

have jurisdiction, it could not have transferred the case under 28 U.S.C. § 1404(a) at all; it would have been compelled to dismiss it.

Plaintiff's argument is not convincing. The record of this case clearly reveals that the court in the District of Columbia did not at any time consider the merits of this action, but merely ruled on the government's motion for change of venue. Further, the transcript of the argument on the government's motion for reconsideration clearly shows that the judge thought that the Southern District of New York was the proper forum (T. p. 8, 14), and only transferred the case to this district because plaintiff preferred this district to the Southern District of New York. (T. p. 16).

Plaintiff also argues that the Attorney General has acquiesced in the transfer of the case to this district. Plaintiff points out that, in his reply to plaintiff's memorandum in opposition to a change in venue, the Attorney General stated that, while he adhered to his position that the case should be transferred to New York, "[W]e have no objection to the transfer of this case to Lewisburg, if the plaintiff prefers Lewisburg." However, plaintiff neglects to mention that the Attorney General footnoted that particular sentence with the following statement:

Since Stapf held that the sentencing court is the appropriate body to grant credit for pre-sentence custody, if any is available, we do caution that the United States District Court at Lewisburg may not believe itself appropriate for disposition of the issue of pre-sentence custody. P.1, n.1.

Plaintiff complains that in the defendants' motion to dismiss the Attorney General rested only "on the ground that the complaint fails to state a claim upon which relief can be granted," and that nowhere in his memorandum in support of this motion did he suggest that this court does not have jurisdiction or that the case should be transferred a second time. Plaintiff feels that under these circumstances

the Attorney General is precluded from urging this court to retransfer the case to New York.

This argument is easily answered. Rule 12(h) (3) of the Federal Rules of Civil Procedure states:

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

It has been held that the question of jurisdiction over the subject matter is not waived if not raised in the defendants' answer and may be raised at any time. *Xaphes v. Mossey*, 224 F. Supp. 578 (D.C.Vt. 1963). The court in *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851, 856 (2d Cir. 1965), states that any party at any state of the proceedings would be entitled to a dismissal for lack of subject matter jurisdiction under Rule 12(h), F.R.C.P.

Plaintiff further asserts that even if this question could be brought under Section 2255, he is nevertheless entitled to bring this proceeding under the Administrative Procedure Act and the Declaratory Judgment Act. In his memorandum on jurisdiction he states that both this circuit and the District of Columbia circuit have held that this procedure is available to test the question whether a federal prisoner has been denied the right of counsel at a parole board revocation hearing, even though he might also have proceeded by habeas corpus in the district of his confinement. (p. 4). While the cases cited by plaintiff for this proposition do so hold, this court is of the opinion that those cases do not support the plaintiff's position in this case because the subject matter involved is substantially different.

Plaintiff contends that the sentencing judge intended that he be given credit for the time spent in presentence custody, and so stated when pronouncing sentence. Both 28 U.S.C. § 2255 and Rule 35 of the Federal Rules of Criminal Procedure state that the sentencing court is the proper forum to decide issues of this type. It is difficult to understand how this issue can be considered as anything but a proceeding under one of these provisions, and plaintiff cannot

change the nature of his action merely by placing an improper label on it.

Plaintiff states that it is the duty of the Attorney General to make the corrections he seeks. However, in *Stapf v. United States*, 367 F. 2d 326, 330 (D.C. Cir. 1966), the court stated:

The foregoing statutory and constitutional considerations compel us to hold that it was and *is the duty of the sentencing court* to provide credit for presentence custody for want of bail to all defendants not granted credit administratively by virtue of the provisions of § 3568. (Emphasis supplied).

In *United States v. Pratt*, 276 F. Supp. 80 (D.C.N.J. 1967), petitioner sought credit for the time spent in custody prior to the imposition of the maximum sentence. The court treated the application as one made pursuant to Section 2255, and stated that the facts rendered the judgment vulnerable to collateral attack and subject to correction under that section. Since both *Stapf* and *Pratt* are relied on by plaintiff, it is difficult to see how he arrives at the conclusion that the Attorney General is the proper party from whom to seek relief. It is possible that the fact that plaintiff has previously brought seven unsuccessful 2255 actions on different issues in the Southern District of New York has made him reluctant to return there again, but this does not alter the fact that New York is the proper forum to resolve this issue.

