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Criminal Law—Credit for Time Served Denied: *State v. King*, 180 Neb. 631, 144 N.W.2d 438 (1966)

Jarret C. Oeltjen
University of Nebraska College of Law, jarret.oeltjen@gmail.com

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CRIMINAL LAW CREDIT FOR TIME SERVED DENIED—*State v. King*, 180 Neb. 631, 144 N.W.2d 438 (1966).

David King, a thirty-six-year-old Negro with a high school education, was arrested on March 24, 1959. On the third day of his detention a preliminary hearing was held. King was formally charged with the crime of robbery on April 2, 1959. Then on September 24, 1959, in the District Court for Douglas County, Nebraska, defendant King entered a plea of guilty on the advice of the public defender. The district court rendered a sentence of eight years in the penitentiary at hard labor.

After five years of incarceration, prisoner King petitioned the United States District Court for the District of Nebraska for a writ of habeas corpus. In light of evidence introduced at the hearing, it appeared that King was induced to prepare and sign a statement as to his guilt after being subjected to physical and mental hazing. It was decided by the district court that the guilty plea was a result of this illegally obtained statement. Thus, the court in granting the writ held, on the basis of uncontradicted evidence, that the plea of guilty entered by petitioner was involuntary as a matter of law.[1]

In April, 1965, King was retried by the District Court for Douglas County, Nebraska, on the same charge of robbery. After a jury trial and a verdict of guilty, King was sentenced to a term of four years at hard labor in the state penitentiary.

The attorney who had represented King at the habeas corpus proceeding and the retrial, left the case at this time. The Supreme Court of Nebraska, on defendant's petition, granted King an attorney at state expense for the purpose of perfecting an appeal.[2]

On appeal the sole question before the court was whether the defendant-appellant should be allowed credit for the time served on the prior void conviction. The Supreme Court of Nebraska, holding adversely to the appellant, set forth in its opinion the following rule of law:

> [W]here a conviction and sentence are held void and on a subsequent trial a new sentence is imposed, defendant is not entitled to

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[1] King v. Sigler, Civil No. 763L (D. Neb., filed Dec. 29, 1964).

[2] State v. King, 179 Neb. 511, 138 N.W.2d 805 (1965). As a further point of interest see the dissent. *Id.* at 512, 138 N.W.2d at 806. The dissenters felt that the law was settled and they would have refused King an attorney at state expense, on the basis that the proposed appeal was without merit.

> credit as a matter of law on the second sentence for the time served under the original void conviction and sentence. . . . The crediting of time in such a situation is a matter of sound judicial discretion on the part of the sentencing court with which this court will not interfere. . . .[3]

The court appears to have borrowed the *rule* of denying credit from an annotation[4] where it is declared that such a view is in accord with the numerical majority of case law. The Nebraska justices espouse this view with little discussion of its origin or rationale. The denial of credit for time served has been based on several theories. The more prevalent of these are the "void sentence" doctrine and the "fear of double jeopardy."

The "void sentence" doctrine originated during the development of the habeas corpus proceeding as a device for reviewing criminal convictions.[5] The writ would not be granted unless the proceeding or judgment supporting the process was *absolutely void.*[6] Many courts then extended this prerequisite of absolute voidness to the extent that they treated time imprisoned under a subsequently reversed conviction as though the defendant had never been sentenced, as if the former proceeding had never existed.[7] The courts had a further reluctance to accord *any* recognition to the former proceeding because they feared the subsequent trial might be barred by double jeopardy.[8] "[I]f it were to be admitted that the defendant had once been *punished*, by even a single day in jail, for the same offense, then the only course would be to release him absolutely."[9]

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[3] State v. King, 180 Neb. 631, 634, 144 N.W.2d 438, 440 (1966).

[4] *Id.* at 633, 144 N.W.2d at 440. ,

[5] For a more complete discussion of the background of the "void sentence" doctrine see Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239, 240-43 (1951).

[6] McDonald v. Short, 190 Ind. 338, 343, 130 N.E. 536, 537 (1921). *Accord*, Franklin v. Biddle, 5 F.2d 19, 21 (8th Cir. 1925); *Ex parte* Patman, 1 Okla. Crim. 141, 95 P. 622 (1908). See also *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830).

