Belmont College of Law Criminal Law Journal
Written Supplemental Materials for 2022 Symposium

Global Perspectives:
Criminal Justice Reform
in the United States and Around the World

Table of Contents:

Overview:

Every year the Belmont Criminal Law Journal hosts a symposium for practicing attorneys on current topics within the criminal justice system. For the academic year of 2021-2022, our symposium will be on criminal justice reform in the United States and Internationally. We plan to focus on topics related to pre-trial rights, plea bargaining, and re-entry, comparing and contrasting what the system in the United States looks like to other areas around the world. Details regarding these topics are provided below. In addition to three panel discussions, there will be two main speakers. The symposium will be included in the Belmont Criminal Law Journal's next journal publication and panelists and speakers will receive 25 printed copies of this journal publication.

Pre-trial Rights:

Appointment of counsel is a fundamental right of an accused in the United States. The timing of when an attorney is appointed is a critical point in the criminal justice process. Oftentimes, the accused is unaware of the protection this right to counsel offers. As a result, the accused will converse with police officers and provide statements that can be used negatively against the accused in trial. Nations across the world, like the United Kingdom, recognize the critical aspect of timing when appointing counsel for the accused. Because of this heightened recognition of the importance that the right to counsel plays, countries like the U.K. and Belgium have taken a different approach from the United States.

This panel will specifically compare and contrast the benefits of the U.K./Belgium approach to the right to counsel to the United States' approach. The hope of this discussion is to provide practicing attorneys in the United States with a better understanding of the gaps in the United States' system and with practical information for how to better the system based upon the U.K. and Belgium approach.

Plea bargains, waiver of trial, and diversion programs:

Plea bargaining has become the foundation of the United States criminal justice system. At its essence, plea bargaining is supposed to support judicial efficiency. However, plea bargaining has adopted a much different role within the criminal justice system in the United States. Critics of the plea bargaining system say that plea bargaining has become a tool for manipulation and prosecutorial abuse within the criminal justice system in the United States.

This panel will specifically compare and contrast the benefits of the plea bargaining system in the United States to surrounding countries around the world. Additionally, this panel will highlight how countries around the world approach judicial efficiency through emerging technology, trial waiver programs, and diversion programs.

Re-entry:

Re-entry and recidivism have been found to be directly related. The support and resources provided to a formerly incarcerated individual will directly impact this individual's likelihood to recommit a crime. The United States' approach to re-entry relies heavily upon the support of churches and non-profit organizations, while also creating stringent rules and check-ins for formerly incarcerated individuals to follow.

The hope of this panel is to compare and contrast the approach the United States takes to re-entry to surrounding countries around the world. More specifically, this panel will explore the various approaches countries around the world have adopted to assist the accused to re-enter back into society and to prevent a formally accused individual from committing another crime.

Section One: Pre-trial Rights and Right to Counsel

GIDEON V. WAINWRIGHT

372 U.S. 335 * | 83 S. Ct. 792 ** | 9 L. Ed. 2d 799 *** | 1963 U.S. LEXIS 1942 **** | 23 Ohio Op. 2d 258 | 93 A.L.R.2d 733

[*336] [***800] [**792] MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having [****4] broken [***801] and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under [*337] Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could [**793] be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced [****5] to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." [****6] Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. Since 1942, when Betts v. Brady, 316 U.S. 455, was decided by a divided [*338] Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another review here, we granted certiorari. 370 U.S. 908. Since Gideon was proceeding in forma pauperis, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: "Should this Court's holding in Betts v. Brady, 316 U.S. 455, be reconsidered?"

I.

The facts upon which Betts claimed that he had been unconstitutionally [***802] denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery [****7] in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison. [*339] Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision. The Court said:

"Asserted denial [of due process] is to be tested by an appraisal of [**794] the totality of facts in a given case. That which may, [****8] in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." 316 U.S., at 462.

Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the Betts case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the Betts v. Brady holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that Betts v. Brady should be overruled.

II.

[1]The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have construed [*340] this to mean that in federal courts counsel must be provided [****9] for defendants unable to employ counsel unless the right is competently and intelligently waived. 3 Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." 316 U.S., at 465. In order to

decide whether the Sixth Amendment's [***803] guarantee of counsel is of this fundamental nature, the Court in Betts set out and considered "relevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date." 316 U.S., at 465. On the basis of this historical data the Court concluded that "appointment of counsel is [****10] not a fundamental right, essential to a fair trial." 316 U.S., at 471. It was for this reason the Betts Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon the States by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial," it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

[*341] [2][3]We think the Court in Betts had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This [****11] same principle was recognized, explained, and applied in Powell v. Alabama, 287 U.S. 45 (1932), a case upholding the right of counsel, where the Court held that despite sweeping language to the contrary in Hurtado v. California, 110 U.S. 516 [**795] (1884),the Fourteenth Amendment "embraced" those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" even though they had been "specifically dealt with in another part of the federal Constitution." 287 U.S., at 67. In many cases other than Powell and Betts, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. [****13] For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the [****12] States the Fifth Amendment's command that [*342] private property [***804] shall not be taken for public use without just compensation, 5 the Fourth Amendment's prohibition of unreasonable searches and seizures, 6 and the Eighth's ban on cruel and unusual punishment. On the other hand, this Court in Palko v. Connecticut, 302 U.S. 319 (1937), refused to hold that the Fourteenth Amendment made the double jeopardy provision of the Fifth Amendment obligatory on the States. In so refusing, however, the Court, speaking through Mr. Justice Cardozo, was careful to emphasize that "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states" and that guarantees "in their origin . . . effective

against the federal government alone" had by prior cases "been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption." 302 U.S., at 324-325, 326.

[4][5]We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before *Betts v. Brady*, this Court, after full consideration of all the historical data examined [**796] in Betts, had unequivocally declared that "the right to the aid of [*343] counsel is of this fundamental character."[****14] Powell v. Alabama, 287 U.S. 45, 68 (1932).While the Court at the close of its Powell opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:

"We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." Grosjean v. American Press Co., 297 U.S. 233, 243-244 (1936).

And again in 1938 this Court said:

"[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant [***805] admonition that if the constitutional safeguards it provides be [****15] lost, justice will not 'still be done.'" Johnson v. Zerbst, 304 U.S. 458, 462 (1938). To the same effect, see Avery v. Alabama, 308 U.S. 444 (1940), and Smith v. O'Grady, 312 U.S. 329 (1941).

In light of these and many other prior decisions of this Court, it is not surprising that the Betts Court, when faced with the contention that "one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State," conceded that "expressions in the opinions of this court lend color to the argument . . . ." 316 U.S., at 462-463. The fact is that in deciding as it did -- that "appointment of counsel is not a fundamental right, [*344] essential to a fair trial" -- the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any

person haled into court, [****16] who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if [****17] the [**797] poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be [*345] heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, [***806] he faces the danger of conviction because he does not know how to establish his innocence." 287 U.S., at 68-69.

The [****18] Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that Betts was "an anachronism when handed down" and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action notinconsistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights.

[*346] Justice Field, the first Justice Harlan, and probably Justice Brewer, took that position in O'Neil v. Vermont, 144 U.S. 323, 362-363, 370-371, as did Justices BLACK, DOUGLAS, Murphy and Rutledge in Adamson v. California, 332 U.S. 46, 71-72, 124. [****19] And see Poe v. Ullman, 367 U.S. 497, 515- 522 (dissenting opinion). That view was also expressed by Justices Bradley and Swayne in the Slaughter-House Cases, 16 Wall. 36, 118-119, 122, and seemingly was accepted by Justice Clifford when he dissented with Justice Field in Walker v. Sauvinet, 92 U.S. 90, 92. 1 Unfortunately it has never commanded a Court. [**798] Yet, happily, all constitutional questions are always open. Erie R. Co. v. Tompkins, 304 U.S. 64. And what we do today does not foreclose the matter.

[****20] My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government. 2 [***807] Mr. Justice Jackson shared that view. 3 [*347] But that view has not prevailed 4 and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

[****21]

Concur by: CLARK; HARLAN

MR. JUSTICE CLARK, concurring in the result.

In Bute v. Illinois, 333 U.S. 640 (1948), this Court found no special circumstances requiring the appointment of counsel but stated that "if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps." Id., at 674. Prior to that case I find no language in any cases in this Court indicating that appointment of counsel in all capital cases was required by the Fourteenth Amendment. 1 At the next Term of the Court Mr. Justice Reed revealed that the Court was divided as to noncapital cases but that "the due process clause . . . requires counsel for all persons charged with serious crimes . . . ." Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948). Finally, in Hamilton v. Alabama, 368 U.S. 52 (1961), we said that "when one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." Id., at 55.

[****22] [*348] That the Sixth Amendment requires appointment of counsel in "all criminal prosecutions" is clear, both from the language of the Amendment and from this Court's interpretation. See Johnson v. Zerbst, [**799] 304 U.S. 458 (1938). It is equally clear from the above cases, all decided after Betts v. Brady, 316 U.S. 455 (1942), that the Fourteenth Amendment requires such appointment in all prosecutions for capital crimes. The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority. In Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960), we specifically rejected any constitutional distinction between capital and noncapital offenses as regards congressional power to provide for court-martial trials of civilian dependents of armed forces personnel. Having previously held that civilian dependents could not constitutionally be [***808] deprived of the protections of Article III and the Fifth and Sixth Amendments in capital cases, Reid v. Covert, 354 U.S. 1 (1957), we held that the [****23] same result must follow in noncapital cases. Indeed, our opinion there foreshadowed the decision today, 2 as we noted that:

"Obviously Fourteenth Amendment cases dealing with state action have no application here, but if [*349] they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here . . .would be as invalid under those cases as it would be in cases of a capital nature." 361 U.S., at 246-247.

[****24] I must conclude here, as in *Kinsella, supra*, that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty" just as for deprival of "life," and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life -- a value judgment not universally accepted 3 -- or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

MR. JUSTICE HARLAN, concurring.

I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial [****25] than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that *Betts v. Brady* represented "an abrupt break with its own well-considered precedents." Ante, p. 344. In 1932, in Powell v. Alabama, 287 U.S. 45, a capital case, this Court declared that under the particular facts there presented -- "the ignorance and illiteracy of the defendants, their youth, [**800] the circumstances of public hostility . . . and above all that

they stood in deadly peril of their lives" (287 U.S., at 71) -- the state court had a duty to assign counsel for [*350] the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an afterthought; they were repeatedly emphasized, see 287 U.S., at 52, 57-58, 71, and were clearly regarded as important to the result.

Thus when this Court, a decade later, decided Betts v. Brady, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital [***809] trials, while at the same time [****26] insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, see Johnson v. Zerbst, 304 U.S. 458, but to have imposed these requirements on the States would indeed have been "an abrupt break" with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in Powell v. Alabama, was not limited to capital cases was in truth not a departure from, but an extension of, existing precedent.

The principles declared in Powell and in Betts, however, have had a troubled journey throughout the years that have followed first the one case and then the other. Even by the time of the Betts decision, dictum in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases. [****27] Such dicta continued to appear in subsequent decisions, and any lingering doubts were finally eliminated by the holding of Hamilton v. Alabama, 368 U.S. 52. In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after Betts, there were cases in which the Court [*351] found special circumstances to be lacking, but usually by a sharply divided vote. 3 [****28] However, no such decision has been cited to us, and I have found none, after Quicksall v. Michigan, 339 U.S. 660, decided in 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the "complexity" of the legal questions presented, although those questions were often of only routine difficulty. 4 The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the Betts v. Brady rule is no longer a reality.

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights. 5 To continue [**801] a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.

The special circumstances rule has been formally abandoned in capital cases, and the time [****29] has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence.

[***810] (Whether the rule should extend to all criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions.

[*352] In agreeing with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment, I wish to make a further observation. When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" 6 and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. Cf. Roth v. United States, 354 U.S. 476, 496-508 [****30] (separate opinion of this writer). In what is done today I do not understand the Court to depart from the principles laid down in Palko v. Connecticut, 302 U.S. 319, or to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.

On these premises I join in the judgment of the Court.

CHANDLER v. FERTAG
348 U.S. 3*|75 S.Ct 1**|99 L.Ed. 4***|1954 U.S. LEXIS 1501
Opinion

[*4] [**2] [***7] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

Petitioner is held in the custody of respondent, Warden of the Tennessee State Penitentiary, under [****3] a sentence of life imprisonment as an habitual criminal. Challenging the validity of that sentence under the Fourteenth Amendment, he commenced this action in the Tennessee courts to obtain his freedom. We granted certiorari, 347 U.S. 933, because of the substantial question presented by his constitutional claim.

The basic facts are undisputed. Petitioner is a middle-aged Negro of little education. He was indicted on March 10, 1949, for the offense of housebreaking and larceny, an offense punishable by a term of three to ten years. The indictment charged him with breaking and entering a business house and stealing therefrom sundry items of the aggregate value of $ 3. Following his arrest, petitioner was released on bond while awaiting trial set for May 17, 1949. On that day, without an attorney and without notice of any habitual criminal accusation against him, petitioner appeared in court intending to plead guilty to the indictment. He "felt that an attorney could do him no good on said charge [housebreaking and larceny]." When his case was called for trial, he was orally advised by the trial judge that he would also be tried as an habitual criminal because

of three alleged [****4] prior felonies. 1Link to the text of the note [****5] He [*5] was informed that conviction under the Tennessee Habitual Criminal Act carries a mandatory sentence of life imprisonment with no possibility of parole. 2Link to the text of the note Petitioner promptly asked for a continuance to enable him to obtain counsel on the habitual criminal accusation. His request was summarily denied, a jury was impaneled, and the case proceeded immediately to trial. Petitioner entered his plea of guilty to the housebreaking and larceny charge, and the prosecution introduced evidence in corroboration of the plea. At the conclusion of the trial, the judge instructed the jury to raise their right hands if they accepted petitioner's guilty plea on the housebreaking and larceny charge and if they approved of a three-year sentence on that charge. The jury responded by raising their right hands. The judge then instructed the jury to raise their right hands a second time if they found petitioner to be an habitual criminal. Once again the jury, without ever having left the jury box, raised their right hands. The entire proceeding -- from the impaneling of the jury to the passing of sentence -- consumed between five and ten minutes.

[**3] Three years later, having served [***8] his sentence on the housebreaking and larceny charge, petitioner applied to the Circuit Court of Knox County for habeas corpus relief. 3Link to the text of the note He alleged that his sentence as an habitual criminal was invalid on the ground, among others, that he had been denied an opportunity to obtain counsel in his defense. 4Link to the text of the note [****7] [*6] At a hearing on the application, petitioner, his wife, his brother, a juror, and the prosecuting attorney testified as to their recollection of petitioner's trial. 5Link to the text of the note All five witnesses were in full accord as to the above-stated facts. They differed only on whether petitioner had pleaded guilty to the habitual criminal accusation and whether the prosecution had introduced any evidence concerning petitioner's prior convictions. The prosecuting attorney, the only witness for the state, testified that petitioner had pleaded guilty to the habitual criminal accusation as well as the housebreaking and larceny charge, and that the record of petitioner's prior convictions had been [****6] read to the jury; the other four witnesses denied it. In all other respects, the testimony of the prosecuting attorney substantiated the testimony of the other four witnesses. Thus he conceded that petitioner had not been represented by counsel, that petitioner had not been given any pretrial notice of the habitual criminal accusation, that petitioner "said he wanted the case put off as he was advised by the Court that he was being tried as an habitual criminal in addition to house breaking and larceny. He asked that the case be put off so he could get a lawyer and [the trial judge] told him he had had since January up to May to get a lawyer."

The Circuit Court, after hearing the case on the merits, accepted -- as does the respondent here -- petitioner's factual allegations as to the denial of counsel. The Circuit Court nevertheless upheld the validity of petitioner's [*7] sentence and the Tennessee Supreme Court affirmed. Both courts emphasized that the Tennessee Habitual Criminal Act, like similar legislation in other

states, does not create a separate offense but only enhances a defendant's punishment on being convicted of his fourth felony. Tipton v. State, 160 Tenn. 664, 672-678, 28 S. W. 2d 635, 637-639. See also McDonald v. Massachusetts, 180 U.S. 311, 313; Graham v. West Virginia, 224 U.S. 616, 623-624. From that premise, the courts below reasoned that petitioner had waived any right to counsel on the habitual criminal accusation [****8] by waiving counsel on the housebreaking and larceny charge. With this conclusion, we cannot agree.

LEdHN[2] [2]LEdHN[3] [3]Section 1 of the Act HN1 defines "habitual criminal" in considerable detail. [****11] Section 7 prescribes standards for [**4] the admissibility of the [***9] record of the prior convictions of a defendant charged with being an habitual criminal. 7 [*8] This section, the Tennessee Supreme Court has held, clearly authorizes "an issue of fact as to the verity of such record, or as to the identity of the accused with the person named in such record . . . ." Tipton v. State, 160 Tenn. 664, 678, 28 S. W. 2d 635, 639. Proof of the defendant's prior convictions is ". . . a condition precedent to the imposition of the increased punishment provided." Tipton v. State, supra. Section 6 of the Act, moreover, provides that the increased punishment cannot be imposed unless the jury specially finds that the defendant is an habitual criminal as charged. 8 "Under section 6 of the Act," according to the Tennessee Supreme Court, "the [****9] question as to whether the defendant is an habitual criminal is one for the jury to decide." McCummings v. State, 175 Tenn. 309, 311, 134 S. W. 2d 151, 152. In short, even though the Act does not create a separate offense, its applicability to any defendant charged with being an habitual criminal must be determined by a jury in a judicial hearing. Compare Williams v. New York, 337 U.S. 241. That hearing and the trial on the felony charge, although they may be conducted in a single proceeding, are essentially independent of each other. 9 Thus, for example, it is possible that the jury in the instant case might have found petitioner guilty on the housebreaking and larceny charge and yet found him innocent of being an habitual criminal. Apparently recognizing this possibility, petitioner at the earliest possible moment affirmatively sought an opportunity to obtain counsel on the habitual criminal accusation. Immediately on being informed of the accusation and suddenly finding himself in danger of life imprisonment, he requested [*9] a continuance so that he could engage the services of an attorney; but the trial court refused the request and forced him to stand [****10] immediate trial. On these undisputed facts, it is clear beyond question that petitioner did not waive counsel on the habitual criminal accusation. See Rice v. Olson, 324 U.S. 786, 788-789.

The Tennessee Attorney General denies, however, that petitioner had any federal constitutional right to counsel. He relies on the doctrine enunciated in Betts v. Brady, 316 U.S. 455. But that doctrine has no application here. Petitioner did not ask the trial judge to furnish him counsel; rather, he asked for a continuance [***10] so that he could obtain his own. The distinction is well established in this [**5] Court's decisions. Powell v. Alabama, 287 U.S. 45, 71; Betts v.

Brady, 316 U.S. 455, 466, 468; House v. Mayo, 324 U.S. 42, 46. Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. [****12] 10 See Palko v. Connecticut, 302 U.S. 319, 324-325. As this Court stated over 20 years ago in Powell v. Alabama, supra, at 68-69:

"What, then, does a hearing include? Historically and in practice, in our own country at least, it HN2 has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, [*10] generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger [****13] of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." (Italics added.)

LEdHN[5] [5]LEdHN[6] [6]A necessary corollary is that HN3 a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth. Avery v. Alabama, 308 U.S. 444, 446;House v. Mayo, 324 U.S. 42, 46;White v. Ragen, 324 U.S. 760, 764;Hawk v. Olson, 326 U.S. 271, 277-278.By denying petitioner any opportunity whatever to obtain counsel on the habitual criminal accusation, the trial court deprived him of due process of law as guaranteed [****14] by the Fourteenth Amendment.

It follows that petitioner is being held by respondent under an invalid sentence. The judgment below, sustaining the denial of habeas corpus relief, is accordingly reversed.

Judgment reversed.

Prosecution of Offences Act 1985
1985 CHAPTER 23

PART III
MISCELLANEOUS
22 Power of Secretary of State to set time limits in relation to preliminary stages of criminal proceedings.

(1) The Secretary of State may by regulations make provision, with respect to any specified preliminary stage of proceedings for an offence, as to the maximum period—

(a) to be allowed to the prosecution to complete that stage;

(b) during which the accused may, while awaiting completion of that stage, be—

(i) in the custody of a magistrates' court; or

(ii) in the custody of the Crown Court;

in relation to that offence.

(2) The regulations may, in particular—

[F1(a) be made so as to apply only in relation to proceedings instituted in specified areas, or proceedings of, or against persons of, specified classes or descriptions;

(b) make different provision with respect to proceedings instituted in different areas, or different provision with respect to proceedings of, or against persons of, different classes or descriptions;]

(c) make such provision with respect to the procedure to be followed in criminal proceedings as the Secretary of State considers appropriate in consequence of any other provision of the regulations;

(d) provide for the M1Magistrates' Court Act 1980 and the M2Bail Act 1976 to apply in relation to cases to which custody or overall time limits apply subject to such modifications as may be specified (being modifications which the Secretary of State considers necessary in consequence of any provision made by the regulations); and

(e) make such transitional provision in relation to proceedings instituted before the commencement of any provision of the regulations as the Secretary of State considers appropriate.

[F2(3) The appropriate court may, at any time before the expiry of a time limit imposed by the regulations, extend, or further extend, that limit; but the court shall not do so unless it is satisfied—

(a) that the need for the extension is due to—

(i) the illness or absence of the accused, a necessary witness, a judge or a magistrate;

(ii) a postponement which is occasioned by the ordering by the court of separate trials in the case of two or more accused or two or more

offences; or

(iii) some other good and sufficient cause; and

(b) that the prosecution has acted with all due diligence and expedition.]

(4) Where, in relation to any proceedings for an offence, an overall time limit has expired before the completion of the stage of the proceedings to which the limit applies, [F3the appropriate court shall stay the proceedings].

