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Presentence Confinement and the Constitution: The Burial of Dead Time

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By F. Thomas Schornhorst*

By early 1970 at least 160,863 persons were confined in jails throughout the United States; over one-half of them had not been convicted of any crime. Thirty-five percent of those not yet convicted remained in custody because they were unable to post bail.¹ Thus, because of their financial situation these innocent men and women remained in prison. They were treated no differently than prisoners who were serving sentences—they ate the same food, lived in the same crowded cells, endured the same dehumanizing experiences, and were subject to the same restrictions with regard to visitors, mail, and reading material. A large percentage of these unconvicted persons had a further cause for anger and frustration—they were doing “dead time”; that is, in the event of conviction the time they will have spent in jail will not count as a part of their sentences unless they have been jailed in one of the two dozen or so United States jurisdictions² that provide credit for presentence custody by statute.

The purpose of this article is to explore and evaluate the methods and rationale by which the various jurisdictions in the United States grant or withhold credit for time served prior to sentence. The major thesis is that all prisoners serving sentences in any jail or prison in the United States are constitutionally entitled to full credit³ for each

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³ The term “full credit” is employed for the purpose of emphasizing that pre-
day of presentence confinement served in connection with the crime for which they have been sentenced.

Current Approaches Regarding Credit for Presentence Confinement

Nonstatutory

Courts generally have refused to recognize any common law or constitutional basis for including presentence confinement as a part of any sentence. The few state courts that have considered the question justify their refusal to award credit either by citing statutes which provide that a sentence does not commence until the date of arrival at the place of confinement, or until the date of imposition of the sentence, or in the absence of such statutes, simply declare themselves powerless to award credit for presentence time. Quite often the court making such a disposition observes that presentence jail time is taken into account in determining the length of sentence which is imposed.

sentence time should be treated in all respects as if it had been served pursuant to sentence. In other words, the presentence time upon which credit is due must be counted in determining eligibility for parole and for computing statutory good time credits.

4. The terms "confinement" and "custody" are used to emphasize the point that credit for presentence time may be due for periods during which the accused has been confined in mental and juvenile institutions as well as jails.


8. See, e.g., State v. Kennedy, 106 Ariz. 190, 193, 472 P.2d 59, 62 (1970). Also, it is evident that presentence confinement is ignored when the defendant is sentenced to a maximum term. E.g., Jenkins v. Warden, 4 Md. App. 629, 632, 244 A.2d 468, 469 (1968) (Defendant on retrial for first degree murder was convicted of second degree murder and given the then statutory maximum of 18 years in prison. No credit was given for the 1 year and 61 days spent in confinement prior
Thus, so far, state courts have ignored arguments that failure to give credit for presentence confinement is a deprivation of either due process, or equal protection, or is an imposition of double punishment in violation of the Fifth and Fourteenth Amendments. Likewise, federal courts have refused to intervene in such cases on the grounds that the granting of credit for presentence confinement is a matter of state law. Recently, however, this pattern of nonintervention has been broken by two federal district courts which have concluded that a state's denial of full credit for presentence jail time to a person unable to post bail is a denial of equal protection of the law.

**State Statutory Approaches**

The state statutes which allow credit for confinement prior to final disposition may be divided into two general categories—those which provide mandatory credit for presentence time, and those to his first sentence which, incidentally, was death); Wright v. Maryland Penitentiary, 429 F.2d 1101 (4th Cir. 1970) (no credit on maximum 18 year sentence for second degree murder for two years and six weeks of pretrial confinement); Miles v. State, 214 So. 2d 101 (Fla. App. 1968); State v. Sanders, 251 S.C. 431, 163 S.E.2d 220 (1968). Again, where the offense for which the defendant is convicted requires the imposition of a minimum term the sentence cannot itself reflect credit for presentence confinement. E.g., Stapf v. United States, 367 F.2d 326, 329 (D.C. Cir. 1966) (discussed in text accompanying notes 40-49 infra).

These matters are discussed below in greater detail. See text accompanying notes 107-119 infra.


11. E.g., ILL. ANN. STAT. ch. 38, § 119-3 (Smith-Hurd 1972); INDIANA ACTS OF 1971, Pub. L. 155. This statute was declared unconstitutional in State ex rel. Peary v. Criminal Court of Marion County, — Ind. —, 274 N.E.2d 519 (1971), on the ground that time credit provision was included in a statute having more than one subject matter in violation of article 4 section 19 of the Constitution of the State of Indiana. However, a more comprehensive time credit statute was passed by the Indiana legislature in 1972—Indiana Code 1971, 35-8, ch. 2.5, added by Senate Enrolled Act...
which allow a court discretion to award credit for time already served.\(^\text{12}\) In addition, the statutes may be viewed according to the time period for which credit is given—either for presentence custody or for some other time period. However, because all or some of these features are present in varying degrees in the statutes, it is impossible to discuss the statutes according to the particular type. For instance, among statutes requiring credit for presentence custody there is considerable variation, not to mention ambiguity, within the provisions themselves. Some statutes require credit for the time served between arrest and pronouncement of sentence;\(^\text{13}\) other statutes specify that credit is to be given for all time spent in custody prior to commencement of sentence, which may be a different date than pronouncement of sentence.\(^\text{14}\) As to statutes which allow a court discretion to award credit, there is also no particular pattern. As in the case of mandatory statutes, the statutes distinguish according to the time period for which credit is sought. Some allow credit only for presentence time while others allow credit only on appeal. Still others are a hybridization of the above categories.

Perhaps the best way to illustrate the variety contained in the statutes is to mention a few of the variations which states have developed. As to states requiring credit, Montana provides credit for each day prior to and after conviction;\(^\text{15}\) Oregon specifies credit for confinement from the date of arrest to the date of delivery at the penal institution where the sentence is to be served;\(^\text{16}\) Tennessee provides credit for confinement pending arraignment and trial and for time after conviction pending commencement of sentence.\(^\text{17}\) In the Tennessee statute there is no mention of credit for confinement during


\(^\text{13}\) FLa. STAT. ANN. § 921.161 (Supp. 1972); KAN. STAT. ANN. § 21-4614 (Supp. 1971) (credit not to exceed 90 days); MINN. STAT. ANN. § 609.145(2) (1964) (credit given unless court directs otherwise); TEX. CODE CRIM. PROC. art. 42.03 (Supp. 1972); W. VA. CODE § 61-11-24 (1966).

\(^\text{14}\) E.g., Illinois, Indiana, Massachusetts, Michigan, New Mexico, Pennsylvania, Rhode Island. See note 11 supra.

\(^\text{15}\) E.g., Kentucky, New York. See note 11 supra.


trial, and credit for time spent in custody pending appeal may be awarded at the discretion of the supreme court—provided that the appellant files a petition to the court requesting such credit within five days after the announcement of a lower court's decision upholding his conviction. 'Oklahoma has a rather unique statute that has both mandatory and discretionary features, requiring credit for jail time served only as to inmates serving their first term "with a good conduct record and who have no infraction of the rules and regulations of the penal institution."' In Florida credit for presentence jail time is discretionary, but a prisoner must be given credit for time of confinement between sentencing and delivery to the correction department. The statute is silent regarding credit time pending appeal.29

Some statutes allow credit for time spent in confinement after conviction pending appeal. Some are mandatory,20 but others give the sentencing court discretion to award credit for such time.21 Three states make failure to post bail a prerequisite to credit for presentence custody,22 and many of the statutes specify a causal relation between the presentence confinement and the ultimate sentence upon which credit is sought.23 Indeed, some might be construed to allow credit only if the defendant is convicted on the original charge filed against him or, at least, a lesser included offense.24 Other statutes do not expressly mention a need for causal connection between the original charge and the ultimate sentence, but such a provision would seem reasonably to be implied.25 Only one statute requires that good time

21. TENN. CODE ANN. § 40-3102 (Supp. 1971); TEX. CODE CRIM. PRO. ANN. art. 42.03 (Supp. 1972). But see Robinson v. Beto, 426 F.2d 797 (5th Cir. 1970) holding that denial of credit for time pending appeal is unconstitutional because it subjects those who appeal their convictions to the risk of additional punishment and is therefore an unlawful impediment to the exercise of the right of appeal. "Due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access to the courts. . . ." Id. at 798. See text accompanying notes 149-56 infra for a further discussion of credit for time pending appeal.
22. Iowa, Michigan, Montana. See note 11 supra.
24. E.g., Michigan, New Mexico. See note 11 supra.
25. Such a construction would seem to be necessary to prevent the "banking" of
credit be given for presentence confinement,²⁶ but such a provision is implicit in the Massachusetts law which requires presentence custody to be treated as time already served.²⁷

Most of the existing statutes are ambiguous with respect to whether presentence time served in a place of confinement other than a jail is to be credited against a subsequent sentence. The majority of the mandatory credit statutes are phrased in terms of "confinement" or "custody."²⁸ These terms are broad enough to cover compulsory presentence confinement in juvenile institutions, hospitals for mental observation, or in rehabilitation centers for alcoholics, drug abusers, and sexual psychopaths. Two of the existing statutes expressly recognize credit for time in mental hospitals²⁹ while others, on their face, would seem to limit credit to persons held in jail prior to conviction and sentence.³⁰

Federal Legislation

Federal law on credit for presentence confinement is best analyzed with respect to three time periods: (1) sentences imposed prior to October 2, 1960; (2) sentences imposed between October 2, 1960, the effective date of the first federal law granting credit for presentence confinement,³¹ and September 20, 1966, the effective date of the most recent amendment;³² and sentences imposed after September 20, 1966. Both the 1960 and 1966 measures were limited in application to sentences imposed on or after their effective dates.³³

Sentences Imposed Prior to October 2, 1960

Prior to 1960, section 3568 of title 18 of the United States Code

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²⁸. See, e.g., Illinois, Indiana, Kentucky, Massachusetts, New Mexico, New York, Oregon, Pennsylvania, Rhode Island. See note 11 supra.
²⁹. Iowa, New Jersey. See note 11 supra.
³⁰. Michigan, Tennessee. See note 11 supra. In addition to the state and federal statutes regarding credit for time served prior to sentence two model statutes have been proposed. See ABA Sentencing Standards, supra note 2, § 3.6, at 186-87; Model Penal Code § 7.09 (Proposed Official Draft 1962).
provided that the sentence of a federal prisoner did not begin until he was received at the place of confinement. There was no provision for credit. In passing on claims of credit for presentence confinement for sentences imposed prior to 1960, federal courts read that provision literally and held that a federal prisoner's time did not begin until he was received at a designated place of confinement for service of his sentence.34 The appellate courts operated under the assumption that federal trial judges would, as a matter of course, take time already served into account when imposing sentences on offenders.35

However, in spite of the express nonretroactive language that accompanied the 1960 amendment to section 3568, the Second Circuit, in Sobell v. United States, awarded credit for the time spent in presentence custody preceding Sobell's conviction and sentence in 1951.36 An assessment of the potential impact of Sobell upon other pre-October 2, 1960 sentences will be deferred pending an examination of the events occurring in the second relevant time period.

The Effect of the 1960 Amendment to Section 3568

Congress in 1960 amended section 3568 by adding the following sentence:

[T]he Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where

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constitutional discussion below, the attempts to limit the retroactive application of these statutes are probably invalid.

34. E.g., Williams v. United States, 335 F.2d 290, 291 (D.C. Cir. 1964); Powers v. Taylor, 327 F.2d 498 (10th Cir. 1964) (dismissing in a two paragraph *per curiam* opinion a claim for time credit on a pre-1960 sentence as "patently without merit"); Byers v. United States, 175 F.2d 654, 658 (10th Cir.), *cert. denied*, 339 U.S. 976 (1949).

35. The legislative history of the 1960 amendment to section 3568 is reviewed in Stapf v. United States, 367 F.2d 326, 328-29 (D.C. Cir. 1966), and in Gilbert v. United States, 299 F. Supp. 689, 693-94 (S.D.N.Y. 1969). In Bryans v. Blackwell, 387 F.2d 764, 765 (5th Cir. 1967), *cert. denied*, 391 U.S. 909 (1968), the court observed that it was "universally known" that time already served was "frequently" taken into account by the sentencing judge. Neither *Bryans* nor any of the congressional reports include any data to support the assertion that time served was taken into account, nor as to how credits, if any, were applied.

