AWARDING CONDUCT CREDITS UNDER P.C. §§ 4019 and 2933 AFTER OCTOBER 1, 2011

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A. Introduction

The rule is straightforward: "The sentencing court is responsible for calculating the number of days the defendant has been in custody before sentencing and for reflecting the total credits allowed on the abstract of judgment." (*People v. Black* (2009) 176 Cal.App.4th 145, 154; also *People v. Buckhalter* (2001) 26 Cal.4th 20, 30-31.) It is the obligation of the court to determine at the time of sentencing the actual time and conduct credits to be award against the sentence. (Cal. Rules of Court, Rule 4.310.) The statement of credits should include the total credits given, broken down between actual time and any good time/work time conduct credits. The court's task, however, is anything but straightforward. It has been complicated by the fact that there have been four different versions of the statutes governing the award of conduct credits in the last 18 months. The purpose of this memorandum is to offer some guidance to trial judges as they wend their way through the maze of changing rules and credit formulas.

Prior to January 25, 2010, Penal Code, section 4019 gave most defendants two days of conduct credit for every six days of actual custody time served, or one-third off their sentence. This credit was awarded to defendants committed to county jail for a misdemeanor or as a condition of probation in a felony case, and as a matter of pre-sentence credit to defendants sentenced to state prison.

Effective January 25, 2010, Penal Code, section 4019 was amended to give two days of conduct credit for every four days of actual custody time to most persons sentenced either to state prison or county jail, or approximately one-half off their sentence; in other words, defendants received conduct credit equal to actual time credit (unless the actual time was an odd number). Excluded from the enhanced credit provisions were defendants having a prior conviction for a serious or violent felony, defendants who were being sentenced on a serious felony, and any person required to register as a sex offender under section 290.

Effective September 28, 2010, section 4019 was returned to its wording prior to January 25, 2010: two days of conduct credit for every six days of actual custody time served. The new provisions eliminated the enhanced credits for persons sentenced to county jail. Section 2933, a statute applying to credits in state prison, was amended to grant one-half conduct credits for local time to most persons sentenced to state prison; in other words,

the state prison inmate would receive one day of pre-sentence conduct credit for each day of local custody time prior to being delivered to state prison. Excluded from the enhanced credit provisions were defendants having a prior conviction for a serious or violent felony, defendants who were being sentenced on a serious felony, and any person required to register as a sex offender under section 290. The statutory change applied only to crimes committed on or after September 28, 2010.

Effective October 1, 2011, as a result of the enactment of the 2011 Realignment Legislation, section 4019 has been amended to now provide that *all* inmates confined in a county jail are to receive two days of conduct credit for every four days served. The provisions apply to persons serving a misdemeanor sentence, a term in jail imposed as a condition of probation in a felony case, pre-sentence credit for some persons sentenced to state prison, and persons serving jail custody for violation of state parole or community supervised parole. The new provisions likely apply to persons denied felony probation and sentenced to a county jail (see discussion, *ante*.). The Legislature eliminated the provisions in section 4019 that excluded the enhanced credit award for persons convicted of prior serious or violent felonies, persons committed for serious felonies, and persons required to register under section 290. The September 28, 2010, version of section 2933 governing credit for persons sent to sate prison, however, remains unchanged. The amendments made by the realignment legislation are to be applied prospectively only to crimes committed on or after October 1, 2011.

B. The Applicable Rules

The question of what rule will apply to any given sentence will depend on the relationship between four potential variables: 1) when the crime was committed, 2) when the sentencing hearing is held, 3) whether the defendant is disqualified from the benefits of the new statutes, and 4) whether the defendant receives a state prison or county jail sentence. One or a combination of these variables will dictate the applicable law and the correct formula to use in the calculation of credits. There are six time periods and sentencing circumstances relevant to this determination.

1. *Crimes or violations of probation committed, sentenced, and final prior to January 25, 2010.*

   The law applicable to cases fully final prior to January 25, 2010, likely will be governed by *In re Estrada* (1965) 63 Cal.2d 740: "The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies." (*Id.* at p. 744.) The reverse corollary also is true: if the amendatory statute becomes effective after the case if final, the old statute applies.

   A more difficult issue is presented by defendants with sentences that became final prior to January 25, 2010, but who are on probation and still serving a term in custody after January 25, 2010. It is well understood that the court retains the

ability to modify conditions of probation during the entire probationary period. (Pen. Code, § 1203.3, subd. (a).) It could be argued that if the court has the discretion to modify conditions of probation, the judgment is not "final" for the purposes of affording a sentenced defendant the benefits of the amendment to section 4019, as long as the defendant still is on probation.

In re Kemp (2011) 192 Cal.App.4th 252, holds, at least as to persons sentenced to state prison, the law effective January 25, 2010, and September 28, 2010, to the extent it increases a defendant's custody credit, will apply regardless of when the judgment becomes final. To deny the enhanced credit would deny such defendants equal protection of the law. Nothing in the opinion suggests its logic would be inapplicable to persons serving county jail sentences. Thus far *Kemp* is the only case to apply the legislative changes to sections 4019 and 2933 fully retroactively. *Kemp has been granted review by the Supreme Court.*

The law applicable to cases falling in this first category is a little unclear. If the reasoning of *Estrada* prevails, the entitlement to credit will be governed by the law as it was prior to September 25, 2010. If *Kemp* is upheld, defendants will receive credits in accordance with sections 4019 and 2933, as they existed after January 25, 2010, and September 28, 2010, regardless of when the case became final and whether they were sentenced to state prison or county jail. The credit formulas are discussed below.

