NEW FOUNDATIONS

OCCASIONAL PAPERS ON
CORRECTIONAL TOPICS FROM THE
CONNECTICUT DEPARTMENT OF CORRECTION

No. III

THE CONNECTICUT CRIMINAL PROCESS

DEPARTMENT OF CORRECTION

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INTRODUCTION

The many options which exist in our present system of criminal sentencing are examined by applying them to three hypothetical cases, each of which considers a distinctly different kind of defendant.

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The Department of Correction gratefully acknowledges the Commission's permission to publish the document in this form.

CASE ONE:

Defendant A was arrested as he was fleeing the liquor store which he had just robbed. He used a handgun to commit the crime, and he fired it at the store owner as he fled. A is male, 30 years old, and has one prior conviction for third-degree burglary, for which he was sentenced to three years' probation. He was discharged from probation two months before the present offense.

STEP ONE: CHARGE

A frequent criticism of the criminal justice system concerns the charging practices of police and prosecutors. Since American penal codes are generally constructed so that a single instance of criminal conduct can constitute several offenses, there is a tendency to "overcharge" a defendant by charging him with most or all of the crimes which he has technically committed.[1] This practice can be a strong incentive for a defendant to plead guilty; prosecutors will commonly offer to nolle or recommend dismissal of other, included offenses if the defendant will agree to plead guilty to one crime.[2]

1. *See State v. Fico, 147 Conn. 426, 162 A. 2d. 697 (1960), which holds that where the necessary elements of two or more distinct offenses are combined in the same act, prosecution for one won't bar prosecution for the others. However, the differences between offenses must be one of kind, not of degree.*

2. *This practice was recently legitimized in Connecticut by Conn. Practice Book §2103 (1976). The Practice Book contains the rules of practice for Connecticut's courts.*

In the instant case, A, who was arrested for committing an armed robbery, could be charged with at least eight crimes:

1) Robbery in the first degree (§53a-134): A Class B felony. Since A is being charged with first-degree robbery with a deadly weapon (§53a-134 (a) (2)), he must, if convicted, be sentenced to a mandatory minimum term of five years which may not be suspended or reduced (§53a-35 (c) (2) (B).[3] Class B felonies carry a potential 20 year maximum term.

2) Unlawful restraint in the first degree (§53a-95): A Class D felony. A presumably "restrained"[4] the store owner while he committed the robbery and his handgun certainly exposed his victim "to a substantial risk of physical injury."[5] Class D felonies carry a potential five year maximum term.

3) Carrying a dangerous firearm (§53-206): This unclassified felony carries a maximum fine of $500.00 and a maximum prison term of three years.

3. *The sentence may, however, be reduced by jail credit and good time.*

4. *Conn. Gen. Stat. §53a-91 (1) defines "restrain" as "to restrict a person's movements intentionally and unlawfully... by confining him either in the place where the restriction commences or in a place to which he has been moved..."*

5. *§53a-95.*

4) Threatening[6] (§53a-62): A Class A misdemeanor, which carries a maximum one year sentence.

5) Reckless endangerment in the first degree[7] (§53a-63): A Class A misdemeanor.

6) Breach of peace (§53a-181): A Class B misdemeanor with a maximum six month sentence.

7) Unlawful discharge of firearm (§53-203): An unclassified misdemeanor with a maximum fine of $250 and a maximum jail sentence of three months.

8) Additionally, A's firing his gun at the store owner leaves him open to charges of either attempted felony murder[8] (§53a-54c) or attempted

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6. *§53a-62(1) defines threatening as a physical threat which "intentionally places another person in fear of serious physical injury."*

7. *This degree of reckless endangerment includes cases in which the defendant, "with extreme indifference to human life, recklessly engages in conduct which creates a risk of serious physical injury to another person."*

8. *Ordinarily, attempt offenses are the same degree as the most serious offense attempted. However, felony murder is a Class A felony, and §53a-51 states that an attempt to commit an A felony is a B felony.*

assault in the first degree (§53a-59); both are Class B felonies.[9]

ASSUME: The information charges A with the first seven crimes and attempted felony murder. Therefore, if he were convicted of all the offenses and consecutive sentences were imposed, A could receive a maximum sentence of as much as 50 years and nine months.

In making the charging decision on defendant A, the prosecutor may want to consider whether or not Connecticut's persistent offender statute, §53a-40, is applicable. A "persistent dangerous felony offender" is one who stands convicted of one of the enumerated violent crimes, including first degree robbery,[10] and who has previously been imprisoned for more than one year for one of the enumerated crimes. Persistent dangerous felony offenders may be given a sentence authorized for a Class A felony; this can be as severe as life imprisonment.

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9. *§53a-49 defines criminal attempt as "...if, acting with the kind of mental state required for commission of the crime he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which...is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."*

10. *Other enumerated offenses include manslaughter, arson, kidnapping, sexual assault first or third (with or without a firearm), robbery second, and assault first.*

A "persistent felony offender" is a convicted felon who has been previously convicted and imprisoned under a sentence of more than one year. In such cases, the court may impose a sentence authorized for the next higher degree of felony.

