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GETTING OUT OF JAIL FREE: SENTENCE CREDIT FOR PERIODS OF MISTAKEN LIBERTY

*Gabriel J. Chin**

“The criminal is to go free because the constable has blundered.”¹

When an individual is convicted of a crime and sentenced to a term of imprisonment, it generally is assumed that the convicted person is taken into custody after sentencing as ordered by the court. Surprisingly, however, ministerial officers of the criminal justice system sometimes improperly release convicted criminals from custody or fail to take them into custody after sentencing. If the error never comes to the attention of the government, no legal issue is raised, and the convicted person may simply remain at liberty. Sometimes, however, the erroneously released prisoner raises the issue with the government, or the government discovers the error on its own. In such cases, the law must determine whether a convict should receive credit for the time erroneously at liberty.

The traditional rule applied by many courts was harsh: no matter how long a defendant spent at liberty, no matter how negligent the government had been, and regardless of whether the defendant brought the issue to the attention of the authorities, the defendant would be required to serve his full sentence.² In recent decades, most courts have recognized

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1. *People v. Defore*, 150 N.E. 585, 587 (N.Y.) (Cardozo, J.), *cert. denied*, 270 U.S. 657 (1926).

2. *See, e.g.*, *United States ex rel. Mayer v. Loisel*, 25 F.2d 300, 301 (5th Cir. 1928); *Morris v. United States*, 185 F. 73, 76 (8th Cir. 1911) (explaining that an offer to surrender in accordance with judgment, which was refused by the marshal, did not constitute service of sentence); *Leonard v. Rodda*, 5 App. D.C. 256, 274-75 (1895) (denying credit based on erroneous release); *Aldredge v. Potts*, 200 S.E. 113, 114-15 (Ga. 1938) (denying credit for time at liberty based on a void court order); *State v. Rider*, 10 So. 2d 601, 604 (La. 1942) (characterizing the rule as “based upon the settled jurisprudence of this country”). *See generally* A. Petryn, Annotation, *Effect of Delay in Taking Defendant into Custody After Conviction and Sentence*, 98 A.L.R.2d 687 (1964).

two doctrines to alleviate the draconian effect of this approach.³ First, under the doctrine of "credit for time erroneously at liberty," a defendant mistakenly released for a short period of time or with a lesser degree of governmental fault will be granted day-for-day credit.⁴ Second, where a defendant is released for a longer period of time, and the government's error or inaction amount to waiver or estoppel, the convict will be excused from serving any part of the remainder of his sentence.⁵

The doctrine of credit for time erroneously at liberty, however, is under scrutiny at two points. First, some recent cases question the doctrine's vitality in one of its central areas of application: where the government fails to take a defendant into custody to begin service of his sentence. These cases suggest that credit is available where a sentence begins and is later interrupted, but that credit is not available where the sentence never begins at all.⁶

Second, at least one federal court has raised the issue of whether the common law doctrine survived the passage of the Sentencing Reform Act of 1984.⁷ At an oral argument before the United States Court of Appeals for the First Circuit,⁸ Judge Bruce Selya raised the possibility that this well-established principle of sentencing law might have been eliminated in the federal system by the Sentencing Reform Act. Although the court did not rule definitively on the continued vitality of credit for time erroneously at liberty,⁹ Judge Selya's point is significant because the doctrine's continued validity may well be questioned in future cases.

This article first explores the two doctrines developed by the courts to replace the old common law approach to erroneously released convicts. Next, this article focuses on the doctrine of credit for time erroneously at liberty, and examines the two criticisms confronting it. It argues that the

3. See *infra* notes 10-102 and accompanying text (explaining the doctrine of credit for time erroneously at liberty and the waiver and estoppel theories).

4. See *infra* notes 10-85 and accompanying text (explaining the doctrine of credit for time erroneously at liberty).

5. See *infra* notes 86-102 and accompanying text (explaining the waiver and estoppel theories).

6. See *infra* notes 10-85 and accompanying text (explaining the doctrine of credit for time erroneously at liberty).

7. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1994) and 28 U.S.C. §§ 991-998 (1994)).

8. Oral Argument, March 9, 1995, *United States v. Nickens*, Appeal No. 94-1861 (1st Cir.).

9. On joint motion of the parties, the judgment below was vacated and the defendant was granted the credit he sought. See *United States v. Nickens*, No. 94-1861, 1995 WL 314483 (1st Cir. Apr. 14, 1995) (granting order on joint motion). The author was co-counsel for Mr. Nickens in this case. Other than the existence of the doctrine, the issues discussed in this article were not litigated.

doctrine applies in cases where the offender was never placed in custody, in cases where a sentence began, but was interrupted, and that the doctrine survived the Sentencing Reform Act of 1984. This article concludes that the doctrine remains viable and still serves an important function in our criminal justice system.

I. THE REPLACEMENT OF THE PRE-MODERN LAW APPROACH TO ERRONEOUS RELEASE

A. *The Doctrine Of Credit For Time Erroneously At Liberty*

The prevailing federal rule, as recently expressed by Judge Richard Posner, is that “[t]he government is not permitted to delay the expiration of the sentence either by postponing the commencement of the sentence or by releasing the prisoner for a time and then reimprisoning him.”¹⁰ This principle, recognized by such luminaries as Learned Hand,¹¹ Augustus Hand¹² and Anthony Kennedy,¹³ is enforced by the doctrine of “credit for time erroneously at liberty.” As the United States Court of Appeals for the Ninth Circuit has noted, “[u]nder the doctrine of credit for time at liberty, a convicted person is entitled to credit against his sentence for the time he was erroneously at liberty provided there is a showing of simple or mere negligence on behalf of the government and provided the delay in execution of sentence was through no fault of his own.”¹⁴ Of course, the doctrine does not apply to periods when a defendant has been released from custody pursuant to law.¹⁵

10. *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir.) (citations omitted), *cert. denied*, 114 S. Ct. 2182 (1994).

11. *United States v. Greenhaus*, 89 F.2d 634, 635 (2d Cir. 1937) (per curiam) (Learned Hand, Augustus Hand, and Harrie Chase, JJ.) (awarding credit for period of erroneous release).

12. *Id.*

13. *In re Garmon*, 572 F.2d 1373, 1376 (9th Cir. 1978) (Sneed, J., joined by Anthony Kennedy and Wallace, JJ.) (assuming validity of doctrine, but distinguishing it and explaining that “unlike the ‘false release’ cases, our case presents no allegations of governmental or prosecutorial harassment, misconduct or oversight”).

14. *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988).

15. *See, e.g., United States v. Melody*, 863 F.2d 499, 506 (7th Cir. 1988) (holding that defendant would not be entitled to credit for the period between her sentencing and execution of sentence where her execution was stayed by order of the court); *Sobell v. Attorney General*, 400 F.2d 986, 989-90 (3d Cir.) (denying credit where defendant expressly elected not to begin service of term after sentencing pending appeal), *cert. denied*, 393 U.S. 940 (1968).

1. *Judicial Recognition Of the Doctrine of Credit For Time Erroneously At Liberty*

The doctrine of credit for time erroneously at liberty has been recognized by courts in the First,¹⁶ Second,¹⁷ Third,¹⁸ Fifth,¹⁹ Sixth,²⁰ Sev-

16. *United States v. Nickens*, No. 94-1861, 1995 WL 314483 (1st Cir. Apr. 14, 1995). The First Circuit stated that:

Upon the "joint motion for disposition of the appeal," [i]t is ordered that the order of the district court is vacated and the cause is remanded to the district court for entry of an order that the 13 month, 5 day period of time beginning February 18, 1992 and ending March 23, 1993 shall be credited against the sentence Mr. Nickens is serving in this case.

Id.

17. *Kiendra v. Hadden*, 763 F.2d 69, 73 (2d Cir. 1985) (granting credit); *In re Liberatore*, 574 F.2d 78, 90 (2d Cir. 1978) (explaining that "in the absence of statutory or constitutional authority to the contrary, a sentence runs continuously from its date of imposition") (citations omitted), *cert. denied*, 493 U.S. 905 (1989); *United States v. Greenhaus*, 89 F.2d 634, 635 (2d Cir. 1937) (per curiam) (Learned Hand, Augustus Hand, and Harrie Chase, JJ.) (awarding credit for period of erroneous release); *see also* *United States v. Agar*, Cr. 85-0354 (E.D.N.Y. Dec. 21, 1995) (ordering resentencing based on delay; the facts of this case are discussed in Patricia Hurtado, *Snafu Keeps Con Free*, *NEWSDAY*, Jan. 23, 1996, at A3); *United States v. Friedman*, No. 88 Cr. 613 (MEL), 1993 WL 227702, at *2 (S.D.N.Y. June 21, 1993) (ordering resentencing based on delay); *Germaine v. United States*, 760 F. Supp. 41, 43 (E.D.N.Y. 1991) (granting credit); *Farley v. Nelson*, 469 F. Supp. 796, 801 (D. Conn.) (denying claim for credit and explaining that "[t]here was no act on the part of any federal authority that resulted in petitioner's being out of federal custody, through no fault of his own, at a time when he should have been in federal custody") (citations omitted), *aff'd without opinion*, 607 F.2d 995 (2d Cir. 1979).

18. *United States v. Mazzoni*, 677 F. Supp. 339, 341-42 (E.D. Pa. 1987) (granting credit); *O'Malley v. Hiatt*, 74 F. Supp. 44, 52 (M.D. Pa. 1947) (explaining that "[t]he government may recommit a prisoner following his release or discharge by mistake where sentence would not have expired had he remained in custody") (citing, *inter alia*, *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1939)); *see also* *United States ex rel. Binion v. O'Brien*, 273 F.2d 495, 498 (3d Cir. 1959) (relying on erroneous release cases to hold that defendant who, at direction of probation office, reported regularly even though under no obligation to do so, was entitled to credit), *cert. denied*, 363 U.S. 812 (1960). *But cf.* *United States ex rel. Binion v. Ryan*, 314 F.2d 389, 391 (3d Cir.) (denying credit where attempt at surrender was solely for purpose of establishing "custody" to lay groundwork for habeas corpus petition; when, a month after the initial attempt, the marshal took custody, the defendant immediately was released on bail), *cert. denied*, 375 U.S. 820 (1963).

19. *McDonald v. Lee*, 217 F.2d 619, 623 (5th Cir. 1954) (explaining that "[a]t common law a prisoner has a right to serve his sentence continuously, and cannot be required to serve it in installments"), *vacated as moot*, 349 U.S. 948 (1955); *McPike v. Zerbst*, 21 F. Supp. 961 (N.D. Ga. 1937) (concluding that the state had relinquished jurisdiction over prisoner to the federal government and, therefore, the petitioner's sentence began to run even though the U.S. Marshal failed to carry out federal court's commitment order), *rev'd*, 97 F.2d 253 (5th Cir. 1938) (disagreeing with conclusion that state had relinquished jurisdiction); *see also* *Casey v. Civiletti*, 621 F.2d 691, 694-95 (5th Cir. 1980) (John R. Brown, J.) (noting that essence of claim was disobedience to court order; "[w]ithout ruling on this issue, we would suggest that the only situation in which we would adopt the position of the Sixth Circuit [and grant credit] would be when a United States Marshall's flagrant disobedience of an order of commitment required" such action).

enth,²¹ Eighth,²² Ninth,²³ and Tenth²⁴ Circuits, and state courts in the

In *Scott v. United States*, 434 F.2d 11 (5th Cir. 1970) (per curiam), the court affirmed the denial of credit even though the convicted person was at liberty when he arguably should not have been. *Scott*, however, probably should not be read as a rejection of the principle. In *Scott*, the convicted person had a federal sentence which was to begin after he was completely discharged from his state time under several separate convictions. *Id.* at 15. He was released on bail from the state penitentiary, and in the next year the state charges were resolved. *Id.* at 17-18. He was not taken into federal custody, however, until 27 months later. *Id.* at 22. First, the courts found that the release was for the benefit of the convicted person in that he would have lost \$18,000 in state bail money if he had been immediately taken into federal custody upon his release. *Id.* Accordingly, the delay was "in petitioner's interest." *Id.* at 22-23. Second, the federal authorities did not negligently lose track of the prisoner, rather they monitored the status of the state cases, and acted after they found out that the state cases had been resolved. *Id.* at 22.

