CREDITS REDUX: HOW TO GET 'EM, WHERE TO GET 'EM

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Introduction

For those of you having a strong sense of déjà vu, I did prepare an essay and presentation on credits six years ago for a SDAP seminar. Why do it again? After a while even a diligent project attorney runs out of topics. And the credits landscape has changed in subtle but important ways, as will be reflected in some of the additions to the discussion presented herein.

In a field like credits, though, it's not always the impact of published decisions or statutory changes, favorable or unfavorable, that makes for new and interesting credits issues. Credits are won (and lost) *on the ground*, often in trial courts, often due to the ingenuity, chutzpah, or laziness of trial or appellate counsel. Sometimes it starts with a comment from the client or trial counsel – on the phone, in writing, or in an appeal notice – indicating that credits were, in his or her view, improperly denied. Many times, such complaints lead you only to an understanding of how the client or counsel didn't really understand the legitimate reason why credits were denied – e.g., the classic "mixed conduct" parole violation. However, in plenty of situations, a winnable credits issue is there in waiting, provided that you figure out the factual predicates for such a claim, the legal arguments supporting it, and the correct, or most expeditious, means of seeking and obtaining credits.

Bear in mind that credits issues can provide your client with small, medium or large benefits in the form of actual reduction in confinement time. As just one example, I recently raised a successful credits issue involving *two years* of jail custody time, which definitely made a big difference to a client with a sentence in the range of ten years. When you compare this – or even a credit gain of several weeks – to the pyrrhic victory of getting a concurrent sentence stayed under section 654, or a brilliant instructional issue where the court agrees with you on error but finds it harmless, you will see that a credits win is well worth the effort.

What is more, credits claims 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 California Supreme Court or the Ninth Circuit.

The purpose of this rewrite of my earlier credits article is to resummarize and update some basic and cutting edge issues involving presentence and postconviction credits, provide you with some tools and links to sample briefing for raising credits issues, and 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 report is prepared, a failure to

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

count that silly February 29th during leap years, etc. (Sometimes, as discussed below, there are errors *in your client's favor*, which can create a potential adverse consequence.)

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 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.) So, if the probation report indicates 3 days here, and 5 days there, your client will have 8 days, with 4 days of 4019 credits, not the 2 days of 4019 credits he would get if each time block were treated separately.

2. **Exceptions and Limitations on Presentence Credits**

a. **When It Isn't Custody**.

In order for presentence time to count towards a sentence, your client must be "in custody." (§ 2900.5, subd. (a).) Under the statute, a defendant accumulates credits when he or she "has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution . . . ." (*Ibid*.) Normally, when jail time is involved, the question whether your client was "in custody" is a rather straightforward proposition.

But there are some in-between situations where a defendant's liberty is restricted to some extent, but not entirely, and a fair amount of case law, with sometimes confusing results, has come out of these situations. I will only give a few examples here. Home

detention or electronic monitoring is not considered "custodial" for purposes of earning presentence credits. (See *People v. Pottorff* (1996) 47 Cal.App.4th 1709, 1715-1717.) Participation in a live-in residential drug treatment program is considered custodial where a person is required to stay on the premises 24 hours a day, with restrictions on his or her liberty, even where the doors of the facility are not kept locked to prevent residents from leaving. (See, e.g., *People v. Mobley* (1983) 139 Cal.App. 3d 320, 323; *People v. Rodgers* (1978) 79 Cal.App.3d 26, 31-32 [describing Delancey Street as a halfway house]; *In re Wolfenbarger* (1977) 76 Cal.App.3d 201, 205-206; and *People v. Downey* (2000) 82 Cal.App.4th 899, 920-921.) However, residence in an alcohol treatment facility which functions mostly as a temporary home for recovering alcoholics, and which does not significantly restrict the freedom of the residents, is not considered custodial. (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922.)

Typically, drug treatment regimes involve two types of residential arrangements. Normally, during the first time period, the person resides full time in the program and receives direct treatment for a set number of days – 30, 60, or 90. In my experience, trial courts have no problem awarding credits for this time as "custodial" under cases like *Mobley* and *Rodgers* mentioned above. A more complicated question arises when, as often happens with drug treatment regimes spawned by Proposition 36, a defendant's probation requires her to reside in a "sober living" environment, where there are significant limits on the liberty of the resident, but not complete restrictions on the resident's ability to come and go. It is in this latter group where there is an unresolved legal question as to whether residency amounts to "custody." To be honest, we have lost this point in unpublished opinions by the Sixth District on the couple of occasions where it's been raised. However, in both cases, a strong argument was made that the restrictions on the resident's liberty were sufficiently severe that it should qualify as custody.

