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The Sentencing Options of Federal District Judges

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1520 H Street, N.W.
Washington, D.C. 20005
Telephone 202/633-6011

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THE SENTENCING OPTIONS OF FEDERAL DISTRICT JUDGES

By Anthony Partridge

Federal Judicial Center
June 1985 Revision

This publication was produced in furtherance of the Center's statutory mission to develop and conduct programs of continuing education and training for personnel of the federal judicial system. The selection and presentation of materials reflect the judgment of the author. This work has been reviewed by Center staff, and its publication signifies that the Center regards it as responsible and valuable. It should be noted, however, that on matters of policy the Center speaks only through its Board.

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Significant Changes Since the June 1983 Revision

This revision incorporates a number of minor changes intended to clarify language, amplify discussions, update citations, etc. Changes of this type are not referred to below.

Changes in law and policy that are reflected in this revision are as follows:

Chapter 2

Enactment of the Criminal Fine Enforcement Act of 1984 (pp. 5–6).

Enactment of 18 U.S.C. § 3013, requiring a "special assessment on convicted persons" (p. 6).

A Ninth Circuit decision holding that it is improper for a judge to have a policy of rejecting pleas to a single count of a multicount indictment (p. 7).

A 1984 amendment to 18 U.S.C. § 3651, dealing with the effect of probation on liability for a fine (p. 8).

New appellate court decisions about restitution, including some dealing with payment of reparations to people who are not victims of the offense (pp. 10–11).

Passage of a resolution, included in the Comprehensive Crime Control Act of 1984, expressing the sense of the Senate about standards to be used in determining whether a sentence of imprisonment is appropriate (p. 11).

Chapter 4

A change in Parole Commission rules about the timing of reconsideration hearings (p. 15).

A change in Parole Commission rules about when the commission considers offenses of which the defendant has been acquitted (p. 20).

Enactment of transitional rules about the application of the parole system to offenders who are incarcerated when the Parole Commission is abolished (p. 23).

Changes

Chapter 5

Repeal of the provision authorizing special parole terms for the most serious drug offenders (p. 26).

Enactment of transitional rules about the application of the parole system to offenders who are incarcerated or on parole when the Parole Commission is abolished (p. 27).

Chapter 7

Amendment of the Bail Reform Act to apply to voluntary-surrender cases (p. 33).

Chapter 8

Repeal of the Youth Corrections Act (*passim*).

A Ninth Circuit decision limiting the scope of decisions suggesting that a Youth Corrections Act sentence may not be longer than the adult sentence that could have been imposed (p. 37).

Changes in Bureau of Prisons facilities to which youth offenders are assigned (pp. 38–39).

A change in the Parole Commission plan for making decisions about members of the *Watts* class (pp. 40–41).

New appellate decisions about the effect of setting aside a sentence under the Youth Corrections Act (p. 42).

Chapter 10

Chapter 10 is new; it discusses newly enacted 18 U.S.C. § 4244, providing for alternative disposition of convicted offenders requiring hospitalization for care or treatment of a mental disease or defect (pp. 47–49).

Chapter 11

Statutory changes in the authorities for committing offenders to the Bureau of Prisons for study (pp. 51–52).

Chapter 12

New developments regarding the applicability of the Freedom of Information Act to presentence reports in the hands of the Parole Commission (p. 54).

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I. INTRODUCTION

When a judge sentences a criminal offender to a term of imprisonment, one thing is nearly certain: The offender will not be imprisoned for the period specified in the sentence. The sentence imposed by the judge is a fiction. Needless to say, however, it is a fiction with real consequences. This publication is an effort to describe the judge's sentencing options in terms of those consequences. It goes beyond the formal language of the statutes to consider the effect of the choice of sentence on the offender's treatment by the Bureau of Prisons and the Parole Commission.

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

The present revision takes account of changes in the sentencing statutes that were made by the Ninety-eighth Congress and are currently in effect. It does not include discussion of the statutory changes that are scheduled to take effect in the fall of 1986 under the Sentencing Reform Act of 1984. For an overview of those changes, which include the implementation of a guideline sentencing system, see A. Partridge, The Crime Control and Fine Enforcement Acts of 1984: A Synopsis 3–11 (Federal Judical Center 1985).

The administrative policies described here are those in effect as of April 30, 1985. They are, of course, subject to revision, and revisions may apply to offenders sentenced currently.

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

For the newly appointed district judge, the most surprising feature of the system described in this publication will probably be the relationship between the sentencing judge and the United

States Parole Commission. Pursuant to various statutes, the judge has broad authority to determine the sentence of an offender. If the sentence is imprisonment, the judge's sentence determines the offender's parole eligibility date and (subject to "good time" deductions) the maximum duration of incarceration. Within the limits so established, the Parole Commission determines the actual release date. Pursuant to 18 U.S.C. § 4203(a)(1), the commission has issued guidelines for making such determinations. Under those guidelines, the primary determinants of an offender's release date are the severity of the offense committed and the offender's age, prior record, and drug history—all factors that were known at the time of sentencing by the judge. Contrary to some commonly held notions:

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

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

The present policies of the Parole Commission are designed to provide consistency in release dates for offenders similarly situated. They reflect the view that a major function of the parole system is to compensate for disparity in the sentences handed down by the judges.

Another feature of the system that may come as a surprise is the limited practical importance of two special sentencing authorities that were designed to facilitate rehabilitation—the Youth Corrections Act (now repealed, but still applicable to some offenders) and the Narcotic Addict Rehabilitation Act. The selection by the sentencing judge of one of the special authorities does make a difference in the subsequent treatment of the offender, but the difference is not always what one would be led to think from reading the statutory language.

II. BASIC SENTENCING OPTIONS FOR ADULT OFFENDERS

Imprisonment

Term

The maximum term that the judge may impose is set forth in the statute defining the crime. Generally, the judge may impose any term up to the maximum. A few statutes have minimum terms (e.g., 18 U.S.C. § 844(h)), and a few have fixed terms (e.g., 18 U.S.C. § 2114).

"Good Time"

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

Parole Eligibility

Term of More Than One Year (or Sum of Consecutive Terms More Than One Year). A prisoner is normally eligible for parole release after one-third of the term. 18 U.S.C. § 4205(a).

In the case of a life sentence or a sentence of more than thirty years, the prisoner is eligible after ten years. 18 U.S.C. § 4205(a). As this provision is interpreted by the Parole Commission, consecutive sentences do not delay eligibility beyond ten years. United States Parole Commission, Rules and Procedures Manual 152 (§ M-01(a), (b)(1)) (Oct. 1984).

In the sentence, the judge may designate an earlier parole eligibility date or specify that the prisoner is immediately eligible. 18 U.S.C. § 4205(b)(1), (2).

Term of Six Months Through One Year (or Sum of Consecutive Terms). A prisoner is normally not eligible for parole.

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

Term of Less Than Six Months (or Sum of Consecutive Terms). Prisoners are not eligible for parole.

Concurrent Service of State Sentence

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

Residence in Halfway House

The Bureau of Prisons maintains a network of contractor-operated halfway houses—"community treatment centers"—principally for offenders who are approaching the ends of terms of imprisonment. Halfway house residents generally work or participate in training programs in the community, but are required to return to the halfway house before a specified hour each evening. Newly sentenced offenders may be required to reside in such halfway houses in two ways:

1. The offender may be sentenced to a term of imprisonment, with a request by the judge that he serve his time in a community treatment center. The Bureau of Prisons will generally honor such a request if the offender qualifies for minimum-security placement. If the placement turns out to be unsatisfactory, the Bureau of Prisons retains discretion to determine how the offender is to serve the remainder of his time.

Unless the sentencing judge requests assignment to a community treatment center, an offender sentenced to imprisonment will not initially be assigned to one and is likely to be transferred to such a center only for the last few months before release.

