SENTENCE CREDITING FOR THE STATE CRIMINAL DEFENDANT—A CONSTITUTIONAL REQUIREMENT

I. Introduction

In recent years several federal courts have encountered the question whether the state criminal defendant charged with a bailable offense and unable to make bail is constitutionally entitled to have his pretrial jail time credited against the sentence which he incurs upon conviction. This small but growing number of decisions tends to uphold the right to and necessity for such sentence crediting.[1] Such a right is recognized by statute for federal defendants;[2] the issue is thus one pressed only by state criminal defendants. The United States Supreme Court has not as yet addressed this precise issue.[3]

This note will examine a series of constitutional arguments which support a finding that states must allow sentence crediting.

II. Sentence Crediting and the Equal Protection Clause

A. *Historical Perspective*

Francis Bacon has said: "The Laws are like cobwebs; the small flies are caught but the great break through." In *Griffin v. Illinois*[4] the Supreme Court began to use the equal protection clause to insure indigents equality of treatment in the criminal process—seeking as it were to disentangle these "small flies" from the criminal law's cobweb-like effects. In ruling that indigent defendants must be furnished with a transcript on appeal, the Court said that there could be no equality before the law if the kind of trial a man received depended on the amount of money he had. The "mere state of being without funds" could no longer be characterized as "constitutionally an irrelevance."[5] While *Griffin* pertained to the

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[1] McGinnis v. United States *ex rel.* Pollack, 452 F.2d 833 (2d Cir. 1971); United States v. Gaines, 449 F.2d 143 (2d Cir. 1971); White v. Gilligan, 351 F. Supp. 1012 (S.D. Ohio 1972); Workman v. Cardwell, 338 F. Supp. 893, 898-901 (N.D. Ohio 1972), *vacated in part*, 471 F.2d 909, 911 (6th Cir. 1972); Mott v. Dail, 337 F. Supp. 731 (E.D.N.C. 1972). *Cf.* Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971); Wright v. Maryland, 429 F.2d 1101 (4th Cir. 1970).

[2] 18 U.S.C. § 3568 (1970); *see* United States v. Jones, 393 F.2d 728 (6th Cir. 1968); Stapf v. United States, 367 F.2d 326 (D.C. Cir. 1966).

[3] *But see* Gaines v. United States, 402 U.S. 1006 (1971), discussed at text accompanying notes 27 through 33 *infra*.

[4] 351 U.S. 12 (1956).

[5] Edwards v. California, 314 U.S. 160, 184-85 (1940). In *Edwards*, a California statute making it a misdemeanor to bring a nonresident "indigent person" into the state was declared invalid. The Court said that a man's property status could not be used by a state to limit or qualify his rights, *i.e.*, that indigence was constitutionally irrelevant. In *Griffin* the Court moved beyond this negative action for indigents to more affirmative action.

appeal segment of the criminal process, recent Supreme Court decisions have extended its equal protection rationale to sentencing procedures.

Williams v. Illinois[6] concerned an indigent defendant who was imprisoned beyond the statutory maximum imposed for his offense because of his inability to pay a fine and court costs. Relying heavily on the argument it had put forth in *Griffin*, the Supreme Court held that such incarceration was violative of equal protection: "Once the state has defined the outer limits of incarceration necessary to satisfy its penalogical interests and policies, it may not then subject certain classes of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."[7] To do so would be to determine the length of an individual's maximum confinement not by a statutory standard, but rather by a standard of wealth—an impermissible discrimination according to the Court. As in *Griffin* the Court seemed to place an affirmative duty upon the state. "At the minimum *Williams* means that in imposing fines as punishment for criminal conditions more care must be taken to provide for those whose lack of funds would otherwise automatically convert a fine into a jail sentence."[8]

It soon became apparent that this necessity for "more care" was not only incumbent upon the courts when indigency caused a defendant to be incarcerated for longer than the maximum term. *Morris v. Schoonfield*,[9] decided shortly after *Williams*, reached the issue of an indigent who served not longer than the maximum, but longer than a man with an ability to pay would have. In an opinion in which three justices concurred, Mr. Justice White stated that:

> The same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failure to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case the Constitution prohibits the state from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay in full.[10]

In these cases the Court was concerned with what it saw as an arbitrary extension of a man's sentence because he lacked economic means. For though a state sets the outer limits of incarceration, it allows the trial judge discretion in setting the boundaries in each case. Theoretically at

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[6] 399 U.S. 235 (1970).

