

standing practice of the Commission. It is also designed to clarify the basis for the agency's determination that it may properly exercise such authority.

EFFECTIVE DATE: April 20, 1989.

FOR FURTHER INFORMATION CONTACT: Rockne Chickinell, Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815, telephone (301) 492-5959.

SUPPLEMENTARY INFORMATION: In recent years, several courts of appeals have questioned the Parole Commission's authority to place a violator warrant as a detainer against a parolee who is in jail awaiting trial on a new criminal offense. *E.g., Heath v. U.S. Parole Commission*, 788 F.2d 85 (2d Cir. 1986). The Court of Appeals for the Eleventh Circuit has held that the Commission is authorized to place a violator warrant as a detainer against a pre-trial detainee. *Goodman v. Keohane*, 663 F.2d 1044 (11th Cir. 1981). The courts disfavoring the Commission's practice have pointed out that 18 U.S.C. 4214(b)(1) only gives the Commission the power to place a detainer against a parolee after his conviction and incarceration for a new offense committed while on parole, and read into that statute an implicit prohibition on placing a violator warrant as a pre-trial detainer. Under the analysis of these courts, the Commission may only issue the warrant and promptly arrest the parolee, or withhold issuance of the warrant pending disposition of the new criminal charge. See U.S.C. 4213(b). Up to now, the Commission's regulations have not explicitly provided that the Commission may place its warrant as a detainer against a parolee in pre-trial custody; the rule at 28 CFR 2.44(b) only stated that issuance of the warrant may be withheld, or the warrant may be issued and "held in abeyance".

However, the Commission's long-standing practice in the disposition of violator warrants has included issuing a warrant and placing a detainer against a parolee in pre-trial custody. It allows the parolee the opportunity to proceed with his criminal trial without having to simultaneously defend himself against the alleged parole violations. But it also permits the Commission to promptly arrest the parolee and initiate revocation proceedings if the parolee is released pending trial. It is primarily used when the parolee is considered a threat to the public safety (thereby warranting his continued detention), and when the approaching expiration of the parolee's sentence requires the Commission to issue the warrant to retain its jurisdiction to conduct a

revocation hearing. See 28 CFR 2.44(d). In these cases, other procedures such as issuance of a summons, or issuance of a warrant and having the U.S. Marshal hold the warrant "in abeyance" are not appropriate.

If the Commission were prohibited from using this practice, it would have to immediately arrest every parolee whose trial was scheduled to extend beyond his full term date, and promptly conduct a revocation hearing, thereby requiring the parolee to simultaneously defend himself against new criminal charges and parole violation charges. This would be an anomaly, for in a case where the parolee had a substantial period to serve until his sentence expired, the Commission would be able to await the conclusion of the trial and then issue the warrant and have it placed as a detainer. It could postpone the revocation proceeding for the duration of any new sentence imposed. *Moody v. Daggett*, 429 U.S. 78 (1976). Congress never intended that the Commission pursue a different course for a parolee nearing the end of his sentence, and be obliged to make a revocation decision before the facts of a new criminal charge can be adjudicated in court, or else lose jurisdiction over such a parolee.

The Commission's practice is described in several cases approving the former U.S. Board of Parole's authority to postpone a revocation hearing until a criminal prosecution has been completed. *Savage v. U.S. Parole Board*, 422 F.2d 1248 (6th Cir. 1970); *Shelton v. U.S. Board of Parole*, 388 F.2d 567 (DC Cir. 1967); *Watson v. Neff*, 383 F.2d 397 (5th Cir. 1967). This procedure was used under the authority of a statute—former 18 U.S.C. 4205—which in pertinent part, provided only that "[a] warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced."

In enacting the Parole Commission and Reorganization Act of 1976, Congress evidenced no dissatisfaction with the Commission's practice, and did not require that a warrant issued under section 4213 be immediately executed. In the absence of an express disapproval from Congress, Section 4213 should be read to permit the Commission to place a violator warrant as a pre-trial detainer. At section 4214(b)(1), Congress gave the Commission explicit authority to issue a warrant and place it as a detainer against a parolee convicted of a new offense, because at the time (1976), that

was the subject of controversy, not pre-trial detainees. As noted by the Supreme Court in *Moody v. Daggett*, *supra*, 82-5 (1976), Congress, in passing section 4214(b)(1), simply adopted as statutory law one of the regulations of the former Board of Parole (28 CFR 2.53 (1975)). Therefore, section 4214(b)(1) should not be interpreted as an implicit restriction on the Commission's authority in the disposition of its violator warrants.

