In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMES LEE BROWN,

Defendant and Appellant.

Case No. S181963

Appellate District Third, Case No. C056516
Lassen County Superior Court, Case No.
The Honorable Stephen Douglas Bradbury, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Before this Court is the issue of whether or not the 2009 amendment to Penal Code section 4019[1] is to be applied prospectively or retroactively. In the opening brief, respondent argued for prospective application as such a construction was supported by the presumption of prospective application as set forth in Penal Code statutes, the legislative history, the statutory scheme as a whole, and principles of fairness and equity. Appellant argues for retroactive application.

Respondent and appellant agree that the answer to this question is in the legislative intent. (Defendant's Answer Brief on the Merits (DABM) 4; Respondent's Opening Brief (ROB) 4-5.) The starting point for any inquiry into legislative intent as to retroactivity of a Penal Code provision begins with section 3. Appellant argues section 3 is not the beginning point for the inquiry, but rather the end-point, or "tie-breaker." This Court has squarely addressed and rejected this argument in another case. Contrary to appellant's assertions, this Court should not ignore section 3. It stands for the long-followed principle that statutes are presumed to operate prospectively, and without some other clear indication that retroactive application was intended, section 3 should be followed.

Next, appellant argues that the *omission* of a saving clause is a clear indication that the Legislature intended retroactive application. This Court has likewise rejected this argument and determined that the omission of a saving clause does not end the inquiry into legislative intent. Further, the cases on which appellant relies do not support his argument.

Appellant also argues that this Court should ignore the legislative purpose behind section 4019 credits. But, when enacting the amendment to

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

section 4019, the Legislature was presumably aware of the purpose, as numerous courts had found section 4019 credits were aimed at encouraging good behavior and work performance. The Legislature amended the statute in light of this construction.

Further, appellant relies on a 2010 amendment to sections 4019 and 2933 to argue a legislative intent to apply the 2009 amendment retroactively. The 2010 amendment provides no insight into the Legislature's intent that the prior 2009 amendment be applied prospectively or retroactively.

Separately, appellant argues that this 2010 amendment provides a distinct basis on which he is entitled to a new, more beneficial accrual rate for his pre-sentence conduct credits. Because this issue is being raised for the first time at this stage of the appellate process, respondent objects to this argument and respectfully requests that this Court not consider it.

In sum, defendant has not rebutted the presumption of prospective application. His construction would amount to an undeserved windfall of conduct credits to inmates who could not have been encouraged by their existence to follow the rules and regulations or to work. Appellant's interpretation of the amendment undermines principles of fairness that form the backbone of section 4019 credits.

ARGUMENT

I. PENAL CODE SECTION 3 SHOULD NOT BE IGNORED

In its opening brief, respondent asserted that an inquiry regarding the Legislature's intent to apply a statute retroactively or prospectively begins with Penal Code section 3. (ROB 4-5.) In his answer, appellant counters that Penal Code section 3 is not the "'starting point' of analysis. It is the 'ending point.' 'It is to be applied *only after*, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative

intent.'" (DABM) 7-9, quoting *In re Estrada* (1965) 63 Cal.2d 740, 746, italics are appellant's.)

Essentially, appellant asks this Court to ignore Penal Code section 3. A similar argument was advanced in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208 (*Evangelatos*). *Evangelatos* involved an initiative measure which revised joint and several liability in tort actions. The issue before this Court was whether or not the initiative measure was to be applied retroactively or prospectively. Obviously, *Evangelatos* did not involve the Penal Code, or Penal Code provisions. But much like Penal Code section 3, California's Civil Code has a prospectivity provision as well. Civil Code section 3 is identical to Penal Code section 3 and reads, " [n]o part of [this Code] is retroactive, unless expressly so declared."

The dissent in *Evangelatos* asserted the same argument appellant now urges. In response to the dissent's position, the majority concluded:

> The dissenting opinion-relying on passages in a few decisions of this court to the effect that the presumption of prospectivity is to be "subordinated ... to the transcendent canon of statutory construction that the design of the Legislature be given effect ... [and] is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent" [citations] -apparently takes the position that the well-established legal principle ... is inapplicable in this state and that Civil Code section 3 and *other similar statutory provisions* have virtually no effect on a court's determination of whether a statute applies prospectively or retroactively. The language in the decisions relied on by the dissent, however, generally has not been, and should not properly be, interpreted to mean that California has embraced a unique application of the general prospectivity principle, distinct from the approach followed in other jurisdictions (citation), so that the principle that statutes are presumed to operate prospectively ordinarily has no bearing on a court's analysis of the retroactivity question and may properly be considered by a court only as a matter of last resort and then only as a tie-breaking factor.

(*Evangelatos, supra*, 44 Cal.3d at pp. 1208 .) As the majority aptly put it, the general prospectivity principle codified in numerous codes applies in California as it applies in all jurisdictions. Such a principle, particularly where it has been codified, is not to be relegated to a mere consideration of "last resort" or a simple "tie-breaker." But this is exactly what appellant urges. Penal Code section 3 is not to be ignored until it is determined that, after considering other factors, the legislative intent is ambiguous. It is, as asserted in Respondent's opening brief, the "starting point" for the analysis.

The *Evangelatos* court went on to discuss the case law post-*Estrada*, and found that "both this court and the Courts of Appeal have generally *commenced* analysis of the question of whether a statute applies retroactively with a restatement of the fundamental principle that 'legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention.'" (*Evangelatos, supra*, 44 Cal.3d at p. 1208, italics added; see also *People v. Floyd* (2003) 31 Cal.4th 179, 184, italics added [finding that when ascertaining legislative intent, "[w]e *begin* with section 3 of the Penal Code."].) In addition, this Court noted that the plethora of California cases which had approached the issue of retroactivity in this manner

> demonstrate[d] that California continues to adhere to the time-honored principle, codified by the Legislature in Civil Code section 3 *and similar provisions*, that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application. The language in *Estrada*, [and other cases] should not be interpreted as modifying this well-established, legislatively mandated principle.

