GETTING CREDITS WHEN CREDIT IS DUE

By William M. Robinson

Introduction

Credits are boring, so we all say. If it's the only issue, it's a bad day at the office. But this is wrong. Credits issues can provide your client with small, medium or large benefits in the form of actual reduction in confinement time. Compare that to the pyrrhic victory of getting a concurrent sentence stayed under section 654, or a brilliant instructional error where the court agrees with you on error but finds it harmless, and you will see that a credits win is well worth the effort.

What is more, credits issues aren't necessarily boring. In addition to sharpening up those dormant arithmetical skills, credits issues can sometimes involve dodgy, unsettled issues of statutory construction, and even constitutional questions such as equal protection and ex post facto. They can lead to published opinions, dissents, and maybe even a trip to the supreme court.

The purpose of this article is to summarize some basic and cutting edge issues involving presentence and postconviction credits, provide you with some tools and sample briefing for raising credits issues, and attempt to energize you, the appellate practitioner, on a set of issues we too often classify as drudgery.

I. BASICS: PRESENTENCE AND PRISON CREDITS

A. Presentence Credits

1. Basic Rules for Garden Variety Felonies and Custody

A defendant is entitled to credits for each day of custody from the time of his arrest until the date of his sentence, provided that the custody is "attributable to proceedings related to the same conduct for which the defendant has been convicted." (Pen. Code § 2900.5.)[1] This latter phrase has been the source of confusion and judicial mischief for decades in those multi-faceted situations where custody can be said to be "attributable" to more than one cause, e.g., where a defendant has served time for more than one transactionally separate offense, or had his parole or probation revoked.

To start with, though, in the simple case of a single set of charges, a defendant gets credit for each day he was jailed pending trial in that offense prior to and including the date of sentence. Thus, in every case, you should review the dates of custody as set forth in the probation report, and count them up carefully. You would be surprised how frequently there is an error in failing to count the first *and* last day, arithmetic miscalculations, especially of the number of days after the probation

[1]Statutory references are to the Penal Code if not otherwise specified.

report is prepared, a failure to count that silly February 29th during leap years, etc.

Since the landmark equal protection decision of the California Supreme Court in *People* v. *Sage* (1980) 26 Cal.3d 498, and the subsequent enactment of section 4019, a defendant, with some recent delimited exceptions, is also entitled to half-time presentence behavior credits, calculated based on two days credit for every four days served. For some foolish reason, the courts have interpreted these provisions literally, refusing to allow odd numbers of behavior credits to be awarded; thus, if your client has 26 days of actual custody, he gets only 12, and not 13, days of behavior credits under section 4019. (See, e.g., *People* v. *Smith* (1989) 211 Cal. App. 3d 523, 527.) However, behavior credits are calculated based on the *aggregate total* days of actual confinement, and not by compartmentalizing various discrete periods of jail time. (See, e.g., *People* v. *Culp* (2002) 100 Cal.App.4th 1278.)

2. Exceptions and Limitations on Presentence Credits

During the past decade, politicians have had a field day restricting credits for persons convicted of more serious crimes. Penologically this makes little sense, since there ought to be the greatest incentives for the most serious offenders to behave and program well while in custody. However, what matters to the legislators who write and pass these laws is not rationality, but the appearance of being tough on crime (and tougher still on violent crime) and pleasing powerful lobbies like the prison guard union.

a. Section 2933.1.

One of the nastiest and most commonly applied of these credit-restricting laws is section 2933.1, which provides that any person convicted of a "violent felony" as defined in section 667.5 shall accrue no more than 15 percent credit on his actual time of confinement for behavior and worktime, a limitation which applies both as to presentence credits (subd. (c)) and postconviction credits (subd. (a)).

Although the statute has an express provision that its limitations apply only to violent felony offenses committed on or after September 21, 1994, the date the law became operative (§ 2933.1, subd. (d)), the court in *People* v. *Ramos* (1996) 50 Cal.App.4th 810 held that section 2933.1 applies to *the offender*, and not the offense. Thus, according to *Ramos*, if a defendant is convicted of a *single* qualifying violent felony, his entire sentence, including consecutive terms on potentially unlimited numbers of non-violent felonies, is subject to the 15 percent credit limitations. (*Id*., at p. 817.)

However, it is an open question whether the "offender not offense" rule applies where the defendant was separately convicted of an un-violent felony, and then suffers an unrelated conviction for a violent felony, and is jointly sentenced on both. The supreme court has recently granted review on three cases reaching different results on this question. (See *In re Black* (2002) 101 Cal. App. 4th 1026 (rev. gtd. 12-18-02), *In re Reeves* (2002) 102 Cal. App. 4th 232 (rev. gtd. 12-18-02) and *People* v. *Baker* (2002) 104 Cal. App. 4th 774 (rev. gtd. 2-25-03)

And, as discussed below, it is a still more open question whether the "offender not offense" interpretation can be used to trump the constitutional prohibition against ex post facto laws where a defendant has a series of current violent felony convictions, some, but not all, of which were committed prior to the effective date of section 2933.1. (See Part III-A, below.)

b. **Other Statutes Eliminating Behavior Credits**.

For certain violent felonies, no behavior credits can be earned. Under section 2933.2, a person convicted of murder gets no presentence or postconviction credits. However, the murder in question must have been committed prior to the effective date of this law, which was June 3, 1998. (See, e.g., *People* v. *Hutchins* (2001) 90 Cal.App.4th 1308, 1315-1317.)

