In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMES LEE BROWN,

Defendant and Appellant.

Case No. S181963

Third Appellate District, Case No. C056510
Lassen County Superior Court Case No. C056510
The Honorable Stephen Douglas Bradbury, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Should the recently enacted amendments to Penal Code[1] section 4019 be applied prospectively to custody time served after the amendment's effective date or retroactively to all non-final judgments?

INTRODUCTION

In October 2009, the Legislature passed Senate Bill 18 ("SB 18"). Among other things, SB 18 revised the accrual rate for conduct[2] credits pursuant to Penal Code section 4019. Under the old version of section 4019, defendants earned two days of conduct credit for every four actual days served in local custody. Under the new provision, certain defendants are eligible to earn two days of conduct credit for every two days of actual custody. (§ 4019, subd. (f).) SB 18's effective date was January 25, 2010.[3]

Appellant Brown was convicted and sentenced in 2007, roughly two and a half years before SB 18 was enacted. Nevertheless, because his appeal is pending, appellant's convictions are not yet final. On appeal below, he argued that the new version of section 4019 should apply

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[1] All future statutory references are to the Penal Code unless otherwise indicated.

[2] "'Conduct credit' collectively refers to work time credit pursuant to section 4019, subdivision (b), and to good behavior credit pursuant to section 4019, subdivision (c). [Citation.]" (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn.3.)

[3] This is by virtue of the California Constitution, article 4, section 8(c)(1), which states in relevant part, "a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed." And, the California Senate Journal for the Third Extraordinary Session indicates that the Third Extraordinary Session adjourned on October 25, 2009. (Cal. Senate Journal, 2009-10 Third Extraordinary Session, Nov. 30 2009, p. 273; http://www.leginfo.ca.gov/senate-journalhtml/sj_200911.html, last accessed May 3, 2010.)

retroactively to all cases not yet final on appeal, and accordingly he is entitled to the benefit of the more favorable accrual rate. The Third District Court of Appeal agreed and held the statutory amendment should be applied retroactively.

The Court of Appeal's ruling fails to comport with the Legislature's intent in amending section 4019. Retroactive application would allow for the recalculation of all local custody conduct credits included in sentences not yet final on January 25, 2010, regardless of when these credits accrued. Inmates with non-final judgments as of the effective date of the statute would receive a windfall of conduct credits.

Conversely, prospective application would grant inmates the benefit of the new calculation for any time served on or after the statute's effective date. Prospective application is consistent with the statute's purpose which is to encourage good behavior and work participation in custody facilities as a means of maintaining security and discipline within the custodial system. It is logically and practically impossible to influence behavior after it has occurred. For these reasons, and because statutes are presumed to operate prospectively, respondent urges this court to overrule the opinion of the Third District Court of Appeal below and find that the amendment to section 4019 is to be applied prospectively only.

STATEMENT OF THE CASE

In August 2006, appellant was involved in the sale of methamphetamine to an undercover police officer.[4] (1 RT 25-113.) On May 24, 2007, a Lassen County jury found appellant guilty of one count of selling or furnishing methamphetamine (Health & Saf. Code, § 11379,

[4] Because the underlying facts of this offense are irrelevant to the issue presently before this Court, Respondent has omitted a "Statement of the Facts" in its entirety.

subd. (a)). (1 CT 41.) On July 24, 2007, the trial court denied probation and sentenced appellant to a total of three years in state prison, the middle term. (1 CT 78-79.) Appellant was awarded 62 days of actual custody time and 30 days of conduct credit, pursuant to the old version of section 4019. (1 RT 239.) On August 6, 2007, appellant filed a notice of appeal. (1 CT 82.)

On direct appeal, appellant raised several issues unrelated to the section 4019 issue. On January 13, 2010, the Third District affirmed the judgment in an unpublished opinion.

But, thereafter, on January 29, 2010, appellant filed a petition for rehearing, arguing he is entitled to the benefit of the amendment to section 4019 that went into effect on January 25, 2010, and which provided for enhanced presentence conduct credits. The Third District granted the petition and vacated the January 13, 2010, decision. On March 16, 2010, the Third District issued the published opinion in this case, finding that the amendment to Penal Code section 4019 was intended to be retroactive. (Slip opn. at p. 35.) The court reasoned that the amendment to section 4019 constituted an "amendatory statute lessening punishment" and thus, it should be applied retroactively to all non-final judgments pursuant to this Court's opinion in *In re Estrada* (1965) 63 Cal.2d 740, 744 (*Estrada*). (Slip opn. at p. 32.) Accordingly, the court awarded appellant an additional 32 days of conduct credit. (Slip opn. at p. 35.)