(*Evangelatos, supra*, 44 Cal.3d at pp. 1208-1209, italics added.)

As appellant points out, the Legislature is presumed to know of the judicial decisions regarding statutes when it acts to amend or change those

statutes. (DABM 18-19.) But, the Legislature is also presumably aware of the provisions of the Penal Code in existence at the time of the amendment. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1096 ["[T]he Legislature is deemed to be aware of statutes and judicial decisions already in existence when it enacts and amends statutes..."]). Accordingly, the Legislature is presumed to know that where it is silent on retroactivity, or has not so clearly indicated its intent that a statute be applied retroactively, the statute will be applied prospectively pursuant to the directive embodied in Penal Code section 3. Hence, where the Legislature is silent on the issue of retroactivity, Penal Code section 3 dictates its intention. Short of some other compelling indication that the statute was intended to be applied retroactively, Penal Codes section 3 ends the inquiry.

II. THE OMISSION OF A SAVING CLAUSE IS NOT A CLEAR INDICATION THAT THE LEGISLATURE INTENDED THE AMENDMENT TO SECTION 4019 BE APPLIED RETROACTIVELY

Next, appellant argues that the failure of the Legislature to include a "saving clause" expressly declaring the amendment to section 4019 prospective constitutes a clear and compelling implication that the Legislature intended retroactive application. (DABM 11.) In large part, appellant's argument rests on previous changes to credit schemes, both actual credits and conduct credits. Essentially, he asserts that through the past changes to credit schemes and the manner in which the judiciary has interpreted legislative intent on retroactivity, a new rule of statutory construction has been created: when a beneficial change is made to a credit scheme, the omission of a saving clause is a clear indication of the Legislature's intent to apply the amendment retroactively. (DAMB 14-20.) The case law belies this assertion and no such rule of statutory construction has ever been approved of by this Court or any other.

Appellant argues that the prior cases involving beneficial changes to credit schemes give rise to a new cannon of statutory construction. He asserts that, with respect to beneficial changes to credit schemes, the Legislature omits a prospectivity clause to signal a clear intention that the statute be applied retroactively. (DABM 14.) Not only does this proposition directly conflict with section 3, it is not supported by the cases on which appellant relies.

First, appellant relies on *People v. Hunter* (1977) 68 Cal.App.3d 389 (*Hunter*) and *People v. Sandoval* (1977) 70 Cal.App.3d 73 (*Sandoval*). In both *Hunter* and *Sandoval*, the Court of Appeal was interpreting a 1976 amendment to section 2900.5. There, the legislative history clearly demonstrates that this amendment was in response to this Court's holding in *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*). As discussed in respondent's opening brief (ROB 22), this Court determined in *Kapperman* that the explicit prospective limitation of *actual* credits violated equal protection principles. (*Id.* at p. 545.) In response to the holding, the Legislature deleted the delivery clause from section 2900.5, as this was the provision the Court had determined was unconstitutional. That *Hunter* and *Sandoval* recognized this, does not give rise to a rule of statutory construction that anytime the Legislature omits an express prospectivity clause, it intends retroactive application. *Hunter* and *Sandoval* simply reiterate what this Court has already held: the presumption of prospective application can be rebutted by a clear and unmistakable legislative intent that the amendment be applied retroactively. In *Hunter* and *Sandoval*, there was such an intent, based on the finding in *Kapperman*, that to do otherwise would be unconstitutional.

Next, appellant relies on *People v. Doganiere* (1978) 86 Cal.App.3d 237 (*Doganiere*) and *People v. Smith* (1979) 98 Cal.App.3d 793 (*Smith.*) Both *Doganiere* and *Smith* found that a beneficial change in the accrual rate

of conduct credits should be applied retroactively. In those cases, like here, there was no saving clause and no explicit indication of legislative intent. Appellant argues that his interpretation continues the legislative tradition of omitting a prospective-only clause where it intends a change in credits should be applied retroactively. Respondent disagrees. As explained in the opening brief, respondent believes *Doganiere*[2] was incorrectly decided and rests on reasoning that is unsound. (ROB 7-8.) That aside, appellant's reliance on *Doganiere* and *Smith* as representative of a rule of statutory construction reaches too far. In both *Doganiere* and *Smith*, the Court of Appeal found the statute retroactive not because the amendment omitted a saving clause, but because the courts determined that a beneficial change in the accrual rate of conduct credits was an "amendatory statute lessening punishment" within the meaning of *Estrada*. (*Doganiere, supra*, 86 Cal.App.3d at p. 240; *Smith, supra*, 98 Cal.App.3d at pp. 798-799.) Accordingly, neither court purported to recognize the rule of construction now advanced by appellant.

Appellant argues that these judicial decisions "inferred an intent for retroactivity from the *omission* of prospectivity language in amendments to sections 2900.5 and 4019." (DABM 19, italics in original.) This misstates the reasoning behind all of the decisions on which appellant relies. These courts did determine, for various reasons, that the amendments at issue were intended to operate retroactively, but not a single court relied on the omission of a saving clause in so finding. Rather, each court determined that retroactive application was the legislative intent either because the

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[2] Although not mentioned in the opening brief, respondent asserts *Smith* is likewise incorrectly decided because its holding rests on the flawed reasoning in *Doganiere*.

history clearly indicated such an intent or because the court determined the amendment fit within the *Estrada* holding.

