A P P E N D I X

Appendix:

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A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12412

D.C. Docket No. 3:70-cr-00176-HLA-JBT-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUY ENNIS SMITH,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(December 7, 2018)

Before MARCUS, NEWSOM, and EBEL,* Circuit Judges.

PER CURIAM:

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* Honorable David M. Ebel, United States Circuit Judge for the Tenth Circuit, sitting by designation.

Petitioner Guy Smith invokes the writ of *coram nobis* in asking this Court to vacate his 1971 conviction for wearing military medals without authorization in violation of what is now 18 U.S.C. § 704(a). In order to obtain *coram nobis* relief, Smith must show, among other things, that this conviction is causing him a present harm. On remand from an earlier decision of this Court, the district court held an evidentiary hearing and found that removing the § 704(a) conviction from Smith's record would not affect his presumptive parole release date (PPRD), and that the conviction was therefore not causing him a present harm. We find no clear error in this finding, and so we affirm.[1]

I

In 1970, Guy Smith was arrested for reckless driving, operating a vehicle without a driver's license, speeding, and possession of marijuana. During the arrest, the officer found a denim jacket with various military medals attached, including a Purple Heart and Vietnam service medal. The government charged Smith with, *inter alia*, wearing a Purple Heart medal without authorization in

[1] We need not, and thus do not, reach the question whether Smith's § 704(a) conviction is unconstitutional in light of the Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709, 730 (2012) (holding 18 U.S.C. § 704(b) unconstitutional because it infringed upon speech protected by the First Amendment). *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

violation of 18 U.S.C. § 704(a).[2] Smith pleaded guilty and was sentenced to six months of probation. With court permission, he satisfied the sentence by paying a $100 fine.

Smith was arrested several more times in the ensuing years, including for a traffic offense, gun possession, vehicle theft, and intimidation. Separately, in 1978, Smith was convicted of first-degree murder for his participation in the beating and stabbing of a woman.

In *United States v. Alvarez*, 567 U.S. 709, 715 (2012), the Supreme Court invalidated 18 U.S.C. § 704(b), which prohibited an individual from falsely representing (either verbally or in writing) that he had been awarded any of a number of government-conferred medals or badges.[3] Shortly thereafter, Smith sought relief under the common law writ of error *coram nobis* for his conviction under § 704(b)'s statutory neighbor, § 704(a). Smith argued that this conviction

[2] At time of Smith's arrest, § 704 provided: "Whoever knowingly wears, manufactures, or sells any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof; except when authorized under regulations made pursuant to law, shall be fined not more than $250 or imprisoned not more than six months, or both." 18 U.S.C. § 704 (1970). In 1994, § 704 was amended and this language became § 704(a). See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2113.

[3] At the time, § 704(b) provided: "Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both." 18 U.S.C. § 704(b) (2006).

was causing him ongoing harm because Florida's Parole Commission had considered it in calculating his PPRD—and would continue to do so—thereby prolonging his entitlement to a hearing or presumptive release date. In a succinct order, the district court concluded that "[f]or the reasons discussed in the Government's Response, the Court finds that [Smith] is not entitled to coram nobis relief."

We vacated that order on the ground that "[n]o evidentiary hearing was held and the district court did not enter any findings" about whether the challenged conviction was causing Smith a "'present harm' that is 'more than incidental.'" *United States v. Smith*, 644 F. App'x 927, 928 (11th Cir. 2016) (per curiam) (quoting *United States v. Sloan*, 505 F.3d 685, 697 (7th Cir. 2007)). On remand, the district court held an evidentiary hearing and received documentary evidence detailing how the Parole Commission calculated Smith's PPRD. The district court also heard testimony from Laura Tully, who worked for the Parole Commission for more than a decade and whose responsibilities included calculating prisoners' PPRDs. In preparation for her testimony, Tully reviewed the calculations used to determine Smith's PPRD. Tully testified that even if Smith's § 704(a) conviction were vacated, his "salient factor score"—a PPRD input that is at the heart of this dispute—would remain the same.