Another credits-precluding law, section 2933.5, applies only in the narrowly delimited situation of a person convicted of a current specified violent felony who has two prior specified violent felony convictions which were brought and tried separately, and for which he served a prison term. I know of one very recent case from Santa Clara County where the court, at the prompting of the probation officer, and without objection by defense counsel, applied this provision to deny credits when the defendant's two priors were brought and tried together. This could be a fluke, but it also may be that the probation officers have just discovered this nifty little statute; so we should keep our eyes open to make sure it is not misused to the detriment of our clients.

c. **The Minefield of "Mixed Conduct" Custody Situations.**

It is often the case that a defendant on probation or parole who is facing new criminal charges has his parole or probation revoked, and serves jail or prison time under such revocation, prior to the adjudication of the new felony charge. Such revocations are frequently based, either in whole or in part, on the new criminal conduct A dodgy legal question then arises as to whether the defendant is entitled to credit for this time served on the parole or probation revocation when he is later sentenced on the new charges.

As noted above, a defendant is entitled to presentence credits for all time spent in custody "only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subd. (d).) Over the years, gallons of ink have been spilled by California courts as to the correct interpretation of this confusing statutory language. The highlights: the sensible Bird court opinion, *In re Atiles* (1983) 33 Cal.3d 805 held that a defendant gets dual credit where his parole revocation is based, at least in part, on the new charged crime; then the absurd Lucas Court decision, in *In re Joyner* (1989) 48 Cal.3d 487 reached a contrary view, holding that a defendant whose probation is revoked in part, but not entirely, because of commission of a new crime is not entitled to credit in the new case for time he served for this type of "mixed conduct" probation revocation unless he can prove that the conduct underlying the new charged crime on which he is sentenced was the "but for" cause of time previously served on the probation revocation. (Warning: Don't read the preceding sentence, or the opinion in *Joyner*, more than once, as it's likely to lead to a state of helpless confusion and may cause you to question your decision to become a lawyer.)

The last word on the subject, and the only one we need to pay attention to most of the time, was *People* v. *Bruner* (1995) 9 Cal.4th 1178, which, in effect, codified the *Joyner* "but for" test as to all mixed conduct situations. *Bruner* held that "when presentence custody may be concurrently attributable to two or more unrelated acts, and where the defendant has already received credit for such custody in another proceeding, the strict causation rules of *Joyner* should apply."(*Bruner*, *supra*, at p. 1180.) Under this test, custody may not be credited against a term of confinement unless a defendant shows that the conduct that led to the confinement in the other proceeding (i.e., a revocation of parole or probation) was also the "'but for' cause of the earlier restraint." (*Id*., at pp. 1193-1194.) The defendant's burden to prove "but for" causation is not met simply by demonstrating that the conduct for which he seeks credit was "a" basis for the restraint. The defendant is only entitled to dual credits if he is able to show that he "could have been free during any period of presentence custody *but for* the same conduct that led to the instant conviction and sentence." (*Bruner*, *supra*, at p. 1195, emphasis added.)

In most cases, the holding in *Bruner* is interpreted by the probation officers who pretty much decide credit issues in the trial court to mean one of the following: (a) if probation or parole was revoked *solely* because of the new offense your client committed, then he gets full credits when he's sentenced in the new case for any time served on revocation of parole or probation; but (b) if there was *any other basis* for parole or probation being revoked – e.g., failure to report, pay a fine, or a dirty drug test – your client get no credits for time served on such a revocation.

There is one notable exception to the "You Lose" rule for mixed conduct cases recognized in case law. In *People* v. *Williams* (1992) 10 Cal.App.4th 827, cited with approval in *Bruner*, *supra*, at p. 1193, fn. 10, a defendant arrested on new charges of kidnapping and sexual assault had his probation in a prior case revoked for "new charges" which included multiple sex counts with which he was originally charged, and for a generic "failure to obey all laws." In the new case, he ultimately pled pursuant to a plea bargain to a single count. The trial court denied him credits on the new case for the time spent in custody on the probation violation, based on the "obey all laws" provision and on the fact that the charges on which probation was revoked included crimes in addition to those for which he pled guilty and was convicted. The court of appeal in *Williams* reversed, concluding to the contrary that his custody on the revocation arose from the identical conduct that led to the criminal sentence. First, there was nothing in the record suggesting that the violation of the "obey all laws" provision referred to anything but the criminal conduct resulting in the charges in the new case. And second, and most usefully, the *Williams* court held that the prosecutor's decision to dismiss numerous transactionally related counts in connection with a plea bargain did not change the case into one of mixed conduct.

> [O]nce the People elect to define criminal conduct which generated a defendant's presentence custody by separately stated counts, the conduct described in dismissed counts is not thereby converted to conduct not attributable to the proceedings related to the same conduct for which defendant is convicted.

(*Williams*, *supra*, at pp. 832-834.)

In addition to the effect in the dismissed counts situation, the holding in *Williams* has proven useful in at least one unpublished Sixth District case involving transactionally related *uncharged* counts. In that case, the new charges were for drug possession, the defendant's parole was revoked for the new charge and for the uncharged conduct of possession of drug paraphernalia. The trial court, following the probation officer's recommendation, classified this as a "mixed conduct" situation because the uncharged paraphernalia possession was a basis for revocation, and denied credits for the entire period of the parole revocation. The court of appeal reversed, holding that *Williams* applied by analogy to this situation. Although prosecutorial discretion was exercised not in dismissing a charged count, but in the decision not to charge the transactionally related crimes in the first place, this was "a distinction without a difference," and the situation remained a "same conduct," and not a "mixed conduct" situation in which the defendant is entitled to dual credits. The same reasoning can be applied where related charges on which revocation was based were dismissed on other grounds – e.g., a 995 motion, hung jury, etc.

