

## **PRESENTENCE CUSTODY CREDITS: A STEP-BY-STEP GUIDE**

**CCAP February 2013**

Virtually every criminal appeal involves presentence custody credits, and a good number of them involve mistakes in the calculation of those credits. While it seems as though calculating a defendant's credits would be a simple undertaking that involves counting the days that a defendant was in custody and some simple math, it can actually be incredibly complicated. The California Supreme Court has recognized 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 has also noted, "in what is surely an understatement," that "[c]redit determination is not a simple matter." (*Ibid.*, quoting *People v. Adrian* (1987) 191 Cal.App.3d 868, 875 [alteration in original and internal quotations omitted]; see also *People v. Daniels* (2003) 106 Cal.App.4th 736, 739 ["This case illustrates how perplexing the computation of custody credits may be for the trial court."].)

This article is intended to help both new and experienced appellate attorneys navigate credits issues and ensure that their clients have received all the presentence custody credit that they are entitled to (or identify a potential adverse consequence when a client has received more credit than he or she should have). The Courts of Appeal routinely check presentence custody credits when cases are reviewed and you do not want the court to find a mistake that you did not find, especially one that is an adverse consequence for your client and results in a loss of credit. The article begins with a brief introduction about presentence custody credits, which is followed by a step-by-step guide for calculating presentence custody credits and raising the issue on appeal.

Unless otherwise noted, this article deals with calculating *presentence* custody credit. Once a defendant is sentenced, his or her custody credit may be calculated differently depending on a number of factors.

## **Introduction to Presentence Custody Credits**

Generally, subject to certain exceptions noted below, a defendant is entitled to credit for actual time spent in custody prior to sentencing and worktime and good behavior credits (collectively referred to as “conduct credits”). (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) Penal Code section 2900.5, subdivision (a) governs the award of actual custody credit. Depending on a number of factors, presentence conduct credits are calculated under Penal Code sections 4019; 2933.1; 2933.2; 2933.5; 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]; former Penal Code section 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 Penal Code section 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]; or former Penal Code section 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]. Concluding which conduct credit provision should apply to a given defendant depends on a number of circumstances, including, for example, the nature of the present and any prior offense(s), the date of the offense, and the date of sentencing.

### **A. Duty of Sentencing Court to Calculate Custody Credit**

It is the duty of the sentencing judge to calculate both actual presentence credit and any presentence conduct credit to which a defendant is entitled. (Pen. Code, §§ 2900.5, subds. (a) & (d); *People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) 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.) Any challenge to the report must be

heard at the time of sentencing (Cal. Rules of Court, rules 4.310, 4.472), although errors in the calculation of presentence custody credits can be raised anytime with certain conditions applicable. (See Pen. Code, § 1237.1.) You can usually find information regarding time in custody in the probation report, the sentencing hearing minute order, and/or the reporter’s transcript of the sentencing hearing.

The custody credit calculation must be recorded on the abstract of judgment or commitment. (Pen. Code, § 2900.5, subd. (d); Cal. Rules of Court, rules 4.310, 4.472.)

**B. 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).)

**C. 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.)

## Step-by-Step Guide to Calculating Presentence Custody Credits

The suggested steps below are general instructions for attorneys who are new to presentence credit issues and are looking for a systematic approach to get started. More experienced appellate practitioners may find this article useful when dealing with specific custody credit issues.<sup>1</sup> The steps address the multiple issues that may arise when calculating presentence custody credits and provide a framework for the calculations. The process will hopefully be a helpful starting point for researching and calculating credits. Once you have had an opportunity to deal with credits in a few cases, you may find that a different approach works best 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 the Defendant Waive Any Presentence Credits?**

One of the first things you will want to determine is whether the defendant waived any portion of his presentence custody credits. A defendant can waive his entitlement to presentence credits but the waiver must be knowing and intelligent [“*Johnson* waiver”]. (*People v. Johnson* (2002) 28 Cal.4th 1050, 1054-1055; see also *People v. Johnson* (1978) 82 Cal.App.3d 183, 187-188.) Frequently, an appellant will waive his accrued credits in exchange for reinstatement on probation following a violation of probation.

- A *Johnson* waiver applies to any future use of the credits if probation is later terminated and prison imposed, even if appellant was not specifically so advised, and even if appellant will have already served the equivalent amount of time in jail for the prison sentence. (*People v. Arnold* (2004) 33 Cal.4th 294, 307-309.)

---

<sup>1</sup> Although on the surface an award of credits would appear to involve straight forward mathematical calculations, this is an unsettled area of the law due to a number of recent amendments to the presentence conduct credit statutes. Currently there are a number of credits issues that have created a split of authority in the Courts of Appeal and are pending in the California Supreme Court.

- A *Johnson* waiver of future credits to be earned in alcohol or drug rehabilitation is a waiver of such credits for all purposes, including application of such credits to a subsequently imposed prison term in the event probation is revoked. (*People v. Jeffrey* (2004) 33 Cal.4th 312, 318; *People v. Black* (2009) 176 Cal.App.4th 145, 152-155.)
- The trial court must exercise discretion in each case for waiver rather than having a standard practice. (*People v. Juarez* (2004) 114 Cal.App.4th 1095, 1103-1106; but see *People v. Torres* (1997) 52 Cal.App.4th 771, 781-782.)
- If it is determined that there was no adequate waiver, the remedy is to remand for resentencing to calculate credits. The appellate court will not independently award them. (*People v. Harris* (1991) 227 Cal.App.3d 1223, 1227-1229.)

If the defendant waived his or her presentence custody credits, determine whether any portions of the confinement were not subject to the waiver. Also, ascertain whether there is an appellate issue regarding the validity waiver, i.e. whether it was knowing or voluntary. If the defendant waived all time, you can stop here. If there was no waiver, or if some custody credits were not waived, move on to the next step.

