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Time Served under a Reversed Sentence or Conviction - A Proposal and a Basis for Decision

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Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision

By Burton C. Agata

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Western National Bank
Missoula, Montana
Member Federal Deposit Insurance Corporation
Time Served Under A Reversed Sentence or Conviction — A Proposal and A Basis for Decision

By Burton C. Agata*

Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.

Holmes, J.**

The focus of this article is the effect of time served pursuant to a reversed proceeding as a limitation on another sentence to be served by the defendant.

1. THE THREE BASIC PROBLEM SITUATIONS

The problems considered fall into three basic fact patterns. All others are variants of the following three hypotheticals.1

Problem I. Conviction after a new trial2

The defendant is convicted of larceny and sentenced to five years in the penitentiary. After serving three years, the defendant obtains his release because of a defect in the proceeding. He is tried again, convicted and sentenced.

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** McDonald v. Mabee, 243 U.S. 90, 91 (1917).
1 The following variations are considered:
(a) Conviction for the same offense with and without error with respect to the sentence.
(b) Conviction for a different offense with and without error with respect to the sentence.

Resentence.
(a) No error with respect to the term or conditions of incarceration.
(b) Error with respect to the term only.
(c) Error with respect to the conditions only.

Problem II. **Resentence**

The defendant is convicted of larceny and sentenced to five years in the penitentiary. After he has served three years, the sentence is vacated because of a defect and the defendant is remanded for resentence.

- **v. Ellsworth,** 375 P.2d 316 (Mont. 1962); **New York:** People ex rel. Lenefsky *v.* Ashworth, 56 N.Y.S.2d 5 (Sup. Ct. 1945); People ex rel. Montana v. McGee, 16 N.Y.S.2d 162 (Sup. Ct. 1939); People ex rel. Stokes v. The Warden, 66 N.Y. 342 (1876); **Oklahoma:** Ex parte Wilkerson, 76 Okla. Crim. 204, 135 P.2d 507 (1943); Ex parte Williams, 63 Okla. Crim. 395, 75 P.2d 904 (1938); **Pennsylvania:** Commonwealth ex rel. Townsend v. Burke, 361 Pa. 35, 63 A.2d 77 (1949); Texas: Ogle v. State, 43 Tex. Crim. 219, 63 S. W. 1099 (1901); Virginia: Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948); Hale v. Commonwealth, 137 Va. 774, 119 S.E. 49 (1923); **Washington:** Lindsey v. Super. Ct., 33 Wash. 2d 94, 204 P.2d 482 (1949); **Wisconsin:** State ex rel. Drankovich v. Murphy, 248 Wis. 433, 22 N.W.2d 540 (1946). Many of the foregoing cases will be considered later in this article in connection with a detailed consideration of this aspect of the subject. In addition, there are other cases that will be considered which present variations of the problem, such as credit on a conviction for a different offense.

* A resentence to correct an error or as a substitute for an improper sentence is constitutional. Murphy v. Massachusetts, 177 U.S. 155 (1900); People v. Dane, 81 Mich. 36, 45 N.W. 655 (1890); but cf., Adams v. State, 9 Ala. App. 59, 64 So. 371 (1913). However, when one separable part of a sentence which itself is a sentence authorized for the offense is wholly executed, there can be no resentence. Ex parte Lange, 85 U.S. 163 (1874). See also State v. Warren, 92 N.C. 825 (1885). But cf., Fay v. Noia, 372 U.S. 391, 408 (1963), where Brennan, J., speaking of *Ex parte Lange,* supra, states:

> The trial judge, after initially imposing upon the defendant a sentence in excess of the legal maximum, had attempted to correct the error by resentencing him. *The Court held this double-sentencing procedure unconstitutional, on the ground of double jeopardy, and while conceding that the Circuit Court had a general competence in criminal cases, reasoned that it had no jurisdiction to render a patently lawless judgment. (Emphasis supplied.)* Mr. Justice Harlan, in his dissent, states the usual and what appears to be the correct meaning of *Ex parte Lange,* supra. Fay v. Noia, 372 U.S. 391, 445 (1963) (dissent). Inasmuch as this point was not even in issue in *Fay v. Noia,* supra, it is reasonable to believe that double jeopardy will not be a defense to a resentence generally.

The cases involving resentence present a variety of situations and results. Their significance with respect to the specific issues considered in the course of this article will be pointed out throughout the text and in the notes at the appropriate places. The following cases are representative of those which involve a resentence or change in the original sentence, without the intervention of a new trial:

- **Alabama:** The Alabama cases do not directly involve the issue of allowing credit for time served, but they do lay a foundation for the void-voidable distinctions discussed at pp. 36-41, infra. The cases are actually concerned with the issue of whether or not there can be a resentence. State ex rel. Attorney Gen. v. Gunter, 193 Ala. 486, 69 So. 442 (1915); Adams v. State, 9 Ala. App. 89, 64 So. 371 (1913); Minto v. State, 9 Ala. App. 95, 64 So. 369 (1913) (the assumption appears to be that there can be no credit).

- **Arkansas:** Switzer v. Golden, 224 Ark. 543, 274 S.W.2d 769 (1955).
- **California:** In re Turrieta, 54 Cal. 2d 816, 356 P.2d 681 (1960); People v. Havel, 134 Cal. App. 2d 215, 285 P.2d 317 (1955); Ex parte Levi, 39 Cal. 2d 41, 244 P.2d 403, 405 (1952); Ex parte Wolff, 27 Cal. 2d 866, 168 P.2d 1 (1946); Ex parte Leyboldt, 32 Cal. App. 2d 518, 89 P.2d 91 (1939); Ex parte Phair, 2 Cal. App. 2d 669, 38 P.2d 526 (1945); Ex parte Wilson, 202 Cal. 341, 260 P. 542 (1927); Ex parte Fritz, 170 Cal. 141, 177 Pac. 157 (1918) (disapproving of the reasoning in *Ex parte Buczek,* supra); 38 Cal. App. 441, 176 Pac. 692 (1918) and *Ex parte Silva,* 38 Cal. App. 98, 175 Pac. 481 (1918)). Prior to the enactment of Section 2900.1, CAL. PEN. CODE in 1949 (see provisions set forth in para. 2, Appendix I. infra), there was no discernible pattern to the practice of the California courts in denying and allowing credit. See note 11 infra.
- **Colorado:** Best v. Dist. Ct., 115 Colo. 240, 171 P.2d 774 (1946).
- **Delaware:** In Biddle v. Bd. of Trustees, 33 Del. 425, 138 Atl. 631 (1927), the court stated that Kozlowski v. Bd. of Trustees, 32 Del. 29, 118 Atl. 596 (1921), was to
Problem III. **Consecutive sentences: Reversal of the first or anchor sentence**

The defendant is convicted on two counts of larceny. He is sentenced to five years on Count I and five years on Count II. The sentence on Count II is designated to commence on the termination of the sentence on Count I. After serving three years, the conviction on Count I is set aside and no new trial is held on Count I.

be disregarded insofar as it was inconsistent with this opinion.

**Florida:** Perry v. Mayo, 72 So. 2d 382 (Fla. 1954); State v. Nelson, 160 Fla. 744, 36 So. 2d 427 (1948).

**Illinois:** People v. Williams, 404 Ill. 624, 89 N.E.2d 822 (1950); People ex rel. Boyle v. Ragen, 400 Ill. 571, 81 N.E.2d 444 (1948); People v. Lukenfield, 396 Ill. 520, 72 N.E.2d 198 (1947); People v. Heard, 396 Ill. 215, 71 N.E.2d 321 (1947); People v. Judd, 396 Ill. 211, 71 N.E.2d 29 (1947); People v. Starks, 395 Ill. 507, 71 N.E.2d 23 (1947); People v. Green, 394 Ill. 173, 68 N.E.2d 263 (1946); People v. Wilson, 391 Ill. 463, 63 N.E.2d 488 (1945); People v. Huber, 389 Ill. 192, 58 N.E.2d 879 (1945); People v. Brown, 383 Ill. 287, 48 N.E.2d 953 (1943); People v. Atkinson, 376 Ill. 623, 35 N.E.2d 58 (1941); Harris v. People, 138 Ill. 223, 27 N.E. 706 (1891).

**Indiana:** Owen v. Commonwealth, 214 Ky. 394, 283 S.W. 400 (1926); Jackson v. Commonwealth, 187 Ky. 760, 220 S.W. 1045 (1920).


**Minnesota:** State ex rel. Petcoff v. Reed, 138 Minn. 449, 163 N.W. 984 (1917).

**New Mexico:** Jordan v. Swope, 36 N.M. 84, 8 P.2d 788 (1932).


**North Dakota:** State v. Malusky, 59 N.D. 501, 230 N.W. 735 (1930).


**Tennessee:** Laury v. State, 187 Tenn. 391, 215 S.W.2d 797 (1948).

**Texas:** Ex parte Nations, 164 Tex. Crim. 611, 301 S.W.2d 675 (1957).

**Utah:** State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (1932).

**Washington:** People v. Melhorn, 195 Wash. 690, 82 P.2d 158 (1938); State v. Lindsey, 194 Wash. 129, 77 P.2d 596 (1938); State v. Fairchild, 136 Wash. 519, 238 Pac. 922 (1925).

**Wisconsin:** McDonald v. State, 79 Wis. 651, 48 N.W. 863 (1891).

**Federal cases.**

(a) Supreme Court: Murphy v. Mass., 177 U.S. 155 (1900); Ex parte Lange, 85 U.S. 102 (1873).

(b) Courts of Appeals: Smith v. United States, 287 F.2d 270 (9th Cir. 1961); Meyers v. Hunter, 160 F.2d 344 (10th Cir. 1947); Youst v. United States, 151 F.2d 666 (6th Cir. 1945); McDonald v. Moinet, 159 F.2d 938 (6th Cir. 1944); King v. United States, 98 F.2d 291 (D.C. Cir. 1938); De Benque v. United States, 85 F.2d 202 (D.C. Cir. 1936).


The issue of constitutionality with respect to the imposition of consecutive sentences has been whether the duration and the commencement date of a sentence designated to commence after a sentence which is subsequently reversed has been fixed with sufficient certainty to satisfy constitutional requirements. It is now well settled
Each of the three hypotheticals raises the common question of what happens to the three years the defendant served pursuant to the reversed proceeding. In the first two, the problem is perceived in terms of the effect of the time served on new sentences. In the third, the issue is the effect of time served on a different sentence imposed prior to reversal.

The failure of the courts and the legislatures to deal with these problems on a rational and orderly basis points up a need for a systematic study of the issues.

Cases that allow the time served pursuant to the earlier sentence to be credited against the later sentence rely on a sense of what is just, on a statute, on the exercise of the court's discretion, or they simply fail to articulate any reason. Most of the cases that deny credit rely on irrelevant characterizations of proceedings or a statute construed to limit the court's power to allow credit. The paucity of reported cases within any

that the reversal of the first sentence does not affect the validity of the second sentence. Smith v. Lovell, 146 Me. 63, 77 A.2d 575 (1950); Blitz v. United States, 153 U.S. 308 (1894); Kite v. Commonwealth, 52 Mass. 581 (1846). But cf., Ex parte Roberts, 9 Nev. 44, 16 Am. Rep. 1 (1873). The following cases are a fair sampling of the cases which involve or discuss the problem raised by hypothetical Problem III in the text, above:

Florida: Vellucci v. Cochran, 138 So. 2d 510 (Fla. 1962); Helton v. Mayo, 153 Fla. 616, 15 So. 2d 416 (1943).


Maine: Smith v. Lovell, supra.


Federal Cases.

(a) Supreme Court: Blitz v. United States, 153 U.S. 308 (1894).

(b) Courts of Appeal: Smith v. United States, 287 F.2d 270 (9th Cir. 1961); Watson v. United States, 174 F.2d 253 (D.C. Cir. 1948); Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948); Youst v. United States, 151 F.2d 666 (5th Cir. 1945); United States v. Tuffanelli, 138 F.2d 981 (7th Cir. 1943); Costner v. United States, 159 F.2d 429 (4th Cir. 1943); O'Brien v. McLaughry, 209 Fed. 816 (8th Cir. 1913).


10The problems referred to above are examined in detail throughout the course of the article. Some of the points included are distinctions based upon whether a reversed proceeding is void or voidable. See, e.g., Brown v. Commonwealth, 4 Rawle 259 (Pa. 1833) and Commonwealth ex rel. Nagle v. Smith, 154 Pa. Super. 392, 36 A.2d 175 (1944). Distinctions based upon the type of proceeding: See also Beach v. Commonwealth, 292 S.W.2d 921 (Ky. 1955); Smith v. Lovell, 146 Me. 63, 77 A.2d 575, 579 (1950).

one jurisdiction precludes meaningful generalization based on a pattern of decision and in some instances, the few outstanding decisions in a jurisdiction are in conflict.\textsuperscript{11} Compounding the difficulty of deriving relevant basic principles for decision is the lack of a uniform judicial approach among the jurisdictions. Existing law is subject to criticism not exclusively because of the results, but primarily because of the failure to express or otherwise develop an approach to the issues that suggests considerations and principles applicable to an over-all solution of the problems.

The object of this article is the development and articulation of basic judicial and legislative guides to decision.

There have been some legislative inroads, but they are characterized by failure to provide for some of the most common situations and are deficient in procedural guides.\textsuperscript{12} A statute is proposed to meet these objections, based upon the considerations discussed herein.\textsuperscript{13}

With the fifty states and the federal government, each enjoying more or less sovereign competence to determine its own penal system, there is a diversity of sentencing philosophies and procedures that are under no compulsion to conform to a general pattern.\textsuperscript{14} Consequently, some difficulty is encountered in providing a satisfactory solution applicable in all details to each of the jurisdictions. Nevertheless, the issues with respect to the allowance or denial of credit for time served are common to all jurisdictions, entailing the same considerations for their resolution. Predicated on the acceptance of the substantive recommendations embodied in it, the proposed statute can easily be adapted to the requirements of any jurisdiction.\textsuperscript{15}

Failure to treat all the major fact patterns is an omission not limited to the judiciary and the legislatures;\textsuperscript{16} the commentators have also

\textsuperscript{11}Often the inconsistency within any one jurisdiction is due to distinctions which cannot be reduced to any guide to decision. (a) Compare Brown v. Commonwealth, 4 Rawle 259 (Pa. 1833) (reversed proceeding erroneous, no credit on consecutive sentence), with Commonwealth \textit{ex rel.} Nagle v. Smith, 154 Pa. Super. 392, 36 A.2d 175 (1944) (reversed proceeding void, credit on consecutive sentence). Neither case indicates why one proceeding is void and the other erroneous. See also Commonwealth \textit{ex rel.} Holly v. Clancy, 171 Pa. Super. 340, 90 A.2d 253 (1953) (denial of credit without reference to void-erroneous distinction; appears to be dicta); United States v. Keenan, 107 F. Supp. 266 (D. Pa. 1952) (b) Compare People v. Brown, 383 Ill. 287, 48 N.E.2d 953 (1943) (discharging defendant; no need to remand for proper sentence), with People v. Lueckfield, 396 Ill. 520, 72 N.E.2d 198 (1947) (appellate court has no authority except to remand for proper sentence). See \textit{Ex parte} Silva, 38 Cal. App. 98, 175 Pac. 481 (1918), and \textit{Ex parte} Bouchard, 38 Cal. App. 441, 176 Pac. 692 (1918) (allowing credit for time served). Both cases were rejected in \textit{Ex parte} Fritz, 179 Cal. 415, 177 Pac. 157 (1918) (no credit for time served on void sentence); but cf., \textit{Ex parte} Leyboldt, 32 Cal. App. 2d 518, 90 P.2d 91 (1939) (allowing credit for time served on void sentence).

\textsuperscript{12}Many statutes are set forth in Appendix I, pp. 65 - 68, infra, and are considered in detail throughout the discussion which follows.

\textsuperscript{13}The proposed statute is set forth in Appendix II, pp. 68 et seq., infra. The proposed statute is referred to in the notes as Proposal, § .......

\textsuperscript{14}For an exhaustive examination of sentencing statutes in all jurisdictions, see Note, \textit{Statutory Structures for Sentencing Felons to Prison}, 60 COLUM. L. REV. 1134 (1960).

\textsuperscript{15}Such characteristics as differences in names of sentencing authorities, parole and review systems, places of incarceration, etc. might require special local recognition.

\textsuperscript{16}One writer described the situation in the following manner: "In nearly all cases, the legislature has been silent as the Sphinx in the matter and the implications of the several judicial conceptions . . . are the source of the trouble." Whalen, \textit{Sentence Without Credit for Time Served: Unequal Protection of the Laws}, 35 MINN. L. REV. 239, 252 (1951).
been remiss in this respect. In addition, a provision dealing with this subject, recently added to the Model Penal Code, while broader in scope than most similar provisions, still is not broad enough to meet the problems adequately.

In the one article found that attempts a broad survey of the problem, the author presents many basic issues together with a call for legislation. Necessarily, the present article, to some extent, overlaps the earlier, but their respective purposes and approaches are somewhat different. Besides presenting some recent significant developments and covering some issues not considered by the earlier one, the present article seeks to develop basic considerations in the context of specific fact patterns, thereby providing a basis for distinguishing between those situations in which the allowance of credit must be mandatory and those in which it may or should be left to the sentencing authority's discretion. The method of approach is to identify the various possible fact patterns in order to isolate the relevant factors and to formulate conclusions applicable generally to the over-all problems. The result sought is an understanding of the relevant factors and a concrete proposal representing a rational approach to the problem, based upon generally applicable and valid conclusions.

Preliminary to undertaking consideration of the fact patterns themselves, note should be taken of some self-imposed limits of the discussion and some basic premises. General consideration of punishment as opposed to treatment, types of sentencing authorities and parole systems are outside the scope of this article, except when directly relevant to

17 This comment is in no way critical of what has been written. In fact, the one article and limited number of notes have been uniformly good within the limits of the task set by the respective authors. See Whalen, Resentence Without Credit for Time Served: Unequal Protection of the Laws, 35 MINN. L. REV. 239 (1951); Note, 45 MICH. L. REV. 912 (1947); Note, 38 B.U.L. REV. 623 (1955); Note, 29 J. CRIM. L., C. & P. S. 738 (1939). See also Annot., 35 A.L.R. 1283 (1954); Annot., 9 A.L.R. 958 (1920).

18 MODEL PENAL CODE § 7.09(2) (Proposed Official Draft, 1962); for text, see Appendix I. para. 14, infra.

19 MODEL PENAL CODE § 7.09(2) (Proposed Official Draft, 1962). The provision speaks generally of vacating a conviction, rather than a reversal on appeal, as do many of the statutes: see, e.g., ARK. STAT. ANN. §§ 43-2726, 43-2728 (1947) (Appendix I. para. 1, infra); IOWA CODE ANN. § 793.26 (1950) (Appendix I. para. 5, infra); KY. REV. STAT. ANN. § 107.041 (1962) (Appendix I. para. 6, infra); N.D. CENT. CODE § 29-28-34 (1960) (Appendix I. para. 12, infra); WASH. REV. CODE ANN. § 9.95.063 (1961) (Appendix I. para. 13, infra). It also indicates the necessity of deducting credit from the maximum and minimum sentence imposed. Cf., Michigan, text accompanying note 248 infra. On the other hand, it deals only with the vacating of a judgment of "conviction" and does not refer to a resentence. In addition, there is no provision dealing with the effect on consecutive sentences. Finally, limiting the provision to a new sentence imposed for the "same crime" fails to consider a lesser included offense, convictions for other offenses arising out of the same transaction, and several other variations.

20 Whalen, Resentence Without Credit for Time Served: Unequal Protection of the Laws, 35 MINN. L. REV. 239 (1951). In this article the author considers most of the cases and statutes up to that time, sharply criticizing the doctrines relied on by the courts and suggesting the inadequacy of existing legislation. He also suggests that the failure to allow credit for time served may be unconstitutional. The prime hope for reform, he suggests, is legislation.

21 For general discussions of these problems, see Wechsler, The Challenge of a Model Penal Code, 65 HARV. L. REV. 1097, 1113-33 (1952); George, Sentencing Methods and Techniques in the United States, FED. PROB. 33-40, (June 1962). Spitzer, Punishment versus Treatment?, FED. PROB. 3-7, (June 1961). The literature is abundant and the references in the foregoing articles will lead to other materials.
the understanding of a specific point or the determination of a particular issue.

Basic to the discussion is the assumption that all defendants should be treated as equals before the law, subject to answering for the same acts in substantially the same manner in the context of the relevant circumstances of their cases. Whatever may be the basic philosophy of a sentencing system, be it rehabilitation, punishment, or a combination of these ends, differences in sentences, whether between different persons or between different sentences imposed on the same person, should be based on factors that rationally justify the differences.

A. NEW TRIAL: CONVICTION FOR THE SAME OFFENSE

Because it presents most of the basic issues that must be disposed of initially, the first fact pattern considered is the imposition of a sentence after a new trial when the reversal of the conviction is due to an error unrelated to the sentence that was or could have been imposed, the conviction at the new trial and the reversed conviction are for the same offense, and the defendant has served time pursuant to the reversed conviction.

A new sentence imposed on a resentence proceeding or after a new trial can present the question of taking time served into account in two contexts: the total of the term of the new sentence plus the time served pursuant to the reversed sentence (1) may be less than the statutory maximum authorized for the offense or (2) may exceed the statutory maximum for the offense.

The objective of equality is not undermined by individualization of treatment of offenders; in fact, individual treatment on a rational basis would appear to be a necessary element of equal treatment. See, e.g., MODEL PENAL CODE § 1.02(2)(e) (Proposed Official Draft, 1962); George, Comparative Sentencing Techniques, FED. PROB. 27-31 (March 1959).


Some courts state or have held that the time served under the reversed sentence will not be taken into account even if the total time served under both sentences would exceed the maximum. See, e.g., Illinois: People v. Williams, 404 Ill. 624, 89 N.E.2d 822 (1950); People v. Lueckfield, 396 Ill. 530, 72 N.E.2d 198 (1947); People v. Starks, 395 Ill. 567, 71 N.E.2d 23 (1947); People v. Judd, 71 N.E.2d 29 (III. 1947); People v. Green, 394 Ill. 173, 68 N.E.2d 263 (1946); but cf., People v. Brown, 383 Ill. 287, 48 N.E.2d 953 (1943) (court refuses to remand for resentencing and can discharge defendant if circumstances warrant it); People v. Huber, 389 Ill. 192, 58 N.E.2d 879 (1945) (remand for resentencing is not required and defendant is discharged when he has served maximum); People v. French, 55 N.E.2d 53 (1944) (to the same effect). California: Ex parte Fritz, 179 Cal. 415, 177 Pac. 157 (1918) (refusing to allow credit for time served and suggesting that even if the maximum was exceeded by such a ruling, the result would be the same); but cf., Ex parte Leyboldt, 32 Cal. App. 2d 615, 90 P.2d 91 (1939) (maximum allowable sentence was six months, court refused to allow second sentence its full effect if total service would exceed six months). Delaware: Biddle v. Bd. of Trustees, 33 Del. 425, 138 Atl. 631 (1927) (earlier sentence to wrong place of confinement, inclined to believe no credit even if maximum exceeded). Indiana: State v. Killigrew, 202 Ind. 392, 174 N.E. 808 (1931) (new trial, no credit on previous sentence even if the entire sentence was served prior to reversal); McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947).
1. The Maximum as a Limit v. Credit for Time Served

Requiring a defendant to serve more than the statutory maximum solely because there was an intervening erroneous proceeding subjects him to a greater penalty than another defendant whose proceeding is free from error. The only difference between the circumstances surrounding the two defendants is the presence in one case of an error that is unrelated to the sentence originally imposed (or which could be imposed on the new sentence) and bears no relation to the conditions under which the time was served.