I note too that a new test case is brewing in a local trial court on a related point in the *Green* case, for which a sample motion is attached. (Attachment A.) In that case, the defendant's new charges were for aiding and abetting two confederates in a bad check passing scheme, where it was alleged that he drove his confederates up to the Bay Area from Compton and ferried them from bank to bank to cash phony checks. Mr. Green's parole was revoked for the new offenses and for traveling beyond the fifty mile limit set for parolees. At sentencing, he got no credits for the one year parole revocation period on the grounds that the 50 mile violation – which probation erroneously described as "absconding" – turned this into a mixed conduct case. In the challenge to this limit brought in a post-appeal credits motion in the superior court, Mr. Green is contending that this is really a same conduct case, and not a mixed conduct situation, because the act of traveling beyond the 50 mile range was the same conduct which underlay the aiding and abetting, i.e., driving his accomplices from Compton to the Bay Area. Thus, under *Williams*, the fifty mile violation is transactionally related conduct which can't be the basis for a finding of mixed conduct. Here, the issue is not the discretion of the prosecution, which could not have charged the fifty mile violation, since it is not criminal conduct, but is focused instead on the common theme of uncharged or dismissed conduct which is directly transactionally related. Alternatively, assuming that this is, in fact, a mixed conduct situation, the defendant in *Green* alternatively contends that we have shown the strict causation required by *Bruner* in that the conduct leading to the new charges of aiding and abetting the check fraud scheme is the "but for" cause of the 50 mile violation.

B. **Post-Conviction Credits**

Post-conviction credits are awarded based on a different set of statutory rules, located at section 2930 et. seq. Normally, issues concerning these credits are not going to be cognizable on appeal, as the awarding and deprival of these credits is up to the Department of Corrections.[2]

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[2] The ensuing discussion will not touch on complicated questions about in-prison determinations which reduce behavior credits, a subject which clients will sometimes bring up, but one over which the appellate lawyer has little ability to address.

However, the application of the laws and restrictions about postconviction credits often overlap with rules about presentence and postconviction credits, and thus there will be ways in which statutorily based restrictions on prison credits can be challenged on appeal.

For example, as noted above, the stringent 15 percent limit on behavior credits under section 2933.1 for persons convicted of current "violent felonies" applies to both presentence and postconviction custody. If there is an issue in your case as to whether the trial court correctly applied section 2933.1 to restrict your client's presentence credits, you can raise this issue on appeal and/or by a trial court motion. While the benefit to the client in terms of presentence credits will normally be fairly minimal, the long term benefit of a favorable ruling will be enormous as to the postconviction credit limits.

Prison credits laws have a long and complicated history. For our purposes, though, it suffices to say that unless one of several enumerated exceptions apply, a sentenced prisoner is entitled under section 2933 to receive, upon good behavior and work participation, half-time credits of one day for every day served, meaning that a two year sentence is completed in one year.

The exceptions are significant, and give rise to some interesting legal issues.

As noted above, a person sentenced as to at least one violent felony can earn only 15 percent limits on his sentence. The potential issues concerning challenges to this law are noted in Part I-A-2-a above.

Under the Three Strikes law, credits are limited by subdivision (a)(5) of section 1170.12 to no more than 20 percent of the sentence. Fortunately, the supreme court has agreed with lower court interpretations of this provision as inapplicable to *presentence* credits, which are still controlled by section 4019. (See *People* v. *Thomas* (1999) 21 Cal.4th 1122, 1125.) This anomaly has created some odd situations. For example, in second strike plea bargained cases, there is a big incentive to drag out the period of presentence custody so as to maximize credits.

Unfortunately, the supreme court made an astonishingly poor and unfavorable interpretation of the credit limitation provisions of the strikes law as applied to *third* strikers, holding in *In re Cervera* (2001) 24 Cal.4th 1073 that such persons earn zero behavior credits while imprisoned in terms of advancing the date of their minimum date for parole eligibility.

II. **PROCEDURAL NICETIES**

A. **When Issue Must be Raised First in Trial Court: Two Situations**.

Generally speaking, we appellate lawyers hate to go to trial court to argue a motion. Only part of this is our regal sense of condescension. Mostly it's a major hassle to figure out (1) how to calendar a motion, especially in an unfamiliar county, (2) how to deal with the DA office's inevitable continuance request(s), (3) travel to remote places to argue the motion and (4) just what

the hell you're supposed to say when you're sitting in the trial judge's chambers with all the regulars, feeling like a fish wearing sunglasses. But if a credits challenge is your only appellate issue, or if you need to introduce matters that are not part of the record to prove your client's entitlement to credits, you have no choice: a motion must be filed in the trial court in order to raise a credits issue on appeal. But have cheer! Many issues can be resolved informally by a *Fares* letter[3] to the trial judge; and if a motion has to be filed, there are ways to avoid the difficulties and it might turn out to be a more favorable experience than you expected.

1. Section 1237.1 and Case Law: If Credit Error Is the Only Issue Raised on Appeal, It Must First Be Presented to Trial Court by Motion.

Apparently, appellate justices are not terribly fond of appeals where the only issue is an error in the computation of presentence credits. The courts in *Fares*, *supra*, 16 Cal.App.4th 954 and *People* v. *Underwood* (1984) 162 Cal.App.3d 420, held that credits issues are non-appealable without a prior attempt to obtain correction in the trial court. However, the court in *People* v. *Lynn* (1978) 87 Cal.App.3d 591, reached the opposite conclusion, finding that appeal was the *only* way to address such error, since a trial court no longer had jurisdiction once sentence was pronounced and an appeal went forward. The Sixth District reached a contrary view to *Lynn*, correctly pointing out that a trial court retains jurisdiction of a case to correct clerical errors or to remedy an unauthorized sentence. (*People* v. *Little* (1993) 19 Cal.App.4th 449, 451-452.)