The key to making an argument that time in such a program is "custodial" is to emphasize the extent to which the restrictions on the defendant's liberty are substantial, i.e., where a resident is not permitted to leave except with permission, where he or she is

required to participate in drug counseling and testing, and where the resident's contact with outsiders is significantly restricted. Sample briefing is available if this issue comes up.

b. **When Behavior Credit is Unavailable or Restricted**.

For many years, there have been exceptions to the rule of *Sage* and section 4019 requiring credit for good behavior. On the obvious level of statutory language, the wording of section 4019 is much narrower than section 2900.5, and allows a defendant to earn credits for time served while "confined in or committed to a county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp." Based on this language, courts have rejected equal protection challenges and consistently held that 4019 behavior credits are not available for persons confined in most residential rehabilitation facilities (*People v. Moore* (1991) 226 Cal.App.3d 783), to mentally disordered sex offenders committed to a state hospital (*In re Huffman* (1986) 42 Cal.3d 552, 563), and to persons subject to restrictive forms of pretrial release. (*People v. Lapaille* (1993) 15 Cal.App.4th 1159.) Likewise, similar credits are not awarded to juvenile offenders because the Legislature expressly excluded juvenile detainees from the language of section 4019, and did so in light of the rehabilitative purpose of the juvenile court law. (See *In re Ricky H.* (1981) 30 Cal. 3d 176.) However, where presentence conduct credit is initially denied because the initial commitment is to the former Youth Authority, defendant is entitled to such credits when he is subsequently found unsuitable for YA treatment and the commitment is changed to state prison. (See *People v. Garcia* (1987) 195 Cal.App.3d 191 [which just happens to be my own first credits case].)

In addition to the restrictions written into section 4019, during the past 15 years, politicians have had a field day enacting laws limiting or precluding behavior 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. I mean, give 'em longer sentences (which they are doing anyway), but let 'em earn full credits. But no, it's just too easy for a politician to pad his

or her "tough on crime" resume by limiting good time for people who commit awful crimes.

i. **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 subdivision (b) of 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 expressly provides 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, credits for his entire sentence, including consecutive terms on potentially unlimited numbers of non-violent felonies, are subject to the 15 percent limitation. (*Id*., at p. 817.)

This holding was extended in a surprisingly bad way in *People v. Baker* (2002) 144 Cal.App.4th 1320, where the defendant was in custody for a specified period of time for a non-violent offense, then later served additional presentence custody on a violent offense committed while charges on the first offense were still pending. Relying on *Ramos*, the court in *Baker* held that the restrictions of section 2933.1 applied to all of the presentence credits when consecutive sentences were imposed, based in large part on the fact that under California's determinate sentencing law, consecutive sentences imposed as to one or more determinate term in a different case "shall be combined as though they were all counts in the current case." (*Id*., at p. 1328.) The court in *Baker* specifically limited the holding in that case to situations involving consecutive sentences. "We do not address the effect of section 2933.1 on a situation in which the sentence for the nonviolent offense is run *concurrently* with the sentence for the violent offense." (*Id*., at

p. 1327, fn. 12.)

Fortunately, the scope of the questionable holding in *Ramos* has been limited to presentence credits on consecutive terms by *In re Reeves* (2005) 35 Cal.4th 765, where the Supreme Court held that for purposes of postconviction credits, the restrictions only apply to time served for violent felonies, and have no application to separately served concurrent terms for non-violent felony crimes. *Reeves*, unlike *Baker*, involved *concurrent* sentences, and provides a strong indication that the holding in *Baker* would not apply where the presentence credits at issue pertained to crimes for which concurrent sentences were imposed.

I recently had a case with an interesting credits issue along these lines. Defendant had earned substantial credits in case number 1, a not-violent offense, for which he was on probation. While on probation, he committed crime No. 2, a violent felony, on which he served an even lengthier period of presentence custody. He got a three year sentence for the "violent" offense, and a two year concurrent term on the not-violent offense. By the time of his sentence, he had nearly two years worth of credit on the violent offense, such that he was going to credit out on that offense fairly quickly. Thus, it was important to his "out date" whether he earned presentence behavior credit on the not-violent offense under section 4019, or under the restricted provisions of section 2933.1.