In cases in which the persistent offender statute applies to the defendant, the prosecutor must charge the defendant as a "persistent dangerous felony offender" or as a "persistent felony offender," and, if the defendant is convicted, his prior record must be proved in a hearing before he can be sentenced to an enhanced term.[11] However, neither provision applies to A's case because he served a probation term for this prior burglary conviction.

STEP TWO: BAIL OR PRETRIAL DETENTION?[12]

ASSUME: A is unable to make bail and is incarcerated for six months before disposition of his case.

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11. *According to prosecutors and judges interviewed by the author, Connecticut's persistent offender law is rarely used. This is partially due to the inconvenience and difficulty of proving prior records. Furthermore, the persistent offender statute is often used as a powerful means of inducing guilty pleas; prosecutors will frequently offer to drop the persistent offender count of the information in exchange for a guilty plea.*

12. *The bail system is not within the mandate of the Commission to Study Alternate Methods of Sentencing Criminals, for which this paper was originally prepared; therefore, it is not discussed.*

STEP THREE: BARGAIN OR TRIAL?

ASSUME: That if A should go to trial, the state will have no trouble in securing a conviction.

This is obviously a situation in which the defendant will want to dispose of the case through a guilty plea. A conviction at trial, which is probably inevitable, is likely to result in a more severe sentence than A is likely to get if he negotiates a guilty plea.[13] The prosecutor may or may not want to bargain. This is an opportunity for him to get a virtually certain conviction of a violent criminal. Conversely, the case is so heavily weighted in the state's favor that the prosecutor could arrange for the imposition of a substantial sentence without the time and effort involved in a trial.

ASSUME: Both parties decide to negotiate a guilty plea.

13. *It is widely believed that defendants who are convicted at trial receive more severe sentences than those who plead guilty. This may occur for two reasons. A defendant charged with multiple offenses may be convicted of more than one crime in a trial and the judge may impose consecutive sentences; defendants who plead guilty often do so in exchange for the dismissal of all charges except the one to which they plead guilty. Sentencing judges may also impose longer sentences upon defendants convicted at trial because the defendant committed perjury in denying the offense, because the defendant "wasted the state's time," or for other reasons. For a useful discussion of "sentencing differentials" see National Institute of Law Enforcement and Criminal Justice, Plea Bargaining in the United States: Phase I Report (Georgetown University Law Center, 1977) at 217-227.*

STEP FOUR: THE BARGAINING PROCESS

Connecticut's new Rules of Criminal Procedure establish precise guidelines for the parties to the plea bargaining process. Under Practice Book §2103, A can plead guilty under any or all of the following conditions:

(1) That the prosecuting authority will amend the information to charge a particular offense;

(2) That the prosecuting authority will nolle, recommend dismissal of, or not bring certain other charges against the defendant; or

(3) That the sentence or other disposition will not exceed specified terms or that the prosecuting authority will recommend a specific sentence, not oppose a particular sentence, or make no specific recommendation.

ASSUME: The prosecutor offers to nolle the other charges if A pleads guilty to Robbery I (with a deadly weapon). Also,

ASSUME: The prosecutor insists upon recommending a particular sentence.

Because Robbery I with a deadly weapon carries a mandatory minimum sentence, the prosecutor must recommend a minimum term of at least five years. Since the minimum term must be no more than one-half the maximum term,[14] and since the maximum authorized term for a Class B felony is 20 years, the recommended sentence must be in the 5-to-10, 10-20 range.

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14. §53a-35 (c) (2).

In deciding upon a sentence recommendation, the prosecutor should consider how long he wants A incarcerated. This cannot be done accurately unless he considers the ways in which A's sentence may be reduced through jail credit, good time, and parole.

The following forms of jail credit and good time are available to A:

(1) Jail Credit (§18-98): Day-for-day credit for the time which A spent in pretrial detention. Six months in this case.

(2) Jail Credit Good Time (§18-98c): Post-conviction credit awarded for good behavior in pretrial detention; awarded at the rate of ten days per month. 60 days here.

(3) Good Conduct Credit (§18-7a): For sentences on or after October 1, 1976;[15] ten days per month for the first five years and fifteen days per month for the sixth and subsequent years.

(4) Seven-Day Work Week Good Time (§18-98a): One day off for each period in which the inmate works for seven consecutive days.[16]

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15. *§18-7, which applies to sentences imposed before October 1, 1976, allows 60 days per year for the first five years and 90 days for subsequent years.*

16. *School and work may be combined to make up a seven day work week for award purposes. Conn. Department of Correction, Administrative Directives, Ch. 5.1 (1977).*

If we assume that A has six months jail credit, 60 days jail good time, and that he will receive all his §18-7a time, a five year minimum term will yield an effective minimum term of 32 months. Other available minimum sentences will have the following effective yields:

6 years ----- 38 months
7 years ----- 44 months
8 years ----- 50 months
9 years ----- 56 months
10 years ----- 62 months[17]

The prosecutor should also consider A's chances of release on parole. While the parole process is highly subjective and therefore unpredictable, the fact remains that about 80% of inmates sentenced for Robbery I are paroled at first appearance.[18] Therefore it is probable that A will not be incarcerated past the expiration of his minimum term less jail credit and good time.

