FEBRUARY 2010 – ADI NEWS ALERT

by

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This alert covers the recent amendment to Penal Code section 4019 enacted by Senate Bill No. 18, section 50, Third Extraordinary Session of 2009-2010, which became effective January 25, 2010.[1] (See attached text of SBx3 18, sec. 50.)

Basically, this section of the bill increases the available pre-sentence credit for a number of prisoners. It used to be six days of credit for every four days of actual custody. (Former Pen. Code, § 4019, subds. (b), (c), (f).) Under SBx3 18, two days of conduct credit are awarded for each two days of actual custody. (For example, under that formula the prisoner receives eight days of credit for four days of actual custody instead of the previous six.) The increase does not apply to sex offenders required to register, those convicted of a serious felony, and those with prior serious or violent felony convictions. A fuller description of the changes enacted by SBx3 18, prepared by ADI staff attorney Victoria Matthews, is attached.

We have been trying to sort out the options on how to handle the increased pre-sentence credits under section 4019. These include administrative remedies, *Fares*[2] / Penal Code section 1237.1 motion in trial court, action in the reviewing court, and habeas corpus, among others. Although some loose ends still exist, this alert provides guidance. Please consult the assigned ADI staff attorney if a case presents any gray areas.

ADI's paper on *Potentially Favorable Changes in the Law* ("*Favorable Changes*") (attached)[3] applies to this situation. In addition, the First District Appellate Project has posted guidance on its website.[4] Panel attorneys should consult both.

Retroactivity and finality

In our opinion these amendments apply to all cases *not yet final for purposes of appellate review as of January 25, 2010*, the effective date of the amendment. (See *In re*

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[1]As a reminder: Counsel are responsible for all matters covered in e-mail alerts, newsletters, and other information made available to the panel. Past alerts and newsletters are at http://www.adi-sandiego.com/news_alerts.html and http://www.adi-sandiego.com/news_newsletters.html.

[2]*People v. Fares* (1993) 16 Cal.App.4th 954.

[3]http://www.adi-sandiego.com/PDFs/Favorable%20changes%2011-08.pdf.

[4]http://www.fdap.org/4019.shtml.

Estrada (1965) 63 Cal.2d 740 [ameliorative changes in statutes presumed to apply retroactively to cases not yet final when they become law]; *Favorable Changes*, *supra*, Part Two, on general principles of retroactivity.)

The term "final" in the *Estrada* context means final for purposes of appellate review.[5] That means the avenues of direct appeal are no longer available. If a petition for review was not filed, the case becomes final for purposes of appellate review when the time for the California Supreme Court to grant review on its own motion expires – 60 days after the Court of Appeal opinion was filed, unless the court extends that time. (Cal. Rules of Court, rule 8.512(c)(1).) If a petition for review was filed, the case becomes final for purposes of appellate review when the time to petition the United States Supreme Court for certiorari expires (90 days from the denial of review) or when that court denies certiorari. (*People v. Vieira* (2005) 35 Cal.4th 264, 306; *In re Pine* (1977) 66 Cal.App.3d 593, 594; see *Favorable Changes*, *supra*, Part Two, on general principles of retroactivity.)

Administrative remedies and actions by trial counsel

CDCR: Although section 59 of SBx3 18 requires the California Department of Corrections and Rehabilitation to implement the changes enacted, it appears that CDCR is recalculating only post-sentence credits, not those under section 4019.[6] Thus counsel – trial or appellate – must do something.

Local agencies: This will have to be done on a county-by-county basis. We have been checking with ours.

- San Diego: The Public Defender and District Attorney are trying to work out a system for conforming pre-sentence credits to the new law; we will advise you of the scope of their arrangement when it is decided.

- Imperial: At this point the Public Defender does not plan any action.

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[5]The various meanings of "final" are explored in the Appellate Defenders, Inc., Criminal Appellate Practice Manual, chapter 7, § 7.29 ("Manual"). See http://www.adi-sandiego.com/manual.html.

[6]CDCR is not applying the changes retroactively, despite *Estrada*. The non-retroactive interpretation as to post-sentence credits may require litigation, but the matter is normally not within our purview. We are contacting the Prison Law Office.

