Credits Revisited 2021: An Update

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for the 2021 Virtual SDAP Seminar

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CREDITS REVISITED 2021: AN UPDATE

William M. Robinson, SDAP Senior Staff Attorney, September 2021

Introduction

As Yogi Berra so aptly put it,"it's déjà vu all over again!" In 2003, I did an essay and presentation on credits for a SDAP seminar. Then I did a "Credits Redux" in 2009 with lots of updates, and even did a "Credits Quiz" contest at the SDAP seminar (the ringer Candace Hale, won the contest as I recall). In the next couple years, I took the credits show on the road and made presentations to various Public Defender offices.

Then, in 2010 and 2011 there were all kinds of changes in the law regarding presentence conduct credits, which I got very involved with in terms of litigating; but I stopped updating this article because it got too confusing, with the law seeming to change every six months; and then I lost *People v. Lara* (2012) 54 Cal.4th 896 in the California Supreme Court (which involved presentence conduct credits but was really about the "implied pleading and proof" requirement that I thought was in one version of amended section 4019 and the Supreme Court thought was not). So I took a break from credits to turn to lighter topics, like homicide and sex crimes.

Well, not really. I kept taking credits cases, and kept assisting panel attorneys with credits issues of all stripes. Of course, we lost most of these cases, but we won a few, unpublished, of course, some of which "proved the point" of various matters raised in my article. Which kind of gets me to a point I made in the Introduction to my second article, which still makes sense 12 years later. Now, like then, the credits landscape has changed. Since my last version of this article, it has altered in two big ways: doubling presentence conduct credits under section 4019, and improving post-convictions credits dramatically based on mandates from federal court supervision, Prop. 57, and more recently from COVID and CDCR-initiated changes. In addition, credits law has seen some other small but important reforms, such as the provision for credits for home detention periods, all of which will be discussed below.

However, it remains the case that with a subject, or set of issues like credits, it's not always the impact of published decisions or statutory changes, favorable or unfavorable, that makes for new and interesting credits issues. Credits are won (and lost) *on the ground*, often in trial courts, in no small part based on the ingenuity and chutzpah, on the one hand, or inattention and laziness, on the other, of trial and/or appellate counsel. A winning credits issues can sometimes emerge from less-than-obvious sources. It can start with a comment from the client or trial counsel – on the phone, in writing, or in an appeal notice – indicating that credits were, in his or her view, improperly denied. Many times, such complaints lead you only to an understanding of how the client or counsel didn't really understand the legitimate reason why credits were denied – e.g., the classic "mixed conduct" parole violation or "term-serving time." However, in plenty of situations, a winnable credits issue is there in waiting, provided that you figure out the factual predicates for such a claim, the legal arguments supporting it, and the correct, or most expeditious, means of seeking and obtaining credits.

Bear in mind that credits issues can provide your client with small, medium or large benefits in the form of actual reduction in confinement time. Here's two examples: One, which I presented in the rewrite 12 years ago, involved a successful credits claim involving *two years* of jail custody time, which definitely made a big difference to a client with a sentence in the range of ten years. Another, from just last year, involved a very complicated habeas claim challenging the propriety of a firearm enhancement, one of the upshots of which, when I astonishingly won the habeas in the Court of Appeal with the AG's office stipulating, was that the client's crime was no longer a violent felony, meaning that his recalculated presentence and postconviction credits led to his immediate release. When you compare this – or even a gain of several weeks of credits – to the pyrrhic victory of getting a concurrent sentence stayed under section 654, or a brilliant instructional issue where the court agrees with you on error but finds it harmless, or a reduction of 100 years from a 250 to life term, you will see that a credits win is well worth the effort.

What is more, credits claims aren't necessarily boring. In addition to sharpening up those dormant arithmetical skills, credits issues can sometimes involve dodgy, unsettled issues of statutory construction, and even constitutional questions such as equal protection and ex post facto. They can lead to published opinions, dissents, and maybe even a trip to the California Supreme Court or the Ninth Circuit.

The purpose of this second rewrite of my earlier credits article is to resummarize and update some basic and cutting edge issues involving presentence and postconviction credits, provide you with some tools and links to sample briefing for raising credits issues, and energize you, the appellate practitioner, on a set of issues we too often classify as drudgery.

I. BASICS: PRESENTENCE AND PRISON CREDITS

A. Presentence Credits

1. Basic Rules for Garden Variety Felonies and Custody

a. Actual Credits

A defendant is entitled to credits for each day of custody from the time of their arrest up to and including the date of their sentence, provided that the custody is "attributable to proceedings related to the same conduct for which the defendant has been convicted." (Pen. Code § 2900.5.)[1] This latter phrase has been the source of confusion and judicial mischief for decades in those multi-faceted situations where custody can be said to be "attributable" to more than one cause, e.g., where a defendant has served time for more than one transactionally separate offense, or had his parole or probation revoked. More on this in a bit.

To start with, though, in the simple case of a single set of charges, a defendant gets credit for each day they were jailed pending trial in that offense prior to and including the date of sentence. Thus, for starters in every case, you should review the dates of custody as set forth in the probation report, and count them up carefully. You would be surprised

[1]Statutory references are to the Penal Code if not otherwise specified.

how frequently there is – or at least was – an error in failing to count the first *and* last day, arithmetic miscalculations, especially of the number of days after the probation report is prepared, a failure to count that silly February 29th during leap years, etc. (Sometimes, as discussed below, there are errors *in your client's favor*, which can create a potential adverse consequence.)[2]

b. **Conduct Credits, Odds & Evens.**

Since the landmark equal protection decision of the California Supreme Court in *People v. Sage* (1980) 26 Cal.3d 498, and the subsequent enactment of section 4019, a defendant, with some delimited exceptions, is also entitled to presentence *conduct* credits. Until around a decade ago, these credits were normally calculated on a "one for two" formula, or more precisely, two days credit for every four days served. This all changed around the time of Realignment, with the enactment, in a staggered series of amendments, of a more generous "one-for one" conduct credit scheme which allowed a person to serve out, for example, a 100 day sentence in 50 days.

For some foolish reason, starting with the old two-for-four statutory language, the courts interpreted these provisions literally, refusing to allow odd numbers of behavior credits to be awarded; thus, under the old scheme, if your client had 26 days of actual custody, he got only 12, and not 13, days of behavior credits under section 4019. (See, e.g., *People v. Smith* (1989) 211 Cal. App. 3d 523, 527.) You would think that with the switch to "one for one" credits, this bit of foolishness would go away. You'd be wrong. The good news is that the same client, with 26 days of actual credits, would get 26 days of conduct credits. But if they had served one more actual day, for a total of 27 days, they would still only get 26 days of conduct credits.

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[2]Alas, I have noted that with the advent of readily available internet based date calculators, these types of arithmetical errors are fewer and farther between. But you should still check in all cases. Mistakes get made at many levels, as we shall see, and, following the precept "garbage in, garbage out," a date calculator only works properly if the correct information is put into it.

The mischief now comes from the extremely confusing statutory language of subdivisions (b) and (c) of section 4019, which, if you read them carefully, make it sound like you get one day of behavior credit, and one day of work credit for each four days you serve, which would mean, in any normal understanding, two days for each four days served; which, of course, is the old one-for-two system.[3] However, you can disregard this confusing phraseology, which I can't even parse into meaning, because of the *absolutely crystal clear* provisions of subdivision (f), which states: "It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody." (§ 4019, subd. (f); see, e.g., *People v. Whitaker* (2015) 238 Cal.App.4th 1354.)

Unfortunately, (b), (c) & (f) still mean that we are stuck with the "even numbers conundrum," i.e., our poor fellow with 27 days of actual custody only gets 26 days of conduct credits. This makes no sense at all. I mean, I understand why if credits are one-for-two, like in the old regime, you can't get a half days credit for 27 days, and you're stuck with 13 – I mean 12 [that part made no sense]. But how it is that the equal protection clause(s) don't require that a person get 27 days conduct credit for 27 days in custody is utterly befuddling. Prior equal protection challenges under the old order failed. See *People v. Jacobs* (1992) 6 Cal.App.4th 101, 103-104; and a challenge to this peculiar construction cased on "latent ambiguity" in the statute failed. (*People v. Whitaker*, *supra*, 238 Cal.App.4th 1354, *passim*.) The one unpublished decision I have found which

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[3]"(b) Subject to subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from the prisoner's period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

"(c) For each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from the prisoner's period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

rejected a one-for-one equal protection challenge did so on the basis that it agreed with *Jacobs*. (See *People v. Loeza*, 2015 Cal. App. Unpub. LEXIS 1373. But *Loeza* relies on the aforementioned indecipherable language of (b) & (c) that you get one day credit for each 4 days served, and on the assumption that odd-day credits would require awarding of half-days (for behavior and conduct). But that's really just an abstract construct. The way conduct credits have always worked is that the days are awarded unless the client really screws up. (See, e.g., *People v. Duesler* (1988) 203 Cal.App.3d 273, 275-277.) So, if you have no other issues in a case, talk to me, or your other project buddy, and maybe we can make our odd-days equal protection challenge, and get a published decision that's contrary to *Loeza*. I mean, fair is fair, right?

But for now, we still have the odd-number conundrum to deal with. On the bright side, though, behavior credits are calculated based on the *aggregate total* days of actual confinement, and not by compartmentalizing various discrete periods of jail time. (See, e.g., *People v. Culp* (2002) 100 Cal.App.4th 1278.) So, if the probation report indicates 3 days here, and 5 days there, your client will have 8 days, with 8 days of 4019 credits, not the 6 days of 4019 credits he would get if each time block were treated separately.

2. **Exceptions and Limitations on Presentence Credits**

a. **When It Isn't Custody**.

In order for presentence time to count towards a sentence, your client must be "in custody." (§ 2900.5, subd. (a).) Under the current version of the statute, "custody" entitling a defendant to actual days of credits is defined rather broadly as "including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution . . .", and as "including days served as a condition of probation in compliance with a court order, credited to the period of confinement pursuant to Section 4019, and [pursuant to a 2011 amendment in connection with Realignment] days served in home detention pursuant to Section 1203.016 or 1203.018. . . ."

Normally, when presentence jail time is involved, the question whether your client was "in custody" is a rather straightforward proposition. But there are some in-between situations where a defendant's liberty is restricted to some extent, but not quite enough, and a fair amount of case law, with sometimes confusing results, has come out of these situations. I will only give a few examples here.

Until the 2011 amendments, home detention or electronic monitoring was not considered "custodial" for purposes of earning presentence credits. (See *People v. Pottorff* (1996) 47 Cal.App.4th 1709, 1715-1717.) Participation in a live-in residential drug treatment program is subject to some confusing distinctions. It is considered "custodial" where a person is required to stay on the premises 24 hours a day, with restrictions on his or her liberty, even where the doors of the facility are not kept locked to prevent residents from leaving. (See, e.g., *People v. Mobley* (1983) 139 Cal.App. 3d 320, 323; *People v. Rodgers* (1978) 79 Cal.App.3d 26, 31-32 [describing Delancey Street as a halfway house]; *In re Wolfenbarger* (1977) 76 Cal.App.3d 201, 205-206; and *People v. Downey* (2000) 82 Cal.App.4th 899, 920-921.) However, residence in an alcohol treatment facility which functions mostly as a temporary home for recovering alcoholics, and which does not significantly restrict the freedom of the residents, is not considered custodial. (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922.)

Typically, drug treatment regimes involve two types of residential arrangements. Normally, during the first time period, the person resides full time in the program and receives direct treatment for a set number of days – 30, 60, or 90. In my experience, trial courts have no problem awarding credits for this time as "custodial" under cases like *Mobley* and *Rodgers* mentioned above. A more complicated question arises when, as often happens with drug treatment regimes spawned by the first Proposition 36, a defendant's probation requires them to reside in a "sober living" environment, where there are significant limits on the liberty of the resident, but not complete restrictions on the resident's ability to come and go. It is in this latter group where there is an unresolved legal question as to whether residency amounts to "custody." To be honest, we have lost

this point in unpublished opinions by the Sixth District on the couple of occasions where it's been raised. I was counsel in one such case, *Alosi*, in which a strong argument was made that the restrictions on the resident's liberty were sufficiently severe that it should qualify as custody.

The key to making an argument that time in such a program is "custodial" is to emphasize the extent to which the restrictions on the defendant's liberty are substantial, i.e., where a resident is not permitted to leave except with permission, where he or she is required to participate in drug counseling and testing, and where the resident's contact with outsiders is significantly restricted. "Old but good" sample briefing is available from my *Alosi* case if this issue comes up.

b. **When Behavior Credit is Unavailable or Restricted**.

For many years, there have been exceptions to the rule of *Sage* and section 4019 requiring credit for good behavior with respect to time that is considered "actual custody." On the obvious level of statutory language, the wording of section 4019 is much narrower than section 2900.5; however, on the bright side, the scope of section 4019 has expanded in two significant respects in recent years, as to home confinement and jail-based competency treatment. As presently worded, section 4019 allows a defendant to earn credits for time served while "confined in or committed to a county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp . . ." (§ 4019, subd. (a)(1)-(6), and also, pursuant to recent amendments, to a situation where a defendant "participates in a program pursuant to Section 1203.016 or Section 4024.2 [home detention] . . ." (§ 4019, subd. (a)(7)), and where a defendant "is confined in or committed to a county jail treatment facility, as defined in Section 1369.1 [for competency treatment] . . ." (§ 4019, subd. (a)(8).) We'll come back to these later two subjects in a moment for a couple of equal protection challenges, the first won already, and the second in the works.

But to start with, based on the limiting language of subdivision (a) (1)-(6), courts have rejected equal protection challenges and consistently held that 4019 behavior credits

are not available for persons confined in most residential rehabilitation facilities (*People v. Moore* (1991) 226 Cal.App.3d 783), to mentally disordered sex offenders committed to a state hospital (*In re Huffman* (1986) 42 Cal.3d 552, 563), and, until the amendment under subdivision (a)(7) described above, to persons subject to restrictive forms of pretrial release. (*People v. Lapaille* (1993) 15 Cal.App.4th 1159.)

Likewise, similar credits are not awarded to juvenile offenders because the Legislature expressly excluded juvenile detainees from the language of section 4019, and did so in light of the rehabilitative purpose of the juvenile court law. (See *In re Ricky H.* (1981) 30 Cal. 3d 176.) However, there is an exception to this limitation where, after presentence conduct credit is initially denied because the initial commitment is to the former Youth Authority, defendant is is subsequently found unsuitable for YA (now, for the time being, DJF) treatment and the commitment is changed to state prison. (See *People v. Garcia* (1987) 195 Cal.App.3d 191 – which just happens to be my own first credits case and published win.) Not sure this will matter anymore, but I had to throw that in there.

i. **Equal Protection Challenges to Restrictions Involving Home Detention and Competency Treatment.**

The equal protection clauses of the state and federal constitutions can sometimes be used to raise winning arguments about arbitrary restrictions on conduct credits. One recent example of this concerns the aforementioned amendment to section 4019 which permits persons serving presentence time in home detention, without making any provision for postconviction conduct credits for persons serving out their sentence on home detention. The court in *People v. Yanez* (2019) 42 Cal.App.5th 91 began its favorable opinion on this subject by noting that the parties disagreed ". . . as to whether . . . the disparity in . . . their treatment must be evaluated under strict scrutiny or under the more deferential rational basis standard. (Compare, e.g., *People v. Sage* (1980) 26 Cal.3d 498, 506, 508, fn. 6 [applying strict scrutiny to decide whether denying conduct credit for

pretrial jail time violated equal protection]; *People v. Lapaille* (1993) 15 Cal.App. 4th 1159, 1168 [applying strict scrutiny to decide whether denying pretrial custody credits for house arrest violated equal protection; 'When the equal protection issue involves fundamental interests, such as liberty, our courts have required that the state establish that it has a compelling interest in making such classifications"] with *People v. Rajanayagam* [(2012) 211 Cal.App.4th 42], 54-55 [rational basis review of equal protection challenge to denial of conduct credits under amendment to § 4019].)" (*People v. Yanez, supra*, 42 Cal.App.5th at p. 95.)

The *Yanez* court then does what we, as effective advocates must also do, given this split, which is to argue both positions and then to hold, ultimately, that "it is unnecessary to decide which level of scrutiny applies because pretrial and postsentence detainees who have served time under home detention are similarly situated for purposes of evaluating their eligibility to earn conduct credits, and the challenged disparity in their treatment does not survive even rational basis review." (*Ibid.*) *Yanez* found these two classes of persons to be similarly situated for the purposes of the conduct credit laws, with no rational basis for the distinction, and required a reward of conduct credit to pretrial detainees premised on this conclusion. (*Id*., at p. 98.) Notably, *Yanez* relied on the oft-ignored Supreme Court holding in *People v. Sage, supra,* 26 Cal.3d 498, which found that pretrial felony detainees were similarly situated to both pretrial misdemeanor detainees and sentenced inmates for purposes of entitlement to conduct credits, concluding that although "pretrial and postjudgment sentencing credit schemes serve entirely different purposes . . .[,] [i]n either instance, conduct credit serves a similar purpose, presumably by encouraging those serving home detention to comply with the terms and conditions of that detention." (*Id*., at pp. 99-100.)

Using *Yanez* as my principal foil, I have recently raised a similar equal protection challenge to the limitations of the other recent amendment to section 4019, which permits pretrial detainees serving time in a county jail mental competency program to obtain section 4019 conduct credits, while excluding their counterparts who are serving

presentence custody time in a State Hospital competency program. My briefing in *People v. Orellana*, H048315, is available on request. The principal contrary arguments advanced by respondent in *Orellana* to rebut my claim are (1) a prior pre-amendment denial of an equal protection challenge to the exclusion inmates serving competency in a State Hospital in *People v. Waterman* (1986) 42 Cal.3d 565 – an argument easily disposed of by showing that the basis for this denial was that competency program detainees with mental health problems were not similarly situated to jail inmates, whereas the distinction at issue now is between two classes of competency program detainees; and (2) a contention that there is a rational basis for the distinction drawn by the Legislature because jails keep track of inmate behavior, while State Hospitals do not – a point I could easily rebut by, first, showing countless situations in mental health related cases where courts have recounted carefully kept State Hospital records about inmates. (See, e.g., *People v. Roa* (2017) 11 Cal.App.5th 428, 446-447 [describing two prior mental health cases involving bad behavior and rules violations in a state hospital setting], *People v. Landau* (2016) 246 Cal.App.4th 850, 876–877 [hospital records documenting defendant's hoarding behavior, refusal to attend treatment sessions, altercations with other inmates, and use of racial slurs]; and *People v. Dean* (2009) 174 Cal.App.4th 186, [state hospital records documenting "hit" on defendant by drug-sniffing dog, derogatory comments about female staff members, sexual assaults while in custody].], and second, by showing how in the actual case on review, the parties agreed that defendant was entitled to section 4019 credits for the time period he was still at the State Hospital but had already been declared competent. The case is pending and the briefing is available.

ii. Restrictions on Presentence and Postconviction Credits Based on the Nature of the Crime Committed.

In addition to the restrictions written into section 4019, during the 1990s and 2000s, politicians had a field day enacting laws limiting or precluding behavior credits for persons convicted of more serious crimes. Penologically this makes little sense, since

there ought to be the greatest incentives for the most serious offenders to behave and program well while in custody. I mean, give 'em longer sentences (which they are doing anyway), but let 'em earn full credits! But no, as Justice Mosk once famously echoed, "Nothing succeeds like excess" (Mosk, "Nothing Succeeds Like Excess" (1993) 26 Loyola L.A. L.Rev. 981), it's just too easy for a politician to pad their "tough on crime" resume by limiting good time for people who commit awful crimes.

(a). **Section 2933.1.**

One of the nastiest and most commonly applied of these credit-restricting laws is section 2933.1, which provides that any person convicted of a "violent felony" as defined in subdivision (b) of section 667.5 shall accrue no more than 15 percent credit on their actual time of confinement for behavior and worktime, a limitation which applies both as to presentence credits (subd. (c)) and postconviction credits (subd. (a)).

Although the statute expressly provides that its limitations apply only to violent felony offenses (§ 2933.1, subd. (d)), the court in *People v. Ramos* (1996) 50 Cal.App.4th 810 held that section 2933.1 applies to *the offender*, and not the offense. Thus, according to *Ramos*, if a defendant is convicted of any *single* qualifying violent felony, credits for his entire sentence, including consecutive terms on potentially unlimited numbers of non-violent felonies, are subject to the 15 percent limitation on conduct credits. (*Id*., at p. 817.)

This holding was extended in a surprisingly bad way in *People v. Baker* (2002) 144 Cal.App.4th 1320, where the defendant was first in custody for a specified period of time for a non-violent offense, then later served additional presentence custody on a violent offense committed while charges on the first offense were still pending. Relying on *Ramos*, the court in *Baker* held that the restrictions of section 2933.1 applied to all of the presentence credits when consecutive sentences were imposed, including the time served prior to commission of the violent crime, based in large part on the fact that under California's determinate sentencing law, consecutive sentences imposed as to one or more determinate term in a different case "shall be combined as though they were all counts in

the current case." (*Id*., at p. 1328.) The court in *Baker* specifically limited the holding in that case to situations involving consecutive sentences. "We do not address the effect of section 2933.1 on a situation in which the sentence for the nonviolent offense is run *concurrently* with the sentence for the violent offense." (*Id*., at p. 1327, fn. 12.) *Baker* had an odd procedural history, in that review was granted and held pending resolution of the *Reeves* case, discussed below; but publication was then *restored* by the Supreme Court after it decided *Reeves*. If you have a client in the same anomalous situation as the defendant in *Baker*, I would strongly urge you to argue that *Baker* was wrongly decided, and should not be followed, with presentence time served for the not-violent offense which preceded commission of the violent felony.

Fortunately, the scope of the questionable holding in *Ramos* was limited to presentence credits on *consecutive* terms by the Supreme Court in *In re Reeves* (2005) 35 Cal.4th 765, which that for purposes of postconviction credits, the restrictions only apply to time served for violent felonies, and have no application to separately served concurrent terms for non-violent felony crimes. *Reeves*, unlike *Baker*, involved *concurrent* sentences, and provides a strong indication that the holding in *Baker* should not apply where the presentence credits at issue pertained to crimes for which concurrent sentences were imposed.

Some years ago, I had a case with an interesting credits issue along these lines. Defendant had earned substantial credits in case number 1, a not-violent offense, for which he was on probation. While on probation, he committed crime No. 2, a violent felony, on which he served an even lengthier period of presentence custody. He got a three year sentence for the "violent" offense, and a two year concurrent term on the not-violent offense. By the time of his sentence, he had nearly two years worth of credit on the violent offense, such that he was going to credit out on that offense fairly quickly. Thus, it was important to his "out date" whether he earned presentence behavior credit on the not-violent offense under section 4019, or under the restricted provisions of section 2933.1.

Reeves, not *Baker*, arguably controls in this situation, because, as the Supreme Court explains in *Reeves*, consecutive and concurrent sentences are very different creatures under California law. "A court that decides to run terms consecutively must create a new, 'aggregate term of imprisonment' (§ 1170.1, subd. (a)) into which all the consecutive terms merge, but no principle of California law merges concurrent terms into a single aggregate term." (*Reeves*, *supra*, at p. 773.) Because of this distinction, once a defendant has fully served out the time on his "violent felony" offense, any remaining time which must be served on a "not-violent" offense is not subject to the restrictions of section 2933.1, which "has no application to a prisoner who is not actually serving a sentence for a violent offense; such a prisoner may earn credit at a rate unaffected by the section." (*Id*., at p. 780.) I never did get to see if my argument would fly, as my client abandoned his appeal for other reasons related to a favorable credits award to which it did not appear that he was entitled. So, this would be an issue to watch for in your own cases. (I can probably dig out the briefing from this case on request.)

Finally, as discussed below, it is a still more open question whether the "offender not offense" interpretation of *Ramos* can be used to trump the constitutional prohibition against ex post facto laws where a defendant has a series of current violent felony convictions, some, but not all, of which were committed prior to the effective date of section 2933.1. (See Part III-A, below.) If you should happen to get a case like this (e.g., involving resentencing in an old case, or extended statutes of limitations in sex crimes), please let me know, and I can try to help.

(b) **Other Statutes Eliminating Behavior Credits**.

For certain violent felonies, no behavior credits can be earned. Under section 2933.2, a person convicted of murder gets no presentence or postconviction conduct credits. However, in order for this credit restriction to apply, the murder in question must have been committed *after* the effective date of this law, which was June 3, 1998. (See, e.g., *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1315-1317.)

Another credits-precluding law, section 2933.5, applies only in the narrowly delimited situation of a person convicted of a current specified violent felony who has two prior specified violent felony convictions which were brought and tried separately, and for which he served a prison term. I recall one Santa Clara County case where the court, at the prompting of the probation officer, and without objection by defense counsel, applied this provision to deny credits when the defendant's two priors were brought and tried *together*. This error was corrected with a *Fares* letter. This case was probably a fluke, since I have not seen any cases in the Sixth District since then which involved section 2933.5, and the only subsequent published case discussing section 2933.5, which held that it did not apply but section 2933.1 did, was depublished by the court which issued the opinion following a grant of rehearing. (See *People v. Busane* (2019) 31 Cal.App.5th 327, reh. gtd., depubl. 2-6-2019.)

So we will leave section 2933.5 to its own obscure corner. But if it ever comes up in a case, please feel free to contact me.

c. The Minefield of "Mixed Conduct" Custody Situations.

It is often the case that a defendant on probation or parole who is facing new criminal charges has his parole or probation revoked, and serves jail or prison time under such revocation, prior to the adjudication of the new felony charge. Such revocations are frequently based, either in whole or in part, on the new criminal conduct. A dodgy legal question then arises as to whether the defendant is entitled to credit for this time served on the parole or probation revocation when he is later sentenced on the new charges.

As noted above, a defendant is entitled to presentence credits for all time spent in custody "only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subd. (d).) Over the years, gallons of ink have been spilled by California courts as to the correct interpretation of this confusing statutory language. The highlights: the Bird court opinion, *In re Atiles* (1983) 33 Cal.3d 805 held that a defendant gets dual credit where his parole revocation is based, at least in part, on the new charged crime; then the Lucas

Court decision, in *In re Joyner* (1989) 48 Cal.3d 487 reached a contrary view, holding that a defendant whose probation is revoked in part, but not entirely, because of commission of a new crime is not entitled to credit in the new case for time he served for this type of "mixed conduct" probation revocation unless he can prove that the conduct underlying the new charged crime on which he is sentenced was the "but for" cause of time previously served on the probation revocation. (Warning: Don't read the preceding sentence, or the opinion in *Joyner*, more than once, as it's likely to lead to a state of helpless confusion and may cause you to question your decision to become a lawyer.)

The last word on the subject, and the only one we need to pay attention to most of the time, was *People v. Bruner* (1995) 9 Cal.4th 1178, which, in effect, codified the *Joyner* "but for" test as to all mixed conduct situations. *Bruner* held that "when presentence custody may be concurrently attributable to two or more unrelated acts, and where the defendant has already received credit for such custody in another proceeding, the strict causation rules of *Joyner* should apply."(*Bruner*, *supra*, at p. 1180.) Under this test, custody may not be credited against a term of confinement unless a defendant shows that the conduct that led to the confinement in the other proceeding (i.e., a revocation of parole or probation) was also the "'but for' cause of the earlier restraint." (*Id*., at pp. 1193-1194.) The defendant's burden to prove "but for" causation is not met simply by demonstrating that the conduct for which he seeks credit was "a" basis for the restraint. The defendant is only entitled to dual credits if he is able to show that he "could have been free during any period of presentence custody *but for* the same conduct that led to the instant conviction and sentence." (*Bruner*, *supra*, at p. 1195, emphasis added.)

