

## ARGUMENT

### I.

#### **UNDER AMENDED PENAL CODE SECTION 4019, APPELLANT IS ENTITLED TO ADDITIONAL PRESENTENCE CONDUCT CREDITS.**

##### **A. Legal background**

The California Legislature has amended section 4019 to increase pre-sentence credits for defendants, such as appellant here, who have no current or prior convictions for serious or violent felonies and who are not required to register as sex offenders. (Stats. 2009-2010, 3rd Ex.Sess., c. 28 (S.B.18), § 50.) Former section 4019 provided for one day each of work and conduct credit for each six-day period in custody. (Former Pen. Code § 4019, subs. (b) and (c).) As amended, the statute now provides for one day of work time credit and one day of conduct credit for each four-day period in custody:

(b)(1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

[¶]

(c)(1) Except as provided in Section 2933.1 and paragraph (2), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily

complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp. (Pen. Code, § 4019, subs. (b)(1) and (c)(1), as amended, eff. Jan. 25, 2010.)

Subdivisions (b)(2) and (c)(2), which do not apply to appellant, exclude from this change defendants who are required to register as sex offenders based on a current or prior conviction, defendants with current serious felony convictions, and defendants with prior serious or violent felony convictions. Appellants with current violent felony convictions remain limited to 15% pre-sentence credits. (§ 2933.1.)

The amendment became effective on January 25, 2010, which has already passed. (Cal. Const. Art. 4, § 8(c)(1) ["a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed"]; Cal. Senate Journal, 2009-10 Third Extraordinary Session, Nov. 30, 2009, at p. 273 (Third Extraordinary Session adjourned Oct. 26, 2009).)

Because appellant's conviction was not final on January 25, 2010, and because the record does not indicate that appellant has any prior serious or violent felony convictions or is required to register as a sex offender, appellant contends that the amendment to section 4019 applies to her. This means that she is entitled to the full benefit of the amended statute, regardless of when she was in the county jail.

**B. Because appellant's conviction is on appeal**

**and is not final, amended Penal Code section 4019 requires a correction to her pre-sentence custody credits.**

"[A]bsent a saving clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal." (*People v. Babylon* (1985) 39 Cal.3d 719, 722; see also *People v. Wright* (2006) 40 Cal.4th 81, 90; *People v. Rossi* (1976) 18 Cal.3d 295, 299-300; *In re Estrada* (1965) 63 Cal.2d 740.) "[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Vieira* (2005) 35 Cal.4th 264, 306 [citations and internal quotation marks omitted].)

This principle applies equally to increases in custody credits. (See, e.g., *In re Kapperman* (1974) 11 Cal.3d 542 [then-newly-enacted Pen. Code § 2900.5, awarding pre-sentence custody credits, was retroactive to those incarcerated or on parole regardless of date of commitment]; *People v. Hunter* (1977) 68 Cal.App.3d 389.) Before January 1, 1977, a defendant granted probation did not receive any pre-sentence custody credit, even for actual days, against a county jail sentence imposed as a condition of felony probation. (*Hunter, supra*, 68 Cal.App.3d at pp. 391-392.) On January 1, 1977, an amendment to Penal Code section 2900.5 took effect to credit pre-sentence jail time against a jail term imposed as a condition of probation.

(*Ibid.*) The Court of Appeal in Hunter, noting the Legislature's omission of a "prospective application only" limitation, held that a defendant who was sentenced prior to the effective date of the statute but whose judgment was not yet final, was entitled to the benefit of the new custody credits. (*Id.* at 392.)

As argued in detail below, Senate Bill 18's ("SB18") amendment to section 4019 contains no saving clause, and the lack of such a clause was clearly a deliberate omission by the Legislature.

### **1. Rules of statutory construction**

The rules for interpreting a statute are well settled. "We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning. [Citation.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Flores* (2003) 30 Cal.4th 1059, 1063; *People v. Bautista* (2008) 163 Cal.App.4th 762, 774.) Furthermore, "[t]he rules of statutory construction direct us to avoid, if possible, interpretations that render

a part of a statute surplusage." (*People v. Cole* (2006) 38 Cal.4th 964, 980-981.)

