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CALCULATION OF TIME CREDITS FOR TEXAS PRISONERS

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Little is more important to a prisoner than the date of his ultimate release from incarceration. This concern and the complexity of the applicable law have contributed to the amount of litigation in the area of time credits. The Texas Code of Criminal Procedure provides some guidelines for the determination of time credits.[1] The code is supplemented by federal and state case law interpreting the statute, and filling gaps left by the legislature.[2] More specifically, the determination of time credits has been left to the courts in cases involving premature release, re-sentencing, and multiple jurisdictions.[3] Perhaps because the courts retain a certain amount of discretion in these areas, the decisions reflect some inconsistencies.

Flat time, or jail time, means actual calendar days from the beginning of incarceration.[4] "Good time" is commonly referred to as time off for good behavior, which is an accurate description. Separate statutes govern the determination of good time credits for felons and misdemeanants.[5] The stated purpose of each statute is to encourage discipline and to reward those prisoners who are "orderly, industrious and obedient,"[6] by commuting their sentences.[7] Commutation is granted to misdemeanants by the

1. *See* TEX. CODE CRIM. PRO. ANN. art. 42.03 (Vernon Supp. 1976-1977).

2. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969); Pruett v. Texas, 468 F.2d 51, 55 (5th Cir. 1972), *aff'd and modified in part*, 470 F.2d 1182 (rehearing en banc), *aff'd*, 414 U.S. 802 (1973); Robinson v. Beto, 426 F.2d 797, 798 (5th Cir. 1970). *See generally* H. HOFFMAN, PRISONERS' RIGHTS 9-1 to 9-41 (1976); H. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED 180-89 (1974).

3. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969) (re-sentencing); *Ex parte* Jasper, 538 S.W.2d 782, 784 (Tex. Crim. App. 1976) (multiple jurisdictions); *Ex parte* Downey, 471 S.W.2d 576, 577 (Tex. Crim. App. 1971) (premature release).

4. *See Ex parte* Bates, 538 S.W.2d 790, 792-93 (Tex. Crim. App. 1976); *Ex parte* Jasper, 538 S.W.2d 782, 784 (Tex. Crim. App. 1976).

5. *Compare* TEX. REV. CIV. STAT. ANN. art. 6184*l* (Vernon 1970) (felons) *with id.* art. 5118a (Vernon 1971) (misdemeanants).

6. *Id.* art. 5118a (Vernon 1971) & art. 6184*l* (Vernon 1970); *see Ex parte* Boyd, 152 Tex. Crim. 164, 166, 212 S.W.2d 156, 157-58 (1948).

7. Felons are classified by the Director of Corrections into one of three classes, according to their conduct. Prisoners in Class I receive twenty days per month deduction, therefore, for every thirty days served the prisoner receives credit for fifty days. *See Ex parte* Anderson, 149 Tex. Crim. 139, 142, 192 S.W.2d 280, 282 (1946); TEX. REV. CIV. STAT. ANN. art. 6184*l* (Vernon 1970). Prisoners in Class II receive ten days per month good time credit, and those in Class III receive none. State-approved trusties—model prisoners with special responsibilities and privileges—receive a deduction of thirty days per month served. TEX. REV. CIV. STAT. ANN. art. 6184*l* (Vernon 1970).

sheriff of the county where the prisoner is detained, and to felons by the director of the Prison Board.[8] In either case, commutation must be earned by the prisoner;[9] it is not a vested right[10] and may be forfeited if prison regulations are violated.[11] The forfeiture of good time credits is within the discretion of the sheriff or the disciplinary committee.[12]

A distinction must be made between the actual *granting* of good time credit and mandatory *consideration* for good time credit. The director of the Texas Department of Corrections has exclusive authority to grant good time credit to a convicted felon.[13] A court, therefore, may require only that the director consider a particular prisoner for good time credit.[14] This limitation on judicial authority is consistent with the purpose behind allowing credit, that of encouraging good conduct.[15] Good time credit is not a gratuitous benefit, but an earned privilege, and can only be granted when the Texas Department of Corrections has investigated the conduct of a prisoner.[16]

DEVELOPMENT OF CURRENT STATUTORY LAW

The statutes prescribing the procedural requirements for allocating good time credits also set forth guidelines for determination of credits earned prior to sentencing, or prior to transfer to the Texas Department of Corrections in the case of a felony conviction.[17] One statute, article 42.03 of the

8. TEX. REV. CIV. STAT. ANN. art. 5118a (Vernon 1971) (misdemeanants) & art. 6184*l* (Vernon 1970) (felons).

9. *Ex parte* Anderson, 149 Tex. Crim. 139, 142, 192 S.W.2d 280, 282 (1946).

10. *Ex parte* Boyd, 152 Tex. Crim. 164, 166, 212 S.W.2d 156, 158 (1948).

11. TEX. REV. CIV. STAT. ANN. art. 5118a (Vernon 1971) & art. 6184*l* (Vernon 1970).

12. TEX. REV. CIV. STAT. ANN. art. 5118a (Vernon 1971) (misdemeanants) & art. 6184*l* (Vernon 1970) (felons); *see Ex parte* Sanderson, 152 Tex. Crim. 180, 184, 212 S.W.2d 639, 642 (1948). In *Ex parte* Boyd, 152 Tex. Crim. 164, 212 S.W.2d 156 (1948), the defendant was in prison on fourteen concurrent felony convictions. He broke the prison rules by possessing seventy tubes of benzidine and by breaking into the locker of another inmate to steal some watches. The court upheld the forfeiture of good time credit and transfer from Class I to Class III status, per art. 6184*l*. *Id.* at 165, 212 S.W.2d at 157. The prisoner in *Ex parte* Sanderson, 152 Tex. Crim. 180, 212 S.W.2d 639 (1948) escaped and all good time was forfeited. *Id.* at 184, 212 S.W.2d at 642.

13. Gardner v. State, 542 S.W.2d 127, 129 (Tex. Crim. App. 1976); Laue v. State, 491 S.W.2d 403, 404 (Tex. Crim. App. 1973); TEX. REV. CIV. STAT. ANN. art. 6184*l* (Vernon 1970).

14. *See* Gardner v. State, 542 S.W.2d 127, 130-31 (Tex. Crim. App. 1976).