In most cases, the holding in *Bruner* is interpreted by the probation officers, who always have the *first* word (but hopefully not the *last* word) on credit issues in the trial court, to mean one of the following: (a) if probation or parole was revoked *solely* because of the new offense your client committed, then he gets full credits when he's sentenced in the new case for any time served on revocation of parole or probation; but (b) if there was *any other basis* for parole or probation being revoked – e.g., failure to report, pay a fine,

or a dirty drug test – your client get no credits for time served on such a revocation.

i. Exceptions to the *Bruner* "Strict Causation" Rule.

There are two notable exceptions to the "You Lose" rule for mixed conduct cases recognized in case law.

(a) The *Williams* Exception: Transactionally Related Conduct.

The earlier exception to the strict causation rule, recognized by the Supreme Court in *Bruner*, is described in *People v. Williams* (1992) 10 Cal.App.4th 827. In *Williams*, a defendant arrested on new charges of kidnaping and sexual assault had his probation in a prior case revoked for "new charges" which included multiple sex counts with which he was originally charged, and for a generic "failure to obey all laws." In the new case, he ultimately pled pursuant to a plea bargain to a single count. The trial court denied him credits on the new case for the time spent in custody on the probation violation, based on the "obey all laws" provision and on the fact that the charges on which probation was revoked included crimes in addition to those for which he pled guilty and was convicted. The Court of Appeal in *Williams* reversed, concluding to the contrary that his custody on the revocation arose from the identical conduct that led to the criminal sentence. First, there was nothing in the record suggesting that the violation of the "obey all laws" provision referred to anything but the criminal conduct resulting in the charges in the new case. And second, and most usefully, the *Williams* court held that the prosecutor's decision to dismiss numerous transactionally related counts in connection with a plea bargain did not change the case into one of mixed conduct.

> [O]nce the People elect to define criminal conduct which generated a defendant's presentence custody by separately stated counts, the conduct described in dismissed counts is not thereby converted to conduct not attributable to the proceedings related to the same conduct for which defendant is convicted.

(*Williams*, *supra*, at pp. 832-834.)

In addition to the effect in the dismissed counts situation, the holding in *Williams* has proven useful in at least one unpublished Sixth District case involving transactionally related *uncharged* counts.[4] In that case, the new charges were for drug possession, the defendant's parole was revoked for the new charge and for the uncharged conduct of possession of drug paraphernalia. The trial court, following the probation officer's recommendation, classified this as a "mixed conduct" situation because the uncharged paraphernalia possession was a basis for revocation, and denied credits for the entire period of the parole revocation. The court of appeal reversed, holding that *Williams* applied by analogy to this situation. Although prosecutorial discretion was exercised not in dismissing a charged count, but in the decision not to charge the transactionally related crimes in the first place, this was "a distinction without a difference," and the situation remained a "same conduct," and not a "mixed conduct" situation in which the defendant is entitled to dual credits. The same reasoning can be applied where related charges on which revocation was based were dismissed on other grounds – e.g., a 995 motion, hung jury, etc.

Some years ago, former SDAP panel attorney Tom Singman was successful in obtaining presentence credits from the trial court for a parole revocation period. In that case, defendant Green's new charges were for aiding and abetting two confederates in a bad check passing scheme, where it was alleged that he drove his confederates up to the Bay Area from Compton and ferried them from bank to bank to cash phony checks. Mr. Green's parole was revoked for the new offenses and for traveling beyond the fifty mile limit set for parolees. At sentencing, he got no credits for the one year parole revocation period on the grounds that the 50 mile violation – which probation erroneously described as "absconding" – turned this into a mixed conduct case. In the challenge to this limit brought in a post-appeal credits motion in the superior court, Mr. Green contended that

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[4] I hasten to add that unpublished cases cannot be cited as authority in any court. (See Cal. Rules of Court, Rule 8.1115(a).) I describe them here and elsewhere to illustrate possible arguments and explain an arguable trend in appellate decisions.

this is really a same conduct case, and not a mixed conduct situation, because the act of traveling beyond the 50 mile range was the same conduct which underlay the aiding and abetting, i.e., driving his accomplices from Compton to the Bay Area. Thus, under *Williams*, the fifty mile violation is transactionally related conduct which can't be the basis for a finding of mixed conduct. Here, the issue does not, as in *Williams*, flow from an exercise of discretion by the prosecution, which could not have charged the fifty mile violation, since it is not criminal conduct, but is focused instead on the common theme of uncharged or dismissed conduct which is directly transactionally related. Assuming that this was, in fact, a mixed conduct situation, the defendant in *Green* alternatively contended that he had shown the strict causation required by *Bruner* in that the conduct leading to the new charges of aiding and abetting the check fraud scheme is the "but for" cause of the 50 mile violation. Fortunately, the trial court agreed with the first argument, and the issue was never tested on appeal. Thus while there is no precedent to cite, there is excellent sample briefing available on request.

I should point out that I lost a similar issue in the Court of Appeal in an unpublished decision in the *Mark Cuellar* case. In that case, parole was revoked for a new drug offense, and also for "Failure to Follow Instructions," which consisted of missing a scheduled appointment with the parole officer on the same day that defendant was found at his house strung out and drunk. I argued that the two matters were transactionally related as in *Williams*, and the conduct of the new offense was the "but for" cause of the other violation. But the Court of Appeal disagreed in not very well thought out unpublished opinion. Sample briefing is available in this case too.

I am happy to report a very recent unpublished win in the Sixth District in *People v. Venegas*, H047758, where panel attorney Jeff Kross got an Attorney General concession and a memorandum opinion holding that where mandatory supervision was revoked based on the same conduct as a new case, *Bruner* required that defendant receive dual credits for the same time on the old case where mandatory supervision had been revoked and the new case.

(b) The *Marquez* Exception: Dismissed Unrelated Charges

The second exception to the *Bruner* strict causation rule is the one described in the California Supreme Court decision *In re Marquez* (2003) 30 Cal.4th 14, and elaborated upon by the Sixth District in *People v. Gonzalez* (2006) 138 Cal.App.4th 246. *Marquez* carves out a discrete exception to the "strict causation" rule of *Bruner* and *Joyner* in a situation where a defendant is held in custody on both newer and older charges and separate sentences are imposed. In this situation, under typical *Bruner* analysis, he would not have earned credits for the time on the older charges for the challenged period of time had the convictions and sentences in both cases been upheld. However, the conviction on the earlier case was reversed on appeal, and the charges were eventually dismissed. In this unique situation, the California Supreme Court held, credits can be awarded without a demonstration of "but for" causation to avoid a period of custody becoming "dead time" for which a defendant receives no credit. (*Marquez*, *supra*, 30 Cal.4th at pp. 23-24.) The upshot of *Marquez* is, in effect, a return to the good-old *Atiles* rule when charges relating to a second, unrelated basis for custody are dismissed. In these delimited circumstances, your client is entitled to credit if you can show, a la *Atiles*, that the custody time was related in some sense to the conduct giving rise to the current conviction.

This is what happened in *Gonzalez*, where the defendant was on probation for a domestic violence case when he committed new offenses of auto theft and possession of a firearm by a felon. While pending trial, he picked up a third case for a jail assault. After being convicted by jury trial on the weapon possession and vehicle theft cases, defendant pled guilty to the inmate assault case and admitted probation violation in the domestic violence case. He was then jointly sentenced on the three cases, remaining in custody during the entire period after his arrest on the gun and vehicle theft case. (*Gonzalez*, *supra*, 138 Cal.App.4th at pp. 248-250.) The disputed issue in *Gonzalez* concerned the 319 day period of custody served by the defendant between his arrest on the auto theft and gun case up until the day prior to the inmate assault, which the trial court allocated to the

domestic violence case, for which defendant already had 361 days served solely on the domestic violence case. (*Id*., at p. 250-251.) Because the total credits awarded in the domestic violence case, 680 days, exceeded the one year consecutive sentence imposed in that case, the defendant in *Gonzalez* sought to reallocate the additional credits to the auto theft and gun case. The Sixth District upheld this claim for credits, finding that the "strict causation" rule of *Bruner* had no application because the time at issue was not one for which dual credits were sought, and thus did not involve a "windfall," but rather concerned custody which would otherwise become "dead time." i.e., "'time spent in custody for which he receives no benefit.'" (*Id*., at p. 253-254, quoting and citing *In re Marquez*, *supra*, 30 Cal.4th at p. 20.)

My own efforts to apply the holdings of *Marquez* and *Gonzalez* have had mixed results. The *Stoll* case was the bad news. In that case, Stoll was on probation for two separate cases when he committed a violation. The trial court, as a condition of reinstating probation, gave Stoll credit for time served of 60 days for the more serious attempted robbery case, but required him to serve a lengthy jail sentence on the less serious vehicle theft case. When he violated probation one more time, and a prison sentence was imposed, the court "cleverly" structured the sentence to cause Stoll to lose much of the time he'd served on the vehicle theft case, imposing a three year sentence on the attempted robbery, and an eight month consecutive term on the vehicle theft. Stoll had considerably more credits on the vehicle theft than the eight months he was required to serve, and the argument raised, both in the trial court and on appeal, was that under *Marquez* and *Gonzalez*, these leftover credits should be allocated to the attempted robbery case rather than becoming "dead time," because probation was jointly revoked on the two cases, and time served was really attributable to both cases. An unpublished Sixth District opinion rejected this claim, holding that the credits belonged in separate boxes and couldn't be moved around after the time had been served exclusively on the vehicle theft case.

On the bright side, in the *Perkins* case, I was able to obtain a substantial credits award from the trial court based on time Perkins served in Alameda County jail pending robbery charges which were ultimately dismissed by the prosecutor for lack of evidence. I was able to demonstrate that during this entire time, there was a hold from the Santa Clara County case on which Perkins was later sentenced; and while his custody during this time was attributable to *both* the Santa Clara County case and the Alameda robbery, under the *Marquez* exception to the "strict causation" test, Perkins was entitled to the credits for the long period of time in Alameda County which would otherwise have become "dead time" by virtue of the dismissal of the Alameda charges. (Sample briefing is available on both of these cases.)

Since the last version of this article came out, I also won an "only in Monterey County" case, *People v. Leon*, 2012 Cal.App.Unpub.LEXIS 2853. In that case, a very creative and very unfair-minded Monterey County judge attempted to allocate all of the defendant's credits to a subordinate count on which a consecutive sentence was imposed, where the total credits greatly exceeded the one-third term imposed; the court then zeroed out Leon's credits on the principal term. My efforts to get this jurist to correct his error by means of a *Fares* letter proved unsuccessful; however, the Court of Appeal's unpublished opinion agreed with me that this creative effort to create "dead time" was improper and reversed, holding that this improperly created "dead time" under *Marquez* and *Gonzalez*, and directed the superior court to allocate all the credits to the principal term. Presumably, this schooled the Monterey County judge because we have yet to see this nasty bit of credit theft again.

ii. The Bruner Strict Causation Rule Applied: Strategies for Winning Credits.

Preamble. The prior versions of this article included a nifty section about how to fight against a determination denying credits on the basis of a "mixed conduct" parole violation. I am going to pretty much leave it intact, with fairly minor revisions, but am inserting a new preamble. This is because with Realignment, the process for parole

violations has changed. Nowadays, parole authorities initiate violation proceedings, and can impose modest sanctions on their own, but actual revocation of parole and imposition of a term must be done by a Court. Thus, parole revocation proceedings are now judicial proceedings, with the attendant rights, including the right to appeal. (See Pen. Code § 1203.02 & § 3000.08 et seq.) How this change bears on the issues discussed below is beyond the scope of this article. But I daresay it may change things quite a bit. Thus far, I have not seen any *Bruner*-type issues arise in any post-Realignment parole revocation cases.

If your client's probation report recommended that credits be denied for "mixed conduct," and the trial court followed suit, don't assume that this is correct! Often it is not. And other times, there is still something to challenge. Here's what you should try to do:

(a) **First, Get the Parole Records.**

If your client is in local custody, the local parole authorities (if the more modest "flash incarceration" is imposed for a parole violation), or the court (under the post-Realignment procedures) will have these records. If the client has been returned to state prison, then the prison where he's housed will have the records. All you should need to obtain the records is a signed release from your client. Try to get all the records concerning the specific parole violation. The most important document to get is the "BPT 1104," known as the "Summary of Revocation Decision." I believe this document survives the Realignment changes, and could well reflect the fact that the "actual" imposition of sanctions by the parole authorities is arguably narrower than the revocation ordered by the trial judge. This document, if it still exists, lists the parole violation charges, describes which charges were found true, and which states the basis for any order of reconfinement in prison for the parole violations.

(b) Is There Really a Mixed Conduct Basis for the Revocation?

Once you get the parole records, review them very carefully. First, make sure that there really was a mixed conduct basis for parole or probation revocation, and that it doesn't fit within the rubric of *Williams* (i.e., related conduct that was either never charged, dismissed, or couldn't have been charged because it wasn't criminal).

(c) Was Prison Time Really Imposed Because of the Mixed Conduct?

Second, if there really are mixed conduct allegations which your client admitted or which were found true at a hearing, double check to make sure that the decision to impose a prison revocation sentence was based on the mixed conduct allegations.

I happily recall the *Walton* case, where we won a parole revocation credits issue in which where there were two grounds for revocation, the new crimes and absconding from parole. On the second page of the form, the parole hearing officer checked only one box under the heading "NEED FOR RECONFINEMENT BASED ON THE FOLLOWING FACTORS," the box labeled "Involved in Felonious Behavior that Mandates Substantial RTC [return to custody]"; and didn't check a different box entitled "Inability/Unwillingness to Conform to the Expectations and Requirements of Parole." Because of this, I was able to persuade the trial judge with my motion that we had shown "strict causation" under *Bruner*, i.e., that but for the conduct of the new offense, defendant would not have lost his liberty. Sample briefing is available on this issue.

A similar process can happen at a court-imposed probation revocation hearing, which can perhaps be a model for the new court-based parole revocation proceedings. A court may find one or more violations of probation, but announce in its ruling revoking parole that they would not have revoked for the minor administrative violations but only, in fact, revoked because of the new criminal conduct which forms the basis for the conviction in your case. (This actually happened in a case I worked on, which, alas, did not involve any credits issues.) Then you'd have the same argument that carried the day

in Walton. Thus, in both parole and probation revocation "mixed conduct" situations, carefully review any statement by the court as to the reasons for revoking probation or parole and imposing a penal consequence. If the stated basis relies only on the new charges, even where there are other violations, you arguably have a winner under *Bruner*.

(d) Can You Demonstrate That *Part* of the Parole Revocation Sentence Imposed Was Strictly Caused by the New Criminal Conduct?

Third, consider an alternative argument raised by me in the *Cuellar* case based on parole regulations, a contention that only *part* of the custody time for the parole violation is attributable to mixed conduct. The applicable Parole Board regulations set out guidelines for periods of imprisonment for violations of parole which represent "the suggested period of confinement when a return to custody is imposed as a disposition for a violation of parole." (15 CCR § 2646.1.) Frequently in mixed conduct cases, the total term imposed is greater than the maximum suggested amount under the guidelines for the "mixed conduct" part of the offense.

In *Cuellar*, for example, "Failure to follow . . . instructions" is listed under subdivision (a) of section 2646.1 among the "Technical Violations of Parole," for which the guideline range is "0 to 4 months." (15 CCR § 2646.1, subd. (a)(7).) By contrast, the crimes on which defendant was convicted, which were also bases for revocation, possession of a controlled substance and possession of ammunition, are more serious violations which have a punishment range of "5 to 9 months." (15 CCR § 2646.1, subds. (c)(14) & (g)(1).) Thus we argued that at most only half of Mr. Cuellar's eight month parole revocation sentence was attributable to the non-current offense conduct, and that he was entitled to credits for the other four months, which were proven to be attributable to the new offense. The argument was rejected based on a questionable reliance on the fact that the regulation guidelines were merely "suggestive." In my view, this is a winner which should continue to be raised, at least until there is published authority rejecting it. Sample briefing is available on this issue.

(This may not work under Realignment, but I left it in here because it was such a fun case.)

iii. *Rojas*, "Term Serving Time," and a Couple of Arguable Exceptions

A longstanding rule precludes awarding double credits where the client is already serving time on an earlier case. (See *In re Rojas* (1979) 23 Cal.3d 152, 155-156.) This rule precludes credits in situations like *Rojas*, where a sentenced prisoner commits a new crime in prison. It has also been used to preclude credits where a defendant commits a new crime, but his period of custody after arrest includes a jail sentence on an unrelated misdemeanor offense for which he had already been convicted. (See, e.g., *People v. Adrian* (1987) 191 Cal.App.3d 868, 880.) The rationale for this limitation is explained by the Supreme Court in *Rojas*: "[T]he deprivation of liberty for which he seeks credit cannot be attributed to the second offense. Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty." (*Rojas*, *supra* at p. 156.)

I have identified two arguable exceptions to the *Rojas* door-slamming rule to "term-serving time" as awardable credits.

(a) Jail Time in New Case Resulting in Prison Sentence Where There Was a Hold from the Current Case.

I was able to obtain an unpublished win in the *Ayala* case, where the trial lawyer came up with a very creative credits argument around this rule. Ayala was arrested in Santa Clara County, jumped bail, committed a new crime in Merced County, and was unable to bail out in Merced because of the hold placed on him by Santa Clara County. After several months in the Merced County Jail, he was sentenced first in Merced, served out his time in prison, and then pled and was sentenced in Santa Clara County. The presentence credit period at issue was the time served in Merced County jail – for which Ayala received credits on his prison sentence in the Merced case – with the argument that credit for this time period should be allocated to the Santa Clara County case based on the

fact that defendant would have been free on bail during this time but for the hold placed on him by Santa Clara County, which amounts to "but for" causation under *Bruner*. The unpublished Sixth District opinion agreed with the claim, rejecting the attorney general's claim that this was "term-serving time" on the Merced case to which Ayala was not entitled. Thus, on these unusual facts, *Bruner* trumped *Rojas*, and we prevailed.

(b) Prison Time Served After Scheduled Release Date Which Is Attributable to In-Prison Offense Leading to Current New Charges.

In-prison offenses rarely give rise to credits issues, since typically the inmate who commits an in-prison offense is serving out another sentence during any period of presentence custody on the new charge, and credits are strictly precluded under *Rojas*.

However, there are some situations where credits issues arise, most commonly where the inmate's prison term ends prior to conviction and sentence for the in-prison offense. Monterey County, which handles prosecutions for the two Soledad prisons, the only CDCR institutions in the Sixth District, will typically award credits for time in custody after a defendant is released on parole. But there are some odd permutations where additional credits can be argued for under the rubric of *Bruner*. My own *Hopkins* case, in which I won a published-but-then-unpublished decision in the Sixth District, involved a meritorious claim for credits where *Bruner* trumped the *Rojas* rule excluding any credits for time served on a prison sentence.

Hopkins was serving time on a prison sentence, with a parole release date of May 12, 2008 when, in January of 2008, he was caught with a syringe and some heroin. CDCR initiated a CDCR 115 disciplinary proceeding, and also referred the case to Monterey County for prosecution. Because of the pending referral, the 115 hearing never took place. Meanwhile, Hopkins' parole release date came and went, with his prison records indicating that he was being held past this date based on the pending 115. About two months after the scheduled release date, the Monterey County district attorney's office filed a felony complaint for possession of drugs in prison, and about two weeks

after this Hopkins was paroled to Monterey County jail. After he pled to the new charges, the sentencing court awarded credits beginning only with the date he was paroled to county jail.

After obtaining CDCR records in the case, I brought a motion for additional credits going back to the parole release date, arguing that we had demonstrated "but for" causation under *Bruner*, in that Hopkins clearly would have been free from custody on that date but for the unadjudicated 115 proceedings which were attributable to the same conduct underlying the criminal conduct. The prosecutor's reliance on *Rojas* was misplaced, I argued, because here, unlike *Rojas* we were able to show that the deprivation of credits was attributable to the conduct underlying the new case. We lost in the trial court, but won in the Sixth District in a case which, though originally published, ended up being depublished after review was granted on an unrelated ground, with the case held by the Supreme Court pending resolution of an unrelated credits issue concerning the retroactivity of one-for-one- credits under the amendments to section 4019.[5] (See *People v. Hopkins* (2010) 184 Cal.App.4th 615, 620-623, rev. gtd., depublished [under old rules], and thus not citable.)

The message here is to look behind the label, even where the probation report indicates that credits are being excluded because defendant was serving a separate sentence. Carefully examine the basis for the credit limitation, and see if there is a way to argue for credit entitlement under *Bruner* or other applicable doctrines.

B. **Post-Conviction Credits**

Post-conviction credits are awarded based on a different set of statutory rules, nominally located at section 2930 et. seq. Normally, issues concerning these credits are

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[5]A backup equal protection argument was also raised in *Hopkins*, comparing the defendant to (a) similarly situated inmates who were already released on parole when the new offense was committed in the prison parking lot and (b) inmates who committed the crime in prison but where the district attorney promptly decided to prosecute, leading to the inmate being paroled to the county jail on the date of his scheduled release.

not going to be cognizable in appeals from conviction, as the awarding and deprival of these credits is up to the Department of Corrections.[6] However, the application of the laws and restrictions about postconviction credits often overlaps with rules about presentence and postconviction credits, and thus there will be ways in which statutorily based restrictions on prison credits can be challenged on appeal.

For example, as noted above, the stringent 15 percent limit on behavior credits under section 2933.1 for persons convicted of current "violent felonies" applies to both presentence and postconviction custody. If there is an issue in your case as to whether the trial court correctly applied section 2933.1 to restrict your client's presentence credits, you can raise this issue on appeal and/or by a trial court motion. While the benefit to the client in terms of presentence credits will normally be fairly minimal, the long term benefit of a favorable ruling will be enormous as to the postconviction credit limits.

Prison credits laws have a long and complicated history. For our purposes, though, it suffices to say that, at least until recently, unless one of several enumerated exceptions apply, a sentenced prisoner is entitled under section 2933 to receive, upon good behavior and work participation, half-time credits of one day for every day served, meaning that a two year sentence is completed in one year.

I say "until recently" because in the past half-dozen years, things have altered dramatically with enhanced credit provisions agreed to as a result of prison overcrowding litigation, Proposition 57, and recent changes relating to the COVID emergency. Rather than try to spell these out here, I am including, as an Appendix to this article, four helpful informational documents from the Prison Law Office, supplied to me by SDAP panel attorney and Greening grad Heather MacKay, who doubles as a prison law expert working with the PLO. The covered topics are Elder Parole, Prop. 57 Parole, Time Credits in CDCR, and Youthful Offender Parole. Each of these includes very useful

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[6] The ensuing discussion will not touch on complicated questions about in-prison determinations which reduce behavior credits, a subject which clients will sometimes bring up, but one over which the appellate lawyer has little ability to address.

information as to how inmates can win released before what would otherwise be their minimum parole date under the standard operating procedures.

What follows is a short discuss of some of the enumerated exceptions to the entitlement to one-for-one credits on parole, followed by a short comment as to whether, with recent changes, they even matter anymore.

As noted above, a person sentenced as to at least one violent felony can earn only 15 percent limits on their sentence. The potential issues concerning challenges to this law are noted in Part I-A-2-a above. (Note: Under Prop. 57 credit procedures and more recent changes, persons with violent felony convictions can now earn up to 33.3 percent conduct credits! See Appendix, "Time Credits in CDCR, July 25, 2021" p. 3.)

Under the Three Strikes law, credits are limited by subdivision (a)(5) of section 1170.12 to no more than 20 percent of the sentence. (But note: Under the most recent changes, such persons can earn up to 50 percent of their sentence. (See Appendix, "Time Credits in CDCR, July 25, 2021", p. 3.) Fortunately, the Supreme Court has agreed with lower court interpretations of this provision as inapplicable to *presentence* credits, which are still controlled by section 4019. (See *People v. Thomas* (1999) 21 Cal.4th 1122, 1125.) This anomaly has created some odd situations. For example, in second strike plea bargained cases, there is a big incentive to drag out the period of presentence custody so as to maximize credits.

Unfortunately, the Supreme Court made a poor and unfavorable interpretation of the credit limitation provisions of the strikes law as applied to *third* strikers, holding in *In re Cervera* (2001) 24 Cal.4th 1073 that such persons earn zero behavior credits while imprisoned in terms of advancing the minimum date for parole eligibility. I have argued elsewhere that *Cervera* should be challenged as an erroneous decision. However, this limitation has essentially disappeared under Prop. 57 for third strikers whose "current offense" is not for a "violent" felony, as they become parole eligible after serving out the greatest term of their most serious conviction. (See *In re Edwards* (2018) 26 Cal.App.5th 1181 [CDCR regulations excluding Third Strikers from Prop. 57 parole eligibility

contrary to plain language of initiative measure, and CDCR regulations enacted after *Edwards* was accepted as correct.) While I have not made a definitive study of this, I believe that other changes in the CDCR credit rules allow violent felony third strikers a chance to be parole eligible prior to their 25th year.

Back in the good old 1990s, there was a strong argument which could, and was, successfully made that a defendant's time spent in both jail and prison between his first, ultimately reversed sentence in a Strikes case, and his second, valid judgment should count as *presentence* time, entitling him to one-for-two credits, and exempting him from the 20 percent credit limits of the Three Strikes law, because the original judgment was void ab initio, and thus could not be used as a basis for reducing credits. (See, e.g., *People v. Thornburg* (1998) 65 Cal.App.4th 1173, 1176 and *People v. Chew* (1985) 172 Cal.App.3d 45, 51.)

Unfortunately, our state Supreme Court slammed the door on this argument. First, in *People v. Buckhalter* (2001) 26 Cal.4th 20 the court held that the twenty percent credit limits of the strikes law apply to a defendant whose sentence, but not underlying conviction, was reversed, on the grounds that this is not really a reversal of the entire judgment. Although the supreme court in *Buckhalter* reserved the question whether this reasoning applied when a defendant's *entire* conviction was reversed, *In re Martinez* (2003) 30 Cal. 4th 29 burst that bubble by holding that even when the entire judgment is reversed, time served in prison between the first invalid and second valid conviction counts as prison time subject to the credits limit of the strikes law by virtue of the subsequent guilty plea and "second strike" conviction. Justice Kennard's dissent in *Martinez* points out the absurdity of the majority's holding and rationale. However, *Martinez* means that this once promising credits issue, brimming with equal protection and statutory construction questions of great moment, is now utterly lost.[7]

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[7] The same limiting rule was applied by the Supreme Court in a case involving a sentencing recall under section 1170, subdivision (d). (*People v. Johnson* (2004) 32 Cal. 4th 260.)

