

**FIRST DISTRICT APPELLATE PROJECT  
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**CREDITS: A SENTENCING CLAIM YOU CAN STILL WIN**

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# Pre-Sentence Credits – A Sentencing Issue You Can Still Win

(If you work through the law, check the calendar and do the math)

# Take Heart – Even the Courts Acknowledge the Going Isn't Easy:

- “We must admonish at the outset that **application of the complex statutory sentence-credit system . . .** “  
**‘is likely to produce some incongruous results and arguable unfairness** when compared to a theoretical state of perfect and equal justice. . . . (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29 quoting *People v. Bruner* (1995) 9 Cal.4th 1178, 1195 and *In re Joyner* (1989) 48 Cal.3d 487, 495.)

# Even the Courts Get a Headache Over Credits:

- “Probably the only sure consensus among the appellate courts is a recognition that section 2900.5, subdivision (b), is ‘difficult to interpret and apply.’ As we have noted, **in what is surely an understatement, ‘credit determination is not a simple matter.’**”  
(*People v. Adrian* (1987) 191 Cal.App.3d 868, 874-875 [internal citations omitted].)

# Entitlement to Credits is a matter of right:

- The failure to accurately award custody credits results in an unauthorized sentence, subject to correction at any time. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764; *People v. Jack* (1989) 213 Cal.App.3d 913, 916-917.)

# No Objection is Necessary to Preserve the Issue on Appeal

- Because credits error results in an unauthorized sentence, credits errors cannot be waived by a failure to object below. (*People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139.)

# But Beware, All Errors are Subject to Correction

- All errors are subject to correction, even if that results in loss of credits for appellant. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

# It is the Trial Court's Duty to Determine and Award Credits

- “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; *People v. Buckhalter* (2001) 26 Cal.4th 20, 30-31; Pen. Code, § 2900.5(d); Cal. Rules of Court, rule 4.310.)

# Simple Calculation Errors Must First be Brought to the Trial Court

- **“No appeal shall be taken . . . on the ground of an error in the calculation of presentence 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.”** (Pen. Code, § 1237.1)

## *Fares* sets forth the basic rule:

- “[T]his court reserves the right in the future summarily to dismiss appeals directed to correction of presentence custody calculations when it appears that prior resort to the superior court in all likelihood would have afforded an adequate remedy.” (*People v. Fares* (1993) 16 Cal.App.4th 954, 960.)

# The First District Agrees:

- “We may henceforth summarily dismiss appellate claims of error in presentence custody calculations when factual disputes or discretionary determinations are involved, unless the record discloses that efforts to correct the claimed errors were made in the trial court.”
- *People v. Wrice* (1995) 38 Cal.App.4th 767, 774 -775 (First Dist., Div. 3)

# Informal Letters OK if the Trial Court Will Act, But If Not, Noticed Motion is Required:

- **Appeal dismissed where defendant failed to file formal motion** as required by statute with trial court before commencing appeal, **even though D sent letter to trial court requesting it amend abstract of judgment**; motion would have been part of appellate record and would have compelled judicial response. (*People v. Clavel* (2002) 103 Cal.App.4th 516 (First District, Div. 2); see also *Fares*, 16 Cal.App.4th at 960 [“If the dispute cannot be resolved **by motion in the superior court**, appeal is always available.”].)

Exception to the General Rule:  
*Fares/Clavel* Does Not Apply When  
Other Issues Also Raised on Appeal.

- Court will consider even simple calculation errors in conjunction with other issues as matter of judicial economy. (*People v. Florez* (2005) 132 Cal.App.4th 314, 318, fn. 12 (First Dist., Div. 3); *People v. Acosta* (1996) 48 Cal.App.4th 411.)

