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Sentence Review by the Trial Court: A Proposal to Amend Rule 35

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During the four years I have been on the bench, I have encountered no task more challenging, no decision more excruciating, no responsibility more awesome than that of imposing sentence on the criminal defendants who appear before me. It is a responsibility which I have had to assume hundreds of times, virtually alone in an uncharted sea, and acutely aware that my decisions would have the most profound and far-reaching effects upon the lives of the defendants in my court. However substantial the stakes or however complex the legal issues in a civil lawsuit—and I have indeed been fortunate to have presided over civil cases involving extraordinarily exciting and important matters, argued by some of the ablest attorneys in the country—they are vastly overshadowed by the gravity of the fundamental question I face as a sentencing judge: whether, in what way, and how severely should I punish a fellow human being.

The word "sentence" derives from the Latin verb *sentire,* to feel. The derivation is apt, for in fashioning a criminal sentence the judge, more than in any other judicial task, must draw upon his own values, insight, and intuition, respond to the parameters of the situation and the character of the individual before him, and strive to achieve what he can only *sense* will be a just and fair disposition. It is troubling that decisions as grave as these are being made every day by judges who, like myself, were almost totally unencumbered, prior to going on the bench, by learning or experience relevant to sentencing.[1] Opportunities

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I wish to express my gratitude to my law clerk, Paul Sugarman, for assisting in the preparation of this article.

[1] Judge Marvin E. Frankel has lamented the near total unpreparedness of most trial judges for fashioning criminal sentences:

> Nothing they studied in law school touched our subject more than remotely. Probably a large majority had no contact, or trivial contact, with criminal proceedings of any kind during their years of practice. Those who had such exposure worked preponderantly on the prosecution side. Whether or not this produces a troublesome bias, the best that can be said is that prosecutors tend generally either to refrain altogether from taking positions on sentencing or to deal with the subject at a bargaining level somewhat removed from the plane of penological ideals.
>
> Thus qualified, the new judge may be discovered within days or weeks fashioning judgments of imprisonment for long years. No training, formal or informal, precedes the first of these awesome pronouncements. Such formal and

for self-education exist, and most judges conscientiously attempt to inform themselves of the range of sentencing alternatives and of the underlying principles, objectives, and ideals of the corrections process.[2] But at heart, sentencing decisions are more inductive than deductive, more a product of creative inference than of scientific proof, and far more impressionistic than we like to admit.

None of these observations is novel. Indeed, such observations merely echo the rallying cry of those who seek to reform the criminal sentencing process: that the power of punishment must not rest in a single judge, free to exercise within limits so broad as to be nearly meaningless a discretion virtually unchecked and unreviewable. Frequently this criticism focuses upon the identity of the punisher, his background, philosophy and idiosyncracies,[3] and the particular skills or lack thereof he brings to the task.[4] More often though, the emphasis

intentional education, other than from the job itself, as may happen along the way is likely to be fleeting, random, anecdotal, and essentially trivial.

Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 6–7 (1972).

Of equal concern is the fact that even after imposing hundreds of sentences, the trial judge has precious little empirical data upon which to draw as to the effect and ultimate consequences of any sentence. It is for this reason that I urge that the sentencing judge obtain as much data as possible about each individual he must sentence. Even with this data, though, we can only hope that the judge will exercise a sensitive awareness to the often conflicting interests involved in sentencing: protecting society without at the same time destroying an individual.

[2] Any effort at self-enlightenment is complicated by the fact that rarely has there been general agreement, either at any one time or across time, on what those principles, objectives, and ideals should be.

> In 1864 Sir Henry Maine could already say "All theories on the subject of punishment have more or less broken down . . . and we are again at sea as to first principles." Some forty years later Professor Kenny, after examining current opinions of judges and legislators alike, reached the same conclusion: ideas on punishment had failed to assume "either a coherent or a stable form." Twenty years later, discussing the position in the United States, Dean Roscoe Pound spoke of the "fundamental conflict with respect to aims and purposes" pervading both penal legislation and penal administration. And now, after another lapse of twenty years, Professor Jerome Hall has shown that the divergence of views is as wide as it was a century ago.