Finally, plaintiff argues that it would be unfair to transfer this case a second time because unless this litigation is resolved in the near future he will suffer merely by reason of the delay in the courts. While this court is sensitive to plaintiff's problem, and is reluctant to do anything to delay a prompt adjudication of the matter, it simply does not have jurisdiction over this issue. However, any delay is due to the fact that plaintiff has ignored the proper forum. It should also be noted that the plaintiff was sentenced in April, 1951, and his conviction was affirmed in February,

1952. He has had ample opportunity to make proper application for relief.

Because this court is without jurisdiction plaintiff's claim for credit for the time spent in presentence custody must be dismissed.

II

TIME SPENT IN CUSTODY AFTER SENTENCING AND PENDING APPEAL

Plaintiff contends that the denial of credit for the time he spent in custody after sentence and pending appeal is unlawful and unconstitutional in that it is not justified by Rule 38(a) (2) of the Federal Rules of Criminal Procedure, and it violates his right to counsel under the Sixth Amendment and his right to equal protection of the laws under the Fifth Amendment. Plaintiff's contentions will be considered seriatim.

A. IS THE DENIAL OF CREDIT FOR THIS PERIOD JUSTIFIED UNDER RULE 38(a) (2) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE?

After plaintiff's conviction he was transferred from the Tombs, where he had remained during trial, to the federal penitentiary in Atlanta, Georgia. In order to return to New York to consult with his counsel concerning his pending appeal, plaintiff signed the following form:

ELECTION NOT TO BEGIN SERVICE OF SENTENCE

Having heretofore taken an appeal from my sentence imposed on April 5, 1951, in the United States District Court for the Southern District of New York, I now elect not to commence service of the sentence.

Signed this 20 day of July, 1951

(Exhibit A of plaintiff's complaint).

The signing of this form was a prerequisite to plaintiff's return to New York because in July, 1951, Rule 38(a) (2) of the Federal Rules of Criminal Procedure read as follows:

A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

Thus, in order for plaintiff to be returned to New York and consult with his counsel, he had to agree to delay beginning service of his sentence. Plaintiff contends that this waiver was not made with knowledge of its consequences and is therefore ineffective.

Plaintiff states that at the time of signing the form he was not notified by any prison official or anyone else that the consequence of signing this form would be a denial of credit for the time spent in custody while in New York. He claims that he wrote to his trial attorney asking him to take steps to have him transferred back to New York, but that he did not receive a direct reply from his counsel. However, prison officials informed him of the requisite procedure and supplied him with the form. (Affidavit of Morton Sobell in support of motion for summary judgment, paragraph 11).

The government, however, contends that plaintiff had ample opportunity to have the advice of his counsel before he signed his "Election." Exhibit B of the government (Attached to the government's brief in support of its motion) is a telegram dated July 2, 1951, from Sobell to his attorney, which read as follows: "Start election proceedings immediately. Letter follows." This message implies that plaintiff and his attorney had discussed this matter at some prior time. On July 5, 1951, plaintiff's attorney sent telegrams to both plaintiff and the warden of the Atlanta penitentiary. (Government Exhibits A and C).

The telegram to Sobell read as follows:

RECEIVED YOUR LETTER OF JUNE 29 THE
WARDEN HAS NECESSARY BLANKS TO BE EX-
ECUTED BY YOU FOR ELECTION I HAVE TEL-
EGRAPHED THE WARDEN ASKING HIS COOP-
ERATION FOR THAT PURPOSE YOU MIGHT
ASK FOR OPPORTUNITY TO EXECUTE THE
BLANKS DO NOT WORRY ABOUT TIME LIMIT
ON APPEAL-EDWARD KUNTZ-

This message refutes plaintiff's contention that he never heard from his attorney directly.

The telegram from plaintiff's attorney to the warden stated:

MY CLIENT MORTON SOBELL 71342-A
WISHES TO ELECT NOT TO SERVE PEND-
ING HIS APPEAL AND DESIRES TO BE RE-
TURNED SOUTHERN DISTRICT NEW YORK
FOR PURPOSE OF CONSULTATIONS ON AP-
PEAL WOULD YOU KINDLY HAVE HIM EXE-
CUTE THE NECESSARY FORMS FOR THAT
PURPOSE VERY GRATEFUL FOR YOUR
COOPERATION.

This message could reasonably lead the warden to believe that Sobell had consulted with his attorney concerning this matter, and was fully aware of the consequences.