[7] "A void sentence is no sentence." Knothe v. State, 115 Neb. 119, 128, 211 N.W. 619, 623 (1926). See also United States v. Harman, 68 Fed. 472, 474 (D. Kan. 1895).

[8] Such a feeling was caused from the result in *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1873), where the court said that: "The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." See also Whalen, *supra*, note 6, at 243.

[9] Whalen, *supra*, note 5, at 243.

Even though the rationale underlying the creation of the rule —a fiction from its inception—is no longer considered applicable to modern law, the rule still persists. The only apparent reason for retaining the rule would be a desire to discourage appeals, or at least to attempt to limit the number of persons applying for post-conviction remedies.

In the years following World War II (or even since the *Betts v. Brady*[10] decision in 1942), the United States Supreme Court has decided numerous cases which set forth certain constitutional rights and guarantees of accused persons. Although some of these decisions such as *Mapp v. Ohio*[11] were held not to be applicable retroactively,[12] many have been held to be retroactive in nature.[13] As many of these guarantees apply to convictions in state courts, the judges and prosecutors alike might well fear that a large number of cases may have to be relitigated. They seem to believe the courts will become overrun with appeals, retrials, and petitions for habeas corpus. It has been estimated that in Florida alone, one retroactive application of the principle of *Gideon v. Wainright*[14] might result in the release of 5,093 convicts who had no appointed counsel at trial.[15] The underlying basis may be to dissuade prisoners from seeking post-conviction remedies; the courts appear to be using a multiplicity of unfounded reasons and distinctions to support such decisions as the *King* case which do, in fact, tend to discourage prisoners from seeking post-conviction remedies.

One such distinction is made by the court in the *King* case. Many of the cases cited by appellant King in his appellate brief deal with a situation where the conviction was valid but the sentence rendered by the trial court was void. One of these cases, *Freeman v. State*,[16] sets forth a statement of what the court in that case considers the "modern rule,"[17] which requires that credit

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10 316 U.S. 455 (1942).

11 367 U.S. 643 (1961).

12 Linkletter v. Walker, 381 U.S. 618 (1965).

13 *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Massiah v. United States, 377 U.S. 201 (1964).

14 372 U.S. 335 (1963).

15 Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

16 87 Idaho 170, 392 P.2d 542 (1964).

17 "In cases dealing with resentencing necessitated by the invalidity of the original sentence, but not involving a new trial between the first and second sentence, the courts are not in agreement on the question whether time served under the first sentence is to be credited against time served under the second. In some jurisdictions, allowance of such credit is provided for by statute. In jurisdictions lacking such a stat-

be granted. The Nebraska court, though, felt it was not to be guided by this particular line of cases for the simple reason that the rules were different for a void sentence than they were in the case of an invalid conviction. Without any discussion of the underlying rationale for such a distinction or whether in either instance credit should or should not be required, the court dismissed this line of authority by stating, "it does not involve the precise question we have before us."[18]

At first glance it seems plausible that such a distinction should be made, but upon close scrutiny there appears to be little if any difference. The ultimate result varies little whether the sentence or the conviction be void; had the defect not been discovered and subsequently corrected, the prisoner would not have been subjected to the additional punishment. The state could have no more of a legitimate interest in granting or denying the defendant credit in one case than in the other, nor could such a distinction be upheld on any type of "public policy" argument. The public interest in appropriate punishment would be identical in either case. If it be thought that the additional punishment is required for a specific purpose, *i.e.*, deterrence or rehabilitation, whether or not such purpose be logical or reasonable, it would have to be applicable in either instance or render the law arbitrary and highly inconsistent.

Besides the apparent lack of rationale in making such a distinction between void convictions and void sentences, there is an added touch of irony in the opinion in that the court cites as authority for the proposition that the decision in the *King* case has been the law of the state for many years, several Nebraska cases *all* of which deal with defects in the *sentence*.[19] The court thus takes the position of disallowing as authority the appellant's cases which deal with void sentences, but on the other hand apparently using this same type of case authority to support its decision. But as explained above, since the distinction between the results of a void sentence and that of a void conviction seems arbitrary, such a distinction should not have been made at all.

