THE SAGA OF SECTION 4019
& PRESENTENCE CREDITS

by Vicki Firstman

INTRODUCTION

In October of 2009, in response to California's fiscal crisis, the Legislature amended the long-standing version of Penal Code section 4019, the statute governing good time/work time presentence credits. For years, section 4019 had permitted inmates to accrue six days of credit for each four days served due to the good time/work time conduct credits provided under the statute. However, the October 2009 legislation doubled the amount of good time/work time credits, permitting four days of credit for every two days served, effectively a two-for-one ratio, for defendants who have no current or prior convictions for serious or violent felonies and who are not required to register as sex offenders. The statute became effective on January 25, 2010.

Little did the Legislature know that this enactment would create a flood of litigation concerning the retroactive application of the increased credits -- so much so that the Legislature was moved to amend the law yet again via two statutes that took effect on September 28, 2010. In the latest and greatest statutes du jour, section 4019 was again amended to nullify the increase in credits and reinstate the old, pre-2010 formula for those defendants who receive local county jail sentences so long as his or her crime occurred on or after September 28, 2010. However, pursuant to an amended version of section 2933, subdivision (e)(1), the Legislature increased the amount of presentence credits to eligible defendants sentenced to state prison. This class of defendants is permitted to accrue one day of credit for every day of custody served. It probably goes without saying that this new legislation only served to complicate an already complicated morass.

This article will try to make sense of the changes in the law, and give an overview of the appellate decisions, most of which have been short-lived and destined for the California Supreme Court's docket behind the lead case of *People v. Brown*, No. S181963, formerly published at *People v. Brown* (2010) 182 Cal.App.4th 1354. (Rev. gtd. June 9, 2010.)

I. THE ONCE AND FUTURE SECTION 4019[1]

A defendant sentenced to state prison is entitled to credit against his sentence for all actual days spent in custody before sentencing, and for conduct credits pursuant to either section 4019 (§ 2900.5, subd. (a); § 4019, subds. (b), (c) & (f)) or the most recent version of section 2933, subdivision (e)(1). Before January 25, 2010, section 4019 provided that for each six-day period of custody, one day was deducted for performing assigned labor and one day was deducted for satisfactorily complying with the rules and regulations. (Former § 4019, subds. (b) and (c).) Thus "if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody." (Former § 4019, subd. (f); emphasis added.)

Under this statute, a defendant's entitlement to conduct credits was calculated based on a formula which divides the days of actual custody credit, including the date of sentencing, by four and then multiplies the result, excluding any remainder, by two. (*People v. Caceres* (1997) 52 Cal.App.4th 106, 110.)

As noted above, the amended version of section 4019, Senate Bill 18, became effective on January 25, 2010. (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].) The express purpose of Senate Bill 18 was to address the fiscal emergency declared by then-governor Schwarzenegger. (*Id*. at § 62 ["This act addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution."].) Senate Bill 18 provided that presentence conduct credits were to accrue at twice the previous rate for all defendants except those with disqualifying convictions. The provision amended section 4019 to read in pertinent part:

> (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

---

[1] Portions of this argument are taken from the Petition for Review authored by Bill Robinson in *People v. Tommy Lee Galia*, H033733.

> 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.
> . . .
>
> (f) It is the intent of the Legislature that <u>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</u>, 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).

(Stats. 2009-2010, 3rd Ex.Sess., c. 28 (S.B.18), § 50; emphasis added.)

Paragraph (2) of subdivisions (b) and (c) excluded from the increased credits provision those individuals whose current offense is a serious felony, or who have a prior serious or violent felony conviction, or who are serious or violent required to register as sex offenders.

Though case law has sometimes referred to Senate Bill 18 as providing one-for-one credits, this is not entirely correct due to the precise wording of the statute. In effect, if a defendant has an odd number of days of actual custody credits, the number of conduct credits will be reduced to the even number of days. Thus, the formula for arriving at the appropriate conduct credits under Senate Bill 18 is to divide the days of actual custody credit, including the date of sentencing, by two, exclude any remainder, and multiply by two. (For example, if a defendant has 121 actual days of custody, that number is divided by 2, any fraction is dropped, and the remaining number is multiplied by 2, leaving 120 days of conduct credits.)

As noted above, litigation on the retroactive application of Senate Bill 18 began shortly after its enactment and has continued without interruption.

This litigation – and the prospect of the reversal and remand of countless cases based on sentencing error – apparently prompted the Legislature to step into the breach yet again.

