

28 through four, the sentences to run concurrently. The court sus-
29 pended King's sentence on count five and placed him on "active
30 probation for a period of five (5) years, to commence upon defen-
31 dant's release from custody."

32 On September 18, 1990, King was released on parole from fed-
33 eral prison in Alabama and thereafter reported to his probation
34 officer. In February 1991, King changed his residence and failed
35 to submit a monthly supervision report, in violation of the terms
36 and conditions of his probation. The government filed a rule to
37 revoke King's probation. On May 1, 1991, a Florida grand jury
38 returned a seven count indictment charging King with bank robbery.
39 Accordingly, the United States amended its rule to revoke, in
40 order to incorporate King's additional violation.

41 The district court held a hearing and found that King had
42 violated the terms and conditions of his probation, as alleged in
43 the government's rule to revoke. The court revoked King's sen-
44 tence of probation on count five of the original indictment and
45 sentenced him to five years' imprisonment. King appeals, arguing
46 that because his term of probation had not commenced when he com-
47 mitted the violation, the district court improperly revoked his
48 probation under United States v. Wright, 744 F.2d 1127 (5th Cir.
49 1984).

50 II.

51 The threshold question is whether King's term of probation
52 had commenced when he was released on parole. King contends that

53 his period of probation could not have begun before termination of
54 his parole. He asserts that he could not have completed his first
55 sentence until his parole term had expired and that when a court
56 imposes a probationary term "consecutively to any other
57 sentences," probation does not begin until expiration of the first
58 sentence.

59 In Sanford v. King, 136 F.2d 106, 108 (5th Cir. 1943), this
60 court stated that "[t]he controlling consideration [in
61 interpreting when a probation period commences] is the intention
62 of the Court imposing the sentence, to be found in the language
63 employed to create the probationary status."¹ The district
64 judge's Judgment and Probation/Commitment Order issued in the
65 instant case provides as follows:

66 The defendant is hereby committed to the
67 custody of the Attorney General or his
68 authorized representative for imprisonment
69 for a period of eight (8) years as to each of
70 counts 1 through 4. Sentences imposed on
71 counts 2, 3, and 4 are to run concurrently
72 with sentence imposed on count 1. Imposition
73 of sentence is suspended on count 5 and the
74 defendant is placed on active probation for a
75 period of five (5) years, to commence upon
76 defendant's release from custody.

77 The order contains no language indicating that "defendant's
78 release from custody" means anything other than the defendant's

¹ Title 18 U.S.C. § 3564 provides for concurrent terms of probation and parole. "A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court." 18 U.S.C. § 3564(a)(1985). "A term of probation runs concurrently with any Federal, State, or local term of probation, or supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation . . ." 18 U.S.C. § 3564(b) (1985 & Supp. 1992) (effective Nov. 1, 1987). This subsection does not apply in this case, however, because King committed his offense prior to its effective date.

79 release from physical custody in federal prison. The court did
80 not use any language indicating that the term of probation would
81 run consecutively to the concurrent prison sentences on counts one
82 through four. Additionally, when the district judge reviewed the
83 order at the revocation hearing, he stated that the order "could
84 not be clearer" in its direction that the term of probation
85 commence when King was released from prison on parole.

86 The plain language of the order, taken together with the
87 court's comments at the hearing, indicates that the intention of
88 the sentencing court was that the term of probation commence on
89 September 18, 1990, when King was released from prison on parole.²
90 Therefore, we find no error in the district court's determination
91 that King was on probation when he committed the violations
92 alleged in the rule to revoke.

93 III.

94 Title 18 U.S.C. § 3651 states that "[t]he court may revoke or
95 modify any condition of probation, or may change the period of
96 probation." 18 U.S.C. § 3651 (1985). Section 3653 provides in
97 pertinent part,

² King asserts that a prisoner released on parole remains in the custody of the Attorney General until the parole term has expired. See 18 U.S.C. § 4210(a). He contends that, therefore, he was not released from "custody" when he was released from prison, as the district court contemplated that term in its probation order. King's reliance upon this provision is misplaced. Courts have distinguished actual custody from the constructive custody under which a defendant is placed while on parole status. See Zerbst v. Kidwell, 304 U.S. 359, 361 (1938); United States v. Harrison, 461 F.2d 1127, 1130 (5th Cir.), cert. denied, 409 U.S. 884 (1972). We need not reach this issue, however, as sufficient evidence of the sentencing court's intent exists in the plain language of the order and in the court's comments at the revocation hearing. Once we have determined the sentencing court's intent, we need look no further.

