

# JAIL CREDIT – A QUICK AND DIRTY GUIDE

Laurie Osberg – Eau Claire Office 3/2018

(with credit to John Storck for the bones of this outline)

## **Wis. Stats. 973.155 Sentence credit.**

**(1)**

*(a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:*

*1. While the offender is awaiting trial;*

*2. While the offender is being tried; and*

*3. While the offender is awaiting imposition of sentence after trial.*

*(b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. [302.113 \(8m\)](#), [302.114 \(8m\)](#), [304.06 \(3\)](#), or [973.10 \(2\)](#) placed upon the person for the same course of conduct as that resulting in the new conviction.*

*(1m) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody as part of a substance abuse treatment program that meets the requirements of s. [165.95 \(3\)](#), as determined by the department of justice under s. [165.95 \(9\)](#) and [\(10\)](#), for any offense arising out of the course of conduct that led to the person's placement in that program.*

*(2) After the imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction. In the case of revocation of probation, extended supervision or parole, the department, if the hearing is waived, or the division of hearings and appeals in the department of administration, in the case of a hearing, shall make such a finding, which shall be included in the revocation order.*

*(3) The credit provided in sub. (1) or (1m) shall be computed as if the convicted offender had served such time in the institution to which he or she has been sentenced.*

*(4) The credit provided in sub. (1) shall include earned good time for those inmates subject to s. [302.43](#), [303.07 \(3\)](#) or [303.19 \(3\)](#) serving sentences of one year or less and confined in a county jail, house of correction or county reforestation camp.*

*(5) If this section has not been applied at sentencing to any person who is in custody or to any person who is on probation, extended supervision or parole, the person may petition the department to be given credit under this section. Upon proper verification of the facts alleged in the petition, this section shall be applied retroactively to the person. If the department is unable to determine whether credit should be given, or otherwise refuses to award retroactive credit, the person may petition the sentencing court for relief. This subsection applies to any person, regardless of the date he or she was sentenced.*

*(6) A defendant aggrieved by a determination by a court under this section may appeal in accordance with s. [809.30](#).*

- 1) It is your responsibility to make sure that appropriate sentence credit is calculated and credited in your client's case. This is especially important if your client is placed on probation, as in the event of a revocation, that credit may not be accounted for in the revocation documents.
- 2) There are three questions to answer regarding credit:
  - a) Was the defendant "in custody"?
    - i. Initial arrest
    - ii. PO hold
    - iii. Cash bail
    - iv. Fugitive warrant
  - b) Was the custody "in connection with the course of conduct for which sentence was imposed"?
  - c) Are there other sentences or read-ins to take into account when awarding sentence credit? A corollary issue – are multiple sentences consecutive or concurrent?
- 3) The court determines sentence credit, or in the case of the revocation of probation, extended supervision or parole, the Department of Hearings and Appeals makes the determination.
  - a) Be sure to check revocation jail credit carefully by contacting your local jail to confirm dates. Be sure to ask the jail for all bookings within the pertinent time frame and the reasons for the booking. A friendly jailer may give you a printout of this information for your client.
  - b) The defendant has the burden of showing the necessary prerequisites for sentence credit. *State v. Villalobos*, 196 Wis. 2d 141 (Ct. App. 1995)
  - c) Be sure to request credit corrections from the appropriate authority. A PO may be willing to amend the revocation summaries with appropriate documentation of the correct information.
- 4) What is "in custody"?
  - a) Would the defendant be subject to an escape charge for leaving their status? The escape statute is Sec. 946.42(1)(a). *State v. Gilbert*, 115 Wis. 2d 371 (1983).
  - b) Would the defendant be subject to an escape charge not covered in the prior statute? *State v. Magnuson*, 233 Wis. 2d 40 (2000) provide other types of confinement that would fit "custody" under the sentence credit statute:
    - i. Community residential confinement programs under Sec 301.046(1) Wis. Stats.
    - ii. Home detention with electronic monitoring used by a sheriff or DOC for a prisoner under Sec. 302.425 Wis. Stats.
    - iii. Home detention as a condition of bail is NOT considered "in custody". See *Magnuson*.
    - iv. An inmate is "in custody" when temporarily outside of the institution for medical care or furlough. *State v. Sevelin*, 204 Wis. 2d 127 (Ct. App 1996) held that when an inmate on a cash bond obtained a furlough to attend an inpatient treatment program with

some time in a halfway house, he was entitled to credit, because Sec. 946.42(1)(a) includes time “temporarily outside the institution for the purpose of work, school, medical care, a leave granted under Sec. 303. 068 Wis. Stats., a temporary leave or furlough granted to a juvenile or otherwise...” *Sevelin* at 135.

- v. Custody does not include time in a treatment facility as a condition of probation unless the inmate is subject to physical detention. *State v Cobb, 135 Wis 2d 181 (Ct. App 1986)*.
  - vi. If the client shows up to start a jail term and is turned away due to no fault of his own (overcrowding), he is entitled to those days in between his turning himself in and the actual start of his jail term. *State v. Riske, 152 Wis. 2d 260 (Ct. App 1989)*.
  - vii. Defendants are entitled to credit for “all days spent in custody”, which means any part of a calendar day. *State v. Antonio Johnson 2018 WI App 2*. Thus, if the defendant is booked into the jail at 11:50 p.m. on the first day, and released at 8:00 a.m. the next day, he is entitled to two days credit.
- 5) What constitutes custody “in connection with the course of conduct for which sentence was imposed”?
- a) Custody that is the result of another sentence is not custody “in connection with the course of conduct for which the sentence was imposed”. A defendant on probation, and subsequently revoked, and then sentenced, will not receive credit for time served after that sentence has started. In *State v. Beets, 124, Wis. 2d 372 (1985)*, the defendant was on probation when he committed a new crime. He was subsequently revoked and sentenced. Once he started the old sentence, he was no longer being held in part because of the new crime. Thus, any credit against the new crime stopped accruing when he started that sentence.
  - b) However, if the revocation leads to reincarceration in prison, that severance does not occur until the defendant walks in the doors of the prison. Larry Davis was revoked from ES due to new charges. He was ordered back to prison, but spent time in jail awaiting transport to the big house. He was granted credit for that time. *State v. Larry Davis, 2017 WI App 55*. Note, this was a concurrent sentence case. This does not apply if the sentences are ordered to run consecutively.
  - c) Whether time spent in a juvenile detention center on adjudicated offenses when charged with adult offenses counts needs to be decided on the facts of the case. See *State v. Johnson, 304 Wis. 2d 318 (2007)*, *State v. Baker, 179 Wis. 2d 655 (Ct. App 1993)* and *State v. Thompson, 225 Wis. 2d 578 (Ct. App 1999)* for different fact patterns with different results.
  - d) Custody while on a probation/ES hold for conduct for which the defendant is later sentenced is in connection with the later sentence. *State v. Hintz, 300 Wis. 2d 583 (Ct. App. 2007)* found that a defendant was entitled to credit on a new charge for time spent on an ES hold that resulted from the conduct in the new charge.

- e) The filing of a detainer does not trigger “custody”. *State v. Demars*, 119 Wis. 2d 19(Ct. App 1984) held that a detainer filed by one county against a defendant in another county merely gave notice that the defendant was wanted in the first county. It did not give subsequent credit for that time against the sentence in the first county.
  - f) Whether one is in custody “in connection” due to an outstanding warrant is a fact-specific determination. *State v. Villabos*, 196 Wis. 2d 141 (Ct. App. 1995) describes a case in which the defendant was arrested in Racine on a Racine County charge. There was an outstanding arrest warrant from Kenosha. The defendant was not entitled to credit on the Kenosha charge, because the defendant failed to show the warrant was executed, and that his arrest in Racine was the result of the Kenosha warrant.
  - g) Dismissed and read-in charges provide “custody in connections with” credit. *State v. Floyd*, 232 Wis. 2d 767 (2000) provides a basis for sentence credit for those charges that are dismissed and read-in. However, if they are dismissed outright, there is no credit.
  - h) An arrest for an out of state fugitive warrant provides a basis for sentence credit. *State v. Carter*, 2010 WI 77. This case contains an excellent summary of this topic.
- 6) How is credit allocated to various sentences?
- a) Dual credit (using the same credit on more than one sentence)
    - i. Dual credit is available on concurrent sentences. See *State v. Ward*, 153 Wis. 2d 743 (Ct. App 1989) for an example
    - ii. Not all credit may be available on all concurrent sentences. This can happen in the event someone is out on bond for an offense, and then later gets a cash bond on the second offense. The time on the cash bond for the second offense only counts on the second offense, if the initial bond is unchanged. *State v. Johnson* 318 Wis. 2d 21(Ct. App 2008).
    - iii. Dual credit is never available on consecutive sentences. *State v. Boettcher*, 144 Wis. 2d 86 (1988). “The objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences.” *Boettcher* at 101.
    - iv. Credit in consecutive sentences is to be applied to the first sentence imposed. See *Boettcher*.
    - v. In cases with an imposed sentence and an imposed and stayed sentence, jail credit is applied to the imposed sentence. *State v. Wolfe*, 2001 WI App 66.
    - vi. If a parolee is revoked, any additional credit must be applied to the reincarceration time. *State v. Andres Obriecht* 2015 WI 66. *Obriecht* reaches this conclusion, but it is based upon old indeterminate sentencing/pre Truth-in-Sentencing law. It merits review on the issue of what happens with jail credit for reincarceration purposes and the importance of establishing it correctly in the documents.

- 7) Odd but important sentence credit issues
  - a) If your client is serving time in custody for a criminal matter (bail or PO hold) and there is an unrelated commitment order (for fines or contempt for child support), the defendant gets dual credit. *State v. Joseph Trepanier, 2014 WI App 105*. This can be important in counties in which judges typically order contempt commitments to be served “consecutive” to any other sentence. Thus, if there is an active commitment order with a “purge condition”, which these orders typically have (serve 30 days or pay \$500 for example), and the defendant comes into the jail and also has a PO hold or cash bond, credit applies to both as long as both are active.
  - b) Correct information about sentence credit constitutes a “new factor” for seeking a resentencing. *State v. Dennis Armstrong 2014 WI App 59*. Here, the amount of sentence credit was unknown but believed to be around 2 years. In fact, it was only 8 months. Based upon the court’s understanding that he wanted some time in prison for the defendant, it was clear that the court was taking the lengthy credit into account.
  - c) If you have multiple cases with concurrent sentences, appeal one, and then get resentenced to consecutive time, you lose the dual credit. *State v. Charles Lamar, 2011 WI 50*. This possibility should be explained to clients in deciding on whether to pursue an appeal.
- 8) Correcting sentence credit most often can be done with a stipulation and proposed order for the court. If the prosecutor agrees, this is the most efficient way to resolve the matter.