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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CALVIN LOVELLE MOORE,

Defendant and Appellant.

H040793

(Santa Clara County

Super. Ct. No. C1239897)

In this appeal, appellant Calvin Lovelle Moore challenges the denial of his motion to suppress evidence, which was found in his bedroom, on the ground that his bedroom was not within the scope of a search warrant that had been issued for 4195 Ambler Way. In addition, appellant asks this court to correct his presentence custody credits and apply his excess custody credits to his parole period. We will modify appellant's presentence custody credits, and as so modified we affirm the judgment.

The Santa Clara County District Attorney charged appellant with one count of possession for sale of a controlled substance (Health & Saf. Code, § 11378). In the information, filed on October 31, 2013, the district attorney alleged that appellant had suffered a prior serious or violent felony conviction (Pen. Code §§ 667, subds. (b)-(i) 1170.12)<sup>1</sup> and had served a prior prison term within the meaning of 667.5, subdivision (b).

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

At the time set for the preliminary examination, appellant moved to suppress the evidence seized from his bedroom on the ground that his bedroom fell outside the scope of the search warrant; he renewed the motion in the superior court by way of a combined motion to suppress (§ 1538.5) and to dismiss (§ 995).

Subsequently, pursuant to a negotiated disposition, appellant pleaded guilty to one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and admitted that he had a prior conviction for a violent or serious felony and had served a prior prison term.<sup>2</sup> In exchange for his guilty plea and admissions, appellant was promised a 32-month prison term (top/bottom) and dismissal of the possession for sale charge.

On February 7, 2014, the court imposed the negotiated term of 32 months in state prison, which the court deemed served based on a presentence custody credit calculation of 1,064 days. The court imposed various fines and fees, none of which is at issue in this case, and imposed a three-year parole period.

Appellant filed a timely notice of appeal challenging the denial of his suppression motion.

#### *Standard of Review*

Where, as here, the trial court ruled on a renewed motion to suppress and motion to set aside the information based on the evidence presented to the magistrate at the preliminary hearing, we look directly to the magistrate's findings. (*People v. Ramsey* (1988) 203 Cal.App.3d 671, 678-679; *People v. Laiwa* (1983) 34 Cal.3d 711, 718.) Thus, in this case the magistrate who presided at the preliminary hearing is the finder of fact, and his or her factual resolutions are binding on this court as well as the trial court. (*People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223; § 1538.5, subd. (i).) In reviewing

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<sup>2</sup> The People amended the information to add one count of possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).)

the denial of a defendant's motion to suppress evidence under section 1538.5, we defer to the magistrate's express and implied factual findings if they are supported by substantial evidence. (*People v. Woods* (1999) 21 Cal.4th 668, 673) We indulge all inferences in favor of the lower court's order. (*People v. Brown* (1990) 216 Cal.App.3d 1442, 1447.) However, we exercise independent judgment to determine whether, on the facts found by the fact finder, the search was lawful. (*People v. Woods, supra*, at pp. 673-674.)

We set forth the facts adduced at the hearing on the motion to suppress.

As part of the Human Trafficking Task Force, San Jose Police Officers entered 4195 Ambler Way in San Jose pursuant to a search warrant. The residence was associated with a man named Samaad Murray. The search warrant authorized the officers to search for Murray and his property, specifically to find evidence of child pornography. The warrant authorized a search of the "single story residence" at 4195 Ambler Way, Murray's car, and any print or electronic media that might contain material depicting or discussing child pornography. The officers were briefed on Murray's description and were shown a photograph of him prior to their arrival at the house.

According to Detective Justin Palmer, before he entered the house it appeared to him that it was a "single residence premise." After entering the house, Detective Palmer saw at least two rooms with metal plates with numbers; one door to his right had the number four and the door at the end of the hallway had the number five. Some doors were equipped with either padlocks or other types of locking mechanisms. Some doors were open, some closed and locked; officers had to break down three doors.

After detaining some residents of the house, Detective Palmer heard someone behind the closed door of the room numbered "5." He asked the person "multiple times" to come out of the room. Eventually, appellant came out of the room and was taken away by another officer and detained in the living room while the officers conducted a protective sweep.