(5) Where—

(a) a person escapes from the custody of a magistrates' court or the Crown Court before the expiry of a custody time limit which applies in his case; or

(b) a person who has been released on bail in consequence of the expiry of a custody time limit—

(i) fails to surrender himself into the custody of the court at the appointed time; or

(ii) is arrested by a constable on a ground mentioned in section 7(3)(b) of the Bail Act 1976 (breach, or likely breach, of conditions of bail);

the regulations shall, so far as they provide for any custody time limit in relation to the preliminary stage in question, be disregarded.

(6) [F4Subsection (6A) below applies where]—

(a) a person escapes from the custody of a magistrates' court or the Crown Court; or

(b) a person who has been released on bail fails to surrender himself into the custody of the court at the appointed time;

[F4and is accordingly unlawfully at large for any period.]

[F5(6A) The following, namely—

(a) the period for which the person is unlawfully at large; and

(b) such additional period (if any) as the appropriate court may direct, having regard to the disruption of the prosecution occasioned by—

(i) the person's escape or failure to surrender; and

(ii) the length of the period mentioned in paragraph (a) above,

shall be disregarded, so far as the offence in question is concerned, for the purposes of the overall time limit which applies in his case in relation to the stage which the proceedings have reached at the time of the escape or, as the case may be, at the appointed time.

[F6(6B)

Any period during which proceedings for an offence are adjourned pending the

determination of an appeal under Part 9 of the Criminal Justice Act 2003 shall be disregarded, so far as the offence is concerned, for the purposes of the overall time limit and the custody time limit which applies to the stage which the proceedings have reached when they are adjourned.]]

(7) Where a magistrates' court decides to extend, or further extend, a custody or overall time limit, [F7or to give a direction under subsection (6A) above,] the accused may appeal against the decision to the Crown Court.

(8) Where a magistrates' court refuses to extend, or further extend, a custody or overall time limit [F8, or to give a direction under subsection (6A) above,] the prosecution may appeal against the refusal to the Crown Court.

(9) An appeal under subsection (8) above may not be commenced after the expiry of the limit in question; but where such an appeal is commenced before the expiry of the limit the limit shall be deemed not to have expired before the determination or abandonment of the appeal.

(10) Where a person is convicted of an offence in any proceedings, the exercise, in relation to any preliminary stage of those proceedings, of the power conferred by subsection (3) above shall not be called into question in any appeal against that conviction.

(11) In this section—

"appropriate court " means—

(a) where the accused has been [F9sent for trial] or indicted for the offence, the Crown Court; and

(b) in any other case, the magistrates' court specified in the summons or warrant in question or, where the accused has already appeared or been brought before a magistrates' court, a magistrates' court for the same area;

F10["custody " includes local authority accommodation [F11or youth detention accommodation to which a person is remanded under section 91 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012] , and references to a person being committed to custody shall be construed accordingly;]

[F12"custody of the Crown Court" includes custody to which a person is committed in pursuance of—

(a) section 43A of the Magistrates' Courts Act 1980 (magistrates' court dealing with a person brought before it following his arrest in pursuance

of a warrant issued by the Crown Court); or
(b) section 52 of the Crime and Disorder Act 1998 (provisions supplementing section 51);]

"custody of a magistrates' court " means custody to which a person is committed in pursuance of section 128 of the M3Magistrates' Courts Act 1980 (remand);

"custody time limit " means a time limit imposed by regulations made under subsection (1)(b) above or, where any such limit has been extended by a court under subsection (3) above, the limit as so extended;

[F13"preliminary stage ", in relation to any proceedings, does not include any stage after the start of the trial (within the meaning given by subsections (11A) and (11B) below);]

"overall time limit " means a time limit imposed by regulations made under subsection (1)(a) above or, where any such limit has been extended by a court under subsection (3) above, the limit as so extended; and

"specified " means specified in the regulations.

[F14(11ZA) For the purposes of this section, proceedings for an offence shall be taken to begin when the accused is charged with the offence or, as the case may be, an information is laid charging him with the offence.]

[F15(11A) For the purposes of this section, the start of a trial on indictment shall be taken to occur [F16at the time when a jury is sworn] to consider the issue of guilt [F17or fitness to plead] or, if the court accepts a plea of guilty before [F18the time when a jury is sworn], when that plea is accepted; but this is subject to section 8 of the M4Criminal Justice Act 1987 and section 30 of the M5Criminal Procedure and Investigations Act 1996 (preparatory hearings).

F15(11B) For the purposes of this section, the start of a summary trial shall be taken to occur—
(a) when the court begins to hear evidence for the prosecution at the trial or to consider whether to exercise its power under section 37(3) of the M6Mental Health Act 1983 (power to make hospital order without convicting the accused), or
(b) if the court accepts a plea of guilty without proceeding as mentioned above,

when that plea is accepted.

[F19(11AA)
The references in subsection (11A) above to the time when a jury is sworn include the time when that jury would be sworn but for the making of an order under Part 7 of the Criminal Justice Act 2003.]]

(12) For the purposes of the application of any custody time limit in relation to a person who is in the custody of a magistrates' court or the Crown Court—

(a) all periods during which he is in the custody of a magistrates' court in respect of the same offence shall be aggregated and treated as a single continuous period; and

(b) all periods during which he is in the custody of the Crown Court in respect of the same offence shall be aggregated and treated similarly.

(13) For the purposes of section 29(3) of the M7[F20Senior Courts Act 1981] (High Court to have power to make prerogative orders in relation to jurisdiction of Crown Court in matters which do not relate to trial on indictment) the jurisdiction conferred on the Crown Court by this section shall be taken to be part of its jurisdiction in matters other than those relating to trial

Human Rights Act of 1998

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a)the lawful detention of a person after conviction by a competent court;

(b)the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c)the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d)the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e)the lawful detention of persons for the prevention of the spreading of infectious

diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f)the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Belgian Act of 1990 on Pre-Trial Detention

TITRE I. - Of the preventive detention.

CHAPITRE I. - Arrest.
Article 1The arrest in case of flagrant crime or misdemeanor is subject to the following rules: 1° the deprivation of liberty may in no case exceed [1 forty-eight]1 hours;
2° the law enforcement officers shall immediately place at the disposal of the judicial police officer any suspected person whose escape they have prevented. The time limit of [1 forty-eight]1 The [forty-eight] hour time limit provided for in 1° shall run from the moment when the person is no longer free to come and go following the intervention of the law enforcement officer;
3° any private individual who detains a person caught in flagrante delicto or in flagrante delicto shall immediately report the facts to a law enforcement officer.
The time limit of [1 forty-eight]1
4° as soon as the judicial police officer has made an arrest, he shall immediately inform the public prosecutor by the fastest means of communication. He executes the orders given by this magistrate with regard to both the deprivation of liberty and the duties to be performed;
5° if the offence is the subject of an investigation, the information provided for in 4° is communicated to the investigating judge;
6° a report of the arrest is drawn up. This record shall mention:
a) the precise time of the actual deprivation of liberty, with a detailed indication of the circumstances in which the deprivation of liberty took place;
b) the communications made in accordance with 4° and 5°, with an indication of the precise time and of the decisions made by the magistrate.
---------- (1)<L 2017-10-31/06, s. 5, 030; Effective: 11-29-2017>

Art. 2.Except in cases of flagrante delicto or flagrant misdemeanor, a person in respect of whom there are serious indications of guilt relating to a felony or misdemeanor may not be placed at the disposal of the justice system, and for a period which may not exceed [1 forty-eight]1 hours, only in compliance with the following rules:
1° the decision to [2 arrest]2 can only be taken by the public prosecutor;
2° if this person tries to flee or tries to evade the surveillance of a law enforcement officer, precautionary measures can be taken while waiting for the public prosecutor, who is informed immediately by the fastest means of communication, to take a decision;
3° the person concerned is immediately notified of the decision to arrest. 4° a report is drawn up stating:
a) the decision and the measures taken by the public prosecutor and the manner in which they were communicated;
b) the exact time of the actual deprivation of liberty, with details of the circumstances in which the deprivation of liberty took place;
c) the exact time of notification to the person concerned of the decision to arrest.
5° the person arrested or detained shall be released as soon as the measure has ceased to be necessary. The deprivation of liberty may in no case exceed [1 forty-eight]1 hours from the notification of the decision or, if binding protective measures have been taken, from the moment when the person no

longer has the freedom to come and go;
6° when the matter is referred to the investigating judge, he or she shall exercise the powers assigned to the public prosecutor by this Article.
---------- (1)<L 2017-10-31/06, art. 5, 030; Effective: 29-11-2017> ()2<L 2017-10-31/06, art. 7, 030;
Effective: 29-11-2017>

Art. 2a.[1 § 1. This provision regulates access to a lawyer within the time limits referred to in Articles 1,
§ 1, 2,[2 12 and 18, § 1]2.
§ (2) Anyone who is deprived of his liberty in accordance with Articles 1 or 2, or in execution of a warrant to bring him in as referred to in Article 3, has the right, from that moment and prior to the first subsequent interrogation by the police or, failing that, by the public prosecutor or the investigating judge, to confer confidentially with a lawyer of his choice without undue delay. In order to contact the lawyer of one's choice or another lawyer, contact is made with the duty office organized by the French and German speaking Bar Association and the "Orde van Vlaamse balies" or, failing that, by the President of the Bar Association or his delegate.
As soon as contact is made with the chosen lawyer or the duty lawyer, the confidential consultation with the lawyer must take place within two hours. The confidential consultation may take place by telephone at the request of the lawyer in agreement with the person concerned.

The confidential consultation may last for 30 minutes and may, in exceptional cases, be extended to a limited extent by decision of the person conducting the hearing. After the confidential consultation, the hearing may begin.
If the planned confidential consultation cannot take place within two hours, a confidential telephone consultation will nevertheless take place with the duty officer, after which the hearing may begin. In the event of force majeure, the hearing may begin after the person concerned has been reminded once again of his or her rights under Article 47bis, § 2, 2) and 3) of the Code of Criminal Procedure.
§ (3) After confidential consultation by telephone with the lawyer of his choice or with the duty lawyer, and in agreement with him, the adult suspect may waive the right to be assisted during the hearing, which may, if possible, be recorded on video in order to monitor the hearing.
The person conducting the hearing, the public prosecutor or the examining magistrate in charge may at any time decide ex officio that the hearing must be filmed.
All these elements are recorded in detail in a report.
The digital recording of the hearing is communicated to the public prosecutor or, if applicable, to the investigating judge in charge, together with the minutes of the hearing. It forms part of the criminal file and copies can be consulted or obtained in accordance with articles 21bis and 61ter of the Code of Criminal Procedure. The suspect who is deprived of his liberty has the right to consult, in person or through his lawyer, the recording of his hearing upon simple request by himself or his lawyer to the public prosecutor or, if applicable, to the investigating judge in charge.
The recording of the hearing shall be kept on digital media. § (b) The court may, at its own discretion, order that a person who is to be examined be given a hearing in the language of the proceedings, or that the person be given a
hearing in the language of the person to be examined, or that the person be given a hearing in the language of the person to be examined. The minutes shall mention the assistance of a sworn interpreter as well as his or her name and position. The costs of the interpretation shall be borne by the State.
§ (5) The person to be heard has the right to be assisted by his or her lawyer during the hearings that

take place within the time limits referred to in paragraph 1.
The hearing shall be interrupted for a maximum of fifteen minutes for an additional confidential consultation, either once at the request of the person to be heard or at the request of his or her lawyer, or in the event of the revelation of new offenses that are not related to the facts that have been brought to his or her attention in accordance with Article 47bis, § 2, of the Code of Criminal Procedure.
§ 6 Only a person of full age who is to be heard may voluntarily and deliberately waive the rights referred to in paragraphs 2 and 5. Before making this decision, he or she may request a confidential telephone conversation with a lawyer on duty. The waiver must be made in writing,

in a document dated and signed by the person concerned, in which the necessary information is provided on the possible consequences of waiving the right to legal counsel. The person concerned shall be informed that he or she may revoke the waiver.
§ (b) the court may, at the request of the suspect, order that a third party designated by the suspect be informed of the arrest by the person conducting the interrogation or by a person designated by that person, by the most appropriate means of communication, without prejudice to the provisions of special laws.
The public prosecutor or the investigating judge in charge of the case, depending on the state of the proceedings, may, by reasoned decision, postpone such communication for the time necessary to protect the interests of the investigation, if one of the following compelling reasons so warrants:
a) an urgent need to prevent serious harm to the life, liberty or physical integrity of a person;
b) an urgent need to prevent a situation in which the criminal proceedings may be seriously compromised.
§ (8) Anyone who is deprived of his or her liberty in accordance with Articles 1, 2 or 3 is entitled to medical assistance. The cost of the medical assistance provided within the time limits referred to in Articles 1, 2 and 3 shall be included in the costs of the proceedings.
Without prejudice to the right provided for in paragraph 1, this person has the subsidiary right to ask to be examined by a doctor of his/her choice. The cost of such an examination shall be borne by him. § (a)
where there is an urgent need to prevent serious harm to the life, liberty or physical integrity of a person.
Interrogations without observance of the rights provided for in paragraphs 2 and 5 shall be conducted for the sole purpose of obtaining information essential to prevent serious harm to the life, liberty or physical integrity of a person and to the extent necessary for that purpose;
b) when it is imperative that the investigating authorities act immediately to avoid seriously jeopardizing criminal proceedings. Interrogations carried out without the rights provided for in paragraphs 2 and 5 being observed shall be conducted solely for the purpose of obtaining information essential to avoid seriously jeopardizing criminal proceedings and to the extent necessary for that purpose.
§ (b) The court may, by decision of the court of first instance, order that a person who has been convicted of a criminal offence be tried by a court of first instance, or by a court of first instance, for a criminal offence, or by a court of first instance for a criminal offence, or by a court of first instance for a criminal offence, or by a court of first instance for a criminal offence. This provision shall not apply to a suspect within the borders of the state as referred to in Article 7 of the Constitution].1
---------- (1)<L 2016-11-21/02, s. 6, 028; Effective: 11-27-2016> ()2<L 2017-10-31/06, s. 8, 030; Effective:
11-29-2017>

CHAPITRE II. - Warrant to bring.

Art. 3.The investigating judge may issue a warrant to bring for cause any person in respect of whom there are serious indications of guilt relating to a felony or misdemeanor, and who is not already at his disposal.
[1 The warrant to bring such persons shall provide a title of deprivation of liberty for a maximum of forty-eight hours from the time of actual deprivation of liberty as referred to in sections 1 and 2.]1
---------- (1)<L 2017-10-31/06, s. 9, 030; Effective: 11-29-2017>

Art. 4.The investigating judge may also issue warrants for the attendance of witnesses who refuse to appear on the summons given to them, in accordance with Article 80 of the Code of Criminal Investigation and without prejudice to the fine provided for in that Article.

Art. 5The investigating judge shall question [.1 without undue delay]1 of the service of the warrant to bring.
---------- (1)<L 2017-10-31/06, s. 10, 030; Effective: 11-29-2017>

Art. 6.The warrant to bring a person shall be signed and sealed by the issuing magistrate.
The person who is the subject of such warrant shall be named or designated therein as clearly as possible.

Art. 7The warrant shall be served at the time of arrest, if the arrest is made in execution of the warrant, or [.1 without undue delay after]1 the actual deprivation of liberty if the issuance of the warrant was preceded by a measure taken by law enforcement officers or the public prosecutor.
A record shall be made of:
a) the precise time of the actual deprivation of liberty;
b) the precise time of service of the warrant to bring the person concerned; and
c) all steps taken by law enforcement officers to place the person concerned at the disposal of the investigating judge.

---------- (1)<L 2017-10-31/06, s. 11, 030; Effective: 11-29-2017>

Art. 8.The warrant to bring in shall be served by a law enforcement officer, who shall give a copy of the warrant to the person concerned and make a record of it.
[1 ...]1
---------- (1)<L 2017-10-31/06, s. 12, 030; Effective: 11-29-2017>

Art. 9. The warrant to bring a person shall be enforceable throughout the territory of the Kingdom. (In peacetime, the warrant to bring a person referred to in Article 10bis of the

Preliminary Title of the Code of Criminal Procedure, may be enforced, if necessary, in foreign territory). <L 2003-04-10/60, art. 48, 012; Effective: 01-01-2004>

Art. 10. The warrant to bring in shall be executed immediately. However, the investigating judge may postpone such execution when the person who is the subject of the warrant is not yet deprived of his

liberty.

Art. 11. The person who refuses to obey the warrant to bring him in, or who, after having declared that he is ready to obey, attempts to escape, must be compelled.
The bearer of the warrant shall, if necessary, request the police force of the nearest place, which shall be obliged to comply with the requisition contained in the warrant.

Art. 12.[1 For witnesses referred to in section 4, the warrant to bring shall cover a period of deprivation of liberty of not more than twenty-four hours from the deprivation of liberty, whether or not the deprivation of liberty follows the execution of the warrant to bring the witness].1
---------- (1)<L 2017-10-31/06, s. 13, 030; Effective: 11-29-2017>

Art. 13. The investigating judge, seized of the case directly or by referral, pursuant to Article 90 of the Code of Criminal Investigation, shall transmit to the investigating judge of the place where the person who was the subject of the warrant to bring was found, the documents, notes and information relating to the offense, in order to have that person heard.
All the documents are then sent, together with the minutes of the examination, to the judge in charge of the case.

Art. 14. If the person against whom a warrant for arrest has been issued cannot be found, the warrant is shown to the mayor or an alderman, or to the police commissioner of the municipality of the person's residence.
The mayor, alderman or police commissioner shall endorse the original of the writ of service.
(If the warrant is issued in accordance with article 9, paragraph 2, and the person cannot be found, it may be presented to the commander of the military unit to which the person concerned belongs. In this case, the commander shall endorse the original of the writ of service). <L 2003-04-10/60, art. 49, 012; Effective: 01-01-2004>

Art. 15. Failure to comply with the formalities prescribed for the warrant to bring a person to court is always punishable by a fine of at least fifty francs against the clerk and may give rise to injunctions to the examining magistrate and the public prosecutor, and even to taking to task.

CHAPITRE II/I.

<Repealed by L 2017-10-31/06, art. 14, 030; Effective: 29-11-2017>

Art. 15bis.<Abrogated by L 2017-10-31/06, art. 14, 030; Effective: 29-11-2017>

CHAPITRE III. - Warrant of arrest.

Art. 16.§ 1. In case of absolute necessity for public safety only, and if the act is of such a nature as to result in the accused being sentenced to a principal correctional term of imprisonment of one year or a more serious penalty, the investigating judge may issue a warrant for arrest.
[2 The investigating judge shall also decide whether this arrest warrant is to be executed either in a prison or by electronically supervised detention. The execution of electronically monitored detention,

which involves the permanent presence of the person concerned at a specific address, with the exception of authorized travel, shall take place in accordance with the procedures laid down by the King].2
This measure may not be taken for the purpose of immediate repression or any other form of coercion. If the maximum sentence applicable does not exceed fifteen years of imprisonment, the warrant may only be issued if there are serious grounds for fearing that the accused, if left at liberty, will commit new crimes or offences, evade justice, attempt to conceal evidence or collude with third parties. [3 In the case of offenses referred to in Book II, Title Iter of the Criminal Code for which the maximum applicable sentence exceeds five years' imprisonment, these reasons need not be met].3 <L 2003-01-23/42, art.
123, 011; Effective: 13-03-2003>
§ 2. Unless the accused is a fugitive or an offender, the investigating judge shall, before issuing an arrest warrant, question the accused (on the facts which are the basis of the charge and which may give rise to the issuance of an arrest warrant,) and hear his or her observations. (Failing this examination, the accused shall be released). <L 2005-05-31/32, art. 6, 014; Effective: 26-06-2005>
[1 The accused has the right to be assisted by his lawyer during the interrogation. Only an accused person of full age may voluntarily and deliberately waive this right. The examining magistrate shall mention this waiver in the hearing report.
[4 The lawyer may make observations in accordance with Article 47bis, § 6, 7) of the Code of Criminal Procedure].4
The investigating judge shall inform the lawyer in good time of the place and time of the examination, which he may attend. The examination may begin at the scheduled time, even if the lawyer is not yet present. Upon arrival, the attorney shall join the hearing].1
[1 The investigating judge shall also inform the accused of the possibility that an arrest warrant may be issued against him, and shall hear his observations on this matter and, if applicable, those of his counsel].1 [4 ...]4

All these elements are recorded in the minutes of the hearing.
(When the arrest warrant is executed in accordance with Article 19, § 1bis, recourse shall be had during the interrogation (to radio, telephone, audio-visual or other technical means that allow direct voice transmission between the investigating judge and the suspect while guaranteeing the confidentiality of their exchanges). <L 2003-04-10/60, art. 50, 012; Effective: 01-01-2004> <L 2006-07-20/39, art. 9, 015;
Effective: 07-08-2006>
§ 3. The arrest warrant shall be issued immediately after the first interrogation of the accused by the investigating judge, unless the judge takes investigative measures for the purpose of verifying an element of the interrogation, with the accused remaining at his disposal.
§ 4. [4 If the accused does not yet have a lawyer, the investigating judge reminds him that he has the right to choose a lawyer and contacts the duty office organized by the French and German-speaking Bar Association and the "Orde van Vlaamse balies" or, failing that, by the President of the Bar Association or his delegate. These formalities shall be recorded in the minutes of the hearing].4
§ (5) The arrest warrant shall contain a statement of the fact for which it is issued, mention the legal provision which provides that this fact is a felony or a misdemeanour and establish the existence of serious indications of guilt.
The judge shall mention the factual circumstances of the case and those related to the personality of the accused that justify preventive detention in light of the criteria provided for in § 1. [4 ...]4
[2 In the event that the investigating judge decides that the arrest warrant is to be executed by

electronically monitored detention, he shall also mention the address of the execution of the electronically monitored detention].2
The arrest warrant shall also state that the defendant has been previously heard.
§ (b) The court shall determine whether or not a person is to be held in custody under electronic surveillance, and shall also indicate the address of the execution of the electronic surveillance. [4 ...]4 The accused shall be named or designated as clearly as possible.
[4 § 6bis. An accused person who does not understand the language of the proceedings shall have the right to request a translation of the relevant passages of the warrant into a language he or she understands to enable him or her to have knowledge of the facts of the case and to defend himself or herself effectively, unless an oral translation has been provided to the accused person. The request must be filed with the clerk of the court of first instance, on pain of forfeiture, within three days of the issuance of the arrest warrant. The translation shall be provided within a reasonable time.
If an oral translation has been provided to the accused, this shall be mentioned in the arrest warrant. The costs of translation shall be borne by the State].4
§ 7. The minutes of the hearing of the accused by the investigating judge, as well as all the minutes of hearings of the accused that took place between the time of his deprivation of liberty and the time when he is brought before the investigating judge, shall mention the times of the

beginning of the interrogation, the beginning and end of any interruptions and the end of the interrogation.
---------- (1)<L 2011-08-13/13, art. 7, 021; Effective: 01-01-2012> ()2<L 2012-12-27/29, art. 2, 022;
Effective: 01-01-2014> ()3<L 2016-08-03/15, art. 6, 027; Effective: 21-08-2016> ()4<L 2016-11-21/02, art.
7, 028; Effective: 27-11-2016> (NOTE: by its judgment no. 86/2018 of 05-07-2018 (M.B. 01-08-2018, p.
60497), the Constitutional Court annulled 4° and 5° of Article 7, the repeals in §§ 5 and 6)

Art. 17. Where the investigating judge refuses to issue an arrest warrant requested by the public prosecutor, he shall issue a reasoned order which he shall immediately communicate to him. This order is not subject to appeal.