In addition, this Court has held that the omission of a saving clause does not end the inquiry for legislative intent. None of the cases cited by appellant indicates that this rule of construction has been changed where the amendment at issue is a beneficial change to the accrual rate of conduct credits.

As appellant concedes (DABM 11), "the absence of an express saving clause, emphasized in *Estrada* ("If there is no saving clause he can and should be punished under the new law." [*Estrada, supra*, 63 Cal.2d at p. 747, citing *Sekt v. Justice's Court* (1945) 26 Cal.2d 297, 305]), does not end '[the] quest for legislative intent.' 'Rather, what is required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.'" (*People v. Nasalga* (1996) 12 Cal.4th 784, 793 (*Nasalga*), citing *In re Pedro T.* (1994) 8 Cal.4th 1041, 1046, italics omitted (*Pedro T.*).)

This Court's holdings in *Nasalga* and *Pedro T.* are applicable here. The absence of a saving clause does not end the inquiry into legislative intent, and despite appellant's contentions to the contrary, no such rule has been implicitly adopted by the Legislature by virtue of the historical pattern of judicial construction of legislative intent with respect to retroactivity of changes to credit accrual rates.

In a slightly related argument, appellant asserts that the Legislature's acquiescence to the Court of Appeal decisions in *People v. Doganiere*, *supra*, 86 Cal.App.3d 237 and *People v. Smith*, *supra*, 98 Cal.App.3d 793 constitutes an indication that the Legislature approved of the retroactive application of a change in conduct credits. (DABM 19-20.) But, "[t]he presumption of legislative acquiescence in prior judicial decisions is not

conclusive in determining legislative intent." (*People v. Escobar* (1992) 3 Cal.4th 740, 751.) In *Escobar*, this Court went on to note:

> Legislative silence after a court has construed a statute gives rise at most to an arguable inference of acquiescence or passive approval.... But something more than mere silence is required before that acquiescence is elevated into a species of implied legislation.... [Citations.] In the area of statutory construction, an examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry. 'Legislative inaction is "a weak reed upon which to lean." ' [Citation.]" (*Ibid.*, internal citations and quotation marks omitted.)

In light of this, we are left with appellant's argument regarding legislative intent, which weighs heavily on a cannon of statutory construction this Court has deemed, "a weak reed upon which to lean" and respondent's argument regarding a presumption of prospectivity (§ 3) that has been followed by this Court in numerous cases and is codified as an accepted principle of statutory construction. Appellant's argument should be rejected.

III. RESPONDENT'S CONSTRUCTION OF THE AMENDMENT TO SECTION 4019 IS CONSISTENT WITH LEGISLATIVE INTENT

In its opening brief, respondent clarified a portion of the prospective argument which had been misconstrued by the Court of Appeal. (See ROB 18.) According to the Third District below, "[a] prisoner sentenced shortly after the effective date of Senate Bill 18 would be granted the enhanced benefits notwithstanding the fact much of his or her presentence custody occurred before the effective date and therefore at a time when the additional incentives were not in place." (Slip opn. at p. 31.) In its opening brief, respondent explained that this was not its view. (ROB 18.) Rather, a prisoner sentenced on or after January 25, 2010, would receive credits calculated under the old formula for time spent in custody before January 25, and under the new formula for time on and after January 25.

Now, appellant claims such a construction is insupportable. (DABM 21-23.) Respondent disagrees. This construction and the use of a bifurcated calculation are supported by the language of section 2900.5 and are consistent with the legislative intent and purpose in awarding conduct credits.

Respondent notes, at the outset, that this particular issue is not directly before this Court as appellant served all of his local custody time prior to the effective date of the statute. Thus, his credits were not bifurcated into those earned prior to the statute's effective date and those earned after. However, to the extent that this Court is concerned with a statutory construction that does not run afoul of constitutional equal protection principles, the use of a bifurcated calculation in such cases is proper.

As noted in respondent's opening brief, numerous courts have recognized the legislative intent in awarding or increasing credit for good conduct, which is to encourage good behavior and work performance by inmates in custody. (ROB 7.)

As the *Stinette* court recognized, awarding such credit after the behavior has occurred defeats the purpose behind section 4019 and defies logic. The court noted the purpose behind awarding conduct credits "is the desirable and legitimate purpose of motivating good conduct among prisoners so as to maintain discipline and minimize threats to prison security. Reason dictates that it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806.) Yet, that is precisely what appellant proposes. Allowing for inmates sentenced after January 25 to receive the benefit of the new accrual rate (as opposed to the bifurcated calculation) would essentially benefit those inmates with a windfall of credits for behavior that could not have been influenced by the increased incentive contained in the amendment. Employing the two-tiered calculation is consistent with the legislative intent because it grants inmates

the credits earned pursuant to the incentives in place at the relevant times. This interpretation maintains the Legislature's intent in awarding section 4019 credits to encourage good behavior.

Section 2900.5, subdivision (a), does not dictate a different result. It states, "In all felony and misdemeanor convictions . . , when the defendant has been in custody . . , all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment, . . ." Subdivision (d) goes on to clarify that the sentencing court has the duty of calculating and determining what these credits are: "It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and *the total number of days to be credited pursuant to this section.*" (Emphasis added.) Nothing in section 2900.5 supports appellant's argument that this calculation must be performed exclusively pursuant to the version of the statute in place on the day of sentencing. Rather, the credits awarded must accurately reflect the credits earned according to the various credit statutes over the course of the inmate's custody. This Court has explained:

> Persons detained in a specified city or county facility, or under equivalent circumstances elsewhere, "prior to the imposition of sentence" may also be eligible for good behavior credits of up to two additional days for every four of actual custody. (§ 4019, subds. (a)(4), (b), (c), (e), (f).) One such additional day is awarded unless the detainee refused to satisfactorily perform assigned labor, and a second such additional day is awarded unless the detainee failed to comply with reasonable rules and regulations. (*Id.*, subds. (b), (c), (f).) "[T]he court imposing a sentence" has responsibility to calculate the exact number of days the 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. (§ 2900.5, subd. (d); see also *id.*, subd. (a).)

