

# **AWARDING CUSTODY CREDITS**

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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.4<sup>th</sup> 145, 154; also *People v. Buckhalter* (2001) 26 Cal.4<sup>th</sup> 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 a number of changes to the statutes governing the award of conduct credits. The purpose of this memorandum is to offer some guidance to trial judges and counsel as they navigate their way through the maze of changing rules and credit formulas.

Penal Code section 4019<sup>1</sup>, governing the award of county jail conduct credits, has had four distinct versions of the credit formula:

**Prior to January 25, 2010**, section 4019 gave defendants confined in or committed to county jail six days or more two days of conduct credit for every six days of actual custody time served, or one-third off their sentence. Stated differently, for every four days of actual time served, a total of six days of the sentence would be deemed served. 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**, section 4019 was amended to give defendants confined in or committed to county jail four days or more two days of conduct credit for every four days of actual custody time served, or approximately one-half off their sentence. In other words, for every two days of actual time, four days of the sentence was deemed served. The net effect of the change was to give an extra two days of credit for every two days actually served. The credit applied to persons sentenced to county jail, and to pre-sentence credits for persons sent to state prison. Excluded from the enhanced credit provisions were defendants who had 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.

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<sup>1</sup> Unless otherwise indicated, all references are to the Penal Code.

**Effective September 28, 2010**, section 4019 was returned to its wording prior to January 25, 2010: persons confined in or committed to county jail six days or longer would receive 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 persons sentenced to prison one day of credit for every day of pre-sentence time served in county jail. Excluded from the enhanced credit provisions were defendants who had 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 excluded defendants would receive only two days of conduct credit for every six days served. 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 Criminal Justice Realignment Act of 2011, section 4019 was amended to provide that inmates confined in or committed to county jail four days or longer are to receive two days of conduct credit for every four days served, or approximately one-half off their sentence. In other words, for every two days of actual time in custody, four days of the sentence will be deemed served. As with the change made on January 25, 2010, the net effect of the amendment is to give an extra two days of credit for every two days actually 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 persons sentenced under section 1170(h), some persons sentenced to state prison, and persons serving jail custody for violation of state parole or Post-Release Community Supervision (PRCS). The new provisions also apply to persons denied felony probation and sentenced to county jail under section 1170(h). 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. Section 2933, governing credit for persons sent to state prison, was restored to its original language: state prison inmates will receive six months of conduct credit for every six months of actual time served. There are no exclusions from this formula, only conduct credit limitations such as sections 2933.1 [violent felonies] and 2933.2 [murder]. 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 potential relationship between four variables: 1) when the crime is committed; 2) when the custody time is served; 3) whether the defendant is disqualified from receiving enhanced credits under the applicable statute; 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 three primary time periods and sentencing circumstances relevant to this determination. The analysis, however, must start with an understanding of the Supreme Court's decision in *People v. Brown*.

## 1. *People v. Brown*

Most of the published opinions addressing the changes to section 4019 concern defendants who committed a crime and were sentenced before the effective date of the amendment to section 4019, but the case was not final as of that date. The courts were widely split on the question of which law applied to the calculation of credits. The conflict was resolved by the Supreme Court in *People v. Brown* (2012) 54 Cal.4th 314.

*Brown* requires the custody credit change made January 25, 2010, to be applied prospectively. “We hold that former section 4019 [operative January 25, 2010] applied prospectively, meaning that 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.” (*Brown* at p. 318.) The opinion is based on the strong presumption created by section 3: “No part of the [Penal Code] is retroactive, unless expressly so declared.” The court determined there was no such declaration regarding the changes made to section 4019, nor could such an intent be inferred from extrinsic sources.

As a result, defendants are to receive custody credit based on the law effective when the time is served. “To apply former section 4019 prospectively necessarily means that prisoners whose custody overlapped the statute’s operative date (Jan. 25, 2012) earned credit at two different rates.” (*Brown* at p. 322.) Even though a court sentences a defendant after the effective date, the conduct credits earned prior to the effective date must be determined under the prior law to avoid any impermissible retroactive application of the new statute. “Credits are determined and added to the abstract of judgment at the time of sentencing, but they are *earned* day by day over the course of a defendant’s confinement as a predefined, expected reward for specified good behavior.” (*Brown* at p. 322; emphasis original.)

The court declined to apply *In re Estrada* (1965) 63 Cal.2d 740. *Estrada* held that when the Legislature reduces the punishment for a specific crime, the benefit of that reduction extends to all defendants whose cases are not final as of the date of the change. *Brown* observed that the change to section 4019 did not reduce the penalty for a particular crime; rather the change relates to an increase in custody credit for a defendant’s conduct in the future. “*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule’s application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments.” (*Brown*, at p. 324.)

Finally, *Brown* rejected any equal protection considerations. The court noted that conduct credits are intended to reward good behavior which happens after the entitlement to the credit, not conduct occurring prior to the existence of the credit. The court distinguished *In re Kapperman* (1974) 11 Cal.3d 542, on the basis that *Kapperman* concerned the equal protection right to *actual time* credit which is given irrespective of behavior by the defendant; here the issue was *conduct* credit which must be earned. "Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing *conduct* credits are similarly situated." (*Brown* at p. 330; emphasis original.)

2. ***Summary of applicable rules***

Based on *Brown* and other cases that discuss the awarding of conduct credits, the determination of the correct formula for the calculation of conduct credits comes down to the application of two basic principles:

- For crimes committed prior to September 28, 2010, look to the formula applicable **when the time was served**.
- For crimes committed on or after September 28, 2010, look to the formula applicable **when the crime was committed**.

See Section D, *infra*, for a discussion of the specific custody credit formulas.

3. ***Crimes committed prior to September 28, 2010 or violations of probation based on crimes committed prior to September 28, 2010***

**For time served prior to January 25, 2010, defendants confined in or committed to county jail six days or more will receive two days of conduct credit for every six days of actual custody time served, or one-third off their sentence. Stated differently, for every four days of actual time served, a total of six days of the sentence would be deemed served. This credit is 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.**

**For time served after January 25, 2010, defendants confined in or committed to county jail four days or more will receive two days of conduct credit for every four days of actual custody time served, or approximately one-half off their sentence. In other words, for every two days of actual time, four days of the sentence was deemed served. The credit applies to persons sentenced to county jail, and to pre-sentence credits for persons sent to state prison. Excluded from the enhanced credit provisions are defendants who have a prior conviction for a serious or violent felony, defendants who are being**

**sentenced on a serious felony, and any person required to register as a sex offender under section 290.**

For crimes committed at any time prior to September 28, 2010, or for probation violations where the underlying crime was committed prior to that date, the selection of the correct custody credit formula will depend on when the time was served. The formula changes on January 25, 2010, the effective date of the first amendment to section 4019. If the time was served prior to January 25, 2010, the traditional formula under section 4019 will apply. If the time was served after January 25, 2010, the new credit formula will apply. If the time was served during both time periods, credits will be calculated separately under each formula. Because the court is selecting a credit formula based on when the time was served, the specific selection is not based on when the crime was committed, when the case was sentenced, whether the case was final as of January 25, 2010, or whether the defendant is serving time for a probation violation based on an underlying crime committed before or after January 25, 2010.

The time period prior to September 28, 2010, was discussed in *Brown*: “To apply former section 4019 prospectively necessarily means that prisoners whose custody overlapped the statute’s operative date (Jan. 25, 2010) earned credit at two different rates. Defendant contends such a result is impermissible because a court may apply only the version of section 4019 in effect at the time sentence is imposed (or modified on appeal). Defendant bases this argument on section 2900.5, which requires the sentencing court to determine and include in the abstract of judgment the presentence credits to which a defendant is entitled (*id.*, subd. (d)), including days ‘credited to the period of confinement *pursuant to Section 4019*’ (§ 2900.5, subd. (a), italics added). Defendant thus reads the italicized reference to section 4019 as meaning ‘the version of section 4019 currently in effect.’ Defendant’s reading would violate section 3 by causing any legislative change in the credit-accrual rate to operate retroactively without an express declaration of retroactive intent. Furthermore, nothing in the legislative history of section 2900.5, the relevant language of which has remained unchanged since 1991 (see Stats. 1991, ch. 437, § 10, p. 2218), suggests the Legislature intended the statute to have such an effect. Credits are determined and added to the abstract of judgment at the time of sentencing, but they are *earned* day by day over the course of a defendant’s confinement as a predefined, expected reward for specified good behavior. Having been earned, credits obtain a kind of permanency, as they may not be lost except for misconduct. (See generally *People v. Deusler* (1988) 203 Cal.App.3d 273, 275-277; Cal. Rules of Court, rule 4.310; cf. § 2932.) Defendant’s reading of section 2900.5 ignores these considerations.” (*Brown* at p. 322; emphasis original.)

*Payton v. Superior Court* (2012) 202 Cal.App.4<sup>th</sup> 1187, concerns a defendant who committed a crime and was sentenced prior to January 25, 2010. Thereafter, in May 2011 he was found in violation of his probation and was sentenced to 90 days in jail; the trial court applied conduct credits based on the law prior to

January 25, 2010. The appellate court issued a writ of habeas corpus, directing the jail to apply the credit formula enacted January 25, 2010. The court's reasoning was based on a portion of the brief submitted by the Attorney General: "The Attorney General explains the 'legislative intent in awarding or increasing credit for good conduct is to encourage good behavior and work performance by inmates in custody. Such good behavior and work performance helps to maintain the security and safety of local custody facilities. [¶] For these reasons, inmates are entitled to the conduct credits which are in effect at the time their custody is served. Because all of petitioner's custody time was served after the effective date of the amendment, he is entitled to the credits which could have served as the incentive for his good behavior. Accordingly, he is entitled to six additional days of conduct credits for his pre-sentence custody time. He should also have been earning conduct credits at this rate over the course of his 90-day period of custody.'" (*Id.* at p. 1191; emphasis added.)

**a. Credits for crimes committed prior to September 28, 2010, but custody is served after that date**

For crimes committed prior to September 28, 2010, but where custody is served after that date, the credit formula will be based on when the time was served as to any time served prior to September 28, 2010. As for time served after September 28, 2010, the formula will be the one effective January 25, 2010. The credit for time served after September 28, 2010, cannot be based on the new formula effective on that date for two reasons. First, the amendment made on September 28, 2010, expressly provides its provisions only apply to *crimes* committed after the effective date. (§ 4019(g).) Second, because the formula effective September 28, 2010, reduces conduct credits, to apply the more restrictive formula to crimes committed prior to that date would likely violate the *ex post facto* provisions of the constitution.

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 *lose* 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.4<sup>th</sup> 158, 182; *People v. Palacios* (1997) 56 Cal.App.4<sup>th</sup> 252, 256-257; and *People v. Rutledge* (1983) 139 Cal.App.3d 620, 623-625.

The statute effective September 28, 2010, which clearly reduces credit 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.

In *People v. Garcia* (2012) 209 Cal.App.4<sup>th</sup> 530, the defendant committed the crime on May 28, 2010 – after the effective date of the amendment of January 25, 2010. He was sentenced on January 26, 2011, after the effective date of the change made September 28, 2010. The court held the proper law applicable to the sentencing was the statute effective January 25, 2010, but because the defendant committed a strike offense and had a prior strike offense, he was excluded from the enhanced credit scheme. He was entitled only to one-third off his sentence. Because he committed the crime prior to any of the realignment legislation, the defendant was not eligible for any of its benefits.

**b. Credits for violations of probation based on crimes committed prior to September 28, 2010**

Just as with crimes committed prior to September 28, 2010, credits for time served on violations of probation based on crimes committed prior to September 28, 2010, will be governed by when the time was served. If the time was served prior to January 25, 2010, the defendant will be entitled to credit under the traditional formula under section 4019. If the time was served after January 25, 2010, the defendant will receive credits under the new formula. As noted above, even if the custody on the probation violation is served after September 28, 2010, the credits will be calculated under the formula effective January 25, 2010.

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

**For crimes committed after September 28, 2010, and prior to October 1, 2011, persons confined in or committed to county jail six days or longer will receive two days of conduct credit for every six days of actual custody time served. Section 2933, a statute applying to credits in state prison, grants persons sentenced to prison one day of credit for every day of pre-sentence time served in county jail. Excluded from the enhanced credit provisions for prison commitments are defendants who have a prior conviction for a serious or violent felony, defendants who are being sentenced on a serious felony, and any person required to register as a sex offender under section 290. The excluded defendants will receive only two days of conduct credit for every six days served.**

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: if sentenced to six or more days, the defendant will receive two 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(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.

**a. Violations of probation based on underlying crimes committed between September 28, 2010, and October 1, 2011**

Violations of probation where the underlying crime for which probation was granted was committed between September 28, 2010, and October 1, 2011, will have credits awarded based on the formula effective September 28, 2010. 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. Accordingly, so long as the violation of probation was based on an underlying crime committed between September 28, 2010, and October 1, 2011, custody credits will be awarded based on the formula effective September 28, 2010, even if custody time on the violation is served after October 1, 2011.

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

**For crimes committed on or after October 1, 2011, or for violations of probation based on underlying crimes committed on or after October 1, 2011, defendants sentenced to county jail for four or more days will receive pre and post-sentence conduct credit of two days for every four days of actual time served. Defendants sentenced to state prison will receive pre-sentence conduct credit of two days of conduct credit for every four days of actual time served. The credits in state prison will be calculated under section 2933.**

**a. Sentences to county jail**

The most recent change to custody credits, made in connection with the 2011 Realignment Legislation, amends section 4019 to specify, *without any exclusion*, that inmates who are sentenced to four or more days are to receive two days of conduct credit for every four days of actual custody time served in county jail. (§ 4019(b) and (c).) In other words, for every two days of actual time in custody, four days will have been deemed served, or essentially half-time credit. (§ 4019(f).) The change is made effective for all crimes *committed* on or after October 1, 2011. (§1170(h); *People v. Brown* (2012) 54 Cal.4<sup>th</sup> 314, 322, fn.11; *People v. Ellis* (2012) 207 Cal.App.4th 1546.) The effective date of this change should not be confused with the effective date of the changes related to section 1170(h), which are effective as to all crimes *sentenced* on or after October 1, 2011.

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 PRCS, where the underlying crime occurred on or after October 1, 2011. The new provisions also will apply to all pre and post-sentence credit for persons serving a term in county jail under section 1170(h) for a crime committed on or after October 1, 2011. (§ 4019(a)(6).)

**b. Sentences to state prison**

Section 4019 will govern the defendant's entitlement to any *pre-sentence* credit. Unless otherwise limited by such statutes as sections 2933.1 (violent felonies) and 2933.2 (murder), the pre-sentence credit for persons sent to state prison will be four days of total credit for every two days served.

Section 2933(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. Unless otherwise limited, all inmates serving a sentence in state prison will receive the same credit. The realignment legislation eliminated the exclusions based on the fact the defendant has a prior adult serious or violent felony conviction, was sentenced for a serious felony, or was required to register as a sex offender under section 290.

**c. Credit for sentences imposed after October 1, 2011, for crimes committed prior to the effective date**

As noted above, the new credit provisions are effective only as to crimes committed on or after October 1, 2011. (*People v. Ellis* (2012) 207 Cal.App.4th 1546.) Any custody credit earned prior to October 1, 2011, is to be governed by the applicable prior law. (§ 4019(h).) Accordingly, when sentencing a defendant after October 1, 2011, for a crime occurring prior to that date, the court must look to the formula applicable to the time when the crime was committed. In other words, the court should determine when the crime occurred (or in cases of a violation of probation, when the underlying crime occurred), then use the applicable credit formula.

The only "gap" in the prior law concerns sentences imposed after October 1, 2011, where the defendant is sentenced to county jail under the provisions of section 1170(h); that section did not exist prior to October 1, 2011. When the court sentences the defendant under section 1170(h) when credit has been earned prior to October 1, 2011, the credits should be based on what the defendant would have received under section 2933 had he been sentenced to state prison. (*People v. Hul* (2013) \_\_\_ Cal.App.4th \_\_\_.) Except as to where the sentence is served, commitments under section 1170(h), are being treated the same as state prison commitments. It is reasonable for the defendant to receive "state prison" credit during this transition period. (*Id.* at p. \_\_\_.) Notwithstanding the credits are listed

in section 2933, a code section applicable to state prison commitments, the credits must be calculated by the trial court. (*People v. Tinker* (2013) \_\_\_ Cal.App.4<sup>th</sup> \_\_\_.)

#### 4) Violations of probation

Because the most recent changes to section 4019 are limited to crimes committed on

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

#### **6. *Credit for time served while on postrelease community supervision (PRCS) or parole***

There are two circumstances where the defendant may be in custody on postrelease community supervision (§§ 3450, *et seq.*) or parole (§3000.08, effective July 1, 2013): (1) custody time imposed by the probation or parole officer for "flash incarceration," and (2) time imposed by the court or parole hearing officer for violation of the conditions of PRCS or parole.

While on PRCS or parole, the defendant is subject to "flash incarceration" for any violations of his conditions of supervision. (§§ 3000.08(d), effective July 1, 2013, and 3454(b).) "Flash incarceration" is defined as "a period of detention in county jail due to a violation of an offender's conditions of postrelease supervision. The length of the detention period can range between one and 10 consecutive days. Flash incarceration is a tool that may be used by each county agency responsible for postrelease supervision. Shorter, but if necessary more frequent, periods of detention for violations of an offender's postrelease supervision conditions shall appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer term revocations." (§ 3454(c); see also § 3000.08(e), effective July 1, 2013.) *A defendant serving time for a period of flash incarceration is not entitled to any conduct credits against any of these periods of custody.* (§ 4019(i).)

If the supervising agency determines intermediate sanctions, including flash incarceration, are no longer appropriate, the parole hearing officer for persons on parole (§ 3000.08(f), effective July 1, 2013) and the court for persons being supervised by the probation officer (§ 3455(a)), may order the defendant to be confined in the county jail for up to 180 days. (§§ 3000.08(g) and 3455(c).) Custody credit for these persons is determined in accordance with section 4019.

(§ 4019(a)(5).) If the underlying crime occurred prior to October 1, 2011, credits will be determined by the applicable prior law. (§ 4019(h).) Accordingly, if the underlying crime occurred prior to September 28, 2010, the correct formula will be the one effective January 25, 2010. If the underlying crime was committed between September 28, 2010, and October 1, 2011, the formula effective September 28, 2010, will apply. If the crime occurred on or after October 1, 2011, the latest formula will apply.

### **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, will not have custody credits calculated by the more liberal versions of the new statutes if they come within any of the following exclusions. (§§ 4019(b)(2) and (c)(2) [law effective 1/25/10], 2933(e)(3) [law effective 9/28/10].)

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

Defendants will be excluded from the enhanced credit provisions “[i]f the prisoner is *required* to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290).” (§§ 4019(b)(2) and (c)(2) [law effective 1/25/10], and 2933(e)(3)[law effective 9/28/10]; emphasis added.) Clearly the exclusion will apply if the defendant is required to register as a sex offender because of the current crime.

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 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.4<sup>th</sup> 342, 349.)

The exclusion also must now be considered in light of the Supreme Court decision in *People v. Hofsheier* (2006) 37 Cal.4<sup>th</sup> 1185, which held registration for a conviction of section 288a(b)(1), oral copulation of a person under 18, is no longer mandatory but is discretionary. Cases following *Hofsheier* have extended its holding to section 288a(b)(2) [oral copulation of a person under 16 by a person over 21], section 288a(e) [consensual oral copulation while in a custody facility], section 286(b)(1) [sodomy of a person under 18], and section 289(h) [sexual penetration of a person under 18]. Based on *Hofsheier* and its progeny, it can

reasonably be expected that registration also will be discretionary for section 286(b)(2) [sodomy of a person under 16 by a person over 21], and section 289(i) [sexual penetration of a person under 16 by a person over 21]. Accordingly, since registration for these offenses is discretionary, persons required to register for these crimes will not be excluded from the enhanced credit provisions. Furthermore, the exclusion likely will not apply when registration is required as a matter of the court's discretion under section 290.006.

**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. In most instances, the list of serious felonies provided in section 1192.7(c), includes all violent felonies as listed in section 667.5(c). A comparison of the two lists reveals that only the following crimes are violent, but not serious felonies: sodomy in violation of section 286(c) or (d); oral copulation in violation of section 288a(c) or (d); sexual penetration as defined in section 289(j); assault with intent to commit 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. As a result, the failure to include a specific reference to violent felonies is a distinction without any meaning.

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

Defendants who have prior conviction for a serious felony under section 1192.7(c), or a violent felony under section 667.5(c), whether being sentenced to state prison or a county jail, will not receive the enhanced conduct credits. (§§ 4019(b)(2) and (c)(2) [law effective 1/25/10], and 2033(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.4<sup>th</sup> 343, 346.) Furthermore, because the legislation makes express reference to prior convictions under

sections 667.5(c), and 1192.7(c), the exclusion likely will not be triggered by out-of-state adult convictions for serious or violent crimes.

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

The realignment legislation has made no change to the custody credits awarded to defendants sentenced to state prison for murder or a violent felony. Section 2933.1, applicable to violent felonies, limits pre and post-sentence conduct credits to 15% “notwithstanding any other law.” Similarly, section 2933.2, applicable to murder convictions, prohibits any grant of conduct credits “notwithstanding Section 2933.1 or any other law.” The changes to sections 2933 and 4019, which now grant half-time credit to most persons committed to the county jail, remain limited by sections 2933.1 and 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 is committed, 2) when the custody time is served, 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 and October 1, 2011, or the formula for state prison commitments 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.4<sup>th</sup> 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 confined in or committed to county jail for 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 and violations of probation, PRCS or parole based on underlying crimes committed prior to September 28, 2010, whether or not the defendant is sentenced to state prison or county jail, to the extent the time is served in local custody prior to January 25, 2010.*
- *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 is confined in or committed to county jail for 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 conduct 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, PRCS or parole based on underlying crimes committed prior to September 28, 2010, but only as to time served in county jail after January 25, 2010, whether or not the defendant is sent to prison or jail.*
- *Crimes committed on or 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).*
- *Crimes committed on or after October 1, 2011, for pre-sentence credit for a state prison sentence.*
- *Violations of probation, PRCS or parole where the underlying crime was committed on or after October 1, 2011.*

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

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

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.

This credit formula applies in the following situations where the defendant is sentenced to state prison:

- *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.*

**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(c) and 1192.7(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. The issue has been resolved by the Supreme Court in *People v. Lara* (2012) 54 Cal.4<sup>th</sup> 896. *Lara* holds the People are not required to plead or prove the existence of any of the disqualifying circumstances. While the defendant is entitled to due process in determining whether he is subject to disqualification, the determination is properly made by the court; *Apprendi v. New Jersey* (2000) 530 U.S. 466, has no application to this process. *Lara* heavily relied on the court's reasoning in *In re Varnell* (2003) 30 Cal.4<sup>th</sup> 1132. Finally, for the reasons discussed in *People v. Brown* (2012) 54 Cal.4<sup>th</sup> 314, *Lara* found no reason to apply principles of equal protection to persons who serve a sentence prior to the effective date of a statute that grants enhanced custody credits. (*Lara*, at p. 906, fn. 9.)

## 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 had been a matter of some dispute. The matter was resolved by the Supreme Court's holding in *People v. Lara* (2012) 54 Cal.4<sup>th</sup> 896. Observing that section 1385 only grants the court authority to dismiss crimes, enhancements and other sentencing factors that must be pled, the court held section 1385 has no effect on the factors that bar enhanced credits, which factors need not be pled and proved. *Lara* relied heavily on *In re Varnell* (2003) 30 Cal.4<sup>th</sup> 1132, which 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 drug 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.4<sup>th</sup> 490, 499.)

## 3. ***Correction of award of credits***

Because of the extensive confusion related to the calculation of credits, courts may be asked to correct the calculation after sentencing. 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.4<sup>th</sup> 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. 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.

#### **4. Equal protection**

Defendants who find they are receiving less conduct credit than some other class of defendant frequently challenge the disparity on equal protection grounds. The argument has not been favorably received on appeal.

*People v. Brown* (2012) 54 Cal.4th 314, rejected any equal protection considerations as to time served prior to the effective date of the January 25, 2010 law increasing conduct credits. The court noted that conduct credits are intended to reward good behavior which happens *after* the entitlement to the credit, not conduct occurring prior to the existence of the credit. The court distinguished *In re Kapperman* (1974) 11 Cal.3d 542, on the basis that *Kapperman* concerned the equal protection right to *actual time* credit which is given irrespective of behavior by the defendant. (See also *In re Strick* (1983) 148 Cal.App.3d 906; *In re Stinnette* (1979) 94 Cal.App.3d 800; *In re Bender* (1983) 149 Cal.App.3d 380.) *Brown* also held, at least as to custody served after January 25, 2010, the defendant will receive the enhanced credits even though the crime was committed prior to the effective date. This aspect of the decision was not based on the Equal Protection clause. The statutory change contained no savings clause making it effective only for crimes committed after a particular date.

*People v. Verba* (2012) 210 Cal.App.4th 991, holds a defendant has no equal protection right to the calculation of custody credits based on the formula effective October 1, 2011, if the crime was committed prior to that date. *Verba* observed there was an express savings clause in the legislation. Although the defendant was similarly situated to persons who commit crimes after October 1, 2011, the Legislature had a rational basis for applying different credit formulas.

*People v. Kennedy* (2012) 209 Cal.App.4<sup>th</sup> 385, holds the legislative change to credits effective for crimes committed on or after October 1, 2011, does not apply to persons who commit crimes prior to that date, even though they serve time after the effective date. The court expressly rejected any equal protection considerations. (*Id.* at 397-399.) Similarly, *People v. Rajanayagam* (2012) 211 Cal.App.4<sup>th</sup> 43, held that although defendants who serve custody after October 1, 2011, for crimes committed either before or after that date are similarly situated, the Legislature had a legitimate state interest in reducing incarceration costs with the use of enhanced credits after October 1, 2011; there was no denial of equal protection.

In *People v. Ellis* (2012) 207 Cal.App.4<sup>th</sup> 1546, the court rejected any extension of equal protection to inmates who commit a crime prior to a change in the credits, but who serve custody time after the change.

Similarly, *People v. Borg* (2011) 204 Cal.App.4<sup>th</sup> 1528, held the Equal Protection Clause did not apply to persons who committed crimes prior to October 1, 2011. The Supreme Court, however, has granted review of *Borg*.

#### **5. Credits and Three Strikes cases**

It is important to note that the various rules regarding the calculation of custody credits have no effect on the credit awarded by CDCR to persons sentenced under the Three Strikes law. Sections 667(c)(5) and 1170.12(a)(5) specify that conduct credits are limited to 20 percent while the defendant is serving the prison sentence. The only statutes that further restrict conduct credits for strike commitments are section 2933.1 for violent offenders (15% limit), and 2933.2 for persons convicted of murder (no conduct credit).

The award of pre-sentence conduct credit for strike offenders, however, will be the normal 4019 credits, determined in accordance with the applicable credit statute. Again, the only exception will be persons coming within the provisions of 2933.1 (15% if committed to prison for a violent offense) and 2933.2 (no conduct credit for murder).

#### **6. Challenges to credits**

The proper vehicle to challenge the awarding of credits accruing *after* judgment is by writ against the custodial officer. A claim for post-judgment credit “must logically be brought in a petition for habeas corpus against the official empowered to award such credits, namely the Director of CDCR.” (*People v. Brown* (2012) 54 Cal.4<sup>th</sup> 314, 322.) The court refused to consider the awarding of credits claimed under the version of section 2933 enacted September 28, 2010, long after the defendant was sentenced.

# APPENDIX I: AWARDING CONDUCT CREDITS UNDER P.C. §§ 4019 and 2933

## Couzens and Bigelow

### Key Time Periods

<b>Time Period</b>	<b>Jail Sentence</b>	<b>Prison Sentence</b>
<i>Crimes committed prior to 9/28/10 - <b><u>When time was served</u></b></i>	<b>Formula A</b> – for pre and post-sentence time served up to 1/24/10 <b>Formula B</b> - for time served on and after 1/25/10 [ <b>Formula A</b> - if excluded]	<b>Formula A</b> – for pre-sentence time served up to 1/24/10 (unless limited) <b>Formula B</b> - for presentence time served on and after 1/25/10 (unless limited); or <b>Formula A</b> – for pre-sentence credit if excluded (unless limited)
<i>Crimes committed between 9/28/10, and 10/1/11 - <b><u>When crime was committed</u></b></i>	<b>Formula A</b> – for pre and post-sentence credit	<b>Formula C</b> – for pre-sentence credit (unless limited) [§ 2933] <b>Formula A</b> – for pre-sentence credit if excluded (unless limited)
<i>Crimes committed on or after 10/1/11 - <b><u>When crime was committed</u></b></i>	<b>Formula B</b> – for pre and post-sentence credit	<b>Formula B</b> – for pre-sentence credit (unless limited) Post-sentence credit awarded under section 2933

### Credit Formulas

#### **Formula A – Traditional 4019**

“Statutory” Formula (*In re Marquez* (2003) 30 Cal.4<sup>th</sup> 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 confined in or committed to county jail for 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 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 confined in or committed to county jail for 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)**

[Time served 1/25/10 - 9/28/10; crimes committed 9/28/10 - 9/30/11]

<b>P.C. § 290 registration</b> – current crime or prior crime
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<b>Committed for serious felony (P.C. § 1192.7(c))</b> – current crime
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<b>Serious (P.C. § 1192.7(c)) or violent felony (P.C. § 667.5(c)) conviction</b> - prior crime
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**Limitations on Credits (State Prison)**

<b>P.C. § 2933.1</b> - 15% conduct credit if violent felony
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<b>P.C. § 2933.2</b> - no conduct credit if murder
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