An argument raising an issue of statutory construction is reviewed independently by the appellate court. (*People v. Rish* (2008) 163 Cal.App.4th 1370, 1381; *People v. May* (2007) 155 Cal.App.4th 350, 357.)

**2. The presumption set forth in Penal Code, section 3 may be overcome by evidence of legislative intent to the contrary.**

Penal Code, section 3 provides: "No part of [the Penal Code] is retroactive, unless expressly so declared." This means that "[a] new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise." (*People v. Hayes* (1989) 49 Cal.3d 1260, 1274.)

However, "[a]s its own language makes clear, section 3 is not intended to be a 'straitjacket.' Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent. Even without an express declaration, a statute may apply retroactively if there is a clear and compelling implication that the Legislature intended such a result." (*People v. Alford* (2007) 42 Cal.4th 749, 753-754, internal quotation marks and

citations omitted.)

**3. The legislature's omission of a saving clause from its amendment to section 4019 demonstrates a legislative intent that the amendment be construed retroactively.**

"[W]here [an] amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Estrada, supra*, 63 Cal.2d 740, 748.)

An example of a saving clause is former section 2933, subdivision (d), which provided that "[t]he provisions of subdivision (c) shall also apply in cases of credit forfeited under Section 2931 for offenses and serious disciplinary infractions occurring on or after January 1, 1983." (Stats. 1996, ch. 598, § 2.) Significantly, SB 18 replaced former section 2933, subdivision (d) with new subdivisions (e) and (f), which provide:

(e) A prisoner sentenced to the state prison under Section 1170 shall receive one day of credit for every day served in a county jail, city jail, industrial farm, or road camp after the date he or she was sentenced to the state prison as specified in subdivision (f) of Section 4019.

(f) The provisions of subdivision (d) shall also apply in cases of credit forfeited under Section 2931 for offenses and serious disciplinary infractions occurring on or after January 1, 1983.

(SB 18, § 38, p. 55.) Subdivision (f) is a saving clause.

SB 18 also amended section 2933.3, subdivision (d), which limits additional credits for firefighting-related training or service. The amended

statute contains another saving clause: "[t]he credits authorized in subdivisions (b) and (c) shall only apply to inmates who are eligible after July 1, 2009." (SB 18, § 41, p. 57.)

The amendments to sections 2933 and 2933.3 demonstrate that the Legislature was well aware of saving clauses. Their inclusion in the bill is also strong evidence that the lack of a saving clause in the portion of the very same bill, SB18, which amends section 4019 was a deliberate omission and not an oversight.

Because the Legislature was presumably aware of the authorities which state that statutory amendments which ameliorate punishment apply retroactively in the absence of a saving clause, its omission of a saving clause from the amendment to section 4019 demonstrates an intent that the amendment be retroactively construed. (SB 18, §§ 38, 50, pp. 54-55, 67-69.)

The amendment to section 4019 reduces punishment. Appellant's judgment is not yet final, since it is presently on appeal in the instant case. Therefore, the amendment became effective prior to appellant's judgment becoming final. Accordingly appellant is entitled to the benefit of the change made to section 4019. (*Babylon, supra*, 39 Cal.3d at p. 722; *Estrada, supra*, 63 Cal.2d 740 at p. 746.) Such an outcome is entirely consistent with the fundamental purpose of SB 18 - to reduce actual and anticipated budgetary

shortfalls. (S.B.18, § 62, p. 76.) Retroactive application of the amendment to section 4019 saves the state funds by reducing the inmates' days in custody. For this reason, application of the amendment to cases not yet final is consistent with the purpose of the legislation, which "addresses the fiscal emergency declared by the Governor." (Stats. 2009 2010, 3rd Ex.Sess., c. 28 (S.B.18), § 62.)

**C. Section 59 of Senate Bill 18 demonstrates a legislative intent that the amended section 4019 apply retroactively to all judgments, including final ones.**

Section 59 of SB18 (Stats. 2009 2010, 3rd Ex. Sess., Ch. 28 (hereafter referred to as section 59)) demonstrates that the amendment to section 4019 set forth in section 50 of SB18, was intended by the Legislature to give one-for-one credits to all persons who were either paroled, imprisoned, or incarcerated in county jails as of SB 18's effective date of January 25, 2010.

