IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	APPELLANT'S REPLY TO
	)	MOTION FOR LEAVE TO FILE
Appellee,	)	PETITION FOR RECONSIDER-
	)	ATION OUT OF TIME AND TO
v.	)	PETITION FOR RECONSIDER-
	)	ATION OUT OF TIME
CHARLES G. WILLENBRING,	)	
	)	USCA Dkt. No. 02-0274/AR
Appellant.	)	Crim. App. No. 9801505

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

Index

Table of Authorities

Cases

Constitution and Statutes

Rules and Regulations

Miscellaneous

Introduction

By Order dated November 5, 2018, the Court directed appellee to address, "as a threshold matter," the Court's jurisdiction to grant appellant's motion for leave "in light of [his] status as an inmate in the North Carolina state prison serving a sentence to life imprisonment." *United States v. Willenbring*, 78 M.J. ___, 2018 CAAF LEXIS 692 (C.A.A.F. 2018) (Order). Appellee was also directed, in connection with appellant's petition for reconsideration, to address, "*inter alia*, the applicability of *Teague v. Lane*, 489 U.S. 288 (1989)." This consolidated reply is submitted in accordance with the Court's Order. For the reasons we now explain, the government's positions on both the motion for leave and the petition for reconsideration lack merit. This Court should grant the motion and petition.

Governing Statutes and Regulations

Art. 14(a), UCMJ, provides for the delivery to civil authorities of military personnel who are accused of civilian offenses. If a civilian conviction follows, it "interrupts the execution of the sentence of the court-martial, and the offender having answered to the civil authorities for his offense shall, upon request of competent military authority, be returned to military custody for the completion of his sentence." Art. 14(b), UCMJ. Similarly, when a person in custody of a state is temporarily returned to military custody for court-martial and returned thereafter, the convening authority "may defer the service of the sentence to confinement, without the consent of that person, until after the person has been permanently released to the armed forces by a state or foreign country." Art. 57a, UCMJ. "A sentence to confinement adjudged by a court-martial will not be served concurrently with any other sentence to confinement adjudged by a court-martial or a civil court." Army Regulation (AR) 633-30, *Apprehensions and Confinement: Military Sentences to Confinement* ¶ 4*b* (28 Feb. 1989); *but see United States v. Mooney*, 77 M.J. 252, 257 (C.A.A.F. 2018) (articulating circumstances, not applicable here, when under Art. 57a a court-martial sentence may *not* run consecutively).

The Army issues a "military detainer" to "[o]fficially inform civilian authorities that an Army Soldier is in their custody and military authorities want to

assume custody at release." AR 190-9, *Military Police: Absentee Deserter Apprehension Program and Surrender of Military Personnel to Civilian Law Enforcement Agencies* ¶ 3-10*a*(1) (28 Sept. 2015). It did so in appellant's case in 1999.

Upon his permanent release by the state, appellant will be turned back over to the Army to serve the confinement portion of his court-martial sentence. *See United States v. Willenbring*, 559 F.3d 225, 228 n.6, 229 n.10 (4th Cir. 2009) ("the military trial court deferred execution of its sentence 'until such time as Staff Sergeant Willenbring is permanently released to the armed forces by the State of North Carolina.'"); Art. 57a(b), UCMJ; Gov't Exhs. 1-2 (attached to Gov't Response to Petition for Reconsideration).

Detainers involving a serious felony, specifically including "those felonies involving sexual assault," are considered by the North Carolina Division of Prisons in connection with "a custody review and, if necessary, job/program removals." N.C. Dep't of Public Safety, Prisons Policy & Procedure Manual ch. G, § 0104(a) (Dec. 12, 2008). Inmates who are subject to a detainer are excluded from the state's Mutual Agreement Parole Program. *Id*. ch. E, § 1702(a)(2) (June 11, 2010).

According to the acknowledgment North Carolina sent the Army in response to the detainer, a copy of which was kindly provided to us by the Department of Public Safety:

> It is departmental policy to deny inmates with serious detainers minimum custody privileges such as work release, home leave, community leave, study release, and other outside activities. . . .

Upon completion of 20 years' confinement, appellant could be paroled under North Carolina's former Fair Sentencing Act, *see* N.C. Gen. Stat. § 15A-1371(al) (1993),[1] *if he were in minimum custody*. Because of the military detainer, he is excluded from minimum custody. The conditions of confinement of inmates in minimum custody are less onerous than the conditions of confinement of those who are not in minimum custody. *See generally* N.C. Dep't of Public Safety, Classification: Assigning Inmates to Prisons, https://www.ncdps.gov/adult-corrections/prisons/classification; N.C. Dep't of Correction, Division of Prisons, Handbook for Family and Friends 11-12 (2006), https://www.ncdps.gov/adult-corrections/prisons/classification.

Sanitized copies of the Army's detainer and North Carolina's acknowledgement are being submitted separately with a motion for leave to file. The

[1] The Fair Sentencing Act has been superseded by the Structured Sentencing Act but continues to apply to appellant's sentence.

Army and state regulations are judicially noticeable. M.R.E. 201. The state regulations can be found at https://www.doc.state.nc.us/dop/policy_procedure_manual/, and are reproduced in the Appendix.

Argument

I

THE COURT HAS JURISDICTION TO GRANT LEAVE TO FILE THE PETITION FOR RECONSIDERATION OUT OF TIME

1. The government insists that the Court lacks jurisdiction to grant leave to file the tendered petition for reconsideration out of time on the ground that the case is final under Art. 76, UCMJ.[2] This is mistaken. As Judge Ryan has observed, Art. 76 "sets out a rule of finality rather than a jurisdictional bar." *Loving v. United States*, 68 M.J. 1, 24 (C.A.A.F. 2009) (Ryan, J., dissenting) (citing *United States v. Denedo*,

[2] Appellee also tosses in a reference to Art. 71, UCMJ, but that provision adds nothing to the conversation about jurisdiction. There is no question that appellee's court-martial conviction is final. That, however, is not the issue. Nor is the Court's jurisdiction to reconsider one of its own decisions affected by the *res judicata* status of earlier proceedings, as appellee also claims, in unwarranted reliance on *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018), and *Schlesinger v. Councilman*, 420 U.S. 738 (1975). After all, the Supreme Court itself has granted rehearing out of time even though finality had attached, *see Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, 26-27 (1965) (per curiam); *see also Foster v. Texas*, 563 U.S. 931 (2011) (granting leave to file petition for rehearing out of time) — something it could not do if appellee's equation of *res judicata* and jurisdiction were correct and applicable to reconsideration or rehearing in the deciding court.

556 U.S. 904, 916 (2009)). In *United States v. Gray*, 77 M.J. 5 (C.A.A.F. 2017) (per curiam), *cert. denied*, 138 S. Ct. 2709 (2018), this Court later took the position that Art. 76 bars *coram nobis* jurisdiction over cases that are final. We respectfully disagree. More importantly, so did the Solicitor General when, representing the United States, he successfully opposed Gray's certiorari petition: "The government agrees with petitioner that, under [*Denedo*], the military courts have subject-matter jurisdiction to entertain such requests for coram nobis relief and that the CAAF erred in concluding otherwise." Brief for the United States in Opposition, *Gray v. United States*, 138 S. Ct. 2709 (2017) (No. 17-7769), at 12, https://www.supremecourt.gov/DocketPDF/17/17-7769/47320/20180518094919997_17-7769%20--%20Gray%20v%20US.pdf. This case is not a *coram nobis*, and indeed, could not be because appellant is subject to a military detainer. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 8.2[d](5) & n.38, -(12) & n.48 (Matthew Bender 7th ed. 2018).[3] Rather, it involves simply a request

[3] The detainer means appellant is in custody in respect of his court-martial conviction, and as a result he could seek habeas corpus under 28 U.S.C. § 2241. *See Braden v. 30th Judicial Cir. Ct.*, 410 U.S. 484, 498-99 & n.15 (1973). That option does not oust this Court of jurisdiction to reconsider its prior decision. To the extent that the standard for granting habeas is more demanding than the mere good cause required for granting leave to file a petition for reconsideration out of time, moreover, compelling him to resort to district court would materially alter the case. Nothing compels the Court to do so.

for reconsideration. Nonetheless, *Denedo* remains highly pertinent for its reminder not to confuse issues that go to jurisdiction with those that go the merits. 556 U.S. at 916-17. The Court's duty is to follow *Denedo*. It should therefore decline the government's invitation to treat Art. 76 (with or without the artificial sweetener of Art. 71) as jurisdictional.

2. Congress has not prescribed a deadline for either motions for leave or petitions for reconsideration. As a result, Rule 31(a), like Art. 76, is not jurisdictional. *Compare United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009) (vacating grant of review and dismissing petition for review) (3-2 decision) (applying *Bowles v. Russell*, 551 U.S. 205 (2007)); *see also Hamer v. Neighborhood Housing Svcs. of Chicago*, 138 S. Ct. 13 (2017). The period Rule 31(a) prescribes may be suspended, either "on application of a party" or *sua sponte*, "[f]or good cause shown." C.A.A.F.R. 33. Like the Supreme Court, *see* note 2 *supra*, and the Article III courts of appeals, *e.g.*, *Young v. Harper*, 520 U.S. 143, 147 n.1 (1997); *United States v. Wall*, 456 F.3d 316 (3d Cir. 2006), this Court has discretion to entertain out-of-time requests for reconsideration. The only question is whether doing so is an abuse of the appellate process or inappropriate for some reason. *Wall*, 456 F.3d at 319 n.5. Nothing in appellee's submission even remotely suggests that such is the case here, but even if it did, it would not go to the Court's jurisdiction.

