The Still Continuing Saga. . .

Section 4019 Revisited

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INTRODUCTION

At the time of our seminar in May of 2011, there had been two amendments to Penal Code section 4019, the statute governing good time and work time presentence credits. These changes were causing discernible havoc in the courts at the trial and appellate levels and were addressed in last year's article.

At the date of this writing, not only do these issues remain unresolved, but the Legislature has again stepped into the fray with an October 1, 2011 amendment that has brought still more uncertainty.

This article will recap the numerous changes to the law, and address the ongoing issues arising from the past and present amendments. For more information on cases which were fully discussed at last year's seminar, please refer to our materials from May of 2011. If you did not attend last year and do not have our packet of written materials, all of our seminar articles are available on SDAP's website.

I.

RECAP - THE 2010 STATUTES

Since 1982, section 4019 had provided that for each six-day period of custody, a defendant awaiting sentencing could earn one day for performing assigned labor and another day for satisfactorily complying

with the rules and regulations. (§ 4019, subds. (b) and (c); Stats 1982, ch. 1234, § 7.) Thus, a term of six days would be deemed served for every four days spent in actual custody. (1982 version of former § 4019, subd. (f).)

A. Senate Bill 18 - Effective January 25, 2010

Effective January 25, 2010, and in response to California's fiscal crisis, the Legislature amended this long-standing version of section 4019. The January 2010 amendment granted four days of credit for every two days served (in other words, a two-for-two formula) for those defendants who had no current or prior convictions for serious or violent felonies and who were not required to register as sex offenders. (Stats. 2009-2010, 3rd Ex.Sess., ch. 28 (S.B.18XXX), § 50.)

Senate Bill 18 amended section 4019 to read in relevant part:

> (b) (1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.
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> (c)(1) Except as provided in Section 2933.1 and paragraph (2), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp.
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> . . .
>
> (f) <u>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</u>,

> 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).

(Emphasis added.)

Pursuant to paragraph (2) of subdivisions (b) and (c), the increased credits provision was not available to individuals with current serious felony convictions, with prior serious or violent felony convictions, or to defendants who were required to register as sex offenders. Of course, credits for defendants with a current violent felony conviction continued to be limited to 15 per cent under Penal Code section 2933.1.

As noted in the prior article, due to the precise wording of the statute, Senate Bill 18 does not provide one-for-one credits where a defendant has an odd number of days of actual custody. In such cases, the number of conduct credits is to be reduced to the even number of days. Thus, the formula for arriving at the appropriate conduct credits under Senate Bill 18 is to divide the days of actual custody credit, including the date of sentencing, by two, exclude any remainder, and multiply by two.

B. Senate Bill 76 - Effective September 28, 2010

Not all that long after the ink was dry on Senate Bill 18, the Legislature stepped in to change the law yet again. This time, it amended section 4019 to return to the old formula for those defendants remaining in local custody. (Stats. 2010, ch. 426, § 2 (SB 76), former § 4019, subds. (b), (c) & (f).)[1] Conversely, for those defendants sentenced to state prison, the Legislature enacted section 2933, subdivision (e)(1) to increase credits even beyond that allowed in Senate Bill 18, and provide one day of credit for

[1] Future references to the September 28, 2010 legislation will either be to "former section 4019," "section 2933," or to "Senate Bill 76."

each day served. Under this formula, a defendant's actual days of custody credit are simply multiplied by two.

The newly enacted section 2933, subdivision (e)(1) provided:

> 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."

(Stats. 2010, ch. 426, § 1 (SB 76); emphasis added.)

As with Senate Bill 18, section 2933 excluded from the increased credits provision those defendants with a current serious felony conviction, with prior convictions for a serious or violent felony, and defendants required to register as sex offenders. (§ 2933, subd. (e)(3).) Defendants with these disqualifying convictions would instead accrue conduct credit at the old 1982 rate. As with Senate Bill 18, credits for defendants with a current violent felony continued to be governed by Penal Code section 2933.1.