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

Fines

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

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

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

18 U.S.C. § 3623. An offense is a misdemeanor if the maximum authorized term of imprisonment is one year or less. 18 U.S.C. § 1.

If multiple counts arise from a common scheme or plan and the offenses did not cause "separable or distinguishable kinds of harm or damage," the aggregate fine that may be imposed under the new

provision is twice the amount that could be imposed for the most serious offense. 18 U.S.C. § 3623(c)(2).

A fine may be imposed either alone or in addition to imprisonment. If payment is to be in installments and the offense was committed after December 31, 1984, the period of payment shall not exceed five years, excluding any time that the defendant is imprisoned for the offense for which the fine is imposed, and interest on the unpaid balance runs at 1.5 percent per month. 18 U.S.C. § 3565(b)(2).

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

Special Assessment

The court is required by 18 U.S.C. § 3013 to impose a "special assessment" on each convicted offender. For misdemeanors, the required assessment is $25 for an individual defendant and $100 for a defendant other than an individual; for felonies, it is $50 and $200, respectively. The Department of Justice takes the position that a separate assessment is required for each count for which a conviction is obtained and for which a defendant could be separately punished. United States Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress 184 (1984).

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

The special assessment is collected in the same manner as a fine. 18 U.S.C. § 3013(b). It apparently must be imposed even in cases in which it will clearly be uncollectible; there is no exception for indigent defendants. Nor is there an exception for petty offenses: Conviction of a five-dollar parking violation requires a special assessment. Since forfeiture of collateral does not produce a conviction, however, the special assessment is not imposed in addition to forfeited collateral.

Probation

When Available

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

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

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

1. "Mixed sentence." Upon a conviction on multiple counts, the court may impose imprisonment on one or more counts, followed by probation on one or more others. For this reason, some judges generally refuse to accept a guilty plea to one count of a multiple-count indictment; they insist on a plea to two counts to give them greater latitude in sentencing. However, the Ninth Circuit has held that it is improper for a district judge to adopt such a policy. *United States v. Miller*, 722 F.2d 562 (9th Cir. 1983).

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

How Imposed

The court may suspend *imposition* of sentence and place the defendant on probation. If probation is revoked, the court then has the full range of sentencing options.

The court may impose a sentence of imprisonment and/or fine, suspend *execution* of the sentence, and place the defendant on pro-

bation. If probation is revoked, the court may reduce—but not increase—the sentence imposed. *See* Fed. R. Crim. P. 35.

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

In a case in which a fine is imposed and *execution* of the fine is suspended, the last paragraph of 18 U.S.C. § 3651, as amended by the Criminal Fine Enforcement Act of 1984, states that successful completion of probation will not extinguish liability for the fine. While this statement is almost certainly the result of drafting error, it may caution against putting an offender on probation by imposing a fine and suspending its execution.

Note that there is no authority for the court to suspend a sentence without putting the offender on probation. *United States v. Elkin,* 731 F.2d 1005 (2d Cir.), *cert. denied,* 105 S. Ct. 97 (1984); *United States v. Sams,* 340 F.2d 1014 (3d Cir.), *cert. denied,* 380 U.S. 974 (1965).

Duration

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

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

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

Probation Conditions

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

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

Conditions specifically authorized by statute (18 U.S.C. § 3651) are—

Residence in a halfway house or participation in its programs (see above)

Participation in a drug program

Payment of a fine (see above)

Support of persons for whose support the offender is legally responsible

Restitution or reparation (see below).

Probation conditions requiring offenders to perform "community service" have been used by a number of federal judges. There is no specific statutory authority for them, and authority must be found in the general power to grant probation "upon such terms and conditions as the court deems best." *See United States v. Restor*, 679 F.2d 338 (3d Cir. 1982).

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

Restitution

There are two authorities in the criminal code for ordering restitution: the Victim and Witness Protection Act and the probation statute.

The Victim and Witness Protection Act, enacted in 1982, added 18 U.S.C. §§ 3579-3580 to the code, effective with respect to offenses committed on and after January 1, 1983. These provisions are applicable only to offenses under title 18 and certain criminal violations of the Federal Aviation Act of 1958. 18 U.S.C. § 3579(a)(1). When sentencing an offender convicted of such an offense, the court must either order restitution to victims of the offense or state on the record the reasons for not doing so. 18 U.S.C. § 3579(a). Restitution may be "in addition to or in lieu of any other penalty authorized by law." 18 U.S.C. § 3579(a)(1). If the offender is placed on probation, any restitution ordered must be made a condition of probation; if the defendant is imprisoned and subsequently paroled, it must be made a condition of parole. 18 U.S.C. § 3579(g).

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With the victim's consent, the court may order that restitution be in services in lieu of money or that restitution be made to a third party designated by the victim. 18 U.S.C. § 3579(b)(4). Either the victim or the United States may enforce the restitution order as if it were a judgment in a civil action. 18 U.S.C. § 3579(h).

Although subsection (a)(1) of 18 U.S.C. § 3579 states that the court "may" order restitution, subsection (d) states that it "shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process." 18 U.S.C. § 3580 sets forth factors to be considered in determining whether restitution shall be ordered and allocates the burden of proof with regard to them. Under 18 U.S.C. § 3579(a)(2), as noted above, the reasons must be placed on the record if full restitution is not ordered. Taken together, these provisions leave considerable ambiguity about the extent of the sentencing judge's discretion to determine whether restitution will be ordered and, if so, the amount.

The probation statute, 18 U.S.C. § 3651, has long contained authority to require restitution as a condition of probation. The 1982 legislation left this provision undisturbed. At least with respect to offenses not covered by 18 U.S.C. § 3579, it remains fully applicable. For offenses covered by the 1982 law, it is unclear whether the court may still require restitution as a condition of probation in circumstances in which 18 U.S.C. § 3579 does not authorize it. For example, 18 U.S.C. § 3579 authorizes restitution for costs of psychiatric care only if the victim has suffered bodily injury.

The language about restitution in the probation statute is as follows: "While on probation, and among the conditions thereof, the defendant . . . [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . ." This language has been held to preclude probation conditions requiring monetary payments to charitable or other groups not damaged by the crime. *United States v. John Scher Presents, Inc.,* 746 F.2d 959 (3d Cir. 1984), and cases cited therein.

The quoted language from the probation statute has generally been held to limit restitution to damages attributable to the counts on which the defendant has been convicted. *United States v. Elkin,* 731 F.2d 1005 (2d Cir.), *cert. denied,* 105 S. Ct. 97 (1984); *United States v. Gering,* 716 F.2d 615 (9th Cir. 1983), and cases cited therein; *United States v. Johnson,* 700 F.2d 699 (11th Cir. 1983); *United States v. Brown,* 699 F.2d 704 (5th Cir. 1983); *Dougherty v. White,* 689 F.2d 142 (8th Cir. 1982). But some courts have carved

out an exception when larger amounts are consented to in plea agreements. *United States v. Orr,* 691 F.2d 431 (9th Cir. 1982). And some have carved out an exception where the counts pleaded to were part of a pattern of conduct and the total amount of damage has been admitted or adjudicated. *United States v. McMichael,* 699 F.2d 193 (4th Cir. 1983); *United States v. Davies,* 683 F.2d 1052 (7th Cir. 1982). Although the language of the Victim and Witness Protection Act is not identical to that of the probation statute, these precedents may have relevance for the newer law as well as the older.

In *United States v. Durham,* 755 F.2d 511 (6th Cir. 1985), the court upheld a sentence that ordered restitution for the value of an automobile that the defendant destroyed by arson in the course of his getaway from the bank robbery to which he pled guilty. The court concluded that the insurer of the automobile was a victim of the bank robbery within the meaning of 18 U.S.C. § 3579.