In support of his contention that his election not to serve was not made intelligently, plaintiff cites the case of *Bolden v. Clemmer*, 235 F. Supp. 832 (E.D.Va. 1964), where it was held that an indigent inmate who had, without advice of counsel, signed a form similar to the one signed by plaintiff had not made a voluntary election. However, in the instant case plaintiff was given ample opportunity to consult with his counsel, as the telegrams mentioned previously show.¹

It is the opinion of this court that plaintiff's election was intelligently made with a full knowledge of the consequences and with advice of counsel.

¹ It should also be noted that Sobell holds a master's degree in electrical engineering and possesses an extremely high I.Q.

B. DOES THE DENIAL OF CREDIT FOR THIS PERIOD CONSTITUTE A VIOLATION OF PLAINTIFF'S RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AMENDMENT?

Plaintiff's transfer from Atlanta to New York was for the purpose of consulting with counsel in connection with his appeal. There is no contention that after his arrival in New York his access to his counsel was in any way hampered. However, plaintiff contends that in order for him to return to New York to exercise his constitutional right, the government exacted an unconstitutional price, namely, that he had to serve an additional time in prison.

In support of this contention plaintiff relies primarily on *Sherbert v. Verner*, 374 U.S. 398 (1963). In that case a person who celebrated the Sabbath on Saturday was denied unemployment compensation because she would not take a job which required that she work on the day of her Sabbath. The Supreme Court stated:

... The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. *Id.* at p. 404.

Similarly, plaintiff contends that he is being imprisoned for additional months because he exercised his constitutional right to counsel.

Prior to its recent amendment, Rule 38(a) (2) of the Federal Rules of Criminal Procedure provided that if a defendant elected not to commence service of his sentence the sentence was stayed. Under this rule, it was uniformly held that a prisoner was not entitled to credit for the time he served under his "election." *Comulada v. Willingham*, 351 F. 2d 936 (10th Cir. 1965), cert. denied, 384 U.S. 973

(1966); *Allocco v. Heritage*, 310 F. 2d 719 (5th Cir. 1962); *Shelton v. United States*, 234 F. 2d 132 (5th Cir. 1956).

Rule 38 was promulgated by the Supreme Court and the constitutionality of this rule was upheld in *Baker v. United States*, 139 F. 2d 721 (8th Cir. 1944), rehearing denied, 325 U.S. 894 (1945). Plaintiff requests this court to hold that this rule was unconstitutional as applied to him because his choice was not a completely free one.

It is obvious that in order to consult with his counsel, plaintiff was required to give something up. It is also obvious that the same is true of all choices, and that in electing to pursue one course of action, another must be surrendered. This court is unwilling to hold that the choice required of plaintiff placed an unconstitutional burden on him.

C. WOULD A REFUSAL TO GIVE CREDIT FOR THIS PERIOD BE A DENIAL OF DUE PROCESS OF LAW AND A VIOLATION OF THE CONSTITUTION'S SEPARATION OF POWERS?

Plaintiff states that had he been free on bail pending appeal he could have engaged and consulted counsel free of hindrance by the government, but that this was not possible because he was financially unable to post bond. He argues that to hold that he is not entitled to credit for time spent in custody pending appeal, whereas a defendant financially able to post bond would have been able to consult counsel without incurring any penalty, denies plaintiff equal protection of the laws.²

Plaintiff states that a classification which establishes a differentiation between persons, in order to be valid, must bear a reasonable relationship to a legitimate government pur-

²Plaintiff admits that the Fifth Amendment does not contain any equal protection clause, but argues that the due process of law guaranteed in the Fifth Amendment embodies the same concept of equal protection as is explicitly set forth in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

pose, and that differentiation becomes an invidious discrimination under equal protection unless it bears a reasonable relationship to a legitimate government purpose. He argues that here the purpose was not to make certain that he would be available for trial, because he was given the opportunity to have bail but could not afford it. Therefore, the only purpose it served was to give him a longer sentence.

Plaintiff concedes that the equal protection clause cannot be pushed to the point where every inequality in the administration of criminal justice attributable to wealth (or the lack of it) must be equalized by the government. This court agrees and declines to hold that plaintiff has suffered a deprivation of a constitutional right because of his inability to afford bail.

At plaintiff's trial the government produced evidence tending to show that plaintiff had fled to Mexico to escape prosecution, and that he had been deported from that country. *United States v. Rosenberg*, 195 F. 2d 583, 602 (1952). Under these circumstances plaintiff's inability to obtain bail could have been caused by considerations other than financial. It should also be noted that plaintiff apparently never appealed from the amount set for bail. It therefore cannot be said that the fact that plaintiff is serving a longer sentence than he would have if he had obtained bail is the result of arbitrary or capricious action on the part of the government, which bore no relation to a legitimate government interest.