**Step 2: Is the Defendant Entitled to Actual Custody Credit Based on the Location of his or her Presentence Custody?**

*Notes: If the defendant was in custody based on two or more offenses, make sure to review Step 8 below*

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

Generally, a defendant will earn credit for actual time spent in presentence confinement. To receive credit, however, the defendant must be “in custody.” (Pen. Code, § 2900.5, subd. (a).) A defendant is entitled to actual custody credit for “any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility,

hospital, prison, juvenile detention facility, or similar residential institution . . . .” (*Ibid.*) Actual custody credit is not limited to time served in these locations, however. (*Ibid.*) In addition to custody in the traditional jail setting, a defendant may be entitled to receive credit for custody if she is subject to restraints not shared by the general public. The non-jail facility must be custodial and cannot be a voluntary placement by defendant. (*In re Wolfenberger* (1977) 76 Cal.App.3d 201, 203-205.) In some cases, a defendant may not be entitled even to actual credit if he or she was not subject to sufficient restraints during the presentence confinement. A potential adverse consequence may arise in a case if the trial court awarded actual credit for time spent in a facility where the defendant should not earn actual credit.

A defendant will receive actual credit for time spent in the following locations:

- Rehabilitation facility. (*People v. Rodgers* (1978) 79 Cal.App.3d 26; *People v. Darnell* (1990) 224 Cal.App.3d 806, 809-811.)
- Time spent in a residential drug treatment program as part of a Proposition 36 sentence. (*People v. Davenport* (2007) 148 Cal.App.4th 240.)

**Exception:** A person does not receive any actual custody credit for time spent as an outpatient in a drug rehabilitation program. (*People v. Schnaible* (1985) 165 Cal.App.3d 275, 277-278.) Similarly, a mentally disordered sex offender, defendants found not guilty by reason of insanity, and mentally disordered offenders do not receive actual custody credit for time in an unlocked outpatient facility. (Pen. Code, §§ 1600.5, 2972, subd. (c).)

- Time in a hospital upon a finding of incompetency pursuant to Penal Code section 1368. (*People v. Cowsar* (1974) 40 Cal.App.3d 578, 579-581.)
- Diagnostic facility. (Pen. Code, § 1203.03 subd. (g); *People v. Goodson* (1990) 226 Cal.App.3d 277, 280.)
- Juvenile detention facility. (*In re Eric J.* (1979) 25 Cal.3d 522, 534-536.)

- Home Detention. Due to various statutory amendments, whether a defendant receives actual credit for home detention will depend on when the defendant was in home detention.

**From 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 January 1, 1999].)

**From January 1, 1999 to September 30, 2011:** Defendants did not receive actual credit for time spent in a home detention program. (Former Pen. Code, § 2900.5, subd. (a) [Stats. 1998, ch. 338, § 6, operative January 1, 1999, amended by Stats. 2011, ch. 15, § 466, operative Oct. 1, 2011]; *People v. Anaya* (2007) 158 Cal.App.4th 608.)

**Beginning on October 1, 2011:** Defendants receive actual credit for days served in home detention pursuant to Penal Code section 1203.018 (Pen. Code, § 2900.5, subd. (a) [Stats. 2011, ch. 15, § 466, operative Oct. 1, 2011].) Section 1203.018 addresses “electronic monitoring programs” which includes “home detention programs, work furlough programs, and work release programs.” (Pen. Code, § 1203.018, subd. (k)(2).)

A defendant under house arrest, and not subject to an electronic home detention program, may be entitled to actual credit depending on the circumstances of the defendant’s confinement. (Compare *People v. Lapaille* (1993) 15 Cal.App.4th 1159 with *People v. Pottorff* (1996) 47 Cal.App.4th 1709.)

- Work release program. If defendant has been released to participate in a work program in lieu of jail, time in the work program is not considered custody. But if the defendant was released for program participation

because of jail overcrowding, he or she is entitled to credit for the time pursuant to Penal Code sections 2900.5 and 4024.3. (*People v. Richter* (2005) 128 Cal.App.4th 575.)

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

**Step 3: If the Defendant is Entitled to Actual Custody Credit Based on the Location of His or Her Presentence Confinement, Count the Days of Custody.**

If the defendant served presentence time in any of the above locations, calculate how many days he or she was in custody. A defendant is entitled to actual presentence credit from the date the defendant is processed into jail or other custodial situation to the date of sentencing. (Pen. Code, § 2900.5, subs. (a) & (d); *People v. Ravaux* (2006) 142 Cal.App.4th 914, 919-921.) 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.) The amount of actual credit will be used to determine how much, if any, conduct credit the defendant is entitled to receive, as explained in the next two steps.

**Step 4: Is the Defendant Entitled to Conduct Credit Based on the Location of His or Her Presentence Custody?**

After calculating the defendant's actual custody credits, determine whether the defendant is entitled to conduct credit based on the location of his or her presentence custody. Unless otherwise prohibited, a defendant is entitled to earn presentence conduct credits 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 (ABX1 17), operative Oct. 1, 2011].)

A defendant is also entitled to conduct credits for time served in the following locations:



- When committed to a diagnostic facility for diagnostic evaluation. (Pen. Code, § 1203.03, subd. (g); *People v. Engquist* (1990) 218 Cal.App.3d 228, 231.)
- Where defendant is sent to California Youth Authority (now Division of Juvenile Justice (DJJ)) for amenability evaluation and ultimately sentenced to prison, or county jail for a felony under Realignment. (*People v. Engquist* (1990) 218 Cal.App.3d 228, 231; *People v. Garcia* (1987) 195 Cal.App.3d 191, 196-197, *People v. Saldivar* (1984) 154 Cal.App.3d 111, 114-115, *People v. Duran* (1983) 147 Cal.App.3d 1186, 1189-1193.)