Art. 18.§ 1. [1 The warrant of arrest shall be served on the accused within [2 forty-eight]2 hours.3 This period shall begin to run either at the time determined by Article 1, 2° or 3°, or by Article 2, 5°, or at the time determined by Article 3, paragraph 2, when the arrest warrant is issued for an accused person detained on the basis of a warrant to bring him or her to trial].3
The service is made by the clerk of the investigating judge, by the director of a penal institution or by a law enforcement officer.
It consists of an oral communication of the decision, in the language of the proceedings, accompanied by the handing over of a complete copy of the document. The arrest warrant is shown to the accused even if he is already detained, and a copy is delivered to him.
If the warrant is not properly served within the legal time limit, the accused shall be released.
§ (2) At the time of service of the arrest warrant, a copy of the record of his hearing by the investigating judge and a copy of the other documents referred to in Article 16, § 7, shall be given to the accused.
---------- (1)<L 2011-08-13/13, art. 8, 021; Effective: 01-01-2012> ()2<L 2017-10-31/06, art. 5, 030;
Effective: 29-11-2017> ()3<L 2017-10-31/06, art. 15, 030; Effective: 29-11-2017>

Art. 19.§ 1. The arrest warrant shall be executed immediately. It shall not be subject to appeal or cassation. (b) the court of

first instance has jurisdiction to hear the case; or (c) the court of first instance has jurisdiction to hear the case.
In peacetime, the arrest warrant issued against a person referred to in Article 10bis of the Preliminary Title of the Code of Criminal Procedure may be executed, if necessary, in foreign territory). <L 2003-04- 10/60, art. 51, 012; Effective: 01-01-2004>

§ 2. The investigating judge, seized of the case directly or by referral, in execution of Article 90 of the Code of Criminal Investigation, shall transmit to the investigating judge of the place where the accused who was the subject of the warrant was found, the documents, notes and information relating to the offense, in order to have him heard.
All the documents shall then be returned, together with the record of the examination, to the judge hearing the case.
§ (3) If, in the course of the investigation, the judge hearing the case issues a warrant for arrest, he may order that the accused be transferred to the prison in the place where the investigation is being conducted.
If it is not stated in the arrest warrant that the accused shall be so transferred, he shall remain in the house of arrest of the district in which he was found, until a decision has been taken by the council chamber, in accordance with articles 127, 128, 129, 130, 132 and 133 of the Code of Criminal Procedure.
§ (4) The bearer of the arrest warrant shall, if necessary, request the police force of the nearest place, which shall be obliged to comply with the request contained in the warrant.
§ (5) The accused person seized by virtue of an arrest warrant shall be taken, without delay, to the house of arrest indicated in the warrant.
§ (6) The officer in charge of the execution of the arrest warrant shall hand over the accused to the guard of the house of arrest, who shall give him a discharge.
He shall then take the documents relating to the arrest to the clerk of the criminal court and receive an acknowledgement of receipt.
He exhibits these discharges and acknowledgements of receipt within twenty-four hours to the examining magistrate; the latter affixes his visa to both of them, which he dates and signs. (When the arrest warrant is executed in accordance with Article 19, § 1bis, the discharge and acknowledgement of receipt must be sent to the investigating judge within [1 forty-eight]1 hours after the arrival of the accused on Belgian territory). <L 2003-04-10/60, art. 51, 012; Effective: 01-01-2004>
§ 7. Failure to comply with the formalities prescribed for the arrest warrant shall always be punishable by a fine of at least fifty francs against the clerk of the court and may give rise to injunctions to the investigating judge and the public prosecutor, and even to the taking of evidence.
---------- (1)<L 2017-10-31/06, art. 5, 030; Effective: 29-11-2017>

Art. 20.(§ 1.) [1 Without prejudice to the provisions of articles [4 Articles 2a and 16]4[Without prejudice to the provisions of Articles [2bis and 16], the accused may communicate freely with his or her attorney immediately after his or her first hearing by the investigating judge].1 <L 2005-01-12/39, art. 179, 013; Effective: 15-01-2007> (
§ 2.) When the necessities of the investigation so require, the judge may issue a prohibition on communicating with persons other than the lawyer. The judge shall issue a reasoned order to this effect, which shall be transcribed in the prison register. The ban may not extend beyond three

days from the first hearing. It may not be renewed. <L 2005-01-12/39, s. 179, 013; Effective: 15-01-2007> (
§ 3. If there are serious reasons to fear that a defendant may attempt to suppress evidence or collude

with third parties, the investigating judge may order that a defendant be kept away from other defendants and, notwithstanding § 2:
(1) prohibit visitation by persons outside the prison named individually in the order;
(2) prohibit correspondence from or to persons named individually in the order; and
(3) prohibit telephone contact with persons named individually in the order.
[2 § 3a. If the arrest warrant is executed by electronically monitored detention, the investigating judge may:
(1) prohibit the accused from visiting the persons individually named in the arrest warrant;
(2) prohibit all correspondence with the persons or bodies individually named in the arrest warrant;
(3) prohibit all telephone or electronic communication with the persons or bodies individually named in the arrest warrant].2
§ (4) The investigating judge shall make such decision by reasoned order, which shall be transcribed at the prison in a register provided for that purpose and shall be served on the accused by the prison director.
The decision shall apply for the strictly necessary period of time determined by the investigating judge, and at the latest until the time when the investigating judge transmits the file to the public prosecutor in accordance with Article 127, paragraph 1, of the Code of Criminal Procedure.
§ 5. La décision du juge d'instruction portant restriction des visites, de la correspondance et des communications téléphoniques ne modifie pas les droits de l'inculpé en ce qui concerne ces possibilités de contact avec son avocat.
The decision of the investigating judge restricting correspondence does not affect the rights of the accused in respect of correspondence with persons with whom he may correspond without supervision under [Article 57] of the Law of Principles Concerning the Administration of Penitentiaries as well as the Legal Status of Prisoners. <L 2005-01-12/39, s. 179, 013; Effective: 15-01-2007; amended by L 2005-12- 23/31, s. 34>
(Without prejudice to the restrictions provided for in Article 59, § 1, subparagraph 2, of the Law of Principles concerning the Administration of Penitentiaries and the Legal Status of Prisoners, the investigating judge may restrict visits to the persons mentioned in Article 59, § 1, subparagraph 1 only to the extent that they have been charged). L 2005-01-12/39, art. 179, 013; Effective: 01-09-2011>
§ 6. The accused may file a motion with the investigating court that decides on the preventive detention for the modification or lifting of the measures imposed by the investigating judge [under [2 of § 3 and § 3bis]2]. Such motion shall be attached to the record of the pretrial

detention. <L 2005-01-12/39, s. 179, 013; Effective: 15-01-2007; amended by L 2005-12-23/31, s. 34>
The procedure shall be conducted in accordance with the provisions of Articles 21 through 24. The appeal of the decision shall be made in accordance with article 30 [3 ...]3. [3 The decision pronounced in appeal is not subject to immediate appeal in cassation.]3) L 2005-01-12/39, art. 179, 013; Effective: 15- 01-2007>
[2 § 7. §§ 2 and 3 shall not apply to an arrest warrant that is executed by electronically monitored detention].2 (NOTE: Effective date of art. 20, § 5, subd. 3, set at 01-09-2011 by AR 2011-04-08/01, art. 31, 2°)
---------- ()1<L 2011-08-13/13, art. 9, 021; Effective: 01-01-2012> ()2<L 2012-12-27/29, art. 3, 022;
Effective: 01-01-2014> ()3<L 2016-02-05/11, art. 127, 025; Effective: 29-02-2016> (NOTE: by its ruling No. 148/2017 of 21-12-2017 (M.B. 12-01-2018, p. 1393), the Constitutional Court annulled Article 127) (4)<L 2017-10-31/06, art. 16, 030; Effective: 29-11-2017>

CHAPITRE IIIbis. - (Of the warrant of arrest for immediate appearance.). <Inserted by L 2000-03-28/31, s. 7; Effective: 04-30-2000>

Art. 20bis. <Inserted by L 2000-03-28/31, art. 7; In force: 30-04-2000> § 1. The Public Prosecutor may request a warrant of arrest for immediate appearance, in accordance with Article 216quinquies of the Code of Criminal Investigation, if the following conditions are met:
1° the fact is punishable by a principal correctional imprisonment of one year without exceeding ten years pursuant to the law of October 4, 1867, on extenuating circumstances;
2° the offense is flagrant or the charges, gathered within one month of the commission of the offense, are sufficient to submit the case to the judge on the merits.
(NOTE: by its decision n° 56/2002 of 28 March 2002, the Court of Arbitration annulled article 20bis, § 1, paragraph 1, see M.B. 13-04-2002, p. 15215 - 15224)
The public prosecutor informs the accused that he has the right to choose a lawyer. If the accused has not chosen or does not choose a lawyer, the public prosecutor immediately informs the President of the Bar Association or his delegate, who appoints one.
If the accused shows that he has no means of support, the Public Prosecutor immediately sends the request for legal aid to the representative of the legal aid office, in accordance with article 184bis of the Code of Criminal Procedure.
The accused has the right to consult with his lawyer before appearing before the investigating judge.
§ (2) The file shall be made available to the accused and his lawyer as soon as the arrest warrant for immediate appearance is issued.
(b) the court may order that a copy of the file be made available to the accused and his or her lawyer.

§ The investigating judge may issue a warrant for immediate appearance, which is served in accordance with Article 18, § 1, after hearing the person presented to him or her and, unless the person refuses to be assisted, the observations of his or her lawyer.
A civil party's application to the investigating judge is inadmissible as soon as the public prosecutor requests an arrest warrant for immediate appearance, provided that this request is not rejected.
§ The decision of the investigating judge and its execution are subject to the conditions and procedures provided for in the following articles: -
Article 16, §§ 1 and 2;
- Article 16, § 3, with the exception of the possibility of taking investigative measures;
- Article 16, §§ 5 to 7;
- Article 17;
- Article 18;
- Article 19, §§ 1, 4 to 7;
- Article 27, from the notification provided for in Article 216quinquies, § 1, subparagraph 2 of the Code of Criminal Procedure until the final decision on the merits, possibly in the degree of appeal; -
Article 36,
§ 3, from the notification provided for in Article 216quinquies, § 1, paragraph 2, of the Code of Criminal Procedure until the judgment, or if the court applies Article 216septies of the same Code;
- Article 37;
- Article 38.

§ (5) The arrest warrant for immediate appearance is valid until judgment is rendered, provided that judgment is rendered within seven days of the order.
Otherwise the accused is immediately released.
§ 6 The examining magistrate can, ex officio or on a reasoned request addressed to him, and as long as the notification provided for in article 216quinquies, § 1, paragraph 2, has not taken place, release the warrant for immediate appearance. He shall decide on the spot by means of a reasoned order which he shall immediately communicate to the public prosecutor.
§ (b) The court may order that a person who has been convicted of an offence be sentenced to imprisonment for a term of up to three years, or to imprisonment for a term of up to three years.

CHAPITRE IV. - The maintenance of preventive detention.

Art. 21(1) The arrest warrant issued by the investigating judge is valid for a maximum of five days from its execution.
Before the expiry of this period and without prejudice to the application of article 25, § 1, the council chamber, on the report of the investigating judge, the public prosecutor [3 and the

accused and/or his counsel]3 shall decide whether to continue the pre-trial detention [1 as well as the manner in which it is to be carried out] .1.
§ (b) The court shall decide whether the accused and/or his counsel shall be remanded in custody [and the manner in which the remand is to be carried out].2 At least twenty-four hours before the appearance in chambers, the place, day and time of the appearance shall be indicated in a special register kept at the court registry and the court clerk shall give notice thereof by fax [, registered mail or electronically].3 by registered mail or electronically]3(b) the accused and his or her counsel, by fax [, by registered mail or electronically].
§ The record shall be made available to the accused and his or her counsel on the last business day before the appearance. [4 The accused or his counsel may themselves, by their own means, take a copy of the file free of charge, on the spot. The examining magistrate may, however, in a reasoned manner, prohibit the taking of copies of the file or of certain documents if the needs of the investigation so require, or if the taking of such copies presents a danger to persons or seriously infringes their privacy].4 [2 Such provision may be made in the form of copies, if necessary in electronic form, certified by the clerk of the court].2
The file shall again be made available to them during the morning of the day of the appearance if the previous day was not a working day; in this case, the appearance in chambers shall take place in the afternoon.
§ (b) The court shall determine whether the arrest warrant is in accordance with the provisions of this Act. The court shall also determine the necessity of continued detention [1 and shall decide on the manner of its execution]1 in accordance with the criteria set out in Article 16, § 1.
§ 5 If the Council Chamber considers that the preventive detention should be maintained, it shall give reasons for its decision as provided for in the first and second paragraphs of Article 16, § 5.
§ 6 The order for continued detention shall be valid for one month from the day it is issued.
---------- (1)<L 2012-12-27/29, art. 4, 022; Effective: 01-01-2014> ()2<L 2012-12-27/29, art. 12, 022;
Effective: 10-02-2013> ()3<L 2012-12-27/29, art. 15, 022; Effective: 10-02-2013> ()4<L 2019-05-05/19,
art. 156, 034; Effective: 29-06-2019>

Art. 22As long as the preventive detention is not terminated and the investigation is not closed, the council chamber shall be called upon to rule, from month to month [5 or, from the third decision, every two months]5on the continuation of the detention[2 and on the modality of its execution] .2.
[5 From the third decision onwards, the order on the continuation of detention and on the modality of its execution shall form a title of deprivation of liberty for two months].5
The court may, at the request of the accused or his or her counsel, summon the accused within ten days prior to each appearance in chambers or in the indictment division ruling on a referral in accordance with Article 31, § 4, for a summary examination; the clerk shall immediately notify

the accused in writing [4 by fax or electronic means]4 the summons to the accused's counsel and the public prosecutor, who may attend the examination.
Before the appearance, the file shall be made available to the accused and his counsel for two days. The clerk shall notify them by fax [4 by registered mail or electronically] .4. [6 The consultation of the file implies that the accused or his counsel may themselves and by their own means, take a copy free of charge, on the spot. The examining magistrate may, however, in a reasoned manner, prohibit the taking of copies of the file or of certain documents if the needs of the investigation so require, or if such taking of copies presents a danger to persons or seriously infringes on their privacy].6
[3 This provision may be made in the form of copies, if necessary in electronic form, certified by the court clerk].3
The Council Chamber shall verify whether there are still serious indications of guilt against the accused and whether there are reasons in accordance with Article 16, § 1, to maintain the detention [2 or to modify the manner in which it is carried out] .2.
If it decides that the detention should be maintained [2 or that the method of enforcement should be modified]2If it decides that the detention should be continued [or that the method of execution should be changed], it should give reasons for its decision as stated in the first and second paragraphs of Article 16, § 5.
[5 ...]5.) <L 2005-05-31/32, art. 7, 014; Effective: 26-06-2005>
---------- ()1<L 2010-02-11/02, art. 2, 020; Effective: 17-02-2010> ()2<L 2012-12-27/29, art. 5, 022;
Effective: 01-01-2014> ()3<L 2012-12-27/29, art. 13, 022; Effective: 10-02-2013> ()4<L 2012-12-27/29,
art. 16, 022; Effective: 10-02-2013> ()5<L 2016-02-05/11, art. 128, 025; Effective: 01-07-2016. Transitional provision: s. 140> ()6<L 2019-05-05/19, s. 157, 034; Effective: 06-29-2019>

Art. 22bis.
<Repealed by L 2016-02-05/11, s. 129, 025; Effective: 01-07-2016>

Art. 23.For the purposes of [2 sections 21 and 22]2 the following rules shall be observed: <L 2005-05- 31/32, art. 9, 014; In force: 26-06-2005>
(1) the proceedings shall be held in camera, which shall be mentioned in the decision;
(2) [1 the accused appears in person or represented by a lawyer. The council chamber may, without any appeal being possible, order the appearance in person [3 whether or not by videoconference,]3 at least three days before the appearance. This decision shall be served on the party concerned at the request of the public prosecutor. If the accused or his lawyer does not appear, the case shall be decided in their absence].1
3° At all stages of the proceedings, the council chamber may, if the characterization of the facts referred to in the arrest warrant appears to it to be inadequate, modify it after having given the parties

the opportunity to explain themselves. It may not substitute other facts;
4° the council chamber must respond to the submissions of the parties. If the parties, in their submissions, contest the existence of serious indications of guilt by referring to elements of fact, the council chamber must, if it maintains the detention, specify which elements appear to it to constitute such indications.
---------- (1)<L 2012-12-27/29, art. 18, 022; Effective: 10-02-2013> ()2<L 2016-02-05/11, art. 130, 025;
Effective: 01-07-2016> ()3<L 2016-01-29/08, art. 7, 026; Effective: indefinite and no later than 01-09- 2017, (NOTE: by its ruling No. 76/2018 of 21-06-2018 (M.B. 02-07-2018, p. 53419), the Constitutional Court annulled Article 7)>

Art. 24. After six months of deprivation of liberty if the maximum applicable sentence does not exceed fifteen years of (reclusion) or after one year in the opposite case, the accused may, when appearing in the council chamber or in the indictment chamber pursuant to Articles 22 (...) or 30, request to appear in open court. <L 2003-01-23/42, art. 124, 011; Effective: 13-03-2003> <L 2005-05-31/32, art. 10, 014; In
force: 26-06-2005>
Such request may be rejected, by reasoned decision, only:
- if such publicity is dangerous to public order, morals or national security;
- if the interests of minors or the protection of the privacy of victims or other defendants so require;
- if publicity is likely to prejudice the interests of justice by reason of the dangers it entails for the safety of victims or witnesses.

Art. 24bis.2 § 1.]2 [1 The investigating judge may decide ex officio or at the request of the public prosecutor, at any time during the proceedings, by a reasoned order, that the warrant of arrest or the order or decree of continued preventive detention executed by electronically monitored detention shall be executed from that time on in the prison, if:
(1) the accused remains in default of reporting for any act of the proceedings [2 in accordance with the provisions of article 23, 2°]2;
2° the accused fails to comply with the standard instructions and rules for detention under electronic surveillance established in accordance with Article 16, § 1, paragraph 2;
3° the accused fails to comply with the prohibitions provided for in Article 20, § 3bis; 4° new and serious circumstances make this measure necessary.
[4 5° the continuation of electronic surveillance is technically impossible].4
The order is served on the accused without delay and communicated to the public prosecutor without delay.
This order is not subject to appeal.
The procedure shall be conducted in accordance with the provisions of Chapters III, IV and V.]1

[2 § 2 The investigating judge may decide ex officio or at the request of the public prosecutor, at any time during the proceedings, by a reasoned order which he or she shall communicate directly to the public prosecutor, that the warrant of arrest or the order or ruling for continued preventive detention executed in the prison shall be executed from that time onwards by means of electronically monitored detention].2
[3 § 3. in the event of continued detention under electronic surveillance, in accordance with Article 26,
§ 3, paragraph 2, the powers referred to in paragraphs 1 and 2 shall be exercised, exclusively on the request of the public prosecutor, by the courts referred to in Article 27, § 1.

