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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD THOMAS SCOTT, II,

Defendant and Appellant.

H036808

(Santa Clara County  
Super. Ct. No. C1077048)

Defendant Ronald Thomas Scott, II was convicted by plea of threatening a crime victim or witness in violation of Penal Code section 139, subdivision (a), with two admitted prior strike convictions for criminal threats, one involving the same victim as the present crime, who for a time was romantically involved with Scott's former girlfriend.<sup>1</sup> (§§ 667, subd. (b)-(i) 1170.12.) After the court granted Scott's *Romero*<sup>2</sup> motion striking one prior, he was sentenced to eight years in prison, consisting of the aggravated term of four years, doubled for the remaining prior strike. The court also, on its own and without objection, imposed a no-contact order prohibiting any contact between defendant and the victim of his threat for a period of 10 years, ostensibly under section 136.2, subdivision (g). The court further imposed, without objection, a restitution fund fine of \$10,000 under section 1202.4, subdivision (b). The court said it was setting

<sup>1</sup> Further unspecified statutory references are to the Penal Code.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

this fine in accordance with the statutory formula. The court further awarded a total of 486 days of pre-sentence credit, of which 162 days were conduct credit calculated under former code section 4019, subdivision (f).<sup>3</sup>

On appeal, Scott contends that the court was without authority to impose the no-contact order. He also contends on equal protection grounds that he is entitled to additional conduct credit based on legislative changes to section 4019, which are expressly operative to crimes committed on or after October 1, 2011, a date subsequent to Scott's crime. He finally challenges the amount of the restitution fund fine as a miscalculation of the statutory formula and asserts ineffective assistance of counsel for his attorney's failure to have objected to the amount of the fine below. We reject Scott's contention concerning his entitlement to additional conduct credit but conclude that the court lacked authority to issue the no-contact order and miscalculated the restitution fund fine based on the statutory formula, and that Scott received ineffective assistance of counsel with respect to this latter error. We accordingly modify the judgment and otherwise affirm it.

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<sup>3</sup> According to the record, the crime for which Scott was convicted was committed on May 12, 2010. He pleaded guilty on February 2, 2011, and was sentenced on April 14, 2011. As we will explain, section 4019 was amended effective January 25, 2010, and again effective September 28, 2010, but defendant's credits were properly calculated under the version of section 4019 in effect either on the date he committed the crime or on the date he was sentenced as both versions yield the same amount of pre-sentence conduct credits awarded at the one-for-two total rate, given Scott's admitted prior serious felony convictions as defined in section 1192.7. (Stats. 1982, ch. 1234, § 7 [former § 4019, subd. (f), operative to Jan. 24, 2010]; Stats 2009-2010, 3d Ex.Sess., ch. 28, § 50 [former § 4019, operative Jan. 25, 2010 to Sept. 27, 2010]; Stats. 2010, ch. 426, §§ 1 & 2 [former §§ 4019 & 2933, operative Sept. 28, 2010-Sept. 30, 2011].)

## STATEMENT OF THE CASE

### I. *Factual Background*<sup>4</sup>

In 2008, Scott was convicted of violating section 422 and sentenced to 32 months in prison for making a criminal threat against Edzavier Reese, who was then dating Erica Pastor, Scott's ex-girlfriend and the mother of his child. Reese had apparently cooperated with authorities in the proceedings leading to Scott's prior conviction.

While in prison serving that 32-month sentence, on May 12, 2010, Scott penned a 12-page rambling letter to Pastor. The letter discussed, among other things, Scott's realization that his upcoming parole conditions would include a no-contact order prohibiting Scott from seeing Pastor and their son. It also discussed Pastor's apparent claim that Scott was not the father of her child, and his love for her and the child. And it included one paragraph that specifically referred to Reese, who by then was no longer dating Pastor. This paragraph said, "So where is Gay Zay?? Where the fuck is he at Erica? Well I need you to help me set him up!! Where is he? Back in Georgia? Or in San Jose in his spot on East Williams St.? Or does he still work in San Mateo? Or in Iraq? Where the fuck is the nigger at Blood? So what is it? Your (sic) not going to help me set him up? Huh, why are you protecting that piece of shit punk bitch ass snitch sucka mutha-fucka? So you are going (sic) just make me find him by myself then? Dam blood that's the least you can do is help me set him up when I get out!! Why are you even protecting that fagget (sic)? So, do you still talk to him?" Scott also said in the letter that he would "beat [Erica's current boyfriend's] ass" when he got out in a few weeks or would "send some of his young hitters" to do the job.

As Scott was scheduled to be released from prison soon after Pastor received the letter, she became afraid when she received it and turned it over to police.

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<sup>4</sup> As the conviction here resulted from a plea, we take the facts of the crime from the probation report and Scott's *Romero* motion.

## II. *Procedural Background*

Scott was charged by complaint on May 29, 2010, with two felony counts of threatening a crime victim or witness. Count one was charged as a violation of section 139, subdivision (a) and count two as a violation of section 140. The complaint also alleged that Scott had suffered two prior strike felony convictions within the meaning of sections 667, subdivisions (b)-(i) and 1170.12, both criminal threats in violation of section 422.

