the offender is addicted to a narcotic drug; and second, whether the offender is likely to be rehabilitated through treatment. 18 U.S.C. § 4252 (1982). In practice, if a defendant is found to be an addict, he or she will probably be found amenable to treatment unless there is strong ground to believe he or she would not receive any benefit from participation in drug programs.

A NARA sentence cannot exceed ten years or the maximum sentence that could have otherwise been imposed, whichever is shorter. 18 U.S.C. § 4253(a) (1982). Several appellate courts have held that the sentencing judge does not have discretion to give a shorter sentence under the Act. *U.S. v. Romero*, 642 F.2d 392 (10th Cir. 1981); *U.S. v. Biggs*, 595 F.2d 195 (4th Cir. 1979), and cases cited therein.

Conditions of Incarceration

Formerly, an inmate serving a sentence under NARA had to be assigned to an institution with a special residential unit for drug offenders. Now, each Bureau of Prisons facility is required to have a chemical abuse program under the guidelines provided in the Bureau's Program Statement 5330.8 (July 22, 1986). Each warden must designate a program coordinator, usually a psychologist with experience and training in the area of chemical abuse. *Id.* at 2. This coordinator must ensure that all new institution admissions are screened to assess the need for chemical abuse programming. Priority for program involvement is given to those inmates with serious chemical abuse problems and to those with court-ordered program involvement (e.g., NARA offenders). *Id.*

A standard chemical abuse package is presented to all inmates as part of the institution's Admission and Orientation Program. For every chemical abuse program participant, a contractual agreement is developed which identifies both the standardized and individualized components of each inmate's program. *Id.* at 3. Program participation is voluntary, but an inmate sentenced under NARA will not receive release certification until the program has been satisfactorily completed.

The drug program contracts involve a variety of activities. The standardized components are primarily educational (e.g., presentation of facts about drug or alcohol abuse, followed by required post-tests). Individualized components are designed to meet the particular needs of each participant and include, for example, personal development programs, group or individual counseling or both, group or individual psychotherapy or both, self-help programs (such as Alcoholics Anonymous), vocational planning, stress management, rational behavior therapy, and transactional analysis. *Id.*

Time required to complete a program varies. In the event an inmate transfers to another institution before meeting all the criteria for program completion, a documented summary report credits the inmate with those program components successfully completed. This report is placed in the inmate's central file, with a copy to the psychology file.

Determining the Date of Release from Incarceration

The maximum period of incarceration is the term of the sentence, less good time. An offender may be paroled following the completion of six months of treatment. 18 U.S.C. § 4254 (1982).

As noted on page 42, 18 U.S.C. § 4252 (1982) contemplates a report from the Attorney General as to whether the offender should be conditionally released and requires certification from the Surgeon General that the offender has made sufficient progress to warrant conditional release.

The authority of the Surgeon General to certify sufficient progress has been delegated to the medical director of the Bureau of Prisons and, through the medical director, to drug abuse program managers in the institutions. U.S. Bureau of Prisons, Program Statement 5330.5, at 23 (1092) (July 23, 1979). A certificate is issued upon successful completion of a drug abuse program. It does not generally represent a judgment that the addict is "cured."

The Parole Commission employs the guideline system for offenders sentenced under NARA as well as for those sentenced under other statutes. However, application of the guidelines is subject to the receipt of a certificate of sufficient progress. Generally speaking, Bureau of Prisons staff make an effort to enable the offender to complete the program in time to be released on the presumptive release date established by the Parole Commission. That is not always possible, however, if the guideline calls for relatively early release. Moreover, as was noted on page 43, an inmate who fails to complete the drug program will not be certified.

Parole Supervision

The duration of parole supervision for offenders sentenced under NARA is determined by application of the same rules that apply to offenders sentenced under the regular adult authorities. 28 C.F.R. § 2.43(e) (1988).

18 U.S.C. § 4255 (1982 & Supp. IV 1986) authorizes the provision of "after-care" services for NARA offenders while on parole. Parole Commission policy requires participation in treatment programs while on parole, "unless there are compelling reasons to the contrary," for NARA parolees and for all others determined to be addicted to narcotic drugs. U.S. Parole Commission, Rules and Procedures Manual 101 (§ 2.40-03(a)) (April 1987). Hence, the experience of a NARA offender on parole is generally very much the same as the experience of any other individual who has been determined to be an addict.

10

Special Disposition of Offenders in Need of Custody for Care or Treatment of a Mental Disease or Defect

APPLICABILITY AND PURPOSE

Under 18 U.S.C. § 4244 (Supp. IV 1986), the court may, in lieu of sentencing, commit a convicted offender to the custody of the Attorney General to be hospitalized for care or treatment of a mental disease or defect.

This provision should not be confused with the provisions dealing with defendants found incompetent to stand trial or found not guilty by reason of insanity. 18 U.S.C. § 4244 (Supp. IV 1986) applies to convicted offenders.

The provision was added to the Criminal Code by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 403(a), 98 Stat. 2057, 2061–62, as amended. Because no explicit effective date was provided, the section took effect on October 12, 1984, the date of enactment. It can be argued that it does not apply to offenders convicted of offenses committed before enactment.

The purpose of the provision is somewhat elusive. Its principal impact appears to be to increase an offender's potential exposure to incarceration.

SENTENCING OPTIONS

ORDINARY OR NARA SENTENCES

An offender thought to be in need of care or treatment for a mental disease or defect apparently can be given any sentence that could be given in the absence of the mental condition. Although there are circumstances in which the court is obliged to hold a hearing on a motion under 18 U.S.C. § 4244(a) (Supp. IV 1986), the court appears to have unrestricted discretion, even if a defendant is found to be in need of hospitalization for a mental condition, to decide whether the defendant "should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment." 18 U.S.C. § 4244(d) (Supp. IV 1986). An ordinary sentence of imprisonment presumably can be imposed.

