

# Supreme Court Copy



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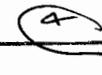
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August 16, 2010

**SUPREME COURT  
FILED**

**AUG 17 2010**

Frederick K. Ohlrich Clerk

  
Deputy

Office of the Clerk  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102

Re: *In re Jenkins*, Case No. S175242

Dear Chief Justice George and Associate Justices of the California Supreme Court:

On July 29, 2010, this court asked the parties to brief the question of “whether petitioner, who is sentenced to an indeterminate term, is entitled to, and can benefit from, “S” time.” Before that question can be answered, this court should ascertain whether the parties, this court and the lower courts are using the term “S” time to refer to the same concept.

## I. How Should “S” Time Be Defined?

### **CDCR’s Definition Based on the Statute and Regulation**

CDCR defines “S” time as the notation on timekeeping documents to be used to indicate that an inmate’s absence from his work/training assignment was authorized or excused. It is the rest of the regulation, section 3045.3,<sup>1</sup> that explicitly provides that the inmate shall receive sentence-reducing credit commensurate with their designated work group. In this context, “S” time explicitly excuses absence from work so that the missed work still reduces the sentence inmates sentence under Penal Code section 2933. Under the regulations, “S” time, or an excused absence, applies to section 2933 credits. This application of “S” time, which is advocated by CDCR here, is supported by the language of the regulation, and the language included in the version of section 2933 that was in effect at the time of Mr. Jenkins’ non-adverse transfer. (Answer BOM, p. 5.) But nowhere in the regulation is “S” time explicitly limited to section 2933 credit calculations. Nonetheless, this is the construction CDCR advocates.

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<sup>1</sup> All unidentified section references that follow refer to the Penal Code or Title 15 of the California Code of Regulations.

### **The Definitions Used in the Case Law**

The second usage of the term "S" time comes from the case law and operates somewhat differently. In this context, the absences excused as "S" time apply only to section 2933 sentence-reducing calculations. But because of a "fairness" consideration, and the courts' interpretation of the classification point regulation, some courts have determined "S" time, meaning an excused absence, should be applied to classification point calculations as well, even if the regulation is limited to section 2933:

Even though "S" time technically refers to excused work time for purposes of calculating credit off of a prisoner's sentence, we do not believe it is logical or fair to deny Player the favorable behavior points for each respective six-month period at issue in this case under this somewhat analogous situation where his credit-qualifying assignments were disrupted or changed due respectively to an adverse transfer which was subsequently vindicated by our earlier opinion in case No. D041462 and a nonadverse transfer. To find otherwise would deprive Player of the favorable points he would have earned during those "continuous" periods if he had been left in the assignment status he was in before it was changed to unassigned by the acts of DOCR.

*(In re Player (2007) 146 Cal.App.4th 813, 828.)*

The unfairness is not because the inmate has an excused absence for purposes of calculating section 2933 sentencing reducing credits, but not for purposes of awarding classification points. Unfairness flows, in either case, from the inmate being penalized for something over which he has no control.

The Legislature determined that section 2933 credits should be awarded so long as the inmate is willing to work, and included language to that effect in the statute. (Effective January 1, 2010, however, the Legislature deleted the sixth sentence of subdivision (b) which read: " Except as provided in subdivision (a) of Section 2932, every prisoner willing to participate in a full-time credit qualifying assignment but who is either not assigned to a full-time assignment or is assigned to a program for less than full time, shall receive no less credit than is provided under Section 2931." For purposes of Mr. Jenkins appeal here, the predecessor statute applies.)

### **The Definition of "S" Time This Court Should Use**

For clarity, and, based on the statute and the regulation, this court should use the regulatory designation of "S" time as the notation on timekeeping documents to be used to indicate that an inmate's absence from his work/training assignment was authorized or excused. Whether the inmate is entitled to credits against the sentence he is serving should be treated as a separate issue, controlled by statute and implementing regulation. In this sense, "S" time is simply shorthand for an excused absence.

Using the term "S" time in this way will then permit this court to view the classification

regulation itself to determine whether Mr. Jenkins should receive points to reduce his classification score for the time that he was unassigned to a program due to a non-adverse transfer. The common denominators for these two separate regulations are the concepts of excused absence and assignment to a program. In the "S" time regulation, excused absence time counts towards a sentence reduction. In the classification regulation, excused absence time allows the evaluation period to be deemed continuous. Both regulations require assignment to a program before credits or points can be earned. But for section 2933 purposes, CDCR does not enforce the program assignment requirement, and awards section 2933 credits, even where an inmate has not been assigned to a program.

