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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 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 September 2011)

We have received your letter asking about changes to California's sentence credit laws. Because we cannot respond to all letters individually, we are sending you this overview of recent developments.

California law for many years has permitted most state prisoners to shorten their sentences by earning credits for good conduct or participation in work or educational programs. The same is true for county jail inmates. The laws and rules for conduct credits have changed many times over the years. As part of the attempts to address California's prison overcrowding problem, in 2010 and 2011 the Legislature enacted new laws that increase the credits earned by many jail inmates and prisoners. This letter explains the changes based on information available in early September 2011.

The letter first describes changes to the laws about conduct credits for county jail inmates who are either waiting for criminal charges to be resolved or serving a jail sentence. The second part of the letter discusses conduct credits that can be earned by people after they arrive in state prison. Because of the changes in the laws, different credit rules may apply depending on the date a prisoner committed the crime, was sentenced, or completed his or her direct appeal case. The courts are still deciding how some of the new credit laws should be applied. The third part of this letter describes on-going disputes about who can benefit from the new laws.

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I. CHANGES TO CONDUCT CREDITS FOR TIME IN COUNTY JAIL

There have been three sets of changes to conduct credits earned by county jail inmates for time spent awaiting sentencing or serving a jail term.

Senate Bill xxx 18 took effect on January 25, 2010. The bill amended Penal Code § 4019 so that, unless an exception applies, a person can earn two days of good conduct/work credit for every four days served in the county jail. With all credits, a total term of four days is deemed served for every two days actually spent in jail; this is also called “half-time.” The bill did not say whether it applies only to people sentenced on or after January 25, 2010, or whether it might apply to some people who were sentenced prior to that date. The exceptions to half-time credit eligibility are as follows:

- Some inmates can earn only two days of conduct credit for each six days actually served (“third time”). 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 § 667.5.¹
- Inmates with current convictions for violent felonies can earn conduct credits only in the amount of 15 percent of the actual days served. (Penal Code § 2933.1.)
- Some inmates cannot earn any conduct credit. This includes anyone convicted of murder (Penal Code § 2933.2(c)) and anyone convicted of certain offenses, who has served two or more prison terms for prior convictions for those specific offenses. (Penal Code § 2933.5.)

Senate Bill 78 took effect on September 28, 2010. This bill did two things:

- The pre-sentence conduct credits rules for people sentenced to prison were moved to Penal Code § 2933(e)(1) but were not significantly changed. A defendant who is sentenced to prison will now receive one day of conduct credit for each day served in jail (“half-time”) starting from the day of arrest and until arriving in state prison. This is just a slightly different calculation formula than the “half-time” allowed for under SB xxx 18. The same exceptions apply as under Senate Bill xxx 18. Senate Bill 78 does not say whether this change applies only to people sentenced on or after September 28, 2010, or whether it might apply to some people sentenced before that date.

¹ Prior juvenile adjudications for serious or violent felonies do not count as “convictions” for purposes of § 4019. (*People v. Pacheco* (2011) 194 Cal.App.4th 343; see also *People v. West* (1984) 154 Cal.App.3d 100, 107.)

The courts of appeal have issued conflicting decisions as to whether a prior serious or violent felony conviction must be pled and proven in order to make a defendant ineligible for full conduct credits, and whether a trial court can strike a prior conviction to make a defendant eligible for full credits. The California Supreme Court is currently reviewing this issue in *People v. Lara*, No. S192784 (rev. granted 5/18/11), previously published at (2001) 193 Cal.App.4th 1393.

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- Penal Code § 4019 was changed so that people sentenced to county jail time or probation were not allowed to earn half-time conduct credits for county jail time. Defendants who were sentenced to county jail or probation only received a maximum of “third time” (two days conduct credit for each six days served) for time spent in the county jail. Senate Bill 78 says this change applies only to people who are confined for a crime committed on or after September 28, 2010.

Assembly Bills 109/117 take effect on October 1, 2011. Assembly Bill 117 states that it applies to anyone confined in a county jail for a crime committed on or after October 1, 2011. The bills further amended Penal Code § 4019 in two ways:

- People who are sentenced to county jail terms or probation can earn up to two days of good conduct/work credit for every four days served in the county jail, either prior to or after sentencing. With all credits, a total term of four days is deemed served for every two days actually spent in jail. This means that people who get sentenced to jail terms and people who get sentenced to prison terms now have the same opportunities to earn “half-time” conduct credits.
- There are now fewer exceptions to half-time eligibility for anyone who is in county jail, either awaiting sentencing or serving a county jail term. There are no longer restrictions on credit-earning for people who have prior serious or violent felony convictions, current serious felony convictions, or who are required to register as sex offenders. However, people who are convicted of violent felonies can still earn only 15% conduct credits and a few people still cannot earn any jail conduct credits at all (inmates convicted of murder and inmates convicted of certain crimes who have served two prior prison terms for such offenses.)

II. CHANGES TO CONDUCT CREDITS FOR TIME IN PRISON

Senate Bill xxx 18, which went into effect on January 25, 2010, increased the amount of in-prison conduct credits that many prisoners can earn. The changes are as follows:

- **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 or undergoing reception center processing.** (Penal Code § 2933(a)-(b).)
- **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 or have just completed firefighter training. The new credits apply only to people who became eligible after July 1, 2009. (Penal Code § 2933.3(b); 15 CCR § 3044(b)(1).)

