IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA	)	No. S181963
Plaintiff and Respondent	)	
v.	)	
JAMES LEE BROWN III	)	
Defendant and Appellant	)	
	)	

DEFENDANT'S ANSWER BRIEF ON THE MERITS

On Review of a Decision of the Court of Appeal
Third Appellate District
No. C056510
Following Appeal from the Lassen County Superior Court
No. CR024002
The Honorable Stephen D. Bradbury, presiding.

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Issues Presented

Whether section 4019,[1] as amended in 2009 to increase presentence[2] conduct credits for certain offenders, applies retroactively to those offenders whose judgment was not final on the amendment's effective date?

Whether section 2933, subdivision (e), as amended in 2010 to increase presentence conduct credits for certain offenders, applies retroactively to offenders whose judgment was not final on the amendment's effective date?

Statement of the Case

James Lee Brown III (defendant) was charged by information with one count of selling or furnishing methamphetamine. (Health & Saf. Code, § 11379, subd. (a).) (CT 1)

On May 24, 2007, a jury convicted defendant of this offense. (CT 41)

On July 24, 2007, defendant was sentenced to a three-year prison term. (CT 78-79) The court awarded defendant 62 days of presentence custody credit and 30 days of presentence conduct credit. (RT 239)

Defendant appealed on August 6, 2007. (CT 82)

The Court of Appeal affirmed the judgment by unpublished opinion

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[1] Undesignated statutory references are to the Penal Code; undesignated rule references are to the California Rules of Court.

[2] For ease of reference, the term "presentence" is used to refer to a period of incarceration that occurs prior to sentencing, an order of probation, a judgment of imprisonment, or any other form of commitment to a custodial facility. (*People v. Dieck* (2009) 46 Cal.4th 934, 938, fn. 2 (*Dieck*).)

filed January 13, 2010.

Defendant timely filed a petition for rehearing on January 29, 2010, requesting the Court of Appeal to increase his conduct credits pursuant to an amendment to section 4019, which became effective January 25, 2010.

On February 3, 2010, the Court of Appeal issued an order to show cause regarding the amendment.

On February 16, 2010, the Court of Appeal granted the petition.

On March 16, 2010, the Court of Appeal issued a published opinion on rehearing, which affirmed the judgment, but modified it to increase defendant's presentence conduct credits to 62 days. (*People v. Brown*, No. C056510 (opn. filed Mar. 16, 2010, p. 35 (*Brown*).)

Respondent filed a petition for review on April 19, 2010.

On June 9, 2010, this court unanimously granted respondent's petition for review.

Statement of Facts

Defendant accepts the statement of facts in the appellate opinion. (*Brown, supra,* slip opn. at pp. 2-6.)

The 2009 Amendment of Section 4019[3]

Prior to the 2009 amendment of section 4019 by SB 18, section 4019

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[3] Unless otherwise indicated, references to "the 2009 amendment," "amended section 4019," and "section 4019 as amended" mean the version of section 4019 that took effect as a result of Senate Bill No. 18 (Stats. 2009-2010 3d Ex. Sess., ch. 28, § 50, p.__ (SB 18)), which went into effect on January 25, 2010.

References to "enhanced credits" are to the conduct credits that were increased by the 2009 amendment of former section 4019.

provided that for each six-day period of a prisoner's confinement, one day "shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp." (Form. § 4019, subd. (b); Stats.1982, ch. 1234, § 7, p. 4553.) The section also provided that for each six-day period of a prisoner's confinement, one day "shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp." (*Id.*, form. subd. (c).)[4] The statute specified "that if all days are earned under this section, the term of six days will be deemed to have been served for every four days spent in actual custody." (*Id.*, form. subd. (f).)[5]

The 2009 amendment increased each credit for eligible offenders[6]

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[4] The two types of credit are commonly referred to collectively as "conduct credit." (*Dieck, supra,* 46 Cal.4th at p. 938, fn. 3.)

The requirement of satisfactory performance of labor and compliance with reasonable rules and regulations will be referred to as "the behavioral standards of section 4019."

[5] For ease of reference, this credit formula will be referred to as "the old credit formula." The credit formula that took effect as a result of SB 18 will be referred to as "the new credit formula."

[6] The class of offenders who were eligible to receive the enhanced credits are referred to as the "eligible prisoners." A prisoner was disqualified from the list of eligible prisoners if he or she was required to register as a sex offender, was committed for a serious felony, or had suffered a prior conviction of a serious or violent felony. (Form. § 4019, subds. (b)(2) & (c)(2); SB 18, § 50.)

from one day to two (form. § 4019, subds. (b) & (c), SB 18, § 50), effectively doubling the number of conduct credits for eligible prisoners. As a result, amended subdivision (f) specified that, for eligible prisoners, "a term of four days will be deemed to have been served for every two days spent in actual custody, ..." (*Id.*, form. subd. (f).) The 2009 amendment made no change to the behavioral standards of section 4019.

The 2009 amendment also left unaltered the trial court's duty to calculate and award actual and conduct credits on the date it imposes sentence, and to include those credits in the abstract of judgment. (§ 2900.5, subds. (a) & (d); *People v. Buckhalter* (2001) 26 Cal.4th 20, 30 (*Buckhalter*); *People v. Sage* (1980) 26 Cal.3d 498, 508-509 (*Sage*).)

Section 4019 was again amended in 2010 (the "2010 amendment"). (Stats. 2010, ch. 426, § 2 (Senate Bill No. 76 (SB 76); Defendant's Second Request for Judicial Notice, dated November 8, 2010 (2 RJN), Exh. A, p. 3.) Enacted as an urgency measure, the amendment took effect on September 28, 2010. (2 RJN, Exh. A, p.1.) The amendment is discussed in more detail below. (See V., *post* at pp. 47-50.)

Summary of Argument

The principal issue presented for review is whether the 2009 amendment requires recalculation of conduct credits for individuals, such as defendant, who were sentenced prior to the statute's effective date. The issue turns on legislative intent. The Court of Appeal in the capital concluded "the Legislature intended that the amendment to Penal Code section 4019 be applied retroactively applied, at least as to those eligible defendants whose convictions were not final on the effective date." (*Brown, supra,* slip opn. at p. 35.) Respondent argues the Legislature

intended otherwise. The Court of Appeal's reasoning is more persuasive, and this court should affirm its judgment.

SB 18 did not include an explicit directive that amended section 4019 be applied retroactively. The inclusion of a retroactivity clause was unnecessary, however, since the Legislature's intent for retroactive application of the enhanced credits was otherwise manifested.

First, pursuant to previously-unquestioned precedents construing prior presentence conduct credit increases, the Legislature's omission of a prospectivity clause was a direct signal of its intent that amended section 4019 should apply to all cases to which it could apply, which would include, at a minimum, all cases not final on January 25, 2010.

Second, the 2009 amendment contains no language supporting respondent's theory that the enhanced credits do not commence to accrue until January 25, 2010.

Third, the 2009 amendment was intended to equalize presentence and postsentence conduct credit schemes and to respond to the fiscal emergency caused by the State's budget problems. Retroactive application of amended section 4019 is more responsive to these concerns than respondent's delayed accrual theory.

Fourth, section 59 of SB 18 further evinces the legislative intent for retroactivity. It imposes a duty on the California Department of Corrections and Rehabilitation (CDCR or Department) to implement within a reasonable time the credit changes of SB 18, which include the amendment to section 4019. Since CDCR routinely calculates and reviews credit determinations based on section 4019, section 59 conveys the Legislature's intent to apply the enhanced credits retroactively, in order to achieve an equalization of credits quickly and equitably, thereby expediting budget

savings and alleviating prison overcrowding. Section 59 resolves the equal protection issue that arises if amended section 4019 is applied prospectively. Section 59 also was intended to alleviate judicial administration concerns that would arise if the enhanced credits were limited to defendants whose judgments were not final on the statute's effective date.

Fifth, the 2010 amendment further equalizes the treatment of eligible prisoners, such as defendant, whose felony sentences are executed, by improving the conduct credit to custody ratio to one-for-one. The 2010 amendment reiterates the validity of section 59, and directs that the amendment be construed in accordance therewith. (SB 76, § 3, 2 RJN, Exh. A, p.4.) Besides confirming defendant's view of the 2009 amendment, the 2010 amendment provides a distinct basis for retroactive application of presentence conduct credits to defendant's case.

In sum, the court should hold defendant is entitled to the favorable credit changes set forth in the 2009 and 2010 amendments, and affirm the judgment of the Court of Appeal.

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ARGUMENT[7]

I.

The Tools of Statutory Analysis Require Courts to Ascertain Legislative Intent First and to Resort to Section 3 Last

A. The Principles of Statutory Construction

Respondent asserts "an analysis of whether or not a statute or an amendment to a statute is to apply retroactively or prospectively begins with Penal Code section 3."[8] (Respondent's Opening Brief (ROB) 5) Defendant disagrees.

Section 3 is not the "starting point" of analysis. It is the "ending point." "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 (*Estrada*), italics added; accord, *People v. Alford* (2007) 42 Cal.4th 749, 753 (*Alford*).)[9]

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[7] Should respondent's reply brief raise an objection to any argument herein on the ground that it was not raised in the Court of Appeal, defendant would respond that this court has allowed parties to advance new theories when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy. (*In re Jenkins* __ Cal.4th __ (2010 WL 4238825), opn. filed Oct. 28, 2010, slip opn. at p. 8.)