There are two small pieces of good news from *Martinez*. First, it upheld, *sub silento*, the trial court's conclusion that time spent in *local* custody following reversal counts as presentence custody, entitling the second strike defendant to the one-for-two behavior credits of section 4019. (*Martinez*, *supra*, at p. 34, fn. 4.) Subsequent case law expressly holds that this "Phase III" period of custody is, in fact, presentence time for which the second strike defendant must receive section 4019 credits. (See *People v. Donan* (2004) 117 Cal.App. 4th 784, which contains the clearest and most precise statement of how things work in resentencing after a reversal.)

The other good news from *Martinez* comes when a defendant, otherwise in the same situation as petitioner Martinez, is sentenced after reversal to a *non-Three Strike* sentence under section 1170 et. seq. In that case, the rationale of *Martinez* will benefit the client, as all the "Phase II" time served in prison between the original sentencing and the remand to the trial court following reversal counts as in-prison custody time for which the one-for-one credits of section 2933, or even more favorable recent conduct credit provisions, are applicable. Well, at least that's what the majority in *Martinez* said was the case. (See *Martinez*, *supra*, at pp. 34-35.) I have found no case following this dicta, but you can cite it as authority under the accepted canon that " dicta of the California Supreme Court ordinarily carries persuasive weight and should be followed, especially where it demonstrates a thorough analysis of the issue or reflects compelling logic. . . ." (*People v. Rodriguez* (1999) 73 Cal.App.4th 1324, 1330.)

II. PROCEDURAL NICETIES

A. When an Issue Must be Raised First in Trial Court.

Generally speaking, we appellate lawyers hate to go to trial court to argue a motion. Only part of this is our regal sense of condescension. Mostly it's a major hassle to (1) figure out how to calendar a motion, especially in an unfamiliar county, (2) deal with the DA office's inevitable continuance request(s), (3) travel to remote places to argue the motion and (4) decide what the hell you're supposed to say when you're sitting in the trial judge's chambers with all the regulars, feeling like a fish wearing clogs.

But if a credits challenge is your only appellate issue, or if you need to introduce matters that are not part of the record to prove your client's entitlement to credits, you have no choice: a motion must be filed in the trial court in order to raise a credits issue on appeal. But don't fret! Many issues can be resolved informally by a *Fares* letter[8] to the trial judge; and recent amendments to Penal Code section 1237.1 make this a lot simpler to do. (See discussion below.)

If a motion has to be filed, there are ways to avoid the difficulties. So, cheer up: it might turn out to be a more favorable experience than you expected, and you will get a chance to match some faces with the names of the Good, Bad, and Ugly among the trial counsel, prosecutors, and judges in the superior court.

Also, bear in mind that in many situations, a credits motion, as opposed to an appeal, is your client's *only* real chance of obtaining a just correction of their sentence. When, as often is the case, your client's prison sentence is relatively short, a credits win in the trial court is the only realistic chance of getting the client's sentence reduced before release from prison, since appeals invariably take much longer than a credits motion, even with the seemingly inevitable continuances.

1. Section 1237.1 and Case Law: If Credit Error Is the Only Issue Raised on Appeal, It Must First Be Presented to Trial Court by Motion.

Apparently, appellate justices are not terribly fond of appeals where the only issue is an error in the computation of presentence credits. The courts in *Fares*, *supra*, 16 Cal.App.4th 954 and *People v. Underwood* (1984) 162 Cal.App.3d 420, held that credits issues are non-appealable without a prior attempt to obtain correction in the trial court. However, the court in *People v. Lynn* (1978) 87 Cal.App.3d 591, reached the opposite conclusion, finding that appeal was the *only* way to address such error, since a trial court no longer had jurisdiction once sentence was pronounced and an appeal went forward. The Sixth District reached a contrary view to *Lynn*, correctly pointing out that a trial court

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

retains jurisdiction of a case to correct clerical errors or to remedy an unauthorized sentence. (*People v. Little* (1993) 19 Cal.App.4th 449, 451-452.)

The Legislature stepped into the fray in 1995 by codifying the *Fares* rule in section 1237.1. It was amended more recently to expand the category of subjects it covers, making it clear that trial courts have jurisdiction to consider credits issues raised to them under its rubric while an appeal is pending, and that a "motion" for credits can be made informally by a letter, and does not require a formal calendared motion.

> No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court, which may be made informally in writing. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the calculation of presentence custody credits upon the defendant's request for correction.

(§ 1237.1.) Under this law, it is sufficient if a credits error was raised at the time of sentencing. For example, trial counsel may argue that a particular crime is not subject to the credit limits of section 2933.1, and have this argument rejected by the trial judge. There is no need for a motion in this situation.

But in the more typical situation, it is you, the appellate lawyer, who discovers the credits error or latent constitutional credits issue. In this situation, the issue must be first presented to the trial court before it can be raised as an issue on appeal. There is one exception, and one oft-available shortcut which can obviate the need for a full-blown motion in the trial court.

The exception applies when credits error appearing on the face of the record is *not* the only appellate issue – e.g., where there was a trial and there are other challenges to trial court error, or a guilty plea case with some other cognizable issue to be raised in the briefs. (See *People v. Acosta* (1996) 48 Cal.App.4th 411 and *People v. Duran* (1998) 67 Cal.App.4th 267.) In this situation, a credits issue which can be raised based on the record in the appeal may be raised in the opening brief without a trial court motion.

The "shortcut" – keeping in mind the old adage that shortcuts make long detours – is an informal request, typically in the form of a letter to the trial judge, to correct a credits error. Such a procedure, often referred to as a "*Fares* letter," can frequently be a prompt and effective way of fixing obvious errors of miscalculation or non-disputable mistakes about the applicability of credit restricting provisions such as 2933.1. When writing such an informal request, it makes the most sense to be as clear and specific as possible, and to attach copies of relevant portions of the record, including the abstract of judgment, probation report, and portions of the reporter's transcript of sentencing. You should "cc" a copy of the letter to trial counsel, the client, and to the trial deputy district attorney. (I note that in a couple non-controversial situations, a deputy DA actually helped finesse correction of the error.)

Also, be sure to include the following: (a) an explanation that under section 1237.1, the court has jurisdiction to consider this request while the appeal is pending, a letter is good enough, and that you are required to present this to the trial court before raising it on appeal; (b) a request that the court issue a minute order and amended abstract of judgment, and transmit these to the Department of Corrections, *and* (c) a request that a copy of the court's order be sent to you, as counsel for the client, an action frequently omitted, with the defense copy of any order sent instead to trial counsel. (Sample section 1237.1/*Fares* letters can be found on the SDAP website, and are available from me on request.)

Many trial judges respond promptly to such informal requests, issuing amended abstracts. But sometimes nothing happens for many weeks. Be prepared; calendar yourself to do a follow-up within two weeks, and phone the trial judge's clerk, an act which can sometimes gently prod a response. When this fails – "It's sitting on the judge's desk, that's all I can tell you" – a polite follow-up letter to the judge will sometimes do the trick.

If more time passes without a response, you must take the next step. We once assumed that an informal *Fares* request, if not acted upon by the court, was the equivalent

of a motion, and would permit you to raise the issue on direct appeal. Then the court in *People v. Clavel* (2002) 103 Cal.App.4th 516 said "not so!" because section 1237.1 requires the defendant to "make[] a motion" in the trial court, an informal request is not a motion, and an appeal raising a credits issue without such a motion is subject to dismissal. But then section 1237.1 was amended to make it clear that an informal, written request is sufficient. So there, *Clavel* court!

Thus, if you get no response, you need to decide whether the more prudent course is to just raise the issue on appeal, or whether you should prepare, file, and calendar a more formal motion. Most times, where there is a simple request based on a clear record, you should make this decision based on the nature of your client's sentence. If they are doing 16 years in prison, just raise the issue on appeal. However, if it is a shorter term, and a more favorable credits award could lead to their release soon, you will probably want to do the formal motion in the trial court, as you are likely to get a remedy much sooner.

2. Requirement of Superior Court Motion Where You Need to Present Facts Beyond the Record on Appeal.

Irrespective of whether you are raising non-credits issues on appeal, a trial court motion for credits will be required in those situations where there is a need to present facts in addition to what is in the record to prove your client's entitlement to credits.

A common example occurs in the supposed "mixed conduct" parole or probation revocation cases. Typically, all that you will have on the record is a couple sentences in the probation report that the probation officer spoke with your client's parole officer, who reported that it was a mixed conduct case; or simply concluded on their own that this was a mixed conduct probation violation situation. But when you obtain the actual parole records, or transcripts or documents from a probation revocation proceeding, and learn that in fact there was no actual revocation for anything other than the conduct in the new case, or that you have a *Williams* type argument about dismissed or uncharged offenses, you will need to put these documents forward as part of your showing in a credits motion.

You will, naturally, need certified copies of these documents as part of your credits motion.

A second situation where you will want to raise a credits motion rather than present an issue on appeal involves a situation where trial counsel may have raised an argument about credits, but failed to properly cite either the factual basis for the claim or the correct legal authority giving rise to it. For example, in the *Perkins* case discussed above, involving application of the *Marquez* exception to strict causation, counsel argued that credit deprival was unfair, but never cited *Marquez*, or pointed out the fact that there had been a hold placed by Santa Clara County when the defendant was arrested in Alameda County. In that situation, I felt it imperative to have a record from the trial court which clearly laid out the factual and legal predicates to the argument.

In either of these situations, another factor noted above may be decisive. As noted above, even if you could raise the issue on direct appeal, a motion may be the only practical way for your client to get his or her credits before he or she is released from prison.

B. **Some Tips on the Nuts and Bolts of Bringing A Trial Court Credits Motion**.

1. **Obtaining Supporting Documents**.

In my view, based on what has now developed into considerable experience and luck defeating supposed "mixed conduct" credit denials, it is worth your time and trouble to obtain copies of prison, parole or probation documents in any case where your client loses a meaningful chunk of presentence credits because he was a sentenced prisoner, or had a parole or probation revocation. If you've ever tried to get documents from prison, parole or probation authorities, you know that it can be a daunting task. A couple of basic rules may help you. First, get a signed release from your client allowing you access to his prison, parole or probation records. Second, if your client is in local custody, or back on the streets, the parole records will be held by local parole authorities in charge of his case. Normally, you can track them down through your client's parole officer. However, if, as

typically occurs, your client is back in state prison, his parole records will normally have been sent to the institution where he's imprisoned, where you must track them down (normally through the "Records" office, or the "Litigation Coordinator") and obtain copies. You may be asked to pay fairly exorbitant copying costs, which can then be reimbursed, thus transferring state money from the starving appellate counsel coffers into the overstuffed state prison coffers.

2. **The Motion Itself**.

Don't do a bare bones trial court type motion; knock yourself out, as it were, and do a motion that is pretty much a template of the opening brief you are going to file. You would be surprised how many trial court judges are pleased to have clear, coherent, and well argued motions presented to them.[9] Irrespective of whether you need material outside the appellate records, you should use extensive attachments to the motion which contain all the documentary evidence you need to prove your client's entitlement to credits.

Many trial judges believe that a pending appeal deprives them of jurisdiction to decide anything about your case. You should thus take pains to explain to the court in your motion that it has the authority to correct the error, citing amended section 1237.1, and *Little*, *supra*, and patiently explain to them that you're required, under section 1237.1, to bring the motion before raising it on appeal. Make sure your proof of service is to the district attorney's office, and not the attorney general.

Calendaring the motion can be difficult. The best trick is to get the trial lawyer to do it for you. He or she will tend to know the Ins and Outs of how to get motions calendared, can appear to argue it without you having to drive dozens or hundreds of miles, and probably has the schmoozing skills needed to survive those in-chambers conferences. If this fails, which it frequently will, you must do it yourself.

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[9] You might, as once happened to me in a Salinas courtroom, receive a nice compliment about the quality of your work, followed by a denial of the motion.

In many jurisdictions, calendaring the motion is relatively simple. Telephone the clerk of the trial judge, tell her or him that you have a credits motion you want to put on calendar, and she/he will give you a date some weeks off to calendar the motion. (Please note that in these COVID/post-COVID times, most trial courts are still holding hearings through Zoom-type platforms, which makes much of what follows less significant; it should now be relatively easy to appear and argue motions remotely. And, to be honest with you, I have no idea how anything like motions get calendared in Santa Clara County these days. So, take what follows with a grain of salt or two.)

Unfortunately, many trial judges in Santa Clara County have, in recent times, been refusing to calendar motions in this manner, insisting that we simply file the motion and that the court will calendar it for us. I fell into this trap a couple times. The motion, after being filed, is sent to some Motions Research Clerk, who evaluates it to see if it has arguable merit, then contacts the trial judge or the "law and motion" judge to set a hearing date, who then (if you're lucky) passes that date on to you. This can take weeks or even months, and complicate your own task of promptly appealing your client's conviction. (You may be able to obtain extensions of time from the court of appeal for delays in this process.) A better method suggested to me by some local counsel is to simply set the case on the law and motion calendar for a Friday around three weeks after you file it. Anyway, be prepared for some delays. If you know trial counsel in the county where the motion is to be filed, ask him or her to help you get the lowdown on the motion procedures you're supposed to follow. This has proven to be extremely useful for me in cases from Monterey and Santa Cruz Counties.

The trial DA, or the deputy assigned to handle the motion, may call you and ask to have the hearing continued for various reasons. Be polite, and give them one continuance, but hardball them after that. If the DA does not concede, and files an opposition, review it carefully. I rarely file reply memos in the trial court, where they are not typically expected, and normally save my reply comments for argument of the motion. I also prepare for argument of the motion in much the same manner as I do in the Court of

Appeal. Careful preparation also makes sense when, as too often happens, you are facing a trial or law and motion judge who has clearly not read over the materials all that well when you come to argue the motion.

3. **Winning; and What to Do If You Lose: New Appeal Notice and Motion to Consolidate**.

If you win, congratulations! Do some follow-up to make sure that the judge's minute order and amended abstract actually gets to the Department of Corrections, and that a copy of these documents is included in an augmentation of the record on appeal, either by the actions of the clerk's office, or by your own motion to augment. These seemingly simple matters are both often screwed up, and will require your careful and persistent attention.

If you lose, in whole or in part, you will need to promptly file a new notice of appeal from an "order after judgment, affecting the substantial rights of any party." (§ 1237, subd. (b).)[10] The Sixth District normally treats this as an entirely separate appeal, with its own case number. If this occurs, you will need to file the Sixth District's equivalent of a "motion to consolidate" (because they don't consolidate cases for some reasons shrouded in the history of that Court), which is a "motion to have the old and new appeal considered together for purposes of briefing, argument, and decision." (A sample motion is available on request.) Sometimes the Sixth District will incorporate any secondary appeal notice in the same superior court case into the same appeal, which would obviate the need for a consolidation motion. Sometimes you can even finesse this process by contacting the clerk's office in advance, though this has only occasionally worked for me.

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[10] N.B. Sometimes trial counsel, before you came into the case, brought a post-sentence motion for credits, or to modify probation, or for some other post-sentence remedy. If these are denied, the original notice of appeal after judgment probably does not cover these orders, and someone must file an "order after judgment" appeal under section 1237, subd. (b).

In any case, you will now have generated your own credits issue on appeal; and since you have already briefed this to the max in the trial court, you won't have to spend too much time writing your opening brief in the Court of Appeal.

4. **Pre-Screening Credits Motion with SDAP Buddy**.

A final word of caution. Many of you may be understandably concerned about getting paid for your work in the trial court trying to win credits. This time can be claimed under "Line 24" for "Other Services."

However, under SDAP protocols, you should always run your issue by your SDAP buddy before taking on a full-blown motion (as opposed to a *Fares* letter) in the superior court. This will give you a chance to discuss the matter with your SDAP buddy, and to maybe figure out whether there is an available less time-consuming way to preserve the issue; it may also allow the buddy to vet the issue in advance and, perhaps in some situations, explain to you why (a) the issue is non-meritorious, or (b) you can possibly raise it on appeal without running a motion.

Finally, running the issue by your buddy before filing a credits motion in superior court will give the buddy notice that you will be claiming significant time for the credits motion in Line 24, and reduce Claim Shock.

III. EX POST FACTO, ANYONE?

Yes, Virginia, there are constitutional credits issues. Both the equal protection clause and the ex post facto prohibitions have come into play in the context of penal laws concerning jail or prison credits. As noted above, presentence jail-time behavior credits have their genesis in California in the state supreme court's equal protection analysis in *Sage*, *supra*, 26 Cal.3d 498, which held that pretrial detainees later sentenced to state prison are similarly situated to bailed out defendants and pretrial misdemeanants such that it was a violation of equal protection to deny them any behavior credits for their jail time. And, as mentioned above, I included an equal protection argument in my briefing on the *Rojas* credits denial in the *Hopkins* case, and have based my challenge to the exclusion of State Hospital competency treatment time from conduct credits on equal protection

grounds in the *Orellana* case. But you all know about equal protection, so I'm going to leave that type of constitutional claim alone here, and instead riff on another of my favorite constitutional provisions.

The Ex Post Facto Clauses of the state and federal constitutions (U.S. Const. Art. I, §10; Cal. Const., Art. I, § 9) forbid the enactment of any law "that *changes the punishment,* and inflicts a greater punishment, than the law annexed to the crime, when committed." (*Calder v. Bull* (1798) 3 Dall. 386, 390 [1 L.Ed.648], emphasis in original.) Since the U.S. Supreme Court's landmark opinion in *Weaver v. Graham* (1981) 450 U.S. 24, it is settled that laws passed after a defendant committed his charged crime which alter to his detriment the defendant's entitlement to postconviction prison credits run afoul of the ex post facto prohibition. A law reducing credit entitlements "implicates the *Ex Post Facto* Clause because such credits are 'one determinant of petitioner's prison term . . . and [the defendant's] *effective sentence* is altered once this determinant is changed." (*Lynce v. Mathis* (1997) 519 U.S. 433, 445, quoting *Weaver*, *supra*, at p. 32, emphasis added; see also *In re Lomax* (1998) 66 Cal.App.4th 639, 647.)

Retroactive changes in credits laws can affect your client's "effective sentence" in some less-than obvious ways. With the extension and revival of limitation statutes in sex crime cases (and with non-limited crimes such as murder), it sometimes occurs that your client is sentenced in a current case for crimes committed prior to the enactment of particular credit restriction statutes. For example, a client may stand convicted for eight "violent felony" sex crimes committed prior to the effective date of the credit restrictions of section 2933.1. Or, a murder defendant may incur a conviction for a crime committed prior to enactment of section 2933.2. Or, in a somewhat more subtle application of the principle, your client may stand convicted of a crime, such as robbery, which was reclassified as a "violent felony" after Proposition 21, but which was not a violent felony when he committed his current robbery back in January of 2000. Application of these laws against your client retroactively is a clear violation of ex post facto prohibition, because they unquestionably increase his "effective sentence" by requiring him to serve a

much longer sentence on good behavior.

A. **Some Tricky 2933.1 Ex Post Facto Issues**.

If, as in the first foregoing example, *all* your client's crimes were committed prior to the effective date of section 2933.1, the ex post facto issue is a no-brainer, and we win. The problem arises (1) where some, but not all crimes are committed prior to the effective date of the new law, and (2) where an accusatory pleading under which your client is charged and convicted specifies a range of dates which *straddles* the effective date of section 2933.1, e.g., where a crime was allegedly committed, "on or between January 1, 1994 and December 31, 1995."

In the former case, the answer seems obvious. If there are two violent felony convictions, one committed after the effective date of section 2933.1, and the other before, the 15 percent behavior credit limitations should apply only as to the post-enactment crime, and not to the pre-enactment offense. For, as *Weaver* makes clear, in ex post facto analysis "the critical question is whether the law changes the legal consequence of acts completed before its effective date." (*Weaver*, *supra*, 450 U.S. at p. 31.) "Through [the ex post facto] prohibition the Framers sought to assure that legislative acts give fair warning of their effects and permit individuals to rely on their meaning until explicitly changed. . . ." (450 U.S. at pp. 28-29.) As to the crime committed before section 2933.1's enactment, a defendant could have had no "fair warning" of the extreme credit limiting consequences and reduction of his "effective sentence" which would follow from his criminal acts.

The mischief arises because of the non-constitutional statutory construction of section 2933.1 as applying "to the offender, not the offense" by the court in *People v. Ramos, supra*, 50 Cal.App.4th 810. According to *Ramos*, if a defendant is convicted of a *single* qualifying violent felony, his entire sentence, including consecutive terms on non-violent felonies, is subject to the 15 percent credit limitations. (*Id*., at p. 817.) Small minds, such as those inside the heads of many trial and appellate judges, could and have concluded that the logic of *Ramos* means that if the limitations of section 2933.1 applies

to one post-enactment violent felony, the defendant is thus a "person" covered by the credit limits of section 2933.1, which would then apply to the entirety of his sentence, violent or nonviolent, predating or postdating the effective date of the law.

However, the constitutional prohibition of ex post facto laws means that the reasoning of *Ramos* cannot be applied to consecutive sentences imposed for crimes, violent or not, committed *prior* to the effective date of section 2933.1. The new law "changes the legal consequences" of these pre-enactment acts by stringently increasing the number of years a defendant must effectively serve as punishment for such crimes. On an eight year sentence, for example, with half-time credits under section 2933, a defendant's "effective sentence" pre-2933.1 was 4 years; if 2933.1 is applied, his effective sentence is 6.8 years. Thus, the net affect of section 2933.1 is to increase the "effective sentence" in this example by more than fifty percent, a clear violation of the ex post facto prohibition as applied to the crime committed before the new law's effective date.

Back in the early 2000s, I pursued two cases involving this issue into federal court. In the end, I won one, and lost the other for reasons to complicated to go into now. The federal courts who have addressed these cases both agreed with my underlying contention that the Ex Post Facto Clause precludes credit limitations for crimes committed before the effective date of section 2933.1. But in both cases, bizarre "waiver" claims were upheld to preclude granting of habeas relief based on plea bargaining principles. I have quite a lot of sample briefing in these two cases, Villa and Martinez, which I would be happy to share with you.

One more twist on the same issue. What if, as suggested above, a crime for which your client was convicted after trial or on which he entered a plea was allegedly committed during a time period that *straddles* the effective date of section 2933.1? In that situation, you can still argue that the new law cannot be applied without violating ex post facto unless there is proof in the record of conviction, by at least a preponderance standard, that the criminal conduct actually took place after the effective date of the law.

(See, e.g., *People v. Lewis* (1991) 229 Cal.App.3d 259 and Cal. Rules of Court, Rule 4.420(b), formerly Rule 420(b) [preponderance standard applies to proof of sentencing facts]; *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 91-92 [preponderance standard for determination of sentencing facts satisfies Due Process Clause of 14th Amendment], disapproved on other grounds in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 484-487.)

There is one published appellate case on this issue, *People v. Palacios* (1997) 56 Cal.App.4th 252, but it applies only to the unique situation of the "continuing crime" of resident child molestation under section 288.5. The question presented in *Palacios* was whether application of the credit reduction provisions of section 2933.1 violated the ex post facto prohibitions as to a 288.5 charge when at least one of the alleged underlying acts was committed before the operative date of September 21, 1994. It did not, according to the court in *Palacios*, because section 288.5

> punishes a continuous course of conduct, not each of its three or more constituent acts . . ., [which] cannot logically be 'completed' until the last requisite act is performed. Where an offense is of a continuing nature, and the conduct continues after the enactment of a statute, that statute may be applied without violating the ex post facto prohibition.

(*Id*., at p. 257, citations omitted.)

By contrast, other sex crimes, such as rape or lewd conduct, involve specific allegations of individual criminal acts, and not courses of conduct, even when their commission is alleged to have occurred within a wide period of time. As such, in order for section 2933.1 to apply without running afoul of the ex post facto prohibitions, there must be proof in the record, by preponderance of evidence, that these crimes occurred on or after September 21, 1994. (Sample briefing on this point is also available.)

B. **Other Latent Ex Post Facto Issues?**

Assume you are handling a case where your client stands convicted, after trial or plea, with crimes committed in the 1980s. It's important in this situation to check each component of the sentence imposed carefully to make sure that no portion of the sentence, fine, or order is based on a punishment provision enacted subsequent to your client's

commission of his criminal act. One obvious example is the parole revocation fine imposed pursuant to section 1202.45 in all cases where a prison sentence is imposed. This fine is routinely imposed in cases where the crimes were committed prior to its effective date, August 3, 1995, in clear violation of the ex post facto prohibition. (See *People v. Callejas* (2000) 85 Cal. App. 4th 667.) Check the terms of the sentence and enhancements imposed against the terms in effect at the time the crime was committed, keeping in mind that old rules like the "double the base term" limit and no-more-than five year consecutive sentence limit may have still applied.

Please note that a combination of two factors, only one of which applied when I wrote the first two versions of this article, make this a somewhat common occurrence. First, as noted above, the expansion of the statutes of limitation, particularly in sex crimes, and the absence of such limitations for murder, mean that you will sometimes see crimes committed many years ago which are only being prosecuted and appealed now. This will require you to examine the nature of the statute in effect at the time the crime was committed. This can be a particularly difficult task in sex crimes, where the date the crime was committed, which is essential in ex post facto terms, is anything but certain. I note that in one unpublished Sixth District case I had some years ago, the Court of Appeal required that there be proof by a preponderance of evidence that the crime occurred after the date that section 2933.1 went into effect.

The second area where this ex post facto issue will arise comes in the many recent resentencing provisions under Propositions 36 and 47, and SB 1437. Again, the controlling date will be the date the offenses are committed, not the date of original sentencing or resentencing. This often overlooked provision also carries over to penal fines (e.g., restitution fines), which are covered by ex post facto, but beyond the scope of this article.

C. **Don't Be Afraid to Go to Federal Court!**

Need I say more? You may lose these clearly meritorious issues in state court, based on questionable interpretations of statutory construction rules as trumping ex post

facto. Have no fear. These issues should be clear winners in federal habeas cases. Push on and you will win. Maybe.

IV. A WORD ON CREDIT WAIVERS: BAD NEWS, WITH A COUPLE POSSIBLE ISSUES.

As noted above, deprival of credits to which a defendant is entitled under the law normally results in an unauthorized sentence, which can be challenged at any time. However, a defendant can give up their right to presentence or other credits as part of a plea bargain in a multiplicity of situations. (See *People v. Johnson* (2002) 28 Cal.4th 1050, and discussion of case law therein.) Prior to *Johnson*, there was room for some creative arguments that credit waivers are proper only in limited situations, such as to allow probation to be granted on condition of serving of additional jail time, when the defendant would otherwise have served the maximum one year period for jail time under section 19.2. For example, the court in *People v. Tran* (2000) 78 Cal.App.4th 383, held that when the court imposed, then suspended, a maximum upper term prison sentence, a waiver of all credits as a condition of probation could not be upheld when it was not related to any proper rehabilitative probationary goal and where "[t]he only purpose served by the waiver condition [was] to lengthen appellant's prison sentence beyond the maximum allowed if he were to violate probation." (*Id*., at p. 390.)

Johnson rejected even the narrow limits in *Tran*, holding, in effect, that a waiver of credits to which a defendant is otherwise entitled under section 2900.5 is proper so long as it serves "any legitimate penological function." (*Johnson*, *supra*, at pp. 1056-1057.) In my view, *Johnson* leaves virtually no room for attacking a defendant's action of waiving his current and future entitlement to credits for a specified time period of custody so long as there was some valid rationale for this action and the waivers appear on the record to have been knowing and intelligent. Thus, it may be worth considering challenging the scope of this holding in *Johnson* as beyond the true scope of a "knowing and intelligent" waiver of credits.