Reeves, not *Baker*, arguably controls in this situation, because, as the Supreme Court explains in *Reeves*, consecutive and concurrent sentences are very different creatures under California law. "A court that decides to run terms consecutively must create a new, 'aggregate term of imprisonment' (§ 1170.1, subd. (a)) into which all the consecutive terms merge, but no principle of California law merges concurrent terms into a single aggregate term." *Reeves*, *supra*, at p. 773.) Because of this distinction, once a defendant has fully served out the time on his "violent felony" offense, any remaining time which must be served on a "not-violent" offense is not subject to the restrictions of section 2933.1, which "has no application to a prisoner who is not actually serving a sentence for a violent offense; such a prisoner may earn credit at a rate unaffected by the

section." (*Id*., at p. 780.) I never did get to see if my argument would fly, as my client abandoned his appeal for other reasons related to a favorable credits award to which it did not appear that he was entitled. So, this would be an issue to watch for in your own cases.

Finally, as discussed below, it is a still more open question whether the "offender not offense" interpretation of *Ramos* 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.)

ii. **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 conduct 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 recall one Santa Clara County case 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 error was corrected with a *Fares* letter.) This case could be a fluke, but it also may be that the probation officers have just discovered this nasty 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 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 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 always have the *first* word (but hopefully not the *last* word) on 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.

i. **Exceptions to the *Bruner* "Strict Causation" Rule.**

There are two notable exceptions to the "You Lose" rule for mixed conduct cases recognized in case law.

(a) **The *Williams* Exception: Transactionally Related Conduct**.

The earlier exception to the strict causation rule, recognized by the court in *Bruner*, is described in *People v. Williams* (1992) 10 Cal.App.4th 827. In *Williams*, a defendant arrested on new charges of kidnaping 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.[2] 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.

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[2] I hasten to add that unpublished cases cannot be cited as authority in any court. (See Cal. Rules of Court, Rule 8.1115(a).) I describe them here and elsewhere to illustrate possible arguments and explain an arguable trend in appellate decisions.

A couple years back, SDAP panel attorney Tom Singman was successful in obtaining presentence credits from the trial court for a parole revocation period. In that case, defendant Green'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 contended 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 does not, as in *Williams*, flow from an exercise of discretion by 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. Assuming that this was, in fact, a mixed conduct situation, the defendant in *Green* alternatively contended that he had 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. Fortunately, the trial court agreed with the first argument, and the issue was never tested on appeal. Thus while there is no precedent to cite, there is excellent sample briefing available on request.

I should point out that I lost a similar issue in the Court of Appeal in an unpublished decision in the Mark Cuellar case. In that case, parole was revoked for a new drug offense, and also for "Failure to Follow Instructions," which consisted of missing a scheduled appointment with the parole officer on the same day that defendant

was found at his house strung out and drunk. I argued that the two matters were transactionally related as in *Williams*, and the conduct of the new offense was the "but for" cause of the other violation. But the Court of Appeal disagreed in not very well thought out unpublished opinion. Sample briefing is available in this case too.

(b) **The *Marquez* Exception: Dismissed Unrelated Charges**

The second exception to the *Bruner* strict causation rule is the one described in the California Supreme Court decision *In re Marquez* (2003) 30 Cal.4th 14, and elaborated upon by the Sixth District in *People v. Gonzalez* (2006) 138 Cal.App.4th 246. *Marquez* carves out a discrete exception to the "strict causation" rule of *Bruner* and *Joyner* in a situation where a defendant is held in custody on both newer and older charges and separate sentences are imposed. In this situation, under typical *Bruner* analysis, he would not have earned credits for the time on the older charges for the challenged period of time had the convictions and sentences in both cases been upheld. However, the conviction on the earlier case was reversed on appeal, and the charges were eventually dismissed. In this unique situation, the California Supreme Court held, credits can be awarded without a demonstration of "but for" causation to avoid a period of custody becoming "dead time" for which a defendant receives no credit. (*Marquez*, *supra*, 30 Cal.4th at pp. 23-24.) The upshot of *Marquez* is, in effect, a return to the good-old *Atiles* rule when charges relating to a second, unrelated basis for custody are dismissed. In these delimited circumstances, your client is entitled to credit if you can show, a la *Atiles*, that the custody time was related in some sense to the conduct giving rise to the current conviction.