(same). Massachusetts: Commonwealth v. Murphy, 174 Mass. 396, 54 N.E. 860 (1899), aff'd Murphy v. Mass., 177 U.S. 155 (1900) (resentence can exceed first sentence, and even though there was a limit of one day's solitary confinement, it could be imposed on both sentences); but cf., Lewis v. Commonwealth, 329 Mass. 443, 108 N.E.2d 922 (1952) (the court states that Commonwealth v. Murphy, supra, did not hold that the first sentence could be ignored, since credit for time served was given in that case and holds that the time served under a reversed sentence must be deducted from the "maximum permissible" for the offense which is final basis of sentence). Michigan: People v. Gilbert, 163 Mich. 511, 128 N.W. 756 (1910) (after serving the maximum for the lesser included offense which was the offense for which defendant should have been convicted, defendant was released after reversal and not remanded for resentence); but cf., In re De Meereleer, 323 Mich. 287, 55 N.W.2d 255 (1948) (defendant, convicted of murder, had served the maximum for manslaughter, the basis of conviction after reversal, and the court refused credit); but see, Millard v. Skillman, 341 Mich. 461, 67 N.W.2d 708 (1951) (credit allowed on guilty plea to different offense); Ex parte Wall, 330 Mich. 430, 47 N.W.2d 682 (1951) (credit allowed on resentence); In re Doelle, 323 Mich. 241, 55 N.W.2d 251 (1944) (credit denied where time served on Count I of two counts, both counts reversed and on new trial defendant pleads guilty to Count II). New York: People ex rel. Stokes v. The Warden, 66 N.Y. 342 (1876) (maximum imposed on new trial sentence with no credit for time served on reversed conviction or between reversal and new sentence).

The cases cited deal with the service of a maximum sentence under the reversed conviction or the service of an amount in excess of the maximum under two sentences. Cases denying credit in which either the defendant has not served the maximum, or the maximum will not be served under the reversed and new sentence contain broad language to the effect either that the defendant is not entitled to credit or that the allowance of credit is within the court's discretion. See, e.g., Ex parte Wilson, 202 Cal. 341, 860 Pac. 542 (1927) (no right to county jail time which should have been served in penitentiary, discretionary consideration only); State v. Malusky, 59 N.D. 501, 230 N.W. 735 (1935) (discretionary); Hale v. Commonwealth, 137 Va. 774, 119 S.E. 49 (1923) (discretionary). But cf., Ex parte Leypoldt, 32 Cal. App. 2d 518, 90 P.2d 91 (1939) (must get credit even if place of confinement is erroneous); State v. Malusky, 59 N.D. 501, 230 N.W. 735 (1935) (discretionary); Compare Hale v. Commonwealth, 137 Va. 774, 119 S.E. 49 (1923) (discretionary) with Stonelbreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948) (requiring allowance of credit). The following cases deny that the court has discretion to allow credit: People v. Wilson, 391 Ill. 406, 63 N.E.2d 488 (1945) (resentence); Boyle v. Ragen, 400 Ill. 571, 81 N.E.2d 444 (1948); People v. Lueckfield, 396 Ill. 520, 72 N.E.2d 198 (1947); compare other Illinois cases cited earlier in this note; People ex rel. Stokes v. The Warden, 66 N.Y. 342 (1876) (new trial); Ogle v. State, 43 Tex. Crim. 219, 63 S.W. 1009 (1901); Ex parte Nations, 164 Tex. Crim. 611, 301 S.W.2d 675 (1957) (refusal to consider habeas corpus based on "void" sentence because even if granted, the resentence would be without credit and the court wanted to protect the defendant from the loss of credit). See notes 36-38 infra, on discretionary power of court.

Both approaches, i.e., lack of discretion or reliance on discretion present the possibility that the court will not allow credit even if the maximum were to be exceeded; on the other hand, note should be taken of the jurisdictions cited herein where the court refused to permit the maximum to be exceeded in the face of broad language in other cases.

Another roadblock to predicting what a court will do when the maximum is exceeded is the refusal to decide the question of credit for time served until the maximum has been reached. The appropriate remedy then becomes a habeas corpus proceeding. See, e.g., In re Swan, 150 U.S. 637, 653 (1893); Biddle v. Bd. of Trustees, 33 Del. 425, 138 Atl. 631 (1927); McDonald v. Johnston, 149 F.2d 768
Standing alone, the opportunity to impose a new sentence cannot justify service by the defendant of a term, not only greater than he would have served in the absence of the irrelevant error, but greater than the term established by the legislature for the offense. A contrary conclusion discriminates between defendants in like circumstances without relevant reason. The inequality of treatment is more striking than in most comparisons, because there is no need to speculate on the basis of a hypothetical "other" defendant. The inequality is concrete; the defendant before the reversal is the "other defendant," the object of the comparison.

When the total of the time served under the reversed sentence and the term imposed by the new sentence does not exceed the statutory maximum, the inequity of refusing to take the time served into account is not as immediately obvious as when the total exceeds the maximum. Nevertheless, the inequity in both situations is identical in degree and kind.

Whether a refusal to take the time served into account when the total does not exceed the maximum can be justified rationally requires a clear definition and articulation of the reason for taking the time into account under any circumstances. The issue is whether "equality" of treatment of defendants in like circumstances is best served and attained by adopting as the basis for taking the time served into account (1) the avoidance of total service in excess of the statutory maximum or (2) the avoidance of total service in excess of an appropriate sentence for the defendant in his particular circumstances. Each approach yields different results.

When the total does not exceed the statutory maximum, some courts avoid the issue of allowing credit by relying on the fact that the total time to be served is within the statutory limits authorized by the legislature for the offense. This approach is not consistent with the objective of avoiding an irrational basis for distinguishing between defendants in like circumstances. Focusing on the statutory maximum as the...
criterion for taking time served into account fails to recognize that when the sentencing authority is given discretion to impose a sentence within statutory limits, the penalty ultimately imposed within those limits is as much an expression of legislative policy as the maximum limits authorized by the applicable statutes.28

Although not undergoing a penalty in excess of the maximum authorized, the defendant is subjected to a penalty in excess of that contemplated for him for that offense under the particular circumstances, unless he is given credit for time served. The reason for the greater sentence will be the irrelevant fact of the intervention of a new trial. This becomes more pointed if the second sentence is thought of in terms of being the sentence the court deems appropriate for the offense without having taken into account the time he has served under the reversed sentence. If no account is taken of the time previously served and the second sentence actually reflects the term which the court decides is appropriate to impose for the offense, the defendant will be required to serve a total sentence actually in excess of the "appropriate" term.29 The objection to this result is, in nature and principle, identical with the objection to the defendant being required to serve more than the statutory maximum: (1) he is required to serve more than the appropriate term contemplated for the offense, in this case, something less than the maximum, and (2) the factual reason will be the intervention of a new trial, a fact which in itself is not relevant to the determination of an appropriate sentence.

2. The Measure of Credit

Assuming that it has been properly concluded that time served under the prior sentence should be taken into account, the measure of the allowance should be precisely defined. If the purpose is merely to bring the sentence within the maximum limits, consideration of the situation involving a total exceeding the maximum leads to the conclusion that only that portion of the sentence which exceeds the maximum should be taken into account. If the purpose is to give credit for actual time served, the analysis of the situation when the total does not exceed the maximum necessarily leads to the conclusion that the time served should be the measure of credit. Thus, whether the total exceeds or is less than the maximum, the credit against the new sentence should be the time served. If the basis is equality of treatment with respect to appropriate sentences, then the same principles should be applicable whether the total exceeds or is less than the maximum. The time served should be credited or accounted for in some way as part of the appropriate sentence.

28In People v. Farrell, 146 Mich. 264, 109 N.W. 440 (1906) (original sentence based on wrong offense) the court remanded for resentence over objections of some members who suggested that the appellate court merely reduce an excessive sentence to the maximum allowable. The basis for remanding was to permit the trial court to impose an appropriate sentence within the maximum allowable on the basis of all the facts including the correct offense. In this case, there was the danger of the defendant serving more than the maximum because the allowance of credit was not mandatory, while merely reducing it to maximum would have avoided this result because it would have been amended nunc pro tunc.

3. Justice as a Basis for Credit

Some courts have denied they have power to allow credit without statutory authority, other others in giving credit rely on a statute and still others have granted credit without statutory authority. In substance, the basis for the allowance without statutory authority has been "that glaring and intolerable injustice would result if the time served on a first sentence should not be taken into account in imposing a second sen-

30See, e.g., Alabama: Jeffries v. State, 40 Ala. 381 (1867) (new trial, no express denial, but court referred to executive clemency as a possible basis for relief); California: Ex parte Fritz, 179 Cal. 415, 177 Pac. 157 (1918) (resistance, no credit on void sentence); Ex parte Ralph, 27 Cal. 2d 866, 168 P.2d 1, 5 (1946) (resistance, no reason to remand, but if it was remanded as a resentence there would be "possible loss of credit for time already served"); Illinois: Harris v. People, 138 Ill. 63, 27 N.E. 706 (1891) (resistance); People v. Wilson, 391 Ill. 463, 63 N.E.2d 488 (1945) (resentence, first sentence under unconstitutional law); People v. Green, 394 Ill. 173, 68 N.E.2d 263 (1946) (resentence under different law); People v. Starks, 395 Ill. 567, 71 N.E. 2d 23 (1947) (resentence); People v. Judd, 396 Ill. 211, 71 N.E.2d 29 (1947); People v. Heard, 396 Ill. 215, 71 N.E.2d 321 (1947) (resentence); Barbour v. Ragen, 400 Ill. 571, 81 N.E.2d 444 (1948) (resentence); People v. Lueckfeld, 396 Ill. 529, 72 N.E.2d 198 (1947) (resentence); People v. Williams, 404 Ill. 624, 89 N.E.2d 822 (1950); Indiana: State v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931) (new trial); McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947) (new trial); Kentucky: Beach v. Commonwealth, 282 S.W.2d 821 (Ky. 1955) (new trial after conviction set aside in habeas corpus proceeding despite statute requiring allowance of credit when new trial ordered); see note 112 infra; Michigan: In re Doelle, 323 Mich. 354, 35 N.W.2d 251 (1948) (new trial); In re De Meerleeer, 323 Mich. 287, 35 N.W.2d 255 (1948); Montana: State ex rel. Nelson v. Ellsworth, 375 P.2d 316 (Mont. 1962); New York: People ex rel. Montana v. McGee, 16 N.Y.S.2d 162 (Sup. Ct. 1939) (resistance, sharply critical of rule denying credit); People ex rel. Lenzesky v. Ashworth, 56 N.Y.S.2d 5 (1945) (new trial, criticizes rule as unjust); Oklahoma: Ex parte Wilkerson, 76 Okla. Crim. 204, 135 P.2d 507 (1943) (new trial, criticizing earlier case allowing credit); Ex parte Williams, 63 Okla. Crim. 395, 75 P.2d 904 (1938); Texas: Ogle v. State, 43 Tex. Crim. 219, 63 S.W. 1009 (1901) (new trial); Ex parte Nations, 164 Tex. Crim. 611, 301 S.W.2d 675 (1957) (resentence) Wisconsin: State ex rel. Drankovich v. Murphy, 248 Wis. 433, 22 N.W.2d 540 (1946) (new trial, prior sentence to life imprisonment, if again convicted and sentenced to life (mandatory sentence), defendant would lose time served toward eligibility for parole). Federal: Meyers v. Hunter, 160 F.2d 344 (10th Cir. 1947).


32See, e.g., Helton v. Mayo, 153 Fla. 616, 15 So. 2d 416 (1943) (involving consecutive sentences and suggesting that credit must be allowed, "otherwise petitioner would be done a grave injustice."); Other consecutive sentence cases are included in note 30, supra, and the cases which are unique to this situation are considered at pp. 47 - 50, infra. Helton v. Mayo, supra, was relied on in Vellucci v. Cochran, 138 So. 2d 510 (Fla. 1962) (consecutive sentences and credit on new trial) and in turn relied upon in Keene v. Cochran, 146 So. 2d 364 (Fla. 1962). In Perry v. Mayo, 72 So. 2d 382 (Fla. 1954) (resentence case) and Tilghman v. Mayo, 82 So. 2d 136 (Fla. 1955) (retrial situation) the courts directed that credit be allowed without the citation of a statute or Helton v. Mayo, supra. See also, e.g., Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922 (1952); Jackson v. Commonwealth, 187 Ky. 760, 220 S.W. 1045 (1920); People v. Ashworth, 264 App. Div. 201, 35 N.Y.S.2d 66 (1942) (resentence, additional time already served credited). Other evidence of reliance on what is just is represented by cases where the courts, apparently believing that there is no obligation to allow credit and perhaps no power to do so, have refused to remand for a new sentence and have discharged the defendant when he has served substantial time on the reversed sentence; see notes 36-39, 127 infra and accompanying text.
Perhaps this is the most and the least which can be said in support of the proposition, a sort of "gut" reaction that in part is the basis of the sense of injustice reflected in acceptable public policy. It may be that the avenues used to reach the foregoing conclusions do not have the satisfying ring of the simple statement objecting to a "glaring and intolerable injustice." In translating the visceral into the verbal, something may be lost in the translation and the foregoing analysis may suffer somewhat from this defect; but by developing and actually stating the underlying reasons for a desirable result, even if in the obvious case the conclusion itself may not require strengthening by such a process, a distinct advantage is gained. In this area, in particular, the situations are varied and articulation of the reasons for the result should be of some aid in distinguishing among these varied situations.

4. Mandatory v. Discretionary Credit

Thus far, two bases have been suggested for taking time served into account in cases involving a new trial and a conviction for the same offense. One is to avoid the possibility of any defendant serving more than the statutory maximum and the other is to allow credit for time served for the same offense. It was concluded that a greater degree of equality of treatment is attained if the problem is approached as one of allowing credit for time served. As a corollary, it was further concluded that the entire time served should be credited to a second sentence for the same offense.

In such cases crediting time served should be mandatory and not a matter of discretion. In a criminal proceeding, there is substantial possibility of inequality of treatment which cannot be effectively and completely eliminated considering the chance coming before the "hard" or "soft" judge, the changing tempers of the times, and some of the irrelevant personality and social factors supplied by judges and juries and the accused themselves. The possibility of inequality based on these substantially unalterable facts of life create sufficient opportunities for unequal treatment, so that the opportunity to provide fair and equal treatment should not be ignored. If, in fact, the allowance of credit neutralizes a factor which heretofore led to inequality of treatment and if the allowance of credit for time served will put the defendant as nearly as possible in the same position as the defendant whose proceeding was free from error, or viewed another way, as if his proceeding were free from error, then the allowance of credit should be mandatory. Most courts generally have denied there is any right to credit, but some courts have spoken of their discretion to take time served into account.

33 See Whalen, Resentence Without Credit for Time Served: Unequal Protection of the Laws, 35 Minn. L. Rev. 239, 253-56 (1951). For further discussion of the discretionary basis for the allowance of credit see notes 36 and 37 infra and pp. 53-4 infra.
34 See note 32 supra, for cases that hold or state that there is no power in the court to allow credit and the discussion therein relating to discretionary power and its relation to those cases.
35 In the following cases, the court stated that there is no right to credit for time served, but the court may allow it in its discretion: Ex parte Wilson, 202 Cal. 341,
The basis for the exercise of this discretion has never been defined and no standards have been established. The result is that further inequality is created when it is exercised in favor of some and not others.

Another deficiency in relying on the exercise of discretion is that the courts have generally exercised it only within the statutory limits so that the second sentence cannot be less than the statutory minimum.

260 Pac. 542 (1927); Commonwealth v. Murphy, 174 Mass. 396, 54 N.E. 860, 862 (1899) (holding that second sentence may exceed the first sentence, and noting that the trial court could have imposed a new sentence to commence as of the date of the imposition of the reversed sentence, but was under no obligation to do so); People ex rel. Stokes v. The Warden, 66 N.Y. 342 (1876) (more in the nature of pre-trial confinement); Hale v. Commonwealth, 137 Va. 774, 119 S.E. 49 (1923) (defendant entitled to instruction that jury may take time served into account when imposing sentence).

It is not clear whether the exercise of discretion means that the appellate court may not reverse if there is a failure to take the time served into account or whether in the exercise of its discretion the court may impose a sentence less than the statutory minimum. The confusion is typified by the Michigan cases prior to the enactment of its present statute which requires the allowance of credit. See Mich. Stat. Ann. § 28.1035(1) (1954) (Appendix I. para. 9A, infra). In Millard v. Skillman, 341 Mich. 461, 67 N.W.2d 708 (1954), the court held that prior to the passage of the statute, it had discretion to allow credit for time served under a prior void sentence upon a subsequent plea of guilty to a different offense. It had previously held that there was no power to allow credit in In re Doelle, 323 Mich. 241, 55 N.W.2d 251 (1948) (where the concurring opinion recognized the discretionary power to allow credit within the statutory limits) and In re De Meeler, 322 Mich. 287, 55 N.W.2d 255 (1948). In Millard v. Skillman, supra, the court attempted to distinguish the cases but with no success. To add to the confusion, the court in Ex parte Wall, 330 Mich. 430, 47 N.W.2d 689 (1951), had decided that the defendant was entitled to credit for time served when there was a rescission and distinguished In re Doelle, supra, and In re De Meeler, supra, on the grounds that those cases involved the setting aside of a conviction and a sentence on a second conviction. This, of course, was precisely the situation in Millard v. Skillman, supra, and the court once more was compelled to distinguish the earlier cases. One almost feels the embarrassment of the court in trying to extricate itself from those earlier cases, although under the Michigan statute, supra, the defendant could have obtained the same relief he was seeking even if the sentence was imposed prior to the passage of the act. Apparently, the credit would be allowed by imposing the sentence nunc pro tunc as of the first judgment, as was done in Millard v. Skillman, supra.

In other cases involving the exercise of discretion, quite probably it is not the allowance of credit that is intended, but merely taking the time served into account as one of the circumstances surrounding the sentence. There is no suggestion that this means that less than the minimum may be imposed. If this is all that the courts mean, it adds nothing that less than the minimum the trial courts have in every case. See, e.g., Ex parte Wilson, 202 Cal. 341, 260 Pac. 542 (1927) (prison directors can take time served "into consideration"); People v. Heard, 396 Ill. 215, 71 N.E.2d 321 (1947) (no power to give credit, but sentencing judge probably took time served into account in fixing maximum sentence); People v. Farrell, 146 Mich. 264, 109 N.W. 440 (1906) (trial court has right to impose second sentence which is not impaired by partial execution of the first sentence, "though it be considered by the trial court in determining the extent of defendant's punishment"); People v. Ancksornby, 231 Mich. 271, 203 N.W. 864 (1925) (remand, "trial court will take into consideration" the prior sentence); People v. Gutterson, 244 N.Y. 243, 155 N.E. 113, 115 (1926) (new sentence will "take into account" time served); People v. Ashworth, 264 App. Div. 201, 35 N.Y.S.2d 66 (1942) (should be "credited with the additional time" he served); Commonwealth ex rel. Townsend v. Burke, 361 Pa. 35, 63 A.2d 77, 80 (1949) ("can properly be taken into account"); Jordan v. Swope, 36 N.M. 84, 86, 8 P.2d 788 (1935) (time served will be a "proper matter to urge in mitigation, and that court, possessing a wide discretion, will give it such weight as it may be entitled to"); State v. Malusky, 59 N.D. 501, 250 N.W. 735, 741 (1935) (remand for resentencing that court in its discretion deemed proper "considering all the circumstances, taking into consideration, of course, the time which the defendant has already served"); State v. Lindsey, 194 Wash. 129, 77 P.2d 598 (1938) (court says trial court probably took time served into account because of short sentences).
although the effect of this approach could be reduced by imposing the second sentence *nunc pro tunc*.

### 5. Assuring that Credit has Been Allowed

*Requiring* the allowance of credit, however, does not solve the problem of enforcing the requirement. In other words, how can there be reasonable assurance that credit has actually been given? For example, assume that the applicable statute provides that a court may impose a term of no less than three years but not to exceed 10 years for a larceny conviction. A sentence of five years is imposed and the conviction is set aside because of error in the trial. Meanwhile, the defendant has served four years. On a new trial, authorized under the facts, the defendant is again convicted of larceny. He is sentenced to six years.

On the face of it, because the total sentence could have been ten years, it could be argued: (1) the defendant will not be serving more than the maximum, and (2) if the court could have imposed the maximum on the second sentence, the defendant would be subject to a six-year maximum on the second sentence even if credit is required for the entire four years served on the reversed conviction. The first approach is directed at avoiding the service of more than the maximum and does not satisfy the rationality and equality objectives previously considered. The second might satisfy those considerations, but (1) there is no evidence, other than arithmetical speculation, that the sentencing judge actually took into account the four years served, and (2) if reversal of the prior proceeding was not based upon any error in the term imposed by the sentence and the first conviction for the offense had been proper, there would have been an unassailable adjudication that the appropriate sentence for this defendant for this particular offense is five years. Without additional safeguards and requirements, the result in this case can be a focus on avoiding the maximum as a limit on the total of the two sentences, rather than the allowance of credit served against the appropriate sentence for the offense.

The problem of assuring that credit has been allowed raises two issues that should be analyzed separately and in relation to one another. The first, relating to the *time served* under the first sentence, is whether evidence other than the arithmetical record should be required to establish that credit was in fact allowed, and if the answer to this question is in the affirmative, what should be the nature of this evidence. The second, relating to the *sentence imposed*, is what effect, if any, should the first sentence imposed have as a limitation on the second sentence.

With respect to requiring that the record show that the deduction has been made or that credit was allowed, Iowa early held that nothing

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38 See note 84 *infra* and Commonwealth v. Murphy, 174 Mass. 396, 54 N.E. 860, 862 (1899), for discussion of *nunc pro tunc* sentences. The applicability of *nunc pro tunc* sentences to a new trial situation is doubtful and consideration is reserved for a more appropriate place.


40 See *Iowa Code Ann.* § 793.26 (1950) (Appendix I. para. 5, *infra*) which first appeared in substantially the same form in the Revision of 1860, as section 4933. It is the first statute to allow credit.
is required to appear in the record, and in the absence of a showing that the court failed to take into account the time already served, it would presume that the court did take the prior imprisonment into account, a presumption based upon a presumption of regularity in the performance of official duties. On the other hand, Washington has held that even a statement in the record that credit was allowed is subject to review to determine if it reflects the actual allowance of credit.

The question of whether credit has been granted is one of fact and involves an inquiry into the operation of the sentencing authority. This is not a clerical or ministerial function which may justify indulging in a presumption of regularity, but a judicial function based on a remedial statute. The inquiry is whether the judge has performed a duty imposed upon him, a duty of which he should have been aware at the time he acted. There is no need to base the entire decision on a presumption when some evidence of the facts can be required. There is nothing inherent in the act of imposing a sentence which would lead one to conclude that credit was allowed as a matter of course.