If the court sentences a defendant under authority other than 18 U.S.C. § 4244 (Supp. IV 1986) and the Bureau of Prisons concludes that there is a need for hospitalization for care or treatment of a mental condition, the defendant will be

transferred to one of the prison hospitals for the necessary care if the defendant consents. If the defendant does not consent to such transfer, however, court approval of the transfer is required under 18 U.S.C. § 4245 (Supp. IV 1986).

If a judge imposing a sentence of imprisonment under the regular sentencing authorities believes that a defendant is in need of treatment for a mental condition, that belief should be communicated to the Bureau of Prisons so that the offender can be assigned to an institution with appropriate diagnostic staff.

COMMITMENT FOR CARE OR TREATMENT

Procedure

Before sentencing, and within ten days after conviction, the government or the defendant may move for a hearing on the defendant's present mental condition. The court must grant a hearing if "there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility." 18 U.S.C. § 4244(a) (Supp. IV 1986). The court may also initiate a hearing sua sponte, at any time before sentencing, on the basis of such reasonable cause.

If a hearing is ordered, the court may order a psychiatric or psychological examination, which is to be conducted as specified in 18 U.S.C. § 4247(b), (c) (Supp. IV 1986). The procedures permit a thirty-day commitment to custody for an examination. At the hearing, the defendant is entitled to testify, present evidence, subpoena witnesses, and confront and cross-examine witnesses. 18 U.S.C. § 4247(d) (Supp. IV 1986).

If the court finds, by a preponderance of the evidence, "that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment," the defendant may be committed under this section. Note that there is no requirement that the defendant be found dangerous to himself or herself, or others. As was observed above, the requirement of a finding that the defendant "should, in lieu of being sentenced to imprisonment, be committed to a suitable facility" appears to give the judge great discretion in determining the appropriate disposition of the offender even if it is concluded that custodial care is appropriate.

Conditions of Incarceration

Offenders committed under 18 U.S.C. § 4244 (Supp. IV 1986) will generally be assigned to one of the Bureau of Prisons institutions that have mental hospitals: Butner, North Carolina; Springfield, Missouri; or Rochester, Minnesota. Their experience is not likely to differ substantially from that of people with similar needs who have been sentenced under other authorities.

Determining the Date of Release from Incarceration

A commitment under § 4244 "constitutes a provisional sentence of imprisonment to the maximum term" authorized for the offense. 18 U.S.C. § 4244(d) (Supp. IV 1986). The director of the facility in which the defendant is hospitalized must submit annual reports on the offender's mental condition to the sentencing court. 18 U.S.C. § 4247(e)(1)(B) (Supp. IV 1986). If, before the expiration of the term, the director of the hospital files a certificate to the effect that the defendant has recovered to the extent that there is no longer a need for care or treatment in such a facility, the court proceeds to final sentencing. 18 U.S.C. § 4244(e) (Supp. IV 1986). In the absence of such a certificate, the offender may from time to time move for a hearing to determine whether he or she should be discharged from the facility. 18 U.S.C. § 4247(h) (Supp. IV 1986). If the offender prevails in such a hearing, the court apparently proceeds to final sentencing, although that is not explicitly stated in the statute.

In the absence of a finding that the offender is no longer in need of hospitalization, it appears that incarceration under § 4244 will continue to the end of the provisional sentence—that is, the maximum sentence that could have been imposed for the offense. The statute does not appear to contemplate that the offender will qualify for either parole consideration or good time credits.

11

The Use of Observation and Study as an Aid to the Sentencing Judge

AUTHORITIES

There are several authorities that may be used to have a convicted offender observed and studied, and a report made to the sentencing judge. They are as follows:

LOCAL STUDIES

Funds are available through the probation office to have studies performed by local psychologists and psychiatrists. Probation offices are expected to maintain lists of people who are qualified and willing to do this work. Local studies often can take place in an environment less restrictive than that in which studies are performed by the Bureau of Prisons. Moreover, if the district of conviction is the defendant's home district, a local psychologist or psychiatrist, familiar with the environment in which the offender has lived, may be in a better position to make judgments about the offender. In a joint statement issued in 1978, the Probation Division, the Bureau of Prisons, and the Parole Commission urged that studies be performed locally whenever feasible.

BUREAU OF PRISONS STUDIES

18 U.S.C. § 4205(c) (1982) authorizes commitment for three months of study "if the court desires more detailed information as a basis for determining the sentence to be imposed." This section was repealed by the Comprehensive Crime Control Act of 1984, effective November 1, 1987. However, the provision remains applicable until November 1, 1992, for an individual who committed an offense or act of juvenile delinquency before the effective date and as to a term of imprisonment during the time before the promulgation of the Sentencing Guidelines. Pub. L. No. 98-473, §§ 218(a)(5), 235(a)(1), (b)(1)(A), 98 Stat. 2027, 2031, as amended.

18 U.S.C. § 4247(b) (Supp. IV 1986) authorizes commitment for thirty days for an examination to determine whether a convicted offender is suffering from a mental disease or defect for the treatment of which the offender is in need of custody for care or treatment in a suitable facility.

18 U.S.C. § 4252 (1982) authorizes commitment for thirty days to determine whether an offender "is an addict and is likely to be rehabilitated through treatment." This authority is limited to offenders who are eligible for sentencing under the Narcotic Addict Rehabilitation Act and has been treated in the discussion of that Act on pages 41-44.

MAKING THE BEST USE OF STUDIES

In ordering presentence studies, the letter referring the offender should specify the questions the judge wants answered so that the person conducting the study can perform such tests as are suitable for answering those questions. When judges fail to specify their questions, they often find that the study reports are not responsive to their sentencing concerns. Sample referral letters can be found in L. Farmer, Observation and Study: Critique and Recommendations on Federal Procedures 33–34 (Federal Judicial Center 1977).

