# 04-3177-pr

*To Be Argued By*:
WILLIAM J. NARDINI

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 04-3177-pr**

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GUISEPPE SPINA,
*Plaintiff-Appellant,*

-vs-

DEPARTMENT OF HOMELAND SECURITY,
*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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## BRIEF FOR THE DEPARTMENT OF HOMELAND SECURITY

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## STATEMENT OF JURISDICTION

This Court has exclusive jurisdiction to review a final order of deportation in the wake of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B., 119 Stat. 231 (May 11, 2005). Pursuant to *United States v. Marquez-Almanzar*, 2005 WL 1864071, at *4 (2d Cir. Aug. 8, 2005), this otherwise timely appeal from the district court's denial of habeas relief should be deemed transferred from the district court and treated as a petition for review filed under 8 U.S.C. § 1252. Venue is appropriate because the immigration proceedings in the present case occurred within this Circuit (here, in Hartford, Connecticut), and so a petition for review would have been properly filed in this Court. *See Marquez-Almanzar*, 2005 WL 1864071 at *4 n.6.

In order to treat this case as a petition for review, the Court should substitute the Attorney General for the current respondent (the Department of Homeland Security). *See* 8 U.S.C. § 1252(b)(3)(A). This conversion does not affect the standard of review in this Court, as denials of habeas petitions have always been reviewed *de novo*. *See Howard v. Walker*, 406 F.3d 114, 121 (2d Cir. 2005); *Kamagate v. Ashcroft*, 385 F.3d 144, 151 (2d Cir. 2004).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, for purposes of determining whether an alien is ineligible for discretionary relief from deportation under § 212(c) of the Immigration and Nationality Act, time spent by the alien in pre-trial custody and credited toward his sentence for an aggravated felony should be counted as "time served" for that felony?

2. Whether an alien is entitled to *nunc pro tunc* relief after an Immigration Judge finds him ineligible to apply for § 212(c) relief based on an erroneous retroactive application of laws that abolished such relief for aggravated felons, where the alien accrued five years in prison during the pendency of administrative appeals?

3. Whether the answer to Question 2 depends on whether the alien was convicted by plea as opposed to trial, where all relevant events occurred after the 1990 enactment of § 212(c)'s five-year bar and there is accordingly no need to engage in retroactivity analysis.

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## BRIEF FOR THE DEPARTMENT OF HOMELAND SECURITY

### Preliminary Statement

On May 31, 1992, Giuseppe Spina stabbed his estranged wife to death with a kitchen knife. He was arrested on the spot, and after nearly two years in custody he pled guilty to manslaughter. Because Spina was an Italian citizen, the INS sought to deport him as an aggravated felon. In 1997, an Immigration Judge denied Spina's application for relief from deportation under § 212(c) of the Immigration and Nationality Act on the

ground that Congress had recently abolished such relief for aggravated felons. In 2000, the Board of Immigration Appeals recognized that such a ruling was erroneous in light of subsequent case law, but held that Spina was ineligible for § 212(c) relief in any event because he had already served five years in prison for an aggravated felony. The Board later denied a motion to reopen, and a district court denied habeas relief.

In his present appeal, Spina argues that he is entitled to apply for § 212(c) relief. To succeed, he must convince this Court of at least two things. First, he must demonstrate that the two years he spent in pre-trial custody should not be counted toward the five-year bar, even though they were credited toward service of his 20-year sentence. As discussed in Point I *infra*, however, the text, context and purpose of § 212(c), together with the BIA's interpretation of an analogous statute, establish that all of the time an alien spends in prison which is credited toward his sentence is time "served for" that sentence. As a result, it is clear that Spina served more than five years in prison before the IJ denied him § 212(c) relief, and so he was statutorily barred from such relief.

Second, even if Spina's pre-trial detention did not count toward § 212(c)'s five-year bar, he would still have to establish that the time he subsequently spent in prison during the pendency of his administrative appeal did not count either. As discussed in Point II *infra*, this Court has already held in *Brown v. Ashcroft*, 360 F.3d 346 (2d Cir. 2004), that a felon's time in prison continues to run for purposes of § 212(c) until a final order of deportation enters. This rule comports with both this Court's analysis

in other cases and the structure of relevant immigration regulations. Because Spina had spent more than five years in prison (not counting pre-trial detention) at the time the BIA entered his final order of deportation, he was statutorily ineligible for § 212(c) relief on this additional ground.

For each of these reasons, as set forth more fully below, Spina's appeal (now treated as a petition for review) should be rejected.

## Statement of the Case

On May 7, 2004, plaintiff-appellant Giuseppe Spina filed a *pro se* petition for writ of habeas corpus in the United States District Court for the District of Connecticut (Robert N. Chatigny, J.) seeking relief from a final order of deportation from the United States which had been entered by an Immigration Judge on September 23, 1997, and which was affirmed by the Board of Immigration Appeals on May 31, 2000. Joint Appendix ("JA") 3-7. The district court dismissed the petition by written ruling on May 21, 2004. JA 136-37.

On June 2, 2004, Spina filed a timely notice of appeal. JA 140. On January 13, 2005, this Court ordered that pro bono counsel be appointed, and on April 20, 2005, the Court appointed Thomas I. Sheridan, Esq., to represent Spina.

On April 27, 2005, Spina moved this Court for a stay of removal. On May 24, 2005, absent government objection, this Court granted that motion.

On June 23, 2005, Spina moved this Court to lift its stay of removal, so that upon his release from state custody after completing his manslaughter sentence, he could be removed to Italy rather than remain in the custody of immigration authorities. On July 11, 2005, on consent of the Government, the Court granted that motion.

On August 2, 2005, Spina was released from state custody upon completion of his sentence, and was received into the custody of federal immigration authorities. At this writing, he is still awaiting deportation.

## STATEMENT OF FACTS

### A. Spina's Manslaughter Conviction and Immigration Proceedings

Spina is a native and citizen of Italy. JA 93. He entered the United States in March 1967 as an immigrant, and has resided here as a lawful permanent resident since then. *Id.*; JA 37. Spina was never naturalized. *Id.*

On May 31, 1992, Spina went to the home of his wife, from whom he was separated, and stabbed her in the stomach with a knife. JA 78. She died from the wound. *Id.* According to the pre-sentence investigation report, the victim's teenage daughter (by a prior marriage) was at the apartment and saw the defendant with the knife in his hands. *Id.* He told her that her mother had "accidentally fallen on the knife." *Id.* She called the police, who came to the apartment and arrested Spina on the scene. *Id.* He remained in state custody thereafter. JA 102 (prison

movements record from Connecticut Department of Correction).

On February 1, 1994, Spina pled no contest to a charge of manslaughter in the first degree, in violation of Conn. Gen. Stat. § 53a-55(a)(3), in Connecticut Superior Court. JA 74, 93. On March 18, 1994, based on this plea, Spina was sentenced to the maximum term of twenty years of imprisonment. JA 74.

Based on this conviction, the INS[1] initiated proceedings to deport Spina from the United States. The INS served Spina with an Order to Show Cause on June 2, 1995. JA 93-95. On July 16, 1996, Spina appeared before an Immigration Judge ("IJ") for determination of deportability. JA 115. The case was continued to January 28, 1997. JA 121. Absent any objection from the parties, the IJ continued the hearing until September 23, 1997, in light of the uncertainty then surrounding § 212(c). JA 123. The IJ stated as follows:

> 212(c) by then we ought to know what the story is -- I doubt that it will be available, but we should know. And, I am going to set it over for September

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[1] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002. *See* Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, 2178 (codified as amended at 6 U.S.C. § 202 (2002)). The enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement ("ICE"). *Id.*

> 23rd, at 9:00 a.m. . . . and at that time we will determine whether there has got to be further hearings, if there is 212(c) or whether an order will be issued.

JA 123.

At the hearing on September 23, 1997, Spina's counsel informed the IJ that although he "would like to seek" § 212(c) relief, it was his "understanding that relief is not available right now." JA 126. The IJ acknowledged that the question of § 212(c)'s availability was being litigated before this Court, but that in the meantime "the new immigration legislation . . . has basically precluded that kind of relief." (Although the IJ did not identify the legislation in question by name, the reference is clearly to Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), which amended INA § 212(c) to prohibit all aggravated felons from receiving such relief from deportation.) The IJ explained that in light of the law as it then stood, he would order Spina deported to Italy, and that Spina could appeal this decision to the Board of Immigration Appeals ("BIA"). JA 126-27; JA 34 (order of deportation).

On October 15, 1997, Spina filed a timely appeal of the IJ's deportation order with the BIA. JA 107. He claimed *inter alia* that Section 440(d) of AEDPA should not be applied retroactively to his case. JA 108.

On July 7, 1998, the BIA returned the record to the Immigration Court for preparation of an oral or written

decision. JA 133 (referencing earlier order). The IJ issued a written decision on March 7, 1999, reopening the case "for a determination of whether or not 212(c) relief should be available to [Spina]" in light of this Court's intervening ruling in *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), JA 36, which had held that Section 440(d) of AEDPA was not intended to apply retroactively. On June 4, 1999, Spina filed a written application for § 212(c) relief with supporting documentation. JA 133-34.

On February 10, 2000, another IJ found that he lacked jurisdiction over Spina's case and returned it to the BIA. JA 134 (referencing IJ decision).

On May 31, 2000, the BIA issued a second decision in this case. The BIA found that it had retained jurisdiction over the case since Spina's original appeal from the September 23, 1997, order of removal. JA 133-35. The BIA explained that the only reason for its earlier remand was "for preparation of an oral or written decision," and that the latest IJ's decision was correct in concluding that he otherwise lacked jurisdiction over the case. JA 135. On the merits, the BIA concluded in light of *Henderson* that Section 440(d)'s elimination of § 212(c) relief for all aggravated felons was not applicable to Spina because the Order to Show Cause in his case had been filed prior to the enactment of AEDPA. JA 134. The BIA further held, however, that because Spina had "now served more than 5 years in prison," he was "statutorily ineligible for section 212(c) relief." JA 134. The BIA rejected the argument that his "lack of opportunity to pursue section 212(c) relief during the last several years" rose "to the level of affirmative misconduct" on the part of the Government.

JA 134. The BIA held that there had been no such affirmative misconduct, because the IJ's decision on September 23, 1997, had been based on a then-correct statement of the law. JA 134. For this reason, the BIA dismissed Spina's appeal. JA 135.

On February 10, 2004, Spina filed a motion to re-open his deportation proceedings before the BIA, raising two arguments. First, he claimed that BIA precedent established that the filing of an order to show cause tolls the accrual of prison time toward the five-year bar under § 212(c). Spina claimed that because he had served only three years in prison at the time the INS issued his Order to Show Cause on October 18, 1995, he was not barred from receiving § 212(c) relief. JA 8. Second, he argued that his case should be remanded to the IJ in light of the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), on the grounds that he is no longer ineligible to apply for § 212(c) relief. JA 9.

On April 21, 2004, the BIA denied Spina's motion to re-open in a written per curiam decision. JA 12. The BIA held that "[e]ven assuming the respondent's motion to reopen were timely, which it is not, the respondent has failed to establish that he is eligible for a waiver of inadmissibility under section 212(c) . . . because he has been convicted of an aggravated felony for which he has served more than five years imprisonment. . . . It is irrelevant that, as the respondent asserts, he had not yet served five years at the time the Order to Show Cause was issued in 1995." JA 12.

## B. Proceedings in Federal Court

On May 7, 2004, Spina filed a *pro se* petition for writ of habeas corpus in the District of Connecticut, claiming that the BIA had erred in concluding that he was statutorily ineligible for § 212(c) relief. JA 3-10.

On May 21, 2004, the district court (Chief Judge Robert N. Chatigny) summarily dismissed the petition, holding that "[u]nder applicable law, the BIA's decision is clearly correct." JA 136.[2] As the court explained,

> "[t]he time an alien spends in prison during the course of a hearing, including up until the BIA issues a decision on a pending appeal, can be considered for the purposes of rendering an alien ineligible for section 212(c) relief." *Brown v. Ashcroft*, 360 F.3d 346, 354 (2d Cir. 2004), citing *Buitrago-Cuesta v. I.N.S.*, 7 F.3d 291, 292 (2d Cir. 1993). At the time the BIA affirmed the immigration judge's decision, petitioner had served more than five years in prison. Clearly, then, he is ineligible for § 212(c) relief.

JA 137. The court further held that because Spina would have been ineligible for § 212(c) relief under the law as it existed before the enactment of the AEDPA amendments in 1996, it was unnecessary to address his claim that the BIA erred by applying those amendments retroactively to him. JA 137. A separate judgment dismissing the petition

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[2] The Government did not file any pleadings in the district court in this matter. *See* JA 1-2 (docket sheet).

was filed on May 24, 2004, and entered the following day. JA 138.

