CALCULATING CUSTODY CREDITS

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NEW TO THIS EDITION

This September 2017 edition contains non-substantive corrections for the May edition, and the following new or revised material:

Page 28 – *People v. Alford*, *People v. Moore*, *People v. Martinez*, and *People v. Webb* re penalty assessments for drug program assessment and crime lab assessment
Page 29 – *People v. Talibdeen* re mandatory nature of penalty assessments
Pages 35 – 38 – Credit against infraction fines

TABLE OF CONTENTS

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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.4th 145, 154; also *People v. Buckhalter* (2001) 26 Cal.4th 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 awarded 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,[1] 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.

[1] Unless otherwise indicated, all statutory references are to the Penal Code

Effective September 28, 2010, section 4019 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 which 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, supra,* 54 Cal.4th 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, supra,* 54 Cal.4th 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." (*Id.* 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*, *supra,* 54 Cal.4th 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, supra,* 54 Cal.4th 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

<u>For time served prior to January 25, 2010</u>, 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.

<u>For time served after January 25, 2010</u>, 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, supra,* 54 Cal.4th at p. 322; emphasis original.)

Payton v. Superior Court (2012) 202 Cal.App.4th 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*, 450 U.S. 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 affect the ability of defendant to *earn* conduct credits; it only affected 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.4th 158, 182; *People v. Palacios* (1997) 56 Cal.App.4th 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.4th 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

<u>For crimes committed after September 28, 2010, and prior to October 1, 2011</u>, 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.

People v. Miles (2013) 220 Cal.App.4th 432, 436, expressly rejected application of the rule of lenity to the calculation of custody credits for persons who commit a crime prior to October 1, 2011, but who are sentenced after that date. "The Legislature expressly made the enhanced custody credit prospective, applicable only to those defendants who committed their offense on or after October 1. 2011." (*Id*.) (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 51-52; *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1550; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 395-396.)

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. (See Calif. Rules of Court, Rule 4.472.)

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.4th 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) or 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) 213 Cal.App.4th 182.) 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. 187.) 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) 212 Cal.App.4th 1502, 1508-1509.)

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 PRCS (§§ 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.

7. Credits and parole eligibility as a result of a federal court order

Two actions have been filed in the Eastern and Northern Federal District Courts challenging California's chronic prison over-crowding: *Coleman v. Brown*, 2:90-cv-00520(E.D.Cal. filed April 23, 1990.), and *Plata v. Brown*, 3:01-cv01351-TEH(N.D.Cal. filed April 5, 2001). In August 2009, the federal court ordered the state to reduce its prison population to 137.5% of design capacity. On February 10, 2014, the court granted the state an additional two years, to February 28, 2016, to meet the required population level. As part of the order of extension,

the court required the state to meet specified population "benchmarks," and to "immediately implement" the following additional measures:

> "(a) Increase credits prospectively for non-violent second-strike offenders and minimum custody inmates. Non-violent second-strikers will be eligible to earn good time credits at 33.3% and will be eligible to earn milestone credits for completing rehabilitative programs. Minimum custody inmates will be eligible to earn 2-for-1 good time credits to the extent such credits do not deplete participation in fire camps where inmates also earn 2-for-1 good time credits;
>
> (b) Create and implement a new parole determination process through which non-violent second strikers will be eligible for parole consideration by the Board of Parole Hearings once they have served 50% of their sentence;
>
> (c) Parole certain inmates serving indeterminate sentences who have already been granted parole by the Board of Parole Hearings but have future parole dates;
> (d) In consultation with the Receiver's office, finalize and implement an expanded parole process for medically incapacitated inmates;
>
> (e) Finalize and implement a new parole process whereby inmates who are 60 years of age or older and have served a minimum of twenty-five years of their sentence will be referred to the Board of Parole Hearings to determine suitability for parole;
>
> (f) Activate new reentry hubs at a total of 13 designated prisons to be operational within one year from the date of this order;
>
> (g) Pursue expansion of pilot reentry programs with additional counties and local communities; and
>
> (h) Implement an expanded alternative custody program for female inmates."

The federal court order clearly modifies the statutory rate of custody credits being awarded to non-violent second strike offenders and their eligibility for parole. The order itself does not address how long these measures will be applied. Because the order was entered by the court to facilitate the reduction of the number of state prison inmates, it is unlikely the order will have effect beyond the time when the federal order is active. In other words, once California's prison population has been reduced to 137.5% of design capacity, and "it is firmly established that [the

state's] compliance with the 137.5% benchmark is durable," the federal court order will be dissolved.