Sense of the Senate Resolution

In January 1984, when passing a bill that provided for guideline sentencing with a deferred effective date, the Senate added a resolution expressing the sense of the body about sentencing practices that should be followed in the period before implementation of the guidelines. 130 Cong. Rec. S545 (daily ed. Jan. 31, 1984). This resolution ultimately became section 239 of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987, 2039–40. Although it appears in a statute passed by both houses of Congress and signed by the president, it remains in terms a declaration of the "sense of the Senate." It is, of course, nonbinding.

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

III. "GOOD TIME"

Function

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

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

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

"Statutory Good Time"

Under 18 U.S.C. § 4161, an offender sentenced to a definite term of six months or more is entitled to a deduction from his term, computed as follows, if the offender has faithfully observed the rules of the institution and has not been disciplined:

Sentence Length	Good Time
At least 6 months, not more than 1 year	5 days for each month of the stated sentence
More than 1 year, less than 3 years	6 days for each month of the stated sentence
At least 3 years, less than 5 years	7 days for each month of the stated sentence
At least 5 years, less than 10 years	8 days for each month of the stated sentence
10 years or more	10 days for each month of the stated sentence

At the beginning of a prisoner's sentence, the full amount of statutory good time is credited, subject to forfeiture if the prisoner commits disciplinary infractions.

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

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

"Extra Good Time"

Under 18 U.S.C. § 4162, prisoners may be awarded good time, in addition to statutory good time, for employment in an industry or prison camp or for performing exceptionally meritorious service or duties of outstanding importance. Bureau of Prisons regulations provide that extra good time is awarded automatically to inmates working in prison industries, those assigned to camps or community treatment centers, and those participating in work or study release programs. It is awarded on a discretionary basis for exceptionally meritorious service in work assignments or for performing duties of outstanding importance. It is not used to reward participation in education or training programs. Extra good time is awarded at the rate of three days per month of eligible service for the first year of such service, and at the rate of five days per month thereafter. These are aggregate limits; they apply even if the inmate qualifies for two types of extra good time. 28 C.F.R. pt. 523 (1984).

Lump sum awards of extra good time are also used to reward exceptional acts. 28 C.F.R. § 523.16 (1984).

Extra good time does not apply to sentences under the Youth Corrections Act. 28 C.F.R. § 523.17(k) (1984).

IV. DETERMINING THE DATE OF RELEASE FROM INCARCERATION: ADULT SENTENCES OF A YEAR AND A DAY OR MORE

Parole Commission Procedures

Initial Hearing

An initial parole hearing is normally held within 120 days of an offender's arrival at a Bureau of Prisons institution. Following the initial hearing, a presumptive date of release is established. 28 C.F.R. § 2.12 (1984), as amended, 49 Fed. Reg. 34,208 (1984).

> *Exceptions.* If the parole eligibility date is ten years from the beginning of service of the sentence pursuant to 18 U.S.C. § 4205(a), the initial hearing is not held until shortly before the eligibility date. 28 C.F.R. § 2.12(a) (1984).
>
> If the offender delays applying for parole, the initial hearing will be commensurately delayed. 28 C.F.R. § 2.11(a)-(c) (1984).
>
> If the commission concludes that release within fifteen years of the initial hearing is not warranted, it will not establish a presumptive date. At the end of fifteen years, a "reconsideration hearing"—similar to an initial hearing—will be held. 28 C.F.R. §§ 2.12(b), 2.14(c) (1984), as amended, 49 Fed. Reg. 34,208 (1984).

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

Interim Hearings

Interim hearings are held from time to time to consider significant developments or changes in status occurring after the initial hearing. Following these hearings, presumptive release dates may be retarded on account of disciplinary infractions. Presumptive release dates and the dates of fifteen-year reconsideration hearings

may also be advanced. However, it is commission policy that, once set, a presumptive release date shall be advanced only for superior program achievement or other clearly exceptional circumstances. 28 C.F.R. § 2.14(a)(2)(ii) (1984), as amended, 49 Fed. Reg. 34,208 (1984).

For offenders serving sentences (including the sum of consecutive sentences) of less than seven years, interim hearings are held at eighteen-month intervals; for those serving sentences of seven years or more, at twenty-four-month intervals. However, the first interim hearing will not be held earlier than the docket immediately preceding the parole eligibility date. 28 C.F.R. § 2.14(a)(1) (1984).

Prerelease Review

Shortly before a presumptive parole date, a review of the record is conducted to determine whether there has been continued good conduct and whether the prisoner has submitted a satisfactory release plan. The regional commissioner has a limited authority to change the release date without a further hearing or pending a hearing. 28 C.F.R. § 2.14(b) (1984).

Procedure upon Abolition of the Parole Commission

Under the Comprehensive Crime Control Act of 1984, the Parole Commission is to be abolished effective November 1, 1991. For offenders sentenced under present law who are still incarcerated on that date, the commission is required, before November 1, 1991, to set a fixed release date. Pub. L. No. 98-473, § 235(a)(1), (b)(1), (b)(3), 98 Stat. 1837, 1976, 2031–32.

Criteria for Release Decisions

General

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

Guidelines setting forth the "customary time to be served" have been issued by the commission for the guidance of commission personnel in making release decisions. 28 C.F.R. § 2.20 (1984), as amended, 49 Fed. Reg. 34,206-07, 40,403 (1984). These guidelines assume good conduct by the prisoner during incarceration.

The guideline table is reproduced on the following pages. Offense severity categories are listed down the left-hand side of the table and "parole prognosis" categories are listed across the top. For each combination of severity category and parole prognosis category, the table contains two ranges—one for adults and one for youth—of the "customary time to be served." Hearing examiners have considerable discretion to choose a period of incarceration within the guideline range as well as discretion to depart from the guidelines, with statements of reasons, if the circumstances of the particular case warrant departure.

Note that the guidelines generally suggest shorter ranges of time to be served for youth than for adults. The youth ranges apply to offenders who were less than twenty-two years of age at the time the offense was committed, regardless of the sentencing authority used, and to older offenders who are sentenced under the Youth Corrections Act. 28 C.F.R. § 2.20(h)(2) (1984).

Severity of Offense

The commission's guideline table is supplemented by an "Offense Behavior Severity Index." 28 C.F.R. § 2.20 (1984), as amended, 49 Fed. Reg. 34,206-07, 40,403 (1984). The index contains instructions for assigning various offenses to severity categories. These instructions are quite detailed, as is illustrated by the instructions for counterfeiting and related offenses, reproduced below (with a footnote omitted) from chapter 3 of the index.

