

SENTENCING M E M O R A N D U M

SENTENCING COMMITTEE RECOMMENDATION NO. 6 - *Incarceration for one year or more must be followed by a period of not less than 6 months at Level 4, 3 or 2.*

To: Superior Court Judges

Date: February 17, 2010

The Sentencing Committee submits the following information and recommendations concerning the requirement that a sentence order which imposes a period of incarceration of one year or more must provide that the period of incarceration be followed by a period of not less than 6 months at Level 4, 3 or 2.

1. Under 11 Del. C. § 4204(1), if the Court imposes a period of incarceration at Level 5 of **one year or more**, the Court must include **as part of its sentence** a period of supervision at Level 4, 3 or 2 of **not less than** 6 months following the defendant's release from Level 5. The statute applies where actual incarceration of one year or more is imposed in the sentence order; a suspended part of a Level 5 sentence is not counted.
2. Example: The Court imposes the following sentence in an order containing one criminal action number: "The defendant is placed in the custody of the Department of Correction at Supervision Level 5 for a period of one year." The example just stated is not a legal sentence. Since the Court imposed a sentence of incarceration at Level 5 of one year, it must include as part of the sentence at least 6 months at Level 4, 3 or 2 to follow the Level 5. Examples of legal sentences are: "The defendant is placed in the custody of the Department of Correction at Supervision Level 5 for a period of 2 years, suspended after 1 year for 6 months at Supervision Level 3." Or, "The defendant is placed in the custody of the Department of Correction at Supervision Level 5 for a period of 1 year, followed by 6 months at Supervision Level 3." Or, "The defendant is placed in the custody of the Department of Correction at Supervision Level 5 for a period of 1 year, followed by 1 year at Supervision Level 3.
3. The period of supervision at Level 4, 3 or 2 imposed under 11 Del. C. § 4204(1) may, in the discretion of the Court, be in addition to the maximum sentence of imprisonment for the offense.¹ For example, Conspiracy in the Second Degree is

¹ *Larson v. State*, 659 A.2d 228 (Del. 1995); *State v. Boston*, 2008 WL 4356278 (Del. Super.).

a Class G felony, punishable by up to 2 years at Level 5. Upon a conviction for that offense, the Court may impose the following lawful sentence: “The defendant is placed in the custody of the Department of Correction at Supervision Level 5 for a period of 2 years, followed by 6 months at Supervision Level 3 pursuant to 11 Del. C. § 4204(1).”² If the defendant violates his probation while at Level 3, the probationary term may be enforced by imposing an additional 6 months at Level 5 for the violation. However, where the probationary term under 11 Del. C. § 4202(1) is added to the maximum sentence, it is limited to a “6-month transition period.”³

4. In a sentence order which imposes a period of incarceration at Level 5 of one year or more and which contains sentences on two or more criminal action numbers, 11 Del. C. § 4204(1) is satisfied if any one of the sentences contains the required 6 or more months at Level 4, 3 or 2. Example: “09-01-0001, the defendant is placed in the custody of the Department of Correction at Supervision Level 5 for a period of 2 years; 09-01-0002, the defendant is placed in the custody of the Department of Correction at Supervision Level 5 for a period of 1 year; suspended for 6 months at Supervision Level 3.
5. 11 Del. C. § 4204(1) applies to habitual offender sentences imposed under 11 Del. C. § 4214(a).⁴ A sentence imposed under 11 Del. C. § 4214(a) cannot be suspended. Example: “Pursuant to 11 Del. C. § 4214(a), the defendant is placed in the custody of the Department of Correction for a period of 10 years, followed by 6 months at Supervision Level 3 pursuant to 11 Del. C. § 4204(1).”

² This sentence memorandum does not address the subject of aggravating and mitigating factors and sentences in excess of guidelines.

³ *Larson v. State*, 659 A.2d 228 (Del. 1995). In *Larson*, the sentence in question imposed the maximum Level 5 term. In *State v. John K. Williams*, 2009 WL 3636767, the Superior Court has held that the 6 month “cap” under *Larson* is only a maximum when the prison sentence imposed is the crime’s maximum sentence.

⁴ *Nava v. State*, 783 A.2d 120 (Del. 2001); *State v. Boston* 2008 WL 4356278 (Del. Super.)