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. The exclusion also applies to a defendant required to register because of a prior crime. (*People v. Sheedy* (2014) 225 Cal.App.4th 445.)

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 convictions 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.4th 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.4th 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, supra,* 30 Cal.4th at pp. 25-26, 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.4th 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.4th 1132. Finally, for the reasons discussed in *People v. Brown* (2012) 54 Cal.4th 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 affect 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.4th 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.4th 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.4th 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. Normally the filing of a notice of appeal divests the trial court of jurisdiction to act. (*In re Antilia* (2009) 176 Cal.App.4th 622, 629.)

Section 1237.1, however, *requires* a defendant to seek correction of the award of pre-sentence credit in the trial court before raising the issue on appeal. It 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, which may be made informally in writing." Case law also 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.)

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.4th 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.4th 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.

An equal protection argument regarding the change in custody credits after realignment was rejected in *People v. Lynch* (2012) 209 Cal.App.4th 353.) "The Realignment Act is, if nothing else, a significant experiment by the Legislature. Prospective application is reasonably related to the Legislature's rational interests in limiting the potential costs of its experiment. Nothing prevents the Legislature

from extending the Realignment Act to all criminal defendants if it later determines that policy to be worthwhile." (*Id*. at p. 361.)

In *People v. Ellis* (2012) 207 Cal.App.4th 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.

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.4th 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.

7. Applying custody credits to fines[2]

Section 2900.5 generally provides for the credit of jail time to the payment of fines ordered by the court. Such a credit often is requested by defendants who have excess custody time over the amount ordered by the court as a sanction and want the surplus applied to the fines; it also arises when the defendant would rather serve time than pay a fine, particularly when the time can be served on a sheriff's

[2] The authors gratefully acknowledge the assistance of the Hon. Victor Martinez, Judge of the Los Angeles Superior Court, in the preparation of this portion of the materials.

work program. A similar credit provision is specified when a defendant is given a term of imprisonment for non-payment of a fine under section 1205. Sections 2900.5 and 1205 have been amended by the Legislature in 2016 and 2017 to clarify the proper method of calculating the conversion between fines and jail time.

a. Background

Prior to 2016, section 2900.5(a) specified, in relevant part: "In all felony and misdemeanor convictions ... when the defendant has been in custody, ... all days of custody of the defendant, ... including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment, or *credited to any fine on a proportional basis, including, but not limited to, base fines and restitution fines*, which may be imposed, at the rate of not less than thirty dollars ($30) per day .... In any case where the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter *the remaining days, if any, shall be applied to the fine on a proportional basis*, including, but not limited to, *base fines and restitution fines*." (Emphasis added.) Based on this language, *People v. McGarry* (2002) 96 Cal.App.4th 644 (*McGarry*), held if a custody credit does not completely satisfy the base fine imposed by the court, the reduction must apply to the remaining base fine and assessments on a proportionate basis. "We conclude that the monetary credit must be applied 'on a proportional basis' (Pen. Code, § 2900.5, subd. (a) (hereafter section 2900.5(a)). In other words, each dollar of monetary credit must be used proportionally to reduce the base fine, penalty assessments and restitution fine rather than any one of these categories alone. Thus, if the monetary credit does not eliminate all amounts due, the defendant still owes the remaining amount in each category." (*McGarry*, at p. 646.)

Effective January 1, 2016, the Legislature amended section 2900.5(a) to raise the custody credit from "not less than thirty dollars ($30) per day," to "not less than 125 dollars ($125) per day." No other changes were made to the formula used to calculate the custody credit. Based on the statute and its interpretation by *McGarry*, a number of courts applied the custody credit to the total fine, which included not only the base fine, but also all related penalties and assessments. (See *People v. Carranza* (2016) 6 Cal.App.5th Supp. 17.)

Effective January 1, 2017, the Legislature again amended section 2900.5(a) to provide, in relevant part: ""In all felony and misdemeanor convictions ... when the defendant has been in custody, ... all days of custody of the defendant, ... including days credited to the period of confinement pursuant to Section 4019, … shall be credited upon his or her term of imprisonment, or *credited to any base fine* that may be imposed, at the rate of not less than one hundred twenty-five dollars ($125) per day .... In any case where the court has imposed both a prison or jail

term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter *the remaining days, if any, shall be applied to the base fine. If an amount of the base fine is not satisfied by jail credits, or by community service, the penalties and assessments imposed on the base fine shall be reduced by the percentage of the base fine that was satisfied*." (Emphasis added.) Similar amendment was made to section 1205.

