PRESENTENCE CUSTODY CREDIT: A STEP-BY-STEP GUIDE

(Revised 3/19/2019)

I. Introduction

Virtually every criminal appeal involves presentence custody credit, and a good number of these appeals involve mistakes in the calculation of that credit. While it seems as though calculating your client's presentence custody credit would be a simple undertaking involving counting the days he or she was in custody and then applying some simple math, it can actually be rather complicated. The California Supreme Court has recognized this, noting that "[a]s with many determinations of credit, a seemingly simple question can reveal hidden complexities." (*In re Marquez* (2003) 30 Cal.4th 14, 19.) The Court further noted that, "in what is surely an understatement, credit determination is not a simple matter." (*Id.* at p. 19, internal quotation marks, alterations, and citations omitted.)

With this complexity in mind, the goal of this article is to help both new and experienced appellate attorneys navigate the area of presentence custody credit. Doing so will both ensure that our clients have received all the presentence custody credit to which they are entitled, as well as help identify any potential adverse consequences stemming from a client receiving more credit than he or she should have. The Courts of Appeal routinely check presentence custody credit when cases are reviewed and you do not want the court to find a mistake that you did not, especially one that results in a loss of credit for your client.

(Note that once a defendant is sentenced, postsentence custody credit may be calculated differently than was done for any presentence credit depending on a number of factors. Thus, this article should not be relied upon for postsentence credit matters.)

II. Presentence Custody Credit

Generally, subject to certain exceptions discussed below, a defendant is entitled to custody credit for both actual time spent in custody prior to sentencing and credit for worktime (Pen. Code, § 4019, subd. (b)) and good behavior (Pen. Code, § 4019, subd.

(c)), collectively referred to as "conduct credit," based on the actual custody time. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) Calculating presentence actual custody credit is rather straightforward. By contrast, calculating presentence conduct credit can be a complex undertaking.

A. Governing Statutes

The award of presentence *actual* custody credit is governed by Penal Code section 2900.5, subdivision (a). The award of presentence *conduct* credit is governed by current enactments of either Penal Code section 4019, 2933.1, 2933.2, or 2933.5, or one of several former enactments of Penal Code section 4019.[1] Which statute applies depends on a number of factors, including the nature of the present offense, the nature of any prior offense(s), the date of the offense(s), and the date of sentencing.

1. Pen. Code, § 2900.5

Penal Code section 2900.5 provides that "[p]ersons who remain in custody prior to sentencing receive credit against their prison terms for all of those days spent in custody prior to sentencing, so long as the presentence custody is attributable to the conduct that led to the conviction. This form of credit ordinarily is referred to as credit for time served." (*People v. Duff* (2010) 50 Cal.4th 787, 793, internal citation omitted.) The intent behind the passage of Penal Code section 2900.5 was "to eliminate the unequal treatment suffered by indigent defendants who, because of their inability to post bail, served a longer overall confinement than their wealthier counterparts." (*In re Rojas* (1979) 23 Cal.3d 152, 156.) Because a defendant "may be in pretrial custody in institutions other than 'jails' for reasons other than indigency, the Legislature and the courts have extended

[1] The most relevant versions of section 4019 are discussed below in Determine applicable presentence conduct credit.

subdivision (a) of [Penal Code section 2900.5] to include a broad range of custodial situations for which credit must be granted upon conviction." (*Id.* at p. 156.)

2. Pen. Code, § 4019

Penal Code section 4019 is one of a couple statutes providing for presentence custody credit in the form of additional days for good behavior that gets applied to a subsequently-imposed prison term. The purpose of conduct credit is to provide an incentive for proper behavior by those in presentence custody. Conduct credit is "designed to ensure the smooth running of a custodial facility by encouraging prisoners to do required work and to obey the rules and regulations of the facility." (*People v. Silva* (2003) 114 Cal.App.4th 122, 128.) Penal Code section 4019, subdivision (a)(1), specifically provides that "[w]hen a prisoner is confined in or committed to a county jail . . . including all days of custody from the date of arrest to the date on which the serving of the sentence commences[,]" he or she is entitled to credit for work performance and good behavior, barring certain exceptions (see Pen. Code, §§ 2933.1, 2933.2, 2933.5). (*People v. Duff, supra*, 50 Cal.4th 787, 793, 799.) Presentence conduct credit is not limited to those sentenced to a determinate prison term. Such "credits are available to a defendant sentenced to an indeterminate life term under the three strikes law." (*People v. Philpot* (2004) 122 Cal.App.4th 893, 908.)

3. Pen. Code, § 2933.1

The Legislature's purpose in enacting Penal Code section 2933.1 was to delay the release of those convicted of an offense classified as violent. (*In re Reeves* (2005) 35 Cal.4th 765, 778.) Penal Code section 2933.1 does this by limiting the amount of presentence conduct credit, defined as that provided by "[Penal Code s]ection 4019 or any other provision of law," to "15 percent of the actual period of confinement for any person specified in [Penal Code section 2933.1,] subdivision (a)." (Pen. Code, § 2933.1,

subd. (c).) The persons specified in subdivision (a) are those "who have been convicted of a felony offense listed in subdivision (c) of [Penal Code s]ection 667.5 . . ." (Pen. Code, § 2933.1, subd. (a).) The offenses listed in Penal Code section 667.5, subdivision (c), are those classified as violent.

4. Pen. Code, § 2933.2

The intent of Penal Code section 2933.2 is "to impose a complete ban on presentence conduct credits for those defendants who come within its purview," i.e., those convicted of murder (Pen. Code, § 187). (*People v. McNamee* (2002) 96 Cal.App.4th 66, 70.) However, this complete ban on presentence conduct credit only applies to a defendant convicted of a murder committed on or after June 3, 1998, the effective date of Penal Code section 2933.2, subdivision (d), as approved by the voters in Proposition 222 on June 2, 1998. (*People v. Chism* (2014) 58 Cal.4th 1266, 1336.) Penal Code section 2933.2 has been "interpreted to bar presentence conduct credits against determinate as well as indeterminate terms of a murderer's sentence." (*People v. McNamee* (2002) 96 Cal.App.4th 66, 74.)

5. Pen. Code, § 2933.5

Penal Code section 2933.5 is another statute baring a defendant from earning presentence conduct credit should certain criteria be met. Those criteria are, "[n]otwithstanding any other law, every person who is convicted of any felony offense listed in paragraph (2), and who previously has been convicted two or more times, on charges separately brought and tried, and who previously has served two or more separate prior prison terms, as defined in subdivision (g) of Section 667.5, of any offense or offenses listed in paragraph (2) . . . ." (Pen. Code, § 2933.5, subd. (a)(1).) Paragraph 2 lists 15 qualifying offenses of the serious and violent sort. (Pen. Code, § 2933.5, subds. (a)(2)(A)–(a)(2)(O).) Should the criteria be met, that person "shall be

ineligible to earn credit on his or her term of imprisonment pursuant to this article." (Pen. Code, § 2933.5, subd. (a)(1).)

Although this statute may control presentence credit to which a defendant may otherwise be entitled, it is the Department of Corrections, not the trial court, that determines a defendant's ineligibility for credits under Penal Code section 2933.5. (*People v. Goodloe* (1995) 37 Cal.App.4th 485, 494–496.) Thus, the proper procedure is for a trial court to determine the total presentence conduct credit earned by a defendant, and then indicate that the defendant is entitled to that credit unless he or she is statutorily ineligible pursuant to Penal Code section 2933.5, as later determined by the Department of Corrections. (*Ibid.*)

B. Duty of the Sentencing Judge

It is the duty of the sentencing judge to calculate both presentence actual credit and any presentence conduct credit to which a defendant is entitled and to record the custody credit calculation on the abstract of judgment or commitment. (Pen. Code, § 2900.5, subd. (d); Cal. Rules of Court, rules 4.310, 4.472.) Prior to the sentencing hearing, the trial "court must direct the sheriff, probation officer, or other appropriate person to report to the court and notify the defendant or defense counsel and prosecuting attorney within a reasonable time before the date set for sentencing as to the number of days that defendant has been in custody and for which he or she may be entitled to credit." (Cal. Rules of Court, rules 4.310, 4.472.)

A challenge to the report must be heard at the time of sentencing. (Cal. Rules of Court, rules 4.310, 4.472). However, errors in the calculation of presentence custody credit can be raised anytime. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 424.) Penal Code section 1237.1 requires that an error in the calculation of presentence custody credit first be raised in the trial court. However, this requirement "only applies when the sole issue raised on appeal involves a criminal defendant's contention that there was a miscalculation of presentence credits. In other words, [Penal Code] section 1237.1 does

not require a motion be filed in the trial court as a precondition to litigating the amount of presentence credits when there are other issues raised on direct appeal." (*People v. Acosta* (1996) 48 Cal.App.4th 411, 420.)

You can usually find information regarding time in presentence custody in the probation report, the sentencing hearing minute order, and/or the reporter's transcript of the sentencing hearing.

C. Term of Imprisonment

Presentence custody credit is applied against the defendant's "term of imprisonment." (Pen. Code, § 2900.5, subd. (a).) This "includes any period of imprisonment imposed as a condition of probation or otherwise ordered by a court in imposing or suspending the imposition of any sentence, and also includes any term of imprisonment, including any period of imprisonment prior to release on parole and any period of imprisonment and parole, prior to discharge . . . ." (Pen. Code, § 2900.5, subd. (c).)

D. Due Process for the Defendant

A defendant is entitled to notice and a fair hearing in determining the amount of custody credit to which he or she is entitled. (*People v. Lara* (2012) 54 Cal.4th 896, 901, 906.)

III. Step-by-Step Guide to Calculating Presentence Custody Credit

This Step-by-Step guide not only provides a framework for calculating your client's presentence custody credit, but also addresses the multiple issues that may arise in the process. The suggested steps are general instructions for attorneys who are new to presentence custody credit issues and are looking for a systematic approach to get started. More experienced appellate practitioners may find these steps a useful framework for dealing with specific custody credit issues. Once you have had an opportunity to deal with presentence custody credit in a few cases, you may find that a different approach works better for you. As always, you will want to verify the law outlined in the following steps and do your own independent research.

Step 1: Did your client waive presentence custody credit?