> SUBCHAPTER E—COUNTERFEITING AND RELATED OFFENSES
>
> *341 Passing or Possession of Counterfeit Currency or Other Medium of Exchange*
>
> (a) If the face value of the currency or other medium of exchange is more than $500,000, grade as Category Six;
>
> (b) If the face value is more than $100,000 but not more than $500,000, grade as Category Five;
>
> (c) If the face value is at least $20,000 but not more than $100,000, grade as Category Four;
>
> (d) If the face value is at least $2000 but less than $20,000, grade as Category Three;

GUIDELINES FOR DECISION-MAKING

[Guidelines for Decision-Making, Customary Total Time to be Served before Release (including jail time)]

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	**OFFENDER CHARACTERISTICS:** Parole Prognosis (Salient Factor Score 1981)			
	Very Good (10-8)	**Good** (7-6)	**Fair** (5-4)	**Poor** (3-0)
Category One	**Adult Range**			
	<=6 months	6-9 months	9-12 months	12-16 months
	(Youth Range)			
	(<=6) months	(6-9) months	(9-12) months	(12-16) months
Category Two	**Adult Range**			
	<=8 months	8-12 months	12-16 months	16-22 months
	(Youth Range)			
	(<=8) months	(8-12) months	(12-16) months	(16-20) months
Category Three	**Adult Range**			
	10-14 months	14-18 months	18-24 months	24-32 months
	(Youth Range)			
	(8-12) months	(12-16) months	(16-20) months	(20-26) months
Category Four	**Adult Range**			
	14-20 months	20-26 months	26-34 months	34-44 months
	(Youth Range)			
	(12-16) months	(16-20) months	(20-26) months	(26-32) months

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	**OFFENDER CHARACTERISTICS:** Parole Prognosis (Salient Factor Score 1981) **Very Good** (10-8)	**Good** (7-6)	**Fair** (5-4)	**Poor** (3-0)
Category Five	**Adult Range** 24-36 months	36-48 months	48-60 months	60-72 months
	(Youth Range) (20-26) months	(26-32) months	(32-40) months	(40-48) months
Category Six	**Adult Range** 40-52 months	52-64 months	64-78 months	78-100 months
	(Youth Range) (30-40) months	(40-50) months	(50-60) months	(60-76) months
Category Seven	**Adult Range** 52-80 months	64-92 months	78-110 months	100-148 months
	(Youth Range) (40-64) months	(50-74) months	(60-86) months	(76-110) months
Category Eight*	**Adult Range** 100+ months	120+ months	150+ months	180+ months
	(Youth Range) (80+) months	(100+) months	(120+) months	150+ months

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

(e) If the face value is less than $2000, grade as Category Two.

342 Manufacture of Counterfeit Currency or Other Medium of Exchange or Possession of Instruments for Manufacture

Grade manufacture or possession of instruments for manufacture (e.g., a printing press or plates) according to the quantity printed (see passing or possession), but not less than Category Five. The term "manufacture" refers to the capacity to print or generate multiple copies; it does not apply to pasting together parts of different notes.

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

In determining the severity classification, the commission refers to "offense behavior"—that is, the conduct that brought the offender into contact with the law—rather than to the offense of conviction. It takes into account "any substantial information available" and resolves disputed issues by a preponderance standard; however, charges upon which a prisoner was found not guilty after trial are not considered unless "reliable evidence is presented that was not introduced at trial," such as a subsequent admission of guilt, or the acquittal was by reason of the defendant's mental condition. 28 C.F.R. § 2.19(c) (1984), as amended, 49 Fed. Reg. 34,207 (1984).

A commission statement of the rationale for this practice is reproduced as appendix A. In it, the commission notes that many convictions are based on plea agreements that result in dismissal of charges supported by persuasive evidence, and that in some cases jurisdictional reasons prevent federal prosecution for the most serious offense (as where a robber is prosecuted for interstate transportation of stolen goods). It argues that consideration of "reliable information about the actual criminal transaction" is essential to responsible consideration of the "nature and circumstances of the offense," as required by 18 U.S.C. § 4206(a).

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

Parole Prognosis

The parole prognosis is determined through the "salient factor score." That score determines which column in the guideline table is to be used to find the guideline for the particular offender. The

method of determining the salient factor score is indicated on the worksheet on the following page. Instructions for completing the worksheet are found at United States Parole Commission, Rules and Procedures Manual 66–72 (§ 2.20-06) (Oct. 1984), as amended by Rules and Procedures Memorandum No. 2, at 219–20 (1985). These instructions are available in probation offices.

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

Disciplinary Infractions

In establishing a presumptive release date at initial hearings, good institutional conduct for the remainder of the term is presumed. Thereafter, at interim hearings, a presumptive date may be set back because of disciplinary infractions.

Infractions of administrative rules are generally thought to warrant a delay in release of not more than sixty days per instance of misconduct. New criminal conduct (including escape) is sanctioned more severely. 28 C.F.R. § 2.36 (1984).

The regulations provide that the guideline ranges are "for cases with good institutional adjustment and program progress." 28 C.F.R. § 2.20(b) (1984). However, they apparently do not permit a presumptive release date to be set back on account of disappointing program progress, such as failure to complete an educational program.

Exceptional Conduct or Superior Program Performance

The Parole Commission's regulations permit a limited advancement of the presumptive release date for "sustained superior program achievement over a period of 9 months or more." 28 C.F.R. § 2.60 (1984). They indicate that this could be achievement in prison industries or in educational, vocational training, or counseling programs. The maximum reduction in a prisoner's time served, on account of one or more concessions for superior program

S A L I E N T F A C T O R S C O R E (SFS 81)

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

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

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

None ..... = 2
One or two ..... = 1
Three or more ..... = 0

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

Age at commencement of current offense
26 years of age or more ..... = 2
20-25 years of age ..... = 1
19 years of age or less ..... = 0

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

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

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

Otherwise ..... = 0

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

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

Otherwise ..... = 0

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

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

TOTAL SCORE ☐☐

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

achievement, is set forth in the regulations. Some examples of these maximums are as follows:

If time of service until presumptive release date established at initial hearing is—	Maximum reduction in time is—
2 years	2 months
3 years	3 months
5 years	7 months
10 years	17 months

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

Other Considerations

The date of a prisoner's parole may also be influenced by such matters as cooperation with the prosecution, medical problems, and the relationship between the sentence on the current offense and other state or federal sentences that may run consecutively. 28 C.F.R. § 2.63 (1984); United States Parole Commission, Rules and Procedures Manual 65-66 (§ 2.20-05, C.8-C.10) (Oct. 1984).

Criteria for Release After Abolition of the Parole Commission

Under the Comprehensive Crime Control Act of 1984, the Parole Commission is to set a fixed release date for each offender sentenced under present law who will be incarcerated on November 1, 1991. The date is required to be within the applicable guideline range. Pub. L. No. 98-473, § 235(b)(3), 98 Stat. 1837, 1976, 2032.

V. DURATION OF PAROLE SUPERVISION; EFFECT OF REVOCATION: ADULT SENTENCES OF A YEAR AND A DAY OR MORE

Limits on Parole Commission Discretion

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

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

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

Guidelines for Early Termination of Supervision

Supervision of parolees with "very good" salient factor scores (8, 9, or 10) will normally be terminated after two years of supervision. Supervision of parolees with lower salient factor scores will normally be terminated after three years. In both cases, it is assumed that the parolee has not engaged in new criminal behavior or committed a serious parole violation. 28 C.F.R. § 2.43(e)(1) (1984).

Revocation of Parole

If parole is revoked, "street time" normally counts as if it were time served in prison. 18 U.S.C. § 4210(b).

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Exceptions. If the parolee has absconded or intentionally refused to comply with a commission order, street time may be forfeited in an amount equal to the time during which the parolee was in noncompliance. 18 U.S.C. § 4210(c); 28 C.F.R. § 2.52(c)(1) (1984).

If the parolee has been convicted of an offense committed while on parole, and such an offense is punishable by imprisonment, all street time is forfeited. 28 C.F.R. § 2.52(c)(2) (1984). If a term of imprisonment is in fact imposed on the new conviction, the commission then determines whether the remaining time is to be served concurrently or consecutively with the new sentence. 18 U.S.C. § 4211(b)(2).

Revocation does not imply that the remainder of the sentence will be served in prison. Policies for reparole are set forth at 28 C.F.R. § 2.21 (1984).

Special Parole Terms Under Title 21

Sections 841 and 845 of title 21 of the *United States Code* require that judges impose "special parole terms" on defendants convicted of certain drug offenses. (Because of an apparent inadvertence in a 1984 amendment, this requirement does not apply to the most serious of these offenses. *See* 21 U.S.C. § 841(b)(1)(A).)

