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ORIGINAL

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	)	
	)	

APPELLANT'S

DEFENDANT'S SUPPLEMENTAL BRIEF

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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Recommendation by CCAP

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Table of Authorities

James L. Brown III (defendant) submits this supplemental brief to apprise this court of two appellate decisions -- *In re Kemp* (2011) 192 Cal. App.4th 252 (*Kemp*) and *People v. Zarate* (2011) 192 Cal. App.4th 939 (*Zarate*) -- published since the filing of Defendant's Answer Brief on the Merits (DABM) bearing directly on the issues presented herein.[1]

I.

Kemp Answers Respondent's Demand that SB 18 Contain a Clear and Unambiguous Indication of the Legislature's Intent for Retroactivity, and Refutes Respondent's Speculation that Section 4019 Was Amended to Provide Additional Incentives for Good Behavior

Respondent contends section 3 requires this court apply section 4019 as amended by Senate Bill No. 18 (Stats. 2009-2010 3d Ex. Sess., ch. 28 (SB 18)) prospectively to conduct occurring on or after January 25, 2010, since SB 18 includes neither an express retroactivity provision nor clear and unambiguous expression of such intent with respect to the version of section 4019 SB 18 enacted. (ROBM 4-5; RRBM 2-5)

With respect to legislative intent, *Kemp* states:

> "Senate Bill No. 3X 18 does contain a 'clear and unambiguous' statement of the Legislature's intent in enacting the bill: 'This act addresses the fiscal emergency declared by the Governor by proclamation on December 19,

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[1] This supplemental brief is filed pursuant to California Rules of Court (rules) 8.520(d)(1), which states: "A party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits."

Statutory references are to the Penal Code unless otherwise noted.

> 2008 . . . .' (Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 62.) This statement of intent, which is addressed to the entire act, establishes that the Legislature's intent in enacting Senate Bill No. 3X 18, including of course the amendment to section 4019, was based solely on economic considerations: namely, to aid the state in meeting its fiscal emergency by the early release of a defined class of prisoners deemed safe for such release, thereby relieving the state of the cost of their continued incarceration."

(*Kemp, supra,* 192 Cal.App.4th at p. 259.)

Even if this court adopts respondent's view that section 3 requires defendant to produce a clear and unambiguous indicium of legislative intent for retroactivity, *Kemp* explains why section 62 of SB 18 supplies the requisite proof.

Additionally, in *Kemp,* as here, respondent argued the Legislature must have intended the enhanced credits be prospective because it is impossible to influence behavior after it has occurred. (*Kemp, supra,* 192 Cal.App.4th at p. 259; ROBM 8, 11; RRBM 10.) Presiding Justice Raye refutes the argument thus:

> The People argue that because the January 25 amendment was or could have been, at least in part, aimed at further encouraging good conduct and because it is impossible to influence behavior after it has occurred, the January 25 amendment was not intended to be retroactively applied to prisoners whose judgments became final prior to the effective date of these amendments. *The predicate for the People's argument*—that part of the Legislature's intent was to encourage good behavior—*finds no support whatsoever in Senate Bill No. 3X 18.* Nothing in Senate Bill No. 3X 18 suggests that the Legislature was dissatisfied with either the lesser conduct credit rate offered to prisoners previously or the number of prisoners taking advantage of the offer.
>
> Had the Legislature remained silent, we might impute a

> purpose from among the plausible purposes that could be imagined, and the purpose suggested by the People—to encourage good inmate behavior—would seem plausible. But here the Legislature has spoken quite clearly, and where the Legislature has expressed the purpose of an enactment, we are not permitted to speculate about legislative motives and tack on additional purposes. *The unexpressed intent posited by the People is at odds with the express declaration of the Legislature's intent to address a fiscal emergency.* By excluding some eligible prisoners from application of the amendment, [respondent's interpretation of] the legislation would reduce the savings that would otherwise accrue.

(*Kemp, supra,* 192 Cal.App.4th at pp. 258-259, italics and brackets added.)

In other words, a reasonable inference of intent on an otherwise silent legislative record becomes unreasonable to the extent it conflicts with the express statement of legislative intent, as here.

Kemp's analysis explains why respondent's reliance on *In re Stinette* (1979) 94 Cal.App.3d 800 and *In re Strick* (1983) 148 Cal.App.3d 906 (as well as *People v. Brunner* (1983) 145 Cal.App.3d 761) is misplaced: none of the cases involved legislation passed to resolve a fiscal emergency. Therefore, the cases had no occasion to consider, let alone decide, whether the inferences they drew in favor of prospectivity were reasonable in light of an expressed legislative intent to cut expenses. *Kemp*, on the other hand, addressed this issue directly. In short, the presence of section 62 in SB 18 makes this a case unto itself for the purpose of retroactivity analysis.

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II.

A.

Kemp Holds Equal Protection Requires Enhanced Credits Be Awarded to All Eligible Prisoners Regardless of the Date His or Her Judgment Became Final

Kemp holds the enhanced credit schemes enacted by SB 18 and Senate Bill No. 76 (Stats. 2010, ch. 426, § 1 (SB 76); § 2933, subd. (e)(1), (2), (3)) must be awarded to eligible prisoners irrespective of sentencing date pursuant to the equal protection clauses of the United States and California Constitutions. (*Kemp, supra,* 192 Cal.App.4th at pp. 257-264.)

Kemp concluded eligible prisoners whose judgments became prior to January 25, 2010 were similarly situated to prisoners whose judgments became final on or after that date (192 Cal.App.4th at pp. 257-260), and no rational basis existed for the disparate treatment of these groups with respect to the award of enhanced section 4019 credits. (*Id.*, at pp. 260-261.)

Kemp directly supports the argument advanced by the Sixth District Appellate Program's Amicus Curaie Brief (ACB 3-10), in which appellant has joined. (App. Ans. to Amicus Curaie Brief, p. 1.)

Amicus curaie argued eligible prisoners in local custody prior to January 25, 2010, are similarly situated to eligible prisoners in local custody on or after that date, and that no rational basis existed for the disparate treatment. (ACB 3-10) In response, respondent posits the two groups are dissimilarly situated because SB 18 offers additional incentives for good conduct as to eligible prisoners in local custody on or after January 25, 2010, and a statute's effective date "rarely has been found to constitute an equal protection violation." (RRACB 5-6)

As noted, *Kemp* directly refutes the purported "incentives" basis for

the classification. (192 Cal.App.4th at p. 259.)