> The Legislature stepped into the fray in 1995 by codifying the *Fares* rule in section 1237.1:
> 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.

Under this law, it is sufficient if a credits error was raised at the time of sentencing. For example, trial counsel may argue that a particular crime is not subject to the credit limits of section 2933.1, and have this argument rejected by the trial judge. There is no need for a motion in this situation.

But in the more typical situation, it is you, the appellate lawyer, who discovers the credits error or latent constitutional credits issue. In this situation, the issue must be first presented to the trial court before it can be raised as an issue on appeal. There is one exception, and one oft-available shortcut which can obviate the need for a full-blown motion in the trial court.

The exception, recognized by a number of recent appellate decisions, applies when credits error appearing on the face of the record is *not* the only appellate issue – e.g., where there was a trial and there are other challenges to trial court error, or a guilty plea case with some other cognizable issue to be raised in the briefs. (See *People* v. *Acosta* (1996) 48 Cal.App.4th 411 and *People* v.

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[3] *People* v. *Fares* (1993) 16 Cal.App.4th 954.

Duran (1998) 67 Cal.App.4th 267.) In this situation, a credits issue which can be raised based on the record in the appeal, may be raised in the opening brief without a trial court motion.

The "shortcut" – keeping in mind the old adage that shortcuts make long detours – is an informal request, typically in the form of a letter to the trial judge, to correct a credits error. Such a procedure, often referred to as a *Fares* letter, can frequently be a prompt and effective way of fixing obvious errors of miscalculation or non-disputable mistakes about the applicability of credit restricting provisions such as 2933.1. When writing such an informal request, it makes the most sense to be as clear and specific as possible, and to attach copies of relevant portions of the record, including the abstract of judgment, probation report, and portions of the reporter's transcript of sentencing. You should "cc" a copy of the letter to trial counsel, the court of appeal, the client and to the trial deputy district attorney. (I note that in a couple non-controversial situations, a deputy DA actually helped finesse correction of the error.) Also, be sure to request that the court issue a minute order and amended abstract of judgment, and transmit these to the Department of Corrections, *and* be sure to request that a copy of the court's order be sent to you, as counsel for the client, an action frequently omitted, with the defense copy of any order sent instead to trial counsel. (See Sample Letters, Attachment B.)

Many trial judges respond promptly to such informal requests, issuing amended abstracts. But sometimes nothing happens for many weeks. Be prepared; calendar yourself to do a follow-up within two weeks, and phone the trial judge's clerk, an act which can sometimes gently prod a response. When this fails – "It's sitting on the judge's desk, that's all I can tell you" – a polite follow-up letter to the judge will sometimes do the trick.

If more time passes without a response, you must take the next step. We used to assume that an informal *Fares* request, if not acted upon by the court, was the equivalent of a motion, and would permit you to raise the issue on direct appeal. Not so, said the court in *People* v. *Clavel* (2002) 103 Cal.App.4th 516: because section 1237.1 requires the defendant to "make[] a motion" in the trial court, an informal request is not a motion, and an appeal raising a credits issue without such a motion is subject to dismissal. So, at this point, you must prepare, file, and calendar a more formal motion.

2. Requirement of Superior Court Motion Where You Need to Present Facts Beyond the Record on Appeal.

Irrespective of whether you are raising non-credits issues on appeal, a trial court motion for credits will be required in those situations where there is a need to present facts in addition to what is in the record to prove your client's entitlement to credits.

A common example occurs in the supposed "mixed conduct" parole revocation cases. Typically, all that you will have on the record is a couple sentences in the probation report that the probation officer spoke with your client's parole officer, who reported that it was a mixed conduct case. But when you obtain the actual parole records, you learn that in fact there was no actual revocation for anything other than the conduct in the new case, or that you have a *Williams* type

argument about dismissed or uncharged offenses. You will, naturally, need certified copies of these documents as part of your credits motion.[4]

B. **Some Tips on the Nuts and Bolts of Bringing A Trial Court Credits Motion**.

1. **Obtaining supporting documents**.

In my view, based on what has now developed into considerable experience and luck defeating supposed "mixed conduct" credit denials, it is worth your time and trouble to obtain copies of parole or probation revocation documents in any case where your client loses a meaningful chunk of presentence credits for a parole or probation revocation. If you've ever tried to get documents from parole or probation authorities, you know that it can be a daunting task. A couple of basic rules may help you. First, get a signed release from your client allowing you access to his parole or probation records. Second, if your client is in local custody, or back on the streets, the parole records will be held by local parole authorities in charge of his case. Normally, you can track them down through your client's parole officer. However, if, as typically occurs, your client is back in state prison, his parole records will normally have been sent to the institution where he's imprisoned, where you must track them down (normally through the "Records" office) and obtain copies. Expect to be asked to pay fairly exorbitant copying costs, which can then be reimbursed, thus transferring state money from the starving appellate counsel coffers into the overstuffed state prison coffers.

2. **The Motion Itself**.

Don't do a bare bones trial court type motion; knock yourself out, as it were, and do a motion that is pretty much a template of the opening brief you are going to file. You would be surprised how many trial court judges are pleased to have clear, coherent, and well argued motions presented to them.[5] Irrespective of whether you need material outside the appellate records, you should use extensive attachments to the motion which contain all the documentary evidence you need to prove your client's entitlement to credits. (See Attachment A, Credits Motion in Green.)

Be sure to explain to the court in your motion that it has the authority to correct the error, citing *Little*, *supra*, and that you're required under section 1237.1 to bring the motion before raising it on appeal. Make sure your proof of service is to the district attorney's office, and not the attorney general.

