

CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

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Welcome to Part I of sentencing issues, nuts and bolts! In this and next month's newsletters, we focus on some real world sentencing-related issues that we hope will help you answer client questions and prevent future client dissatisfaction. In this issue we address (1) how your client's undischarged period of parole time affects the sentence imposed in your case; and (2) "violent felony override" — real thing or urban legend. Next month's issue will address (3) can a court waive or defer payment of the mandatory fees imposed at sentencing; and (4) when can a court judicially impose a sentence of SHOCK incarceration. We've focused on these issues because they are the ones our clients repeatedly bring up to us after they've been sent upstate. Here is Part I of sentencing nuts and bolts.

- **If your client is a second felony or persistent felony offender of any kind, or is being sentenced on an A-I felony, any period of undischarged parole time must run consecutively to the sentence imposed as a matter of law. See Penal Law §70.25(2)(a).**

This sentencing rule is especially important for defendants who plead guilty to know about so that they can intelligently assess the bargain they are getting. Unfortunately, the Court of Appeals has squarely held that the trial court has no duty to advise the defendant of this mandatory consequence. See People v. Belliard, 20 N.Y.3d 381 (2013). So, unless you do, there is a decent chance your client will arrive upstate not knowing that the sentence he thought was 4 years is actually 6 years. And, if your client pleaded guilty unaware of this sentencing rule, there is also a decent chance that he will blame you for not advising him what his sentence would really be, exposing you to a potential IAC claim. Further, the consequences can indeed be severe: a client who had been released to parole on a previous indeterminate sentence with a maximum of life, for example, will again face potential life imprisonment, even if you negotiated a short determinate term for him in your case. (*Caveat*: Note that if through some fluke of timing, your client has a prior conviction that cannot serve as a predicate [because, for example, the sentence on the prior offense was imposed after commission of the present offense], then it is in the court's discretion as to whether to run the undischarged time concurrently or consecutively. If the judge says nothing, the new sentence will run concurrently with the undischarged time, unless the new sentence is a definite sentence. See Penal Law § 70.25 (1)(a), (b).)

Practice tip: ALWAYS advise a client who is considering a plea offer that any undischarged parole time on a predicate conviction will be tacked onto the promised sentence (subject to the caveat noted above). By doing so, you will ensure that your client's guilty plea is truly knowing, and insulate yourself from a later IAC claim from an unhappy client. You can

also use this sentencing rule in your negotiations with the DA to argue that the offer should be discounted by the amount of undischarged parole time that will necessarily extend the sentence. For a client convicted after trial, tell your client about this sentencing rule so that he faces no unhappy surprises when he gets his time comp upstate.

- **Although it is a misnomer, the “violent felony override” your client wants you to ask for is not an urban legend, and, depending on the circumstances of your client’s crime, you can do something to help him.**

There is no such thing as a “violent felony override” in the law. However, there is a provision in the law relating to eligibility for temporary release from incarceration that this term relates to. As one court put it, a “violent felony override” is “an imprecise and potentially confusing term that is sometimes used to describe a document referred to in 7 NYCRR 1900(4)[c][1][iii] that permits [DOCCS] to ascertain whether an inmate has one of the threshold requirements to be eligible for a temporary release program despite conviction of a specified violent felony offense.” See People v. Lynch, 121 A.D.3d 717, 718 (2d Dept. 2014). Therefore, when your client requests a violent felony override, he is probably seeking proof of eligibility for future temporary release from prison despite his violent felony conviction.

Under 7 NYCRR § 1900.4, an incarcerated inmate must meet certain eligibility requirements to even be considered for a temporary release program (such as work release). An inmate who was convicted of one of the violent offenses listed in the regulation (the usual suspects: assault, robbery, burglary, CPW, and a host of others) is ineligible UNLESS he can provide the temporary release committee with “a court-generated document or document generated by the Office of the District Attorney” establishing that, even though he was convicted of one of the listed crimes, it did not involve either (1) “the use or threatened use of a deadly weapon or a dangerous instrument,” or “the infliction of a serious physical injury.” See 7 NYCRR § 1900(4)[c][iii]. So, for example, a client who was convicted of robbery under an aided-by-another-actually- present theory could still be eligible for temporary release down the road, as long as he can provide the proper proof of the qualifying circumstances. See, e.g., People v. Cumberbatch, 24 Misc.3d 412 (Sup. Ct. Kings Co. 2009). (Note that the regulation contains a great deal of other eligibility conditions, which are not directly relevant to the issue we’re addressing here but could affect your client.)