ARGUMENT

I. BECAUSE THIS CASE IS NOT GOVERNED BY *ESTRADA*,[5] AND NOTHING IN THE LEGISLATION OR ITS HISTORY COMPELS RETROACTIVE APPLICATION, THE PRESUMPTION OF PROSPECTIVE APPLICATION HAS NOT BEEN REBUTTED AND THE COURT OF APPEAL ERRED IN DETERMINING THE STATUTE MUST BE APPLIED RETROACTIVELY

Statutes are presumed to operate prospectively. Contrary to the Third District Court of Appeal's decision, the amendment to section 4019 does not constitute "an amendatory statute lessening punishment," and is therefore not governed by this Court's decision in *Estrada*. In addition, nothing in the legislative history or the language of the statute itself demonstrates a clear and compelling indication that the Legislature intended this amendment to apply retroactively. The Court of Appeal's rule of retroactivity is not only inconsistent with other statutory provisions that were amended by SB 18, but, in certain instances, it would reward inmates for trifling with court proceedings. Accordingly, the general presumption that statutes apply prospectively has not been rebutted. Appellant's conduct credits were correctly calculated pursuant to the old formula and he is not entitled to recalculation because the amendment to section 4019 should not be applied retroactively. Finally, this construction comports with principles of equal protection.

A. The Amendment to Section 4019 Is Not an "Amendatory Statute Lessening Punishment," and Thus, This Case Is Not Governed by *Estrada*

At the outset, an analysis of whether or not a statute or an amendment to a statute is to apply retroactively or prospectively begins with

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[5] *In re Estrada, supra,* 63 Cal.2d 740.

Penal Code section 3. Section 3 states that no part of the Penal Code is "retroactive, unless expressly so declared." When there is nothing to indicate a contrary legislative intent, statutes are presumed to be prospective, not retroactive. "[S]ection 3 reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted 'unless express language or clear and unavoidable implication negatives the presumption.' [Citation.]" (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208.) "[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." (*Id.* at p. 1209.)

Estrada created an exception to the general rule of prospective application. There, this Court determined that such a contrary legislative intent was inherent in amendments to Penal Code sections 3044 and 4530, which reduced the punishment for the crime of escape without force. This Court held, "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law." (*In re Estrada*, *supra*, 63 Cal.2d at p. 744-745.) *Estrada* established that an amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date.

With SB 18, there is no explicit indication of the legislative intent. The court below determined that the amendment to section 4019 should be applied retroactively because it constituted an "amendatory statute lessening punishment," and thus *Estrada* applied. (Slip opn. at p. 32.) The lower court discerned a legislative intent of complete retroactive application because it believed the amendment was designed to lessen punishment:

"it appears to us that the Legislature plainly did intend with this legislation to ease budgetary concerns by reducing the prison population. To accomplish this, the Legislature reduced the total term of imprisonment by increasing conduct credits which necessarily reduces the punishment for certain crimes." (Slip opn. at p. 32.)

However, contrary to the court's ruling, a favorable change in the accrual rate of conduct credit does not constitute an "amendatory statute lessening punishment," and accordingly, *Estrada* is inapplicable.

Prior to the passage of SB 18, three lower courts had considered the issue of whether a change in the rate of accrual of credits is a "statute lessening punishment." In *People v. Hunter* (1977) 68 Cal.App.3d 389 (*Hunter*), the court applied *Estrada* in holding that an amendment to section 2900.5 should apply retroactively. (*Id.* at p. 393.) Section 2900.5, subdivision (a), allows for "back time" credit against a sentence resulting from a misdemeanor or felony conviction, or what is known as "actual" credit. (*People v. Hunter*, *supra*, 68 Cal.App.3d at p. 393.) In *Hunter*, the statute was amended to include "back time" for periods of imprisonment imposed as a condition of a grant of probation. *Hunter* is distinguishable from the instant case because it dealt with actual credits, and not conduct credits. The distinction is significant because the legislative intent behind awarding actual credits and conduct credits is entirely different.