In legislation that became effective on September 28, 2010, the Legislature deleted the credit provisions incorporated into section 4019 via Senate Bill 18. In its place, the Legislature amended section 4019 to return to the old formula in effect prior to 2010 for criminal defendants who remain in local custody. Thus, under this once and future version of section 4019, for every four days served, this set of prisoners may accrue one day of credit for satisfactorily performing assigned labor and one day of credit for satisfactorily complying with the facility's rules and regulations. (§ 4019, subds. (b), (c) & (f); Stats. 2010, ch. 426, § 2 (SB 76).)

However, for those prisoners sentenced to state prison, the Legislature amended section 2933, subdivision (e)(1) to increase credits even beyond that allowed in Senate Bill 18, to permit one day of credit for each day served. (Future references to the September 28, 2010 legislation will either be to "section 4019," "section 2933," or to "Senate Bill 76.") Under this formula, a defendant's actual days of custody credit are simply multiplied by two.

Section 2933, subdivision (e)(1) currently provides:

> 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."

(Stats. 2010, ch. 426, § 1 (SB 76).)

As with Senate Bill 18, section 2933 also excludes defendants with prior conviction for a serious or violent felony, and those who must register as a current serious offense, or a sex offenders from the increased credit provisions. (§ 2933, subd. (e)(3).) If a defendant is so excluded, section 2933, subdivision (e)(3) provides that section 4019 shall instead apply.

Apparently in recognition of ex post facto principles prohibiting a retrospective decrease in credits, section 4019 explicitly states that it shall

apply prospectively to crimes committed on or after its effective date. (§ 4019, subd. (g).) On the other hand, section 2933, which authorizes an *increase* in credits is silent on the question of retroactive or prospective application.

II. THE FLOODGATES OPEN: THE LEGAL ISSUES DEFINED

A. Statutory Construction

It is probably not an overstatement to say that after the enactment of Senate Bill 18, "the floodgates of litigation opened," creating a split among the courts of appeal on the question of retroactive application of the increased credits. Specifically, the main argument centered on whether the increased credits would apply to time served before the effective date of Senate Bill 18. The California Supreme Court has taken up a number of these cases and, as noted above, the decision in *Brown* has been designated as the lead case. To date, the majority view, while avoiding an equal protection analysis, has been that retroactive application of Senate Bill 18 is compelled by principles of statutory construction in light of the Supreme Court's decision in *In re Estrada* (1965) 63 Cal.2d 740, discussed below. (See, e.g., *People v. Brown, supra*, 182 Cal.App.4th 1354, rev. gtd. 6/9/10 [Third Dist.]; *People v. Landon* (2010) 183 Cal.App.4th 1096, rev. gtd. 6/23/10 [First Dist., Div. Two]; *People v. House* (2010) 183 Cal.App.4th 1049, rev. gtd. 6/23/10 [Second Dist., Div. One]; *People v. Pelayo* (2010) 184 Cal.App.4th 481, rev. gtd. 7/21/10 [First Dist., Div. Five]; *People v. Norton* (2010) 184 Cal.App.4th 408, rev. gtd. 8/1/10 [First. Dist., Div. Three]; *People v. Weber* (2010) 185 Cal.App.4th 337, rev. gtd. 8/18/10 [Third Dist.]; *People v. Keating* (2010) 185 Cal.App.4th 364, rev. gtd. 9/22/10 [Second Dist., Div. Seven]; and *People v. Bacon* (2010) 186 Cal.App.4th 333, rev. gtd. 10/13/10 [Second Dist., Div. Eight].)

The minority position has rejected retroactivity on both statutory construction and equal protection grounds. (See, e.g., *People v. Rodriguez* (2010) 183 Cal.App.4th 1, rev. gtd. 6/9/10 [Fifth District]; *People v. Otubuah* (2010) 184 Cal.App.4th 422, rev. gtd. 7/21/10 [Fourth District, Div. Two]; *People v. Hopkins* (2010) 184 Cal.App.4th 615, rev. gtd. 7/28/10 [Sixth District], and *People v. Eusebio* (2010) 185 Cal.App.4th 990, rev. gtd. 9/22/10 [Second Dist., Div. Four].)

The reasoning of the majority decisions is illustrated by the analysis in *Brown*. There, a defendant who was sentenced before the effective date of

Senate Bill 18, but whose conviction was not yet final, argued on appeal that he was entitled to the retroactive benefit of the statute. Specifically, the defendant contended that under *Estrada*, he was entitled to the benefit of Senate Bill 18, a statutory amendment that lessens punishment, because the statute did not include a "savings clause" making it applicable prospectively only. (*Brown*, *supra*, 182 Cal.App.4th at p. 1360.) The reviewing court agreed. (*Brown*, *supra*, 182 Cal.App.4th at pp. 1360-1365.)

