UNPACKING THE IMPLICATIONS OF REMAND TIME CONSTITUTING PUNISHMENT

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For state conduct to constitute "punishment," it must be a "consequence of conviction" that either furthers the "purpose and principles of sentencing" or qualifies as a "significant deprivation" of an individual's liberty or security interests. The common practice of deeming time served in remand punishment is inconsistent with this definition. This follows because the consequence is incurred for reasons relating to bail, not conviction. The definition of punishment should therefore be broadened to include any consequence of being charged with an offence. Insisting that sanctions be imposed (or deemed imposed) in furtherance of the purpose and principles of punishment would ensure that this modification of the definition of punishment will not lead to unprincipled results. Bringing remand time within the constitutional definition of punishment would also lend the practice to a more determinate method for assessing the appropriate remedy for offenders who endure undue time on remand. If the time served constitutes grossly disproportionate punishment, I contend that a stay of proceedings ought to follow. In cases where the impugned deprivation of liberty occurred before a guilty verdict, however, a similar analysis can occur under the "treatment" prong of section 12 of the Canadian Charter of Rights and Freedoms*. Time served on remand that is not grossly disproportionate might nevertheless still be incurred due to a breach of the accused's right to reasonable bail. In these circumstances, I maintain that a monetary remedy will be appropriate absent evidence of serious systemic failures in providing reasonable access to bail.*

TABLE OF CONTENTS

I. INTRODUCTION

It often occurs that an accused is charged with an offence and required to spend time in a remand detention facility awaiting the opportunity to apply for bail. These accused frequently plead guilty to avoid serving further time on remand. While they may do so to avoid the notoriously harsh conditions in remand centres,[1] accused also commonly plead guilty because they have already served any time that a judge might reasonably impose upon

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1 *R v Summers*, 2014 SCC 26 at para 2 [*Summers*] (describing remand conditions as "often overcrowded and dangerous" and observing that remand centres "do not provide rehabilitative programs").

conviction. While I am unaware of any empirical study of how often these "time served" cases arise,[2] they are not uncommon in my experience in the criminal justice system. Nor is it unusual for the "time served" rationale to be utilized in cases where the time actually served is significantly harsher than the punishment that would have been imposed on an identical offender who was not subject to pretrial detention.[3] While these cases are typically analyzed as violations of the right to reasonable bail provided under section 11(e) of the *Canadian Charter of Rights and Freedoms*,[4] the fact that remand time is commonly treated like punishment at the sentencing stage of proceedings also makes it possible to subject this practice to scrutiny for consistency with section 12 of the *Charter*.

The starting point for considering this question requires asking whether time served on remand constitutes "punishment" for the purposes of the *Charter*. The Supreme Court has clearly answered this question in the affirmative. While remand time is initially imposed for administrative purposes, the Supreme Court determined that it must subsequently be "deemed" punishment.[5] In so doing, however, the Supreme Court did not engage with whether this approach meets the constitutional definition of "punishment." It falls short for a simple reason: remand time is not a "consequence of conviction."[6] This follows because the whole detention was incurred *before* the conviction. Yet it seems eminently fair to conclude that remand time served for administrative purposes ought to be transformed into punishment.[7] If correct, this observation suggests something is amiss with the current definition of "punishment." More pointedly, accepting that remand time can be credited toward a sentence suggests that the first prong of the punishment test should be broadened to include any consequence incurred as a result of being charged with an offence.

Broadening the first prong of the punishment test may nevertheless raise eyebrows because it would permit seemingly any use of detention facilities to qualify as "punishment" under the *Charter*. The second prong of the punishment test is nevertheless at least partially capable of avoiding this result. It requires either that the state measure be "imposed in furtherance of the purpose and principles of sentencing" or that the measure significantly impacts an individual's liberty or security interests.[8] As pretrial detention is initially imposed for administrative purposes, any time served that is not subsequently deemed punishment simply fails to qualify as "punishment" under the *Charter*. However, any time served in prison surely meets the second arm of this disjunctive test as all prison time constitutes a significant deprivation of liberty. To avoid this odd result, I contend that it is preferable to rid the definition of punishment of this latter component than to backpedal my criticism of

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2 A "time served" sentence is not a lawful sentence, technically speaking, as a sentence commences on the day it is imposed. However, a judge can impose a sentence of one day which has the practical effect of the accused being released the same day of the sentence: see e.g. Gregory Koturbash, *A Guide to Conducting Sentencing Hearings in Canada* (Toronto: LexisNexis, 2023) at 353, citing *R v Brown*, 2014 BCCA 439; *R v McDonald*, 2012 BCCA 321; *R v Coutu* (1997), 101 BCAC 241 (BCCA); *R v T(GA)*, 2007 MBCA 88.

3 This is especially true in the northern regions: see e.g. *R v Balfour and Young*, 2019 MBQB 167 at paras 39, 65–68 [*Balfour*].

4 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

5 *R v Wust*, 2000 SCC 18 at paras 40–41 [*Wust* SCC]. This practice was more recently affirmed in *R v Basque*, 2023 SCC 18 [*Basque*] (applying a similar rationale in the context of driving prohibitions served before the offender is sentenced).

6 *R v KRJ*, 2016 SCC 31 at para 41 [*KRJ*].

7 The common law has long permitted such a rule: see e.g. *R v Lacasse*, 2015 SCC 64 at paras 111–13.

8 *KRJ*, *supra* note 6 at para 41.

the first prong of the punishment test. This follows because the alternative pathway to meeting the second prong of the punishment test perplexingly implies that a measure that does not further any purpose or principle of sentencing can qualify as punishment.

In addition to these more theoretical points, the fact that pretrial detention constitutes punishment raises a more practical question: can "time served" sentences result in grossly disproportionate punishment contrary to section 12 of the *Charter*? Those who are denied bail can apply for bail review,[9] and the fact that they have all but served any reasonably anticipated sentence will often qualify as a change in circumstances warranting release on bail.[10] However, it is not uncommon for bail systems to systemically fail in a manner that results in an accused enduring significant remand time while awaiting trial.[11] Moreover, it will often occur that any conviction following trial will be for a lesser offence or aggravating factors relied upon at bail proceedings will not be proven. It is therefore not difficult to devise reasonable hypothetical scenarios wherein an accused is denied bail and the time spent on remand is revealed to be grossly disproportionate punishment after trial. Those accused whose grievance arises because they were prevented from applying for bail are nevertheless situated differently, and it is arguable that the remand time endured — depending on its duration — could be grossly disproportionate contrary to section 12 of the *Charter*. However, as such detention is not imposed for punitive purposes at this stage, these accused would necessarily plead that their "treatment" was grossly disproportionate.

While time served on remand could also be analyzed as a violation of section 11(e) of the *Charter*, I maintain that framing the argument under section 12 should render the remedial analysis more determinate. This follows because the only appropriate remedy for incurring "cruel and unusual treatment or punishment" before being convicted of an offence would be a stay of proceedings under section 24(1) of the *Charter*. Staying proceedings may nevertheless appear impractical when an accused has been found guilty of an offence (the "punishment" scenario). I maintain that such a remedy would be possible if it were combined with a judicially authorized plea expungement. Time served on remand that is not grossly disproportionate might nevertheless still be incurred due to a breach of the accused's right to reasonable bail. In these circumstances, a monetary remedy is more appropriate unless there is evidence of serious systemic failures in providing reasonable access to bail. In my view, this more nuanced approach to understanding the constitutional implications of time served on remand would be adequately capable of motivating the state to improve its bail practices.

The article unfolds as follows. In Part II, I outline the jurisprudence detailing why remand time is sufficient to constitute punishment for the purposes of the *Charter*. I use this conclusion to problematize the Supreme Court's current definition of "punishment" and propose amendments to ensure that terms are consistent with the common practice of crediting remand time toward an offender's sentence. In Part III, I consider whether any

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9 *Criminal Code*, RSC 1985, c C-46, ss 520–21, 525, 680 (these provisions are explained in more detail below).