Finally, it should be noted that in computing plaintiff's sentence, the Bureau of Prisons was merely following the law as prescribed in 18 U.S.C. § 3568 and Rule 38 (a) (2) of the Federal Rules of Criminal Procedure. No other choice was open to the Bureau, and therefore there was no substitution of an administrative decision for the legislative determination of the maximum penalty.

Accordingly, the motion of plaintiff for summary judgment will be denied; the motion of the defendants to dismiss will be granted as to the issue of presentence custody,

and denied as to the issue of custody pending appeal; and the motion of the defendants for summary judgment as to the issue of custody pending appeal will be granted.

July 1, 1968.

Frederick V. Follmer
United States District Judge

ORDER

NOW, July 1, 1968, in accordance with Opinion filed this day, It is Ordered that:

The motion of plaintiff for summary judgment is denied;

The motion of defendants to dismiss is granted as to the issue of presentence custody, and denied as to the issue of custody pending appeal; and

The motion of defendants for summary judgment as to the issue of custody pending appeal is granted.

Frederick V. Follmer
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17349

MORTON SOBELL,
Appellant,

v.

ATTORNEY GENERAL OF THE UNITED STATES,
DEPARTMENT OF JUSTICE, WASHINGTON, D. C., AND
DIRECTOR, UNITED STATES BUREAU OF PRISONS,
DEPARTMENT OF JUSTICE, WASHINGTON, D. C.APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

Argued July 30, 1968

Before FREEDMAN and SEITZ, *Circuit Judges*, and
LAYTON, *District Judge*.

OPINION OF THE COURT

(Filed August 16, 1968)

SEITZ, *Circuit Judge*.

On April 5, 1951, the plaintiff, appellant here, was sentenced in the United States District Court for the Southern District of New York to serve a thirty year sentence for conspiracy to violate the espionage statute (50 U. S. C. § 32(a) (1946 ed.)). He is now a prisoner in the federal penitentiary at Lewisburg, Pennsylvania. On January 18,

1968, after unsuccessfully seeking relief from the Attorney General, he brought the present action in the district court¹ under the Administrative Procedure Act (5 U. S. C. A. §§ 702, 703, 704 and 706) and the Declaratory Judgment Act (28 U. S. C. A. § 2201) seeking a determination as to whether he was entitled to credit on his prison sentence for the periods:

1. from August 18, 1950, the date of arrest, to April 5, 1951, the date of his sentencing, and
2. from July 20, 1951, to February 25, 1952, the period during which his appeal was pending.

The district court denied plaintiff's claim for the period of pre-sentence imprisonment on the ground of lack of jurisdiction. It denied on the merits the request for appeal time credit. Plaintiff appeals both determinations. We are acting promptly because plaintiff is entitled to be released if there is merit to both of his claims.

We first consider the claim for pre-sentence credit. The district court held that although the plaintiff was incarcerated within its district, neither the Administrative Procedure Act nor the Declaratory Judgment Act gave that court jurisdiction. Rather, it held that under both 28 U. S. C. A. § 2255 and Rule 35 of the Federal Rules of Criminal Procedure the sentencing court (Southern District of New York) was the proper forum to decide this type of issue.

This action was brought against the Attorney General of the United States and the Director of the United States Bureau of Prisons. We need not decide whether the question is one going to the district court's jurisdiction because we are satisfied, in any event, that the claim for pre-sentence credit is within the ambit of 28 U. S. C. A. § 2255, and there-

¹ The action was instituted in the United States District Court for the District of Columbia but was transferred by that Court to the court below rather than to the sentencing court. We express no opinion as to the propriety of the transfer except to say that we do not consider that it constituted an adjudication of the issues here raised.

fore a matter for the sentencing court. Plaintiff's term of imprisonment is considered by defendants to have commenced on the date of sentencing. Plaintiff claims that 18 U. S. C. A. § 3568, as then in effect, required that his sentence commence on the date of his arrest. He also contends that the sentencing court intended to employ the earlier commencement date. Thus, plaintiff is asking this court, in substance, to make a determination regarding the commencement date of the sentence intended or required to be set by the sentencing court. The relief granted, if any, would come within that provision of § 2255 which permits the sentencing court to "correct the sentence." So viewed, plaintiff is attacking the correctness of the sentence as imposed. Under these circumstances, we conclude, as did the district court, that relief, if any, with respect to this claim is a matter for the sentencing court. Moreover, the Attorney General was not confronted with a situation where the governing law was clear. The statute applicable at the time of sentencing was by no means decisive of the present issue and no controlling opinion of the United States Supreme Court or of the Second Circuit was before the Attorney General.