## **II. The Indeterminate Sentence Imposed on Mr. Jenkins Does Not Prevent Him from Benefitting From "S" Time**

In answer to the question of whether Mr. Jenkins is entitled to, and can benefit from, "S" time," the short simple answer is "yes." Mr. Jenkins can benefit from "S" time, defined as the bookkeeping designation denoting an excused absence, because this transfer was non-adverse. When Mr. Jenkins was serving his determinate term, he would have been entitled to apply this benefit to acquire section 2933 credits. Although the record does not confirm this, it is likely that Mr. Jenkins completed the time served for his determinate term long ago, so that he would no longer be eligible to earn section 2933 credits. That is not, however, the only benefit to Mr. Jenkins of receiving "S" time, an excused absence from his otherwise section 2933 qualifying work program. First, it would aid Mr. Jenkins in the showing of rehabilitation he could make at his parole hearings. (See Cal. Code Regs., tit. 15, § 2402, subd. (d)(9): "Institutional activities indicate an enhanced ability to function within the law upon release.") The excused absences would also assist Mr. Jenkins in making his claim that his annual review period was "continuous" for purposes of awarding classification points for program participation.

The more complex answer, however, is that Mr. Jenkins may also benefit from "S" time under the equitable estoppel rationale applied in *In re Monigold* (1988) 205 Cal.App.3d 1224, 1227. But before these answers can be explicated, a brief review of the procedural facts provides context and clarification relevant to both answers.

### **Mr. Jenkins' Sentence**

A jury convicted Mr. Jenkins on August 17, 1993, and the trial court sentenced him on September 15, 1993, for offenses committed in 1992. (1 C.T. p. 41.) The court sentenced Mr. Jenkins to an indeterminate sentence of 15 years to life for second degree murder, and a determinate sentence of three years for personal use of a firearm within the meaning of Penal Code section 12022.5, subdivision (a). Under Penal Code section 669, the determinate term must be served first.

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### **Administrative Review**

Mr. Jenkins exhausted his administrative remedies on the issue of his entitlement to classification points for the time he was unassigned due to a nonadverse transfer. (AOBOM, p. 2, n. 3.) He did not administratively exhaust a claim to "S" time for purposes of reducing his sentence under section 2933. But he relied on the "S" time regulation to support his claim that his absences were excused because they were the result of a non-adverse transfer, and CDCR relied on the classification regulation and the "S" time regulation to reject his claim. (1 C.T. pp. 9-10, 13.)

### **The Habeas Proceedings in Superior Court**

On July 25, 2007, Mr. Jenkins filed his petition for writ of habeas corpus in superior court. (1 C.T. pp. 1-18.) He sought to have his classification points recalculated to award another two points to reduce his classification score. (1 C.T. p. 5.)

In its return, filed on September 28, 2007, CDCR denied, in paragraph 6, that inmates are entitled to be assigned to a program that qualifies for sentence-reducing credits under section 2933, subdivision (b), and further denied that during reclassification proceedings, inmates are entitled to favorable points for participation in a work, school or vocational program during period of time in which they were not assigned to any such program. (1 C.T. p. 27.) This denial relied on CDCR regulations. (Cal. Code Regs., tit. 15, §§ 3375.4, subd. (a)(3)(B), 3375.5, subd. (a)(3)(C)(2).)

CDCR then admitted that "S" time, under section 3045.3, provides credit for authorized absences from work, school or vocational assignments and allows inmates to earn sentence reducing credits they would have otherwise been permitted to earn had they been assigned to a program and not been absent. (1 C.T. pp. 27-28.)

CDCR denied that Mr. Jenkins was entitled to "S" time for the time between a non-adverse transfer and his assignment to another job. (1 C.T. p. 28.)

In its decision, the superior court granted the writ, citing *In re Player, supra*, 146 Cal.App.4th at p. 829, as holding that "S" time is properly granted when an inmate's work-qualifying status had been disrupted or changed to "unassigned" based on circumstances and CDCR conduct that is not within his control, and that the denial of "S" time to Mr. Jenkins was wrongful. The superior court then found:

Accordingly, petitioner deserved to receive not only "S" time, but the accompanying favorable work/behavior points for 22 days between December 21, 2005 and January 12, 2006, and 172 days from his transfer to Facility B at HDSP on March 9, 2006 until his having been given another job. Respondent correctly argues that work assignments are a privilege and not a right; however, in the view of the court, once given, they are not to be taken away without fault of the inmate- such conduct is denial of due process.

