FILED
United States Court of Appeals
Tenth Circuit

October 19, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TOBI KILMAN,

Plaintiff - Appellant,

v.

DEAN WILLIAMS, Executive Director of the Colorado Department of Corrections; RICK RAEMISCH, Former Executive Director of the C.D.O.C.; JAMES RICKETS, Former Executive Director of the C.D.O.C.; TOM CLEMENTS, Former Executive Director of the C.D.O.C.; JOHN SUTHERS, Former Executive Director of the C.D.O.C.; JOE ORTIZ, Former Executive Director of the C.D.O.C.; ARISTEDES ZAVARES, Former Executive Director of the C.D.O.C.; FRANK GUNTER, Former Executive Director of the C.D.O.C.; WALTER KAUTZKY, Former Executive Director of the C.D.O.C. and unnamed former executive director of the C.D.O.C. Circa 1990-2019,

Defendants - Appellees.

No. 19-1476
(D.C. No. 1:19-CV-02265-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

A.1

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **MORITZ**, Circuit Judges.

Tobi Kilman appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

Kilman was a Colorado state prisoner at four different times between 1997 and 2017. In his complaint in this action, filed after his 2017 release, he alleged that he was deprived of 56 months of statutory good-time and earned-time credits. He asserted that this deprivation violated his rights under the Fifth, Eighth, and Fourteenth Amendments. He sought damages against the current and former Executive Directors of the Colorado Department of Corrections (CDOC) in their individual capacities. His theory was that beginning in 1990, Executive Director Kautzky implemented a policy of improperly awarding good-time and earned-time credits, and successive Executive Directors have continued the policy.

After granting Kilman leave to proceed in forma pauperis (IFP), a magistrate judge screened the complaint and ordered Kilman to show cause why the district court should not dismiss it. Kilman responded. The magistrate judge then issued a report and recommendation that the action should be dismissed pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, if "a judgment in favor of [a state prisoner] would necessarily imply the invalidity of his conviction or sentence," a district court must dismiss a § 1983 action "unless the plaintiff can demonstrate that

the conviction or sentence has already been invalidated." *Id.* at 487. In the alternative, the magistrate judge recommended dismissing the complaint as legally frivolous under 28 U.S.C. § 1915(e)(2)(B)(i) for failure to allege facts showing either a constitutional violation or personal participation by any of the named defendants. Kilman filed timely objections to the magistrate judge's recommendation. The district court accepted and adopted the recommendation and dismissed the action for the reasons stated in the recommendation. Kilman appeals.

II. Discussion

Kilman primarily argues that *Heck* does not apply to his action because he did not seek to invalidate either his convictions or his sentences but only the manner in which his sentences were imposed. We disagree and therefore affirm the district court's dismissal based on *Heck*. Consequently, we need not reach Kilman's other arguments.

Because the district court dismissed Kilman's action as part of the IFP screening process, we construe its *Heck* dismissal as one under § 1915(e)(2)(B)(ii)'s directive that a court must dismiss an action if it "fails to state a claim on which relief may be granted." *See Smith v. Veterans Admin.*, 636 F.3d 1306, 1312 (10th Cir. 2011) ("[T]he dismissal of a civil rights suit for damages based on prematurity under *Heck* is for failure to state a claim."). Thus, our review is de novo. *See Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007) (applying de novo review to dismissal of IFP complaint for failure to state a claim under § 1915(e)(2)(B)(ii)). We afford a

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liberal construction to Kilman's pro se filings, but we may not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

In applying *Heck*, the district court relied on our unpublished decision, *Kailey v. Ritter*, 500 F. App'x 766 (10th Cir. 2012). In *Kailey*, we held that *Heck* barred a § 1983 claim that Colorado prison officials violated a prisoner's constitutional rights under the First, Fifth, and Fourteenth Amendments when they failed to award him earned-time credits. *See id.* at 767, 769. Kilman attempts to distinguish *Kailey* in three ways: (1) Kailey was subject to discretionary parole, but Kilman was subject to mandatory parole, so Kilman has a liberty interest in the credits he allegedly did not receive; (2) Kailey's action had technical and procedural issues that are lacking here; and (3) Kailey argued that earned-time credits could not be withheld for bad behavior, but Kilman raises no such argument. While these distinctions exist, Kilman does not explain why they are material to the *Heck* analysis, and we see no materiality. In *Kailey*, our application of *Heck* did not turn on any of the factual distinctions Kilman highlights.

But regardless of *Kailey*, the Supreme Court has made clear that under its precedent, including *Heck*, a writ of habeas corpus is the sole federal remedy in cases where a state prisoner seeks any relief, damages or otherwise, that would "necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). Kilman's success in a § 1983 action for damages based on the deprivation of good-time and earned-time credits would require a federal court to determine that prison officials wrongly deprived him of those credits and held

Kilman longer than they should have. That would necessarily demonstrate that the duration of Kilman's confinement was invalid, even if his claim is viewed purely as a due process challenge to CDOC's allegedly wrongful procedure for computing credits. *See Edwards v. Balisok*, 520 U.S. 641, 646 (1997) (applying *Heck* to prisoner's § 1983 suit that, if successful on procedural challenge, would imply the invalidity of the deprivation of good-time credits). Accordingly, to obtain federal relief, Kilman had to pursue a writ of habeas corpus.

As the district court noted, *Heck* does not apply when a plaintiff has no available habeas remedy, but the plaintiff must show that the lack of a habeas remedy is "through no lack of diligence on his part." *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010). The only statement in Kilman's appellate brief that could be construed as relevant to the *Cohen* exception is his claim that he was simply unaware of the CDOC's "corrupt time-computation practices until he had already [been] discharged." Aplt. Br. at 4. His lack of awareness, however, shows nothing more than a lack of diligence in filing any habeas petitions during his incarcerations. *See Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) ("[I]t is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing." (internal quotation marks omitted)). Kilman, therefore, has not shown that *Cohen*'s exception to *Heck* applies.