A photograph taken of appellant's door shows four holes in the frame, which indicated to Detective Jeremy Martinez, another officer involved in the search, that at one time it held a bracket. Detective Palmer testified that he could not recall seeing a stove in appellant's room and there was no toilet. Detective Martinez testified that no stove was in the room and no toilet. Detective Palmer testified that he did not see any locks on any of the doors, as did Detective Martinez. They both said that they could not recall seeing a refrigerator in appellant's room.

Despite the fact that the photographic exhibits were authenticated as having been taken by Detective Martinez, both officers professed difficulty in recognizing them.<sup>3</sup>

Appellant's room was searched along with all the rooms in the house. Officers pulled appellant's bed away from the wall and the headboard. They located a small bag with less than a tenth of a gram of methamphetamine on the floor; Detective Palmer testified that he believed that a digital scale and a straw were found. During the search of appellant's room, Detective Palmer noticed that a window screen was disturbed. In searching the area outside the window, the officer found five bindles of methamphetamine on the ground.

According to the photographic evidence, appellant's door had some sort of locking mechanism on the outside.<sup>4</sup> Appellant claims that inside the room, he had a small refrigerator, and he kept his medical and personal hygiene products stored in the headboard of his bed; however, it is difficult to discern from the photographic evidence

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<sup>3</sup> The prosecutor stipulated that photographs that were used to refresh Detective Martinez's recollection were photographs that Detective Martinez took of the residence on the day of the search.

<sup>4</sup> It is difficult to discern from the photograph whether the mechanism is a deadbolt, which would not require a key to reopen the door if appellant left the room and did not lock it, or a self-latching lock that would require a key to reenter the room if appellant left the room and the door closed behind him.

where exactly the refrigerator was located. Some photographs do show what appear to be small refrigerators in bedrooms, but not in the photograph of appellant's room.<sup>5</sup>

In denying appellant's motion to suppress, the court found that it had "heard no evidence about where, if at all, Mr. Murray might have particularly resided in the home." Further, there were no "facts established to show that a reasonable officer would have been led to believe that Mr. Murray had no right of access or control over the room designated as number 7<sup>6</sup> for which it appears there was no padlock." The court believed that "even if a padlocking mechanism would have been [*sic*] on the door, Mr. Moore could have still been inside the room without the lock being affixed to the locking mechanism. But the photographs that the court has leads the Court only at best to infer that if there had been any locking mechanism on that in the past it had been removed, and that is just an inference. It's not evidence. [¶] So for those reasons, the Court believes that it was within the scope of the warrant and within the reasonable execution of the warrant, that the officers entered into the room identified as room number 7 and conducted a search within that room and found certain items of evidence."

As noted, in superior court, appellant moved to suppress the evidence and set aside the information. He argued, based on the evidence adduced at the preliminary hearing, that the search and seizure of the methamphetamine in the room and outside the house under the window violated the Fourth Amendment. He asserted that he was a tenant in a boarding house, not a cohabitant in the living space that was the subject of the warrant. Further, he argued that the search was not conducted in good faith.

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<sup>5</sup> The lower court found that the evidence of whether there was a refrigerator in appellant's room was "somewhat ambiguous."

<sup>6</sup> Although appellant's room had the number five on the door, it was designated as number seven for search purposes.

The People countered that the officers executed a lawful search warrant when they observed and seized evidence against appellant; the People argued that there were not sufficient facts to show that a reasonable officer would have been led to believe that Mr. Murray had no right to access appellant's room and therefore it was reasonable for officers to believe that appellant's room was within the scope of the warrant. The People conceded that if the officers had been faced with facts similar to those presented in *Mena v. City of Simi Valley* (9th Cir.2000) 226 F.3d 1031 (*Mena*),<sup>7</sup> then the court could find that appellant's room was in fact a separate and distinct residence from 4195 Ambler Way and it was unreasonable for the officers not to have known that the warrant was overbroad to include appellant's room.<sup>8</sup>

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<sup>7</sup> *Mena* was a civil rights case arising out of the execution of a search warrant. In that case, police officers obtained a warrant to search a house in Simi Valley. Before they executed the search, the officers knew that a "large number" of people lived in the house and that "all of the doors adjacent to the living room were shut and that some of them had padlocks on them." (*Mena, supra*, 226 F.3d at p. 1035.) When the officers entered the house to execute the warrant, "they observed that many of the rooms were padlocked from the outside. Furthermore, upon forcing entry into the locked rooms, the officers saw that the rooms were set up as studio apartment type units, with their own refrigerators, cooking supplies, food, televisions, and stereos." (*Id.* at p. 1038.) The Ninth Circuit concluded that the officers should have realized immediately that the house was a multi-unit residential dwelling and limited their search to their suspect's apartment. (*Ibid.*) The court stated that there was virtually no evidence that the suspect had access to or control of the rooms inhabited by other residents. (*Id.* at p. 1039.)

<sup>8</sup> In denying the renewed motion to suppress, the superior court stated that "Police did not know prior to entering the residence that a large number of people lived there. Additionally, there was no evidence that the units were more like separate studio apartments with their own bathroom, kitchen or appliances. At most some of the rooms had their own tv or small fridge. Lastly, there was no showing that the room searched was its own private unit as there was no padlock on that particular door as there were on others. The defendant argues that the padlock was not on the door because he was inside, but the question is whether the officer knew at that point that it was its own private unit that was not accessible by the subject of the warrant. Defendant's room in particular failed to show other indicia of being its own separate unit such as its own bathroom and kitchen. The only feature it had was a metal number."

### *Discussion*

“ ‘ “In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. We review the court’s resolution of the factual inquiry under the deferential substantial-evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review.” [Citation.] On appeal we consider the correctness of the trial court’s ruling *itself*, not the correctness of the trial court’s *reasons* for reaching its decision. [Citations.]’ [Citation.]” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 364-365 (*Bryant*)).

“ ‘Pursuant to article I, section 28, of the California Constitution, a trial court may exclude evidence under . . . section 1538.5 only if exclusion is mandated by the federal Constitution.’ [Citation.] The Fourth Amendment to the federal Constitution prohibits *unreasonable* searches and seizures. [Citation.]” (*Bryant, supra*, 60 Cal.4th at p. 365.)

For purposes of the suppression motion, both parties appear to be operating under the assumption that appellant had a reasonable expectation of privacy in room number five. We do the same. An overnight guest has a legitimate expectation of privacy in his or her host’s residence, (*Minnesota v. Olson* (1990) 495 U.S. 91, 98) as does a tenant of a house, the occupant of a room in a boarding house (*McDonald v. United States* (1948) 335 U.S. 451), a guest in a hotel room (*Johnson v. United States* (1948) 333 U.S. 10, *Stoner v. California* (1964) 376 U.S. 483, 490), tenants living in buildings with multiple units (*Maryland v. Garrison* (1987) 480 U.S. 79, 86 (*Garrison*)), and, as this court has found, students living in dormitory rooms (*People v. Superior Court (Walker)* (2006)

143 Cal.App.4th 1183, 1206-1207).<sup>9</sup> Given that all the foregoing have legitimate expectations of privacy to hold that unrelated people who share a house, but maintain separate bedrooms for their exclusive use, have no independent right to privacy would deprive a substantial segment of the population of the protections of the Fourth Amendment. (See *State v. Fleming* (Iowa, 2010) 790 N.W.2d 560, 568.)<sup>10</sup> Thus, there is no support for the assumption that unrelated people who share a house, but maintain separate bedrooms/living spaces, have no independent right to privacy in bedrooms maintained for their exclusive use.

“Both the United States Constitution and the Constitution and statutory law of California require that a search warrant describe with particularity the place to be searched. [Citations.]” (*People v. MacAvoy* (1984) 162 Cal.App.3d 746, 753-754.)

“ ‘The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for

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<sup>9</sup> We note that in 1982, the Supreme Court decided a case in which it assumed (without expressly stating) that the Fourth Amendment applies to the search of a state university dormitory room. (See *Washington v. Chrisman* (1982) 455 U.S. 1.)

<sup>10</sup> In *Fleming*, the defendant was one of at least three people renting separate rooms within a single-family residence. (*Fleming, supra*, 790 N.W.2d at p. 562.) In a factual situation almost identical to this case, a warrant was issued to search the entire residence based on an application naming only another renter as having been in possession of drugs. Drugs were found in Fleming’s bedroom when the warrant was executed. (*Ibid.*) Fleming moved to suppress the evidence, arguing that his private bedroom was outside the scope of the warrant. The Iowa Supreme Court concluded that the trial court erred in denying the motion to suppress, and in so doing rejected the reasoning underlying the community-occupation exception that unrelated individuals living together and sharing space and expenses agree to give up their right to privacy in their personal space. (*Id.* at p. 567.) Yet the Iowa Supreme Court suppressed the evidence not because it rejected the community-occupation exception but rather because the search warrant application did not provide probable cause to search Fleming’s room. (*Id.* at pp. 567-568.) The warrant application made no showing that Fleming was in possession of drugs; the only person named in the application as being in possession of drugs was a different co-renter. (*Id.* at p. 568.)

which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.’ [Citation.]” (*People v. Amador* (2000) 24 Cal.4th 387, 392.)

“ ‘ “[A] warrant to search ‘premises’ located at a particular address is sufficient to support the search of outbuildings and appurtenances in addition to a main building when the various places searched are part of a single integral unit. [Citations.]” [Citations.]’ [Citations.]” (*People v. Gallegos* (2002) 96 Cal.App.4th 612, 625.) “[T]he requirement of the Fourth Amendment that a particular ‘place’ be described in the warrant when applicable to dwellings means a single living unit, that is to say the residence of one person or family, and a warrant describing an entire building issued on probable cause for searching only one apartment therein is void. [Citations.] Accordingly when a warrant directs a search of a multiple occupancy apartment house or building, absent a showing of probable cause for searching each unit or for believing that the entire building is a single living unit, the warrant is void and a conviction obtained on evidence seized under it cannot stand. [Citations.]” (*People v. Estrada* (1965) 234 Cal.App.2d 136, 146 (*Estrada*).

In *Estrada*, the court did not hold a search invalid, but rather held that a warrant to search “ ‘the apartment house occupied by Manuel Estrada at 18 S. 19th Street, San Jose’ ” sufficiently limited the search to the defendant’s apartment and was understood as such by the officers executing the warrant. (*Estrada, supra*, 234 Cal.App.2d at p. 149.)

Even so, “the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant.” (*Garrison, supra*, 480 U.S. at p. 85.) The validity of the search of room five “depends on whether the officers’ failure to realize the overbreadth of the warrant was objectively understandable and reasonable.” (*Id.* at p. 88.)

In *Garrison*, officers obtained a warrant for Lawrence McWebb and the third floor apartment of a specific address. At the time of the search, officers believed the third floor contained a single apartment. However, the third floor actually contained two apartments, one belonging to McWebb and the other belonging to Garrison. When serving the warrant, officers encountered McWebb outside of the apartment building. They used his key to enter the building and proceeded to the third floor where they encountered Garrison standing in the hallway area. Officers could see into both apartments, as both doors were open. Officers entered and began searching and discovered that the floor actually contained two separate apartments, and the various items of contraband found were found in Garrison's apartment. Officers discontinued their search of Garrison's apartment upon learning that the apartment they entered actually belonged to Garrison. The trial court found that the officers reasonably believed they were searching McWebb's apartment. (*Garrison, supra*, 480 U.S. at pp. 80-81.)

In upholding the validity of the search, the Supreme Court first determined that the warrant was valid at the time it was issued despite the subsequent discovery that the warrant was overbroad. (*Garrison, supra*, 480 U.S. at p. 85.) The court determined that in assessing the validity of the warrant, the court must consider the information available to the officers at the time they acted. (*Ibid.*)

Next, the court considered whether the *execution* of the warrant violated Garrison's Fourth Amendment right to be free from unreasonable searches. The court noted: "If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment." (*Garrison, supra*, 480 U.S. at p. 86.) However, the court concluded that the "officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable." (*Id.* at p. 88.) This was because the

“objective facts available to the officers at the time suggested no distinction between McWebb’s apartment and the third-floor premises.” (*Ibid.*)

The evidence showed that when the officers executed the search warrant at 4195 Ambler Way they believed that it was a single family residence. The question we must answer is whether there were sufficient signs that would indicate that 4195 Ambler Way was not a single family residence, but a multiple occupancy building.

Below and on appeal, appellant argues that this case is analogous to *Mena, supra*, 226 F.3d at pages 1036-1039. There are some factual differences here. In contrast to *Mena*, the officers here had no knowledge prior to searching 4195 Ambler Way that a “ ‘large number’ ” of people lived in the house. (*Id.* at p. 1035.)

However, whenever police officers exceed the scope of a search warrant for a single building or single dwelling by searching separate subunits within it, as noted, the pivotal issue is whether, under the totality of circumstances, the police officers’ failure to realize the overbreadth of the search warrant was objectively understandable and reasonable. (*Garrison, supra*, 480 U.S. at p. 88.)

While doorbells, deadbolts, separate entrances, separate mailboxes, and separate appliances are certainly indicia of separate units, we do not necessarily hold that these are prerequisites. (See *United States v. Greathouse* (D.Or. 2003) 297 F.Supp.2d 1264, 1274 (*Greathouse*), [rejecting government’s argument that absence of doorbells and deadbolts on private rooms in a single family dwelling are dispositive for Fourth Amendment purposes].)<sup>11</sup> In this case, there is no dispute that the kitchen, bathroom, and living room

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<sup>11</sup> In *Greathouse*, the district court concluded that a search of the defendant’s bedroom was unlawful because the law enforcement officers “were immediately advised” by the owner when they entered the house “that the defendant was a renter and that he lived in the back bedroom on the first floor. It was also apparent to the officers that there was no familial relation between any of the residents; they were simply a group of people sharing a house.” (*Greathouse, supra*, 297 F.Supp.2d at p. 1274.) In addition, the defendant had a “Do Not Enter” sign posted on his door. (*Ibid.*) The court concluded (continued)

areas were occupied in common. There is also no dispute that appellant's bedroom door was closed when the officers entered the house, and opened only so that he could comply with the officer's demands to come out. Further, there is no dispute that there was a separate numbering system for some of the individual rooms, that other doors in the house were padlocked, and that appellant's door had some sort of locking mechanism on the outside; and his room contained his personal medical and hygiene products; the photographs taken by Detective Martinez confirm as much.

Nevertheless, given the totality of the circumstances it was objectively understandable and reasonable for the officers to believe that the warrant covered appellant's bedroom/living space. Although appellant's door had a number and some sort of lock, there was no doorbell that would indicate that no one was allowed in except by appellant's invitation; locks can be left unlocked. The fact that other doors had padlocks indicates nothing more than they were locked from the outside; they could have been storage cupboards. As such, padlocks do not give any reasonable notice that behind the door is a self-contained sub-unit akin to an apartment. Once inside the room, assuming that there was a small refrigerator, there were insufficient other accommodations to indicate to the officers that appellant's bedroom was a self-contained unit—no sink, no cooking supplies or utensils, no stove, no separate bathroom facilities.<sup>12</sup>

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that “upon learning this information from [the owner], when coupled with the sign on the defendant's door and the apparent absence of any familial or other connection between the residents, the agents at that point should have known there were separate residences within the house and should have stopped and obtained a second warrant for the defendant's bedroom.” (*Id.* at pp. 1274-1275.) We find *Greathouse* distinguishable because here the officers were not advised that appellant was renting room five; and appellant did not display a “Do Not Enter” sign on his bedroom door.

<sup>12</sup> Although a conventional dorm room has no doorbell, separate appliances, separate kitchen, or separate bathroom, the likelihood that officers would search the wrong dormitory room is nil given the nature of university and college housing. The same is true of hotel rooms.

Whether or not the residents subjectively considered their rooms to be a series of sub-units, the officer who sought the search warrant, and the officers who executed the warrant, did not know and had no reason to know that the structure was anything other than a single dwelling house.

Our ruling is very narrow. We determine only that magistrate judge was entitled to find from the evidence in the record that the investigating officer did not know and had no reason to believe that 4195 Ambler Way housed multiple units even after entry into the building and the individual bedrooms; that finding is supported by substantial evidence. However, it does not mean law enforcement personnel are now entitled to ignore evidence that might suggest a structure houses multiple self-contained units—such a failure will likely lead to suppression. We simply hold that, in this case, the judge was entitled to find the officers did not know and had no reason to believe the structure in question housed multiple self-contained units.

Based on the information available to the officers at the time of execution of the warrant, the officers' belief that the residence was a single shared living space was objectively reasonable, and the search lawful. Accordingly, the lower court did not err in denying the motion to suppress.

#### *Presentence Custody Credit*

At sentencing, the lower court awarded appellant 532 actual days of custody credit and an equal number of conduct credits for a total credit calculation of 1,064 days. According to appellant, he was arrested on August 22, 2012, and he remained in custody pending sentencing; he was sentenced on February 7, 2014. Appellant argues that the correct calculation based on these dates is 535 days.

As a general rule, a defendant is required to have the trial court correct a miscalculation of presentence custody credits. (§ 1237.1 [no appeal shall be taken by the defendant from a judgment of conviction 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].) However, where—as here—there are other appellate issues to be decided, we may simply resolve the custody credits issue in the interests of economy. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427; *People v. Jones* (2000) 82 Cal.App.4th 485, 493.)

“In all felony and misdemeanor convictions . . . when the defendant has been in custody . . . all days of custody of the defendant . . . shall be credited upon his . . . term of imprisonment . . . .” (§ 2900.5, subd. (a).) The sentencing court is obligated to “determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section.” (§ 2900.5, subd. (d).)

“A defendant who remains in custody between conviction and sentencing will have spent part of the day of sentencing in custody prior to actual sentencing.” (*People v. Smith* (1989) 211 Cal.App.3d 523, 526.) “Since section 2900.5 speaks in terms of ‘days’ instead of ‘hours,’ it is presumed the Legislature intended to treat any partial day as a whole day.” (*Ibid.*) Thus, the lower court is required “to award credits for all days in custody up to and including the day of sentencing.” (*Id.* at p. 527.)

Appellant is correct that the accurate calculation based on the dates he was in presentence custody up to and including the date of sentencing is 535 days. Since appellant committed his crime after October 1, 2011, under section 4019 he is entitled to two days of conduct credit for every two days served. (§ 4019, subd. (f).) Accordingly, he is entitled to 534 days of conduct credit. We will order the abstract of judgment corrected to reflect presentence credits of 1,069 days.

#### *Excess Credits*

Section 1170, subdivision (a)(3) provides, “In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence shall be

deemed to have been served and the defendant shall not be actually delivered to the custody of the secretary [of the Department of Corrections and Rehabilitation (Department)]. The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole.” In addition, case law recognizes that time served in excess of the determinate term must be credited against the prisoner's parole period. (See, e.g., *In re Carter* (1988) 199 Cal.App.3d 271, 273; *People v. Lara* (1988) 206 Cal.App.3d 1297, 1303.)

Appellant contends that his excess presentence credits must be credited against his parole period; he asks this court to order the trial court to correct the abstract of judgment to reflect the application of 109 days to his parole period. Appellant's 1,069 days of presentence credit exceeded the 32-month prison term to which he was sentenced. As can be seen, appellant is correct that the presentence credit exceeding his 32-month sentence must be credited against his parole term, effectively reducing it. (*People v. Lara, supra*, 206 Cal.App.3d at p. 1303; see *In re Bush* (2008) 161 Cal.App.4th 133, 141; Cal. Code Regs., tit. 15, § 2345.) This requirement is explicitly set forth in the regulations governing the Board of Parole: “If any custody credit remains after deducting it from the offense to which it applies, the remaining credit shall be deducted from the parole period.” (Cal. Code Regs., tit. 15, § 2345.) However, there is no relief for this court to grant, as appellant has shown no error in the trial court proceedings or abstract of judgment.

The power to determine the length of a parole period, within the period prescribed by statute, is vested not in the courts but in the Department. (§§ 3000, subd. (b)(7), 3001.) In appellant's case, the maximum parole period set by statute is three years (Pen. Code, § 3000, subd. (b)(1)), but this period must be reduced by the time required to

be credited against the parole period due to the excess time served before sentencing (Cal. Code Regs., tit. 15, § 2345).

Had appellant actually served his sentence in prison, the Department would have been required to meet with him at least 30 days prior to his good-time release date and provide, “under guidelines specified by the parole authority or the department, whichever is applicable, the conditions of parole and the length of parole up to the maximum period of time provided by law.” (§ 3000, subd. (b)(7).) Since appellant was released before actually having to serve time in prison, we must presume such a meeting occurred prior to his release after the sentencing hearing, and that the Department has performed, and will properly perform, its duty. (Evid. Code, § 664.) If appellant has evidence to the contrary, his remedy will be a petition for writ of habeas corpus.

*Disposition*

The judgment is modified to reflect that appellant is entitled to 1,069 days of custody credit. The trial court is directed to prepare a corrected abstract of judgment reflecting an award of 1,069 days of presentence custody credit and to forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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WALSH, J.\*

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\*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.