
NO. 35140

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

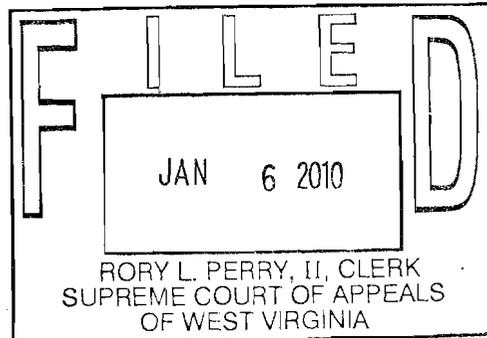
STATE OF WEST VIRGINIA,

Appellee,

v.

DAVID HAROLD EILOLA,

Appellant.



BRIEF OF APPELLEE
STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL
State Bar ID No. 3927
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

| | Page |
|---|-------------|
| I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW | 1 |
| II. PROCEDURAL HISTORY | 2 |
| III. ASSIGNMENT OF ERROR | 4 |
| IV. ARGUMENT | 4 |
| V. CONCLUSION | 16 |

TABLE OF AUTHORITIES

| | Page |
|--|-------------|
| CASES: | |
| <i>Adkins v. Bordenkircher</i> , 164 W. Va. 292, 262 S.E.2d 885 (1980) | 6 |
| <i>Echard v. Holland</i> , 177 W. Va. 138, 351 S.E.2d 51 (1986) | 7, 8, 9, 11 |
| <i>Endell v. Johnson</i> , 738 P.2d 769 (Alaska Ct. App. 1987) | 12 |
| <i>Martin v. Leverette</i> , 161 W. Va. 547, 244 S.E.2d 39 (1978) | 4, 5 |
| <i>People v. Watts</i> , 464 N.W.2d 715 (Mich. App. 1991) | 12 |
| <i>State ex rel. Carper v. West Virginia Parole Board</i> , 203 W. Va. 583, 509 S.E.2d 864 (1998) | 6 |
| <i>State ex rel. Medical Assurance of West Virginia v. Recht</i> , 213 W. Va. 457, 583 S.E.2d 80 (2003) | 9 |
| <i>State ex rel. Roach v. Dietrick</i> , 185 W. Va. 23, 404 S.E.2d 415 (1991) | 5 |
| <i>State v. Arcand</i> , 403 N.W.2d 23 (N.D. 1987) | 13 |
| <i>State v. Hoch</i> , 630 P.2d 143 (Idaho 1981) | 12 |
| <i>State v. Lindsey</i> , 160 W. Va. 284, 233 S.E.2d 734 (1977) | 6 |
| <i>State v. McClain</i> , 211 W. Va. 61, 561 S.E.2d 783 (2002) | 4 |
| <i>State v. Middleton</i> , 220 W. Va. 89, 640 S.E.2d 152 (2006) | passim |
| <i>State v. Scott</i> , 214 W. Va. 1, 585 S.E.2d 1 (2003) | 6, 7, 8 |
| <i>State v. Tauiliili</i> , 29 P.3d 914 (Haw. 2001) | 12 |
| <i>Vickers v. Haynes</i> , 539 F.2d 1005 (4th Cir. 1976) | 14 |
| <i>Wanstreet v. Bordenkircher</i> , 166 W. Va. 523, 276 S.E.2d 205 (1981) | 6 |
| <i>White v. Gilligan</i> , 351 F. Supp. 1012 (S.D. Ohio 1972) | 14 |
| <i>Wilson v. State</i> , 264 N.W.2d 234 (Wis. 1978) | 14 |

STATUTES:

W. Va. Code § 28-5-27(c) 7

W. Va. Code § 28-5-27(e) 8

W. Va. Code § 28-5-27(f) 11

W. Va. Code § 28-5-27(g) 8

W. Va. Code § 28-5-27(h) 11

W. Va. Code § 61-3-4 15

W. Va. Code § 61-11-24 4, 8, 11

W. Va. Code § 62-12-13(b)(1)(A) 5, 8, 10, 11

W. Va. Code § 62-12-13(f) 13

NO. 35140

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

DAVID HAROLD EILOLA,

Appellant.