36. 407 F.2d 180, 182 (2d Cir. 1969). It is interesting to note that a year earlier Sobell had been rebuffed in his attempt to obtain credit for time served while his appeal was pending. See Sobell v. Attorney General, 400 F.2d 986, 990 (3d Cir. 1968). The problems of credit for confinement pending appeal are discussed at text accompanying note 149-56 *infra*. 
the statute requires the imposition of a minimum mandatory sentence. 37

The stated purpose of this legislation was to allow credit for time served in cases where federal judges were required to impose minimum terms. 38 In such cases the inability of a federal judge to impose less than the statutory minimum had resulted in an unwarranted disparity in the time served by those able to effect their pretrial release on bail and who would serve at most the minimum sentence and those who had spent their presentence time in custody for want of bail and who would serve the minimum time without credit for time spent in prior custody. It should be noted, however, that even with the amendment there is no provision for a person who is denied bail, or who simply chooses to remain in jail pending his trial. Nothing appears in the legislation which would suggest a plausible reason why such a person should not also receive credit for the time served preceding the imposition of a minimum mandatory sentence. 39

The legality of the “minimum mandatory sentence” limitation contained in the 1960 amendment was also questionable because of the disparity of treatment of persons who could make bail as compared to those who could not where a statute did not impose a mandatory minimum. This disparity was particularly obvious in the cases of prisoners who had received the maximum sentences allowed by the statutes under which they were convicted. In *Stapf v. United States*, 40 the constitutionality of the 1960 amendment was challenged by a prisoner who had been sentenced to serve from twenty months to five years for interstate transportation of a stolen vehicle. 41 Stapf was unable to post the $1,000 bond set at the time of arrest and spent five months in jail prior to sentencing for which no credit was given. Stapf contended that because of the time spent in presentence custody, and since he was subject to the maximum term of five years, his total time could exceed that of other persons sentenced to the maximum term under the same statute, but who were able to post bail. He argued

39. *See* United States v. Rumbough, 393 F.2d 396, 397 (6th Cir. 1968) (no credit available to person subject to mandatory minimum sentence where presentence jail time was not due to want of bail); Sawyer v. United States, 376 F.2d 615, 618 (8th Cir. 1967) (no credit where defendant was held, but not convicted, on kidnapping charge for which bail was denied).
40. 367 F.2d 326 (D.C. Cir. 1966).
41. While the sentence was indeterminate in form, the statutory maximum under the Dyer Act, 18 U.S.C. § 2312 (1970), is five years.
that in such a situation the amendment had the effect of creating two sets of maximum terms, one for those able to post bond and a longer one for those unable to post bond. Such disparity, so the argument ran, violated his right to equal protection of the law.  

The Court of Appeals for the District of Columbia agreed that the district court had erred in refusing to credit Stapf's presentence jail time against his maximum sentence, but not for the reasons argued by Stapf. After surveying the legislative history of the 1960 amendment to section 3568, the court concluded:

Congress made no provision in this amendment for defendants sentenced for offenses not carrying minimum terms of imprisonment . . . because it assumed that a credit for presentence custody for want of bail would continue to be provided by sentencing courts as a matter of course.

The court held that the district court's refusal to grant Stapf credit for his presentence jail time created an unforeseen disparity in treatment of defendants unable to make bail which was arbitrary and irrational and in violation of the Fifth Amendment because "it was and is the duty of the sentencing court to provide credit for presentence custody for want of bail to all defendants not granted credit administratively by virtue of the provision of § 3568." Although the court did not limit its holding to prisoners who had received statutory maximum sentences, cause for celebration in the cell blocks was short-lived. The court appended a qualification to Stapf that "[w]henever it is possible, as a matter of mechanical calculation, that credit could have been given, we will conclusively presume it was given." With an eye on its own and the district court dockets, the court offered as the only reason for this limitation:

The problems and expenditures of resources which would be caused by allowing each prisoner to attempt to demonstrate that in his particular case credit was not given, we feel, outweigh any possible unfairness.

The rationale of Stapf as to the availability of credit to prisoners

42. 367 F.2d at 327-28.
43. Id. at 328.
44. Id. at 328-29. The court noted also the anomaly of awarding prisoners time credit on mandatory minimum sentences which were generally reserved for the more serious types of offenses, but denying credit in cases where the crime was not seen by the legislature as being sufficiently serious to warrant a mandatory minimum term.
45. Id. at 330 (emphasis added).
46. Id.
47. Id. The validity of this "conclusive presumption" is examined later in this article.
serving maximum terms and who had been held in presentence custody for want of bail has been adopted by most federal courts. Only the Fourth Circuit refused to adopt the conclusive presumption feature of Stapf and ruled that the matter of credit should be left "to be determined according to the facts in the particular case."

The Eighth Circuit which also construed the 1960 amendment in Sawyer v. United States suggested that, in light of its legislative history, Stapf improperly construed the amendment because Congress was concerned only with mandatory minimum terms. Sawyer also discussed the problem of what is a maximum sentence. In that case Sawyer had been indicted on four counts under the federal bank robbery statute, one of which charged the capital offense of kidnapping. In 1962 he pleaded guilty to two counts and received the twenty year statutory maximum on the first count and ten years on the second count (the statutory maximum was twenty-five years). The sentences were

48. E.g., Swift v. United States, 436 F.2d 390, 392 (8th Cir. 1970); Holt v. United States, 422 F.2d 822, 823 (7th Cir. 1970); Davis v. Willingham, 415 F.2d 344, 345 (10th Cir. 1969); Sobell v. United States, 407 F.2d 180, 182 (2d Cir. 1969); Lee v. United States, 400 F.2d 185, 188 (9th Cir. 1968); United States v. Jones, 393 F.2d 728, 729 (5th Cir. 1968); Bryans v. Blackwell, 387 F.2d 746, 767 (5th Cir. 1967), cert. denied, 391 U.S. 906 (1968) (no credit given because prisoner was given less than the maximum term prescribed for his offense—i.e., two concurrent two year sentences for interstate transportation of false securities (18 U.S.C. § 2314 (1970) for which the maximum is ten years—and the statute had no provision for a mandatory minimum term. The court adopted and applied the conclusive presumption that the trial court, in awarding less than the maximum sentence, took into account time previously served); United States v. Smith, 379 F.2d 628, 634 (7th Cir. 1967); Dunn v. United States, 376 F.2d 191, 193 (4th Cir. 1967). But see United States ex rel. Sacco v. Kenton, 386 F.2d 143, 144-45 (2d Cir. 1967).

49. Padgett v. United States, 387 F.2d 649 (4th Cir. 1967). No reported case has been found wherein any district court has made such an independent finding. This is not to say that petitions for credit have not been made by prisoners within the jurisdiction of the Fourth Circuit who are serving other than maximum or mandatory minimum terms. It is reasonable to assume that if credit has been awarded in such circumstances the government has not appealed. Also, in light of the heavy weight that would be accorded a district court finding that credit had been given by the sentencing judge, it is unlikely that the petitioner would press further. Still, the absence of reported cases affords some basis for doubt as to the accuracy of the rationale supporting the conclusive presumption—i.e., the time and expense involved in adjudicating individual claims for credit.

50. 376 F.2d 615 (8th Cir. 1967); see also United States ex rel. Sacco v. Kenton, 386 F.2d 143, 144-45 (2d Cir. 1967); Allen v. United States, 264 F. Supp. 420, 422-23 (M.D. Pa. 1966). However, the Second Circuit seems now to have fully adopted Stapf. See Sobell v. United States, 407 F.2d 180, 182 (2d Cir. 1969).

51. 18 U.S.C. §§ 2113(a), (b), (d), & (e) (1970). Count IV charged Sawyer with kidnapping during the course of a bank robbery for which the death penalty was a possible punishment.
to run consecutively,\textsuperscript{52} and the other counts, including the kidnapping charge, were dropped. However, the ten year sentence later was voided on the ground that consecutive sentencing for simultaneous violations subjected the defendant to more than one punishment for the same crime.\textsuperscript{53} This left intact the longer of the two sentences which was the twenty year maximum imposed under count one. However, when Sawyer sought credit for 145 days of presentence jail time, it was denied not only because his offense was not bailable due to the kidnapping charge, but also on the ground that he was sentenced to thirty years on two counts that could have netted him forty-five, and there was nothing to indicate that the sentencing judge had not taken his presentence time into account. This surprising conclusion suggests strongly that the court did not take seriously its earlier holding that the trial court was without power to aggregate penalties under the two separate counts, and, in the circumstances, the only valid sentence was twenty years which was the maximum sentence under the applicable statute.\textsuperscript{54}

Having discussed the generally accepted construction of the 1960 amendment developed in \textit{Stapf}, we may return to the question of the impact of \textit{Sobell v. United States}\textsuperscript{55} on pre-1960 sentences. In 1968 Sobell sought to have his thirty year sentence corrected to reflect credit for approximately 7\frac{1}{2} months of presentence confinement which allegedly resulted from his inability to post $100,000 bail. Sobell contended that a proper construction of section 3568, as amended in 1960, would require that he be given credit in spite of the congressional direction that the law be applied prospectively only.\textsuperscript{56} He asserted also that denial of such credit would deprive him of due process and equal protection of the law by imposing an addi-
tional term of imprisonment because he was financially unable to post bail. 57

Responding only to the statutory argument, the majority of the Second Circuit found Sobell entitled to presentence time credit even though he was sentenced before 1960, and even though the 1960 amendment contained an express prohibition against retroactive application. The court reasoned:

The 1960 amendment makes sense only if we assume that the courts did grant credit except where a minimum mandatory sentence was required. Thus, the rationale of Stapf, which upheld the statute against a constitutional challenge by construing it to avoid its seeming irrationality, would require that credit be afforded in pre- as well as post-1960 cases. 58

Additional support for this holding was found in the policies reflected in the Bail Reform Act of 1966 59 which included the amendment to section 3568 awarding credit for all presentence jail time. The court noted the nonretroactivity of the 1966 amendment 60 but found that the “policies” considered by Congress in enacting the Bail Reform Act justified its decision. 61 Stapf was rejected insofar as it would

57. Sobell asserted also that the sentencing court intended to give him credit for the presentence jail time. While the written judgment signed by Judge Kaufman made no reference to presentence jail time, Sobell’s argument that the judge meant to give him credit was based on the following exchange at the time of sentencing:

“The Court: I, therefore sentence you to the maximum prison term provided by statute, to wit, thirty years.

“While it may be gratuitous on my part, I at this point note my recommendation against parole. This Court will stand adjourned.

“[Appellant’s Counsel]: Before the Court adjourns, are the months already served taken into consideration?

“The Court: No, they are not, but I will have to so sign the judgment. They have to be so considered.” 407 F.2d at 183. While the three circuit court judges unanimously agreed that Sobell was entitled to credit, Judge Moore refused to accept the majority’s ruling based on a construction of section 3568, but found that while ambiguous, Judge Kaufman’s oral sentence was controlling and any ambiguity was to be resolved in favor of the prisoner. Id. at 183-85. Judge Friendly noted his concurrence with Judge Moore and also his concurrence with the opinion of Judge Hays whose decision was based on an application of section 3568. Id. at 185.

58. Id. at 182.


60. 407 F.2d at 183 n.7.

61. The court did not elucidate what it found to be the relevant policy considerations, but the Bail Reform Act generally was aimed at decreasing, with respect to pretrial confinement, the disparity in treatment of those who have financial means to post bail and those who do not. See generally President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 37-39 (1967).
prevent the retroactive application of the 1960 amendment. However, the court immediately dropped a footnote embracing Stapf's "conclusive presumption" that credit will be treated as having been given whenever "as a matter of mechanical calculation" it could have been given.\(^{62}\)

In summary, before the effective date of the 1966 amendment to section 3568, a majority of federal courts held that in spite of the language of the 1960 amendment limiting mandatory credit to persons serving mandatory minimum terms and who prior to sentence were held for want of bail, all prisoners who had been held in pretrial custody for want of bail were, when the statute was construed in light of the requirements of due process and equal protection of the law, entitled to full credit for presentence custody. However, when it appeared that the presentence time added to the term imposed would not exceed the maximum term allowed by the statute under which the prisoner had been convicted, most federal appellate courts would presume conclusively that the sentencing judge had previously given credit. Sobell added a further dimension holding that the due process and equal protection rationale supporting Stapf required the award of similar credit to a person sentenced before the effective date of the 1960 amendments where (1) he received the maximum sentence, and (2) he was held in pretrial custody because he was unable financially to obtain his release on bail.\(^{63}\)

### The Bail Reform Act of 1966

In 1966 Congress amended section 3568, which in its present form reads in part:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed . . . .

> If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from

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62. 407 F.2d at 183 n.8. The apparent inconsistency of this position with the constitutional principles in Stapf and Sobell is discussed in text accompanying notes 107-15 infra.

63. In Stapf the court distinguished cases involving pre-1960 sentences and those in which no credit was given. However, the court was careful to point out that pre-1960 credit was not at issue. 367 F.2d at 330.
the date on which he is received at such jail or other place of detention.\textsuperscript{64}

This statute reflects a liberalization of congressional attitude toward credit for presentence confinement. Credit is not dependent upon a person's inability to make bail and will not be denied if the offense for which he is held is not bailable. The amendment requires a causal connection between the "offense or acts" for which the person is held in pretrial custody and any subsequent sentence but does not require that the sentence be on the charge as originally filed or even that for which the defendant was tried.\textsuperscript{65} Moreover, the presentence time need not be served in federal custody so long as there exists a causal connection between the ultimate federal sentence and the initial state custody.\textsuperscript{66}

Another important feature of the 1966 amendment is the designation of the attorney general, who in this context would act through the United States Bureau of Prisons, as the person responsible for the award of presentence time credit. Assignment of administrative responsibility to the attorney general appears to effect two important changes: (1) it enables the sentencing judge to focus on what he considers an appropriate length of total confinement without regard to presentence time; and (2) removes any basis for speculation as to whether or not the time credit was reflected in the original sentence.\textsuperscript{67}

Certain problems may be encountered under present law when a court attempts to invoke sentencing alternatives in the case of a person who has built up presentence time credits. For example, \textit{Sullens v. United States}\textsuperscript{68} indicates that a trial court wishing to invoke the "split sentence" provision, which permits sentencing any offender not


\textsuperscript{66} For example, a prisoner arrested by state authorities for robbery of a federally insured bank is entitled to credit for the time spent in state custody if he is later turned over to federal authorities and is convicted for acts in connection with the robbery. Interjurisdictional problems regarding presentence credit are considered in the text accompanying notes 197-213 \textit{infra}.

\textsuperscript{67} Trial judges have been admonished \textit{not} to follow the old practice of taking jail time into account when fixing sentence because of the possibility of giving double credit. Putt v. United States, 392 F.2d 64, 67 (5th Cir.), \textit{cert. denied}, 393 U.S. 929 (1968).


\textsuperscript{68} 409 F.2d 545, 548 (5th Cir. 1969).
subject to life imprisonment or the death penalty to a term of confinement of six months and a term of probation not exceeding five years,\textsuperscript{69} will have to consider the presentence custody as a part of the six month term. Such a limitation may engender reluctance to utilize the split sentence technique for offenders having more than a month or two of presentence jail time. In \textit{Sullens}, after being advised that defendant's time credits exceeded the six months, the trial court resentenced him to three years and invoked another statutory provision\textsuperscript{70} to declare the defendant eligible for immediate parole. On appeal this action was held to be an increase in punishment barred by the double jeopardy clause of the Fifth Amendment.\textsuperscript{71}

\textbf{Inadequacy of Current Time Credit Statutes}

Apart from the sparse federal legislative history, no clues exist as to why the various legislatures adopted different methods of giving prisoners credit for time spent in presentence confinement. What is lacking most is a clearly articulated and principled rationale underlying the decision to grant or withhold credit. So long as the matter of giving credit for time served prior to sentence or pending appeal is viewed as an exercise of legislative or judicial largesse, there exists no impetus for developing a principled approach. However, recent constitutional developments clearly indicate the need for a re-evaluation of all the existing time credit statutes.

\textbf{The Constitutionality of Dead Time}

Failure to award a prisoner full sentence credit, with or without statute, for the time he spent in confinement prior to the formal commencement of his sentence is subject to constitutional challenge on three grounds: First, a person who is held in presentence custody because of his inability to post bail is denied due process and equal protection of the law if he does not receive time credit because he suffers serious disadvantages not suffered by persons financially able to secure their release. Second, a person who serves dead time suffers additional punishment in violation of the double jeopardy clause of the Fifth Amendment if (a) he receives a sentence with a mandatory minimum; (b) he receives the maximum sentence; or (c) he receives any sentence where the court or the appropriate corrections agency

\textsuperscript{70} Id. § 4208(a)(2).
\textsuperscript{71} Sullens v. United States, 409 F.2d 545, 548 (5th Cir. 1969).
does not specifically award full credit, including statutory good time allowances, for all time spent in custody in connection with the offense or act for which he was convicted. Third, the denial of credit for time served prior to formal commencement of sentence penalizes a person’s insistence upon his right to a full and fair trial and is therefore a denial of due process of law.72

Denial of Credit Is a Denial of Equal Protection

In the several federal cases discussed above,73 a denial of time credit to persons unable to secure pretrial release on bail was held to be a denial of due process of law under the Fifth Amendment because there was no rational basis for awarding credit only to persons subject to minimum term sentences while withholding it from persons not subject to minimum terms. While this analysis was based on the existence of a statute limited on its face to one class of offenders, the basic premise supporting these decisions is that federal courts were, whenever possible, actually awarding credit by reducing sentences. Absent statutory provisions and accepting the existence of a judicial practice of taking time served into account when imposing sentence, there would still be two classes of disadvantaged persons who would serve additional time for want of bail—those subject to mandatory minimum terms and those sentenced to maximum terms. In other words, statutes like the 1960 amendment to section 3568 are superfluous. This conclusion is supported by the approach taken in Sobell which, in spite of the statutory direction against retroactivity, mandated presentence time credit for a prisoner sentenced in 1951.74

Arguments seeking to uphold the constitutionality of presentence dead time imposed upon persons financially unable to post bail are severely shaken, if not rebutted totally, by the recent “layout” time trilogy decided by the United States Supreme Court. In Williams v. Illinois75 the petitioner was sentenced to the maximum one year term for petty theft and was assessed a fine of $500 and $5.00 court costs. The judgment provided that if at the end of his one year term he had not paid the fine and costs he was to “work off” the

72. In Short v. United States, 344 F.2d 550, 554 (D.C. Cir. 1965), Judge Bazelon suggested a possible fourth category wherein credit would be required constitutionally, i.e., where a defendant is subjected to excessive bail. Due to the dearth of situations in which courts have been willing to find bail excessive, this theory does not offer much promise of relief.
73. See notes 40-49 & accompanying text supra.
74. 407 F.2d at 182. See text accompanying note 58 supra.
amount by remaining in jail an additional day for each $5.00 owed.\(^7\)

Williams challenged the state's power to hold him for 101 days beyond the maximum term of imprisonment provided for petty theft solely because of his inability to pay the amount owed. The Illinois Supreme Court found "no denial of equal protection of the law when an indigent defendant is imprisoned to satisfy payment of the fine."\(^7\)

The Supreme Court of the United States reversed. In an opinion written by Chief Justice Burger, the Court held that "a state may not constitutionally imprison beyond the maximum duration fixed by a statute a defendant who is financially unable to pay a fine,"\(^7\) and that

the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.\(^7\)

The Court conceded that there was a legitimate and substantial state interest in providing means of collecting fines, but found that

once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.\(^8\)

Mr. Justice Harlan agreed with the result but restated his objection to the Court's continued use of equal protection methodology to make what he felt to be essentially due process decisions.\(^8\) In Justice Harlan's view the case involved the due process question of whether the legislature has impermissibly affected an individual right or has done so in an arbitrary fashion.\(^8\) He cited with approval the test stated in Fleming v. Nester\(^8\) that "the Due Process Clause can be thought

76. ILL. CRIM. CODE OF 1961, § 1-7(k).
77. People v. Williams, 41 Ill. 2d 511, 517, 244 N.E.2d 197, 200 (1969), quoted in 399 U.S. at 241.
78. 399 U.S. at 238. Chief Justice Burger relied mainly on Griffin v. Illinois, 351 U.S. 12 (1956) which held it to be a denial of equal protection for states to refuse free transcripts to indigents who otherwise would not be able to make the same use of the state's criminal appellate process as a person who could pay for a transcript.
79. 399 U.S. at 244.
80. Id. at 241-42.
82. 399 U.S. at 262.
to interpose a ban only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." Justice Harlan concluded that since the state had declared its penal interest to be satisfied by a fine or forfeiture in combination with a jail term, "the administrative inconvenience in a judgment collection procedure does not, as a matter of due process, justify sending to jail, or extending the jail term of, individuals who possess no accumulated assets."84

While Chief Justice Burger attempted to limit Williams to the situation where the layout time would, when added to the sentence of imprisonment, exceed the maximum term of imprisonment permitted by statute, a majority of his colleagues were not, in this context, content with such a narrow limitation on state power. In his concurring opinion Justice Harlan noted that he perceived no distinction between the circumstances in Williams and those "where the State through its judicial agent determines that effective punishment requires less than the maximum prison term plus a fine, or a fine alone."85 Moreover, in Morris v. Schoonfield,86 the not so widely noted companion case to Williams, three justices87 joined in a concurring opinion written by Mr. Justice White who stressed:

[The same constitutional defect condemned in Williams also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.88

84. 397 U.S. at 265. This method of analysis seems to have been adopted in the federal presentence time cases, particularly in Stapf and Sobell. See notes 41-75 & accompanying text supra.
85. 397 U.S. at 265.
88. 399 U.S. at 509. This is not to say that these qualifications on the Williams holding have not been ignored. Without mentioning Morris, the Indiana attorney general, in an official opinion, advised the commissioner of the Department of Corrections that layout time could be imposed on indigents who received less than maximum sentences so long as the sentence and layout time combined do not exceed the maximum term allowed by statute. Also, the opinion suggests that "good time" allowances are not to be taken into account in determining the maximum sentence. The Indiana Attorney General suggests also that good time be computed on the sum of the number of days that a prisoner would be required to serve to satisfy unpaid fines and costs plus the time of the sentence. 1970 Op. IND. ATT'Y GEN. 46. As a result of this method of computation, an indigent prisoner sentenced to a maximum term plus a
The most recent of the layout time cases, Tate v. Short,\textsuperscript{89} demonstrates that the equal protection rationale employed in Williams cannot be limited to situations in which the indigent prisoner is held in excess of the maximum statutory term of imprisonment due to financial inability to pay a fine. Expressly adopting Mr. Justice White's reasoning in Morris v. Schoonfield,\textsuperscript{90} the Court emphasized that "like Williams, petitioner was subjected to imprisonment solely because of his indigency."\textsuperscript{91} More importantly for analysis of the impact of these cases on the dead time issue, the Court recognized that Justice White's conclusion in Morris followed logically from the premise stated in Williams that

the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.\textsuperscript{92}

To be completely consistent with Mr. Justice White's conclusion in Morris, this premise should be modified to reflect Justice Harlan's view that a judicial determination of "effective punishment" reflected in a sentence less than the maximum term of imprisonment permitted by statute also defines the outer limits of the state's penal interest insofar as imprisonment in that particular case is concerned.\textsuperscript{93}

Applying the Fourteenth Amendment to Presentence Confinement

There is no apparent substantive difference between a man who serves extra time before sentence due solely to his financial inability to post bail and a person who serves extra time after completion of his sentence of imprisonment due solely to his financial inability to pay a fine.

\textsuperscript{89} 401 U.S. 395 (1971). The petitioner had, in Houston, Texas, accumulated traffic fines aggregating $425. The ordinances violated carried no provisions for imprisonment, and were enforceable only by fine. Due to his indigency, the petitioner was unable to pay his fines and was committed to the municipal prison in accordance with the Texas layout time law. Tex. Code Crim. Pro. § 45.53 (1966).