15. *See Ex parte* Boyd, 152 Tex. Crim. 164, 166, 212 S.W.2d 156, 157-58 (1948); TEX. REV. CIV. STAT. ANN. art. 6184*l* (Vernon 1970).

16. *See* Gardner v. State, 542 S.W.2d 127, 130-31 (Tex. Crim. App. 1976). Presumably, the same reasoning applies to misdemeanants as to felons.

17. TEX. CODE CRIM. PRO. ANN. art. 42.03 (Vernon Supp. 1976-1977), in pertinent part, provides:

> Sec. 2. In all criminal cases the judge of the court in which the defendant was convicted shall give the defendant credit on his sentence for the time that the defendant has spent in jail in said cause, from the time of his arrest and confinement until

Texas Code of Criminal Procedure, has been amended recently in order to conform with federal constitutional requirements.[18]

Pre-Sentence Flat Time

The Court of Appeals for the Fifth Circuit has held that there is no federal constitutional right to credit for time served prior to sentence.[19] There is, however, an important exception to this holding. A criminal defendant who, because of his indigency, is prevented from making bond and who is sentenced to the statutory maximum for his particular offense, is entitled to credit for pre-sentence time in jail.[20] This exception is required by the equal protection clause of the fourteenth amendment since the maximum sentence for any substantive offense must be the same for all defendants.[21] An indigent may not, therefore, be required to serve the maximum sentence *in addition to* his pre-sentence time, while his wealth-

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his sentence by the trial court.

Sec. 3. If a defendant appeals his conviction, is not released on bail, and is retained in a local jail as provided in Section 5, Article 42.09, pending his appeal, the judge of the court in which the defendant was convicted shall give the defendant credit on his sentence for the time that the defendant has spent in jail pending disposition of his appeal. . . .

Sec. 4. When a defendant who has been sentenced to imprisonment in the Department of Corrections has spent time in jail pending trial and sentence or pending appeal, the judge of the sentencing court shall direct the sheriff to attach to the commitment papers a statement assessing the defendant's conduct while in jail. On the basis of the statement, the Department of Corrections shall grant the defendant such credit for good behavior for the time spent in jail as he would have earned had he been in the custody of the department.

18. *See* Pruett v. Texas, 468 F.2d 51, 55 (5th Cir. 1972), *aff'd and modified in part*, 470 F.2d 1182 (rehearing en banc), *aff'd*, 414 U.S. 802 (1973); Robinson v. Beto, 426 F.2d 797, 798 (5th Cir. 1970). A state prisoner's entry into federal court is by writ of habeas corpus when he is challenging time credits allowed him. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). The prisoner must, however, exhaust his remedies in the state courts before the federal courts will intervene on writ of habeas corpus. Garza v. Texas, 474 F.2d 905, 906 (5th Cir. 1973); 28 U.S.C. § 2254(b) (1970).

19. Jackson v. Alabama, 530 F.2d 1231, 1237 (5th Cir. 1976); Gremillion v. Henderson, 425 F.2d 1293, 1294 (5th Cir. 1970). In Cobb v. Bailey, 469 F.2d 1068 (5th Cir. 1972) the court noted that Congress had passed legislation requiring the crediting of pre-sentence time, and stated, "[a]pparently such credit was not viewed as an absolute Constitutional right. If it were, then there would have been no necessity for the legislation." *Id.* at 1070; *cf.* McGinnis v. Royster, 410 U.S. 263, 277 (1973) (upholding New York statute disallowing good time credit for pre-sentence time against equal protection argument). *But see* Durkin v. Davis, 538 F.2d 1037, 1039-40 (4th Cir. 1976).

20. Martin v. Florida, 533 F.2d 270, 271 (5th Cir. 1976); Jackson v. Alabama, 530 F.2d 1231, 1237 (5th Cir. 1976); *accord*, Caraway v. State, 550 S.W.2d 699, 704 (Tex. Crim. App. 1977); *see* Hill v. Wainwright, 465 F.2d 414, 415 (5th Cir. 1972); Hart v. Henderson, 449 F.2d 183, 185 (5th Cir. 1971).

21. Tate v. Short, 401 U.S. 395, 398-99 (1971); Williams v. Illinois, 399 U.S. 235, 244 (1970).

ier counterpart serves less total time because he is able to secure bail prior to sentencing. On the other hand, a presumption arises that credit was given for pre-sentence time if the defendant's total jail time is less than the maximum allowable for the offense.[22]

In the past, Texas followed the Fifth Circuit, leaving pre-sentence credit to the discretion of the trial judge.[23] The court of criminal appeals found the Texas statutes to be constitutional, reasoning that pre-sentence confinement was not punishment, but merely a method of insuring the defendant's appearance at his trial.[24] In 1973 article 42.03 of the Texas Code of Criminal Procedure was amended to require that credit be given for pre-sentence time spent in jail.[25] The adoption of this amendment reflected the growing trend across the country in favor of allowing credit for pre-sentence time.[26] The change was not made retroactive, however,[27] and was attacked on that basis as an unconstitutional denial of equal protection.[28] The Fifth Circuit upheld the non-retroactive application of the statute, finding that since pre-sentence credit is not a constitutional right, the state had simply conferred a benefit.[29] The court based its holding upon a previous interpre-

22. Parker v. Estelle, 498 F.2d 625, 627 (5th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

23. *See, e.g., Ex parte* Allen, 548 S.W.2d 905, 907 (Tex. Crim. App. 1977); *Ex parte* Freeman, 486 S.W.2d 556, 558 (Tex. Crim. App. 1972); 1965 Tex. Gen. Laws, ch. 722, § 1, at 485 (current version at TEX. CODE CRIM. PRO. ANN. art. 42.03, § 2 (Vernon Supp. 1976-1977)).

24. Bennett v. State, 450 S.W.2d 652, 657 (Tex. Crim. App. 1970). One commentator indicated that the reasoning in *Bennett* was "worthy of the combined wits of the Red Queen and Colonel Cathcart. . . . Like Alice, one gets the feeling there's something wrong here somewhere." Schornhorst, *Presentence Confinement and the Constitution: The Burial of Dead Time*, 23 HASTINGS L.J. 1041, 1067-68 (1972).