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

- Committed to hospital as a Mentally Disordered Sex Offender. (*In re Huffman* (1986) 42 Cal.3d 552, 560-563.)
- Committed to a hospital after being found incompetent to stand trial. (Pen. Code, § 1368; *People v. Waterman* (1986) 42 Cal.3d 565, 571; *People v. Jennings* (1983) 143 Cal.App.3d 148, 150 [no credit for time in state mental hospital before proceedings reinstated]; see also *People v. Callahan* (2006) 144 Cal.App.4th 678, 686-687.) But once the defendant is determined to be competent, he or she is entitled to conduct credits regardless of where he is in custody. (*People v. Bryant* (2009) 174 Cal.App.4th 175, 182-184.)
- Committed to a hospital after being found not guilty by reason of insanity. A defendant found insane pursuant to Penal Code section 1026 is not entitled to precommitment conduct credits for time spent in jail or a hospital. (Pen. Code, § 1026.5, subd. (a)(1); *People v. Mord* (1988) 197 Cal.App.3d 1090, 1103-1105; see also *People v. Callahan* (2006) 144 Cal.App.4th 678, 686-687.)
- Time spent on house arrest as a condition of own recognizance release.

(*People v. Lapaille* (1993) 15 Cal.App.4th 1159, 1170-1173.)

- Time spent in electronic monitoring home detention pursuant to Penal Code section 1203.016. (*People v. Silva* (2003) 114 Cal.App.4th 122; see also *People v. Cook* (1993) 14 Cal.App.4th 1467.)
- Time spent in an alcohol recovery center or residential drug rehabilitation program. (*People v. Moore* (1991) 226 Cal.App.3d 783, 786; *People v. Darnell* (1990) 224 Cal.App.3d 806, 811; *People v. Palazuelos* (1986) 180 Cal.App.3d 962, 965; *People v. Broad* (1985) 165 Cal.App.3d 882. But see *People v. Mobley* (1983) 139 Cal.App.3d 320, 322-324 [defendant released on his own recognizance on the condition that he reside at drug treatment facility entitled to conduct credit on equal protection grounds].)

If the defendant was confined in a location where he or she earned presentence conduct credits, move on to the next step.

**Step 5: If the Defendant is Entitled to Conduct Credit Based on the Location of His or Her Presentence Confinement, Calculate the Presentence Conduct Credits.**

Once you have determined that the defendant is entitled to earn presentence conduct credit based on the location of confinement, the next step is to figure out how much, if any, credit the defendant is entitled to receive. Due to a number of recent amendments affecting the calculation of presentence conduct credit, this has become a very complicated endeavor. Whether a defendant is entitled to conduct credits, and the amount of any credit, will depend on a number of factors. You will need answers to the following questions to make the calculation:

- Where did the defendant serve his or her presentence custody?
- What were the dates of the defendant's presentence custody?
- What offense(s) was the defendant convicted of committing?
- When did the offense occur?

- What is the defendant's prior record?
- Was the defendant sentenced to prison, to county jail for a misdemeanor, to county jail incident to a grant of probation, or to county jail for a felony under Realignment?

To determine the actual number of conduct credits, all periods of noncontinuous custody are aggregated and the sum is the figure used to determine conduct credits.

(*People v. Dailey* (1992) 8 Cal.App.4th 1182, 1183-1184; *People v. Culp* (2002) 100 Cal.App.4th 1278, 1283-1284.)

Work through the next three sections to calculate the defendant's presentence conduct credit.

- A. First, determine whether the defendant lost conduct credits that he or she was otherwise entitled to earn.

A defendant is entitled to receive conduct credit unless it appears from the record that the defendant 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 the defendant was denied conduct credits because he or she refused to work or otherwise behaved badly.

- B. Second, determine whether the defendant's conduct credit is limited due to a presentence conduct credit disability.

There are a number of statutes that limit the amount of presentence conduct credit that a defendant may earn based on the offense that the defendant was convicted of committing and the defendant's prior record. These "credit disabilities," and selected cases applying them, are outlined below.

1. *Defendants Convicted of a Violent Felony Offense Listed in Penal Code Section 667.5 subdivision (c) that Was Committed After September 21, 1994*

The maximum presentence conduct credit that defendants convicted of a violent felony may earn is 15 percent of the actual period of confinement. (Pen. Code, § 2933.1, subds. (a), (c); *People v. Sylvester* (1997) 58 Cal.App.4th 1493, 1495-1497; *People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1138-1142; *People v. Palacios* (1997) 56 Cal.App.4th 252, 255-258; *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-824.)

When a defendant is convicted of both violent and nonviolent offenses, the 15 percent limitation applies to the entire period of presentence confinement, even if the defendant receives concurrent sentences. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 817; *People v. Nunez* (2008) 167 Cal.App.4th 761, 767-768; see also *In re Reeves* (2005) 35 Cal.4th 765, 774-776.)

A defendant is subject to the limitations imposed by section 2933.1 notwithstanding the circumstance that execution of sentence for the violent offenses has been stayed pursuant to section 654. (*In re Pope* (2010) 50 Cal.4th 777, 779-786.)

When a defendant's crime qualifies as a violent felony based on an enhancement, the defendant's conduct credit is still limited by section 2933.1 even if the trial court strikes the punishment for the enhancement pursuant to section 1385. (*In re Pacheco* (2007) 155 Cal.App.4th 1439, 1441-1442.) If the trial court strikes the enhancement in its entirety, however, such a defendant is entitled to full presentence conduct credits. (See *id.* at 1442, 1444-1446.)

If a defendant is granted probation following conviction for a violent felony, conduct credits on any jail time ordered as a condition of probation are computed under section 4019. However, if probation is subsequently revoked and a prison sentence imposed, the conduct credits are recomputed based on the 15 percent limitation. (*People v. Daniels* (2003) 106 Cal.App.4th 736, 738.)