BRIEF OF APPELLEE
STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING
AND NATURE OF THE RULING BELOW

David Harold Eilola (hereafter “Appellant”) appeals the December 10, 2008, amended order of the Circuit Court of Kanawha County, which re-sentenced Appellant for purposes of appeal following his convictions for Attempted Murder in the First Degree, Malicious Assault, Arson in the Fourth Degree, Violation of a Domestic Violence Protective Order, and Domestic Battery.

This Court granted the appeal only as to Assignment of Error No. 3, relating to the proper application of credit for time served by Appellant prior to sentencing. Appellant submits that this Court’s holding in *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152 (2006), regarding credit for time served, should be reconsidered and reversed on equal protection grounds. The State agrees that the opinion should be reconsidered, for reasons that will be more fully discussed herein.

II.

PROCEDURAL HISTORY

Following Appellant's convictions on April 26, 2007, the Circuit Court of Kanawha County imposed consecutive sentences of three to fifteen years for Attempted First Degree Murder, with 495 days credit for time served while awaiting trial, conviction and sentencing; two to ten years for Malicious Assault; two years for Fourth Degree Arson; twelve months for Violation of a Domestic Violence Protective Order; and twelve months for Domestic Battery, by order entered August 8, 2007. (R. 381-84.)¹ Pursuant to this order, a certified penitentiary commitment was prepared on August 16, 2007, which reflected an effective sentence date of March 29, 2006. (R. 378-79.)

On August 21, 2007, the Kanawha County Prosecuting Attorney's office filed a motion to correct the penitentiary commitment prepared by the circuit clerk and delivered to the Commissioner of Corrections, stating:

The commitment is incorrect because the commitment attributes the defendant's credit for time served against the initial (parole eligibility) portion of the sentence in a manner inconsistent with the decisions of the West Virginia Supreme Court of Appeals in *State v. Middleton*, 220 W. Va. 89 (2006). Syllabus Point #6 of the *Middleton* case states,

"Consistent with our decision in *Echard v. Holland*, 177 W. Va. 138, 351 S.E.2d 51 (1986), when a trial court awards credit for presentence incarceration to a defendant receiving consecutive sentences, the period of presentence incarceration must be credited against the aggregated maximum term of the consecutive sentences. To the extent that language in the decision of *State v. Scott*, 214 W.Va. 1, 585 S.E.2d 1 (2003), suggests a different allocation of presentence credit to consecutive sentences, it is disapproved."

Thus, the law requires that credit for time served in a consecutive sentence be credited against the aggregated maximum of the defendant's sentence. Simply, the

¹Record citations are to the felony record, Case No. 06-F-240.

495 days credit for time served is reduced from the “back” end of the sentence, not the front. The West Virginia rule is consistent with the rule in Alaska, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, Oregon, North Carolina, North Dakota, Vermont, and Wisconsin. *See, Middleton, supra*, for list.

The parole eligibility of the defendant is calculated from the commitment and the effective sentence date. The commitment prepared by the Clerk is inconsistent with the controlling decisional law of this State.

WHEREFORE, the State of West Virginia asks that this Court void the prior commitment and require the issuance of a new commitment consistent with the controlling law of this State.

(R. 405-06.)

A hearing was held on the State’s motion on November 13, 2007, following which the circuit court granted the motion by order entered November 21, 2007, directing that “the commitment shall be amended to reflect that the effective sentencing date and the actual sentencing date shall be the 6th day of August, 2007”; and that “the defendant’s credit for time served calculated at four hundred ninety-five (495) days shall be deducted from the maximum aggregated sentence by the Commissioner of Corrections[.]” (R. 431.) Pursuant to this order, an Amended Commitment was certified to the Commissioner of Corrections on December 20, 2007, reflecting an effective sentence date of August 6, 2007. (R. 433-34.)

Appellant was re-sentenced by order entered March 13, 2008, for purposes of appeal. (R.443-46.) He was re-sentenced again on October 15, 2008, and by amended order entered December 10, 2008, in order to perfect this appeal, and new counsel was appointed to represent him on appeal. These orders incorporated the circuit court’s previous rulings regarding the effective sentence date and deduction of Appellant’s credit for time served from the maximum aggregated sentence. It is from these sentencing orders that Appellant now appeals.

III.

ASSIGNMENT OF ERROR

This Court granted appellate review solely on the following assignment of error:

Whether refusing to give the petitioner credit for time served prior to conviction on his parole eligibility violates the constitutional guarantees of equal protection under the law.