In apparent recognition of ex post facto principles prohibiting a retrospective decrease in credits, Senate Bill 18 expressly limited the reduction of credits for locally sentenced defendants to crimes committed on or after the effective date of the amendment. (Former § 4019, subd. (g) (Senate Bill 76).) On the other hand, section 2933, which authorized an *increase* in credits was *silent* on the question of retroactive or prospective application. This distinction is often lost or ignored by courts refusing to retroactively apply the enhancing credit provision of former section 2933 based on the erroneous conclusion that section 2933 expressly provides for

prospective application. (See, e.g., *People v. Russo*, H036873, unpublished opinion filed April 12, 2012; Duffy, Manoukian, Mihara [though defendant won in this case].)

II.

The LATEST & GREATEST – THE OCTOBER 1, 2011 AMENDMENT

The Legislature returned to the presentence credit arena once again via an amendment which was part of the Criminal Justice Realignment Act and became effective on October 1, 2011. The October 2011 amendment deleted credit conduct restrictions on defendants with current convictions for serious felonies, with prior serious or violent felony convictions, and for defendants required to register as sex offenders. (Stats. 2011, ch. 15, § 482, Stats. 2011-2012, ch. 12, § 35.) The new legislation also repealed section 2933, subdivision (e)(1), the provision restricting credits accrued by defendants sentenced to serve time in local custody. The amended statute now grants four days for every two days served (or two-for-two) and the enhanced credits apply to every defendant with the sole exception being those defendants with current convictions for violent felonies. The credits for these defendants remains subject to the 15% limit set forth in section 2933.1. The current version of section 4019 is expressly prospective, stating that it applies only to crimes that were committed on or after October 1, 2011.

The relevant portions of section 4019 currently provide:

> (b) Subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement

unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

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

(d) Nothing in this section shall be construed to require the sheriff, chief of police, or superintendent of an industrial farm or road camp to assign labor to a prisoner if it appears from the record that the prisoner has refused to satisfactorily perform labor as assigned or that the prisoner has not satisfactorily complied with the reasonable rules and regulations of the sheriff, chief of police, or superintendent of any industrial farm or road camp.

(e) No deduction may be made under this section unless the person is committed for a period of four days or longer.

(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.

(g) The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act.

(h) The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.

(I) This section shall not apply, and no credits may be earned, for periods of flash incarceration imposed pursuant to Section 3000.08 or 3454.

III.

RECAP - THE LEGAL ISSUES REGARDING RETROACTIVITY PREDATING THE OCTOBER 1, 2011 AMENDMENT

As noted last year, the enactment of Senate Bill 18, the January 25, 2010 version, opened a floodgate of litigation on the question of the retroactive application of the increased credits. The appellate courts split on this question, with the majority taking the view adopted by the Third District's decision in *People v. Brown* (2010) 182 Cal.App.4th 1354 (review granted on June 9, 2010) that retroactive application was compelled by principles of statutory construction in light of the California Supreme Court's decision in *In re Estrada* (1965) 63 Cal.2d 740. [amendatory statute reducing punishment should be retroactively applied in the absence of a clear legislative intent to the contrary]. Generally speaking, Divisions Two, Three, and Five of the First District, Divisions One, Four, Seven and Eight of the Second District, and the Third District applied Senate Bill 18 retroactively on statutory grounds.

At the time of last year's article, the minority view, rejecting retroactivity on both statutory and constitutional grounds, had been taken by the Division Four of the Second District, Division Two of the Fourth District, and the Fifth and Sixth Districts. In terms of statutory construction, the minority cases generally took the view that *Estrada* was distinguishable because (1) the increase in credits did not necessarily represent a legislative intent to reduce punishment but rather demonstrated a determination that

prison populations should be reduced by the early release of less dangerous offenders; and (2) the Legislature did not intend the increased credits to apply to all defendants regardless of their sentencing date. (See, e.g., *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted on June 19, 2010 [Fifth District].) These cases also agree with one of the principle arguments raised by the state, i.e., that conduct credits are intended to provide an incentive for good behavior with the goal of strengthening prison security. Since it is impossible to influence behavior after it has occurred, an amendment increasing credits cannot act as an incentive for defendants who have already completed their sentences or served time before the effective date of the amendment. Essentially, this was the position taken by the Sixth District in *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted on July 28, 2010.