A special parole term is a period of parole supervision that follows the termination of supervision under the regular sentence. If special parole is revoked, the parolee may be committed for the duration of the special term. Although 21 U.S.C. § 841(c) states that the parolee will not receive credit for street time, the commission views this provision as superseded by the subsequently enacted 18 U.S.C. § 4210(b).

The commission considers the special parole term to be separate from the regular sentence, to begin immediately upon termination of supervision under the regular sentence or, if the prisoner is released without supervision, upon such release. Hence:

If parole on the regular sentence is revoked, the maximum amount of time to be served on revocation is limited by the term of the regular sentence and is not affected by the special parole term. 28 C.F.R. § 2.57(c) (1984).

If the commission terminates supervision under the original sentence pursuant to its authority to terminate supervision early, the guidelines for termination of supervision will

apply anew to the special parole term, generally requiring another two or three years of supervision. 28 C.F.R. § 2.57(e) (1984).

Supervision After Abolition of the Parole Commission

Under the Comprehensive Crime Control Act of 1984, the district courts will have authority, after November 1, 1991, to revoke parole or amend the conditions of parole for offenders sentenced under present law who are on parole on that date or are released on parole thereafter. Pub. L. No. 98-473, § 235(b)(4), 98 Stat. 1837, 1976, 2032–33.

VI. DETERMINING THE DATE OF RELEASE FROM INCARCERATION AND THE DURATION OF SUPERVISION: SENTENCES OF ONE YEAR OR LESS

An offender sentenced to a term of a year or less is not eligible for release on parole. Statutory good time is earned at the rate of five days for each month of sentence, but only if the sentence is for six months or more. The maximum extra good time that can be earned is three days for each month of service.

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

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

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

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

will be released on the specified release date and will be subject to postrelease supervision until the expiration of the stated sentence.

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

VII. CONDITIONS OF INCARCERATION

Management Objectives of the Bureau of Prisons

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

Offenders sentenced under the regular adult authority are required to accept work assignments, but are generally not required to participate in programs of self-improvement. 28 C.F.R. § 524.12(c) (1984).

An exception is made for inmates who test below the sixth-grade level in reading, writing, or mathematics. Such inmates are required to participate in programs of adult basic education for a period of ninety days or until the sixth-grade level is achieved, whichever is earlier. 28 C.F.R. §§ 544.70–.75 (1984).

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

Initial Assignments

The Bureau of Prisons classifies institutions into six security categories. The security level of the institution to which an inmate is initially assigned is determined under guidelines on the basis of the severity of the current offense, the expected length of incarceration, the severity of charges on which any detainers are based, the severity of offenses resulting in previous imprisonment, history of violence, history of escapes, and status before commitment (whether released on recognizance or a voluntary-surrender case). United States Bureau of Prisons, Program Statement 5100.2, §§ 8, 9 (Oct. 7, 1982, as amended through Apr. 8, 1985).

A variety of other considerations also influence the institution to which an offender is sent. One of them is the proximity of the institution to the offender's home. However, even allowing for some discretion in determining the severity level at which an inmate will be confined, the nearest institution of an appropriate security category is often a substantial distance from the home community.

Bureau of Prisons regulations indicate that a judicial recommendation that an inmate be assigned to a specific institution or a particular kind of program will generally not override the security classification, but that every effort will be made to follow such recommendations where consistent with the security classification. *Id.* § 9, at 7 (Apr. 8, 1985). In practice, the bureau may be even more accommodating than the regulations suggest.

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

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

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

Transfers

Following initial placement, the appropriate security category is reviewed from time to time. The review takes account of changes in the information used to make the initial security classification; in particular, the inmate's expected duration of incarceration is recalculated on the basis of Parole Commission action. It also takes account of behavior during incarceration. *Id.* §§ 10–12 (Oct. 7, 1982, as amended through Apr. 8, 1985).

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

Voluntary-Surrender Procedure

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

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

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

VIII. SPECIAL SENTENCES FOR YOUNG OFFENDERS

Continued Applicability of the Youth Corrections Act

The Youth Corrections Act, which provided additional sentencing options for offenders less than twenty-six years old at the time of conviction, was repealed by the Comprehensive Crime Control Act of 1984. Because of ex post facto considerations, however, its provisions may continue to apply to some offenders. In some cases in which the act applies, consideration of a Youth Corrections Act sentence is obligatory.[1]

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

The Youth Corrections Act was the product of a time (1950) at which there was much greater optimism than exists today about the possibility of changing behavior patterns of young offenders. The act contemplated that offenders would be committed for "treatment," 18 U.S.C. § 5010(b), (c), which was defined as "correc-

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

tive and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders," 18 U.S.C. § 5006(f). After commitment, a complete study of the offender was to be conducted, resulting in recommendations for treatment. 18 U.S.C. § 5014. The Bureau of Prisons was to provide such treatment, insofar as practical, in institutions used only for treatment of offenders committed under the act. 18 U.S.C. § 5011. Parole authorities were to release the youth when his antisocial tendencies had been corrected. Testimony of James Bennett, Director, United States Bureau of Prisons, quoted in *Durst v. United States,* 434 U.S. 542, 546–47 n.7 (1978).

Correctional philosophy today is generally in conflict with the medical analogy on which the statute was based. Few authorities believe that it is possible to diagnose an offender and determine the appropriate "treatment"; few believe that it is possible to identify the time at which antisocial tendencies have been corrected. Even before Congress repealed the act, therefore, prison and parole practices departed substantially from the system envisaged by those who developed the statute. Some of the departures have been successfully challenged in litigation, the most important case being *Watts v. Hadden,* 651 F.2d 1354 (10th Cir. 1981). Bureau of Prisons and Parole Commission policies have been changing as a result of these decisions, producing considerable uncertainty about the expectations for an offender sentenced to imprisonment under this statute. The uncertainty is aggravated by the repeal, which will of course produce a declining population of such offenders until the last of them is released.

Sentencing Options

Adult Sentences

Even in a case to which the Youth Corrections Act clearly applies, any sentence that may be given to an adult may also be given to a youth. However, if the offender is less than twenty-two years of age at the "time of conviction," an adult sentence may be given only if the court finds that "the youth offender will not derive benefit from treatment under" the commitment provisions of the act. 18 U.S.C. § 5010(d). The requirement of the "no benefit" finding does not impose a substantive limitation on the court's discretion to select another sentence, but the finding must be made on the record to indicate that the court has considered and rejected a Youth Corrections Act sentence. *Dorszynski v. United States,* 418 U.S. 424, 441–43 (1974).

If the offender is at least twenty-two but not yet twenty-six at the "time of conviction," a "no benefit" finding is not required before imposition of an adult sentence. Under 18 U.S.C. § 4216, use of the Youth Corrections Act for such an offender was permitted if "the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under" it. However, in cases to which the act applies because of ex post facto considerations, the record should probably show that the court exercised its sentencing discretion with awareness that the Youth Corrections Act option remained available.

The term "conviction" was defined in the Youth Corrections Act as "the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere." 18 U.S.C. § 5006(g). The time of the judgment in a criminal case is the time of sentencing, so a literal reading of the statute would make the sentencing date the critical date for determining the offender's age in applying the above rules. However, two courts of appeals, rejecting the literal reading, have held that the critical date is the date the verdict is rendered or the plea taken. *Jenkins v. United States,* 555 F.2d 1188 (4th Cir. 1977); *United States v. Branic,* 495 F.2d 1066 (D.C. Cir. 1974).