On August 5, 2010, Scott's counsel declared a doubt as to his competency to stand trial and criminal proceedings were suspended. On December 15, 2010, the court declared Scott competent to stand trial and reinstated criminal proceedings.

On February 2, 2011, Scott pleaded no contest to count one and admitted the two prior strike allegations. The subsequent probation report observed that "in view of the Strike Law, a commitment to State Prison for a term of 25 years to life is mandated." The report accordingly recommended this term as well as a \$10,000 restitution fund fine "under the formula permitted by Penal Code section 1202.4(b)," which formula partly relates to the length of the prison term imposed, and a parole revocation fine of like amount under section 1202.45.

At sentencing on April 14, 2011, the court granted, in part, Scott's *Romero* motion, dismissing the earlier of the two prior strike convictions in the interests of justice. The court then sentenced Scott to a prison term of eight years, consisting of the upper term of four years, doubled for the remaining prior strike. The court awarded 324 days of actual custody credit plus 162 days of conduct credit under section 4019, for a total of 486 days of pre-sentence credit. The court pronounced that it was imposing a restitution fund fine of \$10,000 "under the formula permitted by Penal Code section 1202.4(b)" and a parole revocation fine of like amount under section 1202.45, suspended. Finally, *sua sponte*, the court said it would "impose a criminal court protective order pursuant to

section 136.2(g) of the Penal Code,” which would be “entered into the Department of Justice Registry pursuant to Family Code section 6380.” The court said nothing about the precise terms of the order or who would be the party to enjoy the benefits of its protection. But, consistently with what it had pronounced as its intention, the court that same day signed and filed a criminal protective order (on Judicial Council form CR-160) with a box checked indicating the order was being issued under section 136.2. The order restrained Scott from any contact or communication with Reese (prohibiting specified kinds of contact) for a period of 10 years. The abstract of judgment also referenced that a “DVPO” “no contact” order had issued, expiring April 14, 2021.

Scott timely appealed from the judgment of conviction, challenging the sentence or matters occurring after the plea but not affecting its validity. (Cal. Rules of Court, rule 8.304(b).)

## DISCUSSION

### I. *The No-Contact Order*

#### A. *The Issue is Not Forfeited*

Scott contends that the trial court lacked the authority to issue the 10-year no-contact order, and specifically that neither section 136.2 nor Family Code section 6320 authorized the order. Respondent counters that both sections provide statutory authority to support the order and that, in any event, the court had the inherent power to issue such an order. But respondent first contends that Scott has waived this claim on appeal for his failure to have objected to the order below.

As we recently noted in *People v. Scott* (2012)203 Cal.App.4th 1303 (*Scott*), it is a “familiar rule that appellate courts will not review errors to which an objection could have been, but was not, made in the trial court. [Citation.] The application of this rule is

governed by *People v. Scott* (1994) 9 Cal.4th 331, 351-352 [(*Scott II*)<sup>5</sup>], and its progeny. That decision holds that while a trial court objection is generally necessary to preserve a claim of sentencing error for appeal, a ‘narrow exception’ exists when the trial court has imposed an ‘ “ ‘unauthorized sentence.’ ” ’ (*Id.* at p. 354.) A challenged sentence falls within this exception when it ‘ “could not lawfully be imposed under any circumstance in the particular case,” ’ such that it is ‘ “ ‘clear and correctable’ ” independent of any factual issues presented by the record at sentencing.’ [Citations.] In contrast, ‘claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.’ (*Scott [III]*, *supra*, 9 Cal.4th at p. 354.)” (*Scott*, *supra*, at 1309.)

*Scott* involved an order under section 1202.05 made at sentencing precluding visitation between the defendant and his sexual-abuse victims, both of whom were minors at the time of the crimes but one of whom, the defendant’s daughter, had attained majority by the time of sentencing. No objection to the order was raised below but on appeal, the defendant challenged the order as to his daughter, no longer a minor, as section 1202.05 applies only to matters involving victims who are children under 18 years of age. (§ 1202.05, subd. (a); *Scott*, *supra*, at 1307-1308.) Respondent contended that the issue was waived on appeal and that the exception to the general waiver rule for unauthorized sentences did not apply as the challenged no-visitation order was not a sentence and did not constitute punishment, relying on *Scott II* and *People v. Stowell* (2003) 31 Cal.4th 1107, 1113 (*Stowell*) [appellate challenge to trial court’s failure to record required finding of probable cause for AIDS-testing order deemed forfeited].