12

Judicial Communication with the Parole Commission and the Bureau of Prisons

GENERAL

There are a number of situations in which the experience of an offender after sentencing may be influenced by communication from the court to the Bureau of Prisons or the Parole Commission.

The Bureau of Prisons makes an effort to accommodate judges' requests about the types or locations of facilities in which offenders are incarcerated, as well as the kinds of programs to which they should be exposed, if the requests are consistent with the Bureau's determination of the appropriate security level. U.S. Bureau of Prisons, Program Statement 5100.2, § 9, at 10–11 (Aug. 1, 1985). If the Bureau is unable to honor a judicial request, the staff will write the judge and explain that inability. As was noted, it is Bureau policy not to make original designations to community treatment centers unless the judge specifically requests such a designation. U.S. Bureau of Prisons, Program Statement 5100.2, § 7 at 2 (July 5, 1983).

The Parole Commission is less likely than the Bureau of Prisons to adopt a judge's recommendation as a matter of deference, but it is very much interested in perceptions and information that may influence Commission decisions. The following excerpt from the regulations, 28 C.F.R. § 2.19(d) (1988), expresses the Commission's position on this issue:

> Recommendations and information from sentencing judges, defense attorneys, prosecutors, and other interested parties are welcomed by the Commission. In evaluating a recommendation concerning parole, the Commission must consider the degree to which such recommendation provides the Commission with specific facts and reasoning relevant to the statutory criteria for parole (18 U.S.C. § 4206) and the application of the Commission's guidelines (including reasons for departure therefrom). Thus, to be most helpful, a recommendation should state its underlying factual basis and reasoning. However, no recommendation (including a prosecutorial recommendation pursuant to a plea agreement) may be considered as binding upon the Commission's discretionary authority to grant or deny parole.

METHOD OF COMMUNICATION; LIMITATIONS

Administrative Office Form 235, reproduced as Appendix D, was designed to facilitate and encourage communication with the Bureau of Prisons and the Parole Commission. It contains information that is useful to the Parole Commission for setting an offender's presumptive release date. Letters and memoranda are equally acceptable. Remarks made orally in open court will not routinely reach the Bureau and the Commission; the judge who wishes such remarks to be acted upon must have them transcribed and transmitted. The Parole Commission in particular is interested in receiving transcripts of sentencing hearings.

AO Form 235 is not required for a defendant sentenced under the new Sentencing Guidelines. The purposes of the form are met by the statutory requirement that reasons for imposition of a particular sentence be stated in open court and transmitted to the Bureau of Prisons and Sentencing Commission. *See* 18 U.S.C. § 3553(c). There is no reason for the court to document aggravating or mitigating circumstances because parole provisions do not apply. Memorandum of Donald L. Chamlee, Chief of Division of Probation, Administrative Office of the U.S. Courts, July 27, 1988.

Prosecutors and defense counsel may also communicate with the Bureau of Prisons and the Parole Commission about a defendant and often do so. Forms somewhat similar to Form 235 are available to them for that purpose.

Generally, it is not appropriate to communicate with the Parole Commission on a confidential basis. The Parole Commission Act, 18 U.S.C. § 4208(b), (c) (1982 & Supp. IV 1986), requires that all materials considered by the Commission also be available to the offender, except that material may be withheld and summarized in the same circumstances in which a summary of information in a presentence report is permitted under Rule 32(c)(3) of the Federal Rules of Criminal Procedure. If a communication to the Commission includes material that should be withheld from the offender, it should be accompanied by a summary that is suitable for disclosure. 28 C.F.R. § 2.55(d) (1988).

Presentence reports are routinely considered by the Parole Commission in reaching its decisions. The U.S. Court of Appeals for the District of Columbia Circuit has held that the Commission has the authority to determine whether information contained in a presentence report should be withheld and summarized under 18 U.S.C. § 4208(c), implying that the Commission may disclose to an inmate information that was withheld by the court under Rule 32(c)(3) at the time of sentencing. *Carson v. U.S. Department of Justice*, 631 F.2d 1008 (D.C. Cir. 1980).

The presentence report is regarded as a Freedom of Information Act (FOIA) document in the hands of the Parole Commission. *See U.S. Department of Justice v. Julian*, 486 U.S. 1, 108 S. Ct. 1606 (1988); *Cotner v. U.S. Parole Commission*, 747 F.2d 1016 (5th Cir. 1984). A completed AO Form 235 or other communication to

the Parole Commission or the Bureau of Prisons is likely to be similarly regarded. *See Berry v. Department of Justice*, 733 F.2d 1343 (9th Cir. 1984).

Although presentence reports are subject to the FOIA, the Justice Department and the Administrative Office of the U.S. Courts had argued in the past that the reports remained nondisclosable under two specific statutory exemptions. In the recent case of *U.S. Department of Justice v. Julian, supra*, the Supreme Court effectively eliminated these arguments as to reports requested from the Bureau of Prisons or the Parole Commission by *subjects* of the reports.

In *Julian*, the Supreme Court held that neither Rule 32 of the Federal Rules of Criminal Procedure nor the Parole Act, 18 U.S.C. § 4208 (1982), is a statute specifically exempting presentence reports from disclosure to subjects of the reports within the meaning of FOIA exemption 3 (5 U.S.C. § 552(b)(3)—documents specifically exempted from disclosure by statute), except as to matters relating to confidential sources, diagnostic opinions, and other information that may cause harm to the offender or to third parties. *Julian, supra*, at 1611–1612. In addition, FOIA exemption 5 (5 U.S.C. § 552(b)(5)—interagency or intra-agency memoranda or letters which would not be otherwise discoverable are exempt from disclosure) is inapplicable where the person requesting the document is the subject of the report. *Id.* at 1613.

The Court did not deal with disclosure of the sentencing recommendation; however, since it is specifically exempt from disclosure under the provisions of Rule 32(c)(3)(A), it is no doubt covered by FOIA exemption 3.

