

[Attorney info.]
Counsel for Appellant Donald G.

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF PLACER**

PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff and Respondent,

v.

DONALD G.,
Defendant and Appellant.

XXX County Superior Court
No. 62-094750

(Third District Court of Appeal
No. C012345)

**MOTION TO RECALCULATE PRESENTENCE CREDITS
AND AMEND RESTITUTION AND PAROLE REVOCATION FINES**

Defendant-appellant DONALD G., through his counsel
appointed by the Third District Court of Appeal, respectfully moves
this Court as follows:

I. Add 400 Days Of Presentence Conduct Credits

Mr. G. moves this Court to grant an extra 400 days of
presentence conduct credits, under authorities such as *People v.*
Brewer (2011) 192 Cal.App.4th 457, 460-464 and *People v. Philpot*
(2004) 122 Cal.App.4th 893, 907-908, which held a defendant who
receives a “three-strikes” sentence of 25 years to life for a current
felony that is not a violent felony is entitled to presentence conduct
credits under Penal Code section 4019, as the text of the “three-
strikes law” does not diminish presentence conduct credits.

Because Mr. G. was convicted of receiving stolen property, which is not a violent felony, authorities such as *Brewer* and *Philpot* require that he be given presentence conduct credits. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) His presentence actual time credits were 801 days; thus, his presentence conduct credits should have been 400 days. The Court erred in awarding him zero.

An error in presentence credits creates a legally unauthorized sentence, which must be corrected any time it comes to the court's attention, irrespective of whether or by whom the matter was raised in the trial court. (*People v. Fares* (1993) 16 Cal.App.4th 954, 958.)

II. Reduce The Restitution Fine And Accompanying Parole Revocation Fine From \$240 To \$200

Mr. G. moves this Court to reduce the restitution fine (Pen. Code, § 1202.4, subd. (b)(1)) and the accompanying parole revocation fine (Pen. Code, § 1202.45) from \$240 to \$200. The appellate record explicitly shows this Court's intent to impose the minimum restitution fine. (RT 92:2-3 ["I am going to set [the fines and fees] at the minimum, because I believe that is appropriate in this case."]) While this Court set the restitution and corresponding parole revocation fines at \$240, believing that was the minimum mandatory fine (RT 92:9-10) – undoubtedly under the amendment to

Penal Code section 1202.4(b)(1) effective January 1, 2012 – doing so made this amendment *ex post facto* as to Mr. G., under long-settled authority. The lawful restitution fine range is the one in effect at the time of the crime to which he pled; thus, the minimum restitution fine is \$200; and this Court stated its intent to impose the minimum. Since a restitution fine that is either unconstitutionally *ex post facto* or not permitted by the Legislature is an unauthorized sentence that can be corrected at any time (*People v. Zito* (1992) 8 Cal.App.4th 736, 740-742), Mr. G. respectfully asks this Court to amend the restitution fine and accompanying parole revocation fine by reducing them to \$200.

Requested Adjudication

This motion can be decided routinely in Mr. G.'s favor on an *ex parte* basis, since it appears the above omissions were matters of simple oversight that are easily corrected. Should this Court disagree and conclude the matter is not routine or not readily correctable in Mr. G.'s favor, then Mr. G. asks this Court to:

- (1) Place this case on its calendar for a hearing on the correct amount of presentence credits and the correct restitution and parole revocation fines; and
- (2) Appoint local counsel or utilize currently appointed local counsel for Mr. G., for purposes of this motion and such

a hearing, including the possibility of resolving this matter by stipulation. (A hearing can be done without Mr. G.'s presence, if he chooses to stipulate to that; or, if the matter can be resolved by stipulation, no hearing would be necessary.)

This motion is based on the files and records of this case, and on the accompanying Memorandum of Points and Authorities.

Mr. G. further requests issuance of an amended minute order and abstract of judgment with corrected credits and restitution and parole revocation fines, with a copy to the Department of Corrections, and another copy to his undersigned appellate counsel.

Under *People v. Clavel* (2002) 103 Cal.App 4th 516, in light of Penal Code section 1237.1 which expresses a legislative preference for resolving credits matters in the Superior Court in the first instance even while a case is on appeal, and in light of the Court of Appeal's general preference for resolving ministerial matters such as these in the Superior Court in the first instance, Mr. G. asks this Court to grant his motion, award an extra 400 days of presentence credits, and reduce his restitution and parole revocation fines to \$200 each.

I declare under penalty of perjury of the laws of the State of California that the above is true. Dated this 10th day of April, 2012.

Respectfully submitted,

[Attorney]
Counsel for Defendant-Appellant Donald G.
Under appointment by the Court of Appeal
(CCAP - Independent Case)

MEMORANDUM OF POINTS AND AUTHORITIES

This motion is made under *People v. Clavel* (2002) 103 Cal.App.4th 516, in order to ensure that appellant is accorded a judicial determination in this Court with respect to plain and inadvertent errors in (i) the award of presentence credits, and (ii) the restitution and parole revocation fines. An error in presentence credits creates an unauthorized sentence, which must be corrected at any time when it comes to the court's attention, and does not require an objection below. (*People v. Fares* (1993) 16 Cal.App.4th 954, 958.) So too for a restitution fine that is unconstitutional as *ex post facto*. (*People v. Zito* (1992) 8 Cal.App.4th 736, 740-742; *People v. Valenzuela* (2009) 172 Cal.App.4th 1264.)

