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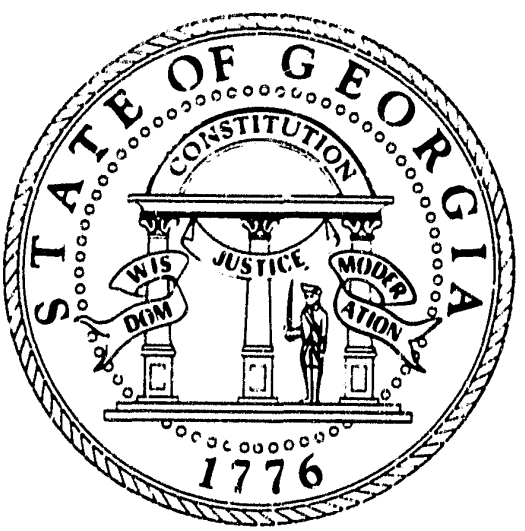

UTILIZATION OF THE SPLIT SENTENCE AND SHOCK PROBATION AS SENTENCING ALTERNATIVES AND IMPLICATIONS FOR THEIR EXPANDED USE IN GEORGIA

by

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"While the judge must not allow public or private demands for vindictive punishment to sway him toward undue severity, he must not, on the other hand, allow the advanced thought of science to sway him toward a degree of clemency that might shock the public conscience and bring the process of law into disrespect."

Glueck, 1933

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Any omission of deserving individuals or organizations is purely an oversight. If anyone who assisted in this study has been omitted from this acknowledgment, the author offers apology and extends appreciation.

"Every sentence imposed sends a man on an unknown journey: and the Court, if it possesses any vision of justice, must provide a reason for that journey. It must seek to impose a sentence that balances the punitive demands of society with the rehabilitative needs of the defendant. Granted, frequently these are contradictory goals - sometimes almost impossible ones - yet both aspects must be considered and somehow achieved . . .[T]he needs of society requires some form of punishment that will jolt him back into reality. Unfortunately, the only way this Court knows of impressing him with the seriousness of his act is to impose some form of incarceration, a 'taste of jail.' In addition to a. . . period of jail, this Court is equally convinced that such a sentence would be meaningless unless immediately followed by. . . [a] period of judicial supervision."

Judge Louis Wallach in
People v. Warren
360 N.Y.S. 2d at 965 (1974)

EXECUTIVE SUMMARY

When an offender is found guilty of a crime, there is usually a certain degree of latitude in the imposition of a sanction. Such latitude provides the judiciary with the discretion to consider the interests of society and the interests of the offender and to impose a penalty which best serves both interests. In most instances of serious crimes, the choice is between incarceration or probation.

The split sentence, incarcerating the offender for part of his sentence, suspending the remainder and placing him on probation, can serve as a viable alternative to the prison versus probation dilemma. The split sentence attempts to combine the advantages of probation with some of the advantages of incarceration. On the one hand, it attempts to avoid the long-term prison commitment and subsequent hardening of attitudes while at the same time providing constant supervision for a short period of time. It is an alternative designed to contribute toward meeting the goals of the criminal justice process - the protection of society, deterrence of the criminal through punishment and offender rehabilitation.

Utilization of the split sentence became a formalized federal practice with the passage in 1958 of the Federal Split Sentence statute (18 U.S.C.A. Sec. 3651). Under this law, an offender could be sentenced to a period of up to six months of incarceration in a jail-type institution to be

followed by probation. Use of this disposition accounted for 5.6% of all convicted defendants who were sentenced in U.S. District Courts in FY 1976.

At the state level, California was the first state to authorize a split sentence when, in 1927, it enacted a statutory provision permitting imprisonment in a county jail as a condition of probation. Since that time, all of the states except three have enacted statutory provisions authorizing some form of split sentence. (This report takes an especially close look at utilization of the split sentence in California, Ohio and Kentucky.)

In general, the split sentence may be authorized in one or more of the following ways:

A. The court may suspend the imposition or execution of the sentence in part and place the defendant on probation after service of a designated period of confinement.

B. The court may impose a period of imprisonment as a condition of probation.

C. The court may modify or reduce a sentence within a specified period of time.

D. The court may commit an offender, prior to sentencing, to a state or other diagnostic facility for diagnosis and recommendation for sentence.

E. The court may re-sentence an offender, who is already serving a term of imprisonment, to a period of probation.

All things considered, it is the majority opinion of those persons associated with split sentence programs in the United States, at the federal and state levels, that this option is a workable and effective sentencing alternative in dealing with certain offenders. The major argument regarding the split sentence, besides any philosophical argument against its use, relates to a critical analysis of its administration and the general lack of evaluation of its effectiveness.

Throughout its history as a sentencing alternative, the split sentence has been subject to judicial interpretation. Although split sentence provisions have been upheld in federal and state courts, such a disposition might or might not be upheld in the absence of a specific statute or legislative intent. (This report examines the many issues relative to the split sentence that the judiciary have ruled on and closely examines the fairly extensive judicial construction that has been given to the Ohio shock probation statute.)

Utilization of the split sentence represented 3.3% of all convicted defendants sentenced in Georgia District Courts in FY 1976. An analysis of the data on its usage clearly indicates that it has been utilized in Georgia as an alternative to longer periods of incarceration and not as an alternative to probation.

Shock probation programs (a form of split sentence) presently are utilized in three of Georgia's correctional institutions. The most frequently used program involves

taking a probationer, who is on the verge of having his probation revoked, to an institution for a period of time and allowing him to go through a mock entry into the institution as well as seeing the functions of the institution during the day. The goal of the program is to make these offenders more aware of the realities of imprisonment and in so doing encourage them that it is more beneficial for them to abide by their conditions of probation than to risk revocation and subsequent imprisonment.

The vast majority of Georgia correctional personnel (Probation/Parole Supervisors, Institution Superintendents, etc.) feel that such a program can serve as an effective deterrent Moreover, it will lessen the chances of recidivism, strengthen the concept of outside supervision and be of particular benefit to young offenders, first offenders and other offenders who have not spent any time in prison and who are having difficulty adjusting to the conditions of their probation.

It is felt that the overall success of split sentence and shock probation programs in Georgia will depend, to a large degree, on a close liaison between the court, the institution and the probation office. If these programs continue to contribute toward a reduction in the revocation of probationers, *the monetary savings can be substantial because the costs of incarceration are far in excess of the costs of supervision*. Furthermore, the programs can act as deterrents to future criminal activity, and in so doing

contribute to a relieving of the problem of overcrowding in the institutions.

Concluding that the split sentence can provide a very viable alternative to the judiciary when sentencing offenders to a correctional facility for an extended period of time or immediately placing them on probation would be inappropriate, this report makes the following major recommendations:

I. THAT UTILIZATION OF THE SPLIT SENTENCE BE EXPANDED IN GEORGIA TO INCLUDE AN ARRAY OF OPTIONS

   A. The Traditional Split Sentence

   B. Post-Incarceration Probation

   C. Pre-Sentence Diagnostic Referral

   D. Imposition of a Period of Imprisonment as a Condition of Probation

-THAT SHOCK PROBATION PROGRAMS BE EXPANDED INTO ADDITIONAL APPROPRIATE GEORGIA CORRECTIONAL INSTITUTIONS

-THAT A TASK FORCE BE ESTABLISHED, CONSISTING OF THOSE PARTIES WHO WILL AFFECT AND BE AFFECTED BY SUCH A PROPOSED COURSE OF ACTION, TO DEVELOP STATUTORY LEGISLATION AND PROGRAM OPERATING POLICIES AND PROCEDURES

-THAT EVALUATIVE MECHANISMS BE BUILT INTO ALL SPLIT SENTENCE AND SHOCK PROBATION PROGRAMS THAT ARE CREATED OR MODIFIED THROUGH THE ACTIONS OF THE TASK FORCE SO THAT THE EFFECTIVENESS OF SUCH PROGRAMS CAN BE MEASURED

II. THAT THE JUDICIARY AND DEPARTMENT OF OFFENDER REHABILITATION BECOME MORE ACTIVE IN PROVIDING THE PUBLIC WITH INFORMATION ON CORRECTIONAL PROGRAMS, SUCH AS SHOCK PROBATION

-THAT THE DEPARTMENT OF OFFENDER REHABILITATION DEVELOP A MEDIA PRESENTATION WHICH EXPLAINS THE SHOCK PROBATION PROGRAM BY SHOWING EXCERPTS OF ALL FACETS OF THE PROGRAM FOR TRAINING AND EDUCATIONAL PURPOSES

III. THAT PRE-SENTENCE REPORTS, IN GENERAL, BE REQUIRED IN GEORGIA AS A GUIDE IN SENTENCING DECISIONS

IV. THAT COMPREHENSIVE STATEWIDE DATA ON SENTENCING DISPOSITIONS OF DEFENDANTS CONVICTED IN GEORGIA STATE COURTS BE DEVELOPED

AUTHOR'S NOTE

Since the split sentence, by definition, is a sentencing alternative to be used by the court, the major user group of this document is seen to be the judiciary. The material herein contained can acquaint unfamiliar judges with the various forms of the split sentence and the judicial interpretation that certain facets of this disposition have received. Moreover, the enumeration of relevant federal and state case law contained in Appendix C can be utilized to document precedent if and when certain aspects of the split sentence receive future scrutiny by the courts and hopefully will result in a substantial savings that would otherwise be expended on legal research into this area of the law. For similar reasons, the Office of the Attorneys General of the states is also seen to be a major user group of this document.

Additionally, the statutory provisions which authorize a split sentence, as listed in Appendix B, can be examined by other states (Legislatures, Task Forces, etc.) and, where appropriate, used as models for any contemplated changes in statutes of this type. It is felt that the compilation of these relevant statutory provisions in Appendix B will result in a substantial savings on research that would otherwise have been required in this regard.

The state Departments of Correction can similarly use the information in this report if they desire to programmatically adopt shock probation as a workable program in their jurisdiction. Furthermore, the comprehensive Bibliography of material relating to the split sentence, compiled for this report, can be utilized by future researchers in this field.

"In my opinion, this legislative grant of power [empowering the court, as a condition of probation, to exact county jail incarceration] was merely an attempt to place in the hands of the trial court, additional options in handling the criminal who is not entitled to clear probation, but is also not entitled to state prison incarceration."

from Judge Jacobson's dissent in State v. Fuentes 549 P. 2d at 232 (Arizona, 1976)

INTRODUCTION

The use of probation in the United States, as an alternative to incarceration in certain cases, began in Massachusetts in the late 1800's. By 1915, 33 states authorized its use and in 1925 Congress authorized probation in the federal courts. Every state, by 1957, had enacted a probation law which applied to adult offenders. (Emory Law Journal, 1975)

The granting of probation attaches conditions to the continued freedom of the probationer, and these conditions are generally the standards against which that freedom and definitions of successful or unsuccessful probation are measured. Conditions of probation generally may be divided into general and specific, or special, conditions. General conditions are applicable to all probationers, and special conditions may be imposed in a given case. (Carter, et.al., 1975)

The traditional definition of probation as a disposition which allows a convicted person to remain at liberty in the community subject to his meeting certain conditions and requirements has, over time, been modified in certain instances to include a period of incarceration as a condition of probation. This practice of combining a jail or prison sentence with a period of probation had its origin in Belgium in 1883 and has been used for many years in the United States by some federal and state judges. [For use in this report, the terms combination sentence, split sentence, mixed

sentence, and jail as a condition of probation are to be considered synonymous except where indicated to the contrary.]