IV.

ARGUMENT

West Virginia Code § 61-11-24 [1923] provides:

Whenever any person is convicted of an offense in a court of this State having jurisdiction thereof, and sentenced to confinement in jail or the penitentiary of this State, or by a justice of the peace having jurisdiction of the offense, such person may, in the discretion of the court or justice, be given credit on any sentence imposed by such court or justice for the term of confinement spent in jail awaiting such trial and conviction.

While the statute appears to be discretionary, this Court has made clear that the granting of such presentence credit is mandatory. *See* Syl. Pt. 6, *State v. McClain*, 211 W. Va. 61, 561 S.E.2d 783 (2002) (“The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that time spent in jail before conviction shall be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable.”); Syl. Pt. 1, *Martin v. Leverette*, 161 W. Va. 547, 244 S.E.2d 39 (1978) (“The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trial or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable.”).

The equal protection argument runs on the premise that an invidious discrimination based on wealth occurs where the indigent defendant, unable to obtain bail, stays in

jail, while his wealthier counterpart is free on bond and, receiving the same ultimate sentence, will have served less total time since he had no jail time.

Martin, 161 W. Va. at 550, 244 S.E.2d at 41 (citing *Durkin v. Davis*, 538 F.2d 1037 (4th Cir. 1976)).

Constitutional protections are implicated because a person who is unable to make bail will be incarcerated before trial. If such person is not given credit for the jail time, a longer period of incarceration will occur than for the person who commits the same offense but is released on pretrial bail.

State ex rel. Roach v. Dietrick, 185 W. Va. 23, 25 n.5, 404 S.E.2d 415, 417 n.5 (1991).

The State can find no compelling reason why the same analysis should not be applied to eligibility for parole. Appellant submits that the Court's ruling in *Middleton* "results in loss of credit on a sentence for periods of incarceration based solely upon economic status or resources." Appellant's Brief at 1. Therefore, refusing to give Appellant credit for time served on the "front" of his sentence, thus moving back his parole eligibility, violates the constitutional guarantees of equal protection under the law. *Id.*

The threshold for parole eligibility is prescribed by West Virginia Code § 62-12-13(b)(1)(A) [2006], which provides in relevant part: "Any inmate of a state correctional center is eligible for parole if he or she . . . [h]as served the minimum term of his or her indeterminate sentence or has served one fourth of his or her definite term sentence, as the case may be. . . ."²

Under this statute, an inmate is entitled to parole consideration if he has served the requisite portion of his sentence. When it comes to time served, Appellant persuasively argues that "[c]onfinement is confinement whether it is spent in the custody of the Department of Corrections or in the custody of the Regional Jail system." Appellant's Brief at 3. However, under the current

²The statute also contains restrictions on parole eligibility when the use, presentment or brandishing of a firearm is found by the court or jury, which is not an issue in the present case.

formula for calculating presentence credit, “two individuals similarly situated are subjected to different punishments based solely upon economic status” if one is unable to make bail. *Id.*

The State acknowledges that “parole is not a right, and that eligibility for parole does not guarantee the defendant’s release from prison.” *State v. Scott*, 214 W. Va. 1, 7, 585 S.E.2d 1, 7 (2003). *See also State v. Lindsey*, 160 W. Va. 284, 291, 233 S.E.2d 734, 738-39 (1977) (“One convicted of a crime and sentenced to the penitentiary is never *entitled* to parole.”); *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 536, 276 S.E.2d 205, 213 (1981) (“[T]here is no automatic right to parole once the prisoner crosses the threshold of eligibility.”).

However, this Court has also recognized that “parole hearings are a substantial interest subject to legal protection,” *State ex rel. Carper v. West Virginia Parole Bd.*, 203 W. Va. 583, 586, 509 S.E.2d 864, 867 (1998) (citing *Vance v. Holland*, 177 W. Va. 607, 355 S.E.2d 396 (1987)); and that parole eligibility is entitled to certain constitutional protections. *See Adkins v. Bordenkircher*, 164 W. Va. 292, 296, 262 S.E.2d 885, 887 (1980) (“Parole eligibility is another facet of penal law scrutinized under the Ex Post Facto Clause.”). Appellant thus argues that “there is a due process and equal protection right to have the opportunity to be considered for parole.” Appellant’s Brief at 4.