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[4] There are two other potential reasons for first bringing a motion in the trial court: to avoid any possible waiver argument (even though credits issues aren't subject to *Scott* insofar as they result in an unauthorized sentence); and because many local courts in the Sixth District provide you with a potentially more favorably-minded judge than court of appeal, or at least with two chances to obtain a favorable ruling.

[5] This seems to be particularly the case with the current law and motion judge in San Jose, who is none other than retired appellate justice Marc Poche.

Calendaring the motion can be more complicated. The best trick of all is to get the trial lawyer to do it for you. He or she will tend to know the Ins and Outs of how to get motions calendared, can appear to argue it without driving dozens or hundreds of miles, and probably has the schmoozing skills needed to survive those in-chambers conferences. If this fails, which it frequently will, you must do it yourself.

In many jurisdictions, calendaring the motion is relatively simple. Telephone the clerk of the trial judge, tell her or him that you have a credits motion you want to put on calendar, and she/he will give you a date some weeks off to calendar the motion. Unfortunately, many trial judges in Santa Clara County have, in recent times, been refusing to calendar motions in this manner, insisting that we simply file the motion and that the court will calendar it for us. I fell into this trap a couple times. The motion, after being filed, is sent to some Motions Research Clerk, who evaluates it to see if it has arguable merit, then contacts the trial judge or law and motion to set a hearing date, who then (if you're lucky) passes that date on to you. This can take weeks or even months, and complicate your own task of promptly appealing your client's conviction. (You can, of course, obtain extensions of time from the court of appeal for delays in this process.) A better method suggested to me by some local counsel is to simply set the case on the law and motion calendar for a Friday around three weeks after you file it. I haven't tried this yet, so no guarantees. Anyway, be prepared for some delays. And, take advantage of anyone you may know in the county where the motion is prepared to help you get the lowdown on the motion procedures you're supposed to follow.

The trial DA, or the deputy assigned to handle the motion, may call you and ask to have the hearing continued for various reasons. Be polite, and give them one continuance, but hardball them after that. If the DA does not concede, and files an opposition, review it carefully. I rarely file reply memos in the trial court, where they are not typically expected, and normally save my reply comments for argument of the motion. I also prepare for argument of the motion in much the same manner as I do in the court of appeal. Careful preparation also makes sense when, as too often happens, you are facing a trial or law and motion judge who has clearly not read over the materials all that well when you come to argue the motion.

3. **New Appeal Notice and Motion to Consolidate**.

If you win, congratulations! Do some follow-up to make sure that the judge's minute order and amended abstract actually gets to the Department of Corrections.

If you lose, in whole or in part, you will need to promptly file a new notice of appeal of an "order after judgment, affecting the substantial rights of any party." (§ 1237, subd. (b).)[6] Up until

[6] N.B. Sometimes trial counsel, before you came into the case, brought a post-sentence motion for credits, or to modify probation, or for some other post-sentence remedy. If these are denied, the original notice of appeal after judgment probably does not cover these orders, and someone must file an "order after judgment" appeal under section 1237, subd. (b).

very recently, the Sixth District has treated this as an entirely separate appeal, with its own case number. If this occurs, you will need to file a motion to consolidate the old and new appeal for purposes of briefing, argument, and decision. (See Attachments C and D, sample Notice of Appeal and Motion to Consolidate.) It appears that since Justice Rushing took over as the new Presiding Justice, the court has altered its policy and is incorporating any secondary appeal notices in the same superior court case into the same appeal, which would obviate the need for a consolidation motion.

III. EX POST FACTO, ANYONE?

Yes, Virginia, there are constitutional credits issues. Both the equal protection clause and the ex post facto prohibitions have come into play in the context of penal laws concerning jail or prison credits. As noted above, presentence jail-time behavior credits have their genesis in California in the state supreme court's decision in *Sage*, *supra*, 26 Cal.3d 498, which held that pretrial detainees later sentenced to state prison are similarly situated to bailed out defendants and pretrial misdemeanants such that it was a violation of equal protection to deny them any behavior credits for their jail time.

Since equal protection challenges that don't involve elections in Florida have not been faring so well of late, I will focus on some new and promising ex post facto credits issues. In pertinent part, the ex post facto clauses of the state and federal constitutions (U.S. Const. Art. I, §10; Cal. Const., Art. I, § 9) forbid the enactment of any law "that *changes the punishment,* and inflicts a greater punishment, than the law annexed to the crime, when committed." (*Calder* v. *Bull* (1798) 3 Dall. 386, 390 [1 L.Ed.648], emphasis in original.) Since the U.S. Supreme Court's landmark opinion in *Weaver* v. *Graham* (1981) 450 U.S. 24, it is now settled that laws passed after a defendant committed his charged crime which alter to his detriment the defendant's entitlement to postconviction prison credits run afoul of the ex post facto prohibition. A law reducing credit entitlements "implicates the *Ex Post Facto* Clause because such credits are 'one determinant of petitioner's prison term . . . and [the defendant's] *effective sentence* is altered once this determinant is changed." (*Lynce* v. *Mathis* (1997) 519 U.S. 433, 445, quoting *Weaver*, *supra*, at p. 32, emphasis added; see also *In re Lomax* (1998) 66 Cal.App.4th 639, 647.)