25. TEX. CODE CRIM. PRO. ANN. art. 42.03, § 2 (Vernon Supp. 1976-1977).

26. *See, e.g.*, 18 U.S.C. § 3568 (1970) (pre-sentence credit mandatory); MASS. GEN. LAWS ANN. ch. 279, § 33A (1968) (pre-sentence credit mandatory). *See generally* Berger, *Equal Protection and Criminal Sentencing: Legal and Policy Considerations*, 71 NW. U.L. REV. 29 (1976); Schornhorst, *Presentence Confinement and the Constitution: The Burial of Dead Time*, 23 HASTINGS L.J. 1041 (1972); Note, *Sentence Crediting For The State Criminal Defendant—A Constitutional Requirement*, 34 OHIO ST. L.J. 586 (1973); Comment, *Presentence Custody Time Under California Penal Code Section 2900.5*, 3 PEPPERDINE L. REV. 157 (1975); Comment, *Credit for Time Served Between Arrest and Sentencing*, 121 U. PA. L. REV. 1148 (1973). The A.B.A. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3.6(a), at 363 (1974), *quoted in* Durkin v. Davis, 538 F.2d 1037, 1038 n.1 (4th Cir. 1976), provide:

> Credit against the maximum term and any minimum term should be given to a defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This should specifically include credit for time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to arrival at the institution to which the defendant has been committed.

27. *See* Harrelson v. State, 511 S.W.2d 957, 958 (Tex. Crim. App. 1974).

28. *See* Franks v. Estelle, 543 F.2d 567, 568 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 1561 (1977).

29. *See id.* at 568; Jackson v. Alabama, 530 F.2d 1231, 1238 (5th Cir. 1976). *Contra, In re* Kapperman, 522 P.2d 657, 659-62, 114 Cal. Rptr. 97, 99-102 (1974) (en banc). The Califor-

tation of a similar statute in Alabama, wherein the court found that a recalculation of credits would be an administrative burden outweighing the inequities resulting from prospective application of the statute.[30] A recalculation of these credits would not seem to present an impossible task since all that would be required is a simple mathematical computation of flat time credits for the affected prisoners.[31] The information necessary for this computation should be readily available in the prisoner's records.

Time in Jail Pending Appeal

The Texas Code of Criminal Procedure now provides mandatory credit for time spent in jail pending appeal.[32] Under prior Texas law, allowance of credit for time spent in jail pending appeal was discretionary with the trial judge.[33] The Fifth Circuit held this procedure to be a violation of due process requirements in *Robinson v. Beto.*[34]

The *Robinson* court held that once a right of appeal had been established by a state, due process required that a defendant's exercise of that right could not be unreasonably impeded.[35] The court reasoned that those defendants who chose to appeal their convictions ran the risk of longer imprisonment because the judge could choose not to credit them with custodial time pending appeal.[36] Threatened with the loss of that time, a prisoner

nia Supreme Court held that a similar non-retroactive provision was a denial of equal protection as a legislative classification which was not supported by a rational and legitimate state interest. *Id.* at 659-62, 114 Cal. Rptr. at 99-102. *See generally* 15 SANTA CLARA LAW. 223 (1974).

30. Franks v. Estelle, 543 F.2d 567, 568 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 1561 (1977); *see* Jackson v. Alabama, 530 F.2d 1231, 1238 (5th Cir. 1976).

31. *Cf.* Allen v. Henderson, 434 F.2d 26, 28 (5th Cir. 1970) (requiring retroactive application of North Carolina v. Pearce, 395 U.S. 711 (1969) since only mathematical computation of time credits required). The "effect on the administration of justice" is one of the criteria for determining whether a statute should have retroactive or prospective effect. *See* Stovall v. Denno, 388 U.S. 293, 297 (1967). For a general introduction to this area, see Stovall v. Denno, 388 U.S. 293 (1967); Ostrager, *Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations*, 19 N.Y.L.F. 289 (1973); Note, *Retroactivity of Criminal Procedure Decisions*, 55 IOWA L. REV. 1309 (1970); 5 UNIV. RICH. L. REV. 129 (1970).

32. TEX. CODE CRIM. PRO. ANN. art. 42.03, § 3 (Vernon Supp. 1976-1977).

33. *See* 1967 Tex. Gen. Laws, ch. 659, § 28 at 1743 (current version at TEX. CODE CRIM. PRO. ANN. art. 42.03, § 3 (Vernon Supp. 1976-1977)).

34. 426 F.2d 797, 798 (5th Cir. 1970). The fourteenth amendment due process clause insures that "action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice . . . ." Buchalter v. New York, 319 U.S. 427, 429 (1943). The due process clause exacts from the states "a conception of fundamental justice." Foster v. Illinois, 332 U.S. 134, 136 (1947).

35. Robinson v. Beto, 426 F.2d 797, 798 (5th Cir. 1970). *See also* North Carolina v. Pearce, 395 U.S. 711, 724 (1969). "Due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access to the courts. . . . A defendant's right of appeal must be free and unfettered." Robinson v. Beto, 426 F.2d 797, 798 (5th Cir. 1970).

36. Robinson v. Beto, 426 F.2d 797, 799 (5th Cir. 1970).

might be discouraged from appealing.[37] This criticism was especially valid since the prior statute had been construed to mean that the trial judge had exclusive authority to allow credit for time pending appeal.[38]

Good time credits

Both case law and the Texas Code of Criminal Procedure now require good time consideration for all time—including pre-sentence time and time pending appeal—spent in detention prior to transfer to the Texas Department of Corrections.[39] The Fifth Circuit's decision in *Pruett v. Texas*[40] extended the *Robinson* holding to include mandatory consideration for good time credits for time in jail pending appeal.[41] The court held that while neither of the good time statutes[42] alone was unconstitutional, their enforcement together constituted a denial of equal protection.[43] When the statutes were read together, all misdemeanants, and those felons who did not appeal, received good time credit for all the time they spent in jail.[44] Felons who appealed, however, did not receive good time credit for time

37. *Id.* at 799. *See also* North Carolina v. Pearce, 395 U.S. 711, 724 (1969).

