



Seeking Corrections in the Trial Court: Ramblings and Ruminations on Requests to Correct Credits, Fines, Fees, and the Abstract of Judgment

Updated March 2023

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Introduction

This article provides a roadmap for resolving credits, fines, and fees issues in criminal appeals. However, counsel should be advised that the decisions of the Fifth and Third District Courts of Appeal emanate only from the justices of those courts who sit on a myriad of possible three-justice panels, and CCAP cannot predict how an individual panel may react to these issues. With that said, CCAP presents the following “ramblings and ruminations” on informal requests to correct credits, fines, and fees.

Penal Code sections 1237.1 and 1237.2

In *People v. Fares* (1993) 16 Cal.App.4th 954, the Fourth District Court of Appeal concluded that the appropriate vehicle to correct credit errors was to seek correction in the trial court because, under Penal Code section 2900.5, it is the obligation of the trial court to calculate the number of credits. (*Id.* at p. 958) The Court of Appeal in *Fares* was “disturbed that this attempt at a minor correction of a sentence error has required the formal appellate process.” (*Id.* at p. 957.) The court warned it would reserve “the right in the future summarily to dismiss appeals directed to correction of presentence custody calculations when it appear[ed] that prior resort to the superior court in all likelihood would have afforded an adequate remedy.”

The Legislature then codified the *Fares* opinion by enacting Penal Code section 1237.1, which became effective in 1996, and currently states:

No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court, which may be made informally in writing. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the calculation of presentence custody credits upon the defendant’s request for correction.

The Legislature later enacted Penal Code section 1237.2, which became effective in 2016, adding similar requirements to correcting errors in fines and fees. This section

states that an appeal may not be taken by the defendant on the ground of an error in “the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs” unless the issue was first presented in the trial court, or the defendant first makes a motion for correction in the trial court if the error is not discovered until after sentencing. The section also states that the motion may be made informally in writing and that “[t]he trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs upon the defendant’s request for correction.” In addition, the statute specifies that it only applies where this is raised as “the sole issue on appeal.”

Scope of Penal Code sections 1237.1 and 1237.2

Penal Code section 1237.1 does not on its face make a distinction between a mathematical miscalculation of credits and a substantive issue dealing with statutory interpretation of credits statutes, or an exercise of judicial discretion in applying a credits statute. The language of the statute broadly states its mandate applies to “an error in the calculation of presentence custody credits.” (Pen. Code, § 1237.1.) Arguably, it could apply to a range of credits issues such as dual credits, *Johnson-waivers* (*People v. Johnson* (1978) 82 Cal.App.3d 183), entitlement to credits for time spent in different custodial settings, etc. In *People v. Marchbanks* (Dec. 16, 2008, A121517) [nonpub. opn.], the First District, Division Two, recognized the ambiguity in the statute but declined to settle the question.

It should be noted, the original error in question in *Fares* was a minor, mathematical miscalculation which the Court of Appeal “deemed clerical, inadvertent, or at most negligent.” (*People v. Fares, supra*, 16 Cal.App.4th at p. 957.) The legislative history of section 1237.1 explained that the purpose of the law was “to curtail misuse of the formal appellate process to correct minor sentencing errors when alternative forums for resolution exist.” (Sen. Com. on Criminal Procedure, Analysis of Assem. Bill No. 354 (1995-1995 Reg. Sess.)) This rule appeared to be further solidified in *People v. Delgado* (2012) 210 Cal.App.4th 761, which concluded that section 1237.1 did not preclude a legal claim regarding which version of an applicable statute applied, but concluded that “an error in ‘doing the math’ or, as in [*People v. Fares* (1993) 16 Cal.App.4th 954], an apparent oversight in an award of credits, constitutes the type of minor sentencing error at which section 1237.1 was clearly aimed.” Courts have continued to follow the

distinction set forth in *Delgado*. (See, e.g., *People v. Gonzalez* (Mar. 16, 2020, F077488) [nonpub. opn.] [Fifth District barring 1237.1 claim because it was a mathematical error that could have been raised and remedied below]; *People v. Carrillo* (Dec. 19, 2016, C079728) [nonpub. opn., Third District dismissal of claim under section 1237.1, which was merely a mathematical error and was not raised below]; *People v. Hagen* (Sept. 27, 2018, G055280) [nonpub. opn., Fourth District not requiring dismissal of 1237.1 claim for substantive legal error which was not raised below]. Thus, if there is a substantive legal issue involving the application of a credits statute or an issue involving the exercise of judicial discretion, appellate counsel may be safe in raising the issue as an argument on appeal without seeking correction in the trial court first under section 1237.1. (See, e.g., *People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139 [Fifth District addressing a legal issue about credits with no mention of compliance with Pen. Code, § 1237.1]; *People v. Earp* (Sept. 7, 2006, C049425) [nonpub. opn.] [the contention involves the legal interpretation of a *Johnson* waiver, not the correction of clerical or mathematical error]; but see *People v. Curry* (Aug. 13, 1996, F024175) [nonpub. opn.])