3. Appellee's response to the motion for leave never connects with the carefully-framed question the Court directed it to address: whether the Court has jurisdiction to grant that motion in light of appellant's status as a state inmate serving a life sentence. The answer is: that status has nothing to do with the Court's jurisdiction. The Code, including Art. 67, UCMJ, "applies in all places." Art. 6, UCMJ. A state prison is not some kind of reverse exclusive-jurisdiction enclave beyond the reach of this geographically boundless Act of Congress. We have found no authority—and appellee cites none—for the proposition that, simply being under a life sentence deprives appellant of legal capacity, including the right to sue and be sued or otherwise invoke the legal process. Quite the reverse: North Carolina's regulations specifically direct that "[e]very inmate committed to the Department of Public Safety shall be afforded reasonable access to the courts." N.C. Dep't of Public Safety, Prisons Policy & Procedure Manual ch. G, § 0201 (July 29, 2014). Even if North Carolina law purported to block access to this or any other federal court, such a measure could not bind this Court as a matter of federal supremacy. *See Ex parte Hull*, 312 U.S. 546 (1941); *cf. Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).

4. Under North Carolina's correctional regulations and policies, appellant is currently adversely affected by the continuing vitality of his court-martial

conviction. While no one can say whether or when he will be freed by North Carolina, he is not under a state sentence of life without parole. There is therefore nothing academic about either his motion for leave or his petition for reconsideration. The Court should emphatically reject any suggestion that its *jurisdiction* to grant leave to file a petition for reconsideration turns in any sense on its appraisal of the likelihood that the moving party will enjoy any real benefit as a result, especially when that appraisal does not enjoy a rigorous evidentiary basis. The courthouse doors must remain open so the Court can exercise its jurisdiction and discretion in accordance with the governing rules and in the interest of justice.[4]

[4] The unusual circumstances warrant a suspension of the normal rule that a majority of the judges who participated in the decision to be reconsidered must concur in order to grant a petition for reconsideration. C.A.A.F.R. 31(d). That rule, like the time limit, is not statutory, and may be relaxed when justified by the circumstances. *See* EUGENE R. FIDELL & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 31.03[8], at 302-03 (17th ed. 2018) ("Guide"). None of the judges who participated in the earlier decision in appellant's case are in active service, but several could in theory be recalled to rule on the petition for reconsideration. Recalling them for this limited purpose, however, would exalt form over substance and waste the taxpayers' money since the underlying statutory issue was authoritatively decided by the current judges, on whom the duty to elaborate military jurisprudence now falls, in *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018).

II

TEAGUE IS INAPPLICABLE, BUT EVEN IF IT APPLIED, IT WOULD NOT PRECLUDE AFFORDING APPELLANT THE BENEFIT OF *MANGAHAS*

1. In its response to the petition for reconsideration, the government again argues that the Court lacks jurisdiction. That claim is without merit for the reasons we explained in Point I. For a host of reasons, appellee's treatment of *Teague v. Lane* is equally lacking in merit.

2. At issue in *Teague* was the retroactive application of "new constitutional rules of criminal procedure" in the context of "cases on collateral review." 489 U.S. at 292; *see also id*. at 310. The case is "inapplicable" where, as here, "the meaning of a criminal statute" is to be decided. *Bousley v. United States*, 523 U.S. 614, 620 (1998). Appellant does not seek a constitutional ruling (the underlying constitutional question having been decided long ago in *Coker v. Georgia*, 433 U.S. 584 (1977)). Rather, the petition for reconsideration involves only the proper interpretation, *given Coker*, of the Code's statute of limitations, Art. 43, UCMJ.

3. Collateral review is "a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process." *Wall v. Kholi*, 562 U.S. 545, 553 (2011). The petition for reconsideration does nothing of the kind. Reconsideration is an integral part of the direct review process and is provided for as such in the Court's

Rules. "Extraordinary relief" is where one would look for the rules governing collateral review, after all, and that is provided for not in chapter 10 of the Rules, but in chapter 6. More to the point, the requisite "judicial reexamination" has already taken place: it happened in *Mangahas* where the Court expressly overruled its earlier decision in appellant's case.

4. *Teague* reflects the comity concern that arises when one sovereign's courts look over the shoulder of another sovereign's courts. That concern is absent where both courts are creatures of the same sovereign. Perhaps for that reason, the Supreme Court has yet to hold (rather than merely assume) that *Teague* applies to cases arising under 28 U.S.C. § 2255. *See, e.g., Welch v. United States*, 136 S. Ct. 1257, 1266-67 (2016). The circumstances make this an even weaker case for applying *Teague* because not only is no other court *system* asked to intervene, the petition seeks reconsideration by *the very court* that decided appellant's case in the first place and has squarely acknowledged that its earlier decision was incorrect.

5. If *Teague* were applicable, it would still not bar affording appellant the benefit of *Mangahas*. This is so because Art. 43 is substantive and new substantive rules generally apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). In this connection, appellee overstates *Bousley* when it claims that "[i]n order to qualify as a substantive rule, the new rule must '[place] certain kinds of primary,

private individual conduct beyond the power of the criminal law-making authority to proscribe.'" Gov't Response to Petition for Reconsideration at 6. A close reading shows that *Bousley* does not go so far. Rather, Chief Justice Rehnquist's opinion for the Court plainly cites such decisions only as an illustration. *See* 523 U.S. at 620 ("certain conduct, *like* decisions placing conduct 'beyond the power . . .'") (emphasis added). There is no principled basis for distinguishing, for retroactivity purposes, rules that decriminalize certain conduct for lack of legislative authority from those that erect a complete defense to prosecution for an offense that is admittedly within Congress's power to create. Because both types of rules preclude conviction, both are substantive. A statute of limitations does not govern *how* a case is tried. Rather, it confers on the defendant the power to prevent the case from being tried at all. *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945). It is difficult to imagine a graver injustice than permitting a criminal conviction to stand where the accused has been denied the benefit of a complete defense despite his determined, timely efforts to assert that defense and where the highest court of the jurisdiction has repudiated its own earlier ruling that the defense was unavailable to him. Appellee's insistence to the contrary notwithstanding, *see* Gov't Response to Petition for Reconsideration at 7, if this is not a denial of fundamental fairness, we do not know what would be.

6. In summary, the Court should afford appellant the benefit of the ruling it has already made. It is not called upon to review the work of some *other* court of law, as is characteristic of collateral review. No federalism interests are at stake. Rather, the Court is called upon to take the logical and *fair* step of following through on its own express repudiation of *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998). That step is clearly in keeping with the Court's power to act "[i]n the interests of justice." *E.g.*, *United States v. Hilton*, 32 M.J. 393, 394 (C.M.A. 1991); Guide § 5.03[7], at 50 (collecting cases). Appellant should not be bundled off on what is likely to be a lengthy journey into the Article III courts, where he will inevitably confront the objection that his statute of limitations claim has received the requisite "full and fair consideration" within the military justice system, *see generally Burns v. Wilson*, 346 U.S. 137 (1953) (plurality opinion), even though the outcome of that consideration has now been authoritatively repudiated. And even if he in the end were to prevail in that stage of his legal odyssey, he will have been prejudiced because of the present effects of the detainer.

Conclusion

The motion for leave and the petition for reconsideration should both be granted. Given the nature and importance of the issues, the Court may wish to set the matter for hearing.

Respectfully submitted,

For
Eugene R. Fidell
CAAF Bar No. 13979
Feldesman Tucker Leifer Fidell LLP
1129 20th Street, NW, Suite 400
Washington, DC 20036
(202) 256-8675 (mobile)
efidell@feldesmantucker.com

For
Terri R. Zimmermann
CAAF Bar No. 30386
Zimmermann Lavine & Zimmermann, P.C.
770 South Post Oak Lane, Suite 620
Houston, Texas 77056
(713) 552-0300
terri.zimmermann@ZLZSlaw.com

Stephen I. Vladeck
CAAF Bar No. 36839
727 East Dean Keeton St.
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

Zachary A. Gray
CPT, JA
CAAF Bar No. 36756
Appellate Attorney
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0648
zachary.a.gray8.mil@mail.mil

Christopher D. Carrier
LTC, JA
CAAF Bar No. 32172
Chief of Capital and Complex
Litigation Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 695-9853
christopher.d.carrier.mil@mail.mil

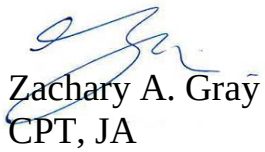
CERTIFICATE OF COMPLIANCE

1. There is no page or other limit for motions for leave, petitions for reconsideration, or responses, answers, and replies thereto. If Rule 21(b) were applicable, this Consolidated Reply would comply with its type-volume limitations because it contains 3021 words and 253 lines of text.

2. This Consolidated Reply complies with the typeface and type style requirements of Rule 37 because it employs 14-point font with proportional Times New Roman typeface using Microsoft Word for Mac Version 2018.

CERTIFICATE OF FILING AND SERVICE

I certify that copies of this Consolidated Reply were electronically mailed to the Court and the Government Appellate Division on November 28, 2018.



Zachary A. Gray
CPT, JA
CAAF Bar No. 36756
Appellate Attorney
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0648
zachary.a.gray8.mil@mail.mil

A P P E N D I X

North Carolina statutes and regulations

1991 N.C. Gen. Stat. § 15A-1380.1

1991 North Carolina Code Archive

GENERAL STATUTES OF NORTH CAROLINA > CHAPTER 15A. CRIMINAL PROCEDURE ACT > SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS > ARTICLE 85A. PAROLE OF CERTAIN CONVICTED FELONS

§ 15A-1380.1. Eligibility of felons for parole

Parole eligibility for prisoners serving a prison or jail term imposed for a felony that occurred on or after the effective date of this Article shall be determined by the provisions of this Article, except that parole eligibility for Class A and Class B felons, and for Class C felons who receive a sentence of life imprisonment shall be determined as provided in Article 85 of this Chapter, and except that parole eligibility for committed youthful offenders shall be determined by G.S. 148-49.15.

History

1979, c. 760, s. 4; 1981, c. 662, s. 4.

End of Document

1991 N.C. Gen. Stat. § 15A-1371

1991 North Carolina Code Archive

GENERAL STATUTES OF NORTH CAROLINA > CHAPTER 15A. CRIMINAL PROCEDURE ACT > SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS > ARTICLE 85. PAROLE

§ 15A-1371. Parole eligibility, consideration, and refusal

(a) Eligibility. -- Unless his sentence includes a minimum sentence, a prisoner serving a term other than one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes. Under this section, when the maximum allowed by law for the offense is life imprisonment, one fifth of the maximum is calculated as 20 years.