Performance of the required duty could be evidenced by the court's statement that credit was allowed or by requiring a demonstration of how the credit was allowed, to the extent that demonstration is possible. A general statement that prior service was taken into account would be some evidence that the court, in fact, did so; a statement showing the computation and the manner in which it was taken into account would be even stronger evidence. In either case, it would be necessary to engage in another presumption, only nominally rebuttable, that the description by the judge of his own mental processes is, in fact, a description and not the justification of a result. The general statement of compliance can easily become a verbal formula converted into a substitute for substance. A requirement that the computation be set

State v. Hopkins, 67 Iowa 284, 25 N.W. 244 (1885); compare Travis v. Hunter, 109 Iowa 602, 80 N.W. 680 (1899).

Ibid.


See discussion of presumptions in McCormick, EVIDENCE § 309 (1954).


For example, in People ex rel. Barrett v. Hunt, 12 N.Y.S.2d 127 (App. Div. 1939), the court held that a sentence that fails to deduct all the time served as required by N.Y. PEN. CODE section 1943 on a resentence is void, but when the record recites a passage somewhat as follows: ‘‘all the time actually served under those sentences was deducted from the new sentence as required by section 1943 of the Penal Law’’, the sentence is in compliance with section 1943; in the case before it, the trial judge had imposed a resentence five years greater than the vacated sentence. Upon a remand for failure to give credit under the appropriate section, the judge merely added the substance of the quoted words and the appellate division held that the sentence was now valid. In Lindsey v. Super. Ct., 33 Wash. 2d 94, 204 P.2d 482, 486 (1949), the sentencing authority had endorsed upon its order a notation reading, ‘‘(1½ years Jail Time Considered)’’, and the court in response to the Attorney General’s contention that the jail time was in fact or effect credited, stated: ‘‘We think it can be readily demonstrated that such is not necessarily the fact or effect’’. Subsequent to the ruling in People ex rel. Barrett v. Hunt, note 47 supra, a New York court stated that although the court was required to give credit for time served on a vacated sentence and the record contained no statement such as appeared in the

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forth has the advantage of compelling the identification and articulation of the relevant elements, including the appropriate sentence for the offense and the credit allowed for the time served, and imposes upon the judge an awareness of the specific act he is declaring performed. To the extent that it requires the judge to make the computation and be aware of its purpose and to the extent that the compuation does not become a means of justifying a preconceived result, it is the most that reliance on procedural or mechanical devices can do to assure compliance with a mandate that credit be given.

Even if the allowance of credit is mandatory and a computation or a statement of compliance appears in the record, so long as the second sentence is limited only by the requirement that the appropriate credit be deducted and the total of the two be within the limitations authorized for the particular offense, there is always the real and practical danger that the problem involved will be conceived of in terms of assuring that the total of the time served under both sentences does not exceed the maximum authorized for the offense.

In view of the wide discretion permitted judges when imposing sentences, it is unlikely that any occasion will arise when it will be found that the judge did not actually make the allowance required. This is true whether the presumption approach is adopted or whether a statement by the judge, general or detailed, is required. The only situations that come to mind when an appellate court might reverse are if the fact of prior imprisonment is never brought to the trial court's attention or when the total exceeds the authorized maximum. The Iowa cases highlight this point. The presumption prevailed when the first and second sentences were for two years, even though the defendant had served fifteen months under the first sentence. The presumption was rebutted, in effect, when the court held it error to impose the maximum on the second sentence when some time had been served under the first sentence. The same danger exists in presuming that the

Barrett case, supra, the error was not prejudicial because the court had imposed the same sentence on the resentence as it had on the vacated sentence and the resentence was within the authorized limits. This case involved a resentence as a second offender, a vacated sentence as a third offender, and the statute authorizes the same sentence for both.

The sequence of events in People ex rel. Barrett v. Hunt, 12 N.Y.S.2d 127 (App. Div. 1939) (see notes 47 and 48 supra), indicates how the requirement of a general statement of compliance can become a statement of justification rather than descriptive of a process. In Lindsey v. Super. Ct., 33 Wash. 2d 94, 204 P.2d 482, 487 (1949), the court discusses the possibility of arriving at a preconceived result and juggling the figures to support the conclusion.


Travis v. Hunter, 109 Iowa 602, 80 N.W. 680 (1899); State v. Hopkins, 67 Iowa 284, 25 N.W. 244 (1885); State v. Butler, 155 Iowa 204, 110 N.W. 280 (1907).

State v. Hopkins, note 52 supra.

State v. Butler, note 52 supra.

See notes 47-49 supra and accompanying text.
appearance of a general statement or a record of computation represents an actual deduction of credit. If the contention is correct that equality of treatment and a rational basis for sentencing require the allowance of credit against an appropriate sentence and not merely an assurance that the defendant will not serve a term in excess of the statutory maximum, then to the extent that the focus by the sentencing judge or the appellate court is on the maximum and not on the credit element, the goal of equality or credit for time served is not attained.

6. The Reversed Sentence as a Maximum on the Second

One way of assuring that the defendant is no worse off on the second sentence than he was on the first merely because of a new trial, is to limit the maximum on the second sentence to the term imposed by the first sentence. Under existing decisions there probably is no constitutional bar to the second sentence exceeding the first. Nevertheless, there are some policy considerations that could lead to a contrary result without a constitutional mandate to do so. On the other hand, there are some reasons not to limit the second sentence by the term imposed on the first.

In establishing or utilizing the presumption that credit was allowed on the second sentence, the Iowa court stated: “The evidence may have disclosed the fact to be that justice required an imprisonment for a longer term.” This point is the strongest argument against limiting the second sentence in terms of the first sentence. It is possible that in a new trial, matters in aggravation of the offense may appear or the sentencing report may reveal additional factors not known when the first sentence was imposed. It is difficult to conclude that these factors should be ignored, unless there are stronger countervailing policy reasons or other interests to be protected.

Recognition of the other factors as a reason for imposing a greater sentence has implicit in it a tacit admission that, in the absence of other factors, there should be no increase in the sentence. If it is concluded that the appearance of new facts bearing on sentence is a proper basis for increase, there should be some safeguards to assure that the increase is based on those factors and nothing else. Some of the measures which might be adopted to safeguard the accused are: the sentencing judge should be required to state the facts upon which he relies for an increase in sentence; there should be a presumption in favor of the correctness of the first sentence as the maximum that should be imposed (subject to credit for time served on the reversed sentence); the presumption should be overcome only on the basis of clear, convincing and compelling facts. On appeal, however, the effectiveness of these requirements may well be reduced when viewed within the context of the traditional wide discretion permitted a sentencing judge and the reluctance of an appellate court to overturn findings of fact by a trial judge.

Lindsey v. Super. Ct., 33 Wash. 2d 94, 204 P.2d 482 (1949) involves the application of these considerations to setting the minimum sentence and the maximum sentence.

Murphy v. Mass., 177 U.S. 155 (1900); see discussion of this case in King v. United States, 98 F.2d 291, 294-96 (D.C. Cir. 1938).

See King v. United States, 98 F.2d 291, 296 (D.C. Cir. 1938).

State v. Hopkins, 67 Iowa 284, 25 N.W. 244 (1885).
The discretion permitted the sentencing authority is another factor that, on its own, stands as a consideration against limiting the second sentence to the maximum imposed on the first sentence. Even without additional factors, the second judge may evaluate the factors bearing on sentence in a particular case differently than the first judge and thereby properly reach a different conclusion.

Recognizing the possibility that different sentences may be imposed by different judges is inherent in any system that allows some discretion to the agent imposing sentence and further conceding that there is merit in permitting and even encouraging the exercise of discretion in the imposition of sentences, the question presented is whether a second opportunity for the exercise of discretion is justified because of an error in the proceeding. This question necessarily involves two different situations. First, when the error has in no way affected the sentence; second, when error is involved in the sentence itself. A typical example of the first situation is a reversal of the conviction because of some constitutional infirmity, followed by a new trial. Error that affects the sentence may involve a sentence under the wrong law, a misapprehension of the limits authorized by statute, or some constitutional or ministerial defect in the sentencing proceeding.

The anatomy of a criminal proceeding involves two major areas for decision-making, the finding of guilt (or acquittal) and the imposition of an appropriate sentence. These are separate problems and there is no a priori reason why they must or should be treated alike for all purposes. Although it has been held that by appealing or otherwise seeking review the defendant has waived any right to further consideration of the reversed proceeding if his contention is upheld, ‘‘waiver’’ is not an accurate description of the facts. ‘‘Waiver’’ or consent to be tried anew is a conclusion that justifies or describes the result. It does not describe the process. The conclusion might be helpful in determining if the prohibition against double jeopardy has been violated, but it should not lead to the policy conclusion that no part of that prior proceeding may be or should be considered in making other determinations. In fact,
a sentence was imposed, itself not erroneous and presumably based on all the factors a judge should consider when imposing sentence, and in the absence of the error, the sentence could not be reconsidered. The defendant has not said, "I want to subject myself to a new sentencing procedure." He has claimed only that the error with respect to the finding of guilt justifies setting aside the conviction. Of course, the result of an invalid conviction is that there is no right to require the service of a sentence. But this is not the same as saying the defendant "waived" something or "consented" to a new sentence. If he has "waived" the effect of the first sentence or "consented" to a new sentence, it is only because the law imposes this as a condition of setting aside the conviction. There may be reasons for imposing this condition, but the question is whether there are some instances when the law should not impose this condition and should take into account the sentence previously imposed. There are occasions when the law takes the reversed sentence into account to some extent when it credits the second sentence with the time served pursuant thereto. The question now is whether the first sentence should be given further effect.

As an original proposition, there is no apparent reason for subjecting the defendant to the risk of a longer sentence solely because there is error in the guilt-finding aspect of the proceeding. Although the possibility of an increased sentence may serve to discourage frivolous appeals, it is doubtful whether a defendant, albeit ultimately found guilty, should be discouraged from raising substantial error in his trial.

The problem is similar to the issues of equality of treatment and a rational basis for sentencing considered in connection with the original question of whether any credit at all should be allowed on the second sentence. Considered in isolation from other factors, it should lead to the conclusion that the second sentence should not exceed the first sentence, because the fact of error in the conviction is not in itself a relevant factor justifying an increased sentence. Opposed to this position are the possibilities of the appearance and consideration of additional evidence which would justify an increase and the desirability of giving the judge discretion in imposing sentence.

See statutes requiring the allowance of credit in Appendix I. See cases cited note 32 supra that require the allowance of credit in the absence of statute. See discussion in King v. United States, note 67 supra. See also discussion of discouraging frivolous appeals in Note, 60 Colum. L. Rev. 1134, 1166 (1960). Underlining the undesirability of permitting an increased sentence after reversal on appeal is the situation presented in Fay v. Nola, 372 U.S. 391 (1963), where the Court grants relief in a habeas corpus proceeding without the defendant having previously appealed to the state court. The court stated, "His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and a death sentence . . . . He declined to play Russian roulette in this fashion". (Id., at 440). The Court opened its doors to the habeas corpus proceeding brought by the defendant when it appeared that not only would the error require vacating the conviction, but that a new trial could not be held.

See King v. United States, 98 F.2d 291, 295 (D.C. Cir. 1938). Although holding that an increase in sentence on a resentence is permitted, the court, faced with a prior sentence erroneous because of a failure to proscribe "hard labor" and a resentence to an increased term at "hard labor", stated, "His second sentence, from which he now appeals, increases his punishment both in length and in kind beyond that which he faced under the first. The increase in kind was necessary if the sentence was to be brought within the statute; but the increase in length was not."
While admitting that there is merit on both sides of the issue, if compelled to make a choice, it appears that when the second sentence is based on the same offense involved in the reversed proceeding and the basis of reversal in no way involved the sentence, the maximum service required on the second sentence should not exceed the time remaining to be served on the first sentence. Th factors that weigh in this direction are: (1) the state has had an opportunity to and did rule on the sentence and exercise its discretion; (2) no error was committed with respect to the sentence; (3) in the absence of the error, which was not relevant to the sentence, there would be no opportunity to even consider an increased sentence, and (4) the difficulties of determining whether credit was actually, and not merely formally, allowed would be eliminated in this one category of cases.

Although the foregoing argument in favor of limiting the second sentence to the maximum imposed on the first sentence for the same offense has merit when there is no error with respect to the sentence, other problems are presented when the error involves an infirmity in the reversed sentence. Cases of this nature involve setting aside the sentence only and a sentence after a new trial when there was error with respect to the sentence, in addition to the errors warranting a new trial. When the sentence is correct with respect to a conviction later reversed, but the new trial results in a conviction for an offense other than the one which was the subject of reversal, additional issues are presented. Before turning to the problems involving errors in the sentence and a conviction for a different offense, one more problem raised by a new trial and a conviction for the same offense should be considered.

7. Release Pending Review

If the defendant has served no time prior to reversal but has been released pending review, there still remains the question of whether the suggested limitation on the second sentence (assuming reversal, new trial and conviction for the same offense) should be applicable. If, as has been suggested, the answer to this question has its basis in the absence of a relevant factor which should permit a reconsideration of the sentence, the result should be the same even when the defendant has not served time pursuant to the reversed sentence. Otherwise, an unwarranted distinction is made between the two situations. Unless the defendant who obtains his release pending review also obtains the assurance that the second sentence will not exceed the first, he will be subjected to a discrimination based upon the exercise of his right to be released. Involved here is the reverse of the arguments for requiring credit for pre-trial confinement and confinement pending review. In those situations, it is contended that a person who cannot or does not avail himself of the right to release on bail should not be penalized or suffer greater confinement than one who can and does avail himself

8For references to state statutes providing for bail pending review, see 1 Catholic U.L. Rev. 93, 98 (1951). For federal rule, see Note, 32 N.Y.U.L. Rev. 557 (1957). See also Johnston v. Marsh, 227 F.2d 528 (3rd Cir. 1955) (bail for state prisoner pending hearing and disposition of habeas corpus petition in federal court).
of that right;\textsuperscript{73} whereas in the situation under immediate consideration, a different rule for a defendant released pending review would result in penalizing or discriminating against one who \textit{did} avail himself of a statutory or constitutional right to release.

Furthermore, if we assume the distinction to be valid, the problem of framing a satisfactory statutory provision raises unnecessary and insoluble problems. To assure that the limitation would be applicable only to those cases where there has been no release pending appeal, the statute would have to provide that the defendant never be released pending review in order for the length of the first sentence to be the maximum time which can be given under the second. This could effectively limit the incentive for the defendant to exercise his rights. This draws the line between those who are never released and those who are released, no matter how short the period of time.

The other alternatives are to require the defendant to serve "some time" under the original sentence or to prescribe a minimum time of service before the suggested maximum would be applicable. Under the first alternative, the defendant could permit himself to remain incarcerated for a nominal period and then obtain his release; under the second proposal he would remain incarcerated for the minimum time set by the statute. In either case, the time served could not possibly bear any relevancy to the issue under consideration, whether the maximum on the second sentence should exceed the maximum imposed on the first sentence. Time served should have no bearing on this point. The principle of equal and rational treatment requires that both the defendant who is released and the one who remains incarcerated pending review be subject to the same possible maximum terms of confinement upon a new trial or a resentence. If the conclusion limiting the second sentence to the maximum imposed on the first is accepted when a person has been incarcerated, then it must be accepted for a person released pending review.

8. \textit{Rehabilitation v. Punishment}

The same factors may dictate different sentencing results, depending upon whether the sentence is considered within the context of a philosophy based on punishment or rehabilitation; but the differences in objectives present no real difficulties in requiring the allowance of credit when there has been no error with respect to the sentence aspect of the reversed proceeding. Punishment and rehabilitation are not necessarily inconsistent.\textsuperscript{74} The former can be an instrument of rehabilitation and the effect of the latter may ultimately be punishment alone, if the program is inadequate or if it doesn't "take" and the defendant is released. With respect to credit for time served, the interest of society in punishing or rehabilitating the defendant competes with the countervailing interest of the defendant in being free. This interest of the defendant is recognized in all United States' jurisdictions. Even when incarceration is viewed as an opportunity to rehabilitate the defendant, there

\textsuperscript{73}\textit{In re Needel, 182 N.E.2d 125, 127 (Mass. 1962).}

\textsuperscript{74}\textit{For references to general discussions see note 21 supra.}
are limits on the term of confinement and the defendant will be released even if he is not rehabilitated.\textsuperscript{75}

The allowance of credit is consistent with contemporary legislative policies, whether based on punishment or rehabilitation.\textsuperscript{76} When a statute provides for a term not to exceed ten years for larceny and the defendant on the reversed conviction is sentenced to five years, service of two of those years pursuant to the reversed conviction and three years pursuant to the sentence on the new trial does not conflict with any policy reflected in any statute. The same result follows even if the authorized sentence is indeterminate. Assume a statute provides for an indeterminate sentence of no less than three and no more than ten years. Service of two years of a three to ten-year sentence pursuant to a reversed conviction should be credited to the sentence on a new trial by reducing the "appropriate" or statutory minimum and maximum by two years. Thus the defendant will be eligible for release after no less than three years total service and will not serve a total of more than ten years, exactly what the statute contemplates. Consequently, regardless of the purpose of the statute, the allowance of credit gives the state the same opportunity to perform its function while implementing the legislative policy that the defendant be released after a designated period.

Although the object of a sentence should never result in a denial of credit where there was no error with respect to the sentence, it could affect the second issue: whether the first sentence should be the maximum that may be imposed on the second sentence. If evidence that might justify an increase is presented at the time of the second sentence, society's interest in imposing the longer sentence for the purpose of rehabilitation clearly conflicts with the defendant's interest in being free and the contention that the new trial should not affect the sentence. The resolution of this problem must be a realistic judgment based on whether the penal system of the particular jurisdiction is so obviously adequate for the rehabilitative purposes that it warrants additional incarceration because of the hoped for result. If it is, then those additional factors could tip the balance in favor of the longer sentence. If it is not, then the defendant may be subjected to the risk of increased punishment solely because of an error in the proceeding unrelated to the sentence, an event not the fault of the defendant and serving no demonstrated purpose other than increased punishment.

\textsuperscript{75}See Note, 60 COLUM. L. REV. 1134, n.21 (1960) for statutes setting maximum penalties. For consideration of common law crimes and penalties therefor see also Note, 47 COLUM. L. REV. 1332 nn.7-10 (1947); DEL. CODE ANN. tit. 11, § 105 (1953); MASS. ANN. LAWS ch. 279, § 5 (1956).

\textsuperscript{76}In Wechsler, Sentencing, Correction, and the Model Penal Code, 109 U. PA. L. REV. 465, 468-69 (1962), the author declares that the MODEL PENAL CODE reflects a "multiplicity of values" including rehabilitation and punishment. In the light of this view, it is significant that a provision for the allowance of credit appears in the Code. See MODEL PENAL CODE § 7.09(2) (Proposed Official Draft, 1962); note 19 supra for discussion of section.
B. ERRORS WITH RESPECT TO THE SENTENCE

With one possible exception, credit should be allowed even in those cases where the reversal is based on an error in the sentence. However, the considerations in support of limiting the maximum on the second sentence to the term imposed on the reversed sentence are generally not compelling when the reversal is based in whole or in part on an improper sentence.

Any analysis of the problems involved in granting credit for time served pursuant to a reversed sentence should distinguish between errors that affect the term of the sentence and those that do not, and also must take into account the possible differences in the quality, kind, or conditions of incarceration.

Each fact pattern should be considered in light of the following questions: (1) whether the allowance of credit should be required for time served under the reversed sentence; (2) whether the second sentence should be limited in any other way by the first sentence.

1. No Error with Respect to Term (Quantity) or Conditions (Quality) of Sentence

When the error relied on is not related to the term or conditions of the incarceration, but is merely clerical or procedural, there is no reason for the defendant to lose the time which he has served pursuant to that sentence. The possible loss of credit is often avoided by construing the proceeding not as a resentence, but as a correction of the record nunc pro tunc.

Although a failure to provide counsel has been held to require reversal, the possibility that the presence of counsel might have affected the length of the sentence imposed should not affect the allowance of credit. The focus should be on the actual incarceration which the defendant has suffered and not on the length of the term imposed. The latter consideration may be relevant in determining the effect that the first sentence should have in limiting the second, but when the conditions of incarceration, other than the term, would be the same under either sentence, there exists no relevant reason for denying credit solely because of the absence of counsel. In addition, the presence or absence of counsel should have no effect on the ultimate

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The exception deals with incarceration in the wrong place or under different conditions than that authorized for the offense or the particular defendant. Discussed at pp. 29 - 34. See, e.g., Ex parte Ralph, 27 Cal. 2d 866, 168 P.2d 1 (1946); Ex parte Richards, 150 Mich. 421, 114 N.W. 348 (1907); see also note 84 infra.

purpose of the incarceration already suffered, whether the purpose is rehabilitation or punishment. Therefore, there is no overriding policy reason which dictates the denial of credit under such circumstances.

2. Error with Respect to “Quantity” Only

Several basic situations present the problem of error directly related to the term imposed: (1) a term that exceeds the maximum authorized by law;\(^8\) (2) a term that is less than the minimum authorized by law;\(^9\) (3) imposition of a fixed term of confinement when an indeterminate term is required;\(^10\) (4) imposition of an indeterminate term when a

\(^8\)See, e.g., California: *Ex parte Phair*, 2 Cal. App. 2d 669, 38 P.2d 826 (1934) (maximum sentence is one year; defendant sentenced to two years, improper to resentence to one year from date of resentence; habeas corpus after one year is proper remedy); *Ex parte Bulger*, 60 Cal. 438 (1895) (maximum six months, habeas corpus granted after serving six months on excessive three year sentence); Colorado: *Abeita v. People*, 112 Colo. 49, 151 P.2d 879 (1944) (remand for proper sentence by correction of record); Illinois: *People v. Lueckfield*, 396 Ill. 520, 72 N.E.2d 198 (1947) (maximum served including good time, remand for resentence); People v. Huber, 389 Ill. 192, 58 N.E.2d 879 (1945) (excessive sentence, defendant served more than maximum for offense, no remand and defendant discharged); People v. French, 387 Ill. 16, 55 N.E.2d 53 (1944) (same as People v. Huber, supra); Oregon: *Cannon v. Gladden*, 203 Ore. 629, 281 P.2d 293 (1955) (statutory provision for life sentence declared unconstitutional, credit for time served ordered); Washington: *State v. Fairchild*, 136 Wash. 322, 238 Pac. 922, 923 (1925) (credit required on resentence when minimum exceeded statutory authorization); Wisconsin: *McDonald v. State*, 79 Wis. 651, 48 N.W. 863 (1891) (sentence, 13 years; authorized maximum, 3-10 years; remand to enter proper judgment *nunc pro tunc*); Federal: *Meyers v. Hunter*, 160 F.2d 344 (10th Cir. 1947) (refusal to give credit or to allow second sentence to commence *nunc pro tunc* the first sentence when first sentence excessive); United States ex rel. *Grabina v. Krimsky*, 207 F. Supp. 208 (S.D.N.Y. 1962) (resentence can’t be *nunc pro tunc*; but of., *Wilson v. Boll*, 37 F.2d 716 (6th Cir. 1943) (credit for excessive sentence by *nunc pro tunc* sentence, although not a resentence but correction of the record).