The request shall be deposited at the registry of the court that is to give judgment and shall be entered in the register provided for that purpose. A
decision on the request is taken in chambers within five days of its being filed, after hearing the Public Prosecutor, the person concerned and his or her counsel, and the latter is notified in accordance with Article 21, § 2.
If no decision has been taken on the request within this period of five days, which may be extended in accordance with Article 32, the preventive detention continues to be carried out under electronic surveillance.
Reasons shall be given for the decision in accordance with Article 16, § 5, paragraphs 1 and 2].3
[4 § The accused person remanded in custody under electronic surveillance remains in prison:
1° for the time strictly necessary for the placement and activation of the electronic surveillance equipment;
2° by order of the public prosecutor, in case of force majeure or when one of the conditions referred to in paragraph 1 appears to be met, or when the accused person is intercepted after having evaded electronic surveillance, or when this proves to be necessary following a change in the address where the electronic surveillance is to be executed.
The investigating judge, duly and immediately notified by the public prosecutor of the order referred to in paragraph 1, 2°, shall decide within five working days of the accused's return to prison whether or not to continue the preventive detention under electronic surveillance in accordance with paragraphs 1 and 2. He shall be obliged to hear the accused and his lawyer beforehand, who shall be notified in accordance with Article 21, § 2. In the event of continued detention under electronic surveillance in accordance with Article 26, § 3, paragraph 2, it shall be done in accordance with paragraph 3].4
---------- (1)<Inserted by L 2012-12-27/29, art. 7, 022; Effective: 01-01-2014> ()2<L 2014-04-25/23, art. 162, 023; Effective: 24-05-2014> ()3<L 2016-02-05/11, art. 131, 025; Effective: 29-02-2016> ()4<L 2019-
05-05/10, art. 116, 033; Effective: 03-06-2019>

CHAPITRE IV/1. [1 - Of the assistance of counsel at hearings during the period of continued pretrial detention]1

---------- (1)<Inserted by L 2016-11-21/02, s. 8, 028; Effective: 11-27-2016>

Art. 24bis/1. [1 As of the service of the arrest warrant, the suspect who is in preventive detention shall have the right to confer confidentially with his lawyer in accordance with Article 20, § 1, to be assisted by a lawyer during the hearings that are conducted and to interrupt the hearing in accordance with Article 2bis, § 5, paragraph 2. In light of the particular circumstances of the case, the investigating judge in charge can decide to act in accordance with Article 2bis, §§ 9 and 10.
If the hearing takes place on the basis of a written summons with a brief statement of the facts, the right to confer confidentially with one's lawyer, the right to be assisted by one's lawyer during the hearing, the right to interrupt the hearing once in accordance with Article 2bis, § 5, paragraph 2, and the rights provided for in Article 47bis, § 2, 2) and 3) of the Code of Criminal Procedure, the person concerned is presumed to have consulted with his or her lawyer.
Only a person of full age may voluntarily and deliberately waive the right to be assisted by a lawyer during the hearing in a document dated and signed by him or her, in which the necessary information is provided on the possible consequences of waiving the right to the assistance of a lawyer. The person concerned is informed that he or she may revoke the waiver.

The person conducting the hearing shall contact the duty office provided for in Article 2bis, § 2, in order to summon the chosen lawyer or the lawyer who replaces him to the hearing, stating the place, day and time. A lawyer who assists a suspect who is in pre-trial detention or who replaces another lawyer shall immediately inform the duty office referred to in Article 2bis, § 2, of his intervention.
The provisions of Article 2bis, §§ 2 and 3, shall apply if the hearing does not take place on a written summons or if the summons and the hearing are not separated by one free day].1
---------- (1)<Inserted by L 2016-11-21/02, s. 9, 028; Effective: 11-27-2016>

CHAPITRE V. - Release of arrest warrant.

Art. 25.§ 1 Before the appearance of the accused before the council chamber provided for in Article 21, the investigating judge may release the arrest warrant by a reasoned order which he shall immediately communicate to the public prosecutor.
This order is not subject to appeal.
§ (b) the court of first instance has the power to order the execution of a judgment of the court of first instance, or to order the execution of a judgment of the court of first instance, or to order the execution of a judgment of the court of first instance, or to order the execution of a judgment of the court of first instance.
This order is not subject to appeal.
In addition, the public prosecutor may at any time request the investigating judge to release the arrest warrant [...1 ...]1.) <L 2005-05-31/32, art. 11, 014; In force: 26-06-2005>

§ 3. In all cases where the release of the arrest warrant has been given by application of the foregoing provisions, the accused shall be required to appear at all acts of the proceedings as soon as he is requested to do so.
---------- (1)<L 2014-04-25/23, art. 163, 023; Effective: 24-05-2014>

CHAPITRE VI. - On the effect of the settlement of the proceedings on the measures of deprivation of liberty.

Art. 26.§ 1. In the event of an order of dismissal or an order of referral to the police court, the accused shall be released (unless the accused is referred for an act constituting a violation of Articles 418 and 419 of the Penal Code or Articles 33, § 2, and 36 of the Act of March 16, 1968, relating to the traffic police). <L 1994-07-11/33, art. 15, 1°, 003; Effective: 01-01-1995>
§ 2. If the council chamber refers the accused to the correctional court (or to the police court) because of an act that should not result in a sentence of imprisonment equal to or greater than one year, the accused shall be released, on the condition that he or she appears, on a fixed date, before the competent court. <L 1994-07-11/33, art. 15, 2°, 003; Effective: 01-01-1995>
§ 3. When, in settling the proceedings, the council chamber refers the accused to the correctional court [or to the police court] because of a fact on which the preventive detention is based and which is legally punishable by imprisonment in excess of the duration of the preventive detention already served, [it may release the accused or decide, by a separate and reasoned order in accordance with Article 16, §§ 1 and 5, first and second paragraphs, that the accused shall remain in detention, or that he shall be released with the imposition of one or more conditions, as provided in Article 35]. <L 1994-07-11/33, art. 15, 3°, 003; Effective: 01-01-1995> <L %1996-08-04/04, art. 2, 004; Effective: 27-09-1996>

[2 If the accused is in custody under electronic surveillance, the council chamber may, by reasoned decision, maintain the preventive detention under electronic surveillance.]2
The court may, by reasoned decision, maintain the remand in custody under electronic surveillance; § 4 In cases where the order of the council chamber results in the release of the accused, the public prosecutor may, within twenty-four hours, appeal against the decision insofar as it relates to the remand in custody; in the cases referred to in §§ 1 and 2 above, he or she may do so only after appealing against the decision insofar as it relates to the settlement of the proceedings.
The accused shall remain in custody until the expiry of the said period. The appeal shall have suspensive effect.
§ (b) The court of first instance may, in the cases provided for in Articles 133 and 231 of the Code of Criminal Procedure, issue an order for committal to prison and prescribe its immediate execution.
These orders shall contain the name of the accused, his description, his domicile, if known, the statement of the fact and the nature [?1 of the offence] .1.

When the order of committal is issued against an accused person who is being prosecuted for a crime, the provisions of article 16, §§ 1 and 5, first and second paragraphs, are observed.
The orders of the Council Chamber and the Indictments Chamber are made by a majority of the judges. [2 Where applicable, paragraph 4 shall apply.]2
---------- (1)<L 2009-12-21/14, art. 232, 018; Effective: 21-01-2010> ()2<L 2016-02-05/11, art. 132, 025;
Effective: 29-02-2016> (NOTE: by its judgment no. 148/2017 of 21-12-2017 (M.B. 12-01-2018, p. 1393), the Constitutional Court annulled Article 132, 1°)

Art. 27(1) When the preventive detention has not ended and the investigation is closed or Article 133 of the Code of Criminal Investigation and Article 26, § 5 have been applied, provisional release may be granted on application to:
1° the criminal court (or the police court) seized, from the committal order until the judgment; <L 1994- 07-11/33, art. 16, 1°, 003; In force: 01-01-1995>
2° [to the correctional court, sitting as an appellate court or] to the chamber of correctional appeals, from the appeal until the appeal decision; <L 1994-07-11/33, art. 16, 2°, 003; In force: 01-01-1995> 3° to the indictment division:
a) [from the order issued in accordance with Article 133 of the Code of Criminal Procedure until the assize court has made a final decision;] <L 2000-06-30/47, art. 42, 008; In force: 27-03-2001>
b) during the proceedings for the settlement of judges, when the accused is detained in execution of an order of committal issued by the council chamber; [
c) during the proceedings before the indictment chamber provided for in articles 135, 235 and 235bis of the Code of Criminal Investigation] <L 1998-03-12/39, art. 41, 005; In force: 1998-10-02>
4° [...] <L 2000-06-30/47, art. 42, 008; In force: 27-03-2001>
5° to the indictment division, from the appeal in cassation until the judgment.
§ (2) Provisional release may also be requested by a person who has been deprived of his liberty by virtue of an order for immediate arrest issued after conviction, provided that an appeal, opposition or cassation appeal has been lodged against the conviction decision itself. It may be requested under the same conditions by a person who is deprived of his liberty on the basis of a conviction in absentia, against which opposition is filed within the extraordinary time limit.
[1 § 2bis. Provisional release may also be requested by one who is deprived of his liberty at the time of his internment or whose immediate incarceration was ordered on the occasion of the internment, in

accordance with Article 10 of the Act of May 5, 2014 on internment [1 ...] 1 provided that an appeal, opposition or cassation appeal has been filed against the internment decision itself].1
§ 3 The petition shall be filed at the registry of the court called upon to rule and shall be entered therein in the register referred to in Article 21, § 2.

The petition shall be decided in chambers within five days of its filing, the public prosecutor, the person concerned and his counsel being heard, the latter being notified in accordance with Article 21, § 2.
If the petition is not decided within the five-day period, which may be extended in accordance with Article 32, the person concerned shall be released.
Reasons shall be given for the decision to reject the application, in accordance with the provisions of Article 16, § 5, first and second paragraphs.
[2 § 4 In the event that the request for provisional release is rejected, a new request may be filed only after the expiration of a period of one month from the rejection].2
---------- (1)<L 2014-05-05/11, s. 130, 024; Effective: 01-10-2016 (L 2016-05-04/03, s. 250) amended by
<L 2016-05-04/03, s. 241> . Transitional provisions s. 134 and 135> ()2<L 2016-02-05/11, s. 133, 025;
Effective: 02-29-2016>

Art. 28.§ 1. The investigating judge may issue an arrest warrant in any case against the accused left or released:
1° if the accused remains in default of reporting for an act of the proceedings;
2° if new and serious circumstances make this measure necessary. In the latter case, the warrant shall state the new and serious circumstances that justify the arrest.
The provisions of Chapters III, IV and V shall apply.
§ (a) the person who has been convicted of a criminal offence is not liable to prosecution for the offence; or1 § 1, 1° and 2°]1.
---------- (1)<L 2016-02-05/11, s. 134, 025; Effective: 29-02-2016>

Art. 28/1. [1 The court or tribunal, as the case may be, may issue an arrest warrant in the event that the suspect is unable to appear in person due to detention abroad and has himself or herself requested the opportunity to be present in person].1
---------- (1)<Inserted by L 2018-07-11/02, s. 12, 032; Effective: 07-28-2018>

Art. 29.The person released on bail shall indicate the address to which summonses and services required by the investigation [1 and the criminal trial]1 may be made to him at a later date. Until such time as the person concerned sends notice of the change by registered letter to the Public Prosecutor [1 or is registered at a new address in the National Registry]1, summonses and service shall validly take place at that location.
---------- (1)<L 2016-02-05/11, s. 135, 025; Effective: 02-29-2016>

CHAPITRE VII. - Appeal.

Art. 30. (§ 1. The accused, the defendant and the public prosecutor may appeal to the indictment division against the orders of the council chamber made in the cases provided for in articles 21, 22 (...) [...].2 ...]2 and 28. In the case of a judgment of the correctional court or the police court, rendered in accordance with article 27, the appeal shall be decided, as the case may be, by the chamber of

correctional appeals or by the correctional court sitting in appellate jurisdiction). <L 1994-07-11/33, art. 17, 1°, 003; In force: 01-01-1995> <L 2005-05-31/32, art. 12, 014; In force: 26-06-2005>
§ 2. The appeal must be lodged within a period of twenty-four hours, which shall run against the Public Prosecutor's Office from the day of the decision, and against the accused, the defendant or the accused, from the day on which he is served with the decision in the forms provided for in Article 18.
This service is made within twenty-four hours. The document of service contains a warning to the accused of the right to appeal and the time limit within which it must be exercised.
The declaration of appeal is made at the clerk's office of the court that rendered the contested decision, and is recorded in the register of appeals in correctional matters.
The documents are, if necessary, transmitted by the public prosecutor to the public prosecutor at the court of appeal.
The counsel for the accused shall be notified by the clerk (of the appeal court). <L 1994-07-11/33, art. 17, 2°, 003; Effective: 01-01-1995>
§ 3. The appeal shall be decided all cases ceased, [1 the public prosecutor and the accused, the defendant or the accused and/or his counsel heard]1. [3 The indictment division may decide that the accused shall appear by videoconference.]3
The accused shall remain in custody until the appeal is decided, provided that the decision is made within fifteen days of the declaration of appeal; the accused shall be released if the decision is not made within that time.
[The rules of article 23, paragraphs 1 to 4, apply to proceedings before the indictment division].1
§ The appellate court shall make its decision taking into account the circumstances of the case at the time of its decision. If the indictment division, in the cases of Articles 21, 22 [...] [...], decides that the case is not admissible, it shall be deemed to have been decided by the court of appeal.2 ...]2 and 28, decides to maintain pre-trial detention, the judgment shall constitute a title of deprivation of liberty for [one month] from the decision [...].2 if it relates to the first or second order of the council chamber or for two months from the decision if it relates to a subsequent order]2. <L 2005-05-31/32, s. 12, 014; Effective: 26-06-2005> [
If, as a result of the application of Articles 135 and 235 of the Code of Criminal Investigation, the indictment division refers the matter to an investigating magistrate and the accused is detained, the indictment division shall rule on the preventive detention by a separate ruling which, if the preventive detention is maintained, shall form a title of detention for [2 two months]2.] <L 1998-03-12/39, art. 42, 005; Effective: 1998-10-02>

---------- ()1<L 2012-12-27/29, art. 19, 022; Effective: 10-02-2013> ()2<L 2016-02-05/11, art. 136, 025;
Effective: 01-07-2016. Transitional provision: art. 140> ()<3L 2016-01-29/08, art. 8, 026; In force: indefinite and no later than 01-09-2017, (NOTE: by its ruling no. 76/2018 of 21-06-2018 (M.B. 02-07- 2018, p. 53419), the Constitutional Court annulled article 8)>

CHAPITRE VIII. - From the appeal in cassation.

Art. 31.§ 1 The judgments [and rulings] by which preventive detention is maintained, shall be served on the accused within twenty-four hours, in the forms provided for in Article 18. <L 1994-07-11/33, art. 18, 1°, 003; Effective: 01-01-1995>
§ 2. [1 These decisions are not subject to any immediate appeal in cassation, with the exception of judgments rendered by the Indictments Division on the appeal filed against the decisions referred to in

Article 21, § 1, paragraph 2, which]1 may be appealed to the Supreme Court within a period of twenty- four hours from the day on which the accused is served with the decision.
§ The file shall be sent to the clerk's office of the Court of Cassation within twenty-four hours of the appeal. The grounds of cassation may be proposed either in the notice of appeal, or in a written document filed on that occasion, or in a memorandum which must reach the clerk's office of the Court of Cassation no later than the fifth day after the date of appeal.
The Court of Cassation shall rule within fifteen days of the date of the appeal, with the accused remaining in custody. The accused shall be released if the judgment is not handed down within this period.
§ The court of appeal may, however, order the release of the accused if the judgment is not rendered within this time limit, and the accused is released if the judgment is not rendered within this time limit. He is released if the ruling of the indictment division is not handed down within this time limit.
For the rest, the provisions of Article 30 §§ 3 and 4 apply.
If the remand court upholds the pre-trial detention, its decision shall constitute a title to detention for [one month] from the decision. <L 2005-05-31/32, art. 13, 014; Effective: 26-06-2005> [
§ 5. If the appeal in cassation is dismissed, the council chamber shall rule within fifteen days from the delivery of the judgment of the Court of Cassation, with the accused remaining in custody in the meantime. He shall be released if the order of the council chamber is not rendered within that period].
<L 1990-11-28/30, art. 1, 002; Effective: 01-12-1990>
---------- ()<1L 2016-02-05/11, art. 137, 025; Effective: 29-02-2016> (NOTE: by its ruling no. 148/2017 of 21-12-2017 (M.B. 12-01-2018, p. 1393), the Constitutional Court annulled article 137)

CHAPITRE IX. - Of the extension of time limits, release, immediate arrest and arrest warrant in absentia.

Art. 32The time limits provided for in articles 21, § 1, [1 22, 24bis, § 3, 25]1§ 2, 27, § 3, 30, § 3, and 31, § 3, shall be suspended during the time of the surrender granted at the request of the accused or his counsel.
---------- (1)<L 2016-02-05/11, s. 138, 025; Effective: 02-29-2016>

Art. 32bis.<inserted by L 2003-04-10/60, art. 52; Effective: 01-01-2004> When the arrest warrant is to be executed in accordance with Article 19, § 1bis, the investigating judge may extend the time limit in Article 21 by five days in case of force majeure. This extension must take place within the period of validity of the arrest warrant issued, on pain of nullity.
The circumstances that justify this course of action must be expressly mentioned in the arrest warrant that the extension concerns. There is no possibility of appeal against this decision.

Art. 33(b) The court may, in accordance with the law of the country in which the defendant is held, order the release of the defendant or the defendant's family members, if the defendant has been convicted of an offence.3 or sentenced to electronic monitoring, work, independent probation or only a fine, or if a simple conviction has been pronounced]3or if he/she benefits from the suspension of the pronouncement of the sentence (, or if he/she is not sentenced to an effective main prison term within seven days from the issuance of the arrest warrant for immediate appearance). (The immediate release of the accused or defendant shall entail, with respect to him, the prohibition of the use of any means of coercion). <L 2000-03-28/31, art. 8, 007; In force: 2000-04-30> <L 2002-08-02/66, art. 2, 010; In force:

15-09-2002>
If he is sentenced to unsuspended principal imprisonment, he shall be released, notwithstanding appeal, as soon as the detention undergone equals the duration of the principal imprisonment pronounced; in other cases, he shall remain in detention insofar as the sentence is pronounced on account of the fact that prompted the preventive detention.
§ (2) When sentencing the accused or the defendant to a principal imprisonment [2 of three years or a more serious, unsuspended sentence, and for convictions for acts referred to in Title Iter of Book II and in Articles 371/1 to 387 of the Criminal Code, to a principal imprisonment of one year or a more serious, unsuspended sentence,]2 the courts and tribunals may order his immediate arrest, upon request of the public prosecutor, if there is reason to fear that the accused or the defendant will attempt to evade the execution of the sentence [4 or will commit further crimes] .4. This decision must specify the circumstances of the case that specifically justify this fear.
If, upon opposition or appeal, the sentence is reduced [2 to less than three years and for convictions for acts referred to in Title Iter of Book II and in articles 371/1 to 387 of the Criminal

Code, to less than one year]2the court or tribunal may, unanimously, at the request of the Public Prosecutor's Office, with the accused and his counsel heard if they are present, maintain the imprisonment.
Decisions rendered pursuant to this paragraph shall be the subject of a separate debate immediately after the sentence has been pronounced. The accused and his counsel shall be heard if they are present. These decisions are not subject to appeal or opposition. [1 They are subject to appeal in cassation provided that the appeal is also lodged against the sentencing decision].1
---------- (1)<L 2016-02-05/11, art. 139, 025; Effective: 29-02-2016> ()2<L 2017-12-21/19, art. 7, 031;
Effective: 21-01-2018> ()3<L 2019-05-05/10, art. 117, 033; Effective: 03-06-2019> ()4<L 2019-11-29/06,
art. 2, 035; Effective: 21-12-2019>

Art. 34.§ 1. Where the accused is a fugitive or a fugitive from justice or where extradition is to be sought, the investigating judge may issue a warrant for arrest in absentia.
§ (b) The court may order the execution of a warrant for the arrest of a person who is a fugitive or a kidnapper, or who is to be extradited, by the examining magistrate. If the investigating judge considers that the detention should be maintained, he may issue a new arrest warrant to which the provisions of Chapters III, IV and V shall apply.
This new arrest warrant shall be served on the accused within [?1 forty-eight]1 hours from the service on Belgian territory (or on foreign territory where a part of the army is stationed) of the default arrest warrant, which must take place within [1 forty-eight]1 hours of the arrival or deprivation of liberty on Belgian soil. <L 2003-04-10/60, art. 53, 012; Effective: 01-01-2004>
§ 3. The accused or defendant may request release only in accordance with Article 27.
---------- (1)<L 2017-10-31/06, art. 5, 030; Effective: 11-29-2017>

CHAPITRE X. - Of conditional release and conditional release.