Plaintiff says that the Attorney General exercised an administrative power when he issued a "Policy Statement" on February 9, 1968, in which he said that implementation was to be given to court decisions regarding jailtime credit on sentences imposed between October 2, 1960, and September 19, 1966. It is true that the Attorney General declared such a policy but, neither the policy by its terms nor its underlying authority would apply to plaintiff's sentence which, of course, was imposed before October 2, 1960. This is not to say that some of the reasoning of the policy statement might not be applicable to plaintiff's sentence. However, since we find that the authority to grant the relief requested was in the sentencing court, our decision is not affected by his policy statement. Other reasons advanced by plaintiff are equally without merit and indeed, in some

instances, point to the practical desirability of a determination of the present issue by the sentencing court. The district court's dismissal of this claim will be affirmed without prejudice to the merits thereof.

We next consider plaintiff's claim to credit for the period spent in custody while his appeal to the Second Circuit Court of Appeals was pending.

Plaintiff was sentenced on April 5, 1951. He was transferred to the federal penitentiary at Atlanta, Georgia. After transfer, he sought to be transferred back to New York in order to consult and assist his counsel concerning the appeal. To that end, and on the basis of his counsel's advice, he signed the following form:

"Election Not To Begin Service of Sentence"

"Having heretofore taken an appeal from my sentence imposed on April 5, 1951, in the United States District Court for the Southern District of New York, I now elect not to commence service of the sentence.

"Signed this 20 day of July, 1951."

Rule 38(a)(2) of the Federal Rules of Criminal Procedure, as then in effect, reads:

"A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail."

Thereafter plaintiff was transferred to New York and remained there while his appeal was processed.

We first note that the district court decided this issue on the merits. The defendants did not raise in the district court and do not here attack that court's jurisdiction to decide this issue. The jurisdictional issue was, however, raised by the court at oral argument. The majority of the court believes that the district court had jurisdiction to declare plaintiff's rights here. The Attorney General administered the election procedure provided by F. R. Cr. P. 38(a)(2), and plaintiff was subject to his custody at the time he invoked this Rule. Plaintiff's attack on the conse-

quences of his election was, of course, based on events occurring after his sentence was imposed. We believe that these factors authorized an action for declaratory judgment which was jurisdictionally justified by the federal habeas corpus statute² without prior resort to the sentencing court under 28 U. S. C. A. § 2253.³ See *Stinson v. U. S.*, 342 F.2d 507 (8th Cir. 1965), *Allen v. U. S.*, 327 F.2d 58 (5th Cir. 1964), *Halprin v. U. S.*, 295 F.2d 458 (9th Cir. 1961), *Freeman v. U. S.*, 254 F.2d 352 (D. C. Cir. 1958), *Barrett v. Hunter*, 180 F.2d 510, 514 (10th Cir.), cert. denied 340 U. S. 897 (1950), and *Costner v. U. S.*, 180 F.2d 892 (4th Cir. 1950). In view of our decision on this issue we need not consider whether the Administrative Procedure Act would also supply jurisdiction in this case.

As to the merits, plaintiff first contends that the waiver or "election" was not made with knowledge of its consequences and was therefore ineffective. He argues that he was not aware that by signing the election he would not be given credit for the time served while the appeal was pending. It is undisputed that prior to his signing the election form his counsel wrote him about the matter and he explicitly authorized his attorney to "start election proceedings immediately." It is further undisputed that, at counsel's request, the prison officials made the election document available for plaintiff's signature. Considering the language of the form and the undisputed facts surrounding its signing we can find nothing in this record which would relieve him from the consequence of his affirmative, attorney counselled, action in signing the election.

Plaintiff next asserts that the 1966 Amendment to Rule 38(a)(2), which abolishes the election procedure and gives credit generally, should be applied retrospectively.

