MARK J. SHUSTED, ESQ.
P.O. Box 2825
Granite Bay, CA 95746-2825
March 2, 2010

Ms. Anita Kenner
Deputy Clerk
Court of Appeal
Third Appellate District
10th Floor
621 Capitol Mall
Sacramento, CA 95814-4719

Re: **Response to Request for Letter Brief in *People v. Brown,* No. C056510**

Dear Ms. Kenner:

On behalf of appellant James Lee Brown (defendant), I thank you, Clerk/Administrator Fawcett, and the court for the opportunity to present this letter brief regarding the court's directive dated February 24, 2010, which states:

> The parties are directed to address in supplemental letter briefs the following issue: Whether section 59 of Senate Bill 18 (Stats. 2009-2010, 3rd Ex. Sess., Ch. 28 (Sen. Bill 18)) suggests a legislative intent that the changes to Penal Code section 4019 be applied retroactively to those whose judgment was not final as of January 25, 2010, as well as those whose judgment was final as of January 25, 2010. All supplemental letter briefs are to be served and filed on or before March 2, 2010. Counsel are to provide an original and 4 copies of the briefs with an attached proof of service to this court.

In response, defendant proposes section 59 of Senate Bill 18 (Stats. 2009-2010, 3rd Ex. Sess., Ch. 28 (hereafter referred to as section 59 and SB 18, respectively)), demonstrates that the amendment to Penal Code section 4019 (hereafter, § 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, on 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 so 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 what is known as 'plus section,' which our Supreme Court [has] termed '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, 858-859, fn. 13, ...) The court subsequently explained that 'statements of the intent of the enacting body . . . , 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 are several "changes made by this act regarding time credits" to which the California Department of Corrections and Rehabilitations (CDCR) could attend. Before discussing those sections, it is of benefit to step back, reiterate the relevant provisions of statutory construction, and assess the purpose and structure of SB 18, as declared by the Legislature.

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. Bautista* (2008) 163 Cal.App.4th 762, 774, quoting *People v. Flores* (2003) 30 Cal.4th 1059, 1063.) Additionally, "[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.)

Penal Code section 3

One other statutory provision is of significance. Penal Code section 3 provides: "No part of [the Penal Code] is retroactive, unless expressly so declared." This provision was discussed recently by our Supreme Court in *People v. Alford* (2007) 42 Cal.4th 749: "We have previously construed the statute to mean '[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. [Citation.]' [Citation.]

"As 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.' (*In re Estrada* (1965) 63 Cal.2d 740, 746, ...) 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. [Citations.]" (*People v. Alford, supra,* 42 Cal.4th at pp. 753-754; cf. *People v. Rodriguez* (2010) ___ Cal.App.4th ___, ___ (Ct. App., Fifth App. Dist., No. F057533, opn filed March 1, 2010) slip opn at p. 6 [restating rule of *People v. Estrada, supra,* as: "in the absence of a saving clause a legislative enactment that reduces punishment will operate retroactively so that the lighter punishment is imposed"] - opinion attached hereto as Exhibit A.)

SB 18, § 38

An example of a saving clause was set forth former section 2933, subdivision (d), which provided: "(d) The 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 amended former section 2933, subdivision (d) by substituting in its place 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.)

Section 38 demonstrates the Legislature not only was aware of a saving clause - the amendment to section 2933 is, after all, contained in the same bill (SB 18) which amends section 4019 - but that it intended that section 4019 be retroactively construed, since the amendment to the latter provision includes no saving clause. (SB 18, §§ 38, 50, pp. 54-55, 67-69.)[1]

Section 59

Turning to section 59, it is apparent that the absence of a saving clause in amended section 4019, coupled with the terms of section 59 of SB 18, are 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, as well as those whose judgment was final as of January 25, 2010.

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 . . . ." Therefore, any argument that section 59 applies to some of the credit changes, but not others, must be fabricated of whole cloth.

It is telling that section 59 assigns to the CDCR the task of recalculating credits. Assuming the amendment to section 4019 was prospective only, section 59 would be superfluous with respect to the amendment of section 4019.

---

[1]That the Legislature was cognizant of a saving clause also is apprent from the amendment to Penal Code section 2933.3, subdivision (d), which limits additional credits for firefighting related training or service. It states: "(d) The credits authorized in subdivisions (b) and (c) shall only apply to inmates who are eligible after July 1, 2009." (SB 18, § 41, p. 57.)

