Filed 1/27/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re RANDY KEMP, on Habeas Corpus.	C064821 (Super. Ct. Nos. 09F06912, 10F01017)

ORIGINAL PROCEEDING. Petition granted.

Elizabeth Campbell, under appointment by the Court of Appeal, for Petitioner Randy Kemp.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Respondent.

INTRODUCTION

In this petition for a writ of habeas corpus filed by Randy Kemp (petitioner), we conclude that irrespective of the date a prisoner's judgment became final, federal and state constitutional principles of equal protection require that the

amendments to Penal Code section 4019[1] provided by Senate Bill No. 3X 18 (2009-2010 3d Ex. Sess.) (Senate Bill No. 3X 18) (see Stats. 2009, ch. 28, § 50), effective January 25, 2010 (January 25 amendment), and Senate Bill No. 76 (2009-2010 Reg. Sess.) (Sen. Bill No. 76) (see Stats. 2010, ch. 426), effective September 28, 2010 (September 28 amendment), which increase the rate at which a specified class of prisoners earns conduct credits, must be applied retroactively.

PROCEDURAL HISTORY

On October 20, 2009, petitioner pled no contest in the Sacramento County Superior Court to one count of battery on a spouse or cohabitant (§ 273.5, subd. (a)), and on November 17, 2009, he was sentenced to state prison for two years. At the time of sentencing, section 4019 provided that conduct credits, i.e., credits for prisoners who performed labor and followed the institutional rules of the facility wherein they were confined, could be earned at the rate of two days for every four days served. (Former § 4019, subds. (b), (c).) Petitioner received credits of 68 days for actual custody served and 34 days for good conduct, which was the maximum amount provided under the statute.[2] Petitioner did not appeal.

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[1] All further references to undesignated sections are to the Penal Code.

[2] We granted petitioner's motion to take judicial notice of the superior court's minute orders and abstract of judgment that set forth the plea, sentencing, and awarding of presentence credits.

The Legislature enacted Senate Bill No. 3X 18, which amended section 4019 effective January 25, 2010, to essentially double the rate at which a specified class of prisoners (eligible prisoners) could earn conduct credits. (§ 4019, subds. (b)(1), (c)(1) as amended by Stats. 2009, ch. 28, § 50.) Eligible prisoners are those who were neither required to register as sex offenders, nor were committed for serious felonies (§ 1192.7), nor had been convicted of serious or violent felonies (§ 667.5). (§ 4019, subds. (b)(2), (c)(2).)[3]

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[3] Effective January 25, 2010, section 4019 provides, in relevant part: "(a) The provisions of this section shall apply in all of the following cases: [¶] . . . [¶]

"(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.

"(2) If the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5, subject to the provisions of subdivision (d), for each six-day period in which the 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

On February 8, 2010, petitioner, an eligible prisoner, filed a petition for writ of habeas corpus in the Sacramento County Superior Court seeking the retroactive application of the additional presentence conduct credits provided by the January 25 amendment. The court denied the petition on March 30 on grounds that Kemp's judgment became final prior to the effective date of the amendment and principles of equal protection were not applicable.

On April 26, 2010, petitioner filed a habeas corpus petition in this court, contending, inter alia, that notwithstanding the finality of his judgment prior to

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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.

"(2) If the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5, for each six-day period in which the 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 is 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 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, 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)."

January 25, 2010, federal and California principles of equal protection require that the January 25 amendment be retroactively applied to him. Relying on *In re Stinnette* (1979) 94 Cal.App.3d 800 (*Stinnette*) and *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*), the People countered that the January 25 amendment was intended, at least in part, to further encourage good conduct; it is impossible to influence behavior after it has occurred, and thus a prisoner whose judgment has become final is not entitled to the benefit of the new amendment.[4] The People also contend that even if the January 25 amendment is retroactive, the separation of powers doctrine constitutes a rational basis for not applying the amendment to those whose judgments were final prior to the effective date of the amendment. For reasons to follow, we disagree with the People.

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[4] Respondent also argues that petitioner is not entitled to the benefit of the January 25 amendment because his judgment became final prior to January 25, 2010, which was its effective date. Petitioner counters that his judgment did not become final until the expiration of the 120-day period within which the trial court has to recall his sentence pursuant to section 1170, subdivision (d), which is beyond January 25, 2010. Because our federal equal protection analysis, if correct, renders moot the date upon which the judgment became final, we need not address the issue. (See *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 31-32, fn. 1 ["It is axiomatic that California's Constitution cannot permit the state to engage in conduct forbidden by the federal equal protection clause . . . ."].)

