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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF MONTEREY

10 PEOPLE OF THE STATE OF CALIFORNIA,

11 Plaintiff,

12 v.

13 AARON BURR,  
14 Defendant.  
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Nos. CR1235

NOTICE OF MOTION AND  
MOTION FOR AN ORDER  
AWARDING ADDITIONAL  
CONDUCT CREDIT (Penal Code  
section 2933)

Date:  
Time:  
Dept.:

17 To DEAN D. FLIPPO, District Attorney of the County of Monterey and/or his representative:

18 Notice is hereby given that on \_\_\_\_\_, at \_\_\_\_\_, or as soon  
19 thereafter as the matter may be heard in Department \_\_ of the above-entitled court, defendant  
20 will move the court for an order awarding additional presentence credit pursuant to Penal Code  
21 section 2933. Defendant seeks 92 additional days of presentence conduct credits.

22 This motion is based on this notice, the attached memorandum of points and authorities  
23 and exhibits and whatever evidence and argument as may be presented at the hearing on the  
24 motion.

25 Dated: December \_\_\_\_, 2010

LAW OFFICE OF JOHN MARSHALL

26 John Marshall, Attorney for Defendant  
27 Aaron Burr  
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**MEMORANDUM OF POINTS AND AUTHORITIES**  
**PROCEDURAL BACKGROUND**

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On July 14, 2010, defendant was sentenced to four years in state prison. (Exhibit A.) He received 184 actual days and 92 conduct days of presentence credits for a total of 276 days. (Exhibit A.) Defendant took an appeal in this case which is still pending in the court of appeal.

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I.

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**THIS COURT HAS JURISDICTION TO ENTERTAIN THE MOTION**

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Pursuant to Penal Code section 1237.1,<sup>1</sup> a defendant is entitled to pursue a post-judgment motion for additional presentence credits. Thus, the court has the jurisdiction to entertain this motion. (*People v. Clavel* (2002) 103 Cal.App.4th 516, 518-519 [where defendant claimed that there was an error in the award of presentence credits, section 1237.1 authorized the filing of a post-judgment motion].)

Aside from section 1237.1, it is also the longstanding rule that a trial court has the continuing authority to correct an “unauthorized” award of presentence credits under the general rule that a court may always correct an illegal sentence. (*People v. Jack* (1989) 213 Cal.App.3d 913, 915-917; accord, *People v. Taylor* (2004) 119 Cal.App.4th 628, 647; *People v. Little* (1993) 19 Cal.App.4th 449, 452. Significantly, there is “no time limitation” upon the right to move the trial court to correct the sentence. (*Little, supra*, at p. 452; see also *Taylor, supra*, at p. 647 [a “sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered.”].) In light of the cited cases, this court has jurisdiction to hear defendant’s motion.

II.

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<sup>1</sup>Penal Code section 1237.1 provides: “No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court.”

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**PURSUANT TO THE EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS, DEFENDANT IS ENTITLED TO THE RETROACTIVE APPLICATION OF THE AMENDED VERSION OF PENAL CODE SECTION 2933**

At the time of his sentencing hearing, defendant was awarded one day of conduct credit for every two days of actual custody. (Exhibit A.) Defendant is now entitled to an award of one for one credit.

Effective September 28, 2010, Penal Code section 2933, subdivision (e)(1)<sup>2</sup> was amended to provide that a defendant sentenced to state prison shall be awarded one for one credits for all time spent in presentence custody. The one for one provision does not apply to certain defendants who have disqualifying convictions. (Section 2933, subd. (e)(3).) However, defendant has not suffered convictions for any of these offenses. (See Argument IV, *infra.*)

In *In re Kapperman* (1974) 11 Cal.3d 542, the Supreme Court considered the then new Penal Code section 2900.5 which provided for an award of presentence credit for actual time spent in custody. Although the statute expressly stated that it applied only to defendants delivered to prison on or after March 4, 1972, the court held that the statute was fully retroactive and applied to all state prisoners by virtue of the equal protection clause. (*Id.* at pp. 544-550.) As a result, the court awarded presentence credit for time spent in custody prior to the effective date of the statute. (*Ibid.*) Significantly, credit was given to Mr. Kapperman even though his judgment was final as of the effective date of the statute. (*Ibid.*)

Subsequently, the California Supreme Court applied *Kapperman* in *People v. Sage* (1980) 26 Cal.3d 498. In *Sage*, the court found that the then presentence credit statute was

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<sup>2</sup>Penal Code section 2933, subdivision (e)(1) provides: “Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner.”