[8] Section 3 provides: "No part of [the Penal Code] is retroactive, unless expressly so declared."

[9] Respondent cites *Alford, supra,* and *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208, for the proposition (per *Alford*) that a "new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise" (ROB 10) or (per *Evangelatos*) that section 3 "reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted (continued...)

The "pertinent factors" are settled: "To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning. [Citation.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" *(People v. Flores* (2003) 30 Cal.4th 1059, 1063.)

Whether the Legislature intends a statute to operate retroactively is a question of law that this court decides independently. (*In re Chavez* (2004) 114 Cal.App.4th 989, 994.) In conducting that inquiry, this court recognizes that the Legislature "manifestly" may have different intents with

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[9](...continued)
'unless express language or clear and unavoidable implication negatives the presumption.'" (ROB 5)

Evangelatos considered Proposition 51, the initiative measure revising joint and several liability in tort actions, and is plainly inapposite to the issue of what presumption, if any, should apply in the case of an ameliorative amendment to a penal statute.

Alford does not require a clear an compelling implication of retroactivity in all situations where section 3 arguably applies, as respondent suggests. *Alford* considered whether retroactive application of a court security fee was an *ex post facto* law. (*Id.* at pp. 755-759.) In the case of an amendment *mitigating* punishment, as here, no *ex post facto* concern is at issue. (*Sekt v. Justice's Court* (1945) 26 Cal.2d 297, 305.) "Where the statute passed after the offense is committed but before final judgment mitigates rather than increases the punishment . . . the problem is not complicated by the prohibition against *ex post facto* laws, . . . [and] the cases quite uniformly hold that the offender may be punished under the new law, ..." (*Ibid;* accord, *Estrada, supra,* 63 Cal.2d at p. 747.)

respect to specific amendments within a single bill. (*People v. Francis* (1969) 71 Cal.2d 66, 78.) The relevant intent is whether the Legislature intended the amendment at issue to apply retroactively. (*People v. Nasalga* (1996) 12 Cal.4th 784, 795-796 (*Nasalga*).)

As will be shown, it is unnecessary to utilize section 3. The provision does, however, play a role in understanding the Legislature's intent with respect to the 2009 amendment to section 4019. Therefore, a review of the judicial explication of the section is warranted.

B. The *Estrada* Rule and the Legislative Response

1. The Estrada Rule

In *Estrada, supra,* this court explained that "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*Estrada, supra,* 63 Cal.2d at p. 745.)[10]

Since application of the amended statute raises no *ex post facto* concerns (the punishment being lighter), the defendant "can and should be punished under the new law," absent a "saving clause," which the court indicated was a legislative expression "that the old law should continue to

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[10] In 1996, respondent asked this court to reconsider *Estrada* in light of the subsequent passage of the Determinate Sentencing Law (DSL). This court did not consider the DSL's shift in penological theory sufficient to reconsider *Estrada* (*Nasalga, supra,* 12 Cal.4th at p. 792, fn. 7), whose principles by that time had repeatedly been relied upon by the Legislature and the courts. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1054-1055 (*Pedro T.*), dis. opn. Arabian J., cited as including "comprehensive list of cases that have applied *Estrada*," in *Nasalga, supra,* 12 Cal.4th at p. 793, fn. 8.)

operate as to past acts, ..." (*Estrada, supra,* 63 Cal.2d at p. 747.)[11] To effectuate legislative intent for retroactivity, *Estrada* held "the amendatory statute should operate in all cases not reduced to final judgment at the time of its passage." (*Ibid.*)

2. Subsequent Judicial Clarification of Estrada

In *Nasalga*, the court reaffirmed that "*Estrada* stands for the proposition that, 'where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.' [Citation.]" (*Nasalga, supra,* 12 Cal.4th at p. 792.) The court added: "The rule in *Estrada,* of course, is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent. In *Pedro T., supra,* we determined the absence of an express saving clause, emphasized in *Estrada* . . . , does not end 'our quest for legislative intent.' 'Rather, what is required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.' [Citation.]" (*Id.,* at p. 793.)

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[11] *Estrada* added that "if the saving clause expressly provided that the old law should continue to operate as to past acts, so far as punishment is concerned that would be the end of the matter." (63 Cal.2d at p. 747.) Technically, this statement is not wholly accurate. In *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*), this court held a prospective restriction on presentence custody credits based on the defendant's delivery date to the custody of prison officials violated the federal and state equal protections clauses. As will be shown, however, the statement communicated to the Legislature its authority to make amelioratory amendments prospective, and the Legislature has exercised its authority on numerous occasions. (*Pedro T., supra,* 8 Cal.4th at p. 1054, fn. 4, dis. opn. Arabian, J. [cases collected].)

C. The Legislature Has Consistently Used Unmistakable Language to Express Its Intent When that Intent Was to Make a Beneficial Credit Change Prospective

Although *Nasalga* clarifies that the absence of an explicit saving clause – that is, a provision stating "the old law should continue to operate as to past acts" (*Estrada, supra,* 63 Cal.2d at p. 747) – is not necessarily determinative, in the 45 years since *Estrada* was decided, the Legislature has consistently included unmistakable language when it desired to limit beneficial credit changes to future events.

These instances include:

(1) the 1971 enactment of section 2900.5, which limited the availability of its new presentence custody credits to prisoners delivered to the CDCR's predecessor on or after March 4, 1972;[12]

(2) the 1976 enactment of the DSL, which adopted a new good behavior and participation conduct credit scheme, but limited the credits to conduct occurring on or after July 1, 1977;[13]

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[12] The Legislature, acting in accordance with the then-recent *Estrada* decision, included an explicit prospectivity clause ("the delivery clause"), which stated: "This section shall be applicable as to those prisoners who are delivered into the custody of the Director of Corrections on or after the effective date of this section (i.e., March 4, 1972.)" (*Kapperman, supra,* 11 Cal.3d at p. 544, fn. 1.)

[13] The DSL added section 1170.2, subdivision (d), which provided: "In the case of any prisoner who committed a felony prior to July 1, 1977, who would have been sentenced under Section 1170 if the felony was committed on or after July 1, 1977, the good behavior and participation provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply from July 1, 1977, and thereafter." (*In re Stinnette* (1979) 94

(continued...)

(3) the 1981 enactment of the successor to the Mentally Disordered Sex Offender (MDSO) law, which established a new conduct credit scheme that was explicitly inapplicable to any person committed under the MDSO prior to January 1, 1982;[14]

and (4) the 1982 enactment of the worktime credit system, which was inapplicable to work performed prior to January 1, 1983.[15]

---

[13](...continued)
Cal.App.3d 800, 805, fn. 3 (*Stinnette*).)

[14] Section 3 of the repealing statute stated: "'Nothing in this act shall be construed to affect any person under commitment [as an MDSO] . . . prior to the effective date of this act.'" (*Baker v. Superior Court* (1984) 35 Cal.3d 663, 666, italics deleted.) With respect to this provision, this court wrote: "Nothing could be clearer than the first sentence of section 3 as to the Legislature's intention to exclude from the repeal of the MDSO laws those persons who had been committed prior to the effective date of the new law." (*Id.*, at p. 667, fn. omitted.)

[15] The 1982 legislation specified that the prison good behavior and participation credit system adopted as part of the DSL in 1976 "shall not apply to any person whose crime was committed on or after January 1, 1983." (§ 2931, subd. (d).) Section 2934 permitted a prisoner subject to the DSL "good behavior and participation" credit scheme to waive the right to receive time credits as provided in section 2931 and be subject to the worktime credit provisions of section 2933. The waiver would be made "[u]nder rules prescribed by the Director of Corrections," and the a prisoner exercising the waiver would "retain only that portion of good behavior and participation credits, . . . , attributable to the portion of the sentence served by the prisoner prior to the effective date of the waiver." (§ 2934, Stats. 1982, ch. 1234, § 5, p. 4552.) The rules were adopted effective January 1, 1983. (*In re Bender* (1983) 149 Cal.App.3d 380, 384.) Consequently, "it is apparent that credits can be earned under section 2933 after January 1, 1983 only; persons delivered to the Department before January 1, 1983 may continue to accrue credits under section 2931 or they may opt to become eligible for section 2933 credits effective January 1,
(continued...)

With the exception of the 1971 amendment to section 2900.5, which was invalidated on equal protection grounds in *Kapperman, supra,* 11 Cal.3d at pp. 544-545, courts have upheld these prospectivity provisions on the uniform ground that the new or revised behavioral standards justified limitation of the credits to future conduct. (*Stinnette*, supra, 94 Cal.App.3d at p. 803 [DSL conduct credits]; *People v. Brunner* (1983) 145 Cal.App.3d 761, 764 (*Brunner*) [post-MDSO conduct credits]; *In re Strick* (1983) 148 Cal.App.3d 906, 913 (*Strick*) [worktime credits].)