DISCUSSION

Equal Protection

"The equal protection guarantees of the Fourteenth Amendment and the California Constitution are substantially equivalent and analyzed in a similar fashion." (*People v. Leng* (1999) 71 Cal.App.4th 1, 11.) In analyzing an equal protection challenge, "'[t]he 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.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 (*Cooley*).) "'In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law . . . .'" (*Castro v. State of California* (1970) 2 Cal.3d 223, 229, quoting *Williams v. Rhodes* (1968) 393 U.S. 23, 30 [21 L.Ed.2d 24, 31].)

The Two Groups at Issue are Similarly Situated for the Purpose of Senate Bill No. 3X 18

The enhanced rate of credit accrual provided by section 4019 applies to prisoners who are neither required to register as sex offenders nor committed for serious felonies or previously convicted of serious or violent felonies. Within this larger group are two subgroups of eligible prisoners: prisoners whose judgments of conviction became final prior to

January 25, 2010, and prisoners whose judgments were either pending or became final on or after that date.[5] Abstractly speaking, the two groups are similarly situated. Nothing distinguishes the status of a prisoner whose judgment became final on January 25, 2010, from one whose judgment became final before that date.

In determining whether these groups are "'"similarly situated [to each other] with respect to the legitimate purpose of the law"'" (*Cooley*, *supra*, 29 Cal.4th at p. 253), "'[w]e look first to the words of the statute itself, which should be the best indicator of the lawmakers' intent. [Citation.] If those words are clear and unambiguous, *we may not modify them to accomplish a purpose not apparent on the face of the statute or from its legislative history*. [Citation.]' [Citation.]" (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1234, italics added; *Legislature v. Eu* (1991) 54 Cal.3d 492, 505 ["'In construing constitutional and statutory provisions . . . *the intent of the enacting body is the paramount consideration*.' (Italics added.)"].)

Senate Bill No. 3X 18 does contain a "clear and unambiguous" statement of the Legislature's intent in enacting

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[5] As to this latter subgroup, we have previously determined they are entitled to the retroactive application of the January 25, 2010, amendment pursuant to the reasoning in *In re Estrada* (1965) 63 Cal.2d 740. (See, e.g., *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963; contra, *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808.)

the bill: "This act addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008 . . . ." (Stats. 2009, 3d Ex. Sess., ch. 28, § 62.) This statement of intent, which is addressed to the entire act, establishes that the Legislature's intent in enacting Senate Bill No. 3X 18, including of course the amendment to section 4019, was based solely on economic considerations: namely, to aid the state in meeting its fiscal emergency by the early release of a defined class of prisoners deemed safe for such release, thereby relieving the state of the cost of their continued incarceration.

The People argue that because the January 25 amendment was or could have been, at least in part, aimed at further encouraging good conduct and because it is impossible to influence behavior after it has occurred, the January 25 amendment was not intended to be retroactively applied to prisoners whose judgments became final prior to the effective date of these amendments. The predicate for the People's argument—that part of the Legislature's intent was to encourage good behavior—finds no support whatsoever in Senate Bill No. 3X 18. Nothing in Senate Bill No. 3X 18 suggests that the Legislature was dissatisfied with either the lesser conduct credit rate offered to prisoners previously or the number of prisoners taking advantage of the offer.

Had the Legislature remained silent, we might impute a purpose from among the plausible purposes that could be imagined, and the purpose suggested by the People—to encourage

good inmate behavior—would seem plausible. But here the Legislature has spoken quite clearly, and where the Legislature has expressed the purpose of an enactment, we are not permitted to speculate about legislative motives and tack on additional purposes. The unexpressed intent posited by the People is at odds with the express declaration of the Legislature's intent to address a fiscal emergency. By excluding some eligible prisoners from application of the amendment, the legislation would reduce the savings that would otherwise accrue.

Because the People's partial intent position is both without support in Senate Bill No. 3X 18 and leads to an unreasonable consequence, we reject it. (See *People v. Jenkins* (1995) 10 Cal.4th 234, 246 [in determining legislative intent behind enactment of a statute, the reviewing court avoids an interpretation that leads to unreasonable consequences].)

The January 25 Amendment Meets the Purpose of Senate Bill No. 3X 18

Senate Bill No. 3X 18 identifies a class of prisoners deemed safe for early release and, to that end, increases the rate at which these prisoners earn conduct credits. The early release of prisoners saves the state money regardless of when their judgments became final, money that would otherwise be spent on their continued confinement. Consequently, the two subgroups are "'similarly situated for purposes of the law challenged.'" (*Cooley*, *supra*, 29 Cal.4th at p. 253.)