Imprisonment Under the Youth Corrections Act

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

It has long been settled law that the indeterminate sentence could be imposed regardless of the maximum sentence provided in the statute defining the offense. *United States v. Magdaleno-Aquirre,* 590 F.2d 814 (9th Cir. 1979); *Harvin v. United States,* 445 F.2d 675 (D.C. Cir.), *cert. denied,* 404 U.S. 943 (1971), and cases cited therein, 445 F.2d at 679 & n.7. However, on the basis of 1979 legislation that by its terms applied only to magistrates, the Ninth Circuit has held that, in misdemeanor cases, "neither a district court judge nor a magistrate may sentence a youth under the Youth Corrections Act to a term of confinement longer than it could impose on an adult." *United States v. Amidon,* 627 F.2d 1023, 1027 (9th Cir. 1980), as limited in *United States v. Lowery,* 726 F.2d 474 (9th Cir. 1983), *cert. denied,* 105 S. Ct. 133 (1984). *Accord United States v. Hunt,* 661 F.2d 72 (6th Cir. 1981). *Contra United States v. Donelson,* 695 F.2d 583 (D.C. Cir. 1982); *United States v. Van Lufkins,* 676 F.2d 1189 (8th Cir. 1982). The legislation had added subsection (g) to

18 U.S.C. § 3401, providing that a magistrate may not impose a Youth Corrections Act sentence "in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense," and that the offender must be conditionally released under supervision not later than three months before expiration of the term imposed. The *Amidon* court could find no reason why a defendant sentenced by a judge on a misdemeanor conviction should be subject to the potential inequity of the indeterminate sentence when a defendant sentenced by a magistrate could not be.

Although the Ninth Circuit in *Lowery* limited the *Amidon* doctrine to misdemeanor cases, the repeal of the Youth Corrections Act raises a similar issue for felony cases: If a defendant opposes a sentence under 18 U.S.C. § 5010(b) because it is longer than the adult sentence that could be imposed, he may argue that the repeal is effective and that the authority to impose the longer sentence is not preserved by the ex post facto clause.

18 U.S.C. § 5010(c) provided that if the maximum term for an adult was greater than six years, and the court found that the youth offender might not be able to derive maximum benefit within six years, it could sentence him to "any further period that may be authorized by law for the offense or offenses of which he stands convicted." In such a case, the youth offender was required to be released under supervision not later than two years before the expiration of the term. This provision was widely understood as empowering the judge to select any term between six years and the statutory maximum for the offense. *E.g., Ralston v. Robinson,* 454 U.S. 201, 206 n.3 (1981). However, the Ninth Circuit has held that a sentence under 18 U.S.C. § 5010(c) must be for the statutory maximum. *United States v. Olmo,* 642 F.2d 280 (9th Cir.), *cert. denied,* 454 U.S. 1087 (1981).

Imprisonment under the act may be accompanied by a fine. *Durst v. United States,* 434 U.S. 542 (1978).

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

At the present time, offenders sentenced under the act are assigned to one of three facilities: a low-security institution for both men and women at Morgantown, West Virgina; a higher-security institution for men at Englewood, Colorado; and a contractor-operated low-security institution for men at La Honda, California. Be-

cause there are only three Youth Corrections Act institutions in the system, many offenders will be incarcerated farther from their homes if sentenced under the Youth Corrections Act than if sentenced under the adult authority.

Although policy in recent years has been to reserve the youth institutions for offenders sentenced under the act, the Bureau of Prisons is now assigning some youth with adult sentences to Morgantown in order to fill the beds there.

To comply with the decision in *Watts v. Hadden,* 651 F.2d 1354 (10th Cir. 1981), the Bureau of Prisons has issued regulations governing programs for offenders sentenced under the Youth Corrections Act. 28 C.F.R. §§ 524.20–.30 (1984). Because of the "treatment" requirement of the act, participation in self-improvement programs is required of Youth Corrections Act offenders rather than optional, as is generally the case for offenders sentenced under the adult authority. A "program plan" is developed for each inmate, and failure to comply with it provides a basis for disciplinary action. The programs available to inmates in Youth Corrections Act institutions do not differ materially from those available to inmates elsewhere.

There are a variety of circumstances in which an offender may be subject to a sentence under the Youth Corrections Act and also to a concurrent or consecutive sentence under other authority, either state or federal. In one such circumstance—where an offender sentenced under the Youth Corrections Act is subsequently sentenced on another federal conviction to a consecutive term as an adult—the judge imposing the subsequent sentence should indicate whether the Bureau of Prisons is to continue to handle the offender in accordance with the Youth Corrections Act. *Ralston v. Robinson,* 454 U.S. 201, 217–19 (1981). Bureau of Prisons regulations deal in some detail with a number of other possible combinations. 28 C.F.R. § 524.21 (1984).

Determining the Date of Release from Incarceration. The maximum period of incarceration was four years under 18 U.S.C. § 5010(b) and two years less than the term imposed under 18 U.S.C. § 5010(c). *See* 18 U.S.C. § 5017(c), (d). For an offender sentenced by a United States magistrate, it was three months less than the term imposed. 18 U.S.C. § 3401(g)(2).

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

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

§ 5006(g). Some exceptions have been carved out, however. When commencement of the sentence is delayed pending appeal, for example, the Bureau of Prisons computes the time from the date of beginning of service. *See United States v. Frye,* 302 F. Supp. 1291 (W.D. Tex.), *aff'd,* 417 F.2d 315 (5th Cir. 1969). On the other hand, offenders sentenced under the act are given credit for time spent in pretrial custody. *See Ek v. United States,* 308 F. Supp. 1155 (S.D.N.Y. 1969). If incarceration commences on revocation of probation, however, no exception is made: The time is computed continuously from the date of sentencing, with the practical result that time spent on probation is credited as service on a Youth Corrections Act sentence. That is an important distinction between the Youth Corrections Act and the regular authority. The time on probation is credited even if imposition of sentence was originally suspended and the Youth Corrections Act sentence was imposed upon revocation of probation.

The provision governing release of youth offenders, 18 U.S.C. § 5017, was amended by the Parole Commission and Reorganization Act of 1976, 90 Stat. 219, 232, and has been interpreted by the Parole Commission to indicate that offenders sentenced under the Youth Corrections Act are to be released pursuant to the same general criteria as other offenders. The only exception contemplated by the Parole Commission's regulations is for offenders who are at least twenty-two at the time of the offense and are eligible for sentencing under the Youth Corrections Act. For such offenders, the youth guidelines are used if the sentence is under the Youth Corrections Act, and the adult guidelines are used if an adult sentence is imposed. As was previously noted, the youth guidelines are always used for an offender less than twenty-two at the time of the offense, even if sentenced under adult authorities. 28 C.F.R. § 2.20(h)(2) (1984).

In *Watts v. Hadden,* 651 F.2d 1354 (10th Cir. 1981), the Court of Appeals for the Tenth Circuit rejected the Parole Commission's view of the meaning of the 1976 enactment. The court concluded that "Congress intended rehabilitation to continue to be considered along with those standards" set forth in the 1976 act. 651 F.2d at 1382. The solicitor general declined authorization for a petition for certiorari. For members of the *Watts* class, the commission is therefore making release decisions under a special plan that represents a substantial departure from the commission's regulations. United States Parole Commission, Rules and Procedures Memorandum No. 2, at 222-28 (1985). The class comprises offenders sentenced under the Youth Corrections Act and incarcerated in the prison at Englewood, Colorado, at any time since May 20, 1980, as well as Youth

Corrections Act offenders supervised on parole in the District of Colorado at any time during that period. In making release decisions about members of the class, the commission will make judgments about offenders' rehabilitative progress, but severity of offense will also be taken into account.

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

Parole Commission guidelines for early termination of supervision—"unconditional discharge" within the meaning of the Youth Corrections Act—are the same as those used for adult sentences. 28 C.F.R. § 2.43(a)(2), (e)(1) (1984). They contemplate termination after two years of "clean" supervision for offenders with "very good" salient factor scores and after three years of clean supervision for others.

