PART B - PROBATION

Introductory Commentary

The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S.C. § 3561. ***It also requires the court to consider "the kinds of sentences available,""in determining the particular sentence to be imposed." 18 U.S.C. § 3553(a) (3). In cases where probation is statutorily authorized, the court should consider, before imposing a sentence of imprisonment, whether the purposes of sentencing can be served with an alternative to incarceration.***

Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including ***reflecting the seriousness of the offense****, promoting respect for law, providing just punishment for the offense, achieving general deterrence, ~~and~~ protecting the public from further crimes by the defendant,* ***and providing the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. The court should consider each of these purposes of sentencing in every case, but may "recognize that one purpose may have more bearing on the imposition of sentence in a particular case than another purpose. For example, the purpose of rehabilitation may play an important role in sentencing an offender to a term of probation with the condition that he participate in a particular course of study, while the purpose of just punishment and incapacitation may be important considerations in sentencing a repeated or violent offender to a relatively long term of imprisonment" S. Rep. 225 at 68, 98th Cong., 1st Sess. 68 (1983). In deciding whether to impose a term of probation or imprisonment, the court should bear in mind that although "custodial sentences are qualitatively more severe than probationary sentences of equivalent terms, defendants on probation are nonetheless subject to conditions that "substantially restrict their liberty." Gall v. United States, 552 U.S. 38, 48 (2007) (citations omitted); see also S. Rep. 225, 98th Cong., 1st Sess. 41(1983 (believing it "would be a roadblock to the development of sensible comprehensive sentencing policy," Congress sought to avoid a "sentencing policy that assumes that a term of imprisonment, no matter how brief, is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine").***

§5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is ~~authorized~~ **approved,** if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions **that includes** ~~requiring~~ intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

(b) In deciding whether to impose a sentence of probation, the court may consider, among other factors, the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties, or lack thereof, as well as his physical, mental, and emotional condition inasmuch as they relate to one of the statutory purposes of sentencing.

~~(b)~~**(c)** A sentence of probation may not be imposed in the event:

(1) the offense of conviction is a Class A or B felony, 18 U.S.C § 3561(a)(1);

(2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense **that is not a petty offense**, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

1, Although the court should not consider the defendant's education, vocational skills, employment record, family ties, and responsibilities, and community ties, or lack thereof, in deciding to sentence a defendant to a term of imprisonment or lengthening the term of imprisonment, those factors may "call for the use of probation, instead of imprisonment, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community." S. Rep. 225, 98th Cong., 1st Sess. 174-75 (1983).

2. A sentence of probation rather than imprisonment is generally appropriate for a first offender "who has not been convicted of a crime of violence or an otherwise serious offense." See 28 U.S.C. § 994(j). A sentence of probation may be appropriate for a repeat or high-risk offender who would benefit from community-based educational or vocational training, medical care, and treatment for substance abuse or other medical/emotional conditions, or who have stabilizing ties in the community, such as family or employment.

~~*1.*~~***3***. *Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines* ***approve of*** ~~*authorize, but do not require*~~*, a sentence of probation in the following circumstances:*

(a) Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed ~~*but is not required*~~*.*

*(b) Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months). In such cases, the court may impose probation****, but the guidelines' recommend that it also*** ~~*only if it*~~ *impose*~~*s*~~ *a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation.* ***but it is recommended that the court also*** ~~*only if it*~~ *impose*~~*s*~~ *a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.*

2. Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more), the guidelines do not ***approve*** ~~*authorize*~~ *a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).*

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute. ~~*or (2) where a term of imprisonment is required under § 5C1.1 (Imposition of a Term of Imprisonment).*~~ *Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense* ***that is not a petty offense****. Although this provision has effectively abolished*

the use of "split sentences" imposable pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is ***approved*** ~~*authorized*~~ *and those where probation is* ***statutorily*** *prohibited* ***or not recommended under the guidelines***

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 302); November 1, 1992 (see Appendix C, amendment 462).

§5B1.2. Term of Probation

(a) When probation is imposed, **for a felony**, the term shall be:

(1) at least one year but not more than five years if the offense level is **6** or greater;

(2) no more than three years in any other case.