Disregarding any inconsistency in using the Nebraska cases as

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ute, what appears to be the modern (and it is submitted, the better) view is that such an allowance is proper." *Id.* at 184, 392 P.2d at 550, citing Annot., 35 A.L.R.2d 1283, 1285 (1954).

18 State v. King, 180 Neb. 631, 633, 144 N.W.2d 438, 439 (1966).

19 McCormick v. State, 71 Neb. 505, 99 N.W. 237 (1904), void or erroneous sentence; Knothe v. State, 115 Neb. 119, 211 N.W. 619 (1926), double sentence for same offense; Crommett v. State, 115 Neb. 399, 213 N.W. 743 (1927), conviction valid but invalid judgment; Cole v. Fenton, 103 Neb. 802, 174 N.W. 509 (1919), invalid sentence.

evidencing the past rule in Nebraska, it is still not at all clear that they would be binding authority for the proposition before the court in the *King* case. Since the most recent case cited was decided in 1927 and none of the Nebraska cases cited was decided primarily on the credit issue,[20] it appears that the court was not inextricably bound by any precedent. In the absence of Nebraska law directly on point, the court should have been free to choose the rule of law most in accord with the present trends in the area rather than choose to deny credit in the absence of any statutory guidance.

It is obvious the court feared that to require credit to be given in such a case would be an act of judicial legislation, perhaps to the extent of upsetting the so-called "balance of power" or by usurping a legislative function. But, the fact is, the court would not be pioneering in an entirely new field as several courts in other jurisdictions have already decided to require credit and they reached this result without the aid of a statute.[21] Actually, despite the court's apparent reluctance to "make law," by holding as it did in the absence of any binding authority, the court did in effect make law in deciding against the allowance of credit.

The court then tries to ease the impact of the decision by asserting that if credit is to be required or even allowed, it should be left solely to the discretion of the trial court.[22] That the trial

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[20] The two main Nebraska cases cited by the court on which the other cited cases all rely are McCormick v. State, 71 Neb. 505, 99 N.W. 237 (1904), and Knothe v. State, 115 Neb. 119, 211 N.W. 619 (1926). The *McCormick* case was concerned with a situation where the defendant was seeking credit for time served during a pendency of his proceeding in error. It was decided that by his failure to obtain a suspension of his sentence during such proceedings, he had waived any objection; thus he was not punished twice for the same offense. In the *Knothe* case the defendant was fined $100 *and* sentenced to a jail term for the crime of boot-legging. The statutory punishment for the crime was a fine of $100 *or* a jail term—not both. The court held that the double sentence was void and the fact that the defendant had paid the fine could not render it valid for any purpose. Since a void sentence is treated as no sentence, the trial court was free to resentence the defendant within its discretion and the statutory bounds. Thus in one instance we have a situation which concerns a failure to follow statutory procedure while the latter case is based upon the extinct "void sentence doctrine."

[21] See note 44, *infra*.

[22] This strictly follows the theory that the trial court should be permitted to use its discretion in matters concerning sentencing, and an appellate court will not disturb the decision unless it be found that the trial court grossly misused this discretion. *E.g.*, State v. Burnside, 181 Neb. 20, 146 N.W.2d 754 (1966).

court has discretion in this area would seem to be but an arbitrary and superficial reason for the denial of credit by the appellate court.[23] In the majority of instances, discretion in the trial court would be as effective to deny credit as an absolute prohibition. By leaving the decision to the discretion of the trial court, credit may, in effect, be entirely denied, since for all practical purposes under our present system of courts, there is no way to ascertain whether credit has been given, whether it has even been considered or on what basis the decision as to the particular punishment rests. Normally the record will show none of this, so there is nothing in such a case as *King* on which an appellate court could base a finding that the trial court abused its discretion. A misuse of this discretionary power would be apparent only in those grossly unjust cases that would not escape the scrutiny of an appellate review regardless of the particular jurisdiction's law as to the propriety of judicial review of the lower courts' sentencing procedures. In any event, there should never be a rule that would encourage or permit the trial court to disregard completely the more than five years already served in prison by the defendant-appellant almost as if the that punishment had never existed.

