Federal Probation

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Criminal Sentencing: Misunderstandings and Misapplications

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WHAT is wrong with the following sentences or resentences?

—After a defendant has served several months in prison, the judge modifies the sentence to probation. (Illegal*: see topic #2)

—A split-sentence is to be served on weekends. (No statutory basis for sentence: see #11)

—A Federal judge sentences a defendant to 5 years of imprisonment and orders that it run concurrently with a state sentence the defendant is then serving. (Exceeds judicial authority: see #15)

Why are the following sentences not problematical?

—A judge, despite his or her intention to do so, omits to include as part of a sentence of imprisonment that the defendant is to receive credit for time served awaiting trial. (Statute provides Attorney General must grant credit: see #14)

—A judge modifies a sentence 6 months after it was imposed although Rule 35 only allows reductions within 120 days. (Case law requires only that motion for reduction be filed within 120 days: see #18)

Unfortunately, criminal sentencing is becoming as complex as the tax code. The above sentences, which are discussed further in the numbered topics below, are examples of frequently misunderstood practices in the Federal courts. When a person's freedom is at issue, mistakes or confusion may cause irreparable damage; and even if no errors are committed, unnecessary complexity is a burden on the 36,494 defendants sentenced last year in Federal court, on judges, prison officials and on probation and parole officers. Furthermore, loopholes and technicalities detract from the public's respect for the criminal justice system.

As will be pointed out again, some technically invalid sentences are knowingly imposed by the court, are acceptable to the defendant, and may be unopposed or undiscovered by the prosecution. Other agencies may recognize the problem but decide not to challenge the sentence in court. Only later when the defendant violates the conditions of the resulting probation or parole are there challenges to the court's judgment and sentence. Whether or not a particular sentence is attacked, "working around" the sentencing statutes continues the unnecessary complexities in the law and may lead to the recodification of the same confusing provisions.

This article discusses some of the often misunderstood or misapplied aspects of sentencing. Under four subject headings—PROBATION, SPLIT-SENTENCES, COMMENCEMENT OF SENTENCE, and MODIFICATION OF SENTENCE—and 18 topic questions, the existing confusions are set out but not always resolved: on the contrary, in some instances, new issues are raised. Hopefully, however, exploration of the problems will be the first step towards their clarification.

Throughout the article there are references to Senate bill 1437, the revision of the criminal code that passed the Senate in the 95th Congress. A significantly different bill in the House of Representatives, H.R. 13959, was still in committee when the Congress adjourned in October 1978. Since other bills will again be considered by the next Congress, the Senate bill is here referred to as an illustration of reforms and possible clarifications in the law.

I. Straight Probation

The ability of a court to suspend the imposition or execution of a sentence during the defendant's good behavior, a practice once called "laying the case on file" and now called probation, has been recognized by the Supreme Court of the United States for only the past half-century. During this time, Congress had added provisions to the probation statute, 18 U.S.C. §3651, permitting courts to require specific types of treatment as a condition of probation, but the basic authority enabling a Federal court to impose probation has not changed. Because the source and nature of this

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authority have often been misunderstood, many illegal sentences have been ordered.

1. *What is the source of the authority to impose probation?*—The Supreme Court has ruled that the power of a Federal court to grant probation "springs solely from legislative action" and not from the constitution.[1] The original Probation Act of 1925 was enacted in response to a decision[2] by the Court that without authorizing legislation, probation was a constitutionally impermissible interference with the legislature's authority to define offenses and punishments and with the executive's authority to relieve punishments. Although courts "inherently possess ample right to exercise reasonable, that is judicial, discretion to enable them to wisely exert their authority," the Court said, it did not follow that the "power to enforce begets inherently a discretion to permanently refuse to do so." By suspending the imposition or execution of sentence, courts were refusing to carry out their duty.

Even though the practice was widespread at the time of the decision and the Court recognized the need for such discretion, probation could not be legally granted until the Probation Act was passed.

2. *When may a court suspend the imposition or execution of sentence?*—In a case interpreting the Probation Act of 1925 for the first time, the Supreme Court stated the narrow rule that still applies today: the sentencing court's ability to grant probation is limited to the time before the service of sentence commences.* The defendants in that case had begun to serve their terms of imprisonment—one had served just one day—so the sentencing judge was without authority to modify their sentences to impose probation, the Court said.

