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How Much Jail Time Does a Sentenced Defendant Actually Serve?
Thomas P. Franczyk, Esq.

HOW MUCH JAIL TIME DOES A SENTENCED DEFENDANT ACTUALLY SERVE?

Thomas P. Franczyk
Deputy for Legal Education
Assigned Counsel Program
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INTRODUCTION:

When it comes to sentencing, the amount of jail (prison) time that the court pronounces when judgment is entered (CPL 1.20[13]) and the time the defendant/prisoner actually spends behind bars is seldom the same (except, perhaps, when the defendant gets “time served” and has no other detainers.)

Unbeknownst to many outside of the criminal justice system, defendants will have their sentence time credited and reduced by jail time (JT) spent in custody prior to the imposition of sentence, (CPL 70.30[3].) Defendants may also have their maximum term shortened (within the discretion of State Corrections Authorities or the Sheriff in the case of a local definite sentence) by up to a third of that time for GOOD BEHAVIOR (including willing and efficient performance of duties and compliance with programs) while in prison. (PL 70.30 [4][a][b], CL 803[1], 804[1]).

So, for example, if a defendant charged with Criminal Contempt 2d degree, (PL 215.50 [3]) a class A misdemeanor (QUALIFYING OFFENSE FOR BAIL PURPOSES per CPL 510.10[4]), was arrested on January 1, 2021 for violating an Order of Protection, pled guilty to Attempted Criminal Contempt 2d degree, a class B misdemeanor, on February 1st, (after spending 30 days in the Holding Center), and was sentenced on that date to 60 days in jail, (30 days less than the maximum possible sentence), his sentence time (ST) spent in the County Correctional Facility (CCF) will have been reduced by the 30 days of JT spent in the Holding Center before sentence was imposed.

And, if the defendant earned GOOD TIME CREDIT (GTC) while serving his sentence, that would serve to reduce his time in jail by one-third (i.e., 20 days) of the 60 days resulting in 40 days. Consequently, when sentenced was pronounced the defendant actually owed only 30 days (because of the JT credit), and, assuming he behaved in jail, he would have served only 40 days (minus the 30-day JT credit). Best case scenario, then, the defendant should have ended up spending ten more days in jail as of February 1st, 2021, and should have been out by February 11th.

IT’S COMPLICATED:

The situation can become much more complicated when the defendant is: arrested on one charge and is served with a detainer/warrant for another charge while in custody on the first one; arrested on a new charge while at liberty on the first; sentenced on one charge while awaiting trial or disposition on another; sentenced at the same or different times for multiple offenses in the same or different jurisdictions; and the sentences are either ordered to run concurrently or consecutively.

The nature of the sentences can also have a significant impact on how much time the defendant will actually spend in prison, whether:

- DEFINITE (for a specified period of time in a local correctional facility (PL 70.15);
- INDETERMINATE (expressed in a minimum and maximum range with the defendant becoming eligible for parole release after serving the minimum period and requiring release after serving 2/3rds of the maximum term, assuming good behavior, [PL 70.00]);or
- DETERMINATE (PL 70.02), for violent felonies, drug felonies(PL 70.70) or sex felonies (PL 70.80), (requiring the defendant two serve 6/7ths of the specified term followed by post release supervision [PRS]),
- and whether they are imposed to run concurrently or consecutively,

Subsequent violations of parole or PRS and new arrests and convictions while on such release can muddy the waters even more.

Not surprisingly, the local and state corrections authorities have commitment clerks and committees assigned to sort it all out and give credit for JT where credit is due and deny it where it does not apply. Such as where JT credit has been applied to a previously imposed sentence per PL 70.30[3]). In such case, a prisoner cannot rub the lamp a second time and expect the corrections genie to apply such credit to another sentence. If the defendant believes that he/she has been improperly denied JT credit, the remedy is to bring an Article 78 proceeding and seek to overturn the determination by the local Sheriff or DOCCS.

SOME JAIL TIME RULES:

The New York State Commission of Corrections (NYSCOC) Handbook for Local Correctional Administrators (scoc@ny.gov) has set forth a number of rules and hypothetical scenarios for calculating JT credit in accordance with PL Article 70 and pertinent case law.

Rule One:

An inmate is entitled to have ALL TIME SPENT IN CUSTODY on a criminal charge credited to the sentence that he/she receives upon conviction of that charge. (PL 70.30[3]).

Therefore, an inmate's sentence of imprisonment MUST BE CREDITED with all time spent in custody prior to the COMMENCEMENT of sentence which, in the case of a DEFINITE sentence, commences when he/she is RECEIVED by the institution specified in the commitment (PL 70.30[2]), and, in the case of a state (INDETERMINATE or DETERMINATE) sentence, when he/she is received by NYSDOCS. (PL 70.30[1]).

For example: a defendant arrested and jailed for PL 215.50(3) (A misdemeanor) on 1/1/20 who is sentenced to 90 days on 2/15/20 (after pleading guilty on 1/15/20 to PL 110-215.50[3], a B misdemeanor), would be entitled to JT credit (assuming he remained in custody), from 1/1/20 to 2/14/20 (i.e., 45 days). The time after that would be sentence time (ST).

On a 90-day sentence, the defendant would have already served half of that time as of the sentence date. He would appear, at first glance then, to owe 45 more days. However, assuming he received one-third time-off for good behavior (thereby reducing his 90-day sentence to 60 days), he would actually owe only 15 days (i.e. 60 minus 45 days).

Rule Two:

An inmate does NOT receive JT credit for time served after sentence is pronounced by the court and the defendant commences serving the sentence.

EXAMPLE: As above, the defendant received JT credit from 1/1/20 through 2/14/20 BUT NOT INCLUDING 2/15/20 which commences the defendant's SENTENCE TIME.