10 For a detailed and recent review of the jurisprudence, see *R v Dhingra*, 2022 QCCQ 1054 at paras 51–60 [*Dhingra*] building upon the Ontario Court of Appeal's seemingly novel decision in *R v Whyte*, 2014 ONCA 268 [*Whyte*] permitting release on bail for such reasons.

11 See e.g. *R v Myers*, 2019 SCC 18 at para 37 [*Myers*].

offenders might incur grossly disproportionate treatment or punishment contrary to section 12 of the *Charter* in light of the judicial use of "time served" sentences. After answering this question in the affirmative, I conclude in Part IV by considering what type of remedy ought to follow under section 24(1) of the *Charter*. When time served on remand violates section 12 of the *Charter*, I contend that the only appropriate remedy is a stay of proceedings. When time served on remand would only give rise to a violation of the right to reasonable bail, courts ought to supply a monetary remedy absent evidence of systemic disregard for the right to reasonable bail.

II. REMAND TIME AS PUNISHMENT

In *R. v. Wust*,[12] the Supreme Court considered whether time served on remand could count as part of the overall sentence a judge must impose when a mandatory minimum sentence exists for the accused's conduct. Several appellate courts concluded that such pre-conviction detention could not be credited to bring the time served moving forward below the mandatory minimum period.[13] This conclusion was driven by the language of section 719(1) of the *Criminal Code* which provides that "[a] sentence commences when it is imposed, except where a relevant enactment otherwise provides."[14] Section 719(3) further provides that in crafting a sentence, courts "may take into account any time spent in custody by the person as a result of the offence."[15] Inclusion of the word "may" left open the possibility that presentencing detention imposed for administrative purposes relating to bail would not count toward a mandatory sentence.[16] This interpretation is arguably consistent with the presumption of innocence as any conclusion that pretrial detention is "punishment" concedes that the legal system is punishing innocent people.[17]

The Supreme Court rejected this argument in *Wust*.[18] As it explained, "it is important to interpret legislation which deals … with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system."[19] The Supreme Court accordingly interpreted section 719 of the *Criminal Code* in a manner that is compatible with other general sentencing objectives, such as the requirement that sentences be proportionate,[20] and that similar sentences be imposed on similar offenders.[21] Imposing different periods of incarceration on two offenders who are identical in all other respects runs afoul of both of these core sentencing principles. It followed that "while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by the operation of s. 719(3)."[22] As Justice Arbour concluded, the Crown's argument "that pre-

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12 *Wust* SCC, *supra* note 5.
13 *R v Alain*, [1997] RJQ 1848 (CA); *R v Lapierre*, [1998] RJQ 677 (CA); *R v Wust*, 1998 CanLII 5492 (BCCA); *R v Morrisey*, 1998 NSCA 91 (reasons of Justice Bateman).
14 *Supra* note 9.
15 *Ibid*, s 719(3).
16 This argument was also made and rejected at the Supreme Court: *Wust* SCC, *supra* note 5 at paras 39–41.
17 For a review of the Crown's argument: *ibid* at paras 39–41.
18 *Ibid* at paras 7–9 (endorsing Justice Rosenberg's reasons in *R v McDonald* (1998), 40 OR (3d) 641 (CA); *R v Mills*, 1999 BCCA 159).
19 *Wust* SCC, *supra* note 5 at para 22.
20 *Supra* note 9, s 718.1.
21 *Ibid*, s 718.2(b).
22 *Wust* SCC, *supra* note 5 at para 41.

sentencing custody can never be *deemed* punishment following conviction because the legal system does not punish innocent people is an exercise in semantics."[23]

The Supreme Court bolstered this conclusion in two cases decided alongside *Wust*. In *R. v. Arthurs*[24] and *R. v. Arrance*,[25] the Supreme Court considered circumstances wherein the accused was detained after pleading guilty. Justice Arbour observed that "[s]uch delay is often necessary to permit the court to make a better informed decision about the appropriate sentence by obtaining input from a pre-sentence report, or otherwise through materials collected by the parties."[26] In her view, "[i]t would be grossly unfair if this period of time, which after a guilty plea is undoubtedly part of the punishment, were to be added to the minimum required by law, rather than computed as part of it."[27] Justice Arbour made nearly identical comments in *Arrance*.[28] While she was specifically concerned with crediting time served after a guilty plea was rendered, the Supreme Court has subsequently reaffirmed its conclusion in *Wust* that all time served in pretrial detention constitutes part of the accused's punishment upon conviction.[29]

While deeming all remand time punishment is not unreasonable, this "all or nothing" approach does overlook an intermediary position. Importantly, pretrial detention does not inherently violate any constitutional principle when the Crown withdraws or stays charges, or the accused is found not guilty after trial. This is because the main objectives underlying the law of bail — protecting the public and ensuring accused attend court — warrant detaining the accused for a reasonable amount of time regardless of whether they are proven guilty.[30] If the detention becomes too long or onerous, the right to reasonable bail protected under section 11(e) of the *Charter* provides the accused with legal recourse.[31] After being found guilty, however, an accused who is not granted a "time served" sentence will accrue some further form of punishment. As this punishment often includes incarceration, it is reasonable to count this time as punishment as the judge implicitly decided that the accused's conduct warranted more punishment.[32] This clear demarcation therefore renders it possible to identify when detention is imposed for the purposes of bail (before a guilty verdict) and when it is imposed for the purposes of punishment (after a guilty verdict).

The Supreme Court's conclusion to the contrary suggests that it thinks broader principles of fairness require that detention imposed for non-punitive purposes can be deemed

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23 *Ibid* [emphasis in original].
24 2000 SCC 19 [*Arthurs*].
25 2000 SCC 20 [*Arrance*].
26 *Arthurs*, *supra* note 24 at para 11. Similarly, see *ibid* at para 9.
27 *Ibid*.
28 *Arrance*, *supra* note 25 at para 9.
29 See e.g. *R v Fice*, 2005 SCC 32 at paras 21–22.
30 See e.g. *R v Bray* (1983), 40 OR (2d) 766 (ONCA) at 769 ("[t]he object of the [*Bail Reform Act*, RSC 1970-71-72, c 37 (2nd Supp)] clearly was to reduce pre-trial detention consistent with securing the attendance of the accused at his trial and the protection of the public interest"). Section 515(10)(c) of the *Criminal Code*, *supra* note 9 notably also permits bail to be denied if detention is "necessary to maintain confidence in the administration of justice."
31 I expand upon this procedure below in Part III.A.
32 It is not typically the case that a judge, upon receiving a guilty plea, would refuse to release the accused on a "time served" basis unless they intended to impose further imprisonment. For instance, further remand would be required for the purpose of having a presentence report, *Gladue* Report, or Impact of Race and Culture Assessment prepared, but these reports are not commonly ordered when prison is not a sanction under consideration. If that report was favourable to the accused, it is nevertheless possible that a "time served" sentence might still be subsequently imposed.

punishment at sentencing.[33] Taking this conclusion at face value nevertheless provides reason to question the accuracy of the Supreme Court's definition of "punishment" under the *Charter*.[34] In particular, the first component of that definition requires that the measure imposed constitute a "consequence of conviction."[35] The plain language of this requirement demands that any consequence arise as a *result* of the conviction. However, that is not the case when a court deems prison initially imposed for administrative purposes to qualify as punishment. While this practice is justifiable, a court saying that the consequence is "deemed" part of the offender's punishment does not change the fact that the time served was endured because the offender was denied bail. I can accept that a court may "deem" in the sense of "acknowledge" that a particular consequence incurred earlier furthered the same punitive ends that any forward-looking punishment might aim to achieve. However, the requirement that a consequence derive from a certain event (conviction) has a temporal component that cannot be "deemed" out of existence. As remand time is a consequence that occurs because the accused was charged with an offence and subsequently denied bail, the "consequence of conviction" component of the punishment test is inaccurate.[36]

The first option to revise the definition of punishment is to label as punishment any remand time served after a finding of guilt and label as non-punishment any time served before that period. As explained earlier, the Supreme Court rejected this approach because it would disadvantage accused who are denied bail.[37] A second approach is to recognize that a measure that deprives an individual of liberty meets the first requirement to qualify as punishment if it was incurred as a result of being charged with an offence. This definition has the salutary effect of capturing all time served on remand within the definition of punishment. It also excludes other mundane forms of detention that occur in the usual course of criminal investigation.[38] It is only when the officer arrests the accused and detains them for the purposes of determining whether they ought to be released that the accused would potentially be "punished" under this definition. Circumstances where an officer charges an accused with an offence and issues an appearance notice or undertaking would not qualify as punishment because the person is released upon being charged.[39]

Admittedly, expanding the definition of punishment in this manner raises concerns over the breadth of punishment analysis under sections 11 and 12 of the *Charter*. In my view, however, any concerns are better addressed when considering the second prong of the

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33 *Wust* SCC, *supra* note 5 at para 7.

