IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA	)	No. S181963
Plaintiff and Respondent	)	
v.	)	
JAMES LEE BROWN III	)	
Defendant and Appellant	)	
	)	

ANSWER TO PETITION FOR REVIEW

On Review of a Decision of the Court of Appeal
Third Appellate District
No. C056510
Following Appeal from the Lassen County Superior Court
No. CR024002
The Honorable Stephen D. Bradbury, presiding.

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Appointed by the Court upon
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Argument

I

A Grant of Review Is Unnecessary in Light of the Weight of Authority and the Need for Expediency; The Issue Raised by Petitioner Can be Resolved by this Court Through the Use of the Power to Depublish, Rather Than Time-Consuming Plenary Review

James L. Brown III (defendant) files this answer to request this Court deny the petition for review and depublish *People v. Rodriguez* (2010) 182 Cal.App.4th 535 (*Rodriguez*) and *People v. Otubuah* (No. E047271, opn. mod. & pub. May 6, 2010 (*Otubuah*), so that inmates and prisoners subject to the 2009 amendment to Penal Code section 4019 (§ 4019) set forth in Senate Bill 18 (Stats. 2009-2010, 3rd Ex. Sess., Ch. 28 (SB 18)), may receive the benefits of that statute while they are still serving time. Alternatively, if this Court votes to grant review, defendant requests an expedited briefing schedule be set for the same reason.

To date, six published decisions of the Courts of Appeal decided the amendment to section 4019 must be applied retroactively:

People v. Brown (2010)182 Cal.App.4th 1354 [3rd Dist.] (*Brown*);

People v. House (2010)183 Cal.App.4th 1049 [2nd Dist., Div. 1] (*House*);

People v. Landon (2010) ___ Cal.App.4th ___ (No. A123779, opn. filed April 13, 2010) [1st Dist., Div. 2] (*Landon*);

People v. Delgado (2010) ___ Cal.App.4th ___ (No. B213271, opn. filed Apr. 29, 2010) [2nd Dist., Div. 6] (*Delgado*);

People v. Norton (2010) ___ Cal.App.4th ___ (No. A123659, opn. filed May 5, 2010) [1st Dist., Div. 3] (*Norton*); and

People v. Pelayo (2010) ___ Cal.App.4th ___ (No. A123042, opn. filed May 6, 2010) [1st Dist., Div. 5] (*Pelayo*).

Two published cases reach a contrary conclusion. In *Rodriguez, supra,* 182 Cal.App.4th at p. 540), the Court of Appeal, Fifth Appellate District, held the section 4019 amendment increasing conduct credits does not apply to defendants sentenced before January 25, 2010. Division Two of the Court of Appeal, Fourth Appellate District, agreed with *Rodriguez* in *Otubuah.* (Slip opn. at pp. 19-22.)

For the reasons stated in the instant case (*Brown*, 182 Cal.App.4th at pp. 280-294), *House* (183 Cal.App.4th at pp. ___, [slip opn. at pp. 7-9]), *Landon* (slip opn. at pp. 5-8), *Delgado* (slip opn. at pp. 11-13), *Norton* (slip opn at pp. 10-18) and *Pelayo* (slip opn. at pp. 11-19), defendant maintains the amendment to section 4019 should be retroactively applied because, in the absence of a saving clause, the credit increase reflects a legislative determination that the prior method of calculating conduct credits was too severe, thus invoking the presumption of retroactivity set forth in *In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*).

A

Section 4019, by Its Own Terms, States that an Award of Work and Conduct Credits Shall Be Presumed in the Absence of a Contrary Showing by the People; It Follows that a Legislative Increase of Such Credits Mitigates Punishment

Otubuah, like *Rodriguez*, placed great reliance on the assumption that the granting of work and conduct credits provides an *incentive* to good behavior and work participation, rather than a *mitigation of punishment*, thereby negating application of the *Estrada* presumption of retroactivity. (*Rodriguez, supra,* 183 Cal.App.4th at pp. 2-5; *Otubuah, supra,* slip opn. at pp.

18-20.) While *Rodriguez* acknowledged that "section 4019 can be said, in some sense, to lessen punishment for a certain class of felons," (*Rodriguez, supra,* 183 Cal.App.4th at p. 3),[1] *Otubuah* takes this a step further, asserting "that increases in custody credits should not be considered in mitigation of punishment." (*Otubuah, supra,* slip opn. at p. 19.)