2. *Crimes or violations of probation committed and sentenced prior to January 25, 2010, but not yet final as of January 25, 2010.*

Most of the published opinions addressing the changes to section 4019 fall in this second category. In each case, the crime and sentencing took place before the effective date of the amendment to section 4019, but the case was not final as of that date. The courts are split on the question of which law applies. The following cases hold the new statute "retroactively" applies to all cases not final as of January 25, 2010: *People v. Brown* (2010) 182 Cal.App.4th 1354 [3d Dist.] [granted review], *People v. House* (2010) 183 Cal.App.4th 1049 [2nd Dist, Div. 1][granted review and held], *People v. Landon* (2010) 183 Cal.App.4th 1096 [1st Dist., Div. 1][granted review and held], *People v. Delgado* (2010) 184 Cal.App.4th 271[2nd Dist., Div. 6][rehearing granted], *People v. Norton* (2010) 184 Cal.App.4th 408[1st Dist., Div. 3][depublished], *People v. Pelayo* (2010) 184 Cal.App.4th 481 [1st Dist., Div. 5][granted review and held], *People v. Keating* (2010) 185 Cal.App.4th 364[2nd Dist., Div. 2][review granted], and *People v. Bacon* (2010) 186 Cal.App.4th 333 [2nd Dist., Div. 8][review granted]; *People v. Jones* (2010) 188 Cal.App.4th 165, 185 [3rd Dist.][granted review and depublished].

The following cases hold the new statute operates only prospectively, at least to the extent that it does not apply to cases sentenced prior to January 25, 2010: *People v. Rodriguez* (2010) 182 Cal.App.4th 535 [5th Dist.][granted review].

People v. Otubuah (2010) 184 Cal.App.4th 422 [4th Dist., Div. 2][depublished], *People v. Hopkins* (2010) 184 Cal.App.4th 615 [6th Dist.][granted review and held], and *People v. Eusebio* (2010) 185 Cal.App.4th 990 [2nd Dist, Div. 4][granted review].

The Supreme Court clearly has signaled its intent to occupy the field. Until the court issues its opinion, however, trial courts are free to select whichever law is the more persuasive. Those opinions denying any retroactive application generally follow the reasoning in *Rodriguez*. *Rodriguez* determined the Legislature did not intend the amendment to apply to a defendant sentenced prior to its effective date, who served all of the relevant custody time prior to its effective date, but whose case was not final as of January 25, 2010. *Rodriguez* found the purpose of awarding conduct credits is to encourage good behavior while in custody. Absent a contrary intent expressed by the Legislature, awarding additional conduct credit for time served in the past would not serve this purpose. The court also relied on *In re Stinnette* (1979) 94 Cal.App.3d 800, 804-805, which determined a prospective application of an increase in custody credits did not violate a defendant's right to equal protection of the law. In the end, *Rodriguez* held the defendant did not overcome the presumption in Penal Code, section 3, that no part of the Penal Code is retroactive "unless expressly so declared."

Those courts applying the statute to cases not final as of January 25, 2010, hold the Legislature intended full retroactive application of the law. These decisions generally are based on the California Supreme Court decision in *In re Estrada* (1965) 63 Cal.2d 740. As observed in *Estrada*: "The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies." (*Id.* at p. 744.) "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Id.* at p. 745.)

Several cases favoring retroactive application also observe that in *People v. Hunter* (1977) 68 Cal.App.3d 389, the court of appeal applied the reasoning of *Estrada* to a credit issue very similar to the one posed by the amendment to section 4019. Prior to 1975, defendants were not entitled to "back time" credit against sentences imposed as a condition of probation. In 1976, Penal Code section, 2900.5 was amended to allow such a credit. The court in *Hunter*

concluded the amendment applied to custody time imposed as a condition of probation for cases not yet final as of the effective date of the amendment. Similar reasoning was used to determine such conduct credit was earned on sentences imposed prior to the imposition of a state prison sentence.

Several cases also rely on *People v. Doganiere* (1978) 86 Cal.App.3d 237, and distinguish *Stinnette*. *Doganiere* applied *Estrada* to an amendment involving *conduct* credits. In *Doganiere* the People argued that *Estrada* did not apply because an amendment extending the opportunity to earn conduct credits is designed to control future behavior. (*Id.* at p. 239.) The argument was rejected. "Under *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe." (*Id.* at p. 240.) Those cases favoring only a prospective application of the changes to section 4019 argue that the awarding of conduct credit was not a legislative determination that sentences were too severe, rather, it was a legislative determination that motivating and incentivizing good behavior would help to maintain discipline and minimize threats to prison and jail security. They point to *In re Stinnette* (1979) 94 Cal.App.3d 800, which concluded there should be no retroactive application of an amendment to section 2931 which allowed state prison inmates to earn conduct credits. *Stinnette* restricted application of the amendment to time served after the effective date. However, the *Stinnette* court did not address the question whether it must be presumed the Legislature intended retroactive application. The Determinate Sentencing Law expressly provided for prospective application. The issue in *Stinnette* was whether this prospective application violated the defendant's equal protection rights. The court concluded it did not, because there was a rational basis for treating those who had already begun serving their sentences differently from those who began serving their sentences after the effective date. (*Id.* at pp. 805-806.)

Finally, several of the cases favoring retroactive application find authoritative a number of other portions of SB 18, the bill making the changes to section 4019, in finding the Legislature, in fact, intended a retroactive application of the new credit calculations.

For the purposes of determining the retroactive application of a statute that mitigates the consequences of a crime, a case is not final until the expiration of the time for petitioning for a writ of certiorari in the United State Supreme Court. " 'The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies.' (*In re Estrada* (1965) 63 Cal.2d 740, 744 [48 Cal.Rptr. 172, 408 P.2d 948].) 'In *Pedro T.* we cited with approval a case holding that, for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1046 [36 Cal.Rptr.2d 74, 884 P.2d 1022],

citing *In re Pine* (1977) 66 Cal.App.3d 593, 594 [136 Cal.Rptr. 718]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 [12 L.Ed.2d 822, 84 S.Ct. 1814] ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)' (*People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5 [50 Cal.Rptr.2d 88, 910 P.2d 1380].)" (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306.) A petition for writ of certiorari is considered timely filed if filed with the court within 90 days after entry of judgment of the state court of last resort. (Rules of the U.S. Supreme Court, Rule 13.1.)