L. RADZINOWICZ, IDEOLOGY AND CRIME 114 (1966).

Even within the last few years we have witnessed in my own state of California and in the Federal Bureau of Prisons a dramatic shift of emphasis from rehabilitation to punishment as the principal goal of the corrections process, a shift that has been endorsed by some leading commentators in the field of penology. *See, e.g.*, Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161 (1974).

[3] "Where law and precedent provide weak guidelines rather than mandates, the chief factors associated with the judge's choice may be discovered in his personal history and in his political and social environment." Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 U. CIN. L. REV. 597 (1973).

[4] Many have argued that judges are particularly ill-suited to sentencing criminal defendants. Justice Frankfurter, for example, expressed his views as follows:

> I myself think that the bench—we lawyers who become judges—are not very competent, are not qualified by experience, to impose sentences where any discretion is to be exercised. I do not think it is in the domain of the training of

is upon the abundant—many would say excessive—discretion the trial judge is permitted to exercise in fashioning criminal sentences.

> The common form of criminal penalty provision confers upon the sentencing judge an enormous range of choice. The scope of what we call "discretion" permits imprisonment for anything from a day to one, five, 10, 20, or more years. All would presumably join in denouncing a statute that said "the judge may impose any sentence he pleases." Given the mortality of men, the power to set a man free or confine him for up to 30 years is not sharply distinguishable.[5]

Not surprisingly, most recent criticism of the sentencing process has focused upon ways in which the discretionary power of the sentencing judge can be structured, limited, reviewed, or, as some have advocated, eliminated. Writings in this area abound,[6] and it is not my purpose to add to that vast literature by setting forth here my own suggestions for dramatic overhaul of sentencing procedures in the federal courts. My objective is far more limited; I wish only to describe and recommend adoption of a practice which I follow in my own court every time I impose sentence on a criminal defendant. It is a practice which looks not to the elimination of the sentencing judge's discretion, but, I believe, to enhanced exploitation of the advantages that can be derived from its existence.

> lawyers to know what to do with a fellow once you find out he is a thief. . . . I think the lawyers are people who are competent to ascertain whether or not a crime has been committed. . . . But all the questions that follow upon ascertainment of guilt, I think require very different and much more diversified talent than lawyers are likely to possess.

Statement of Felix Frankfurter, *quoted in Pilot Institute on Sentencing*, 26 F.R.D. 231, 316 (1959). Others have urged that the supervision and administration of the entire corrections process, including sentencing, be assigned to medical and sociological experts. *See, e.g.*, H. BARNES, THE STORY OF PUNISHMENT—A RECORD OF MAN'S INHUMANITY TO MAN 266 (1930). Although I believe that discretion in sentencing should continue to exist, it is not my purpose here to argue in whom it should lie. However, it is my opinion that our experience with an indeterminate sentence structure, where sentencing decisions do rest in the hands of nonjudicial officers, has clearly shown that such officers have generally not exercised well the vast discretion entrusted to them. *See* Note, *The Collective Sentencing Decision in Judicial and Administrative Contexts: A Comparative Analysis of Two Approaches to Correctional Disparity*, 11 AM. CRIM. L. REV. 695, 708–13 (1973).

Indeed, the Attorney General of California, the chief law officer of the state which pioneered the indeterminate sentence thirty years ago, has recently declared the system a proven failure—a conclusion I share—and recommended its dismantlement.

[5] Frankel, *supra* note 1, at 4. The existence of such wide-ranging discretion is usually justified by reference to an assumption underlying current sentencing theories, namely, that every sentence must be individualized, tailored to the particular offender and his offense in a way that will prevent him and others from committing future crimes. Comment, *Discretion in Felony Sentencing—a Study of Influencing Factors*, 48 WASH. L. REV. 857, 859 (1973).

[6] For an excellent bibliography on sentencing and corrections, see 11 AM. CRIM. L. REV. 217 (1972).