Relying on *In re Kapperman* (1974) 11 Cal.3d 542, 544-545, 549-550 (*Kapperman*) -- which found an arbitrary date for punishment reduction violated equal protection -- *Kemp* also rejects respondent's contention that the date of finality of judgment (in this case SB 18's effective date) constitutes a rational basis for the disparate treatment. (*Kemp, supra*, 192 Cal.App.4th at p. 260.)

B.

Kemp Rejects Respondent's Contentions Based on the Separation of Powers Doctrine

Respondent argues the Legislature (1) intended to restrict or (2) was constrained from authorizing retroactive application of amended section 4019 by an actual or perceived separation of powers violation. (RRACB 8-15)

Kemp rejected respondent's contentions. In accordance with settled precedent from this court, *Kemp* concluded "the awarding of presentence credits, actual or conduct, is essentially a routine or ministerial function [citations] . . . ." (*Kemp, supra,* 192 Cal.App.4th at p. 263.) Applying section 4019 as amended by SB 18 "cannot reasonably be said to constitute a 'readjudicat[ion]' or 'disregard' of a final judgment [citation]. The increased rate is 'purely incidental to the main legislative purpose' of cost reduction and the amendment advances that purpose. It does not violate the separation of powers doctrine." (*Ibid.*) The Court of Appeal concluded the separation of powers doctrine did not provide a rational basis for denying enhanced credits to eligible prisoners whose judgments were final prior to January 25, 2010. (*Ibid.*)

Contrary to respondent's contention (RRACB 12-14), the case upon

which the Court of Appeal principally relied -- *Way v. Superior Court* (1977) 74 Cal.App.3d 165 -- is not distinguishable. The changes to the conduct credit system enacted by SB 18 are as significant as the sentencing scheme revisions in *Way*. SB 18 revised the presentence conduct credit earning scheme for all eligible prisoners. It also abandoned the worktime credit system and replaced it with a continuous incarceration credit scheme for all prisoners who were not otherwise limited to the number of conduct credits they could earn in prison. (§ 2933, subd. (b), SB 18, § 38.) By any measure, these conduct credit changes are monumental.

In light of these revisions, it is apparent why the Legislature included section 59 in SB 18 and reiterated it in section 3 of SB 76.[2] Section 59 provides a mechanism for prison officials to recalcule credits in the most expeditious and economical way possible, in accordance with the express legislative intent to save money, as well as the remedy devised in *Kapperman, supra,* 11 Cal.3d at pp. 549-550, and followed in *People v. Sage* (1980) 26 Cal.3d 498, 509 (*Sage*).[3]

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[2]Respondent also attempts to distinguish *In re Chavez* (2004) 114 Cal.App.4th 989 because there the Legislature was attempting to "fix a mistake." (RRACB 14) As the legislative history of SB 18 demonstrates, amended section 4019 was intended to rectify the inconsistency of presentence and postsentence credits for eligible prisoners. (DABM 27-30) This intent, which is manifest from the SB 18 itself (which increased the presentence conduct credit ratio), is closely analogous to the legislative intent in *Chavez*.

[3]It would be a far greater burden on state resources to have every eligible prisoner -- whether not his or her judgment was final on January 25, 2010 -- to petition for relief in the court system and, upon obtaining a corrected abstract of judgment, to present it to prison officials in order to revise the prisoner's parole release date, than it would be to have the prison officials make the identical ministerial changes in the first instance.

C.

Even if this Court Concludes *the Legislature* Lacked Authority to Make the Enhanced Credits Retroactive for Prisoners with Final Judgments, Equal Protection Should Compel *this Court* to Find an Equal Protection Violation.

Defendant argued section 59 of SB 18 and section 3 of SB 76 express an intent for retroactive application of enhanced credits to eligible prisoners whether or not their judgments were final. (ABM 42-46, 49) *Kemp* confirms this. (*Kemp, supra,* 192 Cal.App.4th at pp. 262-264.) If this court concludes the Legislature's solicitude for the rights of prisoners with final judgments violates the separation of powers doctrine with respect to the judiciary, eligible prisoners would still be entitled to relief under the equal protection clauses of the federal and state constitutions. This follows because the right to retroactive enhanced credits for eligible prisoners with final judgments would stem not from legislative direction, but the *judicial* modification of final *judicial* decrees in order to vindicate equal protection rights of prisoners whose judgments were final prior to January 25, 2010. The separation of powers doctrine is irrelevant in such circumstances.

As part of its plenary power to issue appropriate relief, this court may direct the Department of Corrections and Rehabilitation to make the necessary ministerial adjustments to presentence credit calculations. (*Kapperman*, supra, 11 Cal.3d at pp. 549-550, *Sage*, *supra,* 26 Cal.3d at p. 509.)

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III.

Kemp Holds SB 76 Provides a Distinct Basis for Relief

Finally, *Kemp* confirms defendant's argument that SB 76 establishes a distinct basis for relief. (*Kemp, supra,* 192 Cal.App.4th at 263-264.)[4]

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[4] By allowing supplemental briefing up to 10 days prior to oral argument without the need for leave, rule 8.520(d)(2) contemplates that issues before this court often involve cutting-edge changes in law. Had it been enacted after filing of the DABM or respondent's reply brief on the merits (RRBM), the amendments to sections 2933 and 4019 in SB 76 would be ordinary examples of new legislation under rule 8.520(d)(1). Of course, since SB 76 was enacted prior to filing of the DABM, defendant included a discussion of why the measure further supported his arguments and provided a distinct basis for relief. (DABM 47-50)

SB 76 raises questions of law that need no reference to the Lassen County Superior Court, as respondent would direct. (RRBM 28) Rule 8.520(d) also omits the option for a party to shift to this court the burden of requesting supplemental briefing on SB 76, as respondent does herein. (RRBM 28)

As to the remaining objections to consideration of SB 76 (RRBM 27-28), defendant notes (1) issues related to SB 76 were not ripe for adjudication by the Court of Appeal; (2) SB 76 amends the very statute upon which respondent's petition requested review; and (3) defendant's answer to the petition discussed the proposed legislation ultimately incorporated into SB 76. (Def. Ans. Pet. Rev., pp. 9-10, discussing Sen. Bill No. 1487's amendments to §§ 2933 and 4019, which were incorporated verbatim into SB 76 (see Def. 2d Req. for Jud. Not., p. 1); see also rule 8.516(b) [The Supreme Court may decide any issues that are raised or fairly included in the petition or answer."].) This court should reach the merits of SB 76 and find respondent has forfeited the opportunity to address the merits of the statute.

IV.

