

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Thomas A. Russo, Circuit Court Judge

RECEIVED

AUG 16 2013

S.C. Supreme Court

ROBERT D. BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213166

PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX..... 1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT4

CONCLUSION 12

ISSUE PRESENTED

Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel and Eighth Amendment right to be free from cruel and unusual punishments because he failed to object to the use of petitioners' 1979 conviction pursuant to the federal Youth Corrections Act to enhance his sentence under section 17 – 25 – 45 of the South Carolina Code?

STATEMENT

On April 2, 2008, Robert Dexter Brown (“Brown”) was indicted by a Georgetown County grand jury for assault and battery with intent to kill, assault and battery of a high and aggravated nature, and kidnapping. App. 781 – 89. On July 29, 2008, Brown was tried before the Honorable James E. Lockemy and a jury. App. 1. Dorie C. Biagianti represented the State. App. 2. Reuben Goude represented Brown. App. 2. The jury convicted Brown of all three charges. App. 627, ll. 6 – 16. Judge Lockemy sentenced Brown to life imprisonment without parole (“LWOP”) pursuant to section 17 – 25 – 45 of the South Carolina Code. App. 638, ll. 14 – 24. Petitioner’s appeal was dismissed pursuant to Anders v. California, 386 U.S. 738 (1967). App. 683.

On May 11, 2010, Brown filed a PCR application. App. 684. On August 31, 2012, a hearing was held before the Honorable Thomas A. Russo. App. 700. T. Andrew Johnson, Sr., represented the State. App. 700. Ian A. Taylor represented Brown. App. 700. On September 24, 2012, Judge Russo denied Brown’s PCR application. App. 775. This petition follows.

ARGUMENT

Trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel and Eighth Amendment right to be free from cruel and unusual punishments because he failed to object to the use of petitioners' 1979 conviction pursuant to the federal Youth Corrections Act to enhance his sentence under section 17 – 25 – 45 of the South Carolina Code.

Relevant Facts

On May 24, 1978, a judgment and commitment order was issued by the Superior Court of the District of Columbia in the case of United States of America v. Robert Dexter Brown, case number 53360 – 77A and C. App. 774. The charges were armed robbery and armed kidnapping. App. 774. The convictions stemmed from an incident that occurred on January 27, 1977, when Brown was nineteen years old. App. 118, l. 25 – 119, l. 16. On March 26, 1979, another judgment and commitment order was issued in the same case. App. 773. This order sentenced Brown under the federal Youth Corrections Act and referenced 18 U.S.C. § 5010(C). App. 773. This brief will refer to these convictions as the “DC Convictions.”

Prior to trial on the instant charges, trial counsel moved that the DC Convictions could not be used to sentence Brown under South Carolina's LWOP statute. App. 115, l. 2 – 128, l. 11. Trial counsel argued that the convictions were “too remote to be used to enhance any sentence.” App. 115, ll. 9 – 14. He also argued that sentencing Brown to life without possibility of parole violated the United States and South Carolina constitutional provisions barring cruel and unusual punishment. App. 115, ll. 15 – 19. Finally, only after prompting from his client, trial counsel argued that the DC Convictions were juvenile convictions that could not be considered under South Carolina's LWOP statute. App. 118, ll. 18 – 24. The trial judge then questioned counsel regarding Brown's date of birth and how old he would have been on the offense date for the DC convictions.

App. 118, l. 25 – 119, l. 24. The trial judge determined that Brown would have been nineteen years old at the time of the offense. App. 119, l. 22 – 120, l. 7.

The trial judge asked, “Now, what evidence do we have he was convicted under some juvenile statute?” App. 121, ll. 5 – 7. The solicitor told the court there was “no evidence of that.” App. 121, ll. 8 – 10. The court then asked trial counsel:

THE COURT: Other than the fact he was 19 at the time he was charged; 20 or 21 or 22 when he was convicted, what evidence do you have it was a juvenile procedure.

MR. GOUDE: My client says he was convicted under the youthful offender act of Washington, DC; and therefore he states that that is a juvenile slant youthful offender record that should not or could not be used to enhance the penalty in this case.

THE COURT: Although he admits he was 19 when he was charged; and over 20 when he was convicted?

MR. GOUDE: Uh—Yes, Your Honor.

THE COURT: And he says – you say that Washington, DC, has juvenile statutes permit[ting] an 18 year sentence for juvenile crimes?

MR. GOUDE: He says he was – – released in two years on that sentence.

THE COURT: You have any information on that.

[THE SOLICITOR]: No; I don’t have any information as to his release date.

THE COURT: **Interesting. – I will address that at a later date if he is convicted;** but please proceed as if I have denied your motion Mr. Goude. So it’s a very serious matter; but proceed as if I have denied your motion.

MR. GOUDE: Thank [you], Your Honor.

THE COURT: **But I’ll address it later on when we have more information about it;** but in this state, it seems to me that the State has enough evidence to seek life without parole.

App. 121, l. 19 – 123, l. 9 (emphasis added).