(*People v. Buckhalter* (2001) 26 Cal.4th 20, 30, italics added (*Buckhalter*).)

While credits are calculated at the time of sentencing, they are not earned on the sentencing date. As the *Buckhalter* court noted, inmates *earn* conduct credits over the course of their custody time. This is demonstrated by section 4019, subdivision (f), which reads in part, "a term of four days will be deemed to have been served for every two days spent in actual custody." After every two days in custody, an inmate has earned an additional two days, even if these days have not yet been awarded by the sentencing court.

Contrary to appellant's assertion (DABM 25), the fact that subdivision (f) was made explicitly retroactive when enacted has no bearing on this issue. An express declaration of an intent to make subdivision (f) retroactive when enacted in 1982, does not imply an express intent that all future conduct credit changes will be retroactive as well. As predicted, respondent does rely on subdivision (f) as well as subdivisions (b)(1) and (c)(1) of section 4019. All three subdivisions demonstrate that conduct credit is earned over the course of an inmate's custody time. It is not earned on the date of sentencing; rather, it is *calculated* on the sentencing date. Because the credit is earned over the course of the period of confinement, it is proper for trial courts to employ the different formulas for calculating credits pursuant to the different statutes in effect at the times these credits were being earned.

In addition, appellant's interpretation of the sentencing provisions could potentially give rise to equal protection violations. Prisoners sentenced on January 26, but having served the majority of their presentence time prior to the effective date would receive the benefit of the new calculation, whereas a prisoner sentenced on January 24, would receive only the old credits. This result is not only a possible violation of equal protection (see e.g. *In re Kapperman* (1974) 11 Cal.3d 542, 544-545),

but it would reward inmates for delaying their court proceedings beyond the effective date of the statute. Frivolous or unnecessary delay would be rewarded with additional unearned credits. The Legislature could not have intended such a result as such an outcome is inconsistent with the canon of statutory construction which requires reviewing courts to attempt to avoid an interpretation which would lead to inequitable or unjust results. (*People v. Clark* (1990) 50 Cal.3d 583, 605 ["In construing a statute we must avoid such arbitrary, unjust, and absurd results whenever the language of the statute is susceptible of a more reasonable meaning."]; see also *People v. Cruz* (1996) 13 Cal.4th 764, 782 [holding that when interpreting statutes, courts should give "consideration . . . to the consequences that will flow from a particular interpretation"].)

As such respondent's construction avoids an equal protection problem and best effectuates the legislative intent.

IV. EVEN ASSUMING THE LEGISLATURE INTENDED TO MAKE PRE-SENTENCE CONDUCT CREDITS CONSISTENT WITH PRISON CREDITS, THIS INTENT HAS NO BEARING ON THE LEGISLATURE'S INTENT WITH RESPECT TO RETROACTIVITY

Respondent argued in the opening brief that the intent behind SB 18 was to reduce prison populations in a manner that accounted for the safety of society, and the rehabilitation of inmates. (ROB 12-13.) Appellant contends the purpose or motivation behind the amendment was to make pre-sentence conduct credits consistent with post-sentence or prison conduct credits. (DABM 27-29.) First, the legislative history on which appellant relies is weak. Even if appellant is correct about the purpose behind the amendment, this purpose does not aid in the quest to reveal the legislative intent with respect to retroactivity.

In support of this argument, appellant relies on the legislative history for Assembly Bill 14 ("AB 14"). (DABM 27-28.) According to appellant, the changes made to section 4019 via SB 18, were originally included in

AB 14. It is in the legislative history for AB 14 that appellant finds the indication that the purpose behind the proposed changes to section 4019 was to make pre-sentence and post-sentence conduct credits consistent. (See DABM 28.) But, as appellant concedes, AB 14 did not pass. Discerning legislative intent for the passage of a subsequent bill from the history of a prior unpassed bill is precarious:

> Prior unpassed bills generally have little value in showing legislative intent. (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 378-379....) Where a predecessor bill is passed by both houses and contains provisions "virtually identical" to those enacted in the successor bill, the history of that predecessor bill *may* reliably indicate intent. (See *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1199....)

(*Medical Bd. of California v. Superior Court* (2003) 111 Cal.App.4th 163, 181-182.) This legislative intent may or may not have contributed to the defeat of AB 14. The fact that it appears nowhere in the legislative history of SB 18 makes it difficult to rely on it in determining that this purpose or motivation carried over to SB 18. This is hardly the type of legislative history that can be deemed "a clear and compelling implication that the Legislature intended [retroactive application.]" (*People v. Alford* (2007) 42 Cal.4th 749, 754.)

Even assuming appellant's assertion is correct, and the Legislature did intend to make the credits consistent, the motivation behind the legislation is not necessarily indicative of a legislative intent for or against retroactivity. (See *People v. Nasalga*, supra, 12 Cal.4th 784, 795 [increasing threshold amounts to address inflation only indicates consideration of decline of dollar and does not indicate intent for prospective application].) Indeed, here, the desire to make the credits consistent says nothing of whether the Legislature sought to make them consistent going forward, or consistent retroactively.