Rule Three:

Where an inmate is held on MULTIPLE CHARGES which culminate in MORE THAN ONE SENTENCE, JT credit MUST BE APPLIED AGAINST ALL OF THE CHARGES ON WHICH HE/SHE IS HELD as long as there are NO PREVIOUSLY IMPOSED SENTENCES to which the inmate is subject. (PL 70.30 [3]).

Therefore, when an inmate is held on several charges and HAS NOT YET BEGUN SERVING A SENTENCE for any one of them, JT credit MUST BE APPLIED toward ALL OF THE CHARGES on which he/she is held.

EXAMPLE: On 1/1/20, D is arrested in Buffalo and held on CHG #1.
2/1/20: A warrant/detainer is lodged for CHG #2 (also committed in Buffalo).
3/15/20: D is sentenced on to SIX MONTHS in ECCF on each charge,

Here, D is entitled to JT credit from 1/1/20 to 3/14/20 on CHG #1 and from 2/1/20 to 3/14/20 on CHG #2.

If the sentences are CONCURRENT (i.e., running at the same time), and served in one facility (because the crimes were committed in the same county), the terms MERGE and are satisfied by the term which has the LONGEST UNEXPIRED TERM to run (here, CHG #2), (PL 70.30[2][a]). With GT credit, the six-month sentence would be reduced by one-third to four months, plus a reduction for the JT credit accumulated before sentencing.

If the sentences are CONSECUTIVE (i.e., served one after the other), and are served in the same institution, the terms are ADDED to arrive at an AGGREGATE term and are satisfied by discharge of such aggregate term, or by the service of TWO YEARS IMPRISONMENT, plus any term imposed for any offense committed while the person is under the sentences, whichever is less (i.e., TWO-YEAR CAP ON CONSECUTIVE DEFINITE SENTENCES) (PL 70.30 [2][b]).

CRIMES/SENTENCES IN DIFFERENT JURISDICTIONS:

Per PL 70.30 (2)(c), if the sentences are concurrent and to be served in multiple facilities (e.g. ECCF and NCCF), the term of each sentence shall be credited with the portion of any concurrent term served AFTER that sentence was imposed.

If such sentences (served in different facilities) are CONSECUTIVE, the aggregate of the time served in all of the institutions SHALL NOT EXCEED TWO YEARS plus any term imposed for an offense committed while the person is under the sentences. (PL 70.30[2][d]).

SOME CASES:

In People ex rel Bridges v Malcolm 44 NY2d 875 (1978), the Court of Appeals held that where a person is held in custody under several charges, JT credit must be credited as against all of them UNTIL there is a commencement of imprisonment upon sentencing (citing Matter of Collins v Vincent 42 NY2d 191 [1977]).

In *Bridges*, the defendant was arrested on 9/27/74 upon three outstanding warrants for robbery and burglary and for an unrelated misdemeanor. On 11/25/74, the defendant was sentenced to TIME SERVED on the misdemeanor. Thereafter, on 2/6/75, he was sentenced up to three years on the robbery and, nine months later, on 10/15/75, he was given one and 1/3 to three years (concurrent to the robbery sentence) on the burglary charge.

The Court held that even though the defendant was sentenced to time served for the misdemeanor (meaning that the sentence for that offense was satisfied on 11/25/74), it did NOT qualify under PL 70.30(3) as JT credited to (and used up by) a PREVIOUSLY IMPOSED SENTENCE so as to prevent applying such time (9/27-11/25/74) to the subsequent robbery and burglary sentences.

Had the defendant still been subject to (i.e., serving) such sentence when the felony sentences were imposed, the conclusion would likely have been different since the JT would have been deemed to have been credited to a previously imposed sentence.

A similar result was reached in People ex rel Davis v Arnette 44 NY2d 877 (1978). On 1/14/75, the relator was arrested and held on a weapons charge and then, on 1/20/75 an unrelated misdemeanor warrant/detainer was lodged against him. On 8/13/75, the defendant was sentenced to six months on the misdemeanor charge, but that sentence was deemed to have already been satisfied on 6/10/75, in light of the defendant's having been held in custody since 1/14/75 (and factoring in GT credit).

On 4/17/76, the defendant was sentenced to one and 1/2 to three years on the gun charge. The Court held that the defendant should have been given JT credit from 1/14/75 through 4/17/76 on that charge (not excluding any time credited to the misdemeanor.) This was because he got TIME SERVED on the misdemeanor (and he was no longer subject to such sentence); therefor it did not qualify as JT credit applied to (and exhausted by) a PREVIOUSLY IMPOSED SENTENCE as defined by PL 70.30(3).

JAIL TIME AND GOOD TIME CREDIT ARE DEDUCTED FROM THE STATUTORY AGGREGATE OF PL 70.30(2)(b) RATHER THAN FROM THE COURT'S SENTENCE:

In People v Cheverko 22 NY3d 132 (2013), the defendant was convicted on 10/24/11 of two counts of Petit Larceny and one count of Criminal Possession of Stolen Property (CPSP) -- all class A misdemeanors. He was sentenced to one year on each offense (concurrent for the two larcenies and consecutive on the CPSP) for an aggregate definite term of three years.

On 6/12/12, the defendant was convicted of Escape 2d degree and Grand Larceny 4th degree for crimes that pre-dated his 10/24/11 convictions. He was sentenced on each offense to one-year definite terms to run CONSECUTIVELY to each other AND to the other sentences. In total, he was sentenced to five one-year sentences, four of which were consecutive to each other.