34 See e.g. *R v Boudreault*, 2018 SCC 58 at paras 38–44; *Basque*, *supra* note 5 at para 68.

35 *KRJ*, *supra* note 6 at para 41.

36 Given the frequency of pretrial detention — over half of the prison population in the Canadian criminal justice system are at times on remand — this exception is also not a mere anomaly: see e.g. Kent Roach et al, *Criminal Law and Procedure: Cases and Materials*, 12th ed (Toronto: Emond Montgomery, 2020) at 307, citing Jamil Malakleh, *Adult and Youth Correctional Services in Canada 2017/18*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2019). See also *Myers*, *supra* note 11 at para 26.

37 *Wust* SCC, *supra* note 5 at para 41.

38 It would exclude, for instance, investigative detentions and arrests for breaches of the peace as the latter is not an "offence" per the *Criminal Code*, *supra* note 9, s 32, and the former investigative tactic does not involve an accused being charged with an offence.

39 *Ibid*, ss 496–97, 501 (sections 496–97 deal with appearance notice; section 501 deals with undertaking). If restrictive conditions akin to those found on some probation orders are imposed by the releasing officer, these may also properly satisfy the first prong of the punishment test under my approach: see e.g. *R v Wiles*, 2005 SCC 84 [*Wiles*] (finding that a weapons prohibition is a punishment under section 12 of the *Charter*). While not credited under the *Criminal Code*, *ibid*, s 719(3.1), nothing prevents courts from considering particularly onerous conditions served while on bail as a mitigating factor at sentencing.

Supreme Court's punishment test. That prong requires that the consequence "is imposed in furtherance of the purpose and principles of sentencing" or constitutes a significant deprivation of the offender's liberty or security interests.[40] Section 718 of the *Criminal Code* provides that "[t]he fundamental purpose of sentencing is to protect society and to contribute … to respect for the law and the maintenance of a just, peaceful and safe society."[41] This basic purpose of punishment is accomplished "by imposing just sanctions" that further one or more sentencing objectives: "denunciation, deterrence, separation of offenders from society, rehabilitation, reparation, and promoting a sense of responsibility in offenders."[42] The relevant sentencing principles also include the proportionality and parity principles discussed earlier.[43]

In the "time served" scenario, the consequence is initially imposed for reasons relating to the law of bail, not to forward any sentencing purpose. It would therefore be incorrect under this prong of the test to call remand time "punishment" at any point before a conviction. This conclusion properly excludes from the scope of punishment those who serve remand time but are not convicted. But this does not mean that when a judge chooses to transform remand time into an aspect of the punishment for the offending conduct that they are not acknowledging it as punishment. The Supreme Court's conclusion in *Wust* is that basic principles of fairness require that pretrial detention be *deemed* punishment at the sentencing stage of proceedings.[44] This addition should therefore be added to the Supreme Court's second prong of the punishment test to allow any conduct imposed or *deemed* imposed for the purpose and principles of punishment to meet the definition of punishment for constitutional purposes.

While the first pathway under the disjunctive prong of the punishment test can be modified to avoid pretrial detentions imposed for administrative reasons qualifying as punishment, the alternative pathway is much broader as it requires only that the measure "has a significant impact on an offender's liberty or security interests."[45] Meeting this threshold requires the offender to demonstrate a significant constraint on "a person's ability to engage in otherwise lawful conduct or impose significant burdens not imposed on other members of the public."[46] As all time served under pretrial detention surely qualifies as a significant deprivation of liberty, it would appear that my broadening of the first prong of the punishment test leads to an unprincipled result. As explained earlier, however, it is also true that requiring punishment to qualify as a "consequence of conviction" is inaccurate as the impugned consequence subsequently "deemed" punitive was imposed for purposes relating to bail, not punishment.

To resolve this tension, I think it is preferable to question the merits of including the alternative pathway to proving the second prong of the punishment test. Put plainly, the Supreme Court's approach permits a measure to be labelled "punishment" absent proof that the consequence forwards the purpose or any of the principles of punishment. In my view,

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40 *KRJ*, *supra* note 6 at para 41.
41 *Supra* note 9.
42 *KRJ*, *supra* note 6 at para 32, citing *Criminal Code*, *ibid*, s 718.
43 *KJR*, *ibid*, citing *Criminal Code*, *ibid*, ss 718.1–718.2.
44 *Wust* SCC, *supra* note 5 at para 41.
45 *KRJ*, *supra* note 6 at para 41.
46 *Ibid* at para 42.

this peculiar aspect of the disjunctive test serves no clear role. It is difficult to imagine any circumstance failing to further some basic aim of punishment theory but still needing to be analyzed as "punishment" for constitutional purposes. The second aspect of the disjunctive prong nevertheless strikes me as the type of *treatment* that ought to engage section 12 of the *Charter*. Such an approach would accordingly provide the broader protection the Supreme Court attempted to imbue into its section 12 jurisprudence without muddying the meaning of the term punishment.

Alternatively, it may be that all three components of the punishment test ought to be met before a state-imposed consequence constitutes "punishment." In *R. v. Basque*,[47] Justice Kasirer recently observed for a unanimous Supreme Court that for a "measure to constitute punishment, it must, among other things, have 'a significant impact on an offender's liberty or security interests' and be 'a consequence of conviction.'"[48] The statement that a state-imposed consequence "must" meet these requirements appears to read out the disjunctive component of the punishment test. Moreover, Justice Kasirer's suggestion that "other things" must be proven arguably implies that the accused must also demonstrate that a state-imposed consequence furthers the purpose and principles of sentencing. I can think of no "other thing" that might be relevant to establishing that a particular state measure constitutes "punishment." It therefore seems that Justice Kasirer is suggesting that all three considerations must be proven for state conduct to constitute "punishment" under the *Charter*. As the Supreme Court was not explicitly developing the definition of the term punishment, it may be that this statement was inadvertent. If not, such an approach ought to be reconsidered as requiring proof of a significant impact on liberty serves no discernible purpose for the reasons offered earlier.

III. APPLYING THE *CHARTER*

As the Supreme Court concluded that remand time constitutes punishment, a sentencing judge's decision to utilize time served on remand as the only punishment for an offender should be scrutinized for consistency with section 12 of the *Charter*. In addition, there are circumstances where the time between detention and any trial results in an accused incurring enough detention to qualify as cruel and unusual treatment contrary to section 12 of the *Charter*. In cases where the detention is less onerous, however, a breach of the right to section 11(e) of the *Charter* may still occur. I maintain that identifying the precise nature of the infringement is important as it will significantly aid in determining the appropriate remedy under section 24(1) of the *Charter*.