Zarate Confirms Respondent's Bifurcated Credit Scheme Is Statutorily Unsupported

Zarate involved a sentencing hearing held after January 25, 2010. The trial court used the bifurcated credit formula respondent advocates, which refuses to award enhanced conduct credits for custody occurring prior to January 25, 2010. The Court of Appeal rejected this approach for the reasons stated by defendant. (DABM 20-25)

The court wrote:

> There is nothing in the January 25, 2010, amended version of section 4019 that authorized the trial court to apply both the 1982 and January 25, 2010, amended versions of section 4019 and use a two-part approach in calculating Zarate's conduct credit based on whether his presentence custody was served before or after January 25, 2010. Because the 1982 version of section 4019 was no longer valid at the time of Zarate's sentencing on February 18, the trial court erred in applying the 1982 version of section 4019 in calculating his conduct credit for presentence custody served before January 25. The court's sentence was unauthorized to the extent the court applied the 1982 version of section 4019 to calculate, in part, Zarate's presentence conduct credit. "A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered." [Citation.]

(*Zarate, supra,* 192 Cal.App.4th at p. 944.)

Aside from confirming defendant's view of section 4019 as amended by SB 18, *Zarate's* citation of the rule that an unauthorized sentence may be corrected even though the judgment is final provides an additional reason why respondent's concerns are overstated with respect to the impact of a holding that the enhanced credits are to be awarded to eligible prisoners whose judgments were final prior to January 25, 2010.

Respectfully submitted,

April 12, 2011

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

Certification of Word Count

I, Mark Shusted, do hereby certify that my word processing program reported this brief contains 2,508 words. The font is 13–point Times New Roman.

Dated: April 12, 2011

Mark J. Shusted, Esq.
Attorney for Defendant

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 April 12, 2011. The addressees are:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 12, 2011, in Granite Bay, California.

Mark J. Shusted

Exhibit A

In re Kemp (2011) 192 Cal. App.4th 252

In re RANDY KEMP on Habeas Corpus.
C064821
COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT
192 Cal. App. 4th 252; 2011 Cal. App. LEXIS 96

January 27, 2011, Filed

PRIOR HISTORY: [**1]
Superior Court of Sacramento County, Nos. 09F06912, 10F01017.

DISPOSITION: Petition granted.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY
A state prison inmate sought a writ of habeas corpus to obtain retroactive application of additional presentence conduct credits (Pen. Code, § 4019, as amended). After the inmate's judgment became final, § 4019 was amended to allow certain eligible nonviolent prisoners to earn conduct credits at an increased rate. The inmate was an eligible prisoner under the amended statute. He sought retroactive application on equal protection grounds.

The Court of Appeal granted the petition for writ of habeas corpus and remanded to the Director of Corrections with directions to award conduct credits to the inmate at the increased rate. The court noted that the purpose of the amendments (Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 62) was to address a fiscal emergency by providing for early release of a defined class of prisoners deemed safe for such release, thereby relieving the state of the cost of their continued incarceration. In light of this purpose, the court found no rational basis for distinguishing between those whose judgments became final before and after the date § 4019 was amended. Both groups were deemed safe for early release and thus were similarly situated for purposes of the legislation. Retroactive application of § 4019 would not violate California's separation of powers doctrine because the effect on final judgments was incidental to the main legislative purpose. For the same reasons, the inmate was entitled to retroactive application of an amendment (Pen. Code, § 2933) regarding worktime credit. (Opinion by Raye, P. J., with Blease and Hull, JJ., concurring.) [*253]

COUNSEL: Elizabeth Campbell, under appointment by the Court of Appeal, for Petitioner Randy Kemp.
Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Respondent State of California.

JUDGES: Opinion by Raye, P. J., with Blease and Hull, JJ., concurring.

OPINION BY: Raye

OPINION

RAYE, P. J.—

INTRODUCTION

In this petition for a writ of habeas corpus filed by Randy Kemp (petitioner), we conclude that irrespective of the date a prisoner's judgment became final, federal and state constitutional principles of equal protection require that the amendments to Penal Code section 4019 [1]provided by Senate Bill No. 3X 18 (2009–2010 3d Ex. Sess.) (Senate Bill No. 3X 18) (see Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50), effective January 25, 2010 (January 25 amendment), and Senate Bill No. 76 (2009–2010 Reg. Sess.) (Senate Bill No. 76) (see Stats. 2010, ch. 426), effective September 28, 2010 (September 28 amendment), which increase the rate at which a specified class of prisoners earns conduct credits, must be applied retroactively.

FOOTNOTES
1 All further references to undesignated sections [**2] are to the Penal Code.
[*256]

PROCEDURAL HISTORY
On October 20, 2009, petitioner pled no contest in the Sacramento County Superior Court to one count of battery on a spouse or cohabitant (§ 273.5, subd. (a)), and on November 17, 2009, he was sentenced to state prison for two years. At the time of sentencing, section 4019provided that conduct credits, i.e., credits for prisoners who performed labor and followed the institutional rules of the facility wherein they were confined, could be earned at the rate of two days for every four days served. (Former § 4019, subds. (b), (c).) Petitioner received credits of 68 days for actual

custody served and 34 days for good conduct, which was the maximum amount provided under the statute. [2] Petitioner did not appeal.

FOOTNOTES

2 We granted petitioner's motion to take judicial notice of the superior court's minute orders and abstract of judgment that set forth the plea, sentencing, and awarding of presentence credits.

The Legislature enacted Senate Bill No. 3X 18, which amended section 4019 effective January 25, 2010, to essentially double the rate at which a specified class of prisoners (eligible prisoners) could earn conduct credits. (Former § 4019, subds. (b)(1), (c)(1), [**3] as amended by Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50.) Eligible prisoners are those who were neither required to register as sex offenders, nor were committed for serious felonies (§ 1192.7), nor had been convicted of serious or violent felonies (§ 667.5). (Former § 4019, subds. (b)(2), (c)(2).) [3]

FOOTNOTES

3 Effective January 25, 2010, former section 4019 provided, in relevant part: "(a) The provisions of this section shall apply in all of the following cases: [¶] ... [¶]

"(b)(1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, 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.

"(2) If the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, [**4] as defined in Section 667.5, subject to the provisions of subdivision (d), for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, 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.

"(c)(1) Except as provided in Section 2933.1 and paragraph (2), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, 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.

"(2) If the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as [**5] defined in Section 667.5, for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless is 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. [¶] ... [¶]

"(f) It is the intent of the Legislature 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, except that a term of six days will be deemed to have been served for every four days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c)."
[*257]
On February 8, 2010, petitioner, an eligible prisoner, filed a petition for writ of habeas corpus in the Sacramento County Superior Court seeking the retroactive application of the additional presentence conduct credits provided by the January 25 amendment. The court denied the petition on March 30 on grounds that Kemp's judgment became final prior to the effective date of the amendment and [**6] principles of equal protection were not applicable.