After the jury's verdict, the trial judge heard Brown's motions. App. 628, l. 7. Trial counsel again asked the court to refuse to consider the DC Convictions, but only raised the ground that the LWOP statute was unconstitutional and that the DC Convictions were too remote. App. 628, ll. 14 – 23. App. 401, ll. 7 – 16. Trial counsel failed to raise the issue that the DC Convictions were juvenile offenses. App. 628, ll. 14 – 23. The trial judge only ruled that the statute was constitutional and the DC Convictions were not too remote. App. 628, l. 24 – 629, l. 4. App. 630, ll. 17 – 18. The trial judge made no ruling regarding whether Brown's DC Convictions were juvenile offenses. After denying these motions, the trial judge asked trial counsel, "Anything else?" App. 630, ll. 17 – 19. Trial counsel responded, "No, Your Honor." App. 630, l. 20.

Discussion.

The PCR court erred in its finding that trial counsel properly raised the issue of whether the DC Convictions could be used to enhance Brown's sentence under South Carolina's LWOP statute. App. 778. The PCR court found that the trial judge "simply disagreed" with Brown's arguments, which is tantamount to a ruling that trial counsel was effective in his presentation of the issue and properly preserved the issue regarding whether the DC convictions were juvenile proceedings. App. 778. No evidence supports this finding by the PCR court.

Trial counsel was unprepared to present this issue and failed to preserve the juvenile sentence enhancement for appellate review. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912 – 13 (Ct. App. 2004). The trial judge's consideration of the motion in limine clearly indicates that it was not a final ruling and that a

contemporaneous objection and motion was required at sentencing to preserve this issue. See State v. Johnson, 363 S.C. 53, 58 – 59, 609 S.E.2d 520, 523 (2005); State v. Simpson, 325 S.C. 27, 32, 522 S.E.2d 398, 600 (1999). Pretrial, Judge Lockemy said he would address the juvenile issue “later on when we have more information about it.” App. 123, ll. 5 – 7. Trial counsel never provided any further information about this issue and failed to raise it at sentencing. Therefore, trial counsel was deficient in presenting the full issue to the trial judge and in failing to preserve the issue for appeal.

The fact that this issue was not preserved for appeal is further indicated by the fact that appellate counsel filed an Anders brief. App. 645. The Court of Appeals’ independent review of the record for preserved issues also failed to address whether the DC Convictions could be used for an LWOP enhancement. App. 683. These facts show that no evidence supports the PCR court’s ruling that this issue was preserved for appeal. The failure to preserve an issue for appeal constitutes ineffective assistance of counsel. McHam v. State, , Op. No. 27287, Shearouse Advance Sheet No. 32 at page 60, 2013 WL 3723690 (July 17, 2013). In McHam, trial counsel failed to make a contemporaneous objection after losing a motion in limine. Id. Appellate counsel filed an Anders brief. Id. The State attempted to argue that no prejudice existed because of the Anders review. Id. This Court rejected that argument, stating that under the Anders procedure, the court reviews the entire record “for any *preserved* issues with potential merit.” Id. (emphasis in original). The McHam Court held that trial counsel’s performance was deficient. Id. Just as in McHam, trial counsel’s failure to preserve this issue for appeal constitutes deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (2011).

Trial counsel also performed deficiently by failing to provide the trial judge with any information about the Youth Corrections Act under which Brown was sentenced. In fact, trial

counsel likely would not have brought this issue to the court's attention had Brown not insisted he do so before the trial. Instead of making a forceful and well-prepared argument on Brown's behalf, trial counsel initially prefaced the issue with "My client wishes me to state. . . ." App. 118, ll. 15 – 24. Even though Judge Lockemy told trial counsel this issue was "interesting" and "a very serious matter," trial counsel failed to research the issue and present it at sentencing! App. 122, l. 22 – 123, l. 2. Based on Judge Lockemy's thoughtful questioning and his interest in the matter, had trial counsel been prepared to provide the court with information regarding Brown's DC Convictions it is likely the court would have ruled in Brown's favor at sentencing.

Trial counsel's failure to raise this issue prejudiced Brown. Well before Brown's 2008 trial, this Court ruled that juvenile convictions could not be used for purposes of the LWOP statute. State v. Ellis, 345 S.C. 175, 179-80, 547 S.E.2d 490, 492 (2001). The defendant in Ellis was convicted of voluntary manslaughter as a juvenile. Id. at 179, 547 S.E.2d at 492. The Court strictly construed the LWOP statute and held that juvenile convictions "cannot be used to invoke the mandatory LWOP provisions of the recidivist statute. Id.

Similarly, Brown's DC convictions could not be used to sentence him to life without parole. The Judgment and Commitment Order from the District of Columbia was the conviction used to sentence Brown to LWOP. App. 629, ll. 6 – 630, l. 6. App. 773-74. This order says that Brown was "sentenced under 18 U.S.C. § 5010(c) not to exceed (18) eighteen years concurrent with any other sentence" for armed kidnapping. App. 773. The order also says that Brown was "sentenced under 18 U.S.C. § 5010(c) not to exceed (9) nine years" for armed robbery. App. 773.