One of the first things you will want to determine is whether your client waived any portion of his or her presentence custody credit. (See *People v. Johnson* (2002) 28 Cal.4th 1050, 1054–1055.) Such a waiver is known as a "*Johnson* waiver."[2] (*People v. Arnold* (2004) 33 Cal.4th 294, 307.) A defendant can waive his or her entitlement to presentence custody credit, but the waiver must be knowing and intelligent. (*People v. Johnson*, *supra*, 28 Cal.4th 1050, 1054–1055.) Frequently, a defendant will waive earned presentence custody credit in exchange for reinstatement of probation following a violation of probation. (*People v. Burks* (1998) 66 Cal.App.4th 232, 234–235.) Presentence custody credit that has been waived in exchange for a reinstatement of probation will not be reinstated should probation later be terminated and a prison term be imposed. (*People v. Arnold*, *supra*, 33 Cal.4th 294, 308–309.) This is so even if the defendant was not specifically so advised, and even if any probation-related jail time is the equivalent to the subsequently-imposed prison sentence. (*Ibid.*) Similarly, a *Johnson*

[2] See *People v. Johnson* (2002) 28 Cal.4th 1050.

waiver of credit to be earned in an alcohol or drug treatment program is a waiver of such credit for all purposes, including a subsequently imposed prison term upon revocation of probation. (*People v. Jeffrey* (2004) 33 Cal.4th 312, 318.)

There is an unresolved question as to the waiver of presentence custody credit earned from time spent in a drug rehabilitation program. The question is whether a trial court abuses its sentencing discretion by adopting as a standard condition of probation the waiver of Penal Code section 2900.5, subdivision (a), custody credit for time spent in an applicable rehabilitation facility. The courts in *People v. Juarez* (2004) 114 Cal.App.4th 1095, 1105–1106 (1DCA, Div. 2), and *People v. Penoli* (1996) 46 Cal.App.4th 298, 303 (1DCA, Div. 2) concluded that adopting a standard condition of waiver versus a case-specific approach is an abuse of sentencing discretion. The courts in *People v. Thurman* (2005) 125 Cal.App.4th 1453, 1460–1461, 1463–1464 (3DCA), and *People v. Torres* (1997) 52 Cal.App.4th 771, 781–782 (1DCA, Div. 5), concluded there was no abuse of discretion.

If your review of the record reveals that your client did not waive his or her presentence custody credit, move on to the next step. If your review reveals that a portion of your client's confinement was not subject to the waiver, move on to the next step. If your client waived all time, you can stop here, unless you determine that the waiver was inadequate. If your client's waiver of presentence custody credit was inadequate, the remedy is to remand for resentencing to calculate presentence custody credit. (*People v. Harris* (1991) 227 Cal.App.3d 1223, 1225.) The appellate court will not independently award this credit. (*Id.* at p. 1227.)

Step 2: Is your client entitled to actual presentence custody credit?

A defendant will earn custody credit for any actual time he or she spends in presentence confinement. Such confinement includes "any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution . . . ." (Pen. Code, § 2900.5, subd. (a).)

Note that "[t]he right to credit is based not on the procedure by which a defendant is placed in such a facility, but on the requirements that the placement be 'custodial' . . ." (*People v. Mobley* (1983) 139 Cal.App.3d 320, 323.) The concept of "custody" applies to "anyone subject to restraints not shared by the 'public generally' " (*People v. Rodgers* (1978) 79 Cal.App.3d 26, 31.)

If your client was confined in a location where he or she was entitled to earn actual presentence credit, move on to the next step. Otherwise, stop here.

If you client was in presentence custody based on two or more offenses, make sure to review Step 8 below.

If your client spent presentence time at the California Rehabilitation Center (CRC), see Step 7 below.

A. Adverse Consequences

If the trial court awarded your client actual custody credit to which he or she was not entitled—either because the time was spent in a nonqualifying facility or because a math error resulted in excess credit being awarded— you will need to alert your client of a potential adverse consequence.

B. Qualifying Locations

A defendant is entitled to actual credit for presentence time spent in any of the locations discussed below.

1. Rehabilitation Program - Inpatient

An example of an inpatient rehabilitation program within the meaning of Penal Code section 2900.5 is Delancey Street. (*People v. Rodgers* (1978) 79 Cal.App.3d 26, 29.) It "is a residential treatment program which offers both group and individual

counseling together with vocational and remedial education and training for drug abusers, alcoholics, ex-convicts and persons with general character disorders." (*Ibid.*) Further, "[t]here can be no question that someone in Delancey Street Foundation is subjected to extreme restraints not shared by the public generally, and, for that matter, some of which are not shared even by persons in jail or otherwise incarcerated . . . therefore . . . on its face [Penal Code section 2900.5] requires that [a defendant] be given credit for time spent in Delancey Street Foundation." (*Id.* at pp. 31–32.)

A defendant "placed on probation conditioned on his participation and completion of an appropriate drug treatment program, pursuant to Proposition 36, the Substance Abuse Crime Prevention Act of 2000 (Pen.Code, §§ 1210–1210.5)" is also entitled to actual credit for that time should probation later be revoked. (*People v. Davenport* (2007) 148 Cal.App.4th 240, 243.) "[T]he clear and unambiguous language of section 2900.5, subdivision (f) does not preclude custody credit for time spent in a residential rehabilitation program as a condition of Proposition 36 probation." (*Id.* at pp. 245–246.)

2. Hospital - Incompetency

A defendant who is found to be incompetent to stand trial and thus is committed to a state hospital until he or she regains competency, who then regains competency and is subsequently convicted of the crimes charged, is entitled to presentence custody credit for the period starting with his or her arrest and concluding with his or her sentencing, including the time spent in the state hospital. (*People v. Cowsar* (1974) 40 Cal.App.3d 578, 579.) Time spent in a state hospital "serve[s] all of the permissible purposes of punishment and cannot be distinguished from [presentence] jail time for sentencing purposes." (*Id.* at pp. 580–581.)

3. Department of Corrections Diagnostic Facility

"Time spent by a defendant in confinement in a diagnostic facility of the Department of Corrections . . . shall be credited on the term of imprisonment in state prison, if any, to which defendant is sentenced in the case." (Pen. Code, § 1203.03, subd. (g).)

4. Juvenile Detention Facility

Included in Penal Code section 2900.5's list of facilities entitling a person who spends time there to presentence custody credit is a "juvenile detention facility." (Pen. Code, § 2900.5, subd. (a).) However, it should be noted that Penal Code section 2900.5 "does not apply of its own force in a juvenile proceeding." (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 352.) Rather, it is Welfare and Institutions Code section 726 that provides authority in the juvenile delinquency context. That code section provides that "the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the [same] offense . . ." (Welf. & Inst. Code, § 726, subd. (d)(1).) "Because an adult would be entitled to presentence custody credit under Penal Code section 2900.5, this [Welfare and Institutions Code section 726 language] has been interpreted to mean that an equivalent amount of time must be subtracted from a minor's maximum period of physical confinement. [Citations.]" (*In re Antwon R.*, *supra*, 87 Cal.App.4th 348, 352.) Note, too, that because in the juvenile delinquency context a minor is not "sentenced," this type of credit is not referred to as "presentence" custody credit, but rather either "precommitment" or "predisposition" custody credit. (*Ibid.*)

5. Home Detention

Penal Code section 2900.5 currently provides that defendants who spend "days served in home detention pursuant to [Penal Code s]ection 1203.016 or 1203.018" are entitled to presentence custody credit. (Pen. Code, § 2900.5, subd. (a).) Both these code sections involve the use of electronic monitoring. Thus, generally speaking, for a defendant to receive presentence actual credit for time spent in home detention, he or she must have been in an electronic home detention program in which he or she was required to wear an electronic tracking device. (*People v. Lapaille* (1993) 15 Cal.App.4th 1159, 1165 [holding that a defendant placed under house arrest as condition of release on his own recognizance prior to sentencing was not in a home detention program within meaning of Pen. Code, § 1203.016 entitling defendants in such programs to presentence custody credit].)

Note that there have been a number of amendments to Penal Code section 2900.5 related to home detention, thus affecting the award of presentence actual custody credit. If your client's presentence custody involved home detention, be sure to check the dates of the detention against the enactment in effect at that time. The timeframes coinciding with amendments to Penal Code section 2900.5 are as follows:

a. September 18, 1991 to December 31, 1998

Defendants in a home detention program received credit for actual time served in custody. (Former Pen. Code, § 2900.5, subd. (a), [Stats. 1991, ch. 437, § 9, eff. Sept. 18, 1991, repealed by Stats. 1994, ch. 770, § 6, amended by Stats. 1998, ch. 338, § 6, operative Jan. 1, 1999].)

b. January 1, 1999 to September 30, 2011

Defendants in a home detention program did not receive credit for actual time spent in custody. (Former Pen. Code, § 2900.5, subd. (a) [Stats. 1998, ch. 338, § 6,

operative Jan. 1, 1999, amended by Stats. 2011, ch. 15, § 466, operative Oct. 1, 2011]; *People v. Anaya* (2007) 158 Cal.App.4th 608.)

c. October 1, 2011 to Present

Defendants in a home detention program receive credit for actual days served in custody pursuant to Penal Code section 1203.018 (addressing electronic monitoring programs, which include home detention programs; Pen. Code, § 1203.018, subd. (k)(2)). (Pen. Code, § 2900.5, subd. (a) [Stats. 2011, ch. 15, § 466, operative Oct. 1, 2011].)

6. Work Release Program

If a defendant has been released to participate in a work program in lieu of jail, time in the work program is not considered custody for presentence custody credit purposes. (*People v. Richter* (2005) 128 Cal.App.4th 575, 579–580.) However, if the defendant was released for program participation due to jail overcrowding (Pen. Code, § 4024.3), he or she is entitled to credit for the time pursuant to Penal Code sections 2900.5. (*Id.* at p. 584.)

C. Non-Qualifying Locations

A defendant is not entitled to actual presentence custody credit for time served in the following locations:

1. Unlocked Outpatient Facility

A mentally disordered offender, a mentally disordered sex offender, and a defendant found not guilty by reason of insanity do not receive actual presentence custody credit for time in an unlocked outpatient facility. (Pen. Code, § 1600.5.)

2. Rehabilitation Program - Outpatient

A defendant does not receive actual presentence custody credit for time spent as an outpatient in a drug rehabilitation program. Of note is that when Penal Code section 2900.5 was originally amended to provide for presentence actual custody credit for time spent in institutions other than jail, there was no requirement that the "similar institution[s]" be residential. (*People v. Schnaible* (1985) 165 Cal.App.3d 275, 277.) Upon a subsequent amendment, "the word 'residential' [was added] to this description. (Stats.1978, ch. 304, p. 632.)" (*Ibid.*) "The amendment makes clear the Legislature's intent to exclude outpatient treatment as a form of restraint comprising custody within the meaning of [Penal Code] section 2900.5." (*Ibid.*)

Step 3: Calculate your client's actual presentence custody credit.