Julian does not change the fact that, because *courts* are specifically excluded from coverage under the FOIA, requests for disclosure made to the courts may still be denied. It should be noted, however, that Fed. R. Crim. P. 32(c)(3) was amended in 1989, in part in response to the decision in *Julian*, to allow the defendant and defendant's counsel to retain a copy of the presentence report.

It is unclear to what extent the FOIA exemptions will bar third parties from obtaining copies of these documents. *Julian* addressed only requests for disclosure by subjects of the reports. If disclosure to a third party is necessary to serve the ends of justice, courts will usually order it, though somewhat reluctantly. *U.S. v. McKnight*, 771 F.2d 388 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014; *U.S. v. Anderson*, 724 F.2d 596 (7th Cir. 1984); *U.S. v. Charmer Industries, Inc.*, 711 F.2d 1164 (2d Cir. 1983); *Hancock Brothers, Inc. v. Jones*, 293 F. Supp. 1229 (N.D. Cal 1968). Typically, a third party is required to show a special need in order to obtain a copy of a presentence report. *Julian, supra*, at 1613. It is likely, however, that FOIA exemption 6, 5 U.S.C. § 552(b)(6), which prohibits unwarranted invasion of privacy, would apply to requests by third parties.

APPROPRIATE MATTERS FOR COMMUNICATION

Among the matters that appear to present appropriate circumstances for a communication from the judge to the Bureau of Prisons or the Parole Commission are the following:

1. Cases in which the "prosecution version" of the criminal conduct, as set forth in the presentence report, is known to be at variance with the facts or is considered unreliable. In determining the severity of the offense behavior, the Parole Commission may rely on this version.

2. Cases in which other information in the presentence report is either incorrect or of doubtful validity. Both the Bureau of Prisons and the Parole Commission rely heavily on information in the presentence report. If the judge has concluded that any of this information is inaccurate, it is important that this conclusion be communicated. Similarly, if the judge has concluded that sentencing can proceed without resolving doubts about the accuracy of information, it is important that the doubts be communicated.

3. Cases in which the judge has views about the offender's culpability, particularly cases in which the offender's culpability is thought to be less or greater than what might be inferred from the bare description of the offense behavior in the Commission's guidelines.

4. Cases in which the defendant has cooperated with the prosecution, but the cooperation is not reflected in the presentence report.

5. Cases in which the judge has views about in what kind of institution an offender should serve or to what kinds of programs the offender should be exposed.

In those cases in which the accuracy of information contained in a presentence report is in question, the better practice is probably to have the report corrected or to have a page showing the correction made an integral part of the report as provided for in Fed. R. Crim. P. 32(c)(3)(D). As contrasted with preparing a separate communication, this practice reduces the risk that someone will read the presentence report without becoming aware of its deficiencies.

APPENDIX A

Excerpt from Joint Explanatory Statement of the Committee of Conference on the Parole Commission and Reorganization Act of 1976

(H.R. Rep. No. 838, 94th Cong., 2d Sess. 19-21 (1976))

The managers on the part of the House and Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 5727) to establish an independent and regionalized United States Parole Commission, to provide fair and equitable parole procedures, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommend in the accompanying conference report:

Nearly all men and women sent to prison as law breakers are eventually released, and the decision as to when they are released is shared by the three branches of government. Wrapped up in the decision to release an individual from incarceration are all of the emotions and fears of both the individual and society.

Parole may be a greater or lesser factor in the decision to release a criminal offender. It depends upon the importance of parole in the complex of criminal justice institutions. In the Federal system, parole is a key factor because most Federal prisoners become eligible for parole, and approximately 35 per cent of all Federal offenders who are released, are released on parole. Because of the scope of authority conferred upon the Parole Board, its responsibilities are great.

From an historical perspective, parole originated as a form of clemency; to mitigate unusually harsh sentences, or to reward prison inmates for their exemplary behavior while incarcerated. Parole today, however, has taken a much broader goal in correctional policy, fulfilling different specific objectives of the correctional system. The sentences of nearly all offenders include minimum and maximum terms, ordinarily set by the sentencing court within a range of discretion provided by statute. The final determination of precisely how much time an offender must serve is made by the parole authority. The parole agency must weigh several complex factors in making its decision, not all of which are necessarily complementary. In the first instance, parole has the practical effect of balancing differences in sentencing policies and practices between judges and courts in a system that is as wide and diverse as the Federal criminal justice system. In performing this function, the parole authority must have in mind some notion of the appropriate range of time for an offense which will satisfy the legitimate needs of society to hold the offender accountable for his own acts.

The parole authority must also have in mind some reasonable system for judging the probability that an offender will refrain from future criminal acts. The use of guidelines and the narrowing of geographical areas of consideration will sharpen this process and improve the likelihood of good decisions.

The parole authority must also take into consideration whether or not continuing incarceration of an offender will serve a worthwhile purpose. Incarceration is the most expensive of all of the alternative types of sentences available to the criminal justice system, as well as the most corrosive because it can destroy whatever family and community ties an offender may have which would be the foundation of his eventual return as a law-abiding citizen. Once sentence

has been imposed, parole is the agency responsible for keeping in prison those who because of the need for accountability to society or for the protection of society must be retained in prison. Of equal importance, however, parole provides a means of releasing those inmates who are ready to be responsible citizens, and whose continued incarceration, in terms of the needs of law enforcement, represents a misapplication of tax dollars.

These purposes which parole serves may at times conflict and at the very least are complicated in their administration by the lack of tools to accurately predict human behavior and judge human motivation.

Because these decisions are so difficult from both the standpoint of the inmate denied parole, as well as the concerns of a larger public about the impact of a rising crime rate, there was almost universal dissatisfaction with the parole process at the beginning of this decade. As a result, both the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, and Subcommittee on National Penitentiaries of the Senate Judiciary Committee began seeking legislative answers to the problems raised. In the case of both Subcommittees a major effort was mounted to make parole a workable process.