A. THE REALITIES OF REMAND

Section 503 of the *Criminal Code* requires that police take any accused brought into custody and not subsequently released by the officer to appear before a bail judge within 24

47 *Supra* note 5.
48 *Ibid* at para 68.

hours[49] if a justice is available, and as soon as reasonably possible if a justice is not available.[50] But even if the state complies with this provision, there is no guarantee that a bail decision will be made at the accused's first appearance. Section 516(1) of the *Criminal Code* instead stipulates that the Crown may seek an adjournment of up to three "clear days" without the consent of the accused.[51] While this adjournment is "not an absolute right," three clear days or some lesser time will be granted if the request is "made on a good faith basis and informed by the requirement for a just cause analysis pursuant to s. 515."[52] Repeat adjournments due to inadequate institutional resources are nevertheless common. As Steven Penney and his co-authors observe, "[t]he discretion to adjourn a bail hearing for up to three clear days without an accused person's consent, when combined with heavy caseloads in some jurisdictions, can lead to alarming delays before a bail hearing is held."[53] In some jurisdictions, subsequent adjournments occur in well over half of all cases in no small part because resource limitations prevent the court from getting through its docket.[54]

If an accused's bail is denied after receiving a hearing, they have two main options to seek release before their trial. First, section 520 of the *Criminal Code* (section 522 in limited circumstances)[55] provides the defendant with the opportunity to have a judge review the previous detention order and seek release on conditions deemed reasonable by the reviewing judge.[56] As this hearing is not conducted *de novo*,[57] it is necessary for the accused to show cause before they will be released.[58] While intervention may be appropriate where the justice committed an error of law, the reviewing justice may also overturn the original detention order if there has been a material change in circumstances.[59] Excessive time on remand

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49 *Supra* note 9. This section does not give police the right to hold an accused for 24 hours in all cases. Instead, they must bring the accused before a justice as soon as reasonably possible. The 24-hour period is the outer limit of what can be considered reasonable: see e.g. *R v MacDonald*, 2018 NSPC 25 at para 65 and the numerous authorities cited by Judge Atwood on this point.

50 This exception is meant to apply in circumstances where the accused is in a remote place or a similar circumstance. In those circumstances, however, the ability to appear via video conference must be taken into account: see e.g. Steve Coughlan, *Criminal Procedure*, 4th ed (Toronto: Irwin Law, 2020) at 301, citing *R v Simpson* (1994), 117 Nfld & PEIR 110 (CA); *R v Mendez*, 2014 ONSC 498; *Criminal Code*, *supra* note 9, ss 503, 515(2.2), 515(2.3).

51 *Supra* note 9. The reference to "clear days" excludes the day that the adjournment is requested and the date that the hearing occurs: *Interpretation Act*, RSC 1985, c I-21, s 27(1). The accused will be subject to a warrant of remand and sent to a "prison," defined as "a penitentiary, common jail, public or reformatory prison, lock-up, guard-room or other place in which persons who are charged with or convicted of offences are usually kept in custody." The police therefore relinquish control of the accused at this point: see e.g. *R v Precourt* (1976), 18 OR 714 at 721–723 (CA).

52 *R v Donnelly*, 2016 ONCA 988 at para 80.

53 Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham, ON: LexisNexis, 2011) at 379 (see also the various sources the authors cite).

54 Bail decisions in Ontario from between 2006–2008 were delayed for between 57 and 81 percent of all first appearances: Nicole M Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 Current Issues in Crim Justice 127 at 133. In a study involving five jurisdictions (British Columbia, Ontario, Nova Scotia, Manitoba, and the Yukon) approximately 54 percent of bail hearings were adjourned at first instance: Canadian Civil Liberty Association & Education Trust, "Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention" (July 2014) at 97, online (pdf): [perma.cc/NQP6-MAAW]. In many of the northern parts of Canada, the problem is substantially worse: see e.g. *Balfour*, *supra* note 3 (describing the experience of bail courts in parts of northern Manitoba).

55 Which provision the accused applies under depends upon whether the offence charged is listed in *Criminal Code*, *supra* note 9, s 469. For a section 469 offence (for instance, murder), the accused applies under section 522. The procedure changes significantly and the heightened seriousness of these offences will typically result in much more delay. For a concise review of this procedure, see *Whyte*, *supra* note 10 at para 21.

56 *Criminal Code*, *supra* note 9, s 520, 522.

57 See *R v St-Cloud*, 2015 SCC 27 at para 94 [*St-Cloud*].

58 *Ibid* at para 95.

59 *Ibid* at para 121.

resulting in the accused having served any reasonably anticipated sentence can qualify as an adequate change in circumstances.[60] As the Supreme Court recently observed in *R. v. Myers*,[61] "[d]etermining … the sentence the accused would potentially receive is not an exact science, nor does it require an exhaustive inquiry."[62] The judge's analysis can nevertheless "account for the circumstances of the case that were known at the time of the hearing and reflect the relevant sentencing principles."[63]

Second, accused are provided with an automatic review of their pretrial detention after 90 days per section 525 of the *Criminal Code*.[64] The purpose of the review hearing "is to prevent accused persons from languishing in pre-trial custody and to ensure a prompt trial."[65] Judges accordingly must consider whether any continued detention is justified and they maintain a discretion to expedite the accused's trial if they do not grant bail.[66] The Crown is under a duty to bring these individuals before the court "immediately" at the expiry of the 90 day period,[67] although there are well-documented instances of the Crown systematically failing to meet this responsibility.[68] In addition, the 90 day period will reset if an earlier detention order is continued due to a failed application under sections 520 and 522 of the *Criminal Code* or a new detention order made at any point after the accused's initial appearance.[69] These provisions thereby permit individuals to be subject to significant periods of remand time before trial. As the Supreme Court observes in *Myers*, "approximately 7 percent of those in remand were still in custody after three months, and some spent upwards of 12 or even 24 months awaiting trial in detention."[70] Importantly, Indigenous peoples are disproportionately impacted in this manner as they account for approximately one-quarter of all adult admissions into remand centres.[71]

In addition to undue time spent on remand, it is also important to acknowledge other differences between remand centres and provincial correctional facilities or federal penitentiaries. As the Supreme Court observed in *R. v. Summers*,[72] "[t]ime in a remand centre does not count for the purposes of eligibility for parole, earned remission or statutory release

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60 For a more recent review of the developing jurisprudence, see *Dhingra*, *supra* note 10 at paras 51–60.

61 *Supra* note 11.

62 *Ibid* at para 52.

63 *Ibid*, citing *St-Cloud*, *supra* note 57 at para 65.

64 *Supra* note 9. While the provision used to differentiate between summary conviction (30 days) and indictable offences (90 days), amendments in 2019 did away with this distinction: *An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts and to Make Consequential Amendments to Other Acts*, SC 2019, c 25.

65 *Myers*, *supra* note 11 at para 24.

66 *Ibid*.

67 *Ibid* at paras 34–35. It is accordingly impermissible for the Crown to offload this responsibility onto the accused by asking their legal representative to advise whether they wish to hold such a hearing and arrange a mutually convenient date (*ibid* at para 44).

68 *Ibid* at para 37, citing *R v Acera*, 2017 ABQB 470 at paras 10–17, Appendix A.

69 *Myers*, *supra* note 11 at para 37, citing *Criminal Code*, *supra* note 9, s 525(1)(a)(ii) (to illustrate this point, the Supreme Court notes that "if an accused person is taken before a justice under s. 503 and detained in custody on day 1, then applies to a judge for a review of that decision under s. 520 on day 50 and the detention is confirmed, the jailer's obligation to make the application will not arise until 140 days following the day on which the accused person was first detained in custody" at para 37).

70 *Myers*, *ibid* at para 26, citing Statistics Canada, *Adult Releases from Correctional Services by Sex and Aggregate Time Served*, Table 35-10-0024-01 (Ottawa, SC, 2016/2017), online: [perma.cc/HJD7-U546]. See also Roach et al, *supra* note 36 ("[i]ndividuals [continue to] spend a median of seven days in pre-trial detention, although if bail is denied a person can spend months, or even years, in detention waiting for trial" at 307).

71 *Myers*, *ibid*, citing Statistics Canada, *Trends in the use of Remand in Canada, 2004/2005 to 2014/2015*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2017).

72 *Summers*, *supra* note 1.