If your client served presentence time in any of the locations that qualify for an award of actual presentence custody credit, the next step is to calculate how many days he or she was in custody. A defendant is entitled to actual presentence custody credit from the date he or she was processed into jail or other custodial situation to the date he or she was sentenced. (Pen. Code, § 2900.5, subd. (d); *People v. Ravaux* (2006) 142 Cal.App.4th 914, 919–920.) A partial day, including the day of the sentencing hearing, is counted as a full day. (*People v. Smith* (1989) 211 Cal.App.3d 523, 526.) Note that depending on the facts of your client's case, there may be multiple periods of presentence custody, i.e., his or her presentence custody is noncontinuous. If this is the case, then your calculations will involve adding together these separate periods. Your client's total amount of actual presentence custody will be used not only to credit your client for these days, but also to determine how much, if any, conduct credit he or she is entitled to receive, as explained in the next two steps.

Tip: To quickly calculate the number of days your client spent in actual presentence custody, see the CCAP Day & Date Calculator at: http://capcentral.org/resources/charts_calc/datecalc.aspx. Simply enter the starting date (the date your client went into presentence custody) and the ending date (the date your client was released from presentence custody) and then click on "calculate." The result will be given in days.

Step 4: Is your client entitled to presentence conduct credit?

After calculating you client's actual presentence custody credit, you need to determine whether he or she is entitled to presentence conduct credit based on the location of that custody. If your client was confined in a location where he or she was entitled to earn presentence conduct credit, move on to the next step.

A. Qualifying Locations

Unless otherwise prohibited, a defendant is entitled to earn presentence conduct credit when confined in a county or city jail, industrial farm, or road camp. (Pen. Code, § 4019; former Pen. Code, § 2933, subd. (e)(1) [Stats. 2010 ch. 426, § 1 (SB 76), eff. Sept. 28, 2010, repealed by Stats. 2011, 1st Ex. Sess., 2011-2012, ch. 12, § 16 (ABX117), operative Oct. 1, 2011].) A defendant in mental incompetency proceedings who is confined in or committed to a county jail treatment facility is also entitled to earn presentence conduct credit. (Pen. Code, § 4019, subd. (a)(8) [added by Stats. 2018 ch. 1008, § 5 (SB 1187), effective January 1, 2019, repealed January 1, 2021].) In addition to time spent in a county or city jail, industrial farm, or road camp, a defendant is also entitled to presentence conduct credit for time served in the following locations:

1. Department of Corrections Diagnostic Facility

"In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility for a period not to exceed 90 days . . ." (Pen. Code, § 1203.03, subd. (a).) A defendant who is committed to such a diagnostic facility for evaluation is entitled to presentence conduct credit. (*People v. Engquist* (1990) 218 Cal.App.3d 228, 230–231.)

2. Juvenile Detention Facility for Amenability Evaluation

"[J]uveniles and adults convicted in the criminal courts and sentenced to prison are similarly situated. The state's purpose of punishment is identical for both groups. Juveniles remanded to YA [Department of Youth Authority, now called the Division of Juvenile Facilities (DJF) (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 611)] before sentencing (Welf. & Inst. Code, § 707.2) and adults likewise confined in DOC diagnostic facilities (Pen. Code, § 1203.03, subd. (a)) also are similarly situated. The state's purpose of evaluating both groups for amenability to alternative dispositions is the same. Because an adult confined in a DOC diagnostic facility before sentencing is entitled to conduct credits against his prison sentence for time spent at the facility . . . a juvenile remanded to YA for an amenability evaluation and then sentenced to prison also is entitled on equal protection grounds to conduct credits against his prison sentence for the diagnostic time spent at YA." (*People v. Duran* (1983) 147 Cal.App.3d 1186, 1192–1193.)

B. Non-Qualifying Locations

A defendant is not entitled to presentence conduct credit for time served in the following locations:

1. Hospital – Mentally Disordered Sex Offender

Penal Code section 4019 "does not authorize conduct credit for time in nonpenal institutions such as state hospitals . . ." (*People v. Sage* (1980) 26 Cal.3d 498, 502–503.) Thus, commitment to a hospital as a mentally disordered sex offender does not entitle one to presentence conduct credit. (*Id.* at p. 503.) "The rationale of 'good time' credit as a reward for behavioral conformity does not readily fit the company of the mentally disturbed. The 'carrot or stick' approach represented by the extension or withdrawal of credit as reward or punishment seems inconsistent with the goals of a hospital treatment facility." (*People v. Saffell* (1979) 25 Cal.3d 223, 234.)

2. Hospital – Incompetency

Similarly, a defendant committed to a hospital after being found incompetent to stand trial (Pen. Code, § 1368) does not earn presentence conduct credit for that time. (*People v. Callahan* (2006) 144 Cal.App.4th 678, 686.) This is because "[t]he purpose of confinement is to restore the mental ability to stand trial . . . that goal would be hindered if mere institutional good behavior and participation automatically reduced the therapy period." (*People v. Waterman* (1986) 42 Cal.3d 565, 570.) However, once the defendant is determined to be competent, he or she is entitled to presentence conduct credit regardless of where he or she is in custody. (*People v. Bryant* (2009) 174 Cal.App.4th 175, 184.)

3. Hospital – Not Guilty by Reason of Insanity

A defendant found not guilty by reason of insanity (Pen. Code, § 1026) is not entitled to have any precommitment conduct credit for the time he or she spent in jail prior to sentencing applied to the maximum term of commitment in a state hospital. (*People v. Smith* (1981) 120 Cal.App.3d 817, 826.) This is because "[c]onfinement of a

person found to be insane and sentenced under section 1026 of the Penal Code is for care and treatment, not punishment." (*People v. Bodis* (1985) 174 Cal.App.3d 435, 437.)

4. Home Detention – Own Recognizance

"Though the Legislature amended [Penal Code] section 2900.5, subdivision (a) to include custody credits for home detention, it did not likewise amend [Penal Code] section 4019 to include conduct credits. Thus, no person on home detention, whether electronic or otherwise, is statutorily entitled to such credit. [Penal Code s]ection 4019 itself provides that conduct credits be awarded to those who are in custody in a county or city jail, industrial farm, or road camp pending sentencing." (*People v. Lapaille, supra,* 15 Cal.App.4th 1159, 1170.)

5. Home Detention – Electronic Monitoring

Penal Code section 4019 presentence "conduct credits are designed to ensure the smooth running of a custodial facility by encouraging prisoners to do required work and to obey the rules and regulations of the facility. This statutory scheme has no application where . . . a defendant is not in 'actual custody' in a facility described in subdivision (a)(1) of [Penal Code] section 4019 [but rather on an electronic home monitoring program]." (*People v. Silva* (2003) 114 Cal.App.4th 122, 128.) Thus, a defendant on an electronic home monitoring program is "not entitled to [presentence] conduct credits under [Penal Code] section 4019." (*Id.* at pp. 128–129.)

6. Rehabilitation Facility

"[T]ime spent in a residential drug rehabilitation program as a condition of probation does not qualify for good conduct credits upon revocation of probation." (*People v. Broad* (1985) 165 Cal.App.3d 882, 883.) "Conduct credit is awarded to

prisoners in penal institutions to encourage good behavior. [Citation.] On the other hand, those receiving treatment in alcohol recovery centers have their own incentives for good behavior, including fulfillment of the terms of their probation and avoiding alternate jail time." (*People v. Moore* (1991) 226 Cal.App.3d 783, 787.)

But there can be exceptions to this bar on presentence conduct credit for time spent in a residential drug rehabilitation program. For example, in *People v. Mobley* (1983) 139 Cal.App.3d 320, the defendant was released on his own recognizance on the condition that he reside at a drug treatment facility as an alternative to his being unable to post bail. Although "[g]ood time/work time credit is not statutorily authorized for this type of confinement[,]" in Mobley's case, entitlement to such credit was found to be required by equal protection. (*Id.* at p. 323.) The reviewing court found that if presentence conduct credit was not awarded for the time spent in a rehabilitation facility, the defendant "may ultimately serve more custodial time than he would have served had he been able to post bail and thus avoid custodial restraint . . ." (*Ibid.*)

Step 5: Calculate your client's presentence conduct credit.

If you have determined that your client is entitled to earn presentence conduct credit based on the location of confinement, the next step is to calculate the amount of conduct credit he or she actually earned. As mentioned in Step 3, your client's total actual presentence custody is used to determine how much, if any, conduct credit he or she is entitled to receive. In calculating presentence conduct credit, it does not matter whether your client's presentence custody was one continuous period, or comprised of two or more noncontinuous periods. (*People v. Culp* (2002) 100 Cal.App.4th 1278, 1283–1284.) Conduct credits are calculated based on the total number of days in presentence custody regardless of the number of periods of presentence custody. (*Id.* at p. 1284.)

While calculating presentence conduct credit sounds straightforward, it is not. Due to a number of statutory amendments affecting the calculation of presentence conduct credit, this has become a very complicated endeavor. This step and the next two will

guide you through the process of calculating your client's presentence conduct credit.

A. Failure to Earn Presentence Conduct Credit

The first question to answer is whether your client failed to earn presentence conduct credit. A defendant is entitled to receive conduct credit unless it appears from the record that he or she refused to perform assigned labor or did not satisfactorily comply with reasonable rules and regulations. (Pen. Code, § 4019, former Pen. Code, § 2933, subd. (e)(1) [Stats. 2010 ch. 426, § 1 (SB 76), eff. Sept. 28, 2010, repealed by Stats. 2011, 1st Ex. Sess., 2011–2012, ch. 12, § 16 (ABX1 17), operative Oct. 1, 2011].) Check the record to see if there is any indication that your client was denied conduct credit because he or she refused to work or otherwise behaved badly.

B. Credit Disability Limiting Presentence Conduct Credit

Your client's ability to earn presentence conduct credit may be limited or eliminated based on the offense of which he or she was convicted. Such limitations on custody credit are known as "credit disabilities" and are as follows:

1. Conviction of a Violent Felony

If a defendant is convicted of a violent felony[3], so defined at the time of its commission by Penal Code section 667.5, subdivision (c), then Penal Code section 2933.1 limits the amount of conduct credit the defendant may earn to 15 percent of the actual period of confinement. (Pen. Code, § 2933.1, subds. (a) & (c).) "[B]y its terms, [Penal Code] section 2933.1 applies to the offender not to the offense and so limits a violent felon's conduct credits irrespective of whether or not all his or her offenses come

[3] Committed on or after September 21, 1994. (Pen. Code, § 2933.1, subd. (d).)

within [Penal Code] section 667.5." (*People v. Ramos* (1996) 50 Cal.App.4th 810, 817; see also *In re Mallard* (2017) 7 Cal.App.5th 1220, 1223 [felony offense reduced to a misdemeanor under Prop. 47 was still subject to 15 percent custody credit limitation where petitioner's sentence included a prison term for a violent felony].) Note that the trial court and not the jury determines whether a defendant's current felony conviction is violent for purposes of Penal Code section 2933.1. (*People v. Garcia* (2004) 121 Cal.App.4th 271, 274.)

a. Enhancements

When a defendant's crime qualifies as a violent felony based on an enhancement, the defendant's presentence conduct credit is still limited by Penal Code section 2933.1 even if the trial court strikes the punishment for the enhancement pursuant to Penal Code section 1385. (*In re Pacheco* (2007) 155 Cal.App.4th 1439, 1442, 1444.) However, if the trial court strikes the enhancement itself, a defendant is entitled to full presentence conduct credit. (*Id.* at pp. 1444-1446.)

b. Pen. Code, § 654

A defendant is subject to the limitations imposed by Penal Code section 2933.1 notwithstanding the circumstance that execution of sentence for the violent offenses has been stayed pursuant to Penal Code section 654. (*In re Pope* (2010) 50 Cal.4th 777, 780.)

c. Probation

If a defendant is granted probation following conviction for a violent felony, conduct credit on any jail time ordered as a condition of probation is computed under Penal Code section 4019. However, if probation is subsequently revoked and a prison sentence imposed, the conduct credit is recomputed based on the 15 percent limitation.