As the *Hunter* court held, awarding credit for actual custody days served is a reduction in punishment, and the *Estrada* exception to the presumption of prospective application applies. On the other hand, the legislative intent in awarding (or increasing, as here) credit for good conduct is to encourage good behavior; thus credits are awarded pursuant to section 4019, "unless it appears by the record that the prisoner has refused to satisfactorily perform labor" or "has not satisfactorily complied with the reasonable rules and regulations . . . ." (§ 4019, subds. (b)(1) and (c)(1).)

A number of courts, including this one, have recognized this legislative intent: "The[] provisions of section 4019 [which award credit] make clear that conduct credits are designed to ensure the smooth running of a custodial facility by encouraging prisoners to do required work and to obey the rules and regulations of the facility." (*People v. Silva* (2003) 114 Cal.App.4th 122, 128; see also *People v. Guzman* (1995) 40 Cal.App.4th 691, 695 ["The purpose of . . . section 4019 is to encourage good behavior by incarcerated defendants prior to sentencing. [Citations.]"]; and *People v. Moore* (1991) 226 Cal.App.3d 783, 787 ["Conduct credit is awarded to prisoners in penal institutions to encourage good behavior. [Citation.]"]; *People v. Brown* (2004) 33 Cal.4th 382, 405 ["section 4019, focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody"]; *People v. Sage* (1980) 26 Cal.3d 498, 510 ["The purpose of conduct credit is to foster good behavior and satisfactory work performance. [Citation.] That purpose will not be served by granting such credit retroactively."] (conc. & dis. opn. of Clark, J.) (*Sage*); *People v. Saffell* (1979) 25 Cal.3d 223, 233 ["The purposes of the provision for 'good time' credits seem self-evident. First, and primarily, prisoners are encouraged to conform to prison regulations and to refrain from engaging in criminal, particularly assaultive, acts while in custody. Second, [prisoners are induced] to make an effort to participate in what may be termed 'rehabilitative' activities"].)

In *People v. Doganiere* (1978) 86 Cal.App.3d 237 (*Doganiere*), Division Two of the Fourth District reasoned that the *Estrada* exception also applied to conduct credits because, "it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe." (*People v. Doganiere*, *supra*, 86 Cal.App.3d at p. 240.) But this reasoning ignores the legislative intent behind conduct credits, as opposed to actual credits: i.e., encouraging good behavior. As

discussed below, the awarding of conduct credit was not a legislative determination that sentences were too severe, rather; it was a legislative determination that motivating and encouraging good behavior would help to maintain discipline and minimize threats to prison and jail security. The reasoning in *Doganiere* is unsound.

Less than a year after the holding in *Doganiere*, the First District decided *In re Stinnette* (1979) 94 Cal.App.3d 800, 804-805 (*Stinnette*). In 1977, when the Legislature enacted the Determinate Sentencing Law, it included provisions which allowed prisons to earn conduct credit in prison (§§ 2930 and 2931). By their express terms, the credits were to be awarded prospectively only. (*In re Stinnette, supra*, 94 Cal.App.3d at p. 804.) The *Stinnette* court considered whether or not the prospective application of the conduct credits statute would violate equal protection. (*Id.* at pp. 804-805.) The *Stinnette* court did not discuss the question of legislative intent directly because the legislative intent was made clear by its inclusion of an express provision indicating the statute applied prospectively only. However, the court's equal protection reasoning necessarily implies that the Legislature did not intend retroactive application because to do so would undermine the statute's intent to provide effective incentives for good behavior. Thus, the court noted, the public purpose behind such statutes, "is the desirable and legitimate purpose of motivating good conduct among prisoners so as to maintain discipline and minimize threats to prison security. Reason dictates that it is impossible to influence behavior after it has occurred." (*In re Stinnette, supra*, 94 Cal.App.3d at p. 806.) Accordingly, the *Stinnette* court determined that applying good conduct credits prospectively was not a violation of appellant's equal protection rights. (*Ibid.*)

Here, in holding the amendment should be applied retroactively, the Third District determined that this issue was not distinguishable from *Estrada*, and agreed with the finding in *Doganiere*. But this conclusion does not follow: increasing conduct credits does not necessarily reduce punishment; the credits must still be earned. That is, the prisoner must prospectively perform the good acts that will ultimately shorten his or her sentence. A change in the accrual rate for conduct credit is not a legislative determination that punishments for certain crimes are too severe, otherwise the amendment would necessarily have to apply to all prisoners convicted of those offenses. Here, the amendments apply only to those prisoners convicted of certain offenses who have also earned their conduct credit while in custody.