Following the appointment of Maurice H. Sigler as Chairman of the U.S. Board of Parole in 1972, a working relationship developed between the Board and the two Subcommittees. As a result of this relationship, and with the support of the two Subcommittee chairmen, the Parole Board began reorganization in 1973 along the lines of the legislation presented here.

The organization of parole decision-making along regional lines, the use of hearing examiners to prepare recommendations for action, and, most importantly, the promulgation of guidelines to make parole less disparate and more understandable has met with such success that this legislation incorporates the system into the statute, removes doubt as to the legality of changes implemented by administrative reorganization, and makes the improvements permanent.

It is not the purpose of this legislation to either encourage or discourage the parole of any prisoner or group of prisoners. Rather, the purpose it to assure the newly-constituted Parole Commission the tools required for the burgeoning caseload of required decisions and to assure the public and imprisoned inmates that parole decisions are openly reached by a fair and reasonable process after due consideration has been given the salient information.

To achieve this, the legislation provides for creation of regions, assigning a commissioner to each region, and delegation of broad decision-making authority to each regional commissioner and to a national appellate panel. The bill also makes the Parole Commission, the agency succeeding the Parole Board, independent of the Department of Justice for decision-making purposes.

In the area of parole decision-making, the legislation establishes clear standards as to the process and the safeguards incorporated into it to insure fair consideration of all relevant material, including that offered by the prisoner. The legislation provides a new statement of criteria for parole determinations, which are within the discretion of the agency, but reaffirms existing caselaw as to judicial review of individual case decisions.

The legislation also reaffirms caselaw insuring a full panoply of due process to the individual threatened with return to prison for violation of technical conditions of his parole supervision, and provides that the time served by the individual without violation of conditions be credited toward service of sentence. It goes beyond present law in insuring appointment of counsel to indigents threatened with reimprisonment.

APPENDIX B

Parole Commission Statement on Use of "Offense Behavior"

(Excerpt from "Supplementary Information" published upon promulgation of 28 C.F.R. § 2.19(c), 44 Fed. Reg. 26,549 (1979))

The Problem of Unadjudicated Offenses

Some comments raised the issue of whether the Commission should, under any standard, consider aggravating circumstances about the prisoner's offense behavior when such circumstances may be legally defined as separate criminal offenses.

This situation occurs because prosecutors do not always obtain convictions upon all or the most serious offenses disclosed by the facts. This happens primarily because of plea bargaining. An average of 85 percent of all federal convictions are obtained by pleas, rather than by trials, and many of these pleas result in the dismissal of charges that are nonetheless supported by persuasive evidence.

Another reason for failure to convict on the most serious offense disclosed by the facts is jurisdictional; state charges are frequently dropped when federal prosecution is commenced for a less serious federal offense.

The problem is so common that the question is not simply whether the Commission should consider unadjudicated offense information in its decisions, but whether the Commission could afford to ignore such information and still fulfill the functions required of it by its enabling statute.

In the Commission's view, consideration of a wide scope of reliable information about the actual criminal transaction underlying the conviction is essential to a responsible paroling practice. Without such information, parole decisions would not reflect a realistic understanding either of the seriousness of the offense or of the relative danger that the offender's release may pose to the public safety. Moreover, serious disparities inherent in prosecutorial decisions would be unavoidably magnified by intolerably disparate parole decisions.

(a) *The Concern for Realism.*—If the Commission were to restrict its consideration to pleaded counts alone, it would frequently lack critical explanatory information about the "nature and circumstances of the offense," a consideration required by law: 18 U.S.C. § 4206(a).

One frequently occurring prosecutorial practice is that of taking a plea to a lesser included charge, a practice that results in convicting the defendant for what is really a hypothetical behavior. A bank robber who kidnapped a teller may plead guilty to attempted robbery or bank larceny. See *Bistram* v. *U.S. Board of Parole*, 535 F.2d 329, 330 (5th Cir. 1976). An extortionist may plead guilty to a conspiracy to commit extortion. See *Billiteri* v. *U.S. Board of Parole*, 541 F.2d 438 (2d Cir. 1976). The Commission could not begin to treat such a plea as if it described a real event, for any available explanatory information would relate to the transaction that actually occurred.

In such cases as white collar crimes, the pleaded counts usually do not reflect anything near the actual dollar amounts involved, even though the nature of the unlawful behavior is established. Thus, in order to answer essential questions as to the amount of harm done and the scale of the offense, the Commission must look to information that was reflected in the dismissed counts. See *Manos* v. *U.S. Board of Parole*, 399 F. Supp. 1103 (M.D. Pa. 1975). These were obviously questions that the Congress thought proper for the Commission to ask. See 2 U.S. Code Cong. & Ad. News at 359 (1976).

(b) *The Concern for the Public Safety.*—Another consideration is what the offense behavior reveals about the offender himself, i.e., his likely motivation and characteristics. The need for realism in this regard is especially important in considering the degree to which the offender has shown himself capable of violent or dangerous behavior. One example of this would be a case in which the prisoner had been convicted of interstate transportation of stolen goods, not a particularly threatening type of behavior. However, the prisoner had originally been charged by local authorities with being the perpetrator of a robbery in which those goods were stolen. The robbery charge was dropped when the federal conviction was obtained, even though there was "strongly probative" evidence of guilt. See *Lupo* v. *Norton*, 371 F. Supp. 156 (D. Conn. 1974). Likewise in *Narvaiz* v. *Day*, 444 F. Supp. 36 (W.D. Okla. 1977), information explaining the circumstances underlying a Firearms Act conviction disclosed behavior that amounted to extortion and kidnapping. The Commission could not conceivably ignore persuasive evidence that shows the prisoner to be a very different sort of release risk from that indicated by his plea.[2]

(c) *The Concern for Avoiding Disparity.*—Parole decision-making in both the federal and state systems also serves the function of preventing disparities in prosecutorial practices from being transferred to the highly visible point at which the offender is finally released from prison.