In *Estrada*, the California Supreme Court held that section three's statement that Penal Code amendments operate prospectively does not apply to statutory amendments reducing punishment. When the Legislature amends a statute to lessen punishment, "it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) Thus it is "an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) Accordingly, an amendment creating lighter punishment "can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Ibid*.) In sum, *Estrada* stands for the principle that in the absence of clear legislative intent to the contrary, a criminal defendant should be given the benefit of a mitigation of punishment where the amendment was adopted before his conviction became final. (*In re Chavez* (2004) 114 Cal.App.4th 989, 999.)

In an attempt to circumvent *Estrada*, the government has argued in *Brown* and other cases that it is not clear that Senate Bill 18 constituted an "'amendatory statute lessening punishment' subject to the presumption of retroactivity recognized in *Estrada." (Brown*, *supra*, 182 Cal.App.4th at p. 1361.) Instead, the government has contended that an amendment increasing presentence conduct credits "is not intended to reduce punishment but to increase the incentive for good behavior." (*Ibid*.) Accordingly, the state has argued that the rationale of *Estrada* did not apply and, moreover, that the legislative purpose of encouraging good behavior was "not served by awarding additional credits for conduct that has already occurred." (*Ibid*.)

Brown and cases adopting the majority position have rejected this contention. *Brown* found that whatever the ultimate intent of the amendment, its effect was to reduce the punishment for those less serious offenders who have demonstrated good behavior while in custody. (*Brown*, *supra*, 182

Cal.App.4th at pp. 1363-1364.) Accordingly, the court found that "[t]he holding in *Estrada* logically applies here." (*Id*. at p. 1364.)

The court went a step further, however, reasoning that even without the presumption of retroactivity, a legislative intent to apply Senate Bill 18 retrospectively could be inferred from section 59 of Senate Bill 18. (*Brown*, *supra*, 182 Cal.App.3d at p. 1364-1365.) That provision reads as follow:

> "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."

Stats. 2009, 3d Ex. Sess., ch. 28, § 59, emphasis added.)

Brown reasoned that had the Legislature not intended retroactive application, it would not have been concerned with possible delays in determining the amount of *additional time credits* to be granted against inmate sentences as a result of the changes implemented by Senate Bill 18. (*Brown*, *supra*, 182 Cal.App.4th at pp. 1364.) Moreover, the court concluded that the placement of section 59 at the end of the overall enactment, rather than within the specific amendment to section 4019 also suggested that the Legislature intended that Senate Bill 18's increased credit provision should be applied retroactively to qualifying defendants whose convictions were not final as of January 25, 2010. (*Id*. at pp. 1364-1365.)

This is largely the pattern followed by cases finding retroactive application. Similarly, cases ruling *against* retroactivity have followed, more or less, the analysis of the Fifth District's decision in *People v. Rodriguez*, *supra*, formerly published at 183 Cal.App.4th 1.

In *Rodriguez*, as in *Brown*, the defendant had been sentenced before Senate Bill 18's effective date, but his case had not become final before January 25, 2010. (*Rodriguez*, *supra*, 183 Cal.App.4th at p. 6.) On appeal, the defendant argued that principles of statutory construction and equal protection required that Senate Bill 18's credit provisions be applied to him retroactively. (*Id*. at pp. 6, 13.)

Here, in contrast to cases upholding retroactive application, the *Rodriguez* court rejected the contention that retroactivity was compelled by *Estrada*. Instead, the court distinguished *Estrada* on two grounds. First, the court was unpersuaded that Senate Bill 18 represented a legislative intent to reduce punishment. (*Rodriguez*, *supra*, 183 Cal.App.4th at pp. 6, 8-9.) Secondly, the court did not agree that the Legislature intended its punishment-mitigating provisions to apply to all individuals regardless of their sentencing date. (*Id*. at p. 8.) These conclusions, in turn, were largely based on the fact that the amendment to Senate Bill 18 did not reduce the penalty for a specific offense, but simply allowed certain persons to accrue credits at a greater rate than others. (*Id*. at p. 9.)

As to the first point, the *Rodriguez* court acknowledged that Senate Bill 18 evidenced a legislative intent to conserve the state's fiscal resources and that the amendment would result in a subset of felons serving less time in prison. (*Rodriguez*, *supra*, 183 Cal.App.4th at pp. 8-9.) However, the court nevertheless reasoned that "it does not necessarily follow that the Legislature determined the punishment to which these persons were subject under the former version of section 4019 was 'too severe. . . .' [Citation.]" (*Id*. at pp. 8-9, citing *Estrada*, *supra*, 63 Cal.2d at p. 745.) Rather, the court found it just as likely that there had been no legislative intent to lessen the punishment for the various offenses for which eligible defendants had been sentenced, but that for fiscal reasons, the legislature determined that prison populations needed to be reduced by the early release of less dangerous offenders. (*Rodriguez, supra*, 183 Cal.App.4th at p. 9.) The court found that such a construction would strike the proper balance between the state's fiscal and public safety concerns. (*Id*. at p. 9.)

