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Your Responsibility When Using the Information Provided Below:

When we wrote this Informational Material we did our best to give you useful and accurate information because we know that prisoners often have difficulty obtaining legal information and we cannot provide specific advice to all the prisoners who request it. However, the laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to this material every time the law changes. If you want legal advice backed by a guarantee, try to hire a lawyer to address your specific problem. If you use this pamphlet, it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in your institution law library.

**INFORMATION RE: CDCR CREDIT CALCULATION ISSUES
RELATED TO *IN RE REEVES*, *IN RE PHELON* AND *IN RE TATE*
(Updated 3/2008)**

We are sending you this letter because you have asked for information or advice about recent news that the CDCR has not been following some of the laws regarding goodtime/worktime credits and has not properly calculated some prisoners' release dates. We cannot provide legal representation to individual prisoners who want to check whether their release dates are correct or who want to get the CDCR to correct credit errors. Also, because we receive a large volume of mail, we are unable to provide individualized responses to all the prisoners and parolees who write to us. In this letter, we will attempt to answer the most common questions about this issue. Please note that this is an area of law and policy that may change and that some of the information in this letter may become out-dated as the CDCR and/or courts address these issues.

The credit calculation laws are quite complex. In the past few years, the California Supreme Court and Courts of Appeal have issued several decisions in which they found that the CDCR was not properly interpreting the credit laws or properly calculating prisoners' release dates in certain situations. The CDCR has estimated that these decisions may affect up to 33,000 prisoners. However, the CDCR did not carry out an accurate and system-wide recalculation of prisoners' release dates in accord with these

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decisions. Instead, the CDCR apparently only recalculated credits if an individual prisoner complained or obtained a court order.¹ Thus, some prisoners may not have correct release dates or some prisoners may have been kept past their legal release dates.

Who is affected by the recent cases regarding goodtime/worktime credits?

The current credit issues arise from the laws that say that CDCR prisoners convicted of violent felonies committed on or after September 21, 1994 may earn no more than 15 percent conduct credits,² while prisoners who are convicted of non-violent felonies (and who are not subject to any other credit limits)³ can generally earn one-for-one (“half-time”) credits when they are programming full time and one-for-two (“third-time”) credits when they are not programming full time.⁴ Under past CDCR policy, a prisoner who was convicted of both non-violent felonies and violent felonies never could earn more than 15 percent credits.

Several recent court cases found that the CDCR’s policy was wrong and that some prisoners who are sentenced for both violent and non-violent felonies should be allowed to earn third-time and half-time credits for the portions of their sentences that are for non-violent felonies only. Specifically, the cases hold as follows:

¹ See Rothfield, *State Miscalculations Could Result in Earlier Prison Releases*, Los Angeles Times, Dec. 13, 2007.

² Penal Code 2933.1. The crimes that currently are “violent felonies” under Penal Code § 667.5 are: murder or voluntary manslaughter; mayhem; rape (§§ 261(a)(2) or (a)(6) and 262(a)(1) or (4)); sodomy (§ 286(c) or (d)); oral copulation (§ 288a(c) or (d)); lewd or lascivious act (§ 288(a) or (b)); any felony punishable by death or imprisonment for life; any felony in which the defendant inflicted great bodily injury on a person other than an accomplice (§§ 12022.7, 12022.8, or 12022.9) or used a firearm (§§ 12022.3(a), 12022.5, 12022.53 and 12022.55); any robbery; arson (§ 451(a) or (b)); sexual penetration (§ 289(a) or (j)); attempted murder; explosion of a destructive device (§12308, 12309, or 12310); kidnapping; assault with the intent to commit a specified felony (§ 220); continuous sexual abuse of a child, (§ 288.5); carjacking (§ 215(a)); rape, spousal rape, or sexual penetration, in concert (§ 264.1); extortion for street gang purposes (§§ 518 and 186.22); threats to victims or witnesses for street gang purposes (§§ 136.1 and § 186.22); first degree burglary where another person, other than an accomplice, was present in the residence; weapons of mass destruction (§ 11418(b) or (c)).

Penal Code § 2933.1 applies to any person convicted of a crime that was added to the list of violent felonies before the person’s crime was committed. *People v. Van Buren* (2001) 93 Cal.App.4th 875 [113 Cal.Rptr.2d 510] Because the list of “violent felonies” has been modified many times, a prisoner who wishes to determine whether her or she was convicted of a violent felony should check the annotated statutes to determine what version of § 667.5 was in effect at the time of his or her offense.

³ Other credit limits include: (1) prisoners sentenced to doubled terms under the Two Strike Law may earn no more than 20 percent credits (Penal Code §§ 667(c)(5)) and (2) prisoners convicted of specified felony offenses committed on or after January 1, 1991, who have two or more prior convictions and prison terms for those types of offenses, are not eligible to earn any credit (Penal Code § 2933.5). There are also credit limits that apply to most life prisoners, including those convicted of murder and those sentenced under the Three Strikes Law. A separate law (Penal Code § 3057) limits the credits that can be earned by some parole violators.