ASSUME: The prosecutor and A's attorney agree on a recommendation of seven to fifteen years in exchange for A's guilty plea.

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17. *These calculations were made according to the procedure used by the Department of Correction. Id. Ch. 5.1a.*

18. *Conn. Department of Correction and Connecticut Justice Commission, Study of Time Served by Parolees, March, 1977. Since this study was completed, the Connecticut Board of Parole has tightened its standards for parole release; however, the March statistics are the most recent available set.*

STEP FIVE: THE JUDGE'S ROLE IN THE BARGAINING PROCESS

Under Connecticut's Rules of Criminal Procedure, when the parties reach a plea agreement, the agreement must be disclosed to the judge in open court (or *in camera* when the circumstances warrant).[19] The judge may immediately accept or reject the agreement or he may defer decision pending consideration of the Pre-Sentence Investigation, or for other reasons.[20]

If the judge accepts the plea agreement, he is required to sentence the defendant to the agreed-upon disposition or to a more favorable disposition.[21] However, the judge is not irrevocably limited to the sentence decided upon in the agreement; where a case is continued for sentencing, the judge may impose a more severe sentence on receipt of new information about the defendant.[22] If this should occur, the defendant may withdraw his guilty plea.[23]

If the judge rejects the agreement, he must advise A that the court is not bound by the agreement, and he must allow A the opportunity to withdraw his plea.[24] He must also warn A that he may impose a more severe sentence if he persists in his guilty plea.[25]

ASSUME: The judge accepts the agreement.

19. *Practice Book*, §2105.
20. *Id.*
21. *Id.*, §2107
22. *Id.*, §2108. *If another judge administers sentence, he is not bound by the agreement (Id.)*
23. *Id.*, §2132 (3)
24. *Id.*, §2109
25. *Id.*

STEP SIX: THE GUILTY PLEA

When A pleads guilty to Robbery I with a deadly weapon, the judge must inform him of the consequences of his plea. Among other things, A must be told that there is a mandatory minimum sentence for the crime and that the sentencing statute does not allow the sentence to be suspended.[26] The judge must also satisfy himself that there is a factual basis for the plea; this is usually accomplished through a self-incriminating statement by the defendant.[27]

ASSUME: The judge accepts A's guilty plea.

STEP SEVEN: THE SENTENCING DECISION

The judge's main source of data relevant to the sentencing decision is the Pre-Sentence Investigation (PSI). A PSI must be ordered for any case (other than one involving a capital felony) in which the sentence may exceed one year's incarceration.[28] The report must examine the circumstances of the offense, the attitude of the victim (or his surviving family) toward the defendant, and the defendant's criminal record, social history, and present condition.[29] Defense counsel may take an active part in the investigation; he/she may be present at defendant's interview with the investigator to assist in resolving factual disputes and to protect the defendant's rights.[30]

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26. *Id.*, §2122
27. *Id.*, §2124
28. §54-109. *Pursuant to Practice Book §2321, the judge may also order a PSI in cases in which one is not required.*
29. *Practice Book §2322. A physical and/or mental examination may be made, if necessary.*
30. *Id.*, §2323

Once has has inspected the PSI and other available data, the judge must decide on an appropriate sentence. Under §53a-28, he is permitted to impose the following sentences:

(1) imprisonment;
(2) (A) §18-65a sentences - indefinite sentences for female offenders; (B) §18-73 sentences - indefinite commitments for male youthful offenders (ages 16-21);
(3) a fine;
(4) imprisonment and a fine;
(5) imprisonment, suspended entirely or in part, and probation or conditional discharge;
(6) suspended sentence, with fine and probation, or with fine and conditional discharge;
(7) a fine and a §18-73 sentence; or
(8) unconditional discharge.

Additionally, if the defendant is a drug addict, the judge may, pursuant to §19-484, order a period of suspended prosecution (no longer than two years) so that the addiction may be treated.

The judge's sentencing options are limited in this case because of the mandatory minimum term for Robbery I with a deadly weapon. He could fine A up to $10,000[31] along with the required prison term, but inasmuch as A probably would not be able to pay it, it would not make much sense.

Since the judge accepted the plea agreement, he will probably sentence A to the agreed-upon seven-to-fifteen years, or to a more favorable sentence. He has the power to exceed the agreed recommendation, but if he does so, he runs the risk of A withdrawing his plea.[32]

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31. §53a-41(1).
32. Practice Book, §2108.

ASSUME: The judge wants to dispose of the case at this stage and thinks the agreed recommendation is a sufficiently severe penalty. Therefore, he decides to sentence A to the agreed-upon seven-to-fifteen years.