Certificate Setting Aside Conviction. If the Youth Corrections Act offender is discharged unconditionally before the expiration of the maximum sentence, the conviction is automatically "set aside." 18 U.S.C. § 5021. This provision is not among those explicitly saved by the Crime Control Act as to sentences imposed before the date of enactment, but the Parole Commission will continue to issue certificates setting aside convictions under the act. For the effect of the "set aside" provision, see the discussion of probation below.

Probation Under the Youth Corrections Act

Probation under the Youth Corrections Act differs from adult probation in that it carries the possibility of receipt of a certificate setting aside the conviction. Conditions of probation, including fines and restitution, may be imposed as under adult probation. *Durst v. United States,* 434 U.S. 542 (1978).

18 U.S.C. § 5021(b) stated that the court might, in its discretion, unconditionally discharge a youth offender from probation prior to the expiration of the probation term previously fixed, and that such discharge would automatically set aside the conviction and a certificate to that effect would be issued.

Read literally, section 5021(b) would seem to apply to any offender placed on probation who was less than twenty-two at the "time of conviction." However, the act has been interpreted to give the judge discretion to place the offender on either regular (adult) probation or Youth Corrections Act probation. *United States v.*

Kurzyna, 485 F.2d 517 (2d Cir. 1973), *cert. denied,* 415 U.S. 949 (1974).

Youth Corrections Act probation is presumably subject to the same five-year maximum as adult probation. However, if sentence is imposed by a United States magistrate, Youth Corrections Act probation is apparently limited to six months for conviction of a petty offense and one year for conviction of another misdemeanor. *See* 18 U.S.C. § 3401(g)(3).

There is a conflict of circuits on the question whether "setting aside" the conviction has the effect of expunging it. *See United States v. Doe,* 747 F.2d 1358 (11th Cir. 1984), and cases cited therein; *United States v. Doe,* 730 F.2d 1529 (D.C. Cir. 1984). In calculating the salient factor score, the Parole Commission considers convictions that have been set aside under this provision. United States Parole Commission, Rules and Procedures Manual 67 (§ 2.20-06, A.6) (Oct. 1984).

Upon revocation of probation, if the offender is imprisoned under the Youth Corrections Act, time spent on probation is credited as service on the sentence, as noted above.

Split Sentences Under the Youth Corrections Act

The Ninth Circuit has held that a split sentence may be imposed under the Youth Corrections Act. *United States v. Smith,* 683 F.2d 1236 (9th Cir. 1982) (en banc), *cert. denied,* 459 U.S. 1111 (1983). It is not wholly clear whether parole eligibility would be immediate under such a sentence. Early termination of the probation component would result in setting aside the conviction.

IX. SPECIAL SENTENCES FOR NARCOTIC ADDICTS

Applicability and Purpose of the Narcotic Addict Rehabilitation Act

Under 18 U.S.C. §§ 4251-55, certain narcotic addicts convicted of criminal offenses may be sentenced for treatment.[2] Eligible offenders exclude those whose conviction is for a crime of violence or for dealing in narcotics, as well as those with certain prior records. 18 U.S.C. § 4251(f).

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

Although the Narcotic Addict Rehabilitation Act reads as if NARA offenders would receive special rehabilitative treatment, this impression is largely erroneous. Bureau of Prisons policy today is to make drug treatment available to all offenders who need it, regardless of the authority under which they were sentenced. Policies governing release on parole are only slightly different for offenders sentenced under NARA than for others. And parolees with histories of addiction are generally required by the Parole Commission to participate in community drug treatment programs, again regardless of the authority under which they were sentenced.

2. It is assumed that the offender has been convicted in a criminal proceeding. This publication does not deal with civil commitments under 28 U.S.C. §§ 2901-06, under which certain addicted defendants may be given an opportunity for commitment to the custody of the surgeon general on the understanding that prosecution will be dropped upon successful completion of the treatment program.

Hence, the experience of an offender sentenced under NARA is generally quite similar to that of an addict sentenced under other statutory provisions.

Sentencing Options

Adult or Youth Corrections Act Sentences

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

NARA Sentences

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

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

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

Conditions of Incarceration. Special residential units for drug offenders are maintained at many Bureau of Prisons institutions. An

inmate serving a sentence under the act must be assigned to such an institution and must initially be placed in such a unit. United States Bureau of Prisons, Program Statement 5330.5, at 21 (¶ 1080) (July 23, 1979). There is somewhat greater flexibility for inmates sentenced under other authorities, but general policy is to place narcotic addicts in such units. *Id.* at 7 (¶ 1014) (July 23, 1979).

After an orientation period in a drug abuse unit, an inmate is permitted to withdraw from the drug abuse program. However, an inmate sentenced under NARA will not receive release certification until the program has been satisfactorily completed. *Id.* at 21 (¶ 1080) (July 23, 1979).

The drug programs involve a variety of activities. They include at least forty hours of orientation, including education about the effects of drugs, and a minimum of one hundred hours of counseling and/or psychotherapy. *Id.* at 2 (¶ 1000) (July 23, 1979). Elapsed time required to complete participation in a program varies, but is commonly about two years. After addicts have satisfactorily completed the program—and, in the case of NARA offenders, received certification of completion—they may be moved out of the drug abuse units. *Id.* at 22 (¶ 1082) (July 23, 1979).

Determining the Date of Release from Incarceration. The maximum period of incarceration is the term of the sentence, less good time. An offender may be paroled following the completion of six months of treatment. 18 U.S.C. § 4254.

As noted above, 18 U.S.C. § 4254 contemplates a report from the attorney general as to whether the offender should be conditionally released and requires certification from the surgeon general that the offender has made sufficient progress to warrant conditional release.

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

The Parole Commission employs the guideline system for offenders sentenced under NARA as well as those sentenced under other statutes. For NARA offenders, it uses the same guidelines it uses for youth. 28 C.F.R. § 2.20(h)(2) (1984). Therefore, for an offender who was at least twenty-two at the time of the offense, a NARA sentence may call up a shorter guideline than an adult sentence. However, application of the guidelines will be subject to the receipt of a certificate of sufficient progress. Generally speaking, Bureau of

Prisons staff make an effort to enable the offender to complete the program in time to be released on the presumptive release date established by the Parole Commission. That is not always possible, however, if the guideline calls for relatively early release. Moreover, as was observed above, an inmate who fails to complete the drug program will not be certified.

Parole Supervision. The duration of parole supervision for offenders sentenced under NARA is governed by the same rules that apply to offenders sentenced under the regular adult authorities. 28 C.F.R. § 2.43(e) (1984).

18 U.S.C. § 4255 authorizes the provision of "aftercare" services for NARA offenders while on parole. Parole Commission policy requires participation in treatment programs while on parole, "unless there are compelling reasons to the contrary," for NARA parolees and for all others determined to be addicted to narcotic drugs. United States Parole Commission, Rules and Procedures Manual 101 (§ 2.40-03(a)) (Oct. 1984). Hence, the experience of a NARA offender on parole is generally very much the same as the experience of any other addict.

X. SPECIAL DISPOSITION OF OFFENDERS IN NEED OF CUSTODY FOR CARE OR TREATMENT OF A MENTAL DISEASE OR DEFECT

Applicability and Purpose

Under 18 U.S.C. § 4244, the court may, in lieu of sentencing, commit a convicted offender to the custody of the attorney general to be hospitalized for care or treatment of a mental disease or defect.

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

The provision was added to the criminal code by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1976, 2061–62. No explicit effective date was provided, and the section therefore took effect on October 12, 1984, the date of enactment. It can be argued that it does not apply to offenders convicted of offenses committed before enactment.

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

Sentencing Options

Adult, Youth Corrections Act, or NARA Sentences

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

be committed to a suitable facility for care or treatment." 18 U.S.C. § 4244(d). An ordinary sentence of imprisonment can presumably be imposed. A Youth Corrections Act sentence would not be appropriate, however, since none of the youth institutions include a mental hospital.