The statute stated that the courts "shall have the power, after conviction or after plea of guilty or nolo contendere . . . to suspend the imposition or execution of sentence and to place the defendant upon probation." The Court decided, "the words . . . mean that the placing of the defendant upon probation is to follow the suspension of the imposition or the suspension of the execution of sentence, without an interval of any part of the execution . . . . We do not say that the language is not broad enough to permit possibly a wider construction, but we think this not in accord with the intention of Congress."[3] A broader interpretation of the statute could mean that Congress had intended to allow for the granting of probation at any time during the period of imprisonment. This construction would most likely be an interference with the executive branch's authority to grant reprieves, pardons and parole.

Subsequent cases have further defined the restriction on when probation may be imposed. In the case of a defendant who received a cumulative sentence composed of a number of distinct, consecutive sentences, the Supreme Court ruled that the probationary power of the court ceased with respect to all the sentences upon the defendant's imprisonment for any one of the sentences.[4] Similarly, the Court of Appeals for the Second Circuit ruled that a court's authority to modify a fine to be paid in installments terminated when the first installment had been paid since the "service of sentence" had commenced.[5]

Although the Supreme Court has pointed out that the limitation on when a court may impose probation is within the statutory control of Congress, Congress has not removed this limitation even when amending the statute slightly in 1948. Some change may be forthcoming, however. A committee of the Judicial Conference of the United States has proposed amending the Federal Rules of Criminal Procedure, Rule 35, that governs the correction and reduction of sentences. If approved by the Supreme Court, the new rule would take precedence over the present probation statute and would somewhat enlarge the court's discretion. The rule would provide: "Changing a sentence from a sentence of incarceration to a sentence of probation shall constitute a permissible reduction of sentence under this subdivision." A sentence could then be "reduced" to probation within the 120-day limitations otherwise established by the rule.

Until the new rule is approved, however, the status of a defendant whose commenced sentence of imprisonment is illegally modified to probation is unclear. If the court discovers that an illegal sentence has been imposed, it has the discretion to correct the sentence at any time under Rule 35. (See #16 and #17). The question then becomes how can a court "correct" this form of illegality since there is no substitute for probation within the court's control: parole is only possible at the discretion of the Parole Commission, and the court's resentencing the defendant to time already

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[1] *Affronti* v. *United States*, 350 U.S. 79 (1955), citing Ex parte United States, 242 U.S. 27 (1916).
[2] Ex parte United States, supra.
[3] *United States* v. *Murray*, 275 U.S. 347, 358 (1928).
[4] *Affronti*, supra.
[5] *United States* v. *Beacon Pierce Dying & Finishing Co.*, 455 F.2d 216, 217 (2nd Cir. 1972).

served releases the defendant without any supervision at all.[6]

3. *Is probation modified under Rule 35 or Section 3651?**—The court's power to reduce a sentence of imprisonment is an inherent power of the court over a judgment it has entered.[7] Rule 35 controls the time and circumstances during which such power can be exercised over sentences of imprisonment or fines.

The court's authority to grant or modify probation is controlled by the probation statute itself, section 3651. Changes in the length or conditions of probation may be made at any time under that statute, although if probation is to be revoked or lengthened, the probationer is first entitled to a hearing and other procedural rights.[8] Probation should not be modified under Rule 35 because probation is not a "sentence." (See #5)

4. *What is the difference between suspending the imposition of sentence and suspending the execution of sentence?*—The "sharp distinction" between the two types of suspension was pointed out by the Supreme Court more than 35 years ago but all confusion has not abated.[9] For example, the frequently used expression, "The defendant received a 'suspended sentence,' " does not distinguish between the two alternatives.

The practical distinction between the suspension of imposition and execution of sentence is the time at which the court fixes the number of years to be served in prison. If the imposition of sentence is deferred, only if and when the conditions of probation are violated does it become necessary for the judge to set a term of imprisonment. At that time, section 3653 states that the judge can impose "any sentence which might have originally been imposed."

Alternatively, if the judge imposed a sentence at the time of conviction or plea but suspended its execution, the maximum term of imprisonment has already been defined if the defendant's probation is revoked. It is sometimes said that the defendant thus knows "exactly what sentence is hanging over him," even though section 3653 provides that the court at revocation may require the defendant to serve "the sentence imposed or any lesser sentence."