This is what happened in *Gonzalez*, where the defendant was on probation for a domestic violence case when he committed new offenses of auto theft and possession of a firearm by a felon. While pending trial, he picked up a third case for a jail assault. After being convicted by jury trial on the weapon possession and vehicle theft cases, defendant pled guilty to the inmate assault case and admitted probation violation in the domestic violence case. He was then jointly sentenced on the three cases, remaining in

custody during the entire period after his arrest on the gun and vehicle theft case. (*Gonzalez*, *supra*, 138 Cal.App.4th at pp. 248-250.) The disputed issue in *Gonzalez* concerned the 319 day period of custody served by the defendant between his arrest on the auto theft and gun case up until the day prior to the inmate assault, which the trial court allocated to the domestic violence case, for which defendant already had 361 days served solely on the domestic violence case. (*Id*., at p. 250-251.) Because the total credits awarded in the domestic violence case, 680 days, exceeded the one year consecutive sentence imposed in that case, the defendant in *Gonzalez* sought to reallocate the additional credits to the auto theft and gun case. The Sixth District upheld this claim for credits, finding that the "strict causation" rule of *Bruner* had no application because the time at issue was not one for which dual credits were sought, and thus did not involve a "windfall," but rather concerned custody which would otherwise become "dead time." i.e., "'time spent in custody for which he receives no benefit.'" (*Id*., at p. 253-254, quoting and citing *In re Marquez*, *supra*, 30 Cal.4th at p. 20.)

My own efforts to apply the holdings of *Marquez* and *Gonzalez* have had mixed results. The Stoll case was the bad news. In that case, Stoll was on probation for two separate cases when he committed a violation. The trial court, as a condition of reinstating probation, gave Stoll credit for time served of 60 days for the more serious attempted robbery case, but required him to serve a lengthy jail sentence on the less serious vehicle theft case. When he violated probation one more time, and a prison sentence was imposed, the court "cleverly" structured the sentence to cause Stoll to lose much of the time he'd served on the vehicle theft case, imposing a three year sentence on the attempted robbery, and an eight month consecutive term on the vehicle theft. Stoll had considerably more credits on the vehicle theft than the eight months he was required to serve, and the argument raised, both in the trial court and on appeal, was that under *Marquez* and *Gonzalez*, these leftover credits should be allocated to the attempted robbery case rather than becoming "dead time," because probation was jointly revoked on the two cases, and time served was really attributable to both cases. An unpublished

Sixth District opinion rejected this claim, holding that the credits belonged in separate boxes and couldn't be moved around after the time had been served exclusively on the vehicle theft case.

On the bright side, in the Perkins case, I was able to obtain a substantial credits award from the trial court based on time Perkins served in Alameda County jail pending robbery charges which were ultimately dismissed by the prosecutor for lack of evidence. I was able to demonstrate that during this entire time, there was a hold from the Santa Clara County case on which Perkins was later sentenced; and while his custody during this time was attributable to *both* the Santa Clara County case and the Alameda robbery, under the *Marquez* exception to the "strict causation" test, Perkins was entitled to the credits for the long period of time in Alameda County which would otherwise have become "dead time" by virtue of the dismissal of the Alameda charges. (Sample briefing is available on both of these cases.)

ii. **The Bruner Strict Causation Rule Applied: Strategies for Winning Credits.**

If your client's probation report recommended that credits be denied for "mixed conduct," and the trial court followed suit, don't assume that this is correct! Often it is not. And other times, there is still something to challenge. Here's what you should try to do:

(a) **First, Get the Parole Records.**

If your client is in local custody, the local parole authorities will have these records. If he has been returned to state prison, then the prison where he's housed will have the records. All you should need to obtain the records is a signed release from your client. Try to get all the records concerning the specific parole violation. The most important document to get is the "BPT 1104," known as the "Summary of Revocation Decision." This is the document that lists the parole violation charges, describes which charges were found true, and which states the basis for any order of reconfinement in prison for the parole violations.

(b) **Is There Really a Mixed Conduct Basis for the Revocation?**

Once you get the parole records, review them very carefully. First, make sure that there really was a mixed conduct basis for parole or probation revocation, and that is doesn't fit within the rubric of *Williams* (i.e., related conduct that was either never charged, dismissed, or couldn't have been charged because it wasn't criminal).

(c) **Was Prison Time Really Imposed Because of the Mixed Conduct?**

Second, if there really are mixed conduct allegations which your client admitted or which were found true at a hearing, double check to make sure that the decision to impose a prison revocation sentence was based on the mixed conduct allegations. I happily recall the Walton case, where we won a parole revocation credits issue in which where there were two grounds for revocation, the new crimes and absconding from parole. On the second page of the form, the parole hearing officer checked only one box under the heading "NEED FOR RECONFINEMENT BASED ON THE FOLLOWING FACTORS," the box labeled "Involved in Felonious Behavior that Mandates Substantial RTC [return to custody]"; and didn't check a different box entitled "Inability/Unwillingness to Conform to the Expectations and Requirements of Parole." Because of this, I was able to persuade the trial judge with my motion that we had shown "strict causation" under *Bruner*, i.e., that but for the conduct of the new offense, defendant would not have lost his liberty. Sample briefing is available on this issue.