98 At any time within the probation period,
99 [the probationer may be arrested, either by
100 the probation officer, with cause, or by the
101 United States marshal, with a warrant]. . . .

102 As speedily as possible after arrest the
103 probationer shall be taken before the court
104 for the district having jurisdiction over
105 him. Thereupon the court may revoke the
106 probation and require him to serve the
107 sentence imposed, or any lesser sentence,
108 and, if imposition of sentence was suspended,
109 may impose any sentence which might
110 originally have been imposed.

111 18 U.S.C. § 3653 (1985).³

112 We review the district court's revocation of King's probation
113 under an abuse of discretion standard. United States v. Fryar,
114 920 F.2d 252, 258 (5th Cir. 1990) ("To secure a reversal of a
115 revocation order, a probationer must present clear evidence that
116 the district court abused its discretion by ordering the
117 revocation.") (quoting United States v. Ramirez, 675 F.2d 707, 709
118 (5th Cir. 1982)), cert. denied, 111 S. Ct. 1635 (1991). King
119 argues that the revocation of his probation was improper under
120 United States v. Wright, 744 F.2d 1127 (5th Cir. 1984).

121 In Affronti v. United States, 350 U.S. 79 (1955), the Court
122 considered whether a district court has the power to suspend
123 sentence and place a defendant on probation after he has begun to
124 serve a cumulative prison sentence composed of two or more

³ Sections 3651 and 3653 were repealed by the Comprehensive Crime Control Act of 1984, effective November 1, 1987, and replaced by 18 U.S.C. §§ 3561-3566 (1988). Because King committed his offense prior to the effective date of the new statute, the former statutory provisions apply. See United States v. Balboa, 893 F.2d 703, 706 (5th Cir. 1990) (stating that since revocation of probation under § 3653 was part of sentencing procedure for offense that occurred before effective date of new statute, old provision continues to apply).

125 consecutive sentences. Concluding that "the probationary power
126 ceases with respect to all of the sentences composing a single
127 cumulative sentence immediately upon imprisonment for any part of
128 the cumulative sentence," id. at 83, the Court commented upon the
129 relationship between the power of the courts to place a defendant
130 on probation and the clemency and parole powers vested in the
131 executive branch.

132 Citing United States v. Murray, 275 U.S. 347 (1928), holding
133 that a district court has no power under the Probation Act to
134 place a defendant on probation after he has begun execution of a
135 single general sentence, the Court in Affronti stated that "in
136 view of the existence of provisions for parole and executive
137 clemency, it would seem unlikely that Congress would have intended
138 to make the probation provisions applicable during the same period
139 of time." 350 U.S. at 81 (citing Murray, 275 U.S. at 356).
140 Pointing out that "it is unlikely that Congress would have found
141 it wise to make probation apply in such a way as to unnecessarily
142 overlap the parole and executive-clemency provisions of the law,"
143 id. at 83, the Court therefore chose to "adhere to the Murray
144 interpretation to avoid interference with the parole and clemency
145 powers vested in the Executive Branch." Id. The Court concluded
146 that "the provisions for probation should be interpreted to avoid,
147 so far as possible, duplicating other existing provisions for the
148 mitigation of criminal sentences." Id. at 84.

149 In Wright, we echoed the Supreme Court's concern about
150 unnecessary overlap between the probation and parole powers.

151 There, the district court had sentenced the defendant to five
152 years' imprisonment on the first count of a two-count indictment
153 and had suspended sentence on count two and placed Wright on
154 probation for a period of five years. The district court
155 specifically provided that count two was "to run consecutive to
156 the sentence as to Count 1." 744 F.2d at 1128. During his parole
157 from the sentence of imprisonment on the first count, Wright
158 committed a violation of a parole condition by committing a state
159 offense for which he was sentenced to imprisonment in the state
160 penitentiary. The government sought to have his probation revoked
161 based upon the same conduct, which also constituted a violation of
162 a probation condition.