(*People v. Daniels* (2003) 106 Cal.App.4th 736, 738, 739–740.)

d. Separate Proceedings

"[W]hen a defendant is sentenced consecutively for multiple convictions occurring in different proceedings, the second court designates the longest term as the principal term, and any other consecutive term is considered a subordinate term . . ." (*People v. Baker* (2002) 144 Cal.App.4th 1320, 1328–1329.) This approach applies to presentence conduct credits. "[T]he second court is entitled to recalculate the conduct credits previously awarded on an earlier conviction." (*Id.* at p. 1329.) "Even if a subordinate term is imposed for a nonviolent felony conviction occurring before the current offense, if the current offense triggers the credit limitations of [Penal Code] section 2933.1, those limitations apply to every offense in the aggregate term." (*Ibid.*)

The rationale for this is based on Penal Code section 2933.1 being enacted " '[i]n order to protect the public from dangerous repeat offenders who otherwise would be released . . .' " (*People v. Ramos*, *supra*, 50 Cal.App.4th 810, 817, quoting Stats.1994, ch. 713, § 2, p. 3448.) "That a defendant, currently convicted of a violent felony, was not a violent felon at the time he served his or her presentence custody on the nonviolent offense is irrelevant. It is the current violent felony conviction which triggers application of the 15 percent limitation of [Penal Code] section 2933.1, subdivision (c), and the aggregate sentencing on his violent and nonviolent felonies permits the 15 percent limitation to apply to both offenses." (*People v. Baker*, *supra*, 144 Cal.App.4th 1320, 1329.)

2. Conviction for Murder

A defendant convicted of murder (Pen. Code, § 187)[4] may not earn presentence

[4] Committed on or after June 3, 1998. (*People v. Chism* (2014) 58 Cal.4th 1266, 1336 [Pen. Code, § 2933.2 "applies only to offenses committed after its effective date of June 3, 1998. (§ 2933.2, subd. (d)), as approved by voters (Prop. 222) June 2, 1998].)

conduct credit. (Pen. Code, § 2933.2, subds. (a) & (c).) This bar against presentence conduct credit applies to both determinate and indeterminate parts of the sentence. (*People v. McNamee* (2002) 96 Cal.App.4th 66, 68, 74.)

a. Pen. Code, § 654

A Penal Code section 654 stay of sentence for a murder (Pen. Code, § 187) conviction does not affect the Penal Code section 2933.2, subdivision (c), prohibition against earning presentence conduct credit. (*People v. Duff*, *supra*, 50 Cal.4th 787, 792, 800–801.) This is because "the circumstance that execution of sentence for the murder conviction was stayed pursuant to [Penal Code] section 654 does not alter the reality that [a] defendant [remains] a person who 'is convicted' of the crime of murder within the meaning of [Penal Code] section 2933.2(a) . . . ." (*Id.* at p. 795.)

b. Probation

The prohibition against earning presentence conduct credit for those convicted of murder (Pen. Code, § 187) includes applying conduct credit to a jail term imposed as part of a grant of probation. (*People v. Moon* (2011) 193 Cal.App.4th 1246, 1253.)

3. Presentence Conduct Credit and the Three Strikes Law

"[R]estrictions on the rights of Three Strikes prisoners to earn term-shortening credits do not apply to confinement in a local facility prior to sentencing. . . . [W]hen limiting the credit rights of offenders sentenced thereunder, the Three Strikes law (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5)) expressly refers only to '*post* sentence . . . credits' . . . [citation] and 'does not address *presentence* . . . credits' for Three Strikes defendants [citation]." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 32, emphasis in the original.) Further, "[i]f anything, [Penal Code] section 2933.1 implicitly provides to the

contrary, because it puts a limitation on the presentence conduct credit available to persons convicted of any of the offenses characterized as violent felonies by [Penal Code] section 667.5, subdivision (c), several of which carry mandatory indeterminate life sentences." (*People v. Brewer* (2011) 192 Cal.App.4th 457, 462.)

Note: An indeterminate life sentence not imposed under Three Strikes but rather under a statute providing for such punishment (e.g. Pen. Code, § 269, subd. (b)) is similarly eligible for presentence conduct credit. (*People v. Brewer*, *supra*, 192 Cal.App.4th 457, 463-464.)

a. Nonviolent Third Strike

A defendant who is convicted of a nonviolent third strike (i.e. an offense not listed in Penal Code section 667.5) is eligible to receive presentence conduct credits pursuant to Penal Code section 4019. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 907, 908.)

b. Violent Third Strike

A defendant convicted of a violent third strike, with the exception of murder (Pen. Code, § 187), is not precluded from earning presentence conduct credit. However, he or she is limited in the amount that can be earned. (*People v. Brewer*, *supra*, 192 Cal.App.4th 457, 462.) "[Penal Code s]ection 2933.1 operates as an exception to [Penal Code] section 4019." (*Ibid.*) It provides that the maximum presentence custody credit earned by a person convicted of a felony listed in Penal Code section 667.5, subdivision (c), "shall not exceed 15 percent of the actual period of confinement . . ." (Pen. Code, § 2933.1, subds. (a) & (c).)

C. Determine applicable presentence conduct credit statute.

Calculating presentence conduct credit can, unfortunately, be a challenging task.

The primary statute governing this calculation, Penal Code section 4019, was amended three times over an 18-month period. This resulted in there being four different versions of Penal Code section 4019 to contend with: the version in effect prior to January 25, 2010; a revision effective January 25, 2010; a revision effective September 28, 2010; and a revision effective October 1, 2011.[5] Penal Code section 2933 is similarly challenging in that "between September 28, 2010, and September 30, 2011, the Legislature amended former section 2933 to award day-for-day conduct credit to certain prisoners in local presentence custody who were sentenced to prison. (Former § 2933, subd. (e)(1), as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010.)" (*People v. Whitaker* (2015) 238 Cal.App.4th 1354, 1360.)

For a detailed discussion of the amendments to the statutes governing the calculation of presentence custody credit, see "Awarding Custody Credits after Realignment" by J. Richard Couzens (Judge of the Superior Court, County of Placer (Ret.)) and Tricia A. Bigelow (Presiding Justice, District Court of Appeal, 2nd Appellate, Div. 8), located at: www.courts.ca.gov/partners/documents/Credits_Memo.pdf.

The two charts below, created by CCAP staff, are derived from the work of Couzens and Bigelow, as laid out in their article. The first chart outlines the three current custody credit formulas. The second chart provides guidance to help you determine which formula to apply to your client's case.

[5] See former Pen. Code, § 4019 [Stats. 1982 ch. 1234, § 7, amended by Stats. 2009, 3d Ex. Sess., 2009–2010, ch. 28, § 50 (SB 18X3), eff. Jan. 25, 2010]; former Pen. Code, § 4019 [Stats. 2009, 3d Ex. Sess., 2009–2010, ch. 28, § 50 (SB 18X3), eff. Jan. 25, 2010, amended by Stats. 2010, ch. 426, § 1 (SB 76), eff. Sept. 28, 2010]; former Pen. Code, § 4019 [Stats. 2010, ch. 426, § 1 (SB 76), eff. Sept. 28, 2010, amended by Stats. 2011, ch. 15, § 466 (AB 109), operative Oct. 1, 2011].

Chart 1: Three Current Presentence Conduct Credit Formulas

Formula for conduct credit based on time in county jail:	**Formula A** (Six days deemed served for four days actually confined in county jail.)	**Formula B** (Four days deemed served for two days actually confined in county jail.)	**Formula C** (Two days deemed served for one day actually confined in county jail.)
Math:	1. Actual days ÷ 4 = whole number quotient (drop any remainder). 2. Whole quotient x 2 = conduct credit. 3. Actual + conduct credit = Total credit.	1. Actual days ÷ 2 = whole number quotient (drop any remainder). 2. Whole quotient x 2 = conduct credit. 3. Actual + conduct credit = Total credit.	Actual days x 2 = Total credit.
Authority:	Section 4019 prior to amendment eff. 1/25/10, then restored for the period from 9/28/10 through 9/30/11.	A. Section 4019 from 1/25/10 through 9/27/10. B. Section 4019 from 10/1/11 to Present.	Section 2933 from 9/28/10 through 9/30/11, applicable only if state prison term was ordered executed.

Chart 2: Determining which Presentence Conduct Credit Formula to Apply

Qualifier	Formula to Apply
Time served in local custody prior to January 25, 2010.	**Formula A** (*People v. Brown* (2012) 54 Cal.4th 314.)
Time served in local custody on or after January 25, 2010 for crimes committed prior to September 28, 2010.	**Formula B** (*People v. Brown*, *supra*, 54 Cal.4th 314; former Pen. Code, § 4019 [Stats. 2009, 3d Ex. Sess., 2009–2010, ch. 28, § 50 (SB 18X3), eff. Jan. 25, 2010, amended by Stats. 2010, ch. 426, § 1 (SB 76), eff. Sept. 28, 2010].) **Notes:** Excludes defendants with a prior conviction for a serious or violent felony, defendants who are sentenced on a serious felony, and any person required to register as a sex offender; **Formula A** applies instead. However, if the time was served in custody after October 1, 2011, see note below. If the defendant was sentenced to prison on or after September 28, 2010, or if the defendant was sentenced to local custody under the Realignment Act for a felony, see below. If the defendant was sentenced to prison on or after September 28, 2010, or if the defendant was sentenced to local custody under the Realignment Act for a felony, see below.