On April 26, 2010, petitioner filed a habeas corpus petition in this court, contending, inter alia, that notwithstanding the finality of his judgment prior to January 25, 2010, federal and California principles of equal protection require that the January 25 amendment be retroactively applied to him. Relying on *In re Stinnette* (1979) 94 Cal.App.3d 800 [155 Cal. Rptr. 912] (*Stinnette*) and *In re Strick* (1983) 148 Cal.App.3d 906 [196 Cal. Rptr. 293] (*Strick*), the People countered that the January 25 amendment was intended, at least in part, to further encourage good conduct; it is impossible

to influence behavior after it has occurred, and thus a prisoner whose judgment has become final is not entitled to the benefit of the new amendment. [4] The People also contend that even if the January 25 amendment is retroactive, the separation of powers doctrine constitutes a rational basis for not applying the amendment to those whose judgments were final prior to the effective date of the amendment. For reasons to follow, we disagree with the People.

FOOTNOTES

4 Respondent also argues that petitioner is not entitled to the benefit of the January 25 amendment because his judgment became final prior [**7] to January 25, 2010, which was its effective date. Petitioner counters that his judgment did not become final until the expiration of the 120-day period within which the trial court has to recall his sentence pursuant to section 1170, subdivision (d), which is beyond January 25, 2010. Because our federal equal protection analysis, if correct, renders moot the date upon which the judgment became final, we need not address the issue. (See *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 31–32, fn. 1 [112 Cal. Rptr. 2d 5] ["It is axiomatic that California's Constitution cannot permit the state to engage in conduct forbidden by the federal equal protection clause ... ."].)

DISCUSSION

Equal Protection

HN1 CA(1) **(1)** "The equal protection guarantees of the Fourteenth Amendment and the California Constitution are substantially equivalent and analyzed in a [*258] similar fashion." (*People v. Leng* (1999) 71 Cal.App.4th 1, 11 [83 Cal. Rptr. 2d 433].) In analyzing an equal protection challenge, " '[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.] This initial inquiry is not whether [**8] persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 [127 Cal. Rptr. 2d 177, 57 P.3d 654] (*Cooley*).) " 'In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law ... .' " (*Castro v. State of California* (1970) 2 Cal.3d 223, 229 [85 Cal. Rptr. 20, 466 P.2d 244], quoting *Williams v. Rhodes* (1968)

393 U.S. 23, 30 [21 L.Ed.2d 24, 31, 89 S. Ct. 5].)

The Two Groups at Issue Are Similarly Situated for the Purpose of Senate Bill No. 3X 18

The enhanced rate of credit accrual provided by section 4019 applies to prisoners who are neither required to register as sex offenders nor committed for serious felonies or previously convicted of serious or violent felonies. Within this larger group are two subgroups of eligible prisoners: prisoners whose judgments of conviction became final prior to January 25, 2010, and prisoners whose judgments were either pending or became final on or after that date. [5] Abstractly speaking, the two groups are similarly situated. Nothing distinguishes the status of a prisoner whose judgment became final on January 25, 2010, from one [**9] whose judgment became final before that date.

FOOTNOTES

5 As to this latter subgroup, we have previously determined they are entitled to the retroactive application of the January 25, 2010, amendment pursuant to the reasoning in *In re Estrada* (1965) 63 Cal.2d 740 [48 Cal. Rptr. 172, 408 P.2d 948]. (See, e.g., *People v. Brown* (2010) 182 Cal.App.4th 1354 [107 Cal. Rptr. 3d 286], review granted June 9, 2010, S181963; contra, *People v. Rodriguez* (2010) 183 Cal.App.4th 1 [107 Cal. Rptr. 3d 460], review granted June 9, 2010, S181808.)

HN2 CA(2) **(2)** In determining whether these groups are " ' "similarly situated [to each other] with respect to the legitimate purpose of the law" ' " (*Cooley, supra*, 29 Cal.4th at p. 253), " '[w]e look first to the words of the statute itself, which should be the best indicator of the lawmakers' intent. [Citation.] If those words are clear and unambiguous, *we may not modify them to accomplish a purpose not apparent on the face of the statute or from its legislative history*. [Citation.]' [Citation.]" (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1234 [51 Cal. Rptr. 2d 150], italics added; see *Legislature v. Eu* (1991) 54 Cal.3d 492, 505 [286 Cal. Rptr. 283, 816 P.2d 1309] [" 'In construing constitutional and statutory provisions ... *the intent of the enacting body is the paramount consideration.*' (Italics added.)"].) [*259]

Senate Bill No. [**10] 3X 18 does contain a "clear and unambiguous"

statement of the Legislature's intent in enacting the bill: HN3 "This act addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008 ... ." (Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 62.) This statement of intent, which is addressed to the entire act, establishes that the Legislature's intent in enacting Senate Bill No. 3X 18, including of course the amendment to section 4019, was based solely on economic considerations: namely, to aid the state in meeting its fiscal emergency by the early release of a defined class of prisoners deemed safe for such release, thereby relieving the state of the cost of their continued incarceration.

The People argue that because the January 25 amendment was or could have been, at least in part, aimed at further encouraging good conduct and because it is impossible to influence behavior after it has occurred, the January 25 amendment was not intended to be retroactively applied to prisoners whose judgments became final prior to the effective date of these amendments. The predicate for the People's argument—that part of the Legislature's intent was to encourage good behavior—finds no [**11] support whatsoever in Senate Bill No. 3X 18. Nothing in Senate Bill No. 3X 18 suggests that the Legislature was dissatisfied with either the lesser conduct credit rate offered to prisoners previously or the number of prisoners taking advantage of the offer.

Had the Legislature remained silent, we might impute a purpose from among the plausible purposes that could be imagined, and the purpose suggested by the People—to encourage good inmate behavior—would seem plausible. But here the Legislature has spoken quite clearly, and where the Legislature has expressed the purpose of an enactment, we are not permitted to speculate about legislative motives and tack on additional purposes. The unexpressed intent posited by the People is at odds with the express declaration of the Legislature's intent to address a fiscal emergency. By excluding some eligible prisoners from application of the amendment, the legislation would reduce the savings that would otherwise accrue.