On June 2, 2004, Spina filed a timely notice of appeal. By order dated January 13, 2005, this Court ordered that pro bono counsel be appointed, and that the parties brief the following issues, in addition to any other questions relevant to the appeal:

> (1) Whether an alien who is denied an opportunity to apply for 212(c) relief based on an erroneous retroactive application of AEDPA is entitled to nunc pro tunc relief, see *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004), where the alien accrues five years imprisonment during the pendency of the administrative appeal of that erroneous ruling; (2) whether the answer to this question depends on whether the alien was convicted pursuant to a guilty plea; and (3) whether pretrial detention should be counted in calculating whether 212(c)'s five year bar applies.

In his appellate brief, Spina argues that the first question should be answered in the affirmative, and the second and third questions in the negative.

## SUMMARY OF ARGUMENT

The present case requires this Court to address one, or possibly two, legal issues.

I. The primary question is whether time that an aggravated felon spends in pre-trial custody,[3] and which is credited toward his felony sentence, counts as time "served" for that sentence for purposes of INA § 212(c). The text, context, and purpose of § 212(c), together with the BIA's reasonable interpretation of analogous statutory provisions, all demonstrate that such pre-trial detention must be counted.

*First,* the language of § 212(c) itself indicates that a court must count the length of a "term of imprisonment" which has been "served for" an aggravated felony. The phrase "term of imprisonment" is defined by INA § 1101(a)(48)(B) as "the period of incarceration or confinement ordered by a court of law." The phrase "served for" denotes two things. First, it indicates that the time counted under § 212(c) is time "served," which is commonly understood to mean time actually spent in custody. Second, the requirement that such time be served "for" an aggravated felony indicates that custody counts toward accrual of the § 212(c) bar only insofar as it is somehow set off against the sentence which was imposed as a result of that felony. Beyond these requirements,

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[3] For convenience, this brief will refer to all time spent in custody prior to entry of a final judgment of conviction, regardless of whether a defendant pleads guilty or goes to trial, as "pre-trial custody" or "pre-trial detention."

§ 212(c) does not impose any further limitations -- temporal or otherwise -- on what time is to be counted towards accrual of the five-year bar.

*Second*, Congress's enactment of § 212(c) must also be viewed in the context of the nearly universal rule adopted in federal and state criminal codes, that pre-trial detention is regularly credited toward sentences which are subsequently imposed as a result of criminal convictions. It would be hard to imagine that Congress was ignorant of these background principles of criminal law when enacting the five-year bar in § 212(c). It is even harder to imagine that Congress intended to incorporate *sub silentio* into § 212(c) a rule that is precisely the opposite of this commonly accepted practice.

*Third*, the purpose of the five-year bar is to use a uniform yardstick across all jurisdictions to measure the severity of an aggravated felon's misconduct. To exclude time spent in pre-trial detention which has been credited against a defendant's sentence would undermine this purpose, by shifting the focus away from the relevant question (how much time, in real terms, has an alien been required to spend in prison as a result of his crime) and towards a far less relevant one (how much of that time happens to have occurred *after* entry of the alien's conviction).

*Fourth*, the BIA has authoritatively held that pre-trial confinement must be counted under an analogous provision of immigration law, INA § 101(f)(7), 8 U.S.C. § 1101(f)(7), for purposes of determining whether an alien "has been confined, as a result of conviction, to a penal

institution for an aggregate period of 180 days or more" and hence is ineligible for voluntary departure. In order to promote the consistency of immigration law, this Court should interpret the analogous provisions of § 212(c) in conformity with the BIA's reasonable interpretation of this parallel statute which is entitled to *Chevron* deference.

Because Spina had already spent more than five years in state custody, including pre-trial custody, as a result of his manslaughter conviction at the time the IJ denied § 212(c) relief and ordered him deported, he was statutorily ineligible for such relief.

II. Only if the Court disagrees with the preceding analysis, and concludes that pre-trial detention does not count towards the five-year bar, must it reach the second question: whether an alien who is denied § 212(c) relief by an IJ based on an erroneous ruling that AEDPA's amendment are retroactive continues to accrue time toward his five-year bar during the pendency of his administrative appeals. The answer to this question is provided by this Court's decision in *Brown v. Ashcroft*, 360 F.3d 346 (2d Cir. 2004). In *Brown*, as in the present case, the petitioner had been denied relief by an IJ based on an erroneous retraoctive application of AEDPA. The BIA later concluded (based on this Court's decisions) that such retroactive application was incorrect, but nevertheless denied § 212(c) relief based on the alien's accrual of five years of imprisonment. This Court affirmed, holding that "[t]he time an alien spends in prison during the course of a hearing, *including up until the BIA issues a decision on a pending appeal,* can be considered for purposes of

rendering an alien ineligible for section 212(c) relief." *Id.* at 354 (emphasis added).

This Court's subsequent decision in *Edwards v. INS*, 393 F.3d 299, 312 n.18 (2d Cir. 2004), does not undermine *Brown*. In *Edwards*, this Court held that an alien is entitled to *nunc pro tunc* relief despite his accrual of five years of imprisonment *after* entry of an administratively final order of deportation. As *Edwards* properly observed in *dicta*, this Court's case law as well as immigration regulations have consistently required that an alien demonstrate eligibility for § 212(c) relief at a minimum at the time that an administratively final order is entered. Even if the IJ here had found Spina eligible for § 212(c) relief, the INS could have appealed that decision to the BIA, and the BIA would have been required to deny § 212(c) relief if Spina had accrued five years of imprisonment while the appeal was pending. Because one cannot say, as in *Edwards*, that Spina would have been eligible for § 212(c) relief but for the IJ's error, *nunc pro tunc* relief would be inappropriate here.

III. Finally, the Court has directed the parties to brief whether the answer to the preceding question is dependent upon whether the alien was convicted after trial or by guilty plea. The Government agrees with Spina that this issue is not relevant to the present appeal. Because all relevant events in the present case -- commission of the crime, institution of deportation proceedings, the various administrative decisions, and the district court's ruling -- all post-dated Congress's enactment of the five-year bar, application of that provision does not implicate retroactivity concerns. Accordingly, there is no reason to

inquire into whether the defendant's decision to plead guilty, instead of proceeding to trial, implicates any reliance concerns that might influence a retroactivity analysis.

## ARGUMENT

### I. For Purposes of INA § 212(c), Time Spent in Pre-trial Detention and Credited Against a Felony Sentence Should Be Counted as Time "Served for" that Felony

### A. Relevant Facts

Spina was arrested on May 31, 1992, immediately after he killed his wife. He was continuously held in state custody thereafter. Spina pleaded *nolo contendere* to a manslaughter charge on February 1, 1994, and was sentenced to 20 years in prison on March 18, 1994, at which point the judgment of conviction entered. Within four days of the conviction, the Connecticut Department of Correction credited all of the time Spina had spent in pre-trial detention toward his manslaughter sentence. JA 74, 93. The INS initiated deportation proceedings by issuing an Order to Show Cause on June 2, 1995. JA 93. On September 23, 1997, an IJ ordered Spina deported to Italy. JA 34, 126-27. The BIA ultimately affirmed the IJ's order on May 31, 2000. JA 133-35.

At the time the IJ ordered Spina deported in September 1997, Spina had spent more than five years in prison -- more precisely, he had been held in state custody for

nearly 64 months. Of that time, approximately 42 months postdated his conviction on March 18, 1994.

At the time the BIA affirmed the IJ's decision in May 2000, Spina had been in state custody for exactly eight years. Of that time, over six years had passed since entry of his final conviction.

## B. Governing Law

The INA authorizes the removal of any alien from the United States who has been convicted of an "aggravated felony." *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). The term "aggravated felony" extends to a broad variety of offenses, including in pertinent part "a crime of violence . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Spina has not disputed the IJ's determination that his conviction for manslaughter constitutes an aggravated felony which renders him deportable.

At all times relevant to this proceeding, INA § 212(c) provided that aliens lawfully admitted into the United States, who temporarily proceed abroad and have lawfully lived in the United States for seven years, "may be admitted in the discretion of the Attorney General without regard to the provisions [setting forth various grounds for exclusion]." INA § 212(c), 8 U.S.C. § 1182(c), *repealed by* Pub. L. 104-208, Div. C., Title III, § 304(b), 110 Stat. 3009-597 (1996). It further stipulated that this eligibility provision "shall not apply to an alien who has been convicted of one or more aggravated felonies *and has*

*served for such felony or felonies a term of imprisonment of at least five years*." *Id.* (emphasis added).[4]

Although, on its face, INA § 212(c) only applies to qualified aliens who attempt to re-enter the United States, this Court has interpreted that section to include aliens in both deportation and exclusion proceedings. *See Bedoya-Valencia v. INS*, 6 F.3d 891, 895 (2d Cir. 1993); *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *Matter of Silva*,

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[4] The full text of section 212(c) was as follows:

> Aliens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(c)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. *The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years*.

8 U.S.C. § 1182(c) (1996) (emphasis added). The last sentence of the statute was added by IMMACT § 511(a) in 1990. *See* 104 Stat. 4978, 5052 (1990). Because the five-year bar was enacted prior to the defendant's commission of his deportable offense, this case poses no question relating to retroactive application of that provision.

16 I. & N. Dec. 26, 30 (BIA 1976) (adopting approach of *Francis*).[5]

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of AEDPA amended INA § 212(c) to prohibit all aggravated felons from receiving such relief from deportation. The Attorney General initially ruled that this provision was retroactively applicable to all aliens whose immigration proceedings were pending on the date of the statute's enactment (April 24, 1996), regardless of when they had applied for § 212(c) relief. *See Matter of Soriano*, Int. Dec. No. 3289, 1996 WL 426888 (Op. Att'y Gen. Feb. 21, 1997). This Court later rejected the reasoning of *Soriano*, and held that Section 440(d) was not retroactively applicable to aliens whose deportation proceedings were pending on the date of AEDPA's enactment. *See Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998).

The Supreme Court later held that the amendments to the INA, both in AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), which eliminated § 212(c) relief entirely and replaced it with a

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[5] In the wake of more recent amendments to the INA, "removal" is now the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. Because Spina's immigration proceedings were commenced by an Order to Show Cause in 1995, he was in "deportation" proceedings.

process called "cancellation of removal," were likewise not retroactively applicable to aliens who had pleaded guilty to felonies prior to the effective dates of AEDPA and IIRIRA. More precisely, the Court held that § 212(c) relief "remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

## C. Discussion

Four factors -- the text, context, and purpose of § 212(c), and the BIA's reasonable interpretation of an analogous statute -- all demonstrate that the time an aggravated felon spends in pre-trial custody, and which is credited toward his felony sentence, should count as time "served for" that felony for purposes of INA § 212(c).[6]

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[6] Though this Court has not yet ruled on the specific issue of whether pre-trial confinement counts towards the § 212(c) five-year bar, *see Edwards v. INS*, 393 F.3d 299, 305 n.7 (2d Cir. 2004), the five district courts to address the issue have all interpreted § 212(c) to include such credited time in counting the term of imprisonment. *See Bosquet v. Ashcroft*, 2005 WL 1278272 at *5 (S.D.N.Y. 2005); *Jackson v. Ashcroft*, 2003 WL 22272593 at *4-5 (D. Conn. 2003); *Gordon v. Ashcroft*, 283 F. Supp. 2d 435, 440 (D. Mass. 2003); *Saldana v. DeMore*, 2002 WL 1000168 at *2-3 (N.D. Cal. 2002); *Mezrioui v. INS*, 154 F. Supp. 2d 274, 277-78 (D. Conn. 2001). *See also Restrepo v. McElroy*, 354 F. Supp. 2d 254, 255-56 (E.D.N.Y. 2005) (noting, but not resolving, open question).

When faced with questions of statutory interpretation, a court's "analysis begins, as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997). Since 1990 and at all times relevant to this case, INA § 212(c) provided that relief from deportation was not available to any aggravated felon who "has served for such felony or felonies a term of imprisonment of at least five years." As a starting point, 8 U.S.C. § 1101(a)(48)(B) defines a "term of imprisonment or a sentence with respect to an offense" as including "the period of incarceration or confinement ordered by a court of law . . . ."

Section 212(c) requires that time be "served for" the aggravated felony which gave rise to the term of imprisonment. In common parlance, time "served" for a sentence generally denotes time actually spent in custody, as contrasted with the nominal length of the sentence imposed. *See, e.g.,* Webster's II New Riverside University Dictionary 1066 (1988) ("serve . . . 5. To spend or complete (time) <*serve* six years in the Senate>"); Webster's Ninth New Collegiate Dictionary 1075 (1985) (defining "serve" to mean, *inter alia*, "to put in (a term of imprisonment)"). Thus, a person who was paroled halfway through a twenty-year sentence could accurately say that he had "served" ten years, not twenty. Courts in Connecticut, for example, commonly use the words "serve" or "service" of a sentence in connection with the time a defendant is actually committed to official custody, as opposed to the time during which execution of that sentence is suspended. *See, e.g., State v. Johnson*, 75 Conn. App. 643, 645 (2003) (explaining how judge revoked probation and ordered defendant "to *serve* the

entire three year suspended portion of his sentence") (emphasis added).

