

## ARGUMENT

**I. Pursuant to Equal Protection Principles, the October 1, 2011, Amendment to Penal Code Section 4019 must Be Applied to Appellant for the Portion of His Presentence Custody Served from October 1, 2011, to the Date of Sentencing.**

a. Introduction. At the December 9, 2011, sentencing the trial court awarded 145 days actual plus 72 days conduct credits. (CT 9; 1RT 38.) The court applied the formula of six days credits for four days actual custody pursuant to the September 28, 2010, version of Penal Code section 4019.<sup>1</sup> However, applying equal protection principles to the portion of appellant's presentence custody from October 1, 2011, to December 9, 2011, the conduct award should be four days of custody credits for every two days of actual custody during that period.<sup>2</sup>

b. Application of the September 28, 2010, version of Penal Code section 4019 to presentence custody from October 1, 2011, to the date of sentencing adversely affects defendants who committed offenses prior to October 1, 2011. Effective October 1, 2011, Penal Code section 4019 was amended to provide four days of presentence credits for every two days of actual custody for defendants (except those with a current violent felony conviction or a current murder conviction) incarcerated in county jail whose crimes were "committed on or after October 1, 2011." (Pen. Code, § 4019, subds. (f) and (h).) The formula applicable to all other defendants provides that "Any days earned by a

---

<sup>1</sup> "It is the intent of the Legislature that 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." (9/28/10 Pen. Code, § 4019, subd. (f).)

<sup>2</sup> The record is not clear on the actual dates of appellant's presentence confinement. Upon remand the trial court should determine the correct dates of presentence confinement and calculate the custody credits accordingly.

prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law."<sup>3</sup> (Pen. Code, § 4019, subd. (h).) Defendants whose offenses are prior to October 1, 2011, receive fewer presentence conduct credits than those defendants whose offenses were committed on or after October 1, 2011, notwithstanding that the length of presentence custody from October 1, 2011, may be identical.

c. Equal Protection compels application of Penal Code section 4019 to defendants who are in presentence custody from October 1, 2011, for an offense committed prior to that date. That the present Penal Code section 4019 should apply to defendants whose offenses were committed prior to October 1, 2011, is compelled by the Equal Protection Clause of the California Constitution (Cal. Const., art. I, § 7) and the Fourteenth Amendment to the United States Constitution.<sup>4</sup> Equal protection prohibits the state from arbitrarily discriminating among persons subject to its jurisdiction, and requires that classifications between those to whom the state accords and withholds substantial benefits must be reasonably related to a legitimate public purpose. (*In re Kapperman* (1974) 11 Cal.3d 542, 545.) Those individuals entitled to section 4019 credits who committed crimes before October 1, 2011, are similarly situated to those entitled to section 4019 credits who committed crimes on or after October 1, 2011.

---

<sup>3</sup> The applicable "prior law" at appellant's December 9, 2011, sentencing is the September 28, 2010, version of Penal Code section 4019, because appellant committed his offense on June 26, 2011. (CT 190; 1RT 35.) The September 28, 2010, version of Penal Code section 2933 (which allowed day-for-day presentence conduct credits but not for, among others, serious felonies [subd. (e)(3)] did not apply to appellant's pre-October 1, 2011, presentence custody because appellant's offense (first degree burglary) is a serious felony per Penal Code section 1192.7, subdivision (c)(18).

<sup>4</sup> "The California and federal tests for equal protection are substantially the same." (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 15, fn. 13.)

The only difference is when the offenses occurred.

1) Similarly situated for purposes of a fiscal emergency.

"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." (*In re Eric J.* (1979) 25 Cal.3d 522, 530, emphasis in original.) When enacting Assembly Bill 109 and Assembly Bill ABX1 17 which amended Penal Code section 4019, effective October 1, 2011, the Legislature explicitly stated that the bills addressed a fiscal emergency:

The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. The Governor issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on January 20, 2011. This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on January 20, 2011, pursuant to the California Constitution. (Assembly Bill 109 (2011-2012), chapter 15, Legislative Counsel's Digest, para. 17.)

and

This bill would state that it addresses the fiscal emergency declared and reaffirmed by the Governor by proclamation issued on January 20, 2011, pursuant to the California Constitution. (Assembly Bill X1 17 (2011-2012), chapter 12, Legislative Counsel's Digest, para. 19.)

