Subject: Procedure-Criminal
Attorney General

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STATE OF KANSAS

Office of the Attorney General

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Attorney General

December 16, 1974

Opinion No. 74-389

Mr. Robert R. Raines, Secretary
Department of Corrections
11th floor, State Office Building
Topeka, Kansas 66612

Attention: Bernard J. Dunn
Legal Counsel

Dear Secretary Raines:

You inquire concerning the granting of presentence credit pursuant to K.S.A. 1970 Supp. 21-4614 and the amendment thereof K.S.A. 1973 Supp. 21-4614, which was effective July 1, 1974.

The latter statute provides in pertinent part thus:

> "In any criminal action in which the defendant is convicted upon a plea of guilty or trial by court or jury, the judge, if he sentences the defendant to confinement, shall direct that for the purpose of computing defendant's sentence and his parole eligibility and conditional release dates thereunder, that such sentence is to be computed from a date, to be specifically designated by the court in the journal entry of conviction, . . . to reflect and shall be computed as an allowance for the time which the defendant has spent in jail pending the disposition of the defendant's case."

Under K.S.A. 1970 Supp. 21-4614, the date to be fixed was to be "not more than ninety (90) days prior to the date of conviction."

You inquire whether the denial of full credit to those persons sentenced under K.S.A. 1970 Supp. 21-4614 and prior to July 1, 1974, constitutes a denial of equal protection of the law to the class of persons sentenced under the former statute.

In *Hazelwood v. State*, 215 Kan. 442, decided July 17, 1974, the court considered whether "the refusal of the trial court to credit petitioner with the time spent in custody awaiting trial violated the petitioner's constitutional rights to due process and to equal protection of the law." The petitioner there was unable to make bond, because of indigency and as a result spent 162 days in jail prior to his sentence. The transcript of sentencing discloses that the judge took that into consideration in imposing the minimum sentence. The Court enunciated the following rule:

> "When a sentencing judge considers the time spent by an indigent defendant in jail pending trial and imposes a sentence which, if increased by the jail time would not exceed the maximum sentence allowed by law, the defendant's constitutional rights to due process and equal protection of the laws have not been violated by reason of his inability to give bond and the sentence imposed is constitutionally permissible." 215 Kan. at 447.

Under this holding, denial of credit for time spent in jail by reason of indigency and resultant inability to post bond was upheld on the ground that the sentencing judge did, according to the record, consider a request that the defendant be given credit for the time, although the request was denied, and the minimum sentence imposed.

In *White v. Gilligan*, 351 F. Supp. 1012 (S.D.Ohio 1972), the court rejected a denial of presentence credit to persons detained because of inability to post bond, but also went on to strike down a statutory scheme for denial of full credit on a broader ground.

> "[T]his statutory scheme also discriminates against any defendant who remains in jail prior to his trial. In effect, the Ohio statutory scheme establishes two classes of defendants. The first class consists of those defendants who remain free prior to their convictions and who thus receive full credit for all of their periods of actual confinement on the sentences ultimately imposed. The second class consists of those defendants who remain in jail prior to their convictions and who therefore do not receive full credit

> for all of their periods of confinement because under the Ohio statutory scheme pre-conviction confinement is not imprisonment. As a result, this second class of defendants must remain in jail for a longer period of time before they become eligible for parole than defendants who belong to the first class. In addition, defendants in the first class receive full credit for all periods of actual confinement in determining the date their maximum sentence expires, while members of the second class do not. This Court cannot find any legitimate state interest which is served by allowing the state to grant full credit for all periods of confinement to one class of defendants while denying full credit to another class of defendants." 351 F. Supp. at 1014.

In *Hazelwood, supra*, the court clearly implied that a defendant has a constitutional right not to be confined longer than the maximum term prescribed by law, and that if the sentencing judge considers the time spent in presentencing custody as a result of indigency, and nonetheless imposes a sentence which, together with that period of presentence custody, exceeds the maximum sentence allowed by law, the defendant may well have a valid claim for relief based upon the due process and equal protection clauses. In such a circumstance, the court clearly suggests, the period of presentence custody may be considered as tantamount to a part of the sentence itself. In other circumstances, such as those presented in the case itself, however, the period of pretrial detention will not be considered as part of the sentence, and credit therefor denied. Hazelwood, because of circumstances over which he has no control, will receive no credit for the period of presentence confinement, and will thus not receive credit for the entire period of his confinement, unlike another who was able to post bond, and is confined only upon sentencing, who will spend *no* time in confinement which is not credited toward service of his sentence.

Hazelwood argued that he was the victim of invidious discrimination based on wealth, or lack of it, because, as a result of his indigency, he was unable to obtain his release on bond; denial of credit for such presentencing confinement results in a longer period of confinement than for another defendant who is in identical circumstances, save that he is

not indigent and is unable to obtain his release on bail pending conviction, and who receives an identical sentence. The argument, framed thus, of course, for illustrative purposes, failed to impress the court, which pointed out that "anyone to post bond [would not necessarily] have received minimum concurrent sentences."

The court thus rejected the argument that denial of credit operated discriminatorily against Hazelwood because of his indigency. Indigent and nonindigent defendants are but subgroups of two larger classes, that class of defendants who are denied pretrial release for any reason, and those who are able to obtain pretrial release. Given the rejection in *Hazelwood* of any claim of discrimination between indigent and nonindigent defendants, there is little room within the framework of the *Hazelwood* analysis to consider claimed discrimination between the two larger classes.

There are, however, two further classes involved. All persons sentenced after July 1, 1974, will receive full credit pursuant to the 1973 amendment. Those persons sentenced prior to that time and under K.S.A. 1970 Supp. 21-4614 may not receive full credit. The question is raised whether this different treatment, dependent upon the seemingly accidental fact of sentencing dates, constitutes a denial of equal protection of the laws to those who, because their sentencing predates July 1, 1974, will for that reason not receive full credit.