The reasoning of *Rodriguez* was soundly rejected in *Norton, supra*, where the court wrote:

> [I]n *People v. Rodriguez* (2010) 183 Cal.App.4th 1, . . . , the Fifth District held that *Estrada* did not apply to section 4019, as amended, because "it is not obvious that the Legislature has determined the punishment for [qualified prisoners] was too severe, nor is it an inevitable inference that the Legislature intended its punishment-mitigating provisions to apply [retroactively]." [Citation.] We do not find *Rodriguez* persuasive. First, the court in that case found it significant that the amendments to section 4019 lessen punishment "by allowing [qualified prisoners] to accrue conduct credits at a greater rate than other felons and not, as in *Estrada*, by reducing the penalty for a specific offense." [Citation.] As noted above, in our view, this is a distinction without a difference. Second, we believe the court unduly emphasized the incentive effect of conduct credit in distinguishing such credit from "statutes which reduce punishment in other ways" [citation] because "it is impossible to influence behavior after it has occurred" [citation]. The relevant question is the Legislature's intent in amending the statute, not the purpose for its initial enactment. In any case, the authority on which the court relied is distinguishable, as it emphasizes the purpose of conduct credit in addressing whether

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[1] Throughout its opinion, *Rodriguez* states section 4019 is directed toward "felons." Defendant notes the statute is not limited to felons, but includes within its ambit misdemeanants and contemnors. (§ 4019, subd. (a)(1)-(4).) The statute, therefore, applies with equal force to the latter classes of lesser offenders.

> an express provision of prospectivity violated equal protection. [Citations.] The issue here is not whether a rational basis exists for a prospectivity provision, but whether we should infer a retroactive intent in the absence of such a provision. Third, we do not agree that *Estrada* applies only if "it . . . necessarily follow[s] that the Legislature determined the punishment ... was 'too severe.'" [Citation.] The issue is whether the Legislature has deemed a lesser punishment sufficient (*Estrada, supra,* 63 Cal.2d at p. 745, . . .); the policy reasons for such a finding do not diminish its significance. Finally, we find the court's analysis flawed to the extent it looks to the legislative history in determining whether *Estrada* applies in the first instance. [Citation.] The rule in *Estrada* turns on a statute's penalty-reducing effect, not a construction of other sources of legislative intent."

(*Norton, supra*, slip opn. at pp, 16-17, fns. omitted.)

A fortiori, the *Norton* analysis undermines *Otubuah*, which was filed one day later, without mention of the former.

Moreover, in reviewing the actual language of section 4019, subdivisions (b)(1) and (c)(1), one is struck by the Legislature's directive that the work and conduct credits authorized therein "shall" be awarded the prisoner.[2] (*Peters v. Superior Court* (1989) 212 Cal.App.3d 218, 223 [use of

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[2]These subdivisions provide: "(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

word shall in statute expresses what is mandatory].) In other words, there is a *presumption* that an inmate is entitled to work and conduct credits. As a practical matter, the presumption in favor of such credits operates as an automatic reduction in sentence. Rather than providing an incentive to good behavior and work, as *Rodriguez* and *Otubuah* assume, section 4019 sets forth no more than a *disincentive* to laziness and misconduct.

B

The Presence of Two Limited Retroactivity Clauses in SB 18 Demonstrates the Legislature Understood, and Therefore Intended, that *Estrada*'s Presumption of Unlimited Retroactivity Would Apply to Amended Section 4019

As noted in defendant's March 2, 2010, letter brief (at pp. 4-5) in response to the Court of Appeal's request for supplemental briefing, SB 18 revises two statutes that include express limitations on retroactivity, indicating the Legislature's awareness of how to avoid the presumption set forth in *Estrada*. (Form. Pen. Code, § 2933, subd. (d), Stats. 1996, ch. 598, § 2 [SB 18, § 38, p. 55]; Pen. Code, § 2933.3, subd.(d), SB 18, § 41, p. 57.) The amendment to section 4019 includes no such limitation, which indicates the presumption of *Estrada* should apply.

Although *Brown* did not discuss this argument, *Pelayo* found it persuasive, at least with respect to the amendment to Penal Code section 2933.3, stating:

> Pelayo also contends that the express use of a saving

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satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp."