The County DOCCS Commissioner added up the four consecutive sentences and determined that that defendant owed an aggregate of 1460 days; from this 106 days were deducted (for JT preceding 10/24/11) and 486 good time credit. That left him, in the Commissioner's calculation, with 868 days to serve. However, since that period of time exceeded the statutory two-year aggregate limit (PL 70.30[2][b]), the respondent adjusted the discharge date to 10/24/13, exactly two years from the date his sentences commenced.

The defendant/prisoner brought an Article 78 proceeding, seeking to compel the respondent to apply JT and GT credits against the two-year aggregate required by PL 70.30(2)(b) rather than against a four-year term which exceeds the maximum aggregate sentence. Supreme Court denied the application and dismissed the petition.

The Appellate Division (102 AD3d 990 [2d Dep't 2013]), reversed, holding that where the two-year limit of PL 70.30(2)(b) applies, the release date must be calculated based on that two-year aggregate maximum term, and any JT and GT credit must also be applied against that term (rather than against the sentences imposed by the court).

The Court of Appeals agreed and affirmed, holding that while PL 70.30(2) does NOT affect the authority of the courts to impose multiple sentences (or to determine their individual lengths), it provides DIRECTION TO THE CORRECTIONAL AUTHORITIES AS TO HOW TO COMPUTE THE TIME WHICH MUST BE SERVED UNDER THE SENTENCES (citing People v Teti 41 AD2d 841 [2d Dep't 1973]).

The Court noted that PL 70.30(2)(b) DIRECTS correctional authorities to CALCULATE the sentences based on a two-year aggregate term which, in turn, is reduced by JT credit and (within DOC'S discretion) by GT credit up to one-third of the maximum. (PL 70.30[4][b]; CL 804[1])). Consequently, in the Court's view, the Corrections Authorities should calculate the time to be served by REDUCING the two-year aggregate term by the available JT and GT credit that does not exceed 243 days (i.e., one-third of the two-year aggregate).

So, in this case, the Court of Appeals held that the respondent should have deducted the petitioner's 106 days of JT credit and 243 days of usable GT credit from the two-year aggregate term for a total of 308 days.

The respondent argued that the petitioner was receiving an unwarranted windfall, but the Court concluded that the Legislature intended to impose a two-year cap from which jail time and good time credit would be deducted. Such an interpretation was also deemed to be consistent with the time computation rules for consecutive state sentences which impose an aggregate maximum term (PL 70.30(1)).

The Court also noted that the respondent's position would create an unfair result by treating those who are at liberty prior to sentencing in the same way as those who are in custody before then -- thereby subjecting the latter group to longer periods of overall detention. The Court declined to create such a disparity when the statute could be applied evenhandedly by deducting JT credit from the two-year aggregate term.

The Court also concluded that those who earn GT credit while serving their sentence are entitled to such credit even though they are serving a two-year aggregate term per PL 70.30(2)(b). To conclude otherwise, in the court's estimation, would contravene the Legislature's intent to create incentives toward rehabilitation and return to society.

Rule Four:

Jail time credit does NOT include any time that is credited against the term of any PREVIOUSLY IMPOSED SENTENCE to which the defendant is subject. (PL 70.30[3]).

As discussed above, this rule applies to DEFINITE, INDETERMINATE and DETERMINATE sentences. THE PERIOD BETWEEN COMMENCEMENT (after sentence is pronounced and the defendant is received by the institution named in the commitment or by NYSDOCS in the case of a state prison sentence) AND SATISFACTION (i.e., completion) OF A SENTENCE CANNOT BE CREDITED AS JAIL TIME FOR ANY SUBSEQUENT SENTENCES.

HOWEVER, as previously noted, a sentence of TIME SERVED (where JT spent awaiting disposition is deemed to satisfy such sentence when it is imposed), DOES NOT qualify as a previously imposed sentence to which the defendant is still subject so as to deprive him/her of JT credit toward a subsequent sentence.

EXAMPLE:

1/1/20: D is arrested and jailed on CHG #1 and a detainer is lodged on CHG #2.
2/15/20: D is sentenced to FOUR MONTHS on CHG #1.
3/1/20: D is sentenced on CHG #2.

JAIL TIME CREDIT: D gets JT credit from 1/1/20 to 2/14/20 as applied to both CHGS #1 and #2. BUT D is NOT ENTITLED to JT credit from 2/15/20 to 2/29/20 because the time after 2/14/20 is considered SENTENCE TIME on CHG#1 (i.e., D is now a sentenced prisoner). So, D cannot count this latter 14-day period as JT credit toward CHG #2. (In this scenario, defendant's counsel would have been well advised to delay sentence on CHG #1 to 3/1/20 so that this time could have been credited as JT toward CHG #2).

ONE DOWN, ONE TO GO:

Occasionally, a defendant may be convicted of a crime and satisfy his/her sentence while another charge is pending. Consequently, commencement of the sentence on the first charge will CUT OFF JT credit for any unresolved charge(s). In such case, JT credit (on the unresolved charge) will resume when the sentence on the first one is over. Such credit from the expiration of the first sentence to commencement of sentence on the unresolved charge (assuming the defendant is convicted by plea or verdict), must now be applied to the latter charge because the defendant is NO LONGER SUBJECT TO A PREVIOUSLY IMPOSED SENTENCE.

EXAMPLE:

1/1/20: D is arrested and jailed on CHG #1.
2/1/20: D is sentenced to 90 days ECCF (60 days with GTcredit) minus 30 days JT= 30 days to serve.

2/16/20: Detainer lodged for CHG #2.
3/1/20: Sentence on CHG #1 completed. (D pleads guilty to CHG#2).
4/1/20: D sentenced to 60 days on CHG #2.