The plain language of section 1237.2 does not limit its reach only to situations where the fee simply did not apply or was a result of mathematical error. In *People v. Alexander* (2016) 6 Cal.App.5th 798, the Second District concluded that the statute's requirements were not so limited, and included more complex matters, such as an error involving the imposition of a higher than bargained for fee, and dismissed the appeal because the appellant made no claim of error to the trial court. In *People v. Loper* (August 14, 2017, E066505) [nonpub. opn.], the Fourth District concluded that section 1237.2 was not limited to situations where the fee simply did not apply or was the result of a mathematical error. (*Ibid.* [concluding that the issue of whether a restitution fine was illegally imposed, when the court did not orally order the fine on the record, was covered under section 1237.2 and therefore was not cognizable by the court because the appellant did not raise the issue before the trial court].) As a result, after *People v. Alexander, supra*, 6 Cal.App.5th 798, counsel cannot rely upon the “mathematical” versus “substantive legal” distinction if pursuing a fines and fees issue that should have been raised below under 1237.2. (See, e.g., *People v. Adams* (Mar. 1, 2021, C087715) [nonpub. opn.] [constitutional claims based on trial court's failure to determine defendant's ability to pay fines and fees were covered under section 1237.2 and appeal was dismissed because defendant did not first request relief from the trial court]. But see *People v. Falcon* (Jan. 17, 2023, C094942) [nonpub. opn.] [the issue of whether new

law impacting fines and fees applied retroactively was not a correctible error pursuant to section 1237.2; issues regarding retroactive application of statutes should be addressed by the appellate court in the first instance]; *People v. Clark* (2021) 67 Cal.App.5th 248 [First Dist., Div. 4] [same].)

What if the credits or fines and fees issue is not the sole issue on appeal?

In section 1237.2, the Legislature made it clear that an informal request in the superior court is only required “in cases where the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs are the sole issue on appeal.” Therefore, if the fines and fees issue is not the sole issue on appeal, an informal letter under section 1237.2 is not required.

No such language was added to section 1237.1 regarding credits errors. However, in *People v. Acosta* (1996) 48 Cal.App.4th 411, the Second District recognized an exception to 1237.1’s requirements when the credits error is not the only issue to be raised on appeal. The *Acosta* court concluded that “section 1237.1 . . . does not require defense counsel to file motion to correct a presentence award of credits in order to raise that question on appeal when other issues are litigated on appeal. If there are no other issues, the filing of a motion in the trial court is a prerequisite to raising a presentence credit issue on appeal.” (*Id.* at pp. 427-428.) *Acosta* has often been followed by the Third District and Fifth District. (See, e.g., *People v. Bailey* (Feb. 7, 2022, F079127) [nonpub. opn.]; *People v. Jordan* (2018) 21 Cal.App.5th 1136, 1141-1142 [Third District]; *People v. Sylvester* (1997) 58 Cal.App.4th 1493, 1496, fn. 3. [Fifth District]; *People v. Estrada* (May 19, 2005, F046293) [nonpub. opn.]; *People v. Acosta* (Mar. 3, 2008, C055262) [nonpub. opn.]; *People v. Lee* (Aug. 31, 2005, C043308, C043992) [nonpub. opn.]; *People v. Thomas* (Jan. 6, 2005, C044979) [nonpub. opn.]).

But the California Supreme Court has also made clear that an appellate court is not obligated to consider an appellant’s credits claim even if other issues are raised on appeal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1100-1101.) In *Mendez*, the court concluded that the Court of Appeal did not err in declining to address the appellant’s credits issue even though other issues were raised on appeal. (*Ibid.*) The court noted that *Acosta* was not contrary to its decision and that *Acosta* held “no more than that the

Court of Appeal *may* address a question of this sort *if* it is properly presented with others as well.” (*Id.* at p. 1101.)

