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INTRODUCTION

This manual contains the Commission's rules (28 C.F.R. 2.1-2.107; 2.200-2.220) as well as the notes, procedures, and appendices that clarify and supplement these rules. If there appears to be a direct conflict between any of the procedures and a rule, the rule shall control. The notes, procedures, and appendices in this manual are intended only for the guidance of Parole Commission personnel and those agencies which must coordinate their work with the Commission. The notes, procedures, and appendices do not confer legal rights and are not intended for reliance by private persons.

In some instances, it is necessary to implement procedural changes immediately. This will be accomplished by issuance of a "*Rules and Procedures Memo*" signed by the Chairman (to be subsequently ratified by the Commission). These memos are numbered in sequence according to the year issued.

SUBPART A—UNITED STATES CODE PRISONERS AND PAROLEES

■ §2.1 DEFINITIONS.

As used in this part:

- (a) The term "Commission" refers to the U.S. Parole Commission.**
- (b) The term "Commissioner" refers to members of the U.S. Parole Commission.**
- (c) The term "National Appeals Board" refers to the three-member Commission sitting as a body to decide appeals taken from decisions of a Regional Commissioner, who participates as a member of the National Appeals Board. The Vice Chairman shall be Chairman of the National Appeals Board.**
- (d) The term "National Commissioners" refers to the Chairman of the Commission and to the Commissioner who is not serving as the Regional Commissioner in respect to a particular case.**
- (e) The term "Regional Commissioner" refers to Commissioners who are assigned to make initial decisions, pursuant to the authority delegated by these rules, in respect to prisoners and parolees in regions defined by the Commission.**
- (f) The term "eligible prisoner" refers to any Federal prisoner eligible for parole pursuant to this part and includes any Federal prisoner whose parole has been revoked and who is not otherwise ineligible for parole.**
- (g) The term "parolee" refers to any Federal prisoner released on parole or as if on parole pursuant to 18 U.S.C. 4164 or 4205(f). The term "mandatory release" refers to release pursuant to 18 U.S.C. 4163 and 4164.**
- (h) The term "effective date of parole" refers to a parole date that has been approved following an in-person hearing held within nine months of such date, or following a pre-release record review.**

(i) All other terms used in this part shall be deemed to have the same meaning as identical or comparable terms as used in chapter 311 of part IV of title 18 of the U.S. Code or 28 C.F.R. chapter I, part O, subpart V.

Notes and Procedures

■ 2.1-01. *Calendar Days.* The term "days" means "calendar" days.

■ 2.1-02. *Reference to Rule in Subpart B or C.* A reference to a rule (or a part thereof) in Subpart B (District of Columbia Code Prisoners and Parolees) or Subpart C (District of Columbia Code Supervised Releasees) includes any Notes and Procedures accompanying the referenced rule (or part thereof) unless clearly inapplicable in the context of a U.S. Code parole-eligible offender.

■ **§2.2 ELIGIBILITY FOR PAROLE: ADULT SENTENCES.**

(a) A Federal prisoner serving a maximum term or terms of more than one year imposed pursuant to 18 U.S.C. 4205(a) (or pursuant to former 18 U.S.C. 4202) may be released on parole in the discretion of the Commission after completion of one-third of such term or terms, or after completion of ten years of a life sentence or of a sentence of over thirty years.

(b) A Federal prisoner serving a maximum term or terms of more than one year imposed pursuant to 18 U.S.C. 4205(b)(1) (or pursuant to former 18 U.S.C. 4208(a)(1)) may be released on parole in the discretion of the Commission after completion of the court-designated minimum term, which may be less than but not more than one-third of the maximum sentence imposed.

(c) A Federal prisoner serving a maximum term or terms of more than one year imposed pursuant to 18 U.S.C. 4205(b)(2) (or pursuant to former 18 U.S.C. 4208(a) (2)) may be released on parole at any time in the discretion of the Commission.

(d) If the Court has imposed a maximum term or terms of more than one year pursuant to 18 U.S.C. 924(a) or 26 U.S.C. 5871 [violation of Federal gun control laws], a Federal prisoner serving such term or terms may be released in the discretion of the Commission as if sentenced pursuant to 18 U.S.C. 4205(b)(2). However, if the prisoner's offense was committed on or after October 12, 1984, and the Court imposes a term or terms under 26 U.S.C. 5871, the prisoner is eligible for parole only after service of one-third of such term or terms, pursuant to 18 U.S.C. 4205(a).

(e) A Federal prisoner serving a maximum term or terms of one year or less is not eligible for parole consideration by the Commission.

Notes and Procedures

■ 2.2-01. *Territorial Prisoners.*

(a) *U.S. Territories.* Prisoners sentenced for U.S. Code violations in all territories come under the jurisdiction of the U.S. Parole Commission. Prisoners sentenced for territorial offenses in the Virgin Islands, Puerto Rico, Guam, American Samoa, and the Trust territories of the Pacific Islands come under

the jurisdiction of territorial parole authorities, not the U.S. Parole Commission, even if they are confined within the United States. Prisoners sentenced for territorial offenses in all other territories come under the jurisdiction of the U.S. Parole Commission.

(b) *Panama Canal Zone*. Prisoners sentenced under former territorial Canal Zone law to sentences of incarceration of over one year are sent to Federal Prisons in the United States and come under the parole jurisdiction of the U.S. Parole Commission unless they have chosen to be transferred to the custody of the Republic of Panama.

■ 2.2-02. *District of Columbia Code Prisoners*. The United States Parole Commission has release jurisdiction over all parole-eligible District of Columbia Code felony offenders. See § 2.70.

■ 2.2-03. *Military Prisoners (10 U.S.C. 858; Uniform Code of Military Justice., Art. 58)*.

(a) Prisoners sentenced by military courts-martial and then transferred to a federal institution come under the exclusive jurisdiction of the United States Parole Commission for parole purposes. Military authorities retain jurisdiction for clemency purposes and may reduce the maximum term to be served. Clemency may be granted either while confined or while in the community on parole or mandatory release.

(b) A prisoner paroled and revoked by military authorities, who is subsequently transferred to a federal institution, is eligible for a hearing at the time of the next visit by the United States Parole Commission. The Commission accepts the military parole revocation as final, but conducts a hearing to determine reparole suitability. Such prisoner must file a parole application prior to such hearing.

(c) A military prisoner who committed his crime before August 16, 2001 and is mandatorily released from a facility of the Bureau of Prisons is not subject to supervision by the Parole Commission. A military prisoner who committed his crime on or after August 16, 2001 and is mandatorily released by the Bureau of Prisons may be placed on mandatory supervision as provided at 28 C.F.R. § 2.35(d).

■ 2.2-04. *Non-Parolable Sentences*. Offenders sentenced under any of the following sections are not eligible for parole:

(a) 18 U.S.C. 924(c) [use of a firearm during a federal crime of violence (if the firearm use occurred on or after October 12, 1984) or drug trafficking crime (if the firearm use occurred on or after November 15, 1986)] and 18 U.S.C. 924(e) [possession of a firearm by an offender with at least three prior convictions for a violent offense or serious drug offense (if the possession occurred on or after October 27, 1986)];

(b) 18 U.S.C. 929 [use of restricted ammunition/armor-piercing bullets in a crime of violence (if the use occurred on or after October 12, 1984), or in a drug trafficking offense (if the use occurred on or after November 15, 1986)];

(c) 18 U.S.C. Appendix 1202(a) (if the offense was committed on or after October 12, 1984 and the offender has three prior convictions for certain offenses); section was repealed effective November 15, 1986 and these offenses committed on or after that date will now be charged under §924(e);

(d) 21 U.S.C. 841 (b)(1)(A), (B) and in some cases (C) (drug trafficking offenses involving Schedule I and Schedule II drugs) (only if the offense was committed on or after October 27, 1986);

(e) 21 U.S.C. 848 (continuing criminal enterprise involving drugs); and

(f) 21 U.S.C. 960(b)(1), (2) and in some cases (3) (drug importation and exportation offenses involving Schedule I and Schedule II drugs) (only if the offense was committed on or after October 27, 1986).

Note: An offender may have an aggregate sentence composed of both parolable and non-parolable component sentences and may, therefore, become eligible for parole on part of the aggregate sentence. If the non-parolable component sentence is served first (as usually will be the case), the parole eligibility date on the aggregate sentence will be after completion of the non-parolable component sentence (less good time) plus the minimum, if any, of the parolable sentence. As this date will depend on the amount of good time earned and, thus, may not be known precisely at the time of the initial hearing, the following wording may be used on any parole order on the aggregate sentence: "presumptive parole upon completion of [] months, provided you have reached your parole eligibility date on the aggregate sentence."

The amendments to the criminal code passed by Congress in 1984 included a change for the sentence for firearms offenses under 18 U.S.C. 924 (c)(1) (use of a firearm while committing a drug offense). The amendment required that any term of imprisonment imposed for a violation of the firearms provision shall not run concurrently with any other term of imprisonment. The Bureau of Prisons initially issued a policy instruction that required the 924 count to be served first, regardless of the order in which the other counts were imposed. This method precluded the possibility of any non-924 count from running concurrently with any other sentences. This practice was challenged successfully in *United States v. Gonzales*, 520 U.S. 1(1997). In *Gonzales*, the Supreme Court held that a sentencing court may impose a sentence containing both a 924 count and a non-924 count or counts to run in a way different than stated in the initial Bureau policy instruction. As a result, the Bureau had to review numerous 924(c) sentence computations to see if a change is necessary. If a sentence computation is changed, the Commission may be required to review cases to determine if a *nunc pro tunc* parole decision should be made. If a prisoner contacts the Commission regarding a *Gonzales* issue, refer him back to his case manager to have the Bureau review his sentence computation.

■ 2.2-05. *Transfer Treaty Cases*. A prisoner returned to the United States under a prisoner transfer treaty who committed his offense abroad prior to November 1, 1987, is treated as if sentenced under 18 U.S.C. 4205(b)(2) for all parole purposes (Exception: In Mexican and Canadian treaty cases, the "street time" forfeiture provisions upon parole revocation are the same as those applicable to Youth Corrections Act cases). If the prisoner committed his offense abroad on or after November 1, 1987, the prisoner is not eligible for parole and a release date is set pursuant to 28 C.F.R. 2.68.

■ §2.3 SAME: NARCOTIC ADDICT REHABILITATION ACT.

A Federal prisoner committed under the Narcotic Addict Rehabilitation Act may be released on parole in the discretion of the Commission after completion of at least six months in treatment, not including any period of time for "study" prior to final judgment of the court. Before parole is ordered by the Commission, the Surgeon General or his designated representative must certify that the prisoner has made sufficient progress to warrant his release and the Attorney General or his

designated representative must also report to the Commission whether the prisoner should be released. Recertification by the Surgeon General prior to reparole consideration is not required. (18 U.S.C. 4254).

Notes and Procedures

■ 2.3-01. *Certificate of Release Readiness.* This certificate is signed by the local Drug Abuse Program Manager through authority delegated by the Medical Director of the Bureau of Prisons and the Surgeon General.

■ **§2.4 SAME: YOUTH OFFENDERS AND JUVENILE DELINQUENTS.**

Committed youth offenders and juvenile delinquents may be released on parole at any time in the discretion of the Commission. (18 U.S.C. 5017(a) and 5041).

■ **§2.5 SENTENCE AGGREGATION.**

When multiple sentences are aggregated by the Bureau of Prisons pursuant to 18 U.S.C. 4161 and 4205, such sentences are treated as a single aggregate sentence for the purpose of every action taken by the Commission pursuant to these rules, and the prisoner has a single parole eligibility date as determined by the Bureau of Prisons.

■ **§2.6 WITHHELD AND FORFEITED GOOD TIME.**

While neither a forfeiture of good time nor a withholding of good time shall bar a prisoner from receiving a parole hearing, section 4206 of Title 18 of the U.S. Code permits the Commission to parole only those prisoners who have substantially observed the rules of the institution.

Notes and Procedures

■ 2.6-01. *Disciplinary Infractions.* An effective or presumptive parole date may be granted by the Commission only after a thorough review of circumstances underlying any disciplinary infraction(s) and where the Commission is satisfied that the date it sets will require a period of imprisonment sufficient to outweigh the seriousness of the prisoner's misconduct. Any presumptive or effective date is contingent upon the absence of further misconduct. A parole date shall not be made contingent upon restoration of good time by the Bureau of Prisons.

■ **§2.7 COMMITTED FINES AND RESTITUTION ORDERS.**

(a) Committed Fines. In any case in which a prisoner shall have had a fine imposed upon him by the committing court for which he is to stand committed until it is paid or until he is otherwise discharged according to law, such prisoner shall not be released on parole or mandatory release until payment of the fine, or until the fine commitment order is discharged according to law under the regulations of the Bureau of Prisons. Discharge from the commitment obligation of any committed fine does not discharge the prisoner's obligation to pay the fine as a debt due the United States.

(b) Restitution Orders. Where a prisoner applying for parole is under an order of restitution, and it appears that the prisoner has the ability to pay and has willfully failed to do so, the Commission shall require that approval of a parole release plan be contingent upon the prisoner first satisfying such restitution order. The prisoner shall be notified that failure to satisfy this condition shall result in retardation of parole under the provisions of §2.28(e).

Notes and Procedures

■ 2.7-01. *Release from Imprisonment.* The Bureau of Prisons handles disposition of all committed fines. The Commission shall render a decision irrespective of the status of the committed fine. However, if parole is granted, the order must read: "Parole effective [], provided that a committed fine is paid or otherwise disposed of according to law before release." Provide at least sixty days lead time to allow the Bureau to process such cases.

■ **§2.8 MENTAL COMPETENCY PROCEEDINGS.**

(a) Whenever a prisoner (or parolee) is scheduled for a hearing in accordance with the provisions of this part and reasonable doubt exists as to his mental competency, *i.e.*, his ability to understand the nature of and participate in scheduled proceedings, a preliminary inquiry to determine his mental competency shall be conducted by the hearing panel, hearing examiner or other official (including a U.S. Probation Officer) designated by the Regional Commissioner.

(b) The hearing examiner(s) or designated official shall receive oral or written psychiatric or psychological testimony and other evidence that may be available. A preliminary determination of mental competency shall be made upon the testimony, evidence, and personal observation of the prisoner (or parolee). If the examiner(s) or designated official determines that the prisoner is mentally competent, the previously scheduled hearing shall be held. If they determine that the prisoner is not mentally competent, the previously scheduled hearing shall be temporarily postponed.

(c) Whenever the hearing examiner(s) or designated official determine that a prisoner is mentally incompetent and postpone the previously scheduled hearing, they shall forward the record of the preliminary hearing with their findings to the Regional Commissioner for review.

(1) In the case of a prisoner, if the Regional Commissioner concurs with their findings, the Commissioner shall order the temporarily postponed hearing to be postponed indefinitely until such time as it is determined that the prisoner has recovered sufficiently to understand the proceedings. The Regional Commissioner shall require a progress report on the mental health of the prisoner at least every six months. When the Regional Commissioner determines that the prisoner has recovered sufficiently, the Commissioner shall reschedule the hearing for the earliest feasible date.

(2) In the case of a parolee in a revocation hearing, the Regional Commissioner shall postpone the revocation hearing and order that the parolee be given a mental health examination in a suitable facility of the Bureau of Prisons or the District of Columbia. The postponed revocation hearing shall be held within 60 days, or as soon as a satisfactory mental health report is submitted. The Regional Commissioner shall order that appointment of counsel be sought in any case where the parolee does

not have counsel for the revocation hearing. If the parolee's mental competency is raised at a preliminary interview or probable cause hearing, the Commission (or hearing official) will make a determination of probable cause and, if probable cause is found, schedule a revocation hearing as provided in this paragraph.

(d) If the Regional Commissioner disagrees with the findings of the hearing examiner(s) or designated official as to the mental competency of the prisoner, he shall take such action as he deems appropriate.

(e) At a postponed revocation hearing under this section, the hearing examiner shall make a preliminary determination as to the parolee's mental competency, taking into account all available mental health reports, any evidence submitted on the parolee's behalf, any report from counsel as to counsel's ability to communicate with the parolee, and the parolee's own responses to the examiner's questioning.

(1) If the hearing examiner determines the parolee to be mentally competent, the examiner shall conduct the revocation hearing. If counsel has previously asserted the parolee's incompetence, the examiner shall offer counsel a brief recess to consult with the parolee before proceeding.

(2) If the hearing examiner determines the parolee to be mentally incompetent, the examiner shall conduct the revocation hearing, and shall take into full account the parolee's mental condition in determining the facts and recommending a decision as to revocation and reparole.

(3) If the Commission revokes parole, the Commission may grant reparole conditioned on the parolee's acceptance into a particular type of mental health program prior to release from prison, or may grant reparole with a special condition of supervision that requires appropriate mental health treatment, including medication. In cases where no other option appears appropriate, the Commission may grant reparole conditioned upon the parolee's voluntary self-commitment to a mental health institution until such time as the parolee has sufficiently recovered for the Commission to permit the parolee's return to supervision.

(4) If the Commission finds that the parolee did not commit the charged violations of parole, but also finds that the parolee is unable to fulfill the normal obligations of a parolee by reason of his mental condition, the Commission may reinstate the parolee to parole with any appropriate special condition, including the special condition, if necessary, that the parolee commit himself to a mental institution until such time as the parolee has sufficiently recovered for the Commission to permit a return to supervision.

Notes and Procedures

■ 2.8-01. *Appearances Required.* All parole applicants and alleged parole violators, even where there is a question of mental or emotional disturbance (including those certified as incompetent), will appear before the Commission when normally scheduled. An exception occurs in those cases where the prisoner is so disturbed that to force an appearance would be disruptive. In those instances, a statement by a member of the institutional staff should be prepared for the file with the concurrence of a medical officer in lieu of a personal appearance.

■ §2.9 STUDY PRIOR TO SENTENCING.

When an adult Federal offender has been committed to an institution by the sentencing court for observation and study prior to sentencing, under the provisions of 18 U.S.C. 4205(c), the report to the sentencing court is prepared and submitted directly by the Bureau of Prisons.

■ §2.10 DATE SERVICE OF SENTENCE COMMENCES.

(a) Service of a sentence of imprisonment commences to run on the date on which the person is received at the penitentiary, reformatory, or jail for service of the sentence: *Provided, however,* That any such person shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

(b) The imposition of a sentence of imprisonment for civil contempt shall interrupt the running of any sentence of imprisonment being served at the time the sentence of civil contempt is imposed, and the sentence or sentences so interrupted shall not commence to run again until the sentence of civil contempt is lifted.

(c) Service of the sentence of a committed youth offender or a person committed under the Narcotic Addict Rehabilitation Act commences to run from the date of conviction and is interrupted only when such prisoner or parolee (1) Is on court-ordered bail; (2) Is in escape status; (3) Has absconded from parole supervision; or (4) Comes within the provisions of paragraph (b) of this section.

■ §2.11 APPLICATION FOR PAROLE; NOTICE OF HEARING.

(a) A federal prisoner (including a committed youth offender or prisoner sentenced under the Narcotic Addict Rehabilitation Act) desiring to apply for parole shall execute an application form as prescribed by the Commission. Such forms shall be available at each federal institution and shall be provided to each prisoner who is eligible for an initial parole hearing pursuant to §2.12. Prisoners committed under the Federal Juvenile Delinquency Act shall be considered for parole without application and may not waive parole consideration. A prisoner who receives an initial hearing need not apply for subsequent hearings.

(b) A prisoner may knowingly and intelligently waive any parole consideration on a form provided for that purpose. If a prisoner waives parole consideration, he may later apply for parole and may be heard during the next visit of the Commission to the institution at which he is confined, provided that he has applied at least 60 days prior to the first day of the month in which such visit of the Commission occurs.

(c) A prisoner who declines either to apply for or waive parole consideration is deemed to have waived parole consideration.

(d) In addition to the above procedures relating to parole application, all prisoners prior to initial hearing shall be provided with an inmate background statement by the Bureau of Prisons for completion by the prisoner.

(e) At least sixty days prior to the initial hearing (and prior to any hearing conducted pursuant to §2.14), the prisoner shall be provided with written notice of the time and place of the hearing and of his right to review the documents to be considered by the Commission, as provided by §2.55. A prisoner may waive such notice, except that if such notice is not waived, the case shall be continued to the time of the next regularly scheduled proceeding of the Commission at the institution in which the prisoner is confined.

Notes and Procedures

■ 2.11-01. *Waiver of a Hearing or Parole Grant.*

(a)(1) A prisoner who wishes to waive any hearing or parole grant [except as noted in 2.11-01(b)] shall sign a parole waiver on the appropriate form. The original of this form (witnessed by an institutional staff member) shall be forwarded to the Commission for placement in the prisoner's parole file and a copy shall be retained in the prisoner's institutional file. In the case of a waiver of a parole grant, the previous order shall be marked "*canceled by waiver dated []*." A new application is required if the prisoner later wishes to reapply for parole.

(2) In the case of a prisoner who waives a presumptive, mandatory or effective parole date and later reapplies for parole, a record review shall be conducted. Absent disciplinary infractions or new adverse information, the previous parole date may be reinstated, or if such date has passed, a parole effective date established without a hearing. Otherwise, a new hearing shall be scheduled.

(b) *Exception:* Hearings for juvenile delinquents, revocation hearings, and hearings pursuant to §2.28(b-f) cannot be waived. Rescission hearings, or statutory interim hearings where there has been a DHO disciplinary infraction since the last hearing, may be canceled only by waiver of the actual parole grant.

■ 2.11-02. *Refusal to Make Application/Recalcitrant Prisoners.*

(a) Where a prisoner declines either to apply for or waive parole consideration, institution staff should prepare a signed, dated memorandum to the prisoner's file noting that the prisoner has been advised of (1) his right to apply for parole consideration and (2) that failure to apply for parole is deemed as a waiver of parole consideration; and that the prisoner has declined to file a parole application or waiver. No action is taken by the Commission unless the prisoner subsequently applies for parole.

(b) When a prisoner refuses to enter the hearing room, physical force should not be used to ensure his appearance. Instead, an official of the institution should make a written statement that the prisoner was properly advised of his right to a hearing, but refused to make such appearance. The hearing examiner, in such cases, should consider that he has waived parole and enter a memo for the file to that effect.

■ 2.11-03. *Prisoner Out of the Institution.* A prisoner entitled to a hearing who is unavoidably out of the institution during the examiner(s) visit is normally passed over until the next docket. Such instances occur when a prisoner has been delivered to a court on the basis of a writ, when he has been placed in a civilian hospital or other similar facility, or when he has escaped. A brief memo to the file is prepared. However, when a prisoner has been removed from an institution [on a court writ of ad testificandum] for a reason such as testimony or prosecution in court or [for] hospitalization, is past his parole eligibility date, and

return by the next docket is not anticipated, the examiner is to notify the Commission Office by memo. The Commission should, whenever feasible [absent reasons to the contrary], schedule a hearing at the place of confinement as if the prisoner were a federal boarder (2.16-01). For procedures in revocation cases where the alleged violator is unavailable, see 2.49-01(c).

■ **§2.12 INITIAL HEARINGS: SETTING PRESUMPTIVE RELEASE DATES.**

(a) An initial hearing shall be conducted within 120 days of a prisoner's arrival at a federal institution or as soon thereafter as practicable; except that in the case of a prisoner with a minimum term of parole ineligibility of ten years or more, the initial hearing will be conducted nine months prior to the completion of such a minimum term, or as soon thereafter as practicable.

(b) Following initial hearing, the Commission shall (1) set a presumptive release date (either by parole or by mandatory release) within fifteen years of the hearing; (2) set an effective date of parole; or (3) continue the prisoner to a fifteen year reconsideration hearing pursuant to §2.14(c).

(c) Notwithstanding the above paragraph, a prisoner may not be paroled earlier than the completion of any judicially set minimum term of imprisonment or other period of parole ineligibility fixed by law.

(d) A presumptive parole date shall be contingent upon an affirmative finding by the Commission that the prisoner has a continued record of good conduct and a suitable release plan and shall be subject to the provisions of §§2.14 and 2.28. In the case of a prisoner sentenced under the Narcotic Addict Rehabilitation Act, 18 U.S.C. 4254, a presumptive parole date shall also be contingent upon certification by the Surgeon General pursuant to §2.3 of these rules. Consideration of disciplinary infractions in cases with presumptive parole dates may be deferred until the commencement of the next in-person hearing or the prerelease record review required by §2.14(b). While prisoners are encouraged to earn the restoration of forfeited or withheld good time, the Commission will consider the prisoner's overall institutional record in determining whether the conditions of a presumptive parole date have been satisfied.

Notes and Procedures

■ 2.12-01. *Reports from Probation Officers.* Before a hearing may be conducted there must be available to the examiner(s) a copy of a pre-sentence report or a post-sentence report. A scheduled hearing shall be continued if neither is available to the examiner(s). In such case, the examiner(s) shall notify the Commission's Office to take whatever action necessary to secure the required report.

■ 2.12-02. *Permissible Actions.* Following initial hearing, the examiner(s) may recommend: an "effective date" of parole [within nine months from the date of the hearing]; a presumptive parole date [more than nine months from the date of initial hearing but no later than fifteen years]; a fifteen year reconsideration hearing [at fifteen years from the month of the present hearing]; or continue to expiration [if the statutory release date is within fifteen years of the month of the hearing]. Prisoners will be scheduled, in addition, for statutory interim hearings automatically as required by law.

■ 2.12-03. *Parole on the Record.*

(a) Where it appears upon pre-hearing review (1) that parole upon completion of the minimum sentence (at parole eligibility date) or within nine months of the pre-hearing review decision is clearly warranted, (2) that such release date occurs within or above the applicable guideline range, and (3) that an in-person hearing does not appear necessary for further examination of the case, a hearing panel may recommend that parole based upon the record be granted. When such recommendation is made by a hearing panel and the Regional Commissioner concurs, a standard Notice of Action will be issued with the addition of the wording in paragraph (b) or (c). If the Regional Commissioner does not concur, the panel recommendation is voided and the case will be scheduled for hearing under standard procedure.

(b) Where parole is granted upon completion of the minimum sentence, add to each Notice of Action following the "reasons" section: *"Note: The Commission has decided to grant you a parole date upon completion of your minimum sentence on the basis of a review of your record. As the Commission is precluded by law from releasing you at an earlier time, this release date is NOT APPEALABLE."*

(c) Where parole is granted within nine months of the date of the pre-hearing review and the parole eligibility date will have already passed, add to each Notice of Action following the "reasons" section: *"Note: Under 18 U.S.C. 4208(a), the Commission has decided to grant you an effective parole date on the basis of a review of your record without a personal hearing."*

■ 2.12-04. *Mixed Parolable and Non-Parolable Sentences.* An initial hearing will be held within 120 days of a prisoner's arrival at a federal institution or as soon thereafter as practicable in the case of a prisoner with a non-parolable sentence that precedes a parole-eligible sentence, unless the parole eligible date on the parolable sentence plus the mandatory release date on the non-parolable sentence establishes a period of parole ineligibility of ten years or more. If the period of parole ineligibility is ten years or more, an initial hearing will be held nine months prior to the parole eligibility date or as soon thereafter as practicable.

■ §2.13 **INITIAL HEARING; PROCEDURE.**

(a) **An initial hearing shall be conducted by a single hearing examiner unless the Regional Commissioner orders that the hearing be conducted by a panel of two examiners. The examiner shall discuss with the prisoner his offense severity rating and salient factor score as described in §2.20, his institutional conduct and, in addition, any other matter the examiner may deem relevant.**

(b) **A prisoner may be represented at a hearing by a person of his or her choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner, and to provide such additional information as the examiner shall request. Interested parties who oppose parole may select a representative to appear and offer a statement. The hearing examiner shall limit or exclude any irrelevant or repetitious statement.**

(c) **At the conclusion of the hearing, the examiner shall discuss the decision to be recommended by the examiner and the reasons therefor, except in the extraordinary circumstance of a complex issue that requires further deliberation before a recommendation can be made. Written notice of the decision shall be mailed or transmitted to the prisoner within 21 days of the date of the hearing,**

except in emergencies. Whenever the Commission initially establishes a release date (or modifies the release date thereafter), the prisoner shall also receive in writing the reasons therefor.

(d) In accordance with 18 U.S.C. 4206, the reasons for establishment of a release date shall include a guidelines evaluation statement containing the prisoner's offense severity rating and salient factor score (including the points credited on each item of such score) as described in §2.20, as well as the specific factors and information relied upon for any decision outside the range indicated by the guidelines.

(e) No interviews with the Commission, or any representative thereof, shall be granted to a prisoner unless his name is docketed for a hearing in accordance with Commission procedures. Hearings shall not be open to the public.

(f) A full and complete record of every hearing shall be retained by the Commission. Upon a request, pursuant to §2.56, the Commission shall make available to any eligible prisoner such record as the Commission has retained of the hearing.

Notes and Procedures

■ 2.13-01. *Examiner Functioning.*

(a) Examiners conduct hearings at the institution of confinement according to a printed schedule. The appropriate Case Manager is also in attendance. A recording device is used to record the interview.

(b) The hearing summary is dictated following each hearing. Except where the case is "continued to the Commission's Office" for some unusual reason, the summary includes a recommendation relative to parole, revocation, or continuance. At the conclusion of the hearing, the prisoner (and his representative) is informed of the examiner recommendation (and the fact that his recommendation is subject to review by the Regional Commissioner). If there is a split recommendation (when two examiners are present), the prisoner is told the alternative recommendations (examiners need not be identified by recommendation). In original jurisdiction cases, the prisoner is told the alternative recommendation.

■ 2.13-02. *Representation.*

(a) Representation is normally limited to one person. However, it is within the hearing examiner's discretion, where appropriate, to permit additional representatives to appear. Any continuance due to the absence of a prisoner's representative shall be at the discretion of the hearing examiner and shall be granted only for good cause. A brief memo to the file is prepared.

(b) At local or institutional revocation hearings, a person other than an attorney (Member of the Bar) shall be limited to the role of a witness or representative except that where permissible by state law, a law student may function in the role of an attorney provided (i) the inmate knowingly and intelligently consents; and (ii) the law student is under the direct supervision of a member of the bar (who is physically present). However, representation by both law student and supervisor shall not be permitted. An attorney or other representative at any other hearing shall be limited only to the role of representative as previously defined.

(c) The prisoner and his representative will normally be entitled to be present during the entire hearing except during deliberations of the decision-makers, or where institutional security would be jeopardized and/or personal safety of adverse witnesses might be involved. If the prisoner is removed at the request of the hearing examiner, the reasons for such exclusion from the hearing must be well documented into the record. A prisoner's representative will also be allowed to be present when the examiner informs the prisoner of the recommendation and reasons regardless of the type of hearing.

(d) In cases where (1) the witness will be unavailable, (2) wishes to give testimony containing matters exempt under the statute, or (3) the testimony of the witness would be adverse in nature and the witness does not wish, for proper grounds, to give the testimony in the presence of the prisoner, the prisoner may be removed from the hearing, or in the alternative the witness may offer a written statement to be used by the hearing examiner during his deliberations. If at all possible, this written statement should be submitted by the witness well in advance of the hearing.

(e) If the written statement so offered contains exempt material, and the witness represents a government agency, it is the duty of that witness to determine what material is exempt and to summarize that material for the benefit of the prisoner. If the witness is a private person, the Commission will perform that task in advance of the hearing. Where the material is submitted directly to the hearing examiner, the summary will be given to the prisoner along with his Notice of Action.

(f) Pursuant to 28 C.F.R. 2.55(a)(3), upon the prisoner's request, a representative shall be given access to the presentence investigation report reasonably in advance of an initial hearing, interim hearing, or a fifteen-year reconsideration hearing, pursuant and subject to the regulations of the Bureau of Prisons. Disclosure shall not be permitted with respect to confidential material withheld by the sentencing court under Rule 32(c)(3)(A). Bureau of Prisons personnel are responsible for implementing the above procedure. Note: This procedure does not apply to rescission or revocation hearings.

(g) *Reporter or Recording Device.* Reporter or recording devices brought in by the prisoner or his attorney/representative are not permissible.

■ 2.13-03. *Computation of guidelines.* The guidelines evaluation worksheet will be completed at all initial hearings.

■ 2.13-04. *Provisions of Reasons.* Reasons following the appropriate guideline format will be typed on all Notices of Action denying a parole date or granting a presumptive or effective parole date. However, repetition of the reasons already given is not required (a) when an effective date is granted as a result of a pre-release review of a previous presumptive date order and the date of release has not been changed; and (b) on any other Notice of Action where no change in the previous decision is made.

■ 2.13-05. *Language.* In preparing correspondence, hearing summaries, reports and other documentation, use professional language which describes the subject and explains the Commission's position clearly, simply, and accurately. It should be kept in mind that much of what is written is disclosable to the prisoner or releasee and may come before the Courts, the Congress, or the public. Language which may be interpreted as discriminatory, prejudicial, or insensitively descriptive discredits the Commission and the writer, and its use violates the Commission policy.

■ 2.13-06. *Standardized Wording on Orders.* Use the standardized wording in Appendix 1. It is possible that there may be an action not covered by this wording. In such instances, wording should be developed to fit the action desired.

■ 2.13-07. *Co-defendants.* Co-defendants and their parole status including sentence and guideline data, any reasons for departure from the guidelines, and months served will be listed, when available, in initial and reconsideration summaries.

■ 2.13-08. *Conditions of Parole.* Special conditions (including drug aftercare) should be recommended, where appropriate, by the hearing examiner at the time the presumptive date (whether by parole or mandatory release) is determined (normally at the initial hearing). Where appropriate, special conditions may be added or modified at any time prior to the prisoner's release.

■ 2.13-09. *Additions to Docket.* Where, by reason of transfer, a prisoner has missed his initial hearing, subsequent hearing, or revocation hearing, the prisoner may be added to the docket at the request of the Warden and with the approval of the hearing examiner. No other interviews for cases not on the docket will be conducted without written approval from the Regional Commissioner.

■ 2.13-10. *Visitors at Hearings.*

(a) *In General.* As a general principle, Parole Commission hearings are not open to the public. However, where good cause exists, visitors may be permitted to attend provided their presence will not interfere with the orderly course of the proceedings. The hearing examiner determines who will be admitted to the hearing room. If he cannot make the final decision in accordance with subsection (b), he will communicate with the authorized official.

(b) *Criteria.* The Commission has found it appropriate to allow the following classes of visitors (other individuals must be considered by the hearing examiner on a case by case basis): (1) U.S. Parole Commission, Bureau of Prisons, or U.S. Probation Service employees; and Federal Judges or Magistrates; (2) Federal or State Legislators; State Judges; State Parole or Probation personnel; (3) Newspaper or Magazine Correspondents (permission must be granted by the Regional Commissioner); (4) Researchers (permission must be granted by the Chairman); and (5) Students in fields related to criminal justice. Persons having a direct interest in a case shall be considered under procedures dealing with representatives.

(c) *Restrictions.*

(1) Visitors are not to participate in hearing proceedings. No visitor shall remain in the hearing room during deliberations or dictation unless specifically authorized by the hearing examiner. Examiners will not discuss cases with visitors in any instance until after a recommendation has been made and the summary dictated. Examiners may request visitors to leave the hearing room when it is affecting the progress of the hearing.

(2) Visitors will not be permitted to use recording devices.

(3) Examiners should also remove visitors from the room prior to hearing cases which, in their judgment, involve matters unusually sensitive as far as the prisoner is concerned. Visitors should not be present at

hearings on original jurisdiction cases, or cases which in the judgment of the examiner will be referred to the Regional Commissioner as original jurisdiction cases.

(4) Visitors should not be permitted to enter or leave the hearing room during the proceedings (for sake of the dignity and orderliness of the proceedings).

(5) Except for visitors listed under subsection (b)(1), permission must be granted in writing by the prisoner (at a revocation hearing the attorney must also be in agreement) for visitors to be present at hearings. It must be explicitly and forcefully made clear to the prisoner that he has a right not to have visitors present, and that such action will not affect the Commission action on his case in any way. Examiners should be careful that a prisoner does not feel coerced to allow such visitors to be present.

■ 2.13-11. *Interested Parties Opposing Parole.*

(a) A victim/witness (verified by the Bureau of Prisons Victim/Witness Coordinator) or a criminal justice official (*e.g.*, U.S. Attorney, FBI or DEA Agent) may attend a specific parole hearing to oppose parole without special permission. Any other person wishing to attend a hearing to oppose parole must obtain permission from the Regional Commissioner in advance of the hearing. Requests for such permission must be in writing. Interested persons opposing parole are encouraged to submit written comments in lieu of a personal appearance. Where a personal appearance is made, any persons opposing parole will be requested to select one person as a spokesperson. However, it is in the hearing examiner's discretion, where appropriate, to permit additional persons to be present. A continuance due to the absence of an interested party opposing parole shall be in the discretion of the hearing examiner and shall be granted only for good cause. A brief memo to the file is to be prepared.

(b) An interested party opposing parole shall be provided an opportunity to make a statement at the appropriate time determined by the hearing examiner. The prisoner may be excluded at the request of such person for good cause, or when it appears to the hearing examiner that institutional security or the personal safety of such person might be involved. The reason for any such exclusion must be documented in the record and any testimony out of the prisoner's presence must be promptly summarized for the prisoner with an opportunity for response.

(c) Upon request, any victim/witness (verified through the Bureau of Prisons Victim/Witness Coordinator) or criminal justice system official may be notified of the Commission's official decision in accordance with 2.24-13. The hearing examiner shall attach the appropriate label (a blue label) to the case material to point out the request for notification. The hearing examiner may inform an interested party opposing parole of his recommended decision following the hearing, but the applicable reasons (*e.g.*, guideline indicants) are to be provided only as part of the written notification under 2.24-13.

(d) Upon request, a subpoenaed witness shall be notified of the Commission's decision in his case in accordance with 2.24-13. The hearing examiner will note in the summary whether the witness chose to request that the Parole Commission notify him/her of the results of the hearing. If so, the Hearing Examiner will return all completed "Victim/Witness Notification Request" forms to the Commission for processing.

(e) The Hearing Examiner shall present the Commission's "Victim/Witness Questionnaire" to any witness subpoenaed to the hearing, including any witness representing law enforcement, and request that the witness complete the questionnaire and return it to the Commission in the stamped, self-addressed envelope provided.

■ 2.13-12. *Continuances.* If a hearing is continued, a tape of the discussion with the prisoner leading to the continuance is made. The hearing examiner, at the request of the prisoner, may grant a continuance to the next docket for good cause (for revocation hearings, see 2.50-05). A second continuance may be granted by the examiner only for compelling reasons. A form, available at the institution, shall be executed requesting the continuance. *Note:* A request for a third or additional continuance must be in writing to the Regional Commissioner and must be received at least ten days prior to the scheduled hearing docket. When a continuance is granted, a memo of the reasons for the continuance is prepared and a Commission order is completed.

■ §2.14 SUBSEQUENT PROCEEDINGS.

(a) *Interim proceedings.* The purpose of an interim hearing required by 18 U.S.C. 4208(h) shall be to consider any significant developments or changes in the prisoner's status that may have occurred subsequent to the initial hearing.

(1) Notwithstanding a previously ordered presumptive release date or fifteen year reconsideration hearing, interim hearings shall be conducted by an examiner pursuant to the procedures of §2.13(b), (c), (e), and (f) at the following intervals from the date of the last hearing:

(i) In the case of a prisoner with a maximum term or terms of less than seven years, every eighteen months (until released);

(ii) In the case of a prisoner with a maximum term or terms of seven years or more, every twenty-four months (until released);

(iii) In the case of a prisoner with an unsatisfied minimum term, the first interim hearing shall be scheduled under paragraphs (a)(1)(i) or (ii) of this section, or on the docket of hearings that is nine months prior to the month of parole eligibility, whichever is later.

(2) Following an interim hearing, the Commission may:

(i) Order no change in the previous decision;

(ii) Advance a presumptive release date, or the date of a fifteen year reconsideration hearing. However, it shall be the policy of the Commission that once set, a presumptive release date or the date of a fifteen year reconsideration hearing shall be advanced only: (1) For superior program achievement under the provisions of §2.60; or (2) For other clearly exceptional circumstances.

(iii) Retard or rescind a presumptive parole date for reason of disciplinary infractions. In a case in which disciplinary infractions have occurred, the interim hearing shall be conducted in accordance with the procedures of §2.34(c) through (f). (Prior to each interim hearing, prisoners shall be notified on the progress report furnished by the Bureau of Prisons that any finding of misconduct

by the Discipline Hearing Officer since the previous hearing will be considered for possible action under this paragraph);

(iv) If a presumptive date falls within nine months after the date of an interim hearing, the Commission may treat the interim hearing as a pre-release review in lieu of the record review required by paragraph (b) of this section.

(b) *Pre-Release reviews.* The purpose of a pre-release review shall be to determine whether the conditions of a presumptive release date by parole have been satisfied.

(1) At least sixty days prior to a presumptive parole date, the case shall be reviewed on the record, including a current institutional progress report.

(2) Following review, the Regional Commissioner may:

(i) Approve the parole date;

(ii) Advance or retard the parole date for purpose of release planning as provided by §2.28(e);

(iii) Retard the parole date or commence rescission proceedings as provided by §2.34;

(iv) Advance the parole date for superior program achievement under the provisions of §2.60.

(3) A pre-release review pursuant to this section shall not be required if an in-person hearing has been held within nine months of the parole date.

(4) Where: (i) There has been no finding of misconduct by the Discipline Hearing Officer nor any allegation of criminal conduct since the last hearing; and (ii) No other modification of the release date appears warranted, the Executive Hearing Examiner may act for the Regional Commissioner under paragraph (b)(2) of this section to approve conversion of the presumptive parole date to an effective date of parole.

(c) *Fifteen year reconsideration hearings.* A fifteen year reconsideration hearing shall be a full reassessment of the case pursuant to the procedures at §2.13.

(1) A fifteen year reconsideration hearing shall be ordered following initial hearing in any case in which a release date is not set.

(2) Following a fifteen year reconsideration hearing, the Commission may take any one of the actions authorized by §2.12(b).

Notes and Procedures

■ 2.14-01. *Statutory Interim Hearing.*

(a) Statutory interim hearings are scheduled each 18th or 24th month (or the preceding month when the examiner(s) does not visit the institution during the specified month) after the month of any previous hearing, with the exception provided in the rule for a prisoner with an unsatisfied minimum term.

(b) Where a statutory interim hearing is scheduled for a time subsequent to a presumptive date record review, the statutory interim hearing shall be canceled if the record review results in an effective parole date. [For example, a prisoner is scheduled for a presumptive date after 21 months (with a statutory interim hearing at 18 months). During the 12th month, a presumptive date record review is conducted, and the effective parole date is approved. The statutory interim hearing is not to be conducted.] If the prisoner has already been docketed for a statutory interim hearing, the institution shall delete his name from the docket upon receipt of the notice of the approved effective date. [See 18 U.S.C. 4208(a)].

(c) Following a Statutory Interim Hearing, the Commission may—

(1) Make no change in a presumptive parole date, “Continue to Expiration” decision, or date of a fifteen-year reconsideration hearing. A presumptive parole date that is within nine months may be changed to an effective parole date.

(2) On the basis of new criminal conduct or disciplinary rule infraction(s) (under § 2.36): (A) retard a presumptive parole date; or (B) change a presumptive parole date to a "Continue to Expiration" decision or "Fifteen-Year Reconsideration Hearing.”

(3) On the basis of superior program achievement (under § 2.60) or other clearly exceptional circumstances: (A) advance a presumptive parole date (and, if the new date is within nine months, change it to an effective parole date); (B) change a "Continue to Expiration" decision to a presumptive or effective parole date; or (C) advance the date of a fifteen-year reconsideration hearing.

■ 2.14-02. *Statutory Interim Hearings for Mixed Parolable and Non-Parolable Sentences.* Statutory interim hearings will be scheduled every 18 or 24 months, depending upon the length of the parole eligible sentence(s). However, if the prisoner has not reached his parole eligibility date (due either to the non parolable sentence or the minimum term on the parolable sentence), the first statutory interim hearing will be held after 18 or 24 months (as applicable), or on the docket of hearings that is nine months prior to the parole eligibility date, whichever is later.

■ 2.14-03. *Pre-Release Record Review.* Pre-release record reviews generally are conducted nine months prior to the presumptive parole date. Following a pre-release record review (a record review which may be conducted by an examiner or analyst), the Regional Commissioner may: (1) Approve the release date [order an "effective" date]; (2) Approve an effective parole, but advance or retard the release date for release programming, or advance the release date for superior program achievement pursuant to 28 C.F.R. 2.60; (3) Approve an effective parole, but retard the release date for not more than 90 days without a hearing on account of disciplinary infractions; or (4) Schedule a rescission hearing.

■ 2.14-04. *Delegation to Correct Certain Omissions.* A Regional Commissioner may delegate to an examiner or analyst the authority to add any special conditions that have been omitted from the previous Notice of Action but clearly were ordered by the Commissioner. A note will be entered into the file to reflect this action.

■ **§2.15 PETITION FOR CONSIDERATION OF PAROLE PRIOR TO DATE SET AT HEARING.**

When a prisoner has served the minimum term of imprisonment required by law, the Bureau of Prisons may petition the responsible Regional Commissioner for reopening the case under §2.28(a) and consideration for parole prior to the date set by the Commission at the initial or review hearing. The petition must show cause why it should be granted, *i.e.*, an emergency, hardship, or the existence of other extraordinary circumstances that would warrant consideration of early parole.

■ **§2.16 PAROLE OF PRISONER IN STATE, LOCAL, OR TERRITORIAL INSTITUTION.**

(a) Any person who is serving a sentence of imprisonment for any offense against the United States, but who is confined therefor in a state reformatory or other state or territorial institution, shall be eligible for parole by the Commission on the same terms and conditions, by the same authority, and subject to recommittal for the violation of such parole, as though he were confined in a Federal penitentiary, reformatory, or other correctional institution.

(b) Federal prisoners serving concurrent state and Federal sentences in state, local, or territorial institutions shall be furnished upon request parole application forms. Upon receipt of the application and any supplementary classification material submitted by the institution, parole consideration shall be made by an examiner panel of the appropriate region on the record only. If such prisoner is released from his state sentence prior to a Federal grant of parole, he shall be given a personal hearing as soon as feasible after receipt at a Federal institution.

(c) Prisoners who are serving Federal sentences exclusively but who are being boarded in State, local, or territorial institutions may be provided hearings at such facilities or may be transferred by the Bureau of Prisons to Federal Institutions for hearings by a hearing examiner of the Commission.

Notes and Procedures

■ 2.16-01. *Federal Boarders.* Federal Boarders in a state facility are entitled to an initial or subsequent hearing by an examiner at the state facility in which they are confined unless they waive this right or are transported to a federal facility. Normally, prisoners are heard at state or local facilities, but there may arise situations in which transfer to a federal facility is appropriate. Hearing procedures shall be the same as if such prisoner were confined at a federal institution. Federal Boarders should receive "timely" notice so that a representative may be obtained. A copy of the appeal form is to be transmitted with the Notice of Action. Procedural matters, including the furnishing of forms, are the responsibility of the Bureau of Prisons. By special arrangement, however, the Commission might agree to assume some of these responsibilities.

■ 2.16-02. *Court Designated Parole.* Where the maximum sentence is at least six months but not more than one year, the Court may designate a parole date [18 U.S.C. 4205(f)]. Upon release, the parolee is

subject to the conditions of parole and revocation for violation of such conditions by the Commission. When the court has designated parole in such cases and the prisoner is in a non-federal institution, the Commission must issue the "Court designated Parole Certificate."

■ 2.16-03. *Federal Prisoners Serving Concurrent State and Federal Sentences in Non-Federal Institutions.*

(a) A prisoner who is serving concurrent state and federal sentences in a state institution shall be considered for parole by an examiner panel on the record only. This procedure is to be used for initial, interim, and rescission considerations. The timing of initial consideration is determined by the standards of 28 C.F.R. 2.12.

(b) Upon notification that the prisoner has commenced service of the concurrent federal term, the Commission should forward a request for a progress report from the state institution in which the prisoner is incarcerated along with the parole application packet. For those prisoners with a minimum term of parole ineligibility of ten years or more, this packet should be sent to the institution at least 120 days prior to the month in which the prisoner's eligibility date falls. The Commission will ensure that both a sentence computation record and a pre or post sentence report are available or obtained prior to parole consideration. The authorization to disclose this report or a summary thereof must be obtained from institutional authorities for the Commission to consider this information. Each progress report must be stamp dated when received by the Commission. Disclosure of parole file material and the state progress report should be afforded to a concurrent state and federal prisoner pursuant to 28 C.F.R. 2.55.

(c) The prisoner will not be informed of the examiner panel's recommendation until it has been finalized. Only the final Commission action will be forwarded via the standard Notice of Action. A copy of the appeal form is forwarded with the Notice of Action.

(d) Original Jurisdiction Cases. If a case is designated as original jurisdiction by the Regional Commissioner, notice of the designation will be sent to the prisoner, along with the basis for the designation. Original jurisdiction procedures are applicable to such prisoners as in any other case.

■ 2.16-04. *Former State Prisoners.* Federal prisoners serving concurrent state and federal terms in a state or local institution may be transferred to a federal institution to complete their federal sentence. If they have not previously been considered for parole, they are heard in the usual manner. If they have been considered by the Commission while in the "state" institution on the record without a personal hearing, a special hearing shall be conducted as soon as feasible upon their arrival at a federal institution. The purpose of this hearing shall be solely to determine whether there is any new information sufficiently significant to affect the previous decision rendered.

■ **§2.17 ORIGINAL JURISDICTION CASES.**

(a) Following any hearing conducted pursuant to these rules, the Regional Commissioner may designate that a case should be decided as an original jurisdiction case. If the Regional Commissioner makes such a designation, the Regional Commissioner shall vote on the case and then refer the case to the other Commissioners for their votes. The decision in an original jurisdiction case shall be made on the basis of a majority vote of Commissioners holding office at the time of the decision.

(b) The following criteria will be used in designating cases as original jurisdiction cases:

(1) Prisoners who have committed serious crimes against the security of the Nation, e.g., espionage or aggravated subversive activity.

(2) Prisoners whose offense behavior (i) Involved an unusual degree of sophistication or planning or (ii) Was part of a large scale criminal conspiracy or a continuing criminal enterprise.

(3) Prisoners who have received national or unusual attention because of the nature of the crime, arrest, trial, or prisoner status, or because of the community status of the offender or his victim.

(4) Long-term sentences. Prisoners sentenced to a maximum term of forty-five years (or more) or prisoners serving life sentences.

(c)(1) Any case designated for the original jurisdiction of the Commission shall remain an original jurisdiction case unless designation is removed pursuant to this subsection.

(2) A case found to be inappropriately designated for the Commission's original jurisdiction, or to no longer warrant such designation, may be removed from original jurisdiction under the procedures specified in paragraph (a) of this section following a regularly scheduled hearing or the reopening of the case pursuant to §2.28. Removal from original jurisdiction may also occur by majority vote of the Commission considering a petition for reconsideration pursuant to §2.27. Where the circumstances warrant, a case may be redesignated as original jurisdiction pursuant to the provisions of paragraphs (a) and (b) of this section.

Notes and Procedures

■ 2.17-01. *Referral.* A hearing examiner shall refer any case falling within the criteria for original jurisdiction cases to the Regional Commissioner. The applicant should be told by the examiner that his case is being referred for possible original jurisdiction consideration and the reasons therefor. The examiner should also render a recommendation on the merits of the case. Advising the prisoner of the possible original jurisdiction designation and the reasons therefore is normal practice but is not a due process requirement.

■ 2.17-02. *Review.*

(a) The Regional Commissioner may designate the case as original jurisdiction and submit the case with his recommendation to the National Commissioners. In such case, a Notice of Action shall be sent to the prisoner including the basis for his original jurisdiction (e.g., National or Unusual Attention; Unusual Sophistication or Planning).

(b) Designation of a case meeting the criteria under §2.17 as original jurisdiction by a Regional Commissioner is presumptive not mandatory. A Regional Commissioner may decline to designate the case as original jurisdiction (with a memo to the file) and either (1) agree with the panel recommendation, or (2) take other action under 28 C.F.R. 2.24.

(c) Where a report from the Justice Department or other government law-enforcement agency is considered essential and such report has not been received, the Regional Commissioner may reschedule the case for the next docket for consideration of additional information. In such case, follow-up will be made with the appropriate agency to insure an expedited report.

■ 2.17-03. *Referral to National Commissioners.* The Regional Commissioner referring a case for original jurisdiction shall use two orders (see Appendix 1). The reasons for designation specified in 28 C.F.R. 2.17 shall be particularized to the individual case and an analysis of the case and the reasons for decision shall be set forth.

■ 2.17-04. *Processing by National Commissioners.* Upon receipt of an original jurisdiction case, the National Commissioners, where feasible, shall process the case within 21 days. Cases shall be voted on sequentially.

■ 2.17-05. *Declassification.* Where a case has been previously designated as original jurisdiction and the Regional Commissioner believes it no longer warrants such classification, he may refer the case to the National Commissioners for declassification. The Regional Commissioner shall also vote on the substantive case decision. The National Commissioners shall first vote on declassification. If declassified, the case shall be treated as a non-original jurisdiction case and returned for processing, unless the Regional Commissioner's proposed decision requires action under 2.24(a). If not declassified, the case shall be processed under original jurisdiction procedures.

■ 2.17-06. *Rescission.* Rescission procedures for original jurisdiction cases are set forth at 2.34-05.

■ 2.17-07. *Revocation.* Where a case previously has been designated original jurisdiction or is being designated at this time, all orders (including any forfeiture of street time) will be forwarded with the Regional Commissioner's vote to the National Commissioners. Thereafter, the orders will be processed in the same manner as any other original jurisdiction decision.

■ §2.18 GRANTING OF PAROLE.

The granting of parole to an eligible prisoner rests in the discretion of the U.S. Parole Commission. As prerequisites to a grant of parole, the Commission must determine that the prisoner has substantially observed the rules of the institution or institutions in which he has been confined; and upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, must determine that release would not depreciate the seriousness of his offense or promote disrespect for the law, and that release would not jeopardize the public welfare (*i.e.*, that there is a reasonable probability that, if released, the prisoner would live and remain at liberty without violating the law or the conditions of his parole).

■ §2.19 INFORMATION CONSIDERED.

(a) In making a parole/reparole determination the Commission shall consider, if available and relevant:

(1) Reports and recommendations which the staff of the facility in which such prisoner is confined may make;

- (2) Official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;**
- (3) Pre-sentence investigation reports;**
- (4) Recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge and prosecuting attorney;**
- (5) Reports of physical, mental, or psychiatric examination of the offender; and**
- (6) A statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim.**

(b)(1) There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available (18 U.S.C. 4207). The Commission encourages the submission of relevant information concerning an eligible prisoner by interested persons.

(2) To permit adequate review of information concerning the prisoner, materials submitted to the Commission should be received by the Commission no later than the first day of the month preceding the month of the scheduled hearing docket.

(3) If material of more than six (6), double-spaced, letter-sized pages is first submitted at the time of the hearing (or preliminary interview) and the hearing examiner (or person conducting the hearing or preliminary interview) concludes that it is not feasible to read all the material at that time, the person submitting the material will be permitted to summarize it briefly at the hearing (or preliminary interview). All of the material submitted will become part of the record to be considered by the Commission in its review of the proceedings.

(4) The Commission will normally consider only verbal and written evidence at hearings. Recorded audio and visual material will be reviewed at hearings only if there is no adequate substitute to permit a finding under paragraph (c) of this section. Otherwise, recorded audio and visual material should be submitted prior to the hearing for review and summarization, pursuant to paragraph (b)(2) of this section.

(c) The Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability. If the Commission is given evidence of criminal behavior that has been the subject of an acquittal in a federal, state, or local court, the Commission may consider that evidence if:

- (1) The Commission finds that it cannot adequately determine the prisoner's suitability for release on parole, or to remain on parole, unless the evidence is taken into account;**
- (2) The Commission is satisfied that the record before it is adequate notwithstanding the acquittal;**
- (3) The prisoner has been given the opportunity to respond to the evidence before the Commission; and**
- (4) The evidence before the Commission meets the preponderance standard.**

In any other case, the Commission shall defer to the trial jury. Offense behavior in Category 5 or above shall presumptively support a finding under paragraph (c)(1) of this section.

(d) 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.

Notes and Procedures

■ **2.19-01. *Prohibition Against Use of Illegal Wiretap Evidence.*** Under 18 U.S.C. 2515, courts and other government authorities, including the Commission, are prohibited from using any illegal wiretap evidence for any purpose. Therefore, no information acquired from an illegal wiretap shall be used by the Commission for determining offense severity, salient factor score, or for any other purpose in parole release, revocation, reparole, rescission, or any other decision.

■ **2.19-02. *Not Guilty Verdicts After Trial.***

(a) If a prisoner is convicted after trial of a lesser included offense and acquitted on a more serious offense (*e.g.*, conviction for carnal knowledge after trial for rape; conviction for voluntary manslaughter after trial for murder), only the conviction offense is to be considered unless the case meets the criteria listed in 28 C.F.R. 2.19(c).

(b) If a prisoner is convicted by trial of an offense, such as conspiracy, attempt, aiding or abetting, or accessory after the fact, where the severity rating is, by rule, determined by reference to the underlying offense (*e.g.*, 28 C.F.R. 2.20 specifies that conspiracy is to be rated in the same category as the underlying offense), acquittal on the underlying offense does not bar use of the conviction offense (*e.g.*, conviction for conspiracy to murder is graded as Category Eight even if the prisoner is acquitted of the charge of murder). However, the acquittal should be carefully considered in assessing the offender's role and level of culpability in the offense.

■ 2.19-03. *Evidence Not Considered at Criminal Trial.* Under 28 C.F.R. 2.19(c), the Commission may consider evidence that was excluded or not considered at a criminal trial because of procedural violations (e.g., information concerning the seizure of drugs suppressed for failure to obtain a proper search warrant, or a confession suppressed for failure to properly give the Miranda warning). Particular care should be exercised in considering the reliability of such information since the reasons for its exclusion may raise significant doubts about its reliability (e.g., coercion in the case of a confession). The Commission may also consider reliable information developed after trial (e.g., a subsequent admission of guilt).

■ 2.19-04. *Reliance on Offense Descriptions in Presentence Reports.*

(a) It is not uncommon for a prisoner to present a description of his or her offense behavior which is significantly different from the prosecution version of the offense in the presentence report. Commission regulations (in conformance with the Parole Commission and Reorganization Act of 1976) require the Commission to consider any reasonably available information concerning the prisoner, including information submitted by the prisoner, and require the Commission (not the sentencing court) to resolve conflicting versions of the facts by the preponderance of evidence standard. To say that the description of the offense in the presentence report will be deemed to be controlling unless first modified by the court is contrary to the Commission's duty to make its own independent factual findings. To be sure, the presentence report traditionally, and appropriately, has been given a great deal of weight by the Commission in making fact findings. But determining the weight to be given to any particular source of information is a function to be performed on a case-by-case basis. Several criteria for assessing the reliability of information are listed at 2.19-06. The Commission may not under its statute and regulations treat the presentence report as an unassailable source of factual information. It is to be noted that it may be futile for a prisoner to return to court seeking a modification of his presentence report. Some courts have refused to entertain post-sentencing requests for modification of the presentence report, holding that it is up to the Commission to make its own factual determinations in the parole decision making process.

(b) Therefore, information submitted to the Commission which conflicts with the presentence report, or any other government report, must be weighed by the Commission along with the report. The Commission is then to resolve the conflicting versions of the facts by the preponderance of evidence standard; that is, decide which version of the facts best accords with reason and probability. Judging the credibility of the source of the information naturally is part of the fact finding process. The prisoner, of course, may have an interest in having the facts distorted to show him to be less culpable than he really is. On the other hand, the presentence report writer, who must depend on investigative reports, may have misinterpreted the investigative reports or confused the facts of a complicated case. These possibilities must be weighed in each individual case.

(c) Where the hearing examiner concludes that the description of the offense reported in the presentence report or Form 792 is to be believed, the examiner should, when informing the prisoner of the recommendation, explain that the finding is based upon the information before the examiner. The examiner may then tell the prisoner that if the prisoner obtains further significant information, such as a correction from the sentencing court or probation officer, he may send it to the Commission for consideration of a reopening of the case.

■ 2.19-05. *Information for Decision-Making.*

(a) If the presentence report is not clear as to the data needed to establish the correct guidelines, the U.S. Probation Office that prepared the report should be contacted. Where it is determined that additional information concerning the offense behavior is needed, Form USA-792 may be requested.. Modifications to that sample letter may be made where warranted (*e.g.*, where a report has previously been provided and additional information is required). Note also that, in drug offenses, the DEA regional office where the prosecution occurred may be a useful source of information.

(b) Establishing the correct guidelines and making objective and fair decisions are dependent upon having adequate information. Careful attention, particularly at the pre-hearing stage, will enable the securing of additional information where appropriate, and enhance the quality and fairness of the Commission's work.

■ 2.19-06. *Assessing the Reliability of Information.* The normal indicants of reliability are (a) the report is specific as to the behavior alleged to have taken place; (b) the allegation is corroborated by established facts; and (c) the source of the allegation appears credible. The prisoner is to be informed of the allegation at the hearing and given an opportunity to respond. An allegation that is vague, unsupported, or comes from an unreliable source should not be considered. Cases requiring further information or verification may be referred to the Commission's Office.

■ **§2.20 PAROLING POLICY GUIDELINES; STATEMENT OF GENERAL POLICY.**

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the U.S. Parole Commission has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain instructions for the rating of certain offense behaviors. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) Guidelines for reparole consideration are set forth at §2.21.

(g) The Commission shall review the guidelines, including the salient factor score, periodically and may revise or modify them at any time as deemed appropriate.

(h) If an offender was less than 18 years of age at the time of the current offense, such youthfulness shall, in itself, be considered as a mitigating factor.

(i) For criminal behavior committed while in confinement see §2.36 (Rescission Guidelines).

(j)(1) In probation revocation cases, the original federal offense behavior and any new criminal conduct on probation (federal or otherwise) is considered in assessing offense severity. The original federal conviction is also counted in the salient factor score as a prior conviction. Credit is given towards the guidelines for any time spent in confinement on any offense considered in assessing offense severity.

(2) Exception: Where probation has been revoked on a complex sentence [*i.e.*, a committed sentence of more than six months on one count or more of an indictment or information followed by a probation term on the other count(s) of an indictment or information], the case shall be considered for guideline purposes under §2.21 as if parole rather than probation had been revoked.

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

OFFENSE CHARACTERISTICS:	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1998)			
Severity of Offense Behavior	Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category One	<=4 months	Guideline Range <=8 months	8-12 months	12-16 months
Category Two	<=6 months	Guideline Range <=10 months	12-16 months	16-22 months
Category Three	<=10 months	Guideline Range 12-16 months	18-24 months	24-32 months
Category Four	12-18 months	Guideline Range 20-26 months	26-34 months	34-44 months
Category Five	24-36 months	Guideline Range 36-48 months	48-60 months	60-72 months
Category Six	40-52 months	Guideline Range 52-64 months	64-78 months	78-100 months
Category Seven	52-80 months	Guideline Range 64-92 months	78-110 months	100-148 months
Category Eight*	100+ months	Guideline Range 120+ months	150+ months	180+ 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 Commission will specify the pertinent case factors upon which it relied**

in reaching its decision, which may include the absence of any factors mitigating the offense. This procedure is intended to ensure that the prisoner understands that individualized consideration has been given to the facts of the case, and not to suggest that a grant of parole is to be presumed for any class of Category Eight offenders. However, a murder committed to silence a victim or witness, a contract murder, a murder by torture, the murder of a law enforcement officer to carry out an offense, or a murder carried out to further the aims of an on-going criminal operation, shall not justify a parole at any point in the prisoner's sentence unless there are compelling circumstances in mitigation (*e.g.*, a youthful offender who participated in a murder planned and executed by his parent). Such aggravated crimes are considered, by definition, at the extreme high end of Category Eight offenses. For these cases, the expiration of the sentence is deemed to be a decision at the maximum limit of the guideline range. (The fact that an offense does not fall under the definition contained in this rule does not mean that the Commission is obliged to grant a parole.)

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CHAPTER ONE - OFFENSES OF GENERAL APPLICABILITY

101 Conspiracy

Grade conspiracy in the same category as the underlying offense.

102 Attempt

Grade attempt in the same category as the offense attempted.

103 Aiding and Abetting

Grade aiding and abetting in the same category as the underlying offense. *[[Notes and Procedures. Aiding and Abetting is sometimes referred to as Accessory Before the Fact]].*

104 Accessory After the Fact*

Grade accessory after the fact as two categories below the underlying offense, but not less than Category One.

105 Solicitation to Commit a Crime of Violence

Grade solicitation to commit a crime of violence in the same category as the underlying offense if the crime solicited would be graded as Category Eight. In all other cases, grade solicitation to commit a crime of violence one category below the underlying offense, but not less than Category One.

--- NOTE TO CHAPTER ONE

The reasons for a conspiracy or attempt not being completed may, where the circumstances warrant, be considered as a mitigating factor (e.g., where there is voluntary withdrawal by the offender prior to completion of the offense). *[[Notes and Procedures. In grading unconsummated conspiracy offenses, care must be taken to distinguish the specific and imminent elements of the offense (which are to be considered) from those which are speculative and remote.]]*

CHAPTER TWO - OFFENSES INVOLVING THE PERSON

SUBCHAPTER A - HOMICIDE OFFENSES

201 Murder

Murder*, or a forcible felony* resulting in the death of a person other than a participating offender, shall be graded as Category Eight. *[[Notes and Procedures. (1) Grade a forcible felony resulting in the death of a person other than a participating offender as Category Eight even if the death was not intentional. Example 201-1: During a robbery, an offender's weapon discharges accidentally, resulting in the death of a bank teller. (2) Grade conduct as "attempted murder" only where it is established from the circumstances that both (a) death was the intended object; and (b) had death resulted, the offense would have been graded as Category Eight. Example 201-2: An offender places a bomb aboard an aircraft, but the bomb fails to explode. Example 201-3: During a robbery, an offender places a loaded revolver to the head of a victim and pulls the trigger, but the weapon misfires. Grade each of the above examples as "attempted murder." (3) An attempt to kill which, if successful, would have been classified as "voluntary manslaughter" (Category Seven), is to be graded as "assault with serious bodily injury the result intended".]]*

202 Voluntary Manslaughter*

Category Seven. *[[Notes and Procedures. Example 202-1: An offender stabs and kills a person during a drunken quarrel in a tavern.]]*

*Terms marked by an asterisk are defined in Chapter Thirteen.

203 Involuntary Manslaughter*

Category Four. *[[Notes and Procedures. This offense is frequently referred to as "grossly negligent or reckless homicide." Example 203-1: While driving under the influence of alcohol, an offender loses control of a vehicle and kills a pedestrian.]]*

SUBCHAPTER B - ASSAULT OFFENSES

211 Assault During Commission of Another Offense

- (a) **If serious bodily injury* results or if "serious bodily injury is the result intended,"* grade as Category Seven;** *[[Notes and Procedures. Example 211(a)-1: An offender, while fleeing from a robbery, fires a weapon from a distance at a pursuing police officer. The firing of the weapon at the officer in this circumstance is sufficient to find that "serious bodily injury" was the result intended.]]*
- (b) **If bodily injury* results, or a weapon is fired by any offender, grade as Category Six;** *[[Notes and Procedures. Example 211(b)-1: During a residential burglary, an offender is confronted by the victim; the offender strikes the victim with his fist and breaks the victim's jaw. Example 211(b)-2: During a bank robbery, an offender fires a weapon at the ceiling to intimidate the victims. No one is injured]].*
- (c) **Otherwise, grade as Category Five.** *[[Notes and Procedures. Example 211(c)-1: An offender forcibly escapes by assaulting a correctional officer. Note: If bodily injury to the correctional officer results, or if a dangerous weapon is used to accomplish the assault, grade as Offense 212(d). Example 211(c)-2: An offender assaults a victim while attempting to commit a sexual act (other than forcible rape or sodomy).]]*

[[For the purposes of this guideline, "another offense" means a forcible felony. An assault during the commission of a misdemeanor offense or non-forcible felony is graded as Offense 212 (Assault).]]*

212 Assault

- (a) **If serious bodily injury* results or if "serious bodily injury is the result intended"* , grade as Category Seven;** *[[Notes and Procedures. Example 212(a)-1: During an argument, an offender strikes the victim over the head with a bottle causing injuries sufficient to place the victim on the "critical" list. Example 212(a)-2: An offender throws a vial of acid at the face of a victim.]]*
- (b) **If bodily injury* results or a dangerous weapon is used by any offender, grade as Category Five;**
- (c) **Otherwise, grade as Category Two.**
- (d) **Exception:**
 - (1) **If the victim was known to be a "protected person"* or law enforcement, judicial, or correctional official, grade conduct under (a) as Category Seven, (b) as Category Six, and (c) as Category Three.** *[[Notes and Procedures. Grade an assault on a criminal justice official during an arrest under this section only if it involves force sufficient to create a likelihood of bodily injury (e.g., striking or kicking the officer).]]*
 - (2) **If an assault is committed while resisting an arrest or detention initiated by a law enforcement officer or civilian acting under color of law, grade conduct under (a) as Category Seven, (b) as Category Six, and (c) as Category Three.**

*Terms marked by an asterisk are defined in Chapter Thirteen.

[[*Notes and Procedures*. The phrase "a dangerous weapon is used" refers to conduct in which an offender's use of a dangerous weapon puts the victim in imminent danger of bodily injury (*e.g.*, an offender strikes at a victim with an iron bar) or threatens the victim with death or serious bodily injury (*e.g.*, an offender points a firearm at the victim's head). Conduct that does not fit the above parameters (*e.g.*, an offender displays a baseball bat during a domestic dispute but does not attempt to strike the victim with the bat) is graded as Offense 212(c).]]

- 213 Firing a Weapon at a Structure Where Occupant(s) are Physically Present**
Grade according to the underlying offense if one can be established, but not less than Category Five.

SUBCHAPTER C - KIDNAPING AND RELATED OFFENSES

221 Kidnaping

- (a) If the purpose of the kidnaping is for ransom or terrorism, grade as Category Eight.
- (b) If a person is held hostage in a known place for purposes of extortion (*e.g.*, forcing a bank manager to drive to a bank to retrieve money by holding a family member hostage at home), grade as Category Seven;
- (c) If a victim is used as a shield or hostage in a confrontation with law enforcement authorities, grade as Category Seven;
- (d) Otherwise, grade as Category Seven.
- (e) Exception: If not for ransom or terrorism, and no bodily injury to victim, and limited duration (*e.g.*, abducting the driver of a truck during a hijacking and releasing him unharmed within an hour), grade as Category Six.

222 Demand for Ransom

- (a) If a kidnapping has, in fact, occurred, but it is established that the offender was not acting in concert with the kidnapper(s), grade as Category Seven;
- (b) If no kidnapping has occurred, grade as "extortion".

SUBCHAPTER D - SEXUAL OFFENSES

231 Rape or Forcible Sodomy

- (a) Category Seven.
- (b) Exception: If a prior consensual sexual relationship is present between victim and offender, grade as Category Six.

232 Carnal Knowledge* or Sodomy Involving Minors

- (a) Grade as Category Four, except as provided below.
- (b) If the relationship is clearly consensual and the victim is at least fourteen years old, and the age difference between the victim and offender is less than four years, grade as Category One.
- (c) If the victim is less than twelve years old, grade as Category Seven.
- (d) If the offender is an adult who has abused a position of trust (*e.g.*, teacher, counselor, or physician), or the offense involved predatory sexual behavior, grade as Category Seven.

*Terms marked by an asterisk are defined in Chapter Thirteen.

Sexual behavior is deemed predatory when the offender repeatedly uses any trick or other device to attract, lure, or bribe victims into the initial contact that results in the offense.

233 Other Unlawful Sexual Conduct With Minors

(a) Category Four.

(b) Exception: If the victim is less than twelve years old grade as Category Six.

SUBCHAPTER E - OFFENSES INVOLVING AIRCRAFT

**241 Aircraft Piracy
Category Eight.**

242 Interference with a Flight Crew

(a) If the conduct or attempted conduct has potential for creating a significant safety risk to an aircraft or passengers, grade as Category Seven;

(b) Otherwise, grade as Category Two.

SUBCHAPTER F - COMMUNICATION OF THREATS

251 Communicating a Threat [to kill, assault, or kidnap]

(a) Category Four; [[Notes and Procedures. (1) Communicating a threat includes any threat (written or oral) against the President and successors to the presidency (18 U.S.C. 871); any threat sent through the mail (18 U.S.C. 876); and any threat transmitted in interstate commerce (18 U.S.C. 875). Interstate commerce includes all telephone communications. (2) Separate threats to different victims are treated as multiple separate offenses.]]

(b) Notes:

(1) Any overt act committed for the purposes of carrying out a threat in this subchapter may be considered as an aggravating factor.

(2) If for purposes of extortion or obstruction of justice, grade according to Chapter Three, Subchapter C, or Chapter Six, Subchapter B, as applicable.

[[Notes and Procedures: This guideline applies only to threats that constitute felonious conduct. Misdemeanor threats (not amounting to an assault) are graded as Category One offenses under Chapter Twelve.]]

CHAPTER THREE - OFFENSES INVOLVING PROPERTY

SUBCHAPTER A - ARSON AND OTHER PROPERTY DESTRUCTION OFFENSES

301 Property Destruction by Fire or Explosives

(a) If the conduct results in serious bodily injury* or if "serious bodily injury is the result intended"*, grade as Category Seven;

(b) If the conduct (i) involves any place where persons are present or likely to be present; or (ii) involves a residence, building, or other structure; or (iii) results in bodily injury*, grade as Category Six;

(c) Otherwise, grade as "property destruction other than listed above" but not less than Category Five.

*Terms marked by an asterisk are defined in Chapter Thirteen.

[[*Notes and Procedures.* (1) The term "structure" is not subject to precise definition, but comparability in size to a building may be used for guidance. Thus, an automobile, a small boat, or a small detached shed would not be considered a structure. On the other hand, a ship or an oil storage complex would be considered a structure under this provision. (2) Reminder: Grade multiple separate arsons under the multiple separate offense procedure.]]

302 Wrecking a Train
Category Seven.

303 Property Destruction Other Than Listed Above

- (a) If the conduct results in bodily injury*, or serious bodily injury *, or if "serious bodily injury is the result intended"*, grade as if "assault during commission of another offense;"**
- (b) If damage of more than \$5,000,000 is caused, grade as Category Seven;**
- (c) If damage of more than \$1,000,000 but not more than \$5,000,000 is caused, grade as Category Six;**
- (d) If damage of more than \$200,000 but not more than \$1,000,000 is caused, grade as Category Five;**
- (e) If damage of at least \$40,000 but not more than \$200,000 is caused, grade as Category Four;**
- (f) If damage of at least \$2,000 but less than \$40,000 is caused, grade as Category Three;**
- (g) If damage of less than \$2,000 is caused, grade as Category One.**
- (h) Exception: If a significant interruption of a government or public utility function is caused, grade as not less than Category Three.**

SUBCHAPTER B - CRIMINAL ENTRY OFFENSES

311 Burglary or Unlawful Entry

- (a) If the conduct involves an armory or similar facility (e.g., a facility where automatic weapons or war materials are stored) for the purpose of theft or destruction of weapons or war materials, grade as Category Six;**
- (b) If the conduct involves an inhabited dwelling (whether or not a victim is present), or any premises with a hostile confrontation with a victim, grade as Category Five;**
- (c) If the conduct involves use of explosives or safecracking, grade as Category Five; [[*Notes and Procedures.* The term "safecracking" is intended to include conduct that is appropriately termed "skilled" or "sophisticated" (e.g., "drilling" a safe on the premises or using an instrument to detect the combination of the safe).]]**
- (d) Otherwise, grade as "theft" offense, but not less than Category Two.**
- (e) Exception: If the grade of the applicable "theft" offense exceeds the grade under this subchapter, grade as a "theft" offense. [[*Notes and Procedures.* This guideline applies only to conduct involving unlawful entry of a structure or other enclosed premises with intent to commit a felony or any theft (regardless of amount). This guideline does not apply to conduct involving an unlawful entry into a structure or other enclosed premises (1) with no intent to commit a crime upon entry or (2) with intent to commit a misdemeanor upon entry. Conduct that falls within these two types is graded as a Category One offense under Chapter Twelve (Miscellaneous Offenses). Breaking and entering/unlawful entry of an automobile is graded as a theft offense (Offense 331) because an automobile is not a structure or other enclosed premises.]]**

*Terms marked by an asterisk are defined in Chapter Thirteen.

SUBCHAPTER C - ROBBERY, EXTORTION, AND BLACKMAIL

321 Robbery

(a) **Category Five.**

(b) **Exceptions:**

(1) **If the grade of the applicable "theft" offense exceeds the grade for robbery, grade as a "theft" offense.**

(2) **If any offender forces a victim to accompany any offender to a different location, or if a victim is forcibly detained by being tied, bound, or locked up, grade as Category Six.**

[*Notes and Procedures.* The term "different location" refers to removal from the premises (e.g., forcing a victim of a bank robbery to accompany an offender outside the bank).]

(3) **Pickpocketing (stealth-no force or fear), see Subchapter D.**

(c) **Note: Grade purse snatching (fear or force) as robbery.**

322 Extortion

(a) **If by threat of physical injury to person or property, or extortionate extension of credit* (loansharking), grade as Category Five;**

(b) **If by use of official governmental position, grade according to Chapter Six, Subchapter C;**

(c) **If neither (a) nor (b) is applicable, grade under Chapter Eleven, Subchapter F.**

[*Notes and Procedures:* As for rating robbery offenses, if the grade of the behavior, viewed as a theft offense, exceeds the grade under 322, the behavior should be graded as a theft offense under General Note 1. If the victim is held hostage for the purpose of extortion, the offense should be rated according to Chapter Two, Subchapter C].

323 Blackmail [threat to injure reputation or accuse of crime]

Grade as a "theft" offense according to the value of the property demanded, but not less than Category Three. Actual damage to reputation may be considered as an aggravating factor.

SUBCHAPTER D - THEFT AND RELATED OFFENSES

331 Theft, Forgery, Fraud, Trafficking in Stolen Property*, Interstate Transportation of Stolen Property, Receiving Stolen Property, Embezzlement, and Related Offenses

(a) **If the value of the property* is more than \$5,000,000, grade as Category Seven;**

(b) **If the value of the property* is more than \$1,000,000 but not more than \$5,000,000, grade as Category Six;**

(c) **If the value of the property* is more than \$200,000 but not more than \$1,000,000, grade as Category Five;**

(d) **If the value of the property* is at least \$40,000 but not more than \$200,000, grade as Category Four;**

(e) **If the value of the property* is at least \$2,000 but less than \$40,000, grade as Category Three;**

(f) **If the value of the property* is less than \$2,000, grade as Category One.**

(g) **Exceptions:**

(1) **Offenses involving stolen checks, credit cards, money orders or mail, forgery, fraud , interstate transportation of stolen or forged securities, trafficking in stolen property, or embezzlement shall be graded as not less than Category Two;**

*Terms marked by an asterisk are defined in Chapter Thirteen.

- (2) **Theft of an automobile shall be graded as no less than Category Three.** **Note:** where the vehicle was recovered within 72 hours with no significant damage and the circumstances indicate that the only purpose of the theft was temporary use (e.g., joyriding), such circumstances may be considered as a mitigating factor. *[[Notes and Procedures. Theft of truck incidental to theft of cargo. When the theft of the truck is clearly incidental to the theft of the cargo (e.g., the truck is recovered abandoned within 72 hours without significant damage) the value of the truck shall be added to the value of the cargo but such circumstances may be considered as a mitigating factor.]]*
- (3) **Grade obtaining drugs for own use by a fraudulent or fraudulently obtained prescription as Category Two.**
- (4) **Grade manufacture, sale, and fraudulent use of credit cards as follows:**
- (i) **Grade the manufacture, distribution or possession of counterfeit or altered credit cards as not less than Category Four.**
 - (ii) **Grade the distribution or possession of multiple stolen credit cards as not less than Category Three.**
 - (iii) **Grade the distribution or possession of a single stolen credit card as not less than Category Two.**
- (h) **Notes:**
- (1) **In "theft" offenses, the total amount of the theft committed or attempted by the offender, or others acting in concert with the offender, is to be used.** *[[Notes and Procedures. Example 331(h)-1: Seven persons in concert commit a theft of \$70,000; each receives \$10,000. Grade according to the total amount (\$70,000). Example 331(h)-2: An offender fraudulently sells stock worth \$20,000 for \$90,000. Grade according to the loss (\$70,000).]]*
 - (2) **Grade fraudulent sale of drugs (e.g., sale of sugar as heroin) as "fraud".**

332 Pickpocketing [stealth-no force or fear]

Grade as a "theft" offense, but not less than Category Three.

333 Fraudulent Loan Applications

Grade as a "fraud" offense according to the amount of the loan. *[[Notes and Procedures. Example 333-1: An offender falsifies collateral of \$250,000 to obtain a \$50,000 loan. Grade according to the value of the loan (\$50,000).]]*

334 Preparation or Possession of Fraudulent Documents

- (a) **If for purposes of committing another offense, grade according to the offense intended;**
- (b) **Otherwise, grade as Category Two.**

335 Criminal Copyright Offenses

- (a) **If very large scale (e.g., more than 100,000 sound recordings or more than 10,000 audio visual works), grade as Category Five;**
- (b) **If large scale (e.g., 20,000-100,000 sound recordings or 2,000-10,000 audio visual works), grade as Category Four;**
- (c) **If medium scale (e.g., 2,000-19,999 sound recordings or 200-1,999 audio visual works), grade as Category Three;**
- (d) **If small scale (e.g., less than 2,000 sound recordings or less than 200 audio visual works), grade as Category Two.**

*Terms marked by an asterisk are defined in Chapter Thirteen.

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 \$5,000,000, grade as Category Seven;
- (b) If the face value of the currency or other medium of exchange is more than \$1,000,000 but less than \$5,000,000, grade as Category Six;
- (c) If the face value of the currency or other medium of exchange is more than \$200,000 but not more than \$1,000,000, grade as Category Five;
- (d) If the face value of the currency or other medium of exchange is at least \$40,000 but not more than \$200,000, grade as Category Four;
- (e) If the face value of the currency or other medium of exchange is at least \$2,000 but less than \$40,000, grade as Category Three;
- (f) If the face value of the currency or other medium of exchange is less than \$2,000, 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. *[[Notes and Procedures. The term "manufacturing" does not include the copying of currency not intended to pass visual inspection (e.g., reproducing a dollar bill on a copying machine for insertion in a bill/coin changing machine).]]*

SUBCHAPTER F - BANKRUPTCY OFFENSES

351 Fraud in Bankruptcy or Concealing Property

Grade as a "fraud" offense.

SUBCHAPTER G - VIOLATION OF SECURITIES OR INVESTMENT REGULATIONS

361 Violation of Securities or Investment Regulations

- (a) If for purposes of fraud, grade according to the underlying offense;
- (b) Otherwise, grade as Category Two. *[[Notes and Procedures. If "insider trading", grade as Offense 363.]]*

362 Antitrust Offenses

- (a) If estimated economic impact is more than one million dollars, grade as Category Four;
- (b) If the estimated economic impact is more than \$100,000 but not more than one million dollars, grade as Category Three;
- (c) Otherwise, grade as Category Two.
- (d) Note: The term "economic impact" refers to the estimated loss to any victims (e.g., loss to consumers from a price fixing offense).

*Terms marked by an asterisk are defined in Chapter Thirteen.

363 Insider Trading

- (a) If the estimated economic impact is more than \$5,000,000, grade as Category Seven;
- (b) If the estimated economic impact is more than \$1,000,000 but not more than \$5,000,000, grade as Category Six;
- (c) If the estimated economic impact is at least \$200,000 but not more than \$1,000,000, grade as Category Five;
- (d) If the estimated economic impact is at least \$40,000 but less than \$200,000, grade as Category Four;
- (e) If the estimated economic impact is at least \$2,000, but less than \$40,000, grade as Category Three;
- (f) If the estimated economic impact is less than \$2,000, grade as Category Two.
- (g) Note: The term "economic impact" includes the damage sustained by the victim whose information was unlawfully used, plus any other illicit profit resulting from the offense.

**CHAPTER FOUR - OFFENSES INVOLVING IMMIGRATION,
NATURALIZATION, AND PASSPORTS**

401 Unlawfully Entering the United States as an Alien
Category One.

402 Transportation of Unlawful Alien(s)

- (a) If the transportation of unlawful alien(s) involves detention and demand for payment, grade as Category Five;
- (b) Otherwise, grade as Category Three.

403 Offenses Involving Passports

- (a) If making an unlawful passport for distribution to another, possession with intent to distribute, or distribution of an unlawful passport, grade as Category Three;
- (b) If fraudulently acquiring or improperly using a passport, grade as Category Two.

404 Offenses Involving Naturalization or Citizenship Papers

- (a) If forging or falsifying naturalization or citizenship papers for distribution to another, possession with intent to distribute, or distribution, grade as Category Three;
- (b) If acquiring fraudulent naturalization or citizenship papers for own use or improper use of such papers, grade as Category Two;
- (c) If failure to surrender canceled naturalization or citizenship certificate(s), grade as Category One.

CHAPTER FIVE - OFFENSES INVOLVING REVENUE

SUBCHAPTER A - INTERNAL REVENUE OFFENSES

501 Tax Evasion [income tax or other taxes]

- (a) If the amount of tax evaded or evasion attempted is more than \$5,000,000, grade as Category Seven;
- (b) If the amount of tax evaded or evasion attempted is more than \$1,000,000 but not more than \$5,000,000, grade as Category Six;
- (c) If the amount of tax evaded or evasion attempted is at least \$200,000 but not more than \$1,000,000, grade as Category Five;
- (d) If the amount of tax evaded or evasion attempted is at least \$40,000 but not more than \$200,000, grade as Category Four;
- (e) If the amount of tax evaded or evasion attempted is at least \$2,000 but less than \$40,000, grade as Category Three.
- (f) If the amount of tax evaded or evasion attempted is less than \$2,000, grade as Category One.
- (g) Notes:
 - (1) Grade according to the amount of tax evaded or evasion attempted, not the gross amount of income. *[[Notes and Procedures. Example 501(g)(1)-1: An offender fails to report income of \$30,000, thus avoiding \$10,000 in taxes; the severity rating is determined by the tax avoided (i.e., \$10,000). This amount does not include interest or penalties.]]*
 - (2) Tax evasion refers to failure to pay applicable taxes. Grade a false claim for a tax refund (where tax has not been withheld) as a "fraud" offense.

502 Operation of an Unregistered Still

Grade as a "tax evasion" offense.

SUBCHAPTER B - CUSTOMS OFFENSES

511 Smuggling Goods into the United States

- (a) If the conduct is for the purpose of tax evasion, grade as a "tax evasion" offense.
- (b) If the article is prohibited from entry to the country absolutely (e.g., illicit drugs or weapons), use the grading applicable to possession with intent to distribute of such articles, or the grading applicable to tax evasion, whichever is higher, but not less than Category Two;
- (c) If the conduct involves breaking seals, or altering or defacing customs marks, or concealing invoices, grade according to (a) or (b), as applicable, but not less than Category Two.

512 Smuggling Goods into Foreign Countries in Violation of Foreign Law (re: 18 U.S.C. 546) Category Two.

SUBCHAPTER C - CONTRABAND CIGARETTES

521 Trafficking in Contraband Cigarettes (re: 18 U.S.C. 2342)

Grade as a tax evasion offense.

*Terms marked by an asterisk are defined in Chapter Thirteen.

CHAPTER SIX - OFFENSES INVOLVING GOVERNMENTAL PROCESS

SUBCHAPTER A - IMPERSONATION OF OFFICIALS

601 Impersonation of Official

- (a) If for purposes of commission of another offense, grade according to the offense attempted, but not less than Category Two;**
- (b) Otherwise, grade as Category Two.**

SUBCHAPTER B - OBSTRUCTING JUSTICE

611 Perjury

- (a) If the perjured testimony concerns a criminal offense, grade as "accessory after the fact", but not less than Category Three;**
- (b) Otherwise, grade as Category Three.**
- (c) Suborning perjury, grade as perjury.**

612 Unlawful False Statements Not Under Oath **Category One.**

613 Tampering With Evidence or Witness, Victim, Informant, or Juror

- (a) If concerning a criminal offense, grade as "accessory after the fact", but not less than Category Three;**
- (b) Otherwise, grade as Category Three.**
- (c) Exception: Intimidation by threat of physical harm, grade as not less than Category Five.**

614 Misprision of a Felony*

Grade as if "accessory after the fact" but not higher than Category Three.

615 Harboring a Fugitive

Grade as if "accessory after the fact" to the offense for which the fugitive is wanted, but not higher than Category Three. [[Notes and Procedures. In the case of a fugitive who is an escapee, the "offense for which the fugitive is wanted" is considered to be the escape or the offense for which the fugitive was being held, whichever is graded higher.]]

616 Escape

If in connection with another offense for which a severity rating can be assessed, grade the underlying offense and apply the rescission guidelines to determine an additional penalty. Otherwise, grade as Category Three. [[Notes and Procedures. If the underlying offense behavior cannot be established in accord with Commission regulations (e.g., where the information is insufficient to establish that the offender committed the underlying offense), grade as Category Three, unless Offense 211(c) or 212(d) is applicable.]]

617 Failure to Appear*

- (a) In Felony Proceedings. If in connection with an offense for which a severity rating can be assessed, add to the guidelines otherwise appropriate the following: (i) ≤ 6 months if**

*Terms marked by an asterisk are defined in Chapter Thirteen.

voluntary return within 6 days, or (ii) 6-12 months in any other case. Otherwise, grade as Category Three. *[[Notes and Procedures. Grade as Category Three only if the underlying offense behavior cannot be established in accord with Commission regulations (e.g., where the information is insufficient to establish that the offender committed the underlying offense).]]*

(b) In Misdemeanor Proceedings. Grade as Category One. *[[Notes and Procedures. In the case of a failure to appear on a misdemeanor charge, grade the failure to appear and the underlying charge (if it can be established under Commission regulations) as multiple separate offenses. Example 617(b)-1: A parolee fails to appear on a misdemeanor charge involving theft of \$400. Since the proceeding is a misdemeanor proceeding, the failure to appear is graded as Category One. If the parolee is also convicted of the theft, or if the Commission makes an independent finding of the theft, apply the multiple separate offense procedure.]]*

(c) Note: For purposes of this subsection, a misdemeanor is defined as an offense for which the maximum penalty authorized by law (not necessarily the penalty actually imposed) does not exceed one year.

618 Contempt of Court

(a) Criminal Contempt (re: 18 U.S.C. 402). Where imposed in connection with a prisoner serving a sentence for another offense, add ≤6 months to the guidelines otherwise appropriate.

(b) Exception: If a criminal sentence is imposed under 18 U.S.C. 401 for refusal to testify concerning a criminal offense, grade such conduct as if "accessory after the fact".

(c) Civil Contempt. See 28 C.F.R. 2.10.

SUBCHAPTER C - OFFICIAL CORRUPTION

621 Bribery or Extortion [use of official position - no physical threat]

(a) Grade as a "theft offense" according to the value of the bribe demanded or received, or the favor received by the bribe-giver (whichever is greater), but not less than Category Three. The "favor received" is the gross value of the property, contract, obligation, interest, or payment intended to be awarded to the bribe-giver in return for the bribe. Grade the bribe-taker in the same manner. *[[Notes and Procedures. Example 621-1: A federal employee accepts a \$10,000 bribe to approve a fraudulent claim of \$80,000. The applicable value to be used in grading this offense is \$80,000.]]*

(b) If the above conduct involves a pattern of corruption (e.g., multiple instances), grade as not less than Category Four.

(c) If the purpose of the conduct is the obstruction of justice, grade as if "perjury".

(d) Notes:

(1) The grading in this subchapter applies to each party to a bribe.

(2) The extent to which the criminal conduct involves a breach of public trust, causing injury beyond that describable by monetary gain, may be considered as an aggravating factor.

622 Other Unlawful Use of Governmental Position Category Two.

SUBCHAPTER D - VOTING FRAUD

- 631 Voting Fraud
Category Four.

CHAPTER SEVEN - OFFENSES INVOLVING INDIVIDUAL RIGHTS

SUBCHAPTER A - OFFENSES INVOLVING CIVIL RIGHTS

- 701 Conspiracy Against Rights of Citizens (re: 18 U.S.C. 241)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if "assault".
- 702 Deprivation of Rights Under Color of Law (re: 18 U.S.C. 242)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if "assault".
- 703 Federally Protected Activity (re: 18 U.S.C. 245)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if "assault".
- 704 Intimidation of Persons in Real Estate Transactions Based on Racial Discrimination (re: 42 U.S.C. 3631)
(a) If death results, grade as Category Eight;
(b) Otherwise, grade as if "assault".
- 705 Transportation of Strikebreakers (re: 18 U.S.C. 1231)
Category Two.

