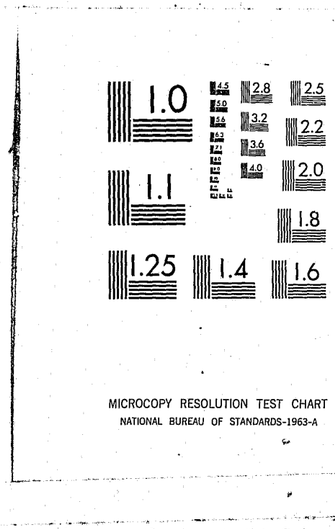

MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS-1963-A

National Institute of Justice
United States Department of Justice
Washington, D. C. 20531

Wisconsin Legislative Council Staff

Special Committee on
Community Correctional Programs

Madison, Wisconsin

October 17, 1980

DISCUSSION PAPER 80-23*

CREDIT AGAINST SENTENCE FOR TIME SPENT ON PROBATION OR PAROLE

A. INTRODUCTION

This Discussion Paper is prepared for the Legislative Council's Special Committee on Community Correctional Programs. The point was raised at a meeting of the Committee that upon revocation of parole, the offender whose parole is revoked is given credit against his or her remaining sentence for the time spent prior to revocation outside the prison. A person whose probation is revoked is not given credit for the time spent between imposition and revocation of probation. The suggestion was made at a meeting of the Committee that a person whose probation is revoked should be given at least partial credit for the time spent prior to revocation.

The next section of this Discussion Paper sets forth the law regarding credit for time spent on probation or parole prior to revocation in Wisconsin and in the surrounding states of Minnesota, Iowa, Illinois and Michigan. That section also contains a discussion of court decisions in those states dealing with the constitutionality of not giving credit for time on probation prior to revocation. The final section of this Discussion Paper is a brief discussion of the issue of granting credit for time spent on probation prior to revocation.

B. CREDIT FOR TIME SPENT ON PROBATION OR PAROLE IN WISCONSIN AND SURROUNDING STATES

In Wisconsin, a person may be placed on probation by a court under one of two methods. First, the court may withhold sentence. Second, the court may impose a sentence and stay its execution. In either case, revocation of probation is done by means of a two-stage administrative process within the Department of Health and Social Services (DHSS). Upon revocation, if the court had initially withheld sentence, the probationer is returned to court for sentencing. Upon revocation under the second method, if the court had initially imposed sentence and stayed its

*This Discussion Paper was prepared by Richard Sweet, Senior Staff Attorney, Legislative Council Staff.

execution, the probationer is immediately incarcerated following revocation to begin serving the sentence which was stayed. In either case, the probationer is not given credit for time spent on probation prior to revocation.

Discretionary parole is granted by the Secretary of DHSS with the advice of an administrative Parole Board. Revocation of parole is done through the same two-stage administrative process as is used for revocation of probation. Since serving time on parole is considered a continuation of the sentence, a parolee is given credit against his or her sentence for the time spent on parole prior to revocation.

In granting credit for time spent on parole, but not for time spent on probation, Wisconsin is consistent with some other surrounding states. Minnesota, Iowa and Michigan provide for credit for time spent on parole, but not for time spent on probation, prior to revocation. However, Iowa does provide that in no case shall the total time served in confinement and in any "locally administered correctional program" exceed the maximum period of confinement authorized for the offense. [Iowa Code Ann., s. 907.11]. "Locally administered correctional program" is not defined. Illinois law provides credit for time served on parole prior to revocation and also provides credit for time served on probation "...unless the court orders otherwise." [Smith-Hurd Ill. Ann. Stats., Ch. 38, s. 1005-6-4].

The distinction in treatment of probationers and parolees with respect to credit for time served on probation or parole in Wisconsin was recently challenged on constitutional grounds and upheld as constitutional. The Court of Appeals in State v. Aderhold, 91 Wis. 2d 306 (Ct. App. 1979) first held that the test of whether the difference in treatment violates the Equal Protection Clause of the 14th Amendment to the U.S. Constitution is whether the difference in treatment has a rational relation to a legitimate government interest. The Court cited a decision by the Federal Tenth Circuit Court of Appeals which held that in the federal system, the difference in treatment of credit for time served by probationers and parolees did not violate the Equal Protection Clause. The federal Court held:

> The Due Process and Equal Protection Clauses do not command symmetry within the probation and parole systems. Legislative solutions are valid and must be respected if the distinctions drawn have some basis in practical experience or if some legitimate state interest is advanced. [United States v. Shead, 568 F. 2d 678 (10th Cir. 1978)].

The Wisconsin Court of Appeals stated that the discretionary parolee is doing "prison time" while on parole and that the mandatory release

parolee is doing "good time" while on parole. The Court stated that in either case the parolee faces the threat of further imprisonment for revocation. The Court also stated that in both cases, the parolee has served a minimum period of time in prison under the supervision and control of prison authorities. The Court went on to state that if a probationer is given full credit for the amount of time successfully served while on the street, it is possible and even probable in misdemeanor cases that the probationer would face no further sanctions for violation of probation. The Court stated that in Wisconsin the minimum period of probation exceeds the maximum possible period of imprisonment for some misdemeanors. It stated that if the probationer were to automatically receive full credit for time successfully served on probation, once the possible term of imprisonment had passed, there would be no possible sanctions available to the court for probation violations and "...thus no real incentive to obey the provisions of probation."