In older, unpublished opinions, the Fifth District and Third District refused to consider credit issues that had not been raised in the trial court even though other issues were raised on appeal. In one case, the Fifth District refused to consider a credits issue on appeal even though appellate counsel had raised other issues because appellant had not raised it at sentencing and appellate counsel had not complied with Penal Code section 1237.1 by raising it subsequently “by motion” in the trial court. (*People v. Felder* (Aug. 11, 2005, F045853) [nonpub. opn.].) Likewise, the Third District refused to consider a credits issue and dismissed an appeal because the other issue raised was a clerical issue, not a substantive one. (*People v. Sargent* (Apr. 8, 2008, C052101) [nonpub. opn.].) In another unpublished opinion, the Third District made clear it is “the better practice” to comply with section 1237.1, notwithstanding *Acosta, supra*, 48 Cal.App.4th 41, “because it wastes judicial resources to require an appellate court to resolve matters which could easily be corrected in the trial court.” (*People v. Ramos* (Feb. 2, 2009 C056331) [nonpub. opn.] [dismissing appeal for failure to comply with section 1237.1 even though other issue raised was a substantive legal issue].) Although *Acosta* sets forth the more common procedure, out of an abundance of caution, counsel may consider sending the trial court a request to correct a credits issue even if other issues will be raised on appeal.

If appellate counsel is going to urge the Court of Appeal to exercise its discretion to address a credits issue, counsel needs to make sure that the appellate record is sufficiently complete that it permits review of the issue. In *People v. Ramos, supra*, (C056331), and *People v. McCutcheon* (Feb. 28, 2008, C055259) [nonpub. opns.], the Third District declined to exercise its discretion and reach the issue where the record was not clear. In *People v. Flores* (Mar. 21, 2006, F047392) [nonpub. opn.], the Fifth District reached the same result. Refusal to consider the issue on appeal in such an instance makes sense since the defendant has the burden of proof on entitlement to credits (*In re Nickles* (1991) 231 Cal.App.3d 415, 419, 423-424), and also bears the burden of ensuring that the appellate record is adequate for review (*People v. Barton* (1978) 21 Cal.3d 513, 519-520).

Turning back to fines and fees: Although an informal letter under section 1237.2 is not required if counsel is raising another issue in addition to the fines and fees issue, counsel may still choose to send a section 1237.2 request to the trial court to correct a fines and fees issue in this situation for tactical reasons (see below). However, if the fines and fees issue is not the sole issue on appeal, any informal request to correct the fines and fees in the trial court must be resolved before filing the opening brief, or the fines and fees issue must be included in the opening brief. Failure to raise a claim in an appellate brief, which also includes at least one other claim, serves to waive that claim for the purposes of future appeals. (*People v. Jordan, supra*, 21 Cal.App.5th 1136 [Third District].) *Jordan* put forward an unusual procedural quandary, where the original appeal, raising a suppression motion issue, was filed on March 20, 2017. Defendant then filed a motion to correct his sentence under *Fares* and section 1237.2 in the trial court on March 23, 2017. After the trial court denied his motion, defendant filed a second notice of appeal on May 3, 2017, while his original appeal was still pending. The Third District issued an opinion disposing the first appeal in July 2017. In the second appeal, the Third District determined that by not raising the 1237.2 issue in his original appeal, defendant waived the issue for all future appeals. The court concluded “that a defendant must either file a motion to correct sentence with the trial court when the sole issue he or she seeks to challenge is one proscribed in section 1237.2, or file an appellate brief including this issue when a defendant seeks to challenge issues in addition to the issues proscribed in section 1237.2.” But even if a fines and fees issue is not the sole issue on appeal, it seems likely that a defendant may send a letter to the trial court pursuant to section 1237.2 to resolve the issue as long as the issue is fully completed below and included in the opening brief. If the trial court does not rule on the section 1237.2 request and the opening brief is due, counsel may raise the fines and fee issue again in the opening brief with the other issues on appeal and inform the Court of Appeal that a section 1237.2 request was sent to the trial court and is pending.

Even when counsel thinks it is safe to raise a credits or fines and fees issue on appeal because there are other issues, there are tactical reasons for filing an informal request in the trial court. If the client is serving a short prison term, consider whether he or she would have likely served the time before the appellate court hears the issue. (Counsel should keep in mind that even if the client has been released from custody, the issue of credits is not moot because any credits that were improperly denied will reduce the client’s period of parole. (*In re Welch* (1987) 190 Cal.App.3d 407, 409; *In re Kemper*

(1980) 112 Cal. App.3d 434, 438-439.)) Not only will a request to the trial court provide quicker relief for the client, but also it may be the only way to get such a matter resolved where there are adverse consequences that might warrant abandonment. And in possible *Wende* situations, by filing a *Fares* request in the trial court, appellate counsel can get the credits or fines and fees problem resolved while preserving for the client the benefit of a *Wende* review.