Appellant further asserts that the Legislature's desire to make the credits consistent with one another creates an inference that "the prior method of calculating conduct credits was too severe." (DABM 29-30.) Respondent disagrees. That the Legislature sought to make the credits consistent with one another does not create an inference that the prior method was too severe; it merely creates the inference that the prior method was inconsistent. The Legislature's reason for making them consistent is unknown. It may have been because the Legislature found the prior method too severe, or it could have been motivated by something as simple as a desire to simplify the calculation process—giving each credit calculator (i.e. probation departments, sentencing judges, and CDCR) the same formula to utilize. In truth, the quest for consistency could have been motivated by any number of reasons, and the legislative history provides little insight into what those reasons may have been. Accordingly, the Legislature's motivation to make the credits consistent does not act to bring the amendment to section 4019 within the *Estrada*[3] holding.

Because there is no indication that the Legislature determined that inconsistent credits were too severe, *Estrada* is not controlling, even if this Court determines that the more beneficial credit scheme operates to effectively lessen appellant's punishment. To say that all "amendatory statutes lessening punishment" are to operate retroactively casts the *Estrada* net too widely. In *Estrada*, this Court found the amendment to the punishment for escape with force was retroactive because it was proof of a legislative determination that the prior punishment was too severe. (*In re Estrada, supra*, 63 Cal.2d at p. 744-745.) The *Estrada* exception to the rule of prospectivity still rests on legislative intent. Here, nothing in the legislative history reveals the same legislative intent, i.e. nothing suggests

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

the Legislature determined the prior credit scheme was too severe. Accordingly, as argued in respondent's opening brief (ROB 4-9), *Estrada* is inapplicable.

V. THE LEGISLATURE IS PRESUMED TO HAVE CONSIDERED THE JUDICIAL DECISIONS REGARDING THE PURPOSE BEHIND SECTION 4019 CREDITS, AND TO HAVE AMENDED THE STATUTE IN LIGHT THEREOF

Next, appellant contends respondent's reliance on section 4019's underlying purpose of encouraging good behavior through the use of incentives is misplaced. (DABM 33.) Appellant asserts this is not a proper basis on which to find the amendment prospective because the legislative history does not indicate a reliance on this reasoning. (DABM 36-38.) But, like anything else, the Legislature here amended section 4019 with an understanding of its original purpose and with the awareness that judicial decisions had interpreted the provision as one which creates incentives to induce good behavior from jail inmates.

As noted in the opening brief, numerous courts have interpreted section 4019 credits as incentives put in place to encourage good behavior and work performance by jail inmates. (See ROB 7.)

When the Legislature amended section 4019, it was presumably aware that this is the purpose behind conduct credits and it amended the statute in light thereof. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1087-1088 ["[W]hen, as here, the Legislature undertakes to amend a statute which has been the subject of judicial construction" "it is presumed that the Legislature was fully cognizant of such construction...."]; *People v. Yartz* (2005) 37 Cal.4th 529, 538 ["The Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.]"].)

Thus, it is fair to assume that the Legislature was not only aware of the judicial construction, but that its increase in the award of credits was in

accord with those prior decisions. By increasing the award for good behavior and work performance, the Legislature necessarily sought to further encourage inmates' compliance with the rules and regulations and their participation in work programs. Such a conclusion is reasonably inferable from the Legislature's awareness of the judicial decisions finding this to be the purpose of section 4019 credits.

Related to his argument regarding the consideration of incentives, appellant next argues that the distinction between actual credits and conduct credits (i.e. conduct credits are incentives to encourage good behavior) is "illusory." (DABM 35.) But this very distinction, between actual and conduct credits was recognized by this Court in *In re Kapperman, supra*, 11 Cal.3d 542. There, in distinguishing *McGinnis v. Royster* (1973) 410 U.S. 263 [35 L.Ed.2d 282, 93 S.Ct. 1055], which dealt with New York's equivalent of conduct credits, the *Kapperman* court explained

> Even if *McGinnis* had concerned a question of retroactivity it still would not be controlling inasmuch as it dealt with a different kind of credit. *McGinnis* involved a potential 10 days a month "good-time" credit awarded as a bonus for good conduct and efficient performance of duty while in prison. It did not involve credit for time actually spent in jail...

(*Kapperman, supra*, 11 Cal.3d at p. 548.) Appellant goes on to argue that actual credits also encourage good behavior. He asserts that "[t]hey must be earned by the act of remaining in custody." (DABM 35.) The refusal to grant credits when an inmate has escaped custody is not to encourage the inmate to stay in custody; it is instead simply a recognition that to award credit for the time spent in actual custody, the inmate must have been in actual custody. Giving inmates credits for days they were supposed to be in custody, but were not because they had escaped, simply makes no sense.

Further, appellant argues that respondent has "implicitly ask[ed] this court to overrule the majority opinion in [*People v. Sage* (1980) 26 Cal.3d

498 (*Sage*)]." (DABM 38.) This argument misconstrues respondent's reliance on a comment made in the dissenting opinion of *Sage*.

Sage is not helpful to appellant's position, and respondent has not implicitly asked this court to overrule *Sage*. Specifically, appellant relies on footnote 7 in the *Sage* opinion (DABM 38), which reads,

> Inasmuch as the same equal protection concerns as those underlying this court's decision in *In re Kapperman, supra*, 11 Cal.3d 542, i.e., the avoidance of arbitrary classification of prisoners, are present in the award of jail conduct credits, our holding that such credits must be awarded, if earned, for all precommitment jail time is retroactive.

(*Sage, supra*, 26 Cal.3d at p. 509.)

