

MEMO

TO: Phyllis J. Newton, Staff Director

FROM: Sharon O. Henegan, Director of Training and Technical Assistance

DATE: December 18, 1989

RE: REPORT OF THE REVOCATION WORKING GROUP

The members of this working group included Rusty Burress, Andy Purdy, Jay Meyer, and myself. In addition, the U. S. Probation Officers on detail with the Sentencing Commission worked with us on this project, and they were: Joshua Wyne (Alaska), David Jones (Maryland), and Sarah Harvey (Massachusetts).

SUMMARY OF CONCLUSIONS OF THE WORKING GROUP

- 1) Guidelines should be developed as soon as possible that set forth the manner in which violation and revocation of probation and supervised release should proceed.
- 2) The guidelines that are developed should be as simple to use as is possible in light of the field's expressions of already being overworked and overextended.
- 3) The revocation guidelines for probation and supervised release should be functionally equivalent, to the extent that statutory differences will allow.
- 4) The guidelines that are developed should reflect a separate punishment for having violated the terms of supervision, that is distinct from the punishment imposed for the commission of new criminal conduct.
- 5) Revocation guidelines need to provide the court with a range of options at resentencing that reflect the significant differences in the seriousness of the conduct that resulted in the violation. The sentencing options available upon revocation should be responsive to the goal of proportionality, imposing different sentences for violations of differing seriousness.
- 6) These guidelines should be neutral as to when the court can revoke (prior or post conviction on the new criminal behavior), leaving this decision to the courts.
- 7) These guidelines, as with all others, should be structured with the goal of reducing disparity.

FOCUS OF THE WORKING GROUP

The group decided that its goal would be the development of guidelines for violations of probation and supervised release that would replace the policy statements that are currently contained in Chapter Seven of the Guidelines Manual.

The group examined how probation and supervised release are different from each another, and different from probation and parole before sentencing reform. We concluded that the purposes of probation and supervised release are more similar than dissimilar. The Committee on the Judiciary of the U. S. Senate wrote in their 1983 Senate Report that:

"The sentencing purposes of incapacitation and punishment would not be served by a term of supervised release—that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release."; and, "The term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment."

Supervised release is different from parole because the period of supervision is not being served in lieu of incarceration, but after service of a term of imprisonment. Sentencing reform has not changed probation, but may have changed the character of the defendant who is on probation. Under present practice, those who qualify for a sentence of probation have not committed a serious offense, and usually do not have a serious criminal history. (Unless there has been a §5K1.1 departure). Whereas with past practice, this was not necessarily so. Accordingly, upon violation of probation the court need not impose a sentence that rethinks the appropriateness of the original sentence of probation because with sentencing guidelines probation was only imposed when it was deemed appropriate.

Peter Hoffman had developed a set of "Draft Guidelines for Revocation of Probation and Supervised Release", (see Attachment A) that provided this group with a beginning point in our discussions. Some elements of Peter's guidelines have been incorporated into ours, such as the concept that the guidelines should treat revocation of probation and supervised release equivalently. Under Peter's draft, in the case of violation for new criminal charges the sentence imposed upon revocation was

determined by applying the Chapter Two guideline to the behavior that prompted the violation, and the sentence imposed upon revocation would then run concurrently with the sentence imposed for the new criminal conduct.

The working group disagreed with the basic premise of Peter's draft guidelines for several reasons. By running the sentence imposed upon revocation concurrently with the sentence imposed on the new criminal charges, there seemed to be little or no sanctioning of the defendant for having violated the terms of supervision. We note that supervised release as originally envisioned and described in the Report on the Comprehensive Crime Control Act of 1983 by the Committee on the Judiciary, United States Senate, (see pages 122-125) was not seen as "revocable". The Senate Report states that "The Committee did not provide for revocation proceedings for violation of a condition of supervised release because it did not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant and because it believes that a more serious violation should be dealt with as a new offense." However, in 1985 and 1986 Congress adopted statutory provisions (18 USC § 3583) that allow for the modification of conditions or revocation of supervised release. There is no explicit statement from Congress as to its thinking regarding these changes, but clearly, the adoption of revocation provisions cuts against the earlier thinking expressed in the 1983 Senate Report.