Short of that, though, there are still some bases for challenging credit waivers in certain situations. Often there will be an absence of advisements about the waivers, such that it can be argued that they were not knowing and intelligent. This requirement means that it must be clear from the record that "the defendant understood he was relinquishing or giving up custody credits to which he was otherwise entitled." (*People v. Arnold* (2004) 33 Cal.4th 294, 308; see also *People v. Salazar* (1994) 29 Cal.App.4th 1550, 1553.) Although it is the "better practice" to give express advisements concerning the scope and consequences of a credit waiver, there is no requirement of express advisements of the consequences of the waivers, as in a *Boykin-Tahl* type waiver situation. (*Salazar*, *supra*, at pp. 1554-1556.)

Also, even if the waiver is presumptively valid, you may want to look behind the purported basis for the waiver and see if it is based on fallacious consideration. About a decade ago, former panel attorney David Martin came up with a clever strategy for attacking a credits waiver where the defendant agreed to waive a lengthy period of presentence credits as part of a plea bargain in exchange for dismissal of two first degree burglary charges, with the understanding that dismissal of these charges would mean that he would not be subject to the 15 percent credit limits of section 2933.1. Martin argued that the vast period of time excluded from presentence credit at the sentencing hearing exceeded the scope of the original understanding of credit waiver at the time of the plea. An even stronger argument was raised in a habeas petition, based on the fact the alleged consideration for the credit waiver – dismissal of the burglary charge to avoid the postconviction restrictions of section 2933.1 – was illusory because the burglaries in question were committed prior to the enactment of Proposition 21, which for the first time classified some residential burglaries as a violent felonies.[11] Thus, it was argued, the failure of defendant's trial counsel to figure out that the agreement to waive credits was without meaningful consideration amounted to ineffectiveness requiring reversal of the

[11] See how that ex post facto clause can sneak up on you?

credit waivers or withdrawal of the plea. (See, e.g., *People v. McCary* (1985) 166 Cal.App.3d 1 and *People v. Hyunh* (1991) 229 Cal.App.3d 1067.)

Trial courts will sometimes try to obtain the *effect* of a credits waiver without actually taking a waiver, doing this by what seems to them to be very cleverly structured allocation of credits to related or unrelated cases. The best example of this, and of the way to challenge it, comes from *People v. Downey* (2000) 82 Cal.App.4th 899, which involved the well-known actor, Robert Downey, Jr. Following a plea to one felony charge of possession of cocaine, and several misdemeanor drug, weapon, and driving offenses, Downey was placed on probation and required to participate in a number of inpatient and outpatient drug treatment programs. After several failures, the trial court ultimately revoked probation and imposed a prison sentence. (*Id*. at pp. 903-905.) The court imposed an upper term sentence of three years on the felony drug charge, and then purported to run the misdemeanor sentences consecutive based on a stated belief that it was required to do so by *People v. Fugate* (1990) 219 Cal.App.3d 1408. The court sentenced Downey separately on the misdemeanor offenses, imposing 180 days for the driving under the influence misdemeanor, 180 days on the firearm possession charge, and 90 days on the under-the-influence charge. (*Downey*, *supra*, at pp. 907-908.)

The Court of Appeal first held that the trial court erroneously concluded that it was required to run the misdemeanor sentences consecutive to the felony offense, rejecting the notion that this was required by *Fugate*, and remanding the matter based on the court's failure to exercise discretion. (*Id*, at pp. 911-912.) The court then turned to the question whether the misdemeanor counts were deemed to run consecutive or concurrent with respect to each other, concluding that because the trial court failed to state how the misdemeanor counts were to run with respect to each other, section 669 compelled a finding that they must be deemed to run concurrently. (*Id*., at pp. 912-915.) In analyzing this question, the court rejected the attorney general's contention that the court intended a consecutive sentence because it allocated separate periods of custody as to each misdemeanor count.

> Respondent argues that the trial court did sentence appellant to consecutive terms on the misdemeanors because appellant had in fact already served "those terms" consecutively, having served separate periods of prior custody which were credited against the respective jail sentences. We reject this argument. Imposition of time in custody as a condition of probation is an act wholly independent of a later sentencing choice. As respondent observes, the concurrent grants of probation on counts 1, 3, and 4 did not amount to a judgment. (*People v. Howard* (1997) 16 Cal. 4th 1081, 1092.) Even if more than one period of custody was imposed as a condition of probation, and even if such periods were imposed and consequently served at successive times, this cannot possibly signify a determination by the trial court that terms on those counts should be served consecutively in the event sentence should later be imposed. . . . Moreover, there is no indication that, when the trial court imposed judgment in August 1999, it intended that the misdemeanor counts be deemed to have been served consecutively because of the prior history of custody.

(*Id*., at pp. 913-914.)

When a near-identical credit-robbing scheme was foisted on one of my clients in the *May* case, I was thrilled to find this opinion in *Downey* to complement the "it's not fair" argument raised by trial counsel. In Ms. May's case, the court had allocated a large chunk of the defendant's sentence, after a probation violation in which probation was reinstated, to misdemeanor counts, but did not actually pronounce judgment on these counts. When probation was again violated and Ms. May was sentenced to state prison, the court subtracted the time allocated to these counts from her credits. My motion, based largely on the holding in *Downey*, was granted by the trial court, and Ms. May ended up getting out of prison about two months before her scheduled release date, allowing her to spend Christmas with her family. Now ain't that nice? If you ever get a crazy case like this, let me know and I can share my briefing in *May*.

V. BANK ERROR IN YOUR FAVOR! TIME TO CONSIDER ABANDONING THE APPEAL.

There is another variety of credits error which requires a very different application of your legal and "counselor" skills. Sometimes your client is awarded credits by the trial court to which he is not entitled under a proper understanding of the law. For example,

courts will occasionally miss the fact that one of the current charges is a violent felony, and award conduct credits under section 4019. Or, as happened in one of my cases, a court might impose consecutive sentences, and then include the same period of custody as part of the credits for each of the sentences imposed, in violation of the clear rule that "Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (§ 2900.5, subd. (b).) Other times, you may catch a mathematical error which favors your client, such as double counting of a particular period of custody (which happens on occasion when there are prior probation revocation proceedings), or a failure to fully deduct time served on a misdemeanor sentence.

When this occurs, it's time to put on your "Adverse Consequence" hat. First, make sure there really is a favorable error, or at least an arguably unauthorized credit error; then talk to your buddy from SDAP or other appellate project, and try to get a good sense of (a) the likelihood that the AG and/or Court of Appeal will spot this error, balanced by (b) the likelihood that CDCR Legal unit, which reviews every sentence, will catch the error anyway even if you do abandon the appeal.

Whatever conclusion you reach, you *must* contact the client and explain the potential adverse consequence. One should be very careful not to make such communications to the client in any manner which could be intercepted by prison authorities, properly or otherwise. Obviously, this includes any collect call from the client, which has no privilege. In certain situations – for example, my own case where a defendant had about a year and a half of double credits to which he wasn't entitled – this may mean you need to personally visit with the client to insure that any communication is as confidential as possible. I got a nice trip to the Yolo County jail out of that situation.

Bear in mind that the decision whether to proceed with the appeal, in spite of the potential adverse consequence of loss of credits, belongs to the client, not to you. Your advice about which way to go will depend on many factors, including the amount of custody time at issue, compared to the length of the sentence, the strength or weakness of

other issues, and the likelihood of the favorable error being spotted by the AG, court, or CDCR.

CONCLUSION

Well, I've managed to expand my article into the 50 page bracket. Hopefully, this second redo of my credits opus has provided you with some of the basics of credits law in California, and with some ideas and tools for identifying and successfully raising credits issues on behalf of your clients. For those of you who previously read my one or both of my prior credits articles, I hope this review has been refreshing, and that the additions will be helpful. This is a work in progress, and I would be very happy to hear from any readers concerning other important credits issues which were omitted from this essay, or additional case law or ideas for successful credit challenges concerning subjects raised herein.

Finally, bear in mind that credits issues, like all of the work that we do, calls for creativity and imagination. There are new credits issues out there for the finding if you can look behind the often confusing rules and case law about credits and get to the heart of what's going on. I have frequently been surprised how often I am led to an arguable and sometimes winning issue because of either a client's complaint about denial or abridgment of credits, or my own sense that there is something wrong or unfair about the credits award.

Now go out there and get those credits!

Appendix: Prison Law Office Documents on Prison Credits and Parole Eligibility

1. Elderly Parole, Nov. 2020
2. Prop. 57 Parole, May 2021
3. Time Credits in CDCR, July 25, 2021
4. Youth Offender Parole, June 2021

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When putting this material together, we did our best to give you useful and accurate information because we know that incarcerated people often have trouble getting legal information and we cannot give specific advice to everyone who asks for it. The laws change often and can be looked at in different ways. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet, it is your responsibility to make sure that the law has not changed and still applies to your situation. Most of the materials you need should be available in the prison law library.

INFORMATION ABOUT THE ELDERLY PAROLE PROGRAM

(revised November 2020)

We have received your request for information about the laws regarding "elder parole" for people incarcerated in California prisons. We apologize for sending this form letter, but we are unable to provide individual responses to everyone who seeks our help. We hope that this letter will answer your questions.

On February 10, 2014, the federal three-judge court overseeing the California prison overcrowding class action case (*Plata/Coleman v. Brown*) issued an order that required the State to develop and implement **"a new parole process whereby inmates who are 60 years of age or older and have served a minimum of twenty-five years of their sentence will be referred to the Board of Parole Hearings to determine suitability for parole."** The process approved by the court applies to people serving indeterminate (life with the possibility of parole) terms and to people serving determinate (set length) terms. It does not apply to people serving death or life without the possibility of parole (LWOP) terms. The date that a person becomes eligible for an elderly parole hearing is listed on their Legal Status Summary.

Effective January 1, 2018, Penal Code § 3055 went into effect [Assembly Bill No. 1440]. The "Elderly Parole Program" created by § 3055 is the same as the program approved by the federal court except that § 3055 excludes from parole consideration people with Two or Three Strike sentences and people convicted of first-degree murder of a law enforcement officer in the line of duty. However, the State has told the federal court that it will continue using the program approved by the federal court until the federal case ends or the February 10, 2014 order is modified. Thus, the BPH is not excluding from elder parole consideration people who are 60 years or older and who have Two or Three Strike sentences or convictions for first-degree murder of an officer.

Penal Code § 3055 has been amended, effective January 1, 2021 [Assembly Bill No. 3234]. The amendment **lowers the age for elder parole consideration to 50 years old and the number**

of years served to 20. The BPH has until December 31, 2022 to complete parole hearings for people who became eligible for elder parole considerations when this amendment took effect and whose new elder parole hearing eligibility date is before January 1, 2023. It is not known whether the BPH will exclude from elder parole consideration people who are 50 to 59 years old and who have a Two or Three Strike sentence or a conviction for first-degree murder of a police officer.

The State reports that from February 2014 through the end of September 2020, the BPH held 4,838 elder parole hearings, resulting in 1,377 grants, 3,010 denials, and 451 stipulations to unsuitability.

Elderly Parole Program for People Serving Indeterminate Terms (Life with the Possibility of Parole)

People with indeterminate sentences (life with the possibility of parole) who are 50 years or older and have been incarcerated 20 years or more on their current sentence, and *who have not already had an initial parole suitability hearing*, will be referred by the CDCR to the BPH and scheduled for an Elderly Parole Program suitability hearing. The elder parole hearing will be scheduled within one year of the person becoming eligible (in other words, one year from the date the person is both age 50 or older and also has served 20 years or more).

People with indeterminate sentences who are 50 years or older and have been incarcerated 20 years or more on their current term, and *who have already been denied parole at the initial suitability hearing* will be considered for elder parole at their next regularly scheduled parole hearing. When the elder parole law first was enacted, the BPH conducted administrative reviews to identify cases in which hearings should be advanced due to eligibility for elder parole. Also, a person who is eligible for elder parole can file a petition with the BPH asking that their hearing be advanced because they meet the eligibility criteria for elder parole. A person with a long denial period (7, 10, or 15 years) can file an advancement petition every 3 years.

The same general procedures and legal standards that apply to regular life parole suitability hearings will apply to elder parole hearings. This means the BPH may deny parole if a person's release would pose an unreasonable risk of danger to public safety. However, for elder parole hearings, the BPH shall give special consideration to how age, time served, and diminished physical condition, if any, have reduced the person's risk for future violence.

A person with an indeterminate term who is found suitable for elder parole will be released when the parole grant becomes final (after review by the full BPH and, in some cases, by the Governor). If a person is denied elder parole, the denial length will be set for 3, 5, 7, 10, or 15 years pursuant to Penal Code section 3041.5(b)(4).

Elderly Parole Program for People Serving Determinate (Set-Length) Terms

The BPH also holds Elderly Parole Program suitability hearings for people who are serving determinate terms and who are 50 years or older and have been incarcerated for 20 years or more on their current sentence. The parole consideration hearing will be scheduled within one year of the person becoming eligible (in other words, one year from the date the person is both age 50 or older and also has served 20 years or more).

The same general procedures and legal standards that apply to regular lifer parole suitability hearings will apply to a determinate term elder parole hearing. This means the BPH may deny parole if a person's release would pose an unreasonable risk of danger to public safety. However, for elder parole hearings, the BPH shall give special consideration to how age, time served, and diminished physical condition, if any, have reduced the person's risk for future violence.

A person with a determinate term who is found suitable for elder parole will be released when the parole grant becomes final (after review by the full BPH), even if that date is before the person's regular "earliest possible release date" (EPRD). If a person is denied elder parole, the denial length will be set for 3, 5, 7, 10, or 15 years pursuant to Penal Code section 3041.5(b)(4). If the next elder parole hearing date is after the regular EPRD, then the person will be released on their EPRD.

****

If you believe you are eligible for elder parole, and think the elder parole program is not being fairly applied to you, please write us. We will read your letter and consider whether we can help.

If you want more information about the parole consideration process or about how to file a state court petition for writ of habeas corpus to challenge a denial of elder parole, please write back to Prison Law Office to request free information packets on those topics. Information is also available on the Resources page of the Prison Law Office website at www.prisonlaw.com.

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INFORMATION ON PROPOSITION 57: "NONVIOLENT OFFENDER" PAROLE CONSIDERATION

(Updated May 2021)

This letter discusses the California Department of Corrections and Rehabilitation (CDCR) and Board of Parole Hearings (BPH) rules under Proposition 57 on earlier parole consideration for some people serving terms for nonviolent offenses. The Title 15 rules should be available in prison law libraries and made available to people in Restricted Housing. The documents are also on the CDCR website at www.cdcr.ca.gov.

The Proposition 57 rules about good conduct and programming time credits are addressed in a separate letter. If you want that letter, and we did not send it to you with this letter, please write to us and ask for it. The time credits letter is also on the Prison Law Office website at www.prisonlaw.com, under the Resources tab.

There is ongoing litigation about some parts of the CDCR rules; the most recent developments are underlined in this letter.

Part I of this letter summarizes the Proposition 57 Title 15 rules for people with determinate (set length) terms and people serving indeterminate (life with the possibility of parole) terms. Part II describes how people can challenge the rules or how they are being applied.

I. EARLY PAROLE CONSIDERATION FOR SOME PEOPLE SERVING TERMS FOR NONVIOLENT OFFENSES

Proposition 57, passed by California voters in November 2016, authorizes earlier parole consideration for people who are serving state prison terms for nonviolent offenses.[1] Pursuant to this law, the BPH and CDCR rules provide early parole consideration for some people. The regulations regarding early parole for people with *determinate* (set length) sentences for nonviolent offenses are 15 CCR §§ 2449.1-2449.7 and 15 CCR §§ 3490-3493. The rules on early parole for people with *indeterminate (life with the possibility of parole)* sentences are 15 CCR §§ 2449.30-2449.34 and 15 CCR §§ 3495-3497. (See *In re Edwards* (2018) 26 Cal.App.5th 1181 [striking down prior rule barring third strikers from eligibility].) As of December 2020, the Board of Parole Hearings (BPH) has granted parole at about 16% of the hearings held for people with determinate sentences and 29% of the hearings for people with indeterminate sentences.

An eligible person will be considered for parole suitability prior to their "Nonviolent Parole Eligible Date," which is the date on which they have served the "full term" of their "primary offense," counting pre-sentence credits for actual days served (as awarded by the sentencing court), credits for actual time between sentencing and arrival in the CDCR, and credits for actual days in CDCR.

- "Primary offense" means the one crime for which the court imposed the longest prison term, without taking into account enhancements, alternative sentences, or consecutive sentences.
- "Full term" means the time imposed by the court for the primary offense *without* considering good conduct or programming credits earned in jail or prison. (See *In re Canady* (2020) 57 Cal.App.5th 1022 [upholding definition of full term as not including credits].) For example, a person serving a doubled term under the two strikes law (which is an alternative sentencing law) for a nonviolent offense is eligible for parole consideration after serving just the ordinary base term (without the doubling or any enhancements). For a person serving a life term under the three strikes law (which is an alternative sentencing law), the full term for the primary offense is the "maximum term applicable by the statute to the underlying nonviolent offense," without the additional three strikes punishment or any enhancements.

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[1] Propostion 57 adopted California Constitution, Article I, section 32, which states:

> (a)(1) Parole Consideration: Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.
>
> (A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.
>
> ….
>
> (b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.

The first parts of the nonviolent parole consideration process – a CDCR eligibility review and CDCR referral to the BPH -- are similar for people with determinate sentences and people with indeterminate sentences, though there are a few differences. The person should be notified within 15 business days about the decision made at each of these steps.

The final parts of the process are a BPH review to confirm whether the person is eligible for Nonviolent Offender Parole consideration and then a review to decide whether the person's release would pose an unreasonable risk to public safety. The type of public safety review depends on whether a person has a determinate sentence or an indeterminate life sentence. People with determinate sentences get a "paper" review by one hearing officer; however, the lack of a formal in-person hearing is being challenged in the courts (see Section I-C, below). People with indeterminate life sentences get a formal in-person hearing, like a regular parole suitability hearing.

A. CDCR Eligibility Review

CDCR staff should do an **eligibility review** within 60 days after a person arrives in the CDCR and anytime there is a change to the sentence or a new sentence is imposed. For people with determinate sentences, a new review should also happen if they come within one year of being considered for Youth Offender Parole or Elderly Parole.

A person will be deemed to be **ineligible** for Nonviolent Offender Parole consideration if *any* of the following are true:

- The person is serving a sentence of *death* or *life without the possibility of parole* (LWOP);
- The person is currently serving an *indeterminate sentence* of life with the possibility of parole for a *violent felony* (violent felonies are listed in Penal Code § 667.5(c));
- The person is currently serving a *determinate sentence* for a *violent felony* (these are listed in Penal Code § 667.5(c));
- CDCR rules also make ineligible some people who are serving a current term for a non-violent felony if they have additional terms for violent felonies. Those who are ineligible are: (1) a person currently serving a *determinate term* for a *nonviolent felony prior to beginning an indeterminate life term for a violent felony* or a *term for an in-prison violent felony*, (2) a person currently serving a *determinate term* for a *nonviolent felony after completing a concurrent determinate term for a violent felony*. (Note: a person who has completed a term for a violent felony and is currently serving a separate term for a non-violent in-prison felony IS eligible for Nonviolent Offender Parole consideration.)
- CDCR also refuses parole consideration to a person with *consecutive determinate terms for a mix of violent and non-violent offenses*, *even if the person's "primary offense" is for a non-violent felony and the violent felonies are subordinate terms*. The California Supreme Court is considering whether this policy violates Proposition 57. (*In re Mohammad*, No. S259999.) Several courts of appeal have issued conflicting opinions, but it is almost certain

that the Supreme Court will grant review of any cases on the issue and hold those cases until the Court decides *Mohammad*. We do not know when *Mohammad* will be decided.

- For a person serving a determinate sentence, the person must not be eligible for a Youth Offender Parole or Elder Parole consideration hearing within a year of the Nonviolent Parole eligibility review and must not have an initial Youth Offender Parole or Elder Parole hearing already scheduled.

- Under a former rule, CDCR excluded people from Nonviolent Offender Parole eligibility if they had *any past or current conviction for an offense that required sex offender registration under Penal Code § 290*. This rule was struck down by the California Supreme Court in *In re Gadlin* (2020) 10 Cal.5th 915, which held that this exclusion violated Proposition 57. Effective April 29, 2021, CDCR put in place emergency rules complying with *Gadlin*; now CDCR cannot exclude people based on a sex offense conviction unless it is a current conviction for a violent felony. The emergency rules also set deadlines for CDCR to make parole referrals for people who became eligible for parole consideration under *Gadlin* and who have already passed their Nonviolent Parole Eligible Date (NVPED):

  -- People with determinate sentences shall be referred to the BPH for parole consideration by July 1, 2021; however, people whose regular Earliest Possible Release Date (EPRD) is on or before November 1, 2021 will not be referred.

  -- People with indeterminate sentences shall be referred to the BPH for parole consideration by July 1, 2021, unless they previously have been scheduled for another type of parole hearing or will be eligible for another type of parole hearing within 12 months. After a referral, the BPH shall schedule parole hearings no later than July 1, 2022 for people who as of April 1, 2021 have been incarcerated for 20 years or more and are within 5 years of their regular Minimum Eligible Parole Date (MEPD). The BPH shall schedule parole hearings no later than December 31, 2022 for all other people whose Nonviolent Parole Eligible Date is on or before December 31, 2022.

If the review indicates that the person is eligible, CDCR determines their Nonviolent Parole Eligible Date.

If the CDCR decides that a person is ineligible for nonviolent offender parole, the person can challenge the decision by filing a CDCR Form 602 administrative grievance/appeal and pursuing it to the highest level necessary.

B. CDCR Referral to the BPH

When an eligible person approaches their parole date, CDCR will refer them to the BPH for parole consideration unless: (1) they are serving a determinate sentence and their Nonviolent Parole Eligible Date is less than 180 calendar days before their regular Earliest Possible Release Date (EPRD) or their EPRD is scheduled for less than 210 calendar days after the date of the CDCR

review, or (2) they are serving an indeterminate life sentence and they previously had some other type of parole consideration hearing or will be eligible for some other type of parole consideration hearing within the next 12 months after the date of the CDCR review.[2]

A person who has concerns about the CDCR's referral process can file a CDCR Form 602 administrative grievance/appeal and pursue it to the highest level necessary.

C. BPH Review: "Paper" Review for People Serving Determinate Sentences

The information in this sub-section describes the "paper" parole hearing process that applies to people serving determinate sentences who are being considered for Nonviolent Offender Parole. Sub-section D, below, describes the formal hearing process that applies to people serving indeterminate life sentences who are being considered for Nonviolent Offender Parole.

When a person serving a determinate sentence is referred to BPH for Nonviolent Offender Parole consideration, the person should be notified that he or she can submit a written statement to BPH. PEOPLE SHOULD SUBMIT A STATEMENT ABOUT WHY THEY SHOULD BE PAROLED EARLY, FOCUSING ON WHY THEY WILL NOT POSE A RISK OF VIOLENCE OR CRIMINALITY. IF POSSIBLE, PEOPLE SHOULD HAVE FAMILY, FRIENDS, POTENTIAL EMPLOYERS OR OTHERS WITH HELPFUL INFORMATION SUBMIT STATEMENTS TO BPH.

Within 5 business days after CDCR refers a case to the BPH, the BPH shall notify the crime victims and prosecuting agencies about the pending parole review and give them 30 calendar days to submit written statements.

Within 30 calendar days after the notification period ends, a BPH staff member will review documents including the person's central file and criminal history records and written statements by the person, the person's supporters, the crime victims, and/or the prosecutor. The BPH staff member is called a "hearing officer" even though -- unlike other types of parole suitability proceedings -- there is no actual hearing at which the person or anyone else can appear. This type of "paper" parole review is being challenged. A court of appeal recently found the policy to be lawful; however, a petition for review has been filed asking the California Supreme Court to review the issue. (*In re Kavanaugh* (2021) 61 Cal.App.5th 320, pet. for rev. filed 4/8/21.) Another case on the same issue is currently pending in another court of appeal. *In re Flores* (No. C089974). We do not know when the issue will be finally resolved.

The hearing officer will first confirm that the person is eligible for Nonviolent Offender Parole. If eligibility is confirmed, the hearing officer must then decide whether the person being

[2] In the past, CDCR staff also did "public safety screenings," and refused to refer people to the BPH if they had certain types of behaviors in prison. A court of appeal held that these screenings violated Proposition 57 because it is the job of the BPH, not CDCR, to decide whether people are suitable for parole. (*In re McGhee* (2019) 34 Cal.App.5th. 902) The state did not appeal. CDCR stopped doing public safety screenings in July 2019. CDCR also referred people who had failed the prior public screening process to the BPH for parole consideration.

considered for release poses a "current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity." The hearing officer shall consider all the circumstances, including the nature of the person's current conviction, prior criminal record, in-prison behavior and programming, along with any input from the person, the crime victims, and the prosecutor. The regulations list specific aggravating and mitigating factors to be considered. If a decision to approve release will result in the person being released two or more years before their regular Earliest Possible Release Date (EPRD), the case must be reviewed by a higher level BPH officer who can either approve or deny release. The written decision should include a statement of reasons and the person should receive a copy of it within 15 business days after it is issued.

Any time prior to release, a higher level BPH staff can request a review of a decision that is based on an error of fact or an error of law, or if there is new information that would have affected the decision. The review must be completed within 30 calendar days after the request is received. If the original decision is overturned, a new decision and statement of reasons should be written, and the person should receive a copy of it within 15 business days after it is issued. In addition, any time prior to release, the BPH can vacate a parole grant if it is determined that the person is no longer eligible for parole consideration. Unlike some other types of parole consideration proceedings, the Governor does not have authority to review Nonviolent Offender Parole grants.

There is a strong argument that the BPH may not deny Proposition 57 parole unless there is a rational nexus between the factors cited by the BPH and a finding of current dangerousness. (See *In re Ilasa* (2016) 3 Cal.App.5th 489 [applying *In re Lawrence* (2008) 44 Cal.4th 1181 to CDCR's former non-violent second striker parole process].)

If the BPH grants release – and does not overturn or vacate the decision -- then the person should be released 60 days after the date of the BPH release decision, following any required notifications to crime victims and law enforcement agencies. If the person has an additional term to serve for an in-prison offense, the additional term shall start 60 days after the BPH release decision. After release, the person will presumably serve the normal parole or PRCS period that would apply for their crimes.

If release is denied, overturned, or vacated, the CDCR will review the matter after one year to determine whether the person should be re-referred to the BPH for Nonviolent Offender Parole consideration.

If release is denied, overturned, or vacated, the person can ask the BPH to review the decision. This is done through a special review procedure (**not** the CDCR 602 process). The person can ask for review by submitting a written request to the BPH within 30 calendar days after the decision being challenged. A BPH officer who was not involved in the original decision will conduct a review within 30 calendar days after the request is received. The officer will either uphold the original decision or vacate it and issue a new decision. The person should be notified in writing within 15 business days after the review decision is made.

