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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MERHAWI Y. MEHARI,

Defendant and Appellant.

A132150

(Contra Costa County  
Super. Ct. No. 5-110278-9)

**INTRODUCTION**

Defendant Merhawi Y. Mehari, driving a stolen car, led police on a chase through Walnut Creek before crashing into a fence. A jury convicted him of unlawfully taking or driving a vehicle and evading an officer. (Veh. Code, §§ 10851, 2800.1.) He was sentenced to prison for eight years, with presentence credit of 199 days.

Prior to trial, defendant asked for a translator. The trial court denied the request. On appeal, defendant argues that reversal is required because the trial court erroneously denied his request for the assistance of an interpreter without making an adequate inquiry. He also argues he is entitled to additional conduct credits under the current version of Penal Code section 4019<sup>1</sup> as a matter of equal protection. We affirm the judgment, because the record does not affirmatively demonstrate defendant needed an interpreter,

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

and a rational basis supports the prospective application of section 4019 for awarding credits.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On the morning of January 7, 2011, a resident of the city of Alameda went outside to defrost the windows of her tan-colored 1999 Mazda Protegé. Leaving the vehicle running and the doors unlocked, she went back inside her home. When she went back outside, she saw a tall, slender, black man wearing a black “hoodie” jacket and latex gloves driving away in her car.

The next morning, a Walnut Creek police officer on uniformed patrol spotted the stolen car. When backup arrived, the officer activated his lights and sirens. Defendant, the driver of the Mazda Protegé, accelerated away from the police cars at 40 miles per hour and led the officers on a chase through city streets and a parking lot. He eventually crashed into a fence and was arrested by police. Defendant was wearing white latex gloves. Police found a hooded jacket in the car.

Defendant was tried in Contra Costa County Superior Court on charges of unlawfully driving or taking a vehicle (count 1, Veh. Code, § 10851), a felony, and evading an officer (count 2, Veh. Code, § 2800.1), a misdemeanor. He was also charged with and tried on a “strike” prior conviction and service of two prior prison terms. (Pen. Code, §§ 667, subds. (b)-(i), 667.5, subd. (b).) On April 22, 2011, a jury found defendant guilty as charged. Following a bifurcated trial on the prior convictions, the jury also found true the prior conviction allegations. On May 20, 2011, defendant was sentenced to a prison term of eight years comprised of the upper term of three years for count one, doubled pursuant to the three strikes law, and one year to be served consecutively for each of the prior prison terms. The trial court awarded defendant a total of 199 days of presentence credit: 133 days of actual local time and 66 days of local conduct credits.

### **DISCUSSION**

#### ***I. Defendant Was Not Deprived Of The Right To An Interpreter.***

Defendant asserts he was denied his federal and state constitutional rights to due process, effective assistance of counsel, and an interpreter when the trial court denied his

request for a translator without holding an adequate hearing. As we explain below, no abuse of discretion appears, but even assuming the court's inquiry was too perfunctory, in our view, any error was harmless beyond a reasonable doubt. (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1012 (*Rodriguez*)).

### *Factual Record*

On April 21, 2011, the fourth day of trial, defense counsel informed the court there were some objections defendant wanted her to state on the record. First, he wanted her to inform the court “that he was highly offended with the Court informing the jury that he was in custody and shackled and wanted me to lodge an objection as to that comment made by the Court. He feels that was highly prejudicial and has probably affected his case at this point.” Next, he wanted her to object to herself “for calling him a black man yesterday when I was doing my voir dire and when I asked the jury if any of them had any racial prejudice against Mr. Mehari. And he wanted me to state that he’s a human being, he’s of no color and does not want me to refer to him in that fashion.” Lastly, defendant wanted to alert the court that “as far as he knows, [the court] has not corrected the fact that he’s charged with only one felony and one misdemeanor, and at this point he feels the jury still believes it’s . . . two felonies.” Defense counsel also explained to the court that she had informed defendant that if the jury were to convict him, he would have three choices about how to deal with his prior convictions: he could have a jury trial, a court trial, or admit the prior convictions. She informed the court that defendant chose to have a jury trial.

The court asked defendant if he had any other concerns besides those voiced by his counsel. Defendant responded, “Yes. Some of this stuff I really couldn’t—some of the stuff that I heard I really couldn’t understand it, because English is like my third language, so it had to be said, like, in something that’s more, like easy for me to understand. Like, she said some of the words that I just couldn’t even remember, some of them. . . . [¶] Or maybe you could bring me a translator.”