Section 5010(c) is part of the federal Youth Corrections Act (the “Act”)¹. 18 U.S.C. section 5010(c). The act defines a “youth offender” as “a person under the age of twenty-two years at the time of conviction.” 18 U.S.C. § 5006(e). “Committed youth offender” is defined as “one committed for treatment hereunder to the custody of the Attorney General pursuant to section 5010(b) and 5010(c) of this chapter.” 18 U.S.C. § 5006 (f). “Treatment” under the act “means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders.” 18 U.S.C. section 5006 (g). These sections show that a conviction under the Act is more like a juvenile sentence than an adult sentence.

Section 5010(a) through (d) states in full:

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, in the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

(c) If the court shall find that youth offender may not be able to derive maximum benefit from treatment by the division prior to the expiration of six years from the date of conviction it may, **in lieu of the penalty of imprisonment**

¹ The Act was passed on September 30, 1950. See c. 1115, § 2, 64 Stat. 1087, Pub. L. 865. Portions of the Act, including section 5010(c), were repealed in 1984. Pub. L. 98-473, Title II, § 218(a)(8). Since the text of the Act is not easily available electronically, copies of the Act from the U.S. Code Congressional Service (available in the Court’s library) are attached to this brief as “Exhibit A” for the Court and opposing counsel’s convenience. The Act was amended in 1976, but that amendment does not bear on the issues presented in this case. Nevertheless, in the interest of completeness and convenience, the 1976 amendments that affect the Act are also included in “Exhibit A.” Citations to the Act will be to the relevant United States Code section instead of the sections of Public Law 865.

otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provisions.

18 U.S.C. § 5010(a) to (d) (emphasis added). It is clear from Brown's judgment and commitment order that he was sentenced under 18 U.S.C. § 5010(c). The trial judge could have sentenced him under section 5010(d) which would have meant an adult sentence and imprisonment with other adults. See 18 U.S.C. § 5011 (mandating segregation of youth offenders from other offenders and the provision of treatment). Instead, the trial judge chose to sentence him as a youthful offender. App. 773.

Of maximum importance to this case, persons sentenced under the Act are required to have their convictions set aside. 18 U.S.C. § 5021. Section 5021 states, "Upon the unconditional discharge by the Division of a committed youth offender before the expiration of the maximum sentence imposed upon him, a conviction shall be automatically set aside and the Division shall issue to the youth offender a certificate to that effect." 18 U.S.C. § 5021. It seems clear that Brown was released before the expiration of his maximum sentence. The SCDC Record Summary shows Brown was convicted of receiving stolen property in 1983, well before the expiration of the eighteen-year sentence. Supp. App. 1-2. Furthermore, Brown's contention that he was released after two years on the DC Convictions was unrefuted by the State. App. 122, ll. 19 – 21. Therefore, pursuant to section 5021, Brown's conviction would have been automatically set aside. Since by operation of law, Brown's conviction was set aside, it could not have been used to enhance his sentence pursuant to section 17 – 25 – 45.

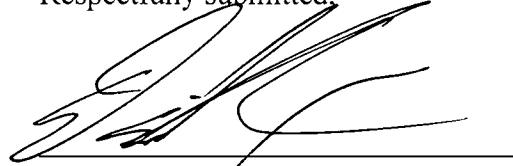
Additionally, pursuant to the rule stated in Ellis, juvenile convictions may not be used for enhancement purposes under section 17 – 25 – 45. Ellis at 179-80, 547 S.E.2d at 492. This rule applies to convictions pursuant to the Act. The trial judge seemed to believe that because Brown was over eighteen at the time of the offense, the conviction could be used. App. 118, l. 25 – 119, l. 24. Trial counsel failed to provide the able trial judge with the information he needed about the Act—that persons under twenty-two were eligible— for him to make the correct decision in this case. App. 118, ll. 15 – 123, l. 17. The solicitor also failed to provide the trial court with any information concerning Brown’s release date on the DC Convictions. App. 122, ll. 19 – 21. Brown represented to the court that he was released after serving two years for the DC convictions. App. 122, ll. 14 – 16. This is consistent with section 5017(d) of the act which states that a youth offender may “at any time... [be] release[d] conditionally under supervision.” 18 U.S.C. § 5017(a). Since Ellis requires that the LWOP statute must be strictly construed, and it does not provide for the enhancement of sentences based on convictions pursuant to the Act or any such similar act, it was error to sentence Brown based on the DC convictions. See also Miller v. Alabama, 132 S.Ct. 2455, 2464 (2012) (holding that mandatory LWOP sentences imposed upon juveniles violate the Eighth Amendment to the United States Constitution).

The State also failed to meet its burden that the DC convictions qualified under the LWOP statute. At all times, the State bears the burden of proof beyond a reasonable doubt. State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012). Given that the Act requires the automatic setting aside of a conviction and the solicitor’s lack of information about the DC Convictions, had trial counsel adequately raised this issue, Brown would not have been sentenced to life imprisonment without the possibility of parole. Therefore, the Court should grant the petition and reverse Brown’s sentence.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse Brown's sentence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Thomas A. Russo, Circuit Court Judge

ROBERT D. BROWN,

PETITIONER,

V.