It is unquestionable that significant disparities exist in the treatment of different types of offenders. For example, white collar offenders are more likely to strike a bargain to a lesser charge than bank robbers. Disparities also exist in the handling of similarly situated offenders. Depending upon local prosecutorial practices and caseloads, some offenders will be able to strike a favorable bargain while others will be brought to trial on all charges.

The criminal justice system has become dependent upon the sentencing judge and the parole authority to bring some measure of realism and consistency to criminal punishments. If they were not able to do so, the terms of the plea agreement would to a great extent predetermine the sentence. This would place in the hands of prosecutors a far greater degree of influence over sentencing and parole choices than they now possess, a transfer of discretionary authority that would not be acceptable. (Guidelines for prosecutorial discretion may be one way of ameliorating the present situation, if such guidelines made it more difficult for prosecutors to drop serious charges unless they had genuine doubts about the supporting evidence.)

2. The Commission agrees with the reasoning of the Supreme Court in *Williams* v. *New York*, 337 U.S. 241 (1949), in which the Court permitted sentencing judges to consider unadjudicated offense information.

APPENDIX C

Memorandum Regarding Applicability of Supervised Release to Certain Drug Offenses Committed Between October 27, 1986 and October 31, 1987

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

July 8, 1991

MEMORANDUM TO ALL: JUDGES, UNITED STATES DISTRICT COURTS
CHIEF PROBATION OFFICERS

SUBJECT: Applicability of Supervised Release to Certain Drug Offenses Committed Between October 27, 1986 and October 31, 1987

The Supreme Court in Gozlon-Peretz v. United States, ___ U.S. ___, 111 S. Ct. 840 (1991), has held that supervised release, rather than special parole, applies for violation of certain provisions of the Anti-Drug Abuse Act of 1986 (ADAA) that were committed after the Act's effective date (October 27, 1986) and prior to the effective date of the Sentencing Reform Act of 1984 (November 1, 1987). Gozlon-Peretz resolves a split among the Courts of Appeals as to the appropriate form of post-confinement supervision: the District of Columbia, First, Third, Sixth and Ninth Circuits had held that supervised release was appropriate; the Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits had held that special parole was appropriate.

This issue arose as a result of a drafting problem in the ADAA of 1986, which in certain penalty sections provided for mandatory terms of supervised release but did not provide for procedures to implement that form of community supervision. The procedures for conducting supervised release were provided in the Sentencing Reform Act of 1984. Since that Act did not take effect until November 1, 1987, the question arose as to whether supervised release could be imposed for offenses committed before the Sentencing Reform Act's effective date. The Supreme Court held that Congress, in passing the ADAA of 1986, referred to the supervised release provisions in the Sentencing Reform Act and presumed that offenders would not be released on supervision until that Act and its procedures took effect. **Accordingly, the supervised release procedures of the Sentencing Reform Act, 18 U.S.C. § 3583, are now in effect and should be used for all terms of supervised release imposed for offenses punishable pursuant to 21 U.S.C. §§ 841(b)(1)(A), (B) or (C) and 960(b)(1), (2) or (3) that took place during the window period, i.e., between October 27, 1986 and October 31, 1987.**

Several administrative problems remain for cases where either special parole was imposed at sentencing or supervised release was originally imposed at sentencing but subsequently changed to special parole in response to a holding of one of the Courts of Appeals listed above which had found that special parole was appropriate. We believe that the decision in Gozlon-Peretz is retroactive since it involves the interpretation of a statute and does not announce a new constitutional rule, which under certain circumstances may not be fully retroactive. See United States v. Shelton, 848 F.2d 1485 (10th Cir. 1988); Ingber v. Enzor, 841 F.2d 450 (2d Cir. 1988). Thus, offenders who committed offenses during the window period, and who were sentenced to special parole pursuant to 21 U.S.C. §§ 841(b)(1)(A), (B) or (C) or 960(b)(1), (2) or (3), may petition the sentencing court for correction of sentence pursuant to "old" F. R. Crim. P. 35(a). (The application of the rule to "old law" cases was preserved by the Sentencing Act of 1987.) The sentencing court also has authority to correct these sentences on its own motion.

The imposition of a supervised release term in place of a special parole term may have adverse consequences for an offender and, therefore, if supervised release is being imposed for the first time, would appear to require the presence of the offender for resentencing pursuant to F. R. Crim. P. 43. See generally United States v. Moree, 928 F.2d 654 (5th Cir. 1991). Since it is costly and administratively burdensome to return imprisoned offenders to the sentencing court, and since the offender is not affected by the type of post-incarceration supervision until release from prison, correction of these sentences can await the offender's return to the community. Offenders who were originally sentenced to supervised release, which was subsequently changed to special parole and will now be returned to supervised release, can be resentenced without being present. See United States v. De los Santos-Himitola, 924 F.2d 380 (1st Cir. 1991).

Probation officers should review all cases with special parole terms to determine whether they are affected by the decision in Gozlon-Peretz, and if so, recommend resentencing to the court pursuant to old Rule 35(a). In addition, staff of the United States Parole Commission should review all special parole cases in which action by the Commission is requested (e.g., transfer of district, issuance of warrant), and, if the case is affected by Gozlon-Peretz, request that the probation officer recommend resentencing. Cases affected by Gozlon-Peretz include offenses committed between October 27, 1986 and October 31, 1987 punishable pursuant to 21 U.S.C. §§ 841(b)(1)(A), (B) or (C) and 960(b)(1), (2) or (3). Until and unless the court changes the sentence, the term of post-confinement supervision imposed by the court is in full force and effect and must be obeyed. Once the offender is resentenced to supervised release, the term of supervised release should run consecutively with any regular parole or mandatory release term.