(a1) A prisoner serving a term of life imprisonment with no minimum term is eligible for parole after serving 20 years. This subsection applies to offenses committed on and after July 1, 1981.

(b) Consideration for Parole. -- The Parole Commission must consider the desirability of parole for each person sentenced as a felon for a maximum term of 18 months or longer:

(1) Within the period of 90 days prior to his eligibility for parole, if he is ineligible for parole until he has served more than a year;

(2) Within the period of 90 days prior to the expiration of the first year of the sentence, if he is eligible for parole at any time. Whenever the Parole Commission will be considering for parole a prisoner who, if released, would have served less than half of the maximum term of his sentence, the Commission must notify the prisoner and the district attorney of the district where the prisoner was convicted at least 30 days in advance of considering the parole. If the district attorney makes a written request in such cases, the Commission must publicly conduct its consideration of parole. Following its consideration, the Commission must give the prisoner written notice of its decision. If parole is denied, the Commission must consider its decision while

the prisoner is eligible for parole at least once a year until parole is granted and must give the prisoner written notice of its decision at least once a year; or

(3) Whenever the Parole Commission will be considering for parole a prisoner convicted of first- or second-degree murder, first-degree rape, or first-degree sexual offense, the Commission must notify, at least 30 days in advance of considering the parole, by first class mail at the last known address:

a. The prisoner;

b. The district attorney of the district where the prisoner was convicted;

c. The head of the law enforcement agency that arrested the prisoner, if the head of the agency has requested in writing that he be notified;

d. Any of the victim's immediate family members who have requested in writing to be notified; and

e. The victim, in cases of first-degree rape or first-degree sexual offense, if the victim has requested in writing to be notified.

The Parole Commission must consider any information provided by any such parties before consideration of parole. The Commission must also give the district attorney, the head of the law enforcement agency who has requested in writing to be notified, the victim, or any member of the victim's immediate family who has requested to be notified, written notice of its decision within 10 days of that decision.

(c) Statement of Reasons for Release before Minimum. -- If parole is granted before the expiration of a minimum period of imprisonment imposed by the court under G.S. 15A-1351(b) or recommended by the court under G.S. 15A-1351(d), the Commission must state in writing the reasons why the imposed or recommended minimum was not followed.

(d) Criteria. -- The Parole Commission may refuse to release on parole a prisoner it is considering for parole if it believes:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

(e) Refusal of Parole. -- A prisoner who has been granted parole may elect to refuse parole and to serve the remainder of his term of imprisonment.

(f) Mandatory Parole at End of Felony Term. -- No later than six months prior to completion of his maximum term, the Parole Commission must parole every person convicted of a felony and sentenced to a maximum term of not less than 18 months of imprisonment, unless:

(1) The person is to serve a period of probation following his imprisonment;

(2) The person has been reimprisoned following parole as provided in G.S. 15A-1373(e); or

(3) The Parole Commission finds facts demonstrating a strong likelihood that the health or safety of the person or public would be endangered by his release at that time.

(g) Notwithstanding the provisions of subsection (a), a prisoner serving a sentence of not less than 30 days nor as great as 18 months for a felony or a misdemeanor may be released on parole when he completes service of one-third of his maximum sentence unless the Parole Commission finds in writing that:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10).

In order that the Parole Commission may have an adequate opportunity to make a determination whether parole under this section should be denied, no prisoner eligible for parole under this section shall be released from confinement prior to the fifth full working day after he shall have been placed in the custody of the Secretary of Correction or the custodian of a local confinement facility.

(h) Community Service Parole. -- Notwithstanding the provisions of any other subsection herein, certain prisoners specified herein shall be eligible for community service parole, in the discretion of the Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of a probation/parole officer. A parolee who is paroled under this subsection must perform as a condition of parole community service in an amount and over a period of time to be determined

by the Parole Commision. However, the total amount of community service shall not exceed an amount equal to 32 hours for each month of active service remaining in his minimum sentence (if he was sentenced prior to July 1, 1981), or 32 hours for each month of active service in one-half of his sentence imposed under G.S. 15A-1340.4. The Parole Commission may grant early parole under this section without requiring the performance of community service if it determines that such performance is inappropriate to a particular case.

The probation/parole officer and the community service coordinator shall develop a program of community service for the parolee. The community service coordinator shall report any willful failure to perform community service work to the probation/parole officer. Parole may be revoked for any parolee who willfully fails to perform community service work as directed by a community service coordinator. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

(1) Who is serving an active sentence the term of which exceeds six months; and

(2) Who, in the opinion of the Parole Commission, is unlikely to engage in further criminal conduct; and

(3) Who agrees to complete service of his sentence as herein specified; and

(4) Who has served one-half of his minimum sentence (if he was sentenced prior to July 1, 1981), or one-fourth of a sentence imposed under G.S. 15A-1340.4.

No prisoner convicted under Article 7A of Chapter 14 of a sex offense, under G.S. 14-39, 14-41, or 14-43.3, or under G.S. 90-95(h) of a drug trafficking offense shall be eligible for community service parole.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) A fee of one hundred dollars ($100.00) shall be paid by all persons who participate in the Community Service Parole Program. That fee must be paid to the clerk of court in the county in which the parolee is released. The fee must be paid in full within two weeks unless the Parole Commission, upon a showing of hardship by the person, allows him additional time to pay the fee. The parolee may not be required to pay the fee before he begins the community service unless the Parole Commission specifically orders that he do so. Fees collected under this subsection shall be deposited in the General Fund. The fee imposed under this section may be paid as prescribed by the supervising parole officer.

(j) The Parole Commission may terminate a prisoner's community service parole before the expiration of the term of imprisonment where doing so will not endanger the public, unduly depreciate the seriousness of the crime, or promote disrespect for the law.

History

1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 960, s. 2; c. 1012, ss. 2, 5; 1987, c. 47; c. 783, s. 7; 1989, c. 1, ss. 3, 4; 1991, c. 217, s. 3; c. 288, s. 2.

Law of Probation & Parole § 24:4 (2d)

The Law of Probation and Parole | June 2018 Update
Neil P. Cohen*

Chapter 24. Initiation of Revocation Proceedings: Detainers

§ 24:4. Consequences of outstanding detainers

References

There is little doubt that detainers serve an important function in the probation and parole scheme. They allow probation and parole officials to keep track of and, when necessary, schedule revocation hearings for probationers and parolees who have violated the conditions of release. Without detainers these alleged violators, convicted of new crimes while on probation or parole, would be released from prison after service of their new sentence, and could possibly abscond without facing revocation proceedings.

Prison and jail officials take **detainers** seriously, often using the data contained in them or the fact of their very existence in administrative decision making. Thus, a **detainer** may affect such important matters as the prisoner's job, program **eligibility** and security classification,[1] and release date.[1.50] Moreover, the **detainer** may have long-term consequences as well. If the **detainer**, and the accompanying warrant, are not executed promptly, the prisoner may have to wait years before the probation or **parole** revocation proceedings are held. Assume, for example, that a parolee is convicted of a new crime and receives a 15-year sentence. A **parole** violation warrant is filed as a **detainer** soon after the parolee enters prison to serve the new sentence. If the revocation hearing is not held until the alleged violator completes the new sentence, the prisoner may suffer several losses. First, the offender could lose the opportunity to serve the new sentence concurrently with any sentence stemming from the revocation.[2] Second, the penalty for the new offense may be increased if the outstanding **detainer** is used by **parole** authorities to delay or deny release on **parole** from the new charge.[3] Third, the 15-year period may hurt the alleged violator's ability to present a defense in the forthcoming revocation proceedings, for important witnesses may disappear, die, or simply forget.[4] And, even if the alleged violator can still present a successful defense at the revocation, the fact that the **detainer** was outstanding may have adversely affected the violator's prison opportunities.[5] Fourth, the outstanding **detainer** creates considerable uncertainty for the prisoner who does not know whether another prison term will follow the one being served.[5.50] This uncertainty can contribute to the prisoner's sense of

frustration, helplessness, and lack of interest in becoming rehabilitated.[6]

Quite naturally, the significant consequences flowing from an outstanding probation or parole violator warrant have produced pressures to change the current detainer practice. Since there is little opposition to the actual use of detainers, the focus of critics has been on limiting their adverse impact. Prisoners and some correctional officials seek to accomplish this by encouraging an early resolution of the charge underlying the probation and parole violator warrants.

While many judges and correctional authorities recognize the harmful effects of outstanding detainers, few accept the need for an early resolution of the matter for which a detainer was issued.[7] For instance, where a Maryland probation violation charge was lodged against an individual being held in a Pennsylvania prison, a Pennsylvania court held that it had no authority to dispose of the Maryland charges that were pending against the inmate, that Pennsylvania courts could not compel Maryland authorities to initiate extradition proceedings against the inmate, that postponement of the disposition of the Maryland charges did not violate the inmate's right to timely access to the courts, and that the inmate was not entitled to issuance of a writ of habeas corpus, even though the detainer that was lodged against him had the effect of restricting his institutional liberties.[8]

The delay in executing a warrant is not always detrimental to the probationer or parolee. For example, if the alleged violator is in jail pending trial for new criminal charges, delaying execution of the warrant permits the offender to resolve the new charges with the least interference. The violator will not have to choose between remaining silent at the revocation hearing or testifying at the revocation and making statements or presenting evidence which may prejudice the defense in the criminal trial.[9] The delay will also preclude a postrevocation removal to a distant prison where the offender will be unable to participate fully in preparing the defense to the new charges.[10] Finally, the delay will permit the offender to defend fully the new charges with the hope that a successful resolution will result in the revocation proceedings being dropped.[11]

If the alleged violator has already been convicted of the new charges and is serving a jail or prison sentence resulting from the conviction, delaying execution of a violator warrant can have the advantage of permitting probation and parole authorities to use the offender's performance while incarcerated as a factor in determining whether revocation should be ordered.[12] A successful institutional record could buttress the argument that the alleged violator had become rehabilitated and could be trusted to be reparoled (rather than reincarcerated) despite the violation of parole.