5. *Is probation a sentence?*—For a variety of purposes, the argument has been made that probation is not a "sentence" within the meaning of various statutes. Whatever the intellectual stimulation of such argument, Federal courts have generally treated probation as a sentence although technically it is not.[10]

One court's conclusion that probation is a sentence was made by a flat assertion of that fact rather than by reference to other cases or statutes. The court simply said, "In determining whether probation is properly defined as a 'sentence,' we avoid needless terminological distinctions of artificial origin; we focus on the reality of the probationary status."[11]

Probation differs from a sentence in several ways. For example, the authority to grant and modify probation is derived from a statute, 3651, distinct from the statutes that create the offense and fix the penalties. The period of probation can last up to 5 years, which may be longer than the term of imprisonment provided for the offense itself. If the defendant violates the conditions of probation and service of the term of imprisonment commences, no credit is given for the time spent on probation towards the length of the term of imprisonment. And finally, to apply the reasoning discussed (in topics #1 and #2) above, the Supreme Court must not have considered probation a sentence when it decided that granting probation was failing to impose a sentence and again when it interpreted the time at which probation could be imposed: if service of sentence terminates the ability of a court to grant probation, probation itself cannot be a sentence.

In short, probation is the period when the sentence is in abeyance and the court has not yet made the final determination of whether or for how long the defendant should go to prison.

Much of the confusion regarding the status of probation as a sentence may be due to the changing concept of probation. A "sentence" was usually considered the punishment or penalty imposed by a court. Imprisonment and fines easily fit within this definition. As originally conceived, however, probation was rehabilitative in nature and designed to allow the defendant to demonstrate good behavior and thus to escape punishment. Even though probation could be conditioned upon supervision and the performance or avoid-

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[6] See 18 U.S.C. §4205(g).
[7] *United States* v. *Ellenbogen*, 390 F.2d 537, 540-541 (2nd Cir.), cert. denied, 393 U.S. 918 (1968).
[8] See generally, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); see new Rule 32.1(b) effective August 1, 1979.
[9] *Roberts* v. *United States*, 320 U.S. 264, 268 (1943). Compare *Smith* v. *United States*, 505 F.2d 893 (5th Cir. 1974), discussing suspended execution of imposition, and *Nicholas* v. *United States*, 527 F.2d 1160 (9th Cir. 1976) which confusingly applies the Smith reasoning and language to the suspended execution of sentence.
[10] *Korematsu* v. *United States*, 319 U.S. 432 (1932); *Tanzer* v. *United States*, 278 F.2d 137, 140 n. 7 (9th Cir. 1960). See generally, *United States* v. *Fultz*, 482 F.2d 1 (8th Cir. 1973).
[11] *Smith*, supra, at 895.

ance of certain types of behavior, it was considered a privilege, not punishment.

Gradually the approach towards probation and rehabilitation has changed. Judicial decisions recognized that probation (and parole) involved the loss of certain liberties and should not be treated merely as an act of grace. Amendments to the probation statute allowed courts to impose probation in conjunction with imprisonment (see II. Split-sentences) or to impose conditions of probation requiring other types of confinement and treatment, further blurring the former distinctions between imprisonment and probation. In 1970, probation was equated with a sentence by the American Bar Association Standards Relating to Probation (Approved Draft) : probation is "an attempt by society to impose a sanction which will accomplish its goals, just as any other sentence is designed to do." Nevertheless, many statutes do not reflect this changing interpretation of probation.

The Senate's revision of the criminal code, S. 1437, 95th Congress, would have removed the confusion in the present law by providing explicitly that probation is a sentence and that every convicted defendant must be sentenced to either probation, a fine, or imprisonment.

6. *Can probation be reinstated upon revocation of probation?*—In resentencing a defendant whose probation has been revoked, the court is empowered by section 3653 to impose "any sentence" it might have originally imposed if the imposition of sentence had been suspended, or to impose the sentence earlier imposed or "any lesser sentence" if the execution had been suspended. In either case, probation must be considered a "sentence" in order for the court to re-impose probation. The primary consequence of determining whether or not probation is a "sentence" (see topic #5) is whether or not a court can reinstate probation.

Despite an opinion by the legal counsel to the Bureau of Prisons and several court decisions that would not allow the reimposition of probation,[12] many courts have routinely reinstated probation without considering these issues. (See #9)

7. *When does probation commence and terminate?*—On a single indictment, the court can impose a maximum of 5 years probation. If the order placing the defendant on probation is not stayed—delayed—by the court pending appeal of the conviction, the court must specify when the term of probation is to begin. See Rule 38(a)(4).

The running of the term is tolled by any term of imprisonment a defendant serves on state or Federal charges or by the time the defendant is in violation of the terms of probation.[13] The period during which the defendant is considered in violation is measured from the time a judge or magistrate signs an arrest warrant (or the probationer appears in court in response to a summons) based upon the probation office's allegations that the probationer has violated the conditions of probation.

Probation expires at midnight on the last day of the term specified by the court. The originally set term may be reduced, usually at the recommendation of the probation office, and the defendant granted an early discharge from probation by court order.