Retroactive changes in credits laws can affect your client's "effective sentence" in some less-than obvious ways. With the extension and revival of limitation statutes in sex crime cases (and with non-limited crimes such as murder), it sometimes occurs that your client is sentenced in a current case for crimes committed prior to the enactment of particular credit restriction statutes. For example, a client may stand convicted for eight "violent felony" sex crimes committed prior to the effective date of the credit restrictions of section 2933.1. Or, a murder defendant may incur a conviction for a crime committed prior to enactment of section 2933.2. Or, in a somewhat more subtle application of the principle, your client may stand convicted of a crime, such as robbery, which was reclassified as a "violent felony" after Proposition 21, but which was not a violent felony when he committed his current robbery back in January of 2000. Application of these laws against your client retroactively is a clear violation of ex post facto prohibition, because they unquestionably increase his "effective sentence" by requiring him to serve a much longer sentence on good behavior.

A. **Some Tricky 2933.1 Ex Post Facto Issues**.

If, as in the first foregoing example, *all* your client's crimes were committed prior to the effective date of section 2933.1, the ex post facto issue is a no-brainer, and we win. The problem arises (1) where some, but not all crimes are committed prior to the effective date of the new law, and (2) where an accusatory pleading under which your client is charged and convicted specifies a range of dates which *straddles* the effective date of section 2933.1, e.g., where a crime was allegedly committed, "on or between January 1, 1994 and December 31, 1995."

In the former case, the answer seems obvious. If there are two violent felony convictions, one committed after the effective date of section 2933.1, and the other before, the 15 percent behavior credit limitations should apply only as to the post-enactment crime, and not to the pre-enactment offense. For, as *Weaver* makes clear, in ex post facto analysis "the critical question is whether the law changes the legal consequence of acts completed before its effective date." (*Weaver*, *supra*, 450 U.S. at p. 31.) "Through [the ex post facto] prohibition the Framers sought to assure that legislative acts give fair warning of their effects and permit individuals to rely on their meaning until explicitly changed. . . ." (450 U.S. at pp. 28-29.) As to the crime committed before section 2933.1's enactment, a defendant could have had no "fair warning" of the extreme credit limiting consequences and reduction of his "effective sentence" which would follow from his criminal acts.

The mischief arises because of the non-constitutional statutory construction of section 2933.1 as applying "to the offender, not the offense" by the court in *People* v. *Ramos*, *supra*, 50 Cal.App.4th 810. According to *Ramos*, if a defendant is convicted of a *single* qualifying violent felony, his entire sentence, including consecutive terms on non-violent felonies, is subject to the 15 percent credit limitations. (*Id*., at p. 817.) Small minds, such as those inside the heads of many trial and appellate judges, could and have concluded that the logic of *Ramos* means that if the limitations of section 2933.1 applies to one post-enactment violent felony, the defendant is thus a "person" covered by the credit limits of section 2933.1, which would then apply to the entirety of his sentence, violent or nonviolent, predating or postdating the effective date of the law.

However, the constitutional prohibition of ex post facto laws means that the reasoning of *Ramos* cannot be applied to consecutive sentences imposed for crimes, violent or not, committed *prior* to the effective date of section 2933.1. The new law "changes the legal consequences" of these pre-enactment acts by stringently increasing the number of years a defendant must effectively serve as punishment for such crimes. On an eight year sentence, for example, with half-time credits under section 2933, a defendant's "effective sentence" pre-2933.1 was 4 years; if 2933.1 is applied, his effective sentence is 6.8 years. Thus, the net affect of section 2933.1 is to increase the "effective sentence" in this example by more than fifty percent, a clear violation of the ex post facto prohibition as applied to the crime committed before the new law's effective date.

I have attached sample briefing on this issue from the *Villa* case. (Attachment E.) We lost this issue in both the superior court and the court of appeal; but I am fairly certain the issue will be eventually won, if not in the state supreme court, then in federal district court, where the clear authority of *Weaver* and *Lynce* erases any potential AEDPA problems.

One more twist on the same issue. What if, as suggested above, a crime for which your client was convicted after trial or on which he entered a plea was allegedly committed during a time period that *straddles* the effective date of section 2933.1? In that situation, you can still argue that the new law cannot be applied without violating ex post facto unless there is proof in the record of conviction, by at least a preponderance standard, that the criminal conduct actually took place after the effective date of the law. (See, e.g., *People* v. *Lewis* (1991) 229 Cal.App.3d 259 and Cal. Rules of Court, Rule 4.420(b), formerly Rule 420(b) [preponderance standard applies to proof of sentencing facts]; *McMillan* v. *Pennsylvania* (1986) 477 U.S. 79, 91-92 [preponderance standard for determination of sentencing facts satisfies Due Process Clause of 14th Amendment], disapproved on other grounds in *Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 484-487.)

There is one published appellate case on this issue, *People* v. *Palacios* (1997) 56 Cal.App.4th 252, but it applies only to the unique situation of the "continuing crime" of resident child molestation under section 288.5. The question presented in *Palacios* was whether application of the credit reduction provisions of section 2933.1 violated the ex post facto prohibitions as to a 288.5 charge when at least one of the alleged underlying acts was committed before the operative date of September 21, 1994. It did not, according to the court in *Palacios*, because section 288.5

> punishes a continuous course of conduct, not each of its three or more constituent acts . . ., [which] cannot logically be 'completed' until the last requisite act is performed. Where an offense is of a continuing nature, and the conduct continues after the enactment of a statute, that statute may be applied without violating the ex post facto prohibition.

(*Id*., at p. 257, citations omitted.)

By contrast, other sex crimes, such as rape or lewd conduct, involve specific allegations of individual criminal acts, and not courses of conduct, even when their commission is alleged to have occurred within a wide period of time. As such, in order for section 2933.1 to apply without running afoul of the ex post facto prohibitions, there must be proof in the record, by preponderance of evidence, that these crimes occurred on or after September 21, 1994. (See Part I-A of the brief in Villa, Attachment E.)