(1 C.T. pp. 79-80.)

The opinion of the superior court was that it is unfair, and a violation of due process, to deny classification points for a disruption caused by a non-adverse transfer. This fairness consideration functions by analogy but does not turn on whether the inmate is entitled to have "S" time applied to section 2933 credits.

**A. Mr. Jenkins Could Have Benefitted from "S" Time Applied Against the Determinate Sentence**

Mr. Jenkins could have benefitted from "S" time while he was serving his three-year determinate term. Mr. Jenkins is not entitled to section 2933 credits against the indeterminate term or the parole period for the indeterminate term because the award of section 2933 credits is available to apply against section 1170 determinate sentences.

Although the record does not reflect whether Mr. Jenkins received any section 2933 credits against his determinate term, by the time this habeas action was filed, he would likely have served his entire determinate term, even if CDCR awarded no section 2933 credits against his determinate term.

**B. Mr. Jenkins Can Benefit From "S" Time Against the Indeterminate Sentence Under *In re Monigold* (1988) 205 Cal.App.3d 1224, 1227**

In the Court of Appeal, CDCR did not contest the superior court's determination that Mr. Jenkins was entitled to "S" time for the time in question. ("Appellant does not contest the superior court's determination that Jenkins was entitled to "S" time for the time in question." See CDCR's AOB filed in the appellate court, p. 17.) In this Court, CDCR conceded that: "CDCR appealed the superior court's order regarding Jenkins' classification score reduction, but not the issuance of 'S' time." (See also CDCR's Answer Brief on the Merits, p. 2.) It seems that CDCR was using "S" time, in this context, as the bookkeeping shorthand for an excused absence.

CDCR did contest, and continues to contest, Mr. Jenkins' entitlement to classification points for the time during which he was unassigned.

Because CDCR has conceded Mr. Jenkins' entitlement to "S" time, CDCR is estopped from now claiming that Mr. Jenkins is not entitled to "S" time. Moreover, because whether Mr. Jenkins is entitled to section 2933 credits is a separate issue, whether Mr. Jenkins can "benefit" from "S" time, as a sentence reduction, is not relevant to whether Mr. Jenkins is entitled to classification points for the period he was unassigned to a program due to a non-adverse transfer.

In *In re Monigold* (1988) 205 Cal.App.3d 1224, the inmate had completed serving his two-year determinate term before section 2933 was enacted. Accordingly, at the time the inmate accepted CDCR's invitation to participate in the section 2933 program, he was serving an indeterminate term only. In signing up to participate in the section 2933 program, the inmate voluntarily submitted to a program that was considerably more restrictive in order to obtain one-for-one credits. The effect was to reduce his sentence

by some 26 months, which had the effect of moving his first parole eligibility hearing up by approximately two years. Approximately four years later, the Attorney General's Office concluded that state prisoners serving indeterminate terms of 15 years to life were ineligible for section 2933 credits. The inmate's one-for-one credits were revoked, and his credits were recalculated, which had the effect of postponing the parole hearing by 26 months.

Even though the *Monigold* court agreed that the inmate could not receive section 2933 credits because he was serving an indeterminate term, out of fairness the court determined that the government was equitably estopped from recalculating the minimum eligibility for parole date (MEPD) and the initial parole date hearing. The loss of the earlier MEPD amounted to a sufficient detriment when balanced against the competing potential harm to the public interest.

Here, Mr. Jenkins has relied on CDCR's concession that he is entitled to "S" time. The appellate court has similarly relied on CDCR's failure to appeal that issue. It is now too late in the litigation to change that position and contest Mr. Jenkins' entitlement to "S" time based on his excused absence from work.

**C. Mr. Jenkins Can Benefit from "S" Time in Earning Classification Points and Making his Showing at his Parole Hearings**

A showing that Mr. Jenkins' absence from his work program was excused as "S" time would aid Mr. Jenkins in the showing of rehabilitation he could make at his parole hearings. (See Cal. Code Regs., tit. 15, § 2402, subd. (d)(9): "Institutional activities indicate an enhanced ability to function within the law upon release.") The excused absences would also assist Mr. Jenkins in making his claim that his annual review period was "continuous" for purposes of awarding classification points for program participation. The award of classification points would benefit Mr. Jenkins at his parole hearings, because he could show that this institutional activity reveals an enhanced ability to function within the law if placed on parole. It does so by showing that through work, Mr. Jenkins had lowered his security placement within the prison.