Though most cases rejecting retroactive application also considered whether retroactive application was compelled on constitutional grounds, they gave little attention to the equal protection analysis. However, at the time of our last seminar, there was one published decision which had ruled *in favor* of the appellant and also reached the equal protection issue. That was the Third District's decision in *In re Kemp* (2011) 192 Cal.App.4th 252 (review granted on April 13, 2011.) *Kemp* held that equal protection required retroactive award of the increased credit provisions of both Senate Bills 18 and 76.

Kemp reasoned that Senate Bills 18 and 76 created two classes of inmates and parolees: those who would receive the benefit of the amendments because of the timing of their custody and those who would not receive the enhanced credits, also because of the timing of their custody with respect to the change in the law.

Kemp found these two classes similarly, if not identically situated. Noting that the revisions to sections 4019 and 2933 did not create an entitlement to conduct credits, the court reasoned that all of the inmates, aware that their good behavior would result in the benefit of conduct credits, had earned such credits either under the former or current statutes by behaving properly in accordance with jail regulations.

Since the purpose of the law was to shorten prison terms, *Kemp* found no rational basis for distinguishing between these two groups, both of whom had earned their credits regardless of the date of delivery to prison, or the dates of their presentence incarceration.

IV.

RETROACTIVE APPLICATION OF THE OCTOBER 1, 2011 LAW

Perhaps since virtually every published decision on Senate Bills 18 and 76 was snatched up by the Supreme Court, there have been almost no published decisions on the retroactive application of the October 1, 2011 version of section 4019. As a result, this article will do what no experienced appellate advocate should do – at least in briefing – and will focus on the various unpublished and *uncitable* decisions discussing the law. This will at least provide a glimpse as to how the various districts are handling the newest version of the law. It also gives some guidance on how the courts are handling situations where a defendant served time before and after the effective date of a particular statute.

A. Retroactivity

For the most part, challenges to the denial of four-for-two credits under the October 1, 2011 law have been raised in the context of equal protection claims. As was the case with equal protection challenges made

in the context of Senate Bills 18 and 76, the equal protection argument claims: (1) that the arbitrary date for application of the law treats similarly situated defendants in a disparate manner; and (2) that there is no rational basis for this unequal treatment with respect to the purpose of the law. Thus, the argument is that defendants with crimes predating the effective date of the statute are nevertheless entitled to the increased credits.

As noted above, unlike Senate Bills 18 and 76, the 2011 amendment applies to every defendant with the sole exception being those defendants with current convictions for violent felonies. Thus, many defendants not previously eligible for the increased credits would qualify if equal protection is found to require retroactive application of the enhanced conduct credits.

Since we are the Sixth District Appellate Program, an analysis of Sixth District cases is an appropriate place to start. However, there is almost nothing but bad news on this front as Sixth District cases have uniformly rejected equal protection challenges. The recent decision in *People v. Bito*, H036375, decided April 5, 2012, is typical of the analysis the court is employing.

Mr. Bito was initially sentenced and placed on felony probation in December of 2010. One of the counts constituted a strike offense. At the time of his initial sentencing, he was excluded from enhanced credits for two reasons. His current strike excluded him from enhanced credits under either Senate Bill 18 or 76. In addition, since he was given probation, even without the strike, he would have been excluded from one-for-one credits granted under Senate Bill 76 because he was being sentenced to local custody rather than state prison.