Further, a favorable change in the rate at which an inmate accrues conduct credit is not a reduction in punishment. The sentences imposed for their criminal behavior remain unchanged and unaffected by the amendment to section 4019. The only change is in the rate at which inmates are rewarded for behaving appropriately and working while in custody. The increase in a reward for certain behavior is not the equivalent of a reduction in punishment. (See, e.g., *People v. Brunner* (1983) 145 Cal.App.3d 761, 764 [holding an amendment that expressly afforded credit to mentally disordered offenders for time spent in mental hospitals and repealing a statute precluding such credit (see §§ 1364 and 1365) was not a "statute lessening punishment."].)

Accordingly, the amendment to section 4019 does not constitute an "amendatory statute lessening punishment," and thus, *Estrada* is inapplicable.

B. Because Nothing in the Legislation Itself, or Its Surrounding Circumstances Compels the Conclusion That the Legislature Intended Retroactive Application, the Presumption of Prospective Application Has Not Been Rebutted

When determining whether an amendatory statute should be applied retroactively or prospectively, the first and most important determination with respect to this issue is the Legislative intent. (*People v. Floyd* (2003) 31 Cal.4th 179, 184.) As noted above, Penal Code section 3 creates a presumption of prospective application, but this presumption can be rebutted where there is a clear and compelling indication that the Legislature intended retroactive application. A new statute or an amendment to a statute, "'is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise. [Citation.]'" (*People v. Alford* (2007) 42 Cal.4th 749, 753 (*Alford),* citing *People v. Hayes* (1989) 49 Cal.3d 1260, 1274.)

In *Alford*, this Court explained,

> As its own language makes clear, section 3 is not intended to be a 'straitjacket.' 'Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent.' (*In re Estrada* (1965) 63 Cal.2d 740, 746 . . . .) Even without an express declaration, a statute may apply retroactively if there is "'a clear and compelling implication'" that the Legislature intended such a result. (*People v. Grant* (1999) 20 Cal.4th 150, 157 . . , quoting *People v. Hayes*, *supra*, 49 Cal.3d at p. 1274 . . . .)

(*People v. Alford*, *supra*, 42 Cal.4th at pp. 753-754.)

As noted above, "conduct credits are designed to ensure the smooth running of a custodial facility by encouraging prisoners to do required work and to obey the rules and regulations of the facility." (*People v. Silva* (2003) 114 Cal.App.4th 122, 128. In *People v. Brown*, *supra*, 33 Cal.4th at page 405, this Court recognized the same principle: "[S]ection 4019, focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody."

The Legislature did not intend, when originally creating conduct and work time credits, to merely reduce time in prison; it intended to create incentives for good behavior. The amendment to section 4019 included in SB 18 furthers this purpose by increasing the reward for good behavior and work participation, thus further encouraging cooperation. As the court in *Stinnette* pointed out, incentive for good conduct and rehabilitative work performance could only be engendered by rewards for behavior that occurred after the statute was enacted. (*In re Stinnette*, *supra*, 94 Cal.App.3d at p. 806.) This supports the presumption of prospective application. Applying SB 18 retroactively would do what the *Stinnette* court realized defied logic, namely, to try to influence behavior after it has occurred. (*In re Stinnette*, *supra*, 94 Cal.App.3d at p. 806; see also *People v. Sage, supra,* 26 Cal.3d 498, 510 (conc. & dis. opn. of Clark, J.) ["The purpose of conduct credit is to foster good behavior and satisfactory work performance. (Citation.) That purpose will not be served by granting such credit retroactively."].) Accordingly, retroactive application of the amendment to section 4019 is inconsistent with the very purpose behind awarding conduct credits. When increasing the accrual rate of conduct credits, the Legislature sought to create additional incentive for local inmates to obey the rules and regulations of the facility and to participate in work. By further encouraging good behavior by local inmates, the legislation helps to further maintain discipline and minimize threats to

security in custodial facilities. Retroactive application of the statute would accomplish none of these goals.

It cannot be ignored that SB 18 was enacted pursuant to the fiscal emergency declared by the Governor on December 19, 2008. (See SB 18, § 62.) However, what started out as a "budget" bill, ended up as a "corrections" bill.[6] Reducing prison populations will certainly reduce state costs. But the Legislature did not take the direct approach of shortening sentences or authorizing early release. Instead, it took an indirect approach of providing jail inmates the opportunity to reduce the ultimate length of their sentences by increasing the accrual rate of conduct credits, which will indirectly reduce prison populations to some extent going forward. Had the Legislature intended solely to reduce prison sentences and effectuate early release dates for any prisoner with a non-final judgment, it could have done so through a more direct means, i.e., simply granting every prisoner the additional credit, with no regard for a means by which to earn the credit.