\textsuperscript{90} 399 U.S. 508, 509 (1970).

\textsuperscript{91} 401 U.S. at 398.

\textsuperscript{92} Id. at 398-99.

\textsuperscript{93} It is important to recognize, as did Justice Harlan, that such an approach would in no way inhibit a judge's sentencing an offender to an appropriate term of imprisonment within the statutory limits based upon his perception of the nature of the offense and the offender, and without regard to his economic status. It is only after such a sentence is determined that the state is prohibited from adding time merely because of the defendant's inability to pay a fine immediately.
In each instance the outer limit of the state's interest in keeping a man in custody has been defined by the maximum term provided by the relevant criminal statute and, in most cases, refined by a court's imposition of what it concludes to be an effective or appropriate term of imprisonment within the statutory limit.

One recent case has considered the question of whether the denial of credit for time spent in presentence confinement violates the equal protection clause. In *Royster v. McGinnis*\(^4\) the plaintiffs received "jail time" credit for the period spent in presentence confinement. They also received "good time" credit towards determining their statutory release date—the date an inmate must be paroled by the parole board.\(^5\) However, a state statute\(^6\) specifically prohibited the award of any "good time" credit for the period spent in presentence confinement when determining a prisoner's minimum release date—the earliest date on which the prisoner is eligible for parole at the discretion of the parole board.\(^7\) The plaintiffs argued that the denial of good time credit violated the equal protection clause because it unfairly discriminated against those who could not afford to post bail and were forced to remain in jail while awaiting trial.

A three-judge district court, one judge dissenting, held that this denial of credit violated the equal protection clause. The court cited *Dandridge v. Williams* for the proposition that "the State's action [must only] be rationally based and free from invidious discrimination."\(^8\) The court analyzed the purpose of awarding good time credit and the state's arguments supporting the rule against awarding such credit when computing a prisoner's minimum release date;\(^9\) the court concluded that no rational purpose existed.

Although the result in *Royster* is correct, the reliance by the court

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\(^5\) *Id.* at 974-75.


\(^7\) The failure to award good time credit in determining the minimum release date delayed one plaintiff's eligibility to appear before the parole board over four months and the other plaintiff's eligibility almost three months. 332 F. Supp. at 974.


\(^9\) The state's main arguments were (1) because rehabilitation programs were not available in county jails, there was a significant difference between the time spent in county jail and time spent in prison; (2) good time credit is awarded for participation in prison rehabilitation programs and no award should be made without such participation; (3) allowing this credit would make prisoners eligible for parole before state personnel, who were responsible for determining if they should be paroled, had adequate opportunity to observe the prisoner's conduct. *Id.* at 977-79.
on *Dandridge v. Williams* leaves open the possibility of a finding of some rational basis for the distinction between presentence confinement and prison time.\(^{100}\) As the following discussion makes clear, the holdings in *Williams, Morris, and Tate* seem to compel a finding of a violation of the equal protection clause. The issue is not whether there is a rational distinction between presentence confinement and "jail time." Rather, the question is whether after *Williams, Morris,* and *Tate* a person who can post bail can constitutionally be forced to spend more time in confinement than a person who can afford to post bail. Furthermore, although the "compelling state interest" test was not used in these three cases, this appears to be the test which was applied. Thus, the use by the *Royster* court of the "rational basis" test seems to be in error. For these reasons, the following discussion is based on the *Williams, Morris,* and *Tate* cases rather than on the holding in *Royster.*\(^{100a}\)

**The Maximum Sentence**

In the case of a prisoner who spends his pretrial time in jail because of his inability to post bail and is later sentenced to the maximum term permitted by the statute he is found to have violated, the result is precisely the same as that condemned in *Williams*—he is subject to punishment in excess of the statutory ceiling due to his inferior economic status. The unconstitutionality of this result is apparent whether it be termed a denial of equal protection or, perhaps more accurately, a denial of due process due to a "patently arbitrary classification, utterly lacking in rational justification."\(^{101}\) While the state has a legitimate and substantial interest in assuring the appearance at trial of criminal defendants, and while the bail system is an imperfect yet arguably rational means of insuring that interest, subjecting to additional disadvantages\(^{102}\) those whose presence at trial is assured by pre-

\(^{100}\) Compare id. at 974-81 (majority opinion) with id. at 981 (dissenting opinion).

\(^{100a}\) In *Workman v. Caldwell*, 11 Crim. L. Rep. 2027 (N.D. Ohio, Mar. 7, 1972), the court held unconstitutional on its face an Ohio statute that made discretionary the award of presentence time credit: "The Equal Protection Clause requires that all time spent in any jail prior to trial and commitment by prisoners who were unable to make bail because of indigency must be credited to his sentence. The Fourteenth Amendment does not conscience discretion in such matters."


\(^{102}\) See generally *D. Freed & P. Wald, Bail in the United States* (1964); *Foote, The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 959, 1125
trial confinement for want of bail does nothing to further the state's interest. The effect is to impose disparate punishment upon persons of inadequate wealth.

One argument that is often made against a requirement that a person be given credit for his presentence time is that the benefit of credit flows only to the guilty. Those who are found innocent and who have been subjected to the same pretrial confinement do not benefit. Such an argument is based upon the premise that credit for time served is a form of compensation to an injured party rather than a manifestation of fairness towards a person who has been convicted. This function of time credit was recognized by the Supreme Court in North Carolina v. Pearce where, with reference to credit for time served on a reversed conviction, it was observed:

[If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed.]

**Conclusive Presumption of Credit**

Since Tate's adoption of the rationale contained in the concurring opinion in *Morris*, it is unlikely that a state could, compatibly with the Fourteenth Amendment, require an indigent unable to pay his fine to serve layout time even though his term of imprisonment was originally set at less than the maximum. Conceivably a court might give a longer sentence in lieu of a fine, but once the limitation on confinement is set, even though less than the allowable maximum, it may not be extended merely because a person is financially unable to pay his fine at the end of his term.

A similar rationale would apply to a person who has served time in custody prior to trial. Assuming that the less-than-maximum sentence imposed by the court reflects its view of an appropriate punishment, unless the time already served is fully credited, a person may, because of his inability to make bail, serve more time than was deemed necessary to vindicate the state's penal interest in his case. The

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(1965), for discussions of the disadvantages faced in the criminal process by persons unable to secure pretrial release on bail.
106. *Id. at 719.*
107. *See* 401 U.S. at 398.
federal courts have recognized the constitutional implication of such a result but countered it by decreeing that whenever mathematically possible a sentencing court would be deemed to have taken the presentence time into account when less than the maximum term was imposed. None of the federal courts have offered any factual support for this conclusion, and the only reason advanced at the time of its adoption was predicated upon the inconvenience that would be experienced by the courts adjudicating claims for credit.

It would seem that administrative convenience, not to mention justice, would be served better by a contrary rule; that is, unless the record is clear that the trial court did indeed award full credit (including earned good time and a recognition that presentence confinement would be counted toward parole eligibility), the presumption should be that credit was not given and the state should bear the burden of proving the contrary. In other words, if the requirement of credit for presentence confinement is of constitutional dimension, it can hardly be satisfied by an unsubstantiated "presumption" that a trial judge complied with the rule.

The basis for the conclusive presumption adopted in *Stapf* is undermined by the facts in the same case. If trial judges were obviously ignoring presentence jail time in certain cases by handing out maximum terms, upon what basis could it be assumed that they were any more cognizant of presentence custody when awarding less than maximum terms? Consider the candid testimony of one distinguished federal judge offered in support of the 1966 amendment to section 3568:

> [I] think [the amendment] would work better than under the most benevolent judge who is carefully trying to accord credit [for presentence custody] because in any court, and I think especially a Federal court, many of the criminal offenses are not serious ones. I am not talking about bank robbery or the occasional treason case. But it is almost true, as someone said to me, the Federal criminal court is sort of a glorified police court so far as the crimes are concerned . . . [W]e have a lot . . . of defendants, often 50 or even a 100, on a week's calendar, and we move pretty fast, and it is just another detail imposed on the judge under the present system to remember. I may forget. I do not mean to, but just inadvertently. I have got four defendants, all in the same bill, and two of them are out on bonds, one has been released, one is in jail. I forget he has been in jail. I do not remember that when I have been through 2 hours of hearing testimony and determining guilt.

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108. See notes 40-63 & accompanying text *supra*.
So inadvertently I fail to give him credit. This is a better way. I do not have to rely on memory. . . . 110

If federal judges have difficulty taking presentence time into account when handling 50 to 100 cases per week, it is doubtful that lower court judges in urban areas handling that many cases in a day—or even a morning—will carefully calculate a sentence to reflect time already served. 111

In short, the validity of any presumption of credit for presentence time served depends upon proof of the existence of a nationwide judicial practice of taking presentence custody into account at the time of sentencing. We must be able to infer from that fact that credit is fully and fairly given in all cases. As in the case of the rule applied to determine the validity of statutory presumptions, there should be a rational connection between the fact proved and the fact presumed. 112

Recently, the Supreme Court of the United States held that

a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. 113

The test should be no less stringent when dealing with a judicially created rule of law which asserts that judges always take presentence time into account when sentencing offenders, and therefore a person who has been held in pretrial custody and who receives less than the maximum term for his crime has been given full credit for that time. As pointed out above, the major defect in this presumption is that the "fact" as to existence of such a judicial practice is at best an unsupported assertion. 114 Even if it were proved, it cannot be said with substantial assurance that such practice results in full credit in all cases where it is due. 115

110. *Hearings on Federal Bail Procedures Before Subcomm. of the Senate Comm. on the Judiciary, 89th Cong. 1st Sess. 146 (1965)* (testimony of the Hon. J. Braxton Craven, Jr., chief judge of the United States District Court for the Western District of North Carolina). At the time of this statement Judge Craven had served nine years on the state and federal bench. Currently, he is serving on the United States Court of Appeals for the Fourth Circuit.


112. *Trot v. United States, 319 U.S. 463, 467 (1943)*.


The Indeterminate Sentence with a Minimum Term

In some states a number of criminal laws dictate indeterminate sentences with prescribed minimum terms.116 Here there is no ready analogy to be found in the layout time cases, but the constitutional principles which support those decisions would seem also to require that credit for presentence custody be applied to reduce the minimum as well as the maximum term of the sentence.117

One would expect at this point to encounter the argument that all the Fifth and Fourteenth Amendments require is the deduction of time from the maximum or "long side." However, the disparity between persons not able to post bond and those who do is as apparent in the context of the minimum sentence as it is in the case of the maximum. Service of all or a portion of the minimum sentence determines parole eligibility.118 If presentence custody is not taken into account, the person unable to make pretrial bond must serve a longer period of time before becoming eligible for parole. This disadvantageous result would have been avoided by a person able to secure his release pending trial.

Also, since minimum as well as maximum terms are reduced by good time credits, a prisoner held in presentence custody for want of bail suffers further disadvantage unless, after sentence, he is credited with the appropriate good time earned in connection with the presentence custody. In other words, the presentence time should be treated in all respects as if it had been served pursuant to the sentence.119

Denial of Presentence Credit as Double Punishment

Presentence Confinement as Punishment

Failure to award a prisoner full credit for time spent in presentence custody is vulnerable to attack on double jeopardy grounds in

117. The only state statute that makes this explicit was recently enacted in Indiana. Indiana Code 1971, 35-8, ch. 2.5, added by Senate Enrolled Act No. 22, Feb., 1972. The ABA SENTENCING STANDARDS, supra note 2, § 3.6, and the MODEL PENAL CODE § 7.09 (Proposed Official Draft 1962), take care to point out that such credit is to be applied to minimum as well as maximum terms.
all of the cases in which the equal protection and due process analysis applies. However, the double jeopardy attack is more broad since it is available not only to persons financially unable to post pretrial bail, but also to persons held in connection with nonbailable offenses and even to persons who choose to remain in custody pending disposition of their cases.\textsuperscript{120}

In \textit{North Carolina v. Pearce}\textsuperscript{121} the United States Supreme Court held that the constitutional guarantee against double jeopardy "is violated when \textit{punishment} already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction for the same offense."\textsuperscript{122} The time credit aspect of \textit{Pearce} deals only with the problem of time served pursuant to a reversed sentence, and to date both state and federal courts have either ignored its application to presentence custody,\textsuperscript{123} or refused to apply its time credit feature in the presentence context.\textsuperscript{124}

The Texas Court of Criminal Appeals rejected a prisoner's \textit{Pearce}-based claim of credit for his presentence jail time:

In referring to the "\textit{punishment already exacted}", the Court [in \textit{Pearce}] consistently refers to the time spent in prison. We find nothing in the opinion to indicate that the Court intended the holding to apply to time spent in the county jail pending trial when state law provides that punishment for the offense charged

\textsuperscript{120}. For example, a person substantially certain of conviction and "hard time" might elect to begin service of his sentence and therefore refuse bail. It is readily conceded that this would be a rare occurrence. See Griffiths, \textit{Ideology in Criminal Procedure or a Third "Model" of the Criminal Process}, 79 \textit{Yale L.J.} 357, 387 (1970).