STEP EIGHT: THE SENTENCING HEARING

The sentencing judge is required to conduct a sentencing hearing in which certain procedures, calculated to protect the defendant's rights, are followed. Both sides have an opportunity to be heard, and, at the judge's discretion, to present evidence relevant to the disposition; this includes the chance to explain or controvert data contained in the PSI or elsewhere in the record.[33]

One particularly innovative provision of the new Rules of Criminal Procedure is the requirement that the judge state, on the record, the reasons for the disposition imposed if the sentence exceeds a year's incarceration.[34] These cases are eligible for sentence review and written reasons for sentences will expedite the review process as well as serve as a potentially useful explanation of the sentence to the defendant.

If, as in this case, the prosecutor has agreed to recommend a sentence as part of the plea agreement, he must make the agreed recommendation.[35] He must also inform the court that his recommendation is pursuant to a plea agreement.[36]

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33. *Id.*, §2330.
34. *Id.*, §2330 (5).
35. *Id.*, §2333; *see also* *Santobello v. New York*, 404 U.S. 257 (1971).
36. *Id.*

ASSUME: The judge sentences A to seven-to-fifteen years.

STEP NINE: SENTENCE MODIFICATION

After A begins his prison sentence, he may be able to obtain a reduction in his sentence from the Sentence Review Division of the Superior Court (SRD), or from the Board of Pardons. Sentence review is available to anyone sentenced to more than one year's incarceration if he or she files an application for review within 30 days after sentence is imposed.[37] The SRD, which is composed of three Superior Court judges appointed to staggered, three-year terms, determines the appropriateness or inappropriateness of the contested sentence in light of the nature of the offense, the character of the offender, the protection of the public interest, and the deterrent, rehabilitative, isolative, and denunciatory purposes for which the sentence was intended.[38]

The SRD has the power to increase as well as decrease a sentence; it rarely, however, increases one. Since its establishment in 1957, the SRD has only modified about 6% of the more than 2,500 cases which it has considered.[39] It would be unusual for the Division to decrease a sentence such as A's, since it is well within the statutorily authorized range for the offense.

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37. §51-195.

38. *Practice Book*, §2353.

39. P. Samuelson, Sentence Disparity and Sentence Review (Unpubl. senior paper, Yale Law School, 1976, at 1.)

The Board of Pardons is a part-time, five-member body which has the power to grant conditional or absolute pardons for any offense at any time after sentence is imposed.[40] Four of the five members must approve any pardon granted.[41] The statutes which authorize the Board prescribe no standards which it must use in evaluating pardon petitions; the Board itself has not promulgated any standards on which applicants may rely.[42]

Recently, however, a U. S. District Court decision has imposed some restrictions on the Board of Pardons' virtually absolute discretion. Dumschat v. Board of Pardons,[43] issued on June 16, 1977, requires the Board to give written explanations when it denies pardons to applicants sentenced to long minimum terms who have served "substantial proportions" of their sentences.[44] These applicants have a reasonable expectation of gaining a sentence reduction through a pardon.[45] The explanations are intended to protect applicants from arbitrary decisions and to help them in future petitions for pardon.[46]

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40. §18-26.
41. §18-27.
42. *The Board of Pardons does publish rules governing procedures before it, but they do not cover the criteria which it considers in making decisions.* Rules for Petitions to the Board of Pardons of the State of Connecticut (1959).
43. *Civil No. H-76-102 (D. Conn. June 16, 1977).*
44. *Id., at 12. The court did not address the questions of what constitutes a "long minimum term" or when in his sentence an inmate "acquires a justifiable expectation of pardon," except to find that plaintiff met both criteria.*
45. *Id., at 8.*
46. *Id., at 11-12.*

The little available data indicating the success rate of applicants before the Board of Pardons show that the rate is very low. Between April, 1974 and November, 1976 the Board held 379 hearings and granted only 25 pardons, a 7% success rate.[47]

ASSUME: Either A makes no effort to have his sentence reduced by either body, or, if he does, that those efforts are unsuccessful.

STEP TEN: INCARCERATION - GOOD TIME

As discussed in Step Four, *supra,* A is capable of substantially reducing his sentence through Connecticut's good time laws. His §18-7a time, along with his jail credit and jail good time (if earned) are credited to his sentence when his term begins; these reductions apply to both his minimum and maximum terms.[48] Seven Day Work Week Good Time and Outstandingly Meritorious Performance Awards are credited as earned.[49]

An inmate may lose some or all of his good time if he violates prison regulations. If the Disciplinary Committee of the institution finds A guilty of a violation of institutional rules, it may recommend that the Commissioner of Correction take some good time away from him. Good time losses are recommended according to the following scale:

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47. *Id., at 9, n.13*

48. *Department of Correction, Administrative Directives, Ch. 5.1 (1977).*

49. *Id., These forms of good time are also credited to the inmate's minimum and maximum terms.*

Class A Violations (including Sexual Misconduct, Bribery, Use or Possession of Drugs or Alcohol, and Riot) - up to 90 days.

Class B Violations (including Gambling, Theft, Creating Disturbance, and Disobeying a Direct Order) - up to 60 days.

