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Your Responsibility When Using the Information Provided Below:

When we wrote this Informational Material we did our best to give you useful and accurate information because we know that prisoners often have difficulty obtaining legal information and we cannot provide specific advice to all the prisoners who request it. The laws change frequently and are subject to differing interpretations. 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 is applicable to your situation. Most of the materials you need should be available in your institution law library.

INFORMATION RE: *HINOJOSA V. DAVEY* (recent Ninth Circuit case on credit-earning status of inmates in SHU)

November 2, 2015

We have received your letter asking for information, advice, or assistance in regards to a September 2015 Ninth Circuit decision, *Hinojosa v. Davey* (9th Cir., Sept. 25, 2015, No. 13-56012) ___F.3d___. We are unable to write individual responses to everyone who has contacted us about the *Hinojosa* case. We hope that the general information in this letter will help answer your questions.

What does the *Hinojosa v. Davey* decision say?

In *Hinojosa v. Davey*, the federal Ninth Circuit Court of Appeals examined the 2010 amendment to Penal Code § 2933.6, which changed the law so that prisoners who are in Security Housing Units (SHUs) as validated prison gang members or associates cannot earn any good behavior credits (“D-2 status”). The court held that the change violated the Ex Post Facto Clause of the United States Constitution because it increased the punishment for a prisoner whose underlying criminal offense was committed before January 25, 2010, the date the amendment took effect. For the purposes of this decision, the court defined the underlying crime as the original commitment offense and not the gang-related misconduct that resulted in the gang validation.

The *Hinojosa* court reached a different conclusion than prior California state cases and federal district court cases that rejected the same ex post facto argument. (See *In re Sampson* (2011) 197 Cal.App.4th 1234; *In re Efstathiou* (2011) 200 Cal.App.4th 725; *Soto v. Lewis* (N.D. Cal. 2012) No. C11-4704 CRB; *Nevarez v. Lewis* (N.D. Cal. 2012) No. C12-1912 SI; *Gregory v. Lewis* (N.D. Cal. 2012) No. C12-0967 EMC.)

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To whom does the *Hinojosa v. Davey* decision apply?

The court's order requiring the CDCR to grant additional good behavior credits affect only the petitioner, Mr. Hinojosa. We believe that the reasoning in the opinion should apply to all prisoners who (1) committed their underlying criminal conduct before January 25, 2010 *and* (2) are in a SHU or have spent time in a SHU due to gang validation since January 25, 2010. However, there are several reasons why prisoners who meet these criteria might NOT get any additional credits.

First, the state is challenging the *Hinojosa* decision, and it is not yet known whether the decision will be overturned or will become good legal authority. The state is asking for rehearing by the full Ninth Circuit Court of Appeal and could still ask the United States Supreme Court to review the decision. We do not know when the challenges to *Hinojosa* will be decided or what the outcome will be. We will update this letter as soon as we have more information.

Second, even if *Hinojosa* becomes citeable authority, it is not clear that the courts will apply it in other cases. Until a higher state court or the U.S. Supreme Court says otherwise, the state superior courts are required to follow the state court of appeal cases that rejected the Penal Code 2933.6 ex post facto argument. The state courts of appeal and California Supreme Court could decide to follow *Hinojosa*, but they do not have to do so because Ninth Circuit cases are not binding authority on state courts. Even the federal district courts may not be able to apply *Hinojosa* in some cases because of "AEDPA" rules that limit the authority of federal courts to overturn state court decisions that are not contrary to clearly-established U.S. Supreme Court law (there were unusual procedural circumstances in *Hinojosa* that allowed the Ninth Circuit to avoid those AEDPA restrictions). The state and federal courts will have to grapple with these issues if *Hinojosa* becomes good law and prisoners file cases seeking more credits based on *Hinojosa*'s reasoning.

In the meantime, what should I do if I think I should get conduct credits for my SHU time for the same reasons as in *Hinojosa*?

You have two options. One is to wait to see if the *Hinojosa* decision becomes final and if the CDCR takes action to apply it more broadly to additional prisoners. The other option is to go ahead now by filing a CDCR Form 602 administrative appeal citing *Hinojosa* and asking for additional credits; however, while the state is still challenging the *Hinojosa* decision, the CDCR will almost certainly deny administrative appeals and the state courts at all levels will very likely deny habeas petitions on the ex post facto issue.

More information on administrative appeals and state and federal petitions for writ of habeas corpus is available free by writing to the Prison Law Office or on the Resources page at www.prisonlaw.com.