The Wisconsin Court of Appeals went on to hold that the determination that probationers and parolees be treated differently with respect to credit for street time is rationally related to the State's legitimate governmental interests.

Similar decisions were reached in Minnesota and Michigan in Equal Protection Clause challenges regarding credit for probationers and parolees for time served prior to revocation.

In State v. Loveland, 240 N.W. 2d 326 (Minn. 1976), the Supreme Court of Minnesota upheld the difference in treatment of probationers and parolees with respect to good time credit earned prior to revocation. In Minnesota, a person on probation does not receive good time credit for good conduct on probation, but a person on parole does receive such credit. In upholding the difference in treatment of probationers and parolees, the Court cited an earlier decision in State ex rel. Ahern v. Young, 141 N.W. 2d 15 (Minn. 1966).

In Ahern, the Court upheld a distinction in treatment of probationers and parolees with respect to credit for time served on probation or parole prior to revocation. The Court held that probation may be considered "an act of judicial grace" while parole is "...the result of an investment of discipline in a prisoner who has earned the rewards of a milder form of punishment." [Ahern, at 19]. The Court also stated that the parolee has demonstrated an empirical need for a new form of punishment. The Court in Ahern went on to state:

> Further, if credit were required to be given, it is foreseeable that a sentencing court would be less inclined to impose the risks of probation upon society, knowing that such concessions might hinder communicating to the defendant

> the full impact of responsibility for his acts and, possibly, frustrate rehabilitation. The effect upon a probationer could well be less respect for the restraints of probation and obedience to the law, with increased danger of recidivism. It is essential that a court should retain the threat of the original sentence upon breach of probation in order more effectively to discipline a probationer and protect against the risks of repeated injury to society. [Ahern, at 20].

In People v. Lacy, 221 N.W. 2d 199 (Ct. App. Mich. 1974), the Michigan Court of Appeals upheld over two constitutional challenges the difference in treatment of probationers and parolees with respect to credit for time served prior to revocation. The first challenge was based on the argument that if the defendant is not given credit for time served on probation, he is punished twice and that this violates the constitutional provisions against double jeopardy. The Court cited several decisions which held that failure to give credit for time spent on probation prior to revocation does not place the defendant in double jeopardy.

The Court in Lacy next rejected the defendant's Equal Protection Clause argument. The Court stated that because a fundamental interest is involved, the Court must determine whether or not the treatment afforded probationers, as compared to the treatment afforded parolees, is "necessary for the achievement of a compelling state interest." The Court stated that parole and probation are different. The Court noted that a person placed on probation is able to avoid the pain of incarceration upon compliance with the lawful conditions of probation, whereas a person on parole has served a minimum period of time in a prison. The Court also stated that if credit were given for time served on probation prior to revocation, trial courts might be reluctant to grant probation.

C. DISCUSSION OF THE ISSUE

This section of the Discussion Paper contains two examples which show how current law works and how the law would work if it were changed to allow full credit for time served on probation prior to revocation. Both are extreme examples, but either could conceivably happen given the assumptions used.

Example 1 - The defendant is convicted of a Class A misdemeanor and sentenced by the court to the maximum penalty of nine months imprisonment. The court stays execution of this sentence and places the defendant on probation for the maximum statutory period of two years. The Court requires as a condition of probation that the first 12 months be spent in the county jail. [This is the maximum allowed under s. 973.09 (4), Wis. Stats.] Immediately prior to the expiration of the two-year probation period, the defendant, while not committing a new criminal offense, violates a rule of probation. The defendant's probation is revoked. The defendant is returned to jail to serve the stayed nine-month sentence. [Assumption: Current law applies.]

In Example 1, current law allows the defendant to be incarcerated for a period of 21 months and to serve an additional 12 months of probation outside the jail. This is the case even though the maximum statutory penalty for a Class A misdemeanor is imprisonment for not more than nine months. No credit is given against the sentence imposed by the court for any portion of the two years spent on probation prior to revocation.

Example 2 - The defendant is convicted of a Class C misdemeanor and the court imposes the maximum penalty of 30 days imprisonment. The court stays execution of this sentence and places the defendant on probation for the maximum statutory period of two years. The defendant, while not committing a new criminal offense, violates a rule of probation on the 31st day of the probationary period. [Assumption: A change in the law provides that defendant is to be given full credit against a sentence of imprisonment for time served on probation prior to revocation.]

In Example 2, if the defendant is given full credit for the 31 days served on probation, neither of the two traditional sanctions for violation of probation would be available. The first is institution of new criminal charges where the violation consists of a crime. This is not the case here. The second is revocation of probation. If the defendant is given full credit for the 31 days served on probation, this would offset the 30-day sentence of imprisonment which was stayed. Thus, even if probation were revoked, this would have little meaning since the defendant could not be imprisoned.

As stated above, the Court of Appeals in Wisconsin has held that the state may constitutionally differ in the treatment of probationers and parolees with respect to credit for time served prior to revocation. Wisconsin has chosen to do so. However, if a decision is made to give credit for time served on probation prior to revocation, consideration might be given to allowing only partial credit rather than full credit for time served. As discussed above under Example 2, giving full credit for time served on probation may result in the sanction of revocation of probation not being available for a person who violates a rule of probation.

RNS:kjh;lah

END