Time served in local custody for crimes committed on or after September 28, 2010 but prior to October 1, 2011.	**Formula A** (Former Pen. Code, § 4019 [Stats. 2010, ch. 426, § 1 (SB 76), eff. Sept. 28, 2010, amended by Stats. 2011, ch. 15, § 466 (AB 109), operative Oct. 1, 2011]; see *People v. Brown*, *supra*, 54 Cal.4th 314.) **Notes:** To date, courts have rejected the argument that **Formula B** applies when time was served in local custody after October 1, 2011 but the crime was committed prior to October 1, 2011. (See *People v. Ellis* (2012) 207 Cal.App.4th 1546 [Fifth Appellate District; applying Formula A for time in custody after October 1, 2011]; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 395–400 [Sixth Appellate District; same]; *People v. Rajanayagam* (2012) 211 Cal.App.4th 42 (Fourth Appellate District, Division Three; same]; *People v. Hollowell* (June 5, 2013, C072075) [nonpub. opn.] [Third Appellate District; same]; *People v. Deanda* (May 31, 2013, C070057) [nonpub. opn.] [Third Appellate District; same]; see also *People v. Verba* (2012) 210 Cal.App.4th 991.) Sample briefing with arguments that the October 1, 2011 amendment to Penal Code section 4019 (**Formula B**) applies to a defendant who served time in local custody after October 1, 2011 for a crime committed prior to this date is available here as a PDF  . If the defendant was sentenced to prison on or after September 28, 2010, or if the defendant was sentenced to local custody under the Realignment Act for a felony, see below.

Time served in custody on or after September 28, 2010 when sentenced to prison (or local custody under Realignment for a felony) on or after this date for crimes committed prior to October 1, 2011 (including crimes committed prior to September 28, 2010)	**Formula C** (Former Penal Code section 2933, subdivision (e) [Stats. 2010 ch. 426, § 1 (SB 76), eff. Sept. 28, 2010, repealed by Stats. 2011, 1st Ex. Sess., 2011–2012, ch. 12, § 16 (ABX1 17), operative Oct. 1, 2011]; see *People v. Brown*, *supra*, 54 Cal.4th 314.) **Notes:** Excludes defendants with a prior conviction for a serious or violent felony, defendants who are sentenced on a serious felony, and any person required to register as a sex offender; **Formula A** applies instead. However, if the time was served in custody after October 1, 2011, see note above. The trial court is responsible for calculating and awarding the presentence conduct credit provided under former Penal Code section 2933, subdivision (e). (*People v. Tinker* (2013) 212 Cal.App.4th 1502, 1506–1509.) **Defendants sentenced to local custody under the Realignment Act for a felony:** If the defendant committed a felony offense before October 1, 2011, but was sentenced to local custody under the Realignment Act for the felony offense after this date, the defendant may be entitled to have his or her conduct credit calculated under **Formula C**. (*People v. Hul* (2013) 213 Cal.App.4th 182.)
Time served in custody for crimes committed on or after October 1, 2011 to present.	**Formula B** (Pen. Code, § 4019 [Stats. 2011, ch. 15, § 466 (AB 109), operative Oct. 1, 2011].) **Note:** Does NOT exclude defendants with a prior conviction for a serious or violent felony, defendants who are sentenced on a serious felony, and any person required to register as a sex offender.

Step 6: Was your client's ordered length of commitment long enough?

The language used in Penal Code section 4019, subdivision (e), as it relates to the duration of custody required before a defendant is entitled to presentence conduct credit has been the subject of misinterpretation. As currently enacted,[6] subdivision (e), reads: "A deduction shall not be made under this section unless the person is committed for a period of four days or longer." In *People v. Dieck* (2009) 46 Cal.4th 934, the California Supreme Court addressed this subdivision and the related misinterpretation.

As the Court explained, the "[p]roper interpretation of [Penal Code] section 4019 rests on the difference between the terms 'committed' and 'confined' . . . 'Committed,' as relevant here, means a judicial officer's order sending a defendant to jail, prison, or other form of qualifying confinement. [Citations.] . . . In contrast, the term 'confinement' is defined as 'the state of being imprisoned or restrained.' [Citation.] Subdivision (e), which uses the word 'committed' but not the word 'confined,' requires only that a person be *ordered to spend* at least [the statutorily specified number of] days in custody before the statute is applicable, not that a person must actually spend [the statutorily specified number of] days in custody prior to sentencing." (*People v. Dieck*, *supra*, 46 Cal.4th 934, 940, emphasis in original.) Thus, Penal Code "section 4019, subdivision (e)[,] sets forth a minimum duration of ordered commitment, not a minimum term of presentence incarceration." (*Ibid.*)

The California Supreme Court concluded that under the then-current version of the statute, "[Penal Code section 4019] does not require that a defendant spend six days in presentence confinement in order to be entitled to receive conduct credit pursuant to

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[6] For earlier enactments, see former Pen. Code, § 4019, subd. (e) [Stats. 1982 ch. 1234, § 7, amended by Stats. 2009, 3d Ex. Sess., 2009–2010, ch. 28, § 50 (SB 18X3), eff. Jan. 25, 2010]; former Pen. Code, § 4019, subd. (e) [Stats. 2009, 3d Ex. Sess., 2009–2010, ch. 28, § 50 (SB 18X3), eff. Jan. 25, 2010, amended by Stats. 2010, ch. 426, § 1 (SB 76), eff. Sept. 28, 2010]; former Pen. Code, § 4019, subd. (e) [Stats. 2010, ch. 426, § 1 (SB 76), eff. Sept. 28, 2010, amended by Stats. 2011, ch. 15, § 466 (AB 109), operative Oct. 1, 2011].

section 4019. Rather, the statute entitles a defendant to conduct credit if he or she is sentenced to, or otherwise committed for, a period of at least six days, without regard to the duration of presentence confinement." (*People v. Dieck*, *supra*, 46 Cal.4th 934, 937.)

The following chart summarizes the minimum number of days to which a defendant must be sentenced (i.e., ordered committed) to receive presentence conduct credit under each version of Penal Code section 4019, subdivision (e):

Date of Offense	**Min # of Days Defendant Must Be Ordered Committed to Receive Pen. Code, § 4019 Conduct Credit**
Prior to January 25, 2010 Former Pen. Code, § 4019, subd. (e) [Stats. 1982 ch. 1234, § 7, amended by Stats. 2009, 3d Ex. Sess., 2009-2010, ch. 28, § 50 (SB 18X3), eff. Jan. 25, 2010.	6 days.
Jan. 25, 2010 through Sept. 27, 2010 Former Pen. Code, § 4019, subd. (e) [Stats. 2009, 3d Ex. Sess., 2009-2010, ch. 28, § 50 (SB 18X3), eff. Jan. 25, 2010, amended by Stats. 2010, ch. 426, § 1 (SB 76), eff. Sept. 28, 2010].	4 days, with the following exception: If the defendant has a prior conviction for a serious or violent felony, was sentenced on a serious felony, or is required to register as a sex offender, then it is 6 days.
Sept. 28, 2010 through Sept. 30, 2011 Former Pen. Code, § 4019, subd. (e) [Stats. 2010, ch. 426, § 1 (SB 76), eff. Sept. 28, 2010, amended by Stats. 2011, ch. 15, § 466 (AB 109), operative Oct. 1, 2011].	6 days.
Oct. 1, 2011 through Present Pen. Code, § 4019, subd. (e).	4 days.

Step 7: Did your client spend time in the California Rehabilitation Center?

With the passage of time, it becomes less and less likely that you will be presented with a fact pattern requiring you to calculate presentence custody credit related to a California Rehabilitation Center (CRC) commitment. This is because starting July 1, 2012, no new commitments were made to CRC. (Former Welf. & Inst. Code, § 3050, subds. (a) & (c), amended by Stats. 2012, c. 41, § 114; § 3051, subds. (a) & (d), amended by Stats. 2012, c. 41, § 115; § 3100, subds. (a) & (b), amended by Stats. 2012, c. 41, § 116; § 3100.6, subds. (a) & (g), amended by Stats. 2012, c. 41, § 117; all repealed by Stats. 2012, c. 41, § 119, operative Jan. 1, 2015.) However, it does still come up from time-to-time.

If your client did not spend any time in CRC, skip this step.

If your client was committed to CRC, as a general rule, he or she does not earn presentence conduct credit for time spent there. (*People v. Jones* (1995) 11 Cal.4th 118, 120–121.)

However, presentence conduct credit can be earned related to a CRC commitment if your client was committed to CRC before July 1, 2012, but subsequently sentenced to prison after this date as a result of either being unamenable to treatment or otherwise being excluded from the CRC program. (*People v. Nubla* (1999) 74 Cal.App.4th 719, 731.) Under an exclusion scenario, a defendant would be entitled to "conduct credits from the time of his or her exclusion from CRC for time spent either at CRC or in county jail." (*Ibid.*) Exclusion can occur as a result of misconduct while at CRC (*Id.* at pp. 724–725, 731; *People v. Guzman* (1995) 40 Cal.App.4th 691, 693, 695), due to a medical condition requiring treatment not available at CRC (*People v. Rodriguez* (1997) 52 Cal.App.4th 560, 565), for being declared ineligible for CRC due to being on parole at the time of the CRC commitment (*People v. Mitchell* (2004) 118 Cal.App.4th 1145, 1147, 1148). In scenarios such as these, a defendant is entitled to presentence conduct credit for time spent in confinement after his or her exclusion from the CRC up through

sentencing, even if that presentence confinement was at the CRC. (*People v. Nubla*, *supra*, 74 Cal.App.4th 719, 731–732.)

Step 8: Does your client's appeal involve multiple cases?

If your client was not sentenced on multiple cases—either as part of a probation or parole violation or as separately-charged cases where probation or parole was not a factor—and thus is not facing a potential dual credit situation, skip this step.

The starting point for working through a multiple case scenario is Penal Code section 2900.5. "Although the statutory language in [Penal Code] section 2900.5 'may appear to have meaning which is self-evident, the appellate courts have had considerable difficulty in applying the words to novel facts.' [Citation.] 'Probably the only sure consensus among the appellate courts is a recognition that [Penal Code] section 2900.5, subdivision (b), is "difficult to interpret and apply." [Citation.]' [Citation.]" (*In re Marquez* (2003) 30 Cal.4th 14, 19.)

Penal Code section 2900.5 "provides that a convicted person shall receive credit against his [or her] sentence for all days spent in custody, including presentence custody (subd. (a)), but '*only* where the custody to be credited is attributable to proceedings related to the *same conduct* for which the defendant has been convicted' (Pen. Code, § 2900.5, subd. (b))." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1180, emphasis in original.) This sentence means that "where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*Id.* at pp. 1193–1194.) While this rule of "strict causation" applies to cases involving the possibility of duplicate credit, and thus a windfall for the defendant, where there is no possibility of a double credit windfall, the rule of strict causation does not apply. (*People v. Gonzalez* (2006) 138 Cal.App.4th 246, 254.)