III. Conclusion

The district court's judgment is affirmed. We grant Kilman's motion to proceed IFP on appeal and remind him of his obligation to continue making partial

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payments until the appellate filing and docketing fees are paid in full. *See* 28 U.S.C. § 1915(a)(1) (excusing only "prepayment of fees"); *id.* § 1915(b)(1) (requiring prisoners to make partial payments of filing fees).[1]

Entered for the Court
Per Curiam

[1] Section 1915(b)(1)'s partial-payment fee provisions apply to Kilman because at the time he filed this appeal, he was a pretrial detainee at a Colorado county detention center.

A.6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02265-LTB-GPG

TOBI KILMAN,

Plaintiff,

v.

DEAN WILLIAMS, Executive Director of the Colorado Department of Corrections,
RICK RAEMISCH, Fmr. Exec. Dir. of the C.D.O.C.,
JAMES RICKETS, Fmr. Exec. Dir. of the C.D.O.C.,
TOM CLEMENTS, Fmr. Exec. Dir. of the C.D.O.C.,
JOHN SUTHERS, Fmr. Exec. Dir. of the C.D.O.C.,
JOE ORTIZ, Fmr. Exec. Dir. of the C.D.O.C.,
ARISTEDES ZAVARES, Fmr. Exec. Dir. of the C.D.O.C.,
FRANK GUNTER, Fmr. Exec. Dir. of the C.D.O.C.,
WALTER KAUTZKY, Fmr. Exec. Dir. of the C.D.O.C., and
UNNAMED FORMER EXECUTIVE DIRECTOR OF THE C.D.O.C. CIRCA 1990-2019,

Defendants.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed November 14, 2019 (ECF No. 15). Plaintiff has filed timely written objections to the Recommendation (ECF No. 16). The Court has therefore reviewed the Recommendation *de novo* in light of the file and record in this case. On *de novo* review the Court concludes that the Recommendation is correct. Accordingly, it is

ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 15) is accepted and adopted. It is

FURTHER ORDERED that the Complaint (ECF No. 1) and the action are dismissed pursuant to the rule in *Heck v. Humphrey*, 512 U.S. 477 (1994), and as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith.

DATED: December 10, 2019

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 19-cv-02265-LTB-GPG

TOBI KILMAN,

Plaintiff,

v.

DEAN WILLIAMS, Executive Director of the Colorado Department of Corrections,
RICK RAEMISCH, Fmr. Exec. Dir. of the C.D.O.C.,
JAMES RICKETS, Fmr. Exec. Dir. of the C.D.O.C.,
TOM CLEMENTS, Fmr. Exec. Dir. of the C.D.O.C.,
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FRANK GUNTER, Fmr. Exec. Dir. of the C.D.O.C.,
WALTER KAUTZKY, Fmr. Exec. Dir. of the C.D.O.C., and
UNNAMED FORMER EXECUTIVE DIRECTOR OF THE C.D.O.C. CIRCA 1990-2019,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the Complaint (ECF No. 1)[1] filed *pro se* by Plaintiff, Tobi Kilman, on August 8, 2019. The matter has been referred to this Magistrate Judge for recommendation (ECF No. 14.)[2]

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[1] "(ECF No. 1)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

[2] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or

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The Court must construe the Complaint and other papers filed by Mr. Kilman liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the Complaint be dismissed.

I. DISCUSSION

Mr. Kilman has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. Therefore, the Court must dismiss any claims in the Complaint that are frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i). A legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does not exist or asserts facts that do not support an arguable claim. *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989).

Mr. Kilman is an inmate at the Arapahoe County Detention Facility in Centennial, Colorado. He claims his Eighth Amendment rights were violated while he was a prisoner in the custody of the Colorado Department of Corrections ("DOC"). He alleges in

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general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

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support of the Eighth Amendment claim that he was imprisoned illegally for fifty-six months during four different periods of incarceration between November 1997 and December 2017. He explains the claim as follows:

> The plaintiff served 165 months of actual calendar time in the Colorado Department of Corrections from November of 1997 to December of 2017. He was credited with 217 months toward his sentences in prison. If Good Time and Earned Time were properly credited to the claimant, he should have served 109 months to be credited with 217. 165 minus 109 is 56. The 56 months of over-incarceration constitutes 56 months of illegal incarceration and/or false imprisonment. This petitioner asserts that the defendants are therefore guilty of inflicting cruel and unusual punishment upon him in violation of the 8th Amendment of the U.S. Constitution. It is also believed by the plaintiff and his loved ones that his over-long incarcerations have caused him post-traumatic stress disorder and another psychological condition called institutionalization.

(ECF No. 1 at p. 19.) Defendants are the individuals who served as Executive Director of the DOC from 1990 to the present. According to Mr. Kilman, each past and present Executive Director of the DOC is "personally responsible for violating his civil rights" because the DOC "made changes that defy the spirit and plain language of established laws that [Defendants] were directly in charge of administering, and they had full knowledge of the scheme that was put into action." (*Id.* at p.20.) Mr. Kilman is suing each Defendant in his individual capacity. He seeks damages as relief.

On August 29, 2019, Magistrate Judge Gallagher ordered Mr. Kilman to show cause why the Complaint should not be dismissed. Magistrate Judge Gallagher noted initially that Mr. Kilman's Eighth Amendment claim appears to be barred by the rule in *Heck v. Humphrey*, 477 U.S. 512 (1994). Magistrate Judge Gallagher noted that, even if

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the claim is not barred by the rule in *Heck*, Mr. Kilman fails to allege facts that demonstrate his federal constitutional rights have been violated or that the named Defendants personally participated in the asserted constitutional violation. On October 16, 2019, Mr. Kilman filed a response (ECF No. 12) to the show cause order.