Using this framework, *Rodriguez* then concluded that the *Estrada* rule does not apply where an amendatory statute increases the amount of conduct credits as opposed to reducing the punishment for a specific offense, as was the case in *Estrada*. (*Rodriguez*, *supra*, 183 Cal.App.4th at p. 9.) The court adhered to this position even when faced with a contrary decision in *People v. Hunter* (1977) 68 Cal.App.3d 389, where the *Estrada* rule was held applicable

to an amendatory statute concerning actual custody credits. *Rodriguez* distinguished *Hunter* on the ground that it dealt with actual time in custody before sentencing which, in the *Rodriguez* court's opinion, had "neither the purpose nor the effect of providing an incentive for good behavior during incarceration, as is the case with conduct credit." (*Rodriguez*, *supra*, 183 Cal.App.4th at pp. 9-10.)

Interestingly, *Rodriguez* virtually ignored *People v. Doganiere* (1978) 86 Cal.App.3d 237, another well-known case applying the *Estrada* rule to an amendatory statute increasing *conduct credits*, as opposed to actual days in custody. The only mention of this case comes in a mere "contra" citation preceding the court's discussion of *Hunter*. (*Rodriguez*, *supra*, 183 Cal.App.4th at pp. 9-10.)

Though its does not fit neatly into the court's statutory construction analysis, *Rodriguez* adopts one of the dominant theories raised by the state in most, if not all, of the cases dealing with the retroactivity of Senate Bill 18. Under this theory of analysis, conduct credits are intended to provide an incentive for good behavior so as to enhance prison security. However, since it is impossible to influence behavior after it has occurred, an amendment increasing such credits cannot act as an incentive for individuals who have already completed their presentence confinement before the effective date of the statute. (*Rodriguez*, *supra*, 183 Cal.App.4th at p. 8, citing *In re Stinnette* (1979) 94 Cal.App.3d 800, 806.) According to *Rodriguez*, this distinguishes the case from *Estrada* and defeats the inference that Senate Bill 18 was intended to operate retroactively as a punishment-reducing amendment. (*Rodriguez*, *supra*, 183 Cal.App.3d at p. 8.)

Rodriguez likewise dismissed the argument that section 59 of Senate Bill 18 evidences an intent to retroactively apply the statute. It will be recalled that this provision required the Department of Corrections and Rehabilitation to implement changes made in Senate Bill 18, but permits for reasonable delays in determining the amount of additional credits to be applied to inmate sentences.

While cases adopting the majority position have relied upon section 59 in finding an intent to apply Senate Bill 18 retroactively (see, e.g., *Brown*, *supra*, 182 Cal.App.4th at pp. 1364-1365), *Rodriguez* arrives at the opposite conclusion, finding that section 59 is at best ambiguous on the question of retroactivity. (*Rodriguez*, *supra*, 183 Cal.App.4th at p. 12.)

Equal protection principles are more fully discussed below in the next subheading. However, to complete the discussion of *Rodriguez*, it will be mentioned here that when the court turned its attention to the defendant's equal protection claim, it gave the argument short shrift. The court failed to even discuss the first prong of the analysis, i.e., whether appellant was similarly situated with defendants receiving the enhanced credits. (*Rodriguez*, *supra*, 183 Cal.App.4th at pp. 13-14.) Instead, *Rodriguez* undertook a brief analysis of the second prong, i.e., whether there is a rational basis for treating the similar classes differently. On this question, the court swiftly concluded that because the legislative intent was, at least partially, to motivate good conduct, there is a rational basis for applying the amendment prospectively only. Returning to the theory that good behavior cannot be motivated after the fact, *Rodriguez* found that this constitutes a rational basis for treating the challenged classifications differently. (*Rodriguez*, *supra*, 183 Cal.App.4th at pp. 13-14.)

For the most part, other cases in the minority follow similar analyses. Although its analysis differed in some minor degrees, the Sixth District unfortunately adopted an analogous view in *People v. Hopkins*, *supra*, formerly published at 184 Cal.App.4th 615.