Class C Violations (including Insulting Language, Malingering, Contraband, and Sanitary Violations) - up to 15 days.[50]

STEP ELEVEN: PAROLE

A will be eligible for parole consideration at the end of his minimum term less accrued good time and jail credit.[51] He will appear before the panel of the Board of Parole which is assigned to his institution.

The panel is authorized to parole A if it finds a "reasonable probability that the inmate will live at liberty without violating the law" and that his "release is not incompatible with the welfare of society."[52]

In making parole decisions, the Board considers many factors, including:

1) the nature of the offense and the inmate's current attitude toward it;

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50. *Id.*, §2.6.

51. *Conn. Board of Parole, Statement of Organization and Procedures (1974) at 5.*

52. §54-125.

2) inmate's prior criminal record;

3) inmate's institutional adjustment, including progress toward self-improvement;

4) employment history, occupational skills, and employment stability;

5) physical, mental, and emotional health;

6) inmate's insight into the causes of his criminal conduct; and

7) adequacy of the inmate's parole plan, including the environment to which he plans to return and the adequacy of his prospective residence and employment.[53]

As previously noted, the Parole Board paroles some 80% of Robbery I inmates at their first appearance.[54] Another 16% are paroled at second appearance.[55]

ASSUME: The Board paroles A at this first appearance.

STEP TWELVE: PAROLE VIOLATION AND REVOCATION

A paroled prisoner is still technically a prisoner; he has been given the opportunity to serve part of his sentence in the community.[56] Therefore the Board of Parole and

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53. *Board of Parole, Statement of Organization, at 9-10.*

54. *See n. 16, supra, and accompanying caveat.*

55. *Id.*

56. *Statement of Organization, at 12.*

the Department of Correction still exercise considerable control over a parolee's life. The Board is authorized to impose whatever conditions it deems necessary to insure the parolee's community adjustment.[57] Parole conditions commonly concern employment, association with undesirable persons, residence, and, of course, obeying the law.[58]

Parolees may violate their paroles either by committing a new crime or by violating the conditions of their release. Both the Board and the Department of Correction have the authority to rearrest a parolee for any reason which they deem sufficient.[59] Violation of parole may result in reimprisonment for the rest of the parolee's maximum term; the Board may also decide to continue the parolee in parole status, or it may decide to reimprison him and re-parole him at some future date.[60]

ASSUME: A violates his parole by being arrested for Breach of Peace (§53a-181), a Class B misdemeanor: he got into a fight with one of his co-workers. The police report indicates that his opponent started the scuffle.

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57. 54-126.

58. Statement of Organization, at 13-14. Certain parole conditions have been held unconstitutional; see e.g., Arciniega v. Freeman, 404 U.S. 4 (1971) (parolee forbidden to associate with other ex-ffenders even though this meant he would have to leave his job); Sobell v. Reid, 327 F. Supp. 1294 (S.D.N.Y. 1971) (restrictions on freedom of speech and assembly).

59. §§54-126, 127.

60. §54-128; Statement of Organization at 16.

When a parolee is rearrested for an alleged parole violation, the decision of the U. S. Supreme Court in Morrissey v. Brewer[61] requires a two-step process by the parole authority when it decides whether or not parole should be revoked. A hearing officer of the Division of Parole (part of the Department of Correction) conducts a preliminary hearing to determine whether or not there is probable cause to believe that the parolee violated his parole agreement.[62] If the hearing officer decides that the parolee should be held as an alleged parole violator, he is entitled to a revocation hearing before the appropriate Board panel.

In compliance with Morrissey, the Board of Parole follows procedures calculated to promote due process at revocation hearings:

1) The parolee must be given written notice of the charges against him and the source of the evidence on which those charges are based.

2) He has the right to request that counsel - either retained or appointed - be permitted to represent him at the hearing. The Board decides these requests according to the principles of Gagnon v. Scarpelli.[63] Counsel will therefore be provided if:

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61. *408 U.S. 471 (1972).*

62. *Statement of Organization, at 16.*

63. *411 U.S. 778 (1973); see also United States ex. rel. Bey v. Connecticut State Board of Parole, 443 F.2d 1079 (2nd Cir. 1971), vacated as moot, 404 U.S. 879 (1971), which held that counsel must be provided at every revocation hearing in which there is a chance that the parolee may be reincarcerated.*

> ...after being informed of his right to request counsel, the...parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation...or (ii) that, even if the violation...is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate and that the reasons are complex or otherwise difficult to develop or present...[T]he responsible agency should also consider, especially in doubtful cases, whether the [parolee] appears to be capable of speaking effectively for himself.[64]

3) He will also be permitted to speak at the hearing, to present evidence and witnesses in his behalf, and to confront and question opposing witnesses (unless the panel finds good cause for disallowing such confrontation).[65]

The panel may revoke A's parole if it finds that:

1) The parolee has failed to comply with a condition of parole without satisfactory reason; or,