In Syllabus Point 6 of *State v. Scott*, this Court recognized that the opportunity to appear before the Parole Board is a significant right that should be protected:

Where a criminal defendant has been placed on probation after successfully completing a program of rehabilitation at a young adult offender center under the Youthful Offenders Act, W. Va. Code, 25-4-1 to -12, and such probation is subsequently revoked, pursuant to W. Va. Code, 25-4-6 [2001] *the circuit court's sentencing order must credit the defendant with time spent in incarceration in such a manner that the defendant's date of eligibility for parole is the same as if the defendant had not been committed to a young adult offender center and subsequently placed on probation. [Emphasis added.]*

The method of apportioning credits between consecutive sentences as set forth in footnote 11 of the *Scott* opinion was seriously flawed, and was rightfully disapproved in *Middleton*. However, the underlying rationale of the *Scott* decision—that any time spent in incarceration should be credited toward the defendant’s parole eligibility date—appears to be sound. “In sum, the circuit judge gives a criminal defendant credit for prior time spent in jail and thereby establishes the first eligibility date for the Parole Board to consider granting the defendant release on parole.” *Scott*, 214 W. Va. at 7, 585 S.E.2d at 7.

In *Echard v. Holland*, 177 W. Va. 138, 351 S.E.2d 51 (1986), this Court was faced with a claim by a prisoner that he was entitled to have “good time” deducted from each of two consecutive sentences he was serving. The Court denied his claim, but in reviewing the record discovered that prison officials had improperly deducted good time credit and presentence credit from both sentences in arriving at his minimum discharge date. In resolving the issue, the opinion stated:

In cases of consecutive sentences, West Virginia Code § 28-5-27(e) requires that good time shall be allowed to the inmate as if the consecutive sentences, when the maximum terms are added together, were one sentence. The maximum terms of the consecutive sentences, determinate or indeterminate, must first be added together to determine the inmate's maximum discharge date. It is from this maximum discharge date that all presentence and good time deductions must be made in order to establish the inmate's *minimum discharge date*.

Echard, 177 W. Va. at 143, 351 S.E.2d at 56-57 (emphasis added). This statement was correct.

West Virginia Code § 28-5-27(c) [1984] provides:

Each inmate committed to the custody of the commissioner of corrections and incarcerated in a penal facility pursuant to such commitment shall be granted one day good time for each day he or she is incarcerated, *including any and all days in jail awaiting sentence and which is credited by the sentencing court to his or her sentence pursuant to section twenty-four, article eleven, chapter sixty-one of this code* or for any other reason relating to such commitment. No inmate may be granted any good time for time served either on parole or bond or in any other status whereby he or she is not physically incarcerated. [Emphasis added.]

Good time is deducted from the aggregate maximum term of consecutive sentences. W. Va. Code § 28-5-27(e) [1984] (“An inmate under two or more consecutive sentences shall be allowed good time as if the several sentences, when the maximum terms thereof are added together, were all one sentence.”). The application of good time to an inmate’s sentence is then used to calculate his or her *minimum discharge date* pursuant to subsection (g) of the statute:

Each inmate, upon his or her commitment to and being received into the custody of the commissioner of the department of corrections, or upon his return to custody as the result of violation of parole pursuant to section nineteen, article twelve, chapter sixty-two of this code, shall be given a statement setting forth the term or length of his or her sentence or sentences *and the time of his minimum discharge computed according to this section.*

W. Va. Code § 28-5-27(g) [1984] (emphasis added).

Neither these statutes nor the *Echard* opinion itself mandate that presentence credits granted pursuant to West Virginia Code § 61-11-24 be deducted only from the aggregate maximum term of consecutive sentences in calculating an inmate’s eligibility for parole under West Virginia Code § 62-12-13(b)(1)(A). The dissenting opinion in *Scott* was the first to suggest that *Echard* created a formula for determining how good time credit must be distributed when consecutive sentences are imposed. “Since no statute actually addressed how to distribute credit for time served prior to sentencing, the Court in *Echard* applied the formulation used in the good time credit statute.” *State v. Scott*, 214 W. Va. at 10 n.5, 585 S.E.2d at 10 n.5 (Davis, J., dissenting).