Mr. Kilman first argues his constitutional claim is not barred by the rule in *Heck* but the Court is not persuaded. Pursuant to *Heck*, if a judgment for damages necessarily would imply the invalidity of a criminal conviction or sentence, the action does not arise until the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by an authorized state tribunal, or called into question by the issuance of a federal habeas writ. *Heck*, 512 U.S. at 486-87. Although Mr. Kilman is not challenging the validity of a conviction or sentence, the rule in *Heck* also applies to his Eighth Amendment claim in which he challenges the amount of good and earned time credits he received and the length of the sentences he actually served. *See Kailey v. Ritter*, 500 F. App'x 766, 768-69 (10th Cir. 2012) (§ 1983 complaint by prisoner challenging failure to award meritorious sentence reduction credits allegedly required under state law "necessarily impl[ies] the invalidity of his sentence" and "must be dismissed unless [the prisoner] can show that the sentence has already been invalidated"). In short, a civil rights action filed by a state prisoner "is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81-82

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(2005).

Mr. Kilman does not allege facts that demonstrate he has invalidated the allegedly illegal periods of incarceration. Furthermore, the fact that he longer is in state custody with respect to the sentences at issue does not mean his claim should be allowed to proceed. It is clear that "a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a § 1983 claim." *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010). However, Mr. Kilman fails to allege facts that demonstrate he was unable to seek habeas relief for the allegedly illegal periods of incarceration while he was serving those sentences. In other words, Mr. Kilman had an available remedy in habeas but failed to pursue that remedy diligently.

The Court also agrees with Magistrate Judge Gallagher that, even if Mr. Kilman's Eighth Amendment claim is not barred by *Heck*, the claim is legally frivolous for two reasons. First, Mr. Kilman fails to allege facts that demonstrate his constitutional rights have been violated. The Eighth Amendment's "prohibition of cruel and unusual punishment imposes a duty on prison officials to provide humane conditions of confinement, including adequate food, clothing, shelter, sanitation, medical care, and reasonable safety from serious bodily harm." *Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008). In order to state an arguable Eighth Amendment claim Mr. Kilman must allege specific facts that demonstrate deliberate indifference to a substantial risk of serious harm. *See Farmer v. Brennan*, 511 U.S. 825 (1994); *Tafoya*, 516 F.3d at 916.

Mr. Kilman fails to allege facts that demonstrate deliberate indifference to a

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substantial risk of serious harm. Furthermore, under Colorado law, "good time and earned time credits serve only to determine the parole eligibility date" and do not constitute service of a sentence. *Meyers v. Price*, 842 P.2d 229, 231-32 (Colo. 1992). Therefore, Mr. Kilman's argument that he was subjected to cruel and unusual punishment simply because he was denied good and earned time credits authorized by state law lacks merit.

Second, Mr. Kilman fails to allege specific facts that demonstrate any Defendant personally participated in the asserted constitutional violation. Allegations of "personal participation in the specific constitutional violation complained of [are] essential." *Henry v. Storey*, 658 F.3d 1235, 1241 (10th Cir. 2011); *see also Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997) ("[i]ndividual liability . . . must be based on personal involvement in the alleged constitutional violation."). A defendant may not be held liable for the unconstitutional conduct of his or her subordinates on a theory of respondeat superior. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Although a defendant can be liable based on his or her supervisory responsibilities, a claim of supervisory liability must be supported by allegations that demonstrate personal involvement, a causal connection to the constitutional violation, and a culpable state of mind. *See Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 767-69 (10th Cir. 2013) (discussing standards for supervisory liability). Because Mr. Kilman fails to allege facts that demonstrate the various executive directors of the DOC personally participated in the alleged withholding of good and earned time credits, the Eighth Amendment claim also is legally frivolous for that reason.

II. RECOMMENDATION

For the reasons set forth herein, this Magistrate Judge respectfully RECOMMENDS that the Complaint (ECF No. 1) and the action be dismissed pursuant the rule in *Heck v. Humphrey*, 477 U.S. 512 (1994) and as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

DATED November 14, 2019.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge

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Document: C.R.S. 17-22.5-306

C.R.S. 17-22.5-306

Copy Citation

Current through all laws passed during the 2020 Legislative Session

CO - Colorado Revised Statutes Annotated TITLE 17. CORRECTIONS CORRECTIONAL FACILITIES AND PROGRAMS FACILITIES ARTICLE 22.5. INMATE AND PAROLE TIME COMPUTATION PART 3. OFFENDERS SENTENCED FOR CRIMES COMMITTED ON OR AFTER JULY 1, 1979

17-22.5-306. Transfer of functions

The executive director shall, on and after July 1, 1984, execute, administer, perform, and enforce the rights, powers, duties, functions, and obligations formerly vested in the state board of parole with respect to the earned time provisions of section **17-22**.5-302. Notwithstanding any other provision of law to the contrary, the state board of parole shall carry out all of its other functions as if this section had not been enacted.

History

Source: L. 84: Entire article R&RE, p. 523, § 1, effective July 1.