A second issue with Peter's draft was its complexity. Upon revocation, the probation officer would have to apply the guidelines to the violative behavior and compute a guideline range for the court to sentence within. This requires a very thorough investigation of the new offense behavior if accurate guideline application is to be made. In many jurisdictions the court revokes probation/supervised release soon after arrest when there is a preponderance of the evidence that the violation has occurred, and does not wait for conviction on the new criminal charges. To do so under Peter's draft would force the court to have mini-trials on the facts before the guideline range could be determined. (These findings of fact may also exert unwanted influence on the disposition of the new criminal charges.)

A final issue occurs in response to the statutory limitation on the sentence that can be imposed upon revocation of supervised release. If, as Peter suggests, the sentence imposed upon revocation is determined through application of the Chapter Two guidelines to the new criminal behavior, this will frequently produce a guideline range considerably in excess of the statutory maximum that can be imposed (which can be as low as one year, and only as high as five years). In this instance, the statute would control and would limit the sentence. Proportionality would be seriously compromised as defendants who faced a maximum revocation sentence of three years could receive this sentence when the new

criminal conduct produced an offense level of twenty or any offense level greater than this. There would be no possible way of imposing a greater revocation sentence on the defendant who had an offense level of forty-three than on the defendant who had an offense level of twenty. Additionally, disparity would be introduced between the revocation sentences received for defendants whose original sentence had been probation (who upon revocation are eligible by statute for any sentence available at the original sentencing) and those who are on supervised release who have a statutory ceiling of five years on the sentence that can be imposed upon revocation.

In consideration of all of these issues, our group abandoned Peter's draft amendment. We looked instead to develop a system that imposed a sanction for the breaking of the supervision contract. This sanction, although limited in length, would always be served consecutively to any sentence imposed for the violative behavior. Thus, the sentence imposed upon revocation is solely for the breaking of the supervision contract. To do otherwise, in the opinion of probation officers, is to depreciate the seriousness of their supervision efforts.

We do accept the premise that the length of the sentence imposed upon revocation for new criminal conduct should be tied to the seriousness of the new criminal conduct. In addition, we assert that a violation for new criminal conduct should result in revocation and a sentence of imprisonment in all cases except those for relatively minor criminal conduct. If the revocation is for technical violations of the supervision conditions or minor criminal conduct, we recommend a system that provides the court with the flexibility it needs to meet the needs of the defendant and the concerns of the community. The court needs a variety of sentencing options, including the option of not revoking supervision, but extending or modifying the conditions of supervision.

INFORMATION RESOURCES

The group prepared for its task by:

- 1) Reviewing existing policy statements on probation and supervised release violations and revocations;
- 2) Reviewing relevant literature including the legislative history;
- 3) Requesting from the AO up-to-date statistical data on the frequency, nature, and disposition of probation, supervised release, and parole revocations;
- 4) Reviewing existing Commission files on this topic, drawing on past experiences in the development of

guidelines and policy statements for violation and revocation;

- 5) Reviewing and considering the recommendations of the U. S. Department of Justice relative to this topic;
- 6) Conferring with drafting staff;
- 7) Reviewing and discussing drafting's proposed guidelines for violation and revocation procedures;
- 8) Drawing on the experiences and knowledge of the group members all of whom are either current or former federal probation officers or federal prosecutor;
- 9) Reviewing information available from the Technical Assistance Service regarding the experiences of the field with violations and revocations; and
- 10) Consulting with staff at the Probation Division and the General Counsel for the Administrative Office for the Courts.

DRAFT OF REVOCATION GUIDELINES

CHAPTER SEVEN - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

§7A1.1 Classes of Violations

- (a) Class I: Violations of any condition of probation or supervised release that constitutes new criminal conduct involving a crime of violence or drug trafficking.
- (b) Class II: Violations of any condition of probation or supervised release that constitutes new criminal conduct not detailed in Class I or Class III.
- (c) Class III: Violations of any condition of probation or supervised release and new criminal conduct consisting of:

minor thefts and property offenses
driving while intoxicated
careless or reckless driving
contempt of court
disorderly conduct or disturbing the peace
driving without a license or with a revoked
or suspended license
false information to a police officer

gambling
hindering or failure to obey a police officer
leaving the scene of an accident
local ordinance violations
non-support
prostitution
resisting arrest
trespassing
hitchhiking
juvenile status offense and truancy
loitering
minor traffic infractions
public intoxication
vagrancy

Application Notes:

1. Crime of violence means any offense under federal or state law punishable by imprisonment for a term exceeding one year that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

2. Drug trafficking means an offense under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute. This also includes conspiracies to commit such offenses.