Assuming for the sake of its analysis that Smith could prove that his § 704(a) conviction was unconstitutional, the district court found that Smith nonetheless had "not met his burden to demonstrate that removing the [§ 704] conviction from his record would change his [salient-factor] Score" and thus enhance his prospects for an earlier parole hearing or release date. Smith timely appealed and now argues that that the district court abused its discretion in denying him *coram nobis* relief.

II

We review a district court's denial of a petition for a writ of error *coram nobis* for abuse of discretion. *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000). Pursuant to our previous opinion, which noted that the district court had not "enter[ed] any findings about the issue," remanded for an evidentiary hearing, and instructed it to "find [whether] Smith ha[d] shown he [was] suffering current harm," *Smith*, 644 F. App'x at 928, we understand the district court's determination that Smith's conviction is not causing him a present harm to be a finding of fact. We review factual findings for clear error. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014).

A

"The bar for coram nobis relief is high." *Alikhani*, 200 F.3d at 734. Because the "[r]outine grant of coram nobis relief . . . would undermine the finality of

criminal convictions," courts must exercise "special restraint." *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002). As the Supreme Court has put it, *coram nobis* relief is an "extraordinary remedy" that should be afforded "only under circumstances compelling such action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511 (1954). With this high bar in mind, we turn to the calculation of Smith's PPRD. If Smith's PPRD would not change even if his conviction under § 704(a) were vacated, then he is not entitled to *coram nobis* relief.

A Florida prisoner's PPRD is the product of several inputs. First, and most relevant here, is the salient-factor score. This figure is calculated with reference to the prisoner's number of prior convictions. According to Smith's PPRD Commission Action form, the Parole Commission found that Smith had three or more prior convictions. Inserting this figure into the designated table yielded a salient-factor score of "2 points." The salient-factor score was then combined with a "Severity of Offense Behavior" assessment to give a "Matrix Time Range." Smith was convicted of a capital felony, meriting a severity score of 6. When cross referenced with his salient-factor score of 2, Smith's matrix time range was 180–240 months.

Based on the evidence and testimony before it, the district court found that even if it were to vacate Smith's § 704(a) conviction, he would still have three

prior convictions, earn the same salient-factor score of 2 points, and thus receive the same matrix time range and PPRD. Smith now argues that vacating the offense would drop him down to two prior convictions, a salient-factor score of "1 point," and thus, per the matrix, a range of 120–180 months.

Smith has been convicted twice for carrying a concealed weapon. The Parole Commission included these convictions in Smith's tally, and neither party contends that it was error to do so. Thus, if there is one more qualifying conviction in Smith's record—other than for unlawfully wearing military medals—then Smith will reach the three-prior-conviction threshold. Vacating his § 704(a) conviction would then not affect his PPRD, he would not be able to show that he suffered a present harm from the conviction, and his petition for *coram nobis* relief would fail.

B

After reviewing the transcripts, the administrative rules governing the Parole Commission's calculation, and the application of these rules to Smith's criminal record, we do not find that the district court's conclusion was clearly erroneous—that is, we do not have a "definite and firm conviction that a mistake has been committed." *Coggin v. Comm'r*, 71 F.3d 855, 860 (11th Cir. 1996) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The first arrest on Smith's Florida Criminal History report lists a traffic offense committed when Smith was 17. The offense level is a "misdemeanor," the disposition is "convicted," and the sentencing provision indicates that Smith received probation. Florida Administrative Code Rule 23-21.007 details how the Parole Commission tabulates a prisoner's salient-factor score. Section (1)(b) provides, "For purposes of scoring this item, do not count . . . *noncriminal traffic infractions* as prior criminal record." FLA. ADMIN. CODE r. 23-21.007(1)(b) (2017) (emphasis added). Misdemeanors are criminal offenses, so, reading "noncriminal traffic infractions" in the converse, Smith's first arrest appears to have been a criminal conviction that would count toward the calculation of Smith's salient-factor score.