2) The violation involves

   (a) commission of another crime; or
   (b) conduct which indicates substantial risk that the parolee will commit another crime; or
   (c) conduct which indicates unwillingness to comply with parole conditions.[66]

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64. *Id., at 790-791.*

65. *Statement of Organization, at 18.*

66. *Id.*

ASSUME: The panel decides to permit A to remain on parole. It issues a reprimand and warns A that further fights with his co-workers will result in revocation.[67]

STEP THIRTEEN: DISCHARGE

A parolee who is successfully complying with his parole conditions need not remain on parole until his maximum term expires. If the appropriate parole panel decides that the parolee "will lead an orderly life" without parole supervision, it may, by unanimous vote, declare him discharged.[68] The Board generally requires that a parolee serve at least one year on parole and usually requires him to serve at least half of his parole term before he will be considered for discharge.[69]

If an inmate has never been paroled, or if he has been paroled and reincarcerated,[70] he will be discharged from custody at the expiration of his maximum sentence less accrued good time and jail credit.

ASSUME: After he serves four years on parole, the Board votes to discharge A.

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67. *Id.*

68. §54-129.

69. *Statement of Organization, at 20.*

70. *Parolees who are subsequently reincarcerated receive day-for-day credit for the time they spend on parole, up to the date when a violation warrant is issued.*

CASE TWO

Defendant B was arrested as she left an apartment with $400 worth of household appliances. She and her male accomplice entered the apartment in the afternoon by breaking a window. B is female, age 18, and this was her first arrest. She had been addicted to heroin for about nine months at the time of her arrest; she admitted committing the burglary to get money for drugs.

STEP ONE: CHARGE

As was defendant A in Case One, B may be charged with a number of offenses:

1) Burglary in the third degree (§53a-103): A Class D felony. Third-degree burglary covers daylight burglaries. D felonies carry a five-year maximum sentence.

2) Conspiracy to commit burglary in the third degree (§53a-48): A Class D felony.[71] Since B committed the burglary with an accomplice, she is chargeable with conspiracy. The fact that the conspirators committed the burglary fulfills the requirements of intent to commit a crime and of commission of an overt act in pursuance of the conspiracy. The parties need not make any kind of formal agreement for there to be a conspiracy.[72]

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71. *Conspiracy is considered a crime of the same degree as the most serious offense which is attempted as an object of the conspiracy. However, conspiracy to commit an A felony is a B felony.* § *53a-51.*

72. *State v. Kemp, 126 Conn. 60, 9 A.2d 63 (1959).*

3) Possession of burglar's tools (§53a-106): A Class A misdemeanor. If B had any tool or device in her possession which she used or could have used to gain entry to the apartment, she may be charged with this offense. A misdemeanors carry one year maximum sentences.

4) Larceny in the third degree (§53a-124): A Class B misdemeanor. This degree of larceny applies since the value of the stolen goods was between $50 and $500. B misdemeanors carry six month maximum sentences.

5) Criminal trespass in the second degree (§53a-108): A Class B misdemeanor.

6) Criminal mischief in the third degree (§53a-117): A Class B misdemeanor. Breaking the apartment window was damage to "tangible property of another."

7) Breach of peace (§53a-181): A Class B misdemeanor.

ASSUME: The information charges B with all seven offenses. Therefore, if she were convicted of all of them and if consecutive sentences were imposed, she could receive a maximum sentence of 13 years.

STEP TWO: BAIL OR PRETRIAL DETENTION?

ASSUME: B is unable to make bail and is incarcerated for two months before her case is disposed.

STEP THREE: BARGAIN OR TRIAL?

ASSUME: The state has a strong case, since B was arrested on her way out of the apartment building.

In this case, a negotiated plea is likely to satisfy both sides. B and her attorney are probably aware that B, as a first offender, will probably get probation if she pleads guilty. The prosecutor is not likely to want to send B to prison; drug rehabilitation is probably the best course of action for her, and this can be arranged through a plea-negotiated probation sentence.

ASSUME: Pursuant to Practice Book §2103,[73] the prosecutor offers to nolle the other charges if B pleads guilty to Burglary III.

If the prosecutor decides to recommend a disposition, and he decides that he does not want to see B incarcerated, he has several options, including probation, conditional discharge, suspension of prosecution for treatment of drug dependence, and accelerated rehabilitation.[74]

ASSUME: The prosecutor agrees to recommend a suspended sentence and five years' probation,[75] contingent upon B's participation in a drug rehabilitation program.[76]

STEP FOUR: THE JUDGE'S ROLE IN THE BARGAINING PROCESS

ASSUME: The judge accepts the plea agreement.

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73. *See* p. 7, *supra*.

74. *These sentencing alternatives are discussed infra.*

75. *Up to five years' probation may be imposed for a felony.* §53a-29 (d) (1).

76. *This is a statutorily permissible condition of probation.* §53a-30.