As to CHG #2, D gets NO JT credit from 2/16/20-3/1/20 because D was a sentenced prisoner on CHG #1, and the time from 2/1/20-3/1/20 was SENTENCE TIME for that offense. BUT, D does get JT credit from 3/2/20-3/31/20 (i.e. 29 days) because the sentence on CHG #1 was over.

Therefore, as of 4/1/20 when D was sentenced to 60 days on CHG #2, he was actually looking at serving another 40 days (with GT credit) less 29 days of JT credit = 11 days until completion of this latter sentence. All things considered, the out date should have been 4/12/20.

Rule Five:

Credit for TIME SERVED = JAIL TIME CREDIT, NOT SENTENCE TIME CREDIT

Even though TIME SERVED is a type of sentence, it contemplates no additional time in jail (for the charge upon which such sentence is imposed) and, therefore, it can be credited as JT applied against a subsequent sentence.

EXAMPLE:

1/1/20: D arrested and jailed on CHG #1
1/15/20: Detainer lodged on CHG#2
3/15/20: D pleads guilty to CHG #2 and gets TIME SERVED (TS) (1/15 - 3/15)
4/15/20: D pleads guilty to CHG #1 and is sentenced to six months

The time from 1/1/20 to 4/14/20 qualifies as JT credit toward CHG #1. Even though the period from 1/15/20 to 3/15/20 was used to satisfy the TS sentence imposed on CHG #2 on 3/15, it is not deemed to have been applied to a PREVIOUSLY IMPOSED SENTENCE (to which D is still subject). Thus, D is entitled to JT credit for this period as well.

When D is sentenced to six months on 4/15/20, he will actually be facing four months (assuming GT credit), which will be reduced by the JT from 1/1/20 to 4/14/20 (about three months and 14 days). So as of 4/15/20, the defendant should owe about 16 more days on his sentence under CHG #1.

THREE CASES IN ONE: MATTERS OF KALAMIS V SMITH, COLLINS V VINCENT AND BUSH V SMITH 42 NY2D 191 (1977):

In each of these cases, the issue was whether time spent in custody between two sentences could be credited to both of them. The defendants, having been sentenced on one charge, were returned from state prison to a local facility pending disposition of one more additional charges which eventually resulted in further sentencing. Each brought an Article 78 proceeding challenging denial of the JT credit to which they believed they were entitled.

In *Kalamis*, the defendant was charged with crimes in three different counties. On 11/14/73, he was sentenced in Nassau County to 0-5 years for an attempted robbery conviction. Two months later, on January 2,1974, while he was still in Nassau County Jail (and still had not "commenced" service of his sentence because he had not been transferred to DOCCS custody) a detainer on a robbery charge was placed on him by Suffolk County.

On 1/16/74, the defendant was sentenced to 0-4 years on an attempted burglary charge out of New York County. This sentence was CONCURRENT to the Nassau County sentence. Two weeks later, on 1/30/74, the defendant was sent to state prison (Green Haven) where he commenced serving his sentences upon the Nassau and NY County convictions. On 2/14/74, he was transferred to Clinton Correctional Facility.

On 2/20/74, the defendant was sent to the Suffolk County Jail where he remained until 12/9/74 pending disposition which encompassed a conviction for Robbery 3d degree and a 0 - 5 year sentence concurrent to the other two. (As the one with the longest unexpired term yet to run, it became the CONTROLLING SENTENCE for purposes of determining the defendant's prison time on merged concurrent indeterminate sentences. (PL 70.30 [1][a]). He was returned to State prison on 12/19/74.

The lower court and the AD agreed that that defendant was entitled to 28 days of JT credit from 1/2/74 (when Suffolk County lodged its detainer) to 1/30/74 when the defendant commenced serving his sentences on the other two cases. The defendant argued, however, that he was in CONSTRUCTIVE CUSTODY of Suffolk County from 1/30/74 to 12/19/74 (by virtue of the detainer) and, therefore was entitled to JT credit for that period as well.

The Court of Appeals held that he was NOT entitled to credit for that time because he had already commenced service of the sentences on the Nassau and NY County charges and, therefore, under PL 70.30(3), that time was credited to a PREVIOUSLY IMPOSED SENTENCE (to which the defendant was still subject when sentenced was imposed on the Suffolk County charge).

The defendant argued, however, that since the other two sentences were imposed at different times (11/14/13 and 1/16/74 respectively), than the Suffolk County sentence, the time between them should be credited to both. The Appellate Division, (51 AD2d 859), determined that once he commenced service of the first two sentences on 1/30/74, all of the time in custody thereafter, whether state or local pending disposition of the Suffolk case, was already being credited to the first two sentences. As such, that time was not applicable to the latter sentence. (citing Matter of Canada v McGinniss 36 AD2d 830 [2d Dep't 1971]).

The defendant cited People ex rel Middleton v Zelker 36 NY2d 691 (1975) in support of his claim for JT credit, but the Court noted that the credit sought in that case was for time spent in custody PRIOR TO the imposition of any sentence. In *Kalamis*, by contrast, since the time sought was ALREADY BEING CREDITED to the first two sentences it could not also be applied to the third one (whether or not the defendant was in Suffolk County's constructive custody).

In Collins v Vincent *supra*, the defendant was arrested in Queens County and released on bail on CHG #1 (UUV). Thereafter, on 9/1/73, he was arrested and jailed on CHG #2 (robbery). A bench warrant was lodged on the first charge on 9/19/73. Then on 11/9/73, the defendant pled guilty to UUV and was SENTENCED on CHG #1 to nine months in jail.

On 1/22/74, the defendant was sentenced to 3 and1/2-to-7 years on CHG #2, CONCURRENT to the first sentence. On 2/2//74, the defendant was transferred to the Brooklyn Detention Center to await disposition of CHG #3 upon which he was convicted and sentenced on 2/27/74 to one year CONCURRENT to the first two sentences.