38. *See, e.g.*, Vessels v. State, 467 S.W.2d 259, 264 (Tex. Crim. App. 1971) (judge on remand had no such authority); *Ex parte* Washburn, 459 S.W.2d 637, 639 (Tex. Crim. App. 1970) (habeas corpus judge had no such authority); Holcombe v. State, 448 S.W.2d 493, 493 (Tex. Crim. App. 1970) (court of criminal appeals had no such authority).

39. *See* Pruett v. Texas, 468 F.2d 51, 53-55 (5th Cir. 1972), *aff'd and modified in part*, 470 F.2d 1182 (rehearing en banc), *aff'd*, 414 U.S. 802 (1973); TEX. CODE CRIM. PRO. ANN. art. 42.03, § 4 (Vernon Supp. 1976-1977).

40. 468 F.2d 51 (5th Cir. 1972), *aff'd and modified in part*, 470 F.2d 1182 (rehearing en banc), *aff'd*, 414 U.S. 802 (1973). *See generally* 51 TEXAS L. REV. 348 (1973).

41. Pruett v. Texas, 468 F.2d 51, 53-55 (5th Cir. 1972), *aff'd and modified in part*, 470 F.2d 1182 (rehearing en banc), *aff'd*, 414 U.S. 802 (1973).

42. TEX. REV. CIV. STAT. ANN. art. 5118a (Vernon 1971) & art. 6184*l* (Vernon 1970).

43. Pruett v. Texas, 468 F.2d 51, 55 (5th Cir. 1972), *aff'd and modified in part*, 470 F.2d 1182 (rehearing en banc), *aff'd*, 414 U.S. 802 (1973). *See also* North Carolina v. Pearce, 395 U.S. 711, 718-19, 719 n.13 (1969); *Ex parte* Bennett, 508 S.W.2d 646, 647 (Tex. Crim. App. 1974). In McGinnis v. Royster, 410 U.S. 263 (1973) the Supreme Court upheld a New York statute disallowing good time credit for pre-sentence time. The Court held that in order to justify a distinction between treatment of prisoners in the application of good time credits in the face of an equal protection challenge, the only question was "whether the challenged distinction rationally furthers some legitimate, articulated state purpose." *Id.* at 270. In *McGinnis* the state purpose was to reward a prisoner's rehabilitative efforts, and since the county jails had no significant rehabilitation program, the denial of good time credits for time in the county jails prior to sentence was not a denial of equal protection. *Id.* at 270-77. Justice Douglas, dissenting, considered the place of a prisoner's confinement to be irrelevant since the inducement of good behavior was the real purpose for good time credits. *Id.* at 278 (Douglas, J., dissenting). The Texas legislature evidently found the arguments of the Fifth Circuit and Justice Douglas the more persuasive in enacting article 42.03. *See* TEX. CODE CRIM. PRO. ANN. art. 42.03, § 4 (Vernon Supp. 1976-1977).

44. *See* Pruett v. Texas, 468 F.2d 51, 55 (5th Cir. 1972), *aff'd and modified in part*, 470 F.2d 1182 (rehearing en banc), *aff'd*, 414 U.S. 802 (1973).

pending appeal, and were effectively punished for exercising their right to appeal.[45]

On rehearing in the *Pruett* case, the Fifth Circuit reluctantly concluded that the decision should have only prospective effect.[46] The court found that the Texas Department of Corrections would be unable to comply effectively with a retroactive order since inadequate records relating to behavior had been kept on felons in the county jails.[47] While the statute requiring mandatory flat time credit for pre-sentence time should have retroactive effect,[48] the same reasoning does not apply when good time credits are involved. Flat time credit may be determined by a simple calculation of actual time spent in jail. The determination of good time credits, on the other hand, is based on a review of the prisoner's conduct while in jail and more extensive recordkeeping is required.[49] The Fifth Circuit would therefore seem to be justified in not giving *Pruett* retroactive effect to the *Pruett* decision.

COMMON SITUATIONS NOT COVERED BY STATUTE

The Texas statutes now require flat time credit, and consideration for good time credit, for all time spent in custody under normal circumstances.[50] The courts retain a certain amount of discretion, however, in recurring problem areas not specifically treated by the statutes. When a prisoner is prematurely released, re-sentenced, or involved in offenses in multiple jurisdictions, a suit disputing the determination of his time credits frequently follows.

Premature Release

There are many combinations of circumstances which have resulted in the release of a prisoner before he has served his full sentence, including escape,[51] probation or parole,[52] clerical error,[53] failure of one jurisdiction to

45. *See id.* at 55; Robinson v. Beto, 426 F.2d 797, 798 (5th Cir. 1970).

46. Pruett v. Texas, 470 F.2d 1182, 1184 (5th Cir.) (rehearing en banc), *aff'd,* 414 U.S. 802 (1973).

47. *Id.* at 1184.

48. *See* notes 25-28 *supra* and accompanying text.

49. *See* Pruett v. Texas, 470 F.2d 1182, 1184 (5th Cir.) (rehearing en banc), *aff'd,* 414 U.S. 802 (1973). In at least one case where adequate records had been kept, a federal district judge held that since the reasoning in *Pruett* did not apply, the holding should not either. Good time credit was granted for the time spent in jail pending appeal. Kane v. Texas, 388 F. Supp. 1188, 1189 (S.D. Tex. 1975).

50. *See* TEX. CODE CRIM. PRO. ANN. art. 42.03 (Vernon Supp. 1976-1977).

51. *See Ex parte* Partridge, 161 Tex. Crim. 185, 188, 275 S.W.2d 682, 684 (1955).

52. *See* TEX. CODE CRIM. PRO. ANN. art. 42.12 (Vernon Supp. 1976-1977). If a prisoner's valid probation or parole is revoked, he receives no credit for the time spent out of jail. *Id.* art. 42.12 §§ 8(b), 22; *see, e.g.,* Quintero v. State, 469 S.W.2d 189, 190 (Tex. Crim. App. 1971)

promptly claim the prisoner from another jurisdiction,[54] and even invalid agreements between the authorities and the prisoner to postpone service of sentence.[55] Two lines of reasoning have developed in the federal courts for determining flat time credits for a prisoner who has been prematurely released.[56] The basic premise underlying both theories is that it is a denial of due process to require a prisoner to serve his sentence in installments if he was not at fault in obtaining his early release.[57]

In *Shields v. Beto*[58] a Texas prisoner was extradited to Louisiana. Texas placed no detainer on the prisoner and did not claim him when he was released by the Louisiana authorities after serving his Louisiana sentence. Twenty-eight years later, Texas authorities arrested the prisoner to require him to serve the remainder of his Texas sentence. The court held that Texas had waived jurisdiction over the prisoner by failing to reclaim him, and that it would be a denial of due process to require the defendant to serve out his sentence after such a lapse of time.[59] This "waiver theory" sounds in estoppel; the courts have reasoned that a prisoner should be able to depend on the action or inaction of the state in claiming him.[60] The end result in a case where the waiver theory is applied is the unconditional release of the prisoner,[61] thereby obviating the need to make a determination of time credits earned.