If a defendant is sentenced in separate proceedings to a consecutive term for a nonviolent felony and then on the violent offense, even if presentence custody time on the nonviolent offense was served before the commission of the violent felony, section 2933.1 applies to the aggregate sentence. (*People v. Baker* (2002) 144 Cal.App.4th 1320, 1324.)

The section 2933.1 limitation applies only when the current felony is a violent felony as listed in Penal Code section 667.5, subdivision (c) at the time of commission of current felony. (See *People v. VanBuren* (2001) 93 Cal.App.4th 875, 878-879 disapproved other grounds *People v. Mosby* (2004) 33 Cal.4th 353.)

The trial court, and not the jury, determines whether a defendant's current felony offenses were violent for purposes of section 2933.1. (*People v. Garcia* (2004) 121 Cal.App.4th 271, 274.)

2. *Defendants Convicted of a Violent Crime Who Have Two or More Separate Prison Terms for Violent Crimes*

A defendant who is convicted of a felony offense listed in Penal Code section 2933.5 and has previously been convicted two or more times, and served two or more separate prison terms, of any of the specified felony offenses is not entitled to any presentence conduct credit. (*People v. Goodloe* (1995) 37 Cal.App.4th 485, 495-496.)

3. *Defendant Convicted of Murder Committed on or After June 3, 1998*

Defendants convicted of a murder committed on or after June 3, 1998 may not earn any section 4019 presentence conduct credit. (Pen. Code, § 2933.2, subd. (c); *People v. McNamee* (2002) 96 Cal.App.4th 66, 69-74.) Such a defendant may not earn conduct credit against determinate as well as indeterminate terms of a murder sentence. (*People v. McNamee* (2002) 96 Cal.App.4th 66, 68, 74.) This remains true even if the defendant receives probation for the offense. (*People v. Moon* (2011) 193 Cal.App.4th 1246.)

A defendant convicted of murder and other offenses does not earn any presentence

conduct credit, even if execution of the sentence for the murder was stayed pursuant to section 654. (*People v. Duff* (2010) 50 Cal.4th 787, 792, 800-801.)

4. *Sentences Under the Three Strikes Law*

While the rights of a defendant serving a sentence under the Three Strikes law to earn prison worktime credit are restricted, these restrictions do not extend to presentence conduct credit. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 32; *People v. Thomas* (1999) 21 Cal.4th 1122, 1125-1130.) A defendant with a nonviolent third strike, sentenced to an indeterminate term, may receive presentence conduct credits under section 4019. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 907-909; see also *People v. Brewer* (2011) 192 Cal.App.4th 457 [defendant sentenced to indeterminate life term under Penal Code section 269, subdivision (a)(1) still earns presentence conduct credit].) The presentence conduct credits may not be used, however, to reduce either a minimum term of 25 years or a maximum term of life. (*People v. Philpot, supra*, 122 Cal.App.4th 893, 908.)

If a conduct credit disability applies to the defendant's case, calculate his presentence conduct credit according to the applicable statute. If no credit disability applies, move on to section C below.

C. Third, if no credit disability applies, determine which statute should be used to calculate the defendant's presentence conduct credit.

The following charts provide instructions on how to calculate conduct credits in light of the recent, and numerous, amendments to sections 4019 and 2933. The first chart outlines the three formulas that may possibly apply. The second chart determines which formula to apply based on when the defendant was in custody, when the offense was committed, the defendant's current offense(s), and the defendant's prior record.

<b>Formula for conduct credit based on time in county jail</b>	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)
<b>Math:</b>	1. Actual days ÷ 4 = whole number quotient (Drop any remainder) 2. Whole quotient x 2 = conduct credit 3. Actual + conduct credit = Total credit <i>(In re Marquez (2003) 30 Cal.4th 14, 25-26.)</i>	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
<b>Authority:</b>	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

Qualifier	Formula to Apply
<b>Time served in local custody prior to January 25, 2010</b>	<b>Formula A</b> ( <i>People v. Brown</i> (2012) 54 Cal.4th 314.)

<p><b>Time served in local custody on or after January 25, 2010 for crimes committed prior to September 28, 2010</b></p>	<p><b>Formula B</b> (<i>People v. Brown, supra</i>, 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].)</p> <p><b>Usage notes:</b>  <b>EXCLUDES</b> 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; <b>Formula A</b> applies instead. However, if the time was served in custody after October 1, 2011, see split in authority note below.</p> <p>Penal Code section 1385 does not authorize a court to disregard historical facts that disqualify a local prisoner from earning conduct credits at an increased rate. (<i>People v. Lara</i> (2012) 54 Cal.4th 896, 899-900.)</p> <p>If the defendant was sentenced to prison on or after September 28, 2010, see below.</p>
--	---



<p><b>Time served in local custody for crimes committed on or after September 28, 2010 but prior to October 1, 2011</b></p>	<p><b>Formula A</b> (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 <i>People v. Brown, supra</i>, 54 Cal.4th 314.)</p> <p><b>Usage notes:</b>  There is a split in authority as to whether <b>Formula A</b> or <b>Formula B</b> applies when time was served in custody after October 1, 2011 but the crime was committed prior to October 1, 2011. (Compare <i>People v. Olague</i> (2012) 205 Cal.App.4th 1126, 1131-1132, review granted Aug. 8, 2012, S203298 [Sixth Appellate District; dicta stating that Formula B applies to time in custody after October 1, 2011] with <i>People v. Ellis</i> (2012) 207 Cal.App.4th 1546 [Fifth Appellate District; applying Formula A for time in custody after October 1, 2011]; <i>People v. Kennedy</i> (2012) 209 Cal.App.4th 385, 395-400 [Sixth Appellate District; opinion after <i>Olague</i> applying Formula A].)</p> <p>If the defendant was sentenced to prison on or after September 28, 2010, see below.</p>
---	---