Neither probation nor incarceration by itself may be a viable or effective approach to crime control. Although the success rate of offenders on probation is relatively high, probation may not have been the appropriate sanction for those offenders who do not succeed on it. These "failures" may have needed the prison experience, treatment or supervision; their experience and background may have required more structure than the minimal contact afforded through straight probation. (Friday, et.al., 1974)

The split sentence attempts to combine the advantages of probation with some of the advantages of incarceration. On the one hand, it attempts to avoid the long-term prison commitment and subsequent hardening of attitudes while at the same time providing constant supervision for a short period of time. It is an alternative designed to contribute toward meeting the goals of the criminal justice process - the protection of society, deterrence of the criminal through punishment, and offender rehabilitation.

The rationale behind this technique is to "shock" the offender into becoming fully aware of the harsh realities of prison life, including the rigors of the prison culture, the loss of freedom, the separation from family and friends, etc. Thus, the shocking experience of a short prison term should serve to motivate him to successfully abide by the

conditions of his probation and act as a deterrent to further crimes since, theoretically, a man is less likely to commit an act when he knows that it will lead to unpleasant consequences for himself.

Most of the arguments supporting or criticizing the use of the split sentence seem to be based on the philosophical or practical implications of its use, rather than on data from actual experience. However, the arguments do have implications for the circumstances under which such sentences might be expected to be most successful. (Angelino, 1975)

Arguments in opposition to the split sentence include the following issues:

-Prison and probation are dispositions which should not be mixed since a person should either be eligible or ineligible for probation. (Campbell, 1960; Scudder, 1959; Chandler, 1950; Chappell, 1947)

The National Advisory Commisson on Criminal Justice Standards and Goals (1973) recommends that the practice of the split sentence be discontinued because it defeats the purpose of probation.

Barkin (1962) summarizes this position well when he states that:

> "once having determined that a person can be trusted to remain in the community and can benefit most under community supervision, no appreciable benefits can be derived from committing the offender to a short period of incarceration."

-The split sentence may be misused. Judges may be tempted to use the mixed sentence as a means of convincing the community that they do not "coddle" criminals. In so doing, many offenders who could benefit from probation might be given short term incarceration needlessly. (Beran and Allen, 1973)

-The period of incarceration may only serve to integrate the naive offender into a community of hardened criminals, make him resentful, harden any hostile attitudes toward the judicial process, and negate any chance he might have of rehabilitation. (Bohlander, 1973)

-Rudnick's study (1970) on the impact of a prison sanction indicated that the impact was strongest on the young first offender where the peak influence was noted to be one to two months for 81.9 percent. He concluded that short-term sentencing as punishment for the first offender is effective for six months, but under such conditions no rehabilitation appears to have been made.

-A short period of confinement is a disruptive force, serving to interfere with successful probationary treatment by disrupting employment, family, and residential patterns along with the resultant stigma that is attached to one who has "done time." (Carter, et.al., 1975; Doyle, 1953; Chappell, 1947)

-In many cases, the shock of arrest and conviction or the period during which the defendant is confined while awaiting trial, if he has not been released on bail, may be a sufficient "shock" to achieve the desired result of disenchanting offenders from future illegal behavior. (Attorney General's Survey, 1939)

Arguments in support of the split sentence include the following issues:

-The split sentence allows more flexibility to the sentencing judge, who can more accurately fit the severity of the penalty to the particular circumstances of the crime and the offender. (Denton, et.al. 1971) Moreover, the judge may not wish to lose control over the particular case, which would be the result in most cases if a final commitment to an institution were made. (Attorney General's Survey, 1939)

In California, judges may give probation with a jail term to individuals who were on the borderline of either a straight jail term or a prison term. These judges feel that it has a salutary effect on some probationers, so that the combined effect of jail and post-jail supervision insures greater likelihood of success than supervision alone. (Dwoskin, 1962)

-Imposition of a period of imprisonment for certain offenses can exhibit the "seriousness" with which the courts view such violations. (Remington and Newman, 1962)

"On balance, . . . the split sentence statute has been used with reasonable discretion during its seventeen years' existence. While it may have resulted in a few offenders being committed for a brief period whereas outright probation may have been more appropriate, it has undoubtedly brought about shorter periods of actual confinement in situations where the sentencing judge feels compelled to impress upon the offender the force of the law." (Federal Judicial Center, 1976)

-It is difficult and perhaps unrealistic to expect some probationers to make behavioral changes if they do not understand the alternatives to probation - county jail or prison - as most probationers have not had this experience. (Fifth Judicial District, 1973; Jayne, 1956)

-Short term incarceration is reassuring to members of the community who feel that punishment is an important aspect of a penal system, since prison time followed by probation is readily perceived as more punitive than probation alone. Furthermore, citizens may feel better protected against the antisocial tendencies of the felon, if he is removed from society for some time, and if it is believed that he will not be released unless there is a fair probability that he can handle the responsibilities of freedom. (Chappell, 1947)

-A Danish study of short term prisoners (Bernsten and Christiansen, 1965) found that the incidence of recidivism increased with the length of sentence and concluded that short-term incarceration may be effective as a sanction, but only under special circumstances, for certain types of offenders, and when it is utilized as the first step in the process of resocialization.

-*Prison/jail overcrowding can be ameliorated by earlier release on probation* of offenders not immediately qualified. Also, certain types of offenders (some mentally disturbed offenders, alcoholics undergoing "drying out," and narcotics users experiencing withdrawal) could be helped by personal contact during a short period of jail confinement. (Johnson, 1974)

-*Monetary savings are associated with shorter periods of incarceration*. Therefore, the economic cost of a split sentence would have to lie somewhere between the cost of prison sentences (most expensive - $3,858 per inmate per year or $10.57 per inmate per day in Georgia during FY 1977) and immediate probation (least expensive - $145 per probationer per year or $0.40 per probationer per day in Georgia during FY 1977).

-The Model Penal Code developed by the American Law Institute in 1962 addresses the split sentence as follows:

Sec. 301.1(3)

"When the Court sentences a person who has been convicted of a misdemeanor to be placed on probation it may require him to serve a term of imprisonment not exceeding 30 days as an additional condition of its order. The term of imprisonment imposed hereunder shall be treated as part of the term of probation, and in the event of a sentence of imprisonment for the revocation of probation, the term of imprisonment served hereunder shall not be credited toward service of the subsequent sentence."

The American Bar Association's 1968 Standards Relating to Sentencing [illegible] the concept of the split sentence:

Sec. 2.4 Partial confinement.

"(a) Attention should be directed to the development of a range of sentencing alternatives which provide an intermediate sanction between supervised probation on the one hand and commitment to a total custody institution on the other and which permit the development of an individualized treatment program for each offender. Examples of the types of dispositions which might be authorized are:

(iii) commitment to an institution for a short, fixed term, followed by automatic release under supervision."

There is little evidence to suggest that any form of treatment, or the imposition of any penal sanction, serves to reduce recidivism among any group of offenders to any significant degree. Arguments for and against use of split sentencing notwithstanding, it is clear from the literature that rigorous evaluations are needed to statistically document the effectiveness, or lack thereof, of the split sentence as a sentencing alternative.

"I often find a young man, not really a criminal at heart, but who needs a firm and decided check . . . A few days or weeks of confinement, with nothing to do but think. . . does far more to bring him to his senses, and to impress his companions, than any other thing will. If several months of such a sentence could be kept suspended over him afterwards, while on an informal five-year probation, it would practically insure his good conduct . . . Again, probation after partial service would solve many problems of needy dependents that now distress the judge."

Judge Sibley in Archer v. Snook
10 F 2d at 570 (D.C. 1926)

UTILIZATION OF THE SPLIT SENTENCE IN THE UNITED STATES

Utilization of the Split Sentence at the Federal Level

Despite opposing arguments (see Introduction pp. 3-5) and, as Bohlander (1973) points out, without any rigorous scientific evaluation of its effectiveness, the 85th Congress passed, in 1958, Public Law 85-741 [18 U.S.C.A. Sec. 3651] (see Appendix A) which authorized a split sentence of up to six months incarceration in a jail-type institution followed by probation. In this manner, the offender could remain in his local community while, at the same time, experience the negative aspects of incarceration.

This statutory provision authorized the split sentence as a disposition upon conviction of an offender for as few as one count. Previously, offenders convicted on two or more counts could be sentenced to a period of incarceration on one count followed by a period of probation on the other count(s).

An additional technique available in the federal courts is the statutory procedure [18 U.S.C.A. Sec. 4208 (b)] by which the court may commit a prisoner while a study is being made (which must be finished in at most six months) and thereafter the court may impose any lawful sentence, including probation. Furthermore, under Rule 35 of the Federal Rules of Criminal Procedure, the court may reduce

TABLE I

UNITED STATES DISTRICT COURTS

TYPE AND LENGTH OF SENTENCE OF CONVICTED DEFENDANTS

FISCAL YEAR	TOTAL CONVICTED DEFENDANTS		IMPRISONMENT		SPLIT SENTENCE		PROBATION		SUSPENDED SENTENCE		FINE ONLY	
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
1976	40,112	100%	16,220	40.4%	2,258	5.6%	18,208	45.4%	228	0.6%	3,198	8.0%
1975	37,433	100%	14,986	40.0%	2,315	6.2%	17,913	47.8%	343	1.0%	1,876	5.0%
1974	36,230	100%	14,280	39.4%	2,900	8.0%	16,623	45.9%	349	1.0%	2,078	5.7%
1973	37,256	100%	15,764	42.3%	3,137	8.4%	15,471	41.5%	1,004	2.7%	1,880	5.0%
1972	39,585	100%	15,819	40.0%	2,562	6.5%	15,545	39.3%	3,399	8.6%	2,260	5.7%
1971	32,103	100%	12,227	38.1%	2,152	6.7%	12,655	39.4%	3,280	10.2%	1,789	5.6%
1970	28,178	100%	11,071	39.3%	1,344	4.8%	10,796	38.3%	3,032	10.8%	1,935	6.9%
1969	26,803	100%	11,535	43.0%	1,312	4.9%	9,408	35.1%	2,866	10.7%	1,682	6.3%
1968	25,674	100%	11,347	44.2%	1,241	4.8%	9,257	36.1%	2,013	7.8%	1,816	7.1%
1967	26,344	100%	11,865	45.0%	1,220	4.6%	8,802	33.4%	2,164	8.2%	2,293	8.7%
1966	27,314	100%	11,899	43.6%	1,383	5.1%	9,648	35.3%	2,028	7.4%	2,356	8.6%
1965	28,757	100%	12,401	43.1%	1,267	4.4%	10,257	35.7%	2,355	8.2%	2,477	8.6%

Source: Federal Offenders in United States District Courts reports and supplementary data furnished by the Administrative Office of the United States Courts.

a sentence within 120 days of its imposition or affirmation. (See Appendix A, pg. 81)

Utilization of the split sentence in the federal courts (Table I) accounted for 5.6% of all convicted defendants who were sentenced in FY 1976. The statistics clearly indicate that use of the split sentence peaked in FY 1973 when it accounted for 8.4% of defendants sentenced. Since that time, its use has steadily declined. Mr. Wayne P. Jackson, Chief, U.S. Federal Probation feels that the following factors have contributed to the decline in use of the split sentence: the trend toward longer sentences - some judges feel the six months is inadequate and recommend lengthening it up to a year; an increasing awareness of the inadequacy of local confinement facilities; and a decrease in the type of offenses that had been given split sentences in the past (i.e., selective service).