The second line of reasoning, the "credit theory," originated in 1930 with *White v. Pearlman.*[62] In *White* the prisoner was released due to a clerical

(probation); DeLeon v. State, 466 S.W.2d 573, 576 (1971) (probation); *Ex parte* Sellars, 384 S.W.2d 351, 352 (Tex. Crim. App. 1964) (parole).

53. *See, e.g.*, White v. Pearlman, 42 F.2d 788, 789 (10th Cir. 1930); *Ex parte* Bates, 538 S.W.2d 790, 793 (Tex. Crim. App. 1976); *Ex parte* Esquivel, 531 S.W.2d 339, 341 (Tex. Crim. App. 1976). In each of these cases, the prison records did not reflect the correct sentence.

54. *See* Shields v. Beto, 370 F.2d 1003, 1005-06 (5th Cir. 1967).

55. *See, e.g.*, Moneyhun v. State, 161 Tex. Crim. 19, 20, 274 S.W.2d 546, 547 (1955) (agreement with judge); *Ex parte* Morgan, 159 Tex. Crim. 241, 245, 262 S.W.2d 728, 730 (1953) (agreement with sheriff); *Ex parte* Wyatt, 29 Tex. Crim. 398, 400, 16 S.W. 301, 301 (1891) (agreement with sheriff).

56. *Compare* Shields v. Beto, 370 F.2d 1003, 1005-06 (5th Cir. 1967) *with* White v. Pearlman, 42 F.2d 788, 789 (10th Cir. 1930).

57. *See* Shields v. Beto, 370 F.2d 1003, 1005-06 (5th Cir. 1967); White v. Pearlman, 42 F.2d 788, 789 (10th Cir. 1930).

58. 370 F.2d 1003 (5th Cir. 1967).

59. *Id.* at 1005-06.

60. *See* Lanier v. Williams, 361 F. Supp. 944, 945 (E.D.N.C. 1973). *See also* Bailey v. Ciccone, 420 F. Supp. 344, 347 (W.D. Mo. 1976). The waiver theory was narrowed in Piper v. Estelle, 485 F.2d 245 (5th Cir. 1973) to apply only to those cases where the state was grossly negligent in failing to claim its prisoner. *Id.* at 246. "Shields v. Beto was not intended to constitute a trap for unwary state officials." *Id.* at 246.

61. *See* Shields v. Beto, 370 F.2d 1003, 1005-06 (5th Cir. 1967); Lanier v. Williams, 361 F. Supp. 944, 947-48 (E.D.N.C. 1973). *See generally* Piper v. Estelle, 485 F.2d 245, 246 (5th Cir. 1973).

62. 42 F.2d 788 (10th Cir. 1930).

error, and the court held that since the release was not due to escape, violation of parole, or the fault of the prisoner, he could not be made to serve his sentence in installments and should receive flat time credit for the time he was out of jail.[63] In applying the credit theory, the key determination in each case is what constitutes "fault."[64] Additionally, in certain cases, the prisoner may be required to take affirmative action to see that he serves his sentence.[65]

Instead of the unconditional release of the prisoner which is achieved when the waiver theory is applied, the prisoner under the credit theory merely receives credit for the time he was out of jail. Of course, if the entire term of his sentence has run while the prisoner was free, he will be released.[66] In any event, while he may receive flat time credit, he cannot receive good time credit for the time out of custody, even if he was not at fault.[67] Allowing good time credit for time not spent in custody would contravene the clearly stated legislative purpose of encouraging good behavior while in custody.[68]

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63. *Id.* at 789. *See also* Cox v. United States, 551 F.2d 1096, 1099 (7th Cir. 1977); Lanier v. Williams, 361 F. Supp. 944, 947 (E.D.N.C. 1973). In White v. Pearlman, 42 F.2d 788 (10th Cir. 1930), the court held:

> A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Certainly a prisoner should have his chance to re-establish himself and live down his past. Yet, under the strict rule contended for by the warden, a prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on ad libitum, with the result that he is left without even a hope of beating his way back. It is our conclusion that where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, that his sentence continues to run while he is at liberty.

Id. at 789. Texas has adopted the rationale of the *White* decision. *Ex parte* Downey, 471 S.W.2d 576, 577 (Tex. Crim. App. 1971).

64. *See, e.g., Ex parte* Bates, 538 S.W.2d 790, 793 (Tex. Crim. App. 1976) (clerical error not defendant's fault); *Ex parte* Partridge, 161 Tex. Crim. 185, 188, 275 S.W.2d 682, 684 (1955) (escape was defendant's fault); Moneyhun v. State, 161 Tex. Crim. 19, 20, 274 S.W.2d 546, 547 (1955) (agreement between sheriff and prisoner was defendant's fault).

65. *See Ex parte* Francis, 510 S.W.2d 345, 347 (Tex. Crim. App. 1974); *Ex parte* Rayburn, 146 Tex. Crim. 204, 205-06, 172 S.W.2d 505, 506 (1943). In each of these cases the defendant failed to present himself to the convicting court after his conviction was affirmed on appeal because no one contacted him. In *Rayburn*, the defendant actually presented himself at the penitentiary, but was denied admittance because his papers were not in order. *Id.* at 205-06, 172 S.W.2d at 506. In both cases the court held that the defendant was at fault for failure to comply with the terms of his appeal bond, requiring that he present himself to the convicting court. *Ex parte* Francis, 510 S.W.2d 345, 347 (Tex. Crim. App. 1974); *Ex parte* Rayburn, 146 Tex. Crim. 204, 205-06, 172 S.W.2d 505, 506 (1943).