A second twist and a cautionary note: If your client pled to pre-effective date sex crimes as part of a plea bargain, the Government will probably try to argue that he is estopped from challenging the credit limitations applied to his sentence because they were express terms of the plea bargain. (See, e.g., *In re Troglin* (1975) 51 Cal.App.3d 434 and *People* v. *Beebe* (1989) 216 Cal.App.3d 927.) Check the plea transcript carefully. If all there is on the record are misadvisements about penal consequences (e.g., "You will be required to serve 85 percent of your sentence because the crimes are violent felonies"), argue that this is not a term of the plea bargain, citing *People* v. *Walker* (1991) 54 Cal.3d 1013, 1022-1025 for the distinction, and that thus no estoppel applies. And, even if the credit limits are implicitly a part of the plea bargain, argue that no estoppel applies because the error here violates a clear constitutional principle, citing the negative pregnant of the opinion in *Troglin*, which involved a plea bargain whose terms violated section 654,

where the court held that a defendant, like the prosecution, must be "held strictly to the terms" of a plea bargain "at least where no public policy, or statutory or decisional or constitutional principle otherwise directs. . . ." (*Id*., at p. 438.) Here, a clear constitutional provision "otherwise directs," and a defendant cannot be estopped from challenging the portion of the plea bargain which seeks to impose an unconstitutional ex post facto sentence.

B. **Other Latent Ex Post Facto Issues?**

Assume you are handling a case where your client stands convicted, after trial or plea, with crimes committed in the 1980s. It's important in this situation to check each component of the sentence imposed carefully to make sure that no portion of the sentence, fine, or order is based on a punishment provision enacted subsequent to your client's commission of his criminal act. One obvious example is the parole revocation fine imposed pursuant to section 1202.45 in all cases where a prison sentence is imposed. This fine is routinely imposed in cases where the crimes were committed prior to its effective date, August 3, 1995, in clear violation of the ex post facto prohibition. (See *People* v. *Callejas* (2000) 85 Cal. App. 4th 667.) Check the terms of the sentence and enhancements imposed against the terms in effect at the time the crime was committed, keeping in mind that old rules like the "double the base term" limit and no-more-than five year consecutive sentence limit may have still applied.

C. **Don't Be Afraid to Go to Federal Court!**

Need I say more? You may lose these clearly meritorious issues in state court, based on questionable interpretations of statutory construction rules as trumping ex post facto. Have no fear. These issues should be clear winners in federal habeas cases. Push on and you will win.

IV. **CREDIT WINS IN STRIKES CASES WITH REVERSALS? ALAS, NO MORE!**

This was going to be the rip-roaring finale of this extended essay, full of triumph, exaltation and more of my characteristic self-congratulation. But, in light of the latest word of our state supreme court, it turns out to be just another "nice try" losing argument.

The issue arose in the not-terribly-uncommon situation of a person originally convicted as a second or third striker, who then, after serving significant time in prison on this conviction, has his or her conviction reversed on appeal, or by a state or federal habeas writ, then pleads or is convicted on remand as a second striker. The former sixty-four-thousand dollar question was, under what credits scheme should he get his behavior credits for the period of time between the first, invalid conviction, and the second, valid conviction? Up until recently, there was a strong argument which could, and was, successfully made that a defendant's time spent in both jail and prison between his first, ultimately reversed sentence in a Strikes case, and his second, valid judgment should count as *presentence* time, entitling him to one-for-two credits, and exempting him from the 20 percent credit limits of the Three Strikes law, because the original judgment was void ab initio, and thus could not be used as a basis for reducing credits. (See, e.g., *People* v. *Thornburg* (1998) 65 Cal.App.4th 1173, 1176 and *People* v. *Chew* (1985) 172 Cal.App.3d 45, 51.)

Unfortunately, our state supreme court, in two very poorly reasoned opinions, has slammed the door on this argument. First, in *People* v. *Buckhalter* (2001) 26 Cal.4th 20 the court held that the twenty percent credit limits of the strikes law apply to a defendant whose sentence, but not underlying conviction, is reversed, on the grounds that this is not really a reversal of the entire judgment.

Although the supreme court in *Buckhalter* reserved the question whether this reasoning applied when a defendant's *entire* conviction was reversed, very recently in *In re Martinez* (2003) __ Cal.4th__ [2003 Cal. LEXIS 2073], decided on April 3, 2003, the court held that it makes no difference. Even when the entire judgment is reversed, time served in prison between the first invalid and second valid conviction counts as prison time subject to the credits limit of the strikes law by virtue of the subsequent guilty plea and "second strike" conviction.[7] *Justice* Kennard's dissent in *Martinez* points out the utter absurdity of the majority's holding and rationale. However, *Martinez* means that this once promising credits issue, brimming with equal protection and statutory construction questions of great moment, is now utterly lost.

The worst of it is that this humble writer has lost a big chunk of the reason for writing this extended essay on credits laws, since my own case on the same issue, in which I obtained a favorable result from a divided Third District in *People* v. *Mack* (2002) 99 Cal.App.4th 329 [not citable, rev. gtd. 8-28-02], was a primary basis for me deciding that credits are worth fighting for. So it goes.[8]

The one lingering sub-issue, which was also expressly reserved in *Buckhalter*, concerns the situation where a defendant sentenced as a third striker has his sentence recalled under section 1170, subdivision (d), and is then resentenced as a second striker. Under what credits scheme is the time period between the original sentence and the new sentence after recall? In *People* v. *Johnson* (2003) 105 Cal.App.4th 515 (rev. pet. pending), the Sixth District held that language in section 1170(d) requiring the awarding of credits means that the trial judge must redetermine all credits, from the date of arrest until the date of resentencing, when pronouncing judgment after a recall. With this background, the court held that all time spent in local custody after the recall counts as presentence jail time, for which section 4019 credits must be awarded. However, the time spent in prison prior to being returned to local custody is up to the Department of Corrections to decide. (*Id*., at pp. 528-531.) Presumably, after *Martinez*, the prison time served after the original sentence will be treated as subject to the strikes law limits, in light of the ultimate resentencing of the defendant as a second striker.