SUBCHAPTER B - OFFENSES INVOLVING PRIVACY

- 711 Interception and Disclosure of Wire or Oral Communications (re: 18 U.S.C. 2511)
Category Two.
- 712 Manufacture, Distribution, Possession, and Advertising of Wire or Oral Communication Intercepting Devices (re: 18 U.S.C. 2512)
(a) Category Three.
(b) Exception: If simple possession, grade as Category Two.
- 713 Unauthorized Opening of Mail
Category Two.

*Terms marked by an asterisk are defined in Chapter Thirteen.

CHAPTER EIGHT - OFFENSES INVOLVING EXPLOSIVES AND WEAPONS

SUBCHAPTER A - EXPLOSIVES OFFENSES AND OTHER DANGEROUS ARTICLES

801 Unlawful Possession or Distribution of Explosives; or Use of Explosives During a Felony
Grade according to offense intended, but not less than Category Five.

802 Mailing Explosives or Other Injurious Articles with Intent to Commit a Crime
Grade according to offense intended, but not less than Category Five.

SUBCHAPTER B - FIREARMS

811 Possession by Prohibited Person (e.g., ex-felon)

- (a) If single weapon (rifle, shotgun, or handgun) with ammunition of the same caliber, or ammunition of a single caliber (without weapon), grade as Category Three;
- (b) If multiple weapons (rifles, shotguns, or handguns), or ammunition of different calibers, or single weapon and ammunition of a different caliber, grade as Category Four.

[[Notes and Procedures. Possession of a weapon(s) without ammunition is rated according to the categories stated above. Aliens illegally in the United States are also prohibited by federal law from possession of firearms.]]

812 Unlawful Possession or Manufacture of Sawed-off Shotgun, Machine Gun, Silencer, or Assassination Kit*

- (a) If silencer or assassination kit*, grade as Category Six;
- (b) If sawed-off shotgun or machine gun, grade as Category Five.

[[Notes and Procedures. (1) Consider unlawful possession of a weapon combined with other offenses under the multiple separate offense procedure of Chapter Thirteen. (2) Possession/manufacture of a sawed-off rifle is graded as Category Three. "Sawed-off shotgun" refers to a shotgun which has a barrel length of less than 18 inches or an overall length of less than 26 inches.]]

813 Unlawful Distribution of Weapons or Possession with Intent to Distribute

- (a) If silencer(s) or assassination kit(s)*, grade as Category Six;
- (b) If sawed-off shotgun(s) or machine gun(s), grade as Category Five;
- (c) If multiple weapons (rifles, shotguns, or handguns), or ammunition of different calibers, or single weapon and ammunition of a different caliber, grade as Category Four;
- (d) If single weapon (rifle, shotgun, or handgun) with ammunition of the same caliber, or ammunition of a single caliber without weapon, grade as Category Three.

[[Notes and Procedures. Distribution of a weapon(s) and possession with the intent to distribute a weapon(s), without ammunition, are rated according to the categories stated above.]]

*Terms marked by an asterisk are defined in Chapter Thirteen.

CHAPTER NINE - OFFENSES INVOLVING ILLICIT DRUGS

SUBCHAPTER A - HEROIN AND OPIATE* OFFENSES

901 Distribution or Possession with Intent to Distribute

- (a) If extremely large scale (*e.g.*, involving 3 kilograms or more of 100% pure heroin, or equivalent amount), grade as Category Eight [except as noted in (c) below];
- (b) If very large scale (*e.g.*, involving 1 kilogram but less than 3 kilograms of 100% pure heroin, or equivalent amount), grade as Category Seven [except as noted in (c) below];
- (c) Where the Commission finds that the offender had only a peripheral role*, grade conduct under (a) or (b) as Category Six;
- (d) If large scale (*e.g.*, involving 50-999 grams of 100% pure heroin, or equivalent amount), grade as Category Six [except as noted in (e) below];
- (e) Where the Commission finds that the offender had only a peripheral role*, grade conduct under (d) as Category Five.
- (f) If medium scale (*e.g.*, involving 5-49 grams of 100% pure heroin, or equivalent amount), grade as Category Five;
- (g) If small scale (*e.g.*, involving less than 5 grams of 100% pure heroin, or equivalent amount), grade as Category Four.

902 Simple Possession Category One.

[[*Notes and Procedures.* (1) The following list contains drugs classified as opiates/synthetic opiate substances (21 C.F.R. 1308):]]

Acetorphine	Etonitazene	Normorphine
Acetyldihydrocodeine	Etorphine	Norpiprane
Acetylmethadol	Etorphine hydrochloride	Opium
Allylprodine	Etoxadine	Raw Opium
Alphacetylmethadol	Fentanyl	Opium Extracts
Alphameprodine	Furethidine	Opium Fluid Extracts
Alphamethadol	Heroin	Powdered Opium
Alpha-methylfentanyl	Hydrocodone	Granulated Opium
Propionanilide	Hydromorphinol	Tincture of Opium
Alphaprodine	Hydromorphone	Oxycodone
Anileridine	Hydroxypethidine	Oxymorphone
Benzethidine	Isomethadone	Pethidine
Benzylmorphine	Ketobemidone	(meperidine)
Betacetylmethadol	Levomethorpan	Pethidine-Intermediate-
Betameprodine	Levomoramide	4-cyano-1-methyl-4-
Betamethadol	Levophenacymorphan	phenylpiperidine
Betaprodine	Levorphanol	Pethidine-Intermediate-B,
Bezitrarnide	Metazocine	ethyl-4-phenylpiperidine-4-
Clonitazene	Methadone	carboxylate
Codeine	Methadone-Intermediate,	Pethidine-Intermediate-C, 1-

*Terms marked by an asterisk are defined in Chapter Thirteen.

Codeine Methylbromide	4-cyano-2-dimethylamino-	methyl-4-phenylpiperidine-
Codeine-N-Oxide	4, 4-diphenyl butane	4-carboxylic acid
Cyprenorphine	Methyldesorphine	Phenadoxone
Desomorphine	Methyldihydromorphine	Phenampromide
Dextromoramide	Metopon	Phenazocine
Dextropropoxyphene	Morpheridine	Phenomorphin
(Bulk non-dosage form)	Morphine	Phenoperidine
Diampromide	Morphine Methylbromide	Pholcodine
Diethylthiambutene	Morphine Methylsulfonate	Piminodine
Difenoxin	Morphine-N-Oxide	Piritramide
Dihydrocodeine	Moramide	Proheptazine
Dihydromorphine	Moramide-Intermediate,	Properidine
Dimenoxadol	2-methyl-3 morpholino-1,	Propiram
Dimepheptanol	1-diphenylpropane-	Racemethorphan
Dimethylthiambutene	carboxylic acid	Racemoramide
Dioxaphetyl butyrate	Myrophine	Racemorphan
Diphenoxylate	Nicocodeine	Sufentanil
Dipipanone	Nicomorphine	Thebacon
Drotebanol	Noracymethadol	Thebaine
Ethylmethylthiambutene	Norlevorphanol	Tilidine
Ethylmorphine	Normethadone	Trimeperidine
3-Methylfentanyl	1-Methyl-4-phenyl-4-	1-(2-Phenylethyl)-4-phenyl-4-
	propionoxypiperidine(MPP)	acetyloxypiperidine(PEPAP)

(2) Certain drugs such as Talwin have opiate characteristics but are not counted as opiates/synthetic opiate substances in determining the offense severity.

(3) In accordance with 21 C.F.R. 1308, dextropropoxyphene will be counted as an opiate in determining the offense severity only when it is found in bulk form (not when found in capsule form prepared under the brand name of Darvon).

(4) Common Brand Names of Opiates (this list is not inclusive):

Amidone (Methadone)	Methadose (Methadone)
Demerol (Pethidine)	Nisentil (Alphaprodine)
Dilaudid (Hydromorphone)	Nucodan (Oxycodone)
Dolophine (Methadone)	Numorphan (Oxymorphone)
Dover's Powder (Opium)	Palfium (Dextromoramide)
Dromoran (Racemorphan)	Paracodin (Dihydrocodeine)
Ethnine (Pholcodine)	Paragoric (Opium)
Heptalgin (Phenadoxone)	Percodan (Oxycodone)
Hycodan (Hydrocodone)	Pethadol (Pethidine)
Leritine (Anileridine)	Pholdine (Pholcodine)
Levo-Dromoran (Levorphanol)	Pipadone (Dipipanone)
Levorphan (Levorphanol)	Prinadol (Phenazocine)

*Terms marked by an asterisk are defined in Chapter Thirteen.

(5) Conversion of Common Opiates to Heroin Equivalent. The following chart may be used to convert common opiates to their heroin equivalent (*e.g.*, 67.4 grams of pure methadone x .5 = 33.7 grams of pure heroin equivalent; 42.6 grams of pure hydromorphone x 2.5 = 106.5 grams of pure heroin equivalent):

1 gm. alpha-methylfentanyl = 10 gms. heroin	1 gm. MPPP = .7 gm. heroin
1 gm. alphaprodine = .1 gm. heroin	1 gm. methadone = .5 gm. heroin
1 gm. anileridine = .1 gm. heroin	1 gm. 3-methylfentanyl = 10 gms. heroin
1 gm. codeine = .08 gm. heroin	1 gm. metopon = .86 gm. heroin
1 gm. dextromoramide = .67 gm. heroin	1 gm. of mixed alkaloids of opium/papaveretum = .25 gm. heroin
1 gm. dextropropoxyphene = .05 gm heroin	1 gm. 6-monoacetylmorphine = 1 gm. heroin
1 gm. dihydrocodeine = .05 gm. heroin	1 gm. morphine = .5 gm. heroin
1 gm. dihydrocodeinone = .5gm. heroin	1 gm. opium = .05 gm. heroin
1 gm. dihydromorphinone =2.5 gms. heroin	1 gm. oxycodone = .5 gm. heroin
1 gm. dipipanone = .25 gm. heroin	1 gm. oxymorphone = 5 gms. heroin
1 gm ethylmorphine = .165 gm. heroin	1 gm. PEPAP = .7 gm. heroin
1 gm. fentanyl = 2.5 gms. heroin	1 gm. paragoric = .003 gm. heroin
1 gm. hydrocodone = .5 gm. heroin	1 gm. paragoric = .003 gm. heroin
1 gm. hydromorphone = 2.5 gms. heroin	1 gm. pethidine (meperidine) = .05 gm. heroin
1 gm of levo-alpha-actetylmethadol (LAAM) = 3 gm. heroin	1 gm. phenadoxone = .15 gm. heroin
1 gm. levorphanol = 2.5 gm. heroin	1 gm. racemorphan = .8 gm. heroin

SUBCHAPTER B - MARIJUANA AND HASHISH OFFENSES

911 Distribution or Possession with Intent to Distribute

- (a) If extremely large scale (*e.g.*, involving 20,000 pounds or more of marijuana/6,000 pounds or more of hashish/600 pounds or more of hash oil), grade as Category Six [except as noted in (b) below];
- (b) Where the Commission finds that the offender had only a peripheral role*, grade conduct under (a) as Category Five;
- (c) If very large scale (*e.g.*, involving 2,000-19,999 pounds of marijuana/600-5,999 pounds of hashish/60-599 pounds of hash oil), grade as Category Five;
- (d) If large scale (*e.g.*, involving 200-1,999 pounds of marijuana/60-599 pounds of hashish/6-59.9 pounds of hash oil), grade as Category Four;
- (e) If medium scale (*e.g.*, involving 50-199 pounds of marijuana/15-59.9 pounds of hashish/1.5-5.9 pounds of hash oil), grade as Category Three;
- (f) If small scale (*e.g.*, involving 10-49 pounds of marijuana/3-14.9 pounds of hashish/.3-1.4 pounds of hash oil), grade as Category Two;
- (g) If very small scale (*e.g.*, involving less than 10 pounds of marijuana/less than 3 pounds of hashish/less than .3 pounds of hash oil), grade as Category One.

912 Simple Possession Category One.

[[*Notes and Procedures.* (1) 1 liter of hash(ish) oil in liquid form = 2.2 lbs. of hash oil in solid form. (2) Marijuana offenses are normally graded by bulk quantity. In determining quantity for guideline purposes,

*Terms marked by an asterisk are defined in Chapter Thirteen.

all parts of the marijuana plant as seized and weighed in bulk (e.g., from a shipment of marijuana being imported), or as negotiated for sale if no seizure is made, are counted. Occasionally, it may be necessary to estimate the scale of the offense from acreage under cultivation or from the number of plants seized. In the absence of more specific information, use the following minimum estimates. Grade 1 plant as equivalent to attempted production of 1/4 lb. of useable marijuana. Note: In the United States, marijuana is frequently grown interspersed with other crops to disguise the marijuana. In such cases, estimate 500 marijuana plants (125 lbs.) per acre. Where marijuana is the only crop under cultivation (e.g., in certain foreign locations), estimate 4,000 plants (1000 lbs.) per acre.]]

SUBCHAPTER C - COCAINE OFFENSES

921 Distribution or Possession with Intent to Distribute

- (a) If extremely large scale (e.g., involving 15 kilograms or more of 100% purity, or equivalent amount; or 1.5 kilograms or more of freebased cocaine), grade as Category Eight [except as noted in (c) below];**
- (b) If very large scale (e.g., involving 5 kilograms but less than 15 kilograms of 100% purity, or equivalent amount; or 500 grams but less than 1.5 kilograms of freebased cocaine), grade as Category Seven [except as noted in (c) below];**
- (c) Where the Commission finds that the offender had only a peripheral role*, grade conduct under (a) or (b) as Category Six;**
- (d) If large scale (e.g., involving more than 1 kilogram but less than 5 kilograms of 100% purity, or equivalent amount; or more than 100 grams but less than 500 grams of freebased cocaine), grade as Category Six [except as noted in (e) below];**
- (e) Where the Commission finds that the offender had only a peripheral role, grade conduct under (d) as Category Five;**
- (f) If medium scale (e.g., involving 100 grams-1 kilogram of 100% purity, or equivalent amount; or 10 grams-100 grams of freebased cocaine), grade as Category Five;**
- (g) If small scale (e.g., involving 5-99 grams of 100% purity, or equivalent amount; or 1 gram-9.9 grams of freebased cocaine), grade as Category Four;**
- (h) If very small scale (e.g., involving 1.0-4.9 grams of 100% purity, or equivalent amount; or less than 1 gram of freebased cocaine), grade as Category Three.**
- (i) If extremely small scale (e.g., involving less than 1 gram of 100% purity, or equivalent amount), grade as Category Two.**

922 Simple Possession

Category One.

[[*Notes and Procedures.* (1) Freebased cocaine is often referred to as "crack". (2) Cocaine paste: 1 gram of cocaine paste is equivalent to 0.4 grams of pure cocaine.]]

SUBCHAPTER D - OTHER ILLICIT DRUG OFFENSES*

931 Distribution or Possession with Intent to Distribute

- (a) If very large scale (e.g., involving more than 200,000 doses), grade as Category Six [except as noted in (b) below];**

*Terms marked by an asterisk are defined in Chapter Thirteen.

- (b) Where the Commission finds that the offender had only a peripheral role*, grade conduct under (a) as Category Five;
- (c) If large scale (e.g., involving 20,000-200,000 doses), grade as Category Five;
- (d) If medium scale (e.g., involving 1,000-19,999 doses), grade as Category Four;
- (e) If small scale (e.g., involving 200-999 doses), grade as Category Three;
- (f) If very small scale (e.g., involving less than 200 doses), grade as Category Two.

**932 Simple Possession
Category One.**

[[Notes and Procedures. Dosage Units. A dose of a drug is equivalent to 1 capsule, tablet, cigarette (500 mg.), gelatin square, button, or other common unit of sale. If the drug is in bulk form, a lab report from DEA may have converted the amount to doses. This information should be in the Presentence Report. If this information is not available, the following chart may be used.

HALLUCINOGENS

Anhalamine	300 mg.	PCP (solid)	5 mg.
Anhalonide	300 mg.	PCP (liquid) .....	.50 mg.
Anhalonine	300 mg.	PCP ("laced"/sprayed cigarette).....	500 mg.
Bufotenine	1 mg.	[e.g. one ounce of marijuana laced with PCP	
Diethyltryptamine	60 mg.	would equal approximately 56 dosage units of PCP]	
Dimethyltryptamine	50 mg.	PCP 1 gallon equals 720,000 dosage units	
Lophophorine	300 mg.	Pellotine	300 mg.
LSD (Lysergic acid diethylamide)	1 mg.	Peyote	12 gms.
LSD tartrate .....	.05 mg.	Psilocin	10 mg.
MDA	100 mg.	Psilocybin	10 mg.
MDMA [3, 4-Methylenedioxymethamphetamine		Psilocybin Mushrooms (fresh).....	50 gms.
(Ecstasy)]	130 mg.	Psilocybin Mushrooms (dried)	5 gms.
Mescaline	500 mg.	STP (DOM) Dimethoxyamphetamine	3 mg.

DEPRESSANTS

Barbituates	100 mg.	Hexethel	100 mg.
Brallobarbitol	30 mg.	Methaqualone	300 mg.
Eldoral	100 mg.	Thiobarbital	50 mg.
Eunarcon	100 mg.	Thiohexethal	60 mg.

STIMULANTS

Amphetamines	10 mg.	Methamphetamine combinations	5 mg.
Ethylamphetamine HCL	12 mg.	Methamphetamines	5 mg.
Ethylamphetamine SO4	12 mg.	Preludin	25 mg.

*Terms marked by an asterisk are defined in Chapter Thirteen.

OTHER

Talwin50 mg.

The dosage equivalents noted above represent the amount of the pure drug that is contained in an average dose. For example, 10 milligrams (mg.) of amphetamine per dose means 10 milligrams of pure amphetamine per dose. Thus, if an offender was in possession of 50 grams of a powder which tested to be 20% pure amphetamine, the appropriate calculations would be as follows: 50 grams x 1000 = 50,000 milligrams [conversion from grams to milligrams]; 50,000 milligrams x .20 purity = 10,000 milligrams of pure amphetamine [conversion to pure amphetamine]; 10,000 milligrams / 10 milligrams per dose = 1,000 doses [division by the number of milligrams per dose]. In this example, the bulk quantity would convert to 1,000 doses of amphetamine.]]

--- NOTES TO CHAPTER NINE

- (1) **Grade manufacture of synthetic illicit drugs as listed above, but not less than Category Five.** [[Notes and Procedures. Grade manufacture of synthetic illicit drugs according to the amount actually manufactured, but not less than Category Five. Note: because of the variety of chemical processes that may be used and the differential in skill of the individuals involved, estimates as to how much a laboratory could produce in the future from materials at hand may vary widely and, thus, are not used in assessing the severity rating.]]
- (2) **"Equivalent amounts" for the cocaine and opiate categories may be computed as follows: 1 gram of 100% pure is equivalent to 2 grams of 50% pure and 10 grams of 10% pure, etc.**
- (3) **Grade unlawful possession or distribution of precursors of illicit drugs as Category Five (i.e., aiding and abetting the manufacture of synthetic illicit drugs).**
- (4) **If weight, but not purity is available, the following grading may be used:**

Heroin

Extremely large scale	6 Kilograms or more
Very large scale	2 kilograms -5.99 kilograms
Large scale	200 grams -1.99 kilograms
Medium scale	28.35 grams -199.99 grams.
Small scale	Less than 28.35 grams

Cocaine

Extremely large scale	18.75 kilograms or more
Very large scale	6.25 kilograms -18.74 kilograms
Large scale	1.25 kilograms - 6.24 kilograms
Medium scale	200 grams -1.24 kilograms
Small scale	20 grams -199.99 grams
Very small scale	4 grams -19.99 grams
Extremely small scale	Less than 4 grams

*Terms marked by an asterisk are defined in Chapter Thirteen.

[[Notes and Procedures. Drug Offense Severity Calculations.]]

(a) Opiate/cocaine offenses are normally graded according to the quantity/ purity of the drug involved. Marijuana/hashish offenses are normally graded by bulk quantity. Other illicit drug offenses are normally graded by the number of doses.

(b) If (and only if) the above information is not available, it may be possible to determine the appropriate severity rating from other information in the file [see (g)].

(c) The severity of drug offenses is to be classified by scale. In some cases, the drugs actually confiscated may not accurately reflect the scale of the offense. For example, convincing evidence of negotiations and transactions of large quantities of drugs over a long period of time may be a more appropriate basis for rating the scale of the drug offense than weight/purity if the evidence shows that only one of many shipments was actually confiscated by authorities. Any evidence used to assess the offense severity must meet the preponderance standard, and the facts relied upon must be noted specifically on the Notice of Action.

(d) *Measurement Conversion Chart*

1 ounce = 28.35 grams	1 quart = .95 liters
1 pound = 453.6 grams	1 kilogram = 1,000 grams
1 pound = .45 kilograms	1 gram = 1,000 milligrams
1 kilogram = 2.2 pounds	1 grain = 64.8 milligrams
1 gallon = 3.8 liters	

(e) *How to Convert to "equivalent amounts"*. The following formula is to be used in calculating 100% pure equivalency for cocaine and heroin offenses:

Quantity Involved	X	Actual Purity
[expressed in grams]		[expressed as a decimal]

Example (1) If the offense involved 3 ounces of 32.6% pure cocaine, it is first necessary to convert ounces to grams, and then to multiply by the purity expressed as a decimal (*i.e.*, .326). The necessary calculations are:

$$\begin{array}{ccccccc} 3 & X & 28.35 & X & .326 & = & 27.73 \text{ grams} \\ \text{(ounces)} & \text{(\# of grams in an ounce)} & & \text{(purity)} & \text{(100\% pure)} & & \end{array}$$

Example (2) If the offense involved one-half ounce of 7% pure heroin, the necessary calculations are:

$$\begin{array}{ccccccc} .5 & X & 28.35 & X & .07 & = & .99 \text{ grams} \\ \text{(ounces)} & \text{(\# of grams in an ounce)} & & \text{(purity)} & \text{(100\% pure)} & & \end{array}$$

Example (3) If the offense involved 68 grams of 23% pure heroin, the only conversion necessary is to pure heroin equivalency, *i.e.*: 68 (grams X .23) (purity) = 15.64 grams (100% purity).

(f) *Drug Purity - DEA Form 7*

(1) The presentence report will normally provide drug weight/purity information from DEA Form 7. This is a complicated form. "Total net weight" [normally in Item 31] refers to the amount of the pure drug. This is the weight used in calculation of the Commission's severity rating. For your information, "gross weight" is the weight of the drug plus adulterants plus the container (normally found in Item 24). Also normally found in Item 24 is "net weight" (the weight of the drug plus adulterants). "Strength" (the percent purity of the drug) is normally found in Item 28. Multiplying "net weight" x "strength" is how DEA arrives at the "total net weight". Remember, "total net weight" is the weight of the pure drug to be used in assessing the Commission's severity rating.

(2) If a presentence report does not specify "total net weight", the probation officer should be contacted for clarification (please be specific as to the clarification necessary; this will enhance feedback/training). Note: DEA lab reports (DEA Form 7), if necessary, also may be obtained directly from the DEA field office for the geographic area in which the offense occurred. If a request to the DEA field office is required, provide the subject's name, date of birth, place of offense, and dates of offense.

(g) If neither weight nor purity is available, but only a money value, DEA may be requested to provide an estimate of the amount of pure drug associated with that money value. In the absence of a specific estimate from DEA pertaining to the particular case, DEA publishes a report (Domestic Drug Prices) providing estimates of average drug prices by year and region from which an estimate may be obtained.

(h) *Determining Offense Severity Relative to Simple Possession of Drugs.* In certain cases, the Commission must determine whether the offense behavior should be considered as "simple possession" of a controlled substance or "possession with intent to distribute." In making this determination, the Commission shall examine a variety of factors (if available). These factors are shown below. The presence of any of the following factors may be considered as a presumption of possession with intent to distribute. However, this presumption may be rebutted if there are circumstances in the individual case which indicate that there was no intention to distribute.

(1) *Weight/amount/purity of the substance:* Possession of the following amounts of controlled substances are presumed to indicate possession with intent to distribute:

Heroin 1 gm. at 100% purity, or equivalent amount; or more
Cocaine 5 gms. at 100% purity, or equivalent amount; or more
Marijuana 10 lbs. or more
Hashish 3 lbs. or more
Hash Oil .3 lbs. or more
Drugs (other than above) 1,000 doses or more.

(2) *Other Factors:* The presence of any of the following factors may be considered indicative of intent to distribute: (A) the substance has been separated into multiple, individual packets; (B) the offender is a non-user of the substance in question; (C) the presence of instruments used in preparing

a substance for sale (*e.g.*, a scale) or a large amount of cash at the scene of the arrest; or (D) the offender was seized with the substance while traveling or soon after traveling.]]

CHAPTER TEN - OFFENSES INVOLVING NATIONAL DEFENSE

SUBCHAPTER A - TREASON AND RELATED OFFENSES

1001 Treason

Category Eight.

1002 Rebellion or Insurrection

Category Seven.

SUBCHAPTER B - SABOTAGE AND RELATED OFFENSES

1011 Sabotage

Category Eight.

1012 Enticing Desertion

- (a) In time of war or during a national defense emergency, grade as Category Four;**
- (b) Otherwise, grade as Category Three.**

1013 Harboring or Aiding a Deserter

Category One.

SUBCHAPTER C - ESPIONAGE AND RELATED OFFENSES

1021 Espionage

Category Eight.

SUBCHAPTER D - SELECTIVE SERVICE OFFENSES

1031 Failure to Register, Report for Examination or Induction

- (a) If committed during time of war or during a national defense emergency, grade as Category Four;**
- (b) If committed when draftees are being inducted into the armed services, grade as Category Three;**
- (c) Otherwise, grade as Category One.**

SUBCHAPTER E - OTHER NATIONAL DEFENSE OFFENSES

1041 Offenses Involving Nuclear Energy

Unauthorized production, possession, or transfer of nuclear weapons or special nuclear material or receipt of or tampering with restricted data on nuclear weapons or special nuclear material, grade as Category Eight.

*Terms marked by an asterisk are defined in Chapter Thirteen.

1042 Violations of Export Administration Act (Re: 50 U.S.C. 2410)

Grade conduct involving "national security controls" or "nuclear nonproliferation controls" as Category Six. *[[Notes and Procedures. Conduct not covered by the above described parameters is to be graded under Chapter Twelve.]]*

1043 Violations of the Arms Control Act (Re: 22 U.S.C. 2778)

- (a) Grade conduct involving export of sophisticated weaponry (*e.g.*, aircraft, helicopters, armed vehicles, or "high technology" items) as Category Six.
- (b) Grade conduct involving export of other weapons (*e.g.*, rifles, handguns, machine guns, or hand grenades) as if a weapons/explosive distribution offense under Offenses Involving Explosives and Weapons (Chapter Eight).

**CHAPTER ELEVEN - OFFENSES INVOLVING ORGANIZED CRIME ACTIVITY,
GAMBLING, OBSCENITY, SEXUAL EXPLOITATION OF CHILDREN, PROSTITUTION,
NON-GOVERNMENTAL CORRUPTION, CURRENCY TRANSACTIONS, AND THE
ENVIRONMENT**

SUBCHAPTER A - ORGANIZED CRIME OFFENSES

1101 Racketeer Influence and Corrupt Organizations (re: 18 U.S.C. 1961-63)

Grade according to the underlying offense attempted, but not less than Category Five.

1102 Interstate or Foreign Travel or Transportation in Aid of Racketeering Enterprise (re: 18 U.S.C. 1952)

Grade according to the underlying offense attempted, but not less than Category Three.

SUBCHAPTER B - GAMBLING OFFENSES

1111 Gambling Law Violations - Operating or Employment in an Unlawful Business (re: 18 U.S.C. 1955)

- (a) If large scale operation [*e.g.*, Sports books (estimated daily gross more than \$15,000); Horse books (estimated daily gross more than \$4,000); Numbers bankers (estimated daily gross more than \$2,000); Dice or card games (estimated daily "house cut" more than \$1,000); video gambling (eight or more machines)]; grade as Category Four;
- (b) If medium scale operation [*e.g.*, Sports books (estimated daily gross \$5,000 - \$15,000); Horse books (estimated daily gross \$1,500 - \$4,000); Numbers bankers (estimated daily gross \$750 - \$2,000); Dice or card games (estimated daily "house cut" \$400 - \$1,000); video gambling (four-seven machines)]; grade as Category Three;
- (c) If small scale operation [*e.g.*, Sports books (estimated daily gross less than \$5,000); Horse books (estimated daily gross less than \$1,500); Numbers bankers (estimated daily gross less than \$750); Dice or card games (estimated daily "house cut" less than \$400); video gambling (three or fewer machines)]; grade as Category Two;
- (d) Exception: Where it is established that the offender had no proprietary interest or managerial role, grade as Category One.

*Terms marked by an asterisk are defined in Chapter Thirteen.

**1112 Interstate Transportation of Wagering Paraphernalia (re: 18 U.S.C. 1953)
Grade as if "operating a gambling business".**

**1113 Wire Transmission of Wagering Information (re: 18 U.S.C. 1084)
Grade as if "operating a gambling business".**

**1114 Operating or Owning a Gambling Ship (re: 18 U.S.C. 1082)
Category Three.**

**1115 Importing or Transporting Lottery Tickets; Mailing Lottery Tickets or Related Matter
(re: 18 U.S.C. 1301, 1302)
(a) Grade as if "operating a gambling business";
(b) Exception: If non-commercial, grade as Category One.**

SUBCHAPTER C - OBSCENITY

**1121 Mailing, Importing, or Transporting Obscene Matter
(a) If for commercial purposes, grade as Category Three;
(b) Otherwise, Category One.**

**1122 Broadcasting Obscene Language
Category One.**

SUBCHAPTER D - SEXUAL EXPLOITATION OF CHILDREN

**1131 Sexual Exploitation of Children* (re: 18 U.S.C. 2251, 2252)
(a) Category Six;
(b) Exception: Where the Commission finds the offender had only a peripheral role (*e.g.*, a retailer receiving such material for resale but with no involvement in the production or wholesale distribution of such material), grade as Category Five.**

SUBCHAPTER E - PROSTITUTION AND WHITE SLAVE TRAFFIC

**1141 Interstate Transportation for Commercial Purposes
(a) If physical coercion, or involving person(s) of age less than 18, grade as Category Six;
(b) Otherwise, grade as Category Four.
[[*Notes and Procedures*. The term "for commercial purposes" refers to procuring a sexual partner for another for profit.]]**

**1142 Prostitution
Category One.**

SUBCHAPTER F - NON-GOVERNMENTAL CORRUPTION

1151 Demand or Acceptance of Unlawful Gratuity Not Involving Federal, State, or Local Government Officials

*Terms marked by an asterisk are defined in Chapter Thirteen.

Grade as if a fraud offense according to (1) the amount of the bribe offered or demanded, or (2) the financial loss to the victim, whichever is higher.

1152 Sports Bribery

If the conduct involves bribery in a sporting contest, grade as if a theft offense according to the amount of the bribe, but not less than Category Three.

SUBCHAPTER G - CURRENCY OFFENSES

1161 Reports on Monetary Instrument Transactions

- (a) If extremely large (*e.g.*, the estimated gross amount of currency involved is more than \$5,000,000), grade as Category Seven.
- (b) If very large scale (*e.g.*, the estimated gross amount of currency involved is more than \$1,000,000 but not more than \$5,000,000), grade as Category Six.
- (c) If large scale (*e.g.*, the estimated gross amount of currency involved is more than \$200,000 but not more than \$1,000,000), grade as Category Five;
- (d) If medium scale (*e.g.*, the estimated gross amount of currency involved is at least \$40,000 but not more than \$200,000), grade as Category Four.
- (e) If small scale (*e.g.*, the estimated gross amount of currency involved is less than \$40,000), grade as Category Three.

SUBCHAPTER H - ENVIRONMENTAL OFFENSES

1171 Knowing Endangerment Resulting From Unlawful Treatment, Transportation, Storage, or Disposal of Hazardous Waste [Re: 42 U.S.C. 6928(e)]

- (a) If death results, grade as Category Seven;
- (b) If serious bodily injury results, grade as Category Six;
- (c) Otherwise, grade as Category Five.
- (d) Note: Knowing Endangerment requires a finding that the offender knowingly transported, treated, stored, or disposed of any hazardous waste and knew that he thereby placed another person in imminent danger of death or serious bodily injury.

1172 Knowing Disposal and/or Storage and Treatment of Hazardous Waste Without a Permit; Transportation of Hazardous Waste to an Unpermitted Facility [Re: 42 U.S.C. 6928(d)(1-2)]

- (a) If death results, grade as Category Six;
- (b) If (1) serious bodily injury results; or (2) a substantial potential for death or serious bodily injury in the future results; or (3) a substantial disruption to the environment results (*e.g.*, estimated cleanup cost exceeds \$200,000, or a community is evacuated for more than 72 hours), grade as Category Five;
- (c) If (1) bodily injury results, or (2) a significant disruption to the environment results (*e.g.*, estimated cleanup costs of \$40,000-\$200,000, or a community is evacuated for 72 hours or less), grade as Category Four;
- (d) Otherwise, grade as Category Three;

*Terms marked by an asterisk are defined in Chapter Thirteen.

- (e) **Exception:** Where the offender is a non-managerial employee (*i.e.*, a truck driver or loading dock worker) acting under the orders of another person, grade as two categories below the underlying offense, but not less than Category One.

[[Notes and Procedures. Grade environmental offenses not listed above under Chapter 12.]]

CHAPTER TWELVE - MISCELLANEOUS OFFENSES

If an offense behavior is not listed, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed in Chapters One - Eleven. If, and only if, an offense behavior cannot be graded by reference to Chapters One - Eleven, the following formula may be used as a guide.

Maximum Sentence Authorized by Statute (Not necessarily the sentence imposed)	Grading (category)
< 2 years	1
2 - 3 years	2
4 - 5 years	3
6 - 10 years	4
11 - 20 years	5
21 - 29 years	6
30 years - life	7

[[Notes and Procedures: The offenses of (1) driving while impaired/intoxicated and (2) unlawful possession of a weapon (other than a firearm or explosive) are generally misdemeanor offenses and thus are graded as Category One offenses under this chapter.]]

CHAPTER THIRTEEN - GENERAL NOTES AND DEFINITIONS

SUBCHAPTER A - GENERAL NOTES

1. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
2. If an offense behavior involved multiple separate offenses, the severity level may be increased. **Exception:** in cases graded as Category Seven, multiple separate offenses are to be taken into account by consideration of a decision above the guidelines rather than by increasing the severity level.

(a) In certain instances, the guidelines specify how multiple offenses are to be rated. In offenses rated by monetary loss (*e.g.*, theft and related offenses, counterfeiting, tax evasion) or drug offenses, the total amount of the property or drugs involved is used as the basis for the offense severity rating. In instances not specifically covered in the guidelines, the decision-makers must exercise discretion as to whether or not the multiple offense behavior is sufficiently aggravating to justify increasing the severity rating. The following chart is intended to provide

guidance in assessing whether the severity of multiple offenses is sufficient to raise the offense severity level; it is not intended as a mechanical rule.

MULTIPLE SEPARATE OFFENSES

Severity	Points	Severity	Points
Category One	= 1/9	Category Five	= 9
Category Two	= 1/3	Category Six	= 27
Category Three	= 1	Category Seven	= 45
Category Four	= 3		

**Examples: 3 Category Five Offenses [3x(9)=27] = Category Six
5 Category Five Offenses [5x(9)=45] = Category Seven
2 Category Six Offenses [2x(27)=54] = Category Seven**

(b) The term "multiple separate offenses" generally refers to offenses committed at different times. However, there are certain circumstances in which offenses committed at the same time are properly considered multiple separate offenses for the purpose of establishing the offense severity rating. These include (1) unrelated offenses, and (2) offenses involving the unlawful possession of weapons during commission of another offense.

Notes and Procedures

Examples:

(1) An offender commits a robbery (Category Five) in which he steals \$80,000 (Category Four). Because the offenses occurred at the same time and are related, grade in the highest applicable category (Category Five) and not as multiple separate offenses.

(2) An offender commits a robbery (Category Five) in which shots are fired to scare the bank employees (Category Six). Because the offenses occurred at the same time and are related, grade in the highest applicable category (Category Six) and not as multiple separate offenses.

(3) An offender when arrested for smuggling aliens is found also in possession of \$8,000 worth of stolen goods. Even though the offenses were discovered at the same time, they are unrelated; therefore consideration under the multiple separate offenses procedure is appropriate.

(4) An offender commits two robberies and each time he possesses a sawed-off shotgun. Grade under the multiple offense procedure as 3 Category Five offenses (3 x 9 = 27 points) = Category Six. Note that possession of a sawed-off shotgun is treated as one offense for purposes of calculating the offense severity even though the weapon was used to rob two separate banks.

(5) An offender robs four banks and each time he possesses a sawed-off shotgun. The offense severity is based upon four robberies (4 x 9 points = 36 points) and one offense of possessing a sawed-off shotgun (9 points) for a total offense rating of Category Seven (45 points). Note that

possession of a sawed-off shotgun is treated as one offense for purposes of calculating the offense severity even though the weapon was used to rob four separate banks.]]

(c) For offenses graded according to monetary value (e.g., theft) and drug offenses, the severity rating is based on the amount or quantity involved and not on the number of separate instances.

Notes and Procedures

Examples:

(6) An offender forges ten \$1,000 checks for a total of \$10,000, and is then arrested. Grade as a \$10,000 forgery, not ten separate offenses.

(7) An offender steals for resale four automobiles worth a total of \$18,000, and is later arrested. Grade as an \$18,000 theft, not four separate offenses.

(8) An offender breaks into a store, steals \$18,000 worth of merchandise and does \$4,000 damage to the store. Grade as a Category Three offense according to the combined property loss (\$18,000 + \$4,000 = \$22,000).

(9) An offender sells 10 grams of pure heroin on four separate occasions, and is later arrested. Grade as a sale of 40 grams of pure heroin and not four separate offenses.

(10) The offender sells 14,000 doses of PCP and 1,000 lbs. of marijuana. He is then arrested. The amount of the drugs is added together based upon a proportion of the amount of drugs involved in the offense compared to the amount of the drugs needed to raise the offense to the next higher category. In this example, 14,000 doses of PCP is 70% of the amount needed to rate the offense as Category Five and 1,000 lbs. of marijuana is 50% of the amount needed to rate the offense as Category Five. The PCP and marijuana added together equal over 100% of the amount of drugs necessary for a Category Five rating, which is the correct severity rating for this offense.

(11) An offender (with a nonperipheral role) sells 10,000 lbs. of hashish (Category Six) and 250,000 doses of amphetamines (Category Six). He is then arrested. The applicable offense rating is Category Six which is the highest severity category for any combined amount of the above drugs.]]

(d) Intervening Arrests. Where offenses ordinarily graded by aggregation of value/quantity (e.g., property or drug offenses) are separated by an intervening arrest, grade (1) by aggregation of value/quantity or (2) as multiple separate offenses, whichever results in a higher severity category.

Notes and Procedures

Examples:

(12) An offender commits 3 Category One larcenies (each \$300). Each time the offender is arrested during the act. Ordinarily, such behavior would be graded as Category One (theft of \$900). But since

the offenses were each separated by intervening arrests, application of the multiple separate offense procedure ($3 \times 1/9 = 1/3$ points) results in a higher severity category. Therefore, grade as Category Two.

(13) An offender is arrested on three separate occasions unlawfully transporting aliens. Since the offenses were separated by intervening arrests, grade as Category Four ($3 \times 1 = 3$ points).]]

(e) Income Tax Violations Related to Other Criminal Activity. Where the circumstances indicate that the offender's income tax violations are related to failure to report income from other criminal activity (*e.g.*, failure to report income from a fraud offense) grade as tax evasion or according to the underlying criminal activity established, whichever is higher. Do not grade as multiple separate offenses.

3. **In cases where multiple sentences have been imposed (whether consecutive or concurrent, and whether aggregated or not) an offense severity rating shall be established to reflect the overall severity of the underlying criminal behavior. This rating shall apply whether or not any of the component sentences has expired.**
4. **The prisoner is to be held accountable for his own actions and actions done in concert with others; however, the prisoner is not to be held accountable for activities committed by associates over which the prisoner has no control and could not have been reasonably expected to foresee. However, if the prisoner has been convicted of a conspiracy, he must be held accountable for the criminal activities committed by his co-conspirators, provided such activities were committed in furtherance of the conspiracy and subsequent to the date the prisoner joined the conspiracy, except in the case of an independent, small-scale operator whose role in the conspiracy was neither established nor significant. An offender has an "established" role in a conspiracy if, for example, he takes orders to perform a function that assists others to further the objectives of the conspiracy, even if his activities did not significantly contribute to those objectives. For such offenders, a "peripheral role" reduction may be considered.**
5. **The following are examples of circumstances that may be considered as aggravating factors: extreme cruelty or brutality to a victim; the degree of permanence or likely permanence of serious bodily injury resulting from the offender's conduct; an offender's conduct while attempting to evade arrest that causes circumstances creating a significant risk of harm to other persons (*e.g.*, causing a high speed chase or provoking the legitimate firing of a weapon by law enforcement officers).**
6. **The phrase "may be considered an aggravating/mitigating factor" is used in this index to provide guidance concerning certain circumstances which may warrant a decision above or below the guidelines. This does not restrict consideration of above or below guidelines decisions only to these circumstances, nor does it mean that a decision above or below the guidelines is mandated in every such case.**

SUBCHAPTER B - DEFINITIONS

1. **"Accessory after the fact"** refers to the conduct of one who, knowing an offense has been committed, assists the offender to avoid apprehension, trial, or punishment (*e.g.*, by assisting in disposal of the proceeds of an offense). **Note:** Where the conduct consists of concealing an offense by making false statements not under oath, grade as "misprision of felony". Where the conduct consists of harboring a fugitive, grade as "harboring a fugitive".
2. **"Assassination kit"** refers to a disguised weapon designed to kill without attracting attention. Unlike other weapons such as sawed-off shotguns which can be used to intimidate, assassination kits are intended to be undetectable in order to make the victim and bystanders unaware of the threat. A typical assassination kit is usually, but not always, a firearm with a silencer concealed in a briefcase or similar disguise and fired without showing the weapon.
3. **"Bodily injury"** refers to injury of a type normally requiring medical attention [*e.g.*, broken bone(s), laceration(s) requiring stitches, severe bruises].
4. **"Carnal knowledge"** refers to sexual intercourse with a female who is less than 16 years of age and is not the wife of the offender.
5. **"Extortionate extension of credit"** refers to any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.
6. **"Failure to appear"** refers to the violation of court imposed conditions of release pending trial, appeal, or imposition or execution of sentence by failure to appear before the court or to surrender for service of sentence. *[[Notes and Procedures. "Failure to appear" is not a strict liability offense. To consider a "failure to appear" in the absence of a conviction for such offense, the Commission must find upon the information presented that such failure was willful.]]*
7. **"Forcible felony"** includes, but shall not be limited to, kidnaping, rape or sodomy, aircraft piracy or interference with a flight crew, arson or property destruction offenses, escape, robbery, extortion, or criminal entry offenses, and attempts to commit such offenses.
8. **"Involuntary manslaughter"** refers to the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death. *[[Notes and Procedures. A finding of involuntary manslaughter should only be made where the evidence shows recklessness or gross negligence.]]*

Example 1: An offender, driving while intoxicated and at a high rate of speed, violates the no-passing zone and collides with a car in the opposite lane, killing the other driver.

Example 2: An offender, shooting a high-powered rifle, fires at targets close to a park he knows is well populated and kills a picnicker.

Examples 1 & 2 represent cases which would warrant a finding of recklessness or gross negligence.

Example 3: An offender, driving without a valid license, and traveling 35 m.p.h. in a 25 m.p.h. zone, strikes and kills a jogger who violates the no-walk sign at an intersection.

In *Example 3*, these circumstances probably establish only ordinary negligence and do not warrant a finding of involuntary manslaughter.]]

9. **"Misprision of felony" refers to the conduct of one who, having knowledge of the actual commission of a felony, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority. The "concealment" described above requires an act of commission (e.g., making a false statement to a law enforcement officer).**
10. **"Murder" refers to the unlawful killing of a human being with malice aforethought. "With malice aforethought" generally refers to a finding that the offender formed an intent to kill or do serious bodily harm to the victim without just cause or provocation.**
11. **"Opiate" includes heroin, morphine, opiate derivatives, and synthetic opiate substitutes.**
12. **"Other illicit drug offenses" include, but are not limited to, offenses involving the following: amphetamines, hallucinogens, barbiturates, methamphetamine, and phencyclidine (PCP).**
13. **"Other medium of exchange" includes, but is not limited to, postage stamps, governmental money orders, or governmental coupons redeemable for cash or goods. [[Notes and Procedures. The term "other medium of exchange" means a bearer instrument, and does not include non-bearer instruments such as checks or credit cards.]]**
14. **"Peripheral role" in drug offenses refers to conduct such as that of a person hired as a deckhand on a marijuana boat, a person hired to help offload marijuana, a person with no special skills hired as a simple courier of drugs on a commercial airline flight, or a person hired as a chauffeur in a drug transaction. This definition does not include persons with decision-making or supervisory authority, persons with relevant special skills (e.g., a boat captain, chemist, or airplane pilot), or persons who finance such operations. Individuals who transport unusually large amounts of drugs (e.g., 50 kilos of cocaine or more) or who otherwise appear to have a high degree of trust, professionalism, or control will be considered to be "transporters" and not "simple couriers". [[Notes and Procedures. (a) Do not presume that an offender's role is peripheral. If an affirmative finding can be made, using the preponderance of the evidence standard, that the offender had a peripheral role in the offense, then the appropriate lower severity rating shall be selected. If no affirmative finding of a peripheral role can be made, then the higher severity rating shall be selected. In determining whether the offender had a peripheral role, the Commission may consider, among other factors, whether the evidence on the offender's role is only his bare assertion of peripheral involvement or whether the offender provided law enforcement authorities with timely details on such matters as the identity of his employer, the source of the drugs, and delivery or operating instructions.**

Example 1: A person is arrested at customs with a large quantity of pure cocaine. The person claims to be a courier but does not cooperate with the arresting agency. In the absence of other information pertaining to the offender's role, no affirmative finding of a peripheral role would appear warranted.

Example 2: A person is arrested at a customs check with a large quantity of pure cocaine. He promptly provides DEA agents with his delivery instructions, although no "controlled" delivery is then attempted. It is established that he has been working as a day laborer, and has been living at the poverty level. In such a case, the Commission may find that a preponderance of the evidence indicates a peripheral role.

(b) The following are some examples of offenders normally graded as having a peripheral role. This is not intended as an exhaustive or definitive listing: (1) a crewman on a marijuana boat; (2) a person hired to operate a small launch to offload marijuana; (3) a person hired to smuggle cocaine aboard a regularly scheduled commercial flight; (4) a person hired as a lookout, chauffeur, or bodyguard.

(c) The following are some examples of offenders who do not have a peripheral role. This is not intended as an exhaustive or definitive listing: (1) an individual who is hired to go to South America and negotiate the purchase of more than 1 kilogram of pure cocaine and arrange its delivery into the United States; (2) an individual who negotiates the sale of more than 1 kilogram of pure cocaine on behalf of the owner of the drug; (3) the financier of a PCP lab producing more than 200,000 doses of PCP; (4) the captain of a freighter hired to import 20,000 pounds or more of marihuana; (5) the captain/owner of a fishing boat hired to import more than 1 kilogram of pure cocaine; (6) the pilot of a private airplane hired to import more than 1 kilogram of pure cocaine; (7) a chemist hired to operate a PCP laboratory.]]

15. **"Protected person" refers to a person listed in 18 U.S.C. 351 (relating to Members of Congress), 1116 (relating to foreign officials, official guests, and internationally protected persons), or 1751 (relating to presidential assassination and officials in line of succession).**
16. **"Serious bodily injury" refers to injury creating a substantial risk of death, major disability or loss of a bodily function, or disfigurement.**
17. **"Serious bodily injury is the result intended" refers to a limited category of offense behaviors where the circumstances indicate that the bodily injury intended was serious (e.g., throwing acid in a person's face, or firing a weapon at a person) but where it is not established that murder was the intended object. Where the circumstances establish that murder was the intended object, grade as an "attempt to murder".**
18. **"Sexual exploitation of children" refers to employing, using, inducing, enticing, or coercing a person less than 18 years of age to engage in any sexually explicit conduct for the purpose of producing a visual or print medium depicting such conduct with knowledge or reason to know that such visual or print medium will be distributed for sale, transported in interstate or foreign commerce, or mailed. It also includes knowingly transporting, shipping, or receiving such visual or print medium for the purposes of distribution for sale, or knowingly distributing for sale such visual or print medium.**

19. **"Trafficking in stolen property" refers to receiving stolen property with intent to sell.**
20. **The "value of the property" is determined by estimating the actual or potential replacement cost to the victim. The "actual replacement cost" is the value or money permanently lost to the victim through theft/forgery/fraud. The "potential replacement cost" refers to the total loss the offender specifically intended to cause by theft/forgery/fraud, or the total amount of the victim's money or property unlawfully exposed to risk of loss through theft/forgery/fraud notwithstanding subsequent recovery by the victim. The highest of these three values is the value to be used in rating the offense on the guidelines. [[Notes and Procedures. The term "value of the property" refers only to primary losses; not secondary losses. Example (1): An offender defrauds a victim of \$50,000. The value of the property is \$50,000; not any interest or dividends that the victim would have earned had the money been put into a legitimate investment. Example (2): An offender steals tools worth \$16,000; the victim sustains an additional \$500 in lost wages during the time spent testifying at trial. The value of the property stolen "actual replacement cost," *i.e.*, the value of the tools.]]**

A theft/forgery/fraud offense is complete when money or property is unlawfully obtained, and it does not matter that the money or property may later be restored to the victim. Thus, in determining "potential replacement cost" use the amount the offender obtained as a direct result of theft/forgery/fraud. Example (3): A bank president fraudulently represents that certificates of deposit are FDIC-insured. Even though investors are ultimately repaid (through withdrawals and FDIC action after the bank is seized), the "potential replacement cost" is the total amount invested and thereby exposed to a risk of loss the investors never knowingly accepted. (See Chapter Three, Subchapter C, paragraph 333 for similar treatment of fraudulent loan applications.) Moreover, a purchase induced through fraud is measured by the purchase price, not the difference in value between the purchase price and the goods delivered. Example (4): An offender fraudulently sells real estate or delivers military hardware not meeting government contract specifications. The "value of the property" is the total purchase price of the real estate/military hardware.

When "potential replacement cost" is measured by the intended loss in an uncompleted theft/forgery/fraud scheme, the offender's specific intent maybe inferred from the circumstances. Example (5): An offender places an order with a company for \$100,000 worth of goods, promising to pay by wire transfer of funds. A confederate then calls the company, posing as a bank officer, and says that the wire transfer has been received and credited to the company's account. The company never actually ships the goods. The "potential replacement cost" is \$100,000 because that was the intended loss, even though there is no "actual replacement cost." However, do not speculate as to how far a scheme might have been carried. Example (6): An offender forges \$50,000, prints another \$150,000 one-sided only and has sufficient paper stocks to print an additional \$5,000,000 in the same denominations already printed. The maximum amount of loss specifically intended is \$200,000. Likewise in credit card theft cases, use "actual replacement cost" only, and do not speculate as to probable intended use.

Special Cases: In check-kiting offenses, do not use the total amount of worthless checks deposited over the life of the scheme. The "potential replacement cost" is the face value of the worthless checks on deposit when the scheme is terminated. If a line of credit in a specified amount is fraudulently obtained, treat as if a fraudulent loan application and use the specified amount.

21. "Voluntary manslaughter" refers to the unlawful killing of a human being without malice upon a sudden quarrel or heat of passion.

SALIENT FACTOR SCORE (SFS 98)

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 30 DAYS (ADULT/JUVENILE)...

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

Item C. AGE AT CURRENT OFFENSE/PRIOR COMMITMENTS

26 years or more	Three or fewer prior commitments = 3
	Four prior commitments = 2
	Five or more commitments = 1

22-25 years	Three or fewer prior commitments = 2
	Four prior commitments = 1
	Five or more commitments = 0

20-21 years	Three or fewer prior commitments = 1
	Four prior commitments = 0

19 years or less	Any number of prior commitments = 0
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Item D. RECENT COMMITMENT FREE PERIOD (THREE YEARS).....

No prior commitment of more than 30 days (adult or juvenile) or released to the community from last such commitment at least 3 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 committed as a probation, parole, confinement, or escape status violator this time =1; Otherwise = 0

Item F. OLDER OFFENDERS.....

If the offender was 41 years of age or more at the commencement of the current offense (and the total score from Items A - E above is 9 or less) = 1; Otherwise = 0

TOTAL SCORE.....

SALIENT FACTOR SCORING MANUAL. The following instructions serve as a guide in computing the salient factor score.

ITEM A. PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE) [[None = 3; One = 2; Two or three = 1; Four or more = 0]]

A.1 In General.

(a) Count all convictions/adjudications (adult or juvenile) for criminal offenses (other than the current offense) that were committed prior to the present period of confinement, except as specifically noted.

(b) Convictions for prior offenses that are not separated from each other by an intervening arrest (e.g., two burglaries followed by an arrest for both offenses) are counted as a single prior conviction. Prior offenses that are separated by an intervening arrest are counted separately (e.g., three convictions for larceny and a conviction for an additional larceny committed after the arrest for the first three larcenies would be counted as two prior convictions, even if all the four offenses were adjudicated together).

(c) Do not count the current federal offense or state/local convictions resulting from the current federal offense (i.e., offenses that are considered in assessing the severity of the current offense). Exception: Where the first and last overt acts of the current offense behavior are separated by an intervening federal conviction (e.g., after conviction for the current federal offense, the offender commits another federal offense while on appeal bond), both offenses are counted in assessing offense severity; the earlier offense is also counted as a prior conviction in the salient factor score.

A.2 Convictions

(a) Felony convictions are counted. Non-felony convictions are counted, except as listed under (b) and (c). Convictions for driving while intoxicated/while under the influence/while impaired, or leaving the scene of an accident involving injury or an attended vehicle are counted. For the purpose of scoring Item A of the salient factor score, use the offense of conviction.

(b) Convictions for the following offenses are counted only if the sentence resulting was a commitment of more than thirty days (as defined in item B) or probation of one year or more (as defined in Item E), or if the record indicates that the offense was classified by the jurisdiction as a felony (regardless of sentence):

- | | |
|---|--|
| 1. Contempt of court; | or promotion of or employment in an |
| 2. Disorderly conduct/disorderly person/breach of the peace disturbing the peace/uttering loud and abusive language; | unlawful gambling business is not included herein]; |
| 3. Driving without a license/with a revoked or suspended license/with a false license; | 7. Loitering; |
| 4. False information to a police officer; | 8. Non-support; |
| | 9. Prostitution; |
| | 10. Resisting arrest/evade and elude; |
| | 11. Trespassing; |
| | 12. Reckless driving; |

5. Fish and game violations;
6. Gambling (*e.g.*, betting on dice, sports, *cards*) [Note: Operation

13. Hindering/failure to obey a police
14. Leaving the scene of an accident (except as listed under (a)).

(c) Convictions for certain minor offenses are not counted, regardless of sentence. These include:

1. Hitchhiking;
2. Local regulatory violations;
3. Public intoxication/possession of alcohol by a minor/possession of alcohol in an open container;
4. Traffic violations (except as specifically listed);
5. Vagrancy/vagabond and rogue;
6. Civil contempt.

A.3 *Juvenile Conduct.* Count juvenile convictions/adjudications except as follows:

(a) Do not count any status offense (*e.g.*, runaway, truancy, habitual disobedience) unless the behavior included a criminal offense which would otherwise be counted;

(b) Do not count any criminal offense committed at age 15 or less, unless it resulted in a commitment of more than 30 days.

A.4 *Military Conduct.* Count military convictions by general or special court-martial (not summary court-martial or Article 15 disciplinary proceeding) for acts that are generally prohibited by civilian criminal law (*e.g.*, assault, theft). Do not count convictions for strictly military offenses. Note: This does not preclude consideration of serious or repeated military misconduct as a negative indicant of parole prognosis (*i.e.*, a possible reason for overriding the salient factor score in relation to this item).

A.5 *Diversion.* Conduct resulting in diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution, probation without plea, or a District of Columbia juvenile consent decree) is not to be counted in scoring this item. However, an instance of criminal behavior resulting in a judicial determination of guilt or an admission of guilt before a judicial body shall be counted as a conviction even if a conviction is not formally entered.

A.6 *Setting Aside of Convictions/Restoration of Civil Rights.* Setting aside or removal of juvenile convictions/adjudications is normally for civil purposes (to remove civil penalties and stigma). Such convictions/adjudications are to be counted for purposes of assessing parole prognosis. This also applies to adult convictions/adjudications which may be set aside by various methods (including pardon). However, convictions/adjudications that were set aside or pardoned on grounds of innocence are not to be counted.

A.7 *Convictions Reversed or Vacated on Grounds of Constitutional or Procedural Error.* Exclude any conviction reversed or vacated for constitutional or procedural grounds, unless the prisoner has been retried and reconvicted. It is the Commission's presumption that a conviction/adjudication is valid, except under the limited circumstances described in the first note below. If a prisoner challenges such conviction, he/she should be advised to petition for a reversal of such conviction in the court in which he/she was originally tried, and then to provide the Commission with evidence of such reversal.

Note: Occasionally the presentence report documents facts clearly indicating that a conviction was unconstitutional for deprivation of counsel [this occurs only when the conviction was for a felony, or for a lesser offense for which imprisonment was actually imposed; and the record is clear that the defendant (1) was indigent, and (2) was not provided counsel, and (3) did not waive counsel]. In such case, do not count the conviction. Similarly, do not count a conviction if: (1) the offender has petitioned the appropriate court to overturn a felony conviction that occurred prior to 1964, or a misdemeanor/petty offense that occurred prior to 1973 (and the offender claims he served a jail sentence for the non-felony conviction); (2) the offender asserts he was denied his right to counsel in the prior conviction; and (3) the offender provides evidence (*e.g.*, a letter from the court clerk) that the records of the prior conviction are unavailable.

Note: If a conviction found to be invalid is nonetheless supported by persuasive information that the offender committed the criminal act, this information may be considered as a negative indicant of parole prognosis (*i.e.*, a possible reason for overriding the salient factor score).

A.8 Ancient Prior Record. If both of the following conditions are met: (1) the offender's only countable convictions under Item A occurred at least ten years prior to the commencement of the current offense behavior (the date of the last countable conviction under Item A refers to the date of the conviction, itself, not the date of the offense leading to conviction), and (2) there is at least a ten year commitment free period in the community (including time on probation or parole) between the last release from a countable commitment (under Item B) and the commencement of the current offense behavior; then convictions/commitments prior to the above ten year period are not to be counted for purposes of Items A, B, or C. **Note:** This provision does not preclude consideration of earlier behavior (*e.g.*, repetition of particularly serious or assaultive conduct) as a negative indicant of parole prognosis (*i.e.*, a possible reason for overriding the salient factor score). Similarly, a substantial crime free period in the community, not amounting to ten years, may, in light of other factors, indicate that the offender belongs in a better risk category than the salient factor score indicates.

A.9 Foreign Convictions. Foreign convictions (for behavior that would be criminal in the United States) are counted.

A.10 Tribal Court Convictions. Tribal court convictions are counted under the same terms and conditions as any other conviction.

A.11 Forfeiture of Collateral. If the only known disposition is forfeiture of collateral, count as a conviction (if a conviction for such offense would otherwise be counted).

A.12 Conditional/Unconditional Discharge (New York State). In N.Y. State, the term "conditional discharge" refers to a conviction with a suspended sentence and unsupervised probation; the term "unconditional discharge" refers to a conviction with a suspended sentence. Thus, such N.Y. state dispositions for countable offenses are counted as convictions.

A.13 Adjudication Withheld (Florida). In Florida, the term "adjudication withheld" refers to a disposition in which a formal conviction is not entered at the time of sentencing, the purpose of which is to allow the defendant to retain his civil rights and not to be classified as a convicted felon. Since the disposition of "adjudication withheld" is characterized by an admission of guilt and/or

a finding of guilt before a judicial body, dispositions of "adjudication withheld" are to be counted as convictions for salient factor scoring purposes. However, it is not considered a conviction on which forfeiture of street time can be based.

A.14 Juvenile Consent Decree (District of Columbia). A juvenile consent decree in the District of Columbia is a diversionary disposition not requiring an admission or finding of guilt. Therefore, it is not to be used in scoring this item.

ITEM B. PRIOR COMMITMENTS OF MORE THAN THIRTY DAYS (ADULT OR JUVENILE)
[[None = 2; One or two = 1; Three or more = 0]]

B.1 Count all prior commitments of more than thirty days (adult or juvenile) resulting from a conviction/adjudication listed under Item A, except as noted below. Also count commitments of more than thirty days imposed upon revocation of probation or parole where the original probation or parole resulted from a conviction/adjudication counted under Item A.

B.2 Count only commitments that were imposed prior to the commission of the last overt act of the current offense behavior. Commitments imposed after the current offense are not counted for purposes of this item. Concurrent or consecutive sentences (whether imposed at the same time or at different times) that result in a continuous period of confinement count as a single commitment. However, a new court commitment of more than thirty days imposed for an escape/attempted escape or for criminal behavior committed while in confinement/escape status counts as a separate commitment.

B.3 Definitions

(a) This item only includes commitments that were actually imposed. Do not count a suspended sentence as a commitment. Do not count confinement pending trial or sentencing or for study and observation as a commitment unless the sentence is specifically to "time served." If a sentence imposed is subsequently reconsidered and reduced, do not count as a commitment if it is determined that the total time served, including jail time, was 30 days or less. Count a sentence to intermittent confinement (*e.g.*, weekends) totalling more than 30 days.

(b) This item includes confinement in adult or juvenile institutions, community corrections centers, and other residential treatment centers (*e.g.*, halfway houses and community treatment centers). It does not include foster home placement. Count confinement in a community corrections center (CCC) or other residential treatment center only when it is part of a committed sentence. Do not count confinement in a community corrections center or other residential treatment center when imposed as a condition of probation or parole. Do not count self commitment for drug or alcohol treatment.

(c) If a committed sentence of more than thirty days is imposed prior to the current offense but the offender avoids or delays service of the sentence (*e.g.*, by absconding, escaping, bail pending appeal), count as a prior commitment. **Note:** Where the subject unlawfully avoids service of a prior commitment by escaping or failing to appear for service of sentence, this commitment is also to be considered in Items D and E. **Example:** An offender is sentenced to a three-year prison term, released on appeal bond, and commits the current offense. Count as a previous commitment under

Item B, but not under Items D and E. To be considered under Items D and E, the avoidance of sentence must have been unlawful (*e.g.*, escape or failure to report for service of sentence). **Example:** An offender is sentenced to a three-year prison term, escapes, and commits the current offense. Count as a previous commitment under Items B, D, and E.

(d) District of Columbia Juvenile Commitment to Department of Human Services. In the District of Columbia, juvenile offenders may be committed to the Department of Human Services for placement ranging from a foster home to a secure juvenile facility. Such a commitment is counted only if it can be established that the juvenile was actually committed for more than 30 days to a secure juvenile institution or residential treatment center rather than a foster home.

ITEM C. AGE AT COMMENCEMENT OF THE CURRENT OFFENSE/PRIOR COMMITMENTS OF MORE THAN THIRTY DAYS (ADULT OR JUVENILE)

C.1 Score 3 if the subject was 26 years of age or more at the commencement of the current offense and has three or fewer prior commitments.

C.2 Score 2 if the subject was 26 years of age or more at the commencement of the current offense and has four prior commitments.

C.3 Score 1 if the subject was 26 years of age or more at the commencement of the current offense and has five or more prior commitments.

C.4 Score 2 if the subject was 22-25 years of age at the commencement of the current offense and has three or fewer prior commitments.

C.5 Score 1 if the subject was 22-25 years of age at the commencement of the current offense and has four prior commitments.

C.6 Score 0 if the subject was 22-25 years of age at the commencement of the current offense and has five or more prior commitments.

C.7 Score 1 if the subject was 20-21 years of age at the commencement of the current offense and has three or fewer prior commitments.

C.8 Score 0 if the subject was 20-21 years of age at the commencement of the current offense and has four prior commitments.

C.9 Score 0 if the subject was 19 years of age or less at the commencement of the current offense with any number of prior commitments.

C.10 Definitions

(a) Use the age at the commencement of the subject's current federal offense behavior, except as noted under special instructions for probation/ parole/confinement/escape status violators.

(b) Prior commitment is defined under Item B.

ITEM D. RECENT COMMITMENT FREE PERIOD (THREE YEARS)

D.1 *Score 1* if the subject has no prior commitments; or if the subject was released to the community from his/her last prior commitment at least three years prior to commencement of his/her current offense behavior.

D.2 *Score 0* if the subject's last release to the community from a prior commitment occurred less than three years prior to the current offense behavior; or if the subject was in confinement/escape status at the time of the current offense.

D.3 *Definitions*

(a) Prior commitment is defined under Item B.

(b) Confinement/escape status is defined under Item E.

(c) Release to the community means release from confinement status (*e.g.*, a person paroled through a CCC is released to the community when released from the CCC, not when placed in the CCC).

ITEM E. PROBATION/PAROLE/CONFINEMENT/ESCAPE STATUS VIOLATOR THIS TIME

E.1 *Score 1* if the subject was not on probation or parole, nor in confinement or escape status at the time of the current offense behavior; and was not committed as a probation, parole, confinement, or escape status violator this time.

E.2 *Score 0* if the subject was on probation or parole or in confinement or escape status at the time of the current offense behavior; or if the subject was committed as a probation, parole, confinement, or escape status violator this time.

E.3 *Definitions*

(a) The term probation/parole refers to a period of federal, state, or local probation or parole supervision. Occasionally, a court disposition such as "summary probation" or "unsupervised probation" will be encountered. If it is clear that this disposition involved no attempt at supervision, it will not be counted for purposes of this item. Note: Unsupervised probation/parole due to deportation is counted in scoring this item.

(b) The term "parole" includes parole, mandatory parole, supervised release, conditional release, or mandatory release supervision (*i.e.*, any form of supervised release).

(c) The term "confinement/escape status" includes institutional custody, work or study release, pass or furlough, community corrections center or other residential treatment center confinement (when such confinement is counted as a commitment under Item B), or escape from any of the above.

ITEM F. OLDER OFFENDERS

F.1 Score 1 if the offender was 41 years of age or more at the commencement of the current offense and the total score from Items A-E is 9 or less.

F.2 Score 0 if the offender was less than 41 years of age at the commencement of the current offense or if the total score from Items A-E is 10.

SPECIAL INSTRUCTIONS - PROBATION VIOLATOR THIS TIME

Item A Count the original conviction that led to the sentence of probation as a prior conviction. Do not count the probation revocation as a prior conviction.

Item B Count all prior commitments of more than thirty days which were imposed prior to the behavior resulting in the current probation revocation. If the subject is committed as a probation violator following a "split sentence" for which more than thirty days were served, count the confinement portion of the "split sentence" as a prior commitment. Note: The prisoner is still credited with the time served toward the current commitment.

Item C Use the age at commencement of the probation violation, not the original offense.

Item D Count backwards three years from the commencement of the probation violation.

Item E By definition, no point is credited for this item. Exception: A person placed on unsupervised probation (other than for deportation) would not lose credit for this item.

Item F Use the age at commencement of the probation violation, not the original offense.

SPECIAL INSTRUCTIONS - PAROLE OR SUPERVISED RELEASE VIOLATOR THIS TIME

Item A The conviction from which paroled or placed on supervised release counts as a prior conviction.

Item B The commitment from which paroled or released to supervised release (including a prison term ordered for a prior supervised release revocation), counts as a prior commitment.

Item C Use the age at commencement of the violation behavior (including new criminal behavior).

Item D Count backwards three years from the commencement of the violation behavior (including new criminal behavior).

Item E By definition, no point is credited for this item.

Item F Use the age at commencement of the violation behavior (including new criminal behavior).

SPECIAL INSTRUCTIONS - CONFINEMENT/ESCAPE STATUS VIOLATOR WITH NEW CRIMINAL BEHAVIOR IN THE COMMUNITY THIS TIME

Item A The conviction being served at the time of the confinement/escape status violation counts as a prior conviction.

Item B The commitment being served at the time of the confinement/escape status violation counts as a prior commitment.

Item C Use the age at commencement of the confinement/escape status violation.

Item D By definition, no point is credited for this item.

Item E By definition, no point is credited for this item.

Item F Use the age at commencement of the confinement/escape status violation.

Notes and Procedures

■ 2.20-01. *Purpose of the Guidelines*

A. *From the Parole Commission and Reorganization Act, Public Law 94-233, 18 United States Code §4206* Parole determination criteria

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

"(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law;" and
(2) that release would not jeopardize the public welfare;

Subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing; provided, that the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

B. From Joint Explanatory Statement of the Committee of Conference, The Parole Commission and Reorganization Act - Section by Section Analysis §4206 Parole determination criteria

This section provides the standards and criteria to be used by the Parole Commission in making parole release determinations for federal prisoners who are eligible for parole.

It is the intent of the Conferees that the Parole Commission make certain judgments pursuant to this section, and that the substance of those judgments is committed to the discretion of the Commission.

First, it is the intent of the Conferees that the Parole Commission reach a judgment on the institutional behavior of each prospective parolee. It is the view of the Conferees that understanding by the prisoner of the importance of his institutional behavior is crucial to the maintenance of safe and orderly prisons.

Second, it is the intent of the Conferees that the Parole Commission review and consider both the nature and circumstances of the offense and the history and characteristics of the prisoner. It is the view of the Conferees that these two items are most significant in making equitable release determinations and are a viable basis, when considered together, for making other judgments required by this section.

It is the intent of the Conferees that the Parole Commission, in making each parole determination, shall recognize and make a determination as to the relative severity of the prospective parolee's offense and that in so doing shall be cognizant of the public perception of and respect for the law. It is the view of the Conferees that the U. S. Parole Commission is jointed in purpose by the Courts, the Congress and the other Executive agencies in a continuing effort to instill respect for the law. The Parole Commission efforts in this regard are fundamental and shall be manifested by parole determinations which result in the release on parole of only those who meet the criteria of this Act.

Determinations of just punishment are part of the parole process, and these determinations cannot be easily made because they require an even-handed sense of justice. There is no body of competent empirical knowledge upon which parole decision-makers can rely, yet it is important for the parole process to achieve an aura of fairness by basing determinations of just punishment on comparable periods of incarceration for similar offenses committed under similar circumstances. The parole decision-makers must weigh the concepts of general and special deterrence, retribution and punishment, all of which are matters of judgment, and come up with determinations of what is meant by "would not depreciate the seriousness of his offense or promote disrespect for the law" that, to the extent possible, are not inconsistent with the findings in other parole decisions.

The phrase "release would not depreciate the seriousness of his offense or promote disrespect for the law" involves two separate criterion and there may be situations in which one criterion is met but the other remains unsatisfied. For example, if a public official was convicted of fraud which involved a violation of the public trust and was sentenced to three years imprisonment, his release on parole after one year might satisfy the "depreciate the seriousness" criterion but the Commission could justify denying release on the grounds that such release "would promote disrespect for the law."

The use of the phrase "release would not jeopardize the public welfare," is intended by the Conferees to recognize the incapacitative aspect of the use of imprisonment which has the effect of denying the opportunity for future criminality, at least for a time. It is the view of the Conferees that the Parole Commission must make judgments as to the probability that any offender would commit a new offense

based upon considerations which include comparisons of the offender with other offenders who have similar backgrounds. The use of predictive devices is at best an inexact science, and caution should be utilized. Such items as prior criminal records, employment history and stability of living patterns have demonstrated their usefulness in making determinations of probability over a substantial period of time. These are not written into the statute, however, as it is the intent of the Conferees to encourage the newly created Parole Commission to continue to refine both the criteria which are used and the means for obtaining the information used therein.

Further, this section provides that Parole Commission guidelines, shall provide a fundamental gauge by which parole determinations are made.

It is the intent of the Conferees that the guidelines serve as a national parole policy which seeks to achieve both equity between individual cases and a uniform measure of justice. The Parole Commission shall actively seek the counsel and comment of the corrections and criminal justice communications (sic) prior to promulgation of guidelines and shall be cognizant of past criticism of parole decision making.

Further, this section provides that when parole is denied, that the prisoner be given a written notice which states with particularity the reasons for such denial.

The phrase "shall be released" includes release at expiration as if on parole or without parole supervision as provided in section 4164 of Title 18, United States Code. The term "holidays" as used in this section refers to congressionally declared Federal holidays. This section also permits the Commission to grant or deny parole notwithstanding the guidelines only when the Commission has determined that there is good cause to do so, and then requires that the prisoner be provided "with particularity the reasons for the Commission's determination, including a summary of the information relied upon." For example, if a prisoner who has served the time required to be released on parole according to the guidelines is denied parole and this denial results in delaying his release beyond the time period recommended by the guidelines, he shall receive a specific explanation of the factors which caused the Commission to reach a determination outside the guidelines.

For the purposes of this section "good cause" means substantial reason and includes only those grounds put forward by the Commission in good faith and which are not arbitrary, irrational, unreasonable, irrelevant or capricious.

The definition of what constitutes good cause to go outside the established guidelines can not be a precise one, because it must be broad enough to cover many circumstances.

For example, in making a parole release determination above the guidelines, the Commission would consider factors which include whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy prior record, or was part of a large scale conspiracy or continuing criminal enterprise.

On the other hand, the Commission would consider factors such as a prisoner's adverse family or health situation in deciding to make a parole release determination below guidelines. By focusing on the justifications for exceptions to the guidelines, subsequent administrative review by the National Appeals Board will be facilitated and there will be more uniformity and greater precision in the grant or denial of parole.

If the decisions to go above or below parole guidelines are frequent, the Commission should reevaluate its guidelines.

■ 2.20-02. *Completion of the Guidelines.* The applicable guideline evaluation worksheet shall be completed at all initial, revocation, and rescission hearings. It will be referred to in the summary at all subsequent hearings. In each case, the examiner shall review the guidelines and, prior to making a recommendation, shall consider whether there is "good cause" for a decision outside the guidelines, or whether a decision within the guidelines is appropriate.

■ 2.20-03. *Calculating Time in Custody.* Time in custody means only time in actual physical custody. Time on probation does not count as time in custody. Nor does time on escape status count. Moreover, a sentence for contempt of court interrupts the running of the federal criminal sentence. Thus, any time spent as a result of a sentence of civil contempt is not counted in calculating time in custody.

A. Original Parole Consideration.

(1) Calculate the number of months in actual physical custody on the present federal sentence(s). Include jail time credit.

(2) Credit is given towards the guidelines for any time spent in confinement on any offense considered in assessing offense severity. For example, if a defendant is prosecuted by both federal and state governments for the same behavior, such as a federal offense of bank robbery and a state offense of assault arising out of that robbery, the behavior will be considered in assessing offense severity and the defendant will be credited towards the guidelines for the time in custody on the state charge.

(3) If the subject was received directly from state custody, where he was serving time on state charges only, count only the time since the federal sentence began. If a subject has been in state custody for a substantial period, this may be considered in determining whether a decision below the guidelines is warranted. However, it should not be counted as time in custody for purposes of guideline calculation unless the behavior is taken into account in assessing offense severity (*e.g.*, a prisoner serving a federal sentence for a bank robbery and a state sentence for an assault committed during that robbery).

B. Non-Parolable Federal Sentences. Credit is given towards the guidelines for any time to be served on a non-parolable federal sentence if the behavior to which the non-parolable sentence refers is considered in assessing offense severity. The Notice of Action would therefore state that the prisoner is continued to a date that will require a total service of [] months in combination with a consecutive sentence requiring [] months in custody. If the consecutive sentence is subsequently vacated or modified by the sentencing court, the Commission will reopen the case to reconstruct its original plan by setting a new release date.

C. Probation Revocation Cases. Credit any time spent in actual physical custody (federal or state) for any offense considered in assessing offense severity. If a prisoner is received as a probation violator from a split sentence, also credit the months spent in federal custody prior to being placed on probation.

D. Parole Violators (Reparole Consideration). In reparole guideline cases, count as time in custody any time spent in actual physical custody (whether state or federal) as a result of the actions leading to parole violation. [Example: A parolee is convicted of a state charge of forgery and spends 10 months in state

custody; he is in federal custody an additional 2 months at the time of his revocation hearing. Time in custody for reparable guideline purposes is $10 + 2 = 12$ months.]

■ 2.20-04. *Offense Severity Rating.*

A. In applying the guidelines, the offense severity rating shall reflect the overall circumstances of the present offense behavior. Select the offense rating appropriate to the actual offense behavior that occurred. The severity rating must be explained on the Notice of Action Worksheet (in the space provided) by a brief summary of the specific facts that justified the rating. 28 C.F.R. 2.19(c) provides: "The Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability."

B. Information in the file describing offense circumstances more severe than reflected by the offense of conviction (for example, information contained in a count of an indictment that was dismissed as a result of a plea agreement) may be relied upon to select an appropriately higher severity rating only if such information meets the standard indicated in 28 C.F.R. 2.19(c). The normal indicants of reliability are (a) the report is specific as to the behavior alleged to have taken place; (b) the allegation is corroborated by established facts; and (c) the source of the allegation appears credible. The prisoner is to be informed of the allegation at the hearing and given an opportunity to respond. An allegation that is vague, unsupported, or comes from an unreliable source should not be considered. Cases requiring further information or verification may be referred to the Commission's Office.

C. The Commission's consideration of aggravating offense circumstances in applying its guidelines has been approved in the following cases: *Zannino v. Arnold*, 531 F.2d 687 (3d Cir. 1976) [allegation that offense was a "large-scale conspiracy" committed in an "unusually sophisticated" manner]; *Brown v. Lundgren*, 528 F.2d 1050 (5th Cir. 1976) [circumstances not given in the opinion but involved pattern of on-going criminal behavior and multiple separate offenses]; *Grattan v. Sigler*, 525 F.2d 329 (9th Cir. 1975) [allegation that the prisoner was a "ringleader"]; *Foddrell v. Sigler*, 418 F.Supp. 324 (M.D. Pa. 1976) ["sophisticated operation involving large amounts of heroin"]; and *Biancone v. Norton*, 421 F.Supp. 1044 (D. Conn. 1976) [multiple separate offenses]; and in the cases cited below. Similarly, Commission's consideration of unadjudicated offenses has been approved in the following cases: *Billiteri v. United States Board of Parole*, 541 F.2d 938 (2d Cir. 1976) [offense rated as extortion based on information in the pre-sentence report; the Court specifically rejected the contention that the Government's acceptance of a plea restricted to the conspiracy charge was a bar to the Commission from considering the actual offense behavior]; *Bistram v. U.S. Parole Board*, 535 F.2d 329 (5th Cir. 1976) [Commission relied upon dismissed count of kidnapping notwithstanding bargained plea to bank robbery only]; *Lupo v. Norton*, 371 F.Supp. 156 (D. Conn. 1974) [prisoner convicted of conspiracy to transport stolen goods was alleged to have committed robbery to obtain same]; and *Manos v. U.S. Board of Parole*, 399 F.Supp. 1103 (M.D. Pa. 1975). [Prisoner pleaded guilty to two counts of filing false tax reports involving less than \$20,000 but Commission considered entire 22-count indictment charging a total defrauding of \$150,000]. These decisions have accorded to the Parole Commission the same scope of discretion as that exercised by the sentencing courts. As stated in *Billiteri*, supra, at 444: "If therefore, the sentencing judge is not limited to a consideration of only that criminal conduct of the defendant that is related to the offense for which he

was convicted, the Parole Board, which is concerned with all facets of a prisoner's character, make-up and behavior, is a fortiori, certainly entitled to be fully advised of the contents of the presentence report and to use it in giving an offense severity rating and for such other purposes as it finds necessary and proper. . ."

■ 2.20-05. *Decisions Outside the Guidelines*

A. *In General.* 18 U.S.C. 4206 provides that the Commission may render a decision outside the guidelines for good cause provided the prisoner is furnished a specific explanation for such action. It is in the Commission's discretion to render a decision outside the guidelines (whether above or below) provided the circumstances warrant and such decision is adequately explained. The reasons given in the Notice of Action for a decision above or below the guidelines must explain what specific facts were relied upon to distinguish that case from the "typical" cases for which the guidelines are set. If a decision outside the guidelines follows the recommendation of the sentencing judge, the prosecutor or another interested party, it is not sufficient to cite that recommendation as the reason for departure from the guidelines. Instead, the Notice of Action must state the reasoning and factual basis for the recommendation which was found to justify a decision outside the guidelines.

The following are examples of situations in which a decision outside the guidelines appropriately may be considered. This does not mean that these are the only situations in which a decision outside the guidelines may be considered. Nor does it mean that a decision outside the guidelines is mandated for every such case.

Each of the following examples sets forth the Commission's reason for its decision and the specific facts primarily relied upon in support of that reason. Avoid sweeping or ambiguous phrases as well as irrelevant facts. Be specific enough with the facts described so that a person not familiar with the case will know what you are talking about.

B. *Decisions Above the Guidelines*

[Examples 1-3: Aggravating Offense Factors]

1. *Aggravated nature of the offense behavior:*

. . .because of the aggravated nature of your offense behavior: victims were repeatedly beaten and threatened during the offense.

. . .because of the aggravated nature of your offense behavior: you were responsible for an offense of unusual magnitude - investors were defrauded of over twenty-five million dollars during a period of five years.

2. *Extremely vulnerable victim(s) [e.g., extremely young or aged, or mentally or physically handicapped].*

. . .because of the aggravated nature of your offense behavior which involved an extremely vulnerable victim: you committed the sexual assault of a 10 year old girl.

. . .because of the aggravated nature of your offense behavior: you distributed a controlled substance near an elementary school.

3. *Unusually extensive, organized criminal enterprise:*

. . .because of the aggravated nature of your offense behavior: you were a ringleader in an unusually extensive, sophisticated criminal enterprise over an eighteen month period which engaged in the fencing of furs and jewelry stolen in numerous burglaries, and involved an extensive network of contacts and sophisticated methods of concealing the origin of the stolen goods.

. . .because of the aggravated nature of your offense behavior: you played a leadership role in an unusually extensive, organized criminal enterprise - a cocaine importation and distribution operation which involved monthly multi-kilo shipments over a two year period and a multi-state distribution network with over twelve co-conspirators acting under your direction.

This provision is particularly applicable to offenders with a leadership role in an organized criminal conspiracy involving more than ten persons.

[Examples 4-7: Parole Prognosis]

4. *Poorer Parole Risk:*

. . .because you are a poorer parole risk than indicated by your salient factor score in that you have repeatedly failed to adjust to previous periods of parole supervision. [*Note: As prior revocation terms of more than 30 days are counted as prior commitments under Salient Factor Score Items B and C, a departure under this provision may be considered only when both of the following are present: (i) the subject has at least two prior revocations on the current sentence or consecutive/concurrent sentence(s); and (ii) the total number of prior commitments is more than nine. See 2.20-06(B).*]

. . .because you are a poorer parole risk than indicated by your salient factor score: you committed a state firearms act offense while on bond in your present criminal case.

. . .because you are a poorer parole risk than indicated by your salient factor score: [you have had an on-going involvement in loan-sharking and extortion activities for the past 10 years] [you have admitted to on-going involvements in drug trafficking for the past 10 years].

5. *More Serious Parole Risk (History of repetitive assaultive behavior):*

. . .because you are a more serious parole risk than indicated by your salient factor score due to your history of repetitive assaultive behavior: [give specifics, *e.g.*, your prior record shows a conviction for aggravated assault and a conviction for armed robbery. Your present offense behavior involved a bank robbery in which an overt threat of violence was made].

6. *More Serious Parole Risk (History of repetitive sophisticated criminal behavior):*

. . .because you are a more serious parole risk than indicated by your salient factor score due to your history of repetitive sophisticated criminal behavior: three out of five prior convictions involve sophisticated fraud similar to your current offense.

7. *More Serious Parole Risk (Unusually extensive and serious prior record):*

. . .because you are a more serious parole risk than indicated by your salient factor score due to your extensive and serious prior record [e.g., you have eight previous convictions for serious offenses (give specifics)].

[Example 8: Institutional Misconduct]

8. *Specified instance of institutional misconduct:*

. . .because you failed to maintain a good institutional record. You were found to have [been in an unauthorized area without permission] [possessed narcotic paraphernalia] by an institutional disciplinary committee on September 9, 1976. [NOTE: Consult Rescission Guidelines for appropriate penalty.]

[Examples 9-10: Other]

9. *Release would promote disrespect for the law:*

. . .because your release within the guidelines would promote disrespect for the law. In committing your offense, you gained a significant advantage from guarantees of financial security created by federal deposit insurance and government regulation of the S&L industry, and your offense has thereby resulted not only in dollar amount losses, but also in damage to public confidence that is not reflected in your offense severity rating.

10. *Refusal to Make Restitution/Return Property/Pay Fine*

. . .because you have refused to [make restitution] [return the property stolen] [pay an outstanding fine] although you have the ability to do so. [Note: where a decision above the guidelines is rendered, the Notice of Action may advise the prisoner that should there be a change in circumstances (e.g., restitution or a full accounting of his finances made), the prisoner may request reopening of the case under 28 C.F.R. 2.28(a).]

C. *Decisions Below the Guidelines*

[Examples 1-6: Mitigating Offense Factors]

1. *Mitigating Offense Factors:*

. . .The prisoner's offense was less serious than the rated offense would normally be: [give specifics] [*e.g.*, the amount of drugs sold was unusually small and no financial gain was involved] [the prisoner was only peripherally involved in the offense].

. . .The prisoner did not knowingly contemplate that his conduct would result in the harm that it did and the harm could not have been reasonably foreseen [give specifics].

2. *Diminished Mental Capacity:*

. . .The prisoner had diminished mental capacity to contemplate the seriousness of the offense [because of extremely low intelligence or extreme youthfulness].

3. *Duress:*

. . .There is confirmed evidence that duress was overtly exercised to force the prisoner to commit the offense.

4. *Attempted Corrective Measure:*

. . .There is confirmed evidence that the prisoner attempted to withdraw prior to completion of the offense or attempted to make restitution prior to discovery of the offense.

5. *Genuine Claim of Right [Property Offenses]:*

. . .because the prisoner believed he had genuine claim of right to the property involved even though the method used to obtain the property was unlawful.

6. *Extreme Provocation [Assaultive Offenses]:*

. . .because there was extraordinarily severe provocation by the victim or provocation combined with a diminished mental state (occurring through no fault of the offender).

[Example 7: Parole Prognosis]

7. *Better Parole Risk:*

. . .The prisoner is a better parole risk than his salient factor score indicates because [give specifics] [*e.g.*, his low salient factor score results exclusively from trivial offenses; he has a substantial crime-free period since his last offense; he has extremely strong community resources available].

[Examples 8-11: Other]

8. *Substantial Cooperation:*

. . .The prisoner has provided substantial cooperation to the government [*e.g.*, in the prosecution of other cases; in averting a riot] which has been otherwise unrewarded.

9. *Substantial Medical Problems:*

. . .because of poor medical prognosis due to a deteriorating heart condition, a degenerative infirmity caused by virus/heredity or advanced age, or the presence of a catastrophic medical condition.

[*Note:* The mere existence of advanced age or a severe medical affliction shall not be considered to be sufficient for a decision below the guidelines or for a more lenient decision. The Commission shall also consider the seriousness of the offense and the long term medical prognosis, as well as the probability of future criminal conduct based upon an assessment of the prisoner's record. In general, a habitual offender/organized crime offender shall require the presence of further extraordinary factors to warrant a decision below the guidelines.]

10. *Substantial Period in Custody on other Sentence(s) or Additional Committed Sentences:*

. . . The prisoner has served a substantial continuous period of time [... months] in federal or state custody as a result of other charges.

. . . The prisoner faces a substantial period of time on additional committed sentences estimated as at least [. . . months].

[*Note:* Deportation shall not be considered a sufficient reason for a decision below the guidelines.]

[Example 11: Superior Program Achievement]

11. *Superior Program Achievement:*

. . . The prisoner has a record of superior program achievement [give specifics]. *NOTE:* Decisions below the guidelines for superior program achievement are governed by 28 C.F.R. 2.60.

■ 2.20-06. *Clinical Judgment Regarding Parole Risk.* One of the more difficult tasks facing the parole decision-maker is the consideration as to when a decision above or below the applicable guideline range is warranted based upon a clinical judgment to override the salient factor score. Clinical override judgments are of two distinct types:

(A) *More serious parole risk.* This judgment concerns whether a parole applicant poses a significantly higher likelihood of committing violent or other extremely serious offenses after release than is taken into account by the guidelines [which consider the current offense and salient factor score]. Offenders with a repetitive history of assaultive conduct, a repetitive history of large scale sophisticated offenses, or an extensive history of serious offenses may be considered for a decision above the guidelines under this provision. [See 2.20-05(B)(5-7).]

(B) *Better/poorer parole risk*. This judgment concerns whether a parole applicant poses a significantly lower or higher likelihood of any new criminal conduct after release than indicated by the salient factor score. [See 2.20-05(B)(4); (C)(7).] In such case, a parole applicant may be given a decision below or above the guidelines (as if the parole applicant had a higher or lower salient factor score).

Note that a decision below the lower limit of the "very good" risk category cannot be authorized on the basis of "risk". The lower limit of the "very good" risk guideline range is set upon the presumption that an individual with a salient factor score of ten will not recidivate.

Note that a decision above the upper limit of the "poor risk" category may be warranted on the grounds of "poorer risk" in certain extreme cases [e.g., where the prisoner has a substantially worse prior record than the typical case with a score of zero. But also note that the majority of prisoners with a salient factor score of zero have 8-12 prior convictions and 6-9 prior commitments. Prior negative parole histories are also frequent. A decision above the upper limit of the "poor risk category" on the basis of "poorer risk" should be considered only where such case can logically be distinguished from the typical case with a score of zero].

An excellent discussion of the application and limitations of clinical judgment, and particularly of its relation to the prediction of violence, is found in Monahan, "The Clinical Prediction of Violent Behavior" (in U. S. Parole Commission Selected Reprints - Volume Four).

■ 2.20-07. *Principle of Parsimony*. It is the intent of the Commission to use the least restrictive sanction required to fulfill the purposes of 18 U.S.C. 4206 and 28 C.F.R. 2.20. It is expected that when a decision within the guidelines is recommended, a case generally will be placed in the lower half of the guideline range unless the offense behavior or prior record/salient factor score is among the more serious contained within the category [For example, other factors being equal, a property offense near the lower limit of the Category Four severity (\$40,000) generally would be placed towards the bottom of the range; a property offense near the upper limit (\$200,000) generally would be placed higher in the range; less culpable codefendants would generally be placed towards the bottom of the range; codefendants with prime responsibility would generally be placed higher in the range]. If the offense behavior involved (a) the possession of a weapon during the commission of another offense (e.g., robbery with a weapon, or possession of a weapon during a drug offense); or (b) the offense behavior involved multiple separate Category Five or higher offenses not sufficient to raise the severity level (e.g., two robberies); or (c) the offender is a parole violator with new criminal conduct, the case will normally be placed in the upper half of the applicable guideline range. It is to be stressed that this paragraph is intended to provide a methodology to promote analysis, not a mechanical rule.

■ 2.20-08. *Guideline Application - Complex Cases*. The following is designed to assist in guideline interpretation of certain complex cases.

(1) *Cases Reopened for a New Sentence*.

(a) If the new criminal conduct was before the most recent commitment (e.g., if it is later discovered that the prisoner had committed three additional robberies), conduct a new initial hearing using the total offense behavior (multiple offense rule), and set a new presumptive date [*de novo*].

(b) If the new criminal conduct was committed during the most recent commitment and the prisoner has been given a presumptive or effective parole date, apply the rescission guidelines and add the time to the previous presumptive or effective parole date. That is, treat exactly as a rescission case for guideline purposes (but otherwise treat as a new initial hearing; no rescission findings are required).

(c) If the new criminal conduct was committed during the most recent commitment and the prisoner had previously been continued to expiration, use initial hearing procedures, but calculate the rescission guidelines and stack the guideline range(s) to the original guideline range.

Example: A 30 year old first offender is continued to expiration on a 15 month sentence for fraud of \$20,000. He escapes from a non-secure facility and three months later is arrested and convicted of a \$5,000 fraud committed while in escape status and given a consecutive 5 year sentence. The applicable guidelines on the total sentence are the original guidelines [Category Four severity (original offense); SFS=10; GL range 12-18 months] + [8-16 months for escape] + [Category Three severity (new offense); recalculated SFS=6, GL range 12-16 months] = [combined GL range of 32-50 months].