Utilization of the Split Sentence at the State Level

California seems to have been the first state to authorize a split sentence when, in 1927, it enacted a statutory provision permitting imprisonment in a county jail as a condition of probation. A few years later, in 1931, the Michigan legislature authorized courts to impose a sentence of not more than 60 days in the county jail as a condition to the probation order. This statute seems to have been prompted by a judicial decision [People v. Robinson, 253 Mich. 507, 235 N.W. 236 (1931)] which ruled that a condition of probation requiring service of a jail sentence was unauthorized.

Since that time, all of the states, with the exception of Alabama, Minnesota and North Dakota have enacted statutory provisions authorizing some form of a split sentence. (See Appendix A for the text of the relevant portions of each state's statute which authorize a split sentence.)

Table II summarizes the major descriptive characteristics of each state's split sentence statute(s). (In most states, an offender must meet the criteria for probation in order to be considered eligible for a split sentence.) In general, the split sentence is authorized in two basic forms with the confinement portion of the sentence almost always preceding probation.

In a majority of states, the court may <u>suspend</u> the imposition or <u>execution of the sentence</u>, in whole or <u>in part</u>, and place a defendant on probation upon such terms and conditions as the court deems proper. In these instances, the court sets a fixed period of and place for confinement. (Of all the states which authorize a disposition of this type, South Carolina and Florida are the only ones with statutes whose language does not explicitly provide for the split sentence. However, the courts in South Carolina and Florida have uniformly interpreted their statutes as authorizing a split sentence.)

In another large group of states, the court can <u>impose a period of imprisonment as a condition of probation</u>. In these cases, the statutory provision usually states the

TABLE II

SYNOPSIS OF STATE STATUTES AUTHORIZING A SPLIT SENTENCE

State	Condition of Probation	Period/Place of Confinement	Other Relevant Characteristics; Additional Options, etc.
Alaska		to be determined by the court	
Arizona	Yes	not to exceed one year; county jail	An additional option available to the court is that it can refer defendants, prior to sentencing, to the diagnostic facilities of the Department of Corrections (which will accept them only when adequate staff and facilities are available) for diagnosis and recommendation which must be sent to the court within 90 days. In such cases, the county of conviction is responsible for transportation and security of the defendant to and from the diagnostic facility.
Arkansas	Yes	not to exceed 90 days for a felony or 30 days for a misdemeanor; county jail, city jail or other local facility	Time served as a condition of probation will be credited on any sentence of imprisonment imposed upon revocation of probation.
California	Yes	to be determined by the court; county jail, road camp or other place of public work	An additional option available to the court, in instances where offenses are punishable by imprisonment in the state prison, is that it can refer defendants, prior to sentencing, to the diagnostic facilities of the Department of Corrections (which will accept them only when adequate staff and facilities are available) for diagnosis and recommendation which must be reported to to the court within 90 days (unless an extension is granted). The county of record is responsible for the expenses of the sheriff in transporting the defendant to and from the diagnostic facility. Any time served under this option is credited on a term of imprisonment imposed at sentence.
Colorado	Yes	not to exceed 90 days for a felony, 60 days for a misdemeanor or 10 days for a petty offense; county or city jail	
Connecticut		to be determined by the court	
Delaware		to be determined by the court	This option is authorized only for offenses other than class A felonies
Florida		to be determined by the court	This option is not authorized for capital felonies. The court may also impose a period of imprisonment as a condition of probation.
Georgia		to be determined by the court	This option is not authorized for offenses punishable by death or life imprisonment. 1) An additional option available to the court is that during the interval between the conviction or plea and a hearing to determine probation, the court may order confinement of the defendant without bond. 2) The sentencing judge does not lose jurisdiction over the defendant during the term of probation.
Hawaii	Yes	not to exceed six months	

State	Condition of Probation	Period/Place of Confinement	Other Relevant Characteristics; Additional Options, etc.
Idaho		defendant may be placed on probation at any time during service of a sentence in the county jail, or within 120 days (which may be extended an additional 60 days) for those sentenced to the custody of the State Board of Corrections	This option is not authorized for the offenses of treason and murder.
Illinois	Yes	not to exceed six months; not in a facility of the Department of Corrections.	
Indiana		not to exceed six months	This mechanism is done on the courts own motion and after review of the diagnostic report by the Department of Corrections. The court may also modify a sentence by reducing it anytime within 180 days after imposition of the sentence.
Iowa		to be determined by the court	Additionally, the court may modify the sentence for a felony, other than a class A felony or a felony requiring a minimum sentence of confinement, within 90 days after service of the sentence begins or within 30 days for a misdemeanor.
Kansas		to be determined by the court; Department of Corrections if confinement is for more than one year, jail if less than one year	1) An additional option available to the court, in cases where the death sentence is not imposed, is to commit a defendant to the Kansas reception and diagnostic center, for a period not to exceed 120 days, for a pre-sentence investigation and report. 2) The court may also modify and/or reduce a sentence within 120 days after it is imposed.
Kentucky	Yes	not to exceed six months; county jail	An additional option available to the court is "shock probation" where an inmate may be released on probation after serving a period of 30 - 130 days in prison. Shock probation is not permitted if the offense involved use of a firearm. (See discussion).
Louisiana	Yes	not to exceed one year, without hard labor, for a felony	Additionally, the court may grant probation after complete or partial service of a sentence for a misdemeanor except criminal neglect of family.
Maine		to be determined by the court, however, if it will be served in the State Prison it is not to exceed 90 days	
Maryland		to be determined by the court	The court may also modify and/or reduce a sentence within 90 days after its imposition. After that time, revision may be done only in case of fraud, mistake or irregularity.
Massachusetts		to be determined by the court	If the sentence is to imprisonment, this option is not authorized for crimes punishable by death or life imprisonment; if the sentence is to fine and imprisonment, it is not authorized for crimes punishable by life imprisonment, crimes committed when armed with a dangerous weapon, or if the defendant has been previously convicted of a felony.

State	Condition of Probation	Period/Place of Confinement	Other Relevant Characteristics: Additional Options, etc.
Michigan	Yes	not to exceed six months; county jail or house of correction	An additional option available to the court is to place youthful offenders, under 22 years of age, convicted of crimes for which a sentence in the state prison may be imposed, in a Department of Corrections probation camp for a period not to exceed one year.
Mississippi		to be determined by the court	The split sentence is only authorized for misdemeanor cases.
Missouri		to be determined by the court	The option is only available to magistrates in certain counties.
Montana	Yes	not to exceed 90 days; jail. However, if it will be served in a facility of the Dept. of Corrections, the length will be determined by the court	
Nebraska	Yes	intermittent, but not to exceed 90 days; county jail	
Nevada		to be determined by the court	
New Hampshire		to be determined by the court	
New Jersey		to be determined by the court; county jail or workhouse	
New Mexico		to be determined by the court	This option is available for crimes for which a sentence of imprisonment is authorized.
New [illegible]		not to exceed 60 days	Restricted to misdemeanors or class E or D felonies. Another option available to the court is to commit an offender under 21 years of age, as a condition of probation, to a Division of Youth facility for a period not to exceed [illegible] years.
North Carolina		not to exceed six months if served in a facility of the Department of Corrections or not to exceed 30 days if served in a local confinement facility	This option is only available for offenses carrying maximum prison sentences of 10 years or less; the defendant has not served an active sentence within the previous five years; and where his background indicates that a suspended sentence should be imposed. Any time served under this option will be credited on any sentence of imprisonment imposed upon revocation of probation. An additional option available to the court is that it may impose, as a condition of probation, that a probationer, within the first 30 days of his probation, visit with his probation officer, a prison unit of the Department of Corrections for a tour so that he may better appreciate the consequences of probation revocation.
North Dakota		to be determined by the court; felonies will be served in a state facility, misdemeanors in a county or regional facility	This option may only be utilized prior to the time custody of an offender is transferred to a penal institution, except in the case of a misdemeanor where it may be done prior to or during the service of the sentence. An additional option available to the court is that it may order a defendant, prior to sentencing, to an appropriate licensed public or private institution for diagnostic testing for a period not to exceed 30 days (which may be extended another 30 days by the court).

State	Condition of Probation	Period/Place of Confinement	Other Relevant Characteristics; Additional Options, etc.
[illegible]		[illegible] jail	"Shock probation" (see discussion). This option is not authorized for certain drug abuse offenses.
[illegible]		to be determined by the court	This option cannot be imposed when an offender receives the death sentence or a third or subsequent felony conviction.
[illegible]	Yes	not to exceed one year; county jail	Any time served as a condition of probation will be credited on any sentence of imprisonment imposed upon revocation of probation.
[illegible]		to be determined by the court	This option is not authorized where a mandatory minimum sentence is prescribed by law.
[illegible] Island		to be determined by the court	This option is not authorized in instances where suspension of sentence is prohibited by law.
South Carolina		to be determined by the court	This option is not authorized for crimes punishable by death or life imprisonment.
Tennessee		minimum of 30 days; county jail or workhouse	
Texas	Yes	not to exceed 10 years	Any time served as a condition of probation will be credited on any sentence of imprisonment imposed upon revocation of probation.
Utah		to be determined by the court	
Vermont		to be determined by the court; facility of the Department of Corrections	
Virginia		to be determined by the court	If the sentence is to jail for a misdemeanor or felony, sentence may be suspended and probation granted at any time during service of the sentence. If sentence is to the penitentiary for a felony, sentence may be suspended or modified within 21 days from the date of entry of the order.
Washington	Yes	not to exceed one year; county jail	
West Virginia		not to exceed 30 days for courts of record; minimum of 10 days for other courts	
Wisconsin	Yes	confinement between hours of employment for a period not to exceed one year; county jail	
Wyoming		not to exceed 120 days	The court, under this option, may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after affirmance of the judgment or dismissal of the appeal.

maximum period of confinement that is permissible (usually under six months or one year) and the place (local, state or other confinement facility) where the imprisonment will or will not occur.