The language of § 212(c) contains no temporal restriction on which periods of custody should count toward accrual of the five-year bar. It does not state, for example, that the five-year bar is triggered only by time an alien serves *after* entry of a final conviction. Instead, it unqualifiedly refers to all time "served." There is no basis in the statutory text for believing that Congress intended courts to engraft any unwritten limitations onto this term. *Bosquet*, 2005 WL 1278272 at *5 ("nothing in the language of the statute would indicate an intent to exclude pre-trial custody from the time-bar"); *cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (concluding that term "employee" in antiretaliation provision of Title VII covered former as well as current employees, in part because term contained no "temporal qualifier"). The only qualifier included by Congress in § 212(c) is that the time served must be "for such felony or felonies" that make the alien deportable. This language thus requires that the time served be counted against the term of imprisonment imposed for the aggravated felony in question. To the extent that a jurisdiction actually credits time served by an alien to the service of a particular sentence, the requisite statutory nexus is unquestionably established.

In keeping with this straightforward interpretation of what it means to have "served" time, this Court has held in the context of the Sentencing Guidelines that when a district court sentences a defendant to "time served," the defendant is thereby sentenced to "a specific term of imprisonment -- the amount of time *actually served*."

*United States v. D'Oliveira*, 402 F.3d 130, 132 (2d Cir. 2005) (emphasis added). The opinion in *D'Oliveira* does not disclose whether some of the time served by that defendant happened to include pre-trial custody, because the sentence in question was imposed in a re-sentencing pursuant to Fed. R. Crim. P. 35. Nevertheless, this Court in *D'Oliveira* relied upon three cases, each of which squarely held that "time served" includes time spent in custody between a defendant's arrest and sentencing. *See United States v. Rodriguez-Lopez*, 170 F.3d 1244, 1246 (9th Cir. 1999) (holding that "time served" sentence constituted "sentence of imprisonment of at least sixty days" where defendant served sixty-two days between arrest and sentence); *Rodriguez v. United States*, 111 F. Supp. 2d 112, 114 (D. Conn. 1999) ("A judge's sentence of time served necessarily incorporates the time a defendant was imprisoned prior to trial, unless specifically stated otherwise."); *United States v. Atkinson*, 15 F.3d 715, 721 (7th Cir. 1994) (holding that when court sentenced defendant to four years in prison, but suspended all confinement "except the time [the defendant] had already served -- 77 days," defendant would be deemed to have served a 77-day sentence for purposes of calculating his criminal history under federal sentencing guidelines); *see also United States v. Cruz-Alcala*, 338 F.3d 1194, 1200 (10th Cir.) (holding, for purposes of calculating federal sentencing guidelines, that 214 days spent in pre-trial custody "were part of the punishment imposed by the state upon its finding that he was guilty" when that time was credited toward service of his sentence), *cert. denied*, 540 U.S. 1094 (2003).

This reading of § 212(c) is particularly sensible given that Congress enacted the five-year bar against the backdrop of federal and state criminal laws that almost universally count pre-trial detention towards the service of criminal sentences. For example, federal law provides that "[a] defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . . as a result of the offense for which the sentence was imposed . . . that has not been credited against another sentence." 18 U.S.C. § 3585(b); *see also* 28 C.F.R. § 2.10(a) (1995).[7] Connecticut law likewise gives convicted defendants credit for their time served in pre-sentence confinement:

> Any person who is confined to a community correctional center or a correctional institution for an offense . . . because such person is unable to obtain bail or is denied bail shall, *if subsequently imprisoned*, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in pre-sentence confinement to the time such person began serving the term of imprisonment imposed.

Conn. Gen. Stat. § 18-98d(a)(1) (2005) (emphasis added). As listed in the Addendum to this brief, all but three states

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[7] A defendant also receives credit for time spent in pre-trial detention "as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed." 18 U.S.C. § 3585(b).

have statutes that similarly credit pre-trial confinement towards a term of imprisonment later imposed. The remaining three states (Oklahoma, South Dakota, and Wyoming) do so in more limited circumstances. It is very hard to imagine that, legislating against the nearly uniform practice of state and federal jurisdictions to count pre-trial detention toward the service of a defendant's sentence, Congress implicitly wished to adopt the opposite practice for purposes of § 212(c).

In the face of this straightforward statutory language and consistent practice across jurisdictions, Spina nevertheless argues that because Connecticut law describes the process of counting pre-trial custody as a "reduction" of a sentence, Conn. Gen. Stat. § 18-98d(a)(1), which is deemed to begin only at the moment sentence is imposed, such time cannot be deemed to have been "served" for that sentence for purposes of § 212(c). Spina Br. at 25-29.

There are at least two flaws in this argument. First, reliance on the particular terminology used in various jurisdictions for describing how to count pre-trial detention would lead to unjustifiable disparities in the treatment of offenders across those jurisdictions -- a result which, as discussed *infra*, would be sharply at odds with the apparent purpose of § 212(c)'s use of time "served" as a uniform measure of the seriousness of an alien's offense. Thus, under Spina's interpretation, the time served for an aggravated felony under § 212(c) would accrue for federal or Connecticut prisoners based solely on time spent in custody after their convictions, because the laws of those jurisdictions describe a sentence as commencing only after

the prisoners are received into detention after conviction. But his interpretation would apparently lead to different results for a prisoner in, say, Kansas where the sentencing court is directed to officially designate a date on which a sentence is to begin, and to backdate this starting point to account for pre-trial detention. *See* Kan. Stat. Ann. § 21-4614. There is no reason to believe that Congress intended to achieve such disparate results for purposes of § 212(c) based solely on variations in the wording of various state laws.

Indeed, a cursory review of the state and federal laws listed in the Addendum to this brief discloses the wide variety of language used in pre-trial custody statutes. Under Connecticut and federal law, for example, the counting of pre-trial custody is described as a "credit." *See* 18 U.S.C. § 3585; Conn. Gen. Stat. § 18-98d(a)(1). In Oregon, the statute discusses the treatment of pre-trial detention interchangeably both in terms of "the amount of sentence served" and in terms of "credit." *Compare* Ore. Rev. Stat. § 137.370(2) ("when a person is sentenced to imprisonment in the custody of the Department of Corrections, *for the purpose of computing the amount of sentence served* the term of confinement includes only . . . [t]he time that the person is confined by any authority after the arrest for the crime for which sentence is imposed") (emphasis added) *with* Ore. Rev. Stat. § 137.370(4) (describing circumstances in which defendant "shall not receive presentence incarceration *credit*") (emphasis added). In Hawaii, the matter is described as a "deduction." *See* Haw. Rev. Stat. § 706-671. Kansas counts pre-trial detention by obligating the sentencing court to officially designate a specific date on which the

sentence is deemed to have begun, based on the amount of time actually spent in pre-trial custody, and the setting of this date is described as an "allowance." Kan. Stat. Ann. § 21-4614. Other states use different terms. Given the wide variation in statutory language adopted by different jurisdictions, it makes far more sense for § 212(c) eligibility to turn on the substance of what these statutes are doing -- i.e., whether they in fact attribute a given period *actually spent in custody* toward a particular sentence -- rather than on the labels used to describe that operation. *Cf. United States v. Ramirez*, No. 04-3147-cr, mem. op. at 10 (2d Cir. Aug. 26, 2005) ("the terminology of punishment employed by a particular state is of limited value in interpreting the meaning of [a federal sentencing] guideline").

Second, even assuming *arguendo* that Congress intended § 212(c) eligibility to vary according to the states' choice of words in counting pre-trial custody towards a term of imprisonment, Connecticut law does not bear out Spina's interpretation that the "reduction" for pre-trial detention is comparable to the awarding of good-time credits or to any other hypothetical bases for reducing a defendant's time in prison. The Connecticut Supreme Court has distinguished between the purposes for counting pre-trial custody and for granting good time credits:

> It is not the purpose of §§ 18-97 and 18-98 to reduce the time a prisoner must serve pursuant to a sentence, as is the purpose of § 54-125, the "good-time" statute. Rather, the purpose of the "jail-time" statutes is to give recognition to the period of pre-sentence time served and *to permit the prisoner, in*

> *effect, to commence serving his sentence from the time he was compelled to remain in custody . . .* because of the court's refusal to allow bail or the defendant's inability to raise bail (§ 18-98).

*Holmquist v. Manson*, 362 A.2d 971, 974 (Conn. 1975) (emphasis added). *See also Johnson v. Comm'r of Corr.*, 836 A.2d 453, 457 (Conn. App. 2003) ("Pre-sentence confinement credit should reduce the number of days of sentenced confinement so as to permit the detainee, in effect, to commence his sentence from the time he was compelled to remain in custody."), *cert. denied*, 267 Conn. 918 (2004). *See also General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) ("We accord respectful consideration and great weight to the views of the State's highest court.") (citations omitted). Accordingly, Spina's construction of the Connecticut penal statute, and his argument that pre-trial confinement is equivalent to good behavior credit, *see* Spina Br. at 26-27, stands in direct contradiction to the Connecticut Supreme Court's interpretation.

Connecticut law also recognizes this distinction between good-time credits and pre-trial custody when calculating a defendant's release date. The rules governing the Connecticut Board of Pardons and Paroles provide that time spent in pre-trial custody counts towards determining an inmate's parole eligibility date, but good-time credits do not. *See* Connecticut Board of Pardons and Paroles, *Parole Eligibility* ("Individuals serving definite sentences (crimes committed on or after 1981) of greater than two years are eligible for parole consideration upon expiration of one-half of the total effective sentence,

satisfaction of any mandatory portion or one-half of the most recently imposed sentence, whichever yields the latest date, less any pre-trial confinement credit. *Good time is not credited toward parole eligibility of definite sentences.*") (emphasis in original), *available at* http://www.ct.gov/doc/site/default.asp (follow "Board of Pardons and Paroles" hyperlink; then follow "Parole Eligibility" hyperlink).

Moreover, the facile equation of good behavior in prison and pre-trial custody based solely on their impact on a defendant's release date overlooks the more important distinction between the two: good behavior allows a defendant to *avoid spending time in prison*, whereas pre-trial custody recognizes that the defendant *has already spent time in prison*. Likewise, the defendant's hypothetical law permitting defendants to pay their way out of jail, Spina Br. at 28, suffers from the same incomparability to pre-trial custody, since it allows a defendant to avoid a fixed amount of jail time entirely. To point out the obvious fact that a defendant is not "serving" time after he is *out of the state's custody* -- whether because of his good behavior, because he has bought off the state, or simply because he climbed over the prison wall and escaped -- simply has no bearing on the present question of whether a defendant who was *in state custody* during pre-trial detention has "served" a term of imprisonment for purposes of § 212(c).[8]

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[8] Spina also argues that, for purposes of § 212(c), time spent in pre-trial custody should be deemed to be tacked on only at the end of a defendant's sentence. Spina Br. at 29-31. (continued...)

It is also sensible to count pre-trial custody toward the five-year bar in light of the purpose underlying § 212(c). The statute identifies those criminal aliens whose crimes pose a greater risk to society, and whose deportation is therefore in the greater public interest. *See Giusto v. INS*, 9 F.3d 8, 10 (2d Cir. 1993) (upholding as reasonable Congress's selection of five years as the "line of demarcation for such 'serious' crimes," and explaining that "[a]n alien's receipt of a sentence of less than five years' imprisonment, or his release on parole from a state sentence prior to serving five years, may well indicate circumstances suggesting that although convicted of a felony defined as 'aggravated,' the alien should receive relatively lenient treatment").

By measuring the seriousness of an aggravated felon's crime by reference to time he actually served in prison, instead of the time to which the offender was nominally sentenced, Congress adopted an objectively comparable standard that readily permits the identification of similarly situated offenders across jurisdictions where superficially similar sentences may bear quite dissimilar consequences.

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[8] (...continued)
He bases this claim in part on a computer printout from the Connecticut Department of Correction, which indicates that within four days of his sentencing on March 18, 1994, the Department credited him with all 655 days spent in pre-trial custody (plus 218 days for good time credit accumulated during those two years), thereby accelerating his release date. JA 62. This, of course, is consistent only with the contrary position that Spina was *immediately* credited with time spent in pre-trial custody -- not that such time should be deemed served only at the end of his prison term.

For example, a nominal sentence of "twenty years" may mean very different things in different jurisdictions. This very case illustrates the point. Federal prisoners may accumulate good-time credits totalling no more than approximately 15% of their sentences. *See* 18 U.S.C. § 3624(b) (authorizing up to 54 days of credit per year). Thus, in federal court, a well-behaved prisoner who is sentenced to twenty years can earn a maximum of 1,080 days (just under 3 years) of good-time credit and will have to serve a minimum of 17 years in prison. In Connecticut, by contrast, the defendant in the present case received a 20-year sentence and has just been released, after spending only 13 years in prison (counting his pre-trial detention). *See* Conn. Gen. Stat. § 18-7a(c) (for prisoners convicted after July 1, 1983, authorizing good-time credits of 10 days per month served for first five years of sentence, and 12 days per month served thereafter).[9]

Although the BIA has not had occasion to issue a published opinion interpreting whether pre-trial confinement should count towards accrual of § 212(c)'s five-year bar, it has authoritatively held that such confinement counts under a closely analogous immigration

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[9] Indeed, the relevant Connecticut statute provides that a defendant is entitled to specified good-time credits "for each month *served*," Conn. Gen. Stat. § 18-7a(c) (emphasis added). Based on discussions with the Connecticut Department of Correction, the Government has learned that the agency interprets that phrase to include months spent in pre-trial detention, and that Spina in fact received the increased amount of 12 days per month of good-time credits after completing the initial five years of his sentence, including the approximately two years he spent in pre-trial custody.

statute. In *Matter of Valdovinos*, 18 I. & N. Dec. 343, 344-45 (BIA 1982), the BIA held that pre-trial confinement is to be counted in determining whether a respondent is a person of good moral character under INA § 101(f)(7), 8 U.S.C. § 1101(f)(7). Under that section, a determination that the alien had demonstrated his good moral character for at least five years immediately preceding the application was required to be eligible for voluntary departure. More specifically, § 101(f)(7) provided:

> (f) For the purposes of this Act -- No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was --
>
> > (7) one who during such period has been confined, *as a result of conviction*, to a penal institution for an aggregate period of 180 days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period.