3. Minor thefts and property offenses means those offenses that represent a loss of less than \$200, and did not result in any threat or injury to a person. (Among offenses that are not covered by this definition are: purse snatching, pick-pocketing, burglary, arson).

4. Those offenses included in Class III violations. also includes offenses similar to them, by whatever name they are known.

§7A1.2 Reporting Violations

- (a) Class I and II: The United States Probation Officer shall report in writing, to the court all included violations of probation or supervised release;
- (b) Class III: The United States Probation Officer shall report in writing to the court all included

violations of probation and supervised release unless he/she determines that non-reporting:

- (1) will not present an undue risk to the public;
- (2) will not depreciate either the defendant's or the public's respect for the justice system; and
- (3) is consistent with the sentencing court's intention for placing the defendant on supervision.

§7A1.3 Warrants and Violation Hearings

- (a) Class I and II: The court shall issue a violator's warrant or a summons to appear, and conduct a violation hearing in accordance with Rule 32.1, Federal Rules of Criminal Procedure, for all included violations of probation or supervised release;
- (b) Class III: The court shall assess the purposes of sentencing, the nature and circumstances of the violations, and the criminal history and other characteristics of the defendant in determining whether to issue a violator's warrant or a summons to appear, and conduct a violation hearing in accordance with Rule 32.1, Federal Rules of Criminal Procedure, for all included violations of probation and supervised release.

§7A1.4 Sanctions Imposable for Violations

(a) Violations of Probation and Supervised Release

(1) Class I

- (A) Upon a finding that a violation occurred, the court shall revoke probation or supervised release and impose a new sentence of imprisonment within the guideline range of 12 - 18 months.
[15 - 21 months]

(2) Class II

- (A) Upon a finding that a violation occurred, the court shall revoke probation or supervised release and impose a new

sentence of imprisonment within the guideline range of 6 - 12 months.
[9 - 15 months]

(3) Class III

(A) Upon a finding that a violation occurred, the court either shall:

- (1) revoke probation or supervised release and impose a new sentence of imprisonment within the guideline range of 1 - 6 months [3 - 9 months], or
- (2) continue or extend the term of supervision (not to exceed the maximum sentence authorized by statute) and modify the conditions to afford more intensive supervision.

Application Notes:

1. The Court shall revoke supervision and impose a new sentence of imprisonment for new criminal conduct described in Class I and II violations. If the new criminal conduct is for conduct included as Class III violations, the guidelines do not require the imposition of a new sentence of imprisonment. This allows for the flexibility to impose sentences that include community confinement and rehabilitative and treatment programs. Repeated violations for new criminal conduct should result in a sentence of imprisonment, regardless of the class of the violation.

2. The statute (18 USC § 3565 and 3583) requires that supervision be revoked for possession of a controlled substance and a sentence of at least one-third the term of the original sentence be imposed. Thus, if a five year term of supervised release was imposed and the defendant is found to be in possession of a controlled substance, the statute requires that the defendant serve in prison not less than one-third of the term of supervised release (twenty months in this example. As elsewhere in the guidelines, when the statute and the guidelines are in conflict, the statute controls. (Refer to §5G1.1.)

3. It is not intended that the court considering revocation must await conviction on the new criminal conduct. If the court finds a violation has occurred, it may revoke probation or supervised release.

§7A1.5 Imposition of Sentence for Violations

- (a) Upon revocation, the court shall give no credit for time served under probation or supervised release.
- (b) If the defendant is serving a period of custody whether or not that custody is related to the same conduct that is the basis for the violation of probation or supervised release, the court shall order that the incarceration imposed upon revocation run consecutively to that period of custody.

Background : The drafters of the Comprehensive Crime Control Act recognized that consistency and certainty are necessary in sanctioning violations of the conditions of supervision and directed the Commission to develop guidelines and policy statements regarding the revocation of both probation and supervised release. (28 USC § 994(a)(3). Compliance with the imposed conditions of supervision is essential if the period of supervision is to be meaningful. Only if an offender understands that failure to comply will result in a prompt and certain response from the court will the conditions be adhered to in a conscientious manner.

To the extent permissible by statute, the guidelines treat violations of probation and supervised release as functionally equivalent.