<p><b>Time served in custody on or after September 28, 2010 when sentenced to prison on or after this date for crimes committed prior to October 1, 2011 (including crimes committed prior to September 28, 2010)</b></p>	<p><b>Formula C</b> (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 <i>People v. Brown, supra</i>, 54 Cal.4th 314.)</p> <p><b>Usage notes:</b>  <b>EXCLUDES</b> 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; <b>Formula A</b> applies instead. However, if the time was served in custody after October 1, 2011, see split in authority note above.</p> <p>Penal Code section 1385 does not authorize a court to disregard historical facts that disqualify a local prisoner from earning conduct credits at an increased rate. (<i>People v. Lara</i> (2012) 54 Cal.4th 896.)</p> <p>No cases have construed former section 2933, subdivision (e) following the <i>Brown</i> decision.</p>
<p><b>Time served in custody for crimes committed on or after October 1, 2011 to present</b></p>	<p><b>Formula B</b> (Pen. Code, § 4019 [Stats. 2011, ch. 15, § 466 (AB 109), operative Oct. 1, 2011].)</p> <p><b>Usage notes:</b>  <b>EXCLUDES</b> defendants who are sentenced on a <i>violent</i> felony; but does <b>NOT</b> exclude defendants with a prior conviction for a serious or violent felony, defendants who are sentenced on a <i>serious</i> felony, and any person required to register as a sex offender.</p>

**Step 6: Determine Whether the Defendant was Committed Long Enough to Earn Presentence Conduct Credit.**

When calculating the defendant’s presentence conduct credit in Step 5, you also determined which statute applies in the defendant’s case. If the defendant is entitled to custody credit under any version of section 4019, you must now determine whether the

defendant was in custody long enough to receive conduct credits.

Currently, a defendant is not entitled to section 4019 conduct credits if he or she has been committed for less than 4 actual days. (Pen. Code, § 4019, subd. (e); see also *People v. Dieck* (2009) 46 Cal.4th 934, 940.) Under former versions of the statute, some or all defendants had to be committed for 6 days before receiving section 4019 credits. (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].)

The following chart summarizes the number of days that a defendant has to be committed in order to receive section 4019 conduct credits under the various versions of the statute.

<b>Version of Penal Code section 4019</b>	<b>Number of Days That Defendant Must be Committed to Receive Section 4019 Credit</b>
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
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 exception noted below  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, the defendant must be committed for 6 days or longer

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
Pen. Code, § 4019, subd. (e)	4 days

**Step 7: Did the Defendant Spend Any Time in the California Rehabilitation Center (CRC)?**

If the defendant did not spend any time in CRC, skip this step.

Presentence credit issues involving CRC arise when a defendant is committed to CRC but found unamenable to treatment or otherwise excluded from the program and is subsequently sentenced to state prison. It is unlikely that appellate practitioners will have to deal with CRC custody credits issues in newly appointed cases because no new commitments will be made after July 1, 2012. (Welf. & Inst. Code, §§ 3050, subd. (c), 3051, subd. (d), 3100, subd. (b), 3100.6, subd. (g).) Issues may arise, however, if a defendant was committed to CRC before July 1, 2012, but sentenced to prison after this date. In cases involving CRC commitments, presentence custody credit is calculated as follows.

**Actual Credit:** A defendant receives actual credit for time spent in a diagnostic facility or as an inpatient of CRC. (Pen. Code, § 1203.03, subd. (g).)

**Conduct Credit:** A defendant committed to CRC for an offense perpetrated on or after January 1, 1983 does not receive good behavior and participation credits. (*People v. Jones* (1995) 11 Cal.4th 118.) There is an exception, however, to this rule. If a defendant is committed to CRC but found unamenable to treatment or otherwise excluded from the program and is subsequently sentenced to state prison, he or she is entitled to presentence conduct credit based on equal protection principles from the date of exclusion to the date sentence is imposed. (*People v. Guzman* (1995) 40 Cal.App.4th

691; *People v. Nubla* (1999) 74 Cal.App.4th 719; *People v. Mitchell* (2004) 118 Cal.App.4th 1145, see also *People v. Rodriguez* (1997) 52 Cal.App.4th 560.)

**Step 8: Is There a Dual Credit Situation in the Defendant's case?**

This step may be one of the most difficult if the defendant has multiple cases. Some of the most complicated credits issues arise in these situations. A defendant is entitled to credit under Penal Code section 2900.5 “only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.” (Pen. Code, § 2900.5, subds. (a) & (b); *In re Rojas* (1979) 23 Cal.3d 152, 156.) Based on this language, the California Supreme Court has held 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.” (*People v. Bruner* (1995) 9 Cal.4th 1178, 1193-1194.) The issue of a defendant’s entitlement to presentence custody credit in dual credit situations will commonly arise when the defendant commits a new offense while on parole or probation. When this occurs, the defendant has the burden of proof on entitlement to credits. (*In re Nickles* (1991) 231 Cal.App.3d 415, 419, 423-424.) .

When a defendant is in custody for two unrelated cases, the first court to sentence the defendant should award him or her custody credit from the date that he or she was arrested on that case or a hold was placed due to it, without regard to the other case. (*People v. Lathrop* (1993) 13 Cal.App.4th 1401, 1405. But see *People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1257-1259.) When the second court sentences the defendant, it will not give credit for time already credited to the first case, thus avoiding duplicative credit. (*People v. Lathrop, supra*, 13 Cal.App.4th 1401, 1405)

While the requirement of “strict causation” is applicable in cases involving the

possibility of duplicate credit that might create a windfall for the defendant, where there is no possibility of a windfall (in the form of double credit) the rule of strict causation does not apply. (*People v. Gonzalez* (2006) 138 Cal.App.4th 246.)

If your client does not have a dual credit situation, skip this step.

Because dual credit situations are so complicated, a number of detailed examples based on published cases are set forth below to help you determine when your client is entitled to credit. You will see that in some cases the defendant is entitled to credit in only one case, and in other cases the defendant is entitled to duplicate credit. In cases involving violations of probation or parole, you will want to pay special attention to when any parole or probation hold was placed, the date parole or probation was revoked, and the conduct that served as the basis for any parole or probation revocation.