(d) **Can You Demonstrate That Part of the Parole Revocation Sentence Imposed Was Strictly Caused by the New Criminal Conduct?**

Third, consider an alternative argument raised in by me in the Cuellar case based on parole regulations, a contention that only *part* of the custody time for the parole violation is attributable to mixed conduct. The applicable Parole Board regulations set out guidelines for periods of imprisonment for violations of parole which represent "the suggested period of confinement when a return to custody is imposed as a disposition for a violation of parole." (15 CCR § 2646.1.) Frequently in mixed conduct cases, the total term imposed is greater than the maximum suggested amount under the guidelines for the

"mixed conduct" part of the offense.

In Cuellar, for example, "Failure to follow . . . instructions" is listed under subdivision (a) of section 2646.1 among the "Technical Violations of Parole," for which the guideline range is "0 to 4 months." (15 CCR § 2646.1, subd. (a)(7).) By contrast, the crimes on which defendant was convicted, which were also bases for revocation, possession of a controlled substance and possession of ammunition, are more serious violations which have a punishment range of "5 to 9 months." (15 CCR § 2646.1, subds. (c)(14) & (g)(1).) Thus we argued that at most only half of Mr. Cuellar's eight month parole revocation sentence was attributable to the non-current offense conduct, and that he was entitled to credits for the other four months, which were proven to be attributable to the new offense. The argument was rejected based on a questionable reliance on the fact that the regulation guidelines were merely suggestive. In my view, this is a winner which should continue to be raised, at least until there is published authority rejecting it. Sample briefing is available on this issue.

(e) ***Rojas*, "Term Serving Time," and a Couple of Arguable Exceptions**

A longstanding rule precludes awarding double credits where the client is already serving time on an earlier case. (See *In re Rojas* (1979) 23 Cal.3d 152, 155-156.) This rule precludes credits in situations like *Rojas*, where a sentenced prisoner commits a new crime in prison. It has also been used to preclude credits where a defendant commits a new crime, but his period of custody after arrest includes a jail sentence on an unrelated misdemeanor offense for which he had already been convicted. (See, e.g., *People v. Adrian* (1987) 191 Cal.App.3d 868, 880.) The rationale for this limitation is explained by the Supreme Court in *Rojas*: "[T]he deprivation of liberty for which he seeks credit cannot be attributed to the second offense. Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty." (*Rojas*, *supra* at p. 156.)

I have identified two arguable exceptions to the *Rojas* door-slamming rule to "term-serving time" as awardable credits.

i. Jail Time in New Case Resulting in Prison Sentence Where There Was a Hold from the Current Case.

I was able to obtain an unpublished win in the Ayala case, where the trial lawyer came up with a very creative credits argument around this rule. Ayala was arrested in Santa Clara County, jumped bail, committed a new crime in Merced County, and was unable to bail out in Merced because of the hold placed on him by Santa Clara County. After several months in the Merced County Jail, he was sentenced first in Merced, served out his time in prison, and then pled and was sentenced in Santa Clara County. The presentence credit period at issue was the time served in Merced County jail – for which Ayala received credits on his prison sentence in the Merced case – with the argument that credit for this time period should be allocated to the Santa Clara County case based on the fact that defendant would have been free on bail during this time but for the hold placed on him by Santa Clara County, which amounts to "but for" causation under *Bruner*. The unpublished Sixth District opinion agreed with the claim, rejecting the attorney general's claim that this was "term-serving time" on the Merced case to which Ayala was not entitled.

ii. Prison Time Served After Scheduled Release Date Which Is Attributable to In-Prison Offense Leading to Current New Charges.

In-prison offenses rarely give rise to credits issues, since typically the inmate who commits an in-prison offense is serving out another sentence during any period of presentence custody on the new charge, and credits are strictly precluded under *Rojas*.

However, there are some situations where credits issues arise, most commonly where the inmate's prison term ends prior to conviction and sentence for the in-prison offense. Monterey County, which handles prosecutions for the only prisons in the Sixth District, will typically award credits for time in custody after a defendant is released on parole. But there are some odd permutations where additional credits can be argued for under the rubric of *Bruner*. My own Hopkins case, which is currently pending in the Sixth District, involves a meritorious claim for credits under *Bruner* which, in my view,

trumps the *Rojas* rule excluding any credits for time served on a prison sentence.