However, the concern in *Kapperman* was with actual credits, and the Court determined that a prospective only award of actual credits violated equal protection. (*Kapperman, supra*, 11 Cal.3d at pp. 544-545.) *Sage* similarly found that giving conduct credits to misdemeanants in local custody, but not giving them to felons in local custody (both pre-conviction and sentence) also gave rise to an equal protection violation. (*Sage, supra*, 26 Cal.3d at pp. 506-508.) Footnote 7 simply indicates that to the extent that felons who served local time did not get these credits, and thus, their equal protection rights had been violated, the decision was retroactive to correct the equal protection violation for those who had suffered it. In a concurring and dissenting opinion, Justice Clark wrote (with Justices Richardson and Manuel concurring):

> I concur in the judgment and opinion of the court except insofar as the rule announced today is given retroactive effect. The purpose of conduct credit is to foster good behavior and satisfactory work performance. (Citation.) That purpose will not be served by granting such credit retroactively.

(*Sage, supra*, 26 Cal.3d at p. 10.) Justice Clark recognized that applying conduct credit retroactively defies logic, as it undermines the purpose of

conduct credit and grants a windfall of credits to inmates who could not have been encouraged by the credits to behave well or to do work. However, short of that principle, which is consistent with respondent's argument, the *Sage* opinion has little relevance to this case unless this Court determines that the Legislature intended prospective application of the amendment but such prospective application violates equal protection. (Contra, *In re Stinette* (1979) 94 Cal.App.3d 800, 806.) Notably, contrary to respondent's prediction in its opening brief (ROB 20-23), appellant has not argued that prospective application of the amendment to section 4019 would violate his equal protection rights.[4]

Respondent has urged that the amendment to section 4019 applies prospectively only. This creates a distinction between prisoners who served time in local custody prior to January 25, and those who served time in local custody after January 25. This distinction exists to serve a legitimate and rational legislative intent, i.e. to further encourage good behavior, which can only be done prospectively. *Sage* stands for the proposition that once an equal protection violation has been established, the correction of that violation needs to be applied retroactively. Such is not the case here, as no equal protection violation occurred in the first instance. Accordingly, *Sage* does not support appellant's position, and respondent has not implicitly asked this court to overrule *Sage*.

For all of these reasons, the Legislature presumably considered the purpose behind section 4019 credits when it amended the statute. Such consideration was proper and bears on the intent to implement the amendment prospectively.

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[4] Respondent would note that the equal protection argument has been raised via amicus curiae brief submitted by the Sixth District Appellate Program and filed with this Court on December 10, 2010.

VI. SECTION 59 DOES NOT SUPPORT APPELLANT'S POSITION THAT THE STATUTE IS RETROACTIVE

Appellant, like the Court of Appeal below, argues that section 59 of SB 18 demonstrates a legislative intent that the amendment to section 4019 was intended to apply retroactively. (DABM 42-47.) Section 59 states, in part:

> The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time [and] [a]n inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act.

(SB 18, § 59.) The Court of Appeal found this indicative of a legislative intent to apply section 4019 retroactively because it referenced "changes in the credit provisions of this act." (See Slip. opn. at p. 34.) Initially, respondent argued that because there were other changes to credit provisions made pursuant to SB 18, section 59 was not helpful in discerning legislative intent. (ROB 17.)

Appellant contends that the "changes made by this act regarding time credits" include a retroactive application of the section 4019 amendments to prisoners who were sentenced prior to the January 25, 2010 effective date of those amendments. (DABM 43.) But, appellant concedes that there are at least three other provisions of SB 18 to which section 59 applies. (DABM 43, citing SB 18 § 38 [continuous incarceration credits pursuant to § 2933, subd. (b); SB 18 § 38 [one-for-one post-sentence conduct credits for local custody]; and changes to § 2933.3 [firefighter credit].) Appellant's argument is actually helpful to respondent's position. In recognizing the other provisions of SB 18 which changed credit provisions, appellant helps to clarify that section 59 applies to at least the three other credit provisions mentioned by appellant. This confirms that section 59

offers no support for or against retroactivity of section 4019. It does not explicitly mention section 4019; it simply says "changes to credit provisions." Because section 4019 credits are calculated at sentencing, by the sentencing court (see § 2900.5), no recalculation is necessary, and the Legislature did not need to grant a similar immunity to trial courts to allow for the changes to section 4019. But, with the retroactive credit changes, and those credit changes which CDCR is already responsible for implementing, such calculation may require additional time. Section 59 is aimed at these provisions.

In addition to the changes noted by appellant, the "credit reductions for inmates who successfully complete specific program performance objectives for approved rehabilitative programming" (§ 2933.05, subd. (a)) are "changes made by this act regarding time credits" (Sen. No. 18, § 59.) Nothing in section 59 of SB 18 states or even implies that the amendments to section 4019 were intended to apply to persons who had already been sentenced under the version of section 4019 in effect at the time of their sentencing.

Section 59's legislative command that the CDCR "implement the changes made by this act regarding time credits in a reasonable time" and that "[a]n inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act" (Stats.2009-2010, 3rd Ex.Sess., ch. 28, § 59, p. 4432) is most reasonably understood as referring to the CDCR's new administrative responsibilities with regard to implementation of the forthcoming mandated regulations. It reflects the Legislature's intent to avoid state liability for administrative delays in applying the new credit regulations and provisions. It does not reveal a clear and unmistakable intent to apply the changes to section 4019 retroactively. Accordingly, the argument should be rejected.