A. Examples of When a Defendant With Multiple Cases is NOT Entitled to Presentence Credit Against Both Cases

1. *Already serving sentence in unrelated case*

Defendant is in custody serving a prison sentence on case A. He is transferred to jail to face pending charges in case B, which is unrelated to case A. Once convicted in case B, he is not entitled to presentence custody credit against his sentence in case B for his time in jail awaiting trial in the case. The defendant's custody during this period was due to his original conviction in case A. (*In re Rojas* (1979) 23 Cal.3d 152; see also *People v. Callahan* (2006) 144 Cal.App.4th 678, 684-686 [defendant not entitled to custody credit for pretrial confinement in hospital on new criminal charge because he remained confined under an unrelated insanity commitment]; *People v. Mendez* (2007) 151 Cal.App.4th 861 [defendant not entitled to presentence custody credit because he would have been confined to hospital as a result of a civil insanity commitment on unrelated charges]; *In re Joyner* (1989) 48 Cal.3d 487; *People v. Gisbert* (2012) 205 Cal.App.4th 277, 279-282.)

2. *Presentence time already credited against parole or probation revocation term when the conduct underlying the current offense is not the “but for” cause of the earlier restraint*

Defendant is released from prison on parole for case A. While on parole, defendant commits a new criminal offense, case B, and violates parole on other, unrelated grounds. Defendant’s parole is revoked based on the conduct underlying case B and the other unrelated violations. He is convicted of the criminal offense in case B while serving his parole revocation term. He is not entitled to presentence custody credit against his new sentence in case B for the time he spent in custody on the revocation matter until he was sentenced in case B.

In this situation, the defendant must show that the conduct that led to his conviction in case B was the “but for” cause for his loss of liberty during the presentence period before he will receive credit. Once the defendant began serving a parole revocation term based on multiple, unrelated acts of misconduct, his custody was unavoidable on that basis regardless of the fact that he was awaiting trial on case B at the same time. (*People v. Bruner, supra*, 9 Cal.4th 1178, 1181-1183, 1191-1194; see also *People v. Stump* (2009) 173 Cal.App.4th 1264 [defendant not entitled to additional presentence credit for time served in parole revocation custody against his new driving under the influence conviction; the conduct of driving under the influence was not the “only unavoidable basis” for the custody because other temporally related acts were also the basis of the parole revocation]; *People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1257-1259 [defendant in custody for parole violation that occurred before he committed new criminal offense not entitled to presentence custody credit against new case even though his parole had not yet been revoked based on earlier violation; he may seek modification if parole is not revoked or he is denied credit against his parole revocation term].)

B. Examples of When a Defendant With Multiple Cases is Entitled to Presentence Credit Against Both Cases

1. *Conduct underlying the probation/parole revocation and the new offense is the same*

While on probation for case A, defendant committed criminal offenses, which were charged in case B. Defendant was found in violation of probation in case A based only on the conduct underlying the crimes charged in case B and sentenced to time in jail. Defendant was subsequently convicted of the charges alleged in case B. The conduct that led to his conviction in case B was the “but for” cause of his presentence custody, including the time he spent in custody for the probation violation. Thus, defendant was entitled to presentence custody credit against his sentence in case B for his time served in custody from the date of his arrest even though this time was also credited against his probation revocation term. (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1484-1485; see also *People v. Kennedy* (2012) 209 Cal.App.4th 385, 389-394 [defendant who committed new criminal offenses while on parole entitled to presentence credit because his parole was revoked based only on the same conduct as in his criminal case; other technical unrelated parole violation allegation was dismissed].)

2. *When the conduct underlying both the probation/parole Revocation and the new offense is the same, the defendant is still entitled to duplicative credit even though some charges are dismissed*

While on probation for a misdemeanor offense, defendant was charged with 13 felony offenses related to the kidnapping and rape of a minor. His probation was revoked based on his failure to “obey all laws” and he was sentenced to time in jail. He later pleaded no contest to one of the felony offenses and was sentenced in accordance with a plea agreement, with the remaining counts dismissed. Defendant was entitled to presentence custody credit against his new case for the time he served in custody from the



date of his arrest for the new case to the date he was sentenced in the new case.

The only basis for defendant's violation of his "obey all laws" probation condition was his criminal conduct that resulted in the charges in his new case. The 12 dismissed counts and the count on which the defendant was convicted were connected and all related to the kidnapping and sexual assault of the minor; they all described the criminal conduct for which he was in presentence custody. The prosecutorial action in charging the defendant was part of the "proceedings" against him and his presentence custody was attributable to proceedings relating to the same conduct for which he was convicted. This was not a "mixed conduct" case and was not converted into one by the prosecution's dismissal of the 12 counts. (*People v. Williams* (1992) 10 Cal.App.4th 827, 831-835.)

### 3. *Defendant Committed to CDCR Diagnostic Facility*

A defendant committed to a CDCR diagnostic facility for a sentencing evaluation is entitled to custody credit for this time against his prison sentence under Penal Code section 1203.03, subdivision (g), even if he simultaneously earns equivalent credits against a previously imposed sentence in an unrelated case for which he was serving a jail term as a condition of probation. (*People v. Gibbs* (1991) 228 Cal.App.3d 420.)

### C. Credit for Time Served on Subordinate State Prison Term Resulting From Probation Violation

A defendant is entitled to have time served on a prior offense as a condition of probation credited against a subordinate term imposed for the prior offense. (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1413-1415; *People v. Lacebal* (1991) 233 Cal.App.3d 1061; *People v. Adrian* (1987) 191 Cal.App.3d 868.) If the credits exceed the subordinate term, the excess credits are not available to reduce the unrelated full base term. (*People v. Cooksey, supra*, 95 Cal.App.4th 1407, 1414-1415; *People v. Lacebal, supra*, 233 Cal.App.3d 1061, 1066 *People v. Adrian, supra*, 191 Cal.App.3d 868, 877.) Credits that are earned after probation is revoked are not credited against the subordinate term if they have already been awarded on a consecutive principal term. (*People v.*

*Cooksey, supra*, 95 Cal.App.4th 1407, 1414-1415.)

