# TOPICS NO LONGER "RECENT"
# BUT STILL POTENTIALLY RELEVANT

**IMPORTANT: These entries are not kept up to date. Information therefore may be obsolete. Users *must* research the current state of the law on each topic.**

## CASES

### *Davis* requirement of unambiguous post-waiver invocation of the right to silence or counsel applies to juveniles

A postwaiver invocation of *Miranda* rights requires an unambiguous request for counsel, so that a reasonable officer would understand the statement as an invocation as a request for an attorney. (*Davis v. United States* (1994) 512 U.S. 452, 459.) The California Supreme Court in *People v. Nelson* (2012) 53 Cal.4th 367 concluded that the *Davis* rule applies to juveniles.

The United States Supreme Court has not yet addressed whether the *Davis* standard applies to juveniles in addition to adults. However, it has held that a minor's age should be considered in evaluating whether the minor was "in custody" for *Miranda* purposes. (*J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S.Ct. 2394, 180 L.Ed.2d 310].)

### Test for competence to represent oneself is higher than test for competence to stand trial

In *People v. Johnson* (2012) 53 Cal.4th 519, the California Supreme Court held the trial court acted properly in revoking the defendant's self-representation status on mental competency grounds, even though the defendant had been found competent to stand trial. California courts may deny self-representation when the United States Constitution permits such denial. (See *Indiana v. Edwards* (2008) 554 U.S. 164 [states may set higher standard for self-representation than for competence to stand trial, even though the federal Constitution does not require them to do so]; cf. *Faretta v. California* (1975) 422 U.S. 806 [general federal constitutional right to self-representation at trial].)

The California test for self-representation is higher than competence to stand trial. It is: whether the defendant suffers from a severe mental illness to the point that he or she cannot carry out the basic tasks needed to present the defense without the help of counsel.

## STATUTES

### 2011 Criminal Justice Realignment Act (AB 109/117)

On October 1, 2011, some significant changes to felony sentencing practices, as well as parole revocation procedures, went into effect. Among other changes, the new laws permit courts to impose a jail term of over one year for certain felonies committed by specified defendants. Also, under amended Penal Code section 4019, only violent felonies (Pen. Code § 2933.1) and murder (Pen. Code § 2933.2) are excepted from halftime credits.

We have been analyzing these changes. In July 2011, the Bench-Bar Coalition of the Office of Governmental Affairs sent a preliminary, informational e-mail outlining the key court-related provisions. It can be viewed here (**PDF**).

The California Judicial Branch website contains many helpful resources through its page dedicated to these new legislative changes: Criminal Justice Realignment Resource Center. CDCR also summarizes the legislation with various resources on CDCR's realignment webpage. Garrick Byers of the Fresno Public Defender's Office presented a webinar on these new laws through CACJ in August. To pay and listen to this event, click here. The websites of both FDAP and CCAP also present useful resources through their Realignment pages.

### Amendments to Penal Code sections 2933 and 4019, changing presentence custody credits for many individuals

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**Summary of Amendments**

The SB3x 18 amendments to Penal Code section 4019, which went into effect on January 25, 2010, provided for additional presentence custody credits for individuals without prior or current serious or violent felonies and without sex offender registration requirements.

The law setting forth calculation of presentence custody credits changed again on September 28, 2010, with the enactment of Senate Bill No. 76 (2009-2010 Reg. Sess.), urgency legislation that was effective immediately. The calculation method set forth in

Penal Code section 2933, subdivision (e)(1), as amended by SB 76, was beneficial in providing for one additional day of conduct credits in cases with odd numbered actual custody credits and requiring no minimum number of 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) was detrimental in creating a new limitation on these credits.

The most recent changes went into effect October 1, 2011. They permit more defendants to get halftime conduct credits (amended Penal Code section 4019). The only exceptions are violent felonies (Pen. Code § 2933.1) and murder (Pen. Code § 2933.2). However, subdivision (e) requires a minimum of four days of actual time before earning conduct credits. The changes also permit actual days of credit for home detention (amended Penal Code section 2900.5). Additional resources addressing the most recent credits amendments can be found in the resources on FDAP's website.