I. **Unauthorized Deprivation Of Presentence Conduct Credits**

At sentencing, this Court awarded the following presentence credits (see transcript of January 12, 2011 sentencing [RT 91:14-21], minute order [CT 620], abstract of judgment [CT 622]):

Actual time	801 days
Conduct credits	0 days
Total	801 days

This was in error. As was expressly held in *People v. Brewer* (2011) 192 Cal.App.4th 457, 460-464 and *People v. Philpot* (2004) 122 Cal.App.4th 893, 907-908, a defendant who has an

indeterminate “three-strikes” sentence of 25 years to life still gets presentence conduct credits. And if the “three-strikes” sentence is not for a violent felony listed in Penal Code section 667.5(c) – which Mr. G.’s conviction of receiving stolen property is not – then the defendant with the “three-strikes” sentence gets full Penal Code section 4019 presentence conduct credits. (*People v. Philpot, supra*, 122 Cal.App.4th at p. 908.)

Brewer and *Philpot* establish Mr. G.’s entitlement to presentence credits definitively. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) They merely construe the “three-strikes” statute related to credits, Penal Code section 667, subdivision (c)(5), which restricts the one-fifth credits limitation to credits awarded “pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3” – when the latter statutory provisions refer only to in-prison (postsentence) credits, and not to pretrial detention (presentence) credits.

Under the familiar pre-2011 formula in Penal Code section 4019, presentence conduct credits are calculated “by dividing the number of days spent in custody [here, 801] by four and rounding down to the nearest whole number. This number is then multiplied by two [Citation.]” (*People v. Fry* (1993) 19 Cal.App.4th 1334, 1341.) Based on that formula, and on this Court’s prior award of 801

days actual time (which appellate counsel has checked and agrees with), the correct credits calculation would be:

Actual time	801 days
Conduct credits	400 days [instead of 0 days]
Total	1201 days [instead of 801 days] ¹

For these reasons, Mr. G. respectfully asks this Court to award an extra 400 days of presentence conduct credits, for a total of 1201 days credits, and send an amended minute order and abstract of judgment to the undersigned counsel and to the Department of Corrections.

II. Ex Post Facto Imposition Of The Minimum Restitution And Parole Revocation Fines

It is certainly understandable why this Court imposed a \$240 restitution fine (Pen. Code, § 1202.4, subd. (b)(1)) and parole revocation fine (Pen. Code, § 1202.45), when it expressly stated its intent to impose the minimum restitution fine (RT 92:2-3). After all, that's what the Legislature seemed to say. Section 1202.4, subdivision (b)(1) states in pertinent part:

¹ Mr. G.'s appellate counsel is still evaluating whether there may be a constitutionally-based argument for further presentence credits beyond that, and no position is taken on any such issue in this memorandum or motion. However, if there were such an argument available, it wouldn't be the type of ministerial argument that would be appropriately raised on a *Fares/Clavel* motion. Consequently, in this particular motion, Mr. G. requests only the minimum presentence conduct credits of 400, that should be beyond dispute under the *Brewer* and *Philpot* cases above.

The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012

Nonetheless, if this statutory provision were construed as referring to a sentence after January 1, 2012 (as in this case), rather than a crime of conviction committed after January 1, 2012 (which is not this case), then it would be an unconstitutional *ex post facto* law to that extent.

Numerous authorities so hold. (*People v. Callejas* (2000) 85 Cal.App.4th 667, 670-678 [*ex post facto* clause prohibited trial court from imposing parole revocation fine that was enacted after the crime of conviction]; *People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31 [*ex post facto* clause prohibited trial court from imposing the minimum restitution fine of \$200 in effect at the time of sentencing, when the minimum in effect at the time of the crime was \$100, and minimum was the proper fine]; *People v. Downing* (1985) 174 Cal.App.3d 667, 672 [*ex post facto* clause prohibited trial court from imposing a restitution fine under statute that was enacted after the crime of conviction].)

Alternatively, one could view the language of the amendment to Penal Code section 1202.4(b)(1) effective on January 1, 2012 as being applicable only to defendants whose crimes were committed

after January 1, 2012 (unlike Mr. G.). While that doesn't seem to be exactly what the language of section 1202.4(b)(1) says, it would be a proper way to construe the statute in order to avoid constitutional problems, as our Supreme Court has directed. (*People v. Simon* (1995) 9 Cal.4th 493, 522.) In that event, the statutory increase in minimum restitution fine to \$240 isn't *ex post facto*; it just doesn't apply to Mr. G. on its face. Either way, the correct minimum restitution fine is \$200.

The above authorities are binding here. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.) Accordingly, the minimum restitution fine range applicable to a defendant such as Mr. G., whose crime of conviction was in 2009, is \$200. Because this Court already expressly stated its intent to impose a minimum restitution fine (RT 92:2-3), and because its prior imposition of a \$240 restitution fine (plus revocation fine) was based on a belief that \$240 was mandatory (RT 92:9-10), Mr. G. respectfully asks this Court to impose the only statutorily authorized minimum restitution fine and accompanying parole revocation fine, \$200.

Conclusion

For the reasons above, Mr. G. respectfully asks this Court to:
(1) add 400 days of presentence conduct credits, for a total of 1201 days presentence credit; and (2) reduce his restitution fine and accompanying parole revocation fine from \$240 to \$200.

Dated this 10th day of April, 2012.

Respectfully submitted,

Attorney
Counsel for Defendant-Appellant Donald G.
Under appointment by the Court of Appeal
(CCAP - Independent Case)