We rejected these contentions urging forfeiture, as well as a reading of *Scott II*, as respondent presses here, that would apply the unauthorized sentence exception to the

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<sup>5</sup> These two cases involving defendants bearing the last name Scott, as well as the instant case, are all unrelated and the commonality of the surname Scott is a coincidence.

forfeiture rule only to directives concerning the length of confinement. (*Scott, supra*, at pp. 1309-1310.) We also rejected in *Scott* a reading of *Stowell* for the proffered rule “that a sentencing directive cannot be viewed as an unauthorized sentence unless its purpose is punitive,” something respondent likewise contends here. (*Scott, supra*, at 1310.) We further concluded in *Scott* that the challenge to the no-visitation order in any event fell within the “ ‘general forfeiture rationale’ ” under which an appellate court retains the discretionary power to entertain an objection first raised on appeal, particularly where, as here, the issues present only pure questions of law based on undisputed facts and the asserted error is “ ‘clear and correctable’ ” independent of any factual issues presented by the record at sentencing.” (*Id.* at p. 1311; *People v. Williams* (1998) 17 Cal.4th 148, 161, 162, fn. 6; *People v. Welch* (1993) 5 Cal.4th 228, 235; *Air Machine Com SRL v. Superior Court* (2010) 186 Cal.App.4th 414, 421, fn 7; *People v. Rosas* (2010) 191 Cal.App.4th 107, 115.)

For the reasons enunciated in *Scott*, we will reach the merits of defendant’s challenge to the no-contact order here. We are further inclined to exercise our discretion to avoid forfeiture in this case because defendant was not provided with any notice that a no-contact order would be issued and neither the victim nor the People requested such an order. Nor was it contemplated in the probation report, which referenced the victim’s view that he was not in fear of defendant and that defendant should be released from prison in spite of the crime. In addition, the court’s oral pronouncement concerning the order did not state which party or parties were to be protected by the order or its specific terms. Under these circumstances, defendant and his counsel had little opportunity to consider or respond to the actual terms of the order or its implications, let alone interpose a timely objection to it on proper legal grounds. Moreover, this case involves the jurisdictional validity of the trial court’s decision to issue a 10-year protective order at sentencing. (See, e.g., *People v. Ponce* (2009) 173 Cal.App.4th 378, 381-382 (*Ponce*))

[challenge to court’s authority to issue protective order under section 136.2 not waived for failure to have raised it below].) Therefore, even if the order does not constitute an “unauthorized sentence” that falls outside the general forfeiture rule as discussed in *Scott*, for all these reasons, we nevertheless exercise our discretion to entertain defendant’s objection to it first raised on appeal.

B. *The Court Lacked Authority to Issue the No-Contact Order*

As noted, the written no-contact order at issue takes the form of Judicial Council form CR-160 with the box checked indicating that it was issued under section 136.2. As we observed in *Scott*, this section “empowers the trial court to make various orders to protect witnesses and victims “ ‘upon a good cause belief that harm to, or intimidation or dissuasion of, a witness has occurred or is reasonably likely to occur.’ ” (*Scott, supra*, at pp. 1324-1325.) Orders issued under this section are generally referred to as “ ‘criminal protective orders’ ” and they include ex parte no-contact orders or stay-away orders under Family Code section 6320;<sup>6</sup> an order that the defendant or any other person before the court not violate any provision of section 136.1, which prohibits intimidation of victims or witnesses; an order that the defendant have no communication with the victim or a specified witness except through an attorney; and an order protecting the victim of a

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<sup>6</sup> Family Code section 6320, subdivision (a), provides, “[t]he court may issue an ex parte order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, . . . , destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specific distance of, or disturbing the peace of the other party . . . .” This section falls within Division 10 of the Family Code, which generally concerns the prevention of domestic violence. Family Code section 6211 defines domestic violence as abuse perpetrated against certain persons included within a domestic relationship such as a spouse or former spouse, cohabitant or former cohabitant, a person with whom a respondent has or has had a dating or engagement relationship, a person with whom the respondent has had a child, a child of a party, or a person related by consanguinity or affinity within the second degree. (Fam. Code § 6211, subds. (a)-(f).) Defendant and the party protected by the order here, Reese, did not have or were not in any such defined domestic relationship.

violent crime from all contact by the defendant. (*Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 950 (*Babalola*).

But we also recognized in *Scott* that orders made under section 136.2 “are ‘operative only during the pendency of criminal proceedings and as prejudgment orders,’ ” relying on *People v. Selga* (2008) 162 Cal.App.4th 113, 118-119; *Ponce, supra*, 173 Cal.App.4th at pp. 382-383; *People v. Stone* (2004) 123 Cal.App.4th 153, 158-160. (*Scott, supra*, at 1325; see also, *Babalola, supra*, 192 Cal.App.4th at p. 959.) Section 136.2 orders accordingly may not extend beyond the duration of criminal proceedings. This serves the aim of the statute, which is to preserve the integrity of the administration of criminal court proceedings or participation in them. (*Babalola, supra*, at pp. 959-962.) Moreover, in cases not involving charges of domestic violence, an order issued under section 136.2 must be founded on good cause, consisting of “ ‘a threat, or likely threat to criminal proceedings or participation in them,’ ” affecting a witness or victim in an ongoing criminal prosecution. (*Babalola, supra*, at pp. 959, 964.) In cases involving charges of domestic violence, the court may also consider the underlying nature of the offense charged and the defendant’s history of domestic violence, prior restraining orders, and other forms of violence or weapons offenses. (§ 136.2, subd. (h).) Thus, in those cases, evidence of past harm to the victim of domestic violence may also constitute good cause for the issuance of a criminal protective order under section 136.2. (*Babalola, supra*, at pp. 963-964.)