2. Initial Hearing (No Previous Hearing) Where There Is New Criminal Conduct Since Commitment. Use initial hearing procedure; consider the case using the guideline procedure specified under 1(c). That is, first calculate the guideline range without considering the escape or new criminal behavior; then stack the ranges for escape and/or the new criminal behavior as in a rescission case (recalculate the salient factor score if the new criminal behavior was committed in the community).

Example: A 30 year old first offender robs a bank. Before having an initial hearing, the offender escapes and five weeks later robs another bank. The applicable guideline range is calculated as follows: [Category Five (original offense); SFS=10; GL range = 24-36 months] + [8-16 months for escape] + [Category Five (new offense); SFS (recalculated) = 6; GL range = 36-48 months] = [combined GL range of 68-100 months].

3. Initial Hearing With a Failure to Appear on the Federal Offense [or a Failure to Appear on a Felony During Probation or Parole Status]. Where the underlying offense behavior can be established (preponderance of the evidence), calculate the guidelines for the underlying offense and add the applicable failure to appear guidelines.

Example: A 30 year old first offender robs a bank, and fails to appear for trial on this charge for 7 days or more. Grade as [Category Five (original offense); SFS=10; GL range = 24-36 months] + [6-12 months for failure to appear] = [combined GL range of 30-48 months].

Note: If there is a new offense while in failure to appear status, treat as a multiple separate offense plus failure to appear [example: robbery + failure to appear + 2 robberies (while in failure to appear status) is treated as 3 robberies + failure to appear].

4. Other.

Example: A prisoner steals a car while on furlough from a CCC, is not discovered, and is later released on parole. After release on parole, the releasee steals another car. Grade under the multiple separate offense procedure and recalculate the salient factor score. The rescission and reparole guidelines are not stacked to each other.

■ **2.20-09. Unwarranted Codefendant Disparity.** "Unwarranted codefendant disparity" refers to different parole decisions for similarly situated offenders where no legitimate reason for the difference in decisions exists. It is to be remembered that different decisions for codefendants are not necessarily inappropriate.

Example 1: Two codefendants appear equally culpable in the current offense. However, codefendant A is a first offender (SFS=9); codefendant B has a long prior record (SFS=3). Different decisions based on risk are appropriate and do not constitute unwarranted disparity.

Example 2: Two codefendants have similar salient factor scores but one is significantly more culpable than the other in regards to the current offense. A more severe decision for the more culpable defendant is appropriate and does not constitute unwarranted disparity.

Example 3: Two codefendants appear equally culpable in the current offense and have similar salient factor scores; codefendant A shows superior program achievement while in prison; codefendant B has numerous disciplinary infractions. Different decisions based upon institutional behavior are appropriate and do not constitute unwarranted disparity.

Example 4: Three codefendants are similar in all respects except one develops a serious medical condition. Earlier release for a valid medical reason is appropriate and does not create unwarranted disparity.

Example 5: Codefendant A pleads guilty; codefendant B who is more culpable avoids prosecution by fleeing the jurisdiction; codefendant C who is most culpable is acquitted after a trial. The fact that more culpable codefendants may have avoided prosecution or conviction does not make appropriate unwarranted leniency on the part of the Commission regarding codefendant A. The decision for codefendant A is to be made pursuant to applicable Commission standards.

Example 6: Codefendant A receives a 5 year sentence, codefendant B receives a 2 year sentence, and codefendant C is placed on probation. The reason for the differences in sentences is not clear. The guideline range for all cases is 24-36 months. That one or more codefendants may have received unwarranted leniency by court action (resulting in a mandatory release date below the applicable guideline range or no imprisonment at all) does not warrant compounding such action by unwarranted leniency on the part of the Commission regarding codefendant A. The decision for codefendant A is to be made pursuant to applicable Commission standards.

Example 7: Three codefendants appear equally culpable, have similar salient factor scores, have identical sentences, and appear to have no other relevant differences. Significantly different decisions by the Commission in such cases constitute unwarranted disparity and are to be avoided. Note: if it appears that the Commission has erroneously granted unwarranted leniency to one codefendant, it is not appropriate to compound such error by providing unwarranted leniency to other codefendant cases.

■ **2.20-10. Military Prisoners.** In applying the guidelines to military prisoners, examiners shall thoroughly examine the details of the offense to determine if case-specific factors pertaining to special military circumstances surrounding the crime justify placing the offender at the top or above the guidelines, such as drug distribution on a ship or near weaponry which endangers the lives of others or the mission, or any other offense which diminishes discipline and morale of the armed services.

Example 1: The offense created a far greater threat to public safety and to the readiness of our military forces than indicated by a simple accounting of the weight of the drugs involved because it was committed in an inherently hazardous environment where mutual trust, physical fitness and mental alertness are prerequisites for success or survival; for example, this offender was distributing "crack" cocaine to aviation jet mechanics, technicians and other members of his anti-submarine squadron thus jeopardizing safe aircraft operations.

Example 2: The offense involved the theft of property from members of the offender's own unit which weaken the bonds of mutual trust and support which are essential to unit integrity and distract unit members from their primary goal of combat readiness.

Example 3: The victim of the crime was (the offender's superior in the chain of command) (a member of the offender's unit) (a family member of a member of the offender's unit). Crimes against members of the offender's immediate military family have significant adverse impact on unit training and operational readiness irrespective of the actual scope of the crime.

■ §2.21 REPAROLE CONSIDERATION GUIDELINES.

(a)(1) If revocation is based upon administrative violation(s) only, grade the behavior as if a Category One offense under §2.20.

(2) If a finding is made that the prisoner has engaged in behavior constituting new criminal conduct, the appropriate severity rating for the new criminal behavior shall be calculated. New criminal conduct may be determined either by a new federal, state, or local conviction or by an independent finding by the Commission at revocation hearing. As violations may be for state or local offenses, the appropriate severity level may be determined by analogy with listed federal offense behaviors.

(b) The guidelines for parole consideration specified at 28 C.F.R. 2.20 shall then be applied with the salient factor score recalculated. The conviction and commitment from which the offender was released shall be counted as a prior conviction and commitment.

(c) Time served on a new state or federal sentence shall be counted as time in custody for reparole guideline purposes. This does not affect the computation of the expiration date of the violator term as provided by Sections 2.47(e) and 2.52(c) and (d).

(d) The above are merely guidelines. A decision outside these guidelines (either above or below) may be made when circumstances warrant.

Notes and Procedures

■ 2.21-01. *Administrative Violations.* The Commission has a range of sanctions available for dealing with administrative parole violations: reprimand, special conditions (*e.g.*, a CCC placement), and revocation. The Commission preference is to use reimprisonment as a last resort, *i.e.*, when other sanctions have been unsuccessfully tried or are plainly inappropriate. Note: Where there are administrative violations and new criminal conduct, the new criminal conduct controls. Do not consider administrative violations under the multiple separate offense procedure.

■ 2.21-02. *Miscellaneous Offenses*. Common offenses involving parole violators that are graded as Category One (under §2.20 Chapter Twelve) include driving while under the influence/ while impaired, and possession of weapons other than firearms (e.g., possession of a switchblade knife).

■ 2.21-03. *Possession of a Weapon by a Parolee*. Possession of a firearm by a parolee will usually constitute new criminal conduct (the Federal Gun Control Act of 1968 generally prohibits persons convicted of felonies from possessing firearms, although there are certain limited exceptions. For example, this Act does not apply to persons adjudicated under the Federal Juvenile Delinquency Act). However, there may be cases in which possession of a weapon does not constitute new criminal conduct but is still a violation of the conditions of parole (e.g., possession of weapons other than firearms). For such cases, the administrative violation category of the reparole guidelines will apply.

■ 2.21-04. *Escape by Parolee from State Custody*. Occasionally, a prisoner will be paroled to a state sentence and will subsequently escape. For guideline purposes, apply the rescission guidelines (28 C.F.R. 2.36) as if the escape had been from a federal sentence.

■ §2.22 COMMUNICATION WITH THE COMMISSION.

Attorneys, relatives, or interested parties wishing a personal interview to discuss a specific case with a representative of the Commission must submit a written request to the appropriate office setting forth the nature of the information to be discussed. Such interview may be conducted by a Commissioner or assigned staff, and a written summary of each such interview shall be prepared and placed in the prisoner's file.

Notes and Procedures

■ 2.22-01. *Review and Referral of Correspondence*. Correspondence from prisoners or their relatives, friends or others is reviewed by an analyst and a reply, if appropriate, is made to the writer by the analyst. If the content of the correspondence is deemed of sufficient importance to warrant referral to the Regional Commissioner for possible initiation of Commission action, the analyst will do so. Referrals will be made at the discretion of the analyst.

■ 2.22-02. *Correspondence from Members of Congress and Other High Officials*.

(a) All correspondence from a Member of Congress, a Federal Judge, or other high government official regarding a prisoner is responded to by letter bearing the signature of the Regional Commissioner, except as noted in (b) and (c) below. Copies of responses to all congressional correspondence tagged by the Office of Legislative Affairs shall be forwarded (two copies) to the Chairman's Office.

(b) In cases currently before the National Appeals Board or National Commissioners, any such correspondence shall be referred to the Vice Chairman for response.

(c) In cases which have been designated as original jurisdiction, responses to congressional inquiries will be prepared by the Chairman's office.

■ 2.22-03. *Congressional Correspondence/Privacy Act.*

(a) Members of Congress either directly or through their staff personnel frequently request information concerning inmates or persons on supervision who are their constituents. Requests should be responded to within one week of receipt with the response signed by the Chairman, Vice Chairman, or the appropriate Commissioner.

(b) The usual request is in the form of a letter from the inmate/parolee to the Congressman or Senator, which is forwarded to the Commission by a covering letter or "buck slip." These may be responded to without obtaining a waiver or form signed by the inmate. (The inmate's letter to the Congressman will be accepted as a waiver.) Include whatever information is appropriate for the response but do not disclose any information which you would not disclose to the inmate/parolee himself if he had made a request under the Privacy Act. Occasionally, a congressional letter is received which does not contain a letter from the inmate/parolee, but specifically advises that this subject has consented disclosure of information to the Congressman or has written to the Congressman requesting assistance. Honor such requests in the same manner as those enclosing the inmate/parolee's letter.

(c) Some congressional requests will contain correspondence from family or friends (not the inmate/parolee) or will mention an inmate/parolee's name without specifying the source of the request and then ask for information. If the writer does not desire any other information than what is contained on the BP-5 plus the action taken in a case (as the result of a hearing or review on the record), comply and furnish this information. However, please note that the disclosure of the action taken does not include disclosure of reasons for that decision. If information which is protected by the Privacy Act is requested, advise the Congressman's Office that detailed information cannot be furnished unless the inmate/parolee provides some written authority waiving his right to privacy; and state that a copy of this letter has been forwarded to the inmate/parolee along with a waiver form and instructions advising him to sign and return the form directly to the Commission if he desires to have such information released.

(d) Some Congressmen request that responses go directly to the inmate/parolee with a copy to the Congressman's Office; these requests are to be honored.

■ 2.22-04. *Requirement for Written Record of Telephone Calls.* The general content of all telephone calls made or received relative to a prisoner is to be made a part of the written record and signed by the Commissioner or staff person who participated in the call.

■ 2.22-05. *Personal Visits.* Visits to the Commission's Office are summarized for the file in all cases. All personal visits will be made upon written requests where possible and will be handled by the appropriate analyst. "Walk in" visits will be referred initially to an analyst. No examiner will grant a personal interview to a visitor regarding a prisoner unless authorized by a Commissioner.

■ 2.22-06. *Visits of Prisoners or Parolees to the Commission's Office.* Commission personnel shall not grant a personal interview to a prisoner except at a duly scheduled hearing. Parolees or mandatory releasees who come to the Commission's office shall be informed that they must instead contact their probation officer. Persons in the community under the legal custody of the Bureau of Prisons shall be informed that they must instead contact their case manager.

■ 2.22-07. *Contacts at Institutions.* Examiners should be careful not to be swayed in their deliberations by comments by any institution official, unless such comments are substantiated by data in the prisoner's file or made during the course of the hearing with the prisoner present. Persons making gratuitous comments to the examiners should be invited to present their thoughts in writing and make them a part of the record. Examiners should not engage in conversation outside the hearing room concerning any prisoner with any member of the public, attorney, or relative of an inmate who might be in the vicinity of an institution or who might attempt to influence an examiner at any place or at any time.

■ 2.22-08. *Contacts Outside of Routine Channels.* From time to time, Commissioners may be contacted by acquaintances and former colleagues in the criminal justice field about particular parole cases that are not within their jurisdiction at the time. In such circumstances, each Commissioner should ascertain first what case has prompted the call, and in whose jurisdiction the case properly lies. If the case is not within the contacted Commissioner's jurisdiction, the caller should be advised to write to the appropriate Commissioner, whether it would be a Regional Commissioner, the Chairman of the National Appeals Board (if the case is on national appeal), or the Chairman of the Commission (if the matter involves a complaint about the general policy or practice of the Commission).

■ 2.22-09. *Personal and Financial Relationships of a Potentially Compromising Nature.* Unless specifically authorized by the Chairman or the appropriate Regional Commissioner, all Commission employees must refrain from any on-going personal, social, financial, or business relationship with a current Federal inmate or parolee, regardless of whether or not the employee is in a position to influence an official decision concerning that inmate or parolee, unless such relationship can be justified as merely coincident to the employee's participation in some organized activity of a professional or charitable nature. Any deliberate attempt by a Federal inmate or parolee to contact or socialize with a Commission employee off-duty, which is not part of such an activity, must be firmly rejected and promptly reported to the employee's supervisor.

■ 2.22-10. *Deputy Designated Agency Ethics Official.* Employees are encouraged to call the Commission's Deputy Designated Agency Ethics Official (DDAEO) in the General Counsel's Office for advice concerning any ethics-related problem, whether actual or potential. Supervisors are required to keep the DDAEO advised of any ethics-related problems which could result in adverse personnel action. Employees considering any post-employment activity in the field of criminal justice which involves representation before agencies or courts are requested to consult with the DDAEO to ensure that the provisions of 18 U.S.C. 207 and 28 C.F.R. §2.61(c)(1) are understood.

■ §2.23 DELEGATION TO HEARING EXAMINERS.

(a) There is hereby delegated to hearing examiners the authority necessary to conduct hearings and make recommendations relative to the grant or denial of parole or reparole, revocation or reinstatement of parole or mandatory release, and conditions of parole. Any hearing may be conducted by a single examiner or by a panel of examiners. An Executive Hearing Examiner shall function as a hearing examiner for the purpose of obtaining a panel recommendation whenever the Regional Commissioner has not ordered that a hearing be conducted by a panel of two examiners. Notwithstanding the provisions of §§2.48 through 2.51, §§2.101 through 2.104 and §§2.214 through 2.217, there is also delegated to hearing examiners the authority necessary to make a probable cause finding, to determine the location of a revocation hearing, and to determine the witnesses who will attend the hearing, including the authority to issue subpoenas for witnesses and evidence.

(b) The concurrence of two examiners, or of a hearing examiner and the Executive Hearing Examiner, shall be required to obtain a panel recommendation to the Regional Commissioner. A panel recommendation is required in each case decided by a Regional Commissioner after the holding of a hearing.

(c) An examiner panel recommendation consists of two concurring examiner votes. In the event of divergent votes, the case shall be referred to another hearing examiner (or to the Executive Hearing Examiner in the case of a hearing conducted by a panel of examiners) for the another vote. If concurring votes do not result from such a referral, the case shall be referred to any available hearing examiner until a panel recommendation is obtained.

(d) A recommendation of a hearing examiner panel shall become an effective Commission decision only upon the Regional Commissioner's approval, and docketing.

Notes and Procedures

■ 2.23-01. *Documentation of Decisions and Decision Modification.*

(a) To facilitate a consistent national policy, examiners shall briefly indicate in the evaluation section of the hearing summary the factors pointing to placement of a decision at the bottom, middle, or top of the guidelines. This requirement is separate from the requirement that any recommendation outside the guidelines (either above or below) be explained with specificity on the Notice of Action Worksheet.

(b) This need for specificity is present at all levels of decision review (*e.g.*, review of panel recommendation by the Regional Commissioner, or consideration of appeals by the National Appeals Board). Therefore, the Regional Commissioner, National Commissioners, and National Appeals Board, as applicable, shall record the specific factors in the case file indicating any modification of a panel recommendation or previous Commission action.

■ §2.24 **REVIEW OF PANEL RECOMMENDATION BY THE REGIONAL COMMISSIONER.**

(a) Upon review of the examiner panel recommendation, the Regional Commissioner may make the decision by concurring with the panel recommendation. If the Regional Commissioner does not concur, the Commissioner shall refer the case to another Commissioner and the decision shall be made on the concurring votes of two Commissioners.

(b) Upon review of the panel recommendation, the Regional Commissioner may also: (1) designate the case for the original jurisdiction of the Commission pursuant to §2.17, vote on the case, and then refer the case to another Commissioner for further review; or (2) remand the case for a rehearing, with the notice of such action specifying the purpose of the rehearing.

Notes and Procedures

■ 2.24-01. *Review of Examiner Recommendation.*

(a) Each examiner recommendation will be reviewed by the Executive Hearing Examiner who will serve as a hearing examiner for the purpose of obtaining a panel recommendation. A recommendation consists of two concurring examiner votes. If the panel renders a split decision, the case will be circulated among the other examiners present until a recommendation is reached prior to referral to the Regional Commissioner.

(b) For initial and reconsideration hearings, an attempt should be made, where feasible, to ascertain the parole action taken relative to any codefendants.

(c) Each case shall then be reviewed by the Regional Commissioner who shall either accept the recommendation of the hearing examiner panel or take one of the other actions specified in 28 C.F.R. §2.24(a) or (b).

■ 2.24-02. *Actions under §2.24(a).*

The Regional Commissioner prepares a memorandum (with reasons in case of parole denial) to the National Commissioners explaining the reasons for the disagreement with the panel recommendation. Also, the Regional Commissioner prepares a second order with his vote and attaches this order to the memorandum. NOTE: In revocation cases, the memorandum to the National Commissioners shall clearly indicate which of the proposed orders of the examiner panel is being referred for a further vote.

■ 2.24-03. *Actions under §2.24(b)(2).* In the event new information has been received between the time of the hearing and review by the Regional Commissioner or if the Regional Commissioner requires a clarification of an issue of fact which is crucial to the decision to be made, the Regional Commissioner may order a new hearing on the next available docket pursuant to 28 C.F.R. 2.24(b)(2), giving notice of the purpose of the hearing to the prisoner and sending the new information (if any) to the institution for timely disclosure. This subsection shall not apply when there is a difference of opinion as to the interpretation of known facts; such differences must be handled under 28 C.F.R. 2.24(a).

■ 2.24-04. *Modification of Reasons/Correction of Errors.* The Regional Commissioner may add to, modify, or correct any of the reasons for parole denial. The Regional Commissioner may also, on his own motion, correct a mathematical error in computing the release date, a release date below the parole eligibility date, or a release date above the mandatory release date. Correction of such error should be indicated in the file together with the initials of the person making the correction and the date of the correction.

■ 2.24-05. *Processing After Decision.*

(a) *Notice of Action.* A Notice of Action is prepared and distributed, and the case coded. The Notice of Action Worksheet prepared by the examiner panel is retained in the case file.

(b) *Non-Appealable Decisions.* When the decision being rendered is "not appealable," the "Right to Appeal" section on the Notice of Action should be deleted and the Notice marked "Non-Appealable." If

parole was granted at the date of parole eligibility, add the following wording at the end of the "Reasons" section: "The above date is the earliest date on which parole can be granted on your current sentence. As the Commission is precluded by law from releasing you at an earlier time, this release date is NON-APPEALABLE." NOTE: If parole on the record was granted, use the wording at 2.12-03.

■ 2.24-06. *State Cases*. After docketing/coding, the Notice of Action is transmitted with the Appeal form, the guidelines used, salient factor score, and a form letter to the State Institution explaining parole procedures and appeal rights.

■ 2.24-07. *Notification of Warden or Superintendent*. Notification of any action of the Commission relative to a grant or a denial of parole, shall not be made to anyone except the prisoner until the Warden or Superintendent of the institution where the inmate is confined has been notified in writing (by Notice of Action). In exceptional cases, the Warden or Superintendent may be notified by telephone or telefax.

■ 2.24-08. *Notification of Attorney in Revocation Cases*. The attorney of record in revocation cases shall receive a copy of the Notice of Action. Copies of all Notices of Action on revocation appeal shall also be sent to the attorney so long as he continues to represent the prisoner before the Commission.

■ 2.24-09. *Notification of Victim/Witness*. Any victim/witness (verified through the Bureau of Prisons Victim/Witness Coordinator) or criminal justice system official, upon request, may be notified in writing by the Commission of the final decision and any subsequent change in the release date by the Commission (e.g., on appeal, at statutory interim hearing). The notification may, where the Commission deems appropriate, include the specific reasons for the decision (e.g., a copy of the Notice of Action or a summary thereof).

■ §2.25 HEARINGS BY VIDEOCONFERENCE.

The Commission may conduct a parole determination hearing (including a rescission hearing), a probable cause hearing, and an institutional revocation hearing, by a videoconference between the hearing examiner and the prisoner or releasee.

■ §2.26 APPEAL TO NATIONAL APPEALS BOARD.

(a) (1) A prisoner or parolee may submit to the National Appeals Board a written appeal of any decision to grant (other than a decision to grant parole on the date of parole eligibility), rescind, deny, or revoke parole, except that any appeal of a Commission decision pursuant to §2.17 shall be submitted as a petition for reconsideration under §2.27.

(2) The appeal must be filed on a form provided for that purpose within 30 days from the date of entry of the decision that is the subject of the appeal. The appeal must include an opening paragraph that briefly summarizes the grounds for the appeal. The appellant shall then list each ground separately and concisely explain the reasons supporting each ground. Appeals that do not conform to the above requirements may be returned at the Commission's discretion, in which case the appellant shall have 30 days from the date the appeal is returned to submit an appeal that complies with the above requirements. The appellant may provide any additional information for the Commission to consider in an addendum to the appeal. Exhibits may be attached to an appeal, but the appellant should not attach exhibits that are copies of documents already in the possession

of the Commission. Any exhibits that are copies of documents already in the Commission's files will not be retained by the Commission.

(b)(1) The National Appeals Board may: Affirm the decision of a Regional Commissioner on the vote of a single Commissioner other than the Commissioner who issued the decision from which the appeal is taken; or modify or reverse the decision of a Regional Commissioner, or order a new hearing, upon the concurrence of two Commissioners. The Commissioner first reviewing the case may in his discretion circulate the case for review and vote by the other Commissioners notwithstanding his own vote to affirm the Regional Commissioner's decision. In such event, the case shall be decided by the concurrence of two out of three votes.

(2) All Commissioners serve as members of the National Appeals Board, and it shall in no case be an objection to a decision of the Board that the Commissioner who issued the decision from which an appeal is taken participated as a voting member on appeal.

(c) The National Appeals Board shall act within sixty days of receipt of the appellant's papers, to affirm, modify, or reverse the decision. Decisions of the National Appeals Board shall be final.

(d) If no appeal is filed within thirty days of the date of entry of the original decision, such decision shall stand as the final decision of the Commission.

(e) Appeals under this section may be based upon the following grounds:

(1) That the guidelines were incorrectly applied as to any or all of the following:

(i) Severity rating;

(ii) Salient factor score;

(iii) Time in custody;

(2) That a decision outside the guidelines was not supported by the reasons or facts as stated;

(3) That especially mitigating circumstances (for example, facts relating to the severity of the offense or the prisoner's probability of success on parole) justify a different decision;

(4) That a decision was based on erroneous information, and the actual facts justify a different decision;

(5) That the Commission did not follow correct procedure in deciding the case, and a different decision would have resulted if the error had not occurred;

(6) There was significant information in existence but not known at the time of the hearing;

(7) There are compelling reasons why a more lenient decision should be rendered on grounds of compassion.

(f) Upon the written request of the Attorney General seeking review of a decision of a Regional Commissioner, which is received within 30 days of such decision, the National Appeals Board shall reaffirm, modify, or reverse the Regional Commissioner's decision within 60 days of receipt of the Attorney General's request. The National Appeals Board shall inform the Attorney General and the prisoner to whom the decision applies in writing of its decision and the reasons therefor. In the event the Attorney General submits new and significant information that has not previously been disclosed to the prisoner prior to a hearing under these rules, the National Appeals Board shall act within 60 days to reaffirm, modify or reverse the Regional Commissioner's decision, but shall also remand the case for a new hearing if its decision is adverse to the prisoner. The prisoner shall have disclosure of the new information, and the opportunity to dispute that information under 28 C.F.R. 2.19(c) of this part. Following the hearing, the case shall be returned to the National Appeals Board, together with a recommendation from the hearing examiner, to render a final Commission decision as to the disposition of the case.

Notes and Procedures

■ 2.26-01. *Date of Entry.* "Date of entry" of decision means the date stamped on the Notice of Action.

■ 2.26-02. *Voting Quorum.*

(a) Decisions to affirm may be based on a single vote of a National Appeals Board member, other than a Commissioner who voted on the decision being appealed. All other actions shall be based on the concurrence of two votes.

(b) Notwithstanding his vote to affirm a decision, a National Appeals Board member may circulate the case for additional vote(s) if he believes that additional consideration is appropriate. Such action may be taken, for example, when the issue to be decided is novel or particularly complex. Such action also customarily will be taken when the Commissioner wishes to affirm the decision but to modify the reasons that accompanied that decision (for example, the reasons for a decision above the guidelines). Whenever this procedure is initiated, the final decision will be based upon the concurrence of two votes.

(c) If a concurrence of two votes is required and cannot otherwise be obtained, the case will be referred to the Regional Commissioner who made the initial decision to review and vote on the appeal. In the event, a concurrence of two votes still cannot be obtained, the original decision shall stand affirmed.

■ 2.26-03. *Processing after Decision.* After voting by the National Appeals Board members, the case will be docketed and a Notice of Action prepared. The National Appeals Board decision becomes official upon docketing.

■ 2.26-04. *Favorable New Information.* When significant new information is submitted as part of an appeal, the National Appeals Board may (a) act upon such new information, or (b) affirm the decision and notify the Regional Commissioner of the existence of such information by memo for possible reopening.

■ 2.26-05. *Reasons for Reopening.* In the event the National Appeals Board reopens a case for a new hearing, such decisions shall be accompanied by the memorandum indicating to the examiners the reasons for this action, including any special instructions. A copy of the memorandum should be sent to the institution for its file. Such memo shall be prepared for possible disclosure as specified in § 2.28-01(b).

■ 2.26-06. *Cases Previously Considered Under 28 C.F.R. 2.24.* The fact that a National Commissioner has voted on a case referred under 28 C.F.R. 2.24 (administrative review) shall not disqualify such Commissioner from voting on the same case later on an appeal under 28 C.F.R. 2.26, 2.27, or 2.220.

■ 2.26-07. *Prohibition of More Adverse Decision.* No appeal by a prisoner shall result in a more adverse decision, except where there is discovery of new adverse information while the appeal is pending. In such case, the National Appeals Board may, under the provisions and quorum of 28 C.F.R. 2.28(f), remand for a new hearing [see also §2.55(f)]. In any other case, where the National Appeals Board believes that a prisoner has received an inappropriately lenient decision, it may affirm the order and note its opinion as part of the reasons for denial of the appeal.

■ 2.26-08. *Privacy Act/FOIA Requests.* A prisoner's request for copies of file material under the Privacy Act or Freedom of Information Act does not extend the time limit for filing or processing an appeal.

■ 2.26-09. *Late Appeals.* Since appeals are not date-stamped in the institution, any appeal received within 45 days of the date on the Notice of Action will be accepted. After that date, "late" appeals may be accepted for good cause in the discretion of the National Appeals Board.

■ 2.26-10. *Non-Appealable Actions.*

(a) The following Commission actions are not appealable:

(1) Decisions to grant an effective or presumptive parole date upon completion of the minimum sentence;

(2) Decisions not to reopen a case under §2.28(a);

(3) Decisions to reopen a case and schedule a new hearing under §2.28;

(4) Decisions to retard parole under §2.28(e), or decisions to retard parole under §2.34(a);

(5) Decisions to approve, advance, or retard an effective parole date following a pre-release review under §2.14(b);

(6) Decisions to designate a case as original jurisdiction under §2.17;

(7) Decisions to deny termination of supervision prior to five years on parole;

(8) Decisions to let a detainer stand or schedule a dispositional revocation hearing under §2.47.

(9) Decisions to forfeit all street time after revocation of a special parole term.

(b) Decisions which are non-appealable are to be marked "NON-APPEALABLE" on the Notice of Action.

(c) Once a case is officially reopened, the prisoner may appeal the final decision [except as listed in (1) above] whether or not the previous decision is actually changed. For example, a case is reopened for a new hearing because of new information of substantial significance favorable to the prisoner. There is no appeal from the preliminary decision to reopen and schedule a hearing. However, the prisoner may appeal

any decision resulting from the hearing on the basis that the new information warranted more weight than was given to it.

(d) In retroactive applications of guideline revision, the determination as to whether or not the prisoner is eligible for retroactive review is not appealable. However, if the prisoner is found to be eligible under the terms announced at the time of the guideline revision, any decision resulting from that finding (whether the previous decision is changed or not) is appealable.

■ **§2.27 PETITION FOR RECONSIDERATION OF ORIGINAL JURISDICTION CASES.**

(a) A petition for reconsideration may be filed with the Commission in cases decided under the procedure specified in § 2.17 within thirty days of the date of such decision. A form is provided for this purpose. A petition for reconsideration will be reviewed at the next regularly scheduled meeting of the Commission provided the petition is received thirty days in advance of such meeting. Petitions received by the Commission less than thirty days in advance of a regularly scheduled meeting will be reviewed at the next regularly scheduled meeting. The previous decision made under §2.17 may be modified or reversed only by a majority vote of the Commissioners holding office at the time of the review of the petition. If a majority vote is not obtained, the previous decision shall stand. A decision under this rule shall be final.

(b) Attorneys, relatives, and other interested parties who wish to submit written information concerning a petition for reconsideration should send such information to the National Appeals Board, United States Parole Commission, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815. A petition and all supporting material are to be submitted thirty days in advance of the meeting at which the petition will be considered.

(c) If no petition is filed within thirty days of the entry of the decision under §2.17 that decision shall stand as the final decision of the Commission.

Notes and Procedures

■ 2.27-01. *Processing.* Upon receipt of the petition for reconsideration, the case file is forwarded to the Legal Office for preparation of a case analysis that will be provided to the Commissioners.

■ **§2.28 REOPENING OF CASES.**

(a) *Favorable information.* Upon the receipt of new information of substantial significance favorable to the prisoner, the Regional Commissioner may reopen a case (including an original jurisdiction case), and order a special reconsideration hearing on the next available docket, or modify the previous decision. The advancement of a presumptive release date requires the concurrence of two Commissioners.

(b) *Institutional misconduct.* Consideration of disciplinary infractions and allegations of new criminal conduct occurring after the setting of a parole date are subject to the provisions of §2.14 (in the case of a prisoner with a presumptive date) and §2.34 (in the case of a prisoner with an effective date of parole).

(c) *Additional sentences.* If a prisoner receives an additional concurrent or consecutive federal sentence following his initial parole consideration, the Regional Commissioner shall reopen his case for a new initial hearing on the next regularly scheduled docket to consider the additional sentence and reevaluate the case. Such action shall void the previous presumptive or effective release date. However, a new initial hearing is not mandatory where the Commission has previously evaluated the new criminal behavior, which led to the additional federal sentence, at a rescission hearing under 28 C.F.R. 2.34; except where the new sentence extends the mandatory release date for a prisoner previously continued to the expiration of his sentence.

(d) *Conviction after revocation.* Upon receipt of information subsequent to the revocation hearing that a prisoner whose parole has been revoked has sustained a new conviction for conduct while on parole, the Regional Commissioner may reopen the case pursuant to §2.52(c)(2) for a special reconsideration hearing on the next regularly scheduled docket to consider forfeiture of time spent on parole and such further action as may be appropriate. The entry of a new order shall void any presumptive or effective release date previously established.

(e) *Release planning.* When an effective date of parole has been set by the Commission, release on that date shall be conditioned upon the completion of a satisfactory plan for parole supervision. The appropriate Regional Commissioner may on his own motion reconsider any case prior to release and may reopen and advance or retard an effective parole date for purposes of release planning. Retardation without a hearing may not exceed 120 days.

(f) *New adverse information.* Upon receipt of new and significant adverse information that is not covered by paragraphs (a) through (e) of this section, a Commissioner may refer the case to the National Commissioners with his recommendation and vote to schedule the case for a special reconsideration hearing. Such referral shall automatically retard the prisoner's scheduled release date until a final decision is reached in the case. The decision to schedule a case for a special reconsideration hearing shall be based on the concurrence of two Commissioner votes, including the vote of the referring Commissioner. The hearing shall be conducted in accordance with the procedures set forth in §§2.12 and 2.13. The entry of a new order following such hearing shall void the previously established release date.

Notes and Procedures

■ 2.28-01. *In General.*

(a) The appropriate Regional Commissioner may on his own motion reopen a case at any time upon receipt of new information of substantial significance that falls within one of the categories specified at 28 C.F.R. 2.28. However, the Regional Commissioner shall not reopen any case during the time it is being considered by the National Commissioners or the National Appeals Board. If the new information is unrelated to the appeal, the Regional Commissioner shall retain the information for possible reopening the case after the appeal process is completed. If the information relates to the appeal, it shall be referred to the National Appeals Board for its consideration.

(b) When a Regional Commissioner reopens a case for any reason, he must specify the applicable subsection of §2.28 and give a brief description of the new information following the "remarks" section on the Notice of Action form. If more explanation is needed, a memo is to be placed with copies attached

to the Notice of Action. It is essential that the examiner panel be provided with sufficient guidance so that the hearing ordered can properly address the pertinent issue(s). The memo must be written in such a manner that it may be disclosed to the prisoner.

■ 2.28-02. *Basis for Reopening*. The six possible bases for reopening are as follows:

(a) *Favorable Information*.

(1) The requirement for "new information of substantial significance" is identical to the "clearly exceptional" standard of 28 C.F.R. 2.14 (a)(2)(ii). The term "favorable information" also includes information that an error adverse to the prisoner was made in the processing of the case.

(2) This section may also be used if an existing sentence is modified or reduced. If the sentence modification is based on new facts concerning the offense, it may be necessary to recompute the guidelines. However, a sentence modification that is not based on new information of substantial significance would not justify a reopening. Institution staff should notify the Regional Commissioner of every instance of a change in sentence structure, and the Commissioner should advise the institution by memo if no reopening is warranted.

(3) *Definition*. The term "advancement of a presumptive date" in 28 C.F.R. 2.28(a) means: (A) the advancement of a presumptive release date to an earlier presumptive release date; (B) the advancement of a presumptive release date to an earlier effective parole date; (C) the advancement of a continue to expiration decision to a presumptive or effective parole date; or (D) the advancement of a fifteen-year reconsideration hearing to a presumptive or effective parole date.

(4) *Advancing a fifteen-year reconsideration hearing*. If the new favorable information is presented in the case of a prisoner continued to a fifteen-year reconsideration hearing, the Regional Commissioner should normally order the advancement of the fifteen-year reconsideration hearing to the next available docket to permit a full reassessment of the case, unless there are compelling reasons why a decision on a release date should be made without a hearing, *e.g.*, the prisoner is suffering from a life-threatening illness and is not expected to survive by the time of the next hearing docket. The advancement of the date of a fifteen-year reconsideration hearing may be effected on the order of the Regional Commissioner without a concurring vote, but a concurring vote is necessary before a record review under this section can change a decision from a fifteen-year reconsideration hearing to a presumptive or effective parole date. Following the advanced fifteen-year reconsideration hearing, the Regional Commissioner may take any action permitted by 28 C.F.R. 2.12(b).

(5) *Original jurisdiction cases*. Original jurisdiction cases may be reopened under 28 C.F.R. 2.28(a) upon the motion of the Regional Commissioner. In such case, the Regional Commissioner may refer the case directly to the National Commissioners for action under the procedures of 28 C.F.R. 2.17, or may order an institutional hearing prior to the referral to the National Commissioners. A decision of a Regional Commissioner not to reopen an original jurisdiction case does not require any additional vote.

(b) *Institutional Misconduct*. Reopening for this reason is covered in 28 C.F.R. 2.14 and 2.34.

(c) *Additional Sentences*.

(1) Rescission guidelines are applied if the additional criminal conduct occurred while in federal custody or escape therefrom.

(2) An additional concurrent or consecutive federal sentence following initial hearing requires a reopening for a new initial hearing. Exception: where the new sentence results from criminal conduct occurring while in the custody of the Bureau of Prisons (including escape and offenses committed while on escape) for which the prisoner has already been sanctioned by the Commission through the rescission process, the case should be reviewed on the record and:

(A) if the record review indicates that a more adverse decision may be warranted, the case should be reopened and a new hearing scheduled (this will most likely occur where the previous decision was to "continue to expiration," and there is a new mandatory release date as a result of the new sentence);

(B) if the record review indicates that the prisoner has already been sufficiently sanctioned, there is no need to reopen the case and the previous decision should stand;

(C) if the record review indicates that the additional sentence will result in a more adverse decision than the Commission intended, a reduction may be considered [*e.g.*, if the prisoner has received a new regular adult sentence of less than one year to be served consecutively to a YCA term (thus not aggregable and not under the jurisdiction of the Commission), the "new information" that the prisoner will now have to serve additional "flat time" may be used to reduce a previously set date where appropriate]. In such case, a reduction of the previous rescission decision may be made on the record following the procedures of 28 C.F.R. 2.28(a).

(d) *Conviction After Revocation*. A reopening under this subsection may be ordered as long as the prisoner remains under the jurisdiction of the Commission. If the prisoner has been rereleased but is still under the Commission's supervision, a summons or warrant may be issued to secure the prisoner's attendance at this hearing.

(e) *Release Planning*.

(1) When reopening and retarding under this subsection, indicate on the Notice of Action the reason (*e.g.*, "lack of suitable employment", etc.). Note: In the rare case where retardation of a parole grant for release planning by a total of more than 120 days becomes unavoidable, the Regional Commissioner shall schedule a "special hearing" on the next available docket (see 28 C.F.R. 2.28 (e)). The purpose of this hearing shall be to explore what steps can be taken to facilitate development of an acceptable release plan. Following such hearing, the Regional Commissioner may, if necessary, retard the parole date "until an acceptable release plan is developed." The Regional Commissioner shall personally review the record of each such case at least once every thirty days thereafter.

(2) When reopening and advancing under this subsection, indicate on the Notice of Action the reason for the advancement, including the reason for any special condition (electronic monitoring or CCC placement) that may be added in conjunction with the advancement of the release date. If a special condition requiring electronic monitoring or CCC placement has not previously been recommended by the U.S. Probation Officer or Commission staff, the Regional Commissioner shall direct staff to solicit the views of the U.S. Probation Office as to the appropriateness of the special condition and as to available resources (*e.g.*, for CCC placement). The U.S. Probation Office shall be given not less than 30 days to respond, except in

emergency situations, in which a shorter deadline may be specified. An advancement of the release date may be made at the time an effective date of parole is approved, provided this procedure is followed before the advancement is ordered.

(f) *New Adverse Information.* In the case of new adverse information, a special reconsideration hearing may be ordered under this subsection upon the concurring votes of two Commissioners. Notice should be sent to the prisoner that his parole date has been automatically retarded pending possible reopening for new information. If the case fails to obtain the necessary concurring signatures, the previous date should be reinstated; or, if the previous date has already passed, a new date set for release as soon as practicable. If the case does obtain the concurring signatures necessary for reopening for a new hearing, the Notice of Action to this effect must specify the adverse nature of the new information and the documentary material must be sent promptly to the institution. The case manager should be contacted to ensure that upon delivery of such material the prisoner will be afforded the opportunity for pre-hearing disclosure. This subsection is the appropriate mechanism for reopening cases to consider new information about the prisoner's original offense behavior or earlier criminal activities that would have resulted in a different decision had the information been presented to the Commission at the time of the initial parole hearing. The entry of a new decision automatically voids the previous decision.

(g) The term "new and significant adverse information" includes (1) documentary or other evidence not contained in the Commission's file at the time the decision in question was made which, taken together with all the other case information, supports the change of a finding or conclusion as to a guideline determinant or as to placement of a decision within or without the guidelines; and (2) discovery of an objectively definable (*i.e.*, definable in terms of Commission rules or procedures) error in a previous decision that affected the determination of the guideline range applicable to the prisoner.

■ 2.28-03. *Hearing Type/Procedure.* Each time a case is reopened under 28 C.F.R. 2.28, the hearing type will be a "special reconsideration hearing," except when a new initial hearing is ordered in the case of additional sentences.

■ §2.29 RELEASE ON PAROLE.

(a) A grant of parole shall not be deemed to be operative until a certificate of parole has been delivered to the prisoner.

(b) An effective date of parole shall not be set for a date more than nine months from the date of the hearing. Residence in a community corrections center as part of a parole release plan generally shall not exceed one hundred and twenty days.

(c) When an effective date of parole falls on a Saturday, Sunday, or legal holiday, the Warden of the appropriate institution shall be authorized to release the prisoner on the first working day preceding such date.

Notes and Procedures

■ 2.29-01. *Processing Parole Grants.*

(a) Institution staff shall be requested to submit completed release plans and a request for a certificate of parole to the Commission not later than 30 days prior to the effective parole date, when feasible. When this deadline is not met the analyst shall contact the institution to ascertain the status of the case and reasons for delay.

(b) The parole certificate shall be signed by the Regional Commissioner or by a professional staff member designated by the Regional Commissioner and be dispatched to arrive at the institution not later than five working days prior to the release date. If such certificate does not arrive by this date the institution should notify the Commission (preferably by telefax or electronic mail). In such case, the Commission will issue a parole certificate via electronic mail.

(c) Release on parole should occur on the effective date shown on the Notice of Action providing the Commission has approved the release plan except as noted in (e) below. The institution should promptly advise the Commission of impending or actual delays (preferably by telefax or electronic mail). In emergency situations (such as disciplinary infractions immediately prior to a release date or a sudden change in release plans), the Bureau of Prisons may delay release on parole until further instructions are received from the Commission. In such case, the reasons for the delay and institutional recommendation must be communicated to the Commission immediately; and the Commission shall respond within 5 working days. Further retardation shall be by order of the Regional Commissioner under 28 C.F.R. 2.28.

(d) In the event a prisoner granted a parole date refuses to sign the parole certificate, the case manager will inform the prisoner that this action is considered by the Commission to be a refusal of the parole date. If the prisoner still refuses to sign the certificate, the prisoner will not be released. The case manager will notify the Commission by memo that the prisoner has refused to sign the parole certificate after being advised that such refusal constitutes a waiver of parole. The memo will be added to the prisoner's file and the previous order marked "*Canceled by Refusal to Sign Parole Certificate Per Memo From [] Dated []*." For further consideration, the prisoner must again apply for parole.

NOTE: These waiver provisions do not affect the release of a mandatory releasee who must be released by expiration of sentence, less good time credits. However, the case manager should notify a mandatory releasee who refuses to sign the release certificate that the conditions of release are still binding regardless of whether or not the release certificate is signed. The case manager must sign an attestation on the certificate that the conditions were read to the prisoner prior to release.

■ 2.29-02. *Case Classifications.* To assist the Probation Service in case classification for purposes of supervision guidelines, the Commission will add the most recently calculated salient factor score category to the parole certificate using the following wording: "Initial Risk Category: (Very Good, Good, Fair, Poor)." For mandatory release cases, the Bureau will add this data to mandatory release certificate.

■ §2.30 FALSE INFORMATION OR NEW CRIMINAL CONDUCT; DISCOVERY AFTER RELEASE.

If evidence comes to the attention of the Commission after a prisoner's release that such prisoner has willfully provided false information or misrepresented information deemed significant to his application for parole or has engaged in any criminal conduct during the current sentence prior to the delivery of the parole certificate, the Regional Commissioner may reopen the case pursuant to the procedures of §2.28(f) and order the prisoner summoned or retaken for hearing pursuant to the procedures of §2.49 and §2.50, as applicable, to determine whether the order of parole should be canceled.

Notes and Procedures

■ 2.30-01. *Hearing Procedure.* Hearings under this section will be conducted under revocation procedures. Unless there is a basis for forfeiture of street time (see 2.30-04 below) or for treating the time on parole as "inoperative time" (see 2.30-06 below), the warrant or summons must state that it is not to be executed after the expiration date of the parolee's sentence. The following order will be entered if the Commission determines to cancel parole based upon a finding authorized by §2.30: "*Previous order of parole effective [] is hereby canceled pursuant to 28 C.F.R. 2.30.*" A new release date is then to be established pursuant to the procedures described below.

■ 2.30-02. *Fraudulent Information.* A finding that the parolee willfully submitted a false statement, or misrepresented significant information, means that the Commission must have relied upon a fraudulent submission from that parolee (or a person acting on his behalf) when it decided to grant parole. It is not enough that the parolee merely failed to volunteer material information. The grant of parole must have been obtained by deliberately fraudulent statement of fact. The Commission will then determine how much additional time is warranted to account for: (1) the true facts of the case, and (2) the fraudulent conduct itself. The fraudulent statement may be graded in the guidelines at §2.36 as if a non-violent escape (*i.e.*, escape by deception, as in the case of a forged court order, etc.).

■ 2.30-03. *Prior Criminal Conduct.* A finding of prior criminal conduct may be based on a crime committed in prison or on a previous period of parole, so long as it occurred during the current sentence. In that case, rescission or revocation guidelines, as appropriate, are to be applied in determining how much additional time the individual would have been required to serve had the criminal behavior been known to the Commission when it occurred.

■ 2.30-04. *Forfeiture of Street Time.* If the parolee committed a crime (punishable by detention) during a previous period of parole, and that crime has resulted in a conviction, forfeiture of that *previous* period of street time must be ordered pursuant to §2.52(b)(2), whether or not the current grant of parole is canceled by the Commission.

■ 2.30-05. *New Violation Charges.* If new parole violation charges are also alleged, the warrant application may list both "cancellation charges" and "revocation charges." Following a combined cancellation/revocation hearing, the Commission may decide to simultaneously revoke *and* cancel the parole grant, issuing separate Notices of Action relative to each decision (or take either action alone).

■ 2.30-06. *Inoperative Time.* A parole obtained by fraudulent misrepresentation is a permissible basis for the parolee to lose credit for all time spent upon the canceled grant of parole, and the Commission should notify the Bureau of Prisons by memorandum to treat the period of release on parole as "inoperative time" (just as in the case of an escape). Otherwise, the parolee retains sentence credit for the time spent on the canceled grant of parole, unless the parole is also revoked and street time forfeiture is based upon parole violation behavior.

■ **§2.31 PAROLE TO DETAINEERS; STATEMENT OF POLICY.**

(a) Where a detainer is lodged against a prisoner, the Commission may grant parole if the prisoner in other respects meets the criteria set forth in §2.18. The presence of a detainer is not in itself a valid reason for the denial of parole.

(b) The Commission will cooperate in working out arrangements for concurrent supervision with other jurisdictions where it is feasible and where release on parole appears to be justified.

■ **§2.32 PAROLE TO LOCAL OR IMMIGRATION DETAINEERS.**

(a) When a state or local detainer is outstanding against a prisoner whom the Commission wishes to parole, the Commission may order either of the following:

(1) Parole to the actual physical custody of the detaining authorities only. In this event, release is not to be effected except to the detainer. When such a detainer is withdrawn, the prisoner is not to be released unless and until the Commission makes a new order of parole.

(2) Parole to the actual physical custody of the detaining authorities or an approved plan. In this event, release is to be effected to the community if detaining officials withdraw the detainer or make no effort to assume custody of the prisoner, providing there is an acceptable plan for community supervision.

(b) When the Commission wishes to parole a prisoner subject to a detainer filed by Federal Immigration officials, the Commission shall order the following: Parole to the actual physical custody of the immigration authorities or an approved plan. In this event, release is to be effected regardless of whether immigration officials take the prisoner into custody, providing there is an acceptable plan for community supervision.

(c) As used in this section "parole to a detainer" means release to the "physical custody" of the authorities who have lodged the detainer. Temporary detention in a jail in the county where the institution of confinement is located does not constitute release on parole to such detainer. If the authorities who lodged the detainer do not take the prisoner into custody for any reason, he shall be returned to the institution to await further order of the Commission.

■ **§2.33 RELEASE PLANS.**

(a) A grant of parole is conditioned upon the approval of release plans by the Regional Commissioner. In general, the following factors are considered as elements in the prisoner's release plan.

- (1) Availability of legitimate employment and an approved residence for the prospective parolee; and**
- (2) Availability of necessary aftercare for a parolee who is ill or who requires special care.**
- (b) Generally, parolees will be released only to the place of their legal residence unless the Commission is satisfied that another place of residence will serve the public interest more effectively or will improve the probability of the applicant's readjustment.**
- (c) Where the circumstances warrant, the Commission on its own motion, or upon recommendation of the probation officer, may require that an advisor who is a responsible, reputable, and law-abiding citizen living in or near the community in which the releasee will reside be available to the releasee. Such advisor shall serve under the direction of and in cooperation with the probation officer to whom the parolee is assigned.**
- (d) When the prisoner has an unsatisfied fine or restitution order, a reasonable plan for payment [or performance of services, if so ordered by the court] shall, where feasible, be included in the parole release plan.**

Notes and Procedures

■ **2.33-01. *Place of Release.*** Release plans are developed through the cooperative effort of the Bureau of Prisons and Probation Service staff. In the event of a disagreement as to the most appropriate district of supervision for a person released on parole or as if on parole, the Regional Commissioner shall resolve the disagreement (Note: the Regional Commissioner's authority to determine the location of supervision derives from the Commission's statutory duty to determine the conditions of supervision).

■ **§2.34 RESCISSION OF PAROLE.**

- (a) When an effective date of parole has been set by the Commission, release on that date is conditioned upon continued satisfactory conduct by the prisoner. If a prisoner granted such a date has been found in violation of institution rules by a Discipline Hearing Officer or is alleged to have committed a new criminal act at any time prior to the delivery of the certificate of parole, the Regional Commissioner shall be advised promptly of such information. The prisoner shall not be released until the institution has been notified that no change has been made in the Commission's order to parole. Following receipt of such information, the Regional Commissioner may reopen the case and retard the parole date for up to 90 days without a hearing, or schedule a rescission hearing under this section on the next available docket at the institution or on the first docket following return to a federal institution from a community corrections center or a state or local halfway house.**
- (b) Upon the ordering of a rescission hearing under this section, the prisoner shall be afforded written notice specifying the information to be considered at the hearing. The notice shall further state that the purpose of the hearing will be to decide whether rescission of the parole date is warranted based on the charges listed on the notice, and shall advise the prisoner of the procedural rights described below.**

(c) A hearing before a Discipline Hearing Officer resulting in a finding that the prisoner has committed a violation of disciplinary rules may be relied upon by the Commission as conclusive evidence of institutional misconduct. However, the prisoner will be afforded an opportunity to explain any mitigating circumstances, and to present documentary evidence in mitigation of the misconduct at the rescission hearing.

(d) In the case of allegations of new criminal conduct committed prior to delivery of the parole certificate, the Commission may consider documentary evidence and/or written testimony presented by the prisoner, arresting authorities, or other persons.

(e) The prisoner may be represented at a rescission hearing by a person of his choice. The function of the prisoner's representative shall be to offer a statement following the discussion of the charges with the prisoner, and to provide such additional information as the hearing examiner may require. However, the hearing examiner may limit or exclude any irrelevant or repetitious statement.

(f) The evidence upon which the rescission hearing is to be conducted shall be disclosed to the prisoner upon request, subject to the exemptions set forth at §2.55. If the parole grant is rescinded, the Commission shall furnish to the prisoner a written statement of its findings and the evidence relied upon.

Notes and Procedures

■ 2.34-01. *In General.* Rescission or retardation of a previously established parole date are sanctions employed by the Parole Commission to assist the Bureau of Prisons in the maintenance of institutional discipline. These sanctions also uphold the integrity of the condition that release on the established date is contingent upon the prisoner's continued good conduct. Neither rescission nor retardation of parole can be ordered for disciplinary reasons unless the Bureau of Prisons has first conducted a hearing by a Discipline Hearing Officer. (New criminal conduct, whether in an institution or in the community, is the sole exception and is discussed in 2.34-07 below.) The purpose of a rescission hearing is to permit the prisoner to explain his misconduct and to permit the Parole Commission to reach an independent judgment as to the seriousness of the misconduct. However, a D.H.O. finding will in each case be considered conclusive that an infraction of the specified prison rule did occur.

■ 2.34-02. *Presumptive Parole Cases.* In cases where a presumptive date of parole has been set, D.H.O. reports will be considered at the prisoner's next interim hearing or the pre-release record review, whichever comes first. However, institution staff will send advance copies of D.H.O. reports to the Commission whenever rescission of parole is recommended. In such cases, the Regional Commissioner may schedule a rescission hearing.

(a) *Interim Hearings.* Progress reports must be prepared at least 30 days before the hearing or the pre-release review and will contain the following notice: "*IF YOU HAVE A PRESUMPTIVE PAROLE DATE, any D.H.O. actions referred to in this report will be considered by the Commission as a basis for possible rescission of your parole date. You may present documentary evidence (including voluntary statements of witnesses) in mitigation of your misconduct. You may also be represented at the hearing by a person of your choice, and may request to review all disclosable documents that will be considered by the Commission.*"

The complete D.H.O. file (BP-IS-115 and all supporting documents) will be made available to the examiner, and a copy of the file will be retained following the hearing for the Commission's consideration. (Pre-hearing disclosure of these documents is discussed in 2.34-06 below.) Interim hearings will be conducted pursuant to the procedures set forth at 28 C.F.R. 2.34(c)-(f), whenever the Progress Report includes D.H.O. actions.

(b) *Pre-release Record Reviews*. If the progress report prepared for a pre-release record review includes D.H.O. actions, the D.H.O. report and supporting documents will be attached to the report. The Regional Commissioner's options are to (1) order a rescission hearing, (2), change the presumptive date to an effective date, but retard parole without a hearing for up to 90 days, or (3) change the presumptive date to an effective date without retardation (if no adverse action is warranted). Specific notice of that decision will be sent by the Commission.

■ 2.34-03. *Effective Parole Cases*. The institution will immediately notify the Commission's office of any misconduct by a prisoner with an effective parole date. A copy of the D.H.O. report and all supporting documents shall accompany this notice, unless the prisoner is so close to the release date that parole must be retarded on emergency notice. (Supporting documents must then be sent as soon as possible.) If the misconduct is not serious enough to warrant a rescission hearing or retardation of parole, the Commission must promptly notify the institution that there will be no change in the previous order.

(a) *Rescission Hearings*. If the misconduct warrants a rescission hearing, the Regional Commissioner may reopen the case and retard parole for a rescission hearing on the next available docket. The hearing shall be in accordance with the procedures specified at 28 C.F.R. 2.34(c)-(f). The examiner will be provided with a copy of the complete D.H.O. file.

(b) *Retardation Without a Hearing*. Under 28 C.F.R. 2.34, a Regional Commissioner may retard a parole date for up to 90 days without a hearing for disciplinary infraction(s). If subsequent to an order to retard a parole date under this provision, the Regional Commissioner becomes aware of additional D.H.O. disciplinary infraction(s) which warrant further retardation of the parole grant, a rescission hearing shall be scheduled if the total retardation warranted exceeds 90 days from the original parole date. An exception is when the additional retardation ordered still results in a parole date preceding the arrival of the next regularly scheduled hearings at such institution; in such case, this limited additional retardation may be ordered without a hearing.

■ 2.34-04. *Notice of Action Formats*.

(a) *Examples*:

(1) If a rescission hearing is ordered and will be conducted prior to the scheduled release date, the Notice of Action will read:

Reopen: [schedule for a rescission hearing on next docket]

Reasons: You were found guilty of [specified misconduct] by D.H.O. report dated [].

(2) If a rescission hearing is ordered but will not be conducted prior to the scheduled release date, the Notice of Action will read:

Reopen: [retard parole and schedule for a rescission hearing on the next docket]

Reasons: You were found guilty of [specified misconduct] by D.H.O. report dated [].

(3) If parole is retarded for up to 90 days without a hearing, the Notice of Action will read:

Reopen: [retard parole for specified number of days]

Reasons: You were found guilty of [specified misconduct] by D.H.O. report dated [].

Provide guideline data (and reasons if the retardation exceeds the guidelines).

(b) *Notice of Procedural Rights in Effective Parole Cases.* Each Notice of Action reopening for a rescission hearing will include the following notice of procedural rights attached to the Inmate Copy of the Notice of Action: "*The purpose of a rescission hearing ordered by the Parole Commission is to decide whether a deferral of your parole date is warranted based on the charges listed on the attached Notice of Action. At your hearing, you may present documentary evidence (including voluntary statements of witnesses) in mitigation of your misconduct. You may also be represented at your hearing by person of your choice, and may request your case manager to permit you to review all disclosable documents that will be considered by the Commission.*"

■ **2.34-05. *Original Jurisdiction Cases.*** A Regional Commissioner may refer a vote to take no action on an D.H.O. report or to retard parole up to 90 days under the procedures of 28 C.F.R. 2.17 or may take action on his own motion. If a rescission hearing is ordered, the decision following such hearing must be handled under 28 C.F.R. 2.17 if the case was previously handled under original jurisdiction procedures.

■ **2.34-06. *Disclosure of Documents.*** Normal pre-hearing disclosure procedures will apply to the D.H.O. file (BP-IS-115 and all supporting documents). If the case manager objects to disclosure of any documents or portion thereof to the prisoner on the grounds of potential harm to any person, the document will be clearly marked "DO NOT DISCLOSE" and the D.H.O. report will serve as the legally-required summary of withheld document(s). Examiners must exercise care not to reveal the contents of any non-disclosable document.

■ **2.34-07. *New Criminal Behavior by a Prisoner.***

(a) The occasion may arise where a prisoner is alleged to have committed a new crime (*e.g.*, while on pass from a C.C.C.) and no D.H.O. is conducted. In such a case, the prisoner will be scheduled for a rescission hearing upon return to an institution. The Commission should ensure that specific notice of the charges is given in the Notice of Action reopening the case, and that the same type of documentary evidence that would be available at an institutional revocation hearing (*e.g.*, arrest reports, etc.) is sent to the institution prior to the rescission hearing. Where appropriate, the U.S. Probation Office may be requested to interview the witnesses and obtain statements.

(b) While the prisoner may not call adverse witnesses at the hearing, the truth of the charges may be contested and the prisoner may present written statements on his behalf. In the event such a hearing is ordered, the case manager is to be contacted and requested to make sure the prisoner is advised of the above procedural rights.

■ **2.34-08. *Escape Cases.*** When a prisoner with a parole date is returned to an institution following an escape, a rescission hearing is not to be conducted until the institution first completes the necessary D.H.O. action.

■ **2.34-09. *Rescission Guidelines.*** Every decision to rescind parole, and every decision to retard parole without a hearing, must be made pursuant to the guidelines set forth at 28 C.F.R. 2.36.

■ §2.35 MANDATORY RELEASE IN THE ABSENCE OF PAROLE.

(a) A prisoner shall be mandatorily released by operation of law at the end of the sentence imposed by the court less such good time deductions as he may have earned through his behavior and efforts at the institution of confinement. If released pursuant to 18 U.S.C. 4164, such prisoner shall be released, as if on parole, under supervision until the expiration of the maximum term or terms for which he was sentenced less 180 days. If released pursuant to 18 U.S.C. 4205(f), such prisoner shall remain under supervision until the expiration of the maximum term or terms for which he was sentenced. Insofar as possible, release plans shall be completed before the release of any such prisoner.

(b) It is the Commission's interpretation of the statutory scheme for parole and good time that the only function of good time credits is to determine the point in a prisoner's sentence when, in the absence of parole, the prisoner is to be conditionally released on supervision, as described in subsection (a). Once an offender is conditionally released from imprisonment, either by parole or mandatory release, the good time earned during that period of imprisonment is of no further effect either to shorten the period of supervision or to shorten the period of imprisonment which the offender may be required to serve for violation of parole or mandatory release.

(c) A prisoner committed under the Youth Corrections Act must be initially released conditionally under supervision not later than two years before the expiration of the term imposed by the court.

(d) If the Commission orders a military prisoner who is under the Commission's jurisdiction for an offense committed after August 15, 2001 continued to the expiration of his sentence (or otherwise does not grant parole), the Commission shall place such prisoner on mandatory supervision after release if the Commission determines that such supervision is appropriate to provide an orderly transition to civilian life for the prisoner and to protect the community into which such prisoner is released. The Commission shall presume that mandatory supervision is appropriate for all such prisoners unless case-specific factors indicate that supervision is inappropriate. A prisoner who is placed on mandatory supervision shall be deemed to be released as if on parole, and shall be subject to the conditions of release at §2.40 until the expiration of the maximum term for which he was sentenced, unless the prisoner's sentence is terminated early by the appropriate military clemency board.

Notes and Procedures

2.35-01 A military prisoner who committed his crime before August 16, 2001, and who is mandatorily released, is not subject to supervision. See 2.2-03(c).

■ §2.36 RESCISSION GUIDELINES.

(a) The following guidelines shall apply to the sanctioning of disciplinary infractions or new criminal conduct committed by a prisoner during any period of confinement that is credited to his current sentence (whether before or after sentence is imposed), but prior to his release on parole; and by a parole violator during any period of confinement prior to or following the revocation of his parole (except when such period of confinement has resulted from initial parole to a detainee). These guidelines specify the customary time to be served for such behavior which shall be added to the time required by the original presumptive or effective date. Credit shall be given towards

service of these guidelines for any time spent in custody on a new offense that has not been credited towards service of the original presumptive or effective date. If a new concurrent or consecutive sentence is imposed for such behavior, these guidelines shall also be applied at the initial hearing on such term.

(1) ADMINISTRATIVE RULE INFRACTION(S) (including alcohol abuse) normally can be adequately sanctioned by postponing a presumptive or effective date by 0-60 days per instance of misconduct, or by 0-8 months in the case of use or simple possession of illicit drugs or refusal to provide a urine sample. Escape or other new criminal conduct shall be considered in accordance with the guidelines set forth below.

(2) ESCAPE/NEW CRIMINAL BEHAVIOR IN A PRISON FACILITY (including a community corrections center). The time required pursuant to the guidelines set forth in paragraphs (a)(2)(i) and (ii) of this section shall be added to the time required by the original presumptive or effective date.

(i) Escape or Attempted Escape

**(A) Escape or attempted escape,
except as listed below** **8-16 months**

**(B) If from non-secure custody
with voluntary return in
6 days or less** **<=6 months**

(C) If by fear or force applied to person(s), grade under (ii) but not less than Category Five.

Notes:

(1) If other criminal conduct is committed during the escape or during time spent in escape status, then time to be served for the escape/attempted escape shall be added to that assessed for the other new criminal conduct.

(2) Time in escape status shall not be credited.

(3) Voluntary return is defined as returning voluntarily to the facility or voluntarily turning one's self in to a law enforcement authority as an escapee (not in connection with an arrest on other charges).

(4) Non-secure custody refers to custody with no significant physical restraint [e.g., walkaway from a work detail outside the security perimeter of an institution; failure to return to any institution from a pass or unescorted furlough; or escape by stealth from an institution with no physical perimeter barrier (usually a camp or community corrections center)].

(ii) Other New Criminal Behavior in a Prison Facility

<u>Severity Rating of the New Criminal Behavior (from §2.20)</u>	<u>Guideline Range</u>
Category One	<=8 months
Category Two	<=10 months
Category Three	12-16 months
Category Four	20-26 months
Category Five	36-48 months
Category Six	52-64 months
Category Seven	64-92 months
Category Eight	120 + months

Note: Grade unlawful possession of a firearm or explosives in a prison facility, other than a community corrections center, as Category Six. Grade unlawful possession of a firearm in a community corrections center as Category Four. Grade unlawful possession of a dangerous weapon other than a firearm or explosives (*e.g.*, knife) in a prison facility or community corrections center as Category Three.

(3) NEW CRIMINAL BEHAVIOR IN THE COMMUNITY (*e.g.*, while on pass, furlough, work release, or on escape). In such cases, the guidelines applicable to reparole violators under §2.21 shall be applied, using the new offense severity (from §2.20) and recalculated salient factor score (such score shall be recalculated as if the prisoner had been on parole at the time of the new criminal behavior). The time required pursuant to these guidelines shall be added to the time required by the original presumptive or effective date.

Note: Offenses committed in a prison or in a community corrections center that are not limited to the confines of the prison or community corrections center (*e.g.*, mail fraud of a victim outside the prison) are graded as new criminal behavior in the community.

(b) The above are merely guidelines. Where the circumstances warrant, a decision outside the guidelines (above or below) may be rendered provided specific reasons are given. For example, a substantial period of good conduct since the last disciplinary infraction in cases not involving new criminal conduct may be treated as a mitigating circumstance.

Notes and Procedures

■ 2.36-01. *Administrative Infractions*. The rescission guidelines for administrative infractions for simple possession or use of illicit drugs (other than alcohol) or refusal to provide a urine specimen are 0-8 months per incident. The rescission guidelines for other administrative infractions (including simple possession or use of alcohol) are 0-60 days per incident. Note: Multiple instances of drug abuse are considered as separate violations only when separated by an intervening disciplinary report. If a decision is rendered following a rescission hearing to defer release above the guideline range for administrative rule infractions, the Notice of Action must state that a decision above the guideline range is found warranted and specify the reasons therefore.

■ 2.36-02. *Escape/New Criminal Behavior Within a Prison Facility or Within a Community Corrections Center*.

(a) *Escape or Attempted Escape Without Force or Threat*. The Notice of Action must indicate the appropriate guideline range to be added to the time required by the original presumptive or effective date, and--if a decision is rendered outside the guideline range--the notice must state with specificity the factors warranting such a decision.

(b) *Other New Criminal Behavior Committed Within a Prison Facility or Within a Community Corrections Center*. New criminal conduct within the confines of a prison facility (or within a CCC) shall be assessed pursuant to the guidelines set forth in §2.36(a)(ii). Note: Offenses not limited to the confines of a prison facility or CCC (e.g., submitting false tax returns to the IRS from a prison facility) are graded as new criminal behavior in the community. The Notice of Action must indicate the new offense severity and the appropriate guideline range to be added to the time required by the original presumptive or effective date, and--if a decision is rendered outside the guideline range--the notice must state with specificity the factors warranting such a decision.

(c) *Escape by Fear or Force*. Grade as "Other New Criminal Behavior in a Prison Facility," but not less than Category Five. Example: A prisoner escapes from an institution work detail by overpowering the correctional officer escorting the detail. The officer does not sustain bodily injury. Grade as Category Five (i.e., add 36-48 months). This sanction is in place of, not in addition to, the sanction for escape without force. The Notice of Action must indicate the offense severity, the appropriate guideline range to be added to the time required by the original presumptive or effective date, and--if a decision is rendered outside the guideline range--the notice must state with specificity the factors warranting such a decision.

(d) *Minor Assaults*. Certain assaults may be rather minor (e.g., shoving, throwing non-dangerous objects), or, in some cases it may not be possible to establish which offender is the aggressor (e.g., where two prisoners are found fighting). In cases of minor assaults such as described above, grade as an administrative violation. Examples: (1) During an argument, a prisoner shoves and verbally abuses another prisoner; (2) Two prisoners are found fighting, but it cannot be established which prisoner was the aggressor; (3) A prisoner throws urine at a correctional officer from a cell while in disciplinary segregation.

■ 2.36-03. *New Criminal Behavior in the Community (e.g., While on Pass from a Community Corrections Center, or on Furlough, Work Release, or Escape)*.

(a) Apply the reparole guidelines under §2.21(b). Recalculate the salient factor score as if the prisoner had been on parole at the time of the new criminal behavior. If other criminal behavior is committed

during an escape or while on escape status, add the time to be served for the escape or attempted escape to the time that is assessed for the other new criminal conduct. The Notice of Action must indicate the new salient factor score, the appropriate offense severity rating, and the guideline range, as well as the Commission's decision with regard to the release date.

(b) **Note:** New criminal behavior includes a new felony or misdemeanor offense with the following exceptions. Possession of a small quantity of drugs for the prisoner's own use, a minor traffic infraction, or a minor "public order" misdemeanor (such as disorderly conduct) shall be treated as an administrative infraction under 2.36-01 above unless another criminal offense to which §2.21 applies also was committed. In such case, all the offenses shall be considered under §2.21 (by applying the multiple separate offense rule).

■ 2.36-04. *Technical Escapes.* A prisoner on pass or furlough who fails to return to Bureau custody within the required time frame solely because of a new arrest is not considered an escapee for rescission guideline purposes. However, a prisoner who fails to return at the required time and is later prevented from returning by a new arrest is treated as an escapee (without voluntary return).

■ §2.37 **DISCLOSURE OF INFORMATION CONCERNING PAROLEES; STATEMENT OF POLICY.**

(a) **Information concerning a parolee under the Commission's supervision may be disclosed to a person or persons who may be exposed to harm through contact with that particular parolee if such disclosure is deemed to be reasonably necessary to give notice that such danger exists.**

(b) **Information concerning parolees may be released by a Chief U.S. Probation Officer to a law enforcement agency (1) as deemed appropriate for the protection of the public or the enforcement of the conditions of parole or (2) pursuant to a request under 18 U.S.C. 4203(e).**

(c) **Information deemed to be "public sector" information may be disclosed to third parties without the consent of the file subject. Public sector information encompasses the following: (1) Name; (2) Register number; (3) Offense conviction; (4) Past and current places of incarceration; (5) Age; (6) Sentence data on the Bureau of Prisons sentence computation record (BP-5); (7) Date(s) of parole and parole revocation hearings; and (8) The decision(s) rendered by the Commission following a parole or parole revocation hearing proceeding, including the dates of continuances and parole dates. An inmate's designated future place of incarceration is not public information.**

Notes and Procedures

■ 2.37-01. *Disclosure of Information.*

(a) Authority for discretionary release of information under §2.37(a) is delegated to the Chief Probation Officer of the District supervising the case (in the absence of a special instruction from the Commission to the contrary). Determinations under this section shall be made under the standards established by the Administrative Office of the U.S. Courts for similar determinations for probationers, subject to any special instructions of the Commission. Any questions concerning the necessity of such disclosure may be referred to the Regional Commissioner for decision.

(b) Section 2.37(b)(1) is intended to facilitate cooperation between the Parole Commission and law enforcement officials. It refers to disclosure on a case by case basis of such information as is necessary to assist a law enforcement agency in the investigation of a specific crime (for example, notification to a law enforcement agency by a probation officer that a parolee has in the past used a modus operandi similar to one reportedly used in a recent crime); and disclosure of such information as is necessary to assist in parole supervision (for example, asking law enforcement officials whether a parolee has been questioned or has had other contacts with the law enforcement agency, or asking assistance in locating a parolee whose whereabouts are unknown). Authority for such disclosure, absent a special instruction from the Commission to the contrary, is delegated to the Chief Probation Officer of the District supervising the case. Determinations to disclose case file information shall be made under the standards established by the Administrative Office of the U.S. Courts for similar determinations for probationers, subject to any special instructions of the Commission. Any questions concerning disclosure under this section shall be referred to the Regional Commissioner for decision.

(c) In addition, §2.37(b)(2) provides for the routine disclosure of certain information about parolees to law enforcement authorities pursuant to 18 U.S.C. 4203(e). When requested by the head of a law enforcement agency of a state or local government, the Chief Probation Officer of the applicable district shall provide with respect to parolees who reside, are employed, or are supervised within such agency's geographical jurisdiction the following information (to the extent that it is maintained by the Probation Office): (1) the names of such parolees, (2) their addresses, (3) their dates of birth, (4) their F.B.I. numbers, (5) their fingerprints and photographs, and (6) the nature of the offense of conviction and the factual circumstances relating to it.

(d) Disclosure of information regarding a parolee's HIV- positive status shall be guided by the policy set forth in 2.204-24.

Notes:

(1) The term "parolee" includes persons released as if on parole (mandatory releasees) and persons on supervised release.

(2) Provisions for routine disclosure do not apply to Witness Security (WITSEC) cases.

(3) Any law enforcement agency receiving information under paragraph (c) above shall be notified that such information is for law enforcement purposes only and is not to be released outside such agency.

(4) Disclosure of information concerning persons sentenced under the Juvenile Justice Act is governed by the following. When a juvenile delinquent is released, the analyst should ask the Probation Officer supervising the case to request authorization from the committing court to disclose information concerning the juvenile (a) to person(s) who may be exposed to harm through contact with that juvenile if such disclosure is deemed to be reasonably necessary to give notice that such danger exists, and (b) to a law enforcement agency where disclosure of information is required for protection of the public or enforcement of the conditions of parole. A copy of this authorization should be sent to the Commission for its file. If such authorization is granted by the committing court, disclosures may then be made as appropriate. For any disclosure consideration not covered above, contact the Commission's Legal Office.

(5) "Designated place of incarceration" means the place of incarceration to which the inmate is scheduled to be transferred in the future.

■ **§2.38 COMMUNITY SUPERVISION BY UNITED STATES PROBATION OFFICERS.**

(a) Pursuant to sections 3655 and 4203(b)(4) of Title 18 of the U.S. Code, U.S. Probation Officers shall provide such parole services as the Commission may request. In conformity with the foregoing, probation officers function as parole officers and provide supervision to persons released by parole or as if on parole (mandatory release) under the Commission's jurisdiction.

(b) A parolee may be transferred to a new district of supervision with the permission of the probation officers of both the transferring and receiving district, provided such transfer is not contrary to instructions from the Commission.

Notes and Procedures

■ **2.38-01. *Supervision Guidelines.*** Special supervision on a highly selective basis for the first six months may be ordered. This order will be placed on the Notice of Action in the following form: "Special Supervision Required for the first six months".

■ **2.38-02. *Supervision Reports.*** All parolees and mandatory releasees shall make monthly written reports (Probation Form 8) to the U.S. Probation Officer to whom they have been assigned, and such written reports shall be submitted regularly on a monthly basis regardless of level of supervision under the parole supervision guidelines.

■ **2.38-03. *Warrant Execution Probation Officers.*** Probation Officers are not authorized by the Commission to execute warrants.

■ **§2.39 JURISDICTION OF THE COMMISSION.**

(a) Jurisdiction of the Commission over a parolee shall terminate no later than the date of expiration of the maximum term or terms for which he was sentenced, except as provided by §2.35, §2.43, or §2.52.

(b) The parole of any parolee shall run concurrently with the period of parole or probation under any other Federal, State, or local sentence.

(c) Upon the termination of jurisdiction, the Commission shall issue a certificate of discharge to such parolee and to such other agencies as it may determine.

Notes and Procedures

■ **2.39-01. *Notice of Discharge.*** In the absence of early termination of supervision, the probation officer, on behalf of the Commission, shall issue a Notice of Discharge to the parolee at the expiration of his term. When a Special Parole Term follows a regular parole term, such Notice shall be issued by the probation officer only at the completion of the Special Parole Term. When a Commission warrant has been issued, no Notice of Discharge shall be given until a final disposition of the warrant has been made.

■ §2.40 CONDITIONS OF RELEASE.

(a) General conditions of release.

(1) The conditions set forth in §2.204(a)(3)-(6) apply for the reasons set forth in §2.204(a)(1). These conditions are printed on the certificate of release issued to each releasee.

(2) (i) The refusal of a prisoner who has been granted a parole date to sign the certificate of release (or any other document necessary to fulfill a condition of release) constitutes withdrawal of that prisoner's application for parole as of the date of refusal. To be considered for parole again, that prisoner must reapply for parole consideration.

(ii) A prisoner who is released to supervision through good-time deduction who refuses to sign the certificate of release is nevertheless bound by the conditions set forth in that certificate.

(b) Special conditions of release.

(1) The Commission may impose a condition other than one of the general conditions of release if the Commission determines that such condition is necessary to protect the public from further crimes by the releasee and to provide adequate supervision of the releasee. Examples of special conditions of release that the Commission frequently imposes are found at §2.204(b)(2).

(2) If the Commission requires the releasee's participation in a drug-treatment program, the releasee must submit to a drug test before release and to at least two other drug tests, as determined by the supervision officer. A decision not to impose this special condition, because available information indicates a low risk of future substance abuse by the releasee, shall constitute good cause for suspension of the drug testing requirements of 18 U.S.C. 4209(a). A grant of parole or reparole is contingent upon the prisoner passing all pre-release drug tests administered by the Bureau of Prisons.

(c) Changing conditions of release. The provisions of §2.204(c) apply.

(d) Appeal. A releasee may appeal under §2.26 an order to impose or modify a release condition not later than 30 days after the date the condition is imposed or modified.

(e) Application of release conditions to absconder. The provisions of §2.204(d) apply.

(f) Revocation for possession of a controlled substance. If the Commission finds after a revocation hearing that a releasee, released after December 31, 1988, has possessed a controlled substance, the Commission shall revoke parole or mandatory release. If such a releasee fails a drug test, the Commission shall consider appropriate alternatives to revocation. The Commission shall not revoke parole on the basis of a single, unconfirmed positive drug test, if the releasee challenges the test result and there is no other violation found by the Commission to justify revocation.

(g) Supervision officer guidance. The provisions of §2.204(f) apply.

(h) Definitions. For purposes of this section –

(1) the terms *supervision officer, domestic violence crime, approved offender-rehabilitation program* and *firearm*, as used in §2.204, have the meanings given those terms by §2.204(g);

(2) the term *releasee*, as used in this section and in §2.204 means a person convicted of a federal offense who has been released on parole or released through good-time deduction; and

(3) the term *certificate of release*, as used in this section and §2.204, means the certificate of parole or mandatory release delivered to the prisoner under §2.29.

Notes and Procedures

■ 2.40-01. *Applicability of Notes and Procedures Accompanying § 2.204.* All Notes and Procedures accompanying § 2.204 apply.

■ 2.40-02. *Release on Condition of Participation in Drug or Alcohol Treatment Program.* Government privacy regulations restrict information flow between treatment facilities, the Commission, and Probation Officers in the absence of the consent of the person being treated. They allow for a blanket consent at the outset of treatment (42 C.F.R. Part 2, 2.29) and a blanket consent form has been prepared for that purpose and is to be signed by the prisoner before release. Refusal to sign this consent form will be treated in the same way as a refusal to sign the certificate of parole.

■ 2.40-03. *Special Conditions.* Special conditions (including drug aftercare) should be recommended, where appropriate, by the hearing panel at the time the presumptive date (whether by parole or mandatory release) is determined (normally at the initial hearing). Where appropriate, special conditions may be added or modified at any time prior to the prisoner's release.

■ 2.40-04. *Appeal of Conditions.*

(a) A Notice of Action shall be used when modifying a condition of release, and such notice serves to advise the releasee of his rights to appeal the action. A decision not to change a condition previously imposed is not appealable.

(b) The parolee may also appeal the original imposition of conditions. When an inmate objects to the conditions of release, he remains subject to them nonetheless until such time as the Commission might revise them on appeal. The prisoner may obtain an appeal form from his case manager prior to his release if he contemplates filing an appeal. The time limit for appeal expires 30 days after the date of his release from custody.

■ §2.41 TRAVEL APPROVAL.

(a) The probation officer may approve travel outside the district without approval of the Commission in the following situations:

(1) Vacation trips not to exceed thirty days.

(2) Trips, not to exceed thirty days, to investigate reasonably certain employment possibilities.

(3) Recurring travel across a district boundary, not to exceed fifty miles outside the district, for purpose of employment, shopping, or recreation.

(b) Specific advance approval by the Commission is required for all foreign travel, employment requiring recurring travel more than fifty miles outside the district (except employment at offshore locations), and vacation travel outside the district exceeding thirty days. A request for such permission shall be in writing and must demonstrate a substantial need for such travel.

(c) A special condition imposed by the Regional Commissioner prohibiting certain travel shall supersede any general rules relating to travel as set forth above.

Notes and Procedures

■ 2.41-01. *Applicability of Certain Notes and Procedures Accompanying § 2.206.* The provisions of 2.206-02 through 2.206-04 apply.

■ 2.41-02. *Original Jurisdiction Cases.* In original jurisdiction cases, the Regional Commissioner may approve or deny such travel on his own motion or may refer the case with his recommendation and vote to the National Commissioners. In such case, the quorum at 28 C.F.R. 2.17 shall be required. Travel as part of transfer to another district does not require Commission approval, but evidence of the completed transfer should be sent to the originating region. Travel to Alaska, Hawaii, and U.S. Territories is not considered to be foreign travel.

■ **§2.42 PROBATION OFFICER'S REPORTS TO COMMISSION.**

A supervision report shall be submitted by the responsible probation officer to the Commission for each parolee after the completion of 24 months of continuous supervision and annually thereafter. The probation officer shall submit such additional reports as the Commission may direct.

Notes and Procedures

■ 2.42-01. *Applicability of Notes and Procedures Accompanying § 2.207.* All Notes and Procedures accompanying § 2.207 apply.

■ **§2.43 EARLY TERMINATION.**

(a)(1) Upon its own motion or upon request of the parolee, the Commission may terminate supervision, and thus jurisdiction, over a parolee prior to the expiration of his maximum sentence.

(2) A committed youth offender sentenced to a term of more than one year may not be granted an early termination of jurisdiction earlier than after one year of continuous supervision on parole. When termination of jurisdiction prior to the expiration of sentence is granted in the case of a youth offender, his conviction shall be automatically set aside. A certificate setting aside his conviction shall be issued in lieu of a certificate of termination.

(b) Two years after release on supervision, and at least annually thereafter, the Commission shall review the status of each parolee to determine the need for continued supervision. In calculating

such two-year period there shall not be included any period of release on parole prior to the most recent release, nor any period served in confinement on any other sentence. A review will also be conducted whenever early termination is recommended by the supervising probation officer.

(c)(1) Five years after release on supervision, the Commission shall terminate supervision over such parolee unless it is determined, after a hearing conducted in accordance with the procedures prescribed in 18 U.S.C. 4214(a)(2), that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law. Such hearing may be conducted by a hearing examiner or other official designated by the Regional Commissioner. In calculating such five-year period, there shall not be included any period of release on parole prior to the most recent release or any period served in confinement on any other sentence.

(2) If supervision is not terminated under paragraph (c)(1) of this section the parolee may request a hearing annually thereafter, and a hearing shall be conducted with respect to termination of supervision not less frequently than biennially.

(3) A parolee may appeal an adverse decision under paragraphs (c)(1) or (2) of this section pursuant to §2.26 or §2.27 as applicable.

(d) The Regional Commissioner shall have authority to make decisions under this section pursuant to the guidelines set forth below; except that in the case of a parolee classified under the provisions of §2.17, an affirmative decision to terminate supervision under paragraph (b) of this section, or a decision to terminate or continue supervision under paragraph (c) of this section shall be made pursuant to the provisions of §2.17.

(e) *Early termination guidelines:* In determining whether to grant early termination from supervision, the Commission shall apply the following guidelines:

(1) Absent case-specific factors to the contrary, termination of supervision shall be considered indicated when:

(i) A parolee originally classified in the very good risk category (pursuant to §2.20) has completed two continuous years of supervision free from any indication of new criminal behavior or serious parole violation; and

(ii) A parolee originally classified in other than the very good risk category (pursuant to §2.20) has completed three continuous years of supervision free from any indication of new criminal behavior or serious parole violation.

Note: As used in this section, an indication of new criminal behavior includes a new arrest if supported by substantial evidence of guilt, even if no conviction or parole revocation results.

(2) Decisions to continue the parolee under supervision past the period indicated above may be made where case-specific factors justify a conclusion that continued supervision is needed to protect the public welfare. Such case-specific factors may relate to the current behavior of the parolee (for example, a parolee whose behavior begins to deteriorate as the normally expected time for termination approaches) or to the parolee's background (for example, a parolee with a history of repetitive assaultive conduct or substantial involvement in large scale or organized criminal

activity). In such cases, an additional period of supervision prior to termination of jurisdiction may be warranted.

(3) Decisions to terminate supervision prior to completion of the three year period specified in paragraph (e)(1)(ii) of this section may be made where it appears that the parolee is a better risk than indicated by the salient factor score as originally calculated. However, termination of supervision prior to the completion of two years of difficulty-free supervision will not be granted unless case-specific factors clearly indicate that continued supervision would be counter-productive.

(4) Cases with pending criminal charge(s) shall not be terminated from supervision until disposition of such charge(s) is known.

(5) After five continuous years of supervision, decisions to terminate will be made in accordance with subsection (c) of this rule.

Notes and Procedures

■ 2.43-01. *In General.*

(a) A probation officer shall submit to the Commission a report (Parole Form F-3) for every parolee and mandatory releasee after two years of active supervision and annually thereafter, except when the releasee's term will expire within 90 days after the anniversary date of his release to supervision. Any period of confinement in a penal type of institution as a result of another sentence shall not be counted as active supervision. This report shall be prepared and submitted as soon as practicable after the completion of the period of supervision to be covered in the report. The initial report shall cover the first two years of supervision. Subsequent reports shall cover the periods of supervision since the last report. Note: In the case of a parolee who was committed under the Youth Corrections Act with a maximum sentence of six years or more, a terminal report shall, in addition, be submitted to the Commission six months prior to the expiration of the full term, and the case shall be reviewed to determine if early unconditional discharge should be granted to set aside the conviction.

(b) After review of the supervision report, the Regional Commissioner shall determine whether or not supervision (and thus jurisdiction) shall be terminated. A Commission order shall be used to record when termination is ordered and the case shall be docketed on a docket provided for that purpose (Early Termination Docket). If the parole is not terminated the Regional Commissioner shall write "no change" on the F-3 form and initial such action. No Notice of Action need be sent following any review based on a supervision period of less than five years.

(c) If early termination is ordered, a Certificate of Early Termination shall be issued with a copy to the probation officer. Certificates of Early Termination shall be signed either by the Regional Commissioner or his designee, and the termination shall be effective as of the date it is signed. NOTE: If the parolee has been transferred to the United States under a treaty, a copy shall be sent to the Office of International Affairs, Criminal Division, U.S. Department of Justice, Washington, D.C. 20530.

(d) In all cases of early termination, F.B.I. Form I-12 "Wanted-Flash-Cancellation Notice" should be completed and sent to: F.B.I. Identification Division, Washington, D.C. 20537, Attention: Recording Section. Copies of Certificates of Discharge or Early Termination need not be sent to the F.B.I.

(e) Parolees may petition the Commission directly for termination. In such instances no decision shall be made to terminate parole early without considering a recommendation of the U.S. Probation Officer.

(f) Unless early termination is ordered, each releasee will continue to report to the probation officer. The probation officer may vary the intensity of supervision in accordance with the supervision guidelines, but (1) reduction of the requirement of monthly written reports (Parole Form 8) is not permitted, and (2) placement in an administrative caseload requires prior approval by the Parole Commission.

(g) After five years under continuous supervision (excluding any time in confinement since the last release from federal custody on the sentence) the Regional Commissioner shall either (1) terminate supervision; or (2) order a personal hearing with the releasee to be held locally by a hearing examiner or other official designated by the Commissioner.

(h) The above hearing will be conducted under the same procedures as revocation hearings in that the releasee is entitled to receive reasonable advance notice of the hearing and that he has the right to have an attorney and witnesses appear in his behalf, and to the cross-examination of adverse witnesses. He also has the right to request a court-appointed attorney, and the probation officer should be instructed to provide Form CJA-22 if such a request is made. The releasee does not have the right to disclosure of file material in the same manner as when a decision to grant or deny parole is being made, but (as in a revocation hearing) should be allowed to see material at the time of the hearing which was added to the file since his release and which may be used by the Commissioner in making his determination relative to termination of supervision. These include any reports from a probation officer to the Commission (except material which is exempt under Federal statute from being disclosed).

(i) The purpose of such hearing is to obtain information upon which the Regional Commissioner might determine whether or not there is a likelihood that the parolee will engage in conduct violating any criminal law. A summary of the hearing is prepared. Upon final determination by the Commissioner, a Notice of Action is issued to the releasee, through the probation officer. Such notice should contain the right of appeal of such action pursuant to 28 C.F.R. 2.26. If the Regional Commissioner makes an order different from the recommendation made by the hearing examiner, the reasons for the differing action shall be made a part of the file.

■ 2.43-02. *Original Jurisdiction Cases.*

(a) *Prior to Five Years of Supervision.* Cases designated as original jurisdiction, which have been on parole supervision for less than five years, shall be processed as described in 2.43-01. If the Regional Commissioner orders "NO CHANGE" and supervision is continued, no referral to the National Commissioners is necessary. However, if after review of an Original Jurisdiction case, the Regional Commissioner votes for termination of supervision, the case must be referred to the National Commissioners for decision.

(b) *Following Five Years of Supervision.*

(1) The Regional Commissioner may vote for termination without ordering a termination hearing. In such case, a referral to the National Commissioners must be made. If a decision is made for termination, the case is returned to Commission staff for processing and certificate preparation. If the decision is for continued supervision, the National Commissioners will enter an order as follows: "Continue Supervision

- Schedule for Termination Hearing". Following completion of the hearing, the Regional Commissioner will vote and refer the case to the National Commissioners.

(2) If supervision is continued, the releasee may submit a petition pursuant to 28 C.F.R. 2.27.

■ 2.43-03. *Special Parole Terms.*

(a) When early termination of a regular parole term is ordered and Special Parole Term is to follow, the probation officer is to be authorized by letter to amend the applicable dates on the Special Parole Term Certificate to show that the Special Parole Term is to begin immediately and that the expiration date is to be moved forward.

(b) As Special Parole Terms are not aggregated with regular parole terms, a new schedule for submission of Form F-3 must be established at the time a Special Parole Term begins. Such reports are due after each year under supervision after the month in which the Special Parole Term began.

(c) The time to be counted for (1) the early termination guidelines and (2) a five-year termination hearing is to be counted from the beginning of the special parole term without credit for time on any regular parole supervision.

■ 2.43-04. *Military Offenders.* If the releasee is serving a sentence under the Uniform Code of Military Justice (UCMJ), early termination by the Parole Commission is not authorized. Early termination of a UCMJ sentence is a clemency action reserved by law to the appropriate military clemency board. If a case appears to warrant early termination, the Regional Commissioner should, by memorandum, refer the case to the appropriate military clemency board. Addresses follow: Army Clemency Board, SFCP, c/o OSA Mail Room, Room 1E526, Washington, D.C. 20310; Air Force Clemency and Pardon Board, SAF MIPC, Commonwealth Building, Washington, D.C. 20330; Navy Clemency and Pardon Board (use for Navy and Marine personnel), 801 North Randolph Street, Suite 905, Arlington, Virginia 22203.

■ §2.44 **SUMMONS TO APPEAR OR WARRANT FOR RETAKING OF PAROLEE.**

(a) If a parolee is alleged to have violated the conditions of his release, and satisfactory evidence thereof is presented, the Commission or a member thereof may:

(1) Issue a summons requiring the offender to appear for a preliminary interview or local revocation hearing.

(2) Issue a warrant for the apprehension and return of the offender to custody.

A summons or warrant may be issued or withdrawn only by the Commission, or a member thereof.

(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.

(c) A summons or warrant may be issued only within the prisoner's maximum term or terms except that in the case of a prisoner released as if on parole pursuant to 18 U.S.C. 4164, such summons or warrant may be issued only within the maximum term or terms, less one hundred eighty days. A summons or warrant shall be considered issued when signed and either–

(1) Placed in the mail or

(2) Sent by electronic transmission to the intended authorities.

(d) The issuance of a warrant under this section operates to bar the expiration of the parolee's sentence. Such warrant maintains the Commission's jurisdiction to retake the parolee either before or after the normal expiration date of the sentence and to reach a final decision as to revocation of parole and forfeiture of time pursuant to §2.52(c).

(e) A summons or warrant issued pursuant to this section shall be accompanied by a statement of the charges against the parolee, the applicable procedural rights under the Commission's regulations and the possible actions which may be taken by the Commission. A summons shall specify the time and place the parolee shall appear for a revocation hearing. Failure to appear in response to a summons shall be grounds for issuance of a warrant.

Notes and Procedures

■ 2.44-01. *Applicability of Notes and Procedures Accompanying § 2.211.* All Notes and Procedures accompanying § 2.211 apply.