\textsuperscript{121}. 395 U.S. 711 (1969).

\textsuperscript{122}. \textit{Id.} at 718. In a footnote the Court emphasized that for credit to be full it must include "the time credited during the service of the first prison sentence for good behavior, etc." \textit{Id.} at 719 n.13. It seems reasonable to assume that by "etc." the Court meant that time should be treated as though it had been served pursuant to the subsequent valid sentence, and therefore would be considered in determining parole eligibility and other benefits or privileges based upon time served.

\textsuperscript{123}. \textit{See, e.g.}, Harper v. State, 462 S.W.2d 847, 849 (Ark. 1971); Richardson v. State, 243 So. 2d 598 (Fla. App. 1971).


One federal circuit court has recognized "substantial constitutional questions" raised by a habeas corpus petitioner who claimed he was subjected to double jeopardy by the state's refusal to credit his maximum 18 year murder sentence with the two years six weeks he spent in pretrial custody. Wright v. Warden, 429 F.2d 1101 (4th Cir. 1970). The case was remanded to the state courts for reconsideration in light of \textit{Pearce}. 
is to be by confinement in a penitentiary or prison or department of correction. Where a defendant is unable to make bail such confinement in jail in such cases is not designed to exact punishment for the offense charged, but to insure the defendant's appearance at his trial.\textsuperscript{125}

The Supreme Court of Arizona has taken a similar position,\textsuperscript{126} quoting at length and adopting the "logic" of a ninety-six-year-old New York case\textsuperscript{127} which proceeds as follows: Punishment is the penalty that the criminal suffers for his offense; it cannot legally be endured until the person is properly convicted of a crime and properly sentenced upon that conviction; therefore,

\begin{quotation}
any pain or penalty which the offender has suffered before conviction and before sentence has been pronounced upon him is illegal, or is due to some demand [such as being held in lieu of bail to assure presence at trial] of the law other than that based upon his conviction.\textsuperscript{128}
\end{quotation}

Also, there are qualitative differences between presentence and post-sentence confinement:

[Important parts of the sentence are the place of imprisonment, to wit: in a State prison, and the manner of detention there, to wit: at hard labor. When the relator lay in the county jail, he was not enduring these parts of the sentence; he was not in State prison; he was not at labor. How then can the time he lay in the county jail be reckoned a part of the time for which the law adjudged him to be at labor in the State Prison?\textsuperscript{129}]

These cases advance three arguments against mandatory award credit for presentence custody whether or not the sum of the presentence time and the sentence exceeds the maximum term permitted by statute. Each of these three arguments will be considered separately.

\textit{Presentence Custody Is Not Punishment}

The first argument is that time spent in presentence custody is not punishment because it is not served pursuant to any sentence. This argument is worthy of the combined wits of the Red Queen and Colonel Cathcart.\textsuperscript{130} The proposition might just as well be:

\begin{itemize}
\item People ex rel. Stokes v. Warden, 66 N.Y. 342 (1876).
\item Id. at 345.
\item Id. at 346.
\item Cf. King v. United States, 98 F.2d 291, 293 (D.C. Cir. 1938): "The Government's brief suggests, in the vein of The Mikado, that because the first sentence was void appellant 'has served no sentence but has merely spent time in the penitentiary'; that since he should not have been imprisoned as he was, he was not imprisoned at all. . . . As other corollaries it might be suggested that he is liable in
An innocent person cannot be punished for a crime; A person accused of crime and held in custody prior to conviction is presumed to be innocent.

Therefore, a person held in custody prior to conviction cannot suffer punishment.\textsuperscript{131}

Like Alice, one gets the feeling that there's something wrong here somewhere.\textsuperscript{132} What we have is a variation of the legal word game wherein a restrictive definition of a term is used to avoid a realistic analysis of a problem. For example, until very recently juveniles accused of delinquency and persons subject to other forms of compulsory commitment predicated on criminal conduct were deprived of significant procedural and substantive rights because courts chose to label the proceedings leading to such confinement as "civil" rather than "criminal." However, the Supreme Court has made it clear that a judicial or statutory definition of a term will not control constitutional analysis.\textsuperscript{133}

Without attempting to define punishment,\textsuperscript{134} if what happens to a man held in jail prior to his conviction is not much different (or per-

\textsuperscript{131} Without attempting to define punishment, if what happens to a man held in jail prior to his conviction is not much different (or per-

\textsuperscript{132} Of course, if we pursue this line of reasoning we may conclude that a person presumed to be innocent may not be held at all.

\textsuperscript{133} C. DODGSON, THROUGH THE LOOKING GLASS 88 (1902). The relevant passage is quoted in Dershowitz, The Law of Dangerousness: Some Fictions About Predictions, 23 J. LEGAL ED. 24 (1970); The Queen said:

"There's the King's Messenger. He's in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all.

"Suppose he never commits the crime? asked Alice.

"That would be all the better, wouldn't it? the Queen responded. . . .

"Alice felt there was no denying that 'Of course it would be all the better,' she said; but it wouldn't be all the better his being punished.

"You're wrong . . . said the Queen. Were you ever punished?

"Only for faults, said Alice.

"And you were all the better for it, I know! the Queen said triumphantly.

"Yes, but then I had done the things I was punished for, said Alice. That makes all the difference.

"But if you hadn't done them the Queen said, 'that would have been better still; better, and better, and better!' Her voice went higher with each 'better' till it got quite to a squeak. . . .

"Alice thought, 'There's a mistake here somewhere. . . .'"

\textsuperscript{134} In re Gault, 387 U.S. 1, 17 (1967); Specht v. Patterson, 386 U.S. 605, 609-10 (1967).

haps even worse) than what happens to him after sentence, there can be no basis for distinguishing one period of custody from the other for the purpose of affording him constitutional protection against double punishment. Consider, for example, the case of D who is accused of petty theft and is held for two months in the county jail before being sentenced to serve six months in the same jail. When D returns to the jail after sentence he is treated no differently and suffers no discomforts in addition to those he suffered before having been sentenced. There is no rational basis for treating the presentence period differently than the postsentence period for purposes extending to D the protection against double jeopardy.

Moreover, the appalling conditions that exist in local jails throughout the country are becoming a matter of general knowledge. Consider the following partial listing of "horribles" compiled in a recent law review comment:

In a Florida jail, a seventeen-year-old runaway, held on a stolen car charge, is strangled in the cell he shares with eighteen other men, many already convicted and sentenced felons. A judge terms the jail a "cesspool" and a "snakepit." In New York, a thirty-three-year-old Puerto Rican gang member, awaiting trial in the Tombs, goes mad in his cell and hangs himself. A Board of Corrections Commission reports that "the intricate system of criminal justice . . . succeeded only in deranging [the victim] and ultimately . . . it permitted his destruction." The Commission concludes that "[I]f we kept our animals in the Central Park Zoo in the way we cage fellow human beings in the Tombs, a citizens committee would be organized, and prominent community leaders would be protesting the inhumanity of our society . . . ." In Ohio, 272 inmates, including both convicted criminals and suspects awaiting trial, are confined in a 76-year-old jail built originally to house 150 men. A court concludes that the unventilated and unilluminated cells, where underfed inmates are forced to sleep on floors dampened by water from the overflowing toilets, constitute cruelty . . . comparable to the Chinese water torture.

**Assuring the Accused's Presence at Trial**

The second argument is that the pretrial custody is justified because it serves the legitimate interest of the state in assuring the accused's presence at this trial. Accepting the legitimacy of this state interest and accepting also the legitimacy of the bail system as a rational
means of preserving that interest, it does not follow that infliction of a
disadvantage upon an accused that is not reasonably necessary to the
interest the state seeks to preserve is warranted. In other words, the
bail system contemplates that the balance between the individual's in-
terest in personal freedom and the state's interest in having the person
available to answer to a criminal charge will be struck in favor of the
state when the individual is unable to satisfy conditions precedent to
his release. Basic fairness to a person who has been forced to ac-
cept this alternative would seem to require that he suffer no more than
is necessary to achieve the state's interest sought to be preserved through
pretrial detention. 137 The state's interests are fully served by keep-
ing the person in jail pending trial. Treatment of the period of pre-
sentence detention as dead time amounts to additional punishment
bearing no relation to any legitimate state interest. Unless this time
is fully credited on the sentence imposed for the offense or acts in
connection with which the prisoner was held, he has been denied a sub-
stantive right.

Qualitative Differences Between Pretrial and Postsentence Cus-
tody

The third argument is that there are qualitative differences be-
tween custody before trial and custody pursuant to sentence and there-
fore it is inappropriate to treat the former as offsetting the latter. If
this is an acceptable reason for refusing to recognize presentence
jail time in some cases, one day of jail time might often be worth two
or more days of prison time. 138 However, such attempted calculations
are obviously ridiculous. One day's lost freedom is like another. Any
attempt to weight qualitative differences in presentence custody as
opposed to postsentence custody would be futile, and no jurisdic-
tion that allows credit for presentence time as a matter of right has at-
tempted any such distinction.

Double Jeopardy Principles and Presentence Confinement

The double jeopardy (multiple punishment) rationale applies
with equal force in all the situations discussed above in the context of
equal protection. Its most obvious application is in the case where
the sum of the formal sentence and the presentence time exceeds the

137. Even the "preventive detention" scheme contemplates credit for time spent
138. See notes 135-36 & accompanying text supra.
maximum term permitted by statute. Similarly, the double punishment rationale applies where the sum of the presentence time and the formal minimum exceed the statutory minimum less earned good time. Finally, any conclusive presumption that time is taken into account in the case of less than maximum sentence is no more valid in this context than in the context of equal protection.

**Inhibiting the Constitutional Right to a Full and Fair Trial**

A person who must await trial in jail and who is aware that he is serving dead time (and this will always be the case where a man faces a minimum mandatory penalty) is likely to forego a vigorous and time consuming defense. He may choose to waive challenges to the sufficiency of the indictment, the method of selecting grand and petit juries, the venue of the case, the admissibility of seized evidence, and in order to get his case to trial he may waive trial by jury. He may even forgo the trial completely and plead guilty just to start his time running. These pressures are particularly strong upon one who has already spent several months in jail and whose trial may still be months away.

Defense lawyers are aware that the longer they delay trial of a case, the better bargain they may be able to make for their clients in plea negotiating sessions. Moreover, delay is an effective means of fee collection; despite the questionable ethics of the lawyers and the courts that allow such tactics to be used, the strategy seems to work. The person held in jail, however, is at a marked disadvantage. He is unlikely to see delay as a favorable defense strategy when each day is dead time. Since his bargaining position is weakened by the fact that he is in jail, he is not likely to get as good a deal as, for example, his codefendant who has been released on bail.

In this context the dead time prisoner can assert that the potential of punishment in addition to his minimum, maximum, or judicially determined "appropriate" sentence imposes an impermissible burden on his exercise of his constitutional right to trial and trial by jury.

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This is but another example of how the existing criminal justice system operates perversely. Our objective ought to be to devise fair methods of avoiding the use of delay as a tactical weapon.