The prison credited the defendant with 60 days against the CONTROLLING SENTENCE (on CHG #2). The defendant then brought an Article 78 proceeding, claiming an additional 138 days credit. Special Term granted the application and awarded an additional six days. The AD (50 AD2d 886), affirmed.

On appeal to the Court of Appeals, the defendant argued that he was entitled to an additional 124 days representing time in custody from 9/19/73 (when the detainer was lodged), to 11/9/73 (50 days) plus 74 days between 11/9/73 (when sentence on CHG #1 commenced), and 1/22/74 (when he was sentenced on CHG #2).

The respondent argued that the period between 9/19-11/9/73 should not be credited to the second sentence because it had already been credited to the first one (UUV). The Court, citing *Middleton v Zelker supra*, held that the defendant was entitled to JT credit for the 50 days spent in local custody between 9/19-11/9/73 because sentence had not yet been imposed. However, credit for the period from 11/9/73 and 1/22/74 was DENIED because this time was credited to the sentence imposed on 11/9/73 (citing *Matter of Canada v McGinniss supra*).

The defendant in *Bush v Smith supra*, was arrested for robbery in Kings County on 1/4/72 and released on bail. On 12/7/72, he was arrested again in Kings County for robbery and held in detention. Eight days later on 12/15/72, he was SENTENCED on the first robbery to 0 to 3 years in prison. He was received in a State Correctional Facility and commenced service of his sentence on 1/16/73.

The defendant was returned to Kings County on 11/15/73 where he was sentenced on the second Robbery to 0 to 7 years in prison, CONCURRENT to the first sentence.

The defendant claimed JT credit against the second sentence for all the time spent in custody from 12/7/72 through 11/15/73. Prison authorities only granted him 7 days between 12/7/72 (arrest on the second robbery) to 12/15/72 (sentence on the first robbery). The remainder of the time through 11/15/73 applied, in the respondent’s calculation, as credit to the first sentence only.

The Appellate Division (51 AD2d 860), citing *Matter of Canada v McGinnis supra*, affirmed. The Court of Appeals, however, noted that even though sentence had been pronounced on the first Robbery on 12/15/72, the defendant had NOT COMMENCED service of that sentence until 1/16/73. Therefore, he was entitled to JT credit for the period from 12/15/72 to 1/16/73 and the lower court orders were modified accordingly.

Rule Six:

If the sentences run CONCURRENTLY, the credit shall be applied against EACH SUCH SENTENCE.

This is so REGARDLESS of whether the crimes were committed at different times as long as the sentences are imposed to run at the same time. (Matter of Colon v Vincent 49 AD2d 939 [2d Dep't 1975], affidavit 41 NY2d 1084 [1977]).

EXAMPLE: A TWO-FER:

1/1/20: D is arrested and jailed on CHG #1.
1/30/20: D is released on bail on CHG #1.
3/15/20: D arrested on CHG #2 and jailed on both charges.
4/15/20: D pleads guilty to both charges and is sentenced to six months on CHG #1 and nine months on CHG #2 CONCURRENT.

Under PL 70.30 (2)(a), the sentences MERGE and are satisfied by service of the sentence with the longest unexpired term, (i.e., controlling sentence), in this case, the nine-month sentence.

With respect to JT credit, the D is clearly entitled to 29 days from 3/15-4/14/20 when he was held in custody on BOTH charges. He is ALSO ENTITLED, per PL 70.30 (2)(a) to 29 days credit between 1/1/20-3/15/20 even though he was only being held on CHG #1. This is because the charges culminated in more than one sentence which were ordered to run CONCURRENTLY.

Therefore, assuming the defendant also earns GT credit which reduces the controlling sentence by one-third to six months (180 days), when the total of 58 days of JT credit is applied, the defendant owes 122 days.

NOTE: If the defendant had been sentenced on CHG #1 on 3/15/20 and then sentenced concurrently on 4/15/20 on CHG #2, he WOULD NOT have been entitled to the credit for 3/15-4/14/20 as that time would have applied to a previously imposed sentence on CHG #1).

In *Matter of Colon v Vincent supra*, the petitioner brought an Article 78 proceeding to compel the respondent to give him 327 days of JT credit. On 12/19/74, the Supreme Court (Dutchess County) dismissed the petition after a hearing. The Appellate Division reversed and the Court of Appeals affirmed, finding that the petitioner was entitled to 319 days of JT credit against the sentences imposed on charges of Reckless Endangerment 1st degree (originally charged as Attempted Murder 2d degree) and Robbery 3d degree.

The defendant was arrested on the attempted murder charge and spent 196 days in jail beginning on 9/15/72. He was released O.R. on 3/29/73. While at liberty, he was arrested on a robbery charge on 7/28/73 and was, thereafter, held on both charges for which he pled guilty to Reckless Endangerment 1st degree and Robbery 3d degree.

On 11/20/73, the defendant was sentenced to concurrent terms of imprisonment of up to four years for each crime. He was received by NYSDOCS (Green Haven CF) on 11/28/73.

The parties agreed that the petitioner was entitled to 123 days of JT credit from his arrest on the robbery charge on 7/28/73 to his arrival at DOCS on 11/28/73. The petitioner, also claimed, however, that he should also be credited for 196 days (319 total) for the period from 9/15/72 (attempted murder arrest) to 3/29/73 when he was released on that charge.

The issue, as the Court framed it, was whether that 196 period which was credited to the sentence imposed on the reckless endangerment charge could also be credited to the sentence

on the robbery charge. Noting that this period had only been served on the first charge, the Court nevertheless concluded that since it had not been credited against a PREVIOUSLY IMPOSED SENTENCE, it was available to be credited the robbery sentence as well.