■ 2.44-02. *Additional Warrant Language Requirement in YCA and NARA Cases.* The following language should be typed on all warrants issued for YCA and NARA releasees “Do not execute or use as a detainer after (full term date).” EXCEPTION: If there is evidence that the releasee is in absconder status omit this sentence and substitute: “Subject is in absconder status - execute warrant whenever subject is apprehended.” If after the warrant is issued information is received that the releasee is an absconder, notify the Marshal by letter or telefax signed by the Regional Commissioner (1) that the subject is in absconder status - execute warrant whenever subject is apprehended; and (2) instruct the Marshal to draw a line through the sentence “Do not execute after (full term date)” and to attach this letter or telefax to the warrant.

■ 2.44-03. *Limitation in Special Parole Term Cases.* A warrant cannot be issued during a special parole term for a violation that occurred during a regular parole term.

■ 2.44-04. *Service of Summons by Probation Officer.* A U.S. Probation Officer, in lieu of a U.S. Marshal, may serve a summons to appear at a revocation hearing.

■ 2.44-05. *Conviction Qualifying for “Street Time” Forfeiture.* Any conviction for an offense that could qualify as a basis for subsequent forfeiture of time on parole shall, at a minimum, require a letter of reprimand (in addition to, or in lieu of, any other sanction) if a warrant is not issued. If a warrant is

subsequently issued for any other violation, such conviction shall be charged on the warrant application to permit forfeiture of street time. Note: A letter of reprimand is not a prerequisite to forfeiture of street time under 28 C.F.R. 2.52(c)(2) if parole is subsequently revoked.

■ **§2.45 SAME; YOUTH OFFENDERS.**

(a) In addition to the issuance of a summons or warrant pursuant to §2.44 of this part, the Commission or a member thereof, when of the opinion that a youth offender will be benefitted by further treatment in an institution or other facility, may direct his return to custody or issue a warrant for his apprehension and return to custody.

(b) Upon his return to custody, such youth offender shall be scheduled for a revocation hearing.

■ **§2.46 EXECUTION OF WARRANT AND SERVICE OF SUMMONS.**

(a) Any officer of any Federal correctional institution or any Federal officer authorized to serve criminal process within the United States, to whom a warrant is delivered, shall execute such warrant by taking the parolee and returning him to the custody of the Attorney General.

(b) On arrest of the parolee the officer executing the warrant shall deliver to him a copy of the Warrant Application listing the charges against the parolee, the applicable procedural rights under the Commission's regulations and the possible actions which may be taken by the Commission.

(c) If execution of the warrant is delayed pending disposition of local charges, for further investigation, or for some other purpose, the parolee is to be continued under supervision by the probation officer until the normal expiration of the sentence, or until the warrant is executed, whichever first occurs. Monthly supervision reports are to be submitted, and the parolee must continue to abide by all the conditions of release.

(d) A summons to appear at a preliminary interview or revocation hearing shall be served upon the parolee in person by delivering to the parolee a copy of the summons. Service shall be made by any Federal officer authorized to serve criminal process within the United States, and certification of such service shall be returned to the Commission.

Notes and Procedures

■ 2.46-01. *Applicability of Notes and Procedures Accompanying § 2.212.* All Notes and Procedures accompanying § 2.212 apply .

■ 2.46-01. *Execution of Warrant by Warden in the Case of New Federal Sentence.* When an alleged violator receives a new federal sentence prior to revocation by the Commission, the warrant is filed with the institution and placed as a detainer. A copy of the warrant application is given to the alleged violator at this time. When released from the new sentence (or prior thereto, if ordered by the Regional Commissioner as a result of a dispositional review), the warrant is executed by taking the alleged violator into custody on the warrant. If no dispositional revocation hearing has been conducted, the prisoner at this time is also provided with an Attorney-Witness Election Form (Form I-16) on which he signifies whether

he desires an attorney or witnesses at the hearing. He is also provided with a CJA Form 22, on which he may request a court-appointed attorney, or waive the opportunity.

■ §2.47 WARRANT PLACED AS A DETAINER AND DISPOSITIONAL REVIEW.

(a) When a parolee is serving a new sentence in a federal, state or local institution, a parole violation warrant may be placed against him as a detainer.

(1) If the prisoner is serving a new sentence in a federal institution, a revocation hearing shall be scheduled within 120 days of notification of placement of the detainer, or as soon thereafter as practicable, provided the prisoner is eligible for and has applied for an initial hearing on the new sentence, or is serving a new sentence of one year or less. In any other case, the detainer shall be reviewed on the record pursuant to paragraph (a)(2) of this section.

(2) If the prisoner is serving a new sentence in a state or local institution, the violation warrant shall be reviewed by the Regional Commissioner not later than 180 days following notification to the Commission of such placement. The parolee shall receive notice of the pending review, and shall be permitted to submit a written application containing information relative to the disposition of the warrant. He shall also be notified of his right to request counsel under the provisions of §2.48(b) to assist him in completing this written application.

(b) If the prisoner is serving a new federal sentence, the Regional Commissioner, following a dispositional record review, may:

(1) Pursuant to the general policy of the Commission, let the warrant stand as a detainer and order that the revocation hearing be scheduled to coincide with the initial hearing on the new federal sentence or upon release from the new sentence, whichever comes first;

(2) Withdraw the warrant, and either order reinstatement of the parolee to supervision upon release from confinement or close the case if the expiration date has passed.

(c) If the prisoner is serving a new state or local sentence, the Regional Commissioner, following a dispositional record review may:

(1) Withdraw the detainer and order reinstatement of the parolee to supervision upon release from custody, or close the case if the expiration date has passed.

(2) Order a revocation hearing to be conducted by a hearing examiner or an official designated by the Regional Commissioner at the institution in which the parolee is confined.

(3) Let the detainer stand and order further review at an appropriate time. If the warrant is not withdrawn and no revocation hearing is conducted while the prisoner is in state or local custody, an institutional revocation hearing shall be conducted after the prisoner's return to federal custody.

(d) Revocation hearings pursuant to this section shall be conducted in accordance with the provisions governing institutional revocation hearings, except that a hearing conducted at a state or local facility may be conducted by a hearing examiner, hearing examiner panel, or other official

designated by the Regional Commissioner. Following a revocation hearing conducted pursuant to this section, the Commission may take any action specified in §2.52.

(e)(1) A parole violator whose parole is revoked shall be given credit for all time in federal, state, or local confinement on a new offense for purposes of satisfaction of the reparole guidelines at §2.20 and §2.21.

(2) However, it shall be the policy of the Commission that the revoked parolee's original sentence (which due to the new conviction, stopped running upon his last release from federal confinement on parole) again start to run only upon release from the confinement portion of the new sentence or the date of reparole granted pursuant to these rules, whichever comes first. This subsection does not apply to cases where, by law, the running of the original sentence is not interrupted by a new conviction (e.g., YCA; NARA; Mexican or Canadian treaty cases).

(f) If a Regional Commissioner determines that additional information is required in order to make a decision pursuant to paragraph (a)(2) of this section, he may schedule a dispositional hearing at the state or local institution where the parolee is confined to obtain such information. Such hearing may be conducted by a hearing examiner, hearing examiner panel, or other official designated by the Regional Commissioner. The parolee shall have notice of such hearing, be allowed to testify in his behalf, and have opportunity for counsel as provided in §2.48(b).

Notes and Procedures

■ **2.47-01. Parolees Serving (A) a New Federal Sentences Over Which The U.S. Parole Commission Has Jurisdiction (Wherever Confined) or (B) a New Federal Non-parolable Sentence of One Year or Less (in a Federal Institution).**

(a) Lodging Warrant as a Detainer.

(1) When a U.S. Probation Officer advises the Commission that a parolee has been sentenced to incarceration for a new federal offense (usually supported by a copy of a Judgment and Commitment Order), the Commission should issue a parole violator warrant or supplement a previously issued warrant to reflect the conviction.

(2) Where a warrant has been held in abeyance by the U.S. Probation Officer, the U.S. Probation Officer will return the warrant unexecuted to the Commission.

(3) The Analyst will forward the unexecuted warrant with instructions to the Warden to place the warrant as a detainer.

(4) IN YCA, NARA, AND MEXICAN/CANADIAN TREATY CASES ONLY: The Warden shall be instructed to execute the warrant when the case is placed on the hearing docket.

(b) Scheduling the Hearings.

(1) If the offender is serving (A) a new federal sentence over which the U.S. Parole Commission has jurisdiction (wherever confined) or (B) a new federal non-parolable sentence of one year or less (in a federal institution), the following procedures apply. In any other case, the procedures at 2.47-02 apply.

(2) If the offender is eligible for a prompt initial hearing and applies for parole on the new sentence within approximately 120 days: The Analyst should forward to the institution two revocation packets with instructions to the Warden to schedule the parolee for a joint initial/dispositional revocation hearing within 120 days of commitment, or as soon thereafter as practicable. These instructions should indicate that if the prisoner waives initial hearing, the Commission is to be notified immediately and the prisoner notified that this also constitutes waiver of the dispositional revocation hearing. The case will then be processed under (3) below.

(3) If the offender either waives a prompt initial hearing (or is serving a new federal sentence with a period of parole ineligibility of 10 years): Upon receipt of the detainer notice, the Analyst will send Form H-13 (Notice of Pending Dispositional Review) to the prisoner and the prisoner will be afforded a dispositional review under 2.47-02 of this section. If, following this review, the warrant remains as a detainer, the prisoner should be scheduled for a dispositional revocation hearing to coincide with the initial hearing on the new sentence, or upon mandatory release from the new sentence if application for parole is never made.

(4) If the prisoner has already had an initial hearing on the new federal sentence, he/she shall be sent a Notice informing him that his case is being reopened for a new hearing under 28 C.F.R. 2.28(c) for joint consideration of both the new federal sentence and the violator term. This hearing will follow the procedures for the combined initial/dispositional revocation hearing, with the resulting orders following the wording specified for joint initial/ dispositional hearings.

(c) Hearing Procedures.

(1) Both combined dispositional revocation/initial hearings and dispositional revocation hearings in federal custody will be conducted under the procedures governing institutional revocation hearings (see 28 C.F.R. 2.50); except that if the prisoner requests a representative in addition to legal counsel at a combined hearing, the representative shall be considered a voluntary witness.

(2) Release guidelines will be computed pursuant to 28 C.F.R. 2.20 and 2.21, and a recommendation made with respect to: (A) revocation; (B) forfeiture of street time credit; (C) commencement of the violator term; and (D) setting of a presumptive release date. NOTES: (i) At a joint initial/dispositional hearing, this will concern both the new sentence and the violator term. (ii) The Commission may grant a reparole date nunc pro tunc if the circumstances warrant.

(3) Interim hearings should be scheduled every 24 months if either the new sentence or the original sentence is seven years or more; otherwise, such hearings should be scheduled every eighteen months.

■ 2.47-02. *Parolees Incarcerated in State/Local Institutions and Parolees Serving Federal Comprehensive Crime Control Act (CCCA) or Other Non-Parolable Sentences of More Than One Year.*

(a) *Lodging Warrant as Detainer.* When the U.S. Probation Officer advises the Commission that the parolee has been sentenced to imprisonment for a new state/local crime or has received a CCCA or other non-parolable sentence (usually supported by a copy of the Judgment and Commitment Order), the Commission should issue a parole violator warrant or supplement a previously issued warrant to state the new conviction. The Commission will forward the warrant to the U.S. Marshal in the district where the parolee will serve the new state/local sentence, with instructions to place the warrant as a detainer. If the parolee is serving a new CCCA or other non-parolable sentence, the Commission will forward the warrant to the designated institution with instructions to place the warrant as a detainer. NOTE: These procedures would also apply to a parolee serving a state term as a probation/parole violator, if the violation behavior occurred while also on federal parole.

(b) *Dispositional Review.* Upon receipt of the detainer notice, the Analyst will forward Form H-13 (Notice of Dispositional Review) to the Warden at the correctional institution where the parolee is incarcerated. The notice should be sent in sufficient time to permit receipt of the application and completion of the Commission's review before the 180 day time period has passed. In the event that an application or written statement is not timely received, the dispositional review should nevertheless be conducted within 180 days of notification. If an application or written statement is submitted after the dispositional review has been completed, (*e.g.*, due to delay in court appointment of counsel), the case should be examined to determine whether it should be reopened under 28 C.F.R. 2.28.

(c) *Alternatives After Dispositional Review.*

(1) If the Commission is to let the warrant stand as a detainer, such decision shall be the final unless, in unusual circumstances, the case is scheduled for a further review under §2.47(c)(3).

(2) If the decision is to withdraw the warrant, such withdrawal shall be accompanied by a Notice of Action stating "Withdraw warrant. Withdrawal of this warrant is conditioned upon service of the sentence currently in effect. If such sentence is vacated or reduced, the warrant shall be reinstated and a new dispositional review shall be ordered." In doubtful cases, the Commission should let the detainer stand and await the execution of the warrant before deciding whether the new sentence has provided a sufficient period of punishment and post-release supervision to warrant the Commission relinquishing its jurisdiction.

(3) As an alternative to the conditional withdrawal of the warrant, the Commission may offer the prisoner a decision under the expedited revocation procedure set forth at 28 C.F.R. 2.67. This procedure may be used, for example, when the conditional withdrawal would be appropriate but the forfeiture of street time is deemed necessary to provide an adequate period of reparole supervision.

(4) If the decision of the Commission is to order a revocation hearing, the Analyst is to commence the scheduling of a dispositional revocation hearing. If the prisoner does not complete the required forms or wishes not to have the dispositional hearing, the dispositional revocation hearing will be postponed until such completion. The Analyst will follow up with institutional officials to assure that the parolee has received the forms.

(5) In the event the parolee is released prior to any subsequent review or revocation hearing, the warrant will be executed by the U.S. Marshal and the parolee designated to a federal institution for an institutional revocation hearing.

(A) Use of Hearing Examiner To Conduct Hearing:

(1) The Analyst will direct a copy of the warrant application and a letter to the parolee (with a copy to the Warden and U.S. Probation Officer), advising the parolee that a dispositional revocation hearing will be conducted at the state/local or federal institution. The parolee will be advised of his right to counsel and voluntary witnesses and instructed to complete and return to the Commission within 30 days, Parole Form I-16 (Attorney Witness Election Form) and CJA Form 22 (Appointment of Counsel).

(2) Upon receipt of the above forms the Analyst will forward CJA Form 22 to the U.S. Magistrate in the district in which the state/local or federal facility is located, if appointment of counsel is requested.

(3) After the Commission is advised of appointment of counsel, a letter will be directed to the parolee (with copies to counsel, Warden, and U.S. Probation Officer) informing him of the date and location of the hearing.

(4) The Analyst will prepare a revocation packet(s) to be hand carried to the state/local or federal institution by the designated hearing examiner.

(B) Use of Other Designated Official (U.S. Probation Officer) to Conduct Hearing: The Analyst will prepare a revocation packet and forward same to the U.S. Probation Officer designated to conduct a revocation hearing, instructing him to schedule an institutional revocation hearing (month/year). The U.S. Probation Officer will then be responsible for carrying out the procedures otherwise performed by the Analyst, with copies of executed forms and correspondence forwarded to the Commission.

(d) Dispositional Revocation Hearing Procedures.

(1) Dispositional revocation hearings for parolees in state/local or federal institutions shall be conducted in accordance with the rules governing institutional revocation hearings at 28 C.F.R. 2.50, except that the hearing may be conducted by an examiner, examiner panel, or other designated official (generally a U.S. Probation Officer).

(2) The examiner, examiner panel, or designated official conducting the revocation hearing will prepare a reparole guideline worksheet and revocation hearing summary. NOTE: The Commission may grant a reparole date nunc pro tunc if the circumstances warrant.

(3) Interim record reviews will be scheduled at either (18) or (24) months from the date of the dispositional revocation hearing dependent on whether the original federal sentence was (less than 7 years) (7 years or more). If the prisoner comes into federal custody prior to a scheduled interim record review, he will be afforded an interim hearing during the month of the previously scheduled record review.

(4) Upon completion of the hearing process, the case will be referred to the appropriate analyst who will assure the proper processing of the case with respect to statutory interim reviews and pre-release processing. If a parolee is serving a sentence in a state/local institution, in addition to the Notice of Action,

a letter is to be sent to the Warden (with a copy to the Chairman of the State Parole Board) explaining the maximum jurisdiction of the U.S. Parole Commission should the state release the prisoner prior to the date specified on the Notice of Action.

(e) *Parole to a State/Local Sentence.* If the prisoner is still in state custody as the date chosen for reparole approaches, a pre-release review will be conducted. If the decision is to grant an effective parole to the state or CCCA or other non-parolable sentence:

(1) The Bureau of Prisons will be notified to amend their time computation record and provide the Commission with a recalculated full term expiration date which will be placed on the parole certificate;

(2) The Marshals Service will be notified to withdraw the warrant on the date specified. Note: As the revocation hearing has already set the date for the commencement of the violator term, withdrawing the warrant at this time does not cancel the violation or restore street time of affect the commencement of the violator term.

■ §2.48 REVOCAION, PRELIMINARY INTERVIEW.

(a) *Interviewing officer:* A parolee who is retaken on a warrant issued by a Commissioner shall be given a preliminary interview by an official designated by the Regional Commissioner to enable the Commission to determine if there is probable cause to believe that the parolee has violated his parole as charged, and if so, whether a revocation hearing should be conducted. The official designated to conduct the preliminary interview may be a U.S. Probation Officer in the district where the prisoner is confined, provided he is not the officer who recommended that the warrant be issued.

(b) *Notice and opportunity to postpone interview:* At the beginning of the preliminary interview, the interviewing officer shall ascertain that the Warrant Application has been given to the parolee as required by §2.46(b), and shall advise the parolee that he may have the preliminary interview postponed in order to obtain representation by an attorney or arrange for the attendance of witnesses. The parolee shall also be advised that if he cannot afford to retain an attorney he may apply to a U.S. District Court for appointment of counsel to represent him at the preliminary interview and the revocation hearing pursuant to 18 U.S.C. 3006A. In addition, the parolee may request the Commission to obtain the presence of persons who have given information upon which revocation may be based. Such adverse witnesses shall be requested to attend the preliminary interview unless the parolee admits a violation or has been convicted of a new offense while on supervision or unless the interviewing officer finds good cause for their non-attendance. Pursuant to §2.51 a subpoena may be issued for the appearance of adverse witnesses or the production of documents.

(c) *Review of the charges:* At the preliminary interview, the interviewing officer shall review the violation charges with the parolee, apprise the parolee of the evidence which has been presented to the Commission, receive the statements of witnesses and documentary evidence on behalf of the parolee, and allow cross-examination of those witnesses in attendance. Disclosure of the evidence presented to the Commission shall be made pursuant to §2.50(d).

(d) At the conclusion of the preliminary interview, the interviewing officer shall inform the parolee of his recommended decision as to whether there is probable cause to believe that the parolee has

violated the conditions of his release, and shall submit to the Commission a digest of the interview together with his recommended decision.

(1) If the interviewing officer's recommended decision is that no probable cause may be found to believe that the parolee has violated the conditions of his release, the responsible Regional Commissioner shall review such recommended decision and notify the parolee of his final decision concerning probable cause as expeditiously as possible following receipt of the interviewing officer's digest. A decision to release the parolee shall be implemented without delay.

(2) If the interviewing officer's recommended decision is that probable cause may be found to believe that the parolee has violated a condition (or conditions) of his release, the responsible Regional Commissioner shall notify the parolee of his final decision concerning probable cause within 21 days of the date of the preliminary interview.

(3) Notice to the parolee of any final decision of a Regional Commissioner finding probable cause and ordering a revocation hearing shall state the charges upon which probable cause has been found and the evidence relied upon.

(e) *Release notwithstanding probable cause:* If the Commission finds probable cause to believe that the parolee has violated the conditions of his release, reinstatement to supervision or release pending further proceeding may nonetheless be ordered if it is determined that:

(1) Continuation of revocation proceedings is not warranted despite the violations found; or

(2) Incarceration pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations, and that the parolee is not likely to fail to appear for further proceedings, and that the parolee does not constitute a danger to himself or others.

(f) *Conviction as probable cause:* Conviction of a Federal, State, or local crime committed subsequent to release by a parolee shall constitute probable cause for the purposes of this section and no preliminary interview shall be conducted unless otherwise ordered by the Regional Commissioner.

(g) *Local revocation hearing:* A postponed preliminary interview may be conducted as a local revocation hearing by a hearing examiner, hearing examiner panel, or other official designated by the Regional Commissioner provided that the parolee has been advised that the postponed preliminary interview will constitute his final revocation hearing.

Notes and Procedures

■ 2.48-01. *Preliminary Interview.*

(a) The preliminary interview is to be conducted (offered to the parolee) without unnecessary delay. Where the alleged violator is arrested outside of his district of supervision, the documents specified in warrant application are to be transmitted immediately to the probation officer designated to conduct the interview. The probation officer supervising the case or recommending the warrant may not conduct the preliminary interview.

(b) The releasee is to be advised of his right to be represented by counsel (retained or court-appointed) at a postponed preliminary interview and at the revocation hearing. Parole Forms F-2 and CJA-22 (addressing this issue) are to be given to the releasee. The releasee is to be advised of his right to have witnesses (including adverse witnesses) appear or be interviewed on his behalf at a postponed preliminary interview and at the revocation hearing. The interviewing officer shall make use of a checklist to guide him as he advises the alleged violator of his rights and the Commission's procedures.

(c) When the parolee contests the charges against him, it will be customary for the parolee's supervising probation officer to be available as a witness at a preliminary interview in the district of supervision, for questioning by either the interviewing officer or the parolee, unless there is good cause for non-appearance (e.g., distance or possibility of aggressive confrontation).

(d) Reporter or recording devices brought in by the alleged violator or his attorney/representative are not permissible. No reproduction of the interview will be permitted. The purpose of this prohibition is to preserve the informality of the preliminary interview, and to ensure that the attention of all parties at the final revocation hearing is focused upon the merits of the case and not the propriety of the probable cause decision. Once the final revocation hearing is commenced, the probable cause decision becomes a moot issue.

■ 2.48-02. *Authorization of Continuance.* One continuance (postponement of a preliminary interview) may be granted by the interviewing officer for up to 30 days to permit the alleged violator to obtain counsel and/or witnesses. The continuance should be recorded in writing. Any further continuances, for cause, shall be approved by the Regional Commissioner. In cases where the alleged violator is detained by the court on a charge and where the violation warrant has been inadvertently executed, a decision will be made as to whether or not a local revocation will be held at the place of detention or when he is returned to a Federal institution. In such cases the Commission's legal office should be contacted for advice.

■ 2.48-03. *The Probable Cause Finding.*

(a) The interviewing officer shall prepare and submit to the Regional Commissioner a summary of the interview which shall include recommended findings of whether there is probable cause to believe that a violation has occurred. A copy of the summary, minus the confidential section, is also given to the alleged violator (and his attorney if any) by the probation officer when he sends the original to the Commission. Accompanying it should be any statements prepared by the prisoner and other pertinent material submitted which has not previously been submitted to the Commission.

(b) Upon review of the summary of the preliminary interview, the Regional Commissioner shall either (1) order the prisoner reinstated to supervision; (2) direct that a revocation hearing be conducted in the locality of the charged violation(s) or place of arrest; or (3) direct that the prisoner be transferred to a Federal institution for a revocation hearing. In the absence of probable cause, the Regional Commissioner shall find "insufficient grounds for revocation based on the evidence presented" and reinstate the releasee to supervision, or close the case if his time would have expired had the warrant not been issued. *Every decision to release a parolee shall be implemented without delay.* The analyst shall send a telefax marked "urgent" to the U.S. Marshal (and the holding facility, if known) stating that the Regional Commissioner has ordered the parolee's release without delay; the U.S. Marshal shall be requested to confirm by return telefax or telephone call as soon as release is effected. The analyst shall verify by telephone that the order

has been carried out or request immediate compliance, if a return telefax or call is not received within 24 hours of the order to release.

(c) The Regional Commissioner may also release the subject to the community pending a revocation hearing. In such case, the Commissioner should inform the Marshal in writing to release the subject pending further instructions. The warrant should be held in abeyance by the U.S. Probation Officer, but a summons should be issued to order the subject to appear at the revocation hearing. When, in such cases, the ultimate decision is to revoke, the Marshal should be instructed by telefax to again take the subject into custody pursuant to the original warrant. Such telefax must be from the Regional Commissioner to the U.S. Marshal, and must reflect an actual statement on an order signed by the Regional Commissioner that the U.S. Marshal is to reassume custody forthwith. If a letter directing the parolee's return to custody is sent in lieu of a telefax, it must be signed by the Regional Commissioner.

Situation 1: Appearance at a Preliminary Interview on the Basis of a Summons. After the Commissioner makes a finding that probable cause exists, he may schedule a revocation hearing and (a) issue a warrant to be forwarded to the U.S. Marshal with appropriate instructions (assume custody), or (b) issue a summons to be either mailed to the parolee (return receipt requested) or forwarded to the U.S. Marshal with instructions to serve it upon the parolee.

Situation 2: Appearance at a Preliminary Interview on the Basis of a Warrant. If the Commissioner finds probable cause after the Preliminary Interview, reinstatement to supervision or release pending further proceedings may be ordered pursuant to 28 C.F.R. 2.48(e). If release pending further proceedings is ordered, the Commissioner should inform the U.S. Marshal in writing (letter or telefax) to release the subject pending further instructions. The warrant will be held in abeyance at the U.S. Probation Office, but a summons should be issued to order the subject to appear at the revocation hearing. If no release pending further proceedings is ordered, subject remains in the custody of the U.S. Marshal on the basis of the warrant.

Situation 3: Appearance at a Local Revocation Hearing on the Basis of a Summons.

a. No Warrant issued previously. If parole is revoked and a continuance is ordered, the Commissioner may issue a warrant and forward it to the U.S. Marshal with instructions to assume custody. Or, the subject may be ordered to voluntarily surrender to the U.S. Marshal if it is deemed appropriate by the Regional Commissioner. In this instance, a certified letter, return receipt requested, with Notice of Action enclosed should be forwarded to the subject. Copies of this letter should be sent to the U.S. Marshal and U.S. Probation Officer (and attorney if necessary).

b. Warrant previously issued-- subject released pending local revocation hearing. If parole is revoked and a continuance is ordered, the Commissioner may instruct the U.S. Marshal, in writing (letter or telefax) to again take subject into custody by the further execution of the original warrant. Or, the subject may be ordered to voluntarily surrender to the U.S. Marshal if it is deemed appropriate by the Regional Commissioner. In this instance a certified letter, return receipt requested, with a Notice of Action enclosed, should be forwarded to subject. Copies of this letter should be sent to the U.S. Marshal and U.S. Probation Officer (and attorney if necessary).

■ 2.48-04. *Notification of Results of Preliminary Interview.* The parolee shall be promptly notified of the Regional Commissioner's decision. If probable cause is found, he shall be notified in writing of the charges upon which such finding was made and the evidence relied upon. Copies of this letter should be sent to the U.S. Probation Office, the U.S. Marshal, and counsel for the parolee whether appointed or retained.

■ 2.48-05. *Preference for CCC Placement.* In the case of administrative violations, a community corrections center or similar placement is generally to be preferred to returning the parolee to prison.

■ 2.48-06. *Supplemental Warrant Application.*

(a)(1) *Updating charge already listed.* A supplemental warrant application may be issued at any time to update a charge already listed (e.g., by adding notice of a conviction), even after the normal expiration of supervision.

(2) *Newly discovered violation that occurred before normal expiration of supervision.* It is the Commission's interpretation of 18 U.S.C. 4213 and 4214 that a supplemental warrant application may be issued at any time prior to the revocation hearing (whether the violations are discovered before or after the normal expiration of supervision), provided that (A) the warrant itself was issued before the normal expiration of supervision, and (B) the violations to be listed on the supplement occurred before the normal expiration of supervision. It is the Commission's interpretation of 18 U.S.C. 4210(b)(2) that a conviction for such a charge is a valid basis for forfeiture of street time. Note: This interpretation may not be applied to alleged violators in New York, Vermont, and Connecticut, given the Second Circuit's decision in *Toomey v. Young*, nor may it be applied to alleged violators in Kentucky, Michigan, Ohio, and Tennessee, given the Sixth Circuit's decision in *Barrier v. Beaver*. For these cases, the legal office should be consulted before a supplemental warrant application is issued after the normal expiration of supervision, unless the purpose of the supplemental application is simply to update a charge already listed on an application issued before the expiration date.

(3) *Newly discovered violation that occurred after normal expiration of supervision when releasee is absconder.* Violations of release occurring after the normal expiration of supervision may be added to an outstanding warrant if the parolee is an absconder from supervision for whom a timely warrant has been issued. The supplemental warrant application should be issued as soon after the releasee's arrest as possible. If the absconding charge cannot be sustained at the revocation hearing, such supplemental charges may not be used to revoke release or forfeit street time.

(b) *Additional charge.* Assuming that probable cause for one of the original charges is found after the preliminary interview, an additional charge that is discovered during or after the preliminary interview may be used at a revocation hearing. The releasee should be given notice of the additional charge by a supplemental warrant application.

(1) If the releasee has been scheduled for a local revocation hearing, a second preliminary interview is not required. The releasee should be informed by letter that the supplemental charge will be considered at the revocation hearing, and that the releasee may request the attendance of adverse witnesses regarding the supplemental charge. (This letter of notification should also be used if new evidence received after the probable cause finding requires the reinstatement of a charge upon which a finding of no probable cause was made, with the letter describing the reinstated charge and the new evidence.)

(2) If the releasee has been designated for an institutional revocation hearing, the same procedure as outlined in the previous paragraph may be followed unless the following circumstances are presented. When the supplemental charge refers to a violation that, if found to be true, would likely cause the Commission to increase the prison time the releasee would serve for the original charges, it may be necessary, in the interests of justice, to terminate the designation so that the releasee may be given a preliminary interview on the supplemental charge. The purpose of interrupting the designation and holding the interview is to resolve the issue of whether the releasee wants to actively contest the supplemental charge, usually by exercising his right to request the appearance of adverse witnesses at a local revocation hearing. If the releasee has been transferred to the designated institution, the releasee should not be returned from the facility until the Commission is satisfied (by an informal interview between the releasee and institutional staff, or a preliminary interview at the institution) that the releasee wants to actively contest the supplemental charge by confronting/cross-examining adverse witnesses (or presenting the testimony of a necessary witness).

■ 2.48-07. *Recommended Finding of No Probable Cause.* If the interviewing officer finds no probable cause to believe a violation has occurred, he shall contact the Commission immediately for instructions. A new preliminary interview should be held in any case where defects, vagueness, or omissions in the warrant application can be corrected by a supplemental warrant application.

■ 2.48-08. *No Preliminary Interview Where There Is A Conviction.*

(a) As the conviction of an offense committed while under supervision constitutes "probable cause" that at least one condition of parole or mandatory release was violated, no preliminary interview is required in such cases. For any serious criminal offense, therefore, a preliminary interview will not be conducted where there is definite information of a conviction. The probation officer should obtain documentary verification of any conviction and transmit it to the Commission. The designation request should not be delayed, however, unless there is reasonable doubt as to the authenticity of the information that a conviction has occurred.

(b) The Regional Commissioner shall require a preliminary interview in marginal cases, for example: (1) where there was a conviction for a minor offense and there is a strong possibility that the releasee will be reinstated to supervision; or (2) where other administrative charges or charges based on unadjudicated criminal conduct (that are denied by the parolee) clearly constitute the more serious violations; or (3) where the conviction is for an infraction (such as a minor traffic violation, loitering, or disorderly conduct) and a fine (rather than imprisonment) is the usual disposition.

(c) Where a forfeiture of collateral constitutes a conviction, in the majority of cases it will fall within the marginal cases described above, and the preliminary interview must be held. Decisions to defer prosecution, suspend acceptance of a guilty plea, or to enter a conviction which by its own terms is "not final" (under certain state statutes), are not "convictions" and do not remove the need for a preliminary interview or provide a basis for denial of local revocation hearing (see 2.48-09).

(d) At the time of issuing a violator warrant where a conviction is used as a basis for such warrant, the United States Marshal shall be instructed by use of Form H-24 (with a copy to the probation officer) to furnish a copy of the warrant application to the prisoner (and the probation officer for information purposes only) and, where no preliminary interview is being held, to transfer the prisoner to a federal institution immediately upon receipt of a designation order from the Bureau of Prisons. In such cases, the Parole

Commission will request designation by the Bureau of Prisons without delay. Prior to designation and transfer, the parolee should be advised in writing by letter (1) that probable cause for violation was established by his new conviction, (2) of the charges to be considered at his institutional revocation hearing, and (3) that he will be transferred to a federal institution for his revocation hearing.

(e) In cases where a conviction is not used as a basis for a warrant but the Commission is advised of a conviction following such issuance, the Commission may advise the probation officer to refrain from holding the preliminary interview which would normally be conducted in the absence of any such conviction. Coincident with such information, a supplemental warrant application should be issued for delivery to the prisoner alleging the offense for which the releasee was convicted.

■ 2.48-09. *"Non-Final", Indian Tribal Court, and Foreign Convictions.*

(a) Circumstances may arise in which it becomes difficult to determine when a court disposition of criminal charges brought against a parolee or mandatory releasee constitutes a "conviction" of federal, state, or local law. It is essential to be certain that the subject has really sustained a conviction before taking actions regarding forfeiture of street time, denial of a preliminary interview, or denial of a local revocation hearing. Cases in which there is room for doubt as to whether the disposition is a conviction should be referred to the legal counsel's office for advice prior to entering a decision.

(b) For purposes of forfeiture of street time, denial of a preliminary interview, or denial of a local revocation hearing, do not count the following convictions:

(1) "Non-Final" Convictions. A decision to defer prosecution, suspend acceptance of a guilty plea, or enter a conviction which by its own terms is not final is included in this heading. [These dispositions result from a procedure deliberately designed to shield the defendant from adverse consequences of a formal conviction.] For example, some state traffic courts will expressly make convictions "non-final" in order to avoid the effect of a state law that requires a person's driving license be revoked if "convicted" of certain traffic offenses. Such convictions only become "final" if the defendant subsequently violates probation. Diversionary programs that involve a guilty plea or finding but no formal conviction also come under this heading (for example, "adjudication withheld" under Florida law).

(2) Foreign Convictions.

(3) Indian Tribal Court Convictions.

(c) For purposes of evidence in revocation proceedings:

(1) The following may be treated as conclusive evidence of law violation:

(i) "Non-Final" convictions of federal, state, or local laws [when the parolee entered a guilty plea or a plea of nolo contendere, or when a court finding of guilt was entered];

(ii) Indian Tribal convictions [when it is determined that the parolee had counsel or that counsel was waived].

(iii) Foreign Convictions. *Note:* A rare exception to the Commission's ability to rely upon foreign convictions as conclusive would be when the parolee provides evidence that the conviction was obtained by blatantly improper means (fraud, duress, etc.) or that the conduct committed is not recognizable as a criminal violation under U.S. domestic law.

(2) Indian Tribal Convictions [where there is no positive showing of counsel or waiver of counsel] should be handled as are allegations of U.S. law violation where there is no conviction. That is, the underlying evidence and testimony may be relied upon in order to make an independent finding of a law violation.

■ 2.48-10. *Refusal by Parolee to Participate in Preliminary Interview.* If a parolee refuses to participate in a preliminary interview, or refuses to complete the form requesting a local revocation hearing, the parolee shall be deemed to have waived the opportunity to request a local revocation hearing..

■ §2.49 PLACE OF REVOCATION HEARING.

(a) If the parolee requests a local revocation hearing, he shall be given a revocation hearing reasonably near the place of the alleged violation(s) or arrest, if the following conditions are met:

(1) The parolee has not been convicted of a crime committed while under supervision; and

(2) The parolee denies that he has violated any condition of his release.

(b) The parolee shall also be given a local revocation hearing if he admits (or has been convicted of) one or more charged violations, but denies at least one unadjudicated charge that may be determinative of the Commission's decision regarding revocation and/or reparole, and requests the presence of one or more adverse witnesses regarding that contested charge. If the appearance of such witness at the hearing is precluded by the Commission for good cause, a local revocation hearing shall not be ordered.

(c) If there are two or more alleged violations, the hearing may be conducted near the place of the violation chiefly relied upon as a basis for the issuance of the warrant or summons as determined by the Regional Commissioner.

(d) (1) A parolee shall be given an institutional revocation hearing upon the parolee's return or recommitment to an institution if the parolee: (i) voluntarily waives the right to a local revocation hearing; or (ii) admits (or has been convicted of) one or more charged violations without contesting any unadjudicated charge that may be determinative of the Commission's decision regarding revocation and/or reparole.

(2) On his own motion, the Regional Commissioner may designate any case described in paragraph (d)(1) for a local revocation hearing. The difference in procedures between a "local revocation hearing" and an "institutional revocation hearing" is set forth in §2.50(c).

(e) A parolee retaken on a warrant issued by the Commission shall be retained in custody until final action relative to revocation of his release, unless otherwise ordered by the Regional Commissioner under §2.48(e)(2). A parolee who has been given a revocation hearing pursuant to the issuance of a summons under §2.44 shall remain on supervision pending the decision of the Commission.

(f) A local revocation hearing shall be scheduled to be held within sixty days of the probable cause determination. Institutional revocation hearings shall be scheduled to be held within ninety days of the date of the execution of the violator warrant upon which the parolee was retaken. However, if a parolee requests and receives any postponement or consents to a postponed revocation proceeding, or if a parolee by his actions otherwise precludes the prompt conduct of such proceedings, the above-stated time limits may be extended. A local revocation hearing may be conducted by a hearing examiner, hearing examiner panel, or other official designated by the Regional Commissioner.

Notes and Procedures

■ 2.49-01. *Local Revocation Hearings.*

(a) If an alleged violator, at the time of the preliminary interview, requests a local hearing on Form F-2 and has not been convicted of a crime while under supervision, the probation officer will send the original of the Attorney-Witness Election Form to the Commission. The Regional Commissioner will determine the proper location for the revocation hearing. If a local hearing is granted, it should be reasonably near the place of the alleged violation (or, if more than one violation is charged, the violation chiefly relied upon) or the place of arrest. The Regional Commissioner has the authority to instruct the Marshal to transport the prisoner to another district, if necessary. Except in unusual circumstances, the place of the hearing will be at or near the place where the alleged violator is in custody on the warrant. The statute requires a local hearing if the above criteria are met, even if no attorney or witness will be present.

(b) When an alleged violator at the preliminary interview refuses to sign the Preliminary Interview and Revocation Hearing Form (Form F-2), the interviewing officer (in his summary report) so notifies the Regional Commissioner, who determines whether or not to conduct a local revocation hearing. The alleged violator should be expressly informed by the interviewing officer that his refusal to sign the Form F-2 will be construed as a waiver of his opportunity for a local hearing.

(c) If the alleged violator meets the criteria for a local revocation hearing, the Commission will schedule the hearing no later than 60 days from the date the Commission finds probable cause. This is a statutory time limit. In an emergency, an official other than a hearing examiner may be designated to conduct a hearing within the 60-day limit. The 60-day limit may be extended only if a continuance is granted for good cause (*e.g.*, if the alleged violator shows a need for more time to secure counsel or witnesses), or if the actions of the alleged violator (*e.g.*, refusal to participate) prevent the holding of a timely hearing. If the alleged violator is temporarily unavailable for a hearing within the 60 day period (*e.g.*, because he is ill, detained on a writ, or has escaped from custody), the hearing will be held as soon as practical after the alleged violator becomes available at the place scheduled for the local revocation hearing. In cases in which the 60 day time limit has not been observed, the examiner should ascertain from the parolee what, if any, prejudice has been caused by the delay.

(d) When a hearing examiner is at the hearing site and prepared to proceed with the hearing, one continuance only may be granted at the request of the alleged violator for good cause (for example, when an attorney and/or witnesses are unavoidably detained). In this event, either the releasee or his attorney (both if present) will sign the Commission's continuance form. The continued hearing will be set within 60 days from the date the continuance was requested. Any further continuance may only be granted "for good cause" by a Regional Commissioner.

(e) After it has been determined that a local revocation hearing is to be conducted, arrangements must be made for suitable quarters and for recording services. The Commission's Victim/Witness Coordinators make these arrangements. The hearing may be conducted in the nearest federal courthouse in the district selected, or in a correctional center, detention center, or local jail. The alleged violator and his attorney, if there is one, will be notified by the Commission of the time and place of the hearing.

(f) Following the local revocation hearing (except where only a summons was used), the prisoner remains in the Marshal's custody until he has received official written notification of the decision. If revocation is ordered, the Bureau of Prisons designates an institution for service of the remainder of the sentence. A copy of Appeal Form (I-22) is sent with the Notice of Action.

(g) "Non-final," Indian Tribal Court, or foreign convictions (see 2.48-09) may not be used to deny a local revocation hearing.

■ 2.49-02. *Institutional Revocation Hearings*. The provisions of 2.215-01 and 02 apply.

■ §2.50 REVOCATION HEARING PROCEDURE.

(a) The purpose of the revocation hearing shall be to determine whether the parolee has violated the conditions of his release and, if so, whether his parole or mandatory release should be revoked or reinstated.

(b) The alleged violator may present witnesses and documentary evidence in his behalf. However, the presiding hearing officer or examiner panel may limit or exclude any irrelevant or repetitious statement or documentary evidence.

(c) At a local revocation hearing, the Commission may on the request of the alleged violator or on its own motion, request the attendance of persons who have given statements upon which revocation may be based. Those witnesses who are present shall be made available for questioning and cross-examination in the presence of the alleged violator unless the presiding hearing officer or examiner panel finds good cause for their non-attendance. Adverse witnesses will not be requested to appear at institutional revocation hearings.

(d) All evidence upon which the finding of violation may be based shall be disclosed to the alleged violator at or before the revocation hearing. The hearing officer or examiner panel may disclose documentary evidence by permitting the alleged violator to examine the document during the hearing, or where appropriate, by reading or summarizing the document in the presence of the alleged violator.

(e) In lieu of an attorney, an alleged violator may be represented at a revocation hearing by a person of his choice. However, the role of such non-attorney representative shall be limited to offering a statement on the alleged violator's behalf with regard to reparole or reinstatement to supervision.

(f) A revocation decision may be appealed under the provisions of §2.26 or §2.27 as applicable.

Notes and Procedures

■ 2.50-01. *Applicability of Notes and Procedures Accompanying § 2.216.* All Notes and Procedures accompanying § 2.216 apply.

■ 2.50-02. *Continuance of Hearing.*

(a) *First continuance.* One continuance to the next hearing docket date may be granted by the examiner at the request of the subject for the purpose of securing counsel or witnesses, or at the request of counsel for further preparation of the case. The time of continuance is fully at the discretion of the examiner. A Commission Order shall be executed to give written notice of this decision. A special form shall be executed in duplicate giving reasons for the continuance. A copy of the continuance form is given to the prisoner and a copy put in the file.

(b) *Second or subsequent continuance.* A second continuance may be granted by the examiner only for compelling reasons. The Commission Order and second continuance form will be executed and processed as per paragraph (a) above. No further continuance shall be granted by the examiner. Requests for more than two continuances or for a longer time must be in writing to the Regional Commissioner and must be made at least ten days prior to the scheduled hearing docket.

(c) *Rejection of an attorney.* If counsel is present, but alleged violator indicates that he does not wish to be represented by that particular attorney, the examiner, after determining the basis for the alleged violator's refusal, should grant a continuance and request the case manager to assist the alleged violator in executing another CJA Form 22 or permit communication with family, etc., if a retained attorney is desired.

■ 2.50-03. *Information on Parolee's Standing as a Good Parole Risk.*

(a) The Parole Commission statute requires that a parole hearing be conducted within 120 days of revocation: 18 U.S.C. 4208(a). The prisoner should therefore be informed specifically at this stage of the proceeding that the examiner will also render a recommendation as to reparole suitability, as well as to revocation, and that this hearing will serve for both purposes.

(b) Revocation may be based only on those charges set forth in the Warrant Application or Supplement or admitted during the course of the revocation hearing. However, adverse information bearing on the subject's behavior while under supervision may be considered in assessing the parolee's standing as a good parole risk. This information, and its potential significance for the Commission's decision-making process, should be fully discussed with the alleged violator.

■ 2.50-04. *Disclosure of Documents at the Revocation Hearing.*

(a)(1) For local revocation hearings, or institutional revocation hearings where the inmate is in federal custody but has no new sentence, the analyst will attach a packet to the letter of probable cause containing one copy of each of the documents which the examiner will consider at the revocation hearing.

(2) These copies are to be delivered to the alleged violator along with the letter of probable cause. The following notation will be added to the bottom of the probable cause letter in these cases: "enclosure -- documents supporting probable cause finding".

(3) Disclosure as outlined above will be made whenever the parolee is notified that new charges have been added after the probable cause finding has been made.

(b) For institutional revocation hearings where the inmate is in federal custody and is serving a new federal sentence, the analyst should forward to the institution a packet of material containing one copy of each of the documents which the examiner will consider at the revocation hearing. These copies are to be delivered to the alleged violator. The packet should be sent to the institution:

(i) within 120 days of commitment or as soon thereafter as practicable, if the inmate is eligible for a prompt initial hearing and applies, or

(ii) upon mandatory release from the new sentence if the inmate is ineligible or does not apply.

(c) For institutional revocation hearings where the prisoner is in state custody and is serving a new state sentence, the analyst should forward to the institution, approximately sixty (60) days prior to the scheduled hearing, or as soon thereafter as practicable, a packet of material containing one copy of each of the documents which the examiner will consider at the hearing. These copies are to be delivered to the alleged violator. The scheduling of hearings under this subsection is controlled by 28 C.F.R. 2.47(b)(1)(i).

(d) A cover sheet will be attached to each packet briefly listing each document included. A copy of that cover sheet will be retained in the file.

(e) If any of the material in the packet appears to be sensitive and confidential, the analyst will give the packet to the disclosure specialist for review.

(f) The disclosure specialist will determine whether any of the documents meets the three disclosure exemptions. If an exemption should be applied, then the sensitive document(s) (or portion thereof) will be removed from the violator's packet and a disclosable summary provided. The following language will be included in the probable cause letter: "If information exempt from full disclosure has been removed from this packet you will find a summary of the exempt material included".

(g) Disclosure specialists should be certain that the exemptions apply and non-disclosure is justifiable, since unjustified non-disclosure can cause revocation decisions to be overturned. Material in arrest reports recounting the observations of the arresting officer should be disclosed.

(h) Where a document produced by a federal agency is marked "FOIA Exempt," or such document or one produced by a state or local agency contains restrictive language which would prevent its inclusion in the revocation package, the disclosure specialist should do the following:

(1) If there is nothing in the content of the document that clearly meets one or more of the standard exemptions at 28 C.F.R. 2.55 (the disclosure exemptions), then the originating agency must be contacted and informed that unless the Commission is permitted to disclose the document, the revocation effort is likely to be unsuccessful.

(2) If the agency is able to submit a written justification for not disclosing all or some part of the document, then disclosure can be withheld.

(3) If there is any refusal to cooperate in this regard by any federal agency whose document is critical in our revocation process, please notify the legal office.

(i) If a FOIA request is filed by the inmate or his attorney for documents pertaining to an upcoming revocation hearing, the disclosure specialist should inform the requester that disclosure has previously been made to the alleged violator and enclose a copy of the cover sheet. This letter should inquire whether the requester wishes the same disclosure to be made a second time.

■ **§2.51 ISSUANCE OF A SUBPOENA FOR THE APPEARANCE OF WITNESSES OR PRODUCTION OF DOCUMENTS.**

(a)(1) Preliminary interview or local revocation hearing: If any person who has given information upon which revocation may be based refuses, upon request by the Commission to appear, the Regional Commissioner may issue a subpoena for the appearance of such witness. Such subpoena may also be issued at the discretion of the Regional Commissioner in the event such adverse witness is judged unlikely to appear as requested.

(2) In addition, the Regional Commissioner may, upon his own motion or upon a showing by the parolee that a witness whose testimony is necessary to the proper disposition of his case will not appear voluntarily at a local revocation hearing or provide an adequate written statement of his testimony, issue a subpoena for the appearance of such witness at the revocation hearing.

(3) Both such subpoenas may also be issued at the discretion of the Regional Commissioner if it is deemed necessary for orderly processing of the case.

(b) A subpoena issued pursuant to paragraph (a) of this section may require the production of documents as well as, or in lieu of, a personal appearance. The subpoena shall specify the time and the place at which the person named therein is commanded to appear, and shall specify any documents required to be produced.

(c) A subpoena may be served by any Federal officer authorized to serve criminal process. The subpoena may be served at any place within the judicial district in which the place specified in the subpoena is located, or any place where the witness may be found. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person.

(d) If a person refuses to obey such subpoena, the Commission may petition a court of the United States for the judicial district in which the parole proceeding is being conducted, or in which such person may be found, to require such person to appear, testify, or produce evidence. The court may issue an order requiring such person to appear before the Commission, and failure to obey such an order is punishable by contempt.

■ 2.51-01. *Applicability of Notes and Procedures Accompanying § 2.217.* All Notes and Procedures accompanying § 2.217 apply..

■ **§2.52 REVOCATION DECISIONS.**

(a) Whenever a parolee is summoned or retaken by the Commission, and the Commission finds by a preponderance of the evidence, that the parolee has violated a condition of the parole, the Commission may take any of the following actions:

(1) Restore the parolee to supervision including where appropriate: (i) Reprimand; (ii) Modification of the parolee's conditions of release; (iii) Referral to a community corrections center for all or part of the remainder of his original sentence; or

(2) Revoke parole.

(b) If parole is revoked pursuant to this section, the Commission shall also determine, on the basis of the revocation hearing, whether reparole is warranted or whether the prisoner should be continued for further review.

(c) A parolee whose release is revoked by the Commission will receive credit on service of his sentence for time spent under supervision except as provided below:

(1) If the Commission finds that such parolee intentionally refused or failed to respond to any reasonable request, order, summons or warrant of the Commission or any agent thereof, the Commission may order the forfeiture of the time during which the parolee so refused or failed to respond, and such time shall not be credited to service of the sentence.

(2) It is the Commission's interpretation of 18 U.S.C. 4210(b)(2) that, if a parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by any term of imprisonment, detention, or incarceration in any penal facility, forfeiture of time from the date of such release to the date of execution of the warrant is an automatic statutory penalty, and such time shall not be credited to the service of the sentence. An actual term of confinement or imprisonment need not have been imposed for such conviction; it suffices that the statute under which the parolee was convicted permits the trial court to impose any term of confinement or imprisonment in any penal facility. If such conviction occurs subsequent to a revocation hearing the Commission may reopen the case and schedule a further hearing relative to time forfeiture and such further disposition as may be appropriate. However, in no event shall the violator term imposed under this subsection, taken together with the time served before release, exceed the total length of the original sentence.

(d)(1) Notwithstanding the above, prisoners committed under the Narcotic Addict Rehabilitation Act or the Youth Corrections Act shall not be subject to any forfeiture provision, but shall serve uninterrupted sentences from the date of conviction, except as provided in §2.10(b) and (c).

(2) The commitment of a juvenile offender under the Federal Juvenile Delinquency Act may not be extended past the offender's twenty-first birthday unless the juvenile has attained his nineteenth birthday at the time of his commitment, in which case his commitment shall not exceed the lesser of two years or the maximum term which could have been imposed on an adult convicted of the same offense.

(e) In determining whether to revoke parole for noncompliance with a condition of fine, restitution, court costs or assessments, and/or court ordered child support or alimony payment, the Parole Commission shall consider the parolee's employment status, earning ability, financial resources, and any other special circumstances that may have a bearing on the matter. Revocation shall not be ordered unless the parolee is found to be deliberately evading or refusing compliance.

Appendix to §2.52

General Statement of Policy. In the case of any revocation hearing conducted within the Ninth Circuit, the Commission will exercise discretion in determining whether or not to order forfeiture of all or part of the time spent on parole pursuant to 18 U.S.C. 4210(b)(2). The Commission's policy shall be to consider granting credit for time on parole in the case of a parole violator originally classified in the very good risk category (pursuant to 28 C.F.R. 2.20) if the following conditions are met. The conviction must not be for a felony offense. The parole violation behavior (the offense of conviction plus any other violations) must be non-violent, and not involve a repeat of the parole violator's original offense behavior. Further, an adequate period of reimprisonment pursuant to the reparole guidelines at 28 C.F.R. 2.21, and an adequate period of renewed supervision following release from reimprisonment or reinstatement to supervision, must be available without forfeiting street time. In the case of a parole violator originally classified in other than the "very good" risk category, it shall be the Commission's policy to order the forfeiture of all time spent on parole absent extraordinary circumstances. In no instance will the Commission grant credit in the case of a repeat violator on the current sentence.

Notes and Procedures

■ 2.52-01. *Specific Findings Prerequisite to Forfeiture of Street Time.*

(a) A separate order requiring the forfeiture of none, a specific number of days, or all of the "street time" is to be entered if revocation is ordered. "Street time" may only be forfeited as provided in paragraphs (b), (c), and (d) below.

(b) *Absconders and Willful Refusals to Respond.*

(1) *Absconders.* An absconder is subject to forfeiture of all the time he was intentionally in absconder status. The term "absconding" describes not only the parolee who intentionally leaves the district of supervision without permission, but also one who intentionally conceals himself from active supervision within the district. Normally, a precise date from which to measure the absconder period will be found in the U.S. Probation Officer's letter or in the U.S. Probation Officer's testimony. This date might be the date the U.S. Probation Officer first tried to contact the parolee unsuccessfully and first discovered that he or she had left his place of residence and his whereabouts became unknown. However, the date may in some cases, be the date of actual departure (if known for certain) or the date a written permission

terminated, if the absconder failed to return within the time set (a copy of such permission should be presented or verified at the hearing). In any case, the date should be conclusive and not a date arrived at by guess-work; it must be a specific date mentioned in the documentary evidence available or in the testimony. The voluntary return of the parolee, or execution of the warrant (or filing of a detainer) marks the limit of the period which can be forfeited. If no clear earlier date is possible, the date on which the warrant was issued should be used. Note: In all cases of failure to report or submit to supervision, the failure must have been intentional. For example, if the parolee was hospitalized because of an emergency, no forfeiture should be made. A parolee who absconds and then is detained as a result of a criminal charge (federal, state, or local), or a parole violation charge from another jurisdiction, should have time forfeited from the date he absconded till the date taken into custody on such charge.

(2) *Willful Refusal to Respond.* The same need for conclusiveness applies to a finding that a parolee failed to respond to any order of his probation officer or of the Commission. If the parolee refused to respond to an order of his probation officer, the date selected must be the date the parolee was to have responded and failed. If a summons was disobeyed, the date the period begins is the date the hearing or interview was to have been held. The end of the forfeited period is the date the parolee finally reported to his probation officer, or the date a warrant was filed as a detainer or executed. "Street time" may also be forfeited for any period of time during which a parolee continuously and willfully fails to abide by one of the conditions of parole (e.g., failing to submit supervision reports, failing to report for drug testing) even though a parolee complies with all other conditions of release.

(c) *New Convictions.*

(1) Any new conviction (whether felony or lesser charge) which is punishable by any term of confinement or imprisonment in a penal facility requires forfeiture of all "street time," except as noted under paragraph (2) and (3). Actual imprisonment need not have been imposed. If in doubt as to whether the offense is punishable by a term of imprisonment, the decision as to possible forfeiture must be withheld pending investigation by the probation office. Note: In some cases, a minor conviction that is classified under the "administrative section" of the reparole guidelines will nonetheless require "street time" forfeiture.

(2) For purposes of forfeiture of "street time" do not use "non-final," Indian Tribal Court, or foreign convictions (see 2.48-09). However, the fact that a conviction is under appeal or is subject to being set aside at some later date does not alter the validity of the conviction for the purpose of forfeiting street time. See 2.48-09(b)(1) for a definition of a "non-final" conviction.

(3) Where forfeiture of cash bond (collateral) in lieu of court appearance constitutes a conviction, such conviction may not be used to forfeit street time. This is because the offense is deemed to be one not punishable by imprisonment since the offender has the option of avoiding imprisonment by forfeiting collateral.

(4) Where a prisoner, in appealing the revocation of his parole, specifically denies that a conviction was sustained, the Regional Commissioner should request the U.S. Probation Officer to submit a copy of the judgment of conviction (certified if possible by the clerk of the court). In this way, disputes of this nature (which are rare) can be conclusively resolved. However, in all cases in which the fact of conviction is not expressly denied, the Commission is entitled to rely upon the written report of the U.S. Probation Officer stating that a conviction has been sustained and that it is or is not of a type requiring forfeiture of time on parole pursuant to 18 U.S.C. 4210(b). It is not grounds for a rehearing in such a case that further evidence

to prove the fact of conviction was not obtained. If the prisoner actively contests the fact of conviction before the National Appeals Board, the correct remedy would be to decide the case on all other issues and to remand the case to the Regional level so that the issue concerning the conviction can be resolved. If the prisoner turns out to be correct, the Regional Commissioner would then reopen the case under 28 C.F.R. 2.28 for appropriate action.

(5) Revocation of probation/supervised release does not constitute a conviction for a crime committed while on parole under 18 U.S.C. §4210. Therefore, if the parolee is serving concurrent terms of federal parole and probation/supervised release (whether federal or state), and the court with jurisdiction over the probation/supervised release term revokes the term, time spent on federal parole cannot later be forfeited for the reason that the parolee incurred a new conviction. After the parolee serves the probation/supervised release violator term and the parole violator warrant is executed, the Commission must order concurrent service of the parole violator term with the probation/supervised release violator term through execution of the warrant *nunc pro tunc* as of the date of arrest on the probation/supervised release violator warrant.

(d) *Exceptions:*

(1) No forfeiture is possible for those committed under the Youth Corrections Act, the Narcotic Addict Rehabilitation Act, and those serving foreign sentences in this country pursuant to their transfer under a prisoner exchange treaty. However, absconding by a YCA, NARA, or foreign code offender will require extending the term of sentence by the period of time the parolee was in absconder status. A separate order at the time the parolee is revoked should show (by dates) the time to be added to the sentence.

(2) For cases sentenced under the District of Columbia (D.C.) Code, forfeiture of all "street time" is mandatory, regardless of the basis of revocation.

(3) In the case of a special parole term violator whose parole is revoked, all "street time" shall be forfeited, regardless of the basis of revocation.

(e) *Forfeiture of "Street Time."* In all cases, the possibility of forfeiture must be discussed with the prisoner at the time of review of the specific charge giving rise to that possibility, and the possible period which may be forfeited must be discussed at that time. NOTE: "Street time" shall be forfeited in any case in which (a) parole has been revoked and, (b) the parolee has been convicted of a new crime (as described above) regardless of whether such crime was initially charged as a violation of parole.

(f) *Conviction After Revocation Hearing.* When a conviction occurs after a revocation hearing (and there was none prior to the revocation hearing) the Regional Commissioner shall reopen the case and schedule a subsequent hearing with the violator. See §2.28(d). Following such hearing, a new order may be made relative to forfeiture of "street time." Note: The provision of this hearing in order to forfeit "street time" is a statutory requirement.

(g) *Credit for Time in Confinement.* Upon revocation, credit is to be given a prisoner towards service of his maximum sentence for every day in federal confinement not previously credited (including confinement on a warrant later withdrawn; and confinement on an improperly executed warrant, whether or not the prisoner was also in state or local custody). In conducting revocation hearings where street time is forfeited, examiners should be alert to situations where a parolee has spent time in confinement as described above. In such case, the following should be added to the Order: "Time spent in confinement

from date to date is to be credited toward service of maximum sentence." It is to be noted that whether credit toward the reparole guidelines is given is a separate determination governed by 28 C.F.R. 2.21.

■ 2.52-02. *Reparole Guidelines.* Reparole guidelines are completed for all revocation hearings.

■ 2.52-03. *Presumptive Sanction for Driving While Impaired.* The provisions of 2.218-01 apply.

■ §2.53 MANDATORY PAROLE.

(a) A prisoner (including a prisoner sentenced under the Narcotic Addict Rehabilitation Act, Federal Juvenile Delinquency Act, or the provisions of 5010(c) of the Youth Corrections Act) serving a term or terms of five years or longer shall be released on parole after completion of two-thirds of each consecutive term or terms or after completion of thirty years of each term or terms of more than 45 years (including life terms), whichever comes earlier, unless pursuant to a hearing under this section, the Commission determines that there is a reasonable probability that the prisoner will commit any Federal, State, or local crime or that the prisoner has frequently or seriously violated the rules of the institution in which he is confined. If parole is denied pursuant to this section, such prisoner shall serve until the expiration of his sentence less good time.

(b) When feasible, at least 60 days prior to the scheduled two-thirds date, a review of the record shall be conducted by an examiner panel. If a mandatory parole is ordered following this review, no hearing shall be conducted.

(c) A prisoner released on mandatory parole pursuant to this section shall remain under supervision until the expiration of the full term of his sentence unless the Commission terminates parole supervision pursuant to §2.43 prior to the full term date of the sentence.

(d) A prisoner whose parole has been revoked and whose parole violator term is 5 years or more shall be eligible for mandatory parole under the provisions of this section upon completion of two-thirds of the violator term and shall be considered for mandatory parole under the same terms as any other eligible prisoner.

Notes and Procedures

■ 2.53-01. *Review Procedure.*

(a) Upon receipt of a progress report from the institution prior to the "two-thirds" date, an examiner panel shall conduct a record review. A recommendation to parole normally should be made in order to provide a period under supervision for all except those who have the greatest probability that they will commit any federal, state or local crime following release. A parole should not be recommended, however, for prisoners who have seriously or frequently violated the rules of the institution.

(b) Unless mandatory parole is ordered on the basis of the record review, the case should be placed on the next hearing docket for a Mandatory Parole Hearing. If the Regional Commissioner disagrees with a panel recommendation to grant Mandatory Parole on the record, he may order that the case be heard as originally scheduled. If parole is not recommended following such hearing, the examiner panel may recommend any such action as may be appropriate.

■ 2.53-02. *Release Certificate*. The Commission's regular parole release certificate (Parole Form H-8) shall be used, except that the word "Mandatory" should be typed beneath the title of the form.

■ 2.53-03. *Concurrent State Sentences*. If Mandatory Parole at two-thirds of a federal term is not granted on the basis of a record review, and the prisoner is serving a state sentence concurrently, no personal hearing is required. If the prisoner is merely "boarded" in a state institution, such personal hearing must be conducted as in cases confined in federal facilities.

■ 2.53-04. *Previous Hearing Within 120 Days*. If a personal hearing is conducted within 120 days of an inmate's "two-thirds date," the examiner panel may recommend relative to Mandatory Parole without the need for a subsequent review on the record or separate Mandatory Parole hearing. Any serious institutional misconduct following such determination will be reported to the Commission in accordance with procedures relative to any parole grant, and, in such event, a rescission may be scheduled.

■ 2.53-05. *Effective Date*. The effective date of Mandatory Parole normally shall be the date on which two-thirds of the maximum term(s) occurs. In the event a Mandatory Parole Hearing is not conducted prior to such date (*i.e.*, where such prisoner has previously waived such hearing) the effective date shall be set as soon as practicable thereafter, but in no case later than the date the prisoner would otherwise be released on the basis of "good time" credits.

2.53-06. *Subsequent hearings for long-term prisoners denied mandatory parole*. If the denial of mandatory parole results in a continuance for the prisoner that exceeds the applicable time period for an interim hearing (either every 18 or 24 months), the prisoner must be scheduled for a subsequent interim hearing. At the interim hearing, the prisoner shall be considered for parole under the mandatory parole criteria of §2.53(a).

■ §2.54 REVIEWS PURSUANT TO 18 U.S.C. 4215(c).

The Attorney General, within thirty days after entry of a Regional Commissioner's decision, may request in writing that the National Appeals Board review such decision. Within sixty days of the receipt of the request the National Appeals Board shall, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing. The Attorney General and the prisoner affected shall be informed in writing of the decision, and the reasons therefore.

■ §2.55 DISCLOSURE OF FILE PRIOR TO PAROLE HEARING.

(a) *Processing disclosure requests*. At least 60 days prior to a hearing scheduled pursuant to 28 C.F.R. 2.12 or 2.14 each prisoner shall be given notice of his right to request disclosure of the reports and other documents to be used by the Commission in making its determination.

(1) The Commission's file consists mainly of documents provided by the Bureau of Prisons. Therefore, disclosure of documents used by the Commission can normally be accomplished by disclosure of documents in a prisoner's institutional file. Requests for disclosure of a prisoner's institutional file will be handled under the Bureau of Prison's disclosure regulations. The Bureau of Prisons has 15 days from date of receipt of a disclosure request to respond to that request.

(2) A prisoner may also request disclosure of documents used by the Commission which are contained in the Commission's file but not in the prisoner's institutional file.

(3) Upon the prisoner's request, a representative shall be given access to the presentence investigation report reasonably in advance of the initial hearing, interim hearing, and a 15-year reconsideration hearing, pursuant and subject to the regulations of the U.S. Bureau of Prisons. Disclosure shall not be permitted with respect to confidential material withheld by the sentencing court under Rule 32(c)(3)(A), F.R.Crim.P.

(b) *Scope of disclosure.* The scope of disclosure under this section is limited to reports and other documents to be used by the Commission in making its determination. At statutory interim hearings conducted pursuant to 28 C.F.R. 2.14 the Commission only considers information concerning significant developments or changes in the prisoner's status since the initial hearing or a prior interim hearing. Therefore, prehearing disclosure for interim hearings will be limited to such information.

(c) *Exemptions to disclosure (18 U.S.C. 4208(c)).* A document may be withheld from disclosure to the extent it contains:

(1) Diagnostic opinions which, if known to the prisoner, could lead to a serious disruption of his institutional program;

**(2) Material which would reveal a source of information obtained upon a promise of confidentiality;
or**

(3) Any other information which, if disclosed, might result in harm, physical or otherwise to any person.

(d) *Summarizing nondisclosable documents.* If any document or portion of a document is found by the Commission, the Bureau of Prisons or the originating agency to fall within an exemption to disclosure, the agency shall:

(1) Identify the material to be withheld; and

(2) State the exemption to disclosure under paragraph (c) of this section; and

(3) Provide the prisoner with a summary of the basic content of the material withheld with as much specificity as possible without revealing the nondisclosable information.

(e) *Waiver of disclosure.* When a timely request has been made for disclosure, if any document or summary of a document relevant to the parole determination has not been disclosed 30 days prior to the hearing, the prisoner shall be offered the opportunity to waive disclosure of such document without prejudice to his right to later review the document or a summary of the document. The examiner may disclose the document and proceed with the hearing so long as the prisoner waives his right to advance disclosure. If the prisoner chooses not to waive prehearing disclosure, the examiner shall continue the hearing to the next docket to permit disclosure. A continuance for disclosure should not be extended beyond the next hearing docket.

(f) *Late received documents.* If a document containing new and significant adverse information is received after a parole hearing but before all review and appellate procedures have been concluded, the prisoner shall be given a rehearing on the next docket. A copy of the document shall be forwarded to the institution for inclusion in the prisoner's institutional file. The Commission shall notify the prisoner of the new hearing and his right to request disclosure of the document pursuant to this section. If a late received document provides favorable information, merely restates already available information or provides insignificant information, the case will not be reopened for disclosure.

(g) *Reopened cases.* Whenever a case is reopened for a new hearing and there is a document the Commission intends to use in making its determination, a copy of the document shall be forwarded for inclusion in the prisoner's institutional file and the prisoner shall be informed of his right to request disclosure of the document pursuant to this section.

Notes and Procedures

■ 2.55-01. *Processing Disclosure Requests -- Institutional File.*

(a) As the Commission's file consists mainly of documents provided by the Bureau of Prisons, prehearing disclosure will normally be accomplished by disclosure of documents in a prisoner's institutional file.

(b) To ensure that the institutional file is complete, any documents that the Commission receives concerning a prisoner prior to an initial hearing should be forwarded to the institution upon receipt. A copy does not have to be retained by the Commission unless the document requires a response by the Commission, or is too sensitive for inclusion in the institutional file. If the Commission does not yet have a file on the prisoner, a correspondence file should be set up for these documents.

(c) *Codefendants.* If it appears, upon prehearing review, that significant information about a prisoner is contained in a codefendant's file, but not in the prisoner's file, that information is to be copied and sent to the institution with a request for placement in the institutional file and prehearing disclosure to the prisoner. This procedure does not apply when the Commission's review of a codefendant's file will be limited to reviewing the offense severity rating and the parole decision, nor will the length of a codefendant's sentence be treated as significant information in any case. Information concerning a codefendant's cooperation is exempt from disclosure under 2.55-03(2).

(d) By Form I-24 institutional staff shall notify a prisoner of his right to request disclosure of his institutional file at least 60 days prior to a hearing. If the prisoner makes a timely request for disclosure of his institutional file (*i.e.*, gives 15 days for staff to respond to request), institutional staff shall ensure that the prisoner is provided disclosure 30 days prior to the hearing. At the time the institutional file is disclosed, the prisoner must complete the section of Form I-24 which indicates that he has reviewed material in his institutional file. If timely requested disclosure is not provided within the established time limits, institutional staff shall give the inmate the opportunity to waive prehearing disclosure by completing the waiver portion of Form I-24.

(e) Institutional staff shall ensure that the institutional file includes:

(1) Current official sentence computation record;

(2) Parole application Form (I-24);

(3) Presentence report(s) for each court docket number noted on the sentence computation record. If one year or more has elapsed between the date of the original presentence report and the date the prisoner began service of the Federal sentence, the institutional staff shall request that the probation officer provide an update to the presentence report to include: (A) additional arrests or convictions during this period, and (B) significant changes related to social history (*e.g.*, opiate dependency, employment, marital status).

(4) Probation Violation Report(s), if applicable, which include a description of the overall circumstances surrounding either the new criminal conduct or technical violations of probation. If this information is not in the institutional file, institutional staff shall request it from the appropriate probation officer;

(5) *Watts v. Hadden Cases*. If a prisoner is a member of the plaintiff class in the above case, the prisoner must have completed the classification process including the development and documentation of a program plan.

(f) The institutional file shall be divided into three sections:

(1) *Bureau of Prisons Only Section*. This section of the file shall consist of sensitive information deemed by the Bureau of Prisons to be totally nondisclosable or not germane to parole. The Commission shall not consider information in this section of the institutional file and disclosure will not be made.

(2) *Disclosable Section*. This section of the file shall contain all disclosable documents or summaries of documents. The prisoner may obtain copies of documents in this section of the file under the Bureau of Prisons regulations except that the presentence report may not be copied without the issuing court's permission.

(3) *Parole Commission/Bureau of Prisons Joint Use Section*. This section of the file shall consist of complete copies of documents which were summarized for disclosure. The Commission will consider these documents in total so long as a summary has been disclosed or disclosure has been waived.

(g) Prior to the initial hearing, but no later than the first day of the month preceding the month of the docket, institutional staff shall prepare and send to the Commission a file (called the "minifile" by the Bureau of Prisons) which consists of all documents listed in 2.55-01(e). In addition to the documents required in 2.55-01(e), institutional staff should provide the Commission with the following documents if they are available: FBI rap sheet, Report on Sentenced Offender (AO-337), Report on Convicted Prisoner by the United States Attorney (USA-792), Classification Study/Current Progress Report, YCA studies, psychiatric/ psychological reports, Disciplinary Hearing Officer's Report, and letters arguing for or against parole. The "minifile" shall be used by the Commission for completion of the prehearing review, preparation of the preliminary guideline assessment worksheet and preliminary summary.

(h) Following the Commission's prehearing review, the "minifile" shall be returned to the institution with the preliminary guideline assessment worksheet. The prisoner may be given copies of the preliminary guideline assessment worksheet. Institutional staff should explain to the prisoner that the preliminary assessment is not final and that it may be modified at the hearing or during the decision making and appeals process.

(i) For an explanation of the exemptions to disclosure, see 2.55-03.

(j) *Summarization of Exempt Documents.*

(1) When a document is marked nondisclosable by the originator, institutional staff shall refer the document to the originator with an explanation of the disclosure requirements of the Parole Commission and Reorganization Act and a request that the originator either permit disclosure of the document or identify the exemption to disclosure found applicable and provide a summary of the document.

(2) When institutional staff finds that a document in the institutional file, although not marked nondisclosable, falls within one of the exemptions to disclosure, institutional staff should identify the exemption to disclosure found applicable and prepare a summary of the document or, if the document is complex or difficult to summarize, institutional staff should refer the document to the originator with an explanation of the disclosure requirements of the Parole Commission and Reorganization Act and request that the originator identify the exemption to disclose found applicable and provide a summary of the document.

(3) Summarization of adverse incident reports and supporting documents will be facilitated by ensuring that the DHO report adequately summarizes the facts resulting in the DHO actions. This report will be deemed to be the legally required summary of any nondisclosable document that was relied upon by the DHO.

■ 2.55-02. *Processing Disclosure Requests.*

(a) If the prisoner makes a timely request for disclosure of documents in the Parole Commission's file, the disclosure specialist should ensure that disclosure is made 30 days prior to the hearing. All prehearing disclosure requests shall be handled on a priority basis and take precedence over disclosure requests submitted under §2.56.

(b) The disclosure specialist should refer the prisoner to his institutional file for disclosure of documents in the Commission file which are copies of documents already in the institutional file.

(c) For documents in the Commission file that are not available to the prisoner through inspection of his institutional file, the disclosure specialist should process the request by sending copies of all disclosable documents and summaries of nondisclosable documents with a brief cover letter to institutional staff for disclosure to the prisoner. This letter shall inform the prisoner that he is being provided disclosure of all information available as of the date of the disclosure response and any document received thereafter but before the hearing will be sent to institutional staff for inclusion in the prisoner's institutional file for disclosure.

(d) The scope of prehearing disclosure is limited to documents relied on by the Commission in making a parole determination. Therefore, only source documents are required by the disclosure (*e.g.*, documents from government official giving description of offense, letter from public arguing for or against parole). Distillations of source documents such as the prehearing assessment, or hearing summaries, do not fall within the scope of prehearing disclosure and need not be disclosed.

(e) For an explanation of the exemptions to disclosure, see 2.55-03.

(f) *Summarizing Exempt Documents.*

(1) When a document is marked nondisclosable by the originator, the disclosure specialist should refer the document to the originator with an explanation of the disclosure requirements of the Parole Commission and Reorganization Act and a request that the originator either permit disclosure of the document or identify the exemption to disclosure found applicable and provide a summary of the document.

(2) When the disclosure specialist finds that a document in the Commission file, although not marked nondisclosable, falls within one of the exceptions to disclosure, the disclosure specialist should identify the exemption to disclosure found applicable and prepare a summary of the document or, if the document is complex or difficult to summarize, the disclosure specialist should refer the document to the originator with an explanation of the disclosure requirements of the Parole Commission and Reorganization Act and request that the originator identify the exemption to disclosure found applicable and provide a summary of the documents.

(g) *Recording Disclosure.* At the hearing, the hearing examiner shall review Form I-24 with the prisoner. If the prisoner has requested either disclosure of his institutional file and/or his Commission file and disclosure has been provided, the examiner will ensure that the prisoner has completed that section of Form I-24 indicating that he has reviewed the requested material.

(h) *Waivers of Disclosure.* If the prisoner requests prehearing disclosure and has not been provided disclosure or was provided disclosure less than 30 days before the hearing, he should be offered the opportunity at his hearing by the examiner to waive disclosure by completing the waiver section of Form I-24. Even if the prisoner has had timely disclosure of the majority of the requested information, if any documents have been provided less than 30 days before the hearing, the examiner should give the prisoner the opportunity to complete the waiver. If the prisoner decides not to waive timely prehearing disclosure, the examiner should continue the hearing to the end of the docket or for the next docket to give the prisoner adequate time to review the material. If a continuance is requested, care should be taken by the examiner and institutional staff to provide timely disclosure so that the continuance does not extend beyond the next hearing docket. Referrals of documents to the disclosure specialist should be made when necessary to prepare the documents for pre-hearing disclosure.

(i) *Disclosure at Statutory Interim Hearing.* Since at interim hearings the Commission only considers information concerning significant developments or changes in the prisoner's status since the last hearing, and such information is normally contained in the progress report available in the institutional file, most requests to the Commission for disclosure prior to the interim hearing can be answered by referring the prisoner to the institutional file. If disclosure of the Commission file is requested and there is information in the Commission file concerning significant developments or changes since the last hearing and the document containing this information is not obviously in the institutional file, that information should be disclosed in conformance with this section.

(j) *Disclosure at 15-Year Reconsideration Hearing.* Requests for disclosure of documents contained in the Commission file prior to a 15-year reconsideration hearing should be handled in the same manner as requests for prehearing disclosure at an initial hearing.

■ 2.55-03. *Exempting Material From Disclosure.*

(a) As noted in 28 C.F.R. 2.55(c), a document, or portion thereof, may be withheld from disclosure if it contains:

(1) *Diagnostic opinions, which if known to the prisoner, could lead to a serious disruption of his institutional program.* The term "diagnostic opinions" is broadly defined to include not only medical, psychiatric, or psychological studies, but also general evaluations of a prisoner or parolee's progress or history by one other than a health professional; for example, a probation officer or case-manager. These evaluations may commonly be found in supervision reports of U.S. Probation Officers (Parole Form F-3), Commission hearing summaries, and Commission staff memoranda regarding a prisoner's administrative appeal. The mere fact that something is characterized as a recommendation, however, does not warrant its being withheld.

Reports from health professionals, whether they are employees of the Bureau of Prisons or under contract to provide services for that agency, should be referred to the Bureau for processing since the documents were originated by Bureau agents. Letters or reports from a requester's private physician on the requester's physical or mental health (generally written at the behest of the requester) should be disclosed to the requester unless the document contains information conceivably not known to the requester which clearly would have a serious adverse impact upon his institutional or community adjustment (*e.g.*, prediction of a relapse in the case of a cancer patient).

Diagnostic opinions or evaluations cannot be withheld from disclosure merely because they are negative in tone or content. In deciding whether use of the exemption is appropriate, the specialist should consider the characteristics of the requester, the content of the document, the nature and progress of the relationship between the subject of the opinion and the originator, and whether the subject has previously been confronted with the opinions of the staff member. For example, little harm normally exists in disclosing to a prisoner, whose parole has been revoked, the opinion of his former probation officer that the prisoner was progressing poorly in the community just prior to his revocation. On the other hand, it may be sensible to delete the judgment of a probation officer or institutional staff member that the subject will never make a successful adjustment to the community life when the parolee or prisoner is apparently making an attempt to participate and cooperate in community or institutional programs.

The specialist should not routinely excise general opinions of Commission staff or probation officers such as "subject has a violent and extensive prior criminal record" or that "he has a disturbing history of disciplinary infractions." Prisoners do have a right to be confronted with adverse opinions regarding their history, personality, or institutional behavior, except where there is a clear concern as to institutional safety and the possibility that the disclosure might seriously discourage the parolee or prisoner from engaging in further community or prison programs. Routine withholding of agency staff memoranda (or the identity of the originator) is not an acceptable practice.

(2) *Material which would reveal a source of information obtained upon a promise of confidentiality.* The purpose of this exemption is to protect from physical harm or real mental anguish those persons who provide information upon an express or implied promise that the information will remain confidential. The exemption primarily extends to information disseminated by undercover law enforcement officers or informants employed by law enforcement agencies, but it may also cover material given by any correctional or law enforcement officer or private party.

Such information will most often be found in warrant requests from probation officers and the documentary evidence in support of the request, *e.g.*, police reports and witness statements. It is also found in recommendations against parole.

The exemption applies where either an express promise or an implied promise of confidentiality is deemed to exist. An implied promise exists in favor of any person described on the file as a confidential informant or undercover law enforcement officer, or where the circumstances described in the file clearly shows that the informant would rationally expect or need confidentiality. (See instructions concerning recommendations against parole).

The exemption covers not only the identity of the person giving the information, but extends to any material which tends to identify the source of the information.

The decision on whether or not to use this exemption depends on such factors as the nature of contents of the documents, the prospect of actual harm to the informant if the information is disclosed, and the likelihood that the requester already knows the identity of the informant.

Generally, the exemption should be used only where the information is adverse to the requester, *e.g.*, if the parolee has left his place of residence or has returned to the use of heroin, and the informant is in a position of vulnerability (*e.g.*, wife, child, former girlfriend). The specialist should examine the requester's past record to determine whether he has committed crimes of violence or could reasonably be expected to take retaliatory action against the informant. If it clearly appears from the file that the requester already knows the source of the adverse information, there is no reason for withholding the information and its source to the parolee/prisoner. For example, if file documents reflect that an informant has testified against the requester in open court, or that a family member has given adverse information regarding the requester to the media, such parties cannot legitimately expect the same information to be confidential when it is made available to the Parole Commission. However, great care should be taken in not engaging in a "guessing game" as to whether or not the requester actually knows the identity of the source if such does not clearly appear from the file itself.

The exemption may be employed to strike the names of arresting or investigative officers only where there is a clear possibility of retaliatory action (*e.g.*, where the prisoner is a member of organized crime or a professional narcotic ring). However, the identities of any victims or witnesses mentioned in police reports and other official documents should be protected where there is an obvious expectation on their part that their identity and statements would remain confidential and a reasonable prospect of actual harm if such information were disclosed.

(3) *Any other information, which if disclosed, might result in harm, physical or otherwise, to any person.* This exemption is utilized to cover those situations where sensitive information needs to be withheld from disclosure because there is a prospect of physical danger, mental anguish, or property or financial loss resulting from disclosure. Thus, the exemption may be applied where disclosure of information would constitute an unwarranted invasion of personal privacy as well as entail a prospect of physical danger. Personal information about other inmates mentioned in a prisoner's file would be exempt under this provision. In particular, the whereabouts of other prisoners should be withheld unless it is clear that the requester already has that information.

This exemption can also be used to protect other persons who are not "confidential sources" but who are discussed in the file. Potentially embarrassing personal details about codefendants who are not in the prison system might be deleted based on this exemption, unless the information is critically important to the requester, or is already a matter of public record, in which case disclosure may be justifiable. In addition, this exemption is particularly useful to withhold information that might cause any individual a substantial loss in money, property, employment, or reputation.

The identity of Commissioners, hearing examiners, other Commission staff or law enforcement officers shall be protected under this section only where there is a clear indication of potential retaliation or danger.

■ §2.56 DISCLOSURE OF PAROLE COMMISSION FILE.

(a) *Procedure.* Copies of disclosable records pertaining to a prisoner or parolee which are contained in the subject's Parole Commission file may be obtained by that prisoner or parolee upon written request pursuant to this section. Such requests shall be answered as soon as possible in the order of their receipt. Other persons may obtain copies of such documents only upon proof of authorization from the prisoner or parolee concerned or to the extent permissible under the Freedom of Information Act or the Privacy Act of 1974.

b) *Scope of disclosure.* Disclosure under this section shall extend to Commission documents concerning the prisoner or parolee making the request. Documents which are contained in the Parole Commission file and which are prepared by agencies other than the Commission which are also subject to the provisions of the Freedom of Information Act, shall be referred to the appropriate agency for a response pursuant to its regulations, unless the document has previously been prepared for disclosure pursuant to §2.55, or is fully disclosable on its face, or has been prepared by the Bureau of Prisons. Any Bureau of Prisons documents in a parole file are duplicates of records in the inmate's institutional file. Before referring these documents to the Bureau of Prisons (BOP), the Commission will ask the requester whether he also wants the BOP documents in his parole file processed.

(1) Requests that are only for a copy of the tape recording of a hearing will be processed ahead of requests seeking multiple documents from the Parole Commission file (priority processing). A requestor may limit the scope of the request to a tape recording only (or to a tape recording and/or up to two documents) and thereby qualify for priority processing. For example, a request for a tape recording and the examiner's summary qualifies for priority processing.

(2) [Reserved]

(c) *Exemptions to disclosure.* A document or segregable portion thereof may be withheld from disclosure to the extent it contains material exempt from disclosure under the Freedom of Information Act. 5 U.S.C. 552(b)(1)-(9).

(d) *Specification of documents withheld.* Documents that are withheld pursuant to paragraph (c) of this section shall be identified for the requester together with the applicable exemption for withholding each document or portion thereof. In addition, the requester must be informed of the right to appeal any non-disclosure to the Office of the Chairman.

(e) *Hearing Record.* Upon request by the prisoner or parolee concerned, the Commission shall make available a copy of any verbatim record (*e.g.*, tape recording) which it has retained of a hearing, pursuant to 18 U.S.C. 4208(f).

(f) *Costs.* In any case in which billable costs exceed \$14.00 (based upon the provisions and fee schedules as set forth in the Department of Justice regulation 28 C.F.R. 16.10), requesters will be notified that they will be required to reimburse the United States for such costs before copies are released.

(g) *Relation to other provisions.* Disclosure under this section is authorized by 28 C.F.R. 16.85 under which the Parole Commission is exempt from the record disclosure provisions of the Privacy Act of 1974, as well as certain other provisions of that Act pursuant to 5 U.S.C. 552a(j)(2). Requests submitted under the Freedom of Information Act or the Privacy Act for the requester's own records will be processed under this section. In no event will the Commission consider satisfaction of a request under this section, the Freedom of Information Act, or the Privacy Act of 1974, to be a prerequisite to an adequate parole hearing under 18 U.S.C. 4208 (for which disclosure is exclusively governed by §2.55 of this part) or to the exercise of a parole applicant's appeal requests under 18 U.S.C. 4215. Provisions of the Freedom of Information Act not specifically addressed by these regulations (including the reading room) are covered by 28 CFR, part 16, subpart A.

(h) *Appeals.*

(1) *Appeals to the Chairman.* When a request for access to U.S. Parole Commission records or a waiver of fees has been denied in whole or in part, or when the Commission fails to respond to a request within the time limits set forth in the FOIA, the requester may appeal the denial of the request to the Chairman of the Commission within thirty days from the date of the notice denying his request. An appeal to the Chairman shall be made in writing and addressed to the Office of the Chairman, U.S. Parole Commission, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815.

(2) *Decision on Appeal.* A decision affirming, in whole or in part, the denial of a request shall include a brief statement of the reason or reasons for the affirmance, including each FOIA exemption relied upon and its relation to each record withheld, and a statement that judicial review of the denial is available in the U.S. district court for the judicial district in which the requester resides or has his principal place of business, the judicial district in which the requested records are located, or in the District of Columbia. If the denial of a request is reversed on appeal to the Chairman, the requester shall be so notified and the request shall be processed promptly by Commission staff in accordance with the Chairman's decision on appeal.

(i) *Expedited processing of Requests.*

(1) The Commission will provide expedited processing of a request when a requester has demonstrated a compelling need as defined in this section and has presented a statement certified by such person to be true and correct to the best of such person's knowledge and belief. A requester may demonstrate "compelling need" by establishing one of the following:

(i) That failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged federal government activity.

(2) A determination as to whether to provide expedited processing shall be made within ten days after the date of the request. However, the fact of lawful imprisonment in a correctional facility or revocation of parole shall not be deemed to pose an imminent threat to the life or physical safety of an individual. The Commission shall process as soon as practicable any request for records to which it has granted expedited processing. An administrative appeal of a denial of expedited processing may be made to the Chairman of the Commission within thirty days from the date of notice denying expedited processing.

Notes and Procedures

■ 2.56-01. *Processing of Requests Under the Freedom of Information Act (FOIA).*

(a) A prisoner or parolee may submit a request for copies of records in the Commission file folder that bears his name. Such a request must be in writing, signed by the prisoner or parolee and contain proof of identity. The request must also contain a register number and sufficient identifying data to retrieve the requested material. Any request not containing proof of identity or sufficient identifying data should be returned to the requester with an explanation of the requirements for making requests. A copy of any returned request should be retained in the disclosure folder along with a copy of the Commission's response. If the request comes from anyone else on behalf of the prisoner (clergyman, wife, friend, etc.), a written consent to disclosure containing the prisoner's or parolee's notarized signature is required. If the request is submitted by an attorney, some proof of the attorney-client relationship must exist, *e.g.*, attorney's representation at most recent hearing, or proof that an attorney was appointed by a court to represent the requester. If such request is received without the necessary consent, the request must be returned to requester with instructions that the prisoner's or parolee's notarized consent is required. In the case of Congressional requests, a copy of the prisoner or parolee's letter requesting assistance or a statement in the Congressional letter that the prisoner requested assistance will be deemed sufficient authorization. If questions arise as to the validity of the consent, refer the matter to the Office of General Counsel.

(b) If it is unlikely that the request will be answered in twenty working days, a letter acknowledging receipt of the request and explaining the delay shall be sent within twenty working days of receipt of the request. After receipt of the acknowledgment letter, the requester may limit the scope of the request in order to receive faster processing. The request shall be answered as soon as possible in order of receipt.

(c) A disclosure log must be maintained to record the date the request was received, the date the request was answered, and the action taken. (See below for further information on maintaining the log.) In addition, a separate chronological file must be maintained containing a folder for each completed request. This must be done in order to keep a record of what action was taken on each request. (The contents of this file are described more fully at paragraph (k) below.)

(d) Upon receipt of the request, the office disclosure specialist should note the date of receipt on the disclosure log. The specialist should then review the request, obtain the parole file for processing, and determine how much of the file needs to be copied. The following items do not have to be copied:

(1) Documents originated by the Bureau of Prisons. Do not process these records unless specifically asked to do by the requester. See §2.56(b) above.

(2) Any documents which fall outside the terms of the request itself. Read the request carefully!

(3) Any other documents from an exempt source (*e.g.*, sensitive investigative material from a Congressional Committee). However, Congressional correspondence from Congressmen on behalf of constituents should be processed for disclosure.

(4) Copies of documents which have previously been disclosed under the FOIA to the prisoner or his representative, unless the prisoner clearly states that such copies have become lost. The requester must be notified of this policy. Verification of a prisoner's claim of lost documents may be required where it would be unduly burdensome to provide the requested documents.

(5) Any material submitted by the requester or his representative (*e.g.*, material submitted with National Appeal). The requester must be notified of this policy.

(6) Duplicates need not be copied. If it appears that there are duplicate copies of documents in the file, the disclosure specialist may destroy them. Care must be taken to make sure that only exact duplicates are destroyed.

(e) If a disclosure request is pending when a national appeal is received, the disclosure request should be taken out of turn if feasible and completed as quickly as possible. The file should then be transmitted to the National Appeals Board. If it is not feasible to complete the request, the file should be sent to the National Appeals Board with a notification letter to the prisoner that the request will be completed after his/her appeal is finalized. However, if the file is already before the National Appeals Board, disclosure should be made after the appeal is decided. In this situation, an acknowledgment letter must be sent to the prisoner explaining that his file is before the National Appeals Board and that his disclosure request will be processed as soon as possible after this appeal has been decided.

(f) If it appears from a review of the parole file that the prisoner or parolee has made a previous disclosure request, check to make sure that he has paid the fees incurred. If the fees for the previous requests have not been paid and the unpaid fees exceed \$14.00, write to the prisoner or parolee and inform him that their current request will not be processed until all such fees have been paid.

(g) The specialist should make two copies of any requested documents coming from other federal agencies, bureaus and departments and refer one copy to the originating agency for a disclosure determination under cover letter unless disclosure instructions have already been received pursuant to the PCRA, or the document is clearly a disclosable one. The second copy should be kept in the disclosure folder. (See paragraph (k) below). The originating agency should be asked to respond to the requester directly. At times, it may be simpler for the specialist to check with the originating agency by phone and process the documents for disclosure as instructed. The specialist may do this where appropriate.

(h) Care must be taken in processing state and local law enforcement agency records. Documents from state or local police departments shall be reviewed to determine whether the report contains an explicit request for confidentiality from the police department, or circumstances from which an expectation of confidentiality can reasonably be inferred. If the report *does* contain a request for confidentiality or if an expectation of confidentiality can be inferred, then the report should be withheld in its entirety pursuant

to (7)(D). If it is determined that the report *does not* contain a request for confidentiality or an expectation of confidentiality, the police report must still be reviewed for the purpose of removing the names and addresses of victims and witnesses (unless clearly known to the subject). Exemptions (6) and (7)(C) can be utilized, along with (7)(F), if applicable. The report would then be released with excisions. The disclosure specialist may consult with the originating agency about questionable material.

(i) Once the copying has been completed and appropriate referrals made, the specialist should decide whether any of the remaining documents or portions thereof should be withheld from disclosure under the exemptions described below. If a portion of a document needs to be exempted, the specialist should obliterate the sensitive passage from a copy of the document for disclosure to the requester. A copy of excised document must be retained in the requester's disclosure folder with brackets around the deleted passage for future reference. Copies of documents totally withheld must also be filed in the disclosure folder.

(j) After the exempting process is finished, the specialist should complete the appropriate form letter and compute the amount owed by the prisoner. Documents or portions thereof that are withheld must also be identified, together with the applicable exemption. Summarization of withheld information does not have to be made since this requirement pertains only to disclosure under the PCRA.