… [which] can result in a longer term of actual incarceration for offenders who were denied bail."[73] This follows because the offender — who is typically eligible for parole after one-third and statutory release after two-thirds of their sentence[74] — cannot have time served on remand count toward that eligibility due to a sentence only commencing when it is imposed.[75] In addition, the Supreme Court observed in *Summers* that conditions in remand centres are generally much harsher than other custodial settings. As Justice Karakatsanis concluded, remand centres "are often overcrowded and dangerous, and do not provide rehabilitative programs."[76] Given these differences, the Supreme Court in *Summers* endorsed a presumption of granting 2:1 credit for time served on remand, a ratio which was often increased to 3:1 and, in rare circumstances, 4:1 to account for particularly harsh conditions.[77]

Subsequent amendments to the *Criminal Code* limited the amount of time creditable to an offender who served time on remand to a 1.5 to 1 ratio.[78] Courts nevertheless have begun employing a variety of rationales for providing enhanced credit despite the plain wording of what is now section 719(3.1) of the *Criminal Code*.[79] The merits of these rationales — which include counting the harsher nature of the time served as a mitigating factor,[80] collateral consequence,[81] or a breach of rights warranting enhanced credit as a remedy under section 24(1) of the *Charter*[82] — is unnecessary to explain in detail for present purposes. As I argue elsewhere, these complex judicially crafted exceptions may be better framed as a constitutional challenge to the 1.5 to 1 limitation on granting remand credit under section 12 of the *Charter*.[83] Regardless of whether the legislation is struck down or a different judicial avenue for crediting time is pursued, each approach allows time served on remand to be counted at a higher rate when determining an individual's sentence. Such a calculation will

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73 *Ibid* at para 2.

74 See *Corrections and Conditional Release Act*, SC 1992, c 20, ss 120(1), 127(3). These rules nevertheless change when the offender is sentenced to life or other threats arise from releasing the offender: see e.g. *ibid*, ss 120(2), 129.

75 *Summers*, *supra* note 1 ("[b]ecause a sentence begins when it is imposed (s. 719(1) [of the *Criminal Code*, *supra* note 9]) and the statutory rules for parole eligibility and early release do not take into account time spent in custody before sentencing, presentence detention almost always needs to be credited at a rate higher than 1:1 in order to ensure that it does not prejudice the offender" at para 26).

76 *Ibid* at para 2. Other effects also occur. For an excellent summary, see Justice Harris' reasons in *R v Simonelli*, 2021 ONSC 354 at para 29 [*Simonelli*], stating those on remand are often:

> [S]ubject to dire conditions including overcrowding and have no access to recreation, basic programming or proper health care. The mental, social and physical life of both the accused and their family are adversely affected by detention. Employment and income are impacted as are housing, health and access to medication, relationships, personal possessions and ability to fulfill parental obligations. The loss of a sense of well being from detention can affect the trial itself and may well exert pressure on an accused to plead guilty in order to be released as soon as possible. It has been acknowledged for many years that it is more difficult to mount a defence if in custody. Those incarcerated before trial have a higher incidence of being found guilty than do those at liberty.

77 *Summers*, *supra* note 1 at para 31.

78 *Criminal Code*, *supra* note 9, s 719(3.1).

79 For an excellent review of these competing rationales, see Judge Gorman's reasons in *R v Payne*, 2023 NLPC 1323A00594 at paras 68–86.

80 See e.g. *R v Duncan*, 2016 ONCA 754; *R v Marshall*, 2021 ONCA 344; *R v Smith*, 2023 ONCA 500 [*Smith*]; *R v Avansi*, 2023 ONCA 547; *R v Biever*, 2023 ABCA 138; *R v Gordey*, 2020 ABQB 425; *R v Leblanc*, 2021 ABQB 230; *R v Shivak*, 2021 ABQB 72.

81 See also *R v Morgan*, 2020 ONCA 279 [*Morgan*]; *R v Caribou*, 2022 MBCA 95 [*Caribou*]; *R v St Constantine*, 2022 BCCA 6 [*St Constantine*]; *R v Mosquito*, 2023 SKCA 29 [*Mosquito*].

82 See e.g. *R v McDonald*, 2021 ABCA 262; *R v Persad*, 2020 ONSC 188.

83 For my view as to why this limitation is unconstitutional, see Colton Fehr, "Are Limits on Granting Credit for Time Served on Remand Constitutional?" (2023) 27 Can Crim L Rev 129 [Fehr, "Remand Credit"].

no doubt be favourable to any accused pleading that their time served on remand violates section 12 of the *Charter*.

B. CRUEL AND UNUSUAL PUNISHMENT

Section 12 of the *Charter* prohibits the state from imposing any "cruel and unusual treatment or punishment."[84] The punishment prong prohibits both particular methods of punishment (for example, lash, lobotomy, and so on) as well as accepted types of punishment that strike a grossly disproportionate balance between the moral blameworthiness of the offender and the penal purposes furthered by the punishment.[85] Numerous phrases have been used to describe the gross disproportionality threshold, including conduct that is "abhorrent or intolerable," "outrage[s] standards of decency," or "shock[s] the conscience."[86] Determining whether this standard is met is ultimately a normative inquiry requiring that "the views of Canadian society on the appropriate punishment … be assessed through the values and objectives that underlie our sentencing and *Charter* jurisprudence."[87]

While the Supreme Court's jurisprudence has primarily developed in the context of determining whether mandatory minimum sentences impose grossly disproportionate punishment, the method that the Supreme Court employed is informative for determining whether other state conduct runs afoul of section 12 of the *Charter*. The Supreme Court adopted a two-step analytical approach. Judges must first determine "what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*."[88] After determining the appropriate sentence for the offender, the sentencing judge then considers "whether the … [sentence imposed] is grossly disproportionate to the fit and proportionate sentence."[89] If so, the state's conduct violates the prohibition against cruel and unusual punishment. While mandatory minimum legislation requires a remedy under section 52 of the *Constitution Act, 1982*,[90] challenges to other state conduct require that an individual remedy be issued under section 24(1) of the *Charter*.

It is not difficult to envision instances of grossly disproportionate punishment being incurred by those who are sentenced to "time served" due to spending undue time on remand. As remand time and conditions vary in more remote areas, particularly egregious examples tend to occur in those contexts. Consider the circumstances in *R. v. Balfour and Young*.[91] Justice Martin of the Manitoba Court of Queen's Bench provides what he accurately calls a "disturbing chronicle of a dysfunctional bail system."[92] One of the accused was a 25-year-old single mother of four with no criminal record.[93] She was originally arrested for assault and released on an undertaking.[94] Upon committing a further assault a month later, she was

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84 *Supra* note 4.
85 *R v Bissonnette*, 2022 SCC 23 at paras 60, 66, citing *R v Smith*, [1987] 1 SCR 1045 at 1074; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 51.
86 See e.g. *R v Morrisey*, 2000 SCC 39 at para 26; *R v Lloyd*, 2016 SCC 13 at paras 24, 33; *R v Ferguson*, 2008 SCC 6 at para 14; *Wiles*, *supra* note 39 at para 4; *Smith*, *supra* note 80 at 1072.
87 See *R v Hills*, 2023 SCC 2 at para 110.
88 See *R v Nur*, 2015 SCC 15 at para 46.
89 *Ibid*.
90 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].
91 *Balfour*, *supra* note 3.
92 *Ibid* at para 1.
93 *Ibid* at para 26.
94 *Ibid* at para 27.

detained and applied for bail. For reasons primarily relating to inadequate resources and the challenges of implementing justice in Canada's north,[95] her bail hearing was repeatedly delayed over the course of nearly two months.[96] Moreover, after release and being rearrested for breaching a condition with respect to possessing alcohol that she claimed did not belong to her, she spent an additional five days on remand.[97] As Justice Martin observes, "from her arrest on November 1 until her release on December 21, she spent approximately 51 days in jail, and another five or so in May 2018."[98]

Granting credit at a 1.5 to 1 ratio per section 719(3.1) of the *Criminal Code* — a pittance given the circumstances under which remand time in the north is commonly served — this would equal 99 days in prison for a first-time offender who committed two basic assaults and a single breach of her conditions.[99] Importantly, the accused was also a 25-year-old Indigenous woman with a young family.[100] In my view, it would be considered harsh for her to be sentenced to even a day of prison in the usual course.[101] Multiplying that sentence by 99 leaves one to ask whether gross disproportionality is strong enough language to describe the time served by the accused. It is for this reason that the Crown stayed the charges against her. Its decision to wait until shortly before the accused's trial to do so was nevertheless egregious in the circumstances.[102] Even more concerning was the fact that criminal justice actors who deposed in the proceeding described the accused's circumstances as not unusual. This strongly suggests that many individuals are being subject to wildly disproportionate punishments when their time spent on remand is finally "deemed" punishment after a conviction.[103]

While I suspect few would take issue with the Crown's decision to stay proceedings in *Balfour*, it is important to note that the Crown's decision prevented any conviction from being entered. This in turn prevented any of the time served being "deemed" punishment for the purposes of section 12 of the *Charter*.[104] However, the same gross disproportionality standard applies when the state "treats" a person in a cruel and unusual manner. As the

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95 *Ibid* at para 64:

> Affidavit evidence makes it clear that there are many factors contributing to delayed hearings including transportation, Crown processes in providing case disclosure to counsel, appointment of counsel by Legal Aid, court policies, isolation of accused from home communities, and difficulties dealing with legal counsel or potential bail sureties because of distant remand locations. Notable as well is that a Crown attorney's stance on bail or disposition of a case was often not communicated to the next Crown attorney handling the case, and in some instances Crown counsel did not consider themselves bound by a previous Crown attorney's position on bail.

