

S175242

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE



1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Supreme Court Copy

Public: (916) 445-9555
Telephone: (916) 324-5374
Facsimile: (916) 322-8288
E-Mail: Christopher.Rench@doj.ca.gov

August 17, 2010

SUPREME COURT
FILED

AUG 18 2010

Frederick K. Ohlrich Clerk


Deputy

Supreme Court of the State of California
San Francisco Branch
350 McAllister Street
San Francisco, CA 94102-4797

RE: Supplemental Letter Brief
In re Harvey Jenkins, Case No. S175242

Dear Honorable Justices:

The Court has requested supplemental letter briefing regarding the “question of whether petitioner, who is sentenced to an indeterminate term, is entitled to, and can benefit from, “S” time” and “the significance of the answer to this question, if any, on the correctness of the Court of Appeal’s disposition of the case.” (Jul. 29, 2010 Order, citing *In re Dayan* (1991) 231 Cal.App.3d 184; *In re Monigold* (1988) 205 Cal.App.3d 1224, 1227.) Petitioner Harvey Jenkins’s claims are substantially predicated on his argument that because he was entitled to “S” time for the period at issue, it was arbitrary for the California Department of Corrections and Rehabilitation (CDCR) to not also reduce his classification score. But *Monigold* and *Dayan* demonstrate that Jenkins is not entitled to earn sentence-reducing work credit under Penal Code section 2933, and therefore is also not entitled to “S” time.

In *Monigold*, the Court of Appeal considered whether or not an inmate sentenced to an indeterminate term could earn work credits under Penal Code section 2933. (205 Cal.App.3d at p. 1227.) The court held that section 2933 “is expressly applicable only to those prisoners sentenced to determinate terms under Penal Code section 1170 . . . [i]t does not cover persons such as [petitioner] who are serving indeterminate terms and were not sentenced under Penal Code section 1170.” (*In re Monigold, supra*, 205 Cal.App.3d at p. 1227.) Similarly, in *Dayan*, the court agreed with the interpretation of Penal Code section 2933 in *Monigold*. (*In re Dayan, supra*, 231 Cal.App.3d at p. 186 fn. 4; see also *In re Oluwa* (1989) 207 Cal.App.3d 439, 444 [agreeing with *Monigold* that inmate sentenced to indeterminate term is not entitled to earn work credits under Penal Code section 2933]; *People v. Huynh* (1991) 229 Cal.App.3d 1067, 1080 [same]; *People v. (Robert) Jenkins* (1995) 10 Cal.4th 234, 244 fn. 6 [acknowledging holding in *Monigold*].) The *Dayan* court observed that while indeterminately sentenced inmates could still earn conduct credits under Penal Code section 2931, such inmates could not earn work credits

under Penal Code section 2933. (*In re Dayan*, *supra*, 231 Cal.App.3d at pp. 187-188.) Further, the court held that any conduct credits could only be applied against an inmate's Minimum Eligible Parole Release Date (MEPD), not the actual term set by the Board of Parole Hearings if it finds a life inmate suitable for release on parole. (*Id.* at pp. 188-189.)

These decisions demonstrate that Jenkins—an indeterminately sentenced life inmate—is not entitled to earn work credit under Penal Code section 2933. Because “S” time includes the issuing of sentence-reducing work credit where an inmate's work assignment is temporarily interrupted through no fault of his or her own, Jenkins is also not entitled to earn “S” time. (Cal. Code Regs., tit. 15, § 3045.3, subd. (a).)

The holdings in *Monigold* and *Dayan* do not impact the correctness of the Court of Appeal decision here. At issue is CDCR's decision to not reduce Jenkins's classification score based on program performance for periods of time when he was unassigned to, and not performing in, a program or job. Jenkins raises several arguments challenging this decision. Most of his arguments are predicated on his assertions that because he is entitled to “S” time he also must be afforded a classification score reduction, and that CDCR should make classification decisions in the same manner as credit decisions. (See generally Opening Brief.) Specifically, Jenkins's equal protection argument, due process claim, challenge to CDCR's regulations, and reliance on *In re Player* (2007) 146 Cal.App.4th 813¹ are based on the premise that he is entitled to earn work credit under Penal Code section 2933 for the time at issue. (Opening Brief at pp. 17-23, 26-27, 30-32, 34-39, 40-46, 46-52; Reply Brief at 17-22, 23-24, 35-37.) The decisions in *Monigold* and *Dayan* undermine, if not eliminate, the basis for these claims since Jenkins is not entitled to earn work credit or “S” time.

Jenkins's lack of entitlement to “S” time does not completely dispose of the issue before the Court. As discussed in the answering brief, the decisive question here and below is whether CDCR's classification decision is arbitrary, capricious, or irrational. (See *In re Jenkins* (2009) 95 Cal.Rptr.3d 864, 874.) Indeed, the Court of Appeal not only rejected Jenkins and the *Player* court's erroneous linking of work credit and classification decisions, but also resolved the ultimate issue of whether CDCR's classification decision was arbitrary or capricious. (*Id.* at pp. 876, 878-880.) Thus, this Court still must determine whether there could be a rational basis for

¹ The inmate in *Player* was also an indeterminately sentenced life inmate. (146 Cal.App.4th at p. 816.)

CDCR to require actual performance in a job or program assignment before reducing classification scores based on program performance. As detailed in the answering brief and explained by the Court of Appeal, CDCR's classification decision is not irrational or arbitrary; rather, it is grounded in CDCR's expertise and discretion in classifying inmates and preserving institutional security. Accordingly, the Court of Appeal decision should be affirmed.

Sincerely,



CHRISTOPHER J. RENCH
Deputy Attorney General
State Bar No. 242001

For EDMUND G. BROWN JR.
Attorney General

CJR:

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Harvey Zane Jenkins, on Habeas Corpus**
No.: **S175242**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 17, 2010, I served the attached

SUPPLEMENTAL LETTER BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Linnea M. Johnson
Attorney at Law
Central California Appellate Program
2407 J Street, #301
Sacramento, CA 95814

Attorney for Petitioner Harvey Zane Jenkins

2 Copies

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 17, 2010, at Sacramento, California.

Supattra Straw
Declarant

Supattra Straw
Signature