In adopting the amendments, the United States Supreme Court's order provided that they "shall take effect on July 1, 1966, and shall govern all criminal pro-

ceedings thereafter commenced and so far as just and practicable all proceedings then pending." 383 U. S. 1089 (1966). Plaintiff's counsel does not tell us how this case comes within the quoted language since admittedly no proceeding was pending on July 1, 1966. Nor is it suggested that this action is a "criminal proceeding thereafter commenced" within the meaning of the order. We do not find the amendment available to this plaintiff.

Plaintiff argues that denial of credit violates his right to Due Process and Equal Protection of the Laws. It is said that the election procedure imposed additional imprisonment on him because of his "financial inability to make bail." It is true that, as between one who could afford bail and one who could not, it worked a hardship on the latter if he elected not to commence serving his sentence. But this consequence flowed from what we must assume was a proper imprisonment. While the result may be unfair it is not sufficiently invidious to reach constitutional proportions.

Finally, plaintiff contends that denial of credit here violates his right to counsel guaranteed by the Sixth Amendment. Plaintiff's counsel in effect argues that he had a constitutional right to be present in a physical location where he could conveniently consult with his counsel concerning his appeal; that it constituted an undue burden on that right to condition its exercise upon the signing of an agreement which had the effect of forcing him to serve an additional period in custody.

By amending Rule 38(a)(2) to eliminate the election provision, the Supreme Court of the United States has indicated that the procedure left much to be desired. But we do not view the former procedure as being in violation of plaintiff's Sixth Amendment rights. It did not deny him his right to appeal and to consult with his counsel. Insofar as the "election" was involved, the plaintiff's choice was between immediate proximity to counsel and credit on his sentence. The choice given him did not, with-

² See 28 U. S. C. A. §§ 2241, 2243 and compare *Shelton v. U. S.*, 234 F.2d 132 (5th Cir. 1956).

³ We think Rule 35 of the F. R. Cr. P. is by its terms not here applicable.

out more, constitute the placing of an impermissible burden on the exercise of his Sixth Amendment rights.

We affirm the judgment of the district court denying plaintiff's motion for summary judgment, granting defendants' motion to dismiss as to the issue of pre-sentence custody without prejudice to the merits and granting defendants' motion for summary judgment as to the issue of custody pending appeal.

FREEDMAN, Circuit Judge, concurring in part and dissenting in part.

I believe the District Court did not have jurisdiction over either of plaintiff's claims.

In my view plaintiff may not seek declaratory judgment in this court because relief is available to him under 28 U.S.C. § 2255. Relief available to federal prisoners under § 2255 parallels the scope of relief available to state prisoners on federal habeas corpus.¹ It is therefore well within the limits of § 2255 to assert collateral claims by which a prisoner's sentence would be reduced and his earlier release obtained. The reported cases show that § 2255 has been invoked on claims for post-sentence credit² as well as for pre-sentence credit.³ Here it is conceded that if the claims made are fully sustained plaintiff is entitled to immediate release.

Under the express requirement of § 2255 relief must be sought in the court which imposed the sentence.⁴ This statutory restriction on the federal substitute for habeas

1 See, e.g., *United States v. Hayman*, 342 U.S. 205 (1952); *Sanders v. United States*, 373 U.S. 1, 12-14 (1963), cf. *Peyton v. Rowe*, 391 U.S. 54 (1968), overruling *McNalley v. Hill*, 293 U.S. 131 (1934).

2 See *Norris v. United States*, 190 F.2d 186 (5 Cir. 1951).

3 See *United States v. Pratt*, 276 F. Supp. 80 (D. N.J. 1967).

4 I find it unnecessary to decide whether relief would be available under Rule 35 of the Federal Rules of Criminal Procedure, for relief under that rule too must be sought in the court which imposed the sentence. See, e.g., *Stapf v. United States*, 367 F.2d 326 (D.C. Cir. 1966).

corpus was specifically designed to avoid the necessity in habeas corpus cases of bringing the proceeding in the district where the applicant is confined. Its twofold purpose was to overcome the undue burden imposed on the courts of districts in which penitentiaries are located and to make more readily available the records of the sentencing court which at times may prove to be of significance. *United States v. Hayman*, 342 U.S. 205, 212-13 (1952). To entertain declaratory judgment actions in cases where § 2255 is available would destroy the Congressional purpose in the enactment of § 2255. Plaintiff's claim that the sentencing judge intended him to be credited with the period of his pre-sentence imprisonment, a matter which would best be determined in the sentencing court, illustrates the desirability of effectuating this purpose.

