

[Letterhead]

[DATE]

Clerk, [COUNTY] County Superior Court
Appellate Department
ADDRESS

Re: *People v. JOHN DOE*
Superior Court Nos. 62-41018 & 62-48054
Court of Appeal No. [#####]

To the Clerk:

I am appointed appellate counsel for [JOHN DOE] in this case. I write the court pursuant to *People v. Fares* (1993) 16 Cal.App.4th 954 and *People v. Clavel* (2002) 103 Cal.App.4th 516, in that I believe the abstract of judgment contains errors which could be corrected with greater judicial economy at the superior court level rather than by appeal.

Accordingly, I am writing to file the enclosed ex parte motion for correction of presentence custody credits. Please forward the motion and proposed order to the Hon. [JUDGE] and ask the court to return a conformed copy of the motion and the court's order to me in the enclosed pre-stamped/addressed envelope.

Your prompt attention to this matter is greatly appreciated. Please do not hesitate to contact me if either you or the court have any questions or concerns.

Very truly yours,

[ATTORNEY]

cc: COURT OF APPEAL, clerk
CCAP

1 ATTORNEY NAME
2 ATTORNEY ADDRESS
3 ATTORNEY SBN

4 Attorney for Defendant
5 JOHN DOE
6

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF [COUNTY]

9 PEOPLE OF THE STATE OF)
10 CALIFORNIA,)
11 Plaintiff,)
12 v.)
13 JOHN DOE,)
14 Defendant.)
15)

Case No. 62-41018 and 62-48054

**EX PARTE MOTION FOR
CORRECTION OF PRESENTENCE
CUSTODY CREDITS**

(Pen. Code, §1237.1.)

Court of Appeal Case No. [#####]

16
17 Defendant JOHN DOE, by and through his appointed counsel on appeal, hereby moves this
18 court for an order (1) correcting the presentence custody credits awarded to defendant at the time of
19 sentencing, (2) directing the immediate preparation and filing of an amended abstract of judgment
20 reflecting that correction and service of the amended abstract of judgment on the Department of
21 Corrections, and (3) directing the court’s clerk to prepare and file an augmented clerk’s transcript in
22 Court of Appeal case number [#####] pursuant to rule 8.340(a), of the California Rules of Court.
23 Defendant seeks this relief on the ground that the court failed to award defendant the full
24 presentence custody credit to which he is entitled. The relief sought herein is based on this motion
25 and the attached exhibit, the court’s files and records in this matter, the declaration of
26 [ATTORNEY] below, and on any other such evidence as may be adduced at any
27 hearing on this motion.

28 **DECLARATION OF [ATTORNEY]**

I, [ATTORNEY], DECLARE AS FOLLOWS:

1 1. I am an attorney at law, licensed to practice before all courts of the State of
2 California. I represent defendant JOHN DOE, on his appeal from the judgment of this court under
3 appointment by the Court of Appeal for the Third Appellate District. The case number in that appeal
4 is C049646.

5 2. On March 25, 2005, Mr. DOE entered a no contest pleas in case number 62-
6 041018 to counts one (Pen. Code, § 245, subd. (a)(1)), two (Pen. Code, § 422) and three (Pen.
7 Code, § 186.22, subdivision (a)), admitted the allegations pursuant to Penal Code section 186.22,
8 subdivision (b)(1) and Penal Code section 667, subdivisions (b) through (i) and 1170.12,
9 subdivisions (a) through (d). Mr. DOE stipulated that his conviction on count one was a strike
10 offense. Mr. DOE also entered no contest pleas in case number 62-048054 counts one (Veh.
11 Code, § 2800.2, subd. (a)), three (Veh. Code, § 10851, subd. (a)) and four (Pen. Code, § 148,
12 subd. (a)) and admitted that he had suffered one prior conviction within the meaning of meaning
13 of Penal Code sections 667, 1170.12 and 1192.7, subdivision (c). (CT 229-233.)

14 3. On April 25, 2005, the court denied probation and ordered Mr. DOE to serve an
15 aggregate term of 10 years and four months in state prison. The court selected count one in case
16 number 62-041018 as the principal term, ordered Mr. DOE to serve the mitigated term of two
17 years in state prison and doubled that term pursuant to Penal Code sections 667, subdivision
18 (e)(1) and 1170.12, subdivision (c)(1). The court imposed a consecutive five-year enhancement
19 pursuant to Penal Code section 186.22, subdivision (b)(1). The court stayed sentence on counts
20 two and three in case ending 018 pursuant to Penal Code section 654. (CT 271-281.)

21 4. In case number 62-048054 the court imposed a consecutive term of eight months,
22 one third the middle term, on count one and again ordered that term doubled pursuant to Penal
23 Code sections 667, subdivision (e)(1) and 1170.12, subdivision (c)(1). The court stayed sentence
24 on count two pursuant to Penal Code section 654. The court ordered Mr. DOE to serve a
25 concurrent term of 90 days in county jail on count four. (CT 271-281.)

26 5. The trial court made two errors during sentencing regarding the presentence
27 custody credits to which Mr. DOE was entitled. First, the trial court awarded custody credits
28 separately as to the two different cases. The court gave Mr. DOE credit for 140 days of credit for
actual custody together with 21 days of “good time” credit on case number 62-48054. The court

1 also gave Mr. DOE credit for 102 days of credit for actual custody together with 15 days of
2 “good time” credit on case number 62-41018. (CT 280.)