> clause in other statutes amended by the same legislation (Sen. Bill 18, § 41; § 2933.3, subd. (d) [providing additional custody credits for prison inmate firefighting training or service only for those eligible after July 1, 2009]) compels a conclusion that the Legislature intended retroactivity for amended section 4019. The Legislature's inclusion of a saving clause in the amendment to section 2933.3, but not in the amendments to section 4019, supports an inference that the Legislature had a different intent with respect to the retroactive or prospective application of the two provisions. (Cf. *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 62, . . . ["use of differing language in otherwise parallel provisions supports an inference that a difference in meaning was intended"].) The People urge that we can divine a contrary legislative purpose for only prospective application from the fact that the amendment to section 2933.3, subdivision (d) was expressly made partially retroactive, and the Legislature failed to do so here. The Fifth Appellate District in *Rodriguez* agreed that the inclusion of an express provision for retroactive application in one instance and its absence from the section amending section 4019 undermines any inference of retroactive intent with respect to section 4019. (*Rodriguez, supra,* 183 Cal.App.4th at p. 3, ...) We think that the Legislature's use of the phrase "shall only apply" in amending section 2933.3 (italics added), however, suggests an intent to limit the provision's retroactive application, rather than extend the provision's otherwise prospective application retroactively, and respectfully disagree with the conclusion in *Rodriguez.*

(*Pelayo, supra,* slip opn. at p. 11; see also *People v. Nasalga* (1996) 12 Cal.4th 784, 792, fn. 7 [expressly reaffirming *Estrada*]; *People v. Alford* (2007) 42 Cal.4th 749, 753-754 [citing *Estrada* favorably].)

C

Otubuah's Finding that Its Reasoning in *Doganiere* Was "Flawed" Fails to Undermine the Published Cases Finding Section 4019 Is Retroactive

Otubuah finds the cases holding section 4019 retroactive are infirm because they rely partly upon *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240, an earlier decision of the Fourth District, Division Two, which *Otubuah* determined rested upon the "flawed" reasoning that increases in custody credits should be considered a mitigation in punishment. (Slip opn. at p. 19.) For the reasons stated herein, the conclusion that the amendment to section 4019 does not lessen punishment is erroneous. Additionally, *Otubuah*'s implicit overruling of *Doganiere* does not undermine the contrary force of *Brown* and its progeny. The cases *Otubuah* distinguished did not rely principally upon *Doganiere*. They rest firmly upon the higher authority of *Estrada*. Therefore, the Fourth District, Division Two's reversal of course in *Otubuah* is of no moment.

D

The Absence of an Urgency Clause in SB 18 Is Insignificant

Otubuah also suggests that the absence of an urgency clause negates the presumption of retroactive application. (Slip opn. at pp. 21-22.) The case cited in support -- *Rankin v. Longs Drug Stores California, Inc.* (2009) 169 Cal.App.4th 1246, 1257-1258 -- concerned *abatement* of a *civil* action. *Estrada* itself does not indicate an urgency clause is significant.

> "[T]he postponement of the operative date of the legislation . . . does not mean that the Legislature intended to

> limit its application to transactions occurring after that date. [Citation.] . . . . The Legislature may do so for reasons other than an intent to give the statute prospective effect. For example, the Legislature may delay the operation of a statute to allow 'persons and agencies affected by it to become aware of its existence and to comply with its terms.' [Citation.] In addition, the Legislature may wish 'to give lead time to the governmental authorities to establish machinery for the operation of or implementation of the new law.' [Citation.] A later operative date may also 'provide time for emergency clean-up amendments and the passage of interrelated legislation.' [Citation.] Finally, a later operative date may simply be 'a date of convenience . . . for bookkeeping, retirement or other reasons.' [Citation.]" [Citation.]

(*People v. Alford, supra,* 42 Cal.4th at pp. 754-755.)

Here, the absence of an urgency provision may have signaled no more than the Legislature's awareness that clean-up legislation might be needed prior to the date SB 18 became fully operative.

In fact, at least one instance of clean-up legislation occurred with respect to SB 18. Senate Bill 678, which was passed one day later than SB 18, slightly revised section 36 of SB 18, concerning the ambitious California Community Corrections Performance Incentives Act of 2009. (Pen. Code, § 1228 et seq.; [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx3_18_bill_20091012_history.html; http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_678_bill_20091011_history.html [bill histories].) The Governor signed SB 18 on October 11, 2009, and Senate Bill 678 one day later. (*Ibid*; *In re Thierry S.* (1977) 19 Cal.3d 727, 738-739 [when two conflicting bills are signed by the Governor during the same session of the Legislature, the bill signed last is the one which takes precedence]; *People v. Cargill* (1995) 38 Cal.App.4th 1551, 1554 [same].)