Judges, United States District Courts
Chief Probation Officers 3

For offenders with special parole terms affected by Gozlon-Peretz who have had special parole revoked or a warrant issued by the Parole Commission, it is essential that coordinated action be taken by the court and the Parole Commission to ensure that these offenders do not avoid responsibility for violations of supervision. Thus, resentencing in these situations should be done at the same time as the violation is considered. Because of the significant statutory differences between supervised release and special parole and the procedural requirements of F. R. Crim. P. 32.1, we believe the court will have to reconsider de novo any alleged violation of the conditions of release. See generally, United States v. Williams, 919 F.2d 266 (5th Cir. 1990). In many cases this will require the return of the offender to the court from the place of imprisonment for resentencing and consideration of the alleged violation.

If you have any questions concerning this matter, please contact the General Counsel's Office of the Administrative Office of the United States Courts or the General Counsel's Office of the United States Parole Commission.

L. Ralph Mecham
Director
Administrative Office of the
United States Courts

Carol Pavilack Getty
Chairman
United States Parole Commission

bc: Karen Gray

TDSlawsky/EClark-Lewis

Director
OGC Reading
Daybook - TDS // LRM
File: Sentencing Reform Act, Supervised Release

APPENDIX D

AO Forms 235 and 235A

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

December 26, 1985

MEMORANDUM TO ALL: JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATES
FEDERAL PUBLIC/COMMUNITY DEFENDERS
CLERKS, UNITED STATES DISTRICT COURTS
UNITED STATES PROBATION OFFICERS

SUBJECT: Report on Committed Offender

The Committee on the Administration of the Probation System of the Judicial Conference has approved the attached forms, AO 235, Report on Committed Offender and AO 235-A, Instruction Sheet for use with AO 235. Revised AO 235 supersedes previous versions and replaces AO 337, Defense Attorney's Parole Report. The new form is applicable only to offenders who have received a commitment of more than one year. The probation office will distribute AO 235 to the court and defense counsel following sentencing and will facilitate transmittal to the Bureau of Prisons and the Parole Commission. The Probation Committee believes the revised AO 235 will encourage greater input by the court and defense counsel into the institutional designation and parole decisionmaking process.

L. Ralph Mecham

Attachments

AO 235 (Rev. 8/85) Report on Committed Offender

United States District Court

_____ DISTRICT OF _____

REPORT ON COMMITTED OFFENDER

DEFENDANT NAME | DOCKET NO.

OFFENSE | SENTENCE

PROBATION OFFICER ESTIMATES OF PAROLE GUIDELINES
(To be completed by Probation Officer)

Severity Rating	Salient Factor Category	Guideline Range

I. INFORMATION RELEVANT TO PAROLE DECISION-MAKING ☐ No Comment

A. Referring to the probation officer's estimate of the parole guidelines given above, do you believe the time served by this defendant should be:

☐ Within the Guidelines

☐ Below the Guidelines (If so, how far below: _____months)

☐ Above the Guidelines (If so, how far above: _____months)

If you checked "Below" or "Above", please indicate your reasons for such assessment in sections 1-3 below by identifying factors that in your view should bear on the parole release decision:

1. Aggravating and/or mitigating circumstances surrounding the offense behavior (including any characteristics that affect your view of this defendant's role in the offense):

2. Aggravating and/or mitigating factors concerning the offender's risk of recidivism:

3. Other aggravating and/or mitigating factors not adequately taken into account by the Guidelines (NOTE: If the defendant has cooperated with the government, please forward this information to the Bureau of Prisons community programs manager as a separate, confidential document):

B. If you disagree with the probation officer's estimate of the Parole Commission Guidelines, please give the reasons for your disagreement:

(Please see reverse side)

AO 235 (Rev. 8/85) Reverse

C. In assessing offense severity, the Parole Commission will consider unadjudicated offenses (alleged to be part of the total current transaction) that are supported by a preponderance of the evidence. Have any findings been made by the court as to this defendant's involvement in such unadjudicated offenses?

D. In multi-defendant cases, please give your assessment of this offender's relative culpability:

II. INFORMATION RELATIVE TO BUREAU OF PRISONS CLASSIFICATION ☐ No Comment

A. What treatment or training should the Bureau of Prisons provide this offender?

☐ Drug Treatment - ☐ Alcohol Treatment
☐ Mental Health Treatment ☐ Medical Treatment
☐ Vocational Training ☐ Education
☐ Other: _____

B. Recommended Institution (by institutional classification or name): _____
Please indicate why this institution is recommended:

☐ No preference

III. OTHER COMMENTS:

IV. NOTIFICATION:

_____ I wish to be notified of the date and place set for this prisoner's parole hearing.

_____ I wish to be notified of the Commission's decision in this case.

☐ Judge
☐ Defense Counsel

_____ _____
Date *Name*

This form will be disclosed to the prisoner under the conditions and exceptions that apply to the presentence report (See 18 U.S.C. 4208(b))

The Relevance of AO-235 Information to Postconviction Agency Policies

The Report on Committed Offender focuses on information that will be useful to the U.S. Parole Commission for setting an offender's presumptive release date, a decision made at the initial parole hearing. The Parole Commission's release decisions are based on guidelines that take into account the severity of the offense and the offender's risk of recidivism (Salient Factor Score). For each combination of the offense severity and offender risk, the guidelines specify a range of months to be served for customary cases. To make a decision outside of the guidelines, the Commission must give written reasons stating the specific circumstances that render the case unusual. In determining the presumptive release date in a particular case, therefore, the Commission must assign a severity rating to the offense; assess the offender's risk of recidivism; and determine whether or not this is a "customary case". [See 28 C.F.R. 2.20]

The Commission places an offense on its severity scale based on the total offense behavior; therefore, the Commission will consider offense behaviors contained in dismissed counts of the indictment provided the available information on offender involvement meets the "preponderance of the evidence" standard. The Parole Commission's position that its governing statute requires that this material be considered has been upheld by the courts. If you do not feel that the presentence report adequately reflects the underlying offense behavior, corrections should be made pursuant to Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure. In addition, the AO-235 form solicits information about any findings made concerning behaviors alleged in dismissed counts. The Commission also will generally hold each defendant responsible for the acts of all codefendants. For example, each defendant in a drug enterprise is held accountable for the total amount of drugs involved in the conspiracy. The Commission, however, does want to array its time-served decisions to reflect the relative culpability of codefendants. Your comments on this matter, therefore, are particularly relevant.