Section 59 provides:

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

Section 59 is an example of what is known as "plus section," which means "a provision of a bill that is not intended to be a substantive part of the code section or general law that the bill enacts, but to express the Legislature's view on some aspect of the operation or effect of the bill. Common examples of 'plus sections' include severability clauses, savings clauses, statements of the fiscal consequences of the legislation, provisions giving the legislation immediate effect or a delayed operative date or a limited duration, and provisions declaring an intent to overrule a specific judicial decision or an intent not to change existing law." (*People v. Allen* (1999) 21 Cal.4th 846, 858, fn. 13.) The Supreme Court subsequently explained that plus statements, "while not conclusive, are entitled to consideration. [Citations.] Although such statements in an uncodified section do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute." (*People v. Canty* (2004) 32 Cal.4th 1266, 1280; *Sequoia Park Associates v. County of Sonoma* (2009) 176 Cal.App.4th 1270, 1287, fn. 8.)

There is no suggestion that section 59 was intended to apply to one or more of SB 18's changes regarding credits, but not others. (See SB 18, §§ 37-47, 50, pp. 48-63, 67-69.) Section 59 applies, without limitation, to "the changes made by this act regarding time credits," which certainly includes the amendment to section 4019.

Significantly, section 59 assigns to the CDCR the task of recalculating credits. This is persuasive evidence of a legislative intent that amended section 4019 be applied retroactively to those whose judgment was not final as of January 25, 2010, because if the amendment to section 4019 were prospective only, section 59 would be surplusage with respect to the amendment of section 4019. Calculating credits is, and continues to be, a task assigned to the sentencing court. (Pen. Code, § 2900.5, subd. (d); Cal. Rules of Court, rules 4.310, 4.472.) There is no question that as of January 25, 2010, sentencing courts were expected to calculate pre-sentence credits according to the amended version of section 4019. Therefore, the only credit calculations CDCR could possibly need to make as the result of the amendment to section 4019 would be for prisoners already in their custody. And CDCR would need to re-calculate the pre-sentence credits for a prisoner only if the change to section 4019 applies retroactively to that prisoner.

Section 59 plainly contemplates that the recalculation of section 4019 credits (as well as other credit changes) with respect to prisoners and parolees will be a time-consuming effort, leading to delays and revised credit awards that may be too late to benefit some prisoners. That is why section 59 provides immunity from suit to the State, in exchange for a benefit to the prisoner - an earlier jail release date, parole release date, or parole discharge date. (*In re Young* (2004) 32 Cal.4th 900, 909, fn. 5; *In re Reina* (1985) 171

Cal.App.3d 638, 642 [award of credits to a parolee is significant since the additional credits will serve to reduce the term of parole].) Again, none of these provisions would be necessary if the amendment to section 4019 had prospective application only.

**D. Under equal-protection principles, appellant is entitled to retroactive pre-sentence custody credits irrespective of the finality of her conviction.**

Irrespective of finality, the equal-protection clauses of the California and federal constitutions compel the conclusion that the revised statute retroactively applies to all defendants who are presently serving a sentence, presently on parole, or presently on probation.

In *Kapperman, supra*, our Supreme Court considered the then-new amendment to Penal Code section 2900.5 which went into effect on March 4, 1972. (*Kapperman, supra*, 11 Cal.3d at p. 544.) The amended statute permitted time in custody at county jails before a prison commitment to be credited toward the time in prison. (*Ibid.*) The amended statute made the credit prospective only. (*Ibid.*) Kapperman was delivered to the Department of Corrections before March 4, 1972, and his conviction was final before the new law went into effect. (*Id.* at 545.)

The Supreme Court held that the state constitutional guarantee of equal protection under the laws (Cal. Const., art. I, § 7; art. IV, § 16) required that the full benefit of the new pre-sentence credit law be applied retroactively to

everyone serving a sentence on March 4, 1972, regardless of when they were in the county jail or whether the conviction was final on the day the statute took effect. (*Kapperman, supra*, 11 Cal.3d at pp. 546-550.)