# Penal Code section 4019 Governs All Non-Violent Felonies:

- Applies:
  - (1) When a prisoner is **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, . . .(PC 4019(a)(1))
  - (2) When a prisoner is confined in or committed to the county jail, . . . **as a condition of probation (PC 4019 (a)(2))**
  - (4) When a prisoner is confined in a county jail . . . **prior to the imposition of sentence for a felony conviction.** (4019 (a)(4))
  - (6) When a prisoner is confined in a county jail, . . . **as a result of a sentence imposed pursuant to subdivision (h) of Section 1170.** (4019(a)(6))

PC §2900.5 states that all 4019 time applies against a prison sentence:

- **PC 2900.5: days served as a condition of probation or credited to the period of confinement pursuant to Section 4019**, shall be credited upon his or her term of imprisonment

- All pre-sentence days are also credited to a local county jail term imposed under Section 1170(h) realignment. PC 4019, subd. (a)(6)

- Note, “all days” includes both the date of arrest and the date of sentencing. (*In re Jackson* (1986) 182 Cal.App.3d 439; *People v. Bravo* (1990) 219 Cal.App.3d 729.)

But There are a Couple of Exceptions  
to 4019

# Penal Code § 2933.1 – 15% Limitation for Pre- and Post-Sentence Credits for Violent Felonies (667.5(c))

- Applies to all 667.5(c) violent] offenses . . . committed on or after the 1-1-03. (Operative date of 2933.1)
- (See *People v. Caceres* (1997) 52 Cal.App.4th 106.)

# Penal Code § 2933.2 – No Pre-Sentence or Post-Sentence Credit for Murder:

- (a) Notwithstanding Section 2933.1 or any other law, **any person who is convicted of murder, as defined in Section 187, shall not accrue any [post-sentence] credit, . . . . .**
- (c) **Notwithstanding Section 4019** or any other provision of law, **no [pre-sentence] credit pursuant to Section 4019 may be earned . . . . .**
- (d) [Operative 1-25-10.]
- (See *People v. Duff* (2010) 50 Cal.4th 787.)

# The Changing Faces of Penal Code § 4019 – Dates Matter

## Easiest Situation: Crimes Committed on or after October 1, 2011 Get 1-for-1 Credit

- PC § 4019(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. (i.e, 2 days actual, 2 days conduct = 4 days total [1-for-1])

## Note the Specific Prospective-Only Application:

- PC § 4019(h): The **changes to this section . . . shall apply prospectively** and shall apply to prisoners . . . [only for crimes] **committed on or after October 1, 2011**. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.

# The Prospective-Only Application has been Upheld by the Courts:

- *People v. Rajanayagam* (2012) 211 Cal.App.4th 42 [prospective-only application upheld as matter of statutory construction; no E/P violation where cost savings provided rational basis for disparity]
- *People v. Verba* (2012) 210 Cal.App.4<sup>th</sup> 991 [no E/P violation: fiscal emergency, public safety, and preserving deterrent effect of law provide rationale basis for prospective-only application]

- *People v. Ellis* (2012) 207 Cal.App.4th 1546 [prospective-only as matter of statutory construction, no right to enhanced credits for time served after 10-1-11 if crime committed before that date; no E/P violation]
- *People v. Kennedy* (2012) 209 Cal.App.4th 385 [*Brown* rationale applies; no E/P violation – Legislature entitled to “piecemeal approach” to remedy social ills and fiscal crisis]
- *People v. Borg* (2011) 204 Cal.App.4th 1528 [First Dist., Div 1] [Note: review granted, briefing deferred pending finality of *People v. Brown* (2012) 54 Cal.4th 314.]

- But Note: First District, Div. 2, in an unpublished opinion finds statutory language that “any days earned ... prior to 10-1-11 shall be calculated at the rate required by prior law,” in conjunction with statute’s directive that 2011 amendments “shall apply prospectively,” supports conclusion that **revised 1-for-1 credits earned after 10-1-11 applies regardless of whether crime was committed before or after that date.** Disagrees with *Ellis*. (*Locke*, A133617.)
- So at least one division (Div. 2) is open to argument that any presentence time served after 10-1-11 should be awarded at the increased rate, consistent with *Brown*.

- **New 4019 1-for-1 applies to everybody not otherwise excluded by 2933.1 (violent felonies) or 2933.2 (murder) for crimes committed after October 1, 2011.**
- (Priors and status do not result in exclusion from 1-for-1 credits, unlike 1170(h) sentencing [no § 1170(h) county jail terms for persons with prior serious or violent felonies, current violent felonies, current § 186.11 white collar crime enhancements, and § 290 registrants] .)

# But what about for crimes committed before October 1, 2011?

- Remember section 4019's language that “Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (PC 4019(h).)
- Be aware that there are four different versions of § 4019 in play based on four separate time periods.