COLORADO REVISED STATUTES

A.14

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CO - Colorado Revised Statutes Annotated TITLE 17. CORRECTIONS CORRECTIONAL FACILITIES AND PROGRAMS FACILITIES ARTICLE 22.5. INMATE AND PAROLE TIME COMPUTATION PART 3. OFFENDERS SENTENCED FOR CRIMES COMMITTED ON OR AFTER JULY 1, 1979

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COLORADO REVISED STATUTES

A. 14

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17-22.5-301. Good time

(1) Each person sentenced for a crime committed on or after July 1, 1979, but before July 1, 1981, whose conduct indicates that he has substantially observed all of the rules and regulations of the institution or facility in which he has been confined and has faithfully performed the duties assigned to him shall be entitled to a good time deduction of fifteen days a month from his sentence. The good time authorized by this section shall vest quarterly and may not be withdrawn once it has vested. No more than forty-five days of good time may be withheld by the department in any three-month period of sentence.

(2) Each person sentenced for a crime committed on or after July 1, 1981, but before July 1, 1985, shall be subject to all the provisions of this part 3; except that the good time authorized by this section shall vest semiannually and no more than ninety days of good time may be withheld by the department in any six-month period of sentence.

(3) Each person sentenced for a crime committed on or after July 1, 1985, shall be subject to all the provisions of this part 3; except that the good time authorized by this section shall not vest and may be withheld or deducted by the department.

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(4) Nothing in this section shall be so construed as to prevent the department from withholding good time earnable in subsequent periods of sentence, but not yet earned, for conduct occurring in a given period of sentence.

History

Source: L. 84: Entire article R&RE, p. 520, § 1, effective July 1. **L. 85:** (3) amended, p. 646, § 1, effective June 6. **L. 98:** (3) amended, p. 727, § 10, effective May 18.

▼ Annotations

Notes

Editor's note: This title was numbered as articles 17 and 18 of chapter 39, C.R.S. 1963. The substantive provisions of this title were repealed and reenacted in 1977, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this title prior to 1977, consult Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

Editor's note: This article was added in 1979. This article was repealed and reenacted in 1984, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1984, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

Editor's note: This section is similar to former § **17-22**.5-101 as it existed prior to 1984.

Case Notes

ANNOTATION

Law reviews. For article, "Adult Parole in Colorado: An Overview", see 44 Colo. Law. 37 (May 2015).

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Annotator's note. Since § **17-22.5-301** is similar to former § **17-22**.5-101, relevant cases construing that provision have been included with the annotations to this section. For other cases construing good time provisions, see the annotations under § **17-22**.5-201.

There is no constitutional right to good-time credits for presentence confinement. People v. Cooper, 662 P.2d 478 (Colo. 1983); People v. Turman, 659 P.2d 1368 (Colo. 1983).

But former § 17-22.5-101 mandated good-time credit for presentence confinement. People v. Chavez, 659 P.2d 1381 (Colo. 1983).

The creation and distribution of good time credits is a matter committed to the authority of the legislature. A trial court order stipulating that credit be given an inmate for good time, presentence confinement, and time served in a community corrections program does not override the discretionary authority granted the department of corrections by the general assembly to withhold or withdraw such credits. Renneke v. Kautzky, 782 P.2d 343 (Colo. 1989).

For crimes committed on or after July 1, 1985, credit for good time is within discretionary authority of the department of corrections. Since the department of corrections may withhold or deduct good time credits, an inmate's maximum control date, as initially calculated by the department of corrections, is not necessarily the date upon which he is entitled to unconditional release. Renneke v. Kautzky, 782 P.2d 343 (Colo. 1989).

Presentence confinement. There is no statutory requirement that a sentencing court include in the mittimus information concerning a defendant's eligibility for good time credit for time spent in presentence confinement. Although such information is often included in the mittimus, it is the department of corrections alone which ultimately determines whether a defendant receives and maintains good time credit. People v. White, 981 P.2d 624 (Colo. App. 1998).

Confinement in county jail. To the extent that a defendant's sentence is served by confinement in county jail, the good-time credit provisions of former § **17-22**.5-101 applied. People v. Chavez, 659 P.2d 1381 (Colo. 1983); People v. Roedel, 701 P.2d 891 (Colo. App. 1985).

By statute, good time credit for presentence confinement exists only in the case of crimes committed on or after July 1, 1979. People v. Emig, 676 P.2d 1156 (Colo. 1984).

When defendant entitled to credits. Where the trial court accepts a stipulation stating that the defendant substantially observed all of the rules and regulations of the county jail and faithfully performed the duties assigned to him, he is entitled to good-time credits for his presentence confinement. People v. Hamilton, 662 P.2d 177 (Colo. 1983); People v. Roedel, 701 P.2d 891 (Colo. App. 1985).

Where presentence report reflects that defendant had met the other requirements for a "good time" credit for the period of his presentence confinement, this section requires that the department of corrections recognize such credit. People v. Chavez, 659 P.2d 1381 (Colo. 1983); People v. Johnson, 776 P.2d 1141 (Colo. App. 1989), rev'd on other grounds, 797 P.2d 1296 (Colo. 1990).

Use of word "shall" mandates good time deduction to each person whose conduct indicates that he or she has observed the rules and regulations of the facility in which such person is confined. People v. Galvin, 835 P.2d 603 (Colo. App. 1992).

Because equal protection and due process claims were not clearly established rights at the time presentence good time credits of inmate were improperly withheld, individual defendants are qualifiedly immune from suit for compensatory damages. Griess v. State of Colo., 841 F.2d 1042 (10th Cir. 1988) (decided under former § 17-20-107).

An inmate who is incarcerated in the state prison system is eligible for two types of time deduction from his sentence. The first is "good time", under this

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section, which rewards the inmate who substantially observes the rules and regulations of the facility in which he is confined and who faithfully performs his assigned duties. The second is "earned time" pursuant to § **17-22**.5-302 (1) which is provided if the inmate makes substantial progress in matters such as work and training. Bynum v. Kautzky, 784 P.2d 735 (Colo. 1989).