D. Respondent's Reliance on *Stinnette, Brunner* and *Strick* Is Misplaced

Before turning to the cases discussing legislative intent where, as here, an amendment increasing credits *omits* a prospectivity or saving clause, it is worth discussing respondent's reliance on *Stinnette* (ROB 8, 11), *Brunner* (ROB 9) and *Strick* (ROB 22) to support its theory that the Legislature did not intend the new credit formula to apply to conduct occurring prior to January 25, 2010. As the preceding section shows, the three cases considered statutes that (1) modified the behavioral standards for obtaining the credits and (2) included explicit language directing prospective application. In each case, the court found the new behavioral standard supported the Legislature's decision to limit the the credits to future conduct. Unlike the amendments at issue in *Stinnette, Brunner,* and *Strick,* the 2009 amendment to section 4019 (1) makes no change to the standards of behavior needed to obtain the enhanced credits and (2)

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[15](...continued)
1983. (§ 2934.)" (*Id.*, at p. 384, fn. 6.)

includes no language directing prospective application. The Legislature omitted a prospective limitation because the reason for such a limitation – new or heightened behavioral standards – is not present in the 2009 amendment, which did not alter the behavioral standards of section 4019. The 2009 amendment simply increased the number of credits a prisoner could receive for the same conduct.[16] *Stinnette, Brunner,* and *Strick* do not supply the prospective limitation on credits that respondent reads into amended section 4019.

E. Prior to the 2009 Amendment, the Legislature Has Consistently Expressed Its Intent that Beneficial Credit Changes Be Retroactively Applied through the Mere Omission of a Prospectivity Clause, rather than Inclusion of an Explicit Retroactivity Clause

In contrast to the preceding examples of explicitly prospective beneficial credit changes, the Legislature has consistently deemed the *omission* of a prospectivity or saving provision sufficient to convey its intent for retroactive application of favorable credit changes, in accordance with *Estrada*.

For instance, in 1976, several years after *Kapperman*, the Legislature amended section 2900.5 by deleting the delivery clause, which had purported to limit the new presentence credits to prisoners delivered into prison custody on or after March 4, 1972. (Stats. 1976, ch. 1045, § 2 (the 1976 amendment).)

A staff report of the Senate Judiciary Committee explained the

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[16] Additionally, as explained below (IV. C., *post* at pp. 33-38), the 2009 amendment was not directed at modifying prisoner behavior through increased incentives. It was enacted to achieve parity of credits between

reason for the deletion: "'The bill would repeal a provision making credit for time served applicable prospectively only. This would codify a portion of *In re Kapperman* (1974) 11 Cal.3d 542 (114 Cal.Rptr. 97, 522 P.2d 657) which invalidates this provision.' (Sen. Com. on Judiciary (1975-1976 Reg. Sess.) Staff Analysis of AB 3653, p.5.)" (*People v. Hunter* (1977) 68 Cal.App.3d 389, 393, fn. 1 (*Hunter*).)

With respect to the deletion of the delivery clause, the court wrote: "The omission of the prospective limitation is significant. It is indicative of a legislative awareness of *Kapperman* which had, prior to 1976, invalidated such a provision in the 1971 version and *an intention not to create a similar problem* by the 1976 amendment. That intention is expressed in the staff report of the Senate Judiciary Committee in an analysis of the bill which became section 2900.5. Thus, the legislative history of the amendment with which we are here concerned argues for retroactive application, at least in cases which are not final." (*Hunter, supra,* 68 Cal.App.3d at p. 393, italics added.)

Hunter held the Legislature's deletion (and therefore omission) of a prospectivity clause in the 1976 amendment of section 2900.5 expressed its intent that the amendment's extension of custody credits to probationary sentences should be applied retroactively to defendants sentenced prior to the effective date of the increase. (*Hunter, supra,* 68 Cal.App.3d at p. 393.)

Less than two months later, a different division of the Second Appellate District agreed: "We are in accord with the conclusion of the court in *People v. Hunter* . . . that 'the statutory history of the amendment to section 2900.5 and the rule of construction of sentencing statutes declared by our Supreme Court in *In re Estrada* . . . require that the 1976 amendment to section 2900.5 be construed as effective to sentences imposed prior to the

effective date by judgments not yet final on January 1, 1977.'" (*People v. Sandoval* (1977) 70 Cal.App.3d 73, 87 (*Sandoval*).)

Without giving any indication *Hunter* or *Sandoval* were wrongly decided, the following year the Legislature amended section 2900.5, subdivision (a), as an urgency measure effective June 28, 1978, to add that "days credited to the period of confinement pursuant to section 4019" shall be credited upon a defendant's term of imprisonment. (Stats.1978, ch. 304, § 1, p. 632 (the 1978 amendment).)

The 1978 amendment was construed in *People v. Doganiere* (1978) 86 Cal.App.3d 237 (*Doganiere*). The court noted the 1978 amendment, like the 1976 amendment, contained no explicit statement of retroactive or prospective intent, and that *Hunter* had applied *Estrada* to the 1976 amendment. (*Doganiere, supra,* 86 Cal.App.3d at pp. 238-239.) Respondent proposed *Hunter* was distinguishable because the 1978 amendment concerned *conduct* credits. In respondent's view, conduct credits were designed to control *future* behavior and thus did not qualify as a reduction of punishment under *Estrada*. (*Id.* at p. 239.) The Court of Appeal rejected this contention, reasoning that"[u]nder *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe." (*Id.* at p. 240.)[17]

In the same year it passed the 1978 amendment, the Legislature amended section 4019 to increase both work and behavior conduct credits

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[17] The Legislature amended section 2900.5 in 1991 (Stats. 1991, ch. 437, §§ 9-10), 1994 (Stats. 1994, ch. 770, §§ 6-7), 1996 (Stats. 1996, ch. 1077, §§ 28, 29) and 1998. (Stats. 1998, ch. 338, § 6.) None of these amendments express any disagreement with *Hunter, Sandoval,* or *Doganiere.*

from one day for each one-fifth of a month in custody to one day for each six days in custody. (Compare Stats. 1976, ch. 286, § 4, p. 595, with Stats. 1978, ch. 1218, § 1, p. 3941.) The measure included no prospectivity, saving or urgency clause. Accordingly, it took effect on January 1, 1979.

The statute (the 1979 credit increase) was construed later that year in *People v. Smith* (1979) 98 Cal.App.3d 793, 798-799 (*Smith*), where the defendant sought retroactive presentence conduct credit based on the 1979 credit increase, as well as the 1978 amendment *Doganiere* had considered. Rejecting arguments quite similar to those respondent asserts herein, the Court of Appeal wrote:

> [T]he Attorney General contends, as to section 4019, that the decision of *Doganiere* is wrongly decided since it is based upon what the Attorney General conceives to be the erroneous rationale of *Estrada*. . . . The Attorney General would rely upon the legislative policy enunciated in Penal Code section 3, which provides that no part of the Penal Code is retroactive unless expressly so declared. He also relies upon the general rule that the Legislature should make its intention clear that a statute should have retroactive effect before a court should find it to be so. [Citation.] He points out the statutes here before us do not have any clear indication of legislative intent as to retroactivity. [¶] The Attorney General's arguments are put to rest by the decision in *Doganiere* which, under the compulsion of *Estrada,* applies Penal Code sections 2900.5 and 4019 to a probationer situation which from the standpoint of retroactivity is legally indistinguishable from this case.

(*Smith, supra,* 98 Cal.App.3d at pp. 798-799.)

The following year, *Sage*, *supra,* 26 Cal.3d 498, considered a different aspect of section 4019. At the time, the section awarded full presentence conduct credits to misdemeanants but not felons who were

confined in jail awaiting trial. (*Id.* at p. 504.) As a result, felons who were unable to post bail and sentenced to prison ultimately served more time than felons who were able to post bail and later earn section 2931 credits on their entire sentence. (*Id.* at pp. 507-508.) The court concluded no rational basis existed for the disparate treatment and upheld Sage's equal protection challenge. The court also determined its ruling should be applied *retroactively* (*id.* at p. 509, fn. 7), implicitly rejecting the dissent's contention that "[t]he purpose of conduct credit" – "to foster good behavior and satisfactory work performance " – "will not be served by granting such credit retroactively." (*Id.* at p. 510, conc. & dis. opn. Clark, J.)

Sage was codified in a 1982 amendment of section 4019. (Stats. 1982, ch. 1234, § 7, p. 4553 (the 1982 amendment); *Buckhalter, supra,* 26 Cal.4th at p. 36 [*Sage* codified].) The 1982 amendment added subdivision (a)(4) to section 4019, to specify the section applies "[w]hen a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp following arrest and prior to imposition of sentence for a felony conviction." The Legislature also added subdivision (f), which stated: "It is the intent of the Legislature that if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody." (Stats. 1982, ch. 1234, § 7, p. 4553.)

It is a "fundamental rule of statutory construction that '[t]he Legislature . . . is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof.' [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1096.) Thus, in crafting the 1982 amendment, the Legislature was presumably aware that *Hunter, Sandoval, Doganiere* and *Smith* – all

decided in the preceding five years – had inferred an intent for retroactivity from the *omission* of prospectivity language in amendments to sections 2900.5 and 4019. In reviewing those decisions, the Legislature also was aware of the various reasons why respondent believed they were incorrectly decided. The Legislature also presumably was aware that the then-recent *Stinnette* decision had construed the *inclusion* of a prospectivity clause to denote an intent for prospective application of credits, with respect to the new conduct scheme of the DSL. (*Stinnette, supra,* 94 Cal.App.3d at p. 803.)