20. *Coleman v. United States*, No. 94-5127, 1994 WL 573917, at *2 (6th Cir. Oct. 17, 1994) (denying credit on facts); *United States v. Croft*, 450 F.2d 1094, 1099 (6th Cir. 1971) (granting credit).

21. *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir.) (affirming denial of credit and finding no violation of the rule against installment punishment), *cert. denied*, 114 S. Ct. 2182 (1994); *Klein v. Kindt*, No. 90-2051, 1992 WL 79044, at *4 (7th Cir. Apr. 20, 1992) (affirming denial of credit and finding there was no disobedience to court order); *Cox v. United States ex rel. Arron*, 551 F.2d 1096, 1098-99 (7th Cir. 1977) (recognizing the doctrine's validity, but finding it inapplicable on the facts).

22. *United States v. Downey*, 469 F.2d 1030, 1032 (8th Cir. 1972) (per curiam) (granting credit for period of time in state custody pending transfer to federal prison, where state sentence had been suspended in favor of federal term); *In re Nelson*, 434 F.2d 748, 750-51 (8th Cir. 1970) (denying credit on facts), *vacated and remanded sub nom. Nelson v. United States*, 402 U.S. 1006, *remanded*, 445 F.2d 631 (8th Cir. 1971); *In re Jennings*, 118 F. 479 (C.C.E.D. Mo. 1902) (granting credit despite wrongful conduct on the part of the marshal who surrendered the prisoner to warden of the wrong penitentiary). *But see Pinkerton v. Steele*, 181 F.2d 536, 536 (8th Cir. 1950) (per curiam) (denying credit based on claim that sentencing court failed to imprison him promptly after affirmance). *Pinkerton* is the most recent federal case unambiguously applying the old rule.

Nelson v. United States, which dealt with this issue only in dicta, is interesting from several points of view. The convicted person had a federal sentence and, while released, earned a state sentence. 434 F.2d at 749. After serving the state sentence, the state conviction was overturned, and the convict sought credit against his federal sentence for what turned out to be "dead time" in state custody. *Id.* at 750. The Supreme Court proceedings were noteworthy because Solicitor General Erwin Griswold may have handled the case personally. No other names appear on the briefs, and some of the court papers are signed by him in manuscript. Moreover, the United States conceded that the convicted person was entitled to credit because he had been held in state custody as a result of his financial inability to post bail. Memorandum for the United States on Petitions for Writs of Certiorari at 13-16, *Nelson v. United States*, 402 U.S. 1006 (1971) (No. 6662). The Supreme Court, by granting certiorari but remanding to the Eighth Circuit without briefing or issuing an opinion with enough facts to be of any precedential value, seemed to take the rare step of reaching out to do justice in an individual case. Conceivably, these somewhat unusual features are explained by the fact that the convicted person's lawyer in the prior proceedings was James Abourezk, who by the time of the Supreme Court proceedings, represented South Dakota in Congress. Congressman Abourezk filed an affidavit in the Supreme Court discussing some of the facts of the prior proceedings, but he also noted that "justice would be served if Petitioner is granted a writ of certiorari." Affidavit of James Abourezk at 2, *Nelson v. United States*, 402 U.S. 1006 (1971) (No. 6662). Although there

District of Columbia,²⁵ Alabama,²⁶ Arizona,²⁷ Colorado,²⁸ Florida,²⁹

seems to have been nothing improper about this, the participation of a sitting member of Congress might have encouraged the Justice Department to take a close look at the case.

23. *Del Guzzi v. United States*, 980 F.2d 1269, 1272 (9th Cir. 1992) (Norris, J., concurring) (denying credit on the facts, but noting circumstances where credit was granted); *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988) (denying premature claim for credit, but illustrating circumstances where credit was granted); *Green v. Christiansen*, 732 F.2d 1397, 1400 (9th Cir. 1984) (granting credit despite alleged misconduct while at liberty); *Smith v. Swope*, 91 F.2d 260, 262 (9th Cir. 1937) (granting credit); *Albori v. United States*, 67 F.2d 4, 7 (9th Cir. 1933) (granting credit); *Gillman v. Saxby*, 392 F. Supp. 1070, 1073 (D. Haw. 1975) (granting credit); *Stetson v. Mahoney*, 42 F. Supp. 298, 299-300 (E.D. Wash. 1942) (granting credit); see also *United States ex rel. Binion v. United States Marshal*, 188 F. Supp. 905, 908 (D. Nev. 1960) (denying credit on facts), *aff'd*, 292 F.2d 494 (9th Cir.), *cert. denied*, 368 U.S. 919 (1961); cf. *Ex parte Sichofsky*, 273 F. 694, 698 (S.D. Cal. 1921) (granting credit for period between conviction and beginning of sentence where convicted person remained in custody and the purpose of delay was to allow the convicted person to be tried in state court on another charge), *aff'd*, 277 F. 762 (9th Cir. 1922).

24. *Van Tassel v. Perrill*, No. 94-1109, 1994 WL 722965 (10th Cir. Dec. 20, 1994) (recognizing doctrine but affirming denial of credit on facts); *Yates v. Looney*, 250 F.2d 956, 957 (10th Cir. 1958) (same); *McIntosh v. Looney*, 249 F.2d 62, 64 (10th Cir. 1957) (same), *cert. denied*, 355 U.S. 935 (1958); *Rohr v. Hudspeth*, 105 F.2d 747, 750 (10th Cir. 1939) (same); *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930) (granting credit).

25. *Millard v. Roach*, 631 A.2d 1217, 1224-25 (D.C. 1993) (awarding credit where prisoner was released to another state without court order).

26. *Capers v. State*, 646 So. 2d 688, 688 (Ala. Crim. App. 1993) (remanding for hearing on claim of erroneous release); *McCall v. State*, 594 So. 2d 733, 734 (Ala. Crim. App.) (same), *on return to remand*, 598 So. 2d 1060, 1060 (Ala. Crim. App. 1992) (noting that trial court found claim to be true, therefore releasing defendant); *Ex parte Agee*, 474 So. 2d 161, 162-64 (Ala. 1985) (affirming award of credit to erroneously released prisoner); *Giles v. State*, 462 So. 2d 1063, 1064 (Ala. Crim. App. 1985) (remanding for hearing on claim of erroneous release); *Carter v. State*, 339 So. 2d 594, 595-96 (Ala. Crim. App. 1976) (discharging convicted person where, after conviction, he reported to the sheriff, who refused to take him into custody); *Hartley v. State*, 279 So. 2d 585, 588 (Ala. Crim. App. 1973) (noting that convicted person was awarded credit for the period he was erroneously at liberty).

27. *McKellar v. Arizona State Dept. of Corrections*, 566 P.2d 1337, 1340 (Ariz. 1977) (en banc) (finding that a convicted person "shall be credited with the time he was illegally paroled . . .") (citing *White v. Pearlman*); *State v. Davis*, 712 P.2d 975, 978-79 (Ariz. Ct. App. 1985) (holding that erroneously released prisoner was entitled to good behavior and double time credits as well as ordinary credits).

28. *Crater v. Furlong*, 884 P.2d 1127, 1129-30 (Colo. 1994) (en banc) (citing *White v. Pearlman* with approval, but denying credit on facts where prisoner had escaped from state custody); *Brown v. Brittain*, 773 P.2d 570, 575 (Colo. 1989) (denying credit where convicted person engaged in misconduct while released); *People v. Stark*, 902 P.2d 928 (Colo. Ct. App. 1995) (remanding for hearing on claim for credit); *People v. Battle*, 742 P.2d 952 (Colo. Ct. App. 1987) (awarding credit); *People v. Incerto*, 557 P.2d 1217 (Colo. Ct. App. 1976) (awarding credit).

29. *Drumwright v. State*, 572 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 1991) (explaining that "[t]he sentence of a prisoner who is discharged without contributing fault continues to run while he is at liberty") (citing *White v. Pearlman*); *Sutton v. Department of Corrections*, 531 So. 2d 1009, 1010 (Fla. Dist. Ct. App. 1988) (holding that if release was through no fault of prisoner, he is entitled to credit); *Carson v. State*, 489 So. 2d 1236, 1238 (Fla. Dist. Ct. App. 1986) (explaining that "[u]nless interrupted by violation of parole or some

Georgia,³⁰ Louisiana,³¹ Massachusetts,³² New Jersey,³³ New York,³⁴ Oklahoma,³⁵ Pennsylvania,³⁶ Tennessee³⁷ and Texas.³⁸ Courts in Califor-

fault of the prisoner, the sentence continues to run while the prisoner is at liberty, and the prisoner's sentence must be credited with that time").

30. *Derrer v. Anthony*, 463 S.E.2d 690, 693 (Ga. 1995) (granting credit for period of erroneous release); *Huff v. McLarty*, 246 S.E.2d 302, 306 (Ga. 1978) (explaining that a sentence began to run when the convict presented himself to authorities despite their refusal to take him into custody); *Maxwell v. State*, 374 S.E.2d 800 (Ga. Ct. App. 1988) (same).

31. *State v. Roberts*, 568 So. 2d 1017, 1018-19 (La. 1990) (ordering release of convicted person on parole where there was a six-year and five-month delay in executing the sentence after appellate affirmance); *State v. Kline*, 475 So. 2d 1093, 1093 (La. 1985) (explaining that reincarceration of an erroneously released prisoner "would be inconsistent with fundamental principles of liberty and justice").

32. *In re Zullo*, 639 N.E.2d 1110, 1112-13 (Mass. App. Ct. 1994) (discussing credit in dicta, and discharging convicted person based on waiver of jurisdiction theory), *remanded*, 653 N.E.2d 150 (Mass. 1995).

33. *State v. Williams*, 410 A.2d 251, 252 (N.J. 1980) (granting credit for period of illegal probation in the interest of justice).

34. *Hooray v. Cummings*, 453 N.Y.S.2d 521, 522 (App. Div. 1982) (awarding credit for erroneous delay in taking custody after appellate affirmance and noting that convicted person has no duty to surrender other than at the direction of the authorities); *Biondo v. Regan*, 415 N.Y.S.2d 690, 691 (App. Div. 1979) (granting credit against parole term), *appeal denied*, 393 N.E.2d 1049 (N.Y. 1979); *Holland v. LaVallee*, 406 N.Y.S.2d 113, 114 (App. Div.) (ordering credit for time not in custody due to failure of state to serve bench warrant), *appeal denied*, 381 N.E.2d 616 (N.Y. 1978); *People ex rel. Bilotti v. Warden*, 345 N.Y.S.2d 584, 585 (App. Div. 1973) (per curiam) (granting credit for erroneous release), *appeal dismissed*, 316 N.E.2d 874 (N.Y. 1974); *Jarrett v. Coughlin*, 519 N.Y.S.2d 591, 594-95 (Sup. Ct. 1987) (granting credit for delay in taking custody following appellate affirmance); *Miller v. Sullivan*, 475 N.Y.S.2d 241, 243 (Sup. Ct. 1984) (ordering hearing on claim to determine reasonableness of state's delay in executing sentences); *see also Licitra v. Coughlin*, 463 N.Y.S.2d 289, 291-92 (App. Div. 1983) (granting credit for delay in retaking convicted person whose conviction had been set aside by the intermediate appellate court, but reinstated by the high court; noting that even though the initial release was authorized, it became unauthorized once the conviction was reinstated), *aff'd*, 463 N.E.2d 1 (N.Y. 1984).