1 violative of equal protection since it failed to provide conduct credit for felons. Citing  
2 *Kapperman*, the court held that its ruling was retroactive. (*Id.* at p. 509, fn. 7.)

3 The conclusion to be drawn from *Kapperman* and *Sage* is indisputable. If a defendant  
4 is serving a sentence, he is entitled to the benefit of the amended statute. Thus, defendant must  
5 be awarded additional conduct credit pursuant to Penal Code section 2933, subdivision (e)(1).

6 III.

7 **SECTION 59 OF SENATE BILL No. 18 EVINCES THE LEGISLATIVE**  
8 **INTENT THAT THE REVISED VERSION OF PENAL CODE SECTION**  
9 **2933 IS TO BE RETROACTIVELY APPLIED TO FINAL JUDGMENTS**

10 Effective January 25, 2010, Senate Bill No. 18 revised various statutes with the express  
11 purpose of reducing the prison population. To this end, the bill amended statutes involving  
12 both prison conduct credits (Penal Code sections 2932, et. seq.) and jail conduct credits (Penal  
13 Code section 4019).

14 With respect to the implementation of the statute, the Legislature included section 59  
15 which provides:

16 “The Department of Corrections and Rehabilitation shall implement the  
17 changes made by this act regarding time credits in a reasonable time. However,  
18 in light of limited case management resources, it is expected that there will be  
19 some delays in determining the amount of additional time credits to be granted  
20 against inmate sentences resulting from changes in law pursuant to this act. An  
21 inmate shall have no cause of action or claim for damages because of any  
22 additional time spent in custody due to reasonable delays in implementing the  
23 changes in the credit provisions of this act. However, to the extent that excess  
24 days in state prison due to delays in implementing this act are identified, they  
25 shall be considered as time spent on parole, if any parole period is applicable.”

26 Subsequent to the enactment of Senate Bill No. 18, the Legislature passed Senate Bill  
27 No. 76 which amended Penal Code sections 2933 and 4019. Significantly, the Legislature  
28 specifically provided that Section 59 of Senate Bill No. 18 was to remain in full force.<sup>3</sup>

Section 59 is a “plus section” which may be utilized in determining the meaning of the

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29 <sup>3</sup>Section 3 of Senate Bill No. 76 provides: “The Legislature intends that nothing in this  
30 act shall affect Section 59 of Chapter 28 of the Third Extraordinary Session of the Statutes of  
31 2009, and that this act be construed in a manner consistent with that section.”

1 revision to section 2933. (*People v. Canty* (2004) 32 Cal.4th 1266, 1280; *People v. Allen*  
2 (1999) 21 Cal.4th 846, 858-861 and fn. 13.) On its face, section 59 reveals that the revised  
3 statute is to be retroactively applied to final judgments.

4 Section 59 requires CDCR to “implement the changes made by this act regarding time  
5 credits in a reasonable time.” Section 59 contains no limitation on the type of credits that are  
6 to be awarded. Thus, section 59 is persuasive evidence that the Legislature intended that the  
7 new section 2933 would be retroactively applied to final judgments.

8 Moreover, by assigning this task to CDCR, the Legislature adopted the same remedy  
9 as the Supreme Court has used in similar situations. (*People v. Sage*, supra, 26 Cal.3d 498,  
10 509; *Kapperman*, supra, 11 Cal.3d 542, 550 [Supreme Court directed CDC to implement  
11 retroactive award of credits].) Since the Legislature is presumed to act with knowledge of  
12 judicial decisions, the conclusion follows that the Legislature has adopted the same remedy.  
13 (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734 [Legislature is presumed to be aware  
14 of judicial decisions].)