[7] *Id.* at 241-42.

[8] Morris v. Schoonfield, 399 U.S. 508, 509 (1970). The Supreme Court remanded this sentence crediting case in light of its decision in *Williams v. Illinois*. In a concurring opinion Justice White, joined by Justices Douglas, Brennan, and Marshall, explained what he felt the Court required by the *Williams* decision.

[9] 399 U.S. 508 (1970).

[10] *Id.* at 509.

least, the trial judge comes to his decision after consideration of the particular defendant, his crime, and the societal interests which need to be served. Thus it is just as discriminatory to effect an extension of imprisonment beyond this court-imposed limit as it is to do so beyond a statutory limit. In each situation the defendant is deprived of his liberty where another with funds would not have been. It could always be argued, of course, that where the extension is not beyond the maximum the accused has no real grievance, since the trial court could have imposed the maximum sentence. The significant point, however, is that the court did not do so; and for the state to take the court's shorter sentence and extend it because of indigency is to discriminate on the basis of wealth. It is, in effect, to punish poverty as if it were a crime.

The language in *Morris* was broad and far-reaching. In much the same way that the *Morris* decision flowed from *Williams* so did *Morris* in turn give rise to *Tate v. Short*,[11] a case in which the Supreme Court directly confronted the situation where in fact it is poverty that *causes* a man to go to jail rather than simply prolonging his sentence. The *Morris* decision condemned the practice of a state automatically converting a fine into a jail term where the sentence consisted of a prison term and a fine. In *Tate* the Court considered the constitutionality of a statutory scheme substantially like the widely used "30 days or 30 dollars" type of statute in which a defendant is obliged to pay a certain fine *or* to spend a certain amount of time in jail "working off" the fine. The Court found it a denial of equal protection to limit punishment to payment of a fine if one is able to pay but to transform the fine into a jail term if one cannot do so because of indigency. Such a choice is an illusion for the man who has no access to funds and is in reality being imprisoned for his poverty.[12]

B. Applying Equal Protection to Sentence Crediting

Against this background the question of a convicted defendant's right to sentence crediting may be examined. It will be argued that such crediting is a "logical extension"[13] of the Supreme Court decisions discussed in the previous subsection of the note. In determining whether this is so, it is first necessary to analyze briefly the equality test that the Supreme Court used in constructing the equal protection model it put forth in *Griffin* and its progeny. As the Court itself has recognized, "absolute equality is not required; lines can be and are drawn and we often sustain

[11] 401 U.S. 395 (1971).

[12] In re Antazo, 3 Cal. 3d 1000, 473 P.2d 999, 1006 (1970) (in which it was held that requiring an indigent defendant to "work off" his fine in jail constituted an invidious discrimination based on poverty in violation of equal protecton).

[13] Workman v. Cardwell, 338 F. Supp. 893 (N.D. Ohio 1972), *vacated in part*, 471 F.2d 909, 911 (6th Cir. 1972).

them."[14] It has come to be recognized that there is a dual aspect to the equal protection standard. The traditional test—by which the Court extends presumption of constitutionality to a state created classification and only asks that there be some rational nexus between it and a legitimate state end[15]—has tended to give way to a stricter test in cases involving "suspect classifications" or cases touching upon "fundamental interests." In these latter situations the Court has subjected the classification to strict scrutiny, demanding not merely a legitimate state end, but rather a compelling state interest.[16] The statute is not afforded a presumption of constitutionality; instead, the burden is upon the state to establish that the distinctions it has drawn are necessary to further a compelling state purpose.