The purpose of the amendments was expressed by the author in committee comments on the legislation: "Last year, the Legislature unanimously approved AB 1375 to help address the excess of the 'debt trap' faced by many defendant [sic] facing small fines in criminal court. The bill called for an inflationary adjustment from $30 to $125 per day to the rate at which jail time offset assessed fines that the prisoner could not pay. The purpose of the bill was to reduce the time spent in jail by indigent defendants unable to pay small fines. Unfortunately, in response, some courts have now changed their method of calculating the fines against which the jail time is offset. Where before the offset was applied to the base fine, with penalties and assessments disregarded or reduced, these courts now are applying the credit only after penalties and assessments have been added. The net result in these courts is that indigent defendants now end up facing more jail time for the same minor fee, rather than less. AB 2839 will address this issue by specifying that the credit for jail time is to be applied to the base fine, not to the fine enhanced by penalties and assessments." (Assem. Com. on Public Safety Analysis on Assem. Bill No. 2839 (2015-2016 Reg. Sess.) April 13, 2016.)

b. Calculation of custody credits applied to fees and fines

Under sections 2900.5(a) and 1205(a), as now amended, the court must apply any available custody credit, both actual time and conduct credit, first to any term of imprisonment, then to the base fine imposed. Any assessments imposed on the base fine are then reduced by the same percentage as the base fine was reduced.

c. Base fine

The calculation of any custody credit begins with a proper determination of the "base fine." The phrase has not been specifically defined by statute or court opinion, but appears to mean that fine which the court may impose for a criminal act. For example, disturbing the peace in violation of section 415 is punishable by imprisonment in the county jail for up 90 days, by a fine of not more than $400, or by both such imprisonment and fine. The $400 is the base fine.

The Legislature has also authorized the imposition of additional fines, depending on the crime committed. These base fine "enhancements" include the crime

prevention fine (§ 1202.5), the sex offender fine (§ 290.3), the drug program fine (Health & Safety C., § 11372.7)[3], the crime laboratory fine (Health & Safety C., § 11372.5)[4] and the AIDS education fine (§ 1463.23). These enhancements are also entitled to the same custody credit adjustment as the base fine, and the same percent reduction of the additional penalty assessments. The total base fine, therefore, is the fine specified for a particular crime, plus any base fine enhancements authorized for that crime.

Added to the total base fine are certain "penalty assessments" calculated by the amount of the total base fine. The phrase "plus penalty assessments" generally refers to six standard penalty assessments and a criminal surcharge: state penalty (§ 1464(a)(1)); county penalty (Gov.Code, § 76000(a)(1)); state surcharge (§ 1465.7(a)); state court construction penalty (Gov.Code, § 70372(a)(1)); a emergency medical services penalty (Gov.Code, § 76000.5(a)(1))[5]; a DNA penalty (Gov.Code, § 76104.6(a)(1)); and a state-only DNA penalty (Gov.Code, § 76104.7(a)) (see *People v. Sharret* (2011) 191 Cal.App.4th 859, 864.) The amount of the "penalty assessments" for each county ranges from $27 to $29 per $10, or part of $10, of base fine imposed. Imposition of these penalty assessments, with certain narrow exceptions, is mandatory. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1155.)

The Legislature also has authorized the courts to assess certain "fees" at specific dollar amounts to cover administrative costs; these fees are not subject to penalty assessments. Such fees include the $40 court operations assessment (§ 1465.8), the $30 court facilities fee (Govt. C., 70373(a)(1)), the $4 Emergency Medical Air Transport penalty (Govt. Code, 76000.10), the Alcohol Abuse Education and Prevention penalty (Veh. Code, 23645), and the $50 Lab Services penalty (§ 1463.14). The requirement of sections 1205(a) and 2900.5(a) of a percentage reduction of penalties and assessments imposed on the base fine does not apply to these assessments because they are not a fine and are not determined by the amount of the base fine. (See *People v. Robinson* (2012) 209 Cal.App.4th 401, 407.)

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[3] Appellate courts are divided on whether the drug program assessment is a fee or a fine. (See *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1694; *People v. Sharret* (2011) 191 Cal.App.4th 859, 864; *People v. Alford* (2017) 12 Cal.App.5th 964; *People v. Webb* (2017) 13 Cal.App.5th 486.)