Finally, although section 136.2 authorizes criminal protective orders to issue ex parte if there is an adequate showing of the need for a temporary order, the court must thereafter set a hearing to consider whether the order should continue for the duration of the criminal case. The defendant is also entitled to some notice that a request for such relief is being made in order to prepare and mount an opposition. (*Babalola, supra*, 192 Cal.App.4th at p. 965.)

As noted, the no-contact order here was issued at sentencing and purported to restrain defendant's conduct for a period of 10 years. As this period is well beyond the duration of the then-pending criminal case, the order is not authorized under section 136.2. (*Scott, supra*, at pp. 1324-1325.) Moreover, no good cause—a threat, or likely threat to criminal proceedings or participation in them—was shown for issuance of the order in this case not involving charges of domestic violence. What's more, defendant received no notice that the order was being contemplated as the victim of his threat did not request the order and, according to the probation report, was not in fear of defendant. For these reasons as well, the order was not authorized under section 136.2. (*Babalola, supra*, 192 Cal.App.4th at p. 965.)

Respondent alternatively contends that the order was properly issued under the authority of Family Code section 6380, which concerns cases of domestic violence. But, as noted, where, as here, the relationship between the defendant and the victim does not qualify as domestic, as defined, neither this section nor others concerning situations of domestic violence come into play. (Fam. Code § 6211.)

Respondent's final position is that even if no specific statute provided the precise authority for the court to issue the no-contact order, the court nonetheless possessed the inherent power to do so independent of any statute, relying on *Wheeler v. United States* (9th Cir. 1981) 640 F.2d 1116, 1123 (*Wheeler*), and *United States v. Morris* (7th Cir. 2001) 259 F.3d 894 (*Morris*), two federal cases finding an inherent power in federal courts to issue post-conviction orders protecting victims from contact with the defendant, and *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1091, 1097 (*Townsel*) [trial court in criminal case had authority to order defendant's appellate counsel not to contact jurors without first obtaining its approval; exercise of discretion to limit juror-contact was supported by specific circumstances involving defendant that raised serious concerns about juror safety].

But this inherent-power argument ignores that the court here intended and purported to enter the order under section 136.2, which, as noted, limits criminal protective orders to the duration of the criminal proceedings and is specifically intended to protect victims or witnesses participating in the proceedings to guard the integrity thereof. Had the court relied on inherent authority to issue the order here, we still would be reluctant to uphold it. As held in *Ponce* in response to this same argument, an “existing body of statutory law regulates restraining orders” and inherent powers should not be exercised to nullify existing legislation. “Where the Legislature authorizes a specific variety of available procedures, the courts should use them and should normally refrain from exercising their inherent powers to invent alternatives. [Citation.]” (*Ponce, supra*, 173 Cal.App.4th at p. 384.) There are multiple statutes providing authority for restraining or no-contact orders under various circumstances. For long-term orders outside of the probation context, these statutes generally contemplate procedural safeguards not observed here, such as notice and a hearing and the requirement of good cause for the issuance of the order. (See, e.g., Code of Civil Procedure § 527.6.)

And as we observed in *Scott*, *Ponce* has already also declined to apply *Wheeler* and *Morris* as respondent urges us to do here. At page 385, “the [*Ponce*] court noted that the courts in those [federal] cases emphasized the narrowness of the power exercised there. In *Wheeler* the court emphasized that any order restraining mere communication by the defendant would have to rest on a demonstration that communication ‘pose[d] a clear and present danger to the witness’ and that the danger could not be averted by less onerous means. (*Wheeler, supra*, 640 F.2d at pp. 1124, 1126.) In *Morris*, similarly, the court emphasized that the power to make such orders ‘must be reserved for rare and compelling circumstances.’ (*Morris, supra*, 259 F.3d at p. 901.) The order there—preventing the defendant from attempting to contact his juvenile victim—was justified because a future trial was still possible, the defendant had demonstrated a willingness to

inflict his ‘harmful influence’ on the victim, and the victim was ‘particularly vulnerable because she is a child.’ (*Ibid.*)” (*Scott, supra*, at p. 1325, footnote omitted.) Even in *Townsel*, the court’s exercise of authority to limit the defendant’s contact with jurors, or that of his counsel, was justified as the defendant there had already been convicted of murdering one victim because she was a witness to a previous crime and attempting to prevent or dissuade a witness—compelling circumstances involving criminal proceedings not present here. (*Townsel, supra*, 20 Cal.4th at p. 1097.)