Aggregation of consecutive sentences is proper when calculating good time credit. People v. Broga, 750 P.2d 59 (Colo. 1988).

Good time and earned time credits do not constitute service of sentence and are only used to determine inmate's parole eligibility date. Thorson v. Dept. of Corr., 801 P.2d 540 (Colo. 1990); Myers v. Price, 842 P.2d 229 (Colo. 1992).

For inmates convicted of crimes committed after July 1, 1993, good time credits awarded by this section are only applied to calculate parole eligibility and not applied toward an inmate's mandatory release date. Ankeney v. Raemisch, 2015 CO 14, 344 P.3d 847.

Although the legislature revised and relocated the good time, earned time, and parole provisions originally included in § 16-11-310, eventually moving them to their present location in the statutes in this section and § § **17-22**.5-302 and **17-22**.5-303, there is nothing in those revisions which would indicate that § 16-11-310 was meant to render inoperative the provision in § **17-22**.5-303 allowing reincarceration for a parole violation. Such an interpretation is unjustified since it would severely undermine the ability of the parole system to effect the successful reintegration of former inmates into the community while recognizing the need for public safety. Bynum v. Kautzky, 784 P.2d 735 (Colo. 1989).

The earned time and good time provisions of this section and § 17-22.5-302 do not preclude the reincarceration of an inmate for violation of his parole. These sections, together with § 16-11-310 (now repealed), were only intended to establish the mandatory date of release on parole. Thus, with respect to parole, the good time and earned time credits "vest" only for the purpose of determining parole eligibility, not for purposes of determining whether reincarceration is possible once a former inmate has violated his parole. Bynum v. Kautzky, 784 P.2d 735 (Colo. 1989); Williamson v. Jordan, 797 P.2d 744 (Colo. 1990); Jones v. Martinez, 799 P.2d 385 (Colo. 1990).

Section does not limit the place of confinement where good-time credit can be earned to only those facilities under the supervision of the department of corrections. Community corrections board also has the discretion to withhold or deduct against good-time credits. People v. Galvin, 835 P.2d 603 (Colo. App. 1992).

Good time and earned time credits are not to be credited towards service of sentence but only toward eligibility for parole. Rather v. Suthers, 973 P.2d 1264 (Colo. 1999).

Person convicted of a sex offense is not entitled to mandatory parole; therefore, the accumulation of good time and earned time credits do not make person eligible for immediate release. Rather v. Suthers, 973 P.2d 1264 (Colo. 1999).

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CO - Colorado Revised Statutes Annotated TITLE 17. CORRECTIONS CORRECTIONAL FACILITIES AND PROGRAMS FACILITIES ARTICLE 22.5. INMATE AND PAROLE TIME COMPUTATION PART 3. OFFENDERS SENTENCED FOR CRIMES COMMITTED ON OR AFTER JULY 1, 1979

17-22.5-302. Earned time

(1) In addition to the good time authorized in section **17-22**.5-301, earned time, not to exceed thirty days for every six months of incarceration, may be deducted from the inmate's sentence upon a demonstration to the department by the inmate that he has made substantial and consistent progress in each of the following categories:

(a) Work and training, including attendance, promptness, performance, cooperation, care of materials, and safety;

(b) Group living, including housekeeping, personal hygiene, cooperation, social adjustment, and double bunking;

(c) Participation in counseling sessions and involvement in self-help groups;

(d) Progress toward the goals and programs established by the Colorado diagnostic program.

(1.3) Notwithstanding the provisions of subsection (1) of this section to the contrary, after his or her first ninety days in administrative segregation, a state inmate in administrative segregation shall be eligible to receive earned time if he or she meets the criteria required by this section or any modified criteria developed by the department to allow a state inmate to

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receive the maximum amount of earned time allowable for good behavior and participation in any programs available to the state inmate in administrative segregation.

(1.5) (a) In addition to the thirty days of earned time authorized in subsection (1) of this section, an inmate who makes positive progress, in accordance with performance standards, goals, and objectives established by the department, in the correctional education program established pursuant to section 17-32-105, shall receive earned time pursuant to section **17-22**.5-405; except that, if, upon review of the inmate's performance record, the inmate has failed to satisfactorily perform in the correctional education program, any earned time received pursuant to this paragraph (a) may be withdrawn as provided in subsection (4) of this section. For purposes of this paragraph (a), "positive progress", at a minimum, means that the person is attentive, responsive, and cooperative during the course of instruction and satisfactorily completes required work assignments equivalent to the courses and hours necessary for advancement at a rate of one grade level per calendar year in the school district where such inmate was last enrolled.

(b) Repealed.

(2) The department shall develop objective standards for measuring substantial and consistent progress in the categories listed in subsection (1) of this section. Such standards shall be applied in all evaluations of inmates for the earned time authorized in this section.

(3) For each inmate sentenced for a crime committed on or after July 1, 1979, but before July 1, 1985, the department shall review the performance record of the inmate and shall grant, consistent with the provisions of this section, an earned time deduction from the sentence imposed. Such review shall be conducted at least annually; except that, in the case of an inmate who has one year or less of his sentence remaining to be served, the review shall be conducted at least semiannually. The earned time deduction authorized by this section shall vest upon being granted and may not be withdrawn once it is granted.

(4) For each inmate sentenced for a crime committed on or after July 1, 1985, the department shall review the performance record of the inmate and may grant, withhold, withdraw, or restore, consistent with the provisions of this section, an earned time deduction from the sentence imposed. Such review shall be conducted as specified in subsection (3) of this section; except that the earned time deduction authorized by this subsection (4) shall not vest upon being granted and may be withdrawn once it is granted.