I see no reason to make a distinction in the Attorney General's determination of the duration of the sentence because his refusal to give credit is for the post-sentence rather than the pre-sentence period. In both cases the Attorney General was merely acting as an officer in charge of the management of the penitentiary. It was as the superior of the warden of the penitentiary that the Attorney General received the election which a prisoner was authorized to make under Rule 38(a), and the receipt of such election and its recognition was not the quasi-judicial action of an "agency" which would be subject to judicial review by declaratory judgment under the Administrative Procedure Act.⁵

Even if we had jurisdiction to consider the claim for post-sentence credit, I would in the exercise of our discretion under the Declaratory Judgment Act⁶ leave it to be

5 Compare decisions by a board of parole which are judicially reviewable. See *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir. 1961); see also *Washington v. Hagen*, 287 F.2d 332 (3 Cir. 1960), cert. denied, 366 U.S. 970 (1961); *Stinson v. United States*, 342 F.2d 507 (8 Cir. 1965); *Allen v. United States*, 327 F.2d 88 (5 Cir. 1964); *Halprin v. United States*, 295 F.2d 458 (9 Cir. 1961); *Freeman v. United States*, 254 F.2d 352 (D.C. Cir. 1958); *Costner v. United States*, 180 F.2d 892 (4 Cir. 1950).

6 *Provident Tradesmen's Bank & Trust Co. v. Lumbermen Mutual Insurance Company*, 365 F.2d 802, 814 (3 Cir. 1966), reversed on other grounds, 390 U.S. 102 (1968).

decided in the sentencing court as pendent to the claim for pre-sentence credit.

The appeal raises for me serious questions on the merits of the two claims. Believing, however, as I do that they should be decided only in the Southern District of New York, I concur in the dismissal without prejudice of the claim for pre-sentence credit and dissent from the dismissal on the merits of the claim for post-sentence credit.

● A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit.*

APPENDIX C

UNITED STATES COURT OF APPEALS

No. 17,349

MORTON SOBELL,

Appellant

v.

ATTORNEY GENERAL OF THE UNITED STATES
DEPARTMENT OF JUSTICE, WASHINGTON, D. C., AND
DIRECTOR, UNITED STATES BUREAU OF PRISONS
DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

(D. C. CIVIL ACTION No. 68-144)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PRESENT: FREEDMAN and SEITZ, *Circuit Judges*, and
LAYTON, *District Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the part of the said District Court order, filed July 1, 1968, which denied plaintiff's motion for summary judgment be and hereby is affirmed; the part of the said District Court order, which granted defendants' motion to dismiss as to the issue of pre-sentence custody be and hereby is affirmed, without prejudice to the merits; the part of the said District Court order, which granted defendants' motion for summary judgment as to the issue of custody pending appeal be and hereby is affirmed.

August 16, 1968

ATTEST: Thomas F. Quinn,
Clerk

APPENDIX D

BUREAU OF PRISONS WASHINGTON, D. C. 20537

POLICY STATEMENT 7600.49

SUBJECT: JAIL-TIME CREDIT UNDER COURT DECISIONS

10-27-67

1. **PURPOSE.** To implement court decisions regarding jail-time credit on sentences imposed before September 20, 1966.
2. **EXPLANATION.** Recent cases decided by the Courts of Appeals for the District of Columbia Circuit (*Stapf v. United States*), the Fourth Circuit (*Dunn v. United States*), and the Seventh Circuit (*Smith v. United States*) have interpreted the jail-time credit under 18 U.S.C. 3568 for sentences imposed prior to the effective date of the Bail Reform Act of 1966. These courts have held that sentencing judges must give defendants credit for time spent in jail awaiting trial in cases not requiring mandatory minimum sentences. However, in those cases where the record indicates that the sentencing court could have taken the pre-sentence custody into account in arriving at the sentence which was imposed, it is to be presumed that such credit was given. Thus, if the maximum sentence allowed under the law was imposed, or if the sentence, when added to pre-sentence custody, exceeds the statutory maximum, credit must be given as a corrective matter, because the sentencing judge obviously did not deduct the pre-trial custody period from the sentence.
3. **ACTION.**
 - a. Rather than to require this credit to be given individually by the court in each case, the credit will be administratively given to defendants who were sentenced before September 20, 1966 in the District

of Columbia, the Fourth Circuit (which comprises all districts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia), or the Seventh Circuit (which comprises all districts in Illinois, Indiana, and Wisconsin).