Commentary

Background: This section governs the length of a term of probation. Subject to statutory restrictions, the guidelines ***recommend*** ~~*provide that*~~ *a term of probation* ~~*may*~~ *not exceed three years if the offense level is less than 6. If a defendant has an offense level of 6 or greater, the guidelines* ***recommend*** ~~*provide*~~ *that a term of probation be at least one year but not more than five years. Although some distinction in the length of a term of probation is warranted based on the circumstances of the case, a term of probation may also be used to enforce conditions such as fine or restitution payments, or attendance in a program of treatment such as drug rehabilitation. Often, it may not be possible to determine the amount of time required for the satisfaction of such payments or programs in advance. This issue has been resolved by setting forth two broad ranges for the duration of a term of probation depending upon the offense level.* ~~*Within the guidelines set forth in this section*~~*,* ***T****he determination of the length of a term of probation is within the discretion of the sentencing judge.*

Historical Note: Effective November 1, 1987.

§5B1.3. Conditions of Probation

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Commentary

Application Note:

1. ***The court is encouraged to fashion conditions "in order to make probation a useful alternative to a term of imprisonment." S. Rep. 225, 98th Cong., 1st Sess. 44 (1983).The Commission encourages judges to impose the least restrictive conditions of probation necessary to accomplish the purposes of sentencing.***

2. ***"Rehabilitation is a particularly important consideration in formulating conditions for persons placed on probation. Their participation in such programs as educational or vocational training, or in treatment programs, such as those for persons with emotional problems or drug or alcohol problems, might be made conditions of probation for rehabilitative purposes." S. Rep. 225, 98th Cong., 1st Sess. 76 (1983). When fashioning conditions of probation, the court should consider those factors that may place a defendant at increased risk of recidivism, but which may be reduced with appropriate conditions of probation. Such factors include lack of education, lack of employment or underemployment, financial problems, anti-social values, criminal peers, low self-control, dysfunctional family ties, substance abuse, and criminal personality. To be effective, conditions of probation should target individual risk factors and be no more onerous than necessary to accomplish the purposes of sentencing. Imposing strict conditions on low-risk offenders may increase rather than decrease their risk of recidivism. The court is encouraged to consider evidence-based practices in assessing the suitability of programs and conditions of probation.***

3. ~~*1.*~~ *Application of Subsection (a)(9)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(9)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(9)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 273, 274, and 302); November 1, 1997 (see Appendix C, amendment 569); November 1, 1998 (see Appendix C, amendment 584); November 1, 2000 (see Appendix C, amendment 605); November 1, 2001 (see Appendix C, amendment 615); November 1, 2002 (see Appendix C, amendment 644); November 1, 2004 (see Appendix C, amendment 664); November 1, 2007 (see Appendix C, amendments 701 and 711); November 1, 2009 (see Appendix C, amendment 733).

PART F - SENTENCING OPTIONS

Introductory Commentary

Sentencing options such as community confinement, community service, home detention, and intermittent confinement may permit the court to fashion a sentence that meets multiple sentencing purposes. Such "intermediate sanctions" can provide additional retribution and incapacitation while permitting the defendant to participate in activities that reduce recidivism, including treatment, employment, educational and vocational programs, and maintenance of family ties.[1] In cases where probation is not statutorily authorized, the court ought to consider whether the purposes of sentencing can be served with shorter periods of imprisonment combined with conditions of supervised release that include sentencing options like those listed here.

§5F1.1. Community Confinement

Community confinement may be imposed as a condition of probation or supervised release.

Commentary

Application Notes:

1. *"Community confinement" means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility; and participation in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility- approved programs during non-residential hours.*

2. *Community confinement generally should not be imposed for a period* ***longer than necessary to accomplish specific treatment objectives or to protect the public*** ~~*in excess of six months. A longer period may be imposed to accomplish the objective of a specific rehabilitative program, such as drug rehabilitation.*~~ *The sentencing judge may impose other discretionary conditions of probation or supervised release appropriate to effectuate community confinement.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 302); November 1, 2002 (see Appendix C, amendment 646); November 1, 2009 (see Appendix C, amendment

[1] Source: The PEW Center on the States, *Arming the Courts with Research: 10 Evidence-Based Sentencing Initiatives to Control Crime and Reduce Costs*, at 4 (May 2009).