Practice tip: If your client requests that you ask the court for a “violent felony override” at sentencing, explain that there is no such document, but, if the circumstances allow, that there is a request you can make to help him with a future request for temporary release. While the regulation does not give guidance as to the form of the document, DOCCS will accept the sentence and commitment¹ as proof of eligibility, as long as it specifies the subdivision that the

¹ The sentence and commitment is prepared by the court clerk at the time of or shortly after sentencing. (In busy parts, the clerk will likely move on to the next case after sentencing and prepare the S&C later). Trial practitioners wouldn’t ordinarily see the S&C, although it is part of the record on appeal. If prepared by the clerk at the time of sentencing, you should ask to double check it, as mistakes are easily made, not just as to the matters we note in this newsletter, but on a host of other matters. If it

defendant was convicted of, and the subdivision is one that does not automatically disqualify the defendant for temporary release. See People v. Lynch, 121 A.D.3d 717, 718 (2d Dep't 2014). As your client is entitled to have the S & C specify the subdivision, id., ensure that the clerk does so. In order to manage client expectations, you should emphasize to your client that the document will only eliminate a threshold eligibility requirement and does not guarantee acceptance; further, only a very small percentage of eligible inmates are ultimately granted temporary release.

Next month: deferral of mandatory fees and judicial imposition of SHOCK.

A special thanks to Alan Rosenthal, Esq., for sharing his expertise on the issues in this month's newsletter.

General Reminders:

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case does not preserve a sufficiency issue for appeal.
- Never rely on an objection, motion, or request made only by a co-defendant's attorney. It will not preserve an issue for your client, unless you specifically join in it, on the record.

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is to be prepared later, remind the clerk of the matters that must be included on the S&C (e.g., the subdivision of the felony for the eligibility proof your client needs to request temporary release). Attached to this newsletter is a sample S&C to illustrate the many items that are a simple-check-the box, but, if done incorrectly, can cause the client problems down the road.

UNIFORM SENTENCE & COMMITMENT

UCS-854(12/2014)

STATE OF NEW YORK

COURT, COUNTY OF

PRESENT: HON.

Court Part:

Court Reporter:

Superior Ct. Case #:

Accusatory Instrument Charge(s):

Law/Section & Subdivision:

Form with fields for Defendant name, SEX, D.O.B., NYSID NUMBER, and CRIMINAL JUSTICE TRACKING NUMBER.

1
2
3
4

Date(s) of Offense:

To

THE ABOVE NAMED DEFENDANT HAVING BEEN CONVICTED BY [] PLEA OR [] VERDICT, THE MOST SERIOUS OFFENSE BEING A [] FELONY OR [] MISDEMEANOR OR [] VIOLATION, IS HEREBY SENTENCED TO:

Table with columns: Crime, Count No., Law § and Subdivision, SMP, Hate or Terror, Minimum Term, Maximum Term, Definite/Determinate, Post-Release Supervision.

**NOTE: For each DETERMINATE SENTENCE imposed, a corresponding period of POST-RELEASE SUPERVISION MUST be indicated [PL § 70.45].

- Counts shall run CONCURRENTLY with each other
Sentence imposed herein shall run CONCURRENTLY with
Sentence imposed herein shall include a CONSECUTIVE term of [] PROBATION OR [] CONDITIONAL DISCHARGE, with an Ignition Interlock Device condition...
Conviction includes: WEAPON TYPE: and/or DRUG TYPE:
Charged as a JUVENILE OFFENDER - age at time crime committed: years
Adjudicated a YOUTHFUL OFFENDER [CPL § 720.20]
Execute as a sentence of PAROLE SUPERVISION [CPL § 410.91]
Re-sentence as a PROBATION VIOLATOR [CPL § 410.70]

- As a: [] Second [] Second Violent [] Second Drug [] Second Drug w/prior VFO [] Predicate Sex Offender [] Predicate Sex Offender w/prior VFO [] Second Child Sexual Assault [] Persistent [] Persistent FELONY Violent OFFENDER

Table with columns: Paid, Not Paid, Deferred - court must file written order [CPL § 420.40(5)]. Rows include Mandatory Surcharge, Fine, DNA Fee, DWI/Other, Crime Victim Assistance Fee, Restitution, Sex Offender Registration Fee, Supplemental Sex Off. Victim.

THE SAID DEFENDANT BE AND HEREBY IS COMMITTED TO THE CUSTODY OF THE:

- [] NYS Department of Correctional Services (NYSDOCS) until released in accordance with the law, and being a person sixteen (16) years or older not presently in the custody of NYSDOCS [] the COUNTY SHERIFF OR [] NEW YORK CITY DEPARTMENT OF CORRECTION is directed to deliver the defendant to the custody of NYSDOCS as provided in 7 NYCRR Part 103.
[] NYS Department of Correctional Services (NYSDOCS) until released in accordance with the law, and being a person sixteen (16) years or older and is presently in the custody of NYSDOCS, defendant shall remain in the custody of NYSDOCS.
[] NYS Office of Children and Family Services in accordance with the law being a person less than sixteen (16) years of age at the time the crime was committed.
[] County Jail/Correctional Facility

TO BE HELD UNTIL THE JUDGMENT OF THIS COURT IS SATISFIED.

REMARKS

Commitment, Order of Protection & Pre-Sentence Report received by Correctional Authority as indicated. Official Name, Shield No.

- Pre-Sentence Investigation Report Attached: [] YES [] NO
Order of Protection Issued: [] YES [] NO
Order of Protection Attached: [] YES [] NO
Amended Commitment:
Original Sentence Date

Date Clerk of the Court by Signature Title