In an opinion authored by Justice Elia, with Justices Rushing and

Premo concurring, Mr. Bito contended that principles of equal protection compelled that he be awarded four-for-two credits under the 2011 amendment. The court rejected the claim with an analysis that parroted the court's previous decision in *Hopkins*. The court distinguished *In re Kapperman* on the ground that it involved actual custody credits and not conduct credits, distinguished *Sage* (which involved conduct credits) because the "purported violation is temporal, rather than based on defendant's status as a misdemeanant or felon," and found that the fact that a defendant's behavior cannot be retroactively influenced provides a rational basis for the Legislature's express intent to prospectively apply the law.

There are similarly reasoned Sixth District decisions on the equal protection issue in *People v. Vasquez*, H037144, April 12, 2012 (Duffy with Bamattre-Manoukian & Mihara concurring); *People v. Patino*, H037445, April 19, 2012 (Duffy with Bamattre-Manoukian & Mihara concurring), *People v. Rodriguez*, H037085, March 28, 2012 (Bamattre-Manoukian with Mihara & Duffy concurring); *People v. Maciel*, H037083, March 19, 2012 [addresses and rejects equal protection argument re 2011 amendment but finds equal protection argument as to Senate Bill 76 forfeited] (Duffy with Bamattre-Manoukian & Mihara concurring).

Other decisions following rejecting equal protection claims with a similar analysis are: *People v. Borg*, A129258, April 2, 2012, First District, Division One; *People v. Brundage*, A132204, March 29, 2012, First District, Division Two; *People v. Monroy*, G045966, March 14, 2012, Fourth District, Division Three [re Senate Bill 76: defendant not similarly situated to person sentenced to prison]; *People Haas*, E052362, February 27, 2012, Fourth District, Division Two [defendant only argued

retroactivity on statutory grounds]; *People v. Edwards* (2011) 195 Cal.App.4th 1051, Fourth District Division Two [in unpublished portion of decision, court finds January 25, 2010 statute inapplicable where crime and sentencing occurred in 2009; basis of decision unclear as the unpublished portion was deleted from Lexis].

There was a momentary glimmer of hope in *People v. Sanchez* (2011) 193 Cal.App.4th 928, a published decision which briefly remained on the books until review was granted on July 20, 2011. In that case, the majority opinion, authored by Justice Mihara with Justice Duffy concurring, rejected a retroactivity argument for charges and a conviction which occurred in 2009. However, Justice McAdams dissented. (This is the glimmer of hope in case you were wondering. . .) Citing *Estrada*, Justice McAdams wrote that statutes with an ameliorative effect must be given retroactive effect. Alas, Justice McAdams retired at the end of February 2011, and research for this article did not turn up any other dissenting voice among the remaining justices.

On the positive side, several decisions have found retroactive application on statutory grounds. In *People v. Spearmon*, B231180, December 7, 2011, Division Eight of the Second District stuck with its earlier decisions on retroactivity. Relying on *Estrada*, the court held that Senate Bill 18 should be applied retroactively to cases not yet final as of the date of its enactment. Similarly, the Third District reaffirmed its *Estrada* analysis in *People v. Talavera*, C063846, where it retroactively awarded credits for an offense committed before January 25, 2010. In *People v. Page*, D056160, November 8, 2010, the court applied Senate Bill 18 retroactively where the crime occurred before January 25, 2010.

B. To Apportion or Not to Apportion – That Is The Question

There are mixed results in cases addressing situations where a defendant had periods of incarceration both before and after the passage of Senate Bill 18. These cases generally involve situations where a crime was committed before Senate Bill 18 became law and the defendant then was charged with probation violations after the law's effective date. Of course, some of the cases involve Senate Bill 76 as well.

Again, starting with the Sixth District, most of the cases apportion the credits. An example is *People v. Navalon*, H036689, August 25, 2011 (Bamattre-Manoukian with Duffy & Walsh concurring]. There, the defendant was sentenced when Senate Bill 18 was in effect and the Attorney General conceded that the enhanced statute should apply. The court rejected the concession and apportioned the credits.