Depending on the Supreme Court's decision regarding retroactivity, defendants in this second category of cases either will receive credits under sections 4019 or 2933 as they existed prior to January 25, 2010, or will receive the enhanced credits under the statute effective January 25, 2010, whether the sentence is to prison or county jail. The credit formulas are discussed below.

3. *Crimes and violations of probation committed prior to January 25, 2010, but sentenced after that date.*

Most of the cases addressing the issue of retroactivity concerned defendants who were sentenced prior to January 25, 2010. People v. *Zarate* (2011) 192 Cal.App.4th 939, however, addresses the situation where the defendant was sentenced after the effective date, but who earned custody credits prior to the change. *Zarate* determined it was not a retroactive application of the law for the sentencing court to award credits according to the law *at the time of sentencing*. Stated differently, it is inappropriate to calculate credits at the time of sentencing based on a form of the statute that no longer exists. Accordingly, as to this group of cases, sentencing courts should apply the new credit formula to all defendants sentenced on or after January 25, 2010, even though the crime was committed and the custody time was earned prior to that date.

For the same reasons the law presumably will apply also to any defendant sentenced on a violation of probation after January 25, 2010, whether the defendant is sentenced to county jail or state prison. Any conduct credits applicable to the new commitment will be calculated according to the formula effective January 25, 2010, regardless of when the custody was served.

The statute also will apply to a person who commits a crime prior to January 25, 2010, and up to September 28, 2010, but who is sentenced after September 28, 2010. For reasons discussed below, the changes made effective September 28, 2010, cannot apply to any crime committed before that date. The law in effect as of the date these defendants are sentenced is the law enacted January 25, 2010.

If an appellate court remands a case for reconsideration of a limited issue, such as the determination of the restitution fine, the defendant is not entitled to a

reconsideration of his conduct credits. (*People v. Nychay* (2011) 193 Cal.App.4th 771. In *Nychay* the defendant was originally sentenced prior to January 25, 2010, but the remand for reconsideration of the restitution fine occurred after that date.

Defendants sentenced in this third category will receive credits under the credit formula effective January 25, 2010, whether the commitment is to state prison or county jail, and even if the sentencing hearing is after September 28, 2010. The credit formulas are discussed below.

4. *Crimes and violations of probation committed between January 25, 2010, and September 28, 2010.*

There can be no question that for crimes committed between January 25, 2010, and September 28, 2010, the controlling law is the formula put into play on January 25, 2010. This law will apply even though the sentencing hearing occurs after September 28, 2010. There are two reasons for this. First, the legislation effective September 28, 2011, expressly provides that it only applies to crimes committed on or after that date. (Pen. Code, § 4019, subd. (g).) Second, to *reduce* credits is to *increase* the penal consequences for the commission of a crime. Application of the changes to crimes committed before the effective date would constitute an ex post facto law.

Custody credit for violations of probation occurring during this time period likely will be governed by the law effective January 25, 2010, regardless of when the underlying crime was committed. The January statute will be the law applicable to all violation hearings held after January 25, 2010, and, as noted above, the statute effective September 28, 2011, is applicable only to *crimes* committed after that date.

The ex post facto problem was discussed by our Supreme Court in *In re Ramirez* (1985) 39 Cal.3d 931. There the defendant challenged a 1982 change of the law that increased the amount of conduct credits that could be taken away from a person in state prison because of misbehavior occurring after the effective date of the change. In rejecting defendant's ex post facto challenge, the court distinguished the United States Supreme Court decision in *Weaver v. Graham* (1981) 450 U.S. 24. In *Weaver* the court reviewed a Florida statute that reduced the ability of a defendant to earn conduct credits while in prison, as applied to a person who committed a crime before the effective date of the change. *Weaver* observed: "[O]ur decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." (*Id.* at p. 29; footnotes omitted.)

In *Weaver* the court found the reduction of the ability of a defendant to earn conduct credits constituted a "disadvantage" for the purpose of ex post facto considerations: "Under this inquiry, we conclude § 944.275 (1) is

disadvantageous to petitioner and other similarly situated prisoners. On its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. By definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison. In *Lindsey* v. *Washington* [(1937) 301 U.S. 397,] at 401-402, we reasoned that '[it] is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term.' Here, petitioner is similarly disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct." (*Weaver*, *supra*, at p. 33.) "Thus, the new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the prohibition against *ex post facto* laws." (*Id.* at pp. 35-36; footnote omitted.)

Our Supreme Court in *Ramirez* distinguished *Weaver* based on the fact that the statutory change in *Ramirez* did not effect the ability of defendant to *earn* conduct credits; it only effected a prisoner's ability to *loose* credits based on misconduct occurring in the prison. "There is a critical difference between a diminution of the ordinary rewards for satisfactory performance of a prison sentence -- the issue in *Weaver* -- and an increase in sanctions for *future misbehavior* in prison -- which is at issue here. Here, petitioner's opportunity to earn good behavior and participation credits is unchanged. All that has changed are the sanctions for prison misconduct. Unlike *Weaver*, petitioner's effective sentence is not altered by the 1982 amendments unless petitioner, by his own action, chooses to alter his sentence." (*Ramirez*, *supra*, at p. 937; emphasis original.) Other cases holding a reduction of credits violates the ex post facto clause if the reduction applies to crimes occurring prior to the legislative change include: *John L. v. Superior Court* (2004) 33 Cal.4th 158, 182; *People v. Palacios* (1997) 56 Cal.App.4th 252, 256-257; and *People v. Rutledge* (1983) 139 Cal.App.3d 620, 623-625.