D. BPH Review: Formal Hearing for People Serving Indeterminate Life Sentences

The information in this sub-section discusses the formal hearing process that applies to people serving indeterminate life sentences who are being considered for Nonviolent Offender Parole. The hearing process that applies to people serving determinate sentences who are being considered for Nonviolent Offender Parole is discussed in sub-section C, above.

When CDCR refers a person serving an indeterminate life sentence to BPH for Nonviolent Offender Parole consideration, the BPH has 15 calendar days to do a "jurisdictional review" to confirm whether the person is eligible for Nonviolent Offender Parole. The BPH should give the person a copy of the review decision within 15 business days after it is issued. If the person becomes ineligible for Nonviolent Offender Parole any time prior to release, the BPH can review the case again and make an ineligibility finding. If the BPH decides the person is not eligible for a hearing, the person can ask for review by submitting a written request to the BPH within 30 calendar days after the decision being challenged (**not** by using the CDCR 602 process).

If eligibility is confirmed, the BPH must schedule the person for a formal parole consideration hearing. Like other formal parole consideration hearings, this will be a full in-person parole hearing in front of a panel of BPH commissioners or deputy commissions, at which the person will be represented by a lawyer. The same legal standard will apply as for other types of formal parole hearings – the BPH panel will consider whether the person's "would pose an unreasonable risk of danger to society if release from prison."

The deadlines for holding hearings depend on the time between the referral to the BPH and the person's Nonviolent Parole Eligible Date. If the referral to the BPH happens less than 180 days before the Nonviolent Parole Eligible Date, the hearing must be held within one year from date of the referral. If the referral to the BPH happens 180 days or more before the Nonviolent Parole Eligible Date, the hearing must be held within 60 days after the Nonviolent Parole Eligible Date.

Since the BPH did not have regulations for Nonviolent Offender Parole hearings for people with indeterminate sentences until January 1, 2019, it is working to catch up on hearings for people are already overdue for Nonviolent Offender Parole hearings. The rules require the BPH to have held hearings by December 31, 2020 for people who became immediately eligible for Nonviolent Offender Parole consideration as of January 1, 2019, have served 20 years or more, and are within 5 years of their Minimum Eligible Parole Date. The rules require the BPH to had held hearings December 31, 2021 for all other people who became immediately eligible for Nonviolent Offender Parole consideration as of January 1, 2019.

As with other types of formal parole suitability hearings, a Nonviolent Offender Parole decision will not be final for 120 days and can be reviewed by higher level BPH officials. The Governor can ask the BPH to review a Nonviolent Offender Parole decision *en banc*, but the Governor cannot himself overturn a BPH decision granting Nonviolent Offender Parole.

Also, as with other types of formal parole hearings, Nonviolent Offender Parole denials will be for a period of 3, 5, 7, 10, or 15 years, but a person may ask to have their next hearing date

advanced if there is a change in circumstances or new information that creates a reasonable likelihood that the person will be deemed suitable for parole.

The BPH does not have an administrative grievance or appeal process for challenging denials of parole suitability.

There is a strong argument that that the BPH may not deny Proposition 57 parole unless there is a rational nexus between the factors cited by the BPH and a finding of current dangerousness. (See *In re Ilasa* (2016) 3 Cal.App.5th 489 [applying *In re Lawrence* (2008) 44 Cal.4th 1181 to the CDCR's former non-violent second striker parole process].)

The Prison Law Office can provide more detailed information about the formal BPH parole suitability hearing process. The information is available by writing to Prison Law Office, General Delivery, San Quentin, CA 94964, or on the Resources page at www.prisonlaw.com.

II. HOW CAN I CHALLENGE THE PROPOSITION 57 PAROLE RULES OR HOW THEY ARE BEING APPLIED TO ME?

If you are denied Nonviolent Offender Parole, you should file the appropriate type of CDCR administrative grievance/appeal or BPH request for review as described in Section I, above.

If you pursue an administrative grievance/appeal or a request for review, and are not satisfied with the responses, you can send the grievance/appeal or request and the responses to the Prison Law Office for review: Prison Law Office, General Delivery, San Quentin, CA 94964. The Prison Law Office is interested in making sure the CDCR applies its parole rules fairly.

If you pursue a request for review or an administrative grievance/appeal to the highest level of review and are not satisfied with the responses, you can file a state court habeas petition arguing that CDCR or the BPH is interpreting or applying its regulations in an unreasonable manner and/or is violating federal or state law.

Note that although courts can review CDCR and BPH decisions regarding eligibility and suitability for Nonviolent Offender Parole, Proposition 57 does not give courts any new authority to independently recall commitments and resentence people. (*People v. Dynes* (2018) 20 Cal.App.5th 523.)

Free manuals on How to File a CDCR Administrative Grievance/Appeal and on State Court Petitions for Writ of Habeas Corpus are available by writing to the Prison Law Office, General Delivery, San Quentin, CA 94964 or on the Resources page at www.prisonlaw.com.

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Your Responsibility When Using the Information Provided Below:
When putting this material together, we did our best to give you useful and accurate information because we know that people in prison often have trouble getting legal information and we cannot give specific advice to everyone who asks for it. The laws change often and can be looked at in different ways. We do not always have resources to make changes to this material every time the law changes. If you use this pamphlet, it is your responsibility to make sure the law has not changed and still applies to your situation. Most of the materials you need should be available in your institution's law library.

TIME CREDITS FOR PEOPLE IN CDCR

(July 25, 2021)

This letter discusses the California Department of Corrections and Rehabilitation (CDCR) rules on time credits for good conduct and programming. CDCR can make credit rules under Article I, section 32 of the California Constitution, which was added in November 2016 when voters passed Proposition 57 CDCR's time credit rules are in Title 15 of the California Code of Regulations (CCR). The Title 15 rules should be available in prison law libraries and available to people housed in restricted housing. The rules are on the CDCR website at www.cdcr.ca.gov.

Because CDCR credit rules have changed in recent years, the credit you earned in the past might be different than what you earn today. The most recent changes to went into effect on May 1, 2021. The main changes are:

(1) Increased Good Conduct Credits (GCC) of 33.3% for people with violent offenses and 50% for people with second- and third-strike sentences for current non-violent felonies;

(2) The way in which credits are awarded to people who are firefighters/in fire camp/assigned Min A or Min B custody has changed. Instead of getting extra Good Conduct Credits (GCC), people get the normal GCC that apply to their sentence/offense PLUS "Minimum Security Credits" (MSC) of 30 days for every 30 days served; and

(3) Placement in Work Group C or Work Group D-2 no longer means Zero Credit Earning.

IMPORTANT NOTE: We are aware that many people found that their release dates changed dramatically for the worse when the new rules went into effect. In addition, some people's release dates have been recalculated several times and postponed, even if they were expecting to be released imminently under the old credit rules. We are investigating these very serious issues and will revise this letter as we get more information. Here is what we know currently:

- CDCR has reported that there was a "glitch" in the computer program, which stopped assuming that people would be earning credits in the future. CDCR is in the process of revising the program and doing recalculations. The CDCR's priority is recalculating EPRDs for people who are due to be released up through December 2021; CDCR expects to complete most of of those recalculations by August 1. CDCR will be notifying people as their EPRDs are recalculated.

- According to a May 7, 2021 CDCR memorandum, CDCR changed its "calculation methodology" as of May 1, 2021. This change does NOT appear in the regulations. The memorandum states that "The application of program credits, net loss and restoration (credit actions) will be applied prior to calculating the GCC." Under this new methodology, it appears that people who earn program credits will get fewer GCC credits than under the old methodology. This is because:

  -- Before May 1, 2021, when a person arrived in prison, CDCR calculated the expected future GCC to be earned, and used that to predict the EPRD or MEPD. When a person earned program credits, those program credits were simply deducted from the EPRD or MEPD to bring the EPRD closer.

  -- After May 1, 2021, under the new methodology, it appears that whenever a person earns program credits, CDCR re-calculates future GCC by taking away the GCC for days the person now won't actually be serving because they've gotten program credit that covers those days. In other words, every time a person earns program credits, their future GCCs are reduced. The degree to which this affects the EPRD or MEPD depends on the person's GCC earning rate.

We have been told that, as of July 12, 2021, CDCR is rescinding this change in "methodology," and will be recalculating credits and release dates in accord with the pre-May 1, 2021 method.

GOOD CONDUCT CREDITS

Sentence, Offense, Custody Level	Credit Rate before 5/1/17	Credit Rate 5/1/17 to 4/30/21	Credit Rate starting 5/1/21
Life without parole (LWOP) or condemned	0%	0%	0%
Indeterminate sentence not previously eligible for credits (murder and some other crimes)	0%	20%	33.3%
Indeterminate three strikes sentence + current offense is violent	0%	20%	33.3%
Other indeterminate sentence or determinate sentence (including two strikes sentences) + current offense is violent	15%	20%	33.3%
Indeterminate three strikes sentence + current offense is non-violent	0%	33.3%	50%
Determinate two strikes sentence + current offense is non-violent	33.3% (eff. 2/10/14, prior 20%)	33.3%	50%
Other determinate sentence + current offense is non-violent	50%	50%	50%
Determinate sentence + current offense is violent + firefighter or in fire camp	15%	50%	Firefighters, people in fire camp, and people in Min A or Min B Custody earn Good Conduct Credits at the normal rate for their sentence + offense (see above) PLUS a new type of "Minimum Security Credits" (see p. 5, below.)
Determinate two strikes sentence + current offense is non-violent + firefighter or in fire camp	33.3% (eff. 2/10/14, prior 20%)	66.6%	
Determinate sentence (except two strikes sentence) + current offense is non-violent + firefighter or in fire camp	66.6%	66.6%	
Assigned to Minimum A or Minimum B custody (but not a firefighter or in fire camp)	No special rate prior to 1/1/15	66.6% (eff. 1/1/15; but people not otherwise eligible for 50% credit – those with violent offenses or two- or three-strikes -- earned only their normal credit rate)	

Good Conduct Credits (GCC) are available to all people in prison who are serving determinate (set-length) sentences and indeterminate (life with the possibility of parole) sentences, including those who are housed in Department of Juvenile Justice (DJJ) facilities (if sentenced as adults) or in alternative custody, pre-parole, or re-entry programs. The credit rules also apply to people serving California prison sentences in modified community correctional facilities (MCCFs), state hospitals, federal prisons, or other states' prisons. As shown in the chart on p. 3 of this letter, CDCR grants different levels of GCCs depending on a person's sentence, type of offense, and (sometimes in the past) custody level or program assignment. Note that the chart does not cover credit-earning rules that applied at various dates prior to January 25, 2010.

Credits for the CDCR groups in the chart are calculated as:

- 20% - serve 4 actual days, get 1 day GCC = 5 days total
- 33.3% - serve 2 actual days, get 1 day GCC = 3 days total.
- 50% - serve 1 actual day, get 1 day GCC = 2 days total.
- 66.6% - serve 1 actual day, get 2 days GCC = 3 days total.

The CDCR rules governing credit-earning are in Title 15 of the California Code of Regulations (CCR) sections 3043-3043.7. These rules replace all previous California laws and CDCR rules regarding credits for good behavior and programming in prison, and include credits required by a February 2014 federal court order to reduce prison overcrowding. Note that although CDCR conduct credits apply toward the Earliest Possible Release Date for determinate sentences and the Minimum Eligible Parole Date (MEPD) for indeterminate (life with the possibility of parole) sentences, the credits do *not* apply toward a Youth Offender Parole Eligible Date (YPED), Elderly Parole Eligible Date (EPED), or Nonviolent Parole Eligible Date (NVPED).

People can lose GCC if they violate prison rules. In some cases, they can get lost credits restored if they then remain free of rule violations for a period of time.[1]

Prior to May 1, 2021, people could be placed on Zero Credit earning status for twice refusing to accept assigned housing, refusing to perform an assignment, or being a program failure (Work Group C) or due to placement in a segregation unit for a serious rule violation (Work Group D-2). Effective May 1, 2021 placements in Work Groups C and D-2 no longer affect GCC earning.[2] People in those Work Groups will continue to earn the GCC that applies to their criminal offenses and sentence.

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[1] 15 CCR §§ 3323, 3327-3329.5.
[2] 15 CCR § 3044(b)(4) and (b)(6).

PROGRAMMING CREDITS – MILESTONE COMPLETION, REHABILITATIVE ACHIEVEMENT, EDUCATION MERIT, EXTRAORDINARY CONDUCT, AND MINIMUM SECURITY CREDITS

Effective August 1, 2017, all people in CDCR prisons serving determinate sentences or sentences of life with the possibility of parole are eligible to earn additional credits for successful participation in approved programs. These credits also apply to people in DJJ (if sentenced as adults) and in alternative custody, pre-parole and re-reentry programs. These credits do not apply to people sentenced to death or to LWOP terms. Note that although CDCR programming credits apply toward the Earliest Possible Release Date for determinate sentences and the Minimum Eligible Parole Date (MEPD) for indeterminate (life with the possibility of parole) sentences, the credits do *not* apply toward a Youth Offender Parole Eligible Date (YPED), Elderly Parole Eligible Date (EPED), or Nonviolent Parole Eligible Date (NVPED).

- **Milestone Completion Credits**: These credits are awarded for achieving objectives in approved rehabilitative programs, including academic, vocational, and therapeutic programs. Milestone Credits have existed since January 2010, but rules that took effect on August 1, 2017 increased the credits that could be earned and made more people eligible to earn such credits. A person can earn 12 weeks of Milestone Credits in a 12-month period (or 6 weeks in a 12-month period for participation in EOP, DDP, or mental health inpatient programs). If a person earns excess credits, the excess credits will be rolled over and can be applied in the following year. A person must participate in a class to get Milestones; they cannot be earned just for passing a test. Also, a person cannot get Milestone Credits for earning a high school diploma if they already have one. The programs eligible for credit include full-time rehabilitative programming, alternative custody programs, Enhanced Outpatient (EOP) mental health participation and Developmentally Disabled Program (DDP) participation. Milestone Completion Credits can be lost due to rule violations and restored for subsequent good behavior under the general rules that apply to credit loss and restoration.[3]

- **Rehabilitative Achievement Credits**: This type of credit is for participation in eligible self-help and volunteer public service activities. Starting August 1, 2017, people could earn 1 week (7 days) of credit for every 52 hours of participation, up to a maximum of 4 weeks (28 days) of credit in a 12-month period. As of May 1, 2019 (under new emergency regulations), people can earn 10 days of credit for every 52 hours of participation, up to a maximum of 40 days credit in a 12-month period. People who are housed in DJJ or alternative custody facilities, including pre-parole or re-entry programs, can earn Rehabilitative Achievement Credits, but in different amounts (starting August 1, 2017, the

[3] 15 CCR § 3043.3.

rate was 1 week of credit for 3 months of participation, up to a maximum of 4 weeks credit in a 12-month period; starting May 1, 2019, the rate is 10 days of credit for every 3 months of participation, up to a maximum of 40 days credit in a 12-month period). Starting May 1, 2019, if a person earns excess credits, the excess credits will be rolled over and can be applied during following years. Rehabilitative Achievement Credits can be lost due to rule violations and restored for subsequent good behavior under the general rules that apply to credit loss and restoration.[4]

- **Education Merit Credits**: These credits recognize the achievements of people who earn high school diplomas, high school equivalency, or higher education degrees, or who complete an offender mentor certification program. A person must earn at least 50 percent or more of the degree or diploma during their current term to receive Education Merit Credits. Starting on August 1, 2017, a person who earned a high school diploma or equivalent got 90 days of credit; these credits apply retroactively to degrees earned prior to that date. Starting on May 1, 2019, a person who earns a high school diploma or equivalent earns 180 days of credit; people who previously got only 90 days of credit under the older rule are to be granted an additional 90 days of credit. Starting August 1, 2017, a person who earns a higher education degree or an offender mentor certification gets 180 days credit. Education Merit Credits apply to people serving California prison sentences who are housed in federal prison, other states' prisons, or in state hospitals. Prior to May 1, 2021, Educational Merit Credits could not be taken away due to rule violations. Effective May 1, 2021, Educational Merit Credits can be lost due to rule violations and restored for subsequent good behavior under the general rules that apply to credit loss and restoration.[5]

- **Minimum Security Credits:** Effective May 1, 2021, CDCR changed the way that it awards extra credits to people who are firefighters, in fire camps, or in Minimum A or Minimum B custody. There are no longer extra Good Conduct Credits for those people. Instead, people who are Work Group M (assigned Minimum A or Minimum B Custody or otherwise eligible for Minimum A or Minimum B Custody) or Work Group F (assigned Minimum B Custody and trained or working as a firefighter or placed in a fire camp) earn 30 days of Minimum Security Credits for every 30 days served (essentially "day for day") in addition to the normal Good Conduct Credits that apply to their sentence and offenses. The credits should be awarded within 10 business days after the person completes 30 consecutive calendar days in Work Group M or F.[6] The total credits earned by a person

[4] 15 CCR § 3043.4.
[5] 15 CCR § 3043.5.
[6] 15 CCR § 3043.7. The emergency rules imply that since Minimum Security Credits are awarded in increments of 30 days, people might not get Minimum Security Credits credits for the

under the new system should eventually add up to more or (close) to the same than under the previous rules:

-- If current offense is non-violent, including non-violent second- or third-strike sentences: 50% (1 day credit for 1 day served) Good Conduct Credit + Minimum Security Credit = total of (approximately) 66.6% credits (2 days credit for 1 day served)

-- If current offense is violent: 33% (1 day credit for 2 days served) Good Conduct Credit + Minimum Security Credit = total of (approximately) 60% credits (1.5 days credit for 1 day served).

However, people who were earning 66.6% credits when the new rules went into effect on May 1, 2021 are ending up with later release dates than they had under the prior credit system. We believe there are three reasons why the new rules are affecting release dates this way (in addition to the computer "glitch" and calculation methodology change discussed on page 2 of this letter, both of which CDCR claims to be fixing):

-- Minimum Security Credits are awarded retroactively, after a person serves the time in Work Group M or F. The credits are awarded in increments of 30 days, within 10 business days after the person completes 30 consecutive calendar days in Work Group M or F. This means that (unlike Good Conduct Credits) Minimum Security Credits don't show up in the advance EPRD calculation. However, the EPRD will move closer every month as Minimum Security Credits get awarded.

-- Minimum Security Credits are awarded in clumps of 30 days. Some people may earn their 30-day award and then have less than 30 more days left to serve. Thus, there will be a period of at the end of the terms for which they won't get Minimum Security Credit.

-- CDCR rules prohibit staff from awarding Minimum Security Credits that will bring a person's release date to within less than 15 calendar days from the date the award is applied (or within 45 days for a person with term for child abuse or sex offense against a minor, or 60 days for a person serving a term for a violent felony). This is another reason why people won't get Minimum Security Credit for the last bit of their terms.

Here is more information about who is eligible to earn Minimum Security Credits:

- Minimum Custody Eligibility: Minimum A and Minimum B are the lowest custody levels in CDCR prisons (the higher custody levels are Maximum, Close, Medium A, and Medium B). Generally, eligibility for Minimum Custody depends on the type of the commitment offense and length of the sentence, criminal history, whether the person has detainers (holds), and their behavior in custody. CDCR rules require that some people be Close Custody due to a lengthy sentence, history of escape, detainer for an offense with a possible long sentence, some serious disciplinary offenses, and having special security concerns; many people can be considered for a custody level reduction after serving a period of time without any recent serious disciplinary violations.[7] The CDCR also has rules limiting some people from being placed in the lowest facility security levels.[8] Another set of rules requires or allows CDCR to put a person in a higher security level than they would otherwise qualify for by placing a "VIO" code on their classification due to a violent current or prior felony criminal conviction or juvenile adjudication, violent A-1 or A-2 prison rule violation, or violent parole or probation violation; these rules also give CDCR staff discretion to remove some people's VIO codes after they serve some time with good behavior and programming.[9] Note that in an effort to expand access to programs, the CDCR has adopted a policy requiring classification committees to actively consider granting "overrides" by placing people in higher or lower levels than otherwise indicated by their classification scores, based on good or poor programming.[10]

- Firefighter or Conservation (Fire) Camp Assignment**:** Only people who are Minimum Custody B and behave well in prison can be assigned to a fire station or fire camp. A person is not eligible for camp if they are required to register as a sex offender, have an arson offense, or have history of escape with force or violence. They must also pass a physical evaluation.[11]

- People Whose Assignments are Limited by Medical, Mental Health, or Disability Needs: Effective January 1, 2018, people became eligible for the same credits they would earn in minimum custody even if they could not be assigned to a minimum

[7] 15 CCR § 3377.2.
[8] 15 CCR § 3375.2(a).
[9] 15 CCR § 3375.2(b)(29).
[10] CDCR, *Memorandum: Utilization of Administrative Determinants Based Upon Positive and Negative Inmate Behavior and Increased Access to Rehabilitative Programs* (Jul. 5, 2016).
[11] CDCR website, www.cdcr.ca.gov/conservation_camps.

custody program because of health reasons. Also, these credits can be applied retroactively to May 1, 2017, so long as the additional credits do not put a person within less than 60 days of release. To qualify, a person must meet three criteria: (1) be otherwise eligible for Minimum A or Minimum B Custody, (2) be otherwise eligible for 50% credit (meaning this does not apply to non-violent second strikers or people serving terms for violent offenses), and (3) their eligibility for placement in a Minimum A or Minimum B facility is limited solely because they are getting mental health services at the EOP level or higher, their medical or mental health status requires additional clinical and custodial supervision, or they have a permanent disability or need for dialysis that impacts placement.[12]

- ♦ Reception Centers: People in Reception Centers generally cannot earn Minimum Security Credits. However, Minimum Security Credits should be granted to people who are delayed in a Reception Center past 60 days solely due to a permanent disability that impacts placement or need for dialysis; these people start earning Minimum Security Credits starting the 61st day of their Reception Center stay.[13]

- ♦ Rule Violations: Minimum Security Credits can be lost due to rule violations and restored for subsequent good behavior under the general rules that apply to credit loss and restoration.

- **Extraordinary Conduct Credit:** CDCR has long had discretion to award up to 12 months additional credits to a person who has performed a heroic act in a life-threatening situation or provided exceptional assistance in maintaining prison safety and security. That provision continues to exist under the newer rules that took effect August 1, 2017. Prior to May 1, 2021, Extraordinary Conduct Credits could not be taken away due to rule violations. Effective May 1, 2021, Extraordinary Conduct Credits can be lost due to rule violations and restored for subsequent good behavior under the general rules that apply to credit loss and restoration. [14]

[12] 15 CCR § 3044(b)(8)(B).
[13] 15 CCR § 3044(b)(8)(G). People with disabilities impacting placement have a CDCR code DPW, DPO, DPM, DLT, DPV, DPH, or DPS.
[14] 15 CCR § 3043.6; see also Penal Code 2935.

CHALLENGING THE CREDIT RULES OR HOW THE RULES ARE BEING APPLIED

The emergency credit rules that went into effect on May 1, 2021 have not yet been permanently adopted. These rules may be amended as CDCR goes through the formal rule-making process, including taking public comments.

In late May 2021, a group of District Attorneys filed a lawsuit in Sacramento County Superior Court, asking the court to force CDCR to stop giving the additional credits provided by the new emergency rules. In July 2021, the Sacramento Superior Court denies the District Attorneys' motions for a preliminary injunction. The lawsuit is still pending. (*District Attorney of Sacramento County v. CDCR*, Sac. Superior Ct. No. 2021-00301253-CU-MC.)

If you believe that prison conduct or programming credits are not being accurately or fairly applied in your case, you should file an administrative appeal and pursue it to the highest level necessary. For most credit issues, use a CDCR Form 602 Inmate/Parolee Appeal. If you are being denied credit opportunities due to a disability, file a CDCR 1824 Reasonable Accommodation Request.

If you pursue an administrative appeal to the highest level of review, and are not satisfied with the responses, you can send copies of the appeal and responses to the Prison Law Office for review: Prison Law Office, General Delivery, San Quentin, CA 94964. The Prison Law Office is interested in making sure the CDCR applies its credit rules fairly.

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We also encourage people to be aware that laws change frequently and can be interpreted in different ways, and that we may not have the resources to update this pamphlet every time the law changes.

If you use this pamphlet, it is your responsibility to check whether the law has changed since the time we published this information, and also to determine how this information applies to your specific situation (if at all). We recommend that you do so using materials available in your institution's law library.

"Youth Offender" Parole Hearings

(and other possible ways to get resentencing or early parole)

(updated June 2021)

This information is for people serving lengthy prison terms in California for crimes committed when they were juveniles (under age 18) or young adults (under age 26). The California Department of Corrections and Rehabilitation (CDCR) calls this group "youth offenders." Many "youth offenders" can be considered for early parole at a special Youth Offender Parole Hearing (YOPH). The purpose of this letter is to help you understand what a YOPH is and whether you qualify for a YOPH, and to point you to resources on preparing for a YOPH. The letter also summarizes other options for early release or resentencing that may benefit some people convicted for crimes committed when they were juveniles or young adults.

Table of Contents

1. What is a Youth Offender Parole Hearing?

A **Youth Offender Parole Hearing (YOPH)** is a special parole type of parole hearing for "youth offenders" – people serving long sentences for crimes committed when they were juveniles or young adults.[1]

At a YOPH, the Board of Parole Hearings (BPH) must give special "great weight" to youth-related mitigating factors when deciding if the person is suitable for parole. These factors include: the person's age at the time of the crime, immaturity, vulnerability to negative influences, and capacity to change, as well as evidence of the person's growth and maturity over time.[2] Thus, BPH rules say that the "hearing panel shall find a youth offender suitable for parole unless the panel determines, even after giving great weight to the youth offender factors, that the youth offender remains a current, unreasonable risk to public safety." The panel must discuss which youth factors are present and how those factors are outweighed by relevant and reliable evidence of current public safety risk.[3] A court of appeal has held that the BPH must do more than give "lip service" to youth factors.[4]

2. Do I qualify for a Youth Offender Parole Hearing?

To be ***eligible*** for a YOPH, you must be:

- serving a determinate term (set number of years) for a crime committed before you turned 26; **or**
- serving an indeterminate term (life with the possibility of parole) for a crime committed before you turned 26; **or**
- serving a life without parole (LWOP) term for a crime committed before you turned 18.[5]

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[1] The Youth Offender Parole law is in Penal Code §§ 3051, 3051.1, and 4801. The BPH regulations for YOPH hearings are in the California Code of Regulations (CCR), title 15, §§ 2440-2446.

[2] Penal Code §§ 3051(d)-(e), 4801(c); 15 CCR § 2445.

[3] 15 CCR § 2445(d). The BPH also uses this standard when holding regular parole hearings for any person who committed their crime when they were under age 26, but who does not qualify for a YOPH. 15 CCR § 2447.

[4] *In re Poole* (2018) 24 Cal.App.5th 965.

[5] Penal Code § 3051(a)(1), (b), (h); 15 CCR § 2440(a)-(c). Courts thus far have found that the lower cut-off age for LWOP youth offender parole eligibility does not violate constitutional rights. *In re Williams* (2020) 57 Cal.App.5th 427; *In re Jones* (2019) 42 Cal.App.5th 477; *People v. Acosta* (2021) 60 Cal.App.5th 769; *In re Murray* (2021) 63 Cal.App.5th 184 [not yet final as of 6/11/2021].