In *North Carolina v. Pearce*\(^{142}\) the Supreme Court stated that an
announced practice of imposing a heavier sentence upon every
reconvicted defendant for the explicit purpose of punishing the de-
fendant for . . . getting his original conviction set aside would
penalize those who choose to exercise constitutional rights [and] would be patently unconstitutional.\(^{143}\)

Similarly, if a trial court is without power to give (or follows a
consistent pattern of not giving) full credit for presentence custody, a
jailed defendant is inhibited from insisting upon the full range of rights
due him as a criminal defendant. If he is denied credit, he is in a very
real sense penalized for exercising those rights due to the time re-
quired for proper adjudication.\(^{144}\) Unlike *Pearce* the validity of
this argument does not depend upon any showing of vindictiveness on
the part of the trial court. In *Pearce* the Court recognized a limited
basis upon which a sentence, after reversal of a prior conviction, could
be increased. A trial judge could, consistent with the principles of dou-
ble jeopardy, impose a heavier sentence the second time around in
light of "events subsequent to the first trial that may have thrown new
light upon the defendant's 'life, health, habits, conduct, and mental
and moral propensities.'"\(^{145}\) Since proper application of double
jeopardy standards precludes *any exception* to the award of credit
for presentence confinement, there can be no question of proper bases
for refusing credit. In some instances, however, good time credits
otherwise attributable to presentence confinement could be denied in
light of the defendant's behavior while in jail—*e.g.*, an attempt to es-
cape.

If courts are expected to perform the calculation as to time credit,
it would be well to require them to do so in writing leaving no room for
"presumption" as to how they counted the time.\(^{146}\) The better


\(^{144}\) Nothing in *Brady v. United States*, 397 U.S. 742 (1970), would detract from
this approach. There the Supreme Court rejected the petitioner's argument that the
death penalty feature of the kidnapping statute, 18 U.S.C. § 1201(a) (1970), de-
declared unconstitutional in *Jackson*, induced his guilty plea and therefore rendered it
invalid. The argument here is not that guilty pleas entered to avoid dead time are
invalid, but that the potential of dead time imposes an impermissible burden on the
exercise of constitutional rights, such as trial by jury, motions to suppress illegally
obtained evidence, etc., which take time. The appropriate remedy is the award of
credit for such time.

\(^{145}\) 395 U.S. at 723 (emphasis added), *quoting* Williams v. New York, 337 U.S.
241, 245 (1949).

\(^{146}\) This approach is urged in *Pearce*. *See* 395 U.S. at 726.
approach, however, is that adopted in the federal time credit statute which makes the award of credit for presentence time an administrative function, leaving the court free to determine the length of sentence necessary to vindicate the penal interests of the state without reference to presentence custody.

Credit for Time Pending Appeal

A number of state statutes mandate the award of time credit to a person held in jail after conviction pending appeal. In other states the decision to award credit for time in custody pending appeal is discretionary.

Before the adoption in 1949 of rule 38 of the Federal Rules of Criminal Procedure, sentence was automatically stayed as to a defendant who appealed and no time credit was awarded for time spent in custody unless the appellant elected to commence service of his sentence pending appeal. As originally adopted, rule 38(a)(2) required a specific election not to commence service of sentence before time served pending appeal would be treated as dead time. The reason behind the rule was to permit the defendant to remain in the vicinity of the trial or the appellate court to assist counsel in the preparation of his appeal. If the appellant elected not to commence service of his sentence and if the appeal failed, the defendant received no credit for any of the time between his conviction and delivery to the place designated by the attorney general for service of sentence. In 1966 rule 38(a)(2) was amended and in its present form eliminates the election feature and its dead time consequences. The trial court is authorized to

148. See note 67 & accompanying text supra.
150. See, e.g., TENN. CODE ANN. § 40-3102 (Supp. 1970) (appellant must file request for credit with Supreme Court within five days after court announces its decision); TEXAS CODE CRIM. PRO. ANN. art. 42.03 (Supp. 1971) (defendant who appeals may be resentenced if appeal is unsuccessful to give credit for time served in jail pending appeal). However, the discretionary feature has been read out of the Texas statute. Ex parte Griffith, 457 S.W.2d 60, 63-64 (Tex. Cr. App. 1970); Robinson v. Beto, 426 F.2d 797 (5th Cir. 1970). But see State v. Kreller, 255 La. 982, 233 So. 2d 906 (1970).
151. 8A J. MOORE, FEDERAL PRACTICE ¶ 38.01 38-3 (R. Cipes ed. 1970).
152. Id. ¶ 38.02.
recommend to the Attorney General that the defendant be re-
tained at, or transferred to, a place of confinement near the place
of trial or the place where his appeal is to be heard, for a period
reasonably necessary to permit the defendant to assist in the prep-
aration of his appeal to the court of appeals.\textsuperscript{155}

The equal protection/due process rationale of \textit{Williams} and \textit{Tate}
and the double jeopardy rationale of \textit{Pearce} apply with equal vigor to
the question of credit for time spent in confinement pending appeal.
Indeed, state and federal courts have been more willing to accept
\textit{Pearce's} bar against multiple punishment in this context than in
the case of presentence confinement.\textsuperscript{156} However, as to both periods,
the question remains whether the constitutional principles apply retro-
actively to cover persons in state and federal penal institutions who
have received no (or less than full) credit for time served prior to
sentence or pending appeal.

\textbf{Retroactivity of Credit for Presentence Confinement}

The various jurisdictions are split insofar as the retroactive appli-
cation of their time credit statutes is concerned. Illinois and Pennsyl-
vania courts have held their presentence time credit statutes to operate
retroactively;\textsuperscript{157} Michigan and New Mexico courts have found similar
statutes to be nonretroactive.\textsuperscript{158} Although Congress expressed its in-
tent to make the 1960 and 1966 amendments to section 3568 apply
prospectively only, the Second Circuit ruled in \textit{Sobell}\textsuperscript{159} that the 1960

\begin{itemize}
\item 156. Wilson v. North Carolina, 438 F.2d 284, 286-87 (4th Cir. 1971); Robinson
  v. Beto, 426 F.2d 797, 798 (5th Cir. 1970); Cole v. North Carolina, 419 F.2d 127
  with \textit{Ex parte} Griffith, 457 S.W.2d 60 (Tex. Cr. App. 1970) (decided before the
  Fifth Circuit's ruling in Robinson v. Beto, \textit{supra}).
\item 157. People \textit{ex rel.} Carroll v. Frye, 35 Ill. 2d 604, 221 N.E.2d 262 (1966);
  (1968). The Pennsylvania court's analysis was aided by language in statute referring to
  "any person who has been convicted," see \textit{Penn. Stat. Ann.} \textit{$\S$} 19-898 (1964),
  indicating a legislative intent to extend the benefits of the statute to persons sentenced
  (Smith-Hurd Supp. 1971), explicitly limited its application to sentences imposed after
  July 1, 1965. However, in \textit{Carroll, supra}, the petitioner argued successfully that as
  to him the nonretroactive applications of the statute would work a denial of equal
  protection and due process of law because he had received a mandatory minimum
  sentence, and therefore any assumption that the trial judge awarded credit would be
  erroneous. \textit{Cf.} \textit{Sobell v. United States}, 407 F.2d 180, 183 (2d Cir. 1969) (con-
  curring opinion).
\item 158. Bowen v. Recorder's Court, 384 Mich. 55, 179 N.W.2d 377 (1970); State v.
\item 159. \textit{Sobell v. United States}, 407 F.2d 180 (2d Cir. 1969).
\end{itemize}
amendment, as interpreted in *Stapf v. United States*, applied retroactively to a defendant who in 1951 received a maximum 30 year sentence.

Federal courts have refused to interfere with the dead time consequences of elections not to commence service of sentence pending appeal under the old rule 38(a)(2) of the Federal rules of Criminal Procedure. Likewise, the North Carolina Supreme Court refused to apply retroactively that state's statute requiring credit for time in custody pending appeal.

These inconsistent approaches are likely to be submerged in the retroactive application of constitutional principles derived from *Pearce*, *Williams*, and *Tate* insofar as they are applicable to dead time. Every prisoner, state or federal, who has not received full credit for the time he spent in custody pending trial, sentence or appeal should receive credit without regard to the date sentence was imposed. The Supreme Court stated in *Stovall v. Denno*:

>[T]he criteria guiding resolution of the question [of the retroactive effect of a holding of unconstitutionality] implicate (a) the pur-

161. 407 F.2d at 181.
164. This inconsistency pervades cases decided by the same court. In *Robinson v. Beto*, 426 F.2d 797 (5th Cir. 1970), the court ruled that Texas could not, in light of *Pearce*, deny credit to a defendant who spent approximately one year in jail while he appealed his conviction: "Due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access to the courts. . . . A defendant's right of appeal must be free and unfettered. . . . It is clear that under the Texas procedure, only those who appeal their convictions run the risk of longer imprisonment. Those who choose not to appeal begin to serve their sentence on the day sentence is pronounced. . . . Those who choose to appeal, however, begin their sentence on the day the Court of Criminal Appeals issues its mandate. . . . After issuance of the mandate, the sentencing judge may or may not resentence the defendant, giving him credit for whatever time he has spent in jail pending the appeal. That statutory scheme tends to impede open and equal access to appellate review since it may deter a defendant from appealing because of a fear that the sentencing judge will not give him credit for the time he has spent in jail pending appeal." *Id.* at 798-99.

However, in *Duke v. Blackwell*, 429 F.2d 531 (5th Cir. 1970), the same court seems to have summarily rejected similar arguments made by a federal prisoner who received a maximum five year sentence under the Dyer Act.
165. 388 U.S. 293, 297 (1967).
pose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect of the administration of justice of a retroactive application of the new standards.

These standards were developed to test the retroactivity of changes in criminal procedure, such as limitations on police activity, rather than to determine retroactive application of substantive requirements such as credit for pretrial confinement. But even applying the restrictive criteria of Stovall, the case for retroactive application seems clear. The purpose to be achieved in the award of credit for presentence confinement is one of fundamental fairness to an individual who otherwise would suffer loss of time because of the state's purported overriding interest in having him available for trial or for service of sentence. Certainly law enforcement authorities cannot claim any reliance on the practice of depriving defendants credit for time served. Finally, while there may be an administrative burden placed upon officials in charge of prisons who will have to recompute release dates for prisoners who have not received full credit for time served, no new trials or findings of fact need be made. A simple arithmetical computation is all that is required, and it should be obvious to all that the individual interest in freedom here outweighs the relatively slight administrative burden. Indeed, it appears that some courts already have begun the retroactive application of Pearce in dead time cases, at least insofar as credit for time pending appeal is concerned.


167. At least one federal court has held that the time credit portion of North Carolina v. Pearce, 395 U.S. 711 (1965), applies retroactively. See Allen v. Henderson, 434 F.2d 26 (5th Cir. 1970) wherein the court found the "reliance" and "administrative impact" criteria of Stovall entitled to little weight in the context of time credit. "Nothing more than a credit for punishment already exacted is involved. The same is true as to the effect on the administration of justice of a retroactive application. . . . It is unlikely that new trials will be necessary. At the most nothing more than resentencing will be required, and in some cases only a recomputation by prison officials." Id. at 28.

Criteria for Crediting Presentence Time

Once a constitutional right not to be subjected to the service of dead time is recognized, the inquiry must shift to the criteria to be satisfied before a prisoner may claim that right. Questions which will be the most difficult to answer are: (1) Apart from being held in jail prior to sentence, are there other forms of custody that must be recognized for credit purposes? (2) What, if any, is the requisite connection between the basis for presentence detention and the offense for which sentence is imposed? (3) Will a person held in presentence custody in one jurisdiction be entitled to any credit for that time when he is sentenced in another jurisdiction?