In *Griffin* and its progeny the Court clearly applied a stricter standard than the rational basis test. These cases have involved, at one and the same time, *both* classifications based upon wealth *and* denials of the personal liberty of the defendant. The former may be a "suspect classification" in and of itself.[17] Since *both*, as will be argued immediately below, are present in the sentence crediting cases, it is unnecessary to rely upon one or the other as determinative of these cases; it is enough to point out that, since the same elements are present in the sentence crediting cases as were present in the *Griffin* line of cases, the same test should be applied.[18]

Sentence crediting by its very nature involves a question of denial of personal liberty; whether such crediting occurs will often determine the length of the convicted defendant's jail term. Nor is it difficult to find a classification based upon wealth in cases involving sentence crediting. Each case involves a situation in which the defendant faced a "choice" before trial: make bail or go to jail. There can be few, if any, cases in which the defendant "chooses" the latter for any reason other than one relating to his ability to meet the bail set in his case. Put briefly, a person will not spend time in jail unless he has no other feasible alternative open to him. Viewed in this light, the sentence crediting case does not give rise to the difficult question, as yet unresolved by the courts, as to what, exactly, constitutes indigency.[19] *Any* person seeking sentence crediting for

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[14] Douglas v. California, 372 U.S. 353, 363 (1963) finding it a violation of equal protection to deny an indigent defendant right to counsel on appeal.

[15] *See e.g.*, Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959); Money v. Doud, 354 U.S. 457 (1957); Walters v. St. Louis, 347 U.S. 231 (1954).

[16] *See, e.g.*, Kramer v. Union Free School District, 395 U.S. 621 (1969)(voting); Shapiro v. Thompson, 394 U.S. 618 (1969)(interstate travel). *Cf.* Korematsu v. United States, 323 U.S. 214 (1944)(racial classification).

[17] *See* San Antonio Independent School District v. Rodriguez, 41 U.S.L.W. 4407, 4414 n.60 (1973); Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).

[18] *See* Note, *Equal Protection—Choice of Fine or Imprisonment is No Choice at All for an Indigent Offender*, 16 VILL. L. REV. 754 (1971).

[19] A good statement of the problem may be found in Kamisar and Choper. *The Right*

a bailable offense has faced a classification based upon wealth, since a person of unlimited means would, assumedly, under the same circumstances secure his release by making bail.

The existence of both deprivation of personal liberty and classifications based upon wealth in these sentence crediting cases should allay the fear, expressed by some, of "an ideology of unrestrained egalitarianism."[20] For example, the suggestion of Mr. Justice Harlan that if a fee could not be imposed for appellate review then it also could not be required for admission to a state university has never, in fact, materialized.[21] Such an argument ignores the dual bases of the Court's equal protection analysis in the *Griffin* line of cases. One commentator has written:

> The provision of applied justice is an essential function of the State even under the most conservative political theory. It is of the essence of citizenship that a person have access to the state's legal institutions. Without this he is also without full citizenship. . . . We cannot conceive of a man as truly a citizen if he is too poor to have access to the courts. We can, however, conceive of him as truly a citizen if he is too poor to receive [an education at a State University]. A state which . . . provides *all* its citizens with applied justice is . . . only giving all men that which is the most basic function of government, the provision of legal process.[22]

The analogies between the *Griffin* line of cases and the sentence crediting cases are compelling. The situation in which an accused indigent today finds himself regarding his right to sentence crediting is essentially the same as that which the pre-*Griffin* indigent faced in regard to his right to appellate review.[23] It would appear that there is "no substantive difference between a prisoner who is forced to remain in jail after the completion of his sentence because of his inability to pay a fine and an indigent defendant who must remain in jail prior to his trial because of his inability to post bond."[24] The defendant who cannot make bail and who, after conviction, is denied sentence crediting, serves, in effect, a longer term than he would have had he been released on bail prior to trial.

> In substance, it compels an indigent prisoner to be confined for a period longer than one who is released on bail between verdict or plea and commitment. The Equal Protection Clause requires that *all* time spent in any

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to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 MINN. L. REV. 1, 22-23 (1963).

[20] Harper v. Board of Elections, 383 U.S. 663, 686 (1966)(Harlan, J., dissenting).

[21] Griffin v. Illinois, 351 U.S. 12, 35 (1956) (Harlan, J., dissenting).