The court further attempts to narrow its holding by a reference to the fact that the total sentence to be served is within the statutory bounds set by the legislature.[24] Though, as such, it may strengthen the court's position, a showing that the questioned procedure still results in a total sentence within statutory bounds does not relieve the legal result from a very close examination.[25] Whether the defendant is required to serve one extra year in prison or twenty should not be the determining factor. The inquiry should be into the reasons for this increased punishment.

To further clarify its position as to a prisoner's rights and remedies in post-conviction procedures, the court states the following as being applicable to the general type of situation present in the *King* case:

> [I]n such a case the defendant has no assurance, and is entitled to none as a matter of law, that he has everything to gain and nothing to lose. In *Shupe* v. *Sigler*, this was pointed out in the court's opinion as follows: "In conclusion, it should be pointed out to Mr. Shupe and the many others who are filing petitions for

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[23] See Patton v. State, 256 F. Supp. 225, 227 (W.D.N.C. 1966); Agata, *Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision*, 23 MONT. L. REV. 3, 14-16, 53-54 (1963); Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239, 253-54 (1951).

[24] NEB. REV. STAT. § 28-414 (Reissue 1964).

[25] See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

> a writ of habeas corpus in this court, that it is possible that some may be doing themselves more harm than good. They may not have 'nothing to lose and everything to gain' in filing for the 'great writ.' . . . For many of them the bright rainbow and the hopes engendered by *Fay v. Noia*, and the other habeas corpus cases recently decided by the United States Supreme Court, may turn out to be an illusory rainbow with only a 'pot of fool's gold' for its seeker."[26]

By quoting the above passage and emphasizing the "everything to gain and nothing to lose" passage, the court would have us believe the defendant should have to "gamble" to achieve a fair and error free trial. The defendant is given a choice of waging the years he has spent in prison against the chance of acquittal on retrial, the odds seemingly being in the state's favor; or on the other hand the prisoner may remain in prison for the duration of his term, forego any possibility of retrial, and thus maintain the status quo. At least by taking the latter alternative the prisoner is assured that his sentence will not exceed the term he is presently serving. The only persons who may wish to gamble in such a situation are those who, such as "lifers" and the prisoners on "death row," as a matter of fact *have nothing to lose and everything to gain.*

In the opinion, the court does not state that it is attempting to discourage appeals, nor is it contended that the court consciously intends that to be the result, but it is extremely difficult to infer otherwise from such a ruling. If the intent or even the result is to discourage any person from availing himself of post-conviction remedies, the holding in the *King* case would definitely be totally inconsistent with the letter and spirit of the Constitution as interpreted by recent United States Supreme Court decisions recognizing certain constitutional guarantees.[27] Thus, the *King* type of ruling is little more than a gimmick or ploy to limit retroactive application of constitutional guarantees set forth in such decisions as *Gideon*[28] and *Massiah*.[29]

Although one of the main theories comprising the rationale behind any type of punishment is deterrence, rulings and holdings such as that in the *King* case put the idea of deterrence to a new and unjustifiable application—to *deter* convicts from consum-

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[26] State v. King, 180 Neb. 631, 635, 144 N.W.2d 438, 440 (1966).

[27] See Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); Cochran v. Kansas, 316 U.S. 255 (1942). Both cases appear to hold that harsher treatment of persons because they pursued post conviction remedies to test constitutional claims is a violation of equal protection, contrary to any legitimate governmental interest.

[28] Gideon v. Wainwright, 372 U.S. 335 (1963).

[29] Massiah v. United States, 377 U.S. 201 (1964).

ing the state's time and money as well as clogging the courts. Such an application presents a dual inquiry: (1) Is additional punishment the proper instrument to be used as the means to achieve the desired end and (2) does the state have any interest in the likely actual result, namely the preservation of erroneous judgments?[30]