Hopkins was serving time on a prison sentence, with a parole release date of May 12, 2008 when, in January of 2008, he was caught with a syringe and some heroin. CDCR initiated a CDCR 115 disciplinary proceeding, and also referred the case to Monterey County for prosecution. Because of the pending referral, the 115 hearing never took place. Meanwhile, Hopkins' parole release date came and went, with his prison records indicating that he was being held past this date based on the pending 115. About two months after the scheduled release date, the Monterey County district attorney's office filed a felony complaint for possession of drugs in prison, and about two weeks after this Hopkins was paroled to Monterey County jail. After he pled to the new charges, the sentencing court awarded credits beginning only with the date he was paroled to county jail.

After obtaining CDCR records in the case, I brought a motion for additional credits going back to the parole release date, arguing that we had demonstrated "but for" causation under *Bruner*, in that Hopkins clearly would have been free from custody on that date but for the unadjudicated 115 proceedings which were attributable to the same conduct underlying the criminal conduct. The prosecutor's reliance on *Rojas* was misplaced, I argued, because here, unlike *Rojas* we were able to show that the deprivation of credits was attributable to the conduct underlying the new case. We lost in the trial court, but I am hopeful we will prevail in the Court of Appeal.[3]

The message here is to look behind the label, even where the probation report indicates that credits are being excluded because defendant was serving a separate sentence. Carefully examine the basis for the credit limitation, and see if there is a way to argue for credit entitlement under *Bruner* or other applicable doctrines.

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[3]A backup equal protection argument was also raised in Hopkins, comparing the defendant to (a) similarly situated inmates who were already released on parole when the new offense was committed in the prison parking lot and (b) inmates who committed the crime in prison but where the district attorney promptly decided to prosecute, leading to the inmate being paroled to the county jail on the date of his scheduled release.

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.[4] However, the application of the laws and restrictions about postconviction credits often overlaps 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

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[4] 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.

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 a 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 minimum date for parole eligibility.

Back in the good old 1990s, 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 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, was 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, *In re Martinez* (2003) 30 Cal. 4th 29 burst that bubble by holding that 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. Justice Kennard's dissent in

Martinez points out the 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.[5]

There are two small pieces of good news from *Martinez*. First, it upheld, sub silento, the trial court's conclusion that time spent in *local* custody following reversal counts as presentence custody, entitling the second strike defendant to the one-for-two behavior credits of section 4019. (*Martinez*, *supra*, at p. 34, fn. 4.) Subsequent case law expressly holds that this "Phase III" period of custody is, in fact, presentence time for which the second strike defendant must receive section 4019 credits. *People v. Donan* (2004) 117 Cal.App. 4th 784.)

The other good news from *Martinez* comes when a defendant, otherwise in the same situation as petitioner Martinez, is sentenced after reversal to a *non-Three Strike* sentence under section 1170 et. seq. In that case, the rationale of *Martinez* will benefit the client, as all the "Phase II" time served in prison between the original sentencing and the remand to the trial court following reversal counts as in-prison custody time for which the one-for-one credits of section 2933 are applicable. Well, at least that's what the majority in *Martinez* said was the case. (See *Martinez*, *supra*, at pp. 34-35.) I have found no case following this dicta, but you can cite it as authority under the accepted canon that " dicta of the California Supreme Court ordinarily carries persuasive weight and should be followed, especially where it demonstrates a thorough analysis of the issue or reflects compelling logic. . . ." (*People* v. *Rodriguez* (1999) 73 Cal.App.4th 1324, 1330.)

II. PROCEDURAL NICETIES

A. When an Issue Must be Raised First in Trial Court.

Generally speaking, we appellate lawyers hate to go to trial court to argue a

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[5] The same limiting rule was applied by the Supreme Court in a case involving a sentencing recall under section 1170, subdivision (d). (*People v. Johnson* (2004) 32 Cal. 4th 260.)

motion. Only part of this is our regal sense of condescension. Mostly it's a major hassle to (1) figure out how to calendar a motion, especially in an unfamiliar county, (2) deal with the DA office's inevitable continuance request(s), (3) travel to remote places to argue the motion and (4) decide 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 clogs.

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 don't fret! Many issues can be resolved informally by a *Fares* letter[6] to the trial judge; and if a motion has to be filed, there are ways to avoid the difficulties. So, cheer up: it might turn out to be a more favorable experience than you expected, and you will get a chance to match some faces with the names of the Good, Bad, and Ugly among the trial counsel, prosecutors, and judges in the superior court.