VII. THE 2010 AMENDMENT DOES NOT PROVIDE ANY INSIGHT INTO THE LEGISLATIVE INTENT ON RETROACTIVITY FOR THE 2009 AMENDMENT AND THIS COURT SHOULD DECLINE APPELLANT'S INVITATION TO CONSIDER AN ENTIRELY NEW CLAIM

Appellant makes two arguments with respect to the 2010 amendment to sections 4019 and 2933 included in Senate Bill No. 76 ("SB 76"). He argues first that the amendment clarifies the legislative intent of the 2009 amendment. (DABM 29, at fn. 25; and see DABM 49.) Second, he argues that the 2010 amendment provides a separate and distinct basis upon which he is entitled to the additional conduct credits. (DABM 47-50.) As to appellant's first claim, respondent disagrees and the legislative history of the 2010 amendment reveals an intent separate and distinct from that asserted by appellant. As to appellant's second claim, respondent respectfully requests this Court decline appellant's invitation to find the 2010 amendment directly applicable to this case because this issue is being raised for the first time in appellant's answer brief.

A. Changes made pursuant to SB 76

SB 76 restores the old version of section 4019. Pursuant to the 2010 amendment, defendants serving pre-sentence custody time are eligible for conduct credits at a rate of two days for every four days of actual custody time. (§ 4019, subd. (f).) SB 76 also added subdivision (g), which makes the new decreased credits applicable only to defendants who committed crimes on or after the statute's effective date, September 28, 2010. (§ 4019, subd. (g).) SB 76 also added section 2933, subdivision (e)(1), which states:

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

New subdivision (e)(2) reincorporates the same behavioral standards from section 4019. Effectively, the Legislature granted the beneficial credit accrual rate to any defendants ultimately sentenced to prison. Defendants sentenced to local custody are now only eligible for the section 4019 credits, and cannot earn the more beneficial credits under section 2933, subdivision (e)(1).

B. The legislative history of the 2010 amendment does not support retroactive application of the 2009 amendment

Nothing in the 2010 bill supports a finding that the Legislature originally intended the 2009 amendment be applied retroactively. First, as appellant notes (DABM 29, at fn. 25), "a legislative expression of the intent of an earlier act is not binding upon the courts in their construction of the prior act," although, "that expression may properly be considered together with other factors in arriving at the true legislative intent existing when the prior act was passed." (*Eu v. Chacon* (1976) 16 Cal.3d 465, 470.)

In order to look to the 2010 amendment for guidance, this Court must first determine that the legislative intent on the issue of retroactivity of the 2009 amendment is unclear. "The recognition of subsequent assertions of legislative intent is derived from cases where the meaning of the earlier enactment is 'unclear.' (Citation.) It cannot rest upon the notion that the (subsequent) Legislature has authority to interpret the earlier statute for that is a judicial task. (Citation.)" (*City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 798.)

Based on the reasoning above and in respondent's opening brief, this Court need not rely on the 2010 amendment in discerning legislative intent. The legislative intent to apply the amendment to section 4019 was made clear through Penal Code section 3 and the statutory scheme, as a whole.

In any event, the 2010 amendment does not provide any helpful insight into the Legislature's intent with respect to the retroactivity or prospectivity of the 2009 amendment.

By all accounts, the 2010 amendment was aimed at rectifying an issue which developed with respect to the 2009 changes, just not the issue cited by appellant. Included in both the Senate floor analyses and the Assembly floor analyses was the following comment from the author of SB 76:

> This bill restores the jail inmate credits that existed before the enactment of the prison reform bill passed last year.
>
> Incidental to one of the prison reforms in SBx3 18 from last year - credits for prison inmates - were changes to credits for jail inmates. For many years, county jail inmates could earn enough credits to reduce their jail sentence by up to one-third. SB 18x increased these jail credits to make them consistent with the credit rules for state prison inmates.
>
> After SBx3 18 went into effect, we learned that its jail credit changes would have the unintended effect of undercutting the community corrections effort launched by a bill I co-authored last year with our former colleague, Senator Benoit, SB 678.
>
> Part of that community corrections model involves judges using county jail time as an intermediate sanction short of prison. By reducing available jail time, judges could be faced with an inadequate custodial alternative to state prison. The last thing we want to do is fast-track offenders out of community corrections into prison.
>
> This bill addresses this concern by restoring the credits available for jail inmates under the law prior to the enactment of SBx3 18. This bill does not affect the prison inmate credit reforms enacted by SBx3 18.

(Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 76 (2009-2010 Reg. Sess.) August 25, 2010, p. 2-3; Assem. Floor Analyses, 2d reading analysis of Sen. Bill No. 76 (2009-2010 Reg. Sess.) August 20, 2010, p. 3.) This Court has relied on an author's comments regarding the intent of a

piece of legislation where the comments were incorporated into the analysis of the bill, as they were here. (See *In re Jennings* (2004) 34 Cal.4th 254, 264.) It is clear that the Legislature was concerned with fixing an issue which had arisen by virtue of the 2009 amendment but it did not speak to or offer any insight into its intent with respect to retroactivity or prospectivity of the 2009 amendment. Accordingly, the Court need not look to or rely on the 2010 amendment to section 4019.

Further, appellant argues that the Legislature omitted a declaration of express intent that the 2009 amendment was to be applied retroactively, "out of respect for the appellate courts that had concluded [the amendment was prospective] earlier this year." (DABM 49.) Respondent could locate no authority, and appellant has cited none, which has found the Legislature's omission of a clarification out of respect for incorrectly decided judicial decisions. It seems highly unlikely that, in the wake of a judicial interpretation with which the Legislature patently disagrees, it would remain silent so as not to offend the judiciary responsible for the misconstruction. Instead, the Legislature would, and has, on numerous occasions, clarified its original intent and its disagreement with the courts' interpretation.

