

ARTICLE 9. AUTHORITY OF COURT IN SENTENCING

Preliminary Draft No. 2; May 1970

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See: Commission Minutes
5/14/70, p. 30, Vol. IX
Tapes #59 and 60

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 9. AUTHORITY OF COURT IN SENTENCING

Preliminary Draft No. 2; May 1970

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Subcommittee on
Grading and Sentencing

ARTICLE 9. AUTHORITY OF COURT IN SENTENCING

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Section 1. Sections 4 to 7 of this Article are added to and made a part of ORS 137.010 to 137.990.

COMMENTARY

The purpose of this section is to incorporate the new proposals of this Article into the existing body of statutes compiled in ORS chapter 137 dealing with judgment, sentencing and parole and probation in criminal cases.

Section 2. ORS 137.075 is amended to read:

137.075. Report to court and to convicted person. (1) Within 60 days after completing the diagnostic examination, the Administrator of the Corrections Division shall file with the court a written report of findings and conclusions relative to the examination. [~~The immunities granted under ORS 137.115 are applicable to the examination and report under this section and ORS 137.072, 137.124, 137.320, 423.020 and 423.090.~~]

(2) A certified copy of the report shall be sent by registered mail by the clerk of the court to the [~~convicted person~~] defendant, his counsel and the district attorney.

(3) No statement made by a defendant in the course of an examination under this section or ORS 137.072, 137.124, 137.320, 423.020 and 423.090 shall be used against him in any civil proceeding or in any other criminal proceeding.

(4) No person shall be examined in any civil or any other criminal proceeding as to any statement made by the defendant in the course of the examination without the consent of the defendant.

(5) No statement contained in any report made under this section shall be the subject of any civil suit or action.

COMMENTARY

Section 2 amends ORS 137.075 which deals with diagnostic examinations of criminal defendants. The statute presently incorporates by reference certain immunities that are set forth in ORS 137.115, one of the sex offender sentencing statutes which would be repealed by section 6 of this Article.

The amendments proposed by section 2 would retain the immunity provisions now found in ORS 137.115 by making them a part of 137.075 itself.

Section 3. ORS 137.124 is amended to read:

137.124 (1) If the court imposes a sentence of imprisonment upon conviction of a felony, it shall not designate the penal or correctional institution in which the defendant is to be confined but shall commit the defendant to the legal and physical custody of the Corrections Division.

(2) Upon commitment to the Corrections Division all convicted male persons under the age of 26 who have not been convicted of the crime of murder or rape where actual force is involved or treason, or who have not served a previous term of imprisonment in an adult penal institution, shall be assigned initially to the Oregon State Correctional Institution. All other convicted male felons shall be assigned initially to the Oregon State Penitentiary.

(3) After assuming custody of the convicted male person and notwithstanding the initial assignment pursuant to subsection (2) of this section, the Corrections Division may transfer inmates from one penal or correctional institution to another such institution for the purposes of diagnosis and study, rehabilitation and treatment, as best seems to fit the needs of the inmate and for the protection and welfare of the community and the inmate.

(4) If the court imposes a sentence of imprisonment upon conviction of a misdemeanor, it shall commit the defendant to the custody of the sheriff for confinement in the county jail or other correctional facility for the imprisonment of misdemeanants.

COMMENTARY

ORS 137.124 shall require amendment to accomplish two things:

(1) To provide the courts with legislative direction regarding imprisonment of misdemeanants which, under the proposed new code, will not be set out in the statute defining each particular crime; and

(2) To provide flexibility in the statute by not limiting confinement of misdemeanants to a county jail but to allow for the use of a "correctional facility" (other than one for felons) if such facilities become available in the future.

Section 4. Reduction of Class C felony or criminal dealing in drugs to misdemeanor; authority of court. Notwithstanding section ____, when a person is convicted of any Class C felony or of the crime of criminal dealing in drugs under section ____ of this Code, if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a Class A misdemeanor and make disposition accordingly.

COMMENTARY - REDUCTION OF CLASS C FELONY OR CRIMINAL

DEALING IN DRUGS TO MISDEMEANOR;

AUTHORITY OF COURT

A. Summary

This section would empower the court with authority to reduce a Class C felony to a misdemeanor. As observed in the Model Penal Code commentary:

"However carefully offenses are defined, it is inevitable that cases will arise where a conviction and a disposition in accordance with the Code will seem unduly harsh to those responsible for its administration. Such cases are now dealt with typically by a plea of guilty or conviction of a lesser degree or grade of crime than the defendant actually has committed. In some jurisdictions, the Court is authorized in its discretion to impose either a state prison sentence or a jail sentence and when the Court pursues the latter course, the conviction in some states stands as for a misdemeanor rather than a felony." (Commentary, Tent. Draft No. 2 (1956) pp. 28-29).