Footnotes

* Second Edition by Neil P. Cohen, Distinguished Service Professor of Law, The University of Tennessee College of Law. Supplements prepared by Publisher's Editorial Staff.

1 Penal authorities in some jurisdictions regard prisoners subject to detainers as escape risks, and therefore put them in more secure detention. See Carchman v. Nash, 473 U.S. 716, 105 S. Ct. 3401, 87 L. Ed. 2d 516 (1985); Note, "Convicts—The Right To A Speedy Trial and the New Detainer Statutes," 18 Rut L Rev 828, 835 (1964).

1.50 Felix v. U.S., 508 A.2d 101 (D.C. 1986) (noting that, because of outstanding detainers an inmate may be classified as a maximum or close custody risk, ineligible for certain work assignments, denied preferred living accommodations, deemed ineligible for work release programs, or denied the possibility of parole).

2 See § 24:17.

3 See Dauber, "Reforming the Detainer System: A Case Study," 7 Crim L Bull 669, 694–95 (1971); see also §§ 23:13-23:14.

4 See §§ 24:20- 24:24.

5 See §§ 24:18- 24:19.

5.50 According to article I of the Interstate Agreement on Detainers, "[t]he party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." See, e.g., Wis. Stat. Ann. § 976.05(1).

6 James Bennett, former Director of the Federal Bureau of Prisons, has written:

> Yet it is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement. Bennett, "The Last Full Ounce," 23 Fed Probation 20, 21 (1959).

7 See, e.g., Bolden v. Murray, 841 F. Supp. 742 (E.D. Va. 1994) (even if a **detainer** filed by New York **parole** authorities was being used by Virginia prison authorities to adversely affect the Virginia prisoner's confinement and **eligibility** for **parole**, the defendant was still not entitled to a due process hearing, since the nature of New York's **parole** revocation decision, which was initiated but not completed by the filing of the **detainer**, was entirely unrelated to Virginia's discretionary **parole** release decision, which created no liberty or property interest requiring procedural protections; defendant was only entitled to a revocation hearing at some point prior to revocation). U.S. v. Romero, 511 F.3d 1281 (10th Cir. 2008) (noting that the Court has rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right).

8 Com. v. Clutter, 419 Pa. Super. 275, 615 A.2d 362 (1992).

9 See §§ 21:42- 21:48.

10 See U.S. ex rel. Lipuma v. Gengler, 411 F. Supp. 948 (S.D.N.Y. 1976); cf. Robinson v. Sartwell, 264 F. Supp. 531 (E.D. Mich. 1967).

11 See §§ 22:4- 22:5.

12 See Moody v. Daggett, 429 U.S. 78, 97 S. Ct. 274, 50 L. Ed. 2d 236 (1976); see § 23:20.

End of Document

POLICY & PROCEDURES

.1501 GENERAL

The following procedures outline inmate releases from the custody of North Carolina Prisons. These guidelines include a variety of processes through which an inmate can be released from prison custody, with specific instructions for North Carolina Prisons staff to ensure that the release is affected accurately. This material also includes the processes completed by other related authorities, i.e., Combined Records, Post-Release Supervision and Parole Commission, the North Carolina Community Corrections (DCC), etc., as appropriate.

.1502 DEFINITIONS

For the purposes of this policy, the following definitions apply:

(a) **EXPIRATION OF SENTENCE** - When an inmate has completely served all sentences and will not be reporting to Parole or Post-Release Supervision. This is commonly known as the inmate's projected release date (PRD) or max out.

(b) **COURT-ORDERED RELEASE** - This release is the result of authorization by the courts for the inmate to be released from the custody of the North Carolina Prisons.

(c) **RELEASE SAFEKEEPER** - This release returns a safekeeper inmate to the custody of the appropriate Sheriff upon presentation of credentials and proper related court documents.

(d) **PRE-SENTENCE DIAGNOSTIC (PSD) RELEASE** - This release occurs when a court-ordered PSD study has been completed.

(e) **RELEASE FROM INTERSTATE CORRECTIONS COMPACT (ICC)** - This release occurs when the state from which the inmate came authorizes the inmate's release.

(f) **PARDON** - A pardon occurs when the Governor of North Carolina forgives an inmate's sentence.

(g) **CONDITIONAL COMMUTATION** - This release occurs when the Governor of North Carolina reduces an inmate's sentence to the time he or she has already served (commonly known as commuted to time served).

(h) **POST-RELEASE SUPERVISION** - Post-release supervision is mandated by statute following release from certain active structured sentence terms.

(i) **PAROLE** - Release on parole is an action by the Parole Commission and can include 6-month mandatory parole, 90-day mandatory parole, misdemeanor parole, one-third parole, regular parole, community service parole, and conditional release (Committed Youthful Offender only) and parole to DWI school (28 and 90 day programs).

(j) **DECLINE TO REVOKE** - This is an action by the Parole Commission which indicates that the inmate's parole supervision time is to continue. If the inmate has no other active prison time to complete, a release from custody and return to parole supervision will be affected. If there is an active prison sentence to complete, (i.e., has received an additional sentence while on parole), the inmate will remain in custody until the active sentence has expired.

(k) **SEX OFFENDERS** - Offenders identified as those inmates convicted of specific statutorily defined assaultive offenses of a sexual nature.

(l) **DEATH** - When an offender dies while in the custody of North Carolina Prisons.

(m) **DIRECT RELEASE –** This procedure applies to inmates that are released to the community as post-release or parole supervisees. Exceptions are indicated in .1503.

(n) **RELEASE OFFICER –** A certified Probation Parole Officer designated to assist with releasing an offender from custody by initiating the process to begin the Post-Release or Parole Supervision period.

The foregoing are the normal releases within the North Carolina Prisons. Combined Records should be contacted for releases from jails.

.1503 PROCEDURE

(a) PROCEDURES FOR ALL RELEASES

(1) Inmates scheduled for release will be listed on the facilities Release Planning List (IPT batch job 02), and the Scheduled Release List (IPT batch job 10).

(2) All releases are authorized by Combined Records on the Significant Issues/Case Management Note screen (IP60/61) with exceptions being Safekeeper Release, PSD Release, and Release from Interstate Corrections Compact. IP60/61 notes will include comments as to the specific approved release date, and a screen print of IP60/61 will serve as the authority to release the inmate. A copy of the screen print should be placed in the inmate's facility jacket for future reference.

(3) The External Movements screen (IP20) should be completed before the inmate departs to ensure no unaudited sentences exist.

(4) If, because of meritorious time being approved, an inmate's projected release date changes after the release is approved, Combined Records should be notified immediately. Facility staff, if possible, should award sentence reduction credits well in advance of projected release dates to avoid changes in approved release dates.

(5) Staff is required to complete the Inmate Release Plan screen (IP55) for any inmate to be released with exceptions being Safekeeper Release, PSD Release, and Release from Interstate Corrections Compact. IP55 completion must be as accurate and complete as possible, with the state and county code essential. Staff shall not enter a post office box as the inmate's proposed release plan. The Plan must be completed before the inmate is released.

(6) Any questions or concerns about the validity of the instructions should be directed to Combined Records at (919) 716-3200 during normal working hours.

(7) All efforts shall be made on the part of Prisons to transfer the inmate to the facility closest to the planned place of residence for all applicable releases. When possible this should be done fourteen (14) days prior to the projected release date. Certain inmates are eligible for custody change for release purposes. All inmates shall be screened for transfer to the closest facility to facilitate release. The Release Officer at the receiving facility will review the post release papers with the inmate. Any exceptions shall be communicated among all parties.

Specific instructions regarding each type of release are:

(b) DIRECT RELEASE

All inmates released to Post-Release Supervision or Parole will be direct released with the exception of the following:

- Inmates determined to be homeless;
- Inmates with pending charges (where bond has not been posted);
- Inmates with outstanding warrants;
- Sex Offenders convicted of a reportable conviction or who have been convicted of a non-reportable offense that involves the physical, mental or sexual abuse of a minor;
- Inmates being released from High Security Maximum Control (HCON), Maximum Control (MCON), and Intensive Control (ICON).

NOTE: The Release Officer will affect the release of inmates from the control statuses listed above. Prisons will purchase a bus ticket to the inmate's home county if needed. <u>The Supervising Officer will not be required to travel to the facility to perform the release unless they are in the same county as the facility.</u>

- Inmates who are under the age of 18.

NOTE: For offenders under the age of 18, the release officer will affect the release on the date of the release; if the inmate does not have transportation, Community Corrections will transport the offender to the inmate's home county.

(1) When an inmate is required to be picked up by the Supervising Officer, the Officer will contact the facility at least fourteen (14) days prior to the scheduled release date and request the inmate be transferred to the facility most convenient to the Officer for pick-up.

(2) The Supervising Officer will utilize CJ LEADS and ACIS to determine if there are pending charges or detainers in North Carolina.

For inmates with pending charges or outstanding warrants, before the date of release, the Supervising Officer will ensure the local sheriff in the county where the charge(s) are pending is made aware the inmate will need to be picked up for transport to the local confinement facility.

(3) The assigned case manager shall work with the Release Officer to find a suitable home plan for the inmate. The assigned case manager shall confirm the home plan within 30 days and within 14 days of release.

(c) COURT-ORDERED RELEASE

(1) When a Superior or District Court Judge orders an inmate's sentence vacated, Combined Records will first notify the facility by telephone to inform them that the inmate must be released. A related comment will then be placed on the Significant Issues/Case Management Note screen (IP60/61), and the facility will receive a faxed copy of the court order from Combined Records. If the court-ordered release documentation is forwarded directly to the prison facility, Combined Records should be contacted immediately.

(2) The facility will not release the inmate until all steps have been completed by Combined Records. A copy of the court order should be retained by the facility for future reference.

(3) If a judge orders an inmate to be removed from the North Carolina Prisons' custody directly from court (frees the inmate), the facility should immediately contact Combined Records.

(d) SAFEKEEPER RELEASE

(1) Procedures for the release of a safekeeper inmate are directed under Chapter C, .1600 Safekeepers, specifically .1608 Release.