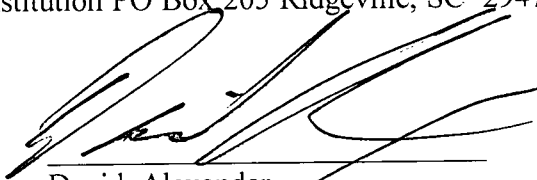
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213166

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and the supplemental appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and also upon Mr. Robert D. Brown #329874 Lieber Correctional Institution PO Box 205 Ridgeville, SC 29472 this 16th day of August, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of August, 2013.

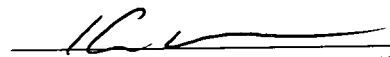
 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

EXHIBIT A

U. S. CODE
CONGRESSIONAL
SERVICE

1
Pages 1-1304

81st CONGRESS
SECOND SESSION
1950

LAWS
MESSAGES
EXECUTIVE ORDERS, Etc.
INDEX-TABLES

of the extent that
g-purposes, may
operated by the
alls Dam power
ts of which are
ember 5, 1924
ceeding sections
ission lines, sub-
for the purposes
for the delivery
struction, opera-
ract, under the
users', organiza-
reserved storage
ee hundred and
de available to
ity under lease
an Falls Reser-
ong contractors
h the interested
e balance of the
nd ninety-three
r the benefit of
division of the
ereby set aside
e Michaud area
it under irriga-
s in connection
second proviso
r, the heading
stat. 390, 417).
ermined by the
the case of the
bove described,
ths of the rev-
termines to be
cements, from
the time water
the case of the
other revenues
nd which the
cost allocable

ades Dam be-
l by the Secre-
e being a find-
cts: have been
r Snake River
verage annual
winter water.
organizations
asons beyond
lling date but
se of capacity
among other
roper to give
, and particu-
arrangements

Sec. 5. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sums of not to exceed \$76,601,000 for the Palisades Dam and Reservoir project, Idaho, \$11,395,000 for the Minidoka project north side pumping division, Idaho, and \$6,600,000 for the American Falls power plant.
Approved: September 30, 1950.

YOUTH OFFENDERS—TREATMENT AND REHABILITATION

See Legislative History, p. 3983

CHAPTER 1115—PUBLIC LAW 865

[S. 2609]

Act to provide a system for the treatment and rehabilitation of youth offenders, to improve the administration of criminal justice, and for other purposes.

Enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 4201 of title 18 of the United States Code²⁹ is amended to read as follows:

Sec. 4201. Board of Parole; members; salaries.
There is hereby created in the Department of Justice a Board of Parole to consist of eight members to be appointed by the President, by and with the advice and consent of the Senate. The salary of each member of the Board shall be fixed in accordance with the Classification Act of 1923,³⁰ as amended, and any Acts supplementary thereto or in substitution therefor. The members of the Board first appointed under this section shall be appointed for terms as follows: Two for two years, two for three years, two for four years, and two for six years, respectively, from the effective date of this section. The term of office of a successor to any member shall expire six years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. Upon the expiration of his term of office, a member of the Board shall continue to act until his successor shall have been appointed and qualified. The Attorney General shall from time to time designate one of its members to serve as Chairman of said Board and delegate to him the necessary administrative duties and responsibilities.

Sec. 2. Part IV of title 18 of the United States Code is hereby amended by inserting therein a new chapter immediately after chapter 401 thereof,³⁰ as follows:

"CHAPTER 402—FEDERAL YOUTH CORRECTIONS ACT

- Sec. 5005. Youth Correction Division.
- 5006. Definitions.
- 5007. Duties of members; meetings.
- 5008. Officers and employees.
- 5009. Rules of Division.
- 5010. Sentence.
- 5011. Treatment.
- 5012. Certificate as to availability of facilities.
- 5013. Provision of facilities.
- 5014. Classification studies and reports.
- 5015. Powers of Director as to placement of youth offenders.
- 5016. Reports concerning offenders.
- 5017. Release of youth offenders.

29. 18 U.S.C.A. § 4201.

30. 18 U.S.C.A. foll. ch. 401.

"Sec.

- "5018. Revocation of Division orders.
- "5019. Supervision of released youth offenders.
- "5020. Apprehension of released offenders.
- "5021. Certificate setting aside conviction.
- "5022. Applicable date.
- "5023. Relationship to Probation and Juvenile Delinquency Acts.
- "5024. Where applicable.

"Sec. 5005. Youth Correction Division.

"There is created within the Board of Parole a Youth Correction Division. The Attorney General shall from time to time designate members of the Board of Parole to serve on said Division as the work requires. The Attorney General shall from time to time designate one of the members of the Division to serve as Chairman and delegate to him such administrative duties and responsibilities as may be required to carry out the purposes of this chapter.

"Sec. 5006. Definitions:

"As used in this chapter—

"(a) 'Board' means the Board of Parole;

"(b) 'Division' means the Youth Correction Division of the Board of Parole;

"(c) 'Bureau' means the Bureau of Prisons;

"(d) 'Director' means the Director of the Bureau;

"(e) 'Youth offender' means a person under the age of twenty-two years at the time of conviction;

"(f) 'Committed youth offender' is one committed for treatment hereunder to the custody of the Attorney General pursuant to section 5010 (b) and 5010 (c) of this chapter;

"(g) 'Treatment' means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders;

"(h) 'Conviction' means the judgment on a verdict or finding of guilty, a plea of guilty or a plea of nolo contendere.