35. *Owens v. Osage Co. Sheriff's Office*, 531 P.2d 1063, 1066 (Okla. Crim. App. 1975) (granting credit despite erroneous transfer from county jail to state penitentiary); *Ex parte Eley*, 130 P. 821, 823 (Okla. Crim. App. 1913) (granting credit for period of erroneous release). *But see Sissney v. State*, 792 P.2d 1181, 1185-86 (Okla. Crim. App. 1990) (denying credit for erroneous release; noting that defense attorney participated in erroneous credit calculation).

36. *Commonwealth v. Kriston*, 588 A.2d 898, 901 (Pa. 1991) (granting credit for time served in unauthorized home monitoring program); *Jacobs v. Robinson*, 410 A.2d 959, 960 (Pa. Commw. Ct. 1980) (granting credit for erroneous release).

37. *State v. Walker*, 905 S.W.2d 554 (Tenn. 1995); *State v. Patterson*, No. 03c01-9401-CR-00025, 1995 WL 605447 (Tenn. Crim. App. Oct. 16, 1995). *But see Wilson v. State*, 882 S.W.2d 361, 364 (Tenn. Crim. App. 1994).

38. *Curry v. State*, 720 S.W.2d 261, 263-64 (Tex. Ct. App. 1986) (granting credit for erroneous parole); *Stasey v. State*, 683 S.W.2d 705, 707-08 (Tex. Crim. App. 1985) (granting credit for erroneous release where inmate did not cause release); *Ex parte Morris*, 626 S.W.2d 754, 757 (Tex. Crim. App. 1982) (same); *Ex parte Hurd*, 613 S.W.2d 742, 744-45

nia,³⁹ Iowa,⁴⁰ Mississippi,⁴¹ Missouri,⁴² New Hampshire,⁴³ and Ohio⁴⁴ have found the doctrine inapplicable in particular cases, but without suggesting that they reject it in principle. Even many prosecutors recognize the principle; the United States Department of Justice⁴⁵ and authorities in Delaware,⁴⁶ Nevada,⁴⁷ and Wisconsin⁴⁸ have granted credit without litigation. Only a handful of modern cases reject the doctrine.⁴⁹

(Tex. Crim. App. 1981) (same); *Ex parte* Tarlton, 582 S.W.2d 155, 156 (Tex. Crim. App. 1979) (awarding credit to prisoner erroneously released); *Ex parte* Esquivel, 531 S.W.2d 339, 341 (Tex. Crim. App. 1976) (same); *Ex parte* Downey, 471 S.W.2d 576, 577 (Tex. Crim. App. 1971) (citing *White v. Pearlman*).

39. *In re* Messerschmidt, 163 Cal. Rptr. 580, 581 (Ct. App. 1980) (refusing to create a blanket rule and denying credit where convicted person engaged in misconduct on release).

40. *Merchant v. State*, 374 N.W.2d 245, 247 (Iowa 1985) (distinguishing, but not rejecting, *White v. Pearlman*, in case involving prisoner released in accordance with law).

41. *Pugh v. State*, 563 So. 2d 601, 603-04 (Miss. 1990) (denying credit where the claimant was an escapee, and did not bring facts to the attention of authorities).

42. *Jackson v. Kaiser*, 185 S.W.2d 784, 787 (Mo. 1945) (en banc) (agreeing that petitioner "cannot be compelled to serve his sentence in installments" but denying credit because state lawfully returned prisoner to federal custody).

43. *State v. Sheehy*, 337 A.2d 348, 350 (N.H. 1975) (distinguishing *White v. Pearlman* because convicted person was paroled, not released by mistake).

44. *Jefferson v. Morris*, 548 N.E.2d 296, 298 (Ohio Ct. App. 1988) (denying use of "credit theory" because even if it were applied the inmate was ineligible for immediate release); *see also id.* at 299 (Grey, J., concurring in part and dissenting in part) (considering credit theory even though it would not result in immediate release); *State v. Dawley*, No. 50974, 1986 WL 10841 (Ohio Ct. App. Sept. 25, 1986) (denying credit based on a lack of constitutional or statutory basis).

45. *Hanks v. Wideman*, 434 F.2d 256, 257 (5th Cir. 1970) (per curiam) (noting that Department of Justice awarded credit for period of erroneous release); *see also* *United States v. Nickens*, No. 94-1861, 1995 WL 314483 (1st Cir. Apr. 14, 1995) (discussing agreement by both parties that convicted person should receive credit for period of erroneous release).

46. *Harley v. State*, Nos. 93 & 230, 1986, 1987 WL 37561 (Del. May 27, 1987) (noting that convicted person "was given credit against the remaining term [of his sentence] for the approximately three years that he was erroneously released . . .").

47. *State v. Bandics*, 805 P.2d 66, 69 (Nev. 1991) (Rose, J., dissenting) (noting that "[t]he attorney for the State explained during oral argument that [convicted person] will be entitled to credit for the time that the State's own negligence kept him from serving in Nevada").

48. *State v. Riske*, 448 N.W.2d 260, 261-62 (Wis. Ct. App.) (noting that state conceded right to credit for time when claimant was released through no fault of his own), *review denied*, 449 N.W.2d 276 (Wis. 1989).

49. *See* *Sissney v. State*, 792 P.2d 1181, 1185-86 (Okla. Crim. App. 1990); *Wilson v. State*, 882 S.W.2d 361, 364 (Tenn. Crim. App. 1994). *But see supra* notes 35, 37 and accompanying text (citing cases from Oklahoma and Tennessee granting credit).

2. *Balancing Fairness Towards Defendants and the Government*

Courts justify the doctrine by referring to principles of fairness towards defendants. As the Tenth Circuit wrote in the leading case of *White v. Pearlman*:⁵⁰

A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Certainly a prisoner should have his chance to re-establish himself and live down his past.⁵¹

Denying credit in this situation would be to permit serious abuses: “[A] prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on ad libitum, with the result that he is left without even a hope of beating his way back.”⁵²

In *Smith v. Swope*,⁵³ a similar Ninth Circuit case, the court noted that the doctrine was designed to limit the power of ministerial officers:

The least to which a prisoner is entitled is the execution of the sentence of the court to whose judgment he is duly subject. . . . [To deny credit] would give the marshal, a ministerial officer, power more arbitrary and capricious than any known in the law. A prisoner sentenced for one year might thus be required to wait forty under the shadow of his unserved sentence before it pleases the marshal to incarcerate him. Such authority is not even granted to courts of justice, let alone their ministerial officers.⁵⁴

Courts are entitled to expect that the prosecution will execute its orders in a timely fashion by imprisoning convicts and keeping them confined until their sentences expire. Moreover, it can only degrade public confidence in the criminal justice system to permit prosecutors, marshals, or correctional authorities to disregard their responsibilities with impunity. Denying credit to convicts, in effect, would ratify errors, leaving individuals convicted of crimes at the mercy of ministerial governmental officers who could effectively compel them to serve their sentences in install-

50. 42 F.2d 788 (10th Cir. 1930).

51. *Id.* at 789.

52. *Id.*

53. 91 F.2d 260 (9th Cir. 1937).

54. *Id.* at 262; *see also* *Shelton v. Ciccone*, 578 F.2d 1241, 1245 (8th Cir. 1978) (explaining that “[t]he Marshals are ministerial officers who do not have the discretionary power to determine when the appropriate time has come for service of a prisoner’s sentence”).

ments. In a time of prison overcrowding, releasing prisoners for later reincarceration might be a real temptation.⁵⁵

Another important principle counterbalances these notions of fairness to defendants. Sentences imposed in accordance with the legal process should be served in full. While the concerns of *Swope* and *Pearlman* are legitimate, so too is the idea that criminals should not arbitrarily be relieved of their debts to society. In many situations where the rule is applied, granting credit represents a reasonable balancing of the interests of both the defendant and the state. In one application, however, the prevailing federal court rule may offer defendants unjustified windfalls.

a. Enforcing Judicial Intent

In a common application, rather than granting defendants windfalls, the doctrine operates to fulfill the intent of sentencing courts and to avoid imposing double punishments. A Sixth Circuit case, *United States v. Croft*,⁵⁶ is typical. Defendant Croft was sentenced to three years in federal prison and shortly thereafter, received a two-year state prison term.⁵⁷ The state court judgment provided that the sentence was to be served concurrently with the federal sentence.⁵⁸ After the state sentencing, instead of being returned to federal custody, however, he was sent to the state penitentiary.⁵⁹ When Croft completed his state sentence, the United States claimed that he still owed the full three years on the federal sentence.⁶⁰ As the Sixth Circuit noted, “[n]o one, neither state nor federal judge, considered that appellant should serve more than three years, at the most.”⁶¹ Yet, because the defendant had been left in state custody after the state sentencing rather than being returned to the federal authorities, he would be forced to serve almost twice as much time as any judge intended.⁶²

The court applied the doctrine of credit for time erroneously at liberty in *Croft* to avoid frustrating the intent of the sentencing courts. The court explained: “The fact that appellant was erroneously taken from the county jail by the Sheriff and delivered by him to the state prison does not affect the running of the time of the federal sentence from the day

55. *Cf. Alberti v. Sheriff of Harris County*, 406 F. Supp. 649, 676 (S.D. Tex. 1975) (ordering release with credit to prisoners serving weekend sentences as a measure to relieve prison overcrowding).

56. 450 F.2d 1094 (6th Cir. 1971).

57. *Id.* at 1095.

58. *Id.* at 1095-96.

59. *Id.* at 1096.

60. *Id.*

61. *Id.*

62. *See id.*

that the order of commitment was issued to the Marshal."⁶³ In cases like this, the credit is not awarded for erroneous "liberty" and the defendant gets no windfall for a mistaken release. Instead he avoids double punishment for mistakenly serving his sentence in one jurisdiction's prison rather than another.⁶⁴

b. Defendants' Good Faith Efforts To Bring Attention To Erroneous Releases

If there is a compelling case for granting credit where the defendant actually has served time in custody, there is another group of cases that is nearly as sympathetic. In these cases, a convicted person's good faith efforts to begin or continue service of his sentence are rebuffed by the authorities. In *White v. Pearlman*,⁶⁵ for example, the warden of a federal penitentiary miscalculated the sentence a defendant was due to serve and released him. "The prisoner told the warden there was some mistake . . . [but he] was brushed aside. He was, in substance, ejected from the penitentiary."⁶⁶ In such a case, where the government's mistake was brought to the attention of responsible authorities, it seems unreasonable to penalize the erroneously released prisoner. Similarly, in *Huff v. McLarty*,⁶⁷ the Georgia Supreme Court held that a sentence began to run when the defendant attempted to surrender, even though the authorities refused to take him into custody.⁶⁸

In these situations, fairness requires relief. The defendants were not exploiting mistakes, and the government's legitimate interests in making defendants serve their sentences were mitigated somewhat by the government's lack of diligence.