In response, the court reviewed the court file, noting that defendant had made several other appearances “[a]nd there’s absolutely no indication that he doesn’t

understand the English language.” The court also recalled that at the preliminary hearing, “there wasn’t any indication from the police officers that they had to use an interpreter in talking to Mr. Mehari after he was arrested or that there was any difficulty understanding. [¶] So, that is the record with respect to your claim that you don’t understand what’s going on.” The court then addressed defendant’s other stated concerns about the jury learning he was shackled and in custody, and defense counsel’s reference to him as a black man. At the conclusion of the court’s comments, defendant stated, “I couldn’t even understand some of the things you just told me right now.” The court responded, “I don’t believe you. . . . [T]he record should reflect I do not believe the defendant when he says he does not understand English.”

#### *Analysis*

The California Constitution guarantees that every “person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings.” (Cal. Const., art. 1, § 14; *People v. Aguilar* (1984) 35 Cal.3d 785, 790 (*Aguilar*); *People v. Menchaca* (1983) 146 Cal.App.3d 1019, 1023.) The burden of demonstrating inability to speak English is on the defendant, who must affirmatively show that his or her “understanding of English is not sufficient to allow him to understand the nature of the proceedings and to intelligently participate in his defense.” (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1454 (*Raymundo B.*)) We review for abuse of discretion the trial court’s determination of whether an accused’s comprehension of English is so minimal as to render the services of an interpreter necessary. (*People v. Carreon* (1984) 151 Cal.App.3d 559, 566–567.) Factors relevant to this determination include the defendant’s request for an interpreter, whether one has previously been provided, and the defendant’s birthplace, community, level of education in the United States, and employment history. (See, e.g., *Aguilar, supra*, 35 Cal.3d 785, 789, fn. 4; *Raymundo B., supra*, 203 Cal.App.3d at p. 1455.)

Here, the record before the trial court supports its conclusion that defendant’s comprehension of English was not minimal. He evidently understood what was being said during voir dire well enough to complain to his attorney about the fact that she had

referred to him as a black man, and that the court had informed the jury of his custodial status and shackling, and that the court had not corrected the jury's misconception that he was charged with two felonies. The evidence adduced at the preliminary hearing demonstrated that defendant did not need an interpreter to understand, or be understood by, the police. Although he had appeared in court several times before, he had never requested an interpreter, or complained of any inability to communicate with his counsel. On this record, the court did not err in finding that defendant did not need an interpreter.

However, assuming arguendo the court erred in failing to conduct a more in-depth inquiry into defendant's linguistic background, we "review the record as a whole to determine whether we can ascertain that any error was harmless beyond a reasonable doubt." (*Rodriguez, supra*, 42 Cal.3d at p. 1013.)<sup>2</sup> Defendant informed the probation officer that he was born in Eritrea and emigrated to the United States with his family in 1990 (when he was 9 years old). He "attended Longfellow Elementary and Chipman Middle schools, Encinal High School and Alameda High School in Alameda and graduated from the latter. He said he attended Alameda College for a short time and was accepted to Sacramento State on a basketball scholarship. However, he failed to take advantage of it. . . . [¶] [H]e indicated he did well in high school." He also reported that "he has had stints of employment with Burger King, Nations, Togo's, GNC, Alameda Book Store and Plaid Pantry Grocery." Defendant also shared with the probation officer facts about his upbringing, substance abuse issues, prior juvenile record, marital status, military record, and financial status, without an interpreter. In short, the record below is devoid of any evidence that defendant's mastery of English was so minimal that he required the assistance of an interpreter. Any deficiency in the trial court's inquiry was manifestly harmless beyond a reasonable doubt.

