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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 information, 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: NEW SENTENCE CREDIT LAWS (updated April 2, 2010)

We have received your letter asking whether there have been recent changes to the sentence time credit laws or to the Three Strikes law or whether there are new state policies or court orders that require early release of some prisoners. Because we cannot respond to all letters individually, we are sending you this overview of the most recent developments.

I. There Are New Credit Laws Effective January 25, 2010

In 2009, the California legislature passed a new law (Senate Bill xxx 18) that made changes to the credits that prisoners can earn. The Governor signed the law and it went into effect on January 25, 2010. Shortly thereafter, the CDCR published proposed regulations implementing the new law; these regulations are in effect as of January 25, 2010. The new law affects credits earned in the county jail before and after sentencing and credits earned in prison. Many of the details about how the new law will be implemented are still not known. The following is a summary of the information that we have as of April 1, 2010.

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A. Changes to Credits Earned in County Jail

Previously, most criminal defendants who were in custody awaiting trial and sentencing could earn credit for the actual days they served plus two days of good conduct credit for every six days served. The same credits were also applied to time spent in jail after sentencing and before transportation to a CDCR prison. Some types of inmates could not earn full pre-sentence/pre-prison conduct credits.

Effective January 25, 2010, Penal Code § 4019 has been amended so that some people will now earn more credits for time in custody awaiting trial and sentencing. Unless an exception applies, a prisoner now earns two days of conduct credit for every four days served. With all credits, a total term of four days will be deemed served for every two days actually spent in jail; this is also called "half-time." (Penal Code § 4019(f).) There are several exceptions:

- C Some prisoners still can earn only two days of conduct credit for each six days actually served. This applies to anyone who is (1) required to register as sex offender under Penal Code § 290 et seq., (2) is being sentenced for or has a prior conviction for a serious felony as defined in Penal Code § 1192.7, or (3) has a prior conviction for a violent felony as defined in Penal Code § 667.5. (Penal Code § 4019(b)(2) and (c)(2).) It appears that prior juvenile adjudications for serious or violent felonies should not count as a "conviction" for purposes of § 4019. (See *People v. West* (1984) 154 Cal.App.3d 100, 107.)
- C Prisoners who are convicted of violent felonies can earn credits only in the amount of 15 percent of the actual days served. (Penal Code § 2933.1 and § 4019(b)(1) and (c)(1)); see also Penal Code § 12022.53(i).)
- C Some prisoners cannot earn any credit. This includes (1) anyone convicted of murder (Penal Code § 2933.2(c)) and (2) anyone convicted of certain offenses, who has served two or more prison terms for prior convictions for those specific offenses. (Penal Code § 2933.5; *People v. Goodloe* (1995) 37 Cal.App.4th 485.)

Prisoners who are eligible for full § 4019 credits now also earn one day of conduct credit for every day served after they been sentenced and are awaiting transfer to the CDCR. (Penal Code 2933(e).) Current CDCR policy is to apply this additional credit only to prisoners who are received by the CDCR after January 25, 2010. (CDCR Instructional Memo re: Changes in Penal Code Sections 2933 and 4019, dated Feb. 4, 2010.)

The new laws on county jail credits almost certainly apply to anyone sentenced on or after January 25, 2010. However, there are open questions regarding the extent to which the law applies to prisoners who were sentenced before that date. There are good arguments that the new law should apply at least to people whose criminal cases were still being appealed on January 25, 2010. This argument is based on several grounds. First, there is a general rule that, unless the legislature says otherwise, new laws that reduce punishment must be applied to cases in which the judgments are not yet final. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393; *People v. Doguniere* (1978) 86 Cal.App.3d 237, 240.) Second, because the legislature passed the new law in response to concerns about budget deficits and prison overcrowding, it is reasonable to conclude that the legislature wants the credit increases to apply to as many prisoners as possible. (See *People v. Alford* (2007) 42 Cal.4th 749, 753-754.) Third, under the principles of equal protection there is no rational reason why the