Courts also may grant credit under the doctrine to a defendant who is actually at liberty and makes no effort to raise the issue with the authori-

63. *Id.* at 1099.

64. *See also, e.g.,* *Kiendra v. Hadden*, 763 F.2d 69, 73 (2d Cir. 1985) (noting that sentences were meant to be concurrent and that by failing to take the convicted person into custody, "the marshals in effect have frustrated the intentions of both the federal and the state courts"); *Smith v. Swope*, 91 F.2d 260 (9th Cir. 1937) (awarding credit where marshals released federal prisoner to state custody); *In re Jennings*, 118 F. 479 (C.C.E.D. Mo. 1902) (awarding credit where marshals released federal prisoner to serve a different federal sentence).

65. 42 F.2d 788 (10th Cir. 1930).

66. *Id.* at 789.

67. 246 S.E.2d 302 (Ga. 1978).

68. *Id.* at 306. Similarly, in *United States v. Friedman*, No. 88 Cr. 613 (MEL), 1993 WL 227702 (S.D.N.Y. June 21, 1993), the court found that a sentence was illegal where there was a substantial delay in execution, even though the convicted person was available and made repeated inquiries about a surrender date. *See also* *Deborah Pines, Delay in Processing Mandates Resentencing*, N.Y. L.J., June 24, 1993, at 1.

ties. In such cases, the error of the government has been held sufficient to justify credit. This result seems sound in light of the prosecution's affirmative duty to enforce criminal judgments, especially where the defendant has a good record on release. If the defendant has engaged in misconduct, the situation is somewhat more problematic; but even then, the reasoning of the Ninth Circuit is persuasive: it is unfair to apply to an erroneously released individual regulations of which he was unaware.⁶⁹

On the other hand, it seems clear that the fairness concerns of *Swope* and *Pearlman* are inapplicable when a prisoner has escaped,⁷⁰ or when the prisoner affirmatively evades recapture following an erroneous release. In such cases, the delay in executing the sentence is not a result of the government's inequitable conduct.

c. Defendant's Silence Regarding A Known Government Error

The most difficult problem has arisen where an erroneously released prisoner is aware of the mistake yet remains silent. Federal case law implies that such knowledge is irrelevant,⁷¹ granting credit even in those circumstances. Colorado⁷² and California⁷³ courts, however, have denied credit when defendants both were aware of their mistaken discharge, and also engaged in misconduct upon release. Relying on cases from other jurisdictions, which noted a defendant's good behavior when deciding

69. See *Green v. Christiansen*, 732 F.2d 1397, 1400 (9th Cir. 1984).

70. See, e.g., *Anderson v. Corall*, 263 U.S. 193, 196 (1923) (explaining that a prisoner's escape terminates the running of his sentence); *Collins v. United States*, No. 88-3436-R, 1992 WL 105047, at *2 (D. Kan. Apr. 15, 1992). *Anderson* contains language which could be construed as inconsistent with the doctrine of time erroneously at liberty: "[m]ere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence." 263 U.S. at 196. The Court held that escape interrupted a sentence, and a failed parole was legally equivalent to an escape. *Id.* Courts have not found *Anderson* dispositive; instead they recognize a distinction between an ordinary lapse of time and lapses of time which are the fault of the government. The latter cases generally allow credit. See, e.g., *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930). *White* distinguishes *Anderson* and grants credit, explaining that:

There is language in some of the opinions in the above cases which, taken from its setting, supports the position of the warden that no matter what the circumstances a prisoner must serve his time, unless pardoned or legally discharged. But opinions must be read against the background of the facts; and the facts in none of the cited cases reach the case at bar.

Id.; see also *United States ex rel. Binion v. United States Marshal*, 188 F. Supp. 905, 908 (D. Nev. 1960) (quoting language from *Anderson* in considering credit claim), *aff'd*, 292 F.2d 494 (9th Cir.), *cert. denied*, 368 U.S. 919 (1961).

71. See, e.g., *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988) (discussing the doctrine of credit, even though the convicted person "testified that he knew a mistake had been made").

72. See *Brown v. Brittain*, 773 P.2d 570, 574-75 (Colo. 1989) (en banc).

73. See *In re Messerschmidt*, 163 Cal. Rptr. 580, 581-82 (Ct. App. 1980).

whether to award credit, the Colorado Supreme Court held that "a prisoner's conduct after he is mistakenly released is an important consideration in determining whether his sentence continues to run after he is mistakenly released despite his silence" ⁷⁴ Similarly, the California Court of Appeals explained that "[t]here is a fundamental unfairness in allowing a prisoner who has established himself as a productive member of society over a long period of time to have his good work destroyed by recommitment," ⁷⁵ but concluded that there was no unfairness when the defendant had misbehaved on release. ⁷⁶

This approach is appealing in many respects. When it is clear that a defendant had knowledge of an inadvertent governmental mistake, and made no effort to correct it, certainly the equitable case for relief becomes less compelling. When a defendant also has committed crimes while at liberty, the argument for relief is indeed precarious.

There are two potential difficulties that, though worthy of attention, do not ultimately undermine the conclusion that the Colorado/California approach is the best yet developed. First, making the defendant's knowledge a central inquiry in every case will be unfair to defendants who are *theoretically* chargeable with knowledge that a mistake had been made but who do not have actual knowledge. Almost all defendants will have been present at sentencing, and through the presumption that everyone knows the law, they arguably should have been able to calculate their earliest lawful release date, as well as the permissible forms of release. Given the existence of complex sentencing regimes in various jurisdictions, as well as the availability, in some states, of work release, furloughs, paroles, and commutations, some sophisticated prisoners will correctly calculate their sentence to the day, while others will be forced to rely on prison officials to tell them when and why they can leave.

The possibility of ignorant defendants is particularly acute in those cases where the convicted person is not represented by counsel. Defendants should not be held to a higher standard of knowledge than prosecutors and prison officials who, despite their experience and expertise in this area, will have made the mistake leading to the erroneous release. ⁷⁷

74. *Brown*, 773 P.2d at 575.

75. *Messerschmidt*, 163 Cal. Rptr. at 581.

76. *Id.* at 581-82.

77. The Mississippi Supreme Court held that credit would be denied where an erroneously released prisoner "knew or should have known that his 'release' from custody was erroneous." *Pugh v. State*, 563 So. 2d 601, 603 (Miss. 1990). Because Pugh was an escapee, however, there was absolutely no question that he knew that his release was erroneous. The court, therefore, was not necessarily suggesting that the "should have known" prong would be applied vigorously against defendants. *See id.* at 604.

For all of these reasons, a court should not be quick to presume that a defendant was aware that what turned out to be an improper release was erroneous in the absence of evidence of actual knowledge. Nevertheless, there will be cases in which a court can be confident that an erroneously released individual knew he should not have been released.

The second problem arises if the prosecution convincingly demonstrates that the defendant knew the release was erroneous. In such cases, the Colorado/California approach arguably is too lenient, in that it denies credit only where there has been post-release misconduct.⁷⁸ It reasonably can be argued that the presence or absence of post-release misconduct is irrelevant to the issue of credit, for a defendant who knowingly exploits a mistake is not entitled to a break. On balance, however, the better outcome may be to award credit in that circumstance where the defendant leads a law-abiding life on release. As the Colorado and California courts recognized, it would be unfortunate to reincarcerate someone who has proven that he can work and obey the law and otherwise remain a decent member of the community.⁷⁹

Moreover, denying credit only when a defendant has engaged in post-release misconduct is an appropriate means of recognizing that, in an adversary system, the government should fairly expect to bear the consequences of its mistakes. In the federal system, the United States Department of Justice has the statutory responsibility for criminal prosecutions.⁸⁰ The Supreme Court has held that federal prosecutors must enforce criminal judgments they obtain by ensuring that defendants are taken into custody:

[the United States Attorney] is specially charged with the prosecution of all delinquents for crimes and offenses; and those duties do not end with the judgment or order of the court. He is

78. See generally *supra* notes 72-77 and accompanying text (discussing the Colorado/California approach). Post-release misconduct by a mistakenly released prisoner has been defined by one court as anything that would allow the state to reincarcerate that individual without being "inconsistent with fundamental principles of liberty and justice." *Brown*, 773 P.2d at 575. This generally would include any significant criminal offense committed on release. See *id.*; *Messerschmidt*, 163 Cal. Rptr. at 581.

79. See *Brown v. Brittain*, 773 P.2d 570, 574 (Colo. 1989); *In re Messerschmidt*, 163 Cal. Rptr. 580, 581 (Ct. App. 1980).

80. 28 U.S.C. § 516 provides: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516 (1988). See generally *United States v. Alky Enters., Inc.*, 969 F.2d 1309, 1313-14 (1st Cir. 1992) (stating that the Attorney General is in charge of all litigation involving the United States).

bound to provide the marshal with all necessary process to carry into execution the judgment of the court.⁸¹

Having been assigned this duty, the government is expected to execute it with diligence.⁸²

By contrast, it is unreasonable to expect defendants or defense counsel to undertake this function. To do so would degenerate the function into a classic “mouse-guarding-the-cheese” problem, because defendants are unlikely to be zealous in seeking their own incarceration. Moreover, it is inconsistent with an adversarial system of justice. The law generally recognizes that it is not the defense’s responsibility to enforce criminal judgments⁸³ (unless, of course, a bail order or voluntary surrender agreement imposes some specific obligation on the defendant).⁸⁴

It is true that allowing a defendant to exploit a known mistake effectively would treat the criminal process as something of a sporting match. Yet, the Supreme Court has done precisely that in the criminal context, refusing to grant relief from errors, even those committed by the prosecution, when the defendant failed to timely assert them.⁸⁵ There may be

81. *Levy Court v. Ringgold*, 30 U.S. (5 Pet.) 451, 454 (1831); *see also* *McMurtrey v. Clark*, 157 F.2d 703, 703 (D.C. Cir. 1946) (per curiam) (explaining that “[u]nder the federal statutes, the Attorney General is made the conduit through which the sentence of a federal court in a criminal case is carried into effect”), *cert. denied*, 329 U.S. 805 (1947).

82. *See* *United States v. Raimondi*, 760 F.2d 460, 462 (2d Cir. 1985) (order on motion before a single judge) (explaining that “[a]n attorney—whether for a private party or the government—owes his client the utmost degree of diligence and industry”).

83. In *United States v. Martinez*, 837 F.2d 861, 866 (9th Cir. 1988), the court held that “just as a defendant has no duty to bring himself to trial, (citations omitted) he has no affirmative duty to aid in the execution of his sentence.” Nor should the duty fall to defense counsel because general principles of the adversary system make it inadvisable to expect defense counsel to carry out actions against their client’s interests and in favor of their opponents. A number of ethical rulings make this point. *See* ABA Comm. on Ethics and Professional Responsibility Informal Op. 1453 (1980) (explaining that an attorney has no obligation to inform the court that his client remains at liberty on bail even though conviction has been affirmed); State Bar of New Mexico, Advisory Op. 1990-2 (Mar. 10, 1990) (stating that attorney, whose client had been forgotten by the court after conviction but before sentence, had “no duty to notify the Court that the case has ‘fallen through the cracks.’ In fact, under some situations, such as a failure to timely prosecute, the attorney might commit malpractice if he did alert the Court or prosecutor”), *reprinted in* 1990 Nat’l Rep. on Legal Ethics & Prof. Resp., N.M. 34, 35 (David Luban, ed.); *cf.* State Bar of Mich. Standing Comm. on Prof. & Jud. Ethics, Op. No. RI-165, 1993 WL 379879, at *2 (May 28, 1993) (explaining that an attorney is under no obligation to notify the prosecutor’s office of failure to initiate criminal charges against client, even though the charges were part of negotiated resolution of other charges).

