



## PRISON LAW OFFICE

General Delivery, San Quentin, CA 94964-0001  
Telephone (510) 280-2621 • Fax (510) 280-2704  
www.prisonlaw.com

Director:  
Donald Specter

Managing Attorney:  
Sara Norman

Staff Attorneys:  
Rana Anabtawi  
Rebekah Evenson  
Steven Fama  
Penny Godbold  
Alison Hardy  
Corene Kendrick  
Kelly Knapp  
Millard Murphy  
Lynn Wu

### 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)** February 2016

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) 803 F.3d 412. 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 Efsthathiou* (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.)

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

The Ninth Circuit Court of Appeals’ order only specifically requires the CDCR to grant additional good behavior credits to the petitioner, Mr. Hinojosa. However, the reasoning in the opinion should apply

Board of Directors  
Penelope Cooper, President • Michele WalkinHawk, Vice President  
Marshall Krause, Treasurer • Christiane Hipps • Margaret Johns  
Cesar Lagleva • Laura Magnani • Michael Marcum • Ruth Morgan • Dennis Roberts

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. Nonetheless, it is still in dispute whether other prisoners who meet these criteria will get additional credits. Here is what we know, as of early February 2016:

- The Ninth Circuit has denied the state's requests to reconsider its *Hinojosa* decision, but the state has now filed a petition for writ of certiorari asking the United States Supreme Court to consider the case. We do not know when the challenge to *Hinojosa* will be decided or what the outcome will be.
- The CDCR Office of Legal Affairs states that the CDCR official policy is that institution staff are not to grant any additional credits under *Hinojosa*. The Federal Defenders office, which represents Mr. Hinojosa, has also received reports from prisoners that the CDCR has refused to grant them such credits. There may be one or more unusual cases in which the state has given individual prisoners additional credits as part of settlement or negotiation of a lawsuit.
- At least for now, the state is likely to argue that other courts should not follow the *Hinojosa* decision, and we do not know how the courts will respond to habeas petitions on the ex post facto issue. Until a higher state court or the U.S. Supreme Court says otherwise, the state superior courts may 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 follow *Hinojosa*, but they do not necessarily have to do so because Ninth Circuit cases are not binding authority on state courts. It is also possible that the federal district courts won't apply *Hinojosa* in some cases because of complex "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 the AEDPA restrictions). The state and federal courts will have to grapple with these issues when more prisoners file cases seeking 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 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, it is likely that the CDCR will continue to deny administrative appeals. After you have exhausted the 602 appeal process, you can file a state petition for writ of habeas corpus. The second option is to wait to see if the *Hinojosa* petition for certiorari is denied, how the case law develops, and whether the CDCR then takes action to apply *Hinojosa* more broadly to additional prisoners.

\*\*\*\*

We will update this letter when we have more information. 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](http://www.prisonlaw.com).