Similar results occurred in *People v. Davis*, H036417, July 28, 2011 (Bamattre-Manoukian with Lucas & Mihara concurring), where the court continued to apply the *Hopkins* rationale, and in *People v. Nevarez*, H036727, February 12, 2011 (Premo with Rushing & Manoukian concurring).

However, apportionment seems to be the norm only in the Sixth District. At least some other districts are taking a more generous approach. Examples are as follows.

In *People v. Dacosta*, D058997, in a decision filed on March 7, 2012, Division One of the Fourth District addressed a case where the crimes were committed before January 25, 2010, but the defendant was sentenced afterwards. His incarceration time spanned a period before and after enactment of Senate Bill 18, and the trial court apportioned the credits accordingly. The Court of Appeal reversed on the ground that Senate Bill 18 did not impose a two-tiered division of presentence credits. Since this

was the only operable version of section 4019 at the time of sentencing, the court found it should apply to the entire period of incarceration. Accordingly, the defendant was entitled to four-for-two credits.

In *Payton v. Superior Court* (2011) 202 Cal.App.4th 1187, the defendant's original conviction occurred in 2008. He then was charged with a probation violation in April 2011 and admitted the violation in May 2011. Probation was reinstated and Mr. Payton was ordered to serve 90 days in county jail. Over Payton's objection, he was awarded conduct credits of six days for every four days served. Payton filed a writ of habeas corpus challenging the award and arguing that he was entitled to day-for-day conduct credits.

The Court of Appeal treated the habeas petition as a writ of mandate and granted the writ. The Attorney General conceded on the ground that conduct credits should be awarded based on the law in effect when the custodial period occurs. However, in this case, the law in effect at the time of the original offense was the 1982 version of section 4019, under which a defendant was entitled to six days of custody for every four days served – the credits awarded by the trial court. Similarly, the law in effect at the time of the probation violation and Payton's incarceration was Senate Bill 76, which rendered defendants serving time in local custody ineligible for enhanced conduct credits, also in line with the trial court's credit award. This is an interesting case, however, because it highlights the fact that Senate Bill 76 is expressly limited to cases where the crime occurred on or after the effective date of the statute. Thus, the court apparently concluded that under these circumstances, the governing statute was Senate Bill 18.

Other cases rejecting apportionment are *People v. Martinez*, F061598, December 20, 2011, Fifth District; *People v. Forest*, F061375,

November 15, 2011, Fifth District [for 2008 conviction, July 2010 violation of probation, and sentence in October 2010, court awards one-for-one credits under Senate Bill 76 because this was law in effect at time of sentencing]; *People v. Cervantes*, D057647 & D057648, November 2, 2011, Fourth District, Division One [for crimes committed before January 25, 2010, but custody both before and after; court relied on *Estrada*, but also holds that defendant entitled to be sentenced per statute in effect at sentencing; *People v. Rivera*, B229306, July 20, 2011, Second District, Division One [*Wende* brief filed in case where crime committed in April of 2010 and defendant placed on probation; probation revoked and defendant sentenced to prison based on an incident occurring on September 24, 2010; court notes trial judge incorrectly apportioned conduct credits and modifies judgment to provide for four-for-two credits].

V.

PLEADING, PROOF & THE POWER TO STRIKE

There has been a lot of action with respect to these particular issues. Last year's article discussed several cases addressing the trial court's power to strike all or part of a disqualifying conviction under section 1385 in the interests of justice. Another question that arose in this context was whether a prior disqualifying conviction had to be pleaded and proved.