Consequently, the Commission is amending its regulation at 28 CFR 2.44(b) in order to provide explicit regulatory authority for its long-standing practice. Because this rule represents the Commission's interpretation of its authority in the disposition of parole violator warrants issued under 18 U.S.C. 4213 and represents no change in the Commission's prior policies or practices, the Commission has not sought public comment on the change.

This rule change will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, prisoners, probation and parole.

PART 2—[AMENDED]

Section 2.44 is amended by revising paragraph (b) to read as follows:

§ 2.44 Summons to appear or warrant for retaking of parolee.

(b) Any summons or warrant under this section shall be issued as soon as practicable after the alleged violation is reported to the Commission, except when delay is deemed necessary. Issuance of a summons or warrant may be withheld until the frequency or seriousness of violations, in the opinion of the Commission, requires such issuance. In the case of any parolee charged with a criminal offense and awaiting disposition of the charge, issuance of a summons or warrant may be withheld, a warrant may be issued and held in abeyance, or a warrant may be issued and a detainer may be placed.

Date: March 3, 1989.

Benjamin F. Baer,

Chairman, U.S. Parole Commission.

[FR Doc. 89-6571 Filed 3-20-89; 8:45 am]

BILLING CODE 4410-01-M

28 CFR Part 2**Paroling, Recommitting and Supervising Federal Prisoners; Special Parole Term Violators**

AGENCY: United States Parole Commission.

ACTION: Final rule.

SUMMARY: The U.S. Parole Commission is adopting an interpretative regulation that clarifies the consequences of parole revocation in the case of a special parole term violator. The regulation states that, if parole is revoked, none of the time spent on parole shall be credited toward the special parole term violator's sentence. The need for this regulation is to distinguish special parole term violators from ordinary parole violators, who do not lose credit for time spent on parole unless they have absconded from supervision, or have sustained a new conviction punishable by jail or prison.

EFFECTIVE DATE: April 20, 1989.

FOR FURTHER INFORMATION CONTACT: Michael A. Stover, General Counsel, U.S. Parole Commission, 5550 Friendship Boulevard, Chevy Chase, Maryland, Telephone (302) 492-5959.

SUPPLEMENTARY INFORMATION: The U.S. Parole Commission's present regulation concerning the consequences of parole revocation with respect to credit for time spent on parole, 28 CFR 2.52(c), addresses the case of ordinary parolees, who do not lose time spent on parole except under the circumstances specified at 18 U.S.C. 4210 (1976). The regulation does not cover the case of special parole term violators. These individuals continue to be subject to the terms of 21 U.S.C. 841(c), which states that the special parole term becomes a term of imprisonment once it is revoked, and that none of the time spent on parole shall be credited toward that prison term.

Although 21 U.S.C. 841(c) has been repealed in the Comprehensive Crime Control Act of 1984, the penalties provided in that statute were not abated by the repeal. See 1 U.S.C. 109, the General Savings Statute. Hence, special parole terms remain in effect, and the automatic forfeiture of street time required by section 841(c) must be applied to any special parolee whose parole is revoked.

In some instances, the Commission has erroneously permitted special parole term violators to receive credit for time spent on parole, by erroneous application of 28 CFR 2.52(c). The Commission intends to reopen these cases whenever they appear before the

Commission for review, and to enter the deduction of credit for time spent on parole required by 21 U.S.C. 841(c) and the interpretative regulation herein promulgated.

This rule change will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

List of Subjects in 28 CFR Part 2

Administrative practice and procedures, Probation and parole, Prisoners.

28 CFR Part 2 is amended as follows:

PART 2—[AMENDED]

1. The authority citation for 28 CFR Part 2 continues to read:

Authority: 18 U.S.C. 4203(a)(1) and 4204(a)(6).

2. 28 CFR 2.57(c) is amended to add the following sentence at the end:

(c) * * * Notwithstanding the provisions of § 2.52(c), a special parole term violator whose parole is revoked shall receive no credit for time spent on parole pursuant to 21 U.S.C. 841(c).

Dated: March 3, 1989.

Benjamin F. Baer,

Chairman, U.S. Parole Commission.

[FR Doc. 89-6568 Filed 3-20-89; 8:45 am]

BILLING CODE 4410-01-M

28 CFR Part 2**Paroling, Recommitting and Supervising Federal Prisoners; Interim Procedures for Conducting Special Transferee Hearings for Inmates Transferred by Treaty Who Committed Their Offenses on or After November 1, 1987**

AGENCY: United States Parole Commission.