Also of interest is information that can assist the Commission in determining whether or not this was a "typical" offense. The form asks for any aggravating or mitigating circumstances that you believe render the offense somewhat unusual. For example, an offense involving undue abuse of victims may be considered aggravated, whereas the intervention of an offender to prevent harm to a victim at the hands of a codefendant could be considered in mitigation.

Turning to the risk factor of the guidelines, information concerning pertinent defendant characteristics is useful to the Commission in deciding whether or not this is a "typical" offender. The Commissioner's assessment of risk is based on an actuarial device, the Salient Factor Score, comprised primarily of prior criminal record items. Any challenges to the validity of the information used in its calculation (e.g., prior convictions) should be handled under the Rule 32(c)(3)(D) procedures. Therefore, the Report on Committed Offender does not ask for comment on the computation of the risk score but rather questions whether or not there are any circumstances that could be used to override the statistical risk classification. For example, a series of prior convictions involving violence might indicate that the offender is a worse risk; conversely, a prior record comprised solely of minor offenses might indicate a better risk.

In addition to risk related factors, the Commission will also take into account a defendant's substantial cooperation to the government where otherwise unrewarded. Due to the sensitive nature of this information, however, it should be submitted in a separate confidential document.

The AO-235 form also asks your view of how the offender should be placed relative to the guidelines as estimated by the probation office (noted at the top of the form), i.e., do you recommend release within or outside of the guidelines. These estimated guidelines are in no way binding on the Parole Commission, which relies on its own calculations for decisionmaking purposes. As the probation estimates are calculated using the Parole Commission manual, however, they should provide a reasonable starting point from which to make your comments. You should be aware that by statute the Commission may only go outside of their guidelines for good cause and must provide the prisoner with written reasons for such a decision, including a summary of the information relied upon. [See 18 U.S.C. 4206(c)]. Therefore, any recommendation for a decision outside of the guidelines should be supported by reasons noted in other sections of the AO-235 form.

Overview of Relevant Bureau of Prisons Policies

The questions in the Report on Committed Offender that relate to the Bureau of Prisons are brief. The first, concerning perceived treatment or training needs, will assist in both institutional designation and program planning. This is followed by a request for your recommendation as to institution, either by name or type. Most Bureau institutions are classified into one of six levels based on their perimeter security, with Level One representing the least restrictive institutions (e.g., prison camps). The Bureau also operates some institutions, open to all types of prisoners, that fulfill specific needs (such as medical or mental health care). It would be particularly helpful if you could indicate the reason for your request (e.g., a particular type of program; placement close to relatives) to assure that your view can be taken into account even if it is not possible to designate the particular institution of your choice.

AO 235-A (8/85) Instruction Sheet For Use With AO 235

TO: Judges and Defense Counsel
SUBJECT: The AO-235: Report on Committed Offender

The AO-235 is to be used to transmit information to the Bureau of Prisons and U.S. Parole Commission concerning defendants committed to the custody of the Attorney General for a period exceeding one year. Given the importance of the decisions that these agencies must make concerning custodial assignment and presumptive release date, it is essential that they be made in light of the most complete and useful information possible. To this end, completion of the attached Report on Committed Offender will ensure that these agencies are aware of your views on issues relevant to their decisionmaking.

On the form state how you believe the information contained in the presentence report, or otherwise presented during the sentencing process, should be used to make postconviction decisions. The presentence report, however, is the primary document upon which the Bureau of Prisons and Parole Commission rely for their information, and the Report on Committed Offender is not an appropriate vehicle for correcting presentence report inaccuracies. This should be accomplished under the mechanisms provided by Rule 32(c)(3)(D), Rules of Criminal Procedure.

The Report on Committed Offender will be disclosed to the prisoner under the same conditions and exceptions that apply to the presentence report. If you wish to communicate material that is not to be disclosed, please also prepare a disclosable version with appropriate deletions and a summary of the deleted material. If you wish to use the form to communicate solely with the Bureau of Prisons, simply leave blank the sections that pertain to parole.

Note that this form is not the only method to communicate with the Bureau of Prisons or the Parole Commission. Both agencies welcome communication in any form, and the Parole Commission expresses particular interest in receiving a transcript of the sentencing hearing where possible.

Attached is a brief description of Parole Commission and Bureau of Prisons policies that includes illustrations of how and why completion of the form will impact upon parole release and custodial assignment decisions. You will probably find it useful to consult this sheet until you become familiar with the form. For further information concerning this form or other methods of communication with the Bureau of Prisons or the Parole Commission, please contact the U.S. probation office in your district.

About the Federal Judicial Center

The Center is the research and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and six judges elected by the Judicial Conference.

The Court Education Division provides educational programs and services for non-judicial court personnel such as probation officers and clerk's office personnel.

The Judicial Education Division provides educational programs and services for judges. These include orientation seminars and special continuing education workshops.

The Planning & Technology Division evaluates, designs, and tests new technology applications and processes, especially computer systems, to support the Center's educational and research activities. The division also contributes to the training required for the successful implementation of technology in the courts.

The Publications & Media Division is responsible for the development and production of educational audio and video media as well as editing and coordinating the production of all Center publications, including research reports and studies, educational and training publications, reference manuals, and periodicals. The Center's Information Services Office, which maintains a specialized collection of materials on judicial administration, is located within this division.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system.

The Center also houses the Federal Judicial History Office, which was created at the request of Congress to offer programs relating to the history of the judicial branch and to assist courts with their own judicial history programs.

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