

SENTENCING M E M O R A N D U M

SENTENCING COMMITTEE RECOMMENDATION NO. 3 - *"Time Served" and Related Issues*

To: Superior Court Judges

Date: March 14, 2007

The Sentencing Committee submits the following information and recommendations concerning "Time Served" and Related Issues:

1. The phrase "credit for time served" should be avoided. If a sentence order, original or VOP, leaves credit time undetermined, the risk that the defendant will not receive appropriate credit time and the risk of error in calculating credit time in future VOP sentence orders in the same case is significantly increased;
2. On original (not VOP) sentences, avoid using "suspended after time served." Instead, use "suspended immediately for . . .;"
3. When a defendant is being sentenced directly to probation, there are circumstances under which credit time should still be addressed, such as cases where a defendant at the time of the plea (or later sentencing) (1) failed to post bond; or (2) the defendant may be in default of bail due to a capias for a prior failure to appear in that case, or (3) the defendant is being held for more serious charges in the same indictment where there is a Level 5 presumptive sentence, or (4) the defendant is in jail on a separate set of charges to be Nol Prossed at sentencing. When sentencing to probation, the defendant must be given credit for any Level 5 time (even if suspended);
4. Please be aware than when sentencing for an offense for which the guidelines are probation where the defendant has Level 5 credit time, the sentence is regarded as exceeded SENTAC guidelines. Therefore, it is statutorily required that the sentencing judge state a reason for deviating from the guidelines. SENTAC recognizes the obvious one, "Time served." Make sure that is said (and there could be other aggravators, of course) and make sure it appears in the sentence order.

All of our sentence orders go to the Statistical Analysis Center. By statute we are required to state the (mitigating and aggravating) reason for deviating from SENTAC guidelines. SAC is required by law to report to

the General Assembly on our sentencing, including compliance with SENTAC guidelines. If a sentence is given which is outside of guidelines, it is out of compliance. If such a sentence has in it the reason for the deviation it is then considered to be within guidelines;

5. The original sentencing order and all subsequent VOP orders in the same case are independent orders. Credit time in an original or VOP sentence does not flow to subsequent VOP orders in the same case. For example, if an original sentence imposes "5 years at Level 5, suspended after 2 years . . .," a first VOP order on the same case which gives "5 years at Level 5, credit for time served, suspended after 1 year," is an improper sentence as it does not give credit for the 2 years previously served. It reimposes the original 5 years. Credit for the first two years should be built into the VOP order, primarily by reducing the Level 5 time to 3 years. Example of a VOP sentence entered February 12, 2007 where the defendant was taken into custody on January 28, 2007: "Effective January 28, 2007, 3 years at Level 5, suspended after 1 year. In simple terms you must reduce the sentence you are imposing at a VOP by the amount of time the defendant has already served at level 5.