Likewise the offense labelled "Arrest 9" on Smith's Criminal History report. What were initially charges for resisting an officer and a moving traffic violation were amended to a single charge of obstruction of justice. Smith pleaded *nolo contendere* to this charge and was assessed $102 in court fees. Smith argues that this arrest should not be counted—among other reasons—because of Rule 23-21.007(1)(g), which instructs, "Do not count offenses when adjudication is withheld, unless a sanction is imposed." *Id.* Smith asserts that $102 in court fees does not amount to a "sanction," and thus that this arrest should not be included in his criminal record.

Although this chapter of Florida's Administrative Code does not define "sanction," it does include a definition for "juvenile sanction." Rule 23-21.002(26) defines that term as "a court-imposed punishment on a minor for an act which, if committed by an adult, would have been criminal." FLA. ADMIN. CODE r. 23-21.002(26) (2018). "Sanction" may thus reasonably be understood to contemplate any "court-imposed punishment . . . for an act." Obstruction of justice is clearly "an act," and we do not find it clear error to conclude that the obligation to pay $102 is a court imposed punishment. Smith's "Arrest 9" thus provides additional support for the district court's determination.

Finally, insofar as Smith challenges the district court's decision to credit Laura Tully's testimony that his salient-factor score would be the same even without his § 704(a) conviction, we note that "[g]enerally, we refuse to disturb a credibility determination unless it is so inconsistent or improbable on its face that no reasonable factfinder could accept it." *Rivers v. United States*, 777 F.3d 1306, 1317 (11th Cir. 2015) (internal quotation marks omitted). We afford such deference "because the fact finder personally observes the testimony and is thus in a better position than a reviewing court to assess the credibility of witnesses." *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002). Tully was the only witness to testify with any expertise concerning these calculations, and the district court questioned her directly. Moreover, while it is true that Tully's

testimony indicated that the Commission may exercise greater discretion than a strict reading of Florida's Administrative Code would suggest, that claim has little bearing on her central conclusion that removing Smith's § 704(a) conviction would have no impact on his salient-factor score. That conclusion falls well short of the inconsistency or improbability required for us to disturb the district court's determination.

III

Our review of the record leaves us short of the requisite "definite and firm conviction that a mistake has been committed." *Coggin*, 71 F.3d at 860. Quite the opposite, it suggests that Smith likely has multiple prior criminal offenses that would support his salient-factor score and PPRD even if his § 704(a) conviction were vacated. The district court did not clearly err in concluding that Smith's conviction is not causing him a present harm, and as such, that Smith is not entitled to *coram nobis* relief.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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December 07, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-12412-JJ
Case Style: USA v. Guy Smith
District Court Docket No: 3:70-cr-00176-HLA-JBT-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Tiffany A. Tucker, JJ at (404)335-6193.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

A-2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,

v. Case No.: **3:70-cr-176-J-25 JBT**

GUY ENNIS SMITH
_____/

ORDER

THIS CAUSE is before the Court on the Eleventh Circuit's Opinion remanding this case (Dkt.16). The Court held a hearing on this matter on October 4, 2016 and allowed the parties to brief the matter after the hearing.

Background

Defendant Smith was convicted in the Middle District of Florida in 1971 for the unauthorized wearing of a Purple Heart medal, in violation of 18 U.S.C. § 704(a), now known as the Stolen Valor Act. He was fined and sentenced to six months of probation.

In 1978, Smith was convicted in the State of Florida for first degree murder and sentenced to life in prison without the possibility of parole for twenty-five years. He has since had hearings before the Florida Parole Commission (the Commission) twice, in 2002 and again in 2013, and both times the Commission found Smith ineligible for an earlier Presumptive Parole Release Date (Release Date). His next review by the Commission is scheduled to occur in the year 2020.

An inmate's eligibility for a Release Date involves the Commission's consideration of at least three factors. One of those factors is the inmate's criminal history. Certain prior convictions are scored, resulting in a Salient Factors Score (Score). The Score is included in a report provided to the Commission, which also includes facts surrounding the offense for which the inmate is currently incarcerated as well as other aggravating and mitigating factors.