Thus, the Legislature's intent, necessarily implied from the action it took, is two-fold. First, it intended to create additional incentive for good behavior in local custody facilities (with the necessary result of maintaining discipline and minimizing threats to prison security), and second, it intended to start addressing the fiscal emergency by reducing prison populations. Applying the statute prospectively, as opposed to retroactively, achieves both the penological and budgetary goals which the Legislature sought to address.

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[6] The bill as introduced is available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx3_18_bill_20090105_introduced.pdf and the chaptered version is available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx3_18_bill_20091011_chaptered.pdf.

Other provisions of SB 18 show a similar dual intent. Section 2933.05 allows for up to six weeks of additional credit for inmates who successfully complete certain rehabilitative programs. These include, but are not limited to, "[a]cademic programs, vocational programs, vocational training, and core programs such as anger management and social life skills, and substance abuse programs." (§ 2933.05, subd. (c).) Inmates involved in the firefighting programs and working on conservation camps can now earn additional credit. (§ 2933.3, subds. (a) and (b).) Additionally, the bill requires counties to develop and implement programs to reduce recidivism and requires the Department of Corrections and Rehabilitation to establish a parole reentry accountability program. (§§ 1228-1233.8.) These measures have the laudatory purposes of both reducing prison costs and promoting the rehabilitation and successful reentry into society of the prison population.

The Legislature is trying to effectively reduce the prison populations, but it is mindful of the security risks posed by releasing prisoners too early. Thus, its efforts to reduce the population have the secondary intent of allowing for the early release of only those prisoners who have demonstrated an ability to safely reenter society, i.e., those with consistently good behavior, who have dedicated themselves to productive vocational pursuits, and are not patently dangerous.

This legislative design is further reaffirmed by other changes made pursuant to SB 18. First, the amendment to section 4019 delineates, for the first time, between serious and violent felons, registered sex offenders, and felons without such classifications. Under the amended provisions of section 4019, any defendant with a prior or current serious or violent felony conviction, and any defendant required to register as a sex offender, is not entitled to the more favorable accrual rate. (§ 4019, subds. (b)(2) and (c)(2).) The amendment to section 4019 maintains the old conduct credit

accrual rate for these more serious offenders. This demonstrates an effort by the Legislature to avoid a blanket, universal reduction in prison sentences.

Section 2933.6 was also amended pursuant to SB 18 to remove prison conduct credits for certain gang members. The prior version of this section read:

> Notwithstanding any other law, a person who is placed in a Security Housing Unit, Psychiatric Services Unit, Behavioral Management Unit, or an Administrative Segregation Unit for misconduct described in subdivision (b) is ineligible to earn credits pursuant to Section 2933 or 2933.05 during the time he or she is in the Security Housing Unit, Psychiatric Services Unit, Behavioral Management Unit, or the Administrative Segregation Unit for that misconduct.

(§ 2933.6, subd. (a), effective until January 24, 2010.)

Pursuant to SB 18, this provision was amended to add the italicized portion below:

> Notwithstanding any other law, a person who is placed in a Security Housing Unit, Psychiatric Services Unit, Behavioral Management Unit, or an Administrative Segregation Unit for misconduct described in subdivision (b) *or upon validation as a prison gang member or associate* is ineligible to earn credits pursuant to Section 2933 or 2933.05 during the time he or she is in the Security Housing Unit, Psychiatric Services Unit, Behavioral Management Unit, or the Administrative Segregation Unit for that misconduct.

(§ 2933.6, subd. (a), effective January 25, 2010.)

These provisions confirm that SB 18 was not a "pure" budget bill, aimed only at the reduction of prison populations. These changes further demonstrate the legislative intent apparent in the other provisions, i.e., the Legislature's attempt to reduce the prison populations while remaining mindful of the security risks posed by releasing certain prisoners early.