[4] Appellate courts are divided on whether the crime lab assessment is a fee without penalty assessments or a fine with penalty assessments. (See *People v. Alford* (2017) 12 Cal.App.5th 964; *People v. Watts* (2016) 2 Cal.App.5th 202, 206, *People v. Moore* (2017) 12 Cal.App.5th 558; *People v. Sharret* (2011) 191 Cal.App.4th 859, 869; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1522; *People v. Webb* (2017) 13 Cal.App.5th 486.)

[5] The penalty assessment for emergency medical services (Gov.Code, § 76000.5(a)(1)) requires the county board of supervisors to elect to levy the penalty in the amount of $2 and currently is not levied in every county.

d. Base fine fully satisfied

If the available custody credits fully satisfy the total base fine, not only is the base fine wiped out, but the credit also will eliminate the penalty assessments that are determined by the amount of the base fine. Stated differently, if the base fine has been eliminated by the custody credit, there can be no means by which additional assessments are calculated. For example, section 1464 provides for a state penalty assessment of $10 for every $10, or part thereof, in fines imposed by the court. If the base fine is eliminated by the custody credit, there can be no state penalty assessment under section 1464. Similarly, the credit can eliminate other assessments such as the criminal fine surcharge penalty (§ 1465.7), the courthouse construction penalty (Gov. Code, § 70372), the county assessment penalty (Gov. Code, § 76000), the emergency medical services assessment (Gov. Code, § 76000.5), the DNA testing penalty (Gov. Code, § 76104.6), and the DNA ID penalty assessment (Gov. Code, § 76104.7). The custody credit will not eliminate or reduce the restitution fine under section 1202.4(b) because the Legislature previously removed the ability to obtain such a credit. (*People v. Morris* (2015) 242 Cal.App.4th 94, 100.) It will also not eliminate or reduce the $30 facilities assessment (Gov. Code, § 70373) or the $40 court operations assessment (Gov. Code, § 1465.8(a)(1)) because these assessments are not punitive and are not determined by the amount of the base fine.

The amendment of section 1205(a) accomplishes similar results. If the defendant is incarcerated for non-payment of a fine, the number of custody days is calculated from the base fine only; it does not allow the imposition of custody for penalty assessments: "The judgment shall specify the term of imprisonment for nonpayment of the fine, which shall not be more than one day for each one hundred twenty-five dollars ($125) of the *base fine*, nor exceed the term for which the defendant may be sentenced to imprisonment for the offense of which he or she has been convicted." (Emphasis added.)

e. Base fine partially satisfied

If the base fine is only partially satisfied with the application of custody credits, the court must determine the appropriate remaining fines and penalties to be paid. Based on the amendments to sections 1205(a) and 2900.5(a) effective January 1, 2017, the court should (1) apply the available custody credit to the base fine, (2) determine the percentage by which the base fine was reduced, (3) apply that percentage reduction to the remaining penalties and assessments that may properly be reduced. (See discussion of full payment of fine, *supra*.)

The application of the credit formula can be illustrated by the following example, which assumes a $300 base fine to be credited with one day of custody ($125). The original and adjusted fees and fines are:

Amount	Description	Credit Percentage Calculation (41.66% of the original amount was satisfied)	Revised Amount Remaining Percentage (58.33% is remaining)
$300	Base fine	$125	$175
$300	Penal Code Section 1464	$125	$175
$210	Government Code 76000	$87.50	$122.50
$150	Government Code 70372	$62.50	87.50
$60	Government Code 76000.5	$25	$35
$30	Government Code 76104.6	$12.50	$17.50
$120	Government Code 76104.7	$50	$70
$60	Penal Code 1465.7	$25	$35
$1230	**TOTALS**	**$512.5**	**$717.50**

The foregoing example tracks the formula specified in section 2900.5(a): the reduction in penalties and assessments is in the same percentage as the reduction of the base fine – in this case, 41.66%.

It would not be in technical compliance with section 2900.5(a) to apply the credit of $125 per day to the base fine, then recalculate the penalties and assessments using the statutory formula for each assessment. Such a methodology results in a

slightly higher assessment than authorized by the new legislation. The reason for the difference is that the penalty assessments are based on a formula that requires the payment of a specified amount for every $10, *or part thereof,* of the base fine. A credit of $125, or any "odd" amount of daily credit that is not equally divisible by 10, has a "rounding up" effect on the penalty assessment. For example, if the statutory penalty assessment formula is applied to the reduced base fine to determine the state assessment under section 1464, the amount of the assessment would be $180, not $175 under the percentage formula as specified by the legislation. Based on the foregoing illustration, the total additional amount of fines imposed with the non-conforming formula is $14.50.