“Custody” for the Purpose of Credit

The largest number of cases in which credit for presentence confinement is in issue will involve total restraint in jail. In these situations the case for credit is clear, and any attempt to adjust credit in relation to the quality of the total restraint would be inappropriate.169

The second largest number of cases involve pretrial commitments to state mental hospitals for determinations of competency to stand trial or in anticipation of the insanity defense. In those jurisdictions having statutes requiring credit for presentence jail time, a number have allowed credit on sentence for compulsory pretrial commitment to mental institutions.170 These courts have recognized that this form of custody differs little from confinement in jail,171 and that it is but another result of a conflict between individual freedom and the public safety where the former has lost.172

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169. See text accompanying note 138 supra.
172. See In re Schneider’s Estate, 130 Ill. App. —, 264 N.E.2d 805, 807-08 (1970). When a prisoner serving a sentence is transferred to a hospital for treatment there is no question of his time being interrupted. Similarly, even in states where credit on sentence for time on parole is discretionary, the time spent as a result of compulsory commitment to a mental hospital in connection with parole or an alleged parole violation is counted as part of the pre-existing sentence. In re Bennett, 71
Jurisdictions that have denied credit have done so under the assertion of lack of power to award credit for any presentence time, or on the ground that the statute allowing credit for presentence jail time does not encompass hospital time. Courts that have allowed credit for pretrial commitment for mental observation have done so without regard to whether the commitment was requested by defense counsel, by the state or by the court. However, the North Carolina Supreme Court has suggested that the time during which an accused undergoes court-ordered mental observation should not offset a sentence because such confinement is for the benefit of the defendant and to assist counsel in the conduct of his defense. This argument ignores the total restraint involved in pretrial mental hospital commitments and the fact the commitment is based on a criminal charge. An accused may choose (or be advised) to forego a determination of competency or an evaluation of his criminal responsibility if the months (or even years)


There are a number of cases where credit has been denied for time served after conviction and commitment under sexual psychopath or drug addict rehabilitation statutes, and where the treatment is terminated in favor of a prison sentence for the same offense. E.g., People v. McCowan, 244 Cal. App. 2d 624, 628, 53 Cal. Rptr. 406, 408 (1966); People v. Reynoso, 64 Cal. 2d 432, 436, 412 P.2d 812, 814, 50 Cal. Rptr. 468, 470 (1966) (civil commitment for treatment not punishment); State v. Braggs, 9 Ohio Misc. 32, 35, 221 N.E.2d 493, 495 (Juvenile Ct. Cuyahoga Co. 1966); State v. Newell, 126 Vt. 525, 526-27, 236 A.2d 656, 658 (1967) (no credit for 20 months served after conviction on a plea of guilty to two counts of assault with intent to rape where time was served pursuant to sexual psychopath commitment, and where the state prison was designated as the place of commitment). But see People v. Foster, 67 Cal. 2d 604, 607, 432 P.2d 976, 978, 63 Cal. Rptr. 280, 290 (1967) (defendant entitled to credit on sentence for time spent in confinement due to invalid sex offender commitment).


174. Marsh v. Henderson, 221 Tenn. 42, 48-49, 424 S.W.2d 193, 196 (1968). Petitioner was arrested and charged with first degree murder in 1954. He was found incompetent to stand trial and was committed to a mental hospital where he was held for the next 11 1/2 years. In 1965 he pleaded guilty to second degree murder and received a sentence of 20 years. The court refused to allow credit for the time spent in the mental hospital on the ground that the statute, TENN. CODE ANN. § 40-3102 (Supp. 1970), permitted credit only for time a prisoner is held "in the county jail or workhouse." In response to the petitioner's argument that the confinement in the mental hospital was tantamount to being held in jail, the court responded that he was being held for treatment and not for punishment.

175. E.g., Sawyer v. Clark, 386 F.2d 633 (D.C. Cir. 1967).

he must spend in a mental institution for these purposes are treated as
dead time.

In another context, the emergence of alternatives to total con-
finement developed to offset the inequities of the bail system will neces-
sitate the development of a standard by which to determine the type of
pretrial restraint that may be taken into account for the purpose of credit
on a subsequent sentence. For example, an accused may be released
from jail during the day to go to his job but compelled to return to the
jail at night. Or, he may be freed to work during the week but be
required to spend weekends in jail. Likewise, a person may be at large
in the community but subject to limitations on his freedom, such as an
11 p.m. curfew, restrictions on travel outside the city, county or state,
or a requirement of periodic reporting to authorities as evidence of
continued availability for trial. 177 In such cases a rather flexible
standard of custody warranting credit will have to be devised. Such
standards have been formulated for use in other areas of the criminal
process for purposes of determining the legality of searches and seiz-
ures, 178 police interrogation 179 and the availability of habeas corpus. 180

In this context, although rejected in the analysis of total re-
straints, some qualitative evaluation of the type and nature of the re-
straint may be a prerequisite to the award of time credit. The re-
straint must be sufficiently akin to that imposed as a result of convic-
tion and sentence to qualify for credit. Any attempt to "weight"
presentence restraint—e.g., treating two or three days under less than
total restraint as the equivalent of one day in prison—is rejected be-
cause of the impracticality of making such determinations.

A person released on a normal bail bond is subject to some re-
straint upon his freedom. For example, he may not be able to leave
the jurisdiction temporarily without notifying the court, but the re-
straint would seem to be too slight for award of credit. However, the

177. Some of these alternatives to the present bail system are suggested in
PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE,

178. Terry v. Ohio, 392 U.S. 1, 16 (1968) ("whenever a police officer accosts an
individual and restrains his freedom to walk away, he has 'seized' that person").

179. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (person entitled to the Mir-
anda warnings when subjected to "custodial interrogation" which means "questioning
initiated by law enforcement officers after a person has been taken into custody or
otherwise deprived of his freedom of action in any significant way.").

180. Jones v. Cunningham, 371 U.S. 236, 242 (1963) ("the custody and control of
the Parole Board involve significant restraints on [a person's] liberty because of his
conviction and sentence. . . . ").
addition of other conditions, such as those listed above, may have a
pronounced inhibiting effect and may be more like restraints imposed
upon persons on probation or parole. The following is suggested as an
appropriate standard: A person convicted of a crime is entitled to
full credit on his sentence for any time prior to such sentence that he
was subjected to substantial restraint upon his freedom of movement
or actions, provided that such restraint was imposed in connection
with the offense or acts which resulted in the sentence. Mere release
on bail, without more, will not be considered a substantial restraint.
Admittedly, the suggested standard is very broad and indefinite, but
it does provide a guideline for administrative or trial court decisions
and for appellate review of those decisions.

The Necessary Connection Between
Sentence and Presentence Time

Constitutional Considerations

Obviously a prisoner should not be given credit for time that bears
no relation to his current sentence. If a prisoner could "bank" time
previously served in connection with offenses for which he was not
convicted, or where his conviction was invalidated, and he could apply
that time against a later offense, the

result [would be] something in the nature of a license to commit
some anti-social act or acts, the extent or scope of the license
measured by the amount of time the defendant has in the
"bank."181

One court has observed that "the time spent in jail prior to conviction
must, at least, bear an intimate and substantial relationship to the crime
for which such person is subsequently convicted."182 Any limitation
based upon the "same offense" would be too severe. Very often a per-
son is arrested on one charge, indicted on another, and convicted of
still another. Yet each of these different charges may be based upon
the same acts. To allow for these shifts in prosecution theory and
for conviction of lesser included offenses, the federal statute requires
credit "for any days spent in custody in connection with the offense or

181. Agata, Time Served Under a Reversed Sentence or Conviction—A Proposal
and a Basis for Decision, 25 Mont. L. Rev. 3, 46 (1963). The cases support this
view. See, e.g., United States ex rel. DiRienzo v. New Jersey, 423 F.2d 224, 226 n.3
N.E.2d 357 (1969); People ex rel. Manfro v. LaVallee, 33 App. Div. 2d 947, 948,
1946).
acts for which sentence was imposed.\textsuperscript{183} Similarly, the ABA minimum standards call for credit "for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based."\textsuperscript{184}

So long as the sentence and the presentence custody arise from the same conduct, the requirements of due process and equal protection would seem to require credit in all cases where a person has been financially unable to post bail. Persons who do post bail may experience changes in the nature of the charges as they progress through the criminal process, but they are able to avoid confinement pending final disposition.

Similarly, the double jeopardy (multiple punishment) rationale would apply when a person is convicted of a lesser included offense.\textsuperscript{185} However, it may be argued that if the charges are amended, say from burglary to theft, where the latter is not a lesser included offense within the former, the application of the "same evidence" test,\textsuperscript{186} would not require credit to be given on the subsequent sentence. This test ultimately may give way to a "same act" or "same transaction" approach,\textsuperscript{187} but even when applied rigidly does not justify withholding of credit for presentence custody. The "same evidence" test was developed to determine whether subsequent prosecutions are banned by former acquittals or convictions and to determine the legality of multiple sentences for related offenses. In the time credit situation none of these problems are present. Looking back from conviction to arrest it can usually be determined readily that the time already served was in connection with that sentence and no other.\textsuperscript{188} If credit could be denied by the simple shifting of charges, prosecutors would be given

\begin{itemize}
\item 184. ABA SENTENCING STANDARDS, supra note 2, § 3.6. Indiana Code 1971, 35-8, ch. 2.5, added by Senate Enrolled Act No. 22, Feb., 1972.
\item 186. Morgan v. Devine, 237 U.S. 632, 641 (1915) ("the test of identity of offenses is whether the same evidence is required to sustain them."); United States v. Bruni, 359 F.2d 807 (7th Cir.), cert. denied, 385 U.S. 826 (1966) ("Offenses are not the same for the purposes of the double jeopardy clause simply because they arise out of the same general cause of criminal conduct; they are the 'same' only when 'the evidence required to support a conviction upon one of them (the indictments) would have been sufficient to warrant a conviction upon the other.'").
\item 188. Admittedly, complications may arise in the cases of multiple sentences to be served concurrently or consecutively. See Agata, Time Served Under a Revised Sentence or Conviction—A Proposal and a Basis for Decision, 25 Mont. L. Rev. 3, 47-50 (1963).
\end{itemize}
the power to alter the sentence and to control plea bargaining by amending or threatening to amend charges whereby time served would become dead time.

Statutory Alternatives

The various statutory alternatives can best be illustrated by example. Suppose that on June 1 D is arrested and charged with a burglary allegedly committed on May 15. Bail is set at $2,000, and because he is indigent, D is unable to secure his release from jail. On July 1, while still in jail, he is charged with a robbery that allegedly was committed on May 1. As a result of the second charge, bail is increased to $3,000. On September 1 D is tried for the May 15 burglary and is acquitted. He remains in jail under the robbery charge, and on October 1 he enters a plea of guilty to the lesser included offense of aggravated assault and receives the maximum sentence of five years. Should D be entitled to credit on his five-year sentence: (1) for all time spent in jail from June 1; or (2) only for the time after the filing of the robbery charge on July 1; or (3) only for the time between the date of his acquittal of burglary (Sept. 1) and his conviction for aggravated assault (October 1)?

If the problem is approached purely from a causal relation perspective, it may be difficult to justify any more than one month's credit. Obviously D has not served any time in connection with the robbery or aggravated assault charge until July 1. The filing of the robbery charge on that date bore no causal relationship to his continued confinement pursuant to the burglary charge. Only if he had the means to post the $2,000 bail set on the burglary charge and was prevented from doing so because of the additional charge could the conclusion be that the robbery charge was the cause of his continued confinement. After his acquittal of the burglary charge his confinement was due solely to the robbery indictment.

Denial of all credit except for pretrial custody that was actually caused by the robbery charge could be justified on the ground that the time spent before the burglary acquittal was time any innocent criminal defendant would have had to serve in lieu of bail. A person similarly situated who had no additional charges against him would not get any benefit from the time spent in pretrial custody. Moreover,

the allowance of any time accumulated pursuant to the burglary charge may be attacked as "banking."\textsuperscript{191}

Despite these arguments, two states and the ABA Sentencing Standards would allow credit for all the presentence time included in the hypothetical problem. New York and Kentucky have identical statutes which specify that if the original charge on which the defendant is held is dismissed or results in an acquittal, credit that would have been due with respect to the original charge must be set off against "any sentence that is based on a charge for which a warrant or commitment was lodged during the pendency of such custody."\textsuperscript{192} The ABA Sentencing Standards provide:

If the defendant is arrested on one charge and later prosecuted on another charge growing out of conduct which occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution should be given for all time spent in custody under the former charge which has not been credited against another sentence.\textsuperscript{193}

The comments explaining this standard include a statement that the above wording was preferred over the New York law because the latter does not seem to extend credit to defendant who is arrested, interrogated, released, but then rearrested and convicted on another charge "even though the whole series of events was aimed at precisely the conviction that occurred."\textsuperscript{194}

The concept of fairness embodied in the above statutes and in the ABA proposal would seem to justify the award for all the time our hypothetical defendant spent in jail. In \textit{North Carolina v. Pearce}\textsuperscript{195} the Supreme Court lamented the fact that usually the time an acquitted defendant spends in jail cannot be returned to him. However, this can be accomplished in the situation described above. The suggested approach avoids the banking argument by limiting the avail-

\textsuperscript{191} See note 181 & accompanying text \textit{supra}.