ACTION: Interim rule.

SUMMARY: The Parole Commission is publishing an interim rule establishing a procedure for conducting hearings for prisoners who are transferred to the United States pursuant to a treaty, and who have been convicted in foreign countries of offenses committed after November 1, 1987. The purpose of this interim rule is to implement the provisions of the Anti-Drug Abuse Act of 1988 requiring the Parole Commission to determine release dates for these prisoners as though the prisoner had been convicted in a United States District Court pursuant to 18 U.S.C. 4106A. The Commission is, at the same

time, requesting public comment on the procedure set forth in the interim rule.

DATES: Effective March 21, 1989; comments must be received by May 22, 1989.

ADDRESS: Comments should be sent to Office of the General Counsel, U.S. Parole Commission, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815, Attn: Richard Preston.

FOR FURTHER INFORMATION CONTACT: Richard Preston at (301) 492-5959.

SUPPLEMENTARY INFORMATION: The Parole Commission has jurisdiction over all prisoners and parolees who are transferred from foreign countries pursuant to treaty. Prior to the Sentencing Reform Act of 1984, the Parole Commission had authority, under 18 U.S.C. 4106, to make parole release decisions for all prisoners, and to supervise all parolees, transferred to the United States. 18 U.S.C. 4100-4115 (originally enacted October 28, 1977). The Sentencing Reform Act of 1984 removed all references to the Parole Commission in 18 U.S.C. 4106 and amended that provision to make all transferees subject to the sentencing guidelines after November 1, 1987.

The 1984 amendment section 4106 left two important questions unanswered. First, it failed to make it clear whether the changes would apply to prisoners who committed their offenses prior to November 1, 1987 but were not transferred to U.S. jurisdiction until on or after November 1, 1987. Second, it failed to indicate which agency would determine the sentencing guidelines for the transferees.

The Sentencing Act of 1987 settled the first issue by stating that the old version of section 4106 would apply to all transferees who committed their offenses prior to November 1, 1987, regardless of when they were eventually transferred. The 1987 Act required the Parole Commission to determine parole release dates for all transferees who committed their offenses before November 1, 1987. The Anti-Drug Abuse Act of 1988 resolved the second question by creating a supplemental provision, 18 U.S.C. 4106A, which requires the Parole Commission to determine release dates for transferees who committed their offense after November 1, 1987. It requires the Parole Commission to apply the applicable sentencing guidelines "as though the offender were convicted in a United States District Court of a similar offense". 18 U.S.C. 4106A(b)(1)(A). It also permits an appeal of the Commission's decision to a U.S. Court of Appeals. The procedures published below are in response to the new

obligations of the Commission required by the 1988 legislation.

The Parole Commission interprets the 1988 legislation as authorizing the Commission to determine release dates for transferred prisoners who committed their offenses after November 1, 1987, by way of procedures similar to those that have been used to determine release dates for parole eligible prisoners. The procedures published below, however, grant more procedural rights to a transferred prisoner who committed his offense after November 1, 1987, than are available to parole eligible prisoners. These procedures satisfy three objectives: (1) The need to produce a record that is similar to the record presented to a U.S. Court of Appeals from a U.S. District Court sentencing guideline determination, (2) the need to have as many issues as possible resolved or put in focus prior to the hearing, and (3) the need to give the prisoner similar procedural rights he would have in a sentencing proceeding without departing from the Commission's traditional reliance upon hearing examiners to make a recommended decision.

The Parole Commission interprets the 1988 legislation as requiring Parole Commissioners to make the release decision, but permitting its hearing examiners to conduct the special transferee hearings. In the Commission's view, Congress was aware of, and implicitly contemplated the use of, the Commission's existing statutory procedures for setting release dates for offenders with parolable offenses. These permit delegation of authority to hearing examiners to conduct hearings and to receive evidence. 18 U.S.C. 4203(c) (1976).

The interim regulation set forth below establishes a procedure whereby the Commission can immediately implement the 1988 legislation and determine release dates for those transferees who are already in the system. The Commission may modify this procedure at a later date if experience and practicality dictate that a modification be made. The Commission welcomes public comment on the interim procedure and will consider all timely received comment prior to promulgating a final rule.

This interim rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Probation and parole, Prisoners.

PART 2—[AMENDED]

28 CFR Part 2 is amended to add § 2.62 follows:

§ 2.62 Prisoners transferred pursuant to treaty.