(k) Once the response has been prepared, the specialist should make two copies of the response, inserting one copy in the inmate file and the second in the disclosure folder. Thus, the disclosure folder shall contain the following documents: (1) a copy of the disclosure request; (2) a copy of the response; (3) copies of all file documents withheld from disclosure; (4) copies of all file documents with excised information clearly marked; and (5) copies of referred documents and miscellaneous correspondence regarding referrals between agencies and bureaus, and other components of the Department of Justice. Fully disclosed documents need not be retained. Disclosure folders should be kept in a separate file cabinet and filed in chronological order. The specialist should then forward the response to the requester, noting the date on the disclosure log. The original request should be retained in the inmate file.

(l) The specialist shall retain on the disclosure log a record of the requests received and responses made under this section. The specialist should also record the number of documents withheld from disclosure and the number of documents where excisions were made. Finally, the specialist should list the number and type of exemptions utilized. These records provide the information for a summary which is made annually to comply with the Department of Justice reporting requirements.

■ 2.56-02. *Exempting Material From Disclosure.*

(a) A document, or portion thereof, may be withheld from disclosure if it contains information covered by the exemptions or exclusions to disclosure found at 5 U.S.C. 552(b) and (c) of the Freedom of Information Act.

(b) Reasonably segregable non-exempt portions of a record should be released.

(c) More than one exemption or exclusion may be used if applicable.

(d) Questions concerning the use of a particular exemption or exclusion should be directed to the Office of General Counsel.

■ 2.56-03. *Exceptions to Confidentiality of Files and Special Requests.*

(a) *Routine Uses.* In performing their official duties, Commission staff may repeatedly employ records from the inmate and supervision system of records in certain established contexts without the need for securing the consent of the subject of the file. Such "routine uses" must be published in the Federal Register.

The approved routine uses currently published in the Federal Register are:

(1) The system may be used as a source for disclosure of information which is solely a matter of public record and which is traditionally released by the agency to further public understanding of its criminal justice system, including but not limited to offense, sentence data, and prospective release date.

(2) The system may be used to provide an informational source for responding to inquiries from federal inmates, their families, representatives, and Congressional offices.

(3) Records from the system of records may be routinely disclosed to U.S. Probation Officers for the performance of their official duties.

(4) In the event that the Parole Commission is informed of a violation or suspected violation of law whether civil, criminal or regulatory in nature, and whether arising by general statute, or by regulation, rule or order issued pursuant thereto, the relevant records may be disclosed to the appropriate agency, whether federal, state, local or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute or rule, regulation or order, issued pursuant thereto.

(5) Records from this system may be disclosed to a federal, state or local agency or court if that agency or court requests information for an official purpose to which the documents appear to be relevant.

(6) A record from this system may be disclosed to a person or to persons who may be exposed to harm through contact with a particular parolee or mandatory releasee (or to persons in a position to prevent or minimize such harm), if it is deemed to be necessary to give notice that such danger exists.

(7) Lists of names of parolees and mandatory releasees entering a jurisdiction and related information may be disclosed to law enforcement agencies upon request as may be required for the protection of the public and the enforcement of parole conditions.

(8) Disclosure of Parole Commission Notices of Action may be made (1) by the Office of Public Affairs of the U.S. Department of Justice to the public generally, and (2) by the Parole Commission to specific crime victims and witnesses (as those terms are used in the Victim and Witness Protection Act of 1982), from the files of prisoners whose applications for parole have been decided by the Parole Commission. The purpose of such disclosure is to further understanding of the criminal justice system by the public and by crime victims and witnesses.

(9) Incidental disclosure of file material may be made during the course of a parole or parole revocation hearing to victims and witnesses of crime and other legitimately interested persons authorized by the Parole Commission to attend such hearing. Disclosure will be made to permit victims and witnesses to be fully informed, and to promote competence and integrity in the correctional process.

(10) Records which are arguably relevant to litigation in which the Parole Commission has an interest, or to the litigation defense of its present or former employees (if the Department of Justice has agreed to provide representation), may be disclosed from a current or former prisoner's or parolee's file by disseminating them in proceedings before a court or tribunal at any time deemed appropriate by the government's attorney.

(11) A record from this system of records may be disclosed to a current or former criminal justice official who is a defendant in a lawsuit brought by, or which involves, an individual who is the subject of a file maintained in this system of records, provided that such litigation arises from allegations of misconduct on the part of the defendant while a criminal justice official, and that the records are arguably relevant to the matter in litigation. Such records may be disclosed to the defendant to facilitate the preparation of his or her defense.

(12) Records from this system may be disclosed to any person performing any service for the Parole Commission pursuant to the authority exercised by the Chairman under 18 U.S.C. 4204(b)(1) through (8), and for the purposes contemplated by that statute.

(13) A record relating to the identification and location of Human Immunodeficiency Virus (HIV)-positive parolees (those who test positive for the Acquired Immune Deficiency Syndrome virus) may be disseminated to State or local health departments where permitted by State law.

(14) Where the Commission or supervising probation office believes that a specific person is or has been exposed to a medically recognized risk from an HIV-positive parolee and has not been advised of such risk, a record relating to the identification of that parolee may be released to the parolee's physician or State or local health authorities for the purpose of determining if the physician or health authorities are willing to provide a warning to the third-party at risk and, if willing, for the purpose of providing such a warning.

(15) A record relating to the identification of an HIV-positive parolee may be disclosed to a third party where it is believed that such third party is or has been exposed to a medically recognized type of risk from an HIV-positive parolee and has not been advised of such risk. Such disclosures under this routine use would be made only where the parolee's physician or State or local health authorities are unable or unwilling to make such a warning to the third party. Such disclosures will be made discreetly and as a confidential communication.

(16) To the extent not prohibited by State law, a record relating to the identification and location of and HIV-positive parolee may be disseminated to those medical facilities, state or local health departments, community organizations or similar groups capable of providing medical help or counseling to HIV-positive parolees.

(17) A record relating to the identification of an HIV-positive parolee may be released to the United States Marshal when the Commission issues a parole violator warrant for the arrest of an HIV-positive parolee.

(18) Information permitted to be released to the news media and the public pursuant to 28 C.F.R. 50.2 may be made available unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

(19) Information not otherwise required to be released pursuant to 5 U.S.C. 552 may be made available to a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests information on behalf of and at the request of the individual who is the subject to the record.

(20) A record may be disclosed to the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

Routine use disclosures are, in effect, responses to third party requests for information. Disclosures under this section may be made by Commission staff after consultation with the Commission's Legal Office. Whenever the Commission staff discloses file material outside of the Department of Justice pursuant to a routine use, the circumstances and extent to the dissemination must be recorded for the inmate/supervision file of the particular prisoner/parolee.

A routine use meriting special attention is found at 28 C.F.R. 2.37(a) and the accompanying procedures. This rule permits third parties to be warned of a particular danger a parolee may pose to them. It does not require dissemination of the parolee's criminal record and background to the general public. The duty to disclose only arises when the probation officer or staff member becomes aware of a special relationship, *e.g.*, employer-employee, between the third-party and the parolee. If from circumstances of the relationship, a prospect of harm to the third party can be reasonably foreseen, disclosure of the possibility of such harm should be confidentially made to the third party. A few examples may help to clarify this routine use:

Example 1: Parolee W is seeking a job as a janitor at an apartment building. The building houses a number of apartments occupied by single women. Parolee W has a prior record listing two convictions for rape and aggravated assault. In this case, disclosure to the prospective employer should be made.

Example 2: Parolee X is seeking employment as a bookkeeper at a local bank. Parolee X just completed serving a three year term for embezzling \$120,000 from a savings and loan association. In this case, disclosure of the circumstances of Parolee X's embezzlement should be made to the bank personnel officer.

Example 3: Parolee Y is attempting to purchase a house in a new residential development. The agent for the real estate company in charge of selling the properties calls the probation office for information on Parolee Y, after receiving information that Parolee Y has a prior record. Parolee Y has suffered one conviction for possession of \$1,000 worth of forged money orders and was arrested once for possession of less than an ounce of marijuana. From these facts, it does not appear Parolee Y poses any significant risk of harm to the public. Therefore, disclosure of the of the parolee's background should not be made.

These examples for §2.37(a) are not all-inclusive, but they help to indicate the points with which probation officers and staff should be concerned in this disclosure situation. It should be noted that the disclosure may be required even without a request from member of the public for the information. The Regional Commissioner may delegate the duty to approve disclosure of file information under this routine use to the Executive Hearing Examiner or Case Analysts. Requests for disclosure, as well as subsequent approvals, may be handled telephonically as long as the request and approval is carefully noted for the record. The information disseminated to the third party should also be accounted for in the inmate/supervision file by the probation officer or staff member. If a question arises as to the propriety

of disclosure under this regulation in any case, the probation officer or staff member should call the Commission's Office of General Counsel for assistance.

(b) *Congressional Correspondence/Privacy Act.* Please review the Commission's Procedures Manual at §2.22.

(c) *Subpoenas from Federal, State and Local Courts.* When a federal probation officer or Commission staff member receives a subpoena from a federal, state, or local court for the production of file material or the oral disclosure of information on a prisoner or parolee, he or she should consult the Commission's Office of General Counsel as soon as possible for appropriate instruction. Disclosure of such information is regulated by the Department of Justice rules found at 28 C.F.R. 16.21-16.29.

Before information can be divulged, the Chairman of the Commission must consent to the dissemination. The procedure need not be followed where an agent of the Department of Justice, *e.g.*, Assistant U.S. Attorney, is subpoenaing the information since the disclosure is essentially "in-house" and covered as a routine use under the Privacy Act. In the event that permission is not granted, persons to whom such subpoenas are directed should be advised to contact the local United States Attorney's Office to secure its assistance in defending that position.

(d) *Requests from Law Enforcement Authorities.* The Privacy Act specifically allows for the unconsented disclosure of file material (including photocopies) concerning a prisoner or parolee to any federal, state, or local government agency for a criminal or civil law enforcement activity if the head of the agency (or a person who can act for the agency head) makes a written request to the Commission specifying the material desired and the law enforcement activity for which the records are sought. 5 U.S.C. 552a(b)(7). Routine use (d) extends this exception for foreign law enforcement agencies. Thus, agencies as different as a state bureau of investigation, a county sheriff's office, a metropolitan police department, the Internal Revenue Service, a state department of insurance, a local liquor control board, or the Royal Canadian Mounted Police may all present valid requests for information under this section.

On occasion, a request which on its face may fall within this exception should still not be complied with unless good cause is shown for the disclosure. For example, a domestic relations agency may seek the file information to compel a parolee to pay child support, which would be a law enforcement activity, especially since continued non-payment may result in criminal prosecution. In this case, disclosure would be appropriate. Yet, if the same agency seeks the information to resolve a child custody dispute, the case probably does not involve law enforcement, but civil litigation regarding the rights of the parents over the child. Routine use (3) would be applicable instead. If in doubt about the propriety of disclosure in any case, staff should not make the decision without the advice of the General Counsel's Office.

Requests from governmental agents who apparently have supervisory authority, such as "chief of homicide division," rather than the actual head of the agency, *i.e.*, chief of police, may be responded to without further correspondence on the issue of proper authorization.

Commission staff should require the requester to be specific about the type of information sought and the purpose of the request. Staff should divulge only that information which reasonably satisfies the request of the law enforcement agency. Any disclosure made to the law enforcement authority must be documented for the file in order to comply with the accountability requirements of the Privacy Act.

(e) *Public Sector Information/Disclosure to Members of the Press.* Information deemed to be the "public sector" can be disclosed to third parties without the consent of the file subject, unless the information pertains to a "protection" case where minimal or no disclosure is made. Public sector information encompasses the following data: (1) name; (2) register number; (3) past and current places of incarceration; (4) age (i.e., date of birth); (5) race; (6) sentence data on the Bureau's Sentence Computation Record (BP-5); (7) date(s) of parole hearing(s); and (8) the decision(s) rendered by the Commission after agency proceedings including dates of continuances and presumptive parole dates. Notes: (1) An inmate's designated future place of incarceration is not public information; (2) Reasons for parole denial or revocation are not considered public sector information. If the requester desires information other than public sector information, the disclosure must fit a Privacy Act exception, a routine use, or be specifically consented to by the inmate or person on supervision.

(f) *Original Jurisdiction Cases.* Media inquires on prisoners who are considered under the Commission's original jurisdiction voting procedure, 28 C.F.R. Section 2.17 and 2.27, will generally be handled by the Department of Justice, Office of Public Information. This office can also be utilized as a resource for Commission staff when they encounter a particular problem with a news reporter's request for information on a prisoner or parolee, regardless of whether or not the file subject is an original jurisdiction case. It is recommended that the Office of Public Information be consulted and that the disclosure be made, or its refusal be communicated, to the media through that office in any but the most routine situations.

■ §2.57 SPECIAL PAROLE TERMS.

(a) The Drug Abuse Prevention and Control Act, 21 U.S.C. sections 801 to 966, provides that, on conviction of certain offenses, mandatory "special parole terms" must be imposed by the court as part of the sentence. This term is an additional period of supervision which commences upon completion of any period on parole or mandatory release supervision from the regular sentence; or if the prisoner is released without supervision, commences upon such release.

(b) At the time of release under the regular sentence, whether under full term expiration or under a mandatory release certificate or a parole certificate, a separate Special Parole Term certificate will be issued to the prisoner by the Bureau of Prisons.

(c) Should a parolee be found to have violated conditions of release during supervision under his regular sentence, *i.e.*, before commencement of the Special Parole Term, he may be returned as a violator under his regular sentence; the Special Parole Term will follow unaffected, as in paragraph (a) of this section. Should a parolee violate conditions of release during the Special Parole Term he will be subject to revocation on the Special Parole Term as provided in §2.52, and subject to reparole or mandatory release under the Special Parole Term. 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).

(d) If a prisoner is repared under the revoked Special Parole Term a certificate of parole to Special Parole Term is issued by the Commission. If the prisoner is mandatorily released under the revoked "special parole term" a certificate of mandatory release to Special Parole Term will be issued by the Bureau of Prisons.

(e) If regular parole or mandatory release supervision is terminated under §2.43, the Special Parole Term commences to run at that point in time. Early termination from supervision from a Special Parole Term may occur as in the case of a regular parole term, except that the time periods considered shall commence from the beginning of the Special Parole Term.

Notes and Procedures

■ 2.57-01. *Special Parole Term Procedure.*

(a) Any special conditions imposed during parole or mandatory release shall also apply to the special parole term and shall be placed on the special parole term certificate. The Special Parole Term will be treated as aggregated with the regular parole or mandatory release term for purposes of modification or removal of conditions or special conditions.

(b) A person serving a special parole term shall be considered the same as a regular parolee. This includes the possibility of termination from supervision if merited, as well as the possibility of relocating outside the United States if justified. However, the special parole term will be treated as a separate consecutive term (without credit for any time spent on any regular parole term) for purposes of the (1) early termination guidelines and (2) the five- year hearing requirement in reference to termination of jurisdiction.

(c) The special parole term is not applicable to sentences under the FJDA, YCA, and NARA. In a "split sentence" situation, the special parole term is considered to be part of the sentence that was suspended and this will not take effect unless probation is revoked.

■ 2.57-02. *Conversion of Special Parole Term (SPT) to Supervised Release Term.*

(a) Drug offenders who committed their offenses between October 27, 1986, and November 1, 1987, and were convicted under 21 U.S.C. 841(b)(1)(A), (B), or (C) or 960(b)(1), (2) or (3), are supposed to have received terms of supervised release, according to the Supreme Court decision of *Gozlon-Peretz v. United States*. Because of confusion in the state of the law between 1986 and 1991, many of them received terms of special parole and are now under the Commission's jurisdiction. U.S. Probation Officers have primary responsibility for identifying such cases under their supervision, and for seeking a conversion of the case to supervised release (*i.e.*, resentencing by the court).

However, when reviewing any request for action (*e.g.*, issuance of a warrant, transfer of supervision, etc.) on a special parole term that might fall within this category, Commission staff should look to the presentence report to determine (1) the date of the offense and (2) the statute under which the offender was convicted. If the offense was committed between October 27, 1986 and November 1, 1987 and the conviction is under 21 U.S.C. 841(b)(1)(A), (B) or (C), or 960(b)(1), (2) or (3), notify the probation officer of this fact. The U.S. Probation Officer should be instructed to inform the sentencing court that the SPT must be converted to a term of supervised release. Until the Commission receives a new judgment and commitment order, or a court order imposing supervised release, the Commission will retain jurisdiction over the case based on the original judgment and commitment order.

(b) If a warrant has been requested in a case that fits the above criteria, the U.S. Probation Officer should be informed that the case should be converted to supervised release. The U.S. Probation Officer should request the sentencing judge to issue a warrant simultaneously with issuing the new judgment and

commitment order. The Commission should only issue a warrant if: (1) it is clear that resentencing will not be possible before the term of supervision runs out (ask the U.S. Probation Officer requesting the warrant how soon resentencing could be accomplished); (2) the individual is an absconder from supervision; or (3) there is an urgent public safety need for the individual's immediate arrest (*i.e.*, even a few days' delay in arrest would be unacceptable).

(c) If the warrant has already been executed, or the Commission has already revoked SPT and the prisoner is in custody as a violator when the Commission discovers that he or she should have been on supervised release, notify the U.S. Probation Officer to seek a correction of sentence from the court. The U.S. Probation Officer should be requested to inform the court of the charges against the prisoner, and to ask the court to consider issuance of a supervised release warrant. (A supervised release warrant would allow the Bureau to keep the prisoner in custody once he or she has been resentenced, until the court conducts its *de novo* supervised release revocation hearing.) If a prisoner has already been resentenced, and the court has declined to issue a warrant, he or she *must* be released from prison immediately. However, the prisoner's custody is lawful under the original judgment and commitment order, until the court amends it.

■ §2.58 PRIOR ORDERS.

Any order of the United States Board of Parole entered prior to May 14, 1976, including, but not limited to, orders granting, denying, rescinding or revoking parole or mandatory release, shall be a valid order of the United States Parole Commission according to the terms stated in the order.

■ §2.59 DESIGNATION OF A COMMISSIONER TO ACT AS A HEARING EXAMINER.

The Chairman may designate a Commissioner, with the Commissioner's consent, to serve as a hearing examiner on specified hearing dockets. The Commissioner who serves as a hearing examiner may not vote in the same proceeding as a Commissioner.

■ §2.60 SUPERIOR PROGRAM ACHIEVEMENT.

(a) **Prisoners who demonstrate superior program achievement (in addition to a good conduct record) may be considered for a limited advancement of the presumptive date previously set according to the schedule below. Such reduction will normally be considered at an interim hearing or pre-release review. It is to be stressed that a clear conduct record is expected; this reduction applies only to cases with documented sustained superior program achievement over a period of 9 months or more in custody.**

(b) **Superior program achievement may be demonstrated in areas such as educational, vocational, industry, or counselling programs, and is to be considered in light of the specifics of each case. A report from the Bureau of Prisons based upon successful completion of a residential substance abuse program of at least 500 hours will be given prompt review by the Commission for a possible advancement under this section.**

(c) **Upon a finding of superior program achievement, a previously set presumptive date may be advanced. The normal maximum advancement permissible for superior program achievement during the prisoner's entire term shall be as set forth in the following schedule. It is the intent of the Commission that this maximum be exceeded only in the most clearly exceptional cases.**

(d) Partial advancements may be given [for example, a case with superior program achievement during only part of the term or a case with both superior program achievement and minor disciplinary infraction(s)]. Advancements may be given at different times; however, the limits set forth in the following schedule shall apply to the total combined advancement.

e) Schedule of Permissible Reductions for Superior Program Achievement.

Total months required by original presumptive date:	Permissible reduction
14 months or less	Not applicable.
15 to 22 months	Up to 1 month.
23 to 30 months	Up to 2 months.
31 to 36 months	Up to 3 months.
37 to 42 months	Up to 4 months.
43 to 48 months	Up to 5 months.
49 to 54 months	Up to 6 months.
55 to 60 months	Up to 7 months.
61 to 66 months	Up to 8 months.
67 to 72 months	Up to 9 months.
73 to 78 months	Up to 10 months.
79 to 84 months	Up to 11 months.
85 to 90 months	Up to 12 months.
91 plus months	Up to 13 months.

Plus up to 1 additional month for each 6 months or fraction thereof, by which the original date exceeds 96 months.

(f) For cases originally continued to expiration, the statutory good time date (calculated under 18 U.S.C. 4161) will be used for computing the maximum reduction permissible and as the base from which the reduction is to be subtracted for prisoners serving sentences of less than five years. For prisoners serving sentences of five years or more, the two-thirds date (calculated pursuant to 18 U.S.C. 4206(d)) will be used for these purposes. If the prisoner's presumptive release date has been further reduced by extra good time (18 U.S.C. 4162) and such reduction equals or exceeds the reduction applicable for superior program achievement, the Commission will not give an additional reduction for superior program achievement.

Notes and Procedures

■ 2.60-01. *Background.*

(a) The objective of the superior program achievement provision is to authorize a small but meaningful reward for prisoners who choose to spend their prison time in an exceptionally constructive manner. The normal maximum reward is purposefully kept small to reduce the likelihood of prisoners participating superficially in programs merely to impress the Parole Commission, and so as not to reintroduce the gross indeterminacy that the presumptive date system was designed to eliminate. The granting of a reward for

superior program achievement is not mandatory; and it is the intent of the Commission that the granting of such award not threaten the public safety.

(b) A reward for superior program achievement may be considered in either of the following situations:

(1) Where the program achievement is deemed likely to enhance the prisoner's ability to lead a law abiding life (for example, where there has been a substantial enhancement in educational or vocational level, or a sustained improvement in work habits); or

(2) Where the conduct has had a significant positive impact upon the operation of the institution or has provided an outstanding example of the constructive use of prison time.

■ 2.60-02. *Application.*

(a) The following procedures apply to all types of considerations: Initial hearings (where the prisoner has been in custody for the required period), interim hearings, pre-release reviews, etc.

(b) Whenever credit for superior program achievement is given, the following wording will be added to the Notice of Action: "The above decision includes a [] month credit for superior program achievement, specifically: *(describe the nature, extent, and duration of superior program achievement)*".

(c) For purposes of applying this rule, the original presumptive date refers to the number of months in custody which would be required without consideration of superior program achievement.

Example A - Initial Hearing - Calculate the number of months to be served without reference to superior program achievement. If 45 months would be required, the maximum permissible reduction for superior program achievement (during the entire term) is 5 months. Note: Superior program achievement will only be considered at initial hearings if the prisoner has at least nine months in custody.

Example B - Interim and Pre-Release Reviews - Calculate the number of months in custody required by the original presumptive date; check to see if the allowable credit for superior program achievement has already been awarded.

(d) For cases originally continued to expiration, the statutory good time date will be used both for computing the maximum reduction permissible and as the base from which the reduction is to be subtracted for sentences of less than five years. For sentences of five years or more, the two-thirds date will be used for these purposes. If the prisoner's date has been further reduced by extra good time and such reduction equals or exceeds the reduction permissible for superior program achievement, the Commission will not give an additional reduction for superior program achievement.

Example C - Prisoner's statutory good time date occurs at 37 months. The permissible reduction for superior program achievement is up to 4 months. The prisoner has earned 4 or more months extra good time; reduction for superior program achievement is not applicable.

(e) This rule provides criteria and standards for consideration of superior program achievement. It does not in any way affect the voting quorums for Commission actions required under §2.17, §2.23, §2.24, §2.26, §2.27.

■ **§2.61 QUALIFICATIONS OF REPRESENTATIVES.**

(a) A prisoner or parolee may select any person to appear as his or her representative in any proceeding, and any representative will be deemed qualified unless specifically disqualified under paragraphs (b) or (c) of this section. However, an examiner or examiner panel may bar an otherwise qualified representative from participating in a particular hearing, provided good cause for such action is found and stated in the record (*e.g.*, willfully disruptive conduct during the hearing by repeated interruption or use of abusive language). In certain situations, good cause may be found in advance of the hearing (*e.g.*, that the proposed representative is a prisoner in disciplinary segregation whose presence at the hearing would pose a risk to security, or has a personal interest in the case which appears to conflict with that of the parole applicant).

(b) The Commission may disqualify any representative from appearing before it for up to a five-year period if, following a hearing, the Commission finds that the representative has engaged in any conduct which demonstrates a clear lack of personal integrity or fitness to practice before the Commission (including, but not limited to, deliberate or repetitive provision of false information to the Commission, or solicitation of clients on the strength of purported personal influence with U.S. Parole Commissioners or staff).

(c)(1) In addition to the prohibitions contained in 18 U.S.C. 207, no former employee of any Federal criminal justice agency (in either the Executive or Judicial Branch of the Government) with the exception of the Federal Defender Service, shall be qualified to act as a representative for hire in any case before the Commission for one year following termination of Federal employment. However, such persons may be employed by, or perform consulting services for, a private firm or other organization providing representation before the agency, to the extent that such employment or service does not include the performance of any representational act before the Commission.

(2) No prisoner or parolee may serve as a representative before the Commission, at the hire of individual clients, in any case.

■ **§2.62 REWARDING ASSISTANCE IN THE PROSECUTION OF OTHER OFFENDERS; CRITERIA AND GUIDELINES.**

(a) The Commission may consider as a factor in the parole release decision-making a prisoner's assistance to law enforcement authorities in the prosecution of other offenders.

(1) The assistance must have been an important factor in the investigation and/or prosecution of an offender other than the prisoner. Other significant assistance (*e.g.*, providing information critical to prison security) may also be considered.

(2) The assistance must be reported to the Commission in sufficient detail to permit a full evaluation. However, no promises, express or implied, as to a Parole Commission reward shall be given any weight in evaluating a recommendation for leniency.

(3) The release of the prisoner must not threaten the public safety.

(4) The assistance must not have been adequately rewarded by other official action.

(b) If the assistance meets the above criteria, the Commission may consider providing a reduction of up to one year from the presumptive parole date that the Commission would have deemed warranted had such assistance not occurred. If the prisoner would have been continued to the expiration of sentence, any reduction will be taken from the actual date of the expiration of the sentence. Reductions exceeding the one year limit specified above may be considered only in exceptional circumstances.

(c) In the case of an eligible DC Code prisoner whose assistance meets the criteria of this section, the Commission may consider deducting a point under Category V of the Point Assignment Table in the Appendix to §2.80, in addition to any other deduction for positive program achievement, when considering such prisoner for parole. In the case of a DC Code prisoner with an unserved minimum term, the Commission may consider filing an application under § 2.76 for a reduction of up to one-third of such term less applicable good time.

Notes and Procedures

■ 2.62-01. *Application.*

(a) The following methodology is to be used in applying this provision:

(1) Determine how much (if any) reduction is warranted. The following are among the factors that may be considered:

(A) The extent and quality of the assistance (*e.g.*, the extent to which the assistance has been an important factor in the prosecution of a serious offender, has resulted in the saving of life or the prevention of a serious offense, has prevented a potentially serious institutional disturbance, etc.).

(B) Whether the information provided places the prisoner (or his family) at substantial risk of retaliation.

(C) Whether information provided is timely, complete, thorough, and not provided in a piecemeal fashion.

(D) Whether information provided would have been available to law enforcement officials without the prisoner's cooperation.

(2) If the reviewer determines that exceptional circumstances warrant a reward of more than one year, the specific circumstances are to be stated (*e.g.*, an offender continues to testify against an organized crime figure after an attempt on his life has been made; an offender saved the life of a correctional officer during a disturbance).

(3) Suggested Wording for Hearing Summary: "The panel believes the nature and extent of the assistance provided (described earlier in the summary) warrants a ___ month reward and that this reward will not threaten public safety. Therefore, a presumptive parole date at ___ months is recommended."

(4) The reward granted is to take into account the total reward contemplated by the Commission whether the cooperation is given at one time or over a period of time.

(5) "Actual date of the expiration of the sentence" means the mandatory release date less good time, *i.e.*, the date the inmate will actually be released from prison.

(b) In D.C. cases, for prisoners who have already had a point subtracted for cooperation under the guidelines in effect from August 5, 1998 through December 3, 2000 (the former Appendix to §2.80 guidelines), the conversion rule at §2.80(o)(3) applies. Otherwise, the possible reduction for cooperation should be considered in accordance with §2.62(b) to set a presumptive parole date or the date of a reconsideration hearing.

■ §2.63 QUORUM.

Any Commission action authorized by law may be taken on a majority vote of the Commissioners holding office at the time the action is taken.

■ §2.64 YOUTH CORRECTIONS ACT.

(a) The provisions of this section only apply to offenders serving sentences imposed under former 18 U.S.C. 5010 (b) and (c).

(b) *Approval of program plans.*

(1) The criteria outlined in paragraph (d) of this section (on determining successful response to treatment) shall be considered in determining whether a proposed program plan will effectively reduce the risk to the public welfare presented by the YCA prisoner's release.

(2) If the prisoner's program plan has not already been approved by the Commission, the examiner shall be given the plan at a hearing for review and approval. The examiner shall indicate approval or disapproval of the program plan (with relevant comments and recommendations) in the hearing summary.

(3) If the examiner considers the plan inadequate, the concerns will be discussed with institutional staff. If there is still a disagreement on the plan, the case will be referred to the Bureau's regional correctional programs administrator with the recommended changes. Unresolved disputes concerning the adequacy of the program plan shall be decided by the Regional Commissioner and the Regional Director of the Bureau of Prisons. The Regional Commissioner shall render the final decision on approving or disapproving each program plan on behalf of the Commission. Once the program plan has been approved, subsequent approvals are not necessary, unless significant modifications are made by institutional staff.

(c) *Parole hearings and progress reports.*

(1) Initial hearings shall be conducted in accordance with §§2.12 and 2.13. The examiner will discuss with the prisoner and a staff member who is knowledgeable about the case the program plan and the importance of good conduct and program participation in setting the release date.

(2) An interim hearing must be scheduled for an inmate every nine months if the inmate is serving a sentence of less than seven years. If the inmate is serving a sentence of seven years or more, the

interim hearing must be scheduled every twelve months. If the inmate has been continued to the expiration of his sentence, and he has less than twelve months remaining to be served prior to his release or his transfer to a community corrections center, no further hearing is required. In addition, within 60 days of receipt of any special progress report from the warden recommending parole, the prisoner shall be scheduled for a special interim hearing, unless the recommendation can be timely considered at a regularly scheduled interim hearing. An institutional staff member who has personal knowledge of the case shall be present to assist the examiner in the evaluation of the prisoner's conduct, program performance, and response to treatment.

(3) After any interim hearing or review on the record, the Commission may advance the presumptive release date, let the date stand, or retard/rescind the date if the prisoner has committed disciplinary infractions or new criminal conduct.

(4) An interim hearing will not be scheduled after receipt of a progress report, if the Commission decides on the record to parole the prisoner as soon as a release plan is approved (normally within 60 days of the decision).

(5) The institution shall send a progress report to the Commission:

(i) No more than 60 days before each interim hearing;

(ii) Upon determining that a prisoner should be recommended for parole; and

(iii) Before a presumptive parole date to allow for the pre-release record review under §2.14(b).

The warden may forward progress reports to the Commission at other times in his discretion. Progress reports shall also be sent to the Commission every six months for prisoners who have waived interim hearings to enable the Commission to verify that these prisoners have satisfied the conditions of securing their release on an alternate parole date granted under the former YCA compliance plan (*i.e.*, completion of the program plan) or the normal presumptive release date (*i.e.*, obedience to institutional rules).

(6) For prisoners granted earlier parole dates under former compliance plans in *Watts v. Belaski*: A prisoner may waive interim hearings under this section, in which case he would retain an alternate parole date previously granted to him or a presumptive parole date granted as a result of a finding that the prisoner had responded to treatment. A prisoner who waives an interim hearing under this section may, at any time, re-apply for the hearing and be considered under this section in accordance with the application/waiver provisions at §2.11. The Commission will not review the program plans for prisoners who waive interim hearings pursuant to this paragraph, unless the prisoner subsequently is scheduled for a hearing to consider new criminal conduct or a rule infraction and a modification of the original program plan appears warranted due to the prisoner's new criminal offense or infraction. If the prisoner is scheduled for a hearing that may not be waived (*e.g.*, an interim hearing where there has been a finding of a disciplinary infraction since the last hearing, or any hearing scheduled pursuant to §2.28(b) through (f), this section will be applied at such hearing.

(7) Warden's recommendation. Based on the completion of the program plan by the prisoner, and the quality of effort demonstrated by the prisoner in completing the plan, the warden will recommend to the Commission a conditional release date for its consideration. This recommendation shall be accompanied by a report on the prisoner's participation and level of achievement in different aspects of his program.

(d) Criteria for finding successful response to treatment programs.

(1) In determining whether a prisoner has successfully "responded to treatment" the Commission shall examine whether the prisoner has shown that he has received sufficient corrective training, counseling, education, and therapy that the public would not be endangered by his release. See former 18 U.S.C. 5006(f) (definition of "treatment" under the YCA). The Bureau of Prisons shall assist the Commission in this determination by informing the Commission when the prisoner has completed his program plan and by advising the Commission of the quality of effort demonstrated by the prisoner in completing the plan.

(2) In determining the extent of a prisoner's positive response to treatment, the Commission shall examine the degree by which the prisoner has increased the likelihood that his release would not jeopardize the public welfare through his program performance and conduct record. See 18 U.S.C. 4206(a)(2). The starting point for the analysis of a prisoner's response to treatment will be the original parole prognosis reached by the use of the salient factor score, and an evaluation of the nature of the prisoner's prior criminal history and other characteristics of the prisoner. The nature of the current offense may also be considered in determining the risk to the public welfare presented by the prisoner's release. The Commission will then proceed to evaluate whether the prisoner's program participation and institutional conduct has improved the original risk prognosis and evidences an alteration of his value system, including an understanding of the wrongfulness of his past criminal conduct. For those prisoners who have exhibited serious or violent criminal behavior, the Commission will exercise more caution in making a finding that the prisoner has responded to treatment to the degree that he should be released.

(3) With regard to program performance, significant weight will be given to the following factors in determining a prisoner's response to treatment. This is not intended as an exhaustive list.

(i) Vocational training. Where the inmate originally had few job skills, the acquisition of a marketable job skill through vocational training or an apprenticeship program.

(ii) Education. Participation in educational programs to acquire an educational level at least the level of a high school graduate.

(iii) Psychological counseling and therapy. Where the prisoner's behavior has shown that he may be affected by personality disorders or a mental illness that has hampered his ability to lead a law-abiding life, or that he may otherwise benefit from such programs, participation in psychological and/or other specialized programs which lead to a judgment by the therapist/counselor that the prisoner has significantly improved his ability to obey the law and favorably modified his value system. Participation in these programs will normally be required for a significant advancement of the presumptive release date for a prisoner who has either committed or attempted a crime of violence.

(iv) *Drug/alcohol abuse programs.* Where the prisoner has a history of drug/alcohol abuse, participation in a drug/alcohol abuse program which leads to the judgment by the therapist/counselor that there is a significant likelihood that the prisoner will not revert to drug/alcohol abuse and has thereby significantly improved his ability to obey the law.

(v) *Work.* Assuming the prisoner is physically and mentally able to do so and is not otherwise engaged in an institutional activity which prevents him from obtaining a job, participation in a job on a regular basis so as to demonstrate a stable life pattern and a favorable modification of his value system.

(4) Prison misconduct (*i.e.*, disobedience to institutional rules, escape) and new criminal conduct in the institution shall be considered in the decision as to whether (or to what degree) a prisoner has successfully responded to treatment. The rescission guidelines of §2.36 shall be used in retarding or rescinding the original presumptive release date set according to the guidelines and the factors described in 18 U.S.C. 4206. If the original presumptive date has been advanced based on response to treatment, the rescission guidelines may also be used to retard or rescind the new date to maintain institutional discipline, if the misconduct is not deemed serious enough to affect the decision that the prisoner has responded to treatment. But misconduct subsequent to the advancement of a release date based on a finding of response to treatment may also result in a reversal of that finding and the cancellation of any advancement of the original presumptive release date.

(e) *Setting the parole date (balancing Sec. 4206 factors with response to treatment).* At any hearing or review on the record, the presumptive release date may be advanced if it is determined that the prisoner has responded to a sufficient degree to his treatment programs. The amount of the advancement should be proportional to the degree of response evidenced by the prisoner. In making the advancement, no rule restricting the amount of the reduction – whether based on the guidelines (§2.20) or the rule on superior program achievement (§2.60) – shall be used. The decision will be the result of a case-by-case evaluation in which response to treatment programs, the seriousness of the offense, and the original parole prognosis are all weighed by the Commission with no one factor capable of excluding all others.

(f) *Parole violators.* Parole violators returned to an institution following a local revocation hearing shall normally be considered for reparole under this section at a hearing within six months of their arrival at the institution.

(g) *Early termination from supervision.*

(1) A review of a YCA parolee's file will be conducted at the conclusion of each year of supervision (following receipt of the annual progress report -- Form F-3) and six months prior to the expiration of his sentence (after receipt of the final report).

(2) A YCA parolee shall not be continued on supervision beyond the time periods specified in the early termination guidelines (§2.43), unless case-specific factors indicate further supervision is warranted. The guidelines at §2.43 shall not be routinely used to *deny* early discharge to a YCA parolee who has yet to complete two (or three) years of clean supervision.

(3) The Commission shall consider the facts and circumstances of each YCA parolee's case, focusing on the risk he poses to the public and the benefit he may obtain from further supervision. The nature of the offense and parolee's past criminal record shall be taken into account only to evaluate the risk that the parolee may still pose to the public.

(4) In denying early discharge, the Commission shall inform the probation office by letter (with a copy to the YCA parolee) of the reasons for continued supervision. The reasons should pertain, whenever possible, to the facts and circumstances of the YCA parolee's case. If there are no case-specific factors which indicate that discharge should be either granted or denied and further supervision appears warranted, the Commission may inform the YCA parolee that he is continued on supervision because of its experience with similarly situated offenders.

■ §2.65 PAROLING POLICY FOR PRISONERS SERVING AGGREGATE U.S. AND D.C. CODE SENTENCES.

(a) *Applicability.* This regulation applies to all prisoners serving any combination of U.S. and D.C. Code sentences that have been aggregated by the U.S. Bureau of Prisons. Such individuals are considered for parole on the basis of a single parole eligibility and mandatory release date on the aggregate sentence. Pursuant to §2.5, every decision made by the Commission, including the grant, denial, and revocation of parole, is made on the basis of the aggregate sentence.

(b) *Basic policy.* The Commission shall apply the guidelines at §2.20 to the prisoner's U.S. Code crimes, and the guidelines of the District of Columbia Board of Parole to the prisoner's D.C. Code crimes.

(c) *Determining the federal guideline range.* The Commission shall first consider the U.S. Code offenses pursuant to the guidelines at §2.20, and shall determine the appropriate number of months to be served (the prisoner's "federal time"). The Commission shall deem the "federal time" to have commenced with the prisoner's initial commitment on the current aggregate sentence, including jail time.

(d) *Decisions above the federal guideline range.* The "federal time" thus determined may be a decision within, below or above the federal guidelines, but it shall not exceed the limit of the U.S. Code sentence, *i.e.*, the number of months that would be required by the statutory release date if the U.S. Code sentence is less than five years, or the two-thirds date if the U.S. Code sentence is five years or more. The D.C. Code criminal behavior may not be used as an aggravating offense factor, but may be used as a predictive basis for exceeding the federal guideline range to account for the actual degree and/or seriousness of risk.

(e) *Scheduling the D.C. parole hearing.* The Commission shall then schedule a D.C. parole hearing to be conducted not later than four months prior to the parole eligibility date, or the expiration of the "federal time," whichever is later. At the D.C. parole hearing the Commission shall apply the point score system of the D.C. Board of Parole, pursuant to the regulations of the D.C. Board of Parole, to determine the prisoner's suitability for release on parole.

(f) *Granting parole.* In determining whether or not a grant parole pursuant to the point score system of the D.C. Board of Parole, and the length of any continuance for a rehearing if parole is

denied, the Commission shall presume that the eligible prisoner has satisfied basic accountability for the D.C. Code offense behavior. However, the Commission retains the authority to consider any unusual offense circumstances pursuant to 28 DCMR 204.22 to deny parole despite a favorable point score, and to set a rehearing date beyond the ordinary schedule. The Commission shall also consider whether the totality of the prisoner's offense behavior (U.S. and D.C. Code) warrants a continuance to reflect the true seriousness or the degree of the risk that the release of the prisoner would pose for the public welfare. Nonetheless, the Commission shall not deny parole or order a continuance, solely on the ground of punishment for the U.S. Code offenses standing alone, or on grounds that have been adequately accounted for in a decision to exceed the federal guideline range.

(g) *Hearings.* The Commission shall, in accordance with §2.12 of these regulations, conduct an initial hearing to determine the federal time. This portion of the decision shall be subject to appeal pursuant to §2.26 of these regulations. A D.C. parole hearing to determine the prisoner's suitability for parole under the D.C. guidelines shall be conducted as ordered at the initial hearing. Prior to the D.C. parole hearing, statutory interim hearings shall be conducted pursuant to §2.14 of these regulations, including an interim hearing at eligibility on the aggregate sentence if no other interim hearing would be held. After the D.C. parole hearing, rehearings shall be conducted pursuant to the rules and policy guidelines of the D.C. Board of Parole, if release on parole is not granted.

(h) *Revocation decisions.* Violations of parole are violations on the aggregate sentence, and a parole violation warrant is therefore issued under the authority of the aggregate sentence. With regard to the reparole decision, the Commission shall follow the guidelines at §2.21 of these rules, but rehearings shall be scheduled according to the guidelines of the D.C. Board of Parole.

(i) *Forfeiture of street time.* All time on parole shall be forfeited if required under §2.52(c) of these regulations. If not, the Commission shall divide the total time on parole (street time) according to the proportional relationship of the D.C. sentence to the U.S. sentence, and shall order the forfeiture of the portion corresponding to the D.C. sentence pursuant to D.C. Code 24-406(a). For example, if the prisoner is serving a two-year D.C. Code sentence and a three-year U.S. Code sentence, the D.C. sentence is two-fifths, or 40 percent, of the total aggregate sentence. If he was on parole 100 days, he therefore forfeits 40 days. "Street time" is measured from the date of release on parole to the execution of the warrant or confinement on other charges.

■ §2.66 REVOCATION DECISION WITHOUT HEARING.

(a) If the releasee agrees to the decision, the Commission may make a revocation decision without a hearing if –

(1) the alleged violation would be graded no higher than Category Two under the guidelines at §2.20;

(2) the alleged violation is in any category under the guidelines at §2.20 and the decision imposes the maximum sanction authorized by law; or

(3) the Commission determines that the releasee has already served sufficient time in custody as a sanction for the violation but that forfeiture of time on parole is necessary to provide an adequate period of supervision.

(b) A releasee who agrees to such a disposition shall indicate such agreement by –

(1) accepting the decision proposed by the Commission in the Notice of Eligibility for Expedited Revocation Procedure that the Commission sent to the releasee, thereby agreeing that the releasee does not contest the validity of the charge and waives a revocation hearing; or

(2) offering in writing, before the finding of probable cause or at a probable cause hearing, not to contest the validity of the charge, to waive a revocation hearing, and to accept a decision that is at the bottom of the applicable guideline range as determined by the Commission if the violation would be graded no higher than Category Two under the guidelines at §2.20, or is the maximum sanction authorized by law.

(c) An alleged violator's agreement under this provision shall not preclude the Commission from taking any action authorized by law or limit the statutory consequences of a revocation decision.

Notes and Procedures

■ 2.66-01. *Expedited Revocation Procedure.*

(a) Upon receipt of the summary report of the preliminary interview or notification of a conviction, the analyst may refer a case for consideration under the expedited revocation procedure.

(b) The following cases may be considered for the expedited revocation procedure:

(1) Cases in which the parole violation behavior is graded as Category One or Category Two.

(2) Cases in which the recommended decision is continue to expiration (regardless of the category of the violation behavior); and

(3) Cases in which the expedited revocation procedure is used as an alternative to deferred withdrawal of a warrant under 2.47 (regardless of the category of the violation behavior).

(c) If the analyst recommends a case for the expedited revocation procedure, he shall forward the case to the Administrative Reviewer. If the Administrative Reviewer concurs, the case shall be forwarded to the Regional Commissioner.

(d) If the Regional Commissioner finds probable cause, he shall then review the case to determine whether to approve handling under the expedited revocation procedure. If the Regional Commissioner approves the use of this procedure (either with the date proposed or with a modified date), he shall sign the expedited revocation decision form. If the Regional Commissioner rejects handling under the expedited revocation procedure, the case shall be processed under otherwise applicable procedures.

(e) If the Regional Commissioner approves processing under the expedited revocation procedure, a Notice of Eligibility for Expedited Revocation Procedure will be completed (including an offense severity rating based on the conduct for which probable cause was found, a recalculated salient factor score, and the applicable reparole guideline range) and sent to the alleged violator.

(f) If the alleged parole violator accepts the expedited revocation procedure by signing the Notice of Eligibility for Expedited Revocation Procedure form and returning it to the Commission in a timely manner (including accepting responsibility for the violation behavior, accepting the proposed decision, waiving the right to a revocation hearing, and waiving the right to an administrative appeal), the proposed decision shall become the official Commission decision. If the alleged parole violator declines the

proposal or fails to return the form in a timely manner, the proposed decision shall be null and void, a revocation hearing may be conducted, and the Commission may thereafter take any action that it might have originally taken had the case not been considered under the expedited revocation procedure. An expedited revocation proposal as offered by the Commission may be accepted or rejected by the alleged violator. It is the policy of the Commission not to modify an expedited revocation proposal once offered other than in extraordinary circumstances (such as discovery of an error in the guideline determination or the receipt of substantial new information pertinent to the decision).

■ §2.67 [RESERVED]

SUBPART B—TRANSFER TREATY PRISONERS AND PAROLEES

■ §2.68 PRISONERS TRANSFERRED PURSUANT TO TREATY.

(a) Applicability, jurisdiction, and statutory interpretation.

(1) Prisoners transferred pursuant to treaty (transferees) 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. 4106A. Transferees 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 C.F.R. 2.13. The Parole Commission shall treat the foreign conviction as though it were a lawful conviction in a United States District Court.

(2) The jurisdiction of the Commission to set a release date and periods and conditions of supervised release extends until the transferee is released from prison or the transferee's case is otherwise transferred to a district court pursuant to an order of the Commission.

(3) It is the Commission's interpretation of 18 U.S.C. 4106A that every transferee is entitled to a release date determination by the Commission after considering the applicable sentencing guidelines in effect at the time of the hearing. Upon release from imprisonment the transferee may be required to serve a period of supervised release pursuant to §5D1.2 of the sentencing guidelines. The combination of the period of imprisonment that results from the release date set by the Commission and the period of supervised release shall not exceed the full term of the sentence imposed by the foreign court. The combined periods of imprisonment and supervised release may be less than the full term of the sentence imposed by the foreign court unless the applicable treaty is found to require otherwise.

(4) The applicable offense guideline provision is determined by selecting the offense in the U.S. Code that is most similar to the offense for which the transferee was convicted in the foreign court. In so doing, the Commission considers itself required by law and treaty to respect the offense definitions contained in the foreign criminal code under which the prisoner was convicted, as well as the official documents supplied by the foreign court.

(5) The release date that is determined by the Commission under 18 U.S.C. 4106A(b)(1)(A) is a prison release determination and does not represent the imposition of a new sentence for the transferee. However, the release date shall be treated by the Bureau of Prisons as if it were the full term date of a sentence for the purpose of establishing a release date pursuant to

18 U.S.C. 4105(c)(1). The Bureau of Prisons release date shall supersede the release date established by the Parole Commission under 18 U.S.C. 4106A and shall be the date upon which the transferee's period of supervised release commences. If the Commission has ordered "continue to expiration," the 4106A release date is the same as the full term date of the foreign sentence. It is the Commission's interpretation of 18 U.S.C. 4105(c)(1) that the deduction of service credits in either case does not operate to reduce the foreign sentence or otherwise limit the Parole Commission's authority to establish a period of supervised release extending from the date of actual release from prison to the full term date of the foreign sentence.

(6) If the Commission sets a release date under 18 U.S.C. 4106A(b)(1)(A) that is earlier than the mandatory release date established by the Bureau of Prisons under 18 U.S.C. 4105(c)(1), then the release date set by the Commission controls. If the release date set by the Commission under 18 U.S.C. 4106A(b)(1)(A) is equal to or later than the mandatory release date established by the Bureau of Prisons under 18 U.S.C. 4105(c)(1), then the mandatory release date established by the Bureau of Prisons controls.

(7) It is the Commission's interpretation of 18 U.S.C. 4106A that U.S. Code provisions for mandatory minimum terms of imprisonment and supervised release, as well as sentencing guideline provisions implementing such U.S. Code requirements (*e.g.*, §5G1.1(b) of the sentencing guidelines), were not intended by Congress to be applicable in an 18 U.S.C. 4106A(b)(1)(A) determination. Alternatively, it is the Commission's position that there is good cause in every transfer treaty case for a departure from any statutorily required minimum sentence provision in the sentencing guidelines, including §5G1.1(b) of the sentencing guidelines, because Congress did not enact mandatory sentence laws with transferees in mind. Thus, in every transfer treaty case, the release date will be determined through an exercise of Commission discretion, according to the sentencing guideline range that is derived from a case-specific "similar offense" determination, rather than by reference to any provision concerning mandatory minimum sentences of imprisonment or terms of supervised release.

(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 who shall inform the transferee of his rights under this regulation. The transferee shall be given the appropriate forms for appointment of counsel pursuant to 18 U.S.C. 3006(A) at the interview if appointment of counsel is requested.

(c) *Postsentence report.* A postsentence 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 postsentence report shall be made as soon as the report is completed, by delivery of a copy of the report to the transferee and his or her counsel (if any). Confidential material contained in the postsentence investigation report may be withheld pursuant to the procedures of 18 U.S.C. 4208(c). Copies of all documents provided by the transferring country relating to the transferee shall be appended to the postsentence report when disclosed to the transferee and when transmitted to the Commission.

(d) *Opportunity to object.* The transferee (or counsel) shall have thirty calendar days after disclosure of the postsentence report to transmit any objections to the report he or she may have, in writing, to the Commission with a copy to the probation officer. The Commission shall review the objections

and may request that additional information be submitted by the probation officer in the form of an addendum to the postsentence report. Any disputes of fact or disputes concerning the application of the sentencing guidelines shall be resolved at the special transferee hearing.

(e) *Special transferee hearing.* A special transferee hearing shall be conducted within 180 days from the transferee's entry into the United States, or as soon as practicable following completion of the postsentence investigation report along with any corrections or addendum to the report and appointment of counsel for an indigent transferee.

(1) *Waivers.* The transferee may waive the special transferee hearing on a form provided for that purpose, and the Commission may either: (A) set a release date that falls within 60 days of receipt of the waiver and establish a period and conditions of supervised release; or (B) reject the waiver and schedule a hearing.

(2) *Short-term cases.* In the case of a transferee who has less than six months from the date of his entry into the United States to his release date as calculated by the Bureau of Prisons under 18 U.S.C. 4105, the Commission may, without conducting a hearing or awaiting a waiver, set a release date and a period and conditions of supervised release. In such cases, the period of supervised release shall not exceed the minimum necessary to satisfy the applicable sentencing guideline (but may extend to the full-term of the foreign sentence if such period is shorter than the minimum of the applicable sentencing guideline). The transferee may petition the Commission for a more favorable decision within 60 days of the Commission's determination, and the Commission may act upon the petition regardless of whether or not the transferee has been released from prison.

(f) *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.

(g) *The 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. The Commission shall take into account the offense definition under foreign law, the length of the sentence permitted by that law, and the underlying circumstances of the offense behavior, to establish a guideline range that fairly reflects the seriousness of the offense behavior committed in the foreign country.

(h) *Hearing procedures.* Special transferee hearings shall be conducted by a hearing examiner. 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 shall inquire whether the transferee and his counsel have had an opportunity to read and discuss the postsentence 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 postsentence investigation report (and the addendum, if any), and to present arguments and information relating to the Commission's final guideline determination and decision.

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

(6) The transferee shall be notified of the examiner's recommended findings of fact, and the examiner's recommended determination and reasons therefore, at the conclusion of the hearing. The case shall thereafter be reviewed by the Executive Hearing Examiner pursuant to §2.23, and the Commission shall make its determination upon a panel recommendation.

(i) *Final decision.*

(1) The Commission shall render a decision as soon as practicable and without unnecessary delay. Decisions shall be made upon a concurrence of two votes of the National Commissioners. The decision shall set a release date and a period and conditions of supervised release. If the Commission determines that the appropriate release date under 18 U.S.C. 4106A is the full term date of the foreign sentence, the Commission will order the transferee to "continue to expiration".

(2) Whenever the Bureau of Prisons applies service credits under 18 U.S.C. 4105 to a release date established by the Commission, the release date used by Bureau of Prisons shall be the date established by the Parole Commission pursuant to the sentencing guidelines and not a date that resulted from any adjustment made to achieve comparable punishment with a similarly situated U.S. Code offender. The application of service credits under 18 U.S.C. 4105 shall supersede any previous release date set by the Commission. The Commission may, for the purpose of facilitating the application of service credits by the Bureau of Prisons, reopen any case on the record to clarify the correct release date to be used, and the period of supervised release to be served.

(3) The Commission may, in its discretion, defer a decision and order a rehearing, provided that a statement of the reason for ordering a rehearing is issued to the transferee and the transferee's counsel (if any).

(4) The Commission's final decision shall be supported by a statement of reasons explaining:

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

(ii) The basis for the guideline range applied; and

(iii) The reason for making a release determination above or below the guideline range. If the release date is within a guideline range that exceeds twenty-four months, the Commission shall identify the reason for the release date selected.

(j) *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.

(k) *Reopening or modification of a determination prior to transfer of jurisdiction.*

(1) A hearing and assistance of counsel will be provided to the transferee whenever a case is reopened under subparagraphs (2),(3),(4) and (5) below unless:

(i) Waived by the transferee; or

(ii) The action to be taken is favorable and no factual issue must be resolved.

(2) The Commission may reopen and modify a determination based upon information which was not previously considered. Such information must, however, be contained in the record of the foreign sentencing court.

(3) The Commission may reopen and modify a determination of the terms and conditions of supervised release. Modifications may include approval or disapproval of the transferee's release plan.

(4) The Commission shall reopen and modify a determination that has been found on appeal to have been imposed in violation of the law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to have been unreasonable.

(5) The Commission may reopen and modify a determination upon consideration of the factors listed in §5K1.1 of the sentencing guidelines if the transferee provides substantial assistance to law enforcement authorities, and that assistance was not previously considered by the Commission. The Commission will treat a request from a foreign or a domestic law enforcement authority as the equivalent of a "motion of the government."

(6) The Commission may modify a determination based upon a clerical mistake or other error in accordance with Federal Rules of Criminal Procedure Rule 36.

(7) The Commission may reopen and modify the release date if it determines that a circumstance set forth in 18 U.S.C. 3582(c) is satisfied.

(l) *Supervised release.*

(1) If a period of supervised release is imposed, the Commission presumes that the conditions of supervised release in §5D1.3(a) and (c) of the sentencing guidelines, a condition requiring the transferee to report to the probation office within 72 hours of release from the custody of the Bureau of Prisons, a condition that the transferee not commit another Federal, state, or local crime, and a

condition that the transferee not possess a firearm or other dangerous weapon are reasonably necessary in every case. These conditions, therefore, shall be imposed unless the Commission finds otherwise. The Commission may also impose special conditions of supervised release whenever deemed reasonably necessary in an individual case.

(2) If the transferee is released pursuant to a date established by the Bureau of Prisons under 18 U.S.C. 4105(c)(1), then the period of supervised release commences upon the transferee's release from imprisonment.

Notes and Procedures

■ 2.68-01. *In General.*

(a) The procedures in this section apply only to transferees who committed their offenses on or after November 1, 1987. If a case processing issue cannot be resolved by the procedures found in this section, then the procedures used for parole eligible prisoners may be used as a guide. The U.S. Parole Commission interprets the legislation authorizing release date determinations under 18 U.S.C. 4106A as contemplating the Commission's use of existing procedures for setting parole dates to the extent that those procedures do not conflict with § 4106A or the sentencing guidelines.

Example: The sentencing guidelines require advance notice of any reason that is contemplated for an upward departure, before the decision is rendered. U.S.S.G. 6A1.2 (Application Note). This is different from procedure applicable to parole hearings, see §2.68-06(e), and the sentencing guidelines therefore control.

(b) The term "release date," as it is used in §2.68 (with the exception of subsection (e)(1)), refers to the determination made by the Commission pursuant to § 4106A(b)(1), and not to the good conduct time release date (sometimes referred to as a mandatory release date) computed by the Bureau of Prisons pursuant to 18 U.S.C. 4105(c) and 3624. For the purposes of §2.68 (e)(1)), the term release date refers to the actual release date computed by the Bureau of Prisons.

(c) Ordinarily, the Bureau of Prisons will calculate a good conduct time release date shortly after a transferee arrives in the United States based upon the sentence imposed by the foreign court. If the Commission determines that a transferee should continue to the expiration of his foreign sentence, then that good conduct time release date and the Commission's release date become the same. If the Commission determines that the transferee should be released earlier than the good conduct time release date originally computed by the Bureau of Prisons, then the Bureau of Prisons will recalculate the good conduct time release date by deducting good conduct time credits from the Commission's § 4106A release date. The recalculated good conduct time release date becomes the date the prisoner will actually be released.

(d) The mandatory minimum terms of imprisonment and of supervised release applicable to U.S. Code offenders (*e.g.*, 21 U.S.C. 841(b)) are not applicable to transfer treaty cases. The recommended guideline range for supervised release found in the postsentence report should be reviewed to check whether it is inadvertently based on a mandatory minimum by comparing the recommendation to the sentencing guidelines at §5D1.2(a).

■ 2.68-02. *Interview Upon Entry.*

(a) Following entry into the United States and designation to a Bureau institution, the Bureau will notify the U.S. Probation Office of the transferee's arrival. The notification will allow the U.S. Probation Office to schedule an interview.

(b) At the initial interview, the probation officer will notify the transferee of his rights under the statute and regulation. The ST Form 1 should be used for this purpose. At the time of the interview, the probation officer should obtain copies of the documents provided by the transferring country from the Bureau. Copies of those documents shall be forwarded to the Commission along with the completed postsentence report and the ST Form 1.

■ 2.68-03. *Postsentence Report and Pre-review.*

(a) It is not necessary to translate all of the documents provided by the transferring country to prepare a postsentence report. In some cases, ordinarily, a translation of the sentencing documents should be obtained. If, however, (1) the defendant is eligible for release within 60 days, (2) there are no areas of controversy (*e.g.*, an adjustment for role in the offense), and (3) the case was assigned to a probation officer who can read the language of the foreign sentencing document, a written translation of the foreign sentencing documents is not necessary. Additionally, in some cases, the summary of the offense behavior prepared by the Department of State may be sufficient to establish the applicable sentencing guideline range.

(b) The probation officer shall forward copies of the postsentence report and the documents provided by the transferring country to the Commission and to the transferee or his/her attorney. If the transferee objects to the postsentence report, those objections should be forwarded to the Commission, with a copy to the probation officer, within 30 days.

(c) The Commission then prepares a prehearing review following the format of ST Form 2. A sentence computation is placed in the file at the time the prehearing review is completed (with the good conduct time release date based on the full foreign sentence noted).

(d) If additional information is needed, the reviewer shall send a request to the probation officer with a copy to the transferee. In addition, if there is a substantial change between the assessment of the postsentence report and the prehearing review (with respect to the applicable guideline range of a departure consideration), the transferee should be promptly notified. Upon receipt of all information and disclosure to the transferee, a hearing should be scheduled.

(e) A copy of the prehearing review and objections to the postsentence report should be sent to the General Counsel's Office for review if a substantial sentencing guideline issue needs resolution prior to the hearing.

■ 2.68-04. *Waiver of Hearing.* A transferee who has already satisfied the minimum time required to be served under the sentencing guidelines (or who will have served it by the time of the scheduled hearing), may waive the right to a hearing on the ST Form 3 provided for that purpose. When a transferee waives the hearing and applies for a release decision on the record, the Commission may either (1) set a release date that will result in actual release by the Bureau of Prisons within 60 days of the date the waiver is

received, or (2) schedule a hearing. If the Commission decides not to set a release date following a review of the record, the Commission shall promptly inform the transferee of the decision to conduct an in-person hearing.

Example: A transferee has been in custody 40 months at the time the waiver is received. The Commission determines that a release date after 46 months is appropriate and the transferee has 4 months combined good time and foreign labor credits. As actual release will occur within 60 days of the date the waiver was received, the transferee may be released without a hearing.

■ 2.68-05. *Waiver of the Right to File Objections.* A prisoner may wish to be placed on the next available hearing docket without pre-hearing review of his postsentence report and without filing written objections. A written waiver should be obtained from the prisoner (or his counsel). ST Form 5 may be used, but a clearly stated waiver by letter is also acceptable.

■ 2.68-06. *Hearing.*

(a) At the hearing, the examiner shall address all issues raised and make recommended findings in the hearing summary following the format on ST Form 4.

(b) The Commission shall use the sentencing guideline manual in effect at the time of the hearing unless the manual in effect at the time of the offense results in a lower guideline range. The Commission will use only one Manual in determining the guideline range.

(c) Claims of torture and abuse should be explored by the examiner if raised by the transferee. Although information obtained from torture is normally inadmissible as evidence, the foreign conviction itself may be based on such a confession. Under the terms of the treaties, the Commission has no authority to review the validity of the conviction. The Commission must, therefore, accept the basic facts of the offense forwarded by that country. However, Commission may depart from the guideline range on the grounds of torture if such a departure appears warranted based on the totality of the circumstances.

The burden of persuasion is on the transferee and the Commission should inquire about and possible corroboration of a claim of torture. Corroboration can be in the form of a report to an American consular official while in foreign custody, a report to the foreign court or various medical documents. Corroboration, however, is not necessary to make a finding that torture occurred.

Note that, even if the Commission finds that torture occurred, it may decline to depart if it also finds substantial countervailing aggravating factors.

(d) For career offenders, the statutory maximum for the U.S. Code offense most nearly similar to the offense of conviction should be used in calculating the guideline range, not the foreign sentence or the foreign statutory maximum.

(e) If the examiner anticipates recommending (or that the Commission may order) a decision outside of the guideline range, the examiner shall provide the transferee reasonable notice of such departure and explain the ground for the departure. See U.S.S.G. 6A1.2 (Application Note). This could be done at the hearing by providing the transferee an opportunity to discuss the anticipated reasons for a departure with his or her attorney and by advising the transferee to submit any material relevant to the departure issue to

the Commission within 10 days of the hearing. If an upward departure appears a reasonable possibility, the examiner should discuss the possible reasons for such a departure in order to avoid the possible need to conduct a further hearing.

■ 2.68-07. *Determination.*

(a) The panel shall make a recommendation to the National Commissioners on ST Form 6. The National Commissioners will make the final decision.

(1) If the panel is split with regard to a release date within the same guideline range, the Commission can resolve the split without any additional procedures.

(2) If the panel is split with one examiner recommending a release date within the guideline range and another recommending a decision outside of the same guideline range, the National Commissioners should first determine whether the transferee had reasonable notice that the Commission was contemplating a departure and the grounds for that contemplated departure as outlined in §2.68-05(e). If reasonable notice has been provided, the Commission can then resolve the split by setting a release date within the guideline range or by departing on the grounds identified.

(3) If the panel is split with regard to the appropriate guideline range, the Commission may either:(i) order a new hearing to consider additional information or argument to resolve a factual dispute or;(ii) provide the transferee with an opportunity to write the Commission to resolve a legal dispute as to the proper application of the guidelines.

(b) If the Commission desires to change the recommendation of the examiner panel substantially in a manner adverse to the transferee, and the basis for the Commission's decision to view the case differently was not an issue discussed at the hearing, a rehearing *must* be ordered to provide the transferee notice and an opportunity to comment on the Commission's proposed revision. A "substantial change" is any upward revision of the offense level or the criminal history category. A "substantial change" also includes a decision to depart upwards from the guideline range when the panel made no recommendation to depart, or when the Commission's ground for departure differs from any ground suggested by the panel. If the Commission desires to substantially change the decision recommended by the panel and the transferee *has* had notice and an opportunity to discuss that substantial change, then it may order the change without a rehearing.

(c) If the case involves any substantial sentencing guideline issue, or is otherwise deemed likely to result in appeal (*i.e.*, if the transferee is to serve a substantial prison term), the Executive Hearing Examiner shall refer the case to the General Counsel's Office for an opinion before submitting the case to the Commission for a final determination. The purpose of this procedure is to provide an assessment by the General Counsel's Office in cases in which the prisoner is most likely to appeal the Commission's determination to a U.S. Court of Appeals.

(d) The determination will be forwarded to the transferee, the institution, the U.S. Probation Office in the district of release, and the transferee's attorney. The staff at the institution will be asked to have the transferee execute the conditions of supervised release, ST Form 7, and return the original to be made part of the file.

■ 2.68-08. *Release.*

(a) If it is anticipated that the Commission will make a determination that will result in an imminent release date and that a CCC placement is warranted, the institution should be contacted as soon as possible to arrange for such placement. The institution should be contacted prior to a determination.

(b) The Commission should make a copy of the file and retain the copy for Commission records. The original file should be forwarded to the U.S. Probation Office in the district of release for filing with the District Court prior to the transferee's release. A transfer of jurisdiction form, ST Form 8, should be executed. The execution of a transfer of jurisdiction form does not deny the Commission authority to modify its determination prior to the transferee's release.

■ 2.68-09. *Reopenings.*

(a) A case may be reopened at any time to correct errors in the guidelines, in the computation of time in custody, in the length of supervised release, or in the computation of the release date. A case may be reopened for these reasons even if an ST Form 8 has been executed and the offender has been released from prison.

(b) If a prisoner files an appeal to a U.S. Court of Appeals and the General Counsel's Office discovers an error, the case shall be presented to the Chairman of the National Appeals Board to determine if the case should be reopened for a new hearing to correct the error. If so, the General Counsel will concede the error and will seek a remand order from the U.S. Court of Appeals to permit that hearing to be held.

■ §2.69 [RESERVED]

SUBPART C - DISTRICT OF COLUMBIA CODE PRISONERS AND PAROLEES

■ § 2.70 **AUTHORITY AND FUNCTIONS OF THE U.S. PAROLE COMMISSION WITH RESPECT TO DISTRICT OF COLUMBIA CODE OFFENDERS.**

(a) The U.S. Parole Commission shall exercise authority over District of Columbia Code offenders pursuant to Section 11231 of the National Capital Revitalization and Self-Government Improvement Act of 1997, Public Law 105-33, 111 Stat. 712, and D.C. Code 24-409. The rules in this subpart shall govern the operation of the U.S. Parole Commission with respect to D.C. Code offenders and shall constitute the parole rules of the District of Columbia, as amended and supplemented pursuant to Section 11231(a)(1) of the Act.

(b) The Commission shall have sole authority to grant parole, and to establish the conditions of release, for all District of Columbia Code prisoners who are serving sentences for felony offenses, and who are eligible for parole by statute, including offenders who have been returned to prison upon the revocation of parole or mandatory release. (D.C. Code 24-404 and 408). The above authority shall include youth offenders who are committed to prison for treatment and rehabilitation based on felony convictions under the D.C. Code. (D.C. Code 24-904(a).)

(c) The Commission shall have authority to recommend to the Superior Court of the District of Columbia a reduction in the minimum sentence of a District of Columbia Code prisoner, if the Commission deems such recommendation to be appropriate. (D.C. Code 24-401c.)

(d) The Commission shall have authority to grant parole to a prisoner who is found to be geriatric, permanently incapacitated, or terminally ill, notwithstanding the minimum term imposed by the sentencing court. (D.C. Code 24-461 through 467.)

(e) The Commission shall have authority over all District of Columbia Code felony offenders who have been released to parole or mandatory release supervision, including the authority to return such offenders to prison upon an order of revocation. (D.C. Code 24-406.)

Notes and Procedures

■ **2.70-01. *Applicability of This Subpart.***

(a) This subpart applies only to D.C. Code offenses committed before August 5, 2000. Because of a delay in signing the Sentencing Reform Emergency Amendment Act of 2000, some offenders who committed their crimes before 5:00 p.m., August 11, 2000 may also be eligible for parole. The judgment and commitment order should show whether the offender was sentenced under the indeterminate sentencing system or the new determinate sentencing laws.

(b) For an offender temporarily in the custody of the D.C. Department of Corrections, a reference in a procedure to the Bureau of Prisons should be read as applicable to the D.C. Department of Corrections where necessary to carry out the purpose of the procedure.

■ **2.70-02. *Reference to Rule in Subpart A or C.*** A reference to a rule (or a part thereof) in Subpart A (U.S. Code Prisoners and Parolees) or Subpart C (District of Columbia Code Supervised Releasees) includes any Notes and Procedures accompanying the referenced rule (or part thereof) unless clearly inapplicable in the context of a D.C. Code parole-eligible offender.

■ ■ **§ 2.71 APPLICATION FOR PAROLE.**

(a) A prisoner (including a committed youth offender) desiring to apply for parole shall execute an application form as prescribed by the Commission. Such forms shall be available at each institution and shall be provided to a prisoner who is eligible for parole consideration. The Commission may then conduct an initial hearing or grant an effective date of parole on the record. A prisoner who receives an initial hearing need not apply for subsequent hearings.

(b) To the extent practicable, the initial hearing for an eligible adult prisoner who has applied for parole shall be held at least 180 days prior to such prisoner's date of eligibility for parole. The initial hearing for a committed youth offender shall be scheduled during the first 120 days after admission to the institution that is responsible for developing his rehabilitative program.

(c) A prisoner may knowingly and intelligently waive any parole consideration on a form provided for that purpose. A prisoner who declines either to apply for or waive parole consideration shall be deemed to have waived parole consideration.

(d) A prisoner who waives parole consideration may later apply for parole and be heard during the next visit of the Commission to the institution at which the prisoner is confined, provided that the prisoner has applied for parole at least 60 days prior to the first day of the month in which such visit of the Commission occurs. In no event, however, shall such prisoner be heard at an earlier date than that set forth in paragraph (b) of this section.

■ § 2.72 HEARING PROCEDURE.

(a) At the initial hearing the examiner shall review with the prisoner the guidelines at § 2.80, and shall discuss with the prisoner such information as the examiner deems relevant, including the prisoner's offense behavior, criminal history, institutional record, health status, release plans, and community support. If the examiner determines that the available file material is not adequate for this purpose the examiner may order the hearing to be postponed to the next docket so that the missing information can be requested.

(b) A prisoner may have a representative at the hearing pursuant to § 2.13(b) and the opportunity for prehearing disclosure of file material pursuant to § 2.55.

(c) A victim of a crime, or a representative of the immediate family of a victim if the victim has died, shall have the right:

(1) To be present at the parole hearings of each offender who committed the crime, and

(2) To testify and/or offer a written or recorded statement as to whether or not parole should be granted, including information and reasons in support of such statement. A written statement may be submitted at the hearing or provided separately. The prisoner may be excluded from the hearing room during the appearance of a victim or representative who gives testimony. In lieu of appearing at a parole hearing, a victim or representative may request permission to appear before an examiner (or other staff member), who shall record and summarize the victim's or representative's testimony. Whenever new and significant information is provided under this rule, the hearing examiner will summarize the information at the parole hearing and will give the prisoner an opportunity to respond. Such summary shall be consistent with a reasonable request for confidentiality by the victim or representative.

(d) Attorneys, family members, relatives, friends of the prisoner, or other interested persons desiring to submit information pertinent to any prisoner, may do so at any time, but such information must be received by the Commission at least 30 days prior to a scheduled hearing in order to be considered at that hearing. Such persons may also request permission to appear at the offices of the Commission to speak to a Commission staff member, provided such request is received at least 30 days prior to the scheduled hearing. The purpose of this office visit will be to supplement the Commission's record with pertinent factual information concerning the prisoner, which shall be placed in the record for consideration at the hearing. An office visit at a time other than set forth in this paragraph may be authorized only if the Commission finds good cause based upon a written request setting forth the nature of the information to be discussed. See § 2.22.

(e) A full and complete recording of every parole hearing shall be retained by the Commission. Upon a request pursuant to § 2.56, the Commission shall make available to any eligible prisoner such record as the Commission has retained of the hearing.

(f) Because parole decisions must be reached through a record-based hearing and voting process, no contacts shall be permitted between any person attempting to influence the Commission's decision-making process, and the examiners and Commissioners of the Commission, except as expressly provided in this subpart.

■ § 2.73 PAROLE SUITABILITY CRITERIA.

(a) In accordance with D.C. Code 24-404(a), the Commission shall be authorized to release a prisoner on parole in its discretion after the prisoner has served the minimum term of the sentence imposed, if the following criteria are met:

(1) The prisoner has substantially observed the rules of the institution;

(2) There is a reasonable probability that the prisoner will live and remain at liberty without violating the law; and

(3) In the opinion of the Commission, the prisoner's release is not incompatible with the welfare of society.

(b) It is the policy of the Commission with respect to District of Columbia Code offenders that the minimum term imposed by the sentencing court presumptively satisfies the need for punishment for the crime of which the prisoner has been convicted, and that the responsibility of the Commission is to account for the degree and the seriousness of the risk that the release of the prisoner would entail. This responsibility is carried out by reference to the Salient Factor Score and the Point Assignment Table at § 2.80. However, there may be exceptional cases in which the gravity of the offense is sufficient to warrant an upward departure from § 2.80 and denial of parole.

■ § 2.74 DECISION OF THE COMMISSION.

(a) Following each initial or subsequent hearing, the Commission shall render a decision granting or denying parole, and shall provide the prisoner with a notice of action that includes an explanation of the reasons for the decision. The decision shall ordinarily be issued within 21 days of the hearing, excluding weekends and holidays.

(b) Whenever a decision is rendered within the applicable guideline established in this subpart, it will be deemed a sufficient explanation of the Commission's decision for the notice of action to set forth how the guideline was calculated. If the decision is a departure from the guidelines, the notice of action shall include the reasons for such departure.

(c) The Commission shall resolve relevant issues of fact in accordance with § 2.19(c). Decisions granting or denying parole shall be based on the concurrence of two Commissioners, except that three Commissioner votes shall be required if the decision differs from the decision recommended by the examiner panel by more than six months. A decision releasing a parolee from active

supervision shall also be based on the concurrence of two Commissioners. All other decisions, including decisions on revocation and reparole made pursuant to §2.105(c), shall be based on the vote of one Commissioner, except as otherwise provided in this subpart.

■ § 2.75 RECONSIDERATION PROCEEDINGS.

(a) (1) Following an initial or subsequent hearing, the Commission may --

(i) Set an effective parole date within nine months of the date of the hearing;

(ii) Set a presumptive parole date at least ten months but not more than three years from the date of the hearing;

(iii) Continue the prisoner to the expiration of sentence if the prisoner's mandatory release date is within three years of the date of the hearing;

(iv) Schedule a reconsideration hearing at three years from the month of the hearing; or

(v) Remand the case for a rehearing on the next available docket (but no later than 180 days from the date of the hearing) for the consideration of additional information.

(2) Exceptions. (i) *With respect to the rule on three-year reconsideration hearings.* If the prisoner's current offense behavior resulted in the death of a victim and, at the time of the hearing, the prisoner must serve more than three years before reaching the minimum of the applicable guideline range, the Commission may schedule a reconsideration hearing at a date up to five years from the month of the last hearing, but not beyond the minimum of the applicable guideline range.

(ii) *With respect to youth offenders.* Regardless of whether a presumptive parole date has been set, a reconsideration hearing shall be conducted every twelve months for a youth offender, and on the next available docket after the Commission is informed that the prisoner has completed his program plan.

(b) When a rehearing is scheduled, the prisoner shall be given a rehearing during the month specified by the Commission, or on the docket of hearings immediately preceding that month if no docket of hearings is scheduled for the month specified.

(c) At a reconsideration hearing, the Commission may take any action that it could take at an initial hearing. The scheduling of a reconsideration hearing does not imply that parole will be granted at such hearing.

(d) Prior to a parole reconsideration hearing, the Commission shall review the prisoner's record, including an institutional progress report which shall be submitted 60 days prior to the hearing. Based on its review of the record, the Commission may grant an effective date of parole without conducting the scheduled hearing.

(e) Notwithstanding a previously established reconsideration hearing, the Commission may reopen any case for a special reconsideration hearing, as provided in § 2.28, upon the receipt of new and significant information concerning the prisoner.

■ § 2.76 REDUCTION IN MINIMUM SENTENCE.

(a) A prisoner who has served three or more years of the minimum term of his or her sentence may request the Commission to file an application with the sentencing court for a reduction in the minimum term pursuant to D.C. Code 24-401c. The prisoner's request to the Commission shall be in writing and shall state the reasons that the prisoner believes such request should be granted. The Commission shall require the submission of a special progress report before approving such a request.

(b) Approval of a prisoner's request under this section shall require the concurrence of a majority of the Commissioners holding office.

(c) Pursuant to D.C. Code 24-401c, the Commission may file an application to the sentencing court for a reduction of a prisoner's minimum term if the Commission finds that:

- (1) The prisoner has completed three years of the minimum term imposed by the court;
- (2) The prisoner has shown, by report of the responsible prison authorities, an outstanding response to the rehabilitative program(s) of the institution;
- (3) The prisoner has fully observed the rules of each institution in which the prisoner has been confined;
- (4) The prisoner appears to be an acceptable risk for parole based on both the prisoner's pre-and post- incarceration record; and
- (5) Service of the minimum term imposed by the court does not appear necessary to achieve appropriate punishment and deterrence.

(d) If the Commission approves a prisoner's request under this section, an application for a reduction in the prisoner's minimum term shall be forwarded to the U.S. Attorney for the District of Columbia for filing with the sentencing court. If the U.S. Attorney objects to the Commission's recommendation, the U.S. Attorney shall provide the government's objections in writing for consideration by the Commission. If, after consideration of the material submitted, the Commission declines to reconsider its previous decision, the U.S. Attorney shall file the application with the sentencing court.

(e) If a prisoner's request under this section is denied by the Commission, there shall be a waiting period of two years before the Commission will again consider the prisoner's request, absent exceptional circumstances.

■ 2.76-01. *Eligibility and Application Procedure.*

(a) D.C. Code prisoners serve minimum terms that reflect the sentencing court's determination of the period of time necessary to achieve adequate punishment and deterrence for the crime or crimes of which they have been convicted. D.C. Code § 24-401c, however, permits a prisoner to request the Commission to apply to the sentencing court for a reduction of his or her minimum term before it is fully served. Such an application is based upon a discretionary determination by the Commission that the prisoner: (1) has shown a sustained, outstanding response to the rehabilitative programs of the institution; (2) is an acceptable risk for parole; and (3) has a minimum term that appears to be disproportionate to the seriousness of the prisoner's criminal behavior. Such a finding can be made only in the most exceptional cases after all three conditions have been met. The Commission's discretion is exercised on a case-by-case basis, and without reference to specific guidelines or precedents. Note: if the prisoner is serving a minimum term imposed under § 24-403, the prisoner must have completed any statutorily required portion of that minimum term.

(b) Only prisoners who have completed three years of their minimum terms are eligible to make application under the provisions of D.C. Code § 24-401c [The purpose of the three-year period is to permit adequate time for (1) sustained program achievement, and (2) a retrospective evaluation of the need for full service of the minimum term imposed by the court]. An application form is provided for this purpose. Upon receipt of the prisoner's application, the Commission will request a Progress Report from the Bureau of Prisons. The Commission will also contact the appropriate confining authority to submit a Progress Report if the prisoner has served more than six months of the three-year qualifying period in a non-federal institution.

(c) Progress Reports will list and describe the prisoner's assigned programs (including the duration of each program) and the degree to which the inmate's program goals have actually been met (*i.e.*, whether the prisoner's participation was unsatisfactory, satisfactory, or above average). If the prisoner's record includes additional factors that would support a conclusion that the prisoner has shown sustained, outstanding achievement (*i.e.*, extraordinary programming efforts or accomplishments) such factors also will be described in the report. Note: satisfactory or above-average completion of all assigned programs is not enough; the prisoner's overall program achievement must be highly exceptional and strongly persuasive of the prisoner's potential for rehabilitation to be considered "outstanding."

(d) If the Commission finds that the Progress Report does not support a conclusion of sustained, outstanding program achievement, the Commission will deny the application and send a written notice to the prisoner that an application will not be presented to the court at this time because the prisoner's program achievement does not, in the Commission's opinion, warrant the extraordinary relief of a minimum term reduction. The Commission will consider a subsequent application no sooner than 24 months from the date of the last notification of denial.

(e) If the Commission finds that the Progress Report supports a conclusion of sustained, outstanding program achievement, the Commission will request the Bureau of Prisons to forward the prisoner's complete mini-file (including presentence reports and other standard parole hearing material). Upon receipt of the mini-file, the Commission will consider both the nature and circumstances of the crime and the likely risk to the public safety if the prisoner were to be granted an early parole. The Commission will

also consider whether the prisoner has fully accepted responsibility for his or her criminal behavior when it evaluates the significance of the prisoner's program achievement. If the Commission decides not to make a § 401c application, it will send a written notice to the prisoner specifying that, in the Commission's opinion, (1) the prisoner's minimum term should be served in full to achieve adequate punishment, and/or (2) the prisoner is, despite positive programming, too significant a risk to public safety to warrant reducing the minimum term.

(f) If the prisoner's primary claim to an amelioration of punishment rests upon factors such as age or medical condition, the case must be processed under 28 C.F.R. 2.77 or 2.78 (medical or geriatric parole).

(g) If the Commission votes to make a § 401c application, the case will be referred to the General Counsel's Office, which will notify the U.S. Attorney's Office. If an objection is received, the case will be presented to the Commission for review. [This procedure is intended to ensure that the Commission is aware of all the information that was known to the prosecutor and sentencing court at the time sentence was imposed]. If no objection is received (or an objection is overruled), the General Counsel's Office will draft an application suggesting to the court that unwarranted disparity may exist in regard to the prisoner's minimum term, and that the prisoner appears suitable for release on parole. The U.S. Attorney's Office will file such application with the court. However, under no circumstances will the Commission advocate that the interests of justice require the court to grant a reduction of the minimum term. The decision of the court is final, and no request by the prisoner for the Commission to reapply under § 401c will be accepted unless such application is expressly invited by the court in its decision.

■ § 2.77 MEDICAL PAROLE.

(a) Upon receipt of a report from the institution in which the prisoner is confined that the prisoner is terminally ill, or is permanently and irreversibly incapacitated by a physical or medical condition that is not terminal, the Commission shall determine whether or not to release the prisoner on medical parole. Release on medical parole may be ordered by the Commission at any time, whether or not the prisoner has completed his or her minimum sentence. Consideration for medical parole shall be in addition to any other parole for which a prisoner may be eligible.

(b) A prisoner may be granted a medical parole on the basis of terminal illness if:

(1) The institution's medical staff has provided the Commission with a reasonable medical judgment that the prisoner is within six months of death due to an incurable illness or disease; and

(2) The Commission finds that:

(i) The prisoner will not be a danger to himself or others; and

(ii) Release on parole will not be incompatible with the welfare of society.

(c) A prisoner may be granted a medical parole on the basis of permanent and irreversible incapacitation only if the Commission finds that:

(1) The prisoner will not be a danger to himself or others because his condition renders him incapable of continued criminal activity; and

(2) Release on parole will not be incompatible with the welfare of society.

(d) The seriousness of the prisoner's crime shall be considered in determining whether or not a medical parole should be granted prior to completion of the prisoner's minimum sentence.

(e) A prisoner, or the prisoner's representative, may apply for a medical parole by submitting an application to the institution case management staff, who shall forward the application, accompanied by a medical report and any recommendations, within 15 days. The Commission shall render a decision within 15 days of receiving the application and report.

(f) A prisoner, the prisoner's representative, or the institution may request the Commission to reconsider its decision on the basis of changed circumstances.

(g) Notwithstanding any other provision of this section :

(1) A prisoner who has been convicted of first degree murder or who has been sentenced for a crime committed while armed under D.C. Code 22-4502, 22-4504(b), or 22-2803, shall not be eligible for medical parole (D.C. Code 24-467); and

(2) A prisoner shall not be eligible for medical parole on the basis of a physical or medical condition that existed at the time the prisoner was sentenced (D.C. Code 24-462).

■ § 2.78 GERIATRIC PAROLE.

(a) Upon receipt of a report from the institution in which the prisoner is confined that a prisoner who is at least 65 years of age has a chronic infirmity, illness, or disease related to aging, the Commission shall determine whether or not to release the prisoner on geriatric parole. Release on geriatric parole may be ordered by the Commission at any time, whether or not the prisoner has completed his or her minimum sentence. Consideration for geriatric parole shall be in addition to any other parole for which a prisoner may be eligible.

(b) A prisoner may be granted a geriatric parole if the Commission finds that:

(1) There is a low risk that the prisoner will commit new crimes; and

(2) The prisoner's release would not be incompatible with the welfare of society.

(c) The seriousness of the prisoner's crime, and the age at which it was committed, shall be considered in determining whether or not a geriatric parole should be granted prior to completion of the prisoner's minimum sentence.

(d) A prisoner, or a prisoner's representative, may apply for a geriatric parole by submitting an application to the institution case management staff, who shall forward the application, accompanied by a medical report and any recommendations, within 30 days. The Commission shall render a decision within 30 days of receiving the application and report.

(e) In determining whether or not to grant a geriatric parole, the Commission shall consider the following factors (D.C. Code 24-465(c)(1)-(7)):

- (1) Age of the prisoner;**
- (2) Severity of illness, disease, or infirmities;**
- (3) Comprehensive health evaluation;**
- (4) Institutional behavior;**
- (5) Level of risk for violence;**
- (6) Criminal history; and**
- (7) Alternatives to maintaining geriatric long-term prisoners in traditional prison settings.**

(f) A prisoner, the prisoner's representative, or the institution, may request the Commission to reconsider its decision on the basis of changed circumstances.

(g) Notwithstanding any other provision of this section:

(1) A prisoner who has been convicted of first degree murder or who has been sentenced for a crime committed while armed under D.C. Code 22-4502, 22-4504(b), or 22-2803, shall not be eligible for geriatric parole (D.C. Code 24-467); and

(2) A prisoner shall not be eligible for geriatric parole on the basis of a physical or medical condition that existed at the time the prisoner was sentenced (D.C. Code 24-462).

■ § 2.79 GOOD TIME FORFEITURE.

Although a forfeiture of good time will not bar a prisoner from receiving a parole hearing, D.C. Code 24-404 permits the Commission to parole only those prisoners who have substantially observed the rules of the institution. Consequently, the Commission will consider a grant of parole for a prisoner with forfeited good time only after a thorough review of the circumstances underlying the disciplinary infraction(s). The Commission must be satisfied that the prisoner has served a period of imprisonment sufficient to outweigh the seriousness of the prisoner's misconduct.

Notes and Procedures

■ 2.79-01. *Parole Not Contingent On Restoration Of Good Time.* A grant of parole may not be made contingent on the restoration of good-time by institutional officials.

■ § 2.80 GUIDELINES FOR D.C. CODE OFFENDERS.

(a) (1) *Applicability in general.* Except as provided below, the guidelines in paragraphs (b)-(n) of this action apply at an initial hearing or rehearing conducted for any prisoner.

(2) *Reparole decisions.* Reparole decisions shall be made in accordance with §2.81.

(3) *Youth offenders.* A prisoner sentenced under the Youth Rehabilitation Act shall be considered for parole under these guidelines pursuant to paragraph (a)(1) of this section, except that the prisoner shall be given rehearings in accordance with the schedule at § 2.75(a)(2)(ii) and the prisoner's program achievements shall be considered in the parole release decision in accordance with §2.106. The guidelines at paragraphs (k)-(m) of this section for awarding superior program achievement and subtracting the award in determining the total guideline range shall not apply.

(4) *Prisoners considered under the guidelines of the former District of Columbia Board of Parole.* For a prisoner whose initial hearing was held before August 5, 1998, the Commission shall render its decision by reference to the guidelines of the former D.C. Board of Parole in effect on August 4, 1998. However, when a decision outside such guidelines has been made by the Board, or is ordered by the Commission, the Commission may determine the appropriateness and extent of the departure by comparison with the guidelines of §2.80. The Commission may also correct any error in the calculation of the D.C. Board's guidelines.

(5) *Prisoners given initial hearings under the guidelines in effect from August 5, 1998 through December 3, 2000 (the guidelines formerly found in 28 C.F.R. 2.80, Appendix to § 2.80 (2000)).* For a prisoner given an initial hearing under the §2.80 guidelines in effect from August 4, 1998 through December 3, 2000, the guidelines in paragraph (b)-(n) of this section shall be applied retroactively subject to the provisions of paragraph (o) of this section.

(b) *Guidelines.* In determining whether an eligible prisoner should be paroled, the Commission shall apply the guidelines set forth in this section. The guidelines assign numerical values to pre- and post-incarceration factors. Decisions outside the guidelines may be made, where warranted, pursuant to paragraph (n) of this section.

(c) *Salient factor score and criminal record.* The prisoner's Salient Factor Score shall be determined by reference to the Salient Factor Scoring Manual in § 2.20. The Salient Factor Score is used to assist the Commission in assessing the probability that an offender will live and remain at liberty without violating the law. The prisoner's record of criminal conduct (including the nature and circumstances of the current offense) shall be used to assist the Commission in determining the probable seriousness of the recidivism that is predicted by the Salient Factor Score.

(d) *Disciplinary infractions.* The Commission shall assess whether the prisoner has been found guilty of committing significant disciplinary infractions while under confinement for the current offense.

(e) *Program achievement.*

(1) The Commission shall assess whether the prisoner has demonstrated ordinary or superior achievement in the area of prison programs, industries, or work assignments while under confinement for the current offense. Superior program achievement means program achievement that is beyond the level that the prisoner might ordinarily be expected to accomplish. Credit for program achievement may be granted regardless of whether the guidelines for disciplinary infractions have been applied for misconduct during the same period. The guidelines in this section presume that the prisoner will have ordinary program achievement.

(2) In the case of a prisoner who has declined to participate in institutional programming, a decision in the upper half of the applicable guideline range generally will be warranted, except that in the case of a prisoner who has a base point score of 3 or less, or who has a criminal record involving violence or sexual offenses and who has not participated in available programming to address a potential for criminal behavior of a violent or sexual nature, a decision above the guidelines may be warranted.

(f) *Base point score.* Add the applicable points from Categories I-III of the Point Assignment Table to determine the base point score.

POINT ASSIGNMENT TABLE

Categories _____ Points

**CATEGORY I: RISK OF RECIDIVISM
(Salient Factor Score)**

10-8 (Very Good Risk)	+0
7-6 (Good Risk)	+1
5-4 (Fair Risk)	+2
3-0 (Poor Risk)	+3

CATEGORY II: CURRENT OR PRIOR VIOLENCE (Type of Risk)

Note: Use the highest applicable subcategory. If no subcategory is applicable, score = 0.

A. Violence in current offense, and any felony violence in two or more prior offenses .	+4
B. Violence in current offense, and any felony violence in one prior offense	+3
C. Violence in current offense:	+2
D. No violence in current offense and any felony violence in two or more prior offenses.	+2
E. Possession of firearm in current offense if current offense is not scored as a crime of violence.	+2
F. No violence in current offense and any felony violence in one prior offense.	+1

CATEGORY III: DEATH OF VICTIM OR HIGH LEVEL VIOLENCE

Note: Use highest applicable subcategory. If no subcategory is applicable, score = 0. A current offense that involved high level violence must be scored under both Category II (A, B, or C) and under Category III.

A. Current offense involved violence (high level violence or other violence) with death of victim resulting	+3
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- B. Current offense involved attempted murder, conspiracy to murder, solicitation to murder, or any willful violence in which the victim survived despite death having been the most probable result at the time the offense was committed. +2
- C. Current offense involved high level violence (other than the behaviors described above). +1

BASE POINT SCORE (Total of Categories I-III)

(g) *Definitions and instructions for application of point assignment table.*

(1) *Salient factor score* means the salient factor score set forth at § 2.20.