However, the calculation of credit for time served for the purpose of parole eligibility was not an issue in *Echard*, and the decision did not result in a new point of law regarding the application of presentence credits to consecutive sentences.³ Syllabus Point 2 of *Echard* merely states: “An

³ “[N]ew points of law . . . will be articulated through syllabus points as required by our state constitution.” Syllabus Point 2, in part, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290

inmate under two or more consecutive sentences shall be allowed good time as if the several sentences, when the maximum terms thereof are added together, were all one sentence.’ W. Va. Code § 28-5-27(e) (Cum. Supp. 1986).” Thus, the *Echard* opinion only dealt with the proper method of calculating an inmate’s *minimum discharge date*; it went no further.

The proper method of applying credit for time served to consecutive sentences for determining parole eligibility was not presented in *Middleton* either. The appellant in that case merely sought to have pre-trial incarceration time credited to both of his consecutive sentences, which obviously would have been improper. In fact, the issue was so poorly briefed by the appellant that the entirety of the State’s brief on that question was as follows:

Appellant’s argument here is quite creative, but is divorced from any statutory or case law support and misapprehends the effective sentence that Appellant received.

Appellant was sentenced to an indeterminate term of 10-20 years on Count One of the Indictment and an indeterminate term of 1-5 years on Count Two. These sentences were set to run consecutively; thus, the effective sentence was 11-25 years, and Appellant’s time served (185 days) *is credited against the 11-year minimum*. The time served credit applies to the total effective sentence, not separately to each component of the sentence. [Emphasis added.]

The State’s brief thus assumed that credit for time served would be applied to the aggregate *minimum* sentence, as was customary under previous rulings of this Court. No one expected that a new syllabus point would result from this claim, much less one that arrived at a contrary conclusion.

Syllabus Point 6 of *Middleton* elevated the *Echard* decision to a rule of law in a manner inconsistent with its original holding, stating:

(2001).” Syl. pt. 13, *State ex rel. Medical Assurance of West Virginia v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003).

Consistent with our decision in *Echard v. Holland*, 177 W. Va. 138, 351 S.E.2d 51 (1986), when a trial court awards credit for presentence incarceration to a defendant receiving consecutive sentences, the period of presentence incarceration must be credited against the aggregated maximum term of the consecutive sentences. To the extent that language in the decision of *State v. Scott*, 214 W.Va. 1, 585 S.E.2d 1 (2003), suggests a different allocation of presentence credit to consecutive sentences, it is disapproved.

Specifically, the opinion stated that it disapproved of any interpretation of *Scott* that would permit “apportionment or outright duplication of credit for presentencing jail time, and *allocation of presentence jail time credit to the minimum terms of consecutive sentences.*” 220 W. Va. at 106, 640 S.E.2d at 169 (emphasis added). Appellant is not seeking apportionment or duplication of credit for time served; it is the highlighted language that creates the equal protection problem for Appellant by delaying his minimum parole eligibility date.

The opinion explained this construction of the presentence credit statute under the doctrine of *in pari materia*, stating: “We believe that the Legislature intended to harmonize the allocation of credit for presentence jail time under W. Va. Code § 61-11-24 with the allocation of good time credit under W. Va. Code § 28-5-27 (1984) (Repl. Vol. 2004).” 220 W. Va. at 107, 640 S.E.2d at 170. Because of the constitutional issue raised by Appellant, this Court should also consider how to harmonize these statutory provisions with the minimum parole eligibility requirements of West Virginia Code § 62-12-13(b)(1)(A).

As the Court in *Middleton* noted, “[i]t is clear that under W. Va. Code § 28-5-27 good time credit may be earned while serving a prison sentence and while in jail awaiting sentencing.” 220 W. Va. at 107, 640 S.E.2d at 170. Therefore, before an inmate may be granted good time credit for time served in jail awaiting sentencing, any credit for time served which is granted pursuant to West Virginia Code § 61-11-24 has to first be deducted from the aggregate terms of consecutive sentences

before applying any good time credits in order to arrive at the inmate's *minimum discharge date*. That is all that the *Echard* opinion holds.

Good time credits may be forfeited for rule violations pursuant to subsection (f) of the statute,⁴ and the inmate's minimum discharge date recalculated pursuant to subsection (h).⁵ By contrast, credit for time served in jail awaiting trial and sentencing pursuant to West Virginia Code § 61-11-24 does not change; it has already been served and has been credited to the inmate's sentence by the circuit court's sentencing order. It seems logical that it should therefore be included in calculating the total period of incarceration to arrive at the inmate's *parole eligibility date* pursuant to West Virginia Code § 62-12-13(b)(1)(A).