(2) Any questions as to the validity of the proposed release of a safekeeper should be directed to Combined Records at (919) 716-3200 during normal working hours.

(e) PRE-SENTENCE DIAGNOSTIC STUDY (PSD) RELEASE

(1) Upon completion of the PSD committee report, the Diagnostic Services Branch will send a DCI message authorizing the sheriff of the committing county to assume custody of the PSD, and notifying the assigned diagnostic center of the same. No PSD is released without this authorization. All PSD's are returned to their respective counties on or before the expiration date of the commitment.

(2) Any validity concerns about release after a PSD should be directed to the DSB at (919**)** 838-3700 during normal working hours.

(f) RELEASE FROM INTERSTATE CORRECTIONS COMPACT (ICC)

(1) That state from which the inmate came will forward all related papers to the Classification Services Section. Classification Services is the final approving authority for actions regarding ICC cases for North Carolina Prisons.

(2) Classification Services will notify the appropriate facility by telephone and forward to the facility the related documentation along with specific instructions.

(3) Questions or concerns should be directed to the Classification Services Manager at (984) 255-6100 during normal working hours.

(g) PARDON

(1) Combined Records manages this release and will notify the facility by telephone to inform them of the pardon. Release instructions will then be entered on the Significant Issues/Case Management Note screen (IP60/61), with comments as to the approved pardon date.

(2) A screen print of IP60/61 will serve as unit authority to release the inmate. A copy of IP60/61 is to be placed in the inmate's facility jacket for future reference.

(h) CONDITIONAL COMMUTATION

(1) Combined Records manages this release and will notify the facility by telephone to inform them of the commutation. Release instructions will then be entered on the Significant Issues/Case Management Note screen (IP60/61).

(2) A screen print of IP60/61 will serve as unit authority to release the inmate. A copy of IP60/61 is to be placed in the inmate's unit jacket for future reference.

(i) POST-RELEASE SUPERVISION

(1) The Parole Commission sets the conditions of post-release supervision, which are provided to North Carolina Community Corrections (DCC).

(2) Eligibility for post-release supervision applies to class B1 through E structured sentence felons with offense dates from October 1, 1994 through November 30, 2011 and all felony structured sentences with offense dates on or after December 1, 2011.

(3) Eligibility for post-release supervision will fall under one of two categories: regular post-release supervision or early post-release supervision. Both types require that an inmate with felony offense be released from prison and placed on post-release supervision on the date equivalent to the maximum prison sentence minus jail credit, less nine/twelve month or 5 year for felony cases or a 4 month deduction for Aggravated Level 1 DWI (which ever is applicable), less any earned time awarded by the Department of Public Safety or the custodian of a local confinement center. The difference between the two types involves structured sentence time being served in conjunction with pre-structured sentence time. If the inmate is serving structured sentence time for a felony, the inmate will be released on regular post-release supervision. If the inmate is serving structured sentence time for a felony and is also serving a pre-structured sentence time, he may be eligible for early post-release supervision which may occur prior to the maximum release date. Note that either type of post-release supervision is not a parole, and the inmate can neither refuse nor be denied the release. If the inmate attempts to refuse post-release supervision, contact the Post-Release/Parole Supervision Office at (919) 716-3107.

(4) When an inmate is scheduled for post-release supervision, the post-release papers will be printed from the OPUS On the Web Inmate Release Checklist screen. This option will appear after the Parole Commission has approved the release. The Release Officer will provide three (3) sets of the approved post-release papers to be reviewed with the inmate.

(5) The Release Officer will read the release agreement and have the inmate sign all sets where indicated to acknowledge awareness and understanding. The inmate is provided with one copy of the Release Order and one signed Release Agreement. The facility will retain one copy and the Release Officer will retain a copy.

(6) For any specific DCC release instructions, view the Release Plan Notes. DCC staff enters relevant release instruction comments through the F23 key on the Inmate Release Plan screen (IP55).

(7) The Facility Parole Results Review screen (PC15) will indicate a parole release date has been set. All post-release supervision cases will be documented by Combined Records on the significant Issues/Case Management Note screen (IP60/61). The Facility Parole Review screen (PC40) will not show a release on/after date, but will note the comment: **See IP60/61 for release date.**

(8) The PC40 screen will include any related Parole Commission comments regarding the case.

(9) Post-release supervision cases must be released on the scheduled release date as prescribed by statute, including cases where the release date falls on weekends and holidays. If the inmate scheduled for post-release supervision has not been released from the prison unit by the designated Release Officer by 5 p.m. on the scheduled release date, the prison unit is to call the Electronic House Arrest (EHA) Base Station at 1-800-735-1432 to report the problem. EHA will contact appropriate personnel who will assist in releasing the inmate.

(10) OPUS will automatically print the "Transfer of Custody" form when the post-release movement code is entered on the External Movement screen (IP20). This form should be given to the parole officer releasing the inmate to ensure information related to inmate's prison adjustment, control status, STG affiliation, and other critical information is available to the supervising officer.

(11) Any questions or concerns about post-release supervision should be directed to the Parole Commission at (919) 716-3010 during normal working hours.

(j) PAROLES

(1) The Facility Parole Results Review screen (PC15) allows a facility to confirm the inmate has been approved for parole. The Facility Parole Review screen (PC40) will show the type of parole approved and the earliest possible date of release. Comments regarding release are also provided on PC40.

(2) Inmates are cleared for parole on PC40 by entering CLR in the Facility Action. However, inmates should be cleared for parole by the facility that releases the inmate. The clearing should be done immediately before the inmate departs the facility (i.e., not several hours before he or she leaves, not several hours after departure). If an inmate who was cleared needs to be changed to hold, refer to the Parole Commission instructions.

(3) Except for a parole to a detainer (federal, in state, out of state), all paroles are normal paroles. Normal paroles will be forwarded to the facility where the inmate

is housed along with instructions concerning the release of the inmate. Parole documents forwarded to the facility will include:

(A) PCAR115 - Facility instructions for release (to be retained by the facility); (Batch job 15)

(B) Two (2) copies of PCAR110A - Certificate of Parole (the facility is to retain one copy and provide one copy to the inmate); (Batch job 15)

(C) Three (3) copies of PCAE111C - Parole Agreement. (Batch job 15)

(4) The assigned Release Officer will contact the facility to arrange release.

(5) The Release Officer will read the parole papers to the inmate explaining the conditions and have the inmate sign all copies where indicated to acknowledge awareness and understanding. The inmate is provided with one set and the facility will retain one copy. The Release Officer will ensure the remaining sets of signed parole papers are forwarded to the Post-Release/Parole Supervision Office.

(6) Parole to a detainer will be accompanied by special instructions for the facility.

(7) Any facility that has an inmate scheduled to be paroled should have the appropriate paperwork at least 24 hours ahead of time. If a facility does not have the documentation on the day before the scheduled parole, the facility is directed to contact the Parole Commission at (919) 716-3010.

(8) Mandatory parole cases, including 6-month and 90-day end of term cases, must be released on the scheduled release date as prescribed by statute, including cases where the release date falls on weekends and holidays. If the inmate scheduled for 90-day mandatory parole has not been released from the prison unit by the Release Officer by 5 p.m. on the scheduled release date, the prison unit is to call the Electronic House Arrest (EHA) Base Station at 1-800-735-1432 to report the problem. EHA will contact appropriate personnel who will assist in releasing the inmate.

(9) OPUS will automatically print the "Transfer of Custody" form when the parole movement code is entered on the External Movement screen (IP20). This form should be given to the parole officer releasing the inmate to ensure information related to inmate's prison adjustment, control status, STG affiliation, and other critical information is available to the supervising officer.

(10) Any other concerns or questions about parole should be directed to the Parole Commission at (919) 716-3010 during normal working hours.

(k) DECLINE TO REVOKE

(1) When an inmate is returned to prison as a parole violator without additional sentences, and the Commission declines to revoke the inmate, Combined Records staff receives the alert that the inmate is not being revoked, and by telephone verifies with the housing facility that there are no additional sentences or pending charges on this inmate.

(2) After verification, Combined Records will place a comment on the Significant Issues/Case Management Note screen (IP60/61) advising the facility to reinstate the inmate to parole and then notify the facility by telephone to verify. The IP60/61 is the facility authority to release the inmate.

(3) The facility will not receive any additional documents because the previous parole action and documentation are still in effect. Any questions on matters related to a Decline to Revoke release without an additional sentence should be directed to Combined Records at (919) 716-3200 during normal working hours.

(4) When an inmate is returned to prison as a parole violator with additional sentences, and the Commission declines to revoke the parole, the additional sentence is processed as usual. Combined Records then verifies the sentence structure and establishes the new release date.

(5) When the additional sentence is completed, if the original parole sentence has expired, the inmate becomes a regular release (expiration of sentence) with appropriate release instructions on the IP60/61 screen.

(6) If at the completion of the additional sentence, the original parole sentence has not yet ended, the inmate returns to parole on the prior sentence. In this case, no additional parole action documents will be sent to the facility. Combined Records will use IP60/61 to instruct the facility to reinstate the inmate to parole.

(7) Any questions related to a Decline to Revoke release with an additional sentence should be directed to Combined Records at (919) 716-3200 during normal working hours.

(l) SEX OFFENDERS

(1) An inmate categorized as a sex offender on either the current or a prior sentence can be identified by the sex offender notification on the bottom of the Facility Parole Review screen (PC40) for parole and post-release supervision cases, and on the Release Planning List (IPT batch job 05) for expiration of sentences. Current sex offenders will be flagged by a “sex offender” notification; inmates with prior convictions for reportable offenses will be identified by a “prior sex offender” notification; and sex predators will be identified by a “sex predator” notification.