It is also worth noting, as we did in *Scott* (*Scott, supra*, at pp. 1325-1326), that in both *Wheeler* and *Morris*, unlike here, the victims or witnesses protected by the contemplated orders, or persons acting on their behalf, had sought or at least supported the orders in question. (*Wheeler, supra*, 640 F.2d at p. 1118 [witness requested protection from court after defendant harassed her and persons associated with her during and after trial]; *Morris, supra*, 259 F.3d at pp. 897, 901 [defendant engaged in persistent efforts to communicate with minor victim after his imprisonment].) In this case, conversely, the party protected by the no-contact order indicated to probation that he was not afraid of, and did not feel threatened by, defendant.

We accordingly conclude as we did in *Scott* that even if “the extraordinary power recognized in [these] federal cases is available to California courts, it can and should be exercised in only the clearest cases,” of which this case is not one. (*Scott, supra*, at pp. 1326-1327.)

Respondent also cites section 1202.05 concerning probation orders and Family Code section 6320 concerning domestic violence as alternative sources of statutory authority for the order. But neither of these contexts is present here and these statutes therefore do not provide authority for the order that was issued.

Because the no-contact order issued here is beyond the authority provided at section 132.6, and because neither the court's inherent authority nor other cited statutes support the order under the particular circumstances presented, we will strike the order.

II. *Defendant is Not Entitled to Additional Conduct Credits*

Scott contends that principles of equal protection entitle him to additional conduct credits. His contention is that the statutory changes to section 4019 and section 2933, expressly operative October 1, 2011, apply retroactively, in effect, so as to entitle him to one-for-one conduct credits under the current version of section 4019 rather than the one-for-two he was awarded.

A criminal defendant is entitled to accrue both actual pre-sentence custody credits under section 2900.5 and conduct credits under section 4019 for the period of incarceration prior to sentencing. Additional conduct credits may be earned under section 4019 by performing additional labor (§ 4019, subd. (b)) and by a prisoner's good behavior. (§ 4019, subd. (c).) In both instances, the section 4019 credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The court is charged with awarding such credits at sentencing. (§ 2900.5, subd. (a).)

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in pre-sentence custody. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended section 4019 in an extraordinary session to address the state's ongoing fiscal crisis. Among other things, Senate Bill No. 3X 18 amended section 4019 such that defendants could accrue custody credits at the rate of two days for every two days actually served, twice the rate as before *except* for those defendants who were required to register as a sex offender; those committed for a serious felony (as defined in § 1192.7); and those, like Scott, with a prior conviction for a violent or serious felony. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].)

For these persons, conduct credit under section 4019 accrued at the same rate as before despite the January 25, 2010 amendments. (Former § 4019, subds. (b)(2) & (c)(2).) These amendments to section 4019 effective January 25, 2010, did not state whether they were to have retroactive application.

California courts subsequently divided on the retroactive application of the amendments to section 4019, effective January 2010, and the issue currently remains pending with the California Supreme Court for resolution. (See, *People v. Brown* (2010) 182 Cal.App.4th 1354, rev. granted June 9, 2010, S181963, and related cases.)<sup>7</sup>

Then, effective September 28, 2010, section 4019 was amended again to restore the less generous pre-sentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating one-for-one credits. (Stats. 2010, ch. 426, § 2.) The express provisions treating differently those defendants who are subject to sex-offender registration requirements, and those committed for a serious felony or, like Scott, with a prior conviction for a violent or serious felony were also eliminated. (*Ibid.*) At the same time, and by the same legislative action, section 2933, previously applicable only to worktime credits earned while in state prison, was amended to encompass pre-sentence conduct credits for those defendants ultimately sentenced to state prison (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e).) In other words, as of September 28, 2010, section 2933 instead of section 4019 applied to the calculation of pre-sentence conduct credits for those defendants sentenced to a prison term, with an exception. This amendment to section 2933 provided for one-for-one pre-sentence conduct credits, more generous than those simultaneously provided under section 4019, but excluded those

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<sup>7</sup> Our own view is that the January 2010 amendments to section 4019 were not retroactive, even in the face of an equal protection challenge analytically akin to that mounted here. (See, *People v. Hopkins* (2010) 184 Cal.App.4th 615, 627-628, review granted June 21, 2010, S183724 [briefing deferred pending decision in *People v. Brown, supra*].)

inmates required to register as sex offenders and those committed for a serious felony or those, like Scott, with a prior serious or violent felony conviction. Under this version of section 2933, subdivisions (e)(1) and (e)(3), these prisoners remained subject to an award of pre-sentence conduct credits under section 4019, accruing at the less generous one-for-two rate. (*Ibid.*) By its express terms, the newly created section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to prisoners confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only.<sup>8</sup> (Stats. 2010, ch. 426, § 2.)

This brings us to legislative changes made to sections 4019 and 2933 in 2011, as relevant to Scott's equal protection challenge. These statutory changes, among other things, effectively made section 4019 again applicable to all prisoners for purposes of the calculation of pre-sentence conduct credits, eliminating this element of section 2933 that was in place from September 28, 2010 to September 30, 2011 only, and reinstated one-for-one pre-sentence conduct credits for all prisoners. (§§ 2933 & 4019, subds. (b)(c) & (f).) These changes to section 4019 were made expressly applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only.<sup>9</sup> (§ 4019, subds. (b), (c), & (h).)