B. Equal Protection[2]

As noted above, cases applying Senate Bill 18 retroactively have avoided the equal protection analysis, having awarded relief based on principles of statutory construction. (See, e.g., *People v. Leon* (2007) 40 Cal.4th 376, 396 [courts should avoid the unnecessary resolution of constitutional questions].) The minority decisions, though necessarily reaching the constitutional claim, have offered very stunted analyses, to say the least. However, recently, the Third Appellate District issued a decision in *In re Kemp* (2011) 192 Cal.App.4th 252, the first case to hold that principles of equal protection require the retroactive award of the increased presentence credit provisions of Senate Bills 18 and 76. (*Id*. at pp. 258-261.) Not unexpectedly, the Supreme Court granted review in *Kemp* on April 13, 2011, on a grant and hold basis, with briefing deferred pending the decision in *Brown*. Nevertheless, though *Kemp* can no longer be cited, its rationale is

---

[2] In addition to the use of briefing authored by William Robinson, noted above in footnote 2, portions of this section are taken from briefing authored by Dallas Sacher in the Amicus Curiae brief filed on behalf of James Lee Brown, No. S181963.

valid and can be used as the framework for an equal protection argument. Before discussing *Kemp*, however, it is useful to thoroughly lay out the elements of the equal protection analysis.

"'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, emphasis in original.) In measuring this requirement, a court must ask whether the classes in question are similarly situated with respect to the purpose of the law challenged. (*Id*. at pp. 1199-1200.)

The construction of Senate Bill 18 advanced by the state in the case law on this subject creates two classes of prison inmates and parolees: (1) those prison inmates and parolees who will receive additional conduct credits since they were in local custody on or after January 25, 2010; or in the case of Senate Bill 76, were in local custody on or after September 28, 2010, and (2) those prison inmates and parolees who will not receive additional conduct credits since they were not in local custody on or after the prescribed dates.

Plainly, these two classes are similarly situated with respect to the purpose of the enhanced credit entitlement. The purpose of awarding conduct credits is to reward those county jail inmates who have behaved appropriately. A prison inmate or parolee who has previously received some conduct credit under former section 4019 is similarly, if not identically, situated to every prison inmate who has received additional conduct credit under the new statutes. This is so since each inmate has earned conduct credit for the identical reason, i.e. they behaved properly in accordance with jail regulations.

Since jail inmates were fully cognizant that their good behavior would yield a benefit, all present prison inmates are similarly, if not identically, situated with respect to the statutory right to earn conduct credit for the time spent in jail. In this respect, it is important to note that the revisions to sections 4019 and 2933 did not create an entitlement to conduct credit. Rather, the pre-existing version of section 4019 authorized the award of such credits, and the purpose of the new statutes is solely to increase the amount of conduct credit.

The remaining question is whether there is any rational basis for the disparate classes noted above. (*Hofsheier,* supra, 37 Cal.4th 1185, 1200-1201.) On this point, binding supreme court precedent is dispositive.

In *In re Kapperman* (1974) 11 Cal.3d 542, our high court considered a 1972 amendment to section 2900.5 that credited county jail time served before prison to the prison sentence. (*Id.* at p. 544.) The amended statute made the credit prospective only. (*Ibid*.) The defendant was delivered to the Department of Corrections before the date the statute was enacted, and his conviction was final before it went into effect. (*Id*. at 545.) The court held that the state constitutional guarantee of equal protection under the laws 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 their conviction was final on the day the statute took effect. (*Id*. at pp. 546-550.) In so holding, the court found that there was simply no "legitimate public purpose" for providing presentence credit to some, but not all, prison inmates and parolees. (*Id*. at p. 547.)

Kapperman is binding on the question of retroactive entitlement to the amended credit provisions of Senate Bills 18 and 76. Under the pre-2010 version of section 4019, a defendant received conduct credit for good behavior. Under the amended versions of sections Senate Bill 18 and section 2933, the amount of conduct credit has been increased. Regardless of the prison inmate's date of delivery to prison, or the dates of his presentence incarceration, he has *earned* conduct credit. Since the express purpose of the new statutes is to shorten prison terms, there is no "legitimate public purpose" for denying additional conduct credit to those inmates incarcerated or sentenced prior to 2010 who have established their entitlement to conduct credit.

Moreover, the fact that *Kapperman* involved actual custody credit whereas the present case involves conduct credit is not a meaningful distinction for equal protection purposes. Indeed, in *People v. Sage* (1980) 26 Cal.3d 498, our high court held that section 4019 conduct credits had to be available to felons who served time in the county jail prior to receiving a prison sentence. (*Id*. at pp. 507-508.) Before *Sage*, section 4019 conduct credits were only awarded for pretrial jail time incurred by individuals eventually convicted of misdemeanors and sentenced to county jail. (*Id*. at p. 507.) Conversely, section 4019 made no award of conduct credit to the presentence detainee eventually sentenced to prison for a felony. On the other hand, under section 2931, a defendant who posted bail or was released on his own recognizance, and was later convicted of a felony and sentenced to prison, received post-sentence conduct credit against his full sentence, i.e., for all the time served in prison. (*Ibid*.) Thus, there were two classes of felons: the

defendant who received conduct credit for his full sentence, having never been incarcerated before sentencing, and the detained felon, who "did not receive conduct credit against his full sentence, because he was denied conduct credit for his presentence confinement." (*Ibid*.)