When an inmate is categorized as a current or prior sex offender or sex predator, staff is required to:

(A) Prepare triplicate original Notice of Duty to Register Forms (print details from IPT batch job 05), review the forms with the inmate, and have the inmate sign all originals to acknowledge understanding of the statutory reporting mandates. In keeping with General Statutes, the Notice to the Inmate must occur not less than 10 days nor more than 30 days prior to release. To obtain this information, each facility should access the "scheduled release of sexual offender" screen on OPUS as follows: IP57 7 MMDDYY_MMDDYY #### (unit number). OPUS will then provide a list of all offenders required to register as sex offenders and scheduled for release between the specified dates. On the first Monday of each month, the date range shall be from the 15th day of the month through the end of the month. On the third Monday of the month, the date range shall be from the 1st day of the next month through the 14th day of the next month.

(B) Provide inmate with a copy of the DC979, Notice of Duty to Register as a Sex Offender/Offender Acknowledgement. This is a summary of information provided by the SBI and is to be given to the inmate upon release so he/she will be aware of statutory requirements related to sexual offenders. The inmate does not sign this copy. Do not send copies to Combined Records, SBI, or the Classification Manager.

(C) Upon having the inmate sign the Notice of Duty to Register, staff shall ensure the inmate has an updated photo taken. It is not necessary to issue a new inmate identification card, but the updated photo shall be used for the inmate release card and shall be uploaded in the photo identification system as the most recent photo on the web.

(D) Complete the sex offender notification entry on the IP55, F24 comments screen. Comments should read "Inmate informed of duty to register as a sexual offender on MM/DD/YY; automated release plans updated; and signature form distributed to inmate, facility record, and Classification and Technical Support Manager. Inmate also provided a copy of the DC-979, Notice of Duty to Register as a Sex Offender/Offender Acknowledgement. Inmate photo updated in the Inmate Photo ID System on MM/DD/YY."

(E) Provide one original copy of the OPUS generated Notice of Duty to Register form (report IPTR130D) to the inmate; retain one original Notice of Duty to Register form in the inmate's facility jacket, and forward the third original to the Manager of Classification & Technical Support, MSC 4275, Raleigh, NC 27699-4275.

(2) Records completion as noted above is essential given the statutory requirements for notification to the local sheriff's departments. No other manual processes are

required because with accurate record completion, the notification is electronic and automatic.

(3) In the event that an identified sex offender refuses to sign the notice of Duty to Register, two staff members will document by signature that the duty was explained and he/she refused to sign.

(m) SATELLITE BASED MONITORING (SBM)

(1) Prior to release, the (SM01) OPUS module shall be viewed for Satellite Based Monitoring (SBM) applicability. Once verified, the IP55 (F24) comments screen shall be utilized for documenting purposes. Comments should read "SM01 OPUS module viewed for SBM applicability – SBM is noted – contacted the Sex Offender Management line on date/time and spoke to DCC employee". If SBM is not noted, IP55 (24) comments shall be documented as such.

As indicated earlier, valid Satellite Based Monitoring (SBM) cases shall be referred to North Carolina Community Corrections Sex Offender Management line at 1-888-663-0156 prior to release.

(2) In addition to IP55 comments, on the date of release for those inmates identified as SBM, staff must run the required release batch reports (AS12 0 IPT 02/05). Inmates flagged as SBM will generate a "Notice to Enroll in Satellite Based Monitoring". The releasing facility will be responsible for reading to and having the inmate sign, acknowledging the contents. Instructions for distribution are on the form.

(3) The sex offender management office will be responsible for the upkeep and tracking of these forms.

(4) In the event that an identified SBM inmate refuses to sign the notice to enroll in SBM, two staff members will document by signature that the notice was explained and the inmate refused to sign.

(m) DEATH

(1) Upon the death of an inmate while in the custody of North Carolina Prisons, the facility Officer-In-Charge will contact the medical examiner (and coroner if applicable) of the county in which the body of the deceased is found; the district attorney and other law enforcement agencies having investigative jurisdiction of the case; and the Prisons Director or designee.

(2) Refer to Fiscal Policy and Procedures .3700 Disposition of Assets of Deceased Inmates.

.1504 ADDITIONAL REQUIREMENTS

Upon the release of an inmate, staff should:

(a) Issue trust fund monies and gate money, if required, by policy. The Release Planning List (IPT batch job 02), and the Scheduled Release List (IPT batch job 10) will both show if an inmate is eligible for gate money.

(b) Issue the paper prison release photo ID card from the inmate's facility jacket, and retain the color identification card in the facility jacket.

(c) Verify that personal property and transition document envelope, to include social security card, driver's license and other identification, and all property in storage is returned to the inmate.

(d) Restore rights in unconditional release cases. Prison releases, specifically, expiration of sentences ("max out"), and unconditional pardons require the restoration of citizenship. The facility affecting the inmate's release from the custody of North Carolina Prisons is responsible for printing the Restoration of Rights form from OPUS. The form is batch job 97 in the Inmate Population Tracking (IPT) module of OPUS.

(e) Prior to the release of any offender not receiving Community Corrections supervision upon release, facility staff will determine if there are pending charges, detainers or notifications requiring release to another agency. Staff will review the OR44 and OR45 screens for pending charges, detainers and notifications. Additionally, Criminal Justice Law Enforcement Data Services (CJ LEADS) will be the primary tool to determine if pending charges exist that is not displayed in OPUS. The Administrative Office of the Court (AOC) files will be a secondary tool in this process. A statewide search should occur by use of offender's name, as well as a name search in the county of residence (misdemeanor). Staff must review all court disposition comments on the OR14 "J70" type to ensure:

(1) A comment exists for each court movement, and

(2) No outstanding additional sentences exist that have not been entered on OPUS.

(f) Any agency holding a warrant, detainer or notification shall be contacted at least 72 hours prior to the scheduled release to establish transfer of custody. Contact is defined as a conversation with an individual at the other agency to discuss the inmate's release including details on transferring the inmate to the other jurisdiction. A voicemail message may be left; however, if no response is received, facility staff shall continue calling the other agency until such time as a supervisor or other personnel is contacted. All such contacts shall be documented on the appropriate OR45, FS11 comment screen to include the name and position of the person contacted as well as the estimated time of arrival to pick up the releasing inmate. Please refer to DOP policy, Outstanding

Charges/Detainers, G.0105(c) for specific instructions regarding priority, should more than one detainer or pending charge exist on the OR44/45 screens.

If the receiving agency does not arrive at the expected time, facility staff should again make personal contact with staff at the other jurisdiction. If these efforts are unsuccessful, facility staff shall contact the Assistant Director for Auxiliary Services or the Manager of Classification for further instruction. If the release occurs on a holiday or weekend, the Prisons Administration duty officer should be contacted. These contacts should occur prior to the release of the inmate and be documented on the OR45, FS11 comment screen.

In the event an inmate is directed to report to court for disposition of pending charges, reporting directions should also be documented on the OR45, FS11 comment screen.

(g) Staff must review all court disposition comments on the OR14 "J70" type to ensure a comment exists for each court movement.

(1) If a comment indicates an additional sentence was issued, the reviewing authority shall access the OT20 screen to determine if the additional sentence has been added to OPUS.

(A) If the additional sentence has been added to the OT20 screen and been audited by Combined Records, no further action is needed and the release may proceed.

(B) If the additional sentence does not appear on the OT20 screen, the reviewing authority shall review the inmate's field jacket to determine if the commitment has been received but not entered in OPUS.

(i) If the commitment is available, the information shall be entered on OPUS immediately. Combined Records shall be notified that an additional sentence has been entered so a "do not release" flag can be entered until such time as the sentence is audited.

(ii) If the commitment is not located in the field jacket, the reviewing authority shall immediately contact the Clerk of Court in the county of conviction to obtain a copy of the commitment. Combined Records shall be notified that the inmate has received an additional sentence and the commitment has been requested so a "do not release" flag can be entered until such time as the commitment is received, entered inn OPUS, and audited.

(2) If the comments indicate no additional commitments have been issued, facility staff shall proceed with the inmate's release.

(h) Questions or concerns about restoration of citizenship should be directed to Combined Records at (919) 716-3200.

.1505 RELEASE PROCEDURAL RESPONSIBILITY

For all releases in which the inmate has mandated supervision by Community Corrections, the Release Officer will take the primary role in effecting the release. Facility staff will act in a supporting role.

For releases with no mandated supervision by Community Corrections, the facility effecting the inmate's release or transfer from the custody of North Carolina Prisons is responsible for reviewing the release action and for ensuring the accuracy and completeness of the required release procedures. The facility affecting the release is defined as the last housing facility, including the receiving facility in the event of transfer for release, transfer for direct release, or any other circumstances in which one facility affects the final release on behalf of another. The final facility is responsible whether or not the inmate is actually housed at that location. Releasing facilities are to review each release for procedural correctness, accuracy, and appropriateness.

.1506 RELEASE THROUGH ADMINISTRATIVE ERROR

If an inmate is erroneously released through administrative error, every reasonable effort must be extended to ensure his/her timely return to custody for completion of the sentence. The following procedure will guide the actions of administrators for such returns to custody.

(a) The Manager of Combined Records or designee will submit a notarized affidavit to the requesting facility specifying information related to the inmate's sentence. Included will be date of commitment to the Department of Public Safety, offense, length of sentence and projected release date. Additionally, the Manager will specify information related to any new commitments which need to be processed, as well as a brief explanation detailing the erroneous release.

(b) The facility head or designee, in cooperation with the local district attorney in the county where the inmate was released, will present to an appropriate District Court Judge (misdemeanor) or Superior Court Judge (felony) a copy of the judgment and commitment form and the affidavit from Combined Records. Note that Combined Records maintains copies of judgment and commitment forms certified true copies by the sending courts.

(c) The facility head or designee, upon presenting the judgment and commitment form and affidavit, will request the District or Superior Court Judge to issue a court order stating that the commitment is valid and requiring a return to confinement. Statutory authority may be found in Section 15A-305(5) of the North Carolina General Statute.

(d) Requests for law enforcement assistance shall be made after carefully evaluating security considerations and the welfare of custodial staff assigned to return the inmate to custody. Law enforcement assistance will be requested on the basis of the court order.

(e) Following the return of the inmate to confinement, a routine classification hearing will be conducted in accordance with established policy for those inmates who do not have a new commitment. The rationale of the Department of Public Safety for the return to custody shall be clearly stated on the OPUS Classification files (IC05) with assignment to the appropriate custody and facility. The inmate shall be allowed the opportunity to make a statement on the Witness Statement form, DC-138B.