Since going on the bench I have evolved the practice of reviewing automatically and on my own motion all criminal judgments 100 days after they have been entered and modifying those sentences I feel should be altered in some way. I am authorized to conduct this review by Rule 35 of the Federal Rules of Criminal Procedure.[7] I strongly believe that there is much to gain from *automatic* review by the *sentencing judge* of *all* correctional dispositions and, when appropriate, modification of some. Moreover, I believe that the benefit that flows from review of criminal judgments can be further increased by amendment of Rule 35, as detailed below.[8]

The motion to reduce sentence under Rule 35,[9] whether made by the defendant or by the court sua sponte, is premised on the assumption that a certain amount of time has passed since the court first imposed sentence and that reconsideration of the sentence is perhaps advisable. It is frequently said that such a motion "is essentially a plea for leniency and presupposes a valid conviction."[10] The Rule gives every criminal defendant an opportunity for a second round before the sentencing judge and permits the court to decide if, on further reflection, the original sentence now appears unduly harsh.[11] It is clearly premised on the psychological principle that passage of time may find the sentencing judge in a more sympathetic or receptive frame of mind,[12] and thus allows the judge to correct any sentence which may have been imposed in response to particular pressures or to a particular mood or temper present on the day of sentencing. It is widely recognized that a motion for reduction of sentence under Rule 35 is addressed to the sound discretion of the trial court,[13] and is reviewable on appeal only for abuse of that discretion.[14]

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[7] Rule 35 reads as follows:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

[8] *See* text accompanying notes 28–38 *infra*.

[9] The discussion that follows is concerned only with a motion to reduce a sentence, and not with one to correct an illegal sentence.

[10] Poole v. United States, 250 F.2d 396, 401 (D.C. Cir. 1957).

[11] *See, e.g.*, United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir. 1968), *cert. denied*, 393 U.S. 918 (1968), *rehearing denied*, 399 U.S. 917 (1970); United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973).

[12] 8A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 35.02[1], at 35–4 (2d ed. 1975).

[13] Green v. United States, 481 F.2d 1140, 1141 (D.C. Cir. 1973); United States v. Krueger, 454 F.2d 1154, 1155 (9th Cir. 1972); United States v. Williams, 446 F.2d 486,

Rule 35 also permits the district court to consider any additional relevant information that may have come to light since sentence was imposed. In its simplest manifestation, this means that an opportunity exists to correct obvious error.

> One of the purposes of Rule 35 in permitting reduction of a sentence within 120 days of its imposition . . . , is to provide time for the defendant to bring to the attention of the sentencing judge any mistake that might have been made or any misapprehension under which the judge may have been laboring when imposing sentence.[15]

More importantly, however, in reviewing a sentence, the judge has access to additional information not available at the time of sentencing, in particular the manner in which a defendant has conducted himself since sentence was imposed.[16] Judges have traditionally been permitted to consider all information relevant to determining the severity of the sentence to be imposed, and much useful information is contained in the pre-sentence report prepared by the Probation Department pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure. I believe that the more information and data the sentencing judge has, the more likely he is to reach a fair and just sentence. Increased utilization of the review procedures of Rule 35 would expand significantly the information base upon which corrections decisions rest. My own procedure for obtaining a report of the defendant's conduct during the 100-day period following his sentencing is set forth below.

I have found that other benefits flow from my practice of reviewing all criminal judgments. When I impose sentence, I advise the defendant of my intention to review his sentence after 100 days. I also

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488 (5th Cir. 1971); United States v. Jones, 444 F.2d 89, 90 (2d Cir. 1971); United States v. Brown, 428 F.2d 1191, 1193 (7th Cir. 1970), *cert. denied*, 400 U.S. 941 (1970).

[14] On rare occasions a court of appeals will find such abuse of discretion and will itself reduce the sentence. *See, e.g.*, McGee v. United States, 462 F.2d 243 (2d Cir. 1972); United States v. McKinney, 466 F.2d 1403, 1405 (6th Cir. 1972), *discussed in* 7 SUFFOLK U. L. REV. 1128 (1973). More commonly, however, when an appellate court disagrees with the sentence imposed, it will do no more than engage in some gentle arm-twisting:

> We recognize, of course, that the imposition of sentence is in the sound discretion of the District Judge. The sentence seems to us extremely harsh, but circumstances not disclosed by the record may justify it. We think the District Court should seriously consider exercising its power under Fed. R. Crim. P. 35 to reduce the sentences imposed.