II. Split-Sentences

A split-sentence is a form of probation that allows for imprisonment in a jail-type institution for up to 6 months followed by probation for up to 5 years on a single-count indictment. Section 3651 was amended in 1958 to provide this sentencing alternative to the court. The brief legislative history of the split-sentence provisions reveals that Congress intended to allow judges to accomplish on a one-count indictment what they could otherwise do on a multi-count indictment: give the defendant a brief term of imprisonment as a warning and then keep the defendant under probationary supervision. Split-sentences and "mixed" sentences (prison on one count, probation on another) were imposed on approximately 9 percent of all defendants sentenced last year.

Without the provision for a split-sentence, a judge could not insure the same balance between a short prison term and a lengthy period of supervision. The court could sentence a defendant to 5 years imprisonment, for example, provide for early parole consideration under 18 U.S.C. §4205-(b)(2) and strongly recommend to the Parole Commission that the defendant be released after 6 months. The ultimate decision as to when to release the defendant (and whether the defendant's subsequent conduct is in accord with the terms of parole) would be in the control of the

[12] Eugene N. Barkin, former Legal Counsel to the Bureau of Prisons, writing in FEDERAL PROBATION, June 1962, pp. 13-14; *Fox* v. *United States*, 354 F.2d 752, 754 (10th Cir. 1965); *United States* v. *Buchanan*, 340 F.Supp. 1285 (E.D.N.C. 1972).

[13] *United States* v. *Lancer*, 508 F.2d 719, 733 n. 42 (3rd Cir.), cert. denied, 421 U.S. 989 (1975) (citing cases); *Nicholas* v. *United States*, 527 F.2d 1160 (9th Cir. 1976). See also, *United States* v. *Strada*, 503 F.2d 1081 (8th Cir. 1974).

commission, not the court, and there is no guaranty to the sentencing judge that the sentence will be divided as the court desires. If the judge imposes a short sentence, for example, between 6 months and 1 year, to insure that the defendant spent no more than that amount of time in prison, the defendant would be released at the full term (minus good-time credit under §4161 if the sentence exceeded 6 months) without further supervision. (see #10) The closest alternative to a split-sentence is a §4205(f) court-ordered release. Under this section, at the time of sentencing a judge can impose a fixed term between 6 months and 1 year and require that the defendant be released as if on parole after one-third of the sentence. The defendant would be under supervision for the remainder of the sentence, which at most would be approximately 8 months.

Because a split-sentence is a method of suspending the execution of sentence—a term of imprisonment is set and all but up to 6 months is suspended—all the above discussed restrictions on when and how probation may be imposed are also applicable to split-sentences.

8. *Can a split-sentence be imposed on a multicount indictment?*—A debatable restriction on split-sentences is that they are only proper on one-count indictments. Although the legislative history of split-sentences is frequently cited by courts, there has not been an explanation of the one-count requirement as a limitation, not expansion, of the court's sentencing alternatives.[14] Nevertheless, it seems likely that courts will look only to the words of the statute itself, and not to its history, in deciding whether a split-sentence is permissible. The second paragraph of section 3651 does not expressly limit a split-sentence to one-count indictments.

9. *Can a split-sentence be imposed at probation revocation?*—If a defendant is convicted of two or more counts and is sentenced to 2 years imprisonment on the first count, 5 years probation on the second count, should the judge be able to impose a split-sentence when the defendant violates the conditions of probation of count two? In this case, the indictment, conviction and sentence specified two (or more) counts, although only one count would still be "alive" at the time of resentencing. A split-sentence should not be permissible because there was not a one-count indictment. (See #5 and #6 on reinstating any form of probation.)

A variation on this question is whether a judge can impose or reimpose a split-sentence upon revocation of probation that had been granted on a one-count indictment. Prior to the split-sentence provision, on a multicount indictment, the defendant could have been sentenced to prison on one count and placed on probation on another. If the probation was subsequently revoked, the judge either had to send the defendant to prison *or* continue the defendant on probation. Since the purpose of the split-sentence was only to allow a judge to do on one count what was already possible on several counts, it should not now be possible to reimpose a split-sentence upon revocation because the possibility of *both* prison and probation was not formerly available at revocation even on multicount indictments.

Notwithstanding these arguments, split-sentences are now being imposed upon revocation of probation.

10. *Can the court or Attorney General reduce the imprisonment portion of a split-sentence?*—For most defendants, the Bureau of Prisons calculates good time credits and the Parole Commission determines the parole release date. Defendants serving sentences of 6 months or less —which encompasses all defendants serving split-sentences—are not entitled to good time credit or parole, however.[15] The court can reduce the prison term although the source of its power is not clear.