(2) *High level violence* in Category III means any of the following offenses ---

(i) Murder;

(ii) Voluntary manslaughter;

(iii) Arson of a building in which a person other than the offender was present or likely to be present at the time of the offense;

(iv) Forcible rape or forcible sodomy (first degree sexual abuse);

(v) Kidnapping, hostage taking, or any armed abduction of a victim during a carjacking or other offense;

(vi) Burglary of a residence while armed with any weapon if a victim was in the residence during the offense;

(vii) Obstruction of justice through violence or threats of violence;

(viii) Any offense involving sexual abuse of a person less than sixteen years of age;

(ix) Mayhem, malicious disfigurement, or any offense defined as other violence in paragraph (g)(4) of this section that results in *serious bodily injury* as defined in paragraph (g)(3) of this section;

(x) Any offense defined as *other violence* in paragraph (g)(4) of this section in which the offender intentionally discharged a firearm;

(3) *Serious bodily injury* means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) *Other violence* means any of the following felony offenses that does not qualify as *high level violence* ---

- (i) Robbery;
 - (ii) Residential burglary;
 - (iii) Felony assault;
 - (iv) Felony offenses involving a threat, or risk, of bodily harm;
 - (v) Felony offenses involving sexual abuse or sexual contact;
 - (vi) Involuntary manslaughter (excluding negligent homicide).
- (5) Attempts, conspiracies, and solicitations shall be scored by reference to the substantive offense that was the object of the attempt, conspiracy, or solicitation; except that Category IIIA shall apply only if death actually resulted.
- (6) *Current offense* means any criminal behavior that is either:
- (i) Reflected in the offense of conviction, or
 - (ii) Is not reflected in the offense of conviction but is found by the Commission to be related to the offense of conviction (*i.e.*, part of the same course of conduct as the offense of conviction). In probation violation cases, the current offense includes both the original offense and the violation offense, except that the original offense shall be scored as a prior conviction (with a prior commitment) rather than as part of the current offense, if the prisoner served more than six months in prison for the original offense before his probation commenced
- (7) Category IIE applies whenever a firearm is possessed by the offender during, or is used by the offender to commit, any offense that is not scored under Category II(A-D). Category IIE also applies when the current offense is felony unlawful possession of a firearm and there is no other current offense. Possession for purposes of Category IIE includes constructive possession.
- (8) Category IIIA applies if the death of a victim is:
- (i) Caused by the offender, or
 - (ii) Caused by an accomplice and the killing was planned or approved by the offender in furtherance of a joint criminal venture.
- (h) *Determining the base guideline range.* Determine the base guideline range for adult prisoners from the following table:

Base Point Score	Base Guideline Range
3 or less	..... zero months
4	..... 12-18 months
5	..... 18-24 months

6	.....	36-48 months
7	.....	54-72 months
8	.....	72-96 months
9	.....	110-140 months
10	.....	156-192 months.

(i) *Months to parole eligibility.* Determine the total number of months until parole eligibility.

(j) *Guideline range for disciplinary infractions.* Determine the applicable guideline range from § 2.36 for any significant disciplinary infractions since the beginning of confinement on the current offense in the case of an initial hearing, and since the last hearing in the case of a rehearing. If there are no significant disciplinary infractions, this step is not applicable.

(k) *Guidelines for superior program achievement.* If superior program achievement is found, the award for superior program achievement shall be one-third of the number of months during which the prisoner demonstrated superior program achievement. The award is determined on the basis of all time in confinement on the current offense in the case of an initial hearing, and on the basis of time in confinement since the last hearing in the case of a rehearing. If superior program achievement is not found, this step is not applicable. Note: When superior program achievement is found, it is presumed that the award will be based on the total number of months since the beginning of confinement on the current offense in the case of an initial hearing, or since the last hearing in the case of a rehearing. Where, however, the Commission determines that the prisoner did not have superior program achievement during the entire period, it may base its decision solely on the number of months during which the prisoner had superior program achievement.

(l) *Determining the total guideline range at an initial hearing.* At an initial hearing---

(1) Add together the minimum of the base point guideline range [from paragraph (h) of this section], the number of months required by the prisoner’s parole eligibility date [from (i) of this section], and the minimum of the guideline range for disciplinary infractions, if applicable [from paragraph (j) of this section]. Then subtract the award for superior program achievement, if applicable [from paragraph (k) of this section]. The result is the minimum of the Total Guideline Range.

(2) Add together the maximum of the base point guideline range [from paragraph (h) of this section], the number of months required by the prisoner’s parole eligibility date [from paragraph (i) of this section], and the maximum of the guideline range for disciplinary infractions, if applicable [from paragraph (j) of this section]. Then subtract the award for superior program achievement, if applicable [from paragraph (k) of this section]. The result is the maximum of the Total Guideline Range.

(m) *Determining the total guideline range at a reconsideration hearing.* At a reconsideration hearing—

(1) Add together the minimum of the Total Guideline Range from the previous hearing, and the minimum of the guideline range for disciplinary infractions since the previous hearing, if applicable [from paragraph (j) of this section]. Then subtract the award for superior program achievement,

if applicable [from paragraph (k) of this section]. The result is the minimum of the Total Guideline Range for the current hearing.

(2) Add together the maximum of the Total Guideline Range from the previous hearing, and the maximum of the guideline range for disciplinary infractions since the previous hearing, if applicable [from paragraph (j) of this section]. Then subtract the award for superior program achievement since the previous hearing, if applicable [from paragraph (k) of this section]. The result is the maximum of the Total Guideline Range for the current hearing.

(n) *Decisions outside the guidelines.*

(1) The Commission may, in unusual circumstances, grant or deny parole to a prisoner notwithstanding the guidelines. Unusual circumstances are case-specific factors that are not fully taken into account in the guidelines, and that are relevant to the grant or denial of parole. In such cases, the Commission shall specify in the notice of action the specific factors that it relied on in departing from the applicable guideline or guideline range. If the prisoner is deemed to be a poorer or more serious risk than the guidelines indicate, the Commission shall determine what Base Point Score would more appropriately fit the prisoner's case, and shall render its initial and rehearing decisions as if the prisoner had that higher Base Point Score. It is to be noted that, in some cases, an extreme level of risk presented by the prisoner may make it inappropriate for the Commission to contemplate a parole at any hearing without a significant change in the prisoner's circumstances.

(2) Factors that may warrant a decision above the guidelines include, but are not limited to, the following:

(i) *Poorer parole risk than indicated by salient factor score.* The offender is a poorer parole risk than indicated by the salient factor score because of —

(A) Unusually persistent failure under supervision (pretrial release, probation, or parole);

(B) Unusually persistent history of criminally related substance (drug or alcohol) abuse and resistance to treatment efforts; or

(C) Unusually extensive prior record (sufficient to make the offender a poorer risk than the "poor" prognosis category).

(ii) *More serious parole risk.* The offender is a more serious parole risk than indicated by the total point score because of ---

(A) Prior record of violence more extensive or serious than that taken into account in the guidelines;

(B) Current offense demonstrates extraordinary criminal sophistication, criminal professionalism in the employment of violence or threats of violence, or leadership role in instigating others to commit a serious offense;

(C) Unusual cruelty to the victim (beyond that accounted for by scoring the offense as high level violence), or predation upon extremely vulnerable victim;

(D) Unusual propensity to inflict unprovoked and potentially homicidal violence, as demonstrated by the circumstances of the current offense; or

(E) Additional serious offense(s) committed after (or while on bond or fugitive status from) current offense that show unusual capacity for sustained, repeated violent criminal activity.

(4) Factors that may warrant a decision below the guidelines include, but are not limited to, the following:

(i) *Better parole risk than indicated by salient factor score.* The offender is a better parole risk than indicated by the salient factor score because of (applicable only to offenders who are not already in the very good risk category) —

(A) A prior criminal record resulting exclusively from minor offenses;

(B) A substantial crime-free period in the community for which credit is not already given on the Salient Factor Score;

(C) A change in the availability of community resources leading to a better parole prognosis;

(ii) *Other factors:*

(A) Unusually lengthy period of incarceration on the minimum sentence (in relation to the seriousness of the offense and prior record) that warrants an initial parole determination as if the offender were being considered at a rehearing;

(B) Substantial period in custody on other sentence(s) sufficient to warrant a finding in paragraph (n)(3) of this section; or

(C) Clearly exceptional program achievement.

(o) *Conversion rules for retroactive application of the § 2.80 guidelines.* When the guidelines of this section are retroactively applied, the following conversion rules shall be used.

(1) If the prisoner previously had any points added for negative institutional behavior under the guidelines formerly found in the Appendix to § 2.80 (2000) (*i.e.*, the guidelines in effect from August 5, 1998 through December 3, 2000), the total guideline range shall be increased by the lesser of:

(i) The guideline range from § 2.36 found to apply to the prior misconduct; or

(ii) The range of months obtained when the number of points previously added for negative institutional behavior is multiplied by the rehearing range applicable under the guidelines in the former Appendix to § 2.80 (*e.g.*, if two points previously were added for misconduct and the applicable rehearing range was 18-24 months, then 36-48 months (2 x 18-24) would be added).

(2) If negative institutional behavior previously was sanctioned by the application of a guideline range at § 2.36, the total guideline range shall be increased by that range for that behavior.

(3) If the prisoner previously had an extra point deducted for superior program achievement (as opposed to ordinary program achievement) under the guidelines in the former Appendix to § 2.80, the total guideline range shall be decreased by the rehearing guideline range applicable under the Appendix to § 2.80 guidelines (e.g., if an extra point previously was subtracted for superior (not ordinary) program achievement and the applicable rehearing range was 18-24 months, then 18-24 months would be subtracted).

(4) Misconduct or superior program achievement since the last hearing shall be considered in accordance with the guidelines of this section.

■ **2.80-01. *Current Offense.***

(a) For purposes of the point score, determinations regarding the current offense (whether it is a crime of violence or a crime of high violence, and whether death resulted), shall be based on the nature and circumstances of the current offense and are not limited to the offense of which the defendant was convicted. Disputed facts are to be resolved under § 2.19(c).

(b) *YRA parole violators.* For the purpose of applying the §2.80 guidelines to YRA parole violators, the “current offense” is the parole violation offense and the offense which led to the original conviction and YRA sentence is considered as a “prior offense.”

■ **2.80-02. *Prior Crime of Violence***

(a) For purposes of the point score, the determination of whether a prisoner has one or more prior crimes of violence is based on the conviction offense. If, however, the Commission finds pursuant to § 2.19(c) that (1) a defendant has committed a prior crime of violence that did not result in a conviction of a crime of violence; and (2) a conviction for the offense actually committed would have resulted in a higher point score, such conduct may be considered as an aggravating factor and may warrant an upward departure from the guidelines (as a more serious risk). In the case of a departure on this basis, the departure should be consistent with the higher point score.

(b) To qualify as a prior crime of violence, the prior conviction/adjudication must be countable as a prior conviction/adjudication under the rules of reapplying the Salient Factor Score in §2.20.

■ **2.80-03. *Rounding of Superior Program Achievement Award.*** If an award for superior program achievement determined under §2.80(k) is a number other than a whole number (e.g., 12.67 months), round to the nearest whole number (.50 and higher is to be rounded upward, and .49 and lower is to be rounded downward).

■ **2.80-04. *Conversion Rules for Retroactive Application of §2.80 - Complex Cases.***

(a) *Inadequate information for application of §2.36 to prior misconduct.* If the information available is not adequate to determine the guideline range for a prior misconduct under §2.80(o)(1)(i) (which references §2.36), the guideline range for the prior misconduct shall be determined under §2.80(o)(1)(ii).

(b) *When §2.36 has a lower minimum, but higher maximum, guideline range for prior misconduct.* In rare cases, the guideline range for a prior misconduct under §2.80(o)(1)(i) (which references §2.36) may have

a lower minimum, but a higher maximum, than the range under §2.80(o)(1)(ii). For example, the guideline range under §2.80(o)(1)(i) might be 0-52 months, and the range under §2.80(o)(1)(ii) might be 36-48 months. In such a case, construct a composite guideline range, using the lower applicable minimum and the lower applicable maximum. In the above example, the composite guideline range would be 0-48 months for the prior misconduct.

■ **2.80-05. *Pickpocketing Offense.*** Under the D.C. Code, pickpocketing is punishable under the robbery statute. For the purposes of § 2.80, a current or prior robbery conviction that is found to be based on a pickpocketing offense (theft by stealth with no force or threat) shall not be considered a current or prior crime of violence.

2.80-06. Determining “months to eligibility” in applying the §2.80 guidelines for YRA offenders. In applying the §2.80 guidelines for YRA offenders (including parole violators), the number of months to eligibility is “0-0.”

2.80-07. Training aid regarding decision-making for YRA offenders with a total guideline range of 0 months.

The §2.80 guidelines are premised on the assumption that the prisoner has served a minimum term imposed by the sentencing judge and this term is factored into the calculation of the total guideline range. Difficulties arise in YRA cases because a YRA offender does not have to serve a minimum term and no “months to eligibility” are added in the total guideline range calculation. Similarly, use of the §2.80 guidelines for a YRA parole violator causes problems because of the absence of any “minimum term” for the violation behavior. Many YRA offenders (including a number of parole violators who have committed administrative violations) will have a base point score of 3 or less. Application of the §2.80 guidelines results in a total guideline range of 0 months and an indication of a prompt parole within several months after commitment.

Examiners are reminded that in YRA cases, response to treatment programs – evidenced in part by completion of the program plan developed by institutional staff – plays a significant role in the release decision for such cases. A YRA offender is committed for correctional training and treatment in order to improve his chances for leading a law-abiding life. Completion of the program plan is an indicant that the offender may have positively responded to treatment programs and reduced his risk of re-offending to the degree that parole is appropriate.

The examiner has the discretion to depart from the outcome indicated by the guidelines for “case-specific factors that are not fully taken into account in the guidelines, and that are relevant in the grant or denial of parole.” See 28 C.F.R. §2.80(n). In the case of a YRA offender, the examiner may consider the offender’s YRA sentence, and the concomitant need to consider correctional training and rehabilitation as significant factors in the release decision, as “case-specific factors” for a guidelines departure. Thus, the examiner may recommend a departure from the total guideline range for reasons related to the need to rehabilitate the offender, deter the offender from further crimes, and protect the public from a resumption of criminal behavior.

The following are examples of permissible reasons for departing from the guidelines in YRA cases.
Example 1: “a departure from the total guideline range is warranted because you have shown by your repeated cocaine use on parole supervision that you need further correctional treatment in an institutional

setting to lead a law-abiding life. You are serving a sentence imposed under the YRA and the duration of your commitment may be based on the need to give you correctional training and treatment. You have not completed your program plan. The present estimated date of program plan completion is _____. The Commission recommends participation in a residential drug treatment program in addition to the items already described in your institutional program plan (obtaining GED and correctional counseling).”

Example 2: “ a departure from the total guideline range is warranted because you reverted to criminal behavior (theft offenses) while on parole supervision and you need a period of confinement and further correctional training to impress upon you the consequences of your misconduct, to deter you from further crimes and to protect the public. You are serving a sentence imposed under the YRA and the duration of your commitment may be based on the need to give you correctional training and treatment. You need to complete the institutional program plan (vocational training and correctional counseling) in order to improve your chances for a successful parole.

■ § 2.81 REPAROLE DECISIONS.

(a) If the prisoner is not serving a new, parolable D.C. Code sentence, the Commission's decision to grant or deny reparole on the parole violation term shall be made by reference to the reparole guidelines at § 2.21. The Commission shall establish a presumptive or effective release date pursuant to § 2.12(b), and conduct interim hearings pursuant to § 2.14.

(b) If the prisoner is eligible for parole on a new D.C. Code felony sentence that has been aggregated with the prisoner's parole violation term, the Commission shall make a decision to grant or deny parole on the basis of the aggregate sentence, and in accordance with the guidelines at § 2.80.

(c) If the prisoner is eligible for parole on a new D.C. Code felony sentence but the prisoner's parole violation term has not commenced (*i.e.*, the warrant has not been executed), the Commission shall make a single parole/reparole decision by applying the guidelines at § 2.80. The Commission shall establish an appropriate date for the execution of the outstanding warrant in order for the guidelines at § 2.80 to be satisfied. In cases where the execution of the warrant will not result in the aggregation of the new sentence and the parole violation term, the Commission shall make parole and reparole decisions that are consistent with the guidelines at § 2.80.

(d) All reparole hearings shall be conducted according to the procedures set forth in § 2.72, and may be combined with the holding of a revocation hearing if the prisoner's parole has not previously been revoked. If the prisoner is serving a period of imprisonment imposed upon revocation of his parole by the D.C. Board of Parole, the Commission shall consider all available and relevant information concerning the prisoner's conduct while on parole, including any allegations of criminal or administrative violations left unresolved by the Board, pursuant to the procedures applicable to initial hearings under § 2.72 and § 2.19(c). The same procedures shall apply in the case of any new information concerning criminal and administrative violations of parole presented to the Commission for the first time following the conclusion of a revocation proceeding that resulted in the revocation of parole and the return of the offender to prison.

Notes and Procedures

■ 2.81-01. *Reparole decisions for YRA parole violations.* Reparole decisions for YRA parole violators are made using the § 2.80 guidelines, not the guidelines at § 2.20 and § 2.21. See 28 C.F.R. §2.106(e).

■ **§ 2.82 EFFECTIVE DATE OF PAROLE.**

(a) An effective date of parole may be granted up to nine months from the date of the hearing.

(b) Except in the case of a medical or geriatric parole, a parole that is granted prior to the completion of the prisoner's minimum term shall not become effective until the prisoner becomes eligible for release on parole.

■ 2.82-01. *Time Required for Release Planning.*

(a) Absent a clearly exceptional circumstance, set an effective parole date that is - -

(1) at least eight months from the date of the hearing, if halfway house placement is deemed essential; and

(2) at least 120 days from the date of the hearing, if halfway house placement is not deemed essential.

(b) If a parole effective date will cause the prisoner to serve more than the time required by the maximum of the guideline range solely for the purpose of release planning, set the parole date at the maximum of the applicable guideline range. However, the parole date set should not be -

(1) less than 120 days from the date of the hearing, if halfway house placement is deemed essential; and

(2) less than 60 days from the date of the hearing, if halfway house placement is not deemed essential.

■ **§ 2.83 RELEASE PLANNING.**

(a) All grants of parole shall be conditioned on the development of a suitable release plan and the approval of that plan by the Commission. A parole certificate shall not be issued until a release plan has been approved by the Commission. In the case of mandatory release, the Commission shall review each prisoner's release plan to determine whether the imposition of any special conditions should be ordered to promote the prisoner's rehabilitation and protect the public safety.

(b) If a parole date has been granted, but the prisoner has not submitted a proposed release plan, the appropriate correctional or supervision staff shall assist the prisoner in formulating a release plan for investigation.

(c) After investigation by a Supervision Officer, the proposed release plan shall be submitted to the Commission 30 days prior to the prisoner's parole or mandatory release date.

(d) A Commissioner may retard a parole date for purposes of release planning for up to 120 days without a hearing. If efforts to formulate an acceptable release plan prove futile by the expiration of such period, or if the Offender Supervision staff reports that there are insufficient resources to provide effective supervision for the individual in question, the Commission shall be promptly notified in a detailed report. If the Commission does not order the prisoner to be paroled, the Commission shall suspend the grant of parole and conduct a reconsideration hearing on the next available docket. Following such reconsideration hearing, the Commission may deny parole if it finds that the release of the prisoner without a suitable plan would fail to meet the criteria set forth in § 2.73. However, if the prisoner subsequently presents an acceptable release plan, the Commission may reopen the case and issue a new grant of parole.

(e) The following shall be considered in the formulation of a suitable release plan:

(1) Evidence that the parolee will have an acceptable residence;

(2) Evidence that the parolee will be legitimately employed as soon as released; provided, that in special circumstances, the requirement for immediate employment upon release may be waived by the Commission;

(3) Evidence that the necessary aftercare will be available for parolees who are ill, or who have any other demonstrable problems for which special care is necessary, such as hospital facilities or other domiciliary care; and

(4) Evidence of availability of, and acceptance in, a community program in those cases where parole has been granted conditioned upon acceptance or participation in a specific community program.

Notes and Procedures

■ 2.83-01. *Retardation of Parole Dates for Release Planning Purposes.*

(a) When the Bureau of Prisons requests the retardation of a parole date for “release planning” purposes, the following instructions apply:

(1) Retardation of a parole date will normally be granted if CSOSA has investigated the prisoner’s release plan and has discovered a significant problem that makes the release plan unacceptable. For example, if the proposed residence or employment turns out not to exist, or the proposed residence or employment is found unsuitable in the light of the parolee’s criminal history, that would be a good reason for the Commission to retard the release date. For prisoners being released from BOP facilities, the Commission will not accept retardation requests directly from CSOSA. A written request to retard the release date must be submitted by the appropriate BOP staff, and must give specific reasons for the request.

(2) The Commission will not order retardation of a release date simply because CSOSA has not been able to complete the release plan investigation process by the scheduled parole date, except in the following two circumstances.

(A) Retardation may be ordered if the prisoner has either (i) high level violence in the current offense or (ii) a current offense that is a sex offense, or (iii) a base point score of 5 or higher.

(B) Retardation may be ordered if the Commission has imposed a special mental health or sex offender treatment condition that will likely not be implemented effectively without further release planning or if there is some other extraordinary reason that a prisoner cannot be released absent further planning (*e.g.*, a mentally or physically handicapped prisoner with no place to reside).

Retardation decisions for cases meeting the above standards are to be made on a case-by-case basis, after consideration of whether and to what extent the likelihood of serious recidivism will be increased absent a more suitable parole plan. The normal retardation for these special cases will be 90 days. The case analyst should inform the BOP (with a copy to the CSOSA requester) that prompt completion of the investigation process is required. Copies of all communications are to be kept in the file.

- (b) Retardations will not be ordered solely to provide more time for placement of the prisoner in a pre-release halfway house. The only exception to this policy is when both of the following apply: (a) The Commission has previously recommended on the Notice of Action granting the parole date, that the prisoner be paroled through a halfway house, and (b) halfway house placement has been approved for the proposed period by which the release date will be retarded.
- (c) If there are still release plan problems at the end of the period of retardation ordered by the Commission, further retardation can be ordered only if the total allowable 120 days has not been used up by the previous retardation(s). See 28 C.F.R. 2.83(d). At the 120-day point, the prisoner must be released on parole unless the parolee is found too dangerous to release into society without a more suitable plan being in place. Those special cases must be referred to the Commission to order a reconsideration hearing under 28 C.F.R. 2.83(d).

■ § 2.84 RELEASE TO OTHER JURISDICTIONS.

The Commission, in its discretion, may parole any individual from a facility of the District of Columbia, to live and remain in a jurisdiction other than the District of Columbia.

Notes and Procedures

■ 2.84-01. *Supervision by U. S. Probation Officers.* It is the Commission's presumption that United States Probation Officers generally will accept supervision of such cases. It is the Commission's preference that such cases be supervised by United States Probation Officers rather than by transfer under the Interstate Compact.

■ § 2.85 CONDITIONS OF RELEASE.

(a) *General conditions of release.*

(1) The conditions set forth in §2.204(a)(3)-(6) apply for the reasons set forth in §2.204(a)(1). These conditions are printed on the certificate of release issued to each releasee.

(2) (i) The refusal of a prisoner who has been granted a parole date to sign the certificate of release (or any other document necessary to fulfill a condition of release) constitutes withdrawal of that prisoner's application for parole as of the date of refusal. To be considered for parole again, the prisoner must reapply for parole consideration.

(ii) A prisoner who is released to supervision through good-time deduction who refuses to sign the certificate of release is nevertheless bound by the conditions set forth in that certificate.

(b) *Special conditions of release.* The Commission may impose a condition other than one of the general conditions of release if the Commission determines that such condition is necessary to protect the public from further crimes by the releasee and provide adequate supervision of the releasee. Examples of special conditions of release that the Commission frequently imposes are found at §2.204(b)(2).

(c) *Changing conditions of release.* The provisions of §2.204(c) apply.

(d) *Application of release conditions to absconder.* The provisions of §2.204(d) apply.

(e) *Supervision officer guidance.* The provisions of §2.204(f) apply.

(f) *Definitions.* For purposes of this section –

(1) the terms *supervision officer*, *domestic violence crime*, *approved offender-rehabilitation program* and *firearm*,

as used in §2.204, have the meanings given those terms by §2.204(g);

(2) the term *releasee*, as used in this section and in §2.204, means a person convicted of an offense under the District of Columbia Code who has been released on parole or released through good-time deduction; and

(3) the term *certificate of release*, as used in this section and in §2.204, means the certificate of parole or mandatory release delivered to the releasee under §2.86.

Notes and Procedures

■ 2.85-01. *Applicability of Notes and Procedures Accompanying §2.204.* All Notes and Procedures accompanying §2.204 (except 2.204-21) apply.

■ 2.85-02. *Release on Condition of Participation in Drug or Alcohol Treatment Program.* Government privacy regulations restrict information flow between treatment facilities, the Commission, and

Supervision Officers in the absence of the consent of the person being treated. They allow for a blanket consent at the outset of treatment (42 C.F.R. Part 2, 2.29) and a blanket consent form has been prepared for that purpose and is to be signed by the prisoner before release. Refusal to sign this consent form will be treated in the same way as a refusal to sign the certificate of parole.

■ 2.85-03. *Special Conditions*. Special conditions (including drug aftercare) should be recommended, where appropriate, by the hearing panel at the time the presumptive date (whether by parole or mandatory release) is determined (normally at the initial hearing). Where appropriate, special conditions may be added or modified at any time prior to the prisoner's release.

■ § 2.86 RELEASE ON PAROLE; RESCISSION FOR MISCONDUCT.

(a) When a parole effective date has been set, actual release on parole on that date shall be conditioned upon the individual maintaining a good conduct record in the institution or prerelease program to which the prisoner has been assigned.

(b) The Commission may reconsider any grant of parole prior to the prisoner's actual release on parole, and may advance or retard a parole effective date or rescind a parole date previously granted based upon the receipt of any new and significant information concerning the prisoner, including disciplinary infractions. The Commission may retard a parole date for disciplinary infractions (*e.g.*, to permit the use of graduated sanctions) for up to 120 days without a hearing, in addition to any retardation ordered under §2.83(d).

(c) If a parole effective date is rescinded for disciplinary infractions, an appropriate sanction shall be determined by reference to § 2.36.

(d) After a prisoner has been granted a parole effective date, the institution shall notify the Commission of any serious disciplinary infractions committed by the prisoner prior to the date of actual release. In such case, the prisoner shall not be released until the institution has been advised that no change has been made in the Commission's order granting parole.

(e) A grant of parole becomes operative upon the authorized delivery of a certificate of parole to the prisoner, and the signing of that certificate by the prisoner, who thereafter becomes a parolee.

Notes and Procedures

■ 2.86-01. *Processing Parole Grants*. The provisions of 2.29-01 apply.

■ § 2.87 MANDATORY RELEASE.

(a) When a prisoner has been denied parole at the initial hearing and all subsequent considerations, or parole consideration is expressly precluded by statute, the prisoner shall be released at the expiration of his or her imposed sentence less the time deducted for any good time allowances provided by statute.

(b) Any prisoner having served his or her term or terms less deduction for good time shall, upon release, be deemed to be released on parole until the expiration of the maximum term or terms for

which he or she was sentenced, except that if the offense of conviction was committed before April 11, 1987, such expiration date shall be less one hundred eighty (180) days. Every provision of these rules relating to an individual on parole shall be deemed to include individuals on mandatory release.

■ **§ 2.88 CONFIDENTIALITY OF PAROLE RECORDS.**

(a) Consistent with the Privacy Act of 1974 (5 U.S.C. 552(b)), the contents of parole records shall be confidential and shall not be disclosed outside the Commission except as provided in paragraphs (b) and (c) of this section.

(b) Information that is subject to release to the general public without the consent of the prisoner shall be limited to the information specified in § 2.37.

(c) Information other than as described in § 2.37 may be disclosed without the consent of the prisoner only pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552(b)) and § 2.56.

■ **§2.89 MISCELLANEOUS PROVISIONS.**

Except to the extent otherwise provided by law, the following sections in Subpart A of this part are also applicable to District of Columbia Code offenders:

- 2.5 (Sentence aggregation)
- 2.7 (Committed fines and restitution orders)
- 2.8 (Mental competency procedures)
- 2.10 (Date service of sentence commences)
- 2.16 (Parole of prisoner in State, local, or territorial institution)
- 2.19 (Information considered)
- 2.23 (Delegation to hearing examiners)
- 2.25 (Hearings by video conference)
- 2.30 (False information or new criminal conduct; Discovery after release)
- 2.32 (Parole to local or immigration detainers)
- 2.56 (Disclosure of Parole Commission file)
- 2.62 (Rewarding assistance in the prosecution of other offenders: criteria and guidelines)
- 2.65 (Paroling policy for prisoners serving aggregated U.S. and D.C. Code sentences)
- 2.66 (Revocation Decision Without Hearing).

■ **§ 2.90 PRIOR ORDERS OF THE BOARD OF PAROLE.**

Any order entered by the Board of Parole of the District of Columbia shall be accorded the status of an order of the Parole Commission unless duly reconsidered and changed by the Commission at a regularly scheduled hearing. It shall not constitute grounds for reopening a case that the prisoner is subject to an order of the Board of Parole that fails to conform to a provision of this part.

■ § 2.91 SUPERVISION RESPONSIBILITY.

(a) Pursuant to D.C. Code 24-133(c), the District of Columbia Court Services and Offender Supervision Agency (CSOSA) shall provide supervision, through qualified Supervision Officers, for all D.C. Code parolees and mandatory releasees under the jurisdiction of the Commission who are released to the District of Columbia. Individuals under the jurisdiction of the Commission who are released to districts outside the D.C. metropolitan area, or who are serving mixed U.S. and D.C. Code sentences, shall be supervised by a U.S. Probation Officer pursuant to 18 U.S.C. 3655.

(b) A parolee or mandatory releasee may be transferred to a new district of supervision with the permission of the supervision offices of both the transferring and receiving district, provided such transfer is not contrary to instructions from the Commission.

■ § 2.92 JURISDICTION OF THE COMMISSION.

(a) Pursuant to D.C. Code 24-221.03(a) and 24-405, the jurisdiction of the Commission over a parolee shall expire on the date of expiration of the maximum term or terms for which he was sentenced, subject to the provisions of this subpart relating to warrant issuance, time in absconder status, and the forfeiture of credit for time on parole in the case of revocation.

(b) The parole of any parolee shall run concurrently with the period of parole, probation, or supervised release under any other Federal, State, or local sentence.

(c) Upon the expiration of the parolee's maximum term as specified in the release certificate, the parolee's Supervision Officer shall issue a certificate of discharge to such parolee and to such other agencies as may be appropriate.

(d) A termination of parole pursuant to an order of revocation shall not affect the Commission's jurisdiction to grant and enforce any further periods of parole, up to the expiration of the offender's maximum term.

■ § 2.93 TRAVEL APPROVAL.

(a) A parolee's Supervision Officer may approve travel outside the district of supervision without approval of the Commission in the following situations:

(1) Vacation trips not to exceed thirty days.

(2) Trips, not to exceed thirty days, to investigate reasonably certain employment possibilities.

(3) Recurring travel across a district boundary, not to exceed fifty miles outside the district, for purpose of employment, shopping, or recreation.

(b) Specific advance approval by the Commission is required for all foreign travel, employment requiring recurring travel more than fifty miles outside the district, and vacation travel outside the district of supervision exceeding thirty days. A request for such permission shall be in writing and must demonstrate a substantial need for such travel.

(c) A special condition imposed by the Commission prohibiting certain travel shall apply instead of any general rules relating to travel as set forth in paragraph (a) of this section.

(d) The district of supervision for a parolee under the supervision of the D.C. Community Supervision Office of CSOSA shall be the District of Columbia, except that for the purpose of travel permission under this section the district of supervision will include the D.C. metropolitan area as defined in the certificate of parole.

Notes and Procedures

■ 2.93-01. *Applicability of Notes and Procedures Accompanying § 2.206.* All Notes and Procedures accompanying § 2.206 apply.

■ **§ 2.94 SUPERVISION REPORTS TO COMMISSION.**

A regular supervision report shall be submitted to the Commission by the officer responsible for the supervision of the parolee after the completion of 12 months of continuous community supervision and annually thereafter. The Supervision Officer shall submit such additional reports and information concerning both the parolee, and the enforcement of the conditions of the parolee's supervision, as the Commission may direct. All reports shall be submitted according to the format established by the Commission.

Notes and Procedures

■ 2.94-01. *Applicability of Notes and Procedures Accompanying § 2.207.* All Notes and Procedures accompanying § 2.207 apply.

■ **§ 2.95 RELEASE FROM ACTIVE SUPERVISION.**

(a) The Commission, in its discretion, may release a parolee or mandatory releasee from further supervision prior to the expiration of the maximum term or terms for which he or she was sentenced.

(b) Two years after release on supervision, and at least annually thereafter, the Commission shall review the status of each parolee to determine the need for continued supervision. In calculating such two-year period there shall not be included any period of release on parole prior to the most recent release, nor any period served in confinement on any other sentence. A review shall also be conducted whenever release from supervision is specially recommended by the parolee's Supervision Officer.

(c) In determining whether to grant release from supervision, the Commission shall apply the following guidelines, provided that case-specific factors do not indicate a need for continued supervision:

(1) For a parolee originally classified in the very good risk category and whose current offense did not involve violence, release from supervision may be ordered after two continuous years of incident-free parole in the community;

(2) For a parolee originally classified in the very good risk category and whose current offense involved violence other than high level violence, release from supervision may be ordered after three continuous years of incident-free parole in the community;

(3) For a parolee originally classified in the very good risk category and whose current offense involved high level violence (without death of victim resulting), release from supervision may be ordered after four continuous years of incident-free parole in the community;

(4) For a parolee originally classified in other than the very good risk category, whose current offense did not involve violence, and whose prior record includes not more than one episode of felony violence, release from supervision may be ordered after three continuous years of incident-free parole in the community;

(5) For a parolee originally classified in other than the very good risk category, and whose current offense involved violence other than high level violence, or whose prior record includes two or more episodes of felony violence, release from supervision may be ordered after four continuous years of incident-free parole in the community;

(6) For a parolee who was originally classified in other than the very good risk category and whose current offense involved high level violence (without death of victim resulting), release from supervision may be ordered after five continuous years of incident-free parole in the community;

(7) For any parolee whose current offense involved high level violence with death of victim resulting, release from supervision may be ordered only upon a case-specific finding that, by reason of age, infirmity, or other compelling factors, the parolee is unlikely to be a threat to the public safety.

(d) Decisions to release from supervision prior to completion of the periods specified in this section may be made where it appears that the parolee is a better risk than indicated by the salient factor score (if originally classified in other than the very good risk category), or a less serious risk than indicated by a violent current offense or prior record (if any). However, release from supervision prior to the completion of two years of incident-free supervision will not be granted in any case unless case-specific factors clearly indicate that continued supervision would be counterproductive to the parolee's rehabilitation.

(e) Except as provided in § 2.99(c), cases with pending criminal charge(s) shall not be released from supervision until the disposition of such charge(s) is known. The term "incident-free" parole shall include both any reported violations, and any arrest or law enforcement investigation that raises a reasonable doubt as to whether the parolee has been able to refrain from law violations while on parole.

■ § 2.96 ORDER OF RELEASE.

(a) When the Commission approves a recommendation for release from active supervision, a written order of release from supervision shall be issued and a copy thereof shall be delivered to the releasee.

(b) Each order of release shall state that the conditions of the releasee's parole are waived, except that it shall remain a condition that the releasee shall not violate any law or engage in any conduct

that might bring discredit to the parole system, under penalty of possible withdrawal of the order of release or revocation of parole.

(c) An order of release from supervision shall not release the parolee from the custody of the Attorney General or from the jurisdiction of the Commission before the expiration of the term or terms being served.

■ § 2.97 WITHDRAWAL OF ORDER OF RELEASE.

If, after an order of release from supervision has been issued by the Commission, and prior to the expiration date of the sentence(s) being served, the parolee commits any new criminal offense or engages in any conduct that might bring discredit to the parole system, the Commission may, in its discretion, do any of the following:

- (1) Issue a summons or warrant to commence the revocation process;
- (2) Withdraw the order of release from supervision and return the parolee to active supervision; or
- (3) Impose any special conditions to the order of release from supervision.

■ § 2.98 SUMMONS TO APPEAR OR WARRANT FOR RETAKING OF PAROLEE.

(a) If a parolee is alleged to have violated the conditions of his release, and satisfactory evidence thereof is presented, the Commission or a member thereof may:

- (1) Issue a summons requiring the offender to appear for a probable cause hearing or local revocation hearing; or
- (2) Issue a warrant for the apprehension and return of the offender to custody.

(b) A summons or warrant under paragraph (a)(1) of this section may be issued or withdrawn only by the Commission, or a member thereof.

(c) 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 the violations, in the opinion of the Commission, requires such issuance. In the case of any parolee who is charged with a criminal offense and who is awaiting disposition of such charge, issuance of a summons or warrant may be:

- (1) Temporarily withheld;
- (2) Issued by the Commission and held in abeyance;
- (3) Issued by the Commission and a detainer lodged with the custodial authority; or
- (4) Issued for the retaking of the parolee.

(d) A summons or warrant may be issued only within the prisoner's maximum term or terms, except that in the case of a prisoner who has been mandatorily released from a sentence imposed for an offense committed before April 11, 1987, such summons or warrant may be issued only within the maximum term or terms less one hundred eighty days. A summons or warrant shall be considered issued when signed and either:

(1) Placed in the mail; or

(2) Sent by electronic transmission to the appropriate law enforcement authority.

(e) The issuance of a warrant under this section operates to bar the expiration of the parolee's sentence. Such warrant maintains the Commission's jurisdiction to retake the parolee either before or after the normal expiration date of the sentence and to reach a final decision as to the revocation of parole and the forfeiture of time pursuant to D.C. Code 24-406(a).

(f) A summons or warrant issued pursuant to this section shall be accompanied by a warrant application (or other notice) stating:

(1) The charges against the parolee;

(2) The specific reports and other documents upon which the Commission intends to rely in determining whether a violation occurred and whether to revoke parole;

(3) Notice of the Commission's intent, if the parolee is arrested within the District of Columbia, to hold a probable cause hearing within five days of the parolee's arrest;

(4) A statement of the purpose of the probable cause hearing;

(5) The days of the week on which the Commission regularly holds its dockets of probable cause hearings at the Central Detention Facility;

(6) The parolee's procedural rights in the revocation process; and

(7) The possible actions that the Commission may take.

(g) Every warrant issued by the Board of Parole of the District of Columbia prior to August 5, 2000, shall be deemed to be a valid warrant of the U.S. Parole Commission unless withdrawn by the Commission. Such warrant shall be executed as provided in § 2.99, and every offender retaken upon such warrant shall be treated for all purposes as if retaken upon a warrant issued by the Commission.

Notes and Procedures

■ 2.98-01. *Applicability of Notes and Procedures Accompanying §2.211.* All Notes and Procedures accompanying §2.211 apply.

■ 2.98-02. *Five-day Holds.* The U.S. Attorney's Office may request, through the supervision officer, that the Commission issue a warrant for a parolee incarcerated on a "five-day hold" by the Superior Court. The supervision officer must clearly mark a warrant request submitted under the five-day hold policy as a U.S. Attorney request for a "five-day hold" and the case analyst's work-up of the case must be similarly marked. The case analyst shall give priority processing to a warrant request in a five-day hold case. Such a request is normally received by 12:00 p.m. on the third day of the parolee's detention and the request must be granted or denied by 9:00 a.m. on the fifth day of detention. Notice of the Commission decision on the request is immediately sent by telefax to the supervision officer and the U.S. Attorney's Office. If a warrant is issued, the warrant is marked as a "five-day hold" case and immediately telefaxed to the U.S. Marshal's Office.

■ 2.98-03. *Additional Language Required in FYCA Cases.* The following language should be typed on all warrants issued for FYCA (not YRA) releasees "Do not execute or use as a detainer after (full term Date)." *Exception:* If there is evidence that the releasee is in absconder status omit this sentence and substitute: "Subject is in absconder status - execute warrant whenever subject is apprehended." If after the warrant is issued information is received that the releasee is an absconder, notify the Marshal by letter or telefax signed by the Regional Commissioner (1) that the subject is in absconder status – execute warrant whenever subject is apprehended; and (2) instruct the Marshal to draw a line through the sentence "Do not execute after (full term date)" and to attach this letter or telefax to the warrant.

■ § 2.99 EXECUTION OF WARRANT AND SERVICE OF SUMMONS.

(a) Any officer of any Federal or District of Columbia correctional institution, any Federal Officer authorized to serve criminal process, or any officer or designated civilian employee of the Metropolitan Police Department of the District of Columbia, to whom a warrant is delivered, shall execute such warrant by taking the parolee and returning him to the custody of the Attorney General.

(b) Upon the arrest of the parolee, the officer executing the warrant shall deliver to the parolee a copy of the warrant application (or other notice provided by the Commission) containing the information described in § 2.98(f).

(c) If execution of the warrant is delayed pending disposition of local charges, for further investigation, or for some other purpose, the parolee is to be continued under supervision by the Supervision Officer until the normal expiration of the sentence, or until the warrant is executed, whichever first occurs. Monthly supervision reports are to be submitted, and the parolee must continue to abide by all the conditions of release.

(d) If any other warrant for the arrest of the parolee has been executed or is outstanding at the time the Commission's warrant is executed, the arresting officer may, within 72 hours of executing the Commission's warrant, release the parolee to such other warrant and lodge the Commission's

warrant as a detainer, voiding the execution thereof, if such action is consistent with the instructions of the Commission. In other cases, a parolee may be released from an executed warrant whenever the Commission finds such action necessary to serve the ends of justice.

(e) A summons to appear at a probable cause hearing or revocation hearing shall be served upon the parolee in person by delivering to the parolee a copy of the summons and the application therefor. Service shall be made by any Federal or District of Columbia officer authorized to serve criminal process and certification of such service shall be returned to the Commission.

(f) Official notification of the issuance of a Commission warrant shall authorize any law enforcement officer within the United States to hold the parolee in custody until the warrant can be executed in accordance with paragraph (a) of this section.

Notes and Procedures

■ 2.99-01. *Applicability of Notes and Procedures Accompanying § 2.212.* All Notes and Procedures accompanying § 2.212 apply.

■ § 2.100 **WARRANT PLACED AS A DETAINER AND DISPOSITIONAL REVIEW.**

(a) When a parolee is in the custody of other law enforcement authorities, or is serving a new sentence of imprisonment imposed for a crime committed while on parole or for a violation of some other form of community supervision, a parole violation warrant may be lodged against him as a detainer.

(b) If the parolee is serving a new sentence of imprisonment, and is eligible and has applied for parole under the Commission's jurisdiction, a dispositional revocation hearing shall be scheduled simultaneously with the initial hearing on the new sentence. In such cases, the warrant shall not be executed except upon final order of the Commission following such hearing, as provided in § 2.81(c). In any other cases, the detainer shall be reviewed on the record pursuant to paragraph (c) of this section.

(c) If the parolee is serving a new sentence of imprisonment that does not include eligibility for parole under the Commission's jurisdiction, the Commission shall review the detainer upon the request of the parolee. Following such review, the Commission may:

(1) Withdraw the detainer and order reinstatement of the parolee to supervision upon release from custody, or close the case if the expiration date has passed.

(2) Order a dispositional revocation hearing to be conducted by a hearing examiner or an official designated by the Commission at the institution in which the parolee is confined. In such case, the warrant shall not be executed except upon final order of the Commission following such hearing.

(3) Let the detainer stand until the new sentence is completed. Following the release of the parolee, and the execution of the Commission's warrant, an institutional revocation hearing shall be conducted after the parolee is returned to federal custody.

(d) Dispositional revocation hearings pursuant to this section shall be conducted in accordance with the provisions at § 2.103 governing institutional revocation hearings, except that a hearing conducted at a state or local facility may be conducted by a hearing examiner, hearing examiner panel, or other official designated by the Commission. Following a revocation hearing conducted pursuant to this section, the Commission may take any action specified in § 2.105.

(1) The date the violation term commences is the date the Commission's warrant is executed. It shall be the policy of the Commission that the parolee's violation term (*i.e.*, the unexpired term that remained to be served at the time the parolee was last released on parole) shall start to run only upon his release from the confinement portion of the sentence for the new offense, or the date of reparole granted pursuant to this subpart, whichever comes first.

(2) A parole violator whose parole is revoked shall be given credit for all time in confinement resulting from any new offense or violation that is considered by the Commission as a basis for revocation, but solely for the limited purpose of satisfying the time ranges in the reparole guidelines at § 2.81. The computation of the prisoner's sentence, and forfeiture of time on parole pursuant to D.C. Code 24-406(a), is not affected by such guideline credit.

Notes and Procedures

■ 2.100-01. *Procedure.*

(a) If a dispositional revocation hearing was not conducted in conjunction with the initial hearing on the most recent parole-eligible sentence, a dispositional revocation hearing should be scheduled to coincide with the next scheduled hearing. A single parole/reparole decision shall be made, as required by § 2.81(c), in accordance with the guidelines at § 2.80. This procedure applies whether the U.S. Parole Commission or D.C. Board of Parole conducted the initial hearing on the most recent parole-eligible sentence.

(b) At a prehearing assessment, an examiner should alert the Case Services section if a dispositional revocation hearing needs to be conducted in conjunction with the scheduled hearing. Notice and disclosure packets (as for institutional revocation hearings) will be the responsibility of the Case Services section.

(c) If a case analyst receives correspondence from a D.C. Code prisoner inquiring about an outstanding D.C. Board of Parole detainer warrant that requires a dispositional revocation hearing, the Commission should issue an order to reopen and schedule for a dispositional revocation hearing pursuant to § 2.100 to be conducted at the time of the next regularly scheduled hearing.

■ § 2.101 **PROBABLE CAUSE HEARING AND DETERMINATION.**

(a) *Hearing.* A parolee who is retaken and held in custody in the District of Columbia on a warrant issued by the Commission, and who has not been convicted of a new crime, shall be given a probable cause hearing by an examiner of the Commission no later than five days from the date of such retaking. A parolee who is retaken and held in custody outside the District of Columbia, but within the Washington, D.C. metropolitan area, and who has not been convicted of a new crime, shall be given a probable cause hearing by an examiner of the Commission within five days of the parolee's arrival at a facility where probable cause hearings are conducted. The purpose of a probable cause hearing is to determine whether there is probable cause to believe that the parolee has violated

parole as charged, and if so, whether a local or institutional revocation hearing should be conducted. If the examiner finds probable cause, the examiner shall schedule a final revocation hearing to be held within 65 days of such parolee's arrest.

(b) *Notice and opportunity to postpone hearing.* Prior to the commencement of each docket of the probable cause hearings in the District of Columbia, a list of the parolees who are scheduled for probable cause hearings, together with a copy of the warrant application for each parolee, shall be sent to the D.C. Public Defender Service. At or before the probable cause hearing, the parolee (or the parolee's attorney) may submit a written request that the hearing be postponed for any period up to thirty days, and the Commission shall ordinarily grant such requests. Prior to the commencement of the probable cause hearing, the examiner shall advise the parolee that the parolee may accept representation by the attorney from the D.C. Public Defender Service who is assigned to that docket, waive the assistance of an attorney at the probable cause hearing, or have the probable cause hearing postponed in order to obtain another attorney and/or witnesses on his behalf. In addition, the parolee may request the Commission to require the attendance of adverse witnesses (*i.e.*, witnesses who have given information upon which revocation may be based) at a postponed probable cause hearing. Such adverse witnesses may be required to attend either a postponed probable cause hearing, or a combined postponed probable cause and local revocation hearing, provided the parolee meets the requirements of § 2.102(a) for a local revocation hearing. The parolee shall also be given notice of the time and place of any postponed probable cause hearing.

(c) *Review of the charges.* At the beginning of the probable cause hearing, the examiner shall ascertain that the notice required by § 2.99(b) has been given to the parolee. The examiner shall then review the violation charges with the parolee and shall apprise the parolee of the evidence that has been submitted in support of the charges. The examiner shall ascertain whether the parolee admits or denies each charge listed on the warrant application (or other notice of charges), and shall offer the parolee an opportunity to rebut or explain the allegations contained in the evidence giving rise to each charge. The examiner shall also receive the statements of any witnesses and documentary evidence that may be presented by the parolee. At a postponed probable cause hearing, the examiner shall also permit the parolee to confront and cross-examine any adverse witnesses in attendance, unless good cause is found for not allowing confrontation. Whenever a probable cause hearing is postponed to secure the appearance of adverse witnesses, the Commission will ordinarily order a combined probable cause and local revocation hearing as provided in paragraph (i) of this section.

(d) *Probable cause determination.* At the conclusion of the probable cause hearing, the examiner shall determine whether probable cause exists to believe that the parolee has violated parole as charged, and shall so inform the parolee. The examiner shall then take either of the following actions:

(1) If the examiner determines that no probable cause exists for any violation charge, the examiner shall order that the parolee be released from the custody of the warrant and either reinstated to parole, or discharged from supervision if the parolee's sentence has expired.

(2) If the hearing examiner determines that probable cause exists on any violation charge, and the parolee has requested (and is eligible for) a local revocation hearing in the District of Columbia as

provided by § 2.102(a), the examiner shall schedule a local revocation hearing for a date that is within 65 days of the parolee's arrest. After the probable cause hearing, the parolee (or the parolee's attorney) may submit a written request for a postponement. Such postponements will normally be granted if the request is received no later than fifteen days before the date of the revocation hearing. A request for a postponement that is received by the Commission less than fifteen days before the scheduled date of the revocation hearing will be granted only for a compelling reason. The parolee (or the parolee's attorney) may also request, in writing, a hearing date that is earlier than the date scheduled by the examiner, and the Commission will accommodate such request if practicable.

(e) *Institutional revocation hearing.* If the parolee is not eligible for a local revocation hearing as provided by § 2.102(a), or has requested to be transferred to an institution for his revocation hearing, the Commission will request the Bureau of Prisons to designate the parolee to an appropriate institution, and an institutional revocation hearing shall be scheduled for a date that is within ninety days of the parolee's retaking.

(f) *Digest of the probable cause hearing.* At the conclusion of the probable cause hearing, the examiner shall prepare a digest summarizing the evidence presented at the hearing, the responses of the parolee, and the examiner's findings as to probable cause.

(g) *Release notwithstanding probable cause.* Notwithstanding a finding of probable cause, the Commission may order the parolee's reinstatement to supervision or release pending further proceedings, if it determines that:

(1) Continuation of revocation proceedings is not warranted despite the finding of probable cause; or

(2) Incarceration pending further revocation proceedings is not warranted by the frequency or seriousness of the alleged violation(s), and the parolee is neither likely to fail to appear for further proceedings, nor is a danger to himself or others.

(h) *Conviction as probable cause.* Conviction of any crime committed subsequent to release by a parolee shall constitute probable cause for the purposes of this section, and no probable cause hearing shall be conducted unless a hearing is needed to consider additional violation charges that may be determinative of the Commission's decision whether to revoke parole.

(i) *Combined probable cause and local revocation hearing.* A postponed probable cause hearing may be conducted as a combined probable cause and local revocation hearing, provided such a hearing is conducted within 65 days of the parolee's arrest and the parolee has been notified that the postponed probable cause hearing will constitute his final revocation hearing. The Commission's policy is to conduct a combined probable cause and local revocation hearing whenever adverse witnesses are required to appear and give testimony with respect to contested charges.

(j) *Late received charges.* If the Commission is notified of an additional charge after probable cause has been found to proceed with a revocation hearing, the Commission may:

- (1) Remand the case for a supplemental probable cause hearing if the new charge may be contested by the parolee and possibly result in the appearance of witness(es) at the revocation hearing;**
- (2) Notify the parolee that the additional charge will be considered at the revocation hearing without conducting a supplemental probable cause hearing; or**
- (3) Determine that the new charge shall not be considered at the revocation hearing.**

Notes and Procedures

■ 2.101-01. *Applicability of Notes and Procedures Accompanying § 2.214.* All Notes and Procedures accompanying § 2.214 apply.

■ **§ 2.102 PLACE OF REVOCATION HEARING.**

(a) If the parolee requests a local revocation hearing, he shall be given a revocation hearing reasonably near the place of the alleged violation(s) or arrest, with the opportunity to contest the charges against him, if the following conditions are met:

- (1) The parolee has not been convicted of a crime committed while under supervision; and**
- (2) The parolee denies all charges against him.**

(b) The parolee shall also be given a local revocation hearing if he admits (or has been convicted of) one or more charged violations, but denies at least one unadjudicated charge that may be determinative of the Commission's decision regarding revocation and/or reparole, and requests the presence of one or more adverse witnesses regarding that contested charge. If the appearance of such witness at the hearing is precluded by the Commission for good cause, a local revocation hearing shall not be ordered.

(c) If there are two or more contested charges, a local revocation hearing may be conducted near the place of the violation chiefly relied upon by the Commission as a basis for the issuance of the warrant or summons.

(d) (1) A parolee shall be given an institutional revocation hearing upon the parolee's return or recommitment to an institution if the parolee: (i) voluntarily waives the right to a local revocation hearing; or (ii) admits (or has been convicted of) one or more charged violations without contesting any unadjudicated charge that may be determinative of the Commission's decision regarding revocation and/or reparole.

(2) An institutional revocation hearing may also be conducted in the District of Columbia jail or prison facility in which the parolee is being held. On his own motion, a Commissioner may designate any case described in paragraph (d)(1) for a local revocation hearing. The difference in procedures between a "local revocation hearing" and an "institutional revocation hearing" is set forth in §2.103(b).

(e) A parolee retaken on a warrant issued by the Commission shall be retained in custody until final action relative to revocation of his parole, unless otherwise ordered by the Commission under § 2.101(e)(3). A parolee who has been given a revocation hearing pursuant to the issuance of a summons shall remain on supervision pending the decision of the Commission, unless the Commission has provided otherwise.

(f) A local revocation hearing shall be held not later than sixty-five days from the retaking of the parolee on the parole violation warrant. An institutional revocation hearing shall be held within ninety days of the retaking of the parolee on the parole violation warrant. If the parolee requests and receives any postponement, or consents to any postponement, or by his actions otherwise precludes the prompt completion of revocation proceedings in his case, the above-stated time limits shall be correspondingly extended.

■ 2.102-01. *Applicability of Notes and Procedures Accompanying § 2.215.* All Notes and Procedures accompanying § 2.215 apply.

■ § 2.103 REVOCATION HEARING PROCEDURE.

(a) The purpose of the revocation hearing shall be to determine whether the parolee has violated the conditions of his release and, if so, whether his parole or mandatory release should be revoked or reinstated.

(b) At a local revocation hearing, the alleged violator may present voluntary witnesses and documentary evidence in his behalf. The alleged violator may also seek the compulsory attendance of any adverse witnesses for cross-examination, and any relevant favorable witnesses who have not volunteered to attend. At an institutional revocation hearing, the alleged violator may present voluntary witnesses and documentary evidence in his behalf, but may not request the Commission to secure the attendance of any adverse or favorable witness. At any hearing, the presiding hearing officer or examiner may limit or exclude any irrelevant or repetitious statement or documentary evidence, and may prohibit the parolee from contesting matters already adjudicated against him in other forums.

(c) At a local revocation hearing, the Commission shall, on the request of the alleged violator, require the attendance of any adverse witnesses who have given statements upon which revocation may be based. The adverse witnesses who are present shall be made available for questioning and cross-examination in the presence of the alleged violator. The Commission may also require the attendance of adverse witnesses on its own motion, and may excuse any requested adverse witness from appearing at the hearing (or from appearing in the presence of the alleged violator) if it finds good cause for so doing. A finding of good cause for the non-appearance of a requested adverse witness may be based, for example, on a significant possibility of harm to the witness, the witness not being reasonably available, and/or the availability of documentary evidence that is an adequate substitute for live testimony.

(d) All evidence upon which a finding of violation may be based shall be disclosed to the alleged violator before the revocation hearing. Such evidence shall include the Community Supervision Officer's letter summarizing the parolee's adjustment to parole and requesting the warrant, all other documents describing the charged violation or violations of parole, and any additional

evidence upon which the Commission intends to rely in determining whether the charged violation or violations, if sustained, would warrant revocation of parole. If the parolee is represented by an attorney, the attorney shall be provided prior to the revocation hearing, with a copy of the parolee's presentence investigation report, if such report is available to the Commission. If disclosure of any information would reveal the identity of a confidential informant or result in harm to any person, that information may be withheld from disclosure, in which case a summary of the withheld information shall be disclosed to the parolee prior to the revocation hearing.

(e) An alleged violator may be represented by an attorney at either a local or an institutional revocation hearing. In lieu of an attorney, an alleged violator may be represented at any revocation hearing by a person of his choice. However, the role of such non-attorney representative shall be limited to offering a statement on the alleged violator's behalf. Only licensed attorneys shall be permitted to question witnesses, make objections, and otherwise provide legal representation for parolees, except in the case of law students appearing before the Commission as part of a court-approved clinical practice program, with the consent of the alleged violator, and under the personal direction of a lawyer or law professor who is physically present at the hearing.

(f) At a local revocation hearing, the Commission shall secure the presence of the parolee's Community Supervision Officer, or a substitute Community Supervision Officer, who shall bring the parolee's supervision file, if the parolee's Community Supervision Officer is not available. At the request of the hearing examiner, such officer shall provide testimony at the hearing concerning the parolee's adjustment to parole.

(g) After the revocation hearing, the hearing examiner shall prepare a summary of the hearing that includes a description of the evidence against the parolee and the evidence submitted by the parolee in defense or mitigation of the charges, a summary of the arguments against revocation presented by the parolee, and the examiner's recommended decision. The hearing examiner's summary, together with the parolee's file (including any documentary evidence and letters submitted on behalf of the parolee), shall be given to another examiner for review. When two hearing examiners concur in a recommended disposition, that recommendation, together with the parolee's file and the hearing examiner's summary of the hearing, shall be submitted to the Commission for decision.

Notes and Procedures

■ 2.103-01. *Applicability of Notes and Procedures Accompanying § 2.216.* All Notes and Procedures accompanying 2.216 apply.

■ § 2.104 ISSUANCE OF SUBPOENA FOR APPEARANCE OF WITNESSES OR PRODUCTION OF DOCUMENTS.

(a)(1) If any adverse witness (*i.e.*, a person who has given information upon which revocation may be based) refuses, upon request by the Commission, to appear at a probable cause hearing or local revocation hearing, a Commissioner may issue a subpoena for the appearance of such witness. Such subpoena may also be issued at the discretion of a Commissioner in the event such adverse witness is judged unlikely to appear as requested.

(2) In addition, a Commissioner may, upon a showing by the parolee that a witness whose testimony is necessary to the proper disposition of his case will not appear voluntarily at a local revocation hearing or provide an adequate written statement of his testimony, issue a subpoena for the appearance of such witness at the revocation hearing.

(3) Such subpoenas may also be issued at the discretion of a Commissioner if deemed necessary for the orderly processing of the case.

(b) A subpoena issued pursuant to paragraph (a) of this section may require the production of documents as well as, or in lieu of, a personal appearance. The subpoena shall specify the time and the place at which the person named therein is commanded to appear, and shall specify any documents required to be produced.

(c) A subpoena may be served by any Federal or District of Columbia officer authorized to serve criminal process. The subpoena may be served at any place within the judicial district in which the place specified in the subpoena is located, or any place where the witness may be found. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such a person.

(d) If a person refuses to obey such subpoena, the Commission may petition a court of the United States for the judicial district on which the parole proceeding is being conducted, or in which such person may be found, to require such person to appear, testify, or produce evidence. If the court issues an order requiring such person to appear before the Commission, failure to obey such an order is punishable as contempt. 18 U.S.C. 4214 (1976).

Notes and Procedures

■ 2.104-01. *Applicability of Notes and Procedures Accompanying § 2.2117.* All Notes and Procedures accompanying § 2.217 apply.

■ **§ 2.105 REVOCATION DECISIONS.**

(a) Whenever a parolee is summoned or retaken by the Commission, and the Commission finds by a preponderance of the evidence that the parolee has violated one or more conditions of parole, the Commission may take any of the following actions:

(1) Restore the parolee to supervision, including where appropriate:

(i) Reprimand the parolee;

(ii) Modify the parolee's conditions of release; or

(iii) Refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or

(2) Revoke parole.

(b) If parole is revoked pursuant to this section, the Commission shall also determine whether immediate reparole is warranted or whether parole should be terminated pursuant to D.C. Code 24-406(a). Termination of parole shall return the parolee to prison. If the parolee is returned to prison, the Commission shall also determine a presumptive release date pursuant to § 2.81.

(c) Decisions under this section shall be made by one Commissioner, except that a decision to override an examiner panel recommendation shall require the concurrence of two Commissioners. The final decision following a local revocation hearing shall be issued within 86 days of the retaking of the parolee on the parole violation warrant. The final decision following an institutional revocation hearing shall be issued within 21 days of the hearing, excluding weekends and holidays.

(d) Pursuant to D.C. Code 24-406(a), a parolee whose parole is revoked by the Commission shall receive no credit toward his sentence for time spent on parole, including any time the parolee may have spent in confinement on other sentences (or in a halfway house as a condition of parole) prior to the execution of the Commission's warrant.

(e) Notwithstanding paragraphs (a) through (d) of this section, prisoners committed under the Federal Youth Corrections Act shall not be subject to forfeiture of time on parole, but shall serve uninterrupted sentences from the date of conviction except as provided in § 2.10(b) and (c). This exception from D.C. Code 24-406(a) does not apply to prisoners serving sentences under the D.C. Youth Rehabilitation Act, to which D.C. Code 24-406(a) is fully applicable.

(f) In determining whether to revoke parole for non-compliance with a condition requiring payment of a fine, restitution, court costs or assessment, and/or court ordered child support or alimony payment, the Commission shall consider the parolee's employment status, earning ability, financial resources, and any other special circumstances that may have a bearing on the matter. Revocation shall not be ordered unless the parolee is found to be deliberately evading or refusing compliance.

(g) A parolee may appeal a decision made under this section to revoke parole, to grant or deny reparole, or to modify the conditions of release. The provisions of §2.26 on the time limits for filing and deciding the appeal, the format of the appeal, the limits regarding the submission of exhibits, and voting requirements apply to an appeal submitted under this paragraph.

Notes and Procedures

■ 2.105-01. *Presumptive Sanction for Driving While Impaired.* The provisions of 2.219-01 apply.

■ § 2.106 YOUTH REHABILITATION ACT.

(a) *Regulations governing YRA offenders and D.C. Code FYCA offenders.* Unless the judgment and commitment order provides otherwise, the provisions of this section shall apply to an offender sentenced under the Youth Rehabilitation Act of 1985 (D.C. Code 24-901 *et seq.*) (YRA) who committed his offense before 5:00 p.m., August 11, 2000, and a D.C. Code offender sentenced under the former Federal Youth Corrections Act (former 18 U.S.C. 5005 *et seq.*) (FYCA). An offender sentenced under the YRA who committed his offense (or who continued to commit his offense) on or after 5:00 p.m., August 11, 2000, is not eligible for release on parole, but may be terminated from

a term of supervised release before the expiration of the term and receive a certificate setting aside the conviction under §2.208(f). See D.C. Code 24-904(c) and 24-906(c).

(b) *Application of this subpart to YRA offenders.* All provisions of this subpart that apply to adult offenders also apply to YRA offenders unless a specific exception is made for YRA (or youth) offenders.

(c) *No further benefit finding.* If there is a finding that a YRA offender will derive no further benefit from treatment, such prisoner shall be considered for parole, and for any other action, exclusively under the provisions of this subpart that are applicable to adult offenders. Such a finding may be made pursuant to D.C. Code 24-905 by the Department of Corrections or by the Bureau of Prisons, and shall be promptly forwarded to the Commission. However, if the finding is appealed to the sentencing judge, the prisoner will continue to be treated under the provisions pertaining to YRA offenders until the judge makes a final decision denying the appeal.

(d)(1) *Program plans and using program achievement to set the parole date.* At a YRA prisoner's initial parole hearing, a program plan for the prisoner's treatment shall be submitted by institutional staff and reviewed by the hearing examiner. Any proposed modifications to the plan shall be discussed at the hearing, although further relevant information may be presented and considered after the hearing. The plan shall adequately account for the risk implications of the prisoner's current offense and criminal history and shall address the prisoner's need for rehabilitational training. The program plan shall also include an estimated date of completion. The criteria at §2.64(d) for successful response to treatment programs shall be considered by the Commission in determining whether the proposed program plan would effectively reduce the risk to the public welfare.

(2) The youth offender's response to treatment programs and program achievement shall be considered with other relevant factors, such as the offense and parole prognosis, in determining when the youth offender should be conditionally released under supervision. See §2.64(e). The guidelines at § 2.80(k)-(m) on awarding superior program achievement and the subtraction of any award in determining the total guideline range shall not be used in the decision.

(e) *Parole violators.* A YRA parolee who has had his parole revoked shall be scheduled for a rehearing within six months of the revocation hearing to review the new program plan prepared by institutional staff, unless a parole effective date is granted after the revocation hearing. Such program plan shall reflect a thorough reassessment of the prisoner's rehabilitational needs in light of the prisoner's failure on parole. Decisions on reparole shall be made using the guidelines at § 2.80. If a YRA parolee is sentenced to a new prison term of one year or more for a crime committed while on parole, the case shall be referred to correctional authorities for consideration of a "no further benefit" finding.

(f) *Unconditional Discharge From Supervision.*

(1) A YRA parolee may be unconditionally discharged from supervision after service of one year on parole supervision if the Commission finds that supervision is no longer needed to protect the public safety. A review of the parolee's file shall be conducted after the conclusion of each year of

supervision upon receipt of an annual progress report, and upon receipt of a final report to be submitted by the Supervision Officer six months prior to the sentence expiration date.

(2) In making a decision concerning unconditional discharge, the Commission shall consider the facts and circumstances of each case, focusing on the risk the parolee poses to the public and the benefit he may obtain from further supervision. The decision shall be made after an analysis of case-specific factors, including, but not limited to, the parolee's prior criminal history, the offense behavior that led to his conviction, record of drug or alcohol dependence, employment history, stability of residence and family relationships, and the number and nature of any incidents while under supervision (including new arrests, alleged parole violations, and criminal investigations).

(3) An order of unconditional discharge from supervision terminates the YRA offender's sentence. Whenever a YRA offender is unconditionally discharged from supervision, the Commission shall issue a certificate setting aside the offender's conviction. If the YRA offender is not unconditionally discharged from supervision prior to the expiration of his sentence, a certificate setting aside the conviction may be issued *nunc pro tunc* if the Commission finds that the failure to issue the decision on time was due to administrative delay or error, or that the Supervision Officer failed to present the Commission with a progress report before the end of the supervision term, and the offender's own actions did not contribute to the absence of the final report. However, the offender must have deserved to be unconditionally discharged from supervision before the end of his supervision term for a *nunc pro tunc* certificate to issue.

Notes and Procedures

■ 2.106-01. *Application of the §2.80 guidelines, including the policy on setting presumptive parole dates.* Since October 12, 2002, the Commission has applied the §2.80 guidelines and the procedures on setting presumptive parole dates to YRA offenders. The §2.80 guidelines and presumptive date procedures should be retroactively applied to any YRA offender heard under the former Appendix to §2.80 guidelines.

■ 2.106-02. *Reparole hearings and decisions for YRA parole violators.* If the Commission revokes the parole of a YRA offender, the normal procedure is to order a reparole hearing within 6 months of the revocation hearing. The reason for the delayed reparole consideration is that a program plan should be developed by institutional staff before the Commission makes a reparole decision for a youth offender. If the hearing examiner is conducting an institutional revocation hearing, and the BOP facility has already developed a program plan for the YRA offender, the reparole consideration may be held at the same time as the revocation hearing.

An effective reparole date may be ordered in lieu of scheduling a reparole hearing. Such a decision is appropriate when the Commission concludes that an extended period of confinement is not necessary to sanction the violator or provide for further correctional treatment.

The expedited revocation procedure may be used in a youth revocation case, and a reparole decision may be made without a hearing with the agreement of the violator.

■ § 2.107 INTERSTATE COMPACT.

(a) Pursuant to D.C. Code 24-133(b)(2)(G), the Director of the Court Services and Offender Supervision Agency (CSOSA), or his designee, shall be the Compact Administrator with regard to the following individuals on parole supervision pursuant to the Interstate Parole and Probation Compact authorized by D.C. Code 24-451:

(1) All D.C. Code parolees who are under the supervision of agencies in jurisdictions outside the District of Columbia; and

(2) All parolees from other jurisdictions who are under the supervision of CSOSA within the District of Columbia.

(b) Transfers of supervision pursuant to the Interstate Compact, where appropriate, may be arranged by the Compact Administrator, or his designee, and carried out with the approval of the Parole Commission. A D.C. Code parolee who is under the Parole Commission's jurisdiction will ordinarily be released or transferred to the supervision of a U.S. Probation Office outside the District of Columbia.

(c) Upon receipt of a report that a D.C. Code parolee, who is under supervision pursuant to the Interstate Compact in a jurisdiction outside the District of Columbia, has violated his or her parole, the Commission may issue a warrant pursuant to the procedures of § 2.98. The warrant may be executed as provided as in § 2.99. A parolee who is arrested on such a warrant shall be considered to be a prisoner in federal custody, and may be returned to the District of Columbia or designated to a facility of the Bureau of Prisons at the request of the Commission.

(d) If a parolee from another jurisdiction, who is under the supervision of CSOSA pursuant to the Interstate Compact, is alleged to have violated his or her parole, the Compact Administrator or his designee may issue a temporary warrant to secure the arrest of the parolee pending issuance of a warrant by the original paroling agency. If so requested, the Commission will conduct a courtesy revocation hearing on behalf of the original paroling agency whenever a revocation hearing within the District of Columbia is required.

(e) The term "D.C. Code parolee" shall include any felony offender who is serving a period of parole or mandatory release supervision pursuant to a sentence of imprisonment imposed under the District of Columbia Code.

SUBPART D - DISTRICT OF COLUMBIA CODE SUPERVISED RELEASEES.

■ § 2.200 AUTHORITY, JURISDICTION, AND FUNCTIONS OF THE U.S. PAROLE COMMISSION WITH RESPECT TO OFFENDERS SERVING TERMS OF SUPERVISED RELEASE IMPOSED BY THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA.

(a) The U.S. Parole Commission has jurisdiction, pursuant to D.C. Code 24-133(c)(2), over all offenders serving terms of supervised release imposed by the Superior Court of the District of Columbia under the Sentencing Reform Emergency Amendment Act of 2000.

(b) The U.S. Parole Commission shall have and exercise the same authority with respect to a term of supervised release as is vested in the United States district courts by 18 U.S.C. 3583(d) through(i), except that:

(1) The procedures followed by the Commission in exercising that authority shall be those set forth with respect to offenders on federal parole at 18 U.S.C. 4209 through 4215 (Chapter 311 of 18 United States Code); and

(2) An extension of a term of supervised release under subsection (e)(2) of 18 U.S.C. 3583 may only be ordered by the Superior Court upon motion from the Commission.

(c) Within the District of Columbia, supervision of offenders on terms of supervised release under the Commission’s jurisdiction is carried out by the Community Supervision Officers of the Court Services and Offender Supervision Agency (CSOSA), pursuant to D.C. Code 24-133(c)(2). Outside the District of Columbia, supervision is carried out by United States Probation Officers pursuant to 18 U.S.C. 3655. For the purpose of this subpart, any reference to a “supervision officer” shall include both a Community Supervision Officer of CSOSA and a United States Probation Officer in the case of a releasee who is under supervision outside the District of Columbia.

Notes and Procedures

■ **2.200-01. Reference to Rule in Subpart A or B.** A reference in this Subpart to a rule (or a part thereof) in Subpart A (U.S. Code Prisoners and Parolees) or Subpart C (District of Columbia Code Prisoners and Parolees) includes any Notes and Procedures accompanying the referenced rule (or part thereof) unless clearly inapplicable in the context of a D.C. Code supervised releasee.

■ **§ 2.201 PERIOD OF SUPERVISED RELEASE.**

(a) A period of supervised release that is subject to the Commission’s jurisdiction begins to run on the day the offender is released from prison and continues to the expiration of the full term imposed by the Superior Court, unless early termination is granted by the Commission.

(b) A term of supervised release shall run concurrently with any federal, state, or local term of probation, parole or supervised release for another offense, but does not run while the offender is imprisoned in connection with a conviction for a federal, state, or local crime (including a term of imprisonment resulting from a probation, parole, or supervised release revocation) unless the period of imprisonment is less than 30 days. Such interruption of the term of supervised release is required by D.C. Code 24-403.01(b)(5), and is not dependent upon the issuance of a warrant or an order of revocation by the Commission.

(c) (1) For an offender serving multiple terms of supervised release imposed by the Superior Court, the duration of the Commission’s jurisdiction over the offender shall be governed by the longest term imposed.

(2) If the Commission terminates such an offender from supervision on the longest term imposed, this order shall have the effect of terminating the offender from all terms of supervised release that the offender is serving at the time of the order.

(3) If the Commission issues a warrant or summons for such an offender, or revokes supervised release for such an offender, the Commission’s action shall have the effect of commencing revocation proceedings on, or revoking, all terms that the offender is serving at the time of the action. In revoking supervised release the Commission shall impose a term of imprisonment and a further term of supervised release as if the Commission were revoking a single term of supervised release. For the purpose of calculating the maximum authorized term of imprisonment at first revocation and the original maximum authorized term of supervised release, the Commission shall use the unexpired supervised release term imposed for the offense punishable by the longest maximum term of imprisonment.

(4) If such an offender is released to a further term of supervised release after serving a prison term resulting from a supervised release revocation, the Commission shall consider the offender to be serving only the single term of supervised release ordered after revocation.

Notes and Procedures

■ **2.201-01. *Split sentences.*** A “split sentence” is a sentence in which the judge imposes a term of imprisonment and a term of supervised release, suspends execution of a portion of the prison sentence and imposes a probation term. In such a case, execution of the supervised release term is suspended along with the suspended prison sentence, and the offender serves only a probation term after release from imprisonment. The offender is subject to serve the supervised release term only if probation is later revoked and the offender is re-imprisoned. If the offender is sentenced on multiple counts and receives a split sentence on one count and a prison term with supervised release on another count, the supervised release term begins upon the offender’s release from imprisonment and runs concurrently with the probation term.

■ **2.201-02. *Release to pretrial custody, or custody on a warrant before a revocation or deportation hearing.*** If an offender is released from imprisonment to pretrial custody, or custody on a warrant before a revocation hearing, the supervised release term begins to run as of the date the offender is released from imprisonment to the other custody. But if there is a subsequent conviction or revocation, and the offender is imprisoned for 30 days or more, service of the supervised release term is retroactively postponed during the period of pretrial/prehearing custody and the period of imprisonment imposed for the conviction/revocation. For an offender released to custody awaiting a deportation hearing, service of the supervised release term begins immediately upon release to prehearing custody and continues to run even after the offender is deported pursuant to a deportation order.

■ **2.201-03. *Determining if the imprisonment for the new conviction or revocation is for “less than 30 days.”*** In deciding whether the offender has served a period of imprisonment of “less than 30 days” for a new conviction or revocation, the case analyst should use the actual time in custody served by the offender. Pretrial and prehearing custody is counted. If the imprisonment is for less than 30 days due to good time and similar credits, then service of the supervised release term is not postponed while the offender is incarcerated for the new conviction or revocation. *Example:* The offender is in pretrial custody on a new offense for 21 days, receives a conviction for the crime, and serves a 10-day jail sentence without any good time deduction. Because the imprisonment is for 30 days or more, the supervised release term does not begin until release from the jail sentence. If the offender serves only 5 days on the jail sentence due to good time deductions, the supervised release term begins upon release to pretrial custody. *Exception for intermittent sentences:* A sentence that expressly provides for intermittent periods of

imprisonment of less than 30 days each (e.g., a sentence of imprisonment to be served on nights or weekends) is treated as a sentence of less than 30 days, even if the cumulative total imprisonment is 30 days or more. For example, a sentence of 60 days imprisonment to be served on weekends would not postpone the running of the supervised release term.

■ § 2.202 PRERELEASE PROCEDURES.

(a) At least three months, but not more than six months, prior to the release of a prisoner who has been sentenced to a term or terms of supervised release by the Superior Court, the responsible prison officials shall have the prisoner's release plan forwarded to CSOSA (or to the appropriate U.S. Probation Office) for investigation. If the supervision officer believes that any special condition of supervised release should be imposed prior to the release of the prisoner, the officer shall forward a request for such condition to the Commission. The Commission may, upon such request or of its own accord, impose any special condition in addition to the standard conditions specified in § 2.204, which shall take effect on the day the prisoner is released.

(b) Upon the release of the prisoner, the responsible prison officials shall instruct the prisoner, in writing, to report to the assigned supervision office within 72 hours, and shall inform the prisoner that failure to report on time shall constitute a violation of supervised release. If the prisoner is released to the custody of other authorities, the prisoner shall be instructed to report to the supervision office within 72 hours after his release from the physical custody of such authorities. If the prisoner is unable to report to the supervision office within 72 hours of release because of an emergency, the prisoner shall be instructed to report to the nearest U.S. Probation Office and obey the instructions given by the duty officer.

■ § 2.203 CERTIFICATE OF SUPERVISED RELEASE.

When an offender who has been released from prison to serve a term of supervised release reports to the supervision officer for the first time, the supervision officer shall deliver to the releasee a certificate listing the conditions of supervised release imposed by the Commission and shall explain the conditions to the releasee.

■ § 2.204 CONDITIONS OF SUPERVISED RELEASE.

(a)(1) *General conditions of release and notice by certificate of release.* The conditions set forth in paragraphs (a)(3)-(6) apply to every releasee and are necessary to protect the public from further crimes by the releasee and to provide adequate supervision of the releasee. The certificate of release issued to each releasee by the Commission notifies the releasee of these conditions.

(2) *Effect of refusal to sign certificate of release.* A releasee who refuses to sign the certificate of release is nonetheless bound by the conditions set forth in that certificate.

(3) *Reporting arrival.* The releasee shall go directly to the district named in the certificate, appear in person at the supervision office, and report the releasee's residence address to the supervision officer. If the releasee is unable to appear in person at that office within 72 hours of release because of an emergency, the releasee shall report to the nearest U.S. Probation Office and obey the instructions given by the duty officer. A releasee who is initially released to the physical custody of

another authority shall follow the procedures described in this paragraph upon release from the custody of the other authority.

(4) *Providing information to and cooperating with the supervision officer.*

(i) The releasee shall, between the first and third day of each month, make a written report to the supervision officer on a form provided for that purpose. The releasee shall also report to the supervision officer at such times and in such a manner as that officer directs and shall provide such information as the supervision officer requests. All information that a releasee provides to the supervision officer shall be complete and truthful.

(ii) The releasee shall notify the supervision officer within two days of an arrest or questioning by a law-enforcement officer, a change in place of residence, or a change in employment.

(iii) The releasee shall permit the supervision officer to visit the releasee's residence and workplace.

(iv) The releasee shall permit the supervision officer to confiscate any material that the supervision officer believes may constitute contraband and that is in plain view in the releasee's possession, including in the releasee's residence, workplace, or vehicle.

(v) The releasee shall submit to a drug or alcohol test whenever ordered to do so by the supervision officer.

(5) *Prohibited conduct.*

(i) The releasee shall not violate any law and shall not associate with a person who is violating any law.

(ii) The releasee shall not possess a firearm, other dangerous weapon, or ammunition.

(iii) The releasee shall not drink alcoholic beverages to excess and shall not illegally buy, possess, use, or administer a controlled substance. The releasee shall not frequent a place where a controlled substance is illegally sold, dispensed, used, or given away.

(iv) The releasee shall not leave the geographic limits set by the certificate of release without written permission from the supervision officer.

(v) The releasee shall not associate with a person who has a criminal record without permission from the supervision officer.

(vi) The releasee shall not enter into an agreement to act as an informer or special agent for a law-enforcement agency without the prior approval of the Commission.

(6) *Additional conditions.*

(i) The releasee shall make a diligent effort to work regularly, unless excused by the supervision officer, and to support any legal dependent. The releasee shall participate in an employment readiness program if so directed by the supervision officer.

(ii) The releasee shall make a diligent effort to satisfy any fine, restitution order, court costs or assessment, or court-ordered child support or alimony payment to which the releasee is subject. The releasee shall provide financial information relevant to the payment of such a financial obligation that is requested by the supervision officer. If unable to pay such a financial obligation in one sum, the releasee shall cooperate with the supervision officer to establish an installment-payment schedule.

(iii) If the term of supervision results from a conviction for a domestic violence crime, and such conviction is the releasee's first conviction for such a crime, the releasee shall, as directed by the supervision officer, attend an approved offender-rehabilitation program if such a program is readily available within a 50-mile radius of the releasee's residence.

(iv) The releasee shall comply with any applicable sex-offender reporting and registration law.

(v) The releasee shall provide a DNA sample, as directed by the supervision officer, if collection of such sample is authorized by the DNA Analysis Backlog Elimination Act of 2000.

(vi) If the releasee is supervised by the District of Columbia Court Services and Offender Supervision Agency, the releasee shall submit to the sanctions imposed by the supervision officer within the limits established by an approved schedule of graduated sanctions if the supervision officer finds that the releasee has tested positive for illegal drugs or has committed a noncriminal violation of the conditions of release. Notwithstanding the imposition of a graduated sanction, if the Commission believes the releasee is a risk to the public safety, or is not complying in good faith with the sanction imposed, the Commission may commence revocation proceedings on the alleged violation(s) upon which the graduated sanction was based.

(vii) As directed by the supervision officer, the releasee shall notify a person of a risk of harm that may be determined from a review of the releasee's criminal record or personal history and characteristics. In addition, the supervision officer is authorized to make such notifications as are permitted by the Commission's rules, and to confirm the releasee's compliance with any notification directive.

(b)(1) *Special conditions of release.* The Commission may impose a condition other than a condition set forth in paragraphs (a)(3)-(6) if the Commission determines that such condition is necessary to protect the public from further crimes by the releasee and provide adequate supervision of the releasee.

(2) The following are examples of special conditions frequently imposed by the Commission –

(i) that the releasee reside in or participate in the program of a community corrections center, or both, for all or part of the period of supervision;

(ii) that the releasee participate in a drug - or alcohol -treatment program, and abstain from all use of alcohol and other intoxicants;

(iii) that, as an alternative to incarceration, the releasee remain at home during nonworking hours and have compliance with this condition monitored by telephone or electronic signaling devices; and

(iv) that the releasee permit a supervision officer to conduct a search of the releasee's person, or of any building, vehicle, or other area under the control of the releasee, at such time as that supervision officer shall decide, and to seize contraband found thereon or therein.

(3) If the Commission requires the releasee's participation in a drug-treatment program, the releasee must submit to a drug test within 15 days of release and to at least two other drug tests, as determined by the supervision officer. A decision not to impose this special condition, because available information indicates a low risk of future substance abuse by the releasee, shall constitute good cause for suspension of the drug testing requirements of 18 U.S.C. 3583(d).

(c) Changing conditions of release. (1) The Commission may at any time modify or add to the conditions of release if the Commission determines that such modification or addition is necessary to protect the public from further crimes by the releasee and provide adequate supervision of the releasee.

(2)(i) Except as provided in paragraph (c)(2)(ii), before the Commission orders a change of condition, the releasee shall be notified of the proposed modification or addition and, unless waived, shall have 10 days from receipt of such notification to comment on the proposed modification or addition. Following that 10-day period, the Commission shall have 21 days, exclusive of holidays, to determine whether to order such modification or addition to the conditions of release.

(ii) The 10-day notice requirement of paragraph (c)(2)(i) does not apply to a change of condition that results from a revocation hearing for the releasee, a determination that the modification or addition must be ordered immediately to prevent harm to the releasee or to the public, or a request from the releasee.

(d) *Application of release conditions to absconder.* A releasee who absconds from supervision prevents the term of supervision from expiring and the running of the term is tolled during the time that the releasee is an absconder. A releasee who absconds from supervision remains bound by the conditions of release, even after the date that the term of supervision originally was scheduled to expire. The Commission may revoke the term of supervision based on a violation of a release condition committed by such a releasee before the expiration of the term of supervision, as extended by the period of absconding.

(e) *Revocation for certain violations of release conditions.* If the Commission finds after a revocation hearing that a releasee has possessed a controlled substance, refused to comply with drug testing, possessed a firearm, or tested positive for illegal controlled substances more than three times over the course of one year, the Commission shall revoke the term of supervision and impose a term of imprisonment as provided at § 2.218. If the releasee fails a drug test, the Commission shall consider appropriate alternatives to revocation.

(f) *Supervision officer guidance.* The Commission expects a releasee to understand the conditions of release according to the plain meaning of those conditions and to seek the guidance of the supervision officer before engaging in conduct that may violate a condition of release. The supervision officer may instruct a releasee to refrain from particular conduct, or take specific steps to avoid violating a condition of release, or to correct an existing violation of a condition of release. The releasee's failure to obey a directive from the supervision officer to report on compliance with

such instructions may be considered as a violation of the condition described at paragraph (a)(4)(i) of this section.

(g) *Definitions.* As used in this section, the term –

(1) *Releasee* means a person who has been sentenced to a term of supervised release by the Superior Court of the District of Columbia;

(2) *Supervision officer* means a Community Supervision Officer of the District of Columbia Court Services and Offender Supervision Agency or United States Probation Officer;

(3) *Domestic violence crime* has the meaning given that term by 18 U.S.C. 3561, except that the term ‘court of the United States’ as used in that definition shall be deemed to include the District of Columbia Superior Court;

(4) *Approved offender-rehabilitation program* means a program that has been approved by the District of Columbia Court Services and Offender Supervision Agency (or the United States Probation Office) in consultation with a State Coalition Against Domestic Violence or other appropriate experts;

(5) *Certificate of release* means the certificate of supervised release delivered to the releasee under §2.203; and

(6) *Firearm* has the meaning given by 18 U.S.C. 921.

Notes and Procedures

■ 2.204-01. *Community Corrections Center Residence.* As a condition of supervised release, residence in a community corrections center may be required. Such residence in a community corrections center shall not generally exceed 120 days.

■ 2.204-02. *Drug, Alcohol, and Mental Health After-Care Condition.*

(a) Each releasee committed determined to be dependent on, or addicted to, drugs shall have the special drug condition imposed unless there are compelling reasons to the contrary. Such program may consist of in-patient or out-patient treatment.

(b) When a releasee appears to be in need of treatment for alcohol abuse, the Commission may impose a special condition requiring treatment for alcohol abuse. Such program may consist of in-patient or out-patient treatment.

(c) When a releasee appears to be in need of treatment in the community for a serious mental or emotional problem, the Commission may impose a special condition requiring such treatment. Such program may consist of in-patient or out-patient treatment.

(d) If the Supervision Officer, after analysis and study of a case, believes a drug, alcohol, or mental health aftercare condition is no longer necessary, the Supervision Officer may recommend to the Regional Commissioner that the condition be deleted.

■ 2.204-03. *Payment for Drug, Alcohol, or Mental Health After-Care.* The Regional Commissioner may include (as part of any drug, alcohol, or mental health aftercare condition) a requirement that the releasee pay all or part of the cost of in-patient treatment or outpatient treatment, as applicable. A payment obligation may only be imposed if the releasee's earnings (or projected earnings) so permit (after satisfaction of any court-imposed fine, restitution order, etc.) and if payment can be made without jeopardizing the releasee's ability to support his family and dependents, if any, as determined by the Supervision Officer. The primary purpose of a payment condition is to provide the releasee with a strong incentive to benefit from the program to which he is assigned. In each case, the releasee will be required to make payments directly to the service provider and to give his payment receipts to his Supervision Officer as evidence of compliance with the payment condition.

■ 2.204-04. *Use of Releasees as Informants.*

(a) *Introduction.* Because of the high risk of recidivism involved with exposure to a criminal environment, the Commission's general policy, as expressed as a condition of release, is that a releasee under the jurisdiction of the U.S. Parole Commission shall not associate with persons engaged in criminal activity nor work as an informant for a law enforcement agency. In this context, an informant is defined as an individual who associates with persons with criminal records or who are engaged in criminal activity for the purpose of furnishing information to, or acting as an undercover agent for, a law enforcement agency on a confidential basis. Under its authority to modify the conditions of release, the Commission may grant an exception and permit a releasee to serve as an informant in an exceptional case (*e.g.*, where such service would likely result in the conviction of a major criminal or where the security of the nation is involved).

(b) *Selection.* (1) When a releasee offers to cooperate with a law enforcement agency and the agency concerned wishes to utilize the services of the releasee, the agency director (or officially assigned designee) will contact the Regional Commissioner at least (except where emergency circumstances dictate otherwise) thirty (30) days prior to the proposed use of the releasee. NOTE: Since the Commission will not consider such requests without input from the appropriate Supervision Office, the agency should forward requests through the appropriate Chief Supervision Officer, who will, in turn, forward the request, along with his office's observations, opinions, and recommendations to the Commission. Included therein will be the determination by the appropriate Supervision Officer that the releasee is offering his services of his own free will.

(2) *Overview.* As part of the request to utilize the services of the releasee, the agency will furnish in writing an overview of the proposed utilization. Such overview will contain the agency's operating instructions to the releasee, the agency's proposed administrative controls, and an evaluation of the risk to the subject and plans to combat such risk. Such overview also will state why the potential benefit to the government outweighs the risk of the releasee's re-involvement with criminal associates. Request for consideration for the use of a releasee's services will specify the period of time (up to ninety [90] days) for which the services of the releasee are desired. [See Appendix 3A: Information Provided].

(3) *In-depth Briefing.* As part of the selection process, an agency representative is to conduct an in-depth briefing with the releasee concerning his relationship with the agency, the intended target, the operating

instructions, and the conditions imposed by the Parole Commission. The Chief Supervision Officer (or his designee) is designated as the Commission's representative and will arrange for and attend this briefing. At the conclusion of this meeting, a Letter of Agreement will be signed by all three parties and forwarded to the Parole Commission. [See Appendix 3B: Letter of Agreement].

(c) *Conditions and Operating Procedures.* (1) The releasee is not to participate in any otherwise criminal activity. "Otherwise criminal activity" is defined as activity that would constitute a crime under state or federal laws if engaged in by a private person acting without authority and approval of a law enforcement agency. [NOTE: An exception to this condition may be granted by the Regional Commissioner, but only with the concurrence of the Chairman (or another Commissioner designated by the Chairman)].

(2) The releasee is not to be used in any manner which might jeopardize his safety without prior approval of the United States Parole Commission.

(3) During the period of the releasee's services as an informant, the agency will be responsible for testing and assessing the relationship to ensure that the releasee is not violating his operational instructions or conditions. The agency will bring any violations promptly to the attention of the Commission. Additionally, any activity that would require a significant change in the operating instructions or conditions of this service will be brought to the immediate attention of the Commission. Approval by the Commission will be required before any change is implemented.

(4) Every thirty (30) days, and at the conclusion of the authorized period, the agency will provide a report, to include, in as much detail as possible, the extent of the releasee's cooperation and effectiveness in the investigation, the status of the case at that time, and the amount, if any, of financial remuneration or other consideration/reward provided to the releasee.

(d) *Approval.* (1) The appropriate Regional Commissioner may approve or disapprove such requests pursuant to the guidelines and procedures in this section. Information copies of all requests and final responses will be forwarded to the Chairman. Exception: when such requests involve an original jurisdiction case, the Regional Commissioner shall transmit the request, with his/her recommendation and vote, to the National Commissioners under the procedures of 28 C.F.R. 2.17.

(2) If the Regional Commissioner approves the request, the conditions of the releasee's cooperation will be set forth in a letter, under the signature of the Regional Commissioner, to the requesting law enforcement agency. A copy will also be sent to the appropriate Chief Supervision Officer.

(3) The releasee's services in this capacity are to be approved for a period not to exceed ninety (90) days, commencing as of the date of the Regional Commissioner's approval. In the event circumstances develop that would indicate that an extension of the specified period of services would be in the best interest of all concerned, the agency will provide a written request for such an extension, to include appropriate justification for the extension. Such request and justification shall be forwarded at least ten (10) days prior to the end of the specified term, unless emergency circumstances dictate otherwise. A copy of this request will also be sent to the appropriate Chief Supervision Officer.

(e) *Termination.* At the conclusion of the period of authorization, the Supervision Officer is to advise the releasee that such authorization has been terminated and that he is no longer authorized to act as an informant for the agency.

(f) *Note.* All U.S. Parole Commission correspondence concerning informants must be marked “Personal & Confidential, to be Opened by Addressee Only.”

■ 2.204-05. *Use of Methadone.* Commission approval is not required for methadone treatment where the community care agency and the Supervision Officer jointly agree on the need for such a program and that the case meets the following criteria: the releasee must be at least 18 years old; he must volunteer; abstinence methods must have been ineffective; and he must have medical clearance. Methadone maintenance is to be administered only by those agencies that are appropriately certified by the Drug Enforcement Administration and the Federal Drug Administration, and is to be employed only in conjunction with other appropriate supportive community care and supervision services.