For courts using computerized systems for the calculation of penalty assessments, there are three potential solutions to the burden that may be imposed on the court because of the new custody credit formula:

- The computer system could be re-programed to account for the new formula. Modifying the computer program will facilitate the adjustment of penalty assessments regardless of the amount of custody credit given the defendant, even if the credit is not equally divisible by 10. It would allow the use of the minimum custody credit of $125 per day without difficulty.

- The amount of the custody credit could be raised to $130 per day, making the credit always fully divisible by $10. The additional amount is authorized by statute because section 2900.5(a) specifies the credit must be $125 *or more per day*. Similarly, section 1205(a) specifies the incarceration "shall not be *more than* one day of each" $125. Such a change would allow the court to use existing computer programs to calculate the credit against penalty assessments. With the increase in custody credit of $5 per day, and if applied to a base fine equally divisible by $10, the resulting reduction of the base fine and penalty assessments would be the same whether calculated based on a percentage reduction as required by the new statute, or re-calculated from the adjusted base fine. If the base fine is not equally divisible by $10, there will be a slight financial benefit to the defendant over the amount if calculated using the new statutory formula. For example, a base fine of $135, reduced by a one-day credit of $125 and using the new statutory formula, will produce a net remaining fine and assessments of $45. If the daily credit is increased to $130 and the penalty assessments are recalculated from the new base fine of $5, the new fine and assessments total $39.

- The court could recalculate the penalty assessments from the adjusted base fine at the $125-per-day rate, using a traditional computer program, but waive the small amount of overage if the daily credit is an "odd"

number of days. *McGarry* acknowledged the administrative burden on busy arraignment courts if they are required to complete multiple complex calculations of fines and assessments: "The rather cumbersome calculation procedure of section 2900.5(a) would also apply to *postsentence* service of time in custody *in lieu of fine*. (See § 1205, subd. (a).) However, in a busy arraignment court, once the defendant's hardship is shown and the defendant elects to 'work off the fine,' the normal procedure would be for the court first to convert each $30 [now $125], for example, of base fine to one day of postsentence custody and then *waive all penalty assessments* as permitted by section 1464, subdivision (d). This avoids time-consuming calculations and would be an appropriate practice in such courts." (*McGarry*, *supra,* 96 Cal.App.4th at p. 654; emphasis in original.) In the same vein, it may well be appropriate for the court to determine in a particular case that the small difference in fine should be waived in the interests of justice and judicial economy. While the defendant would have no objection to this solution, the clerical staff will be faced with the additional question of how to deal with the portion of the penalty assessments that is waived – is it taken from just one assessment, or is it allocated proportionately to all assessments as discussed in *McGarry*? Likely it is the latter.

f. Rounding down

There will be times when the base fine will not be fully divisible by the custody credit. For example, if the base fine is $290 which the defendant wants to convert to custody, it would equal 2.32 days of jail time. The court should "round down" the custody time to two days. To order three days of custody would require the defendant to accept less custody credit than the law requires. (See *People v. Carranza* (2016) 6 Cal.App.5th Supp. 17, 24, fn. 5.)

g. Community service

Clearly community service may be used to reduce the base fine. Section 2900.5(a) provides that "[i]f an amount of the base fine is not satisfied by jail credits, *or by community service*, the penalties and assessments imposed on the base fine shall be reduced by the percentage of the base fine that was satisfied." (Emphasis added.) Section 2900.5(a) does not distinguish between custody credit and community service credit in determining any remaining amount of a fine owed by the defendant. However, the proper allocation of community service credit is not so clear.

The Legislature did not amend section 1205.3, applicable to a person convicted of an offense and granted probation, which provides: "In any case in which a

defendant is convicted of an offense and granted probation, and the court orders the defendant either to pay a fine or to perform specified community service work as a condition of probation, the court shall specify that if community service work is performed, it shall be performed in place of the payment of *all fines and restitution fines on a proportional basis*, and the court shall specify in its order the amount of the fine and restitution fine and the number of hours of community service work that shall be performed as an alternative to payment of the fine." (Emphasis added.) With the exception of restitution fines (see discussion, *infra*), there is no conflict between sections 1205.3 and 2900.5 – reading the sections together, the community service hours should be converted to a dollar value and applied to the base fine using the same procedure as for custody credits. If the credit does not satisfy the entire base fine, then the court would reduce any additional penalty assessments by the same percentage as the base fine was reduced.