Some people are excluded from YOPH eligibility based on the type of sentence they received for their youth crime. Even if you meet the basic eligibility criteria, you are ***excluded*** from getting a YOPH if the controlling youthful offense resulted in:

- a "three strikes" or "two strikes" sentence due to one or more prior serious or violent felonies (Penal Code §§ 1170.12, 667(b)-(i)); **or**
- a "one strike" sex offense sentence (Penal Code § 667.61); however, appellate courts have disagreed about whether this exclusion violates the right to equal protection, and the California Supreme Court is currently reviewing the issue.[6]

Some people are excluded from YOPH eligibility based on a new conviction they received for a crime after they committed after their youth offense. Even if you meet the basic eligibility criteria, you are ***excluded*** from getting a YOPH if you committed a new crime after you turned age 26 and:

- you were sentenced to "life in prison," **or**
- "malice aforethought" was an element of the crime. Crimes that require proof or admission of malice aforethought include first- and second-degree murder (Penal Code § 187); attempted murder (Penal Code §§ 664/187); conspiracy to commit murder (Penal Code §§ 182/187); solicitation to commit murder (Penal Code § 653f(b)); and assault with a deadly weapon or assault likely to produce great bodily injury committed while serving a life term, committed with malice aforethought (Penal Code § 4500).[7]

If you believe that the BPH has wrongly determined that you are not eligible for a YOPH, you can use the **attached form** to challenge that determination.

3. When should I get my first Youth Offender Parole Hearing?

If you are eligible for a YOPH, your first YOPH should be scheduled when you have served a certain amount of time in custody. Your Youth Parole Eligible Date (YEPD) will depend on the type and length of your sentence, and your YOPH should be scheduled within six months after your YEPD.[8]

Your YEPD will be as follows:

- If you were sentenced to a *determinate term* (a set number of years), your YEPD is the first day of your *15th year* in custody;
- If you were sentenced to an *indeterminate term* of *less than 25 years to life*, your YEPD is the first day of your *20th year* in custody;

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[6] Penal Code § 3051(h); 15 CCR § 2440(d-(f)). The case under review is *People v. Mosely*, No. S267309; see also *People v. Edwards* (2019) 34 Cal.App.5th 183; *In re Woods* (2010) 62 Cal.App.5th 740 [not yet final as of 6/11/2021]; *People v. Miranda* (2021) 62 Cal.App.5th 162 [not yet final as of 6/11/2021].

[7] Penal Code §§ 3051(h); 15 CCR § 2440(d).

[8] Penal Code § 3051(a)(2)(C); 15 CCR § 2443.

- If you were sentenced to an *indeterminate term* of *25 (or more) years to life*, your YEPD is the first day of your *25th year* in custody; or
- If you were sentenced to an *LWOP term*, your YEPD is the first day of your *25th year* in custody.[9]

Note that if you your regular "earliest possible release date" (EPRD) or "minimum eligible parole date" (MEPD) is *earlier* than your YPED, you will be released or considered for parole at that earlier date.

The amount of time you must serve before your YEPD is not affected by any good conduct or programming credits you earn in custody. Although a statute gives CDCR discretion to apply good conduct and programming credits to advance YEPDs, CDCR rules still calculate the YEPD based on actual time served.[10]

Many people had already passed their YEPDs prior to the enactment of the law that made then eligible for a YOPH. laws. The laws set forth deadlines by which the BPH must complete YOPHs for those people. These deadlines vary based on a person's age at the time of the crime and type of sentence they are serving.[11] However, BPH does not apply these deadlines to people who had already had regular parole hearings; those people must wait until their next regularly-scheduled hearing before they get their first hearing giving "great weight" to youth factors.[12]

The BPH is supposed to notify all eligible people of their YEPDs and hold all YOPHs in a timely manner. If you believe the BPH has failed to notify you or schedule your YOPH in a timely manner, you should contact: Board of Parole Hearings, P.O. Box 4036, Sacramento, CA 95812.

If you are granted parole at a YOPH, you should be released if and when the parole grant becomes final.[13] You cannot be held in prison longer to serve terms you have gotten for in-prison crimes, regardless of whether you committed those crimes before or after you turned age 26.[14] If parole is denied, your next parole hearing should be scheduled under the rules that apply to subsequent hearings for people serving life with the possibility of parole.[15]

4. Can I get more information or help for my Youth Offender Parole Hearing?

The attached **Youth Offender Parole Guide** (published by the Fair Sentencing for Youth Coalition and Human Rights Watch) provides more details about the YOPH process, as well as advice

[9] Penal Code § 3051(b); 15 CCR § 2441.

[10] Penal Code § 3051(j); see also15 CCR § 2441(b)-(c).

[11] See Penal Code §§ 3051(i), 3051.1; 15 CCR § 2443(b).

[12] See *People v. Brownlee* (2020) 50 Cal.App.5th 720.

[13] Penal Code § 3046(c).

[14] *People v. Trejo* (2017) 10 Cal.App.5th 972; *In re Jensen* (2018) 24 Cal.App.5th 266; *In re Williams* (2018) 24 Cal.App.5th 794.

[15] Penal Code §§ 3041.5(b), 3051(g); 15 CCR § 2443(c)-(d).

on how to prepare for your hearing. Note that the Guide was last updated in October 2017 -- there have been some new developments since then, most of which are described in this letter.

If the court that sentenced you did not receive evidence about youth factors that affected your crime, you may want to ask the court to conduct a "*Franklin* proceeding" so you can make an official record of youth factors to be considered at your future YOPH.[16] If the judgment in your case is final (no longer appealable or no longer being appealed), you can file a motion for a *Franklin* proceeding pursuant to Penal Code § 1203.1 (this is not a habeas corpus petition).[17] Courts of appeal also can remand cases that are still on appeal for *Franklin* proceedings; however, if you were sentenced after the *Franklin* case was decided in 2016, you will have to convince the appellate court that you did not already have an adequate opportunity to present evidence of youth factors.[18] You may be able to get more information or assistance with a *Franklin* proceeding by contacting the attorney who represented you on your trial/plea and sentencing, the attorney who handled your direct appeal, or the public defender's office in the county where you were convicted.

There is more information about YOPH rules and procedures on the BPH website: www.cdcr.ca.gov/bph/youth-offender-hearings-overview/.

5. Is there any other way I could get released early?

For many people who have lengthy sentences for crimes committed when they were juveniles or young adults, a YOPH will provide their earliest opportunity to be considered for release. However, there are other ways that some people may be considered for resentencing to a lower term or for early parole. Some of these apply only to people who were sentenced for crimes committed when they were juveniles. Others apply to people regardless of how old they were at the time of the crime. To ask for advice and assistance about which of these options might apply to you, you should try contacting the attorney who represented you on your trial/plea and sentencing, the attorney who handled your direct appeal, or the public defender's office in the county where you were convicted.

If you committed your crime as a juvenile (under age 18), you may have the following options:

- If you were sentenced to LWOP, you may be able to file a petition in the sentencing court asking to be resentenced to a lower term under Penal Code section 1170(d)(2) ("Senate Bill 9"). You will be excluded from filing a petition if it was pled and proven that your crime involved torture (Penal Code § 206) or the victim was a public safety official or officer or firefighter. The earliest date on which you can file a petition is when you have served 15 actual years of incarceration.

- If you are excluded from getting a YOPH or Senate Bill 9 resentencing because of your crime or criminal record and your sentence is so long you don't have a realistic opportunity of ever being released, then you may be able to argue in a direct appeal or a habeas corpus petition that your sentence violates the U.S. Constitution's Eighth Amendment

[16] *People v. Franklin* (2016) 63 Cal.4th 261,

[17] *In re Cook* (2019) 7 Cal.5th 439; see also *People v. Lipptrapp* (2021) 59 Cal.App.5th 886 (motion sufficient where person clearly set forth the basis for the motion and established eligibility for a YOPH).

[18] *People v. Rodriguez* (2018) 4 Cal.5th 1123; *People v. Medrano* (2019) 40 Cal.App.5th 961.

prohibition on cruel and unusual punishment. How strong your argument will be depends on facts including whether your crime was a homicide (murder or manslaughter) or a non-homicide, the length of your sentence, whether your sentencing was before or after relevant court decisions, and whether the sentencing court was aware of and considered your youth factors.[19]

There also are some new sentencing reform and parole eligibility laws that apply to people who were convicted of crimes at any age. These include:

- Proposition 47, enacted in November 2014, reduces many theft-related crimes and drug possession crimes from felonies to misdemeanors. Some people who were convicted before Proposition 47 took effect can petition for resentencing in accord with the new laws. (Penal Code § 1170.18.) If you are interested in learning more, write back to ask for the information letter on *Proposition 47* (also available on the Resources page of www. prisonlaw.com).

- Senate Bill 1437, which took effect in 2019, limits who can be convicted of murder when the person did not actually kill and did not intend for or expect anyone to be killed. People who were convicted before the law took effect – and who could not be convicted under the current law -- can file a petition to have their murder conviction vacated and substituted with lesser offenses. (Penal Code § 1170.95.) If you are interested in learning more, write back to ask for the *New Murder Laws (SB 1437) Manual* (also available on the Resources page of www. prisonlaw.com).

- Proposition 57 and CDCR regulations allow many people who are serving terms for nonviolent offenses (including second-strikers and third-strikers whose current offenses are not violent felonies) to be considered for early "nonviolent offender" parole. If you are interested in learning more, write back to ask for the information letter on *Proposition 57 "Nonviolent Offender" Parole* (also available on the Resources page of www. prisonlaw.com).

- CDCR can recommend that a sentencing court resentence a person "in the interests of justice." (Penal Code § 1170(d)(1).) CDCR has been making such referrals more frequently. The situations in which CDCR may make a recommendation include those in which (1) a person has demonstrated exceptional conduct in prison and is barred from other sentencing reductions or early parole, (2) court cases that were decided after a person's conviction establish that the conviction or sentence is unlawful, and (3) new laws eliminate sentence enhancements or give courts new discretion to strike sentence enhancements, but the laws do not apply retroactively to a person whose case was final before the law changed. If you are interested in learning more, write back to ask for the information letters on *New Enhancement Laws* and *Penal Code § 1170(d)(1) Resentencing* (also available on the Resources page of www. prisonlaw.com). In addition, District Attorneys

[19] Some of the relevant cases are *Graham v. Florida* (2010) 560 U. S. 48 (LWOP for juvenile's non-homicide crime is cruel and unusual punishment); *Miller v. Alabama* (2012) 567 U.S. 460 (mandatory LWOP for juvenile's homicide crime is cruel and unusual punishment); *People v. Caballero* (2012) 55 Cal.4th 262 (term of life with the possibility of parole that is longer than life expectancy is equivalent to LWOP and cannot be imposed for a juvenile's non-homicide offense); *People v. Gutierrez* (2014) 58 Cal.4th 1354 (Penal Code section 190.5(b) had previously been interpreted as favoring LWOP sentences for 16- and 17-year-olds convicted of special circumstances murder, which violated the Eight Amendment).

have the authority to recommend resentencing in the interests of justice. In particular, the Los Angeles County District Attorney has new policies to actively identify appropriate cases for resentencing recommendations. If you are interested in learning more, write back to ask for the information letter on *New Los Angeles County District Attorney Policies* (also available on the Resources page of www. prisonlaw.com).

Finally, Proposition 57, enacted in November 2016, and Senate Bill 1391, effective January 2019 prohibit adult criminal charges against people who are under age 16 at the time of the offense and limit the circumstances in which 16- and 17-year-olds can be charged in adult criminal court. These laws don't apply recent retroactively to cases that were already final when the new laws took effect. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299.) However, the California Supreme Court is considering whether some types of resentencing hearings re-open a case for the purposes of considering whether the matter should or must be transferred to juvenile court. (*People v. Federico*, No. S263082/E072620; *People v. Padilla*, No. S263375.)

Attachments: BPH Youth Offender Eligibility Denial Appeal Form
Youth Offender Parole Guide

YOUTH OFFENDER PAROLE

A Guide for People in Prison and Their Families and Friends

Know your rights: California's Youth Offender Parole SB 260, SB 261, AB 1308, and SB 394

TABLE OF CONTENTS

UNDERSTANDING THE PURPOSE AND LIMITATIONS OF THIS GUIDE

Human Rights Watch and the Fair Sentencing for Youth Coalition are groups that worked with others to pass bills, including SB 260, SB 261, SB 394, and AB 1308, which create and shape the Youth Offender Parole law. We have updated this guide to include the recently passed Assembly Bill (AB) 1308, which extends the Youth Offender Parole process to people who were 25 years old or younger at the time of their crime, and SB 394, which provides a Youth Offender Parole hearing to people who were under the age of 18 at the time of their crime and sentenced to life without the possibility of parole. We are among many organizations helping to make California's criminal laws more just. We worked with others to write this handout because we know that prisoners and their families often have many questions and difficulty obtaining useful information.

Thank you.
We are grateful to the many people who donated their time, wisdom, and knowledge in writing this guide, including experts at the Post-Conviction Justice Project of USC Gould School of Law; Prison Law Office; Juvenile Innocence and Fair Sentencing Clinic of Loyola Law School; Uncommon Law; Youth Law Center; and numerous individuals. Most of all, we are grateful for the input of family members of murder victims, and people who have paroled who shared their personal stories in order to support this effort.

This guide does not provide legal advice.
What is provided here is general information; it is not legal advice. We do not provide legal advice, representation, or referrals, nor can we answer questions about individual cases. If you have an attorney, you should talk to your attorney about the law and your case and not rely solely on this guide. Your attorney may also be interested in this guide.

We did our best to provide useful and accurate information about these laws law. However, please remember that laws change. We do not have the resources to make changes to these materials every time the law changes, nor can we afford to contact prisoners or respond to questions. If you use this guide, you should make sure that the law has not changed since this guide was written.

In addition, different people can have differing opinions as to the meaning of a law. If you have questions about this law and how it may affect your case, ask an attorney who has expertise in parole law. If you want legal advice about your case, hire a lawyer to address your specific issues. If you use this handout for any purpose, it is your responsibility to make sure that the law applies to your situation.

Remember that laws change, and before relying on anything in this guide you should make sure you have the most up-to-date information.

This guide was last updated in October 2017, before regulations were final for Youth Offender Parole or Proposition 57.

At this time, the Board of Parole Hearings (Board) is still figuring out how to make the new laws work. As time goes on, the Board will put out regulations that make the process clearer. At the time this handout was written, the regulations were not finished. The date and version of these materials is on the lower right of each page. If we update the materials, newer versions will be posted on our website (www.fairsentencingforyouth.org) and the date and version number will change.

If you are in prison, you can request updates by writing to: **Prison Law Office, General Delivery, San Quentin, CA 94964.**

How to find and read the law.

In this handout, you will sometimes see "PC" and a number. PC refers to the California Penal Code. The Penal Code has all the state's laws about crime and punishment. The number is the section of the code where information is found. So, for example, when you see "PC 3051," that means California Penal Code section 3051. That is where you can read the actual law about the topic being discussed. We encourage you to read the law for yourself. This law is found in California Penal Code (PC) sections 3041, 3046, 3051, and 4801.

If you are in prison, please check your prison law library for a copy of the law. People outside of prison can find it at www.fairsentencingforyouth.org.

PART 1: A SUMMARY OF WHAT THE LAW IS SUPPOSED TO DO

What is Youth Offender Parole?

Youth Offender Parole creates a special parole process for people who were age 25 or younger (up to the 26th birthday) at the time of their crimes, and sentenced to life sentences or long determinate sentences.

If you were 25 or younger at the time of your crime, you should have a "Youth Offender Parole Hearing". The purpose of the Youth Offender Parole Hearing is to decide if you are suitable for parole and to "provide for a *meaningful* opportunity to obtain release." PC 3051(a)(1) & (e). This means the law gives you a real chance of getting out of prison on parole. Many people will also get an earlier chance to earn parole and get out of prison.

What are SB 260, SB 261 and AB 1308?

SB 260, SB 261, and AB 1308 are other names for Youth Offender Parole. These are the bill numbers for the laws that created and expanded Youth Offender Parole.

SB 260 was the first law; in 2014, it made people who were under age 18 at the time of their crime eligible for Youth Offender Parole. SB 261 was the second law; in 2016, it expanded Youth Offender Parole to include people who were under age 23 at the time of their crime. AB 1308 was the third law; effective January 1, 2018, it expanded Youth Offender Parole to include people who were age of 25 or younger at the time of their crime.

What is SB 394?

SB 394 is a law for people who were 16 or 17 years old at the time of a crime for which they were sentenced to life in prison <u>without</u> the possibility of parole (LWOP). SB 394 makes these people eligible for a Youth Offender Parole hearing in the 25th year of incarceration. Another way to think about it is that these individuals have LWOP for 24 years, and in the 25th year they become eligible for parole.

Regulations

Youth Offender Parole is a new law, and the Title 15 regulations to describe the details of how the law should work have not yet been made final. The relationship between a law and regulations is like a recipe: the law is the ingredients and regulations are the instructions about what to do with the ingredients. The Youth Offender Parole law provides very good ingredients, but the details of what to do with them is still being worked out. The Board of Parole Hearings (Board) is using temporary rules in Youth Offender Parole Hearings until the final regulations are done.

WHO is eligible for a Youth Offender Parole Hearing?

If you can check each of these boxes as true for you, you are eligible. PC 3051(h)

☐ I was under 26 (meaning, age 25 or younger) at the time my crime occurred.
- ➢ It doesn't matter when you were arrested, convicted, or came to prison.
- ➢ What matters is whether you were under 26, when the crime happened.
- ➢ You must have been **UNDER** the age of 26 – if you were 26 when the crime occurred, you are not eligible.

☐ I do NOT have an LWOP (life <u>without</u> parole) sentence for a crime committed when I was age 18 or older. (PC 190.5).
- ➢ If you had LWOP, but were resentenced under another law, you are eligible.
- ➢ If you were under age 18 (meaning, age 17 or younger) at the time of the crime and got LWOP, you are eligible for a youth offender parole hearing during your 25th year of incarceration.

☐ I do NOT have a "One Strike" life sentence for certain sex offenses (PC 667.61).

☐ I do NOT have a "second-strike" sentence or a "third-strike" sentence based on a prior serious or violent felony. (PC 667(b-i) or 1170.12).
- ➢ You are disqualified ONLY IF you were specifically sentenced under PC 667 (b-i) or PC 1170.12. If you have prior felonies that were eligible for strikes, but you were not sentenced under 667(b-i) or 1170.12, you are still eligible.
- ➢ If you had a sentence under PC 667 (b-i) or PC 1170.12, but then you were resentenced to something different, you are eligible.
- ➢ You should talk to an attorney if you are disqualified for this reason.

☐ AFTER I turned 26, I did NOT commit a crime for which I was **<u>convicted</u>** for which I got a life sentence ("L").
- ➢ *A 115 or other CDCR write-up is not a conviction. You are disqualified for this reason only if you went to court and were <u>convicted and sentenced</u> to a life sentence.*

☐ AFTER I turned 26, I did NOT commit a crime for which I was **<u>convicted</u>** that has "malice aforethought" as a necessary element. This includes, but is not limited to, the following crimes:
- Murder in the first degree or second degree (PC 187)
- Attempted murder (PC 664/187), conspiracy to commit murder (PC 182/187), solicitation to commit murder (PC 653f(b))
- Assault with a deadly weapon or assault that is likely to produce great bodily injury committed while you are serving a life sentence (PC 4500)

➢ *A 115 or other CDCR write-up is not a conviction. You are disqualified for this reason only if you went to court and were <u>convicted for one of these crimes.</u>*

IMPORTANT: If you were age 25 or younger at the time of the crime, but have a sentence or new crime that disqualifies you, the Youth Offender Parole law will not change the date of your parole hearing. PC 3051(h). However, when you do have a parole hearing, the Board should give "great weight" to your youthfulness at the time of the crime. PC 4801. You should talk to your attorney about this before your hearing.

Do I have to ask or file a petition to have a Youth Offender Parole Hearing?

No. A hearing will be automatically be scheduled for all eligible youth offenders, including those youth offenders sentenced to LWOP for a crime committed under age 18, in the same manner as all other parole hearings.

I think I am eligible, but I have been told that I am not eligible. What should I do?

You can file a 602. You can also fill out the Board of Parole Hearings' "Form to Contest Disqualification by BPH as a 'Youth Offender'" available on the BPH website www.cdcr.ca.gov/BOPH/YOPH.html You, or an attorney, can fill out that form and send it to the Board of Parole Hearings at their address:

Board of Parole Hearings
Post Office Box 4036
Sacramento, CA 95812-4036

How will a YOPH be different from a regular parole hearing?

The Commissioners of the Board of Parole Hearings (Board) must now consider qualified youth offenders differently from someone who was 26 or older at the time of the crime. The fact that you were young at the time of the crime should count as one reason in favor of granting you parole. While you still have to work hard to show that you would not pose a danger to the community if released, the YOPH process should increase your chance of being paroled. PC 3051(d).

On the one hand, many things about a YOPH are the same as a regular parole hearing. For example, you will still have to be found suitable for parole in order to be released, and the suitability and unsuitability factors remain the same. You will have the right to an attorney and all other rights you would have at a regular parole hearing.

But, YOPHs should also be very different because the Board must give "**great weight"** to:

- The fact that youth are less responsible than adults for their actions (*the "diminished culpability" of youth*);
- The hallmark features of youth (*For example, that youth are, as compared to adults, not as good at understanding the risks and consequences of their actions; resisting impulses and peer pressure; or less in control of their life circumstances, etc.);* and
- Any subsequent growth and increased maturity of the prisoner. PC 4801(c).

If you have already had a parole hearing before the Youth Offender Parole law went in to effect, your next parole hearing will be a YOPH. If you were denied at an earlier hearing, see common questions on starting on page 11.

There is more information about what happens at a Youth Offender Parole Hearing starting on page 12.

What is a Consultation?

Rather than a Documentation Hearing ("Doc hearing"), which used to take place during the third year of incarceration, a new type of meeting called a "Consultation" will take place six years before your initial parole hearing. You do not need to request the consultation; the Board will schedule it automatically. The consultation should be one-on-one with a commissioner or deputy commissioner from the Board and you have a right to be present. The meeting is intended to help you know what you need to do in order to be ready for parole. The Commissioner will make recommendations about steps you should take, as well as identifying positive steps that you are already taking. The Commissioner should also explain the parole process and answer your questions about the parole process. The Commissioner will give you written recommendations on how to become ready for parole. You do not need to submit documents or parole plans, and you are ***not*** entitled to have an attorney present at the consultation hearing.

If I am eligible for Youth Offender Parole, will I automatically be granted parole?

No. The law still requires that you have a parole hearing, and the Board must find you suitable for parole. This is not an easy task, but with hard work, you can do it. See Part 2 of this guide for more information on how to prepare for your parole hearing.

When am I eligible for release through the Youth Offender Parole process?

Under the Youth Offender Parole process, you will be eligible for release when you reach your "YPED" (see below). This will be no later than your 15th, 20th, or 25th year of incarceration – even if you have a sentence that is longer. Depending on your controlling offense, your first parole hearing will be no later than in the 15th, 20th, or 25th year of your incarceration, and if you are found suitable for parole you will be released.

What is a YPED, MEPD, or EPRD?

YPED

YPED stands for "Youth Parole Eligibility Date." It is the amount of time an eligible youth offender must serve before having his or her first Youth Offender Parole Hearing. In other words, it is the date that a person is eligible for release if found suitable for parole at a Youth Offender Parole Hearing.

The date of your YPED is set by the Youth Offender Parole law. PC 3051(b). Your YPED will be the first day of your 15th, 20th, or 25th year of incarceration (which means after you have served 14, 19, or 24 years). All the time that you have been in custody on your case – including in prison, jail, a juvenile facility, mental health facility, and at DJJ or CYA – counts toward your years of incarceration. Whether your YPED is the first day of your 15th, 20th, or 25th year depends on the length of your "controlling offense" (see below). If you are not eligible for Youth Offender Parole, you will not have a YPED. Your initial Youth Offender Parole hearing will be set approximately 6 months after your YPED.

MEPD

MEPD stands for "Minimum Eligible Parole Date." It is the amount of time that a person with a life sentence must serve before having his or her first parole hearing. Everyone who has a life sentence (other than life without the possibility of parole) has a MEPD. A person who qualifies for Youth Offender Parole may have both a YPED and a MEPD. An initial parole hearing (for someone who does not qualify for Youth Offender Parole) will be set approximately one year before his or her MEPD.

EPRD

EPRD means "Earliest Possible Release Date." It the amount of time a person with a determinate sentence (non-life sentence) serves before being released. A person who qualifies for Youth Offender Parole and does not have a life sentence may have both a YPED and an EPRD.

If I have a both a YPED and a MEPD or an EPRD, which one matters?

As far as when your first parole hearing will be: The one that matters is the one that is earliest. If your YPED is before your MEPD, then your YPED determines when your hearing will be set, and the reverse is true: If your MEPD is earlier, then the MEPD determines your hearing date and possibility for release. The same is true for a EPRD and YPED: Whichever is earlier is the one that will determine when your first hearing is held, or when you are released. (See examples below.)

What is my "controlling offense"?

If you are eligible for Youth Offender Parole, your controlling offense determines when your YPED is. It is the **longest single term**. It is the sentence for a single count or enhancement for which you received the longest term of imprisonment. PC 3051(a)(2)(B). Think about your sentence and the different terms that make up the whole sentence. For example, if you have a 30-to-life sentence, it is really several terms that add up to 30-to-life. It could be two 15-to-life sentences, or five years with a 25-to-life enhancement, or some other combination.

- ***Example**: Luis has 25-to-life. He has a 15-to-life sentence and a 10 year determinate sentence. The 15-to-life is the controlling offense because it is the longest of his sentences.*
- ***Example**: James has 40-to-life. He has a 15-to-life sentence plus a 25-to-life gun enhancement. His controlling offense is the 25-to-life enhancement because it is the longest of his sentences or enhancements.*
- ***Example**: Barbara has 27-to-life. She has a 7-to-life sentence, plus a 10-year sentence, plus another 10-year sentence. The 7-to-life sentence is the controlling offense because it is the longest of her sentences. (A life sentence is always considered longer than a non-life sentence.)*

When will my first hearing be?

If you only have determinate (flat) sentences and no "L" (life sentence), you are eligible for your first hearing no later than during your 15th year of incarceration.

A determinate sentence is one without any "life" terms. It is a set number of years. PC 3051(b)(1).

- ***Example**: Roberto has a total sentence of 53 years based on three sentences: one for 20 years, one for 15, and one for 18. His controlling offense is a 20-year determinate sentence.*

Because his controlling offense is not a life sentence, his YPED will be the first day of his 15th year of incarceration, and his first Youth Offender Parole Hearing will be no later than during his 15th year of incarceration.

If your controlling offense is a life sentence that is less than 25-years-to-life, you are eligible for your first hearing no later than during your 20th year of incarceration. PC 3051(b)(2).