As noted, Scott committed the crime on May 12, 2010, was convicted on February 2, 2011, and was sentenced on April 14, 2011. Under the law in effect on any of these

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<sup>8</sup> These versions of section 4019 and 2933 were in effect when Scott was convicted and sentenced on February 2, 2011 and April 14, 2011, respectively. By noting this, we do not mean to imply that these versions of the statutes applied to him.

<sup>9</sup> These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.) Section 4019 was also amended a third time in 2011, in respects not relevant here. (Stats. 2011, 1st Ex. Sess., ch. 12, § 35.)

dates, he was properly awarded conduct credits on a one-for-two basis (324 days actual credit and 162 days conduct credit).<sup>10</sup>

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, are to have prospective application only, Scott contends, on equal protection grounds, that he is entitled to the reinstated one-for-one conduct credits implemented by those changes (324 actual days and 324 days of conduct credit).<sup>11</sup> He argues that *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*) compels this result, contending that it held that a new statute that provides for pre-sentence credits for prison inmates is fully retroactive to all prisoners by virtue of the equal protection clause. He also cites *People v. Sage* (1980) 26 Cal.3d 498, 507-508 (*Sage*), and urges that it held that felons were similarly situated to all other jail inmates, implicitly overruling *In re Stinette* (1979) 94 Cal.App.3d 800 (*Stinette*), and that the then current version of section 4019 was violative of equal protection because it denied conduct credit to felons who were sentenced to prison while making such credits available to other jail inmates.

Preliminarily, to succeed on an equal protection claim, a defendant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. In considering whether state legislation is violative of equal protection, we apply different levels of scrutiny to different types of classifications.

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<sup>10</sup> This is because as to the dates of conviction and sentencing, and as alleged in the complaint and admitted by Scott, he fits into that category of persons with a prior conviction for a violent or serious felony, who were treated less generously as to an award of pre-sentence conduct credits for the period between September 28, 2010 and September 30, 2011. (Stats. 1982, ch. 1234, § 7 [former section 4019]; Stats. 2010, ch. 426, §§ 1 & 2 [amended former sections 2933, subds. (e)(1) & (e)(3) & 4019, subd. (f), eff. Sept. 28, 2010.)

<sup>11</sup> Respondent contends that Scott has forfeited this argument for his failure to have raised it below. We exercise our discretion to reach the merits because the current version of section 4019 that Scott argues should apply was not yet operative through the date that he was sentenced.

(*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) Where, as here, the statutory distinction at issue neither “touch[es] upon fundamental interests” nor is based on gender, there is no equal protection violation “if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*); see also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities].) Under the rational relationship test, “ ‘ ‘ ‘ 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.” ’ ’ ’ ” (*Hofsheier, supra*, at pp. 1200-1201, italics omitted.)

In *Kapperman*, the Supreme Court reviewed a provision (then-new § 2900.5) that made actual custody credits prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*Kapperman, supra*, 11 Cal.3d at pp. 544-545.) The court concluded that this limitation violated equal protection because there was no legitimate purpose to be served by excluding those already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.) But *Kapperman* is distinguishable from the instant case because it addressed *actual* custody credits, not *conduct* credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served. A further significant distinction may be drawn between *Kapperman* and this case, in that the liberalization of credit at issue in *Kapperman* applied to prisoners regardless of the offense for which they were imprisoned, whereas the change here affects three well defined sub-classes of offenders: those required to register as sex offenders; those committed for a serious felony, as

defined in section 1192.7; or those with a prior serious felony conviction, as defined in section 667.5. (*People v. Olague* [H036888], 2012 Cal.App. Lexis 537, \*16 (May 7, 2012).)

*Sage* is likewise inapposite, because it involved a prior version of section 4019 that allowed pre-sentence conduct credits to misdemeanants, but not felons. (*Sage, supra*, 26 Cal.3d at p. 508.) The high court found that there was neither a “rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons.” (*Ibid.*) But here, assuming without deciding that defendant is similarly situated with those receiving the benefit of the legislative changes, the purported equal protection violation is temporal, rather than based on defendant’s status as a misdemeanor or felon. (*People v. Floyd* (2003) 31 Cal.4th 179, 189-191 [“ ‘punishment lessening statutes given prospective application’ ” on a certain date “ ‘do not violate equal protection’ ”].) The question in this case, which is not answered by *Sage* given its holding, is whether there is a rational basis for the different treatment vis a vis conduct credits.