Although there appears to be no pattern with respect to the allowance of credit on a resentence occasioned by an excessive sentence, excessive sentences based on habitual offender statutes generally result in the allowance of credit. See, e.g., *Perry v. Mayo*, 72 So. 2d 352 (Fla. 1954); *State v. Nelson*, 190 Fla. 744, 36 So. 2d 427 (1948); *Ex parte Whiddon*, 288 Mich. 234, 279 N.W. 854 (1938); *People v. Anckorsby*, 231 Mich. 271, 203 N.W. 864 (1925); *People v. Von Glahn*, 124 N.Y.S.2d 274 (Suff. Cty. Ct. 1953); *Frye v. Delmore*, 47 Wash. 2d 605, 288 P.2d 850 (1955); *but of., People v. Atkinson*, 376 Ill. 623, 35 N.E.2d 58 (1941) (defendant not entitled to discharge, only correct judgment; no indication if it would be *nunc pro tunc* or if credit would be allowed). See also *Walsh v. Commonwealth*, 112 N.E. 486 (Mass. 1916) (discharge on appeal after substantial service as second offender).

One type of case is sometimes treated as if the sentence were excessive, but in fact it was correct for the offense in the reversed proceeding, but without an intervening new trial the court reduces the offense and allows credit for the time served. See, e.g., *People v. Gilbert*, 163 Mich. 511, 125 N.W. 766 (1910); *People v. Farrell*, 146 Mich. 264, 109 N.W. 440 (1906).

\(^9\)No case has been found that deals with the imposition of a term of confinement and service of a part thereof that is less than that authorized for the offense for which conviction was ultimately had. Cases such as *King v. United States*, 98 F.2d 291 (10th Cir. 1948), involving an increase in the conditions of the term to be served from no hard labor to hard labor and other problems relating to the conditions of incarceration are discussed at pp. 29 - 34, infra.

\(^10\)See, e.g., *Ex parte Fritz*, 179 Cal. 415, 177 Pac. 167 (1918) (rejecting rulings in *Ex parte Bouchard*, 38 Cal. App. 441, 176 Pac. 692 (1918) and *Ex parte Silva*, 38 Cal. App. 98, 175 Pac. 481 (1918) (which allowed credit for time served under an improperly imposed indeterminate sentence against the fixed term imposed on resentence); State ex rel. *Petcoff v. Reed*, 138 Minn. 465, 163 N.W. 984 (1917) (remand for proper definite sentence *nunc pro tunc*); *People v. Ashworth*, 264 App. Div. 201, 35 N.Y.S.2d 66 (1942) (improper sentence to consecutive indeterminate sentences, remand for proper sentence and credit for time served).
fixed term is required. Assuming that the original sentence is erroneous only with respect to the term imposed, no relevant factor dictates that the time actually served should not be credited to the corrected sentence. Thus, if the original sentence was four years in the penitentiary at hard labor and the sentence should have been to an indeterminate term of no less than four and no more than eight years in the penitentiary at hard labor, two years served pursuant to the erroneous sentence would not be any different in quality or purpose, than if it had been served pursuant to the proper term.

The effect of granting credit for the time served when the error relates only to the term imposed is to neutralize an error that is not rationally related to subjecting the defendant to a greater sentence than the defendant would have endured in the absence of error. The result and purpose are similar to those considered in allowing credit upon a conviction for the same offense after a new trial. Similarly, in this type of erroneous sentence case, the allowance of credit should be mandatory.

The allowance of credit should be reflected by deducting the time served from the proper fixed term, or, if an indeterminate term is involved, from the maximum and minimum ultimately imposed. This can be accomplished either by imposing the proper term and making the deduction or by imposing the proper term nunc pro tunc. The result

83See People v. Atkinson, 376 Ill. 623, 35 N.E.2d 58 (1941) (erroneous sentence to 20 year fixed term, upon resentence to proper term of 1-20 years, the question of release or other consideration not before court on that record). The courts are often inaccurate in describing the process of allowance of credit. In People v. Melhorn, 195 Wash. 690, 82 P.2d 158, 159 (1938), the court discussed the nunc pro tunc concept:

The judgment recited that it was entered nunc pro tunc as of December 11, 1935, the date of the first sentence, which fixed no minimum term. While the appellant raises no question on the form of the judgment, it may be said that it was not, in a proper sense, a judgment nunc pro tunc. The office of a nunc pro tunc order or judgment is to record some act of the court done at a former time and not then carried into the record. If the court has not rendered a judgment that it might or should have rendered, it has no power to remedy these omissions by ordering the entry nunc pro tunc of a proper judgment. Practically considered, the judgment is effective as of its entry, but the minimum and maximum terms imposed are to be reckoned from the date of the prior judgment, thereby giving the appellant credit for the duration of his confinement under the void sentence, a proper provision under the circumstances. (citation omitted).

See discussion of method allowance of credit in Whalen, Resentence Without Credit for Time Served: Unequal Protection of the Laws, 35 MINN. L. REV. 239, 260 (1951). The courts are divided on the question of the nunc pro tunc concept as a means of allowing credit. The nunc pro tunc approach has been used as a means of avoiding the loss of credit by calling the process a correction of the record rather than a resentencing. See, e.g., Ex parte Ralph, 27 Cal. 2d 866, 165 P.2d 1 (1946). It has also been frequently used in cases involving excessive sentences. See cases cited in note 80 supra. Some courts reject outright the contention that they have the power to impose a sentence nunc pro tunc and this is part and parcel of a denial of power to allow credit. For example, Illinois and New York have consistently refused the allowance of credit or the imposition of a nunc pro tunc sentence when the resentences are under their SENTENCE AND PAROLE COMMISSION ACT and PAROLE COMMISSION ACT, respectively. See, e.g., People v. Williams, 404 Ill. 624, 89 N.E.2d 822 (1950); People v. Heard, 396 Ill. 215, 71 N.E.2d 321 (1947); People v. Green, 391 Ill. 173, 68 N.E.2d 263 (1946); People ex rel. Montana v. McGee, 16 N.Y.S.2d 162 (Sup. Ct. 1939) (excellent discussion of problem, sharply critical of rule). The federal courts have denied that they have the power to enter a nunc pro tunc sentence on a resentencing because of the provisions of 18 U.S.C.A. § 3565 (1940) dealing with the commencement of a sentence. See De Benque v. United States, 85 F.2d 202 (D.C. Cir. 1936). See also United States ex rel. Grabina v. Krimsky, 207 F. Supp. 208, 209
should be that the defendant will serve no more than he would have served in the absence of error and if a minimum term is involved, he will be eligible to be considered for release no later than he would have been in the absence of error. This is the least that should be required, assuming that the second sentence should not be limited by the original sentence in some other way.

If a new trial follows a reversal in a case in which there also has been an erroneous sentence, two basic fact patterns are presented: (1) when the conviction on the new trial is for the same offense and the original sentence is erroneous with respect to that offense; (2) when the second conviction is for a different offense. In either event, if the error relates only to the term (or does not involve either the term or the conditions), the conclusion is the same; credit should be required. The former is similar to a resentence for the same offense. The problem of crediting time served to a sentence for a dif-

(S.D.N.Y. 1962); Meyers v. Hunter, 160 F.2d 344 (10th Cir. 1947) (rejecting defendant's contention that either the second sentence should commence at the date of the reversed excessive sentence or the time served under the reversed sentence should be added to the second). A nunc pro tunc sentence is used in some cases to avoid vacating a sentence and the grounds stated are usually that the sentence is partially valid and the court is merely correcting it. See, e.g., Best v. Dist. Ct., 115 Colo. 240, 171 P.2d 774 (1946); Abeyta v. People, 112 Colo. 49, 145 P.2d 884 (1944); Ex parte Silva, 38 Cal. App. 98, 175 Pac. 481 (1918) (making analogy with correction of record in civil judgment, rejected in Ex parte Fritz, 179 Cal. 415, 177 Pac. 157 (1918)); State v. Nelson, 160 Fla. 744, 36 So. 2d 427 (1948) (wrongful sentence as fourth offender, remand for sentence as second offender, nunc pro tunc); but cf., Perry v. Mayo, 72 So. 2d 382 (Fla. 1954) (same situation involved and court merely "directs" trial court to take into account time served; the reason for not making it nunc pro tunc as in Perry v. Mayo, supra, is not apparent); Jackson v. Commonwealth, 187 Ky. 760, 220 S.W. 1045 (1920) (wrong place of confinement, resentence nunc pro tunc); Owen v. Commonwealth, 214 Ky. 394, 283 S.W. 400 (1926) (wrong place of confinement, nunc pro tunc); Commonwealth v. Murphy, 174 Mass. 396, 54 N.E. 860, 862 (1899) (court has power in its discretion to "order that the last sentence should take effect from the date of the first sentence ... but we do not think it was bound to do so"); In re Weir, 342 Mich. 96, 69 N.W.2d 206 (1955) (nunc pro tunc when court fixed a maximum and statute required that court set a minimum); Ex parte Richards, 150 Mich. 421, 114 N.W. 348 (1907) (court cannot vacate partially valid sentence and impose heavier sentence; just correct record nunc pro tunc); State v. Fairchild, 136 Wash. 132, 238 Pac. 922, 923 (1925) (resentence "to commence from and bear date of the judgment appealed from"); State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (1932) (resentence was imposed nunc pro tunc; court notes that there was no objection to this procedure but doesn't decide if it is valid; concurring opinion expresses doubt).


No judgment shall be reversed or set aside by the appellate court, for the reason that the judgment by virtue of which such person is confined, or from which he has prosecuted an appeal or writ of error, was erroneous as to time or place of imprisonment, but in such case it shall be the duty of the court or officer hearing the case to sentence such person to the proper place of confinement, and for the correct length of time, from and after the date of the original sentence, and to cause the officer or other person having such prisoner in charge to convey him forthwith to such designated place of imprisonment.

ferent offense is examined in detail later, as are the issues presented by some courts that are more likely to allow credit in the case of a re-sentence than in the case of a new trial.

3. Error with Respect to "Quality"

The preceding discussion dealt with reversals involving either no error with respect to the sentence or error that did not relate to the conditions or quality of confinement. The problems raised by a difference between the quality (as distinguished from the quantity) of the sentence originally imposed and the time served pursuant to it and the quality or conditions of the new sentence are considered at this point. When the conditions or place of incarceration are taken into account, a denial of credit may be justified. A typical illustration of this problem is a sentence to, and incarceration in, a place of confinement different from the one authorized.

Incarceration in one place may be more onerous than in another or may have as its purpose a definable program of rehabilitation not available in the other place of confinement. If the place of incarceration does make a difference, then it becomes more difficult to equate time served in the wrong place with time served in the proper facility, unless the focus is exclusively on the restraint imposed on the defendant.

Several guides for decision can be developed in this area, but the ultimate results will vary from jurisdiction to jurisdiction dependent upon realistic evaluations of the purported differences in the facilities in the light of the defendant's interest in being free of restraint. When the defendant has served time more onerous than authorized, as for example, confinement at hard labor in the penitentiary instead of the

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86See pp. 45 - 47, infra.
88See, e.g., Minto v. State, 9 Ala. App. 95, 64 So. 369 (1913) (erroneous sentence to penitentiary instead of county jail; apparently no credit); Ex parte Ralph, 27 Cal. 2d 866, 168 P.2d 1 (1946) (credit allowed); Ex parte Leyoldt, 32 Cal. App. 2d 866, 90 P.2d 91 (1939) (credit allowed); Ex parte Wilson, 202 Cal. 341, 260 Pue. 542 (1927) (first sentence to state prison as felony; second sentence, on authority of another case, to county jail as misdemeanor; thereafter other case is overruled: resentence as felony to state prison; no credit for county jail time); Biddle v. Bd. of Trustees, 33 Del. 425, 138 Atl. 531 (1927) ("inclined to believe" no credit); Owen v. Commonwealth, 214 Ky. 394, 283 S.W. 400 (1926) (erroneous sentence to reformatory instead of penitentiary, credit allowed); Jackson v. Commonwealth, 187 Ky. 760, 220 S.W. 1045 (1920) (erroneous sentence to reformatory instead of penitentiary, credit allowed); People ex rel. Lenefsky v. Ashworth, 56 N.Y.S.2d 5 (Sup. Ct. 1945) (no credit for state prison time on sentence after new trial to penitentiary, law criticized); Commonwealth ex rel. Stuckey v. Burke, 165 Pa. Super. 637, 70 A.2d 466 (1950) (erroneous sentence to penitentiary, on remand for resentence to county jail, court ordered to consider "that imprisonment undergone in the penitentiary is considered equivalent to a substantially greater period of time served under simple imprisonment in the county jail"); Laury v. State, 189 Tenn. 391, 215 S.W.2d 797 (1948) (credit allowed for jail time when proper sentence to penitentiary). See also De Benque v. United States, 85 F.2d 202 (D.C. Cir. 1936) (often cited for denial of credit, but court states that it does not decide that question).
89See Lindsey v. Super. Ct., 33 Wash. 2d 94, 204 P.2d 832 (1949) (under a statute making it mandatory to allow credit for time spent in "prison" pending appeal, time spent in county jail between reversal and new trial conviction credited to term in penitentiary).
authorized confinement in the county jail, there is no apparent reason to deny full credit for time served in the penitentiary. When a less onerous confinement has been suffered, the question becomes more difficult. If the objective is punishment alone, the issue is whether the less onerous punishment is sufficient to satisfy the demands of society; or whether the "pound of flesh" must be exacted to satisfy these demands. Some jurisdictions may have difficulty in allowing credit if imprisonment is viewed as a *quid pro quo* for an offense or a conviction and is the basic or only underlying principle of the penal system. Even in these jurisdictions, however, the time served in the less onerous place can be equated with the time served under the more difficult conditions on the basis of some formula.

Furthermore, in view of the increased tendency to grant credit for pre-trial imprisonment, there should be no difficulty in requiring the allowance of credit in the situations thus far considered. While recognizing that the primary reason for the allowance of credit for pre-trial confinement is to preclude placing a person with insufficient financial resources at a disadvantage vis-a-vis one who can raise bail, nevertheless, one of the effects is an evident satisfaction with the less onerous confinement undergone prior to trial as a proper substitute for at least part of the usually more onerous post-trial confinement. As a restraint on the defendant, the differences in types of confinement are not significant enough to deny credit solely because of the more or less

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*See People ex rel. Stokes v. The Warden, 66 N.Y. 342, 344-46 (1876).

*There are statutory formulas for the satisfaction of fines by imprisonment equivalents. E.g., Ark. Stat. Ann. § 43-2314 (1947). This statute was not referred to by the court in Switzer v. Golden, 224 Ark. 545, 274 S.W.2d 769 (1955), when the court ordered that the defendant be allowed credit for time served in the penitentiary on conviction for a felony which was reversed and reduced to a misdemeanor. As a misdemeanor the offense was punishable only by a fine; presumably credit could have been allowed by equating the prison time with the fine in the manner provided for by statute for other fines. However, another problem is created because the statute does not provide for penitentiary service, but workhouse service, as equivalent for the fine. In this connection see comment on Commonwealth ex rel. Stuckey v. Burke, 165 Pa. Super. 637, 70 A.2d 466 (1950) note 89 supra.


*See In re Needel, 182 N.E.2d 125 (Mass 1962).

*Consideration of credit for pre-trial confinement and credit for time pending appeal when there is an affirmance of the conviction and the defendant has not chosen to commence his term are outside the scope of this article, the assumption being that the time credited would properly be credited towards the service of a sentence if there had been no reversal. It is interesting to note, however, that in some jurisdictions there is discretionary authority to give credit for time served in jail pending trial and no such discretion with respect to time served pending appeal. See e.g., Brown v. State, 300 S.W.2d 101 (Tex. Crim. 1957) (no jurisdiction to allow credit for jail time pending appeal); Reed v. State, 147 Tex. Crim. 41, 177 S.W.2d 784 (1943) (judge and not jury has discretion to allow credit for jail time pending trial). There may be a valid distinction when the defendant has the option of commencing his term in the authorized place of incarceration pending appeal.
onerous natures of the respective confinements. Even viewed from the demands of society, the purpose of isolating the prisoner from society is served whatever the place or condition of incarceration. The allowance of credit neutralizes the error without defeating any significant policy of the state.

The situations thus far considered in connection with the quality of the confinement have assumed that punishment or a quid pro quo attitude is the basic approach of the particular penal system. Thus, a decisional process with emphasis on the restraint aspect of confinement might well satisfy this end so that it reasonably can be concluded that credit for time served should be required in all such cases.

When the real and overriding purpose of the confinement is rehabilitation as opposed to punishment, a significant distinction is made between requirements for the rehabilitation of different types of prisoners. Thus, the restraint aspect of the confinement, characteristic of punishment and isolation, cannot be the only factor considered.96

Confinement in a reformatory or "school" as opposed to the penitentiary or in the penitentiary instead of a school presents the issues most sharply.97 In those instances, the interest of the state in the quality of the confinement competes with the interest of the prisoner in being free of confinement coupled with his probable indifference to its quality in the light of the quantity.

Three Situations

The problems created by the rehabilitative approach are considered in the context of the following situations:98

96From the point of view of the defendant's right to be sentenced to a reformatory instead of a state prison, see Bassett v. Tahash, 315 F.2d 393, 393-94, (8th Cir. 1963), wherein the court stated:

Sentencing a prisoner to the penitentiary instead of to a reformatory, contrary to the provisions of the State's penal code, could constitute a Fourteenth Amendment wrong if this involved differences in conditions, privileges, or consequences of incarceration amounting to matters of substance in criminal punishment. Thus, if differences existed between such institutions under the State's laws in their status to subject inmates to hard labor, or to enable credits and deductions to be earned affecting release, or to have commitment leave no deprivation of civil rights or discharge effect restoration of them, matters of substance would in penal concept be involved, which could make the improper sentencing of a prisoner to the one institution instead of the other, and a refusal to correct the improper commitment, constitute a deprivation or a denial under the Fourteenth Amendment. But under the Minnesota statutes, no such differences are involved between the State Prison and the State Reformatory in the sentencing of convicted felons to incarceration in them.

97See cases cited note 88 supra.

98It is conceivable that the differences in conditions of confinement suggested in the fact patterns that follow the text above may be reflected in differences in the conditions of confinement within the same institution, but the issues dealt with herein are the same regardless of whether the same institution or different institutions are involved.
(1) Both the place where time was served under the reversed sentence and the authorized place of confinement have rehabilitation as the overriding purpose.\textsuperscript{99}

(2) Confinement under the reversed sentence is in a place where punishment and isolation are primary purposes and the authorized place of confinement is a rehabilitative facility.

(3) Confinement under the reversed sentence is in a place where rehabilitation is the overriding factor, and the authorized place of confinement is one designed primarily for punishment and isolation.

Under situation (1), if both institutions provide the same type of rehabilitation opportunity, there is no significant difference between the time served in either place that would warrant denying credit if all other factors require the allowance. If the institutions differ by providing facilities adapted to the needs of different types of defendants and confinement in a particular facility is dependent upon the classification of the individual pursuant to that purpose, it may be concluded that there is a significant difference between the time served and that which was authorized. Perhaps, in that situation the error should not be neutralized by treating the term of the sentence as the only important factor, because a rational basis for denying credit is present.

When time is served in a "punishment" facility which should have been served in a rehabilitative institution (situation 2), it is similar to the situation involving the two different types of rehabilitative facilities. The emphasis on the length of the term cannot be the sole factor considered in the light of the meritorious interest of society in reformation and rehabilitation. There is a rational basis for denying credit since the original sentence was not imposed in a context free from relevant error. Thus it could be argued with some cogency that credit should not be given for time served because of the overriding interest in providing the state with the opportunity to rehabilitate the prisoner.

Situation (3), service in a rehabilitative facility when the authorized confinement is in a facility primarily established for isolation or punishment, presents the question of whether time served in the rehabilitative facility which may be less onerous than in the punishment facility should satisfy the demands of the sentence. Certainly the opportunity to rehabilitate appears to be more meritorious than mere punishment, and it could be reasonably concluded that insofar as the objectives of isolation and confinement are concerned, the confinement in the rehabilitative facility could be argued with some cogency that credit should not be given for time served because of the overriding interest in providing the state with the opportunity to rehabilitate the prisoner.

\textsuperscript{99}This possibility could raise an interesting question in states whose constitutions mandate a penal system based on rehabilitative principles. For example, the constitutions of Oregon, Montana, and Indiana contain the following provisions respectively:

- Laws for the punishment of crime shall be founded on the principles of reformation and prevention, but this shall not affect the power of the legislative assembly to provide for punishing offenses by death. \textit{Mont. Const.} art. III, § 24.

However, the possibility of incarceration for punishment and other purposes has been held not to be violative of the state constitutional provisions. See Tuel v. Gladden, 379 P.2d 553 (Ore. 1963).
facility satisfies those objects as well as confinement in the punishment facility.

Thus, when distinctions between sentences are based on the quality of the confinement, two possibilities are presented. When the primary emphasis is on the onerous nature of the confinement, time served in a rehabilitation facility might not be credited to an authorized confinement in a punishment facility, but if the prior confinement were in the punishment facility and the authorized confinement had rehabilitation as the objective, credit would be allowed. On the other hand, if the emphasis is on the purpose of the confinement, the rehabilitation facility might well satisfy any of the demands of confinement as punishment, whereas an incarceration with punishment as its objective will not serve the purposes of rehabilitation.

It is possible that the foregoing analysis unnecessarily belabors the point, but it does serve to illustrate and emphasize that where the quality of the confinement is concerned, it is not easily concluded that all confinement is "fungible." Issues raised by comparisons of the quality of the confinement require weighing subtle factors and the tools supplied by the behavioral sciences are not yet wholly adequate for the task. Nevertheless, decisions must be made. Whether denying or allowing credit, there are few instances in which the courts have articulated any policy considerations other than the fact that the places of confinement are different. A similar deficiency is found in the legislation, except that the legislation occasionally reflects a deliberate choice to equate confinement in all facilities.

Two considerations could outweigh all others to resolve the issue in favor of allowing credit without regard to the place of confinement, even when the purpose of the authorized confinement is rehabilitation. The first is the possible adverse effect on, or the reaction of, the defendant to being incarcerated, due to an error not of his own making, for a period of time longer than would have been required had the proceedings been free from error. Resolution of the issue in favor of additional confinement must deliberately discount the possibility that the defendant's reaction will undermine any attempted program of rehabilitation.

The second factor is that rehabilitation is not the final test of when and whether a defendant is released. To the extent that the sentence is limited by a specified maximum, the duration of confinement and not

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100 Cf., Whalen, Resentence Without Credit for Time Served: Unequal Protection of the Laws, 35 MINN. L. REV. 239, 258 (1951): "From the administrative point of view, there is a definite advantage in the simplicity of treating confinement of all types as fungible."

101 See note 88 supra.


103 See, e.g., MINN. STAT. ANN. § 631.49 (1962) (Appendix I, para. 10, infra) (providing for credit on sentence after a new trial whether time served was in "state prison" or "state reformatory"); see MO. ANN. STAT. § 547.280 (1949), note 84 supra.

104 See note 75 supra. Regardless of how this maximum is set, whether by a board or the court or intermittently, depending on the development of new facts, the limit is applicable. For discussion of setting the limits of a sentence, see 60 COLUM. L. REV. 1134, 1144-52, 1161-62 (1960).
the success of treatment is the final determinant of the term of the sentence. Allowing credit for all confinement is consistent with this legislative emphasis on the term of confinement. On the other hand, even if the ultimate basis for release is not the success of the rehabilitative process, crediting the defendant with all confinement without regard to the conditions, contravenes another legislative policy by failing to provide the state with the full opportunity under the conditions prescribed contemplated for accomplishing reformation or rehabilitation.