■ 2.204-06. *Restriction on Use of Alcohol.* The Commission has determined that, whenever a special drug or alcohol aftercare condition is imposed, it will also prohibit any use of alcoholic beverages. The regular conditions prohibit "excessive" use of intoxicants. Therefore, if the Commission orders that a releasee participate in some form of aftercare for drug or alcohol abuse, that condition will bar any use of alcoholic beverages during or after treatment.

■ 2.204-07. *Association with Persons Having Criminal Records or Engaged in Criminal Conduct.*

(a) The Supervision Officer supervising the case shall have authority to grant or deny permission to a releasee regarding association with person(s) having a felony criminal record. A special condition requiring approval by the Regional Commissioner of such association shall supersede this authority. For the purposes of this provision, the term "criminal record" refers to a conviction for a felony or any other offense for which a term of imprisonment exceeding one year was, or could have been, imposed.

(b) Unless it is clear that the releasee knows that an associate has a felony criminal record (*e.g.*, they knew each other while in prison together), a warrant or summons charging a violation of this condition ordinarily should not be issued unless the releasee has first been given a warning by his Supervision Officer that the associate in question has a felony criminal record and that further association would be a violation of the release conditions.

(c) As to the condition prohibiting association with persons engaged in criminal activity, there is no need for such a warning before charging a violation of that condition, since prior criminal record is not a factor in that condition. Moreover, such a charge may be based on either felony or misdemeanor conduct.

(d) Where the Commission wishes to prevent a releasee from frequenting an establishment where forbidden associations are suspected, the Commission may impose a special condition that the releasee not visit the specific place in question.

■ 2.204-08. *Changing Conditions.*

(a) When a Supervision Officer wishes to propose a special condition, or revision of the existing conditions of supervision, he shall make such proposal on Parole Form F-1. The original of that form shall constitute notice to the releasee of his recommendation. In most instances he should discuss the matter with the releasee and present the notice in person. The notice should be dated at the time it is given to the releasee. Where the releasee agrees to the proposed revision he may so specify on the form and waive the

ten day period (to which he is entitled if he wishes to submit comments to the Commission relative to the proposal).

(b) If necessary, the notice may be mailed by certified mail and the ten-day period for comments begins on the date the notice is received by the releasee, as stated on the postal service document showing receipt. This date must be shown on the F-1 form sent to the Commission.

(c) Approval or disapproval of the proposal may be made at any time after the comments of the releasee are received, but must be made within 21 days, excluding holidays, of such receipt.

(d) The releasee himself may petition the Commission directly by writing a letter or similar communication to the Regional Commissioner. The Commission will normally ask for comments from the Supervision Officer before approving or disapproving the petition. The Commission is not required to respond within the 21 day period when the releasee petitions for modification of the conditions of his release.

(e) The Commission may add to or revise the conditions of release on the Commission's own motion, but will permit a ten-day period for the releasee to comment in writing and will normally also ask for responses (oral or written) from the Supervision Officer.

(f) The ten-day notice does not apply to the modification of conditions made (1) following a revocation hearing, (2) upon a finding that immediate modification of the conditions of release is required to prevent harm to the releasee or to the public or (3) in response to a request by the releasee (see § 2.204(b)(3)). If a finding is made that immediate modification of the conditions of release is required to prevent harm to the releasee or the public, the Commission must set forth on the Notice of Action the reasons for this finding (including the nature of the harm to be prevented) with specificity.

■ 2.204-09. *Drug Test*. The term "drug test" shall be deemed to include an "alcohol test." A Supervision Officer may order a releasee to submit to a breathalyzer or other alcohol test under the special drug condition.

■ 2.204-09. *Drug Testing*. Each releasee on whom a drug aftercare condition is imposed shall submit to a drug urinalysis test within 15 days of being placed on supervision and to at least two periodic drug tests thereafter as ordered by his Supervision Officer. The decision of the Commission not to impose a drug aftercare requirement waives this requirement.

■ 2.204-10. *Felony Registration and Similar Ordinances*. Certain communities have ordinances which call for registration with the police or other authority of residents who have a record of felony conviction. Other laws may specify that a convicted person may not drive an automobile or be issued certain licenses or that persons with a history of narcotic addiction must register under certain conditions and cannot be issued public licenses. Each Supervision Officer should be familiar with ordinances of this kind in the district and notify persons under supervision of their obligation to comply with such ordinances.

■ 2.204-11. *Physical Examination for Detection of Drug Abuse*.

(a) A Supervision Officer may direct a releasee under the "special drug aftercare condition" to permit reasonable examination of the releasee's person by the Supervision Officer (or other drug treatment

personnel) for the detection of drug abuse (*e.g.*, fresh needle marks). The purpose of this provision is to assist in early detection of certain forms of drug abuse so that proper counseling and treatment can be initiated. This procedure is intended as an additional, supplemental tool and not as a replacement for urine specimen analysis. In conducting such examinations, the following procedures apply:

- (1) Examinations are to be made with due concern for the dignity and privacy of the releasee.
- (2) Examinations under this provision should normally be limited to the arms, legs below the knees, head (including nose) and neck. Use of a magnifying glass to facilitate inspection is permitted. Only for good cause in extraordinary circumstances (and with the advance permission of the Regional Commissioner) may any more intrusive inspection be authorized.
- (3) Examinations should normally be made by a person of the same sex as the releasee. Where this is not feasible, a person of the same sex as the releasee must be present when such examination is conducted.
- (4) Since the primary purpose of the provision is early detection of drug abuse for treatment purposes, revocation consideration will not generally be based solely on evidence of such examination. Should evidence relating to such examination be submitted by a Supervision Officer as part of any application for revocation consideration, the Supervision Officer shall submit a separate statement citing the relevant experience/training of the person conducting such examination.
- (5) Use of force is not authorized. Refusal to submit to a reasonable examination or a drug test may be charged as a violation of the conditions of supervised release.

■ 2.204-12. *Illegal Drug Use.* The Commission's policy is one of "zero tolerance" regarding illegal drug use by releasees. The Supervision Officer shall advise each releasee that even the first illegal drug use will result in an intervention/sanction. The Supervision Officer shall report any instance of illegal drug use by any releasee to the Commission. The Supervision Officer shall also report the intervention/sanction imposed by the Supervision Officer for such drug usage and/or the intervention/sanction which the Supervision Officer recommends be imposed by the Commission.

■ 2.204-13. *Seizure of Contraband in Plain View.*

- (a) A Supervision Officer may require the releasee to surrender to him materials which the Supervision Officer believes may constitute contraband (*e.g.*, dangerous drugs, weapons) and which he observes in plain view in the course of his contacts with the releasee. The Commission shall be promptly notified of any such seizure of contraband. A receipt for any material confiscated must be given to the releasee.
- (b) Safety of all parties involved, or in the vicinity, is the prime consideration in the seizure of contraband. Thus, any use of force is prohibited and consent to the confiscation is required. Refusal of consent shall be a basis for a request by the Supervision Officer for a warrant.
- (c) Where possession of contraband material constitutes a criminal offense, such must be reported to the appropriate law enforcement authority with delivery to them of the contraband. Supervision Officers should obtain from the law enforcement authorities in their district instruction in proper identification and chain of custody procedures to permit use of the materials for criminal proceedings and/or revocation of supervised release.

(d) Contraband materials must be in plain view (open sight). Plain view cannot be the result of a search by the Supervision Officer. Thus, the Supervision Officer may not conduct a search (*e.g.*, enter rooms uninvited or open bureau drawers, glove boxes, or trunks of cars) to cause "plain view" of contraband articles.

■ 2.204-14. *Satisfaction of Court Orders [Including the Payment of Fines, Restitution Orders, Court Costs and Assessments, and Court Ordered Child Support or Alimony Payments]*. When a releasee is subject to an outstanding fine, restitution order, court costs and assessments, court ordered child support or alimony payment, and is unable to pay the obligation in one sum, the following procedures apply:

(a) The Supervision Officer will meet with the releasee to develop a written plan for the payment of the fine, restitution order, etc. The plan will include, among other things, a payment schedule and the amount to be paid at each installment. It will include also the following clause: "This plan, and the obligations described herein, are part of the conditions of my supervised release." The releasee will supply all financial information and records necessary to the development of the plan and will sign the plan, along with the Supervision Officer. A copy of the signed plan will be forwarded to the U.S. Parole Commission.

(b) As to the payment schedule and the amounts to be paid at each installment, the plan will include any relevant court ordered installment payment schedule. If no such installment payment schedule exists, one will be developed that takes into account, among other things, the amount of the fine [restitution order, etc.] and any interest and penalties due, as well as the releasee's employment status, earning ability, financial resources, and the economic burden that the payment of the obligation will impose on the releasee or his dependents. Where feasible, the installment payment term for fines and restitution orders should not exceed two years.

(c) When the releasee has an outstanding restitution order in addition to a fine or other financial obligation, the plan will give precedence to the satisfaction of the restitution order.

(d) If the releasee refuses to accept the terms of the plan in general, refuses to accept the installment payment schedule, and/or refuses to sign the plan, the U.S. Parole Commission will be notified. The U.S. Parole Commission will then resolve any outstanding disputes as to terms and installment payment schedules, complete the plan as necessary, and make the terms and schedules contained therein themselves a special condition of supervised release.

(e) Any modification of the plan will be reduced to written form and signed by the releasee and the Supervision Officer. A copy of the signed modification will be forwarded to the U.S. Parole Commission.

(f) If the releasee does not make a diligent effort to make the payments according to the schedule in the plan, the Supervision Officer will report such failure to the U.S. Parole Commission as a violation of the conditions of supervised release.

■ 2.204-15. *Emergency Placement in CCC (Community Corrections Center)*. When it is not practicable to obtain prior approval from the Commission, a Supervision Officer may, for good cause, place a releasee in a CCC for up to four days, provided the releasee consents in writing to such placement (use Form F-1). The Supervision Officer is to notify the Commission by phone or telefax on the next working day, and a written report (including Form F-1) is to be sent to the Commission promptly.

■ 2.204-16. *Possession of Weapons.* There may be exceptional cases in which the Commission might permit a partial waiver of the condition prohibiting a releasee from possession of a firearm or other dangerous weapon. No such permission may be considered, however, where the releasee is otherwise prohibited by federal, state, or local law from such possession. Bows and arrows, and "black powder" firearms (*i.e.*, antique and reproduction firearms) are "dangerous weapons" even though the releasee may otherwise lawfully possess such items. [Note: 26 U.S.C. 921(a)(16) excludes from the definition of "firearm" weapons manufactured before 1898, and authentic reproductions thereof.] A releasee may request, through the Supervision Office, permission from the Regional Commissioner to possess such weapons for sporting purposes. The Commission must be satisfied that the releasee has a legitimate use for such equipment, and that there is not an undue risk that the equipment will be used in a reckless or assaultive manner. A past history of assaultive behavior or mental illness, or a current problem with substance abuse, will be a sufficient reason to deny permission.

■ 2.204-17. *Home Detention.* Home Detention is approved by the Commission, but only as an alternative to incarceration. The term "incarceration" includes (1) pre-release placement in a community corrections center by the Bureau of Prisons, (2) post-release placement in a community corrections center by the U.S. Parole Commission, and (3) return to prison as for a violation of the conditions of release.

■ 2.204-18. *Search and Seizure Special Condition.*

(a) *Search Policy.* Searches by Supervision Officers are disfavored. Other techniques should be relied upon to monitor compliance with conditions of supervision and, when information exists that indicates possession of contraband or evidence of a crime, consideration should be given to referring the matter to an appropriate law enforcement agency for investigation. When there are no other alternatives, searches should be conducted only (1) pursuant to conditions of release that specifically permit such searches or (2) pursuant to the consent of the releasee freely and voluntarily given.

Searches conducted pursuant to valid search conditions have been held to be permissible as administrative searches pursuant to the Supreme Court's decision in *Griffin v. Wisconsin*, 483 U.S. 868 (1987). Search conditions are restrictions on the liberty of the releasee and do not grant the Supervision Officer the broader search powers of other law enforcement officers. Accordingly, Supervision Officers are not authorized to restrain third parties during a search. Officers should avoid searches where it is reasonably foreseeable that a third party or the releasee himself may present a danger. Likewise, an attempted search should be abandoned if a third party or the releasee refuses to cooperate.

The fruits of any search conducted pursuant to these guidelines may, if relevant, be used in the regular course of management of non-compliant behavior by the releasee. Seized items that are not contraband should be returned to the releasee as soon as practicable. Supervision Officers do not have arrest authority and must contact the Commission for the issuance of a warrant.

Supervision Officers who may participate in searches are encouraged to receive, if available, appropriate training from Federal, state, or local law agencies prior to participating in such searches.

(b) *Special Search Condition.*

(1) *Imposition of Search Condition.* A search condition ordinarily should be imposed only if requested by the Supervision Officer. A Supervision Officer should not routinely recommend that the Commission impose a special condition authorizing searches of persons under supervision. A Supervision

Officer should recommend such a special condition only in those cases in which the Officer determines, based upon the offense of conviction (including the nature and circumstances of the offense behavior) and background of the offender, that resort to such a condition is necessary to enforce the conditions of release or to protect the public.

(2) *Composition of Search Condition.*

(i) A special condition shall permit searches only of the releasee's person, residence, office or vehicle.

(ii) A special condition shall permit searches only if the Supervision Officer has a reasonable belief that contraband or evidence of a violation of the conditions of release may be found.

(iii) A special condition shall provide that any searches be conducted in a reasonable manner and at a reasonable time.

(iv) A special condition shall require the releasee to notify any other residents of his home that areas of the home may be subject to search.

(v) A special condition shall provide that failure to permit a search may be grounds for revocation.

(3) *Model Search Condition.* The Commission may utilize the following model special search condition: “The releasee shall submit his person, residence, office or vehicle to a search, conducted by a Supervision Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the releasee shall warn any other residents that the premises may be subject to searches pursuant to this condition.”

(c) *Consent Searches.*

(1) A Supervision Officer may conduct a search in the absence of a special condition if the releasee gives written consent for the search. To ensure that consent is freely and voluntarily given, the Supervision Officer shall advise the releasee before the consent is given that the consent may be refused without adverse consequences, such as revocation of supervised release. A search based upon consent may not exceed the scope of the consent.

(2) A Supervision Officer may utilize the following model consent: I, _____, hereby consent to permit _____, a Supervision Officer, to search my _____. My consent is freely and voluntarily given. I understand that I am not required to consent to the search and that my refusal to consent may not be the basis of a revocation of my release or other adverse consequences, though the Parole Commission may consider such refusal in connection with a modification of conditions of release.

(d) *General Rules for Searches.*

- (1) A search of the person, residence, office or vehicle of a releasee may be conducted by a Supervision Officer only upon consent or pursuant to a special condition of release, as provided by these guidelines.
- (2) No random, routine, or periodic searches, other than for the purpose of urinalyses as part of a drug treatment program, shall be conducted unless specifically authorized by a special condition of release.
- (3) A search shall not be conducted if the contemplated scope of the search will result in other than minor damage to the property to be searched.
- (4) A search shall not be conducted if there is a reasonably reliable information that suggests that the conduct of the search would subject an officer or any other person to a danger of harm.

(e) *Approval of Searches.*

- (1) A search shall be conducted only upon the written approval of an application for such search. The application shall be in writing, shall be reviewed by the Supervision Officer's supervisor, and shall be approved in writing by the Chief Supervision Officer of the district or his or her designee, which may not be the officer's supervisor. The application shall be approved prior to the officer's seeking consent or, in the case of a search pursuant to a search condition, prior to the search.
- (2) If exigent circumstances make it impracticable to present the application or to give approval in writing, the application or approval may be presented orally and reduced to writing at the earliest opportunity. Exigent circumstances exist if it is reasonably foreseeable that delay will result in danger to any individual or the public.
- (3) The application for the search shall contain the following information:
 - (i) The name, address, type and term of supervision, offense of conviction, and relevant background of the person to be searched;
 - (ii) whether the search would be pursuant to a search condition or consent;
 - (iii) a description (address, license number, etc.) of the place to be searched;
 - (iv) a specific description of the grounds to believe that the search will yield contraband or evidence of a violation of the conditions of release;
 - (v) a description of the general nature of the contraband or evidence sought;
 - (vi) a description of any potential dangers the search may present to the Supervision Officer or others;

- (vii) the assistance to be provided by other law enforcement agencies or the reasons why such assistance is unavailable, unnecessary, or impracticable;
 - (viii) a description of any contemplated minor damage to the property that may be caused by the search;
 - (ix) an explanation of why the matter should not be referred to an appropriate law enforcement agency for investigation; and
 - (x) an explanation of why alternatives to conducting a search are inappropriate or impracticable.
- (4) Approval of a search should, as specifically as is practicable, describe the place to be searched, the object of the search, the scope of the search approved, and the contemplated assistance from other law enforcement agencies.
- (5) The application, approval or rejection, and any consent form shall be filed in the Supervision Office.
- (f) *Conduct of Searches.*
- (1) An officer conducting an approved search should take necessary safety precautions, including, but not limited to, the following;
- (i) conducting the search with one or more other Supervision Officers;
 - (ii) utilizing the assistance of other law enforcement officers for protection while conducting the search, taking possession of any dangerous contraband seized during the search, and arrest of a releasee believed to have violated the law;
 - (iii) carrying firearms, if authorized, during the search; and
 - (iv) conducting an initial security sweep of the premises to ascertain the presence of third parties or other hazards.
- (2) A Supervision Officer is not authorized to detain or to restrain third parties. If third parties are present who may present a risk to any person conducting the search or to the releasee, or if the officer becomes aware of any other reasonably foreseeable danger of harm to any person, the officer should abandon the search.
- (3) The search should be conducted in accordance with the approval and in a reasonable manner. The search should be no more intensive than is reasonably necessary to locate the objective of the search.
- (4) If a search is abandoned because of danger to the officer or another person, and there are reasonable grounds to believe that there exists a danger to the public, the officer shall notify the appropriate law enforcement authority as soon as possible.

(g) *Plain View "Searches."* Contraband that falls within the plain view of a Supervision Officer who is justified being in the place where the contraband is seen may properly be seized by the Supervision Officer. It must be immediately apparent that the item is contraband with respect to the releasee.

(h) *Seizures.*

- (1) An item that is located during an approved search or observed in plain view during that search may be seized if the Supervision Officer has reasonable grounds to believe that the item is contraband or constitutes evidence of a violation of a condition of release. If the item is not contraband, but the Supervision Officer has reasonable grounds to believe that it constitutes evidence of a violation of the conditions of release, the releasee should be given a receipt for the item and the item should be returned after it is no longer needed by the Commission.
- (2) A careful record must be kept regarding the chain of custody of any item seized.
- (3) Contraband should be delivered to an appropriate law enforcement agency as soon as practicable. Pending such delivery, the Supervision Officer should take necessary measures to safeguard the contraband.

(i) *Reports of Search and Seizures.* The Supervision Officer shall prepare a narrative report of the circumstances and results of a search, including a search that is abandoned, file such report in the Supervision Office, and provide copies to the Chief Supervision Officer and the United States Parole Commission.

■ 2.204-19. *Commission Policy With Respect to Supervised Releasee Engaging in Legal or Paralegal Employment.* The Commission will generally disapprove employment of a legal or paralegal nature when the releasee's record includes any form of fraud, deceit, or breach of trust. In other cases, approval may be withheld if other case-specific factors (including a lack of appropriate acceptance of responsibility) indicate that the releasee cannot be counted on to refrain from unlawful practices. Approval of such employment will not, by itself, authorize any form of association with ex-felons. Supervision Officers are directed to recommend a special condition requiring such releasee to seek another line of employment, if the releasee has not fully and truthfully reported the nature and extent of his activities.

■ 2.204-20. *Computer Special Condition.* If the circumstances warrant, the Commission may impose a condition restricting a releasee's possession and use of certain computer equipment. For example, if the Commission believes there exists a significant risk that a releasee may use an on-line computer service to engage in criminal activity or to associate with individuals who are likely to encourage the releasee to engage in criminal activity, it may impose a condition restricting the releasee from possession or use of certain computer equipment. The particular form of the computer-related condition will depend upon individual case circumstances. Given that computers are used for numerous legitimate purposes, the least restrictive condition appropriate (consistent with the need for restriction and the need to monitor the releasee's compliance with the restriction) shall be used.

An example of a condition restricting the releasee from possession or use of a computer with access to an "on line" computer service is set forth below:

"You shall not possess or use a computer with access to any "on line computer service" at any location (including employment) without the prior written approval of the U.S. Parole Commission. This includes any Internet service provider, bulletin board system, or any other public or private computer network. Any approval by the Commission shall be subject to any conditions set by the Commission with respect to that approval.

In addition, you shall not possess or use any data encryption technique or program.

In addition, you shall (i) consent to your Supervision Officer and or Supervision service representative conducting periodic unannounced examinations of your computer(s) equipment which may include retrieval and copying of all data from your computer(s) and any internal or external peripherals to ensure compliance with this condition and/or removal of such equipment for the purpose of conducting a more thorough inspection; and (ii) consent at the direction of your Supervision Officer to having installed on your computer(s), at your expense, any hardware or software systems to monitor your computer use."

Additional, supplementary computer-related conditions may be imposed, where warranted, on a case-by-case basis. Examples of such conditions are set forth below:

"You shall refrain from accessing via computer any "material" that relates to the activity in which you were engaged in committing the instant offense or probation or supervised release violation behavior, namely _____."

"You shall maintain a daily log of all addresses you access via any personal computer (or other computer used by you), other than for authorized employment, and make this log available to your Supervision Officer".

"You shall provide all personal/business phone records to your Supervision Officer upon request. Further, you shall provide your Supervision Officer written authorization to request a record of your outgoing or incoming phone calls from any phone service provider."

"You shall not possess or use a computer that contains an internal modem and or possess an external modem without prior written consent of the Parole Commission."

"You shall not possess or use any computer; except that you may, with the prior approval of your Supervision Officer, use a computer in connection with authorized employment."

"You shall consent to third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon you."

■ 2.204-21. *Graduated Sanctions*. Graduated sanctions may include community service, curfew with electronic monitoring, and/or a period of time in a community corrections center as set forth in the schedule of graduated sanctions adopted by the Court Services and Offender Supervision Agency and approved by the Commission.

■ 2.204-22. *Revocation for Failure to Make Court-Ordered Payment*. In determining whether revocation is appropriate for failure to make a court-ordered financial payment, the Commission shall consider the

releasee's employment status, earning ability, financial resources, and any other special circumstances that may have a bearing on the matter. Revocation shall not be ordered unless the releasee is found to be deliberately evading or refusing compliance.

■ 2.204-23. *Supervision of HIV-Positive Releasees.* In the case of a releasee who has been identified as infected with the Human Immunodeficiency Virus (HIV), the supervision officer shall take the following steps:

(a) Evaluate the releasee immediately upon release to develop a case plan with education, counseling, and (where appropriate) treatment components.

(b) Explain to the releasee the methods of HIV transmission and the measures for preventing such transmission.

(c) Instruct the releasee that it is important for him to make disclosure of his HIV infection to prospective sex partners and other persons in danger of becoming infected by him. Inform the releasee that he may be subject to civil or criminal liability for transmission of HIV to another person.

(d) In a manner consistent with state confidentiality laws, refer the releasee (1) to resources for medical treatment and (2) to state or local health departments, self-help agencies, or other community organizations and networks who provide counseling to persons with AIDS or AIDS-related conditions.

(e) To the extent permitted by state law, notify the appropriate state or local health department that the releasee is HIV-positive.

(f)(1) If the supervision officer is aware of any specific person who is exposed to a medically recognized type of risk of infection from the releasee and believes that such person has not been notified of such risk, consult with the releasee's physician; health care provider; and, if necessary, with the state or local health authorities to determine if they are able and willing to provide a third party warning to such person.

(2) If such a warning is not prohibited by state law and if the releasee's physician, health care provider, and state and local health authorities are unable or unwilling to make such a warning, make a discreet and confidential warning of the releasee's condition to the person at risk and advise that person of one or more health professionals or organizations who can provide counseling.

(g) If a violator warrant is issued, notify the United States Marshal that the releasee is HIV-positive.

■ **§ 2.205 CONFIDENTIALITY OF SUPERVISED RELEASE RECORDS.**

(a) Consistent with the Privacy Act of 1974 (5 U.S.C 552a(b)), the contents of supervised release records shall be confidential and shall not be disclosed outside the Commission and CSOSA (or the U.S. Probation Office) except as provided in paragraphs (b) and (c) of this section.

(b) Information pertaining to a releasee may be disclosed to the general public, without the consent of the releasee, as authorized by § 2.37.

(c) Information other than as described in § 2.37 may be disclosed without the consent of the releasee only pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552a(b)) and the implementing rules of the Commission or CSOSA, as applicable.

■ § 2.206 TRAVEL APPROVAL AND TRANSFERS OF SUPERVISION.

(a) A releasee's supervision officer may approve travel outside the district of supervision without approval of the Commission in the following situations:

(1) Trips not to exceed thirty days for family emergencies, vacations, and similar personal reasons;

(2) Trips, not to exceed thirty days, to investigate reasonably certain employment possibilities; and

(3) Recurring travel across a district boundary, not to exceed fifty miles outside the district, for purpose of employment, shopping, or recreation.

(b) Specific advance approval by the Commission is required for all foreign travel, employment requiring recurring travel more than fifty miles outside the district, and vacation travel outside the district of supervision exceeding thirty days. A request for such permission shall be in writing and must demonstrate a substantial need for such travel.

(c) A special condition imposed by the Commission prohibiting certain travel shall apply instead of any general rules relating to travel as set forth in paragraph (a) of this section.

(d) The district of supervision for a releasee under the supervision of CSOSA shall be the District of Columbia, except that for the purpose of travel permission under this section, the district of supervision shall include the D.C. metropolitan area as defined in the certificate of supervised release.

(e) A supervised releasee who is under the jurisdiction of the Commission, and who is released or transferred to a district outside the District of Columbia, shall be supervised by a U.S. Probation Officer pursuant to 18 U.S.C. 3655.

(f) A supervised releasee may be transferred to a new district of supervision with the permission of the supervision offices of both the transferring and receiving district, provided such transfer is not contrary to instructions from the Commission.

Notes and Procedures

■ 2.206-01. *"Fifty Miles Outside District" Defined.* For the purposes of this section, "fifty miles outside the district" means fifty miles outside the boundaries of the D.C. metropolitan area (as defined in the certificate of supervised release).

■ 2.206-02. *Travel Outside the District Which Requires Approval of the Commission.*

(a) Travel decisions under subsection (b) may be made by an analyst or examiner when there is concurrence between the analyst or examiner and the Supervision Officer. Travel decisions shall be made

by the Regional Commissioner when there is not a concurrence between the Supervision Officer and U.S. Parole Commission staff member recommendation.

(b) Travel as part of transfer to another district does not require Commission approval, but evidence of the completed transfer should be sent to the originating region. Travel to Alaska, Hawaii, and U.S. Territories is not considered to be foreign travel.

■ 2.206-03. *Temporary Surrender of Passport.* The Supervision Officer may require the releasee to surrender his passport for any time up to the duration of supervision if the Officer believes that a parolee may take unauthorized trips outside the United States (*e.g.*, a drug offender who is suspected of traveling abroad to arrange new importation ventures). If the releasee refuses to surrender his passport, the Officer may contact the Commission and request that a special condition be added. The Regional Commissioner shall determine whether a reasonable basis for the proposed condition appears to exist. (The Officer should, when the passport is surrendered, notify the nearest U.S. passport office so that the releasee cannot obtain a replacement.)

■ 2.206-04. *Supervision Officer's Recommendation Relative to Foreign Travel.* Certain foreign countries prohibit entry of convicted felons. It is the responsibility of the Supervision Officer, prior to making a favorable recommendation to the Commission to authorize foreign travel, to ascertain that such travel is not contrary to the law of the country being entered.

■ § 2.207 SUPERVISION REPORTS TO COMMISSION.

A regular supervision report shall be submitted to the Commission by the supervision officer after the completion of 12 months of continuous community supervision and annually thereafter. The supervision officer shall submit such additional reports and information concerning both the releasee, and the enforcement of the conditions of supervised release, as the Commission may direct. All reports shall be submitted according to the format established by the Commission.

Notes and Procedures

■ 2.207-01. *In General.* Exclusive authority and responsibility for decisions relating to imposition of reasonable conditions of supervised release, modification of the conditions of supervised release, and termination and revocation of supervised release have been vested in the U.S. Parole Commission by statute. The Supervision Officer acts as the agent of the Parole Commission in the performance of duties relating to the supervision of a releasee. The Supervision Officer is authorized to exercise only such authority over a releasee as has been delegated to him by the Parole Commission by rule or special condition of release.

■ 2.207-02. *Reporting of Violations.* The following guidelines are established by the U.S. Parole Commission for use by Supervision Officers in reporting alleged violations of supervised release.

(a) *Criminal Conduct.* The Supervision Officer shall immediately report to the Parole Commission the arrest of a releasee for a new criminal offense. The Supervision Officer shall not wait for a conviction or final disposition to report the arrest. Any dispositional information shall be submitted as soon as it becomes available.

(b) *Administrative Violations.* The Parole Commission delegates to the Supervision Officer discretion as to whether to report administrative violations [and minor law violations (such as traffic infractions) that do not result in an arrest] immediately, except that any violation shall be reported immediately under the following circumstances:

(1) The releasee fails to report to his Supervision Officer within 10 days after his release and his whereabouts is unknown.

(2) The releasee leaves the limits fixed by his certificate of release without the permission of the Supervision Officer and fails to return or contact his Supervision Officer within 15 days, or leaves the continental United States for any period of time without the permission of the Parole Commission, or violates a special condition of release regarding travel.

(3) The releasee's whereabouts are unknown for more than 30 days.

(4) The releasee fails to submit written monthly reports for 2 consecutive months even though his whereabouts are known to the Supervision Officer.

(5) The releasee enters into an agreement to act as an informant or special agent for a law enforcement agency without advanced approval of the Parole Commission.

(7) *Reporting of Drug Use or Possession.* The releasee unlawfully uses or possesses a controlled substance. Any instance of illegal drug use or possession by a releasee shall be reported by the Supervision Officer to the Commission. The Supervision Officer shall also report the intervention/sanction imposed by the Supervision Officer for such drug usage and/or the intervention/sanction which the Supervision Officer recommends be imposed by the Commission.

(8) The releasee continues to associate with persons who have a criminal record after the releasee has been directed specifically by the Supervision Officer to discontinue the association.

(9) The releasee possesses a firearm or other dangerous weapon without the approval of the Commission.

(10) The releasee violates any special condition of release.

(11) Use of a graduated sanction. When a graduated sanction is imposed by the Supervision Officer for any violation, the Supervision Officer shall promptly report in writing to the Commission describing the violation and sanction imposed.

(c) *Pattern of Administrative Violations.* The Supervision Officer shall report to the Commission immediately in writing any violation of the conditions of supervised release if, in the opinion of the Supervision Officer, the violation is part of a continuing pattern of infractions or is indicative of a serious adjustment problem likely to culminate in criminal activity. The report should contain the Supervision Officer's recommended action (*e.g.*, warrant, summons, reprimand, modification of conditions).

(d) Violations which must be reported immediately shall be reported by a special report. Any violation that is not reported immediately shall be reported on the yearly Supervision Progress Report.

■ § 2.208 TERMINATION OF A TERM OF SUPERVISED RELEASE.

(a) The Commission, in its discretion, may terminate a term of supervised release and discharge the releasee from further supervision at any time after the expiration of one year of supervised release, if the Commission is satisfied that such action is warranted by the conduct of the releasee and the interest of justice.

(b) Two years after release on supervision, and at least annually thereafter, the Commission shall review the status of each releasee to determine the need for continued supervision. In calculating such two-year period there shall not be included any period of release prior to the most recent release, nor any period served in confinement on any other sentence. A review shall also be conducted whenever termination of supervision is specially recommended by the releasee's supervision officer. If the term of supervised release imposed by the court is two years or less, termination of supervision shall be considered only if specially recommended by the releasee's supervision officer.

(c) In determining whether to grant early termination of supervision, the Commission shall calculate for the releasee a Salient Factor Score under § 2.20, and shall apply the following early termination guidelines, provided that case-specific factors do not indicate a need for continued supervision:

(1) For a releasee classified in the very good risk category and whose current offense did not involve violence, termination of supervision may be ordered after two continuous years of incident-free supervision in the community.

(2) For a releasee classified in the very good risk category and whose current offense involved violence other than high level violence, termination of supervision may be ordered after three continuous years of incident-free supervision in the community.

(3) For a releasee classified in the very good risk category and whose current offense involved high level violence (without death of victim resulting), termination of supervision may be ordered after four continuous years of incident-free supervision in the community.

(4) For a releasee classified in other than the very good risk category, whose current offense did not involve violence, and whose prior record includes not more than one episode of felony violence, termination of supervision may be ordered after three continuous years of incident-free supervision in the community.

(5) For a releasee classified in other than the very good risk category whose current offense involved violence other than high level violence, or whose current offense did not involve violence but the releasee's prior record includes two or more episodes of felony violence, termination of supervision may be ordered after four continuous years of incident-free supervision in the community.

(6) For releasees in the following categories, release from supervision prior to five years may be ordered only upon a case-specific finding that, by reason of age, infirmity, or other compelling factors, the releasee is unlikely to be a threat to the public safety:

(i) A releasee in other than the very good risk category whose current offense involved high level violence;

(ii) A releasee whose current offense involved high level violence with death of victim resulting; and

(iii) A releasee who is a sex offender serving a term of supervised release that exceeds five years.

(7) The terms *violence* and *high level violence* are defined in § 2.80. The term *incident-free supervision* means that the releasee has had no reported violations, and has not been the subject of any arrest or law enforcement investigation that raises a reasonable doubt as to whether the releasee has been able to refrain from law violations while under supervision.

(d) Except in the case of a releasee covered by paragraph (c)(6) of this section, a decision to terminate supervision below the guidelines may be made if it appears that the releasee is a better risk than indicated by the salient factor score (if classified in other than the very good risk category), or is a less serious risk to the public safety than indicated by a violent current offense or prior record. However, termination of supervision prior to the completion of two years of incident-free supervision will not be granted in any case unless case-specific factors clearly indicate that continued supervision would be counterproductive to the releasee's rehabilitation.

(e) A releasee with a pending criminal charge who is otherwise eligible for an early termination from supervision shall not be discharged from supervision until the disposition of such charge is known.

(f) Decisions on the early termination of a term of supervised release for an offender sentenced under the YRA shall be made under the provisions of this section. If the Commission terminates the term of supervised release before the expiration of the term, the youth offender's conviction is automatically set aside and the Commission shall issue a certificate setting aside the conviction. See D.C. Code 24-906(c), (d). The set-aside certificate shall be issued in lieu of the certificate of discharge described in § 2.209.

■ § 2.209 ORDER OF TERMINATION.

When the Commission orders the termination of a term of supervised release, it shall issue a certificate to the releasee granting the releasee a full discharge from his term of supervised release. The termination and discharge shall take effect only upon the actual delivery of the certificate of discharge to the releasee by the supervision officer, and may be rescinded for good cause at any time prior to such delivery.

■ § 2.210 EXTENSION OF TERM.

(a) At any time during service of a term of supervised release, the Commission may submit to the Superior Court a motion to extend the term of supervised release to the maximum term authorized by law, if less than the maximum authorized term was originally imposed. If the Superior Court grants the Commission's motion prior to the expiration of the term originally imposed, the extension ordered by the court shall take effect upon issuance of the order.

(b) The Commission may submit the motion for an extension of a term of supervised release if the Commission finds that the rehabilitation of the releasee or the protection of the public from further crimes by the releasee is likely to require a longer period of supervision than the court originally contemplated. The Commission's grounds for making such a finding shall be stated in the motion filed with the court.

(c) The provisions of this section shall not apply to the Commission's determination of an appropriate period of further supervised release following revocation of a term of supervised release.

■ § 2.211 SUMMONS TO APPEAR OR WARRANT FOR RETAKING RELEASEE.

(a) If a releasee is alleged to have violated the conditions of his release, and satisfactory evidence thereof is presented, a Commissioner may:

(1) Issue a summons requiring the releasee to appear for a probable cause hearing or local revocation hearing; or

(2) Issue a warrant for the apprehension and return of the releasee to custody.

(b) A summons or warrant under paragraph (a) of this section may be issued or withdrawn only by a Commissioner.

(c) 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 the violations, in the opinion of a Commissioner, requires such issuance. In the case of any releasee who is charged with a criminal offense and who is awaiting disposition of such charge, issuance of a summons or warrant may be:

(1) Temporarily withheld;

(2) Issued by the Commission and held in abeyance;

(3) Issued by the Commission and a detainer lodged with the custodial authority; or

(4) Issued for the retaking of the releasee.

(d) A summons or warrant may be issued only within the maximum term or terms of the period of supervised release being served by the releasee, except as provided for an absconder from supervision in § 2.204(i). A summons or warrant shall be considered issued when signed and either:

(1) Placed in the mail; or

(2) Sent by electronic transmission to the appropriate law enforcement authority.

(e) The issuance of a warrant under this section operates to bar the expiration of the term of supervised release. Such warrant maintains the Commission's jurisdiction to retake the releasee either before or after the normal expiration date of the term, and for such time as may be reasonably necessary for the Commission to reach a final decision as to revocation of the term of supervised release.

(f) A summons or warrant issued pursuant to this section shall be accompanied by a warrant application (or other notice) stating:

(1) The charges against the releasee;

(2) The specific reports and other documents upon which the Commission intends to rely in determining whether a violation of supervised release has occurred and whether to revoke supervised release;

(3) Notice of the Commission's intent, if the releasee is arrested within the District of Columbia, to hold a probable cause hearing within five days of the releasee's arrest;

(4) A statement of the purpose of the probable cause hearing;

(5) The days of the week on which the Commission regularly holds its dockets of probable cause hearings at the Central Detention Facility;

(6) The releasee's procedural rights in the revocation process; and

(7) The possible actions that the Commission may take.

(g) In the case of an offender who is serving concurrent terms of parole and supervised release under the Commission's jurisdiction, the Commission may take any action permitted by this section on the basis of one or more of the terms (e.g., the Commission may issue warrants on both terms, and order that the first warrant should be executed, and that the second warrant should be placed as a detainer and executed only when the offender is released from the prison term that begins with the execution of the first warrant). The Commission may conduct separate revocation hearings, or consider all parole and supervised release violation charges in one combined hearing and make dispositions on the parole and supervised release terms. If the Commission conducts separate revocation hearings and revokes parole or supervised release at the first hearing, the Commission may conduct the subsequent hearing on the same violation behavior as an institutional hearing.

Notes and Procedures

■ 2.211-01. *Request for Warrant or Summons.*

(a) A supervision officer must submit a written request (with supporting documentation) for issuance of a warrant or summons. A case analyst will review the request and may temporarily defer action on the request pending the supervision officer's submission of an arrest report or other critical supporting information. However, the case analyst shall make a recommendation within three business days of receipt of the request. If a supervision officer's report indicates a violation of the conditions of release, but the

officer does not explicitly request a warrant or summons, the case analyst may initiate the request for issuance of a warrant or summons. Note: A request for the issuance of a warrant in a public safety case is handled in accordance with 2.211-04(b).

(b) If the case analyst recommends the issuance of a warrant or summons, the case is submitted to a Commissioner for decision. If the case analyst does not concur with a Supervision Officer's request for issuance of a warrant or summons, the file is reviewed by the Case Services Administrator or Deputy Case Services Administrator, who may decline issuance of the warrant or summons without further review by a Commissioner. If the Case Services Administrator (or Deputy) believes issuance of a warrant or summons is appropriate, the file is returned to the case analyst for submission of the warrant or summons request to a Commissioner for decision.

(c)(1) The decision on issuance of the warrant or summons will be made within five business days of receipt of the request. The case analyst will notify the supervision officer of a warrant or summons declination in writing, and indicate in the letter whether the declination was by a Commissioner or the Case Services Administrator (or Deputy). If the reason for the declination is the absence of sufficient supporting documentation, the case analyst will list the required information and inform the supervision officer that a new request for a warrant or summons may be submitted. Following a decision denying the issuance of a warrant or summons, the submission of another request with proper supporting documentation will be considered as an original request.

(2) In the case of declination by the Case Services Administrator (or Deputy), the Director of the Court Services and Offender Supervision Agency may obtain reconsideration of any warrant or summons declination by making a written request to the Chairman of the Parole Commission.

(d) *Preference for CCC Placement/Intermediate Sanctions.* In the case of administrative violations, modification of the conditions of release to require a community corrections center placement or similar placement is generally to be preferred to commencement of revocation proceedings. If the supervision officer requests the issuance of a warrant or summons for alleged administrative violations, the supervision officer must state in the request whether intermediate sanctions were used to address the releasee's behavior, and if not, why such sanctions were not so employed.

■ 2.211-02. *Summons Issuance.*

(a) A summons to appear at a revocation hearing may be issued if, in the opinion of the Regional Commissioner, incarceration pending revocation proceedings is not warranted by the frequency or seriousness of the alleged violation or violations, the releasee is not likely to fail to appear for revocation proceedings, and the releasee does not constitute a danger to himself or others. The summons shall state (on the reverse side) the charges to be considered at the hearing. A summons may be served by certified mail to the releasee, return receipt requested, or may be served in person by a U.S. Marshal.

(b) A summons may also be issued to require the appearance of the releasee at a probable cause hearing. In such cases, the words "revocation hearing" must be struck from the summons form and "probable cause hearing" typed above the stricken words. The probable cause hearing will then be conducted as usual, except that if probable cause is found the Regional Commissioner may issue a warrant or a summons to appear at a revocation hearing. Further, if revocation is ordered following the hearing, a warrant must be issued to authorize the marshal to take the alleged violator into custody.

(c) In limited cases where a summons to a local revocation hearing appears appropriate, but the alleged violator may become a flight risk once advised of a hearing examiner's recommendation to revoke supervised release, a summons may be issued along with the following procedure: A warrant may be signed and carried by the hearing examiner with written instructions to issue the warrant at the conclusion of the hearing if the examiner enters a recommendation calling for revocation and return to prison. The examiner shall issue the warrant after consultation with a Regional Commissioner by handing it to the U.S. Marshal or any officer authorized to serve criminal process, together with written instructions to assume custody without delay. This procedure is designed to make possible the issuance of a summons in doubtful cases and is not to be employed as a standard precaution whenever a summons is issued.

■ 2.211-03. *Warrant Application.*

(a) When satisfactory evidence is received indicating that a supervised releasee has violated the conditions of his release to the extent that a warrant should be issued and it can be issued timely, a warrant application is prepared. Charges on the warrant application should be numbered and listed chronologically (beginning with the earliest charge) with each numbered charge limited to one distinct violation.

(b) Charging a criminal or administrative violation that previously was passed over or resulted in a sanction less than revocation (*e.g.*, reprimand, modification of the conditions of release, or reinstatement) is appropriate when all the violations, taken together, show a pattern of violation that may warrant revocation and, in the case of criminal conduct, to permit application of the multiple offense rule in § 2.20, Chapter 13. *Notes:* (1) A previously considered violation may not be the sole basis for revocation; (2) A previously considered violation (including a previously considered conviction) may not, by itself, be used to deny a probable cause hearing or local revocation hearing;

(c) If (1) the releasee is awaiting trial or sentencing on new charges, (2) the supervised release expiration date is less than 90 days away, and (3) the Commission desires that the releasee be continued on supervision, the warrant shall be sent to the Supervision Officer with instructions to hold the warrant in abeyance until further instructions from the Commission. The Supervision Officer shall be instructed to inform the Commission as soon as the local charges are resolved, at which time a decision will be made regarding the status of the warrant.

2.211-04. *Warrant Issuance in Criminal Cases/Public Safety Cases.*

(a) In the case of a pending criminal proceeding, issuance or execution of the warrant may be delayed pending disposition of local criminal charges, even if the releasee is released on bond, unless (1) there are significant administrative violations warranting warrant issuance, or (2) the case qualifies as a public safety case.

(b) *Public Safety Case.* If the releasee is alleged to have committed a crime of violence and there appears to be a risk of future violent crime, a warrant should be issued with instructions for the immediate arrest of the releasee as soon as the releasee is released from local custody. (*See instruction #1 or #3 on Form H-24, depending on the circumstances.*) Such a decision also may be warranted where the offense charged is not a crime of violence if the circumstances indicate that the releasee is a particularly poor risk for continued release.

(b) A decision must be made within 24 hours upon receipt of a warrant request in a public safety case. The "satisfactory evidence" requirement of 28 C.F.R. 2.211(a) would be met by the fact of arrest plus a reasonably specific written or oral report of the circumstances of the alleged crime and the nature of the evidence. If additional evidence is later available to support the violation charge, the Supervision Officer should be instructed to secure that evidence for presentation before the probable cause hearing. As soon as the warrant is signed and placed in the mail, the Commission must send a telefax to the U.S. Marshal and Supervision Officer, advising of the warrant issuance and conveying the appropriate instructions.

(c) A telephone request may be accepted if strictly necessary and the Commission is assured that the Supervision Officer can obtain sufficient evidence of violation for the probable cause hearing. If a warrant is issued upon a telephone request, the warrant application will list each charge "*per telephone call from Supervision Officer [name] on [date], based upon [e.g., arrest report dated . . . etc.]*". The Supervision Officer shall telefax a written request for the warrant by the close of business on the same day and should be instructed to follow up with any additional information by written report as soon as possible.

■ 2.211-05. *Criteria for Warrant Issuance.* A warrant should be issued when the releasee's violation(s) indicates that continuance on supervised release is incompatible with the welfare of society or would promote disrespect for the supervised release system. In the case of a new criminal conviction (other than for a minor offense), a warrant should be issued unless the Regional Commissioner finds good cause for non-issuance of the warrant, and states his reasons therefor in writing.

■ 2.211-06. *Mechanics of Alleging a Supervised Release Violation.* A warrant application serves two functions: (1) it advises the releasee of the violation with which he is charged and the evidence for that violation, and (2) it provides (at the probable cause hearing and at the revocation hearing) allegations of violation containing simple, accurate, and complete statements of fact. Five elements are covered in each warrant application charge. To provide uniformity, these elements are approached in the same sequence for all charges of violation. The mechanics of alleging a violation are set forth below. It should be remembered that drafting a warrant application is one place where a certain amount of repetition achieves clarity. Unless the specific acts are so intertwined that they are supported by identical evidence, they should be separately stated.

1. When [on] [on or about] [June 3, 2000] [from on or about June 3, 2000 to on or about June 21, 2000]
2. Who [subject] [John J. Jones]
3. What [committed a criminal act (burglary) (driving a car without owner's permission)] [left his place of residence] [left his employment] [failed to file monthly reports]
4. Where [in Tampa, Florida] [in Municipal Court, Miami, Florida] [in Circuit Court of Jefferson County, Mobile, Alabama]
5. Evidence: [According to a statement of his mother, Mrs. Janet Jones dated September 15, 2000] [P.O. Anderson's letter/report dated September 20, 2000] [Police report of September 23, 2000, #6660 by Officer Henry Harris]

■ 2.211-07. *Revocation of Concurrent Parole and Supervised Release Terms.* Under subsection § 2.211(g), if the offender is found in violation of both parole and supervised release, the Commission may order the terms of imprisonment imposed on the violation(s) to run concurrently or consecutively, regardless of whether it conducts a single revocation hearing or at separate revocation hearings.

■ **§ 2.212 EXECUTION OF WARRANT AND SERVICE OF SUMMONS.**

(a) Any officer of any Federal or District of Columbia correctional institution, any Federal Officer authorized to serve criminal process, or any officer or designated civilian employee of the Metropolitan Police Department of the District of Columbia, to whom a warrant is delivered, shall execute such warrant by taking the releasee and returning him to the custody of the Attorney General.

(b) Upon the arrest of the releasee, the officer executing the warrant shall deliver to the releasee a copy of the warrant application (or other notice provided by the Commission) containing the information described in § 2.211(f).

(c) If execution of the warrant is delayed pending disposition of local charges, for further investigation, or for some other purpose, the releasee is to be continued under supervision by the supervision officer until the normal expiration of the sentence, or until the warrant is executed, whichever first occurs. Monthly supervision reports are to be submitted, and the releasee must continue to abide by all the conditions of release.

(d) If any other warrant for the arrest of the releasee has been executed or is outstanding at the time the Commission's warrant is executed, the arresting officer may, within 72 hours of executing the Commission's warrant, release the arrestee to such other warrant and lodge the Commission's warrant as a detainer, voiding the execution thereof, provided such action is consistent with the instructions of the Commission. In other cases, the arrestee may be released from an executed warrant whenever the Commission finds such action necessary to serve the ends of justice.

(e) A summons to appear at a probable cause hearing or revocation hearing shall be served upon the releasee in person by delivering to the releasee a copy of the summons and the application therefor. Service shall be made by any Federal or District of Columbia officer authorized to serve criminal process and certification of such service shall be returned to the Commission.

(f) Official notification of the issuance of a Commission warrant shall authorize any law enforcement officer within the United States to hold the releasee in custody until the warrant can be executed in accordance with paragraph (a) of this section.

Notes and Procedures

■ **2.212-01. Execution of a Warrant.**

(a) In General: When an alleged violator is taken into custody other than on the basis of Commission's warrant (as a result of new criminal charges being filed or a sentence imposed), the Commission's warrant is not executed until he is released by the other authorities, except by further order of the Regional Commissioner.

(b) By U.S. Marshal: A United States Marshal shall take custody of an alleged violator when so instructed by the Commission. Upon execution of the warrant, the U.S. Marshal (1) delivers a copy of the warrant application (or other notice described at § 2.211(f)) to the releasee; (2) notifies the Supervision Officer

and furnishes him with a copy of the warrant application (or notice form); (3) notifies the Parole Commission; and (4) retains custody of the alleged violator until notified of further disposition.

■ 2.212-02. *Withdrawing an Executed Warrant.*

(a) If an arrestee is also wanted by a local law enforcement authority, the Commission may direct the Marshal to release the arrestee if done within 72 hours of execution of the warrant, by order stating the following: *Release and conditionally reinstate to supervision from custody of warrant dated []*. *Said warrant is to be held in abeyance.* The Regional Commissioner may delegate the decision-making authority for such actions to an examiner or case analyst.

(b) When a warrant has been executed contrary to the Commission's instructions, the arrestee is to be released from custody of the violator warrant by an order stating the following: *Release and conditionally reinstate to supervision from custody of warrant dated []*. *Said warrant is to be held in abeyance per previous instructions.*

2.212-03. *Other Withdrawal of Warrants.*

(a) If there is any other justifiable reason (other than mistaken execution) for withdrawing an executed warrant, then the Notice of Action should read as follows: *Release and conditionally reinstate to supervision from custody of warrant dated []*. *Said warrant is to be held in abeyance pending [specify what event (e.g., resolution of local charges) the Commission is awaiting before execution of the warrant]*.

(b) The U.S. Marshal is to be instructed in a letter forwarding the Notice of Action to draw a diagonal line through the entry indicating execution of the warrant, and to attach a clean copy of the reverse side of a Commission warrant (provided by the Commission) to the back of the original warrant.

■ 2.212-04. *Calculating Possible Violator Term.* Upon receiving notice that a violator warrant has been executed, the case analyst shall promptly review the case to determine the maximum authorized term of imprisonment that could be ordered if supervised release were revoked. If a Commissioner concurs with case analyst's determination that the maximum authorized term of imprisonment would be less than six months, the following precautions shall be taken:

(a) The Commission shall request (by letter, telefax, or e-mail) that the Bureau of Prisons:

(1) calculate an estimated release date (based on the warrant execution date and the Commission's determination of the maximum authorized term of imprisonment if supervised release were revoked);

(2) promptly notify the Commission of the estimated release date; and

(3) release the prisoner on such date, if the prisoner remains in custody in a Bureau facility by that date and the Commission has not made a revocation decision that requires a longer prison term.

(b) If the prisoner is in U.S. Marshal's custody, the Commission, after taking the steps noted in (a)(1) and (2) above, shall notify the Marshal that the prisoner must be released at the estimated release date. A case analyst shall follow up to ensure release by that date.

(c) The Commission shall take all feasible steps to ensure that the revocation decision is made and communicated to the Marshal or the Bureau of Prisons before the estimated release date.

(d) *In parole or mandatory release revocation cases*, the same procedures outlined above should be followed, if: (1) the offender has less than six months to serve as of the date of warrant execution and there is no possibility of street time forfeiture; or (2) the amount of street time tentatively subject to forfeiture plus the time remaining to be served at the time of warrant execution totals less than six months. If one of these conditions is met, the case analyst should ask the Bureau to calculate an adjusted mandatory release date (assuming forfeiture of any street time that is subject to forfeiture) and the Commission should take the actions described above.

■ § 2.213 WARRANT PLACED AS DETAINER AND DISPOSITIONAL REVIEW.

(a) When a releasee is a prisoner in the custody of other law enforcement authorities, or is serving a new sentence of imprisonment imposed for a crime (or for a violation of some other form of community supervision) committed while on supervised release, a violation warrant may be lodged against him as a detainer.

(b) The Commission shall review the detainer upon the request of the prisoner pursuant to the procedure set forth in § 2.47(a)(2). Following such review, the Commission may:

(1) Withdraw the detainer and order reinstatement of the prisoner to supervision upon release from custody;

(2) Order a dispositional revocation hearing to be conducted at the institution in which the prisoner is confined; or

(3) Let the detainer stand until the new sentence is completed. Following the execution of the Commission's warrant, and the transfer of the prisoner to an appropriate federal facility, an institutional revocation hearing shall be conducted.

(c) Dispositional revocation hearings pursuant to this section shall be conducted in accordance with the provisions at § 2.216 governing institutional revocation hearings. A hearing conducted at a state or local facility may be conducted either by a hearing examiner or by any federal, state, or local official designated by a Commissioner. Following a revocation hearing conducted pursuant to this section, the Commission may take any action authorized by §§ 2.218 and 2.219.

(d) The date the violation term commences is the date the Commission's warrant is executed. A releasee's violation term (*i.e.*, the term of imprisonment and/or further term of supervised release that the Commission may require the releasee to serve after revocation) shall start to run only upon the offender's release from the confinement portion of the intervening sentence.

(e) An offender whose supervised release is revoked shall be given credit for all time in confinement resulting from any new offense or violation that is considered by the Commission as a basis for revocation, but solely for the purpose of satisfying the time ranges in the reparole guidelines at §

2.21. The computation of the offender's sentence, and the forfeiture of time on supervised release, are not affected by such guideline credit.

■ § 2.214 PROBABLE CAUSE HEARING AND DETERMINATION.

(a) *Hearing.* A supervised releasee who is retaken and held in custody in the District of Columbia on a warrant issued by the Commission, and who has not been convicted of a new crime, shall be given a probable cause hearing by an examiner of the Commission no later than five days from the date of such retaking. A releasee who is retaken and held in custody outside the District of Columbia, but within the Washington D.C. metropolitan area, and who has not been convicted of a new crime, shall be given a probable cause hearing by an examiner of the Commission within five days of the releasee's arrival at a facility where probable cause hearings are conducted. The purpose of a probable cause hearing is to determine whether there is probable cause to believe that the releasee has violated the conditions of supervised release as charged, and if so, whether a local or institutional revocation hearing should be conducted. If the examiner finds probable cause, the examiner shall schedule a final revocation hearing to be held within 65 days of the releasee's arrest.

(b) *Notice and opportunity to postpone hearing.* Prior to the commencement of each docket of probable cause hearings in the District of Columbia, a list of the releasees who are scheduled for probable cause hearings, together with a copy of the warrant application for each releasee, shall be sent to the D.C. Public Defender Service. At or before the probable cause hearing, the releasee (or the releasee's attorney) may submit a written request that the hearing be postponed for any period up to thirty days, and the Commission shall ordinarily grant such requests. Prior to the commencement of the probable cause hearing, the examiner shall advise the releasee that the releasee may accept representation by the attorney from the D.C. Public Defender Service who is assigned to that docket, waive the assistance of an attorney at the probable cause hearing, or have the probable cause hearing postponed in order to obtain another attorney and/or witnesses on his behalf. In addition, the releasee may request the Commission to require the attendance of adverse witnesses (*i.e.*, witnesses who have given information upon which revocation may be based) at a postponed probable cause hearing. Such adverse witnesses may be required to attend either a postponed probable cause hearing, or a combined postponed probable cause and local revocation hearing, provided the releasee meets the requirements of § 2.215(a) for a local revocation hearing. The releasee shall also be given notice of the time and place of any postponed probable cause hearing.

(c) *Review of the charges.* At the beginning of the probable cause hearing, the examiner shall ascertain that the notice required by § 2.212(b) has been given to the releasee. The examiner shall then review the violation charges with the releasee and shall apprise the releasee of the evidence that has been submitted in support of the charges. The examiner shall ascertain whether the releasee admits or denies each charge listed on the warrant application (or other notice of charges), and shall offer the releasee an opportunity to rebut or explain the allegations contained in the evidence giving rise to each charge. The examiner shall also receive the statements of any witnesses and documentary evidence that may be presented by the releasee. At a postponed probable cause hearing, the examiner shall also permit the releasee to confront and cross-examine any adverse witnesses in attendance, unless good cause is found for not allowing confrontation. Whenever a probable cause hearing is postponed to secure the appearance of adverse witnesses (or counsel in the case of a probable cause hearing conducted outside the District of Columbia), the Commission

will ordinarily order a combined probable cause and local revocation hearing as provided in paragraph (i) of this section.

(d) *Probable cause determination.* At the conclusion of the probable cause hearing, the examiner shall determine whether probable cause exists to believe that the releasee has violated the conditions of release as charged, and shall so inform the releasee. The examiner shall then take either of the following actions:

(1) If the examiner determines that no probable cause exists for any violation charge, the examiner shall order that the releasee be released from the custody of the warrant and either reinstated to supervision, or discharged from supervision if the term of supervised release has expired.

(2) If the hearing examiner determines that probable cause exists on any violation charge, and the releasee has requested (and is eligible for) a local revocation hearing in the District of Columbia as provided by § 2.215(a), the examiner shall schedule a local revocation hearing for a date that is within 65 days of the releasee's arrest. After the probable cause hearing, the releasee (or the releasee's attorney) may submit a written request for a postponement. Such postponements will normally be granted if the request is received no later than fifteen days before the date of the revocation hearing. A request for a postponement that is received by the Commission less than fifteen days before the scheduled date of the revocation hearing will be granted only for a compelling reason. The releasee (or the releasee's attorney) may also request, in writing, a hearing date that is earlier than the date scheduled by the examiner, and the Commission will accommodate such request if practicable.

(e) *Institutional revocation hearing.* If the releasee is not eligible for a local revocation hearing as provided by § 2.215(a), or has requested to be transferred to an institution for his revocation hearing, the Commission will request the Bureau of Prisons to designate the releasee to an appropriate institution, and an institutional revocation hearing shall be scheduled for a date that is within 90 days of the releasee's retaking.

(f) *Digest of the probable cause hearing.* At the conclusion of the probable cause hearing, the examiner shall prepare a digest summarizing the evidence presented at the hearing, the responses of the releasee, and the examiner's findings as to probable cause.

(g) *Release notwithstanding probable cause.* Notwithstanding a finding of probable cause, the Commission may order the releasee's reinstatement to supervision or release pending further proceedings, if it determines that:

(1) Continuation of revocation proceedings is not warranted despite the finding of probable cause; or

(2) Incarceration pending further revocation proceedings is not warranted by the frequency or seriousness of the alleged violation(s), and the releasee is neither likely to fail to appear for further proceedings, nor is a danger to himself or others.

(h) *Conviction as probable cause.* Conviction of any crime committed subsequent to the commencement of a term of supervised release shall constitute probable cause for the purposes of this section, and no probable cause hearing shall be conducted unless a hearing is needed to consider

additional violation charges that may be determinative of the Commission's decision whether to revoke supervised release.

(i) *Combined probable cause and local revocation hearing.* A postponed probable cause hearing may be conducted as a combined probable cause and local revocation hearing, provided such hearing is conducted within 65 days of the releasee's arrest and the releasee has been notified that the postponed probable cause hearing will constitute the final revocation hearing. The Commission's policy is to conduct a combined probable cause and local revocation hearing whenever adverse witnesses are required to appear and give testimony with respect to contested charges.

(j) *Late received charges.* If the Commission is notified of an additional charge after probable cause has been found to proceed with a revocation hearing, the Commission may:

(1) Remand the case for a supplemental probable cause hearing to determine if the new charge is contested by the releasee and if witnesses must be presented at the revocation hearing;

(2) Notify the releasee that the additional charge will be considered at the revocation hearing without conducting a supplemental probable cause hearing; or

(3) Determine that the new charge shall not be considered at the revocation hearing.

Notes and Procedures

■ 2.214-01. *No Probable Cause Hearing Where There Is A Conviction.*

(a) As the conviction of an offense committed while under supervision constitutes "probable cause" that at least one condition of release was violated, no probable cause hearing is required in such cases. For any serious criminal offense, therefore, a probable cause hearing will not be conducted where there is definite information of a conviction. The Supervision Officer should obtain documentary verification of any conviction and transmit it to the Commission. The designation request should not be delayed, however, unless there is reasonable doubt as to the authenticity of the information that a conviction has occurred.

(b) The Regional Commissioner shall require a probable cause hearing in marginal cases, for example: (1) where there was a conviction for a minor offense and there is a strong possibility that the releasee will be reinstated to supervision; or (2) where other administrative charges or unadjudicated criminal conduct clearly constitute the more serious violations; or (3) where the conviction is for an infraction (such as a minor traffic violation, loitering, or disorderly conduct) and a fine (rather than imprisonment) is the usual disposition.

(c) Where a forfeiture of collateral constitutes a conviction, in the majority of cases it will fall within the marginal cases described above, and the probable cause hearing must be held. Decisions to defer prosecution, suspend acceptance of a guilty plea, or to enter a conviction which by its own terms is "not final" (under certain state statutes), are not "convictions" and do not remove the need for a probable cause hearing or provide a basis for denial of local revocation hearing (see 2.48-09).

(d) At the time of issuing a violator warrant where a conviction is used as a basis for such warrant, the United States Marshal shall be instructed by use of Form H-24 (with a copy to the Supervision Officer)

to furnish a copy of the warrant application to the prisoner (and the Supervision Officer for information purposes only) and, where no probable cause hearing is being held, to transfer the prisoner immediately upon receipt of a designation order from the Bureau of Prisons. In such cases, the Parole Commission will request designation by the Bureau of Prisons without delay. Prior to designation and transfer, the releasee should be advised in writing by letter (1) that probable cause for violation was established by his new conviction, (2) of the charges to be considered at his institutional revocation hearing, and (3) that he will be transferred to an institution for his revocation hearing.

(e) In cases where a conviction is not used as a basis for a warrant but the Commission is advised of a conviction following such issuance, a supplemental warrant application should be issued for delivery to the prisoner alleging the offense for which the releasee was convicted and the request for designation/notice procedure described in paragraph (d) should be followed.

■ 2.214-02. *"Non-Final" Convictions and Foreign Convictions.*

(a) Circumstances may arise in which it becomes difficult to determine when a court disposition of criminal charges brought against a releasee constitutes a "conviction" of federal, state, or local law. It is essential to be certain that the subject has really sustained a conviction before taking actions regarding denial of a probable cause hearing or denial of a local revocation hearing. Cases in which there is room for doubt as to whether the disposition is a conviction should be referred to the legal counsel's office for advice prior to entering a decision.

(b) For purposes of denial of a probable cause hearing or denial of a local revocation hearing, do not count the following convictions:

(1) *"Non-Final" Convictions.* A decision to defer prosecution, suspend acceptance of a guilty plea, or enter a conviction which by its own terms is not final is included in this heading. These dispositions result from a procedure deliberately designed to shield the defendant from adverse consequences of a formal conviction. For example, some state traffic courts will expressly make convictions "non-final" in order to avoid the effect of a state law that requires a person's driving license be revoked if "convicted" of certain traffic offenses. Such convictions only become "final" if the defendant subsequently violates probation. Diversionary programs that involve a guilty plea or finding but no formal conviction also come under this heading. In the District of Columbia, for example, there is a provision (33 D.C. Code 541(e)) that authorizes probation before judgment in the case of a first offense for possession or attempted possession of drugs.

(2) *Foreign Convictions.*

(c) For purposes of evidence in Revocation Proceedings, the following may be treated as conclusive evidence of law violation:

(1) "Non-Final" convictions of federal, state, or local laws [when the releasee entered a guilty plea or a plea of nolo contendere, or in when a court finding of guilt was entered]; and

(2) Foreign Convictions. Note: A rare exception to the Commission's ability to rely upon foreign convictions as conclusive would be when the releasee provides evidence that the conviction was obtained

by blatantly improper means (fraud, duress, etc.) or that the conduct committed is not recognizable as a criminal violation under U.S. domestic law.

■ 2.214-03. *Supplemental Warrant Application.*

(a)(1) *Updating charge already listed.* A supplemental warrant application may be issued at any time to update a charge already listed (*e.g.*, by adding notice of a conviction), even after the normal expiration of supervision.

(2) *Newly discovered violation that occurred before normal expiration of supervision.* It is the Commission's interpretation that a supplemental warrant application may be issued at any time prior to the revocation hearing (whether the violations are discovered before or after the normal expiration of supervision), provided that (A) the warrant itself was issued before the normal expiration of supervision, and (B) the violations to be listed on the supplement occurred before the normal expiration of supervision. *Note:* This interpretation may not be applied to alleged violators in New York, Vermont, and Connecticut, given the Second Circuit's decision in *Toomey v. Young*, nor may it be applied to alleged violators in Kentucky, Michigan, Ohio, and Tennessee, given the Sixth Circuit's decision in *Barrier v. Beaver*. For these cases, the legal office should be consulted before a supplemental warrant application is issued after the normal expiration of supervision, unless the purpose of the supplemental application is simply to update a charge already listed on an application issued before the expiration date.

(3) *Newly discovered violation that occurred after normal expiration of supervision when releasee is absconder.* Violations of release occurring after the normal expiration of supervision may be added to an outstanding warrant if the parolee is an absconder from supervision for whom a timely warrant has been issued. The supplemental warrant application should be issued as soon after the releasee's arrest as possible. If the absconding charge cannot be sustained at the revocation hearing, such supplemental charges may not be used to revoke release or forfeit street time.

(b) *Additional charge.* Assuming that probable cause for one of the original charges is found after the probable cause hearing, an additional charge that is discovered during or after the probable cause hearing may be used at a revocation hearing. The releasee should be given notice of the additional charge by a supplemental warrant application—

(1) If the releasee has been scheduled for a local revocation hearing, a second probable cause hearing is not required. The releasee should be informed by letter that the supplemental charge will be considered at the revocation hearing, and that the releasee may request the attendance of adverse witnesses regarding the supplemental charge. (This letter of notification should also be used if new evidence received after the probable cause finding requires the reinstatement of a charge upon which a finding of no probable cause was made, with the letter describing the reinstated charge and the new evidence.)

(2) If the releasee has been designated for an institutional revocation hearing, the same procedure as outlined in the previous paragraph may be followed unless the following circumstances are presented. When the supplemental charge refers to a violation that, if found to be true, would likely cause the Commission to increase the prison time the releasee would serve for the original charges, it may be necessary, in the interests of justice, to terminate the designation so that the releasee may be given a probable cause hearing on the supplemental charge. The purpose of interrupting the designation and holding the hearing is to resolve the issue of whether the releasee wants to actively contest the

supplemental charge, usually by exercising his right to request the appearance of adverse witnesses at a local revocation hearing. If the releasee has been transferred to the designated institution, the releasee should not be returned from the facility until the Commission is satisfied (by an informal interview between the releasee and institutional staff, or a probable cause hearing at the institution) that the releasee wants to actively contest the supplemental charge by confronting/cross-examining adverse witnesses (or presenting the testimony of a necessary witness).

■ 2.214-04. *Releasee Arrested and Held Outside the Washington D.C. Metropolitan Area.* In the case of a releasee arrested on a violator warrant outside the District of Columbia metropolitan area, a U.S. Probation Officer will conduct a preliminary interview and the probable cause decision will be made in accordance with § 2.48. If probable cause is found and the Commission determines that a local revocation hearing should be held outside the D.C. metropolitan area, the local revocation hearing will be conducted in accordance with the procedures specified at § 2.49.

■ 2.214-05. *Refusal by Releasee to Participate in Probable Cause Hearing.* If a releasee refuses to participate in a probable cause hearing, or refuses to complete the form requesting a local revocation hearing, the releasee shall be deemed to have waived the opportunity to request a local revocation hearing.

■ § 2.215 PLACE OF REVOCATION HEARING.

(a) If the releasee requests a local revocation hearing, the releasee shall be given a revocation hearing reasonably near the place of the alleged violation(s) or arrest, with the opportunity to contest the violation charges, if the following conditions are met:

- (1) The releasee has not been convicted of a crime committed while under supervision; and**
- (2) The releasee denies all violation charges.**

(b) The releasee shall also be given a local revocation hearing if the releasee admits (or has been convicted of) one or more charged violations, but denies at least one unadjudicated charge that may be determinative of the Commission's decision regarding revocation or the length of any new term of imprisonment, and the releasee requests the presence of one or more adverse witnesses regarding that contested charge. If the appearance of such witnesses at the hearing is precluded by the Commission for good cause, a local revocation hearing shall not be ordered.

(c) If there are two or more contested charges, a local revocation hearing may be conducted near the place of the violation chiefly relied upon by the Commission as a basis for the issuance of the warrant or summons.

(d) (1) A releasee shall be given an institutional revocation hearing upon the releasee's return or recommitment to an institution if the releasee: (i) voluntarily waives the right to a local revocation hearing; or (ii) admits (or has been convicted of) one or more charged violations without contesting any unadjudicated charge that may be determinative of the Commission's decision regarding revocation and/or imposition of a new term of imprisonment.

(2) An institutional revocation hearing may also be conducted in the District of Columbia jail or prison facility in which the releasee is being held. On his own motion, a Commissioner may

designate any case described in paragraph (d)(1) for a local revocation hearing. The difference in procedures between a "local revocation hearing" and an "institutional revocation hearing" is set forth in § 2.216(b).

(e) Unless the Commission orders release notwithstanding a probable cause finding under §2.214(g), a releasee who is retaken on a warrant issued by the Commission shall remain in custody until a decision is made on the revocation of the term of supervised release. A releasee who has been given a revocation hearing pursuant to the issuance of a summons shall remain on supervision pending the decision of the Commission, unless the Commission has ordered otherwise.

(f) A local revocation hearing shall be held not later than 65 days from the retaking of the releasee on a supervised release violation warrant. An institutional revocation hearing shall be held within 90 days of the retaking of the releasee on a supervised release violation warrant. If the releasee requests and receives any postponement, or consents to any postponement, or by his actions otherwise precludes the prompt completion of revocation proceedings in his case, the above-stated time limits shall be correspondingly extended.

(g) A local revocation hearing may be conducted by a hearing examiner or by any federal, state, or local official who is designated by a Commissioner to be the presiding hearing officer. An institutional revocation hearing may be conducted by a hearing examiner.

Notes and Procedures

■ 2.215-01. *Institutional Revocation Hearings*

(a) An alleged violator who does not qualify for a local revocation hearing shall be given a revocation hearing upon return to a federal institution. This hearing must be offered within 90 days of the date of execution of the warrant, unless the alleged violator has requested and received any postponement or delay in the probable cause or revocation proceedings. In such case, the 90 day period is extended only by the period of actual delay. If the alleged violator is temporarily unavailable for a hearing within the 90 day period (*e.g.*, because he is ill, detained on a writ, or has escaped from custody), the hearing will be held as soon as practical after the alleged violator becomes available at the place of confinement. In cases where the 90 day limit has not been observed, the examiner should ascertain from the releasee, what, if any, prejudice has been caused by the delay.

(b) The request for designation of an alleged violator is forwarded to the Bureau of Prisons. Since an institutional revocation hearing must be held within 90 days of the date of execution of the warrant, any delay in designation over two days must be followed up promptly by telephonic inquiry. When a Regional Commissioner has requested the Bureau of Prisons to designate a federal institution for custody of an alleged violator, a courtesy copy of each telefax request shall be sent to the supervision officer who requested the warrant and also the U.S. Marshal who is currently holding the prisoner in custody. The telefax will request that the Marshal notify the analyst if the prisoner cannot be moved within ten days of the request. The case analyst is responsible for contacting the Marshal to request prompt action in the case of delay.

After a request for designation of a federal institution has been made for an alleged violator, the Commission will prepare a "hearing packet" that includes copies of the pertinent documents leading up

to the issuance of the warrant and revocation hearing, and the most current Annual Summary Report (Form F-3).

(c) Upon arrival at the institution designated, the alleged violator shall be placed upon the next available hearing docket. In all cases, the alleged violator will be offered the Attorney-Witness Election Form (I-16) by a member of the institution staff, and will either waive representation by an attorney and/or the right to present voluntary witnesses, or request appointment of an attorney (if he has none) and/or state the witnesses he wishes to be present. If he wishes a court-appointed attorney, the Designation of Counsel Form for D.C.PDS (or CJA Form 22, as applicable) must also be completed. Institutional staff will assist in the completion of these forms. If the alleged violator wishes a continuance for the purpose of obtaining voluntary witnesses or an attorney (appointed or retained), Form I-21 will be used to request such continuance. One continuance only to the next docket may be granted by the examiner. The releasee shall be given a copy of the Attorney-Witness Election Form or the Designation of Counsel Form for D.C.PDS (or CJA Form 22, as applicable) upon request.

(d) Upon refusal of an alleged violator to sign an Attorney-Witness Election Form (Form I-16), the examiner shall orally advise him of his right to receive a continuance for the purpose of obtaining an attorney and/or witnesses, if he has none. If he does not make a request for a continuance by signing the proper form, the hearing shall be held immediately.

(e) *Addition to Dockets.* Upon arrival at the institution, the hearing examiner shall inquire as to the number of alleged violators who have arrived since the "list of eligibles" was prepared. A determination must be made at that time as to which of those alleged violators must be added to the docket in order to comply with the statutory time limit (90 days from the date of execution of the warrant). Alleged violators who have indicated that they desire appointment of an attorney or that they need to obtain voluntary witnesses must appear before the hearing examiner to request a continuance.

(f) At the time of the submission of a "list of eligibles" to be heard at the institution, the Commission is notified of the names of any alleged violators who plan to have the attorney representation or witnesses' testimony.

■ 2.215-02. *Institutional Revocation Hearings for Alleged Violators Outside the Contiguous 48 States.* When an institution outside the contiguous 48 states is designated as the place of confinement, the revocation hearing shall be conducted in the same manner and by the same process as if in a federal institution.

■ § 2.216 REVOCATION HEARING PROCEDURE.

(a) The purpose of the revocation hearing shall be to determine whether the releasee has violated the conditions of the term of supervised release, and, if so, whether the term should be revoked or the releasee restored to supervised release.

(b) At a local revocation hearing, the alleged violator may present voluntary witnesses and documentary evidence. The alleged violator may also request the Commission to compel the attendance of any adverse witnesses for cross-examination, and any other relevant witnesses who have not volunteered to attend. At an institutional revocation hearing, the alleged violator may present voluntary witnesses and documentary evidence, but may not request the Commission to secure the attendance of any adverse or favorable witness. At any hearing, the presiding hearing

officer may limit or exclude any irrelevant or repetitious statement or documentary evidence, and may prohibit the releasee from contesting matters already adjudicated against him in other forums.

(c) At a local revocation hearing, the Commission shall, on the request of the alleged violator, require the attendance of any adverse witnesses who have given statements upon which revocation may be based, subject to a finding of good cause as described in paragraph (d) of this section. The adverse witnesses who are present shall be made available for questioning and cross-examination in the presence of the alleged violator. The Commission may also require the attendance of adverse witnesses on its own motion.

(d) The Commission may excuse any requested adverse witness from appearing at the hearing (or from appearing in the presence of the alleged violator) if the Commission finds good cause for so doing. A finding of good cause for the non-appearance of a requested adverse witness may be based, for example, on a significant possibility of harm to the witness, or the witness not being reasonably available when the Commission has documentary evidence that is an adequate substitute for live testimony.

(e) All evidence upon which a finding of violation may be based shall be disclosed to the alleged violator before the revocation hearing. Such evidence shall include the community supervision officer's letter summarizing the releasee's adjustment to supervision and requesting the warrant, all other documents describing the charged violation or violations, and any additional evidence upon which the Commission intends to rely in determining whether the charged violation or violations, if sustained, would warrant revocation of supervised release. If the releasee is represented by an attorney, the attorney shall be provided, prior to the revocation hearing, with a copy of the releasee's presentence investigation report, if such report is available to the Commission. If disclosure of any information would reveal the identity of a confidential informant or result in harm to any person, that information may be withheld from disclosure, in which case a summary of the withheld information shall be disclosed to the releasee prior to the revocation hearing.

(f) An alleged violator may be represented by an attorney at either a local or an institutional revocation hearing. In lieu of an attorney, an alleged violator may be represented at any revocation hearing by a person of his choice. However, the role of such non-attorney representative shall be limited to offering a statement on the alleged violator's behalf. Only licensed attorneys shall be permitted to question witnesses, make objections, and otherwise provide legal representation for supervised releasees, except in the case of law students appearing before the Commission as part of a court-approved clinical practice program. Such law students must be under the personal direction of a lawyer or law professor who is physically present at the hearing, and the examiner shall ascertain that the releasee consents to the procedure.

(g) At a local revocation hearing, the Commission shall secure the presence of the releasee's community supervision officer, or a substitute community supervision officer who shall bring the releasee's supervision file if the releasee's community supervision officer is not available. At the request of the hearing examiner, such officer shall provide testimony at the hearing concerning the releasee's adjustment to supervision.

(h) After the revocation hearing, the hearing examiner shall prepare a summary of the hearing that includes a description of the evidence against the releasee and the evidence submitted by the releasee

in defense or mitigation of the charges, a summary of the arguments against revocation presented by the releasee, and the examiner's recommended decision. The hearing examiner's summary, together with the releasee's file (including any documentary evidence and letters submitted on behalf of the releasee), shall be given to another examiner for review. When two hearing examiners concur in a recommended disposition, that recommendation, together with the releasee's file and the hearing examiner's summary of the hearing, shall be submitted to the Commission for decision.

Notes and Procedures

■ 2.116-01. *Purpose of Revocation Hearing and Procedural Rights of Alleged Violator.*

(a) The fundamental purpose of a revocation hearing is to determine whether there has been a violation of conditions of release and/or mandatory release of sufficient frequency or severity to warrant removal from the community

(b) The releasee's procedural rights include:

(1) Notice to the releasee of the conditions of release alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

(2) Opportunity for the releasee to be represented by an attorney (retained by the releasee, or if he is financially unable to retain counsel, counsel shall be provided), or, if he chooses, a representative as provided by rules and regulations, unless the releasee knowingly and intelligently waives such representation;

(3) Opportunity for the releasee to be apprised of the evidence against him, and if he so requests, to confront and cross-examine adverse witnesses, unless the Commission specifically finds good cause for not so allowing. Adverse witnesses are authorized at local revocation hearings only; and

(4) Written notice of the Commission's determination not later than twenty-one days, excluding holidays, after the date of the revocation hearing. If release is revoked, a digest (Notice of Action) is prepared by the Commission setting forth the factors considered and reasons for revocation and any further disposition.

■ 2.216-03. *Hearing Procedure.*

(a) Advise of legal rights - procedural safeguards. An opening statement is used to explain the hearing process, advise the releasee of his/her legal rights, identify counsel and witnesses, and address any procedural issues.

(b) At the opening of the hearing, the releasee will be told that the Parole Commission will consider all facts which come out (both mitigating and aggravating) during the course of the hearing.

(c) Questions should be directed to the alleged violator and he alone must answer, but he may confer with counsel at any time.

(d) Each charge will be read as it appears on the Warrant Application (Parole Form H-20). Supporting information under each charge may either be read or paraphrased.

(e) When the charges set forth in the Warrant Application are reviewed, the alleged violator will be required to either admit or deny each charge. If the attorney advises the alleged violator to stand mute, or invoke the Fifth Amendment to the Constitution, the examiner must require the subject to personally indicate that this is his desire. If the alleged violator does stand mute or invokes the Fifth Amendment, that then is his answer to the charges. He should be further advised that the hearing will still proceed. A finding of fact will be made even if he does not make a statement, and a decision will be made based on the information available. Be certain to keep control of the hearing. If the releasee or his attorney threatens a court procedure, inform them that is their privilege.

(f) After each charge is read and subject has admitted or denied the charge, he has the right to present evidence and give an explanation. The violator can confront the Supervision Officer - if it is a local revocation hearing - as well as confront and cross-examine any adverse witnesses. However, the examiner for good cause may disallow confrontation of adverse witnesses by the alleged violator. In such case, the examiner must indicate in his summary the reason why confrontation was not allowed. Any testimony out of the presence of the violator must be promptly summarized for the violator with an opportunity for response.

(g) *Questioning by Examiner.* The examiner controls the hearing and rules out any irrelevant and repetitious information, and denies the appearance of any adverse witnesses if good cause exists (*Morrissey*). The attorney or witnesses may not question or cross-examine the examiner, but must be limited to giving information relative to the alleged violation charges, and whether in their opinion the alleged violator should be reinstated to supervision.

(h) If during the course of discussion and review of alleged charges the violator admits to other charges not known to the Commission previously, the violator should be told that this fact may be used against him and that a violation finding can be made on same. Further, the alleged violator must be given time to prepare a defense, and if this results in a continuance of proceedings a supplemental warrant must be prepared.

(i) It will be customary for the releasee's supervision officer to be available as a witness at a local revocation hearing in the district of supervision even when not requested by the releasee as an adverse witness. In a local revocation hearing, the alleged violator's Supervision Officer normally shall be permitted to be present throughout the proceeding, except during the deliberation of the examiner.

(j) If procedural objections are raised by subject or counsel, the examiner is to respond to those objections immediately and address the issue raised. Occasionally, a hearing examiner may take an objection under advisement (*e.g.*, ruling on an objection based on the absence of a subpoenaed witness might in some cases appropriately be deferred until the witnesses who are available testify so that the examiner may better determine whether the absent witness' testimony is required). In such a case, the hearing examiner must rule on the objection before the conclusion of the hearing.

(k) If adverse witnesses were requested and are not present, the examiner must address this situation and rule on whether to proceed with the hearing. If the releasee complains of missing witnesses who would testify in his favor, the examiner is to ask what their testimony would be. Where appropriate, a hearing examiner may stipulate to the testimony of missing witnesses.

(l) There may be an occasion on which an issue is raised for which the examiner wishes to contact the Commission's office or legal counsel for information or advice. In such case, the hearing should be recessed for such contact to be made.

■ 2.216-03. *Lawyer's Role in Revocation Proceeding*. As noted by the Second Circuit, *U.S. v. John Bey* (1971), "There is no question but a lawyer's role is welcomed in a revocation process. It is important to obtain accurate factual exposition and evaluation of facts. At times, alleged violators may suffer from absence of trained legal assistance. A trained lawyer might well have discovered mitigating circumstances and hidden significances not reported or revealed in alleged violator's explanation of alleged charges." Competent counsel should augment the flow of relevant information and guard against error and distortions, which will benefit both the releasee and the Commission. At the same time, the examiner must remain in control of the hearing process. If necessary, the attorney should be informed that he will not be permitted to employ disruptive tactics or to impede the flow of relevant information.

■ 2.216-04. *Sworn Testimony*. Sworn testimony may be taken by order of the Regional Commissioner, or in the discretion of the hearing examiner in a revocation hearing, where such testimony would appear to be useful in resolving a factual dispute or otherwise appears warranted. Sworn testimony is taken as follows: The examiner instructs the witness to raise his right hand, then asks, "Do you solemnly [swear] [affirm], under penalty of perjury, that the testimony you are about to give in the case now in hearing will be the truth, the whole truth and nothing but the truth [so help you God]?"

■ 2.216-05. *Recommendation of Hearing Examiner*. When the releasee is recalled to the hearing room, the hearing examiner will announce the recommendation and reasons. The attorney and Supervision Officer are permitted to be present for this announcement. Advise that (1) the hearing examiner action is a recommendation; (2) within 21 days an official decision will be mailed [*i.e.*, a Notice of Action with reasons for revocation, plus the reasons for further disposition, if applicable]; and (3) the attorney also will be notified of the official decision by a copy of the Notice of Action which will be sent to him.

■ 2.216-06. *Notification of Attorney*. The attorney of record in revocation cases shall receive a copy of the Notice of Action.

■ 2.216-07. *Right to Appointed Counsel at Continuation Hearings*. If, following a revocation hearing, the Commission enters an order revoking supervised release but continuing the case for a further hearing to establish appropriate guidelines and to make a release decision, the right to appointed counsel continues to be applicable. If the prisoner has been moved from the community to an institution, or to a different institution, the case manager must be instructed to offer the prisoner a CJA-22 form in all such cases so that the prisoner will either waive or request reappointment of counsel. This is not necessary if the continuation hearing will be held in the same location, because a court appointment under CJA will continue to be valid until completion of the revocation proceedings.

■ 2.216-08. *Reporter or Recording Device*. Reporter or recorder devices brought in by the alleged violator or his attorney are not permissible. No reproduction of the hearing other than provided by the Commission will be permitted.

■ 2.216-09. *Law Student Under Personal Direction of Lawyer or Law Professor*. "Personal direction of a lawyer or law professor" shall require that the lawyer or law professor be physically present at the hearing and have approved the law student's strategy for the presentation of the case.

■ § 2.217 ISSUANCE OF SUBPOENA FOR APPEARANCE OF WITNESSES OR PRODUCTION OF DOCUMENTS.

(a)(1) If any adverse witness (*i.e.*, a person who has given information upon which revocation may be based) refuses, upon request by the Commission, to appear at a probable cause hearing or local revocation hearing, a Commissioner may issue a subpoena for the appearance of such witness.

(2) In addition, a Commissioner may, upon a showing by the releasee that a witness whose testimony is necessary to the proper disposition of his case will not appear voluntarily at a local revocation hearing or provide an adequate written statement of his testimony, issue a subpoena for the appearance of such witness at the revocation hearing.

(3) A subpoena may also be issued at the discretion of a Commissioner if an adverse witness is judged unlikely to appear as requested, or if the subpoena is deemed necessary for the orderly processing of the case.

(b) A subpoena may require the production of documents as well as, or in lieu of, a personal appearance. The subpoena shall specify the time and the place at which the person named therein is commanded to appear, and shall specify any documents required to be produced.

(c) A subpoena may be served by any Federal or District of Columbia officer authorized to serve criminal process. The subpoena may be served at any place within the judicial district in which the place specified in the subpoena is located, or any place where the witness may be found. Service of a subpoena upon a person named therein shall be made by delivering a copy of the subpoena to such a person.

(d) If a person refuses to obey such subpoena, the Commission may petition a court of the United States for the judicial district in which the revocation proceeding is being conducted, or in which such person may be found, to require such person to appear, testify, or produce evidence. If the court issues an order requiring such person to appear before the Commission, failure to obey such an order is punishable as contempt, as provided in 18 U.S.C. 4214(a)(2).

Notes and Procedures

■ 2.217-01. *In General.* When an alleged violator requests the presence of adverse witnesses at the local revocation hearing, the Commission will ascertain whether the witnesses requested have provided information to be used as a basis for revocation. If witnesses will not appear voluntarily, the Commission will make a decision on the necessity of the witness and whether personal service of a subpoena (generally by the U.S. Marshals Service) is required.

■ 2.217-02. *Federal Employees, Probation Officers, and Community Supervision Officers.*

(a) Federal employees may be subpoenaed to appear at probable cause hearings (if they are adverse witnesses) and at local revocation hearings, without witness fees, provided that reimbursement is made for transportation at the prevailing rate approved for such travel.

(b) Community Supervision Officers and Probation Officers are obliged to appear upon request of the Commission at a probable cause hearing or revocation hearing. A subpoena is not normally required for the appearance of an officer from within the district the hearing was conducted.

(c) Probation officers (and Community Supervision Officers) should be subpoenaed when their presence is required at a Commission hearing outside their judicial district. The Probation Division bears the expense of producing probation officers as witnesses whenever their presence is requested by competent authority. To exercise fiscal control, they require that a subpoena be issued prior to authorizing such travel outside a judicial district.

■ 2.217-03. *Non-Federal Witnesses.*

(a) All other witnesses, including law enforcement officers, may be reimbursed (either directly or to his agency) when attendance is required by subpoena at the prevailing rate per day of appearance and for the time necessarily occupied in going to and returning from the Commission proceeding, and at the prevailing rate per mile for going from and returning to their places of residence. Witnesses who must attend proceedings so far removed from their places of residence as to prohibit attendance and return on the same day, shall receive the prevailing additional allowance per day for expenses of subsistence.

(b) Witnesses shall be paid following the conclusion of the probable cause hearing or revocation hearing to which they have been called to testify. The hearing examiner shall provide Form OBD-3 to the witness. Upon completion of this form, the hearing examiner will instruct the witness to take the form to the local U.S. Marshal's office and receive payment in cash. If travel or per diem is involved, the hearing examiner may instruct the witness that the U.S. Marshal's office will issue a check upon receipt of the witness form. If advance funds are needed in the case of long distance travel, the witness should be instructed to advise the Marshal's Service.

(c) All witnesses shall be advised that only authorized expenses of travel and subsistence shall be paid. Witnesses traveling more than 100 miles must be paid actual travel expenses.

■ 2.217-04. *Policy Limitations.*

(a) Although the Commission's subpoena power is broad, a subpoena for a requested adverse witness from outside the district should be issued only when an affidavit in lieu of testimony is insufficient to settle the factual dispute raised by the alleged violator.

(b) The alleged violator bears a heavy burden to prove that a witness to testify on his behalf will not appear voluntarily or give a written statement without subpoena. The witness should be essential to determining the basic facts in genuine dispute, rather than merely testimonial to mitigating circumstances, which can more conveniently be obtained by letter or affidavit. Witnesses in mitigation will in no event be required to attend a probable cause hearing, since the fact of violation is the principal issue, rather than mitigating circumstances.

■ 2.217-05. *Subpoena To Aid in Apprehending Absconders.* The following procedure is to be used in cases where the Parole Commission has issued a warrant for a supervised release absconder and the United States Marshal wishes to aid its search by subpoena for such records as telephone company records, etc., and other third-party records that might reveal the absconder's whereabouts. The official in charge of the

investigation should be advised to contact the United States Attorney's Office in the judicial district which imposed the sentence and request that a motion be filed (under the caption of the original criminal proceeding in which the sentence was imposed).

■ 2.217-06. *Subpoena for Persons in Federal, State or Local Custody.* If an adverse witness whose testimony is required at a local revocation hearing is in federal custody, the necessary arrangements with the Federal Bureau of Prisons may be made without issuance of a subpoena. The U.S. Marshal will be required to escort the prisoner to the hearing if it is not held in a BOP facility. If the adverse witness is in state or local custody, issue a subpoena and contact the U.S. Attorney's Office in the federal judicial district in which the witness is confined. Request the duty officer in the Civil Division of that office to apply to the U.S. District Court for the *writ of habeas corpus ad testificandum*, directing the local authorities to produce the prisoner at the local revocation hearing. (The services of the U.S. Marshal may need to be requested if the revocation hearing is to be held out-of-state.) The General Counsel's office has sample application of *writ of habeas corpus ad testificandum* which should be obtained and supplied to the U.S. Attorney's Office.

■ § 2.218 REVOCATION DECISIONS.

(a) Whenever a releasee is summoned or retaken by the Commission, and the Commission finds by a preponderance of the evidence that the releasee has violated one or more conditions of supervised release, the Commission may take any of the following actions:

(1) Restore the releasee to supervision, and where appropriate:

(i) Reprimand the releasee;

(ii) Modify the releasee's conditions of release;

(iii) Refer the releasee to a residential community corrections center for all or part of the remainder of the term of supervised release; or

(2) Revoke the term of supervised release.

(b) If supervised release is revoked, the Commission shall determine whether the releasee shall be returned to prison to serve a new term of imprisonment, and the length of that term, or whether a new term of imprisonment shall be imposed but limited to time served. If the Commission imposes a new term of imprisonment that is less than the applicable maximum term of imprisonment authorized by law, the Commission shall also determine whether to impose a further term of supervised release to commence after the new term of imprisonment has been served. If the new term of imprisonment is limited to time served, any further term of supervised release shall commence upon the issuance of the Commission's order. Notwithstanding the above, if a releasee is serving another term of imprisonment of 30 days or more in connection with a conviction for a federal, state, or local crime (including a term of imprisonment resulting from a probation, parole, or supervised release revocation), a further term of supervised release imposed by the Commission under this paragraph shall not commence until that term of imprisonment has been served.

(c) A releasee whose term of supervised release is revoked by the Commission shall receive no credit for time spent on supervised release, including any time spent in confinement on other sentences (or in a halfway house as a condition of supervised release) prior to the execution of the Commission's warrant.