CA(3) **(3)** Because the People's partial intent position is both without support in Senate Bill No. 3X 18 and leads to an unreasonable consequence, we reject it. (See *People v. Jenkins* (1995) 10 Cal.4th 234, 246 [40 Cal. Rptr. 2d 903, 893 P.2d 1224] HN4 [in determining legislative [**12] intent behind enactment of a statute, the reviewing court avoids an interpretation that leads to unreasonable consequences].) [*260]

The January 25 Amendment Meets the Purpose of Senate Bill No. 3X 18

Senate Bill No. 3X 18 identifies a class of prisoners deemed safe for early release and, to that end, increases the rate at which these prisoners earn conduct credits. The early release of prisoners saves the state money regardless of when their judgments became final, money that would otherwise be spent on their continued confinement. Consequently, the two subgroups are " 'similarly situated for purposes of the law challenged.' " (*Cooley, supra*, 29 Cal.4th at p. 253.)

No Rational Basis Exists for Disparate Treatment

A

HN5 CA(4) **(4)** " ' " '[I]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.* [Citations.]' " ' " (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200–1201 [39 Cal. Rptr. 3d 821, 129 P.3d 29].) [6]

FOOTNOTES

6 The awarding of conduct credits does not involve either a fundamental right or a suspect [**13] classification, and the parties do not argue otherwise. (*Stinnette, supra*, 94 Cal.App.3d at pp. 805–806.)

In urging that a rational basis exists for the disparate treatment of the two subgroups, the People rely on *Stinnette* and *Strick*. Neither case is on point because the intent imputed to the Legislature in each case differs from that expressed in Senate Bill No. 3X 18. Specifically, the intent of the statute challenged in *Stinnette* was to "motivat[e] good conduct among prisoners so as to maintain discipline and minimize threats to prison security." (*Stinnette, supra*, 94 Cal.App.3d at p. 806.) The intent of the statute at issue in *Strick* was "to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct ... ." (*Strick, supra*, 148 Cal.App.3d at p. 913.) In contrast, Senate Bill No. 3X 18 was enacted to address a fiscal emergency.

On the issue of whether the date of finality of judgment constitutes a rational basis for disparate treatment between two subgroups of prisoners equally situated, we find guidance in the reasoning of *In re Kapperman* (1974) 11 Cal.3d 542 [114 Cal. Rptr. 97, 522 P.2d 657](*Kapperman*). Kapperman was delivered into the custody of the [**14] Director of Corrections prior to March 4, 1972. At that time, he was not statutorily entitled to, and did not receive, [*261] credit for 304 days he spent in actual custody prior to his delivery to the Director of Corrections. (*Id.* at pp. 544–545.) Effective March 4, 1972, section 2900.5 provided that actual custody credit be given to prisoners upon their delivery to the Director of Corrections. (*Kapperman*, at pp. 544–545.) However, subdivision (c) of section 2900.5 made the section applicable only to prisoners delivered to the Director of Corrections on or after March 4, 1972. (*Kapperman*, at p. 545.)

Kapperman contended that the state's classifications arbitrarily denied him a substantial benefit without there being a rational relationship for doing so, thereby violating federal and state principles of equal protection. (*Kapperman, supra*, 11 Cal.3d at p. 545.) The California Supreme Court agreed, concluding that because section 2900.5, subdivision (c)'s prospective-only limitation bore no legitimate purpose to the classifications, such classifications violated both the state and federal equal protection principles. (*Kapperman*, at pp. 549–550.) Therefore, the credit provided under section 2900.5 [**15] was extended to those prisoners either incarcerated or on parole for felony offenses regardless of the date of their commitment to state prison. (*Kapperman*, at pp. 549–550.)

CA(5) **(5)** In the present case, the two subgroups of prisoners are distinguished only by the fact that their judgments became final prior to January 25, 2010. Since the purpose of Senate Bill No. 3X 18 is solely economic, the only reasonably conceivable justification for treating the two subgroups differently for equal protection analysis would be if one group were more dangerous than the other. Aside from their partial intent theory, the People have not put forth any other suggestion. [7] However, HN6 since the entire group of eligible prisoners consists of those prisoners deemed safe for early release based upon the offense or offenses they have committed, neither subgroup is more dangerous than the other. Certainly, the date of finality of judgment bears no rational basis for making such a distinction. Just as the date of delivery to the Director of Corrections bore no rational relationship to the classifications at issue in *Kapperman*, the effective dates of the new amendments in the present case bear no rational relationship [**16] for distinguishing between the two subgroups at issue herein.

FOOTNOTES

7 The superior court cited as a rational basis for not retroactively affording prisoners whose judgments were final before January 25, 2010, the benefit of the new amendment that "it is more burdensome to apply than a change in actual day credits." The superior court did not explain, nor do we understand, how calculating conduct credit at the rate provided by the January 25 amendment is more difficult. Since the abstract of judgment shows a prisoner's entitlement to conduct credits, it is no more than simple arithmetic to make the new calculation.

[*262]

B

The People also argue that a rational basis for not applying the January 25 amendment retroactively is that to do so would violate California's separation of powers doctrine. Again, we disagree.

The Separation of Powers Doctrine

HN7 CA(6) **(6)** The separation of powers doctrine is set forth in the California Constitution, which "establishes a system of state government in which power is divided among three coequal branches (Cal. Const., art. IV, § 1 [legislative power]; Cal. Const., art. V, § 1[executive power]; Cal. Const., art. VI, § 1 [judicial power]), and further states that those charged with [**17] the exercise of one power may not exercise any other (Cal. Const., art. III, § 3). Notwithstanding these principles, it is well understood that the branches share common boundaries [citation], and no sharp line between their operations exists. [Citations.]" (*People v. Bunn* (2002) 27 Cal.4th 1, 14 [115 Cal. Rptr. 2d 192, 37 P.3d 380] (*Bunn*).)

"The separation of powers doctrine protects each branch's core constitutional functions from lateral attack by another branch. … [H]owever, this does not mean that the activities of one branch are entirely immune from regulation or oversight by another." (*Bunn, supra*, 27 Cal.4th at p. 16.) As applied to the judicial branch, "[the Supreme Court has] regularly approved legislation affecting matters over which the judiciary has inherent power and control. [Citations.] As long as such enactments do not ' "defeat" or "materially impair" ' the constitutional functions of the courts, a 'reasonable' degree of regulation is allowed. [Citation.]" (*Bunn, supra*, 27 Cal.4th at p. 16.) "Separation of powers principles do not preclude the

Legislature from amending a statute and applying the change to both pending and future cases, though any such law cannot 'readjudicat[e]' or otherwise 'disregard' judgments [**18] that are already 'final.' [Citations.]" (*Bunn*, at p. 17.)