If a defendant is sentenced under authority other than 18 U.S.C. § 4244 and the Bureau of Prisons concludes that he is in need of hospitalization for care or treatment of a mental condition, the defendant will be transferred to one of the prison hospitals for the necessary care. If the defendant does not consent to such transfer, however, court approval of the transfer will be required under 18 U.S.C. § 4245.

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

Commitment for Care or Treatment

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

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

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

discretion in determining the appropriate disposition of the offender even if it is concluded that custodial care is appropriate.

Conditions of Incarceration. It is anticipated that offenders commited under 18 U.S.C. § 4244 will generally be assigned to one of the Bureau of Prisons institutions that have mental hospitals: Butner, North Carolina; Springfield, Missouri; or (beginning in the summer of 1985) Rochester, Minnesota. Their experience is not likely to differ substantially from that of people with similar needs who have been sentenced under other authorities.

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

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

XI. THE USE OF OBSERVATION AND STUDY AS AN AID TO THE SENTENCING JUDGE

Authorities

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

Local Studies

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

Bureau of Prisons Studies

18 U.S.C. § 4205(c) authorizes commitment for three months for study "if the court desires more detailed information as a basis for determining the sentence to be imposed."

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

18 U.S.C. § 5010(e), repealed effective October 12, 1984, authorized commitment for sixty days "if the court desires additional information as to whether a youth offender will derive benefit from treatment" under the commitment provisions of the Youth Corrections Act. Because of the ex post facto considerations previously

discussed, it might be argued that this provision continues to apply to cases in which the offense occurred on or before October 12, 1984. However, as a practical matter, there seems little reason to test the proposition. A commitment for study under 18 U.S.C. § 4205(c) can be used even if the sentence ultimately imposed may be a Youth Corrections Act sentence.

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

Making the Best Use of Studies

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

XII. JUDICIAL COMMUNICATION WITH THE PAROLE COMMISSION AND THE BUREAU OF PRISONS

General

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

The Bureau of Prisons makes an effort to accommodate judges' requests about the types or locations of facilities in which offenders are incarcerated, as well as the kinds of programs to which they should be exposed, if the requests are consistent with the bureau's determination of the appropriate security level for the offender. United States Bureau of Prisons, Program Statement 5100.2, § 9, at 7 (Apr. 8, 1985). If the bureau is unable to honor a judicial request, the staff will write the judge and explain that inability. As was noted earlier, it is bureau policy not to make original designations to community treatment centers unless the judge specifically requests such a designation.

The Parole Commission is less likely than the Bureau of Prisons to adopt a judge's recommendation as a matter of deference, but it is very much interested in perceptions and information that may influence commission decisions. The following excerpt from the regulations, 28 C.F.R. § 2.19(d) (1984), expresses the commission's position on this issue:

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

Method of Communication; Limitations

Administrative Office Form 235, reproduced on the following page, was designed to facilitate and encourage communication with the Bureau of Prisons and the Parole Commission. (A revision of the form is in preparation at this writing.) Letters and memorandums are equally acceptable. Remarks made orally in open court will not routinely reach the bureau and the commission; the judge who wishes such remarks to be acted upon must have them transcribed and transmitted.

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

It is not generally appropriate to communicate with the Parole Commission on a confidential basis. The Parole Commission Act, 18 U.S.C. § 4208(b), (c), requires that all materials considered by the commission also be available to the offender, except that material may be withheld and summarized in the same circumstances in which a summary of information in a presentence report is permitted under rule 32(c)(3) of the Federal Rules of Criminal Procedure. If a communication to the commission includes material that should be withheld from the offender, it should be accompanied by a summary that is suitable for disclosure. 28 C.F.R. § 2.55(d) (1984).

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

The presentence report is regarded as a Freedom of Information Act document in the hands of the Parole Commission. *See Cotner v. U.S. Parole Commission,* 747 F.2d 1016 (5th Cir. 1984). A completed AO Form 235 or other communication to the Parole Commission or the Bureau of Prisons is likely to be similarly regarded. *See Berry v. Department of Justice,* 733 F.2d 1343 (9th Cir. 1984). It is unclear to what extent the act's exemptions will bar offenders and others from obtaining copies of these documents.

AO 235
Rev. 7/82

REPORT ON SENTENCED OFFENDER

United States District Court	DISTRICT

TO BE COMPLETED BY THE PROBATION OFFICER

NAME OF OFFENDER	FBI NO.	DATE OF BIRTH
OFFENSE	**SENTENCE**	

TO BE COMPLETED BY THE SENTENCING JUDGE OR MAGISTRATE

Sentencing Objectives: *(Court's intent or purpose for sentence imposed.)*

Comments on Treatment Needs: *(What treatment or training should the Probation Office or Bureau of Prisons provide?) [e.g., vocational, educational, medical, alcoholic, narcotic.]*

Recommended Institution: *(Type of institution by classification or by name)*

Comments and Recommendation Relative to Parole: *(Give comments regarding the appropriateness of parole in view of the present offense, prior criminal background, and any mitigating or aggravating circumstances.)*

NO COMMENT ☐

This form will be disclosed to the offender and the Parole Commission in connection with parole consideration, unless the court directs otherwise. (See 18 U.S.C. 4208)

		SIGNATURE	
ORIGINAL:	U.S. Probation Office Sentencing Judge		
COPIES:	2 copies to Bureau of Prisons' institution designated for confinement	NAME (TYPED)	DATE

Appropriate Matters for Communication

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

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

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

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

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

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

In those cases in which the accuracy of information contained in a presentence report is in question, the better practice is probably to have the report corrected or to have a page showing the correction made an integral part of the report. As contrasted with preparing a separate communication, this practice reduces the risk that someone will read the presentence report without becoming aware of its deficiencies.

APPENDIX A
Parole Commission Statement on Use of "Offense Behavior"

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

The Problem of Unadjudicated Offenses

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

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

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

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

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

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

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

explanatory information would relate to the transaction that actually occurred.

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

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

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

It is unquestionable that significant disparities exist in the treatment of different types of offenders. For example, white collar offenders are more likely to strike a bargain to a lesser charge than bank robbers. Disparities also exist in the handling of similarly situated offenders. Depending upon local prosecutorial practices and

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

caseloads, some offenders will be able to strike a favorable bargain while others will be brought to trial on all charges.

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

APPENDIX B

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

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

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

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

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

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

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

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

The parole authority must also take into consideration whether or not continuing incarceration of an offender will serve a worthwhile purpose. Incarceration is the most expensive of all of the alternative types of sentences available to the criminal justice system, as well as the most corrosive because it can destroy whatever family and community ties an offender may have which would be the foundation of his eventual return as a law-abiding citizen. Once sentence has been imposed, parole is the agency responsible for keeping in prison those who because of the need for accountability to society or for the protection of society must be retained in prison. Of equal importance, however, parole provides a means of releasing those inmates who are ready to be responsible citizens, and whose continued incarceration, in terms of the needs of law enforcement, represents a misapplication of tax dollars.

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

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

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

The organization of parole decision-making along regional lines, the use of hearing examiners to prepare recommendations for action, and, most importantly, the promulgation of guidelines to make parole less disparate and more understandable has met with such success that this legislation incorporates the system into the

tatute, removes doubt as to the legality of changes implemented y administrative reorganization, and makes the improvements ermanent.

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

To achieve this, the legislation provides for creation of regions, ssigning a commissioner to each region, and delegation of broad ecisionmaking authority to each regional commissioner and to a ational appellate panel. The bill also makes the Parole Commis- ion, the agency succeeding the Parole Board, independent of the epartment of Justice for decision-making purposes.

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

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

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