#### 15 IV.

#### 16 **DEFENDANT’S PRIOR JUVENILE STRIKE DOES NOT DISQUALIFY** 17 **HIM FROM THE APPLICATION OF PENAL CODE SECTION 2933,** 18 **SUBDIVISION (e)(1)**

19 Defendant's current conviction for battery with serious bodily injury as an aider and  
20 abettor (Pen. Code, § 243, subd. (d)) was not a serious or violent felony. Nor was there any  
21 indication that defendant was ever convicted of an offense requiring him to register as a sex-  
22 offender, another factor which restricts credits under amended Penal Code section 4019. (Pen.  
23 Code, § 4019, subs. (b)(2) & (c)(2).) His only felony conviction as an adult was for grand  
24 theft (former Pen. Code, § 487, subd. 2) and domestic violence (Pen. Code, § 273.5, subd. (a),  
25 which were not serious or violent felonies. Thus, the only conceivable explanation for the  
26 credit restriction that defendant had previously incurred a juvenile adjudication which qualified  
27 as a “strike” prior, which was the reason cited by the probation officer.

1 Penal Code section 2933, subdivision (e)(3) provides that a defendant is not entitled to  
2 one for one credits if he “has a prior conviction for a serious felony . . . or a violent felony . .  
3 . . .” Although defendant admitted that he has a juvenile strike prior, he is not disqualified from  
4 the application of section 2933, subdivision (e)(1). This is so since a juvenile strike prior does  
5 not constitute a “conviction” within the meaning of section 2933. Settled authority supports  
6 this conclusion.

7 The leading case, *People v. West* (1984) 154 Cal.App.3d 100, interpreted the five year  
8 “serious felony” enhancement under Proposition 8 adopted in 1982. *West* held that the critical  
9 phrase from Proposition 8, “previously has been convicted of a serious felony . . .” (see Penal  
10 Code section 667, subd. (a)), means that juvenile court adjudications for serious felony  
11 offenses do not qualify. Citing Welfare and Institutions Code section 203, which provides that  
12 “[a]n order adjudging a minor to be a ward of the juvenile court shall not be deemed a  
13 conviction of a crime for any purpose . . .”, the court in *West* held that the intent of the  
14 electorate was not to circumvent this limitation and the distinction between juvenile  
15 adjudications and adult criminal convictions. Convictions, whether of an adult, or a juvenile  
16 being tried as an adult, qualify as serious felonies under *West*; but “the defendant’s prior  
17 juvenile adjudications were not ‘prior conviction[s]’ within the meaning of Penal Code section  
18 667, subdivision (a).” (*Id* at p. 110.)

19 More recently, the court in *People v. Westbrook* (2002) 100 Cal.App. 4th 378 reached  
20 the same conclusion regarding the provisions of Proposition 36 that limit the requirement of  
21 no-jail drug treatment where a defendant “previously has been convicted of one or more  
22 serious or violent felonies in violation of subdivision (c) of Section 667.5 or Section 1192.7.”  
23 (Penal Code section 1210.1, subd. (b)(1).)

24 The reasoning of the court in *Westbrook* as to this near-identical provision applies with  
25 equal weight here, and is thus quoted at some length.

26 “For purposes of determining the drug rehabilitation program treatment  
27 right in Penal Code section 1210 et seq., a juvenile court adjudication, as