Also, even though the crimes were committed at different times, they culminated in more than one concurrent sentence, and credit must be applied as against each such sentence which, in this case, was the same amount of time. In the Court's view, since CPL 70.30 (3) requires JT credit to be applied against each such sentence, such credit applies to the CUMULATIVE TOTAL of the sentences. Consequently, the defendant was deemed entitled to 319 days of JT credit against the sentences upon his convictions for both charges.

Rule Seven:

If the sentences run CONSECUTIVELY, the credit is applied against the AGGREGATE TERM or aggregate maximum term of the sentences and against the aggregate minimum term of the sentences.

Per PL 70.30(1)(b), (2)(b) and (2)(d), consecutive sentences are ADDED TOGETHER to create an AGGREGATE TERM. The amount of time actually spent in confinement is credited as JT and is subtracted from the aggregate term. (Kintz v Coughlin 175 AD2d 670 [4th Dep't 1991]). Unlike concurrent sentences, the defendant does NOT receive the benefit of double credit.

EXAMPLE:

1/1/20: D arrested and detained on CHG #1.
1/31/20: D released on bail on CHG #1.
2/1/20: D arrested on CHG #2 and is now detained on both charges.
4/1/20: D sentenced to one year at ECCF on each charge consecutively.

The sentences are added to create an aggregate term of two years. (PL 70.30 [2][b]). D gets JT credit for 1/1/20-1/31/20 and for 2/1/20-31/20 (60 days total). Assuming D receives GT credit, he should actually serve 16 months (2/3rds of 24 months) less 60 days (two months) or 14 months of a two-year aggregate sentence.

Rule Eight: (LOCAL SENTENCE MERGES WITH STATE SENTENCE):

A DEFINITE sentence of imprisonment imposed on a person for an offense committed BEFORE the imposition of a DETERMINATE or INDETERMINATE sentence MERGES into (and runs concurrently with) the latter sentences and is satisfied by the determinate or indeterminate sentence, UNLESS the definite sentence is imposed for an ASSAULT COMMITTED WHILE INCARCERATED.

If the defendant is already serving a definite sentence when a determinate or indeterminate sentence is imposed, he/she MUST be delivered to NYSDOCS to commence service of the state sentence ASAP.

EXAMPLE:

1/1/20: D is arrested and confined on CHG #1.
1/15/20: A detainer is lodged against D for CHG #2.
4/1/20: D is sentenced to an INDETERMINATE term on CHG #1 and is sent to NYSDOCS
5/1/20: D is returned to local custody and is sentenced to one year DEFINITE on CHG #2.

Because the definite sentence for CHG #2 was imposed upon an offense that was committed BEFORE D was SENTENCED to an indeterminate term on CHG #1, the definite sentence for CHG #2 MERGES with the indeterminate sentence. So, service of the indeterminate sentence satisfies the definite sentence as well.

Rule Nine: ACQUITTAL/DISMISSAL OF CHARGES:

Where a defendant/inmate has been in custody for a charge that culminated in a dismissal or acquittal, the amount of JT that WOULD HAVE BEEN CREDITED against any sentence for such charge (had the defendant been convicted and sentence imposed), SHALL BE CREDITED as JT against any sentence that is based on a charge for which a warrant of commitment (detainer) was lodged during the pendency of such custody. (PL 70.30[3]).

EXAMPLE:

1/1/20: D arrested and held on CHG #1
4/1/20: Detainer is lodged for CHG #2
4/30/20: CHG #1 is dismissed but D is still held on CHG #2.
6/1/20: D is sentenced to nine months definite on CHG #2 and begins service thereof.

Since CHG #1 was dismissed, the jail time that would have been applied to that charge had D been convicted and sentenced (1/1/20 to 3/31/20), must be credited to CHG #2. This is because a detainer on CHG #2 was lodged during the pendency of a charge (#1) that was later dismissed (on 4/30/20). Consequently, D receives JT credit for 90 days (1/1/20-3/31/30) and 60 days from 4/1/20 to 5/3120 (total: 150 days). Assuming D gets 1/3rd off of his nine-month sentence for good behavior, he should serve six months (180 days) less 150 days = 30 days.

This same rule does not necessarily apply where a charge/conviction is later reversed and dismissed on appeal. (Matter of Mullen v Coughlin 72 NY2d 158 [1988]). In Matter of Manley v Annucci 2018 NY Slip Op 08603 (3d Dep't 12/13/18), the Appellate Division affirmed the Supreme Court's dismissal of the petitioner's Art 78 proceeding (seeking additional JT credit) arising from the following scenario:

January 2002: Petitioner (P) was arrested and charged with multiple drug offenses.

April 2003: P was convicted and sentenced to imprisonment. While this case was pending, the defendant remained in NYC custody during which time he was indicted on a second case charging multiple crimes including Murder 2d degree for conduct alleged to have occurred in February 2002.

August 1, 2003: P was transferred to State Prison to begin serving sentence on the 4/03 drug conviction.

Between September 2003 and December 2004, the defendant was returned to local custody for pre-trials and other proceedings on the murder case.

December 27, 2004: The AD reversed and dismissed three of the defendant's four charges (except of CP Marijuana 5th degree), for which the defendant had been sentenced to 90 days.

In January 2005, the defendant was released from NYSDOCS custody and returned to local custody while the murder case was still pending. On May 17, 2005, the defendant, having now been convicted, was sentenced to 25 years-to-life in prison. On July 15, 2005, the defendant was convicted of an unrelated Assault 2d degree charge (FILE #3) stemming from a 5/04 incident. This sentence for this crime was concurrent to the murder sentence.

On October 24, 2005, the defendant was returned to State Prison and was credited with 791 days toward the murder sentence.