Also, bear in mind that in many situations, a credits motion, as opposed to an appeal, is your client's only real chance of obtaining a just correction of his or her sentence. When, as often is the case, your client's prison sentence is relatively short, a credits win in the trial court is the only realistic chance of getting your client his or her sentence reduced before release from prison, since appeals invariably take much longer than a credits motion, even with the seemingly inevitable continuances.

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

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

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 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. 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 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. (Sample *Fares* letters can be found on the SDAP website, and are available from me on request.)

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.

A second situation where you will want to raise a credits motion rather than present an issue on appeal involves a situation where trial counsel may have raised an argument about credits, but failed to properly cite either the factual basis for the claim or the correct legal authority giving rise to it. For example, in the Perkins case discussed above, involving application of the *Marquez* exception to strict causation, counsel argued that credit deprival was unfair, but never cited *Marquez*, or pointed out the fact that there had been a hold placed by Santa Clara County when the defendant was arrested in Alameda County. In that situation, I felt it imperative to have a record from the trial court which clearly laid out the factual and legal predicates to the argument.

In either of these situations, another factor noted above may be decisive. Even if you could raise the issue on direct appeal, a motion may be the only practical way for your client to get his or her credits before she is released from prison.

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 prison, parole or probation documents, an in any case where your

client loses a meaningful chunk of presentence credits because he was a sentenced prisoner, or had a parole or probation revocation. If you've ever tried to get documents from prison, 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 prison, 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, or the "Litigation Coordinator") and obtain copies. You may 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.[7] 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.

Many trial judges believe that a pending appeal deprives them of jurisdiction to decide anything about your case. You should thus take pains 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

[7] You might, as I recently did in Salinas, receive a nice compliment about the quality of your work, followed by a denial of the motion.

general.

Calendaring the motion can be difficult. The best trick 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 may be able to 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. Anyway, be prepared for some delays. Take advantage of the fact that you know any trial counsel in the county where the motion is to be filed, and ask him or her to help you get the lowdown on the motion procedures you're supposed to follow. This has proven to be extremely useful for me in cases from Monterey and Santa Cruz Counties.

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, and that a copy of these documents is included in an augmentation of the record on appeal, either by the actions of the clerk's office, or by your own motion to augment.

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).)[8] The Sixth District normally treats 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. (A sample motion to consolidate is available on request.) Sometimes the Sixth District will incorporate any secondary appeal notice 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

[8] 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).

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. And, as mentioned above, I have included an equal protection argument in my briefing on the *Rojas* credits denial in the Hopkins case.

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 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 pursued two cases involving this issue into federal court. Both are now pending in the Ninth Circuit. The federal courts who have addressed these cases both agreed with my underlying contention that the Ex Post Facto Clause precludes credit limitations for crimes committed before the effective date of section 2933.1. But in both cases, bizarre "waiver" claims were upheld to preclude granting of habeas relief based on plea bargaining principles. I have quite a lot of sample briefing in these two cases, Villa and Martinez, which I would be happy to share with you.

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. (Sample briefing on this point is also available.)

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. Maybe.

IV. **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 defendant understood he was relinquishing or giving up custody credits to which he was otherwise entitled." (*People v. Arnold* (2004) 33 Cal.4th 294, 308; see also *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.)

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. A few years ago, panel attorney David Martin came up with a clever strategy for attacking a credits waiver where the 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. Martin argued 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 some residential burglaries as a violent felonies.[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.)

Trial courts will sometimes try to obtain the *effect* of a credits waiver without actually taking a waiver, doing this by what seems to them to be very cleverly structured allocation of credits to related or unrelated cases. The best example of this, and of the way to challenge it, comes from *People v. Downey* (2000) 82 Cal.App.4th 899, which involved the well-known actor, Robert Downey, Jr. Following a plea to one felony charge of possession of cocaine, and several misdemeanor drug, weapon, and driving offenses, Downey was placed on probation and required to participate in a number of inpatient and outpatient drug treatment programs. After several failures, the trial court ultimately revoked probation and imposed a prison sentence. (*Id*. at pp. 903-905.) The court imposed an upper term sentence of three years on the felony drug charge, and then purported to run the misdemeanor sentences consecutive based on a stated belief that it was required to do so by *People v. Fugate* (1990) 219 Cal.App.3d 1408. The court sentenced Downey separately on the misdemeanor offenses, imposing 180 days for the driving under the influence misdemeanor, 180 days on the firearm possession charge, and 90 days on the under-the-influence charge. (*Downey*, *supra*, at pp. 907-908.)