In arriving at its conclusion that credit for time served must be applied to the aggregated maximum term of consecutive sentences, the *Middleton* opinion noted that “courts of other

⁴West Virginia Code § 28-5-27(f) [1984] provides:

The commissioner of corrections shall promulgate separate disciplinary rules for each institution under his control in which adult felons are incarcerated, which rules shall describe acts which inmates are prohibited from committing, procedures for charging individual inmates for violation of such rules and for determining the guilt or innocence of inmates charged with such violations and the sanctions which may be imposed for such violations. A copy of such rules shall be given to each inmate. For each such violation, by an inmate so sanctioned, any part or all of the good time which has been granted to such inmate pursuant to this section may be forfeited and revoked by the warden or superintendent of the institution in which the violation occurred. The warden or superintendent, when appropriate and with approval of the commissioner, may restore any good time so forfeited.

⁵West Virginia Code § 28-5-27(h) [1984] provides:

Each inmate shall be given a revision of the statement described in subsection (g) if and when any part or all of the good time has been forfeited and revoked or restored pursuant to subsection (f) whereby the time of his or her earliest discharge is changed.

jurisdictions . . . have uniformly held that, when consecutive sentences are imposed for two or more offenses, periods of presentence incarceration may be credited only against the aggregate of all terms imposed[.]” 220 W. Va. at 107, 640 S.E.2d at 170 (quoting *Endell v. Johnson*, 738 P.2d 769, 771 (Alaska Ct. App. 1987)). While this statement is accurate, it sheds little light on the present question. The complete quote from the *Endell* opinion is as follows:

[C]ourts of other jurisdictions, construing similar credit-for-time-served statutes, have uniformly held that, when consecutive sentences are imposed for two or more offenses, periods of presentence incarceration may be credited only against the aggregate of all terms imposed: *an offender who receives consecutive sentences is entitled to credit against only the first sentence imposed, while an offender sentenced to concurrent terms in effect receives credit against each sentence.*

738 P.2d at 771 (emphasis added).

Thus, *Endell* appears to simply stand for the proposition that you only receive *one* credit for time served on consecutive sentences; it does not state that such credit must be applied only to the aggregate *maximum* sentence. Nor do any of the other cases cited therein compel such a conclusion. *See, e.g., State v. Tauiliili*, 29 P.3d 914, 918 (Haw. 2001) (statute required that presentence credit be applied to both the minimum and maximum imprisonment terms; “Once credit has been granted, no additional purpose is served by granting a second or ‘double credit’ against a later consecutive sentence.”) (citing *State v. Cuen*, 761 P.2d 160, 162 (Ariz. App. 1988)); *State v. Hoch*, 630 P.2d 143, 144 (Idaho 1981) (defendant was not entitled to credit for time served prior to convictions against each of the two burglary convictions he received; “We find no intent of the legislature that a person so convicted should have that credit pyramided simply because he was sentenced to consecutive terms for separate crimes.”) (citing *Miller v. State*, 297 So. 2d 36 (Fla. App.1974)); *People v. Watts*, 464 N.W.2d 715, 716 (Mich. App. 1991) (“[A] defendant who has received a consecutive sentence is not entitled to credit against the subsequent sentence for time served.

Rather, any credit for time served should be applied against the first sentence.”); *State v. Arcand*, 403 N.W.2d 23, 24 (N.D. 1987) (“jail credit should be applied only to the first of consecutive sentences, because to do otherwise would constitute double credit.”).

Footnote 25 of *Middleton* suggests that any other alternative construction of the statutes would be absurd because

A defendant would have his/her “good time” earned during “presentence incarceration” allocated to the aggregate maximum term of consecutive sentences, as required by W. Va. Code § 28-5-27; while the “actual” presentence incarceration time would be apportioned between the minimum confinement periods of consecutive sentences, as implicitly suggested by *Scott*. We do not believe the Legislature intended to have presentence incarceration “good time” and presentence “actual time served” allocated in such an irrational manner. Moreover, as pointed out by the dissenters in *Scott*, allocating “actual” presentence incarceration time to the minimum terms of consecutive sentences would allow many defendants to be eligible for parole before they have served a full day in prison. Clearly the Legislature did not intend these results.