⁴ Penal Code § 2933.

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- *In re Reeves* (2005) 35 Cal.4th 765 [28 Cal.Rptr.3d 4] – The California Supreme Court held that
 - (1) when sentences for non-violent and violent felonies are run consecutively, they merge into a single “aggregate term,” and the 15 percent limit under § 2933.1 applies to the whole sentence.
 - (2) when sentences for non-violent and violent felonies are run concurrently, the 15 percent limit under § 2933.1 applies only to the portion of the sentence for the nonviolent felony and does not apply to any portion of the sentence served for the non-violent offense only. Since the sentences for violent felonies are usually longer than the sentences for non-violent felonies, most prisoners who get concurrent sentences for both types of crimes will be serving the violent felony sentence for their whole time in prison. However, in some cases, the concurrent sentence for a non-violent felony might still be running after the violent felony portion of the sentence is still running. This might happen, for example, if the non-violent felony sentence is imposed later in another case and does not start to run until after the prisoner has already served some of the violent felony term.

(Note that the *Reeves* decision affects only the credits that a person can earn after sentencing. Another case established that the 15 percent limit applies to the entire time spent in custody prior to sentencing if the person is sentenced for both non-violent and violent felonies.⁵)

- *In re Phelon* (2005) 132 Cal.App.4th 1214, 1217 [34 Cal.Rptr.3d 276] – A state Court of Appeal held that when the sentence for a violent felony was stayed pursuant to Penal Code § 654, and sentence was imposed only on non-violent felonies, the 15 percent credit limit under § 2933.1 did not apply to either the pre-sentence or in-prison credits. Prisoners should note that in *In re Pope* (2008) 158 Cal.App.4th 860 ;70 Cal.Rptr.3d 314], a different Court of Appeal disagreed with *Phelon* and concluded that violent felony counts stayed under § 654 do trigger the 15 percent credit limit under § 2933.1; a petition for review has been filed in the *Pope* case and is still pending as of March 25, 2008.⁶
- *In re Tate* (2006) 135 Cal.App.4th 756 [37 Cal.Rptr. 3rd 710] – A state Court of Appeal held that when a prisoner is sentenced for a violent felony and then commits a non-violent felony while in prison, the 15 percent credit limit under § 2933.1 does not apply to the sentence for the non-violent term. The reason for this is because, under California law, a consecutive sentence for an in-prison offense runs totally separate from the sentence for the original commitment offense.⁷

⁵ *People v. Ramos* (1996) 50 Cal.App.4th 810 [58 Cal.Rptr.2d 24].

⁶ In *People v. Duff* (2007) 60 Cal.Rptr.3d 185, another court of appeal also disagreed with the reasoning of the *Phelon* case in a slightly different context. In *Duff*, the court found that Penal Code § 2933.2, which bars murderers from earning conduct or work credits, applied even if the sentence for the murder conviction was stayed. The California Supreme Court granted review of the *Duff* case in August 2007. (*People v. Duff*, pending as Cal. Supreme Court No. S153917.)

⁷ Penal Code § 1170.1(c); *People v. McCart* (1982) 32 Cal.3d 338, 340, 343.

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In summary, the prisoners who are affected by these cases, and whose release dates may have been mis-calculated by the CDCR, are those who were convicted of violent felonies and who also (1) received a concurrent sentence for a non-violent felony that extends longer than the violent felony term; (2) were sentenced for only non-violent felonies because the terms for all violent felonies were stayed by the sentencing court, OR (3) received a consecutive sentence for a non-violent in-prison crime.

What should I do if I think my release date is not properly calculated?

If your sentence is long and your release date is far off, you might want to wait before doing anything. A petition for writ of mandate was recently filed in the Sacramento County Superior Court, asking the court to order the CDCR to systematically audit prisoners' cases and re-calculate their release dates in accord with the law.⁸ In response, the CDCR has stated that it is making auditing and correcting release dates a high priority. It is likely that the mandate petition will result in the CDCR complying with the case law described above.

If your sentence is fairly short, and your release date is already within the next few years (or if you have already been released on parole), you should probably take some immediate action to get the CDCR to check your credits and release date promptly. You should also take action if the CDCR has checked your credits but you think the case records staff did not properly re-calculate your release date.