In addition, section 41 of SB 18, which amended section 2933.3, includes an express provision of retroactivity. As noted above, this section was amended to provide for increased credit for certain inmates who have completed training for inmate firefighter assignments. (§ 2933.3, subds. (b) & (c).) The amended version of this section also provides that the "credits authorized in subdivisions (b) and (c) shall only apply to inmates who are eligible after July 1, 2009." (*Id.*, at subd. (d).) This is an express provision of retroactivity by the Legislature, albeit one of limited application. By expressly providing limited retroactivity in section 2933.3, subdivision (d), the Legislature demonstrated that it could, if it wished, similarly provide that other changes to the presentence credit scheme, such as the amendment to section 4019, would apply retroactively. Its failure to do so gives rise to the inference that the Legislature did not intend the amendment to section 4019 to have retroactive effect.

This is consistent with the well-established rule of statutory construction that where a statute with reference to one subject contains a certain provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed. (*People v. Drake* (1977) 19 Cal.3d 749, 755, overruled by statute on other grounds as stated in *People v. Statum* (2002) 28 Cal.4th 682, 691.) Indeed, appellant's construction would evidently render this language mere surplusage. If all of the new credit provisions were intended to apply retroactively, then there would have been no need for the express retroactive language in section 2933.3. When interpreting statutes, "a construction that renders a word surplusage should be avoided." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799; see also *People v. Loeun* (1997) 17 Cal.4th 1, 9.)

If the lower court's analysis in this case were adopted, its reach would go beyond the amendment to section 4019. When interpreting statutes, reviewing courts "do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" (*People v. Pieters* (1991) 52 Cal.3d 894, 899, citing *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 814.) Because other provisions of SB 18 favorably changed the rate at which certain inmates may earn credit, presumably all of these provisions would also be considered "amendatory statutes lessening punishment" and would likewise apply retroactively. Thus, under section 2933.05 (pertaining to vocational programs), any prisoner with a non-final judgment who has completed one of these programs in the past would earn six weeks' additional credit. But, because of the limited express retroactive provision in section 2933.3, inmates with non-final judgments who completed the firefighter training before July 1, 2009 would not earn any additional credit.

Nothing suggests why the Legislature favored the completion of vocational programs over the completion of firefighter training so as to extend the vocation program credit to all prisoners with a non-final judgment, but limit retroactive application of the firefighting training credit to only those prisoners who completed the training after July 1, 2009. One of the fundamental canons of statutory construction requires a reviewing court to, "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246, citing *People v. King* (1993) 5 Cal.4th 59, 69.) If any prisoner is entitled to a windfall, presumably it would be those who train to risk their lives fighting fires on behalf of the state. Yet, the Legislature clearly and

unambiguously revealed it did not intend to provide such a retroactive windfall even to such otherwise worthy prisoners. It would be inconsistent to hold that the Legislature intended to apply such a windfall to persons who do not train to risk their lives on behalf of the state.

The lower court here also relied on a separate provision in SB 18 to conclude that the Legislature intended retroactive application. Specifically, the court looked to section 59 of the bill, which provides the California Department of Corrections and Rehabilitation (CDCR) with a "reasonable time" "to implement the changes made to this act regarding time credits," concluding that this language "arguably" supports retroactive application. (Slip opn. at p. 34.) The lower court acknowledged that CDCR will be required to recalculate credits under other provisions of SB 18 apart from section 4019, such as the amendment to section 2933.3 discussed above. (Slip opn. at p. 34.) Nevertheless, the court stated that the fact CDCR must perform some recalculation of credits under these other provisions "does not preclude" the possibility that section 59 evinces a legislative intent that the amendment to section 4019 be applied retroactively. The court itself betrayed a lack of confidence in the inference it sought to draw from section 59 of SB 18: "[W]hile section 59 of Senate Bill 18 is certainly not an ironclad statement of legislative intent, it does provide some insight into what the Legislature sought to accomplish." (Slip opn. at p. 34.) "Some insight" hardly qualifies as a "'clear and compelling implication'" that the Legislature intended the amendatory statute at issue to apply retroactively. (*People v. Alford*, *supra*, 42 Cal.4th at p. 753.) In respondent's view, the existence of section 59 in SB 18 says nothing about whether the Legislature intended the amendments to section 4019 regarding local credits to be retroactive given that CDCR necessarily will have to recalculate a number of state prison credits under another provision of SB 18.