The 1982 amendment of section 4019 made no changes to the behavioral standards in section 4019, and added no prospectivity or saving clause. By contrast, in the same measure (Stats. 1982, ch. 1234, § 5, p. 4552), the Legislature adopted the explicitly prospective worktime credit system. (See fn. 15, *ante* at p. 12.) The Legislature's inclusion of language directing prospective application of a new credit scheme in the same legislation omitting such a provision conveys it had a different intent with respect to the amendment to section 4019. (*People v. Fairbanks* (2009) 46 Cal.4th 56, 61-62 (*Fairbanks*).) It conveys the explicitly prospective worktime credit system should be construed as in *Stinnette*, and that the amendment to section 4019 should be construed as in *Hunter, Sandoval, Doganiere*, and *Smith.*

When "'"a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it." [Citations.] "There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts."' [Citation.]" (*People v.*

Meloney (2003) 30 Cal.4th 1145, 1161 (*Meloney*).) It particularly applies where the subsequent legislation amends the precise portion of the statute at issue. (*People v. Escobar* (1992) 3 Cal.4th 740, 750-751 (*Escobar*).)

These rules apply not only to the 1982 amendment, but the 2009 amendment as well. As in 1982, the 2009 amendment gave no indication the Legislature considered *Hunter, Sandoval, Doganiere* or *Smith* to be wrongly decided, or that intended its omission of a prospectivity or saving clause in section 4019 to be interpreted any differently than it had in those cases.

As in 1982, the 2009 amendment included a prospectivity clause with respect to another provision, namely, section 2933.05. The prospectivity clause indicates, obviously, an intent for prospectivity. The absence of such a clause in section 4019 denotes a different intent.[18] That different intent would be that the omission be construed in a accordance with *Hunter, Sandoval, Doganiere* and *Smith,* cases which had stood unchallenged for more than a generation when the 2009 amendment was enacted. This court should decline respondent's attempt to revisit the validity of these decisions, and uphold the Legislature's justifiable and valid intention to rely on those decisions in crafting the 2009 amendment.

II.

Respondent's Construction of Amended Section 4019 Is Insupportable

Section 4019 governs the award of presentence conduct credits for individuals confined in or committed to a county or city jail, industrial farm

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[18] Respondent's assertion that analysis of amended section 4019 is impacted by the so-called limited retroactivity clause in section 2933.3 is discussed below. (IV. D., *post* at pp. 38-40.)

or road camp in specified circumstances.[19]

Section 2900.5 imposes upon a trial court the duty at sentencing to calculate and credit upon a defendant's "term of imprisonment" all days of actual custody and "days credited to the period of confinement pursuant to Section 4019." (§ 2900.5, subds. (a) & (c).)[20]

The 2009 amendment left unaltered the trial court's duty to calculate and award custody and conduct credits on the date it imposes sentence, and to include those credits in the abstract of judgment. (§ 2900.5, subds. (a) & (d); *Buckhalter*, supra, 26 Cal.4th at p. 30; *Sage, supra,* 26 Cal.3d at pp. 508-509.) "At the time of sentencing, credit for time served, including conduct credit, is calculated by the court. The 'total number of days to be credited' is memorialized in the abstract of judgment (§ 2900.5, subd. (d))

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[19] Section 4019 applies to custody in four situations: (1) from the date of arrest to sentencing under a judgment of imprisonment or a fine and imprisonment (i.e., a misdemeanor sentence) (§ 4019, subd. (a)(1); *Sage, supra,* 26 Cal.3d at p. 504); (2) as a condition of probation after a suspended imposition or execution of sentence (§ 4019, subd. (a)(2)), (3) for a definite period of time for contempt (*id.,* subd. (a)(3)), and (4) following arrest and prior to imposition of sentence for a felony conviction. (*Id.*, subd. (a)(4).)

[20] Subdivision (a) of section 2900.5 provides in part: "In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, . . . , all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment, ..."

Subdivision (d) provides: "It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213."

and 'shall be credited upon [the defendant's] term of imprisonment . . . .' (§ 2900.5, subd. (a).) The credit 'in effect, becomes part of the sentence.'" (*People v. Duff* (2010) 50 Cal.4th 787, 793 (*Duff*), quoting *In re Marquez* (2003) 30 Cal.4th 14, 21.)[21]

Amended section 4019, when read in conjunction with section 2900.5, is not limited to custody served on or after January 25, 2010. It applies to all periods of custody, whenever served. As of January 25, 2010, these sections required a deduction from each two-day increment of an eligible prisoner's confinement one day for compliance with custodial rules and regulations and one day for satisfactory completion of assigned labor.

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[21] The pertinent rules of court are to the same effect. Rule 8.310 states: "At the time of sentencing, the court must cause to be recorded on the judgment or commitment the total time in custody to be credited on the sentence under Penal Code sections 2900.5, 2933.1(c), and 2933.2(c). On referral of the defendant to the probation officer for an investigation and report under Penal Code section 1203(b) or 1203(g), or on setting a date for sentencing in the absence of a referral, the court must direct the sheriff, probation officer, or other appropriate person to report to the court and notify the defendant or defense counsel and prosecuting attorney within a reasonable time before the date set for sentencing as to the number of days that defendant has been in custody and for which he or she may be entitled to credit. Any challenges to the report must be heard at the time of sentencing."

Rule 4.411.5(a) states: "A probation officer's presentence investigation report in a felony case must include at least the following: . . . [¶] . . . [¶] (10) Detailed information on presentence time spent by the defendant in custody, including the beginning and ending dates of the period or periods of custody; the existence of any other sentences imposed on the defendant during the period of custody; the amount of good behavior, work, or participation credit to which the defendant is entitled; and whether the sheriff or other officer holding custody, the prosecution, or the defense wishes that a hearing be held for the purposes of denying good behavior, work, or participation credit. . . ."

(Form § 4019, subds. (b)(1) & (c)(1), SB 18, § 50.)

The Court of Appeal concluded as much, when it noted that "the People's argument overlooks the fact that amended section 4019, if applied prospectively, would provide additional credits for past behavior." (*Brown, supra,* slip opn. at p. 31.) The court explained the ramifications of prospective-only application thus: "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." (*Ibid.*)

Respondent argues the Court of Appeal "misconstrued a portion of the prospective application argument in a fundamental respect." (ROB 18) In its view, "[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 or after January 25."[22] (ROB 18)

This approach to credit calculations on or after January 25 suffers from a fatal infirmity: it is unsupported by the words of the statute.

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[22] Respondent's proposed construction of amended section 4019 would appear to be responsive to the insurmountable equal protection problem that arises if the benefits of amended section 4019 are limited to defendants sentenced on or after January 25, 2010. While its delayed accrual method solves the equal protection problem, and thus satisfies the maxim that statutes are to be construed to avoid unconstitutional results, it overlooks that it is unsupported by the actual language of section 2900.5 and 4019, thereby violating the paramount rule of construction that a statute first should be construed in accordance with its words. (*People v. Birkett* (1999) 21 Cal.4th 226, 231 ["In ascertaining the Legislature's intent, we turn first to the language of the statute, giving the words their ordinary meaning."].)

Amended section 4019 does not distinguish between conduct credits arising from custody served before or after its effective date of January 25, 2010. It includes no provision authorizing a court to calculate conduct credit using the old credit formula for conduct prior to January 25, 2010, and the new credit formula for conduct occurring on or after that date. At a credits hearing held on or after January 25, 2010, the court is required to calculate credits using the new formula, without exception. (§ 2900.5, subds. (a) & (d).)

The only authority cited to support the view that amended section 4019 authorizes use of the old credit formula to calculate credits accrued prior to January 25, 2010, is *Stinnette, supra,* which upheld the validity of an explicit prospectivity provision in the then-new DSL, which provided it would apply to conduct on or after July 1, 1977. (See fn. 13, *ante* at p. 11.) The 2009 amendment of section 4019 does not contain a prospective limitation on the enhanced credits. *Stinnette* does not supply the explicit prospectivity clause the Legislature here omitted. If anything, a comparison of amended section 4019 to the statute at issue in *Stinnette* confirms that the omission of an explicit prospectivity clause in the 2009 amendment signaled the Legislature had an intent *other* than to make the statute apply as though the *omitted* provision were *included.* (*Fairbanks, supra,* 46 Cal.4th at pp. 61-62.)

It is likely respondent will attempt to buttress its view of amended section 4019 with a new argument in its reply brief. Defendant cannot anticipate any such argument with certainty, but it is possible respondent might argue subdivision (f) – which states the Legislature's intent "that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody" – conveys an

intent that credits are to be awarded according to the credit formula in place on the day the credit is earned. This inference is unreasonable, however. As noted above, subdivision (f) was added in 1982 as part of the codification of *Sage* – which was expressly retroactive. (See I E, *ante.* at pp. 17-18.) It would be unreasonable to infer the addition of subdivision (f) was intended to convey precisely the opposite intent, to wit, that a future beneficial credit change would be prospective only. Subdivision (f) simply "clarifies that conduct credit, if earned, is to be awarded based upon four days of confinement, not six days . . . ." (*Dieck, supra,* 46 Cal.4th at p. 943.)