The Court of Appeal first held that the trial court erroneously concluded that it was required to run the misdemeanor sentences consecutive to the felony offense, rejecting the notion that this was required by *Fugate*, and remanding the matter based on

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

the court's failure to exercise discretion. (*Id*, at pp. 911-912.) The court then turned to the question whether the misdemeanor counts were deemed to run consecutive or concurrent with respect to each other, concluding that because the trial court failed to state how the misdemeanor counts were to run with respect to each other, section 669 compelled a finding that they must be deemed to run concurrently. (*Id*., at pp. 912-915.) In analyzing this question, the court rejected the attorney general's contention that the court intended a consecutive sentence because it allocated separate periods of custody as to each misdemeanor count.

> Respondent argues that the trial court did sentence appellant to consecutive terms on the misdemeanors because appellant had in fact already served "those terms" consecutively, having served separate periods of prior custody which were credited against the respective jail sentences. We reject this argument. Imposition of time in custody as a condition of probation is an act wholly independent of a later sentencing choice. As respondent observes, the concurrent grants of probation on counts 1, 3, and 4 did not amount to a judgment. (*People v. Howard* (1997) 16 Cal. 4th 1081, 1092.) Even if more than one period of custody was imposed as a condition of probation, and even if such periods were imposed and consequently served at successive times, this cannot possibly signify a determination by the trial court that terms on those counts should be served consecutively in the event sentence should later be imposed. . . . Moreover, there is no indication that, when the trial court imposed judgment in August 1999, it intended that the misdemeanor counts be deemed to have been served consecutively because of the prior history of custody.

(*Id*., at pp. 913-914.)

When a near-identical credit-robbing scheme was foisted on one of my clients in the May case, I was thrilled to find this opinion in *Downey* to complement the "it's not fair" argument raised by trial counsel. In Ms. May's case, the court had allocated a large chunk of the defendant's sentence, after a probation violation in which probation was reinstated, to misdemeanor counts, but did not actually pronounce judgment on these counts. When probation was again violated and Ms. May was sentenced to state prison,

the court subtracted the time allocated to these counts from her credits. My motion, based largely on the holding in *Downey*, was granted by the trial court, and Ms. May ended up getting out of prison about two months before her scheduled release date, allowing her to spend Christmas with her family. Now ain't that nice?

V. BANK ERROR IN YOUR FAVOR! TIME TO CONSIDER ABANDONING THE APPEAL.

There is another variety of credits error which requires a very different application of your legal and "counselor" skills. Sometimes your client is awarded credits by the trial court to which he is not entitled under a proper understanding of the law. For example, courts will occasionally miss the fact that one of the current charges is a violent felony, and award conduct credits under section 4019. Or, as happened in one of my cases, a court might impose consecutive sentences, and then include the same period of custody as part of the credits for each of the sentences imposed, in violation of the clear rule that "Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (§ 2900.5, subd. (b).) Other times, you may catch a mathematical error which favors your client, such as double counting of a particular period of custody (which happens on occasion when there are prior probation revocation proceedings), or a failure to fully deduct time served on a misdemeanor sentence.

When this occurs, it's time to put on your "Adverse Consequence" hat. First, make sure there really is a favorable error, or at least an arguably unauthorized credit error; then talk to your buddy from SDAP or other appellate project, and try to get a good sense of (a) the likelihood that the AG and/or Court of Appeal will spot this error, balanced by (b) the likelihood that CDCR Legal unit, which reviews every sentence, will catch the error anyway even if you do abandon the appeal.

Whatever conclusion you reach, you *must* contact the client and explain the potential adverse consequence. One should be very careful not to make such communications to the client in any manner which could be intercepted by prison authorities, properly or otherwise. Obviously, this includes any collect call from the

client, which has no privilege. In certain situations – for example, my own case where a defendant had about a year and a half of double credits to which he wasn't entitled – this may mean you need to personally visit with the client to insure that any communication is as confidential as possible.

Bear in mind that the decision whether to proceed with the appeal, in spite of the potential adverse consequence of loss of credits, belongs to the client, not to you. Your advice about which way to go will depend on many factors, including the amount of custody time at issue, compared to the length of the sentence, the strength or weakness of other issues, and the likelihood of the favorable error being spotted by the AG, court, or CDCR.

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. For those of you who previously read my credits article six years ago, I hope this review has been refreshing, and that the additions will be helpful. This is a work in progress, and I would be very happy to hear from any readers concerning other important credits issues which were omitted from this essay, or additional case law or ideas for successful credit challenges concerning subjects raised herein.

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.

Now go out there and get those credits!