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Attorney for Defendant
Aaron Burr

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN THE COUNTY OF SANTA CLAU

PEOPLE OF THE STATE OF CALIFORNIA,) No. X123456789
)
Plaintiff,) **MOTION TO CORRECT**
) **PRESENTENCE CREDITS**
v.) **(Amended Pen. Code, § 4019)**
)
AARON BURR,)
) Dept: _____
) Judge: _____
) Date: _____
Defendant.)

TO: THE SUPERIOR COURT OF SANTA CRUZ COUNTY AND THE DISTRICT ATTORNEY OF SANTA CRUZ COUNTY

NOTICE IS HEREBY GIVEN that the defendant, Aaron Burr, moves for an order correcting presentence conduct credits from to 136 days. This motion is based on the accompanying points and authorities and exhibits, as well as the material in this court's file.

Dated: February 5, 2010

Respectfully submitted,

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Sixth District Appellate Program for
Defendant Aaron Burr

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6 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

7 IN THE COUNTY OF SANTA CLAU

8
9 **PEOPLE OF THE STATE OF CALIFORNIA,**) No. X123456789

10 Plaintiff,)

11 v.)

12 **AARON BURR,**)

13 Defendant.)
14)

) **POINTS AND AUTHORITIES IN**
) **SUPPORT OF MOTION TO CORRECT**
) **PRESENTENCE CREDITS**
) **(Amended Pen. Code, § 4019)**

15 **UNDER AMENDED PENAL CODE SECTION 4019, DEFENDANT IS ENTITLED TO A**
16 **RECALCULATION OF PRESENTENCE WORK AND CONDUCT CREDITS.**

17 The Legislature has amended Penal Code section 4019 to increase presentence credits for
18 defendants who have no current or prior convictions for serious or violent felonies and who are not
19 required to register as a sex offender. (Stats. 2009, 3d Ex. Sess., ch. 28 (Sen. Bill No. 18), § 50,
20 effective Jan. 25, 2010.) Former section 4019 provided for one day each of work and conduct credit
21 every each six-day period in custody. (Former § 4019, subs. (b) & (c).) As amended, the statute
22 now provides for one day of work time credit and one day of conduct credit for every four-day
23 period in custody:

24 (b)(1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of
25 subdivision (d), for each four-day period in which a prisoner is confined in or committed to
26 a facility as specified in this section, one day shall be deducted from his or her period of
27 confinement unless it appears by the record that the prisoner has refused to satisfactorily
28 perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial
farm or road camp.

1 [¶] . . . [¶]

2 (c)(1) Except as provided in Section 2933.1 and paragraph (2), for each four-day period in
3 which a prisoner is confined in or committed to a facility as specified in this section, one day
4 shall be deducted from his or her period of confinement unless it appears by the record that
5 the prisoner has not satisfactorily complied with the reasonable rules and regulations
6 established by the sheriff, chief of police, or superintendent of an industrial farm or road
7 camp.

8 (Pen. Code § 4019, subs. (b)(1) & (c)(1), as amended.) Subdivisions (b)(2) and (c)(2), which do
9 not apply to defendant, exclude from this change defendants who are required to register as sex
10 offenders based on a current or prior conviction, defendants with current serious felony convictions,
11 and defendants with prior serious or violent felony convictions. Defendants with current violent
12 felony convictions remain limited to 15 percent presentence credits under Penal Code section
13 2933.1. The amendment to section 4019 became effective on January 25, 2010.

14 **A. The Superior Court has Jurisdiction While the Appeal is Pending.**

15 Because defendant is legally entitled to the presentence credits, failure to award them is an
16 unauthorized sentence. The superior court has the jurisdiction to correct the award of presentence
17 credits at any time, even when the case is on appeal. (*People v. Little* (1993) 19 Cal.App.4th 449,
18 452; *People v. Fares* (1993) 16 Cal.App.4th 954, 958; see also Pen. Code, § 1237.1.)

19 **B. Because Defendant's Conviction is on Appeal and is not Final, Amended Penal
20 Code Section 4019 Requires Correcting his Presentence Credits.**

21 Because defendant's conviction was not final on January 25, 2010, the amendment applies
22 to him. This means that the full benefit of amended section 4019 applies to him, regardless of when
23 he was in the county jail.

24 “[A]bsent a saving clause, a criminal defendant is entitled to the benefit of a change in the
25 law during the pendency of his appeal.” (*People v. Babylon* (1985) 39 Cal.3d 719, 722; see also
26 *People v. Wright* (2006) 40 Cal.4th 81, 90; *People v. Rossi* (1976) 18 Cal.3d 295, 299-300; *In re*
27 *Estrada* (1965) 63 Cal.2d 740.) “[F]or the purpose of determining retroactive application of an
28 amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of
certiorari in the United States Supreme Court has passed.” (*People v. Vieira* (2005) 35 Cal.4th 264,
306, citations and internal quotation marks omitted.)