D. Concurrent Sentences Imposed at the Same Time

When concurrent sentences are imposed at the same time for unrelated crimes, the defendant is entitled to presentence custody credits on each sentence for the time he was in custody on both cases if he is not also in postsentence custody for another crime.

(*People v. Kunath* (2012) 203 Cal.App.4th 906.) In contrast to *People v. Bruner* (1995) 9 Cal.4th 1178, where a defendant's custody is solely presentence on all charges and he is simultaneously sentenced on all charges to concurrent terms, presentence custody credits must apply to all charges to equalize the total time in custody between those who obtain presentence release and those who do not. (*People v. Kunath, supra*, 203 Cal.App.4th 906.)

E. Examples of How Credit is Applied When a Defendant Has Multiple Cases and One Case is Dismissed or Reversed on Appeal

Defendant, who is on probation, is arrested and placed in custody on new criminal charges. Almost six months later, his probation is summarily revoked based on the new offense. Following a probation revocation hearing, a previously stayed prison sentence is imposed and the new criminal charges are dismissed. Defendant is entitled to presentence custody credit from the date his probation was summarily revoked, but not from the date of his arrest for the new criminal charges. Defendant was in custody for an initial period, prior to the summary revocation, solely attributable to the *new charges*. Even though the period of custody between his arrest and the summary revocation of his probation was based on conduct that ultimately led to the revocation of his probation, the custody was not attributable to the proceedings related to the same conduct for which he had been convicted and sentenced. Had defendant's probation been summarily revoked when he was arrested, he would have been entitled to the additional presentence custody credit. (*People v. Pruitt* (2008) 161 Cal.App.4th 637, 639-641, 648-649.)

Defendant is arrested in Monterey County on suspicion of first degree burglary on

July 8, 1991 (case A). Subsequently, while out on bail, he is arrested in Santa Cruz County on suspicion of burglary on July 23, 1991 (case B). Monterey placed a hold on him on August 21, 1991. Thereafter, defendant was convicted in case B and awarded presentence custody credit from his July 23 arrest until his December 11 sentencing. He was then rebooked into the Monterey County jail and convicted in case A. On appeal, his conviction in case B was reversed. The Santa Cruz Superior Court then vacated his conviction and dismissed the charges in case B in the interests of justice. Following the dismissal of these charges, Defendant was entitled to presentence credit in case A (Monterey County) from August 21, 1991, when Monterey County placed a hold on him, until his sentencing for the case.

When Santa Cruz County dismissed its charges, the custody to be credited (the time from the Monterey hold until sentencing in case A) became attributable solely to the proceedings in the Monterey case. (Had Monterey County never placed a hold on defendant, defendant's Santa Cruz County presentence custody would have been attributable solely to the Santa Cruz County charges and dismissal of those charges would have left defendant with no sentence against which credit for that period could be applied ("dead time".) Because the Santa Cruz charges were dismissed, there was no possibility of the defendant receiving a windfall in the form of double credit. (*In re Marquez* (2003) 30 Cal.4th 14.)

Once you have sorted out the defendant's presentence custody credits in his or her various cases, move on to the next step.

**Step 9: Was This the First Time the Defendant was Sentenced for the Offense(s)?**

If this was the first time that the defendant was sentenced for the offense(s) at issue in the current appeal, skip this step.

Sometimes there are situations when a trial court may sentence the defendant for an offense a second time (or sometimes more). This may occur because the Court of

Appeal remanded the case for resentencing or for a new trial, or because the trial court recalled the sentence. In these situations, the defendant earns credits as outlined below.

Reason for Second Sentencing	How Credits Are Calculated	Authority
Appellate Remand for Resentencing	The trial court must calculate <b>actual</b> time defendant has already served and credit that time against the new sentence (plus, the original presentence conduct credits calculation, if applicable). The <b>conduct</b> credits for time spent in local jail during remand is calculated by CDCR (or county jail authorities if the defendant was sentenced under Realignment)	<i>People v. Buckhalter</i> (2001) 26 Cal.4th 20, 23, 33-34, 37.

<p>Appellate Remand for Retrial</p>	<p><b>Phase I (the period from initial arrest to the initial sentencing)</b>  The defendant accrues credit as a presentence inmate. The trial court is responsible for calculating this time.</p> <p><b>Phase II (the period from the initial sentencing to the reversal)</b>  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 <b>conduct</b> credit earned in accordance with defendant’s ultimate postsentence status. The trial court must calculate <b>actual</b> credit.</p> <p><b>Phase III (the period from the reversal to the second sentencing)</b>  The defendant accrues credit as a presentence inmate. The trial court is responsible for calculating this time.</p>	<p><i>In re Martinez</i> (2003) 30 Cal.4th 29, 32-37; see also <i>People v. Donan</i> (2004) 117 Cal.App.4th 784, 788-792.</p>
<p>Resentencing Pursuant to California Rules of Court, Rule 4.452</p>	<p>The trial court must calculate <b>actual</b> time defendant has already served and credit that time against the new sentence (plus, the original presentence conduct credits calculation, if applicable). The <b>conduct</b> 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)</p>	<p><i>People v. Saibu</i> (2011) 191 Cal.App.4th 1005, 1011-1013.</p>

<p>Sentencing Following Recall pursuant to Penal Code section 1170, subdivision (d)</p>	<p>The trial court must calculate <b>actual</b> time defendant has already served and credit that time against the new sentence (plus, the original presentence conduct credits calculation, if applicable). The <b>conduct</b> 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)</p>	<p><i>People v. Johnson</i> (2004) 32 Cal.4th 260, 263, 267-268.</p>
---	--	--

It should be noted 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 [23 L.Ed.2d 656, 89 S.Ct. 2072]; see also *People v. Schuler* (1977) 76 Cal.App.3d 324, 335.) However, a defendant is not entitled to credit for time he spent on probation under a conviction that is later invalidated against a subsequent probation period imposed for a related offense. (*People v. Aragon* (1992) 11 Cal.App.4th 749, 761-762.)

