

**I. PURSUANT TO SETTLED EQUAL PROTECTION PRINCIPLES, APPELLANT IS ENTITLED TO ADDITIONAL PRESENTENCE CONDUCT CREDITS.**

As explained below, equal protection compels an award of additional presentence credits in the present case.

**A. The October 1, 2011 Amendment to Section 4019 Must Be Retroactively Applied to Appellant.**

Appellant has a prior assault with a firearm conviction, which he admitted was a serious felony. (CT 184-187; 3RT 21-23; § 1192.7(c)(31).) His present conviction, for using personal identifying information for an unlawful purpose in violation of section 530.5(a), is not a “strike.” (See §§ 667.5(c), 1192.7(c).)

Effective October 1, 2011, Assembly Bill 109 (hereinafter “AB 109”) and Assembly Bill 17, passed during the Legislature’s First Extraordinary Session (hereinafter “ABX1 17”), amended sections 2933 and 4019 to delete the conduct credit restrictions imposed under the September, 2010 amendment to section 4019 for persons, such as appellant, with prior serious or violent felony convictions. (Stats.2011, c. 15 (A.B.109), § 482; Stats.2011-2012, 1st Ex.Sess., c. 12 (A.B.17), § 16.) The Legislature’s express purpose in enacting both AB 109 and ABX1 17 was to “address[] the fiscal emergency declared by the Governor by proclamation issued on January 20, 2011, pursuant to the California

Constitution.” (Legis. Counsel’s Dig., Ass. Bill 109 (2011-2012 Sess.) ¶ (17); Legis. Counsel’s Dig., Ass. Bill 109 (2011-2012 1<sup>st</sup> Ex. Sess.) ¶ (19).)

Section 4019 now provides, in essence, for one-for-one credit for all defendants, including those with prior “strike” convictions, who serve presentence time in county jail. The only defendants who are excluded are those who have a current violent felony conviction or a current murder conviction. (See §§ 2933.1, 2933.2.) The current formula applicable to all other defendants provides that “a term of four days will be deemed to have been served for every two days spent in actual custody.” (§ 4019(f).)

By its express terms, the new statute applies only to defendants whose crimes were “committed on or after October 1, 2011.” (§ 4019, subd. (h).) However, the Supreme Court of California has held that a new statute that provides for presentence credits for prison inmates must be retroactively applied to all inmates by virtue of the equal protection clauses of the state and federal Constitutions. (*In re Kapperman* (1974) 11 Cal.3d 542, 544-545; U.S. Const., 14th Amend.; Cal. Const., Art. I, § 7.) Therefore, equal protection compels that the amendment to section 4019 effective October 1, 2011 be applied to award appellant one-for-one conduct credit.

1. **The New Version of Section 4019 Affects Similarly Situated Groups in an Unequal Manner.**

“‘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.)

For purposes of the present analysis, there are two classes of prison inmates and parolees: (1) those who receive additional conduct credits since they committed a crime on or after October 1, 2011; and (2) those who will not receive additional conduct credits since they committed a crime before October 1, 2011. 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 statute. This is so since each inmate has earned conduct credit for the identical reason, i.e., they behaved properly in accordance with jail regulations.

*In re Strick* (1983) 148 Cal.App.3d 906, does not dictate a contrary result. In *Strick*, the Fourth District Court of Appeal considered a new statute that for the first time authorized additional custody credit for participation in a work program. The court held that the statute could constitutionally be applied in a prospective manner since those denied the extra credit were not similarly situated to those granted the new credit because the former class had not earned the work credit since they were “unaware” of the “incentive.” (*Id.* at pp. 912-913.)

Appellant contends that *Strick* was wrongly decided, and, in any event, is distinguishable from the present case. The thesis of the *Strick* court is refuted by the California Supreme Court’s decision in *People v. Sage* (1980) 26 Cal.3d 498. In *Sage*, the Supreme Court found that the then-applicable version of section 4019 violated equal protection because it denied conduct credit to felons who were sentenced to prison. (*Id.* at pp. 507-508.) Since felons had no preexisting right to earn conduct credit, the implicit holding of *Sage* is that felons were similarly situated to all other jail inmates regardless of their lack of awareness of the right to earn conduct credits.