[22] Willcox, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 16 (1957). Thus far the Supreme Court has not held higher education to be a fundamental right owed all citizens by the state; indeed, the Court has held that *grade-school* education is *not* a fundamental right. San Antonio Independent School District v. Rodriguez, 41 U.S.L.W. 4407 (1973).

[23] Sachs, *Indigent Court Costs and Bail: Charge Them to Equal Protection*, 27 MD. L. REV. 154 (1967).

[24] White v. Gilligan, 351 F. Supp. 1012 (S.D. Ohio 1972).

> jail prior to trial and commitment by prisoners who are unable to make bail because of indigency *must* be credited to his sentence. The Fourteenth Amendment does not conscience discretion in such matters.[25]

Although the Supreme Court has not addressed itself to this issue directly, one case in particular should be noted for its implicit indication of the Court's direction. In *United States v. Gaines*[26] the defendant was seeking credit on a federal sentence for almost two years spent in state custody because he was unable to meet bail. Gaines had been convicted of a federal narcotics violation and was released on bail pending sentencing. While on bail he was arrested by the New York state authorities, charged with robbery and murder, and held without bail. Pursuant to a writ of habeas corpus ad prosequendum, Gaines appeared before the federal court, which sentenced him to two years on the narcotics charge. Then he was returned to state custody for prosecution of the murder and robbery charges. Although bail was then set at $7500, Gaines was unable to meet this and remained in jail. The state charges were dropped when new evidence led to the arrest and indictment of several other persons. Gaines was then turned over to federal custody to begin his two year sentence. At this time he petitioned for credit for the time spent in state custody after bail had been set; but the district court denied his motion and the circuit court affirmed.[27] The Supreme Court vacated this judgment and remanded the case for "reconsideration in light of the position asserted by the Solicitor General."[28] On remand, the Second Circuit stated:

> After such reconsideration, we are now of the view that Gaines should be credited with the time spent in custody after the state court had set bail. Gaines was unable to enter into federal custody after bail was set in December 1969 solely because he lacked sufficient funds to post bond in the state court which had him in custody. The Supreme Court's decisions in *Tate v. Short* . . . and *Williams v. Illinois* . . . indicate that a man should not be kept imprisoned solely because of his lack of wealth. If Gaines had had the money to post the state bond in December 1969 and had then entered federal custody, he would now be eligible for his conditional release. Gaines' lack of wealth has resulted in his having to serve a sentence that a richer man would not have had to serve, an impermissible discrimination according to *Tate* and *Williams*. Accordingly, Gaines ought to be credited with the time spent in state custody after bail was set.[29]

Since *Gaines* concerned a federal prisoner, the Second Circuit's decision upon remand is somewhat clouded by the fact that such prisoners have

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[25] Workman v. Cardwell, 338 F. Supp. 893, 901 (N.D. Ohio 1972), *vacated in part*, 471 F.2d 909, 911 (6th Cir. 1972)(emphasis in the original).

[26] 449 F.2d 143 (2d Cir. 1971).

[27] United States v. Gaines, 436 F.2d 1069 (2d Cir. 1971).

[28] Gaines v. United States, 402 U.S. 1006 (1971).

[29] United States v. Gaines, 449 F.2d 143, 144 (2d Cir. 1971).

a statutory right to sentence crediting.[30] That is, an attempt might be made to distinguish *Gaines* from a case involving a state prisoner in a jurisdiction having no statutory right to sentence crediting. It is clear, however, from the language quoted immediately above, that the Second Circuit grounded its decision in the second *Gaines* opinion upon *constitutional* considerations flowing from the *Tate* and *Williams* line of cases, not upon the federal statutory right to sentence crediting. Indeed, the Second Circuit had held in its first *Gaines* decision that the federal statutory right to sentence crediting does not reach the case in which a federal prisoner is confined before trial by the state.[31]

The Second Circuit did not pull its *ratio decidendi* in *Gaines* from thin air; the memorandum filed by the Solicitor General to which the Court referred in its brief order remanding the case to the Second Circuit,[32] expressly de-emphasized the statutory argument and relied heavily upon the *Tate* and *Williams* line of cases. The Solicitor General argued:

> Had [Nelson[33]] been able to post the bond, he would have been surrendered by the state authorities and would have completed service of all but a few months of his three-year federal sentence by January 20, 1970, the date of the district court's dismissal of the habeas writ; he would have been eligible for conditional good-time release even prior to that date. At all events, Nelson would have completed service of the full term of his sentence prior to the court of appeals' judgment herein. . . . To construe [18 U.S.C. § 3568] to deny Nelson relief under these circumstances would be inconsistent with the spirit of numerous decisions of this Court requiring that justice be applied to all persons equally and not on the basis of ability to pay. *Williams v. Illinois*, 399 U.S. 235, 241; cf. *Rinaldi v. Yeager*, 384 U.S. 305; *Hardy v. United States*, 375 U.S. 277; *Draper v. Washington*, 372 U.S. 487; *Lane v. Brown*, 372 U.S. 477; *Douglas v. California*, 372 U.S. 353; *Gideon v. Wainwright*, 372 U.S. 335; *Coppedge v. United States*, 369 U.S. 438; *Smith v. Bennett*, 365 U.S. 708; *Eskridge v. Washington Prison Board*, 357 U.S. 214; *Griffin v. Illinois*, 351 U.S. 12. Section 3568 is in our view not so inflexible in its provisions as to be incompatible with an interpretation that would give Nelson the relief he seeks.
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> Substantially the same considerations apply in [Gaines v. United States].[34]

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[30] *See* note 2 *supra*.

[31] United States v. Gaines, 436 F.2d 1069, 1070 (2d Cir. 1971). The court said, "We are sympathetic to Gaines' plight, but we see no legal basis to justify relief. . . . [18 U.S.C. §3568] is unambiguous in not allowing credit for an unrelated offense."

[32] Gaines v. United States, 402 U.S. 1006 (1971).

[33] Nelson v. United States, 434 F.2d 748 (8th Cir. 1970), was a companion case to *Gaines* on writ of certiorari before the Supreme Court. The facts of the two cases were similar, and the Court remanded both in light of the Solicitor General's memorandum, *see* 402 U.S. 1006 (1971). The Eighth Circuit, unlike the Second, did not reach the issues on remand, but remanded in turn to the district court, *see* Application of Nelson, 445 F.2d 631 (8th Cir. 1971).

[34] Memorandum for the United States on Petition for Writs of Certiorari, at 14-15, Nelson v. United States and Gaines v. United States, 402 U.S. 1006 (1971) (footnotes omitted).

It is difficult if not impossible to limit the rationale of the Solicitor General and the Second Circuit to cases involving federal prisoners. *Williams*, *Douglas*, *Gideon* and *Griffin* all concerned *state* criminal processes, and it would appear more difficult to apply the holdings in these cases to federal prisoners, as the Solicitor General and the Second Circuit have done, than to apply them to the case of the state prisoner. It is submitted here, therefore, that the *Gaines* case is strong authority, absent an actual Supreme Court decision on this precise issue, for the proposition that sentence crediting is constitutionally required of the states as well as the federal government.[35]

III. Other Constitutional Grounds

Constitutional claims for sentence crediting have, in large part, been founded upon the equal protection clause. As indicated by the discussion immediately above, the case law has recently made substantial progress in developing the contours of these equal protection claims. There are, however, other constitutional grounds upon which a claim for sentence crediting can be based. Although these additional grounds have not been the subject of substantial judicial discussion, they are important to an understanding of the many considerations underlying claims for sentence crediting. This section will, therefore, briefly catalogue other constitutional arguments which support demands for sentence crediting.

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[35] It is necessary at this point to note a recent decision of the Supreme Court. McGinnis v. Royster, 35 L.Ed.2d 282 (1973), upheld a New York statute which denied good-time credit (*i.e.*, reduction of duration of imprisonment for good behavior while imprisoned) with respect to presentence time spent in county jails by persons unable to make bail. The New York statute permitted such good-time credit in computing the prisoner's statutory release date, but denied it in computing the prisoner's minimum parole date. Royster challenged the scheme under the equal protection clause, asserting that it unconstitutionally discriminated against him because of his indigency. The Court rejected this argument:

> As the statute and regulations contemplate state evaluation of an inmate's progress towards rehabilitation, in awarding good time, it is reasonable not to award such time for pretrial detention in a county jail where no systematic rehabilitative programs exist and where the prisoner's conduct and performance are not even observed and evaluated by the responsible state officials. 35 L.Ed.2d at 290.