84. *See, e.g., Ex parte Francis*, 510 S.W.2d 345, 346 (Tex. Crim. App. 1974) (refusing to apply doctrine where bond imposed a duty to surrender).

85. *See* *Davis v. United States*, 411 U.S. 233, 237 (1973) (finding that “defendants who pleaded to an indictment and went to trial without making any nonjurisdictional objection to the grand jury, even one unconstitutionally composed, waived any right of subsequent complaint on account thereof”).

some equity in denying relief to the prosecution where it sleeps on its rights by failing to ensure that the judgment is properly executed—at least where the defendant demonstrates a successful reintegration into the community. While this credit may constitute a windfall, only the most deserving defendants, who have demonstrated their ability to live in compliance with society's laws, will receive it.

B. Waiver And Estoppel Theories

Another body of decisions grants absolute discharge, rather than day-for-day credit, as a remedy for delay in commencing or continuing a sentence. These cases hold that the government has waived jurisdiction, or is estopped from reincarcerating the defendant based on misconduct going beyond mere negligence. These cases are similar to the "credit" cases because they draw on the same principles of fairness to defendants and often cite some key credit cases. This group is distinct, however, in that it relies on the due process clause of the Fourteenth Amendment.⁸⁶

In *Shields v. Beto*,⁸⁷ for example, the defendant had completed just over one year of a forty-year state sentence in Texas when, in December, 1934, he was returned voluntarily to Louisiana to serve time he owed there.⁸⁸ Although he was released from custody in 1944, Texas took no steps to reincarcerate him until 1962—28 years after his departure from Texas.⁸⁹ The Fifth Circuit found that the delay constituted a waiver of jurisdiction, and that the reincarceration violated due process.⁹⁰ Cases from the District of Columbia⁹¹ and the Second,⁹² Fourth,⁹³ Fifth,⁹⁴

86. See, e.g., *United States v. Davis*, 801 F.2d 754, 757 (5th Cir. 1986) (explaining that "due process requires a state to seek completion of a sentence in a timely fashion") (citing *Shields v. Beto*, 370 F.2d 1003 (5th Cir. 1967)). Many of these cases arise on federal habeas corpus grounds where only constitutional claims are cognizable.

87. 370 F.2d 1003 (5th Cir. 1967).

88. *Id.* at 1003-04.

89. *Id.* at 1004.

90. *Id.* at 1005-06 (citing *White v. Pearlman*).

91. *United States v. Merritt*, 478 F. Supp. 804, 805-06 (D.D.C. 1979) (finding waiver where, while in state custody, repeated efforts were made by the convicted individual to determine whether the federal authorities were interested in executing their detainer and the marshal's office did nothing for almost three years after his release, during which time he re-established himself in the community).

92. *Farley v. Nelson*, 469 F. Supp. 796, 801 (D. Conn.) (rejecting claim on the facts), *aff'd without opinion*, 607 F.2d 995 (2d Cir. 1979).

93. *Lanier v. Williams*, 361 F. Supp. 944, 947 (E.D.N.C. 1973). The court stated that: Once the state, through acts or omissions of its officials, has led a person, through no fault of his own, to believe that he is free of a prison sentence, and makes no attempt for a prolonged period of years to reacquire custody over him, that person should be able to rely on the state's action or inaction and assume that further service of the sentence will not be exacted of him.

Sixth,⁹⁵ Seventh,⁹⁶ Eighth,⁹⁷ Ninth,⁹⁸ and Eleventh⁹⁹ Circuits have evaluated these kinds of claims on the merits.

Some courts suggest that the credit theory and the waiver theory are merely different ways of explaining the same concept.¹⁰⁰ This seems untenable, however, because the relief each theory grants is different. The lesser relief, credit, requires a lesser standard of government culpability: mere negligence.¹⁰¹ Absolute discharge is available only for more egregious governmental error. Accordingly, recent cases, rather than choosing which theory to apply, utilize both theories and grant whatever relief, if any, is appropriate.¹⁰²

Id.

94. *Esquivel v. Estelle*, 426 F. Supp. 619, 620-21 (W.D. Tex. 1976) (denying claim on facts), *aff'd*, 547 F.2d 309 (5th Cir. 1977) (per curiam); *Piper v. Estelle*, 485 F.2d 245, 246 (5th Cir. 1973) (per curiam) (denying claim on facts).

95. *Broshears v. Kentucky*, No. 85-5500, 1986 WL 16339, at *3 (6th Cir. Jan. 24, 1986) (denying claim where convicted individual had escaped from state custody).

96. *Mistretta v. Whalen*, No. 92-1311, 1993 WL 118074 (7th Cir. Apr. 14, 1993) (denying claim on facts); *United States ex rel. Walker v. Hartigan*, No. 87 C 9368, 1988 WL 82577, at *1, *2 (N.D. Ill. July 29, 1988) (denying claim where release documents imposed on convicted individual an affirmative duty to surrender).

97. *Camper v. Norris*, 36 F.3d 782, 784-85 (8th Cir. 1994) (denying relief on facts); *Mathes v. Pierpont*, 725 F.2d 77, 79 (8th Cir. 1984) (per curiam) (denying relief where convicted individual had escaped from state custody); *Shelton v. Ciccone*, 578 F.2d 1241 (8th Cir. 1978) (remanding claim of failure to execute judgment for over seven years for evidentiary hearing); *Bailey v. Ciccone*, 420 F. Supp. 344, 348 (W.D. Mo. 1976) (denying claim on facts).

98. In *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982), the court affirmed a finding that the United States was estopped from enforcing an applicable sentencing statute in a criminal case. The statute prohibited defendants convicted of certain offenses from being paroled during their prison terms. *Id.* at 870. The petitioner had been paroled nonetheless, and made a successful adjustment to society. *Id.* The appeals court agreed with the district court that it would violate due process to return the convicted individual to custody. *Id.* at 873 (citing *United States v. Merritt*, 478 F. Supp. 804 (D.D.C. 1979)).

99. *Mobley v. Dugger*, 823 F.2d 1495 (11th Cir. 1987) (denying relief where delay was in part the fault of the convicted individual).

100. The court in *United States v. Merritt*, 478 F. Supp. 804 (D.D.C. 1979), treated the credit theory and waiver theory as variants of the same rule. "Although different courts have thus chosen different theoretical bases for their conclusions, these conclusions do not differ in practice." *Id.* at 807; *see also Lanier v. Williams*, 361 F. Supp. 944, 947 (E.D.N.C. 1973) (explaining that "[t]his court is of the opinion that the waiver theory is more consistent than the credit theory with the principle that a prisoner cannot be required to serve his sentence in installments").

101. *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988).

102. *See, e.g., id.* at 864 (analyzing credit and waiver theories separately); *Green v. Christiansen*, 732 F.2d 1397, 1399-1400 (9th Cir. 1984) (distinguishing between the waiver and credit theories); *United States v. Mazzoni*, 677 F. Supp. 339, 341-42 (E.D. Pa. 1987) (same); *Bailey v. Ciccone*, 420 F. Supp. 344, 347 (W.D. Mo. 1976) (recognizing the installment theory and the intentional waiver theory).

II. DOES THE DOCTRINE OF CREDIT FOR TIME ERRONEOUSLY AT LIBERTY APPLY TO ONLY "INTERRUPTIONS" OF SENTENCES?

Some cases distinguish between situations in which a sentence is interrupted, and those in which a sentence never began. They suggest that the doctrine of credit for time erroneously at liberty applies only to interruptions in sentences, but not to delays in the commencement of a sentence. *United States v. Martinez*¹⁰³ finds this to be a requirement of the common law, suggesting that the traditional rule was that service of some part of the sentence was required for the doctrine to apply.¹⁰⁴

The authorities upon which *Martinez* relies, however, do not support that conclusion. *Martinez* cited *White v. Pearlman*¹⁰⁵ and *Smith v. Swope*.¹⁰⁶ In *Pearlman*, the defendant actually was serving his sentence in the penitentiary when erroneously released,¹⁰⁷ but in *Swope*, while the defendant was in the custody of the marshal at the time of sentence, he never actually was delivered to a penitentiary to begin service of his sentence.¹⁰⁸ Indeed, a dissenting judge in *Swope* argued that credit was unavailable because the defendant never had been received at a prison.¹⁰⁹ Moreover, both *Pearlman* and *Swope* rely on an earlier case, *In re Jennings*.¹¹⁰ In *Jennings*, a defendant was given credit against his sentence when the marshal failed to deliver him to the prison to begin service of his sentence — there was no interruption of a sentence which had already commenced.¹¹¹ Accordingly, there seems little historical support for a requirement that the sentence must already have commenced. Many cases applying the doctrine, in addition to *Jennings* and *Swope*, involve defendants who never commenced their federal sentences.¹¹² Thus, the

103. 837 F.2d 861 (9th Cir. 1988).

104. *Id.* at 865; see also *Bailey v. Ciccone*, 420 F. Supp. 344, 348 (W.D. Mo. 1976) (explaining that "[t]he petitioner never commenced serving a federal sentence, and therefore, the factual basis for the application of this principle does not exist").

105. 42 F.2d 788 (10th Cir. 1930).

106. 91 F.2d 260 (9th Cir. 1937).

107. *Pearlman*, 42 F.2d at 789.

108. *Swope*, 91 F.2d at 261.

109. *Id.* at 262-63 (Haney, J., dissenting).

110. 118 F. 479 (C.C.E.D. Mo. 1902); *Swope*, 91 F.2d at 262; *Pearlman* 42 F.2d at 789.

111. *Jennings*, 118 F. at 480-82 (explaining that the marshal surrendered Jennings to the marshal of another district for trial on a different charge).

112. See, e.g., *Kiendra v. Hadden*, 763 F.2d 69, 72-73 (2d Cir. 1985) (awarding credit for time served to a convicted individual who had not begun serving his federal sentence because marshals failed to take him into custody after he completed serving a state sentence); *United States v. Croft*, 450 F.2d 1094, 1099 (6th Cir. 1971) (awarding credit to a convicted individual on his federal sentence for time served in the state prison after the sheriff erroneously delivered the prisoner to the state prison, instead of the federal prison); *Albori v. United States*, 67 F.2d 4, 7 (9th Cir. 1933) (awarding credit to a convicted individual on his

law fully supports Judge Posner's expression of the common law rule: "[t]he government is not permitted to delay the expiration of the sentence *either* by postponing the commencement of the sentence *or* by releasing the prisoner for a time and then reimprisoning him."¹¹³

The key to the doctrine, rather than being an interruption of a sentence, is disobedience of a court order. Accordingly, if a defendant is brought before a federal court on a writ of *habeas corpus ad prosequendum*, on the understanding that he be returned to state custody before service of any federal sentence, there would seem to be no impropriety in the federal court returning the defendant to state custody. The doctrine should not apply, even though there would be a delay in starting the federal sentence. Several cases support this proposition.¹¹⁴ Similarly, if the defendant procures his release from federal custody and then earns a state sentence, there would seem to be little justification for deeming the federal sentence to be running during the state imprisonment because no ministerial officer would have violated an order of the court.¹¹⁵

federal sentence for time served in the state prison after the federal marshal failed to execute a federal commitment order, but instead allowed the convict to remain in state custody); *Gillman v. Saxby*, 392 F. Supp. 1070, 1073 (D. Haw. 1975) (awarding credit to a defendant on his federal sentence for time served in the state prison after federal officials failed to take him into custody to begin his federal sentence, and instead delivered him to state authorities); *cf. United States v. Merritt*, 478 F. Supp. 804, 806 (D.D.C. 1979) (applying waiver theory where delay occurred before federal sentence had commenced).