Further, the lower court misconstrued a portion of the prospective application argument in a fundamental respect. According to the Third District below, "[a] prisoner sentenced shortly after the effective date of Senate Bill 18 would be granted the enhanced benefits notwithstanding the fact much of his or her presentence custody occurred before the effective date and therefore at a time when the additional incentives were not in place." (Slip opn. at p. 31.) This is not respondent's view. Rather, just as in *Stinnette*, a prisoner may earn the more generous credit rewards only for those days spent in custody after the new law went into effect:

> For prisoners such as respondent who were originally sentenced under the ISL, such credit is available for reduction of their sentence remaining after July 1, 1977. Thus, the entire sentence of a prisoner who began serving time on July 1, 1977, or thereafter may be reduced by one-third, while prisoners who began serving their sentence before that date may only earn one-third reductions of that part of their sentences still to be served after July 1, 1977.

(*In re Stinnette*, *supra*, 94 Cal.App.3d at pp. 804-805.) The same is true here: A prisoner sentenced on or after January 25, 2010, would receive credits calculated under the old formula for time spent in custody before January 25, and under the new formula for time on and after January 25. Otherwise, thousands of inmates would receive a windfall of conduct credits; they would receive a reward for behavior that was complete before the statute went into effect.

Finally, under the Court of Appeal's construction, certain inmates would be rewarded for trifling with the court process and interfering with the efficient administration of justice. Consider the following hypothetical involving prisoners A and B who committed the same crime on the same day. Prisoner A proceeded through the system in a timely manner: he went to trial in a reasonable time, was convicted, filed a timely appeal and

received a timely appellate judgment. As a result, prisoner A had a final judgment before the effective date of the amendment to section 4019. Meanwhile, prisoner B trifled with court proceedings. He delayed the trial unnecessarily and unreasonably; he purposefully interfered with the efficient procession of his case. He did eventually go to trial (after prisoner A) and was convicted; he stalled again during the appellate process, and as a result, prisoner B's judgment was not yet final as of the January 25, 2010. If the amendment to section 4019 is applied retroactively, prisoner A would receive no additional credits because he has a final judgment.[7] But, prisoner B, through his interference and trifling with the court proceedings, has managed to postpone his date of finality beyond the statute's effective date and thus, he would receive the windfall of additional credit. Such an outcome is inconsistent with the canon of statutory construction which requires reviewing courts to attempt to avoid an interpretation which would lead to inequitable or unjust results. (*People v. Clark* (1990) 50 Cal.3d 583, 605 ["In construing a statute we must avoid such arbitrary, unjust, and absurd results whenever the language of the statute is susceptible of a more

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[7] Appellant has not argued that the amendment to section 4019 should be applied retroactively to final judgments as well as non-final judgments. At the outset, this issue is not present in this case, because appellant has a non-final judgment. In addition, appellant is correct in not asserting such a broad retroactive application as *Estrada* itself suggested that retroactive application of amendatory statutes lessening punishment was restricted to non-final judgments by virtue of the constitutional separation of powers doctrine. (*In re Estrada*, *supra*, 63 Cal.2d at p. 745, emphasis added ["It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient *should apply to every case to which it constitutionally could apply*. The amendatory act imposing the lighter punishment *can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final*."].)

reasonable meaning."]; see also *People v. Cruz* (1996) 13 Cal.4th 764, 782 [holding that when interpreting statutes, courts should give "consideration . . . to the consequences that will flow from a particular interpretation"].)

Thus, it is not clear that the Legislature intended SB 18 be applied retroactively. In such circumstances, the rule of statutory construction embodied in Penal Code section 3 should be utilized. Statutes are presumed to operate prospectively, and there is nothing in the legislation itself, or its surrounding circumstances which compels the conclusion that the Legislature intended retroactive application here. In short, the presumption of prospective application has not been rebutted, and as such, this statute should be applied prospectively.

For all these reasons, respondent submits that the decision below was reached in error. The amendment to section 4019 is not an "amendatory statute lessening punishment." To apply it retroactively, defeats the purpose of the statute and results in a windfall to thousands of prisoners. By definition, increasing the incentives for good behavior can only affect the behavior that happens after the new incentives are made available. Accordingly, respondent respectfully requests this Court reverse the judgment of the Third District and find the amendment to section 4019 was intended to apply prospectively only.

C. Applying SB 18 Prospectively Does Not Violate Appellant's Equal Protection Rights

Respondent anticipates that appellant will argue that the prospective application of section 4019 violates his equal protection rights. Because appellant is not a member of a suspect class, nor does the change in the law affect a fundamental interest, and the law is rationally related to a legitimate government purpose, appellant will suffer no equal protection violation.