Send an informal letter under section 1237.1 or section 1237.2 if errors are found

So what should appellate counsel do when a credits or fines and fees error is found? Frequently a simple letter to the trial court under section 1237.1 or section 1237.2 will achieve the result sought. A formal motion is no longer required.

Calculation of credits, fines, and fees, and preparation of the section 1237.1 or section 1237.2, request should be done as soon as practically possible. This will allow time for the issue to be resolved before the opening brief is due.

What to include in the request

Besides describing the error, the trial court should be reminded that under section 1237.1 or 1237.2 appellate counsel is required to make the request in the trial court before raising the issue on appeal. Counsel should explain why the court has jurisdiction to correct the error. Counsel should also point out, citing the statutes and *People v. Clavel* (2002) 103 Cal.App.4th 516, that the process of an informal motion has been approved. Additionally, the letter should inform the trial judge that the appeal is awaiting his/her decision on this issue and the current briefing schedule deadline. You will probably get faster results if you make the trial court's job easy. To this end, counsel should provide the trial court everything it needs to rule on the request, if the record permits. In other words, attach all pertinent documentary evidence, such as relevant sentencing transcripts, the abstract, minute order, and pages of the probation report which show arrest date and other dates of incarceration. Sometimes, such as in mixed-conduct parole revocation cases, counsel may have to rely on matters outside the record. This might entail obtaining records from the client's parole or probation officer, and these too can be included with the letter.

Finally, counsel should be sure to request that the court issue a minute order and amended abstract of judgment and transmit these to the California Department of Corrections and Rehabilitation, the Court of Appeal, as well as counsel for the parties on appeal pursuant to California Rules of Court, rule 8.340(a).

Sample requests under section 1237.1 or 1237.2 can be found in the CCAP online [Motions Samples Book](#) (look under “Corrections in the Trial Court” in the list.)

Why not rely on supplemental briefing?

One should not file a *Wende* in the Third District while awaiting a ruling on a *Fares* request. The Third District does not want unnecessary supplemental briefs and has expressed concern that some attorneys file opening briefs because they have run out of time and are mistaken in thinking they can fix things later by submitting a supplemental brief. The Third District will require counsel to explain why the issue was not filed earlier. This is why it is advised to make an informal request to correct credits, fines, or fees as soon as possible in the case.

In *People v. Johnson* (Mar. 28, 2003, C040050 [nonpub. opn.]) appellate counsel filed a *Wende* brief and then learned the superior court had refused to correct its credit calculation after receiving the *Fares* letter. Counsel then asked to file supplemental briefing raising the credit issue only. The Third denied that request, ordered the *Wende* brief stricken and ordered counsel to file either a *Wende* brief or a brief raising an issue. Similarly, as discussed above in *People v. Jordan, supra*, 21 Cal. App. 5th 1136, the Third District determined it was necessary to publish its opinion, finding that the defendant had waived his fines and fees issue under 1237.2, when the defendant raised it in a subsequent notice of appeal. The court emphasized that “[p]ursuing an appeal, while also pursuing a motion to correct sentence, accomplishes the opposite goal the Legislature was trying to accomplish by enacting sections 1237.1 and 1237.2.”

The Fifth District may be more willing to accept supplemental briefing in this situation, but this cannot be taken for granted.

In the Third District, follow *Fares* procedures to correct a probation term that lacks a scienter requirement in the trial court having jurisdiction

In *People v. Patel*, the Third District Court of Appeal considered the repeated appellate challenges to the lack of a scienter requirement in probation conditions. (*People v. Patel* (2011) 196 Cal.App.4th 956.) Patel’s probation term prohibited him from being in places where alcohol was the chief item for sale, but it did not require he “knowingly” do so. Noting that there is an uncontradicted body of law “establishing that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter” the court found that raising this issue on appeal does not provide a deterrent effect for probation officers to include scienter in a probation term or a protective effect for defendants. The court announced it will no longer entertain this issue on appeal and would instead construe probation terms to require the prohibited action be undertaken knowingly. In the modified opinion, the court added that its decision does not prevent appellate counsel from seeking to correct probation conditions that do not have a scienter requirement in the trial court having jurisdiction. The court noted this procedure is analogous to that established in *People v. Fares*, *supra*, 16 Cal.App.4th 954, for resolution of issues involving conduct credits, which was later given legislative endorsement in section 1237.1. Counsel may use the same section 1237.1/*Fares* sample, modified to address correction of the probation condition, and citing *Patel*.

Who does one serve?