Art. 35.§ 1. In cases where preventive detention may be ordered or maintained under the conditions provided for in Article 16, § 1, the investigating judge may, ex officio, at the request of the Public Prosecutor's Office or at the request of the accused, release the person concerned with one or more conditions, for such time as he or she may determine and for a maximum of three months.
[1 The court may prohibit the person from engaging in any activity that would bring him or her into

contact with minors].1
[In order to determine the conditions, the examining magistrate may have the section of the Service des maisons de Justice of the SPF Justice of the judicial district of the place of residence of the person concerned carry out a social investigation or a brief information report. The King

shall specify the procedures for the summary information report and the social investigation]. <L 2006-12-27/33, art. 48, 1°, 016; Effective: 07-01-2007> [
These reports and investigations may only contain relevant elements likely to enlighten the authority that addressed the request to the service of the houses of justice on the appropriateness of the measure or the envisaged sentence]. <L 2006-12-27/33, art. 48, 1°, 016; Effective: 07-01-2007>
§ 2. All decisions that impose one or more conditions on the accused or defendant shall state the reasons for the decision, in accordance with the provisions of Article 16, § 5, first and second paragraphs.
§ 3 The judge shall determine the conditions to be imposed. They must refer to [...3 one of the reasons stated in article 16, § 1, paragraph 4,]3 and be adapted to that reason, taking into account the circumstances of the case.
§ 4 The judge can also require the prior and full payment of a security, the amount of which he or she determines.
The judge may give reasons for his decision, in particular on the basis of serious suspicions that funds or assets derived from the offence have been placed abroad or concealed.
The bond is paid to the Caisse des dépôts et consignations, and the Public Prosecutor's Office, in view of the receipt, enforces the release order or ruling.
Notwithstanding the time limit set in Article 35, § 1, and without prejudice to the application of Article 36, the bond is returned if the accused has presented himself for all the acts of the proceedings and for the execution of the judgment. If the sentence is conditional, it is sufficient that the accused has appeared for all the acts of the proceedings.
The bond is attributed to the State as soon as the accused, without legitimate excuse, has failed to appear for any act of the proceedings or for the execution of the judgment. [2 Nevertheless, in case of dismissal of the proceedings, acquittal, discharge, conditional conviction or prescription of the public action, the judgment or ruling shall order the restitution of the money, except for the extraordinary costs to which the failure to appear may have given rise].2
The failure of the accused to appear for an act of the proceedings is recorded in the judgment or order of conviction, which at the same time declares that the bond is forfeited to the State.
The failure of the convicted person to appear for the execution of the judgment is established, upon the request of the public prosecutor, by the court that pronounced the sentence. The judgment shall at the same time declare that the bond is forfeited to the State.
§ (5) The investigating judge and the investigating or trial courts have the same powers when an accused person is released.
(b) The court shall have the power to order the release of the accused or the defendant from custody, and shall have the same powers when the accused or the defendant is released from custody. This choice shall be subject to the agreement of the judge or court.
The said person or service that accepts the assignment, shall send to the judge or court [and to the justice assistant of the Service of the Houses of Justice of the FPS Justice who is in charge of support and control], within one month after the release, and each time that person or service

considers it useful, or at the invitation of the judge or court, and at least once every two months, a follow-up report on the

guidance or treatment. <L 2006-12-27/33, art. 48, 2°, 016; Effective: 07-01-2007>
The report referred to in paragraph 2 shall cover the following: the actual attendance of the person concerned at the proposed consultations, unjustified absences, unilateral termination of the guidance or treatment by the person concerned, difficulties that have arisen in the implementation thereof, and situations involving a serious risk to third parties.
The competent service or the competent person is obliged to inform the judge or the court of the termination of the guidance or treatment]. <L 2000-11-28/35, art. 46, 009; Effective: 01-04-2001>
---------- ()<1L 2009-07-31/20, art. 8, 017; Effective: 30-06-2009> ()2<L 2009-12-30/14, art. 14, 019;
Effective: 25-01-2010> ()3<L 2012-12-27/29, art. 9, 022; Effective: 01-01-2014>

Art. 36. § 1. In the course of the judicial investigation, the investigating judge may, on his own motion or at the request of the public prosecutor, impose one or more new conditions, or withdraw, modify or extend, in whole or in part, conditions already imposed.
[The decision to extend the conditions shall be taken before the expiration of the time determined by the investigating judge in accordance with Article 35, § 1. Otherwise, the conditions shall lapse. Such conditions may be extended for such time as he shall determine and for not more than three months].
<L 2005-05-31/32, art. 14, 014; Effective: 26-06-2005>
He may waive compliance with all or some of the conditions.
The accused may request the withdrawal or modification of all or part of the conditions imposed; he or she may also request to be exempted from the conditions or some of them.
If the council chamber does not decide on the request of the accused within five days, the measures ordered lapse.
§ If, in deciding on the proceedings, the Council Chamber refers the accused to the criminal court [or to the police court] because of a fact that justifies the application of a condition referred to in Article 35, it may, by a separate order, with reasons, in accordance with Article 16, §§ 1 and 5, first and second paragraphs, decide to maintain or withdraw the condition. It may not impose new ones. <L 1994-07- 11/33, art. 19, 003; In force: 01-01-1995>
§ 3. After the judicial investigation has been completed, and at the request of the public prosecutor or at the request of the accused, the trial court hearing the case may extend the existing conditions for a maximum term of three months and at the latest until the judgment. It may also withdraw them or dispense with the observance of some of them. It may not impose new conditions.

Art. 37The decisions taken in application of articles 35 and 36 shall be served on the parties in the manner provided for in matters of preventive detention and shall be subject to the same appeals as the decisions taken in this matter.
[1 Decisions taken in application of article 35, § 1, paragraph 2, as well as decisions to withdraw, modify or extend these decisions, shall be transmitted [2 to the Central Criminal Records Office and]2 to the police department of the municipality in which the person concerned has his domicile or residence. [2
...]2.]1

---------- (1)<L 2009-07-31/20, s. 9, 017; Effective: 06-30-2009> ()2<L 2016-12-25/14, s. 106, 029;
Effective: 09-01-2017>

Art. 38. § 1 [For assistance and verification relating to compliance with the conditions, the Justice

House Service of the FPS Justice may be called upon, with compliance with the prohibition conditions being monitored by the police services. In the context of monitoring compliance with the conditions, the justice assistant of the FPS Justice House Service, appointed for this purpose, will draw up a report at the latest 15 days before the end of the term of the conditional release measure. An intermediate report may be drawn up at any time, in the event of non-compliance with the conditions or if a difficulty in relation to compliance with the conditions appears]. <L 2006-12-27/33, art. 49, 016; Effective: 07-01- 2007>
Any person who intervenes in the monitoring of the observance of conditions is bound by professional secrecy.
[Monitoring of compliance with guidance or treatment shall be conducted in accordance with Article 35, § 6.] <L 2000-11-28/35, art. 47, 009; Effective: 01-04-2001>
§ 2. When the conditions are not observed, the investigating judge, the court or the court of appeal, as the case may be, may issue a warrant for arrest, under the conditions provided for in Article 28.

Art. 38bis. <inserted by L 2006-12-27/33, art. 50; Effective: 07-01-2007> At the federal and local levels, consultation structures relating to the application of this law are created. The mission of these consultation structures is to bring together on a regular basis the bodies concerned by the implementation of this law in order to evaluate their collaboration. The King determines the composition and functioning of these consultation structures.

TITRE II. - Final, amending and repealing provisions.

Art. 39. <Amending provision of s. 128 of CIC 1808-11-17/30>

Art. 40. <Amending provision of s. 129, 1st Paragraph, of CIC 1808-11-17/30>

Art. 41. <Amending provision of art. 133, 1st Paragraph, of CIC 1808-11-17/30>

Art. 42. <Amending provision of s. 135 of CIC 1808-11-17/30>

Art. 43. Article 24 of the Act of April 20, 1874, on preventive detention, as amended by the decree-law of February 1, 1947, and by the Acts of March 27, 1969, and June 18, 1985, forms Article 89bis of the Code of Criminal Procedure.

Art. 44Article 25 of the same law, amended by the law of July 4, 1989, forms article 90bis of the Code of Criminal Procedure, under the heading "§ 5 - Corporal exportation", inserted in chapter VI of book I of the same Code.

Art. 45. Article 26 of the same law forms article 136bis of the same Code.

Art. 46.The following amendments are made to article 1 of the law of April 9, 1930, on social defense against abnormals and habitual offenders, as amended by the law of July 1, 1964:
(1) in paragraph 2, the words "notwithstanding the provisions of section 5 of the Act of April 20, 1874" are deleted;

(2) in paragraph 5, the words "in the manner provided for in section 4 of the Act of April 20, 1874" are replaced by the words "in the manner provided for in section 21 of the Act of July 20, 1990, relating to preventive detention".

Art. 47. This Act does not amend the laws relating to the repression of fraud in customs and excise matters.

Art. 48. (1) (a) <Repeal provision of s. 91-112 of CIC 1808-11-17/30>
(b) <Repeal provision of s. 130, Subd. 2, of CIC 1808-11-17/30>
(c) <Repeal provision of s. 131 of CIC 1808-11-17/30>
d) <Repealing provision of art. 134 of CIC 1808-11-17/30>
e) <Repealing provision of art. 232 of CIC 1808-12-09/30>
2° <Repealing provision of art. 1 to 23 of LDP 1874-04-20/30> The
title of the law of April 20, 1874, relating to preventive detention is replaced by the following title: "Law of March 13, 1973, relating to compensation for inoperative preventive detention".

Art. 49. This law comes into force on the first day of the fourth month following its publication in the Belgian Official Gazette.

Section Two: Plea Bargaining:

BRADY V. UNITED STATES

397 U.S. 742 * | 90 S. Ct. 1463 ** | 25 L. Ed. 2d 747 *** | 1970 U.S. LEXIS 45 ****

[*743] [***753] [**1466] MR. JUSTICE WHITE delivered the opinion of the Court.
In 1959, petitioner was charged with kidnaping in violation of 18 U. S. C. § 1201 (a). Since the indictment charged that the victim of the kidnaping was not liberated unharmed, petitioner faced a maximum penalty of death if the verdict of the jury should so recommend. Petitioner, represented by competent counsel throughout, first elected to plead not guilty. Apparently because the trial judge was unwilling to try the case without a jury, petitioner made no serious attempt to reduce the possibility of a death penalty by waiving a jury trial. Upon learning that his codefendant, who had confessed to the authorities, would plead guilty and be available to testify against him, petitioner changed his plea to guilty. His plea was accepted after the trial judge twice questioned him as to the voluntariness of his plea. [*744] [****4] Petitioner [***754] was sentenced to 50 years' imprisonment, later reduced to 30.

[****5] In 1967, petitioner sought relief under 28 U. S. C. § 2255, claiming that his plea of guilty was not voluntarily given because § 1201 (a) operated to coerce his plea, because his counsel exerted impermissible pressure upon him, and because his plea was induced by representations with respect to reduction of sentence and clemency. It was also alleged that the [**1467] trial judge had not fully complied with Rule 11 of the Federal Rules of Criminal Procedure.

[****6] [*745] After a hearing, the District Court for the District of New Mexico denied relief. According to the District Court's findings, petitioner's counsel did not put impermissible pressure on petitioner to plead guilty and no representations were made with respect to a reduced sentence or clemency. The court held that § 1201 (a) was constitutional and found that petitioner decided to plead guilty when he learned that his codefendant was going to plead guilty: petitioner pleaded guilty "by reason of other matters and not by reason of the statute" or because of any acts of the trial judge. The court concluded that "the plea was voluntarily and knowingly made."

[1A]The Court of Appeals for the Tenth Circuit affirmed, determining that the District Court's findings were supported by substantial evidence and specifically approving the finding that petitioner's plea of guilty was voluntary. 404 F.2d 601 (1968). We granted certiorari, 395 U.S. 976 (1969), to consider the claim that the Court of Appeals was in error in not reaching a contrary result on the authority of this [****7] Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968). We affirm.

[***755] I

In *United States v. Jackson, supra*, the defendants were indicted under § 1201 (a). The District Court dismissed the § 1201 (a) count of the indictment, holding [*746] the statute unconstitutional because it permitted imposition of the death sentence only upon a jury's recommendation and thereby made the risk of death the price of a jury trial. This Court held the statute valid, except for the death penalty provision; with respect to the latter, the Court agreed with the trial court "that the death penalty provision . . . imposes an impermissible burden upon the exercise of a constitutional right . . . ." 390 U.S., at 572. The problem was to determine "whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury." 390 U.S., at 581. The inevitable effect of the provision was said to be to discourage assertion of the [**1468] Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment [****8] right to demand a jury trial. Because the legitimate goal of limiting the death penalty to cases in which a jury recommends it could be achieved without penalizing those defendants who plead not guilty and elect a jury trial, the death penalty provision "needlessly penalize[d] the assertion of a constitutional right," 390 U.S., at 583, and was therefore unconstitutional.

[2]Since the "inevitable effect" of the death penalty provision of § 1201 (a) was said by the Court to be the needless encouragement of pleas of guilty and waivers of jury trial, Brady contends that Jackson requires the invalidation of every plea of guilty entered under that section, at least when the fear of death is shown to have been a factor in the plea. Petitioner, however, has read far too much into the Jackson opinion.

The Court made it clear in *Jackson* that it was not holding § 1201 (a) inherently coercive of guilty pleas: "the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that [*747] every defendant [****9] who enters a guilty plea to a charge under the Act does so involuntarily." 390 U.S., at 583. Cited in support of this statement, 390 U.S., at 583 n. 25, was Laboy v. New Jersey, 266 F.Supp. 581 (D. C. N. J. 1967), where a plea of guilty (non vult) under a similar statute was sustained as voluntary in spite of the fact, as found by the District Court, that the defendant was greatly upset by the possibility of receiving the death penalty.

Moreover, the Court in *Jackson* rejected a suggestion that the death penalty provision of § 1201 (a) be saved by prohibiting in capital kidnaping cases all guilty pleas and jury waivers, "however clear [the defendants'] guilt and however strong their desire to acknowledge it in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings." "That jury waivers and guilty pleas may occasionally be rejected" was no ground for automatically rejecting all guilty pleas under the statute, for such a rule "would rob the criminal process of much of its flexibility." 390 U.S., at 584.

[***756] [3A] [****10] Plainly, it seems to us, Jackson ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. Jackson prohibits the imposition of the death penalty under § 1201 (a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both "voluntary" and "intelligent." See Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[3B]

[****11]

[*748] [4]
[5] [6] [7]That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do [**1469] so -- hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial -- a waiver of his right to trial before a jury or a judge. [****12] Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. On neither score was Brady's plea of guilty invalid.

[****13] [*749] II

[***757] [8]The trial judge in 1959 found the plea voluntary before accepting it; the District Court in 1968, after an evidentiary hearing, found that the plea was voluntarily made; the Court of Appeals specifically approved the finding of voluntariness. We see no reason on this record to disturb the judgment of those courts. Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner. It was this development that the District Court found to have triggered Brady's guilty plea.

[9]The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it. Cf. Haynes v. Washington, 373 U.S. 503, 513 (1963); Leyra v. Denno, 347 U.S. 556, 558 (1954). One of these circumstances was the possibility [****14] of a heavier sentence following a guilty verdict after a trial. It may be that Brady, faced with a strong

case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty. 7 But [*750] even if we assume that Brady [**1470] would not have pleaded guilty except for the death penalty provision of § 1201 (a), this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.

[10] [****15] The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.

[11] [12]Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental [****16] coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case; nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty. Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly [***758] higher penalty for [*751] the crime charged if a conviction is obtained after the State is put to its proof.

[13]Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is [****17] advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, 8 as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather

than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

[****18] The [**1471] issue we deal with is inherent in the criminal law and its administration because guilty pleas are not [*752] constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious -- his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages -- the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. 9 It is this mutuality of advantage that perhaps explains the fact that [****19] at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, 10 a great many of them no [***759] doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.

[14]Of course, that the prevalence of guilty pleas is explainable does not necessarily [****20] validate those pleas or [*753] the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

[15]A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far.

[16] *Bram v. United States, 168 U.S. 532 (1897)*, [****21] held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be "'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" 168 U.S., at 542-543. More recently, *Malloy v. Hogan, 378 U.S. 1 (1964)*, carried forward the Bram definition of compulsion

in the course of holding applicable to the States the Fifth Amendment privilege [**1472] against compelled self-incrimination.

[****22] [*754] Bram is not inconsistent with our holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial. Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But Bram and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more than *Miranda v. Arizona, 384 U.S. 436 (1966)*, held that the possibly coercive atmosphere of the police station could not be counteracted by the [***760] presence of counsel or other safeguards.
[****23] Brady's situation bears no resemblance to Bram's. Brady first pleaded not guilty; prior to changing his plea to guilty he was subjected to no threats or promises in face-to-face encounters with the authorities. He had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage. His plea of guilty was entered in open court and before a judge obviously sensitive to [*755] the requirements of the law with respect to guilty pleas. Brady's plea, unlike Bram's confession, was voluntary.

[17] [18]The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:

"'LBA] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments [****24] made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).' 242 F.2d at page 115."

Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.

[****25] [*756] III

[**1473] [19]The record before us also supports the conclusion that Brady's plea was intelligently made. He was advised by competent counsel, he was made aware of the nature of the charge against him, and there [***761] was nothing to indicate that he was incompetent or

otherwise not in control of his mental faculties; once his confederate had pleaded guilty and became available to testify, he chose to plead guilty, perhaps to ensure that he would face no more than life imprisonment or a term of years. Brady was aware of precisely what he was doing when he admitted that he had kidnaped the victim and had not released her unharmed.

It is true that Brady's counsel advised him that § 1201 (a) empowered the jury to impose the death penalty and that nine years later in *United States v. Jackson, supra*, the Court held that the jury had no such power as long as the judge could impose only a lesser penalty if trial was to the court or there was a plea of guilty. But these facts do not require us to set aside Brady's conviction.

[20]

[****26] [21][22][23]Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly [*757] sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent [****27] misrepresentation or other impermissible conduct by state agents, cf. *Von Moltke v. Gillies, 332 U.S. 708 (1948)*, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

[24]The fact that Brady did not anticipate *United States v. Jackson, supra,* does not impugn the truth or reliability [****28] [**1474] of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are [*758] necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions [***762] against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves [****29] that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged. In the case before us, nothing in the record impeaches Brady's plea or suggests that his admissions in open court were anything but the truth.
[1B]

Although Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful.

Affirmed.

MR. JUSTICE BLACK, while adhering to his belief that *United States v. Jackson, 390 U.S. 570*, was wrongly decided, concurs in the judgment and in substantially all of the opinion in this case.

MCCARTHY V. UNITED STATES

394 U.S. 459 * | 89 S. Ct. 1166 ** | 22 L. Ed. 2d 418 *** | 1969 U.S. LEXIS 3280 **** | 69-1 U.S. Tax Cas. (CCH) P9312 | 23 A.F.T.R.2d (RIA) 1048

[*460] [***422] [**1168] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case involves the procedure that must be followed under Rule 11 of the Federal Rules of Criminal Procedure before a United States District Court [****5] may accept a guilty plea and the remedy for a failure to follow that procedure.

On April 1, 1966, petitioner was indicted on three counts in the United States District Court for the Northern District of Illinois for violating § 7201 of the Internal Revenue Code. He was charged with "wilfully and knowingly" attempting to evade tax payments of $ 928.74 for 1959 (count 1), $ 5,143.70 for 1960 (count 2), and $ 1,207.12 for 1961 (count 3). At his arraignment

[*461] two weeks later, petitioner, who was represented by retained counsel, pleaded not guilty to each count. The court scheduled his trial for June 30; but on June 29, it granted the Government's motion to postpone the trial because of petitioner's illness. The trial was rescheduled for July 15.

On that day, after informing the court that he had "advised . . . [petitioner] of the consequences of a plea," defense counsel moved to withdraw petitioner's plea of not guilty to count 2 and to enter a plea of guilty to that count. The District Judge asked petitioner if he desired to plead guilty and if he understood that such a plea waived his right to a jury trial and subjected him to imprisonment [****6] for as long as five years and to a fine as high as $ 10,000. Petitioner stated that he understood these consequences and wanted to plead guilty. The Government consented to this plea change and informed the court that if petitioner's plea of guilty to count 2 were accepted, the Government would move to dismiss counts 1 and 3. Before the plea was accepted, however, the prosecutor asked the judge to inquire [***423] whether it had been induced by any threats or promises. In response to the judge's inquiry, petitioner replied that his plea was not the product of either. He stated that it was entered of his "own volition." The court ordered a presentence investigation and continued the case to September 14, 1966.

At the commencement of the sentencing hearing on September 14, petitioner asserted that his failure to pay taxes was "not deliberate" and that they would have been paid if he had not been in poor health. The prosecutor [****7] stated that the "prime consideration" for the Government's agreement to move to dismiss counts 1 and 3 was petitioner's promise to pay all taxes, penalties, and [*462] interest. The prosecutor then requested the court to refer expressly to this agreement. After noting that petitioner possessed sufficient attachable assets to meet these obligations, the court imposed a sentence of one year and a fine of $ 2,500. Petitioner's counsel immediately moved to suspend the sentence. He emphasized that petitioner, who was then 65 years of age, was in poor health and contended that his failure to pay his taxes had resulted from his "neglectful" and "inadvertent" method of bookkeeping during a period when he had been suffering [**1169] from a very serious drinking problem. Consequently, asserted petitioner's counsel, "there was never any disposition to deprive the United States of its due." The judge, however, after indicating he had examined the presentence report, stated his opinion that "the manner in which [petitioner's] books were kept was not inadvertent." He declined, therefore, to suspend petitioner's sentence.

[****8] On appeal to the United States Court of Appeals for the Seventh Circuit, petitioner argued that his plea should be set aside because it had been accepted in violation of Rule 11 of the Federal Rules of Criminal Procedure. Specifically, petitioner contended (1) that the District Court had accepted his plea "without first addressing [him] . . . personally and determining that the plea [was] . . . made voluntarily with understanding of the nature of the charge . . . ," 3 [****9] and (2) that the court had entered judgment without determining "that there [was] . . . a

factual basis for the plea." 4 [*463] In affirming petitioner's conviction, 5 the Court of Appeals held that the District Judge had complied with Rule 11. The court implied that the Rule did not require the District Judge to address petitioner personally to determine if he understood the nature of the charge. The court also concluded [***424] that the colloquy at the sentencing hearing demonstrated that the judge had satisfied himself by an examination of the presentence report that the plea had a factual basis.

[****10]

[1][2][3]Because of the importance of the proper construction of Rule 11 to the administration of criminal law in the federal courts, [****11] and because of a conflict in the courts of appeals over the effect of a district court's failure to follow the provisions of the Rule, 8 we granted certiorari. 390 U.S. 1038 (1968). We agree with petitioner that the District Judge did not comply with Rule 11 in this case; and in reversing the Court of Appeals, we hold that a defendant is entitled to plead anew if a United [*464] States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11. This decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts; we do not reach any of the constitutional arguments petitioner urges as additional grounds for reversal.

I.

[**1170] [4A]Rule 11 expressly directs the district judge to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea. At oral argument, however, counsel for the Government repeatedly conceded that the judge did not personally inquire whether petitioner understood the nature of the charge. At one point, counsel stated quite explicitly: "The subject on which he [the District Judge] did not directly address the defendant, which is raised here, is the question of the defendant's understanding of the charges." Nevertheless, the Government argues that since petitioner stated his desire to plead guilty, and since he was informed of the consequences of his plea, the District Court "could properly assume that petitioner was entering that plea with a complete understanding of the charge against him." 9 (Emphasis added.)