People v. Jones (2010) 188 Cal.App.4th 165, review granted December 15, 2010, (Third District), *People v. Koontz* (2011) 193 Cal.App.4th 151, review granted (Second District, Division Six), and *People v. Lara* (2011) 193 Cal.App.4th 1393, review granted May 18, 2011 (Sixth District), all held that ineligibility for increased presentence credits constitutes an increase in punishment and as result, the disqualifying conviction must be pleaded and proved before it can be used to deprive a

defendant of increased credits pursuant to Senate Bill 18. All of these cases additionally held that the trial court retains discretion under section 1385 to strike the prior for purposes of permitting the defendant to obtain the increased presentence credits. One other case in agreement with *Jones* is *People v. Tolbert*, B221747, November 22, 2010, Second District, Division Two. *Jones, Koontz,* and *Lara* were all discussed in last year's materials and review has been granted in all three cases.

Surprisingly, both *Jones* and *Koontz* were taken up on a grant and hold basis behind *Brown*, and not on the basis of the pleading and proof or 1385 issues. The grant of review in *Lara*, on the other hand, designated it as the lead case on the issue of the trial court's section 1385 discretion. It will be recalled that *Lara* was Bill Robinson's case in the Court of Appeal, and he is now handling that matter in the Supreme Court. Let's all keep our fingers and toes crossed. . .

Since *Lara*, there have been numerous cases deciding these issues and unfortunately, *Lara* represents the minority view. Most opinions have held that there is no pleading and proof requirement and some have gone further to rule that the trial court *lacks* 1385 discretion to dismiss the offending prior for credit purposes. Even the Sixth District, albeit in decisions by different panels, has backtracked and joined the majority approach.

People v. Voravongsa (2011) 197 Cal.App.4th 657, review granted August 31, 2011, is the leading case taking the position adverse to *Lara*. In *Voravongsa*, Division One of the First District held that there is no pleading and proof requirement in Senate Bill 18 and, further, that the trial court lacks the authority to strike pursuant to section 1385. Looking to the express statutory language of Senate Bill 18, *Voravongsa* determined that

had the Legislature intended such a pleading/proof requirement, it would have said so. (*Id*. at p. 672.)[2] The court also found no distinction between the type of facts that foreclose the enhanced credits under Senate Bill 18 and other facts such as poor conduct in jail that can result in the complete deprivation of conduct credits. (*Ibid*.) The therefore concluded that the Legislature intended the disqualifying facts as constituting the "'traditional facts of a crime or of a defendant's criminal history usually taken into account by sentencing judges.' [Citation.]" (*Id*. at p. 673.)

Turning to constitutional questions of due process, *Voravongsa* then rejected the claim that a pleading and proof requirement must be implied into the January 25, 2010 version of section 4019. (*Ibid.*) It did so after concluding that defendant's punishment was not increased beyond the statutory maximum, or in any way whatsoever, due to his ineligibility for the additional conduct credits afforded by Senate Bill 18. (*Id*. at pp. 673-674.)

Since sex offender status and prior convictions are "sentencing facts" that need not be pled or proven, *Voravongsa* simply concluded that the trial court lacks section 1385 discretion. (197 Cal.App.4th at p. 674.)

Other cases siding with *Voravongsa* are *People v. Rodriguez*, H037085, March 28, 2012, Sixth District (also cited above for its equal protection analysis) and *People v. Yanez*, B229549, January 19, 2012, Second District, Division Five.

Additionally, cases holding that there is no pleading and proof

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[2] Due to the fact that review was granted in *Voravongsa*, it would not normally be cited. It is cited here only for educational purposes so as to provide the rationale for decisions concerning pleading and proof requirements and the extent of the trial court' authority under section 1385.

requirement, but refraining from deciding the extent of section 1385 discretion are: *People v. James* (2011) 196 Cal.App.4th 1102, Fourth District, Division One, review granted August 31, 2011; *People v. Fuentes*, H035286, November 16, 2010, Sixth District; *People v. Smith*, E050923, January 14, 2011; *People v Ortiz*, A129049, June 10, 2011, First District, Division One; *People v. Millsap,* A130626, July 7, 2011, First District, Division One; *People v. Pleitez*, A131702, January 23, 2012, First District, Division One.

VI.