The statute effective September 28, 2010, which clearly reduces awards for good performance for persons committed to county jail, is more analogous to *Weaver*. As such, its retroactive application to crimes or probation violations committed prior to its effective date would likely be considered in conflict with the *ex post facto* clause.

Defendants sentenced in this fourth category will receive credits under the credit formula effective January 25, 2010, whether the commitment is to state prison or county jail, and even if the defendant is sentenced after September 28, 2010. The credit formulas are discussed below.

5. *Crimes and violations of probation with underlying crimes committed between September 28, 2010, and October 1, 2011.*

Unless the equal protection argument of *Kemp* prevails, custody credit for crimes committed between September 28, 2010, and October 1, 2011, will be governed by the provisions of section 4019 and 2933 effective September 28, 2010. Accordingly, defendants sentenced to county jail during this period will only receive the conduct credits traditionally designated in section 4019, as it existed prior to January 25, 2010: four days of conduct credit for every six days of actual time served.

Most defendants sentenced to state prison will receive the enhanced credits authorized by section 2933, subdivision (e): for every day spent in local custody, the defendant will receive an additional day of conduct credit against the prison sentence. Enhanced credits, however, will not be awarded to defendants who have prior serious or violent felony convictions, who are being sentenced for a serious felony, or who are required to register as a sex offender under section 290.

Although the placement of the new credit rules in section 2933 might suggest the prison is responsible for calculating them, undoubtedly it remains the responsibility of the trial court to make the credit determination. It is the trial court that will have the easiest access to actual time and conduct credit information while the defendant is in local facilities.

Violations of probation committed between September 28, 2010, and October 1, 2011, where the underlying crime for which probation was granted was committed prior to October 1, 2011, should be sentenced under the law effective as follows:

- Underlying crime occurred prior to January 25, 2010: use the formula effective January 25, 2010.
- Underlying crime occurred between January 25, 2010, and September 28, 2010: use the formula effective January 25, 2010.
- Underlying crime occurred between September 28, 2010, and October 1, 2011, use the formula effective September 28, 2011.

Because the statutes effective September 28, 2010, and October 1, 2011, expressly provide their provisions are applicable only to crimes occurring after their effective dates, their provisions will only apply to probation violations based on underlying offenses occurring after those respective dates. To apply the statutes to probation violations where the underlying offense occurred prior to their effective dates, likely would contravene the *ex post facto* clause.

Defendants sentenced in this fifth category will receive a credit calculation under section 4019 as it existed prior to January 25, 2010, if committed to county jail. Unless otherwise excluded, defendants will receive one day of

conduct credit for every actual day of credit under section 2933 if sentenced to state prison. The credit formulas are discussed below.

6. *Crimes and violations of probation with underlying crime committed on or after October 1, 2011.*

The final change, made in connection with the 2011 Realignment Legislation, amends section 4019 to specify, *without any exclusion,* that inmates are to receive two days of conduct credit for every four days of actual custody time served in county jail. (P.C. § 4019, subdiv. (b).) The change is made effective for all crimes *committed* on or after October 1, 2011. The effective date of this change should not be confused with the effective date of the changes related to section 1170, subdivision (h), which are effective as to all crimes *sentenced* after October 1, 2011. Any custody credit earned prior to October 1, 2011, is to be governed by the applicable prior law. (P.C. § 4019, subdiv. (h).) The Legislature eliminated the exclusions based on the defendant having a prior adult serious or violent felony conviction, being sentenced for a serious felony, or being required to register as a sex offender under section 290. The new provisions of section 4019 will be applicable to all sentences served in county jail, including misdemeanor sentences, all felony sentences imposed and served as a condition of probation, and all sentences imposed as a result of a violation of parole or community supervision, where the underlying crime occurred on or after October 1, 2011. If the court is imposing sentence after October 1, 2011, but on a crime or violation of probation where the underlying crime occurred prior to that date, custody credits will be determined by reference to paragraphs 1 – 5, *supra.*

The law is less clear with respect to pre-sentence credit for state prison sentences and sentences to county jail imposed pursuant to section 1170, subdivision (h).

Sentences to state prison

Section 2933, subdivision (b), governs *post-sentence* credit for persons sent to state prison: for every six months of actual custody, the defendant is awarded an additional six months of conduct credit. Section 2933, subdivision (e), which remains unchanged from the version effective September 28, 2010, governs the award of *pre-sentence* custody credit for defendants sentenced to state prison. Inmates sentenced to state prison, unless excluded, are to receive one day of pre-sentence conduct credit for every day of pre-sentence actual time served. (P.C. § 2933, subdiv. (e)(1).)

The defendant is excluded from these credit provisions, however, if he has a prior adult serious or violent felony conviction, is being sentenced for a serious felony, or is required to register as a sex offender under section 290. Under these circumstances, the credit provisions of section 4019 apply, not section 2933(e). (P.C. § 2933, subdiv. (e)(3).)

The exclusions under section 2933, subdivision (e)(3), are substantially the same as those under section 1170, subdivision (h)(3). Accordingly, defendants sentenced to state prison for crimes committed on or after October 1, 2011, who are not excluded by section 2933, subdivision (e)(3), will receive pre-sentence custody credit of one-day-plus-one-day under section 2933, subdivision (e)(1). Section 2933, subdivision (e)(1) will apply to inmates sentenced to state prison solely because they have been convicted of a crime with an enhancement for an aggravated white collar theft under section 186.11, and for a number of other crimes where the Legislature has designated state prison for crimes not otherwise excluded by section 1170, subdivision (h)(3) (see *e.g.*, spousal abuse (P.C. § 273.5), child endangerment (P.C. § 273a), and assault with force likely to produce great bodily injury (P.C. § 245(a)(1)).