(Emphasis added). The BIA reasoned:

> [T]he time the respondent spent incarcerated prior to his July 1, 1980 conviction is considered time served *as a result of his subsequent conviction* under California law. . . . Therefore, we find without merit [respondent's] contention that the time he spent incarcerated prior to his July 1, 1980

> sentencing should not be counted in determining the time he was incarcerated . . . .

*Id.* (emphasis added). The BIA's reasonable interpretations of the immigration laws are given *Chevron* deference. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Moreover, it is appropriate for this Court to interpret similar provisions of the INA in harmony, in order to promote the development of a consistent body of immigration law. As two district courts in this Circuit have properly observed, "[t]he fact that this counting method [i.e., including pre-trial detention toward the five-year bar] aligns with BIA precedent is particularly important since '[w]hen reviewing a determination by the BIA, the Second Circuit has instructed lower courts to "accord substantial deference to the [BIA's] interpretations of the statutes and regulations that it administers."'" *Jackson*, 2003 WL 22272593 at *4 (quoting *Mezrioui*, 154 F. Supp. 2d at 278 (quoting, in turn, *Michel v. INS*, 206 F.3d 253, 262 (2d Cir. 2000))). *See also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.") (internal quotations and citations omitted).

Finally, in an effort to avoid counting his pre-trial custody toward the accrual of the five-year bar, Spina invokes the constitutional guarantees of due process and

equal protection, as well as the rule of lenity. None of these principles supports his reading of § 212(c).

Spina correctly states that "a person could not, consistent with due process, be deported based solely on the fact that he has been held in pretrial confinement." Spina Br. at 25. However, that is not the issue in this case. The INS brought its case against Spina only *after* he had been duly convicted and sentenced. Thus, Spina is not being deported solely on the basis of any undefined, indeterminate pre-trial confinement. Rather, he is being deported on the basis of his having served over five years for his manslaughter conviction, two years of which were a defined period of pre-trial confinement credited towards his term of imprisonment. Put another way, § 212(c) should be read as counting time spent in pre-trial custody not in order to punish Spina for having been so detained, but simply to recognize that part of a sentence which is admittedly "punishment" was satisfied by that period of time.

Spina's equal protection argument, that counting pre-trial confinement would result in harsher treatment for those who could not afford to make bail, is likewise meritless. First, it considerably oversimplifies the law of pre-trial custody by mistakenly equating such detention with indigency. It overlooks the fact that some jurisdictions, like the federal system, detain defendants pending trial and sentencing based solely on a judicial officer's assessment that they pose a risk of flight or a danger to the community, without any allowance for bail. *See, e.g.,* 18 U.S.C. §§ 3142-3143. Even in Connecticut, where the state constitution recognizes a defendant's right

to reasonable bail, the courts have recognized that "a reasonable amount is not necessarily an amount within the power of an accused to raise." *State v. Menillo*, 159 Conn. 264, 269 (1970). Second, Spina's claim rests on the faulty premise that if pre-trial custody is counted toward § 212(c)'s five-year bar, then similarly situated defendants would unjustifiably be treated differently. Yet the contrary is true. By counting all the time that aliens physically spend in custody that is attributed to their criminal sentences, the law puts all of them on the same footing and therefore has a rational basis.

Even if one accepts Spina's suggestion that counting pre-trial custody yields temporary differences among offenders (for example, a convicted defendant who has spent two years in pre-trial custody will reach his five-year bar two years earlier than a convicted defendant who was released on bail), his proposed rule would yield even greater, permanent inequities among similarly situated defendants. Assume, for example, that Deportable Aliens A and B are both convicted of the same aggravated felony, in the same jurisdiction, on the same day, and sentenced to six years in prison. Alien A spent two years in pre-trial custody, whereas Alien B spent that time released on bond. (Further assume, for illustrative purposes, that neither alien earns good-time credits.) Under Spina's interpretation, Alien A would *never* accrue five years of prison time for purposes of § 212(c), and would forever remain eligible for a § 212(c) hearing. Alien B, by contrast, would accrue five years before finishing his sentence, and would thereafter be completely barred from seeking § 212(c) relief.

Not only would such a permanent inequity be senseless, but it would also lead to the illogical result of often favoring the *most dangerous* offenders. That is, those aliens who are deemed to have committed the most serious crimes (warranting the highest bail), or posing the greatest risk of flight or danger to the community (warranting, in jurisdictions such as the federal system, denial of bail), are those most likely to be subjected to pre-trial detention. Presumably, these most dangerous or irresponsible offenders are those whom Congress most likely wishes to see deported. Yet by excluding their pre-trial detention from the five-year bar, Spina would make such offenders more likely than non-detained offenders to retain their right to § 212(c) relief. That is exactly backwards.

Spina's final argument, that the Court should construe § 212(c) in favor of lenity, *see* Spina Br. at 23, is equally meritless. The rule of lenity only comes into play as a canon of last resort. "The rule of lenity applies only if, after seizing everything from which aid can be derived, *we can make no more than a guess as to what Congress intended*." *Reno v. Koray*, 515 U.S. 50, 64-65 (1995) (internal citations omitted). As discussed above, there are no "lingering ambiguities" in § 212(c), and so lenity is not at issue. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). The simple fact that Spina proposes a contrary interpretation does not suffice to manufacture ambiguities where none exist.[10]

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[10] The Government notes that the BIA did not consider, and the parties did not brief below, the present question (which (continued...)

## II. An Alien Who Is Denied an Opportunity to Apply for 212(c) Relief Based on an Erroneous Retraoctive Application of AEDPA Is Not Entitled to *Nunc Pro Tunc* Relief, Where He Accrues Five Years of Imprisonment During the Pendency of His Administrative Appeal of That Ruling

### A. Relevant Facts

The relevant facts are set forth *supra* in the Statement of Facts. As argued above in Point I, Spina had already served five years of imprisonment for the aggravated felony of manslaughter at the time the IJ denied his application for § 212(c) relief, counting the pre-trial custody that was credited toward his manslaughter sentence. Only if the Court disagrees with this position must it address the secondary question of whether an alien who is denied § 212(c) relief by an IJ, based on an erroneous retroactive application of AEDPA, is entitled to *nunc pro tunc* relief even though he accrues five years of

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[10] (...continued)
this Court directed the parties to brief) of whether pre-trial detention should count toward accrual of the five-year bar. Nevertheless, the administrative record contains all relevant information about the dates and circumstances of Spina's pre-trial detention, and "it would be futile and inefficient to vacate the removal order because upon remand," the Government could raise the pre-trial detention issue and "the result would be the same." *Brown v. Ashcroft*, 360 F.3d 346, 354-55 (2d Cir. 2004). Therefore, it is entirely appropriate for this Court to resolve the present case on the pre-trial detention issue.

imprisonment during the pendency of his administrative appeal of that ruling.

In this case, the BIA affirmed the IJ's decision on May 31, 2000. On that date, Spina had been in state custody for eight years. Of that time, over six years had passed since entry of his final conviction -- that is, he had spent six years in prison not counting pre-trial custody. Thus, for Spina to prevail in this Court, he must demonstrate *both* that pre-trial custody does not count toward accrual of the five-year bar, *and* that time stopped accruing at the moment the IJ erroneously denied him § 212(c) relief.

## B. Governing Law

The text of § 212(c), along with an analysis of the five-year bar, is set forth in Point I.B above. With respect to the accrual of time towards that five-year bar, three decisions of this Court are particularly relevant: *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993); *Brown v. Ashcroft*, 360 F.3d 346 (2d Cir. 2004); and *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004).

In *Buitrago-Cuesta*, this Court held that the time a petitioner spends in prison during the course of initial hearings before an IJ must be counted toward accrual of the five-year bar. In that case, the petitioner Buitrago was admitted to the United States as a lawful permanent resident in April 1972, arrested on March 7, 1986, convicted of an aggravated felony on July 3, 1986, and sentenced to concurrent terms of twenty and fifteen years of imprisonment. *See* 7 F.3d at 292-93. He remained continuously in federal custody at all relevant times. *Id.* at

293. On June 27, 1991, Buitrago filed a written application for § 212(c) relief. On August 2, 1991, an immigration judge found Buitrago ineligible for a § 212(c) waiver on the grounds that he was an aggravated felon who had served at least five years in prison. On April 17, 1992, the BIA dismissed Buitrago's administrative appeal. *Id.* Buitrago challenged the BIA's order, arguing, *inter alia*, that he had served less than five years in prison at the time he applied for a § 212(c) waiver. The Court agreed with the BIA that the timing of Buitrago's application was irrelevant:

> Changes in law or fact occurring during the pendency of administrative appeals must be taken into account. *See Anderson v. McElroy*, 953 F.2d 803, 806 (2d Cir. 1992). *A fortiori*, the same is true for such changes during the initial hearings and, thus, the immigration judge properly considered all the time Buitrago spent in prison as of . . . the date of his decision. In *Anderson*, the court stated that '[w]hile Anderson's appeal to the BIA was pending . . . he achieved seven continuous years as a lawful permanent resident and became eligible for § 212(c) relief.' *Id.* Just as we credit aliens for time spent in the country while an appeal is pending before the BIA so that they are eligible for § 212(c) relief, we will also consider the time aliens spend in prison during the course of a hearing for

purposes of rendering them ineligible for § 212(c) relief.

*Id.* at 296.[11]

Just last year, in *Brown v. Ashcroft*, 360 F.3d 346 (2d Cir. 2004), this Court re-affirmed *Buitrago-Cuesta* and extended its reasoning, by holding that time continues to accrue toward the five-year bar not only while initial hearings are pending before an IJ, but also while administrative appeals are pending before the BIA. In *Brown*, the petitioner's convictions included a September 1996 conviction for robbery in the first degree. *See* 360 F.3d at 348. Brown began to serve his sentence for his first-degree robbery conviction in October 1996. *See id.*

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[11] In *Reid v. Holmes*, 323 F.3d 187, 188-89 (2d Cir.) (per curiam), *cert. denied*, 540 U.S. 1050 (2003), this Court reaffirmed its holding in *Buitrago-Cuesta*. The *Reid* Court also cited INA § 101(a)(48)(B), for the proposition that "'any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part*.'" 323 F.3d at 188-89 (quoting 8 U.S.C. § 1101(a)(48)(B) (emphasis added)). This language would seem to imply that the time toward § 212(c)'s five-year bar is measured by the sentence imposed rather than by the actual time served. However, the Government respectfully submits that § 212(c) specifically refers to the time that an alien serves in prison rather than the length of his sentence or term of imprisonment. *See United States v. Ben Zvi*, 242 F.3d 89, 99 (2d Cir. 2001) (finding that five-year bar turns on the actual period of incarceration, not the sentence imposed).

In April 1999, the INS charged Brown with being deportable based on two earlier 1994 convictions. *See id.* at 349. In June 2000, an immigration judge found Brown ineligible for § 212(c) relief based on *Soriano*, but in November 2000, the BIA reversed and remanded in light of *St. Cyr II*. *See id.* On remand, the INS argued that Brown was ineligible for § 212(c) relief because he had served at least five years in prison for his September 1996 aggravated felony conviction. *See id.* The immigration judge agreed, and in May 2001, the BIA affirmed the immigration judge's decision. *See id.*

On appeal, Brown argued that he remained eligible for § 212(c) relief because he had served less than five years in prison on his September 1996 aggravated felony conviction by the time of the immigration judge's June 2000 decision. *See id.* at 350. This Court rejected Brown's argument, holding that time Brown had served for both his 1994 and 1996 convictions counted toward the five-year bar. The Court explained that "[t]he time an alien spends in prison during the course of a hearing, including up until the BIA issues a decision on a pending appeal, can be considered for purposes of rendering an alien ineligible for section 212(c) relief." *Id.* at 354 (citing *Buitrago-Cuesta*). Importantly, the *Brown* Court counted Brown's prison time after the immigration judge initially (and, as it later turned out, erroneously) had found him ineligible for § 212(c) relief under *Soriano*. *See* 360 F.3d at 354. The Court reasoned that because Brown had spent more than seven years in prison at the time of the BIA's final denial of his appeal (and hence the entry of an administratively final order of deportation), he was barred from § 212(c) relief. *See id.* The Court further observed,

in a footnote, that even at the time of the BIA's initial reversal and remand, "Brown had served more than six years on his three convictions." *Id.* at 354 n.10.