Subsequently, the California Supreme Court applied *Kapperman* in *People v. Sage* (1980) 26 Cal.3d 498. The case involved a challenge to the then-current interpretation of the very statute at issue here, section 4019. Prior to *Sage*, the provision of section 4019, subdivision (a)(1) which makes the statute applicable to prisoners "confined in or committed to a county jail . . . under a judgment of imprisonment" had been interpreted to mean that only those prisoners who were sentenced to jail terms, but not those prisoners who were sentenced to prison terms, qualified to receive credit for pre-sentence incarceration. (*Sage, supra*, 26 Cal.3d at p. 506.) In other words, defendants ultimately convicted of a misdemeanor received time off their sentences for pre-sentence custody, but defendants ultimately convicted of a felony did not. (*Id.* at 506, 507-508.)

In a section of the opinion headed "Equal Protection," the Supreme Court found that there was no "rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons." (*Sage, supra*, 26 Cal.3d at pp. 506-508.) Therefore, the court held that section 4019 must be construed as providing pre-sentence credits to all prisoners. (*Ibid.*) Moreover, the court held that this change in the previously common

interpretation of section 4019 must be given retroactive effect. (*Sage, supra*, 26 Cal.3d at p. 509, fn. 7.) The court held that "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." (*Ibid.*, emphasis supplied.)

Here, in contrast to the situation in *Kapperman*, the Legislature did not even state an intention that the amendments to Penal Code section 4019 be applied prospectively. The conclusion to be drawn from *Kapperman* and *Sage* is indisputable. Because defendant is currently in custody, she is entitled to the full benefit of the amendment to Penal Code section 4019.

**E. *People v. Rodriguez* is wrongly decided.**

On March 1, 2010, the Court of Appeal for the Fifth District held that the amended version of section 4019 does not apply retroactively. (*People v. Rodriguez* (2010) \_\_\_ Cal.App.4th \_\_\_, 2010 Cal.App. Lexis 250 (case no. F057533).) As argued below, the case was wrongly decided for several reasons.

**1. *In re Estrada* is directly on point.**

The *Rodriguez* court rejected appellant's claim that *In re Estrada, supra*, compels the conclusion that the Legislature intended the amendment

of section 4019 to have retroactive application. (*Rodriguez, supra*, at pp. 8-9.)

The analysis was based on a distinction without a difference.

*Rodriguez* relies on the fact that *Estrada* was addressing a reduction in the penalty for a specific offense; specifically, the creation of a new subsection of section 4530, the prison-escape statute, providing a reduced sentence for prisoners who escape without force or violence. The *Rodriguez* opinion agrees with *Estrada* that such a reduction necessarily reflects a determination by the Legislature that "its former penalty was too severe and that a lighter punishment is proper for the commission of the prohibited act," and that, therefore, the Legislature must have intended that everyone convicted of that offense should be subject to the penalty newly determined to be the proper one. (*Rodriguez, supra*, at pp. 6-7, citing *Estrada, supra*, 63 Cal.2d at p. 745.) However, the court reasoned that this principle does not apply to a legislative change increasing pre-sentencing credits, because "it is not obvious that the Legislature has determined the punishment for those felons who qualify for the more generous rate of conduct credit was too severe." (*Rodriguez, supra*, at p. 9.)

It is certainly true that the amendment to section 4019 does not reflect a legislative determination that the penalty for any particular offense was previously too severe. What it does reflect, however, is a legislative determination that the reward given to certain jail inmates for good conduct

was previously too small. The two situations are precisely analogous. In *Estrada*, a statutory amendment had carved out a subset of defendants convicted of prison escape - those who had accomplished their escapes without force or violence - and the court determined that the Legislature's reduction in the punishment for that subset of offenders necessarily implied that the Legislature felt that all such offenders, regardless of when they were convicted, merited the lesser punishment. *Rodriguez* addressed a statutory amendment which carved out a subset of prisoners: those who had no prior violent or serious offenses, were not sex offenders, and are of good conduct in jail while awaiting trial. Just as in *Estrada*, the Legislature's grant of increased pre-sentence credits to the members of this class necessarily implies that all such prisoners, regardless of when they were convicted, merit the increased credits. The fact that the reduction in the time to be served is not tied to a specific offense provides no logical basis to distinguish the two legislative actions.