96 *Ibid* at paras 28–45.

97 *Ibid* at para 46.

98 *Ibid* at para 48.

99 While the second assault also constituted a breach of her conditions, the breach charge would be automatically stayed if the accused were found guilty of the second assault: *Kienapple v R*, 1974 CanLII 14 (SCC).

100 *Balfour*, *supra* note 3 at para 26.

101 While it is possible that the law should develop to allow for the second charge or breach of conditions to render a portion of the remand time justifiable for reasons relating to bail, this approach is inconsistent with the Supreme Court's decision in *Wust* SCC, *supra* note 5. Even if some bail time is properly subtracted pursuant to a constitutional analysis — an approach that would involve apportioning some time for the index offence and any breaches — the judge will still have the benefit of hindsight to approximate how long an accused, in a reasonably well-functioning bail system, ought to have been detained. In cases like *Balfour*, *supra* note 3, it seems that even apportioning some time toward the rationale underpinning bail would still leave any time "deemed" punishment upon conviction in violation of section 12 of the *Charter*.

102 *Balfour*, *supra* note 3 at para 47.

103 *Ibid* at paras 64–69.

104 Part II, above.

Supreme Court explains, the term "treatment" encompasses any "process or manner of behaving towards or dealing with a person or thing."[105] The Supreme Court later clarified that it required "some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute 'treatment' under s. 12."[106] Presentence detention clearly meets this definition. This in turn brings the remand time served — whether deemed punishment or not — properly within the ambit of section 12. If the Crown secured convictions in *Balfour*, however, the judge would be able to deem the time spent on remand "punishment" and the constitutional analysis would appropriately be considered under that prong of section 12.

A lack of diligence with respect to conducting a bail hearing can also result in excessive time being served in non-northern jurisdictions that may qualify as grossly disproportionate treatment or punishment. An illustrative case is the Ontario Court of Appeal's decision in *R. v. Zarinchang*.[107] The accused was charged in relation to a domestic conflict and was taken into custody. Due to a lack of institutional resources and the inability of sureties and defence counsel to hold themselves in perpetual availability, the accused spent 24 days on remand.[108] While a 24 day delay caused mostly by resource shortages violated section 11(e) of the *Charter*, the trial judge's decision to impose a stay in the circumstances was overturned.[109] In so doing, the appellate court was more particular with respect to the nature of the conduct than the trial judge, describing it as "three counts of assault, one count of assault with a weapon (a glass cup), three counts of threatening death and two counts of mischief."[110] In both decisions, however, no mention is made of the accused's record or any other reason the Crown wished to detain him. Instead, the stay application was considered based on the nature of the delay in conducting a hearing and the fact that much of the delay was attributable to the underfunding of the criminal justice system.

In one sense, it is understandable that more information relating to the offence was not considered in *Zarinchang*. The accused's argument pertained only to the right for a bail hearing to be conducted. But a stay of proceedings does not consider only the impact of state conduct on the accused. As I discuss in more detail below, it is also necessary to consider the seriousness of the charges given society's interest in prosecuting crime. Indeed, the Ontario Court of Appeal overturned the trial judge's decision to stay proceedings due to its failure to balance the harm done by systemic delay against the nature of the accused's charges.[111] Presumably, if those charges were not serious — a conclusion which the record implies was not true[112] — a stay of proceedings would have been affirmed on appeal. The need to address the nature of the charges nevertheless strongly implies that any balancing ought to consider whether the time spent on remand is disproportionate to the likely sentence that would have been imposed if the accused were found guilty. In my view, such an analysis would be most

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105 See *Chiarelli v Canada (Minister of Employment & Immigration)*, [1992] 1 SCR 711 at 735.
106 See *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 612.
107 2010 ONCA 286 [*Zarinchang*].
108 *Ibid* at paras 4–20.
109 *Ibid* at paras 1, 64–66.
110 *Ibid* at para 4, n 1. The lower court judge described the conduct as "[a]ssault (x 4), Threatening (x 3), Mischief Under $5000 and Mischief Over $5000": *R v Zarinchang*, 2007 ONCJ 470 at para 1.
111 *Zarinchang*, *supra* note 107 at paras 62–64.
112 The fact that the charges were domestic in nature and involved violence suggests they were serious.

fruitfully conducted at the rights stage of the analysis — most obviously under section 12 of the *Charter*. As I explain below, such an analysis can aid in developing a more determinate framework for remedying undue time spent on remand.

IV. REMEDYING THE INFRINGEMENT

Any consideration of how to remedy undue time spent on remand raises a variety of questions relating to the particular circumstances of the accused. If the remand time could be deemed grossly disproportionate punishment upon conviction or constitutes grossly disproportionate treatment, I maintain that a stay of proceedings is the only reasonable remedy. If an accused is acquitted, however, other remedial challenges arise. There are clear difficulties with giving these offenders future "credit." Such a remedy is meaningless to an offender who never reoffends. Moreover, such a policy unreasonably grants these individuals a licence to commit crime. Monetary damages may nevertheless provide an appropriate middle ground remedy that is capable of incentivizing the state to improve its bail practices. So too would preserving a limited ability to stay proceedings where systemic delay becomes particularly egregious.

A. STAY OF PROCEEDINGS

Section 24(1) of the *Charter* provides that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[113] While the residual nature of this provision allows for many remedies to be granted, a stay of proceedings is the most valuable to an accused as it permanently halts their criminal charges.[114] A stay of proceedings is nevertheless also the "most drastic remedy" as "the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits."[115] As a result, a stay of proceedings only is awarded in the "clearest of cases."[116]

Any application for a stay relating to undue remand time invariably implicates the residual ground for staying proceedings: "[U]ndermining the integrity of the judicial process."[117] To identify such cases, the Supreme Court requires that the accused meet two conditions. First, they must prove that the state conduct caused prejudice to the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome."[118] Second, the accused must demonstrate an absence of an alternative remedy capable of redressing the state conduct's impact on the accused.[119] In cases where uncertainty persists, courts must in addition conduct a more general balancing of "the interests in favour of

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113 *Supra* note 4.

114 See also *Canada (Minister of Citizenship and Immigration) v Tobiass*, 1997 CanLII 322 at para 86 (SCC) (calling a stay the "ultimate remedy").

115 *R v Babos*, 2014 SCC 16 at para 30 [*Babos*].

116 *Ibid* at para 31, citing *R v O'Connor*, 1995 CanLII 51 at para 68 (SCC) [*O'Connor*].

117 *Babos*, *ibid*, citing *O'Connor*, *ibid* at para 73. It is also possible to stay proceedings if state conduct undermines trial fairness. It is difficult to foresee a scenario wherein remand time would render the trial unfair.

118 *Babos*, *ibid* at para 32, citing *R v Regan*, 2002 SCC 12 at para 54.