Certain states, either singularly (Wyoming), or in addition to other statutory provisions authorizing a split sentence (i.e., Indiana, Iowa, Kansas, Maryland), allow the court to modify or reduce a sentence within a specified period of time (usually one, three, four or six months). By this procedure, a split sentence can also be effectuated.

An additional procedure which authorizes a split sentence is the option, in Arizona, California, Kansas and North Dakota, by which the court can commit an offender, prior to sentencing, to a state or other diagnostic facility for diagnosis and recommendation for sentence. (The period of confinement in these instances ranges from one month to four months depending upon the particular statute.)

Finally, the "shock probation" statutes of Ohio, Kentucky and Texas authorize the split sentence by permitting the court to resentence an offender, who is already serving a term of imprisonment, to a period of probation. (The maximum period of confinement under these statutes is supposed to be 130 days in Ohio and Kentucky, 120 days for felonies in Texas, and 90 days for misdemeanors in Texas.)

California: Utilization of Jail as a Condition of Probation

California exceeds all states in the use of jail as a condition of probation. The data presented in Table III

TABLE III

CALIFORNIA SUPERIOR COURT FELONY DISPOSITIONS

Calendar Year	Total Convicted Defendants	Death	Prison	Youth Authority	Probation	Probation And Jail	Jail Only	Fine	CRC*	Mental Hygiene
1976** Number	35,238	15	5,953	1,716	5,994	16,693	1,776	187	1,356	744
Percent	100%	0.1%	17.8%	5.1%	17.0%	49.5%	5.5%	0.6%	4.0%	0.6%
1975 Number	35,416	19	5,157	1,572	7,731	17,381	1,924	133	1,248	255
Percent	100%	0.1%	14.6%	4.4%	21.8%	49.1%	5.4%	0.4%	3.5%	0.7%
1974 Number	38,407	9	5,628	1,541	8,566	17,736	2,114	220	1,917	286
Percent	100%	0.0%	14.8%	4.1%	22.5%	46.7%	5.6%	0.6%	5.0%	0.7%
1973 Number	42,672	8	5,826	1,505	13,688	16,196	2,849	230	2,026	352
Percent	100%	0.0%	13.7%	3.5%	32.1%	38.0%	6.7%	0.5%	4.7%	0.8%
1972 Number	49,324	4	5,660	1,515	17,606	17,318	4,062	436	2,084	339
Percent	100%	0.0%	11.5%	3.1%	35.7%	35.1%	8.2%	0.9%	4.2%	0.7%
1971 Number	56,018	22	5,386	1,973	21,738	17,703	5,771	704	2,350	371
Percent	100%	0.0%	9.6%	3.5%	38.8%	31.6%	10.3%	1.3%	4.2%	0.7%
1970 Number	49,950	19	5,006	1,873	19,249	14,564	6,118	988	1,903	230
Percent	100%	0.0%	10.0%	3.8%	38.5%	29.2%	12.2%	2.0%	3.8%	0.5%
1969 Number	50,568	9	4,951	2,197	19,470	13,718	7,020	1,112	1,855	256
Percent	100%	0.0%	9.8%	4.3%	38.5%	27.1%	13.9%	2.2%	3.7%	0.5%
1968 Number	49,477	19	5,473	2,056	13,536	11,524	5,285	919	1,389	278
Percent	100%	0.0%	11.1%	4.1%	33.4%	28.5%	13.1%	2.3%	3.4%	0.7%
1967 Number	34,683	18	5,972	1,993	11,079	9,265	4,335	570	1,125	265
Percent	100%	0.1%	17.2%	5.7%	32.0%	26.7%	12.5%	1.6%	3.4%	0.8%
1966 Number	32,000	29	6,711	1,831	9,883	6,871	4,777	596	961	350
Percent	100%	0.1%	21.0%	5.7%	30.9%	21.5%	14.9%	1.8%	3.0%	1.1%

*Narcotics Treatment Center
**There were an additional 17 dispositions classified as "Other" in 1976 which represented 0.1%

SOURCE: California Bureau of Criminal Statistics

clearly indicate the extent of its use - approximately 50% of all California Superior Court felony dispositions in FY 1976 received jail as a condition of probation.

Commenting on the use of this disposition, the Probation Task Force of the 1971 California Correctional System Study on Probation and Parole Field Services took the position that many offenders given jail as a condition of probation could be placed on straight probation without seriously jeopardizing the safety of the community. Furthermore, they felt that minimizing the use of jail as a condition of probation would result in substantial savings since the estimated average per capita annual cost (in 1968) for successful cases on straight probation was $247, while the cost ranged between $1,000 and $3,000 if jail was a condition of probation. (California Board of Corrections, 1971)

To examine the effectiveness of this technique, the California Division of Law Enforcement, Bureau of Criminal Statistics, conducted a follow-up study (one full calendar year from the time of the individual's release to the street on probation or following incarceration in jail) of 5,076 persons sentenced in superior court to probation, either straight or with a conditional jail sentence, and those sentenced to straight jail during the first six months of 1966. Included were all cases from twelve of the largest counties and 30% of the cases from Los Angeles County.

The significant findings of this study were:

I. Approximately 66% of those felons admitted to straight probation during the first six months of 1966 remained free from any further violation during their first year. In contrast, only 52% of those given probation and jail and 41% of those given straight jail remained violation free.

II. The length of probation sentence or length of jail sentence imposed did not appear to have an appreciable effect on subsequent violation history.

III. The three factors that exerted a strong influence on subsequent history were the defendant's age (younger defendants were more likely to commit additional crimes than were older offenders), prior level of criminality (as the seriousness of a defendant's prior record increased, so did his chance for further serious criminality), and race (non-white offenders generally exhibited the greatest proportion of major subsequent violations). (California Department of Justice, n.d.)

California: Pre-sentence Diagnostic Program

Since its enactment in 1957, criminal courts in California have an option (Cal. Penal Code Sec. 1203.03) of sending, prior to sentencing, an individual, convicted of an offense punishable by imprisonment, to the Department of Corrections for up to 90 days, for the purpose of obtaining a diagnostic evaluation and a recommendation for an appropriate sentence. (See Appendix B, pp. 85-86) An examination of this procedure by Dickover and Durkee (1974) pointed out that acceleration in the use of the Sec. 1203.03 commitment, over time, may reflect interest by the courts in the deterrent effects of a short period of imprisonment. This may be equal to or more than the courts' desire to obtain assistance in making decisions about sentencing.

Dickover and Durkee's study, done under the auspices of the California Department of Corrections, concludes that the diversionary achievements and potential of Sec. 1203.03 have considerable significance from the standpoint of savings in human costs and monetary costs. The authors calculated that monetary savings for the year 1970 amounted to more than $1,600,000. Moreover, this estimate did not include the costs for new construction that would have been necessitated by the greater number of commitments that would have entered the Department of Corrections in the absence of the Sec. 1203.03 option. Since prison populations have been generally increasing, this point is particularly significant.

Shock Probation in Ohio

In 1965, the Ohio legislature passed into law Section 2947.061 of the Ohio Revised Code (see Appendix B, p.114 for text of present statute) which has come to be known as "shock probation." (This occurred seven years after the implementation of the federal split sentence statute.)

Unlike the federal split sentence statute, shock probation is not part of the original sentence. This technique allows the court, after approval of a motion made by an inmate [all incoming inmates (felons and misdemeanants) are eligible to file a motion for early release], or by the court, to release an inmate on probation after 130 days or less of incarceration (a minimum of 30 days must be served under the statute).

The Ohio Adult Parole Authority (1971) describes the five positive functions that this alternative was thought to provide as follows:

I. A way for the courts to impress offenders with the seriousness of their action without a long prison sentence.

II. A way for the courts to release offenders found by the institution to be more amenable to community-based treatment than was realized by the courts at the time of sentence.

III. A way for the courts to arrive at a just compromise between punishment and leniency in appropriate cases.

IV. A way for the courts to provide community-based treatment for rehabilitable offenders while still observing their responsibility for imposing deterrent sentences where public policy demands it.

V. Shock probation affords the briefly incarcerated offender a protection against socialization into the "hard rock" inmate culture.

Friday and Petersen et al. (1974) and Bohlander (1973) however, point out that in the literature available regarding this technique, no mention is made of possible deleterious effects.

Denton et al. (1971) implied a series of guidelines for the use of shock probation:

(1) it is especially applicable to first offenders;

(2) it should not be used with convicts who had experienced numerous convictions;

(3) incarceration should be brief, preferably shorter than the 130 day limit;

(4) it should be denied to "potentially violent offenders, and narcotics addicts;"

(5) release under shock probation should be a surprise to the felon and should not be pre-arranged at the time of sentence.

Several problems, however, have been encountered in the utilization of shock probation to date. In some instances, judges were granting shock probation to inmates who had experienced numerous previous convictions. In other cases (approximately 17% of Friday and Petersen's 1970 shock probation sample), motions timely filed by inmates were not ruled upon by the court until after the expiration of the time limit set in the statute for ruling on the motion (a significantly larger percentage of the blacks released statewide under the shock probation statute were released after the 130 day limit). (Friday and Petersen et al., 1974) Additionally, the filing of shock probation motions by inmates has also resulted, in many instances, in overwhelming already overburdened courts. (Dinitz, 1977)

Moreover, in some cases, lawyers of convicted defendants may convince the defendant before he goes to prison that he is likely to be granted shock probation, or judges would tell offenders at the time of sentencing that if they filed motions for shock probation the court would give them favorable consideration. In such cases, the shock value of this technique may have either been negated or considerably lessened. (Friday and Petersen et al., 1974; McCarthy, 1976)

Furthermore, some prison officials may neglect to incorporate new prisoners into prison life until they are sure the prisoner is not likely to be granted shock probation. In such cases, rather than designate permanent living quarters, full-time jobs, etc., the prison officials merely hold the

individual until the hearing (if one is required by the court). The "shock" value again is limited in these instances as the defendants are not actually ingrained to incarceration. (McCarthy, 1976)

Scott and Kramer (1975) point out that most conclusions regarding shock probation have been laudatory regarding the principle but critical of its usage to date. With few exceptions, the judiciary sees this sentencing alternative as a workable and working solution to the problems of recidivism among first offenders. (Friday and Petersen et al., 1974) Moreover, the Ohio Adult Parole Authority credits the shock probation program as being one of the major reasons for reductions in the prison population thus reducing the cost to taxpaying citizens) in spite of the increased load of criminal cases on the state courts. (Benton et al., 1971)

Community-based correctional workers, in general, see it as an effective tool which "jolts" the naive offender into a more lurid perception of reality. However, it was the opinion of many probation officers that shock probation allowed the judges to "look tough" by incarcerating almost half of all convicted felons while later "quietly" releasing a substantial proportion of them on shock probation to satisfy "political obligations." (Friday and Petersen et al., 1974)

The staff of the various correctional institutions throughout the state were found to be generally unimpressed with the technique. Furthermore, inmate perception was felt

to be that the statute was designed to coerce them into good institutional behavior in the hope of attaining early release. (Friday and Petersen et al., 1974)

Several studies have been written examining the use and effectiveness of shock probation in Ohio. In one of the first of these, Denton et al. (1971) found that success on shock probation was associated with such factors as no previous felonies, intelligence, marriage and advancing age.