66. *See Ex parte* Morgan, 159 Tex. Crim. 241, 245, 262 S.W.2d 728, 730 (1953).

67. *Ex parte* Bates, 538 S.W.2d 790, 793 (Tex. Crim. App. 1976); *see Ex parte* Esquivel, 531 S.W.2d 339, 341 (Tex. Crim. App. 1976).

68. *See Ex parte* Boyd, 152 Tex. Crim. 164, 166, 212 S.W.2d 156, 157-58 (1948); TEX. REV. CIV. STAT. ANN. art. 5118a (Vernon 1971) & art. 6184*l* (Vernon 1970).

Credit for Time Served on a Void Judgment[69]

Until 1969, a prisoner in Texas received no credit for time spent in jail on a void judgment.[70] The court of criminal appeals in *Ex parte Ferrell*[71] recognized that due process problems might exist, but refrained from amending its policy for reasons peculiar to that case.[72] The United States Supreme Court, in *North Carolina v. Pearce*,[73] settled the due process questions in 1969 by holding that, when re-sentencing for the same offense, the failure to credit time already served was a violation of the double jeopardy clause of the fifth amendment.[74] The Court also indicated that a prisoner should be given the benefit of any good time credits which had been earned.[75]

The *Pearce* decision has been applied retroactively by the Fifth Circuit, which reasoned that only a simple mathematical computation of time earned under the void sentence would be required to determine credit.[76] Presumably, good time earned in the Texas Department of Corrections could also be easily calculated, since records would have been kept of conduct during the void sentence just like any other sentence. Retroactive application of *Pearce* in this instance would not, therefore, present the problems which would have been encountered in a similar application of

69. The term "void" is used here to describe a judgment which has been reversed or set aside, for whatever reason, with the result that the prisoner is re-sentenced.

70. *See Ex parte* Nations, 164 Tex. Crim. 611, 612, 301 S.W.2d 675, 676 (1957); Ogle v. State, 43 Tex. Crim. 219, 233, 63 S.W. 1009, 1013 (1901). In *Ogle*, the prisoner served seventeen years on his first sentence for which he received no credit, although his second sentence was much lower than the first. *Id.* at 233, 63 S.W. at 1013.

71. 406 S.W.2d 440, 443 (Tex. Crim. App. 1966).

72. *Id.* at 443. In this case the defendant received a sentence of life imprisonment. He challenged this sentence in a federal habeas corpus proceeding on the ground that his attorney was not present at sentencing. The federal court ordered that he be released unless he was re-sentenced. Ferrell was re-sentenced to life, but this judgment was reformed to ten years by the court of criminal appeals. In a subsequent habeas corpus proceeding, Ferrell requested and was denied credit for the time he served under the original sentence. On a motion to consolidate, the court recognized that due process problems might exist in denial of credit, but refused to remedy the situation because it had decided that Ferrell really should have had to serve the original life sentence. *Id.* at 441-43. This case is a procedural jungle and is noteworthy only in that the court, after sixty-five years, began to perceive the unfairness of this doctrine.

73. 395 U.S. 711 (1969).

74. *Id.* at 718-19. "[T]he constitutional guarantees against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." *Id.* at 718-19. On the same day *Pearce* was decided, the Supreme Court held that the double jeopardy clause of the fifth amendment applies to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969).

75. North Carolina v. Pearce, 395 U.S. 711, 719 n.13 (1969).

76. *See* Allen v. Henderson, 434 F.2d 26, 28 (5th Cir. 1970).

the *Pruett v. Texas*[77] decision.[78]

In keeping with their decisions holding that credit for pre-sentence time is not constitutionally mandated,[79] the Fifth Circuit and the Texas Court of Criminal Appeals have refused to apply *Pearce* to pre-sentence time.[80] The court of criminal appeals has held that if pre-sentence credit was not granted in a case decided under the discretionary statute, such credit is not required by *Pearce*.[81] Since credit for time spent in jail pending appeal is a constitutional requirement,[82] however, it should be allowed for such time on re-sentencing.

The result of *Pearce* and its progeny is that, on re-sentencing, a Texas prisoner will receive credit for all the time spent in jail pursuant to his original sentence. Additionally, he will receive credit for pre-sentence time if he was originally sentenced under the current Code of Criminal Procedure, or if pre-sentence credit was granted by the judge under the old discretionary statute.[83] If pre-sentence credit was denied under the discretionary statute, *Pearce* does not require that it be given on re-sentencing.[84]

A situation analogous to the void sentence problem arises when a prisoner's death sentence is commuted to life—he is in effect re-sentenced. The importance of determining flat time and good time credits for prisoners with life sentences is in the computation of their parole eligibility dates.[85] The court of criminal appeals has held that individuals with death sentences which are commuted to life are entitled to flat time and consideration for good time credits for time spent in prison since the date of their admission,[86] as well as credit for time spent in jail pending appeal.[87] Pre-sentence time and good time credit for time in jail pending appeal would depend on the law in effect at the time of sentencing.[88]

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77. 468 F.2d 51 (5th Cir. 1972), *aff'd and modified in part*, 470 F.2d 1182 (rehearing en banc), *aff'd*, 414 U.S. 802 (1973).

78. *See* Pruett v. Texas, 470 F.2d 1182, 1184 (5th Cir.) (rehearing en banc), *aff'd*, 414 U.S. 802 (1973). *See also* notes 44-47 *supra* and accompanying text.

79. *See* Gremillion v. Henderson, 425 F.2d 1293, 1294 (5th Cir. 1970); *Ex parte* Allen, 548 S.W.2d 905, 907 (Tex. Crim. App. 1977); Bennett v. State, 450 S.W.2d 652, 657 (Tex. Crim. App. 1970).

80. *See* Parker v. Estelle, 498 F.2d 625, 627 (5th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Bennett v. State, 450 S.W.2d 652, 657 (Tex. Crim. App. 1970).

81. *See* Bennett v. State, 450 S.W.2d 652, 657 (Tex. Crim. App. 1970).

82. *See* Robinson v. Beto, 426 F.2d 797, 798 (5th Cir. 1970).