AN EX POST FACTO VIOLATION

One area that has provided at least two wins for defendants has arisen where a defendant has been deprived of enhanced presentence conduct credits because he or she has been sentenced to local custody under the Criminal Justice Realignment Act. The Act made substantial changes to the sentencing and supervision of certain felons. In terms of felony sentencing, the Act changes the place where an otherwise eligible defendant will serve his sentence for specified crimes. If a trial court determines that a defendant should not be granted probation and the defendant is eligible for realignment, the Act requires that the sentence be served on the county level, and sentencing occurs pursuant to section 1170, subdivision (h).

In the case of *In re Real* (D061439), a defendant committed crimes in June of 2011, was convicted by plea on August 4, 2011, and was sentenced on November 7th. The defendant was sentenced under the Realignment Act and because he remained in local custody, the court found him ineligible for the increased award of credits available to eligible defendants sentenced to prison under Senate bill 76.

The defendant petitioned for a writ of habeas corpus, arguing that the denial of one-for-one conduct credits under Senate Bill 76 constituted an ex post facto violation. Division One of the Fourth District granted the writ on the ground that the deprivation of increased credits in effect at the time the crimes were committed constituted an ex post facto violation.

The same issue arose in *In re Campbell* (D061227), also in Division One of the Fourth District. As in *Real*, the denial of enhanced conduct credits was found to violate the ex post facto clause.

VII.

ADVERSE CONSEQUENCES

As noted above, the 2011 amendment of section 4019 explicitly provides for prospective application. The enhanced credits are to apply only where the crime occurred on or after the effective date of the law, October 1, 2011. However, a number of trial courts have been awarding the increased credits under the current version of section 4019 even though a defendant's crime predated the effective date of the statute. In some cases, trial courts have also awarded increased credits under Senate Bills 18 and 76 in situations where the award could be questioned. Thus, appellate counsel should carefully review the record to determine whether a retroactive award of conduct credits has occurred which would pose an adverse consequence to the client. In such cases, the client must be notified of the potential for losing these additional credits and given the option of abandoning the appeal.

CONCLUSION:

THE LAW IS STILL IN FLUX

A year later and we are STILL waiting for resolution of these credit issues after almost 1,000 cases have been decided by appellate courts throughout the state. Many months after briefing was concluded, oral argument in *Brown* was finally scheduled and held on April 5th. Thus, absent unforeseen circumstances, we can expect a decision by July 5th.

As noted last year, however, *Brown* itself relied on a statutory construction analysis to reach its decision and did not consider whether the award of credits was mandated by principles of equal protection. Once in the Supreme Court, Mr. Brown's answer on the merits did not assert that he

was entitled to relief on equal protection grounds. Instead, the issue was first affirmatively raised by Dallas Sacher in an amicus brief filed on behalf of the Sixth District Appellate Program. Counsel for Mr. Brown then filed a response to the amicus in which he joined the argument, and then further advanced the equal protection claim in a supplemental brief.

As was the case last year, the law will remain uncertain until *Brown* is decided and even then, if the high court fails to reach the equal protection claim, the issue will remain unresolved.

In the meantime, appellate counsel should continue to raise equal protection claims to challenge the denial of credits under all versions of the enhanced credit provisions. The *Jones*, *Lara*, and *Koontz* rationales also should continue to be raised pending the Supreme Court's decision in *Lara*.

Where the trial court apportions credits for time served before and after effective dates of various versions of the statutes, equal protection claims should also be raised. However, forfeiture will be a problem if the sentencing occurred after the effective date of the statute and a request for increased credits was not made. In such cases, appellate counsel should consider seeking a correction in the trial court and/or raising a backup ineffective assistance of counsel claim.

In cases where a defendant is sentenced under the Realignment Act and is potentially subject to a credit award governed by Senate Bill 76, such a sentence should be viewed as a prison term and the deprivation of credits an ex post facto violation.

Finally, watch out for those adverse consequences!