One of section 4019’s principal purposes is to motivate or reward good behavior while in pre-sentence custody, and it is impossible to influence behavior after it has occurred. The fact that a defendant’s conduct cannot be retroactively influenced provides a rational basis for the Legislature’s express intent that the October 2011 amendments to section 4019 apply prospectively. (*Stinette, supra*, 94 Cal.App.3d at p. 806 [prospective only application of provisions of Determinate Sentencing Act (§ 1170 et seq.) upheld over equal protection challenge]; *In re Strick* (1983) 148 Cal.App.3d 906, 912-913 [prospective only application of statutory changes designed to incentivize productive work and good conduct of prison inmates upheld over equal protection challenge].) This is so even if an inmate has already earned the maximum amount of good conduct credits available under the applicable former version of the statute and is only claiming

entitlement to *additional* conduct credits for the same good behavior that earned him those conduct credits in the first place. What illustrates this point is that unquantifiable and unidentifiable group of inmates who did not earn good conduct credits in the same period of time as defendant, but who might have behaved better given enhanced incentives.

Scott goes to great lengths to illustrate that the purposes of the October 2011 amendments to section 4019 were intended to address California's current fiscal and prison overcrowding crises, a point we accept. But Scott goes further to argue that the equal protection analysis requires focus solely on the purposes of the legislative amendments, not section 4019 itself, and that for these purposes, prisoners whose offenses were committed before the date of the amendments are similarly situated to those whose crimes were committed after. This argument suggests that in the equal protection analysis, the narrow purposes of the amendments trump the legislative purposes of section 4019 in general, which, as noted, include the primary purpose of motivating good behavior, something that cannot occur retroactively and that rationally justifies disparate treatment of inmates in different categories by date who might otherwise be considered similarly situated. But the purposes of the most recent amendments to section 4019 do not displace the essential and fundamental purposes of the statute itself. We find Scott's argument to focus too narrowly on the purposes of the amendments, discarding the overarching goals of the entire statute in constructing his equal protection claim.

Finally, as noted, we accept that the specific purpose of the amendments to section 4019 that became operative October 1, 2011, was 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. [Citations.]" (*People v. Borg* (2012) 204 Cal.App.4th 1528, 1538, 1537-

1539 [amendments do treat similarly situated classes of persons disparately but the legislation nevertheless bears a rational relationship to a legitimate state purpose].) But we agree with our colleagues in Division One of the First Appellate District that “[r]educing prison populations by granting prospective-only increase in conduct credits strikes a proper, rational balance between the state’s fiscal concerns and its public safety interests.” (*Id.* at p. 1539; *People v. Olague, supra*, at pp. \*20-\*21.)

We accordingly reject Scott’s contention that he is entitled to additional conduct credits based on amendments to section 4019, operative October 1, 2011.

### III. *The Restitution Fund Fine*

As noted, the court here imposed the maximum restitution fund fine of \$10,000 under section under section 1202.4, subdivision (b), and a parole revocation fine under section 1202.45 of like amount, suspended. When making the oral pronouncement at sentencing, the court said that the amount of the restitution fine was “under the formula permitted by” the statute. This was preceded by the probation report’s observation that in view of Scott’s two prior strikes, a prison “term of 25 years to life was mandated,” which observation did not take into account the possibility that the court would dismiss either of the prior strikes, reducing the sentence. Perhaps consistently with this recommended 25-year to life prison term, the probation report also recommended a restitution fund fine in the maximum amount of \$10,000. But this amount is not per the statutory formula, given that the court ultimately dismissed one of the prior strikes and imposed a reduced prison term of eight years.

Section 1202.4 provides that when a person is convicted of a crime, the court must order the defendant to pay a restitution fine unless the court finds extraordinary and compelling reasons for not doing so. (§ 1202.4, subd. (a).) Former section 1202.4, subdivision (b)(1) provided that the restitution fine mandated upon the conviction of a felony crime must be set at the discretion of the court, commensurate with the seriousness

of the offense but not less than \$200 and not more than \$10,000.<sup>12</sup> Subdivision (b)(2) provided that “[i]n setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.” Subdivision (d) provides that in setting the fine in excess of the felony minimum, the court shall consider any relevant factors and it lists several nonexclusive factors, including the defendant’s inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any pecuniary or intangible losses, and the number of crime victims. Finally, section 1202.45 further requires the court to impose an additional parole revocation restitution fine in the same amount imposed under section 1202.4, subdivision (b), with the additional fine suspended unless and until parole is revoked.

The sentencing court has wide discretion in setting the amount of the restitution fine and the court is not required to make express findings or state its reasons on the record. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 405-406; *People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1798.) We review the court’s determination for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663; *People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1136.) A court generally abuses its discretion when it rules in an arbitrary, capricious, or absurd manner, or outside the bounds of reason of the particular law being applied, resulting in a miscarriage of justice. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.) But abuse of discretion also occurs when the factual findings critical to the decision are not supported by the record. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998; *People v. Wyman* (1985) 166 Cal.App.3d 810, 815.)

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<sup>12</sup> Section 1202.4, subdivision (b) was amended in 2011 to increase the minimum and maximum amounts of the fine but the prior version of the statute is applicable in this case. (Stats. 2011, ch. 358, § 1.)