This Court has addressed the five-year bar most recently in *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004), in which it held that where an alien is denied § 212(c) relief based on an IJ's erroneous retroactive application of AEDPA, and the alien accrues five years of imprisonment *after* entry of an administratively final order of deportation, the alien is entitled to *nunc pro tunc* relief -- that is, the alien may file a § 212(c) application which is adjudicated "as if it were done as of the time that it should have been done." *Id.* at 308. The Court observed that the BIA possessed authority to grant *nunc pro tunc* relief to rectify agency errors, and held that Congress had not implicitly precluded the availability of such relief when it enacted § 212(c). *Id.* at 309-11. Although the Court did not make any reference to *Buitrago-Cuesta* or *Brown*, it acknowledged that its holding was limited to cases in which an alien passed the five-year mark after entry of the final deportation order. *Id.* at 312 n.18 ("We express no views on whether an award of *nunc pro tunc* relief would be similarly warranted where the alien accrued more than five years imprisonment during the pendency of administrative appeals.").

## C. Discussion

As noted above, this Court has already held in *Brown v. Ashcroft* that "[t]he time an alien spends in prison during the course of a hearing, *including up until the BIA issues a decision on a pending appeal*, can be considered

for the purposes of rendering an alien ineligible for section 212(c) relief." 360 F.3d at 354 (emphasis added). As in the present case, *Brown* issued this holding after the IJ had erroneously denied the alien § 212(c) relief in reliance on *Soriano*. Accordingly, under binding circuit precedent, because Spina had undisputedly served more than five years in prison as a result of his manslaughter conviction at the time the BIA denied his appeal and entered a final order of deportation (regardless of whether one counts time spent in pre-trial detention), he is ineligible for § 212(c) relief.

This is a sensible rule, and its rationale is in no way called into question by this Court's later decision in *Edwards*. First, *Edwards* itself was careful to limit its holding to circumstances in which an alien reached the five-year mark in prison *after* entry of an administratively final order of deportation. *See* 393 F.3d at 312 n.18. Thus, *Edwards* in no way purports to overrule *Brown* -- indeed it does not cite *Brown* anywhere in the opinion. And of course, a three-judge panel could not have overruled *Brown* on its own. *See United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986) ("This court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*."), *overruled on other grounds, United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (en banc).

Second, dicta in *Edwards* suggested (without so holding) that it would have reached the same conclusion adopted in *Brown*: "Were we to look only at our decisions concerning when an alien's eligibility [for § 212(c) relief]

is to be determined, we might well conclude that whether five years' imprisonment has been served should be decided as of the date on which each alien's final order of deportation was entered." *Id.* at 307. In this respect, *Edwards* relied on two prior decisions of this Court, *Lok v. INS*, 681 F.2d 107, 100 (2d Cir. 1982), and *Buitrago-Cuesta*, 7 F.3d at 296. According to *Lok*, time ceases to accrue upon entry of a final determination of deportability, for purposes of determining whether an alien has lived for seven years in the United States and is therefore eligible for § 212(c) relief. Similarly, *Buitrago-Cuesta* borrowed the logic employed in *Lok* to hold that time continues to accrue toward the five-year imprisonment criterion of § 212(c) during initial hearings before an IJ.[12] The *Edwards* Court likewise suggested that immigration regulations could be read to support the position that the relevant inquiry is whether an alien was eligible for relief at the time the final administrative order was entered. For

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[12] As the Government argued in *Edwards*, of course, there is a strong argument that time continues to accrue toward the five-year bar even *beyond* entry of an administratively final decision, even though the seven-year lawful domicile clock stops running upon entry of a final removal order. The most obvious reason is that upon entry of such an order, domicile is no longer lawful. By contrast, an alien does not stop serving a prison sentence simply because an order of removal is entered. *See* 8 U.S.C. § 1101(a)(20) (defining "lawfully admitted for permanent residence"); 8 C.F.R. § 1001.1(p) (lawful permanent resident status "terminates upon entry of a final administrative order of exclusion or deportation"); 8 U.S.C. § 1231(a)(4)(A) (with very limited exceptions not relevant here, "the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment").

example, it pointed out that 8 C.F.R. § 3.2(c)(1) (recodified at 8 C.F.R. § 1003.2(c)(1)) provided that a motion to reopen may be granted "if the alien demonstrates that he or she *was statutorily eligible for such relief prior to the entry of the administratively final order of deportation*." (Emphasis added). The Court also took the position that other regulations further supported the conclusion that "an alien's eligibility for § 212(c) relief should be determined by reference to the alien's status *as of, or prior to, the time of entry of the alien's final order of deportation*." *Id.* at 307 n.10.

In his reply brief, Spina must seek to distinguish *Brown* in some fashion, because it is binding circuit precedent which directly defeats his claim on this issue. He may suggest that *Brown*'s discussion of the accrual of time during the pendency of administrative appeals is *dicta*, because the dates listed in the opinion seem to suggest that at the time the IJ denied § 212(c) relief, Brown had already served a total of five years in prison. *See* 360 F.3d at 354 n.10 (noting that as of November 2000, Brown had served more than six years) and *id.* at 349 (noting that IJ denied § 212(c) relief in June 2000). Yet a Court's express holding cannot be relegated to *dicta* merely upon the hypothesis that, given the facts involved in a particular case, the Court might have chosen a different rationale for deciding the case. Indeed, this Court has explained that it has "not hesitated to describe our prior statements as dicta when they were *not necessary to the holdings* of the decisions in which they were made." *Cotto v. Herbert*, 331 F.3d 217, 250 n.20 (2d Cir. 2003). To distinguish away *Brown*, the Court would have to do more than disregard statements that were unnecessary to the holding;

it would have to disregard the holding itself, and substitute a narrower ground of decision that was not articulated by the *Brown* Court itself.

Moreover, even if *Brown*'s statements regarding accrual of time pending administrative appeal were regarded as nonbinding, its conclusion is still persuasive. As the Court pointed out in *Edwards*, this Court's case law (including *Lok* and *Buitrago-Cuesta*) as well as immigration regulations all support the notion that an alien's eligibility for § 212(c) relief is measured by the date on which any final adminstrative order is entered.

To the extent that *Edwards* suggested that *nunc pro tunc* relief is might constitute an appropriate exercise of the BIA's discretion to reopen a case even after an alien has served five years of imprisonment, there are sound reasons for distinguishing between time in prison that accrues *before* entry of an adminstratively final order of deportation (which counts toward the five-year bar under *Brown*) and time that accrues *afterwards* (which does not foreclose *nunc pro tunc* relief under *Edwards*). As this Court explained in *Buitrago-Cuesta*, an alien may take advantage of changes in circumstances that inure to his benefit during the pendency of administrative appeals, and so he must also take the bitter with the sweet. 7 F.3d at 296. Even if the IJ had granted Spina § 212(c) relief, the INS still would have been entitled, in good faith, to appeal that decision to the BIA. And it would have been appropriate for the BIA to consider the state of affairs at the time of its appellate decision -- both in terms of the length of Spina's residence in the United States (*see Lok, supra*) as well as the length of time he had spent in prison

(*see Brown, supra*).[13] Thus, it would not be true (as it was in *Edwards*) that Spina would have been entitled to § 212(c) relief but for the IJ's erroneous reliance on *Soriano* in this case. Accordingly, there is no basis for deciding that Spina would be entitled to *nunc pro tunc* relief.

The First Circuit has followed the rule articulated in *Buitrago-Cuesta*, and held that the relevant date for purposes of determining whether the five-year bar precludes 212(c) eligibility is the date of the BIA's decision. *Gomes v. Ashcroft*, 311 F.3d 43, 45 (1st Cir. 2002) (citing *Buitrago-Cuesta*, 7 F.3d at 296). *See also Fernandes Pereira v. Gonzales*, 417 F.3d 38, 44-45 (1st Cir. 2005) (re-affirming *Gomes*, and rejecting approach of *Edwards* in affording *nunc pro tunc* relief to aliens who accrue five years after the BIA's decision). At least three district courts have held the same. *See, e.g., Greenidge v. INS*, 263 F. Supp. 2d 696 (S.D.N.Y. 2003) (denying habeas relief and agreeing with determination of BIA, on earlier remand, that prison time during pendency of

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[13] *See generally Walters v. Ashcroft*, 291 F. Supp. 2d 237, 240-41 (S.D.N.Y. 2003) (noting that BIA overturned IJ's grant of § 212(c) relief on grounds that alien had accrued five years of imprisonment during pendency of administrative appeal; reversing BIA because it improperly relied on new evidence that was offered in untimely manner by INS); *Hartman v. Elwood*, 255 F. Supp. 2d 510, 512-13 (E.D. Pa. 2003) (same action by BIA; district court reverses denial on grounds that time stops accruing toward five-year bar upon IJ's initial decision).

administrative appeal, after IJ's erroneous denial of § 212(c) relief on retroactivity grounds, must be counted toward five-year bar); *Davis v. Ashcroft*, 2003 WL 289624, at 5-6 (S.D.N.Y. Feb. 10, 2003) (finding alien ineligible for § 212(c) relief when he accrued five years of imprisonment during pendency of administrative appeals, and before issuance of IJ's second removal order); *Cruz v. U.S. Dept. of Justice*, 2002 WL 986861, at *5 (S.D.N.Y. May 14, 2002) (holding that where BIA issued final decision more than five years after date on which alien was sentenced and remanded into custody, alien was ineligible for § 212(c) relief).[14] *See also Matter of Ramirez-Somera*, 20 I. & N. Dec. 564 (BIA 1992) (holding that five-year bar of § 212(c) applies only after alien has actually served five years, not immediately upon imposition of sentence for which five years is likely to be served; suggesting in dicta that remand would have been unnecessary "if the proceedings were continued to a point in time when the respondent has actually served 5 years in prison on his aggravated felony conviction, thereby establishing with certainty his statutory ineligibility for the relief he now seeks").[15]

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[14] *But see Hartman v. Elwood*, 255 F. Supp. 2d 510, 515-18 (E.D. Pa. 2003) (not counting time accrued after IJ's initial denial of § 212(c) relief based on retroactive application of AEDPA); *Lara v. INS*, 2002 U.S. Dist. LEXIS 21522 (D. Conn. 2000) (same).

[15] *See also Nguyen v. District Director*, 400 F.3d 255 (5th Cir. 2005) (per curiam) (rejecting alien's claim that he was deprived of due process after the BIA held him ineligible for § 212(c) eligibility based on his accrual of five years of (continued...)

## III. Because The Five-Year Bar of § 212(c) Applies Retroactively, It Is Irrelevant Whether an Alien Has Been Convicted by Guilty Plea or Jury Trial

The Court instructed the parties to brief whether the answer to the previous question -- whether time spent in prison continues to accrue for purposes of § 212(c) during the pendency of administrative appeals -- depends on whether the alien has been convicted by guilty plea or after trial. For the reasons set forth below, that question is not implicated in the present case.

As an initial matter, the question of whether an alien has been convicted by plea or trial has arisen in cases analyzing whether Congress's abolition of § 212(c) relief for aggravated felons in AEDPA, and the repeal of § 212(c) relief in IIRIRA, should be applied retroactively. In *St. Cyr*, the Supreme Court held that Congress's repeal of § 212(c) relief should not be applied retroactively to aggravated felons who pleaded guilty to their crimes before the effective date of IIRIRA. *Id.* at 317-26. The Supreme Court reasoned that such aliens had surrendered substantial rights through their guilty pleas, and that in doing so they "almost certainly relied" on their continued eligibility for § 212(c) relief. *Id.* at 321-23. To apply the amendments to such aliens, the Court held, would

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[15] (...continued)
imprisonment during administrative appeals, after IJ had erroneously denied § 212(c) relief based on retroactive application of AEDPA).

therefore have an impermissible retroactive effect. *Id.* at 321-23.

Subsequently, in *Rankine v. Reno*, 319 F.3d 93, 98 (2d Cir.), *cert. denied sub nom. Lawrence v. Ashcroft*, 540 U.S. 910 (2003), this Court held that aliens who had been convicted after trial did not thereby manifest a reliance interest that would render application of the AEDPA amendments to them impermissibly retroactive. According to the Court, an alien who has proceeded to trial did not detrimentally alter his position in any way, much less in reliance on the state of immigration law. Moreover, an alien who goes to trial does not take any action that in any other way manifests a desire to maintain eligibility for § 212(c) relief. As a result, the Court held that IIRIRA's amendments were not impermissibly retroactive as to such aliens.[16] *See also Thom v. Ashcroft*,

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[16] In *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004), this Court subsequently held that an alien who was convicted after trial may nevertheless be able to demonstrate that application of AEDPA and IIRIRA would defeat a valid reliance interest, and hence be impermissibly retroactive, on the grounds that some aliens may have postponed filing "affirmative" § 212(c) applications -- that is, applications filed before the INS initiated deportation proceedings -- on the assumption that they could file a stronger application at a later point in time. *Id.* at 632-33. The Court declined to decide whether such reliance interests should be determined on a categorical or case-by-case basis, and remanded to the district court for further proceedings. *Id.* at 639. On remand, the district court had no occasion to consider these matters further, because it ascertained that the alien had served five years of

(continued...)