- San Bernardino: The Public Defender and District Attorney are recalculating credits for persons in local custody, but not those sentenced to prison.

- Riverside: We are still awaiting a definitive answer from the Public Defender.

- Inyo: Inquiry pending.

- Orange: The Public Defender Writs and Appeals section is planning to identify all of their affected cases in which sentencing occurred in 2009 and make a motion. The District Attorney and court agree the law is retroactive. Appellate counsel should make sure their cases get on the list for action. They should contact Denise Gragg, Assistant Public Defender, not the individual deputy.[7] If the sentencing was before 2009 or the case was handled by retained or conflicts counsel or the client was in pro per, it will not be on the list. Even if the case is a Public Defender one with a sentence in 2009, it might be overlooked if the notice of appeal was filed in pro per and trial counsel is not aware the case was appealed.

Steps panel attorneys can take in their cases

The *Favorable Changes* memo, *supra*, Part One, on what appellate attorneys can do to help their clients, provides detailed guidance on applying a favorable change in the law at various stages of a case. The main points applicable here are, in brief:

Evaluation of need for urgent action: In some cases the client may be entitled to immediate or imminent release with the application of the revised credits. Counsel should review their entire pre-final caseload to identify any such cases and take swift action. *Favorable Changes*, *supra*, Part One, section IV on alternative and expedited procedures discusses options. (See also Manual, *supra*, chapter 1, § 1.30 et seq.)

Evaluation of adverse consequences: As always, counsel should be alert to the possibility that pursuing a remedy will call attention to an error in the client's favor and end up costing the client more time than it saves. Counsel should not plunge in without investigating such a possibility. (See Manual, *supra*, chapter 4, § 4.91 et seq.)

Communication with trial counsel: It is important to contact trial counsel early and see if he or she is handling the correction in the superior court. (See preceding discussion of what the counties are doing.) If so, keep in touch to make sure trial counsel is

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following through. The previous two steps – evaluation of urgency and adverse consequences – are needed even if trial counsel will handle it, in case he or she overlooks that aspect.

Motion in trial court: If after communicating with trial counsel the appellate attorney decides he or she needs to do something, it is often advisable to start with a *Fares* / Penal Code section 1237.1 motion in the trial court. (See Manual, *supra*, chapter 4, § 4.42.) This is not automatic; sometimes other action is preferable. The California Appellate Project, Los Angeles, has distributed a sample, which is attached.

Argument in appellate court in pre-remittitur cases: If a trial court motion is denied[8] or is not feasible, it can be raised in the appellate courts by opening brief, supplemental brief, petition for rehearing, petition for review, or modification to petition for review – depending on the stage of the appeal. See *Favorable Changes*, *supra*, Part One, section II, on pre-remittitur procedures. The FDAP website page mentioned above has a sample argument and also a step-by-step analysis.

Post-remittitur cases not yet final for purposes of appellate review on January 25: A remittitur issues when the California Supreme Court denies a petition for review or the time for granting review expires. (Cal. Rules of Court, rules 8.272(b)(1)(A), 8.528(b).) As discussed above, if a petition for review was not filed, the case becomes final with the issuance of the remittitur. If a petition for review was filed, finality is when the time for petitioning for certiorari expires or the court denies certiorari. If a case was not yet at that stage on January 25, the new credits law would apply, and counsel should review possible remedies. *Favorable Changes*, *supra*, Part One, section III, discusses potential procedural steps for post-remittitur cases not yet final for purposes of appellate review. It is especially important to consult ADI about remedies in post-remittitur, pre-final situations. Preapproval is needed for compensation for actions taken, because the appointment is technically expired.

Post-remittitur cases final before January 25: At this time we do not contemplate routinely pursuing the added credits in cases final for purposes of appellate review before January 25, 2010. Obviously, that is subject to reconsideration if in a test case a court holds the amendment to be fully retroactive. Consult the ADI staff attorney if a final case seems to require action. Preapproval is needed for any compensation for such action.

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[8]The denial might be appealed separately or added to the existing appeal via augmentation. See rule 8.340(a) on automatic augmentation of subsequent trial court orders. This rule is commonly not complied with because the superior court clerk has to remember the case is on appeal and proactively prepare an augmentation. As a result, appellate counsel should remind the clerk of this duty.