(5) For each inmate sentenced for a crime committed on or after July 1, 1987, the department shall not credit such inmate with more than one-half of his allowable earned time for any six-month period or portion thereof unless such inmate was employed or was participating in institutional training or treatment programs provided by the department or was participating in some combination of such employment, training, or treatment programs.

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This subsection (5) shall not apply to those inmates excused from such employment or programs for medical reasons.

History

Source: L. 84: Entire article R&RE, p. 521, § 1, effective July 1. **L. 87:** (5) added, p. 654, § 10, effective March 27. **L. 88:** (1.5) added, p. 697, § 3, effective July 1. **L. 90:** (1.5)(a) amended and (1.5)(b) repealed, pp. 976, 977, § § 3, 7, effective July 1. **L. 91:** (1.5)(a) amended, p. 431, § 9, effective May 24. **L. 92:** (1.5)(a) amended, p. 2173, § 23, effective June 2. **L. 2011:** (1.3) added, (SB 11-176), ch. 289, p. 1343, § 3, effective July 1. **L. 2020:** (1.5)(a) amended, (HB 20-1402), ch. 216, p. 1047, § 29, effective June 30.

▼ Annotations

Notes

Editor's note: This section is similar to former § **17-22**.5-102 as it existed prior to 1984.

Cross references: For the Colorado diagnostic program, see article 40 of this title 17.

Case Notes

ANNOTATION

An inmate does not have a vested right in earned time, so the inmate's punishment is not increased by withholding earned time from the inmate for not participating in sex offender treatment. Reeves v. Colo. Dept. of Corr., 155 P.3d 648 (Colo. App. 2007).

The creation and distribution of credits to be applied against an inmate's sentence are matters committed to the authority of the legislature; trial court orders do not prevail over the letter and intent of statutory provisions adopted by the general assembly. Renneke v. Kautzky, 782 P.2d 343 (Colo. 1989).

For crimes committed on or after July 1, 1985, deductions for earned time are within discretionary authority of the department of corrections. Since the department of corrections may withhold, withdraw, or restore earned time deductions,

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an inmate's maximum control date, as initially calculated by the department of corrections, is not necessarily the date upon which he is entitled to unconditional release. Renneke v. Kautzky, 782 P.2d 343 (Colo. 1989).

Granting of earned time credit for educational programs under subsection (1.5) lies with the discretion of the department. To read "shall" in subsection (1.5) in a mandatory sense would create an absurd result. An inmate has no clear right to receive and department has no clear duty to grant earned time credit. Verrier v. Dept. of Corr., 77 P.3d 875 (Colo. App. 2003).

An inmate who is incarcerated in the state prison system is eligible for two types of time deduction from his sentence. The first is "good time" pursuant to § **17-22**.5-301, which rewards the inmate who substantially observes the rules and regulations of the facility in which he is confined and who faithfully performs his assigned duties. The second is "earned time" under this section which is provided if the inmate makes substantial progress in matters such as work and training. Bynum v. Kautzky, 784 P.2d 735 (Colo. 1989).

Inmate not entitled to earned time for time spent in county jail because statutory requirements of this section were not met. People v. Alderman, 720 P.2d 1000 (Colo. App. 1986).

Good time and earned time credits do not constitute service of sentence and are only used to determine inmate's parole eligibility date. Thorson v. Dept. of Corr., 801 P.2d 540 (Colo. 1990); Myers v. Price, 842 P.2d 229 (Colo. 1992).

Subsection (3) of this section and § § 16-11-310 (now repealed), 17-22.5-301 (2), and 17-22.5-303 (2) do not preclude the reincarceration of a person for violating his parole even though his time served, together with his good time and earned time credits accrued, equal or exceed the length of the sentence originally imposed. Bynum v. Kautzky, 784 P.2d 735 (Colo. 1989); Williamson v. Jordan, 797 P.2d 744 (Colo. 1990); Jones v. Martinez, 799 P.2d 385 (Colo. 1990).

The earned time and good time provisions of this section and § 17-22.5-301 do not preclude the reincarceration of an inmate for violation of his parole. These sections, together with § 16-11-310 (now repealed), were only intended to establish the mandatory date of release on parole. Thus, with respect to parole, the good time and earned time credits "vest" only for the purpose of determining parole eligibility, not for purposes of determining whether reincarceration is possible once a former inmate has violated his parole. Bynum v. Kautzky, 784 P.2d 735 (Colo. 1989); Williamson v. Jordan, 797 P.2d 744 (Colo. 1990); Jones v. Martinez, 799 P.2d 385 (Colo. 1990).

Inmates in administrative segregation do not meet certain criteria required for an award of earned time credits, even under the apparently mandatory subsection. Tempelman v. Gunter, 16 F.3d 367 (10th Cir. 1994).

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CO - Colorado Revised Statutes Annotated TITLE 17. CORRECTIONS CORRECTIONAL FACILITIES AND PROGRAMS FACILITIES ARTICLE 22.5. INMATE AND PAROLE TIME COMPUTATION PART 4. PAROLE ELIGIBILITY AND DISCHARGE FROM CUSTODY

17-22.5-405. Earned time - earned release time - achievement earned time - definition

(1) Earned time, not to exceed ten days for each month of incarceration or parole, may be deducted from the inmate's sentence upon a demonstration to the department by the inmate, which is certified by the inmate's case manager or community parole officer, that the inmate has made consistent progress in the following categories as required by the department of corrections:

(a) Work and training, including attendance, promptness, performance, cooperation, care of materials, and safety;

(b) Group living, including housekeeping, personal hygiene, cooperation, social adjustment, and double bunking;

(c) Participation in counseling sessions and involvement in self-help groups;

(d) Progress toward the goals and programs established by the Colorado diagnostic program;

(e) For any inmates who have been paroled, compliance with the conditions of parole release;

(f) The offender has not harassed the victim either verbally or in writing;

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(g) The inmate has made positive progress, in accordance with performance standards established by the department, in the correctional education program established pursuant to article 32 of this title;

(h) The inmate has shown exemplary leadership through mentoring, community service, and distinguished actions benefiting the health, safety, environment, and culture for staff and other inmates.