119 *Babos*, *ibid*.

granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against 'the interest that society has in having a final decision on the merits.'"[120]

In my view, any accused who endures what amounts to cruel and unusual treatment or punishment because of the time they spent on remand should readily satisfy these requirements.[121] The broader idea underpinning the jurisprudence is that a stay of proceedings is warranted where state conduct shocks the conscience of the community.[122] Allowing an accused to sit in prison for a period that simply covers any potential forward-looking sentence is unlikely to meet this standard. While highly problematic, there is inadequate prejudice moving forward as the accused may apply for release on bail as permitted under sections 520, 522, and 525 of the *Criminal Code*. As detailed earlier, however, the rights flowing from these provisions are not always accommodated. It is also possible for the 90-day period to be reset if a section 520 and 522 application fails. In these circumstances, it is not difficult to imagine how time served on remand could become considerably greater than anything reasonably imposed upon conviction. Moreover, a scenario could readily arise wherein a failed attempt to prove a grossly disproportionate effect at the presentencing stage nevertheless warrants a stay at sentencing. Perhaps the state was only able to prove a lesser included offence or was incapable of proving aggravating factors that would render the time served on remand within a reasonable range of sentences. If the time served that is now "deemed" punishment would be grossly disproportionate, it would violate section 12 of the *Charter* in the same manner.

I cannot fathom how any reasonable community member would be anything but aghast if an accused suffers grossly disproportionate treatment or punishment due to the state's failure to provide a bail hearing or because they exercised their right to a trial and were thereby required to serve an exorbitant amount of remand time. A stay of proceedings no doubt deprives society of a final verdict which is of great symbolic importance for society and any victims. However, the primary reason a stay of proceedings is so objectionable is because the typical accused who is granted this remedy avoids incurring consequences that ought to follow from their criminal conduct. Importantly, however, this claim is not sustainable in the context of a breach of section 12 of the *Charter*. Any claim that justice is not achieved is incredulous as the consequence of the offending conduct has not only been incurred but grossly overpaid by the accused. This prejudice invariably impacts the repute of the criminal justice system moving forward. In my view, the only potential remedy that can distance the judiciary from such conduct is a stay of proceedings.

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120 *Ibid*, citing *O'Connor*, *supra* note 116 at para 57.

121 For one contrary view, see *R v Prystay*, 2019 ABQB 8 at paras 158–62. In granting a large sentence reduction due to undue length of treatment in solitary confinement, the judge viewed this remedy as an adequate alternative given that the offender was already receiving a lengthy sentence. The fact that the reasoning was short, and the fact that the judge said the sentence would have been reduced to time served had the judge not claimed that serving a further portion of the sentence was in the "offender's interest" (*ibid* at para 163), suggests that the stay of proceedings remedy was actually appropriate. It is also of note that a more appropriate means for challenging solitary confinement cases is to attack the legislation itself: see e.g. *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228; *Canadian Civil Liberties Assn v Canada (Attorney General)*, 2019 ONCA 243. Notably, however, Parliament passed a slightly more protective — but still constitutionally vulnerable — regime in response to these cases (*An Act to Amend the Corrections and Conditional Release Act and Another Act*, SC 2019, c 27).

122 *Babos*, *supra* note 115 at paras 41, 72.

Procedural difficulties might nevertheless arise in response to a court ordering a stay of proceedings to remedy a violation of section 12 of the *Charter*. Such a remedy in response to cruel and unusual treatment provides no barrier as the accused has not yet been found guilty. However, staying proceedings after an accused has pleaded guilty raises other complications. A stay of proceedings is a powerful remedy because it prevents the state from holding the accused criminally responsible for their alleged conduct. Registering a finding of guilt therefore undermines the remedy's purpose. Fortunately, I see no reason why a court could not allow the accused to expunge the guilty plea pursuant to section 606(1.1) of the *Criminal Code*. While a nuanced legal test must be met when the accused is uninformed of a legal consequence,[123] the language of section 606(1.1) — a judge "may accept a plea of guilty" — is itself flexible enough to allow judges to expunge guilty pleas in the unique circumstance under consideration.[124] If a violation of section 12 is only apparent after the accused is found guilty, permitting the court to expunge the accused's guilty plea would be necessary to ensure that the purpose of the stay of proceedings remedy is met.

The approach of gauging whether a stay of proceedings is appropriate by asking if the accused incurred grossly disproportionate treatment or punishment is prudent because it provides a more determinate standard for deciding whether a stay is appropriate. As judges deal with the law of sentencing regularly, they will be readily able to determine what constitutes a proportionate sentence for the accused's conduct and equally capable of determining whether the remand time served by the accused meets the constitutionally prohibited gross disproportionality standard. This in turn obviates the need to engage in the vague weighing exercise prescribed by the Supreme Court when considering whether a stay of proceedings ought to be granted. While that test is necessarily pitched at a general level to address the myriad circumstances that could warrant a stay of proceedings, any approach that renders judicial decision-making more determinate in this complex area of law ought to be endorsed.

The Ontario Court of Appeal is nevertheless correct that certain systemic delays also ought to require a stay of proceedings. Its failure to explain why the situation in *Zarinchang* did not warrant a stay nevertheless illustrates the difficulty of focusing on the accessibility of bail hearings when determining whether a stay of proceedings is appropriate. Several questions must be considered to answer that question. What constitutes systemic delay? How long must the systemic delay be ongoing? How many accused must be subject to inordinate delay? Does it matter whether the conditions in the remand centre are particularly poor? How should the seriousness of the charges against the accused factor into this analysis? Balancing the shifting answers to these questions on a case-by-case basis is not outside the scope of judicial competency. However, I suggest that these questions are far more difficult to answer than determining whether the remand time served would constitute grossly disproportionate treatment or punishment. Where possible, then, an analytical approach that begins under section 12 of the *Charter* is prudent as it generally will determine whether a stay is

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123 *R v Wong*, 2018 SCC 25 at para 6 [*Wong*].

124 *Criminal Code*, *supra* note 9. The Supreme Court has also not provided a strict definition of what constitutes a legally relevant consequence sufficient to engage whether a collateral consequence — combined with a subjective intent to proceed differently — would permit the accused to expunge the guilty plea: *Wong*, *ibid* at para 9.

appropriate or whether the accused ought to seek some alternative remedy for any other breach under section 11(e) caused by their undue time spent on remand.

This approach is also consistent with the language of sections 11(e) and 12 of the *Charter*. Establishing a breach of the former provision is much less difficult given its lower threshold only requiring proof that bail is denied in an unreasonable manner. But nothing in the interpretation of the term "punishment" I advocate for or the Supreme Court's understanding of the word "treatment" prevents section 12 from also being applicable to presentencing deprivations of liberty. While this approach may strike some as redundant, this is not the case if establishing one breach over the other leads to a more determinate remedial analysis. Indeed, there is a significant amount of conduct that falls between an "unreasonable denial of bail" and a deprivation of liberty that is "grossly disproportionate" relative to its purpose. If I am correct that the appropriate remedy should always be a stay of proceedings in the latter cases, then I maintain that there is good reason to allow defendants to invoke both rights provisions.

B. ALTERNATIVE REMEDIES

Section 11(e) of the *Charter* provides accused with a right not to be denied reasonable bail without just cause.[125] Timely bail hearings are a core component of the right to reasonable bail and are intricately connected to the "golden thread" of the criminal law: the presumption of innocence.[126] While the criminal justice system requires some time to decide bail applications, any period extending beyond the three day non-consent remand period is highly likely to infringe the accused's right to reasonable bail.[127] Such breaches will nevertheless often not be raised at the pretrial stage. The legal costs of bringing an application are significant, and the rewards are likely low given the high bar for being granted a significant remedy like a stay of proceedings.[128] Instead, accused will typically receive a limited monetary award and, in rare cases, costs (usually a portion thereof) for bringing a *Charter* damages application.[129] As these limited remedies deter litigation at the presentencing stage, unreasonable pretrial detentions are often "deemed" punishment for the offending conduct after the accused is found or pleads guilty.[130] This is less problematic where the punishment

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125 See e.g. *R v Antic*, 2017 SCC 27 at paras 32–42.