"Sec. 5007. Duties of members; meetings:

"The Division shall hold stated meetings to consider problems of treatment and correction, to consult with and make recommendations to the Director with respect to general treatment and correction policies for committed youth offenders, and to enter orders directing the release of such youth offenders conditionally under supervision and the unconditional discharge of such youth offenders, and take such further action and enter such other orders as may be necessary or proper to carry out the purposes of this chapter.

"Sec. 5008. Officers and employees:

"The Attorney General shall appoint such supervisory and other officers and employees as may be necessary to carry out the purposes of this chapter. United States probation officers shall perform such duties with respect to youth offenders on conditional release as the Attorney General shall request.

"Sec. 5009. Rules of Division.

"The Division shall adopt and promulgate rules governing its own procedure.

"Sec. 5010. Sentence.

"(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

"(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017 (c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017 (d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

Sec. 5011. Treatment.

Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment.

Sec. 5012. Certificate as to availability of facilities.
No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided.

Sec. 5013. Provision of facilities.
The Director may contract with any appropriate public or private agency not under his control for the custody, care, subsistence, education, treatment, and training of committed youth offenders the cost of which may be paid from the appropriation for 'Support of United States Prisoners'.

Sec. 5014. Classification studies and reports.
The Director shall provide classification centers and agencies. Every committed youth offender shall first be sent to a classification center or agency. The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. In the absence of exceptional circumstances, such study shall be completed within a period of thirty days. The agency shall promptly forward to the Director and to the Division a report of its findings with respect to the youth offender and its recommendations as to his treatment. At least one member of the Division shall, as soon as practicable after commitment, interview the youth offender, review all reports concerning him, and make such recommendations to the Director and to the Division as may be indicated.

Sec. 5015. Powers of Director as to placement of youth offenders.

(a) On receipt of the report and recommendations from the classification agency the Director may:

- (1) recommend to the Division that the committed youth offender be released conditionally under supervision; or

"(2) allocate and direct the transfer of the committed youth offender to an agency or institution for treatment; or

"(3) order the committed youth offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public.

"(b) The Director may transfer at any time a committed youth offender from one agency or institution to any other agency or institution.

"Sec. 5016. Reports concerning offenders.

"The Director shall cause periodic examinations and reexaminations to be made of all committed youth offenders and shall report to the Division as to each such offender as the Division may require. United States probation officers and supervisory agents shall likewise report to the Division respecting youth offenders under their supervision as the Division may direct.

"Sec. 5017. Release of youth offenders.

"(a) The Division may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division.

"(b) The Division may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

"(c) A youth offender committed under section 5010 (b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

"(d) A youth offender committed under section 5010 (c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

"(e) Commutation of sentence authorized by any Act of Congress shall not be granted as a matter of right to committed youth offenders but only in accordance with rules prescribed by the Director with the approval of the Division.

"Sec. 5018. Revocation of Division orders.

"The Division may revoke or modify any of its previous orders respecting a committed youth offender except an order of unconditional discharge.

"Sec. 5019. Supervision of released youth offenders.

"Committed youth offenders permitted to remain at liberty under supervision or conditionally released shall be under the supervision of United States probation officers, supervisory agents appointed by the Attorney General, and voluntary supervisory agents approved by the Division. The Division is authorized to encourage the formation of voluntary organizations composed of members who will serve without compensation as voluntary supervisory agents and sponsors. The powers and duties of voluntary supervisory agents and sponsors shall be limited and defined by regulations adopted by the Division.

"Sec. 5020. Apprehension of released offenders.

"If, at any time before the unconditional discharge of a committed youth offender, the Division is of the opinion that such youth offender will be benefited by further treatment in an institution or other facility any member of the Division may direct his return to custody or if necessary may issue a warrant for the apprehension and return to custody of such youth offender and cause such warrant to be executed by a United States probation officer, an appointed supervisory agent, a United States

marshal or any officer of a Federal penal or correctional institution. Upon return to custody, such youth offender shall be given an opportunity to appear before the Division or a member thereof. The Division may then, or at its discretion revoke the order of conditional release.

Sec. 5021. Certificate setting aside conviction.

Upon the unconditional discharge by the Division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Division shall issue to the youth offender a certificate to that effect.

Sec. 5022. Applicable date.

This chapter shall not apply to any offense committed before its enactment.

Sec. 5023. Relationship to Probation and Juvenile Delinquency Acts.

(a) Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of this title relative to probation.

(b) Nothing in this chapter shall be construed in any wise to amend, repeal, or affect the provisions of chapter 403 of this title (the Federal Juvenile Delinquency Act), or limit the jurisdiction of the United States courts in the administration and enforcement of that chapter except that the powers as to parole of juvenile delinquents shall be exercised by the Division.

Sec. 5024. Where applicable.

This chapter shall apply in the continental United States other than the District of Columbia and Alaska.

Sec. 23. (a) When a majority of the members of the Board of Parole appointed under section 4201 of title 18 of the United States Code, as amended by this Act,³¹ qualify and enter upon their duties, the Board of Parole, established by that section prior to its amendment, shall cease to exist and its powers and duties shall become vested in and be exercised by the Board established by section 1 of this Act.