The only practical distinction between the pre-sentence credit provisions of sections 2933 and 4019 is that instead of getting full conduct credit for every day of actual time, the excluded defendants will receive two days of conduct credit for every four days of actual time served. Application of the formula means that excluded defendants will receive one day less credit if the actual time served is an odd number of days. If the actual time credit is an even number of days, the conduct credit is the same for both sections.

When the Legislature made the changes effective September 28, 2010, section 4019 was returned to the credit formula of two days of conduct credit for every six days of actual time served, the traditional one-third credit formula that existed prior to January 25, 2010. It seems that most recently in not amending section 2933 to provide its own limited credits to the excluded defendants, the Legislature has inadvertently increased the custody credits for inmates with prior serious or violent felony convictions, inmates being sentenced for a serious felony, and inmates required to register as a sex offender under section 290 to substantially the same as all other defendants sentenced for felony crimes.

To summarize, defendants sentenced to state prison for crimes committed on or after October 1, 2011, will receive credits as follows:

- Where a defendant is being sentenced to state prison solely because of an enhancement under section 186.11, or where the defendant has committed a crime not excluded by section 2933, subdivision (e)(3), the defendant will receive one day of conduct credit for every day of actual time served.
- Where the defendant is being sentenced to state prison but is excluded from the credit formula in section 2933, subdivision (e)(1), he will receive credits as calculated under section 4019: two days of conduct credit for every four days of actual time served.
- Once in prison, however, the defendant will receive custody credit under section 2933 of six months of conduct credit for every six months of custody actually served, unless otherwise limited by provisions such as section 2933.1.

Sentences under section 1170(h)

It is not clear what statute governs post-sentence credits when the defendant is committed to a county jail under section 1170(h). It would appear that section 2933 would be inapplicable because subdivision (a) limits its provisions to "persons convicted of a crime and sentenced to the *state prison* under section 1170." There is no reference to persons committed to a *county jail* under section 1170(h).

Section 4019 also is not clearly applicable. Section 4019, subdivision (a)(1) provides that its provisions apply to a "prisoner confined in or committed to a county jail, . . . including all days of custody from the date of arrest to the date on which the serving of the sentence commences, under a judgment of imprisonment, or a fine and imprisonment until the fine is paid in a criminal action or proceeding." Section 4019, subdivision (a)(4), however, specifies that the section applies to a "prisoner confined in a county jail, . . . following arrest and prior to the imposition of sentence for a felony conviction." When subdivisions (a)(1) and (a)(4) are read together, section 4019 may not be applicable to custody credits when the defendant is serving a sentence under section 1170(h).

The legislation effective October 1, 2011, added section 4019, subdivision (a)(5), which provides that the section also will apply to a prisoner who "is confined in a county jail, . . . as part of [a] custodial sanction imposed following a violation of post-release community supervision or parole." Time served on an original sentence is not the same as time served on a parole violation. By not mentioning time served because of a commitment under section 1170(h), did the Legislature intend to exclude these inmates from section 4019?

Until this issue is resolved either by remedial legislation or appellate court decision, and except as to defendants with an enhancement under section 186.11, it is suggested that courts use the custody credit formula specified in section 4019 for all time served in the county jail, whether the custody relates to pre-sentence felony time or post-sentence custody served because of a felony commitment under section 1170(h). In this manner all inmates in the county jail will receive the same custody credits and the award of credit will be the same for an original sentence under section 1170(h) and persons serving custody in county jail for a violation of parole.

Violations of probation

Because the most recent changes to section 4019 are limited to crimes committed on or after October 1, 2011, the newest rules will have no application to violations of probation when the underlying crime occurred prior to that date. Courts must look to the prior law to determine the applicable formula. (See paragraphs 1-5,

supra.) The new provisions, however, will apply to violations of probation when the underlying crime occurred on or after October 1, 2011.

This last category of crimes will cover only crimes committed on or after October 1, 2011, and violations of probation or parole where the underlying crime occurred on or after October 1, 2011. Defendants sentenced to county jail will receive pre and post-sentence conduct credit of two days for every four days of actual time served. A defendant being sentenced to state prison solely because of an enhancement under section 186.11, or where the defendant has committed a crime not excluded by section 2933, subdivision (e)(3), will receive one day of conduct credit for every day of actual time served. A defendant being sentenced to state prison, but who is excluded from the credit formula in section 2933, subdivision (e)(1), will receive credits as calculated under section 4019: two days of conduct credit for every four days of actual time served. The credit formulas are discussed below.

C. Exclusion From the Enhanced Credit Provisions

Defendants sentenced to state prison or county jail under the credit formula effective January 25, 2010, or state prison under the credit formulas effective September 28, 2010, or October 1, 2011, will not have custody credits calculated by the more liberal versions of the new statutes if they come within any of the following exclusions. (Pen. Code, §§ 4019, subd. (b)(2) and (c)(2) [law effective 1/25/10], 2933, and subdiv. (e)(3) [law effective 9/28/10].)

1. *Defendants who are required to register as a sex offender under section 290.*

The exclusion clearly will apply to all defendants who are being sentenced on a current crime where registration is either mandatory or required as a matter of discretion under section 290.006. (Pen. Code, §§ 4019, subd. (b)(2) and (c)(2) [law effective 1/25/10], and 2933, subd. (e)(3)[law effective 9/28/10].) Because the statute reads "[i]f the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290)," the defendant would be entitled to the new custody credits if the court exercised its discretion **not to** require registration under Penal Code section 290.006.