113. *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir.) (emphasis added), *cert. denied*, 114 S. Ct. 2182 (1994).

114. *See, e.g., Thomas v. Bogan*, No. 95-1307, 1995 WL 692987, at *1 (6th Cir. Nov. 17, 1995) (denying credit where "incarceration in the state system did not result from a mistake by federal authorities"); *Lewis v. United States*, No. 94-2275, 1995 WL 700962, at *1 (10th Cir. Nov. 14, 1995) (denying relief; cases granting relief "deal with federal marshals failing to execute federal court orders"); *Thomas v. Brewer*, 923 F.2d 1361, 1366-67 (9th Cir. 1991) (denying credit where federal jurisdiction had been obtained over state prisoner by writ); *Gunton v. Squier*, 185 F.2d 470, 471 (9th Cir. 1950) (same); *Lunsford v. Hudspeth*, 126 F.2d 653, 656-57 (10th Cir. 1942) (same); *United States v. Vann*, 207 F. Supp. 108, 110-12 (E.D.N.Y. 1962) (denying credit and distinguishing *Smith v. Swope* on the ground that *Swope* involved disobedience of a federal court order); *United States v. Baker*, 170 F. Supp. 651, 654-56 (E.D. Ark. 1959) (denying credit towards a federal sentence for time served on several state sentences), *aff'd*, 271 F.2d 190, 192 (8th Cir. 1959); *cf. Harkins v. Lauf*, 532 S.W.2d 459, 461-63 (Mo. 1976) (denying credit for time served in federal confinement where state jurisdiction had been obtained over defendant by writ of *habeas corpus ad prosequendum*).

115. *See In re Nelson*, 434 F.2d 748, 751 (8th Cir. 1970) (per curiam) (holding that federal sentence did not run where, while prisoner was free on bail pending appeal on a federal conviction, he received a state sentence and explaining that "[w]ithout the consent of state authorities, the Marshal possessed no means of enforcing the federal mandate"), *vacated and remanded sub nom. Nelson v. United States*, 402 U.S. 1006, *remanded*, 445 F.2d 631 (8th Cir. 1971); *In re Niewinski*, 191 F. Supp. 272, 274 (D. Minn. 1961) (explaining that the federal sentence could not begin to run where prisoner, at liberty on bail pending

In cases granting¹¹⁶ and denying¹¹⁷ relief, courts often characterize the determinative factor as whether the release was in conformity with a court order. Thus, a defendant will not automatically receive concurrent time by operation of law simply because an outstanding federal sentence exists while he is serving state time. However, when a court imposes a sentence which is meant to be concurrent, either by the express terms of the sentence or by operation of applicable law, and the marshal's failure to execute the sentence threatens to force the prisoner to serve consecutive state and federal time, the doctrine provides a means for effectuating

appeal, was rendered unavailable because he was taken into state custody for a separate offense); *Kellett v. United States*, 162 F. Supp. 791, 794-96 (W.D. Mo. 1958) (same).

116. See, e.g., *Kiendra*, 763 F.2d at 72 (explaining that "[t]he federal judgment and commitment order directed that Kiendra's sentence was to commence upon his release from the sentence then being served on the first state charge"); *Croft*, 450 F.2d at 1097 (noting that credit will be given "where a court has issued the mittimus and has given authority to the proper officer to enforce it, and such officer refuses to act on it"); *Swope*, 91 F.2d at 262 (explaining that "[i]f a ministerial officer, such as a marshal, charged with the duty to execute the court's orders, fails to carry out such orders, that failure cannot be charged up against the prisoner"); *Albori*, 67 F.2d at 7 (explaining that "[t]he question is, Did the failure on the part of the marshal to execute the commitment postpone the beginning of the sentence? We think not"); *Gillman*, 392 F. Supp. at 1073 (explaining that "[h]ere, there is no question that the court ordered the sentence to begin immediately and that order was not obeyed"); *In re Jennings*, 118 F. 479, 482 (C.C.E.D. Mo. 1902) (explaining that "no ministerial officer, by disobeying the mandate of the court . . . could suspend the running of the sentence . . .").

117. *In re Garmon*, 572 F.2d 1373, 1376 (9th Cir. 1978) (denying credit where the previously imposed sentence was suspended during sentence for contempt and distinguishing the situation from that presented in *White v. Pearlman*, on the ground that "unlike the 'false release' cases, our case presents no allegations of governmental or prosecutorial harassment, misconduct or oversight"); *McIntosh v. Looney*, 249 F.2d 62, 64 (10th Cir. 1957) (declining to award credit on ground that the non-incarceration was in accordance with law, and there was no disobedience of a court order), *cert. denied*, 355 U.S. 935 (1958); *Haywood v. Looney*, 246 F.2d 56, 58 (10th Cir. 1957) (distinguishing *Smith v. Swope* on ground that in this case, there was no disobedience to the order of a federal court); *Rohr v. Hudspeth*, 105 F.2d 747, 750 (10th Cir. 1939) (denying credit where defendant had been brought before the federal court by writ of *habeas corpus ad prosequendum*, and then returned, but noting that "[a] different situation might be presented if the Marshall [sic] had exclusive custody of petitioner on the date of sentence, had failed to carry out the judgment and orders of the federal court, and had surrendered him to the state authorities"); *Cody v. Missouri Bd. of Probation & Parole*, 468 F. Supp. 431, 438 (W.D. Mo. 1979) (denying claim of petitioner who earned federal sentence after absconding from state and explaining that "[s]ince petitioner's federal confinement was not mistaken or illegal . . . Missouri officials had no constitutional duty to give credit for the time spent by petitioner in federal custody . . ."); *Vann*, 207 F. Supp. at 112 (denying credit and distinguishing *Smith v. Swope* on grounds that there was no disobedience to the court order); *United States ex rel. Binion v. United States Marshal*, 188 F. Supp. 905, 908 (D. Nev. 1960) (explaining that erroneous release "cases stand for the proposition that in such circumstances, the sentence commences to run immediately, where the Marshal, without fault on the part of the prisoner, fails to execute the commitment order"), *aff'd*, 292 F.2d 494 (9th Cir.), *cert. denied*, 368 U.S. 919 (1961).

the court's intent. It would be ironic indeed if the doctrine were construed to be inapplicable in circumstances where the equitable case is most compelling.

There also is a federal statutory argument that the doctrine cannot apply in the federal system unless the defendant has begun to serve the sentence and subsequently is released. Since 1932, federal law has provided that a sentence "shall commence to run from the date on which such [sentenced] person is received at the penitentiary . . . for service of said sentence. . . . No sentence shall prescribe any other method of computing the term."¹¹⁸ This provision originally was enacted as § 709a of Title 18, and then renumbered § 3568; it is now codified at § 3585(a).¹¹⁹ Based on § 3568, a line of authority from the Fourth Circuit holds that where a sentence never begins, credit is unavailable.¹²⁰

118. This requirement was added to federal law as 18 U.S.C. § 709a (Supp. VI 1932), by the Act of June 29, 1932, ch. 310, § 1, 47 Stat. 381. As originally enacted, it read:

The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term.

47 Stat. at 381.

119. It was renumbered 18 U.S.C. § 3568 by Public Law Number 86-691 in 1960; the only change was the addition of a provision for jail time credit. *See* 18 U.S.C. § 3568 (Supp. IV 1962) (inserting "the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence . . . for want of bail . . . under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence"). It received its current designation, 18 U.S.C. § 3585(a) (Supp. III 1985), in 1984 and it now reads: "A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served." 18 U.S.C. § 3585(a) (1988). The jail time credit provision was renumbered 18 U.S.C. § 3585(b) (Supp. III 1985).

120. In *Thomas v. Whalen*, 962 F.2d 358 (4th Cir. 1992), a convicted individual was sentenced in state court and then released to serve a federal sentence. *Id.* at 360. While the court assumed *arguendo* that the sentences were meant to be served concurrently, it refused to grant credit against the federal sentence for the state time. *Id.* at 362-64. It relied on 18 U.S.C. § 3585 (then § 3568) to find that credit was inappropriate. *Id.* at 363-64. Judge K. K. Hall concurred in the result, but rejected the majority's reasoning. *Id.* at 364 (Hall, J., concurring). Judge Hall concluded that the sentences in fact were meant to be consecutive, but if they had been meant to be concurrent, relief would have been available notwithstanding the statute. *Id.* at 364-65. Similarly, in *Youngworth v. United States Parole Commission*, 728 F. Supp. 384 (W.D.N.C. 1990), the court, relying on the statute, rejected the magistrate's recommendation and held that the sentence had not commenced because the convicted individual had not been taken into custody. *Id.* at 390-91. The court also noted that the convict did not prove that the state and federal sentences were meant to

The United States Department of Justice has taken the position that the statute should be read liberally, with fairness and justice in mind, rather than literally.¹²¹ In *Nelson v. United States*,¹²² the Department of Justice, speaking through then-Solicitor General and former Harvard Law School Dean Erwin Griswold, agreed with the defendant that it would be inequitable to deny credit to a prisoner whose federal sentence never commenced, for purposes of the statute, because he was too poor to post bail for a state conviction which turned out to be invalid.¹²³ Dean Griswold explained that “[t]he problem is that of interpreting the statute in the light of the particular circumstances of each case and the requirements of fairness.”¹²⁴ Accordingly, Dean Griswold concluded that the statute “is in our view not so inflexible in its provisions as to be incompatible with an interpretation that would give [the defendant] the relief he seeks.”¹²⁵

A majority of recent cases follow the Griswold approach holding that the federal statute is not a bar to credit, even when a sentence never began because a defendant was erroneously at liberty.¹²⁶ *Germaine v. United States*,¹²⁷ a case from the Southern District of New York, is typical. Germaine was sentenced in federal court and immediately delivered to state custody for disposition of state charges.¹²⁸ After pleading guilty, he remained in state custody until he was delivered to federal authorities.¹²⁹ The Bureau of Prisons declined to credit his sentence with the time spent in state custody after his federal sentence.¹³⁰ The court noted the presumption that sentences run concurrently, and that there was no contrary suggestion in this case.¹³¹ The court rejected the claim that § 3568 precluded credit for the time in state custody; explaining that “[s]uch an application of § 3568 to the facts of this case would be mechan-

be concurrent. *Id.* at 391; see also *Mitchell v. Shank*, 105 F. Supp. 274, 275-76 (E.D. Ky. 1952) (relying on statute to find that credit was unavailable).

121. See *infra* notes 122-25 and accompanying text.

122. 402 U.S. 1006 (1971).

123. Memorandum for the United States on Petitions for Writs of Certiorari at 13-16, *Nelson v. United States*, 402 U.S. 1006 (1971) (No. 6662).

124. *Id.* at 10; see also *id.* at 11 (noting that in cases where a convicted individual serves a valid state sentence, and then commences a federal sentence, “literal enforcement of the statute has offended no instinctive notions of fairness or propriety”).

125. *Id.* at 15.

126. See, e.g., cases cited *infra* notes 127-47 and accompanying text.

127. 760 F. Supp. 41 (S.D.N.Y. 1991).

128. *Id.* at 42.