163 On appeal, we considered whether the district court was
164 authorized to revoke the probation for a violation of a probation
165 condition that had occurred while Wright was on parole from the
166 sentence of imprisonment on the first count but before the
167 consecutive period of probation had commenced. We recognized that
168 in a series of cases beginning with United States v. Ross, 503
169 F.2d 940 (5th Cir. 1974), we had held that a district court may
170 revoke probation when a defendant commits an illegal act prior his
171 commencement of service of any sentence imposed at the time the
172 probationary sentence was imposed. Wright, however, had committed
173 the violation of a probation condition while on parole from his
174 first sentence.

175 Relying upon Affronti, we observed that overlap certainly
176 would occur if the same pre-probation violation could serve to

177 revoke parole on a prior sentence and to revoke the uncommenced
178 probation on a consecutive sentence. 744 F.2d at 1131. We held
179 that once Wright had commenced serving the prior sentence, the
180 district court had no authority to revoke the probation on the
181 second count for a violation that had occurred before he had begun
182 serving his probationary sentence.

183 Because we observe that King was serving his parole and
184 probation terms concurrently at the time he committed the
185 violations, we conclude that the district court properly exercised
186 its authority in revoking King's probation. In Fryar, we
187 reaffirmed the holding in Ross and extended that holding to allow
188 revocation of probation for violation of a probation condition
189 when the violation occurred after sentencing but before the
190 commencement of the probation term, regardless of whether the
191 defendant had begun serving his term of incarceration.⁴

192 No issue of overlap between parole and probation was involved
193 in Fryar, and we observed that the Wright holding therefore was

⁴ Title 18 U.S.C. § 3565, enacted by the Comprehensive Crime Control Act of 1984, see supra note 3, provides in pertinent part,

(a) Continuation or revocation.)) If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure . . .

* * *

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

18 U.S.C. § 3565 (1988). The court in Fryar agreed with other circuits that this amendment was intended to clarify, rather than change, existing law. The court therefore considered the amendment as evidence of what Congress intended under the previous statute, § 3653, which controlled in Fryar and in the case before us.

194 inapplicable. We commented, however, upon the policy
195 considerations underlying Wright and concluded that "Wright is an
196 exception to the Ross rationale which holds that the act which
197 forms the basis for a probation revocation cannot be one that
198 occurred while the defendant was on parole from a sentence on
199 another count." 920 F.2d at 258.

200 In King's case, the same misconduct relied upon by the
201 government in its rule to revoke probation also constituted a
202 parole violation. Although King's case appears to fit within the
203 Fryar court's description of the holding in Wright, that
204 description is not complete, as the court in Wright emphasized
205 that the conduct relied upon by the district court in that case
206 could not be used to revoke an uncommenced probation.

207 The proper focus here is on the power and authority of the
208 district court, not on the conduct that constitutes the parole
209 and/or probation violations. In Wright, relying upon the Affronti
210 Court's rationale, we observed that the district court's power to
211 revoke probation may interfere with the parole powers of the
212 executive branch if the district court sought to exercise its
213 power to revoke probation before the probation period had
214 commenced. No question arises, however, about the district
215 court's power to revoke probation once a defendant has begun his
216 probationary term.⁵

⁵ Moreover, even if the focus here were on the same conduct constituting both parole and probation violations, the overlap concerns of the Affronti Court are not implicated. In Affronti, a jury found the defendant guilty on counts two through ten of a ten-count indictment charging him with illegal sales of narcotics. The court imposed a five-year prison sentence on each count, to be served consecutively. At sentencing, the court suspended

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IV.

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The district court intended King's probation to commence on September 18, 1990, when he was released from custody. Because King's term of probation had commenced when he committed violations of probation terms and conditions, the district court properly exercised its authority in revoking his probation. The order appealed from is AFFIRMED.

sentence on counts six through ten and granted probation to commence at the expiration of the sentences on counts two through five. While serving his sentence on count two, the prisoner sought suspension of sentence and probation on counts three, four, and five.

The Court therefore was concerned about the effect that suspension of the three consecutive sentences would have on the parole and clemency powers of the executive branch. The Court addressed the overlap created by suspension of a prison sentence once service of the first of several consecutive sentences had begun, and the conflict that would be created by the executive and judicial branches' working at cross-purposes. King's argument that overlapping conduct, or indeed, overlapping terms of probation and parole, bring the Affronti Court's reasoning into play misses the mark, as the district court's revocation of King's probation in no way interferes with the parole power of the executive branch.