369 F.3d 158, 163 (2d Cir. 2004) (re-affirming *Rankine*'s holding that decision to go to trial does not engender cognizable reliance interests for purposes of retroactivity analysis), *pet'n for cert. filed*, No. 04-9116 (Feb. 24, 2005).

Unlike *St. Cyr* and *Rankine*, the present case does not require the Court to examine the retroactivity of the AEDPA and IIRIRA amendments which abolished § 212(c) relief. The BIA properly recognized that the IJ had erred in denying § 212(c) relief in reliance on *Soriano*, and the parties are in agreement that, absent the five-year bar, Spina would be entitled to apply for such relief in light of *St. Cyr* because he was convicted upon a guilty plea.

At issue here, by contrast, is the provision of § 212(c) which precludes such relief for aggravated felons who have served five years in prison, and which operates independently of the 1996 amendments.[17] This case does not require the Court to address the retroactivity of that

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[16] (...continued)
imprisonment at the time of the IJ's decision, and hence would have been statutorily ineligible for § 212(c) relief regardless of whether such relief had been more generally abolished. *See Restrepo v. McElroy*, 354 F. Supp. 2d 254, 255 (E.D.N.Y. 2005).

[17] *See Ponnapula v. Ashcroft*, 373 F.3d 480, 493 n.11 (3d Cir. 2005) (observing that even the alien in *St. Cyr* "would have been ineligible for discretionary relief under § 212(c)" "if he had actually served the full five-year unsuspended portion of his sentence"); *id.* at 496 n.15.

provision for two reasons. First, this Court has already held that the provision was immediately applicable upon enactment, regardless of whether the alien in question had been convicted prior to the law's enactment, or whether the INS had commenced deportation proceedings pre-enactment. *See Buitrago-Cuesta*, 7 F.3d at 293-95. Second, even if the retroactivity of the five-year bar were theoretically an open issue in some cases, it would not be so in Spina's case. All of the relevant events in the present case post-dated the 1990 enactment of the five-year bar. *See* IMMACT § 511(a), 104 Stat. 4978, 5052 (1990). Spina killed his wife in 1992; he was convicted in 1994; his deportation proceedings commenced in 1995; he applied for § 212(c) relief in 1997; and his appeal was denied by the BIA in 2000. Accordingly, there would be no basis for Spina to claim that any of his actions were made in reliance on the absence of the five-year bar, because it had always been in place as far as he was concerned.

In any event, Spina could not realistically articulate a claim of reliance as hypothesized in *Restrepo* or *Thom*, on the ground that he might have relied to his detriment on the INS's failure to immediately begin deportation proceedings, and "decide[d] on that basis to make important commitments to his residency in the United States (such as by marrying, establishing a business, and losing ties with his home country)." *Thom*, 369 F.3d at 166. As this Court pointed on in *Thom*, an incarcerated alien would be hard pressed to claim "that he made life shaping decisions relying on the INS's disinclination to institute proceedings against him." *Id.* at 166 n.15.

In short, because this case undisputedly involves no retroactive application of the five-year bar contained in § 212(c), there is no need to consider the distinction between aliens who are convicted upon guilty plea and those who are convicted after trial.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: September 2, 2005

Respectfully submitted,

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## CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,587 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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# ADDENDUM OF STATUTES

State statutes governing credit for pre-trial custody:

**Alabama Code § 15-18-5**
**Credit towards sentence for time spent incarcerated -- Pending trial.**

Upon conviction and imprisonment for any felony or misdemeanor, the sentencing court shall order that the convicted person be credited with all of his actual time spent incarcerated pending trial for such offense. The actual time spent incarcerated pending trial shall be certified by the circuit clerk or district clerk on forms to be prescribed by the Board of Corrections.

**Alaska Statutes § 12.55.025**
**Sentencing procedures.**

. . . .

(c) Except as provided in (d) of this section, when a defendant is sentenced to imprisonment, the term of confinement commences on the date of imposition of sentence unless the court specifically provides that the defendant must report to serve the sentence on another date. If the court provides another date to begin the term of confinement, the court shall provide the defendant with written notice of the date, time, and location of the correctional facility to which the defendant must report. A defendant shall receive credit for time spent in custody pending trial, sentencing, or appeal, if the detention was in connection with the offense for which sentence was imposed. A defendant may not receive credit for more than the actual time spent in custody pending trial, sentencing,

or appeal. The time during which a defendant is voluntarily absent from official detention after the defendant has been sentenced may not be credited toward service of the sentence.

. . . .

**Arizona Revised States § 13-709**
**Calculation of terms of imprisonment.**

A. A sentence of imprisonment commences when sentence is imposed if the defendant is in custody or surrenders into custody at that time. Otherwise it commences when the defendant becomes actually in custody.

B. All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment otherwise provided for by this chapter.

C. If a sentence of imprisonment is vacated and a new sentence is imposed on the defendant for the same offense, the new sentence is calculated as if it had commenced at the time the vacated sentence was imposed, and all time served under the vacated sentence shall be credited against the new sentence.

D. If a person serving a sentence of imprisonment escapes from custody, the escape interrupts the sentence. The interruption continues until the person is apprehended and confined for the escape or is confined and subject to a detainer for the escape. Time spent in actual custody

prior to return under this subsection shall be credited against the term authorized by law if custody rested on an arrest or surrender for the escape itself, or if the custody arose from an arrest on another charge which culminated in a dismissal or an acquittal, and the person was denied admission to bail pending disposition of that charge because of a warrant lodged against such person arising from the escape.

E. The sentencing court shall include the time of commencement of sentence under subsection A and the computation of time credited against sentence under subsection B, C or D, in the original or an amended commitment order, under procedures established by rule of court.

**Arkansas Code § 16-93-610**
**Computation of sentence.**

(a) Time served shall be deemed to begin on the day sentence is imposed, not on the day a prisoner is received by the Department of Correction. It shall continue only during the time in which a prisoner is actually confined in a county jail or other local place of lawful confinement or while under the custody and supervision of the Department of Correction.

(b) The sentencing judge shall direct, when he or she imposes sentence, that time already served by the defendant in jail or other place of detention shall be credited against the defendant.

**California Penal Code § 2900.5**
**Credit for time in custody upon term of imprisonment or fine.**

(a) In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment, or credited to any fine on a proportional basis, including, but not limited to, base fines and restitution fines, which may be imposed, at the rate of not less than thirty dollars ($30) per day, or more, in the discretion of the court imposing the sentence. If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served. In any case where the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter the remaining days, if any, shall be applied to the fine on a proportional basis, including, but not limited to, base fines and restitution fines.

(b) For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the

defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.

(c) For the purposes of this section, "term of imprisonment" includes any period of imprisonment imposed as a condition of probation or otherwise ordered by a court in imposing or suspending the imposition of any sentence, and also includes any term of imprisonment, including any period of imprisonment prior to release on parole and any period of imprisonment and parole, prior to discharge, whether established or fixed by statute, by any court, or by any duly authorized administrative agency.

(d) It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213.

(e) It shall be the duty of any agency to which a person is committed to apply the credit provided for in this section for the period between the date of sentencing and the date the person is delivered to the agency.

. . . .

**Colorado Revised Statutes § 18-1.3-405**
**Credit for presentence confinement.**

A person who is confined for an offense prior to the imposition of sentence for said offense is entitled to credit against the term of his or her sentence for the entire period of such confinement. At the time of sentencing, the court shall make a finding of the amount of presentence confinement to which the offender is entitled and shall include such finding in the mittimus. Such period of confinement shall be deducted from the sentence by the department of corrections. If a defendant is serving a sentence or is on parole for a previous offense when he or she commits a new offense and he or she continues to serve the sentence for the previous offense while charges on the new offense are pending, the credit given for presentence confinement under this section shall be granted against the sentence the defendant is currently serving for the previous offense and shall not be granted against the sentence for the new offense.

**Connecticut General Statutes § 18-98d**
**Credit for presentence confinement.**

(a) (1) Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of

imprisonment imposed; provided (A) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (B) the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement, except that if a person is serving a term of imprisonment at the same time such person is in presentence confinement on another charge and the conviction for such imprisonment is reversed on appeal, such person shall be entitled, in any sentence subsequently imposed, to a reduction based on such presentence confinement in accordance with the provisions of this section. In the case of a fine, each day spent in such confinement prior to sentencing shall be credited against the sentence at a per diem rate equal to the average daily cost of incarceration as determined by the Commissioner of Correction.

(2) (A) Any person convicted of any offense and sentenced on or after October 1, 2001, to a term of imprisonment who was confined to a police station or courthouse lockup in connection with such offense because such person was unable to obtain bail or was denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence in accordance with subdivision (1) of this subsection equal to the number of days which such person spent in such lockup, provided such person at the time of sentencing requests credit for such presentence confinement. Upon such request, the court shall indicate on the judgment mittimus the number

of days such person spent in such presentence confinement.

(B) Any person convicted of any offense and sentenced prior to October 1, 2001, to a term of imprisonment, who was confined in a correctional facility for such offense on October 1, 2001, shall be presumed to have been confined to a police station or courthouse lockup in connection with such offense because such person was unable to obtain bail or was denied bail and shall, unless otherwise ordered by a court, earn a reduction of such person's sentence in accordance with the provisions of subdivision (1) of this subsection of one day.

(C) The provisions of this subdivision shall not be applied so as to negate the requirement that a person convicted of a first violation of subsection (a) of section 14-227a and sentenced pursuant to subparagraph (B)(i) of subdivision (1) of subsection (h) of said section serve a term of imprisonment of at least forty-eight consecutive hours.

(b) In addition to any reduction allowed under subsection (a) of this section, if such person obeys the rules of the facility such person may receive a good conduct reduction of any portion of a fine not remitted or sentence not suspended at the rate of ten days or five hundred dollars, as the case may be, for each thirty days of presentence confinement; provided any day spent in presentence confinement by a person who has more than one information pending against such person may not be counted more than once in computing a good conduct reduction under this subsection.

(c) The Commissioner of Correction shall be responsible for ensuring that each person to whom the provisions of this section apply receives the correct reduction in such person's sentence; provided in no event shall credit be allowed under subsection (a) of this section in excess of the sentence actually imposed.

**11 Delaware Code § 3901**
**Fixing term of imprisonment; credits.**

(a) When imprisonment is a part of the sentence, the term shall be fixed, and the time of its commencement and ending specified. An act to be done at the expiration of a term of imprisonment shall be done on the last day thereof, unless it be Sunday, and in that case, the day previous. Months shall be reckoned as calendar months.

(b) All sentences for criminal offenses of persons who at the time sentence is imposed are held in custody in default of bail, or otherwise, shall begin to run and be computed from the date of incarceration for the offense for which said sentence shall be imposed, unless the person sentenced shall then be undergoing imprisonment under a sentence imposed for any other offense or offenses, in which case the said sentence shall begin to run and be computed, either from the date of imposition thereof or from the expiration of such other sentence or sentences, as the court shall, in its discretion, direct.

(c) Any period of actual incarceration of a person awaiting trial, who thereafter before trial or sentence succeeds in securing provisional liberty on bail, shall be credited to the person in determining the termination date

of sentence. Where a prisoner is hospitalized, the time spent in an institution under involuntary restraint is to be credited to the person when calculating the sentence under this subsection.

(d) No sentence of confinement of any criminal defendant by any court of this State shall be made to run concurrently with any other sentence of confinement imposed on such criminal defendant.

**District of Columbia Official Code § 24-221.03.**
**Jail time; parole.**

(a) Every person shall be given credit on the maximum and the minimum term of imprisonment for time spent in custody or on parole as a result of the offense for which the sentence was imposed. When entering the final order in any case, the court shall provide that the person be given credit for the time spent in custody or on parole as a result of the offense for which sentence was imposed.

(b) When a person has been in custody due to a charge that resulted in a dismissal or acquittal, the time that would have been credited against a sentence for the charge, had the charge not resulted in a dismissal or acquittal, shall be credited against any sentence that is based upon a charge for which a warrant or commitment detainer was placed during the pendency of the custody.

(c) Any person who is sentenced to a term of confinement in a correctional facility or hospital shall have deducted from the term all time actually spent, pursuant to

a court order, by the person in a hospital for examination purposes or treatment prior to trial or pending an appeal.

**Florida Statutes § 921.161.**
**Sentence not to run until imposed; credit for county jail time after sentence;**
**certificate of custodian of jail**

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time she or he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the Department of Corrections shall receive credit on her or his sentence for all time spent between sentencing and being placed in custody of the department. When delivering a prisoner to the department, the custodian of the local jail shall certify to it in writing:

(a) The date the sentence was imposed and the date the prisoner was delivered to the department.

(b) The dates of any periods after sentence the prisoner was at liberty on bond.

(c) The dates and reasons for any other times the prisoner was at liberty after sentence.

(d) The offender-based transaction system number or numbers from the uniform arrest report or reports established pursuant to s. 943.05(2).