Unlike the other situations that have been considered, equality of treatment with respect to the term of confinement cannot be the sole factor when comparing situations that, in fact, differ qualitatively. A determination must be made as to whether the emphasis should be on the quality or quantity of the incarceration and the validity of any such determination depends on the evaluation and availability of meaningful data. When the quantity is the criterion, the resolution of issues is implicit in the standard, and arithmetic is the primary tool for determining the result, but competing factors preclude this somewhat mechanistic approach to comparisons of quality. Differences, real and apparent, in the goals of, and the methods employed by, different penal systems do not permit the suggestion of a uniform approach for all jurisdictions. The desirable approach must be based on a realistic evaluation of the purpose and the actual functioning of the particular penal system.

Concluding that the allowance of credit should not be mandatory (when the purpose of confinement is treatment and the qualities of the confinements differ) does not preclude permitting the sentencing authority to exercise its discretion in allowing or denying credit. Unfortunately, there is little basis for believing that the usual sentencing judge is qualified by background and training to exercise this discretion meaningfully.\textsuperscript{105}

4. Error in the sentence; limitation on second sentence

Provided there is no error with respect to the first sentence, it was concluded that the maximum sentence on a new trial conviction for the same offense should be the maximum that could be imposed on the reversed sentence. Having previously decided the correct sentence for the defendant for that particular offense an error unrelated to that determination should not provide the court with an opportunity to increase the sentence. Similarly, the sentence should not be increased when the error is unrelated to its terms and conditions, such as clerical or procedural

\textsuperscript{105}Although speaking of English lawyers and judges, Glanville Williams' comment is also applicable to his American counterparts:

The training of a judge before appointment does not include the all-important question of sentencing policy, and where no preparatory period during which the new recruit to the Bench is required to learn the actual working of the penal and remedial methods now established for the reclamation of wrongdoers. If his practice was at the Commercial Bar, he may even be largely ignorant of criminal law and procedure. WILLIAMS, THE PROOF OF GUILT, A STUDY OF THE ENGLISH CRIMINAL TRIAL, 17-18 (3d ed. 1963).

See also, George, Sentencing Methods and Techniques in the United States, FED. PROB. 33, (June 1962).
errors. Irrelevant error should not provide the court with an opportunity to amend or modify a decision with respect to an issue properly decided. 106

Whether the new sentence should be so limited when the error relates to the quality or conditions of confinement depends on whether credit should be required. 107 If credit is not required, it evidences the conclusion that the nature of the error precludes equating the two sentences and service in a different place for less than the full time is contrary to some overriding policy. On the other hand, if credit is mandatory, the conclusion is that the places or conditions of confinement are interchangeable. There being no error with respect to the term, no reason appears to permit a change in that aspect of the sentence; therefore the limitation should be applied to the new sentence.

When the error relates to the term of the sentence (the quantity), it was concluded that the allowance of credit should be mandatory. However, the first sentence should not be the maximum which may be imposed on the second sentence when there is an error in the first proceeding that justifies a change in the term. When the error in the first proceeding relates to the term, it is apparent that the court must change the term in order to correct the error and the term imposed on the first sentence cannot be a limitation on the second sentence. This clearly will be the case when the reversed sentence exceeds the authorized maximum. When the reversed sentence is less than the authorized minimum, it might be argued that the maximum that may be imposed should be the authorized minimum; the court having already decided that the proper sentence is less than the minimum, the sentence should be increased no more than is necessary to bring it within the authorized limits. However the court may have acted without considering a relevant factor, to wit: the applicable law. The court should be permitted to impose a sentence within the context of the correct law. 108 As a practical matter, if the court intended leniency on the first

106It appears to be accepted that a sentence may not be increased unless there is error, at any rate, not after the term of court has passed. See note 71 supra. In King v. United States, 98 F.2d 291 (D.C. Cir. 1938), the court suggests that the failure to impose a sentence at hard labor does not mean that an increase of the term on the second sentence should be permitted, although in view of Murphy v. Mass., 177 U.S. 155 (1900), it was not unlawful to increase it. In King v. United States, supra, however, it might be argued that the original time served was not identical in quality with the time authorized for the offense. There is also language in Murphy v. Massachusetts, supra, that suggests that the correction of the error should be limited to the error itself, although the case does not hold to that effect:

And as the decision which he sought and obtained involved the determination that he had been improperly sentenced under chapter 504 of the Statutes of 1895, providing for so-called indeterminate sentences, but should have been sentenced under antecedent statutes, which differed from that, it followed that the second sentence must be a new sentence to the extent of those differences, and might turn out to be for a longer period of imprisonment. (Emphasis supplied.) (177 U.S. at 160).

Quare: If a proper sentence cannot be amended, what reason is there to permit a change in the part of a sentence that is not erroneous?

107Although the court in Bassett v. Tahash, 315 F.2d 393, 393-94 (8th Cir. 1963) did not include the difference between rehabilitation and punishment as a basis for complaint under the Federal Constitution for service in the wrong place of incarceration, it is possible that differences of this nature would amount to "matters of substance" under some state constitutional provisions. See notes 96 and 99 supra.

108See People v. Farrell, 146 Mich. 264, 109 N.W. 440, 448 (1906) (concurring opinion) rejecting the contention that where the sentence is excessive, there should be no re-
sentence, there is little reason to believe it will be more severe on the second sentence and probably something close to the minimum will be imposed.

When the error involves the imposition of a fixed term when an indeterminate term is required, or vice versa, the same argument is applicable, and the court should be given the opportunity to impose a sentence free from the error which affected the validity of the first sentence.

Although credit for time served should be required, the failure to impose a limitation on the second sentence in the above situations passes up an opportunity to avoid the difficulties of determining whether credit, in fact, has been granted in some cases involving an erroneous sentence. Indeed, one of the reasons for so limiting the second sentence when the convictions are for the same offense was to assure that credit would be allowed, but the desirability of assuring that credit is allowed was not urged as the sole reason for limiting the second sentence. It is actually more in the nature of a description of a desirable result that accrues if conflicting interests and arguments relevant to limiting the maximum on the second sentence are resolved in favor of so limiting it. These additional factors are not present when there is error in the prior sentence with respect to the very element that the court intends to alter on the second sentence. The argument based on assuring that the court will give credit cannot stand alone unless there is an assumption that the court will act in bad faith or not in accordance with the spirit of the mandate that credit be allowed. If the judge is acting in good faith, the possible injustice arising out of the actions of an unqualified judge is a risk that the defendant must share with all others who come before the court.

5. THE VOID-VOIDABLE-ERRONEOUS MAELSTROM

Before turning to the fact situations remaining for consideration, a critical analysis of a pervasive doctrinal feature in this area of judicial inquiry yields some principles which aid in the solution of the remaining problems.

mand, but that appellate court should merely reduce the sentence to the statutory maximum. Referring to an interpretation of a statute urged by the state, the opinion stated:

Manifestly the only reason that can be given, is a real or imaginary improbability, that the Legislature could have meant to deprive a man of the opportunity or [sic] having the judge exercise his discretion, in pronouncing judgment upon the particular offense, of which he was lawfully convicted . . . .

Divested of all unimportant considerations the claim is, that the record shows that both jury and court supposed that he was convicted of a higher grade of offense than the law courtenances, and that he was sentenced, accordingly, and that the judge cannot have exercised any discretion, for the reason that he imposed the extreme penalty fixed by any law of the state for any crime. (109 N.W. at 448)

But see, Ex parte Woods, 153 Tex. Crim. 420, 220 S.W.2d 889 (1949) and Ex parte Castleberry, 152 Tex. Crim. 583, 215 S.W.2d 584 (1949) (discharging defendants after they had served the minimum sentence of a sentence setting a maximum and a minimum when the maximum exceeded the statutory authorization).

The contention that the court should be able to impose a sentence within the context of the applicable law is diluted by the constitutional prohibition on a court correcting a sentence on its own motion after the defendant has completed the service of a sentence, erroneous when imposed, when the court had jurisdiction over the subject matter and the defendant. See Murphy v. Mass., 177 U.S. 155, 159-60 (1900).
Some courts determine whether credit for time served should be allowed on the basis of a characterization of the reversed proceeding as void or voidable.\(^{109}\) This characterization may serve some purpose in avoiding the bar of a double jeopardy plea at a new trial or a resentence,\(^{110}\) but it is misused when given as the reason for denying credit for time already served. The rationalization based on characterizing a proceeding as void is a perversion of the concept. The problem can be disposed of simply by pointing out that a judgment can be characterized as void for one purpose and not another,\(^{111}\) but the continued reliance on the doctrine\(^{112}\) requires a demonstration that calling a judgment “void” does not, and never was intended to, mean that everything done pursuant to such a judgment must be ignored.

A typical verbalization of the view concluding that time served pursuant to a void judgment may not be taken into account is offered by the court in *Minto v. State*:\(^{113}\) “The defendant could not have served any part of a former sentence of imprisonment, as there has been no such sentence which the law can recognize.”

\(^{109}\) The origin of the “‘void’” concept in habeas corpus proceedings and its application to other situations because of a fear that double jeopardy might be interposed as a defense if any part of the earlier sentence were given recognition is set forth in Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 Miss. L. Rev. 239, 240-44 (1961), and little is to be gained by repeating those matters. The cases utilizing or expressly rejecting this concept are considered at the appropriate place in the text following this note.

\(^{110}\) See note 109 supra.

\(^{111}\) E.g., *Watson v. United States*, 174 F.2d 253, 254 (D.C. Cir. 1948); “‘That a sentence may be void as an agency of punishment does not obliterate it from the records of the court so far as concerns its effect to evidence the intention of the court in respect of connected sentences.’” Cf., *State v. Lee Lim*, 79 Utah 68, 7 P.2d 825, 842 (1932) (dissent): “‘Courts refuse to recognize a hybrid sentence which for one purpose is voidable or erroneous and for another purpose is void.’”

\(^{112}\) Jurisdictions whose last judicial pronouncement on the subject, not subsequently modified by statute, rely on the void-voidable distinction as a basis for denying credit, include: *Alabama*: *State ex rel. Attorney Gen. v. Gunter*, 69 So. 442 (Ala. 1915); *Minto v. State*, 9 Ala. App. 95, 64 So. 369 (1913); *Adams v. State*, 9 Ala. App. 89, 64 So. 371 (1913). *Kentucky*: *Beach v. Commonwealth*, 282 S.W.2d 821 (Ky. 1955) (denying credit on retrial after habeas corpus petition granted in spite of statute requiring credit for former confinement ‘upon a mandate of reversal, ordering a new trial’). The statute was amended, (see *Ky. Rev. Stat. Ann.* § 197.041 (Supp. Spec. Pam. 1962) (Appendix I. para. 6, infra)), but it does not appear that the amended statute meets the problem of *Beach v. Commonwealth*, supra, because it still speaks of ‘an appeal’ and the basis of the decision was that the prior proceeding was declared void in a habeas corpus proceeding. *Maine*: *Smith v. Lovell*, 146 Me. 65, 77 A.2d 575 (1950) (credit denied on consecutive sentences because reversed conviction erroneous and not void). *Oklahoma*: *Ex parte Wilkerson*, 76 Okla. Crim. 204, 135 P.2d 507 (1943) (denying credit on new trial after habeas corpus petition allowed); compare *Ex parte Williams*, 63 Okla. Crim. 395, 75 P.2d 994 (1938) (allowing credit, rejected as authority in *Ex parte Wilkerson*, supra, although not expressly overruled, the court in the latter case said it would have decided otherwise and makes a tenuous distinction between the cases). *Pennsylvania*: *Commonwealth ex rel. Holly v. Claudio*, 171 Pa. Super. 340, 90 A.2d 253, 254 (1952) (dictum) (consecutive sentences); *United States ex rel. Holly v. Keenan*, 107 F. Supp. 266 (W.D. Pa. 1952). *Texas*: *Ex parte Nations*, 164 Tex. Crim. 611, 301 S.W.2d 675 (1957) (resentence); *Ogle v. State*, 43 Tex. Crim. 219, 63 S.W. 1009 (1901) (new trial). *Federal*: The federal cases deny the right to credit even if the particular opinion does not rely on the void-voidable distinction. *Compare King v. United States*, 98 F.2d 291 (D.C. Cir. 1938) (rejecting the distinction and also denying allowance of credit), *with United States v. Harman*, 68 Fed. 472 (D.C. Kan. 1895) (no credit, sentence void, omission of words ‘at hard labor’). It should be noted that the cases cited herein relate only to the characterization of a sentence as void as a basis for denying credit.

\(^{113}\) *Minto v. State*, 9 Ala. App. 95, 64 So. 369 (1913).
This view, reminiscent of a poor form of medieval mental gymnastics, and expressly rejected by some courts,\textsuperscript{114} finds its effective answer in the disdainful remarks of the court in \textit{King v. United States}:\textsuperscript{115}

The Government's brief suggests, in the vein of \textit{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 at all . . . it might be suggested that he is liable in quasi-contract for the value of his board and lodging, and criminally liable for obtaining them by false pretenses. We cannot take this optimistic view. Though appellant's first sentence was void, he was threatened with and suffered imprisonment under it.

As offensive as it is to rely solely on the fiction that an imprisoned individual was never confined as a basis for denying him credit for the time served, reliance on the concept is even more untenable because of disagreement about what constitutes a void judgment.\textsuperscript{116}

One court states:\textsuperscript{117}

It is further definitely settled in the Federal courts that where in a criminal case a sentence is not imposed in strict accordance with the penalty statute, the sentence is void in a fundamental sense. This rule, on first thought, appears to be in conflict with the proposition laid down in civil cases that a court has jurisdiction in the sense that its erroneous action is voidable only, not void, when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth for the court's action is not obviously frivolous. . . . But in criminal cases the theory apparently is that the penalty statutes are themselves jurisdictional, that is to say, that they delimit the very power of the court.

On the same subject, another court says:\textsuperscript{118}

It is not even technically correct to say that the first sentence must now be deemed to have been a nullity. It was not a nullity when it was imposed or while it was being served. The court had jurisdiction over the crime of robbery and had jurisdiction over the defendant. The sentence was erroneous and voidable for error but was not void until reversed.

\footnotesize{\textsuperscript{114}\textit{Ex parte} Williams, 63 Okla. Crim. 395, 75 P.2d 904, 906 (1938) (referring to the distinction as a basis for decision as 'a result seemingly more consistent with dry logic than natural justice'); \textit{but see, note 112 supra, and discussion of Oklahoma cases therein. See also Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922 (1952); Brown \textit{v. Comm'r of Correction}, 336 Mass. 718, 147 N.E.2d 782 (1958).}

\textsuperscript{115}\textit{King v. United States}, 98 F.2d 291, 293-94 (D.C. Cir. 1938) (but still denying authority to allow credit).


\textsuperscript{117}\textit{De Benque v. United States}, 85 F.2d 202, 206 (D.C. Cir. 1936) (the definition was used as a means of avoiding a contention that no new sentence could be imposed because the term had passed); \textit{cf., Ex parte} Lange, 85 U.S. 163 (1874), and discussion thereof in \textit{De Benque v. United States}, \textit{supra, at note 4.}

Sentences have been characterized as void or voidable with little pattern of consistency based upon the nature of the error involved, but no case has been found in a jurisdiction denying credit because the sentence was "void" that suggests the defendant could have departed the prison before the reversal of the "void" sentence without risking conviction for escape.

Whatever the view taken of a sentence, void or not, it should have no effect on the denial or allowance of credit. Requiring the fact of imprisonment to be ignored is not even a correct statement of the fiction. If a judgment is void, it merely means that any action taken pursuant to it should not and cannot impair the rights of the parties which it purports to affect. Neither the fact that the sentence was imposed nor served is erased from all consideration. The sentence imposed may be considered in construing other actions by the court, though no time was served pursuant to it. In addition, some courts, including some that usually refuse to allow credit, have taken time served into account or suggested that it would be taken into account, in the exercise of their discretion by applying the time served to sentences for other offenses or deciding that the defendant should not be required to serve.
time under the reversed sentence and the new sentence totalling more
than the authorized maximum. In addition, courts have resorted to
some makeshift devices to alleviate the obvious injustice of refusing
credit, including the refusal by appellate courts to remand for a new
sentence when a substantial part of the sentence imposed or authorized
has been served by the defendant.

Some of these situations will be considered further; at this point,
however, they serve to demonstrate that imprisonment is a "fact" which
must be dealt with and cannot be disposed of by characterizing a pro-
ceeding as void. In addition, the very existence of statutes authorizing
the allowance of credit is striking testimony against any alleged neces-
sity, constitutional or otherwise, to ignore the time served.

Reliance on the "conceptualism" of the void sentence does not uni-
formly deny the defendant credit, although in some cases when it
works to his advantage, the result cannot be rationally justified.

In a civil case, the attempt is to place the parties in as nearly the
same position as they were before the judgment was rendered. Thus,
execution on a void judgment would justify recovery of what the defend-
ant lost as a result of the proceeding. Calling the judgment "void" con-
templates vitiating that which was done pursuant to the judgment and
preventing further action based upon any alleged rights accruing as a
result of the judgment. It does not embrace the idea that whatever
in fact was done pursuant to the judgment never happened.

the second conviction, the court held that the time served under the second conviction
should never have been served because taking him to the other district for trial was
contrary to the order of the court after the first conviction and the defendant was
credited with the time served against the sentence on the first conviction.

See note 25 supra.

See, e.g., Ex parte Bouchard, 38 Cal. App. 441, 176 Pac. 692 (1918); People v.
Brown, 383 Ill. 287, 48 N.E.2d 953 (1943); People v. Huber, 389 Ill. 192, 58 N.E.2d
879 (1945); People v. Lueckfield, 396 Ill. 520, 72 N.E.2d 198 (1947) (must remand);
to remand does not dilute court's common law power to discharge on appeal); People
v. Gilbert, 163 Mich. 511, 128 N.W. 756 (1910). The problem of the power to
remand for a proper sentence was often the basis of decisions that denoted a sentence
as void, the theory being that the court's power was unexercised and the sentence
remained to be imposed; otherwise it was believed that there was the possibility of
double jeopardy being interposed as a defense to a new sentence. This characteriza-
tion of the sentence as void then crept into the consideration of the allowance of
credit for time served. With respect to erroneous sentences, there was a common
law rule which appeared to forbid a remand and required the discharge of the pri-
soner, although it does not appear that this was in fact the practice in the United
States. For discussion of the issues, see State ex rel. Attorney Gen. v. Gunter, 193
Ala. 486, 69 So. 442 (1915); McCormick v. State, 71 Neb. 505, 510, 99 N.W. 237,
239 (1904). See also Biddle v. Bd. of Trustees, 33 Del. 425, 138 Atl. 631 (1927) (de-
fendant discharged instead of resented).

See statutes contained in Appendix I, infra.

See discussion of consecutive sentences, pp. 47 - 50, infra.

See United States v. Tuffanelli, 138 F.2d 981 (7th Cir. 1943) (reversal of anchor
sentence upon which concurrent and consecutive sentences are dependent, resulted in
the latter sentence being served concurrently with the remaining concurrent sentence);
rejected as authority in Watson v. United States, 174 F.2d 255 (D.C. Cir. 1948). See
also Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948).

E.g., Pennoyer v. Neff, 95 U.S. 714 (1877). Even assuming that the court is correct
in De Benque v. United States, note 117 supra, and what is void in a civil judgment
is not the same as what is void with respect to a criminal proceeding, it does not
mean that the consequences of calling a judgment void need differ.

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Applying this to the situation involving credit for time served pursuant to a "void" judgment, the actual fact that the defendant was imprisoned is not erased even if the proceeding is characterized as void. It cannot be erased. Like the execution in a civil case, it is an event which actually occurred. In fact, a refusal to recognize the imprisonment gives the "void" sentence some effect and confirms that which was done pursuant to it. Like the civil judgment, only the conviction as a basis for further impairment of the defendant's rights is erased. The problem still remains: what disposition should be made of those disabilities and disadvantages resulting from a void or erroneous criminal judgment?

6. Compensation v. Fair Treatment

In a civil case, it is usual to compensate the defendant for losses resulting from enforcement of a reversed judgment; in a reversed criminal case, the question is how to treat the time served. If there are no further proceedings with respect to the charge, he could be paid compensation. If he is convicted in a new trial, the time served on the reversed conviction could be credited against the new sentence by way of compensation. Whatever the merits of crediting time served as a means of compensation, if compensation of some sort is denied to the innocent or the unconvicted, it is difficult to conclude that a person convicted should receive compensation and even more difficult to conclude that he must receive compensation. Thus, if the only basis for the allowance of credit were compensation, the position that the allowance in some cases should be mandatory could not be sustained when there is no compensation provision generally. This does not mean that credit should not be required. It only precludes basing a mandatory requirement on compensation principles.

The reason for requiring the allowance of credit for time served is not based on compensation, but is a means of assuring substantially equal treatment to defendants in essentially the same position with respect to the offense for which they stand convicted. The distinction between (1) allowing credit as a means of compensation and (2) requiring the allowance in order to neutralize the effect of error, aids in resolving the remaining problems.

132See King v. United States, note 115 supra and accompanying text. Referring to "imprisonment" or other form of corporal punishment in State v. Warren, 92 N.C. 825, 827 (1885), the court stated:

Let us suppose a judgment for corporal punishment, such as formerly might be rendered, and its prompt and full execution during a term, could the sentence be set aside and all done under it annulled? The stripes upon the person, or the painful pressure of the stocks or pillory, with their attending humiliation, could not be effaced; nor could the officers that carry the sentence into effect be thus exposed to an action for assault and false imprisonment, at the instance of those who suffered, by an order vacating the judgment.

133Compensation of those wrongfully convicted is outside the scope of this article. For a capsule view of this problem, see Bratholm, Compensation of Persons Wrongfully Accused or Convicted in Norway, 109 U. PA. L. REV. 833, 845 (1961), containing a Note on American Law at the page indicated. See also Donnelly, Unconvicting the Innocent, 45 VAND. L. REV. 20, 33-35, nn.63-71 (1962); CAHN, THE PREDICAMENT OF DEMOCRATIC MAN, 11-14, 51-52 (1961).
C. SENTENCES FOR OTHER OFFENSES; FIVE SITUATIONS

Five classes of cases present the problem of crediting time served for one offense against a sentence for a different offense:

(1) A new trial conviction or resentence for an offense for which there could not have been a separate conviction at the original trial unless there was error in the original conviction: e.g., a lesser included offense. 134

(2) A new trial conviction or resentence for an offense for which there could have been a separate conviction, but a separate sentence could not have been imposed: e.g., an offense that could have been charged differently in separate counts and warrants a conviction on each, but a sentence on only one is permitted. 135

(3) At the time of the original conviction, more than one charge is pending against the defendant. After a reversal of the entire proceeding, a new trial results in a conviction on one of the original charges, but not the one for which he was originally sentenced. This includes several charges in one indictment or information, separate indictments and informations, or a sentence imposed on only one of several convictions. 137

(4) A reversed conviction not followed by a trial for any offense described above, but followed by a new trial for a different offense committed either before or after the reversal. 138

(5) The defendant is under sentence for another conviction when the reversal occurs. 139 The sentences may have been imposed at the same or at different times.