It is possible respondent will argue former subdivisions (b)(1) and (c)(1) (SB 18 § 50) – which state that one day shall be deducted for each four day period of confinement – also convey an intent that credits are to be awarded according to the credit formula in place on the day the credit is earned. While subdivisions (b)(1) and (c)(1) "explain how conduct credits may be earned and at what rate" (*Dieck, supra,* 46 Cal.4th at p. 943), the provisions do nothing to preclude application of the *Estrada* rule to favorable rate increases, as *Doganiere* and *Smith* held. Aside from changing the number of days to be credited, the 1982 and 2009 amendments did not change the statutory language stating that the credit "shall be deducted" for the applicable "period of confinement." (Stats. 1982, ch. 1234, § 5, p. 4552; SB 18, § 5.) Respondent has failed to overcome the strong presumption that the Legislature adopted the *Doganiere* and *Smith* holdings that the omission of a prospectivity or saving clause in section 4019 would be deemed to express an intent for retroactive application of a favorable credit increase. (*Meloney*, supra, 30 Cal.4th at p. 1161; *Escobar, supra,* 3 Cal.4th at pp. 750-751.)

III.

Amended Section 4019 Is a Valid Retrospective Law

Amended section 4019, as implemented by section 2900.5, is a valid retrospective (or retroactive) law as to conduct credits *arising from custody occurring prior to January 25, 2010.* "[A] retroactive or retrospective law '"is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute."' [Citations.]" (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839.) To be retrospective, a law "must apply to events occurring before its enactment, ..." (*Weaver v. Graham* (1981) 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17.) The effective date of the statute is not determinative. (*Id.*, 450 U.S. at p. 31.) "The critical question is whether the law changes the legal consequences of acts completed before its effective date." (*Ibid.*) A statute decreasing conduct credits after the date a crime is committed "substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.' [Citation.] Therefore, it is a retrospective law which can be constitutionally applied to petitioner only if it is not to his detriment. [Citation.]" (*Id.*, 450 U.S. at p. 33; *Lynce v. Mathis* (1997) 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 [statute decreasing credits "clearly retrospective"] (*Lynce*).)

By parity of reasoning, a statute which *increases* conduct credits based on conduct occurring before the statute's effective date is necessarily retrospective as well. This is entirely permissible. Retrospective penal or criminal laws are *prohibited* only where they are *ex post facto.*[23] By

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[23] An *ex post facto* law is one that (1) is retrospective and (2) alters the definition of criminal conduct or increases the penalty by which a crime is (continued...)

contrast, retrospective laws that *benefit* a defendant are exempt from the prohibition.

This was explained in *Calder v. Bull* (1798) 3 U.S. 386, 391, 3 Dall. 386, 1 L.Ed. 648, which was cited for the point in *Estrada, supra,* 63 Cal.2d at p. 748. "There are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. . . . Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful, and before committed, and the like; is retrospective. But such laws may be proper or necessary, as the case may be." (*Calder v. Bull, supra,* 3 U.S. at p. 391.)

As the following sections demonstrate, the Legislature's intent to enact a valid retrospective law is confirmed by the legislative history of the 2009 amendment. The legislative history also further undermines respondent's interpretation of the measure.

IV.

The Legislative History of Amended Section 4019 Confirms the Intent that the Enhanced Credits Be Retroactively Applied

As explained more fully in defendant's Request for Judicial Notice filed August 13, 2010 (1 RJN), SB 18 was based in part on two other bills

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[23](...continued)
punishable. (*California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 504-506. esp. fn. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588.)

introduced during the 2009-2010 legislative session.[24] One of those bills was Assembly Bill No. 14 (AB 14). (1 RJN, Exh. 1) Although AB 14 did not pass (1 RJN, Exh. 2, p. 1), AB 14's proposed amendment of section 4019 was adopted verbatim in SB 18. (Compare SB 18, § 50, with AB 14, § 318 (1 RJN, Exh. 3).)

The third reading analyses prepared for the Senate and Assembly floor votes on AB 14 explain the purpose of the amendment, and summarize the changes to credit earning statutes as follows:

> This bill makes the following changes:
>
> 1. Property Crime Thresholds . . . .
>
> 2. Inmate Credit Reform. Establishes: (a) *consistent day-for-day credit earning status for offenders currently eligible for earning day-for-day credit in both jail and prison*; . . . [and] (d) *provides for day to day credits for inmates serving jail terms.* Results in $42 million in savings.
>
> [¶] . . . .

(1 RJN Exhs. 5 & 6, pp. 1-2, italics added.)

These bill analyses identified two reasons for the increase in presentence conduct credits: the first is consistency of conduct credits between offenders in prison and offenders in jail. The second is financial: a

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[24] Before relying on the presumption of section 3, this court should review applicable legislative history for indicia of legislative intent. The analyses quoted below are properly considered by this court in that effort. (*People v. Benson* (1998) 18 Cal.4th 24, 34, fn. 6 ["In determining legislative intent, we may consider bill analyses prepared by the staff of legislative committees."]; *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 948 ["In determining legislative intent, we may also consider a senate floor analysis."].)

savings of $42 million. There is no mention of any intent to link the credit increase to better prisoner conduct, contrary to respondent's suppositions. (ROB 2, 7-9, 11-12, 18)

A. The Intent to Equalize Inconsistent Credits Implies the Old Credit Formula Was Too Severe, and that the *Estrada* Rule Should Apply

Increasing presentence conduct credits to make them *consistent* with prison conduct credits implies the prior method of calculating conduct credits was *inconsistent*.[25] From this, one may infer the Legislature's

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[25] This conclusion finds additional support in Senate committee and floor analyses of Senate Bill No. 1487 (2010 Reg. Sess. (SB 1487)), whose provisions were transferred verbatim to SB 76, the urgency legislation that amended sections 2933 and 4019 in 2010. (Compare 2 RJN, Exhs. A & B.) With respect to the credit increases for jail inmates enacted in SB 18, the third reading Senate Floor Analysis of SB 1487 explains: "For many years, county jail inmates have been able to earn enough credits to reduce their jail sentence by up to one-third. *SB3X 18 increased these jail credits to make them consistent with the credit rules for state prison inmates* and, except for serious and violent offenders, increased these credits to up to *one-half the jail inmate's sentence*. [¶] While the credit changes for county jail inmates included in SB3X 18 *were enacted for sound reasons of parity and consistency,* it has been brought to our attention that these changes will have the unintended effect of undercutting the community corrections effort launched by SB 678." (1 RJN, Exh. 7, pp. 2-3.) The Assembly committee analysis is to the same effect. (1 RJN, Exh. 8, p. 4.)

Although a legislative expression of the intent of an earlier act is not binding upon the courts in their construction of the prior act, that expression may properly be considered together with other factors in arriving at the true legislative intent existing when the prior act was passed. (*Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 90, 97; *Eu v. Chacon* (1976) 16 Cal.3d 465, 470.) Like the analyses prepared in connection with AB 14, the analyses prepared for SB 1487 recognize the 2009 amendment to section 4019 was intended to equalize the schemes for calculating conduct credits

(continued...)

conclusion that the prior method of calculating conduct credits was *too severe*. The *Estrada* rule applies on these facts.

1. A Conduct Credit Increase Is a Reduction of Punishment

Respondent argues "a favorable change in the rate at which an inmates accrues conduct credit is not a reduction in punishment." (ROB 9) Defendant disagrees.

The Legislature has specified that imprisonment is punishment: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following *punishments*: [¶] 1. Death; [¶] 2. *Imprisonment*; [¶] 3. Fine; [¶] 4. Removal from office; or, [¶] 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State." (§ 15, italics added.) Since imprisonment is punishment, it follows a statute that allows for a reduction of imprisonment necessarily allows for a reduction of punishment.

The conclusion that an *increase* in conduct credits *reduces* punishment also finds support in the substantial body of law holding that an amendment that potentially *reduces* conduct credits is a prohibited *increase* in punishment. (*Lynce, supra,* 519 U.S. at p. 441; see also *Ex parte Lee* (1918) 177 Cal. 690, 695 [Indeterminate Sentencing Law's substitution of discretionary conduct credit for former fixed conduct credits is *ex post facto* law, even though discretionary credit may be more favorable to the

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[25](...continued)
for state prisoners and inmates incarcerated locally. The 2010 bill analyses confirm defendant's reading of the floor analyses of AB14, and in turn, SB 18.

prisoner].)

In any event, as explained above (I. E., *ante* at pp. 16-20), *Doganiere* and *Smith* held that an increase in conduct credits is a reduction of punishment. The Legislature thereafter amended section 4019 in 1982, 2009 and 2010 without indicating these decisions had incorrectly interpreted the statute, or altering the statutory language upon which the decisions were based. Further, the 1982 amendment was intended specifically to codify *Sage,* which was expressly retroactive. Respondent's attempt to relitigate the precise arguments that *Doganiere* and *Smith* rejected is foreclosed.