126 *R v Oakes*, 1986 CanLII 46 at para 30 (SCC), citing *Woolmington v Director of Public Prosecutions*, [1935] AC 462 at 481–82 (HL (Eng)). See also *R v Hall*, 2002 SCC 64 at para 47 (dissenting reasons of Justice Iacobucci). Justice Iacobucci's reasoning was affirmed in *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21 at para 51.

127 See e.g. *Zarinchang*, *supra* note 107 at para 39 (finding a delay of 24 days before a bail hearing occurred breached the right to reasonable bail); *R v B(S)*, 2014 ONCA 527 (finding a delay of 12 days before a bail hearing violated section 11(e)). See also *R v Dawson*, 2016 ONSC 3461; *R v James and Dawson*, 2017 ONSC 473; *R v EW*, 2002 NFCA 49; Penney, Rondinelli & Stribopoulos, *supra* note 53 at 378. For general overviews of how bail practices in Ontario and Manitoba systematically fail to meet these standards, see e.g. *Simonelli*, *supra* note 76; *Balfour*, *supra* note 3.

128 See e.g. *Zarinchang*, *supra* note 107 at paras 1, 64–66 (describing an egregious instance of delay lasting 24 days that did not result in a stay of proceedings).

129 *R v 974649 Ontario Inc*, 2001 SCC 81 (costs in a criminal case are only appropriate where the Crown acted in a way that constitutes "a marked and unacceptable departure from the reasonable standards expected of the prosecution" at para 87). See e.g. *Zarinchang*, *supra* note 107 at paras 25, 71 (Ontario Court of Appeal ordering a limited $3600 cost order against the Crown despite incurred costs originally being calculated at $11,950 by the trial judge).

130 In this circumstance, it is notable that judges caution against the judicial tendency to inflate sentences to ensure all time spent on remand is accounted for at sentencing. Such a practice has a variety of unjust implications if the offender is subsequently convicted of any further criminal offences. See e.g. *R v Hatt*, 2017 NSCA 36 at para 24; *R v Laforge*, 2020 BCSC 1269 at paras 80–81.

is accounted for by granting credit for time served on remand. However, in cases where the accused is acquitted or served excessive (though not grossly disproportionate) time on remand, an accused ought to be able to receive some remedy.

While a monetary remedy strikes me as reasonable, an accused may also wish to seek other remedies given the broad discretion provided to courts under section 24(1) of the *Charter*. One potential remedy that ought not be available is to credit the accused with any time served on remand that was not necessary to achieve a proportionate sentence. Such a scenario would arise either because the accused was found not guilty,[131] or a proportionate sentence would have been something lower (but not so much lower as to run afoul of section 12 of the *Charter*) than the time served on remand. To be sure, section 719(3) of the *Criminal Code* prohibits granting such credit as it states that "[i]n determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence."[132] Reference to "the" offence requires that time credited toward an offence must have been served as a result of that offence.[133] An accused might nevertheless attempt to circumvent this restriction with a section 24(1) remedy.[134]

The policy reasons underlying the prohibition in section 719(3) of the *Criminal Code* should result in courts rejecting such a remedial approach. Writing in *R. v. Wilson*,[135] Justice Rosenberg explained that allowing accused to "bank" time served on remand and use it toward another offence would logically require that "an accused who years earlier spent time in custody for a prior offence of which he was acquitted … [to] also be able to ask a trial judge to take that prior time into account."[136] For Justice Rosenberg, there is "no basis in principle for allowing credit in this case, and not giving an accused credit for time spent in custody on a prior offence that was not used up because the accused was acquitted of that prior offence at trial."[137] Such a rationale would also allow the accused who, upon receiving a "time served" sentence on appeal, to ask the appellate court to indicate how much time should be allocated toward the sentence with the remainder being allocated toward some future offence.[138] The idea of allowing accused to "bank" time is nevertheless contrary to the rule of law, as it effectively provides accused with a licence to commit crime. Financial remedies are far less drastic and more proportionate to the harm actually incurred by those who serve excess time on remand. It is likely for these reasons that Justice Rosenberg concluded that "when it comes time to sentence an offender the court can only take into account factors that relate to the particular offence under consideration."[139]

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131 See e.g. *R v Wilson*, 2008 ONCA 510 [*Wilson*] (time served on remand sought to be credited toward separate offence as original offence resulting in remand time was stayed for unreasonable delay).

132 *Supra* note 9.

133 See e.g. *Wilson*, *supra* note 131 at para 24 (Justice Doherty in dissent but not on this point).

134 Such an argument would be similar to the one used to endorse "*Duncan*" credits as a section 24(1) *Charter* remedy currently being employed in courts across the country despite the plain wording of section 719(3.1) limiting pretrial credit to a 1.5 to 1 ratio: see e.g. *Morgan*, *supra* note 81; *Caribou*, *supra* note 81; *St Constantine*, *supra* note 81; *Mosquito*, *supra* note 81. I contend that the better approach is to challenge the legislation itself, but it is not clear that I am correct on that point: see Fehr, "Remand Credit," *supra* note 83.

135 *Wilson*, *supra* note 131.

136 *Ibid* at para 43.

137 *Ibid*.

138 *Ibid*.

139 *Ibid* at para 45.

A clear problem nevertheless arises with enforcing monetary remedies. The vast majority of criminal accused are processed in the provincial courts. However, monetary damages can only be sought in the superior courts which is unlikely to occur given the inconvenience and cost to an average accused inherent in making such an application.[140] While possible to provide provincial courts with jurisdiction, Kent Roach suggests that it is unlikely that they would want such authority given their already overburdened dockets.[141] While a forceful critique, I more optimistically suggest elsewhere in the context of financial remedies for unreasonable trial delay that "the somewhat generic nature of the infringement on liberty and security interests may eventually result in a more predictable remedy."[142] The more predictable the remedy, the more willing provincial court judges may be to adopt increased responsibility.[143] Alternatively, developing agencies for determining *Charter* damage claims,[144] or as Roach suggests, relying on small claims courts to award damages for proven *Charter* violations,[145] might provide a more workable structure that would incentivize the state to take delay more seriously. While any reliance on financial remedies requires addressing this procedural issue, remedying undue time spent on remand with financial payouts strikes me as a balanced remedial approach that could also deter — alongside the possibility of a stay of proceedings — the current complacency demonstrated by the Crown toward bail hearings.

V. CONCLUSION

The fact that many individuals serve an unreasonable amount of time on remand should not be surprising given the troubling state of Canada's criminal justice system. As the Supreme Court observed nearly a decade ago in *R. v. Jordan*,[146] the ability of the state to provide a trial within a reasonable time is a good "indicator of the health and proper functioning of the [criminal justice] system itself."[147] Rampant delays have nevertheless "fostered a culture of complacency within the system towards delay."[148] Chief Justice Wagner subsequently observed in *Myers* that significant delays in routine bail hearings "are a manifestation of the culture of complacency denounced by this Court in *Jordan*, and must be addressed."[149] To achieve this end, it is necessary to develop a more determinate and forceful remedial regime for determining when a stay of proceedings provides an appropriate response to time served on remand. Cases where remand time gives rise to grossly disproportionate treatment or punishment provide a clear (though not an exclusive) standard for staying proceedings. Judicial enforcement of this standard, alongside other less drastic remedies like financial payouts, should incentivize the state to address the unjust treatment of those presumed innocent detainees who are unable to obtain bail.

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140 See also Kent Roach, "A Promising Late Spring for Charter Damages: *Ward v. Vancouver*" (2011) 29:2 NJCL 135 at 142 [Roach, "Damages"].

141 *Ibid*.

142 See Colton Fehr, "Remedying Unreasonable Delay" (2023) 60:3 Alta L Rev 739 at 751 [footnotes omitted].

143 *Ibid*.

144 See Keara Lundrigan, "*R v Jordan*: A Ticking Timebomb" (2018) 41:4 Man LJ 113 at 131–32.

145 See Roach, "Damages," *supra* note 140 at 142. See also *ibid* at 133–34.

146 2016 SCC 27.

147 *Ibid* at para 3.

148 *Ibid* at para 4.

149 See *Myers*, *supra* note 11 at para 38.