If the imprisonment portion of the split-sentence is considered a term of imprisonment in the custody of the Attorney General, the court could reduce the sentence pursuant to Rule 35 within the time limits of the rule. (See #18) Alternatively, since the sentence was imposed pursuant to the probation statute, section 3651, that section could allow modification at any time. In the context of split-sentences, determining the source of the court's authority becomes critical only in the rare case in which the court wishes to release the defendant from prison but the authority under Rule 35 has lapsed because the defendant failed to file a timely motion.

11. *What is the status of weekend service of a split-sentence?*—One variation of a split-sentence —weekend service of sentence—may not be a split-sentence nor even a valid sentence of any kind. The Ninth Circuit has ruled that weekend imprisonment can be required by a court "only

[14] *United States* v. *Nunez*, 573 F.2d 769 (2nd Cir.), cert. denied, 436 U.S. 930 (1978); *United States* v. *Hooper*, 564 F.2d 217 (7th Cir. 1977); House Report 1658, Senate Report 2135, both accompanying H.R. 7260, Cong. Record, p. 8000, all 85th Congress (1958).

[15] 18 U.S.C. §4161; §4205; and 28 C.F.R. 2.2(e).

where sentence is suspended and restraints are imposed *as conditions of probation.*" (emphasis added) When a defendant is sentenced to a term of imprisonment on a regular or split-sentence, "control over the prisoner passes to the Attorney General and determination of the manner in which sentence shall be served is for agencies of the Department of Justice," the appellate court explained.[16] (See #14)

Thus a court is without authority to specify that time spent in the custody of the Attorney General (as we have assumed the imprisonment portion of a split-sentence is) be served in a particular institution on particular days. To fulfill the court's intention that a sentence be spent on weekends, the Bureau of Prisons, exercising its own authority (see #15), has attempted to accommodate probationers at its own or contract institutions.

A split-sentence to be served on weekends raises another problem: probation would not commence until all the jail time has been served.[17] Consequently, while serving the interrupted periods in jails, the defendant would not be on probation during the weekends or during the weekdays and probation arguably should not be revoked for conduct during those times.[18] Furthermore, weekends in custody would be credited towards the 6-month maximum that can be served in custody under a split-sentence and not towards the maximum of 5-years probation which would commence after the last prison date.

Authority in section 3651 apart from the split-sentence paragraph allows a court to require a defendant to reside or participate in a residential treatment program as a condition of probation. If a judge sentences a defendant to "confinement" for 3 months, to be served on weekends in a residential treatment center, these terms are conditions of probation and are a valid exercise of the court's discretion. As conditions of probation and not a split-sentence, they can be modified by the court at any time during the 5 years of probation; the 6-month maximum for imprisonment under a split-sentence is not applicable. With residential treatment on weekends or everyday, the defendant is under continuous probation supervision.

Under present law, it may be unfair, if not illegal, for the court to require the defendant to serve weekends in jail in the custody of the Attorney General as a condition of probation. This hybrid approach would make the defendant responsible for arranging his or her own imprisonment when the Attorney General is under no obligation to accept the defendant. The defendant would be on probation 7 days a week, and failure to find a prison or jail willing to accommodate him or her could be a violation of probation.

Senate bill 1437 would have changed the law to specify that imprisonment *up to one year* on a split-sentence would be a condition of probation. The report accompanying the bill states that, "Flexibility is provided by permitting confinement in split-intervals, thus authorizing, for example, weekend imprisonment [in the custody of the Attorney General] with release on probation during the week . . . or nighttime imprisonment with release . . . during working hours."[19] The effect of the flexibility would apparently be the enlargement of the discretion of the court and the reduction of the discretion of the Attorney General, with the result that the Bureau of Prisons would statutorily be required to accept probationers on weekends.

12. *What is the maximum amount of probation or imprisonment under a split-sentence?*—The 5-year maximum term of probation allowed by section 3651 is cumulative: that is, no matter how many times probation is interrupted, revoked and reinstated on a single indictment, the maximum term is 5 years.

Similarly, the maximum term of imprisonment on a split-sentence is 6 months. Should probation be revoked and another split-sentence imposed (see #9), the total time served in prison, with credit for time served awaiting trial or revocation proceedings (see #14) is still 6 months.[20]

13. *Can a split-sentence be imposed under the Youth Corrections Act?*—Probably not. A recent Supreme Court decision[21] ruled that fines were consistent with the rehabilitative purposes of the

[16] *United States* v. *Haseltine*, 419 F.2d 579, 582 (9th Cir. 1969), overruled on other grounds, *United States* v. *Bishop*, 12 U.S. 346 (1972).