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[7]The only positive aspect of the holding in *Martinez* is that it upheld, sub silento, the trial court's conclusion that time spent in *local* custody following reversal counts as presentence custody, entitles the defendant to the one-for-two behavior credits of section 4019. (*Martinez*, *supra*, 2003 Cal. LEXIS 2073 at pp. 4, 16-17.)

[8] Sample briefing on this issue is available, if you want to either paper your office walls with it or conceivably take such an issue up in federal court on equal protection grounds.

V. A WORD ON CREDIT WAIVERS: BAD NEWS, WITH A COUPLE POSSIBLE ISSUES.

As noted above, deprival of credits to which a defendant is entitled under the law normally results in an unauthorized sentence, which can be challenged at any time. However, a defendant can give up his right to presentence or other credits as part of a plea bargain in a multiplicity of situations. (See *People* v. *Johnson* (2002) 28 Cal.4th 1050, and discussion of case law therein.) Prior to *Johnson*, there was room for some creative arguments that credit waivers are proper only in limited situations, such as to allow probation to be granted on condition of serving of additional jail time, when the defendant would otherwise have served the maximum one year period for jail time under section 19.2. For example, the court in *People* v. *Tran* (2000) 78 Cal.App.4th 383, held that when the court imposed, then suspended, a maximum upper term prison sentence, a waiver of all credits as a condition of probation could not be upheld when it was not related to any proper rehabilitative probationary goal and where "[t]he only purpose served by the waiver condition [was] to lengthen appellant's prison sentence beyond the maximum allowed if he were to violate probation." (*Id*., at p. 390.)

Johnson rejected even the narrow limits in *Tran*, holding in effect that a waiver of credits to which a defendant is otherwise entitled under section 2900.5 is proper so long as it serves "any legitimate penological function." (*Johnson*, *supra*, at pp. 1056-1057.) In my view, *Johnson* leaves virtually no room for attacking a defendant's action of waiving his current and future entitlement to credits for a specified time period of custody so long as there was some valid rationale for this action and the waivers appear on the record to have been knowing and intelligent.

Still, there may be some bases for challenging credit waivers in certain situations. Often there will be an absence of advisements about the waivers, such that it can be argued that they were not knowing and intelligent. This requirement means that it must be clear from the record that the waiver was made with "awareness of its consequences." (*People* v. *Harris* (1987) 195 Cal.App.3d 717, 725; *People* v. *Salazar* (1994) 29 Cal.App.4th 1550, 1553.) Although it is the "better practice" to give express advisements concerning the scope and consequences of a credit waiver, there is no requirement of express advisements of the consequences of the waivers, as in a *Boykin-Tahl* type waiver situation. (*Salazar*, *supra*, at pp. 1554-1556.) However, *Harris* stands for the proposition that where a defendant waives credits as part of an agreement to impose probation, and then later has his probation revoked and is sentenced to prison, the credit waiver will not be upheld as to the prison sentence where the defendant was not advised in any manner that the waiver would apply for all future purposes. (*Harris*, *supra*, at pp. 721-725.)

Also, even if the waiver is presumptively valid, you may want to look behind the purported basis for the waiver and see if it is based on fallacious consideration. In a recent case, a defendant agreed to waiver of a lengthy period of presentence credits as part of a plea bargain in exchange for dismissal of two first degree burglary charges, with the understanding that dismissal of these charges would mean that he would not be subject to the 15 percent credit limits of section 2933.1. On appeal, panel attorney David Martin, appointed counsel for the defendant, came up with some clever strategies for attacking the validity of the credit waivers, including one based upon an argument that

the vast period of time excluded from presentence credit at the sentencing hearing exceeded the scope of the original understanding of credit waiver at the time of the plea. An even stronger argument was raised in a habeas petition, based on the fact the alleged consideration for the credit waiver – dismissal of the burglary charge to avoid the postconviction restrictions of section 2933.1 – was illusory because the burglaries in question were committed prior to the enactment of Proposition 21, which for the first time classified residential burglary as a violent felony.[9] Thus, it was argued, the failure of defendant's trial counsel to figure out that the agreement to waive credits was without meaningful consideration amounted to ineffectiveness requiring reversal of the credit waivers or withdrawal of the plea. (See, e.g., *People* v. *McCary* (1985) 166 Cal.App.3d 1 and *People* v. *Hyunh* (1991) 229 Cal.App.3d 1067.)

CONCLUSION

Hopefully, the preceding discussion has provided you with some of the basics of credits law in California, and with some ideas and tools for identifying and successfully raising credits issues on behalf of your clients. If you know of other important credits issues which were omitted from this essay, please get in touch with this writer, as it would be useful to update this summary with any other new or interesting credits issues.

Finally, bear in mind that credits issues, like all of the work that we do, calls for creativity and imagination. There are new credits issues out there for the finding if you can look behind the often confusing rules and case law about credits and get to the heart of what's going on. I have frequently been surprised how often I am led to an arguable and sometimes winning issue because of either a client's complaint about denial or abridgment of credits, or my own sense that there is something wrong or unfair about the credits award.

[9] See how that ex post facto clause can sneak up on you?