Wilson v. United States, 335 F.2d 982, 984 (D.C. Cir. 1963).

[15] United States v. Erickson, 300 F. Supp. 1236, 1240 (E.D. Ark. 1969).

[16] I recognize, of course, that a report describing the defendant's conduct in the controlled environment of an institution may not be indicative of how he will perform at a future date in society, and therefore should not be controlling in the decision whether modification is desired. However, certain information from the institution, such as participation in vocational and educational training, drug abuse programs, psychological counseling and the like, may be of material significance. Such information, when carefully evaluated and balanced, may substantially support modification of sentence.

inform him that in the overwhelming majority of cases I do not modify my sentence, but that the possibility exists, and therefore he should conduct himself in the best possible manner at the institution. It has been my experience that this procedure frequently encourages a defendant to get started on the right foot, and that the effort he makes and the pattern he establishes are continued during the remainder of his incarceration. Finally, I have also found that for many defendants the knowledge that somebody is interested in them and is indeed following their progress can be very meaningful and supportive.

Although I strongly believe that the sentencing judge should review *all* corrections judgments several months after they are entered, my own experience suggests that actual modification of sentence will occur infrequently, and for good reason. Balanced against the benefits to be derived from the reduction of a sentence in a particular case is the desirability of preserving the general expectation that a court's sentencing decisions are permanent and subject to change only in unusual circumstances. Though a court should never refuse to modify a sentence solely on the grounds that permanency of decision is a worthwhile goal,[17] neither should it ignore that consideration. The reduction of a sentence is, and should remain, an uncommon action taken in response to an exceptional situation.

> Sentencing is not a game nor is it a matter of contract with the defendant who receives the sentence . . . . Though courts do their best in the first instance to perform this task, occasionally a situation arises where it appears that the sentence originally imposed is inadequate to fulfill its multiple purpose [*sic*]. In such a situation, the Court has a responsibility to adjust the sentence so that it will fulfill its purpose.[18]

Were modification of sentences to become the rule rather than the exception, both the efficient administration of the criminal justice system and the defendant himself would suffer as a result. In my own court, I have modified the sentences of only 14 of the hundreds of defendants I have sentenced.[19]

A proper understanding of the intent and purpose of Rule 35 should further contribute to the infrequent exercise of the court's dis-

[17] United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir. 1968).

[18] United States v. Mandracchia, 247 F. Supp. 1, 4 (D.N.H. 1965).

[19] In analyzing those cases in which the original sentence was modified, I have discovered no pattern either with respect to the nature of the offense or of the particular defendant, with a single exception: modification occurred in several cases when an educational or employment opportunity became available which had to be seized at that particular time and where I believed the maximum benefit from incarceration already had been obtained. In those cases, where the circumstances warranted, I modified the sentence and placed the defendant on a very conditional probation.

cretionary authority to reduce a sentence. That authority is limited by time constraints.[20] By no means should the sentencing judge attempt to exercise the equivalent of executive clemency.[21]

Both procedurally and administratively, a practice of reviewing automatically all corrections judgments imposes only a slight additional burden on the sentencing judge and the penal authorities. It is well established that the defendant is not entitled to a formal hearing on a motion to reduce sentence;[22] nor is his presence required should the court choose to hear testimony or arguments, or should it decide to reduce the sentence.[23] Therefore, penal authorities will not be inconvenienced by routine transportation of every prisoner to court for reconsideration of his sentence. From the judge's perspective the additional work entailed by a practice of reviewing all sentences centers largely upon the effort needed to become informed of, and to evaluate the defendant's progress since the imposition of sentence, as well as any other relevant information that may have come to light. In my own court, when a defendant is sentenced to an institution, I generally write to the institution to which the defendant has been sent and tell them that I will be reviewing my sentence within 100 days and would appreciate their having the caseworker or some other official prepared to discuss that particular defendant's case with me at the end of 90 or so days. On the 100th day my secretary puts the file on my desk and my courtroom deputy enters an appropriate minute order in the defendant's file.[24] In those cases where the defendant has gone to an institution, I call the institution and talk to the caseworker or some other official and find out how the defendant has progressed.[25] I then evaluate the information I have received and decide either to modify the original sentence imposed or, in the vast majority of cases, to let stand the original