733).

§5F1.2. Home ~~Detention~~ Confinement

Home **confinement** ~~detention~~ may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment.

Commentary

Application Notes:

1. ***Home confinement typically has three levels of restriction on the defendant's liberty: home detention, curfew, and 24-hour-a- day lockdown. Home confinement benefits the courts because it costs much less than incarceration. Home confinement also enables defendants to continue to support their families, and if employed, to pay taxes.*** [2]

2. *"Home detention" means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used so long as they are as effective as electronic monitoring.*

3. "Curfew" requires the program participant to remain at home every day at certain times.

4. "Home incarceration" calls for 24-hour-a-day "lock-down" at home, except for medical appointments, court appearances, and other activities that the court specifically approves.

2. *The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available.*

3. *The defendant's place of residence, for purposes of home detention, need not be the*

[2] Descriptions taken from Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts, *Court and Community: Home Confinement* (2007).

place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, e.g., conditions that a monitoring system be installed, that there will be no "call forwarding" or "call waiting" services, or that there will be no cordless telephones or answering machines.

Background: The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring. However, in some cases home detention may effectively be enforced without electronic monitoring, e.g., when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not ***recommended*** ~~*required*~~ *that electronic monitoring be a necessary condition for home detention* ***in all cases.*** *Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance will be equally effective.*

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 271 and 302).

§5F1.3. Community Service

Community service may be ordered as a condition of probation or supervised release.

Commentary

Application Note:

1. *Community service generally should not be imposed in excess of 400 hours. Longer terms of community service impose heavy administrative burdens relating to the selection of suitable placements and the monitoring of attendance.*

2. ***"Community service addresses the traditional sentencing goals of punishment, reparation, restitution, and rehabilitation: Punishment. Community service adds a punitive measure to probation. It restricts offenders' personal liberty and requires them to forfeit their leisure time. Reparation. Community service allows offenders to atone or make the victim whole in a constructive way. Restitution. Community service may be regarded as a substitute for financial compensation to individual victims or a form of symbolic restitution when the community is the victim. Rehabilitation. Community service fosters a sense of social responsibility in offenders and allows them to improve their self-image through serving the community. It also instills a work ethic and helps***

offenders develop interests and skills."[3]

[or]

"Community service is a versatile condition that can serve multiple purposes. It can, for example, serve as the "publicly discernible penalty" in probation cases or as a negative consequence for noncompliance; as a controlling strategy that requires offenders to be productively occupied; or as a correctional strategy that provides a way for offenders to acquire job readiness skills and job experience, or broaden their network of associates in a more productive direction. In addition to the specific sentencing purpose to be served, the desired by-product of community service is <u>always</u> to benefit the community." [4]

<u>Historical Note</u>: Effective November 1, 1987. Amended effective November 1, 1989 (<u>see</u> Appendix C, amendments 283 and 302); November 1, 1991 (<u>see</u> Appendix C, amendment 419).

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~~**§51.7 Shock Incarceration Program (Policy Statement)**~~

Delete completely because the program no longer exists.

§5F1.8. <u>Intermittent Confinement</u>

Intermittent confinement may be imposed as a condition of probation during the first year of probation. <u>See</u> 18 U.S.C. § 3563(b) (10). It may be imposed as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. <u>See</u> 18 U.S.C. § 3583(d).

<u>Commentary</u>

<u>Application Note</u>:

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[3] Source: *United States Probation and Pretrial Services, Administrative Office of the U.S. Courts, Court and Community: Community Service (2007).*

[4] Source: *U.S.Probation Office, The Supervision of Federal Offenders, Monograph 109 (Revised March 2008).*

1. *"Intermittent confinement" means remaining in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release. See 18 U.S.C. § 3563(b) (10).*

2. ***Intermittent confinement imposes an additional restraint on a defendant's liberty while also permitting him or her to work, go to school, support family, or participate in other rehabilitative programs or pro-social activities***.