No Rational Basis Exists for Disparate Treatment

A

"'"'[I]n 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.* [Citations.]'"'" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200-1201.)[6]

In urging that a rational basis exists for the disparate treatment of the two subgroups, the People rely on *Stinnette* and *Strick*. Neither case is on point because the intent imputed to the Legislature in each case differs from that expressed in Senate Bill No. 3X 18. Specifically, the intent of the statute challenged in *Stinnette* was to "motivat[e] good conduct among prisoners so as to maintain discipline and minimize threats to prison security." (*Stinnette*, *supra*, 94 Cal.App.3d at p. 806.) The intent of the statute at issue in *Strick* was "to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct . . . ." (*Strick*, *supra*, 148 Cal.App.3d at p. 913.) In contrast, Senate Bill No. 3X 18 was enacted to address a fiscal emergency.

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[6] The awarding of conduct credits does not involve either a fundamental right or a suspect classification, and the parties do not argue otherwise. (*Stinnette*, *supra*, 94 Cal.App.3d at pp. 805-806.)

On the issue of whether the date of finality of judgment constitutes a rational basis for disparate treatment between two subgroups of prisoners equally situated, we find guidance in the reasoning of *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*). Kapperman was delivered into the custody of the Director of Corrections prior to March 4, 1972. At that time, he was not statutorily entitled to, and did not receive, credit for 304 days he spent in actual custody prior to his delivery to the Director of Corrections. (*Id.* at pp. 544-545.) Effective March 4, 1972, section 2900.5 provided that actual custody credit be given to prisoners upon their delivery to the Director of Corrections. (*Kapperman*, at pp. 544-545.) However, subdivision (c) of section 2900.5 made the section applicable only to prisoners delivered to the Director of Corrections on or after March 4, 1972. (*Kapperman*, at p. 545.)

Kapperman contended that the state's classifications arbitrarily denied him a substantial benefit without there being a rational relationship for doing so, thereby violating federal and state principles of equal protection. (*Kapperman*, *supra*, 11 Cal.3d at p. 545.) The California Supreme Court agreed, concluding that because section 2900.5, subdivision (c)'s prospective-only limitation bore no legitimate purpose to the classifications, such classifications violated both the state and federal equal protection principles. (*Kapperman*, at pp. 549-550.) Therefore, the credit provided under section 2900.5 was extended to those prisoners either incarcerated or on parole for felony offenses regardless of the

date of their commitment to state prison. (*Kapperman*, at pp. 549-550.)

In the present case, the two subgroups of prisoners are distinguished only by the fact that their judgments became final prior to January 25, 2010. Since the purpose of Senate Bill No. 3X 18 is solely economic, the only reasonably conceivable justification for treating the two subgroups differently for equal protection analysis would be if one group were more dangerous than the other. Aside from their partial intent theory, the People have not put forth any other suggestion.[7] However, since the entire group of eligible prisoners consists of those prisoners deemed safe for early release based upon the offense or offenses they have committed, neither subgroup is more dangerous than the other. Certainly, the date of finality of judgment bears no rational basis for making such a distinction. Just as the date of delivery to the Director of Corrections bore no rational relationship to the classifications at issue in *Kapperman*, the effective dates of the new amendments

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[7] The superior court cited as a rational basis for not retroactively affording prisoners whose judgments were final before January 25, 2010, the benefit of the new amendment that "it is more burdensome to apply than a change in actual day credits." The superior court did not explain, nor do we understand, how calculating conduct credit at the rate provided by the January 25 amendment is more difficult. Since the abstract of judgment shows a prisoner's entitlement to conduct credits, it is no more than simple arithmetic to make the new calculation.

in the present case bear no rational relationship for distinguishing between the two subgroups at issue herein.

B

The People also argue that a rational basis for not applying the January 25 amendment retroactively is that to do so would violate California's separation of powers doctrine. Again, we disagree.

The Separation of Powers Doctrine

The separation of powers doctrine is set forth in the California Constitution, which "establishes a system of state government in which power is divided among three coequal branches (Cal. Const., art. IV, § 1 [legislative power]; Cal. Const., art. V, § 1 [executive power]; Cal. Const., art. VI, § 1 [judicial power]), and further states that those charged with the exercise of one power may not exercise any other (Cal. Const., art. III, § 3). Notwithstanding these principles, it is well understood that the branches share common boundaries [citation], and no sharp line between their operations exists. [Citations.]" (*People v. Bunn* (2002) 27 Cal.4th 1, 14 (*Bunn*).)

