

**ARGUMENT FOR ENHANCED CREDITS
FOR ALL PRE-SENTENCE CUSTODY
IF PERSON SENTENCED ON OR AFTER JANUARY 25, 2010**

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Courts have accepted the argument that persons *sentenced on or after January 25, 2010*, are entitled to full credits under the amended credits laws for their entire time in presentence custody, regardless of whether the new amended law applies retroactively to sentences imposed before then and regardless of when the custody was served. The law on the date of *sentencing* controls.

As now is common knowledge, legislation effective January 25, 2010, enacted a more favorable calculation for presentence custody conduct credits. If a person was sentenced after January 25, 2010, but had served some presentence custody time before that date, a strong argument exists that all presentence conduct credits should be calculated under the amended law, regardless of the law's retroactivity to sentences imposed before then under *In re Estrada* (1965) 63 Cal.2d 740 and equal protection theories.¹ The reason is that courts are to calculate presentence credits at the time of sentencing. (Pen. Code, § 2900.5, subs. (a) & (d).) The only law in effect at the time of sentencing in this situation was the amended law.

Some trial courts have employed a “two-tiered” approach, calculating conduct credits under the new formula for time in custody on or after January 25, 2010, but under the old formula for time in custody before January 25, 2010. Both Divisions One and Two already have concluded in unpublished (non-citable) opinions that this two-tiered approach is erroneous. (E.g., *People v. Brock*, E050996; *Tate v. Superior Court*, D057427; *People v. Jones* (E050882).) They have agreed with the argument that the law on the date of sentencing controls.

¹The amended more favorable credits law that applied between January 25, 2010, and September 27, 2010, was located in former Penal Code section 4019. The amended more favorable credits law that currently applies and has applied since September 28, 2010 is in Penal Code section 2933, subdivision (e). Please note that section 2933 provides for one additional day of conduct credits in cases with odd numbered actual custody credits and requires no minimum number of actual credits prior to the award of conduct credits. ADI has a memo by Cindi Mishkin on this change.

Counsel should make this argument when it is applicable.

Because this argument has been accepted by the courts, although not in citable cases, whenever a client was sentenced after January 25, 2010, and a two-tiered approach was employed, counsel should argue the two-tiered approach was erroneous. Credits entitlement is governed by the law at the time of sentencing, which in this case was the amended law, and that directly applied to *all* presentence custody time.

Other arguments for applying the amended credits should be separated from this argument and independently labeled.

Because *Estrada* retroactivity and equal protection claims are so commonly raised and are commonly rejected by some courts, it is important to make clear this argument is not a retroactivity or equal protection claim. Retroactivity and equal protection claims also may be appropriate but should be clearly separated. Each theory should have a separate heading.

Counsel must be alert for time-sensitive cases.

Time often is of the essence in these cases. Counsel must be careful to immediately determine whether there is a time issue by contacting the prison to learn the client's expected release date or by calculating the client's estimated release date. Based on this date, counsel should determine whether helping the client avoid serving dead time requires an expedited appeal, a petition for writ of mandate, or a petition for writ of habeas corpus. Please consult with the assigned ADI staff attorney about these options, when time is of the essence.

Check ADI website or ask staff attorney for additional resources.

Please check the ADI website and ask the staff attorney for sample briefs regarding this issue and sample arguments on *Estrada* and equal protection theories, as well.