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20 *See* text accompanying notes 22–30 *infra.*

21 United States v. Marchese, 341 F.2d 782, 788 (9th Cir. 1965), *cert. denied,* 382 U.S. 817 (1965).

22 United States v. Jones, 490 F.2d 207 (6th Cir. 1974), *cert. denied,* 416 U.S. 989 (1974); Fournier v. United States, 485 F.2d 130 (5th Cir. 1973); United States v. Krueger, 454 F.2d 1154 (9th Cir. 1972).

23 Fournier v. United States, 485 F.2d 130, 131 (5th Cir. 1973).

24 The minute order is in the following form: "It is hereby ordered that pursuant to Rule 35 of the Federal Rules of Criminal Procedure the Court, on its own motion, will consider modification of the sentence imposed on the defendant herein."

25 Because I have visited for a period of three to four days each institution to which I sentence defendants, I have some familiarity with the personnel and with the psychological, educational, vocational, and other resources at each institution. The information I have gleaned from these visits is of particular assistance to me in evaluating the reports I receive from the institution and deciding whether to modify a particular sentence.

sentence. My courtroom deputy then enters a minute order reflecting the action taken.[26]

Often I feel that modification of the original sentence is not justified, but that the defendant has shown excellent progress at the institution. In those cases I write to the Board of Parole in support of the defendant's early release. Despite the fact that the Board of Parole's present policy is to adhere almost mechanically to its guidelines and to take into account the progress of the defendant at the institution only in a negative rather than a positive sense,[27] I have found that such interest on the part of the sentencing judge has on occasion resulted in the release of the defendant on parole earlier than would otherwise have occurred.

I believe that the procedure I have described would be even more beneficial if Rule 35 were amended in two ways.[28] The first change I propose concerns the timing of sentence review. At present, Rule 35 provides that the court may reduce a sentence within 120 days after the appeal is dismissed or the judgment affirmed. The 120-day requirement was added in 1966; prior to that time the Rule authorized the court to act only within 60 days of the date of sentence. I propose that the Rule be amended to permit consideration of a motion to reduce sentence within 180 days of the imposition of sentence.

Operating within the 120-day limit has often proven troublesome for many courts. Technically, the Rule is phrased so as to require the court to act within 120 days, and not merely for the motion for reduc-

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[26] The order reads as follows:

The Court, having reviewed on its own motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure the sentence imposed on the defendant herein,

IT IS HEREBY ORDERED that the sentence is modified as follows:

[or]

IT IS HEREBY ORDERED that the sentence is not modified.

[27] The guidelines presently utilized by the Board of Parole assume that the prisoner has been on good behavior while at the Institution. If he has not, then the guidelines are inapplicable and in all likelihood he will serve time beyond that specified in the guidelines. The guidelines do not take into account how favorable an inmate's institutional behavior has been. In sum, he gets no credit if he is good, but he is further penalized if he is bad.

[28] The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recently recommended to the Judicial Conference that Rule 35 be amended in several particulars, the most significant of which would establish a Sentence Review Panel, composed of three district judges of the circuit, to review upon the defendant's motion all sentences which may result in imprisonment for two years or more. The defendant must first seek reduction of his sentence from the trial judge. The Review Panel would be empowered to modify, reduce, or confirm the sentence, but not to increase it, and its decision would not be reviewable on appeal. The Judicial Conference discussed the matter at length at its meeting on September 26, 1975, and decided not to approve the proposed amendment and forward it to the Supreme Court at this time. The amendments I propose here to Rule 35 are obviously of much more limited scope than those recently considered by the Judicial Conference.

tion of sentence to be filed within that period, a view seemingly endorsed by the Supreme Court:

> It is quite significant that Rule 45(b) not only prohibits the court from enlarging the period for taking an appeal, but, by the same language in the same sentence, also prohibits enlargement of the period for taking any action under Rules 33, 34 and 35, except as provided in those Rules . . . . [T]he Rules, in abolishing the limitation based on the Court Term, did not substitute indefiniteness, but prescribed precise times within which the power of the courts must be confined. [I]t has been held that a District Court may not reduce a sentence under Rule 35 after expiration of the 60-day [now 120-day] period prescribed by that Rule regardless of excuse.[29]

Thus, the 120-day requirement is jurisdictional; unless it is met, "The court has no jurisdiction or power to alter sentence."[30]

Almost all courts, however, have stretched the language of the Rule to permit action after expiration of the 120-day period whenever the motion was timely filed.[31] Although some have disapproved of this practice[32] it is one which is widely followed, acquiesced in by most prosecutors, and, in my opinion, is consistent with the underlying purpose of the Federal Rules of Criminal Procedure.[33] The court is still obliged to act with reasonable promptness:

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[29] United States v. Robinson, 361 U.S. 220, 224–26 (1960).

[30] United States v. United States District Court, Cent. Dist. of Cal., 509 F.2d 1352, 1354 (9th Cir. 1975), *cert. denied,* 421 U.S. 962 (1975). The Court of Appeals went on to hold, however, that the sentencing court may nevertheless reduce a sentence within a reasonable time after expiration of the 120-day period, provided the motion for reduction of sentence was timely filed. *See* text accompanying note 34 *infra.*

[31] The 120 day period is technically not the time within which the motion may be made, but is rather the time within which the court may act. [Citation omitted.] However, as a matter of practice, the requirement has been interpreted to permit a court to act upon a motion as long as the motion is made within that period.

Irizzary v. United States, 58 F.R.D. 65, 67 (D. Mass. 1973).

[32] Professor Moore, for example, suggests that with the increase in the time limitation from 60 to 120 days, courts will no longer be forced to adopt such a strained interpretation of the Rule's literal language. 8A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 35.02[2], at 35–6 n.10.1 (2d ed. 1975). I disagree with Professor Moore. I cannot foresee how the court would be able to reach an informed and intelligent decision within the technical time limitation of Rule 35 when, for example, defendant's motion was filed close to the expiration of that time period, if the court is to consider those factors which I suggest should be taken into account in deciding whether to reduce a sentence.

[33] In Fallen v. United States, 378 U.S. 139 (1964), the Supreme Court held that it was error to dismiss a motion for new trial received by the District Court four days beyond the ten day time limitation of Rule 37(a)(2) of the Federal Rules of Criminal Procedure when petitioner had done all he could under the circumstances to file his motion in a timely fashion. The Court emphasized:

> Overlooked, in our view, was the fact that the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances. Rule 2 begins with the admonition that '[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the

> [A]s long as the district judge acts with reasonable speed after the timely motion is filed, the time limit should be flexible enough to give him an opportunity to hear and consider new evidence regarding the appropriateness of the sentence.[34]

Of course, when the sentencing judge acts sua sponte, as I am advocating here, he should be required to stay strictly within the time requirements set forth in the Rule, whether the present 120 days or the 180 days I propose.

My suggestion that the time limitation of Rule 35 be increased to 180 days is motivated both by substantive and administrative considerations.[35] I realize that some restriction on the court's authority to act is necessary, and that at some point the trial court must relinquish its central role in the corrections process and defer to the presumably greater competence of penal authorities.[36] Nevertheless, I believe that after four months the pattern of conduct the defendant has established following his sentencing is only beginning to emerge, and that an additional two months would enable the court to reach a more considered and informed decision on whether to modify the original sentence. Any cutoff date is, of course, necessarily arbitrary, and mistakes in judgment will be made no matter how long the period in which the sentencing judge may act. However, my own experience has convinced me that amendment of Rule 35 to permit reduction of the sentence within 180 days of the date of sentencing would, on balance, significantly increase the benefits that flow from a practice of automatic sentence review by the trial judge.