1. Situations (1) and (2)

If a plea of double jeopardy would have barred the second conviction, the defendant is in substantially the same position as one whose reversed and second convictions are for the same offense. He was


139See, e.g., McDonald v. Moinet, 139 F.2d 939 (6th Cir. 1944); Holbrook v. United States, 136 F.2d 649 (8th Cir. 1943); Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948); Smith v. United States, 287 F.2d 270 (9th Cir. 1961); Costner v. United States, 139 F.2d 429 (4th Cir. 1943); O'Brien v. Mc Claughry, 209 Fed. 816 (8th Cir. 1913).

137See, e.g., In re Doelle, 323 Mich. 241, 35 N.W.2d 251 (1948).
serving time in satisfaction of the offense for which he was convicted and any other offense for which prosecution is barred because of the conviction.

When the second conviction is for a lesser included offense or an offense that may be charged in different ways but subjects the defendant to only one sentence, substantially the same acts are involved and the defendant has been serving time for those acts. The fact that the penalties prescribed for the reversed and second convictions are different does not change the conclusion that credit should be allowed for the prior service. A separate penalty and the fact that it is a different offense does bear on the question of whether the first sentence should be the maximum that may be imposed by the second sentence. However, with respect to requiring the allowance of credit, if the defendant had been properly tried in the first place, the service of time would have been attributed to the conviction that was ultimately obtained after two trials. In principle, the situation is the same as that involving two convictions for the same offense; in neither situation is the error in the first trial a reason that justifies denying credit and, in effect, increasing the “appropriate” term the defendant must serve.

When the convictions are for different offenses, the sentences on the reversed and new convictions may be subject to different limitations or the second conviction may involve facts that the court could not have taken into account on the first sentence. If the court is permitted to consider these factors, the sentence justifiably could be different. Unlike a second conviction for the same offense for which the appropriate sentence was decided in the first trial based on an opportunity to consider all of the relevant factors, when different offenses are involved, no sentence for the second offense has been previously determined. While credit should be required for the time served, the first sentence should not be the maximum on the second sentence because the final sentence should be based on all factors relevant to the offense for which the defendant is finally convicted.

However, when the second conviction is for an offense involving the same elements as the original conviction, differing only in the way it is charged, the relevant considerations are identical with convictions for the same offense. Thus the sentence originally imposed should be the maximum which may be imposed on the second sentence. This prevents the state from sidestepping the maximum limitation by simply charging the same acts in a different manner.


\[^{141}\text{See Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948). Also consider the situation that would arise if, in a case like McDonald v. Moinet, 139 F.2d 939 (6th Cir. 1944), in which the defendant was convicted of, and sentenced on, six counts when a sentence on only one count was authorized, he had been tried on only five of those counts and the convictions on all five were reversed. Thereafter, in a new trial, the defendant is charged with and convicted on the sixth count.}\]
The third situation can arise in several fact patterns.

The defendant is charged with several offenses, each of which would support a separate sentence upon conviction. The charges are in the same indictment or in separate indictments and (a) he is tried and convicted on all charges and sentenced on each one, or

(b) instead of being sentenced on each charge, he is sentenced on only one of them, or

(c) he pleads guilty to one charge in satisfaction of all the other charges and is sentenced only on that charge.

In each instance, upon a reversal of the conviction for which the sentence was imposed and being served, a new trial is held and the defendant is convicted of one of the other original charges and acquitted of the charge for which he has started to serve time.

If only some of the convictions for which a sentence was imposed are reversed, different problems are presented than when they are all reversed. For example, when the sentences are designed to be served concurrently, then the problem of a credit for time served does not arise because he simply continues to serve his time on the remaining sentences. On the other hand, when they are designated to be served consecutively and only the anchor sentence is reversed, a problem arises as to whether the time served on the reversed conviction should be credited to the succeeding sentence. This problem is covered in detail later in this article, but it should now be noted that the conclusion reached is that the second sentence should be deemed to have commenced when it was imposed, thereby attributing all of the time served to the succeeding sentence. In view of this conclusion it follows that even when all sentences are reversed, credit should be allowed because in the absence of error the time served would have been attributed to one of the original convictions.

By like token, when there has been a conviction on only one charge, but it was in satisfaction of the other charges, it is like any other double jeopardy situation and the defendant should be deemed to have been serving time for all of the offenses satisfied by the conviction. In the absence of error, this would have been the result, and the new sentence clearly is imposed in lieu of the reversed sentence and as a consequence of the reversal.


If, instead of an acquittal, the state does not prosecute the charge that was the basis of the conviction for which the defendant was serving time, the failure to prosecute should be treated like an acquittal. Otherwise, if credit is to be allowed if there is an acquittal, the consequences of allowing credit can be avoided merely by failing to prosecute the offense.

Proposal, §§ 11, 1(b) (Appendix II, infra.)
Although the allowance of credit should be mandatory, the second sentence need not be limited by the sentence imposed on the reversed conviction, except when the second sentence is imposed on a charge for which there was a prior conviction and the error was not with respect to the sentence.146

When a sentence is imposed on only one of several convictions, the reversal of that conviction should cause the time served to be credited to the sentences for the other convictions.147 If sentences had been imposed at the time of the reversed sentence, the defendant would have received credit for the time served; if concurrent, the reversal of one would have still permitted crediting the other sentence, and if consecutive, the sentence on the remaining convictions would have been deemed to have commenced when imposed.148

Situation (3) embraces a variety of possible situations, making it difficult to state a general rule applicable to all. The problems do suggest some general considerations that may serve as guides to decision. Briefly, the first step is to determine whether the second conviction or sentence for a different offense can be viewed as a substitute for the reversed proceeding and whether, in the absence of error, the time served would have been attributed or credited to the sentence that was imposed on the last conviction or sentence proceeding.

3. Situation (4)—Conviction for an Unrelated Offense

In Situation (4), there is a reversal of a conviction followed by a second trial for an unrelated offense committed after the first conviction, either before or after the reversal. In addition to the usual offenses, included are several recurrent types of offenses that would not have been committed in the absence of the erroneous conviction, such as escape or increased penalties because of violation of parole.149 By hypothesis, the only connection between the reversed conviction and the second conviction is the presence of the same defendant. Allowing credit would provide another connection, but obviously this begs the question inasmuch as the inquiry is whether credit should be granted.

In this type of case, the denial of credit presents no problem of inequality of treatment with respect to the crime for which the defendant stands convicted, because concerning that prosecution and sentence, he

146See discussion pp. 19 - 22, supra.
147See In re Doelle, 323 Mich. 241, 35 N.W.2d 251 (1948) (credit denied on new trial sentence where defendant found guilty in reversed proceeding on two counts, sentence imposed only on Count I; on new trial, defendant pleads guilty to Count II in satisfaction of both counts).
148Another possible situation could involve conviction on several charges and a sentence imposed on only one charge, followed by a reversal and new trial conviction on all the charges; sentence imposed on the charges for which no time had been served and no sentence on the other conviction. See House v. Mayo, 81 F. Supp. 663 (S.D. Fla. 1948), for a situation involving a reversal of all four consecutive sentences and a resentence on three of the four to be served in a different order than originally imposed and no sentence imposed on the charge for which some time had been served prior to the reversal; credit was allowed. See also United States v. Keenan, 107 F. Supp. 266 (W.D. Pa. 1952).
149See cases cited note 120 supra.
has suffered no disability which any other defendant will not suffer. The fact of reversal does not cause the holding of the second trial nor would the absence of error have meant there would be no second trial.

The fact is, however, that the defendant has served some time not taken into account in any proceeding, criminal or civil. It appears that giving credit for this time would be in the nature of compensation and not to assure equality of treatment among defendants in like circumstances with respect to specific convictions and sentences. To illustrate this point, consider two defendants, each convicted of larceny. Each receives a five year sentence, but one has served two years on a reversed conviction for assault, ten years prior to the larceny conviction. A two-year reduction in the larceny sentence does not serve the purpose of equalizing the respective positions of the defendants with respect to the larceny convictions. It only reduces the sentence of one of the defendants for a reason wholly unrelated to the offense of larceny and for an error bearing no relation to the holding of the second trial. To allow credit in this case is more in the nature of compensating the defendant for the time he served on the earlier reversed conviction, because neither the time served nor the error in the reversed proceeding can be rationally related to the conviction for time to be served for larceny.

Assuming that allowing credit for time served under these circumstances would be a proper mode of compensation, credit should not be allowed unless there is a general compensation statute; otherwise, the defendant receives compensation while another person who has served time under a reversed conviction and has committed no other offense receives no compensation. Under such circumstances, the allowance cannot be mandatory. The disposition of the time served lies in the consideration of those factors that determine if compensation for a wrongful conviction should be awarded. To allow, and certainly to require, credit for time served without allowing for compensation generally, puts a premium on committing an anti-social act. These considerations are applicable to convictions for offenses committed before and after reversal.

"Banking" Prison Time

Furthermore, even if it is concluded that allowing credit for time served is a desirable means of compensation, it could be allowed only when the subsequent conviction is for an offense committed before reversal. Allowing credit against a sentence for an offense committed after reversal has the effect of permitting an individual to "bank" prison time. The result is 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", i.e., the time he has served on reversed convictions. Regardless of what view is taken of allowing credit for time served, whether as compensation or as a means of insuring equal treatment of defendants, the policy of

150 See cases cited note 138 supra, all denying credit for time served on erroneous sentences unconnected with the last conviction. See also Commonwealth ex rel. Pyatte, 170 Pa. Super. 355, 85 A.2d 659 (1952).
151 See note 133 supra with accompanying and preceding text.
prohibiting and discouraging anti-social acts would be an overriding factor requiring the denial of credit when the offense is committed after reversal.

4. Situation (5): Consecutive Sentences

The designation of one sentence to commence after the termination of another sentence presents problems with respect to allowing credit that are somewhat unique when compared with the other problems that have been considered. For the purposes of this discussion, the sentence ordered to commence first is referred to as Sentence I, and the one designated to commence on its termination is Sentence II.

There are two basic fact patterns: (1) when Sentences I and II are imposed at the same time,152 (2) while Sentence I is being served, Sentence II is imposed.153

The problems involved present themselves most clearly when Sentence I is reversed and no new trial is held or new sentence imposed. The disposition of the time served pursuant to Sentence I can be viewed in one of two ways: (1) as a determination of whether the time served pursuant to the reversed sentence should be credited to Sentence II; or (2) as a determination of when Sentence II should be deemed to have commenced.

The discussion and conclusion denying credit against a sentence for a wholly unrelated offense dictates that if the time served under Sentence I is accorded any recognition or taken into account in any way, it cannot be on the basis of crediting Sentence II, an unrelated sentence. Thus if Sentence II, for a conviction wholly unrelated to Sentence I, were imposed after the reversal of Sentence I, credit would not be given unless the basis for allowing credit was compensation.

152 See, e.g., Kite v. Commonwealth, 52 Mass. 581 (1846) (second sentence commences upon reversal); Brown v. Commonwealth, 4 Rawle 259 (Pa. 1833) (second sentence commences on reversal); Smith v. Lovell, 146 Me. 63, 77 A.2d 575 (1950) (second sentence commences on reversal); Blitz v. United States, 153 U.S. 308 (1894) (second sentence commences when imposed); Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948) (second sentence commences when imposed); Youst v. United States, 151 F.2d 666 (5th Cir. 1945) (second sentence commences when imposed); Costner v. United States, 139 F.2d 429 (4th Cir. 1943) (second sentence commences when imposed); McNewly v. Johnston, 30 F. Supp. 312 (N.D. Cal. 1939) (second sentence commences when imposed).

When Sentence II is imposed prior to the reversal of Sentence I, the commencement of Sentence II is delayed by giving effect to an erroneous proceeding, Sentence I. If, upon the reversal of Sentence I, Sentence II is deemed to have commenced at the time it was imposed, which is when it would have commenced if there had been no erroneous sentence, the existence of the erroneous sentence would no longer affect the total term to be served by the defendant after the imposition of Sentence II. The result is the same as it would have been if the reversal of I had come prior to the imposition of II. By attributing the time served since the imposition of Sentence II to Sentence II, the defendant serves no more time under the second sentence than he would have served if there had been no erroneous prior proceeding. Furthermore, and at least as significant, he serves no less than he would otherwise have served since the imposition of Sentence II. In this manner, the effect of an erroneous sentence on another sentence is neutralized and the error causes the defendant to serve no more and no less than he should pursuant to Sentence II.154

When Sentences I and II are imposed at the same time, all the time served is attributed to Sentence II when Sentence I is reversed. However, when the second sentence is imposed at a later time, some portion of the time served will not be attributed to Sentence II.

Two illustrations may be helpful: (1) The defendant is convicted on two counts in the same trial or of two charges in separate trials, and sentence for each conviction is imposed on the same day, May 30, 1952. The sentence on Count two is to commence at the expiration of the sentence on Count one. Upon reversal of the conviction on Count one, the sentence on count two will be deemed to have commenced on May 30, 1952, resulting in all the time served being attributed to the valid sentence on count two.155 (2) If Sentence I is imposed on May 30, 1952, and Sentence II for another offense is imposed on June 15, 1954 and designated to commence after the expiration of Sentence I, when Sentence I is reversed, Sentence II is deemed to have commenced on June 15, 1954, when it was imposed.156 Thus, the time served between May 30, 1952 and June 15, 1954 is not attributed to any term of confinement.157

The result is correct. The defendant will serve a period with respect to the second offense, commencing and terminating at the same time as

154See notes 152-53 supra.
155Some jurisdictions provide that a sentence commences when the defendant is delivered to the place of incarceration or, if there is an appeal, at some other time provided by statute; see note 188 infra; see, e.g., WASH. REV. CODE §§ 9.95.061, 9.95.062 (1959). Regardless of when the sentence commences, in this situation the second will commence at the same time the first commenced.
156See note 152 supra.
157The problem raised in note 155 supra should not arise here because the defendant is incarcerated pursuant to Sentence I at the time Sentence II is imposed. A problem can be presented if the defendant has been released on parole from Sentence I and Sentence II is imposed while he is on parole. See Harding v. State Bd. of Parole, 307 Mass. 217, 29 N.E.2d 756 (1940); Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948); Hofstetter v. Hollowell, 214 N.W. 698 (Iowa 1927); Commonwealth ex rel. Pyeatt v. Burke, 170 Pa. Super. 355, 85 A.2d 659 (1952); Commonwealth ex rel. Nagle v. Smith, 154 Pa. Super. 392, 36 A.2d 175 (1944).
158Some period of time is not attributed to any offense in the cases cited in note 153 supra.
if there had been no erroneous sentence in existence when it was imposed. The time served between May 30, 1952 and June 15, 1954 is not attributed or attributable to any offense for which the defendant is ultimately convicted; hence, the problem concerning this period is the same as that concerning time served under any reversed conviction not followed by a new trial. It is one of compensation, and credit for this time is not required unless it is determined that (1) compensation is required and (2) credit for time served is an appropriate method of compensation.

The approach of the courts to consecutive sentences has not been uniform. Some, adopting the void-voidable distinction, have held that when the reversed sentence is voidable, the second sentence commences at the time of the reversal. If the first sentence was void, then the second sentence begins at the time it was imposed. The theory relied on is that if the reversed sentence was void, it never existed and the second sentence could not commence after something which never existed. However, if the first sentence is voidable, it continues to be effective until vacated.

The courts are all of opinion that it is no error in a judgment, in a criminal case, to make one term of imprisonment commence when another terminates. It is as certain as the nature of the case will admit; and there is no other mode in which a party may be sentenced on several convictions. Though uncertain at the time, depending upon a possible contingency that the imprisonment on the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment, or a pardon, it then expires; and then, by its terms, the sentence in question takes effect, as if the previous one had expired by lapse of time. Nor will it make any difference, that the previous judgment is reversed for error. It is voidable only, and not void; and, until reversed by a judgment, it is to be deemed of full force and effect; and though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect. (Emphasis supplied.)

Relying on this language, the Maine court in Smith v. Lovell, 146 Me. 63, 77 A.2d 575 (1950), invoked the void-voidable distinction in holding a reversed sentence merely erroneous so that the sentence designated to commence on its termination began when the order vacating the first sentence was made, not from the time the second sentence was imposed. The Maine court pointed out that the language was cited with approval in Blitz v. United States, 153 U.S. 308 (1894), but the Supreme Court also decided that the second sentence should commence as of the time it was imposed. The Maine court attributes this result to procedural differences. The Maine court also relied on Dolan's Case, 101 Mass. 219, 223 (1869) which contained the following language quoted with approval by the Maine court: "The time fixed for the execution of the second sentence is not the end of the limited period from the date of the order of commitment in the first case, but the end of the imprisonment under the first sentence, however that may be legally terminated." The Massachusetts opinion also contained the following language immediately after the quoted language: "Expiration of time without imprisonment is in no sense an execution of sentence. The period of the second sentence will not begin to run until the first has been fully performed or legally discharged." Considering that the defendant in Dolan's Case had escaped and was claiming credit for the period of time during which he was free, the language by the Massachusetts court was appropriate to the situation it faced, but not necessarily applicable to any other situation. In any event the Massa-
Other courts have ignored or refused to follow this distinction and, relying on a sense of fairness, have allowed credit for the time served under the reversed sentence by reckoning the commencement of the second sentence from the time it was imposed. Only three statutes provide anything approaching express guidance on the issue.

The objections to basing decisions on the void-voidable characterization are as applicable here as in the other situations considered. With consecutive sentences, the characterization of a sentence as "void" results in the defendant receiving credit for at least some of the time served pursuant to a reversed sentence, whereas its characterization as erroneous denies him credit—a result contrary to its application in other situations.

In the event the reversal of Sentence I is followed by a new trial that results in a conviction, there is the problem of crediting the time served to the new sentence or to Sentence II. Quite obviously, equality does not require the credit to be duplicated. There is a choice and, except if it affects the period of eligibility for parole, it should not make any difference if the time is credited to the new sentence or to Sentence II. Perhaps as a point of administration, it would be better to credit it to the existing sentence in order to avoid split sentences, and any time not attributed to Sentence II should be credited to the new sentence, if it is otherwise appropriate. When it does affect the time for eligibility for parole, the method of attribution that results in the period of eligibility closest to the one that would have been applicable in the absence of reversal should be selected.

Massachusetts court, in Brown v. Comm'r of Correction, 336 Mass. 718, 147 N.E.2d 782 (1958), expressly rejected Judge Shaw's statement as binding on it even though it appeared to say what the Maine court said it did. The court held that the defendant was entitled to have the time served under the reversed sentence attributed to the second sentence from the time the latter was imposed, that this was a matter of right and not grace, regardless of whether the first sentence was void or voidable.

Brown v. Comm'r of Correction, note 161 supra; Helton v. Mayo, 15 So. 2d 416 (Fla. 1943).

Only Puerto Rico expressly provides for credit to the succeeding sentence. P.R. LAWS ANN. tit. 34, § 1040 (1956) (Appendix I. para. 14C, infra). Texas and Indiana have provisions that could be construed to deny credit.

TEx. CODE CRIM. PROC. art. 774 (1948) states in part: "When the same defendant has been convicted in two or more cases . . . the judgment in the second and subsequent convictions may . . . be that the punishment shall begin when the judgment and sentence in the preceding conviction has ceased to operate . . . ."

IND. STAT. ANN. § 9-2250 (1947) provides that when a person commits a crime while on parole and is sentenced to one of several named institutions, "said prisoner shall be subject to serve the second sentence after the first sentence is served or annulled and the second sentence is to commence from the termination of his or her liability upon the first or former sentence."

See also Helton v. Mayo, 15 So. 2d 416 (Fla. 1943) and Brown v. Comm'r of Correction, 336 Mass. 718, 147 N.E.2d 782 (1957) (rejecting contention that language of respective statutes precluded attributing time served on reversed sentence to subsequent sentence).

See pp. 36-41 supra for discussion of void-voidable issue. An extreme application of the effect of a void sentence is found in United States v. Tuffanelli, 135 F.2d 981 (7th Cir. 1943) See note 130 supra. See also Ex parte Sams, 67 So. 2d 657 (Fla. 1953).


II. SOME OTHER PROBLEMS AND ISSUES

Remaining for consideration are:

A. The allowance or denial of credit based upon distinctions between a resentence and a sentence after a new trial;
B. Some problems with respect to the exercise of discretion;
C. Alleged statutory limitation on the allowance of credit;
D. Constitutional issues;
E. The allowance of good conduct credits and the determination of eligibility for parole.

A. RESENTENCE OR A NEW TRIAL

In Lewis v. Commonwealth, the Massachusetts court decided that characterizing the reversed proceeding as void or voidable would not determine whether credit would be given. The court allowed credit on the theory that to hold otherwise would result in an injustice. It did note, however, that in the case before it, there had not been a new trial and intimated that if there had, it might have felt neither compelled nor able to allow credit for the time served. The court did not suggest that injustice would not result if credit were denied in the new trial situation, and the considerations developed in this article do not support different results on the sole basis of the differences in the two types of proceedings.

In this article, the focus has been on the appropriate sentence for a specific defendant for a particular offense. A distinction based on whether the sentence or the conviction was set aside appears to be concerned with the conviction, rather than the offense which gives rise to the conviction, as the basis for determining whether credit should be allowed. That a sentence is a consequence of a conviction and not the commission of a crime has been stated by the New York Court of Appeals.

168 Id., 108 N.E.2d at 923.
169 Id., 108 N.E.2d at 925.

See Ex parte Wall, 47 N.W.2d 682 (Mich. 1951) (distinguishing new trial and new sentence cases).

170 People ex rel. Stokes v. The Warden, 66 N.Y. 342, 345 (1876): Punishment for the commission of crime is that pain, penalty or forfeiture which the law exacts, and the criminal pays or suffers for the offense. In legal view, it cannot be said to have been exacted, nor to have been endured or begun to be endured, until the commission of the particular crime has been legally determined, and the particular criminal legally ascertained; nor until the due sentence, that is, the judicial fixing and utterance, of the definite kind, amount, or period of punishment has been authoritatively, and in due form of law and proceeding, pronounced upon him for his crime, after his conviction therefor. Punishment is a consequence of crime, to be sure, but in a legal view, it is the immediate consequence of only a conviction of crime. Hence, 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 of the law other than that based upon his conviction. In either case, it fails to enure to his benefit as part of that due punishment which the law exacts, by reason of his conviction and of the sentence passed upon him.
Obviously, a sentence should not and cannot be imposed without a conviction for that offense, but the determination of what is an appropriate and fair sentence does not depend on the fact of conviction. The conviction only provides the opportunity to make the determination; it is the offense and other factors, such as the background of the defendant and the circumstances surrounding the commission of the offense, that determine the terms and conditions of the sentence. To take the fact of conviction as the sole reason for the imposition of a sentence and to deny any relevancy, in this context, to the fact that particular acts by the defendant require the imposition of a sentence is a sort of "bad man" view of the law. The sentence is being imposed because the defendant was caught and for no other reason. Furthermore, the extreme consequence of this view is to permit the imposition of successive sentences that equal the maximum on each conviction after a new trial. Ignored is all the time served pursuant to the reversed proceeding, and the defendant could be subject to the service of time well in excess of the authorized maximum. This type of conceptualism results in an obvious injustice and arises from a reliance on an irrelevant factor, i.e., the type of intervening proceeding, to determine if credit shall be allowed.