E

The Proposed Amendments to Section 4019 Do Not Impact This Case

Otubuah notes that "the Senate has unanimously passed urgency legislation undoing the amendment to section 4019, and the Assembly's mirror version is in committee." (*Otubuah, supra,* slip opn. at p. 22.)

At first glance, this statement suggests the Legislature is now expressing its view on retroactivity. However, the Senate Committee and Floor analyses of the cited bill, namely, Senate Bill No. 1487, make no mention (let alone reflect any conclusion) that the instant (or any other) case was wrongly decided, even though these analyses were prepared for a hearing and floor vote occurring approximately one month *after* the Court of Appeal published its decision herein. (Sen. Public Saf. Com, Analysis of Sen. Bill 1487 [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1451-1500 /sb_1487_cfa_20100412_141831_sen_comm.html]; Sen. Rules Com., Floor Analysis,http://www.leginfo. ca.gov/pub/09-10/bill/sen/ sb_1451-1500/sb_1487_cfa_20100427_100638 _sen_floor.html)

The analyses instead focused on the need to increase the length of probationary periods so that sentencing courts may use the threat of jail incarceration as a rehabilitative tool, due to SB 18's reduction of maximum jail time for many offenses to 180 (from 360) days. (*Ibid.)*

In fact, with respect to SB 18, the Committee Analysis of Senate Bill 1487 states "*the credit changes for county jail inmates included in SB3X 18 were enacted for sound reasons of parity and consistency, ...*" (Sen. Public Saf. Com, Analysis of Sen. Bill 1487, at p. I, italics added.) The italicized language indicates that SB 1487, rather than undermining the reasoning of the Court of Appeal herein, supports the court's decision to apply *Estrada*, since

section 4019 was intended to equalize the schemes for calculating conduct credits for state prisoners and inmates incarcerated locally.

In any event, it is established that unpassed bills have little value as evidence of the intent underlying the legislation of an earlier legislative session. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735, fn.7; *Bell v. Department of Motor Vehicles* (1992) 11 Cal.App.4th 304, 313.)

Finally, even if Senate Bill 1487 becomes law, it will only impact the calculation of credits after its effective date. The issues raised herein will be unaffected.

II

If Review Is Granted, this Court Should Also Extend Its Review to Defendant's Equal Protection Argument

Pursuant to Rule 8.500(a)(2), defendant requests this Court, should it grant review, address the defendant's equal protection argument, which the Court of Appeal did not reach.

Section 4019 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 Clauses of the federal and state constitutions. (U.S. Const., Amend. XIV; Cal. Const., art. I, § 7, art. IV, § 16.) 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, and as such, are entitled to be treated equally.

In *In re Kapperman* (1974) 11 Cal.3d 542, this 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, this Court applied *Kapperman* in *People v. Sage* (1980) 26 Cal.3d 498, 509, fn. 7), 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.

The published cases discussing SB 18's amendment to section 4019 have declined to reach this issue, instead relying upon interpretations of legislative intent with respect to section 4019. If this Court grants review, it should include a directive that the equal protection issue be briefed on the merits, since it arguably controls this case no matter how the section 4019 issues are resolved.

Dated: May 10, 2010

_____

Mark J. Shusted, Esq.
Attorney for Defendant

Certificate of Word Count

I, Mark Shusted, do hereby certify that my word processing program reported this brief contains 3,034 words. The font is 13–point Times New Roman.

Dated: March 10, 2010

_____

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People v. Brown
Court of Appeal, Third Appellate District, No. C056510
Lassen County Super.Ct.No. CR024002

DECLARATION OF SERVICE

I, Margaret E. Ruth, say: I am over 18 years of age and not a party to the subject action. I am employed in the County of Placer, California, with a business address of P.O. Box 2825, Granite Bay, California 95746. I served a true and correct copy of the document herein presented for filing, on each addressee listed below, by placing the copy in a separate envelope for each addressee, sealing the envelope, affixing the proper Priority Mail postage thereto, and depositing same in the United States Mail at Granite Bay, California, on May 10, 2010. The addressees are:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 10, 2010, in Granite Bay, California.

Margaret E. Ruth