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increased credits should apply only to people sentenced after January 25, 2010. (See *In re Kapperman* (1974) 11 Cal.3d 542; *People v. Sage* (1980) 26 Cal.3d 498.) Fourth, Section 59 of Senate Bill xxx18 states that it is expected that there will be delays in CDCR determining what additional credits will be granted under the new law and that such delays may result in some prisoners serving excess days in prison; this implies that the recalculations may include retroactive awards of credit. So far, the Third District Court of Appeal has adopted some of these arguments and granted retroactive credits (*People v. Brown* (Mar. 16, 2010) No. C056510 ___ Cal.App.4th ___; 2010 WL 924421; 2010 Daily Journal DAR 4049), but the Fifth District Court of Appeal has rejected such arguments (*People v. Rodriguez* (Mar. 1, 2010) 182 Cal.App.4th 535); these two court decisions are very recent and may subject to further review. It is possible that some of the same legal arguments can be used to argue that the new pre-sentence credit law should be applied even to prisoners whose criminal judgments were already final as of January 25, 2010.

People who are still awaiting trial and sentencing should be awarded credit in accord with the new law when they appear at their sentencing hearings. People who have already been sentenced and are appealing their criminal cases should contact their appellate attorneys to determine whether they are entitled to additional pre-sentence credits and how any credit issue should be raised.

B. Changes to Credits Earned in Prison

The laws that went into effect on January 25, 2010 also increase the amount of prison credits that many prisoners can earn. The changes are as follows:

- C **All eligible prisoners who are discipline-free will be granted one day of credit for every day served (“half-time”), regardless of whether they are working full-time or part-time or on waiting lists for assignments or undergoing reception center processing.** (Penal Code § 2933(a)-(b).) This provision also applies to parole violators returned to custody who are otherwise eligible for credits. (See Penal Code § 3057(d).) CDCR will not grant any conduct credits for prisoners who are on C status (refusal to work or unassigned due to programming misconduct) or D2 status (prison gang members or people with serious disciplinary violations who are placed in ASU, SHU, PSU or BMU). (CDCR Instructional Memo re: Changes in Penal Code Sections 2933 and 4019, dated Feb. 4, 2010; Pen. Code § 2933.6; 15 CCR § 3043.4.)
- C **More prisoners are eligible to earn two days of credit for every one day served.** This type of credit used to apply only to prisoners who were working at fire camps. It now also applies to prisoner fire-fighters who are assigned to an institution rather than to a camp. In addition, two-for-one credits now apply to prisoners who have completed firefighter training. These new credits are applicable only to inmates who are eligible after July 1, 2009. (Penal Code § 2933.3(b); 15 CCR § 3044(b)(1).) The law also gives the CDCR authority to provide additional credits for prisoners who successfully complete firefighter assignments (Penal Code § 2933.3(c)); so far, no further regulations have been adopted.
- C **Eligible prisoners can receive up to 6 weeks of additional credit each year for successful completion of approved rehabilitation programs such as academic, vocational, therapeutic life skills and substance abuse programs.** CDCR is calling these “milestone” credits. Milestone credits cannot be earned by anyone who is (1)

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required to register as a sex offender under Penal Code section 290 et seq., (2) serving time on a parole violation without a new term, (3) serving a term for a violent felony as defined in Penal Code § 667.5(c), or (4) serving a term under the Two or Three Strikes Law described in Penal Code § 667(b)-(I) and § 1170.12. (Penal Code § 2933.05.) Also, the CDCR will not award milestone credits to anyone who is serving only a parole violation term. CDCR will decide which programs qualify and those programs will develop criteria that must be met to earn milestone credits. Prisoners will be notified of a credit award via a CDCR Form 128G. The program begins January 25, 2010, and no credit will be granted for milestones completed prior to that date. If a prisoner earns more than 6 weeks of milestone credits in a year, the excess credits will go into a credit “bank account” and can be applied at the end of the next 12-month period. Milestone credits that are not applied by the time a person paroled will not reduce the parole term or apply to any future parole revocation or criminal term. (15 CCR § 4043(c); CDCR memo on Credit Earning Frequently Asked Questions.) Like other types of conduct credits, milestone credits can be forfeited if a prisoner is found guilty of a serious disciplinary violation. (15 CCR § 3043.3)

The new laws do not change the statutes that limit or prohibit credit-earning for certain categories of prisoners. These include the following:

- C Prisoners sentenced under the Two Strikes Law can earn only 20 percent credits. (Penal Code § 667(c)(5) and § 1170.12(a)(5).)
- C Prisoners convicted of violent felonies can earn only 15 percent credits. (Penal Code § 2933.1; see also Penal Code § 12022.53(i).)
- C Some prisoners cannot earn any conduct credits. These include (1) prisoners convicted of murders committed on or after June 3, 1998 (Penal Code § 2933.1) and (2) prisoners convicted of certain offenses, who have served two or more prison terms for prior convictions for those specific offenses. (Penal Code § 2933.5.) It also includes many, but not all, other prisoners serving terms of life with the possibility of parole; eligibility for credits on a life term depends on whether the sentencing statute for the crime incorporated Penal Code section 2930 et seq. at the time the person committed the offense.
- C Parole violators who are serving parole revocation terms cannot earn any conduct credits if they have committed certain types of crimes or parole violations. (Penal Code § 3057(d).)
- C People serving civil commitments as narcotics addicts do not earn any conduct credit. (*People v. Jones* (1995) 11 Cal.4th 118.)

There is one new law that *decreases* the credits that some prisoners can earn. Under prior law, prisoners were ineligible to earn credits while they were in a SHU or ASU for certain types of serious misconduct; which was called D-2 status. D-2 status, and the bar on credit-earning, has now been expanded in two ways. First, prisoners who are placed in segregation as validated gang members are now included in the D-2 group. Second, D-2 status applies when the gang member or prisoner with a serious misconduct is placed in a PSU or BMU. (Penal Code § 2933.6; 15 CCR § 3043.4 and 3044(b)(7).) There is a legal argument that taking away credit-earning eligibility from prisoners who previously could earn

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credits violates the U.S. Constitution's prohibition on ex post fact laws. (See, e.g., *Hunter v. Davis* (9th Cir. 2003) 336 F.3d 1007; *In re Lomax* (1998) 66 Cal.App.4th 639.)

The CDCR is calculating credits earned by prisoners from January 25, 2010 onward in accord with the new laws. (15 CCR § 3042; CDCR Instructional Memo re: Changes in Penal Code Sections 2933 and 4019, dated Feb. 4, 2010.) CDCR is not applying the new laws to time served prior to January 25, 2010. Likewise, eligible parolee violators will get credit under the new laws for time served on or after January 25, 2010, even if the arrest or hold date was prior to January 25, 2010. (CDCR Instructional Memo re: Changes in Penal Code Sections 2933 and 4019, dated Feb. 4, 2010.)

There are legal arguments that the new laws should have more-far-reaching retroactive applications. These arguments are based on similar grounds as some of the arguments in favor of retroactive application of the new pre-sentence credit law, which are discussed in section I-A, above. However, as of April 2, 2010, there have not been any decisions overturning or modifying CDCR's current policies on how the new laws are applied.

Senate Bill xxx 18 recognizes that the CDCR has limited resources and gives the CDCR a "reasonable time" to determine which prisoners will get additional credits. The law also says that prisoners cannot sue for damages if there is a delay in granting credits under the new law. However, credit for any excess time served in prison is supposed to be applied to the prisoner's parole term. (SB xxx 18, § 59.)

Any prisoner who thinks the law is not being properly applied to his or her case should file a 602 administrative appeal and pursue it through the Third Level of Review. If a 602 does not solve the problem, a prisoner may file a petition for writ of habeas corpus in state court. A free manual on state habeas corpus petitions is available from the Prison Law Office upon request.

II. There are No Changes to the Three Strikes Laws

In the past years, there have been several propositions and legislative bills that proposed changes to the Three Strikes laws. As of February 2010, *none* of those proposals has been adopted.

III. The Court Order Requiring the CDCR to Reduce Overcrowding Has Not Gone Into Effect

On January 12, 2010, a federal court issued an order for California officials to reduce prison overcrowding, in accord with a plan that the state previously had submitted to the court. The state's plan includes enhanced good-time credits, diversion of some low-risk/low-level offenders and parole violators away from prison, and creating additional bed spaces. However, the state is appealing the case to the U.S. Supreme Court and the lower federal court order is "stayed" while the appeal is pending. *This means that the January 12, 2010 federal court order will not take effect unless and until the U.S. Supreme Court upholds it.* The U.S. Supreme Court is not expected to decide the case until late 2010 or early 2011.