The *Sage* court found that the different treatment of the detainee/felony and the felon who served no presentence confinement violated equal protection. (*Sage*, *supra*, 26 Cal.3d at pp. 506-508.) Accordingly, the court struck down this distinction as violative of equal protection, holding that there was no "rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons." As a result, the court held that section 4019 must be construed as providing pre-sentence credits to all prisoners. (*Ibid*.)

Then, citing *Kapperman*, *Sage* held that its expansion of the previous application of section 4019 must be applied retroactively in order to avoid the "arbitrary classification of prisoners" that would otherwise result. (*Sage*, *supra*, 26 Cal.3d at p. 509, fn. 7.)

The Court of Appeal in *Doganiere* also held that the equal protection clause commands retroactive application of an amendment increasing credits. "It would appear to be eminently unfair for a defendant to get 10 years for an offense committed on December 31 and another defendant to get 5 years for the identical offense committed on January 1." (*People v. Doganiere*, *supra*, 86 Cal. App. 3d at p. 239, fn. 1.)

In sum, the *ratio decidendi* of *Kapperman* is that a prisoner suffers invidious discrimination if he is denied presentence credit which is given to another prisoner based on an arbitrary date. In *Kapperman*, the arbitrary date was the date of delivery to prison (March 4, 1972). In the case of Senate Bills 18 and 76, the arbitrary date would be January 25, 2010, or alternatively, September 28, 2010. In either instance, the state has no legitimate interest in providing credit to one class of prisoner but not another.

Given that there is no rational basis for distinguishing between a defendant serving time before January 25, 2010, or September 28, 2010, and someone serving time on those dates or later, equal protection requires that Senate Bill 18 and the amended version of section 2933, subdivision (e)(1) be applied retroactively.

In re Kemp applied these principles to hold that under the equal

protection clause, even a prisoner whose judgment had become final prior to the enactment of Senate Bills 18 and 76 is entitled to their retroactive application. (*In re Kemp*, *supra*, 192 Cal.App.4th 252, 258-261.) The *Kemp* court first found that for purposes of the law, the defendant was similarly situated to defendants whose convictions became final on or after January 25, 2010. (*Id*. at pp. 258-259.) To discern the legislative intent, *Kemp* the examined the words of the statute itself, which, as noted above, demonstrated the Legislature's intent to address California's fiscal emergency through the "early release of a defined class of prisoners deemed safe for such release, thereby relieving the state of the cost of their incarceration." (*Id*. at p. 259.)

In this respect, *Kemp* rejected the People's familiar canard that Senate Bill 18 was intended to encourage good conduct and, because it is impossible to influence conduct after it has occurred, that Senate Bill 18 was not intended to be retroactively applied to prisoners whose judgments had become final before the statute's effective date. (*In re Kemp*, *supra*, 192 Cal.App.4th at p. 259.) In rejecting this argument, the Court of Appeal found that there was no support for such an intent in Senate Bill 18. (*Ibid*.) The court reasoned that had the Legislature remained silent, it might impute such a purpose from "the plausible purposes that could be imagined, . . ." (*Ibid*.) However, given the express declaration of legislative intent to address a fiscal emergency, the court found the People's suggested rationale was unsupportable. (*Ibid*.) Moreover, under the People's rationale, otherwise eligible prisoners would be excluded from application of the amendment resulting in a reduction of the savings the state otherwise would accrue. (*Ibid*.)

Turning to the rational basis test, and mindful of *In re Kapperman*, the *Kemp* court could find no reasonable basis for distinguishing between the classes of prisoners based solely on the date of the finality of their judgments. (*In re Kemp*, *supra*, 192 Cal.App.4th at pp. 260-261.) Accordingly, *Kemp* held that there was no rational basis for treating these groups differently. As a result, the court found that petitioner and others situated like him are entitled to the increased credits. (*Id*. at p. 263.)

Lastly, turning to the enactment of Senate Bill 76, which amended section 2933, subdivision (e)(1), *Kemp* found that equal protection also requires that the increased one-for-one credits be awarded to eligible prisoners without regard to the date of finality of their judgments. (*Id.* at pp. 263-264.)

As noted above, the Supreme Court has granted review in *Kemp*, but *Kemp* was correct in determining that our high court precedent compels

retroactive application under the equal protection clause. It remains to be seen whether our present-day Supreme Court will follow the lead of those prior thoughtful and principled decisions or, for that matter, whether the court will even reach the equal protection issue when it decides *Brown*.

For now, counsel should be arguing that the equal protection issue applies to every inmate without regard to the dates of incarceration the finality of his or her conviction, or the type of sentence imposed.