(1.2) Subsection (1) of this section applies to a person who was convicted as an adult for a class 1 felony committed while the person was a juvenile and who was sentenced pursuant to section 18-1.3-401 (4)(b) or (4)(c), C.R.S. As to a person who was convicted as an adult for a class 1 felony committed while the person was a juvenile and who was sentenced pursuant to section 18-1.3-401 (4)(c), C.R.S., it is the intent of the general assembly that the department award earned time to such a person both prospectively and retroactively from June 10, 2016, as if the person had been eligible to be awarded earned time from the beginning of his or her incarceration pursuant to the sentence that he or she originally received for such felony.

(1.5) (a) Earned time, not to exceed twelve days for each month of incarceration or parole, may be deducted from an inmate's sentence if the inmate:

(I) Is serving a sentence for a class 4, class 5, or class 6 felony or level 3 or level 4 drug felony;

(II) Has not incurred a class I code of penal discipline violation within the twenty-four months immediately preceding the time of crediting or during his or her entire term of incarceration if the term is less than twenty-four months or a class II code of penal discipline violation within the twelve months immediately preceding the time of crediting or during his or her entire term of incarceration if the term is less than twelve months;

(III) Is program-compliant; and

(IV) Was not convicted of, and has not previously been convicted of, a felony crime described in section 18-3-303, 18-3-305, 18-3-306, or 18-6-701, sections 18-7-402 to 18-7-407, or section 18-12-102 or 18-12-109, C.R.S., or a felony crime listed in section 24-4.1-302 (1), C.R.S.

(b) The earned time specified in subsection (1.5)(a) of this section may be deducted based upon a demonstration to the department by the inmate, which is certified by the inmate's case manager or community parole officer, that he or she has made positive progress in accordance with performance standards established by the department.

(c) Nothing in this subsection (1.5) shall preclude an inmate from receiving earned time pursuant to subsection (1) of this section if the inmate does not qualify for earned time pursuant to this subsection (1.5).

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(2) The department shall develop objective standards for measuring consistent progress in the categories listed in subsection (1) of this section. Such standards shall be applied in all evaluations of inmates for the earned time authorized in this section.

(3) For each inmate sentenced to the custody of the department, or for each parolee, the department shall review the performance record of the inmate or parolee and may grant, withhold, withdraw, or restore, consistent with the provisions of this section, an earned time deduction from the sentence imposed. Such review shall be conducted annually while such person is incarcerated and semiannually while such person is on parole and shall vest upon being granted. However, any earned time granted to a parolee shall vest upon completion of any semiannual review unless an administrative hearing within the department determines that such parolee engaged in criminal activity during the time period for which such earned time was granted, in which case the earned time granted during such period may be withdrawn. In addition to any other sanctions, the executive director may refer to the district attorney all cases where the offender tests positive for the presence of drugs.

(3.5) In addition to the earned time deducted pursuant to subsection (1) of this section, an inmate working at a disaster site pursuant to section 17-24-124 shall be entitled to additional earned time in the amount of one day of earned time for every day spent at a disaster site.

(4) (a) Except as described in subsection (6) or (9) of this section or in paragraph (b) of this subsection (4), and notwithstanding any other provision of this section, earned time may not reduce the sentence of an inmate as defined in section **17-22**.5-402 (1) by a period of time that is more than thirty percent of the sentence.

(b) Earned time may not reduce the sentence of an inmate described in subsection (1.2) of this section by a period of time that is more than twenty-five percent of the sentence.

(5) (a) Notwithstanding subsections (1), (2), and (3) of this section, an offender who is sentenced and paroled for a felony offense other than a nonviolent felony committed on or after July 1, 1993, shall not be eligible to receive any earned time while the offender is on parole. An offender who is sentenced and paroled for a nonviolent felony offense committed on or after July 1, 1993, shall be eligible to receive any earned time while the offender is on parole.

(a.5) Notwithstanding the provisions of paragraph (a) of this subsection (5), an offender who is sentenced for a felony committed on or after July 1, 1993, and paroled on or after January 1, 2009, shall be eligible to receive any earned time while on parole or after reparole following a parole revocation.

(b) As used in this subsection (5), unless the context otherwise requires, a "nonviolent felony offense" means a felony offense other than a crime of violence as defined in section 18-1.3-406 (2), C.R.S., any of the felony offenses set forth in section 18-3-104, 18-4-203, or

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18-4-301, C.R.S., or any felony offense committed against a child as set forth in articles 3, 6, and 7 of title 18, C.R.S.

(6) Earned release time shall be scheduled by the state board of parole and the time computation unit in the department of corrections for inmates convicted of class 4 and class 5 felonies or level 3 drug felonies up to sixty days prior to the mandatory release date and for inmates convicted of class 6 felonies or level 4 drug felonies up to thirty days prior to the mandatory release date for inmates who meet the following criteria:

(a) The inmate has not incurred a class I code of penal discipline violation within the twenty-four months immediately preceding the time of crediting or during his or her entire term of incarceration if the term is less than twenty-four months or a class II code of penal discipline violation within the twelve months immediately preceding the time of crediting or during his or her entire term of incarceration if the term is less than twelve months;

(b) The inmate is program-compliant; and

(c) The inmate was not convicted of, and has not previously been convicted of, a felony crime described in section 18-3-303, 18-3-305, 18-3-306, or 18-6-701, sections 18-7-402 to 18-7-407, or section 18-12-102 or 18-12-109, C.R.S., or a felony crime listed in section 24-4.1-302 (1), C.R.S.