In *People v. Schmeck* (2005) 37 Cal.4th 240, 257, this court recognized that Jerry Enomoto, a former Director of the Department of Corrections, had testified that an inmate serving an indeterminate term of life imprisonment without possibility of parole, is permitted to work in prison, and that such work can have a rehabilitative effect.

**III. Under the Classification Regulation, Mr. Jenkins Is Entitled to Classification Points, and "S" Time is Relevant to the Issues of How the Classification Regulation Should Be Interpreted and Applied**

Under the regulation governing classification points, it is the "continuous period" language of the classification regulation, which governs, and it provides:

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(a) Favorable behavior since last review (Boxes 46-51). The categories below provide favorable points for six-month intervals. For an annual reclassification review, two six-month periods may be counted. **When an inmate's status is interrupted during the period without inmate fault, the period shall be considered continuous.**

(1) For each six-month period of continuous minimum custody, four points shall be entered in Boxes 46-47.

(2) For each six-month period since the last review with no serious disciplinary(s), two points shall be entered in Boxes 48-49.

(3) For each six-month period with an average or above performance in work, school or vocational program, two points shall be entered in Boxes 50-51.

(A) Part-time assignments which when work/program hours are added together are equivalent to a full-time assignment shall be combined.

**(B) Favorable points shall not be granted for average or above average performance for inmates who are not assigned to a program. [emphasis added]**

(Cal. Code Regs., tit. 15, § 3375.4, emphasis not part of original text.)

Two critical factors emerge from an analysis of the classification regulation.

First, the regulation does allow for excused absences in the calculation of classification points. Under subdivision (A), when an inmate's status is interrupted during the "period" without inmate fault, the "period" shall be considered continuous for purposes of earning favorable classification points. Under the regulation, an annual review period is made up of two six-month periods. It is unclear from the language of the regulation whether the "period" referred to in the interruption provision is the annual review period, or one of the two six-month periods that makes up the annual review period. The *Player* court, however, decided that the "period" language in this provision referred to the entire annual review period and not to one of the six-month review periods making up the annual review period. (146 Cal.App.4th at p. 826.) Mr. Jenkins contends that the *Player* court's interpretation of the regulation on this point is correct.

Second, under subdivision (a)(3)(B), the regulation requires the inmate to have been assigned to a program in order to have his evaluation period considered continuous for purposes of awarding classification points. This provision is the same provision that the "S" time regulation includes, but which CDCR does not enforce. Subdivision (b)(13) of the "S" time regulation authorizes the award of "S" time for: "A temporary interruption or delay in the inmate's work/training assignment which is no fault of the inmate." The *Player* court found that both "S" time and classification points require that the inmate be

assigned to a program. (146 Cal.App.4th at p. 827.)

CDCR has subsequently conceded that Mr. Jenkins is entitled to "S" time for the duration at issue here, even though he was not in a work assignment. But at the administrative level, CDCR denied classification points and "S" time to Mr. Jenkins because he was not assigned to a program. (1 C.T. pp. 48, 50.)

It appears CDCR does not enforce the program assignment requirement of its own regulation as to "S" time, but it does as to classification points. According to *Player*, CDCR does not enforce the program assignment required for "S" time because under the case law and plain language of the regulations, worktime credits could not be denied for time during which the inmate was "unassigned," due to no fault of his own. (146 Cal.App.4th at 826, also citing *In re Carter* (1988) 199 Cal.App.3d 271, 276, and *In re Reina* (1985) 171 Cal.App.3d 638, 644.)

Clearly, CDCR does not enforce the requirement of "program assignment" to award "S" time, and there is no reason it should here.

Yet in the appellate court, CDCR did not contest Mr. Jenkins' entitlement to "S" time based on his excused absence. This request for supplement briefing implies that if "S" time cannot be applied to reduce Mr. Jenkins' sentence under section 2933, it should not be applied to reduce his classification points. Mr. Jenkins urges this court to decline to tether the award of sentence reducing credits to the award of classification reducing points based on CDCR's own regulatory scheme. At the same time, Mr. Jenkins urges this court to recognize that both regulations require assignment to a program, and that CDCR does not enforce this requirement as to "S" time. Mr. Jenkins also urges this court to recognize that under the classification regulation, Mr. Jenkins annual review period was continuous because the interruption was caused by the non-adverse transfer. Mr. Jenkins is therefore entitled to classification points based on that annual review period. The annual review period here was from October 1, 2005 through September 30, 2006. (1 C.T. p. 43.) At the beginning of this review period, Mr. Jenkins was housed at Centinela State Prison, where he was assigned to a program. From December 21, 2005, until January 12, 2006, Mr. Jenkins was unassigned. On March 9, 2006, Mr. Jenkins was moved again and was unassigned for 172 days. (*In re Jenkins, supra*, 175 Cal.App.4th at p. 307.) But at the beginning of the annual review period, Mr. Jenkins was assigned.