(b) Nothing in chapter 402 of title 18 of the United States Code³² shall be construed as repealing or modifying the duties, power, or authority of the Board of Parole with respect to the parole of United States prisoners not held to be committed youth offenders or juvenile delinquents.

Sec. 4. Chapter 401 of title 18 of the United States Code is hereby amended by adding at the end thereof immediately after section 5001³³ a new section as follows:

Sec. 5002. Advisory Corrections Council.

There is hereby created an Advisory Corrections Council, composed of one United States circuit judge and two United States district judges designated from time to time by the Chief Justice of the United States, of one member, who shall be Chairman, designated by the Attorney General, and, ex officio, of the Chairman of the Board of Parole, the Chairman of the Youth Division, the Director of the Bureau of Prisons, and the Chief of Probation of the Administrative Office of the United States Courts. The Council shall hold stated meetings to consider problems of treatment and correction of all offenders against the United States and shall make such recommendations to the Congress, the President, the Judicial Conference of the United States, and other appropriate officials as may improve the administration of criminal justice and assure the coordination and integration of policies respecting the disposition, treatment, and correction of all persons convicted of offenses against the United States. It shall also consider measures to promote the prevention of crime and delinquency, suggest appropriate studies in this connection to be undertaken by agencies both public and private. The members of

31. 18 U.S.C.A. § 4201.

32. 18 U.S.C.A., ch. 402.

33. 18 U.S.C.A. § 5001.

the Council shall serve without compensation but necessary travel and subsistence expenses as authorized by law shall be paid from available appropriations of the Department of Justice.

Sec. 5. (a) The analysis of part IV of title 18 of the United States Code, immediately preceding chapter 401 of that title,³⁴ is amended by inserting immediately after and underneath item 401, "General Provisions * * * 5001," a new item to read as follows: "402. Federal Youth Corrections Act * * * 5005."

(b) The analysis of chapter 401 of said title 18 of the United States Code,³⁵ is amended by inserting immediately after and underneath item "Sec. 5001. Surrender to State authorities, expenses," a new item "Sec. 5002. Advisory Corrections Council".

Approved September 30, 1950.

PRISONERS OF WAR—PERSONS ENTITLED TO PAYMENT OF CLAIMS

See Legislative History, p. 3993

CHAPTER 1116—PUBLIC LAW 866

[S. 3000]

An Act to amend the War Claims Act of 1948, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 6 of the War Claims Act of 1948 (Public Law 896, Eightieth Congress; 62 Stat. 1240), as amended,³⁶ be amended by striking therefrom part 4 of subsection (c) and inserting in lieu thereof: "(4) Parents (in equal shares) if there is no widow, dependent husband, or child."

Approved September 30, 1950.

TRANSPORT AIRCRAFT—OPERATION, TESTING, ETC.

See Legislative History, p. 3998

CHAPTER 1117—PUBLIC LAW 867

[S. 3504]

An Act to promote the development of improved transport aircraft by providing for the operation, testing, and modification thereof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

It is hereby declared to be the policy of Congress to promote, in the interest of safety, the national air transportation system and the national defense, the development of improved transport aircraft, particularly turbine-powered aircraft, aircraft especially adapted to the economical transportation of cargo, and aircraft suitable for feeder-line operation, by providing for temporary Government assistance in the testing and minor experimental modification of such aircraft and in the operation of available turbine-powered aircraft in simulated transport service to secure data to aid in the development and manufacture of turbine-powered transport aircraft and to aid in the adaptation of civil airways, civil airports, and air-safety regulations applicable to civil aircraft to the operation of such aircraft.

Sec. 2. (a) The Secretary of Commerce (hereinafter referred to as the Secretary) is authorized to carry out the purposes of this Act by

(1) preparing broad operating and general utility characteristics and specifications for all types of such aircraft which he finds are

34. 18 U.S.C.A., prec. ch. 401.
35. 18 U.S.C.A., prec. § 5001.

36. 50 U.S.C.A. Appendix, § 2005.

U. S. CODE
CONGRESSIONAL
AND
ADMINISTRATIVE
NEWS

94th CONGRESS
SECOND SESSION
1976

LAWS
[90 STAT. pages 1 to 1933]

PUBLIC LAW 94-233 [H.R. 5727]; March 15, 1976

PAROLE COMMISSION AND REORGANIZATION ACT

For Legislative History of Act, see p. 335

Act to establish an independent and regionalized United States Parole Commission, to provide fair and equitable parole procedures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Parole Commission and Reorganization Act".

Parole Commission and Reorganization Act, 18 USC 4201 note, Repeal.

UNITED STATES PAROLE COMMISSION; PAROLE PROCEDURES, CONDITIONS, ETC.

SEC. 2. Title 18 of the United States Code is amended by repealing chapter 311 (relating to parole) and inserting in lieu thereof the following new chapter to read as follows:

Chapter 311—PAROLE

- 4201. Definitions.
4202. Parole Commission created.
4203. Powers and duties of the Commission.
4204. Powers and duties of the Chairman.
4205. Time of eligibility for release on parole.
4206. Parole determination criteria.
4207. Information considered.
4208. Parole determination proceeding; time.
4209. Conditions of parole.
4210. Jurisdiction of Commission.
4211. Early termination of parole.
4212. Aliens.
4213. Summons to appear or warrant for retaking of parolee.
4214. Revocation of parole.
4215. Reconsideration and appeal.
4216. Young adult offenders.
4217. Warrants to retake Canal Zone parole violators.
4218. Applicability of Administrative Procedure Act.