The Legislature also did not amend section 1209.5, applicable to infractions, which states: "Notwithstanding any other provision of law, any person convicted of an infraction may, upon a showing that payment of the total fine would pose a hardship on the defendant or his or her family, be sentenced to perform community service in lieu of the total fine that would otherwise be imposed. The defendant shall perform community service at the hourly rate applicable to community service work performed by criminal defendants. *For purposes of this section, the term "total fine" means the base fine and all assessments, penalties, and additional moneys to be paid by the defendant.* For purposes of this section, the hourly rate applicable to community service work by criminal defendants shall be determined by dividing the total fine by the number of hours of community service ordered by the court to be performed in lieu of the total fine." (Emphasis added.) Section 1209.5 does not include any language concerning a reduction of only the base fine or a proportional reduction of assessments. The plain language of the statute requires the court to apply the community service to the "total fine," which includes "*the base fine and all assessments, penalties, and additional moneys to be paid by the defendant.*" However, section 1209.5 must be read with section 2900.5(a) in determining the base fine and adjusted assessments. If a defendant wishes to convert the entire infraction fine to community service, the court should calculate the number of hours necessary to satisfy the base fine, which will have the effect of clearing any penalty assessments as required by section 2900.5(a). If the defendant wishes to satisfy only a portion of the fine with community service, the court should value the number of hours being served, apply that value to the base fine, and reduce the remaining assessments by the same percentage as the base fine was reduced, as required by section 2900.5(a). To apply the community service only to the *unadjusted* base fine and penalty assessments would produce an absurd result – a person convicted of an infraction would be required to do more community service hours per dollar of base fine than persons convicted of a felony or misdemeanor.

h. Restitution fines and community service

Section 1205.3 provides that community service may be served "in place of the payment of *all fines and restitution fines on a proportional basis*." As noted above, the Legislature previously removed the ability to apply custody credits under section 2900.5(a) to restitution fines, but has not removed the ability to apply community service to such fines. The ability to use community service in this manner, however, is limited. Section 1205.3(a) must be read with section 1202.4, which authorizes the assessment. Section 1202.4(b) specifies the range of the assessment depending on whether the crime is a felony or misdemeanor. The court is required to impose the assessment "unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record." The defendant's inability to pay is not such a reason. (§ 1202.4(c).) If the court finds such compelling and extraordinary reasons, it must order the defendant to "perform specified community service," unless there are compelling and extraordinary reasons not to require such service. (§ 1202.4(n).) Accordingly, the only way community service may be used to satisfy a restitution fine, is when the court makes the necessary "compelling and extraordinary" findings.

i. Credit against infraction fines

There are three issues related to the satisfaction of infraction fines by imprisonment or community service: first, whether custody can ever be used to satisfy any portion of an infraction fine; second, whether community service must be credited against the total fine, including all penalty and other assessments, or only the base fine; and, three, the proper calculation of credits based on community service.

Use of incarceration for satisfying an infraction fine

Section 1205(a) provides, in relevant part, that "[a] judgment that the defendant pay a fine, with our without other punishment, may also direct that he or she be imprisoned until the fine is satisfied and may further direct that the imprisonment begin at and continue after the expiration of any imprisonment imposed as a part of the punishment or of any other imprisonment to which the defendant may have been sentenced. The judgment shall specify the term of imprisonment for nonpayment of the fine, which shall not be more than one day for each one hundred twenty-five dollars ($125) of the base fine, *nor exceed the term for which the defendant may be sentenced to imprisonment for the offense of which he or she has been convicted*." (Emphasis added.) Section 1205 applies to "any violation of any of the codes or statutes of this state punishable by a fine or by a fine and imprisonment." (§ 1205(c).)

Although the plain meaning of section 1205(c) clearly includes infractions, it is unlikely a person charged with an infraction can ever be *involuntarily* ordered to serve time for non-payment of an infraction fine. It is well established that persons may be ordered to serve custody time for the willful non-payment of fines imposed in felony and misdemeanor cases. Custody may not be ordered to enforce the fine if the failure to pay is based on the person's indigency – to do so would violate the Equal Protection Clause. (*In re Autazo* (1970) 3 Cal.3d 100.) While section 1205 technically applies to infractions, it also provides, the imprisonment shall not "*exceed in any case the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted*." (§ 1205(a); emphasis added.) Because infractions carry no custody penalty, subdivision (a) effectively eliminates the ability of the court to *involuntarily* order a person to serve custody for non-payment of an infraction fine, even if the non-payment is willful. (See 63 Ops.Cal.Atty.Gen. 418 (1980).)