*Sage* aside, the reasoning of *Strick* is flawed. The defendant in *Strick* successfully participated in a work program. (*Strick, supra*, 148 Cal.App. 3d 906, 909.) The court reasoned that Mr. Strick was not

similarly situated to a prisoner awarded work credit since he could not satisfy the purpose of a law that he was unaware of at the time that he performed his work. (*Id.*, at p. 913.) This reasoning fails because a prisoner successfully participates in a work program, he is identically situated to every other prisoner who does the same. In other words, the prisoner's mental state (i.e., his awareness or lack of awareness of the right to additional credit) cannot serve to place him in a dissimilarly situated class.

In any event, even if this Court accepts the reasoning in *Strick*, it has no application here. Long before October 1, 2011, all jail inmates had the right to earn custody credit. Thus, unlike the situation in *Strick*, 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.

**2. There Is No Rational Basis for the Disparate Effect on Similarly Situated Groups Created by the New Version of Section 4019.**

The remaining question is whether there is any rational basis for the disparate classes created by the new version of section 4019. (*Hofsheier, supra*, 37 Cal.4th at pp. 1200-1201.) There is not.

In *Kapperman, supra*, 11 Cal.3d 542, the California Supreme Court considered the then-new section 2900.5, which provided an award of

presentence credit for actual time spent in custody. Although the statute 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 to all state prisoners by virtue of the equal protection clause. (*Id.* at pp. 544-550.) In so holding, the Court determined that there simply was no “legitimate public purpose” for providing presentence credit to some, but not all, prison inmates and parolees. (*Id.* at p. 547.)

*Kapperman* is binding in this case. Under the pre-October 1, 2011 version of section 4019, a defendant with a prior serious or violent felony conviction, but with a current “non-strike” conviction, received one-for-two conduct credit for good behavior. (Former §§ 2933(e), 4019.) Under the newly amended versions of section 4019 and 2933, the amount of conduct credit has been increased to award one-for-one credit. Regardless of the date of the crime committed by the defendant, he has earned conduct credit. Since the express purpose of the new statute is to address the fiscal emergency, there is no “legitimate public purpose” for denying additional conduct credit to those prison inmates who committed a crime before October 1, 2011 and established their entitlement to conduct credit.

A footnote in *Kapperman* makes this point crystal clear. The Court favorably cited *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604 [221 N.E.2d 262]. (*Kapperman, supra*, 11 Cal.3d at p. 547, fn. 6.) In *Carroll*,

the Supreme Court of Illinois considered a statute that provided prospective presentence credit for those sentenced on or after July 1, 1965. As the *Kapperman* Court noted, *Carroll* held that equal protection principles required that the statute be retroactively applied to those sentenced before July 1, 1965 in order to avoid “arbitrary discrimination based upon the fortuitous circumstance of conviction date.” (*Ibid.*) The prospective operation of section 4019 by effective date of the statute (i.e., October 1, 2011) is no less “arbitrary” than the prospective operation of the Illinois statute by sentencing date (i.e., July 1, 1965). In either case, no “rational purpose would be served” by giving additional credit to some, but not all, prisoners. (*Kapperman, supra*, 11 Cal.3d at p. 547, fn. 6.)

Pursuant to *Kapperman*, the October 1, 2011 amendment to section 4019 must be made fully retroactive to award the additional conduct credit provided by the new amendment to persons, such as appellant, who have prior serious or violent felony convictions, without regard to the date the crime was committed. (See *Kapperman, supra*, 11 Cal.3d at p. 550.)

**C. Remedy.**

The denial of equal protection should be remedied by a modification of the judgment. Under the formula effective prior to October 1, 2011, appellant received 2 days of conduct credits for 7 days of actual presentence credits. Under the current formula provided in section 4019, “a term of four

days will be deemed to have been served for every two days spent in actual custody.” (§ 4019(f).) As appellant served 7 days of actual custody, his conduct credit should be modified to award him 6 days of conduct credits, for a total of 13 presentence credit days.