Justices Douglas and Marshall dissented, arguing that good-time crediting is in reality a disciplinary tool rather than a rehabilitative one, *i.e.*, that "[t]he 'good time' deduction is not based on progress toward rehabilitation but is an inducement to inhibit bad conduct." 35 L.Ed.2d at 293. The dissenters acknowledged, however, that if the assumption of the majority is made, their result is correct: "If 'good time' were related to rehabilitative progress, I would agree that the law passes muster under the Equal Protection Clause of the Fourteenth Amendment." 35 L.Ed.2d at 295.

The facts of *McGinnis*, relating as they do to *good-time* crediting and therefore to the rehabilitative process, make the decision a very narrow one and inapplicable to the question of the right of prisoners to sentence crediting for the time they spend in jail before conviction due to their inability to make bail. Prisoners seeking sentence crediting ask not to have their sentences reduced as a discretionary matter depending upon the authorities' judgment of their progress in rehabilitation, but rather demand that their presentence incarceration time, which occurred solely because of their indigency, be applied against their post-sentence incarceration time.

A. *Eighth Amendment Excessive Bail*

Another constitutional ground for requiring states to engage in sentence crediting is the eighth amendment provision: "Excessive bail shall not be required. . . ." The Supreme Court has never decided the issue whether bail is excessive per se if a defendant is unable to meet it. But it has said that when bail is set at an amount which is reasonable, then it is not excessive.[36] What then is a reasonable amount? It is an amount, according to the Court, that assures the defendant's presence at trial.[37] The Court seems to have come full circle for this in effect is the most widely accepted definition of bail—a device to assure an accused's appearance at his trial.[38] In any case bail should not, and cannot, be used as a device for keeping defendants in jail. Yet this is the effect it has when a certain class of persons—indigents—are required to make bail in a system based only on monetary considerations. "The practice of requiring a certain class of people to post money bail not only assures that they will be present at trial, it also ensures that they will remain in pretrial custody (jail) pending their trial."[39] To avoid such a result, then, the proscription of the eighth amendment must be read in conjunction with the guarantees of the fourteenth amendment:

> These words should be given an interpretation consistent with *Griffin* and forbid any financial discrimination against the accused. This interpretation focuses on "the fundamental interest with which the amendment is concerned: The right not to be punished before conviction and the right not to be prejudiced in preparing for trial.[40]

The court's application of equal protection to the area of bail is not without support. In dictum set forth in *Bandy v. United States* Mr. Justice Douglas argued that:

> We have held that an indigent defendant is denied equal protection of the laws if he is denied an appeal on equal terms with other defendants, solely because of his indigence. Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?[41]

Several months later when the same case was again presented to him, Mr. Justice Douglas reaffirmed his position.[42] Although the Court has

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[36] Stack v. Boyle, 342 U.S. 1 (1951).

[37] *Id.*

[38] Foote, Studies on Bail 3 (1966).

[39] Workman v. Cardwell, 338 F. Supp. 893, 899 (N.D. Ohio 1972), *vacated in part*, 471 F.2d 909, 911 (6th Cir. 1972).

[40] *Id.* (quoting Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 960, 1181 (1965)).

[41] 81 S. Ct. 197-98 (Douglas, Circuit Justice, 1960).

[42] Bandy v. United States, 82 S. Ct. 11, 12-13 (Douglas, Circuit Justice 1961):

It would be unconstitutional to fix excessive bail to assure that a defendant will not

never adopted Mr. Justice Douglas' view, it did decide the threshhold question of the impact of excessive bail on pretrial custody time in *Yates v. United States*.[43] *Yates* has been interpreted as holding that where pretrial imprisonment results from the imposition of "excessive bail" a defendant is constitutionally entitled to sentence credit.[44] Again, excessive bail was defined to be an amount higher than was reasonably required to secure the presence of the accused.

The eighth amendment's guarantee against excessive bail when coupled with the fourteenth amendment's guarantees against financial discrimination as enunciated in *Griffin* thus constitutes another ground for requiring sentence crediting.