These inquiries are discussed in a very recent case, *Patton v. State*,[31] which answers both of them in the negative. In the *Patton* case the facts are very similar to those before the Nebraska court in the *King* case. Eddie Patton was convicted on armed robbery and sentenced to twenty years in prison. Four years later Patton was awarded a new trial on the basis of *Gideon v. Wainwright*[32] because at his first trial he requested a court-appointed attorney and such request was denied. On retrial Patton was again sentenced to a term of twenty years in prison. Even though the lower court, as evidenced by the transcript,[33] *considered* the prior imprisonment, the appellate court, in an opinion written by Judge Craven, held that a "denial of credit for time served while in the de facto status of state prisoner is so fundamentally unfair as to constitute a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution."[34] The opinion continues by pointing out that the effect of the denial of credit "is to inhibit the right to petition for a new trial." This is so, according to Judge Craven, because other prsioners will conclude, whether their conclusions be right or wrong, that the defendant was punished for obtaining a new trial. The good motives of the judges are not enough and regardless of intentions, "the imposition of such a penalty inhibits the right to petition for a new trial and unconstitutionality conditions that right."[35]

Professor Van Alstyne has also suggested that a denial of credit may well be within the ambit of the "equal protection" clause.[36] He feels that in light of the increased use of the equal

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30 See generally People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677 (1963).

31 256 F. Supp. 225 (W.D.N.C. 1966). See also Hill v. Holman, 255 F. Supp. 924 (N.D. Ala. 1966).

32 372 U.S. 335 (1963).

33 Patton v. State, 256 F .Supp. 225, 227 (W.D.N.C. 1966).

34 *Id.* at 236.

35 *Id.* at 236. The court cites as authority for its propositions: Fay v. Noia, 372 U.S. 391 (1963); Green v. United States, 355 U.S. 184 (1957); United States *ex rel* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677 (1963).

36 Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606, 636-39, (1965). See also Whalen,

protection clause since 1950, it could well lend itself to application in this area. In further developing his proposition, he suggests that to be able to adjust the sentences of only those retried or resentenced and not all of the prisoners is as basically unequal, though less obvious, as if a state board were set up to review only the sentences of Negro prisoners but to permit all others to stand. Further, he suggests, generally to invoke the equal protection clause, a showing need not be made of the underlying motives of the rule under attack. Thus one should not have to show that the practice is to *deliberately* frustrate post-conviction remedies. "It is enough that the practice has that effect, and that it is not otherwise defensible as a necessary means for effectuating legitimate public policy."[37]

Another, although perhaps at the present time weaker,[38] constitutional argument may be presented on the basis of "double jeopardy"[39] or cruel and unusual punishment."[40] The gist of a double jeopardy argument would necessarily resemble the following: The conviction of a crime and the imposition of a specific sentence amounts to an implied acquittal of any greater crime or longer sentence for the same act. By seeking a post-conviction

Resentence Without Credit for Time Served: Unequal Protection of the Laws, 35 MINN. L. REV. 239 (1951).

[37] Van Alstyne, *supra* note 36, at 639. "In Griffin v. Illinois, 351 U.S. 12 (1956), there was no evidence that the requirement of a transcript for appeal was imposed for the purpose of disabling indigents. It was enough that the effect of the requirement was economically discriminatory, that it affected a significant (statutory) right of appeal, and that failure to provide free transcripts was not due to some compelling and legitimate public policy unsusceptible to satisfaction by less discriminatory alternative means. See also Douglas v. California, 372 U.S. 353 (1963)." *Id.* at n. 93.

[38] It is a weaker argument in that as the law presently stands the "waiver doctrine" is in full force. Although a defendant while he is serving a prison term may not be subjected to a greater sentence for the same offense, he is said to have "waived" this right by taking advantage of post conviction remedies thus waiving any right as to the punishment already inflicted, and any double jeopardy defense. *E.g.*, King v. United States, 98 F.2d 291 (D.C. Cir. 1938). This doctrine has been criticized in Green v. United States, 355 U.S. 184, 191-94 (1957); Van Alstyne, *supra* note 36, at 626-28 (1965); Agata, *Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision*, 25 MONT. L. REV. 3, 20-21 (1963).

[39] As the double jeopardy clause of the Federal Constitution has not yet been applied to the state, Palko v. Connecticut, 302 U.S. 319 (1937), this argument would have to be based on NEB. CONST. art. 1, § 12.