This principle applies equally to increases in custody credits. (See, e.g., *In re Kapperman*

1 (1974) 11 Cal.3d 542, 544-550 [holding then-newly enacted Pen. Code § 2900.5, awarding
2 presentence custody credits, retroactive to those incarcerated or on parole regardless of date of
3 commitment]; *People v. Hunter* (1977) 68 Cal.App.3d 389.) Before January 1, 1977, a defendant
4 granted probation did not receive any presentence custody credit, even for actual days, against a
5 county jail sentence imposed as a condition of felony probation. (*Hunter, supra*, at pp. 391-392.)
6 On January 1, 1977, an amendment to Penal Code section 2900.5 took effect to credit presentence
7 jail time against a jail term imposed as a condition of probation. (*Ibid.*) The court of appeal, noting
8 the Legislature’s omission of a prospective-application-only limitation, held that a defendant who
9 was sentenced prior to the effective date of the statute but whose judgment was not yet final, was
10 entitled to the benefit of the new custody credits. (*Id.* at p. 392.)

11 Senate Bill 18’s amendment to section 4019 contains no savings clause, it reduces
12 punishment, and it was effective prior to appellant’s judgment becoming final. Applying the
13 amendment to defendants already sentenced advances the purpose of the statute to saves state funds
14 by reducing the inmates’ days in custody. For this reason, application of the amendment to cases
15 not yet final is consistent with the purpose of the legislation, which “addresses the fiscal emergency
16 declared by the Governor.” (Stats. 2009, 3d Ex. Sess., ch. 28 (Sen. Bill No. 18), § 62.)

17 Defendant is thus entitled to the benefit of the change made to section 4019. Defendant was
18 in custody for 137 actual days. (See exhibit A [transcript of the sentencing hearing], exhibit B
19 [minute order of the sentencing hearing], and exhibit C [abstract of judgment].) He is entitled to 136
20 days of work time and good time credit.

21 Under the former formula found in section 4019, “[t]he correct amount of credit [was]
22 calculated by dividing the number of days spent in custody by four and rounding down to the nearest
23 whole number. This number is then multiplied by two and the total added to the original number of
24 days spent in custody.” (*People v. Fry* (1993) 19 Cal.App.4th 1334, 1341, citing *People v. Smith*
25 (1989) 211 Cal.App.3d 523, 527.)

26 Under the new law appellant would be entitled to two days credit for every two days actually
27 served:

28 (f) It is the intent of the Legislature that if all days are earned under this section, a
term of four days will be deemed to have been served for every two days spent in actual
custody, except that a term of six days will be deemed to have been served for every four
days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c).

1 (Amended Pen. Code, § 4019, subd. (f), effective. Jan. 25, 2010.) Accordingly, using the structure
2 described in *Fry* and accounting for the increase in credits, the work and conduct credits are to be
3 calculated by dividing the number of actual days in custody by two, rounding down to the nearest
4 whole number, and multiplying by two. Under this formula, presentence work and conduct credits
5 are equal to the actual credit days, unless the actual number of credit days is odd. If the actual credit
6 days are an odd number, the total number of presentence work and conduct credits can be
7 determined by subtracting one day from the actual days in custody.

8 In this case, with 137 actual days in custody, appellant is thus entitled to 136 work and
9 conduct credits, for a total of 273 presentence credits. The abstract of judgment must be amended
10 to reflect 137 actual days, 136 work and conduct credits, and a total of 273 credits.

11 **C. Under *Kapperman*, Defendant is Entitled to Retroactive Presentence Credits
12 Under Amended Penal Code Section 4019.**

13 Even if defendant's conviction were final, he would be entitled to the correction of
14 presentence credits under amended Penal Code section 4019. In *Kapperman, supra*, 11 Cal.3d 542,
15 the court considered the amendment to Penal Code section 2900.5 which went into effect on March
16 4, 1972. (*Id.* at p. 544.) The amended statute permitted time in custody at county jails before a
17 prison commitment to be credited toward the time in prison. (*Ibid.*) The Legislature specifically
18 said the amendment shall be applied prospectively. (*Id.* at p. 545.) *Kapperman* was delivered to the
19 Department of Corrections before March 4, 1972, and his conviction was final before the new law
20 went into effect. (*Ibid.*) The supreme court held that the state constitutional guarantee of equal
21 protection under the laws (Cal. Const., art. I, § 7; art. IV, § 16) required that the full benefit of the
22 new presentence credit law be applied retroactively to everyone serving a sentence on March 4,
23 1972, regardless of when they were in the county jail or whether the conviction was final on the day
24 the statute took effect. (*Id.* at pp. 546-550.) The same principle applies under the equal protection
25 clause of the Fourteenth Amendment to the United States Constitution. In *People v. Sage* (1980) 26
26 Cal.3d 498, the court held equal protection principles required awarding presentence conduct credits
27 to felons sentenced to prison. (*Id.* at pp. 507-509.)

28 Here, the Legislature did not even state an intention that the amendments to Penal Code
section 4019 be applied prospectively. Because defendant is currently in custody, he is entitled to
the full benefit of the amendment to Penal Code section 4019. Accordingly, he is entitled to 136

1 days of work time and good time credit.

2 **D. Conclusion**

3 Defendant Aaron Burr respectfully requests that this court order that the abstract of judgment
4 be amended to award him 136 days of presentence conduct credits for a total of 273 days of
5 presentence credits.

6 Dated: February 10, 2010.

7 Respectfully submitted,

8 JONATHAN GROSSMAN
9 Attorney for Defendant
10 Aaron Burr

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