- b. The simplest situation will involve the defendant who is sentenced to the statutory maximum (5 years for Dyer Act, for example). In such a case, credit will be given for all time spent in custody for want of bail set for the offense, before the date of sentence imposition. In addition, a person who receives less than the maximum, but the amount received plus jail-time exceeds the statutory maximum, will receive such credit so that the total time does not exceed the maximum. For example, if an inmate received 4½ years for a Dyer offense, and was in pre-sentence custody for the offense for 9 months, for want of bail, a credit of 3 months will be applied against the sentence.
- c. The credit will also be applied to the violator term of parole and mandatory release violators, whose original sentences would exceed the statutory maximum as defined above.
- d. As of now, this credit will not be applied to persons committed under the Youth Corrections Act (18 U.S.C. 5010(b) or (c)) or the Federal Juvenile Delinquency Act (18 U.S.C. 5034), since the crediting provisions of 18 U.S.C. 3568 do not appear to apply to youth or juvenile commitments.
- e. Assistance in determining eligibility in questionable cases may be sought from the Legal Counsel.

MYRL E. ALEXANDER
Director, Bureau of Prisons
Commissioner, Federal Prison
Industries, Inc.

APPENDIX E

BUREAU OF PRISONS

WASHINGTON, D. C. 20537

POLICY STATEMENT

7600.49A

SUBJECT: JAIL-TIME CREDIT UNDER COURT DECISIONS

2-9-68

1. PURPOSE. To give nationwide implementation to court decisions regarding jail-time credit on sentences imposed between October 2, 1960, and September 19, 1966.
- *2. DIRECTIVE AFFECTED. This Policy Statement supersedes Policy Statement 7600.49 dated 10-27-67.
- *3. EXPLANATION. In addition to the rulings in the District of Columbia, the Fourth, and the Seventh Circuits referred to in Policy Statement 7600.49, the Court of Appeals for the Fifth Circuit (*Bryans v. Blackwell*) has followed the ruling regarding jail-time credit, which was originally set out in *Stapf v. United States*. Consequently, it has been determined that the *Stapf* ruling should be applied to all federal inmates, regardless of the place of original sentencing.

These courts have held that sentencing judges must give defendants credit for time spent in custody awaiting trial in certain cases other than mandatory minimum sentences, for which such credit was provided in the 1960 amendment to 18 U.S.C. 3568. They have held that credit should be given if the maximum sentence allowed under the law was imposed, or if the sentence, when added to presentence custody, exceeds the statutory maximum. The reasoning behind these cases is that in such situations, the sentencing judge obviously did not deduct the pre-trial custody period from the sentence. If the maximum sentence is not imposed, pre-trial credit should be given only to the extent that the actual time spent in custody would otherwise exceed the statutory maximum.

In all other cases, it will be presumed that the sentencing judge took jail time into account in sentencing and no jail-time credit will be given administratively.*

4. ACTION

- *a. Since the *Stapf* ruling was related to the 1960 amendment to 18 U.S.C. 3568, and was designed to remedy a disparity which would otherwise exist between mandatory minimum penalty cases which received the jail-time credit under the statute and nonminimum cases which did not, the credit will be applied only to those who were sentenced during the effective period of the 1960 amendment. Records should be reviewed to identify those defendants who were sentenced between October 2, 1960, and September 19, 1966, inclusively.*
- b. The simplest situation will involve the defendant who is sentenced to the statutory maximum (5 years for Dyer Act, for example). In such a case, credit will be given for all time spent in custody for want of bail set for the offense, before the date of sentence imposition. In addition, a person who receives less than the maximum, but the amount received plus jail-time exceeds the statutory maximum, will receive such credit so that the total time does not exceed the maximum. For example, if an inmate received 4½ years for a Dyer offense, and was in pre-sentence custody for the offense for 9 months for want of bail, a credit of 3 months will be applied against the sentence.
- c. The credit will also be applied to the term of parole violators, and mandatory release violators, whose original sentences would exceed the statutory maximum as defined above.
- d. As of now, this credit will not be applied to persons committed under the Youth Corrections Act (18 U.S.C. 5010(b) or (c)) or the Federal Juvenile Delin-

quency Act (18 U.S.C. 5034), since the crediting provisions of 18 U.S.C. 3568 do not appear to apply to youth or juvenile commitments.

- e. Assistance in determining eligibility in questionable cases may be sought from the Legal Counsel.

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