Calculating credits is, and continues to be, a task assigned to the sentencing court.[2]

As of January 25, 2010, sentencing courts would be expected to apply the amended version of section 4019. 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. In order to ameliorate the harm, both to the State and individual defendants, 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].)

Such an outcome, of course, 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.)

People v. Rodriguez

Although arguably beyond the scope of the court's directive dated February 24, 2010, the decision in *People v. Rodriguez*, *supra,* merits discussion, particularly since it adopts the

---

[2] Prior to sentencing, the sentencing court is required to determine the total number of days to be credited, and that number must be contained in the abstract of judgment provided under Penal Code section 1213. (Pen. Code, § 2900.5, subd. (d) ["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. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213."]; Cal. Rules of Court, rules 4.310 & 4.472.)

identical arguments the People presented in their response to the order show cause herein, which this court implicitly rejected when it granted defendant's petition for rehearing on February 16, 2010.

Rodriguez emphasizes that the existence of *incentives* for credits in SB 18 undermines the suggestion that the statute was intended to apply retroactively. (*Rodriguez, supra,* slip opn at p. 8.)

To begin with, defendant does not dispute that SB 18 contains incentives for credit awards. This is logical and sensible. This is not to admit, however, that SB 18 was intended to apply only to credits awarded for satisfactory completion of incentives earned *after* the bill's enactment or effective date. Prisoners, parolees, and probationers who earned presentence credits *prior to these dates* did so because they behaved well and performed their work in accordance with established law, that is to say, former section 4019, *which was not amended with respect to such incentives.* In other words, these individuals already have responded to the existing incentives in order to earn their credits. The *incentives* for earning section 4019 credits remain unchanged after the amendment to section 4019; only the *numerical formula* for calculating those credits has.

In addition, the *Rodriguez* court's reliance on *In re Stinnette* (1979) 94 Cal.App.3d 800 (*Stinnette*) is misplaced. *In Stinnette,* the court considered the then-new Penal Code section 2931, which awarded conduct credits to state prisoners under the Determinate Sentencing Law. Stinnette argued that the Equal Protection Clause required the court to retroactively apply the statute to the time that he had served under the Indeterminate Sentencing Law. The court rejected the argument on the grounds that it was "impossible to influence behavior after it has occurred." (*Stinnette,* supra, 94 Cal.App.3d at p. 806.)

Subsequent to *Stinnette,* though, the Supreme Court of California held section 4019 credits were to be retroactively awarded under the Equal Protection Clause. (*People v. Sage (1980)* 26 Cal.3d 498, 509, fn. 7.) Under the rule of *stare decisis*, *Sage* is the controlling authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Additionally, *Stinnette* is distinguishable. *Stinnette* relied on the notion that conduct credit cannot be retroactively awarded since past behavior cannot be presently influenced. However, in the present case, defendant has *already* been awarded credit under section 4019 due to his compliance with the terms of that provision. The question, therefore, is whether he can be denied the *additional* section 4019 conduct credits that have been awarded to those sentenced after January 24, 2010. The answer to this question has already been decided. (*People v. Sage,* supra, 26 Cal.3d 498, 509, fn. 7 [section 4019 credit was retroactively awarded].)

Equal Protection

Finally, and irrespective of finality, the new statute retroactively applies to all defendants who are (1) presently serving a sentence, (2) presently on parole, or (3) presently on probation. This result is compelled by the Equal Protection Clause of the California Constitution. (Cal. Const., Art. I, § 7.) As demonstrated in the previous section, those individuals entitled to section 4019 credits prior to January 25, 2010 are similarly situated to those entitled to section 4019 credits after January 25, 2010.

In *In re Kapperman* (1974) 11 Cal.3d 542, the Supreme Court considered the then new Penal Code section 2900.5 which provided for an award of presentence 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 presentence 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, supra,* where the court found that the then-existing version of section 4019 was violative of

equal protection since 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 indisputable. If a defendant is serving a sentence or is on parole or probation, he or she is entitled to the benefit of the amended statute.

Dated: March 2, 2010

_____
Mark J. Shusted, Esq.
Attorney for James L. Brown