There is a question whether the exclusion will apply to persons who are required to register for a prior crime, and not because of the crime currently being sentenced. The plain language of the statute suggests that anyone required to register, whether or not for the current offense, will have limited credits. So, for example, a defendant sentenced for driving under the influence may not be entitled to half-time credit if he was previously convicted of a sex offense and is subject to the registration requirement. Because the statutory wording is relatively clear and unambiguous, it seems likely that trial courts are required to follow its dictates and exclude such defendants from the enhanced credit

provisions. (*California Fed. Saving & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

2. *Defendants committed for a serious felony listed in section 1192.7.*

Subdivisions (b)(2) and (c)(2) of section 4019, effective January 25, 2010, and subdivision (e)(3) of section 2933, effective September 28, 2010, provide that the enhanced credit formula will not apply to persons committed for a *serious* felony. Neither statute contains a similar limitation for persons committed for a *violent* felony. This omission, at first blush, may appear to be a legislative oversight, given that in all other respects the statute limits credits in cases involving both serious and violent felonies. It is likely there is no mention of commitments for violent felonies so as not to confuse the new legislation with the 15% limitation on credits under section 2933.1, at least as to persons sent to prison. Section 2933.1, however, does not apply to persons sentenced for violent felonies, but placed on probation. (*In re Carr* (1998) 65 Cal.App.4th 1525, 1536.) So, as written, the statute dictates the anomalous result of an award of one-third conduct credits to persons convicted of serious felonies, but one-half conduct credits to persons convicted of violent felonies who are granted probation under the interim versions of section 4019. In most instances, the list of serious felonies provided in Penal Code section 1192.7, subdivision (c), includes all violent felonies as listed in Penal Code section 667.5, subdivision (c). A comparison of the two lists reveals that only the following crimes are violent, but not serious felonies: sodomy in violation of Penal Code section 286, subdivisions (c) or (d); oral copulation in violation of Penal Code section 288a, subdivision (c) or (d); sexual penetration as defined in Penal Code section 289, subdivision (j); assault with intent to commit Penal Code sections 288, 289, or 264.1. However, each of these offenses require a defendant to register as a sex offender, thus limiting the credit to one-third time for this independent reason.

3. *Defendants who have prior convictions for a serious or violent felony.*

Defendants who have prior serious or violent felonies under sections 667.5(c) or 1192.7(c), whether being sentenced to state prison or a county jail, will not receive the enhanced conduct credits. (Pen. Code, §§ 4019, subd. (b)(2) and (c)(2) [law effective 1/25/10], and 2033, subd. (e)(3)[law effective 9/28/10].) Because the statute limits the credits when the defendant has prior serious or violent felony "convictions," the restriction will not apply to defendants having only juvenile "adjudications" that will qualify as strikes under the Three Strikes law. (*People v. Pacheco* (2011) 194 Cal.App.4th 343, 346.)

4. *Defendants who are subject to special credit limitations.*

Defendants sentenced to prison for a current violent felony will have local conduct credit limited to 15% under section 2933.1. Defendants convicted of murder will receive no conduct credit in accordance with section 2933.2.

D. Calculation of credits

The calculation of conduct credits will depend on the application of a particular formula depending on 1) when the crime was committed, 2) when the sentencing hearing is held, 3) whether the defendant is disqualified from the benefits of the new statutes, and 4) whether the defendant receives a state prison or county jail sentence. Depending on the interplay between these variables, the court will use one of three possible credit formulas: the traditional formula, the formula effective January 25, 2010, or the formula effective September 28, 2010.

1. FORMULA A [*Traditional formula*]

The following formula is applicable to situations where none of the new credit provisions apply:

"Statutory" Formula (*In re Marquez* (2003) 30 Cal.4th 14, 25-26):
- •Divide actual time in custody by 4 (drop fractions and don't "round up")
- •Multiply by 2 = conduct credits
- •Conduct credits + actual time = total credits

"Shortcut" Formula:
- •Actual [-1 if odd] ÷ 2 = conduct [-1 if odd]

Under Formula A, conduct credits always will be an even number.

If the defendant is *sentenced* to six or more days, he is entitled to two days of conduct credit for every four days served. If the defendant is *sentenced* to five days or less, there are no conduct credits. For example, if a defendant is *sentenced* to 10 days, and has pre-sentence actual time credit of four days, the defendant will receive an additional two days of conduct credit for a total credit of six days against the 10-day sentence. If, however, the defendant is sentenced to five days in jail and has four days of actual time credit, he will need to serve one more day to complete the sentence.

The traditional formula is applicable to all pre-sentence credits for a state prison sentence or all local time for persons committed to county jail in the following sentencing situations, as discussed above (unless a special credit limitation applies):

- *Crimes or violations of probation sentenced and final prior to January 25, 2010*, whether or not defendant is sentenced to state prison or county jail.
- *Crimes or violations of probation sentenced prior to January 25, 2010, but not yet final as of that date* [if changes to section 4019 are not

retroactive], whether or not defendant is sentenced to state prison or county jail.

- *Crimes committed and violations of probation based on underlying crimes committed between September 28, 2010, and October 1, 2011*, if defendant is sentenced to county jail.
- *Defendants excluded from the enhanced credit provisions for crimes committed or violations of probation based on underlying crimes committed between January 25, 2010, and October 1, 2011.*

2. **FORMULA B** [*Formula effective January 25, 2010, and October 1, 2011*]

The following formula is used when the credit provisions effective January 25, 2010, or October 1, 2011, apply:

"Statutory" Formula (applying the reasoning of *Marquez* to the provisions of section 4019 effective 1/25/10 and 10/1/11):

•Divide actual time in custody by 2 (drop fractions and don't "round up")
•Multiply by 2 = conduct credits
•Conduct credits + actual time = total credits

"Shortcut" Formula:

•Actual = conduct credit [-1 if odd]

Under this Formula B, conduct credits always will be an even number.