It is unclear whether the defendant could *voluntarily* agree to serve custody time to discharge an infraction fine, or *voluntarily* agree to apply excess custody credits to satisfy any such fines. Section 2900.5, applicable to "all felony and misdemeanor convictions" permits the application of custody credit to the payment of any fines. There is no mention of infractions. Given the broad intent of the Legislature to award custody credit whenever a fine is owed, it would seem a violation of the Equal Protection Clause – or at least principles of equity and fairness – to deny such credit when the violation is an infraction. A defendant charged with an infraction together with a felony or misdemeanor, should be able to *voluntarily* apply existing or future custody credit to an infraction fine.

Although it makes perfect sense to allow the defendant to apply existing or future custody credit to the payment of a fine when he is otherwise charged with a misdemeanor or felony, it does not appear likely a person charged solely with an infraction will be able to request custody time to discharge the fine.

Whether community service must be applied only to the base fine or whether it must be applied to all fees, fines and assessments

Sections 1205 and 2900.5, applicable to fines imposed in felony and misdemeanor cases, clearly require the court to apply any custody credit or community service to the base fine imposed by the court. If the base fine is fully credited, no further penalty or other assessments predicated on the base fine are owed. If the base fine is not fully discharged, the penalty and other assessments are to be "reduced by the percentage of the base fine that was satisfied." (§§ 1205(a), 2900.5(a).) Infractions are clearly included in section 1205 by virtue of the broad scope of subdivision (c): "This section applies to any violation of any of the codes or statutes of the state punishable by a fine or by a fine and imprisonment."

Section 1209.5, however, provides: "*Notwithstanding any other provision of law*, any person convicted of an infraction may, upon a showing that payment of the total fine would pose a hardship on the defendant or his or her family, be sentenced to perform community service *in lieu of the total fine* that would otherwise be imposed. The defendant shall perform community service at the hourly rate applicable to community service work performed by criminal defendants. For purposes of this section, the term 'total fine' means the base fine and all assessments, penalties, *and additional moneys to be paid by the defendant.* For purposes of this section, the hourly rate applicable to community service work by criminal defendants shall be determined by dividing the total fine by the number of hours of community service ordered by the court to be performed in lieu of the total fine." (Emphasis added.) Since section 1209.5 applies "notwithstanding any other provision of law," it likely overrides the more restrictive credit formula for felonies and misdemeanors in sections 1205 and 2900.5. (See *People v. Harbison* (2014) 230 Cal.App.4th 975, 985 [interpreting "notwithstanding any other provision of law" to be a term of art that expresses a legislative intent to have the specific statute control despite the existence of other law which might otherwise govern].) Accordingly, like sections 1205 and 2900.5, section 1209.5 authorizes community service to discharge the base fine on an infraction and all penalty and other assessments predicated on the base fine. Unlike sections 1205 and 2900.5, however, section 1209.5 authorizes community service for discharge of any "additional moneys to be paid by the defendant" – which would include all other penalties, assessments, and administrative fees, such that the defendant will pay absolutely nothing for the violation.

Calculating the proper credit for community service against an infraction fine

If the cited person seeks to discharge the "total fine" with community service, the amount of community service ordered by the court must be sufficient to cover the base fine, all penalty and other assessments, and administrative fees. Because infractions are included in sections 1205 and 1209.5, the conversion must include the formula specified in those sections, at least to the extent of any base fine and any penalty assessments and criminal surcharges predicated on the base fine. If the community service does not clear the base fine, then the related fees and assessments are to be reduced by the percentage reduction of the base fine. Because the person cited for an infraction may apply community service to the "total fine" imposed by the court under section 1209.5, the court must also calculate the fees and assessments not discharged by the reduction of the base fine and impose an appropriate amount of community service hours to cover them.

Assuming a $100 base fine is imposed for an infraction, the defendant will be required to pay a total fine of $490:

Base fine:	$100
Penalty assessments and criminal Surcharges:	$310
Court operations assessment:	$ 40
Court facilities fee:	$ 35
Night court fee:	$ 1
County emergency air transport:	$ 4
Total charge against the defendant:	$490

If the defendant chooses to discharge the entire fine with community service, the defendant will need to clear $100 for the base fine (which results in the elimination of the $310 in penalty assessments and criminal surcharges predicated on the base fine), plus $80 in other assessments, for a total of $180. Assuming a rate of $10.50 per hour, the defendant will need to perform 17 hours of community service to completely clear the fine.