[17] *Haseltine*, supra. This is the position of the General Counsel of the Administrative Office of the United States Courts in letters to Dan R. Beto (March 25, 1976) and William P. Adams (April 6, 1977).

[18] "Courts have often sustained the revocation of probation for criminal activity committed prior to the defendants going on probation even though the defendant, not yet being on probation, could not technically violate a condition of probation." *Tiitsman* v. *Black*, 536 F.2d 678, 682 (6th Cir. 1976), citing *United States* v. *Ross*, 503 F.2d 940 (5th Cir. 1974) and other cases. It is doubtful whether an "administrative" violation—not criminal conduct—could be the basis of such a "revocation." See *United States* v. *Dane*, 570 F.2d 840 (9th Cir. 1977), cert. denied, 436 U.S. 959 (1978).

A similar question may be raised for (additional) violations occurring between the time an arrest warrant for probation violations is issued and the time the revocation hearing is held: can such violations be the basis for revocation if the defendant is not under supervision or is not receiving credit towards probation for that time?

See generally, Legal Opinion No. 2 (Nov. 16, 1978), General Counsel, Administrative Office of the United States Courts.

[19] Senate Report 605, Part I, to accompany S. 1437 (95th Cong.). See pp. 905-906 commenting on section 2103 of S. 1437.

[20] See *Clayton* v. *United States*, 588 F.2d 1288 (9th Cir. 1979).

[21] *Durst* v. *United States*, 434 U.S. 542 (1978). See *United States* v. *Marron*, 564 F.2d 867 (9th Cir. 1977), discussing youth act sentences.

act and could be imposed in conjunction with probation or imprisonment, but did not refer to the possibility of split-sentences. Although 18 U.S.C. §5010(a) of the youth act incorporates many of the alternatives of adult probation, that section specifically provides that probation can be imposed only if the court finds that commitment is not necessary. A split-sentence, of course, would involve imprisonment and would be inconsistent with this limitation even after pondering the differences between youth act "commitment" and section 3651 "confinement" or "residence."

The problems of youth act sentences, and the differences between youth act and adult sentences are discussed further elsewhere.[22]

III. Commencement of a Sentence of Imprisonment

Once the judge imposes sentence, the court loses control over most aspects of the administration of the sentence. Nonetheless, the impression is often maintained that the court controls the following functions.

14. *When does a defendant receive credit for time served in jail while awaiting trial?*—Section 3568 of the criminal code provides that a sentence is deemed to commence when the defendant is taken into Federal custody, but that the defendant also must be awarded credit for time served prior to conviction. Before the enactment of this section and its amendment in 1960 and 1966, there was some confusion: had the sentencing judge already taken into account the time the defendant spent in custody awaiting trial and consequently imposed an additional term of years, or did the judge intend the time served to be subtracted from the total term stated in the sentence? Section 3568 now provides that the Attorney General must administratively grant credit towards service of sentence for any days spent in custody "in connection with the offense or acts for which sentence was imposed." It is not necessary for the judge to include as part of the judgment and sentence that such credit is granted.[23]

The statute broadly covers time served for the "offense" or "acts" so that the defendant's credit is not contingent upon conviction and sentence for the same offense for which he or she was arrested or indicted. A defendant serving a sentence from a conviction on another state or Federal jurisdiction would be in custody as a result of that conviction and would not be entitled to credit towards the sentence being imposed.

One troublesome question occurs when a defendant in pre-trial custody of another jurisdiction, for example the state, has Federal charges and a detainer lodged against him or her. If the defendant can otherwise post bail for the state offense and be released, it seems logical to conclude that the defendant is being held as a result of the Federal charges and should later receive credit for that time served against the Federal sentence. However, section 3568 has been interpreted to allow Federal credit in such circumstances only if the Federal detainer precludes (under state law) state bail or is for a nonbailable offense *and* no state credit is given.[24] To give the defendant in state custody credit towards both state and Federal sentences would have the same effect as postconviction concurrent sentences, but has been objected to in the preconviction context as inappropriate "double credit." It would be preferable for the statute to provide that the Federal court or Attorney General should inquire and decide whether the defendant would have been released but for the Federal detainer, and if so, specify that Federal credit is to be granted independently of a state award of credit.