**Georgia Code § 17-10-11**
**Credit for time spent awaiting trial or resulting from court order applied to sentence and parole.**

(a) Each person convicted of a crime in this state shall be given full credit for each day spent in confinement awaiting trial and for each day spent in confinement, in connection with and resulting from a court order entered in the criminal proceedings for which sentence was imposed, in any institution or facility for treatment or examination of a physical or mental disability. The credit or credits shall be applied toward the convicted person's sentence and shall also be considered by parole authorities in determining the eligibility of the person for parole.

(b) This Code section applies to sentences for all crimes, whether classified as violations, misdemeanors, or felonies, and to all courts having criminal jurisdiction located within the boundaries of this state, except juvenile courts.

**Hawaii Revised Statutes § 706-671**
**Credit for time of detention prior to sentence; credit for imprisonment under earlier sentence for same crime.**

(1) When a defendant who is sentenced to imprisonment has previously been detained in any State or local correctional or other institution following the

defendant's arrest for the crime for which sentence is imposed, such period of detention following the defendant's arrest shall be deducted from the minimum and maximum terms of such sentence. The officer having custody of the defendant shall furnish a certificate to the court at the time of sentence, showing the length of such detention of the defendant prior to sentence in any State or local correctional or other institution, and the certificate shall be annexed to the official records of the defendant's commitment.

(2) When a judgment of conviction or a sentence is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, the period of detention and imprisonment theretofore served shall be deducted from the minimum and maximum terms of the new sentence. The officer having custody of the defendant shall furnish a certificate to the court at the time of sentence, showing the period of imprisonment served under the original sentence, and the certificate shall be annexed to the official records of the defendant's new commitment.

**Idaho Code § 18-309**
**Computation of term of imprisonment.**

In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration prior to entry of judgment, if such incarceration was for the offense or an included offense for which the judgment was entered. The remainder of the term commences upon the pronouncement of sentence and if thereafter, during such term, the defendant by any legal means is temporarily

released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

**730 Illinois Compiled Statutes 5/5-8-7**
**Calculation of Term of Imprisonment.**

(a) A sentence of imprisonment shall commence on the date on which the offender is received by the Department or the institution at which the sentence is to be served.

(b) The offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for time spent in custody as a result of the offense for which the sentence was imposed, at the rate specified in Section 3-6-3 of this Code. Except when prohibited by subsection (d), the trial court may give credit to the defendant for time spent in home detention, or when the defendant has been confined for psychiatric or substance abuse treatment prior to judgment, if the court finds that the detention or confinement was custodial.

(c) An offender arrested on one charge and prosecuted on another charge for conduct which occurred prior to his arrest shall be given credit on the determinate sentence or maximum term and the minimum term of imprisonment for time spent in custody under the former charge not credited against another sentence.

(d) An offender sentenced to a term of imprisonment for an offense listed in paragraph (2) of subsection (c) of Section 5-5-3 of this Code or in paragraph (3) of subsection (c-1) of Section 11-501 of the Illinois Vehicle

Code shall not receive credit for time spent in home detention prior to judgment.

**Indiana Code 35-50-6-3**
**Credit time classes**.

Sec. 3. (a) A person assigned to Class I earns one (1) day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing.

(b) A person assigned to Class II earns one (1) day of credit time for every two (2) days he is imprisoned for a crime or confined awaiting trial or sentencing.

(c) A person assigned to Class III earns no credit time.

**Iowa Code § 903A.5.**
**Time to be served--credit**

An inmate shall not be discharged from the custody of the director of the Iowa department of corrections until the inmate has served the full term for which the inmate was sentenced, less earned time and other credits earned and not forfeited, unless the inmate is pardoned or otherwise legally released. Earned time accrued and not forfeited shall apply to reduce a mandatory minimum sentence being served pursuant to section 124.406, 124.413, 902.7, 902.8, 902.8A, or 902.11. An inmate shall be deemed to be serving the sentence from the day on which the inmate is received into the institution. If an inmate was confined to a county jail or other correctional or mental facility at any time prior to sentencing, or after sentencing but prior to the case having been decided on appeal, because of failure

to furnish bail or because of being charged with a nonbailable offense, the inmate shall be given credit for the days already served upon the term of the sentence. However, if a person commits any offense while confined in a county jail or other correctional or mental health facility, the person shall not be granted jail credit for that offense. Unless the inmate was confined in a correctional facility, the sheriff of the county in which the inmate was confined shall certify to the clerk of the district court from which the inmate was sentenced and to the department of corrections' records administrator at the Iowa medical and classification center the number of days so served. The department of corrections' records administrator, or the administrator's designee, shall apply jail credit as ordered by the court of proper jurisdiction or as authorized by this section and section 907.3, subsection 3, and shall forward a copy of the number of days served to the clerk of the district court from which the inmate was sentenced.

An inmate shall not receive credit upon the inmate's sentence for time spent in custody in another state resisting return to Iowa following an escape. However, an inmate may receive credit upon the inmate's sentence while incarcerated in an institution or jail of another jurisdiction during any period of time the person is receiving credit upon a sentence of that other jurisdiction.

**Kansas Statutes § 21-4614**
**Deduction of time spent in confinement.**

In any criminal action in which the defendant is convicted upon a plea of guilty or no contest or trial by court or jury or upon completion of an appeal, the judge,

if the judge sentences the defendant to confinement, shall direct that for the purpose of computing defendant's sentence and 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 sentencing order of the journal entry of judgment or the judgment form, whichever is delivered with the defendant to the correctional institution, such date shall be established to reflect and shall be computed as an allowance for the time which the defendant has spent incarcerated pending the disposition of the defendant's case. In recording the commencing date of such sentence the date as specifically set forth by the court shall be used as the date of sentence and all good time allowances as are authorized by the Kansas parole board are to be allowed on such sentence from such date as though the defendant were actually incarcerated in any of the institutions of the state correctional system. Such jail time credit is not to be considered to reduce the minimum or maximum terms of confinement as are authorized by law for the offense of which the defendant has been convicted.

**Kentucky Revised States § 532.120**
**Calculation of terms of imprisonment.**

(1) An indeterminate sentence of imprisonment commences when the prisoner is received in an institution under the jurisdiction of the Department of Corrections. When a person is under more than one (1) indeterminate sentence, the sentences shall be calculated as follows:

(a) If the sentences run concurrently, the maximum terms merge in and are satisfied by discharge of the term which has the longest unexpired time to run; or

(b) If the sentences run consecutively, the maximum terms are added to arrive at an aggregate maximum term equal to the sum of all the maximum terms.

(2) A definite sentence of imprisonment commences when the prisoner is received in the institution named in the commitment. When a person is under more than one (1) definite sentence, the sentences shall be calculated as follows:

(a) If the sentences run concurrently, the terms merge in and are satisfied by discharge of the term which has the longest unexpired time to run; or

(b) If the sentences run consecutively, the terms are added to arrive at an aggregate term and are satisfied by discharge of the aggregate term.

(3) Time spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the court imposing sentence toward service of the maximum term of imprisonment. If the sentence is to an indeterminate term of imprisonment, the time spent in custody prior to the commencement of the sentence shall be considered for all purposes as time served in prison.

(4) If a person has been in custody due to a charge that culminated in a dismissal, acquittal, or other disposition not amounting to a conviction, the amount of time that would have been credited under subsection (3) of this section if the defendant had been convicted of that charge shall be credited as provided in subsection (3) of this section against any sentence based on a charge for which a warrant or commitment was lodged during the pendency of that custody.

(5) If a person serving a sentence of imprisonment escapes from custody, the escape shall interrupt the sentence. The interruption shall continue until the person is returned to the institution from which he escaped or to an institution administered by the Department of Corrections. Time spent in actual custody prior to return under this subsection shall be credited against the sentence if custody rested solely on an arrest or surrender for the escape itself.

**Louisiana Statutes Art. 880**
**Credit for prior custody**

A defendant shall receive credit toward service of his sentence for time spent in actual custody prior to the imposition of sentence.

**Maine Revised Statutes § 1253**
**Calculation of period of imprisonment.**

1. The sentence of any person committed to the custody of the Department of Corrections shall commence to run on the date on which that person is received into the

correctional facility designated as the initial place of confinement by the Commissioner of Corrections pursuant to section 1258. That day is counted as the first full day of the sentence.

The sentence of any person committed to the custody of a sheriff shall commence to run on the date on which that person is received into the county jail specified in the sentence. That day is counted as the first full day of the sentence if the term of imprisonment, or the initial unsuspended portion of a split sentence, is over 30 days; otherwise, credit is accorded only for the portion of that day for which the person is actually in execution of the sentence.

1-A. When a person is sentenced to a concurrent sentence as authorized by section 1256, subsection 7, the provisions of this section shall apply and shall be administered by the supervisory officer of this State's institution when the person is committed to the custody of the department, or by the sheriff of this State's county jail when the person is committed to the custody of the sheriff. If the person is released from imprisonment under the sentence of the other jurisdiction prior to the termination of this State's sentence, the remainder of this State's sentence shall be served at the appropriate state institution or county jail.

**Maryland Code, Correctional Services, § 11-502**
**Scope--presentence and postsentence confinement.**

An inmate who has been sentenced to a term of imprisonment shall be allowed deductions from the inmate's term of confinement as provided under this subtitle for any period of presentence or postsentence confinement in a local correctional facility.

**Massachusetts General Laws 127 § 129B**
**Confinement while awaiting trial; reduction of sentence.**

The sentence of any prisoner in any correctional institution of the commonwealth or in any house of correction or jail, who was held in custody awaiting trial shall be reduced by the number of days spent by him in confinement prior to such sentence and while awaiting trial, unless the court in imposing such sentence had already deducted therefrom the time during which such prisoner had been confined while awaiting trial.

**Michigan Compiled Laws 769.11b**
**Credit for time served prior to sentence because of lack of bond.**

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit

against the sentence for such time served in jail prior to sentencing.

**49 Minnesota Statutes, Rules Crim.Proc., Rule 27.03 Sentencing Proceedings.**

Subd. 4. Imposition of Sentence. When sentence is imposed the court:

(A) Shall state the precise terms of the sentence.

(B) Shall assure that the record accurately reflects all time spent in custody in connection with the offense or behavioral incident for which sentence is imposed. Such time shall be automatically deducted from the sentence and the term of imprisonment including time spent in custody as a condition of probation from a prior stay of imposition or execution of sentence.

. . . .

**Mississippi Code § 99-19-23**
**Credit for jail time served.**

The number of days spent by a prisoner in incarceration in any municipal or county jail while awaiting trial on a criminal charge, or awaiting an appeal to a higher court upon conviction, shall be applied on any sentence rendered by a court of law or on any sentence finally set after all avenues of appeal are exhausted.

**Vernon's Annotated Missouri Statutes § 558.031**
**Commencement of sentence of imprisonment--credit for time in prison, jail or custody, when--escape from custody, effect--vacation of sentence, effect--violation of conditions of parole or release, additional prison term.**

1. A sentence of imprisonment shall commence when a person convicted of a crime in this state is received into the custody of the department of corrections or other place of confinement where the offender is sentenced. Such person shall receive credit toward the service of a sentence of imprisonment for all time in prison, jail or custody after the offense occurred and before the commencement of the sentence, when the time in custody was related to that offense, except:

**Montana Code § 46-18-403**
**Credit for incarceration prior to conviction.**

(1) A person incarcerated on a bailable offense against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction, except that the time allowed as a credit may not exceed the term of the prison sentence rendered.

(2) A person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of the offense may be allowed a credit for each day of incarceration prior to conviction, except that the amount allowed or credited may not exceed the amount of the fine. The daily rate of credit for incarceration must be established annually by the board of county

commissioners by resolution. The daily rate must be equal to the actual cost incurred by the detention facility for which the rate is established.

**Nebraska Revised Statutes § 83-1,106**
**Maximum term; credit; how obtained.**

(1) Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services, the county board of corrections, or, in counties which do not have a county board of corrections, the county sheriff.

(2) Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody under a prior sentence if he or she is later reprosecuted and resentenced for the same offense or for another offense based on the same conduct. In the case of such a reprosecution, this shall include credit in accordance with subsection (1) of this section for time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same conduct.

(3) If an offender is serving consecutive or concurrent sentences, or both, and if one of the sentences is set aside

as the result of a direct or collateral proceeding, credit against the maximum term and any minimum term of the remaining sentences shall be given for all time served since the commission of the offenses on which the sentences set aside were based.

(4) If the offender is arrested on one charge and prosecuted on another charge growing out of conduct which occurred prior to his or her arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge which has not been credited against another sentence.

(5) Credit for time served shall only be given in accordance with the procedure specified in this subsection:

(a) Credit to an offender who is eligible therefor under subsections (1), (2), and (4) of this section shall be set forth as a part of the sentence; or

(b) Credit to an offender who is eligible therefor under subsection (3) of this section shall only be given by the court in which such sentence was set aside by entering such credit in the final order setting aside such sentence.