2. The Legislature Need Not "Necessarily" Conclude the Prior Punishment Was Too Severe for Estrada to Apply

Respondent appears to assume an ameliorative amendment is not subject to *the Estrada* unless it can be said the amendment includes a necessary implication that the prior punishment was too severe. It asserts that "increasing credits does not *necessarily* reduce punishment." (ROB 9, italics added.) It also argues: "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." (ROB 12, italics added.)

Estrada does not require a necessary implication in all cases or that punishment reduction be the Legislature's *sole* intent. *Estrada* was faced with a silent legislative record and the presumption of section 3. The court reasoned that the presumption of section 3 was *rebutted* by the *necessary implication* of the amendment that the prior punishment was too severe,

bringing it within the common law rule that a statute mitigating punishment should extend to all cases to which it could apply. A "necessary implication" sufficient to rebut section 3 is *unnecessary* where the legislative intent for retroactivity is supplied by other sources of legislative intent, as are present here, including a prior amendment in which the omission of a prospectivity clause was construed to denote an intent for retroactivity, legislative acquiescence to the decisions of *Hunter, Sandoval, Doganiere* and *Smith,* and the legislative history of the 2009 amendment, which implies a finding that the prior punishment was too severe based on inconsistency of credits.

B. Retroactive Application of Amended Section 4019 Advances All of the Reasons for the 2009 Amendment, While Respondent's Prospective Accrual Formula Does Not

The 2009 amendment to section 4019 was intended to achieve consistency of conduct credits for state prisoners and county inmates and to reduce costs through shortened periods of confinement. These goals are more quickly achieved through retroactive application of the amendment. The sooner credits are applied and terms reduced, the sooner conduct credits are equalized and savings realized.

Retroactive application of the credit changes will achieve *greater* savings and do so *more quickly* than would respondent's proposed accrual method. These facts, in turn, would be *more responsive* to the fiscal *emergency* identified Governor's Proclamation of December 19, 2008, which is one of the stated purposes of SB 18. (SB 18, § 62.) Respondent's interpretation of amended § 4019 *fails to advance* the expressed legislative intent to respond to the *emergency* the budget crisis had created, and thus

frustrates the Legislature's intent in this respect. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 341 [declining to interpret statute in a manner that would frustrate legislative intent].) In fact, respondent's prospective accrual formula advances no interest identified by the Legislature in 2009. Since retroactive application of amended section 4019 advances all of the legislature's objectives, it is the favored construction. (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012-1013 ["In construing a statute a court's objective is to ascertain and effectuate the underlying legislative intent."].)

C. Respondent's Arguments Concerning Incentives Are Meritless

1. Applying Amended Section 4019 Retroactively Does Not Frustrate the Legislative Intent Underlying the Statute As Originally Enacted

Respondent contends: "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 institutions. Retroactive application of the statute would accomplish none of these goals." (ROB 11-12)

Defendant notes that neither the text nor legislative history of the 2009 amendment substantiate this assertion. The amendment made no change in the behavioral standards by which inmate conduct credit is awarded; it simply increased the credits. Respondent also does not explain why, if the legislative intent directed toward maintaining discipline and minimizing threats, the credit increase was limited to the least dangerous

inmates. It is inaccurate to assert that retroactive application of the amendment does not help maintain discipline and minimize threats. It results in equal treatment of similarly-situated prisoners, thereby encouraging good behavior.

In any event, the 2009 amendment expresses the Legislature's intent that presentence credits be awarded retroactively. To the extent the legislative intent underlying the 2009 amendment varies from the intent underlying the statute as originally enacted, the later intent is paramount. "'[I]n the process of construing a statute the intent of the legislature is always of prime importance. Where there is an ambiguity in the statute, the legislative intent is the source of the compromise, but where a conflict is readily seen by an application of the later enactment in accord with that intent, it is clear that the later enactment is intended to supersede the existing law." (*California Correctional Peace Officers Assn. v. Department of Corrections* (1999) 72 Cal.App.4th 1331, 1340, fn. 9, quoting 1A Sutherland, Statutory Construction (5th ed. 1993) § 23.09, p. 338.)

2. Respondent's Attempt to Distinguish Doganiere from Hunter Is Based on the Illusory Distinction that Conduct Credits "Incentivize" Future Prisoner Behavior While Custody Credits Do Not; Both Credits Offer an Incentive (Punishment Reduction) in Exchange for Prisoner Behavior (Good Conduct and Not Escaping)

Respondent apparently concedes the correctness of *Hunter's* application of *Estrada* to a legislative increase in custody credits, but contends the present case is distinguishable because it involves conduct credits, which are a reward to encourage prisoners to conform to rules,

perform work, and refrain from threats. (ROB 6-8) Respondent asserts *Doganiere's* extension of *Estrada* to a legislative increase in conduct credits is "unsound" because it "ignores the legislative intent behind conduct credits, as opposed to actual credits: i.e., encouraging good behavior." (ROB 7)

Respondent's proposed distinction between custody and conduct credits is illusory. Section 2900, subdivision (c), states that "all time served in an institution designated by the Director of Corrections shall be credited as service of the term of imprisonment." Subdivision (c)(2) adds: "Time during which the prisoner is an escapee shall not be credited as service of the prison term." Subdivision (c) makes clear that custody credits are not granted as a matter of right. They must be earned by the act of remaining in custody. Section 2900.5, subdivision (a) is to the same effect. It requires the court to credit upon a defendant's term of imprisonment "all days of custody of the defendant, . . ." If the defendant does not remain in custody, he receives no custody credit. Therefore, incentives exist for both custody and conduct credits. It follows that the two types of credits cannot be distinguished because an incentive exists for one but not the other. If *Estrada* applies to custody credit increases, as *Hunter* held it did, it applies to conduct credit increases as well, as *Doganiere* held. As *Smith* said in rejecting the identical contention more than a generation ago: "The Attorney General's arguments are put to rest by the decision in *Doganiere* . . . ." (*Smith, supra,* 98 Cal.App.3d at p. 799.) The result here should be the same.

3. The Legislature Did Not Utilize Incentives in Drafting the 2009 Amendment; Neither Should This Court in Construing the Amendment

Respondent suggests the incentive component of a credit scheme can be satisfied only if the appropriate conduct occurs during a period when the incentive is in place. Respondent would deny credit for good behavior unless it was demonstrated in response to the incentive, or at least demonstrated while the incentive was in place. Under respondent's plan, credit would be granted or denied based on a prisoner's actual or presumed knowledge of incentives, rather than on the prisoner's actions alone. This approach places undue emphasis on the subjective component of a prisoner's behavior, rather than the behavior itself.

Additionally, the asserted distinction is not one upon which the Legislature relied. Amended section 4019, read in conjunction with section 2900.5, requires the sentencing court to grant enhanced conduct credits even if the conduct occurred prior to the amendment's effective date of January 25, 2010. Here, the asserted reason for denying credits to those sentenced *before* January 25, 2010 – the absence of in-place incentives – also could justify denial of enhanced credits to prisoners sentenced *on or after* January 25, 2010 for custody served prior to January 25, 2010. Sections 2900.5 and 4019 do not deny enhanced credits to the latter class of prisoners on this basis, however, and thus fail to support the distinction respondent attempts to draw.

In this respect, the "incentives" argument is similar to arguments rejected in *Kapperman* and *Sage*. In *Kapperman,* respondent attempted to justify the delivery clause as being founded on a presumed legislative finding "that only recently had rehabilitative facilities at county jails

advanced sufficiently to justify granting credit on prison sentences." (*Kapperman, supra,* 11 Cal.3d at p. 547.) The court responded: "Section 2900.5 does not purport to award credit on the basis of whether a prisoner was incarcerated in a county jail as distinguished from a state prison; rather, credit is granted or withheld solely on the basis of the date on which a person was delivered into the custody of the Director of Corrections. Thus, possible differences between county and state rehabilitation programs are in no way related to the classification made by the Legislature and cannot serve to justify that classification." (*Id.*, at p. 548.)

Similarly, in *Sage,* respondent offered several explanations why the Legislature had authorized the deduction of presentence conduct custody from misdemeanor sentences but not felony sentences. (*Sage, supra,* 26 Cal.3d at p. 507.) In rejecting the explanations, the court wrote: "Each of the grounds advanced by the People for denying presentence conduct credit to detainee/felons might also be given for denying such credit to detainee/misdemeanants as well. Yet detainee/misdemeanants are clearly entitled to such credit under section 4019. The inescapable conclusion is that the challenged distinction between detainee/felons and felons who serve no presentence time was not based on the grounds proposed. Accordingly, we will not further analyze these grounds." (*Id.*, at pp. 507-508.)

Respondent's "incentives" argument is based on a distinction which the Legislature implicitly rejected. It cannot serve as a basis to deny retroactive credits to prisoners, such as defendant, sentenced prior to January 25, 2010.