15. *Can a Federal judge require a Federal sentence to run concurrently with a state sentence?*—A Federal judge is without authority to order that a Federal sentence be served concurrently with a prior state sentence, although the judge can certainly make a recommendation that this be done.[25] Under 18 U.S.C. §4082(a) and (b), the Attorney General has the responsibility for designating the place of confinement where the sentence is to be served. That discretion has been delegated to the Bureau of Prisons pursuant to 28 C.F.R. §0.96(c). Since the Bureau may choose not to designate the state institution as the place for Federal confinement, it is possible that the defendant will have to wait until he or she is actually turned over to Federal custody (see section 3568) before the sentence is deemed to commence.

An unrelated but frequent misunderstanding is what happens upon the expiration of a concurrent state sentence. If the defendant is sen-

[22] See Kutcher, "Looking at the Law," FEDERAL PROBATION (June 1978), pp. 58-59.

[23] *Soyka* v. *Alldredge*, 481 F.2d 303 (3rd Cir. 1973).

[24] Policy Statement 7600.59, Bureau of Prisons (May 27, 1975); *Boyd* v. *United States*, 448 F.2d 477 (5th Cir. 1971), cert. denied, 405 U.S. 992 (1972); *Jackson* v. *Attorney General*, 447 F.2d 747 (5th Cir. 1971); *Emig* v. *Bell*, 456 F.Supp 24 (D.Conn. 1978). See also *Shields* v. *Daggett*, 460 F.2d 1060 (8th Cir. 1972) (double credit); *Willis* v. *United States*, 438 F.2d 923 (5th Cir. 1971) (remand for determination of why defendant held.

[25] *United States* v. *Myers*, 451 F.2d 402 (9th Cir. 1972).

tenced to a Federal term of imprisonment and the judge desired the sentence to run concurrently with a state sentence, whether or not the Bureau designates the state institution as the place of confinement, the Federal term continues to run even when the state term expires. The judge has not provided that the Federal sentence will last only as long as the state holds the defendant but only recommended that the period of state custody be counted against both sentences. When the state term ends, the defendant will be placed in exclusively Federal custody.

16. *When do Federal sentences run concurrently?*—A sentencing judge may provide that a term of imprisonment is to run concurrently or consecutively to other Federal sentences that the defendant is already serving or to other terms of imprisonment imposed at the same time. If the court does not specify, the sentences are considered to run concurrently, although there is no statutory authority for this presumption.

Senate bill 1437 would have established a statutory basis and new presumptions for determining when sentences run consecutively or concurrently.

IV. Court Modification of Sentences

The court can modify probation at any time, as has been discussed above (see #2). The authority to modify a Federal term of imprisonment is much more modest and is primarily based on the Rules of Criminal Procedure. However, a judgment and sentence may also be subject to "collateral attack"—a challenge that is not part of the criminal prosecution. A person in custody can file a writ of habeas corpus (28 U.S.C. § 2241) or a petition under 28 U.S.C. § 2255 seeking to vacate the conviction and/or sentence and to be resentenced. The distinctions between these methods of relief are not clear and there is a disagreement among several courts of appeal as to what actions (parole decisions?) may be challenged under section 2241 or 2255, and correspondingly, where the challenges must be filed (sentencing district or district of confinement?).[26] Since two cases that may clarify this area are pending before the Supreme Court, further discussion will not be included here.[27]

17. *When can illegal sentences be corrected?*—Rule 35 allows a court to correct an illegal sentence at any time. This provision is applicable, for example, to sentences that exceed the maximum term authorized for the offense, omit the required special parole term for drug offenders, or impose probation after the court's authority to do so has lapsed. It is limited to the correction of sentences and does not grant the power to reduce the sentence at that time.

A sentence that would be legal except for the manner in which it was imposed—for example, the defendant was not present in the courtroom—can be corrected at the times authorized for the reduction of sentences, discussed next.

18. *When can sentences be reduced?*—Rule 35 states that a sentence can be reduced, at the discretion of the court, within 120 days of the imposition of sentence, within 120 days after the court receives an order from the court of appeals affirming the judgment or dismissing the appeal, or within 120 days after the Supreme Court denies review of the case or enters an order affirming the judgment. During these periods, Rule 35 allows, sentences of imprisonment or fines—but not probation or restitution which are governed by section 3651—to be reduced. Should the proposed amendment to Rule 35 be adopted* (see #2), or should the criminal code be revised in accordance with S. 1437, probation would become a permissible reduction in a sentence of imprisonment. The Senate bill, however, limited the time when the court could reduce the sentence to within 120 days of sentencing, and then only if an appeal (under the proposed provision for review of sentences) had not been filed.