If the defendant receives a *sentence* of four days or longer, for every two days of actual custody, the defendant will get an additional conduct credit of two days. If the defendant is *sentenced* to three days or less, there will be no conduct credits awarded. For example, if a defendant is *sentenced* to 10 days, and has pre-sentence actual time credit of two days, the defendant will receive an additional two days of conduct credit, for a total credit of four days against the 10-day sentence. However, if the defendant is sentenced to three days in jail and has two days of actual time credit, he will receive no credit and will need to serve one more day to complete the sentence.

The foregoing formula is applicable to all pre-sentence credits for a state prison sentence or all local time for persons committed to county jail in the following sentencing situations, as discussed above (unless a special credit limitation or exclusion applies):

- *Crimes or violations of probation sentenced prior to January 25, 2010, but not yet final as of that date* [if changes to section 4019 are retroactive], whether or not defendant is sent to prison or jail.
- *Crimes and violations of probation committed prior to January 25, 2010, but sentenced after that date*, whether or not defendant is sent to prison or jail.

- *Crimes and violations of probation committed between January 25, 2010, and September 28, 2010,* whether or not the defendant is sent to state prison or county jail.
- *Crimes or violations of probation committed between September 28, 2010, and October 1, 2011, where the underlying offense for which probation was granted occurred between those dates,* if the defendant is sent to county jail.
- *Crimes committed after October 1, 2011, and the defendant is committed to a county jail for a misdemeanor, a felony condition of probation, or under section 1170(h).*
- *Violations of probation or parole where the underlying crime was committed on or after October 1, 2011.*

3. **FORMULA C** [*Credit formula effective September 28, 2010*]

The following formula is used for defendants *sent to state prison* (unless a special credit limitation or exclusion applies):

- *Crimes committed between September 28, 2010, and October 1, 2011.*
- *Probation violations based on underlying crimes committed between September 28, 2010, and October 1, 2011.*
- *Persons sentenced to state prison for a crime committed on or after October 1, 2011 or a violation of probation based on an underlying crime committed on or after October 1, 2011, solely because of an enhancement under section 186.11, or for a crime not excluded by section 2933, subdivision (e)(3).*

For every day of actual time in custody, the defendant receives one day of conduct credit. Accordingly, if the defendant does 26 days in custody, he receives 26 days of conduct credits, for a total pre-sentence credit of 52 days. Under this formula, conduct credits can be either an even or odd number.

E. Additional issues

1. *Whether disqualifying conditions must be pled and proved.*

The enhanced custody credits allowed by the amendment to sections 2933 and 4019 are not available to defendants who have prior violent or serious felony convictions listed in sections 667.5, subdivision (c), and 1192.7, subdivision (c), or who are required to register as a sex offender. But the credit statutes do not indicate whether these circumstances must be pled and proved for the court to deny the extra custody credit. There will be no issue if the defendant is actually charged with and found to have committed a prior serious or violent felony, or if the defendant is being sentenced for a current crime that requires registration as a sex offender. The "plead and prove" requirement, however, will be an issue in all other circumstances. *People v. Lara* (2011) 193 Cal.App.4th 1393, and *People v.*

Jones (2010) 188 Cal.App.4th 165, holding there is a pleading and proof requirement, have been granted review or depublished by the Supreme Court. *People v. James* (2011) 196 Cal.App.4th 1102, and *People v. Voravongsa* (2011) ___ Cal.App.4th ___ [D.A.R.], conclude there is no requirement to plead and prove the existence of a prior disqualifying strike. There is no reason to suggest that these cases not equally applicable to other disqualifying factors.

The pleading and proof requirement remains a matter of some dispute. Most notably, neither section 2933 nor 4019 contain such an explicit requirement. A similar circumstance arises with a defendant's eligibility for Proposition 36 treatment. Except in limited circumstances, a defendant with a prior serious or violent felony conviction is not eligible for Proposition 36. (Pen. Code, § 1210.1, subd. (b)(1).) *In re Varnell* (2003) 30 Cal.4th 1132, 1143, concluded the prosecution is not required to plead and prove the disqualifying convictions. The court also concluded no such duty was compelled by *Apprendi v. New Jersey* (2000) 530 U.S. 466. (*Id.* at pp. 1141-1142.) Finally, it should be recalled that *Apprendi* and its progeny have only been applied in determining the maximum sentence a person is ordered to serve; it has never been applied to such things as calculation of the minimum term of custody. (See, *e.g.*, where *Blakely v. Washington* (2004) 542 U.S. 296, 304-305 expressly distinguished its circumstances from those in *McMillan v. Pennsylvania* (1986) 477 U.S. 79, where the court imposed a statutory *minimum* if particular facts were found.)

2. *Effect of striking of prior serious or violent felonies under section 1385*

Whether the exercise of the court's discretion under section 1385 to dismiss prior serious or violent felony convictions will effect the award of credits also is a matter of some dispute. *People v. Jones* (2010) 188 Cal.App.4th 165, *People v. Koontz* (2011) 193 Cal.App.4th 151, and *People v. Lara* (2011) 193 Cal.App.4th 1393, which hold that such a dismissal does allow the court to grant the enhanced custody credits, have been granted review or depublished. *People v. Voravongsa* (2011) ___ Cal.App.4th ___ [D.A.R.], concludes the court may not use section 1385 to dismiss factors that would disqualify a defendant from receiving the enhanced custody credit.