B. *Sixth Amendment Right to Trial*

In addition to the contentions based on the fourteenth and the eighth amendments, two other issues not discussed above may be raised by a demand for sentence credit. The first concerns the sixth amendment right to trial. Those defendants who plead guilty can immediately begin to serve their sentence. Those on the other hand who insist on asserting their right to trial face—in the absence of bail—the prospect of serving many months, if not years, of "dead time." Such a possibility cannot but have a chilling effect on the assertion of this constitutional right. It places the accused under subtle but very real pressure to waive his right to trial so that he might begin to serve his time. Such an effect should not be permitted under our constitutional system. As was noted by the Supreme Court in a case involving the issue of double jeojardy: "Penalizing those who choose to exercise constitutional rights would be patently unconstitutional. . . . And the very threat inherent in the existence of such a punitive policy would . . . serve to chill the exercise of basic constitutional rights."[45]

C. *Fifth Amendment Guarantee Against Double Jeopardy*

In addition to its chilling effect on the right to trial, denial of sentence credit may transgress the double jeopardy guarantee inherent in the fifth amendment. Jail time—regardless of the name attached to it—is punitive; and to deny credit is to subject an accused to more punishment for a single offense than he would have had to endure otherwise. Given that pretrial incarceration might serve the very legitimate purpose of insuring

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> gain his freedom. . . . Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. . . . Further reflection has led me to conclude that no man should be denied release because of indigence.

[43] 356 U.S. 363 (1958).

[44] Meltsner, *Pretrial Detention, Bail Pending Appeal, and Jail Time Credit: The Constitutional Problems and Some Suggested Remedies*, 3 CRIM. L. BULL. 618, 626 (1967).

[45] North Carolina v. Pearce, 395 U.S. 711, 724 (1969).

a defendant's presence at his trial, once that trial has taken place and a conviction has resulted, no purpose seems to be served by not allowing credit. The fact remains that the defendant has been deprived of his liberty in connection with a crime for which he will now serve a sentence. It is a fiction to maintain that this pretrial time has not been punishment, especially in light of the conditions prevalent in jails.[46] In speaking of the constitutional prohibition of double jeopardy in *Pearce* the Supreme Court said:

> We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully "credited" in imposing sentence for a new conviction for the same offense . . . the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.[47]

Such language has obvious application to pretrail detention; it should matter little whether the punishment occurred before or after conviction.

IV. A Practical Problem

Admittedly, finding a guaranteed right to sentence credit raises difficult problems. Perhaps the most immediate of these concerns the use of indeterminate sentencing, in which the trial judge has discretion—within the parameters established by statute—to set the actual period of confinement.[48] In *Williams* the Supreme Court emphasized that its decision was not meant to abridge a trial judge's discretion in setting sentence.[49] Consequently, it would be possible for a trial court to nullify a program of sentence credit by simply increasing the defendant's sentence by the length of pretrial incarceration. There is perhaps no effective way to safeguard completely against this problem. However, there are procedures that could be implemented to protect a defendant. In providing for federal sentence credit, the Congressional Bail Reform Act of 1966 stated that: "The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. . . ."[50] This provision in effect makes sentence crediting an administrative, not a judicial, act. Consequently, the trial judge should be able to decide the length of a defendant's sentence without any consideration of presentence time. Another possible procedural safeguard could be drawn from the Supreme Court's

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46 *See* Jones v. Wittenberg, 323 F. Supp. 933 (1971)(Memorandum in which court detailed the conditions in a particular county jail finding it, although especially bad, representative of local jails in the United States).

47 North Carolina v. Pearce, 395 U.S. 711, 718 (1969).

48 In jurisdictions with determinate sentencing the trial judge would not have this discretion and hence this would not be a problem.

49 Williams v. Illinois, 399 U.S. 235, 243 (1970).

50 18 U.S.C. § 3568 (1970).

suggestion in *North Carolina v. Pearce*.[51] In *Pearce* the Court was concerned with a defendant who was given a much longer sentence upon retrial after his first conviction had been set aside on appeal. In such a situation, said the Court, a trial judge should be required to state explicitly the reasons for imposing the harsher term. There seems to be no reason why such an articulation of the sentencing decision must be restricted to the *Pearce* situation. Requiring it as a general practice would perhaps lead to a more rational sentencing process, one in which pretrial confinement was not a factor.