First, in *People v. Floyd* (2003) 31 Cal.4th 179, this Court noted that the defendant could point to no case which had "recognize[d] an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense." (*People v. Floyd, supra,* 31 Cal.4th at p. 189.) Indeed, "'[a] refusal to apply a statute retroactively does not violate the Fourteenth Amendment.'" (*Baker v. Superior Court* (1984) 35 Cal.3d 663, 668, quoting *People v. Aranda* (1965) 63 Cal.2d 518, 532.)

An equal protection claim is equally unavailing here. Because the amendment to section 4019, like the statute at issue in *Stinnette*, does not involve a "suspect classification" or a "fundamental interest", the "distinction drawn by the challenged statute [need only bear] some rational relationship to a conceivable legitimate state purpose." (*In re Stinnette, supra*, 94 Cal.App.3d at p. 805, citing *Serrano v. Priest* (1971) 5 Cal.3d 584, 597; and *McGinnis v. Royster* (1973) 410 U.S. 263, 270 [93 S.Ct. 1055, 35 L.Ed.2d 282, 288].) The *Stinnette* court held that, because the Legislature had the legitimate purpose of "motivating good conduct among prisoners so as to maintain discipline and minimize threats to prison security," equal protection was not violated where the distinction drawn amongst prisoners reasonably and rationally served to effectuate that purpose. Specifically, as noted above, the court found, "[r]eason dictates that it is impossible to influence behavior after it has occurred." (*Id.* at p. 806.) As such, affording conduct credits as of the effective date of the statute was rationally related to a legitimate state interest and no equal protection violation occurred. (*Ibid.*) The same is true here, because the enactment of the revised version of section 4019 was aimed, at least in part, at further encouraging good conduct, there is a rational reason which supports the Legislature's intent to apply the amendment prospectively.

A similar result was reached in *In re Strick* (1983) 148 Cal.App.3d 906, with respect to work credits awarded to prison inmates. In 1982, the California Legislature passed Assembly Bill 2954, which amended sections 2930, 2931, 2932, and 4019 of the Penal Code, and added sections 2933, 2934, and 2935 to the code. (*In re Strick, supra,* 148 Cal.App.3d at p. 909.) The *Strick* court found the "obvious" purpose of these legislative enactments was to, "affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison. Under the new statutory scheme, a prisoner will no longer receive credit only for good behavior; he must work." (*Id.* at p. 913.) Accordingly, the *Strick* court, relying on *Stinnette*, found the prospective application of these provisions was not an equal protection violation. Specifically, the court in *Strick* never applied rational basis because it concluded the appellant had not even met the first burden: demonstrating that he was similarly situated to other prisoners who did stand to receive the benefit of the new provisions. (*Id.* at p. 914.)

In re Kapperman (1974) 11 Cal.3d 542 (*Kapperman*) supports the same conclusion. *In Kapperman*, this Court held that an express prospective limitation on application of the statute creating presentence custody credits was a violation of equal protection because there was no legitimate purpose served by excluding those prisoners who had already been sentenced. (*Id.* at p. 544-545.) *Kapperman* likewise found a rational basis to be the appropriate standard for the equal protection issue, but concluded that with respect to *actual* custody credits, there was no rational reason to distinguish between those prisoners who had been sentenced before the effective date of the statute and those that had been sentenced after. (*Id.* at p. 545.) Based on the distinction between actual credits and conduct credits discussed above, the equal protection analysis here is different. Awarding conduct credits prospectively does effectuate a

legitimate public purpose, i.e. it creates an incentive for good behavior going forward. Thus, prospective application of the amendment to section 4019 is not violative of appellant's equal protection rights, and no constitutional violation would result.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: August 5, 2010

Respectfully submitted,

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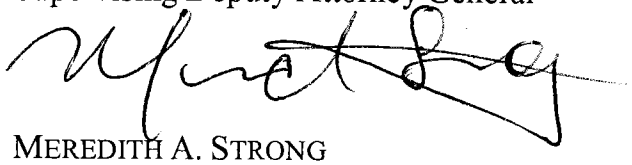

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 6,294 words.

Dated: August 5, 2010

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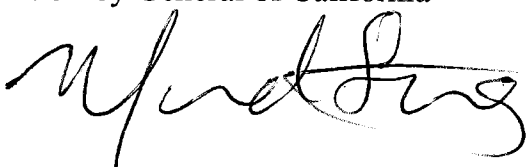

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Brown** No.: **S181963**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 5, 2010, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 5, 2010, at San Diego, California.

Olivia de la Cruz
Declarant

Olivia de la Cruz
Signature

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