Friday and Petersen et al. (1974) conducted a statewide and countywide (Franklin County) study of offenders receiving shock probation. The sample in the statewide study included 61 of the 85 offenders granted shock probation in 1966, 485 of the 632 offenders granted shock probation in 1970 and the control samples drawn for these groups (cases eligible for shock probation under the law but not released). It was felt that this sample would be representative of the most frequent usages of the law, as well as providing a longitudinal view of its early implementation and its usage after the statute had become a somewhat institutionalized sentencing alternative.

The sample in the Franklin County study included all persons granted shock probation in 1970 plus all persons granted shock probation after 1970 whose pre-sentence reports were prepared in 1970. The total in this sample was 67 plus the control sample drawn for this group (a control group of regular probationers and a control group of institutionalized

individuals eligible for shock probation but not released under the statute).

The following characteristics were noted as being descriptive of those offenders receiving shock probation:

(1) disproportionately white;

(2) generally young - 22 to 26 years of age - but ranged upward to 69 years of age;

(3) of slightly higher socio-economic status, generally from middle and upper-middle class families;

(4) usually high school graduates, while many attended college;

(5) rarely had parents or siblings with criminal records;

(6) as likely to be married as single, but more were divorced than in the sample populations;

(7) more likely to have been convicted for fraud or narcotics violations than for property or personal offenses;

(8) usually were represented by privately-retained attorneys;

(9) generally received a recommendation for incarceration from the probation department;

(10) usually entered a plea of guilty; and

(11) generally had prior criminal records, but the majority had not previously been confined in an adult correctional institution.

The racial disparity in the granting of motions for shock probation has also been pointed out in other studies. Swingle (1972) in a survey of 216 shock probationers released from Lebanon Correctional Institution in 1969 and 1970 found that black inmates were less likely than whites to be granted

shock probation. Petersen and Friday (1975) in a sample of all persons granted shock probation at a medium security prison for male offenders between the ages of sixteen and thirty during 1970 (202) and a control sample of persons who were eligible but not released (373) also found that when other factors are considered equal, blacks have less chance of receiving shock probation than whites (white inmates were more than twice as likely to be released than black inmates).

One factor which may contribute toward this racial imbalance in granting shock probation under the statute is that black inmates have less access to private legal counsel or are generally less familiar with legal criteria. (Friday and Petersen et al., 1974) A second is that black inmates do not perceive their chances of being granted shock probation as being very great and as a result are less likely to file a motion for release under the statute. (Bohlander, 1973)

The Franklin County study of Friday and Petersen et al. found that those offenders granted shock probation who were considered successful generally:

(1) were between the ages of 18 and 22;

(2) were black more often than white;

(3) were married;

(4) were from lower-middle to upper class;

(5) were high school dropouts;

(6) had some parent or sibling criminality;

(7) were convicted of personal crimes;

(8) were recommended for probation by the probation department;

(9) were represented by private counsel; and

(10) had no prior criminal record.

It also found that those offenders who were granted shock probation who failed to complete probation generally:

(1) were 23 or 24 years old;

(2) were more often white than black;

(3) were found to be single and as often divorced;

(4) were of lower socio-economic status;

(5) had high levels of educational attainment;

(6) had no parent or sibling criminality;

(7) were convicted of narcotics-related offenses;

(8) were recommended for shock probation by the probation department;

(9) were represented by court-appointed attorneys; and

(10) had criminal records which included arrests and jail sentences.

In comparing the findings from the county study with those of the statewide study, Friday and Petersen et al. found a number of discrepancies. In contrast to the county study, the statewide study found success on shock probation to be correlated with older age categories, the absence of family criminal involvement, and conviction of one or two adult offenses. In contrast to the statewide study, the county study found success on shock probation to be slightly higher among blacks and middle-upper social status categories.

The two studies agreed that success is higher among the married, and that failure is greater for those convicted of narcotics offenses.

Overall, their study found that success was concentrated in that group for which the law intended - the young, but not juvenile; the previously convicted, but not hard core offender. They concluded that

> "Short term incarceration coupled with the supervison of probation appears to not only be effective, but humanitarian as well... We would caution, however, that shock probation requires a much more thorough-going empirical analysis and interpretation, particularly as its use begins to expand throughout the correctional system."

Bohlander (1973), who collaborated in the Friday and Petersen study described above, reported a higher failure rate among shock probationers than those offenders who did not experience a short period of confinement. Addressing this point, Mr. Ned Woodruff, Chief Probation Officer, Franklin County (Ohio) Court of Common Pleas, states that he expects people in the shock probation program to have a higher revocation rate than regular probationers since persons assigned to prison in the first place are usually more difficult people than those placed on routine probation.

Bohlander concludes that shock probation in Ohio and as administered in Franklin County has not served as an alternative to incarceration, but instead has been used as an alternative to probation, and that it is, in reality, a move toward retributionist punishment. He states that

> "The knowledge that incarceration increases the likelihood of continued commitment to criminal behavior patterns seems to have had little or no effect on legislative, judicial, or correctional policy makers."

Although his research findings indicate that shock probation brings the same negative effects as incarceration and eventual parole, Bohlander agrees that "shock probation is a far more satisfactory sanction for humanitarian reasons than longer periods of incarceration."

McCarthy (1976) states that the ideal defendant for shock probation is most likely to be young, have no previous record, have good education and/or employment, married with dependents, and have committed a non-assaultive crime of little severity. From his study of a sample of 45 shock and straight probationers, he found that the typical shock probationer is a white, unmarried (with one dependent) male less than 23 years old, with an eleventh grade education and who has had one conviction as a juvenile or as an adult.

A study of the economic impact of the shock probation program on correctional institutions in Ohio by Thompson (1975) pointed out the high direct and indirect cost of the shock probation program (i.e., support costs, in-processing costs, inmate wages, release money, transportation of the inmate to the institution or back to the local community, etc.). His alternative to reduce the cost of the program would

be to incarcerate shock probationers in local jails where the per diem costs of maintaining an offender are less than those of a state correctional institution.

It is felt by Thompson that such an alternative would still provide the "shock" of imprisonment but at less cost; with fewer hardships to be encountered by families visiting offenders; and provide greater access to the courts whenever needed. In other words, Thompson seems to be proposing that Ohio's shock probation statute be modified so that its form resembles that of the Federal Split Sentence law. However, he does not address the issue of the impact that such a proposed change would have on local jails in Ohio.

Thompson's study of 712 offenders released on shock probation in 1973 shows that for this group, the frequency of release on shock probation peaked between 76 and 90 days. It also found that 15.6% of the 712 offenders were released after the expiration of the 130 day time limit under the statute.

A study by Angelino et al. (1975) compiled a sample that consisted of all inmates released from Ohio prisons under the shock probation statute during 1969 plus the female inmates released during the years 1966, 1967, 1968, and 1970. This sample totaled 554 shock probationers of whom 136 were female. Members of the sample were equally divided between urban and rural counties, were predominatly white (76%), young (49% in the 18 to 22 year old range), unskilled (76%), poorly educated (78% did not finish high school and many were

regarded as attendance and behavior problems in school), unemployed (53% of the males and 69% of the females), and of average intelligence.

The findings of this study do not support the underlying rationale for shock probation and indicate that shock probation was not administered in strict accordance with the intent of the legislature or the Ohio Adult Parole Authority (O.A.P.A.) guidelines (see discussion p. 22). While the majority of offenders were young, 22% were over 30 years of age. Moreover, the felons selected for shock probation were frequently not naive first offenders; 40% had been convicted before and 12.1% had served prior prison terms. Furthermore, 20% of the felons seem to fit the category of "potentially violent offenders." (More than one-quarter of the convictions were for crimes against persons.) Additionally, shock probationers were not being released as promptly as the legislature had intended. Although the average felon served about 105 days before being released on shock probation, nearly 40% of the sample were incarcerated for greater than 121 days before release.

Commenting on the low recidivism rate for shock probationers reported by the O.A.P.A. (see Table IV), Angelino's report states that such a figure is highly optimistic as:

> (1) it is based on reincarceration and probation violation and does not include convictions of persons who have completed probation, unless they are reincarcerated;

TABLE IV

UTILIZATION OF

SHOCK PROBATION

IN OHIO

Calendar Year	Number of Shock Probation Cases Granted	Number of Shock Probation Cases Recommitted*	Shock Probation Cases Recommitted* By Percent
1966	85	5	5.8%
1967	183	26	14.2%
1968	294	18	6.1%
1969	480	48	10.0%
1970	652	68	10.7%
1971	967	83	9.2%
1972	1,292	115	8.9%
1973	1,132	137	12.1%
1974	1,079	118	10.9%
1975	1,528	157	10.3%
1976	1,478	166	11.2%
TOTAL	9,090	941	10.4%

*Does not take into account absconders which may approximate an additional 2-5%

Source: Ohio Adult Parole Authority

(2) the measure does not include out-of-state convictions; and

(3) the recidivism figures are not controlled for length of time since release from the institution.

His study, with regards to recidivism, found that nearly half (47.7%) were arrested at least once after serving their shock probation sentence; 31.3% were subsequently convicted of a felony within five years; and 24% served at least one prison sentence after release. It was found, however, that these later crimes were less serious than those leading to the original imprisonment. The report states that the discrepancy between these recidivism figures and those reported by the O.A.P.A. may be attributed to the fact that only one-half of the recidivists committed new crimes within the first year after release.

Among men, the study found that recidivism tends to be slightly higher among younger men, blacks, the unemployed, those who were attendance problems in school, and those who lived in urban areas. Among women, although higher recidivism was also associated with being black, urban and an attendance problem in school, additional factors included lower intelligence and school achievement, having a behavior problem in school, and having served a longer time preceding shock probation.

Comparing the effects of various lengths of incarceration on the recidivism rates of the sample of shock probationers, Angelino's study found that time served had no effect on recidivism rates. However, the study pointed out that the

apparent ineffectiveness of short term sentences may be due in large measure to inappropriate selection of felons for shock probation. (That the guidelines of the O.A.P.A. were not followed, especially in regard to the number of past offenses, has been pointed out previously.)

Angelino's study states that recidivism might be reduced if shock probation sentences were restricted to naive first offenders with relatively minor crimes. [However, when testing this hypothesis with a sample of 281 offenders, the results seemed to indicate that incarcerating offenders with relatively short criminal histories, of less serious nature, for a short period of time (less than 130 days) is no different, with regards to future recidivism. than incarcerating them for a longer period of time.]

Shock Probation in Kentucky

Relying heavily on the reported success of shock probation in Ohio, the Kentucky Legislature enacted a shock probation statute (KRS Sec. 439.265 - see Appendix B, pg. 99 for text) in 1972. Following, almost exactly, the wording of the Ohio statute, this technique similarly allows the court, after the approval of a motion made by an inmate or by the court, to release an inmate on probation after 130 days or less of incarceration (a minimum of 30 days must be served under the statute).