Even with an informal letter request for correction, ***use a formal proof of service*** – this is a common oversight by inexperienced appellate counsel working with the Third and the Fifth. Be sure to serve the Court of Appeal, the district attorney, Attorney General, the client, and the appellate project. Additionally, a courtesy copy to trial counsel would not hurt.

To stay or not to stay

Rather than serial requests for extensions of time to submit briefing, the Third District would entertain a motion for stay pending resolution of a request to correct credits or fines and fees, or other motion matter pending in the trial court that holds up briefing.

The Fifth District, however, would prefer serial requests for extensions of time that provide the status of the pending matter.

Counsel must stay on top of the status of the informal letter

By now, most trial judges are familiar with informal requests to correct credits and fines and fees and promptly act upon them. But sometimes nothing happens for weeks and it falls between the cracks. If there is no response to the informal request within two weeks of its filing, counsel should call the judge's chambers to: (1) ensure the request was received and (2) remind the court that the appeal is awaiting a decision. This phone call will generally prompt the court to act. If not, a polite follow-up letter to the judge will sometimes do the trick.

Counsel should obtain a ruling on the request to correct credits or fines and fees before filing the Appellant's Opening Brief, even if it means filing a request for an extension of time or a stay (see "To stay or not to stay" above). In the extensions, counsel should advise the Court of Appeal that appellant is awaiting the ruling on the 1237.1 or 1237.2 request and state the last known status of the request. Continue to file extensions as needed in the Court of Appeal, each time updating the court with the contacts counsel has made with the trial court and the latest status of the request sitting before the trial judge.

What if the informal letter is denied or partially denied?

Previously, it was unclear whether a formal motion in trial court was required after the trial court had denied a motion made informally by letter. (See e.g., *People v. Baker* (Dec. 23, 2004, C043971) [nonpub. opn.] [appellate counsel's two applications for conduct credit, formally served upon the People and resulting in formal orders of denial, sufficed as a "motion" within the meaning of section 1237.1]; and *People v. Wiltse* (Apr. 11, 2005, F045655) [nonpub. opn.] [even if the trial court rules on the informal *Fares* request, if the ruling is not the one desired, a formal motion should then be filed].) However, when the Legislature added section 1237.2, it also amended 1237.1 to note that the motion for correction in the trial court "may be made informally in writing." Now, both sections 1237.2 and 1237.1 clearly state that an informal motion is all that is required before proceeding to raise the issue on appeal.

Juvenile delinquency proceedings

Juvenile delinquency appeals are not subject to Penal Code section 1237.1. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 350.) Section 1237.1 referred to an appeal by the “defendant” from a “judgment of conviction.” Minors charged with violations of the Juvenile Court Law are not “defendants” and adjudications of juvenile wrongdoing are not “criminal convictions.” (*Id.* at pp. 352-353; see also *In re M.L.* (Dec. 2, 2019, B283567) [nonpub. opn., applying same reasoning to 1237.2].)

Even so, because the minor is more likely to obtain a quicker result in the juvenile court, CCAP urges appellate counsel to raise the issue in the lower court instead of as an argument on appeal.

Can the informal letter request be adapted to other correction requests?

Yes! Appellate counsel routinely have success in correcting clerical errors in abstracts of judgment and minute orders, and in seeking clarification of fines and fees pursuant to *People v. High* (2004) 119 Cal.App.4th 1192, and even insertion into the clerk’s minutes of statements of reasons for striking a component of a sentence per Penal Code section 1385 via informal letter requests to the trial court. The key here is to emphasize that one is writing pursuant to the spirit of *People v. Fares, supra*, 16 Cal.App.4th 954, and *People v. Clavel, supra*, 103 Cal.App.4th 516, 519, fn. 4, because the case contains a clerical error which could be corrected with greater judicial economy at the superior court level rather than by appeal.

And, in fact, at least one appellate district has urged appellate counsel faced with clerical errors in the abstract of judgment, to attempt correction in the trial court before elevating the issue to a formal appeal or face the risk of dismissal. (*People v. Little* (1993) 19 Cal.App.4th 449, 452 (Sixth Dist.); see also *People v. Mortis* (Sept. 29, 2004, B169493) [nonpub. opn.].)

Compensation justification

As with all pleadings filed in superior court, counsel will be compensated a reasonable amount of time based on the circumstances of the case for seeking a credits correction

and related steps necessary to accomplish the task. Keep track of the time necessary for each step, reporting time in appropriate categories on the claim form (i.e., communication time, etc.), and include explanations for any unusual or extraordinary amounts of time claimed. Contact the CCAP staff attorney assigned to your case if you need additional assistance or if you have questions.