Finally, this court already has implicitly rejected this argument. The dissent in *Sage* argued: "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." (*Sage, supra,* 26 Cal.3d at p.510, conc. & dis. opn. Clark, J.) The majority impliedly rejected this argument when it concluded: "Inasmuch as the same equal protection concerns as those underlying this court's decision in *In re Kapperman, supra,* 11 Cal.3d 542, . . . , I. e., the avoidance of arbitrary classification of prisoners, are present in the award of jail conduct credits, our holding that such credits must be awarded, if earned, for all precommitment jail time is retroactive." (*Sage, supra,* 26 Cal.3d at p. 509, fn. 7.) Respondent's reliance on the dissent in *Sage* (ROB 7, 11) implicitly asks this court to overrule the majority opinion therein. Since respondent does not attempt to explain why its argument overcomes the principle of *stare decisis*, this court should decline the request to revisit *Sage.*

D. The Clause Extending Enhanced Firefighter Credits to Firefighter Trainees and Assignees "On or After July 1, 2009" Is a Prospectivity Clause that Has a Retrospective Effect Based on the Date SB 18 Became Effective; Its Inclusion Confirms the Intent that Amended Section 4019 Is Fully Retroactive

Prior to being amended by SB 18, section 2933.3 provided that an inmate assigned to a conservation camp who was eligible for one-for-one worktime credits would receive two-for-one conduct credits for each day of service. (Form § 2933.3, subd. (a).) As amended, section 2933.3 extends the two-for-one credits to an eligible inmate who has completed training for assignment to a conservation camp or to a correctional institution as an inmate firefighter, or is assigned to a correctional institution as an inmate firefighter (§ 2933.3, subd. (b)), as well as to inmates "who have

successfully completed training for firefighter assignments." (§ 2933.3, subd. (c).) A new subdivision (d) states: "The credits authorized in subdivisions (b) and (c) shall only apply to inmates who are eligible after July 1, 2009."

With respect to subdivision (d), respondent argues: "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 custody scheme, such as the amendment to section 4019, would apply retroactively. Its failure to do so gives rise to an inference that the Legislature did not intend the amendment to section 4019 to have retroactive effect." (ROB 15)

Defendant initially observes that this logic mirrors that of the majority opinion in *People v. Harmon* (1960) 54 Cal.2d 9, where it was stated: "This view of the legislative intent is confirmed by the fact that the Legislature, when it desires to make an ameliorating amendment retrospective in effect, knows how to do so and does so expressly. [Citations.]" (54 Cal.2d at pp. 22-23.) This was repeated by the dissent in *Estrada, supra,* 63 Cal.2d at pp. 751-752, dis. opn. Burke, J., but implicitly rejected by the majority, which disapproved *Harmon.* (*Estrada, supra,* 63 Cal.2d at p. 742.) Respondent's view has been a minority one for close to half a century.

Respondent also makes a public policy argument, asserting the Legislature could not have intended to bestow ordinary felons with the "windfall" (ROB 18, 19, 20) of retroactive two-for-two credits, while denying fully retroactive two-for-one credits to more deserving firefighter trainees. Putting to one side the label respondent affixes to the

Legislature's action, valid reasons support the distinction it made. The legislative history discloses enhanced section 4019 credits were intended to remedy an inconsistency between presentence conduct credits and postsentence conduct credits. To eliminate the disparity more quickly and equitably, the Legislature opted to forego imposing a prospective limitation on the accrual or award of the credits. The extension of firefighter credits to firefighter trainees and assignees, on the other hand, was not directed at remedying an actual or perceived inequity in the treatment of firefighter trainees and assignees. Prior to its amendment, enhanced firefighter credits were available only to conservation camp inmates, who were subject to being called for actual firefighting duty at *any* time, pursuant to express statutory authority. (§ 6202.)[26] Non-conservation camp inmates, including firefighter trainees and assignees, are subject to fighting fires only upon explicit directive of the Department. (§ 2701.) Firefighter trainees and assignees – while they ultimately may be impresssed into service – are, prior to such assignment, in no different position than ordinary inmates. The Legislature reasonably could conclude that extending enhanced credits to these individuals would motivate and encourage inmates to apply for firefighter training, and hence to increase the pool of trained prisoners ready to fight fires at a moment's notice. The Legislature could also reasonably conclude, as it had with the DSL conduct credits in 1976 and the worktime conduct credits in 1982, that the enhanced credits should be awarded prospectively, in recognition of the new credits would reward a prisoner's

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[26] With respect to the work to be performed at the conservation camps, section 6202 states in part: "Inmates and wards may be assigned to perform . . . forest fire . . . control. . . ."

future act of complying with a new standard of behavior that had not previously been in place.

That the enhanced credits commence accruing on July 1, 2009 is further recognition of the value the Legislature has attached to firefighting training and duty. It is not in conflict with the separate intent to rectify the inconsistency in the presentence and postsentence conduct credit schemes.

E. The Inclusion of an Express Prospectivity Clause in Section 2933.05 Demonstrates the Legislature Did Not Intend to Limit Accrual of Credits to Time Spent in Custody on or After January 25, 2010

Respondent argues that "[i]f the lower court's analysis in this case were adopted, its reach would go beyond the amendment to section 4019." It asserts persons who completed section a section 2933.05 program "in the past" would receive six weeks' additional credit, but those who completed firefighter training would not receive credit for such training prior to July 1, 2009. (ROB 16) Respondent claims "[i]t 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." (ROB 17)

Unlike amended section 4019, section 2933.05 includes an explicit commencement date for accrual of the increased credits. Subdivision (a) thereof directs the Secretary of the Department to promulgate regulations that provide for credits reductions "[w]ithin 90 days of the enactment of this section . . . ." The section adds: "*Commencing upon the promulgation of those regulations*, the department shall thereafter calculate and award credit reductions authorized by this section." (Italics added.) This provision ties the accrual of the enhanced credits to the operative date of the statute. It expresses a legislative intent that the enhanced credits would not accrue

prior to that date. A prisoner who demanded retroactive credits would be no more entitled to them than the prisoners in *Stinnette, Brunner,* or *Strick.* The Court of Appeal's decision with respect to section 4019 does not affect section 2933.05. The inclusion of an explicitly prospectivity clause in section 2933.05 once again highlights the absence of such language in section 4019, and thus a different legislative intent, in favor of retroactivity.

F. Section 59 of SB 18 Confirms the Legislative Intent for Retroactivity

Section 59 of SB 18 provides:

> "The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable."[27]

Of the credit changes effected by SB 18, there are four provisions to

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[27] Section 59 is what is known as "plus section," which this court has described as "a provision of a bill that is not intended to be a substantive part of the code section or general law that the bill enacts, but to express the Legislature's view on some aspect of the operation or effect of the bill." (*People v. Allen* (1999) 21 Cal.4th 846, 858-859, fn. 13.) Such "statements of the intent of the enacting body . . . , while not conclusive, are entitled to consideration. [Citations.]" (*People v. Canty* (2004) 32 Cal.4th 1266, 1280.)

which section 59 might reasonably apply: (1) continuous incarceration credits (§ 2933, subd. (b), SB 18, § 38); (2) one-for-one postsentence conduct credits for local custody (form. § 2933, subd. (e), SB 18, § 38); (3) the extension of enhanced firefighter credits to firefighter trainees and assignees for eligible service on or after July 1, 2009 (§ 2933.3); and (4) enhanced presentence conduct credits. (Form. § 4019, subds. (b)(1), (c)(1) & (f), SB 18, § 50.)

According to respondent, section 59 is limited to the extension of enhanced firefighter credits to firefighter trainees and assignees for eligible service on or after July 1, 2009. (ROB 17) Respondent contends "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." (ROB 17)

Defendant disagrees. In his view, section 59 arguably applies to all four of the provisions to which it might reasonably be said to apply, but at a minimum, it applies to the enhanced presentence conduct credits. The text and scope of section 59 favors defendant's view.

Section 59 imposes a mandatory duty by directing that the Department "shall implement the changes made by this act regarding time credits in a reasonable time." (*Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1512 [use of "shall" denotes mandatory].) The language of section 59 implies the duty is not limited to one specific credit change, such as enhanced firefighter credits. It applies to "the *changes* made by this act regarding time credits," and recognizes there will be delays "resulting from *changes in law* pursuant to this act." (Italics added.) Additionally, as the Court of Appeal noted, the placement

of section 59 at the end of SB 18 indicates it was intended to apply than more than one section of SB 18. (*Brown, supra,* slip opn. at p. 34.)[28] Section 59 includes an immunity provision that is extraordinary in its scope and breadth, since negates any cause of action or claim for damages "because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act." In recognition of this unprecedented immunity, section 59 provides an additional benefit to affected prisoners: it treats any "excess days in state prison due to delays in implementing this act . . . as time spent on parole, if any parole period is applicable."

Section 59 advances the legislative intent to equalize presentence and postsentence conduct credits, and to avoid the constitutional problem which would arise if amended section 4019 were applied prospectively. Amended section 4019, read with its enabling provision, section 2900.5, requires enhanced credits be awarded to those whose sentencing hearings are held on or after January 25, 2010. If the enhanced credits were limited to prisoners solely on the fortuity of whether they were sentenced on or after January 25, 2010, the classification would be as arbitrary as denial of presentence custody credits to prisoners delivered to prison custody on or after March 4, 1972, as *Kapperman* held. (11 Cal.3d at pp. 546-548.) Prospective application of section 4019 manifestly would contravene the equal protections clauses of the federal (U.S. Const., Amend. 14) and state constitutions. (Cal. Const., art. I, §§ 11 & 21.) It is unreasonable to infer the Legislature intended section 4019 be construed in such manner, since

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[28] As explained in the following section (V., *post* at pp. 48-49), the 2010 legislation confirms section 59 applies to more than just section 2933.3.

the Legislature is presumed to act with constitutional intent. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 788.)