This alternative has given judges the opportunity to extend the perceived potential benefits of community-based corrections to offenders heretofore deemed inappropriate

for such supervision. By and large, it has generally been utilized as a replacement for incarceration rather than for probation. (Faine, and Bohlander, 1976.

Utilization to date of shock probation in Kentucky is shown in Table V. These figures indicate that only 15.5 of all offenders placed on shock probation have been recommitted. However, it must be remembered that, as in the case of Ohio, this is:

(1) is based on reincarceration on probation violation and does not include violations of persons who have completed probation, unless they are reincarcerated;

(2) does not include attempted violations; and

(3) is not available in terms of time since release from the institution.

To study the use and effectiveness of shock probation in Kentucky, a thorough study was conducted by Faine and Bohlander (1976). Their major findings are as follows:

I. Concerning the Original Intended Use of Shock Probation in Kentucky:

A. At the time of the introduction of the statute there was no empirical verification of its effectiveness, however, there were considerable philosophical arguments against its use.

II. Concerning the Relationship Between Offender Characteristics and the Penal Sanctions Imposed [their study examined the case records of 1,403 offenders sentenced in Kentucky between 1972 and 1974 (542 granted shock probation, 504 incarcerated and 317 granted regular probation)]:

A. Shock probationers were more likely to be white, married, in their thirties and often convicted of forgery, auto trafficking or theft of autos.

TABLE V

UTILIZATION OF
SHOCK PROBATION
IN KENTUCKY

Fiscal Year	Number of Shock Probation Cases Granted	Number of Shock Probation Cases Recommitted*	Shock Probation Cases Recommitted* By Percent
1971-1972	3		
1972-1973	181	6	3.3%
1973-1974	243	35	14.4%
1974-1975	311	67	21.5%
1975-1976	351	45	12.8%
1976-1977 (thru May, 1977)	334	67	20.1%
TOTAL	1,423	220	15.5%

*Does not take into account absconders.

Source: Kentucky Bureau of Corrections

B. Offenders granted shock probation tended to come from families with higher social status than those of either probationers or incarcerated offenders.

C. Shock probationers were recommended for community supervision more often than were incarcerated offenders, but less often than those placed on regular probation.

D. Shock probationers were found to have less serious criminal records than offenders sentenced to protracted incarceration but more serious criminal records than offenders granted regular probation.

E. Considered in aggregate, the characteristics of shock probationers fall somewhere between those of regular probationers and incarcerated offenders.

F. Shock probation as a sentencing option was generally used in cases where the characteristics of the offense and the attributes of the offender made both incarceration and probation undesirable alternatives.

III. Concerning the Impact of the First Five Weeks of Incarceration (Faine and Bohlander interviewed 502 inmates, admitted to the Kentucky State Reformatory at LaGrange in 1975, during their first and fifth week of imprisonment):

A. During the early period - the first five weeks of incarceration - it was found that:

1. Offenders' preferences for association with other persons who engage in law-violating behavior generally decreased. Generally, the older the offender, the less likely he was to choose friends who had "little respect for the law."

2. Offenders' self esteem tended to increase.

3. The offenders' negative self-images generally decreased.

4. Offenders' commitment to radical values as well as expressions of support for radical action tended to increase. This was particularly true for youthful offenders who did not anticipate release on shock probation.

5. The high levels of fear of personal harm identified at admission did not decrease. (Youthful first offenders were found to be more fearful of physical harm to themselves than were other offenders.)

6. Isolationism as a mode of adoption to living in a controlled environment became increasingly accepted. This was particularly true for older married offenders who previously did not know any other inmates in the institution.

7. A substantial increase in hostility toward, and a rejection of, the institutional staff was found to occur.

8. No significant changes were identified in the offenders' commitment to fellow inmates. Inmate solidarity was found to be high at admission and equally high following five weeks of confinement.

Regarding these findings, Faine and Bohlander point out that this analysis does not address long-term attitudinal change among offenders sentenced to shock probation.

IV. Concerning the Assessment of Shock Probation by Circuit Court Judges and Commonwealth Attorneys (questionnaire responses were received from 67 judges and 44 prosecutors):

A. Rather than a formal reconsideration of the original sentence, the use of shock probation is anticipated by court personnel when the original sentence is rendered.

B. The offender is frequently informed of the court's intention to shock probate prior to the initial incarceration. This may tend to mitigate the "shock" effect of the short period of incarceration.

C. As in the rendering of the original sentence, the seriousness of the offense and the offender's prior criminal record were generally perceived as the most important factors in considering the granting of shock probation.

D. In cases where an offender is incarcerated and where shock probation may be granted, judges often investigate the offender's adjustment to confinement before rendering a decision.

E. In general, the judges and prosecutors typified the offender for whom the shock probation alternative would be the most appropriate rehabilitative tool as being:

(1) generally under the age of 25;

(2) with no history of felony convictions;

(3) convicted of offenses not associated with personal harm or violence;

(4) who have demonstrable family or community ties;

(5) who exhibit remorse over their offense and a positive attitude toward rehabilitation; and

(6) who presently hold a stable job, or who have sound prospects for future employment.

F. Both judges and prosecutors generally indicated that shock probation provides them with sufficient latitude in cases where regular probation or protracted incarceration would potentially fail to either protect society or to rehabilitate the offender.

G. With a wide range of specified qualifications, shock probation was held to be a useful and effective sentencing alternative by a majority of court personnel.

V. Concerning the Effectiveness of Shock Probation:

A. Shock probation appears to be most successful in cases where defendants:

1. had been convicted of only one offense.

2. had been sentenced to long-term imprisonment.

3. had been convicted of expressive (personal) rather than instrumental (economic) crimes.

4. had minimal juvenile and misdemeanor records.

5. had minimal felony records and imprisonments.

6. were older, married and had children.

7. came from stable, non-criminal, home environments.

8. were able to make bond prior to trial.

9. were employed prior to the offense.

10. were able to obtain private counsel for their defense.

11. had been recommended for probation by the officer preparing the pre-sentence report.

12. had not been charged with disciplinary rule infractions during the confinement phase of shock probation.

B. The characteristics of offenders who "succeed" on shock probation more clearly approximate those characteristics of offenders granted regular probation than they do the characteristics of offenders confined until parole or expiration of sentence.

This study concludes:

(1) that shock probation appears to be a logical alternative sentencing option in cases where regular probation or protracted incarceration seem inappropriate;

(2) that the technique not be employed in cases where the offender is clearly a candidate for probation; and

(3) that further success of shock probation will best be achieved by continued utilization of the program as an alternative to protracted confinement.

Representative Comments by State Correctional Officials:

"More and more probation officers are recommending incarceration [as a condition of probation] and judges are ordering it whenever it appears justified and warranted as a form of social protection, retribution, and as a treatment tool, [from] a compromise between the advantages of probation and the advantages of incarceration."

[illegible]
[illegible] Probation Officer
[illegible], Arizona

"The legislation affords much flexibility for the courts for selected [illegible]."

[illegible]
[illegible] Prisoner Programs
[illegible] Offender
[illegible]

"Many judges in Illinois and [illegible] officers utilize this practice when they feel that the confinement experience will 'teach them a lesson.'"

Lynn S. [illegible]
Executive Director
Illinois Probation Services
Council

"...we are definitely in favor of the 'shock probation' policy."

[illegible]
[illegible] Probation
[illegible] Department of Corrections

"Shock probation in my opinion would serve a valuable experience for those individuals who do not appreciate the seriousness of correctional confinement until it is on them in a very direct manner. If shock probation were to be instituted I would suggest that it be done only at the discretion of the Court, and that the Court not be permitted to tell an individual that he or she would be going to [illegible] only a short period of time. If shock probation were used in lieu of longer sentences and not in place of probation there would be substantial savings and/or diminished overcrowding."

John A. Thalacker
Deputy Director
Iowa Division of Adult Corrections

". . . preliminary indications are that it [split sentencing] has been extremely successful for those who have received such sentences."

Richard P. Haskell
Deputy Director
Maine Bureau of Corrections

"The primary problem associated with this program is the administrative one of maintaining the mechanisms necessary to follow defendants who have [thus] been sentenced . . . if the probation case is not followed through upon the defendant's release from confinement . . . the effect of the split sentence [may be negated].

We feel that the use of [this] device provides the court with a significant alternative to institutional commitment and provides the probation agent with the credibility that accompanies such a balance between punishment and treatment. We would like to see a more formalized use of [this] mechanism as soon as we are able to develop the capability of coordinating such a program."

Robert Renshaw, Jr.
Chief of Program Development
Maryland Department of Public Safety and Correctional Services

"My personal reaction is to question the usefulness and effectiveness of [this] approach. I suspect that most adult offenders who require incarceration for whatever purposes will have already been exposed to some sort of confinement in local jails or other holding facilities either awaiting conviction and sentencing or afterwards. Therefore, they will have had a sufficient experience in institutions that leave much to be desired to know what confinement means and how it impacts on each person. If that experience didn't shake them up, then I doubt that an additional short sentence before probation is implemented will do the job either. On the other hand, if they don't require incarceration for punishment and/or security purposes, then no confinement seems justified. Certainly, not to just 'shock' them into realization of what prison means."

Fred D. Fant
Assistant Director for Probation
New Jersey Administrative Office of the Courts

"The trial court indicated his concern that the defendant did not recognize the seriousness of what he had done and explained that the reason he was sentencing the defendant to a term of imprisonment as a condition of his probation was that he wanted the defendant to get a pretty good idea of what imprisonment was like; how frustrating, useless, and degrading it is; and to reflect upon what a 3 or 5 or 10 year sentence would mean."

Justice McCown in State v. Nuss
212 N.W. 2d at 566 and 567
(Nebraska, 1973)

JUDICIAL INTERPRETATION OF THE SPLIT SENTENCE

The practice of placing an offender on probation after he completes a period of imprisonment has been subject to judicial interpretation throughout the course of its history as a sentencing alternative. Appendix C lists a preponderance of federal and state case law dealing with various facets of this issue.

Judicial Interpretation in the Federal Courts

The United States Supreme Court in United States v. Murray/Cook v. United States ruled that when a person sentenced to imprisonment by a District Court had begun to serve his sentence the court had no power, under the Probation Act of 1925, to grant him probation even though the term at which sentence was imposed had not expired. The Supreme Court's position was that although the language of the statute could be broad enough to permit wider construction, neither the language of the Act when considered as a whole nor the declared purpose of Congress in passing it was consistent with the granting of probation after commitment. 275 U.S. 347, 48 S.Ct. 146, 72 L.Ed. 309 (1928). See also Archer v. Snook, 10 F. 2d 567 (D.C. 1926); Mouse v. United States, 14 F. 2d 202 (D.C. 1926); United States v. Albrecht, et al., 25 F. 2d 93 (1928); White v. Burke, 43 F. 2d 329 (C.C.A. 1930); United States v. Praxulis, et al./United States v. Casciato, et al., 49 F. 2d 774 (D.C. 1931); United States v. Greenhaus, 85 F.