§ 4201. Definitions

- As used in this chapter—
(1) 'Commission' means the United States Parole Commission.
(2) 'Commissioner' means any member of the United States Parole Commission;
(3) 'Director' means the Director of the Bureau of Prisons;
(4) 'Eligible prisoner' means any Federal prisoner who is eligible for parole pursuant to this title or any other law including any Federal prisoner whose parole has been revoked and who is not otherwise ineligible for parole;
(5) 'Parolee' means any eligible prisoner who has been released on parole or deemed as if released on parole under section 4164 or section 4205 (f); and
(6) 'Rules and regulations' means rules and regulations promulgated by the Commission pursuant to section 4203 and section 553 of title 5, United States Code.

18 USC 4201.

18 USC 4164.

§ 4202. Parole Commission created

There is hereby established, as an independent agency in the Department of Justice, a United States Parole Commission which shall

18 USC 4202. Membership.

the parole... community treatment... original sentence... if on parole pursuant... provided it has taken into... been convicted of any... release on parole... and... is warranted by the... of any other condi...
 lee with a written notice... days, excluding holi...
 If parole is revoked, a... etting forth in writing... on a copy of which shall...
 ler: section 4206; parole... ction 4209; parole dis... le is modified or revoked... such decision applies... ting a written applica... n thirty days following... regional commissioner;... ant to rules and regula... or reverse his original... ting of the decision and... tion: (a) of this section... ration may be appealed... Board by submitting a... days following the date... tional Appeals Board... t pursuant to rules and... ify or reverse the deci... of the decision and the...
 view any decision of a... t of the Attorney Gen... g the decision and, by... se the decision withi... al's request. The Board... ndividual to whom the... the reasons therefor...
 ined his twenty-second... h birthday at the time... ion the previous record... il experience, his social... health, and such other... urt finds that there are... nt will benefit from the... h Corrections Act, (18... suant to the provisions

§ 4217. Warrants to retake Canal Zone parole violators
 An officer of a Federal penal or correctional institution, or a Federal officer authorized to serve criminal process within the United States to whom a warrant issued by the Governor of the Canal Zone for the retaking of a parole violator is delivered, shall execute the warrant by taking the prisoner and holding him for delivery to a representative of the Governor of the Canal Zone for return to the Canal Zone.

18 USC 4217.

§ 4218. Applicability of Administrative Procedure Act
 (a) For purposes of the provisions of chapter 5 of title 5, United States Code, other than sections 554, 555, 556, and 557, the Commission is an agency, as defined in such chapter.

18 USC 4218.

5 USC 500 et seq.

(b) For purposes of subsection (a) of this section, section 553(b)(3)(A) of title 5, United States Code, relating to rulemaking, shall be deemed not to include the phrase 'general statements of policy'.

(c) To the extent that actions of the Commission pursuant to section 4203(a)(1) are not in accord with the provisions of section 553 of title 5, United States Code, they shall be reviewable in accordance with the provisions of sections 701 through 706 of title 5, United States Code.

(d) Actions of the Commission pursuant to paragraphs (1), (2), and (3) of section 4203(b) shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of title 5, United States Code.

Sec. 3. Section 5005 of title 18, United States Code, is amended to read as follows:

§ 5005. Youth correction decisions

The Commission and, where appropriate, its authorized representatives as provided in section 4203(c), may grant or deny any application or recommendation for conditional release, or modify or revoke any order of conditional release, of any person sentenced pursuant to this chapter, and perform such other duties and responsibilities as may be required by law. Except as otherwise provided, decisions of the Commission shall be made in accordance with the procedures set out in chapter 311 of this title.

Ante, p. 220.

18 USC 4201 et seq.

Sec. 4. Section 5006 of title 18, United States Code, is amended to read as follows:

§ 5006. Definitions

- (a) "Commission" means the United States Parole Commission;
- (b) "Bureau" means the Bureau of Prisons;
- (c) "Director" means the Director of the Bureau of Prisons;
- (d) "youth offender" means a person under the age of twenty-two years at the time of conviction;
- (e) "committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to sections 5010(b) and 5010(c) of this chapter;
- (f) "treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders; and
- (g) "conviction" means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.

Sec. 5. Sections 5007, 5008, and 5009 of title 18, United States Code, are repealed.

Repeal.

Sec. 6. Section 5014 of title 18, United States Code, is amended to read as follows:

18 USC 5014. **§ 5014. Classification studies and reports.**
 "The Director shall provide classification centers and agencies. Every committed youth offender shall first be sent to a classification center or agency. The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. In the absence of exceptional circumstances, such study shall be completed within a period of thirty days. The agency shall promptly forward to the Director and to the Commission a report of its findings with respect to the youth offender and its recommendations as to his treatment. As soon as practicable after commitment, the youth offender shall receive a parole interview."