Adopting the view that the sentence is the consequence of a conviction may explain, even if it does not justify, a distinction between the consequences of a new trial and a resentence. The Lewis case, however, does not reveal what the Massachusetts court relied on when it suggested that there might be a difference between a new trial and a resentence. In fact, both the conviction and the sentence were reversed and the defendant was ordered discharged unless the prosecution moved for a judgment and sentence as if upon a designated lesser charge. It is difficult to see, and the court does not explain, why it should even suggest that there would be a different result if instead of reducing the charge, the court had ordered a new trial, which resulted in a conviction for the lesser crime. The "glaring and intolerable injustice" which the court feared would result if it allowed no credit in the proceeding before it would not have been lessened by denying credit merely because there had been a new trial. The only difference is that the court called the proceeding at bar a "resentence," and the other proceeding would have been called a "new trial."
B. DISCRETION

Some situations have been presented in which the period of time served is not required to be credited to any sentence. Although equality of treatment does not require the allowance of credit, this does not mean that the allowance of credit should be prohibited.

Consideration of some problems raised when the exercise of the court's discretion is relied on for the allowance of credit is of value, because some courts rely exclusively on this power to allow or deny credit,\(^{178}\) and even the adoption of the suggestions contained in this article leave some cases to the discretion of the court. Included are situations already discussed, such as a sentence served in the wrong place of confinement or a conviction for an offense in no way connected with the complex of factors surrounding the reversed conviction. In addition, there may be some problems that require special treatment, such as sentences for escape, when the escape was from a sentence for a conviction subsequently set aside or a sentence for violation of parole from a sentence similarly set aside.

One court suggested that when the power to allow credit is discretionary, there is difficulty in determining whether the allowance is actually made.\(^{179}\) However, the same problem exists when the allowance is mandatory.\(^{180}\) In the absence of a record, under either the mandatory or discretionary approach, there can be certainty with respect to only two determinations: (1) if the new sentence is the maximum, credit was not allowed; (2) if the new sentence is less than the minimum, some credit was allowed the defendant. Furthermore, if the requirement that credit be allowed is not mandatory and the total time to be served exceeds the maximum, it could mean either that the discretion was exercised against the defendant or that it was never exercised at all because the court never considered the point. Like the mandatory allowance of credit, when the basis of the allowance is discretion, some record should be required to determine if, and how, the discretion was exercised.

Another problem raised by reliance on discretion is the failure to define the extent of the power. Most courts that suggest the allowance of credit is a matter of discretion, or that the time already served is just another factor to be considered in imposing the new sentence, speak of it in terms of "taking into account the time served," and similar phrases.\(^{181}\) It is not clear if the second sentence may or may not be less than the statutory minimum required by law or whether the court may, if it wishes, impose the minimum and deduct from it the time already served. Although not limited to credit for time served situations, at least two states have given a court statutory power to impose less than the authorized minimum if in the court's judgment the minimum is too severe under the circumstances.\(^{182}\) Other courts have

\(^{178}\)See notes 36-39 \textit{supra}.

\(^{179}\)Gabriel v. Warden, 178 N.Y.S. 595 (Sup. Ct. 1919) (referring to allowance of pre-trial confinement credit).

\(^{180}\)See discussion pp. 16 - 19, \textit{supra}.

\(^{181}\)See last series of cases in note 37 \textit{supra}.

concerned themselves with the problem of whether it is an executive, judicial or legislative function to take this time into account.\footnote{In Millard v. Skillman, 341 Mich. 461, 67 N.W.2d 708 (1951), the court held that it was a proper judicial function to credit the time served. But cf., In re Doelle, 323 Mich. 241, 35 N.W.2d 251 (1948), wherein the same court stated that it was up to the legislature to provide for credit and suggested that legislation might be in order; the dissent objected to the court making suggestions with respect to legislation. See, e.g., Minto v. State, 9 Ala. App. 95, 64 So. 369 (1913) (reliance on executive clemency); Ex parte Wilson, 202 Cal. 341, 260 Pac. 542 (1927) (reliance on prison directors); In re Johnnie Allen, 140 So. 2d 640 (Fla. 1962) (denying credit for escape when sentence being served was void; power is in Parole Comm'n or Pardon Board); People v. Lueckfield, 396 Ill. 520, 72 N.E.2d 198 (1947) (pardon and parole is in executive branch; no credit; must remand); People v. Ashworth, 264 App. Div. 201, 35 N.Y.S.2d 66 (1942) (suggests legislative change); Ex parte Wilkerson, 76 Okla. Crim. 204, 135 P.2d 507 (1943) (governor); United States v. Howell, 103 F. Supp. 714 (S.D. W. Va. 1952) (court gave credit for time served, but method resulted in delayed parole eligibility; suggestion that parole board might construe parole law liberally in such cases).}

If courts do have power to grant credit or to take time served into account as an exercise of discretion, a plausible argument can be made that the failure to exercise it in favor of the defendant is, in some cases, an abuse of this discretion, and hence reversible error. If there is merit in requiring the allowance of credit for the purpose of eliminating irrational bases for different treatment of defendants in substantially the same positions, discretionary power could be the basis for a judicial rule requiring the allowance of credit unless a good reason appears for not doing so. The appearance of other factors not available at the first sentence might be a justifying factor; but in the absence of a factor rationally justifying the refusal, a bald reliance on its discretion as a basis for denying credit is an arbitrary ruling.

C. STATUTORY LIMITATIONS

Some courts rely on statutory provisions as a basis for denying credit,\footnote{See De Benque v. United States, 85 F.2d 202 (D.C. Cir. 1936); State v. Lindsey, 194 Wash. 129, 77 P.2d 596 (1938); Beach v. Commonwealth, 282 S.W.2d 821 (Ky. 1955); State ex rel. Nelson v. Ellsworth, 375 P.2d 316 (Mont. 1962).} although no statute expressly provides that credit for time served on a reversed conviction or sentence should not be allowed.\footnote{See State ex rel. Drankovich v. Murphy, 248 Wis. 433, 22 N.W.2d 540 (1946) and comment in Whalen, Resentence Without Credit for Time Served: Unequal Protection of the Laws, 35 Minn. L. Rev. 239, n.67 (1951). Compare this view with the criticism of the Montana case, supra, following this note. Quare: doesn't the Wisconsin case involve just another "commencement" statute? Compare State v. Lindsey, supra, with Lindsey v. Super. Ct., 33 Wash. 2d 94, 204 P.2d 482 (1949), and see note 196 infra. But see, Texas and Indiana statutes, note 163 supra.}

A recent Montana decision\footnote{State ex rel. Nelson v. Ellsworth, 375 P.2d 316 (Mont. 1962).} is typical of one type of case that has adopted a "'straitjacket" statutory construction. The statute deals with the time when a sentence commences.\footnote{Revised Codes of Montana, 1947, § 94-4717: The term of imprisonment fixed by a judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment, and if, thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment, and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.} Typical of a significant group

\footnote{\textcopyright 1963 Montana Law Review, Vol. 25 [1963], Iss. 1, Art. 1. https://scholarship.law.umt.edu/mlr/vol25/iss1/1}
of statutes, it states that a sentence shall commence upon delivery of the defendant to the place of incarceration. On the basis of this statute, the Montana court held it could give no credit for the time served on a prior reversed conviction because the sentence must commence when the person is delivered to the penitentiary and could not have begun prior to that time. Apparently the court reasoned that granting credit for time served prior to the second conviction would be tantamount to having the sentence commence prior to the incarceration for the last conviction, a result contrary to the statute. The court suggested that any possible injustice was a legislative problem.

There are several disturbing factors in the conclusion and basis for the decision. If the court’s construction and utilization of the statute is correct, it could afford no relief if the total of all the time served exceeded the maximum. By requiring express statutory authority to allow credit when the total of the sentences does not exceed the maximum as in this case, the court closed the door on allowing credit when the maximum is exceeded. There is no statutory provision authorizing the court to allow credit when the maximum is exceeded, although the court could rely on the maximum stated in the statute under which the defendant is sentenced. Should the court limit the total sentence on this basis, it would be admitting that the statute it relied on does not clearly prohibit taking the prior time served into account and this would dilute the effectiveness of its reasoning when the maximum is not exceeded. Of course, in a case presenting the precise issue, the Montana court might well conclude that even if the maximum is exceeded, the statute dealing with the commencement of the term of imprisonment is controlling and no credit will be allowed. The result would be a greater inequity than merely refusing credit for time served. The most disturbing feature of the court’s opinion is that it did not have to rely on the “commencement” statute nor deny itself the power to allow credit. Although also undesirable, there would be less potential harm if the court had merely noted that the sentence imposed plus the time served was within the authorized limits, and even if time served should have been taken into account, it could assume the trial court had done so. Of course, a holding that it could allow credit would have been more desirable, but a decision that it could not allow credit for the reasons stated by the court lays the foundation for the greater inequities suggested.

This type of statute has no place in a proper consideration of the issue of allowing credit. The statute merely makes it clear that neither pre-trial confinement nor incarceration in an unauthorized place will satisfy the sentence; only time served in the “place of imprisonment” should be credited. The statute deals with the duration and nature of the time served and not with the issue of credit for time served on a reversed conviction. This purpose is evidenced by the italicized clause of the section:


Revised Codes of Montana, 1947, § 94-4717.
When term of imprisonment commences. . . . The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment, and if, thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment, and subsequently returned thereto, the time during which he was at large must not be computed as part of such term. (Emphasis supplied.)

If the question is posed in terms of any other criteria for the "commencement" of the sentence, it becomes apparent that requiring it to commence upon delivery to a designated place has no greater inherent significance with respect to the issue of credit than any other standard. If the legislature had said that the term should commence at the time of the imposition of sentence, the Montana court should again conclude that credit should be denied.

The issue of when a sentence starts and ends is present in every case, and its determination has no necessary relationship to the question of granting credit for time served under a reversed conviction. Whether the basis is a statute or a judicial decision, there must be some determination of when a sentence commences. There is no reason why reduction of this determination to an express provision in a statute should lead to the conclusion that the legislature has decided anything more than this one issue, or done anything different than the court would have done in a case limited to the issue of determining when a sentence commences. Of course, if there is evidence that the problem of credit for time served was a problem intended to be covered, then a different conclusion is warranted.

For example, if there was no statute in Montana dealing with the commencement of the term, the court would have to make this decision; otherwise, there would be no way of knowing precisely when the term ends. In the absence of a statute, if the Montana court had adopted the criterion of either delivery to the place of imprisonment or the time of imposition of the sentence, there would be no so-called legislative directive on the issue and the court would still have to decide if prior time served could be taken into account. The narrow issue of commencement of a term is commonly presented to the court in a case in which the defendant claims that his term has ended because his term commenced when the sentence was imposed and the state contends that it commenced with the incarceration in the penitentiary. Whichever position the court takes, it will not have decided the issue of whether it can allow credit for time served on a reversed conviction. The opinion of the court in such a case might well contain a statement substantially as follows: 192

191See, e.g., In re Fuller, 52 N.W. 577 (Neb. 1892).
192A court might also state: "It will thus be seen that the term of imprisonment dates from the time of the sentence . . . ." In re Fuller, 34 Neb. 581, 52 N.W. 577, 579 (1892); or "It is the law of this Commonwealth that the term of imprisonment begins on the day that sentence is imposed". Harding v. State Bd. of Parole, 307 Mass. 217, 29 N.E.2d 756, 757 (1940).
The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment, and if, thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment, and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

In the context of the hypothetical case, the statement does not mean that the court will not allow credit for time served on a reversed conviction yet the language is appropriate to resolving the issue before it. The statement, of course, is the Montana statute, and in the absence of additional evidence, there is no apparent reason why its reduction to a statutory provision should give it any greater effect than if it were stated in a judicial opinion. Like the hypothetical decision, the Montana statute supplies the answer to only one narrow issue.

In the absence of a statute requiring the allowance of credit, the position the Montana court has taken will always preclude it from giving credit, even though a more reasonable construction of the Montana statute is that it restricts the allowance of any credit for time served to service in the authorized place of incarceration. Whether credit should be given depends on the resolution of other issues, not the construction of this statutory provision. If it is the word “commence” that disturbs the court, the sentence needn’t be nunc pro tunc, i.e., as of the date of the first sentence. It merely commences when the statute says it should, but terminates earlier because of the allowance of credit.

The problem presented by the Montana case is basic to all attempts at codification and a purported exclusive reliance on legislative provisions. Courts must recognize that there are gaps in legislation and unless a statute is actually intended to cover a particular situation or is expressly and unambiguously applicable because of unequivocal language, a court, finding no statutory resolution of a problem, must perform one of its classic functions under the common law of filling the gaps. In the case of uncertainty or ambiguity, there is no reason why the court must assume the legislature intended an obviously unjust result. When credit for time served is denied, the judicial system is in the ignominious position of having committed an error in the reversed proceeding and compounding it by penalizing the defendant. When the statute is ambiguous and the issue not covered by any reasonable interpretation of the statute, it would be more consistent with dispensing justice for the court to adopt the “fairer” or “more just” interpretation and leave it to the legislature to change the result if, in fact, that was the legislative purpose.

Concern is not with the interpretation of any particular statute, but rather that the denial of credit based on any statute should be the object
of scepticism, because legislatures have given the problem little attention, and it is unlikely that a legislature intended to deal with it unless it has expressly provided for it.\(^{196}\)

D. CONSTITUTIONAL ISSUES

Research has revealed no case that has recognized a constitutional requirement making it mandatory for a court to allow credit for time served on a reversed sentence. Although it has been suggested that the imposition of a sentence without the allowance of credit is a violation of the "equal protection of the laws" clause of the Federal Constitution because it results in an unreasonable classification of defendants,\(^ {197}\) the reported cases do not provide encouragement justifying reliance on constitutional principles for the resolution of the problems presented.\(^ {198}\) The courts have rejected constitutional arguments challenging the power of the court to impose an increased penalty on a resentence. Also the introduction of the "void proceeding" concept into double jeopardy cases has had its effect in encouraging the use of that doctrine in cases involving the allowance of credit for time served.\(^ {199}\) There is little to be gained by an exhaustive consideration of the possible constitutional arguments that would support the mandatory allowance of credit because the hope of success is relatively remote, and even if there is a constitutional mandate to allow credit for time served, there remains the necessity of determining the cases to which the mandate is applicable and developing underlying principles that will effectuate the constitutional mandate. Attaining both these objectives is the purpose of this article and the results would not differ in a constitutional, legislative or wholly judicial context.

E. GOOD CONDUCT CREDITS AND ELIGIBILITY FOR PAROLE

While serving a sentence, not only will the defendant be satisfying the term of the sentence, but usually he will earn good conduct credits\(^ {200}\) and also be satisfying parole eligibility requirements.\(^ {201}\) When it is

\(^{196}\text{Compare the approach of the Massachusetts court in Brown v. Comm'r of Correction, 336 Mass. 718, 147 N.E.2d 782, 785 (1958), where the court refused to construe the following statute as authority to deny credit in a consecutive sentence context because the legislature did not intend to cover the issue: "For the purpose only of determining the time of the taking effect of a sentence which is ordered to take effect from and after the expiration of a previous sentence, such previous sentence shall be deemed to have expired when a prisoner serving such previous sentence shall have been released therefrom by parole or otherwise."", with the language of Shaw, J., note 161 supra.}

\(^{197}\text{Whalen, Resentence Without Credit for Time Served: Unequal Protection of the Laws, 35 Minn. L. Rev. 239, 251 (1951).}

\(^{198}\text{See Ex parte Wilkerson, 135 P.2d 507 (Okla. Crim. 1943) (holding that there was no constitutional power in the court to allow credit); In re De Meerleer, 35 N.W.2d 255, 256 (Mich. 1948) (denying that defendant's constitutional rights required the allowance of credit against a sentence after a new trial conviction for a different offense for which a separate penalty was provided). The cases recognizing that the second sentence may be longer than the reversed sentence would also seem to imply that there is no constitutional requirement that credit be allowed.}

\(^{199}\text{See Whalen, Resentence Without Credit for Time Served: Unequal Protection of the Laws, 35 Minn. L. Rev. 239, 243-44 (1951).}

\(^{200}\text{See Note, Statutory Structures for Sentencing Felons to Prison, 60 Colum. L. Rev. 1134, 1152-54 (1960), for an exhaustive review of the "good behavior" provisions.}

\(^{201}\text{Id., at 1141-44 for review of parole provisions.}
mandatory to allow credit for the time served, good conduct credits earned during the prior sentence also should be taken into account, and the time previously served should be included in determining the defendant's eligibility for parole.

Although most courts that allow credit for time served have also required the allowance of good conduct credits, the issue is not properly disposed of by merely deducting the good conduct time earned from the second sentence. Generally, jurisdictions that provide the defendant with the opportunity to reduce the time he is required to serve by earning good conduct credits also provide for the forfeiture of credits when the defendant commits an infraction of the rules. Good conduct credits are not in the nature of vested rights. Requiring the term to be reduced by allowing credits which would have been subject to possible forfeiture in the absence of the reversal gives the defendant more than is necessary to avoid inequality. Rather than a deduction of the credits from the second sentence, it is more consistent with the nature of the good conduct credits to provide that the good conduct credits against the reversed sentence be included in the determination of good conduct credits earned towards the reduction of the term of the second sentence. The credits will be subject to forfeiture and any other conditions that might have become operative if the first sentence had not been reversed.

In addition, if there is no provision for earning good conduct credits on the reversed sentence, but there is the opportunity to earn such credits on the second sentence, to the extent that it is feasible to determine what those credits would have been if there had been an authorization for such credits on the earlier sentence, they should be determined and...
considered in connection with the service of the second sentence. In order to neutralize the effect of the original error, it is necessary to allow the defendant good conduct credits for the time served pursuant to the erroneous sentence; otherwise, the defendant continues to suffer a disability as a result of the erroneous imposition of the first sentence.

The purpose and operation of good conduct credits bears little or no relation to rehabilitation, but is designed primarily to induce the defendant not to cause the authorities trouble while serving his sentence. In view of this purpose, there is no reason on the basis of "equality of treatment" to credit the second sentence with the credits earned, when the time served is not credited. The good conduct credits are actually an integral part of the term imposed on the reversed sentence, and if it is concluded that the time served should not be credited, there is no reason to credit an element that serves only as a determination of the term to be served.

Even when the time served under the first sentence is not taken into account in determining the term of the second sentence, sometimes it should be taken into account in determining when the defendant is eligible for parole. Although equality of treatment does not demand this result, the purposes and objectives of the parole system do require it. By way of illustration, assume a case involving the reversal of the anchor sentence of two consecutive sentences imposed at different times. Although neither equality nor fairness make it mandatory to attribute to the second sentence the time served between the commencement of the reversed sentence and the imposition of the second sentence, the defendant has been under continuous supervision and subjected to whatever program has been instituted to reform, rehabilitate and treat the defendant in order to facilitate his return to society. The reversal of the conviction does not change the continuity of the confinement nor the events of that period relevant to the granting of parole. Having been subjected to the appropriate supervisory program, no reason is apparent for refusing to take those factors into account when considering his eligibility for parole, regardless of whether the maximum duration of the term on the second sentence is reduced by all of the time served on the reversed sentence. The various methods of computing eligibility for parole raise some problems with respect to this proposal, but whatever the system, the principle should be adopted with respect to this one problem of time served under a reversed conviction. By like token, when good conduct credits are used not only to reduce the term but also to shorten the period of eligibility for parole, they should be taken into account for that latter purpose.

There are also cases when the time served may be credited to the second sentence, but no credit towards parole could have been earned on the reversed sentence. This may arise when the reversed sentence is a life sentence and the jurisdiction does not provide the possibility of

205 See Cannon v. Gladden, 203 Ore. 629, 281 P.2d 233 (1955) (where a contrary result was reached).

parole to "lifers." In those cases, the time served under the life sentence should be taken into account in determining eligibility for parole on the second sentence.

III. STATUTORY APPROACHES

A. EXISTING STATUTES

Unfortunately, not only have the courts failed to provide a systematic approach to the problem, but the relevant statutes are likewise remiss by (1) employing careless language, (2) not providing procedural guides and safeguards to assure the allowance of credit, and (3) failing to deal with all the situations in which the problem can arise.

Occasionally the statutes are deficient in their terminology and definitions. Sometimes they are relatively narrow and, by design or otherwise, embrace limited problems. With the exception of Puerto Rico, none expressly deals with credit for time served in the context of consecutive sentences. Few distinguish between or deal with different places of incarceration. Characteristically, no statute imposes any requirement on the sentencing authority to cause the record to reflect compliance with the statute.

As an indication of an awakening interest in providing relief in this area, it is encouraging to note that some of the statutes are relatively

207For a reference to such statutes, see Note, 5 WAYNE L. REV. 237, n.129 with accompanying text (1959).

208The problem in this entire area of the relation between credit for time served and parole arises because of the relationship of parole to the term of the sentence imposed. Cf., MODEL PENAL CODE § 305.6 (Proposed Official Draft, 1962).

209References in the notes that follow are to the statutes set forth in Appendix I, infra, and refer to the paragraph in Appendix I.

210For additional discussion of the statutes, see Whalen, Resentence Without Credit for Time Served: Unequal Protection of the Laws, 35 MINN. L. REV. 239, 252-61 (1951).

211E.g., The Michigan statute calls the reversed proceeding void and erroneous in the same section. See Appendix I. para. 9A, infra.

212E.g., Arkansas, Iowa, North Dakota and Washington speak in terms of a new trial, imprisonment pending appeal and the imposition of a sentence on a second conviction. (Appendix I. paras. 1, 5, 6, 12 and 13 infra respectively). The question is raised as to whether these statutes also include resentences. See State v. Lindsey, 194 Wash. 129, 77 P.2d 596 (1938). An additional question is whether they deal with habeas corpus proceedings as well as appeals. See note 112 supra. Other statutes speak in terms of a second conviction for the "same criminal act or acts" (California, Appendix I. para. 2, infra) or "the same act or omission" (Minnesota, Appendix I. para. 10, infra) or "the same crime" (New York, MODEL PENAL CODE, Appendix I. paras. 11, 15, infra) or "the same offenses" (Puerto Rico, Appendix I. para. 14, infra). New York and the MODEL PENAL CODE do not by their terms cover other offenses and lesser included offenses. The others apparently include lesser included offenses, but with the possible exception of Puerto Rico may not include convictions and sentences on different counts in the first and second trials. Michigan (Appendix I. para. 9A, infra) contains language ambiguous or broad enough to cover most of the "other offense" situations by referring to the second conviction "based upon facts arising out of the earlier void conviction":

213Appendix I. para. 14C, infra. See note 163 supra.

214See note 88 supra. See also Arkansas (Appendix I. para. 1, infra) which provides for credit for "former confinement in the penitentiary": so limited it would not cover county jail time and this is where the defendant is detained pending trial after the reversal. See ARK. STAT. ANN. § 43-2726 (1947).
recent enactments,215 others have been recently amended,216 and a provision dealing with this subject is a recent addition to the Model Penal Code.217 On the dark side is the relatively few number of states that have dealt with the problem by statute.218 The generality of some of the statutes and the utter failure to deal with the problem in most jurisdictions lend support to the belief that, with the possible exception of Puerto Rico, little systematic thought has been given to this subject in any jurisdiction.