B. Derivation

The section is based on Model Penal Code section 6.12 and Connecticut Penal Code section 37; however, the section

Section 5. Criteria for discharge of defendant. (1) Any court empowered to suspend imposition or execution of sentence or to place a defendant on probation may discharge the defendant if:

(a) The conviction is for an offense other than murder, treason or a Class A or B felony; and

(b) The court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release.

(2) If a sentence of discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

(3) If the court imposes a sentence of discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine, probationary supervision or conditions.

(4) If a defendant pleads not guilty and is tried and found guilty, a sentence of discharge is a final judgment on a conviction for all purposes, including an appeal by the defendant.

(5) If a defendant pleads guilty, a sentence of discharge is not appealable, but for all other purposes is a final judgment on a conviction.

COMMENTARY - CRITERIA FOR DISCHARGE OF DEFENDANT

A. Summary

The sentence of unconditional discharge provides the court with the means to make an appropriate disposition of a case where it does not have any reason to impose any conditions or to otherwise keep a "string" on a defendant. If

the court believes that the fact of conviction itself constitutes sufficient punishment, it can use this section to permit the defendant to go hence without any conditions and without the possibility of later bringing him back before the court on the original conviction. The court in felony cases is required to state its reasons for the record. Discharges in felony cases would be limited to Class C felonies.

B. Derivation

Section 5 is based on New York Revised Penal Law s. 65.20 and Michigan Revised Criminal Code s. 1335.

C. Relationship to Existing Law

The courts now have the power to suspend the imposition of sentence in a criminal case under ORS 137.510. Suspension of the imposition of sentence is an authorized disposition most closely approximating an unconditional discharge.

If a defendant pleads not guilty and is tried and found guilty, he may appeal the conviction even though the court suspends the imposition of sentence and places him on probation. State v. Gates, 230 Or 84, 368 P2d 605 (1962). However, if he pleads guilty and the imposition of sentence is suspended, he cannot appeal because under ORS 138.050 the only grounds for appeal from a sentence on a plea of guilty are the imposition of an excessive fine or excessive, cruel or unusual punishment.

Subsections (4) and (5) of section 5 are in accord with Gates and ORS 138.050, and are intended to allow the defendant to appeal on the merits if he is tried and convicted following a plea of not guilty, even though the court imposes a sentence of discharge. However, if the defendant pleads guilty and is discharged by the court, there would be no grounds for appeal since no fine or other "punishment" would be imposed.

Section 5 is not meant to be an annulment of the conviction or a means to expunge the record, so for all other purposes a sentence of discharge under either subsection (4) or (5) would be a judgment on a conviction. As a result, the section would enable the court to make a final disposition instead of suspending imposition of sentence in those cases where it has good reason to believe that the defendant will not be back.

Section 6. Criteria for sentencing of dangerous offenders. The maximum term of an indeterminate sentence of imprisonment for a dangerous offender is 30 years, if the court finds that because of the dangerousness of the defendant an extended period of confined correctional treatment or custody is required for the protection of the public and if it further finds, as provided in section 7 of this Article, that one or more of the following grounds exist:

(1) The defendant is being sentenced for a Class A felony, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity;

(2) The defendant is being sentenced for a felony that seriously endangered the life or safety of another, has been previously convicted of a felony not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity;

(3) As used in this section, "previously convicted of a felony" means:

(a) Previous conviction of a felony in a court of this state;

(b) Previous conviction in a court of the United States, other than a court-martial, of an offense which at the time of conviction of the offense was and at the time of conviction of the instant crime is punishable under the laws of the United States by death or by imprisonment in a penitentiary, prison or similar institution for a term of one year or more; or

(c) Previous conviction by a general court-martial of the United States or in a court of any other state or territory of the United States, or of the Commonwealth of Puerto Rico, of an offense which at the time of conviction of the offense was punishable by death or by imprisonment in a penitentiary, prison or similar institution for a term of one year or more and which offense also at the time of conviction of the instant crime would have been a felony if committed in this state.