(7) Beginning in the fiscal year 2012-13, the general assembly may appropriate the savings generated by subsections (1.5) and (6) of this section to recidivism-reduction programs.

(8) Notwithstanding any provision of this section to the contrary, after his or her first ninety days in administrative segregation, a state inmate in administrative segregation shall be eligible to receive earned time if he or she meets the criteria required by this section or any modified criteria developed by the department to allow a state inmate to receive the maximum amount of earned time allowable for good behavior and participation in any programs available to the state inmate in administrative segregation.

(9) (a) Notwithstanding any provision of this section to the contrary, in addition to the earned time authorized in this section, an offender who successfully completes a milestone or phase of an educational, vocational, therapeutic, or reentry program, or who demonstrates exceptional conduct that promotes the safety of correctional staff, volunteers, contractors, or other persons under the supervision of the department of corrections, may be awarded as many as sixty days of achievement earned time per program milestone or phase or per instance of exceptional conduct, at the discretion of the executive director; except that an offender shall not be awarded more than one hundred twenty days of achievement earned time pursuant to this subsection (9).

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(a.5) (I) Pursuant to the intent of the general assembly in enacting House Bill 12-1223 during the 2012 regular session, the general assembly shall appropriate savings generated from the enactment of this subsection (9) to:

(A) The education subprogram, for academic and vocational programs to offenders; and

(B) The parole subprogram, for parole wraparound services.

(II) Notwithstanding the provisions of subparagraph (I) of this paragraph (a.5), the appropriation described in said subparagraph (I) must not exceed six million five hundred thousand dollars in any fiscal year.

(III) In allocating the moneys appropriated pursuant to sub-subparagraph (B) of subparagraph (I) of this paragraph (a.5), the department shall give priority to parole wraparound services that are administered based on evidence-based practices.

(b) As used in this section, unless the context otherwise requires, "exceptional conduct" includes, but is not limited to:

(I) Saving or attempting to save the life of another person;

(II) Aiding in the prevention of serious bodily injury or loss of life;

(III) Providing significant assistance in the prevention of a major facility disruption;

(IV) Providing significant assistance in the solving of a cold case, as defined in section 24-4.1-302 (1.2), C.R.S.;

(V) Acting to prevent an escape; or

(VI) Providing direct assistance in a documented facility or community emergency.

History

Source: L. 90: Entire part added, p. 952, § 19, effective June 7. **L. 91:** (1)(g) amended, p. 1912, § 20, effective June 1. **L. 93:** (5) added, p. 1980, § 5, effective July 1. **L. 95:** (5) amended, p. 879, § 14, effective May 24. **L. 97:** (5)(b) amended, p. 1548, § 24, effective July 1. **L. 2001:** (3.5) added, p. 1452, § 2, effective June 5. **L. 2002:** (5)(a) and (5)(b) amended, p. 1507, § 165, effective October 1. **L. 2008:** IP(1) amended, p. 658, § 9, effective April 25; (5)(a.5) added, p. 1756, § 3, effective July 1. **L. 2009:** (1.5), (6), and (7) added and (4) amended, (HB 09-1351), ch. 359, p. 1866, § 1, effective June 1. **L. 2010:** (1.5)(a) and (6) amended, (HB 10-1374), ch. 261, p. 1181, § 5, effective May 25. **L. 2011:** (8) added, (SB 11-176), ch. 289, p. 1343, § 4, effective July 1. **L. 2012:** (4), (5)(a), and (5)(a.5) amended and (9) added, (HB 12-1223), ch. 213, p. 916, § 2, effective May 24. **L. 2013:** (1.5)(a)(I) and IP(6) amended, (SB 13-250), ch. 333, p. 1934, § 51, effective October

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1. **L. 2015:** (9)(a.5) added, (SB 15-195), ch. 279, p. 1144, § 1, effective August 5. **L. 2016:** (1.2) added and (4) amended, (SB 16-181), ch. 353, p. 1450, § 4, effective June 10. **L. 2020:** IP(1) and (1.5)(b) amended and (1)(h) added, (HB 20-1019), ch. 9, p. 26, § 6, effective March 6; (1)(g) amended, (HB 20-1402), ch. 216, p. 1047, § 30, effective June 30.

Annotations

Notes

Cross references: For the legislative declaration contained in the 2002 act amending subsections (5)(a) and (5)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in the 2012 act amending subsections (4), (5)(a), and (5)(a.5) and adding subsection (9), see section 1 of chapter 213, Session Laws of Colorado 2012.

Case Notes

ANNOTATION

Exclusion of felony theft from definition of "nonviolent felony offenses" in this section did not operate to deny defendant equal protection of the law. People v. Gonzales, 973 P.2d 732 (Colo. App. 1999).

An inmate does not have a vested right in earned time, so the inmate's punishment is not increased by withholding earned time from the inmate for not participating in sex offender treatment. Reeves v. Colo. Dept. of Corr., 155 P.3d 648 (Colo. App. 2007).

Earned time credit not available for presentence confinement. People v. Maestas, 920 P.2d 875 (Colo. App. 1996).

Where prisoner was not in the custody of the department of corrections, but was instead held in a county jail awaiting sentencing, credit was not available under this section. People v. Maestas, 920 P.2d 875 (Colo. App. 1996).

Earned time credits are not required to be given when serving a concurrent sentence in a federal prison, but department was required to conduct a hearing pursuant to subsection (3). When state and federal sentences are running concurrently, even when defendant was in federal prison, defendant was in the custody of the department. People v. Frank, 30 P.3d 664 (Colo. App. 2000).