Smith argues that his 1971 conviction for violating 18 U.S.C. § 704(a) is unconstitutional because it violates his First Amendment right to free speech. He further contends that the Court should vacate his conviction by granting his Petition for Writ of Error Coram Nobis.

Standard[1]

Per the mandate in this case, before the Court may entertain Defendant's petition, Smith must establish that this prior federal conviction "is 'causing a present harm' that is 'more than incidental.'" (citing *United States v. Sloan*, 505 F.3d 685, 697 (7th Cir. 2007).

A mere presumption is insufficient to grant coram nobis relief. A petition for Writ of Error Coram Nobis is an extraordinary remedy that should be allowed only "under circumstances compelling such action to achieve justice." *United States v. Swindall*, 107 F.3d 831, 834 (11th Cir. 1997).

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[1] Internal citations and quotations will be omitted in this Order.

Analysis

As to the Stolen Valor Act, in 2012, the United States Supreme Court declared § 704(b) to be unconstitutional, holding that it violates an individual's First Amendment right to free speech. *United States v. Alvarez*, 567 U.S. 709 (2012). The Government argues that the holding does not apply to § 704(a), the subsection under which Defendant was convicted.

Defendant points out that in *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016)(en banc), the Ninth Circuit concluded that § 704(a) "is a content-based regulation of false symbolic speech, closely analogous to § 704(b)," and thus, unconstitutional. *Id.* at 315.

The Government notes that the Supreme Court has never declared subsection § 704(a) unconstitutional and the Ninth Circuit's opinion does not specifically address the constitutionality of the subsection. Further, the Fourth Circuit in *United States v. Hamilton* held that "the imposition of a limiting construction requiring an "intent to deceive" is appropriate with respect to both... [§]704(a)." 699 F.3d 356, 368 (4th Cir. 2012).

Defendant points out that as there is no evidence that when wearing the relevant medal he deceived, defrauded, or derived any pecuniary gain from anyone. Furthermore, there is no evidence that anyone was harmed by his conduct.

Asssuming without deciding that Smith correctly asserts that his 1971

conviction is unconstitutional, the Court must decide whether he has adequately demonstrated that vacating the conviction would lower his Score and, further, whether a change in the score will increase his chance to receive an earlier parole review date before the Commission.

At the evidentiary hearing on this matter, the Government called Laura Tully with the Florida Parole Commission. She was recently employed as director of field services and trained investigators to calculate scores. The Government asked her to recalculate Defendant's Score assuming that the Stolen Valor conviction was removed. Defendant objected to the request. Regardless, Ms. Tully stated she qualified five priors that would count toward Mr. Smith's Score and that even with his federal conviction removed, Smith's Score remains unchanged. (Transcript of 10/4/2016 hearing; Dkt. 32 at 45-46, 48)

Ms. Tully also stated that the Score is generally considered during an inmate's initial interview and a request to alter an interview date is only considered when an inmate demonstrates a "substantial change." *Id.* at 41, 47-48.

Smith has previously challenged the accuracy of his Score, and the Chairman of the Commission's response was, "I have reviewed all of the materials you've presented and the issues you've raised and find no reason to make any changes to [Smith's current Release Date] or interview date." (Dkt. 32 at 76-77).

Defendant disagrees with Ms. Tully's calculation, objecting to the inclusion of two of the relevant arrests and Ms. Tully's assessment of them. Specifically,

Defendant argues the inclusion of the arrests does not comply with the Administrative Rules of the Commission.[2]

Regardless, as noted, aside from the Score, the Commission considers the severity of the present state offense (in this case, first degree murder) and (2) other aggravating or mitigating factors. The Government notes that regarding the most recent parole interview, the Commissioners decided to delay the next parole hearing citing Defendant's use of a deadly weapon, brutal heinous behavior, the nature of the offense, and that they believe that Defendant continues to pose a risk to the public. (Dkt. 32 at 49; Smith's hearing Exhibit 9). Thus, the Government argues that the Commissioners' statement demonstrates that Smith's Score was

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[2] In one instance, adjudication was withheld and Defendant paid only court costs. Defendant evidently maintains that the inclusion would only be warranted if he paid an actual fine, arguing "with the benefit of time and resources the Commissioners and their teams would have likely ruled out this offense." (Dkt. 36, pp. 13-14).