A precisely analogous question was raised in *Cole v. North Carolina*, 419 F.2d 127 (4th Cir. 1969), where the petitioner was convicted and sentenced prior to the enactment of new sentencing laws by North Carolina which provided for full credit. The federal district court denied the claim for presentence credit. On appeal, the court stated thus:

> "Commendably, the Attorney General of North Carolina in his brief in this Court suggests that the case should be remanded to the district court with directions that petitioner be given the credit he claims. The justification, the Attorney General states, is to avoid unlawful discrimination between defendants tried subsequent to the enactment of the credit statutes and those tried prior to their enactment. Petitioner, of course, belongs to the latter group."

> "We agree that petitioner should be granted the relief he prays." 419 F2d at 128.

This case was followed in *Ham v. North Carolina* , 471 F.2d 406 (4th Cir. 1973), a similar case in which, after denial of relief by the federal district court on a claim for presentence confinement, the state law was changed to provide for full credit, although the new statute did not apply retroactively. The court followed *Cole* thus:

> "The statute by its specific language affords petitioner no relief, as his trial occurred long prior to its effective date. The attempt to limit the statute to a prospective application, though, is palpably unconsitutional . . ." 471 F.2d at 408.

A more analytical and closely reasoned discussion of the issue involved in compelling on constitutional grounds the retroactive application of a statute granting full credit may be found in *In re Kapperman*, 11 Cal.3d 542, 114 Cal. Rptr. 97, 522 P.2d 657 (1974), where reliance was placed both by the petitioner and the court on the "basic guarantees" of the Fourteenth Amendment and sections of the California constitution

> "which prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction, and require that classifications between those to whom the state accords and withholds substantial benefits must be reasonably related to a legitimate public purpose."

After extensive analysis of the statute, and purported justifications offered in its support, the court concluded that prospective application only of a statute granting full credit violated these equal protection precepts

> "in that it constitutes a legislative classfication which is not reasonably related to a legitimate public purpose. We do not invalidate the entire statute, however, but only eliminate the discriminatory classification under subdivision (c) and thus extend the statutory benefits retroactively to those whom the Legislature improperly excluded." 11 Cal.3d at 98.

The same equal protection principles obtain in Kansas. In *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974), the court stated thus:

> "A classification employed in the exercise of the police power cannot be made arbitrarily. Any distinctions inherent in a particular classification must furnish a proper and reasonable basis for such a classification. The concept of equality of all citizens under the law is, of course, basic to our free society. We have stated that classifications may not be created arbitrarily, discriminatorily or unreasonably, or the principle of equality would be violated. These must be some difference in character, condition, or situation, to justify distinction, and this difference must bear a just and proper relation to the proposed classification and regulation; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert." 213 Kan. at 753.

"[D]ifferent treatment [may not] be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."

The legislature has the conceded right to change the law. In *State v. Richard*, 14 N.C.App. 706, 189 S.E.2d 574 (1972), the court relied upon this settled principle to reject a claim of unlawful discrimination between those tried prior to and those tried subsequent to a statutory change regarding credit for presentence confinement. To state the obvious right of the legislature to change the law, however, does not necessarily justify any unlawful classification which results from such a statutory change if the classification has no other justification than the existence of the legislative prerogative itself.

Given the present state of the law in Kansas, whether credit for presentence confinement must be granted depends solely whether the date of sentence falls before July 1, 1974, or on and after that date. The question arises whether the classification of defendants for the purposes of entitlement to such credit based solely on the date of sentence occurring on or after a fixed date, and denial of such mandatory credit to all those convicted prior to that date, is

reasonably related to a competent governmental purpose other than the mere right of the legislature to change the law. As Justice Kaul stated, dissenting in *Bauder, supra,* "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." We can conceive of no state of facts which provides a reasonable justification for requiring mandatory credit for presentence confinement for an entire class of defendants identified only by the fact that their date of sentence occurs on and after July 1, 1974, and denying such mandatory credit to an entire different class of defendants, again identified only by the accidental fact that their sentence occurred before that date. Having granted mandatory entitlement to credit to one class of defendants, the legislature may not constitutionally withhold that benefit from other defendants similarly situated. Those sentenced prior to July 1, 1974, are entitled to the equal protection of the laws enjoyed by those sentenced after that date, absent a conceivable state of facts from which it may be inferred that different treatment of the two classes for purposes of right to credit for presentence confinement is reasonably related to a legitimate governmental interest.

It is our opinion that the right to credit for presentence confinement granted by K.S.A. 1973 Supp. 21-4614 may not constitutionally be denied to those defendants in custody who were sentenced prior to that date, and who would receive such full credit were that statute applicable.

You also inquire concerning K.S.A. 1973 Supp. 22-3431 which states in pertinent part thus:

> "The time spent in a state or county institution pursuant to a commitment under section 22-3430 shall be credited against any sentence, confinement or imprisonment imposed on the defendant."

This provision, effective July 1, 1970, succeeded K.S.A. 62-1537:

> "If after commitment to any state or county institution, it appears that the defendant has been restored mentally, he shall be returned to the court where convicted and be sentenced or paroled as the court deems best under the circumstances."

Those sentenced prior to July 1, 1970, thus, have been denied credit for the period of such commitment, while those sentenced after that date do receive such credit. For the reasons stated above, it is our opinion that K.S.A. 1973 Supp. 22-3431 must be applied retroactively to those persons who are presently being denied such credit merely because their sentences were imposed prior to July 1, 1970.

Yours very truly,

Vern Miller

VERN MILLER
Attorney General

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