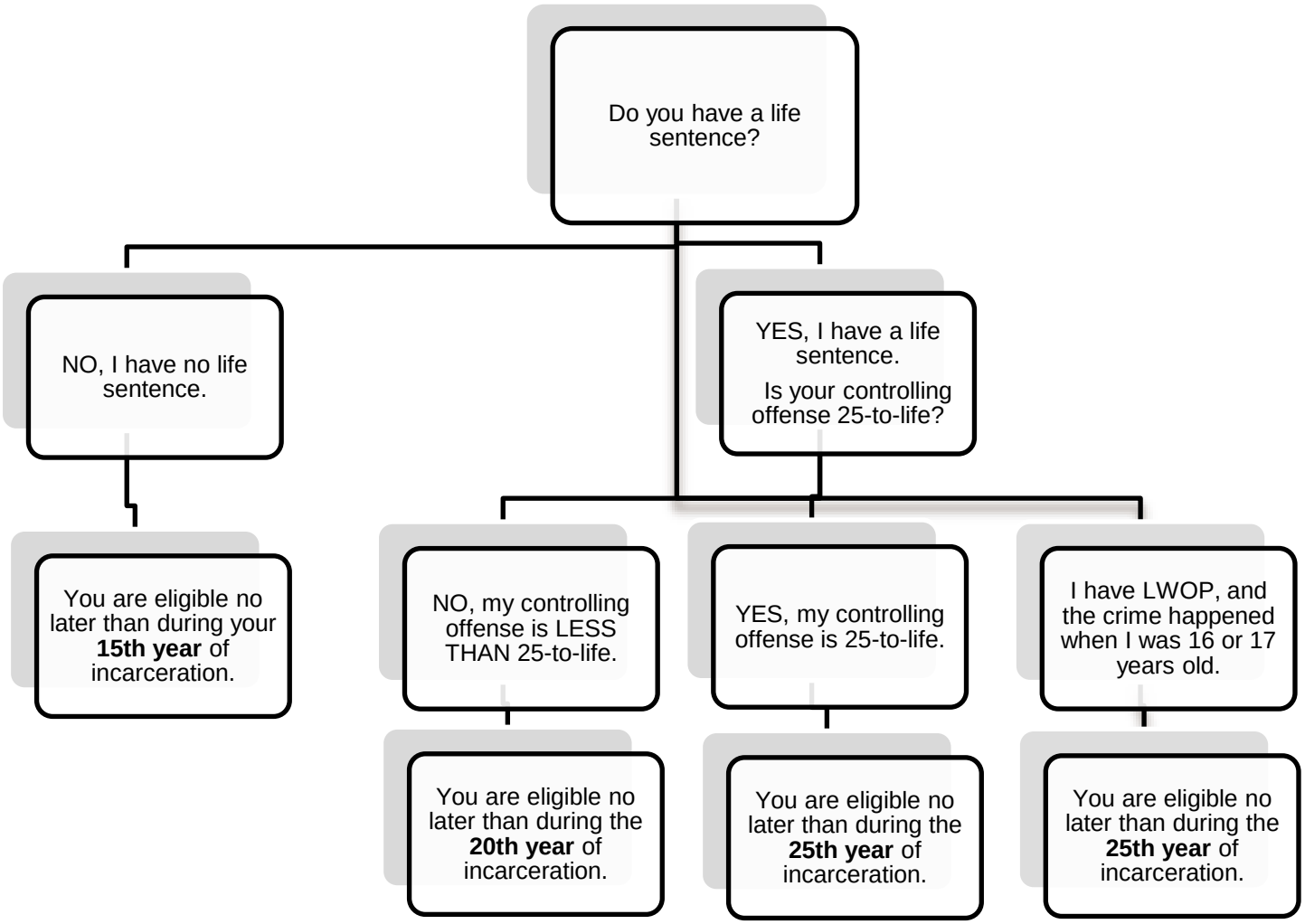
- ***Example****: Melissa has a 15-to-life sentence plus a 10-year sentence, and a 10-year gun enhancement, for a total sentence of 35-years-to-life. Because her controlling offense is a life sentence under 25-to-life, her YPED will be the first day of her 20th year of incarceration, and her first Youth Offender Parole Hearing will be no later than during her 20th year of incarceration.*

If your controlling offense is a life sentence that is 25-years-to-life, you are eligible for your hearing no later than during your 25th year of incarceration. PC 3051(b)(3).

- ***Example****: Nathan has a sentence of 25-years-to-life. His YPED will be the first day of his 25th year of incarceration. His first Youth Offender Parole Hearing will be no later than during his 25th year of incarceration.* ***But*** *if his MEPD is earlier than his 25th year of incarceration, he will have his first hearing one year before his MEPD, and he will be eligible for release once he reaches his MEPD, even though that is earlier than his YPED.*
- ***Example****: Deon has a total sentence of 65-years-to-life. He was sentenced to a 15-to-life sentence plus a 25-to-life gun enhancement and a 25-to-life gang enhancement. Because his controlling offense is 25-to-life, his YPED will be the first day of his 25th year of incarceration, and his first Youth Offender Parole Hearing will be no later than during his 25th year of incarceration.*

If your controlling offense is Life without the Possibility of Parole (LWOP) and you were age 16 or 17 at the time of the crime, you are eligible for your hearing no later than during your 25th year of incarceration. PC 3051(b)(4).

- ***Example****: George has LWOP, and his crime occurred when he was 17 years old. His YPED will be the first day of his 25th year of incarceration, and his first Youth Offender Parole Hearing will be no later than during his 25th year of incarceration.*



Common questions about when you will have a Youth Offender Parole Hearing

I am a lifer and supposed to have my first parole hearing before 20 or 25 years. Do I have to wait?

No. If you are a lifer and are eligible under another law for a parole hearing before 20 or 25 years of incarceration, you do not have to wait. Youth Offender Parole laws set <u>maximum</u> times before a first hearing is held. If you have a right to an earlier hearing, you will have a YOPH at that time. PC 3051(b). At your hearing, the Board must give great weight to the "diminished culpability of youth", "the hallmark features of youth", and your subsequent growth and maturity. PC 4801.

- ***Example**: Juan has a sentence of 15-years-to-life, and so his YPED is the first day of his 20th year of incarceration. But based on his MEPD, he has a right to a hearing in his 14th year. He will not have to wait until his 20th year of incarceration for his hearing, and the earlier hearing will be a Youth Offender Parole Hearing. PC 3051(b). If he is denied parole, he will continue*

to have hearings pursuant to the Board's set offs. He will not receive an additional hearing in his 20th year.

I have consecutive sentences. Do I have to serve all of them before I am released through Youth Offender Parole?

No. If you have more than one sentence, you will have a Youth Offender Parole Hearing at the time set by your YPED and, if granted parole, you will immediately be eligible for release. You do not have to serve other consecutive sentences or enhancements related to your controlling offense. PC 3046(c).

- ***Example**: Chris has a 40-years-to-life sentence. He was sentenced to one 25-to-life sentence and another (consecutive) 15-to-life sentence. Under the old law, his release date would be at a minimum of 40 years of incarceration. Under the Youth Offender Parole law, the controlling offense determines when he will be eligible for parole. In this case, his controlling offense is the 25-to-life sentence, so his YPED is the first day of his 25th year of incarceration. If found suitable for parole, he would be eligible for release in his 25th year of incarceration. PC 3046(c).*
- ***Example**: Jorge has a 12-year determinate sentence, a consecutive 10-year determinate sentence, a consecutive 5-year determinate sentence, and a consecutive 25-to-life sentence. Under the old law, he would have to finish serving all of his determinate sentences before the life sentence begins. Under the Youth Offender Parole law, it does not matter that the sentences are consecutive. His YPED is the first day of his 25th year of incarceration, and he is eligible for his first parole hearing (and release if he is found suitable) no later than during the 25th year of incarceration.*

Under AB 1308, when does the Board have to complete initial hearings for those who were under age 26 at the time of their crimes and are already eligible for a first hearing?

AB 1308 will take effect January 1, 2018. By January 1, 2020, the Board must complete initial hearings for people with life sentences ("lifers") who have reached their YPED by the effective date of AB 1308. PC 3051(i)(3)(A). By July 1, 2020, the Board must complete initial hearings for people who became eligible for a Youth Offender Parole Hearing under SB 394 and will have served 24 years by that date. PC 3051(i)(4). By January 1, 2022, the Board must conduct initial hearings for people with a determinate sentence ("no L") who have reached their YPED by the effective date of AB 1308. PC 3051(i)(3)(B). Note that these dates do not apply to people who have already had a parole hearing or who were eligible for Youth Offender Parole before AB 1308 went into effect.

I have LWOP, but I was 18 years old when my crime happened. Will I be eligible for Youth Offender Parole?

No. Unfortunately, only people sentenced to LWOP who were 17 and younger at the time of the crime are eligible for Youth Offender Parole. This was made possible in 2017 in part because a US Supreme Court case required states to take action on juvenile LWOP cases. At this writing, however, people are exploring the possibility of future changes in law to recognize that other people with LWOP deserve second chances, too.

I think the wrong date for my YPED has been set, or I haven't gotten notice of a hearing and my YPED is six months away. What do I do?

You can file a 602. After you have received a response to your 602, if the issue is not resolved, you can write a letter to the Board of Parole Hearings at:

Board of Parole Hearings
Post Office Box 4036
Sacramento, CA 95812-4036

Can I reschedule my parole hearing?

If you decide not to proceed with your hearing on the scheduled date, you have three options which are explained below. You should discuss any decision to reschedule your parole hearing with an attorney. You must submit a Board of Parole Hearings Form 1001(a) to reschedule your hearing. BPH Form 1001(a) gives you three ways to reschedule a hearing (it also gives you the choice to have a hearing but not attend). Title 15, section 2253.

1. **Waiver.** You can choose to waive your hearing for 1, 2, 3, 4, or 5 years. This means that you give up the right to have a hearing and you choose how long (up to 5 years) until your next hearing. The Board must receive the signed Form 1001(a) at least 45 days before your scheduled hearing date. If the Board receives the Form 1001(a) less than 45 days before your scheduled hearing, they will likely deny your request to waive the hearing and proceed with the hearing unless you can show "good cause" why you did not send it sooner.
2. **Stipulation.** You can stipulate that you are NOT suitable for parole and request that the Board schedule your next parole hearing in 3, 5, 7, 10 or 15 years. A stipulation is an admission that you are unsuitable for parole and you must tell the Board why you are unsuitable. Your admission that you are unsuitable and your explanation of why you are unsuitable become part of the record for the next hearing. You may stipulate to unsuitability any time – even on the day of your parole hearing. I
3. **Postponement.** You can request a postponement of your hearing to a later date. You can make this request at any time, but the sooner you make the request, the better. The shortest period for a postponement is to the "next available" date, which is usually 3-6 months. The Board grants postponements for extraordinary circumstances; if you can think you need one, you should request it but there's no guarantee it will be granted.

I was denied parole before the Youth Offender Parole laws went into effect. When will my hearing be?

You will not automatically get an earlier hearing (the set-off you received will remain the same). But your next parole hearing will be a Youth Offender Parole Hearing. You can file a Petition to Advance using a Board of Parole Hearings Form 1045(a) to ask the Board to move up the date of your next hearing. It would be good to consult with an attorney who knows parole law, procedure, and the details of your situation to decide whether it would be a good idea to file a Petition to Advance. If your Petition to Advance is denied, you must wait three years to file another Petition to Advance.

Do I have to serve the time on the controlling offense to be eligible for parole?

No. The YPED is what matters. It does not matter which sentence or enhancement is being served first.

PART 2: A GUIDE TO PREPARING FOR YOUTH OFFENDER PAROLE HEARINGS

Understanding the Parole Process

Before you can prepare for a parole hearing, you need to understand how the process works. The next few pages will give you some basic information, but the laws and regulations about parole are complicated, so not everything can be explained here. This is just a start. Also, please understand that this is ***not*** legal advice; it is information. There are many resources available to provide information about parole. For example, the Prison Law Office California State Prisoners Handbook, available in the prison law library, devotes Chapter Five to the parole process. You can also write to the Prison Law Office to request a copy of Chapter Five.

How does the Board decide whether or not to grant parole?

The law requires the Board to grant parole unless it finds "some evidence" that you would pose a danger to the community if released. The most common reasons that commissioners use to deny parole are:

- Recent and/or violent disciplinary violations (115s and sometimes 128As);
- Recent gang involvement;
- Recent substance abuse;
- Lack of credibility or lack of truthfulness;
- Lack of remorse for your actions;
- Lack of insight (failing to understand why the crime happened and its effect on others)
- Lack of realistic parole plans and proof (documentation) for those plans; and
- Information contained in confidential file.

What is the Board looking for?

The easy answer is that the Board wants to make sure that it does not release someone who will commit another crime. This core determination is an assessment of your current dangerousness. In re Lawrence, 44 Cal. 4th 1181 (2008). But you cannot simply tell the Board that you do not want to come back to prison or that you will not commit another crime. Your words are not enough. You must show the Board that you will not commit crimes in the future. You can do that, in part, by:

- Explaining why you committed the crime (you cannot do this if you deny the crime, minimize your role in the crime, or blame others); and
- Showing, by your actions, how you have matured and developed into a different person today compared to when you committed the crime.

If you do not show with your actions that you are now a different person and demonstrate that you understand what led up to your involvement in the crime, the Board will not believe that you can prevent it from happening again.

What are the three key questions the Board wants answers to?

The Board is essentially looking for truthful answers to the following big questions:

1. **Do you take full responsibility for your crime?**
    - Do you fully admit to your offense without excuses?
    - Can you be truthful about all of your intentions and choices before, during and after the crime?
    - Have you thought deeply about how your choices impacted others?
    - Do you understand the effect your crime had on others (the victim, the victim's family and friends, the community, your family, and others)?

    If the Board determines your testimony at the hearing is not credible, you will probably be denied parole.

2. **Have you explored and do you understand why you committed the crime(s) ("causative factors")?**
    - Have you thought deeply about the things that led you to commit the crime? It is important that you speak openly about the circumstances of your childhood so that the Board can give great weight to any youth factors.
    - What kind of person were you at the time of the crime? What kind of lifestyle were you living?
    - Can you describe the choices you made, the perspectives you had, the situations you put yourself in that led you to commit the crime?
    - Have you faced the challenges and traumas in your life that may have influenced your choices or character?

    The Board is looking for explanations, but not excuses for any negatives: the crime(s), your prior lies about the crime, your prior lifestyle, or your negative behavior in prison.

3. **What have you done to address the things in your life that led to you committing the crime?**
    - Have you sincerely faced the issues in your life that led to criminal behavior?
    - How are you different today? How does the way you live your life now show that you have addressed and overcome the causative factors of the crime?
    - Does your disciplinary history (115s and 128As) reflect who you are today?
    - How do you make choices today? What values guide your choices?
    - What are some specific lessons or skills that you have learned from programs that you've done in prison?
    - How have you grown and matured? Part of maturity is understanding both our strengths and weaknesses – what are your biggest strengths and weaknesses of character?

You need to have <u>real</u> answers to these questions for the Board. You cannot fake it at a parole hearing. Answering these questions is hard work and can lead you to spend time thinking about very sensitive or difficult issues in your life that you may have ignored up to now because it is uncomfortable, painful, or hard. These questions require you to reach down to the very core of what

shaped your choices and how you lived your life at the time of the crime. Addressing these issues will increase your ability to show the Board how much you have learned, matured, and changed while incarcerated. These questions are often very difficult to answer and answering them requires a long process of self-reflection. To help with this process of reflection, you can start by thinking about the "Starter Questions" on page 21 of this guide.

One of the best ways to get started is to discuss the questions with another person. Choose someone you trust and who will give you honest feedback and support as you work through things, but beware of revealing incriminating information that someone could use against you later. If you do not have a "safe" person or place to discuss these topics, you can also write about them. Once you start working with an attorney, it will be important to discuss these issues with him or her.

What will happen at my Youth Offender Parole Hearing?

This section provides an overview of basics of the process so you know what to expect as you prepare for the hearing. It is just a starting point.

Will I have an attorney?

Yes. You can hire your own attorney or, if you cannot afford a private attorney, the Board will appoint one to your case. It is the Board's expectation that an appointed attorney will meet with you no later than 45 days prior to your hearing.

Who will be at my parole hearing?

- **Commissioners:** One Commissioner (sometimes two) and one Deputy Commissioner from the Board of Parole Hearings will run the hearing – they will review all of the paperwork in your case, ask most of the questions, and make a decision to grant or deny you parole.
- **District Attorney:** A district attorney from the county of commitment may attend the hearing (in person, by video, or by phone). He or she will have an opportunity to ask questions and make a closing statement. He or she may say things that are untrue.
- **Your Attorney:** Your attorney will have a chance to ask you questions to clarify any issues that might be unclear for the Commissioners. Your attorney can also make objections and a closing statement.
- **You:** You will answer questions throughout the hearing. After your attorney has given a closing statement, you have the right to make a brief (about 5 minutes) closing statement if you wish.
- **Victims:** The victim(s) and/or the victim(s)'s family may be present (in person, by video, by phone). They are allowed to make a statement at the end of the hearing. If they are not present, a victim's representative may read letters from victims or victim's family.
- **There will also be a Correctional Officer in the room and there may also be a few neutral observers in the room.** None of these people speak at the hearing.

Do the same commissioners who conduct parole hearings conduct YOPHs?

Yes. The same commissioners will hear these cases, but they are trained on how to conduct the Youth Offender Parole Hearings and apply the "great weight" factors described above. In addition, the Board is required to draft regulations that will guide the commissioners in these hearings. At the time this guide was written, the regulations were not completed.

Is there a role for my family and friends?

Yes, there is a special role at the hearing for friends and family members. The Youth Offender Parole laws state that family members, friends, school personnel, faith leaders, and representatives from community-based organizations who have knowledge about the young person prior to the crime, or who can attest to his or her growth and maturity since the time of the crime, can submit letters to the Board. This is allowed in regular parole hearings also, but the fact that the Youth Offender law specifically includes this should make the commissioners pay extra attention to that support for Youth Offenders. The law does not, however, allow friends and family to come to the hearing. PC 3051(f)(2).

What information will the Board have about me?

The Board will read and consider <u>everything in your C-file</u>. This may include, but is not limited to:

- Case paperwork (police reports, trial transcripts, probation report, autopsy, appellate decision)
- All 115s, 128As, and 602s
- Psychological Evaluations (see below)
- Transcripts of prior Parole Hearings
- Certificates and Vocations
- Positive and Negative Chronos for Programs or from Staff
- Victim Statements
- Confidential Information (You and your attorney cannot review the confidential information, but you are entitled to receive a CDCR form 810 listing any documents contained in the confidential file. You should also receive a CDCR form 1030 summarizing any confidential information that the Board relies on in its decision <u>at least 10 days prior to the hearing</u>.)

You are entitled to review your entire C-file, except the confidential portions, once a year in an *Olsen* review.

The Board will also read and consider any documents you and your attorney submit to the Commissioners. These may include:

- Documentation of parole plans
- Letters of support from people in the community who know you
- Insight Statement (not required, but might help). This is something you write that includes deep and thoughtful discussion of your insight. Working through the Starter Questions listed on page 21 can help with this.
- Remorse Statement (not required, but might help). This is something you write that includes a description of your understanding of the harm you have caused and your feelings about that harm.
- Relapse Prevention Plan
- Book reports on self-help or other books

Psychological Evaluations (Comprehensive Risk Assessments)

For everyone appearing for parole consideration, the Board uses psychological evaluations, called "Comprehensive Risk Assessments," to predict whether you present a **low**, **moderate** or **high** risk of future violence. The reports also contain other information about whether you accept responsibility

for your actions, whether you understand why your crime happened and whether you have participated in the right kind and number of programs to address the factors that contributed to the crime. When these risk assessments are prepared for youth offender hearings, they must also take into consideration the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual. PC 3051(f)(1). The Board's psychologists address this requirement by adding a section in their reports that directly discusses those factors. It is not yet clear whether this is enough to meet the requirements of the law.

Your evaluation will include a meeting with a Board psychologist, which will usually take place at least a couple of months before the scheduled parole hearing. This meeting is very important, and you should approach it as you would approach your Board hearing. The psychologist will be evaluating and considering the same factors that the Board considers, and the Board will rely on the conclusions of the psychologist. You will receive a written copy of the psychologist's report before your hearing. Plan to discuss the report with your attorney, and be sure to identify for the attorney anything in the report you think is inaccurate.

If you have done positive things like reading books, doing correspondence classes, making plans for parole, creating a relapse prevention plan, or getting support letters from your family, try to get documentation of this before your psychological evaluation. You can ask your counselor to put copies of this kind of documentation in your C-file before the evaluation. However, you should also make sure to bring your own copies of this documentation with you when you go to the evaluation. Then, the psychologist who is evaluating you can see all the good things you are doing before he or she writes the evaluation.

What will the Board ask me at my parole hearing?

There are four main areas the Board will ask you questions about at the hearing:

1. **Commitment Offense**
   The Board will ask many questions about your commitment offense. Often, the Board will read facts into the record (from the appellate decision or the probation report), and then ask if you agree with those facts. If you do not agree, the Board will allow you to state your own version. It is important to remember the Board will not decide all over again whether you were guilty of your crime. However, it may be important to correct any inaccurate facts about the crime. What facts, if any, you should correct is something that you should decide with your attorney's help. The most important thing is that the Board expects you to be truthful about the crime and your role in it. And the Board will be listening to how you describe the crime and whether you appear to be making excuses for your behavior or downplaying the effect of your crime. The Board wants to see if you have insight into your commitment offense and remorse for the impact of your actions.

2. **Social History**
   The Board will also discuss your life before your crime. This is often called "social history." The Board can ask questions about anything in your life prior to the commitment offense. They are likely to ask about your family life and upbringing, your neighborhood, your school,

your friends and relationships. The Board wants to know about positive activities (like sports, jobs, school, hobbies) and things that may have hurt you in some way (like learning difficulties, physical or sexual abuse, neglect, exposure to violence in your home or neighborhood, gang involvement, drug and alcohol use, criminal history). The Board wants to understand the person you were and the things that may have led to your crime (causative factors). There is more information on page 18 about causative factors.

3. **Post-Commitment Factors**
   The Board will also discuss what you have done since you were incarcerated. This is an important part of the hearing and allows you to show how you have changed. This is your chance to demonstrate your growth and maturity and positive change. The Board will discuss your (1) disciplinary history; (2) education, jobs, programming; (3) any positive chronos; and (4) your psychological evaluations. If you have a history of gang involvement in prison, the Board will most likely ask about that as well. The Board wants to see evidence that you are on a different path than you were at the time of the crime. There is more information on page 19 about post-commitment factors.

4. **Parole Plans**
   Finally, you must have realistic parole plans and provide documentation of those plans. Documentation is proof, and usually it is in the form of letters from the people offering you support when you get out. It is important to have very specific parole plans. In addition, you should have at least one back-up option in case your first choice does not work. Usually the Board wants you to have:
   - a job offer or employment skills;
   - a place to live (a transitional home is preferred);
   - emotional and/or financial support from family or friends; and
   - a relapse prevention plan if you have a history of drug or alcohol use.

   The Board wants to know that if you are released you will have the plans and support necessary to succeed.

Will the hearing be recorded?

Yes, by law, the hearing must be recorded and there will be a transcript of everything that is said. You will be provided a copy of the transcript approximately 30 days after the hearing. If you do not receive your transcript, you can write to the Board of Parole Hearings to request one. The transcript will become part of your record and the Commissioners will consider all your statements at any future parole hearings. If you are denied, it is a good idea to read and review your transcripts so that you can better understand the Board's reasons for denying parole and address them at the next hearing.

What can I do to prepare for my parole hearing?

There are many things you can do to prepare for your parole hearing. Take every class or program you can. Read books and write book reports on each one. Join available groups at your prison that help you with personal growth or give you opportunities to help others. Stay or get in contact with healthy friends and family on the outside. Limit your contact with negative people on the inside. Think

about who you are and who you want to be. Make sure you keep track of all of your positive work and behavior, so you can talk about it at your hearing.

When should I start preparing for my hearing?

"NOW!" The Board considers your entire time in prison in deciding whether to grant parole or not. Focus on the present and use the time in a way that will help you get ready to go home. It is never too early to start preparing, but it is also never too late. Even if you were not on the right track before, you can turn things around and show the Board you are ready to go home.

How can I start preparing for my parole hearing?

Here are some starter questions to help you begin thinking deeply about some of the issues the Board will want you to address. Take your time on these. Write or talk about them with a trusted person, then take time to reflect and go deeper into the issues. Start over with what you have written and go more in-depth.

Starter Questions

Commitment Offense

Ask yourself: What was going through my mind as I made the choices that led to my committing the crime? Why did I not stop the crime from happening? How would I handle the same situation differently today?

Read the interview with a murder victim family member in this guide. Ask yourself: How were my victim(s) hurt? What did they feel? How were their family members and friends affected at the time of the crime? How was the community affected? And, now, years later, what is the impact of what I did?

Social History

Ask yourself: How were my relationships with my family members? Who were my role models? What did they teach me (good and bad)? Prior to my crime did I experience violence, abuse (physical, sexual, verbal, emotional), neglect, poverty, mental illness, drug use, gangs, or criminal activity in my family? How did that affect me (anger, denial, loneliness, low self-esteem)? What decisions did I make about who I wanted to be (or not be) when I got older? How did my experiences in my family and community impact my decisions? What is different now? How did I get from there to here?

If you used drugs or alcohol, ask yourself: Can I remember the first time? What was the situation? Did my drug or alcohol use begin (or increase) because I was experiencing some other difficulty that I did not know how to deal with? What is different now? How did I get from there to here?

If you associated with gangs or participated in any gang-like behavior, ask yourself: When did I start to get involved? What was I running from? What did I think gangs would give me that was missing in my life? What was my experience with gangs? What did I believe about gangs? How was my gang involvement related to things going on in my family, community, or school? What is different now? How did I get from there to here?

If you sold drugs or committed other crimes, ask yourself: When did I start doing this, and why? How did it make me feel? How was my criminal behavior related to things going on in my family, community, or school? What is different now?

Post-commitment

If you have had a negative disciplinary record in prison, ask yourself: What was going on in my life that I chose to do things that would get me in trouble in prison? What is different now? What types of programs have I participated in while in prison to better myself? What were one or two programs that really focused on addressing my specific needs? What specific tools have I gained from these programs? Have I gotten any disciplinary write-ups in prison (115s or 128As)? What led me to violate the rules of the prison? Do I take responsibility for those violations? How will I avoid violating rules if I am released?

I was granted parole. When will I be released? Does the Governor get a say?

When will I be released?

The Board has up to 120 days to review and finalize the panel's decision to grant parole. You will be notified if the Board makes any changes to the decision that adversely affect you. If the Board does not change its mind after 120 days, then the decision goes to the Governor's office for review.

What is the Governor's role?

The state constitution allows the Governor to affirm, modify, or reverse the Board's decision to grant parole in the following cases. Cal. Constitution Art. 5, Sec. 8(b).

If you have a life sentence for murder, the Governor can reverse the Board's decision to grant or deny parole. The Governor has up to 30 days to review the Board's decision. In non-murder cases, the Governor cannot reverse the Board's decision, but he can require the full Board to re-consider the decision and potentially change the decision.

If the Governor decides to take no action in your case, you will be released.

Do I have to serve my "Thompson" term?

Maybe not. If you have been convicted and sentenced for new crimes committed before age 26 (during your incarceration), often called "Thompson terms", you may not be required to serve the sentences for these crimes after you are found suitable for Youth Offender Parole.