(4) As used in this section, "previous conviction of a felony" does not include:

(a) An offense committed when the defendant was less than 16 years of age;

(b) A conviction rendered after the commission of the instant crime;

(c) It is the defendant's most recent conviction described in subsection (3) of this section, and the defendant was finally and unconditionally discharged from all resulting imprisonment, probation or parole more than seven years before the commission of the instant crime; or

(d) The conviction was by court-martial of an offense denounced only by military law and triable only by court-martial.

(5) As used in this section, "conviction" means an adjudication of guilt upon a plea, verdict or finding in a criminal proceeding in a court of competent jurisdiction, but does not include an adjudication which has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.

COMMENTARY - CRITERIA FOR SENTENCING OF DANGEROUS OFFENDERS

A. Summary

Section 6 establishes the criteria for identifying dangerous offenders. An offender may be sentenced as dangerous if he fits into any one of two categories: (1) commission of a Class A felony, and propensity to commit crime; (2) commission of a felony (such as arson) which, intended or not, seriously endangered the life or safety of another, previous criminal conviction and propensity to commit crime.

Subsections (3), (4) and (5) are similar to definitions in the habitual criminal act, ORS chapter 168.

The section authorizes commitment of dangerous offenders for a period up to 30 years, a period long enough to protect the public and to allow sufficient time for treatment and reformation. As with the ordinary term authorized for felonies under the proposed code, the extended term under this section would be an indeterminate sentence -- the statutory maximum is not mandatory and the court may fix the maximum at any period less than 30 years. The court is permitted to invoke the provisions of the section if one or more of the two grounds exist; however, it is not mandatory under the section, thereby affording the sentencing judge flexibility to use this as a sentencing tool in appropriate cases.

B. Derivation

The section is based on section 5 of the Model Sentencing Act (1963) with substantial changes in subsection (1) and deletion of a subsection dealing with organized crime.

C. Relationship to Existing Law

Oregon, like most states, has a number of statutes that provide for enhanced penalties for certain offenses and/or offenders. ORS chapter 168 (the habitual criminal act) now permits the court to impose extended terms of imprisonment up to life for second, third and fourth felony offenders. Before amendment by the Legislature in 1967 the imposition of an enhanced penalty was mandatory upon a finding by the court that the defendant who was convicted had been formerly convicted of one or more felonies. The trial court cannot

proceed to act until an information has been filed by the district attorney and filed on the defendant pursuant to ORS 168.055. ORS 168.085, which sets forth the terms of imprisonment that may be imposed for subsequent convictions, does not attempt to distinguish between dangerous and non-dangerous felonies. The habitual criminal act would be repealed by sections 6 and 7 of this Article.

Under the provisions of ORS 137.111 to 137.119 any person convicted under ORS 163.210 (rape), ORS 167.040 (sodomy), ORS 163.220 (rape of sister, daughter or step-daughter), ORS 163.270 (assault with intent to rob or commit rape or mayhem), ORS 167.035 (incest), ORS 167.045 (removal, detention or inducement of child with intent to commit certain sex offenses) may be sentenced to an indeterminate term not exceeding his natural life if:

- (1) The offense involved a child under 16; and
- (2) The court finds that the person has a mental or emotional disturbance, deficiency or condition predisposing him to the commission of any of the above-mentioned sex offenses.

ORS 167.050 provides for an enhanced penalty for the second conviction of any of the same sex offenses. (See, Commentary, Sexual Offenses, pp. 64-67 for further discussion of the above statutes.) ORS 137.111 to 137.119 and ORS 167.050 would be repealed by the draft.

ORS 166.230 provides for enhanced penalties for committing or attempting to commit a felony while armed with a firearm. The degree structure of the code's specific crimes, i.e., robbery in the first degree, burglary in the first degree, assault in the first degree, etc., take into account whether or not the felony is committed by a person who is armed in determining the grade of offense and maximum penalty. Therefore, additional enhancement of the penalties beyond that already built into the definitions of the crimes seem unnecessary. Furthermore, many of such offenses with firearms would fall within the purview of subsection (1) of the proposed section and permit sentencing as a dangerous offender.

For a critical analysis of sex offender and habitual criminal legislation see, ABA Standards Relating to Sentencing (Tent. Draft 1968) pp. 100-107, 160-171.

Section 7. Dangerous offenders; procedure and findings.

(1) Whenever, in the opinion of the court, there is reason to believe that the defendant falls within section 6 of this Article, the court shall order a presentence investigation and a psychiatric examination. The court may appoint one or more qualified psychiatrists to examine the defendant or may order that he be taken by the sheriff to a state hospital designated by the Mental Health Division for the examination.

