SB 76 CHANGES TO PRE-SENTENCE CREDITS PROVISIONS IN PENAL CODE SECTIONS 2933 AND 4019

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On September 28, 2010, the law setting forth calculation of presentence custody credits was changed yet again with the enactment of Senate Bill No. 76 (2009-2010 Reg. Sess.). The text is attached. This urgency legislation was effective immediately.

Pre-sentence credits for clients actually sent to prison moved to section 2933(e)

For defendants *eligible* for increased credits who are given an *executed* prison sentence, SB 76 preserved most of the changes from the January 25, 2010, conduct credits amendment enacted in SBx3 18. However, it moved these provisions to Penal Code section 2933, subdivision (e). It also made some substantive changes, as described under the next heading.

Penal Code section 4019 still applies to *ineligible* prisoners, such as those convicted of a serious felony or a registerable sex offense or having a serious or violent prior. (Pen. Code, § 2933, subd. (e)(3).) Defendants in that category have not been affected by the changes in SBx3 18 or SB 76.

Otherwise, section 4019 now applies only to jail or camp sentences. For these defendants, section 2933 is inapplicable, and credits revert to the less advantageous pre-SBx3 18 levels. Under section 4019, new subdivision (g), the changes do not apply to defendants who committed the crime before the effective date of the statute. Thus, for an offense committed while the provisions of SBx3 18 were in effect (January 25-September 27, 2010), SBx3 18 controls.[1]

Substantive changes

The calculation method set forth in Penal Code section 2933, subdivision (e)(1), as amended by SB 76, is beneficial in providing for one additional day of conduct credits in cases with odd numbered actual custody credits and requiring no minimum number of

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[1]Providing lesser credits presumably would violate ex post facto laws. (E.g., *Weaver v. Graham* (1981) 450 U.S. 24, 31-33 [reducing conduct credits is ex post facto violation; "the prospect of the gain time [conduct credits] . . . in fact is one determinant of petitioner's prison term – and . . . his effective sentence is altered once this determinant is changed"]; see also *Miller v. Florida* (1987) 482 U.S. 423 [increasing presumptive term and requiring that judge justify any lower sentence is ex post facto violation].)

actual credits prior to the award of conduct credits, as had been required under former Penal Code section 4019. (See also *People v. Dieck* (2009) 46 Cal.4th 934.)

On the other hand, subdivision (e)(2) is detrimental in creating a new limitation on these credits. It specifies that the prisoner must behave satisfactorily and not refuse to perform labor satisfactorily as assigned. If the prisoner fails to do either, (s)he will not get conduct credits. This regimen differs from the former one, under which a prisoner could gain good behavior but not work credit, or vice versa. Now the prisoner must earn both in order to get any conduct credits. An ex post facto argument may be available if a client was denied all conduct credits because of failure to earn one kind of credit, although the other was earned and would have been awarded under the law at the time the offense was committed.[2]

Retroactivity

Like the January 25, 2010, amendment enacted in SBx3 18, SB 76 has no language stating it would apply prospectively only as applied to persons with executed prison sentences. Therefore, similar arguments can be raised with respect to these new amendments, including *In re Estrada* (1965) 63 Cal.2d 740 retroactivity and *In re Kapperman* (1974) 11 Cal.3d 542 equal protection. The fact the Legislature again chose not to state the amendments should apply prospectively only, even after the judicial debate about what it intended with the former amendment and even after it included a specific prospective application in the amendments to Penal Code section 4019, subdivision (g), arguably supports the conclusion that the Legislature intended the amendments of Penal Code section 2933 to apply retroactively.

The "law at the time of sentencing" argument described in Jamie Popper's memo accompanying the February 2011 alerts should additionally be raised in any case where a trial court employed a two-tiered approach for calculating credits, unless the law at the time of sentencing was less favorable than that at the time of the offense.[3]

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[2]See footnote 1.

[3]See footnote 1.