V. THE BAIL SYSTEM ITSELF

In general, courts have chosen to remain silent despite mounting documentation of the discriminatory effect upon indigents of requiring monetary security in order to obtain pretrial release. That the state has a legitimate and perhaps even compelling interest in assuring a defendant's presence at trial is indisputable. That it seeks to achieve this interest by using a bail system based on wealth seems to distort the purpose of bail by violating the very rights it was meant to guarantee: "the right not to be punished before conviction and the right not to be prejudiced in preparing for trial;"[52] and even more basically, the right to be presumed innocent until proven guilty.

Bail, or alternately pretrial detention, plays a crucial part in each defendant's case. Studies have shown that persons who must await trial in jail are far more often convicted, far more often given a prison term after conviction, and far more often given a longer sentence than those who are free on bail.[53] In *Griffin* the Supreme Court noted that studies had demonstrated that a substantial portion of criminal convictions are reversed on appeal.[54] Given its importance to the outcome of a defendant's case it was even more crucial, said the Court, that the appellate process

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[51] 395 U.S. 711 (1969).

[52] Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1181 (1965).

[53] Single, *The Unconstitutional Administration of Bail: Bellamy v. Judges of New York City*, 8 CRIM. L. BULL. 459 (1972). Research studies have not yet shown conclusively why this is so. The factors which lead to a verdict of guilty are for the most part elusive, oftentimes defying attempts to set up causal relationships. However, some tentative conclusions are possible. A jailed defendant loses the opportunity to participate effectively in his own defense. For an accused who is part of a racial or social minority this right is especially valuable because often he is better able to conduct an investigation in his community than his attorney. Further, detention usually means loss of a defendant's employment which is perhaps the principal reason he fares poorly in the sentencing process, particularly in obtaining probation. It also usually means he cannot afford a lawyer of his own choosing and must rely on one provided by the state. Finally, there are the rather subtle prejudices that attach to a jailed defendant. He must walk into court in prison garb between two guards rather than in his own suit and tie at the side of his lawyer. His self-respect and presumption of innocence is perhaps lessened in the eyes of the trial judge or jury.

[54] 351 U.S. at 18.

not be arbitrarily denied to any accused. Since pretrial detention seems to have a similar outcome-determinative impact, it would seem that pretrial freedom should also not be arbitrarily denied. This is not to say that the state has no right to confine some defendants prior to trial. It does imply, however, that the criteria for such confinement should not be solely financial. "A man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court."[55] The term "relevant factors" refers to a man's ties to his community; whether he has a family in the community; how long he has lived there; whether he has employment there. In addition, it refers to a consideration of the man himself and his crime: whether his release would jeopardize society; whether he would be likely to commit another crime or to intimidate the witnesses to the crime with which he is charged. All of these are indications of whether or not a man would be a good risk for release. They avoid the anomalous situation in which a poor-risk defendant with money can gain release while a good-risk without means cannot. The application of the *Griffin* rule to the bail system itself could lead to a more rational pretrial release system not only for indigents but for all defendants.

VI. CONCLUSION

Though federal courts have traditionally been reluctant to interfere with the sentencing process of state courts, a few such courts are beginning to break this pattern of nonintervention. They have based their decisions on the equal protection principles begun in *Griffin* and extended in such cases as *Williams* and *Tate*. Some of the courts have recognized that the issue of sentence credit leads into the more involved question of bail. Though not directly confronting this question, they do seem to formulate their sentence crediting decision so as to take a first step toward the application of equal protection to the area of bail. Minimumly they have held that sentence crediting is constitutionally mandated, at least for defendants denied bail because of indigency. In addition they have suggested that pretrial detention, if not to assure an accused's appearance at trial, is unconstitutional. Thus though the courts do not go so far as to declare unconstitutional a monetary bail system, they do seek to remedy some of its most adverse effects.

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[55] Bandy v. United States, 82 S. Ct. 13.