The crux of defendant's primary argument here is that because the court unequivocally stated its intention to impose a restitution fine in accordance with the statutory formula provided at section 1202.4, subdivision (b)(2) when it imposed the fine, the amount should have been no more than \$1,600 (the product of \$200 x 8 (number of years of imprisonment) x 1 (number of felony counts of which defendant was convicted) and the court thus abused its discretion in setting the fine at the maximum amount, \$10,000. He also contends that he received ineffective assistance of counsel because his lawyer did not object to the amount of the fine below. Respondent counters that the claim has been forfeited by the failure to object, and that in any event, the court acted within its discretion in setting the maximum fine, pointing out that in the absence of a showing that the decision was irrational or arbitrary, the sentencing court is presumed to have acted to achieve legitimate sentencing objectives and to have followed the applicable law in making discretionary sentencing decisions. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) Respondent also contends that ineffective assistance of counsel has not been demonstrated as the record only shows that the court exercised its discretion in setting the maximum fine and that it was not required to show leniency in the amount of the fine just because it did so by dismissing one of Scott's prior strikes.

But we have already concluded that where the court states its intention to apply the statutory formula in setting the restitution fine, counsel's failure to object to a greater fine constitutes ineffective assistance of counsel. (*People v. Le* (2006) 136 Cal.App.4th 925, 935-936 (*Le*)). In *Le*, the defendant was convicted by plea of two felony counts—second degree robbery and second degree burglary—and he admitted three prior strikes, two of which were dismissed in the interests of justice under section 1385. The court sentenced the defendant to a total term of 12 years, four months, which included a consecutive sentence of one year, four months for the burglary conviction. The court also imposed a

\$4,800 restitution fine under section 1202.4, subdivision (b), in accordance with the statutory formula, as was the court's stated intention, and a parole revocation fine of like amount. (*Le, supra*, at 928.)

On appeal, we held that the consecutive sentence violated the section 654 prohibition on multiple punishments and we reduced the sentence. We also concluded that the calculation of the restitution fine in accordance with the statutory formula based on the improper consecutive sentence further violated section 654, and that counsel's failure to object to the improper sentence and the resulting excessive fine constituted ineffective assistance of counsel.<sup>13</sup> (*Le, supra*, at pp. 928, 932-936.) We rejected the People's contention that the amount of the fine falling between \$200 and \$10,000 was a proper exercise of the court's discretion despite the reduced sentence because the court, like here, had expressly stated its intention to set the fine in accordance with the statutory formula, which amount was mathematically incorrect after the length of the sentence was reduced to account for section 654. (*Id.* at pp. 935-936.) We found it reasonably probable that the trial court would have imposed a smaller restitution fine (and corresponding parole revocation fine) if counsel had objected both to the sentence and the amount of the fine on the basis of section 654, and thus counsel's error was prejudicial. We accordingly reduced the fines in accordance with the statutory formula based on the reduced sentence. (*Id.* at p. 936.)

Our holding in *Le* that counsel's failure to object to a restitution fine that exceeds the statutory formula in the face of the court's stated intention to apply the formula applies here with equal force. Although the factual setting is different and we are not

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<sup>13</sup> We noted that to demonstrate ineffective assistance of counsel, a defendant must show that "(1) 'counsel's performance fell below a standard of reasonable competence' and (2) 'prejudice resulted,' " citing *People v. Anderson* (2001) 25 Cal.4th 543, 569, and *Strickland v. Washington* (1984) 466 U.S. 668, 687-688. (*Le, supra*, 136 Cal.App.4th at p. 935.)

concerned here with section 654, the court likewise stated its intention to follow the statutory formula in setting the restitution fine but applied the formula erroneously. On this record, it is obvious that the court neglected to adjust the amount of the fine in accordance with the formula from the \$10,000 recommended in the probation report after the court exercised its discretion to dismiss one prior strike, which had the effect of reducing the sentence to eight years from the 25 years to life referenced in the probation report. This constituted an abuse of discretion given the court's stated intention to apply the statutory formula, and counsel provided ineffective assistance by failing to object or point out the error to the court. On this record, as in *Le*, it is reasonably likely that the court would have reduced the fine in accordance with the statutory formula had the error been raised. Although the court was not bound to set a lower fine and had the discretion not to follow the formula, its stated intention to do so is dispositive.

We will accordingly reduce the restitution fine and the corresponding parole revocation fine each to \$1,600 per the statutory formula stated at section 1202.4, subdivision (b).<sup>14</sup>

#### DISPOSITION

The criminal protective order pronounced and filed April 14, 2011 is stricken. The restitution fine under section 1202.4, subdivision (b) is reduced from \$10,000 to \$1,600, as is the parole revocation fine imposed but suspended under section 1202.45. As so modified, the judgment is affirmed. The clerk of the superior court is directed to amend the abstract of judgment to reflect these modifications to the judgment of

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<sup>14</sup> In light of this result, we need not address defendant's alternative argument that the court imposed excessive fines that are disproportionate to the seriousness of the offense.

conviction, and to transmit the amended abstract to the Department of Corrections and Rehabilitation.

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Duffy, J.\*

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Mihara, J.

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\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.