The award of "S" time, therefore, does have some relevance to Mr. Jenkins' claim that the regulations have no rational basis; however, it is CDCR's interpretation and enforcement of its own regulations that is dispositive, and it is the comparison between the "S" time regulation and the classification point regulation that brings this deficit to light.

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**IV. Whether Mr. Jenkins' Sentence Can Be Reduced By "S" time Is Irrelevant to the Incorrectness of the Appellate Court Opinion Because Mr. Jenkins' Entitlement to "S" Time Was Decided by the Superior Court, Has Been Conceded by CDCR in this Court and in the Court of Appeal, and Has Not Been Contested in This Court or in the Court of Appeal**

Even if awarding "S" time does not benefit Mr. Jenkins by reducing his indeterminate sentence, the effect of "S" time on an indeterminate sentence still has no significance to the reasoning of the Court of Appeal's disposition of the case.

First, the appellate court acknowledged that Mr. Jenkins' entitlement to "S" time was not at issue in the appeal because the warden did "not contest the superior court's determination that Jenkins was entitled to 'S' time for the time in question." (*In re Jenkins* (2009) 175 Cal.App.4th 300, 307, n. 5.) The appellate court was correct on this point. CDCR's failure to raise the issue of Mr. Jenkins' entitlement to "S" time means CDCR forfeited that issue. ("As a policy matter," we "normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (Rule 8.500(c)(1).) (*In re Joshua S.* (2007) 41 Cal.4th 261, 272.) Moreover, CDCR's concession, that Mr. Jenkins is entitled to "S" time, also constitutes a binding concession or judicial admission. (See *Smith v. Walter E. Heller & Co.* (1978) 82 Cal.App.3d 259, 269, and *People v. Hayes* (1999) 21 Cal.4th 1211, 1293.) No reason has been advanced by the Deputy Attorney General to persuade this court that his concession should be rejected. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 16.)

Unless this court were to find, independent of the *Monigold* rationale, that the superior court's award of "S" time also required CDCR to award section 2933 credits against Mr. Jenkins' indeterminate term, and further found that this was tantamount to the imposition of an unauthorized sentence which can be corrected at any time, the superior court's finding that Mr. Jenkins was entitled to "S" time binds this court on a combined forfeiture/judicial admission/concession theory.

Second, the appellate court's finding, based on the forfeiture and concession, is the reason Mr. Jenkins is entitled to "S" time under *Monigold*: CDCR is now equitably estopped from claiming Mr. Jenkins is not entitled to "S" time. (See *Monigold* discussion, *supra*.)

Third, the award of "S" time is not dispositive of whether an inmate is entitled to section 2933 credits against his particular sentence. The award of "S" time here does not mean that Mr. Jenkins should receive section 2933 credits against his indeterminate sentence, independent of the *Monigold* rationale.

The appellate court's opinion below in the case at bar was incorrect because it found the policy objectives behind the award of "S" time to be profoundly different from the reasons for awarding classification points. The appellate court posited that for prison security reasons, an inmate's performance on the job should be observed before his classification score is lowered. (*In re Player, supra*, 175 Cal.App.4th at pp. 318-319.) The flaw in the appellate court's opinion was in its view that observation of an inmate's

job performance necessarily occurs before his classification score is lowered. It does not. Like the "S" time regulation, the classification regulation focuses on assignment to a program as a prerequisite to earning points, not on actual job performance.

The "S" time regulation, as written, allows an individual who has been assigned to a program, but misses 100% of one six month period because of an excused absence, to receive full section 2933 credits, while an individual who is not assigned, through no fault of his own, but wants to work, receives no "S" time under the regulation. This schism, created by the regulation's focus on assignment to a program, creates a system for awarding "S" time that violates the due process and equal protection clauses. The two individuals are similarly situated, except that one is assigned, and the other is not. The "unassigned" individual is penalized for no rational reason because assignment is in the exclusive hands of CDCR. It is unfair, and this unfairness was recognized in the case law. In view of this recognition, the Legislature and CDCR appear to have agreed that "S" time should be awarded to those who have not yet been assigned to a program, through no fault of their own, in spite of what the regulations say. But the regulation, as written, does not require that.