C. Pleading, Proof & The Power to Strike

The next set of cases concerns decisions that have addressed the trial court's authority to use its power to strike all or part of a disqualifying conviction under section 1385, in the interests of justice.

The first of these was *People v. Jones* (2010) 188 Cal.App.4th 165 (rev. gtd. 12/15/10) There, in exchange for a maximum possible term, the defendant pleaded to several counts and admitted a prior strike and prior prison term. (*Id*. at pp. 170-171.) To comply with the terms of the plea bargain, the trial court struck the prior strike and prior prison term and then imposed the maximum sentence allowed under the plea bargain. (*Id*. at p. 171.)

On appeal, the defendant made several arguments unrelated to Senate Bill 18, but the Third Appellate District invited supplemental briefing on whether the defendant was eligible for additional presentence custody credits under the amended statute. (*Jones*, *supra*, 188 Cal.App.4th at p. 171.) The court concluded that the defendant might be eligible for the additional presentence credits if the trial judge, having already stricken the prior strike to comply with the plea bargain, also elected to dismiss the strike for the purpose of awarding defendant the increased credits permitted under Senate Bill 18. (*Id*. at pp. 181-188.) Accordingly, the court remanded for further proceedings.

In reaching its decision, the court also held that ineligibility for additional presentence credits constitutes an increase in punishment and as a result, the prior disqualifying conviction must be pleaded and proved before it can be used to deprive a defendant of increased credits pursuant to Senate Bill 18. (*Jones*, *supra*, 188 Cal.App.4th at pp. 184-186.) The court then determined that the trial court retained discretion to strike the prior conviction in the interests of justice. (*Id*. at p. 186.) Here, the trial court could not have exercised its 1385 discretion because Senate Bill 18 had not been enacted at

the time of sentencing. (*Id*. at p. 187.) Thus, the reviewing court remanded to give the court the opportunity to exercise its discretion. (*Id*. at pp. 187-188.)

This case raises intriguing possibilities which go beyond the normal retroactivity issues that have been raised. However, as the grant of review in this case merely was for a grant and hold behind *Brown*, it is unlikely that the Supreme Court will provide an answer to these questions at least under the grant of review in *Jones*.

However, a similar conclusion was reached by the Second Appellate District, Division Six, in *People v. Koontz* (2011) 193 Cal.App.4th 151. There, the defendant pleaded to an offense and admitted a prior strike and two prior prison terms. (*Id*. at p. 153.) The trial court struck the strike under section 1385, but ruled that the order dismissing the prior strike did not entitle the defendant to one-for-one credits under section 2933, subdivision (e)(1). (*Id*. at pp. 153-154.) The reviewing court reversed.

As had the court in *Jones*, *Koontz* also found that the trial court retained discretion to dismiss the prior strike for the purpose of awarding the enhanced credits and remanded the case back to the trial court for the exercise of its discretion. (*Id*. at pp. 155-157.) A petition for review was filed in this case on April 11, 2011, but as of this writing, the Supreme Court has not yet ruled on the petition.

The last case which will be discussed in this section is the Sixth District's decision in *People v. Lara* (March 30, 2011, H036143) ____ Cal.App.4th ____ [2011 D.A.R. 4627], a case won by SDAP's Bill Robinson. Given the Sixth District's restrictive view of retroactivity in *Hopkins*, *supra*, 184 Cal.App.4th 615, it is somewhat surprising that in *Lara*, the court sided with *Jones* and *Koontz* on the question of a trial court's authority to exercise section 1385 discretion to award the additional credits authorized under section 2933. We can only attribute this favorable outcome to Bill's outstanding advocacy, yes?

In *Lara*, a prior strike conviction and great bodily injury enhancement rendering the defendant ineligible for enhanced credits was pleaded, but was dismissed pursuant to the defendant's plea bargain. The defendant did not admit either of these allegations when he entered his plea. (*Lara*, *supra*, ____ Cal.App.4th ____ [2011 D.A.R. at pp. 4627-4628.)

At sentencing, the defendant sought the increased credits permitted

under Senate Bill 18, arguing that since the disqualifying prior had been pleaded but not proved, that he was eligible for the additional credits. (*Lara*, *supra*, ____ Cal.App.4th ____ [2011 D.A.R. at p. 4628.) The court and counsel then discussed the ruling in *People v. Jones*, *supra*, 188 Cal.App.4th 165, which had been decided some three weeks earlier. (*Lara*, *supra*, 2011 D.A.R. at p. 4628.) Concluding that the defendant was not "really being punished" by the denial of the increased credits, the trial court refused to award the additional credits. (*Ibid*.)