It would not be proper to convert the total infraction fine to community service without adjustment based on the reduction of the base fine. Not to do so clearly violates the provisions of sections 1205 and 1209.5 which apply to infraction fines, at least to the extent of any credit against a base fine and associated assessments. To convert the entire infraction fine without adjustment for the discharge of the base fine also creates the mathematical possibility that a defendant convicted of an infraction may be required to do more community service than a defendant convicted of a misdemeanor or felony with the same fine – a result that appears unintended and absurd. In the case of a $100 base fine imposed for an infraction, with a total fine of $490, and a rate of $10.50 per hour, the defendant would be required to perform 46 hours of community service if the entire fine is to be satisfied with community service without adjustment for reduction of the base fine. Assuming the same $100 fine is imposed in a misdemeanor case, the defendant would be required to pay a total fine of $645:

Base fine:	$100
Penalty assessments and criminal Surcharges:	$310
Restitution fine:	$150
Citation fee:	$ 10
Court operations assessment:	$ 40
Court facilities fee:	$ 30
Night court fee:	$ 1

County emergency air transport: $ 4

Total charge against the defendant: $645

Assuming a rate of $10.50, the base fine can be cleared with 9 hours of community service (which would discharge the $310 in penalty assessments and criminal surcharges associated with the base fine); the remaining $235 must be paid by the defendant. Even if community service could be used to discharge the entire fine, including the remaining $235 in fines and assessments, the defendant would only be required to serve 31 hours – substantially less time than required of the defendant charged with an infraction.

j. State prison custody credit

Nothing in sections 1205 or 2900.5 suggests their provisions would not be applicable to time earned in state prison. The practice of crediting prison time to fines has been acknowledged by appellate decisions. (See, *e.g.*, *People v. Morris* (2015) 242 Cal.App.4th 94.) The incidence of such a credit, however, will be rare because Vehicle Code, section 41500(a) bars prosecution for a non-felony arising out of the operation of a motor vehicle occurring prior to the defendant's commitment to the Department of Corrections and Rehabilitation, or to county jail under section 1170(h). It is likely to arise only for the limited exclusions from section 41500 for reckless driving, driving under the influence of alcohol or drugs, and driving under the influence causing bodily injury. (Veh. Code, § 41500(f).)

k. Effective date of change

The most recent amendments to sections 1205(a) and 2900.5(a) are effective January 1, 2017, and will apply to all crimes committed on or after that date. It is likely that the new provisions also will apply to crimes committed prior to that date if the case was not final as of January 1, 2017. An appellate division of a superior court has determined that the legislation reduces the punishment of crimes effected by the change. Accordingly, the court found that *In re Estrada* (1965) 63 Cal.2d 740, applies. (*People v. Carranza* (2016) 6 Cal.App.5th Supp. 17, 35-37.) "When the Legislature amends a statute so as to lessen the punishment [without clearly specifying the statute should have only prospective operation] it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada*, at p. 745.)

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

Couzens and Bigelow

Key Time Periods

Time Period	Jail Sentence	Prison Sentence
Crimes committed prior to 9/28/10 - **When time was served**	**Formula A** – for pre and post-sentence time served up to 1/24/10 **Formula B** - for time served on and after 1/25/10 [**Formula A** - if excluded]	**Formula A** – for pre-sentence time served up to 1/24/10 (unless limited) **Formula B** - for presentence time served on and after 1/25/10 (unless limited); or **Formula A** – for pre-sentence credit if excluded (unless limited)
Crimes committed between 9/28/10, and 10/1/11 - **When crime was committed**	**Formula A** – for pre and post-sentence credit	**Formula C**– for pre-sentence credit (unless limited) [§ 2933] **Formula A** – for pre-sentence credit if excluded (unless limited)
Crimes committed on or after 10/1/11 - **When crime was committed**	**Formula B** – for pre and post-sentence credit	**Formula 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.4th 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, supra,* 30 Cal.4th at pp. 25-26, 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]

P.C. § 290 registration – current crime or prior crime
Committed for serious felony (P.C. § 1192.7(c)) – current crime
Serious (P.C. § 1192.7(c)) or violent felony (P.C. § 667.5(c)) conviction - prior crime

Limitations on Credits (State Prison)

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

Limitations on Credits (County Jail)

P.C. § 4019(i) – no conduct credit for "flash incarceration"