(f) For those inmates returned with an additional commitment that has not been processed, the inmate shall be admitted to the appropriate diagnostic center as directed by the Prisons Transfer Branch staff. Processing of the additional sentence will occur in accordance with prisons policy.

(g) The Chief of Security's office shall enter the Release Through Administrative Error into the National Crime Information Center (NCIC) as a Wanted Person with appropriate alerts to law enforcement. Facility staff shall contact the Randall Building Security Officer at 919-838-3572 as soon as local authorities determine the inmate cannot be located for return to custody to complete his/her sentence(s). The Assistant Director for Auxiliary Services and/or the Classification Manager shall consult with the Chief of Security's office on each erroneous release to determine whether prisons administration assistance, such as PERT or SORT, shall be activated to assist in the search and return to custody. The Chief of Security or his/her designee shall be responsible for any coordination of efforts.

.1507 EXCEPTIONS

These procedures govern regular operations. Exceptions may be made by the Prisons Section Director or designee.

.1508 ISSUES

Questions or other issues regarding release procedures may be directed to Manager, Classification and Technical Support staff at (984) 255-6100 during normal working hours.

C.1500_09_12_16.doc

George T. Solomon

09/12/16

Prisons Director Date

290 N.C. 45
Supreme Court of North Carolina.

STATE of North Carolina
v.
Franklin WRIGHT.

No. 81.
|
May 14, 1976.

Synopsis
Defendant was convicted before the Watauga County Superior Court, Harry C. Martin, J., of the felonious breaking and entering of a restaurant and the felonious larceny therefrom of $600, and he appealed. The Court of Appeals, 28 N.C.App. 426, 221 S.E.2d 751, found no error, and defendant appealed. The Supreme Court, Moore, J., held that where defendant, a Negro who was tried by a jury of 12 Caucasians, offered no evidence that Negroes were excluded from jury service by reason of race, although he had ample time to do so, he failed to carry his burden of establishing discrimination and also failed to establish a prima facie case of racial discrimination; and that considering the number of criminal cases pending in Watauga County in 1974—75, the limited number of days scheduled for the trial of criminal cases, the fact that the scheduled days were fully utilized, the failure of defendant to show any prejudice by reason of the 19-month delay in bringing him to trial, and the fact that defendant's handwritten demand for a speedy trial was not sent by registered mail to the district attorney of the judicial district in which the charges were pending, as required by statute, defendant failed to establish that he was deprived of his right to a speedy trial.

Affirmed.

Exum, J., filed a dissenting opinion.

****625 *46** Defendant was charged on a bill of indictment, proper in form, with the felonious breaking and entering of the Villa Maria restaurant in Blowing Rock, North Carolina, and with the felonious larceny therefrom of $600.

The State's evidence tends to show the following: The Villa Maria was broken into on the night of

22 August 1973 and some $500 to $800 in coins was taken from the vending machines located therein. on that date, Bruce Johnson and defendant, both Negroes, were living together in a trailer in Boone, North Carolina. That night, around midnight, Johnson drove defendant to the Villa Maria restaurant, which was closed, and let him out. Defendant told Johnson that he was going to rob the pinball machines at the Villa Maria and for him to return and pick him up in about an hour ****626** and a half. Later that night while Johnson was waiting for defendant, he was questioned by a Blowing Rock police officer for parking near the Villa Maria at such a late hour. After this incident, Johnson drove back to a friend's house in Boone. There he found defendant ***47** who told Johnson that he had called a friend to pick him up at the Villa Maria, which she did. Johnson and defendant then returned to a place near the Villa Maria and retrieved a metal box containing approximately $525 in coins, which defendant said he had taken from the Villa Maria and hidden there. On 23 August 1973, Johnson and defendant drove to Johnson's home in Louisburg, North Carolina, stopping at a bank in Winston-Salem where defendant converted the coins into currency.

The officer who had questioned Johnson in Blowing Rock on the night of 22 August had noted Johnson's license number, and by this, the police traced Johnson to his home in Louisburg. Johnson was arrested on 7 September 1973, and on 9 September he made a complete statement to the police relating the facts substantially as set out above. A warrant was served on defendant charging him with these offenses on 5 October 1973 while he was being held in Franklin County Jail on another charge.

Defendant testified that on the night in question Johnson drove him to Blowing Rock to see a girl friend with whom he stayed for several hours before returning to Boone. When Johnson returned later that night, he had a large number of coins in his possession. The next day he accompanied Johnson to his home in Louisburg, stopping in Winston-Salem where defendant converted the coins into currency for Johnson. Defendant denied breaking into or robbing the Villa Maria. He admitted however: 'I have been convicted of larceny, arson, breaking, and entering, I don't know how many times I have been convicted of larceny. I have been convicted of breaking and entering into other people's buildings once or twice. I am not sure about that either, I have been convicted of arson once.'

The jury found defendant guilty as charged. From the imposition of a prison sentence of three to five years, effective at the expiration of two ten-year sentences imposed on defendant in Wake Superior Court on 17 December 1973, defendant appealed to the Court of Appeals. That court found no error. Defendant appealed to this Court as a matter of right for the reason that the case involved substantial questions arising under the Constitution of the United States.

Attorneys and Law Firms

Atty. Gen. Rufus L. Edmisten and Associate Attorney Noel Lee Allen, Raleigh, for the State.

Robert H. West, Boone, for defendant appellant.

Opinion

***48** MOORE, Justice.

Defendant's case was called and he was arraigned in open court, entered a plea of not guilty, and twelve jurors were called to the jury box but not empaneled. Defense counsel then moved to dismiss the entire jury 'for the reason that there are no blacks.' Defendant offered no evidence in support of this motion and the court overruled it. Defendant argues that the court erred in summarily denying his motion without giving him an opportunity to offer evidence on the motion and without requiring the State to show affirmatively the absence of systematic exclusion. This is the first assignment discussed in defendant's brief.

Defendant's counsel was appointed on 3 April 1974, and during the some thirteen months which elapsed prior to trial, counsel could have investigated all aspects of the selection or exclusion of blacks from the jury box of Watauga County. Yet, he did not offer any evidence that no Negroes had been summoned as jurors for that particular term, nor that Negroes had been systematically excluded from jury service on the basis of race. Neither did he request additional time in which to procure such evidence. To the contrary, when the motion was denied, defendant excepted and stated: 'We pass on the Jury.' The trial judge then excused the jurors and, in their ****627** absence, asked defense counsel, 'Do you have any evidence in support of the motion which appears of record . . .?' To that this request referred to another 'No, sir.' Although defense counsel contends that the request referred to another motion pending at the time, the record clearly indicates that if defendant had testimony concerning the jury's selection, the judge would have heard it at that time. In fact, defendant was immediately thereafter placed on the stand and testified on Voir dire concerning his motion for a speedy trial. He made no statement and was not asked anything concerning the composition or the selection of the jury.

In State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970), Justice Huskins, speaking for the Court, said:
'Both state and federal courts have long approved the following propositions:

'1. If the conviction of a Negro is based on an indictment of a grand jury or the verdict of a petit jury ***49** from which Negroes were excluded by reason of their race, the conviction cannot stand.

(Citations omitted.)

‘2. If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it. (Citations omitted.) But once he establishes a Prima facie case of racial discrimination, the burden of going forward with rebuttal evidence is upon the State. (Citations omitted.)

‘3. A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn. (Citations omitted.)

‘4. A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged intentional exclusion of Negroes because of their race from serving on the grand or petit jury in his case. (Citations omitted.) ‘Whether a defendant has been given by the court a reasonable time and opportunity to investigate and produce evidence, if he can, of racial discrimination in the drawing and selection of a . . . jury panel must be determined from the facts in each particular case.’ State v. Perry, supra (248 N.C. 334, 103 S.E.2d 404 (1958)).’

See also State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).
In present case, defendant offered no evidence that Negroes were excluded by reason of their race, although he had ample time to do so. Hence, he failed to carry the burden of establishing discrimination and also failed to establish a Prima facie case of racial discrimination. Therefore, the State had nothing to rebut and the trial judge correctly denied defendant’s motion challenging the array.

Defendant next contends the Court of Appeals erred in affirming the trial court’s refusal to dismiss the charges against defendant on the ground that his Sixth Amendment right to a speedy trial had been violated.

The law concerning a defendant’s right to a speedy trial is well established in North Carolina. In State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969), Justice Sharp (now Chief ***50** Justice) set out the basic precepts established by decisions of this Court.
‘1. The fundamental law of the State secures to every person Formally accused of crime the right to a speedy and impartial trial, as does the Sixth Amendment to the Federal Constitution (made applicable to the State by the Fourteenth Amendment, Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967)).

‘2. A convict, confined in the penitentiary for an unrelated crime, is not excepted from the constitutional guarantee of a speedy trial of any other charges pending against him.

‘3. Undue delay cannot be categorically defined in terms of days, months, or even years; the circumstances of each particular case determine whether a speedy trial has been afforded. Four interrelated factors bear upon the question: the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant.

****628** ‘4. The guarantee of a speedy trial is designed to protect a defendant from the dangers inherent in a prosecution which has been negligently or arbitrarily delayed by the State; prolonged imprisonment, anxiety and public distrust engendered by untried accusations of crime, lost evidence and witnesses, and impaired memories.

‘5. The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. State v. Hollars, 266 N.C. 45, 145 S.E.2d 309; State v. Lowry, 263 N.C. 536, 139 S.E.2d 870, Appeal dismissed, 382 U.S. 22, 86 S.Ct. 227, 15 L.Ed.2d 16 (1965); State v. Patton, 260 N.C. 359, 132 S.E.2d 891, Cert. denied, 376 U.S. 956, 84 S.Ct. 977, 11 L.Ed.2d 974 (1964); State v. Webb, 155 N.C. 426, 70 S.E. 1064.’

