

**Sample Argument on Appeal for Increasing Presentence  
Custody Credits Under Amended Penal Code Section 4019**

**First District Appellate Project  
Jan., 2010**



# I

## **UNDER AMENDED PENAL CODE SECTION 4019, APPELLANT IS ENTITLED TO A RECALCULATION OF PRESENTENCE WORK AND CONDUCT CREDITS.**

The California Legislature has amended Penal Code section 4019 to increase presentence credits for defendants, like appellant, who have no current or prior convictions for serious or violent felonies and who are not required to register as a sex offender. (Stats.2009-2010, 3rd Ex.Sess., c. 28 (S.B.18), § 50, eff. Jan. 25, 2010.) Former section 4019 provided for one day each of work and conduct credit for each six-day period in custody. (Former § 4019(b) and (c).) As amended, the statute now provides for one day of work time credit and one day of conduct credit for each four-day period in custody:

(b)(1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

[¶]

(c)(1) Except as provided in Section 2933.1 and paragraph (2), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

(Pen. Code § 4019(b)(1) and (c)(1), as amended eff. Jan. 25, 2010.)

Subdivisions (b)(2) and (c)(2), which do not apply to appellant, exclude from this change defendants who are required to register as sex offenders based on a current or prior conviction, defendants with current serious felony convictions,<sup>1</sup> and defendants with prior serious or violent felony convictions.

The amendment is effective January 25, 2010, which will pass before this appeal is concluded. (Cal. Const. Art. 4, § 8(c)(1) (“a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed”); Cal. Senate Journal, 2009-10 Third Extraordinary Session, Nov. 30, 2009<sup>2</sup>, at p. 273 (Third Extraordinary Session adjourned Oct. 26, 2009).) Because appellant’s conviction will not be final on January 25, 2010, the amendment applies to him.

“[A]bsent a saving clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal.” (*People v. Babylon* (1985) 39 Cal.3d 719, 722; see also *People v. Wright* (2006) 40 Cal.4th 81, 90; *People v. Rossi* (1976) 18 Cal.3d 295, 299-300; *In re*

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<sup>1</sup> Defendants with current violent felony convictions remain limited to 15% presentence credits under Penal Code section 2933.1.

<sup>2</sup> The Senate Journal for November 30, 2009, can be downloaded on this page: [http://www.leginfo.ca.gov/senate-journalhtml/sj\\_200911.html](http://www.leginfo.ca.gov/senate-journalhtml/sj_200911.html).

*Estrada* (1965) 63 Cal.2d 740.) “[F]or 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.” (*People v. Vieira* (2005) 35 Cal.4th 264, 306 [citations and internal quotation marks omitted].)

This principle applies equally to increases in custody credits. (See, e.g., *In re Kapperman* (1974) 11 Cal.3d 542 (holding then-newly enacted Pen. Code § 2900.5, awarding presentence custody credits, retroactive to those incarcerated or on parole regardless of date of commitment); *People v. Hunter* (1977) 68 Cal.App.3d 389.) Before January 1, 1977, a defendant granted probation did not receive any pre-sentence custody credit, even for actual days, against a county jail sentence imposed as a condition of felony probation. (*Hunter*, 68 Cal.App.3d at 391-392.) On January 1, 1977, an amendment to Penal Code section 2900.5 took effect to credit pre-sentence jail time against a jail term imposed as a condition of probation. (*Ibid.*) The Court of Appeal in *Hunter*, noting the Legislature’s omission of a prospective-application-only limitation, held that a defendant who was sentenced prior to the effective date of the statute but whose judgment was not yet final, was entitled to the benefit of the new custody credits. (*Id.* at 392.)

Senate Bill 18's amendment to section 4019 contains no savings clause, it reduces punishment, and it is effective prior to appellant's judgment becoming final.<sup>3</sup> Appellant is thus entitled to the benefit of the change made to section 4019. In this case, appellant was awarded 68 work and conduct credits based on 136 actual days in custody. (CT [REDACTED].) This was based on the former formula applicable under subdivision (f) of section 4019, which provided that a defendant would be deemed to have served six days for every four days. Under the former formula, "[t]he correct amount of credit [was] calculated by dividing the number of days spent in custody by four and rounding down to the nearest whole number. This number is then multiplied by two and the total added to the original number of days spent in custody." (*People v. Fry* (1993) 19 Cal.App.4th 1334, 1341 (citing *People v. Smith* (1989) 211 Cal.App.3d 523, 527).)

Under the new law appellant would be entitled to two days credit for every two days actually served:

(f) It is the intent of the Legislature that if all days are earned under this section, **a term of four days will be deemed to have been served for every two days spent in actual custody**, except that a term of six days will be deemed to have been served for every four

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<sup>3</sup> Applying the amendment to defendants already sentenced saves the state funds by reducing the inmates' days in custody. For this reason, application of the amendment to cases not yet final is consistent with the purpose of the legislation, which "addresses the fiscal emergency declared by the Governor." (Stats.2009-2010, 3rd Ex.Sess., c. 28 (S.B.18), § 62.)

days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c).

(Amended Pen. Code § 4019(f), eff. Jan. 25, 2010 (emphasis added).)

Accordingly, using the structure described in *Fry* and accounting for the increase in credits, the work and conduct credits are to be calculated by dividing the number of actual days in custody by two, rounding down to the nearest whole number, and multiplying by two. Under this formula, presentence work and conduct credits are equal to the actual credit days, unless the actual number of credit days is odd. If the actual credit days are an odd number, the total number of presentence work and conduct credits can be determined by subtracting one (1) from the actual days in custody.

In this case, with 136 actual days in custody, appellant is thus entitled to 136 work and conduct credits, for a total of 272 presentence credits. The abstract of judgment must be amended to reflect 136 actual days, 136 work and conduct credits, and a total of 272 credits.