**Nevada Revised Statutes § 176.055**
**Credit against sentence of imprisonment.**

1. Except as otherwise provided in subsection 2, whenever a sentence of imprisonment in the county jail or state prison is imposed, the court may order that credit be

allowed against the duration of the sentence, including any minimum term thereof prescribed by law, for the amount of time which the defendant has actually spent in confinement before conviction, unless his confinement was pursuant to a judgment of conviction for another offense. Credit allowed pursuant to this subsection does not alter the date from which the term of imprisonment is computed.

**New Hampshire Revised Statutes § 651-A:23**
**Credit for Confinement Prior to Sentencing.**

Any prisoner who is confined to the state prison, any house of correction, any jail or any other place shall be granted credit against both the maximum and minimum terms of his sentence equal to the number of days during which the prisoner was confined in jail awaiting and during trial prior to the imposition of sentence and not under any sentence of confinement. The clerk of the court sentencing a prisoner shall record in the mittimus the number of days of such confinement, and the credit provided for herein shall be calculated on the basis of such information.

**New Jersey Rules of Court § 3:21-8**
**Credit for Confinement Pending Sentence.**

The defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence.

**New Mexico Statutes § 31-20-12**
**Credit for time prior to conviction.**

A person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense.

**New York Penal Law § 70.30**
**Calculation of terms of imprisonment**

. . . .

3. [Eff. until Sept. 1, 2009, pursuant to L.1995, c. 3, § 74, subd. d. See, also, subd. 3 below.] Jail time. The term of a definite sentence, a determinate sentence, or the maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence. In the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court or by the board of parole, the credit shall also be applied against the minimum period. The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence or period of post-release supervision to which the person is subject. Where the charge or charges culminate in more than one sentence, the credit shall be applied as follows:

(a) If the sentences run concurrently, the credit shall be applied against each such sentence;

(b) If the sentences run consecutively, the credit shall be applied against the aggregate term or aggregate maximum term of the sentences and against the aggregate minimum period of imprisonment.

In any case where a person has been in custody due to a charge that culminated in a dismissal or an acquittal, the amount of time that would have been credited against a sentence for such charge, had one been imposed, shall be credited against any sentence that is based on a charge for which a warrant or commitment was lodged during the pendency of such custody.

3. [Eff. Sept. 1, 2009. See, also, subd. 3 above.] Jail time. The term of a definite sentence or the maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence. In the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court or by the board of parole, the credit shall also be applied against the minimum period. The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence to which the person is subject. Where the charge or charges culminate in more than one sentence, the credit shall be applied as follows:

(a) If the sentences run concurrently, the credit shall be applied against each such sentence;

(b) If the sentences run consecutively, the credit shall be applied against the aggregate term or aggregate maximum term of the sentences and against the aggregate minimum period of imprisonment.

In any case where a person has been in custody due to a charge that culminated in a dismissal or an acquittal, the amount of time that would have been credited against a sentence for such charge, had one been imposed, shall be credited against any sentence that is based on a charge for which a warrant or commitment was lodged during the pendency of such custody.

**North Carolina General Statutes § 15-196.1**
**Credits allowed.**

The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

**North Dakota Century Code § 12.1-32-02**
**Sentencing alternatives -- Credit for time in custody -- Diagnostic testing.**

1. Every person convicted of an offense who is sentenced by the court must be sentenced to one or a combination of the following alternatives, unless the sentencing alternatives are otherwise specifically provided in the statute defining the offense or sentencing is deferred under subsection 4:

a. Payment of the reasonable costs of the person's prosecution.

b. Probation.

c. A term of imprisonment, including intermittent imprisonment:

(1) In a state correctional facility in accordance with section 29-27-07, in a regional corrections center, or in a county jail, if convicted of a felony or a class A misdemeanor.

(2) In a county jail or in a regional corrections center, if convicted of a class B misdemeanor.

(3) In a facility or program deemed appropriate for the treatment of the individual offender, including available community-based programs.

(4) In the case of persons convicted of an offense who are under eighteen years of age at the time of

sentencing, the court is limited to sentencing the minor defendant to a term of imprisonment in the custody of the department of corrections and rehabilitation.

d. A fine.

e. Restitution for damages resulting from the commission of the offense.

f. Restoration of damaged property or other appropriate work detail.

g. Commitment to an appropriate licensed public or private institution for treatment of alcoholism, drug addiction, or mental disease or defect.

h. Commitment to a sexual offender treatment program.

Except as provided by section 12.1-32-06.1, sentences imposed under this subsection may not exceed in duration the maximum sentences of imprisonment provided by section 12.1-32-01, section 12.1-32-09, or as provided specifically in a statute defining an offense. This subsection does not permit the unconditional discharge of an offender following conviction. A sentence under subdivision e or f must be imposed in the manner provided in section 12.1-32-08.

2. Credit against any sentence to a term of imprisonment must be given by the court to a defendant for all time spent in custody as a result of the criminal charge for which the sentence was imposed or as a result of the conduct on

which such charge was based. "Time spent in custody" includes time spent in custody in a jail or mental institution for the offense charged, whether that time is spent prior to trial, during trial, pending sentence, or pending appeal.

**Ohio Revised Code § 2967.191**
**Credit for confinement awaiting trial and commitment.**

The department of rehabilitation and correction shall reduce the stated prison term of a prisoner or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum term or the parole eligibility date of the prisoner by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, and confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term.

**Oregon Revised Statutes § 137.370**
**Commencement and computation of term of imprisonment; concurrent sentences.**

(1) When a person is sentenced to imprisonment in the custody of the Department of Corrections, the term of confinement therein commences from the day the person is delivered to the custody of an officer of the Department of Corrections for the purpose of serving the sentence executed, regardless of whether the sentence is to be served in a state or federal institution.

(2) Except as provided in subsections (3) and (4) of this section, when a person is sentenced to imprisonment in the custody of the Department of Corrections, for the purpose of computing the amount of sentence served the term of confinement includes only:

(a) The time that the person is confined by any authority after the arrest for the crime for which sentence is imposed; and

(b) The time that the person is authorized by the Department of Corrections to spend outside a confinement facility, in a program conducted by or for the Department of Corrections.

(3) When a judgment of conviction is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, the period of detention and imprisonment theretofore served shall be deducted from the maximum term, and from the minimum, if any, of the new sentence.

(4) A person who is confined as the result of a sentence for a crime or conduct that is not directly related to the crime for which the sentence is imposed, or for violation of the conditions of probation, parole or post-prison supervision, shall not receive presentence incarceration credit for the time served in jail towards service of the term of confinement.

(5) Unless the court expressly orders otherwise, a term of imprisonment shall be concurrent with that portion of any sentence previously imposed that remains unexpired at the time the court imposes sentence. This subsection

applies regardless of whether the earlier sentence was imposed by the same or any other court, and regardless of whether the earlier sentence is being or is to be served in the same penal institution or under the same correctional authority as will be the later sentence.

**42 Pennsylvania Statutes & Consolidated Statutes § 9760. Credit for time served.**

After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:

(1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

**General Laws of Rhode Island § 12-19-2**
**Selection of method and amount or term of punishment. --**

(a) Whenever it is provided that any offense shall be punished by a fine or imprisonment, the court imposing punishment may, in its discretion, select the kind of punishment to be imposed, and, if the punishment is fine or imprisonment, its amount or term within the limits prescribed by law; provided, if the punishment to be imposed is imprisonment, the sentence or sentences

imposed shall be reduced by the number of days spent in confinement while awaiting trial and while awaiting sentencing; and provided, further, that in the case of a person sentenced to a life sentence, the time at which he or she shall become eligible to apply for parole shall be reduced by the number of days spent in confinement while awaiting trial and while awaiting sentencing; and any sentence or sentences in effect at present, including the provision as to a life sentence as described in this subsection may be reduced in like manner by the court which imposed the sentence upon application by the person serving the sentence to the court.

(b) The court upon the sentencing of a first time offender, excluding capital offense and sex offense involving minors, may in appropriate cases sentence the person to a term of imprisonment, and allow the person to continue in his or her usual occupation or education and shall order the person to be confined in a minimum security facility at the A.C.I. during his or her nonworking or study hours.

(c) The director of corrections or his or her designee may impose any conditions and restrictions upon the release of persons sentenced under this section that he or she deems necessary.

(d) The director of corrections may at any time, subject to the approval of the director, recall a prisoner from release status if he or she believes or has reason to believe the peace, safety, welfare, or security of the community may be endangered by the prisoner being under release status. Any prisoner recalled under this subsection shall be

presented to the next regularly scheduled meeting of the classification board for its further consideration.

(e) A prisoner authorized to work at paid employment in the community under this section may be required to pay, and the director is authorized to collect, costs incident to the prisoner's confinement as the director deems appropriate and reasonable. These collections shall be deposited with the treasurer as a part of the general revenue of the state.

**Code of Laws of South Carolina § 24-13-40**
**Computation of time served by prisoners.**

The computation of the time served by prisoners under sentences imposed by the courts of this State shall be reckoned from the date of the imposition of the sentence. But when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served shall be reckoned from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence shall be given for time served prior to trial and sentencing. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive

credit for time served prior to trial in a reduction of his sentence for the second offense.

**Tennessee Code § 40-23-101**
**Commencement of sentence; time served; credit.**

(a) When a person is sentenced to imprisonment, the judgment of the court shall be rendered so that such sentence shall commence on the day on which the defendant legally comes into the custody of the sheriff for execution of the judgment of imprisonment.

(b)(1) This section shall not apply in a case where, after the rendition of the judgment of imprisonment, an execution of the judgment is stayed by appeal or otherwise.

(2) This section shall not interfere with the operation of the statute requiring sheriffs in whose custody defendants come for execution of judgments of imprisonment to commit such defendants as soon as possible to jail or to the warden of the penitentiary.

(c) The trial court shall, at the time the sentence is imposed and the defendant is committed to jail, the workhouse or the state penitentiary for imprisonment, render the judgment of the court so as to allow the defendant credit on the sentence for any period of time for which the defendant was committed and held in the city jail or juvenile court detention prior to waiver of juvenile court jurisdiction, or county jail or workhouse, pending arraignment and trial. The defendant shall also receive credit on the sentence for the time served in the jail,

workhouse or penitentiary subsequent to any conviction arising out of the original offense for which the defendant was tried.

**Texas Statutes and Codes, Code of Criminal Procedure Art. 42.03.**
**Pronouncing sentence; time; credit for time spent in jail between arrest and sentence or pending appeal**

Sec. 2. (a) In all criminal cases the judge of the court in which the defendant was convicted shall give the defendant credit on his sentence for the time that the defendant has spent in jail in said cause, other than confinement served as a condition of community supervision, from the time of his arrest and confinement until his sentence by the trial court.

**13 Vermont Statutes § 7031**
**Form of sentences; maximum and minimum terms**

(a) When a respondent is sentenced to any term of imprisonment, other than for life, the court imposing the sentence shall not fix the term of imprisonment, unless such term is definitely fixed by statute, but shall establish a maximum and may establish a minimum term for which such respondent may be held in imprisonment. The maximum term shall not be more than the longest term fixed by law for the offense of which the respondent is convicted and the minimum term shall be not less than the shortest term fixed by law for such offense. If the court suspends a portion of said sentence, the unsuspended portion of such sentence shall be the minimum term of sentence solely for the purpose of any reductions of term

for good behavior as provided for in section 811 of Title 28.

(b) The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which the person is received at the correctional facility for service of the sentence. The court shall give the person credit toward service of his sentence for any days spent in custody in connection with the offense for which sentence was imposed.

(c) If any such person is committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or such place of detention.

**Virginia Code § 53.1-187**
**Credit for time spent in confinement while awaiting trial.**

Any person who is sentenced to a term of confinement in a correctional facility shall have deducted from any such term all time actually spent by the person in a state hospital for examination purposes or treatment prior to trial, in a state or local correctional facility awaiting trial or pending an appeal, or in a juvenile detention facility awaiting trial for an offense for which, upon conviction, such juvenile is sentenced to an adult correctional facility. When entering the final order in any such case, the court shall provide that the person so convicted be given credit for the time so spent.

In no case shall a person be allowed credit for time not actually spent in confinement or in detention. In no case is a person on bail to be regarded as in confinement for the purposes of this statute. No such credit shall be given to any person who escapes from a state or local correctional facility or is absent without leave from a juvenile detention facility.

Any person sentenced to confinement in a state correctional facility, in whose case the final order entered by the court in which he was convicted fails to provide for the credit authorized by this section, shall nevertheless receive credit for the time so spent in a state correctional facility. Such allowance of credit shall be in addition to the good conduct allowance provided for in Articles 2 (§ 53.1-192 et seq.) and 3 (§ 53.1-198 et seq.) of this chapter or the earned sentence credits provided for in Article 4 (§ 53.1- 202.2 et seq.) of this chapter.

**Revised Code of Washington § 9.94A.505**
**Sentences.**

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.

. . . .

(6) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

**West Virginia Code § 61-11-24**
**Offender may have credit for term of confinement before conviction.**

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.

**Wisconsin Statutes § 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) 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.

(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) shall be computed as if the convicted offender had served such time in the institution to which he or she has been sentenced.