**2. *People v. Sage* is directly on point, and was not addressed by the *Rodriguez* opinion at all.**

The same concerns raised by the judicial modification to section 4019 in *Sage*, supra are raised by the legislative modification at issue here. If the increased credits provided by the amended section 4019 do not apply retroactively, the effect will be to create two classes of state prisoners: those

who get the extra credits after January 24, 2010, and those who do not. *Sage* makes it clear that since both classes are identically situated - that is, both of them exhibited good behavior in county jail which merited the award of conduct credits - they cannot be treated differently without offense to the equal-protection clauses of the federal and California constitutions. Just as in *Sage*, there is no rational basis or compelling interest in creating such an "arbitrary classification." (*Sage, supra*, 26 Cal.3d at p. 509, fn. 7.)

*Rodriguez* does not even so much as mention *Sage*. Because *Rodriguez* ignores a landmark case addressing a closely analogous modification to the precise statute it construes, it does not fully address the equal-protection implications of its ruling, and is therefore fatally flawed.

### **3. *In re Stinnette* is inapplicable here.**

In rejecting the equal-protection claim, the *Rodriguez* court relied on *In re Stinnette* (1979) 94 Cal.App.3d 800. (*Rodriguez, supra*, at pp. 9-10.) There are two fundamental problems with this. First, *Sage*, discussed above, was decided after *Stinnette*. Under the rule of stare decisis, *Sage* trumps *Stinnette*. Therefore, to whatever extent *Stinnette* stands for the proposition that no equal-protection violation inheres in granting pre-sentence custody credits at different rates to different classes of identically-situated prisoners, it was overruled by *Sage*.

Second, the rationale of *Stinnette* is that it is "impossible to influence

behavior after it has occurred." (*Stinnette, supra*, 94 Cal.App.3d at p. 806.) This was a reasonable point in the context that *Stinnette* addressed, which was the then-newly-enacted section 2931, which awards post-conviction conduct credit to state prisoners. (*Id.* at 804.) Since the statute was new, no prisoner had earned any conduct credit at the time it went into effect. But this rationale has no application to the situation addressed by *Rodriguez*, since the appellant there had already been awarded conduct credits under the former version of section 4019. All that changed was the formula used to calculate them.

Appellant here, like the appellant in *Rodriguez*, has already demonstrated the factual basis for an award of the additional credits by exhibiting good behavior while in pre-sentence custody. No provision of the amended section 4019 suggests that prisoners in jail awaiting custody are expected to exhibit conduct that is twice as good in order to qualify for the twice as much credit provided by the new law. Appellant has already done everything required of her by law to qualify for the additional credit.

**F. Appellant is entitled to a total of 92 days of pre-sentence custody credit.**

Appellant was awarded 22 days of work and conduct credits based on 46 actual days in custody. (CT 97 [Abstract of Judgment filed December 9, 2009].) This was based on the formula formerly applicable under subdivision (f) of former section 4019, which provided that a defendant would be deemed to have served six days for every four days of actual custody. Under the

former version of the statute, "[t]he correct amount of credit [was] calculated by dividing the number of days spent in custody by four and rounding down to the nearest whole number. This number is then multiplied by two and the total added to the original number of days spent in custody." (*People v. Fry* (1993) 19 Cal.App.4th 1334, 1341, citing *People v. Smith* (1989) 211 Cal.App.3d 523, 527.)

Under the new law appellant is entitled to two days credit for every two days actually served:

(f) It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody, except that a term of six days will be deemed to have been served for every four days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c).  
(Amended section 4019, subd. (f), eff. Jan. 25, 2010 (emphasis supplied).)

Accordingly, using the formula described in *Fry* and modifying it to account for the increase in credits, the work and conduct credits are to be calculated by dividing the number of actual days in custody by two, rounding down to the nearest whole number, and multiplying by two. Under this formula, pre-sentence work and conduct credits are equal to the actual credit days, unless the actual number of credit days is odd. If there is an odd number of actual credit days, the total number of pre-sentence work and conduct credits can be determined by subtracting one from the number actual days in custody.

In this case, with 46 actual days in custody, appellant is entitled to 46 days of work and conduct credits, for a total of 92 days of pre-sentence credits.

### **CONCLUSION**

For all of the foregoing reasons, appellant respectfully requests this Court to modify appellant's judgment to award her total pre-sentence credits of 92 days under the amended section 4019.

Dated: \_\_\_\_\_ Respectfully submitted,

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Counsel for Appellant