There are "two primary sources of confusion [when working with multiple case

scenarios]. First, there are many factual variations of crime and punishment, probation and parole, reverse time sequences, and unclear reasons for action or inaction. Often the statutory language does not adapt easily to the particular sequence of events. Second, because the complexity usually arises in cases involving recidivists whose multiple crimes are prosecuted at different times, and perhaps in several jurisdictions, it is sometimes difficult to describe and keep in mind the pertinent facts." (*People v. Adrian* (1987) 191 Cal.App.3d 868, 875.) To better manage these sources of confusion, it is often helpful to diagram the facts of both your client's case and those cases reviewed as part of your case law research.

In evaluating a multi-case fact pattern that raises the possibility of either a dual credit issue or an adverse consequence, it is also helpful to keep in mind the general purpose of Penal Code section 2900.5. That purpose is to eliminate the inequities that arise between defendants charged with a crime who cannot afford to post bail, and thus must spend time in presentence custody, and those who can afford bail and thus do not spend time in presentence custody, by awarding presentence custody credit to the former. (*People v. Bruner*, *supra*, 9 Cal.4th 1178, 1191.) Because the purpose of Penal Code section 2900.5 is not to bestow a windfall of duplicative credits on a defendant in a multiple case scenario, the question to ask is whether your client would have been free from custody if the case upon which he or she was sentenced went away. (*Id.* at pp. 1180, 1191.) If the answer is no, then your client is likely not entitled to the credit in question.

In the section below there is a discussion of opinions involving some of the more commonly-occurring multiple case scenarios. The list is arranged by fact pattern to make it easier to identify cases on point with you client's case and thus provide a starting point for your research. Note that the list is intended to be illustrative not exhaustive. Be sure to read any opinions listed in Westlaw or LexisNexis as disagreeing with an opinion discussed below. Such disagreements are often based on slight differences in the fact patterns, and thus will aid you is analyzing your client's case.

Once you have sorted out your client's presentence custody credit as it relates to his or her multiple-case scenario, move on to the next step.

A. Multiple Case Scenario: No Probation or Parole Involved

Scenario: One Case Deferred via Hold Pending Resolution of the Other – Overlapping Presentence Custody – Both Cases Sentenced

- Reference Case: *People v. Lathrop* (1993) 13 Cal.App.4th 1401.
- Fact Pattern: Defendant is arrested in County A. On the same day, County B places a hold[7] on defendant in the subject case. County A transports defendant to County B, deferring the County A case pending resolution of the County B case.
- Holding: Defendant is **entitled** to presentence custody credit at the time the first case is sentenced, covering the period from arrest on that case, or a hold being placed due to it, through sentencing. At the time the second court imposes sentence on the second case, if it ever does, defendant will not be entitled to credit for time already credited to the first sentence. This avoids duplicative credit.
- Reasoning: To not award all presentence custody at the time of the first case to be sentenced risks substantial difficulties should the charges in the second case be dismissed after the first case resolves. This would result in the defendant receiving no presentence custody credit, even though after the dismissal of the second case his or her custody is attributable to that first case.
- Additional Case: *In re Joyner* (1989) 48 Cal.3d 487 [same facts but two different states instead of counties].

[7] As the California Supreme Court explained: "The term 'hold' does not appear in any statute and although it has been mentioned frequently in the case law, the term has seldom been defined or explained. [Citation.] A hold refers generally to any document or agreement or understanding, formal or informal, used to prevent the release of a prisoner. Although it has become common to speak of a warrant hold as providing a basis for custody, it would seem that, strictly speaking, custody must be based ultimately on the arrest warrant itself or on other recognized legal process. [Citations.]" (*In re Joyner* (1989) 48 Cal.3d 487, 490, fn. 2.)

Scenario: One Case Deferred via Hold Pending Resolution of the Other – Overlapping Presentence Custody – Other Case Subsequently Dismissed

- Reference Case: *In re Marquez* (2003) 30 Cal.4th 14.
- Fact Pattern: Defendant arrested in County A; released on bail. While on bail, arrested in County B for an unrelated offense. County A puts a hold on defendant while County B proceeds with prosecution. Defendant is convicted in County B. Defendant then returned to County A and convicted on the case there. Later, the County B case is reversed on appeal and the charges are dismissed.
- Holding: Defendant is **entitled** to presentence custody from the time of the hold through sentencing in the County A case upon the subsequent dismissal of the County B case. This is because this period can be deemed attributable to the conduct for which defendant was convicted in the County A case as a result of County A placing a hold on him prior to sentencing in the County B case.
- Reasoning: Initially, County A placed a hold on defendant following arrest in County B, thus making defendant's presentence custody attributable to the pending criminal charges in two counties. Had County B dropped its charges at that time, the subsequent custody would have been attributable solely to the County A hold. Thus, similarly, once County B dismissed charges following remand, all presentence custody following County A's hold became attributable to the County A case.

Scenario: Released on Bond in One Case then Arrested in New Case – Overlapping Presentence Custody – Both Cases Sentenced Concurrently

- Reference Case: *People v. Kunath* (2012) 203 Cal.App.4th 906.
- Fact Pattern: Defendant arrested for committing an offense and then released on bond. A short time later, defendant arrested for committing a new offense and held

in presentence custody on both charges. Defendant convicted in both cases and sentenced to concurrent prison sentences at the same sentencing hearing.

- Holding: Defendant is **entitled** to dual presentence custody credit where he or she has been in presentence custody at the same time on all charges and he or she is sentenced at the same time on all charges to concurrent terms, so long as the presentence custody has not already been credited to a previously imposed sentence.
- Reasoning: A defendant in this scenario is entitled to dual presentence custody credit consistent with the policy behind Penal Code section 2900.5 of equalizing the total time in custody between those who spend time in presentence custody and those who do not. Were this not the case, the result would be contrary to the Penal Code section 2900.5 policy: Consider two defendants who are arrested at the same time and charged with the same two crimes. One posts bail, the other spends time in presentence custody. A year later, both plead guilty and are sentenced to one year for each conviction, to be served concurrently. If the defendant who spent time in presentence custody was only credited with his or her one year of presentence custody against only one of the two concurrent terms, then he or she would still have to serve a year on the other concurrent term, for a total of two years in custody. By contrast, the defendant who posted bail would only be serving one year in custody for the two one-year concurrent terms.

Scenario: Convicted and Sentenced in One Case with Unrelated New Charges Subsequently Filed – Presentence Custody on New Case Overlaps with Already-Existing Confinement in Earlier Case

- Reference Case: *In re Rojas* (1979) 23 Cal.3d 152.
- Fact Pattern: Defendant is convicted of an offense and sentenced to prison. Some time later, while still in prison, new unrelated charges are filed. Defendant is transferred from prison to jail pending trial on the new charges. While in jail,

defendant remains in the constructive custody of the prison and receives credit against his prison term.

- Holding: Defendant is **not entitled** to presentence custody credit for a period of presentence custody that is attributable solely to another offense such as where it occurs simultaneous to a prison term the defendant is already serving on a separate, unrelated offense.
- Reasoning: Because Penal Code section 2900.5 does not authorize presentence custody credit for a proceeding that has no effect on defendant's liberty (i.e., was not the but-for cause of the presentence custody), there is no basis for awarding credit to a person who is already incarcerated on a different matter and is subsequently charged with and convicted of a new offense.
- Additional Cases: *People v. Callahan* (2006) 144 Cal.App.4th 678 (instead of already being in prison at the time the new charges are filed, defendant is in a state hospital); *People v. Adrian* (1987) 191 Cal.App.3d 868 (complicated fact pattern involving overlapping parole and probation grants and revocations and a prison term for parole revocation).

B. Multiple Case Scenario: Probation/Parole – Violation Solely Attributable to New Case

Scenario: Probation Violation – Violation Solely Attributable to New Case

- Reference Case: *People v. Johnson* (2007) 150 Cal.App.4th 1467.
- Fact Pattern: Defendant is on probation when arrested in a new case. Found in violation of probation and probation terminated. Defendant's presentence custody in the new case and the probation violation case overlap.
- Holding: Defendant is **entitled** to presentence custody credit against his sentence in the new case for the period prior to that sentencing where he was restrained for

both the violation and the new case.

- Reasoning: Because defendant was found in violation of probation based solely upon the crimes for which he was convicted in the new case, the conduct that led to his conviction in the new case was the "but for" cause of his presentence custody. But for the new case, defendant would have been free from incarceration.
- Additional Cases: *People v. Williams* (1992) 10 Cal.App.4th 827 (similar facts and outcome except involved dismissal of 12 counts in new case); *People v. Odom* (1989) 211 Cal.App.3d 907 (similar facts and outcome except involved hold being placed on VOP case and a release on own recognizance in new case); *People v. Cooksey* (2002) 95 Cal.App.4th 1407 (similar facts but different outcome where defendant received a consecutive sentence comprised of a principle term for the new case and a subordinate term for the VOP case; under these facts, consistent with Pen. Code, § 2900.5, defendant only entitled to presentence custody credit for the presentence period against his principle term, not additionally against the consecutive subordinate term).

Scenario: Parole Violation – Violation Solely Attributable to New Case

- Reference Case: *People v. Kennedy* (2012) 209 Cal.App.4th 385.
- Fact Pattern: Defendant on parole when arrested both in a new case and for violating his parole. A parole hold is immediately placed on defendant.
- Holding: Defendant is **entitled** to presentence credits from the day of his arrest in the new case through the day of sentencing in that case even though that period overlaps with a presentence custody period for the parole revocation.
- Reasoning: Defendant is entitled to the presentence custody credit at issue because his parole was revoked solely based on the conduct for which he was convicted in the new case. In other words, the conduct leading to the defendant's sentence was a dispositive ("but for") cause of his presentence custody.

C. Multiple Case Scenario: Probation/Parole – Violation Not Solely Attributable to New Case

Scenario: Probation Violation – Custody Not Attributable to New Case

- Reference Case: *People v. Brown* (1980) 107 Cal.App.3d 858 (Note that this case was decided before the California Supreme Court's decision in *People v. Bruner* (1995) 9 Cal.4th 1178, discussed below.)
- Fact Pattern: Defendant is on probation in County A when arrested in County B for a new offense. Following presentence time in County B, defendant is convicted for the new offense. Probation is granted with a probation jail term. Upon completion of probation jail term in County B, defendant is transported to County A, whereupon that probation is revoked due to four different violations: not obeying all laws (the County B new offense), failing to keep appointments with probation officer, failing to make restitution payments to victim, and failing to pay any portion of fine imposed. Defendant incarcerated upon revocation of County A probation.
- Holding: Upon revocation of County A probation, defendant is **not entitled** to presentence custody credit for the time he was incarcerated in County B for the new offense.
- Reasoning: Defendant's revocation of probation in the County A case was based on four separate violations, only one of which was the County B offense. Penal Code section 2900.5 requires credit against the County A sentence only where the County B custody is attributable to the County A proceedings. Here defendant was not entitled to credit because there was no factual showing that he was held in custody in County B based on the proceedings in County A.