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<sup>2</sup> Defendant acknowledges that in *Rodriguez* our Supreme Court held that *Aguilar* error is not reversible per se, but rather is subject to harmless error analysis. However, he maintains that "*People v. Rodriguez*[, *supra*, 42 Cal.3d 1005] does not require applying the harmless beyond a reasonable doubt standard in the instant case. Instead, the prejudicial per se standard should be applied." We disagree. *Rodriguez* is binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

## ***II. Defendant Is Not Entitled To Additional Conduct Credits Under the Amended Version of Section 4019.***

The trial court awarded defendant 133 days of custody credit and 66 days of conduct credit for the time he spent in county jail prior to sentencing. The offenses of which defendant was convicted were committed in January of 2011. He was sentenced on May 20, 2011. Defendant argues that he is entitled to an award of 67 additional conduct credits, because the October 1, 2011 amended version of section 4019, if applied prospective only, violates equal protection of the laws. He relies on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), in which our Supreme Court held that the prospective application of section 2900.5 violated equal protection.<sup>3</sup> Defendant argues that, as in *Kapperman*, “there is no rational basis” here for section 4019’s distinction between defendants whose offenses were committed before the effective date of the statute, and those whose offenses were committed after that date. As we recently explained in *People v. Borg* (2012) 204 Cal.App.4th 1528 (*Borg*), the prospective application of section 4019 does not violate equal protection.

### *The Statutory Backdrop*

“Before January 25, 2010, section 4019 provided that if a defendant earned all available presentence conduct credits, six days would be deemed to have been served for every four days spent in actual custody. (Former § 4019, subd. (f); Stats. 1982, ch. 1234, § 7, pp. 4553–4554.) [¶] Effective January 25, 2010, the Legislature amended section 4019 to increase the number of presentence conduct credits available to eligible defendants. (Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50.) Under the amended version of the law, a defendant earned credits at twice the previous rate, that is, four days of presentence credit for every two days of custody. (Former § 4019, subd. (f); Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50.) However, defendants who were required to

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<sup>3</sup> At the time, section 2900.5, “which gives credit to persons convicted of felony offenses for time served in custody prior to the commencement of their prison sentence” applied prospectively only, “limiting the application of the section to those persons who are delivered into the custody of the Director of Corrections on or after March 4, 1972, the effective date of the section.” (*Kapperman, supra*, 11 Cal.3d at pp. 544–545.)

register as sex offenders, who were incarcerated for commission of a serious felony, or who had suffered a prior conviction for a serious or violent felony, as defined in sections 667.5 and 1192.7, were ineligible for the enhanced credits and continued to accrue credits at the previously applicable rate. (Former § 4019, subds. (b)(2) & (c)(2).) [¶] The Legislature again amended section 4019 in 2010 and 2011. (See Stats. 2010, ch. 426, § 2; Stats. 2011, ch. 15, § 482; Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 35.)” (*Borg, supra*, 204 Cal.App.4th at pp. 1536–1537.)

As of October 1, 2011, section 4019 deems “a term of four days . . . to have been served for every two days spent in actual custody” . . . “[w]hen a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp as a result of a sentence imposed pursuant to subdivision (h) of Section 1170.” (Pen. Code, § 4019, subds. (a)(6), (f).) This is a more generous formula than the one applicable under prior versions of the statute to prisoners, like defendant, who were excluded from earning enhanced credit because of their criminal histories. The current version eliminates the exclusion. However, the current amendment was expressly made prospective only<sup>4</sup> and explicitly states that “[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” Defendant contends the distinction drawn by the current statute violates his right to equal protection of the laws. To remedy the constitutional infirmity, defendant argues, the current amendments to the statute should be applied retroactively, thereby entitling him to additional credits for the entire period of time he served in county jail prior to his sentencing on May 20, 2011.

#### *Analysis*

“ “Guarantees of equal protection embodied in the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction. . . .”

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<sup>4</sup> Section 4019, subdivision (h) currently provides: “The changes to this section enacted by the act that added this subdivision shall apply prospectively and 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 October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.”

[Citation.]’ . . . [¶] ‘ “The equality guaranteed by the equal protection clauses of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated. The Legislature may make reasonable classifications of persons and other activities, provided the classifications are based upon some legitimate object to be accomplished.” [Citation.]’ [Citation.]” (*Borg, supra*, 204 Cal.App.4th at pp. 1536–1537.)

“ “ “The 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.] . . .’ [Citation.]” (*Borg, supra*, 204 Cal.App.4th at p. 1537.) “The ‘similarly situated’ prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified.” (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714; *Borg, supra*, at p. 1537.)