129. *Id.*

130. *Id.*

131. *Id.*

ical and inequitable.”¹³² Accordingly, the court awarded credit.¹³³ In *Smith v. Swope*¹³⁴ itself, the court granted credit over a dissent contending that § 3568’s predecessor, § 709a, precluded relief.¹³⁵ Cases from the District of Columbia Court of Appeals,¹³⁶ and the Second,¹³⁷ Third,¹³⁸ Sixth,¹³⁹ Ninth,¹⁴⁰ and Tenth¹⁴¹ Circuits implicitly or expressly hold that

132. *Id.* at 43.

133. *Id.*

134. 91 F.2d 260 (9th Cir. 1937).

135. *Id.* at 262 (Haney, J., dissenting) (arguing that the sentence had not begun because § 709a was not satisfied).

136. *Millard v. Roach*, 631 A.2d 1217, 1220-25 (D.C. 1993) (granting credit, notwithstanding § 3568, because of erroneous delay in commencing sentence).

137. *United States v. Greenhaus*, 89 F.2d 634, 635 (2d Cir. 1937) (per curiam) (Learned Hand, Augustus Hand, and Harrie Chase, JJ.) (awarding credit for period of illegal release; discussing § 709a, and applying it to a separate period of time when convict was in state custody after erroneous release but resisting return to federal custody); *Farley v. Nelson*, 469 F. Supp. 796, 801 (D. Conn.) (after concluding that “[t]here was no act on the part of any federal authority that resulted in petitioner’s being out of federal custody, through no fault of his own, at a time when he should have been in federal custody,” the court determined that § 3568 controlled), *aff’d without opinion*, 607 F.2d 995 (2d Cir. 1979).

138. *United States v. Harrison*, 156 F. Supp. 756, 760 (D.N.J. 1957) (applying statute and distinguishing, but not rejecting *Smith v. Swope* because there was no erroneous failure to incarcerate); *United States v. DeFillippo*, 108 F. Supp. 410, 412 (D.N.J. 1952) (applying statute and distinguishing, but not rejecting, *Smith v. Swope* where convict had been brought before federal court on a writ of *habeas corpus ad prosequendum* from state custody and then returned).

139. *Coleman v. United States*, No. 94-5127, 1994 WL 573917, at *2 (6th Cir. Oct. 17, 1994) (noting erroneous failure to commence sentence is exception to § 3585(a)); *United States v. Avery*, No. 90-5216, 1990 WL 118695, at *5-*7 (6th Cir. Aug. 15, 1990) (denying credit based on statute, distinguishing erroneous release cases on grounds that the case did not involve disobedience of a court order), *cert. denied*, 498 U.S. 990 (1990); *Vaughn v. United States*, 548 F.2d 631, 632-33 (6th Cir. 1977) (per curiam) (applying statute in absence of failure to comply with court order of concurrent sentencing).

140. *Del Guzzi v. United States*, 980 F.2d 1269, 1272 (9th Cir. 1992) (Norris, J., concurring) (relying on § 3568 to deny credit against federal sentence for time spent in state custody and explaining that credit would be available if the convicted individual had been in the custody of the federal marshals, “and those federal marshals had erroneously turned him over to state authorities”) (citing *Smith v. Swope*); *Thomas v. Brewer*, 923 F.2d 1361, 1366-67 (9th Cir. 1991) (distinguishing *Smith v. Swope* and applying § 3568 because federal prisoner properly was returned to state custody following federal sentencing); *In re Garmon*, 572 F.2d 1373, 1376 (9th Cir. 1978) (assuming validity of *White v. Pearlman*, and distinguishing it; “unlike the ‘false release’ cases, our case presents no allegations of governmental or prosecutorial harassment, misconduct or oversight”).

141. *McIntosh v. Looney*, 249 F.2d 62, 64 (10th Cir. 1957) (agreeing “with appellant’s academic premise that a prisoner cannot be charged with a detriment attributable to the misfeasance or nonfeasance of the United States Marshal in executing or failing to execute an order of the federal court,” but, nevertheless, applying the statute to deny credit where there was no such error), *cert. denied*, 355 U.S. 935 (1958); *Hayward v. Looney*, 246 F.2d 56, 58 (10th Cir. 1957) (applying statute and distinguishing *Smith v. Swope* on the ground that the present case involved no disobedience to an order of the federal court); *Rohr v. Hudspeth*, 105 F.2d 747, 750 (10th Cir. 1939) (denying credit where convicted individual

§ 3585(a) (or its predecessors) do not preclude relief when a defendant has been erroneously released. Rather, they evaluate claims on the merits even after discussing or otherwise acknowledging the existence of the statute.¹⁴²

The Fourth Circuit view that the doctrine is inapplicable unless the federal sentence has commenced is not well-founded. As a formal matter, the statute is not violated by granting credit for time erroneously at liberty. The language in § 3568, that “no sentence shall prescribe any other method of computing the term”¹⁴³ is not transgressed, for the sentence itself is not the instrument that awards credit for time erroneously at liberty.¹⁴⁴ It would be strained to construe § 3568, which is explicitly addressed to a “sentence,” as controlling an order granting credit, which is not a sentence.¹⁴⁵ Moreover, the issue of credit for time erroneously at liberty can arise only after sentencing. It would be odd for a provision regulating sentencing to govern a matter which, by definition, could not arise until after sentencing. Although the “no sentence” language was omitted from § 3585(a), there is no indication that Congress intended to change this feature of the law.

More fundamentally, the statute governs the method of calculating what constitutes service of the sentence. Credit for time erroneously at

had been brought before the federal court by writ of *habeas corpus ad prosequendum*, and then returned, but even after addressing statute, noting that “[a] different situation might be presented if the Marshall [sic] had exclusive custody of petitioner on the date of sentence, had failed to carry out the judgment and orders of the federal court, and had surrendered him to the state authorities”) (citing *Smith v. Swope*).

142. See *supra* notes 134-41 and accompanying text.

143. 18 U.S.C. § 3568 (Supp. IV 1962).

144. In *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986), the Supreme Court interpreted § 706(g) of Title VII, which provided that “no order of the court” may compel the hiring of a person who had been excluded for a reason other than discrimination. *Id.* at 514. The question before the Supreme Court was whether a consent decree was an order within the scope of the statute. *Id.* at 513. The Court held that it was not. *Id.* at 521-24. If a consent judgment is not an “order,” it seems plausible that an order on a motion pursuant to 28 U.S.C. § 2255 is not a “sentence.” *Id.*; see 28 U.S.C. § 2255 (1988 & Supp. V 1993).

145. The conclusion that a statute would not contemplate a factual impossibility supported the Court’s decision in *United States v. Wilson*, 503 U.S. 329, 333 (1992), which interpreted 18 U.S.C. § 3585(b) as making the Attorney General, rather than the district court, responsible for calculating credit for custody prior to the convicted individual’s arrival at the penitentiary.

At sentencing, the District Court only could have speculated about the amount of time that Wilson would spend in detention prior to the commencement of his sentence Because § 3585(b) bases the credit on how much time a defendant “has spent” (not “will have spent”) [in custody] prior to beginning his sentence, the District Court could not compute the amount of the credit at sentencing.

Id. at 334.

liberty is beyond the purview of the statute because it is granted for something other than service of the sentence. The doctrine does not purport to provide that a period of erroneous liberty *is* service of the sentence. Rather, it awards credit against the sentence even though the sentence was not served. The requirement that the sentence shall commence upon receipt at the prison does not preclude credit against that sentence for things other than service of the sentence in that fashion. In fact, the statute itself provides for jail time credit, time that obviously is earned before being received at the penitentiary. Indeed, it is possible that earned jail time credit could exceed the duration of a sentence, such as when a defendant charged with a felony is convicted of a misdemeanor, in which case the sentence would be over without ever having begun. This illustrates that there is no talismanic quality to commencement of the sentence.

Construing § 3585(a) in this way does no violence to the purposes of the statute. Its predecessor was enacted in 1932 to deal with manipulation of sentences.¹⁴⁶ According to the 1932 Report of the House Judiciary Committee, judges sometimes would sentence “a prisoner for a year and a day to make him eligible for parole,” but then provide that the sentence “shall commence to run from some date prior to the sentence or some date before the prisoner actually commences his service, with the result that the parole law may be made applicable to a case where the prisoner actually serves less than a year.”¹⁴⁷ The law was designed to “produce certainty and prevent juggling with sentences.”¹⁴⁸ The credit doctrine does not undermine this purpose. The sentence begins to run as provided in the statute and, accordingly, the doctrine does not prevent the certainty intended by the statute. Indeed, the credit doctrine is consistent with the law, because it is intended to prevent “juggling with sentences.”

Finally, principles of statutory construction favor the majority rule. The Sentencing Reform Act of 1984 uses essentially the same language as the prior statute. As the Supreme Court has noted, “re-enactment of a statute creates a presumption of legislative adoption of previous judicial construction.”¹⁴⁹ Accordingly, there is a presumption that the Act does

146. See Act of June 29, 1932, ch. 310, Pub. L. No. 72-210; H.R. REP. NO. 960, 72d Cong., 1st Sess. 2 (1932).

147. H.R. REP. NO. 960, 72d Cong., 1st Sess. 2 (1932).

148. *Id.*

149. *Shapiro v. United States*, 335 U.S. 1, 20 (1948); *accord* *Central Bank v. First Interstate Bank of Denver*, 114 S. Ct. 1439, 1452 (1994) (citing several recent cases applying the principle). The Supreme Court already has held that the procedural requirements of § 3585(b), governing jail time credit, would be the same as under the predecessor statute, notwithstanding changes in language that were more significant than those to § 3585(a).

not overrule the views of the courts, which in 1984 were apparently unanimous in holding that credit was available notwithstanding the federal sentencing commencement statute.¹⁵⁰

III. DOES THE SENTENCING REFORM ACT LEGISLATIVELY OVERRULE THE DOCTRINE OF CREDIT FOR TIME ERRONEOUSLY AT LIBERTY?

The Sentencing Reform Act of 1984 systematically revised federal sentencing law. It has changed the philosophy and goals of sentencing in significant ways. The most important changes include a dramatic reduction in the discretion vested in trial judges when imposing sentences, an effort to promote uniformity of sentences for comparable crimes, and promotion of "truth in sentencing" by abolishing parole and imposing sentences that approximate time actually served.¹⁵¹

The Sentencing Reform Act does not mention credit for time erroneously at liberty.¹⁵² No court has expressly addressed whether it continues to exist in the federal system, although some assume that it does.¹⁵³ The statute itself does not explicitly abolish the doctrine, although it specifically repeals many statutes.¹⁵⁴ No provisions of the statute are fatally inconsistent with the concept of credit for time erroneously at liberty; however, there are no provisions directly supporting it. Similarly, the leg-

See United States v. Wilson, 503 U.S. 329, 333-36 (1992); *see also* Reno v. Koray, 115 S. Ct. 2021, 2026 (1995) (interpreting "official detention" in § 3585(b) in accordance with Courts of Appeals' prior construction of "custody" in § 3568, despite a change in language; "nothing suggests that Congress disagreed with the [prior construction]").

150. *Mitchell v. Shank*, 105 F. Supp. 274, 276 (E.D. Ky. 1952), the only pre-Act case denying credit based on the statute, effectively was overruled by *United States v. Croft*, 450 F.2d 1094 (6th Cir. 1971). Thus, at the time the Sentencing Reform Act became law, the federal courts apparently were unanimous, the cases cited in note 120, *supra* not yet having been decided.

151. *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

152. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1994) and 28 U.S.C. §§ 991-998 (1994)).