3 6. Mr. DOE was sentenced to an aggregate term of 10 years and 8 months,
4 comprised of a principal term and consecutive terms on two separate cases. That aggregate term
5 constitutes a single sentence, not an order requiring the service of the individual components. (*In*
6 *re Reeves* (2005) 35 Cal.4th 765, 772-773.) Because the court imposed a single consecutive
7 sentence, the court should have made a single award of credit for actual custody reflecting the
8 actual number of days Mr. DOE served on both cases rather than credit on both cases. Mr. DOE
9 was entitled to credit for actual custody as follows:

10	January 15, 2004 to April 24, 2004	101 days	(62-41018)
11	August 31, 2004 to August 31, 2004	1 day	(62-41018)
12	December 3, 2004 to April 21, 2005	<u>140</u> days	(62-41018 and 62-48054)
		242	actual

13 7. From this it should be evident that Mr. DOE was entitled to credit for the 242
14 days of actual custody he served on case number 62-41018. Mr. DOE was not entitled to “double
15 credit” for the period of custody he served on both cases between December 3, 2004 and April
16 21, 2005 (Pen. Code, § 2900.5, subd. (b)), but he still was entitled to credit for all of the 140 days
17 he actually served.

18 8. The court’s second error was in awarding conduct credits pursuant to Penal Code
19 section 2933.1, which limits the total amount of conduct credit to 15%. Section 2933.1
20 specifically applies only to persons who suffer a current conviction for a violent felony as
21 defined by Penal Code section 667.5, subdivision (c).

22 9. Because Mr. DOE did not suffer a current conviction for any of the offenses listed
23 in that Penal Code section 667.5, subdivision (c), his conduct credit should have been calculated
24 pursuant to Penal Code section 4019. The appropriate formula for that calculation is to
25 take the number of actual custody days (101 + 1 + 140 = 242), divide by 4 and discard any
26 remainder, leaving 60 which is then multiplied by two resulting in a total of 120 days of conduct
27 credit pursuant to Penal Code section 4019. (*In re Marquez* (2003) 30 Cal.4th 14, 26.)

28 10. For this reason, Mr. DOE is requesting that this court issue an order correcting the
award of presentence custody credits in this matter *nunc pro tunc* awarding Mr. DOE credit for 242

1 days of actual custody together with 120 days pursuant to Penal Code section 4019 for a total award
2 of 362 days of presentence custody credit.

3 11. Mr. DOE further is requesting (1) that the court order the immediate preparation and
4 filing of an amended abstract of judgment reflecting the corrected custody credits, (2) that the court
5 order the immediate transmission of the amended abstract to the Department of Corrections, and (3)
6 that the court order its clerk to file, pursuant to rule 8.340(a) of the California Rules of Court, an
7 augmented clerk's transcript in Court of Appeal case number [#####] containing a copy of this
8 request and copies of the corrected minute orders and the amended abstract of judgment.

9 12. I declare under penalty of perjury under the laws of the state of California that the
10 foregoing is true and correct and that I signed this declaration on August 12, 2005.

11 Respectfully submitted,

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14 _____
15 [ATTORNEY NAME]
16 Attorney for Defendant
17 JOHN DOE
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PROOF OF SERVICE

I am over the age of eighteen (18) years and not a party to the within-entitled action; my business address is [ADDRESS].

On _____, I personally served the within

EX PARTE MOTION FOR CORRECTION OF PRESENTENCE CUSTODY CREDITS

on the interested parties herein in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail addressed as follows:

Office of the Attorney General Central California Appellate Program
State of California 2407 J Street, Suite 301
P.O. Box 944255 Sacramento, CA 95816
Sacramento, CA 94244-2550

Clerk of the Superior Court Office of the District Attorney
County of [COUNTY] County of [COUNTY]
ADDRESS ADDRESS

For delivery to: [COURT OF APPEAL], Clerk
Hon. [JUDGE] ADDRESS

[DEFENDANT/APPELLANT] [TRIAL ATTORNEY]
ADDRESS ADDRESS

I certify (or declare), under penalty of perjury under the laws of the State of California, that the above is true and correct and that I executed this declaration on _____.

ATTORNEY

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 COUNTY OF [COUNTY]

3
4 PEOPLE OF THE STATE OF)
5 CALIFORNIA,)
6 Plaintiff,)
7 v.)
8 JOHN DOE,)
9 Defendant.)
10
11

Case Nos. 62-41018 and 62-48054

**[PROPOSED] ORDER GRANTING
EX PARTE MOTION FOR
CORRECTION OF PRESENTENCE
CUSTODY CREDITS**

(Pen. Code, §1237.1.)

Court of Appeal Case No. [#####]

12 **GOOD CAUSE APPEARING, IT IS HEREBY ORDERED AS FOLLOWS:**

13 1. The judgment and sentence previously imposed in this matter is amended and
14 corrected to reflect an award of presentence custody credits comprised of 242 days of actual time
15 and 120 days of credit pursuant to Penal Code section 4019 for a total of 362 days of presentence
16 custody credit. The clerk of the court is hereby ordered and directed to prepare a minute order
17 reflecting the above correction.

18 2. The clerk of the court also is hereby ordered and directed to prepare an amended
19 abstract of judgment reflecting this change immediately, and to serve a copy of the amended
20 abstract of judgment forthwith on the Department of Corrections and on counsel for defendant.

21 3. The clerk of the court further is ordered and directed to prepare and file a
22 supplemental clerk’s transcript with Court of Appeal for the [COURT] Appellate District in case
23 number C049646 containing copies of (i) defendant’s ex parte motion for correction of presentence
24 custody credits, (ii) this order, (iii) a copy of the minute order reflecting the corrected presentence
25 custody credits and (iv) the amended abstract of judgment prepared in accordance with this order.

26 Dated: _____

27 _____
28 Judge of the Superior Court