The defendant sought more JT credit, specifically 524 days from 8/1/03 (when he was returned to state prison on the drug sentence), to 12/27/04 (when most of the drug charges were dismissed) which Supreme Court denied.

The Appellate Division affirmed, holding that between 8/1/03 and 12/17/04, the defendant was in custody on charges that culminated in the April 2003 drug convictions. During that time, he was also being held on charges that resulted in his May 2005 (murder) conviction. In the court's view, the reversal of three out of the four drug charges and vacatur of those sentences DID NOT operate to re-instate the JT credit previously used so as to apply it to the latter conviction. As such, that time had still been applied to a PREVIOUSLY IMPOSED SENTENCE (citing *People ex rel Bridges v Malcolm supra*).

The court also rejected the defendant's "dismissal/acquittal" argument since the dismissals arose in the context of appeal (rather than pre-trial), and not all of the charges were dismissed in any event.

Similarly unavailing was the defendant's argument under PL 70.30 (5) that where a sentence is vacated and replaced with a new one, the latter sentence should be credited as if it had commenced at the time the original sentence was imposed. The court noted that the murder conviction was completely unrelated to the drug convictions and when the three charges were dismissed, no new sentence had been imposed.

Rule Ten: VACATED SENTENCES:

Time spent by a defendant/inmate on a sentence which is subsequently VACATED SHALL BE CREDITED against the new sentence. (PL70.30[5]).

A vacated sentence is one which is undone and replaced with a new one for the same crime. Time spent in custody on a sentence that is later vacated is CREDITED against the new sentence. For example, if a defendant, previously sentenced to a split sentence of jail and probation is VIOLATED (e.g., for absconding and/or testing positive for drugs) and re-sentenced to straight jail time (e.g., one year definite term), he/she would receive JT credit for any time spent in custody pre-disposition as well as for the time spent in jail on the front end of the split sentence.

EXAMPLE:

1/1/20: D arrested and held on a charge of PL 215.50(3) (A Misdemeanor)
2/1/20: D pleads guilty and is sentenced to 60 days in jail and 3 years probation.
2/11/20 D released after serving 2/3rds of his jail sentence (40 days with GT credit) less 30 days (1/1/20-1/31/20) JT credit pre-disposition. D commences probation.

6/11/20: D VIOLATES PROBATION and ADMITS VIOLATION and is held for re-sentencing.
6/21/20: PROBATION is revoked and D is re-sentenced to one year ECCF.

Per CPL 70.30(5), D'S new sentence will be credited with 30 days from 1/1/20-1/31/20 plus 40 days actually served on his original jail sentence and nine days from 6/11/20 to 6/20/20, (79 days total). On a one-year (i.e., 12-month) sentence, the defendant should then serve eight months (assuming one-third off for good behavior) minus 79 days JT credit which translates to about 161 days. (There is no JT credit for time spent on probation).

Defense counsel might argue that the defendant should be credited with 60 rather than 40 days of JT credit (based on the court's original sentence as pronounced), thereby bringing the total credit to 99 days instead of 79. Counsel might also argue that since the defendant was already sentenced to 60 days (two months) in jail, his maximum re-sentence can only be ten months instead of twelve, and the GT and JT credit deductions should reduce that lesser period. (County Corrections officials would likely take the less generous view).

INTERMITTENT SENTENCE:

An intermittent sentence (IS) a REVOCABLE sentence that is served on specified days or during certain periods or blocks of days. (e.g., Friday at 6:00 pm to Sunday at 6:00 pm or specified weekdays not to exceed 15 days to start). Such sentence commences ON THE DAY SENTENCE IS IMPOSED (rather than when the defendant arrives at the designated facility). It is calculated based on the DURATION of its overall term (e.g., 90 days from the sentence date) rather than upon the number of days spent in confinement.

So, on a 90-day intermittent sentence specified on weekends as above, the defendant would spend only Fridays to Sundays in jail until 90 days have elapsed. If the 90th day arrives on a Saturday of the last specified weekend, the defendant would not be made to remain in custody through that Sunday as the sentence period would have expired the day before.

No person may be subject to any intermittent sentence for a period that is longer than a period that commences on the date sentence is imposed and ends on the date the term of the LONGEST DEFINITE SENTENCE for such offense would have expired.

If the court intends to impose an INTERMITTENT SENTENCE (e.g. upon a defendant who would lose his/her job on a straight-time sentence), it must: 1. so state on the record; 2. pronounce the term of such sentence; 3. specify the days or parts thereof on which the sentence is to be served; and 4. set forth the first and last dates on which the defendant is to be in custody (whether at the Holding Center or ECCF). (PL 85.00[4]).

The sentencing court (i.e., most likely the court clerk), should make sure that the last dates on which the defendant is ordered to be in confinement do NOT EXCEED the overall length of the sentence term.

Rule Eleven: THE DEFENDANT IS ENTITLED TO JAIL TIME CREDIT TOWARD AN INTERMITTENT SENTENCE:

It should also be noted that the defendant IS ENTITLED to JT credit for any time in custody before sentence is imposed so that such time will be subtracted from the duration of the term to arrive at a revised term. (PL 85.00[3]).

So, if the defendant had 10 days in custody by the time sentenced is imposed (e.g., 90 days intermittent), that period would reduce the overall sentence duration to 80 days and the number of days that the defendant would actually spend in custody would also be reduced accordingly (i.e., the last day in custody could not exceed 80 days from the sentence date).

EXAMPLE:

1/1/20: D arrested and held on PL 215.50 (3) (Class A Misdemeanor).
1/10/20: D pleads guilty and is sentenced to 90 days intermittent (beginning that night at 6:00 pm to Sunday 1/12/20 at 6:00 pm whereupon D is released until the following Friday (1/17 through Sunday 1/19).