83. *See Ex parte* Allen, 548 S.W.2d 905, 907 (Tex. Crim. App. 1977) (pre-sentence credit formerly discretionary); TEX. CODE CRIM. PRO. ANN. art. 42.03, § 2 (Vernon Supp. 1976-1977) (pre-sentence credit now mandatory).

84. Bennett v. State, 450 S.W.2d 652, 657 (Tex. Crim. App. 1970).

85. Caraway v. State, 550 S.W.2d 699, 704 (Tex. Crim. App. 1977); *Ex parte* Esquivel, 531 S.W.2d 339, 340 n.1 (Tex. Crim. App. 1976).

86. *Ex parte* Enriquez, 490 S.W.2d 546, 547 (Tex. Crim. App. 1973).

87. *Ex parte* Freeman, 486 S.W.2d 556, 558 (Tex. Crim. App. 1972). *See also* Robinson v. Beto, 426 F.2d 797, 798 (5th Cir. 1970).

88. *See* Pruett v. Texas, 470 F.2d 1182, 1184 (5th Cir.), *aff'd*, 414 U.S. 802 (1973) (good

Multiple Jurisdictions

Frequently, a prisoner may already be in the custody of another jurisdiction when a conviction is obtained against him. This situation can occur when several offenses arise out of the same criminal episode or when the prisoner has committed more than one unrelated crime. In such cases, the Texas courts have held that when multiple sentences in different prosecutions are not expressly made consecutive; they are automatically made concurrent.[89] Section two of article 42.09 of the Texas Code of Criminal Procedure provides that a sentence "begins to run on the day it is pronounced."[90] This provision has been construed to give the prisoner flat time credit from the day sentence is pronounced, no matter where the defendant is in custody.[91] The defendant is considered to be in the "constructive custody" of the State of Texas.[92]

"Constructive custody" may attach prior to sentencing in some instances.[93] If the prisoner is in custody in one jurisdiction, and another jurisdiction places a detainer upon him, "constructive custody" begins at the time the detainer is issued.[94] The defendant will, therefore, receive flat time

time credit pending appeal; prospective effect); Kane v. Texas, 388 F. Supp. 1188, 1189 (S.D. Tex. 1975) (good time credit pending appeal; retroactive effect due to unique circumstances); Harrelson v. State, 511 S.W.2d 957, 958 (Tex. Crim. App. 1974) (pre-sentence credit; prospective effect).

89. *See Ex parte* Downey, 471 S.W.2d 576, 577 (Tex. Crim. App. 1971); *Ex parte* Reynolds, 462 S.W.2d 605, 606 n.1 (Tex. Crim. App. 1970).

90. TEX. CODE CRIM. PRO. ANN. art. 42.09, § 2 (Vernon Supp. 1976-1977).

91. *See, e.g., Ex parte* Williams, 551 S.W.2d 416, 417 (Tex. Crim. App. 1977) (federal prison); *Ex parte* Jasper, 538 S.W.2d 782, 784 (Tex. Crim. App. 1976) (Louisiana prison); *Ex parte* Iglehart, 535 S.W.2d 185, 187 (Tex. Crim. App. 1976) (federal prison). The federal statutes provide that the prisoner should receive credit for any days spent in custody *"in connection with the offense for which the sentence was imposed."* 18 U.S.C. § 3568 (1970) (emphasis added). A prisoner will not receive credit on his federal sentence unless he is actually in custody of the United States for the offense in question. *See* United States v. Williams, 487 F.2d 215 (5th Cir.), *cert. denied*, 416 U.S. 942 (1973).

92. *See Ex parte* Williams, 551 S.W.2d 416, 417 (Tex. Crim. App. 1977); *Ex parte* Jasper, 538 S.W.2d 782, 784 (Tex. Crim. App. 1976). There are some early Texas cases holding that a prisoner who is convicted and imprisoned in another jurisdiction while on parole or after escape from Texas is not entitled to credit on his Texas sentence while serving time in the other jurisdiction. *See, e.g., Ex parte* Spears, 154 Tex. Crim. 112, 114, 235 S.W.2d 917, 918 (1950); *Ex parte* Jones, 152 Tex. Crim. 346, 348, 214 S.W.2d 123, 124 (1948); *Ex parte* Drake, 151 Tex. Crim. 17, 20, 205 S.W.2d 372, 374 (1947). It may be reasonable to conclude that if the situation were to arise today, the court of criminal appeals would allow credit from the time a detainer was placed on the prisoner, reasoning that the prisoner was in the "constructive custody" of the State of Texas. *See Ex parte* Jasper, 538 S.W.2d 782, 784 (Tex. Crim. App. 1976); *Ex parte* Spates, 521 S.W.2d 265, 266 (Tex. Crim. App. 1975).

93. *See Ex parte* Jasper, 538 S.W.2d 782, 784 (Tex. Crim. App. 1976); *Ex parte* Spates, 521 S.W.2d 265, 266 (1975). *Spates* involved a probation revocation proceeding. Under the Texas deferred sentencing procedure, a probationer is not sentenced until probation is revoked. *See* TEX. CODE CRIM. PRO. ANN art. 42.12, § 3d(b) (Vernon Supp. 1976-1977).

94. *Ex parte* Jasper, 538 S.W.2d 782, 784 (Tex. Crim. App. 1976).

credit beginning on the date the detainer is filed.[95] On the other hand, if a court with a pending case against a prisoner being held in another jurisdiction on another charge does not place a detainer on him, the prisoner will receive no credit.[96] The court of criminal appeals has reasoned that presentence credit depends on the prisoner's being held in jail on the conviction in question—constructive custody and commencement of credit depend on some type of hold being placed on the prisoner so that he cannot be released inadvertently.[97]

Since the issuance of a detainer apparently has been left to the discretion of local authorities, a possible equal protection problem arises.[98] Under the requirements of the equal protection clause of the fourteenth amendment, disparity in treatment of prisoners can only be justified by a "legitimate, articulated state purpose."[99] If the disparate treatment is based solely upon the arbitrary or negligent failure of a district attorney to issue a detainer for a prisoner, resulting in one prisoner's receiving credit while another does not, then, it appears, the equal protection clause will not have been satisfied. It is quite possible, however, that a finding of gross negligence on the part of the officials in question would be required before the court of criminal appeals would allow credit even though no detainer had been filed.[100]

> The typical detainer is an informal document in which one law enforcement or corrections officer asks another to notify him when the wanted man is to be released so that he may be on hand to pick him up and return him to the requesting jurisdiction to answer a formal charge or even an informal accusation.

H. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED 478 (1974). *See also* TEX. CODE CRIM. PRO. ANN. art. 51.14 (Vernon Supp. 1976-1977) (Interstate Agreement on Detainers Act). Within Texas, a detainer may be effected by issuance of a capias. *See Ex parte* Spates, 521 S.W.2d 265, 266 (Tex. Crim. App. 1975); TEX. CODE CRIM. PRO. ANN. art. 23.01-.18 (Vernon 1966 & Supp. 1976-1977).

95. *See Ex parte* Jasper, 538 S.W.2d 782, 784 (Tex. Crim. App. 1976); *Ex parte* Spates, 521 S.W.2d 265, 266 (Tex. Crim. App. 1975).

96. *Ex parte* Alvarez, 519 S.W.2d 440, 443 (Tex. Crim. App. 1975).

97. *Id.* at 443.

98. *Compare Ex parte* Alvarez, 519 S.W.2d 440, 443 (Tex. Crim. App. 1975) (no detainer) *with Ex parte* Spates, 521 S.W.2d 265, 266 (Tex. Crim. App. 1975) (detainer). The court in *Spates* distinguished *Alvarez* on the basis that in *Alvarez* no detainer was filed, while in *Spates* one was filed. Neither opinion provides any satisfactory explanation for the filing of a detainer in one case and not in the other.

99. *See* McGinnis v. Royster, 410 U.S. 263, 270 (1973). *See also* Berger, *Equal Protection and Criminal Sentencing: Legal Policy Considerations*, 71 NW. U.L. REV. 29, 56 (1976); Schornhorst, *Presentence Confinement and the Constitution: The Burial of Dead Time*, 23 HASTINGS L.J. 1041, 1084-86 (1972); Note, *Detainers and the Correctional Process*, 1966 WASH. U.L.Q. 417.

100. *Cf.* Piper v. Estelle, 485 F.2d 245, 246 (5th Cir. 1973) (gross negligence required for waiver of jurisdiction in premature release cases). Although there may be some lapse of time before a detainer is issued for a defendant, the delay cannot be indefinite. A prisoner still retains his right to a speedy trial, even though he is in custody of another jurisdiction on an unrelated charge. Smith v. Hooey, 393 U.S. 374, 383 (1969).

Once a prisoner is in the "constructive custody" of the State of Texas, he may also receive consideration for good time credits.[101] The allowance of good time credit for time spent in another jurisdiction is a fairly recent development in Texas law.[102] Formerly, good time credit could not be earned on a Texas sentence while a prisoner was incarcerated in another jurisdiction;[103] the courts holding that the purpose of good time credits was to promote good behavior in Texas prisons.[104] In *Ex parte Jasper*,[105] however, the court of criminal appeals interpreted the new statute to require good time credit for all time spent in custody, regardless of where the detention occurred.[106] In another recent case, the court did not rely on the new statute, but held that in view of "efficient modern communications" there was no reason to deny such a prisoner consideration for good time credits.[107] The court of criminal appeals used different reasoning in these two cases to reach the same result—consideration for good time credits earned in another jurisdiction will now be allowed.[108]

Although the requirement that good time credit be awarded only for time spent in a Texas prison has been abrogated, the actual allowance of the credit still lies within the discretion of the Texas Department of Corrections after a review of the prisoner's conduct in the other jurisdiction.[109] Additionally, the prisoner must be in the actual, physical custody of the Department of Corrections before such credit will be given.[110]

CONCLUSION

The Texas Code of Criminal Procedure now provides that flat time and consideration for good time credit be mandatory for all time spent in custody on a particular offense.[111] A few areas, however, remain unclear. When a prisoner is prematurely released, for instance, allowance of time credits will depend on whether or not the release was due to his own fault.[112] The critical question in each case is the determination of what constitutes

101. *Ex parte* Williams, 551 S.W.2d 416, 418 (Tex. Crim. App. 1977); *Ex parte* Jasper, 538 S.W.2d 782, 785 (Tex. Crim. App. 1976).

102. *See Ex parte* Jasper, 538 S.W.2d 782, 785 (Tex. Crim. App. 1976).

103. *See* Holtzinger v. Estelle, 488 F.2d 517, 518 (5th Cir. 1974); Mills v. Beto, 477 F.2d 124, 125 (5th Cir.), *cert denied*, 414 U.S. 1005 (1973).

104. *See* Holtzinger v. Estelle, 488 F.2d 517, 518 (5th Cir. 1974).

105. 538 S.W.2d 782 (Tex. Crim. App. 1976).

106. *Id.* at 785.

107. *Ex parte* Williams, 551 S.W.2d 416, 418 (Tex. Crim. App. 1977).

108. *Compare Ex parte* Jasper, 538 S.W.2d 782, 785 (Tex. Crim. App. 1976) *with Ex parte* Williams, 551 S.W.2d 416, 418 (Tex. Crim. App. 1977).

109. *See Ex parte* Vasquez, 553 S.W.2d 383, 384 (Tex. Crim. App. 1977); *Ex parte* Williams, 551 S.W.2d 416, 418 (Tex. Crim. App. 1977).

110. *Ex parte* Williams, 551 S.W.2d 416, 418 (Tex. Crim. App. 1977).

111. TEX. CODE CRIM. PRO. ANN. art. 42.03 (Vernon Supp. 1976-1977).

112. *See Ex parte* Downey, 471 S.W.2d 576, 577 (Tex. Crim. App. 1971).

"fault." Potential problems also exist when a prisoner has cases pending in more than one jurisdiction. In such instances, credit will depend on whether a detainer has been issued.[113] It is in this area that serious constitutional questions are raised. When given the opportunity, the court of criminal appeals should provide a more definite framework for the determination of credit on multiple offenses.

113. *Compare Ex parte* Alvarez, 519 S.W.2d 440, 443 (Tex. Crim. App. 1975) (no detainer) *with Ex parte* Spates, 521 S.W.2d 265, 266 (Tex. Crim. App. 1975) (detainer).