**Brown Decision Finds Credits Changes Not Retroactive**

The California Supreme Court decided the favorable changes from SB3x 18 should not be applied retroactively under the principles of In re Estrada (1965) 63 Cal.2d 740, 748, or under equal protection principles, as applied as explained in In re Kapperman (1974) 11 Cal.3d 542, 546-550. (People v. Brown (2012) 54 Cal.4th 314.) Further, it concluded credits for cases with custody time before and after the statute's effective date should be calculated with a hybrid approach of using the old rate for custody time before the effective date and the new rate for custody time after the effective date. (Brown, at p. __ [slip opinion, at p. *8].) Brown's reasoning also seemingly would apply to the same issues raised by subsequent credits law changes.

**Lara: 20% Credits Limit Applies Even Without Pleading Strike Priors, and Section 1385 Does Not Permit Court To Dismiss Strike Priors to Enhance Credits**

On July 19, 2012, People v. Lara (2012) 54 Cal.4th 896 found that the limited credit rate for defendants with strike priors applies in cases where the priors were not pled and proved. Additionally, Penal Code section 1385 does not give courts discretion to strike the strike priors for the purpose of enhancing credits. Lara held the Legislature made mandatory the lower credit accrual rate for those with strike priors. Section 1385 applies only to facts that must be pled and proven. Strike priors need not be formally pled and proved for purposes of limiting credit because credit disabilities need not be pled and proved, the Legislature did not indicate a pleading and proof requirement, and the Constitution does not mandate one since decreasing credits does not increase punishment above the statutory maximum.

As the decision does clarify that due process requires "notice and a fair hearing," counsel should consider whether it is arguable these requirements were not fulfilled before limiting credits.

**Post-Brown Credits Challenges: Issues Within Brown's Scope**

So, what now? The first question is whether the arguments at issue in Brown are federal claims that still should be pursued for purposes of federal review. The second question is the scope of Brown.

*Estrada and hybrid issues*

Brown probably ends the Estrada retroactivity question because it is unlikely a federal issue. Brown also probably ends the "hybrid" argument – that credits are awarded under the law at the time of sentencing and not by a hybrid calculation, depending on the law at the time the custody was served. This, too, seems not to be a federal issue.

Attorneys should write to the Court of Appeal acknowledging Brown and saying these issues can be deemed withdrawn when Brown becomes final under rule 8.532 (30 days from dating of filing, with specified exceptions).

If the Estrada and/or "hybrid" argument was the only argument raised on appeal, counsel should consider asking for the opportunity to file a Wende/Anders brief. According to Anders v. California (1967) 386 U.S. 738, 744, counsel has a duty to file a no-merits brief "if counsel finds his case to be wholly frivolous, after a conscientious examination of it."

*Equal protection*

The equal protection issue, unlike the Estrada and hybrid ones, is a federal issue because it involves the Equal Protection Clause in the Fourteenth Amendment. Nevertheless, in light of Brown and McGinnis v. Royster (1973) 410 U.S. 263, 270, it does not appear useful to pursue it further, unless counsel has a credible way of distinguishing those authorities or arguing they do not apply in the particular case.

*Further analysis of these arguments and their application in pending and closed cases is available from ADI.*

**Post-Brown credits challenges: issues outside Brown's scope**

It is imperative that counsel look at each separate issue to see if it is arguable that it falls outside Brown. Some issues we have found that seem to fall outside of Brown are listed below:

*Realignment hybrid credits*

The Supreme Court has granted review in People v. Olague, 2012, formerly published at 205 Cal.App.4th 1126, superseded by grant of review, S203298, with briefing deferred pending the finality of Brown. The Court of Appeal had found that prisoners with offenses committed prior to October 1, 2011, should get credits pursuant to the new realignment formula for time in custody after that date. This decision was based on statutory interpretation of the new Penal Code section 4019 (not the version at the time of Brown). After a statement that the statutory revision applies prospectively from October 1 on, section 4019 says: "Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." Olague construed this language to mean that pre-sentence time served after that date was subject to the new credits formula.