> elimination of unjustifiable expense and delay.' That the Rules were not approached with sympathy for their purpose is apparent when the circumstances of this case are examined.

Id. at 142. *See also* Dodge v. Bennett, 335 F.2d 657, 658 (1st Cir. 1964) (district court had jurisdiction to consider motion for reduction of sentence under Rule 35 received by the court more than 60 days after the date of sentencing when defendant's letter was timely mailed at the institution where he was confined but was inexplicably delayed by the penitentiary authorities).

[34] United States v. United States District Court, Cent. Dist. of Cal., 509 F.2d 1352, 1356 (9th Cir. 1975), *cert. denied*, 421 U.S. 962 (1975).

[35] Extension of the time limit to 180 days would bring Rule 35 into conformity with 18 U.S.C. § 3651 (1970), which provides that the trial court

> when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

[36] "[T]he period [for reduction of sentence] should not be so long as to conflict with institutional programs. Additional material discovered later can be used by parole boards." National Council on Crime and Delinquency, *Model Sentencing Act—2d Edition*, Comment on Section 11, *Modification of Sentence*, in 18 CRIME AND DELINQUENCY 335, 364 (1972). *Cf.* United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973); United States v. Smith,

From an administrative point of view, my suggestion to broaden the time limitation of Rule 35 is best understood with reference to the second amendment I propose to that Rule. Where the judge has imposed a sentence of incarceration, I believe that he should receive in every case, no later than 20 days before the date on which his authority to modify the original sentence terminates, a written report from the institution describing and evaluating the conduct of the defendant at that institution. Retaining the present 120-day time limitation upon the judge's jurisdiction to modify sentence sua sponte would thus impose a heavy burden upon penal authorities, who cannot realistically be expected to prepare and submit the contemplated report within 100 days. Judge James M. Burns of the United States District Court for the District of Oregon has emphasized this precise problem:

> I know from my own experience (and from the experience of other District Judges) that even when the motion is filed within 120 days, often a considerable amount of time elapses before the Judge can act. Many District Judges do as I myself when a Rule 35 motion is received: I ask the Bureau of Prisons for a report on the status, conditions and progress of the Defendant in the institution in which he is confined. It usually takes at least 60 or 90 days for a significant report to be prepared by the Bureau of Prisons. From time to time, the report itself suggests the necessity for exploration and further study of particular aspects of the case. In such an event, a request to the Bureau of Prisons may well result in a further delay of one or two months.[37]

Some have expressed strong objections to the procedure I propose,[38] and there are obvious limitations to any such report.[39] Nevertheless, I reiterate my personal conviction that the sentencing judge is entitled to receive, indeed is under a duty to consider, all relevant information both at the time of sentencing and at the time of review of the sentence imposed. I believe that requiring a written report from the institution would greatly assist the sentencing judge and would

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331 U.S. 469, 476 (1947) *cited in* 8A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 35.02[1], 35-4 n.5 (2d ed. 1975).

[37] United States v. United States District Court, Cent. Dist. of Cal., 509 F.2d 1352, 1357 (9th Cir. 1975) (Burns, J., dissenting).

[38] If every prisoner who alleged good behavior were entitled to have a warden prepare and submit a report to the court, the burden on the warden would be overwhelming and the court would be taking on the function of a parole board. Surely 18 U.S.C. § 4208(a)(2), under which Maynard was sentenced, reflects the sound policy that good behavior by a prisoner is chiefly for the Board of Parole to consider, not the judge.

United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973).

[39] *See* note 16 *supra*.

neither unreasonably burden penal authorities nor encroach excessively upon their competence.

A practice of automatic review of all criminal dispositions by the sentencing judge, as I have recommended here, is obviously no panacea for the many deficiencies that plague the sentencing process. We live in a time of great anxiety and confusion about what should be the goals of our criminal justice system and how those goals can best be achieved; it is a time of desperate need for direction, clarification, and improvement. My own suggestions are admittedly undramatic, modest in scope and purpose. Nevertheless, I deeply believe that they would contribute to the fair and just determination of criminal judgments, and I urge their adoption .