1 occurred in this case is not a disqualifying factor. A juvenile delinquency  
2 adjudication and disposition in a prior robbery case does not result in the  
3 accused's having previously been 'convicted' of a serious felony for purposes  
4 of Penal Code section 1210.1, subdivision (b)(1). Our decision in this regard is  
5 based upon the explicit language used by the voters in Penal Code section  
6 1210.1, subdivision (b)(1). In order for a defendant to be excluded from drug  
7 treatment, Penal Code section 1210.1, subdivision (b)(1) requires the defendant  
8 in a nonviolent drug case to previously have been 'convicted' of a serious or  
9 violent felony. Welfare and Institutions Code section 203 explicitly states, 'An  
10 order adjudging a minor to be a ward of the juvenile court shall not be deemed  
11 a conviction of a crime for any purpose, nor shall a proceeding in the juvenile  
12 court be deemed a criminal proceeding.' . . . [T]he expansive scope of the  
13 language in Welfare and Institutions Code section 203, which prevents a  
14 delinquency wardship order from being considered a 'conviction of a crime for  
15 any purpose,' by its very terms includes defendant's March 12, 1993, wardship  
16 order based upon his commission of a robbery. This construction is entirely  
17 consistent with other decisions applying Welfare and Institutions Code section  
18 203 under varying circumstances. (*People v. West* (1984) 154 Cal. App. 3d 100,  
19 108-110) [juvenile court adjudication cannot be a prior serious felony conviction  
20 under Pen. Code, § 667, subd. (a)]; *In re Anthony R.* (1984) 154 Cal. App. 3d  
21 772, 775-776 [Pen. Code, § 666 felony enhancement for prior theft-related  
22 convictions does not apply to juvenile court adjudications]; *In re Ricky B.* (1978)  
23 82 Cal. App. 3d 106, 114, fn. 2 [juvenile court adjudication is not a prior  
24 'conviction' for purposes of Evid. Code, § 788 impeachment]; see *In re Michael*  
25 *S.* (1983) 141 Cal. App. 3d 814, 817 ['a minor ward[']s] . . . conduct could not  
26 correctly be classified as a 'felony'"].) Because the express direction chosen by  
27 the voters, that which requires the accused to have previously been 'convicted,'  
28 and the explicit language in Welfare and Institutions Code 203 which prohibits  
a juvenile court disposition from being deemed to be a conviction, there is no  
need for reference to extrinsic materials. (*Ladd v. County of San Mateo* (1996)  
12 Cal. 4th 913, 921; *California Fed. Savings & Loan Assn. v. City of Los*  
*Angeles* (1995) 11 Cal. 4th 342, 349.)

No doubt, other criminal statutes do permit the use of prior juvenile court  
adjudications to enhance adult sentences. For example, a juvenile court  
delinquency adjudication can be used to enhance sentences pursuant to Penal  
Code sections 667, subdivision (d)(3) and 1170.12, subdivision (b)(3). But no  
similar language appears in Penal Code section 1210.1, subdivision (b)(1).  
Rather, the only language utilized in Penal Code section 1210.1, subdivision  
(b)(1) refers to an accused who has been previously 'convicted' of a violent or  
serious felony. Because defendant has not been convicted, he does not fall  
within the exception in Penal Code section 1210.1, subdivision (b). He is  
therefore eligible pursuant to Penal Code section 1210, subdivision (a) for  
placement in the drug treatment program."

1 (*Westbrook, supra*, 100 Cal. App. 4th at pp. 383-385.)

2 Defendant submits that the statutory provision at issue here is virtually identical to the  
3 provisions construed in *Westbrook* and *West*. The Legislature, when it enacted the amendment  
4 to section 2933, chose the term “prior conviction” to describe the event triggering credit  
5 entitlement restriction, and it is well settled under Welfare and Institutions Code section 203  
6 that a juvenile adjudication cannot be treated as a conviction for any purpose. As the Three  
7 Strikes Law provisions of section 667, subdivision (d)(3) make clear, the Legislature knows  
8 precisely how to draft a statute so as to make a prior juvenile adjudication the equivalent of a  
9 “prior conviction” for purposes of a penal statute. That the Legislature, when it enacted the  
10 recent amendments to section 2933, chose *not* to include prior juvenile adjudications for  
11 serious or violent felonies as disqualifying factors for credits clearly signals an intention that  
12 the limits under section 2933 only apply to persons with adult court convictions for serious or  
13 violent felony offenses. (*Westbrook, supra*, 100 Cal. App. 4th at pp. 383-385, *West, supra*, 154  
14 Cal.App.3d at p. 110.)

15  
16 **CONCLUSION**

17 For the reasons expressed above, this court should issue an amended abstract of  
18 judgment which provides for 184 actual days and 184 conduct days for a total of 368 days of  
19 presentence credits.

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21 Respectfully submitted:

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23 Dated: December \_\_\_\_, 2010

LAW OFFICE OF JOHN MARSHALL

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25  
26 John Marshall, Attorney for Defendant  
Aaron Burr

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Motion for Pretrial Credits