## Prior to January 25, 2010:

- traditional 4 days actual/2 days conduct
- (Divide actual by 4, multiply by 2 = conduct)
- (*In re Marquez* (2003) 30 Cal.4th 14, 25-26.)

# Effective January 25, 2010 through September 27, 2010:

- 2 days actual/2 days conduct (1-for-1)
- But be aware of applicable exclusions: increased 1-for-1 credits not available to those with prior or current serious or violent felony and § 290 sex offenders. (Exclusions similar to those for 1170(h) treatment.)

Effective September 28, 2010 through  
September 30, 2011:

- Back to traditional 4 days actual/2 days conduct for all **crimes committed** on or after September 28, 2010.
- But note: if person was sent to prison, then got 1-for-1 under § 2933 unless excluded because of prior or current serious or violent felonies or § 290 sex offender

## Current Statute in Effect as of October 1, 2011:

- 1-for-1 for everybody, no exclusions except 2933.1 violent and 2933.2 murder offenses. (No exclusion for priors or status.)

## To Review:

- Easiest situation is for crimes committed on or after October 1, 2011 –
  - 1 day conduct for every 1 day actual, no exclusions except 2933.1 violent and 2933.2 murder offenses. (No exclusion for serious or violent priors or sex offender status.)

## Next easiest situation:

- Crimes committed, custody served prior to January 25, 2010 – traditional 4 days actual/2 days conduct

**A little bit harder now: crimes committed before, but custody served after** January 25, 2010 version (1-for-1):

- *People v. Brown* (2012) 54 Cal.4th 314 : changes effective January 25, 2010, apply prospectively only; no E/P violation.
- Therefore “qualified prisoners in local custody first become eligible to earn credit for good behavior at the increased rate beginning on the statute’s operative date.” (54 Cal.4th at 318.)

Where custody was both prior to and after  
January 25, 2010 effective date:

- “To apply former section 4019 prospectively necessarily means that prisoners whose custody overlapped the [operative date] earned credit at two different rates.” (Brown, 54 Cal.4th at 322.)

Crime before Jan. 25, 2010, but custody served after, D gets increased 1-for-1 credits for the time served after the enactment of the statute if not otherwise excluded

- *Payton v. Superior Court* (2012) 202 Cal.App.4th 1187  
– “[I]nmates are entitled to the conduct credits which are in effect at the time their custody is served.”
- [Crime committed prior to January 25, 2010, VOP May, 2011 – gets 1-for-1 for post-Jan. 25 custody]

## Another Easy One: Crimes committed between Jan. 25, 2010 and September 28, 2010:

- Jan. 25, 2010 1-for-1 controls, even if sentencing occurs after Sept. 28, 2010.
- (Sept. 28 version only applies to **crimes committed after** Sept. 28, 2010.)
- *People v. Garcia* (2012) 209 Cal.App.4th 530 – D committed crime May 28, 2010 (post-Jan. 25, 2010), but sentenced January 26, 2011 (post-Sept.28).

Court holds applicable law is Jan. 25, 2010 version of 4019.

## Harder: Crimes committed between Sept. 28, 2010 and October 1, 2011

- If committed to county jail – traditional 4 days actual/2 days conduct
- If sentenced to state prison – enhanced 1-for-1 under version of § 2933 then in effect. Exclusions for serious or violent felony priors and § 290 sex offenders also apply to § 2933 credits.

## Even Harder: Violations of Probation – Credits Depend on Date of Original Crime

- Original crime occurred prior to Jan. 25, 2010 – traditional 4 actual/2 conduct
- Original crime occurred between Jan. 25, 2010 – Sept. 28, 2010 – 1-for-1
- Original crime occurred between Sept. 28, 2010 – Oct. 1, 2011 – traditional 4 actual/2 conduct

# Hardest of All: Crime Occurs Between Sept. 28, 2010 – Oct. 1, 2011, Sentenced After Oct. 1, 2011, and Committed to County Jail per 1170(h)

- Split in 4019 and 2933 between Sept. 28, 2010 and Oct. 1, 2011 – CJ got traditional 4/2, state prison terms got 1-for-1 unless subject to exclusion
- Judges Bigelow and Couzens suggest that everybody should be treated under the 2933 scheme for state prisoners
- Not aware of any authority on this yet. Sonoma County has denied writ petitions brought on behalf of county jail inmates after an early indication that it might consider additional credits.