220 W. Va. at 107, 640 S.E.2d at 170.

These concerns would appear to be easily addressed. When calculating parole eligibility there should be no “apportionment” between the minimum terms of consecutive sentences, as suggested by *Scott*; rather, one credit for time served should be applied either to the first sentence, or to the aggregate *minimum* terms of all consecutive sentences combined. If this means that some inmates become eligible for parole before they are ever sent to the penitentiary, that is what is already happening today in many cases. Indeed, there is even a procedure by which convicted prisoners in regional jails who become eligible for parole while awaiting transfer to correctional facilities may apply for parole. *See* W. Va. Code § 62-12-13(f).⁶ Moreover, due to prison

⁶West Virginia Code § 62-12-13(f) [2006] provides:

Any person serving a sentence on a felony conviction who becomes eligible

overcrowding some defendants serving sentences for lesser offenses completely discharge their sentences before ever being transferred to a prison. Certainly the Legislature did not intend this result. However, those persons have nonetheless served their sentences, albeit in a regional jail.

The cases cited by Appellant are also persuasive. In *Wilson v. State*, 264 N.W.2d 234 (Wis. 1978), the Supreme Court of Wisconsin held that equal protection required that time spent in presentence incarceration be credited not only to the expiration date of a sentence, but also to the date of parole eligibility. Otherwise, “a person financially unable to make bail would be required to serve a longer period of incarceration to be eligible for parole than a non-indigent prisoner who is bailed pending conviction.” *Id.* at 236. At least one federal court has recognized that granting a defendant credit for all periods of pretrial confinement “will result both in earlier parole consideration and in an earlier expiration of his maximum sentence.” *White v. Gilligan*, 351 F. Supp. 1012, 1014 (S.D. Ohio 1972).

In addition, the Fourth Circuit in *Vickers v. Haynes*, 539 F.2d 1005, 1006 (4th Cir. 1976), held that a West Virginia prisoner was entitled to full credit for all time spent in pretrial custody on a nonbailable offense, noting: “Although Vickers was given a life sentence, the jury’s recommendation of mercy makes him eligible for parole. Credit for preconviction jail time will advance the date upon which he will first be eligible for parole.”

It does not appear that adoption of the Appellant’s position would do violence to any existing law or disrupt the judicial process. This Court should therefore consider it.

for parole consideration prior to being transferred to a state correctional center may make written application for parole. The terms and conditions for parole consideration established by this article apply to such inmates.

Appellant was sentenced to indeterminate terms of 3-15 years in the penitentiary on Count One and 2-10 years on Count 2; and a determinate sentence of 2 years on Count 3;⁷ followed by 12 months in jail for each of Counts 4 and 5.⁸ These sentences were set to run consecutively; thus his effective penitentiary sentence is 6-27 years, and Appellant's time served (495 days) should be credited against the 6-year minimum in calculating his parole eligibility date. There is no need to apportion the credit among Appellant's various sentences; the time served credit applies to the total effective sentence, not separately to each component of the sentence. By far the simplest method of accomplishing this is the one originally employed by the circuit court: establishing the effective sentence date as March 29, 2006, the date Appellant was first incarcerated on these charges while awaiting trial.

⁷The fourth degree arson statute, West Virginia Code § 61-3-4 [1997] provides: "A person imprisoned pursuant to this section is not eligible for parole prior to having served a minimum of one year of his or her sentence."

⁸The December 10, 2008, amended sentencing order also provides that "this order shall be deemed a detainer in favor of the West Virginia Regional Jail and Correctional Facility Authority so that, once the defendant completes his penitentiary sentences or is paroled, the defendant shall be remanded into the custody of the said West Virginia Regional Jail and Correctional Facility Authority for service of the misdemeanor sentence."

V.

CONCLUSION

The State respectfully suggests that the decision of this Court in *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152 (2006), insofar as it deals with the application of credit for time served to consecutive sentences, should be reconsidered in light of Appellant's contention that it denies equal protection of the law to indigent defendants regarding eligibility for parole.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

by counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL
State Bar ID No. 3927
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States Mail, first-class postage prepaid, on this 6th day of January, 2010, addressed as follows:

Edward L. Bullman, Esq.
607 Ohio Avenue
Charleston, WV 25302



DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL