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offered by International Shoe more to heart than have the federal courts.

The drafters of the Business Corporation Act intended that the local residents should have as much protection as possible.

It is thought the wise policy favors subjecting such foreign corporations to suit here for the convenience of residents of this state where it is constitutionally possible, since the alternative is to force our residents to bring their actions in foreign jurisdictions.

While the decisions in the Byham and Abney Mills cases are not earth-shaking deviations from a trend, the guidelines furnished by the North Carolina Supreme Court as to what it considers to be “transacting business” in section 55-144 and what constitutes “minimum contacts” in allowing jurisdiction under section 55-145(a) are useful. Nevertheless, the basic problem of applying these concepts to the particular activities of the defendant corporation will continue to confront the court. It is inconceivable that this problem can be alleviated by substitution of legal rule for ad hoc judgment.

Harold D. Colston

Criminal Law—Credit for Time Served Under a Vacated Judgment Upon Retrial and Second Conviction

In the recent case of State v. Weaver the North Carolina Supreme Court reversed its former position and allowed the time served in prison by the defendant prior to his collateral attack upon the previous proceedings and subsequent retrial and conviction, to count toward his prison sentence resulting from his second trial.

Defendant was first tried in May 1963 and pleaded nolo contendere to a charge of felonious assault. He was sentenced to imprisonment for a term of not less than five or more than seven


1 264 N.C. 681, 142 S.E.2d 633 (1965).
2 Id. at 687, 142 S.E.2d at 637.
3 N.C. GEN. STAT. § 14-32 (1953) provides:
Any person who assaults another with a deadly weapon with the intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the state prison or be worked under the supervision of the State Highway and Public Works Commission for a period of not less than four months nor more than ten years.
years. On May 9, 1963, he was committed to state prison and began serving the sentence. On September 25, 1964, after a habeas corpus hearing in the United States District Court for the Middle District of North Carolina, defendant was awarded a new trial. From October 8, 1964, until the new trial in December 1964, he was confined in county jail, apparently because of failure to meet the bond requirement. At the second trial in December 1964 defendant was convicted of assault with a deadly weapon—a general misdemeanor—which is a crime of less degree than the one for which he was charged at the first trial. Defendant was sentenced to two years, which was the maximum legal sentence for this offense.

The North Carolina Supreme Court ruled that from May 9, 1963, until September 25, 1964, defendant's de facto status was that of a prisoner serving a sentence and that this time should be credited against the two-year maximum sentence imposed at the second trial. The court further ruled that the defendant's status from September 25, 1964, until the second trial in December 1964 was that of a person under indictment awaiting trial, and in custody on account of his failure to give the appearance bond fixed by the district court. This time would not be credited to the sentence imposed at the second trial.

There are four situations where the question of credit for time

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4 See 28 U.S.C. § 2241 (1959), which provides for the writ of habeas corpus to extend to a prisoner who is in custody in violation of the Constitution or laws or treaties of the United States.
5 264 N.C. at 682, 142 S.E.2d at 634 (reversed on grounds that defendant had not been represented by counsel at the first trial).
6 Id. at 683, 142 S.E.2d at 635.
7 N.C. GEN. STAT. § 14-33 (1953) provides: "In all cases of assault, with or without the intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court." (Emphasis added.)
9 264 N.C. at 682, 142 S.E.2d at 635. The defendant, upon retrial, was charged with felonious assault, but since the jury was probably instructed that assault with a deadly weapon was a lower degree of the same offense, they returned a verdict of guilty for the misdemeanor.
10 N.C. GEN. STAT. § 14-33. The statute itself does not provide a minimum and maximum sentence for assault with a deadly weapon, and the only restriction is that against cruel and unusual punishment imposed by N.C. CONST. art. 1, § 14. See State v. Crandall 225 N.C. 148, 33 S.E.2d 861 (1945) (two years not cruel and unusual punishment); but see State v. Austin, 241 N.C. 548, 550, 85 S.E.2d 924, 926 (1955) (two years the maximum sentence).
11 264 N.C. at 687, 142 S.E.2d at 637.
previously served is likely to arise: (1) where, as in *Weaver*, the sentence imposed at the second trial is for the maximum legal sentence; (2) where the sentence imposed at the second trial is not for the maximum legal sentence, and when added to the time served under the vacated judgment the aggregate does not exceed the maximum legal sentence; (3) where the sentence imposed at the second trial is not for the maximum legal sentence but when added to the time served under the vacated judgment the aggregate does exceed the maximum legal sentence; and (4) where the defendant has been confined in jail because of his inability to raise bond or because of the denial of bond.

In the situation where the maximum legal sentence was imposed at the second trial, the North Carolina court had, prior to *Weaver*, followed the rule that time served in prison under a prior conviction would not as a matter of law be credited to a subsequent sentence resulting from a valid trial. This position was adopted in *State v. Williams*. In that case the defendant was convicted of larceny on February 19, 1963, and sentenced to two years in prison. On July 8, 1963, he was awarded a new trial in a post-conviction hearing. On July 29, 1963, he was again convicted of larceny and sentenced to ten years. The court refused to allow credit for the time served under the vacated judgment, stating merely that "defendant's contention that the judge was compelled to allow him credit for the period spent in prison before a valid trial was had is also without merit." There was no citation of authority, and the fact that the second sentence imposed a maximum prison sentence was not stressed.

In the later case of *State v. White*, decided in the same year,

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14. Defendant was awarded a new trial because he had not been afforded the benefit of counsel.
15. 261 N.C. at 174, 134 S.E.2d 163 at 165. However the court did state that "the mere fact that different judges impose different punishment does not invalidate the sentence imposed at the second trial." *Ibid.*
the court reconsidered its position and examined the existing authority but did not allow credit for the time served under the vacated judgment. The court stated that a majority of courts have denied credit in such situations and that "the rationale of the decisions seems to be that the defendant in seeking and obtaining a new trial must be deemed to have consented to a wiping out of all the consequences of the first trial. This is not a denial of defendant's constitutional rights..." In **White** the defendant was tried and convicted of armed robbery and sentenced to be imprisoned for ten years. Subsequently, he obtained a new trial and was again convicted of armed robbery and sentenced to be imprisoned from twelve to fifteen years, a term that was not for the maximum legal sentence, nor when added to the time already served under the vacated judgment did it total the maximum legal sentence. In this respect **White** was distinguishable from **Williams** and some of the authority relied upon in **White** would not have been applicable in deciding **Williams**.

After **White**, the North Carolina Supreme Court in **State v. Anderson** did not allow the time served under the vacated judgment to count toward a second sentence. This case was factually in accord with **White** and distinguishable from **Williams**, i.e., the maximum sentence was not imposed. The court denied credit on the authority of **White** without discussion.

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18 262 N.C. at 56, 136 S.E.2d at 208.

19 Id. at 53, 136 S.E.2d at 205.


21 E.g., *In re Doelle*, 323 Mich. 241, 35 N.W.2d 251 (1948) (no maximum sentence imposed at second trial). Cf. Lewis v. Commonwealth, 32 Mass. 445, 108 N.E.2d 922 (1952) (maximum sentence given, but credit allowed). Had this case been followed in deciding **Williams**, a different result would have been obtained.

22 262 N.C. 491, 137 S.E.2d 823 (1964). Defendant was indicted upon a charge of rape. He entered a plea of guilty to assault with the intent to commit rape and was sentenced to be imprisoned for not less than twelve or more than fifteen years. After serving almost three years of the sentence he was awarded a new trial. He entered the same plea again, and this time was sentenced to five years.

23 262 N.C. at 492, 137 S.E.2d at 824.
Until *Weaver* the court was not called upon to decide a case where the time served under a vacated judgment added to the sentence imposed at the second trial totaled *more* than the maximum legal sentence. The court, in allowing credit for the time served under the first sentence, stated that *Williams*, to the extent that it was in conflict with *Weaver* was overruled. The position of the North Carolina Court in *Weaver* seems to be in accord with the weight of authority.

An examination of the decisions from various jurisdictions reveals that several theories have been advanced to support the position of not allowing the time served under the vacated judgment to be credited to the sentence imposed at the second trial. One such theory is that the first sentence is void, and hence the state has no responsibility for the punishment the individual has undergone; however some courts say that the sentence is merely erroneous and allow credit for time served. The waiver theory has been used to deny credit in this situation with, the courts emphasizing the fact that the defendant himself procured the reversal thereby waiving the benefit of time served. No court has found a constitutional requirement that credit be allowed; however, a growing number of

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24 264 N.C. at 687, 142 S.E.2d at 637.
25 This precise question seems to have been answered in In Matter of Leypoldt, 32 Cal. App. 2d 518, 90 P.2d 91 (1939); Kozlowski v. Board of Trustees of New Castle County Workhouse, 2 W. W. Harr. (32 Del.) 29, 118 A. 596 (1921); Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922 (1952). Substantially the same question seems to have been decided in Youst v. United States, 151 F.2d 666 (5th Cir. 1945); People v. Huber, 389 Ill. 192, 58 N.E.2d 879 (1945); People v. Gilbert, 163 Mich. 511, 128 N.W. 756 (1910); see King v. United States, 98 F.2d 291 (D.D.C. 1938); People v. Brown, 383 Ill. 287, 48 N.E.2d 953 (1943). All of these decisions tend to support the decision in *Weaver*.
27 The “waiver” doctrine is a device created to prevent a defendant from claiming double jeopardy after winning a second trial. Comely, *Former Jeopardy*, 35 Yale L.J. 674, 685 (1926), maintains that the “waiver” doctrine was first stated in Hopt v. Utah, 110 U.S. 574 (1884), in which there was no claim for double jeopardy. See Kepner v. United States, 195 U.S. 100, 134 (1904) (no waiver, and double jeopardy not applicable). *But see* People v. Wilson, 391 Ill. 463, 63 N.E.2d 488 (1945), *cert. denied*, 327 U.S. 801 (1946). In Illinois the 1941 Indeterminate Sentence Law had been declared unconstitutional in People v. Montana, 380 Ill. 596, 44 N.E.2d 569 (1942). During its short life many defendants had been sentenced under the enactment. Upon resentencing, even though there had been no appeal and retrial, and hence no waiver, the Illinois court denied credit.
28 *E.g.*, *Ex parte* Wilkerson, 76 Okla. Crim. 204, 135 P.2d 507 (1943) (no constitutional power in the court to allow credit).
jurisdictions do grant credit with\textsuperscript{29} or without\textsuperscript{30} legislative enactment. One state has even made its statutory provision retroactive, applying it to all persons in prison at the time of its enactment who had not been granted credit.\textsuperscript{31}

Prior to \textit{Weaver} the North Carolina court had rejected the theory that a previous sentence was void, holding that it was merely erroneous and hence voidable at the instance of the defendant.\textsuperscript{32} In \textit{Weaver} the court took a definite step away from the harsh technicalities heretofore imposed to deny credit for the time served before a defendant has been granted a new trial. It intimated that the trial judge is to have considered the time already served pursuant to the first sentence when passing judgment at the second trial. The court goes on to say "when the maximum sentence is imposed at the second trial, this dispels any suggestion that the trial judge gave defendant credit for the punishment he had already received."\textsuperscript{33}

A situation that the North Carolina court has not yet had to face is where the sentence imposed at the second trial does not exceed the maximum legal sentence, but when added to the time served under the vacated judgment the total is more than the maximum legal sentence. In this situation the court will be faced with two alternatives. It may allow credit for the total time served under the vacated judgment or it may allow credit only for the time in excess of the maximum legal sentence. Following the rationale of \textit{Weaver} it would seem mandatory that full credit be given, since it is evident that the trial judge did not consider this time when passing sentence at the second trial.

Another possible solution is to treat this type of sentence as any other sentence in excess of the legal maximum. The rule regarding excessive sentences was stated in \textit{State v. Austin}.\textsuperscript{34}

\textsuperscript{29} See \textit{e.g.}, \textit{CAL. PEN. CODE} § 2900.1 (1949); \textit{In re James}, 38 Cal. 2d 302, 240 P.2d 596 (1952). \textit{But cf.}, \textit{State ex rel. Nelson v. Ellsworth}, 141 Mont. 78, 375 P.2d 316 (1962), where the court interpreted a Montana law as forbidding credit in certain situations.


\textsuperscript{32} \textit{State v. Goff}, 264 N.C. 563, 142 S.E.2d 142 (1965).

\textsuperscript{33} \textit{264 N.C.} at 686, 142 S.E.2d at 637.

\textsuperscript{34} 241 N.C. 548, 85 S.E.2d 924 (1955).
It is the general rule in this jurisdiction that where a defendant has been properly convicted but given a sentence in excess of that authorized by law and comes to this court pursuant to a petition for a writ of certiorari in a habeas corpus proceeding, when such defendant has not served as long under the sentence as he might have been legally imprisoned, we vacate the improper sentence and remand for proper sentence.35

As noted previously, the North Carolina court expressly refused to grant credit for the time served in county jail prior to the time the first sentence was vacated and the second judgment pronounced. The court stated that "during this period, while in custody in default of bond, defendant was not serving a sentence as punishment for the conduct charged in the bill of indictment."36 Research indicates that only a small minority of jurisdictions grant credit in this situation.37 The view expressed by the North Carolina court has rarely been challenged by appeal or by collateral attack.

In respect to the credit problem in general, it would seem that Weaver is at least an affirmative step in the right direction. To deny a prisoner credit in this situation is to penalize him unduly for exercising his post-conviction remedies; furthermore, it would seem to constitute an unnecessary—if not unconstitutional—restraint on the exercise of such rights.38 It is hoped that the court will extend this decision to instances—not factually in accord with Weaver—where the defendant does not receive the maximum sentence upon the second conviction. One means of assuring that such credit is granted would be to have the court remanding the case to specify that the trial court is expressly to give the credit. This would have the desirable effect of removing any idea from the prisoner's mind,39 and the minds of the public in general, that time served and good

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35 241 N.C. at 550, 85 S.E.2d at 926. (Emphasis added.)
36 264 at 687, 142 S.E.2d at 637.
37 See Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957). The court gave credit for the time the defendant was confined in jail awaiting a new trial. He had been awarded a new trial because the sentence imposed at the previous trial was excessive. Cf. Freeman v. State, 87 Idaho 170, 392 P.2d 542 (1964). But see State v. Boles, 148 W.Va. 802, 137 S.E.2d 418 (1964) (court may at its discretion grant credit from the time first confined).
38 See Alstyne, In Gideon's Wake, 74 YALE L.J. 606 (1965); 1965 DUKE L.J. 395.
39 This would tend to make the prisoner more receptive to prison programs aimed at helping him become a useful citizen. See Tisdal, Rehabilitation—Colossal Failure, 7 CAN. B.J. 142 (1964) which points out the failure of the penal systems to rehabilitate and the urgent need for changes to meet this objective.
behavior credits earned would not be tossed into a bottomless pit under the guise of some harsh and highly technical legal theory. This approach has been adopted by the Virginia Supreme Court of Appeals. In Stonebreaker v. Smyth the court expressly provided that time served under a vacated judgment should be credited to a second sentence if the defendant were convicted at the second trial.

The North Carolina Supreme Court has followed this procedure in analogous situations. In a case involving an excessive sentence the North Carolina court remanded with the instruction that the trial court so condition its sentence upon the second sentencing to allow credit for the time already served. In another case the defendant had been found guilty on more than one count and had been given consecutive sentences. After having served some time under the first sentence, that conviction was reversed, and the court remanded with directions to allow the time served toward that sentence to count against the second sentence.

In Weaver, North Carolina took a giant step in dispensing with the subtle legal technicalities heretofore utilized to deny credit for time served under a vacated judgment. By analogy, it could be argued that the court should grant credit for all confinement following the first conviction, be it in prison or in county jail. In Weaver, the defendant was confined in jail for a period of two months because of failure to give bond. The Florida court, granting credit under similar circumstances, stated: "It is not petitioner's fault that the states criminal system failed to judge him guilty and sentence him properly in an uninterrupted operation. . . . It is only fair to give petitioner full credit for all time he has been in official custody since the time of his first commitment. . . ."

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41 In this case the defendant had served fifteen years under a sentence imposed for a conviction of armed robbery. Because he had been denied counsel at the first trial, he was awarded a new trial. It seems that in other jurisdictions as in North Carolina this problem has arisen primarily where the right to counsel has been denied in a previous trial, but the same principle holds true in other situations.
44 264 N.C. at 683, 142 S.E.2d at 635.