A similar schism exists in how classification points are awarded, and it is the analogous schism, and CDCR's inconsistent interpretation and enforcement of that regulation, that makes the "S" time statutory-regulatory scheme relevant. Whether Mr. Jenkins could use the section 2933 credits, i.e. whether he had already maxed out the credits applicable to his determinate term, is not relevant to this analysis of the statutory-regulatory scheme.

Penal Code section 5068 gives CDCR the discretion to classify prisoners. The regulation promulgated to implement this statutory delegation is section 3375 (Cal. Code Regs., tit. 15, §3375.) That regulation includes a provision that restricts the decisions of classification decisions to "available information."<sup>2</sup> When an individual is "unassigned," through no fault of his own, the information regarding his relative success in programming is "unavailable." Even giving affect to CDCR's claim that the purpose of classification points is to maintain prison security, and that purpose is different from awarding section 2933 credits toward release, it is unfair to penalize Mr. Jenkins because information about his performance in programming is unavailable, when, through no fault of his own, CDCR has not assigned him to a program.

Construing the annual review period as continuous cures this problem. The classification regulation, section 3375.4, subdivision (a)(3)(B), forbids the award of favorable classification points to inmates who are not assigned to a program, but allows the award of favorable classification points to inmates who are assigned, but whose status is interrupted during the review periods, through no fault of their own.

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<sup>2</sup> "Classification committee decisions shall be based on evaluation of available information and mutual agreement of the committee members." (Cal. Code Regs., tit. 15, §3375, subd. (f)(7).)

What is dispositive is not that there has been no opportunity to observe the inmate performing in his job. What is dispositive is whether the inmate has been assigned to a job as of the first day of his review period, and whether his review period qualifies as "continuous" under the regulation.

The Court of Appeal found that the purpose of the credits award was to provide an incentive to participate, and to reward the willingness to participate, and distinguished this purpose from the purpose of awarding classification points. A review of the historical context of section 2933 demonstrates that rewarding willingness to participate was not the Legislature's original intent. (See AOBOM, pp. 42-46.)

Finally, while underscoring the significance of the distinction between "S" time for purposes of awarding section 2933 credits and the calculation of a "continuous" period for purposes of awarding classification points, was critical to the opinion of the Court of Appeal, whether Mr. Jenkins had a sentence against which section 2933 credits could be awarded was irrelevant to the appellate court's analysis. The appellate court's purpose in making this distinction was to show that the award of classification points and the award of section 2933 credits were not governed by the same factors. This was the basis for the appellate court's rejection of the analysis in *Player*. So while the superior court found that awarding "S" time was appropriate, the appellate court determined that awarding classification points was a completely different matter involving completely different considerations of prison security, and therefore any award of "S" time did not require the award of classification points.

In short, the appellate court sought to "disconnect" the entitlement to section 2933 credits from the award of classification points that had been connected in *In re Player*. But this attempt to disconnect "S" time from classification time missed the real reason for the connection: the regulations are similar in that they both require assignment to a program. In missing that factor, the appellate court improperly focused its attention on the different functions sentence-reducing credits and classification points serve, and missed the fact that CDCR effectively waives the requirement of assignment to a program for purposes of "S" time, but relies on it to defeat a claim to classification points. At the same time the appellate court's incorrect focus also caused it to miss another glaring factor: that an individual who is assigned to a program on day one of the period, and misses 172 days due to a nonadverse transfer, is entitled to classification points, while an individual who is not assigned on day one of the period will receive no points. This completely undercuts CDCR's claim, and the appellate court's endorsement of the claim, that observation of the inmate on the job is a requirement for the award of classification points.

Very truly yours,



Linnéa M. Johnson  
Staff Attorney

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 2407 J Street, Suite 301, Sacramento, CA 95816.

On August 16, 2010, I served the attached

SUPPLEMENTAL LETTER BRIEF

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

Office of the Attorney General  
P.O. Box 944255  
Sacramento, CA 94244-2550

Harvey Zane Jenkins  
H-90221  
P.O. Box 7100 (SATF)  
Corcoran, CA 93212

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 2010, at Sacramento, California.

\_\_\_\_\_  
DECLARANT