Section 59 addresses this problem directly. It requires CDCR to "implement the changes made by this act regarding time credits in a reasonable time." Pertinent regulations already require CDCR to deduct presentence custody and conduct credit from the base period of confinement. (15 Cal.Code.Regs. §§ 2341, 2342.)[29] Requiring CDCR to adjust presentence conduct credits in order to avoid a constitutional violation also is consistent with the remedy adopted in *Kapperman, supra,* 11 Cal.3d at pp. 549-550, which directed the Department to make the necessary "ministerial" credit adjustments, and *Sage, supra,* 26 Cal.3d at p. 509, which did the same.

Section 59 also was intended to alleviate the potential for delay or extensive litigation that could result if amended section 4019 were limited either to sentencing hearings held on or after January 25, 2010, or to

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[29] Section 2341 states: "(a) Custody Credit. As used in this article, 'custody credit' refers to credit granted pursuant to [¶] (1) Penal Code Section 2900.5; [¶] (2) Penal Code Section 4019; [¶] (3) Penal Code Section 1203.03 for time actually served in custody; [¶] (4) Penal Code Section 2900.1. [¶] (b) *Sage* Credit. As used in this article, '*Sage* credit' refers to credit granted pursuant to *People v. Sage* (1980) 26 Cal.3d 498, as modified 27 Cal.3d 144a. *Sage* held that equal protection requires good time credit for time served in county jail prior to sentencing to state prison, for time spent in county jail from and after July 1, 1977 only. . . ."

Section 2342 states in part: "(a) Single Offense. All preprison custody credit attributable to the base offense shall be deducted from the base period of confinement computed under Sections 2282, 2320 or 2403. [¶] (b) Multiple Offenses. Preprison custody credit shall be deducted from the base period of confinement and the multiple crime adjustment. Preprison custody credit shall not be deducted from any other adjustment."

judgments that were not final on appeal as of the amendment's effective date.[30]

Defendant is aware of the oft-repeated dictum from *Estrada* that "[t]he 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.*" *(Estrada, supra,* 63 Cal.2d at p. 745, italics added.) According to respondent, this statement reflects *Estrada's* recognition that retroactive application of amendments lessening punishment are "restricted to non-final judgments by virtue of the constitutional separation of powers doctrine." (ROB 18, fn. 7) Subsequent decisions, however, have extended the benefits of ameliorative amendments to defendants whose cases were already final. (*Kapperman, supra,* 11 Cal.3d at p. 547 [legislation may adjust prison sentences for legitimate public purposes]; *Way v. Superior Court* (1977) 74 Cal.App.3d 165, 178-180 [no separation of powers violation where proposed violation was incidental to a comprehensive reformation of California's penal system; finality of judgment rule must yield to legislative intent for retroactive application of amendment], cited with approval in *Younger v. Superior Court* (1978) 21 Cal.3d 102, 107-108; *People v. Community Release Bd.* (1979) 96 Cal.App.3d 792, 800 ["We therefore take it as settled that legislation reducing punishment for crime may constitutionally be applied to prisoners whose judgments have become final."]; *In re Chavez* (2004)

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[30] This answers respondent's argument that "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" by delaying finality of judgment until January 25, 2010 or thereafter. (ROB 18-19)

114 Cal.App.4th 989, 1000 ["There is nothing in *Estrada* that prohibits the application of revised sentencing provisions to persons whose sentences have become final if that is what the Legislature intended or what the Constitution requires."].)

In short, Section 59 confirms the Legislature intended the enhanced credits of section 4019 be fully retroactive.

V.

The 2010 Amendment Provides a Distinct Basis for Retroactive Application of the New One-for-One Presentence Conduct Credits to Defendant

As amended effective September 28, 2010, section 2933, subdivision (e)(1) (§ 2933(e)(1)) provides:

> Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner.

(Stats. 2010, ch. 426, § 1, 2 RJN, Exh. A, p. 3.)

A statute's use of the word "notwithstanding" followed by reference to another provision signifies clearly the Legislature's intent that the statute overrides the application, if any, of the other provision. (*People v. Palacios* (2007) 41 Cal.4th 720, 728 [construing the phrase "notwithstanding any other provision of law"; *Duff, supra,* 50 Cal.4th at pp. 798-799.)

Here, the use of the phrase "[n]otwithstanding Section 4019 and

subject to the limitations of this subdivision" conveys the Legislature's intent that the conduct credit scheme of section 2933(e) overrides the application of section 4019 for "a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed," who has complied with the behavioral standards of section 4019 (§ 2933(e)(2)) and is not excluded by reason of his present or prior convictions. (*Id.*, subd. (e)(3).)

Eligible prisoners "shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner." (§ 2933(e)(1).) In effect, for eligible prisoners, the favorable two-for-two credit formula in the 2009 amendment is transformed into an even more favorable one-for-one credit formula by the 2010 amendment. This is in accord with the legislative intent to achieve consistency of credits, expressed in the committee bill analyses relevant to SB 18 and SB 76. (IV., *ante* at pp. 27-28.)

For the sake of brevity, defendant will not repeat all the arguments explaining why the Legislature intended the 2009 amendment to section 4019 be retroactively applied. Defendant simply notes they are equally applicable to the 2010 amendment. While the statute does not include an explicit directive that it is retroactive, the omission of a prospectivity or saving clause clearly conveys the intent for retroactivity, at least as to judgments that are not final on appeal, in accordance with *Estrada* and its progeny. (I. E., *ante* at pp. 14-20.) Even if the court accepts one or more of respondent's arguments with respect to the 2009 amendment, the 2010 amendment offers a distinct basis for relief, since it discloses even more clearly the intent for retroactivity.

In particular, section 3 of Senate Bill 76 (2 RJN, Exh. A, p. 4) reaffirms the Legislature's intent that section 59 of the 2009 amendment applies with equal force to the 2010 amendment. Section 3 states: "The Legislature intends that nothing in this act shall affect Section 59 of Chapter 28 of the Third Extraordinary Session of the Statutes of 2009, and that this act be construed in a manner consistent with that section."

As explained above (IV. F., *ante* at pp. 42-45), section 59 implies the Legislature's intent that the credit changes of SB 18 are to be applied retroactively. Senate Bill 76 amends only one provision to which section 59 arguably could apply: section 2933, which includes the enhanced one-for-one presentence conduct credits defendant claims.

Section 3 of Senate Bill 76 further establishes the validity of defendant's view that section 59 applies to the enhanced presentence conduct credits of the 2009 amendment, and that respondent's interpretation is incorrect. If section 59 were limited to section 2933.3, as respondent contends, there would have been no need to reiterate its validity in SB 76, which does not affect section 2933.3. Section 3 is as clear an expression of intent that the 2009 amendment to section 4019 is to be applied retroactively without actually saying so, presumably out of respect for the appellate courts that had concluded otherwise earlier this year.

This conclusion is further supported by the inclusion of an explicit prospectivity clause with respect to the credit decrease that SB 76 effects with respect to prisoners other than those who suffer an executed felony prison sentence. (§ 4019, subds. (b) & (c), SB 76, § 2, 2 RJN, Exh. A, p. 4.) As amended in 2010, section 4019 includes a new subdivision (g), which provides: "(g) The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail,

city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act." The "the act that added this subdivision" is SB 76. The "effective date of that act" is September 28, 2010. (2 RJN, Exh. A, p. 1) The Legislature's inclusion of an explicit prospectivity clause in section 4019 and the omission of such a provision in section 2933(e) indicates the latter provision should not be construed as expressing an intent for prospectivity. (Cf. *Fairbanks*, *supra,* 46 Cal.4th at pp. 61-62.)

Defendant, whose judgment is not final on appeal, is entitled to a judicial recalculation of his presentence conduct credits pursuant to the 2010 amendment. Defendant served 62 days of presentence custody. He is thus entitled to 62 conduct credits under the 2010 amendment to § 2933(e). This is the same number of presentence conduct credits to which he is entitled under the 2009 amendment.

VI.

Conclusion

The judgment of the Court of Appeal should be affirmed.

November 8, 2010

Mark J. Shusted, Esq.
Attorney for James Lee Brown III

Certificate of Word Count

I, Mark Shusted, do hereby certify that my word processing program reported this brief contains 13, 958 words. The font is 13–point Times New Roman.

Dated: November 8, 2010

_____

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People v. Brown **No. S181963**
Court of Appeal, Third Appellate District, No. C056510

DECLARATION OF SERVICE

I, Mark J. Shusted, say: I am over 18 years of age and not a party to the subject action. I am employed in the County of Placer, California, with a business address of P.O. Box 2825, Granite Bay, California 95746. I served a true and correct copy of the document herein presented for filing, on each addressee listed below, by placing the copy in a separate envelope for each addressee, sealing the envelope, affixing the proper First Class Mail postage thereto, and depositing same in the United States Mail at Granite Bay, California, on November 8, 2010. The addressees are:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 8, 2010, in Granite Bay, California.

_____
Mark J. Shusted