Younger v. Superior Court (1978) 21 Cal.3d 102 [145 Cal. Rptr. 674, 577 P.2d 1014] cites *Way v. Superior Court* (1977) 74 Cal.App.3d 165 [141 Cal. Rptr. 383] as a proper application of separation of power principles to the question of whether a legislative enactment may retroactively affect judgments that were final prior to the enactment. In *Way*, as explained by *Younger*, "Effective July 1, 1977, the Legislature repealed the Indeterminate Sentence Law (ISL) and replaced it with the Uniform Determinate Sentencing Act of 1976 (UDSA).Penal Code section 1170.2 provides for retroactive application of the UDSA, thus resulting in a reduction in the terms of some prisoners convicted under the ISL. The statute was challenged on the ground it infringed on the Governor's constitutional power of commutation. ([[*263] Cal. Const., a]rt. V, § 8.) [8] Rejecting the claim, the Court of Appeal reasoned (at p. 177) that the intent of section 1170.2 was not to commute existing sentences as an act of grace but to bring them in line with sentences under the new law, in furtherance of the UDSA's principal objective of making punishments uniform. The Court of Appeal concluded (at pp. 177–178) that the effect of section 1170.2 [**19] in shortening certain terms is 'purely incidental to the main legislative purpose,' and hence the statute does not violate the separation of powers [doctrine]." (*Younger v. Superior Court, supra*, 21 Cal.3d at pp. 117–118.)

FOOTNOTES

8 Article V, section 8 of the California Constitution was amended in 1972, 1974, and 1988, but none of these amendments is relevant to the present discussion.

CA(7) **(7)** Applying the foregoing principles to the instant case, we conclude that HN8 extending the benefits of the January 25 amendment to those whose judgments were final prior to the amendment's effective date would not violate separation of powers. Therefore, separation of powers cannot serve as a rational basis for withholding the benefits from that subgroup. As we previously explained, the January 25 amendment was enacted as part of the legislation (Senate Bill No. 3X 18) designed to meet the fiscal emergency declared by the Governor. The January 25 amendment increased the rate at which a class of eligible prisoners could earn conduct credits,

thereby providing for their early release, which would save the state funds that would otherwise be spent for their continued confinement. Because the awarding of presentence credits, actual or conduct, [**20] is essentially a routine or ministerial function (see *People v. Sage* (1980) 26 Cal.3d 498, 508–509 [165 Cal. Rptr. 280, 611 P.2d 874]; *Kapperman, supra*, 11 Cal.3d at pp. 548–550), the January 25 amendment cannot reasonably be said to constitute a "readjudicat[ion]" or "disregard" of a final judgment (*Bunn, supra*, 27 Cal.4th at p. 17). The increased rate is "purely incidental to the main legislative purpose" of cost reduction and the amendment advances that purpose. It does not violate the separation of powers doctrine.

Holding

CA(8) **(8)** In sum, we hold that prisoners whose judgments became final before January 25, 2010, are, for purposes of the new amendments, similarly situated to prisoners whose judgments were still pending or were not final on or after this date. Because there is no rational basis for treating the two subgroups differently, petitioner is entitled to have his conduct credits calculated under the formula provided by the new amendments.

Effect of September 28, 2010, Amendment

CA(9) **(9)** Effective September 28, 2010, the Legislature enacted Senate Bill No. 76, which amended HN9 section 2933 regarding worktime credit for prisoners [*264] confined in state prison, to give such prisoners, to the extent they qualify, one day of presentence [**21] conduct credit for each day of actual presentence confinement served. (Sen. Bill No. 76, § 1; § 2933, subd. (e)(1), (2), (3).) For the same reasons that we found the January 25, 2010, amendment to section 4019 was retroactive irrespective of the date of finality of a prisoner's judgment, we conclude the same is true as to the September 28 amendment.

DISPOSITION

The petition for writ of habeas corpus is granted. The matter is remanded to the Director of Corrections with directions to award petitioner conduct credits as provided by Senate Bill No. 76's amendment to section 2933, effective September 28, 2010.

Blease, J., and Hull, J., concurred.

Exhibit B

People v. Zarate (2011) 192 Cal. App.4th 939

*192 Cal. App. 4th 939, *; 2011 Cal. App. LEXIS 171, ***

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR BRICENO ZARATE, Defendant and Appellant.
D056837
COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE
192 Cal. App. 4th 939; 2011 Cal. App. LEXIS 171

February 14, 2011, Filed
PRIOR HISTORY: [**1]
APPEAL from a judgment of the Superior Court of Imperial County, No. JCF24760, Christopher W. Yeager, Judge.

DISPOSITION: Affirmed as modified.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant pled no contest to sale or transportation of marijuana, and the Superior Court of Imperial County, California, imposed sentence on February 18, 2010, awarding conduct credit for local custody time served before January 25, 2010, in accordance with a former version of Pen. Code, § 4019, rather than the amended version that went into effect January 25. Defendant appealed.

OVERVIEW: The court of appeal held that the trial court erred by not applying Pen. Code, § 4019, as amended effective January 25, 2010, to all of the days served by defendant in presentence local custody, even though the prior version was in effect during part of the time served, because the amended version was in effect on the date of sentencing, February 18, 2010. At the time of sentencing, the trial court was required to calculate the exact number of days defendant had been in custody prior to sentencing, add applicable conduct credits earned pursuant to the amended version of § 4019, and reflect the total in the abstract of judgment. At the time of sentencing, there was only one version of § 4019 in existence, the amended version effective January 25. There was nothing in that version that authorized the trial court to apply both the 1982 version and amended version and use a two-part approach in calculating defendant's conduct credit based on whether his presentence custody was served before or after January 25, 2010.

OUTCOME: The court modified the judgment to award defendant

additional days of presentence conduct credit and affirmed the judgment as modified.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Defendant pled no contest to sale or transportation of marijuana, and the trial court imposed sentence on February 18, 2010, awarding conduct credit for local custody time served before January 25, 2010, in accordance with a former version of Pen. Code, § 4019, rather than the amended version that went into effect January 25, 2010. (Superior Court of Imperial County, No. JCF24760, Christopher W. Yeager, Judge.)