Regarding the other, Defendant argues that the record "does not indicate a plea of guilty, or nolo contendere, rather, Mr. Smith, then a 17 year old child, received probation for a misdemeanor traffic offense. One can deduce that a team of three investigators, analysts, and Commissioner's [sic] with ample time to research the matter could have concluded that the 1968 offense should not be counted." *(Id.* at p. 12). The record shows the offense as "DISP-CONVICTED.

Defendant also notes that the two relevant offenses do not appear in the parole commission files.

The Government argues that the Defendant is merely speculating regarding the Commission's calculation.

not the overwhelming reason for its decision to delay his next parole hearing.

The Court finds that Defendant has not met his burden to demonstrate that removing the Stolen Valor Act conviction from his record would change his Score. Even if granting the requested relief did change the Score, Defendant has failed to demonstrate that this amendment would amount to a substantial change in the Score nor otherwise entitle him to an earlier parole hearing. Thus, it is **ORDERED:**

Defendant's Petition for Writ of Error Coram Nobis (Dkt. 1) is **DENIED**.

DONE AND ORDERED this 5 day of April 2017.

HENRY LEE ADAMS, JR.
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

A-3

Judgment and Order of Probation (May 1953) and Fine.

Cr. Form No. 101b

United States District Court

FOR THE

MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION

United States of America

v.

GUY ENNIS SMITH

No. 70-176-Cr-J.

On this 26th day of February, 19 71 came the attorney for the government and the defendant appeared in person and with Court Appointed Counsel, Sam E. Barket.

IT IS ADJUDGED that the defendant has been convicted upon his plea of GUILTY of the offense of knowingly, and without being authorized to do so by any regulation made pursuant to a law of the United States, did wear a medal authorized by Congress for the armed forces of the United States, that is a Purple Heart; in violation of Title 18, U. S. C., Section 704, as charged in Count 1 of the Information, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that imposition of sentence herein be and the same is hereby withheld and the defendant is placed on probation with the Probation Officer for the Jacksonville Division of this District for SIX (6) MONTHS, with supervision for SIX (6) MONTHS, under the standing conditions of Probation.

IT IS ADJUDGED that the United States of America shall have and recover of and from the defendant the sum of ONE HUNDRED AND NO/100 ($100.00) DOLLARS, as a fine imposed herein to be paid during the period of probation. IT IS FURTHER ADJUDGED that if the fine is paid before the SIX (6) MONTHS period of probation, the Court will consider discharging the defendant from probation.

IT IS ADJUDGED that upon motion by the Government, Count 2 of the Information be and the same is hereby dismissed.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

Edward Bard Gurney
United States District Judge.

.....
Clerk.

Judgment and Order of Probation (May 1953) and Fine. Cr. Form No. 101d

United States District Court

FOR THE

MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION

United States of America

v.

GUY ESMIS SMITH

No. 70-176-Cr-J.

On this 26th day of February, 19 71 came the attorney for the government and the defendant appeared in person and with Court Appointed Counsel, Sam E. Burkett.

IT IS ADJUDGED that the defendant has been convicted upon his plea of GUILTY of the offense of knowingly, and without being authorized to do so by any regulation made pursuant to a law of the United States, did wear a medal authorized by Congress for the armed forces of the United States, that is a Purple Heart; in violation of Title 18, U. S. C., Section 704, as charged in Count 1 of the Information, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

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IT IS ADJUDGED that upon motion by the Government, Count 2 of the Information be and the same is hereby dismissed.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

/s/ GERALD BARD TJOFLAT
United States District Judge.

Clerk.

A True Copy. Certified this 26th day of February, 1971

(Signed) WESLEY R. THIES *Clerk.* *(By)* Earl F. Jones *Deputy Clerk.*