B. The Proposed Statute

Appendix II is a proposed statute drafted within the framework of reference suggested in this article.219 To the extent that it is successful, the attempt to provide for the great number of possible contingencies within the unified context of the statutory form can serve as a basis for legislation in the immediate future; to the extent the attempt is deficient, it will serve to highlight the problems that a legislature will encounter when it deals with the problems.

The proposed statute seeks to deal with those situations that require common solution by including them within the definition of the applicable terms used in the statute, thereby making the definition provisions highly important with respect to substance, as well as form.220 For example, the definition of "new trial"221 is intended to include a conviction for both the same or a different offense by emphasizing the new trial as being "held as a consequence of" a "reversal."222 The definition of "reversed proceeding"223 is intended to avoid the distinctions between void and voidable proceedings and appeals and habeas corpus proceedings. The term "new sentence"224 includes both resentence and a new trial sentence, although each of those terms is also defined separately,225 so as to enable separate226 or common treatment,227 as the situation may require.

The problems are treated in a threefold manner; a resentence,228 a new trial229 and consecutive sentences.230 Credit is allowed in the case

216Kentucky, 1962, note 244 infra; Maryland, 1957, note 245 infra.
217See Appendix I. para. 15, infra).
218See Appendix I infra.
219See pp. 68 et. seq. infra.
220Proposal, § 1.
221Proposal, § 1(f).
222Proposal, § 10.
223Proposal, § 1(m).
224Proposal, § 1(d).
225Proposal, §§ 1(g), 1(i).
226Proposal, §§ 7, 8.
227Proposal, §§ 4, 5, 6. This deals with limitations on the new sentence.
228Proposal, § 7.
229Proposal, §§ 8, 10.
230Proposal, § 11.
of a resentenced by making it *nunc pro tunc*\(^{231}\) in a new trial, by credit against an appropriate sentence\(^{232}\) and, in consecutive sentences, by considering the second sentence as having commenced when imposed.\(^{233}\) Provision is also made to avoid the possibility of delayed eligibility for parole because of a reversal.\(^{234}\)

There is no separate treatment of incarceration in different or unauthorized places of confinement,\(^{235}\) but this is easily adapted to the needs of a particular jurisdiction by providing for exceptions if the policy of the jurisdiction requires them to be made.

An examination of the proposal will reveal that most of the problems it covers relate to each of the points covered in the text of this article. It should provide a working basis for legislation.

**IV. CONCLUSION**

In order to resolve the one basic issue of whether the defendant should be credited on a different sentence with time he has served pursuant to a reversed sentence, it is necessary to isolate and classify the myriad of situations that can raise this question. They include: the conviction for the same or a different offense in a proceeding following the reversal; the reversal of the anchor sentence of two or more consecutive sentences; and a reversal in which either there was no error with respect to the sentence, or there was error relating to its quantity or quality, or both, or error not related to either.

The courts are not uniform in their approach to the problems raised so that there is no consistency in the results in specific cases. The basic problem has been the total lack of a rational framework within which the solution of these problems can be accomplished. The results are often inconsistent and almost always unpredictable.

Basic considerations for a rational solution can be developed, and, at least, some light can be shed on those situations in which the allowance should be mandatory. These considerations include the basic assumption that inequity results if a defendant is subjected to more than the appropriate sentence merely because there was an error in a proceeding and a new proceeding is required to establish guilt or to correct the sentence. In order to avoid this inequity, the defendant should be credited with the time he has served under the reversed proceeding, unless the nature of the error that caused the reversal and the purpose of the new proceeding provide a rational and relevant basis for refusing to allow him credit.

Although it may be argued with some merit that the emphasis on the nature of the offense as a basis for determining statutory maxi-

\(^{231}\)Proposal, § 7(a).

\(^{232}\)Proposal, § 8(a).

\(^{233}\)Proposal, § 11(a).

\(^{234}\)Proposal, §§ 7(b), 8(b), 11(b).

\(^{235}\)But see, Proposal, § 9. A distinction is made between errors that affect the term of the sentence and those that do not. Proposal, §§ 3, 4, 5, 8.
mums and minimums does not serve the purposes of treatment and that statutory limits on sentences should not vary because of the offense alone, the fact is that present penal systems do provide for differences in possible sentences based upon the offense involved and the concern in this article is with providing a rational basis for considering time served within the context of existing systems.236

In certain cases overriding policy factors dictate a denial of credit for time served; in others, even if the time served is not credited against the sentence, it may be taken into account for other purposes. The quality of the confinement competes with the term of confinement and may provide a basis for denying credit which should take precedence over the defendant's interest in being free. In other cases, even though the allowance of credit for time served need not be mandatory, the time served should be taken into account for the purpose of determining eligibility for parole.

Mandatory allowance of credit is not always appropriate. Consequently in these areas, the court's power to exercise its discretion should be preserved.237 Furthermore, even in some of those situations when principle dictates a mandatory allowance of credit, there can be no certainty that it should be applied in a particular case because, as in the case of different places of confinement, a factual examination and evaluation of the particular penal system may be required in order to determine whether it is one of those situations to which the requirement is applicable.

The relatively long history of judicial attempts to deal with the problem reveals little reason to expect a basic rationale to be developed by the courts. The problem has been treated either on an ad hoc basis or by resort to irrelevant fictions and narrow statutory interpretations with a consequent self-denial of adequate tools for reaching a satisfactory solution.

Adequate legislation appears to be the most likely means of dealing with the issues. The proposal set forth in Appendix II deals with the problems on the basis of the foregoing considerations and attempts a solution within the context of the approaches to sentencing reflected in contemporary systems in the United States. Whether or not the principles and proposal suggested in this article present the most desirable avenue of approach, any effective legislation must be based upon some rational foundation or framework that:

(1) isolates and identifies each possible situation;
(2) identifies the purposes of allowing and denying credit;
(3) identifies and defines the consideration relevant to
   (a) determining when the allowance of credit should be mandatory, and
   (b) determining when the allowance should be left to the discretion of the sentencing authority:

237Proposal, § 15.
(4) recognizes that differences among penal systems require different results in some cases and
(a) identifies those cases, and
(b) the relevant considerations.

Inherent in recent Supreme Court decisions expanding the scope of Fourteenth Amendment and other protections is a promise of cases, with increasing regularity that will present the issues considered herein. A rational systematic approach developed beforehand will avoid the obvious inequities of past decisions.

APPENDIX I

STATUTES DEALING WITH CREDIT FOR TIME SERVED ON REVERSED
CONVICTIONS AND SENTENCES

1. Arkansas
If the defendant upon the new trial is again convicted, the period of his former confinement in the penitentiary shall be deducted by the court from the period of confinement fixed in the last verdict of conviction.

2. California
Where defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts.

3. Connecticut
Time served on the sentence reviewed shall be deemed to have been served on the sentence substituted.

4. Indiana
Whenever it shall appear from the indictment or affidavit and final judgment in any criminal cause that an erroneous sentence has been imposed by the trial court, the defendant in such cause may at any time petition the trial court to correct retroactively such judgment to conform to the term of imprisonment specified in the applicable statute upon proper notice (by serving a copy of the petition in person or by mail) upon the prosecuting attorney of the circuit and the attorney-general of Indiana. An appeal may be taken to the Supreme Court from a final order granting or denying said petition under the same rules and conditions as provided in rules 2-40 and 2-40A of this court.


ARK. STAT. ANN. § 43-2728 (1947).
CAL. PEN. CODE § 2900.1, Stats. 1949, ch. 519, § 1 at 926.
5. Iowa

If a defendant, imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction.

6. Kentucky

If a defendant is confined in the penitentiary during the pendency of an appeal and, on reversal, is again convicted, he shall be given credit for the period so confined in determining his date of eligibility for parole and his date of release by expiration of sentence.

7. Maryland

If the Court of Appeals shall remand a criminal action to the lower court in order that such court may pronounce the proper judgment or sentence, the lower court in passing sentence shall deduct from the term of the sentence the time already served by the defendant under the previous sentence from the date of his conviction.

8. Massachusetts

Time served on a sentence appealed from shall be deemed to have been served on a substituted sentence.

9. Michigan

A. Whenever any person has been heretofore or hereafter convicted of any crime within this state and has served any time upon a void sentence, the trial court, in imposing sentence upon conviction or acceptance of a plea of guilty based upon facts arising out of the earlier void conviction, may in imposing the sentence specifically grant or allow the defendant credit against and by reduction of the statutory maximum by the time already served by such defendant on the sentence imposed for the prior erroneous conviction, failure of the corrections commission to carry out the terms of said sentence shall be cause for the issuance of a writ of habeas corpus to have the prisoner brought before the court for the taking of such further action as the court may again determine.

B. Any person now incarcerated in any state prison, or on parole from a sentence thereto, who was sentenced under the terms of sections 10, 11, 12 or 13 of this chapter as in effect prior to the effective date of Act No. 56 of the Public Acts of 1949, shall be entitled to a review of sentence upon application to the court in which he was sentenced. Upon such application any judge of such court may vacate the previous sentence and impose any lesser sentence which in his judgment might have been imposed under sections 10, 11, 12 or 13 of this chapter, as amended by Act No. 56

24Iowa Code Ann. § 793.26 (1950), Source Revision 1860, § 4933.
of the Public Acts of 1949, had such sections as amended been in force at the date of the previous sentence, and the rights of such prisoner under the laws shall be governed by the lesser sentence as then imposed.

C. 25 Whenever, in any criminal case, the defendant shall be adjudged guilty and a punishment by fine or imprisonment shall be imposed in excess of that allowed by law, the judgment shall not for that reason alone be judged altogether void, nor be wholly reversed and annulled by any court of review, but the same shall be valid and effectual to the extent of the lawful penalty, and shall only be reversed or annulled on writ of error or otherwise, in respect to the unlawful excess.

10. Minnesota 250
When a person who has been imprisoned in the state prison or state reformatory and whose conviction has been set aside for any cause, is thereafter convicted of felony growing out of the same act or omission, the judge when sentencing the person shall limit the maximum penalty fixed by statute by reducing it by a period of not less than the time that the person was imprisoned under the former conviction and in calculating the time imprisoned, the person so convicted shall have credit for all time earned in diminution of sentence under Minnesota Statutes, section 243.18.

11. New York 251
Where a judgment of conviction is vacated, and a new sentence is thereafter imposed with respect to the same crime, any time spent by a person under the original sentence shall be deducted from and credited to the term of the sentence subsequently imposed with respect to such crime.

12. North Dakota 252
If a defendant, during the pendency of an appeal, has been imprisoned in the execution of the judgment appealed from, and upon a new trial ordered by the supreme court shall be again convicted, the period of his former imprisonment shall be deducted by the district court from the period of imprisonment to be fixed on the last verdict of conviction.

13. Washington 253
If a defendant who has been in prison during the pendency of an appeal, upon a new trial ordered by the supreme court shall be again convicted, the period of his former imprisonment shall be deducted by the superior court from the period of imprisonment to be fixed on the last verdict of conviction.

14. **Puerto Rico**
   
   A. The time that a person may have been deprived of his liberty under a sentence that is subsequently annulled or reversed, shall be fully deducted from the prison term that said person must serve in case he is sentenced again for the same offenses for which he was imposed the sentence so annulled or reversed.

   B. The time that a person may have been deprived of his liberty under a sentence which is subsequently suspended, shall be fully deducted from the prison term that said person must serve in case he has to resume the serving of said sentence.

   C. Neither all nor part of the time to be deducted according to the provisions of sections 1036-1041 of this title shall be deducted from two or more prison terms at the same time, that is, concurrently. If, after covering a prison term by deducting part of the time that a person may have been deprived of his liberty, as provided in the foregoing sections, any portion of said time is left, the excess shall be deducted from the prison term which said person must serve under another consecutive sentence, and so forth, as the case may be.

   D. The deductions mentioned in sections 1036-1041 of this title shall be made by the proper penal authorities with preference over any other reductions or deductions authorized by other laws, except where it is otherwise provided in said laws.

15. **Model Penal Code**

   When a judgment of conviction is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, the period of detention and imprisonment theretofore served shall be deducted from the maximum term, and from the minimum, if any, of the new sentence. The officer having custody of the defendant shall furnish a certificate to the Court at the time of sentence, showing the period of imprisonment served under the original sentence, and the certificate shall be annexed to the official records of the defendant's new commitment.

**APPENDIX II — PROPOSED STATUTE**

AN ACT to require credit for time served pursuant to reversed convictions and sentences.

**CREDIT FOR TIME SERVED ACT**

Section 1. **Definitions.** When used in this chapter, unless the context requires a different meaning:

a. "Confinement" means confinement or detention in any confine-
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or detention facility pursuant to a sentence, and includes such confinement when the sentence is to a facility not authorized by applicable provisions of law.

b. "Consecutive sentences" means two or more sentences in which the term of one sentence is designated to commence on and after the expiration of or termination of a preceding sentence, regardless of when said sentences were imposed. The "preceding" sentence is referred to herein as the "first sentence" and the sentence designated to commence on or after its expiration or termination is referred to herein as the "second sentence."

e. "Conviction" means a finding of guilt of one or more offenses after a trial or on a plea or pleas of guilty.

d. "New sentence" includes a resentence and a new trial sentence.

e. "New sentence proceeding" includes a resentence proceeding and a new trial proceeding.

f. "New trial" means a trial resulting in a conviction subsequent to a reversed conviction and held as a consequence of such reversal. The term includes but is not limited to the following which are conclusively presumed to be trials held as a consequence of a reversal within the meaning of this section:

(1) a proceeding which would have been prohibited for reasons of double jeopardy or otherwise, unless the reversal had preceded it;

(2) a proceeding authorized or required by an order for a new trial;

(3) when the offense for which conviction is had at the trial is a lesser included offense of the offense which was the basis of the reversed conviction or is a different offense and the reversed conviction, by operation of law or by agreement, satisfied any charge based on such different offense.

g. "New trial sentence" means the sentence imposed at a new trial.

h. "Offense" includes a felony, misdemeanor, offense or violation.

i. "Resentence" means the sentence imposed in lieu of a reversed sentence and as a consequence of the reversal of such sentence, and includes a corrected sentence.

j. "Resentence proceeding" means the proceeding in which a resentence is imposed.

k. "Reversal" is the result of a reversed proceeding.

l. "Reversed conviction" means a reversed proceeding with respect to the conviction and the vacation of the sentence as a consequence thereof.

m. "Reversed proceeding" means a conviction or a sentence, or both, which have been reversed, vacated, set aside, or modified.
(1) in any proceeding whatsoever, including, but not limited to, appeal, writ of error, habeas corpus, coram nobis and proceedings to correct sentences; and

(2) for any reason whatsoever, and whether the conviction or sentence or both be described as void, voidable, or erroneous.

n. “Reversed sentence” means a reversed proceeding with respect to the sentence only.

o. “Sentencing authority” includes the court and any other authority which determines the term and conditions of a sentence, except parole and clemency boards. A sentence imposed by a sentencing authority includes such sentences with respect to which the minimum or maximum or both are set by operation of law without the necessity of any action by the sentencing authority.

p. “Term” means the period of confinement which the defendant is required to serve pursuant to a sentence.

q. “Time served,” “serving time,” and similar expressions refer to the period during which a defendant was or is actually confined pursuant to a sentence.

Section 2. Time Served Required to be Credited. There shall be deducted from or credited to the term of a new sentence the time served by the defendant pursuant to the reversed proceeding, in the manner provided by and subject to the provisions of this chapter.

Section 3. Error in Term of Sentence.

a. “An error with respect to the term authorized for the offense” means one or more of the following errors committed with respect to the term of the sentence imposed in the reversed proceeding for the offense which is the basis of the conviction in such proceeding, whether or not such error is stated or given as a basis or reason for reversal:

(1) when the term imposed is less than the minimum term authorized for such offense;

(2) when the term imposed exceeds the maximum term authorized for such offense;

(3) when a fixed term is imposed and an indeterminate term is required to be imposed for such offense;

(4) when an indeterminate term is imposed and a fixed term is required to be imposed for such offense.

b. When in the discretion of the sentencing authority, the reversed sentence could have been to either a fixed term or an indeterminate term, and when the sentencing authority may exercise its discretion in this regard in a new sentence proceeding:

(1) only the errors described in subdivisions (a) (1) and (2) of this section shall be deemed error with respect to the term authorized for the offense; and
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(2) if there was no such error and the sentencing authority, in the exercise of its discretion, imposes a new sentence to an indeterminate term when the reversed sentence is to a fixed term or imposes a new sentence to a fixed term when the reversed sentence is to an indeterminate term, the maximum term which may be imposed on the new sentence shall not exceed the maximum term of the sentence imposed in the reversed proceeding.

Section 4. Limitation on Term of New Sentence; No Error With Respect to Term; Same Offense. When there has been no error with respect to the term authorized for the offense and the same offense is the basis for the sentence in the reversed proceeding and the new sentence proceeding, the term imposed in the new sentence proceeding shall not exceed the maximum term imposed in the reversed proceeding.

Section 5. Limitation of Term of New Sentence; Error With Respect to Term. When there has been error with respect to the term authorized for the offense, a new sentence for the same offense shall be such sentence as may be authorized for such offense, subject to the provisions of this chapter.

Section 6. Limitation of Term of New Sentence; Different Offense. A new sentence for an offense other than the one which was the basis for the conviction in the reversed proceeding shall be in accordance with the provisions applicable to such offense, subject to the provisions of this chapter.

Section 7. Method of Allowing Credit on a Resentence.

a. A resentence shall be deemed to have commenced when the reversed sentence commenced and if the reversed sentence has not commenced, the commencement of the resentence shall be in accordance with the provisions applicable to the commencement of sentences.

b. All time served from the commencement of the reversed sentence shall be deemed to have been served pursuant to the resentence for the purpose of determining the expiration of the new sentence, the crediting and forfeiture of good conduct credits and the determination of the defendant’s eligibility for parole.

Section 8. Method of Allowing Credit on a New Trial Sentence.

a. In determining the time to be served by the defendant pursuant to a new trial sentence, there shall be deducted from the term imposed the time served pursuant to the reversed conviction, as if such service had been pursuant to the new trial sentence. If the new trial sentence is an indeterminate sentence, such deduction shall be from the minimum and maximum terms of such sentence.

b. For the purposes of determining the defendant’s eligibility for parole and the crediting and forfeiture of good conduct credits, the time served pursuant to the reversed proceeding and the time served pursuant to the new trial sentence shall be deemed to have been served continu-
ously, as if all such time had been served pursuant to the new trial sentence.

Section 9. Change of Place of Confinement. A change of the place of confinement solely for the purpose of imposing a new sentence, including the period pending trial, if any, shall not be deemed an interruption in the period of confinement.

Section 10. Conviction on Several Counts, Etc. In the event:

a. the defendant has served time pursuant to a sentence imposed on one or more convictions of several counts in one information or indictment or one or more convictions of charges contained in separate informations or indictments and the defendant had not commenced the service of a sentence for such other convictions at the time the sentence pursuant to which he served time as aforesaid was imposed, and

b. the conviction pursuant to which time was served is reversed, and

c. there is no new trial conviction with respect to such reversed conviction, and

d. the provisions of Section 11 hereof are not applicable because

(1) no sentence was imposed with respect to the remaining charges referred to in subsection (a) hereof, or

(2) the conviction with respect to such remaining charge or charges has been reversed, the time served pursuant to the reversed conviction referred to in subsection (c) hereof shall be credited to the sentence or any new sentence imposed with respect to the remaining charges in the manner provided for in Sections 6, 7, 8 and 9 of this chapter.

Section 11. Consecutive Sentences.

a. When there is a reversed conviction with respect to the first sentence of consecutive sentences, the second sentence shall be deemed to have commenced when it was imposed, for the purpose of computing the time served pursuant to the second sentence, and the crediting of good conduct credits.

b. In addition to crediting the time served pursuant to subsection (a) hereof for the purpose of determining the defendant's eligibility for parole, including the crediting or forfeiture of good conduct credits for the purpose of determining such eligibility, the time served pursuant to the first sentence from the time of its commencement to the time of its reversal shall be credited to the second sentence in the same manner as if all of the time served since the commencement of the first sentence had been served pursuant to the second sentence from the time of the imposition of the second sentence.

c. When the said reversed conviction is followed by a new sentence proceeding with respect thereto and credit for the time served on the
first sentence is required against the new sentence because of the other provisions of this chapter or any other provision of law and all or any part of such service of time shall also be required to be attributed to the second sentence under the provisions of this section, the time served shall be credited in the following manner:

(1) First, the time served which is required to be credited to the new sentence only shall be credited thereto;

(2) Second, the time served which may be credited to either sentence shall first be credited to the second sentence and the balance of the credit, if any, shall be credited to the new sentence.

(3) In determining eligibility for parole, the time served shall be attributed and credited in a manner so as to ensure that the period of eligibility for parole shall not be greater than it would have been if the new sentence had been the sentence originally imposed as the first sentence. In furtherance of such purpose, if the second sentence has terminated prior to the commencement of the new sentence, all of the time served pursuant to the first sentence, the second sentence and the new sentence may be considered to have been served continuously and without any intervening interruption in service.

d. When there is a reversed sentence with respect to the first sentence

(1) not followed by a resentence proceeding, the provisions of subsections (a) and (b) hereof shall be applicable as if such reversal was a reversed conviction, or

(2) if such reversal is followed by a resentence proceeding, the time served shall be credited

(a) first, to the new sentence and

(b) any balance remaining not credited to the new sentence shall be credited to the second sentence subject to the provisions of subsections (b) and (c)(3) hereof as if there had been a reversed conviction.

Section 12. **Matters Which Must Appear in the Record.**

a. When the sentence is a resentence subject to the provisions of Section 7 of this chapter, the court shall so state.

b. When the new sentence is subject to the provisions of Section 8 of this chapter, the court shall state the following:

(1) The sentence imposed on the new sentence.

(2) The time served by the defendant under the reversed sentence.

(3) The amount of such time served which will be credited to the new sentence under the provisions of subsection (b) of Section 8 of this chapter.

(4) The difference between the time served to be so credited and the term imposed on the new sentence.
c. Each of the matters required to be stated pursuant to subsections (a) and (b) of this section shall be made a part of the judgment record.

Section 13. Limitations on this Chapter. Nothing contained in this chapter shall be deemed to:

a. Limit the authority or power of the sentencing authority to credit the defendant with time served pursuant to a reversed proceeding in such cases in which the allowance of credit is not made mandatory by this chapter;

b. Limit, expand or otherwise affect in any matter whatsoever, the scope or limits of the defense of double jeopardy;

c. Create, limit, expand or affect in any manner whatsoever, procedures for the review of a conviction or a sentence.

Section 14. The provisions of this chapter shall be applicable to all sentences being served on its effective date.

Section 15. Discretionary Power to Allow or Deny Credit for Time Served. In any case in which the allowance of credit for time served is not made mandatory by this chapter, the sentencing authority shall have the power to allow to the defendant credit for all or any part of a term served on a reversed proceeding on any sentence for a conviction of an offense committed prior to the reversal of the reversed proceeding. The sentencing authority may deny or allow such credit in its discretion. Whenever the sentencing authority is requested by the defendant to exercise its discretion under this section, it shall advise the defendant whether it has decided to deny or allow credit and if it has decided to allow credit, the sentencing authority shall advise the defendant as to what part of the term served shall be credited to his sentence.

Section 16. This chapter shall be known and may be cited as "The Credit for Time Served Act."

Section 17. This chapter shall become effective on..........................