The Court of Appeal modified the judgment to award defendant additional days of presentence conduct credit and affirmed the judgment as modified. The court held that the trial court erred by not applying Pen. Code, § 4019, as amended effective January 25, 2010, to all of the days served by defendant in presentence local custody, even though the prior version was in effect during part of the time served, because the amended version was in effect on the date of sentencing, February 18, 2010. At the time of sentencing, the trial court was required to calculate the exact number of days defendant had been in custody prior to sentencing, add applicable conduct credits earned pursuant to the amended version of § 4019, and reflect the total in the abstract of judgment. At the time of sentencing, there was only one version of § 4019 in existence, the amended version effective January 25, 2010. There was nothing in that version that authorized the trial court to apply both the 1982 version and amended version and use a two-part approach in calculating defendant's conduct credit based on whether his presentence custody was served before or after January 25, 2010. (Opinion by McDonald, J., with Aaron, J., concurring. Dissenting opinion by Benke, Acting P. J. (see p. 945).) [*940]
JUDGES: Opinion by McDonald, J., with Aaron, J. concurring. Dissenting opinion by Benke, Acting P. J.

OPINION BY: McDonald

OPINION

McDONALD, J.—Salvador Briceno Zarate appeals a judgment following his plea of no contest to one count of sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)). On appeal, he contends the trial

court erred at his February 2010 sentencing by awarding him conduct credit for local custody time served before January 25, 2010, in accordance with a former version of Penal Code section 4019 [1] rather than the amended version in effect on the date of his sentencing. We conclude the trial court erred by not applying the amended version of section 4019 to all of the days served by Zarate in presentence local custody.

FOOTNOTES

1 All further statutory references [**2] are to the Penal Code unless otherwise pecified.

FACTUAL AND PROCEDURAL BACKGROUND

On or about November 2, 2009, Zarate transported marijuana in Imperial County. On January 28, 2010, an information charged him with one count of sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)) and one count of possession of marijuana for sale (Health & Saf. Code, § 11359).

On February 18, 2010, pursuant to a plea agreement, Zarate pleaded no contest to the Health and Safety Code section 11360, subdivision (a), count with a stipulated sentence of two years in state prison; the other count was then dismissed. At that hearing, the trial court sentenced Zarate to two years in state prison and awarded him a total of 115 days of presentence custody credit. The court awarded Zarate 22 days of conduct credit for 44 days in actual custody before January 25 and 24 days of conduct credit for 25 days in actual custody on and after that date. The court denied Zarate's request for [*942] "day for day" conduct credit for all of his days in custody pursuant to the "new law" (i.e., amended § 4019), including his days served in custody prior to January 25. Zarate timely filed a notice of appeal.

DISCUSSION

I

*Actual [**3] Custody and Conduct Credits Generally*

CA(1) **(1)** HN1 A defendant "sentenced to prison for criminal conduct is entitled to credit against his [or her] term for all actual days of [presentence] confinement solely attributable to the same conduct. [Citations.]" (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30 [108 Cal. Rptr. 2d 625, 25 P.3d 1103] (*Buckhalter*).) That confinement or custody includes days spent in jail

before sentencing. (§ 2900.5, subd. (a).) Pursuant to section 4019, a defendant may also earn "conduct credit" for good behavior (i.e., compliance with rules and regulations) and satisfactory performance of any labor assigned him or her during presentence custody. (§ 4019, subds. (b), (c); *People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3 [95 Cal. Rptr. 3d 408, 209 P.3d 623]; *Buckhalter*, at p. 30.)

CA(2) **(2)** Section 2900.5, subdivision (a), provides: HN2 "In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail ... , all days of custody of the defendant, ... *including days credited to the period of confinement pursuant to Section 4019*, shall be credited upon his or her term of imprisonment ... ." (Italics added.) Section 2900.5, subdivision (d), provides: HN3 "*It shall be [**4] 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." (Italics added.) The California Supreme Court has stated that HN4 when a trial court imposes a sentence, it "has responsibility to calculate the exact number of days the [*943] defendant has been in custody 'prior to sentencing,' add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment." (*Buckhalter, supra*, 26 Cal.4th at p. 30.)

Prior to January 25, 2010, a former version of section 4019 (1982 version) provided that a defendant earned two days of conduct credit for every four actual days in local custody. (Stats. 1982, ch. 1234, § 7, pp. 4553–4554.) However, HN5 section 4019 was amended, effective January 25, 2010, to provide qualifying defendants with increased conduct credit of two days for every two actual days in local custody. [2] (Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50.) That amended version of section 4019 [**5] provided: HN6 "It is the intent of the Legislature 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 ... ." (Former § 4019, subd. (f).) [3] HN7 The provisions of section 4019 apply to those defendants confined in a county jail for time served, "including all days of custody from the date of arrest to the date on which the serving of the sentence commences, under a judgment of imprisonment" or, alternatively, for time served "following arrest and prior to the imposition of sentence for a felony conviction." (Former § 4019, subd. (a)(1), (4).)

FOOTNOTES

2 Pursuant to the January 25, 2010, version of section 4019, defendants can qualify for such conduct credit unless they have current or prior convictions for serious or violent felony offenses or are required to register as sex offenders. (§ 4019, former subds. (b)(2), (c)(2), as amended by Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50.)

3 Section 4019 was amended again, effective September 28, 2010, to reinstate the conduct credit provisions that applied before the January 25, 2010, amendment, but that version applies only to local custody served by defendants for crimes [**6] committed on or after September 28, 2010. (Stats. 2010, ch. 426, § 2.) The most recent amendment to section 4019 is inapplicable to Zarate's case because his crime was committed in November 2009. Unless otherwise specified, all references to section 4019 or its amendments refer to section 4019, as amended effective January 25, 2010, pursuant to Statutes 2009, Third Extraordinary Session 2009–2010, chapter 28, section 50.

II

Trial Court's Calculation of Section 4019 Conduct Credit

Zarate contends the trial court erred in sentencing him by applying the 1982 version of section 4019 to time he was in local custody prior to January 25, 2010, and thereby awarding him only 22 days of conduct credit for the 44 actual days he was in custody during that period. He asserts the court was required to apply the January 25, 2010, amended version of section 4019 in effect on the date of his sentencing (Feb. 18, 2010) to *all* time he was in local custody, whether before or after January 25, 2010. He argues he should have received 44 days of conduct credit for the 44 actual days he was in custody prior to January 25, 2010, for a total of 68 days of conduct credit for all 69 actual days in custody prior to his [**7] February 18 sentencing. [*944]

CA(3) **(3)** We conclude the trial court erred in sentencing Zarate on February 18, 2010, by applying a *former* version of section 4019 to the time he served in local custody prior to January 25, 2010. At the time of his sentencing on February 18, the trial court was required to calculate the exact number of days Zarate had been in custody prior to sentencing, add applicable conduct credits earned pursuant to section 4019, and reflect the total in the abstract of judgment. (§ 2900.5, subds. (a), (d); *Buckhalter, supra*, 26 Cal.4th at p. 30.) At the time of Zarate's sentencing on February

18, there was only one version of section 4019 in existence (i.e., the amended version of § 4019 effective Jan. 25). The trial court was required to calculate Zarate's presentence conduct credit pursuant to that version ofsection 4019.