Scenario: Parole Violation – Violation Not Solely Attributable to New Case

- Reference Case: *People v. Bruner* (1995) 9 Cal.4th 1178.
- Fact Pattern: In Case B, defendant is convicted of an offense for which he receives a prison sentence concurrent to a term he is already serving for violating parole in Case A. Defendant's parole violation custody was based in part on his conviction in Case B, but also upon other, unrelated violations.
- Holding: A defendant is **not entitled** to presentence custody credit where his or her presentence custody arises from conduct not solely attributable to that for which he or she is convicted absent a showing that the conduct that led to the conviction was the "but for" cause of the presentence custody.
- Reasoning: To allow dual presentence custody credit for conduct that is only partially attributable to the conduct for which a defendant is newly convicted and sentenced is contrary to the purpose of Penal Code section 2900.5 of equalizing the amount of time spend in custody by both those who can post bail and those who cannot. Further, affording a defendant dual presentence credit under this scenario would likely negate the imposition of any sentence for parole violation rendering such provisions meaningless.
- Additional Cases: *People v. Stump* (2009) 173 Cal.App.4th 1264 [similar facts and outcome]; *In re Nickles* (1991) 231 Cal.App.3d 415 [similar facts and outcome]; *People v. Shabazz* (2003) 107 Cal.App.4th 1255 [similar facts and outcome except parole not revoked at time of sentencing on new case].

D. Multiple Case Scenario: Probation/Parole – Violation – Additional Scenarios

Scenario: Probation Violation – Overlapping Presentence Custody – Sentenced on VOP Case and New Case Dismissed

- Reference Case: *People v. Pruitt* (2008) 161 Cal.App.4th 637.
- Fact Pattern: Defendant is on probation when arrested and placed in presentence custody on new criminal charges. Some time later, probation is revoked based on the new offense. Following a probation revocation hearing, previously stayed prison sentence imposed and new criminal charges dismissed.
- Holding: Defendant is **not entitled** to presentence custody credit for period from the date of arrest for the new criminal charges, which were subsequently dismissed, through sentencing on the revocation of probation in the original case.
- Reasoning: Because the case involving the new charges was dismissed, the period of presentence custody from arrest to revocation of probation, which was solely attributable to the new charges, also went away. This is so even though this period of presentence custody was based on conduct that ultimately led to the revocation of defendant's probation, because it was not attributable to the proceedings for which he was originally convicted and sentenced. Had defendant's probation been summarily revoked when he was arrested instead of six months later, he would have been entitled to this additional period of presentence custody credit.
- Additional Case: *People v. Huff* (1990) 223 Cal.App.3d 1100 [same facts except new charges dismissed due to failure to prosecute].

Scenario: Probation Violation – Overlapping Presentence Custody – Probation Reinstated in VOP Case and Granted in New Case

- Reference Case: *People v. Santa Ana* (2016) 247 Cal.App.4th 1123.
- Fact Pattern: Defendant's current case triggered a probation violation in an earlier case resulting in dual presentence custody for violation case and new case. Probation in violation case is revoked then reinstated; in current case it is granted. A condition of probation in each case is a term in jail, to be served consecutively.
- Holding: Defendant is **not entitled** to an award of presentence custody credit against each consecutively imposed probation condition jail term for dual presentence custody period, as this would result in duplicative presentence credit.
- Reasoning: Although defendant may have only served a single period of presentence custody, it was not solely attributable to the offense triggering the violation of probation. Rather, the single period of custody was attributable to multiple offenses—the new offense and the offense of conviction underlying the violated grant of probation—for which a consecutive sentence was imposed and thus it fell squarely within the language of Pen. Code, § 2900.5, subd. (b). Further, a jail term imposed as a condition of probation, where imposition of sentence has been suspended, falls within the scope of the word "sentence" as used in Pen. Code, § 2900.5, subd. (b).

Scenario: Probation Violation – Overlapping Presentence Custody – Presentence Period Attributable to Arrest in New Case, VOP Triggered by New Case, and Additional In-Custody Offense

- Reference Case: *People v. Gonzalez* (2006) 138 Cal.App.4th 246.
- Fact Pattern: In Case A, defendant is convicted and placed on probation. In Case B, while on Case A probation, defendant commits new, unrelated offenses.

Probation revoked. In Case C, while in presentence custody on Case B, defendant is charged with in-jail offense. Defendant is convicted in Case B, pleads in Case C, and admits probation violation in Case A. The trial court awarded presentence credit in such a way as to create excess credit that defendant had earned but ended up losing.

- Holding: Defendant is **entitled** to presentence custody credit across multiple cases under the particular facts of this case, because the Penal Code section 2900.5 rule of strict causation does not apply where the total earned credit applied across the individual cases does not result in duplicative credit.
- Reasoning: Although defendant's custody can be attributed to "multiple, unrelated causes," the strict causation (but for) rule does not apply under these facts. This rule is only applicable in cases involving the possibility of duplicate credit and thus a windfall for the defendant. Here, the excess credit could be applied to Case B, even though it was not the sole reason for the presentence confinement, because defendant was not seeking duplicate credit for the period of confinement. Thus the Penal Code section 2900.5, subdivision (b), prohibition against duplicate credit is not violated.

Scenario: Probation Violation – Overlapping Presentence Custody – Diagnostic Facility Commitment for One Case While Serving Sentence on Another

- Reference Case: *People v. Gibbs* (1991) 228 Cal.App.3d 420.
- Fact Pattern: While serving a jail term as a condition of probation in Case A, defendant was arrested and convicted in Case B. Prior to Case B sentencing, defendant was sent to the Department of Corrections Diagnostic Facility for a diagnostic evaluation pursuant to Penal Code section 1203.03. Subsequently, probation in Case A was revoked, and defendant was sentenced to prison in Case B, with a concurrent sentence imposed.
- Holding: A defendant committed to a CDCR diagnostic facility for a sentencing

evaluation is **entitled** to custody credit against current prison sentence under Penal Code section 1203.03, subdivision (g), even if he simultaneously earns equivalent credit against a previously imposed sentence in an unrelated case for which he was serving a jail term as a condition of probation.

- Reasoning: Penal Code section 1203.03 specifically addresses the award of presentence custody credit in the context of commitments to facilities operated by the Department of Corrections. As such, it differs from the later-enacted, general provisions of Penal Code section 2900.5 for presentence custody credit in institutions not operated by the Department of Corrections. This distinction is consistent with a legislative intent that all time spent by a defendant under commitment to the Department of Corrections in a particular case should be credited on their prison sentences. A defendant in such circumstances will only serve the same length of time as those sentenced directly to prison on the initial date of sentencing.

E. Multiple Case Scenario: Mandatory Supervision

Scenario: Incarcerated on a New Case While on Mandatory Supervision

- Reference Case: *People v. Samuels* (2018) 21 Cal.App.5th 962.
- Fact Pattern: In Case A, defendant pleaded no contest and the trial court suspended execution of sentence and ordered mandatory supervision pursuant to Penal Code section 1170, subd. (h)(5)(B). While on mandatory supervision, he pleaded no contest to a new offense in Case B. He also admitted violating the terms of his mandatory supervision. The trial court sentenced him to county jail on Case B. It released him from custody on Case A, and reinstated mandatory supervision. After his release from custody on Case B, defendant moved to correct the credit calculation in Case A, arguing he was entitled to work and conduct credits under Penal Code section 4019 for the time he spent in jail on

Case B.

- Holding: Defendant is **not entitled** to an award of presentence custody credit against his term of mandatory supervision. "[P]ursuant to section 1170, subdivision (h)(5)(B), an incarcerated defendant may not accrue section 4019 credits against a term of mandatory supervision unless the conduct resulting in the supervision was the 'true and only unavoidable basis' for the incarceration. (*People v. Samuels*, *supra*, 21 Cal.App.5th 962, 965, quoting *People v. Bruner*, *supra*, 9 Cal.4th 1178, 1192.)
- Reasoning: While under mandatory supervision, a defendant is "entitled to only actual time credit against the term of imprisonment" unless "in actual custody related to the sentence imposed by the court." (Pen. Code, § 1170, subd. (h)(5)(B).) The trial court properly denied defendant's request for section 4019 credits against the term of mandatory supervision in Case A because he was not "in actual custody related to the sentence imposed by the court" in Case A. The court released defendant from custody on Case A and reinstated mandatory supervision before he was incarcerated in Case B. By definition, a defendant under mandatory supervision is not under restraint. (*Ibid.* [mandatory supervision commences "upon release from physical custody or an alternative custody program"].) A defendant may not accrue section 4019 credits if not under restraint. Additionally, allowing defendant to accrue section 4019 credits against both his cases would result in a dual-credit windfall, which the California Supreme Court has repeatedly disavowed.

Step 9: Was this the first time your client was sentenced for the offense(s)?

A. First Time

If this was the first time that your client was sentenced for the offense(s) at issue in

the current appeal, skip this step.

B. Not the First Time

Situations where a defendant maybe sentenced more than once for a particular offense include the Court of Appeal remanding the case for resentencing or for a new trial, and the trial court recalling a sentence. In any of these situations, the defendant earns credit as outlined below.

Note that a defendant whose conviction is overturned on appeal and who is subsequently convicted of the same or related offenses is entitled to credit for time served on the first conviction against the second conviction under the Fifth Amendment. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 718–719, overruled on unrelated grounds in *Alabama v. Smith* (1989) 490 U.S. 794; see also *People v. Schuler* (1977) 76 Cal.App.3d 324, 335.) However, a defendant is not entitled to credit for time spent on probation under a conviction that is later invalidated as to a subsequent probation period imposed for a related offense. (*People v. Aragon* (1992) 11 Cal.App.4th 749, 761–762.).

Reason for Second Sentencing	**How Credits Are Calculated**	**Authority**
Appellate Remand for Resentencing	The trial court must calculate **actual** time defendant has already served and credit that time against the original presentence conduct credits calculation, if applicable). The **conduct** credits for time spent in local jail during remand is calculated by CDCR (or county jail authorities if the defendant was sentenced under Realignment).	*People v. Buckhalter* (2001) 26 Cal.4th 20, 23, 33–34, 37.
Appellate Remand for Retrial	**Phase I (the period from initial arrest to the initial sentencing)** The defendant accrues credit as a presentence inmate. The trial court is responsible for calculating this time. **Phase II (the period from the initial sentencing to the reversal)** The defendant accrues credit as a postsentence inmate. Prison authorities (or county jail authorities if the defendant was sentenced under Realignment) are responsible for calculating **conduct** credit earned in accordance with defendant's ultimate postsentence status. The trial court must calculate **actual** credit. **Phase III (the period from the reversal to the second sentencing)** The defendant accrues credit as a presentence inmate. The trial court is responsible for calculating this time.	*In re Martinez* (2003) 30 Cal.4th 29, 32–37; see also *People v. Donan* (2004) 117 Cal.App.4th 784, 788–792.