[4B]

[5A]

[*465] [6]We cannot accept this argument, which completely ignores the two purposes of Rule 11 and the reasons for its recent amendment. First, although the procedure embodied in Rule 11 has not been held to be constitutionally mandated, 10 it is designed to assist the district [****13]

judge in making the constitutionally [***425] required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

[****14] Prior to the 1966 amendment, however, not all district judges personally interrogated defendants before accepting their guilty pleas. 13 With an awareness of the confusion over the Rule's requirements in this respect, the draftsmen amended it to add a provision "expressly [*466] requir[ing] the court to address the defendant personally." 14 This clarification of the judge's responsibilities quite obviously furthers both of the Rule's purposes. By personally interrogating the defendant, not only will the judge be better able to [**1171] ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack.

[7][8][9] These two purposes have their genesis in the nature of a guilty plea. A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. 15 [****16] For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst, 304 U.S. 458, 464 (1938)*. Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. 16 Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

[*467] [10]Thus, in addition to directing the judge to inquire into the defendant's [***426] understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." 18 [****17] Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."

[5B] [11A]

To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. For this reason, we reject the Government's contention that Rule 11 can be complied with although the district judge does not personally inquire whether the defendant understood the nature of the charge.

[11A]

[****18] [*468] II.

[**1172] Having decided that the Rule has not been complied with, we must also determine the effect of that noncompliance, an issue that has engendered a sharp difference of opinion among the courts of appeals. In *Heiden v. United States, 353 F.2d 53 (1965)*, the Court of Appeals for the Ninth Circuit held that when the district court does not comply fully with Rule 11 the defendant's guilty plea must be set aside and his case remanded for another hearing at which he may plead anew. 21 Other courts of appeals, however, have consistently rejected this holding, either expressly 22 [****20] or tacitly. 23 Instead, they have adopted the approach [*469] [***427] urged by the Government, which is to place upon the Government the burden of demonstrating from the record of the Rule 11 hearing that the guilty plea was voluntarily entered with an understanding of the charge. See, e. g., *Halliday v. United States, 380 F.2d 270 (C. A. 1st Cir. 1967); Lane v. United States, 373 F.2d 570 (C. A. 5th Cir. 1967)*. In these circuits, if voluntariness cannot be determined from the record, the case is remanded [****19] for an evidentiary hearing on that issue. See, e. g., *Kennedy v. United States, 397 F.2d 16 (C. A. 6th Cir. 1968); Halliday v. United States, supra.*

[12]We are persuaded that the Court of Appeals for the Ninth Circuit has adopted the better rule. From the defendant's perspective, the efficacy of shifting the burden of proof to the Government at a later voluntariness hearing is questionable. In meeting its burden, the Government will undoubtedly rely upon the defendant's statement that he desired to plead guilty and frequently a statement that the plea was not induced by any threats or promises. This prima facie case for voluntariness is likely to be treated as [****21] irrebuttable in cases such as this one, where the defendant's reply is limited to his own plaintive allegations that he did not understand the nature of the charge and therefore failed to assert a valid defense or to limit his guilty plea only to a lesser included offense. No matter how true these allegations may be, rarely, if ever, can a defendant corroborate them in a post-plea voluntariness hearing.

[13]Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding "in this highly subjective area." *Heiden v. United States, supra, at 55.* The Rule "contemplates that disputes as to the understanding of the defendant and the voluntariness of his [*470] action are to be eliminated at the outset . . . ." Ibid. As the Court of Appeals for the Sixth Circuit explained in discussing what it termed the "persuasive rationale" of Heiden: "When the [**1173] ascertainment is subsequently made, greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided . . . ." [****22] Waddy v. Heer, 383 F.2d 789, 794 (1967). There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him.

[14]The wisdom of Rule 11's requirements and the difficulty of achieving its purposes through a postconviction voluntariness hearing are particularly apparent in this case. Petitioner, who was 65 years old and in poor health at the time he entered his plea, had been suffering from a serious drinking problem during the time he allegedly evaded his taxes. He pleaded guilty to a crime that requires a "knowing and willful" attempt to defraud the Government of its tax money; 25 yet, throughout his sentencing hearing, he and his counsel insisted that his acts were merely "neglectful," "inadvertent," and committed without [***428] "any disposition to deprive the United States of its due." Remarks of this nature cast considerable doubt on the Government's assertion that petitioner pleaded guilty with full awareness of the nature of the charge. Nevertheless, confronted with petitioner's statement that he entered his plea of his "own [****23] volition," his counsel's statement that he explained the nature of the charges, and evidence that petitioner did owe the Government back taxes, both the District Court and the Court of Appeals concluded that petitioner's guilty plea was voluntary.

[15A]Despite petitioner's inability to convince the courts below that he did not fully understand the charge against [*471] him, it is certainly conceivable that he may have intended to acknowledge only that he in fact owed the Government the money it claimed without necessarily admitting that he committed the crime charged; for that crime requires the very type of specific intent that he repeatedly disavowed. See *Sansone v. United States, 380 U.S. 343 (1965).* Moreover, since the elements of the offense were not explained to petitioner, and since the specific acts of tax evasion do not appear of record, it is also possible that if petitioner [****24] had been adequately informed he would have concluded that he was actually guilty of one of two closely related lesser included offenses, which are mere misdemeanors.

[15B]

On the other hand, had the District Court scrupulously complied with Rule 11, there would be no need for such speculation. At the time the plea was entered, petitioner's own replies to the court's inquiries might well have attested to his understanding of the essential elements of the crime

charged, including the requirement of specific intent, and to his knowledge of the acts which formed the basis for the charge. Otherwise, it would be apparent [****25] to the court that the plea could not be accepted. Similarly, it follows that, if the record had been developed properly, and if it demonstrated that petitioner entered his plea freely and intelligently, his subsequent references to neglect and inadvertence could have been summarily dismissed as nothing more than overzealous supplications for leniency.

[16]We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are [*472] designed to facilitate a more [**1174] accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, [****26] district judges take the few minutes necessary to inform them of their rights [***429] and to determine whether they understand the action they are taking.

We therefore reverse the judgment of the Court of Appeals for the Seventh Circuit and remand the case for proceedings consistent with this opinion.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT.

The relevant portion of the colloquy at the Rule 11 hearing on July 15 is as follows:

"Mr. Sokol [petitioner's counsel]: . . . If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.

"The Court: Is that satisfactory to the government?

"Mr. Hughes [Government counsel]: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

[*473] "The Court: There will be a disposition in regard to the other Count?

"Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

"The Court: Not until the plea is accepted and there is a judgment thereon.

"Mr. Hughes: Correct.

"The Court: This is [****27] tax evasion, five and ten?

"Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $ 10,000.

"The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

"Defendant McCarthy: Yes, your Honor.
"The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

"Defendant McCarthy: Yes, your Honor.

"The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

"Defendant McCarthy: Yes, your Honor.

"The Court: You understand you may be fined in an amount not in excess of $ 10,000?

"Defendant McCarthy: Yes, your Honor.

"The Court: Knowing all that, you still persist in your plea of guilty?

"Defendant McCarthy: Yes, your Honor.

"The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

"Now, in regard to Counts 1 and 3?

[*474] [****28] " [**1175] Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

[***430] "Mr. Sokol: No, no promises or threats.

"The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

"Defendant McCarthy: No, your Honor.

"The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

"Defendant McCarthy: I beg your pardon?

"The Court: Has anybody threatened you to enter a plea of guilty?

"Defendant McCarthy: That's right, of my own volition, your Honor.

"The Court: All right. Enter a pre-trial investigation order and continue the matter until the 14th day of September. Same bond may stand."

APPENDIX B TO OPINION OF THE COURT.

The colloquy at the September 14 sentencing hearing included the following:

"Mr. Sokol [petitioner's counsel]: . . . If the Court please, apart from the wrecking of his physical health that has attended a number of the problems that relate to the drinking in this case, this man has experienced a kind of punishment, self-inflicted, which almost [****29] is a categorical listing of how he flees, actually, and I use that word advisedly, flees from consequence to punishment to additional consequence. It is a sad thing when at the age of sixty-five a man who has been able to rear, with the help of his wife, a fine family, has to leave a legacy such as this. I submit to the Court that he needs [*475] no deterrent. I cannot imagine a man -- apart from the conventional contrition, he has actively sought out help in order to overcome what has become a very, very serious physical and psychological problem.

"When I spoke with Mr. Sanculius [the probation officer], I knew that we had given to him some reference to the fact and some attestations of the facts, supported the facts, that there had been a very, very serious psychological problem here.

"With respect to the tax case itself, he never took one single step to delude the investigating officer from the very, very start, and this was before Counsel was in the matter. He extended -- in other words, he was open and he answered all questions readily.

"The Court: Yes, but his books were in such shape that it made it very difficult to -- and that, in my opinion, was not inadvertent.

[****30] . . . .

"Mr. Sokol: . . . When a man is neglectful and adopts a kind of a devious way of secreting himself from the government, that is one thing, and we are mindful they are kind of indicia of fraud. But where a man's pattern is neglect of not only something like this -- he is sloppy with respect to that, but in gross, in gross, unaccountable, so to speak.

"There was no direct relationship to the consequences of taxation. Now, I would like to point out in that connection that when the investigation commenced it zeroed in, and very, very properly, there was a disclosure made from the very, very first that in the case of the Blue Cross check, the matter of depositing that in a second account actually had absolutely nothing whatever to do with the government. At that [***431] time he had been very, very deeply involved in a protracted drinking situation [*476] and had been in the hospital for several weeks. [**1176] His family, in order to avoid the matter of him really needing somebody to lead him around by the nose said, and his wife said, 'You have to put yourself under the jurisdiction of your brother,' and there was some indication that he was supposed to deposit [****31] this and he would not have disposition over his own assets. They did not feel that he could look out for himself. He was oppressed, and there is no sense in going over how people become so. In this particular case with a history after sixty-five years of this kind of a situation, one can perhaps guess without going into Freudian terms he was oppressed, and in order to free himself -- and this had nothing to do with the government -- in order to free himself from what he felt was a trap situation where he, at the age of sixtytwo or sixty-three was being treated like a little boy, he put it in a different bank account. But there was never any disposition to deprive the United States of its due.

"He has never acted, actually, in what you would call normal consequence, because an interview with this man, even once, indicates that if he has -- and it is like a little boy -- if he has the consequence lying before him he says, 'Oh, yes.'
. . . .

"Mr. Sokol: He did not act in contemplation of avoiding taxation. That was a natural consequence ofwhat can best be described as gross neglect, and criminal neglect, if you please.

"I could not have, in good conscience, recommended that [****32] he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage. But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that --

[*477] "The Court: It took place over a series of four years, didn't it, Counsel?

"Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

"The Court: Well, I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years.

"Mr. Sokol: No, he had already done this, apart from the fact that he had sought help with respect to the drinking, apart from the fact that he had sought help with respect to the psychiatric problem, and apart from the fact that he had already, so to speak, contained himself, he did, in addition, seek out the help of Mr. Abraham Angram, my associate counsel in the case, who was guiding him and he was on the right path. No, he had -- I want to point out to the Court that this has occurred. This is fait accompli."

Concur by: BLACK

MR. JUSTICE BLACK, concurring.
[****33] I concur, though not without some doubt, in the reversal of the judgment of conviction in this case. Rule 11 of the Federal Rules of Criminal Procedure requires that the trial judge personally address a defendant who pleads guilty in order to ascertain if he understands the nature of the crime of which he has pleaded guilty. In this case the trial [***432] judge did not personally address the defendant but seems to have accepted the statement of the defendant's lawyer that he had advised the petitioner of the consequences of a plea of guilty. I base my concurrence in the judgment not upon any "supervisory power" of this Court, however, but exclusively on the failure of the judge to first address the defendant personally, as required by Rule 11.

Section Three: Re-entry:

Tenn. Code Ann. § 41-1-412 (West):

(a) The trial courts and the department of correction shall coordinate efforts to prepare offenders for reentry into society. To that end, it is the intent of the general assembly that validated risks/needs assessment instruments shall be used to develop offender reentry plans.
(b) In preparing presentence reports in accordance with § 40-35-207, the department of correction shall include information identifying the defendant's risks and needs as determined through the use of a validated assessment instrument, along with recommended treatment programs to address the risks and needs and enhance the defendant's opportunity for successful reentry into the community.
(c) The department of correction shall develop an individual treatment/supervision plan for each offender in its custody or under its supervision to enhance the offender's opportunity for successful reentry into the community. The plan shall be developed using a validated instrument to evaluate the individual risks and needs of the offender.

Tenn. Code Ann. § 49-8-205:

Educational and workforce development programs for criminal offenders held in local correctional facilities

In addition to all other authorized functions of the community colleges and state colleges of applied technology within the board of regents, each institution is authorized to contract and partner with local governments for the purpose of providing educational and workforce development programs to assist with reducing recidivism rates of criminal offenders held in local correctional facilities and improving opportunities for successful reentry upon release from incarceration.

Tenn. Code Ann. § 40-35-506 (West)
Eligible inmates--mandatory reentry supervision

(a) As used in this section, “eligible inmate” means an inmate who:
(1) Is serving a felony sentence for an offense that occurred on or after July 1, 2021;
(2) Is eligible for parole consideration;
(3) Is calculated to have one (1) year or less remaining until expiration of all sentences that the inmate is serving or set to serve, or is calculated to reach the inmate's release eligibility date with less than one (1) year remaining until expiration;
(4) Does not have an active detainer for new or untried charges or sentences to serve in other jurisdictions;
(5) Has not been classified as maximum or close custody for disciplinary reasons in the previous two (2) years; and

(6) If the inmate has previously had the inmate's probation or parole revoked, has served at least six (6) months since returning to custody after revocation of probation or parole.
(b)(1) The department of correction shall determine whether an inmate is an eligible inmate. Notwithstanding § 40-35-503, an eligible inmate must be released on mandatory reentry supervision one (1) year prior to the inmate's sentence expiration date as calculated by the department or, if the inmate is not eligible for parole one (1) year prior to the inmate's sentence expiration date, upon reaching the inmate's release eligibility date. Upon release, an eligible inmate is subject to mandatory reentry supervision until the inmate's sentence expiration date. The release must be under the terms and conditions established by the department of correction. The board of parole shall issue a certificate of mandatory reentry supervision to such offenders.
(2) Eligible inmates released on mandatory reentry supervision must be considered released on parole and must be supervised and subject to violations or revocation under chapter 28 of this title to the same extent as discretionary parolees. All provisions relative to imposition of graduated sanctions under chapter 28 of this title apply to eligible inmates released on mandatory reentry supervision.
(3) Upon the issuance of a violation warrant regarding an eligible inmate, the inmate does not earn credit toward completion of the sentence until the removal of the delinquency.
(4) Mandatory reentry supervision for eligible inmates is not a commutation of sentence nor any other form of executive clemency.
(c) Notwithstanding § 40-35-111, upon expiration of a sentence of confinement for a person who is not an eligible inmate, the inmate must be released and subject to mandatory reentry supervision for a period of one (1) year following the inmate's sentence expiration date under conditions to be prescribed by the department of correction. Noncriminal, technical violations of supervision conditions by ineligible inmates must not result in revocation of supervision or incarceration. The mandatory reentry supervision period must be calculated by the department of correction.
(d) Mandatory reentry supervision under this section constitutes release into the community under the direct or indirect supervision of any state or local governmental authority or a private entity contracting with the state or a local government for purposes of § 40-35-114(13).

34 U.S.C.A. § 60541 (West)
(a) In general
The Attorney General, in coordination with the Director of the Bureau of Prisons, shall, subject to the availability of appropriations, conduct the following activities to establish a Federal prisoner reentry initiative:

(1) The establishment of a Federal prisoner reentry strategy to help prepare prisoners for release and successful reintegration into the community, including, at a minimum, that the Bureau of Prisons–

(A) assess each prisoner's skill level (including academic, vocational, health, cognitive, interpersonal, daily living, and related reentry skills) at the beginning of

the term of imprisonment of that prisoner to identify any areas in need of improvement prior to reentry;

(B) generate a skills development plan for each prisoner to monitor skills enhancement and reentry readiness throughout incarceration;

(C) determine program assignments for prisoners based on the areas of need identified through the assessment described in subparagraph (A);

(D) ensure that priority is given to the reentry needs of high-risk populations, such as sex offenders, career criminals, and prisoners with mental health problems;

(E) coordinate and collaborate with other Federal agencies and with State, Tribal, and local criminal justice agencies, community-based organizations, and faith-based organizations to help effectuate a seamless reintegration of prisoners into communities;

(F) collect information about a prisoner's family relationships, parental responsibilities, and contacts with children to help prisoners maintain important familial relationships and support systems during incarceration and after release from custody; and

(G) provide incentives for prisoner participation in skills development programs.

(2) Incentives for a prisoner who participates in reentry and skills development programs which may, at the discretion of the Director, include–

(A) the maximum allowable period in a community confinement facility; and

(B) such other incentives as the Director considers appropriate (not including a reduction of the term of imprisonment).

(b) Identification and release assistance for Federal prisoners

(1) Obtaining Identification

The Director shall assist prisoners in obtaining identification prior to release from a term of imprisonment in a Federal prison or if the individual was not sentenced to a term of imprisonment in a Federal prison, prior to release from a sentence to a term in community confinement, including a social security card, driver's license or other official photo identification, and a birth certificate.

(2) Assistance developing release plan

At the request of a direct-release prisoner, a representative of the United States Probation System shall, prior to the release of that prisoner, help that prisoner develop a release plan.

(3) Direct-release prisoner defined

In this section, the term “direct-release prisoner” means a prisoner who is scheduled for release and will not be placed in prerelease custody.

(4) Definition

In this subsection, the term “community confinement” means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility.

(c) Improved reentry procedures for Federal prisoners

The Attorney General shall take such steps as are necessary to modify the procedures and policies of the Department of Justice with respect to the transition of offenders from the custody of the Bureau of Prisons to the community–

(1) to enhance case planning and implementation of reentry programs, policies, and guidelines;

(2) to improve such transition to the community, including placement of such individuals in community corrections facilities; and

(3) to foster the development of collaborative partnerships with stakeholders at the national, State, and local levels to facilitate the exchange of information and the development of resources to enhance opportunities for successful offender reentry.

(d) Duties of the Bureau of Prisons

(1) Omitted

(2) Measuring the removal of obstacles to reentry

(A) Coding required

The Director shall ensure that each institution within the Bureau of Prisons codes the reentry needs and deficits of prisoners, as identified by an assessment tool that is used to produce an individualized skills development plan for each inmate.

(B) Tracking

In carrying out this paragraph, the Director shall quantitatively track the progress in responding to the reentry needs and deficits of individual inmates.

(C) Annual report

On an annual basis, the Director shall prepare and submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report that documents the progress of the Bureau of Prisons in responding to the reentry needs and deficits of inmates.

(D) Evaluation

The Director shall ensure that–

(i) the performance of each institution within the Bureau of Prisons in enhancing skills and resources to assist in reentry is measured and evaluated using recognized measurements; and

(ii) plans for corrective action are developed and implemented as necessary.

(3) Measuring and improving recidivism outcomes

(A) Annual report required

(i) In general

At the end of each fiscal year, the Director shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report containing statistics demonstrating the relative reduction in recidivism for inmates released by the Bureau of

Prisons within that fiscal year and the 2 prior fiscal years, comparing inmates who participated in major inmate programs (including residential drug treatment, vocational training, and prison industries) with inmates who did not participate in such programs. Such statistics shall be compiled separately for each such fiscal year.

(ii) Scope

A report under this paragraph is not required to include statistics for a fiscal year that begins before April 9, 2008.

(B) Measure used

In preparing the reports required by subparagraph (A), the Director shall, in consultation with the Director of the Bureau of Justice Statistics, select a measure for recidivism (such as rearrest, reincarceration, or any other valid, evidence-based measure) that the Director considers appropriate and that is consistent with the research undertaken by the Bureau of Justice Statistics under section 60551(b)(6) of this title.

(C) Goals

(i) In general

After the Director submits the first report required by subparagraph (A), the Director shall establish goals for reductions in recidivism rates and shall work to attain those goals.

(ii) Contents

The goals established under clause (i) shall use the relative reductions in recidivism measured for the fiscal year covered by the first report required by subparagraph (A) as a baseline rate, and shall include–

(I) a 5-year goal to increase, at a minimum, the baseline relative reduction rate of recidivism by 2 percent; and

(II) a 10-year goal to increase, at a minimum, the baseline relative reduction rate of recidivism by 5 percent within 10 fiscal years.

(4) Format

Any written information that the Bureau of Prisons provides to inmates for reentry planning purposes shall use common terminology and language.

(5) Medical care

The Bureau of Prisons shall provide the United States Probation and Pretrial Services System with relevant information on the medical care needs and the mental health treatment needs of inmates scheduled for release from custody. The United States Probation and Pretrial Services System shall take this information into account when developing supervision plans in an effort to address the medical care and mental health care needs of such individuals. The Bureau of Prisons shall provide inmates with a sufficient amount of all necessary medications (which will normally consist of, at a minimum, a 2-week supply of such medications) upon release from custody.

(e) Encouragement of employment of former prisoners

The Attorney General, in consultation with the Secretary of Labor, shall take such steps as are necessary to educate employers and the one-stop partners and one-stop operators (as such terms are defined in section 3102 of Title 29) that provide services at any center operated under a one-stop delivery system established under section 3151(e) of Title 29 regarding incentives (including the Federal bonding program of the Department of Labor and tax credits) for hiring former Federal, State, or local prisoners.