There is nothing in the January 25, 2010, amended version of section 4019 that authorized the trial court to apply both the 1982 and January 25, 2010, amended versions of section 4019 and use a two-part approach in calculating Zarate's conduct credit based on whether his presentence custody was served before or after January 25, 2010. Because the 1982 version of section 4019 [**8] was no longer valid at the time of Zarate's sentencing on February 18, the trial court erred in applying the 1982 version of section 4019 in calculating his conduct credit for presentence custody served before January 25. The court's sentence was unauthorized to the extent the court applied the 1982 version of section 4019 to calculate, in part, Zarate's presentence conduct credit. HN8 "A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered." (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647 [14 Cal. Rptr. 3d 550].) Therefore, we award Zarate an additional 22 days of presentence custody credit, for a total of 137 days of presentence custody credit. (*Ibid.*)

Although the People argue the January 25, 2010, amended version of section 4019 should be applied prospectively and not retroactively, we do not consider the issue to involve retroactivity. [4] The January 25, 2010, amended version of section 4019 applies to any sentencing of a defendant by a trial court on or after January 25, 2010. [5] Therefore, based on our discussion [*945] above, the January 25, 2010, amended version of section 4019 *is* being applied*prospectively* in Zarate's case because that version was effective January [**9] 25, 2010 (and he was sentenced on Feb. 18, 2010), and therefore was the only version of section 4019 in existence on the date of his sentencing.

FOOTNOTES

4 Because Zarate was sentenced on February 18, 2010, we conclude the issue of whether the amended version ofsection 4019 should be applied prospectively or retroactively to those judgments appealed and not final as of January 25, 2010, which issue is currently before the California Supreme Court, is irrelevant to his case. (See, e.g., *People v. Brown* (2010) 182 Cal.App.4th 1354 [107 Cal. Rptr. 3d 286], review granted June 9, 2010,S181963 [holding amended § 4019 applies retroactively to judgments not yet final]; *People v. Rodriguez* (2010) 183 Cal.App.4th 1 [107 Cal.

Rptr. 3d 460], review granted June 9, 2010, S181808 [holding amended § 4019 does not apply retroactively to judgments not yet final].)

5 However, as noted above, the present version of section 4019 will apply to sentencing of those defendants who committed their crimes on or after September 28, 2010. (Stats. 2010, ch. 426, § 2.)

DISPOSITION

The judgment is modified to award Zarate an additional 22 days of presentence conduct credit, for a total of 137 days of presentence custody credit. As so modified, the judgment is affirmed. [**10] The trial court is directed to amend its abstract of judgment to reflect this modification and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

Aaron, J., concurred.

DISSENT BY: Benke

DISSENT

BENKE, Acting P. J., Dissenting.—I respectfully dissent.

Although it attempts to avoid the issue of retroactivity, the majority gives Salvador Briceno Zarate the benefit of additional good conduct credits which were not in effect during most of his presentence incarceration. My colleagues afford Zarate the additional credits because, although the amendment providing the additional credits was not in effect during the bulk of Zarate's presentencing incarceration, the amendment did become effective shortly before he was sentenced.

The chief vice in their rationale is the failure to consider the underlying purposes of the good conduct credits provided by the statute. " 'The presentence credit scheme, [Penal Code] section 4019, focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed on felony charges.' " (*People v. Brown* (2004) 33 Cal.4th 382, 405 [15 Cal. Rptr. 3d 624, 93 P.3d 244].) As another court observed in rejecting [**11] a claim to credit for time served before credits were

available: "Reason dictates that it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806 [155 Cal. Rptr. 912].) Given the self-evident proposition that it is not possible to influence behavior after it has occurred, any [*946] consideration of the purpose of the statute requires a construction which applies Penal Code [1] section 4019 credits based on the law in effect during the period of incarceration, rather than at the time of sentencing.

FOOTNOTES

1 All further statutory references are to the Penal Code.

Such a construction is also required by section 3 which provides: "No part of [the Penal Code] is retroactive, unless expressly so declared." Indeed, any 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." (*People v. Hayes* (1989) 49 Cal.3d 1260, 1274 [265 Cal. Rptr. 132, 783 P.2d 719], italics added.)

Here, there is no express declaration of retroactivity and given that the manifest purpose of providing good time credit is to influence future conduct, there is only a clear and compelling implication of *prospective application.* [**12] While it is true section 2900.5 expressly requires credits be calculated at the time of sentencing, section 2900.5 does not speak to the method by which such calculation should be made. By their terms, section 4019 andsection 2900.5 both permit a court to provide a prisoner credits based on the law in effect during any particular period of incarceration. Plainly, a trial court is quite capable of making such calculation at the time of sentencing, as it did in this case.

In addition to ignoring the underlying purposes of good conduct credits, the majority opinion mandates an unfair application of the statute. Under the majority's interpretation, a prisoner who was incarcerated on the same day as Zarate, but sentenced before January 25, 2010, would receive no additional credit, while by virtue of a lengthier pretrial proceeding Zarate would receive additional credits calculated on the entire period of his incarceration. I find nothing in the history of the statute or logic which would support such disparate treatment of similarly situated defendants.

Finally, any doubt as to the Legislature's intention with respect to application of the additional credits was definitely resolved when [**13] on

September 28, 2010, the Legislature again amended section 4019 and eliminated the additional credits which Zarate seeks. Importantly in eliminating the additional credits, the Legislature expressly provided that the changes it made would apply to prisoners who are confined for a crime committed after the effective date of the change. (§ 4019, subd. (g).) The Legislature's latest amendment [*947] makes it clear not only that we should narrowly apply the credits it has decided to eliminate, but also that the Legislature recognizes that good conduct credits are matters which have only prospective impact.

I would affirm the trial court's judgment without modification.

8

ORIGINAL

Law Offices of Mark J. Shusted, Esq.
P.O. Box 2825
Granite Bay CA 95746
People v. Brown S181963

Amended 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 April 12, 2011. The addressees are:

Dallas Sacher, Esq.
SDAP
100 Noerth Winchester Blvd.
Suite 310
Santa Clara, CA 95050

I declare under penalty of perjury that the foregoing is true and correct.
Executed on April 12, 2011, in Granite Bay, California.

Mark J. Shusted