On appeal, the Sixth District held that the denial of credits based on the prior conviction constitutes punishment (*Lara*, *supra*, 2011 D.A.R. at pp. 4628-4629), and accordingly, that it has to be pleaded and proved before it can operate to deprive a defendant of the increased credits. (*Id*. at pp. 4629-4630.) The court also agreed that a trial court retains section 1385 discretion either *in toto,* i.e., to eliminate all additional punishment flowing from the enhancement, or alternatively, the court can utilize this power to strike the enhancement for some purposes and not for others. (*Ibid.*) Given the ambiguity of the plea agreement as to whether the stricken prior would affect the defendant's presentence credits, the court concluded that the plea bargain left intact the trial court's discretion to determine whether the prior should be considered or disregarded in determining the amount of presentence credits. (*Ibid*.) Accordingly, the court remanded the case for the trial court to exercise its discretion as to whether its order striking the prior conviction should be applied to maximize the defendant's presentence credits. (*Ibid*.)

D. Finally – A Juvenile Prior Is Not a Strike

In another gratifying win by Bill Robinson, the Sixth District held in *People v. Pacheco* (March 17, 2011, H035418) ____ Cal.App.4th ____ [2011 D.A.R. 5350], that the trial court erred in finding that the defendant's prior juvenile adjudication for a serious felony disqualified him from earning the higher rate of presentence credits under Senate Bill 18. (*Id*. at pp. 5350-5351.) Rather, the court ruled that a juvenile adjudication is not a "conviction" and hence, could not be used to deny the defendant the additional credits. (*Id.* at p. 5351.)

E. Prospectivity As Related to the Sentencing Date

There are some trial courts that have been apportioning presentence custody credits based on the dates of confinement. The Fourth Appellate

District, Division One, addressed such a situation in *People v. Zarate* (2011) 192 Cal.App.4th 939. There, when the trial court imposed sentence on February 18, 2010, it apportioned the conduct credits, treating time served before January 25, 2010, in accordance with the former version of section 4019 rather than the amended version under Senate Bill 18. (*Id*. at p. 941.) For time served after January 25th, the court awarded the defendant one-for-one day conduct credits. (*Ibid*.)

On appeal, the defendant contended the trial court was required to apply Senate Bill 18 to all the time he served in local custody because that is the statute that was in effect on the date of his sentencing hearing. (*Zarate*, *supra*, 192 Cal.App.4th at p. 943-944.)

The reviewing court agreed. (*Zarate*, *supra*, 192 Cal.App.4th at p. 944-945.) The court concluded that as there was only one version of section 4019 in existence at the time of sentencing, i.e., Senate Bill 18, that the trial court was required to calculate the defendant's presentence conduct credit pursuant to that version of the statute. (*Id*. at p. 944.) The *Zarate* court noted that there was nothing in Senate Bill 18 that authorized the trial court to apply *both* the older and new versions of section 4019 and to use a two-part approach in calculating the conduct credit in such a manner. (*Ibid*.) Thus, *Zarate* found that the defendant's sentence was unauthorized to the extent that the court applied the older version of section 4019. (*Ibid*.)

In response to the Attorney General's argument that Senate Bill 18 should only be applied prospectively, the court concluded that the issue did not involve retroactivity. The court reasoned that Senate Bill 18 *was* being applied prospectively because this was the only version of section 4019 in effect on the date of sentencing. (*Zarate*, *supra*, 192 Cal.App.4th at pp. 944-945.)

A petition for review was filed in *Zarate* on March 24, 2011, and is still pending.

CONCLUSION:
THE LAW REMAINS IN FLUX

As of this writing, *Brown* has not been scheduled for argument, though hopefully, it will be decided sometime this summer. However, as discussed above, it remains unclear whether the Supreme Court will decide the equal protection question.

As previously noted, *Brown* itself did not reach the constitutional issue. Moreover, Brown's answer on the merits did not assert that he was entitled to relief on equal protection grounds. The issue has been affirmatively raised, however, in an amicus brief filed by Dallas Sacher on behalf of the Sixth District Appellate Program, after which counsel for Brown filed a response to the amicus brief in which he joined the argument. Counsel for Brown has further advanced the equal protection claim in a supplemental brief filed on April 13, 2011. Until *Brown* is decided, the law will remain in flux – and if the court declines to rule on the equal protection issue, the uncertainty will continue. In the meantime, the *Jones*, *Koontz*, and *Lara* line of reasoning provides another avenue for relief, though it is one fraught with uncertainty. Of course, due to the grant of review, neither *Jones* or *Kemp* can be cited, and it seems more likely than not that *Koontz* and *Lara* are also destined for Supreme Court review. Nevertheless, the reasoning in these cases as well as in *Pacheco* should continue to be invoked by trial counsel, and scrutinized by appellate counsel as possible claims for appellate or habeas review.