(a) *Applicability and jurisdiction.* Prisoners transferred by treaty who committed their offenses on or after November 1, 1987 shall receive a special transferee hearing pursuant to the procedures found in this section and 18 U.S.C. 4106(A) as amended by the Anti-Drug Abuse Act of 1988. Prisoners transferred by treaty who committed their offenses prior to November 1, 1987, are immediately eligible for parole and shall receive a parole hearing pursuant to procedures found at 28 CFR 2.13. The Commission's jurisdiction in either case is the limit of the sentence imposed by the foreign court, and the Commission shall treat the foreign conviction as though it were a lawful conviction in a United States District Court.

(b) *Interview upon entry.* Following the transferee's entry into the United States, the transferee shall, without unnecessary delay, be interviewed by a United States Probation Officer and informed of his rights under this regulation. The transferee shall be given the appropriate forms for appointment of counsel at the interview if appointment of counsel is requested.

(c) *Presentence report.* A presentence investigation report, which shall include an estimated sentencing classification and sentencing guideline range, shall be prepared by the probation office in the district of entry (or the transferee's home district). Disclosure of the presentence report shall be made as soon as the report is completed, by delivery of a copy of the report to the transferee and his counsel (if any). Confidential material contained in the presentence investigation report may be withheld pursuant to the procedure of 18 U.S.C. 4208(c). Following disclosure of the presentence report, the Commission shall review the report and may request that a corrected report be submitted. The transferee (or counsel) may submit a request for correction of the presentence report to the probation office within ten calendar days of receiving the report.

(d) *Special transferee hearing.* Following the submission of a presentence report and the completion of any corrections to that report, the Parole Commission shall conduct a special transferee hearing. A special transferee hearing shall be conducted within 60 days from the transferee's entry into the United States, or as soon as practicable following completion of

the presentence investigation report and appointment of counsel for an indigent transferee.

(e) *Representation.* The transferee shall have the opportunity to be represented by counsel (retained by the transferee or, if financially unable to retain counsel, counsel shall be provided pursuant to 18 U.S.C. 3006(A)), at all stages of the proceeding set forth in this section. The transferee may select a non-lawyer representative as provided in 28 CFR 2.61.

(f) *Decisionmaking criteria.* The Commission shall apply the guidelines promulgated by the United States Sentencing Commission, as though the transferee were convicted in a United States District Court of a statutory offense most nearly similar to the offense of which the transferee was convicted in the foreign court.

(g) *Hearing procedures.* Special transferee hearings shall be conducted by a panel of examiners. Each special transferee hearing shall be recorded by a certified court reporter and the proceedings shall be transcribed if the determination of the Commission is appealed. The following procedures shall apply at a special transferee proceeding, unless waived by the transferee.

(1) The examiner panel shall inquire whether the transferee and his counsel have had an opportunity to read and discuss the presentence investigation report and whether the transferee is prepared to go forward with the hearing. If not, the transferee shall be given the opportunity to continue the hearing.

(2) The transferee shall have an opportunity to present documentary evidence and to testify on his own behalf.

(3) Oral testimony of interested parties may be taken with prior advance permission of the Regional Commissioner.

(4) The transferee and his counsel shall be afforded the opportunity to comment upon the guideline estimate contained in the presentence investigation report, and to present arguments and information relating to the Commission's determination.

(5) Disputes of material fact shall be resolved by a preponderance of the evidence, with written recommended findings by the panel unless the panel determines, on the record, not to take the controverted matter into account.

(6) The transferee shall be notified of the panel's recommended findings of fact, and its recommended determination and reasons therefore, at the conclusion of the hearing.

(h) *Final decision.* The Commission shall render a decision as soon as practicable and without unnecessary delay. The decision shall set a release date and a period and conditions of supervised release. The Commission may, in its discretion, defer a decision, and order a hearing, provided that a statement of the reason(s) for ordering a rehearing is issued to the transferee and his counsel (if any). The Commission's final decision shall be supported by a statement of reasons explaining:

(1) The similar offense selected as the basis for the Commission's decision;

(2) The basis for the guidelines range applied;

(3) The reason for making a release determination at a particular point within the range (if the range exceeds twenty-four months); or

(4) The special reason for departing from the range. The Commission shall also provide a written statement setting forth the conditions of any period of supervised release imposed.

(i) *Appeal.* The transferee shall be advised of his right to appeal the decision of the Commission to the United States Court of Appeals that has jurisdiction over the district in which the transferee is confined.

Dated: March 3, 1989.

Benjamin F. Baer,

Chairman, U.S. Parole Commission.

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