Reason for Second Sentencing	**How Credits Are Calculated**	**Authority**
Resentencing Pursuant to California Rules of Court, Rule 4.452	The trial court must calculate **actual** time defendant has already served and credit that time against the new sentence (plus, the original presentence conduct credits calculation, if applicable). The **conduct** credits for time spent in custody from the initial sentencing to the second sentencing is calculated by CDCR (or county jail authorities if the defendant was sentenced under Realignment).	*People v. Saibu* (2011) 191 Cal.App.4th 1005, 1011–1013.
Sentencing Following Recall pursuant to Penal Code section 1170, subdivision (d)	The trial court must calculate **actual** time defendant has already served and credit that time against the new sentence (plus, the original presentence conduct credits calculation, if applicable). The **conduct** credits for time spent in local jail during the recall proceedings is calculated by CDCR (or county jail authorities if the defendant was sentenced under Realignment).	*People v. Johnson* (2004) 32 Cal.4th 260, 263, 267–268.

Step 10: Assess the outcome of your calculations.

After working through Steps 1 through 9, you now have your client's presentence custody credit calculated. Your calculation will present one of four scenarios: (A) awarded credit matches earned credit, (B) awarded credit exceeds earned credit, (C) earned credit exceeds awarded credit, or (D) earned credit exceeds imposed custody term.

A. Awarded Credit Matches Earned Credit

If your calculation matches the trial court's award of presentence custody credit, the trial court properly calculated your client's presentence custody credit. There is nothing more for you to do on this issue.

B. Awarded Credit Exceeds Earned Credit

If the trial court awarded more presentence credit than your client earned, the trial court has committed a mistake in your client's favor. You should advise your client that there is a possible adverse consequence if he or she pursues the appeal because the Court of Appeal may find the mistake and take the unearned credit away. For tips on communicating with your client about an adverse consequence, see "Tip Six" in CCAP's article "Effective Communications with the Client and Trial Counsel" found at: http://www.capcentral.org/procedures/client_matters/communication.asp.

C. Earned Credit Exceeds Awarded Credit

If the trial court made a mistake by not awarding your client all the presentence custody credit he or she was entitled to, and the credit does not exceed the imposed term of imprisonment, move on to Step 11.

D. Earned Credit Exceeds Imposed Custody Term

If it appears that your client's presentence custody credit exceeds the imposed term of imprisonment, move on to Steps 11 and 12.

Step 11: Correcting Presentence Credit Error that Undercredits Your Client

There are two ways to correct a presentence credit error that undercredits your client: (A) raising the issue first in the trial court or (B) raising the issue first on appeal. However, the choice of where to first address a credit issue is not entirely discretionary. By statute, the matter must first be presented to the trial court unless certain factors are present. If those factors are present, then and only then may the matter be first presented on appeal.

A. Raising a Credit Issue First in the Trial Court

If your review of the record, or information from trial counsel or your client, reveals that an error was made in calculating your client's presentence custody credit and this is your only issue on appeal, you must first raise the matter in the trial court. (Pen. Code, § 1237.1.) Such a request may be made informally in the form of a letter rather than by a formal motion. (Pen. Code, § 1237.1 [a claim of error in the calculation of presentence custody credit presented to the trial court "may be made informally in writing"], abrogating *People v. Clavel* (2002) 103 Cal.App.4th 516, 518–519 [holding that Pen. Code, § 1237.1 requires a formal motion not an informal letter].) Such a letter is referred to as a *Fares*[8] letter and is typically addressed to the sentencing judge. However, practices may vary by court, so you should first familiarize yourself with the preferred *Fares* letters practice in the trial court involved. Following your submission of the *Fares* letter, if the trial court disagrees with your assertion of error, you may then raise the credit issue on appeal.

Note that the requirement that a presentence custody credit issue must first be raised in the trial court applies only to "mathematical or clerical error[s]." (*People v.*

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

Delgado (2012) 210 Cal.App.4th 761, 765.) Errors of a non-clerical nature may be directly raised on appeal. (*Id.* at pp. 766–767.)

Sometimes you will have to locate additional records to support your claim of error. (See Robinson, Credits Redux: How to Get 'Em, Where to Get 'Em (SDAP May 2009) pp. 15–19, found at: http://www.sdap.org/downloads/research/criminal/ptc2.pdf.) But be aware that you may need to request and receive an expansion of your appointment in order to be compensated locating the relevant records if doing so takes more than a nominal amount of time.

B. Raising a Credit Issue First on Appeal

There are several situations where a credit issue may be raised on appeal without first raising it in the trial court. However, even where it is not necessary to first raise the error in the trial court, it is often to your client's benefit to do so. This is especially true where your client's sentence is relatively short and he or she will have served the time before the appellate court hears the issue.

1. Other Issues Raised on Appeal

When there already is an issue for you to raise on appeal other than the credit issue, the credit issue may also be raised without first seeking correction in the trial court. (*People v. Acosta* (1996) 48 Cal.App.4th 411.)

2. The Error Is a Matter of Law

If the trial court has imposed the wrong law in calculating custody credit, then the issue is not a matter of calculation but an error of law and may be brought to the attention of the appellate court without going to the trial court first. (*People v. Delgado*, *supra*, 210 Cal.App.4th 761 [Pen. Code, § 1237.1 does not preclude a defendant from raising, as the

sole issue on an appeal, a claim his or her presentence custody credit was calculated pursuant to the wrong version of the applicable statute].) The failure to award the legally mandated amount of presentence custody credit results in an unauthorized sentence that can be corrected whenever it is discovered. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) A sentence is unauthorized "where it could not lawfully be imposed under any circumstance in the particular case . . . [such as] where the court violates mandatory provisions governing the length of confinement." (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

3. The Error Occurred in Juvenile Wardship Adjudication

"Penal Code section 1237.1—which precludes a criminal defendant from raising an error in the calculation of presentence custody credit, at least as the sole issue on appeal, if he or she has not previously raised the error in the trial court—does not apply to juvenile appeals." (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 350.) This is because the references used in Penal Code section 1237.1 to an appeal "by the *defendant* from a judgment of *conviction* . . ." (emphasis added) do not apply to a minor who is instead subject to a juvenile wardship adjudication under the Welfare and Institutions Code. (*Id.* at pp. 351–352.) This is because "[t]he State has 'a parens patriae interest in preserving and promoting the welfare of the child,' [citation], which makes a juvenile proceeding fundamentally different from an adult criminal trial." (*Schall v. Martin* (1984) 467 U.S. 253, 263.)

4. Appellate Waiver and Forfeiture

A defendant who signs a general waiver of his right to appeal is not barred from challenging an alleged misapplication of presentence conduct credit on appeal where the plea agreement and waiver of appellate rights made no mention of conduct credit. (*People v. Kennedy* (2012) 209 Cal.App.4th 385, 391.) However, in *People v. Becerra*

(2019) 32 Cal.App.5th 178, the Sixth District determined the defendant's appellate waiver encompassed his challenge concerning custody credits and that a certificate of probable cause was required.

A defendant does not waive an issue regarding the appropriate formula for calculating presentence conduct credit when he fails to object at trial. (*People v. Cooper* (2001) 27 Cal.4th 38, 41, fn. 3 citing with approval *People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139.)

Step 12: Does your client's presentence custody credit exceed imposed term?

If your client's presentence custody credit does not exceed his or her term of imprisonment, skip this step.

In some cases, your client's presentence custody credit may exceed the term of imprisonment imposed by the trial court during sentencing. When this happens, "the entire term of imprisonment shall be deemed to have been served." (Pen. Code, § 2900.5, subd. (a).) The defendant need not be delivered to CDCR or county jail. (Pen. Code, § 1170, subd. (a)(3); *People v. Wallace* (1979) 97 Cal.App.3d 26, 28.). Although the defendant will not have served a prison term actually in prison (or in local custody under Realignment), the sentence is still considered a prison term for future sentence enhancement purposes. (Pen. Code, §§ 1170, subd. (a)(3), 667.5, subd. (b).)

Additionally, if defendant's presentence custody time is greater than the period of imprisonment ordered, the excess should be applied against any ordered fine. (Pen. Code, § 2900.5, subd. (a); *People v. McGarry* (2002) 96 Cal.App.4th 644 [outlining how to allocate monetary credit]; see also *People v. Pinon* (2016) 6 Cal.App.5th 956, 966-967; *People v. Morris* (2015) 242 Cal.App.4th 94, 97, 101-103 [excess custody credits resulting from a Proposition 47 resentencing can be applied to reduce fines].) This is calculated at a rate of not less than $125 per day. (Pen. Code, § 2900.5, subd. (a).) However, Penal Code section 2900.5, subdivision (a), which provides that the time that a

defendant has served in custody may be credited against fines, does not apply to assessments (e.g., Pen. Code, § 1465.8, subd. (a)(1), court operations assessment; Gov. Code, § 70373, subd. (a)(1), court facilities assessment). (*People v. Robinson* (2012) 209 Cal.App.4th 401, 405–407.)

If your client's presentence custody "credits equal the total sentence, including both confinement time and the period of parole[,]" your client will not have to serve a period of parole. (Cf. Pen. Code, § 1170, subd. (a)(3).) Similarly, when errors in the calculation of presentence custody credit results in the defendant serving time in excess of the imposed prison term, the excess time is applied against the parole term where the error is one "involving ministerial application of various types of sentence credits earned by determinate-term prisoners [(see, e.g., *In re Ballard* (1981) 115 Cal.App.3d 647, 648–650 [presentence actual and conduct custody credits])], not discretionary decisions by the executive branch regarding parole of life prisoners. [Citations.]" (*In re Lira* (2014) 58 Cal.4th 573, 582.) However, excess custody credits resulting from a Proposition 47 resentencing do not reduce the one-year period of parole required by section 1170.18, subdivision (d). (*People v. Morales* (2016) 63 Cal.4th 399, 403).

There is a split of authority whether excess custody credits can be applied to reduce the period of postrelease community supervision (PRCS). (Compare *People v. Steward* (2018) 20 Cal.App.5th 407 and *People v. Superior Court (Rangel)* (2016) 4 Cal.App.5th 410.)

IV. Other Resources

5 Erwin et al., California Criminal Defense Practice (2012) Sentencing Credits, §§ 91.140–91.142.

Adachi et al., California Criminal Law: Procedure and Practice (2012) §§ 37.54–37.60, 37.65.

Robinson, Credits Redux: How to Get 'Em, Where to Get 'Em (SDAP May 2009) < http://www.sdap.org/downloads/research/criminal/ptc2.pdf>.

Couzens and Bigelow, Awarding Custody Credits after Realignment (Feb. 2013) <http://www.courts.ca.gov/partners/documents/Credits_Memo.pdf>.