Although Olague cannot be cited, an argument based on that case's reasoning remains viable and should be raised in all applicable cases (by writ if important to avoid a client serving dead time).

The Fifth District rejected this argument in People v. Ellis (2012) 207 Cal.App.4th 1546. It reasoned that in light of a clear legislative intent for the amendment to apply prospectively for cases with offenses committed after October 1, the quoted sentence merely clarified the rate all others are to earn credits. Counsel can argue Ellis was decided erroneously, and the Olague reasoning should prevail to avoid an interpretation with superfluous language and under the rule of lenity. Further, the Ellis court's interpretation fails to address why the Legislature chose the language "days earned by a prisoner prior to October 1,..." if the sole relevant factor is the date of the offense.

It additionally seems arguable that the Olague construction is necessary to avoid a constitutional equal protection problem. (See People v. Davis (1981) 29 Cal.3d 814, 828 [statutes should be interpreted to avoid constitutional doubts].) Unlike Brown, where credits were sought for custody time from before the law went into effect , inmates serving time after October 1 for offenses before and after October 1 are similarly situated because all inmates after October 1 could change their behavior to take advantage of the increased credits.

McGinnis v. Royster, supra, 410 U.S. 263, 270, can be distinguished on the same ground. There, a rational basis existed for denying pre-sentence rehabilitation credit to persons in

local custody, because no rehabilitation programs were offered. Here, both groups could equally modify their behavior after October 1. While the Legislature could rationally designate a change in punishment prospective-only to maintain a deterrent effect of the older sentence (People v. Floyd (2003) 31 Cal.4th 179), awarding enhanced presentence credits would not interfere with a valid state interest (see In re Kapperman (1974) 11 Cal.3d 542, 546).

Ellis, supra, rejected an argument for full retroactive application of amended section 4019, finding Brown indistinguishable, but it did not consider the specific argument proposed here for enhanced credits only for custody on and after October 1.

The Fifth District in People v. Cruz (2012) 207 Cal.App.4th 664 rejected a claim that equal protection requires inmates with offenses from before October 1 to serve their time in county jail after October 1 if they would have been sentenced to county jail under post-realignment section 1170(b). Cruz does not resolve the equal protection question at hand. (Id. at p. 668, fn. 3.) Cruz is distinguishable, because it found the need for counties to obtain the resources for realignment's influx of inmates was a rational basis to distinguish those sentenced before and after October 1. (Id. at pp. 679-680.) Awarding enhanced conduct credits to inmates, in contrast, would not affect the place of confinement or allocation of resources between local and state facilities. Also, Cruz dealt with a claim for retroactive application of a law that did not exist at the time of sentencing. Here, those incarcerated for pre-October 1 offenses are requesting even-handed treatment for time served after October 1, not retroactive application.

*Ex post facto claims*

Any claims regarding ex post facto violations for retroactive application of disadvantageous changes are untouched by Brown and still should be pursued. See SB 76 Memo (PDF).

*Strike priors*

It is still possible, after Brown and Lara, to argue that the October 1 changes eliminating the denial of enhanced credits for strike priors, except for violent felonies (Pen. Code § 2933.1) and murder (Pen. Code § 2933.2), are retroactive. Counsel might note that Brown relies heavily on this quote from Estrada: ""[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.'" (People v. Brown, supra, 54 Cal.4th 314, 323, emphasis added by Brown.) Counsel may be able to argue that, unlike the general changes to section 4019 at issue in Brown that apply to most

offenses, the Legislature's singling out of cases with strike priors shows a determination less punishment is sufficient to meet the legitimate ends of the criminal law with regard to strike priors.

> *Important: Counsel must consider the factors set forth in ADI's email to panel attorneys accompanying the August 31 news alert. Counsel may request a copy from ADI.*