[40] Any argument embodying the "cruel and unusual punishment" clause would have to be based on the same "fairness" principles implicit in the "due process" and "equal protection" arguments.

remedy, the defendant should not be found to have waived this implied acquittal. Thus, in effect the sentence at the first trial would operate as an upper limit to bar by reason of double jeopardy any punishment in excess of that awarded at the first trial. When computing the time served, it would have to be the actual, total time spent in prison plus the sentence imposed at the second trial.[41]

The whole argument boils down to the proposition that constitutional guarantees would mean nothing if one has to fear invoking them. Thus in order to protect these "rights" from becoming hollow, people should be protected in invoking them. If for no other reason, a prisoner on retrial or on resentence should be entitled to credit just out of a sense of fairness and justice, as there can be no legitimate reason to require a holding to the contrary unless the state has some right to be "compensated" for the inconvenience caused by retrial.[42] Clearly such a reason is totally preposterous and thus it would appear that, "since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal."[43] Denial of credit for time served can be little more than such an unreasonable condition.

Since the highest court of Nebraska has made explicit its views on the particular subject, the only open avenue to establish the requirement of credit for time served in Nebraska may be through the legislature. Although many jurisdictions have reached the desired results without the aid of a statute,[44] many states, in order to codify the law, have enacted statutes requiring that credit be given as a matter of law.[45] The military in their code also have a section

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41 Such an argument may be based on People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677 (1963), and Green v. United States, 355 U.S. 184 (1957). Such an argument would have to stress the decreasing distinction between capital and non-capital cases such as evidenced by Gideon v. Wainwright, 372 U.S. 335 (1963). Even so, such an argument may be difficult to maintain in the absence of a ruling, either on a state or federal level, that a harsher punishment may not be imposed on retrial.

42 See generally Agata, *supra* note 38. The author bases his arguments that credit should be allowed almost entirely on non-constitutional and equitable principles.

43 People v. Henderson, 60 Cal. 2d 482, 497, 386 P.2d 677, 686 (1963).

44 The following jurisdictions have allowed credit for time served in cases where the conviction was void and they did so in the absence of statute: Hill v. Holman, 255 F. Supp. 924 (N.D. Ala. 1966); Patton v. State, 256 F. Supp. 225 (W.D.N.C. 1966); Lassiter v. State, 166 So. 2d 159 (Fla. 1964); Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922 (1952); Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948).

45 Below is a partial listing of state statutes that require that credit be

requiring credit, which code also prohibits a harsher punishment on rehearing or resentence.[46] Furthermore, the proposed Model Penal Code also deals with the problem and explicitly requires that credit be granted.[47]

Regardless of how it is achieved, either by the courts or by the legislature, Nebraska should establish a system for granting credit for time served, as a matter of law. The rule of *State v. King* is not fair.

PROPOSED STATUTE

Section (a) When a judgment of conviction is vacated, reversed, set aside, or otherwise remanded and on retrial the defendant is again convicted of the same crime, the maximum term of the new sentence thereafter imposed shall be limited in duration by the sentence under the vacated, reversed, set aside or otherwise remanded judgment of conviction less any time defendant spent imprisoned under such conviction and sentence.

Section (b) When a sentence is subsequently reversed, vacated, or annulled, on resentencing the maximum term of the new sentence thereafter imposed shall be limited in duration by the prior reversed, vacated, or annulled sentence less any time defendant spent imprisoned under such sentence.

Section (c) This act shall also be a basis of review upon its effective date for any one presently imprisoned contrary to the provision of either section (a) or (b) of this act.[48]

Jarret C. Oeltjen '68

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allowed on retrial: ARK. STAT. ANN. § 43-2728 (1947); CAL. PEN. CODE § 2900.1 (West 1956); ILL. ANN. STAT. ch. 38, § 121-14 (Smith-Hurd 1964); IOWA CODE ANN. § 793.26 (1950); KY. REV. STAT. § 197.041 (1962); N.D. CENT. CODE § 29-28-34 (1960). This list is not meant to be exhaustive; for a more complete listing see Agata, *supra* note 38, at 65-68.

[46] 10 U.S.C. § 863(b) (1956).

[47] MODEL PENAL CODE § 7.09(a) (Proposed Official Draft, 1962).

[48] For other proposed statutes see Agata, *Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision*, 23 MONT. L. REV. 3, 68-74 (1963); MODEL PENAL CODE § 7.09(a) (Proposed Official Draft, 1962).