(f) Omitted

(g) Elderly and family reunification for certain nonviolent offenders pilot program

(1) Program authorized

(A) In general

The Attorney General shall conduct a pilot program to determine the effectiveness of removing eligible elderly offenders and eligible terminally ill offenders from Bureau of Prisons facilities and placing such offenders on home detention until the expiration of the prison term to which the offender was sentenced.

(B) Placement in home detention

In carrying out a pilot program as described in subparagraph (A), the Attorney General may release some or all eligible elderly offenders and eligible terminally ill offenders from Bureau of Prisons facilities to home detention, upon written request from either the Bureau of Prisons or an eligible elderly offender or eligible terminally ill offender.

(C) Waiver

The Attorney General is authorized to waive the requirements of section 3624 of Title 18 as necessary to provide for the release of some or all eligible elderly offenders and eligible terminally ill offenders from Bureau of Prisons facilities to home detention for the purposes of the pilot program under this subsection.

(2) Violation of terms of home detention

A violation by an eligible elderly offender or eligible terminally ill offender of the terms of home detention (including the commission of another Federal, State, or local crime) shall result in the removal of that offender from home detention and the return of that offender to the designated Bureau of Prisons institution in which that offender was imprisoned immediately before placement on home detention under paragraph (1), or to another appropriate Bureau of Prisons institution, as determined by the Bureau of Prisons.

(3) Scope of pilot program

A pilot program under paragraph (1) shall be conducted through Bureau of Prisons facilities designated by the Attorney General as appropriate for the pilot program and shall be carried out during fiscal years 2019 through 2023.

(4) Implementation and evaluation

The Attorney General shall monitor and evaluate each eligible elderly offender or eligible terminally ill offender placed on home detention under this section, and shall report to

Congress concerning the experience with the program at the end of the period described in paragraph (3). The Administrative Office of the United States Courts and the United States probation offices shall provide such assistance and carry out such functions as the Attorney General may request in monitoring, supervising, providing services to, and evaluating eligible elderly offenders and eligible terminally ill offenders released to home detention under this section.

(5) Definitions

In this section:

(A) Eligible elderly offender

The term "eligible elderly offender" means an offender in the custody of the Bureau of Prisons–

(i) who is not less than 60 years of age;

(ii) who is serving a term of imprisonment that is not life imprisonment based on conviction for an offense or offenses that do not include any crime of violence (as defined in section 16 of Title 18), sex offense (as defined in section 20911(5) of this title), offense described in section 2332b(g)(5)(B) of Title 18, or offense under chapter 37 of Title 18, and has served 2/3 of the term of imprisonment to which the offender was sentenced;

(iii) who has not been convicted in the past of any Federal or State crime of violence, sex offense, or other offense described in clause (ii);

(iv) who has not been determined by the Bureau of Prisons, on the basis of information the Bureau uses to make custody classifications, and in the sole discretion of the Bureau, to have a history of violence, or of engaging in conduct constituting a sex offense or other offense described in clause (ii);

(v) who has not escaped, or attempted to escape, from a Bureau of Prisons institution;

(vi) with respect to whom the Bureau of Prisons has determined that release to home detention under this section will result in a substantial net reduction of costs to the Federal Government; and

(vii) who has been determined by the Bureau of Prisons to be at no substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention.

(B) Home detention

The term "home detention" has the same meaning given the term in the Federal Sentencing Guidelines as of April 9, 2008, and includes detention in a nursing home or other residential long-term care facility.

(C) Term of imprisonment

The term "term of imprisonment" includes multiple terms of imprisonment ordered to run consecutively or concurrently, which shall be treated as a single, aggregate term of imprisonment for purposes of this section.

(D) Eligible terminally ill offender

The term "eligible terminally ill offender" means an offender in the custody of the Bureau of Prisons who–

(i) is serving a term of imprisonment based on conviction for an offense or offenses that do not include any crime of violence (as defined in section 16(a) of Title 18), sex offense (as defined in section 20911(5) of this title), offense described in section 2332b(g)(5)(B) of Title 18, or offense under chapter 37 of Title 18;

(ii) satisfies the criteria specified in clauses (iii) through (vii) of subparagraph (A); and

(iii) has been determined by a medical doctor approved by the Bureau of Prisons to be–

(I) in need of care at a nursing home, intermediate care facility, or assisted living facility, as those terms are defined in section 1715w of Title 12; or

(II) diagnosed with a terminal illness.

(h) Authorization for appropriations for Bureau of Prisons

There are authorized to be appropriated to the Attorney General to carry out this section, $5,000,000 for each of fiscal years 2019 through 2023.

United States v. Holden, 452 F. Supp. 3d 964 (D. Or. 2020)

BROWN, Senior Judge.

This matter comes before the Court on Defendant Jack Holden's Motion (#318) for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). On April 1, 2020, the Court heard oral argument and took the Motion under advisement. For the reasons that follow, the Court DENIES Defendant's Motion with leave to renew when Defendant has satisfied the exhaustion provision of 18 U.S.C. § 3582(c)(1)(A).

The Court DIRECTS counsel for the government to ensure a copy of this Opinion and Order is delivered to FCI Sheridan Warden Josias Salazar.

BACKGROUND

On September 24, 2013, a grand jury charged Defendant Jack Holden and a co-conspirator with one Count of Conspiracy to Commit Mail and Wire Fraud in violation of 18 U.S.C. § 1349, five

counts of Wire Fraud in violation of 18 U.S.C. § 1343, three counts of Mail Fraud in violation of 18 U.S.C. § 1341, five counts of Money Laundering in violation of 18 U.S.C. § 1957, and one Count of Conspiracy to Commit Money Laundering in violation of 18 U.S.C. § 1956(h).
The matter went to trial on September 28, 2015. On October 8, 2015, the government dismissed one count of Money Laundering. On October 15, 2015, the jury returned a Verdict finding Defendant guilty on all remaining counts.
On August 5, 2016, the Court entered a Judgment sentencing Defendant to a term of 87 months in prison; restitution of $1,410,760; three years of supervised release; a money judgment of $1,410,760; and a special assessment of $1,500.
On August 11, 2016, Defendant appealed his conviction and sentence.
On November 8, 2018, the Ninth Circuit affirmed Defendant's conviction, but the court vacated Defendant's "custodial sentence" due to this Court's miscalculation of the applicable sentencing range under the United States Sentencing Guidelines and also vacated the restitution portion of the Judgment. The matter was remanded to this Court for further proceedings.
On February 20, 2019, the Court held a resentencing hearing. On February 21, 2019, the Court entered a Judgment sentencing Defendant to a term of 87 months in prison; restitution of $1,410,760; three years of supervised release; a money judgment of $1,410,760; and a special assessment of $1,500.
*967 On March 20, 2020, Defendant filed a Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) in which he seeks an order reducing his sentence to time served on the grounds that he "meets the criteria for compassionate release and ... his vulnerability to infection by the coronavirus (COVID-19) places him at a serious risk of death if he remains in the custody of the Bureau of Prisons."
On March 24, 2020, defense counsel emailed the Court and noted
[Defendant] meets the[ ] criteria [for early release under 18 U.S.C. § 3582(c)(1)(A)(i)] because he is 79 years old, has served over 75% of his sentence (in fact, 87%), and has serious deterioration in physical health from his diabetes, low kidney function, and heart issues; he also suffers from cognitive decline.

* * *

The coronavirus pandemic is what makes review of [Defendant's] application urgent.
On March 24, 2020, the Court held a telephone status conference to assess the urgency of the matter after which the Court directed the parties to file supplemental briefing and set oral argument on the Motion for April 1, 2020.
Before the hearing defense counsel emailed the Court on March 30, 2020, with the following information:
(1) "The government identified a math error in the defense petition, which the defense concedes. [Defendant] has not yet served 75% of the imposed term of imprisonment, as would be required for relief under Application note 1(B) of the guideline [U.S.S.G. § 1B1.13]. For this reason, the defense is now asserting that [Defendant's] advanced illnesses and deteriorating physical

health qualify him for relief under App. Note 1(A)(i) and (ii), rather than under Note (B), and that in the alternative, the COVID pandemic constitutes a compelling reason for relief";
(2) Defendant "is currently scheduled for release to home confinement pursuant to the Second Chance Act's eligible elderly offender program on September 2, 2020"; and
(3) Defendant submitted a request for compassionate release at some point, but the parties agree[ ] ... 30 days have not elapsed since it was submitted.
Also on March 30, 2020, the government filed its Response to Defendant's Motion and Defendant filed a Supplemental Brief on his Motion.
On April 1, 2020, the Court heard oral argument by telephone on Defendant's Motion and took it under advisement.
On April 2, 2020, Defendant filed a Second Supplemental Brief on his Motion, and on April 3, 2020, the government provided the Court with additional authority by email.

DISCUSSION

As noted, Defendant moves for an order reducing his sentence to time served pursuant to the First Step Act (FSA), 18 U.S.C. § 3582(c)(1)(A), on the grounds that he has serious degenerative physical conditions or, in the alternative, that the COVID-19 pandemic provides an independent ground for release.
I. FSA Compassionate Release Standards
1" '[A] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *968 *Dillon v. United States*, 560 U.S. 817, 824–25, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010)(quoting 18 U.S.C. § 3582(b)). Compassionate release provides an exception in extraordinary cases. Prior to December 21, 2018, the provision of Title 18 relating to compassionate release of prisoners provided:
[T]he court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
(i) extraordinary and compelling reasons warrant such a reduction

* * *

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.1
18 U.S.C. § 3582(c)(1)(A)(i)(2018).
On December 21, 2018, the FSA amended 18 U.S.C. § 3582(c)(1)(A) to provide:
[T]he court, upon motion of the Director of the Bureau of Prisons, *or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier* may

reduce the term of imprisonment ... after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
(i) extraordinary and compelling reasons warrant such a reduction
* * *
and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.
First Step Act of 2018, PL 115-391, December 21, 2018, 132 Stat. 5194 (emphasis added).
The applicable Sentencing Commission policy statement relating to the FSA is found at U.S.S.G. § 1B1.13. Application Note 1 to § 1B1.13 sets out the extraordinary and compelling reasons as follows:
1. Extraordinary and Compelling Reasons. - ... extraordinary and compelling reasons exist under any of the circumstances set forth below:
(A) Medical Condition of the Defendant.--
(i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
(ii) The defendant is--
(I) suffering from a serious physical or medical condition,
(II) suffering from a serious functional or cognitive impairment, or
*969 (III) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.
(B) Age of the Defendant.-- The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.
* * *
(D) Other Reasons.--As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).
Emphasis in original.
A defendant seeking a reduction in his terms of imprisonment bears the burden to establish both that he has satisfied the procedural prerequisites for judicial review and that compelling and extraordinary reasons exist to justify compassionate release. 18 U.S.C. § 3582(c)(1)(A).
II. Court's Authority to Modify Defendant's Sentence
As noted, " '[a] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon*, 560 U.S. at 824–25, 130 S.Ct. 2683 (2010)(quoting 18 U.S.C. § 3582(b)). *See also United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003)(courts generally may not correct or modify a prison sentence after it has been imposed unless expressly permitted by statute or by

Rule 35 of the Federal Rules of Criminal Procedure). The FSA, however, provides a limited exception for courts to modify a final judgment of conviction either
upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant *after the defendant has fully exhausted all administrative rights* to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf *or the lapse of 30 days from the receipt of such a request by the warden* of the defendant's facility, whichever is earlier.
18 U.S.C. § 3582(c)(1)(A)(emphasis added).
A. Date of Defendant's Request for Compassionate Release under the FSA
2It is undisputed that Defendant submitted a request to the Bureau of Prisons (BOP) for compassionate release pursuant to § 3582(c)(1)(A) and that he did not submit his request until March 24 or 25, 2020. It is also undisputed that the BOP has not yet denied Defendant's March 24 or 25, 2020, request nor have 30 days passed from the time the BOP received Defendant's request.
The record also reflects Defendant is being considered for early release pursuant to the Elderly Offender Pilot Program (EOPP) under the Second Chance Act (SCA), 34 U.S.C. § 60541. Although it is not entirely clear how Defendant came to be considered for release under the EOPP, the record reflects on February 25, 2020, Defendant's case manager at FCI Sheridan, Jamie Pedraza, emailed the Warden of FCI Sheridan as follows:
[Defendant] is a 79-year-old male serving 87 months for Conspiracy to Commit Mail and Wire Fraud; Wire Fraud and *970 Engaging in Monetary Transaction with Criminally Derived Property and Money Laundering Conspiracy. To date, he has served 60% of his sentence and meets all criteria set forth under the FSA Elderly Offender Pilot Program. Additionally, he has been approved to relocate and reside with his daughter in Orting, Washington. He has a current PRD of 12-17-2021. The unit team is requesting a DHD placement on, or after, 9-2-2020. Thank you for your consideration.
Def.'s Second Suppl. Br., Ex. 9 at 1.
At the hearing on April 1, 2020, Defendant suggested the Court could consider the February 25, 2020, email recommending Defendant for the EOPP as a request for compassionate release pursuant to the FSA, in which case 30 days have elapsed from the time Defendant submitted that request to the BOP for early release. The EOPP is a program administered by the BOP pursuant to the SCA, 34 U.S.C. § 60541. Specifically, the SCA authorizes the Attorney General to "conduct a pilot program to determine the effectiveness of removing eligible elderly offenders ... from Bureau of Prisons facilities and placing such offenders on home detention until the expiration of the prison term to which the offender was sentenced." 34 U.S.C.A. § 60541(g)(1)(A). The SCA permits the Attorney General to release eligible offenders from BOP facilities "upon written request from either the Bureau of Prisons or an eligible elderly offender." 34 U.S.C.A. § 60541(g)(1)(B). The SCA also permits the Attorney General to waive the requirements of 18 U.S.C. § 36242 "as necessary to provide for the release of some or all eligible elderly offenders ... from Bureau of Prisons facilities to home detention for the purposes of the pilot program." 34 U.S.C.A. § 60541(g)(1)(C). Finally, the SCA provides:

A violation by an eligible elderly offender ... of the terms of home detention ... shall result in the removal of that offender from home detention and the return of that offender to the designated Bureau of Prisons institution in which that offender was imprisoned immediately before placement on home detention ... or to another
appropriate Bureau of Prisons institution, as determined by the Bureau of Prisons.
34 U.S.C.A. § 60541(g)(2).
3The SCA is a statutory scheme separate from the FSA. The SCA is administered solely by the BOP and does not require the BOP to obtain permission from the sentencing court before it approves inmates for release to home detention because a release pursuant to the SCA is a change only in the location of an inmate's confinement rather than a reduction in an inmate's sentence. *See* 18 U.S.C. § 3621(b)(the BOP is required to "designate the place of the prisoner's imprisonment."). *See also United States v. Ceballos,* 671 F.3d 852, 855 (9th Cir. 2011) (" 'While a [district court] judge has wide discretion in determining the length and type of sentence, the court has no jurisdiction to select the place where the sentence will be served. Authority to determine place of confinement resides in the executive branch of government and is delegated to the Bureau of Prisons.' ")(quoting *United States v. Dragna*, 746 F.2d 457, 458 (9th Cir. 1984)). A placement to home detention *971 by the BOP pursuant to the SCA, therefore, differs substantially in kind and scope from a defendant's request for reduction of sentence pursuant to the FSA like Defendant seeks in his pending Motion.
The Court notes the record in this case reflects only that the BOP considered Defendant for home placement pursuant to the EOPP under the SCA. The February 25, 2020, email from Pedraza to the Warden of FCI Sheridan indicates Defendant was considered for placement in home detention, but the email does not indicate Defendant requested or was considered for a reduction in his sentence pursuant to the FSA. The Court, therefore, concludes on this record that Defendant has not established the February 25, 2020, email (or any other document in the record before March 24 or 25, 2020) constituted a request for reduction of Defendant's sentence pursuant to the FSA. Moreover, due to the fundamentally different nature of the FSA and the SCA, the Court declines to deem Defendant's February request to be one for a reduction in sentence within the parameters of the FSA.
Accordingly, the Court concludes the February 25, 2020, email does not constitute a request to the BOP that began the 30-day period under the FSA exhaustion provision, 18 U.S.C. § 3582(c)(1)(A).
B. Defendant's Failure to Exhaust Administrative Remedies
4Defendant concedes if the Court does not deem the February 25, 2020, email to be a request for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), Defendant has not satisfied the FSA exhaustion criteria. Defendant, however, asserts the Court, nevertheless, has the authority to waive the exhaustion provisions of the FSA "due to the urgency of the COVID-19 pandemic, the statutory requirements, and the historically recognized equitable exceptions to the exhaustion requirement." Def.'s Suppl. Br. at 13. Defendant relies on a number of cases in which the Ninth Circuit excused administrative-exhaustion requirements in other contexts such as petitions for

habeas corpus and inmate civil-rights actions pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Agents*, 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), when the courts concluded there were not any administrative remedies that were effectively "available." For example, the Ninth Circuit did not require an inmate to exhaust his administrative remedies before filing a *Bivens* action when the inmate "took reasonable and appropriate steps to exhaust his Fourth Amendment claim and was precluded from exhausting, not through his own fault but by the Warden's mistake." *Nunez v. Duncan*, 591 F.3d 1217, 1225-26 (9th Cir. 2010)(finding the mistake of the prison Warden "rendered [the prisoner's] administrative remedies effectively unavailable."). The Ninth Circuit also excused inmates' failures to exhaust administrative remedies before bringing civil-rights actions pursuant to 42 U.S.C. § 1983 when a prison's improper screening of a grievance rendered administrative remedies "effectively unavailable," *Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010), and when a jail did not inform a prisoner of the process for filing a complaint even after repeated requests, *Albino v. Baca*, 747 F.3d 1162, 1177 (9th Cir. 2014). Similarly, the Ninth Circuit excused an inmate's failure to exhaust administrative remedies before filing a civil-rights action pursuant to § 1983 when the inmate established he was under threat of retaliation for reporting an incident. *McBride v. Lopez*, 807 F.3d 982, 986 (9th Cir. 2015). In all of these cases the Ninth Circuit excused the administrative-exhaustion requirement found in the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e, *972 which provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner ... until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

In *Ross v. Blake* the Supreme Court reviewed the authority of district courts to excuse administrative exhaustion when it is required by statute as in the PLRA. —— U.S. ——, 136 S. Ct. 1850, 195 L.Ed.2d 117 (2016). In *Ross* an inmate brought an action pursuant to 42 U.S.C. § 1983 against correctional officers for use of excessive force. One officer moved for summary judgment on the ground that the plaintiff failed to exhaust his administrative remedies as required by the PLRA. The district court granted the officer's motion, and the plaintiff appealed. The Fourth Circuit Court of Appeals reversed the district court and noted the PLRA's "exhaustion requirement is not absolute.... [T]here are certain special circumstances in which, though administrative remedies may have been available[,] the prisoner's failure to comply with administrative procedural requirements may nevertheless have been justified. In particular, that was true when a prisoner reasonably — even though mistakenly — believed that he had sufficiently exhausted his remedies."

Ross, 136 S. Ct. at 1856 (quoting *Blake v. Ross*, 787 F.3d 693, 698 (4th Cir. 2015)). The Supreme Court accepted *certiorari* and reversed the Fourth Circuit's decision. The Supreme Court noted the exhaustion requirement of the PLRA provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner ... until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "[T]hat language is 'mandatory' [and] ... suggests no limits on an inmate's obligation

to exhaust — irrespective of any 'special circumstances.' " 136 S. Ct. at 1856 (citing *Jones v. Bock*, 549 U.S. 199, 211, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007)("There is no question that exhaustion is mandatory under the PLRA")). In addition, "that mandatory language means a court may not excuse a failure to exhaust, even to take such circumstances into account." *Id.* (citations omitted). The Supreme Court explained:

No doubt, judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions. *See McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)("The doctrine of exhaustion of administrative remedies ... is, like most judicial doctrines, subject to numerous exceptions"). But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules — and courts have a role in creating exceptions only if Congress wants them to. For that reason, mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion. *See, e.g., McNeil v. United States*, 508 U.S. 106, 111, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993)("We are not free to rewrite the statutory text" when Congress has strictly "bar[red] claimants from bringing suit in federal court until they have exhausted their administrative remedies"). Time and again, this Court has taken such statutes at face value — refusing to add unwritten limits onto their rigorous textual requirements.

Ross, 136 S. Ct. at 1857 (citations omitted). The Supreme Court noted, however, that the PLRA contains "its own, textual exception to mandatory exhaustion." *Id.* at 1858. Specifically, "the exhaustion requirement [of § 1997e(a)] hinges on the 'availab[ility]' of administrative remedies: An inmate ... *973 must exhaust available remedies, but need not exhaust unavailable ones." *Id.* The Court reviewed various circumstances in which administrative remedies had been deemed by courts to be unavailable and noted the record in *Ross* "raise[d] questions about whether [the plaintiff] ... had an 'available' remedy to exhaust." *Id.* at 1859. The Supreme Court, therefore, remanded to the lower court to determine whether "the remedies [the plaintiff] failed to exhaust were 'available' under the principles set out" by the Court. *Id.* at 1862.

56The administrative-exhaustion provision of the FSA, like that of the PLRA, is set out in mandatory terms. It permits a court the authority to reduce a defendant's sentence only "upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal ... or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility." Like the PLRA, the exhaustion requirement of the FSA is not a "judge-made exhaustion doctrine," but instead it is a "statutory exhaustion provision." Thus, as the Supreme Court explained in *Ross*, "it stands on a different footing.... Congress sets the rules — and courts have a role in creating exceptions only if Congress wants them to ... [and] judicial discretion" is "foreclosed." *Ross*, 136 S. Ct. at 1857. Unlike the PLRA, however, the FSA does not contain "its own, textual exception to mandatory exhaustion." *Id.* at 1858. The FSA does not require inmates to exhaust "such administrative remedies as are *available*," but instead it requires them either to exhaust completely their administrative remedies or to wait 30 days after they have submitted a request for compassionate release to the BOP to file with the court a motion for a reduction in sentence. Thus, in contrast to the PLRA, the FSA does not provide this Court with the authority

to excuse Defendant's failure to exhaust his administrative remedies or to waive the 30-day waiting period.