SEC. 7. Section 5017(a) of title 18, United States Code, is amended to read as follows:

Ante, p. 223.

"(a) The Commission may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender in accordance with the provisions of section 4206 of this title. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Commission."

SEC. 8. Section 5020 of title 18, United States Code, is amended to read as follows:

§ 5020. Apprehension of released offenders

"If, at any time before the unconditional discharge of a committed youth offender, the Commission is of the opinion that such youth offender will be benefited by further treatment in an institution or other facility the Commission may direct his return to custody or if necessary may issue a warrant for the apprehension and return to custody of such youthful offender and cause such warrant to be executed by a United States probation officer, an appointed supervisory agent, a United States marshal, or any officer of a Federal penal or correctional institution. Upon return to custody, such youth offender shall be given a revocation hearing by the Commission."

18 USC 5005
et seq.

SEC. 9. Chapter 402 of title 18, United States Code, is amended by deleting the term "division" whenever it appears therein and inserting in lieu thereof the word "Commission".

SEC. 10. The table of sections for chapter 402 of title 18, United States Code, is amended to read as follows:

"Sec.

- "5005. Youth correction decisions.
- "5006. Definitions.
- "5010. Sentence.
- "5011. Treatment.
- "5012. Certificate as to availability of facilities.
- "5013. Provision of facilities.
- "5014. Classification studies and reports.
- "5015. Powers of Director as to placement of youth offenders.
- "5016. Reports concerning offenders.
- "5017. Release of youth offenders.
- "5018. Revocation of Commission orders.
- "5019. Supervision of released youth offenders.
- "5020. Apprehension for released offenders.
- "5021. Certificate setting aside conviction.
- "5022. Applicable date.
- "5023. Relationship to Probation and Juvenile Delinquency Acts.
- "5024. Where applicable.
- "5025. Applicability to the District of Columbia.
- "5026. Parole of other offenders not affected."

in centers and agencies... be sent to a classification... or, agency shall make a... rder, including a mental... personal traits, his capa... family life, any previous... mental or physical defect... In the absence of excep... tled within a period of... ard to the Director and... ith respect to the youth... tment. As soon as prac... r shall receive a parole... States Code, is amended

ter reasonable notice to... ision a committed youth... section 4206 of this title... mitted youth offender... sion he shall so report... tes Code, is amended to... charge of a committed... ion: that such youth... nt in an institution or... return to custody or in... ension and return to... e such warrant to be... appointed supervisory... of a Federal penal or... y, such youth offender... sion.

s Code, is amended by... s therein and inserting... 02 of title 18, United... ders.

SEC. 11. Section 5041 of title 18, United States Code, is amended to read as follows:

§ 5041. Parole. "A juvenile delinquent who has been committed may be released on parole at any time under such conditions and regulations as the United States Parole Commission deems proper in accordance with the provisions in section 4206 of this title."

SEC. 12. Whenever in any of the laws of the United States or the District of Columbia the term "United States Parole Board" or any other term referring thereto, is used, such term or terms, on and after the date of the effective date of this Act, shall be deemed to refer to the United States Parole Commission as established by the amendments made by this Act.

SEC. 13. Section 5108(c)(7) of title 5, United States Code, is amended to read as follows:

(7) The Attorney General, without regard to any other provision of this section, may place a total of ten positions of warden in the Bureau of Prisons in GS-16."

SEC. 14. Section 3655 of title 18, United States Code, relating to duties of probation officers, is amended by striking out "Attorney General" in the last sentence and inserting in lieu thereof "United States Parole Commission".

SEC. 15. There is hereby authorized to be appropriated such sums as are necessary to carry out the purposes of the amendments made by this Act.

SEC. 16. (a) There are hereby transferred to the Chairman of the United States Parole Commission, all personnel, liabilities, contracts, property and records as are employed, held, used, arising from, available or to be made available of the United States Board of Parole with respect to all functions, powers, and duties transferred by this Act to the United States Parole Commission.

(b) This Act shall take effect sixty days after the date of enactment, except that the provisions of section 4208(h) of this Act shall take effect one hundred twenty days after the date of enactment.

(c) Each person holding office as a member of the United States Board of Parole on the day before the effective date of the Parole Commission and Reorganization Act shall be a Commissioner whose term as such shall expire on the date of the expiration of the term for which such person was appointed as a member of the Board of Parole.

(d) For the purpose of section 4202 of title 18, United States Code, service by an individual as a member of the United States Board of Parole shall not constitute service as a Commissioner.

Approved March 15, 1976.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-184 (Comm. on the Judiciary) and No. 94-838 (Comm. of Conference).

SENATE REPORTS: No. 94-369 (Comm. on the Judiciary) and No. 94-648 (Comm. of Conference).

CONGRESSIONAL RECORD:

Vol. 121 (1975): May 21, considered and passed House, Sept. 16, considered and passed Senate, amended.
Vol. 122 (1976): Mar. 2, Senate agreed to conference report, Mar. 3, House agreed to conference report.

Ante, p. 223.
18 USC 4202
note.

5 USC 5332
note.

Appropriation
authorization.

18 USC 4202
note.

Effective date.
18 USC 4201
note.

18 USC 4202
note.

18 USC 4202
note.