In April 2017, the California Court of Appeal, First Appellate District, decided *In re Trejo*, 10 Cal. App. 5th 972 (2017), which held that PC 3051 (the Youth Offender Parole Law, requiring youth offenders to be released once they have reached their YPED and been found suitable) supersedes PC 1170.1 (requiring that an inmate sentenced to consecutive terms not be released on parole before completing all the terms of imprisonment imposed).

At this time, CDCR and BPH are requiring people to serve "Thompson terms" for offenses committed after age 25. Many people are challenging this interpretation of *Trejo* in court, and some people have won these cases. The outcome is still to be determined in court.

What if I have an immigration hold?

The Youth Offender Parole laws will not change any immigration consequences.

I was denied parole. Now what?

When will my next hearing be held?

Your next hearing will be scheduled according to "Marsy's Law," which was enacted in 2008. At the end of the hearing, the Commissioners will decide whether your next parole hearing will be in 3, 5, 7, 10, or 15 years. In making that determination, the Youth Offender Parole laws require the Commissioners to consider that you were under the age of 26 at the time of the crime, the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual. PC 3051(g).

You may have heard about the "*Gilman*" case. In February 2014, a federal court held that "Marsy's Law" violates a life prisoner's constitutional rights if he or she committed an offense before November 4, 2008 because the law increases the length of time a lifer must wait before his/her next hearing. The court ordered that, for this group of prisoners, the BPH must set their next hearing one year later unless there is good cause to postpone the hearing for three years or (for murder cases) five years. However, the state has appealed the order and the order has been stayed; this means the order will have no effect unless and until it is affirmed on appeal.

Remember that laws change, and before relying on anything in this guide you should make sure you have the most up-to-date information.

I was denied parole, but I have a determinate sentence and my EPRD is before my next parole hearing.

You will be released at the Earliest Possible Release Date (EPRD) established on the determinate term. You do not have to wait until your next parole hearing.

- ***Example****: Justin has a sentence of 18 years. He had his Youth Offender Parole Hearing at 15 years but was denied parole. His next hearing was set for five years later. Because his EPRD is before the next hearing date, he will be released at his EPRD and will not need the hearing.*

Is there any way to move up the date of my hearing so that it comes sooner?

It is possible to file a Petition to Advance with the Board in order to move up the date of your next hearing. You can only do this once every three years, so you should consult with an attorney who knows parole law and procedure and your situation to decide whether it would be a good idea to file a Petition to Advance. It is helpful in some cases, but not in all cases; if you are not ready to go before the Board, then you might receive a denial with a long setback period.

Spend the time before your next hearing to do everything that the Board recommended that you do (and more!).

I want to challenge my parole denial. How do I do that?

In the first 120 days after the decision, you can send a letter to the Board's Decision Review Board.

After 150 days, you can file a petition for a writ of habeas corpus asking a judge to review the Board's denial (or the Governor's reversal) of parole. If you would like more information on how to do this, write to the **Prison Law Office, General Delivery, San Quentin, CA 94964**.

PART 3: A FATHER'S POINT OF VIEW

Soccer season had ended, and seven-year-old Elijah was looking forward to getting his team trophy. His mother packed him and his 10-month-old brother, Adam, in the back seat of the family car and drove to the sports office at a local park. They picked up the trophy and signed Eli up for basketball season. Next stop that afternoon was a school fundraiser at a pizza parlor. It should have been a perfect day for a seven-year-old.

But as his mother buckled her sons back into their seats, three members of a local gang stormed into the park, intent on revenge for a shooting earlier in the day. They opened fire on a man; He ran and their bullets pierced the family's car. The boys' mother desperately tried to move the vehicle. When the shooting was over, she turned to look at her children: Still strapped into their seats, Eli was slumped over, motionless; his tee-shirt soaked with blood. The baby, Adam, was crying hysterically and had blood on his face. Eli had been struck three times and died instantly. Adam, hit in the face, had his left eye damaged by metal fragments, but he lived.

James was at work when his wife and sons were attacked. Nearly 16 years have passed. "There's not a day that goes by that we don't hurt," James says. "It was nothing short of devastating for our family and friends."

Why did you agree to be interviewed and share you family's story with people in prison?[1]

James: I hope that by telling this painful story it will give people in prison a deeper understanding of what victims and their families have gone through. My message to people in prison is this: Developing compassion will lead to healing for yourself and others.

You worked to pass laws that give second chances to people who were young when they committed their crimes. You repeatedly took time off from work and away from family to go to Sacramento and urge lawmakers to pass these laws. Why did you work so hard to change laws that help people like those who killed your son?

James: I worked on these bills because I believe each person has a purpose in life. Your crime, what you did then, does not fully define who you are now. I am a person of faith, and I believe we were created to promote life and love in one another. I helped pass these laws because I understand the importance of every human being, even people who have committed serious crimes. We must help pull each other up. I help one person, then that person can help someone else. It is how we create peace and vitality in the world.

[1] Pseudonyms are used throughout this piece to protect the privacy of the family. This interview was conducted in April 2014 by Elizabeth Calvin of Human Rights Watch.

What did you feel when you first found out about your family being attacked?

James: I got a call. "There's been a shooting involving your family and you need to go to the park." I was in shock. I am almost always composed, able to handle any kind of difficulty, but this was so unbelievable. On the drive to the park I was feeling fear of the unknown, rage, confusion…I couldn't fully comprehend what had happened. I was in a state of disbelief. I arrived at the park and saw our car with officers around it. I didn't see my family. The commanding officer came up to me and said, "They have gone to the hospital. Your wife and son are going to be ok." I said, "I have two sons." The officer hesitated, and dropped his head. "How old was your oldest son?" I said, "He is seven." The officer struggled with his own emotions. "I'm sorry. He didn't make it." I felt my world crash into a pile of pieces. I was left in this pile, trying to navigate emotionally, mentally, spiritually. It was overwhelming. I immediately needed to be with my wife and other son. I realized I didn't really know what it meant when the officer said they were going to "be ok."

Tell us something about who Elijah was.

James: 50 pounds, 50 inches, seven years old. Full of hope and aspirations. Full of spunk. He could entertain a toddler or have an intelligent conversation with a senior citizen, freely expressing his point of view on many subjects. He was a straight "A" student, reading books before entering kindergarten, winning numerous awards, including "Student of the Month" and twice placing 3rd in the annual science fair. He was the 1st grade representative for our regional Spelling Bee. He played soccer, basketball, and baseball, earning a "Good Sportsmanship" medal in soccer. He also played the piano for four years. He was most proud of becoming a big brother, or maybe, he was most proud of his baby brother! My wife and I feel Elijah's life is an example for us: To love God and be exhilarated about the life we've been given, to honor and love one another, to seek to give our best each day and express God's gifts in us.

Your son Adam survived. How was he affected?

James: He had many surgeries and other painful treatments for years. He has learned to adapt to the deficits in that eye. And, he was impacted in ways that we will never really know. At the time he was a 10-month-old, joy-filled baby. Before this happened we always called him "Happy Baby." He's grown up into a very composed and serious young man, and I often look at him and wonder if he would have been different had this tragedy not happened. He's got a sense of humor, but overall, he's a serious person. He's very aware of hard things going on in the world, perhaps in a way that isn't typical for someone his age. He's in a different place than his peers. Part of this is what we have modeled for him, and what we believe as spiritual people. He has embraced a spiritual path on his own as he has come to see the power of God in his own life.

At first, as a young child, other kids would notice his eye, and ask questions, and he would share what happened. When he was a little older, kids began teasing him. He was made fun of, and at one point kids started calling him "Shot-eye." It was very hard for him. I was appalled. I felt so badly for him. Again, I felt violated, with my child being further traumatized. After that, he became a more private person; for a long time he would have close friends but not share what happened to him and his brother. When he was around 12 or 13 years old, I saw that he started sharing with people who were sensitive and willing to talk about difficult things, but choose not to share with others.

Recently in high school he had to write an essay about someone being resilient and surviving despite a difficult thing. He let my wife and I read it. He had written something like, "In my own life I have examples of people who are resilient, even heroic, and they are my mother and father," and he told our story. I am proud of who he has become, but I so wish he had not gone through this.

Almost 16 years have passed. You mentioned not a day goes by without hurt since this happened. Would you share what you mean?

James: In the early years after Elijah was taken from us, I felt such a sense of deep violation. Everything was colored by red, I saw red—blood—everywhere. Our lives had been shattered, and although shattered we still had to function. But life was changed. We had to figure out—reinvent—how to live. When something like this type of violent crime happens, it changes you. You are one way one moment, and then in an instant, the moment of that violation, you are changed. You look the same, but everything about you is different. You have to look around and put everything into a different perspective given what has happened to you.

I struggled with finding pleasure in things. Even now, I'm not sure the word "happiness" is in my vocabulary. I had to look deep into myself and ask really hard questions about what I believe about life and God after something this terrible happens. I realized my faith was intact, but my humanity was shaken down to the foundation. My reaction to everything was different. If the simplest thing was not right, it would cause feelings to rise up in me about my son. Natural, every-day kind of stuff, like, someone cut in line ahead of me at a store, and it seemed like a racial thing. I would feel violated, I'd feel enraged…I'd think to myself, "You don't know what happened to me and you're disrespecting me here, treating me less than yourself." Having my son murdered created such a deep wound, it made me reactive in a way I wasn't before. It's like the terrible wound created by my son's murder caused a vulnerability I carry with me all the time.

Even though this happened 16 years ago, it could have been 16 minutes ago. The pain isn't 16 years ago. It is now. The pain might be different at different times, but I think one of the things that people who have not gone through this don't understand is that you don't just "get over it." I have moved past a lot of the anger; God has healed me. But the pain is still there.

What do you think victims or surviving family members want to hear from a prisoner at a parole hearing?

James: I think the most important thing to remember is that victims and survivors don't all feel the same way. Each person responds differently to tragedy. There will be some victims/survivors who might say things like, "I just want to know why you did what you did." Or, "I want to know what you have done to turn your life around and make sure you never do this kind of thing again." Other victim/survivors might want to have a conversation with you, back and forth, to get a sense of who you are at the hearing. Others still may want to hear and believe that you truly, deeply feel sorry for what you did, and that you have thought a lot about all of the ways your actions have harmed their lives.

On the other hand, some victims/survivors may not want to know anything about you, what you think, or what you have done to rehabilitate yourself. They may want the opportunity to tell you and the commissioner about how they have been injured by your acts, and why you should not be paroled. And, while some people's perspective might change over time and someday agree you should be released, others will never change their feeling that you should be locked up. Remember, too, that some victims/survivors may be angered about opportunities you have had in prison, for example, to further your education or watch your children grow up, that they have been denied.

Each person is on their own path, trying to figure out how they can heal from the crime and its effects.

What questions would you suggest a prisoner ask him or herself to get a deeper understanding of the effect of their crimes?

James: Life is full of challenges and injustices and difficulties. I believe that often times when people offend it is because of something that has happened to them. One thing I'd ask you to think deeply about is this: Do you know why you committed your crime? I'd also suggest you ask yourself: Do you honestly know how your crimes have hurt others? It may be difficult for you to face the pain you have caused. Are you doing the hard work needed to really understand the effect of your actions? Do you know how your family was impacted? And how your community was impacted as well? Have you thought deeply about how your victims were affected? Perhaps you have read my story and thought to yourself, "Well, at least I didn't kill a child." Even if that is true, or even if you were not the shooter in your crime, or even if your crime was not murder, your victims were harmed. It may be uncomfortable or even painful for you to think about the fact that you have hurt others. Are you making yourself face the reality of your actions?

What is your hope for people in prison?

James: My hope is this: That you will see your own self-worth, and that you understand that, no matter what you have done, you are a person of value. I believe you can choose to live your life in such a way that it reflects the worthy person you really are. If you have committed a terrible crime, even if someone died because of your action or inaction: I urge you, do not let that person's death be in vain. Do your best to live your life in a way that honors the lives you have taken or damaged.

PART 4: ADVICE FROM PEOPLE WHO HAVE SUCCESSFULLY PAROLED

How to Choose the Right Path in Prison: Eight Different Perspectives[2]

There is more than one path to changing your life and finding success. We asked people who paroled from California prisons what advice they have for you. What they have in common is that each committed a crime at a young age and spent a long time in California prisons. They are now living full, successful lives on the outside. These individuals offer up their insights to you. Here is who they are:

- *J.A. was convicted of two murders. He had just turned 18 at the time of his crimes. He spent nearly 23 years in California prisons. J.A. is currently an intern for a nonprofit, and this fall he will start as a student at a Cal State University where he will study math and physics.*
- *S.B. was convicted of murder for a crime committed at age 16. S.B. served nearly 20 years in prison and was paroled in 2013. Currently in a transitional living home, S.B. hopes to work on human rights issues.*
- *N.C. was convicted of murder for a crime she committed at age 20. She was in prison for 18 years. When she paroled at age 40, her son was already an adult. She is employed at "Get on the Bus," working hard on behalf of those she left behind in prison by helping as many people as she can.*
- *T.D. was convicted of two murders. He was 22 years old when he committed his crimes and he spent almost 22 years in prison. He was paroled in July 2010 and since then has earned a B.S. and a J.D. degree, discharged from life parole, and is now a licensed California attorney practicing parole law and committed to protecting and advancing the rights of prisoners and parolees*
- *L.G. was 22 when convicted of assault with a deadly weapon and burglary. He had parole violations which resulted in further incarceration. He now works full-time as a program analyst in a public mental health agency. He started community college in prison, and since being paroled he earned undergraduate and master's degrees. He is working towards his goal of a doctorate.*
- *T.N. was convicted of murder for a crime that occurred when he was 16 years old. He spent 18 years in California state prisons. He now works full time but volunteers extensively. T.N. was recently recognized by a community group with its "Most Inspirational Volunteer" award, and by another group with its "Unsung Hero" award. He is engaged to be married and is helping to raise his fiancé's child. T.N. hopes to go to school to become a social worker.*
- *V.R. was convicted of murder and sentenced to 25-to-life plus 12 years. After a rocky start in prison, she turned things around and was paroled after 29 years. She is currently living in a*

[2] Elizabeth Calvin of Human Rights Watch interviewed these individuals in April 2014.

transition house, loves riding her bike on the beach, and cherishes every day. She appreciates the simple act of walking freely among people who know nothing about her past. She hopes to own a kennel and dog training business.

- *D.S. was 16 at the time of his crime. He is currently building a family with his fiancé and young daughter, and hoping to become involved with the conservation corp.*

What do you think is the most important thing people can do to become suitable for parole?

J.A.: To be found suitable for parole you must show the board of Parole Hearings that you are ready to be an outstanding citizen that is 100% committed to giving back. Not 90% or 95% committed, but 100% committed!

S.B.: Re-define your character, and have who you are on the inside reflect who you are on the outside.

N.C.: Be able to talk about and present what you have learned in the groups you have attended.

T.D.: Live like a square. Do your work/educational/vocational assignment and go back to your cell. Involve yourself in as many self-help groups and programs as possible. Sign up and complete whatever they offer. *Overdo* what the Board requires you to do.

L.G.: Accept your circumstances. Recognize that no matter what got you in prison, it's up to you to take responsibility for how you live going forward, including while in prison. Educate yourself.

T.N.: Aim for a progressive path of rehabilitation records. The Board will want to see a consistent path of rehabilitation, not just here and there. Even if you were a troublemaker when you first entered prison or you have had recent 115s, a positive record going forward will show the Board that you are moving forward, changing, and improving yourself.

V.R.: Education.

D.S.: Think less and feel more, just sounding educated is not enough.

How did you develop insight into your crime?

J.A.: I put myself in my victims' shoes. I thought about how they felt. I thought about their families and how family, friends, and neighborhoods were affected by what I did. I made myself think: What does their family feel now, even years later? How would my family feel if it happened to me, or someone we love?

S.B.: I removed myself from the personal feelings I had about my victim, and I got to the core of recognizing that he was a human being, a person, somebody's son.

N.C.: Being a mom and understanding that my son has issues as a result of things that happened in his life helped me understand things about my victim and what happened in his life. I also tried to listen compassionately to as many people as possible. Hearing their stories gave me compassion and understanding about how things can spiral out of control. Finally, seeing how grief and sadness

can overwhelm someone, and thinking deeply about how I created this grief in another family gave me insight into the effect of my crime.

T.D.: I read my transcripts over and over again. I started out thinking my crime (DUI 2nd degree murder) was not "as bad" as other crimes. I thought to myself: I did not rob or deliberately shoot someone. But no matter how my victims died, car or gun, dead is dead. Reading my transcripts caused me to view my actions from an outside perspective and I realized that I was just as dangerous, if not more dangerous, than a madman running around in a crowded mall shooting off a gun. Once I realized how bad my actions were, I stopped trying to minimize them. I was the worst of the worst. Why not admit it? I'm already tried and convicted. That was my key to gaining insight. Putting myself in another's shoes and looking at myself.

L.G.: I started by accepting my actions. I chose to not become bitter towards the justice system. And crucially: I developed self-awareness that I had a problem with alcohol.

T.N.: I asked myself: How did I become the person that landed me in prison? Am I really dealing with the problems that caused me to get in trouble in the first place? I looked back at the time of my crime (and earlier!) and listed the harms, damage, and pain I caused, and then I carefully listed out all the ways I could have avoided those things then and how I could avoid similar things now.

V.R.: Three things that helped me develop insight to my crime were: 1. One-on-one counseling; 2. Self-help and self-discovery groups; and 3. Victim-awareness groups.

D.S.: I wrote out my whole life story as I remembered it. It was one of the hardest things I've ever done. Some parts of my life were very painful to write about, and that pain brought old feelings back. Some of these feelings were the feelings that created my negative thinking and led to my crime. By making myself look at this, I figured out that I was a tired victim who became a victimizer. That understanding gave me insight and the strength to never commit a crime again.

If you could only give one small piece of advice to people on the inside, what would that be?

J.A.: Be real, and truly abandon all gang activity. Stop all drug or alcohol use and stop all criminal activity! Live as a good citizen now in prison! Don't wait! Better yourself and reject the prison criminal culture.

S.B.: Learn how to be genuinely honest. Don't down play your responsibility. When it comes to 115s, 128s: Just be honest about how you felt at that moment, faced with a difficult situation. Be honest about what led to the incident; don't water down the truth.

N.C.: View your prison stay as a type of "school" and learn as much as you can on how to professionally, kindly, and confidently deal with people from ALL walks of life. Pretend every interaction in prison is one with your boss or co-workers. That will help you when you are in the work force out here.

T.D.: You are the most important person in your universe. Your friends and homies will eventually go home without you. You need to live for yourself and do what is best for yourself. Don't allow others

to get you caught up in drama. The stakes are too high: With the Youth Offender Parole law you have a better chance of going home.

L.G.: Be yourself. Understand the dynamics of prison but never let that change who you are.

T.N.: Focus on going home and remind yourself you need to sacrifice now in order to go home. Sacrifice means letting go of the temporary temptations in prison. Tell yourself: Prison is temporary and won't last forever. I am going to focus on what's important: making myself eligible for parole.

V.R.: Accept total responsibility for your actions and your inactions.

D.S.: Practice doing good. We all practiced doing wrong until we ended up in prison. So, try practicing doing good and see where you end up.

Where did you draw strength from when faced with difficult situations in prison?

J.A. I drew strength by remembering my most shameful moments. I would think back to the night that put me in prison. That night, I went along with the crowd around me. Everyone wanted revenge and chose the way of aggression and violence. I did not think for myself; I did not stand up for doing the right thing. I caved into peer pressure and my own thoughts of revenge. Years later in prison I was faced with similar situations. I decided to not give in to my feelings or to the pressure from people around me. I made a vow to myself to never hurt another person. I drew strength from the thought that this time around I would not hurt anyone, no matter what the situation, and no matter what the pressure. I would make the right decision when given the chance, and I was given the chance many times.

S.B.: My strength developed over time. I had 20 115s when I went to Board. I entered prison defiant and angry. I couldn't understand the consequences of my actions. I was impulsive; my emotions led me, not logic. But you can change. Each time you make a good decision and walk away, it develops a pattern in your brain. Just start small. To change my patterns, I did this small thing: I would buy a chocolate bar (I love chocolate…) I'd put it in my drawer, and make a decision to be disciplined and not eat it. I'd look at it but not let myself eat it…for months. That little step was one step toward being in control of my life. I also found a sense of perseverance to overcome obstacles by relying on my experience running track in high school. With sports, you have the competition, fear, apprehension, but you find some strength within yourself to push a little further to try to win. You might fail, but you start again.

N.C.: I practiced self-talk, telling myself, "don't get in the mud with the pigs." And I practiced "healthy detachment" and would picture my son standing beside me and think how I would react if he were there.

T.D.: I drew (and still draw) strength from God. Behind those walls we have no one we can really trust or to turn to but God. I talked to God all the time in my heart and my head. God gave me the strength to go on. After six parole denials and untold habeas denials, God came through for me and opened the door with a release date.

L.G.: I played by the rules. I did not lose my sense of identity of who I was as a person. A wise old convict once told me, "Be yourself and that will keep you from getting caught up."

T.N.: I focused my mind continually on GOING HOME. That made it clear to me that everything happening in prison is temporary, including having to "man up" or save face. Try to be straight up and let everyone know you ain't into it anymore, and you're doing your best to go home.

V.R.: I became involved in something more important than myself (for me it was the dog program) and any time I faced conflict I had to decide if it was worth losing involvement with that program.

D.S.: I remembered Jesus was tempted and how he handled himself. Pride is every man's downfall.

Everyone needs to choose a first step. What was your first step?

J.A.: I thought a lot about when and why I started using drugs and alcohol, and when and why I joined a gang. Then I thought about when and why I stopped doing these things. And, last, but most importantly, I thought about what would keep me from turning to drugs, alcohol, and gang participation in the future.

S.B.: I began believing that I was worthy of changing. I don't know when it happened, but at some point I knew that I was a valid individual even though I didn't get that validation from family or peers. At random points I would get some validation—even a little thing, like a corrections officer saying something small or my having some success in school. I realized I didn't have to live up to the person the court said I was. I could be someone different.

T.D.: My first step was to enroll in an NA meeting. Second step was to sign up for a vocational trade. The Board requires both. PIA and paid jobs could wait. Get the requirements out the way first.

L.G.: I started by accepting my reality. Then, I took advantage of anything I could to improve my life. I earned my H.S. diploma while in jail. Since being paroled I graduated from college, earned a Master's degree, and am working on my doctorate. That could be you, too. If you are a high school drop-out, get your GED or diploma. Look at what's in front of you and grab any opportunity to learn to be a better person.

T.N.: I started by promising myself that I would do everything possible to stay away from trouble. Then, I figured out what I needed to do for my own rehabilitation. What are your main problems? (Drugs, alcohol, anger…?) Take a step, even a small one, to deal with those problems. Then keep dealing with them, whether with AA/NA programs or whatever. And, don't ever stop. Take any self-help programs and therapy you can!

V.R.: My first step was to stop getting 115s and 128s. My second step was to begin attending self-help groups.

D.S.: My first step was accepting life as it was. I decided that there was no need to resist life, I just needed to just do my best with the way things are. Next, I worked on my thought process. I believe you have to change your mind and your way of thinking to really change your actions.

Any last words of advice to those on the inside?

J.A.: Even though you are in prison, find ways to give back to your community. You can do this by programming positively, by improving yourself, and by living a good, clean life. Help others around you. Never give in to negative people. Don't give into despair. Your life has value right now.

S.B.: Don't let others define who you are. You have the power of choice. You can choose how to respond and who to be, even in the place you are right now. You do not have to die in prison.

N.C.: It is possible! Work on yourself, and aim to parole being your best self, physically, spiritually, and emotionally. Come to terms with what you do when the going gets tough: Is it productive? Finally, if you are using drugs then go back to the drawing board and figure something else out because that will be what defines you.

T.D.: The Board and the Governor are powerful, but they do not control destiny. No matter how many times you have been denied parole or if this is your first time going to the Board, you have to keep your eyes on the road ahead. A personal example: Who would have thought that an ex-lifer who was denied parole six times would become an attorney helping lifers? The future is wide open for you. Stay focused on it.

L.G.: Do not ever give up on yourself. Learn to forgive yourself. Hold on to hope.

T.N.: I used to think I will grow up, grow old, and die in prison. I thought none of my rehabs matter and the Board will just shut me down. Finally, I became tired of the excuses I was making to myself. I challenged myself to beat the odds. It happened! You can do it, too. You now have a law in your favor that will help. Pick yourself up and do everything you can to make sure you walk out that gate.

V.R.: At 23 I faced the death penalty. I received 25-to-life plus 12 years, and I really did not give a damn. Continuing to be active in my addiction resulted in my getting about 10 115s and 30 128s. Then I just got tired of it all. I had a lot of inner demons to conquer, and I tackled them one by one. I was found suitable and released after serving 29 years. You can be found suitable for parole, too, even if you have racked up a lot of 115s. Make the decision to turn things around today.

D.S.: Change requires action. You can't think your way into a new way of living, but you can live your way into a new way of thinking. Just start with every single small act and do the right thing. When you sit, sit. When you stand, stand. Whatever you do, don't wobble.

Form to contest disqualification by BPH as a "youth offender" under California Penal Code section 3051.

TO CONTEST A PC § 3051 YOUTH OFFENDER DISQUALIFICATION, PLEASE COMPLETE THE FORM BELOW AND MAIL IT TO: **BOARD OF PAROLE HEARINGS, P.O. BOX 4036, SACRAMENTO, CA 95812**

PART ONE: What is the inmate's date of birth? _____

PART TWO:

1. For what **crime** did the inmate receive the longest single sentence (not including any enhancements)? _____
   What was the length of the sentence for only that **crime**? _____
2. For what **single enhancement** did the inmate receive the longest single sentence? _____
   What was the length of the sentence for only that **enhancement**? _____

If the sentence length in #1 is longer, then the CRIME listed in #1 is the "controlling offense."
If the sentence length in #2 is longer, then the ENHANCEMENT listed in #2 is the "controlling offense."

PART THREE:	**CIRCLE YOUR ANSWER**:	
Did the inmate commit the "controlling offense" after turning 23 years old?	**NO** (If **NO**, continue to Part Four)	**YES** (**NOTE**: if you circled "YES," the inmate does not qualify as a "youth offender")

PART FOUR:	**CIRCLE YOUR ANSWER**:	
Was the inmate sentenced for the "controlling offense" under three strikes?	**NO** (If **NO**, continue to Part Five)	**YES** (**NOTE**: if you circled "YES," the inmate does not qualify as a "youth offender")

PART FIVE:	**CIRCLE YOUR ANSWER**:	
Did the inmate commit any crimes after turning 23 for which a court sentenced him/her to a life term?	**NO** (If **NO**, continue to Part Six)	**YES** (**NOTE**: if you circled "YES," the inmate does not qualify as a "youth offender")

PART SIX:	**CIRCLE YOUR ANSWER**:	
Did the inmate commit any of the crimes after turning 23 for which "malice aforethought" is a necessary element of the crime, as defined in the penal code?	**NO** (If **NO**, please submit this completed form to the Board of Parole Hearings for reconsideration, which may or may not result in a different determination.)	**YES** (**NOTE**: if you circled "YES," the inmate does not qualify as a "youth offender")

INMATE'S NAME: _____ **CDCR #**: _____ **DATE**: _____

PERSON COMPLETING FORM: _____ **SIGNATURE**: _____
(Print name of Inmate or Legal Representative)