153. *See Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir.) (applying rule to a hypothetical sentence imposed on July 1, 1990, which presumably, would be a guidelines sentence), *cert. denied*, 114 S. Ct. 2182 (1994); *United States v. Martinez*, 837 F.2d 861 (9th Cir. 1988) (involving a pre-Act sentence although decided after the effective date of the Act); *United States v. Friedman*, No. 88 Cr. 613 (MEL), 1993 WL 227702, at *2 (S.D.N.Y. June 21, 1993) (finding guidelines sentence illegal where there was excessive delay in implementation and ordering resentencing).

154. *See* Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1994) and 28 U.S.C. §§ 991-998 (1994)).

islative history fails to indicate any intention with regard to credit for erroneous release.¹⁵⁵

A. *Statutory Purpose And Congressional Intent*

Examination of the purposes of the statute does not compel the conclusion that Congress intended either to retain or abolish the doctrine. To some degree, non-statutory credits violate the truth in sentencing effort because a person sentenced to sixty months, for instance, if given credit for an erroneous release, in fact would serve less than that. Yet, denying credit also would impair truth in sentencing because allowing ministerial officers to delay or interrupt sentences without limitation undermines the expectation that sentences will be served with reasonable promptness. If citizens lose confidence in the system because a twenty-year sentence could result in parole after six years and eight months, they also are likely to be upset that a marshal is free to decide that execution of a sentence should be delayed, perhaps indefinitely.

The goal of uniformity would be compromised by allowing an erroneously released defendant to serve less time than another convict who received the same sentence, but was properly taken into custody. Yet, uniformity is not fostered by having some defendants begin or continue their sentences years after they should have started while others are served on time.

Finally, while the Act was designed to curtail the discretion of district judges and eliminate discretionary parole, it was not intended to replace that discretion by giving unlimited authority to the marshal to release defendants or fail to take them into custody. Denial of credit would effectively permit this intolerable result.¹⁵⁶

In fact, the issue probably was never considered by Congress. It is difficult to imagine that Congress would abolish the doctrine without replac-

155. S. REP. NO. 225, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182.

156. One passage of the legislative history shows how the doctrine of credit is simultaneously consistent and inconsistent with the Act. "Under the bill, the sentence imposed by the judge will be the sentence actually served." *Id.* at 56, *reprinted in* 1984 U.S.C.C.A.N. at 3239. This suggests that credit will be available only for time served under the sentence, although the availability of jail time credit indicates that this is not literally true. Later in the same paragraph, however, the report states that "[t]he prisoner, the public, and the corrections officials will be certain at all times how long the prison term will be" *Id.* This is consistent with limitation on the discretion of ministerial officials to interrupt a sentence, as is the observation that with the abolition of parole, "[p]risoners' morale will probably improve when the uncertainties about release dates are removed." *Id.*; *see also id.* at 57, *reprinted in* 1984 U.S.C.C.A.N. at 3240 (stating that "because of the increased certainty of release dates, the bill should enhance prison rehabilitation efforts because prison officials will be able to work with prisoners to develop realistic work programs and goals within a set term of imprisonment").

ing it with another mechanism or providing a cause of action against recalcitrant prosecutors, marshals, or wardens. It also would be surprising were Congress to act *sub silentio* given the wide acceptance of the doctrine in both state courts and the federal system. In addition, while there exist many cases that deal with credit claims, accidental release of sentenced defendants was not Congress' concern in reforming the law. The Act outlines how the system is supposed to operate when the process works correctly, not for the rare instances when the system breaks down. Congress almost certainly had no specific intention to deal with this issue.

B. Assessing The Doctrine's Status Without Express Congressional Direction

The question then is what status the doctrine has in the absence of any congressional intention either to keep the doctrine or to abolish it, and where the statutory scheme can work either way. It is clear that the Act, though an effort at consolidation, is not an exclusive expression of the law.¹⁵⁷ Many common law sentencing rules, which were not set forth in the Act, still exist.¹⁵⁸ Moreover, in addition to saying nothing about the credit doctrine, the Act did not mention the waiver principle.¹⁵⁹ Because the waiver principle is grounded in the Constitution, it cannot be repealed by Congress, explicitly or implicitly. The fact that this doctrine was not incorporated in the Act suggests that it was not meant to be the sole expression of the law of sentencing, even in this area.

There is evidence that the Act did not abolish all pre-Act sentencing practices and principles, even with regard to the areas it covered. The

157. *But cf. id.* at 50, reprinted in 1984 U.S.C.C.A.N. at 3233 stating that:

Title II . . . contains a comprehensive statement of the Federal law of sentencing. It outlines in one place the purposes of sentencing, describes in detail the kinds of sentences that may be imposed to carry out those purposes, and prescribes the factors that should be considered in determining the kind of sentence to impose in a particular case.

Id.

158. *See, e.g.,* United States v. Dillard, 43 F.3d 299, 310-12 (7th Cir. 1994) (relying on pre-Sentencing Reform Act cases to hold that sentence disparity between co-defendants does not warrant resentencing); United States v. Contreras-Subias, 13 F.3d 1341, 1344 (9th Cir.) (relying on pre-Sentencing Reform Act cases as support for the traditional rule that "[a] sentence that is 'so ambiguous that it fails to reveal its meaning with fair certainty' is illegal") (quoting United States v. Alverson, 666 F.2d 341, 348 (9th Cir. 1982) (quoting United States v. Daugherty, 269 U.S. 360, 363 (1926))), *cert. denied*, 114 S. Ct. 2105 (1994); United States v. Restrepo, 986 F.2d 1462, 1463 (2d Cir.) (relying on pre-Act case to support the traditional rule that oral pronouncement of sentence prevails over contradictory written order), *cert. denied*, 114 S. Ct. 130 (1993).

159. *See* Sentencing Reform Act of 1984, ch. 227, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1994) and 28 U.S.C. §§ 991-998 (1994)).

Supreme Court has relied on past practice, at least twice, in interpreting the Sentencing Reform Act. In *United States v. Wilson*,¹⁶⁰ the Court relied on prior practice in construing 18 U.S.C. § 3585(b), a provision granting jail time credit to sentenced prisoners.¹⁶¹ This section was based on preexisting law, but contains different language.¹⁶² The *Wilson* Court addressed whether the Attorney General has initial administrative jurisdiction to award credit, as prior law had explicitly provided, or whether the silence of the new provision, with respect to this issue, means that district courts now may award credit.¹⁶³ The Court determined that the new statute has the same meaning as the old statute, and that the Attorney General may grant the credit as an initial matter. The Court stated that: “[c]rediting jail-time against federal sentences long has operated in this manner. . . . ‘It is not lightly to be assumed that Congress intended to depart from a long established policy.’”¹⁶⁴ Similarly, in *Reno v. Koray*,¹⁶⁵ the Supreme Court held that “official detention” for purposes of pre-sentence credit in § 3585 means the same as “custody” in § 3568 because, in spite of the change in language, Congress gave no indication that it meant to change existing practice.¹⁶⁶

Similarly, in *United States v. O’Neil*,¹⁶⁷ the First Circuit explained that reliance on pre-guidelines authority often was appropriate: “We have recognized—and we believe the Sentencing Commission has recognized—the desirability of emulating pre-guidelines practice to the extent that plain meaning does not compel change. Thus, we have repeatedly referred to pre-guidelines precedent as an aid to interpreting the sentencing guidelines.”¹⁶⁸ A number of other Courts of Appeals also rely on pre-guidelines decisions.¹⁶⁹

160. 503 U.S. 329 (1992).

161. *Id.* at 334-36 (holding that Congress’s failure to specify the role of the Attorney General in the statute’s revision does not obviate the Attorney General’s role in computing the credit under § 3585(b)).

162. *Id.* at 337.

163. *Id.* at 332-33.

164. *Id.* at 335-36 (quoting *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 627 (1925)).

165. 115 S. Ct. 2021 (1995).

166. *Id.* at 2026.

167. 11 F.3d 292 (1st Cir. 1993).

168. *Id.* at 298 (citing *United States v. Emery*, 991 F.2d 907, 911 (1st Cir. 1993); *United States v. Blanco*, 888 F.2d 907, 910 (1st Cir. 1989)). The First Circuit noted that “‘the guidelines represent an approach that begins with, and builds upon, pre-guidelines practice.’” *Id.* (citing *United States Sentencing Guidelines Ch. 1, Pt. A, Intro. cmt. 3* (Nov. 1992)); see also *United States v. Akitoye*, 923 F.2d 221, 228 (1st Cir. 1991) (relying on pre-guidelines cases regarding trial perjury by defendant to determine whether adjustment for obstruction of justice was applicable).

169. See, e.g., *United States v. Fleming*, 9 F.3d 1253, 1254 (7th Cir. 1993) (noting that the issue was one of first impression under the guidelines, but following the approach

Traditional canons of construction also support the conclusion that the Act was not meant to eliminate the common law doctrine of credit.¹⁷⁰ There is a presumption that statutes do not overrule the common law. In *Tome v. United States*,¹⁷¹ the Court recognized that “[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.”¹⁷² Because the Court could find no intent to change the common law rule,¹⁷³ it determined that no change in the law had taken place. This seems to be the traditional approach.¹⁷⁴

As the Supreme Court recently explained:

[W]here a common-law principle is well-established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’ This interpretive presumption is not, however, one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption’s application to a given statutory scheme.¹⁷⁵

taken in pre-guidelines cases) (citations omitted); *United States v. Frederick*, 897 F.2d 490, 492 (10th Cir.) (following pre-guidelines practice with regard to standard of proof of sentencing evidence), *cert. denied*, 498 U.S. 863 (1990); *United States v. Baig*, No. 89-10064, 1989 WL 132177 (9th Cir. Nov. 6, 1989).

170. 2B NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 50.01, at 90 (5th ed. 1992) (stating that “[a]bsent an indication that the legislature intends a statute to supplant the common law, the courts should not give it that effect”).

171. 115 S. Ct. 696 (1995) (plurality opinion).

172. *Id.* at 704 (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989)).

173. *Id.*

174. *See, e.g.*, *Midlantic Nat. Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 501 (1986) (stating that “[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific”) (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979)); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970) (stating that “[i]t has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles . . .”); *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304-05 (1959) (stating that “[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express”) (quoting *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1879)) (alteration in original); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (stating that “[s]tatutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident”); *Ross v. Jones*, 89 U.S. (22 Wall.) 576, 592 (1874) (explaining that “statutes are not presumed to make any alteration in the common law, beyond what is expressed in the statute”).

175. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). The familiar principle that Congress is presumed to know the law has been applied to the law of sentencing. *See Washington Legal Found. v. United States Sentencing Comm’n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994)

* * *

[Rather, t]he presumption here is thus properly accorded sway only upon legislative default, applying where Congress has failed expressly or impliedly to evince any intention on the issue.¹⁷⁶

This appears to be precisely the circumstance here. Congress did not expressly address the issue, and either result could pertain harmoniously with the structure of the Act. Under such a circumstance, the presumption against legislative repeal should apply.

IV. CONCLUSION

After the Sentencing Reform Act, and notwithstanding 18 U.S.C. § 3585(a), the doctrine of credit for time erroneously at liberty still has a role to play. It remains fair to have a rule that places the burden of government negligence on the government, rather than on the convicted person. The government has the ability to prevent the circumstances of the doctrine from ever applying simply by making sure that people who should be in custody in fact are in custody.

(presuming that Congress was aware of a prior decision of the Court regarding the Sentencing Commission when it enacted a new statute) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979)).

176. *Astoria*, 501 U.S. at 110.