"The separation of powers doctrine protects each branch's core constitutional functions from lateral attack by another branch. [H]owever, this does not mean that the activities of one branch are entirely immune from regulation or oversight by another." (*Bunn*, *supra*, 27 Cal.4th at p. 16.) As applied to the judicial branch, "[the Supreme Court has] regularly approved legislation affecting matters over which the judiciary has inherent power and control. [Citations.] As long as such

enactments do not '"defeat" or "materially impair"' the constitutional functions of the courts, a 'reasonable' degree of regulation is allowed. [Citation.]" (*Bunn*, *supra*, 27 Cal.4th at p. 16.) "Separation of powers principles do not preclude the Legislature from amending a statute and applying the change to both pending and future cases, though any such law cannot 'readjudicat[e]' or otherwise 'disregard' judgments that are already 'final.' [Citations.] (*Bunn*, at p. 17.)

Younger v. Superior Court (1978) 21 Cal.3d 102 cites *Way v. Superior Court* (1977) 74 Cal.App.3d 165 as a proper application of separation of power principles to the question of whether a legislative enactment may retroactively affect judgments that were final prior to the enactment. In *Way*, as explained by *Younger*, "Effective July 1, 1977, the Legislature repealed the Indeterminate Sentence Law (ISL) and replaced it with the Uniform Determinate Sentencing Act of 1976 (UDSA). Penal Code section 1170.2 provides for retroactive application of the UDSA, thus resulting in a reduction in the terms of some prisoners convicted under the ISL. The statute was challenged on the ground it infringed on the Governor's constitutional power of commutation. ([Cal. Const., a]rt. V, § 8.)[8] Rejecting the claim, the Court of Appeal reasoned (at p. 177) that the intent of section 1170.2 was not to commute existing sentences as an

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[8] Article V, section 8 of the California Constitution was amended in 1972, 1974, and 1988, but none of these amendments is relevant to the present discussion.

act of grace but to bring them in line with sentences under the new law, in furtherance of the UDSA's principal objective of making punishments uniform. The Court of Appeal concluded (at pp. 177-178) that the effect of section 1170.2 in shortening certain terms is 'purely incidental to the main legislative purpose,' and hence the statute does not violate the separation of powers [doctrine]." (*Younger*, *supra*, 21 Cal.3d at pp. 117-118.)

Applying the foregoing principles to the instant case, we conclude that extending the benefits of the January 25 amendment to those whose judgments were final prior to the amendment's effective date would not violate separation of powers. Therefore, separation of powers cannot serve as a rational basis for withholding the benefits from that subgroup. As we previously explained, the January 25 amendment was enacted as part of the legislation (Senate Bill No. 3X 18) designed to meet the fiscal emergency declared by the Governor. The January 25 amendment increased the rate at which a class of eligible prisoners could earn conduct credits, thereby providing for their early release, which would save the state funds that would otherwise be spent for their continued confinement. Because the awarding of presentence credits, actual or conduct, is essentially a routine or ministerial function (see *People v. Sage* (1980) 26 Cal.3d 498, 508-509; *Kapperman*, *supra*, 11 Cal.3d at pp. 548-550), the January 25 amendment cannot reasonably be said to constitute a "readjudicat[ion]" or "disregard" of a final judgment (*Bunn*, *supra*, 27 Cal.4th at p. 17). The

increased rate is "purely incidental to the main legislative purpose" of cost reduction and the amendment advances that purpose. It does not violate the separation of powers doctrine.

Holding

In sum, we hold that prisoners whose judgments became final before January 25, 2010, are, for purposes of the new amendments, similarly situated to prisoners whose judgments were still pending or were not final on or after this date. Because there is no rational basis for treating the two subgroups differently, petitioner is entitled to have his conduct credits calculated under the formula provided by the new amendments.

Effect of September 28, 2010, Amendment

Effective September 28, 2010, the Legislature enacted Senate Bill No. 76, which amended section 2933 regarding worktime credit for prisoners confined in state prison, to give such prisoners, to the extent they qualify, one day of presentence conduct credit for each day of actual presentence confinement served. (Sen. Bill No. 76, § 1; § 2933, subd. (e)(1), (2), (3).) For the same reasons that we found the January 25, 2010, amendment to section 4019 was retroactive irrespective of the date of finality of a prisoner's judgment, we conclude the same is true as to the September 28, 2010, amendment.

DISPOSITION

The petition for writ of habeas corpus is granted. The matter is remanded to the Director of Corrections with directions to award petitioner conduct credits as provided by

Senate Bill No. 76's amendment to section 2933, effective September 28, 2010.

RAYE, P. J.

We concur:

BLEASE, J.

HULL, J.