We agree with defendant that he is similarly situated with persons whose offenses were committed after October 1, 2011 with respect to the award of conduct credits under section 4019. Those defendants who committed the same offenses or earned conduct credits before the operative date of the statute are treated more harshly than those who committed the same crimes or earned their credits on or after October 1, 2011. “[T]he two groups are similarly situated in the sense that they committed the same offenses, but are treated differently in terms of earning conduct credits based entirely on the dates their crimes were committed and their credits were earned. In terms of receiving additional conduct credit, nothing distinguishes the status of a prisoner whose crime was committed after October 1, 2011, from one whose crime was committed before that date. This satisfied the first prerequisite for a meritorious claim under the equal protection clause, a classification that affects two similarly situated groups in an unequal manner. [Citation.]” (*Borg, supra*, 204 Cal.App.4th at p. 1538.)

We also agree with the parties the rational basis test is the proper standard of review for scrutinizing the legislative action in this case. “Legislation that creates sentencing disparity or alters the treatment of custody credits for inmates does not affect a fundamental right, and thus satisfies the requirements of equal protection ‘if it bears a rational relationship to a legitimate state purpose.’ [Citations.]” (*Borg, supra*, 204 Cal.App.4th at p. 1538.) “ “[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.] Where there are “plausible reasons” for [the classification], “our inquiry is at an end.” ’ ’ ’ ’ ” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200–1201; see also *Borg, supra*, at p. 1539.)

“We look to the purposes of the 2011 amendments to section 4019 to evaluate the rational basis for the legislative classification. The presentence custody credit scheme of section 4019 is generally focused on encouraging ‘ “minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed on felony charges. . . .” [Citations.]’ [T]he 2011 amendments to section 4019 were enacted for a decidedly different purpose: as part of legislation to address the state’s fiscal emergency by effectuating an earlier release of a defined class of prisoners, thereby relieving the state of the cost of their continued incarceration and alleviating overcrowding in county jail facilities. (See Assem. Bill No. 17X (2011–2012 1st Ex. Sess.); Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 35; Legis. Counsel’s Dig., Assem. Bill No. 109 (2011–2012 Reg. Sess.); Legis. Counsel’s Dig., Assem. Bill No. 109 (2011–2012 Reg. Sess.).)” (*Borg, supra*, 204 Cal.App.4th at p. 1538.)

Here, as in *Borg*, the defendant posits “there is no rational basis” for “precluding a retroactive application of the more generous formula of conduct credits to some prisoners, based only on the dates their crimes were committed or credits were earned, [however], we perceive a legitimate reason for limiting the extension of credits. The Legislature may have decided that the nature and scope of the fiscal emergency required granting additional credits to the specified classes of prisoners previously denied

them—those who must register as sex offenders, or committed serious felonies, or had suffered a prior conviction for a serious or violent felony—only after the effective date of the amendments. That basis for the legislation is substantiated by the explicit articulation in subdivision (h) of section 4019 of a prospective application of the statutory amendments. Reducing prison populations by granting a prospective-only increase in conduct credits strikes a proper, rational balance between the state’s fiscal concerns and its public safety interests.” (*Borg, supra*, 204 Cal.App.4th at p. 1539.)

“ “The decision of how long a particular term of punishment should be is left properly to the Legislature. The Legislature is responsible for determining which class of crimes deserves certain punishments and which crimes should be distinguished from others. As long as the Legislature acts rationally, such determinations should not be disturbed.” [Citation.]’ [Citations.]” (*Borg, supra*, 204 Cal.App.4th at p. 1539.) The California Supreme Court has rejected the claim that an equal protection violation arises out of the timing of the effective date of a statute that ameliorates the punishment for a particular offense. (*People v. Floyd* (2003) 31 Cal.4th 179, 188.) “ “ “ “The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.” [Citations.]’ ” ’ ” (*Borg, supra*, at p. 1539.)

We conclude that a rational basis exists for the timing and prospective application of the effective date of the 2011 amendments to section 4019, which lessened punishment by expanding the class of prisoners who receive increased conduct credits. The prospective application of the statute does not violate equal protection principles.

### CONCLUSION

On the record before it, the trial court did not abuse its discretion in denying defendant’s request for a translator. If the court erred in failing to conduct a more in-depth inquiry of defendant’s linguistic background, any error was harmless beyond a reasonable doubt. The prospective application of section 4019 does not violate equal protection principles.

## **DISPOSITION**

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Banke, J.

*People v. Mehari, A132150*