\textsuperscript{193} ABA SENTENCING STANDARDS, \textit{supra} note 2, § 3.6(d). The commentary on this provision indicates that the basic concern of the committee was the situation in which a person is arrested on a minor or "holding" charge although he is suspected, and later charged, with a greater crime. The committee acknowledged also "that in justice the defendant should be awarded credit for time detained for unprosecuted charges." \textit{Id.} at § 3.6(e).

\textsuperscript{194} \textit{Id.}; cf. People v. Rosen, 45 Misc. 2d 789, 791, 257 N.Y.S.2d 626, 628 (Sup. Ct. 1965) (No credit on subsequent sentence for time during which the defendant was held as a material witness on an unrelated charge. The criminal charge was filed the day he was released from material witness custody.).

ability of credit to the time spent in custody after the commission of the offense for which sentence credit is sought.\textsuperscript{196}

**Credit for Time Spent in Custody in Another Jurisdiction**

Closely related to the problem of the necessary connection between the claimed credit and subsequent sentence is the question whether one jurisdiction should award credit for time spent in custody in another jurisdiction.\textsuperscript{197} The legislative history of the federal time credit statute\textsuperscript{198} indicates that Congress intended that credit be awarded to prisoners first arrested on state charges but subsequently turned over to federal authorities for prosecution.\textsuperscript{199} For example, if a person is arrested and charged with robbery by state authorities in connection with a hold up of a federally insured bank, and if the state chooses to turn the defendant over for federal prosecution rather than prosecute him under the state charge, section 3568 would allow him credit on his federal sentence for the time spent in state custody in connection with the same conduct, that is, for the robbery of the bank.\textsuperscript{200} Also, if federal detainers filed against a person held by a state on unrelated charges prevent the release of the prisoner on bail, the time he spends in state custody thereafter must be credited to his subsequent federal sentence.\textsuperscript{201} In such a case the cause of the continued confinement is the federal charge represented by the detainer. However, a prisoner subject to federal detainer when held by state authorities and who was unable to make state bond has been denied credit for the state time on a later federal sentence growing out of the charge represented by the detainer.\textsuperscript{202}

Another interesting variation is the case of a prisoner serving a sentence in a state institution and who is delivered to federal authorities for prosecution. The issue is whether the prisoner is entitled to credit against his federal sentence for the time during which he was "loaned" to federal authorities. In *Siegel v. United States*\textsuperscript{203} the court

\textsuperscript{196} ABA SENTENCING STANDARDS, *supra* note 2, at § 3.6(e).
\textsuperscript{197} The important and complex problem of fixing terms for multiple offenders subject to several sentences in two or more jurisdictions is beyond the scope of this article. *See generally* ABA SENTENCING STANDARDS, *supra* note 2, § 3.5.
\textsuperscript{200} United States v. Morgan, 425 F.2d 1388 (5th Cir. 1970).
\textsuperscript{202} United States v. McCrocklin, 410 F.2d 1137, 1138 (6th Cir. 1969).
rejected a prisoner's request for credit for such time on the ground that the prisoner was continuing to serve his state sentence while on loan to the federal authorities, and he was not entitled to double credit.\textsuperscript{204} Perhaps this opinion should be welcome if it implies a rejection of the "dual sovereignty" theory upholding the power of the states and federal government to impose separate punishments for the same act.\textsuperscript{205} A refusal to treat separately the time spent in actual federal custody, even if within the period of a state sentence, seems inconsistent with the dual sovereignty rationale.\textsuperscript{206} Moreover, the prisoner "borrowed" from the state is held temporarily in federal custody "in connection with the offense or acts" which result in a federal sentence, and in other situations there is no policy against "double" credit in the federal/state context. For example, assume that $D$ is held on charges of burglary in a state that requires credit for presentence jail time and bond is set at $1,000$. He is about to make bond, but a federal detainer is filed in connection with an alleged interstate transportation of a stolen motor vehicle. Bond is increased to $2,000$ and defendant is unable to secure his release. He is later convicted of both crimes. In this context he could receive credit on his state sentence for all the time spent pending disposition of the state charge. Even though there is an overlap, he would receive credit on the federal sentence for the presentence time served after the filing of the federal detainer.\textsuperscript{207} Credit is "double" only in that it is applied to separate sentences imposed by separate sovereigns in situations where there was "shared" custody.

As a policy matter, consideration should be given to the award of credit to a person who is serving a sentence in one jurisdiction and is subject to a detainer based on outstanding charges in another. It is well known that detainers affect the custodial treatment of a prisoner. Because of the pending charge he may be regarded as a greater escape risk and be subjected to greater security; because of the uncertainty of his release date he may be precluded from partaking in rehabilitational activities including educational and work-release pro-

\textsuperscript{204} 436 F.2d at 95.  
\textsuperscript{206} See Walsh v. State ex rel. Eyman, 104 Ariz. 202, 450 P.2d 392 (1969) (prisoners serving Arizona sentence entitled to credit on that sentence for time during which they were returned to California for trial on other charges. Grant of credit consistent with policy granting speedy trial and encouraging disposition of outstanding charge in order to remove some of the adverse consequences of detainers).  
\textsuperscript{207} See note 201 supra.
grams. Also, the detainer may affect adversely his chances of parole.\textsuperscript{208} Recognizing the impact of these factors, the United States Supreme Court has imposed upon the states the duty to afford speedy trials to prisoners subject to detainers.\textsuperscript{209} In light of the important interest of the accused in a speedy trial, and since detainers have significant custodial effects, a prisoner subject to a detainer based on an outstanding charge should be given credit against any subsequent sentence that is based on that charge from the date of the filing of the detainer to the date of sentence. Such a rule would (1) provide prosecuting authorities with a needed incentive to grant speedy trials to prisoners held in custody in other jurisdictions; (2) decrease partially the corrosive effects of detainers; and (3) encourage interstate cooperation in working out rational sentences for multiple offenders.

As to the third point, it is not to be understood that once a prisoner serving a sentence is returned to another jurisdiction for trial the second sentence must always be made to run concurrently with the first. As far as the above proposal is concerned, only the time between the filing of the detainer and the sentencing on the charge represented by the detainer would be awarded as credit as a matter of right. However, at the time of sentencing the court must attempt to determine a fair and realistic sentence, taking into account the time already served as well as the time to be served under existing sentences.

The point is well stated in the ABA Sentencing Standards:

The failure to integrate prison sentences for crimes committed in different states seriously inhibits a consistent, coherent treatment program during confinement. Similarly, detainers typically prevent the phasing of the individual back into the community at the optimal time. It is therefore highly desirable that multiple sentences of imprisonment imposed by different states be served at one time and under one correctional authority. It is also desirable that all outstanding charges of offenses committed in different states be disposed of promptly.\textsuperscript{210}

The standards suggest also that interstate consecutive sentencing be allowed only where there is a clear showing of a need to protect the public by the imposition of an extended term. Otherwise prison authorities should give automatic credit "for all time served in an out-of-state institution since the commission of the offense."\textsuperscript{211}


\textsuperscript{210} ABA Sentencing Standards, supra note 2, § 3.5(a).

\textsuperscript{211} Id. at § 3.5(c). The Michigan Supreme Court has taken a strong stand
A few recent cases deal with the question of credit for time in custody while fighting extradition. Michigan, New York and Pennsylvania, all of which have liberal presentence time credit statutes, have allowed credit for the period spent contesting extradition in another state in connection with the charge that culminates in sentence in the demanding state. The Tennessee Supreme Court refused to grant credit for the period during which the prisoner opposed extradition from Pennsylvania to Tennessee where he was to begin service of a sentence:

[I]t is really up to the prisoner who has been convicted to bring himself within the confines of the law to get the credit for the sentence that he concedes has been rightly fixed against him, and . . . the prisoner cannot by his acts have his sentence begin running before he presents himself to the officers for incarceration under the sentence.

against consecutive sentencing in the absence of specific statutory authorization. Browning v. Department of Corrections, 385 Mich. 179, 183, 188 N.W.2d 552, 555 (1971); In re Carey, 372 Mich. 378, 380, 126 N.W.2d 727, 728 (1964). As to sentences passed by different sovereigns which result in the imposition of consecutive terms, the court observed in Carey: "There seems little justification for this dual approach in the sentencing law, and the sooner we eliminate it the better. A defendant who is sentenced in a state court after receiving sentence in a federal court is subject to the same 'undefined and uncertain contingencies' about when state sentence begins, as he is in the case of two or more state sentences. The reason for the rule aptly applies in both types of cases. Therefore, we hold that where a defendant has been sentenced in federal court, and is subsequently sentenced in a state court or courts, sentence may not be imposed to commence at the completion or expiration of federal sentence in the absence of statutory authority." Id. at 381, 126 N.W.2d at 729. But see United States v. Gaines, 436 F.2d 1069, 1070 (2d Cir. 1971) (no credit on federal sentence which was held in abeyance due to state charges that were later dropped. State "dead time" was about equal to the two year federal sentence imposed while defendant was awaiting state trial).

212. People v. Havey, 11 Mich. App. 69, 82-83, 160 N.W.2d 629, 636 (1968) (statute designed to confer a benefit should not be construed to the detriment of a person it is designed to aid); People v. Nagler, 21 App. Div. 2d 490, 494, 251 N.Y.S. 2d 107, 111 (1964) (Credit for time spent fighting extradition from France. "A fugitive from justice detained in another state or territory of the United States by reason of being charged with the commission of a crime in a sister state is held in custody under process of law . . . And if the subject be detained in a foreign country by reason of a treaty stipulation he is similarly held in custody under process of law . . . and by reason of a legal arrest.") But see People v. Luttrell, 60 Misc. 2d 328, 303 N.Y.S.2d 105 (Sup. Ct. 1968) (escapee facing charges of burglary and larceny in New York arrested in Pennsylvania and charged and convicted there as a fugitive from justice with reference to the burglary and larceny charge in New York. Returned to New York after service of five months in Pennsylvania. New York refused credit for Pennsylvania time on ground prisoner was held on separate and distinct charge in Pennsylvania.).

Insofar as this reasoning applies to presentence time spent asserting rights with regard to extradition, it could as well be applied to the exercise of other rights such as contesting the admissibility of illegally seized evidence, challenging jury selection procedures, venue, etc. Viewed from this perspective, the Tennessee position is untenable in that denial of credit for the time exercising these rights would be tantamount to a penalty for their assertion and, as such, a denial of due process.

Conclusion

With some notable exceptions such as Stapf, Sobell, and Robinson v. Beto, the presentence time credit cases show very little in terms of analytical depth. Perhaps this is because many petitions for credit are made by prisoners pro se, and arguments supporting the award of credit are made inartfully. However, the constitutional principles flowing from Williams, Tate, and Pearce require state and federal courts to deal seriously with claims for credit without regard to when sentence was passed. Unless the record reveals that a prisoner has been accorded full credit for presentence confinement, including good time and credit toward parole eligibility, prison authorities should recalculate release dates taking the presentence time into account.

None of the existing statutes seem wholly adequate in light of the problems discussed above. The model suggested in the ABA Sentencing Standards comes closest to meeting the constitutional requirements and the requirements of sound penal policy and should seriously be considered by Congress and all state legislatures. However, the award of credit should be an administrative function once a court has determined the appropriate length of time a particular defendant should serve without regard to the time spent in custody pending trial and sentence. This procedure would remove the need for any presumption as to the award of credit and would preclude the award of double credit.