With these principles in mind, we now consider the four factors enunciated in State v. Johnson, supra, and followed in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), as they apply to the case before us.
***51** Defendant was arrested on an unrelated charge on 7 September 1973 and served with a warrant for the breaking and entering of the Villa Maria, and larceny therefrom, while in jail on 5 October 1973. An indictment was returned on these charges in January 1974 and defendant was tried in May 1975. Therefore, some nineteen months elapsed between the date the warrant was served and the date of defendant’s trial. Although we do not approve of such a long delay, we do not determine the right to a speedy trial by the calendar alone, but must weigh the length of the delay in relation to the three remaining factors. Barker v. Wingo, supra.

The second factor, the reason for the nineteen-month delay, does not clearly appear in the record. It Is clear that defendant was indicted in January 1974, the first session of court after he was arrested, and that at the next session of court in April 1974 an attorney was appointed to represent him. Thereafter, defendant’s case was calendared at each succeeding session of court—September 1974, January 1975, March 1975—but not reached. Finally, a special session of court was scheduled for the weeks of 12 May and 19 May 1975 for the trial of the backlog of felony cases. Defendant’s case was tried during the week of May 19.

The Court of Appeals took judicial notice of the infrequent sessions of court in Watauga County and found that it was common knowledge that the district attorney first disposes of the cases involving defendants incarcerated in the county jail. From September 1973 through the time of trial, defendant was either in jail in Wake County awaiting trial there on an unrelated charge, or serving time in the State's prison system based on his Wake County conviction; hence, he was not deprived of his liberty due to the charges in this case. The Court of Appeals reasoned that the district attorney was unable to reach defendant's case before each one-week session of court expired, due to the number of defendants in the county jail.

While the conclusions of the Court of Appeals as to the reasons for the delay are undoubtedly correct and would provide sufficient justification for the delay on the part of the State, the State should have presented evidence, preferably through the district attorney, fully explaining the reasons for the delay. In the present case, however, we take judicial notice of the statistics on the operation of the superior courts as compiled by our own Administrative Office of the Courts. G.S. s ***52** 7A—340 through G.S. s 7A—346; 1 Stansbury, N.C. Evidence s 13 (Brandis Rev.1973), and cases therein cited. The 1974 Annual Report of that office shows that on 1 January 1974, 72 criminal cases were pending in Watauga Superior Court. During 1974, 142 additional criminal cases were filed, 97 of these being felonies. During 1974, 98 cases were ****629** disposed of by jury trial, plea or other disposition, leaving 116 cases remaining on 1 January 1975, or an increase of 44 cases from 1 January 1974. These figures further show that during 1974, Watauga County had only 20 days of superior court scheduled for the trial of criminal cases, and used all 20 days. This 100% Utilization of such scheduled court days was achieved by only two other counties in the State during 1974. Despite utilizing all available court days, the district attorney was still unable to reduce the docket case load below that of 1973. On 1 January 1975, 116 criminal cases were pending, and during the year, 117 were added. Of these cases, 208 were disposed of in 1975, leaving a backlog of 25 cases pending on 1 January 1976, a significant decrease from 1974. This decrease was in part achieved by the scheduling of a special two-week session in May 1975. From these statistics, it is apparent that the district attorney did not negligently or arbitrarily delay trying defendant, but, on the contrary, the regular sessions scheduled for 1974 were not sufficient to dispose of the cases calendared. Due to this fact, a special session was provided for 1975, at which defendant was tried.

On the issue of prejudice, defendant stated:

> '. . . The reason why I filed a motion for dismissal is because I wanted witnesses, you know, called in my behalf, and due to the time limit, the witnesses done moved away and can't be contacted because I don't try to contact them, you know. I can't even get an accurate report, you know, recalling way back, what really transpired, you know, and almost two years.'

No evidence was presented as to the witnesses he wanted to call, what their testimony would be, or what efforts he had made to contact them.

Lost witnesses and faded memories are only two of the disadvantages the right to a speedy trial is designed to avoid. When a **detainer** is filed against an individual who is already incarcerated, it jeopardizes his chances for a **parole**, for proper ***53** good behavior credits, and for work release. State v. O'Kelly, 285 N.C. 368, 204 S.E.2d 672 (1974); State v. White,270 N.C. 78, 153 S.E.2d 774 (1967). Here, however, defendant has failed to show the existence of a **detainer** against him or other circumstances arising from the delay that have prejudiced him.

Finally, we examine the defendant's demand for a speedy trial. The record discloses that on 13 November 1973, while in jail in Wake County awaiting trial there, defendant filed a motion with the Clerk of Superior Court of Watauga County. Obviously, it was handwritten by a man of limited education and without benefit of counsel. The motion reads as follows:

'Comes now Franklin Wright afore said court and moves this herein styled 'Motion for Speedy Trial' be so entered on behalf of above named petitioner pursuant to KROPLER v N. CAROLINA, 385 Supp 2d Fd (b) 10; Due Process and Equal Protection Clause U.S. Const—Supra Note—WAINWRIGHT v. U.S., 349 at 4d F, 'Right to Speedy Trial shall not be abused without due cause, violation of same shall constitute irreverseable error by trial court & dismissal thereof.' Petitioner was arrested Sept. 7, 1973, charged with B&E,L, the Villa Maria, located in Blowing Rock N.C.

'So submitted this 9 day of Nov. 1973.

s/ FRANKLIN WRIGHT

Affidavit'

Defendant contends that by reason of G.S. s 15—10.2, this case should be dismissed. G.S. s 15—10.2, in part, provides:

> '(a) Any prisoner serving a sentence or sentences within the State prison system who, during his term of imprisonment, shall have lodged against him a detainer to answer to any criminal charge pending against him in any court within the State, shall be brought to trial within eight months after he shall have caused to be sent to the district attorney of the court in which said criminal charge is pending, by registered mail, written notice of his place of confinement and request for a ****630** final disposition of the criminal charge against him; said request shall be accompanied by a certificate from the Secretary of Correction stating the term of the sentence or sentences under which ***54** the prisoner is being held, the date he

was received, and the time remaining to be served . . ..'

At the time defendant filed his motion with the clerk, he had not been indicted for the offense Sub judice. He was in jail awaiting trial on nonrelated charges. He was not serving a sentence within the State prison system and no detainer had been filed against him by the superior court of Watauga County. Hence, G.S. s 15—10.2 does not apply. Furthermore, defendant failed to comply with the requirements of G.S. s 15—10.2 that the motion be sent by registered mail to the district attorney of the judicial district in which the charges are pending. In State v. White, supra, we held that the failure to follow this requirement deprived defendant of the benefit of this statute. Regardless of the statute, however, defendant was entitled to a speedy trial as guaranteed by the Constitution of the United States and the Constitution of North Carolina. We do not believe he has been denied these constitutional rights. Once counsel was appointed for defendant, no additional attempts to secure a speedy trial were made. On 27 March 1975, defendant filed a motion to dismiss because of the delay. Six weeks later he was tried. Considering the number of criminal cases pending in Watauga County in 1974—1975, the limited number of days scheduled for the trial of criminal cases, the fact that the scheduled days were fully utilized, and the failure of defendant to show any prejudice by reason of this delay, we hold that defendant has not been deprived of his right to a speedy trial. Every effort should be made by the State to avoid a delay such as occurred in this case, but in view of all the circumstances here, we do not think the prosecution has been negligent or willful in the handling of defendant's case or has deliberately or unnecessarily caused the delay for the convenience or supposed advantage of the State. Defendant's motion to dismiss was therefore properly overruled.

The decision of the Court of Appeals finding no prejudicial error is correct and is therefore affirmed.

Affirmed.

EXUM, Justice (dissenting).

While I agree with almost all the majority Says about the speedy trial issue, I respectfully disagree with the conclusion ***55** drawn from what is said. Defendant's motion to dismiss for failure of the State to provide him a speedy trial under Amendments VI and XIV to the United States Constitution and Section 18, Article I, of the North Carolina Constitution should have been allowed.

I agree with the majority that upon defendant's showing of a delay of eighteen months, it was incumbent upon the State to present 'evidence, preferably through the district attorney, fully explaining the reasons for the delay.' I agree, too, that the factor of waiver also weighs in defendant's favor inasmuch as he made demand early in the proceedings agaisnt him for trial.

The factor of prejudice, I believe, weighs neither in favor of nor against defendant. It is true that he could not name the witnesses whom he claimed were unavailable or relate what their testimony might be; nor did he say what efforts were made to have them present. He seems to attribute, however, these very inabilities to the long lapse of time saying in effect that because of it the witnesses had 'moved away and can't be contacted' and that his own memory of the occasion had largely faded. He must have suffered at least from prolonged anxiety, public distrust and, more specifically, distrust by those in whose custody he was held on unrelated charges—these being some of the things which, the majority recognizes, a speedy trial is designed to avoid.

Only one factor—the reason for the delay—is left to weigh against defendant on his motion. Because the State failed to come forward with any adequate reason, as was incumbent upon it to do upon defendant's ****631** showing, defendant's motion should have been allowed.

The majority circumvents this failure of the prosecution below by judicially noticing certain statistical data from the Administrative Office of the Courts. I agree that this data may be judicially noticed, but I disagree with the majority's conclusion that the data demonstrates 'the district attorney did not negligently or arbitrarily delay trying defendant . . ..' At most the data shows that the District Attorney was busy in Watauga County during the pendency of this prosecution and fully utilized the time available to him. The question, though, is not whether he was busy, generally, but why he did not busy himself with the case against this defendant. Had the District ***56** Attorney relied at trial upon the information judicially noticed by the majority, And shown further that he reasonably gave the matters which he did handle precedence over defendant's case, I would have no quarrel with denying the motion for a speedy trial. The District Attorney might have shown, for example, that the cases to which he gave preference were older than defendant's, or that they involved people in jail because of charges pending against them in Watauga County, or that they involved witnesses or other evidence which if not promptly utilized may not later be available. There could be other various reasons why the cases he did dispose of Should have been handled before defendant's. The point is that no such reasons appear in this record and the statistical data relied on by the majority does not supply them.

All Citations

290 N.C. 45, 224 S.E.2d 624

224 S.E.2d 624