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- **Eligible prisoners can receive up to 6 weeks of additional credit each year for completing approved academic, vocational, life skills and substance abuse programs.** The CDCR calls these “milestone” credits. Milestone credits cannot be earned by anyone who is (1) required to register as a sex offender under Penal Code section 290 et seq., (2) serving time on a parole violation without a new criminal term, (3) serving a term for a violent felony, or (4) serving a term under the Two or Three Strikes Law. (Penal Code § 2933.05.) The CDCR decides which programs qualify and what criteria that must be met to earn milestone credits. Prisoners will be notified of a credit award via a CDCR Form 128G. The program began January 25, 2010, and no credit is granted for programming 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. The next 12 month period begins on the date the first milestone is completed. 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 § 3043(c).)

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

- Prisoners sentenced under the Two Strikes Law can earn only 20 percent credits. (Penal Code § 667(c)(5) and § 1170.12(a)(5).)
- Prisoners convicted of violent felonies can earn only 15 percent credits. (Penal Code § 2933.1.)
- Some prisoners cannot earn any conduct credits. These include prisoners convicted of murders committed on or after June 3, 1998 (Penal Code § 2933.1) and prisoners convicted of specific very serious offenses who have served two or more prior prison terms for those types of offenses (Penal Code § 2933.5). It also includes many, but not all, prisoners serving terms of life with the possibility of parole (eligibility for conduct credits on a life term depends on whether the statute for the crime authorizes credit-earning).
- 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).)
- People serving civil commitments as narcotics addicts do not earn any conduct credit. (*People v. Jones* (1995) 11 Cal.4th 118.)

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There is one part of Senate Bill xxx 18 that *decreases* the credits that prisoners can earn. As in the past, prisoners are ineligible to earn credits after they commit certain types of misconduct. (Pen. Code § 2933.6; 15 CCR § 3043.4.) One type of credit ineligibility, called D-2 status, used to apply just to prisoners who committed serious misconduct and were placed in a SHU or ASU. D-2 status has now been expanded in two ways. First, prisoners who are placed in segregation as validated gang members are included in the D-2 group. Second, D-2 status applies when a gang member or prisoner with serious misconduct is placed in a PSU or BMU. (Penal Code § 2933.6(a); 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 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.) However, one court of appeal has rejected such an argument in regards to the recent changes to D-2 status. (*In re Sampson* (2011) 197 Cal.App.4th 1234, pet. for rev. pending as of 9/8/11.)

The CDCR is calculating credits earned by prisoners since January 25, 2010 in accord with the changes in the law. CDCR is not applying the new laws to any time served prior to January 25, 2010. Parole violators also get credit under the new laws for any time served on or after January 25, 2010.

III. HOW DOES A PRISONER OR INMATE KNOW WHICH LAW APPLIES?

This is a complicated question. Some of the amendments state that they apply only to people who are in custody for crimes committed on or after a certain date. (Parts of Senate Bill 78 and Assembly Bills 109/117.) However, even for those amendments there are legal arguments that the provisions should be applied to some people who committed their crimes and served time prior to those dates.

Other amendments are silent about how they apply. (Senate Bill xxx 18 and parts of Senate Bill 78.) There is general agreement that those provisions apply to all people sentenced after the effective dates of those amendments. There is disagreement about whether the amendments should also apply to some people who were sentenced before those dates.

The issues are now under review by the California Supreme Court. The lead case is *People v. Brown*, No. S181963, previously published at (2010) 182 Cal.App.4th 1354 (rev. granted 6/9/10). The main legal arguments are as follows:

- There is a 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.) Also, the legislature passed Senate Bill xxx 18 in response to concerns about budget deficits and prison overcrowding, so 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.) In addition, Section 59 of Senate Bill xxx18 states that there could be delays in CDCR calculating additional credits under the new law that may result in some prisoners serving excess days in prison; this implies that the recalculations should include retroactive awards of credit. If the California Supreme Court adopts these arguments, Senate Bill xxx18 and parts of

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Senate Bill 78 would apply to anyone whose case was still on direct appeal as of the effective dates of those amendments.

- Second, under the constitutional principle of equal protection there is no rational reason why the conduct credit increases should apply only to people sentenced after the effective dates of each of the statutes. (See *In re Kapperman* (1974) 11 Cal.3d 542; *People v. Sage* (1980) 26 Cal.3d 498.) If the California Supreme Court adopts this argument, some or all of the new laws may apply to anyone was serving a sentence when the amendments took effect.

Prisoners should check with their public defenders and appellate attorneys to make sure the correct law concerning pre-sentence credits is applied in their cases. Any prisoner who thinks the CDCR is not properly calculating his or her in-prison credits should file a Form 602 administrative appeal and pursue it through the Third Level of Review. If a 602 does not solve the problem, or if the credit error was made by the superior court at sentencing, a prisoner or jail inmate may file a petition for writ of habeas corpus in state court. A free manual on STATE HABEAS CORPUS PROCEDURE is available from the Prison Law Office on request.