(2) When the examination is conducted at a state hospital the superintendent shall notify the sheriff upon completion of the examination, and the sheriff shall return the defendant to the county in which he was convicted. The defendant shall remain in the custody of the sheriff subject to further order of the court. All costs connected with the examination shall be paid by the county in which the defendant was convicted.

(3) The psychiatric examination shall be completed within 30 days, subject to additional extensions not exceeding 30 days on order of the court. The psychiatrist shall file with the court a written report of his findings and conclusions, including an evaluation of whether the defendant is suffering from a severe personality disorder indicating a propensity toward criminal activity.

(4) The immunities granted under ORS 137.075, as amended by section 2 of this Article, are applicable to the psychiatric examination made under this section 7.

Section 7. Dangerous offenders; procedure and findings.

(1) Whenever, in the opinion of the court, there is reason to believe that the defendant falls within section 6 of this Article, the court shall order a presentence investigation and a psychiatric examination. The court may appoint one or more qualified psychiatrists to examine the defendant or may order that he be taken by the sheriff to a state hospital designated by the Mental Health Division for the examination.

(2) When the examination is conducted at a state hospital the superintendent shall notify the sheriff upon completion of the examination, and the sheriff shall return the defendant to the county in which he was convicted. The defendant shall remain in the custody of the sheriff subject to further order of the court. All costs connected with the examination shall be paid by the county in which the defendant was convicted.

(3) The psychiatric examination shall be completed within 30 days, subject to additional extensions not exceeding 30 days on order of the court. The psychiatrist shall file with the court a written report of his findings and conclusions, including an evaluation of whether the defendant is suffering from a severe personality disorder indicating a propensity toward criminal activity.

(4) The immunities granted under ORS 137.075, as amended by section 2 of this Article, are applicable to the psychiatric examination made under this section 7.

(5) Upon receipt of the psychiatric examination and presentence reports the court shall set a time for a presentence hearing, unless the district attorney and the defendant waive the hearing. At the presentence hearing the district attorney and the defendant may examine the psychiatrist who filed the report regarding the defendant.

(6) If, after considering the presentence report, the psychiatric report and the evidence in the case or on the presentence hearing, the court finds that the defendant comes within section 6 of this Article, the court may sentence the defendant as a dangerous offender.

(7) In determining whether a defendant has been previously convicted of a felony, the court shall consider as prima facie evidence of the previous conviction:

(a) A copy of the judicial record of the conviction which copy is authenticated under ORS 43.110 or 43.120;

(b) A copy of the fingerprints of the subject of that conviction which copy is authenticated under ORS 43.330; and

(c) Testimony that the fingerprints of the subject of that conviction are those of the defendant.

(8) Subsection (7) of this section does not prohibit proof of the previous conviction by any other procedure.

COMMENTARY - DANGEROUS OFFENDERS;

PROCEDURE AND FINDINGS

A. Summary

Section 7 establishes the procedures for determining whether a defendant comes within the dangerous offender provisions of section 6. The purposes of the section are

to provide procedural safeguards for the defendant, while at the same time furnishing the court with as much information as can be obtained on which to base an intelligent decision.

B. Derivation

The section is derived from Model Sentencing Act s. 6, but ORS 137.112 to 137.115 is the source of most of the language regarding the time and manner for conducting the psychiatric examination and presentence hearing. These are essentially the same procedures outlined in the statutes for utilization of the indeterminate sentence procedures for certain sex offenders. Subsections (7) and (8) are from ORS 168.080 (habitual criminal act).

C. Relationship to Existing Law

See Commentary to sections 2 and 6 supra.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 6.07. Sentence of Imprisonment for Felony; Extended Terms.

In the cases designated in Section 7.03, a person who has been convicted of a felony may be sentenced to an extended term of imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than five years nor more than ten years, and the maximum of which shall be life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than five years, and the maximum of which shall be fixed by the Court at not less than ten nor more than twenty years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be fixed by the Court at not less than five nor more than ten years.

Section 6.12. Reduction of Conviction by Court to Lesser Degree of Felony or to Misdemeanor.

If, when a person has been convicted of a felony, the Court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the view that it would be unduly harsh to sentence the offender in accordance with the Code, the Court may enter judgment of conviction for a lesser degree of felony or for a misdemeanor and impose sentence accordingly.