In a series of decisions, courts have interpreted the present Rule 35 to allow reductions in a sentence after the apparent 120-day limitation has expired as long as the motion for reduction was filed during the period.[28] While this extension of the rule has worked to prevent hardship on defendants whose motions just missed the cut-off period, it has sometimes been used as a basis for the court's retention of authority that should pass to the Parole Commission. Some judges encourage a defendant to file a Rule 35 motion and keep it on file for months or years after the 120-day period has passed so that the court retains its ability to reduce the sentence. The court also impresses upon the defendant the importance of

[26] See *Andrino* v. *United States Board of Parole*, 550 F.2d 519 (9th Cir. 1977) as opposed to *Kortness* v. *United States*, 514 F.2d 167 (8th Cir. 1975).

[27] *United States* v. *Addonizi*, (No. 78-156), cert. granted December 11, 1978.

[28] *United States* v. *Stollings*, 516 F.2d 1287 (4th Cir. 1975); *United States* v. *Janice*, 505 F.2d 983 (3rd Cir.), cert. denied 420 U.S. 948 (1975); *United States* v. *Polizzi*, 500 F.2d 856 (9th Cir. 1974), cert. denied 419 U.S. 1120 (1975).

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good behavior in the institution and participation in certain activities in influencing the court to grant the motion. While upon occasion judges may in fact follow up on their stated intention of "keeping an eye on the defendant," in many more cases such indications hamper the efforts of prison or parole authorities to work with the defendant and may foster a misplaced belief in the defendant that the judge is the primary supervisor and determiner of the release date.

* EDITOR'S NOTE: An amendment to the Federal Rules of Criminal Procedure, Rule 35(b) has been approved by the Supreme Court on April 30, 1979, to become effective on August 1, 1979. This change would allow a sentence of imprisonment to be reduced to probation within the time limitations of Rule 35. The text of the amendment and its effect are discussed in topic #2.

The Lawyer and the Accuracy of the Presentence Report

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THERE is currently difference of opinion as to the major objective to be served in sentencing a convicted offender. The former emphasis on treatment or rehabilitation is being replaced by an emphasis on justice or fair and certain punishment. The indeterminate sentence designed to achieve treatment objectives is being replaced by a determinate sentence designed to achieve equality of treatment and certainty of punishment.[1]

Raymond Parnas and Michael Salerno, drafters of the Uniform Determinate Sentencing Act of 1976 which was substantially adopted in California,[1.1] had this to say about the trend toward determinate sentencing:

> Whether determinate sentencing will be any more successful than indeterminate sentencing in changing criminal offenders into law abiding citizens is doubtful. In that sense, the new process is just as experimental as the former. However, a crucial difference between the two is that rehabilitation is not a dominant goal of the new law. In fact, widespread recognition of the failure and abuses of the rehabilitative ideal was the primary factor in the dismantling of a system grounded in a diagnostic, sickness, causality-capability and curative, predictive change. Nonetheless, there is speculation that a collateral benefit of a visible, fair and equitable sentencing process of relatively certain and early prison terms may be rehabilitation. It is hypothesized that the apparent factual fairness of such a system will be more effective than a system geared toward rehabilitation but incapable of making the decisions required to accomplish that end.[1.2]

There is some variety among determinate systems. Some, like California's, give the judge the discretion to vary a statutory fixed term if certain criteria exist. Others, like the system being experimented with in Wisconsin and now in use in Minnesota and in the Federal system, give the judge wide discretion as to the term to be imposed and fix the parole date through a scoring system based on facts already in existence. Such facts typically include the offense severity and the offender's prior record, employment, history and record under prior parole and probation supervision.

These systems are in contrast to the more prevalent indeterminate systems which give wide discretion to the court to set the maximum term an offender may serve and similar discretion to a parole authority to set the date of release. The indeterminate system is based on a medical model in which an attempt is made to diagnose the offender's problem and release him when a prediction of satisfactory adjustment to the community can be made. During confinement, attempts are made to deal with the offender's problems in a way that enhances the chances for successful reassimilation into the community.

Whatever the system used, an effective sentencing decision requires knowledge of facts, whether those facts relate to characteristics of the defendant which might make him responsive

1. *See, e.g.*, McGEE, CALIFORNIA'S NEW DETERMINATE SENTENCING ACT, 42 FED. PROB. 3 (1978); ALSCHULER, SENTENCING REFORM AND PROSECUTORIAL POWER: A CRITIQUE OF RECENT PROPOSALS FOR "FIXED" AND "PRESUMPTIVE" SENTENCING, 126 Y. PA. L. R. 550. (1978); REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING: FAIR AND CERTAIN PUNISHMENT (1976).

1.1. 1975 Cal. Stats. Ch. 1139.

1.2. Parnas and Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 1978 Univ. of Cal., Davis L. R. 29, 29.

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