## A few additional points to note:

- For pre-Oct. 1, 2011 crimes, if enhanced 1-for-1 credits scheme applies, statutory exclusions for serious or violent prior or current offenses and § 290 sex offenders also apply.
- (Jan. 25-Sept. 27, 2010 version of 4019)

## No Pleading or Proof Requirement for the Disqualifying Factors:

- *People v. Lara* (2012) 54 Cal.4th 896.
- And the Court meant it:
- Trial court may not strike prior convictions under § 1385 in an attempt to award credits under enhanced scheme. (*People v. Lara*, 54 Cal.4th 896.)

Note that any claim to post-sentencing credit must be raised in a petition for writ of habeas corpus against the CDCR. (*People v. Brown* (2012) 54 Cal.4th 314, 322.)

## Other Problem Situations: Multiple Charges, Multiple Cases, Dual Credits, Etc.

- Multiple Charges in a Single Superior Court Case – Concurrent Sentences:
- Credits Come Off of All Charges (*People v. Adrian* (1987) 191 Cal.App.3d 868, 875-876.)

# Multiple Charges in Single Case – Consecutive Sentences

- Penal Code § 2900.5(b) – Credit can only be given once:
- “Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.”
- Credit gets deducted from the principal term first, then subordinate terms. (15 Cal. Code of Regulations, § 2344.)

## Multiple Cases – “Dual Credits” and The *Joyner* But-For Test

- “Duplicative credits against separately imposed concurrent sentences for unrelated offenses will be granted only on a showing of strict causation.” (*In re Joyner* (1989) 48 Cal.3d 487, 489.)

- “Where a period of presentence custody stems from **multiple, unrelated incidents** of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a ‘but for’ cause of the earlier restraint.” (*People v. Bruner* (1995) 9 Cal.4th 1178, 1193-1194.)
- No credits on second case “unless it is demonstrated that the claimant would have been at liberty during the period were it not for a restraint relating to the proceedings resulting in the later sentence.” (*Joyner*.)

# All Dual Credits End Once D is Sentenced

- Once sentenced, prisoners' custody is not attributable to anything other than the prison term, so entitlement to pre-sentence credits ends.
- (*In re Joyner* 48 Cal.3d 487, 492; *People v. Goodson* (1990) 226 Cal.App.3d 277.)

## Note that D is entitled to Time Attributable to the Case at Issue

Where D gets a consecutive term on a separate case, D entitled to credit for time served solely on that case (“attributable to that offense”). (*People v. Riolo* (1983) 33 Cal.3d 223; *People v. Lacebal* (1991) 233 Cal.App.3d 1061.)

Credits must be attributable to the offense, so any excess credits cannot be transferred and applied to other cases. (*People v. Adrian* (1987) 191 Cal.App.3d 868, 877.)

# Re-Sentencing Following Reversal – *People v. Buckhalter* (2001) 26 Cal.4th 20

- Relevant Time Frames:
- Pre-Sentence: § 4019 for Arrest to Initial Sentencing (Phase I)
- Initial Sentencing, Sentenced Prisoner Serving Term Up to Reversal and Remand (Phase II)
- Remittitur & Remand Up to Second Sentencing (Phase III)

## Where Remand is for Sentencing Error Only:

- § 4019 Does Not Apply, D Remains in CDC custody even if temporarily housed in county jail for re-sentencing. No § 4019 credit for phases II and III.

## Reversal and Remand Where Conviction Overturned:

- § 4019 for Phases I (presentence) and III (post-opinion), but not for time spent as sentenced prisoner during Phase II.
- (See extended discussion in *People v. Donan* (2004) 117 Cal.App.4th 784, 789-792.)

## Helpful Resources:

- Awarding Custody Credits After Realignment (Sept. 2012), Hon. J. Richard Couzens & Hon. Tricia A. Bigelow
- Credits Redux: How to Get 'Em, Where to Get 'Em (May 2009), William M. Robinson, SDAP Staff Attorney
- An Overview of Sentencing Credits, Mat Zwerling & Pam Boskin, FDAP