The 90th day from January 10, 2020, is April 9, 2020. However, since the defendant has accumulated 10 days in custody as of January 10th, the sentence period is actually 80 days. So, the last day is now Monday March 30th. Consequently, the last weekend that the defendant could spend in custody under this sentence would be Friday 3/27 through Sunday 3/29/20.

It should be noted that GOOD TIME CREDIT is NOT AVAILABLE under an intermittent sentence. So a 90-day sentence period (if not lessened by JT credit) cannot be reduced by up to one-third as would be the case with a sentence of straight jail time.

> WHAT IF THE DEFENDANT VIOLATES THE SENTENCE (E.G. BY FAILING TO REPORT TO THE FACILITY, BY VIOLATING IN-HOUSE RULES OR BY GETTING ARRESTED AGAIN?)

In the case of a failure to report to the institution or a violation of jail-house rules, the head of such institution must report such violation to the court in writing. (PL 85.05 [1][c]). Where the defendant fails to report, the term of the sentence is interrupted and such interruption continues until the defendant either reports to the institution (which may now refuse him/her re-admittance unless the court has issued a warrant), or appears before the sentencing court.

The court SHALL NOT modify or revoke the intermittent sentence until the defendant has had an opportunity to be heard. (PL 85.00 [3]). Any modification of such sentence may:

a. provide i) for different, additional or fewer days of confinement; or ii) where the defendant has failed to report for confinement, extend the sentence for the period of sentence interruption or both and b. shall be by WRITTEN ORDER.

As is evident, intermittent sentences are REVOCABLE and, therefore, may be revoked and replaced by a straight prison sentence. In such case...

Rule Twelve: time spent in confinement under the intermittent sentence SHALL BE CREDITED as jail time per PL 70.30 (3) and added to any jail time accrued against such newly imposed sentence. (PL 85.05 [4]).

While courts have disagreed whether JT credit under an intermittent sentence includes the full period of time (see People v Becker 98 Misc 2d 1081 [Sup Ct Queens County 1979]), or just the time actually spent in confinement (People ex rel Bailey v Netzel 169 Misc2d 623 [Sup Ct Erie County 1995]), PL 85.05 [4], by its terms ("TIME SPENT IN CONFINEMENT"), would appear to support the latter conclusion.

EXAMPLE:

1/6/20: D arrested and held on a misdemeanor charge.
1/10/20: D sentenced to 30days of INTERMITTENT WEEKENDS to start 1/10-1/12/20 and to continue on 1/17-1/19, 1/24-1/26 and 1/31-2/2/20.

(Since D had 4 days JT credit when sentenced, the actual sentence was 26 days which expired on 2/6/20, Hence the last available weekend was 1/31-2/2/20 and not 2/7-2/9/20).

On 1/17/20, D fails to report to the HOLDING CENTER and the court is advised in writing, whereupon a bench warrant is issued and the defendant is picked up on the morning of Monday 1/20/20 and brought before the court that day. (The sentence time was interrupted as of 1/17/20 when the defendant went AWOL).

After the defendant is given an opportunity to explain him/herself, the court (not persuaded to show lenience), re-sentences the defendant to a definite term of 30 days in the ECCF.

On these facts, the defendant will receive JT credit for four days (1/6-1/10), plus two days (1/10-1/12) for a total of eight days. When he is re-sentenced on 2/20/20, he will owe 22 days of straight jail time. He will not be entitled to any credit for good behavior during the brief time that he was under the intermittent sentence.

With respect to the new definite term, the defendant may argue that he should get one-third (i.e. 10 days) off of the 30 days for good behavior going forward, (resulting in 20 days), and after deducting the eight days of JT credit, he should only serve 12 more days. Inasmuch as GT credit is discretionary, it seems unlikely that a defendant, who squandered an intermittent sentence, would be on solid footing to obtain even more lenience upon re-sentencing.

FINAL THOUGHT:

Some defense attorneys may believe that they need not concern themselves with what happens to the defendant, timewise, after sentence has been imposed, a Notice of Appeal has been filed and their voucher has been submitted for legal services rendered. Some judges may also not find much reason to wonder (beyond hoping the judgment will survive any appeal), about how

the Department of Corrections (or Sheriff in the case of a local sentence), will calculate the time the defendant will actually serve in confinement before being released to the community.

The fact is, however, that when clients ask counsel how much time they're looking at for a given offense (or, as is often the case, multiple offenses), what they really want to know, bottom line, is how much ACTUAL TIME they will they have to spend in jail and when can they reasonably expect to be back out on the street.

In order to provide sound and reliable advice, counsel MUST be aware not only of sentence ranges and their nature (DEFINITE, INDETERMINATE, DETERMINATE), the implications of multiple offenses (concurrent or consecutive sentencing), and the effect of prior convictions on sentencing, but also be mindful of the provisions for jail time credit and time off for good behavior which can turn a seemingly interminable sentence into a tolerable one.

In order to show the client where the light at the end of the tunnel can be found, (however distant it may seem), counsel cannot afford to be working in the dark when it comes to the law of sentencing and time spent in jail. And while clients often complicate their own lives by "catching new cases" while awaiting disposition on the first (or second or third) ones, counsel's job, among other things, is to try and keep things as straightforward as possible by keeping good track of the actual overall time the client is facing if convicted on all charges.

It is when charges stack up and the client faces possible consecutive sentencing in one or more jurisdictions, that counsel's legal knowledge and skills at creative negotiation aimed at minimizing the overall sentence exposure are put to the test. When done well, a favorable package plea-and-sentence disposition can truly be a gift to the client and a feather (or bow) in counsel's cap.