STEP FIVE: THE SENTENCING DECISION

As in Case One, since the judge has accepted the agreement, he must sentence B to the agreed-upon disposition or to one more favorable to B, unless he wants to run the risk of her withdrawing her plea.[77]

If the judge decides that B should be incarcerated, he will probably sentence her under §18-65a, which provides for indefinite sentences at the women's institution at Niantic. Since B is between 16 and 21, she is eligible for an indefinite sentence if the judge determines that she is "amenable to reformatory methods."[78] Under an indefinite sentence, the inmate is sentenced to a maximum term which cannot exceed the maximum authorized for the offense, or five years, whichever is lower;[79] there is no set minimum term. For first offenders, parole eligibility is determined by the Parole Board according to a set schedule; prisoners with sentences not exceeding three years are eligible after completing six months of their sentences, and those with maxima between three and five years are eligible after nine months. Under an indefinite sentence, good time is only credited toward the inmate's maximum.[80] About 90% of all inmates sentenced for Burglary III are paroled at first appearance.[81]

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77. See n. 19, supra.

78. §18-65a.

79. Id.

80. §18-7

81. See n. 16, supra, and accompanying caveat.

Probation is the sentencing judge's most obvious alternative to incarceration. B can be treated for her drug problem while she continues to live in the community; at the same time, she can be supervised by the probation department. If she does not respond to treatment and gets into more trouble, she can easily be taken off the street as a probation violator.

The judge could also suspend sentence and give B a conditional discharge.[82] This is unsupervised release subject to court-imposed conditions. However, to impose this sentence, the judge would have to decide that probation supervision is inappropriate for B;[83] since she is a heroin addict, he is unlikely to believe that she can lead an unsupervised life.

Since B was a heroin addict at the time of the offense, the court may order prosecution suspended for up to two years and release B to the custody of the Commissioner of Adult Probation for drug treatment by the Department of Mental Health.[84] If B complies with the requirements of both departments, the charges against her may be dismissed; if not, the suspension may be terminated and B may be tried on the original charges.[85]

Finally, the judge may decide to deal with B through accelerated rehabilitation.[86] Under this program, the charges against B would be left pending while she was placed on probation for up to two years. If she successfully complied with her probation conditions, the charges against her

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82. §53a-29 (b).
83. §53a-29 (b) (2).
84. §19-484
85. Id.
86. §54-76p.

could be dismissed.[87] However, there is a good chance that the judge will not reach the required conclusion that B will "probably not offend again";[88] she is a heroin addict who has already committed a burglary to support her habit.

ASSUME: The judge decides to accept the prosecutor's recommendation of a suspended sentence and probation.

STEP FIVE: THE SENTENCING HEARING

ASSUME: After conducting a proper sentencing hearing,[89] the judge sentences B to an indefinite sentence not to exceed three years. The sentence is suspended, and B is placed on probation for five years subject to the condition that she enter a drug rehabilitation program and participate in it until she is discharged as cured.

STEP SIX: PROBATION REVOCATION

As in the case of parole, a probationer is subject to probation revocation and incarceration if he or she violates a probation condition.

ASSUME: B fails to attend several meetings of her drug therapy group. Her probation officer places her under arrest[90] and has her jailed pending a revocation hearing.

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87. *Id.*

88. *Id.*

89. *See pp. 14-15, supra.*

90. *Pursuant to §53a-32 (a).*

After her rearrest, B must be brought before a competent court for a probation revocation hearing. The court is required to give B notice of the way in which she has allegedly violated her probation, and to give her the opportunity to present evidence and confront opposing witnesses.[91] Connecticut goes beyond the Gagnon v. Scarpelli[92] guidelines and gives every probationer who undergoes a revocation hearing the right to counsel.[93] Any probation revocation must be based upon "reliable and probative evidence."[94]

If the court finds that a violation has been committed, the court may decide to continue B on probation, under the same of modified conditions. It may also decide to incarcerate her for her original sentence or any lesser sentence.[95] If B is imprisoned, she will receive day-for-day credit on her sentence[96] for the time that she served on probation up to the date that she was rearrested or that a violation warrant was issued.[97]

ASSUME: The court finds that B has violated her probation, but it decides to retain her on probation with a warning that future unexcused absences from her scheduled drug therapy meetings will result in immediate revocation.

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91. Id.
92. See n. 61, supra, and accompanying text.
93. §53a-32(a).
94. §53a-32(b).
95. Id.
96. This credit will only apply to B's maximum term, since her sentence will be indefinite. See text accompanying n. 78, supra.
97. §53a-31.

STEP SEVEN: DISCHARGE

The sentencing judge may discharge B from probation at any time during her probation term after holding a hearing and finding "good cause." *98*

ASSUME: B is discharged from probation after serving two years of her term.

CASE THREE

Defendant C, the majority stockholder and managing officer of a construction company, was arrested when it was discovered that he had stolen $15,000 from his company during the preceding year. He accomplished this by fabricating bills for non-existent companies which billed his company for alleged services rendered. Checks were issued to these "companies" and they were sent to post office boxes which C had rented. Defendant is male, age 46, and he has no prior record; he is a thoroughly respectable, upper middle class citizen. The theft was not committed for any reason with which we might sympathize (except, perhaps, greed).