**Step 10: Assess the Calculation.**

After working through Steps 1 through 9, you should now have the defendant's presentence custody credits calculated.

- If it appears that the defendant's presentence custody credits exceeded the imposed term of imprisonment, move on to Step 11.
- If the calculation matches the trial court's award of presentence custody credit, there is nothing more for you to do on this issue. The trial court properly calculated the defendant's presentence custody credits.

- If there is a mistake in the defendant’s favor (the trial court awarded too much presentence credit) you should advise the defendant that there is a possible adverse consequence of pursuing his appeal because the Court of Appeal may find the mistake and take the credit away.
- If the trial court made a mistake by not awarding the defendant all the presentence custody credit that he or she was entitled to receive, and the credits do not exceed the imposed term of imprisonment, move on to Step 12.

**Step 11: Do the Defendant’s Presentence Custody Credits Exceed the Imposed Term of Imprisonment?**

If the defendant’s presentence custody credits do not exceed his term of imprisonment, skip this step.

In some cases, the defendant’s presentence custody credits may exceed the number of days of the term of imprisonment that the trial court imposed 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).)

If the defendant’s presentence custody “credits equal the total sentence, including both confinement time and the period of parole” the defendant 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 credits result in the defendant serving time in excess of the imposed prison term, the excess time is applied against the parole term. (*In re Ballard* (1981) 115 Cal.App.3d 647, 648-650.)

*Note that there is a pending issue in the California Supreme Court related to application of credit to a parole term:*

Is a life prisoner who is granted parole on a pre-1983 offense entitled to credit against the applicable five-year parole period for the time he or she was incarcerated following the Governor's improper reversal of a prior grant of parole?

*(In re Batie (2012) 207 Cal.App.4th 1166, review granted 10/17/12 (S205057/D059794); In re Lira (2012) 207 Cal.App.4th 531, review granted 10/17/12 (S204582/H036162).)*

Additionally, if defendant's presentence custody time is greater than the time 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].) This is calculated at a rate of not less than \$30 per day. (Pen. Code, § 2900.5, subd. (a).) However, 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 (i.e., Penal Code section 1465.8, subdivision (a)(1) court operations assessment and Government Code section 70373, subdivision (a)(1) court facilities assessment). (*People v. Robinson (2012) 209 Cal.App.4th 401.*)

If there appears to be a mistake with the calculation of defendant's presentence custody credit at this point, move on to the next step.

**Step 12: Correcting a Mistake in the Calculation of the Defendant's Presentence Custody Credits.**

If a review of the record, or information from trial counsel or the client, indicate that an error has been made in the determination of credits, the matter cannot be raised on direct appeal until it has been presented to the trial court, either at the sentencing hearing, or in a subsequently filed *Fares* motion. (Pen. Code, § 1237.1; *People v. Fares (1993) 16 Cal.App.4th 954*; *People v. Clavel (2002) 103 Cal.App.4th 516.*) Sometimes you will have to locate additional records to support your claim. (See Robinson, Credits Redux:



How to Get 'Em, Where to Get 'Em (SDAP May 2009) pp. 15-19

<<http://www.sdap.org/downloads/research/criminal/ptc2.pdf>>.) But be aware that you may need to expand your appointment in order to be compensated if locating the relevant records takes more than a nominal amount of time. As for raising credits issues in the trial court, some superior courts may require a formal motion whereas others will accept a nonappearance letter motion. You should call the trial court and find out what the particular judge in your case prefers.

Exceptions: There are some situations where a credits issue can be raised on direct appeal without first raising it in the trial court.

- When there already is an issue raised on appeal, other than the credits issue, the credits issue may also be raised without first seeking correction in the trial court. (*People v. Acosta* (1996) 48 Cal.App.4th 411; also see *People v. Mendez* (1999) 19 Cal.4th 1084, 1093 [economical to raise the credits issue on appeal, since the appellate court will have to issue an opinion on the merits anyway].)
- Where the error is a matter of law rather than an erroneous calculation. If the trial court has imposed the wrong law in calculating custody credits, then the issue is not a matter of calculation and may be brought to the attention of the appellate court without going to the trial court first. (*People v. Delgado* (2012) 210 Cal.App.4th 761 [Penal Code section 1237.1 does not preclude a defendant from raising, as the sole issue on an appeal, a claim his or her presentence custody credits were calculated pursuant to the wrong version of the applicable statute].)
- Where the error occurred in a juvenile wardship adjudication. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 350.)

Even when it is not necessary to first raise the error in the trial court, frequently it is to appellant's benefit to do so. This is true especially in the situation where the client's

sentence is relatively short and he or she would have served the time before the appellate court hears the issue.

Assuming you raise the issue in the trial court, if the court does not agree with you, make sure you have filed a formal motion to preserve the issue for appeal. (See *People v. Clavel* (2002) 103 Cal.App.4th 516, 518-519.) This means that you may need to file a formal motion after sending an informal nonappearance letter. Once the court rules on the motion, you should augment the record on appeal with your motion, any documents presented to the trial court in support of the motion, any opposing motion by the district attorney, any transcripts from a hearing on the motion, and the trial court's ruling. (See Cal. Rules of Court, rule 8.340(a).) You are now ready to raise the credits issue on appeal.

Also note:

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

A defendant does not waive an issue regarding the appropriate formula for calculating presentence conduct credits 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.)

### **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>>