2d 116, 107 A.L.R. 630 (C.C.A. 1936); Watkins v. Merry, 106 F. 2d 360 (C.C.A. 1939).

The first direct statement in the federal courts in support of the mixed sentence came in Judge Cotteral's dissent in White v. Burke, supra, where he interpreted the Probation Act as conferring the power, before sentence has begun, to grant probation or suspend sentence, effective after a partial service of the sentence. 43 F. 2d 329 (C.C.A. 1930). Following this, the decision in United States v. Wittmeyer held that a District Court at the time of imposing sentence not exceeding one year could reserve jurisdiction of the case and, after the defendant had served a portion of the sentence, could order the release of the defendant on probation for the remainder of the term. In this case, the court interpreted the intent of Congress in the Probation Act as to grant the court the necessary time to conduct an investigation to ascertain "the propriety of placing one convicted of a criminal offense, upon probation." 16 F. Supp. 1000 (D.C. 1936). See also Rosenwinkel v. Hall, 61 F. 2d 724 (C.C.A. 1932).

The practice of a mixed sentence received further support, albeit grudgingly, in United States ex rel. Spellman v. Murphy which ruled that the Federal District Court, which suspended execution of a prison sentence and placed a defendant on probation in a felony case, had jurisdiction to impose the condition that the defendant would, once each week, surrender to the custody of the U.S. Marshall for 24 hours. 217 F. 2d 247 (C.A. 1954). It stated:

> "The prevaling opinion among criminologists and probation officers, as well as others who have studied the question, is that mixed sentences of prison and probation should not be imposed. Undesirable as the practice may be we think it was within the power of the District Court to have imposed the mixed sentence in the case at bar." 217 F. 2d at 251 and 252 (C.A. 1954).

After passage of the Federal Split Sentence statute (18 U.S.C.A. Sec. 3651) in 1958 (see Appendix A, pg. 79), federal court decisions have dealt with authority of and procedure under the statute, see Gaddis v. United States, 280 F. 2d 334 (C.A. 1960); Green v. United States, 298 F. 2d 230 (C.A. 1961), and with reaffirming that the maximum term of imprisonment allowable under the statute was six months. See Sibo v. United States, 332 F. 2d 176 (1964); Sullens v. United States, 409 F. 2d 545 (C.A. 1969).

Judicial Interpretation in the State Courts

Prior to the passage of statutory provisions authorizing a split sentence, the majority of state courts ruling on this issue held that such a disposition was not authorized by statute; that if courts were to exercise the power of granting probation it must be in toto rather than in part and that, if imprisonment were to be coupled with probation, it could only be imposed after probation was revoked or terminated. (In many instances, state legislatures amended or enacted statutory provisions as a direct result of a court decision.) See State v. McKelvey, 246 P. 550 (Ariz. 1926); People v. Ramos, 251 P. 941 (Calif. 1926) [in 1927 the California legislature authorized the split sentence by amending its statute]; People v. Robinson, 253 Mich. 507, 235 N.W. 236 (1931) [in 1931, subsequent to the

Robinson decision, [illegible] law authorizing [illegible] Commonwealth ex rel. [illegible] 401); State v. Smith, [illegible] In re Powell, [illegible] Stewart v. Gladden, [illegible] State v. Van Meter, 7 Ariz. [illegible] Van Meter, the [illegible], 477 P. 2d [illegible]

[illegible]

> "[illegible]"

See also Hill v. Hill, 332 Mich. 98, 33 N.W. 2d 678 (1948); Ex Parte Cramer, 335 Mich. 150, 55 N.W. 2d 72 (1952); Ex Parte Hays, 120 C.A. 2d 308, 260 P. 2d 1030 (1953); State v. Van Meter, 7 Ariz. App. 424, 440 P. 2d 58 (1968); State v. Poffenbaugh, 14 Ohio App. 2d 59, 237 N.E. 2d 147 (1968); People v. Ledford, 477 P. 2d 374 (Colo. 1970); People v. Syph, 344 N.Y.S. 2d 47, 74 Misc. 2d 466 (1973); State v. Nuss, 190 Neb. 755, 212 N.W. 2d 365 (1973); State v. Marshall, 247 N.W. 2d 484 (S. Dak. 1976).

The importance of a clear expression of legislative intent is given by the Kentucky Court of Appeals in Wells, et al. v. Commonwealth ex rel. Meredith:

> "If the legislature had intended to authorize circuit courts to place a defendant on probation as to only a part of the penalty fixed by the jury...evidently it would have so provided in exact language or language clearly indicating such intention.' 284 Ky. 783, 146 S.W. 2d at 60 (1940).

Moreover, the reluctance of the judiciary to engage in "judicial legislation" is clearly stated in State v. Poffenbaugh, supra,:

> "The courts are without authority to engage in judicial legislation by adding or augmenting into a statute some matter which was not within the contemplation or intention of the Legislature when the law was enacted." 14 Ohio App. 2d 59, 237 N.E. 2d at 152 (1968);

and in People v. Ledford, supra,:

> "...this policy and the limits which should be placed upon it are matters properly for the legislature to consider and not for this court to attempt to read into the present statute." 477 P. 2d at 376 (Colo. 1970).

See also Ex Parte Hays, 120 C.A. 2d 308, 260 P. 2d 1030 (1953); State v. Marshall, 247 N.W. 2d 484 (S.Dak. 1976).

In the absence of clear language or intent, the South Carolina Supreme Court stated in State v. [illegible] that "a criminal statute must be strictly construed against the state and any doubt must be resolved in favor of the defendant." 216 S.C. 182, 57 S.E. 2d at 164 (1949). See also People v. Sarnoff, 302 Mich. 266, 4 N.W. 2d 544 (1942); State v. Jones, 327 So. 2d 18 (Fla. 1976); State ex rel. Cyprien v. Court of Common Pleas, 45 Ohio St. 2d 177, 343 N.E. 2d 94 (Ohio, 1976).

Once statutory authority exists the clarity of the sentence itself is of no less importance, as stated in State v. Braeunig, supra,:

> "Sentences must not be ambiguous and thus subject to confusion or misunderstanding as to the time and manner in which they are to be served. Sentences must be certain, definite and unambiguous in all their terms." 122 N.J. Super. 314, 300 A.2d at 353 (1973).

Addressing this point as it relates to conditions of probation, the Superior Court of New Jersey in Lathrop v. Lathrop states:

> "If conditions of probation are to be imposed, the court must expressly state them. Such provisions, prohibitory or mandatory, should be clearly set out and not left to implication, for what is involved is nothing less than the liberty of the individual. Before a person is subject to punishment for violating a command of the court, he should be informed in definite terms as to the duties imposed upon him." 59 N. J. Super. 525, 142 A.2d at 925 (1958).

In four instances, State Supreme Courts have liberally interpreted the statutory provision giving trial judges the power to suspend execution of the entire sentence and to place the defendant on probation "upon such terms as such judge or magistrate determines," as to authorize the placing of the defendant on probation, after serving a designated portion of

the term of imprisonment. See Moore v. Patterson/State v. Moore, 203 S.C. 90, 26 S.E. 2d 319 (1943); State v. Germany, 216 S.C. 182, 57 S.E. 2d 165 (1949); Tabor v. Maxwell, 175 Ohio St. 373, 194 N.E. 2d 856 (1963). [There was some confusion in the Ohio Law applicable at the time of this case as to whether probation could only be applied in felony cases.]; Sanders v. MacDougall, 244 S.C. 160, 135 S.E. 2d 836 (1964); Franklin v. State, 87 Idaho 291, 392 P. 2d 552 (1964); State v. Best, 257 S.C. 361, 186 S.E. 2d 272 (1972); State v. Jones, 327 So. 2d 18 (Fla. 1976). Justice McQuade's opinion in Franklin v. State, supra, states in part:

> "Because of their humane provisions and their highly remedial nature, statutes providing for suspension of sentence and probation are universally given liberal construction..." Although a restriction of the meaning of probation so that it could never encompass incarceration "might have seemed reasonable twenty or thirty years ago, it is rapidly becoming apparent in this dynamic area of the law that probation signifies the employment of any reasonable means which may be used to effectuate the rehabilitation of the defendant... To adopt any other point of view would hamstring our trial judges and disregard the beneficent purposes of our act." 87 Idaho 291, 392 P. 2d at 561, 562, 563 (1964).

That such a general statutory provision relating to probation should be liberally interpreted as to include authority for a split sentence has also been supported by the State of Nebraska's contention in State v. Nuss, 190 Neb. 755, 212 N.W. 2d 565 (1973); and in the dissenting opinion of Justice Wollman in State v. Marshall, 247 N.W. 2d 484 (S. Dak. 1976).

The validity and/or constitutionality of statutory provisions providing for a split sentence has been consistently

upheld by the courts. See People v. Sarnoff, 302 Mich. 266, 4 N.W. 2d 544 (1942) where the court also ruled that such a sentence does not violate double punishment nor cruel or inhuman punishment; Ebling v. Hayes et al., 21 S.E. 2d 624 (Ga. 1942); Ex Parte Hays, 120 C.A. 2d 308, 260 P. 2d 1039 (1953); State v. Barros, 78 N.M. 623, 435 P. 2d 1005 (1968); Commonwealth v. Williamson, 492 S.W. 2d 874 (Ky. 1973) where the court also ruled that such a provision does not invade or encroach upon the executive power of clemency; State v. Pietrowski, 136 N.J. Super. 383, 346 A. 2d 427 (1975); State v. Jones, 327 So. 2d 18 (Fla. 1976). Moreover, the courts have held that such a provision, when applied to a defendant who committed a crime before the effective date of the law, does not violate ex post facto doctrine because of its ameliorative nature in allowing the court to impose a penalty considerably less than that imposed by law for the offense of which he was guilty. See In re Nachnaber, 89 C.A. 530, 265 P. 392 (1928); People v. Warren, 360 N.Y.S. 2d 961, 79 Misc. 2d 777 (1974).

It has generally been held that after the adjournment of the term of court at which a sentence is imposed, the judge is without authority to change or modify it except in a manner provided by statute. See Mathews v. Swatts, 16 Ga. App. 208, 84 S.E. 980 (1915); In re Robinson, 8 Ohio App. 391 (1917); Porter v. Gaimony, 148 Ga. 261, 96 S.E. 426 (1918); Auldridge v. Womble, 157 Ga. 64, 120 S.E. 620 (1923); In re Silverman, 69 O.A. 128, 42 N.E. 2d 87 (1942);

Stockton v. State, 27 S.E. 2d 240 (Ga. 1943); Long v. Stanley, 200 Ga. 239, 36 S.L. 2d 785 (1946); State v. Markos, 18 O. O. 2d 75, 179 N.E. 2d 397 (1961); State v. Lawrence, 264 N.C. 220, 141 S.E. 2d 264 (1965); State v. Stewart, 279 N.E. 2d 894 (Ohio 1971); State v. Best, 257 S.C. 361, 186 S.E. 2d 272 (1972); State v. Jones, 327 So. 2d 18 (Fla. 1976).