(d) The Commission's decision regarding the imposition of a term of imprisonment following revocation of supervised release, and any further term of supervised release, shall be made pursuant to the limitations set forth in § 2.219. Within those limitations, the appropriate length of any term of imprisonment shall be determined by reference to the guidelines at § 2.21. If the term of imprisonment authorized under § 2.219 is less than the minimum of the appropriate guideline range determined under § 2.21, the term authorized under § 2.219 shall be the guideline range.

(e) Whenever the Commission imposes a term of imprisonment upon revocation of supervised release that is less than the authorized maximum term of imprisonment, it shall be the Commission's general policy to impose a further term of supervised release that is the maximum term of supervised release permitted by § 2.219. If the Commission imposes a new term of imprisonment that is equal to the maximum term of imprisonment authorized by law (or in the case of a subsequent revocation, that uses up the remainder of the maximum term of imprisonment authorized by law), the Commission may not impose a further term of supervised release.

(f) Where deemed appropriate, the Commission may depart from the guidelines at § 2.21 (with respect to the imposition of a new term of imprisonment) in order to permit the imposition of a further term of supervised release.

(g) Decisions under this section shall be made upon the vote of one Commissioner, except that a decision to override an examiner panel recommendation shall require the concurrence of two Commissioners. The final decision following a local revocation hearing shall be issued within 86 days of the retaking of the releasee on a supervised release violation warrant. The final decision following an institutional revocation hearing shall be issued within 21 days of the hearing, excluding weekends and holidays.

Notes and Procedures

■ 2.218-01. *Presumptive Sanction for Driving While Impaired.* In the case of a releasee found to have violated supervised release by driving under the influence of (while impaired by) alcohol or drugs, revocation will be the presumptive sanction if the releasee is found to have been driving in a life threatening manner or has caused a serious accident, or if the violation is the second or subsequent such violation during the current period of supervision. Whenever supervised release is not revoked, the presumptive response will be imposition of a special condition that the releasee undergo an aftercare treatment program for alcoholism and surrender his driver's license to the Supervision Officer for a period of time determined by the Regional Commissioner (normally 90-180 days). The likelihood of the repetition of such conduct shall guide the Commission in determining whether such action may be withheld in a particular case.

■ § 2.219 MAXIMUM TERMS OF IMPRISONMENT AND SUPERVISED RELEASE.

(a) *Imprisonment; first revocation.* When a term of supervised release is revoked, the maximum authorized term of imprisonment that the Commission may require the offender to serve, in accordance with D.C. Code 24-403.01(b)(7), is determined by reference to the maximum authorized term of imprisonment for the offense of conviction. The maximum authorized term of imprisonment at the first revocation shall be:

(1) Five years, if the maximum term of imprisonment authorized for the offense is life, or if the offense is statutorily designated as a Class A felony;

(2) Three years, if the maximum term of imprisonment authorized for the offense is 25 years or more, but less than life, and the offense is not statutorily designated as a Class A felony;

(3) Two years, if the maximum term of imprisonment authorized for the offense is 5 years or more, but less than 25 years; or

(4) One year, if the maximum term of imprisonment authorized for the offense is less than 5 years.

(b) *Further term of supervised release; first revocation.* (1) When a term of supervised release is revoked, and the Commission imposes less than the maximum term of imprisonment permitted by paragraph (a) of this section, the Commission may also impose a further term of supervised release after imprisonment. A term of imprisonment is “less than the maximum authorized term of imprisonment” if the term is one day or more shorter than the maximum authorized term of imprisonment.

(2) The maximum authorized length of such further term of supervised release shall be the original maximum term of supervised release that the sentencing court was authorized to impose for the offense of conviction, less the term of imprisonment imposed by the Commission upon revocation of supervised release. The original maximum authorized term of supervised release is as follows:

(i) Five years if the maximum term of imprisonment authorized for the offense is 25 years or more;

(ii) Three years if the maximum term of imprisonment authorized for the offense is more than one year but less than 25 years; and

(iii) Life if the person is required to register for life, and 10 years in any other case, if the offender has been sentenced for an offense for which registration is required by the Sex Offender Registration Act of 1999.

(3) For example, if the maximum authorized term of imprisonment at the first revocation is three years and the original maximum authorized term of supervised release is five years, the Commission may impose a three-year term of imprisonment with no supervised release to follow, or any term of imprisonment of less than three years with a further term of supervised release of five years minus the term of imprisonment actually imposed (such as a one-year term of imprisonment followed by a four-year term of supervised release, or a two-year term of imprisonment followed by a three-year term of supervised release).

(c) *Reference table.* The following table may be used in most cases as a reference to determine both the maximum authorized term of imprisonment at the first revocation and the original maximum authorized term of supervised release:

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
Title 22			
22-301 [22-401]	Arson	3 years	2 years
22-302 [22-402]	Arson: own property	3 years	2 years
22-303 [22-403]	Destruction of property over	3 years	2 years
22-401 [22-501]	Assault: with intent to kill/rob/poison, to commit sex abuse (1 st or 2 nd degree) or child sex abuse	3 years (10 years if SOR)	2 years
22-401, 4502 [22-501, 3202]	Assault: with intent to kill etc. while armed*	5 years (10 years if SOR)	5 years
22-402 [22-502]	Assault: with a dangerous weapon	3 years	2 years
22-403 [22-503]	Assault: with intent to commit an offense other than those in § 22-401	3 years	2 years
22-404(d) [22-504]	Stalking -- 2 nd + offense	3 years	1 year
22-404.01, 4502 [22-504.1, 3202]	Assault: aggravated while armed*	5 years	5 years
22-404.01(b) [22-504.1]	Assault: aggravated	3 years	2 years
22-404.01(c) [22-504.1]	Assault: attempted aggravated	3 years	2 years
22-405(a) [22-505]	Assault: on a police officer	3 years	2 years
22-405(b) [22-505]	Assault: on a police officer while armed	3 years	2 years
22-406 [22-506]	Mayhem/malicious disfigurement	3 years	2 years
22-406, 4502 [22-506, 3202]	Mayhem/malicious disfigurement: armed*	5 years	5 years
22-501 [22-601]	Bigamy	3 years	2 years

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-601 [22-3427]	Breaking and entering machines	3 years	1 year
22-704(a)	Corrupt influence	3 years	2 years
22-712(c)	Bribery: public servant	3 years	2 years
22-713(c)	Bribery: witness	3 years	2 years
22-722(b)	Obstructing justice*	5 years	5 years
22-723(b)	Evidence tampering	3 years	1 year
22-801(a) [22-1801]	Burglary 1 st degree	5 years	3 years
22-801(b) [22-1801]	Burglary 2 nd degree	3 years	2 years
22-801, 4502 [22-1801, 3202]	Burglary: armed*	5 years	5 years
22-902(b)(2) [22-752]	Counterfeiting (see statute for offense circumstances)	3 years	1 year
22-902(b)(3) [22-752]	Counterfeiting (see statute for offense circumstances)	3 years	2 years
22-1101(a), (c)(1) [22-901]	Cruelty to children 1 st degree	3 years	2 years
22-1101(b), (c)(2) [22-901]	Cruelty to children 2 nd degree	3 years	2 years
22-1322(d) [22-1122]	Inciting riot (with injury)	3 years	2 years
22-1403 [22-1303]	False personation	3 years	2 years
22-1404 [22-1304]	Impersonating a public official	3 years	1 year
22-1510 [22-1410]	Bad checks \$100 or more	3 years	1 year
22-1701 [22-1501]	Illegal lottery	3 years	1 year
22-1704 [22-1504]	Gaming	3 years	2 years
22-1710, 1711 [22-1510, 1511]	Bucketing: 2 nd + offense	3 years	2 years
22-1713(a) [22-1513]	Corrupt influence: Athletics	3 years	2 years
22-1803 [22-103]	Attempted crime of violence	3 years	2 years

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-1804 [22-104]	<p>Second conviction</p> <p><u>One prior conviction</u></p> <p>If the underlying offense is punishable by life imprisonment</p> <p>If the underlying offense is punishable by 16 2/3 years or more</p> <p>If the underlying offense is punishable by 3 1/3 years or more but less than 16 2/3 years</p> <p>If underlying offense is punishable by less than 3 1/3 years</p> <p><u>Two or more prior convictions</u></p> <p>If the underlying offense is punishable by life imprisonment</p> <p>If the underlying offense is punishable by 8 1/3 years or more</p> <p>If the underlying offense is punishable by 1 2/3 years or more but less than 8 1/3 years</p> <p>If underlying offense is punishable by less than 1 2/3 years</p>	<p>5 years</p> <p>5 years</p> <p>3 years</p> <p>3 years</p> <p>5 years</p> <p>5 years</p> <p>3 years</p> <p>3 years</p>	<p>5 years</p> <p>3 years</p> <p>2 years</p> <p>1 year</p> <p>5 years</p> <p>3 years</p> <p>2 years</p> <p>1 year</p>
22-1804a(a)(1) [22-104a]	Three strikes for felonies*	5 years	5 years
22-1804a(a)(2) [22-104a]	Three strikes for violent felonies*	5 years	5 years

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-1805 [22-105]	Aiding or abetting	same as for the offense aided or abetted	same as for the offense aided or abetted
22-1805a(a) [22-105a]	Conspiracy If underlying offense is punishable by less than 5 years	3 years 3 years	2 years 1 year
22-1806 [22-106]	Accessory after the fact If the underlying offense is punishable by 10 years or more If the underlying offense is punishable by more than 2 years but less than 10 years	3 years 3 years	2 years 1 year
22-1807 [22-107]	Offenses not covered by D.C. Code	3 years	2 years
22-1810 [22-2307]	Threats (felony)	3 years	2 years
22-1901	Incest	3 years (10 years if SOR)	2 years
22-2001 [22-2101]	Kidnapping*	5 years	5 years
22-2001, 4502 [22-2101, 3202]	Kidnapping: armed*	5 years	5 years
22-2101, 2104 [22-2401, 2404]	Murder 1 st degree*	5 years	5 years
22-2101, 2104, 4502 [22-2401, 2404, 3202]	Murder 1 st degree while armed*	5 years	5 years
22-2102, 2104 [22-2402, 2404]	Murder 1 st degree: obstruction of railway*	5 years	5 years
22-2103, 2104 [22-2403, 2404]	Murder 2 nd degree*	5 years	5 years
22-2103, 2104, 4502 [22-2403, 2404, 3202]	Murder 2 nd degree while armed*	5 years	5 years

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-2105 [22-2405]	Manslaughter	5 years	3 years
22-2105, 4502 [22-2405, 3202]	Manslaughter: armed*	5 years	5 years
22-2201(e) [22-2001]	Obscenity: 2 nd + offense	3 years (10 years if SOR)	1 year
22-2402(b) [22-2511]	Perjury	3 years	2 years
22-2403 [22-2512]	Subornation of perjury	3 years	2 years
22-2404(b) [22-2513]	False swearing	3 years	1 year
22-2501 [22-3601]	Possessing implements of crime 2 nd + offense	3 years	2 years
22-2601(b)	Escape	3 years	2 years
22-2603	Introducing contraband into prison	3 years	2 years
22-2704	Child prostitution: abducting or harboring	3 years (10 years if SOR)	2 years
22-2705 to 2712	Prostitution: arranging and related offenses	3 years (10 years if child victim and SOR)	2 years
22-2801 [22-2901]	Robbery	3 years	2 years
22-2801, 4502 [22-2901, 3202]	Robbery: armed*	5 years	5 years
22-2802 [22-2902]	Robbery: attempted	3 years	1 year
22-2802, 4502 [22-2902, 3202]	Robbery: attempted while armed*	5 years	5 years
22-2803(a) [22-2903]	Carjacking	3 years	2 years
22-2803(b) [22-2903]	Carjacking: armed*	5 years	5 years
22-3002 [22-4102]	Sex abuse 1 st degree*	5 years (life if SOR)	5 years
22-3002, 4502 [22-4102, 3202]	Sex abuse 1 st degree while armed*	5 years (life if SOR)	5 years
22-3003 [22-4103]	Sex abuse 2 nd degree	3 years (life if SOR)	2 years
22-3003, 4502 [22-4103, 3202]	Sex abuse 2 nd degree while armed*	5 years (life if SOR)	5 years

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-3004 [22-4104]	Sex abuse 3 rd degree	3 years (10 years if SOR)	2 years
22-3005 [22-4105]	Sex abuse 4 th degree	3 years (10 years if SOR)	2 years
22-3008 [22-4108]	Child sex abuse 1 st degree*	5 years (life if SOR)	5 years
22-3008, 3020 [22-4108, 4120]	Child sex abuse 1 st degree with aggravating circumstances*	5 years (life if SOR)	5 years
22-3008, 4502 [22-4108, 3202]	Child sex abuse 1 st degree while armed*	5 years (10 years if SOR)	5 years
22-3009 [22-4109]	Child sex abuse 2 nd degree	3 years (10 years if SOR)	2 years
22-3009, 4502 [22-4109, 3202]	Child sex abuse 2 nd degree while armed*	5 years (10 years if SOR)	5 years
22-3010 [22-4110]	Enticing a child	3 years (10 years if SOR)	2 years
22-3013 [22-4113]	Sex abuse ward 1 st degree	3 years (10 years if SOR)	2 years
22-3014 [22-4114]	Sex abuse ward 2 nd degree	3 years (10 years if SOR)	2 years
22-3015 [22-4115]	Sex abuse patient 1 st degree	3 years (10 years if SOR)	2 years
22-3016 [22-4116]	Sex abuse patient 2 nd degree	3 years (10 years if SOR)	2 years
22-3018 [22-4118]	Sex abuse: attempted 1 st degree/child sex abuse 1 st degree	3 years (life if SOR)	2 years
22-3018 [22-4118]	Sex abuse: other attempts If offense attempted is punishable by 10 years or more If the offense attempted is punishable by more than 2 years but less than 10 years	3 years (life if SOR) 3 years (life if SOR)	2 years 1 year

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-3020 [22-4120]	Sex abuse 1 st degree/child sex abuse 1 st degree, with aggravating circumstances	5 years (life if SOR)	5 years
22-3020 [22-4120]	<p>Sex abuse: other offenses with aggravating circumstances</p> <p>If the underlying offense is punishable by life imprisonment</p> <p>If the underlying offense is punishable by 16 2/3 years or more</p> <p>If the underlying offense is punishable by 3 1/3 years or more but less than 16 2/3 years</p> <p>If underlying offense is punishable by less than 3 1/3 years</p>	<p>5 years (10 years if SOR)</p> <p>5 years (10 years if SOR)</p> <p>3 years (10 years if SOR)</p> <p>3 years (10 years if SOR)</p>	<p>5 years</p> <p>3 years</p> <p>2 years</p> <p>1 year</p>
22-3102, 3103 [22-2012, 2013]	Sex performance with minors	3 years (10 years if SOR)	2 years

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-3153	Terrorism – Acts of		
	Murder 1 st degree	5 years	5 years
	Murder of law enforcement officer or public safety employee	5 years	5 years
	Murder 2 nd degree	5 years	5 years
	Manslaughter	5 years	5 years
	Kidnapping	5 years	5 years
	Assault with intent to kill	5 years	3 years
	Mayhem/ malicious disfigurement	3 years	2 years
	Arson	3 years	2 years
	Malicious destruction of property	5 years	3 years
	Attempt/conspiracy to commit first degree murder, murder of law enforcement officer, second degree murder, manslaughter, kidnapping	3 years	2 years
	Attempt/conspiracy to commit assault with intent to kill	3 years	2 years
	Attempt/conspiracy to commit mayhem, malicious disfigurement, arson, malicious destruction of property	3 years	2 years
	Providing or soliciting material support for act of terrorism		

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-3153, 22-4502 [22-3202]	Committing any of the above acts of terrorism while armed*	5 years	5 years
22-3154	Manufacture/possession of weapon of mass destruction	5 years	5 years
	Attempt/conspiracy to possess or manufacture weapon of mass destruction	5 years	3 years
22-3155	Use, dissemination, or detonation of weapon of mass destruction	5 years	5 years
	Attempt/conspiracy to use, disseminate, or detonate weapon of mass destruction	5 years	3 years
22-3155, 22-4502 [22-3202]	Manufacture, possession, use or detonation of weapon of mass destruction while armed or attempts to commit such crimes while armed*	5 years	5 years
22-3212 [22-3812]	Theft 1 st degree	3 years	2 years
22-3214.01(d)(2) [22-3814.1]	Deceptive labeling	3 years	2 years
22-3215(d)(1) [22-3815]	Vehicle: Unlawful use of (private)	3 years	2 years
22-3215(d)(2) [22-3815]	Vehicle: Unlawful use of (rental)	3 years	1 year
22-3221(a), 3222(a) [22-3821, 3822]	Fraud 1 st degree \$250 or more	3 years	2 years
22-3221(b), 3222(b) [22-3821, 3822]	Fraud 2 nd degree \$250 or more	3 years	1 year
22-3223(d)(1) [22-3823]	Fraud: credit card \$250 or more	3 years	2 years
22-3225.02, 3225.04(a) [22-3825.2, 3825.4]	Fraud: insurance 1 st degree	3 years	2 years

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-3225.03, 3225.04(b) [22-3825.3, 3825.4]	Fraud: insurance 2 nd degree	3 years	2 years
22-3231(d) [22-3831]	Stolen property: trafficking in	3 years	2 years
22-3232(c)(1) [22-3832]	Stolen property: receiving (\$250 or more)	3 years	2 years
22-3241, 3242 [22-3841, 3842]	Forgery:		
	Legal tender, public record, etc.	3 years	2 years
	Token, prescription	3 years	2 years
	Other	3 years	1 year
22-3251(b) [22-3851]	Extortion	3 years	2 years
22-3251(b), 3252(b), 4502 [22-3851, 3852, 3202]	Extortion while armed or blackmail with threats of violence*	5 years	5 years
22-3252(b) [22-3852]	Blackmail	3 years	2 years
22-3303 [22-3103]	Grave robbing	3 years	1 year
22-3305 [22-3105]	Destruction of property by explosives	3 years	2 years
22-3318 [22-3118]	Water pollution (malicious)	3 years	1 year
22-3319 [22-3119]	Obstructing railways	3 years	2 years

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-3601 [22-3901]	<p>Senior citizen victim of robbery, attempted robbery, theft, attempted theft, extortion, and fraud</p> <p>If the underlying offense is punishable by life imprisonment</p> <p>If the underlying offense is punishable by 16 2/3 years or more</p> <p>If the underlying offense is punishable by 3 1/3 years or more but less than 16 2/3 years</p> <p>If underlying offense is punishable by less than 3 1/3 years</p>	<p>5 years</p> <p>5 years</p> <p>3 years</p> <p>3 years</p>	<p>5 years</p> <p>3 years</p> <p>2 years</p> <p>1 year</p>
22-3602 [22-3902]	<p>Citizen patrol victim of various violent offenses</p> <p>If the underlying offense is punishable by life imprisonment</p> <p>If the underlying offense is punishable by 16 2/3 years or more</p> <p>If the underlying offense is punishable by 3 1/3 years or more but less than 16 2/3 years</p> <p>If underlying offense is punishable by less than 3 1/3 years</p>	<p>5 years</p> <p>5 years</p> <p>3 years</p> <p>3 years</p>	<p>5 years</p> <p>3 years</p> <p>2 years</p> <p>1 year</p>

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-3703 [22-4003]	<p>Bias-related crime</p> <p>If underlying offense is punishable by life imprisonment</p> <p>If underlying offense is punishable by 16 2/3 years or more</p> <p>If underlying offense is punishable by more than or equal to 3 1/3 years but less than 16 2/3 years</p> <p>If underlying offense is punishable by less than 3 1/3 years</p>	<p>5 years</p> <p>5 years</p> <p>3 years</p> <p>3 years</p>	<p>5 years</p> <p>3 years</p> <p>2 years</p> <p>1 year</p>
22-4015 [24-1135]	Sex offender, failure to register (2 nd offense)	3 years	2 years
22-4502 [22-3202]	Violent crimes: committing or attempting to commit while armed	5 years	5 years
22-4502.01 [22-3202.1]	<p>Gun-free zone violations</p> <p>If underlying offense is a violation of 22-4504</p> <p>If underlying offense is a violation of 22-4504(b) (possession of firearm while committing crime of violence or dangerous crime)</p>	<p>3 years</p> <p>5 years</p>	<p>2 years</p> <p>3 years</p>
22-4503 [22-3203]	Pistol: unlawful possession by a felon, etc. 2 nd + offense	3 years	2 years
22-4504(a)(1)-(2) [22-3204]	Pistol: carrying without a license	3 years	2 years

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
22-4504(b) [22-3204]	Firearm: possession while committing crime of violence or dangerous crime	3 years	2 years
22-4514 [22-3214]	Prohibited weapon: possession of 2 nd + offense	3 years	2 years
22-4515a [22-3215a]	Molotov cocktails --1 st or 2 nd offense	3 years	2 years
	3 rd offense	5 years	5 years
Title 23			
23-1327(a)(1)	Bail Reform Act	3 years	2 years
23-1328(a)(1)	Committing a felony on release	3 years	2 years
Title 48			
48-904.01(a)-(b) [33-541]	Drugs: distribute or possess with intent to distribute.	5 years	3 years
	If schedule I or II narcotics or abusive drugs (e.g., heroin, cocaine, PCP, methamphetamine)	3 years	2 years
	If schedule I or II drugs other than above (e.g., marijuana/hashish), or schedule III drugs	3 years	1 year
	If schedule IV drugs		
48-904.01, 22-4502 [33-541, 22-3202]	Drugs: distribute or possess with intent to distribute while armed*	5 years	5 years
48-904.03 [33-543]	Drugs: acquiring by fraud	3 years	1 year
48-904.03a [33-543a]	Drugs: maintaining place for manufacture or distribution	5 years	3 years

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
48-904.06 [33-546]	<p>Drugs: distribution to minors</p> <p>If a schedule I or II narcotic drug (e.g., heroin or cocaine) or PCP</p> <p>If schedule I or II drugs other than above (e.g., marijuana, hashish, methamphetamine), or schedule III or IV drugs</p> <p>If schedule V drugs</p>	<p>5 years</p> <p>3 years</p> <p>3 years</p>	<p>3 years</p> <p>2 years</p> <p>1 year</p>
48-904.07 [33-547]	Drugs: enlisting minors to sell	3 years	2 years
48-904.07a [33-547.1]	<p>Drugs: distribute or possess with intent to distribute in drug-free zones</p> <p>If schedule I or II narcotics or abusive drugs (e.g., heroin, cocaine, methamphetamine, or PCP)</p> <p>If schedule I or II drugs other than above (e.g., marijuana, hashish), or schedule III or IV drugs</p> <p>If schedule V drugs</p>	<p>5 years</p> <p>3 years</p> <p>3 years</p>	<p>3 years</p> <p>2 years</p> <p>1 year</p>

DC Code Reference for Conviction Offense (Former Code Reference in Brackets)	Offense Description	Original Maximum Authorized Term of Supervised Release	Maximum Authorized Term of Imprisonment at First Revocation
48-904.08 [33-548] Note: This section does not apply if the offender was sentenced under 48-904.06	Drugs: 2 nd + offense If schedule I or II narcotics or abusive drugs (e.g., heroin, cocaine, methamphetamine, or PCP) If schedule I or II drugs other than above (e.g., marijuana, hashish), or schedule III or IV drugs If schedule V drugs	5 years 3 years 3 years	3 years 2 years 1 year
48-904.09 [33-549]	Drugs: attempt/conspiracy	the same as for the offense that was the object of the attempt or conspiracy	the same as for the offense that was the object of the attempt or conspiracy
48-1103(b) [33-603]	Drugs: possession of drug paraphernalia with intent to deliver or sell (2 nd + offense)	3 years	1 year
48-1103(c) [33-603]	Drugs: delivering drug paraphernalia to a minor	3 years	2 years
Title 50			
50-2203.01 [40-713]	Negligent homicide (vehicular)	3 years	2 years
50-2207.01 [40-718]	Smoke screens	3 years	2 years

Notes:

(1) An asterisk next to the offense description indicates that the offense is statutorily designated as a Class A felony.

(2) If the defendant must register as a sex offender, the Original Maximum Authorized Term of Supervised Release is the maximum period for which the offender may be required to register as a sex offender under D.C. Code 22-4002(a) and (b) (ten years or life). See D.C. Code 24-403.01(b)(4). Sex offender registration is required for crimes such as first degree sexual abuse, and these crimes

are listed in this table with the notation “10 years if SOR” or “life if SOR” as the Original Maximum Authorized Term of Supervised Release. Sex offender registration, however, may also be required for numerous crimes (such as burglary or murder) if a sexual act or contact was involved or was the offender’s purpose. In such cases, the offender’s status will be determined by the presence of an order from the sentencing judge certifying that the defendant is a sex offender.

(3) If the defendant committed the offense before 5:00 p.m., August 11, 2000, the maximum authorized terms of imprisonment and supervised release shall be determined by reference to 18 U.S.C. 3583.

(d) Imprisonment; successive revocations. (1) When the Commission revokes a term of supervised release that was imposed by the Commission after a previous revocation of supervised release, the maximum authorized term of imprisonment is the maximum term of imprisonment permitted by paragraph (a) of this section, less the term or terms of imprisonment that were previously imposed by the Commission. In calculating such previously-imposed term or terms of imprisonment, the Commission shall use the term as imposed without deducting any good time credits that may have been earned by the offender prior to his release from prison. In no case shall the total of successive terms of imprisonment imposed by the Commission exceed the maximum authorized term of imprisonment at the first revocation.

(2) For example, if the maximum authorized term of imprisonment at the first revocation is three years and the original maximum authorized term of supervised release is five years, the Commission at the first revocation may have imposed a one-year term of imprisonment and a further four-year term of supervised release. At the second revocation, the maximum authorized term of imprisonment will be two years, i.e., the maximum authorized term of imprisonment at the first revocation (three years) minus the one-year term of imprisonment that was imposed at the first revocation.

(e) Further term of supervised release; successive revocations. (1) When the Commission revokes a term of supervised release that was imposed by the Commission following a previous revocation of supervised release, the Commission may also impose a further term of supervised release. The maximum authorized length of such a term of supervised release shall be the original maximum authorized term of supervised release permitted by paragraph (b) of this section, less the total of the terms of imprisonment imposed by the Commission on the same sentence (including the term of imprisonment imposed in the current revocation).

(2) For example, if the maximum authorized term of imprisonment at the first revocation is three years and the original maximum authorized term of supervised release is five years, the Commission at the first revocation may have imposed a one-year term of imprisonment and a four-year further term of supervised release. If, at a second revocation, the Commission imposes another one-year term of imprisonment, the maximum authorized further term of supervised release will be three years (the original five-year period minus the total of two years of imprisonment).

(f) Effect of sentencing court imposing less than the original maximum authorized term of supervised release. If the Commission has revoked supervised release, the maximum authorized period of further supervised release is determined by reference to the original maximum authorized term

permitted for the offense of conviction (see paragraph (b) of this section), even if the sentencing court did not impose the original maximum authorized term permitted for the offense of conviction.

§ 2.220 APPEAL.

A supervised releasee may appeal to the Commission a decision to revoke supervised release, impose a term of imprisonment, or impose a new term of supervised release after revocation. The provisions of §2.26 on the time limits for filing and deciding the appeal, the grounds for appeal, the format of the appeal, the limits regarding the submission of exhibits, and voting requirements apply to an appeal submitted under this section.

■ MISCELLANEOUS PROCEDURES

■ M-01 *Aggregated/Non-Aggregated Sentences.*

(a) *Aggregation of sentences.* Under federal law, adult sentences will be aggregated (combined to form a single term) for purposes of determining good time release and parole eligibility dates. For sentences under §4205(a), eligibility for parole consideration will be calculated at one-third of the term or terms of confinement; except for any term or terms totaling more than 30 years, parole eligibility is after ten years of such term or terms. For sentences under 18 U.S.C. 4205(b)(2), eligibility for parole is at the Commission's discretion. For combined sentences (18 U.S.C. 4205(b)(2) and 4205(a)), parole eligibility is at the one-third point of the 4205(a) sentence, calculated from the beginning date of the aggregated sentences (and adjusted for jail time credit).

(c) *Sentences that are not aggregated for parole eligibility purposes.*

1. **FJDA sentences.** Federal Juvenile Delinquency Act (FJDA) sentences can only be aggregated with other FJDA sentences.

2. **YCA sentences.** Youth Correction Act (YCA) sentences are not aggregated with other sentences or with each other.

3. **NARA sentences.** NARA sentences are not aggregated with other sentences.

4. **Split sentences.** "Split sentences" (confinement and probation imposed on a single count) are not aggregated with other sentences.

(d) *Multiple count terms.* The court may impose a term of confinement on one count and impose probation on another count, and specify the probation to be consecutive to the term of confinement. While the general structure is similar to a true "split sentence," it varies in that two or more counts are involved and the Commission will have parole jurisdiction over the period of confinement, provided all other parole criteria are met.

(e) *Parole Consideration of Non-Aggregable Consecutive Sentences.* Whenever a non-aggregable consecutive sentence is added to sentences being served, the prisoner may apply for parole on both sentences (if no initial hearing on the first sentence has been held). If he has already had an initial hearing on the first sentence, he receives an initial hearing on the next docket, even though the

consecutive term has not yet commenced to run. At the initial hearing, all factors will be considered, and a new presumptive release date or continuance shall be ordered. (Subsequent hearings will be at the appropriate interval after the date of the most recent initial hearing.)

If the consecutive sentence carries no minimum term of imprisonment, a single presumptive release date may be set for both sentences as if they were aggregable. The order is to be in two parts: (1) ordering parole from the first to the second sentence; and (2) ordering parole from the consecutive sentence. Both parts of the parole order should be for the same presumptive release date. The parole certificate would indicate that the prisoner was paroled from the consecutive sentence.

If the consecutive sentence carries a minimum term, the Commission will set two presumptive release dates: The first date will release of the prisoner to the consecutive sentence only. The second date will effect actual release to the community. In such case, the first date will have to be set to permit completion of the minimum term prior to the second (actual) presumptive parole date. For example, assume an initial hearing in the case of a prisoner with a six year Y.C.A. term followed by a six year (non-aggregable) regular adult sentence. If parole release is desired for 36 months, the first date will be for one year in custody, to permit completion of the 24 month minimum term on the consecutive sentence, prior to release. The second date would be for the 36th month of total confinement (the date the prisoner completes his minimum term). During service of the two-year minimum term, no interim review hearing will be held. Only the pre-release record review shall be conducted.

■ **M-02 *Courtesy Hearings.*** When resources permit, the Commission, upon the request of a state parole board, will endeavor to provide a hearing for a state prisoner when such prisoner is confined in a federal institution outside the requesting state and such institution is located at a substantial distance from the requesting state. The requesting state will be asked to provide specific instructions for the conduct of the hearing, as to any criteria to be considered, and as to whether a specific recommendation is desired.

■ **M-03 *Disqualifications of Commission Personnel.*** A hearing examiner or Commissioner shall disqualify himself when it reasonably appears that he may have a conflict of interest or that his participation in the hearing might place the Commission in an adverse situation. The disqualification should be recorded on tape and made a part of the hearing, followed by a memorandum to the file.

■ **M-04 *Standards for Prisoner Interviews.*** The processing of a parole case requires the exchange of substantial amounts of information between the parties involved. Interviews must be scheduled promptly and be conducted in circumstances that are conducive to the achievement of their purpose. It is the responsibility of the custodian of those defendants who have not been released from custody to provide adequate facilities and the timely presence of prisoners for interview.

Some of the physical conditions essential to a successful interview are: (1) a quiet, private room free of distractions (if glass is necessary for observation, interviewee should be able to face away from glass; (2) walls that are adequate to provide a sound barrier; (3) an atmosphere that is pleasant, relaxing, unthreatening, uncluttered and conducive to communication; and (4) freedom from telephone calls or other interrupting intrusions.

Some conditions deleterious to the purpose of the interview and unfair to the parties involved are: (1) when questions or statements can be overheard by others; (2) poor acoustics or bad lighting; (3) distractions caused by other voices, movements or noises in the area; (4) uncomfortable furniture; (5) interviews through bars; (6) unnecessary physical restraints; and (7) scheduling of the interview that causes the prisoner to miss a meal, medical or other basic needs.

■ **M-05 *Designation of Personnel Other Than Hearing Examiner to Conduct a Hearing.***

(a) *Assignment of Commission Staff.* A case analyst may conduct any hearing as assigned by the Regional Commissioner. Any other Commission staff may conduct hearings upon designation and assignment by the Chairman. Case-by-case designation is not required.

(b) *Local Revocation/Dispositional Revocation/Five Year Termination Hearings.* Where appropriate, the Regional Commissioner may designate an official (*e.g.*, a federal probation officer or state parole board member) other than an institutional official as a hearing examiner to conduct such hearing. A Commission order providing for such designation will be entered in the case file. The recommendation of such official shall be treated as a hearing examiner recommendation for purposes of any hearing panel quorum requirement [NOTE: if the designated official does not sign a Commission order, Commission staff can complete the Commission order by printing the name of the designated official and cross-referencing the recommendation in the summary submitted by the designated official].

(c) *Any Other Hearing.* Where appropriate, the Chairman may designate an official (*e.g.*, a federal probation officer or state parole board member) other than an institutional official to participate on a hearing panel for any type of hearing. The recommendation of such official(s) shall be treated as a hearing examiner recommendation for purposes of any panel quorum requirement. Designation under this section will normally be by telefax with a copy to the prisoner's case file. [NOTE: This section contemplates the designated official joining a Parole Commission hearing examiner in conducting a hearing. Only in an extreme emergency will two non-Commission personnel be used to constitute a hearing panel.]

■ **M-06 *Court Modification of Sentences.*** When a motion for a modification of sentence (Rule 35) is filed within 120 days from the date of sentencing, the court may act upon such motion within "a reasonable time." Cases in which a modification appears not in conformance with this rule should be brought to the attention of the General Counsel of the Commission.

■ **M-07 *Translations.*** If a translation is needed of a document, such requests may be sent to the State Department on Form DS-434 (GPO Form) at the following address: Department of State Translation Department, 2201 C Street, N.W., Room 2214A, Washington, D.C. 20520; telephone (202) 647-2201.

■ **APPENDIX 1 - STANDARD WORDING ON ORDERS [EXAMPLES]**

I. PAROLE HEARINGS (U.S. Code initial and subsequent hearings; D.C. Code initial hearings; D.C. Code subsequent hearings if the initial hearing was conducted on or after 8/5/98)

- A. "Parole Effective after service of () months (date)" (use when date is within nine months from date of hearing).
- B. "Continue to a Presumptive Parole after service of () months (date)" (use when date is 10 or more months from date of hearing).
- C. "Continue to a Presumptive Parole after service of () months (date) or Continue to Expiration, whichever comes first." [Use when parole prior to the statutory release date (sentences of less than five years) or prior to the two-thirds date (sentences of five years or more) is desired, but extra good time may result in even earlier release].

NOTE: The following conditions, among others, may be added:

". . . with placement through a Community Corrections Center recommended."

". . . to a (concurrent) (consecutive) sentence."

". . . provided the committed fine is paid or otherwise disposed of according to law."

". . . to the actual physical custody of detaining authorities only. If not taken into custody on the detainer, place on the next docket for a special reconsideration hearing."

". . . to the actual physical custody of detaining authorities, or if detainer is not exercised parole (presumptive parole) to the community effective (date)." Allow an additional 30 days for release planning."

". . . to the actual physical custody of immigration authorities, or if detainer is not exercised parole (presumptive parole) to the community effective (date)." Allow an additional 30 days for release planning."

NOTE: When parole is to a detainer, the written reasons given should be associated with the date of release to the detainer; the reason for setting the alternative date of parole to the community 30 days later is to allow for release planning. If a detainer is withdrawn sufficiently in advance to make this additional 30 day period unnecessary, the institution should notify the Commission.

- D. "Continue for a Fifteen-Year Reconsideration Hearing in (month & year) [U.S. Code cases and all revocation hearings].
- E. "Continue to a Reconsideration Hearing (month & year) [D.C. Code three-year and five-year reconsideration cases].

F. "Continue to Expiration" [For federal sentences, use when parole prior to the statutory release date (sentences of less than five years) or two-thirds date (sentences of five years or more) is not desired. For D.C. Code sentences, use when parole prior to the mandatory release date (or sentence expiration date) is not desired.]

G. *For a YRA prisoner granted a presumptive parole date or continued to expiration within three years of the hearing:* "Continue to a presumptive parole on [date] after the service of [] months, with a rehearing in [12 months from the date of the hearing]" or "Continue to expiration, with a rehearing in [12 months from the date of the hearing]."

For a YRA prisoner not granted a presumptive parole date or continued to expiration within three years of the hearing: "Deny a presumptive parole date within three years of the hearing and continue to a rehearing in [12 months from the date of the hearing]."

II. SPECIAL CONDITIONS [*NOTE:* The special condition must be typed out in full on the Notice of Action immediately after the decision]

A. ". . . with the special drug aftercare condition"

B. ". . . with the special alcohol aftercare condition"

C. ". . . with the special mental health aftercare condition"

D. "...with the special Community Corrections Center condition."

E. ". . . with special supervision for () months" (not to exceed six months).

F. ". . . with the special condition regarding [fines] [restitution orders] [court-ordered child support or alimony payments]."

G. ". . . with the special condition regarding financial disclosure."

H. "... provided your committed fine is paid or otherwise disposed of according to law."

I. "... with the special home confinement condition. For a period of ___ months".

J. "... with the special search condition."

K. "...with special employment-restriction condition as follows:

You shall not to be employed in a fiduciary capacity without the prior approval of your U.S. Probation Officer.

You shall not be employed in any position that requires you to handle money or authorize funds to be disbursed, unless your employer is first notified of your conviction and the circumstances thereof and with the approval of your U.S. Probation Officer.

You shall not be employed in the (gaming) (telemarketing) (business) industry without obtaining prior approval from your U.S. Probation Officer and the U.S. Parole Commission. [and/or]

You shall refrain from engaging directly or indirectly in the occupational activity in which you were engaged when you committed the instant (offense) (parole) (probation) (violation behavior); namely _____, unless approved by your U.S. Probation Officer and the U.S. Parole Commission.

You shall not become involved in any business transactions relating to mortgage brokering that includes putting buyers and sellers of businesses together, appraising businesses, doing financial research, or arranging financing with banks or private investors unless approved by your U.S. Probation Officer and the U.S. Parole Commission.”

L. “... with the special (SEC)(IRS) condition. You will comply with all the rules and regulations and sanctions of the (Security and Exchange Commission). (Internal Revenue Service).” [and/or] “You shall comply with all IRS reporting and financial obligations and provide proof of meeting all IRS obligations to your U.S. Probation Officer as requested.”

M. “... with the special credit-restriction condition.”

N. “... with the special computer-restriction condition.”

O. “... with the special sex-offender-treatment condition as follows:

You shall participate in an in-patient or out-patient mental health program as directed by your U.S. Probation Officer, with special emphasis on long-term sex offender testing and treatment. You are expected to acknowledge your need for treatment and to participate in good faith in achieving the program goals that will be established for you.” [and/or]

You shall not have any association or contact of any kind with minor children, whether in your residence, employment, social, or other activities, without the approval of your U.S. Probation officer. [and/or]

You shall not possess in any place, or at any time, any pornographic material.”

III. PSYCHIATRIC CONTINUANCE

"Continue to (one year later) or until such time as the medical staff shall advise the Regional Commissioner that subject is sufficiently recovered mentally to participate in a parole hearing." (According to regulations the institutional staff is required to submit a progress report at least every six months on the mental health of the inmate)

IV. ORIGINAL JURISDICTION (Use Two Orders)

A. "Refer to Regional Commissioner for Original Jurisdiction consideration."

B. (Alternate Decision) "Continue, etc."

V. ORIGINAL JURISDICTION - ORDER OF REGIONAL COMMISSIONER

A. "Your case has been designated as Original Jurisdiction and referred to the National Commissioners for decision."

B. "Your case has been previously classified as Original Jurisdiction -Refer to National Commissioners for declassification."

C. "Your case has been previously classified as Original Jurisdiction -Refer to National Commissioners for declassification and reconsideration pursuant to 28 C.F.R. 2.24(a)."

VI. RESCIND PAROLE EFFECTIVE DATE (Use two orders)

A. 1. "Rescind Parole Grant Effective (date)."

2. (a) "Continue to a Presumptive Parole (date). This requires service of an additional _____ (mos.)(days)."

(b) "Parole Effective (date). This requires service of an additional _____ (mos.)(days)."

(c) "Continue to Expiration. This requires service of an additional _____ (mos.)(days)."

B. 1. "No Decision to Rescind."

2. "Parole Effective (date)."

NOTE: Instruct typists to copy the findings of fact and the basis for each finding on the Notice of Action.

VII. ACTIONS AT STATUTORY INTERIM HEARING

A. "No change in Presumptive Parole date (____)."

B. "No change in Fifteen-Year Reconsideration date (____)."

C. "No change in Continuance to Expiration."

D. "No change in Presumptive Parole date." "Parole effective date (____)."

NOTE: If the original decision included a special condition/detainer wording, add this condition/wording.

- E. "Reopen and retard (or rescind) Presumptive Parole date." SPECIFY NEW ACTION.
NOTE: Use in cases of significant disciplinary infractions only.
- F. "Reopen and advance (Presumptive Parole date) (Continue to Expiration)." SPECIFY NEW ACTION.

VIII. PRE-RELEASE REVIEW (ON THE RECORD)

- A. "No change in Presumptive Parole and Parole effective (date)."
- B. "Reopen and retard Presumptive Parole date of (date) [up to 90 days for disciplinary reasons; up to 120 days for program planning] and Parole effective (date)."
- C. "Reopen and retard Presumptive Parole date of (date) and schedule for a rescission hearing (on the next appropriate docket) (upon return to a federal institution)."
- D. "Reopen and advance Presumptive Parole date of (date) for superior program achievement and Parole effective (date)."

IX. REOPENINGS

- A. "Reopen and (Parole effective, Continue, etc.)"
- B. "Pursuant to [28 C.F.R. 2.28(f)] [Pursuant to 28 C.F.R. 2.28(f) and 2.30], reopen and schedule for a special reconsideration hearing to consider new adverse information."
- C. "Pursuant to 28 C.F.R. 2.28, Reopen and Continue to Expiration." NOTE: Use in cases in which a presumptive parole date has been ordered and the inmate subsequently receives a sentence reduction which will result in release prior to the presumptive parole date given. Indicate on the NOA that this action is non-appealable. In the 'Reasons' section state that "the Commission's evaluation of your case remains the same. Your sentence reduction will result in mandatory release prior to the previously set presumptive parole date".
- D. "Pursuant to 28 C.F.R. 2.28(e), reopen and retard parole effective date of _____ and parole effective _____ [with the following additional special condition(s)]:"
- E. "Pursuant to 28 C.F.R. 2.28(d), reopen and schedule for a special reconsideration hearing pursuant to 28 C.F.R. 2.52(c)(2) on the next regularly scheduled docket to consider forfeiture of time spent on release and further action as may be appropriate."

X. DISPOSITIONAL RECORD REVIEW

- A. "Let the Detainer Stand."
- B. "Withdraw detainer and close case." (where expiration date has passed)

- C. "Withdraw detainer and reinstate to supervision when released from present sentence."
- D. "Withdraw warrant dated _____ conditioned upon full execution of current sentence. Warrant to be reissued if sentence is vacated or modified."
- E. "Void previous order to schedule for a subsequent dispositional review and let the detainer stand."

XI. DISPOSITIONAL REVOCATION/COMBINED DISPOSITIONAL REVOCATION/INITIAL HEARING

Two orders should be used – the first addressing the revocation and street time decisions, and the second addressing the recommencement/reparole decision. The following examples pertain to prisoners with sentences other than YCA, NARA, Canadian/Mexican transfer cases. In YCA, NARA, and Canadian/Mexican transfer cases, the federal term runs uninterruptedly (unless absconding is also found as a violation of parole) so the wording concerning the commencement of the unexpired portion of the federal sentence is to be deleted; and the wording as to the street time credit changed appropriately.

A. NEW STATE SENTENCES (Dispositional Revocation Hearing Orders)

“Revoke parole; none of the time spent on parole shall be credited. The unexpired portion of your federal sentence shall commence upon your release from state custody or upon federal rep parole to your state sentence, whichever comes first;”

“(Continue for a presumptive) parole from the violator term after service of ____ months (date) [or by expiration of sentence, whichever comes first].”

“Continue for a fifteen-year reconsideration hearing (mo/yr 15 years from date of dispositional hearing).”

(ADD AT THE BEGINNING OF THE 'REASONS' SECTION)

“If you are released from state custody prior to the above date, you will be taken into federal custody. You will then have a presumptive parole on the above date unless you are released earlier by expiration of sentence less good time. If you are still in state custody as of the above date, you will have a presumptive parole from the violator term to your state sentence on the above date.”

“If you are released from state custody prior to the above date, you will be taken into federal custody and provided a fifteen year reconsideration hearing on the above date, unless you are released earlier by expiration of sentence less good time. If you are still in state custody as of the above date, you will be given a fifteen year reconsideration hearing in state custody.”

“Number of days owed on federal parole violator term = (_____) (use for sentences where street time is forfeited)”

“Maximum expiration date on federal parole violator term is (______). (use for YCA, NARA, Mexican/Canadian Treaty cases)”

“In addition, you have been scheduled for an interim record review during (mo/yr); if you are returned to federal custody before that time an interim hearing will be conducted during the month scheduled for the record review.”

NOTE: If it is evident that the time remaining on the new sentence plus the amount of time remaining on the violator term will fall short of the appropriate 'time-served' decision, the order may be modified to reflect commencement upon release from the new sentence and a 'continue to expiration' on the violator term.

B. FEDERAL OR D.C. CODE SENTENCE

1. Orders for Combined Initial/Dispositional Revocation Hearings

“Revoke parole; none of the time spent on parole shall be credited. The detainer warrant will be executed on your parole violation term upon your release by parole or mandatory release from the new sentence.”

“(Continue for a presumptive) parole on the new sentence after service of months (date); (Presumptive) parole on the violator term as of the same date.”

“Continue to expiration on the new sentence; Continue to expiration on the violator term.”

“Continue to expiration on the new sentence; Continue to a presumptive parole on the violator term (date) [or by expiration of sentence less good time, whichever comes first].
NOTE: Add the wording in brackets if there is a question as to whether expiration of sentence will occur prior to the appropriate presumptive parole date.”

“Continue to a fifteen-year reconsideration hearing on the new sentence; Defer consideration on the violator term.”

“Continue to expiration on the new sentence; Continue to a fifteen-year reconsideration hearing during (mo/yr 15 years from date of dispositional revocation hearing) on the violator term.”

NOTE: Use the reparole guideline worksheet and add wording so that the offense behavior statement references both "new offense/parole violation behavior"; the months in custody reflect "federal" or "state and federal" as appropriate; the guideline reference is to "Parole/Reparole Guidelines". The severity rating should reflect all aspects of the parole violation behavior, even if there were instances of criminal conduct involved in the parole violation which are not a part of the offense for which the new federal sentence was imposed.

2. Orders for Dispositional Revocation Hearings Not Combined with Initial Hearings

“Revoke parole; none of the time on parole shall be credited. The unexpired portion of your original federal sentence shall commence upon your release from your new sentence or upon reparole to your new sentence, whichever comes first;”

“(Continue for a presumptive) parole from the violator term after service of ____ months (date).”

“Continue for a fifteen-year reconsideration hearing (mo/yr) (15 years from date of dispositional revocation hearing).”

NOTE: If it is evident that the time remaining on the new sentence plus the amount of time remaining on the violator term will fall short of the appropriate 'time-served' decision, the order may be modified to reflect commencement upon release from the new sentence and a 'continue to expiration' on the violator term.

XII. TERMINATION OF SUPERVISION

- A. "Terminate supervision effective (date)."
- B. "Continue under supervision [Five Year Hearings Only]. There is a likelihood that you will engage in conduct violating a criminal law." [The Notice of Action and the Hearing Summary should also specify the basis for this finding of likelihood.]

XIII. MANDATORY PAROLE (AT TWO-THIRDS OF TERM)

- A. "Mandatory Parole at two-thirds of the term."
- B. "Deny Mandatory Parole and Continue to Expiration" (use when there is a finding after a hearing that there have been serious violations of institutional rules or there is a likelihood of further criminal conduct).
- C. "Schedule for a Mandatory Parole Hearing on the next docket."

XIV. REVOCATION HEARINGS (Use three separate orders)

- A. With Regard to Revocation
 - 1. "Revoke parole"
 - 2. "no finding of violation"
 - 3. "the violation(s) found deemed not sufficient for revocation"

B. With Regard to Service of the Term

1. "Time spent on parole from ([last date of reporting] [day after release] through [the day before the warrant was executed] shall be credited)
2. "No credit on the sentence shall be given for the period beginning ([last date of reporting] and ending [the day before the warrant was executed])
3. "None of the time spent on parole shall be credited." (Use when there is a criminal conviction)
4. "No credit on the sentence shall be given for the period beginning () and ending ()." (Use in YCA, NARA, and Mexican/Canadian Treaty cases - absconding cases only).

C. With Regard to Continuance "Continue [to a Presumptive Parole after service of () months (date), for a fifteen-year reconsideration hearing, or to expiration] if no 'effective parole date' is established."

D. With Regard to Reinstatement "Withdraw warrant dated _____ and (close case) (reinstate to supervision forthwith). The (U.S. Marshals Service) (Bureau of Prisons) is requested to return the warrant to the Parole Commission as soon as possible."

____ E. Wording for Street-Time Forfeiture in the 9th Circuit "Revoke _____, None of the time spent on _____ shall be credited." The Commission has considered the mitigating circumstances brought forth at your Revocation Hearing and has determined in its discretion that forfeiture of all street time is warranted under the circumstances.

XV. NATIONAL APPEALS BOARD

- A. "Decision dated () Affirmed"
- B. "Decision dated () Modified" (state new action)
- C. "Decision dated () Reversed" (state new action)
- D. "Original Jurisdiction Classification dated () reversed. Case declassified."

XVI. CASES WITH UNSATISFIED RESTITUTION ORDERS

The following wording on the Notice of Action shall be added to each presumptive/effective parole case: "If you have not satisfied the restitution order prior to release, a reasonable plan of payment (or performance of services, if ordered) must be included in your parole release plan. If it is determined that you have the ability to satisfy the restitution order prior to release, but have willfully failed to do so, approval of your release plan shall be contingent upon your first satisfying the restitution order."

XVII. D.C. CODE CASES - INITIAL HEARINGS BEFORE AUGUST 5, 1998

- A. "Parole effective on _____."
- B. "Deny parole and continue to expiration."
- C. "Deny parole and continue for a rehearing in _____ after service of ___ months from your parole eligibility/ initial hearing/rehearing date of _____."

XVIII. D.C. YOUTH PAROLE DENIAL CASES WITH CONTINUANCE OF MORE THAN ONE YEAR

Use the applicable wording from Section I above, but add: "In addition, you shall have a yearly interim hearing in _____ (month/year) and a special interim hearing on the next available docket after the Commission is notified of your completion of your program plan."

XIX. D.C. SUPERVISED RELEASE REVOCATION HEARINGS

- A. With respect to revocation: "Revoke the Term of Supervised Release."
- B. With respect to the number of months to be served and credit toward the sentence: "You shall serve a new term of imprisonment ___ months from the date the warrant was executed." [Add if applicable: For purposes of the guidelines only, you are credited with ___ months in custody before the warrant was executed.]
- C. With respect to additional supervision upon release: "Upon your release from custody, you shall commence a new term of supervised release of ___ months." "You shall be subject to the following special conditions. (List any special conditions)."

■ **APPENDIX 2 - TEMPORARY/SPECIAL PROCEDURES**

A. RETROACTIVITY OF CERTAIN COMMISSION REVISIONS

[Cancellation Date - Effective Until Canceled]

1. Retroactivity of Guideline Revisions

a. Retroactivity for guideline revisions is authorized where the guideline range calculated under the revised guidelines is more favorable to the prisoner than the previously calculated guideline range. That is, retroactivity is to be determined by whether the guideline range is more favorable when calculated, *de novo*, under current procedures. This retroactivity determination will be made at all subsequent hearings (*e.g.*, statutory interim hearings), appeals, pre-release record reviews and/or whenever the matter is brought to the attention of the Commission.

b. Interim Hearings: (1) If the revised guideline range is more favorable, complete reasons will be given beginning with the statement – "Your guidelines are recalculated as follows:." (2) If the revised guideline range is not more favorable, complete reasons need not be given, but the Notice should state: "Retroactivity does not apply." This statement means that a finding has been made by the Parole Commission at your hearing that no regulatory or procedural changes have been made by the Parole Commission since your last hearing which would positively affect your case in terms of Offense Severity or Salient Factor Scoring.

c. Pre-release reviews. Advancement of the parole date will be considered, but revised reasons need not be provided to the prisoner.

2. Retroactive Application of Parsimony. At a statutory interim hearing or a pre-release record review, a case may be advanced to correct an unwarranted departure from the principle of parsimony at a previous decision. This may be cited on the Notice of Action as 'retroactive application of parsimony.'

3. Dispositional Revocation Procedure. The revision to 28 C.F.R. 2.47 (effective 10/1/84) is prospective only and applies to cases given dispositional record reviews on or after 10/1/84. Cases for which dispositional revocation hearings were ordered under previous procedure will be heard as previously ordered.

4. Fifteen-Year Reconsideration Procedure. Cases previously scheduled for ten-year reconsideration hearings will be given reconsideration hearings at the time of the next scheduled statutory interim hearing. Following such hearing, a presumptive release date may be set up to fifteen years from such hearing or a fifteen-year reconsideration hearing may be ordered.

B. SPECIAL PROCEDURE FOR PRELIMINARY INTERVIEWS: WESTERN DISTRICT OF WASHINGTON CASES [Cancellation Date: Effective Until Canceled]

In order to comply with a decision by the United States District Court for the Western District of Washington, U.S. Probation Officers who conduct preliminary interviews in that district make the actual finding rather than a recommended finding whether or not there is probable cause to believe that the parolee violated a condition of his parole. If the Probation Officer finds no probable cause, he is to contact the Parole Commission by telephone immediately, so that the Regional Commissioner may, if appropriate, reverse that finding before the parolee is released.

In all other respects, preliminary interviews in this district are conducted in accordance with standard procedures, including the use of the summary report of the preliminary interview and the Commission's probable cause letter.

C. SPECIAL PROCEDURE FOR RESCISSION CONSIDERATIONS: SECOND CIRCUIT CASES [Cancellation Date: Effective Until Canceled]

The following procedures are presently being used to comply with a decision involving parole rescission in the Second Judicial Circuit (New York, Vermont, and Connecticut). *Drayton v. McCall*, 584 F.2d 1208 (1978).

1. In General. These procedures apply only to the rescission of a parole effective date and should not be used to rescind a presumptive parole date.
 - a. The scope of the rescission hearing is a *de novo* determination whether the parole grantee violated institutional rules or committed a new crime and, if so, whether parole should be rescinded as a sanction. Findings of a rule violation by Disciplinary Hearing Officer may be considered as evidence of the charged disciplinary infraction, but such findings are not taken by the Commission as conclusive of the matter. The parole grantee is given an opportunity to show that the DHO erred in his findings or that his conduct does not justify the rescission of the parole already granted. A new criminal conviction, however, is accepted as a conclusive determination of guilt.
 - b. A statement giving *notice of procedural rights* (Attachment 1) is attached to the prisoner's copy of the Notice of Action reopening the case for a rescission hearing.
 - c. Disclosure of documents is provided under the ordinary procedures for rescission hearings.
 - d. The prisoner is given the opportunity for confrontation and cross-examination of adverse witnesses. Requests for adverse witnesses should be received by the Commission within twenty days of the date of the Notice of Action reopening the case for a rescission hearing. Such requests are referred to a case analyst, who will recommend to the Commissioner whether to grant or deny them. In making that determination, reference should be made to the standards for deciding whether adverse witnesses are warranted at local revocation hearings. Such witnesses should be persons who have provided information supporting the charges. Ordinarily, such witnesses should be present at the hearing unless the

Commission finds good cause for their non-appearance. Good cause may include irrelevancy, repetitiousness, or undue hazard to institutional security (the Bureau of Prisons should be contacted for information relating to this possible determination). In addition, the fact that a possible adverse witness is a great distance from the place of the hearing may be good cause for non-appearance. In these cases, alternative means of presenting the information at the hearing should be used (*e.g.*, affidavits, letters, etc.).

If an adverse witness is not produced at the hearing, the reason should be stated in the hearing summary. If time permits, a case analyst should send the prisoner a letter before the hearing stating whether the request for witnesses is granted or denied and, if denied, the reasons therefor.

NOTE: The fact that a request for adverse witnesses is untimely is not reason in itself to deny the request. If the untimely request is otherwise proper and time does not permit arrangements to be made for the witnesses to attend the hearing, the examiner panel should continue the hearing to the next docket unless the prisoner waives his right to confrontation and cross-examination of the witnesses.

e. The prisoner may be represented by an attorney or another representative. The attorney may be hired by the prisoner; or, if the prisoner is financially unable to retain counsel, he may apply for a court-appointed attorney on Form CJA-22 (available from the case manager). The role of an attorney or other representative at these hearings is the same as in a parole revocation hearing.

f. The following forms used for revocation hearings are used for these rescission hearings, with the word "revocation" replaced by the word "rescission": revocation checklist, attorney witness election form, Form CJA-22. Additionally, the section of the revocation hearing checklist relating to receipt of a copy of the warrant application should instead read that the prisoner has received a copy of the Notice of Action listing the charges.

2. Special Notice Procedure in Connecticut. Because of an injunction issued in *Green v. McCall*, Civil No. N-78-23 (February 9, 1978), the procedures described above are applied in rescission hearings in Connecticut, but instead of the notice of procedural rights given in New York and Vermont, prisoners in Connecticut are sent a special form letter relating to the *Green* case. (Attachment 2).

ATTACHMENT 1

The purpose of the rescission hearing is to decide whether a deferral of your parole date is warranted based upon the charges listed on the attached Notice of Action. At your hearing, you may present documentary evidence and you may call voluntary witnesses on your behalf. If you wish to contest the charges stated on the Notice of Action, you may request the presence of those persons who have given information upon which the charges are based. Such requests must be sent directly to the Commission within twenty days of the date of the notice. These witnesses will be provided unless good cause is found for their non-appearance. You may request your case manager to permit you to review all disclosable documents that will be considered by the Commission.

You may be represented by an attorney or other representative of your choice. If you are unable to pay for counsel, an attorney may be provided by the U.S. District Court if you complete and promptly return a Form CJA-22 to your case manager.

ATTACHMENT 2

U. S. Department of Justice – United States Parole Commission

The Parole Commission has been required by court order dated February 9, 1978, by Judge Daly to send you a copy of a letter annexed to the record in the case of *Green v. McCall*. This letter sets forth your rights as per the court's order at your forthcoming parole rescission hearing. The following is a copy of this letter:

Two individuals who had been incarcerated at the Federal Correctional Institution at Danbury, Connecticut, have brought a class action in federal district court on behalf of all federal inmates incarcerated in the District of Connecticut who have had or who will have parole rescission hearings. A major issue in the lawsuit is what rights must be given inmates at rescission hearings.

By order of the Honorable T.F.G. Daly, Federal District Judge, the United States Parole Commission cannot hold parole rescission hearings for any member of the plaintiff class until he has had the opportunity to confer with counsel. Further, at that hearing, a member of the class will have an opportunity to present documentary evidence and witnesses. A class member may also be entitled to the assistance of counsel.

If you are an inmate serving a federal sentence within the District of Connecticut and have been given a parole grant, but at some time prior to your release, your parole grant has been retarded so that the United States Parole Commission may reconsider that grant, you are automatically a member of the plaintiff class. Therefore, you are eligible to have the rights described above (e) and you will benefit from any final favorable judgment or be bound by any final unfavorable judgment in this action unless you take the steps set forth below to exclude yourself from this class. Any inmate who does exclude himself will be entitled, as a matter of law, to raise in a separate lawsuit the issue of what rights should be given at parole rescission hearings. However, as a practical matter, the judgment in the class action will probably dictate the outcome in similar suits.

If you wish to exclude yourself from the class action described above, you must give notice of your decision addressed to:

- (1) United States Parole Commission, 5550 Friendship Boulevard - Suite 420, Chevy Chase, Maryland 20815;
- (2) J.L. Pottenger, Jr., Esquire, Attorney for the Plaintiff Case, 127 Wall Street, New Haven, Connecticut 06520.

If you exclude yourself from the plaintiff class, the Parole Commission may be permitted to hold a rescission hearing for you without giving you the protections described above and may hold that hearing sooner than it is allowed to hold hearings for members of the plaintiff class. If you wish to remain a member of the plaintiff class, you need not do any thing. However, if you have any questions concerning this case, you may write to plaintiff's attorney, J.L. Pottenger, Jr., at the above address.

Sincerely,

Case Operations Administrator

cc: (1) J.L. Pottenger, Jr., Esquire, 127 Wall Street, New Haven, CT. 06520; (Enclosure);
(2) Case Manager, Federal Correctional Institution, Danbury, CT. 06810.

■ **APPENDIX 3 - USE OF RELEASEES AS INFORMANTS**

A: INFORMATION TO BE PROVIDED TO THE UNITED STATES PAROLE COMMISSION ON THE USE OF INFORMANTS. The following information is provided to aid agencies when preparing initial requests and subsequent status reports on releasees acting as informants:

1. The letter requesting the use of the releasee should be prepared for the signature of the Director of the agency requesting the use and addressed to the appropriate Regional Parole Commissioner through the Chief United States Probation Officer of the supervising district.
2. The letter should begin with an overview of the proposed utilization of the releasee, specifically stating the significance of intended target(s) in the case.
3. The letter should contain the agent (by name and telephone number) who will be working directly with the releasee.
4. The letter should contain the agency's operating instructions to the releasee and the administrative controls to be used.
5. The letter should contain an evaluation of the releasee's risk factor and the agency's plan to combat this risk.
6. The letter should contain a statement indicating why the potential benefit to the government outweighs the risk of the releasee's reinvolvement with criminal associates.
7. The letter should contain a statement concerning monies to be paid to the releasee for his services and/or expenses.
8. The letter should contain a statement concerning any travel that the informant might be required to make outside the supervising district.
9. The letter should contain a summary of any intended utilization of electronic equipment, surveillance equipment or wiring of the releasee.

B: LETTER OF AGREEMENT ON USE OF INFORMANTS

Re: Name: _____ Register Number: _____

Dear (Director of Agency):

I am in receipt of your request to have the above-named individual act as an informant for your agency. Before such approval is granted, all parties concerned must agree to the below-listed set of conditions.

1. The use of the releasee's services in the capacity of informant will be for a period of no longer than ninety (90) days.

2. A written report will be provided to the United States Parole Commissioner every thirty (30) days. A final report will also be prepared at the end of the authorized period. Copies of all reports will be sent to the appropriate United States Probation Office. The reports will include, among other things, any changes in the status of subject's participation, including payment for cooperation, use of wires, the agency's operating instructions to the releasee, the proposed administrative controls and proposed travel outside of the supervising district that has not been previously approved. All foreign travel must be approved by the United States Parole Commission prior to the actual date of travel. Failure to submit said reports constitutes an immediate cancellation of authorization to use releasee as an informant.
3. [Except for the specific circumstances outlined in the requesting agency letter dated _____], the releasee is not to participate in any illegal activity while engaged in an informant capacity. If any arrest occurs, the United States Parole Commission is to be notified immediately and no attempts are to be made by the agency to divert the prosecution of new charges.
4. The release is not to be used in any manner which might jeopardize his safety or cause him to violate any of the conditions of parole (a list of standard parole conditions is attached).
5. The releasee shall acknowledge that he understands these conditions and that he is signing this agreement willingly and is not being subjected to any threats or coercion.

A copy of this letter has been forwarded to the Chief United States Probation Officer responsible for the supervision of the releasee. An in-depth briefing with the releasee concerning his relationship with your agency, the intended target, your operating instructions to him and the conditions imposed by the United States Parole Commission will be conducted by the appropriate United States Probation Officer and a representative of your agency.

At the briefing, this agreement must be signed by the releasee, the appropriate United States Probation Officer, and your agency's Director, Regional Director or their designee acknowledging that all parties understand and accept the conditions outlined.

As the operation proceeds, the assigned U.S. Probation Officer is to be kept fully informed regarding the operation's progress insofar as it involves the releasee, and regarding your agency's expectations for releasee's future activity in the operation. This is essential in order to insure that an uninformed U.S. Probation Officer does not inadvertently enter into a situation which might needlessly jeopardize the U.S. Probation Officer's safety and/or the integrity of the operation.

At the conclusion of the agreement period authorized by the United States Parole Commission, the appropriate United States Probation Officer is to advise the releasee that his informant role has been terminated.

Once this office is in receipt of this signed agreement and all the necessary information is obtained, your request will be carefully reviewed. You will be notified of my decision as expeditiously as possible.

Sincerely,
Regional Commissioner

Encl: Conditions of Release, USPC Rules & Procedures: 2204-04

Parolee/Mandatory Releasee

Date

United States Probation Officer

Date

Agency Representative

Date

cc: Chief U.S. Probation Officer

■ APPENDIX 4 - TRANSFER TREATY CASES

UNITED STATES PAROLE COMMISSION TRANSFER TREATY CASES - SUPPLEMENTARY INSTRUCTIONS FOR APPLICATION OF SENTENCING GUIDELINES

(Revised April 1, 2003)

The following supplementary application instructions and examples are designed to facilitate application of the sentencing guidelines to transfer treaty cases. They are set forth in order by guideline section.

CHAPTER THREE, PART E (ACCEPTANCE OF RESPONSIBILITY)

§3E1.1. Acceptance of Responsibility

1. In General. Application of §3E1.1 in transfer treaty cases is made more complicated by the fact that the court procedures of the various transferring countries may be significantly different from those of U.S. Courts.
2. Transferring Country With Similar Court Procedures. In the case of a transferring country with court procedures similar to those of U.S. Courts (*e.g.*, Canada, England), the standards set forth in §3E1.1 are readily adaptable.

A key element is whether the defendant pleads guilty or whether he denies his guilt and goes to trial. In practice, a plea of guilty acts as a rebuttable presumption. If a defendant pleads guilty and accepts responsibility for the conduct that constitutes the offense of conviction, he will receive an adjustment for acceptance of responsibility absent substantial countervailing circumstances. Conversely, if a defendant goes to trial, he will receive no adjustment for acceptance of responsibility absent substantial countervailing circumstances.

A defendant who receives a 2-level adjustment under §3E1.1(a) is eligible for an additional 1-level adjustment under §3E1.1(b) if (A) he timely provides complete information to authorities concerning his involvement in the offense, or (B) he timely notifies the government of his intent to plead guilty.

3. Transferring Country With Dissimilar Court Procedures. A number of countries have court procedures that are dissimilar to those used in U.S. Courts. In such cases, the application instructions in §3E1.1 must be adapted to account for the differences in procedures.

In Mexico, for example, there are no pleas of guilty. Each defendant has a trial and findings of guilt are frequently based, in whole or in part, upon the statement given to the police by the defendant. In such cases, an incriminating statement given to the police and incorporated into the Sentencia (the judgment of conviction) is equivalent to a plea of guilty.

Thus, if the transferring country is a country with procedures similar to Mexico --

A. A defendant who provided self-incriminating information to the police resulting in his conviction will qualify for a 2-level adjustment for acceptance of responsibility under §3E1.1(a), provided there are no countervailing circumstances warranting denial of this adjustment.

If the defendant qualifies for a two-point reduction under §3E.1.1(a) and the self-incriminating information was provided fully and in a timely manner (for example, where the defendant gave full confession shortly after arrest), the defendant will be eligible for an additional 1-level adjustment under §3E1.1(b) (provided the defendant's offense level before the application of §3E1.1 is level 16 or greater).

Note: A denial of responsibility for the offense to the Post Sentence Investigator does not bar an adjustment under §3E1.1 if it otherwise would be applicable from the defendant's conduct in the foreign country and at the current hearing.

B. A defendant who has not cooperated with the foreign authorities by providing self-incriminating information will nonetheless qualify for a 2-level adjustment for acceptance of responsibility under §3E1.1(a) if the defendant, upon return to the United States, promptly accepts responsibility for his offense(s) of conviction (even if only because the law and treaty require it) and there are no countervailing circumstance(s) warranting denial of this adjustment. Such a defendant, however, is not eligible for a 3-level adjustment under §3E1.1(b).

C. The following are examples of countervailing circumstances that may warrant denial of an adjustment for acceptance of responsibility: (1) the defendant has attempted to obstruct justice by making a material false statement to the probation officer preparing the Postsentence Report about his offense, prior criminal record, or other matter relative to the Commission's determination; (2) the defendant has attempted to obstruct justice by threatening a witness, by giving a material false statement to a judicial officer, or by urging another person to make a material false statement to a law enforcement or judicial officer, either in the foreign jurisdiction or in the United States; (3) the defendant persists in attacking the facts established by his foreign conviction at the time of the hearing before the Parole Commission (see the discussion in subdivision 4 below).

4. Attacks on Foreign Court Findings of Guilt.

A. Transfer treaty prisoners sometimes seek guideline adjustments and/or downward departures based on factual contentions that contradict the evidence accepted by the foreign court as true (*e.g.*, the confessions included in the Sentencia by a Mexican court). The defendant should be advised by the hearing examiner that law, treaty, and the defendant's own agreement not to challenge the foreign court conviction, preclude consideration by the Parole Commission of any challenge to the evidence accepted by the foreign court as the basis for the defendant's conviction. Hence, the hearing examiner is not empowered to make findings of fact that contradict the foreign judgment of conviction.

B. A defendant who challenges the findings of the foreign court pertaining to his offense of conviction (for example, by claiming that he is not guilty or that his participation in the offense was significantly less than is consistent with the facts accepted by the foreign court) cannot be said to have accepted responsibility for his offense and will disqualify himself from any downward adjustment under §3E1.1 that he would have received if he otherwise qualified for such an

adjustment under subdivision 3 above. Partial acceptance of responsibility for the offense of conviction is insufficient for an adjustment under §3E1.1.

C. If a defendant appears to be violating his agreement not to challenge the foreign court conviction, the hearing examiner should advise the defendant that (1) the Commission is precluded from considering challenges to the foreign court conviction (including the facts upon which it is based) and (2) the defendant's continued challenge to such conviction will require him to forfeit any adjustment under §3E1.1 that he might receive if he otherwise qualifies for such an adjustment. The hearing examiner may recess the hearing to give the defendant an opportunity to consult with his attorney on this issue. If the defendant reconsiders, and announces that he accepts responsibility for the offense(s) of conviction (even if only because the law and the treaty require it), and the defendant thereafter refrains from challenging the foreign conviction, an adjustment for acceptance of responsibility will be awarded if the defendant otherwise qualifies for such adjustment under subdivision 3 above.

Example: A defendant gave a statement to foreign authorities in which he admitted his guilt. At the hearing, he claims that he was innocent and confessed only out of fear of being tortured. The hearing examiner provides the caution described in the previous paragraph. The defendant then reconsiders and states that he accepts responsibility for his offense of conviction because the law and the treaty require him to do so. Under subdivision 3, the defendant will qualify for an adjustment for acceptance of responsibility based on his admissions to foreign authorities unless the Commission finds a countervailing circumstance that warrants denial of this adjustment.

D. Notes

1. The requirement that the defendant accept responsibility for his conduct applies only to the conduct that forms the basis for the offense of conviction. The defendant is not obligated to accept responsibility for other relevant conduct (conduct relevant to the offense but not included in the foreign court adjudication of guilt). Disputes about other relevant conduct must be resolved by the preponderance of the evidence standard. Note also that, although a defendant is not obligated to affirmatively accept responsibility for relevant conduct or even to speak about it, he is not entitled to lie about it. A finding by the Commission that the defendant has falsely contested his relevant conduct is grounds for denying any adjustment for acceptance of responsibility.

2. Even where it is alleged that a conviction was obtained by torture, the Commission, under the treaty, must accept the findings of the foreign court regarding the offense of conviction. That is, the Commission may, for example, find that the defendant only confessed under torture (and grant a departure for this reason), but it cannot overrule the factual findings accepted by the foreign court.

CHAPTER FIVE, PART K (DEPARTURES)

A. Parole Commission Authority to Depart

1. In General. It is important to remember that a finding that the Parole Commission has "no authority to depart" is not the same as a finding that the Parole Commission has the authority to depart, but declines to depart under the circumstances of the particular case. Although the outcome to the defendant is the same in both instances (no downward departure), the legal impact is different. A court of appeals will remand a case back for rehearing if it believes the Parole Commission erroneously concluded that it had no authority to depart, even if the Commission lawfully could have declined to exercise its discretion to depart based on the circumstances of the case. That is, a decision not to exercise the Parole Commission's discretion to depart (based upon a finding that, after consideration of all the circumstances, the particular factors do not sufficiently distinguish the case from a typical, "heartland" case to warrant a departure) is not appealable. An erroneous conclusion that the Parole Commission has no authority to consider a departure is reversible error.
2. Important Caution. The hearing summary, in each case, must reflect the panel's consideration of all reasons put forward by the defendant for downward guideline adjustments or departures, and explain the panel's decision. Observing this requirement will prevent any misunderstanding as to whether the panel considered the issue, and whether the panel properly understood its authority to consider a departure where warranted by the circumstances of the case.

B. Departure for Single Act of Aberrant Behavior

1. In General. The Sentencing Commission has recognized the possibility of a downward departure for a "single act of aberrant behavior" in §1A4(d). More specific guidance is now contained in §5K2.20.
2. Definition. A "single act of aberrant behavior" generally will be a spontaneous, thoughtless, and "out of character" criminal act. A classic example would be a defendant who parks his car on the street, does an errand, and upon returning to his car finds a bank moneybag dropped by a careless armored car employee on the street in front of his car's fender. The defendant sees no one around, puts the moneybag in his car, and drives home. The essence of this example is that the defendant succumbed to the temptation offered by the circumstances and, with little reflection, committed an offense that he was not predisposed to commit. It is important to note that the defendant did not create the circumstances leading to the offense and committed the offense with little reflection. In this case, it is possible to see how a defendant, with no particular predisposition to commit the offense, might have, with little reflection, succumbed to the temptation in the unusual circumstances created by others. It is the unusual nature of the circumstances (in sentencing guidelines terminology, a "non-heartland" case) and the uncharacteristic, spontaneous and, unplanned action that makes the departure warranted.
3. Prior Criminal Record. The fact that the defendant has no prior criminal record does not by itself warrant a departure for aberrant behavior because the consideration of no prior record is already taken into account in Chapter Four (Criminal History). Conversely, the fact that a defendant has a criminal history does not automatically bar consideration of a downward departure for aberrant

behavior. In the above example, a prior conviction for driving while intoxicated or a barroom fight would not seem relevant. On the other hand, if the defendant had a prior record for theft or misappropriation of property, this criminal record might negate the "aberrant" requirement for a departure on this basis. The Sentencing Commission has restricted consideration of a departure for aberrant behavior to a defendant with no more than one criminal history point (see §5K2.20).

4. Nature of the Offense. Some offenses, are by their nature, unplanned and spontaneous (for example, voluntary manslaughter). A departure for aberrant behavior in such a case would require exceptional circumstances, given that the unplanned, spontaneous nature of the offense is already taken into account by the offense guideline itself.

C. Departure in the Case of a Foreign Sentence That Is Less Than the Applicable Guideline Range.

1. In General. If the foreign sentence is lower than the applicable guideline range, the foreign sentence is deemed to be the "guideline sentence" under §5G1.1(a). The question then arises as to whether any downward departure is to be taken from the applicable guideline range or the full term date of the foreign sentence.
2. Procedure. If the foreign sentence is lower than the minimum of the applicable guideline range, the prisoner's release date will be the full term date of the foreign sentence unless the Commission finds that: (A) a downward departure from the applicable guideline range is warranted, and (B) the downward departure warranted is great enough to provide a release date earlier than the full term date of the foreign sentence.

That is, the downward departure is not taken from the full term date of the foreign sentence. Rather, the downward departure is taken from the bottom of the applicable guideline range, and should be the same for any similarly-situated prisoner regardless of the length of the foreign sentence imposed. If, for example, a downward departure for a mitigating offense factor or substantial assistance to government authorities is found warranted, but the appropriate departure is not great enough to provide a release date below the full term date of the foreign sentence, the Commission will find that the "guideline sentence" already accounts for the mitigating factor and a further departure is not appropriate.

There is, however, a special procedure applicable to consideration of a departure for torture or other severe physical or psychological abuse. See Departure for Torture or Other Severe Abuse.

3. Interpretation of Sentencing Guidelines. It is the Parole Commission's interpretation of the sentencing guidelines that any departure is first to be considered in relation to the applicable guideline range, regardless of the length of the defendant's sentence. For example, if the applicable guideline range is 121-151 months, the hearing panel must consider whether a term of imprisonment of less than 121 months is warranted on the basis of the mitigating circumstances presented. Assume that a downward departure of 25 months from the bottom of the applicable guideline range is warranted. This would result in a term of imprisonment of 96 months. If the maximum of the foreign sentence is 110 months, the departure would result in an earlier release date because the appropriate term of imprisonment (determined with respect to the applicable guideline range) is less than the maximum of the foreign sentence. In practical effect, the

downward departure would be 14 months from the maximum foreign sentence. If the maximum of the foreign sentence is 96 months or less no further downward departure is warranted because the length of the foreign sentence has already resulted in a downward departure of 25 months from the term provided in the applicable guideline range.

4. Certain Defense Arguments. A defendant may make the argument that the downward departure for a mitigating factor should be considered in relation to the maximum of the foreign sentence only and without regard for the applicable guideline range. The Parole Commission does not believe this to be the correct interpretation of the sentencing guidelines. Although it is not the hearing examiner's role or responsibility to engage in debate with a defendant or his attorney about the Parole Commission's interpretation of the sentencing guidelines, the following information is provided to enable hearing examiners to have a better understanding of the arguments that may be presented on this issue.

In some cases, a defendant will make the argument noted above based on the belief that the use of the term "guideline sentence" in §5G1.1 is equivalent to "guideline range" as used in §5K2.0. The Parole Commission believes that the Sentencing Commission used different terminology to refer to different concepts and that "guideline sentence" and "guideline range" are not equivalent. Rather, the "guideline sentence" in §5G1.1 refers to the sentence that must be imposed absent any reasons for a departure (determined with respect to the applicable guideline range) sufficient to override §5G1.1 and warrant a higher sentence (in the case of a minimum sentence above the applicable guideline range) or a lower sentence (in the case of a maximum sentence below the applicable guideline range). To consider a departure only with respect to the "guideline sentence" rather with respect to the "applicable guideline range" would result in consideration of the extent of the departure without regard to the seriousness of the defendant's offense or criminal history, a result clearly not in accord with the structure of the guidelines.

In other cases, a defendant will make a more limited form of the argument described above. Based upon the Sentencing Commission's use of the phrase "departure from the guidelines," rather than "departure from the guideline range," in §5K1.1 (concerning departures for substantial assistance to government authorities), the argument may be made that the Sentencing Commission meant that any departure for "substantial assistance" should be considered from the "guideline sentence" rather than from the guideline range. The Commentary to §1B1.8, however, makes clear that the term "departure from the guidelines" in §5K2.1 refers to a departure from the applicable guideline range.

D. Departure for Torture or Other Severe Abuse

1. In General. A downward departure may be warranted in the case of torture or other severe abuse. Although a downward departure for torture or other severe abuse (including inhumane prison conditions) is taken from the bottom of the guidelines, the Commission must, in such cases, take into account that the U.S. Sentencing Guidelines were not designed to account for this type of mitigating circumstance (*i.e.*, unconstitutional punishment) at all. Therefore, the following extra step is required.
2. Procedure. If a downward departure is found warranted for torture or other severe abuse, the Commission will first determine how great a departure would normally be warranted in relation

to the applicable guideline range. If such departure is not great enough to require an earlier release date than the prisoner's §5G1.1(a) "guideline sentence," the Commission will then determine whether a greater departure is nonetheless appropriate to provide some recognition of the torture or other severe abuse. This consideration requires balancing the humanitarian need for providing the defendant some measure of relief from the foreign sentence against the seriousness of the offense and the potential threat to the public safety as indicated by his or her criminal history. An earlier release date than the full term date of the foreign sentence ordinarily will be appropriate in the case of torture or other severe abuse, but substantial countervailing factors indicating the need for incarceration may override this presumption.

3. Distinction Between Torture and Abuse.

"Torture" is defined as the officially-instigated infliction of severe physical or mental pain or suffering upon a prisoner, either to extract a confession, to punish the prisoner unlawfully, to terrorize the prisoner into obedience, or out of wanton official cruelty.

"Other severe abuse" is defined as conditions of confinement or conduct (for example, conduct by other prisoners) that inflicts severe physical or mental pain or suffering upon a prisoner, but is not officially instigated or otherwise does not meet the definition of torture.

"Abuse" is defined as conditions of confinement or conduct, whether or not officially instigated, that inflicts unwarranted physical or mental pain or suffering upon a prisoner that is less than severe physical or mental pain or suffering.

Although substantial abuse (for example, repeated rough treatment or harsh prison conditions) ordinarily will warrant a decision at or near the bottom of the applicable guideline range, cases of severe abuse (especially where permanent physical or psychological injury is inflicted) may warrant a decision below the guidelines just as in the case of torture.

ST (Special Transferee) Form 2 - Revised 3/03

PREHEARING ASSESSMENT FOR TRANSFER TREATY CASES

OFFENSE OF CONVICTION:

NAME:

INSTITUTION:

REG. NO.:

SENTENCE(S) LENGTH/COUNTRY:

DATE OF BIRTH:

FULL TERM DATE:

DATE DICTATED:

REVIEWER:

TIME IN CUSTODY:

MONTHS AS OF:

I. PRELIMINARY INFORMATION

A. INFORMATION USED. Describe the documents used for this report and make sure all information has been disclosed. Such information will normally consist of a postsentence report, sentencing documents provided by the transferring country, translations of sentencing documents as appropriate, documents obtained by the probation officer, and other documents relating to the

transfer. There may also be a request for a correction of the postsentence report made by the transferee or his attorney, and (if requested by the Commission) the probation officer's response to the transferee's request. See 28 C.F.R. § 2.68(d).

B. **CONVICTION AND SENTENCE.** List the date of arrest, the offense of conviction, the date of conviction, the name of the court, the length of the sentence, the full term date, and the date of transfer.

C. **CODEFENDANTS.** Check if there are any co-defendants who may have transferred. If there are co-defendants, determine if a release date has been set and if there were any reasons to go outside of the guidelines.

II. OFFENSE LEVEL CALCULATIONS [Note any unresolved guideline issue(s) to be explored at the time of the hearing in the appropriate section(s) below. Note any disagreements with the probation officer's conclusion in the postsentence report as to the application of the guidelines.]

A. CONDUCT FROM CHAPTER TWO

1. Description of Conduct. Describe the offense behavior in detail. Depending on the offense, describe the total amount of drugs involved, the total amount of money involved or the extent of any injuries. Indicate the transferee's role and any aggravating or mitigating factors.

2. Chapter Two Offense Level. List the most analogous U.S. Code offense. Indicate the Base Offense Level and any adjustments (*e.g.*, weapon, injury, and loss adjustments in a robbery case) from Chapter Two of the Sentencing Guidelines Manual. Cite the relevant U.S.S.G. provision(s). Do this for each offense if there are multiple offenses.

B. ADJUSTMENTS FROM CHAPTER THREE

1. Victim-Related Adjustments. Indicate whether there are any factors that would indicate an adjustment based on the victim (*e.g.*, a vulnerable victim, an official victim, or whether the victim was restrained). See USSG Chapter Three, Part A (Victim Related Adjustments).

2. Role in the Offense. Determine whether the transferee qualifies for a role adjustment (*e.g.*, aggravating role, minimal or minor role, abuse of position of trust or special skill, use of a minor). Determine if there are issues relating to whether the transferee abused a position of trust or used a special skill. See USSG Chapter Three, Part B (Role in the Offense).

3. Obstruction or Impeding the Administration of Justice. Determine if there are any issues as to whether the transferee either impeded or attempted to obstruct the investigation, prosecution or sentencing for the offense or recklessly endangered others in an attempt to flee apprehension. See USSG Chapter Three, Part C (Obstruction).

4. Multiple Counts. Apply provisions for addressing multiple counts. See USSG Chapter Three, Part D (Multiple Counts).

5. Acceptance of Responsibility. Determine whether the transferee should receive an adjustment for affirmatively accepting responsibility for the offense. The Commission may not revisit the issue of guilt or innocence. See USSG Chapter Three, Part E (Acceptance of Responsibility) and USPC Supplementary Instructions for Application of Sentencing Guidelines with respect to Chapter Three, Part E in this Appendix.

6. Adjusted Offense Level. Indicate the total adjusted offense level after Chapter Two and Three.

C. CRIMINAL HISTORY, CAREER OFFENDER, AND CRIMINAL LIVELIHOOD FROM CHAPTER FOUR.

1. Criminal History Category. Determine the transferee's criminal history category pursuant to §4A1.1. The definitions for the criminal history provisions are found at §4A1.2. Review the adequacy of the tentative Criminal History Category pursuant to §4A1.3 and indicate whether any unresolved issues should be discussed at the hearing.

2. Career Offenders and Criminal Livelihood. Determine whether the Career Offender provisions of §4B1.1 apply. If the Career Offender provision is applicable, determine the maximum term for the most nearly similar U.S. Code offense tentatively identified. Review the Criminal Livelihood provisions at §4B1.3 only if the tentative offense level is 13 or less. If the offense of conviction was possession of a firearm, determine whether the Armed Career Criminal provisions at §4B1.4 apply.

III. DETERMINE THE GUIDELINE RANGE AND POSSIBLE DEPARTURE FACTORS FROM CHAPTER FIVE.

A. Computation. Indicate the tentative guideline range from the sentencing table found at USSG Chapter Five, Part A.

B. Factors Indicating Potential Departure. Indicate if there are any factors that might warrant a departure from the tentative guideline range. Determine whether the foreign government reported that the transferee provided any substantial assistance in the investigation or prosecution of another pursuant to §5K1.1. Reports of abuse or torture may be considered under §5K2.0 and the legislative history. Outline the abuse claim and indicate if there is any corroborating evidence, *e.g.*, reports from the U.S. consul abroad, reports to the foreign court, reports to others prior to transfer, medical documents and claims of co-defendants.

C. Waiver of Hearing/Release on the Record. Review the computation above and determine if there are factors present suggesting that a release date should be set on the record (*i.e.*, whether the tentative guideline range has already been satisfied or whether there are factors present suggesting a potential downward departure from the guideline range requiring less than the time already served). If the tentative guideline range has not been fully served, consider whether a release date within or above the guideline range would, after deduction by the Bureau of Prisons of applicable service credits (*e.g.* "good time"), result in immediate release from prison. If such factors are present and there are no other reasons to conduct a hearing, then a hearing waiver form (Special Transferee Form 3) should be forwarded to the transferee. Once the waiver form is returned, the Commissioner can enter a decision on the record.

D. Delay of Decision for Release Planning. The entry of a decision on the record that requires immediate release may be delayed by 30 days from receipt of a signed hearing waiver form following notice to the Bureau of Prisons to permit adequate release planning.

IV. SUPERVISED RELEASE

A. Guideline Range. Determine the applicable guideline range for the term supervised release under USSG §5D1.4. The class of felony is determined by reference to 18 U.S.C. § 3559.

B. Maximum Period of Supervised Release Imposable. Determine how many months of supervised release may be imposed by indicating the difference between the maximum tentative guideline less any service credits that may be available ("good time" and foreign credits) and the number of months in the total foreign sentence imposed. The total number of months of imprisonment and under supervised release may not exceed the foreign sentence.

Note: Under some treaties the period of supervised release must extend to the foreign full term date.

C. Special Conditions. Determine if any special conditions of supervised release might be appropriate. A list of sample special conditions can be found at §5D1.4(d)and (e). Give the reasons for imposition of any special conditions.

V. OTHER SIGNIFICANT MATTERS Include any other significant matter that did not fall within the above sections.

ST (Special Transferee) Form 4 - Revised 4/97

SPECIAL TRANSFEREE HEARING SUMMARY

NAME: _____ REG. NO.: _____
EXAMINER: _____ INSTITUTION: _____
DATE: _____
CURRENT PROJECTED GOOD CONDUCT TIME/ MANDATORY RELEASE DATE: _____

I. NAME AND ADDRESS OF CERTIFIED COURT REPORTER RECORDING THIS HEARING.

II. ATTORNEY OR REPRESENTATIVE Provide full identification including address and telephone number(s).

III. DISCLOSURE

A. Provide a statement, including dates, verifying that subject and/or counsel have received a copy of the postsentence report.

B. Provide a statement, including dates, verifying that subject and/or counsel have received documentation prepared by the probation officer in response to any request by the Commission for further investigation for correction.

C. For any other documents or information considered, provide a statement identifying the documents and indicate that those documents have been reviewed by subject and attorney.

D. If disclosure incomplete, obtain a waiver, briefly delay hearing for review of documents, or continue hearing for next docket.

IV. ARGUMENTS AND FINDINGS ON CONTESTED FACT(S)

A. If there are no unresolved objections to the factual statements contained in the postsentence report, provide the following statement on the tentative guideline range: “There being no unresolved objections to the factual statements contained in the postsentence report, the Commission adopts these statements as its findings as follows: Total Offense Level: _____; Criminal History Category ____; Guideline Range _____ to _____ months of imprisonment and ___ to ___ years of supervised release.”

B. If the transferee or the examiner panel disagrees with any of the conclusions of the probation officer reflected in the postsentence report as to the application of the guidelines, then the panel must resolve the issue(s) at the hearing by a preponderance of the evidence. The following format should be followed:

1. Describe the argument(s) of the prisoner and/or attorney for each controverted item in a separate paragraph.
2. Make a formal finding for each controverted item.
3. Explain how a preponderance of the evidence supports each finding of fact.
4. If there are any changes, indicate the recommended total offense level, criminal history category and guideline ranges for imprisonment and supervised release.

C. Determine if there are any factors warranting a departure. If the transferee argues a ground for a downward departure, explain why the decision recommended will include that ground or not. Make a formal finding of fact if the transferee has asserted the existence of any fact that would be a significant consideration, if true. If there is a reason for departing upward, be sure that the transferee and his attorney have been advised of the possibility of an upward departure and the grounds supporting the departure. The transferee should be permitted to respond to the proposed ground for departing upward. The disclosure of the grounds for a possible upward departure can be made at the hearing prior to the announcement of the recommendation.

D. Note for the record any other significant matter discussed at the hearing even if that matter is unrelated to the application of the guidelines. For example, if the transferee questions the Bureau of Prison's computation of his sentence or challenges the validity of his consent to transfer.

V. RECOMMENDED ACTIONS

A. Decision in months. Based on the recommended guideline range indicated above and, if applicable, factors warranting a departure, recommend a decision in months, taking into account time in foreign and U.S. custody, but without taking into account either the foreign sentence length or the result that will be obtained through the application of "good time" and foreign labor credits.

B. Decision as a release date. Then, based on the recommended decision in months, compute a recommended release date by counting forward the above number of months from the date of arrest in the foreign country.

C. Continue to expiration cases. If the recommended release date is the same as or later than the foreign full term date, then the recommended decision will be "continue to expiration." In such case, the foreign full term date will become the Commission's release date.

Note: The Bureau of Prisons will deduct good time and foreign labor credits from the foreign full term date (if the Commission orders "continue to expiration") or from any earlier release date determined by the Commission.

D. Departures. In determining whether a decision to "continue to expiration" is a departure from the recommended guideline range, refer only to the foreign full term date (not the mandatory release date). If the foreign full term date expressed in months is above the guideline range, the decision is an upward departure, even if the mandatory release date is within the guideline range.

If the recommended release date reflects a departure from the guideline range, indicate the reason(s) for the departure (*e.g.* the transferee provided substantial assistance in the investigation or prosecution of another (see USSG §5K1.1) or was a victim of abuse or torture (see USSG §5K2.0 and Supplementary Instructions For Application of Sentencing Guidelines with respect to Chapter Five, Part K in this Appendix).

E. Provide a statement that the reason(s) for the recommended action(s) were explained to subject.

F. Recommend the term of supervised release. If the recommended decision was "continue to expiration," the action should read: "serve a ___ month period of supervised release, or until (full term date), which ever is earlier, under the following conditions:" If the case involves a treaty requiring the period of supervised release to extend to the full term date, the action should read: "serve a period of supervised release until (*full term date*) under the following conditions:" The combined time to be served and time on supervised release cannot exceed the length of the foreign sentence.