The fiscal emergency was addressed, for purposes of Penal Code section 4019, by according four days of presentence conduct credits for every two days of actual custody to defendants whose offenses were committed after the effective date of the enactment (October 1, 2011). "The question for equal protection purposes is not whether [defendants] are similarly situated to other dissimilarly treated groups for all purposes but rather whether they are similarly situated for purposes of the law challenged." (*People v. Gibson* (1988) 204 Cal.App.3d 1425,

1438 [violation of equal protection clause of the Fourteenth Amendment to exempt MDO's from a requirement of proof of dangerousness applicable to all other persons subject to involuntary commitment].) Here, defendants whose offenses are prior to October 1, 2011, and those whose offenses are on or after that date are similarly situated for the express purpose of amended Penal Code section 4019; that is, to remedy a fiscal emergency. (A. B. 109 (2011-2012), ch. 15, Legis. Counsel's Dig., para. 17; A. B. X1 17 (2011-2012), ch. 12, Legis. Counsel's Dig., para. 19.) Because there is no difference between defendants in custody from October 1, 2011, who committed an offense before or after October 1, 2011, both categories are similarly situated. The desired result of awarding greater presentence conduct credits is to effect earlier releases of prisoners whose good conduct earned the credits.

2) Similarly situated for purposes of incentives for good behavior. In holding recently that the January 25, 2010, version of Penal Code section 4019 should not be applied retroactively, the California Supreme Court stated, "The important correctional purposes of a statute authorizing incentives for good behavior [Citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response." (*People v. Brown*, 2012 Cal. LEXIS 5263, 9.) This reasoning plainly implies that prisoners in presentence custody on October 1, 2011, can certainly modify their behavior in response to the increased conduct credit incentives afforded by the October 1, 2011, version of Penal Code section 4019.

Indeed, *People v. Brown, supra*, emphasized that prisoners can modify their behavior in response to increased incentives when it referred to *In re Strick* (1983) 148 Cal.App.3d 906, where the Court of Appeal denied retroactive application of Penal Code section 2933. *In*

*re Strick, supra*, stated, "Thus, inmates were only similarly situated with respect to the purpose of section 2933 on January 1, 1983, when they were all aware that it was in effect and could choose to modify their behavior accordingly. As of that date, the law applied to petitioner in exactly the same manner it applied to all the other prisoners." (*In re Strick* (1983) 148 Cal.App.3d 906, 913.) In the case at bar, the law (October 1, 2011, version of Penal Code section 4019) should apply in exactly the same manner to appellant as it applies to all other prisoners (irrespective of the dates of the offenses) who are in presentence custody on or after October 1, 2011. All such prisoners are aware of the increased conduct credit benefits of Penal Code section 4019 and, thus, have an incentive to earn conduct credits by their good behavior.

3) No rational basis. The United States Supreme Court has defined the scope of an equal protection analysis regarding the state's purpose in treating similarly situated classes differently:

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. (*FCC v. Beach Communications* (1993) 508 U.S. 307, 313.)

Here, there is no rational basis to deny the substantial benefit of increased presentence custody credits for those who committed crimes before October 1, 2011--and who are in presentence custody after this date--because it is not reasonably related to a legitimate public purpose.

*In re Kapperman, supra*, considered the then new Penal Code section 2900.5 which provided for an award of pre-sentence credit for

actual time spent in custody. Although the statute expressly stated that it applied only to defendants delivered to prison on or after March 4, 1972, the court held that the statute was fully retroactive and applied to all state prisoners by virtue of the Equal Protection Clause. (*Id.* at pp. 544-550.) As a result, the court awarded pre-sentence credit for time spent in custody prior to the effective date of the statute. (*Ibid.*) Significantly, credit was given to Kapperman even though his judgment was final as of the effective date of the statute. (*Ibid.*) Subsequently, the California Supreme Court applied *Kapperman* in *People v. Sage* (1980) 26 Cal.3d 498, where the court found that the then-existing version of section 4019 violated equal protection because it provided conduct credit solely to misdemeanants and not felons. Citing *Kapperman*, the court held that its ruling was retroactive. (*Id.* at p. 509, fn. 7.) The conclusion to be drawn from *Kapperman* and *Sage* is that section 4019 increased presentence conduct credits should be awarded to all defendants who are in presentence custody on or after October 1, 2011, for crimes committed before or after the effective date of the statute.