Text of Model Penal Code (Cont'd)

Section 7.02. Criteria for Imposing Fines.

(1) The Court shall not sentence a defendant only to pay a fine, when any other disposition is authorized by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.

(2) The Court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless:

(a) the defendant has derived a pecuniary gain from the crime; or

(b) the Court is of opinion that a fine is specially adapted to deterrence of the crime involved or to the correction of the offender.

(3) The Court shall not sentence a defendant to pay a fine unless:

(a) the defendant is or will be able to pay the fine; and

(b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

(4) In determining the amount and method of payment of a fine, the Court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

Text of Model Penal Code (Cont'd)

Section 7.03. Criteria for Sentence of Extended Term of Imprisonment; Felonies.

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examina-

Text of Model Penal Code (Cont'd)

Section 7.03. (Cont'd)

tion resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

The Court shall not make such a finding unless:

(a) the defendant is being sentenced for two or more felonies, or is already under sentence of imprisonment for felony, and the sentences of imprisonment involved will run concurrently under Section 7.06; or

(b) the defendant admits in open court the commission of one or more other felonies and asks that they be taken into account when he is sentenced; and

(c) the longest sentences of imprisonment authorized for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively would exceed in length the minimum and maximum of the extended term imposed.

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Text of New York Revised Penal Law

§ 65.20 Sentence of unconditional discharge

1. Criteria. The court may impose a sentence of unconditional discharge in any case where it is authorized to impose a sentence of conditional discharge under section 65.05 if the court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release.

When a sentence of unconditional discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

2. Sentence. When the court imposes a sentence of unconditional discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine or probation supervision. A sentence of unconditional discharge is for all purposes a final judgment of conviction. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 70.10 Sentence of imprisonment for persistent felony offender

1. Definition of persistent felony offender.

(a) A persistent felony offender is a person who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.

(b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:

(i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor; and

(ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and

(iii) that the defendant was not pardoned on the ground of innocence.

(c) For the purpose of determining whether a person has two or more previous felony convictions, two or more convictions of crimes that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction.

Text of New York Revised Penal Law (Cont'd)

Sec. 70.10 (Cont'd)

2. Authorized sentence. When the court has found, pursuant to the provisions of the code of criminal procedure, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A felony. In such event the reasons for the court's opinion shall be set forth in the record. L.1965, c. 1030, eff. Sept. 1, 1967.

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Text of Michigan Revised Criminal Code

[Unconditional Discharge]

Sec. 1335. (1) If a person who has been convicted of a crime is not sentenced to imprisonment, the court may sentence him to unconditional discharge if it is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release.

(2) If a sentence of unconditional discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

(3) If the court imposes a sentence of unconditional discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine, or probationary supervision.

(4) A sentence of unconditional discharge is for all purposes a final judgment of conviction.

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Text of Model Sentencing Act

§ 5. DANGEROUS OFFENDERS

Except for the crime of murder in the first degree, the court may sentence a defendant convicted of a felony to a term of commitment of thirty years, or to a lesser term, if it finds that because of the dangerousness of the defendant, such period of confined correctional treatment or custody is required for the protection of the public, and if it further finds, as provided in section 6, that one or more of the following grounds exist:

(a) The defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, has been previously convicted of one or more felonies not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons.

The findings required in this section shall be incorporated in the record.

§ 6. PROCEDURE AND FINDINGS

The defendant shall not be sentenced under subdivision (a) or (b) of section 5 unless he is remanded by the judge before sentence to [diagnostic facility]⁴ for study and report as to whether he is suffering from a severe personality disorder indicating a propensity toward criminal activity; and the judge, after considering the presentence investigation, the report of the diagnostic facility, and the evidence in the case or on the hearing on the sentence, finds that the defendant comes within the purview of subdivision (a) or (b) of section 5. The defendant shall be remanded to a diagnostic facility whenever, in the opinion of the court, there is reason to believe he falls within the category of subdivision (a) or (b) of section 5. Such remand shall not exceed ninety days, subject to additional extensions not exceeding ninety days on order of the court.

The defendant shall not be sentenced under subdivision (c) of section 5 unless the judge finds, on the basis of the presentence investigation or the evidence in the case or on the hearing on the sentence, that the defendant comes within the purview of the subdivision. In support of such findings it may be shown that the defendant has had in his own name or under his control substantial income or resources not explained to the satisfaction of the court as derived from lawful activities or interests.