It has been ruled that, as a matter of common law (in the absence of statute), where a defendant has entered upon the execution of a valid sentence, the court has no jurisdiction, even during the term at which the sentence was rendered, to set it aside and renier a new sentence, see State v. Fiester, 32 Or. 254, 50 P. 561 (1897); In re Sullivan, 3 Cal. App. 193, 84 P. 781 (1906); State v. Meyer, 86 Kan. 793, 122 P. 101 (1912); Stewart v. United States, 300 F. 769 (C.C.A. 1924); State v. McKelvey, 246 P. 550 (Ariz. 1926), or to suspend sentence and place a person on probation. See Rutland v. State, 14 Ga. App. 746, 82 S.E. 293 (1914); United States v. Murray/Cook v. United States, 275 U.S. 347, 48 S.Ct. 146, 72 L.Ed. 309 (1928); United States v. Albrecht, et al., 25 F. 2d 93 (1928); Lloyd v. Superior Court of California, in and for Los Angeles County, 208 C. 622, 283 P. 931 (1929); People v. Forbragd, 127 C.A. 768, 16 P. 2d 755 (1933); Opinion of the Indiana Attorney General No. 58 (June 27, 1945); Ex Parte Smith/Smith v. Pelham, 41 So. 2d 570 (Ala. 1949). Moreover, the legislature, in providing for the suspended sentence, is not acting arbitrarily or discriminatorily when it places

limits upon the exercise of that power by the trial courts or by prohibiting courts from suspending sentence once the defendant has begun to serve the sentence. See Bector v. State, 506 S.W. 2d 137 (Tenn. 1974).

The addition of a new condition to an order of probation is not within the courts power to, during the period of probation, modify an existing order. This can only be done through revoking probation and pronouncing new sentence. See Ex Parte Hazlett, 137 C.A. 734, 31 P. 2d 448 (1934). Wilson v. Carr, 41 F. 2d 704 (C.C.A. 1930). However, an order granting probation may be modified by extending the period to be served as a condition thereto where such change is made before the original condition has been fully complied with. See Ex Parte Sizelove, 15 Cal. 493, 111 P. 527 (1910); In re Glick, 126 C.A. 649, 14 P. 2d 796 (1932); People v. Roberts, 136 C.A. 709, 29 P. 2d 432 (1934); Ex Parte Marcus, 11 C.A. 2d 359, 53 P. 2d 1021 (1936); State v. Jones, 327 So. 2d 18 (Fla. 1976).

Where the court, after pronouncing a judgment and sentence of imprisonment orders all or a part of the sentence suspended, such an order is considered to be an informal grant of probation equivalent to a formal order, see Stockton v. State, 27 S.E. 2d 240 (Ga. 1943); Ex Parte Torres, 86 C.A. 2d 178, 194 P. 2d 593 (1948); Oster v. Municipal Court of Los Angeles Judicial District, County of Los Angeles, 45 C. 2d 134, 287 P. 2d 755 (1955); People v. Brandon, 166 C.A. 2d 96, 332 P. 2d 708 (1959); United States ex rel. Wissenfeld v. Fay, 214 F. Supp. 360

(D.C.N.Y. 1963); People v. Victor, 42 Cal. Rptr. 199, 62 C. 2d 280, 398 P. 2d 391 (1965), unless an order of suspension is made after the court has already expressly denied probation and it is clear that a grant of probation was not intended. See People v. Rickson, 112 C.A. 2d 475, 246 P. 2d 700 (1952); Oster v. Municipal Court of Los Angeles Judicial District, County of Los Angeles, 45 C. 2d 134, 287 P. 2d 755 (1955).

An order placing a defendant on probation, even though it includes as a condition a period of imprisonment, is not a judgment and sentence and does not amount to serving a term of imprisonment in a penal institution because the period of imprisonment was imposed not as a sentence but as a condition of probation. See People v. Roberts, 136 C.A. 709, 29 P. 2d 432 (1934); People v. Wallach, 8 C.A. 2d 129, 47 P. 2d 1071 (1935); Ex Parte Goetz, 46 C.A. 2d 848, 117 P. 2d 47 (1941); Ex Parte Martin, 82 C.A. 2d 16, 185 P. 2d 645 (1947); Ex Parte Hays, 120 C.A. 2d 308, 260 P. 2d 1030 (1953); People v. McShane, 126 C.A. 2d Supp. 845, 272 P. 2d 571 (1954); State v. Bassett, 86 Idaho 277, 385 P. 2d 246 (1963); In re Williams Petition, 145 Mont. 45, 399 P. 2d 732 (1965); Petersen v. Dunbar, 355 F. 2d 800 (C.A. 1966); People v. Terven, 130 Ill. App. 708, 264 N.E. 2d 538 (1970); State v. Wright, 202 N.W. 2d 72 (Iowa, 1972); Prue v. State, 63 Wis. 2d 109, 216 N.W. 2d 43 (1974).

Where statutory authority exists, the period of imprisonment that a probationer serves as a condition of his

probation shall be deducted from a subsequent term of imprisonment imposed upon revocation of his probation. See People v. Roberts, 136 C.A. 709, 29 P. 2d 432 (1934); People v. Wallach, 8 C.A. 2d 129, 47 P. 2d 1071 (1935); State v. Jones, 327 So. 2d 18 (Fla. 1976). However, the courts may infer that, without such statutory provision, it was the intent of the legislature to allow the court, upon revocation, to impose the maximum penalty allowable by law without credit for the period of imprisonment served as a condition of probation. See People v. Wallach, 8 C.A. 2d 129, 47 P. 2d 1071 (1935); Ex Parte Hays, 120 C.A. 2d 308, 260 P. 2d 1030 (1953); In re Larsen, 44 C. 2d 642, 283 P. 2d 1043 (1955); People v. Jaynes, 23 Mich. App. 360, 178 N.W. 2d 558 (1970); State v. Barnett, 112 Ariz. 212, 540 P. 2d 684 (1975); State v. Fuentes, 26 Ariz. App. 444, 549 P. 2d 224 (1976). Moreover, the possible applicability of the double jeopardy clause may be considered only when pre-sentence jail time and/or incarceration as a condition of probation, when added to the sentence imposed after revocation, exceeds the maximum statutory sentence. See State v. Pena, 26 Ariz. App. 442, 549 P. 2d 222 (1976); State v. Fuentes, 26 Ariz. App. 444, 549 P. 2d 224 (1976).

Judicial Interpretation of Ohio's Shock Probation Statute

Ohio's shock probation statute (see discussion pp. 21-35 and Appendix B, p. 114) has undergone fairly extensive judicial construction since its passage in 1965. Only two months after it became effective, the decision in State v. Veigel almost destroyed the intended effect of the statute when it was ruled that the only time a trial court

could use the statute was when it acted under a misapprehension of the facts in passing sentence. 5 Ohio Misc. 45, 213 N.E. 2d 751 (1965). Three months later, the decision in State v. Dent stated that the holding in Leigel "emasculates the statute" and that the court's discretion in this area is not limited to situations in which the court had imposed sentence under some misapprehension of the facts. 6 Ohio Misc. 177, 217 N.E. 2d 76 (1966).

In 1968, the Ohio Court of Appeals in State v. Allison ruled that one of the functions of the statute was to relieve, in part, the burden of the state parole board; that the statute did not impinge on or usurp authority vested in the Ohio Adult Parole Authority; and that the discretion of the court was not limited or restricted to any prescribed time within which to make ruling on the motion. 14 Ohio App. 2d 55, 237 N.E. 2d 147 (1968). Subsequent to the decision in Allison, supra, the Ohio legislature amended the statute by providing a time limit within which a motion under the statute is to be ruled on. The issue of whether or not this time limit was mandatory on the courts was addressed in several later decisions.

In State ex rel. Dallman v. Court of Common Pleas the court ruled that the time period was mandatory and that shock probation may not be granted by a trial court beyond the ten-day period following the hearing on the motion, either pursuant to a motion for reconsideration or otherwise. At the expiration of the ten-day period the trial court would lose jurisdiction over the defendant and thereafter, by

virture of that statute, could not release the defendant on shock probation. The court stated that release from confinement after the time period, except where a sentence has expired, [illegible] is reversed and set aside through appeal, is left to the executive branch and the pardon and parole [illegible]. 32 Ohio App. 2d 192, 288 N.E. 2d 303 (1972). See also State v. Arn., 29 Ohio App. 2d 87, 269 N.E. 2d 622 (1971); Opinion of the Attorney General OAG 73-079 (1973).

The decision rendered in State ex rel. Smith v. Court of Common Pleas, however, interpreted language in the statute as suggesting a mandatory time limit within which failure to meet the mandatory time limit would automatically divest jurisdiction in the matter. The court referred to the opinion in Allison, supra, as being entirely reflecting the intention of the legislature and stated in part:

> "Nothing in the language of R.C. 2947.061, while positive and directive, indicates an intention of the legislature to invade the plenary right of a court to control its docket and assign matters for hearing and trial, at least not to the extent that the failure of a court to timely act should destroy the right it had created in the same enactment. If the legislature had so intended it could have included such a provision in its enactment." Civil No. 73 AP-15 at 210 (Ct. App. Franklin County, Ohio, Jan. 26, 1973).

In a later decision, State ex rel. Dallman v. Court of Common Pleas, the Ohio Supreme Court did not rule on the issue of the time limit because of the lack of standing of one of the parties in the case but did point out the adoption on July 11, 1973 of Rule 8.3 of the Rules of

Superintendence, Supreme Court of Ohio which provides in part (emphasized by the court in italics)...

> *"If a hearing is deemed necessary by the trail court in the determination of a motion for suspension of further execution and, for probation made pursuant to R.C. 2947.061, the court shall hold the hearing within sixty days after the filing date of the motion and enter its ruling thereon within ten days of the hearing. If no hearing is conducted on such motion, the court shall enter its ruling thereon within seventy days of the filing of the motion."*
> 35 Ohio St. 2d 176, 298 N.E. 2d at 917 (1973).

As stated in Ammer (1974), it is hoped that either the Ohio Supreme Court will have an opportunity to decide the issue or the legislature will act to clarify the statutory language in the future.

The one time limit [illegible] in the statute that has uniformly been upheld by the courts as being mandatory is the time limit within which a motion for shock probation must be filed. After expiration of this time limit the court loses jurisdiction under the statute. See State ex rel. Dallman v. Court of Common Pleas, 32 Ohio App. 2d 102, 288 N.E. 2d 303 (1972); State ex rel. Smith v. Court of Common Pleas, Civil No. 73 AP-15 (Ct. App. Franklin County, Ohio, Jan. 26, 1973). It has also been ruled that ignorance of the shock probation statute does not relieve an inmate from the time limit requirement. See State v. Crawford, 34 Ohio App. 2d 137, 296 N.E. 2d 578 (1973).

In a related decision, on Kentucky's similar shock probation statute, the Kentucky Court of Appeals in Commonwealth ex rel. Hancock v. Melton ruled that an oral

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