Again, this issue was discussed in *Varnell*. The court concluded no exercise of discretion under section 1385 will remove the serious or violent felonies for the purpose of qualifying the defendant for Proposition 36 treatment. (*Varnell* at pp. 1136-1139.) "[W]hen a court has struck a prior conviction allegation, it has not 'wipe[d] out' that conviction as though the defendant had never suffered it; rather, the conviction remains a part of the defendant's personal history, and a court may consider it when sentencing the defendant for other convictions, including others in the same proceeding." (*People v. Garcia* (1999) 20 Cal.4th 490, 499.)

3. *Correction of award of credits for cases not final on January 25, 2010*

If the Supreme Court determines that the provisions of section 4019 effective January 25, 2010, are retroactive, defendants may ask the trial court to correct the award of the pre-sentence credits for cases that were not final as of January 25, 2010. There is a question whether the trial court has jurisdiction to correct the previously entered award of credits. There is no problem if a defendant seeks the modification before filing a notice of appeal. Generally, though, the filing of a notice of appeal divests the trial court of jurisdiction to act. (*In re Antilia* (2009) 176 Cal.App.4th 622, 629.)

There is authority, however, that *requires* a defendant to seek correction of the award of pre-sentence credit in the trial court before raising the issue on appeal. Penal Code section 1237.1 prohibits a defendant from taking an appeal from a judgment of conviction on the ground of an error in the calculation of pre-sentence custody credits, "unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." Case law dictates that the appropriate method for correcting errors in the calculation of credits is to move for correction in the trial court first. (See, e.g., *People v. Salazar* (1994) 29 Cal.App.4th 1550, 1556-1557; *People v. Culpepper* (1994) 24 Cal.App.4th 1135, 1138-1139; *People v. Fares* (1993) 16 Cal.App.4th 954, 957; *People v. Little* (1993) 19 Cal.App.4th 449.) An exception to that rule is when other issues are also being raised on appeal. In such instances, the credit issue need not first be raised in the trial court. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427 ["section 1237.1, when properly construed does *not* require defense counsel to file a motion to correct a pre-sentence award of credits in order to raise that question on appeal when other issues are litigated on appeal."].) The reason for such a rule is that the trial court is in a better position to access the records that are necessary to determine the appropriate award of conduct credits. (*People v. Hyde* (1975) 49 Cal.App.3d 97, 102.) Given such authority, the trial court clearly has jurisdiction to make a correction in pre-sentence custody credits even after the filing of a notice of appeal.

AWARDING CONDUCT CREDITS UNDER P.C. §§ 4019 and 2933

Summary of Key Provisions

Couzens and Bigelow

Key Time Periods

Time Period	Jail Sentence	Prison Sentence
Crimes and VOP's committed, sentenced, and final prior to 1/25/10	**Formula A** – for pre and post-sentence credit	**Formula A** – for pre-sentence credit (unless limited)
Crimes and VOP's committed and sentenced prior to 1/25/10, but not final	**Formula A** – for pre and post-sentence credit [if NOT retroactive] **Formula B** – for pre and post-sentence credit [if retroactive] **Formula A** – if excluded	**Formula A** – for pre-sentence credit (unless limited) [if NOT retroactive] **Formula B** – for pre-sentence credit (unless limited) [if retroactive] **Formula A** – for pre-sentence credit if excluded (unless limited)
Crimes and VOP's committed prior to 1/25/10, but sentenced after	**Formula B** – for pre and post-sentence credit **Formula A** – if excluded	**Formula B** – for pre-sentence credit (unless limited) **Formula A** – for pre-sentence credit if excluded (unless limited)
Crimes and VOP's committed between 1/25/10, and 9/28/10	**Formula B** – for pre and post-sentence credit **Formula A** – if excluded	**Formula B** – for pre-sentence credit (unless limited) **Formula A** – for pre-sentence credit if excluded (unless limited)
Crimes and VOP's with underlying crimes committed between 9/28/10, and 10/1/11	**Formula A** – for pre and post-sentence credit	**Formula C**– for pre-sentence credit (unless limited) **Formula A** – for pre-sentence credit if excluded (unless limited)
Crimes and VOP's with underlying crimes committed on or after 10/1/11	**Formula B** – for pre and post-sentence credit	**Formula B** – for pre-sentence credit (unless limited) **Formula C** – for pre-sentence credit if 186.11 is only reason for state prison, or crime not excluded by 2933(e)(3) (unless limited)

Credit Formula

Formula A – Traditional 4019

"Statutory" Formula (*In re Marquez* (2003) 30 Cal.4th 14, 25-26):
- •Divide actual time in custody by 4 (drop fractions and don't "round up")
- •Multiply by 2 = conduct credits
- •Conduct credits + actual time = total credits

"Shortcut" Formula:
- •Actual [-1 if odd] ÷ 2 = conduct [-1 if odd]

Conduct credits always will be even number. No entitlement to credits unless sentenced to 6 or more days.

Formula B

The following formula is used when the credit provisions effective January 25, 2010, and October 1, 2011, are applicable:

"Statutory" Formula (applying the reasoning of *Marquez* to the interim provisions of section 4019):
- •Divide actual time in custody by 2 (drop fractions and don't "round up")
- •Multiply by 2 = conduct credits
- •Conduct credits + actual time = total credits

"Shortcut" Formula:
- •Actual = conduct credit [-1 if odd]

Conduct credits always will be even number. No entitlement to credits unless sentenced to 4 or more days.

Formula C

For every day of actual local time, award one day of conduct credit.

Applicable only to state prison sentences. Conduct credits can be either even or odd number.

Exclusions From Enhanced Credits (Jail or State Prison)

P.C. § 290 registration – current crime, or prior crime [pled and proved?]
Committed for serious felony (P.C. § 1192.7(c)) – current crime
Prior serious (P.C. § 1192.7(c)) or violent felony (P.C. § 667.5(c)) conviction [pled and proved?]
Credits limited – P.C. §§ 2933.1, 2933.2