Prisoners should attempt to solve release date problems by taking following actions:

(1) File a CDCR Form 602 Administrative Appeal

The CDCR has acknowledged that it has not systematically screened cases to see if proper credits have been awarded. If you file a Form 602 administrative appeal, the CDCR should review your case, award any additional credits that the law requires, and re-calculate your release date. If you think that re-calculation of your release date will make you due for immediate release, or if you think you may already be overdue for release, you can file your 602 as an emergency appeal.⁹

⁸ *Baustista v. Schwarzenegger*, Sacramento County Superior Court No. 43-2007-00883037-CU-WM-GDS, Petition for Writ of Mandate, filed Dec. 12, 2007.

⁹ The rules concerning emergency appeals are set forth in 15 CCR § 3084.7(a). To file an emergency appeal, write "Emergency Appeal" on the top of the 602 form and submit it directly to the Appeals Coordinator. If emergency processing is granted, the informal and first formal levels are waived and the appeal will be sent to the second formal level for review. Prison staff will have five working days to answer the appeal. (15 CCR § 3084.7(a)(2)(B)). To file the appeal to the third level of review, you must send the 602 back to the Appeals Coordinator, who will fax it to the CDCR Chief of Inmate Appeals; third level review must be completed within five working days.

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There are a few special rules for processing 602s about credit computation or release date issues.¹⁰ To obtain informal review, prisoners must submit such appeals concerning to the prison records office. The records office staff have 10 working days to answer. If the appeal is denied, the response must be hand-delivered to the prisoner, who must sign an acknowledgment of receipt.

If an appeal is denied at the informal level, the prisoner may submit it to the appeals coordinator. First level review is bypassed. Second level review consists of a “computation review hearing.” The hearing must be conducted by a case records manager and must take place within 15 days. The prisoner must be provided with a copy of the computation review hearing decision on a CDCR Form 1033.

If the appeal is denied, or the prisoner is dissatisfied with the computation review hearing decision, the prisoner can submit the appeal to the CDCR chief of inmate appeals for third level review.

If a prisoner files a 602 appeal, and the CDCR staff determine that the error is the responsibility of the court (for example, if a matter concerns pre-sentence credits), the CDCR must refer the matter to the court.¹¹

(2) File a Petition for Writ of Habeas Corpus in State Court

Being overdue for release directly affects a person’s liberty, a fundamental interest characterized by the California Supreme Court as “second only to life itself.”¹² If you complete the administrative appeal process, and you think that the CDCR is still violating the law or that the sentencing court miscalculated your pre-sentence credits, you can file a petition for writ of habeas corpus in a state superior court. The process for filing such petitions is fairly straight-forward and state habeas cases can often be resolved within a few months.

What can I do if I was kept in prison past my proper legal release date?

If think you were kept in prison past your release date, you should file a CDCR Form 602 administrative appeal with your parole office and, if necessary, file a petition for writ of habeas corpus in state court as described above.

If you are granted additional credits, and the credit award exceeds the length of time remaining on the prison sentence, you will be entitled to immediate release. Any excess credits must then be deducted

¹⁰ These rules are set forth in 15 CCR § 3084.7(h). See also *Haygood v. Younger* (9th Cir. 1985) 769 F.2d 1350 and *Alexander v. Perrill* (9th Cir. 1990) 916 F.2d 1392 (prisoners have constitutional due process right to have CDCR investigate and hold informal hearings on complaints regarding credits and release date calculations). The timeframes within which the CDCR is supposed to respond to appeals are set forth in 15 CCR § 3084.6(b).

¹¹ 15 CCR § 3084.7(h)(2)(D).

¹² *People v. Olivas* (1976) 17 Cal.3d 236, 251 [131 Cal.Rptr. 55].

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from your parole period.¹³ The deduction will be made from the controlling parole discharge date, not the presumptive early discharge date. An award of credits applied to the parole term will not allow you to avoid re-incarceration on a parole violation, unless your maximum parole discharge date expires before the end of the revocation term.¹⁴

If you were kept past your release date, you might also be able to sue the prison officials for money damages by bringing either a federal civil rights lawsuit or a state tort claim. The rules and procedures for lawsuits for money damages are complicated; you should try to consult with an attorney if you are interested in filing such a lawsuit. You should also act quickly because there are strict time limits that must be met in order to file various types of money damages lawsuits.

Other Prison Law Office information packets may be enclosed with this letter. If not, and you want more information related to credit issues and legal challenges, please write to request our free information packets on (1) how to calculate release dates, (2) how to file an administrative appeal, (3) how to file a state court petition for writ of habeas corpus or (4) how to file a lawsuit against prison officials for money damages. These information packets are also available at the Prison Law office website at www.prisonlaw.com.

¹³ *In re Reina* (1985) 171 Cal.App.3d 638, 642 [217 Cal.Rptr. 535]; *In re Ballard* (1981) 115 Cal.App.3d 647, 650 [171 Cal.Rptr.459].

¹⁴ *In re Monterrosa* (1987) 193 Cal.App.3d 851 [238 Cal.Rptr. 535].