STEP ONE: CHARGE

C cannot be charged with as many crimes as A and B, but he could still be in serious trouble. He is chargeable with the following:

1) Larceny in the first degree (§53a-122): A Class B felony. This degree of larceny applies because C stole more than $2,000. B felonies carry a 20 year maximum term.

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98. §53a-33.

2) Forgery in the first degree (§53a-138 (a)(2): A Class C felony. C falsely made written instruments which "represent...claims against a corporation or other organization or its property." C felonies carry a 10 year maximum term.

3) C may be arrested by postal authorities for mail fraud[99] and fraud through the use of a fictitious name or address,[100] each of which carry a maximum fine of $1,000, and a maximum of five years' imprisonment.

ASSUME: The information charges C with both Larceny I and Forgery I; therefore, if consecutive sentences were imposed C faces as much as 30 years' imprisonment. The Federal charges will not be discussed.

STEP TWO: BAIL OR PRETRIAL DETENTION?

ASSUME: C is able to make bail.

STEP THREE: BARGAIN OR TRIAL?

ASSUME: C will be easily convicted if his case goes to trial.

This is another case in which both parties are likely to desire a disposition through plea negotiations. C will probably be advised that he has an excellent chance of avoiding prison if he pleads guilty. If the prosecutor does not want to see C incarcerated, he can recommend probation or another, non-prison disposition in an agreed

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99. 18 *U.S.C.* §1341.

100. 18 *U.S.C.* §1342.

recommendation. If he believes that "white collar" criminals such as C should be imprisoned, he can recommend that and hope that the judge goes along with it.[101]

ASSUME: The prosecutor agrees to nolle the Larceny I and Forgery I charges and amend the information to charge C with Larceny in the second degree (§53a-123) if he agrees to plead guilty to that charge.[102] The prosecutor is likely to make this offer because the kind of sentence he probably has in mind for C is more in line with a Class D felony such as Larceny II than with a B or C felony. This reasoning applies whether or not the prosecutor wants to see C incarcerated.

Under Practice Book §2103, the prosecutor has three alternatives as to sentence recommendation: he may recommend a specific sentence; he may agree not to impose a particular sentence; or he may make no specific recommendation. In this case, the prosecutor may have some difficulty deciding what he wants to do; it will depend on his attitude toward C and his conception of what the sentencing judge is likely to do. His chance of getting the sentence he wants for C are better if he does not want a prison sentence. If he recommends incarceration,[103] the judge must sentence C to

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101. Practice Book, §2107.

102. Id., §2103.

103. All of this assumes, perhaps extravagantly, that C will agree to plead guilty if the price is a recommendation of incarceration.

the recommended term or a more favorable sentence, or else the defendant can withdraw his plea.[104] Conversely, if the prosecutor recommends a non-incarcerative sentence, the judge can only impose a prison sentence if he wants to risk a trial.

ASSUME: The prosecutor decides that he will make no sentence recommendation.

STEP FOUR: THE JUDGE'S ROLE IN THE BARGAINING PROCESS

ASSUME: The judge accepts the plea agreement.

STEP FIVE: THE SENTENCING DECISION

Since the prosecutor made no recommendation as to C's sentence, the judge has more discretion here than in the first two cases. Except for sentences under §18-65a, §18-73, and §19-484, the judge may impose any authorized sentence.[105]

A sentencing alternative which may be appropriate in this case is a fine. Since Larceny II is a D felony, C may be fined up to $5,000.[106] The judge may also impose a fine of up to twice the amount of C's gain from the theft; this could be as high as $30,000.[107]

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104. *Practice Book*, §2107

105. *See pp. 12-13, supra.*

106. §53a-41.

107. §53a-44. *In this section, "gain" is defined as "the amount of money or the value of property derived."*

The judge could also sentence C to either probation or conditional discharge on condition that he make restitution to his company.[108] §53a-28(6) permits the judge to impose both the fine and probation or conditional discharge with restitution as a required condition.

If the judge should decide that incarceration is appropriate for C, he can impose a maximum term of up to five years. At present, the median effective sentence (after jail credit, good time, and parole are deducted) for inmates sentenced for Larceny II with no prior convictions is 13.0 months; about 88% of these inmates are paroled at first appearance.[109]

ASSUME: The PSI reveals that it would be difficult, but not impossible, for C to pay the $15,000 back to his company and to pay a $30,000 fine.

STEP SIX: THE SENTENCING HEARING

ASSUME: After conducting a sentencing hearing, the judge gives C a one-to-five year sentence, suspended, with three years probation. C's probation is conditioned upon his making full restitution to his company within the next year.[110] He also fines C $30,000.

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108. §53a-30(a) (4) makes this a permissible condition of probation or conditional discharge.

109. See n. 16, supra.

110. The court may determine the amount to be repaid and the manner in which restitution is made. §53a-30(a) (4).

STEP SEVEN: DISCHARGE

ASSUME: C fulfills his restitution and fine requirements and serves the rest of his probation term without incident.

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