Appellant cites the reincorporation of section 59 of SB 18 as further evidence of an intent that the 2009 amendment was intended to be applied retroactively. (DABM 49.) Section 3 of SB 76 states:

> The Legislature intends that nothing in this act shall affect Section 59 of Chapter 28 of the Third Extraordinary Session of the Statutes of 2009, and that this act be construed in a manner consistent with that section.

Section 59, in the original bill, granted a reasonable time to CDCR to allow for changes to inmates' credits. The argument that this included retroactive application of section 4019 was based, in part, on the fact that CDCR does not typically calculate section 4019 credits, sentencing courts

do. (§ 2900.5, subd. (d).) Accordingly, the argument advanced was that CDCR would not need immunity unless section 4019 credits needed to be *recalculated* because the change was to be applied retroactively. As explained above, this argument fails because SB 18 included other credit provisions for which CDCR was responsible for the calculations. (See section VI, ante.)

Appellant now contends that because SB 76 only includes one credit change provision, i.e. the addition of section 2933, subdivision (e)(1), the reincorporation of section 59 of SB 18 signals an original intent that this credit change be retroactive. But appellant fails to consider the statutory scheme, as a whole. The addition of new credits pursuant to section 2933, subdivision (e)(1), is not included in the calculations for which sentencing courts are responsible under section 2900.5, subdivision (d). Thus, under prospective application of the new credits in section 2933, subdivision (e)(1), CDCR *is* responsible for adding the requisite days of credit to the sentences of those defendants sent to state prison. Because the 2010 credit scheme change makes CDCR responsible for the additional calculation, CDCR may presumably require some protection against any inmate who serves "dead time" as a result of a delay in CDCR's ability to calculate the changes quickly. Accordingly, section 3 of SB 76 offers no insight into the Legislature's intent to apply SB 18 retroactively or prospectively.

Finally, contrary to appellant's assertion (DABM 49-50), the inclusion of section 4019, subdivision (g), does not embody a change in the law, but rather, is declaratory of existing law. (See e.g. *K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1234, at fn. 2.) Subdivision (g) was added by SB 76 and states:

> The changes in this section as enacted by ... [SB 76] that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act.

(§ 4019, subd. (g).) In its clarity, subdivision (g) helps to avoid a dispute over the retroactivity of the 2010 amendment to section 4019. Because the amendment decreases the amount of credits earned by inmates, retroactive application has the potential to raise *ex post facto* concerns. (See e.g. *Weaver v. Graham* (1981) 450 U.S. 24, 36 [101 S.Ct. 960, 964, 67 L.Ed.2d 17]; and *Lynce v. Mathis* (1997) 519 U.S. 433 [117 S.Ct. 891, 137 L.Ed.2d 63].) The Legislature's inclusion of the prospective only clause in the 2010 amendment to section 4019 is simply declaratory of existing law, and a reiteration of its desire to avoid any constitutional concerns with respect to the decrease in available credits.

For all of these reasons, SB 76 and its changes to sections 4019 and 2933 offers nothing to help clarify the Legislature's original intent with respect to SB 18 and whether it should be applied prospectively or retroactively.

C. This Court need not consider appellant's claim that the 2010 amendment to section 4019 is applicable to this case

Respondent objects to appellant's claim that he is entitled to new credits pursuant to the 2010 amendment as it is being raised for the first time in appellant's answer brief. Parties may not raise an issue for the first time on appeal. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal. [Citations.]" (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.) The California Rules of Court indicate that an answer brief must be limited to the issues contained in the Petition for Review or in any order of this Court, "and any issues fairly included in them." (Cal. Rules of Court 8.520, subd. (b)(3).)

Appellant's claim that the 2010 amendment applies to this case was neither included in the Petition for Review, nor was it encompassed in this appeal via an order of this Court. Finally, given that it is an entirely new statute, with a new legislative history, requiring a distinct analysis on the retroactivity issue, it is not fairly included in the issues raised in the Petition for Review. Accordingly, it is not fairly presented. This issue would be more properly raised by a petition for writ of habeas corpus to the Superior Court in Lassen County, where appellant was initially sentenced.

On that basis, respondent respectfully requests this Court decline appellant's invitation to consider the 2010 amendment to section 4019. In the event this Court grants appellant's request to consider this amendment, respondent would respectfully request an opportunity to separately address the claim via supplemental briefing at the Court's request. (See Cal. Rules of Court 8.520, subd. (e).)

CONCLUSION

At best, the arguments urged by appellant reveal uncertainty regarding the legislative intent. Nothing has been advanced which depicts a clear and unmistakable intent to apply the amendment retroactively. This is precisely why Penal Code section 3 exists. In such cases, the initial presumption of prospectivity made pursuant to section 3 has not been rebutted, and the amendment should be applied prospectively. Accordingly, respondent respectfully requests this Court overrule the opinion from the Court of Appeal, and find the 2009 amendment to section 4019 was intended to be applied prospectively only.

Dated: December 17, 2010

Respectfully submitted,

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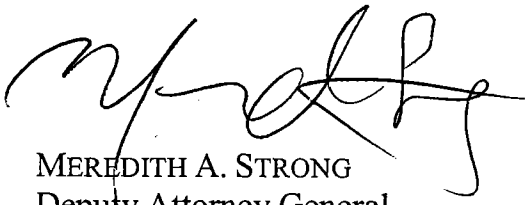
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 8,650 words.

Dated: December 17, 2010

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

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

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

On December 17, 2010, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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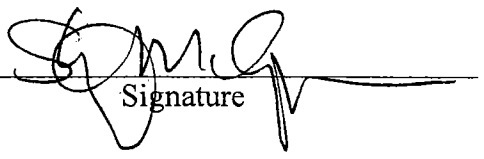
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 17, 2010, at San Diego, California.

STEPHEN MCGEE
Declarant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