Appellant notes that *People v. Brown, supra*, found *In re Kapperman* irrelevant because *Kapperman* concerned custody credits and not conduct credits. (*People v. Brown, supra*, 2012 Cal. LEXIS at pp. 15-16.) However, *People V. Brown, supra*, went on, nevertheless, to stress the very point of appellant's argument here: "Credit for time served is given without regard to behavior, and thus does not implicate the distinction between statutes that provide behavioral incentives (e.g., *conduct credits*) and statutes that mitigate the penalty for a particular crime." (*People v. Brown, supra*, 2012 Cal. LEXIS at p. 16, internal quotations and citations omitted, emphasis added.) Here, the increased conduct credits of Penal Code section 4019 do provide behavioral incentives as of October 1, 2011.

Because appellant is similarly situated for purposes of conduct incentives and fiscal incentives to other defendants who are in presentence custody on or after October 1, 2011, it is irrational--and a violation of equal protection--to award him fewer conduct credits merely because he committed his offense prior to October 1, 2011.

**II. Pursuant to the Rule of Lenity, Penal Code Section 4019 Should Be Applied to Award Presentence Conduct Credits for Custody on or after October 1, 2011.**

Subdivision (h) of Penal Code section 4019 states, "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." The second sentence of this subdivision implies that any days earned by a prisoner on or after October 1, 2011, should be calculated at the rate required by the present law, that is, four days for every two in actual custody (for qualified prisoners, such as appellant)<sup>5</sup>. To the extent that this implication conflicts with an interpretation that the first sentence of this subdivision means that no part of section 4019 applies to any defendant whose offense was before October 1, 2011, the rule of lenity dictates the contrary. That is, any defendant (who is not in custody for murder or a violent felony) who is in presentence custody on or after October 1, 2011, may earn four-for-two conduct credits.

"The rule of lenity . . . generally requires that ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of

---

<sup>5</sup> Where the present offense is not a violent crime (Pen. Code, § 2933.1) or murder (Pen. Code, § 2933.2).

interpretation." (*In re M.M.*, 2012 Cal. LEXIS 6163, 29-30, internal quotations omitted [school security officer is a "public officer" within the meaning of Penal Code section 148, subdivision (a)(1)].) Here, to resolve the ambiguity in subdivision (h) of Penal Code section 4019-- and to give appellant the benefit of every reasonable doubt--one infers that he should earn four-for-two presentence conduct credits from October 1, 2011, to sentencing. This is especially true where, as here, "two reasonable interpretations of the statute stand in relative equipoise." (*In re M.M.*, *supra*, at p. 30 ["But as we have frequently noted, that rule applies only if two reasonable interpretations of the statute stand in relative equipoise"].) It is reasonable to interpret the second sentence of subdivision (h) as applying to all prisoners in presentence custody on or after October 1, 2011.

Further, the purpose of Penal Code section 4019 is two-fold. One, to address a fiscal emergency: "This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on January 20, 2011, pursuant to the California Constitution." (Assembly Bill 109 (2011-2012), chapter 15, Legislative Counsel's Digest, para. 17.) Two (as has long been the case), the purpose of this section is to give prisoners in presentence custody incentives to behave. "The presentence credit scheme, [of Penal Code] section 4019, focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed on felony charges." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 36.) Interpreting Penal Code section 4019, subdivision (h), to allow four-for-two presentence conduct credits as requested herein achieves both goals: it allows prisoners to be released sooner and it encourages prisoners to behave.

This two-fold benefit comports perfectly with the purpose of Penal Code section 4019 and the rule of lenity. "Although it is the policy of this state to have courts construe penal laws as favorably to criminal defendants as reasonably permitted by the statutory language and circumstances of the application of the particular law at issue [Citations], that policy generally comes into play only when the language of the penal law is susceptible of two constructions." (*People v. Gardeley* (1996) 14 Cal.4th 605, 622.) Not to apply Penal Code section 4019's conduct credit scheme to appellant's presentence custody from October 1, 2011, would fail fully to achieve both the fiscal goal and the good conduct goal. Thus, of the "two constructions" (*ibid.*), this latter one fails to achieve either goal, yet appellant's construction fully achieves both.

### **CONCLUSION**

For the foregoing reasons, this matter must be remanded to determine the period of presentence custody from October 1, 2011, to December 9, 2011, and to then award four-for-two conduct credits for that period.