Defendant, nonetheless, asserts the "purposes of requiring exhaustion would not be advanced by ignoring equitable bases for excusing exhaustion." Def.'s Suppl. Br. at 14. Defendant contends exhaustion rules in other contexts serve to promote agency autonomy or federal-state court comity and to efficiently resolve a matter before it reaches the federal court. *See, e.g., Woodford v. Ngo*, 548 U.S. 81, 88-89, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006)(PLRA exhaustion). In the context of the FSA, however, the BOP does not have the autonomy to grant a reduction in sentence and it serves only as a gatekeeper to bring the matter to a court's attention for the grant of relief. According to Defendant, therefore, "just as in the habeas context and the PLRA context," this Court should excuse him from pursuing exhaustion because the delay that would occur would cause him undue hardship.

7Although the Court retains the ultimate authority to decide whether to reduce an inmate's sentence under the FSA, the Court concludes it may only exercise that authority within the strictures of the statute that grants it, and, as noted, the FSA does not grant this Court the authority to consider whether to reduce Defendant's sentence until the exhaustion criteria of the FSA have been met. This conclusion is supported by a number of cases in which courts have addressed motions for compassionate release under the FSA due to COVID-19 and found they do not have the authority to address those motions when the defendants have not first satisfied the exhaustion requirements of the FSA. For example, in *United States v. Raia* the government appealed the defendant's sentence. 954 F.3d 594, 596 (3d Cir. 2020). While the government's *974 appeal was pending in the Third Circuit and before the defendant had exhausted his administrative remedies with the BOP, the defendant filed a motion with the district court for compassionate release under the FSA "given the present pandemic caused by COVID-19." *Id.* The district court denied the defendant's motion on the ground that his pending appeal divested the district court of jurisdiction. The defendant did not appeal the district court's denial and instead filed a motion "asking [the Third Circuit] to decide his compassionate-release motion." *Id.,* at 596. The Third Circuit concluded it did not have the authority to decide the defendant's motion for compassionate release because § 3582 "requires those motions to be addressed to the sentencing court." *Id.* (citations omitted). The Third Circuit noted it had the authority to remand the matter to the district court, but the court concluded any remand "would be futile" because the defendant "failed to comply with § 3582(c)(1)(A)'s exhaustion requirement: BOP has not had thirty days to consider [the defendant's] request to move for compassionate release on his behalf, nor has [the defendant] administratively exhausted any adverse decision by BOP." *Id.* The Third Circuit observed the "exhaustion requirement ... presents a glaring roadblock foreclosing compassionate release at this point." *Id.* Similarly, in *United States v. Eberhart,* No. 13-cr-00313, 448 F.Supp.3d 1086, 1088–90 (N.D. Cal. Mar. 25, 2020), the defendant filed an emergency application for immediate release "in light of the increasing risks to health that the coronavirus disease (COVID-19) poses to incarcerated persons." *Id.*, at 1088. The defendant conceded he had not exhausted his administrative remedies under the FSA, but he asserted "the exhaustion

requirement should be deemed satisfied or entirely dispensed with due to the BOP's failure to address the dangers of the pandemic, or that the 30-day lapse requirement should be waived as futile in light of the pressing public health concerns." *Id.*, at 1088. The court concluded it lacked authority to grant the defendant's motion. Similarly, in *United States v. Sloan*, No. 1:19-cr-10117-IT-11 (D. Mass. Mar. 19, 2020), the defendant filed an emergency motion to modify sentence and asked the court to reduce his four-month sentence by two weeks. Def.'s Second Suppl. Br., Ex. 2 at 1. The court denied the defendant's motion and explained:

The limited relief sought by Defendant may well be warranted in light of the pandemic due to COVID-19.... However, the court's jurisdiction to modify Defendant's sentence is constrained by statute. With limited exceptions, the court "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c).

Defendant seeks modification of his sentence on the basis that "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). However, that section requires a request to the warden of his facility first, and contemplates either a motion from the Director of the Bureau of Prisons, or by a defendant after exhaustion of his administrative rights. Defendant does not state that a request has been made to the warden.

Def.'s Second Suppl. Br., Ex. 2 at 1-2. The *Sloan* court noted the "pandemic raises a critical question of whether Congress and the President ... should afford the courts or Bureau of Prisons greater flexibility regarding the continued imprisonment of non-violent offenders who have served the majority of their sentences," but the court ultimately concluded it did "not have authority [at present] to grant the requested relief." *Id.* In *United States v. Carver* the *975 defendant moved to reduce his sentence pursuant to the FSA without indicating whether he had satisfied the exhaustion requirement of that statute on the ground that COVID-19 provided an extraordinary and compelling reason for the court to reduce his sentence. No. 4:19-CR-06044-SMJ, 451 F.Supp.3d 1198, 1199–200 (E.D. Wa. Apr. 1, 2020). The court denied the defendant's motion:

The Court's authority to amend a criminal defendant's sentence of incarceration, once it has been imposed, is narrow. *See* 18 U.S.C. § 3582(c)("The court may not modify a term of imprisonment once it has been imposed except that...."). The only apparently relevant mechanism by which the Court could authorize Defendant's early release to home confinement permits a sentence reduction if the Court finds "extraordinary and compelling reasons warrant" such relief. *Id.* § 3582(c)(1)(A)(i). But that provision is only available "upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." *Id.* § 3582(c)(1)(A). The administrative exhaustion requirement admits of no exception.

Id. The court noted its "hands are bound by the statute.... [It] is indisputable that the COVID-19 outbreak is unprecedented and poses a heightened risk to those in this nation's prisons and jails. Yet absent congressional action to relieve inmates of the exhaustion requirement, the Court is

unable to provide the relief Defendant seeks." *Id.* In *United States v. Garza* the defendant filed a motion for compassionate release pursuant to the FSA before he exhausted his administrative remedies. The defendant asserted the FSA, nevertheless, "allow[ed] the Court to modify the term of imprisonment for 'extraordinary and compelling reasons,' " such as the COVID-19 virus. No. 18 Cr. 1745, 2020 WL 1485782, at *1 (S.D. Cal. Mar. 27, 2020). The court, however, noted the extraordinary and compelling provision of the FSA

is only triggered ... [when] (A) the Director of the Bureau of Prisons files a motion; or (B) the defendant files a motion "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility whichever is earlier."

Id. (quoting 18 U.S.C. § 3582(c)(1)(A)). The court, therefore, concluded it did not have the authority to grant the defendant's motion. In *United States v. Gileno* the defendant filed a motion to modify his sentence pursuant to the FSA on the ground that COVID-19 constituted an extraordinary and compelling reason to modify his sentence. No. 19 Cr. 161, 448 F.Supp.3d 183, 185–86 (D. Conn. Mar. 19, 2020). The court concluded the defendant had "not satisfied the requirement under 18 U.S.C. § 3582(c)(1)(A) to first request that the Bureau of Prisons file a motion on his behalf and then show that thirty days have passed without any BOP action. As a result, the Court cannot consider his motion to modify his sentence." *Id.*, at 187. *See also United States v. Zywotko*, No. 2:19 Cr. 113, 2020 WL 1492900, at *1 (M.D. Fla. Mar. 27, 2020)(the court denied the defendant's motion to reduce sentence because it "was filed by Defendant, not the BOP ... [and] Defendant does not represent that he has exhausted all his administrative remedies with the BOP under § 3582(c)(1)(A)(i)"); *976 *United States v. Clark*, 17-85-SDD-RLB, 451 F.Supp.3d 651, 654–55 (M.D. La. Apr. 1, 2020)(denying the defendant's motion to modify prison sentence pursuant to 18 U.S.C. § 3582(c) on the ground that the defendant did not exhaust his administrative remedies before bringing his motion).

89Defendant cites a number of cases in which inmates have been released due to concerns about COVID-19, but those cases either do not address the exhaustion provision of the FSA or they are distinguishable. For example, in *United States v. Powell*, No. 1:94-cr-00316, 2020 WL 1698194 (D.D.C. Mar. 28, 2020), the court granted the defendant's motion for compassionate release under the FSA. The court reasoned:

"Defendant is 55-years-old, suffers from several respiratory problems (including sleep apnea and asthma), and has only 3 months remaining on his 262-month sentence." (Mot. at 1.) The government does not oppose the relief sought. In addition, the Court finds that requiring defendant to first seek relief through the Bureau of Prisons' administrative process would be futile because defendant has an open misdemeanor case in Superior Court which the Bureau of Prisons has advised defense counsel renders defendant ineligible for home confinement.

Def.'s Second Suppl. Br., Ex. 1 at 1. The court, however, did not cite any legal support for its authority to excuse the defendant's failure to exhaust administrative remedies. In *United States v. Huneeus*, No. 1:19-cr-10117-IT-7 (D. Mass. Mar. 17, 2020), the court granted the defendant's

emergency motion to modify his sentence pursuant to the FSA "in light of the national state of emergency due to the global COVID-19 pandemic and [the defendant's] unique health circumstances." Def.'s Second Suppl. Br., Ex. 3 at 1. The court, however, sealed the defendant's motion and the government's response, and it did not indicate in its order whether the defendant had exhausted his administrative remedies. In *United States v. Muniz* the defendant moved for compassionate release due to COVID-19. No. 4:09-cr-0199-1, —— F.Supp.3d ——, ——, 2020 WL 1540325, at *1 (S.D. Tex. Mar. 30, 2020). The defendant, however, had "exhausted all possible avenues for administrative release." *Id. United States v. Davis*, No. ELH-20-09, 449 F.Supp.3d 352 (D. Md. Mar. 30, 2020), concerned the government's motion for pretrial detention of defendant. Evaluation of a request for pretrial detention involves the Bail Reform Act, 18 U.S.C. § 3142, which is a different statutory scheme and analysis than that pertaining to an individual who has been convicted of a crime and sentenced by the court. Moreover, the Bail Reform Act does not contain an exhaustion requirement similar to the one in the FSA. In *United States v. Rodriguez*, No. 2:03-cr-00271-AB-1, 451 F.Supp.3d 392 (E.D. Pa. Apr. 1, 2020), the defendant moved for compassionate release pursuant to the FSA, but only after he "complied with § 3582(c)(1)(A)'s 30-day lapse provision." Def.'s Second Suppl. Br., Ex. 8 at 3 n.6. Finally, in *United States v. Perez* the defendant filed a motion for compassionate release based on the FSA. 17 Cr. 513-3, 451 F.Supp.3d 288 (S.D.N.Y. Apr. 1, 2020). The defendant conceded he had not exhausted his administrative remedies, but he asserted the court could waive the exhaustion requirement "in light of the extraordinary threat posed — in his unique circumstances — by the COVID-19 pandemic." *Id.*, at 290–91. The court noted the exhaustion requirement of the FSA, but it pointed out that the Second Circuit has held " '[e]ven where exhaustion is seemingly mandated by statute ..., the requirement is not absolute.' " *Id.,* at 291 (quoting *977 *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019)). Relying on *Washington*, the *Perez* court found three circumstances in which courts may excuse a failure to exhaust: when it would be futile, when " 'the administrative process would be incapable of granting adequate relief,' " and when " 'pursuing agency review would subject plaintiffs to undue prejudice.' " *Id.* (quoting *Washington*, 925 F.3d at 119). The *Perez* court found all of the *Washington* exceptions applied, relied on *Washington* to support its conclusion that it had the authority to waive the administrative-exhaustion requirement of the FSA, and proceeded to waive the administrative-exhaustion requirement of the FSA. Thus, the court's conclusion in *Perez* appears to support Defendant's assertion that this Court may excuse the FSA's administrative-exhaustion requirement. *Washington*, however, was a case brought pursuant to the Controlled Substances Act (CSA), 21 U.S.C. § 801, which "does not mandate exhaustion of administrative remedies." *Washington*, 925 F.3d at 116. Courts have created a judicial-exhaustion requirement for the CSA, but, as the Supreme Court noted in *Ross*, "judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions." 136 S. Ct. at 1857 (citing *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)). Thus, courts have the authority to excuse the exhaustion requirement of the CSA. In contrast, the exhaustion provision of the FSA is statutorily created, and, therefore, as the Supreme Court made clear in *Ross,* courts

lack the authority to excuse or to waive such an exhaustion requirement. The court in *Washington* also asserted "[e]ven [when] exhaustion is seemingly mandated by statute or decisional law, the requirement is not absolute." 925 F.3d at 118. The *Washington* court relied on the Supreme Court's decision in *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992), to support its assertion. *McCarthy*, however, was superseded by the PLRA, which, as noted, requires inmates to exhaust their administrative remedies. *Woodford v. Ngo*, 548 U.S. 81, 126 S. Ct. 2378, 2393, 165 L.Ed.2d 368 (2006). In addition, as noted, the Supreme Court made clear in *Ross* that the PLRA contains "its own, textual exception to mandatory exhaustion." 136 S. Ct. at 1858. The FSA does not contain such an exception. In short, the cases on which the *Perez* court relied involve statutes that either have a judicially-created exhaustion requirement or that have their own textual exceptions to the exhaustion requirement, but the *Perez* court did not address the fundamental differences between the exhaustion provisions at issue in *Washington* and *McCarthy* nor did it reconcile those differences with its conclusion. This Court, therefore, finds the court's reasoning in *Perez* to be unpersuasive because it is unsupported by law.

10In summary, the Court concludes the administrative-exhaustion provision of the FSA is mandatory; it is a statutorily-created exhaustion provision rather than a judicially-created provision; and the FSA does not include "its own textual exception" to the exhaustion provision. This Court, therefore, does not have the authority to excuse an inmate's failure to comply with the exhaustion provision of the FSA. Because Defendant has not satisfied the exhaustion provision of the FSA, this Court lacks the authority to address Defendant's Motion for Reduction of Sentence. Although this Court agrees with the *Carver* court's observation that it "is indisputable that the COVID-19 outbreak is unprecedented and poses a heightened risk to those in this nation's prisons and jails," 451 F.Supp.3d at 1199, this Court, *978 "absent congressional action to relieve inmates of the exhaustion requirement, ... is unable to provide the relief Defendant seeks." *Id.*

Accordingly, the Court denies Defendant's Motion for Reduction of Sentence with leave to renew if the BOP denies his request for compassionate release or if the BOP does not decide Defendant's request for compassionate release within 30 days of the date that the BOP received Defendant's request.

CONCLUSION

For these reasons, the Court DENIES Defendant's Motion (#318) for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) with leave to renew if the BOP denies Defendant's request for compassionate release or if the BOP does not decide Defendant's request for compassionate release within 30 days of the date that the BOP received Defendant's March 24 or 25, 2020, request, whichever occurs first.

IT IS SO ORDERED.

All Citations

452 F.Supp.3d 964

Footnotes

1

28 U.S.C. § 994(t) provides: "The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."

2

This section notes "[a] prisoner shall be released by the [BOP] on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence"; provides guidance as to the factors that the BOP must consider when calculating a prisoner's sentence; and addresses issues related to supervised release.

Vasquez v. Strada, 684 F.3d 431 (3d Cir. 2012)

OPINION

PER CURIAM.

Appellant George Vasquez was sentenced in December 1993 in the United States District Court for the Southern District of New York to a term of imprisonment of 262 months for conspiracy to distribute heroin and for possession of heroin. In January 1996, Vasquez was sentenced in the United States District Court for the Middle District of Pennsylvania to a term of imprisonment of 14 months, to run consecutively to his New York sentence, for possession of a prohibited object. Vasquez's current projected release date with good conduct time is October 10, 2012.

The Second Chance Act of 2007, which applies here, increases a federal prisoner's eligibility for pre-release placement in a halfway house from 6 to 12 months, and requires the Bureau of Prisons (BOP) to make an individual determination that ensures that the placement is "of sufficient duration to provide the greatest likelihood *433 of successful reintegration into the community." 18 U.S.C. § 3624(c)(6)(C). In accordance with the Act, regulations were issued so that placement in a community correctional facility by the BOP is conducted in a manner consistent with 18 U.S.C. § 3621(b). *See* 28 C.F.R. § 570.22. In addition to the individual determination under section 3621(b), a prisoner's participation in, or completion of, Inmate Skills Development programs within the institution is considered separately to determine if additional placement time is warranted as an incentive under 42 U.S.C. § 17541, the Federal prisoner reentry initiative. Section 17541 requires the BOP to "provide incentives for prisoner participation in skills development programs." *Id.* at § 17541(a)(1)(G). One such incentive may "at the discretion of the [BOP]" include "the maximum allowable period in a community confinement facility." *Id.* at § 17541(a)(2)(A).

On April 20, 2011, Vasquez's Unit Team met to review his pre-release needs. As a result of this review, Vasquez was recommended for a 151–180 day placement in a Residential Re-entry Center ("RRC"). In making its assessment, the Unit Team considered Vasquez's criminal history, his community and financial resources, his disciplinary history, his employment skills, and family resources. Finally, Vasquez's institutional programming, specifically, his participation in or completion of Inmate Skills Development programs, was considered separately to determine whether additional RRC time was warranted under § 17541. It was noted that although Vasquez

completed some programming courses, he had not regularly participated in educational programs during his extensive incarceration period. Vasquez's referral to community placement was subsequently approved by the Warden.

On September 14, 2011, Vasquez filed a petition for writ of habeas corpus, 28 U.S.C. § 2241, in the United States District Court for the Middle District of Pennsylvania. In this petition, Vasquez argued that the BOP failed to comply with the Federal prisoner reentry initiative, and that the BOP improperly amended section 3621(b) by unlawfully adding a sixth factor to trick inmates into thinking that they have been considered for the incentives that were never properly implemented by the BOP. Vasquez sought an order directing the BOP to grant him a community placement of 12 months. He also requested an order compelling the BOP to explain why the incentives were never created.

The BOP submitted an answer, arguing that Vasquez had not exhausted his administrative remedies. In the alternative, the BOP argued that Vasquez's habeas corpus claims lacked merit. In an order entered on December 29, 2011, the District Court agreed with both of the BOP's arguments and denied the habeas corpus petition. Vasquez appeals.

We have jurisdiction under 28 U.S.C. § 1291; *United States v. Cepero,* 224 F.3d 256, 264–65 (3d Cir.2000) (certificate of appealability not required to appeal from denial of section 2241 petition). Vasquez may resort to federal habeas corpus to challenge a decision to limit his RRC placement, *Woodall v. Federal Bureau of Prisons,* 432 F.3d 235, 243–44 (3d Cir.2005). However, prior to filing his petition, he was required to exhaust his administrative remedies. *Moscato v. Fed. Bureau of Prisons,* 98 F.3d 757, 760 (3d Cir.1996). Vasquez conceded before the District Court that he did not exhaust his administrative remedies, but argued that exhaustion was not necessary prior to filing the instant petition.

1

We have held that a prisoner need not exhaust administrative remedies where *434 the issue presented involves only statutory construction, *Bradshaw v. Carlson,* 682 F.2d 1050, 1052 (3d Cir.1981), but Vasquez asked the District Court to direct the BOP to provide him with the maximum 12–month RRC placement. Contrary to his assertion in the proceedings below, he was not merely challenging the construction of the Second Chance Act, or the BOP's implementation of the Federal prisoner reentry initiative. Exhaustion was required in his case, and Vasquez's habeas corpus petition properly was dismissed for failing to exhaust administrative remedies.

2

We further agree with the District Court that Vasquez's habeas corpus petition lacks merit in any event. Our review is limited to whether the BOP abused its discretion. *See Barden v. Keohane,* 921 F.2d 476, 478 (3d Cir.1991). The BOP exercises its authority pursuant to the Second Chance Act to determine individual prisoner RRC placements by applying the five factors set forth in section 3621(b).1 The sixth factor used by the BOP is participation and/or completion of Skills Development programs pursuant to 42 U.S.C. § 17541. The record establishes that the BOP gave Vasquez an individual review of the five statutory factors contained in section 3621(b), and the additional factor of his participation and/or completion of Skills Development programs pursuant to 42 U.S.C. § 17541, prior to recommending that he receive a 151–180 day placement.

Having reviewed the record, and the arguments on appeal, we see no abuse of discretion in the way that the section 3621(b) factors were balanced with the goals of the Second Chance

Act in Vasquez's case. Indeed, Vasquez received appropriate consideration for the maximum allowable period of community placement, as reflected by the BOP's comments concerning his skills development completion, his strong ties to the community, his significant financial resources, and his housing needs. (*See* DC dkt. # 8, Ex. 2, p. 44.) The District Court properly concluded that the BOP did not abuse its discretion in reaching the determination that a 5 to 6 month placement is of sufficient duration to account for Vasquez's history.

3

We also agree with the District Court that Vasquez was unable to demonstrate that the BOP failed to comply with the Federal prisoner reentry initiative. Vasquez claimed that BOP violated the statute when it failed to develop any incentives for participation in Inmate Skills Development Programming other than the incentive of consideration for the maximum period in an RRC. Although the Second Chance Act requires the BOP to establish incentives for prisoner participation in skills development programs, the statute does not require that any particular *435 incentive be established. *See* 42 U.S.C. § 17541(a)(1)(G) and (2). Moreover, Vasquez received appropriate consideration for the maximum allowable period of community placement. For all of these reasons, we will affirm the judgment of the District Court.

All Citations

684 F.3d 431

Footnotes

1
Section 3621(b) states:
(b) Place of imprisonment.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—
(1) the resources of the facility contemplated;
(2) the nature and circumstances of the offense;
(3) the history and characteristics of the prisoner;
(4) any statement by the court that imposed the sentence—(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or (B) recommending a type of penal or correctional facility as appropriate; and
(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28 ...
18 U.S.C. § 3621(b).